

MISSION POSSIBLE: Winning Strategies for Litigation Management

November 8-9, 2019

AGENDA and COURSE DESCRIPTION

FRIDAY, NOVEMBER 8, 2019

8:30a – 8:40a Opening Remarks and Welcome

8:40a – 9:00a **Class Action Trends and Legal Developments**

Emily Harris – Corr Cronin (Seattle, WA)

Read the news and find that class action litigation and settlements continue to be a hot bed of activity across many economic sectors. When confronted with a new class action, many factors must now be considered including venue, after the impact of the Bristol Myers jurisdictional decision; current state of play on arbitration waivers; use of statistical evidence to support class certification; and ability to settle class claims in light of statutory standing issues. This session highlights critical new rulings and key decision points in successfully defending against class action claims.

9:00a - 9:20a **The Effect Of “#MeToo” and “Time’s Up” In Discrimination Litigation**

Lauren Fisher White – Christian & Barton (Richmond, VA)

The United States Supreme Court has recognized the relevance and admissibility of pattern evidence in discrimination cases. In the recent past, some may have concluded that “me-too” evidence and the “piling on” of similar circumstances in the workplace were not relevant to individual claims. The public narrative appears to have changed. As a result of the “#MeToo” and “Time’s Up” movements, the presumption scale now seems to tip toward the claimant. This session covers the history of these movements, their impact in elevating the value of “me-too” evidence and recent cases that may be indicative of emerging patterns in how jurors and judges evaluate such evidence.

9:20a - 10:00a **PANEL: Conducting Internal Investigations – Best Practices and Current Trends**

Moderator: James Melendres – Snell & Wilmer (Phoenix, AZ)

Recently, the Department of Justice (“DOJ”) released a publication for white-collar prosecutors on the evaluation of corporate compliance programs. Additionally, the DOJ expects that corporations will police themselves and, increasingly, self-report potential misconduct, swiftly and decisively. This panel discusses the issues and strategic approaches to conducting internal investigations while balancing a company’s various and best interests.

10:00a – 10:20a Refreshment and Coffee Break

10:20a - 10:40a **The Expert-Witness Impact of Judicial Appointments by Elected Officials**

Bob Fulton – Hill Ward Henderson (Tampa, FL)

The recent appointment of two justices in Florida led the Florida Supreme Court's reversal of its position on the standards for admitting expert testimony from Frye back to the stricter Daubert standard. Some believe this signals an end to frivolous lawsuits and "junk science" in the courtroom, while others maintain it could cause meritless motions that will drive up the costs of litigation and place extra burden on the court. This session examines what to expect in the wake of this 5-2 ruling and how this will affect future expert witness testimony.

10:40a – 11:00a **Antisocial Media: Internet Defamation, Online Libel and Free Speech in the Facebook Era**

Stuart McMillan – Bowles Rice (Charleston, WV)

Can a tweet be proven libelous or an Instagram story slanderous? In the public social media arena, we are witnessing a precipitous increase in online defamation cases, content moderation, and First Amendment concerns involving free speech and censorship. It is only a matter of time before the law begins setting boundaries that define acceptable forms of online expression.

11:00a - 12:00p **Interactive Panel Discussion Groups**

TRACK A: Rediscovering E-discovery – What Do I Do With This Mess?

Moderator: Kathryn Walker - Bass Berry & Sims (Nashville, TND)

E-discovery in any sized case can be challenging and drain precious resources. It is an expensive and arduous process with many twists and turns, including when the landscape deviates from the initial search. This roundtable discusses the latest best practices for both in-house and outside counsel to find practical and defensible solutions to identifying, preserving and collecting data, as well as tips and tricks for controlling costs.

TRACK B: The Trial Lawyer's Role in Mediation Advocacy

Moderator: Tony Rospert - Thompson Hine (Cleveland, OH)

Trial lawyers can bring significant value to the mediation process and provide effective advocacy on behalf of their clients. This roundtable discussion of trial lawyers and in-house counsel offers insights and strategies that can be utilized to maximize the likelihood of a successful resolution at mediation or to best position a case for trial. Best practices will include mediation preparation, mediator selection strategy, effective use of opening statements, and reliance on experts at the mediation.

