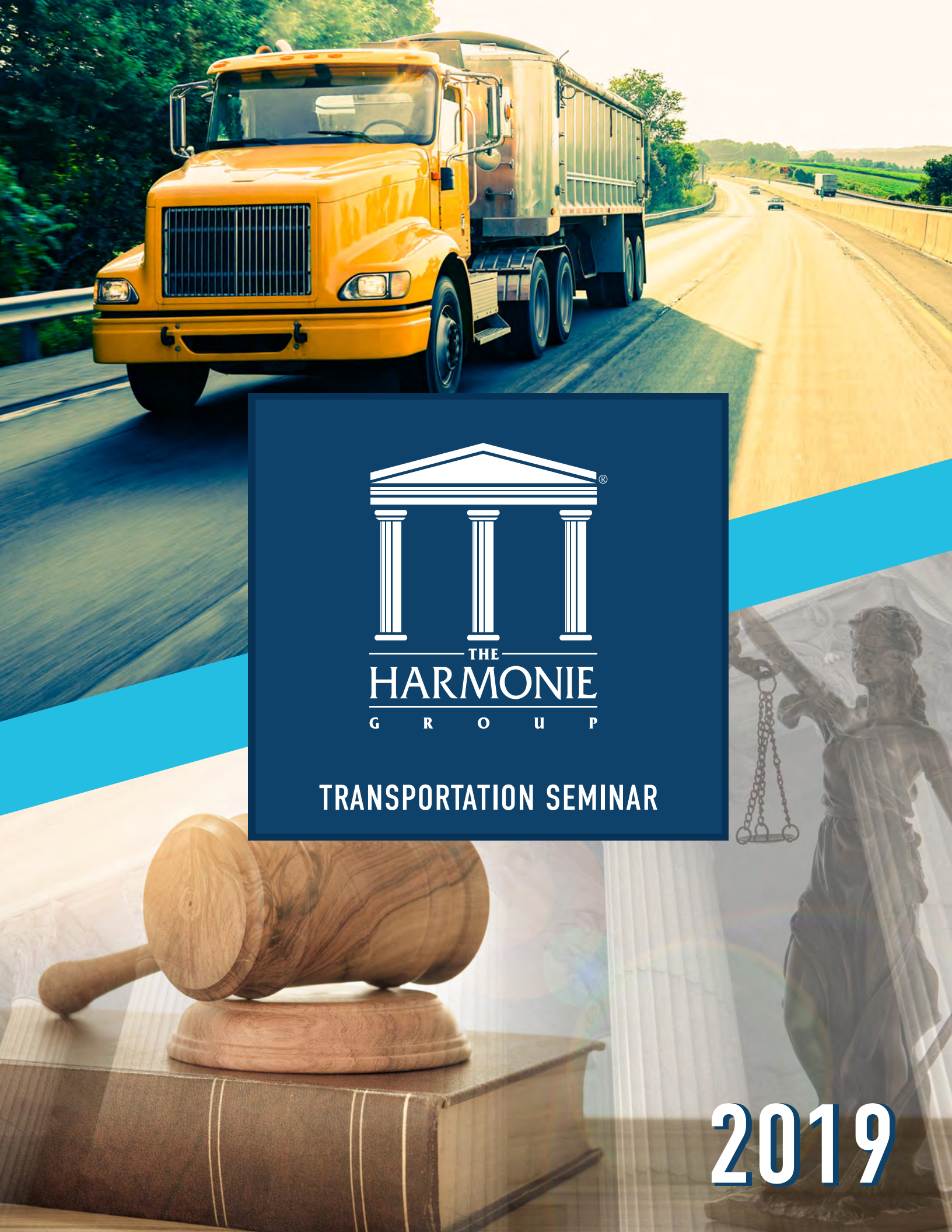

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2019

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DETANGLING LIABILITY IN RIDESHARING ACCIDENTS

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I. Introduction

In 2014, there were approximately 160,000 active Uber drivers in the U.S.[1] By 2019 there were more than 2,000,000 Uber drivers worldwide.[2] Uber has become a global service providing roughly 15 million rides per day across 500 cities, and international markets are growing as fast as ever. So, if Uber is completing 15 million rides per day (worldwide) with 2 million drivers, that means there are 7.5 passengers per driver – on average. With more ridesharing drivers on the road, it is safe to assume that the number of motor vehicle accidents involving ridesharing drivers will increase at a similar rate. As accidents involving ridesharing drivers become more common, finding the correct way to allocate liability between drivers and ridesharing companies for injuries caused in car accidents will become a pressing necessity. Defining the relationship between a rideshare driver and rideshare coordinator, like Uber or Lyft, will have a significant impact on the ultimate allocation of liability for injuries that occur in the ridesharing context. However, there are legal theories that could result in a coordinator being held liable for injuries caused by driver, regardless of how the relationship between driver and coordinator is defined. Legal theories exist that could impose liability directly on the coordinator, but the legal status of the relationship between drivers and coordinators is still of primary importance. This paper will explore how the relationship between the ridesharing driver and ridesharing coordinator can impact how liability is allocated in the event of any injury. Furthermore, this paper will outline the principles that support holding a ridesharing company responsible for the torts

[1] Artyom Dogtiev, *Uber Revnue and Usage Statistics 2017*, Businesss of Apps (Jan. 9, 2018), http://www.businessofapps.com/data/uber-statistics/, (last visited April 17, 2018).
[2] *Id.*

committed by associated drivers. Lastly, this paper will explore a variety of legal theories that could be used to assert claims directly against ridesharing companies in the event one of their drivers harms a ridesharing customer or a third-party.

II. Relationship of the Rideshare Driver to the Rideshare Coordinator

Unsurprisingly, the various parties involved in this relationship take different approaches to defining and describing the interplay between a ridesharing coordinators and drivers. For instance, Uber refers to its drivers as "Partners," emphasizes the flexibility provided to "Partners," and insists drivers are independent contractors.[3] Conversely, drivers seeking the enhanced protections that come with being classified as an employee, or injured parties hoping to establish a coordinator's liability for an injury caused by a driver, focus heavily on the control coordinators exercise over drivers. While the issue of defining the relationship between drivers and coordinators in the employment law context has been frequently litigated and considered by courts, few rulings have been issued on this question as a matter of tort law.[4] The lack of case law on this issue is likely attributable to quick settlement of tort cases brought by third-parties, and the arbitration provisions passengers are generally subject to. However, as ridesharing moves from a novel, disruptive technology to a commonplace fact of life, we expect to see this question arise more frequently.

