For The Defense™

dri
The magazine for defense, insurance and corporate counsel

July/August 2025

Governmental Liability

Including . . .

Deepfakes and the Law: Emerging Trends and Legal Responses Across the U.S.

Also in This Issue . . .

Am I Behind the Curve on AI in My Legal Practice?

And More!

A New Era in Partnerships

For over 60 years DRI has been the leader in providing resources and thought leadership to the civil defense community.

Today, we look to further advance the profession by creating Partnerships with organizations that are ready to work in concert to shape the future.

DRI welcomes LawyerGuard as our inaugural Premier Corporate Partner—we look forward to collaborating on a number of exciting new initiatives in support of the interests of business and individuals in civil litigation.

LawyerGuard®
An Insurance Program for Lawyers

Learn more about DRI and our Premier Corporate Partners at dri.org/partners.

dri PREMIER CORPORATE PARTNER

You Defend Others. Who's Defending *You*?

Successful risk management requires a proactive and systematic approach. Check out the latest post on ***Court & Counsel: The DRI Blog*** for some fundamental steps to establish an effective risk management plan for your practice.

THE DRI BLOG

COURT & COUNSEL

Opening Doors

DRI Second Vice President **Sara M. Turner** is a shareholder in the Birmingham, Alabama, office of Baker, Donelson, Bearman, Caldwell & Berkowitz and serves as chair of Baker Donelson's Hospitality Industry Service Team.

As I write this from the Spring DRI Board of Directors meeting, I am filled with a renewed sense of purpose and pride in the incredible work our organization does every single day. We gather here not only to conduct the important business of advancing the civil defense bar, but also to reflect on what it truly means to be part of something larger than ourselves. From our outstanding professional staff to our dedicated Board members, my colleagues on the Executive Committee, Past Presidents, and the many family members who have joined us this week as our loudest champions and quietest supporters, one thing is crystal clear: what makes DRI exceptional is not just what we do, it's who we are.

This week, as I looked around the room, I saw more than titles and roles. I saw friendships formed over decades, mentors guiding future leaders, and a community that thrives because we show up for one another. DRI is more than a professional association. It is a network of relationships built on trust, service, and shared purpose. It is a place where careers are launched, confidence is built, and lifelong connections are formed. This is where we come to grow, to lead, and to give back.

In his heartfelt final remarks before stepping down from his last year serving as a Senior Advisor, Past President John Kuppens spoke candidly about the people who opened doors for him throughout his DRI journey. His words stayed with me, because they reminded me how much we owe to those who have lifted us up along the way. John was one of those people for me. So was Mark Solheim, who encouraged me to attend my very first DRI seminar. I didn't know then how much that single opportunity would change the course of my career and life. Laura Proctor, then Chair of the ***Young Lawyers Committee***, welcomed me in at a time when I was eager, uncertain, and searching for a way to get more involved. And the late Rana Siam (my first partner in DRI leadership) became not just a colleague but a friend, when I was honored to serve as her Vice Chair of the SLDO Liaison Subcommittee in my first DRI leadership role.

The truth is, I could list dozens of names, people who believed in me, who made space for me at the table, and who helped me find my voice as a leader. Each of them left a lasting impression. Many of them may not even realize the impact they had. That's the beauty of opening a door for someone, you often don't see how far they'll go after walking through it.

We all have the opportunity to be that person for someone else. Every time we extend an invitation, offer encouragement, or simply say "you belong here," we change someone's trajectory. That act may feel small in the moment, but it reverberates. These connections, these moments of inclusion and generosity, are the backbone of DRI's legacy.

Our community matters more than ever. As our newly elected Immediate Past President John Parker Sweeney (a former past president

himself) reminded us this week, DRI plays a vital and irreplaceable role in counterbalancing the influence of the well-organized plaintiff's bar. Our work is not just about defending businesses; it is about defending the integrity and future of the civil justice system. That requires growth. That requires engagement. And that requires each of us to act.

So, I'm asking you to take a step today.

- ***Sign up your summer associates for complimentary DRI membership.*** Help them see the value of joining a national network at the very start of their careers.
- ***Take advantage of the SLDO free membership campaign.*** Our partnerships with state and local defense organizations are essential, and we are stronger when we stand together.
- ***And most importantly, personally invite one person, a colleague, a mentee, someone you admire, to join or get more engaged in DRI.*** Tell them what this organization has meant to you. Tell them what's possible here.

The future of DRI isn't abstract. It is personal. It looks like a young lawyer showing up to their first seminar and finding their people. It looks like a seasoned litigator discovering new ways to lead. It looks like someone like you, taking a moment to reach out and offer an opportunity.

You don't have to be a past president to make an impact. You don't need a title to change a life. You just need to open a door.

DRI has been opening doors for decades. Let's make sure we keep holding them open for the next generation.

You won't regret it. And you will be remembered.

Sara M. Turner

DRI 2025 ANNUAL MEETING

CHICAGO, IL | OCTOBER 15-17, 2025

KEYNOTE SPEAKER: Bob Woodward

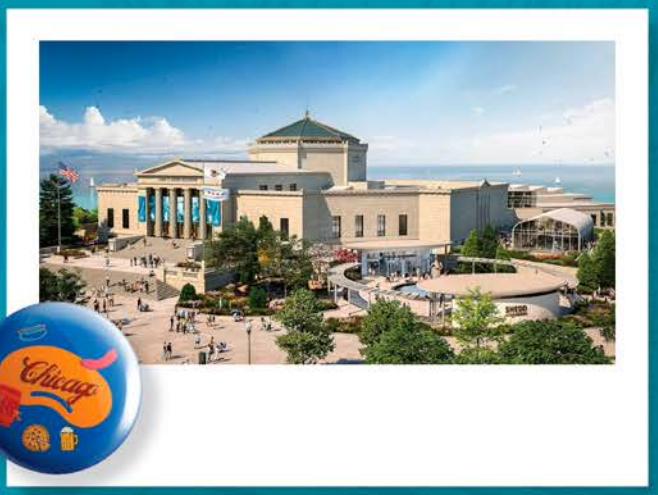
Legendary journalist, best-selling author, and winner of two Pulitzers.

Register by Sept. 2 and save up to $700!

dri.org/AM25

2025 ANNUAL MEETING
Premier Networking Reception

Experience a Special Night at Chicago's Iconic **Shedd Aquarium**



At this year's Annual Meeting in Chicago, dive into an extraordinary evening of networking and wonder at the world famous Shedd Aquarium. Mingle with DRI members and industry leaders over gourmet bites and premium drinks, enjoy up-close encounters with penguins and marine life, and make lasting connections surrounded by the magic of Lake Michigan.

This exclusive reception is included with your DRI Annual Meeting registration.

Unlock Early Bird Savings!

SPONSORED BY
LawyerGuard®

dri.org/AM25

For The Defense

Vol. 67, No.7 July/August 2025

For The Defense, July/August 2025, Vol. 67 Issue 7 (ISSN 0015-6884).

Published ten times per year by DRI, 222 South Riverside Plaza ~ Suite 1870, Chicago, Illinois 60606. Telephone: (312) 795-1101. Fax: (312) 795-0747.

Correspondence and manuscripts should be sent to the Director of Communications, *For The Defense.*

ON THE RECORD

3 **Opening Doors**
By Sara Turner

ANNUAL MEETING SPOTLIGHT

8 **A Special Invitation for Every DRI Member Be Part of the 2025 Annual Meeting**
By Ricardo A. Woods

GOVERNMENTAL LIABILITY

10 **From the Publications Chair**
By Scott Kelly

11 **Deepfakes and the Law:** Emerging Trends and Legal Responses Across the U.S
By Mary Erlingson

14 **How to Cope with the Conundrum of Conditions of Confinement Claims Against Municipalities**
By Jon Mark Hogg and Mike Thompson, Jr.

21 ***Monell* in Practice:** The Intentionally Elusive Path to Municipal Liability
By Timothy Stucky

28 **Three Circuit Approaches to Applying *Monell* to Multi-Member Voting Bodies**
By Michael M. Hill

31 **From Monahan to Ava:** The Supreme Court Considers the Standard for Disability Discrimination in Education
By Ashley Hetzel and Zachary Weigel

TRUCKING LAW

36 **When the Driver's Gone:** Tactical Defense Strategies in High-Risk Trucking Claims
By C. Dino Haloulos

ARTIFICIAL INTELLIGENCE

42 **Am I Behind the Curve on AI in My Legal Practice?**
By Heather Neubauer and Ethan Groothuis

INTELLECTUAL PROPERTY

49 **Early Identification of Trade Secrets in Federal Trade Secret Cases**
By Christopher T. Sheean and Corey A. Bauer

A Special Invitation for Every DRI Member—Be Part of the 2025 Annual Meeting!

Ricardo A. Woods serves as the Managing Partner of Burr Forman's Mobile, Alabama office and the former Vice Chair of the firm's Executive Committee. He is Chair of the 2025 DRI Annual Meeting and the Secretary/Treasurer on the DRI Board.

This year's ***DRI Annual Meeting*** promises to be a defining moment for lawyers representing business. I'm honored to serve as chair and excited to invite you to the vibrant city of Chicago from October 15–17 to network, advance, and discover what lies ahead for our profession.

With our theme, ***Built for Business: The Future of the Defense Bar,*** front and center, the 2025 Annual Meeting will address the challenges and opportunities lawyers representing business face today. Having experienced the profound impact of DRI on my own professional journey, I can confidently say that this meeting is more than just a conference. It's a catalyst for advancement, collaboration, and cutting-edge insight that will shape the defense bar for years to come.

Hello from the Heart of the Midwest

We're bringing the energy of Chicago to life with a lineup that's as bold and diverse as the city itself. From CLE sessions on third-party litigation funding to fireside chats with thought leaders like legendary journalist Bob Woodward, the 2025 Annual Meeting is designed to challenge your thinking while also elevating your practice.

Wisdom from the Front Lines

Gain strategic insights from ***leading voices in law,*** including Phil Goldberg on third-party litigation funding and Caroline Tinsley on bridging courtroom and C-suite collaboration. Explore practical well-being strategies with Tara Antonipillai and Denise Gaskin, as well as hear from Attorneys General John B. McCuskey (West Virginia) and Steve Marshall (Alabama) on navigating the AG landscape. Plus, enjoy CLE on the GO, Substantive Law Committee meetings, and dynamic panels addressing today's most urgent legal challenges.

Connect at a Legendary Chicago Landmark

Join us for our ***Premier Networking Reception*** at the iconic Shedd Aquarium, sponsored by LawyerGuard. It's your chance to unwind, connect, and enjoy one of Chicago's most stunning venues with colleagues from across the country.

Early Birds Get the Best Deal

Be sure to register by September 2nd in order to save up to $700. I don't want you to miss this chance to save big!

Strengthen Your Presence

Sponsorship packages are still available with exclusive benefits including free registrations. It's a prime opportunity to elevate your profile with high-impact decision-makers and showcase your commitment to the defense bar community.

I can't wait to welcome you to Chicago this October. Let's make the **2025 DRI Annual Meeting** an unforgettable experience that strengthens our profession and builds lasting connections. See you in the Windy City!

Letter from the Publications Chair

A Complete DRI Meal…

Scott W. Kelly is a partner with Fulcher Hagler LLC in Augusta, Georgia. He is Publications Chair for the Governmental Liability Committee.

Everyone appreciates a good meal. One that starts with a promising first course, proceeds to a lingering main course, and ends with a final course that leaves you satisfied. The ***Governmental Liability's*** contributions to For the Defense this summer begin with a very modern first course focusing on a troubling misuse of artificial intelligence and how the law will respond. We then move to the main course, which is comprised of three articles that involve the landmark decision in Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978). Finally, we close with a final course addressing an issue that was argued before the Supreme Court this past term. It concerns the burden of proof on school children when making certain claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973. As always, thanks to our authors for their hard work. Enjoy!

Mary Erlingson starts us off with a thought-provoking appetizer about how the misuse of AI is leading to a new arena of legal problems. Her focus is on how deepfakes - manipulated images/videos there one person's s likeness has been superimposed onto another's body – are being used pornographically. This obviously raises issues of personal privacy, workplace harassment, and criminal liability. It also illustrates why technology can be a blessing and a curse.

Our second article, a collaboration from Jon Mark Hogg and Mike Thompson Jr., takes us to the main course. It focuses on the constitutional duty owed by jail operators to jail detainees, including the duty to protect pre-trial detainees from themselves. While it is well-established that such detainees are not to be punished, municipal liability for violations of this right is restricted under Monell to situations where the municipality has been deliberately indifferent. However, two recent cases in the Fifth Circuit have created a path to circumvent this standard. Our authors analyze the Circuit's novel approach and the serious threat of hyper-judicial oversight it presents.

Timothy Stucky provides our third article and continues the main course. While Monell is meant to ensure that municipalities do not become insurers of every constitutional misstep committed by their employees, this has not stopped creative legal practitioners from seeking new ways to establish liability against such entities. The author examines the subject matter broadly and provides a useful, up-to-date resource for defense lawyers facing claims against their municipal clientele.

We visit Monell yet again in Michael M. Hill's article, although he tackles the issue of when municipal liability can be found based on a single act of a city council or other legislative body. Such governing authorities are usually comprised of multiple people who do not all vote the same way, nor do they necessarily have the same motives or reasoning when they do. Our author analyzes the three different ways that Circuit Courts have approached the issue of determining the motive of a public entity as a whole when the motives of its individual decision makers may not be one and the same.

Our offer ends, as every great meal should, with dessert. Ashley Hetzel and Zachary Weigel provide the satisfying end with an analysis of the central issue before the Supreme Court in A.J.T., by and through her parents, v. Osseo Area Schools, Independent School District No. 279, a case that asked whether school children bringing claims under the ADA and the Rehabilitation Act must make a heightened showing of bad faith and gross misjudgment in order to prevail or whether they are subject to the same standards as non-student making similar disability-related claims.

As always, we appreciate your support of our committee and of DRI. Your time reading these submissions and considering their content makes it worth the effort!

By Mary Erlingson

Deepfakes and the Law: Emerging Trends and Legal Responses Across the U.S.

Recent litigation illustrates both the legal gaps and the growing toolbox attorneys are using to combat the misuse of AI-generated content.

As synthetic media technology accelerates, the legal system is struggling to keep pace with one of its most disturbing applications: deepfake pornography. These manipulated images or videos, created using artificial intelligence to superimpose someone's likeness onto another body—often in sexual contexts—raise urgent questions about privacy, workplace harassment, and criminal liability. Although no comprehensive federal statute yet addresses deepfakes directly, courts across the country are beginning to define the legal contours of this digital frontier. Recent litigation illustrates both the legal gaps and the growing toolbox attorneys are using to combat the misuse of AI-generated content.

Case Study 1: Workplace Harassment in the Age of AI – Jane Does 1–5 v. The Nature Conservancy and Douglas Shaw, 33 F.3rd 49 (2d Cir. 1994)

Jurisdiction: U.S. District Court, Minnesota (2024)

Summary: Five former employees of The Nature Conservancy (TNC) alleged that their supervisor used AI to create sexually explicit deepfake images using their faces. These were circulated online, creating a hostile work environment.

Legal Claims: Sexual harassment under Title VII and the Minnesota Human Rights Act; Tort claims: defamation, false light, intentional infliction of emotional distress (IIED).

Outcome: Tort claims were partially dismissed, but core sexual harassment and discrimination claims were allowed to proceed.

Case Study 2: Criminal Accountability – People of New York v. Patrick Carey

Jurisdiction: Nassau County, New York (2023)

Summary: Patrick Carey used AI to generate nude images of underage female classmates, posting them online with names and contact details.

Legal Claims: Distribution of indecent material to minors; Endangering the welfare of a child.

Outcome: Carey was sentenced to 6 months in jail, 10 years of probation, and mandatory sex offender registration. This case helped spark New York's proposed Digital Manipulation Protection Act.

Case Study 3: Platform Accountability – City of San Francisco v. AI Image Websites

Jurisdiction: San Francisco County, California (2024)

Summary: The city sued 16 websites that allow users to create and distribute AI-generated nude images of real women and minors.

Legal Claims: Violations of California's revenge porn and child exploitation laws; Unfair competition and consumer protection violations.

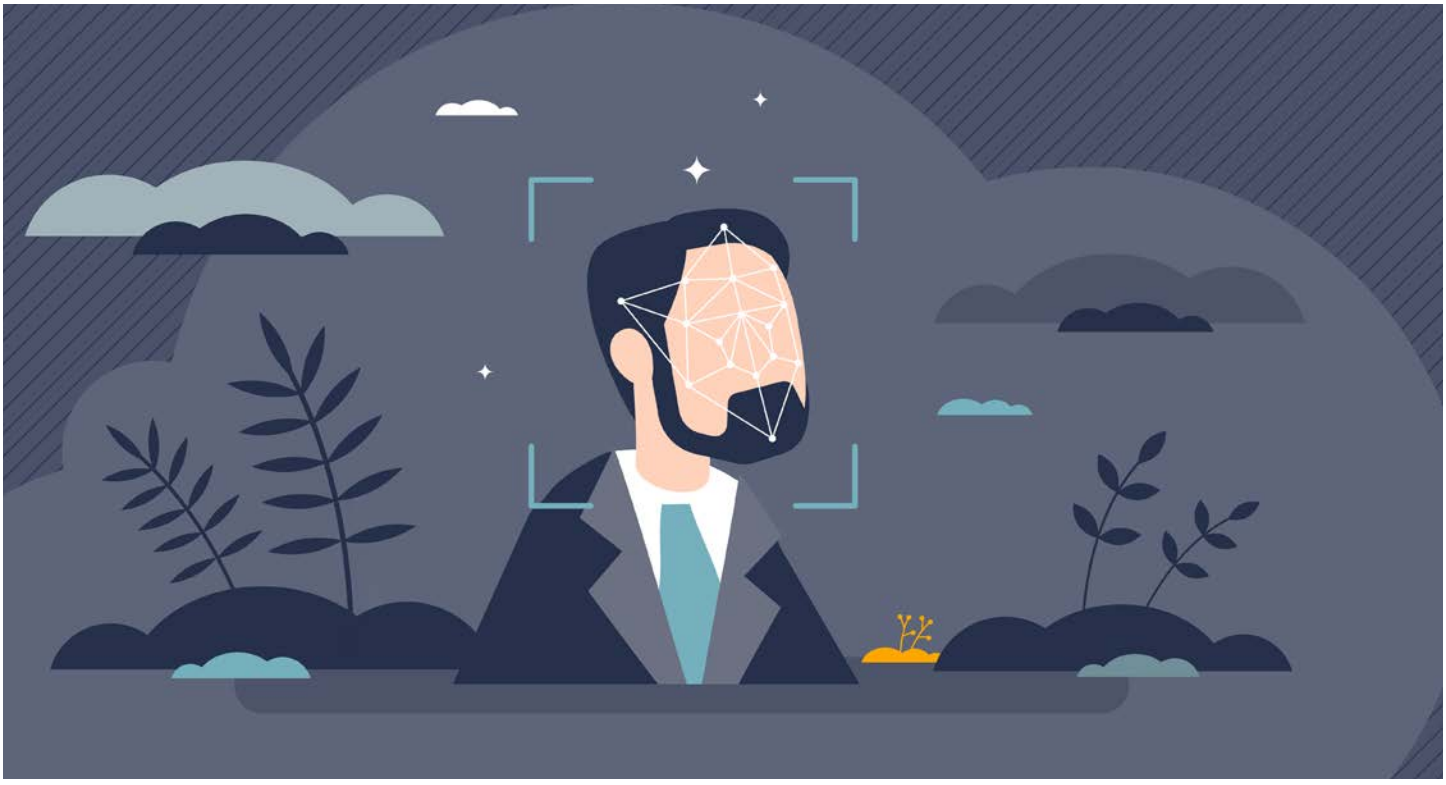
Status: Litigation is ongoing, but 10 of the sites have been shut down.

Case Study 4: Individual Victim Litigation – Ja`ne Doe v. Unnamed Reddit Users No. 21-56293 (9th Cir. 2022)

Jurisdiction: Federal Civil Court (2023, filed under seal)

Summary: A woman sued Reddit users for distributing deepfake porn made with her image.

Mary Erlingson is a founding member and the managing partner of Erlingson Banks, PLLC in Baton Rouge, Louisiana. Mary is an active member of the Governmental Liability Committee at DRI and an active member of the Federation of Defense and Corporate Counsel (FDCC), currently serving as Vice-Chair of the Governmental Liability Section.



Legal Claims: Invasion of privacy; Intentional Infliction of Emotional Distress; Digital Millennium Copyright Act takedown violations.

Outcome: The case settled confidentially, with Reddit cooperating in unmasking defendants.

Deepfakes and Civil Rights: A Growing Frontline

Deepfakes are not just tools of sexual exploitation—they also present an evolving threat to civil rights, particularly in areas involving racial, gender, or political targeting.

Deepfakes are not just tools of sexual exploitation—they also present an evolving threat to civil rights, particularly in areas involving racial, gender, or political targeting. AI-generated media can be used to fabricate discriminatory incidents, falsify workplace behavior, or sabotage candidates of color and marginalized groups.

These risks demand new litigation strategies and legal doctrines capable of addressing harms arising from false but convincing digital representations.

Emerging Legislation: Closing the Gaps

As courts grapple with deepfake harms under existing tort and civil rights frameworks, lawmakers are beginning to craft targeted solutions.

In the absence of comprehensive federal AI regulation, state legislatures have rapidly advanced AI-related legislative efforts—many with a sharp focus on deepfakes. According to a BSA | The Software Alliance analysis shared with Axios, over 407 AI-related bills had been introduced in more than 40 states as of February 2025, marking a six-fold increase from the previous year. Nearly half of these bills address deepfakes, with lawmakers increasingly concerned about election interference, image-based abuse, and digital impersonation. Ryan Heath, "Nearly Half of State AI Bills Address Deepfakes," Axios, February 13, 2025. https://www.axios.com/2025/02/13/state-ai-bills-deepfakes.

States such as California, New York, and Tennessee are leading in volume of legislation, with Tennessee's flurry of bills driven in part by its music industry's copyright concerns, exemplified by the ELVIS Act (Ensuring Likeness, Voice and Image Security Act) passed in March 2024. January alone saw 211 AI-related bills introduced, with legislation being proposed at a rate of 50 per week—half of them specifically focused on deepfakes. Id.

Several states are also enacting executive actions. Maryland, Massachusetts, Virginia, and Washington introduced AI directives in January, while Connecticut implemented mandates for ongoing review of AI systems to prevent discrimination. Id. In South Dakota, Governor Kristi Noem signed a law mandating prison sentences for those who create or distribute AI-generated child sexual abuse images, highlighting the seriousness of deepfake misuse in criminal contexts. Id.

Despite this surge of proposed legislation, few governors have emphasized AI in their 2024 state addresses, though upcoming gatherings of governors may foster greater coordination. Id. Experts observe that much of the deepfake legislation shares similar language across jurisdictions, indicating increasing interstate collaboration. However, critics warn that complex AI regulations may disproportionately benefit large tech firms capable of bearing compliance costs. Id.

