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**2021 VIRTUAL PROFESSIONAL LIABILITY & INSURANCE SEMINAR:  
PROFESSIONAL LIABILITY AND INSURANCE PRACTICE  
CHALLENGES - CONFRONTING THE NEW NORMAL**

*June 24, 2021*

# OPENING REMARKS - PROGRAM CO-CHAIRS



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# SOCIAL INFLATION AND ITS RECENT IMPACT ON JURY VERDICTS

# PRESENTERS



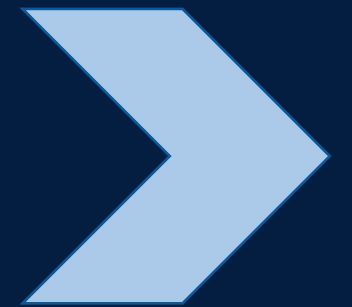
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# WHAT IS SOCIAL INFLATION

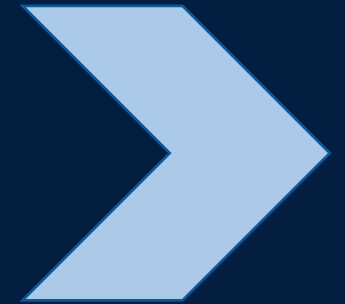


# SOCIAL INFLATION

- The term “social inflation” describes rising insurance losses due to the growing emergence of litigation funders, higher jury awards, more liberal workers’ compensation claims, legislated compensation increases and new tort and negligence concepts — a phenomenon especially prevalent in the U.S. but which is now growing globally.



# THE KEY DRIVERS OF SOCIAL INFLATION



# THE KEY DRIVERS OF SOCIAL INFLATION

- Anti-corporate sentiment. A main driver of social inflation is the anti-corporate sentiment dating back to the 2008 financial crisis. These new attitudes mean that injured parties are more likely to bring litigation against companies – and win. Jurors today are often biased toward the plaintiff in the name of social justice. They strive to hold big companies responsible and make statements with their actions. According to The National Law Journal, 42% of jurors say they would decide a case based on what they believe is fair.
- Litigation funding. Claimants are receiving help from outside investors to bring their cases to court. These investors pay legal fees and expenses (primarily towards a top-notch plaintiff's attorney) in exchange for a stake in potential awards and settlements.
- Fictional Evil Corporations:
  - BIFFCO, LEXCORP, VOUGHT INT., DOOFENSHMIRTZ EVIL INC.



# THE KEY DRIVERS OF SOCIAL INFLATION (CONT'D)

- Plaintiff's bar. The bar is a well-organized and sophisticated group willing to invest in advertising, social media, technology and expert resources to drive damage awards.
- Normalization of nuclear verdicts. Across state courts, caps on punitive damages and damages for pain and suffering are being raised or eliminated entirely. This breaks the ceiling on what plaintiffs can ask for and be awarded.



# THE RISE OF SOCIAL INFLATION

# THE RISE OF SOCIAL INFLATION

- In the US, there were 77 court-approved class action settlements totaling \$4.2bn in 2020. Although the number of settlements increased only slightly compared to 2019 (74), the aggregate total doubled (2019: \$2.1bn) largely as a result of several “mega” settlements over \$100mn. The average settlement amount in 2020 was \$54.5mn – a 15% increase over the prior nine-year average
- A review by VerdictSearch showing a more than 300% increase in the frequency of verdicts of \$20 million or more in 2019 when compared to the annual average from 2001 to 2010.