The positions taken by ridesharing operators in prior legal disputes over how drivers should be classified for the purposes of employment law give insight into the arguments that ridesharing companies and injured parties are likely to make in the tort context. When these employment questions have been litigated, coordinators typically seek to distance themselves from the transportation aspect of their operations.[5] Companies like Lyft and Uber have argued they are merely "technology companies" that allow independent drivers to connect with people who need a ride. Some operators go so far as to describe the service they provide as being more like that of a phone book than a transportation service. By casting themselves as mere facilitators, coordinators aim to avoid the legal liabilities attached to operating as a transportation company, including liability for injuries caused by rideshare drivers.

Arguments from ridesharing coordinators aimed at persuading courts their companies are more like a technology company, such as eBay, than a traditional taxi service have not been well received. Two Courts in the Northern District of California that considered the issue of the employment classification of rideshare drivers found Uber and Lyft's mere "technology company" arguments to be "fatally flawed" and "obviously wrong."[6] In reaching the conclusion that rideshare drivers are entitled to the protections afforded to employees, these Courts relied on many of the same factors that prospective plaintiffs are likely to point to, such as the detailed instructions operators provide to drivers on how to conduct themselves, and the fact that drivers are essential to operators generating revenue.[7]

III. Vicarious Liability for Injuries Caused by Rideshare Drivers

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[3] Agnieszkja A. McPeak, Regulating Ridesharing Platforms Through Tort Law, 39 Hawaii L. Rev. 347, 364 (2017).
[4] See e.g., Ashley L. Crank, *O'Connor v. Uber Technologies, Inc.*: *The Dispute Lingers – Are Workers in the On-Demand Economy Employees or Independent Contractors?*, 39 AM. J. TRIAL ADVOC. 609 (2016).
[5] See, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015); *O'Connor v. Uber Techs.*, *Inc.*, 82 F. Supp. 3d 1133,1136 (N.D. Cal. 2015).
[6] *Id.*
[7] *Id.*

As briefly mentioned above, the classification of ridesharing drivers is of primary importance to the question of the apportionment of liability between drivers and ridesharing companies. The answer to the question of how ridesharing drivers are classified is important though not wholly determinative of the issue of whether ridesharing coordinators can be held liable for torts committed by associated drivers. This is because if ridesharing drivers are routinely held to be employees for the purposes of tort law, it will be significantly easier to establish that the ridesharing operator is vicariously liable for injuries caused by drivers.[8] Typically, the third-party held accountable for someone else's tort is a company that employs the tortfeasor. The tort theory supporting this use of vicarious liability is that it allows for better allocation of risk and cost of injuries between companies, employees and injured third-parties. To better understand the contours of the debate surrounding the apportionment of liability in the ridesharing context, it is necessary to look at the general principles governing the questions surrounding vicarious liability and worker classification. This examination will begin with an explanation of the differences between employees and independent contractors, followed by a brief overview of the tests employed by courts when tasked with making this distinction.

A. Employee vs. Independent Contractor

Simply put, for an employment relationship to exist, the purported employer must have a right to control methods and means by which an employee accomplishes the tasks assigned by the employer. If a company exercises sufficient control to justify imposing the employee classification on workers, then the company will be responsible for injuries caused by the employee in the course and scope of the execution of the employee's duties. Conversely, an independent contractor is a person who is assigned a job to complete, but who is not specifically instructed on *how* to do the job. Contractors are merely provided with what needs to be accomplished and the payment for completing the task. Given that, ostensibly, hiring parties have less control over the actions of an independent contractor than over the actions of an employee, there is less reason to hold hiring parties responsible for the actions of a contractor. The differences between employees and contractors can also be understood by considering where the control over the relationship is found. In the context of an employer/employee relationship, the employer is recognized as having the authority to control the employee's actions. Conversely, a contractor is subject only to the terms of the agreement with the hiring party, not the hiring party's whims over how to complete the agreed upon tasks.[9]

B. The "Control Factors" Test.

While control is the primary consideration in worker classification questions, stating that control is the determinative issue provides little guidance on how to analyze specific relationships. In an effort to clarify the consideration of the question of control, the Supreme Court has analyzed twelve factors relevant to this inquiry.[10] These factors are:

1. The skill required to complete the task;
2. which party provides the tools necessary to complete the work;
3. where the work is done;
4. how long the relationship between the parties will continue;
5. which party has discretion over when and how long the hired party works;

[8] Vicarious liability is the legal concept that permits third-parties to be held liable for the tortious acts of others.
[9] It is important to point out that a contractor's actions can be used as a basis for establishing vicarious liability to the same extent as an employee if the tortious actions of the contractor were controlled by the hiring party.
[10] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

6. whether the hiring party is permitted to assign additional tasks to the worker;
7. the method used to issue payment;
8. the hiring party's role in providing assistants to the hired party;
9. whether the task accomplished by the worker is part of the hiring party's regular business;
10. whether the hiring party is a company or business, as opposed to an individual;
11. whether the worker receives benefits; and
12. the tax implications related to the hired party.[11]

These factors can be useful to determine whether sufficient control exists to establish an employee-employer relationship, but they are not the only relevant factors. Other facts courts may consider are the understanding between the parties, and whether the worker is held out to the public in a way that makes them appear to be associated with the hiring party.[12] While the expanding lists of factors can be useful, the large number of factors to be analyzed has led to inconsistent results, which has in turn lead some to the conclusion that the multi-factor analysis "begs the question of employee status as much as answers it."[13]

Courts considering these factors in the ridesharing context have often focused on the fact that ride sharing companies depend entirely on drivers for the business models to succeed.[14] Additionally, the fact that some ridesharing companies have a policy of suspending drivers if they too frequently decline fares supports the notions that drivers do not have an unrestrained degree of control over when and how much they work while logged-in to a ridesharing application. However, given that most other "control" factors weigh against the existence of an employment relationship, and the lack of uniformity in the application of the control factor test, it is unclear if courts are likely to uniformly hold that an employment relationship exists between companies like Uber and its drivers.

C. Additional Considerations for Establishing Vicarious Liability

In the event an employment relationship is found, only the first step of establishing vicarious liability through the *respodeat superior* theory has been accomplished. The second prong of holding a company liable for the tortious acts of an employee requires that the employee be within the "course and scope" of their work at the time the injury is caused. In the ridesharing context, the question of whether a driver can be considered to be within the course and scope of their job is complicated by the different "Periods" of a ridesharing transaction.

The acts of ridesharing drivers can be split into three Periods. The Period in which an incident occurs can have significant impact on the probable division of liability due to the differing degrees of involvement of the coordinator during each Period. For instance, Period 1 is the time where the driver does not currently have a fare, but has their ridesharing application running. Period 2 is the time when the driver has matched with a rider and is driving to the pickup location. Finally, Period 3 is the time where the driver is taking their passenger to their pre-selected destination. While a convincing argument can be made that a driver is within the course and scope of the work they are doing on behalf of a ridesharing service during Periods 2 and 3, it is less clear that injuries that occur during

[11] *Id.*
[12] See Restatement 2d of Agency § 220(h).
[13] David Weil, Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation No. 2015-1 at 2 (2015).
[14] See, *O'Connor v. Uber Techs., Inc.* 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015).

