THE HARMONIE GROUP®

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2020 Trucking & Transportation Seminar
The Harmonie Group

Victory from the Jaws of Defeat

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While everyone wants the glory of a defense verdict, avoiding a catastrophic or Nuclear Verdict® is equally important. Preventing bad facts from becoming a Nuclear Verdict® is often more than difficult than securing a defense verdict. This can be limiting compensatory damages or defeating a punitive damages claim. It represents a victory for your company. This paper addresses the mindset necessary when implementing strategies in the presuit investigation and during litigation to prevent a bad case from getting worse.

1. Have a Plan/Reporting System.

If you don't know where you're going, you'll never get there. Checklists are a good start. The Harmonie Accident Checklist is an example of a plan for pre-suit accident investigations. Many companies have form status reports that also create a plan for litigation. Every case is unique. Each element may not apply to your case. It is our job to customize the form to fit the facts of each case. Clients also need an internal plan when dealing with potentially catastrophic cases. Include decision-makers early in the process. This may not minimize damages, but it prevents coverage issues which often arise when faced with large exposures. It is important that the parties can focus on the litigation rather than coverage issues.

2. Don't Wait.

Investigations should begin upon notice of potentially catastrophic events. This is the best opportunity to secure evidence and witness testimony. Waiting to begin your investigation prevents you from controlling the narrative. This also applies to retaining experts and securing evidence as discussed below. The same applies to litigation, but do not be impatient (see #7). Start the litigation process with discovery requests. Once you secure the documents schedule plaintiff's deposition. Interview witnesses, secure sworn statements and then deposition testimony. Keep the pressure on plaintiff. If you don't, plaintiff will apply the pressure and we will be on the defense.

3. Confirmation Bias/Losing Objectivity

Investigations and case evaluations must be done objectively. We evaluate the facts as they are, not the way we want it to be. You see this on television crime shows. They interview the guilty person in the first 5 minutes of the show, but don't believe the person can be involved, so they miss clues. They chase ghosts for the rest of the show. Sometimes they arrest the wrong person. Then in the last 5 minutes, in a plot twist, the investigator realizes his mistake.

There are multiple ways to investigate and defend a claim. Our investigation is not over when we find a fact that supports our claim. We need to be open to different alternatives even if we have not used them in the past. "That is the way we have always done it" is not an answer. Conducting an investigation to reach a specific opinion may result in damaging evidence being ignored. We see this with police reports where our truck drivers are presumed to be at fault.

4. Trust.

Ronald Reagan once said of the former Soviet Union, "Trust, but verify." Nobody wants to admit they did something wrong. Clients will often leave out facts or exaggerate facts to put them in

a better light. Their statement of the facts is a good starting point, but further investigation is needed to verify. Compare your driver's statement to their logs, receipts, dash cam video and any other objective evidence secured by your expert. We do this all the time when we audit a driver's log books. We should do the same with litigation

Hopefully, we can get to the driver BEFORE he gives a statement to the police. Statements made immediately after a catastrophic accident are filled with emotion and speculation. It is hard for them to answer time and distance questions soon after an accident. They are usually inconsistent with the objective facts from the ECM, skid marks or crush analysis. If there is no police statement, a driver has time to think about his answer, discuss it with friends and "develop" what they think is their best answer. These are equally unreliable. It is important to challenge our client's statements. Share the objective facts with them. Let them know we are playing devil's advocate when we challenge their statement. This is a form of early deposition preparation. Our client should not go into a deposition without his testimony first being challenged by his attorney. It hurts our clients if we blindly trust them without securing additional objective evidence to support their testimony.

5. <u>Assumptions/Jumping to Conclusions</u>.

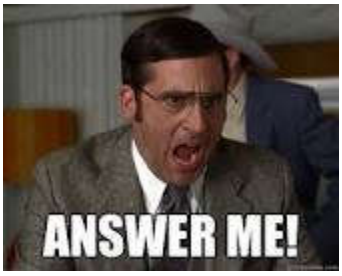
Most investigations and cases are fluid. We can report the facts that have been discovered, but should not make any assumptions about facts that do not exist. Hoping that evidence exists is not a strategy. We cannot assume Plaintiff has a preexisting medical condition, we have to secure the records. We have to "test" our theories to confirm we have admissible evidence to support our theories. Assumptions are not admissible evidence.

6. <u>Failure to Follow-Up</u>.

Once an action plan is completed, we must make sure we follow through with recommendations. For instance, if there is an indication Plaintiff has preexisting medical issues, it is important to request those records. Often, Plaintiffs will object and not produce the information.

Rather than accepting that objection, it is important to file a Motion to Compel with the Court. If plaintiff identifies witnesses, interview them and then take their depositions. Confirm plaintiff's testimony just as we confirm our own client's testimony.

7. <u>Being Impatient</u>.



While it is important to get evidence as soon as possible, we must be patient to secure sufficient evidence before forming an opinion. This may be a lengthy process. It could evolve multiple depositions, motions to compel, and hiring private investigators. This is also important as a defensive posture. Plaintiff's attorneys try to depose multiple employees trying to get inconsistent answers about whether a document exists and where it is kept. For instance, one employee states no discipline record exists and another employee says it does exist. Once plaintiff secures an inconsistent answer, they approach the court and ask for sanctions because we did not produce a document, even if your employee was wrong about the existence of a disciplinary record.

8. <u>Failure to Secure an Expert</u>.

It is important to secure experts early in the investigation or litigation process. They can secure evidence from the accident scene. Consultation with experts before proceeding with discovery can help you shape your discovery requests and deposition questions. Find out if your expert needs specific information to render an opinion and then secure it in discovery.

<u>9.</u> <u>Failure to Secure Evidence.</u>

This applies to a pre-suit investigation as well as litigation. Failure to preserve or secure evidence can result in a spoliation claim. This may result in sanctions, a default judgment, or a jury instruction from the Court that had you preserved the evidence, it would have been damaging to your case. That cuts into your credibility. If a jury thinks you are hiding something from them or intentionally destroying evidence, they can punish you in the form of a jury verdict.

This section relates back to trusting your driver. I have had multiple cases where the initial report from the driver is favorable, but the story does not hold up to an objective investigation. Some statements were mildly off point while others were directly opposite to the objective facts. Do we "create" evidence if we download the ECM? Do we "destroy" evidence if we fail to download the ECM?

10. <u>Communications</u>.

It is important for everyone involved in the case communicate on a regular basis. This helps eliminate surprises and allows a company to make an informed decision whether to proceed to trial. This starts at the beginning when an investigation is first assigned to an attorney. Be clear in your expectations of what is expected from the attorney. Likewise, the attorney should be clear with their findings and recommendations to the client/carrier. It is important to place the excess carrier on notice if there is a possibility damages can exceed your SIR or first layer of insurance coverage. This applies even if the likelihood of an excess verdict is small.

<u>Conclusion</u>:

Successfully Plaintiff attorneys are trying to turn normal cases into catastrophic cases. This must be met with an aggressive defense which begins with an aggressive investigation. Start with utilizing the attached Trucking Accident Checklist, secure evidence, test your theories and client's statements and continue with regular communications to make sure all parties are aware and satisfied with the progress of the case. While this is not a guarantee to prevent catastrophic injuries, it will help minimize them.

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Direct Negligence Claims Against a Motor Carrier

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There's no such thing as a simple truck wreck case anymore.

Even when the facts of the accident seem rather simple and even if the injuries are not catastrophic, Plaintiffs often will assert direct negligence claims against the motor carrier for negligent hiring, training, supervision, and entrustment. Generally, if the motor carrier admits that a driver was acting in the course and scope of his employment (whether as a direct employee or a leased driver) and that it is therefore vicariously liable for the driver's negligence, such claims are superfluous and should be dismissed. Since the purpose of such direct negligence claims is to impose vicarious liability where none otherwise exists, there is no need to submit such claims to the jury where vicarious liability is admitted. *See, e.g. McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). See also Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 Wyo. L. Rev. 229 (2010).

Why do Plaintiffs bother? The reason is because the submission of such direct negligence claims to the jury requires the admission of evidence that would otherwise be excluded in a simple negligence claim. This could include the driver's DMV record, evidence of other accidents, and any violations (technical or otherwise) by the motor carrier of the FMCSR requirements for hiring, training, and supervision. Another reason to pursue such claims is the possibility that the court will allow an allocation of fault to both the driver and the motor carrier, even though the only way the motor carrier's direct negligence can cause an accident is through the conduct of the driver. This has the potential to result in double recovery for the Plaintiff.

Since the majority of courts have dismissed direct negligence claims in the face of an admission of vicarious liability, Plaintiffs have adapted. More recently, many Plaintiffs also assert punitive damage claims based on the conduct of the motor carrier in an attempt to circumvent *McHaffie* and other similar cases. When punitive damages are asserted, either against the driver or the company or both, several additional issues must be evaluated with respect to the defense of the case.

Early in the process, you should discuss the unique state of the law in the relevant jurisdiction with defense counsel. Many different issues come into play. Has the jurisdiction embraced the *McHaffie* reasoning and to what degree? If not, how might the court rule? What are the standards for punitive damages—both for direct liability as well as vicarious liability? This knowledge, together with a full understanding of the particular facts of the case, can then be used to formulate a plan to try or settle the case on the facts that really matter.

Elements of Each Theory of Recovery

Negligent Supervision/Training (RESTATEMENT (2ND) TORTS § 317)

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Negligent Hiring

(1) the employer was required to make an appropriate investigation of the employee and failed to do so;

(2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and

(3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.

(4) causation and damages

Negligent Entrustment

(1) entrustment of a vehicle by the owner;

(2) to an unlicensed, incompetent, or reckless driver;

(3) the owner knew or should have known the driver was unfit;

(4) the driver was negligent on the occasion in question; and

(5) the driver's negligence proximately caused the accident.

Negligent Retention

(1) employer retained an employee that it knows or should have known is incompetent; or

(2) the employer knew or should have known that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor; or

(3) employer knew or should have known of the employee's dangerous proclivities

Practical Common Threads among the Theories

(1) the employee is actually unfit to drive

(2) the employer knows or should know that the employee was unfit

(3) the employer acts or fails to act in a reasonable manner (hires anyway, doesn't train, fails to re-train/supervise, etc.)

(4) the driver negligently causes an accident

(5) a causal relationship between the direct negligence and the accident.

Other Issues

Minority Courts are Wrong

A few courts view direct negligence claims as independent theories against the employer without appreciating that the very purpose of these theories is to impose liability on the employer for the driver's negligence in causing the accident. They refuse to acknowledge that direct negligence cannot *cause* an accident unless the driver was also at fault. Obviously, a failure to train cannot possibly cause an accident unless the driver was negligent at the time in question. But you may have to live with it.

The Punitive Damage Exception.

Some courts have held that language in the *McHaffie* decision acknowledged an exception to the general rule when the Plaintiff asserts a claim for punitive damages based on the direct negligence conduct. "It is also possible that an employer or entrustor may be liable for punitive damages which would not be assessed against the employee/entrustee." However, other Missouri courts hold that this brief discussion did not constitute a decision to create an exception. See, e.g., *Allstate Ins. Co. v. Hasty*, 2010 U.S. Dist. LEXIS 144965, *7 (W.D. Mo. 2010). See also *Ferrer v. Okbamicael,* 390 P.3d 836 (Colo. 2017) which forcefully rejected the punitive damages exception.

On the other hand, in *Hockaday and Warren v. Aries Logistics*, No. 14-CV-260 and 16-CV-247, a Wyoming Federal District Court went against consistent district precedent and refused to dismiss direct negligence claims relying on the punitive damages exception. The case involved a driver who hit a passenger vehicle, fled the scene, and tried to mislead law enforcement claiming he hit a deer. The employer apparently took part in the deception to one degree or another. Defendants admitted negligence and vicarious liability for that negligence. The trial court arguably committed additional errors in the admission of evidence and the punitive damages instructions. The result was an award of punitive damages to both defendants, but not a true Nuclear Verdict®. This is a prime example of bad facts making bad law. The facts were egregious, the judge was angry, and one attorney represented both the company and the driver. The case settled before an appellate court could potentially clean up some of the mess.

Examples of Conduct Required for Punitive Damages

1. Intentional misconduct

2. Willful and wanton misconduct

3. Deliberate indifference to the safety of others

4. Some states require a higher level of proof.

Generally, punitive damages are designed to punish the defendant and deter others from similar reprehensible conduct.

Generally, the defendant must proceed with knowledge that the conduct is wrongful and poses a high degree of likelihood that harm will occur.

In a commercial motor vehicle context, it is counterintuitive to believe that a motor carrier would entrust someone with a valuable vehicle and cargo knowing there is a high likelihood that he/she would be in a crash. And this is before you ever consider that the crash might harm anyone.

Vicarious liability for the driver's willful and wanton misconduct

Obviously, it is difficult to imagine a situation where the type of conduct required to support an award of punitive damages would be in the course and scope of employment, especially for a commercial motor carrier. As such, courts will typically not hold an employer vicariously liable for such conduct. Note sub-section (b) however. *See* RESTATEMENT 2(D) TORTS § 909:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Dealing with direct negligence claims

1. If the jurisdiction acknowledges that these claims are an alternate way to establish vicarious liability, then the claims should be dismissed if you admit vicarious liability under a respondeat superior (course and scope) theory. Note—some Plaintiffs now purposely avoid alleging respondeat superior, but you can try to admit it anyway to render the direct negligence claims superfluous.

2. If there is no claim for punitive damages, then consider admitting the driver was in the course and scope and that you are vicariously liable for the driver's negligence, if any. Immediately file a Motion to Dismiss the direct negligence claims.

3. If the Complaint also alleges that your driver's conduct merits punitive damages, then you have to assess the nature and viability of the allegations.

    a. If the threat is very low and the facts only support a typical negligence case, then consider admitting he/she was in the course and scope and you are vicariously liable for the driver's negligence, if any. But deny that any conduct that would merit a punitive

award was in the course and scope of employment. In these cases, you may be able to still retain just one attorney for both the company and the driver, though there is a risk if discovery reveals more egregious misconduct.

b. If the threat is real, then you should probably answer the allegations as above, but also retain separate counsel for the driver.

c. If the case involves only reprehensible misconduct that is obviously outside the course and scope (i.e. an intentional tort such as assault and battery) then you have to decide whether to cut the driver loose and defend on the proposition that the driver was outside the course and scope for all conduct OR decide to defend the driver under a reservation of rights. Keep in mind that the attorney you retain for the driver will likely oppose your MTD/MSJ on course and scope.

Initial questions to ask when evaluating a new file

1. Is the driver an employee or owner-operator.

2. Was the driver acting in course and scope of employment? You should review the company's employment and safety policies as well as any standards for O-O conduct.

3. Does the state typically permit direct negligence claims against the employer to go forward even when the employer admits the driver was acting in the course and scope of employment?

4. Is there a claim for punitive damages?

   If so:

   A. Is the punitive damage claim against the driver or the company?

   B. Is the basis the driver's actions or something else (logbooks, driving history, unfit to be a driver, falsified application, etc.)?

5. What is the standard for imposing vicarious liability for punitive damages in the jurisdiction?

   A. Does it require that employee act at direction of employer?

   B. Does the employer have to ratify the actions that give rise to punitives?

   C. If so, are either applicable here?

6. How well did the company follow policies re: hiring, training, the DQ file, background checks, etc.?

7. Should the insured admit course and scope for everything?
   Should the insured admit course and scope for negligence only?
   Deny course and scope?
   Do you have sufficient information at this time?

8. If the driver is a named party, do I need to hire two attorneys?

Case Law

This is NOT a complete survey of the law in this area.

***Ferrer v. Okbamicael,* 390 P.3d 836 (Colo. 2017).** The Colorado Supreme Court adopted the *McHaffie* Rule, but explicitly rejected the punitive damages exception. The court recognized that those courts that have recognized such an exception "have done so with little to no analysis. . . . Such an exception is not logically consistent with the rule." *Id.* at 847-48.

***Bogdanski v. Budzik*, 2018 WY 7, 408 P.3d 1156 (Wyo. 2018).** Adopts *McHaffie* Rule but is silent on the punitive damages exception.

***Rand v. Stanosheck*, 2019 U.S. Dist. LEXIS 135359, *11 (D. Neb. 2019).** USDC Nebraska again predicts Nebraska Supreme Court will adopt *McHaffie* but insinuates punitive damages exception may apply.

***Greene v. Grams*, 384 F. Supp. 3d 100 (D. D.C. 2019).** Adopts *McHaffie* and suggests punitive damages suggestion will not apply in D.C. courts.

***Justice v. Greyhound Line, Inc.*, 2019 U.S. Dist. LEXIS 9496 (E.D. N.C. 2019).** Follows the rule but does not explicitly adopt *McHaffie*.

***Finkle v. Regency CSP Ventures Ltd. P'ship*, 27 F. Supp. 3d 996 (D. S.D. 2014).** Rejects the *McHaffie* Rule.

NOTE--A Tennessee Court of Appeals rejected *McHaffie*, but that decision was later vacated by the Tennessee Supreme Court on procedural grounds.

***Allstate Ins. Co. v. Hasty*, 2010 U.S. Dist. LEXIS 144965, No. 10-00209-CV-W-DW (W.D. Mo. Sept. 14, 2010)** (Held *McHaffie* and its progeny do not apply only to automobile cases; applying *McHaffie* principles in a legal malpractice and breach of contract action). Note that in Wyoming, a med mal case involving issues of who was vicariously liable for a nurse's conduct served as a basis for the Wyoming decisions that adopted *McHaffie*.

***Frederick v. Swift Transp. Co.*, 616 F.3d 1074 (10th Cir. 2010)** (Recognizing that when an employer admits the applicability of *respondeat superior*, it is entitled to summary judgment on claims for negligent entrustment, hiring, and retention on the basis that "since the employer would be liable for the employee's negligence under respondeat superior, allowing claims for negligent entrustment, hiring, and retention would not entitle the plaintiff to a greater recovery, but would merely serve to prejudice the employer").

***Cruz v. Durbin*, 2011 U.S. Dist. LEXIS 51057, No. 2:11-CV-00342-RCJ-LRL (D. Nev. May 9, 2011)** (Granting defendants motion to dismiss plaintiffs' negligent hiring and training claims because defendant employer admitted defendant employee was acting in the course and scope of his employment. Although the Nevada Supreme Court had not decided this issue, the federal district court based its decision on *McHaffie* and its progeny). In ***Wright v. Watkins & Shepard Trucking, Inc.*, 968 F. Supp 2d 1092 (D. Nev. 2013),** the court followed *McHaffie*, but allowed the punitive damage exception to keep a case alive.

***Kwiatkowski v. Teton Transp., Inc.*, 2012 U.S. Dist. LEXIS 56478, No. 11-1302-CV-W-ODS (W.D. Mo. Apr. 23, 2012)** (Denying defendants' motion to dismiss plaintiff's claims for negligent hiring and entrustment on the basis that the employer admitted liability for the acts of its driver employee, because the employer could still be liable for exemplary damages under the direct negligence claim and stating, "If the Missouri Supreme Court was presented with the issue, the Court believes it would recognize a punitive-damage exception to the rule stated in *McHaffie*").

***Wilson v. Image Flooring, LLC*, 400 S.W. 3d 386 (Mo. Ct. App. 2013)** (Recognizing that a punitive damages exception to *McHaffie* exists and stating, "If an employer's hiring, training, supervision, or entrustment practices can be characterized as demonstrating complete indifference or a conscious disregard for the safety of others, then the plaintiff would be required to present additional evidence, above and beyond demonstrating the employee's negligence, to support a claim for punitive damage. Unlike the *McHaffie* scenario, this evidence would have a relevant, non-prejudicial purpose. And because the primary concern in *McHaffie* was the introduction of extraneous, potentially prejudicial evidence, we believe that the rule announced in *McHaffie* does not apply where punitive damages are claimed against the employer, thus making the additional evidence both relevant and material.").

