



# 2023 Hospitality & Retail Practice Group Seminar

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## **FROM *FAST TIMES TO STRANGER THINGS***

*How the last few years have molded where we are and where we are headed!*

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## From Fast Times to Stranger Things

### Watch Out for *The Fall Guy*: Preparing Your A-Team to litigate everything from slip-and-falls to *Murder (she wrote)* – What are Juries Focused on Post-Covid?

The pandemic effectively ended most civil jury trials in early 2020. Jury trials slowly began to resume under strict Covid screening and jury-protection measures. As jury trials resumed, there was speculation as to the citizens who would respond to jury summonses and how jurors might assess liability and damages in personal injury cases. Almost three years since the start of Covid, there is an opportunity for trial lawyers to reflect on how COVID-19 has, if it has, changed jury trials both for jurors and lawyers. This can be a confusing and difficult exercise. There are numerous surveys on people's attitudes about the pandemic, and the surveys reflect a snapshot of current (hypothetical) responses to questions, which do not necessarily predict anyone's future views or actual conduct. Has COVID-19 left potential jurors with a heightened state of emotion? If so, has that heightened state of emotion affected the jurors' cognitive resources available to devote to analyzing case evidence? Are jurors, and will jurors, use their hearts and not their heads?

One school of thought believes that, on the whole, the "typical" post-COVID damage award is lower than the "typical" pre-COVID damage award. Jurors may view the suffering of the plaintiff as relatively insignificant compared to the suffering others have experienced during the pandemic.<sup>i</sup> Specifically, jurors may be more apt to provide lower monetary awards in the post-COVID era because the plaintiff's alleged injuries do not seem to be a "big deal" in light of current events. Plaintiffs who have been injured during work accidents may not receive the same sympathy or empathy from jurors as they once would have because many jurors have experienced traumatic events during COVID-19 (e.g., deaths of loved ones, job terminations, and home foreclosures) and many of them did not receive compensation. Therefore, these individuals' perceptions of an appropriate damage award have been altered. Of course, this school of thought also believes that these lower post-COVID damage awards are not likely to continue well into the future. Instead, these lower amounts are likely a blip on the radar and jury awards will return to their pre-COVID levels.<sup>ii</sup>

The other school of thought, and what seems to be the majority opinion, is that nuclear verdicts are on the rise. Some speculate that post-COVID damage awards have increased because jurors are going to feel more empathy and sympathy for individuals who have been wronged.<sup>iii</sup> Are nuclear verdicts (any verdict in excess of \$10 million) the new normal? A nuclear verdict is the classic disproportionate response -- it exceeds a reasonable damage amount and only emotional or punitive juror motives can adequately explain it.<sup>iv</sup> The below factors seem to drive the rendering of a nuclear verdict:

- **Corporate mistrust/scandals.** Corporations enter jury cases at a significant disadvantage. Scandals have heightened popular distrust of corporations. Juror pools enter courtrooms with an inherent bias.
- **Social inflation.** As public exposure to news of extreme jury awards, attorney advertising, and litigation funding all increase, jurors become desensitized to nuclear settlements. The rise in social inflation is not a new phenomenon, but it's increasingly become a factor in a significant number of jury cases.
- **Reptile tactics.** This is a tactic where attorneys manipulate jurors to reach decisions on liability and damages based on fear for themselves or others, rather than based on the evidence presented at trial. The idea behind this strategy is to make jurors feel threatened, so they lash out at their perceived attackers. The tactic aims to instill a sense of danger in jurors' minds to suggest that unless they render a verdict that exceeds actual damages and effectively punishes the defendant, they are doing a disservice to the community and endangering the public and themselves.

- **Attorney advertisements.** The public has become accustomed to viewing advertisements on television and social media suggesting that it is normal for plaintiffs to receive verdicts and settlements in the hundreds of millions or billions of dollars. The amounts advertised often are misleading because they flash nuclear verdicts that do not disclose that trial courts promptly slashed these amounts or that the awards are likely to be further reduced or overturned on appeal.<sup>v</sup>

Combatting nuclear verdicts and social inflation takes several factors, including:

- Proper defense counsel, cooperative clients, and collaborative dialogue amongst them;
- early development of a detailed case strategy;
- a realistic and practical defense budget;
- an aggressive defense;
- proper jurisdiction/venue analysis;
- aggressive discovery tactics;
- strong pre-trial motions;
- creative settlement strategies/offers of judgment; and
- intense trial and witness prep (mock trials, focus groups, jury and venue research, jury consultants, witness coaches, etc.).<sup>vi</sup>

Simply put, knowledge about reptile tactics and social inflation and the issues weighing on juries' minds, coupled with preparation of an aggressive defense, early planning, and collaborative dialogue with clients will help reduce the chance of a nuclear verdict.

