

# Science, Storytelling, and the Law: Combatting Misinformation Ethically and Effectively

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**“Well, whoever I talk to, they don’t have the right story. So I always ask, ‘What do you think happened?’”<sup>1</sup>**

*-Judy Liebeck*

The legal profession has long required zealous advocacy, constrained by the foundational duties of competence, honesty, and respect for the rule of law. Traditionally, adherence to these obligations has been understood primarily in terms of technical proficiency in substantive law and procedure. However, the pervasive influence of misinformation, within both the courtroom and in broader public discourse, introduced new challenges that affect the credibility of evidence, the reliability of witnesses, and the impartiality of jurors. These developments implicate both an individual’s professional ethics and the legitimacy of the entire justice system. Accordingly, defense counsel can no longer regard “competence” as a purely doctrinal or procedural matter; rather, effective representation now demands recognition of and strategic responses to the

ways in which misinformation is weaponized in litigation and public perception. Only by engaging in this evolving reality, one marked by a rise in misinformation and a decrease in public trust, can attorneys fulfill their ethical duties, best represent their client, and safeguard the integrity of legal outcomes.

## I. Background

The proliferation of misinformation has eroded public trust in conventionally respected authorities, reflecting a deeper crisis of epistemic authority in modern society. Historically, there existed a type of social contract of expertise: non-experts acknowledged the authority of experts and accepted the credibility of their reports. Expert reports earned credibility by being grounded in systematic research and accumulated professional experience. However, at the turn of the century, an unprecedented mistrust of authority crystalized and transformed this social contract of expertise.

The once essential practice of critically engaging with information through verifying sources, evaluating credentials, and discerning underlying biases gave way to the unchecked proliferation of misinformation.<sup>2</sup>

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<sup>1</sup> Amy Goodman, *Do You Know the Full Story Behind the Infamous McDonald’s Coffee Case and How Corporations Used It to Promote Tort Reform?*, Democracy Now! (Jan. 25, 2011),

[https://www.democracynow.org/2011/1/25/do\\_you\\_know\\_the\\_full\\_story](https://www.democracynow.org/2011/1/25/do_you_know_the_full_story).

<sup>2</sup> *Misinformation*, MERRIAM-WEBSTER, <https://www.merriam->

Suddenly the public, ever encouraged to engage responsibly with information, was inundated with false or misleading information. Over the course of the twentieth century, misinformation became increasingly sensationalized and structurally embedded within modern society. Working in tandem, the rise of mass media accelerated the pace at which misinformation took hold in modern society while the advent of digital and social media platforms amplified its presence.<sup>3</sup> Between the pace at which the public is fed misinformation and the nearly ubiquitous presence of it, the public, in an effort to critically engage with information, now more often than not approaches information with skepticism and inherent distrust. Studies illustrate that overall trust in information, particularly (but not exclusively) from national news outlets, has declined substantially.<sup>4</sup> This decline underscores the notion that the majority no longer assume the information they encounter is truthful or reliable.

Though both the justice system and the science community may appear to be immune from the reverberations of misinformation—by virtue of being rooted in fact—the two are particularly affected by confusion and distrust. Science is a discipline hallmarked by research and facts, “the whole strength of science is that people who have ideological bents can do experiments,

transcend their prior beliefs, and try to build a foundation of facts.”<sup>5</sup> Similarly, the legal system is a discipline rooted in the pursuit of justice in truth. Given their roots in the pursuit of truth, the two disciplines are naturally interconnected: lawyers employ expert witness testimony and scientific studies as evidence in their litigation strategy. Though expert witnesses have long been accepted as credible and trustworthy, the erosion of public trust in institutions correlates to an erosion of the perceived credibility of an expert. By undermining trust in a compelling aspect of a lawyer’s case, lawyers *must* account for this phenomenon as they develop their courtroom strategy.

Undeniably, the effects of misinformation reverberate into many aspects of modern society, but they particularly affect disciplines rooted in the pursuit of truth in fact. Several societal factors can be attributed to this phenomenon, including: a public overwhelmed by too much information, growing polarization, disinformation campaigns, a media environment that rewards outrage and outlandishness, and the increasingly public nature of scientific research.<sup>6</sup> At the same time, how individuals interact with mass information, true or not, impacts how individuals, thus, perceive, absorb, and spread information. For example, there are those individuals who intend to find the truth,

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webster.com/dictionary/misinformation (last visited October 28, 2025).

<sup>3</sup> Joanna M. Burkhardt, *Combating Fake News in the Digital Age* 1–4 (Library Tech. Reps., Nov./Dec. 2017).

<sup>4</sup> Kirsten Eddy & Elisa Shearer, How Americans’ Trust in Information from News Organizations and Social Media Sites Has Changed Over Time, PEW RESEARCH CTR. (Oct. 29, 2025),

<https://www.pewresearch.org/short-reads/2025/10/29/how-americans-trust-in-information-from-news-organizations-and-social-media-sites-has-changed-over-time/>.

<sup>5</sup> Patrick Boyle, *Why Do So Many Americans Distrust Science?*, AAMC (May 4, 2022),

<https://www.aamc.org/news/why-do-so-many-americans-distrust-science>.

<sup>6</sup> *Id.*

but they get confused or outraged by misinformation they stumble into. There are also those who find comfort in clinging to information that confirms their opinion or belief, whether accurate or not.<sup>7</sup> Altogether, the result is a public that is simultaneously skeptical of presented information yet highly impressionable toward content that affirms existing beliefs or attitudes.

“Confirmation bias” is the human propensity to seek out, favor, and remember agreeable information while disregarding viewpoints that challenge beliefs.<sup>8</sup> This propensity is not inherently problematic, but it can be dangerous because of the sheer volume and varying accuracy of information available. The unique and modern challenge is that in pursuit of objective guidance, an individual is “just as likely to find a made-up ‘fact,’ a conspiracy theory, and/or a group of others eager to affirm beliefs and assumptions.”<sup>9</sup> Once that information is consumed, absorbed, and engrained, humans are naturally resistant to changing beliefs, even when they are confronted with facts.<sup>10</sup> Compounding on this natural human inclination, external forces deepen and reinforce preexisting convictions, while closely-held beliefs grow more resistant to change.

Digital and social media platforms have dual competing purposes: to

disseminate information while also commodifying it. The public developed unprecedented access to information, and sensationalized news stories generated engagement, making it a lucrative venture. The media’s driving force quickly devolved from “presenting facts” to “selling stories.” Knowing that humans are drawn to narratives that confirm biases, evoke strong emotions, or create certainty in complex situations, the media leverages these human characteristics to disseminate their information and drive their business.<sup>11</sup> Seemingly sudden, seeds of responsible skepticism were drenched with misinformation and bloomed into a deep mistrust of authority.

The consequences of sensationalized stories paired with unprecedented accessibility destabilize the very foundations of informed citizenship by eroding trust, polarizing communities, undermining democratic deliberation, weakening standards of truth, and producing real-world harms. These permeate broader social and institutional domains, shaping how individuals interpret and respond to authority in all forms, including questioning the legitimacy of judicial proceedings, courtroom and legal personnel, including judges, and evidence. With striking effect, strategic storytelling and narratives can craft public understanding before a single fact is

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<sup>7</sup> *Id.*

<sup>8</sup> Masaki Suzuki & Yusuke Yamamoto, *Characterizing the Influence of Confirmation Bias on Web Search Behavior*, 12 *Frontiers in Psychol.* 771948 (2021).

<sup>9</sup> David Metz, *Defending Against Conspiracies Through Storytelling*, *IMS LEGAL STRATEGIES* (Mar. 21, 2024), <https://www.imslegal.com/articles/defending-against-conspiracies-through-storytelling>.

<sup>10</sup> Zara Abrams, *Controlling the Spread of Misinformation*, *AM. PSYCH. ASS’N*, (Mar. 1, 2021), <https://www.apa.org/monitor/2021/03/controlling-misinformation>

<sup>11</sup> Haoning Xue, Jingwen Zhang & Xinzhi Zhang, *Facts or Feelings? Leveraging Emotionality as a Fact-Checking Strategy on Social Media in the United States*, 11 *Social Media + Society* 1 (2025), <https://doi.org/10.1177/20563051251318172>.

adjudicated in the legal system. The plaintiff's bar recognized this shift and recalibrated its advocacy strategies, aptly employing approaches both within the courtroom and in the broader public sphere so to advance the client's position well before ever picking a jury.