## POP UP QUESTION

- What was the average class action settlement amount in 2020?
  - A. 20.6 million
  - B. 54.5 million
  - C. 34.2 million
  - D. 26.3 million

# WHAT IMPACT WILL COVID-19 PANDEMIC HAVE ON SOCIAL INFLATION?



# WHAT IMPACT WILL COVID-19 PANDEMIC HAVE ON SOCIAL INFLATION?

- What Impact will the COVID-19 Pandemic have on Social Inflation? It's unclear for now, but there are two divergent views.
  - COVID-19 may ease social inflation, OR
  - COVID-19 and the way the insurance industry handled business interruptions may cause a spike

# COVID-19 MAY EASE SOCIAL INFLATION

- As a result of the pandemic, the country shut down, courts closed, jury trials were put on hold, discovery slowed and some mediations were conducted virtually while others were postponed. We are just now beginning to see a return to “normal.”
- Defense lawyers have reported receiving more calls from plaintiffs' lawyers to settle their cases. Whether because plaintiffs would rather settle now rather than continue to be left in limbo, or plaintiffs are facing financial difficulties because of the pandemic related economic downturn and need the immediate cash infusion from a settlement, or plaintiffs are concerned that jurors, who similarly have suffered financial (and perhaps personal) loss throughout the pandemic, may start to temper the award of nuclear verdicts, these are all concerns of the plaintiffs' bar.
- These concerns have tempered the impact of social inflation.

# THE PANDEMIC MAY CAUSE SOCIAL INFLATION TO SPIKE

- Newspapers and legal journals are replete with updates on litigation against insurers that have denied coverage for COVID-19-related business interruption and civil authority claims. A.M. Best reported that this litigation, and the attendant costs, could cause social inflation to rise.
- Even if courts begin to find that business interruption claims are not covered, the court of public opinion may feel otherwise.
- To the extent the jurors of the future feel the insurance industry wronged those who suffered COVID-related losses, they may seek to punish the industry in other matters, leading to an increased number of nuclear verdicts and a rising tide of social inflation.



# HOW TO COMBAT SOCIAL INFLATION

- Although social inflation cannot be ignored, attorneys should not use social inflation as an excuse for all excessive verdicts
- Preparing for trial and outworking your opponent can offset social inflation
- Focus on painting corporate clients in a positive light. Witness preparation is imperative

# JURY ATTITUDES



- “A jury consists of twelve persons chosen to decide who has the better lawyer.”

# JURY ATTITUDES IN THE WAKE OF COVID-19

- The data suggests that those who are willing and able to appear for jury duty tend to hold more pro-defenses, pro-corporate attitudes.
- Prior Examples
  - Uptick in hostility towards large corporate defendants after Enron.
  - The Great Recession of 2008-2009 was followed by a dramatic shift in pro plaintiff, high-award verdicts.
- Concern of Infection & Life Disruption
  - Potential jurors who expressed significant concern of COVID-19 infection for themselves or a loved one were generally pro-plaintiff and awarded higher damages.
  - Life disruption also related to damages. The more people felt their lives were personally disrupted, the higher the damages they would award.

THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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**COVID-19 BUSINESS INCOME LOSS CLAIMS:  
BOOM OR BUST?**

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COVID-19 BUSINESS INCOME LOSS  
CLAIMS: BOOM OR BUST

# BUSINESS INCOME COVERAGE

- What Is Business Income or Business Interruption Coverage?
  - Insurance for income lost because an insured must suspend operations in certain situations.
- What Is The Purpose of Business Income Coverage
  - Compensate insured for financial losses sustained because they had to suspend operations
    - Short term
    - Longer term



# COMMON COVERAGES

- Business Income
  - Suspension caused by direct physical loss of or damage to property at the premises
  - Loss or damage caused by a covered peril



# COMMON COVERAGES

- Civil Authority

Access to insured's property is actually and completely prohibited by action of civil authority, which results from physical damage to other premises within a specified distance of the insured's premises caused by a coverage cause of loss



# COMMON COVERAGES

- Civil authority coverage under standard forms can generally be distilled into five elements:
  1. The loss must be caused by an action of civil authority;
  2. The civil authority must prohibit access to the insured premises;
  3. The prohibition must be due to damage to property in proximity to the insured premises but no more than one mile from the insured premises;
  4. The loss or damage to property other than at the insured premises must be caused by or result from a “covered cause of loss”; and
  5. The civil authority’s action must be taken in response to dangerous physical conditions resulting from the damage.