***Coomer v. Kansas City Royals Baseball Corp.*, 2013 Mo. App. LEXIS 46, Docket No. WD73984 and WD74040 (Mo. Ct. App. Jan. 15, 2013)** (Affirming the trial court's decision to dismiss the plaintiff's negligent supervision and training claims based on *McHaffie*. "While *McHaffie* left open the possibility, 'that the employer or entrustor may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an entrustee or employee,' such is not the case here. . . ."

***MV Transport, Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014)**. Rejects *McHaffie*.

***James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008).** Rejects the rule.

***Gant v. L.U. Transp.*, 331 Ill.App.3d 924, 770 N.E.2d 1155 (1st Dist. 2002), citing *Montgomery v. Petty Management Corp.*, 323 Ill. App. 3d 514, 519, 752 N.E.2d 596 (1st Dist. 2001).** Early adopters of the rule.

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Reading People: Applying Human Psychology to Your Litigation Strategy

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Imagine you are sitting at a poker table holding a hand of cards. You get tired of repeatedly analyzing the same data that you are holding. You have your cards memorized by now but are still not sure how to proceed. So you look around the table at the other people. You are hoping to recognize a "tell" from those sitting around you that would help you get an idea of what your next move should be. Do they seem confused? Intimidated? Overconfident? The cards are what they are. But the human element is the space where you can identify variables and implement strategy.

The real question is*: what can you observe about a person that will help you predict their next decision*? Better yet, what you can you do to prompt them to give you such a "tell"? This paper will explain how learning a person's personality, generational makeup, and socio-economic class can help you tailor your communication to maximize effectiveness and elicit favorable decisions from them. It's not about judging people. It's about identifying someone's core motivation and tendencies; because once you do, it is just a short leap to persuading them.

Of course, every person is unique. But there are general tendencies of personality make ups, age-related predictors, and social class biases that can help you quickly get a read on someone. You just have to know what to look for. This paper will help you do that. Specific to litigation, it will help you:

- Recognize your own natural wiring and tendencies
- Become a more effective communicator
- Understand the psychology of a Plaintiff towards settlement
- Effectively size up a Judge and opposing counsel
- Identify the predisposed mindset of a Juror
- Properly vary your witness preparation (i.e. for a CEO, Middle-management, and day laborer)
- Staff your litigation files based on team members' innate strengths

I. DIFFERENT THINKING AMONG HUMAN PERSONALITIES

Your "personality" is a combination of characteristics that form your distinctive character. In short, it's how you are wired. You were born with some of this natural wiring and acquired the rest as a result of environmental factors you experienced in your childhood. (There are more resources and theories on this than I can cite, but this is the gist of it.)

I bet you have taken some type of personality test in the past. So you know if you are "introverted" or "extroverted." And you know if you are more task-oriented or people-oriented. But have you ever thought about this wiring of the person you are trying influence? This empathetic understanding is the key to better connecting with and influencing people.

Personality Assessments

There are several different personality assessments available. They run the gambit from free online questionnaires to professional (and expensive) in-house consultants. But they all aim to provide you with the same information: how you and your team are wired. The idea is that once you understand this wiring you can develop a company culture that is more productive. Here is a sampling of some the best and most well-known assessments:

- DISC
- Meyers-Briggs
- Gallup Strength Finders
- Culture Index
- Enneagram

The 9 Personality Types (according to Enneagram)[1]

Type 1

The Moral Perfectionist

Type Ones are people who are conscientious, sensible, ethical, responsible, idealistic, serious, self-disciplined, orderly, and feel personally obligated to improve themselves and their world.

What drives a Type One to think, feel, and behave in particular ways?

Core Fear:

- Being wrong, bad, evil, inappropriate, unredeemable, or corruptible.

Core Desire:

- Having integrity, being good, balanced, accurate, virtuous, and right.

Core Weakness:

- Resentment—repressing anger that leads to continual frustration and dissatisfaction with themselves, others, and the world for not being perfect.

Core Longing *(message they long to hear):*

[1] https://www.yourenneagramcoach.com/types

- "You are good."

Type 2

The Supportive Advisor

Twos are very giving people who see the world through relationships and define themselves through their service to others. They may be selfless, loving, and giving; or dependent, prideful, and manipulative.

What drives a Type Two to think, feel, and behave in particular ways?

Core Fear:

- Being rejected and unwanted, being thought worthless, needy, inconsequential, dispensable, or unworthy of love.

Core Desire:

- Being appreciated, loved, and wanted.

Core Weakness:

- Pride —denying their own needs and emotions while using their amazing intuition to discover and focus on the emotions and needs of others, confidently inserting their helpful support in hopes that others will say how grateful they are for the Type 2s thoughtful care.

Core Longing *(message they long to hear):*

- "You are wanted and loved."

Type 3

The Successful Achiever

Types Threes are people who measure themselves by external achievement and the roles that they play. They may be goal-oriented, accomplished, and excel at what they do, or they can embellish the truth, be overly competitive, and focused only on their own accomplishments.

What drives a Type Three to think, feel, and behave in particular ways?

Core Fear:

- Being exposed as or thought incompetent, inefficient, or worthless; failing to be or appear successful.

Core Desire:

- Having high status and respect, being admired, successful, and valuable.

Core Weakness:

- Deceit - deceiving themselves into believing that they are only the image they present to others; embellishing the truth by putting on a polished persona for everyone (including themselves) to see and admire.

Core Longing *(message they long to hear):*

- **"**You are loved for simply being you."

Type 4

The Romantic Individualist

Type Fours live primarily in their imagination and in their feelings. They may be artistic, sensitive, creative, articulate, and inspiring; or moody, elitist, and self-absorbed.

What drives a Type Four to think, feel, and behave in particular ways?

Core Fear:

- Being inadequate, emotionally cut off, plain, mundane, defective, flawed, or insignificant.

Core Desire:

- Being unique, special, and authentic.

Core Weakness:

- **Envy—**feeling that they are tragically flawed, something foundational is missing inside them, and others possess qualities they lack.

Core Longing *(message they long to hear):*

- **"**You are seen and loved for exactly who you are—special and unique."

Type 5

The Intellectual Thinker

Type Five is a person who pulls back from the world and others to observe and prefers to live in their mind. They may be wise, visionary, and knowledgeable; or abstract, stingy, eccentric, and intellectually arrogant.

What drives a Type Five to think, feel, and behave in particular ways?

Core Fear:

- Being annihilated, invaded, or not existing; being thought incapable or ignorant; having obligations placed upon them or their energy depleted.

Core Desire:

- Being capable and competent.

Core Weakness:

- Avarice—feeling that they lack inner resources and that too much interaction with others will lead to catastrophic depletion; withholding themselves from contact with the world; holding onto their resources and minimizing their needs.

Core Longing *(message they long to hear):*

- "Your needs are not a problem."

Type 6

The Loyal Guardian

Type Sixes are skeptic people who anticipate life's dangers. When healthy, they have faith, are courageous, loyal, and effective. When struggling, they are cowardly, hyper-vigilant, and paranoid.

What drives a Type Six to think, feel, and behave in particular ways?

Core Fear:

- Feeling fear itself, being without support, security, or guidance; being blamed, targeted, alone, or physically abandoned.

Core Desire:

- Having guidance, security and support.

Core Weakness:

- **Anxiety—**scanning the horizon of life and trying to predict and prevent negative outcomes (especially worst-case scenarios); remaining in a constant state of apprehension and worry.

Core Longing *(message they long to hear):*

- **"**You are safe and secure."

Type 7

The Entertaining Optimist

Type Sevens love to plan and anticipate positive future events. They enjoy having variety and multiple choices to choose from. They do not want to be limited, restricted, or bored. They may be well-rounded, affirming, and generous, or at their worst they can be self-focused, an escapist, and have an insatiable appetite for excitement.

What drives a Type Seven to think, feel, and behave in particular ways?

Core Fear:

- Being deprived, trapped in emotional pain, limited, or bored; missing out on something fun.

Core Desire:

- Being happy, fully satisfied, and content.

Core Weakness:

- Gluttony—feeling a great emptiness inside and having an insatiable desire to "fill themselves up" with experiences and stimulation in hopes of feeling completely satisfied and content.

Core Longing *(message they long to hear):*

- "You will be taken care of."

Type 8

The Protective Challenger

Eights are people that fear being weak, vulnerable, and harmed, so they create an image that they are strong, able to prevail, determined and committed to those who are innocent. If they are not doing well, they can be vengeful, excessive, and destructive.

What drives a Type Eight to think, feel, and behave in particular ways?

Core Fear:

- Being weak, powerless, harmed, controlled, vulnerable, manipulated, and left at the mercy of injustice

Core Desire:

- Protecting themselves and those in their inner circle.

Core Weakness:

- Lust/Excess—constantly desiring intensity, control, and power; pushing themselves willfully on life and people in order to get what they desire.

Type 9

The Peaceful Mediator

Type Nines are people who are very receptive to their environment and downplay their own presence. They can be loving, down-to-earth, modest, and trusting, or stubborn, lazy, and asleep to themselves.

What drives a Type Nine to think, feel, and behave in particular ways?

Core Fear:

- Being in conflict, tension, or discord; feeling shut out and overlooked; losing connection with others.

Core Desire:

- Having inner stability and peace of mind.

Core Weakness:

- Sloth—remaining in an unrealistic and idealistic world in order to keep the peace, remain easy-going, and not be disturbed by their anger; falling asleep to their passions, abilities, desires, needs, and worth by merging with others.

Application of the 9 Personality Types

Which of the 9 types do you think you are? How would this affect what motivates you if you were personally involved in a lawsuit? This is the very reason why we should tailor our litigation strategy to each individual involved in the process- just like you play each hand of poker differently depending on who is sitting at your table. To excel in litigation, you must adjust your tone, content, and reactions to the person you are communicating with. To be most effective, you have to address each person's core fear and core desire. For example, if you are communicating with a Type 1 (Moral Perfectionist) you would appeal to them through the lens of what is right vs. wrong.

Personalities also play a giant role in team dynamics. So you should be more intentional in reading people BEFORE you put them on your team. Best-selling author Jim Collins, in his classic business book *Good to Great*, explains that great companies "get the right people on the bus." And the next step is to "get the right people in the right seats on the bus." In claims handling and litigation, the team often consists of in-house counsel, a claims manager, an adjuster, an investigator, and an attorney. Everyone has basically the same playbook encoded in their claims handling manual and counsel litigation guidelines. But execution is what separates the "great" teams from the "good" ones. As you read the different personality types above, think about which ones would best fit the roles in resolving your cases.

II. DIFFERENT THINKING AMONG GENERATIONS

There are four generations walking this earth as adults right now. And each of these four generations tend to process information differently. Further, each generation has communication preferences. So let's take a look at the differences and derive a strategy for approaching people from each generation.

1. **Traditionalists** – the silent generation.

These people were born between 1928 and 1945, ranging from age 75 to 92. This is the silent generation or, as penned by Tom Brokaw, "The Greatest Generation". These jurors grew up during The Great Depression and World War II. Many experienced the challenges of poverty followed by prosperity. The Traditionalists are known for pulling together and sacrificing for the greater good. Many spent their entire work life with the same employer, and they were less likely to change jobs frequently. This generation adheres to rules. They have a dedicated work ethic, trust government, and are patriotic and loyal, accepting that duty comes before fun. The Traditionalist respects authority. They are usually good team players. Their social structure is built around the traditional family with men typically employed while women stayed at home raising children. The Traditionalist is conservative. The Traditionalist did not grow up with modern technology, struggles to learn it and may resent those that rely on it. They do not adapt well to change. They do not deal well with ambiguity. The traditionalist is frugal, private, trustworthy, and uncomfortable with social changes.

2. Baby Boomers

The Baby Boomers were born between 1946 and 1964 and are currently between the ages of 56 and 74. The Baby Boomers grew up during the Civil Rights Movement, the Vietnam War, and the Cold War. They created the term "workaholic." They generally believe that rules should be obeyed unless the rules are contrary to what they want, then the rules are to be broken. They hold positions of power and authority. They are loyal to their employer. They give maximum effort to go the extra mile in order to obtain a desired result. They are optimistic and team orientated, but will question everything. They are generally anti-government and anti-war. They want to make a difference and believe they can change the world. They are competitive, competent, and ethical but will challenge authority. They are confident and independent.

3. Generation X

Members of Generation X were born between 1965 and 1980, ranging in age between 40 and 55. Generation X are known for ethnical diversity and generally are more educated than Baby Boomers. This is the generation of Y2K, the Watergate Scandal, and increased divorce rates. Generation X is the "latch-key kid", because, unlike the Traditionalists, both Baby Boomer parents were in the workplace. Their perceptions were shaped by raising themselves, watching politicians lie, and having their parents laid off. They experienced an increase in personal computer use and the internet. This was the first generation to grow up with computers. They generally hold middle-management positions in the corporate world. They dislike being micro-managed, and they embrace hands-off management philosophy. Generation X defined the term "slackers." They work to live rather than live to work. They adapt well to change. Many experienced disrupted vocational careers with numerous employers. They are the children of the parents who have the highest rates of divorce and downsizing. They ignore leadership and are unimpressed with authority. They are skeptical of institutions.

4. Millennials

Generation Y, or the Millennials, were born between 1980 and 1995. These are the people ranging in age from 25-40. The Millennials are known as the "entitlement generation." This is the most ethnically diverse generation. Generation Y grew up with technology and rely on it 24/7. This is the least religious generation. They are shaped by exposure to school shootings, terrorist attacks, including the attacks of September 11, 2001. This generation was exposed to the rise of the smart phone, iPad, iPods, social media, including Facebook and Twitter. Generation Y saw the death of landline telephones, payphones, and video rentals. This generation saw the transformation of the economy from flat to recessive, but hope to be the next generation to turn around all the "wrong" they see in the world. They are concerned about security. They are independent and think for themselves. They are achievement oriented with high expectations of employers. They believe they are entitled to higher pay due to their technical skills. However, they are willing to trade high pay for fewer hours. This generation, like Generation X, work to live rather than live to work. While they are individualists, they are also group oriented. Generation Y wants instant gratification. They are more culturally and racially tolerant and more accepting of change. They believe policies and procedures are supreme. They share strong anti-corporate beliefs and lack trust in companies. They respect their elders. They believe their voice is important and should be heard over multiple media platforms.

5. Generation Z

Generation Z are those born after 1995. This generation will be shaped by the War on Terror, the Financial Crisis of 2008, Mobile Banking and Mobile Media.

Communication Styles

The Traditionalist

As each generation has distinct characteristics, each also has a distinct communication style. The Traditionalists grew up without modern technology and prefer to communicate in a manner consistent with the technology available during their generation. They prefer one-on-one discussions and face-to-face conversations. They prefer written letters rather than email. The best way to communicate with Traditionalists is to present your client's story in a formal, logistical manner. Respect must be shown for the Traditionalist, age and experience, using sir, ma'am, mister and Mrs. in voir dire. If your defendant has a solid history, emphasize that history and tradition with the Traditionalists. The Traditionalists will prefer written instructions to assist them in reaching a verdict. They will pay attention to the words you use rather than your body language. Keep things simple, do not waste their time, and get to the point. In using technology, be aware of the difficult balance between the Traditionalist's desire for not much technology and the Millennials' expectation of a high tech presentation. The Traditionalist likes simple demonstrative evidence, such as graphs and tables. They respect structure and hierchy, so be careful if your client did not follow proper policy and procedure. However, if your polices support your defense, then emphasize the written policies and procedures.

Baby Boomers

The Baby Boomer generation is comfortable with texts and emails but prefer telephone conversations or face-to-face conversation. This generation will speak in an open and direct manner. During voir dire, expect them to answer in a direct and thorough manner. However, they also expect

to be pressed for details. They will welcome questions about themselves and have a desire to express what is important to them. They will focus on your body language, as they learn by hearing and seeing. They relate well to storytelling methods, such as the use of timelines. They value hard work and commitment to career, so it may be helpful if key witnesses are long-term employees to emphasize that aspect. They also care about image and reputation, so focus on any positive image or reputation within the community. They learn best when their personal experience can be tied to the case.

Generation X

Generation X is more likely to rely on technology than their Baby Boomer parents. They use cell phones, but they prefer to only be called at work. Communicating by email is preferred. Generation X is more receptive to short, concise and simple messages that are reinforced with demonstrative evidence. Provide short sound bites. Visual aids prevail over long documents. Their approach is more hands-on in learning. Provide an element of entertainment and engage quickly, leaving no down time. Avoid buzz words or company jargon. Tie your message to results. Generation X will be skeptical of expert witnesses, so highlight the expert's achievements and work experiences as opposed to credentials. Generation X has a strong sense of entitlement and, like Millennials, tend to favor compensation if someone is injured regardless of fault.

Millennials

The Millennials are completely "plugged in" to technology. This generation is described as "digital native", because they are the first generation born into the daily use of computers, internet, and social media. The use of modern technology is a natural way to connect to people, and the Millennials grew up with technology and constantly rely on it. They prefer to communicate through social media or text messages, rather than by telephone or face-to-face. In communicating with Millennials, like Generation X, they expect to be entertained. Keep the message simple and use short sound bites. The Millennials are used to communications in 140 character tweets or disappearing Snapchat messages. Use videos and pictures that consolidate information and illustrate key points. The Millennials have short attention spans and get bored quickly. You must act fast or lose them. The subject must be interesting and engaging to retain their interest. You must perfect your client's message to easily digestible and memorable themes. Reinforce this message throughout your presentation or jury trial. Long, convoluted explanations and redundant testimony will cause Millennials to tune out. Use language to portray visual pictures. Millennials are tactile learners and like the hands-on approach.

The Millennials expect openness, sincerity, credibility, and transparency. Any inconsistencies in the documentation needs to be addressed. Exploit any credibility issues of the plaintiff and discuss issues of personal responsibility. Personal safety is key, so be careful if a claim relates to safety, as it will have greater appeal with the Millennials. The Millennials value loyalty, and they will not be sympathetic to a party who has betrayed the trust of another.

In summary, to enhance your influence with each person you must tailor your communication style according to their generational preferences. It is akin to speaking their language. While generational categories are very general, the communication styles preferred by each are remarkably consistent.

III. DIFFERENT THINKING AMONG ECONOMIC CLASSES

Some differences between economic classes are obvious. For example, different tastes in music, food, and clothing. However, there are more weighty "hidden rules" that actually drive the decisions of the poor, middle class, and wealthy. These hidden, unspoken rules are subconscious biases that affect how each person views and approaches their decisions in life. So in order to better understand potential jurors, coworkers, and new acquaintances, we must unpack some of subtle and dramatic differences among each economic class.

In her book, "Bridges out of Poverty" Ruby K. Payne, PhD presents a text-book like case study of behavioral differences among the three economic classes. She even gives the reader the 3 following tests:

*Directions: Give yourself 1-point for every question that you answer "yes" to.

Could you survive in Poverty?

1. I know how to get someone out of jail.
2. I know how to defend myself physically.
3. I know how to get a gun.
4. I know how to keep my clothes from being stolen at a laundromat.
5. I know how to live without a checking account.
6. I know where the free medical clinics are.
7. I am good at trading and borrowing.

Could you survive in the Middle Class?

1. I know how to properly set the table.
2. I know which stores carry the brands I wear.
3. I know how to order at a nice restaurant.
4. I know how to decorate the house for different holidays.
5. I know how to get a library card.
6. I talk to my children about going to college.
7. I can help my children with their homework.

Could you survive in Wealth?

1. I can read a menu in French, English, and another language.
2. I have several favorite restaurants in different countries in the world.

