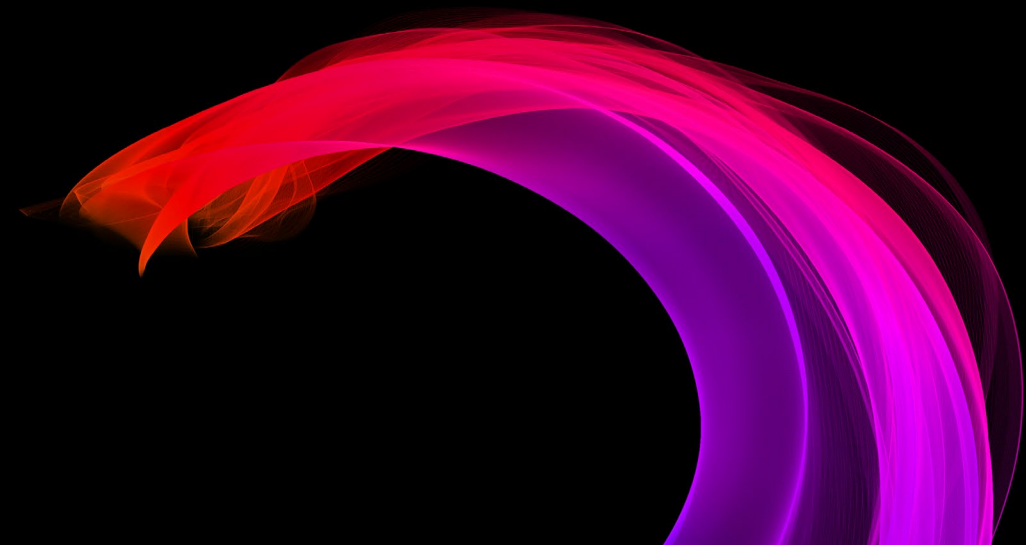




# A New Wave in Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020



## Avoiding the Catastrophic Loss

Karl Lindegren – Fisher Phillips Irvine

Kristen Nesbit – Fisher Phillips Los Angeles

Lisa A. Stephenson – Vice President and General Counsel, CRST International, Inc.

February 27, 2020

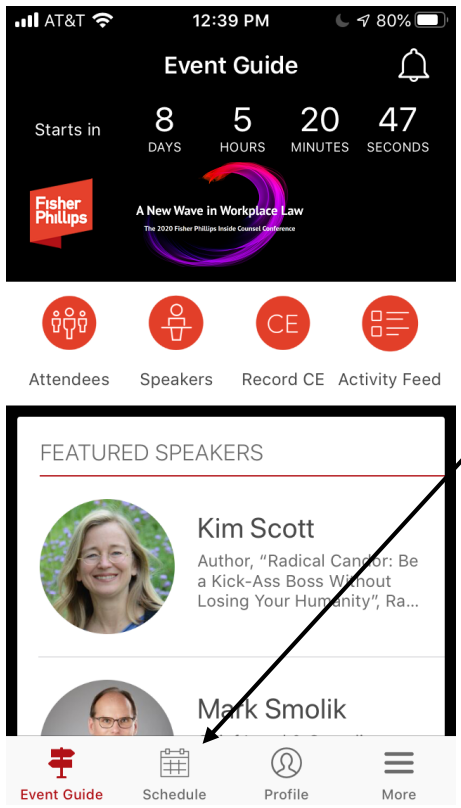
# Introduction & Overview

---

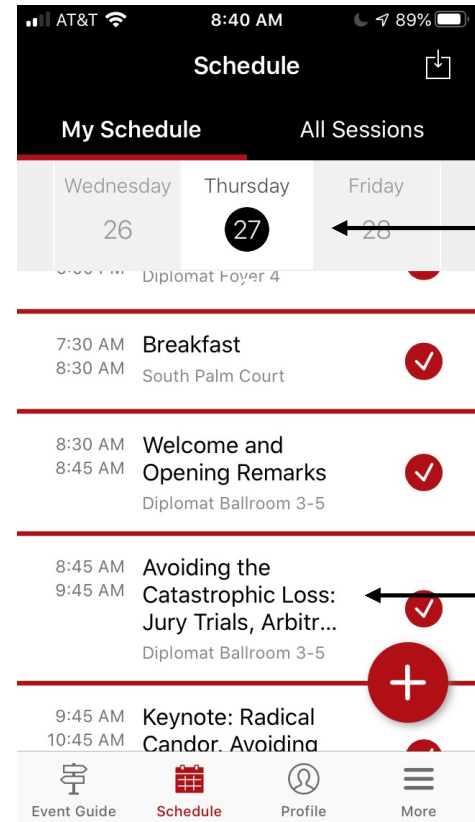
- Who We Are
- Catastrophic Losses In Employment Cases:
  - Headline-Grabbers
  - Minimal Lost Wages & Huge Emotional Distress Damages
  - Punitive Damages: State vs. Federal Law
    - Federal Court Cap on Punitive Damages
  - Jurisdiction-Dependent
    - California vs. other states

