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Spinal Cord Injuries and Recent Developments

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Claims involving spinal cord injuries are among the most profound and challenging ones to defend. They are unique in that they impact virtually every aspect of a patient's life from breathing, eating, to life expectancy. While there is no *cure* for spinal cord injuries, there is a degree of optimism as medical and scientific advancement in the area offer new treatment and promising care path options. Understanding the nature of spinal cord injuries, current state of treatment, as well as future treatment options, is critical in comprehensively defending a spinal cord injury claim.

Types of Spinal Cord Injuries

All spinal cord injuries are divided into two broad categories: incomplete and complete.

- Incomplete spinal cord injuries: With incomplete injuries, the cord is only partially severed, allowing the injured person to retain some function. In these cases, the degree of function depends on the location and extent of the injuries.
- Complete spinal cord injuries: By contrast, complete injuries occur when the spinal cord is fully severed, presumably eliminating all function. However, with treatment and physical therapy, it is possible to regain some function.

Incomplete spinal cord injuries are increasingly common, thanks in part to better diagnosis, treatment, and increased knowledge about how to properly respond—and how not to respond—to a suspected spinal cord injury. These injuries now account for more than 60% of spinal cord injuries.

Some of the most common types of incomplete or partial spinal cord injuries include:

- Anterior cord syndrome: This type of injury, to the front of the spinal cord, damages the motor and sensory pathways in the spinal cord. Patients may retain some sensation, but struggle with movement.
- Central cord syndrome: This is an injury to the center of the cord, and damages nerves that carry signals from the brain to the spinal cord. Loss of fine motor skills, paralysis of the arms, and partial impairment—usually less pronounced—in the legs are common. Some survivors also suffer a loss of bowel or bladder control, or lose sexual function.
- Brown-Sequard syndrome: This variety of injury is the product of damage to one side of the spinal cord. The injury may be more pronounced on one side of the body; for instance, movement may be impossible on the right side, but may be fully retained on the left. The degree to which Brown-Sequard patients are injured greatly varies from patient to patient.

Knowing the location of injury and whether or not the injury is complete is critical for prognosis and determining appropriate care. Doctors assign different labels to spinal cord injuries depending upon the nature of those injuries. The most common types of spinal cord injuries include:

- Tetraplegia: These injuries, which are the result of damage to the cervical spinal cord, are typically the most severe, producing varying degrees of paralysis. Sometimes known as quadriplegia, tetraplegia eliminates ability to move below the site of the injury and may produce difficulties with bladder and bowel control, respiration, and other routine functions. The higher up on the cervical spinal cord the injury is located, the more severe symptoms will likely be.
- Paraplegia: This occurs when sensation and movement are removed from the lower half of the body, including the legs. These injuries are the product of damage to the thoracic spinal cord. As with cervical spinal cord injuries, injuries are typically more severe when they are closer to the top vertebra.
- Triplegia: Triplegia causes loss of sensation and movement in one arm and both legs, and is typically the product of an incomplete spinal cord injury.

Injuries below the lumbar spinal cord do not typically produce symptoms of paralysis or loss of sensation. They can, however, produce nerve pain, reduce function in some areas of the body, and necessitate several surgeries to regain full function. Injuries to the sacral spinal cord, for instance, can interfere with bowel and bladder function, cause sexual dysfunction, and produce weakness in the hips or legs. In very rare cases, sacral spinal cord injury survivors suffer temporary or partial paralysis.

Data collected by spinal cord centers nationwide suggests the prognosis and care of spinal cord injuries is changing. The average age of injury is materially higher than in the past. That fact alone is impactful. The age of the patient has great relevance in the vocational realm, determining life expectancy, prognosis for regaining loss function and quality of life. Patients with a lower age of onset are statistically better able to emotionally cope with the challenges a spinal cord injury presents.

Spinal Cord Injuries 2010 -2015

According to the National Spinal Cord Injury Statistical Center at UAB, the causes of SCI have changed drastically since 2010.

- Vehicular 38%
- Falls 30%
- Violence (primarily gunshot wounds) 14%
- Sports/Recreation Activities 9%
- Medical/Surgical 5%
- Other 4%

Researchers have estimated that, as of 2015, 12,500 new SCI occur each year and between 240,000 and 337,000 people are currently living with some form of SCI in the United States.

The average age at injury has moved from 29 years in the 1970's to 42 years in 2015. With medical advancement, the length of hospital stays is declining with the stay in acute care averaging 11 days - down from 24 in the 1970's - and rehabilitations stays averaging 36 days - down from 98 days in the 1970's.

Treatment of spinal cord injuries, even the most basic treatment, is costly. Beyond the medical costs, there are economic impacts on the patient, his family, his employer, and the community. These include home accessibility, portable medical equipment, home care, and transportation costs. In the litigation arena, reviewing life care plans in the tens of millions of dollars to address a plaintiff with a significant spinal cord injury is not unusual.

What Do Spinal Cord Injuries Really Cost?

- Length of initial hospitalization following injury in acute care units: about 15 days
- Average stay in rehabilitation unit: 44 days
- Initial hospitalization costs following injury: \$140,000
- Average first year expenses for a SCI injury (all groups): \$198,000
- First year expenses for paraplegics: \$152,000
- First year expenses for quadriplegics: \$417,000
- Average lifetime costs for paraplegics, age of injury 25: \$428,000
- Average lifetime costs for quadriplegics, age of injury 25: \$1.35 million
- Percentage of SCI individuals who are covered by private health insurance at time of injury 52%
- Percentage of SCI individuals unemployed eight years after injury 63%.

Until recently, most care for spinal cord injury patients was palliative and rehabilitation based, intended to prevent further degradation of body systems. After the administration of steroids and/or lowering patients' body temperatures, there was little immediate post-accident treatment administered in order to maintain the patient's post-injury status (neuro-protection). However recent developments in medical science offer new and promising treatment options to patients suffering spinal cord injuries.

- In May 2016, an experimental trial at Mount Sinai Hospital in New York yielded positive results for a group of patients suffering severe spinal cord injuries. This particular approach involved the injection of stem cells into the damaged areas, with the goal of restoring function and movement. In particular, one patient -- a quadriplegic who was not expected to be able to walk again after a devastating car accident -- has begun regaining sensation and movement in his legs and hips. Thus far, four out of the six patients involved in the study have already demonstrated signs of improvement. Naturally, more research is needed, but the results are certainly encouraging.

- A research study at the Washington University School of Medicine in St. Louis in late 2015 has seen quadriplegics regain some hand and arm movement after spinal cord injuries impacted their lower necks. The procedure involves the rerouting of patients' nerves so that healthy nerves are connected to their damaged counterparts, resulting in improved neural communication throughout the body. Impressively, it can be performed just hours after the injury has taken place and allows for patients to be released after a single night of recovery from the four-hour surgery. Of course, extensive physical therapy is still required to train the brain to recognize the new nerve networks, but the psychological benefit that even a modicum of improvement has had on patients has already proven invaluable. Expect more on this one in the near future.
- At the German Center for Neurodegenerative Diseases, an FDA-approved anti-cancer drug called *epothilone B* represents a promising new treatment for spinal cord injuries, as reported in early 2015. Although the research is still in early stages, it has demonstrated cell regeneration in rodents with spinal cord injuries, leading to improvements in motor skills such as balance and coordination. Oftentimes, scar tissue and other factors restrict the body's ability to self-repair at the site of injury. As it stands, this particular therapy requires too many different treatments to justify a valid clinical approach. However, the team seeks to continue its research into how effective the drug may be in combatting different types of injury.

Recent animal based studies also provide a degree of promise in the proper treatment of spinal cord injuries. Delivering a single injection of scar-busting gene therapy to the spinal cord of rats following injury promoted the survival of nerve cells which improved hind limb function within weeks, according to a study in *The Journal of Neuroscience*. The findings suggest that, with more confirming research in animals and humans, gene therapy may hold the potential to improve the lives of individuals suffering from spinal cord injuries. In New Zealand, scientists inserted genes into damaged spinal cord tissue which allowed motor neurons to regrow and restore function.

In addition to restorative therapies, researchers are making progress in the arena of assistive devices intended to help patients move and walk. Post-injury, intensive attention must be paid to avoid muscle wasting and spinal curvature. The sooner a patient's muscles are utilized in a pre-injury manner, the better. There has been great technological advancement in restoring patients ability to walk (albeit in short spans and with significant training) with the use of wearable exoskeletons and robotic locomotive devices. There is promising research involving the use of brain-computer interface technology and EEG feedback to allow a paralyzed patient to walk. While none of these products are currently available outside the clinical or trial arena, there is reason to expect that assistive technology will be available in the future allowing a patient to "walk" or move independently.

Perhaps most intriguing, the Journal of Neuro Engineering has recently published a study where a spinal cord injury patient, using his own brain "power" was able to walk without any robotic

assistance using an EEG based system which takes signals from the patient's brain and delivers them to electrodes on the patient's knees which creates movement—bridging the feedback pathway damaged by the spinal cord injury itself. This study seems to bridge the gap between restorative therapies and assistive walking devices.

The potential that patients may regain function is clearly relevant in the litigation arena. Even limited mobility would ameliorate the ever present risk posed by pressure ulcers and reduce the risk of urinary tract infections, a common and often potentially fatal condition in spinal cord injury patients. Most importantly perhaps, mobility would have an enormous impact on quality of life issues.

There is a great deal of research addressing spinal cord injury patients and quality of life. Generally, the studies suggest a greater degree of satisfaction than most would expect, but there are unquestionably emotional and social stigma issues which are pervasive and erode a patient's sense of well-being. Independence of any kind and the ability to participate with less assistance in daily tasks would clearly impact the psychological and social impact of spinal cord injuries.

A patient's mobility also impacts life expectancy. Presently, spinal cord injury patients have a reduced life expectancy, in large part due to septicemia (associated with pressure ulcers as well as kidney issues) and pneumonia. While patients who are ventilator-dependent have a shorter lifespan than those who breathe independently, any increase in mobility directly correlates to improved health and presumably fewer complications and an increased life span.

Spinal cord injuries are complex and challenging to defend. However, the challenges they pose can be effectively managed if medical and technological developments and treatment options are made part of the case. Experts in the field should be utilized to explain what the state of medical research is, what can be reasonably expected, and how an individual patient may recover.

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Practical Defense Strategies for Clients, Claims, and Counsel 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. and such tactics seem to be more than just a passing fad. In response, reptile theory has been a growing topic amongst the defense bar and various seminars throughout the U.S. Where there has been much discussion of the reptile theory, its origins, and the use of such theory by the plaintiff's bar, this paper will focus primarily on some practical applications during the course of investigation, discovery, and through the pretrial/trial phase of a litigated case in an effort to combat the potential negative impacts of such reptile theory tactics.

Many resources are available to gather knowledge about the basic concepts behind the reptile theory. The theory originated from a book authored by a Georgia plaintiff's lawyer, Don C. Keenan and a psychologist, David Law, 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 tractor trailer 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 the 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 reptile 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.” *Twombly*, 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 reptile 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., *Eflight 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-lon*, 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 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 Limine 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); *Dablgren 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); *Calaban 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 of 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 authority 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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...And the Drone Wins

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1. FACT SCENARIO

It is a clear, bright day. A utility truck bears left as it approaches a curve along a two-lane, undivided rural highway. A motorcycle approaches the same curve from the opposite direction, traveling slightly uphill. Neither vehicle has a clear view of what is around the bend due to lush vegetation lining the roadside. This combination of factors proves to be disastrous.

During trial, the motorcyclist (as Plaintiff) claimed the truck crossed the center line coming around the curve, causing him to take evasive action to avoid imminent collision. As a result, he lost control of the motorcycle and was thrown beneath the oncoming truck. The truck driver (as Defendant) denied the claim and asserted his vehicle stayed in its lane, presenting no hazard. There were no witnesses.

The Plaintiff's expert used laser scanner technology during the investigation. The scanner unit was set up according to the motorcycle's point of view at the curvature of the road. In his testimony, the expert claimed the only probable way the accident could have happened was a scenario where the truck veered across the central double line.

The Defendant's expert also used laser scanner technology but augmented the findings with data from an unmanned aerial vehicle (drone) to get a more comprehensive view of the terrain approaching the curve.

A battle of the experts ensued. Ultimately, they would have to make the determination: Was this a left-of-center or a line-of-sight issue?

We will present the direct examination of the Defense expert to resolve the conflict. The expert will explain the basis of the two investigations and explain the findings to reveal the most likely cause of the accident.

2. DIRECT EXAM PE INVESTIGATOR

a. Qualifications

b. Site Investigation

i. Total Station

ii. Laser Scanning

- iii. Unmanned Aircraft System
- c. Plaintiff Used Laser Scanning
 - i. Result
- d. Defendant Used Unmanned Aircraft System
 - i. Result
- e. Advantages
 - i. Time Spent
 - ii. Expenses
 - iii. Personnel
 - iv. Safety
 - v. Does Not Intrude on Law Enforcement Investigations
 - vi. Short Time to Reconstruct Scene Into 3D Video
- f. Animation

3. CONCLUSION

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USE OF VIDEO SURVEILLANCE IN LITIGATION: STRATEGY AND TACTICS

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The use of video surveillance in personal injury litigation can be an effective tool in helping to resolve cases prior to trial. Jurors find video evidence easy to understand and at times entertaining when contrasted to a plaintiff's testimony. The use of video to attack the plaintiff's credibility is very effective if handled properly. The strategy of how and when to utilize surveillance is typically determined on a case by case basis by the claims professional and legal counsel based on their combined experience, the law and rules of procedure applicable in the particular jurisdiction. We have included as part of this paper a compendium of the law in all 50 states regarding the legality of surveillance in each jurisdiction as well disclosure requirements prior to trial.

METHODS OF VIDEO SURVEILLANCE

Improvements in technology have considerably improved the quality and effectiveness of video surveillance in recent years. Most plaintiff counsel warn clients to be aware of their surroundings and assume that the defendant will have an investigator surveil plaintiff at some point in the life of the case. Most surveillance video footage is obtained by private investigators. However, the availability of closed circuit cameras used for security, social media and other technology have increased the parameters of potential data available. License plate recognition cameras have allowed private companies (such as TransUnion) to compile databases allowing insurance investigators to spot vehicle patterns and most likely locations to search for subjects of an investigation. This information can reveal travel patterns, which may in turn lead to information about undisclosed activity or employment. Some investigators have deployed unmanned cameras in vehicles to reduce the suspicion level of the previously warned plaintiffs with the added benefit of reducing the expense of the investigation.

PLAINTIFF USE OF VIDEO SURVEILLANCE

Some plaintiff attorneys have been creative in turning the surveillance table on defendants by employing investigators in cases where the issue of adherence to regular equipment maintenance practice and procedures is disputed. For example, in a trucking incident caused by mechanical failure the parties disputed whether the failure could have been anticipated or was the result of improper maintenance. The plaintiff attorney hired an investigator to surveil the truck driver's daily activities in pre-trip maintenance and inspection to refute the driver's testimony. Defendants should take note of the possibility of counter-surveillance by the plaintiff and take appropriate precautions.

STRATEGY IN DEPLOYING SURVEILLANCE

A number of considerations are involved in the decision to obtain video surveillance

- Cost/benefit compared to overall value of the claim
- Coordination with the investigator with detailed instructions
- Budgeting investigation efforts
- Proper timing in the life of the case
- Compare and contrast before and after IME exams
- Timing to determine whether plaintiff is working or engaged in inconsistent activity
- Utilize other resources such as neighbors, co-workers, ex-spouses who have knowledge of plaintiff activity
- Long weekend and holiday potential for inconsistent activity by plaintiff

DISCLOSURE OF SURVEILLANCE EVIDENCE

The attached compendium summarizes the disclosure rules for each jurisdiction. Generally, video footage may be protected and privileged work product to the extent that it is not intended to be used by defendant at trial. Many jurisdictions require production of the video in response to proper discovery requests. Some differ as to whether the plaintiff is entitled to production of the video before their deposition or first given an opportunity to be truthful about their level of physical ability. Some courts frown on late production of video evidence if there is unfair surprise and/or failure to properly disclose in discovery. Late production of video as a defense strategy must be weighed against the expense of the surveillance of exercise and the risk that those efforts will to no avail if late production results in exclusion of the evidence.

AUTHENTICATION VIDEO EVIDENCE

The video evidence will need to be “proven up” in order to be admitted as evidence at trial. Ensure that you investigator is available to prove up the video at trial. This will include establishing the qualifications of the investigator who took the video, the activity filmed, the reliability of the equipment used, chain of custody of the video and accuracy of the video depicting the activity observed.

PHYSICIAN COMMENT ON SURVEILLANCE

Use of video surveillance can be useful when shown to medical experts and eliciting opinions as to nature and extent of any injury and causation. Most medical experts are reluctant to put their professional reputation at risk when confronted with video evidence that is inconsistent with a plaintiff’s complaints and history of physical restrictions described to the medical expert.

PLAINTIFF ATTACKS ON SURVEILLANCE

Plaintiff attorneys tend to counter video surveillance with a number of strategies that defendants should be prepared to encounter and rebut.

- Characterization of the surveillance as an invasion of privacy
- Cross-examine the investigator as someone who “sneaks” around “spying”
- Attack the license and credentials of the investigator

- Video is heavily edited and does not include
- Plaintiff has good days and bad days and video is one of the good days
- Video not timely produced
- Require production of all video footage taken
- “impeachment” video is a short compilation over a lengthy period of time

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What's Next? The Autonomous Vehicle Revolution Expands to Trucks

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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). Google (now Waymo) and Nissan hope to get there by 2020. Ford and Volvo hope to have a fully autonomous vehicle on the road by 2021. You have probably begun to take more than a passing glimpse at the seemingly daily news articles about AV technology. 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) 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. Traditional auto parts suppliers such as Continental, known for its tire division, are also pioneering innovations in the autonomous vehicle race. Continental opened a Silicon Valley business unit called “Continental Intelligent Transportation Systems” in 2014.