Period 1 can be in any way attributed to the ridesharing coordinator. This is because during Period 1, drivers are free to go where they like, with no input from the coordinator.

IV. Imposing Liability Directly on Ridesharing Coordinators.

Even in the event that the determination is made that ridesharing drivers are independent contractors, there are still a number of ways that a ridesharing coordinator can be held liable for the injuries caused by a driver. The most likely methods for bringing direct claims against ridesharing companies are discussed in the following sections of this paper. One of the most obvious methods of imposing liability directly on the ridesharing company are claims against the ridesharing coordinator for its own negligent acts that can be casually linked to an injury.

a. Direct Liability for Negligent Hiring and Retention

Even in a jurisdiction where ridesharing drivers are deemed independent contractors, ridesharing companies are not wholly protected from liability. This is because companies have a duty to exercise reasonable care in their hiring and retention practices, even where independent contractors are involved. Under a theory of negligent hiring, supervision, and retention, a plaintiff may be able to hold a ridesharing company directly liable if they can prove that an unfit worker caused an injury and the hiring party was negligent in the hiring, training, supervision or retaining of the tortfeasor. The plaintiff asserting such a claim also has the burden of proving that the hiring party knew or had reason to know of a specific risk of harm or hazard and that specific risk of harm resulted in an injury.[15]

Ridesharing companies have encountered legal problems with respect to their public representations regarding hiring practices. Importantly, these issues related to the "safety" of a company's hiring practices are wholly independent from the employee/independent contractor question. In the past, Uber and Lyft frequently touted their "industry leading background checks" for drivers but ultimately these claims created problems when it was revealed that the safety check performed on drivers were not as thorough as advertised.[16] Specifically, Uber paid $28.5 million to settle claims related to its practice of charging drivers "safe rides fees" in response to allegations that the charge was misleading.[17] Uber also agreed to stop its use of the phrase "the safest ride on the road" and stop referring to its background check process as "the gold standard."[18] Lyft was faced with a similar situation when it was sued by state prosecutors in California over the language used to describe the safety of its services.[19]

b. Negligent Hiring Claims Based on Criminal Acts Committed by Ridesharing Drivers

In perhaps the most high-profile example of a negligent hiring claim brought against a ridesharing company, two women sued Uber after being sexually assaulted by rideshare drivers.[20] In *Doe v. Uber Techs., Inc.*, the Court held that both Jane Doe plaintiffs sufficiently pled claims against Uber for fraud arising from claim that the women relied on Uber's statements regarding driver safety when they accepted rides from the two Uber drivers involved.[21] However, the Court dismissed one of

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[15] See, Restatement 2d of Agency § 213.
[16] Ellen Huet, Joel Rosenblatt, *Uber to Pay $28M to Settle Claims over Its 'Safe Rides Fee',* INSURANCE JOURNAL (Feb. 12, 2016), https://www.insurancejournal.com/news/west/2016/02/12/398528.htm.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Doe v. Uber Techs., Inc.*, 184 F.Supp. 3d 774 (N.D. Cal. 2016).
[21] *Id.*

the plaintiffs' negligent hiring, supervision, and retention claims based on the fact that the driver who committed the assault had been in the U.S. for less than three years, and there was no information available to Uber to put them on notice of a specific risk of the driver committing a criminal act.[22] Ultimately this case was settled for an undisclosed amount after the majority of the plaintiffs' claims remained intact after Uber's 12(b)(6) motion.

The *Doe v. Uber* case displays the risks ridesharing coordinators must deal with and the challenges plaintiffs will face with regard to negligent hiring and retention claims. One of the major appeals of the ridesharing model is that it is quick and easy to become a driver. This aspect of the business plan of ridesharing operators could quickly be placed in jeopardy if the background checks required to become a driver became more expansive and expensive. Companies like Uber have long resisted calls to impose a background check that includes fingerprinting prospective drivers, in part because it would place a hurdle into the simple process of becoming a driver.[23] However, this hiring model poses a significant risk because limiting background checks to a name-based search increases the likelihood that prior crimes or other red-flags will be missed.

Conversely, given that ridesharing operators do take some precautions to ensure the safety of their drivers, plaintiffs asserting negligent hiring claims will often face an uphill battle in establishing the "knew, or should have known, of specific risks" aspect of the claim. This is because if the risk posed by a potential driver's criminal history or driving record is sufficiently well concealed, the plaintiff will be unable to establish that the information was reasonably available to the ridesharing operator. This defense is essentially how Uber was able to have one of the negligent hiring claims asserted against it dismissed in the *Doe* case.[24]

c. Negligent Hiring, Training, or Retention Claims Based on Bad Driving, Mechanical Issues, or Intoxicated Driving

Criminal assaults by drivers are a rare, albeit very serious, occurrence. A more common factual scenario that may allow for imposing direct liability against a ridesharing coordinator arises from car accidents that could be attributable to predictably bad driving, or mechanical failure that could have been avoided. The vehicle eligibility requirements for most ridesharing companies are typically quite minimal, though some cities have imposed stricter inspections to ensure that vehicles are safe for the road.[25] Generally, a prospective driver's vehicle must pass a cursory inspection, which is aimed at making sure all safety features on the vehicle, such as taillights and seatbelts are functioning. Similarly, ridesharing companies generally do not require that their drivers show they possess advanced ability behind the wheel, rather they merely require that those signing up not have an extensive or recent history of bad driving. Given the relatively relaxed benchmarks to become a ridesharing driver, there is an opening for plaintiffs injured in auto accidents with ridesharing drivers to argue that the ridesharing coordinator will be responsible for some portion of the cost of those injuries. Specifically,

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[22] *Id.*

[23] Robert Burnson, *Uber Tells Judge Not to Trust Cab Companies in Battle Over Safety*, INSURANCE JOURNAL (May 13, 2016), https://www.insurancejournal.com/news/west/2016/05/13/408431.htm.

[24] See, *Doe v. Uber Techs., Inc.*, 184 F.Supp. 3d 774 (N.D. Cal. 2016).

