

## PRODUCT LIABILITY

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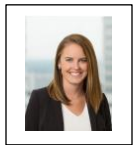
*Design thinking is a user-centered process that leverages collective expertise, allows for buy-in from clients and team members, and encourages innovation. This article explains how to incorporate a little creativity into your litigation practice.*

## Design Thinking for Litigators

### ABOUT THE AUTHORS



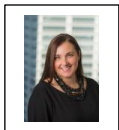
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### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Design thinking is considered by its adherents to be a “systematic approach to innovation and problem solving that is, fundamentally: user centered, experimental, responsive, intentional, and tolerant of failure.”<sup>1</sup> The Harvard Business Review framed design thinking as a kind of social technology which by “shaping the experiences of the innovators, and of their key stakeholders and implementers, at every step.”<sup>2</sup> Design thinking has been used by engineers and architects for decades, and has more recently been adopted in fields like business and health care. It has not yet caught on in the legal profession, which is typically slower to innovate.

Design thinking is counterintuitive to lawyers—and litigators, in particular—for a number of reasons. First, design thinking focuses on the delivery of legal services and the experience of the end user rather than on the specific legal issue you have been retained to resolve.<sup>3</sup> The structure is aimed at solving your client’s problem(s) rather than simply answering an isolated legal question.<sup>4</sup> The design thinking process favors concrete action over talking through a problem.<sup>5</sup> It encourages lawyers to use feedback from clients as part of an iterative approach to developing a solution.<sup>6</sup> The aspect of design thinking some lawyers find most counterintuitive and unfamiliar, however, is the use of a collaborative approach.<sup>7</sup>

The six steps of the traditional design thinking process can be adapted to litigation in a way that leads to better results, and, in turn, increased client satisfaction and investment. Design thinking is useful in various phases of litigation. The steps below can be used to develop a strategic approach at the outset of a case, to obtain the best results at mediation, or to prepare for trial.

**1. Empathize and Discover**—spend time learning about your client. If you are retained to defend an employer against claims of workplace discrimination, for example, take the time to visit the workplace. In product liability litigation, take the time to go on a site visit. See where and how the product at issue is made. Follow it through the production process, if possible. Your goal during this phase is to learn about what motivates your client. After you’ve completed this phase, you will be able to put your client’s problem in context and view it from their perspective rather than your own.

**2. Define**—apply what you learned about your client in step one in order to identify your client’s goals for solving the problem. What are you hoping to accomplish on behalf of your client? Communicate with your client during this phase to ensure that the goals you have defined match your client’s expectations.

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<sup>1</sup> *Design Thinking for Lawyers*, LAWYERIST.COM (Jan. 14, 2019), <https://lawyerist.com/strategy/innovation/design-thinking/>.

<sup>2</sup> Jeanne Liedtka, *Why Design Thinking Works*, HARVARD BUS. REV. (2018), <https://hbr.org/2018/09/why-design-thinking-works>.

<sup>3</sup> See Susan Ursel, *Building Better Law: How Design Thinking Can Help Us Be Better Lawyers, Meet New Challenges, and Create the Future of Law*, 34 WINDSOR Y.B. ACCESS. JUST. 28, 50 (2017).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 50 – 51.

<sup>7</sup> See *id.*

**3. Ideate**—collaborate with your team to develop the most effective strategy for accomplishing your client’s goal. Don’t be afraid to draw upon the knowledge of colleagues who possess expertise in different areas of practice, as they may bring a fresh perspective to the table. Exchange ideas and proposals. Brainstorm the best approach to take at mediation in order to handle sensitive topics during an opening statement. Workshop various ways to use a particularly important piece of evidence at trial. If you are worried about a client’s willingness to pay for a brainstorming session at hourly rates, try it first with clients who are billed pursuant to an alternative fee arrangement. Get their feedback on the value the collaboration adds, and use that feedback to get your more skeptical clients invested in design thinking. It is also important to note that the “ideate” phase can also be effective when carried out independently; the idea is to take the time to step outside of the box in order to explore multiple avenues for solving your client’s problem.

**4. Prototype**—begin putting your vision for accomplishing your client’s goals to work. Refine and redevelop legal arguments. Consider the pros and cons of each strategy or solution. The goal of this phase is to explore the strengths and weaknesses of various approaches in order to determine what is “feasible”.

**5. Test**—now that you know what’s feasible, share alternative options developed during

the “ideate” and “prototype” phases with your client. Get your client’s feedback and buy-in. For example, assume you have completed the previous two phases and have emerged with two promising but divergent ideas for an overarching trial strategy. Put together a draft closing statement for both of the approaches and present them to your client. Think about how each strategy will be received by the jury, who is the ultimate “end user” at trial.

**6. Implement**—put your plan or strategy into action.<sup>8</sup>

Many lawyers engage in design thinking without following the traditional steps – especially since it is not necessary to use all six for every task. There are several ways you can easily incorporate design thinking into your practice. Most importantly, visit your clients! Then, take time to consider whether discovery should proceed in the normal course. For example, is it *really* necessary to depose each of the opposing side’s eight expert witnesses when they have submitted expert reports under Federal Rule of Civil Procedure 26? Is an expert deposition *really* a prerequisite to filing a *Daubert* or summary judgment motion? It is almost guaranteed that all clients would welcome the opportunity to avoid the expense of an expert deposition when the same result could be achieved without one.

When preparing for mediation and trial, we’ve already discussed how design thinking can help you refine your strategy. However, design thinking also requires you to stop and

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<sup>8</sup> See generally Sarah Gibbons, *Design Thinking 101*, NIELSEN NORMAN GROUP (July 31, 2016), <https://www.nngroup.com/articles/design-thinking/>

(providing explanations of each of the six steps of the design thinking process, as applied in the traditional context).

think about your audience. What kind of presentation would be most effective? It is important to consider how an emotional plaintiff or fiery, egocentric former business partner can be persuaded to understand your client's position in a way that fosters resolution at a mediation. Or how a sleepy, disengaged juror who is frustrated about having to miss two weeks of work for a monotonous trial would want to receive information about the facts of the case.

Using design thinking in your litigation practice leverages collective expertise, allows for buy-in from clients and colleagues, and encourages innovation. It fosters creativity and flexibility—qualities always appreciated by clients.

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