## II. Manipulative Advocacy Practices

### A. Extrajudicial Influence

One of the most enduring archetypes of the legal profession is that of the lawyer as a champion of justice. Attorneys are not simply private advocates, but agents of societal transformation, entrusted with safeguarding fundamental rights and advancing rule of law. This archetype is hallmarked by technical precision and articulate presentation, whether in the courtroom or negotiating among parties. And the mission is noble: attorneys zealously representing and advocating for their client's interests. As the plaintiff's bar has realized, this zealous representation and advocacy extend beyond the traditional bounds of the courtroom walls, judge, and jury.

#### a. Third-Party Litigation Funding

Third-party litigation funding refers to the agreement between a litigant and a non-party entity where the non-party agrees to provide financial resources in exchange for a

share of any proceeds from a successful outcome, without assuming direct responsibility for the case.<sup>12</sup> It has become a cornerstone of the evolution in strategic advocacy. The plaintiff's bar cooperates with third parties to fund litigation, seek additional plaintiffs, advance social causes, and otherwise advocate with seemingly limitless reach.

Third-party litigation funding ("TPLF") is valued at approximately \$15 billion globally, and over three billion USD domestically.<sup>13</sup> It is projected to increase to \$25-30 billion by the end of the decade.<sup>14</sup> These types of financiers have become a critical aspect of plaintiff's bar's litigation strategy.

Aside from providing income to the plaintiff's counsel, the funds can be used to influence legal strategy before stepping foot into a courtroom: advertising to advance a social cause, simultaneously shaping the court of public opinion, and seeking additional plaintiffs. The result is troubling: in addition to prolonging litigation and increasing affiliated costs, financiers have a vested interest in the outcome. Because they are pouring money into an outcome, they can play a role in litigation and settlement strategy to advance their interests.

Financiers are drawn to this type of investment because it is largely uncorrelated with macroeconomic risks. The financiers are not parties to the case, so they assume no direct responsibility. Nor do they owe any

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<sup>12</sup> U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends*, GAO-23-105210 (Dec. 20, 2022), <https://www.gao.gov/products/gao-23-105210>.

<sup>13</sup> Brett F. Clements & Elyse A. Shimada, *Dark Money: Why Courts Should Enforce Disclosure of*

*Third-Party Litigation Funding*, WLF LEGAL OPINION LETTER (May 17, 2024), <https://www.wlf.org/2024/05/17/publishing/dark-money-why-courts-should-enforce-disclosure-of-third-party-litigation-funding/>.

<sup>14</sup> *Id.*

type of fiduciary duty to the plaintiffs. Some TPLF contracts provide that the funder have significant influence over the matter, including decisions that should be made by the plaintiff. Meanwhile, they are not bound to any ethical rules mandating that they pursue justice or make a plaintiff whole. They are chiefly motivated by a financial return on their investment. In pursuing this financial goal, may very well be at the expense of plaintiffs themselves. TPLF may choose to prolong a case, add additional plaintiffs, or settle a case, and their agreement in providing funding may hold that they bear that decision-making power. The plaintiff is left at the behest of the financier's interest. The hope is that the financiers' financial interests align with the plaintiff's best interests, but they may not be.

While lawyers have the capability of promoting their own professional interests, it must not be at the expense of their clients.<sup>15</sup> The plaintiff may have consented to a funder, but there is no guarantee that the plaintiff understands the full implications of a funder. Without disclosing the funding arrangement, either by choice or by confidentiality clauses, courts, juries, and opposing parties can be deprived of critical information and the funder's role and potential influence in the matter remain shrouded. These outside influences taint the traditional decorum of courtroom strategy and behavior.

There are clear courtroom implications of TPLF, but there are also clear ethical concerns in attorney conduct related

to third-party litigation funding and media campaigns. These ethical concerns relate to: conflicts of interest, impairment of an attorney's ability to represent a client, confidentiality, and impartiality and decorum of the tribunal. However, the narrative propagated by TPLF supporters does not acknowledge these concerns. Instead, they claim that TPLF creates an even legal playing field between parties, that plaintiffs can shift the cost of a loss to financiers, and that the accounting treatment of TPLF permits corporate plaintiffs to remove litigation from their documents.<sup>16</sup> This narrative is proving to be effective at refuting the necessity of disclosing TPLF agreements, supported in tandem by media campaigns.

## **b. Reputational and Media Campaigns**

Complementing these financial mechanisms are strategic media efforts aimed at conditioning public perception. Such efforts manifest through the lobbying activities of trial bars, like the American Association for Justice ("AAJ"), and through organized media initiatives. Collectively, these undertakings reflect an attempt by plaintiff's counsel to strategically shape public perception, influence potential jurors, and create pressure on defendants and policymakers.

AAJ proudly claims that it "promotes justice and fairness for injured persons, safeguards victims' rights, particularly the

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<sup>15</sup> Model Rules of Prof'l Conduct r. 1.7(b) (Am. Bar Ass'n 2021).

<sup>16</sup> Jim Lynch, *Financing Justice: The Rise and Risks of TPLF*, CAS (July 16, 2025),

<https://ar.casact.org/financing-justice-the-rise-and-risks-of-tplf/>.

right to trial by jury, and strengthens the civil justice system through education and disclosure of information critical to public health and safety.”<sup>17</sup> It does so by tangentially benefitting its own interests. For example, the current Federal Rules of Civil Procedure (“Federal Rules,” “FRCP”) do not contain an explicit provision requiring disclosure of TPLF agreements. Over the years, legal reform advocacy groups have and continue to call on the Federal Advisory Committee on Civil Rules (“Advisory Committee”) to amend the Federal Rules and include a uniform and mandatory TPLF disclosure. The three reasons most recently asserted in support are as follows: “(1) ‘mounting evidence’ of funder control over litigation and settlement decisions; (2) growing use of TPLF arrangements as part of ‘all types of civil litigation’ and increased funding amounts; and (3) the need to standardize and simplify TPLF disclosure approaches as part of a single disclosure rule.”<sup>18</sup> These three reasons are in addition to ethical concerns.

Conversely, AAJ denounced these concerns as unnecessary, that state ethics commissions were the more appropriate body to consider TPLF ethical concerns, and that

there was no evidence that third-party funders were “[dictating] the litigation strategy or decisions,”<sup>19</sup> or undermining attorney-client privilege protections.<sup>20</sup> AAJ claims that efforts to amend are “just an attempt to unbalance the playing field.”<sup>21</sup>

Meanwhile, Swiss Re further estimates that up to 57 percent of legal costs and compensation in TPLF cases goes to lawyers, funders, and others compared with an average of 45 percent in typical tort liability cases.<sup>22</sup> As of October 2026, the Advisory Committee has not issued a recommendation to amend the Federal Rules of Civil Procedure to add a mandatory disclosure rule.<sup>23</sup> Some state jurisdictions have implemented a disclosure rule, though they constitute the minority.<sup>24</sup>

Additionally, AAJ engages with governmental branches to expand liability, encourage lawsuits, and support any narrative carried on by plaintiff’s counsel. In 2015, facing the guardrails of traditional court-sanctioned practices, like respecting arbitration agreements and reasonably limiting liability and damages, AAJ successfully lobbied federal agencies. These successes include: preventing any

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<sup>17</sup> About Us, AMERICAN ASSOCIATION FOR JUSTICE, <https://www.justice.org/about-us> (last visited Dec. 5, 2025).

