

# Litigating Trade-Secret Cases to Win

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**Fredrikson**

The logo for Fredrikson, featuring the name in a bold, black, sans-serif font. A red horizontal bar is positioned below the 'F', extending to the right and ending under the 'n'.

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# Talking Points

- Critical issues at the onset of litigation
- Gaining the advantage early in the discovery process
- Arbitration and trial tips for success



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# Critical Issues At The Onset Of Litigation

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# Defining The Trade Secrets

1. Meeting the statutory requirements: the information must not be not generally known or readily ascertainable; the information must gain independent economic value from its secrecy; and the information must be subject to reasonable measures to protect its secrecy.
2. The trade-secret definition should be as pithy as possible.
3. The defense will focus on the weakest link.
4. Remember your role as a translator.
5. Stories matter.

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# Reasonable Measure Checklist

- Stamp or mark critical confidential information as “confidential.”
- Implement policy regarding the handling/shredding of waste documents
- Require non-disclosure agreements with both employees and other businesses
- Require employee non-competition agreements where appropriate
- Require new employees to promise in writing that they will not disclose or use their former employers’ confidential information
- Secure access to the premises. Lock doors. Guard entrances.

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# Reasonable Measure Checklist

- Require employees to wear access badges
- Require visitors to sign-in and remove unknown persons from the premises
- Deny visitor/public access to areas with confidential information
- Keep confidential information in locked area/file
- Limit access to confidential information stored on computers with passwords

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# Check Jurisdiction

- General presumption that state statutes do not apply extraterritorially. *See Longaker v. Bos. Sci. Corp.*, 872 F. Supp. 2d 816, 819 (D. Minn. 2015) (citing *In re Pratt*, 219 Minn. 414, 18 N.W.2d 147, 153 (1945)).
- DTSA: A plaintiff cannot sue for trade secret misappropriation occurring outside the United States unless the defendant is a citizen of the United States, an entity organized under its laws, or if “an act in furtherance of the offense was committed in the United States.” 18 U.S.C. § 1837.
- Choice of law or consent to jurisdiction may not be enough

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# Selecting Forum (State v. Federal Court)

- Length of the litigation
- Pleading standard
- Chance of summary judgment
- Jury pool
- Expert discovery
- ADR Procedure

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# Analyzing Public Availability

- Patent / copyright applications
- Advertising
- Customer manuals / drawings
- Competitors' products
- Textbooks / reference manuals

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# Damages Analysis

- Getting more than a rough estimate
- Unjust enrichment can be labor intensive
- Early expert engagement
- Avoid target fixation



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# Injunctive Relief

- High reward / high risk
- Jurisdiction and judge dependent
- Front load a lot of case expense
- Incomplete record



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# Critical Issues During Discovery

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# Gaining Advantage Early In The Discovery Process

- Defining ESI search terms and agreeing on what metadata is exchanged
- Proactive review of client's documents
- Issuing subpoenas (customers)
- Early 30(b)(6) depositions

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# Motion Practice

- Keep It Simple Stupid
- Proactive versus reactive on resolving disputes
- Have a strategy for depositions

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# Critical Issues During Trial or Arbitration

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# Tips For Arbitration or Trial Success

- Focus group (ideally, early and often)
- Avoid a jury of one
- Make your trade secret tangible
- Think of yourself a translator
- Use graphics
- Have a theme (e.g., the defendant wants to start on third base; plaintiff has chosen to litigate instead of choosing to innovate)
- Consider adverse witnesses in your case in chief
- Credibility is key

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# Q&A

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# Presenter



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# Fredrikson



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