

**PRESENTATION TO:
ASSOCIATION OF CORPORATE COUNSEL OF HOUSTON**

The Final Countdown: Where to Focus and What to Avoid in the Lead Up to Trial

February 9, 2021 | Taj Clayton, Jeremy Fielding, and Anna Rotman

The views, opinions, statements, analysis and information contained in these materials are those of the individual presenters and do not necessarily reflect the views of Kirkland & Ellis or any of its past, present and future clients. These materials (1) do not constitute legal advice; (2) do not form the basis for the creation of the attorney/client relationship; and (3) should not be relied upon without seeking specific legal advice with respect to the particular facts and current state of the law applicable to any situation requiring legal advice. These materials may only be reproduced with the prior written consent of Kirkland & Ellis. These materials are provided with the understanding that the individual presenters and Kirkland & Ellis are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters, and, accordingly, such entities assume no liability whatsoever in connection with their use. Pursuant to applicable rules of professional conduct, this material may constitute Attorney Advertising. Prior results do not guarantee a similar outcome. © 2021 Kirkland & Ellis LLP. All rights reserved.

EUROPE

THE FINAL COUNTDOWN



ON BROKEN WINGS

WHAT TO DO

- 1 Decide!**
- 2 Hire TRIAL Counsel**
- 3 Divide and Conquer on Settlement**
- 4 Prep Your Rep (and Witnesses)**
- 5 Mock Your Case**
- 6 Win the Pre-Trial**
- 7 Always be Appealing**

NO!





1

DECIDE!

2

HIRE TRIAL COUNSEL





DIVIDE

&

CONQUER

3

SETTLEMENT

TRIAL PREP



To Settle, You Have to Be Ready for Trial

- ▶ Once in pre-trial mode, your trial lawyers need to stay focused on trial, but we know that most cases settle.
- ▶ Divide and Conquer:
 - Trial team gets ready for trial...
 -meanwhile, one lawyer who knows the case can focus on settlement.
 - In-house counsel will likely need to wear both hats.
- ▶ Stay connected but don't get distracted
 - Plan for regular check-ins between one trial lawyer and the settlement lawyer
 - Do not let your entire trial team get distracted by the prospect or dream of settlement; keep them focused

4

PREP YOUR REP (AND WITNESSES)



TESTIMONY
AHEAD

Actively Engage in Witness Management

- ▶ Make sure the witness allots proper amount of prep time
 - Ensure prep starts early and often
- ▶ Clear out witnesses' schedules for prep
 - Communicate with witnesses' superiors
- ▶ Manage witnesses' expectations
 - Witness prep may involve late nights, early mornings, weekends, and travel
 - Minimize stress for witnesses who worry bad testimony will cost them their jobs
 - Assist with reluctant, cocky, or difficult witnesses

Actively Engage in Witness Management

- ▶ Primary purposes of corporate representative
 - Put a human face on the corporation
 - Assist in presentation of the case
 - Allow the rep to hear the testimony of the opposing witnesses
- ▶ Identify the right corporate rep for your case
 - Best witness
 - Most knowledgeable person
 - Most presentable/likeable
 - Most senior executive

Actively Engage in Witness Management

- ▶ Prep the rep
 - Prepare the rep for the sheer stamina it takes to sit at counsels' table during trial
 - Prepare the rep on how to present herself at counsels' table and all times during trial
 - Prepare the rep to testify as much if not more than other witnesses

5

MOCK YOUR CASE



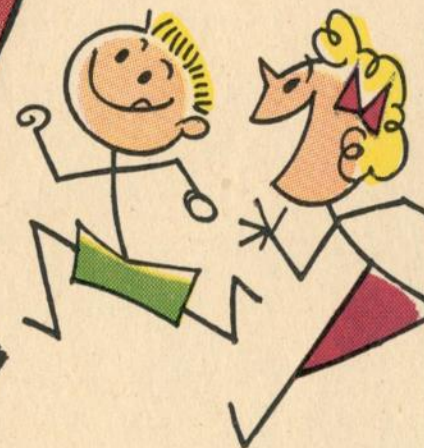
STIR UP A
PITCHERFUL
OF FUN!