The race has resulted in a series of mergers, acquisitions, and partnerships among the auto manufacturers and a variety of start-ups, software companies, and product suppliers. For example, GM recently invested \$500 million in ride-share company Lyft, and then it invested \$1 billion to purchase Cruise Automation, a self-driving vehicle startup. Among technology and software companies, Intel recently acquired Mobileye, and Nvidia is providing self-driving software to Audi. In May 2016, Google announced the construction of a 53,000-square-foot facility in Michigan, to test its AV technology, and Google/Waymo is testing its self-driving cars in Phoenix through its “early rider” program. Toyota recently announced a \$1 billion investment in its AV program. Uber is operating autonomous cars in Phoenix and Pittsburgh, and it acquired self-driving truck start-up Otto in August 2016 in a deal reportedly valued at about \$680 million. As a group, several of the companies recently banded together to form the Self-Driving Coalition for Safer Streets, a lobbying group, to ensure that AVs hit the market sooner rather than later. The coalition is promoting one clear set of federal laws, which they intend to help develop, as the best way to evolve the technology.

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 recent, highly publicized, Tesla accident in Florida, believed to be the first fatality involving a vehicle in autonomous mode, has been a wake-up call 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, i.e., GM), or “full autonomy,” (meaning no steering wheel, no brake pedals, i.e., Google). 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 two 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. This first policy, divided into four sections, identified which aspects of AV regulation would be uniform, and which would be left to the states’ discretion. The guideline, which uses the term “HAVs” (highly automated vehicles), focused on safety, acknowledging that there were over 35,000 deaths on U.S. highways in 2015, 94 percent of which were caused by human error or bad decision making. This initial regulatory framework served as a “best practices” to guide manufacturers in the safe design, testing, and deployment of HAVs. In keeping with NHTSA’s “ambitious approach to accelerate the HAV revolution,” and its desire “to be more nimble and flexible,” the policy was expected to be updated annually, if not sooner.

“A Vision for Safety”

Accordingly, a year later, the DOT in cooperation with NHTSA, under the Trump administration, issued a new federal AV policy on September 12, 2017, entitled, “Automated Driving Systems: A Vision for Safety 2.0” (A Vision for Safety), replacing the FAVP. The non-regulatory framework refers to automated driving systems (ADSs), whereas the original guideline referred to highly automated vehicles (HAVs). The new NHTSA guideline continues 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 include vehicles with no human driver. The new policy is “technology neutral” in that it does not favor traditional auto manufacturers over software companies; rather, it encourages one and all to enter the space to develop the AV technology sooner.

A Vision for Safety is a much leaner, 36-page document with only two sections. Section 1, “Voluntary Guidance,” offers recommendations and suggestions by NHTSA for industry discussion among designers of ADSs to help analyze, identify, and resolve safety considerations with regard to design best practices before deployment. The new policy simplifies the process for manufacturing, testing, and deploying AVs, and it discourages the states from drafting conflicting legislation of their own. The policy attempts to strike a balance among competing groups by giving the manufacturers the flexibility that they need to allow the private sector to lead the charge on technology, while maintaining federal oversight over the process to appease the critics who are voicing safety concerns over the new technology. As for trucks, the “Voluntary Guidance” section notes that interstate motor carrier operations and commercial drivers continue to fall under the Federal Motor Carrier Safety Administration (FMCSA).

While NHTSA will be responsible for regulating the safety, design, and performance of the AVs, section 2, “Technical Assistance to States,” provides clarity to the states on their role in the safe integration of Level 3–5 ADSs on public roads to ensure a consistent, unified, national framework, so as not to create barriers to ADS operation (such as any requirement that a driver keep one hand on the steering wheel at all times). The states will be responsible for regulating the human

driver and most aspects of vehicle operation, including driver licensing, vehicle registration and titling, and ensuring that traffic laws do not hamper AV technology. Section 2 encourages the states to create or designate a lead agency to monitor ADS applications and testing, along with asking them to consider how to allocate liability among owners, operators, and manufacturers, and determining who must carry motor vehicle insurance.

Similar to the FAVP, the new policy is intended to be flexible and updated when necessary, with the expectation that it will evolve as the needle continues to move on AV development.

SELF DRIVE Act and AV START Act

The new guideline comes on the heels of the passage of H.R. 3388, by the U.S. House of Representatives on September 6, 2017—first-of-its-kind legislation entitled, “Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution” (SELF DRIVE) Act. A rare bipartisan bill, the House passed the SELF DRIVE Act for the stated purpose of increasing safety, increasing mobility for the handicapped and the elderly, and keeping America at the forefront of autonomous vehicle research. The Act preempts the states from implementing laws creating barriers to AV technology, and to the contrary, it allows manufacturers to deploy 25,000 vehicles in the first year that do not meet normal safety standards, with that number increasing to 100,000 vehicles in subsequent years.

The SELF DRIVE Act expedites the continued development of AV technology by clearing out the patchwork of conflicting state laws around the country. The Act recognizes the urgency to improve traffic safety, noting the recent uptick in traffic fatalities, while placing a specific emphasis on mobility for those in our society who are unable to drive themselves, given AVs’ promise to provide our handicapped and disabled communities with the experience and freedom of mobility.

The House bill, however, does not include heavy trucks. The Senate conducted a hearing on September 13, entitled, “Transportation Innovation: Automated Trucks and Our Nation’s Highways,” to consider whether to include trucks in the Senate version of the bill. The testimony on behalf of the American Trucking Association emphasized the importance of including trucks in the discussion and a desire to be at the table while the roadmap for AVs is being drawn. After all, there are some 33.8 million commercial vehicles in the United States, which travel an estimated 450 billion miles annually. The Senate is expected to pass its own version of the SELF DRIVE Act—S. 1885 the “American Vision for Safer Transportation through Advancement of Revolutionary Technologies” (AV START) Act—so we will continue to monitor the daily evolution of the ongoing federal legislation on AVs.

State Regulations and the SAVE Act

Meanwhile, before the release of the new NHTSA policy and passage of the SELF DRIVE Act, some 22 states had already passed some form of AV legislation or issued an executive order concerning AVs. Among those states, several have passed what is known as “Save Act” legislation. The Save Act legislation (Safe Autonomous Vehicles Act) is seen by some as favoring traditional auto manufacturers over the non-traditional software companies, which merely add their equipment

to existing vehicles. The new federal guideline puts an end to any preferential treatment for one manufacturing or software entity over another, and it discourages any such distinctions between those invested in the emerging autonomous vehicle space.

Beyond the legislation, several states have been increasingly proactive with their investment in AV infrastructure and technology. In an effort to make Virginia a leader in AV-technology research and development, and to streamline the use of Virginia's roadways and state-of-the-art test facilities for AV testing and certification, the state announced on June 2, 2015, the creation of the "Virginia Automated Corridors Partnership." This initiative was created to help build a new economy, and to provide the opportunity for AV manufacturers and suppliers to experience ideal, real-world environments that they need to test complex driving scenarios. The program integrates numerous resources, such as 70 miles of interstate highway, dedicated high-occupancy toll lanes, high-definition mapping capabilities, enhanced pavement markings, and connected vehicle capability, via dedicated, short-range communications. Likewise, Ohio (home to some 70,000 truck drivers) committed \$15 million to create a 35-mile stretch of highway outside Columbus for testing self-driving trucks.

Similarly, Arizona Governor Doug Ducey signed an executive order on August 25, 2015, to encourage AV development and testing. Michigan lawmakers recently passed new legislation to allow for the expanded manufacture and road testing of AVs, in an effort to protect Michigan's dominance in the automotive research and development arena, before other states (and countries) beat them to the task. California and Nevada, among others, have already passed legislation to promote and encourage AV development and to allow AV testing on public roads. Much of the past debate among state legislatures involved whether to require a human driver behind the wheel who can take over, or whether the definition of "driver" can actually include the AV's computer system, which acts to control the vehicle. The new NHTSA policy and the SELF DRIVE Act take care of those issues, however.

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 reached a high pitch 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 by 2020.

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.) 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.

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 is designing an after-market kit to give trucks autonomous capabilities. Starsky’s vision is to allow truck drivers to operate closer to home . . . actually, from home. Drivers will use a remote control to steer the truck from a highway exit to its final destination. Starsky is already hauling freight for money in Florida, and testing in Michigan, and Nevada.

Google/Waymo is reportedly set to test self-driving trucks in Arizona, in late 2017; 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 technology; and Tesla is set to reveal its “Tesla Semi” electric truck, on November 16, 2017.

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.

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, 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.

Other Problems?

In addition to safety, there are a plethora of other thorny practical, legal, and regulatory issues to navigate before we see the mass commercialization of AVs, such as licensing, registration, certification, insurance, infrastructure, cybersecurity, privacy, and ethical dilemmas—such as when the AV must decide between two bad outcomes in an unavoidable accident scenario. But at the current pace of AV technology, expect to see these issues debated and resolved sooner than later.

What Else Is Out There?

Just when you thought that the concept of a self-driving car or truck was difficult to digest, you are already way behind! AVs are just a piece of the new transportation ecosystem. On October 27, 2016, Uber released a white paper revealing its ambitious vision for on-demand aviation via small, electric-

powered aircraft known as VTOLs (vertical take-off and landing), by and through a new division called “Uber Elevate.” Yes, flying cars. Uber Elevate does not intend to build the VTOL aircraft hardware itself, but it plans to collaborate with vehicle designers, entrepreneurs, regulators, government agencies, and others to bring on-demand urban air transportation to life.

In the larger scheme of things, we are steadily working our way toward “smart cities.” The ever-connected and app-friendly smart cities will be engineered to alleviate everyday annoyances by using technology systems that react to the data collected. For instance, think smart power grids to address power outages immediately; smart garbage cans to compact trash and notify the sanitation department when they need to be emptied; on-demand mobility, with new car-sharing availability; smart parking meters that alert drivers to open spots; and smart policing, with artificial intelligence programs to predict where future crimes will occur 8–10 hours in advance so that police can concentrate patrols where needed.

And looking way on out there, Charles Bombardier has a design on paper for a supersonic plane called the Antipode, which can travel from New York, to London, in 11 minutes. The supersonic business aircraft can supposedly reach a speed of Mach 24—up to 16,000 miles per hour—which is 12 times faster the Concorde! Oh yes, the transportation revolution is here! Fasten your seatbelts.

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Removing Unnecessary Discovery with Removal to Federal Court

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I. Introduction

Given the potentially outcome altering implications the applicable rules of procedure can have on a matter, a complete understanding of the differences between the various rules of procedure that could apply to a case is an invaluable asset. A strong grasp of the difference between the procedural mechanisms available requires more than a superficial knowledge of the difference between the language used in the procedural rules of different forums. Accordingly, this paper will begin with an examination of the foundational principles and goals that result in the divergence between state and federal procedural rules. Next this paper will provide a chart explaining some of the areas where differences exist between the rules applicable in state and federal courts. Lastly, the paper will conclude with an in-depth examination of the most recent changes to the Federal Rules of Civil Procedure, their impact on the discovery process in federal court cases, and suggestions for employing the new changes for the greatest advantage.

II. Why are State and Federal Procedural Rules Different?

Analyzing the different challenges and goals that state and federal courts face can lead to a more complete understanding of the ramifications of the divergence of state and federal procedural rules. The relevance of this inquiry to the present discussion is made clear by considering the intentions of the original drafters of the first set of Federal Rules and why the outcome envisioned by those drafters failed to become a reality.

A. Development of The Federal Rules of Civil Procedure and The Impact of the Federal Rules on State Procedure.

Prior to the adoption of the first set of Federal Rules of Civil Procedure in 1938, federal courts drew their procedural law from state in which the federal court sat, as was mandated by the federal Process Acts and Conformity Acts. The drafters of the first set of Rules of Civil Procedure envisioned that the superior clarity and functionality of the Federal Rules would result in states co-opting the Federal Rules in their entirety, thereby creating a uniform system of procedural law that would apply in every federal and state court in the country. For better or worse, the dream of state and federal procedural uniformity was never realized. Most states did not accept an outright adoption of the Federal Rules, and the minority of states that replicated the Federal Rules frequently declined to adopt the federal interpretation of similarly worded provisions.

B. Why State and Federal Procedural Rules are Becoming More Dissimilar.

In recent years the number and import of procedural differences between state and federal courts has grown at an accelerating rate. Part of the explanation for this growing uniformity gap is the increasing regularity of amendments to the Federal Rules. In the first forty-five years after the

adoption of the Federal Rules, there were five substantive amendments.¹ In the last thirty-five years there have been over twenty additional substantive amendments to the Federal Rules.²

The impact of frequent revisions to the Federal Rules on state and federal procedural uniformity can be seen in the abundance of state rules of procedure that are identical to prior versions of the corresponding Federal Rule.³ For example in the states that are considered “replica states” with respect to their mass adoption of most of the Federal Rules of Civil Procedure, the state rule regarding class actions reflects the Federal Rule that was in place prior to 2003, and to see the history of the development of Federal Rule 11, one need only review a handful of corresponding state procedural rules regarding sanctions, which are often identical to various past iterations of this rule.⁴ While it would be easy to attribute the varying paces at which state and federal rules are amended to the bureaucratic morass inherent in the process of rules being considered, promulgated, and ultimately, adopted at the state level, it is likely that a more fundamental force is at play.

State and federal courts often face very different challenges due to large disparities in available resources and the number and complexity of cases filed. These differences in the challenges faced by state and federal courts have an impact on what reforms are considered a priority and whether reforms are best realized through amending procedural rules or allowing changes to happen through the development of case law. The varying needs for new rules between state and federal courts can also be attributed to a large disparity in the types of cases most frequently considered in those forums. The chart below compares data on the most common types of civil cases found in state and federal courts.

Federal ⁵	State ⁶
1. Tort (24% of district court filings)	1. Contract disputes (47% of state court filings)
2. Prisoner Rights (20%)	2. Miscellaneous civil filings ⁷ (19%)
3. Civil Rights (12%)	3. Small Claims (18%).
4. Contract disputes (9%)	4. Probate (11%)
5. Social Security Claims (7%)	5. Tort (4%)
6. Labor Disputes (6%)	

¹ Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay Adjusting the “One Size Fits All” Assumption*, 87 DEN. U. L. REV. 377, 480-81 (2010) (listing the years in which amendments were added to the Federal Rules of Civil Procedure).

² Thomas O. Main, Stephen N. Subrin, *Breaking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 Case W. Res. 501, 516 (2016).

³ *Id.*

⁴ *Id.*

⁵ Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1183-84, 1198, 1208-09 (2015).

⁶ NAT’L CTR. FOR STATE COURTS, *Statewide Civil Caseload Composition in 26 States*, (2016), http://www.courtstatistics.org/~/_media/Microsites/Files/CSP/Civil/PDFs/EWSC-2016-CIVIL-Page-2-Comp-Pic.ashx.

⁷ This category includes domestic relations cases, real property disputes, and various other matters that are rarely, if ever, found in federal courts.

While the largest percentage of filings in federal court are tort cases, in state courts, contract claims (typically debt collection cases) may account for more than half of the suits filed.⁸ In addition to the disparity in types of cases, the amount at issue in cases in federal and states courts is also generally quite dissimilar. The \$75,000 jurisdictional minimum in diversity cases ensures that that a large portion of the federal docket involves cases where substantial sums are in dispute. Conversely, the mean dollar amount for judgements in civil cases in state court is the relatively low figure of \$9,267.⁹

The disparity in the types of cases, and corresponding issues that arise, in state and federal courts is the most likely explanation for the divergence in state and federal rules of civil procedure. Mechanisms like initial disclosures and mandatory conferences would likely be an unnecessary burden if imposed on an action to collect unpaid credit card debt. Conversely, quick disclosures and frequent judicial involvement can be instrumental in the resolution of a complicated tort case. Accordingly, when making decisions regarding which forum best suits a given case, an initial consideration of which court is likely to be best equipped to deal with the probable challenges and disputes created by the case is worthwhile.

The next section of this paper will provide an overview of areas of state and federal procedural rules that are often different and a discussion of recent changes to the Federal Rules that exemplify efforts by the current Rule drafters to expedite and economize litigation in district courts.

III. Differences Between State and Federal Rules of Civil Procedure.

The chart below provides an overview of some the most frequently found differences between the Federal Rules and their state-based counterparts:

Rule	Federal	Common State Variant
Pleading Standards	A complaint must contain factual allegations that “plausibly suggest” liability. ¹⁰	Traditional “notice pleading” standard expressed in <i>Conley v. Gibson</i> . ¹¹
Service Requirements	Under newest amendment to FRCP 4(m), a plaintiff must serve a defendant within 90 days or risk dismissal, without prejudice, of any claim against that defendant. ¹²	Significantly longer periods of time in which to perfect service. ¹³

⁸ Main, *supra* note 2, at 524.

⁹ NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, iii (2015), <http://ncsc.org/media/files/PDF/Research/CivilJusticeReport-2015.ashx>.

¹⁰ While the language of FED. R. CIV. P. 8(a) still requires “a short and plain statement of the claim,” the Supreme Court’s rulings in *Iqbal* and *Twombly* effectively overruled the decades-old interpretation of the federal pleading standard announced in *Conley v. Gibson*, 335 U.S. 41 (1957). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹¹ Ohio Civ. R. 8(a); *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶ 13.

¹² FED. R. CIV. P. 4(m).

Signing and Sanctions	21-day “Safe Harbor” period before sanctions may be imposed. ¹⁴	Significant Variance Between Jurisdictions: Kentucky: Motions for sanctions under Rule 11 may be made immediately after the violative motions is filed but ruling on such motions are postponed until a final judgment is entered. ¹⁵ Ohio: Motion requesting sanctions can be made any time during litigation and may be ruled on at any time. No “safe-harbor” period. ¹⁶
Initial Disclosures	Required disclosure of witnesses, documents, applicable insurance policies, and computation of damages. Generally, disclosures must be made within 14 days after the initial planning conference. ¹⁷	Relatively uncommon in state practice but some states have adopted rules similar to the federal rule. ¹⁸
Timing of Discovery	Generally, a party is not entitled to discovery responses until the required initial planning conference has taken place. ¹⁹	In many states, discovery requests may be propounded at the same time the complaint is filed. ²⁰
Limits of Discovery	Under the most recent amendments to the Federal Civil Rules, the discovery requested must be “proportional” to the needs of the case, which puts constraints on the information a party may seek. ²¹	State procedural rules often permit broad and unconstrained discovery. ²²
Availability of	Available without leave of court prior	Plaintiff may dismiss at any time

¹³ Ohio Civ. R. 4(E) (requiring service within six-months of filing of complaint).

¹⁴ FED. R. CIV. P. 11(c)(2).

¹⁵ Kentucky C.R. 11.

¹⁶ Ohio Civ. R. 11.

¹⁷ FED. R. CIV. P. 26(a)(1)(C).