[25] *Does my vehicle need to get inspected*, UBER, https://help.uber.com/h/373c9b72-b09d-4604-876b-d8ce203a9b49. Also, it should be noted that Uber now uses different quality classifications for vehicles and drivers, which correspond to the price of a given trip. UberX is the easiest level to qualify a vehicle for, while UberBlack has a demanding vehicle qualification standard. UberBlack also uses professional drivers who have commercial licenses. Jonathan V. Hall & Alan B. Krueger, An Analysis of the Labor Market for Uber's Driver-Partners in the United States 16-17 (Princeton Univ., Indus. Relations Section, Working Paper No. 587, 2015).

when the injuries can be tied to an obvious mechanical problem, or the recurrence of a known bad driving habit.

Additionally, there is some indication that ridesharing companies have struggled to adequately combat risks associated with intoxicated or impaired driving. Last year Uber reportedly faced over $1 million in fines imposed by California state regulators related to failure to adequately investigate reports of drunk driving that came from Uber customers.[26] An investigation by the California Public Utilities Commission, which is responsible for regulating ridesharing companies, found that out of 154 customer complaints related to intoxicated drivers, Uber had failed to adequately investigate or suspend the driver quickly enough in 151 instances.[27] In the event a person is injured by a driver that a ridesharing company has reason to know is currently intoxicated, or who has been reported for that problem in the past, that injured person would have a strong negligent retention claim that could be asserted against the company. Whether the driver is considered to be an employee or contractor, if the ridesharing company allows a driver to continue transporting customers while intoxicated, that company will bear some responsibility for injuries caused by such a driver. Currently, ridesharing companies place the responsibility of reporting intoxicated driving on customers, which should result in an immediate suspension of the driver and follow up investigation of the report. However, as revealed by the investigation of the California Public Utilities Commission, these mandatory suspensions and investigations do not always occur.[28]

d. Common Carrier Liability

While ridesharing coordinators have taken pains to create circumstances that will make it more difficult for injured parties to hold ridesharing companies liable under vicarious liability theories, other available theories could support recovery even where vicarious liability is not available. Specifically, injured parties could argue that ridesharing platforms are essentially modern day common carriers and as such, owe a heightened, nondelegable duty of care to ensure the safety of passengers. Generally, a common carrier is a company who offers transportation services to the general public. While some states have done away with the common carrier distinction, in other jurisdictions this theory can, and has, been used to effectively argue that ridesharing companies owe a heightened duty to customers.

In the *Doe v. Uber* case, the Court held that the Plaintiffs had alleged sufficient facts to proceed with their claims that alleged Uber was a common carrier at the time they sustained their injuries.[29] The *Doe* Court also noted that Uber's liability under this theory was unrelated to the question of whether the driver was an employee or a contractor, because liability arose from the company's alleged failure to meet its duty to protect passengers from harm.[30] Thus, plaintiffs in jurisdictions where common carrier claims are still available may be able to establish liability far more easily than in jurisdictions where this theory has been abolished. However, it should be noted that some states, namely Florida, have specifically excluded ridesharing companies from the definition of a common carrier foreclosing this approach to pursuing recovery directly from a ridesharing company.[31]

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[26] Steven M. Sweat, Legal Ramifications of Uber Ignoring Drunk Driver Complaints, National Law Review (April 20, 2017), https://www.natlawreview.com/article/legal-ramifications-uber-ignoring-drunk-driver-complaints, (last visited April 13, 2018).
[27] *Id.*
[28] *Id.*
[29] *Doe v. Uber Techs., Inc.*, 184 F.Supp. 3d 774 (N.D. Cal. 2016).
[30] *Id.*
[31] Florida Statute § 627.748.

V. Conclusion

Attorneys who plan to incorporate ridesharing cases into their practice have a plethora of legal theories that will need to be considered. Given that there is little case law to provide guidance on how courts are likely to analyze cases involving ridesharing, it will be incumbent on the attorneys working cases in this field to pursue all available legal theories. Whether from effective arguments against imposing vicarious liability on ridesharing operators or the establishment of a novel theory of recovery in ridesharing cases, there will be a tremendous amount of precedent set in this field in the coming years. Attorneys who make it a point to stay informed on developments in this area of the law will be well positioned to handle the eventual influx of cases that will correspond to the increased use of ridesharing services.

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PROTECTING PREVENTABILITY DETERMINATIONS

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Many motor carriers conduct preventability determinations following an accident in order to determine what happened, why, and whether the accident could have been prevented. While preventability determinations are not specifically required by the Federal Motor Carrier Safety Regulations, the regulations do generally require that motor carriers have systems, policies, programs, practices, and procedures in place to ensure compliance with applicable safety regulations, and to reduce the risk of highway accidents. Many carriers view preventability determinations as one of the ways to do that.

Another laudable goal of conducting a preventability determination is to avoid similar accidents from occurring in the future. Motor carriers are able to identify, educate, retrain, and/or discipline drivers as appropriate. This self-analysis can also help the company prevent future accidents from occurring by improving equipment, maintenance or internal procedures. Presumably, the ultimate goal of performing post-accident preventability determinations is to reduce the frequency of accidents, the severity of injuries to persons or property, and to improve the overall level of safety for the carrer's trucking operations.

However, regardless of the underlying reasons that prompt a motor carrier to conduct preventability determinations, a potential "catch 22" arises when the possibility of future litigation is factored in by the carrier. If it determines that the accident was in fact "preventable", does that immediately doom its lawyers from disputing legal liability in the future if a lawsuit is filed? Similarly, if the person performing the preventability determination has the threat of future litigation - and his own possible testimony - lingering in the back of his mind prior to reaching a conclusion, could that prejudice the findings? If so, the company's goal of improving safety operations may be thwarted. Allowing these determinations to become discoverable and/or admissible in litigation can unfortunately create a substantial chilling effect on a carrier's safety operations, thereby actually decreasing the level of safety for the travelling public as opposed to increasing it. Unfortunately, some courts have permitted the discovery and/or admissibility of preventability determinations. This article explores arguments counsel can make in order to protect preventability determinations from disclosure in litigation.

I. Relevance Under Rules 401 and 403

Federal Evidence Rules 401 and 403 (and/or their state law counterparts) are the starting points for protecting preventability determinations from disclosure. The test for whether evidence is "relevant" under Rule 401 is simply if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Even if evidence is relevant, Rule 403 provides for the exclusion of relevant evidence in certain circumstances. It holds in part:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury . . .

It can be argued that preventability determinations are not relevant under Rule 401, and that even if they are relevant, they should be excluded under Rule 403 based on the danger of unfair prejudice, confusing the issues, and/or misleading the jury.

In making these arguments, it is crucial to point out the differences in the standard used by the motor carrier in making the preventability determination, versus the standard used by the jury to find negligence. The Restatement Third of Torts defines negligence as a failure to "exercise reasonable care under all the circumstances." Restatement 3d of Torts § 3. The Restatement further explains that reasonable care is "conduct that shows 'ordinary care,' conduct that avoids creating an 'unreasonable risk of harm,' and conduct that shows 'reasonable prudence." State definitions of negligence will invariably use similar language. However, the National Safety Council, the American Trucking Association, and the Federal Motor Carrier Safety Regulations each have a different definition of "preventable" than the law uses for "negligence".

