

Q1 - 2026

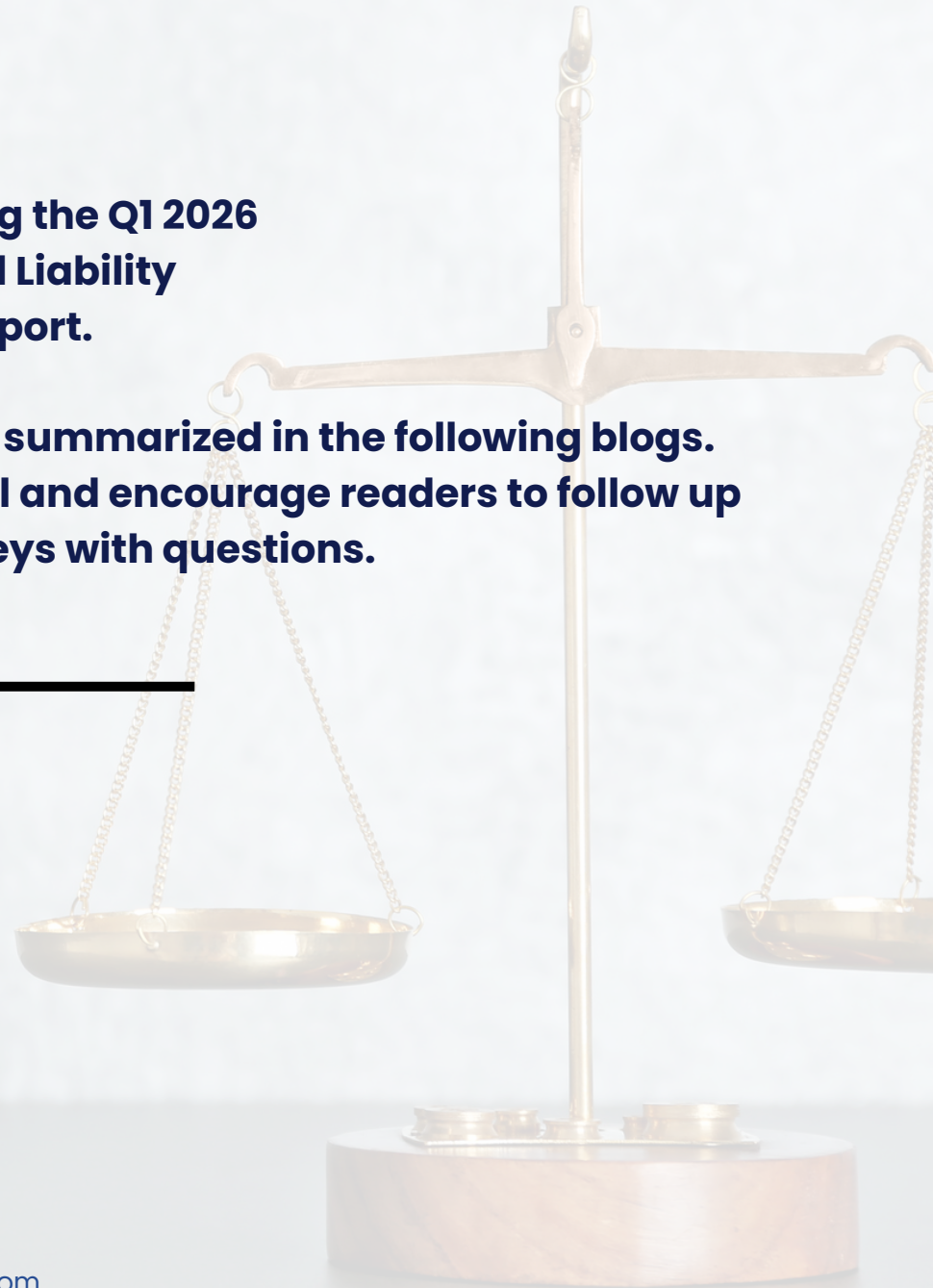
FMG Professional Liability Quarterly Report

A summary of the important professional liability topics by our expert team members for the first quarter.