3. I have at least two residences that are staffed and maintained.

4. I fly on my own plane or the company plane.

5. I am on the board of at least two charities.

6. I support or buy work of a particular artist.

7. During the holidays, I know how to hire a decorator to identify the appropriate themes which to decorate the house.

*Which class did you score the highest in?

The purpose of this exercise:

Is to examine how hidden rules function. For example, if you fall mostly in the middle class, the assumption is that everyone knows these things. However, if you don't know many of the items for the other classes, the exercise points out how many of the hidden rules are taken for granted by a particular class. What are the Hidden Rules?

The Hidden Rules Among Economic Classes:

	Poverty	**Middle Class**	**Wealth**
Money	To be spent	To be managed	To be conserved and invested
Worldview	Sees world in terms of their local setting.	Sees world in terms of national setting.	Sees world in terms of international view.
Personality	Is for entertainment. Humor is highly valued.	Is for acquisition and stability. Achievement is highly valued.	Is for connections. Financial, political, social connections are highly valued.
Time	Present is the most important. Decisions are made for moment based on feelings or survival.	Future is the most important. Decisions are made against future ramifications.	Traditions and history are most important. Decisions are made partially on basis of tradition and decorum
Education	Viewed as abstract, but not as reality	Crucial for climbing success ladder and making money	Necessary traditions for making and maintain connections
Language	Casual register. Language is about survival.	Formal register. Language is about negotiation.	Formal register. Language is about networking.

Family Structure	Tends to be Matriarchal	Tends to be Patriarchal	Depends on who has the money
Food	Did you have enough? Quantity	Did you like it? Quality	Was it presented well? Presentation
Humor	About people and sex.	About situations.	About social faux pas.
Driving Forces	Survival, relationships, entertainment	Work and achievement	Financial, political and social connections

Chart from "Bridges out of Poverty" Ruby K. Payne, PhD, p. 44-45.

World views from each class

- Wealthy individuals view the international scene as their world. "My favorite restaurant is in Brazil".
- The middle class tends to see the world in terms of the national picture.
- While poverty sees the world in its immediate locale.

Key point:

Hidden rules among economic classes greatly influence thinking and behavior. We often take the rules from our class for granted while overlooking and failing to account for the hidden rules that other classes live by. To be more effective, we must modify our communication to account for the different psychology among classes.

How this applies to influencing a Plaintiff or jury pool:

- Assumptions made about a persons' intelligence and the way they approach life or work may relate more to their understanding of hidden rules.
- Poverty has general misconceptions about money – what it is and how it is used.
- We can't present information solely from the standpoint of the hidden rules of the middle class. We must vary our communication to account for the other classes. I do this by giving different class-specific analogies and examples to illustrate a point across many economic strata.
- Many of the attitudes that jurors bring with them are an integral part of their culture and belief system.
- Understanding the culture and values of poverty will help us communicate more effectively to maximally influence perception.

<u>"Thin Slicing"</u>

Why are all of these behavioral influences so important to understand? It's because people make decisions by interpreting a small sample size of data almost instantaneously using their own unique subconscious biases. Malcolm Gladwell, in his book "Blink" "(the power of thinking without thinking)" calls this process "thin slicing." All your efforts in trying to persuade someone will boil down to a split-second decision that they make for or against you. This decision comes from their innate wiring. Of course, the influence of someone's personality, generational experience, and economic status are the big drivers behind their subconscious biases that they use for decision making. Therefore, it is imperative to understand these factors so you can predict how they will "thin slice" the data you will present. And the next step will be tailoring the data you present to each person to help the elicit the response you seek. We'll cover that next.

IV. Strategy

In my favorite book on business strategy, "Playing to Win", author A.G. Lafley warns against the do-it-all strategy: where we fail to make choices or prioritize. Yet most attorneys and claims professionals will approach each of their litigation files with the same cookie-cutter game plan. Author A.G. Lafely quips "sameness isn't strategy, it is a recipe for mediocrity." It is time for you to improve and update your strategy.

You have already read countless materials or heard talks on why it is so important to "define the win." In litigation, most of us define the "win" as saving money, paying no money, paying little money, winning money, or closing the file etc. But Mr. Lafley goes further by challenging the reader to develop a strategy in part by asking "How will I win?" Let's answer that question now.

You will win by convincing people to see things your way. You see, litigation is not a battle of wits. It is a battle of *perception.* It does not matter that you are right if no one cares that you are right. For example, it is a poor strategy to simply clutch the results from your conservative mock jury awards that you obtained through focus group testing before trial while the real jury awards a $10 million dollar verdict against you. We must take the crucial step of influencing the jury's perception and not "just hoping they will see it too."

In short, "how you win" in litigation is by getting other people to perceive that you are right. Examples of this range from getting settlement authority from your own claims manager to convincing a Plaintiff to take less money at a mediation. But before you can do any of this you must figure out how that person thinks so you can effectively influence their perception. Stated differently, you must learn to read people before you try to influence them.

V. Tactics

There are several tactics that can help you get a read on a person. Any hostage negotiator or salesman will tell you that the number one tactic of reading people is to keep the other person talking. This allows you to learn information about them. Once you get this read on a person, you have a better chance of convincing them to do what you want. Before we cover some ways to keep a person talking, let's touch on two things NOT to do (because they will shut the other person down and keep you from getting a read on them).

Bad Tactics:

Do not criticize, condemn or complain:

The very first principle in Dale Carnegie's classic book "*How to Win Friends and Influence People*" is to "never criticize, condemn or complain" when dealing with others. All this does is kick in their fight-or-flight instincts and they shut down in dealing with you. You immediately lose your influence with them. While they may say they agree with you to get you off of their back, your influence is dead on arrival.

Do not argue:

I know what you are thinking: "What?! But we argue for a living!" That is because you learned that in your debate class or law school. But people also think emotionally, so let's zoom out and look at the big picture. When is the last time you won an argument with your spouse and felt satisfied with your marriage in that moment? Did you get a big hug and kiss right then? Of course not. Because you can "win" the argument and lose the relationship. Not worth it. As Benjamin Franklin said: "If you argue and rankle and contradict, you may achieve a victory sometimes; but it will be an empty victory because you will never get your opponent's good will."

Dale Carnegie's section on "How to Win People to Your Way of Thinking"[2] says "The only way to get the best of an argument is to avoid it." He shares this story:

> Mr. O'Haire became one of the star salesman of the White Motor Company in New York. How did he do it? Here is his story in his own words: "If I walk into a buyer's office now and he says: 'What? A White truck? They're no good! I wouldn't take one if you gave it to me. I'm going to by a Whose-It truck.' I say, "The Whose-It is a good truck. If you buy the Whose-It, you'll never make a mistake. The Whose-Its are made by a fine company and sold by good people.'
>
> "He is speechless then. There is no room for argument. If he says the Whose-It is best and I say sure it is, he has to stop. . . .We then get off the subject of Whose-It and I begin to talk about the good points of the White truck."

It is so important to not get sucked into the back and forth of explaining your position in a mediation or when exchanging letters with other attorneys. The other side often needs to be heard *before* they will listen to you. We will cover the "how to" of this later in this paper. For now, just know that if you do not listen and validate some of their points, often nothing will get accomplished in the negotiations. Listening to someone and validating some of what they say allows them to emotionally unload which paves the way for your next stage of negotiation. Also, by simply actively listening, with sincerity, to your adversary's position you will gain valuable insight into what it is that they actually want. Just remember: It is good to argue in a courtroom where a Judge can make a decision between two adversaries. But it is madness to argue out in the hallway where the Judge is nowhere around. This is because you never "win" an argument.

Good Tactics:

[2] "How to Win Friends and Influence People"

My favorite book on negotiations, "*Never Split the Difference*" by Chris Voss, provides many concrete tactical steps to win influence over someone. Voss says: "Being right is not the key to a successful negotiation. Having the right mindset is." He shares many useful tactics gained as the lead negotiator for the FBI in hostage situations around the world as well as from his experience as a business consultant. He has learned he has to gain "tactical empathy" with his counterpart to make them feel understood, to understand their true motives, and to reach a favorable conclusion. Here are some tips he offers:

Mirroring:

You want to keep the other person talking because you will learn more about their position. It also builds rapport. To do this, try to "mirror" their words: repeat the last 3 words (or the most important words) of what someone just said. They will automatically continue talking. Then do it again. They will keep talking. Something magical tends to happen as they emotionally release their built-up frustration and begin to trust you: they soften on their position without you saying a word! Try it and then stay quiet for a few seconds to allow it to work. In my experience, the more type "A" a person is the better this strategy works. It is the key to negotiating without really negotiating. And you often gain concessions from them as they think out loud without you offering anything in return.

Mirroring also allows you to get a read on a person. If you listen to someone talk long enough you will catch glimpses of their biases, worldview, and thought processes. So try mirroring instead of talking. Then, after gaining a read on the person, present your position.

Labeling:

You need to validate your counterpart's emotions by labeling them. This will show them that you understand. For example, if you are at mediation for a toxic dispute between two former law firm partners, one of them is likely to feel betrayed. So by labeling that feeling by saying, "It is clear to me that you feel betrayed and I know this dispute is not what you wanted to spend your energy on this year" helps the other side release the toxic emotions out of the negotiations. This paves the way to fruitful negotiations on how to split the firm and fees. Remember, even when we try to act rationally, our emotions can cloud our judgment. That's why it is so important to remove this "cognitive bias" during negotiations. It can save your client so much money.

Some useful phrases for labeling include: It seems like_____, I hear you saying _____, So you feel like _____, etc.

Just remember that your counterpart is not crazy or stupid. They are either lacking information, have mistrust towards you (or something else), have constraints that they are not willing to admit, or they have their own worldview. Try to understand them. Make them feel you are on the "same side," whatever that is, or at least you understand which beliefs they identify with. You want to label their feelings and have them say "that's right" not "you're right."

Asking Questions:

This one should be obvious. But ask your questions with a genuine interest so it won't come across as an interrogation. Ask the person "why" they hold the opinion they just shared with you. This will likely reveal their core motivation and fears. And that will show you where their leverage point is.

Reading Body Language:

A lot of communication is nonverbal. So you need to train yourself to identify people's body language in order to read their feedback. There are tons of books and resources on body language. But here are a few obvious ones to look for.

- Are they covering their vital organs by crossing their arms? *They are defensive.*
- Are they making themselves look smaller? *They are not comfortable or intimidated.*
- Are they glancing towards an exit? *They want to leave the conversation.*
- Are they shifting their weight as they talk and avoiding the question? *They are lying.*
- Are they spread out making themselves look bigger? *They are confident.*

These tactics accomplish our strategy of getting a read on a person. Once you do, you can tailor your communication accordingly. For example, if they are defensive you need to become less threatening by softening your voice. If they have a naturally skeptic personality (Enneagram 6), you need to present the information objectively and let them draw their own conclusions. If they are a millennial, use short sound bites and media in your presentation. You can learn all of this information by mirroring, labeling, asking questions, and reading body language. These are the best tactics for implementing your strategy.

VI. CONCLUSION

Like playing poker, litigation is a game that involves anticipating human behavior. If you can properly read a person, you can tailor your communication to elicit a favorable response. Identifying the person's personality, generational, and economic influences can help you get a read on how they will likely think or "thin slice" the information you present to them.

Your strategy is simple: tailor your communication to the person you are trying to influence. The tactics for reading people are mirroring, labeling, asking questions, and interpreting body language. Once you learn a person's worldview and preferences, you can present your information in a way that will most influence them. Specifically, you will address their personality's core fear and desire in a communication style that fits their generation- all while staying mindful of their economic class' "unspoken rules." Harnessing these truths about human psychology will make you drastically more effective in implementing your litigation strategy.

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Introduction to the Reptile Strategy

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In 2009, attorney Don Keenan and jury consultant Dr. David Ball published a book entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution*. The authors advertised it as "the most powerful tool in the fight against tort reform" available to plaintiff's attorneys seeking to obtain favorable verdicts and extraordinary damages awards. At last check, the authors' website claims that at least $7.7 billion dollars had been recovered in settlements and trial verdicts using the reptile strategy. Since its publication, the reptile strategy has been taught and presented to plaintiff's attorneys across the country. Defense attorneys were comparatively slow to react to the use of the reptile strategy by plaintiff's attorneys, perhaps due to their failure to understand the strategy and its techniques, or perhaps due to their refusal to acknowledge its potential efficacy.

The concept of the reptile strategy is based on a 1960's neuropsychological theory that humans have three parts of their brain reflective of the stages of human evolution: reptilian (primitive survival based), paleomammalian (emotion, reproduction, parenting) and neomammalian (language, logic, planning). The reptilian portion of the brain was theorized to be responsible for species-typical instinctual behavior, such as aggression, dominance, or territoriality. Mr. Keenan and Mr. Ball theorized that the reptilian portion of the brain maximizes "survival advantages" and minimizes "survival dangers." They contended that this reptile theory could be applied to jurors who see danger in the facts of a case and, rather than objectively awarding damages to a plaintiff, instead act to protect themselves and their community by awarding damages that punish or deter defendants when the jury's "reptile brain" is activated.

The science theorized by Ball and Keenan to be supportive of their reptile litigation theory has been rejected by neuropsychologists, but the reptile strategy's techniques can nevertheless still be effective – even if scientifically inaccurate. Successful plaintiff's attorneys using the reptile strategy convey to the jury the immediate danger of the defendant's actions and that they alone are responsible for compensating the plaintiff so that those dangers are diminished to them and to their community.

Accordingly, the reptile strategy's purpose is to convince the jury that the defendant is a hazard to the safety of the jury and the community. This is often accomplished by presenting a defendant with seemingly simple "safety rules" during their deposition (or trial), and asking if the defendant agrees with the safety rules. The witness often instinctually agrees to the safety rules because, after all, they are safety-conscious. The safety rules often link the danger to their alleged specific conduct. The witness begins to unknowingly entrench themselves into an absolute and inflexible position that ignores individual circumstances, judgment, and exceptions.

For example, deposition questioning may ensue with the plaintiff's attorney asking the defendant if they agree with the following:

- Truck drivers for company X must obey all traffic laws.
- Truck drivers for company X must obey their state's CDL manual.
- Truck driver for company X are held to the highest standard of safety.

- Company X must ensure that its truck drivers are adequately trained.

- Company X must ensure that its drivers are able to safely operate tractor-trailers.

- Company X must ensure that its drivers are complying with all Federal Motor Carrier Safety Regulations.

A defendant who is unprepared and sitting in a deposition chair for their first time might readily agree to any and every safety rule proposed to the defendant, without carefully considering each and every one. Any deviation from those safety rules is framed as a choice by the defendant to violate the safety rule. The trial then becomes a safety arena where damages are awarded to enhance the community's safety and decrease the danger posed by the defendant. The goal for the plaintiff's attorney is to have the jury view itself not as a neutral arbiter of justice for *this* specific plaintiff, but instead as the guardian of safety in the community. Ball and Keenan contend that the "reptile brain" is activated when a safety rule is established, and the jury then senses danger. As a result, they believe that the jury will then act out of primitive survival based instincts rather than neutral, logic based instincts.

Plaintiff's attorneys using the reptile strategy seek to establish their safety rules during defendant's deposition – and often do so with the very first deposition taken in the case. This allows them to frame and focus their argument early on in the case. An unprepared or unwitting defendant may agree to a seemingly innocuous and undeniable safety rule early in the case. Plaintiff's attorney then asserts that the defendant knowingly deviated from the safety rule. Any later attempt by the defendant to clarify his deposition response risks a loss of credibility.

Note that no jury instructions use the term "safety rules" or the specific safety rules established by the plaintiff's attorney when the judge charges the jury with the law. Instead, the judge will generally instruct the jury in a negligence case about the defendant's duty to use ordinary care which a reasonable person would use under the same or similar circumstances.

There are various motions in limine that can be made at trial to limit the use of a plaintiff's reptile theory, but perhaps the most effective defense strategy is to adequately prepare a deposition witness for questions based on safety rules and other reptilian tactics. This can often be difficult when the deponent is a low-level employee involved in an accident, but is nevertheless essential to limiting the potential effectiveness of the reptile strategy.

The reptile strategy has been widely adopted by the plaintiff's bar as a litigation technique that is likely to stay and become more and more widespread. Defense counsel should focus on ways to combat and limit its effectiveness. Rather than being reactive to its use in a particular case, defense counsel should expect the technique to be used and proactively prepare their witnesses for deposition and trial.

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Practical Defense Strategies to Combat the Impact of Reptile Tactics

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Reptile Theory tactics remain actively used with the plaintiff's bar across the U.S. The theory originated from a book authored by a Georgia plaintiff's lawyer, Don C. Keenan and a psychologist, David Ball, entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution*. The authors of the book advocate persuading jurors at trial by appealing to their "reptile brains," the "oldest" part of the brain and the part responsible for primitive survival instincts. While the book itself lays out some strategy and theory for attacking the fear triggers in the minds of jurors, the theory has largely been extrapolated by the plaintiff's bar and put into motion through investigation, discovery, cross-examination, and trial arguments designed to produce greater income for plaintiff's counsel through magnification of jury awards largely based on fear and attempts to elicit jury outrage.

Use of reptilian tactics in civil cases involving vehicle collisions typically comes with plaintiff lawyers framing pleadings, discovery, depositions, and trial around the action or inaction of the motor carrier and/or the driver rather than focusing on the actual accident or the plaintiff's injury. Generally, in such cases, reptile tactics are focused on (1) establishing the existence of a general or specific danger or safety rule, (2) luring a defense witness into agreeing that such a danger/rule exists, (3) demonstrating how the motor carrier or driver violated the rule or caused the danger, and (4) emphasizing that a motor carrier's and/or the driver's action or inaction "needlessly endangers the community." In theory, the emphasis on a motor carrier's or driver's violation of a safety rule appeals to the jurors' "reptile" brain, and encourages jurors to take action, usually by way of awarding large damages, to protect their community.

While it is not new that the plaintiff's bar attempts to invoke strategies to elicit jury fear and outrage in an effort to magnify damage awards, it is important to identify and anticipate reptile type tactics early in order to establish a procedural defense and prepare to invoke counter measures in an effort to minimize any negative impact of reptile arguments.

Although certainly not inclusive, five suggestions to consider by clients, claims personnel, and defense counsel include: 1) consideration of the potential for reptile tactics when investigating claims pre-suit; 2) conducting discovery when suit is filed in order to flush out or box in potential reptile tactics and strategies used by plaintiff or plaintiff's bar; 3) preparing all witnesses for reptile questioning and tactics; 4) preparing motions in limine and other pretrial motions to exclude reptile theory tactics; and 5) prepare your oral arguments and trial objections to expose and clearly highlight improper reptilian tactics so as to bar use at trial or at least establish favorable grounds for appellate leverage if needed.

1. Pre-suit Investigation

Pre-suit investigation (if possible) is always key to support viable defenses and this is true in an effort to combat reptile tactics. The building blocks of a reptile strategy in a commercial vehicle case are consistent and focus on an argument of danger in that the defendant's violation of any safety rule, regardless of whether a particular or relevant rule was violated in the underlying case or a direct cause of an accident or harm alleged, is a problem for the jurors to resolve. It is essential a

"community" safety campaign meant to trigger emotional self-interested reaction magnifying even small damage cases to favorable plaintiff's verdicts "on a scale that protects the public"

The first stage of investigation should ideally begin with the accident investigation including: obtaining the police report, fire department/first responder reports, ambulance trip reports, accident reports, witness statements, vehicle repair estimates, Carfax information, and photographs of the vehicles and the scene. A thorough investigation of the involved parties involved in the accident including criminal background checks through the Crime Information Bureau (CIB), ISO claim searches, driving history/Motor Vehicle Record (MVR) checks, obtaining and maintaining electronic logging devices ("ELDs") data from the vehicles, and obtaining cell phone/text message records from the day of the accident for both the claimant and the client/defendant driver. It is important to know the claim and accident history of both the claimant as well as the client driver to anticipate reptilian type criticism of the client driver's history and to "fight fire with fire" concerning the history of the claimant.