# VIRUS EXCLUSION

- Insurance Services Office, Inc. (ISO) submitted a virus exclusion in 2006 following the 2002-2004 SARS outbreak
  - Similarities between SARS and COVID-19
- ISO's Concerns
  - Property policies were never intended to cover losses caused by a pandemic
  - Insureds with business income coverage may attempt to expand coverage and create sources of coverage for losses from disease-causing agents

# VIRUS EXCLUSION

COMMERCIAL PROPERTY  
CP 01 40 07 06

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART  
STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
- However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".
- D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
  2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.



# COVID BUSINESS INCOME CLAIMS: COMMON ISSUES

- Virus Exclusion
  - Efforts to circumvent the virus exclusion:
    - Ignore the exclusion
    - Public fear and commotion
    - Precautionary measures
  - Does the virus exclusion apply to all potential coverages?

# COVID BUSINESS INCOME CLAIMS: COMMON ISSUES

- Business Income Coverage
  - Was the “suspension” caused by “direct physical loss of or damage to property.”
    - “Physical loss” versus physical “damage”
      - Is the presence of COVID “physical loss” or damage?
      - Is loss of use “physical loss” or “damage?”
    - What caused the economic loss?
      - Stay at home or similar shut down order?
      - Something else?



# COVID BUSINESS INCOME CLAIMS: COMMON ISSUES

- Civil Authority Coverage
  - Did the governmental order actually and completely prohibit access to the building?
  - Was the order because of physical damage to property in the specified radius? Or, to slow the spread of COVID?
  - Was the damage because of a covered cause of loss?
  - Was a governmental order issued because of danger presented by damage to property in the specified radius??

# COVID BUSINESS INCOME CLAIMS: TRENDS

- Penn Law's COVID Coverage Litigation Tracker
  - Almost 1,900 lawsuits
  - Merit rulings in about 25% of those cases, mostly motions to dismiss or motions for judgment on the pleadings
    - Motions to dismiss
      - About 88 % granted
      - About 92% where the policy contains a virus exclusion
  - Small number of motions for summary judgment
    - Insurers have been very successful
    - About ten insureds obtained summary judgment in their favor. Spilt evenly between policies with and without virus exclusions

# COVID BUSINESS INCOME CLAIMS: TRENDS

- Commonly litigated issues:
  - Policies without virus exclusions
    - Manuscript policies that do not require direct physical loss or damage
    - Underwriting Considerations: Applications and their potential impact
  - Policies with virus exclusions
    - Non ISO exclusions
    - State specific rules of construction

# COVID BUSINESS INCOME CLAIMS: TRENDS

- Multi-District Litigation
  - Denied for all federal actions
  - Considered insurer specific actions
    - Denied as to most carriers
    - Granted as to Society Insurance and Erie
- Appeals

## POP UP QUESTION - INSURANCE BROKER'S DUTY TO ADVISE

- The past three years Bob Broker procured insurance coverage for Appleseed Farms. Until an employee was recently injured, Appleseed Farms did not know state law required worker's compensation coverage. Appleseed Farms now has no coverage for that accident.
  - A. Bob Broker had a duty to inform Appleseed Farms it was required by state law to obtain this coverage
  - B. Bob Broker had no duty to inform Appleseed Farms that state law required worker's compensation coverage
  - C. It depends on the nature of the broker client relationship

# INSURANCE BROKER'S DUTY TO ADVISE

- *Merrick v. Fischer, Rounds & Associates, Inc.*, 305 Neb. 230 (2020)
- Client alleges Broker failed to advise of Nebraska's statutory requirement for employers to carry worker's compensation insurance
- Supreme Court of Nebraska: Broker did not have a duty to advise employer of its worker's compensation obligations

# COVID CLAIMS AGAINST BROKERS: TRENDS

- *Soundview Cinemas Inc. v. Great American Ins. Group*, 71 Misc.3d 493 (Supreme Court, New York Feb. 8, 2021)
  - Movie theater brought claims against insurance broker and insurance company for breach of contract and negligence.
  - Insurance broker has common-law duty to obtain requested coverage.
  - Client did not inquire about coverage for pandemic-related government closures.