**Thank you for reading the Q1 2026
FMG Professional Liability
Quarterly Report.**

**Highlights from the first quarter of 2026 are summarized in the following blogs.
We hope that you find this information useful and encourage readers to follow up
with their local FMG attorneys with questions.**



USPS POSTMARK PROCEDURE CHANGE

By: [Nancy Reimer](#) and [Ryne Sack](#)

March 19, 2026

The U.S. Postal Service has implemented a significant operational change that alters how attorneys and claimants should think about postmarks on time-sensitive mail. As of December 24, 2025, the date reflected in a USPS postmark no longer reliably represents the day a document was actually mailed. Instead, the postmark now generally reflects the date when an item is first processed at a USPS automated facility, which may occur one or more days after the document was deposited in a mailbox or accepted at a local post office.

This shift introduces new uncertainty into professional services professions, including lawyers, accountants, real estate professionals particularly in areas where a “postmarked by” deadline determines whether a filing is timely. In the past professionals could confidently rely on the idea that dropping a document into a mailbox before the last pickup or handing it to a postal clerk on the due date would result in a matching postmark. Now, a document mailed on time may nevertheless appear untimely if processing delays cause the postmark to reflect a later date. The USPS characterizes this change as a clarification rather than a new rule, but the practical impact is clear.

For professionals, this change heightens the importance of planning around mailing delays.

Time-sensitive documents should now be sent earlier than in years past, allowing for the possibility that automated processing will not occur until the following day. When the exact mailing date must be documented, it is advisable to request a manual postmark at a USPS retail counter, as this is applied at the moment of acceptance and accurately reflects the true date of mailing. Likewise, services such as Certified Mail, Registered Mail or a Certificate of Mailing provide independent proof of the date a document was handed to USPS personnel and can help avoid disputes if automated postmarks appear late.

Professionals should adjust their internal practices to account for this change. Although the shift may seem minor, its effect on legal deadlines is substantial, and taking proactive steps now can prevent unnecessary challenges and protect clients’ rights.

For more information on this topic contact, [Nancy Reimer](#) at nancy.reimer@fmglaw.com, [Ryne Sack](#) at ryne.sack@fmglaw.com or [your local FMG attorney](#).

MASSACHUSETTS COURT HOLDS DESIGNATING FORMER ATTORNEY AS EXPERT WITNESS WAIVES ATTORNEY CLIENT PRIVILEGE

By: Jessica Gray Kelly, Nancy Reimer and Julia Ruch

March 5, 2026

The Massachusetts Superior Court recently issued a notable discovery ruling that serves as an important reminder for litigants who consider naming a former attorney as an expert witness. In *Cummings v. Deloitte*, the court held that the plaintiffs' decision to designate their former tax attorney as an expert witness waived the attorney-client privilege and work-product protection related to his expert opinions, prior statements he made related to or inconsistent with his expert opinions and all of the work he "performed, documents he reviewed, or communications he had related to, or in order to form, his opinion." The court noted that the waiver was particularly clear where prior counsel's proposed expert opinion was arguably inconsistent with the positions he took on behalf of plaintiffs before the IRS.

As such, the court ordered Plaintiffs to produce all documents within the scope of the waiver or to provide a more detailed privilege log for documents Plaintiffs believed fell outside the scope of the waiver. Additionally, the court ordered prior counsel to answer all deposition questions within the waiver's scope, and neither he nor the plaintiffs may invoke privilege to withhold that information.

Designating a former attorney as an expert witness can significantly, and sometimes unexpectedly, expand the scope of discovery.

When an attorney's prior legal work intersects with their expert testimony, courts may find privilege waived as to that subject matter. Parties should weigh the strategic benefits of using such an expert against the potential exposure of privileged communications, work product, and internal legal analysis.

If you have any questions regarding this blog please contact [Jessica Gray Kelly](#), [Nancy Reimer](#), [Julia Ruch](#) or [your local FMG attorney](#).

AI ISN'T YOUR CO-COUNSEL: JUDGE RAKOFF PROVIDES A PRIVILEGE WAKE-UP CALL

By: [Marissa Dunn](#)

February 17, 2026

Federal courts are now confronting the question of whether a client's AI-generated documents—created using prompts that incorporate information learned from counsel—fall within the attorney-client privilege. Judge Rakoff of the Southern District of New York has ruled from the bench that they do not in the case of *United States of America v. Bradley Heppner*.