The National Safety Council states that a "preventable collision is one in which the driver failed to do everything that reasonably could have been done to avoid the accident." This definition seemingly requires a truck driver to anticipate driving errors and carelessness of other drivers. In fact, it may also include accidents where the truck driver's actions were not even a proximate cause of the accident. The emphasis is not on the truck driver's affirmative actions that caused the accident, but rather on what the driver could have done to avoid the accident.

The American Trucking Association defines preventability as follows: "Was the vehicle driven in such a way to make due allowance for the conditions of the road, weather, and traffic and also to assure that the mistakes of other drivers did not involve the driver in a collision?" Under this definition, the truck driver is required to *assure* that the road conditions, the weather, and the mistakes of other drivers do not cause him to be involved in an accident. Again, this is a much more exacting standard than that of "reasonable care" typically seen for negligence.

Finally, Part 385.3 of the FMCSR defines a preventable accident as "an accident . . . that could have been averted but for an act, or failure to act, by the motor carrier or the driver." This standard is less demanding than those set forth by the NSC or the ATA with respect to the driver's actions. However, it still does not appear to require an affirmative negligent act by the driver and again focuses on defensive driving by the truck driver. This also potentially requires the anticipation of other drivers' negligence by the truck driver. Presumably if any outside force (weather, road conditions, other drivers, etc.) was a cause of the accident, then the accident would not be preventable.

Accordingly, the various definitions for a "preventable accident" used by the sources referenced above, and perhaps even a motor carrier's own unique definition of preventability, can exceed and differ from the tort standard for negligence. An accident determined to be preventable may not necessarily be due to a driver's negligence. Clearly these definitions focus on defensive driving concepts – not on legal tort liability. Therefore, it is crucial to find out what definition (if any) was used by the carrier. The closer the definition is to the common law definition of negligence, the more likely it will be that the determination is admitted into evidence. Conversely, the more it differs from common law negligence, the better the chance of it being excluded due to relevance, unfair prejudice, confusion of the issues, and misleading of the jury.

As might be expected, courts have come down on both sides of whether preventability determinations should be admitted into evidence based on Rule 401 and 403 challenges. For example,

in *Villalba v. Consolidated Freightways Corp*., 2000 U.S. Dist. LEXIS 11773, the defendant moved to exclude three documents created during the company's post-accident review analysis, including its preventability determination. The court found that analysis and determination inadmissible under Rule 403. Of significance to the court was the standard of preventability used by the defendant. The court noted the difference between the carrier's standard and the state's negligence standard. The defendant carrier used the more stringent standard used by the National Safety Council cited above to determine preventability, and noted that the NSC's preventability standard was not solely based on, or determined by, legal liability. Accordingly, the court acknowledged the differences in the two standards and agreed that the jury could be confused or misled by the differences and the significance (or perhaps, insignificance) of the preventability determination.

Similarly, *Tyson v. Old Dominion Freight Line, Inc.,* 270 Ga.App. 897 (2004), addressed the discoverability of the defendant company's preventability finding. The company's standard depended on whether or not the driver could have done anything to prevent the collision, and not simply whether its driver obeyed traffic laws. Furthermore, the standard specifically stated that responsibility for accidents was based on whether the accident was preventable, and not on who was at fault. It stated that responsibility to prevent accidents went beyond careful observance of traffic rules and regulations, and that drivers must drive in a manner to prevent accidents, regardless of the other fellow's faulty driving. . ." *Id.* at 897-8. The preventability standard also stated that it was for internal purposes only. *Id.* Like the court in *Villalba*, the *Tyson* court noted that Old Dominion's definition of preventable was different from the standard of liability, and upheld the trial court's ruling barring discovery of the determination. *Id.* at 901. See also *Cockerline v. Clark*, 2013 N.J. Super. Unpub. LEXIS 2446, 21-22 (N.J. Super. 2013) (holding that the preventability determination was inadmissible because it was "a matter entirely separate from the circumstances of the accident itself" and would only confuse and mislead the jury.)

It is clear that the specific definition of "preventable" used by a motor carrier is a critical factor in supporting an argument that the determination is inadmissible because it is irrelevant, unfairly prejudicial, or risks confusing or misleading the jury.

II. Public Policy / Self-Critical Analysis Doctrine

Public policy arguments and the self-critical analysis doctrine are two additional arguments that defense counsel can make to protect preventability determinations. As stated previously in this article, the admission of preventability determinations can have a significant chilling effect on a motor carrier's willingness to be wholly objective and without bias in its post-accident analysis. Worse yet, a carrier might decide to forego preventability determinations entirely if it fears their impact on litigation. Either way, the safety of the public can be negatively affected. The societal benefits of motor carriers investigating, evaluating, and analyzing their accidents without fear of future legal implications cannot be understated.

The self-critical analysis doctrine is grounded on similar concerns. It is based "on the premise that 'disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law," *Morgan v. Union Pacific R.R. Co.,* 182 F.R.D. 261, 264 (N.D, Ill. 1998) (quoting *Sheppard v. Consolidated Edison Co.,* 893 F. Supp. 6, 7 (E.D.N.Y. 1995). The requirements of the self-critical doctrine are: (1) the information sought resulted from a critical self-analysis undertaken by the party seeking protection; (2) the public has a strong interest in preserving the free flow of the type of information sought; (3) the information is of the type whose

flow would be curtailed if discovery were allowed; and (4) the document was prepared with the expectation it would be kept confidential, and has in fact been kept confidential. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992); *Morgan* at 266.

Strong arguments exist supporting the application of the self-critical analysis doctrine to preventability determinations. Factors (1) and (4) appear to be easily satisfied under the requirements, as preventability determinations are certainly a "critical self-analysis" and typically kept confidential. Additionally, the same arguments regarding a potential chilling effect and negative effect on motor carriers' safety operations can be made to support and establish factors (2) and (3). While this doctrine may not be recognized in every jurisdiction, it has been used to successfully exclude evidence related to the preventability conclusions reached by a motor carrier's Accident Review Board. *Harper v. Griggs* (W.D. Ky. 2006) 71 Fed. R. Evid. Serv. 227. In doing so, the *Harper* court cited *Granger v. Nat'l R.R. Passenger Corp.,* 116 F.R.D. 507 (E.D.Pa. 1987) and set forth the rationale for the doctrine. Specifically, *Granger* explained that "[o]ne of the purposes of the doctrine is to prevent a "chilling" effect on self-analysis and self-evaluation prepared for the purpose of protecting the public by instituting practices assuring safer operation." *Id.* at 509. Ultimately, the *Harper* court held that factual statements in the preventability determination were admissible, but protected all "thoughts, analyses, inferences, deductions . . . recommendations, changes in policy, or employment decisions" contained in the motor carrier's report. *Harper* at 227.