Statements should be taken from all parties involved in the accident, including any witnesses. Particular detail should be paid to not only the accident but also any conversation or comments that may have followed, which can be indicators of opportunism. Portions of social media sites (for both the claimant and the client driver) available or open to the public should also be inspected and monitored as well for contemporaneous accounts of the accident or continuation of activities after the accident which may support defenses and leverage any reptilian arguments.

It is also important during the investigative phase of the case to identify any applicable policies, procedures or standards used by client companies that employ or engage drivers including driver distraction policies, federal motor carrier safety standards, vehicle/equipment maintenance and inspection policies, state driving rules (i.e. "rules of the road") and especially motor vehicle checks and other background and criminal checks of drivers.

Once applicable policies and procedures are identified it is advisable to begin preparations of drivers, company representatives, and other personnel for discovery and litigation testimony so such defense witnesses are familiar with and prepared to testify concerning the application of policies, procedures, training and that such were carried out as it relates to the driver and equipment involved.

In all phases whether it be presuit discovery or pretrial, it is important to be a giver and not just a receiver when it comes to reptile tactics used. Pre-suit investigation and the discovery phase is also a perfect opportunity to go on the offensive and obtain evidence concerning the plaintiff's driving history as well as training, driver policies and procedures (or the lack thereof) as well as criminal employment and motor vehicle backgrounds for use in giving the claimants/plaintiffs a taste of their own reptilian medicine. Claimants/plaintiffs drive on the same roads and operate similar vehicles and equipment as defendants and therefore safety standards should be no different for plaintiffs as they should for defendants operating on such roads.

2. Discovery

In some instances, reptile tactics will be revealed during the pleadings phase, and in others it will be flushed out during the discovery phase. Typically, a plaintiff intending to employ reptile tactics will utilize the complaint as his or her de facto first discovery request. This is true because in most jurisdictions the scope of disclosures and discovery requests are dictated by the claims and defenses

of the parties. Thus, if you see pleadings referencing "violations of safety rules" or "unnecessarily endangering the public or community," you should respond with denials and begin preparing your witnesses for likely reptilian-themed deposition questions. Below is an example of retile theory from an enumerated paragraph in a complaint under a count for vicarious liability against a trucking company employer:

Defendant X and/or defendant Y, through its agents and employees, knew, or should have known by exercising reasonable care, about the risks set forth in this Complaint and that by simply exercising reasonable care these risks would be reduced or eliminated. These risks include, but are not limited to:

a. The risks associated with unsafe and improperly trained drivers;

b. The risks associated with fatigued drivers;

c. The risks associated with violations of the hours of service regulations;

d. The risks associated with failing to train drivers to obey the FMCSR;

e. The risks associated with failing to have adequate risk management policies and procedures in place;

f. The risks associated with failing to have policies and procedures in place to identify undertrained and unqualified drivers;

g. The risks associated with failing to identify from prior wrecks, similar to the one in question, a root cause and implement policies, procedures, protocols, and practices to effectively reduce or eliminate the risk prior to the wreck in the question;

h. The risks associated with failing to appropriately implement and enforce risk management policies and procedures to identify the risks described above;

i. The risks associated with failing to appropriately implement and enforce risk management policies and procedures to reduce and eliminate the risks described above;

j. The risks associated with failure to appropriately implement and enforce risk management policies and procedures to monitor and assess DEFENDANT Z;

k. The risks associated with failing to implement and follow a written safety plan;

l. The risks associated with failing to protect the members of the public, such as the PLAINTIFF, from the risks described above; and

m. The risks associated with failing to use the composite knowledge reasonably available to defendant X and/or defendant Y to analyze the data available to it to identify the risk, take steps to reduce or eliminate the risk, and to protect members of the public from that risk.

Notice how the above "allegations" are bare legal conclusions without factual support. In federal court, pleadings are governed by *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009). In *Twombly*, the Court held that plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Twonbly*, 550 U.S. at 570. In *Iqbal*, the Court made clear that "plausibility" standard of Twombly applies to all cases. The majority opinion also clarified the methodology set forth in Twombly. First, the court ruling on a Rule 12(b)(6) motion ignores "legal conclusions" alleged in a complaint. Second, the court should look to the factual allegations to see if the claim is plausible. Defense practitioners would be advised to follow a similar procedure when answering reptilian complaints. (See *Drake v. Old Dominion Freight Line, Inc.*, 2016 WL 1328941 for an example of a federal court striking plaintiff's claim for negligent hiring, retention, qualification, supervision, and training due to a lack of factual support.)

If a plaintiff brings claims such as negligent hiring, retention, training, supervision, or entrustment, and these claims are permitted to stand, these claims oftentimes render evidence of prior incidents or accidents discoverable and sometimes admissible based upon knowledge or absence of mistake. (The reptile theory with these type claims focuses on triggering a fear/outrage reaction from the jury through evidence of safety rule violations or the perception that rules are systematically or habitually not followed or instead that companies have no rules or insufficient rules).

Therefore, the first step towards thwarting reptile tactics in the discovery phase is use discovery to isolate or limit evidence to only the accident or incident at issue. This can be accomplished through carefully crafted written discovery, requests for admissions, and thorough cross-examination of the plaintiff and other witnesses. Further, when responding to the plaintiff's reptilian discovery requests, respond with objections and facts and context to support defenses and bring to light plaintiff's improper reptile arguments as well as facts and arguments which may be unfavorable to the plaintiff's position.

The goal of aggressive discovery pursuits would be to support a motion to dismiss, motion for summary judgment, or motion to strike evidence of unrelated accident/incidents or policies/procedures which have nothing to do with the accident at issue. Oftentimes, early motions of this nature are successful because many corporate negligence and punitive damages claims lack factual support and simply recast boilerplate elements and legal conclusions. The plaintiff's burden many times at the pleading stage in defending such a motion is establishing that the complaint contains sufficient facts "to state a claim to relief that is plausible on its face." Assuming your jurisdiction follows this pleading standard, motions to dismiss punitive damages and direct corporate negligence claims should always be filed in each and every instance where the complaint lacks adequate factual allegations. Moreover, once these claims have been dismissed, other incidents and accidents become far less likely to be relevant to the claims at hand, and, therefore, less likely to be admitted as evidence. Narrowed scope of pleadings and issues may take away some of the heat associated with reptile tactics and arguments.

3. Preparing witnesses for deposition testimony

In most instances, the reptile tactics take hold during the deposition of the defendant's corporate representative, the defendant driver, and other representatives of the defendant company. This is the point in time when the plaintiff's attorney begins establishing safety rules to later serve as the basis for plaintiff's counsel to argue at trial in an attempt to invoke a sense of fear into jurors. During the defendant corporate representative's deposition, common retile tactics can usually be found with hypothetical questions and questions in which the plaintiff's attorney asks the defense witness to "agree with plaintiff's counsel" about what may seem like common sense generalities about public safety. Below are some examples:

"You would agree with me that hiring someone with prior accident history is not as safe as hiring someone with a clean record?"

"You would agree that a truck driver and a company employing or engaging truck drivers should not needlessly endanger the public?"

"You would agree with me that failing to look both ways before pulling into an intersection needlessly endangers the public and community?"

[to the defendant driver] "Do you drive as carefully at other times as you did when you were driving and hit my client, the plaintiff?"

When being put to use, you will see reptile tactics asked in broad hypotheticals. However, because lay witness testimony must always be rationally based upon his or her perceptions, any hypothetical posed to a fact witness should be followed with an immediate objection.

Careful and lengthy preparation of all defense witnesses should be implemented throughout the litigation in anticipation of reptilian cross-examination tactics.

4. Preparing motions in limine and other pretrial motions

Several courts have begun to recognize these reptile themes and tactics as improper efforts to elicit juror passion and prejudice that seek punitive verdicts against defendants on the basis of fear. *See e.g. Brooks v. Caterpillar Global Mining Am.*, No. 4:14-cv-00022-JHM, 2017 U.S. Dist. Lexis 125095, at *24-25 (W.D. Ky. Aug. 8, 2017); *Big-low v. Eidenberg*, No. 112,701, 2016 Kan. App. Unpub. Lexis 285, at *39-40 (Kan. Ct. App. Apr. 15, 2016) (per curiam); *Hopper v. Ruta*, No. 12cv1767, 2013 Colo. Dist. Lexis 249, at *1 (Colo. Dist. Ct. Oct. 29, 2013); *see also Turner v. Salem*, No. 3:14-cv-00289-DCK, 2016 U.S. Dist. Lexis 1022389, at *7 (W.D.N.C. July 29, 2016) (discouraging "reptile theory" arguments but reserving ruling for specific objections at trial). However, most jurisdictions have a high standard for an order excluding evidence before trial, requiring that the evidence be "inadmissible on all potential grounds." E.g., *Efight ex rel. Wright v. Watkins & Shepard Trucking, Inc.*, 2:11-cv-001575-LRH-GWF, 2016 U.S. Dist. Lexis 6530, at *2 (D. Nev. Jan 19, 2016) (granting defense motion to exclude "golden rule" arguments). Pinpointing particular questions, evidence, or argument as inadmissible is the first step necessary to satisfy this standard.

Recent decisions denying defense motions in limine to exclude "reptile" evidence and arguments provide some basic guidance for researching and writing more effective challenges. One key takeaway is that failing to identify specific evidence, questions, or arguments for exclusion, or failing to articulate specific evidentiary grounds showing inadmissibility may be fatal to any effort to obtain a pretrial order precluding more generalized "reptile" theory or arguments at trial. It is

important to note that "reptile" is not a category of evidence but a strategy by plaintiff's counsel for eliciting fear. The mere fact that a type of evidence or argument can be used as part of a reptile theme or theory supplies no evidentiary grounds for a court to exclude it. Therefore, it is more likely than not that a court would deny "stock" motions to generally or unambiguously exclude an umbrella style reptile category no matter how well defense counsel explains reptile strategy to the court. Accordingly, it is important to provide the court with specific examples of questions, testimony, opinions, or arguments made by plaintiff's counsel based on the discovery records or prior examples from trial transcripts or deposition transcripts of such reptile arguments or theory which should be precluded at trial.

Identify Specific Evidence or Argument for Exclusion

A federal district court in Tennessee recently recognized that reptile theory is used by the plaintiff's bar in some states as a way of showing the jury that the defendant's conduct represents a danger to the survival of jurors and their families. *Hensley v. Methodist Healthcare of Memphis Hosps.*, No. 2:13-cv-02436-STA-cgc, 2015 U. S. Dist. Lexis 113565, at *13-14 (W.D. Tenn. Aug. 27, 2015). The court further described it as an "appeal to the passion, prejudice, and sentiment of the jury." *Id.* But despite skepticism of reptile tactics, the court denied the defendants' motion in limine categorically requesting exclusion of techniques and "scare tactics" consistent with reptile theory because the defendants have again not identified the specific evidence that is sought to be excluded.

As a Georgia district court explained, "[t]o the extent that defendants seek to preclude plaintiffs from engaging in the reptile tactics, this request is unnecessary and overbroad. *Bunch v. Pac. Cycle, Inc.,* No. 4:13-cv-0036-HLM, 2015 U.S. Dist. Lexis 183890, at *6 (N.D. Ga. Apr. 27, 2015). Accordingly, it is important to identify the specific evidence sought to be excluded.

The following lines of authority are examples of exclusion or limiting particular evidence or arguments commonly offered as part of a reptile strategy. These are just examples of pretrial opportunities that defense counsel may wish to use to limit the foundation for a plaintiff's reptile theme. Of course jurisdiction specific research must be conducted to identify the best possible authority to bar or limit reptilian strategy.

Needless endangerment questions or hypothetical questions suggesting danger to non-plaintiffs.

Recent authority for precluding questions suggesting that certain conduct "needlessly endangers" the public include: *Pracht v. Saga Freight Logistics, LLC,* No. 3:13-cv-00529-RJC-DCK, 2015 U.S. Dist. Lexis 149775, at *4 (W.D.N.C. Oct. 30, 2015); *Big-low,* 2016 Kan. App. Unpub. Lexis 285, at *39; and *Hopper*, 2013 Colo. Dist. Lexis 249, at *1. In *Pracht*, the district court granted a motion by a motor carrier and its driver to bar the plaintiff's counsel from questioning defense witnesses in a way that suggested that jurors put themselves in the plaintiff's position or implied that the defendants were a danger to the public or a threat to the community. *Id.*; Defs' Omnibus Mot. In Limine 3-4, *Pracht v. Saga Freight Logistics, LLC,* No. 3:13-cv-00529-RJC-DCK, ECF No. 102 (W.D.N.C. Oct. 8, 2015). Questions specified in the motion and barred by the court's order granting the motion included the following:

Driving down the highway when you know you are fatigued and have not received proper rest needlessly endangers the lives of other people, doesn't it? Based on all your experience, familiarity with trucks and truck accidents, do you

believe that a driver who knowingly violates the hours or service regulations is needlessly endangering other people on the highway?

The defendants argued effectively that such questions are irrelevant, violate prohibitions against "golden rule" arguments asking jurors to put themselves in the position of the injured party, are improper, under long standing bars against speculative proof of liability and damages, and improperly invite decisions based on decisions based on emotions and prejudice rather than on facts.

For the same legal reasons, a line of questioning designed to focus on harm that could have occurred to community members other than the public is equally improper. Defense counsel for a trucking company driver effectively illustrated this tactic in a recent motion in limine by quoting a series of questions by plaintiff's counsel:

Somebody could be hurt?

Somebody could be killed?

A child could be run over?

Mom could be run over?

A grandparent could be run over?

A wife could be run over?

Defs.' Mot. In Liminie No. 1 3-4 *Haley v. Westfreight Sys., Inc.*, No. 3:15-cv-1161-JPG-SCW, ECF. No. 79 (S.D. Ill. Feb. 15, 2017).

The above example questions "invoke the underpinnings of the golden rule arguments" that "seek to have jurors decide a case, not on the evidence presented at trial as instructed, but rather on the potential harms and losses that could have occurred within the community." *Id.* A federal district court agreed with a similar argument explained that "asking the jurors to put themselves in Plaintiffs' position and make a judgment based on that hypothetical reality amounts to improper 'golden rule' arguments." *Sialoi v. City of San Diego*, No. 3:11-cv-02280-JLS-KSC, 2016 U.S.Dist. Lexis 145013, at *4 (S.D. Cal. Oct. 18, 2016). Such arguments are "irrelevant to the actual damages alleged" and "have a substantial likelihood of unfairly prejudicing the jury" because they "may encourage the jury to render a verdict based on personal interest and bias rather than on the evidence." *Id.* (granting in part Defs.' Mot. In Limine No. 1 to Preclude "Golden Rule" Arguments Framed as References to or Arguments About "Public Safety or "Community Safety," *Sialoi v. City of San Diego*, No. 3:11-cv-02280-JLS-KSC, ECF No. 83 (Sept. 23, 2016)).

References to company policies/procedures as "Safety Rules"

Two decisions by the court of appeals in Kansas are especially on point and both provided persuasive rationale for excluding "safety rules" references that could be argued in a jurisdiction without such direct authority. In *Lanam v. Promise Reg'l Med. Ctr.-Hutchinson, Inc.* the district court issued a pretrial order barring a medical malpractice plaintiff from referring to the defendant's policies and procedures as "safety rules." No. 113,430, 2016 App. Unpub. Lexis 18, at *5-7, 19-24 (Kan. Ct. App. Jan. 8, 2016) (per curiam). While the plaintiff would be allowed to indicate that the purpose of the

policies and procedures was patient safety, the district court required that the policies be referred to as what they were "policies and procedures." References to "safety rules" risked that "the jury would conflate the standard of care with an alleged safety rule," the trial court reasoned and the appellate court agreed. The plaintiff's counsel violated the order by referring to "the safety requirements that protect patients" during the opening statement. Finding this language synonymous and equally likely to prejudice the jury, the appellate court affirmed the district court's decision granting a mistrial. Similarly, in *Biglow v. Eidenberg*, the Court of Appeals of Kansas affirmed the trial court's pretrial ruling requiring plaintiff's counsel to instruct witnesses not to respond to questioning "with any derivative of the word 'safe' or the phrase 'needlessly endangering a patient'" with to refrain from using such language in closing argument. 2016 Kan. App. Unpub. Lexis 285, at *39-42, 45-47. The terms were inconsistent with a doctor's "legally defined duty of care," the trial and appellate courts found. Moreover, it would be easy for the jury to interpret such language from counsel in closing as a golden rule argument.

In some cases, however, the type of case of the jurisdiction's prior authority allowing "safety" language will make some reference to "safety rules" at trial inevitable. In a product liability case, a federal district court recently declined to enter a broad order requested that would have barred safety prevention references. "Certainly, it would be hard for plaintiffs to prove the product is defective if they cannot say it was unsafe or dangerous," the court wrote. *Bunch*, 2015 U.S.Dist. Lexis 187687, at *6-7. The court barred a narrow category of safety related arguments, ordering that plaintiffs' could not "argue that this lawsuit was brought to ensure or promote community safety." *Id.* At *7.

"Rule" terminology necessarily implies a "duty." Language defining the defendant's actual duty of care is an essential starting point for any argument to exclude or to limit "safety rule" references. Most jurisdictions have negligence *per se* case law describing the only source of legal duty – generally, a statute, an ordinance, or a regulation would define negligence per se. A plaintiff's counsel may attempt to multiply the list of suggested "rules" by other means, such as answers to deposition questions, opinion or a retained expert, or a driver training manual or internal policy.

Jurisdictions may also vary in their treatment of the admissibility and legal consequence of a driver's manual, a training handbook, or an internal company policy. It is essential to compare the plaintiff's intended use of such source with decisions from that jurisdiction on admissibility and legal consequence of such materials. For example, in some states a manual or policy is inadmissible because it lacks the source of law, whereas in others it may be admissible as evidence of the standard of care or whether a defendant met the standard but should not operate to create a duty where the law imposes none.

Truck drivers subject to a higher, "Professional" standard of care

Arguably, no proposed heightened standard of care for commercial drivers should reach a jury in most jurisdictions. Many courts across the country have rejected plaintiff's suggestion that a commercial driver is a "professional driver held to a higher standard of care. *E.g., Fredericks v. Castora*, 360 A.2d 696, 697-98 (Pa. Super. Ct. 1976) (per curiam); *Dahlgren v. Muldrow*, No. 1:06-cv-00065-MP-AK, 2008 U.S. Lexis 4103, at *18-19 (N.D. Fla. Jan. 18, 2008); *Townsel v. Dadash, Inc.*, No. 05-10-01482-CV, 2012 Tex. App. Lexis 3185, at *9-10 (Tex. App. Apr. 24, 2012; *Calahan v. May Trucking Co.*, No. 1:11-cv-00214-NDF, 2012 U.S. Dist. Lexis 189853, at *13-15 (D. Wyo. Aug. 28, 2012); *Angulo v. Santillanes*, No. 1-12-2685, 2013 Ill. App. Unpub. Lexis 617, at *9 n.1 (Ill. App. Ct. Mar. 27, 2013); *Botey v. Green*, No. 3:12-cv-01520-RDM, at *6-8 (M.D. Pa. June 8, 2017). In Georgia a motorist has a

duty to exercise ordinary care in the operation of a motor vehicle upon the highways. This standard applies to both non-commercial and commercial drivers. *Rios v. Norsworthy*, 266 Ga. App. 469, 597 S.E.2d 421 (2004). It is also noted that Louisiana is somewhat of a rare exception. *See Davis v. Witt*, 851 So.2d 1119, 1128-29 (La. 2003).