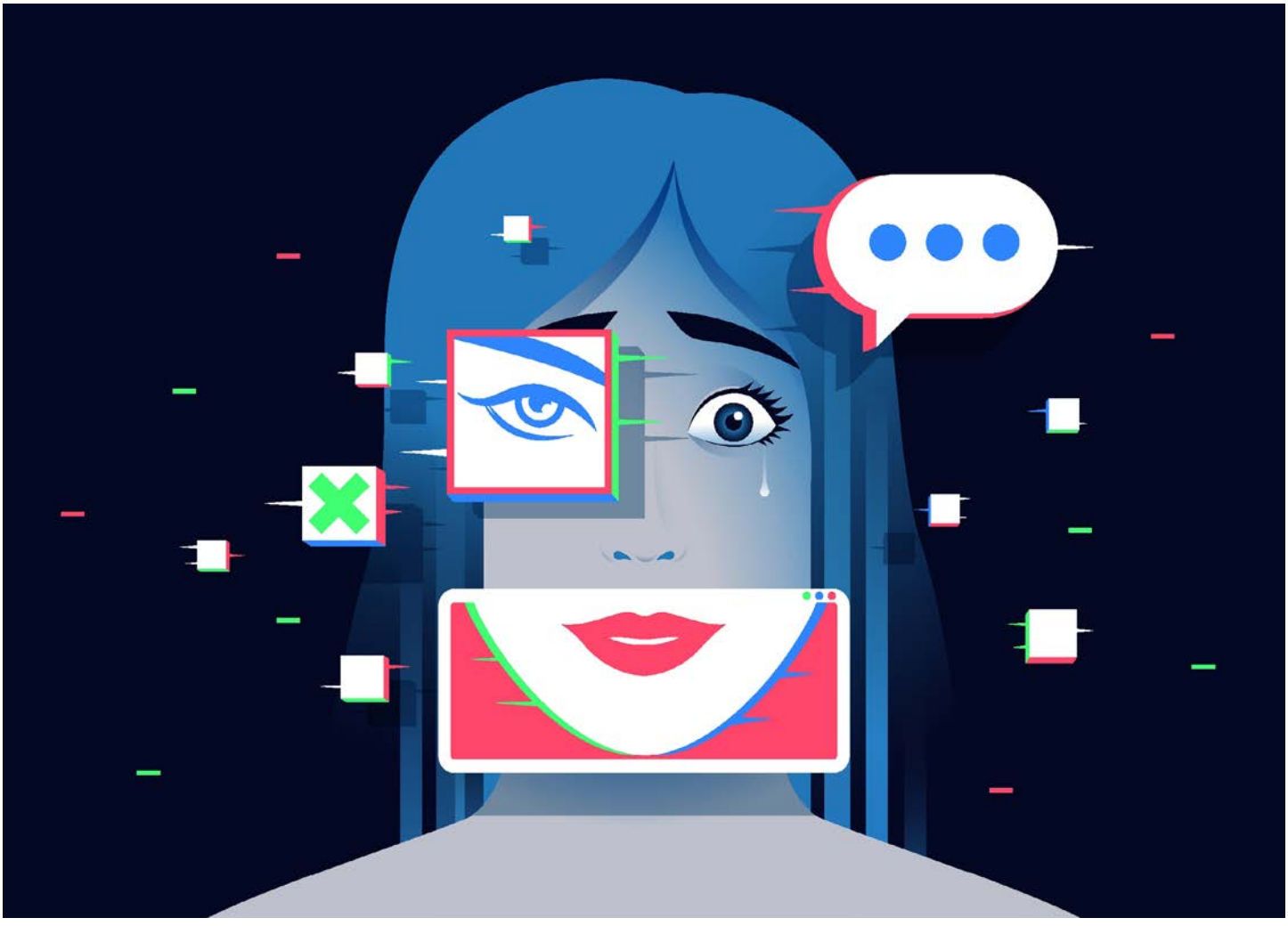
Deepfakes pose a unique legal challenge: they combine the credibility of real media with the malicious intent of deception.

Under the Big Beautiful Bill being advanced in Congress, the federal government would adopt a baseline of federal standards for transparency, safety, and accountability in the development and deployment of AI systems. In other words, allegedly creating a floor rather than a ceiling for AI legislation.. However, opponents of the Big Beautiful Bill assert that the bill does actually contain a moratorium on states legislation of AI. Changes are being made every day to the bill, and the final outcome is still unknown. The continued activity at the state level reflects their retained power to regulate AI technologies within their jurisdictions, especially in areas like consumer protection, criminal law, and civil rights.

Conclusion

Deepfakes pose a unique legal challenge: they combine the credibility of real media with the malicious intent of deception. While tort law, civil rights statutes, and copyright law have proven useful in some cases, the legal landscape remains fragmented and reactive.

As new laws emerge, attorneys must remain proactive—updating policies, mastering digital evidence standards, and staying ahead of fast-evolving technology. Until a uniform federal framework exists, the fight against deepfakes will depend on innovative advocacy, cross-jurisdictional knowledge, and a keen understanding of technology's darker edges.



By Jon Mark Hogg &
Mike Thompson Jr.

How to Cope with the Conundrum of Conditions of Confinement Claims Against Municipalities

What duty is owed to those charged with a crime while guilt is determined; or punishment carried out? And what punishments are just if a person is convicted?

History of Incarceration and Punishment

Because all men are not angels, every society must protect itself with correctional facilities. Madison, J, The Federalist Papers Number Five. Enduring questions follow, like: what duty is owed to those charged with a crime while guilt is determined; or punishment carried out? And what punishments are just if a person is convicted?

Our ancestors, too, debated these questions, amplified by the history they knew and the experiences they had lived. That historical knowledge included stories like that of Margaret Clitherow of York, England, who was sentenced to being crushed to death for her alleged role in hiding Catholic priests. "Saint Margaret Clitherow," Britannica.com, *http://www.britanica.com/ Saint-Margaret-Clitherow*. Other punishments with which the founders were familiar included the colonial experiences of the stocks and whippings, as well as capital punishment by hanging, guillotine, and the occasional burning at the stake. They also knew that in Virginia, a third offense of hog stealing was a capital crime. A History of Colonial America (1931) p. 191.

During the congressional debates about what punishments would be allowed, some members argued that the words under consideration were too indefinite. Annals of Congress 754 (1789). Still others argued that "villains often deserve whipping and perhaps having their ears cutoff; but are we in the future to be prevented from inflicting those punishments because they are cruel." Id. Ultimately, despite those objections, they passed what became the Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor cruel and unusual punishments inflicted."

From those words, a body of law has grown that regulates housing of detainees and convicted inmates, how correction institutions are operated and what specific punishments are forbidden. Debates about the meaning continue to the present day. Consider: is it cruel and unusual for the convicted to be confined without air conditioning? Is it unconstitutional to remove the unhoused from city parks? See e.g., *https://www.economist.com/united-states/2025/05/07/american-cities-are-criminalising-homelessness-will-that-help*.

In this article we focus on the constitutional duty of care owed by jail officials to jail detainees, with primary consideration given to the duty to protect detainees from themselves.

The Conundrum for Jails

Given that focus, part of the legal puzzle that must be discussed is the treatment and reasonable protection of incarcerated people with mental illness. Traditionally, jails have not been hospitals. In fact, most

Jon Mark Hogg is a West Texas trial lawyer, mediator, an accomplished thespian, podcaster and former member of the San Angelo City Council. He has defended Coleman County and involved jailers in this case up and down the appellate ladder in Cope I and II. That experience largely provides the background for this article. **Mike Thompson Jr.** is a recovering trial lawyer. He lives and practices law in Austin, Texas. None of the opinions he offers should be attributed to employers. He has been a DRI member since the first Clinton administration.

The holding by the majority in Cope II conflicts with Monell, which requires deliberate indifference on the part of the municipality before it can be found liable under 42 U.S.C. §1983.

states are like Texas in which jails are statutorily prohibited from serving as mental health hospitals and may not hold "insane persons." Tex. Local Gov. Code Section 351.014.

For many years, federal courts and mental health professionals have questioned involuntary hospitalization of the mentally ill, preferring outpatient care. For example, in Texas, "Since the 1950s, the number of state-run mental hospital beds has decreased by 95%. Outpatient treatment hasn't filled the gap," Stuckey, A "In Crises, Part 2: Funding Cuts so deep they kill," Houston Chronicle, updated March 9, 2022. Many other states' facilities have closed too, reducing the number of beds for treatment. See e.g., J, Hirschauer "The Last Institutions," City Journal Dec 27, 2022. As a result, some argue that many people who should probably be in mental health facilities end up on the streets or in jail. See e.g. J, Hirschauer "Why Pennsylvania Failed to Keep Its Governor Safe," ***www.city-journal.org*** visited May 5th, 2025.

Many states and local governments around the country have responded politically to these issues. For example, California has passed laws allowing for courts to appoint conservators to help those who cannot help themselves because of untreated mental illness. T, Nguyen, "New California law aims to force people with mental illness or addiction to get help," ***https://apnes.com/California-newsom-mental-helath-conservatorship***, visited on line 12/4/2023. Similarly, the Mayor of New York has tried to make it easier to secure mental health commitments and to involuntarily hospitalize homeless people. "NYC's mayor faces backlash for planning to involuntarily hospitalize homeless people," N.P.R. Jan. 3, 2023, 5:15 am. The debate will continue.

The Tragedy of Self-Harm

Sadly, many persons with mental illness are likely to end up in jail because families and communities have no other recourse. Some experts argue that this population is prone to self-harm. Many also believe that detainees or prisoners themselves have a higher risk of suicide than the general population. But suicide is not unique to jails or prisons. According to the CDC, suicide is among the top 10 leading causes of death in the United States for persons aged 10-64 years. ***https://www.cdc.gov/suicide/facts/index.html*** It is the second leading cause of death for persons aged 10-14 and 25-34 years. Id.

Yet, what leads a person to take his own life is largely unknown. In fact, a landmark psychological study in 2016 concluded that despite major advancements in medical and

psychological science, there has been no improvement in our ability to predict when a person will take their own life. Franklin & Ribeiro, Risk Factors for Suicidal Thoughts and Behaviors: A Meta-Analysis of 50 Years of Research, Psychological Bulletin, 2017, Vol 143 No. 2 pp. 187-232.

If uncorrected, Cope II will mean the eventual demise of Monell in pre-trial detainee cases in the Fifth Circuit, and quite possibly other Circuits as well.

Discussing the release of that study, Joseph Franklin, PhD, of Harvard University, said, "Our analyses showed that science could only predict future suicidal thoughts and behaviors about as well as random guessing. In other words, a suicide expert who conducted an in-depth assessment of risk factors would predict a patient's future suicidal thoughts and behaviors with the same degree of accuracy as someone with no knowledge of the patient who predicted based on a '' 'coin flip'". Sliwa, ***After Decades of Research, Science Is No Better Able to Predict Suicidal Behaviors***, American Psychological Association Website accessed Dec. 31, 2023, 2016. If this reflects the experienced opinions of experts, how are corrections officers to know otherwise?

While suicide is tragic, rarely is a third person held liable under our law for the suicide of another. This is why courts require proof of deliberate indifference and causation before a municipality or other government entity can be held liable for a detainee taking his own life. Absent intent on the part of the jail or jail staff, the taking of one's own life is not punishment by the government. Suicide is the act of the detainee, not the jail. Causation in most suicides is difficult if not impossible to determine and prove.

Suicide is unpredictable. It arises out of a toxic milieu of emotions, thoughts, circumstances, irrational and illogical decisions and actions of the individual. The risk of suicide is almost impossible for a reasonable person to identify in a person they know and love intimately, let alone in a stranger. Taylor v. Barkes: Liability Issues and Custodial Suicide, Criminal Law Bulletin, Vol. 53, Issue 6 Winter 2017, Ross, Darrell. (Discussion of suicide in corrections facilities after Taylor).

Municipal Liability and Jail Suicide

During the last half century, it has been settled law that local governments, such as counties, are not liable under 42 U.S.C. §1983 for the acts of their employees based on the doctrine of respondeat superior. Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 691 (1978). It is only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." Id. at 694; also see, "Keeping Monell Well in Civil Rights Cases with Multiple Individual Co-Defendants," Thompson, M, For the Defense, July 10, 2023. (Discussion of the congressional debate regarding 42 U.S.C. §1983).

To recover damages against a municipality under §1983, a plaintiff must prove a causal link between the municipality's policy and the constitutional deprivation, or—in the absence of a specific policy that caused the harm—that the government consciously acted with "deliberate indifference" to the constitutional rights of its citizens. Canton v. Harris, 489 U.S. 378 (1989). Thus, "only when a municipality adopts a policy that violates a constitutional right or fails to adopt a policy preventing the violation of a constitutional right that evidences a deliberate indifference to the rights of its detainees is it considered a policy or custom that is actionable under §1983." Id.

The year after Monell, the Court decided Bell v. Wolfish, 441 U.S. 520 (1979). Bell is a Fourteenth Amendment substantive due process decision. It did not address the legal standard necessary to subject a municipality to liability for money damages. Rather, Bell established the substantive due process right of a pretrial detainee to not be punished prior to conviction.

The detainees in Bell sought to compel a change in the conditions under which they were being held. Those conditions were double bunking, a prohibition on receiving books other than directly from a publisher or bookstore, a prohibition against receiving food and personal items from outside the institution, a rule that inmates stay outside their cells during a "shakedown" inspection, and body cavity searches after contact visits. Id., at 541-563. The Court held, "In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee." Id., at 535.

In determining whether conditions complained of amount to punishment, the Court stated:

"[A]bsent a showing of express intent to punish on the part of detention officials, the determination generally will turn on 'whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." Id., at 538.

"Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." Id., at 539

With that background, we turn to what has been labeled the "Cope conundrum" in considering conditions of confinement claims. The conundrum derives from Cope v. Cogdill et. al. 3 F. 4th 198 (5th Cir. 2021) (Cope I) and Cope v. Coleman County, 2024 WL 3177781 (5th Cir. 2024) (Cope II),

a jail suicide in the Coleman County Texas County Jail.

There was no question in Cope that the detainee was potentially suicidal and that the jail considered him at risk of suicide. Coleman County removed all blankets, sheets and clothing from the detainee. He was placed in a separate cell with a paper anti-suicide smock as a precaution. He was monitored constantly. On a return trip from a shower, he became violent and for safety placed in the closest available cell, which had a phone cord in it. He used that cord to strangle himself. Only one jailer was on duty when this occurred. The jailer did not enter the cell without backup because jail policy prohibited it to ensure the safety of officers. It took more than ten minutes for backup to arrive and emergency treatment to begin. The detainee was taken to the hospital where he later died.

Cope I was concerned with the qualified immunity of jailers in an interlocutory appeal. In Cope II, the Fifth Circuit devoted most of its time to addressing the county's municipal liability under Monell. The latter decision found, under an episodic act or omission theory, that there was no constitutional violation of the decedent's Fourteenth Amendment rights that was caused by a policy of Coleman County. When the court turned to consider Plaintiffs' alternative conditions of confinement claim under Bell, the panel split.

The majority held that Plaintiffs had sufficiently stated a conditions-of-confinement case by alleging that three policies of the county jail had the "mutually enforcing" effect of depriving "all pre-trial detainees' constitutional rights to adequate medical care and protection from known suicidal tendencies." It also held that. under this theory. all that is necessary to prevail is to show these policies acting together created "durable restraints or impositions on inmates' lives" that transcend a single act or omission by an officer. Under this theory, the majority noted, Plaintiffs did not have to prove deliberate indifference by any county employee. This creates an artful dodge around Monell's causation and deliberate indifference requirements as discussed below.

Cope II Effectively Allows Plaintiffs to Circumvent Monell

The holding by the majority in Cope II conflicts with Monell, which requires deliberate indifference on the part of the municipality before it can be found liable under 42 U.S.C. §1983. The majority's decision in Cope II seriously undermines Monell in the Fifth Circuit. We think practitioners can expect this will be coming to other circuits also.

Fifth Circuit Judge Jerry Smith understood the issue, explaining in his dissent, that the decision of the majority in Cope II amounts to the creation of a new rule that permits municipal liability without the causation and culpability requirements of Monell. Under Cope II, arguably now all a plaintiff needs to do to recover money damages against a municipality is plead that various alleged facially neutral policies of the county have a "mutually enforcing effect" that transcends any single act or omission of an individual employee. In other words, if the alleged policies create conditions that might impact more than one individual detainee in the future, even if it hasn't actually impacted more than one detainee, deliberate indifference is not required to hold the county liable. Indeed, the decision goes so far as to say that specific examples of other instances of detainees who suffered the same fate as a result of Coleman County's policies are also not necessary to subject the county to an award of damages.

Under this reasoning, even if the suicide or other injury is the result of the act or failure to act of an individual officer, a plaintiff no longer must prove deliberate indifference on the part of a final policy maker of the county caused the alleged violation or injury. All a plaintiff must do now is plead that there is some facially neutral policy that, acting with other facially neutral policies or other circumstances, might, under some as yet unknown facts, negatively impact more than one detainee. It means that a plaintiff can hold a county liable for damages in a detainee suicide case for the acts or omissions of its employees without proof that the county intended to violate the Constitution or was deliberately indifferent to the rights of the detainees. It not only makes deliberate indifference irrelevant in jail suicide cases, but it also wipes out Monell's causation requirement as well.

The Bell conditions of confinement test breaks down outside of the true conditions of confinement context. While intent to overcrowd or double-bunk detainees may be inferred by the fact that a jail is overcrowded or that detainees are indeed double-bunked, such a conclusion is merely self-evident. But this same rationale does not apply to suicides where the underlying cause(s) remain within the mind of the detainee and are not objectively known or knowable.

The result of the decision in Cope II is to create respondeat superior liability on the part of the municipality for the acts or omissions of its officers so long as some policy can be identified relevant to the officers' acts or omissions. Taken to its logical conclusion Cope II creates strict or negligence based liability on the part of the jail operator for a detainee's suicide. This is not only contrary to Supreme Court precedent, but it also conflicts with the decisions by other panels of the Fifth Circuit and by other Circuit Courts of Appeal about the interplay between Monell and Bell.

In Cope II the Fifth Circuit disagrees with itself, the Supreme Court and with other circuit courts of appeal on whether Monell's deliberate indifference requirement applies to Bell conditions of confinement claims.

The Fifth Circuit majority's decision in Cope II finalizes the long-coming break between the Fifth Circuit and other circuits on whether a Bell condition of confinement claim must still satisfy Monell to result in municipal liability. Not long ago, every Circuit Court of Appeals that considered Bell in a jail suicide case harmonized Bell with Monell and held that a plaintiff must prove deliberate indifference under a conditions-of-confinement claim for detainee suicide.

Indeed, in a general conditions-of-confinement case, the Supreme Court has said that prisoners claiming their conditions violate the constitution must show deliberate indifference on the part of prison officials. Wilson v. Seiter, 501 U.S.

294 (1991). And in Taylor v. Barkes, 575 U.S. 822 (2015), the high court held that "any" right of an incarcerated person to proper implementation of adequate suicide prevention goals was not clearly established law, and qualified immunity was thus granted for individual defendants in that case. But in recent years, the Fifth Circuit has drifted from this understanding, culminating in Cope II and the practical abrogation of Monell in the Fifth Circuit in jail suicide cases.

The first circuit court to address Bell in a detainee suicide was the Sixth Circuit. In Roberts v. City of Troy, 773 F. 2d 720 (6th Cir. 1985), it affirmed a jury verdict for the city in a jail suicide case and held that, before a jail suicide can constitute punishment under Bell, there must be proof of deliberate indifference on the part of the jail officials. Id. at 725. Noting that Bell dealt with actions rather than a failure to act, the Sixth Circuit stated "if we transpose the Bell v. Wolfish standard to failures to act, we would arrive at a deliberate indifference requirement. If a failure to act is reasonably related to a legitimate governmental objective, the failure to act cannot have the purpose of punishment unless the failure to act was deliberate. Bell v. Wolfish requires an intent to punish." Id. at 725.

The Sixth Circuit addressed the issue again in Francis v. Pike Cnty, 875 F.2d 863 (6th Cir. 1989) (unpublished disposition). It made clear that the failure to prevent a suicide could constitute punishment under Bell only where a plaintiff could establish deliberate indifference. Id. at *3.

The Third Circuit followed suit but described the standard as one of reckless disregard for the rights of pre-trial detainees to be protected from suicidal tendencies. Colburn v. Upper Darby TP, 838 F.2d 663, 669 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). Though technically a different standard, it still required proof of heightened intent.

The Second Circuit has held that Monell applies to conditions of confinement claims. See Maxwell v. City of New York, 108 Fed. Appx 10 *2 (2d Cir. 2004). This also appears to be the rule in the Ninth Circuit as well. See Mahon v. City of Los Angeles, 95 F.3d 1157 (9th Cir. 1996). Thus, these circuits also require deliberate indifference before municipal liability is possible.

Initially, the Fifth Circuit appeared to agree. Partridge v. Two Unknown Police Officers of the City of Houston, Tex., 791 F.2d 1182, 1183 (5th Cir. 1986). Partridge was a jail suicide case complaining about a "systemic indifference to the serious medical needs of pretrial detainees and a "deliberate pattern of conduct," that is, of a custom or policy." Id. The Fifth Circuit noted that "[t]hose allegations … amount to the kind of arbitrariness and abuse of power that is preserved as a component of the due process clause in Bell v. Wolfish[.]" Id. In the same decision, the Fifth Circuit went on to say, "[u]nder the Bell v. Wolfish standard, the defendants had a duty, at a minimum, not to be deliberately indifferent to Partridge's serious medical needs... failure to take any steps to save a suicidal detainee from injuring himself may also constitute a due process violation under Bell v. Wolfish." Id. at 1187.

During the years after Partridge, the Fifth Circuit became fixated on the distinction between whether a case was an episodic act or omission or a conditions-of-confinement case to determine what standard applied. Apparently, no other Circuit Court of Appeals uses this hard distinction between episodic acts or omissions and conditions of confinement in determining which rule to apply in a municipal liability claim. The Fifth Circuit is the outlier in this regard, and this hard distinction makes a fundamental error because it ignores the holdings in Monell and Bell and their interrelated impact on the underlying liability issues. However, properly understood, there are not two different causes of action for municipal liability for damages. There is only one. The issues in that single cause of action should be whether the municipality punished a pretrial detainee. And was the punishment done with deliberate indifference to the detainees' rights under a municipal policy? Monell and Bell both apply, intertwine and work together in answering that question. Monell and Bell are not two separate causes of action for municipal liability.

The Fifth Circuit stumbled deeper into the hole in Shepherd v. Dallas Cnty., 91 F.3d 445 (5th Cir. 2009). There, it held that pretrial detainee claims may be brought under either a "conditions of confinement" or an "episodic act or omission" claim. Shepherd, 91 F.3d at 452 (citing Hare, 74 F.3d at 644-45). The Fifth Circuit classified the failure to provide medical care claim in Shepherd as a conditions-of-confinement claim. Dallas County argued that even if it was a conditions-of-confinement claim, a plaintiff challenging conditions of confinement must still prove intent, specifically deliberate indifference. Id. at 454. The Fifth Circuit rejected the county's argument, stating that in Hare it had already held that jail officials' individual states of mind are not disputed in conditions-of-confinement cases. Id.