TRACK C: Tools for Investigating Medicare Claims

Moderator: Nikki Nesbitt - Goodell DeVries Leech & Dann (Baltimore, MD)

Government sponsored payors such as Medicare and Medicaid have statutory rights to recover for conditional payments made on behalf of a beneficiary, following a final settlement with or judgment from a third-party insurer (including self insurers), as well as rights to recover for future care costs. Additionally, settlements above a reporting threshold must be reported to the Center for Medicare and Medicaid Services. It is, therefore, critical for parties involved in a healthcare insurance settlement to investigate whether a Medicare or other form of “super lien” exists and ensure that the interests of the government-sponsored plan are protected first. Penalties for noncompliance of reimbursement or non-reporting can be severe. This session offers several tools to assist defense counsel and risk management professionals in identifying and investigating Medicare liens and other “super liens,” as well as analyzing those liens to prepare for mediation or settlement.

TRACK D: TRO's/Preliminary Injunctions – Winning Strategies

Moderator: David Gustman — Freeborn & Peters (Chicago, IL)

When developing a mission critical litigation winning strategy, Temporary Restraining Orders (“TRO”) and Preliminary Injunctions (“PI”) are significant tools requiring serious consideration. This interactive roundtable delivers insight into the best use of these tools, recent developments and jurisdictional differences, and how to use the element of surprise to win the next TRO and PI.

TRACK E: Lessons Learned (or to Be Learned) from the Michael Cohen Fiasco

Moderator: Tammy Westerberg - Wheeler Trigg O'Donnell (Denver, CO)

Michael Cohen’s story is an extreme but cautionary tale to all lawyers, everywhere, but particularly to in-house lawyers who have a single client or one group of professionals they advise. While Cohen’s plight played out publicly, there are real, not often so public, consequences to unethical conduct of this kind. Using the Cohen fiasco as a backdrop, this interactive discussion addresses the ethical issues of when a client directs its attorney to violate the law or cross ethical lines.

SATURDAY, NOVEMBER 9, 2019

8:30a – 8:40a

Welcome Back from the Seminar Chairs

8:40a – 9:00a

Bristol-Myers Squibb Two Years Later – The Evolving Legacy of a Landmark Decision and Potential Impact on Class Actions

Casey Wong - Sandberg Phoenix (St. Louis, MO)

The U.S. Supreme Court landmark personal jurisdiction decision in 2017 involving Bristol-Myers Squibb brought considerable conversation, changes and questions for litigants, lawyers and federal courts across the country. This session examines the impact and trends following the decision, including the rift it has caused among federal courts as to whether it applies to class actions.

9:00a – 9:20a **ETHICS: Legal Marijuana Sales and the Resulting Ethical Morass – Avoiding Traps for the Unwary**

Scott O'Connell - Nixon Peabody (Boston, MA)

While the number of states legalizing cannabis continues to expand, the cultivation, sales, distribution, and use of marijuana for any purpose remains a federal crime under the Controlled Substance Act. The model rules of professional conduct prohibit lawyers from counseling a client to engage or assist in conduct known to be illegal; and, therefore, the implications of advising clients on marijuana-related business activity presents considerable ethical constraints. This session focuses on emerging best practices for providing internal and outside legal counsel within the boundaries of applicable professional responsibilities.

9:20a -9:40a **ETHICS: More Money, More Problems? The Use of Litigation Finance in Complex Litigation**

Jason Lien – Maslon (Minneapolis, MN)

Third-party litigation finance has been around for a long time; however, according to a Burford Capital survey in 2018, the use of third-party funding in commercial litigation grew by more than 200% between 2012 and 2018. This session discusses the rising utilization of litigation financing in civil litigation, the types of cases in which it is being used most often, and the legal and ethical implications of using a third-party funder.