Kool-Aid

TRADE-MARK

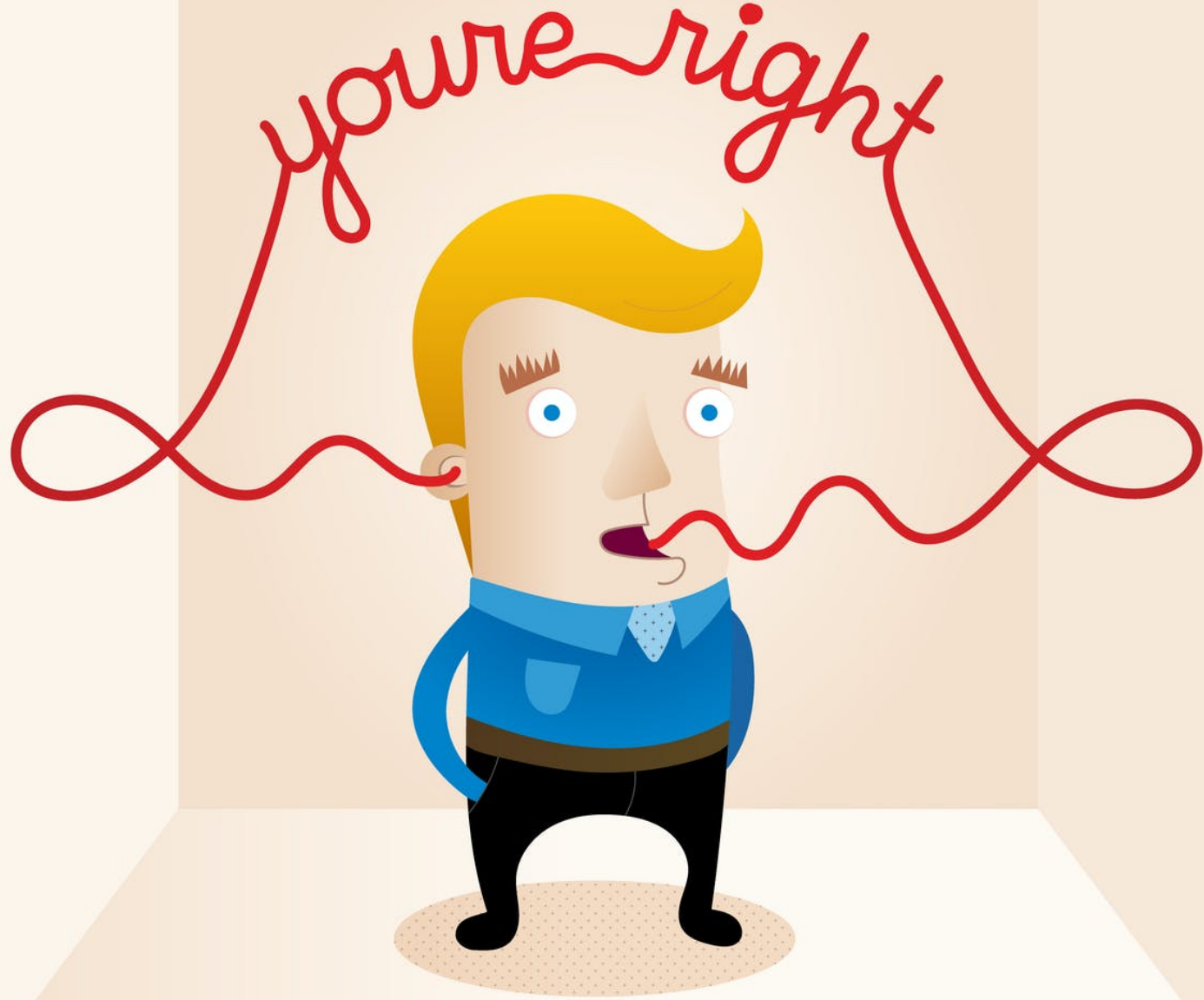
**5¢ package
makes two quarts**



9 Great
Flavors
including
NEW LEMON!
Try 'em all!

One of the many fine products of General Foods.

©1956
PERKINS
PRODUCTS CO.