Prior to his arrest, Defendant Heppner ran queries about the FBI's criminal investigation of him through an AI tool (Claude) created by a third-party company, Anthropic. The prompts included information the Defendant learned from his counsel. Defendant later shared them with his defense attorney. Prosecutors sought to use the AI documents as evidence, but Defense counsel asserted they were privileged. On February 6, 2026, prosecutors moved for a ruling on privilege, arguing three central points. First, they argued that the AI generated documents do not meet the definition of attorney-client privilege. Second, prosecutors highlighted that later transmission of the documents to defense attorneys cannot retroactively cloak unprivileged documents with privilege. Finally, prosecutors argued that work product does not shield the documents because the documents were created independently by the Defendant, not at the direction or request of his attorneys.

Judge Rakoff granted the government's motion from the bench, memorialized only by the spare docket note: "Government's motion granted." The ruling may be short on words, but its consequences could reverberate widely in litigation involving AI-generated materials.

The immediate significance of this ruling is two-fold. First, lawyers should take care in cautioning clients that any divulgence of attorney-client conversations to any third party, including an AI robot, could waive the privilege. Second, litigators should consider whether to request a party's AI conversations during the discovery process.

For more information, contact [Marissa A. Dunn](#) at marissa.dunn@fmglaw.com or your local FMG attorney.

MODERNIZING CPA LICENSURE: A MAJOR WORKFORCE SHIFT IN THE PROFESSION

By: **William Covino and Nancy Reimer**

February 17, 2026

As tax season begins—and with practitioners already stretched thin—the Massachusetts Senate has unanimously passed S.2946, *An Act relative to modernizing the pathway to becoming a certified public accountant*. This bill is aimed at modernizing the pathway to becoming a Certified Public Accountant.

If approved by the House, this bill would remove long-standing, costly barriers to CPA licensure while preserving the rigorous professional standards the profession is known for. Given the well-known documented shortage of licensed CPAs in the Commonwealth, this is a significant development for firms, municipalities, and businesses who rely on timely financial reporting. Indeed, this change arrives at a critical moment.

Over the past several years, Massachusetts has watched its CPA workforce steadily decline. Firms, municipalities, and small businesses are reporting increasing hiring pressures—not because demand is falling, but because the supply of qualified talent is not keeping pace. This is more than an inconvenience; it is destabilizing. Businesses and families depend on competent accounting professionals, particularly in a year marked by major tax cuts and evolving financial regulations.

The Senate's press release acknowledges what many practitioners already know: the traditional

path to licensure—particularly the 150-credit educational requirement—has become an outdated barrier that may be pushing otherwise qualified candidates into other fields.

The proposed bill seeks to modernize entry into the profession by allowing a more balanced combination of education and real-world experience. Specifically, the bill:

- Removes the requirement that CPA candidates earn more credit hours than a standard bachelor's degree.
- Recognizes supervised work experience as a meaningful component of competency.
- Allows CPAs licensed in other states to practice in Massachusetts, provided they meet certain standards and pass the Uniform CPA Examination.

The President and CEO of MassCPAs has already publicly endorsed the bill as supporting the Commonwealth's long-term economic competitiveness.

The bill will not solve the talent shortage overnight. But it represents a meaningful step toward removing structural barriers that have discouraged capable candidates from entering the profession.

By aligning licensure requirements with modern workforce realities, Massachusetts is signaling a renewed commitment to growing—and retaining—its future accounting profession.

For more information on this topic, please contact [William R. Covino](mailto:william.covino@fmglaw.com) at william.covino@fmglaw.com, [Nancy Reimer](mailto:nancy.reimer@fmglaw.com) at nancy.reimer@fmglaw.com or [your local FMG attorney](#).

BIG CHANGES IN MED-MAL: SCOTUS BARS DELAWARE'S AFFIDAVIT-OF-MERIT IN FEDERAL COURT

By: **Robert Scavone Jr.**

January 30, 2026

In *Berk v. Choy* (Jan. 20, 2026), the U.S. Supreme Court considered whether Delaware's medical-malpractice "affidavit of merit" statute applies in federal court when a plaintiff sues under diversity jurisdiction. Delaware law generally requires an affidavit from a medical professional stating there are "reasonable grounds" to believe negligence occurred, and it contemplates that the affidavit must "accompanie[s]" the complaint (subject to a limited extension).