III. Subsequent Remedial Measure – Rule 407

The exclusion of preventability determinations under the subsequent remedial measure rule can be challenging because courts often view post-accident determinations as the analysis of an event, and not a true subsequent remedial measure. However, exclusion under Rule 407 can nevertheless be pursued under the right circumstances. Rule 407 states:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury less likely to occur, evidence of the subsequent measure is not admissible to prove negligence…

In *Martel v. Massachusetts Bay Transp. Auth.*, 403 Mass. 1, 525 N.E.2d 662 (1988), a plaintiff was run over by a bus operated by the defendant. The defendant conducted an investigation and concluded the accident could have been prevented by the bus driver. The court agreed that the opinions resulting from the investigation were not admissible under Rule 407. The court reasoned that while there was no "repair" of a dangerous condition, as typically seen in subsequent remedial measures, a prerequisite to any such repair is an investigation to determine the cause and how to prevent future similar occurrences. *Id.* at 664. Other cases in non-transportation contexts similarly find post-incident analyses to be inadmissible. For example, the Third Circuit applied Rule 407 to exclude a safety memo pertaining to the injury of a deckhand on a ship. *In re Complaint of Consolidation Coal Co.*, 123 F. 3d 126 (3rd Cir. 1997). The safety memo assessed causation and cautioned employees to be more careful. The court ruled that authority did exist which supported the exclusion of evidence of post-accident investigations under Rule 407. *Id.* at 136. See also *Specht v. Jensen,* 863 F.2d 700 (10th Cir. 1988) (holding that a press release summarizing the findings of an investigation of police officers accused of civil rights violations, including conclusions that the officers exercised poor judgment and that disciplinary action would be taken, was inadmissible.)

Ultimately, Rule 407 may be more successful in excluding portions of a preventability determination that discuss procedures or actions to be taken after an accident, as opposed to a motor carrier's conclusion of whether an accident was preventable or not.

IV. Conclusion

Perhaps the most critical factor in protecting preventability determinations is the standard and definition used by the motor carrier in finding preventability. Case law suggests that having a standard which is different (and more demanding) than the legal definition of negligence results in better odds of excluding the preventability determination from admissibility. Carriers should have written standards for preventability, state that the preventability determination is for internal use only, and state that an adverse finding is not to be equated with legal liability. Other arguments such as public policy, the self-critical analysis doctrine, subsequent remedial measures under Rule 407, and perhaps others, can also be used depending on the jurisdiction and circumstances.

Preventability determinations can be an excellent method of improving a motor carrier's safety performance. However, the carrier must be allowed to conduct post-accident investigations without fear of the resulting impact on liability or exposure for the company. Defense counsel should have a thorough understanding of how and why a carrier's preventability determinations are performed, and the best arguments and trends in litigation for protecting them from discovery and admissibility.

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THE ELD MANDATE: WHAT IT MEANS FOR TRUCKING COMPANIES

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The Federal Motor Carrier Safety Administration (FMCSA) published the Electronic Logging Device rule, better known as the ELD (Electronic Logging Device) Mandate, in 2015. The final deadline for fleets to comply with published specifications, including those equipped with AOBRDs (Automatic On-Board Recording Devices) is just around the corner—December 16, 2019. By this date all vehicles subject to the mandate must be equipped with certified and registered devices.

Several studies showed that driver fatigue was the primary cause of trucking accidents. Although the FMCA had Hours of Service (HOS) regulations that limited how many hours a driver can drive daily, those number were recorded on paper by the driver and could be easily manipulated. Often, drivers drove more than they were permitted, got tired and were involved in avoidable accidents. In 2012, Congress enacted the "Moving Ahead for Progress in the 21st Century" bill, which included a provision requiring the FMCSA to develop a rule regarding the implementation of electronic logging devices. In balancing the costs to trucking companies with the safety of its drivers and the general public, the FMCSA mandated that ELDs be utilized to replace paper logbooks. ELDs are made to be tamper-resistant and automatically log information from the vehicle's engine. ELDs document duty status, as well as time and duration of operation among other valuable information. According to the FMCSA, though the estimated cost is approximately $2 billion, ELDs will prevent 1,844 crashes, 562 injuries and save 26 lives annually.

It should be noted that not every driver must comply with the ELD mandate. As a general rule, if a driver maintains a Record of Duty Status (RODS), he is required to utilize ELDs. Exemptions include drivers who conduct tow-away operations where the vehicle driven is the item being delivered, vehicles that have pre-2000 engines, and short-haul drivers who are not required to maintain RODS.

ELDs do far more than record RODS, they also monitor Driver Vehicle Inspection Reports (DVIR), IFTA automation, as well as record driver behavior such as idling and hard braking events. Utilizing that data, carriers can create internal policies that check for such events and censure and correct driver behavior before an accident takes place. The majority of ELD systems on the market utilize route guidance solutions that assist drivers around high traffic areas, construction, or major accidents, increasing productivity and communication with dispatch teams. As data is being collected in real time, fleet managers can alert drivers of upcoming HOS violations before they become an issue. Fleet managers can also ascertain whether certain fault code in vehicles necessitates early inspection and preventative maintenance before vehicles break down or create a safety risk. When used to its fullest potential, data pulled from ELDs can be used as a prophylactic against a host of violations both in driver behavior and mechanical breakdown—two large cost factors for any fleet.

The ELD Mandate is not without its detractors. Drivers have been vocal about Big Brother watching their actions and taking away from the freedom of the roadways which may have initially attracted them to the job. Some drivers argue that ELDs may increase accidents as drivers feel a need to rush to the final destination before they are pushed into a mandatory break. In order to

dispel such misinformation, proper policies, training, and transparency is necessary as between fleet management and its drivers.

ELD devices are the responsibility of drivers, therefore proper training is critically important. Drivers need to know that the data is not being shared with third parties or the government—the data is logged and reviewed by their fleet family only and for their benefit and the safety of other drivers in mind. Drivers must know that because the data pulled from ELDs need to be reliable, devices are not to be tampered with or disconnected at any time, and that there are serious penalties regarding same. If there is a malfunction of the ELD, the device must be repaired within eight days—accordingly the driver must alert management of an issue with any ELD device immediately.