¹⁸ Compare Ohio Civil Rules, which does not contain an initial disclosure requirement; *with* Minnesota Gen. R. Prac. 26.01(a)(1) requiring nearly identical disclosures to those required in federal court.

¹⁹ FED. R. CIV. P. 26(d).

²⁰ Ind. R. Tr. P. 26(D).

²¹ FED. CIV. R. P. 26(b)(1).

²² Ohio Civ. R. 26(B)(allowing discovery of any relevant, non-privileged, matter).

Voluntary Dismissal	to filing of answer. After an answer or Motion for Summary Judgment, leave of all parties or leave of the court is required. ²³	before trial, unless there is counterclaim that cannot remain pending for independent adjudication. ²⁴
Summary Judgment Standard	A movant is entitled to summary judgment under Rule 56 when the non-moving party fails to produce evidence that would allow a trier of fact to find for the non-moving party. ²⁵	Some states impose a more onerous burden on those seeking to resolve a case at the summary judgment stage. Indiana: Movant must “affirmatively negate an opponent’s claim” to prevail on summary judgment. ²⁶
Jury Size/ Verdict Requirements	A jury must be comprised of at least six, and no more than twelve, jurors. Verdicts must be unanimous. ²⁷	Varies by jurisdiction, but frequently less than unanimous verdicts are required. ²⁸
Offer of Judgment	A party defending a claim may make a formal settlement offer which if the plaintiff does not accept the offer and is unable to secure a judgment more favorable than the defendant’s offer, will result in the plaintiff becoming responsible for the cost incurred after the offer was made. ²⁹	Available in some states, but often with significant caveats, such as costs of attorney’s fees being recoverable only where attorney’s fees are awardable in the underlying action, or specifically allowing the recovery of expert-witness fees. ³⁰

IV. Recent Changes to The Federal Rules of Civil Procedure.

On December 1, 2015 a new round of amendments to the Federal Rules of Civil Procedure went into effect. These rules applied to all proceedings commenced after that date and apply retroactively to cases filed before the effective date “insofar as just and practicable.”³¹ This set of amendments was intended to increase efficiency in litigation by imposing constraints on the

²³ FED. R. CIV. P. 41 (a)(1)(A).

²⁴ Ohio Civ. R. Rule 41 (A)(1).

²⁵ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

²⁶ See *Hughley v. State*, 15 N.E.3d 1000, 1003-04 (Ind. 2014). This more demanding burden is imposed on movants in Indiana in spite of the fact that the Federal and Indiana rule governing Motions for Summary Judgment are nearly identical. Compare Ind. R. Tr. P. 56(C); with FED. R. CIV. P. 56(a).

²⁷ FED. R. CIV. P. 48. It should also be noted that parties may stipulate to accepting a non-unanimous verdict, though there is some indication that this practice is uncommon.

²⁸ See Ohio Civ. R. 48.

²⁹ FED. R. CIV. P. 68.

³⁰ Offers of Judgment are not an available mechanism in some states, e.g. Michigan or Illinois, while other states have rules related to Offers of Judgment that are nearly identical to Federal Rule 68, Kentucky being one of them. Most frequently, states have made slight alterations to the procedure for making an Offer of Judgment and the effects such an offer may have. See US LAW NETWORK, INC. Offer of Judgment Compendium of Law, (2010), http://www.uslaw.org/files/Compendiums2012/Offer%20of%20Judgment/USLAW_OfferofJudgment_2012.pdf.

³¹ Order (U.S. Apr. 29, 2015).

discovery process and increasing the speed at which a case moves through a District Court by shortening and simplifying deadlines.

Rule 1 – Purpose of the Rules:

The overriding goal of the recent round of amendments to the Federal Rules of Civil Procedure is embodied in the amendment to Rule 1. This Rule now includes a statement that the primary purpose of the Rules is “to secure the just, speedy, and inexpensive determination of every action and proceeding.”³² While it is unlikely that this change will have an impact on its own, the decision to include this phrase in Rule 1 sheds light on what the drafters of these amendments were trying to achieve, namely a greater emphasis on reducing the time and money expended while litigating a matter in federal court. Furthermore, this Amendment makes clear that the burden of responsibility for increasing the efficiency of the litigation process falls on litigants as well as on the court.

Rule 4 – Service:

The time allowed for perfecting service before a plaintiff risks dismissal was reduced to 120 days as part of the 2015 amendments to the Federal Rules. This period was shortened again to 90 days in a subsequent amendment that took effect in December 2017.³³ The desired impact of this Rule is clear – moving cases through a court more quickly. While the prudence of this amendment may be debated, its effectiveness in achieving the desired goal may not. With a shorter window for perfecting service, Judges will have greater leeway in dismissing unserved defendants and removing cases from their dockets.

Rule 16 and 26 – Scheduling and Disclosures:

The amendments to Rules 16 and 26 provide an additional example of how the recent changes are aimed at increasing the speed that a case moves through the litigation process. As stated in the newest Committee Notes for Rule 16, the time to issue a scheduling order is reduced by 30 days. The drafters envision that this change will work in harmony with the shorter time limit for service to reduce the overall delays at the beginning of litigation. This shorter timeline has other effects on scheduling at the beginning of the litigation process. For instance, the timing of the inter-party conference required by Rule 26(f) is tied to the date that a scheduling order is due. Thus, by reducing the due date for scheduling order, the window for conducting the 26(f) conference is also reduced. Additionally, the occurrence of the Rule 26(f) conference triggers some discovery and disclosure obligations pursuant to Rule 26(a)(1)(C).

Rule 26 – Scope of Permissible Discovery (Proportionality):

The most discussed change in the 2015 amendments to the Federal Rules was the removal of the language most frequently cited to support arguments in favor of very broad discovery. Specifically, in the portion of Rule 26 that defines the scope of discovery, the phrase “reasonably

³² FED. R. CIV. P. 1.

³³ Order (U.S. Apr. 27, 2017).

calculated to lead to the discovery of admissible evidence” was removed. In place of that language, a proportionality requirement has been added to the definition of the scope of discovery. After the 2015 amendment, Rule 26(b)(1) now states that scope of discovery is limited to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”³⁴ Along with adding proportionality to the definition of discovery, a list of factors that should be considered to determine whether a discovery request is “proportional to the needs of the case” was included. These factors are:

- The importance of the issues at stake
- The amount in controversy
- The parties’ relative access to the relevant information
- The parties’ resources
- The importance of the discovery in resolving the issues; and
- Whether the burden or expense of the discovery outweighs the benefit it provides.

While this amendment has produced a significant amount of discussion, it is worth noting that proportionality considerations are not a wholly new limitation on discovery in federal court. Most of the proportionality factors now listed in the definition of the scope of discovery were previously found in Rule 26(b)(2)(C). The removal of the “reasonably calculated to lead to the discovery of admissible evidence” language is likely to have a greater impact than the reinforcement of the importance of proportionality, as this language is at the root of most overly-broad discovery requests.³⁵

It is important to keep in mind that no single proportionality factor is given greater weight than any other. Thus, an argument that broad discovery should be permitted simply because a substantial-sum of money is at issue is unlikely to be successful. In order to argue effectively that the scope of discovery should be enlarged or constrained, attorneys should strive to show how their proposed request or limitation accords with each of the factors to be considered. Additionally, given that the Federal Rules now explicitly authorize the use of cost-shifting orders, counselors should be mindful when trying to prevent disclosure of potentially damaging information and avoid arguments that focus too much on the fact that production could be expensive. A more effective alternative may be to include in your response alternative proposals to the form or volume of discovery requested.

Review of Cases Addressing Proportionality Considerations:

In the cases summarized below, it is clear that courts are making a concerted effort to curtail discovery abuses by addressing and balancing the Rule 26(B) proportionality considerations. Additionally, courts seem inclined to decide discovery disputes by siding with the party who does the best job of providing a detailed, factual basis for their position. In cases where one party relies on

³⁴ Emphasis added.

³⁵ See *Power Holding, LLC v. Malibu Boats, LLC*, NO. 14-0912, 2106 WL 403650, (E.D. La. Jan. 11, 2016)(denying a motion to compel discovery that used “reasonably calculated” language).

bare recitations of the rules and the opposing side provides a factual analysis of why their argument comports with the proportionality requirements, courts have not hesitated to summarily rule against the party who failed to embrace the type of fact-specific analysis the Rules encourage.³⁶

- ***Black v. Buffalo Meat Serv., Inc.***³⁷:

In this employment discrimination case, the Court sided with a corporate defendant over an individual plaintiff, partly because the defendant used detailed and fact specific objections to plaintiff's discovery requests. The defendant's sharply tailored objections were a stark contrast to the plaintiff's requests, which were aimed at very broad categories of documents rather than identifiable information. The Court ultimately decided that the plaintiff's requests were "disproportionate to the claims at issue."

- ***Mid. Am. Solutions LLC v. Vantiv, Inc.***³⁸:

The dispute in this case centered on the format in which information was produced. The plaintiff requested information in a condensed reporting format and in its original unaltered format. The defendant produced the unaltered format but refused to produce the condensed analysis, which led to a dispute. In ruling for the defendant, the Court noted that requesting that the defendant conduct analysis of the previously produced information on behalf of the plaintiff was not proportional to the needs of the case. The Court also suggested that plaintiff could obtain the information requested from the "simple step of using the sum function in Excel..."

- ***Wilmington Trust Co. v. AEP Generating Co.***³⁹:

This case sheds light on how courts are likely to view which party has the burden of addressing proportionality requirements. In ruling for the defendant, the Court noted that, based on the defendant's representations, there was little chance that any information of importance would be discovered by expanding the scope of discovery as requested by the plaintiff. The Court also stated that while a responding party still has the initial burden of explaining why a discovery request is overly burdensome or costly, after this information is put forward, "there is no reason why both sides should not be required to address the issue of proportionality."

Rule 34 – Production of Documents:

The major change to Rule 34 is primarily aimed at ensuring that objections to requests for production of documents are more than mere boilerplate responses, which often leave a party wondering whether documents are being withheld. Under the new version of the rule, objections to

³⁶ *Id.*

³⁷ No. 15-Cv-49S, 2016 WL 4363506 (W.D.N.Y. Aug. 16, 2016).

³⁸ 2016 U.S. Dist. LEXIS 53106 (S.D. Ohio Apr. 20, 2016).

³⁹ 2016 U.S. Dist. LEXIS 28762 (S.D. Ohio March 7, 2016).

requests for production must state “with specificity the ground for objecting.”⁴⁰ Additionally, a party who objects to a request for production must also specifically indicate whether documents are being withheld based on an objection.⁴¹

In keeping with the theme of this round of amendments to the Rules, this change was aimed and speeding up the discovery process by allowing parties to more quickly identify discovery disputes. By forcing parties to provide specific grounds for their objection and indicate if their objection even has an impact on whether responsive documents will be produced, it is probable that disputes on this issue will be more sharply defined from the moment they arise, which will enable courts to resolve these issues quickly.

While boilerplate objections to nearly every request for production may have been standard practice in the past, continuing such a practice will run afoul of the rules and could potentially draw the ire of a judge early in the proceedings. As one Court noted, objections that a request is overly broad, vague, or burdensome, are “meaningless” without further explanation.⁴² Thus, rather than simply objecting to a request for production as being “overly-broad,” the best practice is objecting, explaining *why* a given request is too broad, and responding to a more reasonable version of the request. For instance, in response to a request for “any and all documents related to safety and compliance training,” an objection that the request is overly broad should be accompanied by a statement that “the request is too broad because it could be interpreted to include a request for safety and compliance training for office or maintenance positions that have no bearing on the conduct alleged to be negligent.” Furthermore, including in such a response a statement that “documents related to driver safety training and driver compliance are being produced” may ward off the filing of a motion to compel production.

Rule 37 – Preservation of Electronically Stored Information:

The last of the major changes to the Federal Rules reflects a recognition of the ever-increasing importance of electronically stored information (“ESI”) to modern litigation. The previous version of Rule 37(e) restricted a court’s ability to impose sanctions for the failure to produce ESI that was lost as a result of routine and good faith management of a computer system. Under the new version of this Rule, courts are directed to impose sanctions in conformity with an escalating level of harshness matching the reasonable or unreasonable nature of the premature deletion of the information. Additionally, a party seeking to impose sanction on an opposing party for loss of ESI must be able to show that the loss resulted in prejudice. Even where a party can show they have been prejudiced by the loss of information, the sanction imposed should be no more onerous than what is “necessary to cure the prejudice.”⁴³ Furthermore, even where the irreparable destruction of ESI was intentional, as opposed to merely negligent, whether sanctions

⁴⁰ FED. CIV. R. P. 34(b)(2)(B).

⁴¹ FED. CIV. R. P. 34(b)(2)(C).

⁴² *Spencer v. City of Orlando*, No. 6:15-cv-345, 2016 WL 397935 (M.D. Fla. Feb. 2, 2016).

⁴³ FED. R. CIV. P. 37(e).

will be imposed is subject to a *may* not a *must* standard.⁴⁴ Despite these safeguards designed to prevent courts from running wild in imposing sanctions for the loss of ESI, it is still more important than ever for companies to have procedures in place for the preservation of ESI, and for attorneys to quickly and effectively communicate preservation requirements to clients.

V. Conclusion:

While the 2015 amendments to the Federal Rules are designed to increase efficiency and increase the pace of litigation, whether the specific rules of procedure available in federal court or the relevant state court provide the greatest tactical advantage will still require consideration on a case by case basis. A strong understanding of the procedural mechanisms at your disposal and the likely impact the various rules will have on a dispute should be fundamental part of the analysis of every new case.

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⁴⁴ *Id.*

APPLICATION OF THE WORK PRODUCT DOCTRINE TO PROTECT PRE-SUIT INVESTIGATIONS

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1) The Evolution of the Work Product Doctrine

In 1947, in the landmark case of *Hickman v. Taylor*,¹ the United States Supreme Court established the “work product” doctrine by designating certain materials prepared by counsel in anticipation of litigation as protected from discovery under the federal rules. The *Hickman* Court held that an attorney’s private memoranda, written witness statements, and mental impressions or personal recollections prepared or formed by an attorney in the course of his legal duties and contained in his files or in his mind, are protected from discovery as the “work product” of the attorney.

In *Hickman*, the question was whether the discovery rules allow a party to inquire into materials collected by an adverse party’s counsel in the course of preparation for possible litigation. The Supreme Court agreed with the district court that, because the statements were obtained from third persons instead of the client, the information the plaintiff sought was not protected by the attorney-client privilege. However, the Court reasoned that the discovery rules would not allow production. The Court recognized that a lawyer works, not only to advance justice, but to protect the interests of his clients; and in order to do so, the lawyer must be free to prepare his legal theories and to plan his strategy without unnecessary interference from opposing counsel. The Court termed this qualified protection as the “work product of the lawyer” and stated:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Although the work product doctrine shields an attorney’s mental impressions, opinions and legal conclusions from discovery, it is not a true privilege. Rather, it is a qualified protection, which the Court found necessary to preserve and advance the adversary system.² “Our adversarial system of justice cannot function properly unless an attorney is given a zone of privacy within which to prepare the client’s case and plan strategy, without undue interference.”³ Courts often echo this

¹ 329 US 495, 91 L.Ed 451, 67 S. Ct. 385 (1947).

² Greenwald, David M. and Slachetka, Michele L., “Protecting Confidential Legal Information,” 2015 Jenner & Black.

³ *Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 434 (D. Me. 2003); *United States v. Noble*, 422 U.S. 225, 238 (1975) (“At its core, the work-product doctrine shields the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”).

“zone of privacy” rationale to support application of the work product doctrine to protect documents from disclosure.⁴

The Federal Rules of Civil procedure substantially codified the *Hickman* work product doctrine in Rule 26(b)(3), which provides that a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer or agent). The party claiming work product protection must prove that the materials are: (1) documents and tangible things; (2) prepared in anticipation of litigation or trial; and (3) by or for the party or by or for the party’s representative. Despite the Rule’s codification, the work product protection afforded under *Hickman* is broader than the protection afforded under Rule 26, and reference to that *Hickman* should be made when seeking to advance the doctrine.⁵

a) To Whom Does it Apply

The phrase “attorney work product” doctrine is a misnomer, as the work product protection extends to any materials prepared in anticipation of litigation by or for a party.⁶ Work product protection includes materials prepared “by or for [a] party or its representative” as long as the agent is assisting in preparing for litigation.⁷ Indeed, the Supreme Court explained the importance of protecting the work product of such agents:

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect materials prepared by agents for the attorney as well as those prepared by the attorney himself.⁸

⁴ *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 304 (D. Utah 2002) (“The work product privilege protects against invading the privacy of an attorney’s course of preparation and where the privilege exists the burden is on the party seeking to invade the privilege to establish adequate reasons for production. However, the party asserting the work-product privilege has the burden of showing the application of the doctrine.”).

⁵ *Frank Betz Assocs. v. Jim Walter Homes, Inc.*, 226 F.R.D. 533, 534 (D.S.C. 2005) (“When applying the work product privilege to such nontangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to ‘documents and tangible things.’”).

⁶ *In re Cendant Corp., Sec. Litig.*, 343 F.3d 658, 662-63 (3d Cir. 2003) (work product protection “extends beyond materials prepared by an attorney to include materials prepared by an attorney’s agents and consultants.”).

⁷ Fed. R. Civ. P. 26(b)(3) advisory committee’s note (“the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers”); *Nelson v. Geren*, 2010 WL 3491360, at *3-4 (D. Or. Aug. 31, 2010) (finding that a nonlawyer’s draft report was prepared in anticipation of litigation); *Rodriguez v. SLM Corp.*, 2010 WL 1416107 (D. Conn. Apr. 5, 2010) (finding tests and studies conducted by Sallie Mae constituted work product as the analyses were prepared due to the prospect of litigation). But see *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 183522 (E.D.N.Y., Jan. 8, 2010) (an attorney’s engagement of a consultant on behalf of a client does not bestow privilege on non-legal work); *United States v. Smith*, 502 F.2d 680, 689 (7th Cir. 2007) (“It is not up to the client to determine whom to make an agent for the purposes of asserting the work-product privilege; the privilege extends to the work of the attorney’s agents, not the client’s agents.”).

⁸ *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

In application, however, demonstrating that materials prepared by a non-lawyer were prepared in anticipation of litigation may be more difficult. The following examples reflect where the court examined the application of the work product doctrine to non-attorneys.