# COVID CLAIMS AGAINST BROKERS: TRENDS

- *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, --F.Supp.3d-- (W.D. Texas Jan. 21, 2021)
  - Restaurant brought claims against insurance company for breach of contract, breach of common-law duty of good faith and fair dealing, and violations of the Texas Insurance Code and request for declaratory judgment.
  - Claim against insurance broker for negligence.
  - Insurance company removed case to federal court.
  - Insurance broker was dismissed based on fraudulent joinder.



THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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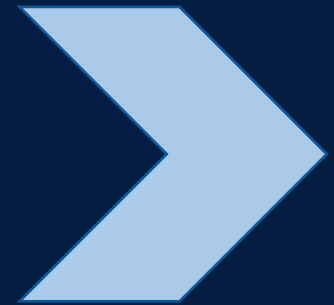
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BREAK –  
PLEASE RE-JOIN AT  
4:05PM CT





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**DEFENSE COUNSEL: NO LONGER A PROTECTED GROUP**

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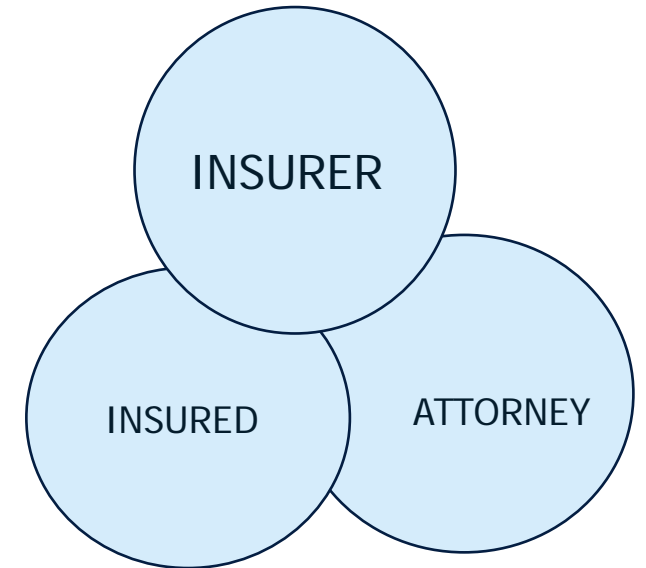
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# THE RELATIONSHIP

- Insurer -- defense counsel -- insured:
  - Defined
  - Transitory vs. ongoing role
  - Potential for a conflict of interest - impairs ability to represent common interests of multiple clients competently





# RECENT DECISIONS



# RECENT DECISIONS



- *Sentry Select Insurance Company vs. Maybank Law Firm, LLC, etc.*, Supreme Court in the State of South Carolina (3/6/19) Opinion No.: 27865.
  - Held insurer's duty to defend insured, based on tripartite relationship insurer had ability to bring a direct malpractice action.



- *Arch Insurance Company vs. Kubicki Draper, LLP* (6/3/21) Supreme Court of Florida, No. SC19-673.
  - Held no privity between the law firm and the insurer, however insurer has standing against defense counsel where insurer is contractually subrogated to the insured's rights under the insurance policy.

# INTERESTING FACTS

- Lawsuits by the insurer against its defense counsel.
  - Recognized in at least 23 States, rejected in at least 3 States.
    - (1) Failing to determine the existence of other insurance.
    - (2) Runaway verdict.
    - (3) Failure to properly investigate the case.
    - (4) Failure to respond to factual admissions in a timely fashion.
    - (5) Failure to accurately assess verdict ranges, exposure.
    - (6) Failure to retain experts.
    - (7) Trial strategy.
    - (8) Sanctions for discovery abuse which lead to either the striking of pleadings or an adverse verdict.
    - (9) Failing to answer a complaint.
    - (10) Failing to join a party with potential liability or assert counterclaims.
    - (11) Sanctions resulting in evidence exclusion.
    - (12) Failing to transmit a settlement offer or over-extending authority