Drivers and carriers found to be using unauthorized ELDs will be considered to have "no record of duty status." Drivers who cannot produce or transfer data from an ELD when asked by an authorized enforcement official will be cited for having "no record of duty status." Drivers who indicate a special driving category on their ELD when not involved in that activity will be cited for having false driving logs. Drivers and trucks can be placed out of service for up to 10 hours for each violation in the guidelines—that time adds up quickly. Non-compliant drivers will also face fines issued by state enforcement agencies that handle roadside inspections—the amounts vary by state but can cost anywhere between $90.00 – over $200.00 per citation. Fleets found in consistent violation could face a federal investigation.

The FMCSA's website lists over 100 certified ELD providers. Although not an exhaustive list, the following presents the minimum requirements of feature and functions of ELDs pursuant to the FMCSA:

	ELD Feature or Function
	Provides separate accounts for drivers and administrative (non-driver) ELD users
	Has "integral synchronization" with the engine control module to automatically record engine power status, vehicle motion status, and other data
	Automatically records all driving time and at intervals of 60 minutes. Records date, time, location, engine hours, vehicle miles, and driver identification
	Records location with an accuracy of one-mile radius during on-duty driving periods
	Reduces location accuracy to a 10-mile radius when vehicle is used for authorized personal use
	ELD time is synchronized with UTC (coordinated universal time)
	Retains data for the current 24-hour period and the previous 7 consecutive days
	Prevents tampering; does not allow anyone to alter or erase information originally collected for driver ELD records
	Requires driver to review unidentified driver records – and either acknowledge assignment of this driving time, or indicate that the records do not belong to the driver

	Allows a driver to obtain a copy of his/her ELD records on demand – either through a printout or electronic file
	Supports one of two options for electronic data transfer: • Telematic type: using wireless web services or email • Local transfer type: using USB2.0 or Bluetooth
	Displays all required standardized data to authorized safety officials on demand – through a screen display or printout that includes three elements: a daily header, graph grid showing driving duty status changes, and detailed daily log data. The graph grid, if printed, must be at least 6 inches by 1.5 inches
	Requires driver certification and annotation (written explanation) for any edits to records that are made by the driver or any other ELD user
	Requires certification of driver records at the end of each 24-hour period
	ELD provider furnishes user's manual, instructions for handling malfunctions and record-keeping during malfunctions, and instructions for transferring ELD hours of service records to safety officials
	Volume control or mute option for any audio feature

Regulations regarding ELDs will continue to change as technology alters the landscape of the trucking industry. Training and transparent communication between fleet management and drivers is vital to ensure that everyone is working towards the common goals of safety and efficiency while operating within a changing regulatory environment.

Data pulled from ELDs coupled with driver feedback can be utilized to calibrate best practices that redirects undesirable driver behavior and reward safe and efficient drivers. The ELD mandate and the changing regulatory landscape may be a challenge, but it is also an area of opportunity for fleets to optimize workflow and revisit policies that ensure the safety and integrity of everyone on the open roads.

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THE RACE FOR AUTONOMOUS VEHICLES – ARE WE THERE YET?

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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 Delphi/Aptiv, and 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 has been testing autonomous cars in Phoenix and Pittsburgh, and it acquired self-driving truck start-up Otto (now Uber ATG) 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 highly publicized, Tesla accident in Florida during May 2016, 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), or "full autonomy," (meaning no steering wheel, no brake pedals). Google argues that semi-autonomy is actually more dangerous because the whole point is to remove the humans from behind the wheel, since humans cannot be relied upon to act quickly enough in emergency situations.

Federal Regulation and Guidance

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

Federal Automated Vehicle Policy

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

"Automated Driving Systems 2.0: A Vision for Safety"

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

AV 2.0 was a much leaner, 36-page document with only two sections. Section 1, "Voluntary Guidance," offered 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. AV 2.0 simplified the process for manufacturing, testing, and deploying AVs, and it discouraged the states from drafting conflicting legislation of their own. The policy attempted 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 were voicing safety concerns over the new technology. As for trucks, the "Voluntary Guidance" section noted that interstate motor carrier operations and commercial drivers would continue to fall under the Federal Motor Carrier Safety Administration (FMCSA).

While NHTSA would be responsible for regulating the safety, design, and performance of the AVs, section 2, "Technical Assistance to States," provided clarity to the states on their roles 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 would 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 encouraged 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, AV 2.0 was intended to be flexible and updated when necessary, with the expectation that it would evolve as the needle continued to move on AV development.

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

In October 2018, the U.S DOT released the current, third AV policy, entitled "Preparing for the Future of Transportation – Automated Vehicles 3.0" (AV 3.0). This most recent policy establishes a clear and consistent Federal approach to shaping policy for automated vehicles, based on six principles: prioritizing safety, remaining technology neutral, modernizing regulations, encouraging a consistent regulatory and operational environment, preparing proactively for automation, and protecting and enhancing the freedoms enjoyed by Americans. AV 3.0 is intended to be the beginning of a national discussion about the future of our surface transportation system, and introduces a comprehensive, multimodal approach toward safely integrating automation. In AV 3.0, the Department clearly shows its support for an environment where innovation can thrive, and the American public can be excited and confident about the future of transportation.

SELF DRIVE Act and AV START Act

AV 2.0 came 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, 2017, 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 considering 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 DOT/NHTSA policies 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 guidelines put an end to any preferential treatment for one manufacturing or software entity over another and discourage 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 policies 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.

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

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 (now Uber ATG), with its sights set on “Uberizing” the long-haul freight business, with a new division called “Uber Freight.” Uber unveiled Uber Freight in the early 2017, with plans for a “load-matching” app to connect shippers to trucks, as Uber connects riders to cars. Uber Freight is set to revolutionize the supply chain and increase efficiencies by cutting out the middleman (the broker) and by reducing empty miles (which some estimate to be 30 percent). At present, there is no self-driving component to Uber Freight, but Uber is using its experience with

Otto to learn the trucking business. Uber Freight started in the "Golden Triangle"— Dallas, Houston, and San Antonio—and recently expanded into six new states. Uber Freight is continuing to catch on, as drivers get used to the app and the resulting efficiencies . . . and to getting paid quickly. There are several other Uber-for-trucking-type logistics companies out there, notably Convoy (based in Seattle), which is backed by Bill Gates, among others. Convoy has raised $80 million since its launch in 2015. Convoy originated with loads out of the Pacific Northwest, and it has since expanded into several other regions.

Liability?

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

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

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

late 2018, Uber Elevate announced a $23M investment in France to develop its all-electric VTOLs, with hope of launching a flying car network by 2023.