AIM HERE

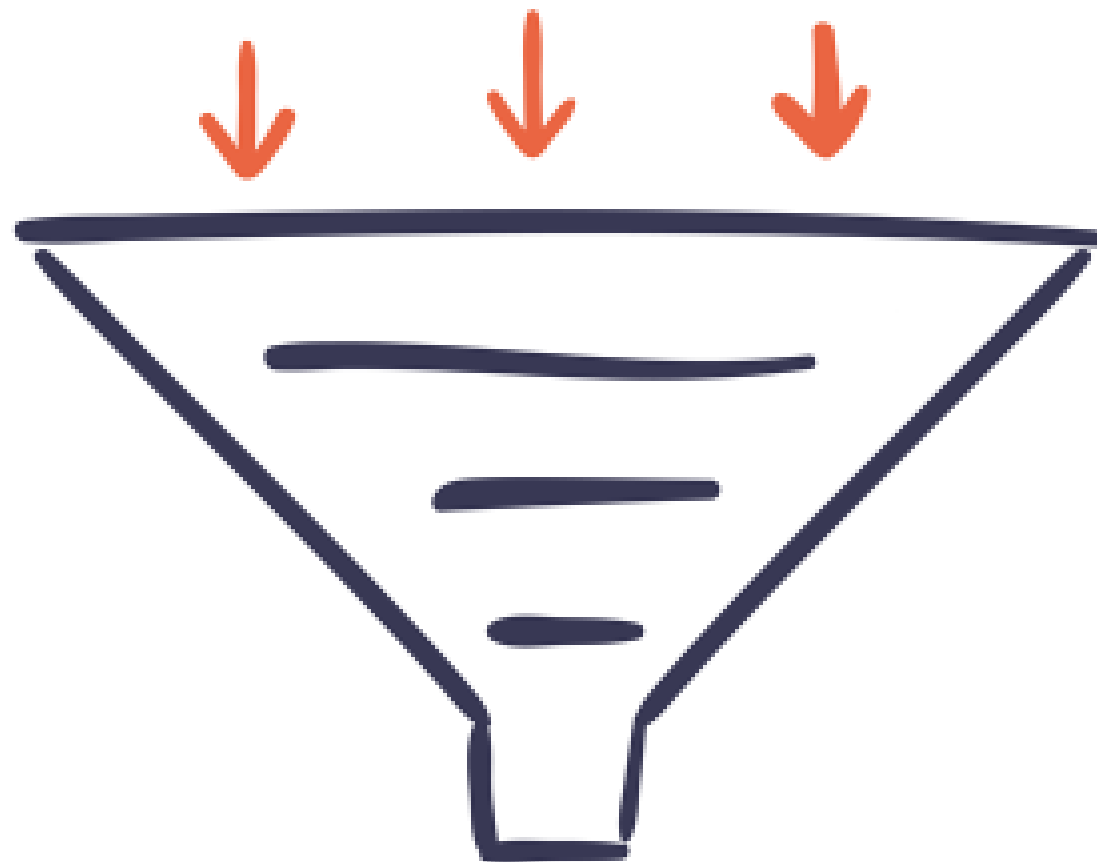
Pain Scale



AIM HERE

6

WIN THE PRE-TRIAL



VICTORY

Pick your Pre-Trial Battles

- ▶ Your trial lawyers shouldn't just go through the pre-trial "motions"
 - Pre-trial is ***not*** the time to pick fights that serve no strategic or tactical purpose in terms of resolving issue that matter for trial.
 - Every minute spent on a pre-trial issue that you are likely to lose is a minute not spent preparing for trial.
- ▶ Two factors determine whether time spent on pre-trial motions is well-spent: your relationship with opposing counsel *and* the Court
 - If anything pre-trial requires agreement among counsel, and you haven't agreed on anything, forget it!
 - If anything pre-trial requires the Court to make a tough call, and she hasn't made any tough calls, forget it (subject to preserving the issue on appeal).

Pick your Pre-Trial Battles

► The menu of pre-trial motions and agreements

- Jury questionnaire
- Juror notebook
- Juror questions
- Voir dire protocol
- Motions in limine
- Exhibits (numbering, objections, deemed admitted, authentication)
- Exchange of demonstratives
- Time for opening arguments
- Clock for trial
- Amount of interim argument
- Advance notice of upcoming witnesses
- Exchange of depo designations and when the counter-designations will be played
- Exchange of jury instructions
- Use of pattern jury instructions
- Providing jurors with copy of instructions and verdict form

7

ALWAYS BE APPEALING

UNITED STATES COURT OF APPEALS

Utilize Appellate Counsel Strategically for Trial

- ▶ Appellate counsel can be used strategically to maximize success at trial and on appeal
 - Help draft pre-trial motions
 - Keep track of proof charts as evidence comes in
 - Develop objection scripts setting forth grounds for objections to anticipated evidence
 - Preserving Error
 - JMOL motions
 - Jury instructions

QUESTIONS?

Anna Rotman (anna.rotman@kirkland.com)

Taj Clayton (taj.clayton@kirkland.com)

Jeremy Fielding (jeremy.fielding@kirkland.com)