The Fifth Circuit compounded this error further in Sanchez v. Young County, 866 F.3d 274 (5th Cir. 2017), cert denied, 139 S.Ct. 126 (2018) ("Sanchez I"). In Sanchez I, Diana Simpson died of a drug overdose while she was a pretrial detainee in the Young County Jail. Id. at 277-78. Sanchez brought alternative claims against Young County under both episodic acts or omissions and conditions of confinement theories. Id. at 276. The Fifth Circuit affirmed summary judgment on the episodic act or omission claims. Id. at 280. But it reversed and remanded with instructions to the trial court to consider the alternative conditions-of-confinement claim. Id. at 280.

In the follow-on case, the Fifth Circuit reversed the trial court's grant of summary judgment on the conditions-of-confinement claim. Sanchez v. Young County, 956 F.3d 785 (5th Cir. 2020), cert. denied, 141 S.Ct. 901 (2020) ("Sanchez II"). It stated that such claims were about "de facto policies that systematically deny medical care to highly intoxicated detainees—e.g., policies of placing highly intoxicated detainees in the holding or detox cells to 'sleep it off' without proper medical or risk-of-suicide assessment or treatment, of ignoring outside information when assessing a detainee's medical needs, and of failing to train jailers to evaluate detainees' mental health and medical needs." Id. at 791-92. The court divided these alleged policies into three categories: (1) failure to assess, (2) failure to monitor, and (3) failure to train. Id. at 792.

While noting that the District Court had analyzed the failure to train theory as a

conditions-of-confinement claim, the Fifth Circuit held that was incorrect. Id. It should have been considered as an episodic act or omission claim. Id. Regardless, the court agreed that the failure to train claim should be dismissed. Id.

However, on the failure-to-monitor claim, the court reversed because the trial court failed to consider all of Sanchez's summary judgment evidence and arguments. Id. This included a history of previous failures to monitor, the failure of the Sheriff to address the prior failures, and evidence that pointed to an attempted cover up created a fact issue over whether the jail habitually failed to properly monitor detainees. Id.

The failure-to-assess claims also raised a fact issue because of the consistent testimony of jail employees that the jail's protocol with highly intoxicated detainees was to place them in holding cells to "sleep it off" before they completed booking. Id. at 794. That testimony created a fact issue on the failure to assess claim. Id.

This long trail of decisions leads us finally to Cope II. There, the Fifth Circuit found there was no policy of Coleman County that caused any constitutional violation. Then it turned around and found those same policies should now be considered "conditions of confinement" and needed to be evaluated a second time by the trial court. Additionally, it instructed the trial court that Plaintiff did not have to prove deliberate indifference or that any prior similar incidents had ever happened before. This means that in the Fifth Circuit deliberate indifference and causation are no longer required to hold the municipality liable for damages under a conditions-of-confinement theory.

But this decision directly contradicts other circuits as noted above and other Fifth Circuit decisions, including at least one en banc decision. See Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (en banc) (holding inadequate staffing was not a condition of confinement); Estate of Bonilla v. Orange County, 982 F.3d 298, 308 (5th Circ. 2020) (finding a plaintiff's attempt to predicate liability for suicide on two theories, one derived from Monell and one based on conditions of confinement, was error]; Duvall v. Dallas County, Tex., 631 F.3d 203, 209 (5th Cir. 2011), cert. denied 565 U.S. 823 (2011)(recognizing the issue on the application of Monell to conditions of confinement claims but not reaching it because jury found county was deliberately indifferent). This tension between Monell and Bell in the Fifth Circuit also continues to grow as shown by these three recent district court cases.

A district judge in the Southern District of Texas recently commented: "It is somewhat unclear to what extent Monell applies in conditions-of-confinement cases. At times, the Fifth Circuit has assessed whether Monell's preconditions are met in such cases. See Duvall, 631 F.3d at 209. In other instances, there is no mention of Monell. See Shepherd, 591 F.3d at 455." Wagner v. Harris Cnty., 2024 WL 4438668, at *4 n.2 (S.D. Tex. Oct. 7, 2024).

On the one hand, In Hovis v. Wichita County, Texas, 2024 WL 3836559 (N.D. Tex. July 31, 2024) the district judge held that Monell does not apply to a conditions-of-confinement case. Yet, In Rangel v. Wellpath, LLC, 2024 WL 1160913 * 6(N.D. Tex. Mar. 18, 2024), a different district judge discussed the Fifth Circuit's observation in Estate of Bonilla that "there is no meaningful difference between the showing of a policy under a Monell theory and a conditions of confinement theory". That judge then held that the deficiencies in the Monell claim were also fatal to her conditions of confinement claim because the two types of claims are nearly identical. Id., at *13

Will Cope II Swallow Monell and Make Federal Courts Arbiters of All Manner of Jail Policies, Conditions and Operations

If uncorrected, Cope II will mean the eventual demise of Monell in pre-trial detainee cases in the Fifth Circuit, and quite possibly other Circuits as well. It will turn the federal courts into the arbiters of all manner of detention facility policies and operational decisions. This will open the proverbial floodgates of litigation, and the courts will be buried evaluating every jail policy imaginable, turning the cruel and unusual punishments clause into what Justice Thomas calls with displeasure the "National Code of Prison Regulations" and result in the micromanaging of prisons by the federal judiciary.

This also raises important questions about federalism and separation of powers, which is ironic considering that the Bell Court noted these concerns and admonished courts against acting as super legislatures by directing the operations of detention facilities. "[T]he

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.
>
> Bell, at 547-548.

Judicial inattentiveness to Cope II (cert was denied Jan. 13, 2025) may allow Monell to be swallowed up by its conditions-of-confinement theory in the Fifth Circuit. Under the theory espoused in that case, federal judges will inevitably become the overseers of jail standards and operations and end up being responsible for the thousands of jails across the country. Courts should realize this inevitability and protect the thoughtful Monell jurisprudence and the delicate balance it protects.

By Timothy Stucky

Monell in Practice: The Intentionally Elusive Path to Municipal Liability

Monell and its progeny reject respondeat superior liability outright and instead require plaintiffs to meet an exacting standard.

Municipal exposure under 42 U.S.C. § 1983 remains carefully constrained by a doctrinal framework that resists expansion and continues to favor institutional protection over broad liability. While municipalities are technically "persons" under § 1983 per Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), the Supreme Court intentionally drew narrow contours around municipal accountability. Monell and its progeny reject respondeat superior liability outright and instead require plaintiffs to meet an exacting standard: proving that the municipality itself, through a policy, custom, or deliberate omission, was the moving force behind a constitutional violation.

This threshold is deliberately rigorous. Courts have consistently reaffirmed that municipal liability arises only where the alleged misconduct is traceable to institutional decision-making at the policy level. Isolated missteps by line-level employees, bureaucratic oversights, or negligent supervision do not suffice. The doctrine is designed to limit exposure to only those rare instances in which a municipality affirmatively directs or consciously disregards an unconstitutional practice.

To succeed under Monell, a plaintiff must demonstrate four critical elements. First, the challenged conduct must stem from a municipal action—this can include an express policy, a widespread and persistent custom, or a single act by an individual possessing final policymaking authority. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986). Second, liability can arise from a municipality's failure to act, such as failing to adequately train or supervise its employees, but only where such failure reflects "deliberate indifference" to constitutional rights. City of Canton v. Harris, 489 U.S. 378, 379–89 (1989). Third, the municipality must be culpable, meaning that its conduct was not merely negligent but deliberately indifferent or otherwise intentional. Fourth, the plaintiff must establish causation—that is, the municipal action must be the "moving force" behind the constitutional injury. Board of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997); Connick v. Thompson, 563 U.S. 51 (2011); Cash v. Cnty. of Erie, 654 F.3d 324 (2d Cir. 2011); J.K.J. v. Polk Cnty., 960 F.3d 367, 377 (7th Cir. 2020); Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 777 (10th Cir. 2013).

While plaintiffs often attempt to rely on so-called "policy gaps" or systemic deficiencies, courts have repeatedly clarified that liability cannot rest on vague assertions or generalized dysfunction. The Seventh Circuit's decision in Dixon v. Cnty. of Cook, 819 F.3d 343, 348 (7th Cir. 2016), acknowledged the possibility of liability in the face of policy omissions, but emphasized the need for evidence that the municipality's inaction amounted to an implicit approval of unconstitutional conduct. Even in such cases, proof of deliberate indifference by a policymaker remains essential.

It is important to stress that mere negligence is not sufficient to establish municipal liability. Courts have consistently rejected claims grounded solely on

Timothy Stucky is an attorney with Kightlinger & Gray LLP in New Albany, Indiana, where he focuses on civil litigation involving governmental defense, premises liability, personal injury, employment disputes, and insurance subrogation. He represents clients in both state and federal court, as well as before administrative agencies such as the Indiana Civil Rights Commission. He serves as the Young Lawyer Vice Liaison to DRI's Governmental Liability Committee. Tim is active with the Indiana State Bar Association and is the Secretary of the Floyd County Bar Association. Tim is also a member of the Defense Trial Counsel of Indiana.

inattentiveness or bureaucratic oversight. Mitchell v. Aluisi, 872 F.2d 577, 581 (4th Cir. 1989); Arnett v. Webster, 658 F.3d 742, 751 (7th Cir. 2011). Rather, deliberate indifference is a stringent standard, requiring proof that the municipality was actually aware of and disregarded a substantial risk of harm. If a policymaker knowingly designs or maintains a deliberately indifferent policy that results in constitutional injury, then liability may attach, both to the municipality and, potentially, to the individual. Burke v. Regalado, 935 F.3d 960, 1001 (10th Cir. 2019); Armstrong v. Squadrito, 152 F.3d 564, 581 (7th Cir. 1998).

When direct evidence of a formal policy or custom is unavailable, plaintiffs may rely on circumstantial evidence of systemic deficiencies. In these cases, plaintiffs must demonstrate that the municipality's practices were so deficient as to suggest the existence of an implicit policy. For example, plaintiffs may point to evidence of "systemic and gross deficiencies" in staffing, facilities, training, equipment, or procedures. Dixon, 819 F.3d at 348. However, even then, they must also show that a policymaker or someone with authority was aware of these deficiencies and failed to act. St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988) (plurality). The defense bar should remain attentive to plaintiffs' frequent misuse of circumstantial evidence in attempting to imply the existence of a municipal policy. Courts are skeptical of efforts to conflate repeated incidents with actual policy, especially where causation and culpability remain speculative. Claims based on custom or practice require a showing that the alleged conduct was so widespread and well-settled as to carry the force of law—an inherently high bar.

Despite aggressive efforts by plaintiffs to expand the reach of municipal liability, case law confirms the high bar courts impose on Monell claims. Monell claims are not only dismissed at high rates but are frequently abandoned altogether due to the burden of proof and procedural complexity. But that is exactly how the system was designed to work. Courts enforce the limitations of Monell rigorously, particularly when plaintiffs fail to identify a policymaker, fail to demonstrate actual or constructive knowledge, or fail to establish a direct causal nexus between the policy and the alleged harm.

The Supreme Court's deliberate architecture of Monell liability ensures that municipalities are not turned into insurers of every constitutional misstep committed by their employees. As local governments face increasing operational demands and civil rights litigation grows more sophisticated, it is critical that counsel continue to assert and preserve the structural protections embedded in Monell. The path to municipal liability remains intentionally narrow, and the effective enforcement of its limits is essential to shielding municipalities from expansive and unsupportable theories of institutional fault.

The Notice Requirement

Imposing municipal liability under § 1983 for failure to act requires more than a hindsight critique of governmental oversight. To prevail on such a claim, a plaintiff must establish that the municipality had either actual or constructive notice and failed to take appropriate measures to prevent it.

Connick, 563 U.S. at 61–62 (2011); Holloway v. City of Milwaukee, 43 F.4th 760, 770 (7th Cir. 2022). This requirement is not merely procedural; it reflects the deliberate indifference standard's core function as a form of institutional notice filter, one that insulates municipalities from liability absent proof of culpable awareness and intentional disregard.

Courts have consistently reaffirmed that municipal liability arises only where the alleged misconduct is traceable to institutional decision-making at the policy level.

In Connick, the Supreme Court articulated that when policymakers are aware, whether through actual or constructive means, that a particular omission in policy or training causes employees to violate constitutional rights, municipal liability may arise if those officials nonetheless continue the deficient practice. Connick, 563 U.S. at 61–62. This standard demands more than mere foreseeability; it requires that the risk of constitutional harm be "known or obvious." Brown, 520 U.S. at 410; Polk Cnty., 960 F.3d at 379–80. Even gross negligence or bureaucratic disorganization is insufficient. Deliberate indifference requires conscious inaction in the face of a risk that policymakers cannot plausibly deny.

Courts have recognized only two avenues for plaintiffs to establish the kind of notice necessary to support municipal liability for inaction. The first is by demonstrating a "pattern of injuries." Courts have held that a pattern of similar constitutional violations is "ordinarily necessary to establish municipal culpability and causation." Brown, 520 U.S. at 409; Connick, 563 U.S. at 62. This emphasis on systemic failure ensures that municipalities are not held liable for isolated errors or unanticipated misconduct, but only for enduring and unaddressed problems of which they were aware.

The second method, though far more exceptional, allows for what is known as "single-incident liability." In rare cases, a municipality's failure to act may lead to liability based on a single event, but only if that event was a "highly predictable consequence" of the inaction. Brown, 520 U.S. at 409. This narrow exception to the general rule recognizes that there may be situations where the risk of a constitutional violation is so obvious that no prior pattern is required to impute notice. For example, if a municipality fails to supervise an employee with known violent tendencies or fails to provide critical training for duties that carry a high risk of constitutional violations, the resulting harm may be deemed predictable and attributable to the municipality.

Courts have articulated this principle in various ways. The Second Circuit in Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995), held that liability may attach when the need for supervision was so apparent that failure to provide it amounted to deliberate indifference. Nonetheless, courts are cautious: a single incident, without more, is generally insufficient to establish a municipal custom. A plaintiff may not circumvent the need to demonstrate notice by relying solely on the gravity of a singular event. A one-off injury, no matter how tragic, is rarely enough.

Even when plaintiffs attempt to circumvent the notice requirement by pointing to circumstantial or cultural indicators—such as vague allegations of widespread misconduct, lax disciplinary practices, or ill-conceived training—courts demand more. They require proof that these conditions were known to policymakers and that a direct causal link exists between those conditions and the constitutional injury. In the absence of such evidence, Monell liability fails. As with patterns of misconduct, there must be a demonstrable nexus between notice, inaction, and harm. While all federal circuits recognize the theoretical viability of single-incident liability, that recognition does not alter the practical reality that these claims are rarely successful. Courts remain skeptical of efforts to use isolated incidents as proxies for institutional fault, particularly where plaintiffs fail to tether those incidents to documented deficiencies or policymaker awareness.

Ultimately, the notice requirement in failure-to-act cases serves as both a procedural threshold and a substantive check on expanding municipal exposure. Without clear, contemporaneous evidence that municipal actors knew of a constitutionally significant risk and chose to disregard it, plaintiffs cannot meet the high bar required by Monell. For defense counsel, reinforcing this requirement in discovery, dispositive motions, and trial strategy remains a key means of narrowing the path to liability and preserving the protective function of the deliberate indifference standard.

Failure to Screen, Supervise, or Train

Claims based on a municipality's failure to supervise or train its employees represent recognized but challenging avenues under Monell liability. These theories, while formally accepted in every federal circuit, are considered among the more tenuous forms of municipal liability. The Supreme Court in Connick, 563 U.S. at 61, described such claims as "tenuous," a characterization echoed by the Seventh Circuit in Ruiz-Cortez v. City of Chicago, 931 F.3d 592, 599 (7th Cir. 2019). This is largely because these claims do not allege direct harm inflicted by a municipal policy itself, as was the case in Monell, but rather seek to hold the municipality liable for failing to prevent employee misconduct. City of Oklahoma City v. Tuttle, 471 U.S. 808, 822–23 (1985).

As a result, claims for failure to supervise or train are available only in "limited circumstances," and are subject to particularly "rigorous standards of culpability and causation." Canton, 489 U.S. at 387; Brown, 520 U.S. at 405. To prevail, plaintiffs must demonstrate that the municipality's omission constituted "deliberate indifference" to the risk of constitutional harm. See, e.g., Connick,

563 U.S. at 61; Alexander v. City of South Bend, 433 F.3d 550, 557 (7th Cir. 2006); Ruiz-Cortez, 931 F.3d at 599. Additionally, they must show that the failure was the "moving force" behind the constitutional violation. Canton, 489 U.S. at 390; Brown, 520 U.S. at 404.

These theories are further complicated by their procedural and evidentiary demands. While failure to train and failure to screen typically concern decisions made at or before the beginning of employment, failure to supervise involves a municipality's ongoing duty to monitor employee conduct over time. Supervision requires municipalities to actively evaluate, guide, and, when appropriate, discipline personnel. Courts have noted that, at minimum, this duty includes reviewing employee performance, responding to complaints, and implementing corrective measures such as retraining or discipline.

Despite the high standards, federal courts have upheld failure-to-supervise claims under specific circumstances. See Vann, 72 F.3d at 1049. Courts found liability where supervisory failures contributed directly to serious constitutional injuries. See Johnson v. City of Philadelphia, 975 F.3d 394 (3d Cir. 2020); Cash, 654 F.3d 324. Other decisions affirm the viability of such claims when municipal oversight is essentially absent. See, e.g., Forrest v. Parry, 930 F.3d 93, 108 (3d Cir. 2019); Covington v. City of Madisonville, 812 F. App'x 219, 226 (5th Cir. 2020); Wright v. City of Euclid, 962 F.3d 852, 881 (6th Cir. 2020); Estate of Roman v. City of Newark, 914 F.3d 789, 799–800 (3d Cir. 2019).

Establishing deliberate indifference in failure-to-supervise claims often requires showing that the municipality lacked meaningful daily oversight. For instance, the Eighth Circuit in S.M. v. Lincoln Cnty., 874 F.3d 581, 586, 588–89 (8th Cir. 2017), recognized that the absence of regular evaluations, feedback, or corrective action may support a finding of deliberate indifference. The Sixth Circuit reached a similar conclusion in Shadrick v. Hopkins Cnty., 805 F.3d 724, 739–42 (6th Cir. 2015), emphasizing that a lack of designated supervisory personnel or infrastructure to implement oversight can also demonstrate deliberate indifference.

The pattern requirement serves as a key gatekeeper in Monell litigation. Courts consistently require plaintiffs to show a history of similar constitutional violations before inferring deliberate indifference. Brown, 520 U.S. at 409; Connick, 563 U.S. at 62. This demand for factual repetition protects municipalities from hindsight-based claims and prevents liability for isolated or tragic incidents that do not reflect systemic fault.

Though the "single-incident" theory remains doctrinally available, Brown confines it to rare cases where the risk of constitutional harm was glaringly obvious at the time of the municipal decision. Courts have narrowly applied this exception, as in Vann, 72 F.3d 1040, and Polk County, 960 F.3d 367, where officials ignored repeated and credible warnings about employee misconduct. These cases turn not on a single misstep, but on a sustained failure to address known risks.

Brown also sets a high bar for hiring-based claims. 520 U.S. 397. There, despite a jury verdict, the Court reversed because the deputy's criminal background—though troubling—did not make it "plainly obvious" that hiring him would cause a constitutional violation. Id. at 399. The Court rejected the idea that negligent screening or incomplete background checks alone could support liability. Only a hiring decision so reckless as to constitute deliberate indifference will suffice under § 1983.

Collectively, these principles reinforce the narrow scope of Monell liability. Whether the theory is failure to train, supervise, or hire, plaintiffs must show repeated misconduct, actual notice, and policy-level inaction. The continued insistence on pattern, causation, and fault remains a powerful defense against efforts to convert individual misdeeds into municipal liability.

This standard reflects a broader principle that municipal hiring decisions are inherently discretionary, and § 1983 does not impose a constitutional duty of perfection in public employment practices.

Failure-to-train claims are subject to the same rigorous standards that govern other Monell theories. Plaintiffs must show that the municipality's failure to provide adequate training was so clearly deficient that it amounted to deliberate indifference to constitutional rights, and that this failure was the direct cause of the alleged violation. Canton, 489 U.S. at 388–89; Ruiz-Cortez, 931 F.3d at 599. Typically, this requires evidence of a pattern of similar constitutional violations, or a showing that the need for training was so obvious, based on the nature of the job and its inherent risks, that the failure to act reflects intentional disregard.

These requirements serve as a substantial check on attempts to expand municipal liability. Without a well-developed factual record demonstrating that policymakers were on notice of repeated misconduct and consciously chose not to act, failure-to-train claims are structurally weak and often fail at the pleading or summary judgment stage. Serious harm alone is not enough. Unless a plaintiff can prove both causation and notice under the strict Monell framework, liability should not attach.

While plaintiffs may attempt to frame isolated misconduct as systemic failure, the courts have drawn a firm distinction between employee error and institutional fault. As Judge Posner aptly observed in Shields v. Ill. Dep't of Corr., 746 F.3d 782, 792 (7th Cir. 2014), "Monell is probably best understood as simply having crafted a compromise rule that protected the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability." That pragmatic concern continues to influence courts' resistance to expanding Monell beyond its intended reach. For defense counsel, these limitations are more than theoretical—they are indispensable tools for resisting efforts to impose municipal liability for acts the government neither sanctioned nor could have reasonably foreseen.

The practical consequence of this precedent is that Monell claims grounded in alleged failures to supervise, train, or screen are frequently dismissed for lacking the necessary factual detail.

Motions to Dismiss

At the pleading stage, federal courts routinely take a restrictive and exacting approach to Monell claims premised on failure to supervise, often resulting in early dismissal before any meaningful discovery occurs. This pattern reflects not only judicial skepticism toward these theories but also the heightened pleading standards articulated in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Under those decisions, plaintiffs must allege facts that make their claim "plausible," not merely conceivable.

Iqbal holds that a civil rights plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 556 U.S. at 676. A plaintiff may not establish a supervisor's liability by "mere knowledge of his subordinate's discriminatory purpose." Id. at 677. It is not enough for plaintiffs to rely on the generalized assertion that "the police" committed a wrongful act; plaintiffs must identify specific actors and detail how each contributed to the constitutional deprivation. This principle of individualized liability has been repeatedly reinforced by federal appellate courts. See, e.g., Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982) (reasoning plaintiff could not establish police officers had the opportunity to intervene if plaintiff was unable to identify the officers present during the time he was beaten); Colbert v. City of Chicago, 851 F.3d 649 (7th Cir. 2017) (liability cannot be premised on vague or collective attributions of misconduct).

The practical consequence of this precedent is that Monell claims grounded in alleged failures to supervise, train, or screen are frequently dismissed for lacking the necessary factual detail. Courts have repeatedly held that these claims cannot survive based on generic allegations, formulaic recitations of legal standards, or broad references to a municipality's oversight duties. See e.g., Atwood v. Town of Ellington, 427 F. Supp. 2d 136, 145 (D. Conn. 2006), Estate of Abdul Kamal v. Twp. of Irvington, 2018 U.S. Dist. LEXIS 192855 (D.N.J. Nov. 9, 2018), aff'd 790 F. App'x 395 (3d Cir. 2019). As a result, it is critical to scrutinize such complaints early for factual specificity and to challenge them where they rely on conclusory or unsupported assertions.