- *United States v. AT & T*, 642 F.2d 1285 (D.C. Cir. 1980) (noting that the *Hickman* work product protection encompasses nonparty work product).
- *Herzberg v Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003) (“By its own terms, then, the work product privilege covers material prepared by or for any party or by or for its representative; they need not be prepared by an attorney or even for an attorney.”).
- *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir 1988) (heightened protection for opinion work product applies to the “mental impressions, conclusions, opinion, or legal theories” of a party or its agents).
- *Davis v. Seattle*, No. C06-1659Z, 2007 WL 4166154 (W.D. Wash., Nov. 20, 2007) (holding that outside attorney investigator was acting as functional equivalent of an employee of the company, where attorney prepared draft investigative reports).
- *Angel Learning, Inc. v. Houghton Mifflin Harcourt Publ’g Co.*, No. 1:08-CV-01259-LJM-JMS, 2010 WL 1579666 (S.D. Ind., April 19, 2010) (applying the work product doctrine to documents prepared by party’s employee evaluating the settlement value of the case).
- *Gator Marshbuggy Excavator L.L.C v. M/V Rambler*, No. Civ. A 03-3220, 2004 WL 1822843, at *2 (E.D. La., August 12, 2004) (notes taken by investigator in response to request made by an attorney were protected work product).
- *In re ContiCommodity Servs., Inc. Sec. Litig.*, 123 F.R.D. 574 (N.D. Ill. 1988) (work product doctrine does not prevent discovery of tax refund claim form prepared by an accountant, but documents prepared by the accountant as an agent for the lawyer would be protected).

That said, some courts strictly apply Rule 26(b)(3)’s use of the term “party” to preclude non-parties from asserting work product protection. “[D]ocuments prepared by one who is not a party to the present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party in a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.”⁹⁹

b) When Does it Apply

Documents and tangible things must be prepared in anticipation of litigation in order to be afforded work product protection. In order for the protection to apply, the probability of litigation “must be substantial and the commencement of litigation must be imminent. Phrased another way, some particular litigation must be contemplated at the time the document is prepared.”¹⁰⁰

⁹⁹ *Ramsey v. NYP Holdings, Inc.*, 2010 WL 1402055, at *6 (S.D.N.Y., June 27, 2002 (“[t]his conclusion has been adhered to by the Supreme Court in dictum, by at least one circuit court and by numerous district courts); *In re Cal. Pub. Util. Comm’n*, 892 F.2d 778 (9th Cir. 1989 (a nonparty to a suit cannot assert work product protection); *LG Elecs. v. Motorola, Inc.*, 2010 WL 4513722, at *3-4 (N.D. Ill. Nov. 2, 2010 (a party could not assert work product protection for documents its counsel prepared regarding a separate lawsuit in which it was not a party).

¹⁰⁰ *Duplan Corp. v. Deering Milliken, Inc.*, 61 F.R.D. 127, 130 (Dist. S.C. 1973).

Factors relevant to determine whether a document has been prepared in anticipation of litigation include the purpose or reason the document was created; when the document was created; and the likelihood that litigation will ensue.¹¹ The definition of “litigation” has been applied liberally to include criminal and civil trials as well as other adversarial proceedings, such as administrative hearings, arbitration, and grand jury proceedings.¹²

i) Imminent Litigation¹³

A party must demonstrate that the threat of litigation is impending to be afforded work product protection. In this respect, courts perform a case-by-case analysis to determine if the anticipated litigation has the requisite level of imminence. “A general fear of ever-present litigation in the future will not meet the anticipation requirement.”¹⁴ There must be an “articulable” claim at the time the material was prepared in order for it to be protected under the work product doctrine.¹⁵ For instance:

- *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (attorney must have “had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable,” holding documents prepared prior to the materialization of specific claim were protected because they were prepared “in anticipation of possible litigation”).
- *Lopes v. Vieira*, 719 F. Supp. 2d 1199 (E.D. Cal. June 23, 2010) (documents prepared in response to an administrative investigation were protected work product; they were not prepared for a business purpose since the securities offering took place a year earlier).
- *Binks Mfg. Co. v. Nat’l Presto Inds., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1982) (there must be more than a remote prospect of future litigation for work product protection to apply; work product immunity requires at least some articulable claim likely to lead to litigation and a document which was prepared because this litigation was fairly foreseeable).
- *SmithKline Beecham Corp. v. Pentech Parm., Inc.*, 2001 WL 1397876, at *2 (N.D. Ill. Nov. 6, 2001) (“[T]o be subject to work product immunity, documents must have been created in response to ‘a substantial and significant threat’ of litigation, which can be shown by ‘objective facts establishing an identifiable resolve to litigate.’ Documents are not work-product simply because ‘litigation [is] in the air’ or ‘there is a remote possibility of such future litigation.’”)

¹¹ Whittamore-Mantzios, Melanie J., “Work Product Doctrine for Non-Attorney Produced Documents.”

¹² *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 268 F.R.D. 114 (D.D.C. 2010) (materials prepared in anticipation of an administrative hearing are protected by the work product doctrine where there was a significant adversarial aspect to the hearing); *Galvin v. Hoblock*, 2003 WL 22208370, at *3-4 (S.D.N.Y. Sept. 24, 2003) (“[T]he term ‘litigation’ encompasses not only litigation in court, but also quasi-judicial proceedings before a government agency.”).

¹³ See Greenwald, David M. and Slachetka, Michele L., “Protecting Confidential Legal Information,” 2015 Jenner & Black.

¹⁴ *In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003) (“In general, though, a party must show more than a remote prospect, an inchoate possibility, or a likely chance of litigation.”)

¹⁵ Persand, Vivian, “Overcoming Work Product Objections that Relate to an Insurer’s Claims Investigation,” July 2010.

- *Medical Protective Co. v. Bubenik*, 2007 WL 3026939, at *4 (E.D. Mo. Oct. 15, 2007) (While retention of outside counsel by the insurer was not dispositive, in this case it indicated “the beginning of an adversary relationship between the parties.”)

Conversely, these courts held that litigation was not sufficiently imminent to trigger application of the work product doctrine.

- *King v. CVS Pharmacy, Inc.*, 2010 WL 1643256 (E.D. Tenn., April 21, 2010) (holding insurer’s adjuster’s files created prior to the adjuster’s contact with the claimant’s attorney were not protected work product).
- *Celmer v. Marriot Corp.*, 2004 WL 1822763, at *3 (E.D. Pa Jul 15, 2004) (holding report prepared by loss prevention officer whose primary role was to gather facts following accident was not protected work product because litigation was not anticipated at the time of the creation of the report).
- *Minebrea v. Papst*, 229 F.R.D. 1 (D.D.C. 2005) (holding parties were not “anticipating litigation” where a lawsuit had not been filed and the parties instead entered into a tolling agreement in a serious, good faith effort to negotiate a patent license).
- *Heyman v. Beatrice Co.*, 1992 WL 97232, at *3 (N.D. Ill. May 1, 1992) (“[T]he prospect of litigation must be identifiable because of specific claims that have already arisen.” A mere contingency of litigation will not give rise to work product protection. Thus, documents that were prepared to analyze or preclude future litigation, but not regarding existing claims were not protected work product).

In fact, pre-existing documents that were not initially prepared in anticipation of litigation may not be immunized merely by transmitting them to an attorney in response to the prospect of future or later litigation.¹⁶ It is also not enough that an attorney is involved in client oversight, in order to trigger application of the work product doctrine.¹⁷ However, a “counsel’s selection and compilation of pre-existing documents may constitute opinion work product.”¹⁸ In these instances, a court will often apply a two-part test to determine whether an attorney’s selection of documents is protected by the work product doctrine. This test provides that a “court should first determine that (1) disclosure of the documents would create a real, non-speculative damage of revealing the lawyer’s thoughts, and (2) the lawyer had a justifiable expectation that such mental impressions revealed by the materials would remain private.”¹⁹

ii) “Because Of” Test²⁰

Materials generated in the ordinary course of business are not work product and would thus be discoverable if relevant.²¹

The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have

¹⁶ *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1982).

¹⁷ *Guardsmark, Inc. v. Blue Cross & Blue Shield*, 206 F.R.D. 202, 210 (W.D. Tenn. 2002).

¹⁸ *In re Allen*, 106 F.R.D. 582, 608 (4th Cir. 1997).

¹⁹ *Hambarian v. Comm’r of Internal Rev.*, 118 T.C. 565, 570 (2002).

²⁰ See Greenwald, David M. and Slachetka, Michele L., “Protecting Confidential Legal Information,” 2015 Jenner & Black.

²¹ Advisory Committee’s Notes, 48 F.R.D. 487, 501 (1970); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977).

been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of the business rather than for purposes of litigation.²²

However, courts often apply the “because of” test in order to determine whether the alleged protected materials was prepared in anticipation of litigation. In this respect, a court may ask the question, “was the document created *because of* the anticipated litigation?”²³ Specifically, “a court will find the work product doctrine applicable if, in light of the nature of the document and the factual situation in the particular case, the document ‘can fairly be said to have been prepared or obtained because of the prospect of litigation.’”²⁴ Put another way, the “because of” test requires a “subjective belief that litigation was a real possibility.”²⁵

The following cases are examples of where the court has adopted the “because of” approach to determine whether a document was prepared in anticipation of litigation.

- *SmithKline Beecham Corp., v. Pentech Pharm., Inc.*, 2001 WL 1397876 (N.D. Ill. Nov. 6, 2001) (“The threshold determination of work product generally is ‘whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared for or obtained because of the prospect of litigation.’ Therefore, documents that were prepared for other reasons, such as documents created in the ordinary course of business, cannot be withheld as work product.”).
- *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011) (with no evidence that the appraisal work file would have been prepared differently in the absence of prospective litigation, the work file could not be said to have been created because of litigation).
- *Sandra T.E. v. S. Bernwyn School Dist.*, 600 F.3d 612 (7th Cir. 2010) (factual investigation materials prepared by outside counsel of the school board were protected by the work product doctrine since the investigation was conducted “because of” litigation against the school district, with which the school board anticipated being involved).
- *Cent. States Se & Sw. Areas Pension Fund v. Temp Excel Props. LLC*, 2010 WL 4735828 (N.D. Ill. Nov. 15, 2010) (only documents created after the pension fund issued a demand of payment were created because of litigation).
- *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002) (“In order to protect work-product, the party seeking protection must show the materials were prepared in anticipation of litigation, i.e., because of the prospect of litigation.”).

iii) “For Use In Litigation”

²² *Simon v. G.D. Searle*, 816 F.2d 397, 401 (8th Cir. 1987).

²³ *Safeco Ins. Co. v. M.E.S., Inc.* No. 09-CV-3312, 2011 WL 6102014 (E.D.N.Y. Dec. 7, 2011).

²⁴ CITE; citing 8 Charles Alan Wright, et al., *Federal Practice & Procedure* §2024 (3d ed. 2010).

²⁵ *Barko v. Halliburton*, 2014 WL 1016784 (D.D.C. March 6, 2014).

The First Circuit adopted a narrower “for use in litigation” test, to decide whether the work product protection applies. In *United States v. Textron, Inc.*, the court held that tax accrual work papers, prepared in consultation with the company’s attorneys, which analyzed various tax positions, assessed the likelihood of success against the IRS, and were used to establish contingent tax reserve liabilities for each position, were not protected by the work product doctrine because they were not prepared for use in litigation.²⁶

Conversely, other courts have held that documents prepared in anticipation of litigation, but not in anticipation of the litigation in which the work product protection was asserted, are work product.²⁷ Otherwise stated, “[t]he work product privilege extends beyond the termination of litigation.”²⁸ “Thus, the initial preparation of the document must have been in anticipation of the initial litigation, but whether the subsequent litigation was anticipated is irrelevant.”²⁹

2) Specific Applications

a) Claim File and Investigative Reports

Insurance claim files containing information such as investigative and adjusters’ reports, present unique issues in analyzing whether the work product doctrine applies.

In the insurance claim context, the distinction between materials prepared in the ordinary course of business and work product prepared in anticipation of litigation is often a moving target. The adjustment of insurance claims by its nature presents a possibility of litigation in many, if not most, claims involving a material loss. On the other hand, a significant part of an insurance company’s ordinary course of business involves investigating insurance claims and making coverage determinations.³⁰

Although not determinative, factors such as who prepared the documents, the nature of the documents prepared and the time the documents were prepared, are relevant in the analysis as to whether the work product doctrine applies.³¹ However, application of these tests can be further complicated by the fact that insurance companies routinely investigate and evaluate claims as part of its regular, ordinary and principal business purposes. “Thus, even though litigation is pending or may eventually ensue does not cloak such routinely generated documents with work product protection.”³²

²⁶ *United States v. Textron*, 577 F.3d 21 (1st Cir. 2009), cert. denied, 130 S. Ct. 3320 (2010).

²⁷ *Frontier Refining Inc. v. Gordon-Rupp Co.*, 136 F.3d 695 (10th Cir. 1998).

²⁸ *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002); *Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 104 (S.D.N.Y. 2002) (“Generally, work-product immunity continues to protect documents even when the litigation is completed.”)

²⁹ Restatement (Third) of the Law Governing Lawyers § 136, cmt. J.

³⁰ *Milder v. Farm Family Cas., Ins. Co.*, 2008 U.S. Dist. LEXIS 84665, at *3-4 (D.R.I. Oct. 21, 2008).

³¹ *Falkner v. General Motors*, 200 F.R.D. 620 (S.D. Iowa 2001) (acknowledging the complexities of defining the work product protection as it pertains to insurance claims files); *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 542 n. 42 (N.D.W. Va. 2000) (stating no bright-line test determines when investigation is conducted in the ordinary course of business and when it becomes in anticipation of litigation).

³² *Piatkowski v. Abdon Callais Offshore, L.L.C.*, 2000 WL 1145825, at *2 (E.D. La. Aug. 11, 2000).

To determine whether the work product protection applies with respect to claim files, it is important to analyze the role of the insurer with respect to the claim.

- i) **First Party Claims:**³³ During an insurer's adjustment of an insured's claims, an investigative report is usually considered to have been drafted as part of the regular course of the insurer's business and would thus not be protected work product.³⁴ "The rationale is that when an insured presents a first party claim, the insurance company owes the insured a duty to adjust the claim in good faith, and there is no initial contemplation of litigation." In *Bombard v. Amica Mut. Ins.*,³⁵ the court reiterated that "reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable." In *Bombard*, the insured sued, challenging the insurer's decision to disclaim. The trial court ordered the insurer's entire claim file be disclosed, a ruling affirmed by the appellate court which held that all materials prepared prior to a decision to disclaim are considered to have been made in the ordinary course of business.

Critical to whether the work product doctrine applies is the timing as to when or how the materials were obtained. For instance, in *Falkner v. General Motors Corp.*,³⁶ a statement a father provided to the insurer five days after his three year old child was killed, was not protected work product. There was no showing that the statement was taken under the direction of or on behalf of an attorney; rather, the statement was found to be obtained primarily for insurance coverage purposes. Further, there was no threat of litigation against the father, as the death had been ruled an accident, and the father told the newspaper that he has no plan to sue. Conversely, the mother's statement taken by the insurer more than a year after the child's death was deemed protected because she was at fault for the accident. See also:

- *St. Paul Reinsurance Company, Ltd. v. Commercial Financial Corp.*, 197 F.R.D. 620, 637 (N.D. Iowa 2000) (when insurer attempted to rescind the policy, the insurer's investigation of the insured's claim changed from being one in the ordinary course of business, to one in anticipation of litigation).
- *Taylor v. Travelers Insurance Company*, 183 F.R.D. 67 (N.D.N.Y. 1998) (in an uninsured motorist case, the insurer's investigation was not protected by the work product doctrine; there was no evidence that the documents sought were prepared after Travelers had denied the plaintiff's claims or that they had firmly decided to do so.)
- *Schmidt v. California State Automobile Association*, 127 F.R.D. 182 (D. Nev. 1989) (work prepared by insurer's claims adjuster was not prepared in anticipation of litigation prior to the time a UIM complaint was filed).

³³ Whittamore-Mantzios, Melanie J., "Work Product Doctrine for Non-Attorney Produced Documents;" Greenwald, David M. and Slachetka, Michele L., "Protecting Confidential Legal Information," 2015 Jenner & Black.

³⁴ *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D.Colo. 1993).

³⁵ 11 A.D.3d 647, 783 N.Y.S.2d 85 (2d Dept. 2004).

³⁶ 200 F.R.D. 620 (S.D. Iowa 2001).

- *Connecticut Indemnity Company v. Carrier Haulers, Inc.*, 197 F.R.D. 564 (W.D. N.C. 2000) (documents created by insurer prior to deciding whether to deny the claim and prior to the date insurer decided to litigate claim, were not protected).

In at least one instance, the severity of the injury may warrant application of the work product doctrine, even in first party claim litigation. For instance, in *Turner v. Moen Steel*,³⁷ the court held that documents prepared as part of the investigation by the worker compensation insurer were protected by the work product doctrine. Within hours of a fatal accident, the insurer had conducted an internal, preliminary investigation to assess fault, and had done so with guidance by the company's attorney. The court granted the motion for a protective order filed by the insurer, noting that the claim was one of enormous magnitude and there was more than a remote chance of litigation.

- ii) **Insurer as a Plaintiff (Subrogation):** In *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA*, the court held "[d]ocuments prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney.'" ³⁸ Although the insurer attempted to protect reports by having them prepared by counsel, the court ordered the insurer to produce all claims file information which did not specifically include legal advice. The court reasoned that where counsel was primarily engaged in claims handling—an ordinary business activity for an insurance company—an insurer could not claim this was a privileged activity.³⁹
- iii) **Third-Party Accident Claims:** In third-party cases, requests for production of the claim file are generally denied. When the insurer is not party to the litigation, claims files generally remain protected.⁴⁰

Federal courts often utilize one of three tests to determine whether an insurer's investigative claim file may be work product protected under Rule 26(b)(3). In this respect, it is fair to say that federal case law "regarding investigative reports made in connection with third-party accident claims is unsettled."⁴¹ One test holds that a claim file is conclusively presumed to have been made in the regular course of business and not in anticipation of litigation, unless it was requested by or prepared for an attorney.⁴² The second test, which is opposite from the first test, holds that a document prepared by an insurer in response to a third-party accident claim is prepared in anticipation of litigation and is protected work product.⁴³ The third and majority approach holds that the work product analysis as to claims files is fact specific, and that the party opposing production must meet its burden of proof under Rule 26(b)(3).⁴⁴

³⁷ 2006 WL 3392206 (D.Neb. 2006) (unpublished).