### *Gimmie A Break with all of the social media! Are social media influencers the new Golden Girls? How has the rise in social media affected the way you do business? Or has it?*

The retail and hospitality industries are built on face-to-face tangible interactions. The pandemic wreaked havoc on that foundation. There is an ever-growing virtual world and companies must be cognizant of fluctuating consumer preferences and concerns moving forward. The pandemic has confirmed that digital transformation is not only necessary but essential to business longevity.<sup>vii</sup> Consumers have become more reliant on social media and digital resources for entertainment, social interaction, and basic news and information. Research conducted by AI-powered personalization platform Widerfunnel found that time spent online has skyrocketed by 37%.<sup>viii</sup> According to the Harris Poll, one of the longest-running research and analytics companies in the United States, between 46% and 51% of American adults are using social media more since the pandemic began.<sup>ix</sup> Since social media and digital technology has become an integral part of everyday life, businesses must now adopt, revamp, reassess how to be hospitable in a digital world. The question becomes not "should" you market on social media, but "how should you" engage on social media.

What are some of the common mistakes that prevent companies from harnessing the full power of social media?<sup>x</sup>

- **Not Being on Social Media.** With billions of active users across various social media platforms, there is no advantage to not being on social media. Since 99% of Gen Z and millennials are likely to check social media before visiting a new establishment, the need for a strong presence on social media cannot be overemphasized.

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- **Not Posting Interesting Content.** Posts should combine writing, graphics, and high-quality images. Content is king.
- **Not Posting Consistently.** It is a delicate balance. The general rule is to post at least three times week on Facebook and Instagram.
- **Not Engaging with Customers.** The word “social” in social media is meant to be taken literally. Endeavor to engage with anybody willing to connect with your brand.
- **Disregarding Analytics and Insights.** Pay attention to the numbers – those tell you who your audience is, what they like, what they want to see, what they don’t want to see, and the best time to engage with your posts.
- **Vague Audience Targeting.** Know your audience. And know which social media platform reaches what audience.

When it comes to knowing your audience – it is important to know which social media platform, and what type of postings on each, will reach your intended audience. According to Statista, the most popular social media platforms for business in 2022 were: (1) Facebook, (2) Instagram, (3) LinkedIn, (4) YouTube, (5) Twitter, and (6) TikTok.<sup>xii</sup> Facebook is the most popular social media platform for local marketing and advertising to ages 65+. In fact, the 65+ demographic is the fastest growing demographic for Facebook ad reach.<sup>xiii</sup> Instagram is the most popular social media platform for Ecommerce and influencer marketing. 130 million users tap on Instagram shopping posts every month.<sup>xiv</sup> And, of course, TikTok is the most popular platform for entertainment.

Post-pandemic, as of 2023, there are approximately 4.89 billion social media users around the world.<sup>xv</sup> In fact, more than 72% of American were on social media by the end of 2020. And that number is growing. Trends that companies need to prepare and plan for are:<sup>xvi</sup>

- The popularity of TikTok surging with Gen Z
- Brands using social media to provide support to impatient customers
- The need for a social media crisis management plan
- The use of social media as a shopping platform
- Using more bite-sized content to match shorter attention spans

The beauty of social media is that you can engage with people/customers at just about any point of the customer lifecycle. To make the most of your social media usage, it is critical to understand your target audience, the platform necessary to reach that audience, and what content will get the desired result.

**Are you *Too Close for Comfort* after the pandemic? Who's *The Boss* when it comes to remote work and alternative work schedules? Are the 5 Generations in the workplace *Perfect Strangers* when it comes to work post-pandemic?**

The workplace has transformed more in the span of the last 5 years than it did in the 50 years previous. The pandemic became a catalyst that forced many organizations to restructure the way they do business and led to many employees reconsidering their jobs. But it also forced organizations to become more creative and innovative in the way they deliver products and services, to embrace technology, and to refocus how they structure their workforce.

With these post-pandemic changes, employers are also seeing 5 different generations in the workplace at the same time. This creates unique challenges since each generation has a different mindset as to values, concerns, needs, and expectations. It is important to recognize the differences between the generations:<sup>xvi</sup>

GENERATION	BORN BETWEEN	DESIRED BENEFITS
SILENT GENERATION	1928 and 1945	<ul style="list-style-type: none"> <li>• Retirement</li> <li>• Healthcare</li> <li>• Flexible work policies</li> </ul>
BABY BOOMERS	1946 and 1964	<ul style="list-style-type: none"> <li>• 401K match</li> <li>• Medical, dental, and vision coverage</li> <li>• Wellness benefits and discounts</li> </ul>
GENERATION X	1965 and 1980	<ul style="list-style-type: none"> <li>• Affordable healthcare coverage</li> <li>• Hybrid work arrangements</li> <li>• Professional development opportunities</li> <li>• Salary increases</li> <li>• Work-life balance</li> </ul>
MILLENNIALS	1981 and 1996	<ul style="list-style-type: none"> <li>• Mission-driven work</li> <li>• Work-life balance</li> <li>• Career development programs</li> <li>• Childcare benefits</li> <li>• Flexible schedules</li> <li>• Wellness benefits</li> </ul>
GENERATION Z	1997 and 2012	<ul style="list-style-type: none"> <li>• Work with socially responsible companies</li> <li>• Holistic wellness options</li> <li>• Mental health coverage</li> <li>• Financial services</li> </ul>

The key to successful management of a multigenerational workplace is recognizing the different expectations and contributions each generation has to offer. The pandemic had an undeniable influence on the workplace, affecting the goals and plans of all generations from the silent generation to Gen Z. While we are still recovering from a wild and crazy few years, the future remains bright. Gen Z is entering the workforce with innovative ideas that will challenge, in a good way, the baby boomers and Gen X. At the same time, Gen Z can learn from the vast experience of the baby boomers and Gen X. Employers must pay attention to workplace trends and generational differences to create a positive, collaborative culture tailored to the needs the workers in every generation.