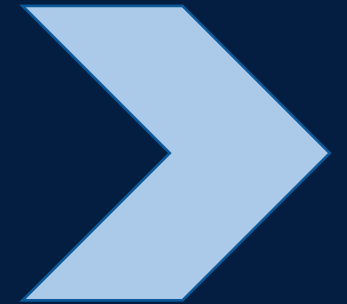


## POP UP QUESTION

- Recent decisions on the ability of an insurer to sue its defense counsel have used the following analysis to reject or approve:
  - A. The tripartite relationship;
  - B. Lack of privity of contract;
  - C. Both of the above.



# TIPS AND TAKE-AWAYS



# TIPS AND TAKE-AWAYS

- 2020 CLM Survey
- Document, document, document. Follow up discussions with a confirming email. Avoid miscommunications or lack of communication.
- Calendar deadlines with a built in cushion. Ensures that not scrambling at the 11th hour to get the work done.
- Avoid “puffing” up the defense in your evaluation. Insurance carriers want an honest evaluation, even if it is a negative one. Perhaps more importantly, do not inflate your chances to win hoping that doing so leads to the assignment of more files. The only time a claim should ever exceed a 75% chance to win is if you truly expect a directed verdict.
- Know the impact of a policy limits demand or a proposal for settlement and be able to explain it to the carrier. Most claim consultants cover a number of states where rules and requirements vary. They rely on the attorney to advise of the deadline and the potential exposures that arise if such a demand is ultimately rejected.
- Settlement demands and settlement authority should always be conveyed or confirmed in writing. These are black and white numbers. Do not leave a gray area.

THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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LEVERAGING TECHNOLOGY AND HOW THE PRACTICE  
OF LAW CHANGED IN THE WORLD OF COVID-19

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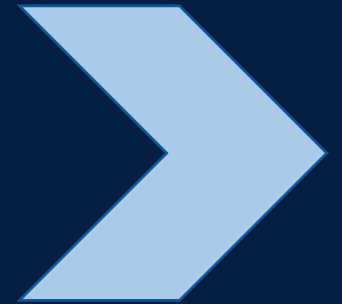
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# IT'S A VIRTUAL WORLD...AND WE'RE JUST LIVING IN IT

- Overview: How has going virtual in the face of COVID-19 changed the way we practice law?
  - Paperless Claims Handling and File Exchange
  - Remote Depositions
  - Virtual Mediation
  - Courtroom Appearances
  - Civil Trial Preparation



# POPULAR PLATFORMS





# WHICH PLATFORM TO USE...



zoom



Skype



GoToMeeting  
by LogMeIn



Google Meet



CISCO

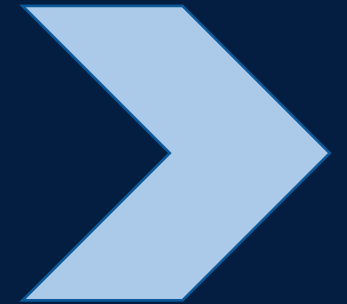
Webex



Microsoft Teams



# CLAIM HANDLING

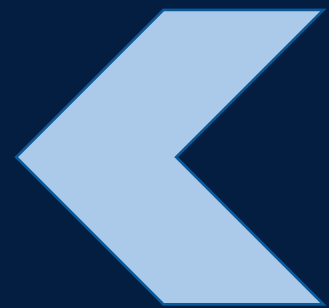


# CLAIM HANDLING GOES VIRTUAL...STILL

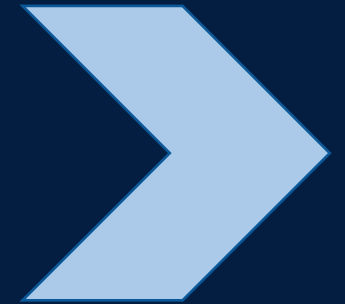
- Attorney-Client File Exchanges
- Remote Work Environments and Client Contact
- Discovery Investigation and Exchanges
- Attorney-Client Communications and Availability

## POP UP QUESTION

- The operator/administrator of ZOOM depositions, in adherence to procedural rules regarding audio/video depositions, must include the following information when commencing the deposition:
  - A. The caption of the case.
  - B. The name of the party on whose behalf the deposition is to be taken.
  - C. The location of the witness.
  - D. All of the above.