³⁸ 119 A.D.3d 492, 990 N.Y.S.2d 510 (2014).

³⁹ *Id.*

⁴⁰ Whittamore-Mantzios, Melanie J., "Work Product Doctrine for Non-Attorney Produced Documents."

⁴¹ Richard, Steven M., "Are Insurance Investigative Documents Work-Product Protected?," November 18, 2014.

⁴² *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972).

⁴³ *Fibtaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980).

⁴⁴ *S.D. Warren Co. v. Eastern Elec. Corp.*, 201 F.R.D. 280, 283 (D. Me. 2001).

It appears courts are more likely to find that work product is protected from disclosure when the injuries and damages are severe. In *Fontaine v Sunflower Beef Carrier, Inc.*,⁴⁵ the court held that the statement of the insured's driver which was taken the day of the accident by the insured's safety director was protected by work product, even though no suit had been filed. From the nature of the accident, it was clear who the plaintiff would be and what the claims would be if suit is filed. Further, notes taken during witness interviews by the insurer and provided to the insured's attorney following a fatality car accident were also protected from disclosure by the work product doctrine.⁴⁶ See also:

- *Banks v. Wilson*, 151 F.R.D. 109 (D. Minn. 1993) (insured's statement obtained after plaintiff had filed a claim was found to have been prepared in anticipation of litigation. "Here the filing of the Plaintiff's claim, which placed the Defendant's insurer on notice that they were alleging their injuries and losses had resulted from Defendant's negligence, resolves any doubt, however, remote, we might otherwise have had as to the purposes of Defendant's statement.").
- *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125 (D. Colo. 1993) (documents prepared by insurer after it was informed of demand against its insured with a copy of a draft complaint was protected by the work product privilege).
- *Wikel v. Walmart Stores, Inc.*, 197 F.R.D. 493 (N.D. Okla. 2000) (documents prepared as part of defendant's routine claims investigation before injured party informed the adjuster that he would get an attorney if the medical bills were not paid, were not prepared in anticipation of litigation).

iv) Incident Reports: Incident reports created after an accident but pursuant to the defendant's internal practices and procedures, are generally treated as discoverable. Specifically, these reports are found to be documents prepared in the ordinary course of business rather than for purposes of litigation. In *Shook*,⁴⁷ the plaintiff filed a negligence lawsuit against Love's after falling at a Love's store. The incident report at issue was required by Love's internal practices and procedures, and was prepared by the store manager immediately after the plaintiff fell; it was prepared for the express purpose of informing the manager's superiors of what happened. It was also prepared years before the lawsuit was filed. The *Shook* court held that the report constituted a document prepared in the regular course of business rather than for purposes of the litigation, and held that the trial court erred in withholding it from production. See also:

- *Leviathan, Inc. v. Alaska Mann*, 86 F.R.D. 8 (W.D. Wash. 1979) (captain's incident report after a collision between two vessels was created in the ordinary course of business; it was made months in advance of any claim and could not have been made in anticipation of litigation).
- *Cochran v. St. Paul Fire and Marine Insurance Co.*, 909 F. Supp. 641 (W.D. Ark. 1995) (incident reports of medication errors were routinely created in the ordinary course of business and not in anticipation of litigation).

⁴⁵ 87 F.R.D. 89 (E.D. Mo. 1980).

⁴⁶ *Schipp v. Gen. Motors Corp.*, 457 F. Supp.2d 917 (E.D. Ark. 2006).

⁴⁷ *Shook v. Love's Travel Stops & Country Stores, Inc.*, 536 S.W. 3d 635, 641 (2017).

3) The Protection is Not Absolute

Although the work product doctrine is broader than the attorney-client privilege because it protects a wider array of materials than just communications between the client and attorney, this protection is not absolute. Indeed, as noted in *Hickman* and in Rule 26, discovery may be permitted in to work product if the party seeking access to it can establish adequate reasons. “In this way, the work product doctrine ‘balances the interest of the system of providing lawyers with a degree of privacy free of unnecessary intrusion by opposing parties against the societal interest in ensuring that all parties obtain knowledge of the relevant facts involved in a dispute.’”⁴⁸

In this respect, the burden is on the party seeking discovery to show that (1) he has a “substantial need” for the materials in preparing his case, and (2) he is unable without “undue hardship” to obtain the substantial equivalent of these documents in any other way. Although this is an exception to work product protection, this exception does not permit a court to disclose an attorney’s “mental impressions, conclusions, opinions, or legal theories...concerning the litigation.” “If the court orders disclosure, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”⁴⁹

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⁴⁸ *Hickman*, 329 U.S. at 510-11, 67 S. Ct. at 393; S. Cohn, “The Work Product Doctrine: Protection, Not Privilege,” 71 Geo. L.J. 917, 918-22 (1983).

⁴⁹ Rule 26(b)(3)(B).

2018 Trucking Regulation Update

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Preservation of Evidence and State Survey of Spoliation Laws

Laura E. Kruse - Betts, Patterson & Mines, P.S.
Robert Griffin & Molly Pearce -Cranfill Sumner & Hartzog LLP

Update on Litigation Holds, the Duty to Preserve Evidence and the Doctrine of Spoliation

You are a few months from trial, and are working feverishly to get your witness and exhibit lists squared away, queuing up your motions in limine, finalizing the jury instructions and outlining an opening statement. Then the alleged “game changer” lands on your desk – a motion for sanctions based on alleged discovery abuses.

This litigation tactic is being advanced more often as a means to alter the course of litigation, either to drive up the alleged damages or to make a very defensible case indefensible. Because such sanctions may include granting a default judgment, striking pleadings, giving an adverse jury instruction, or ordering monetary sanctions, the focus of the case is no longer on the merits of the litigation, but on the alleged discovery abuse.

It is becoming more and more common that when a party is not succeeding in developing the merits in litigation, the party will turn its focus from the merits towards claims of destruction or spoliation of evidence.¹

For any company, it is important to create a defensible litigation hold plan. Simply emailing a litigation hold notice to your record’s custodian is no longer sufficient. Instead, the keys to establishing a defensible plan are consistency, standardization, documentation and diligence.

This paper addresses the various aspects of receiving and issuing a litigation hold, including when the duty to preserve potentially relevant evidence attaches; determining the scope of the litigation hold; the contents of and responding to the litigation hold notice; enforcing and implementing a litigation hold; and the impact of failing to follow the litigation hold and preserving relevant evidence. This paper also provides some practice tips to ensure that neither you, your client nor your company are ever faced with an indefensible sanctions motion.

I. What is a Litigation or Legal Hold

A “litigation hold” is a commonly used term that refers to the duty to preserve evidence when one has knowledge, actual or constructive, that such evidence is likely to be relevant to resulting litigation.²

A litigation or legal hold letter is a written directive advising custodians of certain documents and electronically-stored information (“ESI”) to preserve potentially relevant evidence in anticipation of future litigation.³ Litigation Hold Letters (or Litigation Hold Notices) (“LHL”) are used to describe a written notice from an adversary to trigger a duty to preserve relevant evidence.

¹ Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012.

² Franklin, Robert, “The Importance of ‘Evidence Preservation’:” Part 8 – Dealing with the ‘Litigation Hold.” (www.bigtrucktv.com)

³ Because the duty to preserve extends beyond litigation, experts on this subject now refer to the act of directing a party or individual to preserve potentially relevant evidence as “legal holds” rather than litigation holds. Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes.”

LHLs are also used to describe notices sent by lawyers to the clients or to the company's employees advising them to suspend routine document retention/destruction policies and implement a legal hold on all evidence which may be relevant to future litigation.⁴

II. The Duty to Preserve Potentially Relevant Evidence – When is it Triggered?

The duty to preserve also attaches when litigation is reasonably anticipated.⁵ “A duty to preserve evidence ‘arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.’” Otherwise stated, the duty to preserve is not limited to litigation. Whether litigation is “reasonably anticipated” is a good faith evaluation based on the facts and circumstances of the case, as they are known at the time.⁶

The duty to preserve is generally triggered when there is a likelihood of future litigation. “The future litigation must be ‘probable,’ which has been held to mean ‘more than a mere possibility.’”⁷ Although vague rumors or a simple disagreement will generally not trigger the duty to preserve, the duty of preservation arises “when an organization is on notice of a credible probability that it will become involved in litigation.”⁸ For example, “pre-litigation correspondence with an opposing party with unequivocal threats of litigation, receiving a summons and complaint, notice of an administrative complaint, an inquiry from the government, initiation of a government or a third-party subpoena for documents, can all result in reasonably anticipated litigation” and thus trigger the duty of preservation.⁹ For motor carriers, “it is critically important to recognize that the time to issue a litigation hold letter often precedes the filing of a complaint, especially in cases involving serious injury or death[.]”¹⁰

In other instances, it is not quite as clear as to whether litigation is anticipated and will require a more detailed analysis as to whether the duty to preserve has been triggered. Potential triggers could include internal grievances, compliance questions, pre-litigation communication with the opposing party involving non-specific threats of litigation, or litigation involving similar products.

That said, litigation holds are expensive to institute and to maintain. Although it is easy to conclude that it is safe to begin a litigation hold early, common sense requires a thorough analysis of the facts of each case, including an analysis of the experience and knowledge of the specific industry. For instance, if a party is generally aware that certain facts or events will trigger litigation and that

⁴ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes.”

⁵ *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (“Zubulake IV”) (S.D.N.Y. 2003) (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure preservation of relevant documents.”).

⁶ *Rimcus Consulting Grp., Inc. v. Cammarata*, 668 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (although the general rules regarding the duty to preserve are not controversial, “applying them to determine when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances”).

⁷ *Keithley v. Homestore.com, Inc.*, 2008 WL 3833384, at 5 (N.D. Cal., August 12, 2008). In *Keithley*, the court held that the duty to begin data preservation arose more than two years before the suit was filed. Defendants received a letter from the plaintiff stating that “we assume that Homestore.com wishes to litigate this matter” two years before plaintiff filed suit. The court found that this was sufficiently clear to inform the defendants that litigation was “reasonably anticipated.”

⁸ *Spanish Peaks Lodge, LLC v. Keybank Nat’l Ass’n*, 2012 WL 895465, at 1 (W.D. Pa., March 15, 2012).

⁹ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 3.

¹⁰ Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012.

certain information is routinely sought as a result of that litigation, the party has a duty to preserve such evidence.¹¹

For corporate defendants, timing may hinge on which agent was aware of the claims or events. For example, the duty might attach sooner if corporate counsel was aware of the claim or events, or similar claims in the industry, because they may be better situated to anticipate which claims will evolve into full litigation.¹² Conversely, if a company's experience is that a particular type of demand never results in litigation, when it receives another demand, there likely would not be a need to issue a legal hold.¹³

More recently, courts have adopted a practical bright-line answer to the issue as to when a litigation hold should be initiated. "If there is sufficient anticipation of litigation for the work product privilege to be applicable, then there must also be sufficient anticipation of litigation for a litigation hold to be triggered."¹⁴

III. What Should You Do If Litigation Is Reasonably Anticipated

Most commentators on the subject of evidence preservation offer one strong piece of advice if you receive an indication that litigation is likely: "do not panic." The second most important piece of advice: "do not procrastinate."¹⁵

Responding to and managing preservation issues can be daunting, but delaying action even for a few days may result in the destruction of potentially relevant evidence which may expose you, your client and/or your company to costly discovery sanctions. As set forth below, there are certain critical steps you should consider following to ensure relevant evidence is preserved, which includes establishing a plan, determining the scope of the legal hold, and then ensuring compliance.

a. Establish a Litigation Hold Plan

A litigation hold plan should be developed in advance of litigation so that, if necessary in the future, it can effectively and efficiently be enacted. The plan should include the following details:

- **Identify in advance where data is stored in active, backup, and in archival systems.**
 - Prioritize your preservation efforts by identifying which data is at risk of spoliation, such as data that is being overwritten or expired daily.

¹¹ *Pension Comm. of Univ. Of Montreal Pension Plan v. Banc of Am. Sec., LLC.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), abrogated by *Chin v. Port Auth. of New York & New Jersey*, 2012 WL 2760776 (2d. Cir., July 10, 2012).

¹² *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191 (D. Utah 2009) (preservation duty triggered when defendant's industry was "sensitized to the issue" in the case and discussing significance of a document retention policy).

¹³ Stacy, Stephanie F., "Litigation Holds: Ten Tips in Ten Minutes," at 4.

¹⁴ "Common Sense Standard for When Litigation Holds Begin Provides an Earlier Requirement than is Often Used," September 2010 (discussing *Siani v. State University N.Y. at Farmingdale* (E.D.N.Y., August 10, 2010)). The plaintiff in *Siani* sought an adverse inference against the university for the alleged destruction of electronic records after the pro se plaintiff wrote a letter to the university's president approximately a year before a lawsuit was filed. The letter expressed concerns about facts and circumstances that supported a prima facie case of age discrimination, disparate treatment and retaliation. Although the letter did not come from a lawyer and did not expressly threaten litigation, the court held that that a litigation hold obligation was triggered at the time the university's attorney invoked the work product privilege.

¹⁵ Maddex, Stephen J., "Responding to a Litigation Hold Letters - Some Practical Tips," February 19, 2009. (www.lexology.com).

- For electronically stored information (“ESI”), establish a plan that considers different tiers according to the significance of the source of the information and the frequency for which it is requested. For instance, tier one sources should always be preserved and will likely include emails, metadata, information contained on file servers, hand-held devices, and computers for key custodians. Tier two sources should be preserved on a case-by-cases basis and will depend on the nature of the cases (for instance, industry specific information may need to be preserved). By establishing a tier based system, the company will be able to prioritize what type of evidence needs to be preserved.¹⁶
- You should not limit your efforts to traditional paper documents (such as letters, memoranda, reports, brochures, and meeting minutes); recorded information falls within the definition of “document” pursuant to Fed. R. Civ. P. 34. This includes e-mails, databases, electronic logs, digital images, audio (voicemail messages), video recording, spreadsheets, presentation (PowerPoint slides), and electronic calendars. Do not forget about smart phones, social networking sites, home computers, remote desktops and portable storage devices.¹⁷
- **Establish a method to identify those who should be contacted for timely preservation of data.**
 - It is important to have the relevant “key players” identified – from legal, IT, records department, HR, compliance and other business units as appropriate.¹⁸ This list should include individual employee/custodians, enterprise and business unit data custodians, third parties and collection service providers.¹⁹
- **Develop an exit checklist for when employees leave the company to ensure their documents/ESI is easy to locate and properly deleted and/or stored.**
 - Your checklist should identify and inventory their data sources, such as laptops, portable storage devices and smartphones. You should also identify their successor data owners.²⁰
- **Dedicate resources appropriately and engage help early.**
 - Consider hiring an experienced eDiscovery consultant or outside counsel to facilitate the litigation hold plan.
 - For example, the attorneys at Betts, Patterson & Mines, P.S. have employed the services of Eric Blank of Blank Law & Technology to conduct forensic investigation of the opposing party’s computer system to locate metadata and deleted emails. Mr. Blank and his team are also experienced in advising companies through the electronic discovery process and will help facilitate a cost effective litigation hold plan.
 - Blank Law & Technology
157 Yesler Way, Third Floor
Seattle, Washington 98104
Ph: 206.256.9699

¹⁶ D’Agostino, Brandon, “Four Steps to a More Defensible Preservation and Legal Hold Process,” May 27, 2010. (www.clearwellsystems.com).

¹⁷ Probst, Eric L, “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012.

¹⁸ *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004); Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012.

¹⁹ Beard, Jeffrey J., “Best Practices for Legal Hold Processes,” ILTA White Paper, Litigation Support: Document Forensics and Legal Holds, May 2009.

²⁰ *Id.*

- It may be necessary to retain an experienced outside consultant or outside counsel when the amount of documents/data, the complexity of the data sources, or the level of sophistication required to implement a litigation hold or to identify discoverable documents becomes too much for you or your company to manage effectively or efficiently. A neutral facilitator may also bring a wider range of experience and may enable bringing all of the important players together in order to effectively facilitate the litigation hold.²¹
- Ensure your experts respond quickly and appropriately, and that they have a legitimate plan in place to preserve evidence within their scope of qualifications and responsibilities. For instance, clients should be advised to not move or drive their tractor after a collision, as such action may cause the engine to override the last stop data preserved in the relevant digital evidence preservation system (such as the ECM), without first consulting an expert. Recently, experts have also advised to disconnect the vehicle speed sensor (VSS) from the output shaft of the transmission before even moving (towing) the vehicle from the crash scene.²²

b. Define the Scope of the Litigation Hold

Given the universe of documents and records that an entity could preserve, it is significant to define the scope of the litigation hold. The litigation hold should include documents and records, including ESI, that are relevant to the facts and circumstances giving rise to the need for a legal hold or to the potential litigation.²³

The touchstone of discovery in civil cases used to be whether the information sought is “reasonably calculated to lead to the discovery of admissible evidence.”²⁴ However, on December 1, 2015, Federal Rules of Civil Procedure 26(b)(1) was amended to now include language that states such discovery must be “proportional to the needs of the case.”²⁵ This amendment now puts responding parties in a better position to argue that discovery is not permitted where it does not satisfy the enumerated proportionality limitations set forth in the rule.²⁶ When deciding on the reasonable scope of a litigation hold, this same legal principle should hold true. Thus, although an organization has a duty to preserve documents and records that it “knows, or reasonably should know, will likely be requested [by an opponent] in reasonably foreseeable litigation,”²⁷ that duty “does not extend beyond evidence that is relevant and material to the claims at issue in the litigation.”²⁸ This means that there are limits to how much information should be retained, such that the duty to preserve does not require a potential litigant to “preserve every shred of paper, every e-mail or electronic document, and every backup tape.”²⁹ These same proportionality principles have now effectively been memorialized in the amendment to FRCP 26.³⁰

²¹ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 3.

²² See Exhibit A attached.

²³ Global EDD Group, Legal Technology Today, “Step 3 for Legal Holds: Define the Scope,” February 26, 2010.

²⁴ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 3.

²⁵ FRCP 26(b)(1).