<sup>18</sup> Mark Popolizio, J.D., *Several Industry Groups Renew Calls for a Mandatory TPLF Disclosure Rule as Part of the Federal Civil Rules of Procedure*, VERISK (June 9, 2023), <https://www.verisk.com/blog/several-industry-groups-renew-calls-for-a-mandatory-tplf-disclosure-rule-as-part-of-the-federal-civil-rules-of-procedure/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Elizabeth Y. Healy, *Third-Party Litigation Funding on the Rise*, THE DOCTORS COMPANY (First Quarter 2023), [https://www.thedoctors.com/the-doctors-](https://www.thedoctors.com/the-doctors-advocate/first-quarter-2023/third-party-litigation-funding-on-the-rise/)

[advocate/first-quarter-2023/third-party-litigation-funding-on-the-rise/](https://www.thedoctors.com/the-doctors-advocate/first-quarter-2023/third-party-litigation-funding-on-the-rise/).

<sup>23</sup> Mark Popolizio, J.D., *Several Industry Groups Renew Calls for a Mandatory TPLF Disclosure Rule as Part of the Federal Civil Rules of Procedure*, VERISK (June 9, 2023), <https://www.verisk.com/blog/several-industry-groups-renew-calls-for-a-mandatory-tplf-disclosure-rule-as-part-of-the-federal-civil-rules-of-procedure/>.

<sup>24</sup> Amy Buttell & Michael C. Stinson, *Calls for Regulating Third-Party Litigation Funding Increase*, MPL ASS’N (inside medical liability online, Winter 2025), [https://www.mplassociation.org/Web/Publications/Inside\\_Medical\\_Liability/Issues/2025/Winter/Calls\\_for\\_Regulating\\_Third-Party\\_Litigation.aspx](https://www.mplassociation.org/Web/Publications/Inside_Medical_Liability/Issues/2025/Winter/Calls_for_Regulating_Third-Party_Litigation.aspx).

substantive medical liability reform out of a comprehensive healthcare bill, and seeking an Executive Memorandum from the President to agency heads, warning them to avoid new regulations that could preempt lawsuits by establishing definitive federal standards for health and safety, requiring agencies to consider reversing rules that had such effect.<sup>25</sup>

Although both the plaintiff's bar and defense counsel groups advocate for their interests, individual defense counsel must have a thorough understanding of the reach and influence of the plaintiff's bar in their jurisdiction as they develop a litigation strategy.

### **B. Evidentiary Distortion in Advocacy**

Press engagement formerly was limited to press conferences after strategic litigation milestones. This practice evolved into sophisticated, multi-channel communication to control narrative, visibility, and longevity. Now, litigation strategy encompasses digital and social media as tools. And for good reason: "the hand that rules the press, the radio, the screen,

and the far-spread magazine, rules the country."<sup>26</sup>

Social media platforms have long since evolved from pure social content to providing around-the-clock access to news; counsel or affiliated advocacy groups utilize platforms like X, TikTok, Instagram, and Facebook to humanize plaintiffs' experiences, amplify allegations, and cultivate public empathy.<sup>27</sup> This primes potential jurors: if chosen, they instinctually make a connection between what they saw online, how they felt about it, and bring that bias into the courtroom. Put simply, plaintiff's counsel utilizes the media to "attempt to influence potential members of a jury."<sup>28</sup>

Media campaigns are effective because the public increasingly relies on emotionally charged or simplified narratives, creating vulnerabilities to mischaracterizations that the plaintiff's bar recognizes and leverages. This integration of media strategy into litigation strategy blurs the boundary between public persuasion and courtroom persuasion. With information available at unprecedented rates, the public is not only susceptible to misinformation outside of the courtroom, but in effect,

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<sup>25</sup> Victor E. Schwartz & Cary Silverman, *The Trial Lawyer Underground: Covertly Lobbying the Executive Branch* (U.S. Chamber Inst. for Legal Reform & Amer. Tort Reform Found'n, Oct. 2015), <https://instituteforlegalreform.com/wp-content/uploads/2020/10/TrialLawyerUndergroundWeb.pdf>.

<sup>26</sup> Gary A. Hengstler, *The Media's Role in Changing the Face of U.S. Courts*, USINFO, <https://usinfo.org/enus/media/overview/hengstler.html>.

<sup>27</sup> Courtroom Sciences, *Strategies for Managing Public Opinion in Litigation*, COURTROOM SCIENCES (Nov. 6, 2024), <https://www.courtroomsciences.com/litigation-consulting-1/strategies-for-managing-public-opinion-in-litigation-778/>.

<sup>28</sup> J. Philip Davidson et al., *Antithetical Antics: New and Unusual Tactics From the Plaintiff's Bar* (Johnson & Bell, Ltd., May 2018), [https://johnsonandbell.com/wp-content/uploads/2018/05/Davidson\\_-\\_Antithetical\\_Antics.pdf](https://johnsonandbell.com/wp-content/uploads/2018/05/Davidson_-_Antithetical_Antics.pdf).

primed for evidentiary distortion within the courtroom.

Because misinformation thrives in the contemporary short-form and rapid media system, strategic narratives can effectively rewrite public understanding prior to trial and cast doubt upon evidence presented as fact during trial. In this environment, fact can become malleable and allows misinformation and disinformation to converge. Though closely connected, intent differentiates the two: misinformation is getting the facts wrong whereas disinformation is deliberately intended to mislead.<sup>29</sup> Individuals or organizations who “weaponize uncertainty and [try] to create distrust”<sup>30</sup> are “disinformation strategists.”<sup>31</sup>

Disinformation strategists manufacture doubt akin to plaintiff’s counsel when plaintiff’s counsel manipulates proof to create doubt and confuse the jury. Although all attorneys are required to submit evidence on a good-faith basis,<sup>32</sup> this does not prevent counsel from presenting questionable information to deliberately manufacture doubt.

### **a. Introducing Expert Testimony**

All attorneys rely on published scientific evidence and expert testimony to help prove their cases. Attorneys can submit

studies, witnesses, peer review, and more as evidence; however, there are confusing standards over what expert testimony is permitted. Courts must balance evidence limitations to avoid unduly restricting novel scientific results while simultaneously preventing the admission of junk science (an argument or finding presented as scientifically-verified but is false or misleading).<sup>33</sup> Aside from prohibiting an expert witness to testify if the testimony is simply a subjective belief or unsupported speculation, there are few clear rules over what expert witness testimony may be admitted as evidence and heard by a jury.

Rule 702 of Federal Rules of Evidence (“FRE”) currently provides that an expert witness is:

“...qualified as an expert by knowledge, skill, experience, training, or education [and] may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;

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<sup>29</sup> Misinformation and Disinformation, AM. PSYCH. ASS’N, <https://www.apa.org/topics/journalism-facts/misinformation-disinformation> (last visited Dec. 9, 2025).

<sup>30</sup> Patrick Boyle, *Why Do So Many Americans Distrust Science?*, AAMC (May 4, 2022), <https://www.aamc.org/news/why-do-so-many-americans-distrust-science>.

<sup>31</sup> *Id.*

<sup>32</sup> Dick Thornburgh, *Junk Science – The Lawyer’s Ethical Responsibilities*, 25 Fordham Urb. L.J. 449, 459 (1998).

<sup>33</sup> Terran Hill, *Close Enough for Government Work?: The Use of “Junk Science” and Its Effect on Modern Policing* 1–16 (Cornell L. Sch. Student Note, Sept. 2023), <https://community.lawschool.cornell.edu/wp-content/uploads/2023/09/Hill-note-final.pdf>.

(c) the testimony is the product of reliable principles and methods; and  
(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.”<sup>34</sup>

Prior to the FRE’s enactment of Rule 702, the Supreme Court held a “general acceptance” standard, which required that expert testimony that is based on novel scientific evidence to have gained general acceptance by a large scientific group in order to be permitted.<sup>35</sup> This standard, the “Frye Rule,” was considered to a strict standard and prohibitive of including novel scientific discoveries. Subsequently, the FRE Rule 702 superseded the Frye Rule (though some state courts follow the Frye standard).<sup>36</sup> In contrast to the Frye Rule, Rule 702 was seen as too liberal, providing an avenue for nearly any type of expert to testify if the methodology was sound and relevant, without clarifying what sound principles are.<sup>37</sup> Since Rule 702’s passage, courts have struggled with measuring the reliability of relevant evidence from experts.