# REMOTE DEPOSITIONS



# DEPOS, DEPOS, EVERYWHERE...

- Rules allowing virtual depositions
- Technology issues and opportunities
- Tips for effective remote depositions
- Exhibit handling during remote depositions
- Preparing and defending client depositions
- Non-party witness depositions

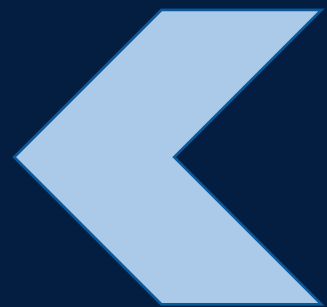


# ONLINE DISPUTE RESOLUTION

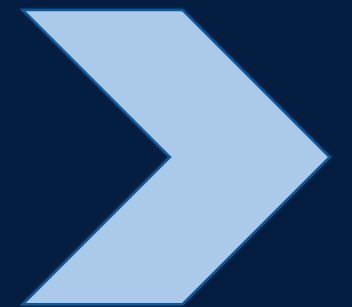
# VIRTUAL MEDIATION AND SETTLEMENT CONFERENCES

- Choosing the right mediator
- Client availability and attendance
- Document exchanges during mediation
- Break-out rooms
- Confidentiality issues
- BE PREPARED





# COURT APPEARANCES



# MAY IT PLEASE THE COURT...

- Coordination with the Clerk and Parties
- Virtual platform access and client participation
- Exhibits and demonstratives online
- Professionalism
- BE PREPARED

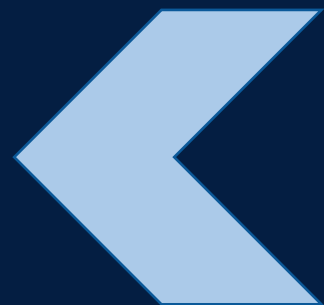


# POST-COVID CIVIL TRIALS

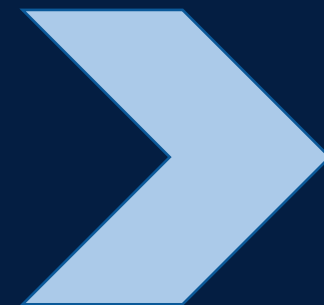


# VIRTUAL TRIALS...AND TRIBULATIONS

- Setting realistic expectations
- Know what is going on in your state and federal courts
- Better promotion of ADR
- BE PREPARED



# GRIPE SESSION



THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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# CLE & POST-EVENT SURVEY

- CE:
  - This course has been approved for two hours of CE credit in the state of TEXAS.
  - Attendees in need of CE credit will be asked to complete the course evaluation and provide your License Number. A certificate of completion will be provided upon receipt of those details.
  
- CLE:
  - ALFA INTERNATIONAL IS AN APPROVED PROVIDER OF CLE IN CALIFORNIA, ILLINOIS AND PENNSYLVANIA. If you need credit in another state, you should consult with that state's CLE board for details on how to apply for approval. ALFAI provides a CLE package that answers questions you will likely be asked when applying and also gives direction as to what we believe is needed to apply in each state.
  - NEW SERVICE: Some state CLE boards require verification of participation in webinars. To satisfy that requirement, ALFAI will now prompt participants to answer questions and/or provide a verification code, as we did in this virtual seminar. If this is required in your state:
    - Please note these items on the Certificate of Completion you will receive after the session.
    - Keep a copy of the certificate for auditing purposes.
  - If you encounter any difficulties in obtaining CLE credit in your state, please contact:
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