# Live Audience Q&A Through the Conference App

To participate in our live audience Q&A, please follow these simple steps:

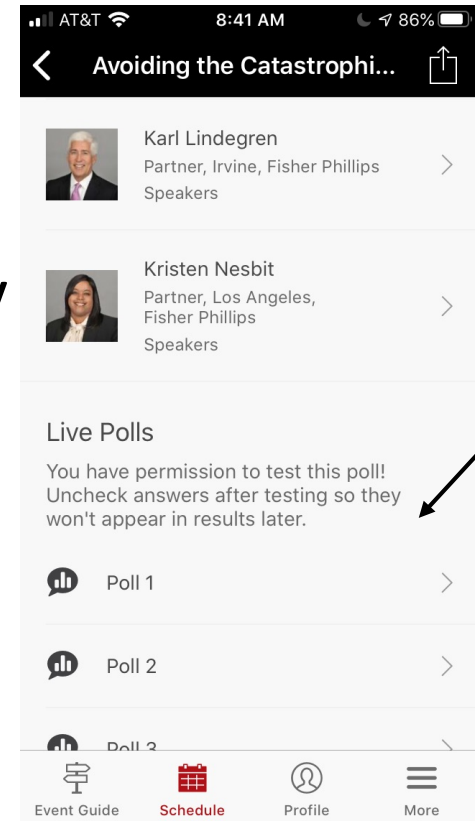


Click  
Schedule



Slide to  
Thursday

Select  
this  
general  
session



Scroll  
down to  
live polls

# Audience Q&A

---

**Q1: When evaluating lawsuits/claims, is your legal team concerned about potential high-dollar awards from both juries and arbitrators?**

**A. Yes**

**B. No**

# Audience Q&A

---

**Q1: When evaluating lawsuits/claims, is your legal team concerned about potential high-dollar awards from both juries and arbitrators?**

**<<POLLING LINK TO GO HERE>>**

# Audience Q&A

---

**Q2: If your legal team is concerned about potential high-dollar awards from both juries and arbitrators, what area of law are you most concerned may result in a high-dollar award?**

- A. Discrimination**
- B. Harassment**
- C. Retaliation**
- D. Wage and Hour/FLSA**
- E. Equal Pay**
- F. Noncompete and Trade Secrets**
- G. Other**

# Audience Q&A

---

**Q2: If your legal team is concerned about potential high-dollar awards from both juries and arbitrators, what area of law are you most concerned may result in a high-dollar award?**

**<<POLLING LINK TO GO HERE>>**

# Media Worthy Verdicts – T.J. Simers & Marie Pierre



Simer's worked for the **LA Times** for **22 years** before he was forced out.



**DEVOUT DISHWASHER /  
FIRED, WINS /  
\$21 MILLION /**





# A Catastrophic Loss

*Simers v. Los Angeles Times:*



# Case Study #1 – Simers v. Los Angeles Times

---

## Facts & Circumstances:

- T.J. Simers sued the LA Times for age and disability discrimination when he was demoted
- Simers was a high-wage earner – he made \$234,000 per year as a sports columnist
- He claimed he was told to “take it easy”
- The LA Times offered to reinstate Simers, but Simers resigned instead claiming the work environment had become too negative

# Case Study #1 – continued

---

## The Result:

- Jury 1: awarded Simers over \$7.1M
  - \$5M was emotional damages
  - Judge reduced award, Simers appealed – new trial awarded
- Jury 2: awarded Simers \$15.5M
  - Overturned by judge