Other decisions reflect a similar judicial posture. See, e.g., Maldonado v. Westchester Cnty., 2021 U.S. Dist. LEXIS 19592, at *14 (S.D.N.Y. Feb. 2, 2021); Vasquez v. City of New York, 2023 U.S. Dist. LEXIS 219614, at *9 (S.D.N.Y. Dec. 11, 2023); Grove v. Metro. Gov't of Nashville, 2019 U.S. Dist. LEXIS 89060, at *2 (M.D. Tenn. May 28, 2019); Gilmore v. Anderson, 2022 U.S. Dist. LEXIS 205840, at *4 (E.D. Wis. Oct. 5, 2022). In each case, the court emphasized the absence of facts showing prior incidents, notice to municipal officials, or an established pattern of similar conduct sufficient to support the inference of an actionable policy or custom.

These decisions collectively demonstrate a crucial strategic point for defense counsel: courts are not inclined to let Monell claims survive unless the pleadings clearly allege specific facts indicating that municipal policymakers were aware of, and deliberately indifferent to, a known constitutional risk. The mere assertion that a municipality failed to train or supervise an employee is insufficient. Courts require plaintiffs to connect the alleged failure to a broader pattern of misconduct or policy-level omission. Absent that connection, courts have not hesitated to terminate such claims at the threshold.

The application of Twombly and Iqbal to claims under § 1983 serves as a potent defense tool, enabling municipalities to eliminate exposure early in litigation and avoid the cost and burden of discovery on legally infirm theories. For defense practitioners, early motion practice challenging the sufficiency of Monell pleadings—particularly where complaints rely on legal buzzwords without factual support—remains a critical safeguard in ensuring that municipalities are not drawn into protracted litigation based on speculative, unsupported claims of systemic failure.

Motions for Summary Judgment

Even when plaintiffs succeed in avoiding dismissal at the pleading stage, Monell claims—particularly those based on

failure to train or supervise—routinely falter at summary judgment due to the formidable evidentiary burdens imposed by the deliberate indifference and causation standards. The Supreme Court has consistently emphasized that municipal liability under § 1983 is not lightly imposed and requires "rigorous standards of culpability and causation" to ensure that only truly institutional failures are actionable. Canton, 489 U.S. at 388–89; Brown, 520 U.S. at 411.

Courts apply these standards narrowly. In Connick v. Thompson, supra, the Supreme Court declined to impose municipal liability despite repeated Brady violations by prosecutors. It held liability could not attach in the absence of a demonstrable pattern of similar constitutional violations that were sufficient to place municipal policymakers on notice such violations were occurring. This holding was not an aberration—it reflects a broad judicial consensus that the existence of a few prior complaints or even repeated misconduct is not enough unless those incidents are factually similar and closely aligned with the plaintiff's claims.

This principle was reiterated in Peterson v. City of Fort Worth, 588 F.3d 838 (5th Cir. 2009), where the Fifth Circuit rejected Monell liability despite evidence of multiple excessive force complaints. See, e.g., Flores v. Cnty. of Los Angeles, 758 F.3d 1154 (9th Cir. 2014) (holding general allegations of misconduct to be insufficient to show the county should have anticipated the plaintiff's particular harm).

This insistence on factual congruence has only intensified in recent years. In Tolston v. City of Atlanta, 723 F. Supp. 3d 1263, 1319 (N.D. Ga. 2024), the district court granted summary judgment in favor of the city on a failure-to-train claim, finding that numerous citizen complaints about police misconduct bore insufficient similarity to the incident alleged by the plaintiff. Once again, the court applied the Peterson framework, requiring a close factual alignment between past misconduct and the present claim before finding that municipal policymakers were on constructive notice. See, e.g., A.H. v. Montgomery Cnty., 2025 U.S. Dist. LEXIS 86123 (E.D. Mo. May 5, 2025); Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020); Williams v. Ponik, 822 F. App'x 108 (3d Cir. 2020); Jones v. City of N. Las Vegas, 2014 U.S. Dist. LEXIS 157918 (D. Nev. Nov. 6, 2014); Brown v. Battle Creek Police Dep't, 844 F.3d 556 (6th Cir. 2016).

Taken together, these decisions underscore a prevailing judicial trend: generalized complaints, dissimilar fact patterns, and inferential leaps are insufficient to support Monell liability. Courts require not only evidence of prior constitutional violations but also a persuasive showing that those violations were so specific, repeated, and closely aligned with the plaintiff's injury that municipal inaction amounts to conscious disregard.

From a defense standpoint, the strategic implications are clear. At summary judgment, municipal defendants are well-positioned to challenge the sufficiency of plaintiffs' proof on three critical grounds—notice, pattern, and causation. Plaintiffs must establish a pattern of past violations that are not just thematically related but factually parallel and must also tie that pattern to a policymaker's knowledge and failure to act. Even then, they must still prove that the alleged omission was the "moving force" behind the violation. In practice, this high bar is rarely met.

Indeed, the combined effect of Twombly, Iqbal, and post-Connick jurisprudence is that plaintiffs must enter litigation with a well-developed evidentiary foundation to even survive into the later stages of a case. Courts view Monell claims based on training or supervision with skepticism—recognizing the potential for such claims to devolve into de facto respondeat superior liability, which the Supreme Court has expressly barred. Tuttle, 471 U.S. at 822–23.

For municipal defense counsel, these legal standards provide powerful tools for early and decisive resolution. Summary judgment briefing should target not only the absence of a documented policy but also the failure of plaintiffs to demonstrate a prior pattern, policy-level notice, and causation. Even where courts permit discovery, they remain unwilling to extrapolate liability from disjointed or anecdotal evidence.

While failure-to-supervise claims remain viable in theory, in practice they survive only when plaintiffs bring forward a narrowly tailored, deeply factual, and pattern-driven record that satisfies the judiciary's heightened evidentiary expectations. Absent that, Monell serves its intended purpose: protecting municipalities from speculative theories of liability rooted in hindsight rather than institutional fault.

The judiciary's unwavering focus on causation, notice, and institutional fault gives municipalities a powerful defense against broad institutional liability theories.

The Causation Requirement

Causation under Monell serves as a substantive barrier preventing municipal liability for constitutional violations not affirmatively caused by the municipality. The Supreme Court has consistently held that § 1983 liability attaches only where a direct causal link exists between a specific municipal policy or custom and the alleged harm. Brown, 520 U.S. at 404. This requirement ensures municipalities are not held vicariously liable for the unauthorized acts of individual employees.

The Seventh Circuit's decision in Ruiz-Cortez, 931 F.3d at 598, illustrates this point. The plaintiff alleged a Brady violation tied to a broader municipal practice of compensating informants, but the court found no causal connection. The misconduct was deemed a rogue act, not the product of any official policy. As the court reiterated, Monell does not extend to individual wrongdoing absent institutional endorsement or awareness. See also Glisson v. Ind. Dep't of Corr., 849 F.3d 372, 379 (7th Cir. 2017) (en banc).

The Supreme Court's reasoning in Canton, 489 U.S. at 385, reinforces the same principle. There, no liability attached where an officer failed to provide medical care because the lapse was inconsistent with official policy—not caused by it. Only a deliberate, policy-based omission, such as inadequate training or supervision, can give rise to liability, and only when it is affirmatively linked to the injury through deliberate indifference.

Recent appellate decisions including reflect continued adherence to this strict causation standard. See, e.g., Armstrong v. Ashley, 60 F.4th 262 (5th Cir. 2023); Franklin v. Franklin Cnty., 115 F.4th 461 (6th Cir. 2024); Perkins v. Hastings, 915 F.3d 512 (8th Cir. 2019). Courts demand more than generalized criticisms or isolated failures; they require proof that a municipal decisionmaker was aware of a known risk of constitutional harm and failed to act, and that this failure directly caused the plaintiff's injury.

This consistently narrow view of causation presents a powerful defense tool. It allows municipalities to defeat claims that rely on anecdotal evidence, speculative inferences, or post hoc policy critiques, reinforcing the principle that Monell liability attaches only in cases of demonstrable institutional fault.

Thus, the insistence on factual similarity has developed as a major procedural barrier to Monell liability. Without pre-discovery access to prior incidents, internal reports, or supervisory records, plaintiffs struggle to establish the necessary causal link. Even where past incidents exist, courts require a close match in both context and harm—general misconduct or bureaucratic failure is insufficient. Although a few courts have admitted alternative causation evidence, such as DOJ reports, these exceptions are rare and limited to cases where external findings directly align with the plaintiff's claims and highlight municipal inaction, as in Daniel, 833 F.3d at 734.

The causation requirement is more than a technical hurdle—it is a strategic asset for municipal defense. It allows governments to separate individual wrongdoing from institutional liability and reinforces that Monell claims demand proof of deliberate, policy-driven harm. Plaintiffs unable to meet this burden rarely survive summary judgment, making causation a critical focus for any dispositive motion in Monell litigation.

The Take Aways

This article underscores that the legal framework governing Monell liability under § 1983 rightly imposes a rigorous standard designed to shield municipalities from liability based on individual misconduct, while preserving the core principle of constitutional accountability. Courts have generally drawn appropriate doctrinal lines, requiring strict adherence to pleading, proof, and causation standards.

The "deliberate indifference" threshold, the requirement of policy-level fault, and the direct causal link set forth in Brown, 520 U.S. 397, collectively ensure that liability is confined to institutional failures—not isolated employee actions.

The high bar established by Monell is a deliberate feature, not a flaw. It reflects the principle that municipalities may only be held liable when a constitutional violation is directly caused by their own policies, customs, or decisions by final policymakers. The rejection of respondeat superior reinforces that even egregious employee misconduct does not give rise to liability unless it stems from a municipal act or omission evidencing deliberate indifference.

Courts enforce this standard with consistency. Plaintiffs must prove municipal action, fault, notice, and a causal connection between the institution's conduct and the violation. These requirements do not bend in the face of tragic facts or serious harm. Without concrete evidence that a policymaker knowingly ignored an obvious risk, liability will not attach.

This rigor is most evident in failure-to-train and supervise claims, where vague allegations and hindsight critiques fall short. Courts demand specific facts, repeated patterns, and policymaker awareness. Monell claims are routinely dismissed at the pleading stage and often fail at summary judgment due to evidentiary deficiencies. Efforts to rely on anecdotal or inferential reasoning rarely survive judicial scrutiny.

For defense counsel, these limitations are not merely doctrinal—they are strategic. They should be asserted early, reinforced through discovery, and emphasized in dispositive motions. The judiciary's unwavering focus on causation, notice, and institutional fault gives municipalities a powerful defense against broad institutional liability theories. Monell was never intended to make municipalities liable by default, and federal courts have shown little appetite for relaxing those limits. The doctrine remains a vital barrier against transforming every constitutional tort into a municipal case.

Three Circuit Approaches to Applying *Monell* to Multi-Member Voting Bodies

By Michael M. Hill

When a local government's voting body votes to take or not take a certain action, how are the courts to determine the motivation of the public entity as a whole to assess its lawfulness?

Representing political voting bodies, like city councils and county commissions, in employment cases can present challenges (partisan infighting, competing political ambitions, elected officials' garrulous nature in depositions). But public entities also have defenses unavailable to private entities. One of the more interesting is that a city or county cannot be liable under 42 U.S.C. § 1983 without evidence that the alleged constitutional or federal law violation at issue was due to a policy, custom, or practice of the city or county, known as Monell liability.

In Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978), the Supreme Court held the doctrine of respondeat superior is inapplicable to public entities. This means that, unlike with private entities, a supervisor's or manager's unlawful act, even if it violates an individual's constitutional rights, generally is not enough to impose liability on the city or county as a whole (save, in appropriate cases, when the supervisor or manager acted with final policymaking authority).

Generally, Monell liability is established in one of three ways: (1) an officially enacted policy, (2) repeated acts of a final policymaker, or (3) a single act of the city's or county's legislative body. City of St. Louis v. Praprotnik, 485 U.S. 112, 121, 123 (1988); Grech v. Clayton Cnty., Ga., 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc). The third form of Monell above is the focus of this article, as it presents an interesting question that currently divides the circuits: When a local government's voting body votes to take or not take a certain action, how are the courts to determine the motivation of the public entity as a whole to assess its lawfulness?

The Three-Way Split Among the Federal Circuits

The "*majority rule*" approach

Currently, the federal circuits take three different approaches to this question. Perhaps the simplest and most straightforward is the "majority rule" approach of the Eleventh Circuit. Under this view, for a city or county as a whole to incur § 1983 liability for an act of its legislative body (such as for alleged race discrimination under § 1981, First Amendment retaliation, etc.), the plaintiff must prove that a majority of the legislative body acted with an unlawful motive. Matthews v. Columbia Cnty., 294 F.3d 1294, 1298 (11th Cir. 2002).

Matthews involved a five-member county commission's vote to eliminate the plaintiff's job as director of administrative services, which she contended was in retaliation for her comments about a company that was contracting with the county. Three commissioners voted to eliminate her job, and, after a trial, the jury found that one of the commissioners was motivated by the plaintiff's protected speech and also influenced the votes of the other two commissioners in the majority. Id. at 1295-96.

The Eleventh Circuit's "majority rule" approach is intuitive. If it takes a majority vote for a local government to enact a lawful policy, then it also should take a majority vote for the local government to adopt an unlawful policy. Short of that majority, the city or county cannot be said to have adopted a policy of unlawful discrimination or retaliation.

But what if one councilmember with an unlawful discriminatory or retaliatory animus persuades his colleagues to vote with him and actually influences their votes? Under Matthews, this fact alone

Michael M. Hill is a Partner in the Labor & Employment Law and Government Law National Practice Sections in Freeman Mathis & Gary's Atlanta office. He serves as Vice-Chair for the Government Law National Practice Section, Vice-Chair for the Southeast Employment Practice Team, and Vice-Chair for the Southeast Government Practice Team.

will not result in liability, even if the other councilmembers he persuaded were aware of his unlawful animus. See Matthews, 294 F.3d at 1298 ("That Titus and Ford may have known about the unconstitutional basis of Reynolds's selection and vote or that Reynolds may have affected Titus and Ford's votes by his influence is not enough to show that they ratified the unlawful basis by also voting for the RIF.").

Why? Because, as the Eleventh Circuit reasons, councilmembers may vote for a variety of reasons, some lawful, some not. If one councilmember has a lawful reason for voting a certain way, the law should not require him to change his vote merely because another councilmember has an unlawful motive for voting the same way:

> A well-intentioned lawmaker who votes for the legislation—even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote—does not automatically ratify or endorse the unconstitutional motive.
>
> .. .
>
> We think this proposition is true even where—as Plaintiff argues is the case here—the properly motivated lawmaker has often voted the same way as the improperly motivated lawmaker.
>
> Id. at 1298 & n.2.

Under this view, the local government as a whole cannot incur § 1983 liability without evidence that a majority of the voting body also adopted the unlawful motivation for the vote. See also Mason v. Village of El Portal, 240 F.3d 1337, 1340 (11th Cir. 2001) ("[T]here can be no municipal liability unless all three members of the council who voted against reappointing [p]laintiff [in a 3-2 vote] shared the illegal motive.") (emphasis added).

The "significant bloc" approach

The First Circuit approached the same issue in Scott-Harris v. City of Fall River, 134 F.3d 427 (1st Cir. 1997), rev'd on other grounds sub nom. Bogan v. Scott-Harris, 523 U.S. 44 (1998), but reached a different outcome. Scott-Harris concerned the passage of a city ordinance eliminating the position of the director of the social services department, which the plaintiff contended was retaliation for her engaging in First Amendment protected speech.

The court considered the Eleventh Circuit's precedent and reasoning but ultimately found it unpersuasive and "overly mechanistic," in light of the difficulties plaintiffs can face in proving another individual's state of mind:

> On the one hand, because a municipal ordinance can become law only by a majority vote of the city council, there is a certain incongruity in allowing fewer than a majority of the council members to subject the city to liability under section 1983. On the other hand, because discriminatory animus is insidious and a clever pretext can be hard to unmask, the law sometimes constructs procedural devices to ease a victim's burden of proof.
>
> Id. at 438 (citing to the burden-shifting framework from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)).

In other words, the First Circuit is saying, since discrimination and retaliation claims can be hard to prove, the court should lower the plaintiff's burden to make them easier to prove. In place of the bright-line "majority rule" approach, the First Circuit suggested a more relaxed test where the plaintiff must show both (1) "bad motive on the part of at least a significant bloc of legislators," and (2) "circumstances suggesting the probable complicity of others." Id.

How much is a "significant bloc"? Unclear. But the court did hold that one councilmember out of eight is not enough. What kinds of circumstances suggest "the probable complicity of others"? Again, this appears to be open to interpretation, but Scott-Harris suggested that "evidence of procedural anomalies, acquiesced in by a majority of the legislative body, may support such an inference," and "evidence

indicating that the legislators bowed to an impermissible community animus, most commonly manifested by an unusual level of constituent pressure, may warrant such an inference." Id. The court found neither to be present in that case, so it found no municipal liability under § 1983, despite this relaxed standard.

Understanding your circuit's approach to Monell liability when it comes to multi-member voting bodies thus is critical to tailoring your defense strategy for these types of claims.

The "but for" causation approach

In Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 262 (6th Cir. 2006), the Sixth Circuit considered both of the above approaches and found neither satisfactory. The plaintiff in that case was a school superintendent who alleged the county board of education refused to appoint him to the newly created position of director of schools due to a newspaper article that identified him as the featured speaker at a convention sponsored by a church with a predominantly gay congregation. He asserted multiple First Amendment claims (freedom of speech, freedom of association, and free exercise of religion) and an equal protection claim against the school board under § 1983.

The district court entered summary judgment in favor of the board of education and certain individual board members, relying on the "majority rule" approach discussed above. Id. at 261-62. As the district court noted, the evidence showed a triable issue of fact as to whether three of the six board members—less than a majority—changed their support for the plaintiff after learning of the newspaper article. On appeal, however, the Sixth Circuit rejected this approach but also declined to follow the "significant bloc" approach from Scott-Harris, which the plaintiff favored:

> That approach would be difficult to apply, because it leaves many questions unanswered. Among the most important of these is what constitutes a "significant bloc of legislators" or "circumstances suggesting the probable complicity of others."
>
> Id. at 262.

Instead of either of these approaches, the Sixth Circuit followed an approach it found to be implied in holdings from the Second, Third, and Ninth Circuits, based on the principle of "but for" causation. Id. The Scarbrough court reasoned this "but for" causation approach was the most consistent with the Supreme Court's holding in Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), also a First Amendment retaliation case, which required a school board to prove, upon the plaintiff's showing that his protected conduct was a substantial factor in the government's decision, that it would have taken the same action in the absence of the unlawful motive. "Thus, where improperly motivated members supply the deciding margin, the [local government] itself is liable." Scarbrough, 470 F.3d at 262.

Applying the "but for" causation approach, Scarbrough held the county board of education was not entitled to summary judgment on the issue of Monell liability. Because the board's vote against appointing the plaintiff the new director of schools split 4-2, evidence showing that two of the six board members may have voted with an improper motivation meant the board "would not have taken the action it did were it not for their votes." Id. at 263.

Defense Strategies Under the Above Approaches

Understanding your circuit's approach to Monell liability when it comes to multi-member voting bodies thus is critical to tailoring your defense strategy for these types of claims.

In the Eleventh Circuit or another following the "majority rule" approach, evidence of unlawful discriminatory or retaliatory animus by less than a majority of councilmembers does not necessarily sink the defense to a § 1983 claim. In such a circuit, focus on the other councilmembers' motivations for the challenged action and, if possible, develop evidence that their motivations were unrelated to the plaintiff's protected characteristic or conduct. Such a strategy can be successful even if the plaintiff has evidence that a councilmember with an unlawful motive influenced the vote of others and that these others were aware of the unlawful motive.

In a circuit following the First Circuit's "significant bloc" approach, the focus for the defense should be on developing evidence that minimizes the number of voting members with purportedly unlawful animus as much as possible, while understanding that merely proving the majority did not act unlawfully will not on its own be sufficient to avoid § 1983 liability. One also would need to identify early on potential "circumstances suggesting the probable complicity of others," such as procedural anomalies with the vote at issue or vociferous expressions of unlawful animus by constituents or other members of the community. Evidence that one or more councilmembers with unlawful animus may have influenced the votes of others may bolster the plaintiff's claim in a "significant bloc" jurisdiction whereas it would not in a circuit following the "majority rule" approach.

Finally, in circuits following the "but for" causation approach, which appears to be the majority of circuits (Second, Third, Sixth, and Ninth Circuits), the relevant question is whether the council, commission, or board would have taken the same action in the absence of any individual member's alleged unlawful motive. Counting votes is crucial. For example, if the vote at issue is 7-2, evidence that two members of the majority may have voted differently absent the alleged unlawful animus would not alter the final outcome, whereas evidence calling into question the votes of three members of the majority would suggest the outcome would not have been the way it was but for the unlawful motive. So in this example, evidence that at least five members of the majority would have voted the way they did no matter what would be helpful to the defense.

By Ashley Hetzel & Zachary Weigel

From Monahan to Ava: The Supreme Court Considers the Standard for Disability Discrimination in Education

The Supreme Court is expected to issue an opinion this term.

Individuals suing under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") can establish statutory violations and obtain injunctive relief without proving intentional disability discrimination. In order to obtain compensatory damages, plaintiffs must only prove that a defendant was deliberately indifferent to their federally protected rights. However, as it relates to children with disabilities seeking to recover compensatory damages for discrimination in the school setting, circuits are currently split on which standard applies.

Currently, five of the Circuit Courts of Appeal hold that children with disabilities seeking to recover relief for discrimination in a school setting must also prove that school officials acted with bad faith or gross misjudgment. This bad faith or gross misjudgment standard was originally set out by the Eight Circuit in Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982). Since that ruling, the Second, Fourth, Fifth, and Sixth Circuits have all adopted the heighted standard for school children. The Third and Ninth Circuits differ and apply a deliberate indifference standard in order to recover damages, which is the same standard that courts apply to disability claims outside of the school setting.

On April 29, 2025, the Supreme Court heard arguments in A.J.T., by and through her parents, v. Osseo Area Schools, Independent School District No. 279. Plaintiffs identified A.J.T. in their brief as "Ava," so this article will also refer to her by this same name. Barring an unexcepted ruling, this case will resolve a long-standing circuit split on the applicable standard and could even expose school districts to monetary awards by lowering the standard for plaintiffs to recover.

Students' Disability Rights in Education

Children with disabilities are protected from educational-related discrimination through multiple federal laws. Congress enacted the Individuals with Disabilities Education Act ("IDEA") to guarantee a free appropriate public education. See 20 U.S.C. Section 1400(d)(1)(A). The IDEA ensures that children with disabilities receive an "individualized education program [or IEP]" that "spells out a personalized plan to meet all of the child's educational needs." Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 158 (2017). The IDEA also created special procedures for resolving disputes related to any individualized education program ("IEP"). However, the IDEA only permits courts to award equitable relief, such as injunctions or reimbursement for educational expenses.