When FRE 702 was first enacted, it simply required that an expert witness be “qualified as an expert by knowledge, skill, experience, training, or education” and that the testimony “assist the trier of fact to

understand the evidence or to determine a fact in issue.”<sup>38</sup> Nearly twenty years later, FRE 702 was amended to codify the decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (the “Daubert Rule”) and this is the rule as used today. The Daubert Rule emphasizes the reliability of the methodology and its application, additionally providing four factors for judges to consider in determining the reliability of evidence:

- “1) whether the theory or technique can be, or has been, tested;
- 2) whether it has been subjected to peer review and publication;
- 3) the known or potential rate of error; and
- 4) the degree to which the theory or technique is widely accepted in the scientific community.”<sup>39</sup>

Although this criteria intends to prevent junk science from being heard as evidence, the Daubert Rule is not so restrictive as to prevent any from being admitted. The Supreme Court in *Daubert* even recognized that “shaky” scientific evidence could still be admissible.<sup>40</sup> If the methodology is relatively plausible, it may be admitted. However, “the burden is on the proponent of the testimony to establish its admissibility by a preponderance of proof.”<sup>41</sup>

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<sup>34</sup> Fed. R. Evid. 702.

<sup>35</sup> Frye Standard, Wex, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/frye\\_standard](https://www.law.cornell.edu/wex/frye_standard).

<sup>36</sup> Christine Funk, J.D., *Daubert vs. Frye: A State-by-State Comparison*, EXPERT INST. (July 10, 2024), <https://www.expertinstitute.com/resources/insights/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards/>.

<sup>37</sup> Anjelica Cappellino, J.D., *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert*

*Testimony*, EXPERT INST. (Mar. 4, 2025), <https://www.expertinstitute.com/resources/insights/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/>.

<sup>38</sup> Federal Rule of Evidence 702: Judicial Conference Amends Rule 702, 138 Harv. L. Rev. 899 (2025).

<sup>39</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993).

<sup>40</sup> *Id.* at 596.

<sup>41</sup> *Id.*

The Daubert Rule provides that the basis of an opinion may be evaluated, not necessarily the opinion itself, though the gap between the data and an opinion preferred may be considered.<sup>42</sup> This rationale espouses the notion that the judges are gatekeepers of information, and the jury is the trier of fact. Despite judicial gatekeeping efforts, the jury is still able to hear unsubstantiated or unreliable evidence and is still tasked with deciphering and determining right and wrong, scientific truth, and scientific falsity.

This legal standard analysis illustrates the unsettled nature of determining reliability, relevance, and reliability of expert witness testimony, which is often used by lawyers in their litigation strategy. To bolster their client's case, plaintiff's counsel can call expert witnesses whose expertise is outweighed by their willingness to testify—either for a price or to spread an unreliable belief that is cast as fact. When expert witnesses are sought and paid for their testimony, it raises legitimate concern around the validity of such testimony. Expert witnesses are sworn under oath to tell the truth and to speak on an issue with expertise, but when their testimony is sought to advance a particular point or case, is their testimony unbiased or is it to advance a pre-determined result?

Further complicating the courtroom is that when the threshold for admitting expert testimony is low, and each counsel can call

their own expert witnesses to bolster their clients' cases, conflicting information, both presented as scientific fact, may be introduced. The determination of the weight or fact of expert testimony, conflicting or not, lies with the jury.

Nearly 130 years ago, Judge Learned Hand questioned the capability of a jury consisting of laypeople to interpret and determine conflicting expert testimony: “the whole object of the expert is to tell the jury not facts...but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience admittedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is not necessary at all.”<sup>43</sup>

Judge Hand posed this question prior to the onset of systematic psychological studies on juries, including evaluations on jurors' ability to deliver justice fairly and predictably.<sup>44</sup> As discussed earlier, individuals tend to seek information that confirms what they already know or are comfortable with. Scientific studies on juror behavior demonstrate how this phenomenon impacts juror deliberation. In one 2024 study, findings included that jurors tend to seek out and remember information that is consistent with their verdict preference and scrutinize and reject information that is inconsistent with that preference (“ideological congruency”).<sup>45</sup> In another 2020 study, it

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<sup>42</sup> Dick Thornburgh, *Junk Science – The Lawyer's Ethical Responsibilities*, 25 *Fordham Urb. L.J.* 449, 459 (1998).

<sup>43</sup> Billings Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 *Harv. L. Rev.* 40, 53–54 (1901).

<sup>44</sup> Brian B. Dunford & Robert J. MacCoun, *Jury Decision-Making: An Empirical Exploration*, 87 *J. Crim. L. & Criminology* 463 (1997).

<sup>45</sup> H.J. Cullen et al., *The Impact of Misinformation Presented During Jury Deliberation on Juror Memory and Decision-Making*, 15 *Front. Psychol.* 1232228, 17 (2024).

found that jurors exposed to misinformation misremembered it as appearing during the trial, and those who misattributed the most misinformation were most likely to reach a guilty verdict.<sup>46</sup> Even though ordinary citizens are prone to error and emotional influence, the jury system still requires that they hear evidence, reconcile conflicting facts, and apply legal rules to reach a verdict.<sup>47</sup>

Recognizing the vulnerabilities of the legal standard of expert witness testimony and juror predispositions, this area is ripe for evidentiary distortion. While legal standards attempt to limit the opportunity for junk science to be heard as evidence, they do not wholly deny it from the courtroom.

### **b. Discrediting the Expert**

While presenting their own witnesses and evidence is part of the courtroom battle, Plaintiff's counsel also employs a variety of tactics to discredit the defendant's witnesses and evidence. It is insufficient to simply build one's case without addressing all angles, including what the opposing counsel is presenting. Considering that evidence is admitted, then the intuitive next best strategy is to discredit it and/or make your evidence appear stronger. To that effect, the plaintiff's counsel recognizes the shift in human consumption of information, including the deep skepticism of authority, and leans into it

when discrediting defense evidence and witnesses.

Recall that responsible consumption of information requires critical engagement: verifying sources, evaluating credentials, and discerning bias. Plaintiff's counsel, however, capitalizes on the broader misinformation phenomenon that has reshaped how individuals perceive authority. By exploiting the public's tendency toward skepticism of expertise, counsel often seeks to amplify confirmation bias where it exists, or, alternatively, to manufacture ambiguity and cast unreasonable doubt where it does not.<sup>48</sup>

One prominent example arises in cross-examination, where plaintiff's counsel often seeks not merely to test a witness but to strategically undermine credibility. The plaintiff's counsel's objective is to extract favorable admissions and effectively cherry-pick testimony to substantiate the narrative. A common maneuver is the so-called "do your own research" tactic, which positions the witness as uninformed or contradictory, thereby creating the impression of unreliability even in the absence of substantive inconsistency.

Similarly, plaintiff's counsel can also constrain the witness's ability to provide fuller context, creating an illusion of truth. When a witness attempts to clarify a perceived inconsistency, plaintiff's attorneys may be quick to move on or interrupt to maintain the narrative they have created. This narrative is not necessarily the truth. Like the

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<sup>46</sup> Craig Thorley et al., *Misinformation Encountered During a Simulated Jury Deliberation Can Distort Jurors' Memory of a Trial and Bias Their Verdicts*, 25 *Legal & Criminological Psychol.* 150 (2020).

<sup>47</sup> Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 *Current Directions in Psychol. Sci.* 63 (2011).

<sup>48</sup> Although such tactics are not unique to the plaintiff's bar, this paper examines the challenges they pose for defense counsel.

way the media publishes sensationalized stories to the public, plaintiff's counsel only permits a witness to speak insofar as the pre-determined plaintiff's objective is satisfied. Rather than presenting information in whole for which the jury to deliberate, the full context of the matter is clouded by the plaintiff's precarious guardrails.

Another dagger aimed at the witness, and not the veracity of the testimony, is plaintiff's counsel engaging in ad hominem attacks: resorting to personal attacks to discredit the person testifying. Borderline irrelevant questioning aims to create an illusion of untrustworthiness and distract from the substance of the testimony. This tactic further manipulates a jury, which has already been tainted by extrajudicial influences before stepping into the courtroom and now may be left feeling confused by what the truth is.