9:40a -10:00a **ETHICS: Making the Mission Possible Through Mentorship**

Joe Angersola - Swift Currie McGhee & Hiers (Atlanta, GA)

For some attorneys, mentorship is a natural extension of who they are and their daily routine; however, the use of technology has made working remotely more prevalent, which typically results in less face time with colleagues. This discussion highlights the enormous benefits of mentorship to a law firm, its attorneys and its clients; new challenges mentoring junior lawyers; and considerations for a more effective mentoring program.

10:00a – 10:20a Refreshment and Coffee Break

10:20a – 11:00a **PANEL: Challenges in Managing Litigation in Multiple Jurisdictions**

Moderator: Haley Cox - Lightfoot Franklin & White (Birmingham, AL)

Managing litigation in multiple jurisdictions presents its challenges. It's important that counsel is knowledgeable on the substantive and procedural differences in the law by each state as well as the importance to develop consistent strategies for discovery responses and legal positions. This panel discusses some of these challenges and resulting approaches to ensure an effective plan to manage litigation across the country.

11:00a – 11:05a Closing Remarks

11:05a – 12:10p

Interactive Panel Discussion Groups

TRACK A: Winning the Appeal While Still at Trial Court

Moderator: Carly Alameda - Farella Braun + Martel (San Francisco, CA)

While preparing for trial, every litigator ought to contemplate the potential outcomes and plan for how an appeal might play out to affirm or reverse a decision. This roundtable examines what to keep in mind while at trial and how to create a record to ensure a client will also be in the best position possible for success in case of a future appeal. Tips for creating a record will include evidence, objections, transcripts, orders, prejudice, preservation of your position on jury instructions, as well as directed verdict and post-trial motions.

TRACK B: It Wasn't Raining When Noah Built the Ark – Effective Elements of Your Disaster/Crisis Response Plan

Moderator: Ray Lewis - Deutsch Kerrigan (New Orleans, LA)

From weather, fire, utilities outage, to a security breach, many organizations will inevitably face unexpected small or big crises over time but are ill-equipped to deal with them. Ideally, corporate counsel and business executives should proactively reflect on how a variety of disasters/crises could impact employees, customers, suppliers, and company's value, as well as how it could potentially produce litigation. Advanced planning is the key to survival and overcoming adversity. This session discusses critical elements of a disaster/crisis management plan that every company should have in place.

TRACK C: Efficiency, Value, and Collaboration – New Approaches for Outside Counsel Working with In-House Legal Teams

Moderator: Diane Averell - Porzio Bromberg & Newman (Morristown, NJ)

Shrinking legal budgets, required technology efficiencies, and diminishing headcount and other resources is the new reality that many in-house teams are embracing; however, some teams are creatively collaborating with outside counsel to help further their business objectives. This session discusses the mutually beneficial in-house and outside counsel relationship in which each team shares the risks and rewards; achieves their goals, including exceeding expectations for budgets, project management, and client service; as well as works together to advance important initiatives like diversity and inclusion.

TRACK D: How to Lose at Trial – A Tutorial

Moderator: Josh Lanning - Moore & Van Allen (Charlotte, NC)

Every trial has its own set of moving parts and, inevitably, many lawyers will make their share of mistakes prior to verdict with some far more critical than others. The spectrum ranges from the endearing mishap where an attorney accidentally leaves his phone on during closing arguments to the disastrous blunder where an attorney omits important aspects of his expert disclosure, leading to sustained objections and a painful march toward a potential unfavorable verdict. In this interactive discussion, trial lawyers share tales of serious blunders they have encountered and how these mistakes have affected outcomes at trial. The discussion also covers how these mistakes can possibly be overcome, and even better, how they can be avoided.

TRACK E: Cracking the Code – Risk Mitigation & Litigation Considerations for the Smart Product

Moderator: Cheryl Bush — Bush Seyferth (Troy, MI)

While many products liability cases are complex, those involving highly complex technology including software and imbedded code are becoming more prevalent with the growth of our tech-driven society. Proactive risk mitigation is essential to ward off or defend such products in litigation. This roundtable discussion will uncover the known problematic and litigious areas for advanced technologies including product ID, design, warnings, and post-sale responsibilities.