The Court held (9-0) that Delaware's affidavit requirement does not apply in federal court. The Court's reasoning followed the familiar *Hanna/Shady Grove* framework: when a Federal Rule of Civil Procedure is "on point" and answers the question in dispute, the federal rule governs and the court "bypasses" the usual *Erie* inquiry.

The Court framed the operative question as whether Berk's suit could be dismissed because his complaint was unaccompanied by an expert affidavit, and concluded Rule 8 supplies the controlling rule—setting a "ceiling" on what plaintiffs may be required to provide at the pleading stage unless the Rules themselves impose special pleading requirements. The Court also emphasized that Rule 12 limits what a court may consider at the motion-to-dismiss stage ("matters outside the pleadings").

Defendants' attempts to salvage Delaware's statute failed. The Court rejected the notion that state-law affidavit screening can be imported through federal practice and pointed to the Federal Rules' own mechanism for testing proof—summary judgment after "adequate time for discovery." It also rejected reliance on Rule 11's verification proviso, explaining that it "has nothing to do with affidavits from third parties."

On the Rules Enabling Act question, the Court reiterated that Rule 8 is valid because it "really regulates procedure," and that the state law's substantive purpose "makes no difference" to the validity analysis once a Federal Rule is on point.

For med-mal lawyers, *Berk* makes forum selection and removal strategy even more consequential: state affidavit-of-merit requirements may remain potent in state court, but they cannot be used as a federal pleading-stage gate when the Federal Rules answer the same question.

Defense counsel should adjust playbooks accordingly—pressing Rule 12 defenses and building an early Rule 56 record, rather than over-investing in "missing affidavit" dismissal arguments. And beyond med-mal, the decision is a reminder that state "attached proof," pre-suit certification, or pleading-stage evidentiary screens in other practice

areas may likewise be displaced in federal court when the Federal Rules already "set a ceiling" on what must accompany a complaint.

For more information, please contact [Robert Scavone Jr.](mailto:robert.scavone@fmglaw.com) at robert.scavone@fmglaw.com or [your local FMG attorney](#).

COURT ORDERS REFORMATION OF SETTLEMENT AGREEMENT WHERE ATTORNEY SHOULD HAVE NOTIFIED OPPOSING COUNSEL OF DRAFTING ERROR

By: Jessica Gray Kelly and Anna Nilles

January 29, 2026

A recent Massachusetts Superior Court decision provides a cautionary tale for attorneys: you cannot take advantage of a drafting mistake by the opposing party.

In *Cahoon Capital Strategic Income Fund, LLC v. Ross, et al.*, the Suffolk County Superior Court conducted a two-day bench trial to decide whether a prior settlement agreement between the parties should be reformed to include mutual releases. The court ordered reformation on the grounds of the unilateral mistake of one party, which was known to the other party.

The litigation arose from a dispute between business partners who accused each other of competing against their shared enterprise. After unsuccessful attempts to resolve their differences, the parties finally agreed to settlement terms, which included mutual releases of all claims. After several rounds of revisions, however, the finalized agreement contained a one-sided release. The disadvantaged party and his attorney did not notice the error. Counsel for the other party noticed and mentioned the error to his client, but not to the other side, gradually adopting the view that the one-sided release might have been intentional. During subsequent litigation between the parties, the disadvantaged party realized the mistake and sought to reform the contract to include a mutual release that would reflect the

parties' initial understanding.

The court noted the "exceptional" nature of reformation and found that the evidence here satisfied the high standard of proof. The court also recognized the tension between an attorney having an obligation to point out his opposing counsel's mistakes, even if doing so was not in the best interests of his client. Relying on Massachusetts precedent and a 1986 ABA ethics opinion, however, the court ruled that the attorney had an ethical obligation to alert opposing counsel to her oversight. Arguments against reformation, despite their "facial appeal," did not persuade the court. Negligence, carelessness, and the sophistication of clients and attorneys in this case did not foreclose the equitable remedy of reformation.