Altogether, the plaintiff's bar capitalizes on the effects of unchecked proliferation of misinformation. The once essential practice of critically engaging with information is distorted to manufacture uncertainty or doubt. The courtroom tactics utilized mirror how the public now engages with information and limit how much truth a jury is able to hear; in deciding what a jury can hear, the jury can be left feeling confused, misled, or as if their preconceived opinion or attitude was validated. In considering a courtroom strategy, it is critical for defense counsel to recognize that reliance on facts to rehabilitate witnesses or re-earn evidentiary

credibility may not be successful in convincing a jury.

### **III. Defense Counsel Strategies for Effective Storytelling**

Storytelling is a foundational element of effective litigation. The courtroom is an arena for facts to be presented; litigation is about persuasion, and persuasion transcends courtroom doors. Because law demands logic and proof, and jurors are influenced by emotion, intuition, and moral judgment, it is nearly impossible to unravel storytelling from litigation. Through storytelling, lawyers have the unique opportunity to connect with the jury; the power of storytelling lies in its ability to engage the jury's emotions.

It is critical, and required by our professional ethics rules, for lawyers to balance factual integrity and emotional appeal. Lawyers can increase their chances of connecting with a jury, effectively present their case, and achieve a favorable outcome for their clients by understanding the audience and tailoring the case presentation to emotional and memory triggers.<sup>49</sup> This strategy is not novel, but the angle at which lawyers approach connecting with the jury must account for the changed ways jurors engage with information and authority and the plaintiff's adapted strategies.

Earlier discussion illustrated how the plaintiff's bar engages extrajudicial strategies, like lobbying and media campaigns, to prime potential jurors ahead of trial; throughout trial, litigation strategies

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<sup>49</sup> Kenneth J. Lopez, J.D., *Crafting Compelling Legal Arguments Using Storytelling Techniques — Paint a Picture for Your Jury*, PERSUADIUS (Aug. 8, 2024),

<https://persuadius.com/blog/crafting-compelling-legal-arguments-through-storytelling/>.

include evidentiary distortion that are technically within the guidelines of FRE and MRPC. This section is intended to discuss strategies for defense counsel to consider when creating their litigation strategy that accounts for modern-day challenges while adhering to ethical duties and statutory requirements.

### **A. Impartiality of Jurors**

It is reckless for defense counsel to underestimate the importance of extrajudicial influence on potential jurors. Defense counsel may craft narratives endlessly, but such efforts are ineffective without accounting for the inherent biases and preconceptions jurors bring into the courtroom. As such, it is imperative to anticipate the extrajudicial impacts on litigation, including TPLF and media campaigns, and craft a proactive defense.

#### **a. TPLF**

Because there is no uniform disclosure rule on litigation funding, it is necessary to ascertain whether the jurisdiction defense counsel is in permits or requires disclosure. If disclosure is required, is it automatic, or does defense counsel need to make a motion? If disclosure is not required and is not disclosed, there are a variety of strategies to consider to: uncover and discredit outside influence, illuminate inconsistencies in the plaintiff's presentation of its case, and dispel any predispositions jurors may have.

Effective litigation planning requires setting realistic trial expectations and evaluating the influence of TPLF. If funding is suspected, defense counsel may anticipate: prolonged litigation, a higher settlement threshold, and/or a need for creative settlement strategies (*e.g.*, structuring settlements that require funder approval, or bifurcating damages and liability phases to manage exposure).

If litigation occurs in jurisdictions where disclosure is required or not clearly prohibited, defense counsel should consider filing a motion to compel discovery of the funding agreement and related documents. The relevance of such agreement and documents relate to impeachment, bias, and identifying the real party in interest.

In discovering a TPLF agreement, defense counsel can: show that the real interested party is the funder, not the plaintiff, or challenge the plaintiff's credibility using the funder's control or influence over litigation and illustrate to the jury potential bias of a witness. These strategies certainly can advance a defense counsel's argument, but as importantly, it is the duty of an attorney to raise potential conflicts of interest. The Model Rules of Professional Conduct ("Rules") prohibit fee-splitting arrangements between lawyers and non-lawyers,<sup>50</sup> and the Rules further require reporting conduct, substantiated by actual knowledge and not suspicion, that violates the Rules.<sup>51</sup> Thus, if plaintiff's counsel is compelled to ameliorate ethical concerns and disclose the nature of the agreement, they will reveal key information,

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<sup>50</sup> Model Rules of Prof'l Conduct r. 5.4 (Am. Bar Ass'n 2021).

<sup>51</sup> Model Rules of Prof'l Conduct r. 8.3 (Am. Bar Ass'n 2021).

which the defense counsel can use in crafting their litigation strategy.

If TPLF is only suspected and not confirmed during discovery, defense counsel can still call into question the motives of the plaintiff, framing the plaintiff's case as strategically manufactured rather than justly motivated. However, defense counsel must be mindful of the impression on the jury: will it appear as too cold or disconnected from the harm of the plaintiff? To avoid an antagonistic effect on the jury, tethering questioning of motivations to facts can be persuasive.

Aside from directly challenging the credibility of the plaintiff, defense counsel must anticipate the narrative impact of TPLF on the jury. A common narrative constructed by plaintiff's counsel is that the plaintiff is a lone individual who was harmed by and going against a foreboding corporation. If TPLF is suspected or confirmed, defense counsel can shatter this illusion by showing financial backing of a large institution, discrediting the narrative, the plaintiff, the opposing counsel, and perhaps the entire controversy.

## **b. Media Campaigns**

Similar to the approach to TPLF, it is important for defense counsel to understand any launched media campaigns prior to wholly developing litigation strategies. As discussed, media engagement can shape perceptions, influence potential jurors, and

pressure opposing parties. This is especially important when the public confidence in institutions is decreasing<sup>52</sup> while human nature is seeking confirmation of biases. Media campaigns are effective in framing the controversy, establishing who the victim is, who the wrongdoer is, and what moral stakes are involved; public framing is powerful in creating a tone for how the case is perceived and can prime jurors' expectations about justice, credibility, and fairness.

As it relates to misinformation, controlling misinformation is often as critical as legal success. Due to the unparalleled accessibility and spread of information, it is critical to develop a media strategy that includes: proactively correcting inaccuracies before they are accepted and remembered as fact, protecting a client's reputation, and preserving the integrity of the judicial process.

The integration of media into litigation strategy must align with the Rules. Rule 3.6(a) holds that lawyers must balance the need to protect their client's interests with the duty not to prejudice judicial proceedings.<sup>53</sup> Because there are organizations in the business of creating and spreading stories, lawyers must control their own conduct strictly and monitor the impact that the external media has on the case. Strategic considerations in a media strategy should include: if crafting communications, focus on informing, rather than inflaming; ensure that any public statements remain truthful and are not misleading; and maintain

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<sup>52</sup> Claudia Deane, Americans' Deepening Mistrust of Institutions, PEW RESEARCH CENTER (Oct. 17, 2024), <https://www.pew.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions>.

<sup>53</sup> Model Rules of Prof'l Conduct r. 3.6(a) (Am. Bar Ass'n 2021).

respect for the judicial process, avoiding excessive extrajudicial influence that undermines justice.

Altogether, defense attorneys face challenges in confronting the extrajudicial influences on litigation. The best approach defense counsel can take is to acknowledge this reality, evaluate realistic impressions jurors may already have, what story is being pushed, and strategize accordingly. In strategizing, there is a delicate balance in confronting these influences, the impact on jurors, and upholding ethical duties with connecting to a jury who is predisposed to question authority and accept information that confirms biases.

Litigation strategy is developed well before trial begins and is adapted as necessary. Once trial begins, defense counsel must anticipate the evidentiary distortion presented by the plaintiff's counsel while taking into consideration the impact on jurors. In a different era, simply refuting distortions and facts with a complementary narrative may have been sufficient in establishing a defense. However, recent history and studies on juror behavior illustrates that jurors are susceptible to pre-decisional distortion, memory distortion, and that jurors may incorrectly attribute misleading information as appearing in the trial because the misleading details seemingly fit with the narrative presented during the trial ("source monitoring framework").<sup>54</sup>

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<sup>54</sup> Cullen HJ, Dilevski N, Nitschke FT, Ribeiro G, Brind S & Woolley N, *The Impact of Misinformation Presented During Jury Deliberation on Juror Memory and Decision-Making*, 15 *Front. Psychol.* 1232228, 2 (2024).