Likewise, the "size, type, and kind of truck being driver" does not impose on the driver "a duty to exercise more than ordinary care." *Assoc. Petroleum Carriers, Inc., v. Beall*, 217 F.2d 607, 608 (5th Cir. 1954). *Accord Lemons v. Maryland Chicken Processors*, 164, A.2d 703, 706 (Md. 1960) (no different test of negligence applies to the operation of "large, heavy and unwieldy vehicles").

One reptile tactic used by plaintiffs is to elicit testimony or introduce training materials stating that a commercial driver has a duty to be constantly aware or to maintain a constant vigil and that a driver must anticipate and see any potential hazard. Arguably, this is prejudicial because it suggests that the mere occurrence of an accident is proof of a commercial driver's negligence and adjusts the standard of care closer to a strict liability standard. Because a relevant standard of care is the duty to exercise ordinary care under the circumstances, and a driver "cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care," expert opinions and other evidence suggesting a constant awareness requirement should arguably be excluded. *Rios v. Norsworthy*, 597 S.E.2d 421, supra.

Suggestion of a "Safest Possible" standard of care

Decisions expressly rejecting the "safest" conduct as a measure of a negligence defendant's standard or care may provide some leverage in motions in limine. *E.g., Johnson v. Nat'l Sea Prods., Ltd.,* 35 F.3d 626, 632 (1st Cir. 1994) (defendant alleged to have loaded pallets into trailer negligently was not required to package and palletize its cartons "in the safest possible way"); *Biglow*, 2016 Kan. App. Unpub. Lexis 285, at *47 ("exercise of ordinary care and diligence does not necessarily require the safest option"). Not even a common carrier owes its passengers the "safest" conduct, nor does a manufacturer subject to strict liability have a duty to provide the "safest" product possible. Under the case law so holding, an under authorities simply setting forth a defendant's "reasonable" or "ordinary" standard of care, questions or argument by plaintiff's counsel or testimony by plaintiff's expert suggesting defendant's responsibility or failure to do what was "safest" should arguably be inadmissible.

Arguments as to community "Values" and arguments that jurors stand for the safety of the community

Arguments made by plaintiff counsel attempting to appeal to jurors to "bring justice" by applying "the values of the community" or acting as the community "conscience" have become common reptile tactics. While some jurisdictions may permit such arguments (at least without a direct link to the amount of money the jury should award), at least one federal district court reiterated that "'[s]end a message' or conscience of the community arguments are disfavored in the Sixth Circuit" because they "can have no appeal other than to prejudice" and amount to "improper distraction from the jury's sworn duty to reach a fair, honest and just verdict." *Brooks,* 2017 U.S. Dist. Lexis 125095, at *22-23 (quoting *Strickland v. Owens Corning,* 142 F.3d 353, 358-59 (6th Cir. 1998)). *Accord Westbrook v. Gen. Tire & Rubber Co.,* 754 F.2d 1233, 1238-39 (5th Cir. 1985). It is also noted that "voice/consciousness of the community" arguments and arguments telling a jury that they, along with the courthouse/courtrooms, exist to keep the community safe are also disfavored in several venues. *Smith v. Courter*, 531 S.W.2d 743, 747 (Mo. 1976) (Improper for plaintiff's counsel to ask jurors to

speak out on social issues through their verdicts.); *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712, 725-26 (Cal. Ct. App. 2016) (Because it panders to jurors' prejudice, passion, or sympathy, such argument is forbidden, the California appellate court explained, calling closing argument appeals to jurors' self-interest "improper" and "misconduct.")(quoting *Cassim v. Allstate Ins. Co.,* 16 Cal. Rptr. 3d 374 (Cal. Ct. App. 2004)). *Accord Landrum v. Conseco Life Ins.,* No. 1:12-cv-00005-HSO-RHW, 2014 U.S. Dist. Lexis 188, at *17-18 (S.D. Miss. Jan. 2, 2014); *Norton v. Nguyen,* 853 N.Y.S.2d 671, 674 (N.Y. App. Div. 2008) ("it is inappropriate to refer to the jury as the `conscience of the community'").

Asking jurors to "Send a Message"

When only compensatory damages are available, statements asking the jury to "send a message" with the verdict are "intended to inflame and prejudice the jury," improperly invite punitive use of compensatory damages, and "should never be allowed." *Janssen Pharmaceutica, Inc. v. Bailey,* 878 So. 2d 31, 62 (Miss. 2004). *Accord Bunch,* 2015 U.S. Dist. Lexis 187867, at *6. The courts in Georgia have condemned send-a-message arguments as improper and highly prejudicial. *Central of Georgia R. Co. v. Swindle*, 260 Ga. 685, 398 S.E.2d 365, 367 (1990); *Gielow v. Strickland*, 185 Ga. App. 85, 363 S.E.2d 278, 279-80, cert. denied, 185 Ga. App. 910 (1987).

Some courts also treat "send a message" arguments together with "conscience of the community" references and exclude both for the same reason: that both "urge the jury to render its verdict based upon passion and prejudice and not the facts and evidence presented at trial." *Landrum,* 2014 U.S. Dist. Lexis 188, at *17-18. *See also Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC,* No. 2:10-cv-01494-JCM-GWF, 2017 U.S. Dist. Lexis 148520, at *9-11 (D. Nev. Sept. 13, 2017) (granting defendants' motion in limine and excluding "inappropriate argumentation," including arguments that the client's cause is just, that jurors should place themselves in the plaintiff's shoes, and that jurors should "send a message" with a high verdict). The authorities and rationale for exclusion apply equally to statements telling jurors to "speak" or "announce" with their verdict.

"Send a message" arguments should be challenged as improper when punitive damages are unavailable and may be challenged even when a punitive damage claim is supported by the evidence. In Florida, even when punitive damages are at issue, "a plaintiff may not utilize 'send a message' and conscience of the community arguments when discussing whether the plaintiff should be compensated, due to the potential for the jury to punish through the compensatory award." *R.J. Reynolds Tobacco Co. v. Gafney,* 188 So. 3d 53, 58 (Fla. Ct. App. 2016).

Other areas where plaintiff's counsel may present arguments which could be a basis for an exclusionary motion in limine may be found in opposition to summary judgment or other pretrial motions as well as expert disclosures or portions of expert reports, especially those reports or expert opinion disclosures related to safety, and in the specific context of trucking, other HR hiring practices and MVR background and training procedures. Careful pretrial review of the evidence is necessary to carefully craft motions in limine to give the best shot at exclusion of reptile tactics in advance of trial.

5. Trial arguments and objections

Of course it can be difficult in advance of trial to show plaintiff's counsel intent to offer a particular argument to the jury as discovery records will not normally include a preview of plaintiff's counsel opening or closing arguments or demonstrative exhibits plaintiffs may seem to use at trial. This is why it is important to, if possible, obtain examples of plaintiff's counsel's opening and closing

arguments from other cases based on trial transcripts which may be available and provide a basis for argument that reptile tactics during voir dire, opening, and closing should not be used.

If for some reason the plaintiff is allowed use of reptile arguments at trial, consideration of a counter-reptile attack. If a plaintiff is permitted to introduce reptilian arguments and evidence to attack the safety history or character of the defendants then submit rebuttal evidence. This can be done through use of the plaintiff's driving history, training, experience and former/current employment. There may also be consideration for use of past customers testifying about their positive experiences with the defendant/defendant driver, experts testifying about how the defendant company has reasonable practices and procedures in place to make the company as safe as possible, or through company employee and customer testimony that the defendant company is caring and diligent in its practices and procedures.

While reptile tactics are not necessarily a new creation, the use of such by plaintiff's counsel has increased in an effort to magnify damages and recovery in litigated cases. The tactics and defenses to the same are numerous. The reality is that there is may not be a "one size fits all" approach, as every case must be evaluated upon its merits, with all evidence being considered. However, the reptile tactics have proven to be effective and are likely here to stay. Accordingly, it is important to recognize such tactics and engage in efforts as early as possible in the investigation, discovery, and pre-trial phase of the litigation in an effort to gain leverage and fight back the impact of such tactics.

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Autonomous Trucks – Rolling Down an Interstate Near You – With the Potential to Take Liability out of the Company/Driver's Hands

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The transportation revolution is here! Fasten your seatbelts!

The race is on for the mass rollout of self-driving, autonomous vehicles (AVs). The reality is that the technology is here (subject only to being fine-tuned), but the current federal and state regulatory schemes (or lack of them) are causing confusion and delays. In other words, our existing automobile laws are becoming more outdated day-by-day as AV technology continues to advance, and these outdated laws are creating barriers to the development, testing and deployment of AVs.

While the "non-traditional" auto manufacturers (Google/Waymo, Apple, Uber, Tesla, Zoox, Cruise) raced to take a quick lead in the public's eye on AV technology, the major auto manufacturers quickly ramped up their AV development to keep the pace. Now, GM, Ford, Toyota, Nissan, Volvo, BMW, Mercedes, and Audi are all in the race to see which one can bring AVs to the commercial market first.

Why All the Fuss?

Safety is the reason for all this attention. There were about 40,000 deaths in the United States in 2016, due to automobile accidents (an increase of 6 percent), including some 4,000 fatalities (11 per day) related to truck and bus crashes. In addition, there were 2.5 million injuries and over 6 million accidents. And more than 90 percent of those accidents were caused by human error. Estimates show that AV technology could reduce traffic deaths by about 80–90 percent. So the obvious problem is the human driver. Humans get tired, sleepy, and distracted, they text, they look at Facebook . . . and they drink. In fact, one theory is that our children and grandchildren will look back one day with shock and disbelief as they consider the number of deaths and accidents during the first 100 years of the automobile when we actually drove them ourselves! On the other hand, the highly publicized, Tesla accident in Florida during May 2016, believed to be the first fatality involving a vehicle in autonomous mode, and the Uber fatality in Arizona in March 2018, have been wake-up calls to the industry. But statistically, Tesla points out that its autopilot mode, when used in conjunction with driver oversight, reduces driver fatigue and is still safer than purely manual driving. Tesla also notes that its system was still in the beta-testing phase and that it provided warnings to the drivers that they remain engaged and ready to take the wheel.

Other benefits expected to come about as a result of AVs include reduced traffic congestion, off-site parking, fewer cars on the road, and less individual car ownership, as our society moves to a ride-hailing and ride-sharing mentality. Who wants the cost, maintenance, and insurance expenses and the other hassles of car ownership when your vehicle sits unused in the garage depreciating 90 percent of the time? Studies show that the members of our younger generation do not want to be bothered with driving anyway. They much prefer the freedom to text and use social media. And AVs will give new freedom to the elderly and people with disabilities.

How Will It Work?

The AVs are loaded with radar, lidar, cameras, sensors, software, maps, and computers with 360-degree awareness that can see around corners and over hills and otherwise anticipate things that humans cannot, and they can react faster. And the AVs will be connected to each other by vehicle-to-vehicle (V2V) technology, and to the world around them by vehicle-to-infrastructure (V2I) technology, via dedicated, short-range communication (DSRC) links to a wireless spectrum band similar to Wi-Fi. The merger of these technologies will allow the AV to become part of an integrated transportation ecosystem. In fact, the National Highway Traffic Safety Administration (NHTSA) proposed a rule mandating the deployment of connected V2V communications in December 2016.

One of the biggest debates among the manufacturers is how much autonomy the car needs to have and whether to pursue "semi-autonomy," (meaning that the human driver must take over in emergency), or "full autonomy," (meaning no steering wheel, no brake pedals). Google argues that semi-autonomy is actually more dangerous because the whole point is to remove the humans from behind the wheel, since humans cannot be relied upon to act quickly enough in emergency situations.

Federal Regulation and Guidance

With the backing of the federal government, the manufacturers and the states have the support to move the AV technology, testing, and development along at a brisk pace. President Obama carved out $4 billion in the 2017 budget for AV development, and NHTSA is bullishly advocating for AVs. To circumvent the patchwork of various state laws that are already developing, the U.S. Department of Transportation (DOT) and NHTSA have issued three recent operational guidelines for AV testing and regulation and a "model" policy for the states to help end the mish-mash of regulations that threaten to stymie the development of AVs.

Federal Automated Vehicle Policy

The first proposal by NHTSA was a 116-page policy, entitled, "Federal Automated Vehicle Policy—Accelerating the Next Revolution in Roadway Safety" (FAVP), which was released during the Obama administration on September 20, 2016, and was intended to serve as a guideline to establish a foundation and a framework upon which future DOT/NHTSA action would occur.

"Automated Driving Systems 2.0: A Vision for Safety"

A year later, the DOT in cooperation with NHTSA, under the Trump administration, issued a second federal AV policy on September 12, 2017, entitled, "Automated Driving Systems 2.0: A Vision for Safety" (AV 2.0), replacing the FAVP. The non-regulatory framework referred to automated driving systems (ADSs), whereas the original guideline referred to highly automated vehicles (HAVs). AV 2.0 continued to adopt SAE International's six automation levels (levels 0–5), specifically focusing on vehicles falling within Levels 3 through 5, which are considered to be "conditional," "high," and "full automation," and included vehicles with no human driver. AV 2.0 policy was "technology neutral" in that it did not favor traditional auto manufacturers over software companies; rather, it encouraged one and all to enter the space to develop the AV technology sooner.

"Preparing for the Future of Transportation – Automated Vehicles 3.0"

In October 2018, the U.S. DOT released the third federal AV policy, entitled "Preparing for the Future of Transportation – Automated Vehicles 3.0" (AV 3.0). This policy established a clear and consistent Federal approach to shaping policy for automated vehicles, based on six principles: prioritizing safety, remaining technology neutral, modernizing regulations, encouraging a consistent regulatory and operational environment, preparing proactively for automation, and protecting and enhancing the freedoms enjoyed by Americans. AV 3.0 was intended to be the beginning of a national discussion about the future of our surface transportation system, and introduced a comprehensive, multimodal approach toward safely integrating automation.

"Ensuring American Leadership in Automated Vehicle Technologies - Automated Vehicles 4.0"

In January 2020, the U.S. DOT and the National Science and Technology Council ("NSTC") released the fourth federal AV report titled "Ensuring American Leadership in Automated Vehicle Technologies - Automated Vehicles 4.0." Expounding upon AV 3.0, this report expands the scope to 38 relevant United States Government components which have a direct or tangential stake in the safe development and integration of AV technologies. This report addresses three key concerns: 1) United States Government AV principles, 2) administration efforts supporting AV technology growth and leadership, and 3) United States Government activities and opportunities for collaboration. Specific administrative efforts in this report include advanced manufacturing, artificial intelligence and machine learning, connected vehicles and spectrum, STEM education, and STEM workforce, supply chain integration, and quantum information sciences. AV 4.0 represents a unified effort across 38 federal departments, interdependent agencies, commissions, and Executive Offices of the President to share high-level guidance with agencies, innovators, and stakeholders regarding the research and development of AV technology throughout America.

From Self-Driving Cars to Robo-Trucks

While driverless cars have been getting most of the media attention, self-driving trucks are quickly entering the discussion. The chatter began in May 2015, when Daimler showcased its Freightliner Inspiration Truck at the Hoover Dam in Nevada, promising to unlock autonomous vehicle advancements that reduce accidents, improve fuel efficiency, cut highway congestion, and safeguard the environment. It was the first licensed, autonomous-commercial truck to operate on an open public highway in the United States. The truck is equipped with "highway pilot" sensors and computers that link together cameras, radar systems, lane stability, collision avoidance, speed control, braking, steering, and other monitoring systems, which combined, create a Level-3 autonomous vehicle, allowing the driver to cede full control under certain conditions. The driver is in control when exiting the highway, traveling on local roads, and making deliveries. Daimler expects its semi-autonomous truck to hit the market in the near future.

The Daimler event was followed by the Otto self-driving truck (in partnership with Uber), transporting a load of beer from Fort Collins, Colorado, to Colorado Springs, on October 20, 2016. (Otto was acquired by Uber in August 2016, which was followed by the highly publicized trade secrets litigation in 2019.) This was followed by Starsky Robotics and Embark coming out of stealth mode in February 2017, to reveal to the public their self-driving technology. Since then, Starsky Robotics folded in December 2019 due to a lack of funding, but others, such as TuSimple, Kodiak

Robotics, Waymo (truck division), Ike, Plus.ai, and Pronto.ai have all made great strides in the self-driving truck space.

Embark, which received authority to test its trucks on public highways from Nevada, in January 2017, was founded by two Canadian 21-year-olds in response to a shortage of long-haul drivers and the 10x job turnover ratio. Their vision is an exit-to-exit strategy: the truck operates without a driver until it reaches an exit point staging area. The result is the creation of more "local" truck-driving jobs for delivering the goods to their final destination. It is believed that handing off hundreds of miles of "boring" freeway driving to a robot partner will allow Embark to move more loads per day and increase driver productivity. Embark recently announced that it is teaming up with Peterbilt to roll out its new fleet of test trucks.

Starsky's vision was different and focused on tele-operations via an after-market kit to give trucks autonomous capabilities. Starsky's technology allowed truck drivers to operate closer to home . . . actually, from home. Drivers used a remote control to steer the truck as needed in situations where a human driver would otherwise need to take over.

TuSimple, a global self-driving truck company, raised $95 million in funding in December 2018, and is making daily fully-autonomous deliveries in Arizona; Kodiak is testing and hauling paying loads in Texas, Volvo is testing self-driving trucks in mines and self-driving garbage trucks in neighborhoods in Sweden; Amazon has reportedly formed a team to explore self-driving truck technology; and Tesla revealed its "Tesla Semi" electric truck, in November 2017.

Beyond Self-Driving - Expanded Truck Technology

As AV technology continues to permeate the trucking world, both warning and avoidance technologies are continuing to develop as well. Similar to today's passenger cars, trucks are beginning to take advantage of common safety features, including automatic emergency braking (AEB), steering assistance, adaptive cruise control, lane keep assistance, and automatic headlights, high beams, and wiper blades.

This technology has led to new and enhanced management and training solutions as well. In early July 2020, Navistar and Samsara entered into a new partnership to streamline data sharing by bringing data from Navistar's factory installed telematics devices into the Samsara platform. Additionally, Samsara's fault code data - including GPS location, odometer, speed, engine hours, and fuel levels - have been rolled into Navistar's OnCommand Connection platform. This enables Samsara customers to access OnCommand in order to get real-time insights into vehicle health and maintenance needs.

Another recent advance is a new integrated video product from Verizon Connect that provides businesses with increased visibility and context. Its smart dash-cam solution captures and automatically classifies harsh driving events in near-real time, providing video analysis that can be used to keep drivers safe and to protect them against false claims in the event of an incident. The data can also be used for coaching and rewarding good driving behavior.

Lytx has recently upgraded its driver cam videos to capture distracted driving and risky behaviors with expanded detection technology. In 2017 alone, over 3,166 people were killed by distracted driving and in commercial vehicles fleets, distracted driving served as the second leading

cause of fatal truck crashes. New Lytx technology combines machine vision and artificial intelligence with telematic sensors in order to accumulate data and risk insights, further enabling fleets to learn and study their biggest dangers on the road.

SmartDrive Systems has released two additional driver-assist sensors which provide real time alerts to drivers and managers. These sensors include speeding/weather conditions and sitting duck sensors in its line of driver-assists sensors. Specifically, these technologies aim to alert drivers driving too fast in bad weather and assist drivers who stop at unsafe locations. Alerts are sent directly to drivers to warn of areas impacted by severe weather and notifications are sent to safety managers if corrective action is not taken.