The ADA and Rehabilitation Act provide additional protection against disability discrimination. The ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. Section 12132. Title II of the ADA applies to state and local governments,

Ashley Hetzel is a partner in the Columbus, Ohio office of Freeman, Mathis and Gary, LLP. She practices mainly in the areas of government law, employment law, and education law. **Zachary Weigel** is an associate in the Columbus, Ohio office of Freeman, Mathis and Gary, LLP. Zach's practice focuses on government law, employment law, and professional liability.

which includes school districts. 42 U.S.C. Section 12131(1).

Similarly, the Rehabilitation Act states that individuals with disabilities shall not "be excluded from the participation in, be denied the benefits of, or be subject to discrimination" under any federally funded program or activity "solely by reason of her or his disability." 29 U.S.C. Section 794(a). Included in "program or activity" are state and local government entities that receive federal funds. Id.

Unlike the IDEA, which is limited to the education of school-age children, the ADA and Rehabilitation Act cover all Americans within and outside the school setting. Simply put – "the IDEA guarantees individually tailored education services," and the ADA and Rehabilitation Act promise non-discriminatory access to education. Fry, 580 U.S. at 170-171.

The ADA and Rehabilitation Act also recognize that failing to provide reasonable accommodations, which would enable people with disabilities to participate equally in a given service or program, is disability discrimination. Id. Accommodations are reasonable so long as they do not entail a "fundamental alteration" of the service in question or impose "undue financial or administrative burdens" on the party subject to these laws. 28 C.F.R. Section 35.150(a)(3); 28 C.F.R. Section 41.53; Alexander v. Choate, 469 U.S. 287, 300 (1985).

The rights and remedies provided under Title VI of the Civil Rights Act of 1964 are expressly incorporated into the ADA and Rehabilitation Act. See Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022); 42 U.S.C. Section 12133; 29 U.S.C. Section 794a(a)(2). Children with disabilities are authorized "to seek redress for violations" by filing a suit for both injunctive relief and monetary damages for discrimination occurring outside of the school setting. Plaintiffs can establish statutory violations of the ADA and Rehabilitation Act if they prove that a defendant failed to provide a reasonable accommodation for a person with a qualifying disability.

However, this changes in the school setting; private individuals may not recover compensatory damages under Title VI except for a showing of intentional discrimination. Indeed, every Circuit demands such proof before monetary damages can be awarded under the ADA and Rehabilitation Act. S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3d Cir. 2013). In order to establish such intentional discrimination, a plaintiff must show that the defendant was, at a minimum, "deliberately indifferent" to the plaintiff's federally-protected rights. Deliberate indifference exists when a defendant ignores a "strong likelihood" that the challenged action or inaction would "result in a violation of federally protected rights." Meagley v. City of Litle Rock, 639 F.3d 384 (8th Cir. 2011).

Presently, the Circuits are split when it comes to children with disabilities bringing education-related claims. The Second, Fourth, Fifth, and Sixth Circuits hold that children with disabilities seeking relief from discrimination in the educational setting cannot establish a violation (and cannot obtain an injunction or damages) unless they prove that officials acted with

bad faith or gross misjudgment. See C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 841 (2d Cir. 2014); Sellers ex rel. Sellers v. Sch. Bd. of the City of Manassas, 141 F.3d 524, 529 (4th Cir. 1998); D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 454-55 (5th Cir. 2010); G.C. v. Owensboro Pub. Schs., 711 F.3d 623, 635 (6th Cir. 2013); Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982). This standard is a more stringent test than the one applied by the Third and Ninth Circuits which use a "deliberate indifference" standard as the threshold for recovery. See D.E. v. Cent. Dauphin Sch. Dist., 765 F,3d 260, 268-269 (3d Cir. 2014); Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010). In other words, whether children may recover depends largely on the Circuit in which their claim arises and is pending.

Currently, five of the Circuit Courts of Appeal hold that children with disabilities seeking to recover relief for discrimination in a school setting must also prove that school officials acted with bad faith or gross misjudgment.

It is this split that is the subject of Ava's case that is pending before the Supreme Court.

Ava's Disabilities and Requests for Accommodation

Ava has epilepsy. This condition impacts her physically, affecting everyday tasks such as walking and toileting. It also has related intellectual challenges. Her seizures are frequent in the morning, and she is unable to attend school before noon. However, while her seizures are frequent in the morning and interfere with her capacity to learn then, Ava is alert and able to learn in the afternoon until 6:00 p.m. Since preschool, Ava's parents and doctors developed an individualized plan where she would sleep late and avoid activities, including school, until noon. Her schooling would take place from noon to 6:00 p.m. This plan was in effect until Ava was 10 years old, at which point her family moved from Kentucky to Minnesota. The officials at Ava's new school in Minnesota claim that state law does not require adjusting her instructional hours, highlighting that it would set an unfavorable precedent for itself and other school districts. Due to the school's determination, by the time Ava entered middle school, her instructional day was reduced to about 3 hours.

The school district declined to provide in-home paraprofessional support from 4 pm to 6 pm. However, it offered several other measures to assist Ava, including: hiring an additional paraprofessional specifically to support her; offering to serve Ava's educational needs earlier in the day; extending Ava's school day by 15 minutes to accommodate her safety while navigating the halls; 16 3-hour educational sessions in the home from 12-3 pm during summers; and offering to provide additional at-home instruction over the summer.

Ava's parents rejected the school district's proposed accommodations. When they sought to ensure their daughter received a full instructional day with adjusted afternoon and evening hours, the school district declined, claiming it was focused on a combination of Ava's needs, staff availability, and effectively utilizing resources shared among all students.

Ava's Case Through the Courts

Ava's parents filed an IDEA complaint with the Minnesota Department of Education. An ALJ concluded that the school district violated the IDEA by depriving Ava of a free appropriate public education. The school district then challenged the ALJ's ruling and Ava, through her parents, sued the school district under the ADA and Rehabilitation Act. Ava sought an injunction and compensatory damages for expenses that would not be reimbursed through her IDEA claim, such as costs of hiring outside specialists.

Presently, the Circuits are split when it comes to children with disabilities bringing education-related claims.

The Minnesota district court upheld the ALJ's ruling on Ava's IDEA Claim but granted summary judgment in favor of the school district on the ADA and Rehabilitation Act claims. Applying the Monahan standard, the district court held that Ava did not show that the school district acted with bad faith or gross misjudgment. The district court considered "all the [School] District's attempts at conciliation" including convening multiple IEP meetings, extending Ava's school day beyond that of her peers, implementing many of Ava's expert suggestions, and ensuring that Ava always has at least one and often two aides with her at school. Finally, the district court held the school district did not act with bad faith because its officials exercised professional judgment.

The Eighth Circuit unanimously affirmed, stating that it was "constrained" by Monahan. The court acknowledged that "Ava may have established a genuine dispute about whether the school district was negligent or even deliberately indifferent;" however, the Eighth Circuit further held that "under Monahan, that's just not enough." A.J.T. by & through A.T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279, 96 F.4th 1058, 1061 (8th Cir. 2024).

Holding that while Ava may have established that the school district was negligent and even deliberately indifferent in refusing the requested accommodations, the court rejected Ava's ADA and Rehabilitation Act claims. Ultimately, the Eighth Circuit explained that "a school district's simple failure to provide a reasonable accommodation is not enough

to trigger liability" under Section 504 or Title II. Id. at 1061.

Submission to the Supreme Court and the Parties' Briefs

Arguing that the current precedent of Monahan restricts recovery for school-age children to prove violations of the ADA and Rehabilitation Act, Ava asked the Supreme Court to enforce the plain meaning of the ADA and Rehabilitation Act.

Pointing to the clear Circuit split, Ava petitioned the Supreme Court to resolve whether the ADA and Rehabilitation Act require children with disabilities to satisfy a uniquely stringent "bad faith or gross misjudgment" standard when seeking relief for discrimination relating to their education." Ava argued that the test established in Monahan was established prior to Congress amending the Education for All Handicapped Children Act to enact Section 1415(l) of the IDEA:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities.

As such, Ava argues that because Congress declared that the IDEA does not restrict or limit the ability of children with disabilities to obtain relief under the ADA or Rehabilitation Act, the stringent test established by Monahan was overturned by the Congressional act.

The Third and Ninth Circuits both utilize the deliberate indifferent test when determining if a plaintiff is entitled to recover monetary damages. Using the test from Title IX cases, this requires a defendant to ignore a strong likelihood that the challenged action or inaction would result in a violation of federally protected rights. Ava argued that this is the correct standard that should be applied.

However, the school district, in its brief, argued that Monahan is the correct standard, both in schools and out, arguing that Rehabilitation Act and Title II only cover intentional discrimination. The school district further argued that doing away with Monahan would expose school districts to undue scrutiny on "intensely local questions about how best to fulfill those obligations to local authorities." Brief of Respondents, page 22.

A court only needs to consider the Monahan heightened standard when a plaintiff seeks monetary damages. Proponents of the Monahan standard argue that students with disabilities can still obtain injunctive relief under the less stringent deliberate indifference standard. Therefore, Monahan supporters argue that imposing monetary liability on school districts should require a heightened standard. If the Supreme Court rejects the

Monahan intent requirement, not only will school districts be subjected to monetary awards, but damages could also be assessed under the lower standard.

The school district argued that the bad faith or gross misjudgment test is correct, highlighting that Monahan explained that the standalone evidence that a decisionmaker made an incorrect decision does not typically demonstrate wrongful intent. See 687 F.2d at 1170. The school district further argued that absent clear statutory direction, the Court should not presume that Congress took the extraordinary step of imposing liability on any federal funding recipient who acts in good faith yet fails to remedy unintentional barriers to access. After all, Monahan was decided eight years before the adoption of the IDEA. Ultimately, the school district countered Ava's argument regarding the overturning of Monahan by arguing that Congress would have explicitly adopted a different standard if it intended to adopt one.

However, the school district argued that the deliberate indifference test utilized in Title IX cases examines an entity's notice of someone else's intentional discrimination, i.e., Title IX plaintiffs must still show intentional discrimination.

One cannot overlook the practical impact of the Supreme Court's decision on this case. While the majority of a school district's funding comes from local and state governments, most rely on federal funding for needed programming. Those who do must conform with federal laws and regulations in order to continue receiving needed federal funds. Considering this practical reality, overturning Monahan could mean that school districts face a much greater risk of losing their federal funding when faced with even the threat of litigation, regardless of the true merit of the claim at issue.

Interestingly, the school district argued that Monahan is the correct standard "across the board, both in school and out." Brief of Respondents, 2. The school district appears to request that the Court not only adopt Monahan's bad faith or gross misjudgment standard as the correct standard in the education setting, but it also asked the standard be applied to all plaintiffs seeking damages under the ADA and Rehabilitation Act. Ava highlighted this argument in her reply brief and noted it was first time the school district had made the argument. Until that time, the school district had consistently argued, both in the lower courts and in its certiorari briefing, that Monahan was an appropriately developed, special rule applying only to claims brought by children with disabilities against their schools. Ava's counsel seized the distinction and asked the Court to accept the change as an 11th-hour concession and reject Monahan's two-tiered analysis.

A Spicy Oral Argument

Ava's counsel opened oral argument by announcing, "the school district has conceded Ava's question presented. Both sides now agree that the ADA and Rehabilitation Act apply the same legal standards to all plaintiffs and that it's wrong to impose any sort of uniquely stringent test on children facing discrimination at school. That concession fully resolves this case." Counsel for Petitioners went on to urge the Court to reject the school district's argument requiring that all plaintiffs show bad faith or gross misjudgment.

In response, the school district's counsel clarified to the Court that it was not abandoning Monahan but rather was asking the Court to impose the Monahan standard on all ADA and Rehabilitation Act cases where a plaintiff was seeking damages.

The Justices expressed unease at being caught off guard by the last-minute change by Ava's counsel. Justice Sotomayor told counsel for the school district that "it would have been nice to know that we were biting off that big a chunk." Another Justice expressed unease that the school board's shift left the two-tiered Monahan standard, as applied in only school settings, without a defender.

Counsel for the school district also disputed that her client had conceded and called such contention a "lie." This, of course, prompted further discussion by the Justices and made the oral argument one of the more contentious arguments of the term. Eventually, following further questioning by Justice Gorsuch, counsel for the school district withdrew her comment, instead highlighting that Ava's counsel was mistaken.

Conclusion

The Supreme Court has several options. Assuming it does not request further briefing on the two-tiered Monahan standard, it could reject Monahan and hold that courts should apply deliberate indifference when students with disabilities are seeking monetary damages against their schools. It could also side with the school district and hold that all plaintiffs seeking monetary damages, both inside and outside the educational setting, are required to prove that an official acted with bad faith or gross misjudgment. However, considering the drama that unfolded in the briefing and argument, this author would be surprised if it ruled without requiring more in-depth briefing.

The Supreme Court is expected to issue an opinion this term.

By C. Dino Haloulos

When the Driver's Gone: Tactical Defense Strategies in High-Risk Trucking Claims

We often don't defend what happened. We defend what's documented. When that falls short, you improvise with what you've got.

The Vanishing Act in Trucking Litigation

In trucking litigation defense, we often don't defend what happened. We defend what's documented. When that falls short, you improvise with what you've got.

Carl (not his real name) was listed in the accident report as our driver. But by the time the case reached us, he was gone.

The accident happened in the Bronx. That matters. If you defend cases in New York, you understand the context: Bronx juries favor plaintiffs, liability hardens early, and even soft tissue cases can carry real exposure. It's not where you want to be without a driver, especially when the file's limited and the client's recordkeeping habits hover between handwritten notes and hopeful intentions.

When we received the file, the trucking company, a small, family-run outfit originally based in New Jersey, had already relocated to Pennsylvania. The owners, a husband and wife, were cooperative but overwhelmed. He handled dispatch. She kept the books, mostly on paper. Their approach to recordkeeping was more aspirational than actual. According to them, everything relevant had been "lost in the move."

According to the owner, Carl was a "friend of the family" brought in for a one-off job. Whether he was on the payroll, properly licensed, or qualified to be behind the wheel of an 18-wheeler was never verified. He disappeared soon after the crash and likely picked up work elsewhere. There were no dashcams, no logs, no pre- or post-trip inspection reports. The truck was reportedly still parked outside their home, but no one had secured it, inspected it, or documented anything, all of which are baseline requirements under the Federal Motor Carrier Safety Administration (FMCSA) regulations. By the time we got the case, any opportunity to preserve critical evidence was long gone.

What we did have: a one-million-dollar commercial trucking policy, a Bronx venue, and a plaintiff alleging soft tissue injuries with no surgical intervention.

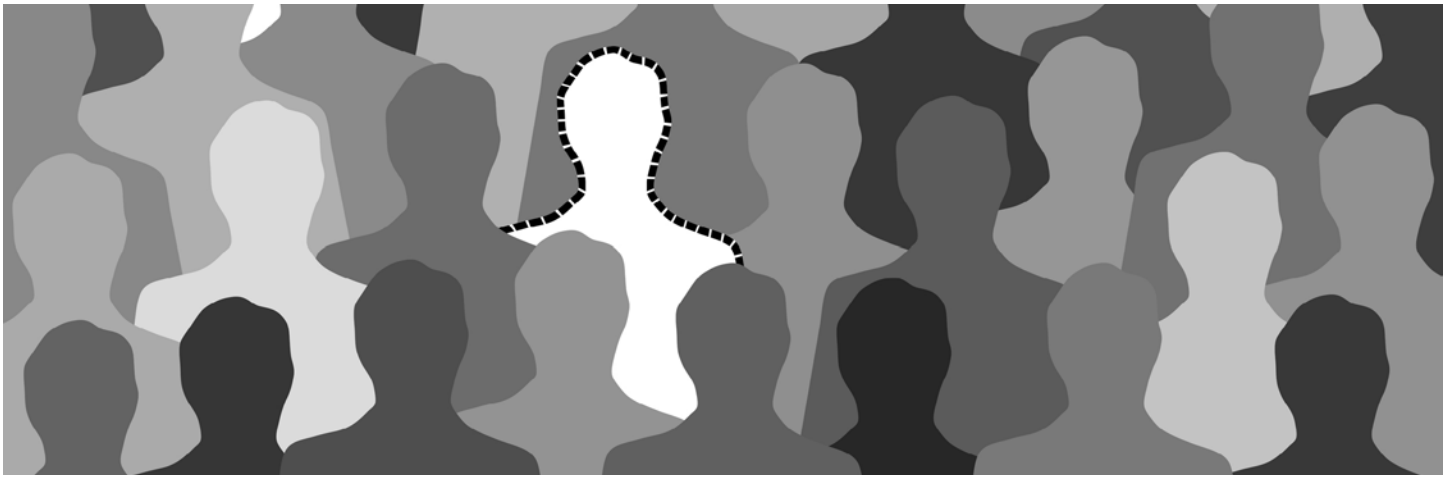
Cases like this often resolve shortly after discovery. The facts weren't getting better, and we didn't need to see how creative a Bronx jury might get with a soft tissue case when the defense had no driver and no meaningful documentation. But this one stayed with me, not because it was unusual, but because it wasn't. it was part of a larger pattern: small carriers, missing drivers, lost or nonexistent records, and insurers looking to close filed cleanly and early in cases where liability felt settled from day one.

This article is for the defense lawyers handling these cases, the insurers managing exposure behind the scenes, and the legal teams tasked with navigating liability when the facts are thin, and the files are thinner. We'll walk through the missing witness doctrine, spoliation risks, and how to frame the defense when the driver, quite literally, isn't there to drive it. Because when the driver's out of the picture, the defense doesn't disappear, it just has to work harder.

The Landscape of Small Trucking Companies

If you've handled more than two trucking claims, you've met these operators. Small companies. Sometimes just a husband and wife, one could be behind the wheel, the other managing paperwork, operating under a DOT number from a home office or

C. Dino Haloulos is a partner at Foley Mansfield, where he oversees the New York team's transportation and logistics defense practice. He is joined on this piece by Tiffany Montanez, a paralegal with a strong interest in trial procedure and regulatory compliance, and Taku Muziwi, J.D., a graduate of St. Johns Law School currently awaiting admission to the New York State Bar.



a leased storefront, usually without much infrastructure behind it.

These aren't national fleets with layered compliance teams and telematics dashboards; those centralized systems that track driver behavior, vehicle diagnostics, and real-time location data for risk and compliance management. These are the outfits where driver onboarding might happen in a driveway, where referrals come through family networks, and where "document retention" can mean a plastic bin under the desk labeled with a Sharpie.

Still, they carry insurance. Most meet the FMCSA's minimum liability coverage ($750,000 or $1 million) and when a claim comes in, those limits bring appointed defense counsel. That's where we come in.

A Few Things to Know

- **They're everywhere.** As of 2023, more than 90% of motor carriers in the U.S. operate six trucks or fewer. Small trucking operations aren't the exception, they're the norm. And in New York and New Jersey, they're the backbone of the industry.
- **Turnover is high.** According to FMCSA data, driver turnover for small fleets exceeds 70% annually. The driver on the loss date might be long gone by the time a claim hits, and already behind the wheel for someone else.
- **Documentation is often incomplete.** Many drivers come from multilingual, transnational backgrounds, especially in and around New York City. Work histories may span multiple carriers and jurisdictions, and the paperwork doesn't always follow.
- **Compliance isn't always intentional.** When documents are missing, it's rarely malicious. These operations are lean, fast-moving, and under-resourced. Many owners don't know what they're required to preserve, and enforcement only shows up after the fact.

These cases aren't complicated, but they're uncorroborated. One subpoena for driver records, one unanswered preservation letter, one deposition notice to a driver no one can find, and the defense is already on its back foot. That's not necessarily a loss, but it is a shift. These aren't standard commercial auto claims. The risks are different. The story is different. And the defense has to adjust accordingly, early, and deliberately.

The Missing Witness Doctrine: When Your Driver's Gone and the Jury Knows It

"He was just helping out that day."

That's what the owner told me. About the driver. Who disappeared right after the crash.

Whether Carl was an employee, a contractor, or just someone with a Class A license and a connection to dispatch, no one could confirm. He never gave a statement, never returned a call or an email. By the time depositions rolled around, he was off the radar, likely working for another motor carrier in another state.

There we were: a motor carrier with an FMCSA-compliant commercial trucking policy, a plaintiff alleging soft-tissue injuries, and no driver to testify.

That's where the missing witness doctrine comes in.

What the Doctrine Does

In New York and New Jersey, when a key witness doesn't appear, especially a driver with firsthand knowledge of the incident, the court may allow the jury to draw an adverse inference. That is, they may be told they're permitted to assume the missing testimony would have harmed the defense.

The rule comes from People v. Savinon,[2] where the New York Court of Appeals held that if a party fails to call a witness who would be expected to support their account, the jury can infer that the testimony would have been unfavorable.

But the instruction isn't automatic. Courts apply a specific four-part test to determine whether the charge is warranted, and defense counsel should be prepared to address each element directly.

When Does It Apply?

In DeVito v. Feliciano, the New York Court of Appeals clarified when a missing witness charge is appropriate. The test is fact-specific and turns on four factors:

1. Material, non-cumulative knowledge - The witness must offer testimony that adds something new and relevant.
2. Availability - The witness must be physically available to testify.
3. Control - The party must have control over the witness, broadly defined to include employment relationships or other associations implying cooperation.
4. No reasonable explanation for the absence - There must be no valid reason for failing to call the witness.

If all four elements are met, the instruction may be given, and when it is, the impact can be significant.

Where Control Gets Complicated

In these cases, it's the third DeVito factor – control - that often causes the most trouble. Courts take a broad view. A driver doesn't need to be on the payroll to be considered under the company's control. A history with the business, a personal connection to the owner, or even the expectation that the driver would testify favorably can all be enough.

This is where defense risk builds quickly. If we cannot show good-faith, well-documented effort to locate the driver, the court may allow a missing witness instruction. And once it's in, the jury is told they can assume the driver's testimony would have hurt the defense.

In Clarke v. Toure, the defense tried to substitute a deposition because the driver had left the state. The court denied it. There was no real showing of what had been done to find him. A brief affidavit with hearsay wasn't enough. The absence looked strategic, and the court treated it that way.

A driver who can't testify becomes more than a missing witness. He becomes a blank space the plaintiff gets to define.

When Silence Becomes Evidence

Psychologically, missing witnesses create gaps in the story, and jurors don't leave gaps unfilled. They connect dots. They draw conclusions. And those conclusions tend to align with the version of events that already feels most coherent or emotionally intuitive.

This isn't about bad faith or bias. Studies show that it's how decision-making works. Jurors build narratives. And when a key witness is absent, especially someone the defense was expected to produce, that absence becomes a form of evidence itself.

Empirical research confirms this. Studies in jury behavior have shown that it's not simply the fact of a missing witness that shifts perception. It's the framing. When jurors are invited, either explicitly through instruction or implicitly through context, to draw meaning from the silence, they often do, especially in cases where the facts are already leaning one direction.

And in plaintiff-friendly venues, where liability may feel like a given and sympathy is easy to earn, the risk compounds. A driver who can't testify becomes more than a missing witness. He becomes a blank space the plaintiff gets to define.