\*Case still ongoing\*

## What This Tells Us:

- Jurisdiction – this trial was in LA Superior Court
- A jury does not need terrible facts of discrimination or egregious facts to award a large verdict
- The nature of these verdicts lead to drawn out appellate processes

# Strategies Used By Plaintiffs' Counsel

## The Reptile Theory:

- Appealing to the primitive part of the minds of jury members to influence the outcome of a case
- Akin to the “Golden Rule”
- Traditionally in personal injury & products liability
  - Increasingly popular in employment litigation

## The Gatekeeper Effect:

- The judge is the gatekeeper
- **Who** a jury hears information from can be more influential than the substance of the information
- How does the gatekeeper affect expert witness credibility and testimony?

# Combating the Reptile Theory & Gatekeeper Effect

---

## Pre-Trial Options:

- Motions in Limine
  - A motion in limine can be brought to exclude reptile arguments
    - Will this be helpful?
    - Effects of making the objection in front of the jury during trial
- Controlling who the gatekeeper of certain evidence/testimony will be
- Bifurcation of Punitive Damages
  - Consider whether it will be beneficial to separate testimony and evidence on damages from the determination of liability

# Case Study #2 – Pierre v. Hilton Worldwide

JURY AWARDS \$21 MILLION TO HOTEL DISHWASHER AFTER SHE WAS FORCED TO WORK ON SUNDAYS



# Case Study #2 – Pierre v. Hilton Worldwide

---

## Facts & Circumstances:

- Marie Pierre sued Park Hotels & Resorts, Inc. (formerly known as Hilton Worldwide) for failure to accommodate, religious discrimination, and retaliation
- Pierre was a lower wage earner, and was employed as a housekeeper at a Miami hotel from 2006 through 2015
- Pierre requested Sundays off of work due to her religion, and was accommodated until suddenly in 2015 she began being scheduled on Sundays
- Pierre was terminated following a string of unexcused absences from work

# Case Study #2 – Continued

## The Result:

- Jury award: over \$21.5M
  - \$36,000 in back pay
  - \$500,000 in emotional distress
  - \$21M in punitive damages
    - Judge lowered punitive damage award to \$300,000 – which is the federal cap

## What This Tells Us:

- A low-wage earner does not necessarily equate to a low damage award
- Headlines do not always note that an award has been reduced – they want to use the highest, most eye-catching figure
- Jurisdiction in federal court provides a statutory cap on punitive damages
  - Always consider removal to federal court



# Audience Q&A

---

**Q3: Have you significantly altered your business practices in the past few years in an effort to minimize risk of a catastrophic jury or arbitration award?**

**A. Yes**

**B. No**

# Audience Q&A

---

**Q3: Have you significantly altered your business practices in the past few years in an effort to minimize risk of a catastrophic jury or arbitration award?**

**<<POLLING LINK TO GO HERE>>**

# Audience Q&A

---

**Q4: Have you proactively worked with your legal counsel to implement efforts to reduce the risk of a catastrophic jury or arbitration award?**

**A. Yes**

**B. No**

# Audience Q&A

---

**Q4: Have you proactively worked with your legal counsel to implement efforts to reduce the risk of a catastrophic jury or arbitration award?**

**<<POLLING LINK TO GO HERE>>**

# How To Avoid Catastrophic Losses

---

## Investing Upfront

- Hiring Practices
- HR Procedures
  - Investigations
  - Terminations & Layoffs
  - Accommodations
- Up-to-Date HR Policies
- EPLI Insurance?