Looking to the future, blind spot warning and braking, cross traffic mitigation, mirror cameras, and external environmental cameras will prove to be highly valuable equipment. In the context of litigation, blind spot warning and braking will be highly valuable in accidents occurring in urban settings, while cross traffic mitigation would provide evidentiary aid in rural areas with poorly marked intersections or stop signs. As trucking litigators have already witnessed, integrated video cameras can help exonerate drivers in the case of no-fault accidents. These integrated video cameras and advanced commercial vehicle safety systems may also prove to reduce insurance premiums, serve as a driver training tool and assist in driver retention and recruiting.

Trucking Economics 101

Why are trucking companies suddenly so interested in autonomous vehicle technology? It is a matter of simple economics. In fact, the economic rationale for driverless trucks may be even more compelling than the one for self-driving cars. Drivers account for about one-third of the per-mile cost of operating a truck. If a trucking company pays a driver $50,000 a year to drive a tractor-trailer that can only operate 11 hours a day and 60–70 hours a week due to the hours of service (HOS) guidelines, then why would the company not consider a one-time, $30,000 add-on piece of equipment to its tractors, which would potentially eliminate the need for drivers and allow the company to operate its assets 24/7?

The potential for 24/7 asset utilization is also expected to alter our current supply chain. For example, many of today's major warehouse distribution centers are located geographically, based on the distance that a tractor-trailer can drive under the current HOS regulations. And, along with the overlapping technology in the fields of 3D printing and drone delivery, further disruption is coming to the supply chain as we know it. Mercedes is now using cutting-edge, 3D printing to make metal components and spare parts, and UPS is experimenting with drone delivery of packages from the rooftops of its delivery vans.

Platooning

"Platooning" is a concept often discussed in the same conversation with self-driving trucks. Platooning occurs when two or more trucks are electronically tethered about 40–50 feet apart by V2V communications, and it is thought by some to be the first step leading to a totally self-driving truck. It is estimated that in a two-truck platoon scenario, the lead truck would experience a 4 percent fuel cost savings, and the following truck would experience a 10 percent fuel cost savings, created by the reduction in wind drag and synchronized acceleration and braking. It is also anticipated that platooning drivers could alternate driving the lead truck so that the following driver

(or drivers) could rest during those time frames, thus creating a reduction in driver fatigue (and additional arguments for extended HOS rules) and an increase in driver job satisfaction. Peloton is a leading AV-technology company and an innovator in the field of platooning, but many of the truck manufacturers are also developing their own platooning platforms in-house.

Truck-Driving Jobs

It is estimated that there are approximately 3.5 million truck drivers, making it one of the most common jobs in America. It is also estimated that there is currently a shortage of approximately 50,000-100,000 drivers. Looking further, it is estimated that by 2024, there will be a driver shortage of about 175,000.

There are two schools of thought on the future of truck-driving jobs. On the one hand, it is believed that autonomous technology will merely serve as a part-time "driving assistant," allowing temporary hands-free driving in limited situations, such as on remote interstate highways, where the driver might get a two-hour break from the monotony and stress of driving. Thus, AV technology is seen as a job-enhancement feature, which along with automatic transmissions, and other improvements that will make truck driving easier (and easier to learn), are expected to make truck-driving jobs more attractive, allow older drivers to extend their retirement, and even entice younger millennials and females to enter the truck-driving market. In other words, AV technology has the potential to make truck driving a more readily desirable occupation, with less stress, and the ability to communicate with the outside world during periods of downtime created by frequent hands-free driving periods. It may also create an argument for extended HOS rules, given the resulting reduction in driver fatigue. Driver fatigue is estimated to be the cause of about one of seven fatal truck accidents.

The other side of the argument is that AV technology will slowly chip away at truck-driving careers, and as the technology evolves, it will completely eradicate the job of the long-haul truck driver. In fact, some groups have used this scenario as an argument to support a "universal income," which is a guaranteed income for our work force necessitated by the loss of jobs caused when the robots take over! There is a lot of concern, especially from the Teamsters Union, that self-driving trucks will eliminate thousands of truck-driving jobs, and the union is speaking out against the inclusion of trucks in the current and future AV legislation.

Uber for Trucking?

As mentioned above, Uber recently got into the trucking business when it purchased the self-driving truck start-up, Otto (now Uber ATG), with its sights set on "Uberizing" the long-haul freight business, with a new division called "Uber Freight." Uber unveiled Uber Freight in the early 2017, with plans for a "load-matching" app to connect shippers to trucks, as Uber connects riders to cars. Uber Freight is set to revolutionize the supply chain and increase efficiencies by cutting out the middleman (the broker) and by reducing empty miles (which some estimate to be 30 percent). At present, there is no self-driving component to Uber Freight, but Uber is using its experience with Otto to learn the trucking business. Uber Freight started in the "Golden Triangle"— Dallas, Houston, and San Antonio—and recently expanded into six new states. Uber Freight is continuing to catch on, as drivers get used to the app and the resulting efficiencies . . . and to getting paid quickly. There are several other Uber-for-trucking-type logistics companies out there, notably Convoy (based in Seattle), which is backed by Bill Gates, among others. Convoy has raised $80

million since its launch in 2015. Convoy originated with loads out of the Pacific Northwest, and it has since expanded into several other regions.

Liability?

The proliferation of AVs could indeed bring about a new paradigm in the way that we have traditionally viewed auto liability cases and insurance coverage. If the shift to AVs will result in fewer accidents caused by human drivers (i.e., a shift in responsibility from the driver to the car itself), then we are likely to see a shift from traditional auto insurance (purchased by the driver), to product liability coverage (purchased by the manufacturer). Simply put, if the human driver is no longer "driving" the vehicle (since it may not have a steering wheel), then how is the human liable under a typical negligence analysis?

On the flip side, if the promise of AV technology proves true, then there should be very few accidents at all, with few claims to pay, and lowered premiums. While the insurance industry is trying to get a handle on all of this, looking for some concrete information to gauge their potential risk exposures, some believe that the price of personal auto insurance will decline as human driver liability declines, while auto manufacturers and suppliers will need more product liability coverage to deal with an increase in defective technology claims. In fact, in an effort to speed the process and to settle any questions related to liability, several of the major auto manufacturers have stated publicly that they will be responsible for any accidents occurring while their vehicle is operating in autonomous mode. If the AV technology can truly account for most of the 94 percent of accidents currently caused by human error, then it sounds like a pretty safe bet.

Defending Claims of Inadequate/Outdated Technology in Trucks

Along with this rise in technology comes new and novel arguments by our friends in the plaintiff's bar. Plaintiffs' attorneys are now bringing claims for negligent failure to equip trucks with the latest safety technology. These claims generally allege that the trucking company defendant failed to take advantage of and utilize reasonably available safety devices and state-of-the-art technology to increase safety. Many of these claims convert a simple negligence claim into a quasi-products liability claim. And, of course, the theme of the argument is likely to be "profits over safety."

When a failure to equip claim is made, there are a number of ways for defense counsel to combat this theory. A lack of Federal preemption (i.e., a lack of any mandate from NHTSA) is one argument that has been utilized by courts to rule on failure to equip claims. However, courts are split as to whether the lack of agency regulation has a preemptive effect on common law claims of negligence. In *Dashi v. Nissan North American, Inc.*, 445 P.3d 13, 22 (Ariz. Ct. App. 2019), the Court of Appeals in Arizona held a Plaintiff's state tort claims were preempted, noting "Dashi's claims would frustrate NHTSA's federal regulatory objectives by thrusting a jury-imposed AEB standard on Nissan inside Arizona's borders." In doing so, the court suggested allowing "the [tort] claims would disrupt NHTSA's careful balance, diminish its non-traditional efforts, compromise its ultimate safety goals, muzzle innovation and competition in this evolving space, and strip the federal government of leverage in NHTSA's ongoing negotiation efforts." However, recent courts have held the opposite, finding NHTSA rules do not preempt plaintiff's common law claims. *See Varela v. FCA US LLC*, No. 1-CA-CV 19-0209, 2020 WL 2123281 (Ariz. Ct. App. May 5, 2020); see also *Butler v. Daimler Trucks North America, LLC*, 433 F.Supp.3d 1216 (D. Kan. 2020).

As these new safety innovations continue to emerge and make their way from the passenger vehicle industry to the heavy truck industry, failure to equip claims against trucking companies and/or heavy-duty vehicle manufacturers will continue to grow in number. While tactics to defend these cases are largely case-specific, defendants have a number of options and arguments available to defend claims of this nature. Defendants may question the commercial availability and overall effectiveness and reliability of the particular safety devices in their application to heavy trucks (as opposed to cars) to justify not equipping their vehicles. Or, they may argue that the subject safety devices would not have prevented or mitigated the damages in the particular accident scenario.

Further, companies may base their decisions not to feature enhanced safety devices on their vehicles simply due to the cost of third-party add-ons for older fleets. Take for example the recent rise in dash-cam video technology. Even many of the larger carriers who have chosen to take advantage of the technology have had to implement the camera equipment in phases. For the smaller "mom and pop" trucking companies, the financial and technical challenges are even more difficult. Obviously, there is a fine line between a company's reasonable inability to afford the new technology versus plaintiffs' "profit motive" argument.

However, until NHTSA or other regulators mandate AEB and other new and developing safety devices on heavy trucks, the clearest and most successful argument for trucking defendants is that the truck manufacturers are presently under no legal duty to install the subject safety equipment on their production vehicles, and the trucking companies are under no legal duty to install any new and developing safety technology (via third-party add-on equipment) to their fleets.

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The Jury Has Returned: What's Changed in the Wake of COVID-19 — and What You Can Do to Deal with It

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Jury trials are gradually resuming even as the COVID-19 threat lingers and safety measures are enacted and evolve. In this unprecedented context, jury verdict risks have changed. While particulars are fact and venue dependent, we provide broad guidance as to likely changes in the dynamics of jury selection and jury deliberations, highlighting areas of greatest risk and recommended steps to address them.

Jury pools will likely skew noticeably younger and whiter than before, with somewhat more males and conservatives. Several recent national surveys converge in this direction, with views on the seriousness of COVID-19 a strong underlying factor.

Venires will mostly be comprised of Generation X (~40 – 55 y.o.), Millennials (~24 – 39 y.o.), and a smaller but ever increasing proportion of Generation Z jurors (≤23 y.o.). Data show that, relative to older generations, Generation Z and Millennials are accustomed to learning in shorter bursts and through multimedia formats. They also *on average:* are more educated, liberal and ethnically diverse; are less nationalistic, authoritarian and hierarchical; tend to assume email keeps executives in the internal loop; look for corporations to be good citizens; and believe that government should play a greater role in solving society's problems. However, though near-term jury pools are expected to skew noticeably younger, they are also likely to be markedly whiter and moderately more male and conservative, undercutting some of the broad trends a younger jury pool might otherwise suggest.

Cumulatively, these overall demographic shifts will more likely benefit civil and white collar defendants, though the overall risk profile of a case and the most compelling case narrative for a particular venue and jury pool is highly fact- and context-dependent, but can be gauged in advance of trial.

Voir dire is likely to be curtailed for the foreseeable future. Lower turnout for jury duty and prioritization of criminal cases will cause courts in civil cases to conserve juror availability through measures such as limiting extra peremptory challenges (or even reducing the standard number), rejecting "gray area" cause challenges, and extensive rehabilitative questioning. There also will be pressures to conduct live voir dire quickly, limiting opportunities for effective questioning. Courts in some states are already experimenting with non-traditional voir dire formats such as online (*e.g.*, Florida, Texas, Washington) and in auditoriums or arenas (*e.g.,* Michigan, Mississippi, Texas). These pressures increase the importance of having a sharper understanding of the profiles of riskiest adverse jurors to enable highly prioritized usage of peremptory challenges, and the value where permitted of a thorough written juror questionnaire.

Certain juror attitudes will be starker where shaped by personal experience during the pandemic. The experience of the pandemic will lead to some strong attitudes among prospective jurors, based on their perspectives as employees, customers, business partners, patients, federal aid recipients, taxpayers, members of particular communities and, more broadly, as physical, psychological or financial victims of the pandemic. The pandemic is likely to be especially fertile ground for jurors' personal anecdotes in employment, healthcare, insurance, and business disputes involving claims of

force majeure, and will bear on their views of what is acceptable behavior in meeting legal versus moral duties and what they view as "common sense." Where such anecdotes are perceived as case-relevant, jurors will tend to deploy them as a yardstick for gauging a defendant's liability and blameworthiness and a plaintiff's deservedness of compensation.

In cases where COVID-19 itself is at issue, jurors are likely to have particularly strong reactions. Jurors may expect both businesses and individuals to react to circumstances – whether created by the pandemic or otherwise – with more flexibility, mirroring the ways in which certain industries and entities have been more forgiving during the pandemic. For example, in cases involving business interruption insurance claims, we anticipate that jurors, especially those negatively impacted by the pandemic, will be inclined to stretch to find coverage for struggling small businesses, entities with an essential worker "halo", and beloved companies that support the local community. Equally, jurors are likely to be inclined against plaintiffs who appear to be gaming the system at a time when the average person is independently managing their own losses.

Certain jurors will be more skeptical of expert evidence. Jurors may have less trust in experts' opinions in light of conflicting and evolving views among scientists, medical experts and policymakers as knowledge of COVID-19 continues to rapidly evolve. This may also galvanize skeptical jurors to dismiss expert evidence opposing the side they favor as a kind of false narrative, especially if the juror is unclear on how the expert reached their conclusion. Polling in recent years shows a higher likelihood among conservatives than liberals to resist the import of scientific evidence, which has most visibly emerged in public discourse over climate change, vaccines, and now the seriousness of the COVID-19 threat. The increasingly partisan divide could also lead to more hung juries in cases where fact patterns trip partisan wires.

Anxiety due to COVID-19 will have complex impacts on both real-time case information processing and group deliberations. Jury service entails sustained forced interaction with multiple strangers in an environment over which jurors have little control. Heightened anxiety due to fear of contracting COVID-19 during jury service – reinforced in court through constant visual and sensory cues of PPE and potentially compounded by physical, psychological, and financial stressors in jurors' daily lives due to the pandemic – will likely impinge in complex ways upon jurors' ability to absorb case information during trial and engage properly in deliberations.

Broadly, psychological studies show that a state of anxiety: (i) tends to lead to more thoughtful, broader-based causal attributions and to less confidence in the final decision (which would generally benefit defendants more than plaintiffs), *but* (ii) makes it more difficult to focus one's attention in a sustained manner on case presentations, especially for more complex and drier evidence and arguments (which would generally benefit plaintiffs, who often have a simpler story to tell).

Separate lines of research on the cognitive effects of anxiety highlight other trends to watch for, particularly in cases involving the scienter of a large corporation or group of corporations, for example, in antitrust, products liability, environmental, employment and fraud cases, and in cases involving perceived "outsiders." Consider:

- Anxiety tends to trigger sense-making and control-restoring mechanisms that make people more prone to conspiratorial thinking, which typically benefits plaintiffs in cases involving the scienter of large corporations.

- Anxiety in the courtroom about COVID-19 may inherently amplify the emotional effects of a plaintiff's "reptile strategy", while media coverage of governmental and corporate responses to the pandemic may give defense counsel a ready analogy to combat such an approach. For example, corporate defendants may be able to reference best efforts at multifaceted decision-making by government entities and businesses in light of evolving scientific evidence to cope with the pandemic as a backdrop to tell their own story in a more directly relatable manner. Any explicit comparison would need careful, case- and venue-specific testing to be framed appropriately and hedge against risks of backfire.

- As self-protective psychological mechanisms trigger – as during a pandemic – individuals tend to experience greater negative feelings and display bias toward "outgroups," *i.e.*, against members of communities perceived as "not my tribe." For the foreseeable future, this could lead to greater risks for litigants construed as outsiders by the local community – for example, a socially progressive Silicon Valley tech company defending itself in a socially conservative venue, or a foreign corporation.

Against the backdrop of these trends, since time taken to reach a majority or unanimous verdict is something that the jury controls, anxiety may lead to curtailed deliberations, mere compliance rather than genuine attitude change, and more roughly hewn compromise verdicts if jurors seek to end jury service as quickly as practicable. Any resentment at jury service relative to perceived case merits may be reflected in the verdict, at one side or the other.

Recommendations for Counsel

In light of the foregoing factors, we recommend that counsel consider the following steps to help minimize the risk of an adverse jury verdict:

(i) **Consider conducting pretrial research in the venue.** Pretrial research, such as mock juries, can be used to gauge risks, frame the client and case narrative relatably, and develop an empirically-based juror profile. Online methodologies may suit simpler cases. Local counsel can be an invaluable resource as to trends in the jury pool mindset.

(ii) **Anticipate curtailed in-court voir dire**. Develop a focused and efficient set of (proposed) voir dire questions to identify the most dangerous jurors, and a honed technique for building cause challenges resistant to judicial rehabilitation efforts. Petition for a comprehensive written juror questionnaire addressing both hardship and bias to supplement and streamline the live voir dire.

(iii) **Tailor voir dire to meet likely shifts in juror thinking**. Consider broadening a typical generic voir dire question about physical or mental health concerns to encompass the impact of COVID-19 and the experience of self-quarantining on ability to serve as a juror. Further, voir dire questions about likely origins of the coronavirus and best strategies for managing it would provide a useful litmus test for identifying potential conspiracy theorists and scientific skeptics.

(iv) **Engage the judge in process planning**. Encourage comforting messaging to jurors re: civic importance of jury duty, gratitude for jurors' time, and court practices to maximize jurors' safety. Discuss issues such as when masks or clear face shields will be required, with an eye towards clear verbal and non-verbal communication at key junctures.

(v) **Model the mindset desired from jurors.** After a strong thematic introduction to the opening statement, counsel should engage jurors with heartfelt thanks for their service, counsel's conviction to ensure a fair and just result for the client (an intimation that despite the client's reasonableness, the case ultimately requires resolution by jury trial), and counsel's calm reassurance that the team will adopt best practices to keep everyone safe. Follow through on these affirmations.

(vi) **Tailor case presentation modes to meet expectations**. Take advantage of trial technology and multimedia modalities to engage a relatively younger jury, be extremely organized with exhibits, and keep the case-in-chief lean and focused.

(vii) **Be aware of ways to draw express parallels to the pandemic.** For example, where applicable, point to sound evidence-based tradeoffs made during the pandemic between reducing transmission of COVID-19 and saving small businesses as a touchstone for explaining multifaceted corporate decision-making that involved well-intentioned risk-benefit tradeoffs based on what was known at the time.

(viii) **Be aware of ways in which jurors may draw express parallels to the pandemic.** For example, to militate against adverse jurors who may cite "common sense" as a reason to inject into deliberations extraneous information from media coverage or internet searches, remind the jury during closing argument of the courtroom tests that the admitted evidence has passed in order to be worthy of consideration by the jury. Suggest to the jury that these facts should be placed in a mental safety-deposit box dedicated to this case, and are the only facts to consider while deliberating.

(ix) **Pay particular attention to expert evidence.** Especially for cases in highly partisan venues or where applicable science is likely to clash with local community values, utilize an expert pre-tested to be relatable, trustworthy, and able to teach local jurors in a clear, engaging, and memorable manner. Pre-test expert theories with mock jurors to identify potential pedagogical and ideological stumbling blocks to persuasion and how to surmount them.

Conclusion

In light of the coronavirus pandemic, we expect prospective jurors to enter the courtroom harboring starker attitudes, palpable personal experiences and anecdotal observations about a wide range of people, entities, conduct and claims. Jury selection strategy grounded in case- and venue-specific juror research will be critical to navigate the potential for such amplified biases, especially given the greater procedural constraints we anticipate. Likewise, it will be critical for the case narrative and presentation of witness testimony to be responsive to shifts in attitudes as to certain litigants, certain norms, and the credibility of certain types of evidence, while also anticipating the cognitive impacts of anxiety on the matrix of juror decision-making. For a white paper providing further analysis of these issues, please contact: publications@davidperrott.com.