The *Cahoon* decision not only reminds attorneys of the importance of carefully drafting and reviewing agreements, but also that you cannot just ignore a drafting mistake by your opposing counsel. Attorneys have an affirmative obligation to notify opposing counsel of drafting errors, even if the error could favor your client.

For more information please contact Jessica Gray Kelly at jessica.kelly@fmglaw.com, Anna G. Nilles at anna.nilles@fmglaw.com or your local FMG attorney.

ABSOLUTE LITIGATION PRIVILEGE SHIELDS COMPLAINTS TO CERTIFICATION BODIES IN ILLINOIS

By: [Quinn Donnelly](#)

January 7, 2026

In *American Backflow & Fire Prevention, Inc. v. Hincks et al*, 2025 IL App (1st) 250023, the Illinois Appellate Court, Second District, affirmed the dismissal of claims arising from allegedly defamatory statements made to the American Society of Sanitary Engineering (ASSE), the National Institute for Certification in Engineering Technologies (NICET), and the Illinois State Fire Marshal. The Appellate Court held that the statements were protected by Illinois's absolute litigation privilege and reaffirmed that this privilege applies broadly to communications made before, during, or after judicial or quasi-judicial proceedings and specifically applies to complaints made to certification bodies, such as the ASSE and the NICET.

Background & Procedural Posture

The plaintiffs – a fire protection company and its owner – sued union representatives, a former employee, and counsel, alleging a coordinated campaign to interfere with their business and damage their reputation through complaints to the ASSE, NICET, and the Illinois State Fire Marshal. These complaints challenged whether plaintiffs and their employees had sufficient field experience for ASSE and NICET credentials and alleged that plaintiffs had fraudulently documented their work experience.

Plaintiffs asserted an array of claims—tortious

interference with economic advantage, tortious interference with contract, defamation, defamation per se, violations of the Uniform Deceptive Trade Practices Act (815 ILCS 510/1 *et seq*), and civil conspiracy—seeking nearly \$934,000 in damages. Defendants moved to dismiss under 735 ILCS 5/2-619(a)(9), invoking the absolute litigation privilege. The circuit court (Lake County) dismissed plaintiffs' Complaint in its entirety, and the Second District affirmed.

The Court's Analysis

The court's analysis centered on Illinois's expansive application of the absolute litigation privilege. The court reaffirmed that the privilege applies broadly to communications made before, during, or after judicial or quasi-judicial proceedings, and even to statements by non-parties, so long as they are pertinent to the matter at hand. Motive is irrelevant, and any doubts about pertinency are resolved in favor of applying the privilege.

To determine whether ASSE and NICET qualified as quasi-judicial bodies, the court applied the six-factor test from *Kalish v. Illinois Education Ass'n*, 157 Ill. App. 3d 969, 971–72 (1987). The test considers whether the entity has the power to: (1) exercise judgment and discretion; (2) ascertain facts and decide; (3) make binding orders; (4) affect personal or property rights; (5) examine witnesses, compel their attendance, and conduct hearings; and

(6) enforce decisions or impose penalties.

The court found that ASSE and NICET satisfied at least five of these factors. Both organizations investigate complaints, exercise discretion in determining whether to revoke certifications, conduct hearings with rights to counsel and witnesses, issue binding decisions on certification status, and impose penalties by revoking credentials. Although they lack subpoena power, the presence of these other powers was sufficient for the court to conclude that ASSE and NICET function as quasi-judicial bodies, triggering the absolute litigation privilege for statements made in connection with their proceedings.

The court further concluded that defendants' statements were related to the quasi-judicial proceedings they were submitted through each entity's formal complaint process and specifically questioned plaintiffs' qualifications for the ASSE and NICET certifications.

[To read the full blog post, click here.](#)

For more information, please contact [Quinn P. Donnelly](#) at quinn.donnelly@fmglaw.com or your [local FMG attorney](#).