²⁶ http://www.jonesday.com/significant-changes-to-the-federal-rules-of-civil-procedure-expected-to-take-effect-december-1-12015-practical-implications-and-what-litigators-need-to-know-09-25-2015/#_edn20.

²⁷ *Mosaid v. Samsung*, 348 F.Supp.2d 332, 333 (D.N.J. 2004).

²⁸ *Hynix Semiconductor Inc. v. Rambus Inc.*, 2006 WL 565893, 27 (N.D.Cal. Jan. 5, 2006).

²⁹ *Zubulake VI*, 220 F.R.D. at 217.

³⁰ Simply noting that the amount in controversy is large and the responding party's resources are substantial is not a sufficient proportionality analysis. Rather, the benefit of the information requested should be weighed against the costs.

To this extent, it is critical to always respond to a litigation hold letter sent by an opposing party, particularly when the proposed scope of the litigation hold is overly broad. If you do not agree with the parameters or the scope of the preservation request as articulated by the opposing party, use the responsive letter to redefine the parameters of what you consider to be relevant to the issues involved in the future litigation. Your responsive letter will place the burden on your adversary to articulate why his/her proposed parameters should be broader than those suggested by you.³¹ This will also permit you to set forth what efforts you and/or your company/client have already taken in order to comply with your internal litigation hold plan, including the fact that a litigation hold plan was instituted, the type of documents and ESI that has so far been preserved and from whom that information was gathered.

c. Issue a Written Litigation Hold Letter

An essential component of a litigation hold plan is the issuance of a litigation hold letter to advise your adversary, client, employees and/or co-workers to preserve documents and suspend automatic deletion and document destruction practices.³² It is critical that a litigation hold be put in writing. Courts are increasingly critical of passive or careless oversight of the litigation hold process. Indeed, many things should be documented so your company is well prepared to withstand scrutiny.³³ Thus, it is recommended that your litigation hold letter address the following:

- It should explain which type of documents and ESI have to be preserved, consistent with the determination of what is relevant to the litigation.³⁴
 - The LHL should provide some “practical guidance” on what information would be relevant in the context of the immediate or pending litigation.³⁵
- It should advise that destruction policies must be terminated immediately, especially automatic deletion/destruction procedures.³⁶
 - The LHL should also advise the custodian/employee that “documents cannot be destroyed even if the employee believes the document will adversely affect the company at trial.”³⁷
- It should be sent from a key company employee, such as the president, general counsel, CEO or owner of the company, or from outside counsel.³⁸

Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *11 (N.D. Ill. Sept. 28, 2012); Conversely, a hefty price tag does not alone indicate “disproportionality.” *John B. v. Goetz*, 879 F. Supp. 2d 787, 887 (M.D. Tenn. 2010) (“[A]ny cost of ESI discovery is far outweighed by the benefits of the improved health of the children in this state.”). All proportionality factors must be considered. http://www.jonesday.com/significant-changes-to-the-federal-rules-of-civil-procedure-expected-to-take-effect-december-1-12015-practical-implications-and-what-litigators-need-to-know-09-25-2015/#_edn20.

³¹ Maddex, Stephen J., “Responding to a Litigation Hold Letter,” February 19, 2009. (www.lexology.com).

³² Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012.

³³ *Acorn v. City of Nassau*, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009) (issuance of a verbal hold was insufficient; along with other failures, this resulted in the court’s finding that the defendant was grossly negligent in facility to implement a litigation hold and the court consequently imposed sanctions).

³⁴ Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012.

³⁵ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 4.

³⁶ Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012.

³⁷ *Id.*

³⁸ *Id.*

- It should explain why that person is getting the letter (e.g., their role in the company warrants receipt of the letter or their knowledge of the potential litigation or immediate lawsuit).³⁹
- The letter should identify the parties involved, the relevant dates, where the action is or could possibly be pending; it should convey the serious nature of the action; and it should provide certain but essential neutral facts related to the nature of the litigation (or potential lawsuit).⁴⁰
- Finally, it should clearly state that the failure to preserve potentially relevant document and ESI could result in severe sanctions to the company.⁴¹

Just as it is critical to issue a litigation hold letter, it is essential that the client/company capture other aspects of the hold process, including the forms and timing of the hold notification; what follow-up steps were taken and by whom; and when and why those follow-up were steps taken.⁴² It is also important to document why data was deliberately not preserved (such as when it is clearly duplicative) or why data was not collected (such as when ESI is not reasonably accessible).⁴³

d. Enforcing the Litigation Hold Plan and Ensuring Compliance

It is critical to follow up on the litigation hold to ensure that it was implemented properly and is being followed. Once the litigation hold is in place, “counsel and client must take *some reasonable steps* to see that sources of relevant information are located.”⁴⁴ Although “enforcement requirements depend on the size of the company and the scope of the hold,”⁴⁵ “it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.”⁴⁶

The client/company should consider communicating the litigation hold in a variety of methods (e.g., issue a written memorandum and then e-mail the same written memorandum). You may also want to consider including a signed certification to the memorandum, which requires each

³⁹ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 4; Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan.”

⁴⁰ Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,” Committee News, ABA, Spring 2012. Although litigation holds are not discoverable generally, at least one court has ordered the litigation hold letter to be produced as a sanction for discovery abuses. *Major Tours v. Colorel*, 2009 WL 2413631 (D.N.J. 2009) (defendants’ delay in issuing the litigation hold letter and the letter’s limited distribution were sufficient to provide a preliminary showing of spoliation and, thus, the court ordered defendants to produce their litigation hold letter). Further, another court permitted a 30(b)(6) deposition of the defendant to explore the procedures defendants’ counsel took to “identify, preserve and produce responsive documents” after finding that defendants expunged the hard drives of several former employees after the present litigation began. *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 224 F.R.D. 614, 634 (D. Colo. 2007).

⁴¹ Probst, Eric L., “Navigating the Perils of E-Discovery: Avoid the Bumps in the Road with a Business Records Management Plan,”

⁴² Beard, Jeffrey J., “Best Practices for Legal Hold Processes,” ILTA White Paper, Litigation Support: Document Forensics and Legal Holds, May 2009.

⁴³ *Id.*

⁴⁴ *Zubulake V*, 229 F.R.D. at 432 (emphasis in original).

⁴⁵ Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012.

⁴⁶ *Zubulake V*, 229 F.R.D. at 432 (emphasis in original).

employee who receives the memorandum to verify that it has been read, understood and that they agree to comply with the preservation obligations set forth in the memorandum.⁴⁷

After distribution of the litigation hold letter, it is recommended that the client/company should send periodic written reminders about the litigation hold to key players.⁴⁸ Commentators on this subject recommend “posting the legal hold on the company’s intranet, periodically issuing pop-up message on certain employees’ work computers, leaving a recorded message on work phones, or simply reissuing the original legal hold notice.”⁴⁹

If warranted, you should also revise the scope and parameters of your litigation hold. Failure to do so would essentially negate the impact of issuing a litigation hold in the first place. Simply put, you should continue to “refine the scope of the hold if the legal issues evolve and change.”⁵⁰ “[P]arties should periodically review the scope of the hold to determine if any people should be added to or removed from the hold and if the scope should be changed.”⁵¹

[T]he creation of a legal hold is very fact intensive, so logically as the fact investigation of a matter proceeds, the scope of the hold could change. For instance, a party may learn of additional people who have relevant data, and thus, should be added to the hold. A party may learn that there are people who were included in the original hold who did not have any involvement related to the anticipated litigation, and thus, should be removed from the hold. As a result of investigation, it might be determined that the scope of the data that is being preserved should be changed. Any changes in the scope of the hold, and the basis for those changes, should be documented in writing.⁵²

e. Application of a Litigation Hold Plan to Transportation Matters

The Arkansas Trial Lawyers Association published a recent article that discussed the impact of spoliation principles to the trucking industry. In doing so, the author provided a detailed list of documents and ESI that may be sought or requested by plaintiff attorneys in litigation involving a trucking company.⁵³ Although the article is written from a plaintiff counsel’s perspective, the following list is instructive as it provides guidance as to what type of “evidence” may be included in a litigation hold letters.

- **Electronic Data**

- Electronic Control Modules (ECM), which will include information relating to engines and anti-lock brakes.

⁴⁷ Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012. These same authors suggest using a “web-based survey that contains the hold information that the individuals can review, print and acknowledge receipt, understanding and compliance.”

⁴⁸ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 5 (citing Eng, Michael J., “Counsel Must Not Only Implement Litigation Hold But Must Oversee Its Compliance. Electronic Discovery Navigator,” March 7, 2007).

⁴⁹ Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012.

⁵⁰ Stacy, Stephanie F., “Litigation Holds: Ten Tips in Ten Minutes,” at 5.

⁵¹ Marean III, Browning and Owen, Kathy, “Designing, Maintaining, Implementing and Releasing Legal Holds,” November 2012.

⁵² *Id.*

⁵³ Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice.

- Event Data Records (EDR), which records the speed, throttle status, brake status, cruise control status, velocity changes, and historical top speeds.
- Satellite communications, such as Qualcomm, which includes e-mail, crash reports, GPS tracking systems for both tractors and trailers.
- T-Check and/or Comdata, a system which reflects payment for fuel, repairs and payroll.
- Videos from DriveCam or Dashcam systems.
- **Records Required to Be Retained**⁵⁴
 - Driver's Logs.
 - Supporting trip documents for hours of services (e.g., documents to verify the driver's logs). A list of documents required to be maintained to verify the driver's logs is listed at 49 C.F.R. § 395.8(k)(1).⁵⁵
 - Maintenance Records.
 - Driver Vehicle Inspection Reports.
 - Annual Inspections.
 - Driver Qualification Files.
 - Driver History Investigations.
 - Alcohol and Drug Tests.
 - Bills of Lading and/or Freight Bills.
- **Physical Evidence**
 - Tractor or Trailer
 - If either the tractor and/or trailer were repaired and put back into service, evidence should be gathered as it relates to the accident. Pictures and measurements of the damaged area should be taken; repair receipts should be preserved; parts repaired or replaced should be maintained and stored; and video should be taken, to the extent possible, of the repairs being performed. In those cases, the party should be prepared to share this information with the opposing party in order to avoid a sanctions motion.

IV. The Impact of Failing to Issue and Follow a Litigation Hold Letter

a. Spoliation Law Generally

Failure to preserve relevant evidence once litigation has been anticipated may constitute spoliation and result in sanctions. Spoliation is defined as “[t]he intentional destruction, mutilation, alteration, or concealment of evidence.”⁵⁶ In practice, however, the definition of spoliation has been expanded to include the unintentional and negligent destruction of evidence.⁵⁷ “Courts have

⁵⁴ Although these records must be saved pursuant to the federal regulations, the period of time that is required under the regulation is generally less than the applicable statute of limitations on the specific claim. It is thus advisable to maintain the records for the longer of the two periods.

⁵⁵ *Darling v. J.B. Expedited Services, Inc.*, 2006 WL 2238913 (M.D. Tenn. 2006) (“the prudent course of action” is for the motor carrier to retain logs for six months prior to the accident in order to avoid spoliation charges in future litigation; an adverse inference jury instruction was imposed on the defendant for failing to stop the scheduled destruction of drivers logs after defendant received a spoliation letter.)

⁵⁶ Duru, Chika, “Taking the Stand: Spoliation: An Argument Against the Bad Faith Requirement,” October 2009. (www.dcbarr.org); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).

⁵⁷ *Id.*

expanded the definition because they recognize that lost or destroyed physical evidence or destroyed physical evidence is often the “most eloquent impartial ‘witness’ to what really occurred. . . .”⁵⁸

A finding of spoliation generally requires the court find the existence of a duty to preserve the information, a culpable breach of that duty, and resulting prejudice to the innocent party.⁵⁹ The evidence spoliated must also be material evidence or, otherwise stated, evidence that “could be a substantial factor in evaluating a claim or defense.”⁶⁰ The party seeking the sanction bears the burden of proof.

If spoliation is found to have occurred, courts generally hold that the type of spoliation sanction ordered should address the nature of the spoliation and the impact of that spoliation on the innocent party in proving or defending the case. Specifically, a court will order sanctions to (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; (3) restore the prejudiced party to the same position he would have been absent the wrongful destruction of evidence by the opposing party; and (4) prevent abuses of the judicial system and promote the efficient administration of justice.⁶¹

Certain jurisdictions recognize a separate cause of action for spoliation of evidence.⁶² In those jurisdictions, if the destruction of evidence is deemed to have reached a certain level, such as gross negligence, then the court may award punitive damages if such damages are recognized in the jurisdiction.⁶³

b. Sanctions

A finding of spoliation may result in direct and significant sanctions that will directly impact the outcome of the litigation. For instance, “if the court finds that the opposing party needed the missing evidence in order to prove a certain fact, that fact may be deemed to have been established, and the jury may be instructed to assume it was so established.”⁶⁴

Spoliation of evidence may also result in the exclusion of witnesses or other evidence; in having pleadings stricken; or in having judgment entered against the party who committed the alleged spoliation. Many courts also enter a monetary sanction against the offending party, generally awarding damages in the amount of attorney’s fees incurred in having to pursue the missing discovery and in having to move for sanctions.⁶⁵ In the case where direct sanctions are not awarded, “a finding of spoliation can result in an extremely detrimental ‘inference,’” . . . where the “jury may be instructed to ‘infer’ that the missing evidence would have been detrimental to the offending

⁵⁸ Duru, Chika, “Taking the Stand: Spoliation: An Argument Against the Bad Faith Requirement,” October 2009. (www.dcbart.org) (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)); see also, *Kirkland v. N.Y. Hous. Auth.*, 666 N.Y.S.2d 609, 611 (N.Y. App. Div. 1997).

⁵⁹ *Stevenson v. Union Pacific*, 354 F.3d 739, 746-50 (8th Cir. 2004); Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice (“In order to satisfy the prejudice requirement, the party seeking sanctions must demonstrate that the missing or altered evidence would have been relevant to the case.”).

⁶⁰ *Id.*

⁶¹ Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice.

⁶² *Id.* According to Mr. Adams, Alabama, Alaska, the District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio and West Virginia have all explicitly recognized some form of an independent tort action for spoliation.

⁶³ Franklin, Robert, “The Importance of ‘Evidence Preservation’: Part 9: The Impact of Failure to Preserve Evidence.” (www.bigtrucktv.com)

⁶⁴ *Id.*

⁶⁵ *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004).

party.”⁶⁶ In egregious scenarios, courts have been inclined to order more than one of the sanctions depending on the nature of the conduct.⁶⁷

c. Bad Faith or Intent Is Not Always Required Before Sanctions Can be Ordered

Courts have not been uniform in defining the level of culpability (i.e., negligence, gross negligence, willfulness, or bad faith) required to find spoliation. Various courts have taken divergent positions in deciding the extent of culpability required before different levels of sanctions should be ordered.⁶⁸ “Culpability can . . . range along a continuum, from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation.”⁶⁹

Courts are also not uniform in determining what constitutes “bad faith” or even if bad faith is required.⁷⁰ For instance, in a collision between a tractor-trailer and a bus, the Eighth Circuit Court of Appeals found that a spoliation sanction was improper absent a finding of bad faith.⁷¹ The court found that even though the electronic control module (ECM) data was destroyed, the trial court did not abuse its discretion because it is the “intentional destruction of evidence indicating a desire to suppress the truth” that is the basis of sanctions, “not the prospect of litigation.” Because the destruction was not deliberate, the court determined that spoliation had not occurred. However, if proof of bad faith is required, courts have defined bad faith as “the fraudulent intent and a desire to suppress the truth.”⁷²

More recently, courts are finding spoliation in the absence of bad faith or intent, relying on the court’s inherent power to regulate justice.⁷³ In these instances, even though a finding of spoliation requires a “culpable state of mind,” certain courts have found spoliation when there is a

⁶⁶ Franklin, Robert, “The Importance of ‘Evidence Preservation’: Part 9: The Impact of Failure to Preserve Evidence.” (www.bigtrucktv.com)

⁶⁷ *Keithley*, 2008 WL 3833384 (the court found that “[t]he discovery misconduct by Defendants in this case is among the most egregious this Court has seen,” and awarded \$320,000 in present sanctions, an adverse inference jury instruction impacting the scope and duration of the IP infringement, and also awarded future cost sanctions once Plaintiffs incurred and substantiated them.”).

⁶⁸ A detailed analysis of the scope of the preservation duty and the level of culpability required before sanctions are imposed for each circuit, as of September 2010, is set forth in *Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497, 542 (D. Md., Sept. 9, 2010).

⁶⁹ Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice (citing *Rimkus Consulting Group, Inc. v. Cannarata*, 688 F. Supp. 2d 598, 612, 615-16 (S.D. Tex. 2010)).

⁷⁰ In most instances where severe sanctions have been order, such as granting a default judgment, striking the pleadings, or giving an adverse jury instruction, a showing bad faith is required. Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice.

⁷¹ *Greyhound*, 485 F.3d at 1035. In *Greyhound Lines, Inc. v. Wade*, Greyhound sued Robert Wade and Archway Cookies, LLC after an Archway truck driven by Wade rear-ended a Greyhound bus. At trial, the court learned that at the time of the accident, the Greyhound bus was traveling below the posted minimum speed limit because of a mechanical failure. Specifically, a failed speed sensor caused the bus to travel at slow speed. In addition, “[t]he bus had an electronic control module (ECM) that stored information, including speed, starts, stops, and the time and type of mechanical failure.” Ten days after the accident, Greyhound removed the ECM, retrieved the information from it, and then sent the ECM to the engine manufacturer, who erased the information before Greyhound filed suit. Archway argued that Greyhound should have been sanctioned for destroying the information on the ECM.

⁷² *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 344 (M.D. La. 2006).

⁷³ *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“A federal trial court has the inherent discretionary power to make appropriate evidentiary ruling in response to the destruction or spoliation of relevant evidence.”); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004) (court has discretion to impose spoliation sanctions under its inherent authority).

knowing or intentional violation, even if it the violation is not done with bad faith.⁷⁴ For instance, in *Dillon v. Nissan Motor Company, Ltd.*,⁷⁵ the Eighth Circuit held that the district court has inherent power to impose sanctions when a party destroys evidence. The court stated that “sanctions may be imposed against a litigant who is on notice that documents or information in its possession are relevant to the litigation, or potential litigation, or reasonably calculated to lead to the discovery of admissible evidence, and destroy[s] such documents and information.”⁷⁶ Taken further, the Sixth Circuit ordered sanctions against a party under the theory that the duty to preserve evidence is a “duty owed to the court, not to the party’s potential adversary; hence, spoliation is considered an abuse of the judicial process.”⁷⁷

V. Conclusion

Preservation of potentially relevant evidence is one of the most important aspects to responding to anticipated litigation. Once that duty is triggered, your client/company must *actually* implement and execute its litigation hold plan and then ensure that the litigation hold plan is being followed. Simply having a plan and issuing a litigation hold notice is not enough to avoid sanctions. “Any lapse of vigilance in post-accident evidence collection and preservation can be costly – perfect planning and procedures are useless without 100% execution.”⁷⁸ If potentially relevant information is not preserved, the impact can be catastrophic, as the focus of litigation may shift from the merits of the litigation to the alleged discovery abuse.