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Reopening and Redefining Transportation Workplace During the Pandemic

By: Raymond A. Greene, III
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While the Federal Motor Carrier Safety Administration (FMCSA) and its state partners have effectively cleared the way for trucking companies and commercial drivers to continue to deliver critical goods and supplies during the pandemic, the uncertainty and fluid nature of the health crisis has made it essential for transportation industry members to rethink their operations and reopen components of their businesses in a safe and legal manner. Motor carriers and all of their employees face an ever-changing landscape and multiple impediments to operations as states vacillate on shelter in place and related local orders. And while uncertainties will continue to exist, one thing that is certain is that trucking will play a vital role in recovery of segments of the economy impacted by the pandemic. Therefore, it is incumbent on the transportation industry to reopen and reimagine the workplace to assure that deliveries and services are unimpeded and that supply chains for food and goods are not compromised.

The challenge for the transportation industry is complicated as jurisdictions gradually remove pandemic related workplace restrictions. It behooves transportation employers to start considering their best options in responding to a diverse array of issues, such as reopening or expanding operations, incorporating remote working or furloughed employees, adapting to new state and local orders and assuring the safety of employees and customers. It will be difficult to implement broad policies that will apply to all employees. Even distinguishing driver versus non-driver employees is only a partial step to redefining operations. Further analysis is needed to identify what employees can effectively work remotely and which cannot.

And while every terminal or administrative office has its own unique characteristics, transportation employers need to consider the following issues with a goal of identifying steps that can be used to facilitate a safe and pragmatic reopening or restoring the full extent of operations.

A. Remote Work and Training

Employers in all industries are fielding requests to continue to work remotely even as workplaces reopen. As previously noted, analysis of the individual request should be viewed in light of potential impact on communication and staffing. While certain non-driving teams may be very adaptable to remote work, a one size fits all approach will be difficult to implement. One general rule is that management should be ready to handle requests for reasonable accommodations and flexible work arrangements that perhaps would have been denied previously.

Many transportation companies are reporting that up to 85% of its office staff are working from home with only upper management staying in the office. For instance, driver managers are spending less time commuting and more time effectively communicating with their drivers in a less stressful home environment.

Other employers have implemented at least a partial remote approach to driver training. The use of videos and electronic document signatures has enabled employers to conduct virtual orientation. As a result, many drivers will report for work with most of their orientation already completed. And drivers have expressed their appreciation for the balance between in person and

virtual training. Some orientation sessions have been reduced from three days to one and a half days which has the positive impact of allowing trainers and drivers' time for other activities and getting drivers on the road sooner.

B. Social Distancing Plans

Despite the improvements with increased remote work, many transportation employees will need to work in person. And multiple states require essential businesses to institute written social distancing plans. Even if these plans are not legally required in a particular jurisdiction, the development or updating of a socially distancing procedure will accomplish multiple goals. It will help protect currently working employees, reassure employees who are fearful of returning to work and could reduce employer liability after reopening.

While social distancing protocol is unique to each workplace, some factors to consider generally in the transportation setting may apply:

1. Modification of workspace

Separating work stations, adding partitions, eliminating work stations to create more space, reducing use of common areas such as conference rooms, cafeterias and break rooms and installing signage that reminds employees and vendors to maintain social distancing in areas where people tend to congregate are all simple ways of creating social distance.

2. Shift Scheduling

Pandemic related vehicle utilization changes have created havoc for preventative maintenance and inspection schedules. So maintenance managers have faced the challenge of creating social distance for shop employees who obviously cannot work from home. The most frequently used remedies are staggering schedules to reduce the number of technicians per shift and isolating the shop person when possible. That said, the schedules need to take into account increased time need for sanitation tasks like cleaning equipment, washing hands and disinfecting trucks being assigned to a new driver.

3. Employee Interaction

Policies regarding employee interaction and contact should also be considered. These include fewer in person meetings and increased use of videoconferencing, limiting in person gatherings to low numbers, development of shift schedules that limit the number of employees on the company premises at one time, staggering employee break and meal schedules to again avoid overcrowding of common areas.

4. Screening Protocol

Employers should also consider the implementation of screening protocol for employees, customers/clients or other workplace visitors. These may include temperature screens or other symptom checks and the maintenance of private medical information collected through screening. The implementation of such a plan and must also contemplate potential complications such as how to restrict those who do not pass the screening from entering company locations and the location of the screening process itself.

5. Personal Protective Equipment Policies

The use of masks or gloves for certain areas or duties and consideration of additional equipment for higher risk job positions should be considered.

6. Cleaning and Disinfecting the Workplace

Revising contracts with cleaning services, disinfecting common use areas and making cleaning supplies like hand sanitizers available to employees and visitors are among the steps to be evaluated.

7. Safety Communication Plan

This type of plan should explain safety protocols such as the precautionary measures the company is taking, identify benefits that the company is making available including employee assistance programs, and create an employee safety committee to assure compliance with local ordinances and communication with employees.

C. Full Review of Existing HR Policies

There are many factors to consider for transportation businesses in the attempt to adapt to the uncertainties created by the pandemic. Among the HR policies that could be reevaluated are the following:

1. Need for Flexible Return to Work Policies

Overly broad policies identifying categories of employees that return to work will be difficult to implement. Due to the complex nature of underlying health conditions that potentially could leave employees vulnerable to COVID-19, employers will need to be sensitive to individual requests and provide accommodations to impacted workers that are in compliance with the American with Disabilities Act (ADA).

2. Leaves

Leave entitlements will be an issue for those employees who are unable to work remotely. Consultation with local counsel regarding recent sick leave legislation is recommended. Many transportation employers are providing an additional 14-day sick leave for drivers who are infected with COVID-19.

3. Furloughs

Opportunities may exist for the hiring of new employees for important positions given the pandemic created uncertainties. That said, many jurisdictions are contemplating new legislations that gives priority in the hiring process to furloughed or part time employees. Consultation with labor counsel is advised especially if collective bargaining agreements are in play.

4. Bonus Plans and Benefits

Temporary work stoppages can impact employee eligibility for bonus pay, incentive plans and benefits like 401K programs. It is incumbent upon employers to determine the effect of work

interruptions on pay and benefit amounts owed. Employees may also need to reenroll in their respective plans. Failure to clarify these issues could result in costly wage and hour litigation.

5. Disaster Preparedness/Planning

Surges of the virus, new pandemics, future extreme weather events or terrorism require future planning even as companies deal with current operational challenges.

Time should be spent learning from the impact of COVID-19 so that procedures can be implemented as seamlessly as possible in the event of a catastrophic event. While these processes are unique to each company, the lessons of remote work operations, alternative scheduling, communication with teams and employees and succession plans in the event of compromised leadership should be used to formulate future crises strategies

D. CONCLUSION

While the transportation industry has proven to be a resilient and impactful player in responding to the challenges and uncertainties created by the pandemic, the prospect of ongoing or new challenges makes it important for companies to consider new ways to redefine the workplace and minimize the impact on their operations and employees.

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Duty Bound: Protecting Customers and Employees from Covid-19

By: Nathan R. Skeen
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Employers must take adequate precautions designed to provide reasonably safe premises to both its employees and its customers. During the COVID-19 pandemic, there has been an increased awareness of the potential for transmission of disease for obvious reasons.

The pandemic has exposed a significant deficiency in most companies' customer and employee safety/protection plans, and companies are scrambling to adapt their workforces to the changing regulations and recommended precautions. Transportation companies are certainly no exception. This article is intended to define a transportation company's general duties to its employees and customers as they relate to COVID-19 exposure.

1. Risks Specific to Transportation Employers

Transportation company employees and their customers face serious and unique risks relating to the exposure of COVID-19. First, in all states, employees of transportation companies are considered essential workers.[1] This means that they are not only able, but also expected, to work during the pandemic. Anecdotally, it appears that some truck drivers are busier now than before it began. The more these employees are required to be on the road, the more opportunities there are for potentially contracting the disease.

Second, although truck drivers spend most of their day isolated in their cabs, they regularly encounter others who may have contracted COVID-19. These intersectional points include truck stops, docking and loading bays, and other delivery points. Unfortunately, these are often high traffic areas, with individuals coming from all over the country, and most outside of the control of the employer.

Third, many truck drivers are considered at risk individuals. These include those over 65, those with diabetes, asthma, obesity, smoking, and other underlying conditions.[2] These conditions form a terrifying Venn diagram with the conditions most commonly diagnosed among truck drivers. Statistics from the National Institute of Health show that more than 50 percent of truck drivers are obese, have been diagnosed with diabetes at a 50 percent higher rate, and 87 percent have hypertension or pre-hyper tension.[3] The prevalence of these symptoms underscores the importance of providing adequate equipment and protection to ensure that they can perform their jobs safely and with minimal danger.

2. Duties to Employees

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[1] *See* COVID-19: Essential Workers in the States, *available at* https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx.
[2] *See* People of Any Age with Underlying Medical Conditions*, available at https*://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.
[3] *See* American Crisis - Health of our Nation's Truck Drivers, available at https://www.corporatewellnessmagazine.com/article/american-crisis-health-of-our-nation-s-truck-drivers#:~:text=Compared%20to%20the%20general%20population,58.3%20percent%20(JOEM%202009).

As with other employers, a transportation company's duty to its employees includes a common law duty of reasonable care, as well as regulatory duties. These regulatory duties often inform the standard for reasonable care, so employers should be cognizant of developments in regulations and statutes. OSHA's General Duty Clause requires an employer provide its employees with a workplace free from recognized hazards likely to cause death or serious bodily harm.[4]

OSHA's position regarding employer duties of care toward employees during the Coronavirus Pandemic is that existing duties defined by federal law apply in this unprecedented situation. There have been no newly enacted standards relating specifically to COVID19.[5]

However, OSHA has identified the relevant COVID19 Standards that define an employer's duties involving the General Industry requirements of 29 CFR 1910. These specific sections include 29 CFR 1910 Subpart I – Personal Protective Equipment, which provides information regarding appropriate eye protection, face protection, respiratory protection, and hand protection. Employers who were not previously impacted by the need for Personal Protective Equipment will need to understand these recommendations. 29 CFR 1910 Subpart J – General Environmental Controls, sets out guidelines for properly sanitizing stations and workplaces. 29 CFR 1910 Subpart Z – Toxic and Hazardous Substances, which includes information about how to handle employee exposure and medical records; as well as provides guidelines for protecting against blood borne pathogens, developing proper strategies for hazard communication, and reducing occupational exposure to hazardous chemicals in laboratories.

OSHA's recordkeeping and reporting requirements regarding occupational injuries and illness (29 CFR 1904) create additional duties for a company to consider. Under these requirements, COVID-19 is considered a recordable illness, and thus employers are responsible for recording cases of COVID-19, if:

- The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
- The case is work-related as defined by 29 CFR § 1904.5; and
- The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.[6]

It is also important to keep in mind that duties under privacy laws may arise from COVID-19 exposure to an employee. HIPAA and other privacy regulations have not been suspended, despite an employer's heightened awareness of its employees' illnesses. Companies that have not carefully protected their employees' health information (including diagnosis and temperature checks) obtained while trying to keep a workplace safe may face potential fines and other liability.

Apart from duties owed to employees under OSHA and HIPAA, common law duties to employees may vary from jurisdiction to jurisdiction, as will the remedies for breaching these duties.

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[4] Section 5(a)(1) of the Occupational Safety and Health Act.

[5] *See* https://www.osha.gov/SLTC/covid-19/.

[6] *See* Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19) May 19, 2020, *available at* https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

The exclusive remedy for workers against their employers in most jurisdictions is governed by workers' compensation statutes, but that has not stopped some lawsuits from being filed. In April, the family of a Walmart employee that had died from COVID-19 brought a wrongful death suit against Walmart.[7] It alleges that Walmart failed to provide adequate protections for its employees, including failing to warn, not providing personal protective equipment, failing to close, failing to monitor its employees, failure to train, and a number of other allegations.

To assist in fulfilling these duties, the CDC has provided additional, specific guidance directed toward long-haul truck drivers and their employers.[8] Perhaps most crucially, the CDC recommends that transportation employers should create a COVID-19 response plan to protect drivers. These plans should follow the CDC Interim Guidance for Businesses and Employers,[9] which is routinely updated as more information regarding COVID-19 exposure is discovered. Specifically, response plans should include what instructions to provide employees about COVID-19, how to respond when an employee is feeling sick, methods to ensure a load is delivered in the event that a driver becomes ill, and the provision of checklists and supplies to ensure the trucks are properly cleaned. Companies should also perform a worksite assessment to identify potential problem areas. Analyze potentials for limiting the spread, such as contactless deliveries. Prepare cleaning protocols in the event that an individual is diagnosed. Determine how or if they would like to conduct screening of the employees.

Additionally, the CDC has issued guidance regarding a variety of safety practices for employers of critical workers (like truck drivers) who are asymptomatic and continue to work following a potential exposure to COVID-19.[10] This guidance is particularly important for employers in the transportation industry because their employees may travel through many areas, and come in contact with a number of people who may be infected by COVID-19. These instructions promote social distancing and are intended to avoid unnecessary contact with others. For example, transportation companies should instruct their drivers to limit time spent outside of the truck cab during fueling, loading and unloading, and at rest and truck stops, use paperless, electronic invoicing for fueling, deliveries, and other tasks, when available, and communicate with dock managers or other drivers by radio or phone, if possible.

The scope of transportation company's duties towards its employees to prevent COVID-19 exposure will almost certainly continue to develop over time. For this reason, it is important for employers to continually monitor CDC and OSHA guidance on the steps to take to prevent exposure of the virus among their employees.

3. Duties to Customers

Similar duties may attach to the customers of transportation companies. With respect to customers who enter the property of transportation companies, those companies generally owe an

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[7] *See* Complaint, *available at* https://www.porterwright.com/content/uploads/2020/04/evans-walmart.pdf.
[8] *See* What Long-Haul Truck Drivers Need to Know about COVID-19, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/long-haul-trucking.html.
[9] *See* Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020, *available at* https://www. https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.
[10] *See* Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19*, available at* https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html.

affirmative duty to exercise ordinary care to keep their property in a reasonably safe condition, and warn the customers of known hidden dangers or unsafe conditions. [11] Similar duties extend to govern interactions between drivers and their points of delivery. An individual who is harmed by the acts or omission of a driver often seeks to hold the driver's employer accountable under theories of vicarious liability or direct negligence. Drivers should be trained to take adequate precautions, such as wearing masks and keeping six feet of distance where possible in order to ensure such interactions are reasonably safe, and that exposure to COVID-19 may be avoided where possible.

Just last month, two separate lawsuits were filed against Princess Cruises.[12] These suits allege that Princess Cruises failed to provide adequate safeguards against the transmission of COVID-19. Princess Cruises is facing allegations of gross negligence for allowing passengers to be exposed to the disease. Princess Cruises set the ship to sea, despite knowing that two passengers on the ship previously had symptoms of COVID-19. Princess Cruises did not warn the complaining passengers of the potential exposure either before or after they boarded the ship.

The extent to which companies may be held liable to customers for potential exposures is not clear, but it will likely vary from jurisdiction to jurisdiction. For instance, in Utah, the state legislature has provided individuals and entities immunity from damages for an injury resulting from exposure to COVID-19 while on the entities' premises.[13] This immunity does not protect against willful or reckless behavior. Similar legislation is being considered at the federal level.[14] Companies that fail to take reasonable steps to ensure their customer's protection, particularly if combined with a general lack of awareness, indifference, or outright refusal to provide protection may be considered to act willfully or recklessly.

4. Conclusion

Transportation employers undoubtedly must take reasonable steps to prevent exposure of COVID-19 among their employees and customers. The scope of those duties remains fluid as information regarding the virus continues to develop. Ultimately, there is no perfectly effective preventative measure to ensure the safety of employees and customers. Fortunately, the law does not require perfection, but rather good faith and reasonable efforts to provide safety. Ongoing care and attention should be given to the guidance provided by government and healthcare professionals to limit or avoid the spread of the virus among the people who keep transportation companies running.

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[11] § 14:14. 3 American Law of Torts § 14:14.
[12] *See* "New lawsuits claim Princess Cruises knew of coronavirus exposure before ships went to sea," *available at* https://www.usatoday.com/story/travel/2020/06/08/princess-cruises-faces-two-new-lawsuits-over-coronavirus-plagued-ships/5322809002/.
[13] *See* COVID-19 PROVISIONS, available at *https://le.utah.gov/~2020S3/bills/static/SB3007.html#78b-4-517*
[14] *See* "Businesses Want Virus Legal Protection. Workers Are Worried" available at: https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html.

Potential Third-Party Liability for COVID Exposure

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We are in uncharted waters here. While Congress, not surprisingly, has hinted at limiting liability for COVID-19 exposures, we have seen nothing concrete from Washington, DC, at this point. It is unclear whether we will, and even if it were to happen, whether such limitations would pass constitutional muster.

There are concerns for potential liability arising from the spread of COVID-19 for employers and businesses, including restaurants, schools, transportation carriers and the medical profession. Each of these have unique challenges and potential exposure, but each has defenses to such claims.

If a business has workers' compensation coverage, employees who claim COVID-19 illness from exposure at work generally are limited to benefits under their state's workers' compensation program. In other words, such employees should not be able to maintain a lawsuit against their employer for COVID-19 illness about some allegation of intentional conduct. However, customers, vendors, and delivery people are not affected by the worker's compensation bar. To the extent customers, vendors, and delivery people can establish that their illness is related to an exposure at a certain business, they may pursue a lawsuit against the business.

Restaurants

Historically, the restaurant industry and food supply chain have had to defend claims related to food-borne illnesses and illnesses related to poor hygiene practices. Courts have applied contact tracing to a specific restaurant or food supplier to permit recoveries for damages and pain and suffering.

Schools

The Center for Disease Control has issued strategies for the safe re-opening of schools. Additionally, the American Academy of Pediatrics has opined that schools, which provide not only academic education but social education and services as well, should start with the goal of having students physically present in school. The AAP also has offered guidance for how schools can take precautions to help limit the spread of the virus. Decisions related to implementing the strategies and guidance offered by the CDC and the AAP are to be made locally and in collaboration with local health officials. What happens, however, if the local school district does decide to allow children to return to in-person learning and then there is an outbreak of the virus at the school? Not surprisingly, that answer could vary from jurisdiction to jurisdiction. Many states have sovereign immunity or discretionary function immunity doctrines that would likely shield schools or limit liability in the event of a COVID-19 outbreak on school premises, but those doctrines have not been tested during a pandemic. Furthermore, such doctrines will not shield private schools from liability. While many states are discussing the possibility of passing legislation that would provide a safe harbor for schools and businesses from COVID-19-related lawsuits as long as CDC guidelines are being followed, it remains to be seen whether those laws will be enacted. And, it is questionable whether parents could waive liability for their children.

Passenger Transportation

Few industries have faced more challenges from the emergence and spread of COVID-19 than the passenger transportation industry. Not the least among these challenges is the potential for lawsuits alleging that the transportation of infected individuals in confined spaces – often over long distances – resulted in the infection of fellow passengers or others. Compounding this risk is that many jurisdictions, including both Indiana and Kentucky, hold common carriers to a heightened duty of care when it comes to the safety of passengers. However, this is not to say that a plaintiff bringing a COVID-19-based claim against a common carrier will not face several difficulties.

Waivers

Among the challenges many potential plaintiffs may face is the increased use of liability waivers. As the risk for lawsuits increases with the spread of COVID-19, some common carriers have turned to liability waivers as a means of protection. With some key exceptions, both Indiana and Kentucky have enforced liability waivers. It remains to be seen if such liability waivers will withstand scrutiny in the context of COVID-19. However, these waivers likely will serve as a deterrent.