Authors



William Covino
Partner
Boston



Quinn Donnelly
Partner
Chicago



Marissa Dunn
Associate
Atlanta



Jessica Gray Kelly
Partner
Boston



Anna Nilles
Associate
Boston



Nancy Reimer
Partner
Boston



Julia Ruch
Associate
Boston



Ryne Sack
Associate
Chicago



Robert Scavone Jr.
Senior Counsel
Ft. Lauderdale

Professional Liability/E&O - Leadership



Jessica Gray Kelly
Partner
Chair
Boston



Alex Diaz
Partner
Vice-Chair
Miami



Kevin Stone
Partner
Vice-Chair
Atlanta

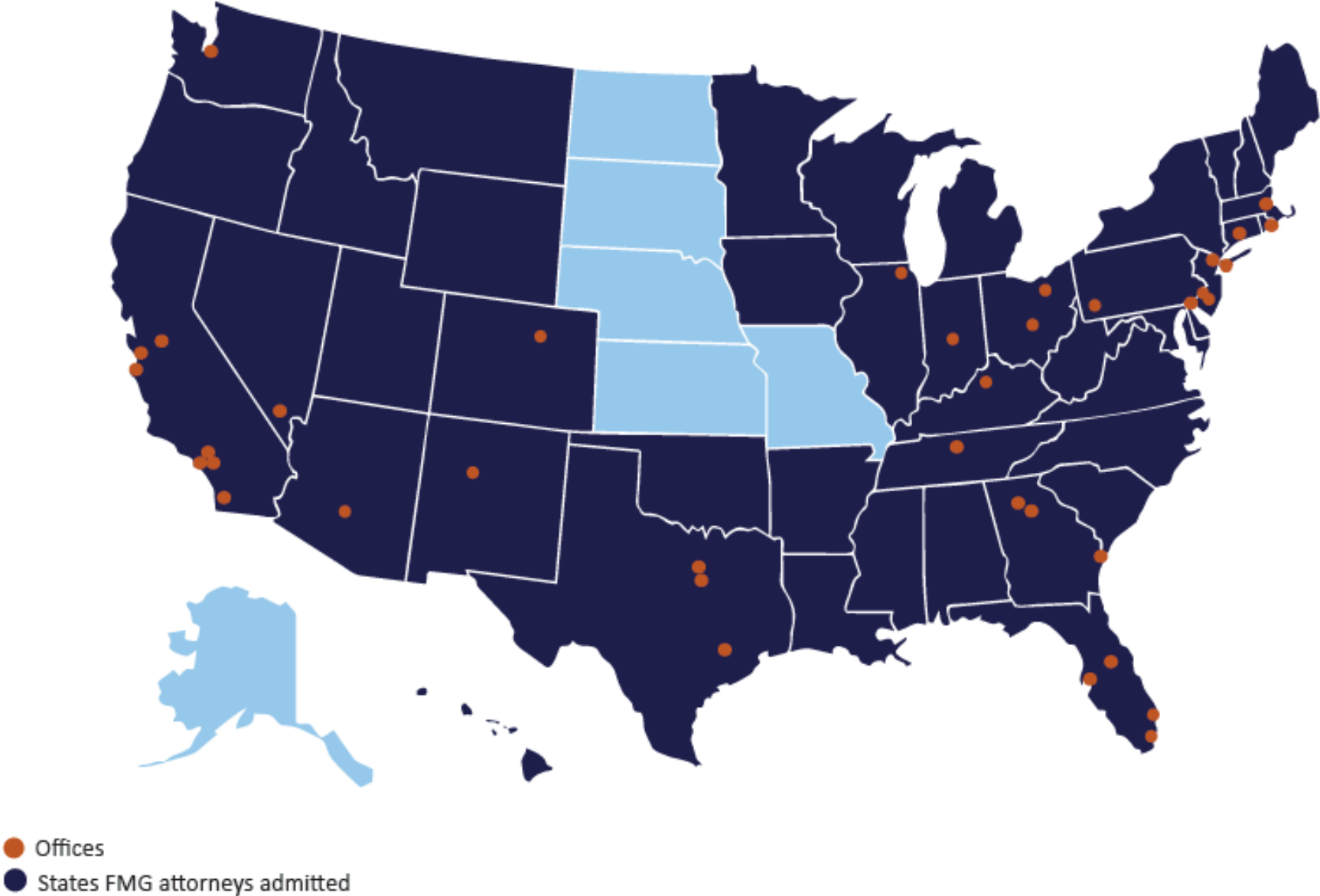


Dana Maine
General Counsel/Partner
Executive Committee
Atlanta



Nancy Reimer
Partner
Practice Group Leader
Boston

FMG's National Reach





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