# How To Avoid Catastrophic Losses

---

## Five Step Action Plan for Trial

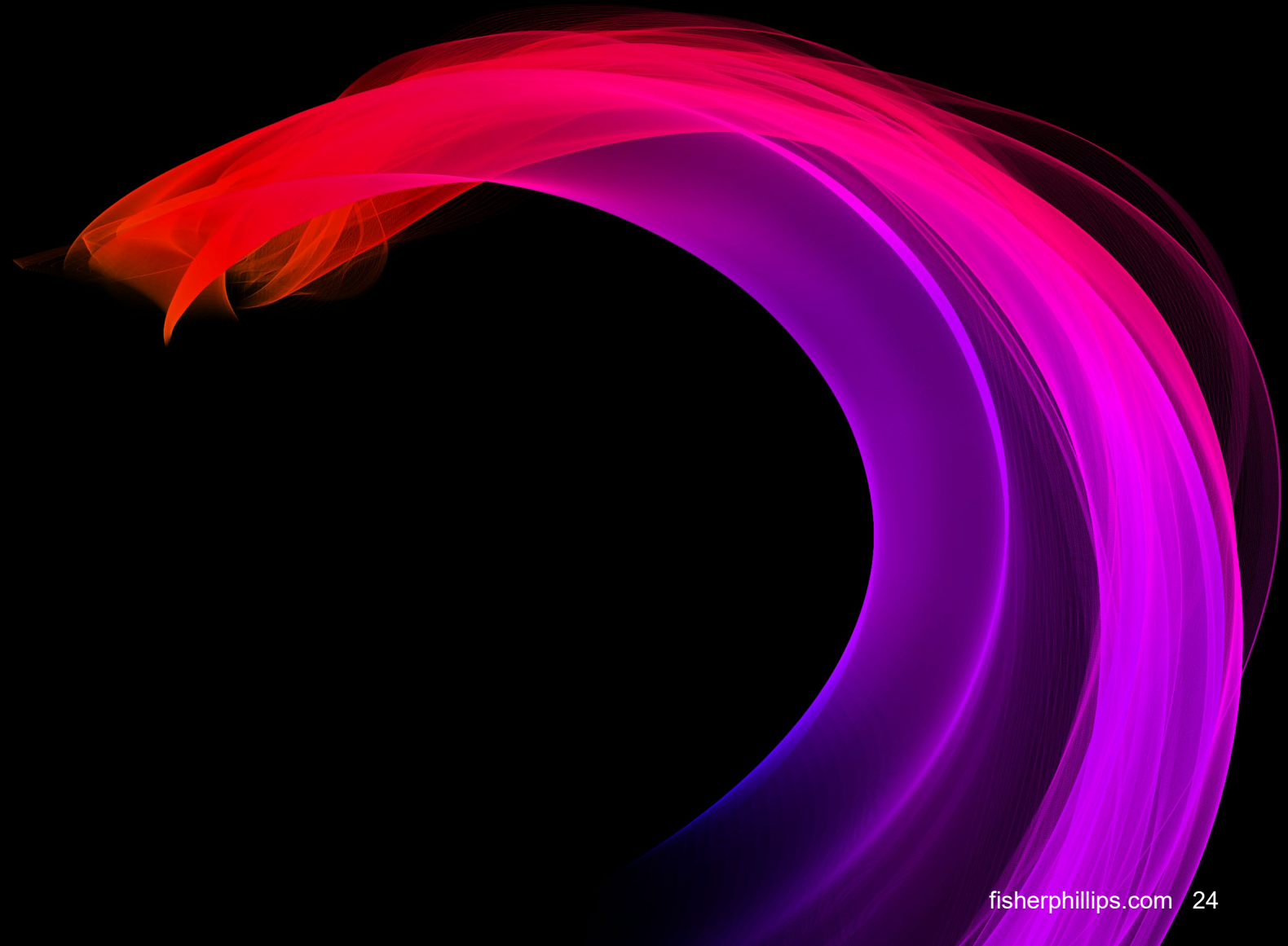
- (1) Assemble your defense team.
- (2) Stay involved with pre-trial strategy.
- (3) Select the best company representative to be present at trial.
- (4) Establish a protocol for keeping informed of the trial's key developments.
- (5) Ensure potential opportunities for settlement are not overlooked.