This jury behavior underscores the importance of developing a defense that refutes inaccuracies or misinformation by the plaintiff while being well-received by jurors. Simply refuting evidentiary distortion is an incomplete defense; as aforementioned, storytelling is the foundation to presenting a case. To combat misinformation within a trial, the defense must: determine what story needs to be told, craft a complete story, secure a fair jury, remind jurors what the case is and is not about, and help the jurors "feel good" about a verdict in the defense's favor.<sup>55</sup>

The importance of storytelling connects to human nature; humans think in stories, so when an incomplete narrative is presented, jurors will fill the gaps with their own beliefs.<sup>56</sup> It is impossible to expect jurors to refrain from introducing biases and assumptions. Therefore, it is paramount that defense attorneys anticipate what predispositions jurors may have and preempt them by crafting a narrative that acknowledges any predisposition and adapting as may become necessary.

## **B. Credibility and Reliability of Evidence**

As it pertains to concrete trial strategies, each should be used to bolster facts, clarify confusion, and discredit the plaintiff's evidence. While a Frye motion may be an intuitive option since it is a strict standard, counsel must determine which

<sup>55</sup> David Metz, *Defending Against Courtroom Conspiracies Through Storytelling*, NAT'L L. REV. (Apr. 1, 2024),

<https://www.natlawreview.com/article/defending-against-courtroom-conspiracies-through-storytelling>.

<sup>56</sup> *Id.*

standard is employed in their jurisdiction. Because FRE Rule 702 is the standard in federal courts, this section will evaluate strategies under FRE Rule 702 in confronting unreliable or misinformed evidence.

If defense counsel identifies potentially prejudicial or irrelevant evidence, which can include expert testimony that fails to meet the FRE Rule 702 standards, the defense may file a motion in limine (“Daubert Motion”). This motion is filed before or during trial, and if granted, a separate hearing will be held.

In some circumstances, it may be advantageous to file a pretrial motion, whereas in others, it may be detrimental. There are key considerations in deciding whether to incorporate a Daubert Motion as part of the defense’s pretrial strategy. Benefits include: a trial judge is more likely to spend the time necessary to learn the science introduced than if the challenge is made during the trial; and, the rules of evidence are not applicable in this type of hearing, therefore defense counsel has considerable freedom to introduce a variety of probative evidence demonstrating the unreliability of the *Daubert* expert’s testimony and defense counsel is able to cross-examine the expert with evidence that may not have been available at the expert’s deposition.<sup>57</sup>

However, there are key reasons to forgo pretrial challenges as well. These include: if the motion fails, the plaintiff will have time to correct the now-revealed deficiencies in the expert’s testimony before

trial; and, the plaintiff has the opportunity to develop a record in support of the trial court’s denial of the *Daubert* challenge, and this may be difficult to reverse during the trial and/or on appeal as an abuse of discretion.<sup>58</sup>

In determining whether to file a pretrial Daubert Motion, due consideration should be given to the history of the judge (is he/she likely to deny a Daubert Motion?) and the expert’s deposition. Recall that FRE Rule 702 attempts to limit the amount of unsubstantiated or junk science from being admitted into evidence. The issue is not necessary the conclusion of an expert, but how the expert came to that conclusion. Thus, ahead of trial, defense counsel can consider posing the following questions and approaches when depositing such an expert:

- 1) Whether the expert subscribed to the scientific method;
- 2) Demonstrate that experts’ opinions are unreliable because of their unfamiliarity with the underlying theory;
- 3) Demonstrate that the theory has not been subject to adequate and/or objective scientific testing;
- 4) If the experts’ theories have been tested, show that the data have not been validated by others;
- 5) Determine whether the data was properly statistically analyzed;
- 6) Determine whether the method is accepted within the scientific community;

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<sup>57</sup> Bruce R. Parker, *Effective Strategies for Closing the Door on Junk Science Experts*, 65 Def. Couns. J. 338, 344–45 (1998).

<sup>58</sup> *Id.* at 345.

- 7) Whether the study has been peer reviewed;
- 8) Whether the data is reliable;
- 9) Show that the data is not the type on which experts typically rely pursuant to Rule 703 in rendering opinions; and,
- 10) Whether the experts practice is consistent with the expert's testimony.<sup>59</sup>

These considerations are not intended to be exhaustive, nor are the answers to these considerations dispositive of the validity or credibility of the expert. However, these considerations and answers may illuminate the trajectory of the plaintiff's litigation strategy. In uncovering the trajectory, the defense can adequately prepare their litigation strategy, including whether to file a Daubert Motion, when to file a Daubert Motion, and how to react to evidence presented by plaintiff's counsel.

Throughout trial, the defense can employ effective cross-examination to expose inconsistencies, question credentials and bias', reveal inadequate methodology, highlight lack of support, simplify complex issues, and identify any extrajudicial influences. However, defense counsel must maintain both strategic dismantling of plaintiff's case and professional restraint. The goal is to expose weaknesses and discredit evidence while still appealing to the jury.

At this point, the defense counsel should be aware of predispositions by the jury, and studies show that jurors typically do

not respond well with defense attorneys appearing combative, disrespectful, or manipulative.<sup>60</sup> To that effect, consider the following strategies to undercut plaintiff's evidence without alienating the jury:

- 1) Adopt a controlled, surgical approach: ask short, leading questions in a controlled pace and tone;
- 2) Anchor to objective facts: whenever possible, tether questions to documents, prior statements, or physical evidence. This signals to jurors that the defense is grounded in verifiable information;
- 3) Focus on credibility, not character: aim to illustrate that the witness' perception, memory, or bias undermines their testimony;
- 4) Undermine evidence through context, not condemnation: discredit expert testimony by revealing methodological weaknesses or omitted data;
- 5) Sequence the examination for maximum psychological impact; primacy and recency effects are powerful in juror memory so structure the cross-examination to start and end strong;
- 6) Maintain juror alignment through demeanor; and,
- 7) Integrate cross-examination themes into the defense's

<sup>59</sup> *Id.*

<sup>60</sup> Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, THE JURY EXPERT (Jan. 1, 2011),

<https://www.thejuryexpert.com/2011/01/the-influence-of-jurors-perceptions-of-attorneys-and-their-performance-on-verdict/>.

narrative: jurors remember themes more than details, so every cross-examination point should connect back to your overarching narrative.<sup>61</sup>

Effective cross-examination balances persuasion through precision and maintains connection with the jury. Framing, emotional connection, context, and interpretation are all factors that demand attention by defense counsel when crafting a litigation strategy. In addition to effective approaches during trial, the defense can provide a proactive defense by determining if and when to file any pretrial motions.

Truly competent defense representation today arises when a strategy incorporates the considerations outlined above, addresses plaintiff-generated misinformation via narrative, witnesses, or evidence, and accounts for juror predispositions.

#### **IV. Application: *Liebeck v. McDonald's Rests.***

Although decided over 30 years ago and prior to the exponential rise of misinformation seen today, *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. D-202-CV-93-02419 (N.M. Dist. Ct. 1994), remains

an on-point case illustrating the enduring tension between public perception and substantive realities of litigation. The case is often mischaracterized as an example of a frivolous lawsuit when it is actually an example of the defense neglecting crafting a complete defensive strategy. McDonald's Restaurants' defense told the jury that Stella Liebeck spilled a cup of McDonald's coffee on herself,<sup>62</sup> and the media campaign substantiated this assertion: Ms. Liebeck became the woman who carelessly spilled coffee on herself while driving and sued over hot coffee.<sup>63</sup>

Ahead of trial, the defense and affiliated groups launched a media campaign portraying an oversimplification of the controversy. As discussed, media campaigns can be highly effective in shaping public perception. In this case, public perception framed Ms. Liebeck as "simply an old lady who spilled some warm McDonald's coffee on herself while driving ended up suing the company and suckered a jury into giving her millions of dollars, claiming the coffee was too hot... Stella Liebeck became a joke."<sup>64</sup>

However, this media campaign was ultimately ineffective because: 1) it prioritized public perception over factual precision; and 2) instead of identifying any predispositions or biases and crafting a narrative based on those, tapping into

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<sup>61</sup> King County Bar Ass'n, *Back to the Basics: The Essentials of Jury Decision-Making*, KING COUNTY BAR BULLETIN (Jan. 1, 2025), <https://www.kcba.org/?pg=News-Bar-Bulletin&blAction=showEntry&blogEntry=118215>.