How the Defense Can Stay in the Game

- **Start the search early.** From the moment the case lands, document all efforts to locate the driver: subpoena records, verify licensure, track prior employment. Whether the case is resolved in negotiations, mediation or gets scheduled for trial, early diligence becomes your foundation.
- **Establish the absence in the record**. If the driver can't be found, create a clear, credible account of why, that's in writing, and early. This isn't just for trial; it's for the adjuster, the mediator, or opposing counsel who needs to understand why the absence isn't evidence of negligence.
- **Position your defense, even without a witness.** In cases likely to resolve post-discovery, the defense still matters. Objective evidence, including medical records, vehicle inspections, treatment gaps, and prior injuries, can drive down exposure. Use it to reframe the claim, challenge the valuation, and shift the conversation from liability to damages.
- **Know when the story shifts from trial prep to resolution strategy.** Not every case is going to verdict. In fact, most won't. But discovery is the window to influence the outcome. How you document the absence, organize the facts, and challenge assumptions can often determine whether the number closes high or low.

Spoliation of Evidence: Missing Records and Risk Shifting

At some point, you ask for the basics: the driver logs, the ELD data, the dashcam footage. Instead, you get: "We moved and lost everything."

The truck is still parked outside someone's home. No inspection. No mechanic's report. No file. The driver, of course, is out of the picture. The evidence you need either never existed or disappeared before you were assigned the case.

This is where spoliation becomes a real issue.

The **Federal Motor Carrier Safety Administration (FMCSA)** sets clear requirements for record preservation. Driver qualification files, maintenance logs, personnel documents, each has a retention timeline. Most can be stored electronically, but only if they're secured from damage, alteration, or unauthorized access. Small carriers often don't know this, and no one tells them until the preservation letter arrives. By then, it may already be too late.

Courts in New York apply a strict standard when evaluating spoliation claims. Sanctions may be imposed if the party seeking relief can establish three elements:

1. That the evidence was under the control of the party accused of spoliation.
2. That there was an obligation to preserve the evidence at the time it was lost or destroyed; and
3. That the loss occurred with a culpable state of mind.

When destruction is intentional or willful, prejudice is presumed. But even if the loss is the result of ordinary negligence, the moving party still must show that the missing evidence was relevant to their claim and that they were prejudiced by its absence. See Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543 (2015).

This issue comes up more often than it should in trucking defense.

Consider Clarke v. Toure, where the defense sought to rely on deposition testimony in lieu of live appearance by the driver, who had voluntarily relocated out of state. The court rejected that substitution, citing the lack of any meaningful effort to locate the witness. A vague affidavit wasn't

enough. The absence looked avoidable—and the inference was allowed.

In VOOM HD Holdings LLC v. EchoStar Satellite LLC, the court emphasized the obligation to suspend routine document destruction policies once litigation is reasonably anticipated. That applies to emails, logs, digital files, and operational records, precisely the types of evidence that can disappear in small carrier cases unless counsel steps in early.

And in Pegasus Aviation, the New York Court of Appeals confirmed that when evidence is willfully destroyed, prejudice is presumed. Even when the destruction is negligent, the burden shifts: the party seeking sanctions must still show the loss materially impaired their case. In defense files where documents are already sparse, that threshold is often crossed quickly.

The takeaway: courts don't require bad faith to find fault. They require diligence. And if the defense can't explain what was lost, when, and why, it's often too late to repair the damage.

Best Practices When the Records Are Already at Risk

- **Educate early.** As soon as the file lands, walk your client through the FMCSA's retention requirements. Keep it practical. Focus on what's needed and why.
- **Create a clean record.** If documents are missing, flag it, in writing, early. Courts respond better to transparency than to retroactive damage control.
- **Reframe the issue.** If spoliation becomes part of the case, stay focused on what remains. Use what you have to reconstruct the timeline. Shift the narrative from blame to reliability.
- **Evaluate the venue.** Some courts treat spoliation as a discovery issue. Others view it as a direct reflection on credibility. Know which one you're in.
- **Don't overpromise.** Especially when the file arrives with holes. Frame expectations clearly with both the client and the insurer.

At a certain point, you're no longer looking for a witness, you're managing exposure. That's when the defense pivots from reconstruction to mitigation

When evidence disappears, the question becomes who knew what, and when. If you're going to defend these cases well, your strategy should show that the gaps weren't created by indifference and that they don't change the outcome.

Who Are We Even Defending?

There's a recurring moment in these cases. You're a few weeks in. Liability looks baked-in, a rear-ender, or a lane change gone wrong, and the plaintiff's side knows it. You pick up the phone, talk to the adjuster, and the question becomes: Who's actually our client here? The company, the driver, or just the policy?

Answer: yes.

And most days, none of them are helping your defense.

The driver? Gone. No affidavit. No deposition. Sometimes no CDL. The company? It might be a single-truck operation with a borrowed address and no working office phone. You finally get the owner on the line and hear the driver was a family friend "helping out for the day." The logs? "Somewhere on the old computer." Which doesn't work anymore.

So now you're defending a claim without a witness and without records. What you do have is a policy limit and a need for clarity.

Here's what matters next, and what we already know:

In most of these cases, the facts of the accident aren't really in dispute. A rear-end collision in the Bronx? That's not a liability fight. As a client once said to me, "I've never seen a depo move the needle when it's a clean rear-ender." He was right.

The defense in these cases isn't about shifting liability. It's about managing exposure. That means testing the damages story. Scrutinizing timelines, treatment patterns, and documentation. Asking the right questions about causation, preexisting conditions, gaps in care, and diagnostic findings that arrive just in time for discovery. Your job is to pressure-test the plaintiff's number, not to deny recovery outright, but to anchor it in something defensible.

Sometimes, the defense is also there to buy time. When the demand comes in early and high, before the records tell a full story, delay can be a strategy. Pushing the case into discovery resets the tempo. The emotional tenor cools. The numbers might come back to earth.

This is especially important when the insured company isn't built to last. Maybe they've already dissolved. Maybe they rebranded after the accident. Maybe they never understood what a litigation hold required. Now they're left trying to explain operations through a G-mail account, a missing hard drive, and a business address that leads to a garage.

That's when the defense becomes triage.

For insurers managing these claims, especially in volume, defense counsel brings focus. Identify exposure early. Don't overpromise. Don't chase facts that won't move the file. And don't treat every matter like it's heading to trial - because most won't.

What you're defending is process, valuation, and the credibility of the case. Sometimes, that's the difference between strategic resolution and escalation.

When the Driver's Gone and the Story's Patchy: Jury Strategy That Holds the Line

You walk into trial without your driver. No live testimony, no dashcam, no signed statement to point to. What you have is a plaintiff with a cervical strain, a plaintiff-friendly venue, and a jury already wondering why they haven't heard from the person behind the wheel.

It's not hopeless. But it's not simple, either.

The biggest challenge isn't the absence of facts. It's the absence of narrative. And juries don't leave gaps unfilled. They create the most plausible version of the story they can - with or without your help.

Peer-reviewed studies in jury decision-making confirm what trial lawyers have known for years: jurors process evidence by building coherent, cause-and-effect stories.

When a key piece is missing, like the driver, jurors don't wait for permission to draw inferences. They do what people do: they read between the lines.

This is where the presence of absence becomes palpable. The missing driver isn't just a void; it's a focal point that draws attention and speculation. In the courtroom, this absence can speak louder than any testimony, shaping perceptions and influencing decisions.

Therefore, the defense must pivot. The case can't revolve around who's not in the room. It must center on what is: the medical records, the treatment patterns, the photographs, the vehicle data, and any inconsistencies in the plaintiff's account. Even the silence, especially the silence, must be framed before someone else frames it for you.

This approach is equally vital at the settlement table. The narrative pressures are the same. A strong, credible record reduces reliance on a witness you don't have and increases your leverage in discussions of value. A clean file and an organized strategy can make the difference between an inflated demand and a realistic number.

Bluffing won't work. Jurors, adjusters, and mediators can sense it. A defense without the driver must be constructed deliberately that's tight, focused, and anchored in the parts of the case that are actually in evidence.

Because when you're missing a witness, what you're really defending is the meaning of that absence. And that's something you have to decide how to shape, before your opposition, the jury, or the mediator, does it for you.

The Playbook: Best Practices When the Driver's Gone

Trucking defense doesn't always begin with a crash. It often starts with a voicemail that doesn't get returned. The driver's gone. The documents are missing. The truck is sitting in someone's driveway, uninspected. And your client has never heard the phrase "litigation hold," let alone followed one.

But this isn't a blank slate. It's a familiar landscape and it demands a proactive approach.

Start with the driver. Not eventually. Immediately. Get every piece of information you can: last known address, license number, prior employers, dispatcher records, even social media. If he's gone and you can't find him, make sure you can show how and that it wasn't for lack of trying. Courts don't expect miracles, but they do expect diligence.

At the same time, bring the client up to speed. Small motor carriers don't always know what's expected of them once litigation starts. That's your job. Walk them through the FMCSA record retention rules. Help them understand that saving logs, texts, and truck data isn't optional, it's foundational. If you don't explain it, no one will. And when the spoliation motion lands, you'll be the one standing in front of the judge.

Know when to stop chasing. At a certain point, you're no longer looking for a witness, you're managing exposure. That's when the defense pivots from reconstruction to mitigation. Focus on what you can prove. Challenge the treatment. Scrutinize the narrative. Reframe what's missing without pretending it never mattered.

Lean into the FMCSA's rules as both sword and shield. They tell you what the carrier should've done, and when used correctly, they can also show how far your client did or didn't fall short. In some cases, that contrast is your strongest defense.

Don't let high volume flatten your strategy. When these cases come in waves, it's easy to treat them as interchangeable. But each file carries its own risk profile. One affidavit, one preserved vehicle, one well-timed record can shift the outcome. Missing that opportunity can cost more than delay, it can change the entire trajectory.

And don't go it alone. These cases work best when the defense team operates as a single unit. Senior lawyer, associate, paralegal - moving fast, sharing strategy, closing gaps before they turn into problems. Collaborate. Don't delegate. Because these cases, chaotic as they can be, aren't unmanageable. They just require structure, consistency, and strategy tailored to the facts in front of you. Not a one-size-fits-all playbook, but a one tailored to your facts, drawn from experience. And that's the point. These aren't just messy files. They're real cases with real consequences. And when the driver is gone, the records are incomplete, and the venue leans unfavorable, what you're really defending isn't just your client. You're defending the number. The narrative. The outcome.

Don't let high volume flatten your strategy. When these cases come in waves, it's easy to treat them as interchangeable.

And sometimes, that's enough.

Acknowledgments

The author wishes to thank Tiffany Montanez, paralegal, and Taku Muziwi, J.D., for their substantive research, insight, and ongoing commitment to our trucking defense practice. Their work on federal regulatory retention standards and the evolving doctrine of adverse inference significantly shaped the framework of this article. This piece reflects the practical realities we navigate together every day, their contributions, both legal and strategic, helped ensure this article stays grounded in exactly that. Table of Authorities

Cases

People v. Savinon, 100 N.Y.2d 192 (2003).
DeVito v. Feliciano, 22 N.Y.3d 159 (2013).
Clarke v. Toure, 82 Misc. 3d 646 (Sup. Ct. Kings Cnty. 2023).

Secondary Sources

U.S. Dep't of Transp., FMCSA Pocket Guide to Large Truck and Bus Statistics (2023).
Am. Trucking Ass'ns, Driver Shortage Report (2022).
Brian H. Bornstein & Edie Greene, Jury Decision Making: Implications for and from Psychology, 20 Current Directions in Psychol. Sci. 63 (2011).
Nancy Pennington & Reid Hastie, The Story Model for Juror Decision Making, in Inside the Juror: The Psychology of Juror Decision Making 192 (Reid Hastie ed., 1992).

By Heather Neubauer
& Ethan Groothuis

Am I Behind the Curve on AI in My Legal Practice?

Know your LLM models and their limitations, and you can edge out others in this ever-evolving legal landscape, while ensuring to follow the ethical oaths we all swore to uphold.

AI Is a Useful Tool, Not a Replacement for an Attorney

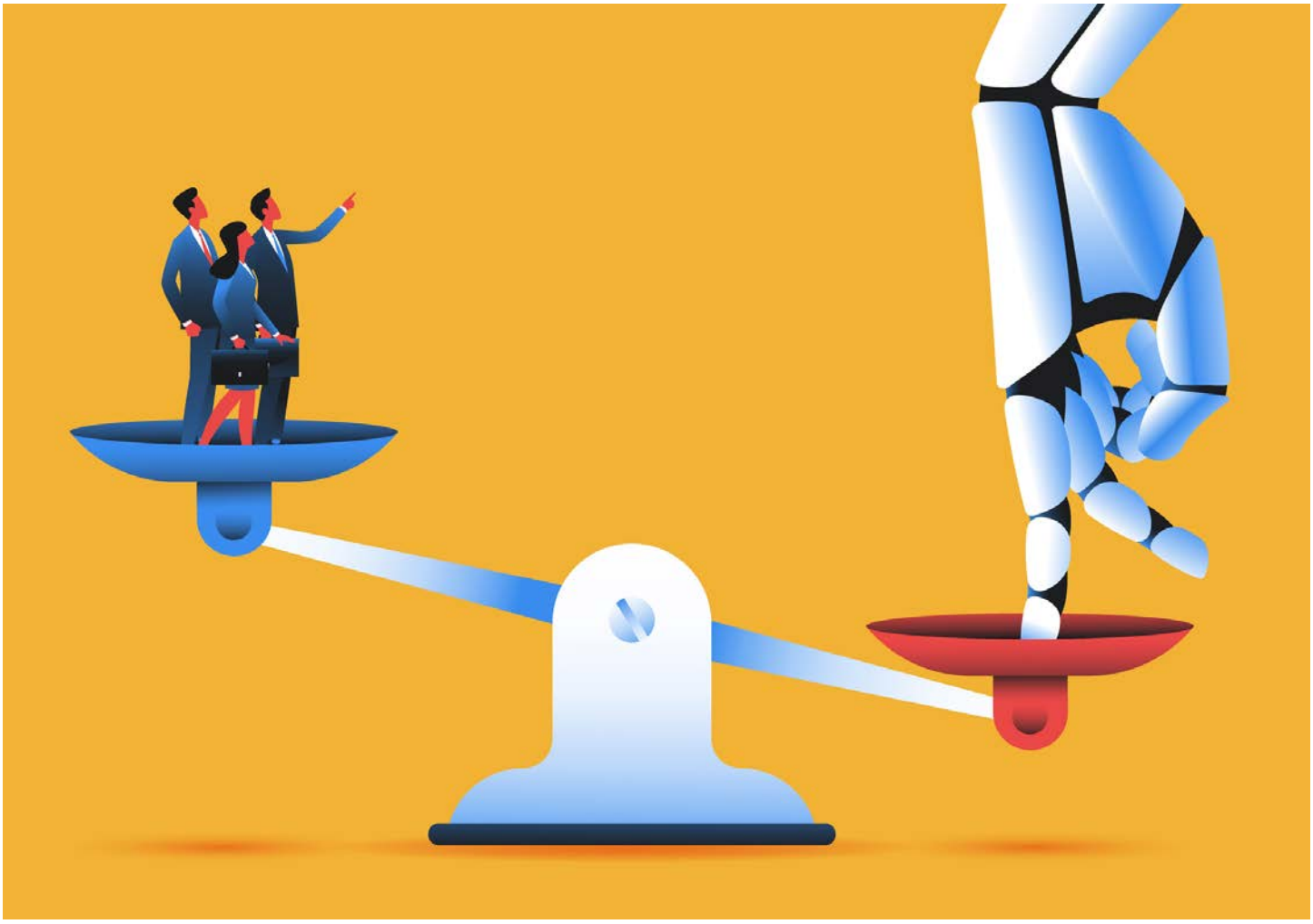
Earlier this year I was defending a motion to dismiss I had raised for lack of personal jurisdiction over my client. Following a back and forth of briefs over weeks of motion practice, both sides were well briefed and ready to argue. But nothing could prepare us for what came next. The judge sidestepped our meticulously researched briefs and arguments and asked a question, sua sponte, that was not briefed by either party. This question was on a topic seemingly so foreign to the judge himself, it might as well have been in another language.

Opposing counsel and I had half a century or more of combined legal experience, but neither of us knew the answer, nor were we prepared to give one on the spot. The judge said, "Figure it out, and come back to me with an answer," before pushing us to the end of the calendar, so he could work through his criminal docket. This meant we had 30 minutes to find an answer. An open-ended, obscure legal question direct from a judge? A billable attorney's dream come true. Only half an hour to find an answer? Any attorney's nightmare. I called an associate and asked him to start combing through Westlaw, while I did the same. The clock ticked down, and neither of us were finding anything remotely on point. There had to be a case, even in opposition to us, but we were not using the exact right words to get close. We had a quickly closing window and actual leverage—but only if we could find a single case or statute that not only answered the judge's question but could be argued persuasively for my client. With minutes to spare, I turned to a new tool: artificial intelligence. Using the AI-assisted research tools in Westlaw Precision, I searched for the question at hand, and I did not have to worry about using the exact magic language. After a minute or so of "thinking," it had found it: a case that was on point and luckily favorable for us. With the DUIs and petty misdemeanors out of the way, it was again our turn to argue – and thanks to Westlaw's AI-assisted research tools, I had the upper hand.

AI is everywhere. From software to medical devices and now the legal industry, tools and devices built on AI are being marketed to the masses and used widely. But, despite the scores of emails promising new AI tools to purchase or CLEs on AI use and ethics, many attorneys are still not using it. Generative AI for legal professionals: Top use cases, THOMSON REUTERS (May 13, 2025), ***https://legal.thomsonreuters.com/blog/generative-ai-for-legal-professionals-top-use-cases***.

As I have talked with colleagues about the use of AI, some attorneys have asked – "Am I behind on use the of AI?" Some have mentioned seeing news articles about attorneys sanctioned for using AI and have asked:"Is AI safe or ethical for me to use?"

Heather Neubauer is a partner in Meagher + Geer's Minneapolis office, where she is a member of the Management Committee and Chair of the Products Liability, Mass Tort/Toxic Tort, Asbestos/Talc, and Safety and Environmental practice groups. She is licensed in Minnesota, Arizona, Illinois, Missouri, Montana, North Dakota, South Dakota, and Wisconsin. Heather defends manufacturers, suppliers, and installers in construction, toxic tort, and products liability cases. She is a Litigation Counsel of America Fellow and IADC member, and she has been included as a Best Lawyers of America® and in Minnesota Super Lawyers® for several years. Heather was a keynote speaker on "Leveraging Artificial Intelligence for Enhanced Legal Practice," at the November 2024 DRI Asbestos Medicine Seminar. **Ethan Groothuis** is an associate in Meagher + Geer's Minneapolis office, where he practices primarily products liability, mass tort and toxic tort litigation. He is licensed in Minnesota, Illinois, and the District of Columbia.



For others, the question might be more basic: "What even is AI?"

For attorneys with those questions, or even those who have started to dabble in the use of AI products, this article will help show what AI tools can be used in many distinct aspects of your practice. Above all, we want to demonstrate that attorneys do not need to fear the use of AI as a tool to enhance your practice. If you know your model, and the strengths and weaknesses of any particular tool, you can avoid the pitfalls currently ensnaring uninformed attorneys.

AI – What Is It?

AI can be incorporated into many products and fields, whether it be deep learning algorithms to detect future cancers, to mass analysis of stock trades to find fraud, or even for converting family photos into Disney cartoons.

There are many terms related to AI that are often used interchangeably. See, Julia Matuszekska, What is the difference between AI and Gen AI?: MIQUIDO (Nov. 21, 2024), ***https://www.miquido.com/blog/gen-ai-and-ai-difference***. General AI (also known as Artificial General Intelligence, or AGI) aims to achieve human-level intelligence, capable of understanding and learning various tasks. Generative AI is a subfield of AI that specializes in content generation, whereas AGI is a more ambitious goal of achieving broad, human-like intelligence. For the purposes of this article, we are just referring to the concept broadly as "AI," regardless of how certain products may or may not define themselves as AGI, GenAI, or any other term.

The most prominent use of AI, at least what has been driving most of the recent excitement, is the uses of generative AI, such as Large Language Models (LLM), like ChatGPT. LLMs are trained on datasets curated from diverse sources, which may include public-domain content, proprietary datasets, and web-scraped information depending on the model and its creators. At its core, an LLM is using its troves of collected human language – from novels, to newspapers, to social media posts – to create an answer or generate text that sounds like what a human would say. How CHATGPT and Our Foundation models are developed, OPENAI, https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-foundation-models-are-developed; Alex Reisner, The unbelievable scale of AI's pirated-books problem, THE ATLANTIC (March 20, 2025), ***https://www.theatlantic.com/technology/archive/2025/03/libgen-meta-openai/682093***. Do not mistake an LLM for an expert or its answers to contain definitively true information. While answers can often be correct because they have been fed correct and factual information, an LLM's core function is

taking what it has learned from other sources to mimic human language. This means an LLM will also pass off information that it has been fed from any online source, from salacious rumor blogs to the political rants and drivels of your recluse uncle on Facebook, and treat them as real answers, so long as it looks and sounds like a human answer. LLMs can even get basic grammar wrong because answers are based on common usage, not correct usage. For example, when asked which article should precede "LLM," separate searches through Google's AI gave confident, yet direct opposite, answers. (The answer is "an." See, 'A' or 'an'? An Indefinite Article Guide, MERRIAM WEBSTER, *www.merriam-webster.com/grammar/is-it-a-or-an*).

The most prominent use of AI, at least what has been driving most of the recent excitement, is the uses of generative AI, such as Large Language Models (LLM), like ChatGPT.

LLMs do not distinguish between fact or fiction in their source information, as long as it looks and sounds correct. While this has led to often-funny instances such as Google's AI suggesting that you use non-toxic glue in a recipe for cheese pizza, or that humans should eat one rock every day for health benefits, attorneys who do not realize this limitation can use AI to their detriment. Liv McMahon, Google Ai Search tells users to glue pizza and Eat Rocks, BBC NEWS (May 24, 2024), *https://www.bbc.com/news/articles/cd11gzejgz4o*.

If an LLM has not been taught on proprietary information, like the case law and motions that are exclusively hosted by vLex, Westlaw or LexisNexis, an LLM will not be able to learn from it for use in an answer, and instead will create an answer that merely sounds pleasing to you, because it sounds like a human response. This is how invented case law, called "hallucinations," have started finding their way into legal filings. What are AI Hallucinations?, IBM THINK BLOG (Sept. 1, 2023), *https://www.ibm.com/think/topics/ai-hallucinations*.

"Hallucinations" and Sanctions

The first prominent misuse of AI and the law collided in 2023, when a judge in the Southern District of New York discovered at least six fake cases to show precedent in a legal filing. Molly Bohannon, Lawyer Used ChatGPT in Court—And Cited Fake Case. A Judge is Considering Sanctions, Forbes, (June 8, 2023), *https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions*. A member of the legal team admitted that he used ChatGPT in his legal research, and was assured that ChatGPT "could make legal research obsolete." And then, when asked by the court for more information on the fake cases, the team once again used ChatGPT to get copies of the case, believing that it was a search engine and not an LLM creating answers about case law from thin air.