The Doctrine of Spoliation: State Survey

Arizona

Arizona does not recognize a separate tort for either negligent or intentional spoliation of evidence. *Tobel v. Travelers Ins. Co.*, 988 P.2d 148, 156 (Ariz. App. 1999). However, the courts will give a spoliation instruction to the jury in certain circumstances, and the court has substantial discretion in instructing the jury. While there is no bright-line rule in Arizona, an “adverse inference” instruction generally requires evidence of bad faith or intent to destroy evidence. *Smyser v. City of Peoria*, 215 Ariz. 428 (App. 2007) (finding loss of relevant evidence did not warrant adverse inference jury instructions in the absence of bad faith). See also *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247 (App. 1997) (finding negligent destruction of vehicle before it was inspected did not warrant the harsh sanction of dismissal).

The issue of a spoliation instruction will be decided on a case-by-case basis, considering all relevant factors, and the resulting penalties vary as well. *Souza*, 191 Ariz. at 250. Litigants have a duty to preserve evidence which they know, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery or is the subject of a pending discovery request. *Id.* A party seeking an adverse inference instruction for the spoliation of evidence must establish the following: that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;

⁷⁴ *Schumacher Immobilien Und Beteiligungs AD v. Prova, Inc.*, No. 1:09CV18 (M.D.N.C. July 21, 2010) (citing *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008)); Duru, Chika, “Taking the Stand: Spoliation: An Argument Against the Bad Faith Requirement,” October 2009. (www.dccbar.org).

⁷⁵ 986 F.2d 263 (8th Cir. 1993).

⁷⁶ Adams, Morgan, “Spoliation in Trucking Cases,” 2012 ATLA Docket, Hiding Justice.

⁷⁷ *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008).

⁷⁸ Wernette, Ronald C. “Why Preserve Evidence After a CMV Accident and Get Counsel Involved Immediately? Here’s Why,” Commercial Transportation Litigation Committee Newsletter, Spring 2012.

that the items were destroyed with the culpable state of mind; and that the destroyed evidence was significant to the parties' claim or defense and that comparable evidence could not be obtained to support that claim or defense. *Id.* at 250-1. In short, the plaintiff must prove the following three elements to substantiate an adverse inference instruction: 1) control, 2) bad faith, and 3) no alternative evidence. *Id.*

Arkansas

Spoliation is defined as “the intentional destruction of evidence and when it is established, [the] fact finder may draw [n] inference that [the] evidence destroyed as unfavorable to [the] party responsible for its spoliation.” *Rodgers v. CWR Construction, Inc.*, 343 Ark. 126, 132 (2000) (citations omitted). The intentional tort of spoliation is not recognized as a cause of action. *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 150 (2000). Arkansas courts have deemed a separate tort not necessary, based upon other avenues to remedy the wrong, such as Ark. Code Ann. § 5-5-4-111 which make it a Class B misdemeanor to alter, destroy, suppress, remove, or conceal any record, document, or thing with the purpose of impairing its verity, legibility, or available in any official proceeding or investigation.

The Arkansas Supreme Court held that a specific finding of bad faith on the part of the spoliator is not necessary. *Bunn Builders v. Womack*, 2011 Ark. 231 (2011) (finding that the jury was properly instructed on spoliation, despite a finding that the destruction of evidenced was intentional). In *Russellville Holdings*, the Court found that spoliation was properly submitted to the jury when, after receiving a preservation letter, the hospital converted the subject medical records chart into electronic format and destroyed the physical paper copy. *Russellville Holdings, LLC v. Peters*, 2017 Ark. App. 561, 7-9 (2017).

California

There is no cause of action for spoliation of evidence by a party or third party in California. *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal. 4th 1, 17-18 (1998); *Temple Cmty. Hosp. v. Sup Ct.*, 20 Cal. 4th 464 (Cal. 1999). Other various remedies are available , such as the evidentiary inference provided by Evidence Code § 413, that evidenced destroyed by a party is unfavorable to that party, the sanctions for abuse of discovery pursuant to Code of Civil Procedure § 2023, the punishment for attorneys who are involved in their client's spoliation, and criminal penalties for spoliation of evidence. *Cedars-Sinai Medical Center*, 18 Cal. at 17-18. These remedies provide a substantial deterrent to acts of spoliation and considerable protection to the spoliation victim. *Id.*

Colorado

A trial court may impose sanctions to punish a party that has spoiled evidenced and to remediate the harm to the injured party from the absence of that evidence. *Rodriguez v. Schutt*, 896 P.2d 881 (Colo. App. 1994), *aff'd in part and rev'd in part on other grounds*, 914 P.2d 921 (Colo. 1996). A court may instruct the jury on an adverse inference regarding the destroyed evidence if the evidence was lost or destroyed in bad faith or willfully; the evidence would have been relevant to an issue at trial and would have naturally been introduced as evidence; and the evidence would have been unfavorable to the spoliator. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1003-4 (Colo. 2006). The trial court has wide discretion to provide an adverse inference instruction, and the form and style of the instruction are within such discretion. *Id.* at 1004.

Florida

The remedy against a first-party defendant for spoliation of evidence is not an independent cause of action. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 347 (Fla. 2005). The available remedies are discovery sanctions and a rebuttable presumption of negligence for the underlying tort. *Id.*

Florida Appellate Courts have recognized an independent claim for spoliation against third-parties. See, e.g., *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167 (Fla. Dist. Ct. App. 2002); *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So.2d 656 (Fla. 2d DCA 2003). To establish a cause of action for spoliation against a third-party, a party must show: (1) the existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and inability to prove the lawsuit, and (6) damages. *Jost v. Lakeland*, 844 So.2d 656, 657-685 (Fla.2d DCA 2003). This claim for spoliation does not arise until after the underlying action is completed. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So.2d 433, 434-5 (Fla. Dist. Ct. App. 2001). Spoliation is established where the moving party demonstrates, (1) the missing or destroyed evidence existed, (2) the non-moving, allegedly spoliating party had a duty preserve the evidence, and (3) the allegedly spoliated evidence was *crucial* to the movant's ability to prove a *prima facie* case or defense. *Walter v. Carnival Corp.*, 2010 WL 292792 (S.D. Fla. 2010).

Georgia

Georgia does not recognize an independent first-party or third-party tort for spoliation of evidence. *Owens v. Am. Refuse Sys., Inc.*, 244 Ga. App. 780 (Ga. 2000); *Gardener v. Blackston*, 185 Ga. App. 754 (Ga. 1988) (discussed in *dicta*).

Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis. *AMLI Residential Properties, Inc. v. Georgia Power Co.*, 293 Ga. App. 358, 361, 667 S.E.2d 150, 153-54 (2008). "The trial court should weigh five factors before exercising its discretion to impose sanctions: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded." *Id.* (citations omitted). If the trial court determines that sanctions are warranted, the trial court may dismiss the case, prevent the party's expert from testifying in any respect about the evidence, or instruct the jury that spoliation of evidence creates a rebuttable presumption that the evidence would be harmful to the spoliator. *Id.*

Illinois

Spoliation is not a claim as an independent tort, but a spoliation claim can be stated under existing negligence principles. *Dardeen v. Kuehling*, 213 Ill.2d 329, 335 (Ill. 2004). "The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute, or other special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Adams v. Bath and Body Works, Inc.*, 358 Ill. App.3d 387, 392 (Ill. App. 1st Dist. 2005).

In addition to the cause of action sounding in negligence, an individual who destroys relevant evidence may be sanctioned. *Shimanovsky v. General Motors Corp.*, 692 N.E.2d 286 (Ill. 1998).

Sanctions are within the court's discretion, but the court must consider the following factors: 1) the surprise to the adverse party; 2) the prejudicial effect of the proffered testimony or evidence; 3) the nature of the testimony or evidence; 4) the diligence of the adverse party in seeking discovery; 5) the timeliness of the adverse party's objection to the testimony or evidence; and 6) the good faith of the party offering the testimony or evidence. *Id.* at 291.

Michigan

"Although Michigan law recognizes a duty to preserve evidence ... there is no published authority in Michigan expressly recognizing or rejecting a claim for spoliation of evidence as a valid cause of action in this state. The substantive requirements for such a claim have not, therefore, been settled or even expressly considered by any binding Michigan authority." *Ace Am. Ins. Co. v. Emmet Coating Servs., Inc.*, 2006 WL 3826988 (Mich. App. Dec. 28, 2006).

MCR 2.313(B) permits a trial court to impose sanctions for failure to comply with a discovery order. The court rule is inapplicable "in the absence of a discovery order." *Brenner v Kolk*, 226 Mich. App. 149, 159 (1997). Nonetheless, "[a] trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Bloemendaal v Town & Country Sports Ctr., Inc.*, 255 Mich. App. 207, 211 (2002).

Spoliation can occur in the absence of a discovery order. *Brenner*, 226 Mich. App. at 160. Spoliation of evidence occurs when a party either deliberately or accidentally destroys or loses crucial evidence, or when a party fails to preserve such evidence when it is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action. *Id.* The litigant is under such a duty "[e]ven when an action has not been commenced and there is only a potential for litigation[.]" *Id.* at 162. An appropriate consequence for a party's failure to preserve evidence may be "an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence." *Dokbo v Jablonowski*, No. 306082, 2012 WL 5853754, at *3-4 (Mich. Ct. App. Nov. 15, 2012).

New York

In general, there is no independent cause of action for spoliation in New York. *Met-Life Auto & Home v. Joe Basil Chev., Inc.*, 1 N.Y.3d 478, 482 (N.Y. 2004). However, spoliation by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third-party tortfeasor. *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 53 (N.Y. 2nd Dept. 1998). In other cases, New York courts have rejected a cause of action for spoliation of evidence when the employer was not on notice that the evidence would be needed by the employee in potential litigation. *Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 637 (N.Y. 2nd Dept. 2003). Sanctions are case specific, but may include dismissal. *See Amaris v. Sharp Elecs.*, 758 N.Y.S.2d 637 (N.Y. App. Div. 2003). *Contra Herrera v. Matlin*, 758 N.Y.S.2d 7, 7 (N.Y. App. Div. 2003) (finding that loss of records only warranted precluding certain evidence, not striking the defendant's answer or granting summary judgment in favor of the plaintiff).

North Carolina

In North Carolina, spoliation is an evidentiary issue and not a separate cause of action. *See, e.g. Panos v. Timco Engine Center, Inc.*, 197 N.C. App. 510, 521 (2009) (discussing that spoliation is a doctrine that allows for a permissible adverse inference). If a party fails to introduce in evidence

documents that are relevant to the matter in question and within his control, there is a permissible adverse inference. *Arndt v. First Union Nat. Bank*, 170 N.C. App. 518, 527–28, 613 S.E.2d 274, 281 (2005). “When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case.” *Id.* (citations omitted). The factfinder *is free* to determine “the documents were destroyed accidentally or for an innocent reason” and reject the inference. *Id.*

“[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction. *Id.* The obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation will likely occur. In addition, the lost evidence must be pertinent and potentially supported. *Id.* To prove the “coverup,” the proponent of the adverse inference may rely on circumstantial evidence. *Id.* Spoliation permits an inference that the destroyed evidence was unfavorable to the party that destroyed it, but the inference does not “Supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.” *Panos*, 197 N.C. App. at 521.

Ohio

Ohio recognizes an independent cause of action for intentional spoliation against parties to the primary action as well as third parties. *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St. 3d 28, 29 (Ohio 1993). The elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. *Id.* The claim may be brought at the same time as the primary action. *Id.*

Ohio does not recognize an independent cause of action for negligent spoliation of evidence; however, negligent spoliation can be the basis for sanctions in ongoing litigation. *See Simeone v. Girard City Bd. of Educ.*, 171 Ohio App.3d 633, 648 (2007). Sanctions for spoliation may be awarded upon proof that: (1) the evidence was relevant; (2) a party or its expert has had an opportunity to examine the unaltered evidence; and (3) even though that party was contemplating litigation, the evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the opposing party. *See Watson v. Ford Motor Co.*, 6th Dist. No. E-06-074, * 11 (2007). If these elements are established, the moving party is entitled to a rebuttable presumption that it was prejudiced by the destruction of evidence, meaning that the burden of persuasion shifts to the other party to show that no prejudice exists. *Bright v. Ford Motor Co.*, 63 Ohio App.3d 256 (1990). The Ohio Supreme Court determined that spoliation of evidence may be the basis for punitive damages. *Moskovitz v. Mt. Sinai Med. Centr.*, 635 N.E.2d 331, 343 (Ohio App. 1994). Thus, an argument that the spoliation of evidence prevented the plaintiff from proving his claim will fail, assuming that plaintiff does not have other evidence to establish the claim. *Id.* at 522.

Texas

Texas does not recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation. *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998). “[S]poliation analysis involves a two-step judicial process: (1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must

assess an appropriate remedy. To conclude that a party spoliated evidence, the court must find that (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Spoliation findings—and their related sanctions—are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of evidence that is unrelated to the facts underlying the lawsuit. Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit. Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. Key considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party.” *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014).

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Combatting the latest efforts by the Plaintiffs' Bar to Misuse the FMCSA FMCSR to bolster claim values

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In the never ending question to increase case values, plaintiffs and their counsel in personal injury actions often advance claims and arguments which misconstrue the Federal Motor Carrier Safety Act ("FMCSA") and the Department of Transportation's regulations implementing the act, the Federal Motor Carrier Safety Regulations ("FMCSR"). For those dealing with claims in the transportation industry it is critical to aggressively combat this growing trend.

In the typical truck accident two foundational claims are generally expected at a minimum: (1) a basic negligence claim against the truck driver; and (2) a vicarious liability claim against the motor carrier based upon the premise that the driver was in the course and scope of his employment at the time the accident occurred. In addition to the two foundational claims, it is common to also see claims for negligent hiring, retention, driver qualification, supervision and training, as well as claims for violations of the FMCSA and the FMCSR. Claims for punitive/exemplary damages are also often asserted but beyond the narrow scope of this paper.

This paper will briefly address some of the techniques used by plaintiffs and their counsel to increase their recovery through the misuse of the FMCSA's and FMCSR's as well as provide some strategies to defend against such techniques.

Do the FMCSA and the FMCSR Give Rise to a Private Cause of Action?

One tactic which is often employed by the Plaintiffs' bar is to assert that the FMCSA and/or FMCSR give rise to a private cause of action and that a violation of specific provisions of either provide a plaintiff a separate avenue of recovery beyond the traditional negligence and vicarious liability theories typically advanced or that the alleged violations support a punitive damages claim. Additionally, plaintiffs often attempt to use such claims as an avenue to introduce otherwise irrelevant information to bolster a "reptile" case theory.

Plaintiffs commonly advance a series of arguments against the motor carrier that it failed to provide safe and adequate service, equipment and facilities in violation of 49 U.S.C. §14101(a), or that it encouraged, aided or abetted the driver to drive an excessive number of hours in violation of 49 C.F.R. 390.13. Similarly the allegation is often advanced that the motor carrier permitted the driver to operate the vehicle in an impaired and/or fatigued condition. As a consequence plaintiffs assert that the motor carrier is liable for damages under the seemingly broad language of 49 U.S.C. §14704(a)(2) which provides in relevant part:

A carrier or broker providing transportation or service subject to jurisdiction under Chapter 135 is liable for damages sustained by a person as a result of an act or omission of the carrier or broker in violation of this part.

The key question presented by this code section is thus whether §14704(a)(2) creates a private right of action for individuals or “person[s]” who have suffered personal injuries. A number of courts have addressed the issue and have determined that no private right of action exists under §14707. See e.g. *Stewart v. Mitchell Trans.*, 241 F.Supp. 2d 1216 (2002). The Court in *Jones v. D’Souza*, Fed.Carr. Cas. P 84, 501(2007) provides some additional helpful analysis as it addressed the question based upon a plain language interpretation of §14704 in the context of other provisions in the code and the legislative history. The *Jones* court determined that the broad language of §14704(a)(2) stood in stark contrast to other provisions in the code section immediately preceding it which “expressly authorizes individuals to bring suit for violations of orders of the Secretary of Transportation or the Surface Transportation Board. *Id.* The *Jones* Court thus found it compelling that §14704(a)(2) did not expressly confer a private right of action for its violation whereas the code section immediately preceding it conferred a narrow but express right of private action. *Id.* The *Jones* court went on to discuss the legislative history which revealed “that Congress did not intend to create a private cause of action for personal injuries.” *Id.* (citing *Stewart v. Mitchell Trans.*, 241 F.Supp.2d 1216, 1219 (D.Kan.2002). Instead, the statute was “enacted to address commercial disputes,” and “[t]he legislative history gives no indication that Congress intended to expand the scope of the Motor Carrier Act to cover personal injury claims where there was no such coverage before.” *Id.* Additionally, as the District of Maryland explained in the case of *Schramm v. Foster*, 341 F.Supp.2d 536 (D.Md. 2004), the statute’s legislative history contains no discussion regarding the impact that the creation of a federal private right of action for personal injuries would have on the federal courts. *Id.*; *Schramm*, 341 F.Supp.2d at 547. “Because that impact would be substantial, it is reasonable to infer that Congress did not intend to create such a right of action.” *Id.*

Recently Plaintiffs have also attempted to use some of the provisions of Map-21 to not only expand the claims available but to also broaden the types of parties who may be held liable in the aftermath of an accident. One specific provision of Map-21 appears at first blush to open the door not liability for “injuries” where a load was, in some respect, illegally brokered. In cases where a load has been unlawfully brokered through interlining, double brokering or similar activities some Plaintiffs have sought to use 49 U.S.C. § 14916 to support claims against virtually any party involved with the load to include the original motor carrier to whom the load may have been assigned, third party logistics providers and even the shippers and receivers of a load. In one such case in Montana the Plaintiff sued the motor carrier that allegedly illegally brokered the load, the motor carrier that transported the load, the third party logistics supplier as well as the shipper and receiver on the theory that 49 U.S.C. § 14916 made those parties liable to the injured party for all damages incurred. *McFerrin v. Khan, et al.*, 15-CV-100-SHE. That particular case involved a wrongful death action against a small trucking company involved in a head on collision after the load in question had been delivered in Canada. In that case the Plaintiffs argued that the illegal brokering activity placed the illegally brokered load “into the stream of commerce” and as such, the injuries directly flowed from the illegal brokering activity.