<sup>62</sup> *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. D-202-CV-93-02419 (N.M. Dist. Ct. Aug. 18, 1994).

<sup>63</sup> Scott Lemieux, *Burned by the Courts*, AM. PROSPECT (July 21, 2011), <https://prospect.org/2011/07/21/burned-courts/>.

<sup>64</sup> Don't Be Fooled by Chamber of Commerce Propaganda and the "Big Lie" of Tort Reform, VEHICLE SAFETY FIRM (Oct. 28, 2013, updated Nov. 4, 2013), <https://www.vehiclesafetyfirm.com/blog/general/dont-be-fooled-by-chamber-of-commerce-propaganda-and-the-big-lie-of-tort-reform/>.

confirmation bias, the media campaign tried to manufacture how the jurors should feel about the case. This media campaign so starkly diverged from the courtroom reality that, however primed the jurors were ahead of trial, the plaintiff's counsel successfully refuted the defense's narrative and built rapport and credibility with jurors.

Plaintiff's counsel established: that because McDonald's served coffee much hotter than typical home-brewed coffee or than their competitors, Ms. Liebeck suffered third-degree burns and required skin grafts; McDonald's had prior similar complaints that they willfully ignored; and Ms. Liebeck initially offered to settle for less than her medical costs.<sup>65</sup> Ultimately, it was the jury who awarded Ms. Liebeck \$200,000 in compensatory damages (reduced by her comparative negligence of 20 percent), and \$2.7 million in punitive damages.<sup>66</sup> Though the court later reduced the punitive award and McDonald's ultimately settled out-of-court with Ms. Liebeck, the amount awarded by the jury indicates a cultural statement about fairness, proportionality, and the legitimacy of the civil justice system. This incredible and infamous outcome was only made possible by the plaintiff's counsel strategically countering misinformation and evidentiary distortion while connecting emotionally with the jury.

The plaintiff's counsel successfully shifted both the factual focus and moral framing of the case. Ms. Liebeck's counsel employed the previously suggested approaches, illustrated below, to effectively

navigate a trial complicated by mischaracterizations and misinformation.

**1) Adopt a controlled, surgical approach: ask short, leading questions in a controlled pace and tone.**

Plaintiff's counsel approached McDonald's Restaurants' corporate representative with short, fact-specific, and unemotional questions. Simultaneously, plaintiff's counsel preserved juror trust by refusing to badger the witness, instead letting the fact-driven testimony deliver information.

**2) Anchor to objective facts: whenever possible, tether questions to documents, prior statements, or physical evidence. This signals to jurors that the defense is grounded in verifiable information.**

Plaintiff's counsel meticulously cited objective evidence to every assertion, straying from a completely emotional appeal. Instead of arguing that hot coffee causes burns, plaintiff's counsel used empirical data to establish that coffee at 185°F causes third-degree burns in seconds, and McDonald's coffee was served at hotter temperatures than that of competitors or home-brewed coffee.

**3) Focus on credibility, not character: aim to illustrate that the witness' perception, memory, or bias undermines their testimony.**

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<sup>65</sup> *Liebeck v. McDonald's Restaurants* (1994), LII / CORNELL LAW SCHOOL WEX,

[https://www.law.cornell.edu/wex/Liebeck\\_v\\_McDonalds\\_Restaurants\\_1994](https://www.law.cornell.edu/wex/Liebeck_v_McDonalds_Restaurants_1994).

<sup>66</sup> *Id.*

The defense presented witnesses to testify on the company's business decisions. Rather than accuse the witnesses of malintent, Plaintiff's counsel questioned the witnesses to allow jurors to question corporate decision-making themselves.

**4) Undermine evidence through context, not condemnation: discredit expert testimony by revealing methodological weaknesses or omitted data.**

Plaintiff's counsel contextualized McDonald's rationale for high coffee temperatures: it was a business decision that ignored public safety data and prior injury reports. The jurors connected with the idea that profit motives overshadowed safety considerations.

**5) Sequence the examination for maximum psychological impact; primacy and recency effects are powerful in juror memory so structure the cross-examination to start and end strong.**

Plaintiff's counsel first presented the severity of Liebeck's injuries (harm and empathy) and closed with the company's disregard.

**6) Maintain juror alignment through demeanor.**

Plaintiff's counsel maintained a calm and respectful demeanor toward corporate witnesses and an empathetic demeanor toward Ms. Liebeck. This

approach conveyed a sense of sincerity and bolstered credibility. Meanwhile, the jury perceived defense counsel as cold and manipulative, leaving them skeptical of the validity of the defense.<sup>67</sup>

**7) Integrate cross-examination themes into the defense's narrative: jurors remember themes more than details, so every cross-examination point should connect back to your overarching narrative.**

Plaintiff's counsel created a lasting thematic impression of corporate negligence and indifference. Every piece of testimony reinforced the plaintiff's narrative: that McDonald's business decisions outweighed consumer safety.

Plaintiff's counsel intertwined facts and compassion to frame a compelling narrative that resonated with jurors. Meanwhile, the defense counsel relied heavily on institutional justification, rhetorical minimization, technical correctness, and policy rationales. While the defense was in accord with the Rules and was technically correct throughout trial, the strategy failed to engage jurors emotionally or ethically, ultimately alienating the jury. Defense counsel and "McDonald's underestimated the power of a sympathetic jury."<sup>68</sup>

*Liebeck* exemplifies the foundational challenges that continue to confront counsel today. Although extrajudicial influence, juror perception, and courtroom strategy are

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<sup>67</sup> Dan Cox, *Liebeck v. McDonald's: How a Misunderstood Verdict Could Impact Your Next Case*, Spill Burn Lawsuits (Mar. 30, 2021),

<https://handlinghotbeverages.com/liebeck-v-mcdonalds/>.

<sup>68</sup> *Id.*

cornerstones of litigation, the modern landscape, dominated by rapid information flow and widespread misinformation, has intensified their impact. As such, ethical, fact-driven storytelling as part of the litigation strategy is integral, particularly when the effects of misinformation reverberate dangerously in and out the courtroom.

## V. Societal Examples / Ramifications

Misinformation can reveal a darker side to legal practice where lawyers are motivated by large financial settlements, judges lack a scientific background, yet serve as gatekeepers of information, and jurors contemplate scientific-based evidence without expertise and an inherent distrust in authorities and institutions.<sup>69</sup> This rise in skepticism of authority and institutions in the legal system translates to another discipline similarly rooted in systematic inquiry and evidence.

The rise of modern anti-science can be at least partially attributed to four psychological reasons: 1) people are prone to rejecting scientific messages when the source is one they do not find credible; 2) when individuals, as recipients of the scientific message, identify with social groups that hold anti-science attitudes; 3) when the scientific message itself contradicts their related beliefs

or attitudes; and 4) when the message is delivered in ways that do not align with their motivational and cognitive approaches to information processes.<sup>70</sup> In brief, “nobody likes science when it conflicts with their deeply held views.”<sup>71</sup>

Having earlier established a rise in misinformation and now understanding how individuals grapple with scientific messages, it is evident that the rise of misinformation and the rise in anti-science are connected. “Misinformation shared on social media websites has fueled an epidemic of false belief... and a profound public mistrust of basic societal institutions.”<sup>72</sup> Much like the legal system, individuals hold a pre-determined belief, seek sources that affirm that belief, and are skeptical of sources and authorities that counter that belief. Although “[confirmation bias] has a function... it [is] also very dangerous because it means that we do [not] listen to evidence which challenges our beliefs.”<sup>73</sup>

In the legal system, lawyers can confront and respond to these human behaviors; moreover, the effects of misinformation and anti-science in the courtroom are generally limited to a case or similar controversy. The same is not true for the scientific community.