Health Care Providers

While disease-related liability is certainly not a novel concern for healthcare providers, the rapid spread of COVID-19 has necessitated the creation and expansion of immunities for medical facilities and their employees. The CDC has provided thorough, albeit evolving, guidelines that have helped to define the standard of care owed to COVID-19 patients as well as those who find themselves at healthcare facilities for other reasons. However, states also have begun granting specific protections to healthcare providers. In fact, over the last several months, more than twenty-three states have granted varying degrees of immunity to healthcare providers through executive orders and/or legislation. Although the scope of protection conferred by these states varies greatly, nothing currently shields healthcare providers from liability arising out of heightened levels of misconduct, such as gross negligence, recklessness, or willful misconduct. Some states, such as Tennessee, have contemplated passing legislation that would shield healthcare providers and facilities from nearly all COVID-19-related injuries – including premises liability stemming from contraction of the disease – as long as certain standards are met. This type of broad protection will undoubtedly become more common as the current public health crisis continues to worsen.

Duty to Cease or Curtail Operations in Light of Surge in COVID Exposure

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On June 29, 2020, the Principal Deputy Director of the Centers for Disease Control and Prevention (CDC), Dr. Anne Schuchat, delivered a somber message. Outside of a few areas, the coronavirus is spreading too rapidly and too broadly throughout the United States to bring it under control. "We have way too much virus across the country for that right now, so it's very discouraging." Noting the recent surge from coast to coast, she said "This is really just the beginning." In the weeks since she made that statement, many states have continued to set new daily records for COVID-19 infections and deaths. As Dr. Schuchat noted, "in lots of places, there's more virus circulating than there was."

Some states have begun to roll back the process of reopening because of the recent surge in coronavirus cases. Others will likely do so in the future. The question that arises is what is a company's obligation to cease or curtail operations in the absence of state or local mandates?

No single answer can fit all situations that will arise during this unprecedented and rapidly evolving crisis. The right course of action may vary depending on the nature of the workplace, the geographic location, the specific jobs or work being performed and other factors.

Business leaders and risk managers must balance the company's need to continue to operate against the risks that continued operations pose to employees, customers and others. Among other things, special consideration should be given to the following:

- Are employees required to work close together?
- Do employees have to travel and, if so, will their travels require them to visit areas experiencing a surge in coronavirus cases?
- Do employees have lengthy, close contact with customers, vendors or others?
- How will the employer implement CDC, state and local public health protocols and guidelines?
- What steps can or must the company take to ensure a reasonably safe workplace?
- If an employee contracts COVID-19, what additional mitigation or prevention steps should the company take?

Implementation of Workplace Controls

The congressional statement of purpose and policy set forth in the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* in 1970, indicates that the goal of workplace safety legislation is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." The General Duty Clause, Section 5(a)(1), requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1).

Occupational safety and health experts recognize a framework called a "hierarchy of controls" to manage and minimize workplace hazards. The most effective way to control a hazard is to eliminate it. That is probably an overly optimistic goal with COVID-19. There is little doubt that businesses will have to deal with COVID-19 for the foreseeable future and that there will be occasional surges in cases that might be geographically broad as well as long-lasting.

OSHA provides additional information specific to COVID-19 standards and requirements (www.osha.gov/SLTC/covid-19/standards.html). In a surge situation, companies must be ready to implement additional preventative measures to help ensure the safety of its workers as well as customers and others. If less-disruptive measures such as working from home, staggered schedules, or the use of various protective equipment, measures and practices are inadequate to ensure a reasonably safe workplace, a company may have to consider taking extraordinary steps. Depending upon the severity of the situation, even in the absence of state or local directives a company might need to do one or more of the following:

- Restricting the number of employees present at any one location;
- Restricting the number of customers or vendors allowed to access the premises;
- Limiting hours of operation to provide additional time for disinfecting;
- Modifications of the work environment to increase social distancing;
- Adoption of "contactless" practices and procedures;
- Reduction of services offered;
- Temporary cessation of services.

The Role of Testing

There are two types of coronavirus tests. Diagnostic tests reveal whether a patient has an active infection; antibody tests reveal whether the patient had a past infection. As of now, there are more than 175 COVID-19 tests approved by the Food and Drug Administration for emergency use.[1] Unfortunately, the reliability of some tests is suspect. On July 15, 2020, the FDA updated its FAQ page to identify 71 other tests that should no longer be used because of failure to demonstrate reliability. (www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2#nolonger).

Testing employees can provide some level of comfort. It remains an open question, however, whether employers can require testing as a condition to return to work or to continue to work. In addition, few companies will have the resources to test all employees. An employer that decides not to test all employees should select those tested based on non-discriminatory business reasons.

If testing is undertaken, care must be taken to maintain confidentiality regarding the identity of employees who test positive for COVID. Employers should alert other employees who might have been exposed to the infected employee without disclosing his or her identity.

[1] FDA, Emergency Use Authorizations (updated July 1, 2020), http://bit.ly/38NUJTt.

Reasonable Employer Sanitization/Mitigation Efforts to Prevent COVID-19 Exposure to Employees

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"Wear a mask," but is it really that easy? Unfortunately, it probably isn't. While wearing masks or cloth face coverings *is* an important and relatively easy mitigation effort for employers, thorough sanitation is vital to a return to business as usual. OSHA imposes an affirmative duty on employers to provide a safe and healthy workplace for its employees.[1] A business's failure to implement reasonable sanitization and mitigation efforts to prevent COVID exposure can result in increased worker absenteeism, downsizing operations, interrupted supply chains, or delayed deliveries.[2]

I. Mitigation

Given the ease of connectivity in today's business world via remote teleconferencing platforms such as Zoom, one of the easiest ways a business can mitigate exposure to COVID is establishing policies and practices for remote work. Permitting employees to work remotely is the most effective means of ensuring physical distancing among employees. If it is permissible for employees to work remotely, be sure to communicate same to the workforce. Employers should also permit working remotely if a member of the employees' household is experiencing COVID-19 symptoms.[3] Employers can also allow remote work without requiring documentation from a healthcare provider, given that provider offices and medical facilities are presumptively very busy and may not be able to provide such documentation in a timely manner.[4] An alternative to purely remote work would be a hybrid system, whereby employees would alternate days in and out of the office, reducing the frequency of physical interaction and allowing them to maintain appropriate distance from one another.

If the spread of COVID-19 in your community indicates returning to the office is appropriate, an employer should still implement mitigation policies and procedures. Before resuming business operations, check the building to see if it's ready for occupancy. Identify work and common areas where employees could have close contact (within 6 feet) with others – for example, meeting rooms, break rooms, cafeteria, locker rooms, check-in areas, waiting areas, and routes of ingress and egress. The American Industrial Hygiene Association suggests that all employers modify or adjust seats, furniture, and/or workstations to maintain social distancing.[5]

If necessary, install transparent shields or other physical barriers to separate employees and visitors, whether or not social distancing is an option. Employers must also encourage basic respiratory etiquette, such as coughing and sneezing into the bend of the elbow or shirt sleeve if a disposable

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[1] Occupational Safety and Health Administration, *Workers' Rights*, https://www.osha.gov/Publications/osha3021.pdf (last accessed July 15, 2020).
[2] Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*, https://www.osha.gov/Publications/OSHA3990.pdf (last accessed July 15, 2020)
[3] *Id.*
[4] *Id.*
[5] American Industrial Hygiene Association, *Reopening: Guidance for General Office Settings: Guidance Document*, https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Guidance-Documents/Reopening-Guidance-for-General-Office-Settings_GuidanceDocument.pdf (last accessed July 15, 2020).

tissue is unavailable. Employers can require workers to wear a face mask, but at the very least should strongly encourage employees to wear them if they are away from their desk.

There are a number of facial coverings that can be considered in your workplace, but some are more appropriate than others. For example, N95 respirators are likely inappropriate for average businesses. An N95 respirator is a type of mask similar to commonly used "dust masks," but which supplies significantly greater respiratory protection, due to advanced materials engineering:

N95 respirators are legislatively regulated by the Centers for Disease Control, the National Institute for Occupational Safety and Health, and the Occupational Safety and Health Administration.[6] Such masks are critical supplies that are necessary to protect front line workers treating confirmed and presumptive COVID-19 patients.[7] Instead of N95 respirators, employers should suggest surgical masks or generic cloth face masks which are designed to protect other people besides the wearer as opposed to N95 masks which protect the wearer.[8] Indeed, the Centers for Disease Control "recommends that members of the public use simple cloth face coverings when in a public setting to slow the spread of the virus, since this will help people who may have the virus and do not know it from transmitting it to others."[9]

If an employee is sick, businesses need to have policies and procedures for prompt identification and isolation.[10] In the event that an employee becomes ill in the workplace, employers should have established protocols for determining how and where the sick person will be isolated, disinfecting areas the sick person occupied, and identifying other workers who came in close contact with the sick individual that day and some days prior.[11] Employers and employees will likely need to cooperate with

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[6] U.S. Food and Drug Administration, *N95 Respirators, Surgical Masks, and Face Masks*, https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-surgical-masks-and-face-masks (last accessed July 16, 2020).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*, https://www.osha.gov/Publications/OSHA3990.pdf (last accessed July 15, 2020)

[11] Occupational Health and Safety Administration, *Guidance on Returning to Work*, https://www.osha.gov/Publications/OSHA4045.pdf (last accessed July 15, 2020).

state and local health officials for contact tracing to determine the extent or origination of COVID-19 exposure.[12]

Some businesses may be able to use screening measures such as temperature checks upon arrival, which can assist in identifying potentially sick employees, but that may not be practical for all employers. Infrared "touchless" thermometers, such as the one shown here, are readily available for purchase and use by businesses:

Alternatively, employers can encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure. Companies also must have policies and procedures for employees to inform management if the employee experiences typical COVID symptoms. It is prudent to demand that those employees do not come into the office, and to actively encourage COVID testing for employees who have experienced symptoms.

Regional governments have endorsed the practice of pre-entry temperature and symptom checks. In Kentucky, as part of the "Healthy at Work" initiative, Governor Beshear has mandated that certain employers "must require employees to undergo daily temperature and health checks [which] may be either self-administered or administered by the entities prior to workplace entry."[13] In Indiana, the Indiana State Department of Health suggests that workers who have had previous exposure to COVID-19 but are permitted to return to work, should "[take] their temperature before each shift to ensure that they do not have a fever."[14] In Ohio, Governor DeWine and the Ohio Department of

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[12] *Id.*

[13] *Healthy at Work*, https://govsite-assets.s3.amazonaws.com/PuhOvvxS0yUyiIXbwvTN_2020-7-10%20-%20Minimum%20Requirements.pdf (last accessed July 16, 2020).

[14] Indiana State Department of Health – Epidemiology Resource Center, *COVID-19 Guidance for Businesses and Employers*, https://www.coronavirus.in.gov/files/IN-COVID-19_Occupational%20Guidance%204.1.20.pdf (last accessed July 16, 2020).

Health recommend a daily symptom assessment before work, including a temperature check.[15] They urge individuals with a fever at or above 100.4 degrees Fahrenheit to stay home.[16]

Employees will understandably be concerned about pay, leave, safety, and other issues that may arise throughout the course of this pandemic, especially in instances where they are forced to stay home. Businesses should work with insurance companies and state and local health agencies to provide accurate information to workers and customers about coverage if necessary. In addition, employers must provide adequate and meaningful training, education, and informational material about business-essential job functions and worker health and safety. Informed workers who feel that their employers are committed to providing a safe work environment are more likely to maintain regular levels of productivity and are less likely to be unnecessarily absent.[17] Employers should guarantee to workers that they have a right to a safe and healthful work environment, and that they understand that they have a right to raise concerns without the risk of encountering an adverse or retaliatory action.[18]

II. Sanitization

For disinfection, use EPA-registered disinfectants or a diluted household bleach solution if appropriate for the surface. Always wear skin protection and ensure adequate ventilation when using chemical disinfectants. Avoid mixing chemical products, as doing so may result in potentially harmful chemical reactions.[19] Clean and disinfect high-touch surfaces at east daily. Examples of surfaces that are frequently touched by multiple people include door handles, desks, light switches, faucets, workstations, keyboards, telephones, handrails, printers, copiers, coffee makers, and drinking fountains.[20]

Depending on the size of the office and number of employees, once-daily cleaning may be insufficient. The efficacy of alternative disinfections methods, such as ultrasonic waves, high intensity UV radiation, sanitization tunnels and LED blue light are not known.[21] EPA is reluctant to endorse

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[15] Ohio Department of Health, *COVID-19 Information for Employers and Employees: Employee Screening for COVID-19*, https://coronavirus.ohio.gov/wps/wcm/connect/gov/6fa237c5-c697-4907-8277-9689b8ba2bc8/Guidance+for+Screening+Employees+05.19.20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-6fa237c5-c697-4907-8277-9689b8ba2bc8-n8TJXY3 (last accessed July 16, 2020).

[16] *Id.*

[17] Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*, https://www.osha.gov/Publications/OSHA3990.pdf (last accessed July 15, 2020)

[18] Occupational Health and Safety Administration, *Guidance on Returning to Work*, https://www.osha.gov/Publications/OSHA4045.pdf (last accessed July 15, 2020).

[19] Centers for Disease Control and Prevention, *Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html (last accessed July 15, 2020).

[20] Occupational Health and Safety Administration, *Guidance on Returning to Work*, https://www.osha.gov/Publications/OSHA4045.pdf (last accessed July 15, 2020).

[21] Centers for Disease Control and Prevention, *Cleaning and Disinfecting Your Facility*, https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html (last accessed July 15, 2020).

the use of these alternative disinfection methods, and instead recommends using readily available EPA-registered disinfectants.[22]

Six steps for safe & effective disinfectant use:[23]

1. Check that your product is EPA-approved: find the EPA registration number on the product. Then, check to see if it is on EPA's list of approved disinfectants at: www.epa.gov/listn

2. Read the directions: Follow the product's directions. Check "use sites" and "surface types" to see where you can use the product. Read the "precautionary statements."

3. Pre-clean the surface: Make sure to wash the surface with soap and water if the directions mention pre-cleaning or if the surface is visibly dirty.

4. Follow the contact time: You can find the contact time in the directions. The surface should remain wet the whole time to ensure the product is effective.

5. Wear gloves and wash your hands: For disposable gloves, discard them after each cleaning. For reusable gloves, dedicate a pair to disinfecting COVID-19. Wash your hands after removing the gloves.

6. Lock it up: Keep lids tightly closed and store out of reach of children.

Employers should implement good hygiene and infection control practices within the workplace. Obviously, promote frequent and thorough hand washing by providing workers, clients, and visitors with a place to wash their hands. If soap and water are unavailable or impractical, ensure easy access to an alcohol-based hand sanitizer that is at least 60% alcohol and encourage workers to use it frequently. Key times to wash or sanitize one's hands are after blowing one's nose, coughing, sneezing, after using the restroom, and before eating or preparing food or drink.

In the instance that an employee does become infected with COVID, or even shows signs of an infection, while at work or shortly thereafter, a business should take steps to sanitize and disinfect the area. First, close off all areas that the person used or occupied. This does not necessarily require a compete shut down of operations, so long as the employer can close off affected areas.[24] Increase air circulation to the affected areas, using natural (opening windows) or commercial methods such as a fan. If feasible, wait 24 hours until you begin the disinfection process. Once sanitization efforts begin, clean and disinfect all areas used by the person who is sick, including offices, bathrooms, common areas, shared electronic equipment like tablets, touch screens, keyboards, or light switches.[25] If available, use a vacuum equipped with high-efficiency particular air filters to clean empty rooms that the sick worker occupied. Whomever operates the vacuum should wear proper face coverings, like an

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[22] *Id.*

[23] Environmental Protection Agency, *6 Steps for Safe & Effective Disinfectant Use*, https://www.epa.gov/sites/production/files/2020-04/documents/disinfectants-onepager.pdf (last accessed July 15, 2020).

[24] Centers for Disease Control and Prevention, *Cleaning and Disinfecting Your Facility*, https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html (last accessed July 15, 2020).

[25] *Id.*

N95 mask in order to avoid exposure to any particles that escape during vacuuming. Once the cleaning and disinfecting process is completed, it is safe to open up the affected areas.[26]

Consider the viability of improving air flow and ventilation within the building, in consultation with an HVAC professional. If possible, consider utilizing natural ventilation to increase outdoor air dilution of indoor air- i.e. opening windows. Increase air filtration to as high as possible without compromising airflow.

III. Conclusion

While businesses cannot completely eliminate the risk that their workplace or workforce is exposed to COVID, there remain numerous strategies for mitigating that risk. All employers would be prudent to implement policies and procedures to address these risks and ensure that the workforce is informed of same. While COVID exposure can be detrimental to the success of a business, its potentially fatal effects on the individuals who comprise those companies is a grave risk all of us should recognize.

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[26] *Id.*

Impact of COVID-19 on Drivers and the Families First Coronavirus Response Act

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In March 2020, drivers began reporting impacts of the novel Coronavirus on life on the road. These impacts included disruption of needed services such as unexpected closing of shower facilities and shortages of bottled water, hand sanitizer, and toilet paper. One driver reported that she had tried for two days to take a shower and ultimately returned to her home base just to get some rest and clean up. Drivers reported other inconveniences, such as problems created by short food supply, the closing of restaurants, and limited "grab-and-go" options. The drivers also experienced difficulties due to lack of personnel at the docks to timely load and unload their trucks quickly. Despite these inconveniences, the drivers recognize the essential role they serve in the distribution of necessities.[1]

The inconvenience of the difficulty in obtaining basic services on the road pales in comparison to the impact on drivers who contracted COVID-19. On March 18, 2020, Congress passed the Families First Coronavirus Response Act (FFCRA). The FFCRA requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor's Wage and Hour Division is charged with enforcement of the provisions of the Act, which apply from March 18, 2020 through December 31, 2020.

Families First Coronavirus Response Act

The Act provides that employees of covered employers are eligible for:

1. Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a healthcare provider); and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or

2. Two weeks (up to 80 hours) of paid sick leave at 2/3 the employee's regular rate of pay because the employee is unable to work because of a bonafide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a healthcare provider), or to care for a child (under 18 years of age) whose school or childcare provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantial similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and

3. Up to an additional 10 weeks of paid expanded Family and Medical Leave at 2/3 the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bonafide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.

Covered Employers

The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to public employers and private employers with fewer than 500 employees. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closing or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Eligible Employees

All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

Notice of Leave

Where leave is foreseeable, and employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

Qualifying Reasons for Leave

The Act specifies the following qualifying reasons for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. Is subject to Federal, State, or local quarantine or isolation order related to COVID-19;

2. Has been advised by a healthcare provider to self-quarantine related to COVID-19;

3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);

5. Is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or

6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

Duration of Leave

For reasons 1-4 and 6, a full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period. For reasons 5, a full-time employee is eligible for up to 12 weeks of leave (two weeks of paid leave followed by up to 10 weeks of paid expanded family and medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay

For leave reasons 1, 2, or 3, employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a two-week period). For reasons 4 or 6, employees taking leave are entitled to pay at 2/3 the regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2000 in the aggregate (over a two-week period). For reason 5, employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period).[ii]

Trucking companies qualifying under the provisions of the Act must provide these benefits to avoid enforcement by the Wage and Hour Division of the Department of Labor.

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[i] https://www.truckinginfo.com/353692/the-pandemic-highway-drivers-report-in-as-covid-19-rages-on

[ii] https://www.dol.gov/agencies/whd/pandamic/ffcra-employee-paid-leave