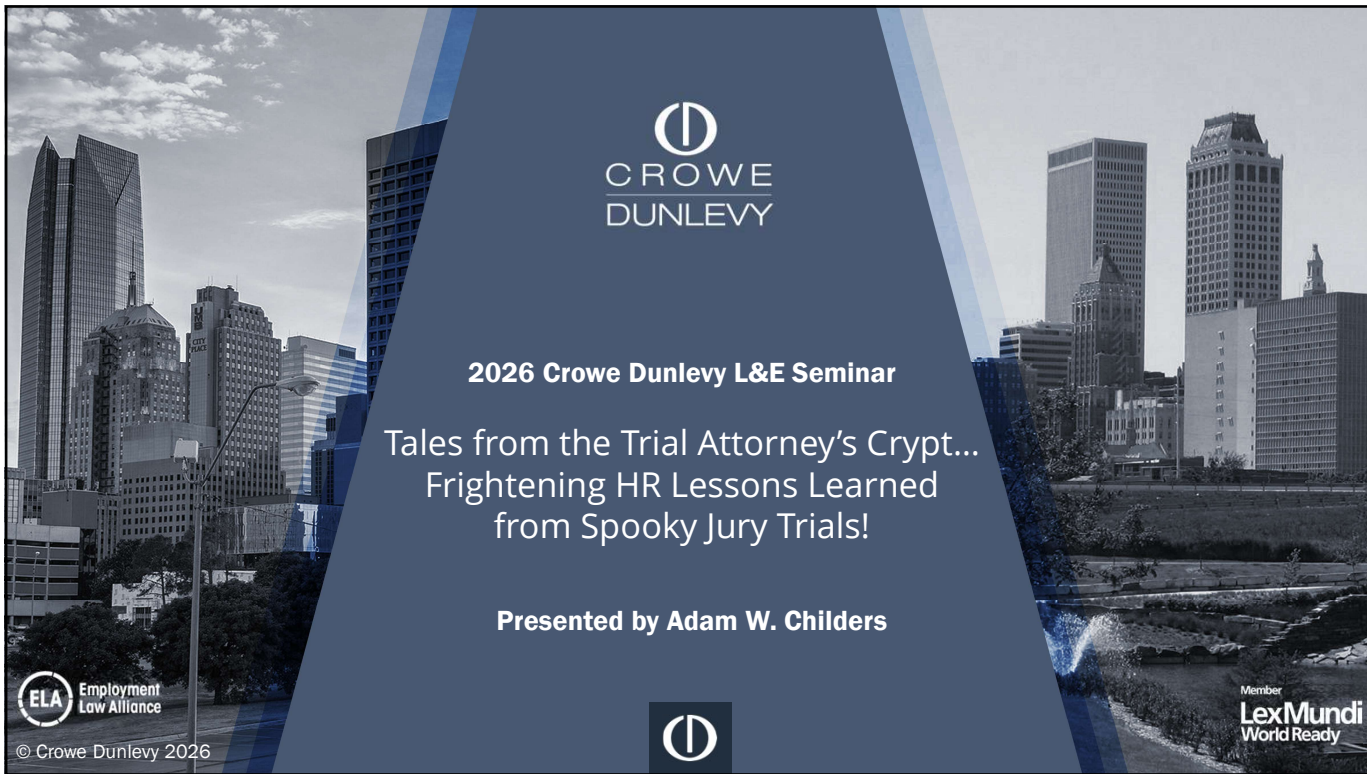





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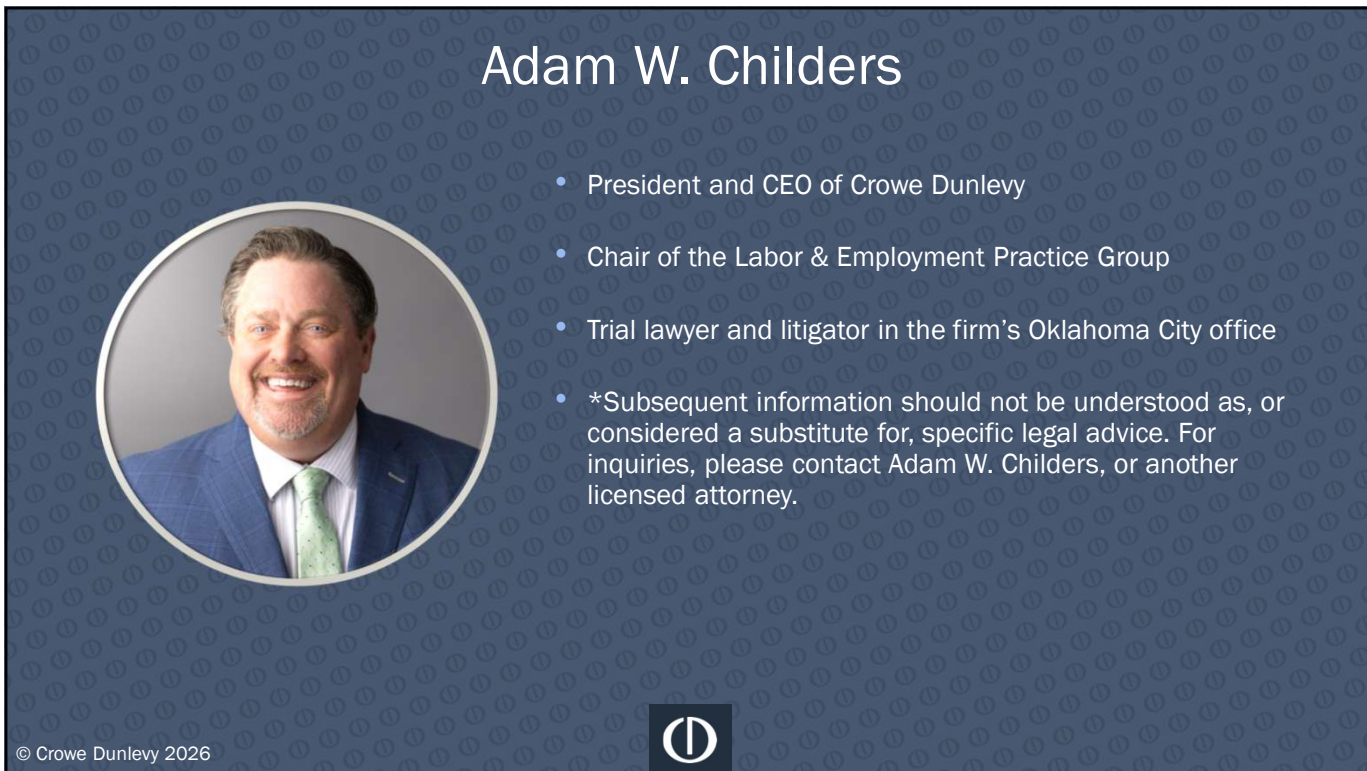
2026 Crowe Dunlevy L&E Seminar

**Tales from the Trial Attorney's Crypt...
Frightening HR Lessons Learned
from Spooky Jury Trials!**

Presented by Adam W. Childers

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Adam W. Childers

- President and CEO of Crowe Dunlevy
- Chair of the Labor & Employment Practice Group
- Trial lawyer and litigator in the firm's Oklahoma City office
- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Adam W. Childers, or another licensed attorney.



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Two Tales, Two 2026 Jury Trials, Two Cities, and Two Victories!



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Jury Trial Number 1

- February 2026 (3-day jury trial)
- Federal District Court, Northern District of Texas (Amarillo Division)
- ADA discrimination and retaliation case

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Our Villain



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Jury Trial Number 1: The Relevant Facts

- Plaintiff was hired in November 2019 as a salesclerk at a fast-food restaurant
 - Informed the hiring manager of a latex allergy at time of hire
 - Allowed the use of non-latex gloves as an accommodation
- Quickly promoted to Assistant Manager

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Jury Trial No. 1 – The Problems Begin

- **December 19, 2019** (24 days after hire) - plaintiff goes to the ER for allergy symptoms (put on latex gloves instead of the non-latex provided to her)
 - The first of **4 times** this would happen while employed!