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<sup>69</sup> Paul A. Offit, *Autism's False Prophets: Bad Science, Risky Medicine, and the Search for a Cure* (Columbia Univ. Press 2008).

<sup>70</sup> Aviva Philipp-Muller, Spike W. S. Lee & Richard E. Petty, *Why Are People Antiscience, and What Can We Do About It?*, 119 Proc. Nat'l Acad. Sci. U.S.A. e2120755119 (2022).

<sup>71</sup> Christina Pazzanese, *What Caused the U.S.' Anti-Science Trend?*, HARVARD GAZETTE (Oct. 30, 2020),

<https://news.harvard.edu/gazette/story/2020/10/what-caused-the-u-s-anti-science-trend/>.

<sup>72</sup> Cailin O'Connor & James Owen Weatherall, *How Misinformation Spreads — and Why We Trust It*, SCIENTIFIC AM. (Sept. 1, 2019), <https://www.scientificamerican.com/article/how-misinformation-spreads-and-why-we-trust-it/>.

<sup>73</sup> *Food Evolution*, directed by Scott Hamilton Kennedy (Black Valley Films 2016).

The U.S. Surgeon General<sup>74</sup> and the World Health Organization<sup>75</sup> (“WHO”) have declared that health misinformation is a threat to public health because it leads people to ignore science-based recommendations about behaviors to practice and to avoid.<sup>76</sup>

Whether combatting misinformation in the courtroom or in society, constructive storytelling is one of the strongest tools to use. By framing scientific concepts in relatable and emotionally-resonant narratives, complex information becomes more accessible and more memorable. This notion resonates with both factual information and misinformation. Similar to media campaigns and unreliable expert witnesses in the courtroom, there are charlatans in the scientific community who profit from projecting junk science and fear mongering, at the expense of public health and trust. Once public health and trust are undermined, restoring both is difficult to fully restore.

One prominent example of the health consequences related to misinformation is the largest measles outbreak in a generation.<sup>77</sup> In 1998, British doctor Andrew Wakefield published a study that suggested the measles,

mumps, and rubella (“MMR”) vaccine can cause autism.<sup>78</sup> This study was conducted with systematic scientific and ethical failures: the facts were falsified, investigations on children were conducted without obtaining the necessary clearances, the sampling was falsely reported as consecutive instead of selective, and Wakefield was funded by lawyers who had been engaged by parents in lawsuits against vaccine-producing companies.<sup>79</sup> Essentially, Wakefield was paid by lawyers to find or create science that supported their case. Almost immediately after publishing this study, scientists and organizations around the world conducted and published credible studies reaffirming that the MMR vaccine did not cause autism and that scientific fraud had formed the basis of the paper.<sup>80</sup>

Unfortunately, Wakefield’s disinformation was widely spread by sensationalist British media reports. This resulted in a decline of public confidence in the vaccine and a significant drop in the MMR vaccination rate: from 92 percent before the controversy to 80 percent in 2004.<sup>81</sup> The UK government launched media campaigns to counter the disinformation,

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<sup>74</sup> Office of the Surgeon General, *Confronting Health Misinformation: The U.S. Surgeon General’s Advisory on Building a Healthy Information Environment* (2021),

<https://www.hhs.gov/surgeongeneral/reports-and-publications/health-misinformation/index.html>.

<sup>75</sup> World Health Org. et al., *Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation* (Sept. 23, 2020),

<https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>.

<sup>76</sup> Patrick Boyle, *Why Do So Many Americans Distrust Science?*, AAMC (May 4, 2022),

<https://www.aamc.org/news/why-do-so-many-americans-distrust-science>.

<sup>77</sup> Cailin O’Connor & James Owen Weatherall, *How Misinformation Spreads — and Why We Trust It*, SCIENTIFIC AM. (Sept. 1, 2019),

<https://www.scientificamerican.com/article/how-misinformation-spreads-and-why-we-trust-it/>.

<sup>78</sup> T. S. Sathyanarayana Rao & Chittaranjan Andrade, *The MMR Vaccine and Autism: Sensation, Refutation, Retraction, and Fraud*, 53 *Indian J. Psychiatry* 95 (2011).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Andrea Stöckl & Anna Smajdor, *The MMR Debate in the United Kingdom: Vaccine Scares, Statesmanship and the Media*, in *The Politics of*

restore public health, and improve vaccine rates. The campaigns were effective, improving vaccine rates up until the mid-2000s<sup>82</sup>; in 2016, WHO declared measles as eliminated in the U.K.<sup>83</sup> However, the media campaign is ongoing following the U.K. losing that elimination status after a large measles outbreak in 2018.<sup>84</sup> The anti-vaccine movement in the U.K. endures as a legacy of Wakefield's fraudulent study.

Wakefield's scientific disinformation campaigns spread to the U.S. and quickly evolved into a populist narrative rooted in distrust of institutions. Wakefield collaborated with Del Bigtree, an American TV and film producer and, now, CEO of the American anti-vaccination group "Informed Consent Action Network," to produce a film. This 2016 film amplified the long-debunked claims that vaccines cause autism and that government agencies, including the U.S. Centers for Disease Control and Prevention, were engaged in a cover-up.<sup>85</sup> Together, they revitalized the anti-vaccine movement in the U.S. into one that "use[s] public comment to spread fear and misinformation."<sup>86</sup>

Wakefield has never shown the slightest remorse for his disgraceful actions.

He continues his "research" today in the United States with funding from advocacy groups and personal injury lawyers.<sup>87</sup> In response to Wakefield's disinformation campaign, animal genomics and biotechnology researcher and scientist Dr. Alison Van Eenennaam provides that data is what "inform[s] your opinion, not who funded you."<sup>88</sup> Altogether, whether applied responsibly or dangerously, storytelling wields significant persuasive force that can quickly diminish trust and obstruct its renewal.

## VI. Conclusion

The dangers of misinformation reverberate across disciplines. In the legal field, extrajudicial strategies and evidentiary distortion compromise the integrity of fact-finding, further weaken institutional credibility, and blur the boundary between empirical truth and persuasive narrative. The rapid rise of misinformation resulted in a rise in anti-science and a decrease in public trust, indicative of a broader crisis of epistemic authority. The erosion of trust in experts and institutions deepens polarization and

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*Vaccination: A Global History* 239 (Christine Holmberg, Stuart Blume & Paul Greenough eds., Manchester Univ. Press 2017).

<sup>82</sup> UK Health Security Agency, *UK Measles and Rubella Elimination: Indicators and Status* (last updated Sept. 4, 2025), <https://www.gov.uk/government/publications/measles-and-rubella-elimination-uk/uk-measles-and-rubella-elimination>.

<sup>83</sup> Nicola Davis, *Measles Cases on the Rise in England, Say Public Health Experts*, THE GUARDIAN (May 4, 2023), <https://www.theguardian.com/society/2023/may/04/measles-cases-on-the-rise-in-england-say-public-health-experts>.

<sup>84</sup> The UK Has Lost Its World Health Organization Measles-Free Status, NEW SCI. (Mar. 3, 2024), <https://www.newscientist.com/article/2213764-the-uk-has-lost-its-world-health-organization-measles-free-status>.

<sup>85</sup> VAXXED: From Cover-Up to Catastrophe (Andrew Wakefield dir., Cinema Libre Studio 2016).

<sup>86</sup> *Shot in the Arm* (Scott Hamilton Kennedy dir., SHK Productions 2023).

<sup>87</sup> Paul A. Offit, *Autism's False Prophets: Bad Science, Risky Medicine, and the Search for a Cure* (Columbia Univ. Press 2008).

<sup>88</sup> *Food Evolution*, directed by Scott Hamilton Kennedy (Black Valley Films 2016).

undermines collective capacity to address complex societal challenges.

These dynamics have tangible consequences for both democratic governance and public health. The solution does not lie in demanding that the public change the way they think, but in adapting communication strategies to engage with their perspectives and reduce the influence of misinformation. By fostering informed dialogue, employing responsible, evidence-based storytelling, and utilizing pointed strategies to undercut misinformation, institutions and advocates can rebuild trust, promote understanding, and safeguard the integrity of both scientific and civic discourse.