# Key Take-Aways

---

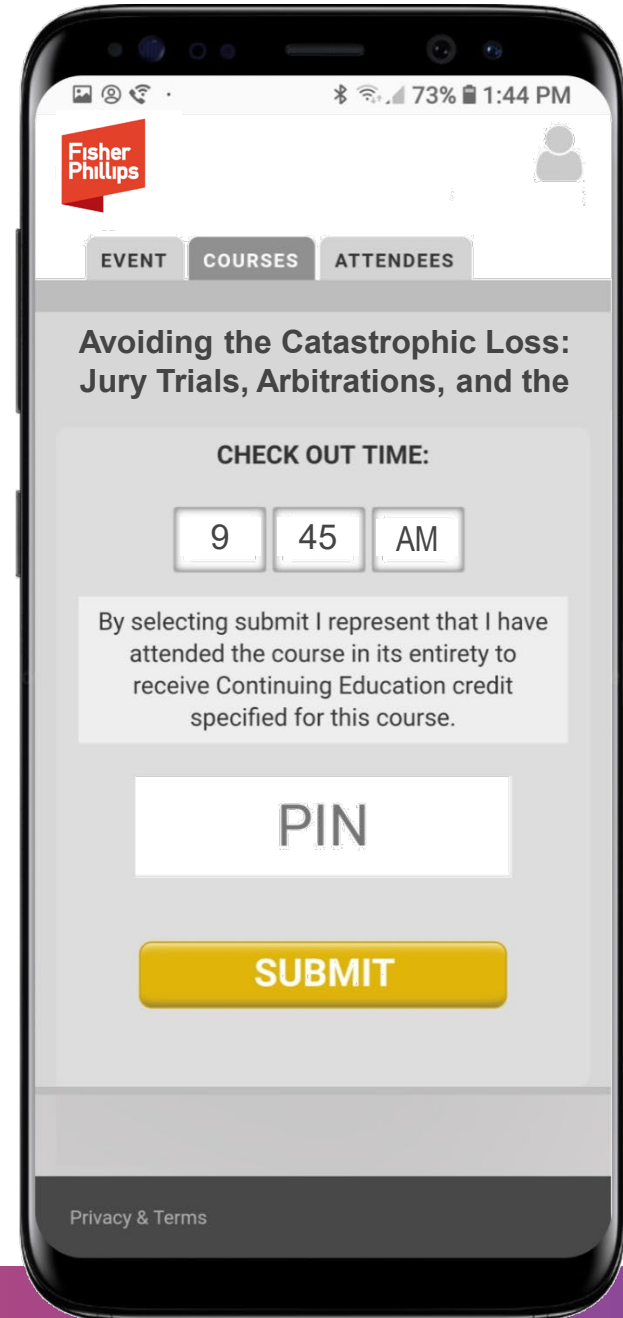
1. Know Your Audience: Court & Jurisdiction is Highly Relevant
2. Have A Trial Action Plan In Place
3. Invest Upfront: Think Prevention Rather Than Mitigation

# Questions?





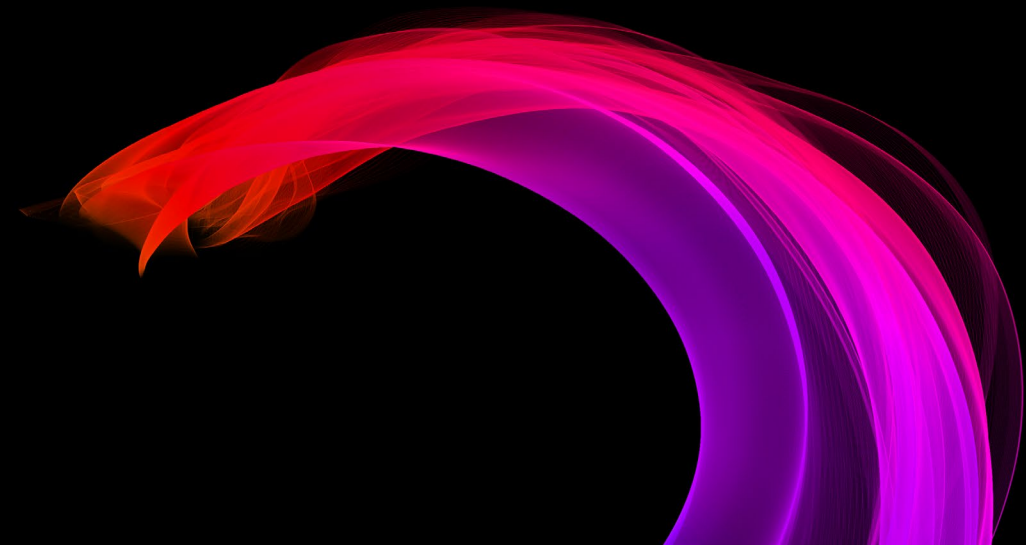
PIN#  
**3812**





# A New Wave in Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020



## Thank you

Karl Lindegren  
klindegren@fisherphillips.com  
949.798.2124

Kristen Nesbit  
knesbit@fisherphillips.com  
213.330.4455