49 U.S.C. § 14916 was enacted on July 6, 2012 as part of MAP -21. While it has long been understood that interlining, double brokering and similar activities were not expressly permitted, the

enactment of 49 U.S.C. § 14916 made it unequivocally clear that such activities, when undertaken by an entity without brokerage authority, constitute unlawful brokerage activities. Under the plain language of 49 U.S.C. § 14916(c) “[a]ny person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person [a violation of 49 U.S.C. § 14916] ... is liable ... to the injured party for all valid claims incurred without regard to amount.” Plaintiffs assert that this code section makes all persons or entities involved *in any respect* with an unlawfully brokered load strictly liable “to the injured party” for any damages incurred. Unfortunately there remains no case law addressing specifically whether this code section confers a private right of action for personal injuries or whether the section is specifically targeted at commercial injuries. Despite this fact, a review of similar language contained elsewhere in the FMCSA suggests that the remedies provided for under the Act are intended to address commercial disputes, not personal injury claims. *See Stewart v. Mitchell Trans.*, 241 F.Supp. 2d 1216 (2002).

Even in the face of facts constituting an illegal brokering activity, it is likely advantageous to consider a motion for summary judgment or motion for judgment on the pleadings asserting that 49 U.S.C. § 14916 only applies to commercial damages and not personal injury damages. To the extent the load was already delivered at the time of the accident, as it was in the Montana case referenced above, a further argument can be made that the allegedly illegally brokered load had been delivered and thus 49 U.S.C. § 14916 is inapplicable because no injuries occurred as a result of any illegal brokering activity.

Do the FMCSA and FMCSR Raise the Standard of Care for Motor Carriers

Plaintiffs commonly misconstrue the FMCSA and FMCSR to effectively raise the standard of care from a standard which is typically “ordinary care” or “reasonable care” to something much higher.¹ They often do so by relying on provisions such as 49 C.F.R. 390.3(d) which provides that the FMCSA regulations are the “minimum” safety standards with which all motor carriers must comply. The obvious argument, which is made often, is that motor carriers are expected to, and should do more than the “bare minimum” and in fact should impose standards for safe operation which are more stringent than the floor allegedly set by the regulations.

The goal of this tactic is obvious: to lead the jury to the inaccurate premise that the FMCSR and FMCSA are insufficient standing alone and that, while setting standards that exceed these regulations is the preferred course, even a slight deviation means the motor carrier fell below the standard of care. In other words, while the carrier should do more than the “minimum” a technical violation of any regulation is evidence that the motor carrier is not even capable of meeting the bare minimum standards. This argument of course goes hand in glove with many “reptile” case

¹ The applicable duty owed by the motor carrier or driver is typically determined by state law. With regard to the driver, most states have specified that the duty owed by the commercial truck driver, with the exception of those who carry passengers for hire, is the same duty owed by drivers of other vehicles. *See e.g. Townsel v. Dadash, Inc.*, 2012 WL 1403246 (Tex.App.Apr. 24, 2012). That duty is typically one of “ordinary care” or “reasonable care.” *Id.*

presentations and in some jurisdictions can be used as support for punitive damages allegations where a regulation or code provision has been violated.

The important point here is straightforward and undeniable. The word “minimum” is not found anywhere within 49 C.F.R. 390.3(d). Instead, Part 390.3(d) provides the following:

Nothing in subchapter B of this chapter shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.

Thus, the regulation typically relied upon by Plaintiffs simply provides that a motor carrier is allowed to set more stringent requirements for safety of operation and employee health and safety. This is not the same thing as saying the standards which currently exist are a minimum and this distinction becomes critical when one considers the pervasiveness of theories such as the “reptile” theory in modern trucking and transportation cases.

Similar tactics are used to implicitly raise the standard of care applicable to the commercial driver. Even though the driver is often not the target due to the fact that the motor carrier is vicariously liable for the driver’s conduct, raising the standard of care applicable to the driver impliedly raises the standard of care applicable in the hiring, training and retention of the driver. The logic however remains false. The transportation industry is heavily regulated and motor carriers and commercial drivers are clearly subject to laws and regulations well beyond anything to which the ordinary private operator of a passenger vehicle is subject. This however does not mean that motor carriers and commercial drivers somehow owe a higher duty to the motoring public than do other drivers on the road.

The standard of care applicable to the motor carrier and the commercial driver is a matter of state law. Fortunately, the majority of courts addressing the issue have determined that motor vehicle drivers, with the exception of common carriers which carry passengers for hire are subject to the same standard of care which is typically “ordinary care” or “reasonable care.” *See e.g. Townsel v. Dadash*, 2012 WL 1403246 (Tex.App.Apr. 24, 2012); *Dahlgren v. Muldrow*, 2008 WL 186641 (N.D. Fla. Jan. 18, 2008).

Attempts to misconstrue and thus implicitly raise the standard of care are pervasive in trucking litigation due to the heavy regulatory overlay in the industry. Despite this fact, it is important to be mindful that state law establishes the standard of care rather than the sometimes inaccurate testimony of the truck driver or the testimony of a corporate representative or safety director. Unfavorable testimony or admissions regarding the applicability of the governing regulations does not change this fact. When faced with these tactics it is important to be vigilant and to seek to limit or preclude any such testimony, argument and certainly jury instructions through targeted motion practice. There is now a significant body of national case law supporting the application of the “ordinary care” or “reasonable care” standards to trucking accidents and limiting the use of improper argument which misstates the law is critical to successfully defending your case.

Using the Motion to Dismiss or Strike to Blunt Improper FMCSA, FMCSR, and Negligent Hiring, Training, Qualification, Supervision and Retention Claims

While motions to dismiss or strike are often met with limited success, a 2016 federal opinion dismissing a plaintiff's hiring and retention claims and striking allegations related to the FMCSA and FMCSR demonstrates that early motion practice in transportation cases remains a viable tool for addressing not only overbroad claims in federal court but also to thwart some of the fishing expedition style discovery tactics often seen. An added benefit is that, in dismissing many of these claims the defendant can get out in front of plaintiffs who will seek to use their sweeping allegations of company misconduct and practices to further a “reptile” approach to litigation.

In *Drake v. Old Dominion Freight Line, Inc.* the United States District Court for the District of Kansas applied the now familiar *Twombly* and *Iqbal* standards in dismissing plaintiff's claims for negligent hiring, retention, supervision, and training. Under the *Twombly* and *Iqbal* standards, which themselves rely upon Federal Rule of Civil Procedure 12(b)6, “a complaint must state sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). In this regard the *Drake* court found that “the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.” Memorandum and Order at 2 (citing *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)(emphasis original).

The analysis in *Drake* is significant for the reason that the allegations in that case were boilerplate allegations which are typical of those which are often seen in trucking cases where the only basis is plaintiff's speculation that facts supporting their claims *may* exist. While the elements for negligent hiring, training supervision and entrustment variety of claims are traditionally a matter of state law, generally a plaintiff may claim that the motor carrier/employer was itself negligent in entrusting the employee with a tool (i.e. a tractor trailer) which created an unreasonable risk of harm to the public. See e.g. Restatement (Second) of Torts §317 (1965). The liability of the motor carrier/employer for negligent hiring, training, supervision and entrustment is distinct from imputed liability under the doctrine of respondeat superior; it is based on the separate duty of the employer to use reasonable care in selecting, retaining, and supervising its employees. *James v. Kelly Trucking Co.*, 377 S.C. 628, 632, 661 S.E. 2d 329, 331 (2008). Stated differently, the motor carrier/employer's liability is not derivative, it is direct. *Id.*

In order to survive a motion to dismiss or strike, the plaintiff must plead more than mere boilerplate allegations. In this regard, the plaintiff must plead specific facts to support their belief that the motor carrier committed an independent tort. If a plaintiff fails to plead facts which tend to show that the motor carrier had reason to believe that the employee presented an undue risk of harm to the motoring public, or that the specific risk presented by that employee is within the risk created by those known propensities, then the speculatively plead negligent hiring, training and supervision type of claim should be subject to a motion to dismiss. This was precisely the case in *Drake* where the plaintiff failed to plead any factual allegations under Kansas law to state a “plausible” claim that the

defendant motor carrier had hired an “unfit” or “incompetent” employee whom it “knew or should have known to be unfit or incompetent.” See e.g. *Hollinger v Jane C. Stormont Hosp. & Training School for Nurses*, 578 P.2d 1121, 1127 (Kan. Ct. App. 1978)(reciting elements for negligent hiring, training and retention under Kansas law).

The *Drake* court also struck plaintiff’s claims under the FMCSA and FMCSR on the basis that neither creates a private cause of action for personal injuries. Memorandum and Order at 3-4 (citing *Stewart v. Mitchell Trans.*, 241 F.Supp. 2d 1216 (2002)). The *Drake* Court also observed that the plaintiff had failed to “include any facts and simply states legal conclusions that Defendant violated the FMCSR.” *Id.* Because the Court found the reasoning in *Mitchell* persuasive and the complaint failed to “include any factual basis for a cognizable claim under these regulations” the court struck the allegations from the complaint.

While the *Drake* decision is not a panacea, it does serve as a basis for defendants defending against overbroad claims and “reptile” tactics to simplify the case, narrow permissible discovery, focus trial issues and thereby focus the case upon what matters; the facts of the particular accident at issue rather than the company or the industry as a whole.

Conclusion

The growing trend of misusing the FMCSR and FMCSA is simply an attempt to make the case less about the facts of the particular accident and more of an indictment of the motor carrier’s policies and practices and at times, the industry as a whole. In this day and age, goods move in this country primarily on trucks and studies have repeatedly shown that the average juror has an innate fear of large commercial vehicles. Attempts by the plaintiffs’ bar to effectively raise the standard of care for trucking companies and to put the company on trial for its policies and practices is simply a way capitalize on the pre-existing fears related to large commercial vehicles with the end goal being to translate those ingrained fears into disproportionate verdicts. Mitigating these issues through early motion practice will help narrow the scope of discovery and help to focus the case upon the circumstances of the particular trucking accident rather than allowing the plaintiff to attempt to prosecute the company and the industry as a whole.

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The Pros and Cons of Onboard Cameras

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I. INTRODUCTION

Cameras are always watching. From cell phones, to surveillance cameras inside and outside buildings, to traffic cameras mounted high atop traffic signals and street lights, to the cameras mounted on a motorcyclist's helmet or the dash of a truck, even down to the tiny camera staring out from the neighbor's door bell, video cameras are approaching omnipresence. With this proliferation of video surveillance comes a powerful new tool in predicting, preventing, investigating and, sometimes, litigating accidents.

II. AVAILABLE TECHNOLOGIES

The most basic systems have a forward facing camera mounted on the dash or windshield that is always capturing and recording video. Either the driver turns on the camera or it is activated automatically when the ignition is turned on. Other systems are more sophisticated in the number of camera angles and may be programmed to record and preserve a predetermined amount of footage before and after a defined event, such as an aggressive application of the brakes or a sudden swerve. Some systems require the video to be downloaded manually, while others automatically transmit the footage back to the company or to a third party monitoring service. Some even allow the company to go back and review footage going back a month or longer to help investigate and train their drivers.

While the majority of systems are limited still to forward facing cameras, rear facing dash mounted cameras that record the driver are becoming increasingly more common. Synced to and shown side-by-side with the forward facing camera footage, this rear facing footage shows what the driver was doing at any moment. The most sophisticated systems provide a 360 degree view of what is going on around the commercial vehicle, as well as a rear facing view of the driver, which provides more situational context to an accident or to the driver's actions.

As technologies improve and the use of onboard cameras gains momentum, systems are coming online that help companies spot dangerous or distracted driving and take the driver off the road. For example, some rear facing cameras or other detection devices can track the driver's eye movements and sound an alarm if it senses he or she is getting drowsy or is otherwise distracted.

While the good seems to outweigh the bad and companies generally favor the use of onboard cameras in their fleets, not everybody agrees. This remainder of this paper will explore some of the pros and cons related to their use.

III. PROS

A. More reliable evidence

In many cases, video footage is irrefutable. It is unbiased and generally speaks for itself. It can either eliminate or drastically reduce the reliance on witness testimony, which is often gathered weeks, months, or even years after the event and is almost always partially inaccurate. Sometimes video evidence eliminates the need to retain an accident reconstructionist; and in those instances where an accident reconstruction is needed, the video footage usually plays an integral part in his or her investigation. Favorable footage often shuts claims down early and deters costly litigation.

B. Fraud and frivolous claim prevention

Russia has experienced a huge surge in the number of staged accidents and frivolous claims. “Swoop and Squat” type staged accidents are a common occurrence. To protect themselves many Russian motorists use dash cams to record every trip and expose would be fraudsters. (YouTube is replete with Russian dash cam video). Although not as prevalent, insurance fraud is alive and well in North America, and the transportation industry is a primary target of the scammers. Onboard cameras are perhaps the best tools to defeat the scams.

C. Insurance cost savings

Insurance carriers are increasingly supporting the use of video recording equipment because of its chilling effect on claims.

D. Security

Some systems monitor a vehicle even while it is not in use. These cameras can record full-time or be triggered under certain conditions. Like surveillance videos in stores and warehouses, onboard surveillance reduces losses caused by theft and vandalism, whether by a third party or the driver.

E. Better production and cost savings

Cameras in the workplace help keep people on task. Drivers who know they are being recorded drive differently. Statistics from a 2015 National Transportation Safety Board (“NTSB”) study of onboard cameras show that they promote safer driving and can aid in the reduction of accidents.¹ One study performed by the Virginia Tech Transportation Institute estimated a reduction of fatal and injury causing crashes by 20% and 35%, respectively.² This is significant for any trucking company, because, as the FMCSA estimates, the average cost of an injury crash is \$195,258 and \$3.5 million for a fatal crash.

Further, as discussed above, the more sophisticated systems actively monitor a driver’s attentiveness and sound the alarm when it senses a problem. Companies are also using the data and video captured by onboard systems to provide driver specific training to address unsafe or economically inefficient driving habits.

¹ National Transportation Safety Board. 2015. *Commercial Vehicle Onboard Video Systems*. Safety Report NTSB/SR-15/01. Washington, DC.

² *Id.*

Additionally, video footage can streamline the internal investigation because the driver knows a video exists and is more likely to be forthcoming with what actually happened.

IV. CONS

A. The footage can increase the value of the claim

Like a doubled edged sword, onboard cameras cut both ways. The footage is great when the facts are in your favor, but it can sting when they are not, especially when it shows aggravating behavior. For example, footage from a 2013 accident in Arizona captures the moment an empty fuel tanker slams into the back of a parked highway patrol car at 65 miles per hour, killing the officer and causing a chain reaction pile up. The driver told investigators that he was checking his mirrors and did not see the patrol car stopped in the road, but the rear facing camera inside the cab clearly showed that the driver was looking at his cell phone.³ While forensic evidence probably would have shown that the driver was on the phone around the time of the accident, the video conclusively proved that he was on the phone in the critical moments leading up to the accident.

B. Video is fallible, and there may be a tendency to rely too heavily on video footage

Video footage, like any digitally stored information, can be lost or corrupted, whether intentionally or unintentionally. Systems crash and files get lost. On the sinister side of things, editing software is everywhere and an unscrupulous opponent might find the temptation to tamper with previously undisclosed footage overwhelming. Care must be taken, and systems put in place, to establish a clear chain of custody.

Further, video footage often lacks critical context. Even the most sophisticated systems cannot capture everything that happens at the scene in the moments leading up to an accident. Factually important events that give context to what was captured on the video sometimes occur just outside the camera's field of view.⁴ The investigator should consider whether additional activities such as witness interviews, accident reconstruction and other more traditional approaches be employed to give proper context to the video.

C. Pushback from drivers

In a heavily regulated industry where drivers often feel that “Big Brother” is always on their back, some drivers bristle at the use of onboard cameras because they see it as just another invasion of their privacy and autonomy. Consequently, some drivers try and block the cameras with their hats, clipboards or other objects. In the 2013 Arizona accident discussed above, the driver had placed his wallet in front of the camera, allegedly to block the camera view. Onboard cameras also can have the

³ See, <https://www.youtube.com/watch?v=Rz1pPh5jOzg>, last accessed April 6, 2018; see also <http://abcnews.go.com/US/cops-truck-driver-facebook-time-fatal-crash/story?id=20772843>, last April 6, 2018.

⁴ See e.g., *Ritzul v. Consumer Prod. Services*, 37 Misc. 3d 1204(A), 964 N.Y.S.2d 62 (Sup. Ct. 2012) (finding proper grounds exist to deny summary judgment because “the video does not depict the scene to the right of the truck which is where the box truck is alleged to have come from.”).

effect of sowing discontent in a workforce, especially when the use of the cameras is not governed by reasonable and clearly communicated policies.

D. Onboard cameras sometimes lead to increased discovery disputes and spoliation actions

As the use onboard cameras increases, so does the amount of discovery associated with camera footage. Some of the issues raised include the following: was the video footage gathered in violation of my rights to privacy or without my consent?⁵ Is the video evidence privileged or confidential and somehow immune from discovery? Is the video evidence work product, i.e. was it prepared in anticipation of litigation?⁶ Is the video evidence unfairly prejudicial under the applicable rules of evidence? And what duty does a company have to preserve video footage, under what circumstances, and in what format?

V. CONCLUSION

As the use of onboard cameras continues to grow and become more sophisticated, trucking and transportation companies can leverage the technology to improve safety, to reduce risk and to streamline the claims and litigation process.

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⁵ See e.g., A.R.S. § 13-3019 (Photographing, videotaping, recording an individual where they have an expectation of privacy is unlawful without his or her consent. Similarly, that person's permission is required to disclose or publish that information.)

⁶ See e.g., Ariz.R.Civ.P. 26(b)(3) (precluding the discoverability of work product).