- **December 31, 2019** – plaintiff was found unconscious in the women’s bathroom (let a co-worker borrow her jacket and had a reaction to powder residue left in the pockets)
- **March 4, 2020** – plaintiff was handed a customer’s ice cream cone by a co-worker and powder from the latex glove worn by the co-worker touched plaintiff’s hand
- **April 26, 2020** – plaintiff was accidentally touched by a co-employee with a hand that had latex powder residue on it.

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Jury Trial No. 1 – COVID-19 Makes its Appearance as the Villain

- The game changer – COVID-19
 - Governor Greg Abbott declared a State of Disaster in Texas on March 13, 2020
 - The store ramped up its cleaning protocols, and the use of gloves became mandatory at all times and in all places in the store
 - Extra steps taken at plaintiff’s store
 - Sanitization buckets deployed around the store
 - Plaintiff allowed to wear long-sleeve shirts
 - The “hunt” for non-latex, non-powder gloves began

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Jury Trial No. 1 – the “Latex-Free” Conundrum

- At the time of the fourth incident plaintiff’s management team was waiting 3 weeks just to get a couple of small boxes of the right kind of gloves (Amazon, Wal-Mart stores, etc..)
- “Latex-free” became the only viable option
- Vertical integration of the store’s business meant:
 - A truck arrived every two days with all of the food and other items for the store = thousands of employees through the vertical chain would have to be latex free during a time that they were hard to find
 - And what about customers wearing latex gloves in the store?!?