This was the first of now many instances across the country – from New York to Wyoming and states in between—of attorneys getting caught citing to hallucinations. See, e.g., Benjamin v. Costco Wholesale Corp., No. 24-cv-7399 (E.D.N.Y., April 24, 2025); Bevins v. Colgate-Palmolive Co., No. 25-576 (E.D. Pa., April 10, 2025); Wadsworth v. Walmart Inc., No. 23-cv-118 (D. Wyo., Feb. 24, 2025). Hallucinations occur when a model lacks understanding or is relying on incomplete and inferior training data. If you have not used an LLM before, it may be hard to understand how easy it is to fall for these mistakes.

Here is an example of what a hallucinated case may look like. Let's pretend I was helping defend someone in my Minneapolis office for citing to hallucinated cases in a filed motion, like the attorneys in the prior examples. I asked ChatGPT to draft a standard of review section for a case about getting sanctioned in Minnesota for the use of ChatGPT in legal briefs. ChatGPT

complied, and in under a minute gave me this paragraph:

> This Court reviews decisions regarding sanctions for an abuse of discretion. See State v. Bahtuoh, 770 N.W.2d 626, 630 (Minn. 2009). A trial court abuses its discretion when it makes a decision that is against logic and the facts on the record, or when it fails to consider a relevant factor or imposes an unreasonable sanction. See Eich v. Lubeck, 527 N.W.2d 349, 352 (Minn. 1995).

Glancing at these citations, nothing looks obviously wrong. They follow BlueBook citations properly, and it sounds like a basic standard of review. But neither of these cases are correct. In the absence of an answer it could find that was accurate, the LLM was trying to give me an answer I wanted to hear, but without the benefit of real case law or a law degree to interpret them correctly. "State v. Bahtuoh" is a Minnesota case, but it is from 2013 and about an appellant challenging his conviction of a first-degree felony murder while committing a drive-by shooting. 840 N.W.2d 804, (Minn. 2013). And the case citation, 770 N.W.2d 630, is in the middle of an analysis by the Nebraska Supreme Court about the use of the "rescue doctrine" in the case of a motorist who was injured trying to rescue another motorist. Rasmussen v. State Farm Mut. Auto. Ins. Co., 770 N.W.2d 619, 630 (Neb. 2009). Certainly not a case about AI, let alone about sanctions. The second case is even more of a hallucination. "Eich v. Lubeck" does not appear to be a case name in any jurisdiction, let alone in Minnesota. The citation, 527 N.W.2d 352, is a 1994 Wisconsin case about the right to effective assistance of counsel. State v. Flynn, 527 N.W.2d 343, 352 (Wis. Ct. App. 1994). In this particular search, ChatGPT lucked out in that one of the stated holdings it ascribed to the fake case was at least correct, but often the holding can be mistaken as well. See, e.g., Gibson v. Coldwell Banker Burnet, 659 N.W.2d 782, 787 (Minn. App. 2003) (stating that a decision to impose sanctions is an abuse of discretion). If I were to rely on this paragraph in a brief solely because it looked, at a glance, like it was proper and sounded correct, I would be the next attorney in line for a sanctions hearing.

While I used ChatGPT for this example, you should consider that every LLM is susceptible to giving hallucinated cases or incorrect information. While general-purpose LLMs were found to have a higher hallucination rate than legal-driven LLMs for legal citations, a Stanford study found that the legal research tools developed by LexisNexis and Westlaw each hallucinated between 17 and 33 percent. Varun Magesh, et al., Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, J. EMPIRICAL LEGAL STUD. (forthcoming 2025). Since an LLM is focused above all on giving an answer that sounds human, it can even argue with you if you ask it if something it just stated is correct. Like a teenager trying to evade curfew, an LLM can lie because it similarly wants you to agree it is right. Prompt engineering can help you avoid, or at minimum, better detect false answers. Unlike standard search engines, your conversations with an LLM can evolve like an actual dialogue. Like talking with an associate in your office, ask follow-up questions about the sourcing of the information, or let it know when it is getting on the wrong track. Remember, the LLM is actively learning from you. If an LLM is giving you information that you know is incorrect, you can tell the LLM that it is wrong, to help train the model so future answers are also closer to what you are looking for.

The pitfalls of AI should not scare you away from using AI in your practice. Attorneys have gotten into trouble by not only failing to proofread their own AI-driven briefs before filing them, but by also using AI as a full replacement for being an attorney. An attorney asking an LLM to add a section to their brief on the law is asking it to both research and draft simultaneously. When doing that, the LLM, which may not have been fed the case law about that specific topic in your jurisdiction, is not only trying to find an answer where it cannot, it is still going to give you something that looks and feels like a correct, human-drafted answer.

Instead, here is how an attorney trying to draft their brief should use AI. Ask Westlaw Precision's AI to find cases about sanctions and holdings in your jurisdiction. After verifying the cases are correct, take the verified holdings and ask ChatGPT to compile a standard of review section using all of the cases you researched and vetted. Then, after drafting your analysis section based on your client-specific facts, ask your closed system Copilot, which is integrated into your Microsoft365 Tenant, to analyze your brief to see where you could be more persuasive. While this hypothetical workflow is using three different AI products, it is using each product in the way it is best designed to be used, while still using your knowledge and skills as an attorney to know that you are applying good law. You still likely saved time, found on point case law, and made accurate, if not compelling, arguments. If you know the strengths, and most importantly the weaknesses, of any AI product, you can use these products in appropriate and effective ways to enhance your practice and your results.

LLMs do not distinguish between fact or fiction in their source information, as long as it looks and sounds correct.

Ethical Obligations and AI

The use of AI in legal work can very quickly run afoul of ABA Model Rules of Professional Conduct.

In 2024, the ABA released a formal opinion regarding the use of AI in the practice of law, and noted several model rules that were implicated, including the obligation to provide competent representation. ABA issues first ethics guidance on a lawyer's use of AI tools, ABA (July 29, 2024), ***https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools***.

Lawyers using AI also must be cognizant of the duty to keep confidential all information relating to the representation of a client. See Model R. Prof. Conduct 1.6

While general-purpose LLMs were found to have a higher hallucination rate than legal-driven LLMs for legal citations, a Stanford study found that the legal research tools developed by LexisNexis and Westlaw each hallucinated between 17 and 33 percent.

(ABA 2025). Certain LLMs will protect client information by not storing it or training on it, but often that is not a feature of the free versions. This requires that attorneys know what their versions will do with the information in order to comply with ethical obligations. You have an obligation to protect your client's information. If I inadvertently feed an open-system LLM (referring to the system architecture, not source code) information about my client because I asked it to summarize all of my client's data I provided it, that information has been retained by the open-system LLM, and you have just inadvertently disclosed attorney-client or work-product privileged information. Do your research on LLMs, use closed-system LLMs for information that is confidential, and be wise what tasks you use open-system LLMs for.

You also have a duty to check your local rules about the use of AI. Several Courts around the country have created standing orders on the uses of AI, including implementing sanctions for misuse. Litigation, Comparison Table – Federal Court Judicial Standing Orders on Artificial Intelligence, BLOOMBERG LAW, ***https://www.bloomberglaw.com/external/document/XCN3LDG000000/litigation-comparison-table-federal-court-judicial-standing-orde.*** This ranges from jurisdictions like the U.S. District Court of New Mexico, which effectively just asks attorneys to be careful in the use of AI, to the U.S. District Court of Hawaii, which requires that an attorney filing a document utilizing AI "must disclose in the document that AI was used and the specific AI tool that was used." C.J. Kenneth Gonzales, Use of Artificial Intelligence in the United States District Court for the District of New Mexico, (May 9, 2025), ***https://www.nmd.uscourts.gov/news/use-artificial-intelligence-united-states-district-court-district-new-mexico***; HI R USDCT Order 23-1. Keep on top of rule changes. Just because there is not a rule today does not mean there will not be one next week in your Courts.

Beyond the written rules, know your client's guidelines and discuss all use of AI with your clients. Some clients are simply not going to be okay with the use of AI right now, or maybe ever, which means you need to also remember how to practice law without fully leaning on these tools. You should also consider that there is a social cost to using AI. Some people consider their colleagues' use of AI negatively, and others have raised legitimate concerns about the environmental impact of frequent AI use. Benj Edwards, AI use damages professional reputation, study suggests, ARS TECHNICA (May 8, 2025), ***https://arstechnica.com/ai/2025/05/ai-use-damages-professional-reputation-study-suggests***; Adam Zewe, Explained: Generative AI's environmental impact, MIT NEWS (Jan 17, 2025), ***https://news.mit.edu/2025/explained-generative-ai-environmental-impact-0117***. The American public at large considers AI more harmful than good, and this likely will include some of your clients. Colleen McClain, et. al, How the U.S. Public and AI Experts View Artificial Intelligence, PEW RESEARCH CENTER (April 3, 2025), ***https://www.pewresearch.org/internet/2025/04/03/how-the-us-public-and-ai-experts-view-artificial-intelligence***. You should be having explicit conversations with your clients about the use or nonuse of AI and document your agreement with them. The use of AI should also be addressed in your retainer agreements, so everyone involved understands what tools are going to be used while the period of representation exists.

Suggestions for AI Uses

Analyzing Briefs and Drafting Clauses

One use of AI includes reviewing briefs and asking the AI models to find any weaknesses. As a test, you can use your firm-integrated Microsoft 365 Copilot to review a finalized brief. Ask Copilot to analyze it for weaknesses, or to read it with the eye of the opposing counsel and how they could attack your brief. Even your best polished work could have an argument that might need strengthening, and Copilot or other LLMs can review and give critiques of your brief in minutes. This helps take the brief to the next level in no time!

If you are using an open-system LLM, you do not want to feed any proprietary or protected information, but you can still use it for non-confidential purposes to help you find the needle in a haystack. Let's say you need a clause in a release that you do not typically draft. It might take you a long time to hunt through examples of releases in your firm's document management system for the extremely specific clause you are looking for. But you can ask ChatGPT, for example, for several kinds of non-disparagement clauses. You are not risking giving up any client information by doing this, and you save yourself time hunting for the specific clause you want in your contract (of course, after you review and edit it).

Preparing/Summarizing Depositions

After taking hundreds of depositions, I may know the general goals of my questioning and basic answers I seek in every deposition. But there are still questions I may not have considered based on the specific facts of the case. You can ask ChatGPT to brainstorm and generate deposition questions with those specific facts in mind. Asking via your prompt: "Prepare deposition questions for defending a products liability case," is bound to give you some basic questions that might yield useful information. But this is not like a basic Google search of old – you can give it more direction. Consider adding to your prompt: "Prepare 50 deposition cross-examination questions for a

defense attorney to use against a plaintiff homeowner witness in a products liability case involving a water heater fire in a home with no personal injuries." I guarantee you the time to craft this detailed prompt only costs you an additional minute, yet it is much more likely to result in cross-examination questions you did not think of, even if you are an experienced products liability attorney.

Now the deposition is over, and you asked the questions you needed of the deponent. Take the additional step and ask for a deposition report based on the notes you took. But remember, an LLM does not know what is important in a given case—you do. However, you can give LLMs plenty of instructions to get the end product you want. Instead of just saying "Look at these notes and summarize them," you can instead add "Give me a summary with eight paragraphs. The first paragraph is background information. The second paragraph is alleged damages. The third paragraph is the allegations specifically against my client," etc.

Let's say you have to report to multiple clients after a deposition. One is legal counsel, and one is a new board member of the company you are defending. The voice for a report when there is a knowledge gap in the intended audience can be challenging. However, you can just ask your firm-integrated Copilot to redraft a report and request that the voice be for a layperson or any other level of expertise. Now your report, which may be necessarily complex or technical for a reader who needs that knowledge, can be quickly converted to a readable, accessible version for someone who just needs the basics, or vice versa.

Improved Marketing

While the bulk of the discourse in legal circles has been around the use of AI for research and drafting, the other uses of AI in an attorney's practice are nearly endless.

One major category is the use of AI for marketing. Take a look at your bio or the description of your practice group on your firm's website. Be honest—how many years has it been since it has been changed? And is it really a description that is going to excite a potential client, or is it a rudimentary recitation that just checks off the boxes of what you do? You can use AI to suggest edits to your bios. You can keep all the same information but ask for suggestions for better word choice, for featuring certain skills, and other efficiencies. You might be shocked at how a handful of changes by ChatGPT or Copilot can spruce up an outdated bio and practice group pages.

Managing the Team

You can better manage your team through your firm-integrated Copilot to set meetings without reading through numerous emails from your team and looking at their several calendars. You can ask Copilot to review all of your team's calendars for a meeting time that will work for everyone. You can also ask Copilot to show you the last emails that were sent between team members on a given topic, so you can be reminded of what the team has already covered to avoid rehashing topics and wasting time in meetings.

Slideshow Presentations

If you've ever had to give a presentation, whether within your firm or to potential

clients, you know the hassles and tedium that a slideshow presentation can cause. It might seem simple at first, but as the slide count grows, hours evaporate and you're still far from done. Even if you are lucky to have support staff create it for you, you often end up spending more time tweaking the presentation than you'd like because you know best how the final result should look.

I've started using Beautiful AI and it's a game-changer for creating polished slideshows efficiently that I'm happy to attach my name to. By providing the key information I want to include and sharing details like the tone, audience, and overall goals, Beautiful AI generates a complete presentation in minutes compared to many hours. Sure, I still need to make a few edits here and there, but the structure and visuals are already handled, leaving me free to focus on the finer details. Plus, I am always impressed by how well it captures the personality and style I want to convey. For those who do not want a full panoply of AI products, the standard-use LLMs, like ChatGPT and Copilot, can also make slideshows based on your direction, but without the same visual panache.

Verdict Research

When I am trying to determine the potential damages in a case, I have to turn to previous settlement and verdict histories in the jurisdiction I am practicing in. Before, I would have to scan through droves of verdicts, including many that are not analogous to a factual scenario I'm trying to compare to. My searches used to be limited to exact word matches. For example, in the past if I was working on a slip and fall case involving a broken leg, I would have to search individually for other leg injuries like a sprained ankle, torn Achilles, etc., that are factually different medically, but similar enough to kick off my verdict analysis. Now I can ask Westlaw Precision's AI to analyze verdicts for any leg injury, and all of those verdicts are pulled without me needing to think through a whole menagerie of related injuries.

Or if I'm working on a case with fewer similar verdict examples, I might be stuck with verdicts from over a decade ago. I can also ask ChatGPT to look through government data and statistics to tell me how that jurisdiction has changed in ten years. However, unlike drafting contract terms or basic legal research, be mindful of the bias that creeps into LLMs when using one for questions about groups of people. Where scanning and analyzing labor statistics from the government may seem neutral, the LLMs themselves are a tool built by humans—biases included. James Manyika, Jake Silberg & Brittany Presten, What Do We Do About the Biases in AI?, HARVARD BUSINESS REVIEW (Oct. 25, 2019), ***https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai***. Particularly for models that are built on the open internet including message boards and social media posts, stereotypes and bigotry can easily be provided in the LLM's response to your prompts.

Stanford researchers found that results from some searches in LLMs would use extreme racist stereotypes dating from the pre-Civil Rights era. Katharine Miller, Covert Racism in AI: How Language Models Are Reinforcing Outdated Stereotypes, STANDARD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Sept. 3, 2024), https://hai.stanford.edu/news/covert-racism-ai-how-language-models-are-reinforcing-outdated-stereotypes. Other biases found in LLMs include biases about gender as well. A study by MIT found that LLMs think that "flight attendant," "secretary," and "physician's assistant" are feminine jobs, while "fisherman," "lawyer," and "judge" are masculine. Rachel Gordon, Large Language models are biased. Can logic help save them?, MIT NEWS (March 3, 2023), ***https://news.mit.edu/2023/large-language-models-are-biased-can-logic-help-save-them-0303***. When asking questions about a potential jury pool, issues like race, gender, class, and religion—topics that can be fraught with stereotypes or biases—can quickly come to the forefront. If you are not careful about how you are searching, you will have violated your ethical duties to eliminate any biases in your work.

Work/Life Balance

The use of AI does not need to stop at the office doors. I know I will need a break by the end of the summer, so I decided to plan a trip to Washington state. But every member of the family had different priorities of what they wanted to see. How do we incorporate the landmark sites my husband wants to visit, the big mountains my son expects to see, and also the scenic shots designed for Instagram that my daughter is craving? Instead of plotting out every location and searching for the best routes and hotels between them all, I asked ChatGPT to give me an itinerary for a seven-day trip, including all of my family's priorities. After 15 minutes of tweaking with follow up requests to ChatGPT, I have an itinerary for a logistically complicated vacation winding around mountains, without spending hours on it.

But for some of us, it is hard to completely turn off from work, even on vacation. Without fail, I will have a deposition scheduled no matter what week of the year I take a vacation. Through tools like Depo CoPilot by Filevine, a real-time AI-powered transcription tool, I can set the goals for a deposition before I have left. Depo CoPilot can then analyze live how my associate is handling the deposition by not only keeping track of the goals I have set, but by flagging the witness's contradictory answers or questions that were essentially evaded by the deponent. Instead of fretting all day while the deposition is occurring and I am supposed to be relaxing, I can briefly step in and monitor how my associate is handling the deposition by seeing the witnesses' responses as they are provided and information about what additional areas need to be covered after the next deposition break.

Conclusion

While I can't agree with the AI "experts" that are promising a complete rehaul of society and the legal profession as we know it through AI, I would go so far as to say that a smart use of AI as a tool can help your practice through creating efficiencies and finding information quickly that was once out of your grasp. Know your LLM models and their limitations, and you can edge out others in this ever-evolving legal landscape, while ensuring to follow the ethical oaths we all swore to uphold.

This is not an endorsement of any specific AI or LLM product.

By Christopher T. Sheean & Corey A. Bauer

Early Identification of Trade Secrets in Federal Trade Secret Cases

In trade secret litigation, plaintiffs try to keep their options open as to the identification of their trade secret(s) as long as possible, while defendants seek to pin down the particularities of a trade secret as soon as possible.

The federal rules of civil procedure provide a long-standing and comprehensive guide for the rules of engagement in the discovery process. As such, it is not often that lawyers encounter a situation in which the very subject of the dispute remains amorphous up to the summary judgment stage. Yet, this is exactly what is occurring in federal trade secret litigation across the country when parties attempt to establish the parameters of a trade secret at issue in litigation. In trade secret litigation, plaintiffs try to keep their options open as to the identification of their trade secret(s) as long as possible, while defendants seek to pin down the particularities of a trade secret as soon as possible. As will be discussed herein, this not only creates an undue burden and an immense discovery expense for the defendants in these cases trying to take discovery on the alleged trade secret, but it also disincentivizes the plaintiff owners of trade secrets from engaging in the proper identification and protection that intellectual property ("IP") management best-practices and the Defend Trade Secrets Act ("DTSA") require.

The DTSA was passed by Congress and signed by President Obama in 2016, creating a federal civil cause of action for trade secret misappropriation. The DTSA incorporated large parts of the Uniform Trade Secrets Act ("UTSA") – which has been adopted by all but two states – and amended the Economic Espionage Act ("EEA"). As a result, the DTSA shares some definitions with the EEA; most notably, the definition of a trade secret. After decades of trade secret litigation taking place on the front lines of state courtrooms, the federal court system has spent the last eight years interpreting the DTSA and establishing guardrails through case law opinions.

Regardless of whether a court applies state or federal law, judges and lawyers across the country have worked to balance the secret nature of trade secrets with the need for transparency between the parties in the discovery process. Balancing the need for defendants to know the trade secret they are accused of misappropriating with the plaintiff's pleading and secrecy requirements has made a uniform rule of trade secret identification elusive. However, the DTSA and UTSA should be

[1] *See, Fed. R. Civ. P. 26 -37, generally.*

[2] *This article will address the DTSA only and calls for a federal standard. However, it is recognized that the issue of trade secret identification has been historically relevant in state UTSA cases, and remains an issue in those cases today. To highlight the ramifications of the failure to identify trade secrets, state UTSA cases will be cited herein due to Circuit Courts acknowledging that the UTSA and DTSA have substantially similar definitions of a trade secret. E.g., InteliClear, LLC v. ETC Glob. Holdings, Inc., 978 F.3d 653, 657 (9th Cir. 2020); Compulife Software Inc. v. Newman, 959 F.3d 1288, fn. 13 (11th Cir. 2020); and Analog Techs., Inc. v. Analog Devices, Inc., 105 F.4th 13, 17 (1st Cir. 2024).*

Christopher T. Sheean is a partner at Swanson, Martin & Bell, LLP in Chicago, Illinois, and litigates commercial and intellectual property litigation in courts throughout the country. **Corey A. Bauer** is senior counsel at Gordon, Rees, Scully, Mansukhani, LLP in Denver, Colorado, where he practices as a trial lawyer and litigator in the intellectual property and commercial litigation groups. Chris and Corey wish to thank and acknowledge Julia R. Raczek, Swanson, Martin & Bell Summer Associate, for her research and assistance with this paper.

The Third Circuit has made clear that by the preliminary injunction stage the trade secrets must be defined sufficiently enough to put Defendants on notice of what they are being enjoined from doing.

amended, or federal courts should adopt a procedural requirement at the district court level, to require early identification of the allegedly misappropriated trade secrets to promote judicial economy, to minimize the burden to defendants and third parties, and to encourage proper IP protection and management as a matter of public policy.

The Problem: The Failure to Properly Identify Trade Secrets in the Early Stages of a Case Creates Excessive and Unnecessary Discovery Expenses and Places an Unfair Burden on Parties and Non-Parties

The very nature of IP litigation – whether a patent, copyright, trademark, or trade secret case – nearly always requires considerable expense in discovery and expert witness involvement. It is only trade secret cases, however, where a description of the at-issue intellectual property cannot be readily found within the four corners of a document maintained by a federal agency. As a result, trade secrets litigation requires a judicially managed investigation to identify each trade secret at issue. If the plaintiff fails to provide a proper identification of the trade secrets at issue early in the case, it is likely to cause unnecessary discovery costs and place unfair burdens on defendants and non-parties.

First, it makes the discovery process less targeted, leading to unnecessary costs. Indeed, the search for the identification of trade secrets leaves defendants in the dark during the discovery process and makes it difficult to develop defenses. Until a plaintiff details its trade secret(s), "neither the court nor the parties can know, with any degree of certainty, whether discovery is relevant or not." What's often overlooked is that failing to identify the trade secret at issue with particularity also harms the plaintiff's case. A plaintiff cannot undertake a meaningful discovery program aimed at tracing the flow and use of a trade secret within a defendant company if the trade secret itself remains amorphous. Instead, all parties typically over-produce and hedge discovery responses, running up costs incurred by the clients. While many federal district courts allow for the record to develop, eventually requiring that trade secrets be identified with specificity at the summary judgment stage, this practice often permits months to years of litigation time and expenses to accrue before the court recognizes that lengthy discovery processes have been undertaken with no identifiable trade secret in sight.