#### A Few Workplace trends for 2023:<sup>xvii</sup>

- **Implement Quiet Hiring.** Recently, the wave of “quiet quitting” swept through workplaces. Quiet quitting is where employees would refuse to go above and beyond and would do only the minimum required for their jobs. Organizations kept people, but lost skills and capabilities. In order to “quiet hire” employers will acquire new skills and capabilities without adding new full-time employees. For example, employers will focus on addressing priorities that matter the most to employees, stretch and upskill opportunities for existing employees, and look at alternative approaches such as leveraging alumni networks and bringing in employees on an as-needed basis.
- **Institute Hybrid Flexibility.** In addition to offering remote work for those employees that can, employers can look to offer more flexibility for those employees for which remote work is not possible; for example, more employee control over schedules, paid leave, more stability and/or flexibility in a work schedule.
- **Provide Manager Support.** The demands of the multi-generational workforce coupled with the effects of

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the pandemic have left managers out of their depth. Managers feel pressure from above and below. Management is a skill which, for most, takes practice. Employers can provide new support and training for managers and clarify manager priorities and redesign their roles if necessary.

- **Prioritize Mental Health.** The turbulence of recent events has resulted in many employees still experiencing mental health challenges. Employers can implement discussion opportunities, counselors, and proactive rest before high-demand working periods or offer allotted wellness time.
- **Focus on DEI.** Employers can implement inclusion efforts with a focus on bringing the workforce together, addressing any opposition early on. This will result in a diverse workplace that is inclusive of all employees working together for the good of the organization.

Employers have an exciting opportunity to differentiate themselves from competitors by looking at the trends, focusing on generational differences and addressing those differences for each generation, and implementing programs related to employee health and well-being.

<sup>i</sup> Wood, Steve, Ph.D. “*Scientific evaluation of juror damage awards post-COVID*”; [www.courtroomsciences.com/blog/litigation-consulting-1/scientific-evaluation-of-juror-damage-awards-post-covid-219](http://www.courtroomsciences.com/blog/litigation-consulting-1/scientific-evaluation-of-juror-damage-awards-post-covid-219)

<sup>ii</sup> *Id.*

<sup>iii</sup> *Id.*

<sup>iv</sup> Taylor, Kiara. “*COVID-19 and Nuclear Verdicts: Disastrous Combination or Phantom Fear*.” 21 May 2021, [www.riskandinsurance.com/covid-19-and-nuclear-verdicts-disastrous-combination-or-phantom-fear](http://www.riskandinsurance.com/covid-19-and-nuclear-verdicts-disastrous-combination-or-phantom-fear).

<sup>v</sup> US Chamber of Commerce Institute for Legal Reform. 29 September 2022, <https://instituteforlegalreform.com/blog/rising-nuclear-verdicts-threaten-businesses-and-society/>

<sup>vi</sup> Fein, Fred. “*One Law Firm’s Insurance Industry Predictions for 2023*.” 15 December 2022, <https://www.claimsjournal.com/news/national/2022/12/15/314233.htm>

<sup>vii</sup> Jiampetro, Jenna. “*Have Restaurants Altered Their Social Media Approach*.” Boston Hospitality Review, 26 August 2021, <https://www.bu.edu/bhr/2021/08/26/have-restaurants-altered-their-social-media-approach/>

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> Pedreda, Joao. “*Top 7 Mistakes Restaurants Make on Social Media*.” 4 June 2022, <https://webdiner.com/top-7-mistakes-restaurants-make-on-social-media>

<sup>xi</sup> McCormick, Kristen. “*The 6 Biggest, Baddest Social Media Platforms of 2022 (+How to Wield Their Power)*.” Business Community, 14 January 2022, <https://www.business2community.com/social-media-articles/the-6-biggest-baddest-social-media-platforms-of-2022-how-to-wield-their-power-02452016>

<sup>xii</sup> *Id.*

<sup>xiii</sup> *Id.*

<sup>xiv</sup> Howarth, Josh. “*14 Important Social Media Trends*.” Exploding Topics, 14 December 2022, <https://explodingtopics.com/blog/social-media-trends>

<sup>xv</sup> *Id.*

<sup>xvi</sup> White, Terri. “*5 Generations in the Workplace: How to Engage Them All*.” Roundstone Insurance, 3 November 2022, <https://roundstoneinsurance.com/blog/generations-in-the-workplace/>

<sup>xvii</sup> McRae, Rose and Aykens, Peter. “*9 Future of Work Trends for 2023*.” Gartner, 22 December 2022, <https://www.gartner.com/en/articles/9-future-of-work-trends-for-2023>