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Jury Trial No. 1 – the Termination Decision

- On May 1, 2020 the store terminated the employment of the plaintiff
 - Informed plaintiff it was for her own safety and the safety of her children
 - Informed plaintiff it was impossible to make the entire vertical chain of employees latex-free (i.e., it was more than just the store)
 - Informed plaintiff it was impossible to make all customers abide by a latex-free rule

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Jury Trial No. 1 – Lessons Learned

- Written policies matter
 - The store had COVID-19 cleaning protocols in place that required mandatory glove usage
 - Also spelled out how often the gloves had to be changed, which helped to establish the frequency and amount of usage
 - The ADA policy was very light, which created problems

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Jury Trial No. 1 – Lessons Learned (cont'd)

- Final termination documentation is critical
 - The final termination paperwork did not mention “undue burden” or words to that effect
 - Instead, it made mention of terminating the plaintiff because “she presented a danger of liability exposure to the company”
 - What could have been our best exhibit became the albatross of the case

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Jury Trial No. 1 – Lessons Learned (cont'd)

- To prove “undue burden” under the ADA, it helps to have numbers and data to “prove” the burden is real and substantial
 - The store had the “receipts” for the places, times, and most importantly, the wait time, to get the non-latex gloves that were needed
 - The visual aid at the trial of the number of vertically integrated employees X the number of gloves X the frequency of changes was HUGE!

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Jury Trial No. 1 – Lessons Learned (cont'd)

- The little things matter....
 - The discrepancies in the plaintiff's ER and doctors' notes
 - The issue of who should pay for her ER visits
 - The focus on what was said to the plaintiff at the time of hire, and in February/March 2020 when a new management team arrived

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Jury Trial Number 2

- April 2026 (5-day jury trial)
- District Court, City and County of Denver, State of Colorado
- Breach of contract (unpaid bonuses, equity, and vacation pay), unpaid wages under the Colorado Wage Act, unjust enrichment, promissory estoppel, breach of implied duty of good faith and fair dealing, and civil theft

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Our Plaintiff/Villain



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Jury Trial Number 2: The Relevant Facts

- Defendants (company and 4 executives) are a Canadian fracking company
- Started an American company in January 2019 in the Powder River Basin in Casper, Wyoming
- Plaintiff was hired in December 2018/January 2019 as the company's Director of U.S. Sales (lived in and worked from Denver)

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Jury Trial Number 2: The Relevant Facts (cont'd)

- Plaintiff signed an offer letter in December 2018, pending a formal Employment Agreement that would follow
- February 22, 2019, the EA was presented to plaintiff and signed the same day
 - No mention of equity
 - **Discretionary** bonuses only
 - No severance in the event of a "no cause" termination
 - Integration clause
 - No future modifications unless jointly agreed upon and in writing
 - Wyoming law was the governing law

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Jury Trial Number 2: The Relevant Facts (cont'd)

- The parties kept talking about bonuses and equity from 2019 – 2022 (plaintiff was terminated in January 2022)
- Two more revised versions of the EA were discussed and distributed by and amongst the parties, **but none were ever signed**
- A “Cash Option Bonus” was agreed upon via emails and texts and it was paid in full
- After plaintiff was terminated in January 2022 he claimed to be owed:
 - \$18 Million Dollars in unpaid equity, bonuses, and vacation pay, as well as back pay and front pay (failed retaliatory discharge claim)

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Jury Trial No. 2 – Lessons Learned

- Be careful about what you say in negotiations versus what is written down
 - It was early days of the business and there was a lot of “big talk” about how much money could be made and opportunities for company ownership
 - Plaintiff pushed for promises, and failing that, assurances of “future” money, all of which became a “contract”
 - Most plaintiffs say that offer letters and employment agreements are “fine print” and try to hold the company to alleged promises made in the courting process

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Jury Trial No. 2 – Lessons Learned (cont'd)

- Be careful with offer letters (even when there will be a subsequent formal employment agreement)
 - The offer letter in this case was sparse, and it made reference to “severance” with vague guidance that conflicted with the later EA (cleaned up by the integration clause)
 - The offer letter covered some, but not all, of the initial discussions and left some “holes” that although were filled by the EA, created a lot of legal work to address in the litigation