Second, the late identification of trade secrets results in an impediment to judicial economy and a burden on defendants. A good example of this can be found in Source Prod. & Equip. Co. v. Schehr, which "lasted more than three years and involved extensive discovery and motion practice." In dismissing the plaintiff's DTSA and Louisiana UTSA claims, the court found that the plaintiffs failed to timely identify four trade secrets because they were raised with specificity for the first time one day before defendant's expert reports were due. The court stated that "[s]uch a late identification of purported trade secret identification amounts to trial by ambush and is exactly the type of tailoring of trade-secret identification to discovery that earlier identification is designed to prevent." The court also awarded attorneys' fees to the defendant as a result of the tardy identification. Late trade secret identification and the resulting cost on all parties involved can be found in federal courts across the country in DTSA cases. As a result, some district court judges have gone as far as to require plaintiffs to identify trade secrets with particularity before requiring defendants to reply to plaintiff's discovery requests.

The Third Circuit has made clear that by the preliminary injunction stage the trade secrets must be defined sufficiently enough to put Defendants on notice of what they are being enjoined from doing. This places district court judges in a difficult spot when crafting injunction orders in

[3] *Plaintiffs in trade secret cases also may wish to avoid identifying the alleged trade secret(s) with particularity until later in discovery for strategic reasons, arguing that the specific trade secret(s) misappropriated are yet unknown. Nonetheless, as discussed below, this can be addressed through amended complaints under Fed. R. Civ. P. 15 and flies in the face of the fundamental requirement of trade secret identification that the DTSA requires.*

[4] *Xerox Corp. v. Int'l Bus. Machs. Corp., 64 F.R.D. 367, 371-72 (S.D.N.Y. 1972).*

[5] *Source Prod. & Equip. Co. v. Schehr, No. 16-17528, 2020 WL 4785048, at *2–3 (E.D. La. Aug. 18, 2020)*

[6] *Id.*

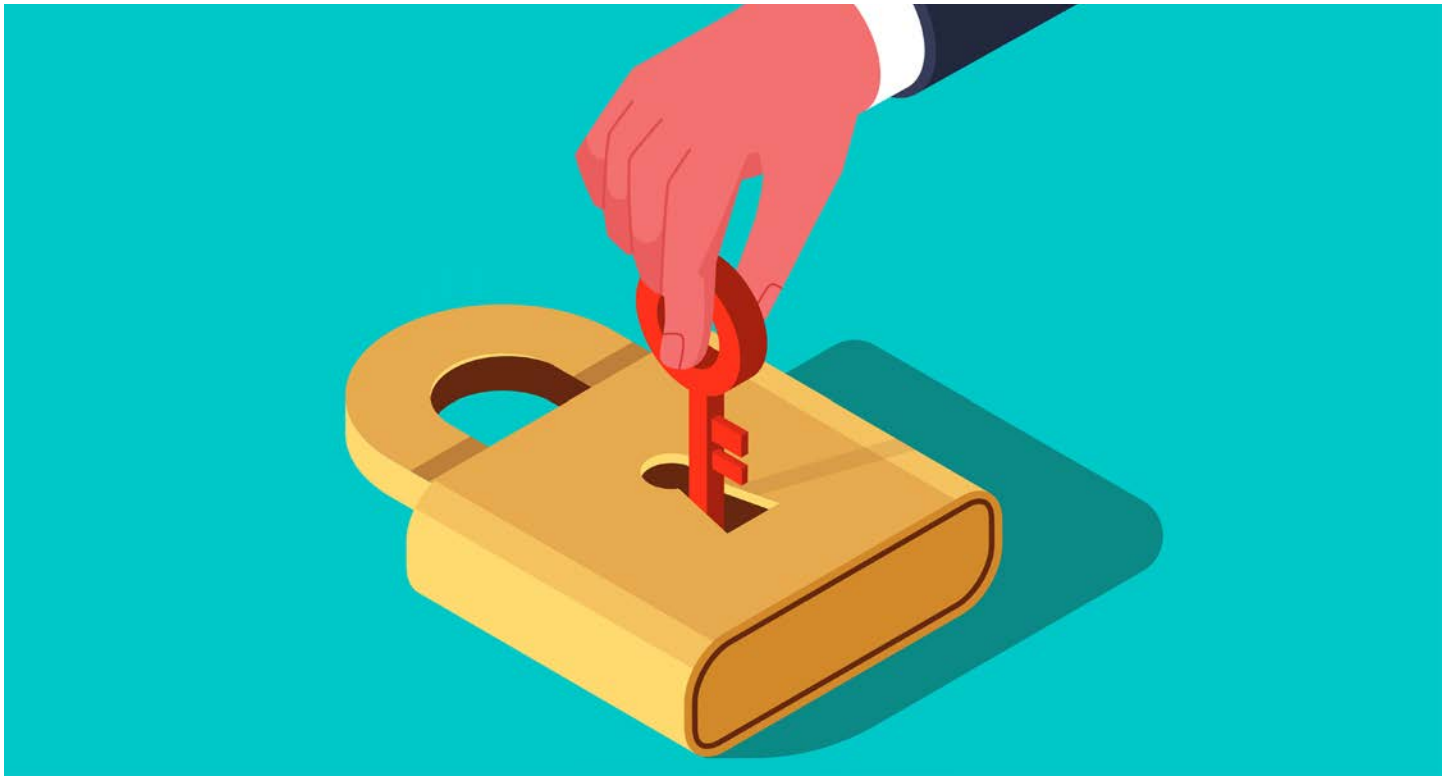
[7] *Id.*

[8] *By way of example, see NEXT Payment Sols., Inc. v. CLEARResult Consulting, Inc., No. 1:17-cv-8829, 2020 WL 2836778, at *1 (N.D. Ill. May 31, 2020); IDX Sys. Corp. v. Epic Sys. Corp., 165 F. Supp. 2d 812, 814 (W.D. Wisc. 2001); Neothermia Corp. v. Rubicor Med. Inc., 345 F. Supp.2d 1042, 1044 (N.D. Cal. 2004); and DeRubeis v. Witten Tech, Inc., 224 F.R.D. 676, 681 (N.D. Ga. 2007).*

[9] *See, BioD, LLC v. Amnio Tech., LLC, No. 2:13-cv-1670-HRH, 2014 WL 3864658, at *6 (D. Ariz. Aug. 6, 2014); see also, Nike, Inc. v. Enter Play Sports, Inc., 305 F.R.D. 642, 645 (D. Or. 2015).*

[10] *Mallet & Co. Inc. v. Lacayo, 16 F.4th 364 (3d Cir. 2021).*

[11] *Id. at 387.*



trade secret cases. As the Third Circuit stated, "without knowing what particular information [a plaintiff] claims as trade secrets, [one] cannot assess its likelihood of success in establishing that the information the Defendants acquired, disclosed, or used is trade secret information or that misappropriation of a trade secret has occurred" at the preliminary injunction stage.

Third, a failure to adequately identify trade secrets prior to discovery makes the court's evaluation of relevance and discoverability as they relate to subpoenas directed to third parties very difficult. For example, in Wilbur-Ellis Co. LLC v. Gombert, the plaintiff filed a motion to serve a subpoena on non-party that was denied because the judge could not evaluate the relevance of the requests without knowing the specific, allegedly misappropriated trade secrets.

Additionally, on a public policy note, a company's failure to have a particular identification of its trade secrets in the regular course of business makes the protection of that trade secret much more difficult. The DTSA is the mechanism by which Congress meant for companies to defend their trade secrets. If that mechanism provides an opportunity for companies to potentially defend trade secrets without proper identification, it enables ineffectual IP management practices. Congress's intent for the DTSA was to safeguard American company trade secrets for the betterment of the economy and national security. For that reason, the law should be applied in a manner that facilitates the proper cataloging and maintenance of trade secrets.

When the underlying trade secret is not identified with specificity for all parties and the court before the discovery phase, it unnecessarily frustrates the discovery process for all involved and prolongs meritless claims. As seen above, it also results in a frustrated judiciary that only too late discovers that considerable resources have been expended without a trade secret being identified with particularity as required by the DTSA. Fortunately, there is some guidance on how to address it.

[12] *Wilbur-Ellis Co., LLC v. Gompert, No. 8:21CV340, 2022 WL 17736773, at *5 (D. Neb. Dec. 16, 2022) (denying plaintiff's motion to serve a subpoena on employer because without knowing the specific allegedly misappropriated trade secrets, the court could not evaluate the relevance of the broad discovery sought from the third party).*

[13] *Senate. Rept. 114-220 - DEFEND TRADE SECRETS ACT OF 2016, Section I. Background and Purpose of the Defend Trade Secrets Act of 2016. See also House Rept. 114-529 – DEFEND TRADE SECRETS ACT OF 2016, Background and Need for the Legislation.*

[14] *Id.*

[15] *Restatement (Third) of Unfair Competition, § 39, cmt. d (Am. L. Inst. 1995).*

[16] *See id. at § 42, cmt. d.*

[17] *Pac. Indem. Co. v. Broward Cnty., 465 F.2d 99, 103 (5th Cir. 1972).*

[18] *See, Kevin R. Casey, Identification of Trade Secrets During Discovery: Timing and Specificity, 24 AIPLAQJ 191 (1996) (Outlining nine different approaches to trade secret disclosure timing and strategy (noting that "courts have resolved the issue in a variety of ways along a broad continuum").*

The Current State of the Law Relating to Trade Secret Identification

The Restatement (Third) of Unfair Competition Affords Discretion to Courts

The Restatement (Third) of Unfair Competition discusses how trade secret identification is considered in common law. Specifically, the Restatement establishes that "[a] person claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection described in this Section and to determine the fact of an appropriation." Moreover, courts have discretion to "require greater specificity when the plaintiff's claim involves information that is closely integrated with the general skill and knowledge that is properly retained by former employees."

The DTSA Is Silent on When Identification of Trade Secrets Must Occur and Courts Have Used a Varied Approach

Neither the DTSA nor UTSA provide guidance as to when the identification of trade secrets must take place. Appellate courts have long held "that district courts have discretion to conduct reasonable pretrial procedures and case management to narrow the issues and simplify the mechanics." What the district courts do with that discretion has been varied, with scholars finding up to nine different approaches to trade secret disclosure throughout the nation, but a trend has emerged to require identification prior to discovery efforts.

However, even among the courts that require a pre-discovery identification, there exists a lack of consensus as to what type of showing is required from the plaintiff. The variety of courts' approaches indicate that the issue is fact intensive. Indeed, a case where an alleged trade secret is a recipe can be a simple exercise in identifying the ingredients and amounts, whereas a case where an alleged trade secret is more abstract can be a more difficult exercise. Some courts require the identification of trade secrets with particularity by list or chart, separately breaking out each alleged misappropriated trade secret with enough specificity to differentiate them from information generally known in the industry.

District Courts in the Fifth Circuit have invoked Federal Rule of Civil Procedure 16(c)(2)(L) to support pre-discovery identification in this manner in trade secrets cases. Rule 16(c)(2)(L) sets forth "a mechanism for fostering the same goals of facilitating discovery in unique cases by providing the district court with broad discretion to 'adopt [ ] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems.'"

A second option utilized by many courts throughout the nation is the "Trade Secret Statement." These statements are either shared between the parties in discovery or filed under seal and can be exchanged either before discovery or during it. Even going back nearly forty years – well before the DTSA existed – courts have required plaintiffs to submit trade secret statements before requiring defendants to respond to discovery. Yet, other courts have denied defendants' requests for trade secret statements citing a likelihood of increased objections from the defendant upon reviewing the statement causing more discovery disputes and delays.

Defendants in both federal and state courts faced with claims of trade secrets misappropriation are frequently faced with having to guess the trade secrets that are the subject of the claim.

As previously mentioned, there are up to nine different methods courts have used to achieve trade secret identification. The approaches listed above – (1) requiring a

[19] *See JJ Plank Co., LLC v. Bowman, No. 3:18-CV-00798, 2018 WL 3545319, at *3 (W.D. La. July 23, 2018) (stating that while "[r]equiring pre-discovery identification seems to be the predominate trend… a mandate has not arisen"); Diversified Tech. Inc. v. Dubin, 31 U.S.P.Q.2d (BNA) 1692 (S.D. Miss. 1994) (In response to Dubin's motion to compel DTI to specifically identify the allegedly misappropriated trade secrets, the court required DTI to provide Dubin with written disclosure of trade secrets before DTI conducted discovery of Dubin).*

[20] *For example, see StoneEagle Servs., Inc. v. Valentine, No. 3:12-cv-1687, 2013 WL 9554563 (N.D. Tex. June 5, 2013) (Court granted defendants' motion for order requiring pre-discovery identification of trade secret claims through the break out of each trade secret, the identification of each with sufficient particularity to differ them from public domain information, and to list which trade secrets apply to each defendant).*

[21] *Id. at 3.*

[22] *Id. (quoting United Servs. Auto Ass'n v. Mitek Sys., Inc., 289 F.R.D. 244, 248 (W.D. Tex. 2013); see also FRCP 16(c)(2)(L).*

[23] *For example, see Engelhard Corp. v. Savin Corp., 505 A.2d 30 (Del. Ch. 1986) (Court required plaintiff to identify allegedly misappropriated trade secrets in a "trade secret statement" before permitting discovery); see also, Magnox v. Turner, No. 11951, 1991 WL 182450, at *2 (Del. Ch. Sept. 10, 1991) (Holding defendants were entitled to a particularized statement of the trade secrets at issue before being compelled to respond to discovery requests).*

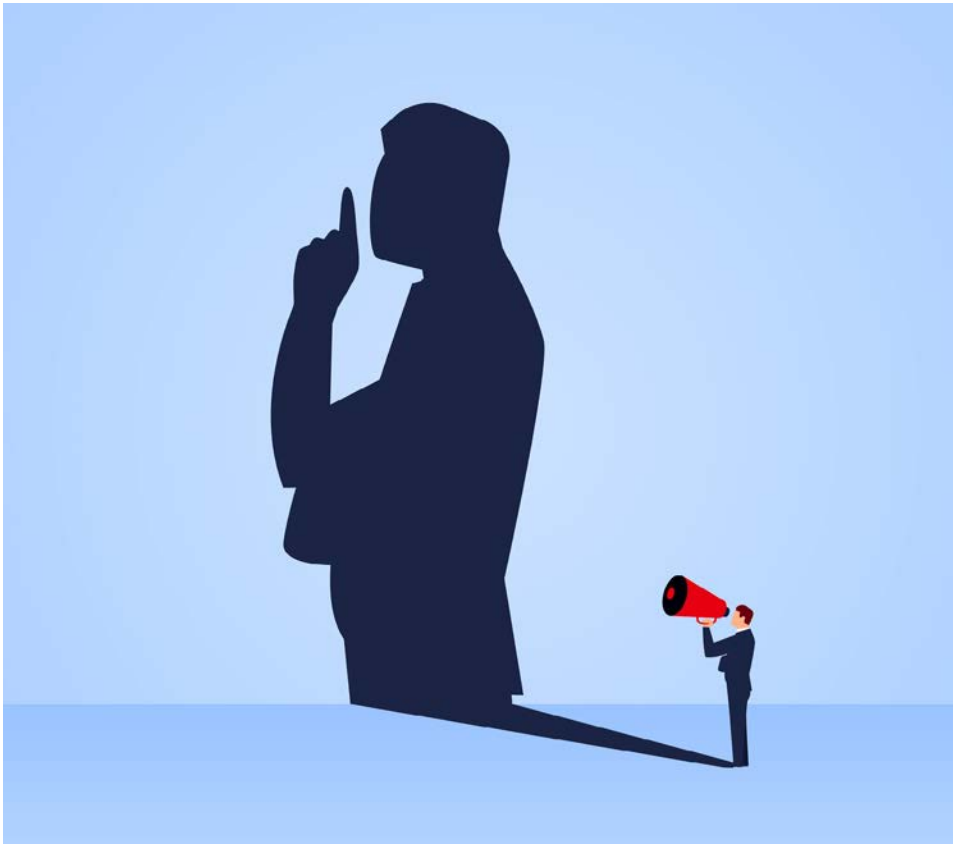
plaintiff to specify the trade secrets through a general list; and (2) requiring a trade secret statement – are the most common and procedurally driven options. The other approaches are less about procedure and more about discovery dispute resolution. These include bifurcating discovery, assigning a neutral expert to control discovery, deferring defendant's discovery, and fashioning a discovery order under the FRCP.

Some States Have Enacted Statutory Trade Secret Identification Requirements

Both California and Massachusetts have enacted statutes requiring trade secret identification with reasonable particularity before commencing other discovery. California Code of Civil Procedure § 2019.210 states that "before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code." District court judges in California have mentioned how such a statute has been helpful in assisting the courts set the appropriate scope of discovery. What's more, § 2018.210 is consistent with Federal Rule of Civil Procedure 26 in its "requirement of early disclosure of evidence relevant to the claims at issue and the Court's authority to control the timing and sequence of discovery in the interests of justice."

The language in Mass. Gen. Laws Ann. 93 § 42D(b) tracks California's statutory language. § 42D(b) reads "before commencing discovery relating to an alleged trade secret, the party alleging misappropriation shall identify the trade

[24] *See, Global Advanced Metals USA, Inc. v. Kemet Blue Powder Corp., No. 3:11-cv-00793, 2012 WL 3884939, at *7 (D. Nev. Sept. 6, 2012).*
[25] *See Cal. Code Civ. Pro. § 2019.210 and Mass. Gen. Laws Ann. 93 § 42D(b).*
[26] *Social Apps LLC v. Zynga Inc., No. 4:11-CV-04910, 2012 WL 2203063, at *2 (N.D. Ca. June 14, 2012).*
[27] *E.D. of Louisiana Local Rule 26.3.*



secret with sufficient particularity under the circumstances of the case to allow the court to determine the appropriate parameters of discovery and to enable reasonably other parties to prepare their defense."

A Proposed Uniform Framework Based on Existing Federal Court Local Rules

As discussed herein, some states have stepped in to regulate the identification of trade secrets in litigation for their adopted UTSA claims. Federal courts have also weighed in, noting the most effective solution to the issues arising from late trade secret identification is to require a party asserting trade secret misappropriation to file under seal a Trade Secrets Identification Statement before trade-secret-related discovery begins, in addition to their disclosures required by FRCP 26(a).

The Eastern District of Louisiana has a local rule requiring this very thing. That rule, modeled after the Sedona Conference Commentary, 22 SEDONA CONF. J. 223 (2021), provides as follows:

LR 26.3 Initial Disclosures in Misappropriation of Trade Secret Cases

Except as otherwise ordered by the court, in addition to the initial disclosures required by FRCP 26(a), a party asserting that any trade secrets have been misappropriated must file under seal a Trade Secrets Identification Statement before trade-secret-related discovery begins.

(A) Identification of Asserted Trade Secrets. A party claiming the existence of a trade secret must, before merits discovery begins (or, subject to paragraph D below with a motion for preliminary relief) identify in writing and serve on the parties, with a level of particularity that is reasonable under the circumstances, each asserted trade secret.

The required particularity of this identification differs from what may be adequate in a publicly filed pleading under applicable pleading rules such as FRCP 8. It must be sufficiently particularized to allow the other party to meaningfully compare the asserted trade secret to information that is generally known or readily ascertainable and to permit the parties and the court to understand what information is claimed to be the trade secret. The identification should separate, to the extent practical, distinct trade secrets into numbered paragraphs. A document may be appended as a supplement to the identification but may not be used as a substitute for the identification unless the document itself is claimed to be the trade secret. In cases where an entire document or portions thereof constitute the trade secret, the written identification must identify the content in such document or portions thereof in language sufficient to meet the standards herein.

(B) Amendments. A party that has provided an initial identification under paragraph A above may amend that identification upon the agreement of the parties or upon motion establishing good cause.

(1) Prior to any motion to amend, the parties must confer regarding the timing and terms of the proposed amendment. If the parties are unable to reach an agreement, the party proposing the amendment may apply to the court for an order allowing the proposed amendment.

(2) In determining whether to grant leave to amend the identification, the court shall consider whether the party seeking amendment was diligent and whether the party opposing amendment would be unduly prejudiced by the amendment considering, among other factors, whether the proposed amendment is based on discovery of newly learned facts, the stage of the litigation, whether the amendment will expand discovery and/or delay the trial date, and whether the amendment adds, removes, or materially modifies asserted trade secrets or merely clarifies an existing identification.

(C) Verification. The identification of each asserted trade secret shall be verified under oath or affirmation by the individual or one or more employees or officers of the party asserting trade secret misappropriation.

(D) Applications for Preliminary Relief. Where a party has evidence that an

opposing party improperly downloaded or otherwise took documents, things or information from the party, and the party files a lawsuit that includes a trade secret misappropriation cause of action, and then, by motion, seeks an early court order requiring only that the defendant (1) preserve evidence; and/or (2) return the specific documents, things or information allegedly taken, the moving party is not required to prepare or serve a Trade Secret Identification Statement that complies with paragraph A above prior to seeking such preliminary relief. In all other situations in which a party asserting trade secret misappropriation seeks preliminary relief, the moving party must comply with paragraph A as to the trade secrets for which it seeks early injunctive relief to the extent it has not already done so. This paragraph is subject to FRCP 65(d) or state law equivalents and other applicable statutory requirements.

E.D.La. L.R. 26.3 (June 1, 2024).

The Eastern District of Louisiana has already had the opportunity to provide guidance on the level of specificity required to comply with Local Rule 26.3's Trade Secrets Identification Statement. In Incat Crowther America, L.L.C. v. Birdon America, Inc., 2024 WL 4665262 (E.D. La. November 4, 2024), the defendant filed a motion to compel plaintiff to file an amended Trade Secret Identification Statement, asserting that plaintiff's reference to various documents filed under seal, without identifying the actual trade secrets within the documents, failed to comply with the requirements of the new Local Rule 26.3. The trial court agreed, holding that:

> INCAT's Statement must be sufficiently particularized to allow the other party and the Court to understand what information is claimed to be the trade secret. This cannot be left to assumptions. It should not require reference to briefing or pleadings. Indeed, while INCAT may contend that the documents it cites are trade secrets, the Local Rule nonetheless requires that it identify the document or portions thereof in language sufficient to permit the Court and the parties to understand what information is claimed to be the trade secret and to meaningfully compare it against generally known information.

Id. citing Local Rule 26.3(A). The court in Incat Crowther America, LLC confirmed the plain language of the rule – a plaintiff must identify its trade secrets with **particularity,** and, in so doing, demonstrate to the court and defendant that the trade secrets it claims are in the documents the plaintiff cited.

Local Rule 26.3 of the Eastern District of Louisiana, in line with the Sedona Conference Commentary, provides a reasonable framework that balances the need for the plaintiff to maintain the secrecy of its confidential information and conduct reasonable discovery, while providing the defendants and the Court with an understanding of what plaintiff claims to be its trade secrets and to compare them to what is generally known in the public domain.

Conclusion

Defendants in both federal and state courts faced with claims of trade secrets misappropriation are frequently faced with having to guess the trade secrets that are the subject of the claim. Many courts wait until summary judgment or trial to force the plaintiff to provide a meaningful definition of the trade secrets it claims have been stolen. This approach penalizes defendants, injects inefficiencies into cases, multiplies costs to clients, and allows a below-standard IP strategy for thousands of companies. To ameliorate this problem, some jurisdictions have followed the Sedona Conference Commentary and require plaintiffs in trade secrets cases to file a Trade Secret Identification Statement, verified and under seal. Short of Congress amending the DTSA (which is, admittedly, unlikely), district courts should adopt a local rule similar to that in the Eastern District of Louisiana to better serve the American judicial system and public policy.