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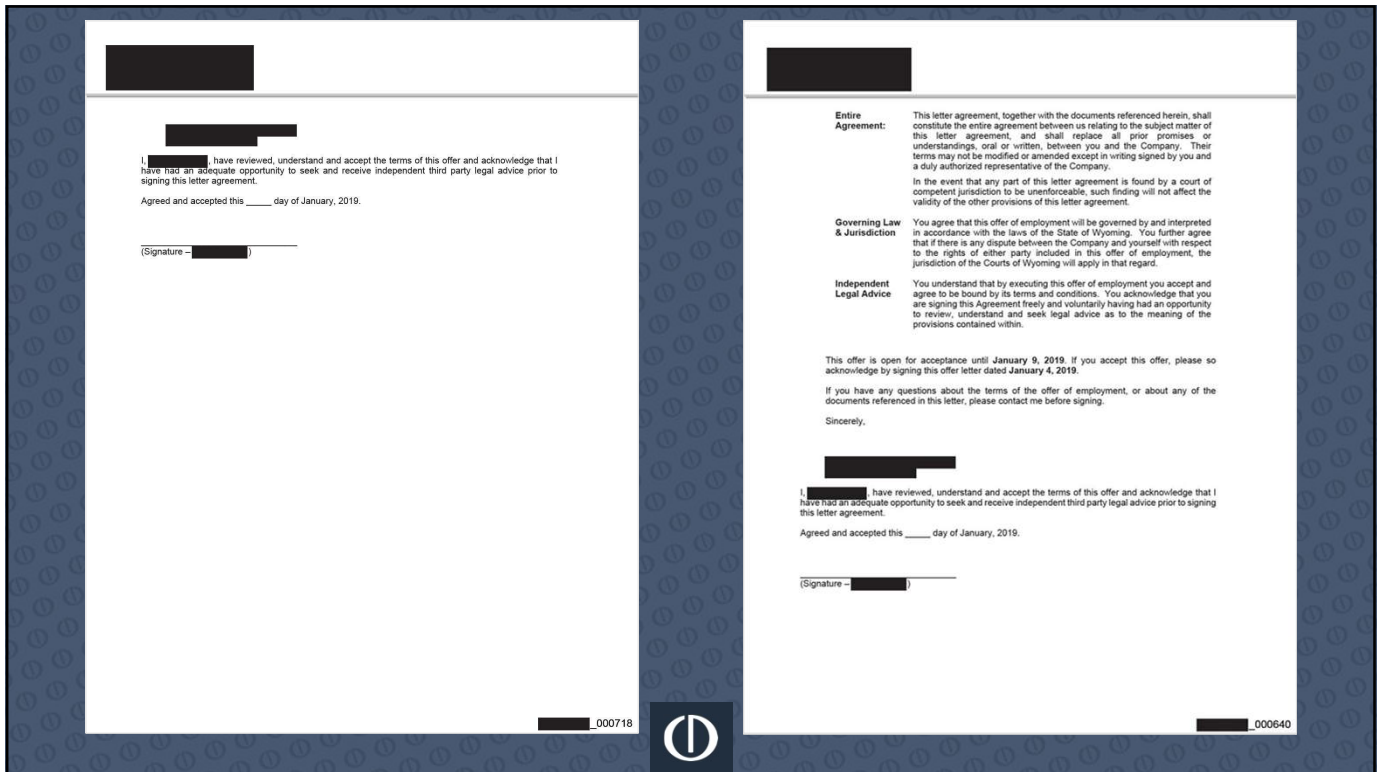
Jury Trial No. 2 – Lessons Learned (cont'd)

An important lesson learned about formatting of signature pages

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Jury Trial No. 2 – Lessons Learned (cont'd)

- “Extrinsic evidence” in contract cases can be critical
 - A contract that is unambiguous and that can be read and understood based on the contents found in the “four corners” does not need “extrinsic evidence”
 - But parties can still make other agreements if they pertain to promises that are not covered by the contract at issue
 - This led to tons of emails and text messages about all kinds of discussions about compensation and whether any of those discussions equated to a new binding contract(s)



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Jury Trial No. 2 – Lessons Learned (cont'd)

- The use of “discretionary” when talking about bonuses and/or the use of measurable goals
 - The lion’s share of 18M in alleged damages hinged on whether the bonuses in question were “discretionary” or not
 - The “Cash Option Bonus” was measured by “steady utilization” of the fracking fleet and “profitability”
 - The desire to hire and retain quality talent through the use of bonuses that become “part of the salary” over time can be very dangerous

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Jury Trial No. 2 – Lessons Learned (cont'd)

- The importance of where an employee lives and works versus what the contract says is the controlling law
 - COVID-19 kept the plaintiff away from Casper, WY
 - Colorado wage and hour law does not allow for use-it-or-lose-it vacation/PTO, but Wyoming does
 - Colorado public policy protected the plaintiff despite the language in the contract
- The saving grace was the tracking of the plaintiff’s time

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To Help Avoid Trials (or Win When You Have One) ... You Can Always Call This Crew of Crows!



Jaycee Simon



Michael W. Bowling



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Adam W. Childers



Katie Campbell



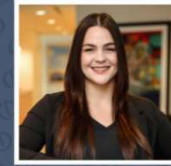
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