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 about 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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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN AN ERA OF INESCAPABLE, INSTANTLY ACCESSIBLE, LIVE MEDIA

By Kara L. Ellsbury and Mandy M. Good
Hirst Applegate, LLP

Wyoming recognizes a claim for negligent infliction of emotional distress (NIED) by parents, spouses, children, and siblings who observe the infliction of serious bodily harm or death, or its immediate aftermath without material change in the condition and location of the victim.[1] What happens, though, when a plaintiff goes to the scene of the accident because he knows or suspects that a close relative was involved? This article discusses the increasing instances of this occurring in light of today's media.

A. Recognition of the Tort in Wyoming

Gates v. Richardson presented the first opportunity for the Wyoming Supreme Court to decide whether to recognize an action for NIED.[2] The *Gates* Court initially noted that, "[t]raditionally a plaintiff could not recover for mental injuries unless they were linked to an actual or threatened physical impact caused by the defendant."[3] "There was no duty with respect to negligent acts which caused purely mental harm where there was no impact or threat of impact upon someone in the zone of danger."[4] The *Gates* Court then proceeded to analyze whether it should join the thirty-nine states that at least implicitly overruled the traditional impact and zone of danger rules, extending a defendant's duty of care "even though [the plaintiff] was neither physically impacted nor within the zone of danger."[5] It noted that it "must balance the interests of the injured parties against the view that a negligent act should have some end to its legal consequences."[6]

The *Gates* Court focused on limiting NIED claims to those where there was some certainty that an injury was suffered.[7] The court acknowledged that "[i]t is hard to imagine a mental injury that is more believable than one suffered by a person who witnesses the serious injury or death of a family member."[8] It noted, however, that it previously recognized, in the workers' compensation context, that mental distress is more easily feigned than physical injury.[9] The court also expressed concern regarding the potential burden that overly broad liability would impose on the court system.[10] In an effort to ensure some certainty that an actual injury was suffered, the *Gates* Court imposed the following limitations:

1. The plaintiff must be someone permitted to bring a wrongful death action pursuant to Wyoming's wrongful death statute;

2. The plaintiff must observe the infliction of serious bodily harm or death, or observe the aftermath shortly after its occurrence and without material change in the condition and location of the victim; and

3. The victim must be seriously injured or killed, and the claimant must realize, at the time, that the injuries are serious.[11]

Once these conditions were satisfied, the court held that an NIED cause of action could proceed "under normal negligence principals," meaning "[t]he defendant must have been negligent and his negligence must be the proximate cause of the plaintiff's mental injuries."[12] If he proves those

elements, a plaintiff will be "compensated for his entire damage so that he is made whole."[13] The *Gates* Court declined to limit damages for NIED claims, reasoning that a limit on damages was unnecessary "given the restrictions that we have imposed upon the cause of action."[14] The *Gates* Court also expressed its suspicion that "recovery will not occur often in these [NIED] cases; and when that does happen, it will ordinarily be minimal in amount."[15]

B. Recent Trend Limiting Recovery to Compensate for Media Advances

The *Gates* Court likely could not have envisioned the enormous advances in technology that would impact NIED claims thirty years later.[16] In 1986, when the Wyoming Supreme Court decided *Gates v. Richardson*, the electronic media landscape was significantly different than today. The first truly portable cellular phone was not introduced until 1989.[17] The World Wide Web went public in 1991.[18] Internet Explorer was not released until 1995.[19] The first social networking site was not launched until 1997.[20] YouTube was created in 2005.[21] Facebook was launched in 2004, but did not expand registration to allow anyone with an email address to join until around 2006.[22]

As of December 2015, Facebook "had 1.04 billion daily active users, with 934 million of those users utilizing mobile technology… Twitter reports 320 million monthly active users, with about 80% using mobile technology…"[23] A recent MSN news article recognized that "Facebook Live, which allows users to broadcast live video to followers …can also offer a window into…accidents everywhere in the world, as they happen."[24] "These platforms, along with a host of others, allow users to share information instantaneously, amplified by increasing use of mobile devices such as smartphones and tablets."[25]

Even though the media landscape we know today was virtually nonexistent when the *Gates* Court reached its decision, the *Gates* Court showed remarkable forethought. While recognizing that coming upon the immediate aftermath of an accident and hearing cries of pain and, in some cases, the decedent's dying words, could produce the kind of shock an NIED claim contemplates, the court also recognized that NIED claims require "more than the shock one suffers when he learns of the death or injury of a child, sibling or parent over the phone, from a witness, or at the hospital. It is more than bad news."[26] The underlined words were prescient. In today's digital world, "news," and more specifically "bad news," is the media by which more and more potential plaintiffs hear of accidents involving loved ones. While the Wyoming Supreme Court has not addressed whether a plaintiff can recover if he learns of an accident and then travels to the scene of the accident, other jurisdictions have.[27]

In *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015), the Indiana Supreme Court refused to allow a father to recover for NIED where the father learned of the accident involving his son on television. The father, who was sitting at home, watched a news story about a fatal car crash involving a moped, and knowing that his son had left home on his moped and would likely take the route on which the accident occurred, the father had a "very bad feeling."[28] Fearing for his son, the father drove to the scene where he observed his son's body covered on the ground, his shoes sticking out from under the sheet.[29] The court held that to recover for NIED the claimant must demonstrate that the scene viewed was essentially the same as at the time of the accident, the victim was in essentially the same condition, and "that the claimant was not informed of the incident before coming upon the scene."[30] Regarding the requirement that the claimant not be informed of the accident before coming to the scene, the court explained:

> [This prerequisite] requires a bystander to arrive to an incident unwittingly and bars claims where bystanders knowingly and willingly expose themselves to the scene of an accident. The trigger for the emotional distress must not be some prior knowledge of the incident before arriving to the scene, but rather the happenstance contemporaneous or near-contemporaneous sensory experience of the incident itself. To put it another way, the compensable emotional trauma must be unmediated, and there should be no period of time during which a bystander can brace himself or herself.
>
> Again, we must stress that major public policy concerns dictate that we draw bright lines, especially in terms of this particular tort. To allow a claimant to recover under a bystander theory when his or her emotional distress begins as a result of seeing a news story or the like would result in virtually limitless litigation. Our quickly evolving state of social media and instantaneous news coverage further underscores the importance of setting parameters for this tort. We are at a point in time when people are often subjected to seeing live, streaming footage—on high-definition televisions, smart phones, or other devices—of emergencies possibly involving their immediate beloved relatives. There must be a point at which a defendant's exposure to liability for negligent infliction of emotional distress ends—not to diminish real anguish, but simply because pragmatism demands that the line be drawn somewhere.[31]

Other courts similarly recognize that a plaintiff seeking to recover for NIED must be an "unwitting plaintiff." For example, in *Coleman v. American Commerce Insurance Co.*, the court refused recovery for NIED where the plaintiff received a call informing her that her daughter was in an accident prior to travelling to the scene of the accident and observing her daughter.[32] The court reasoned that the plaintiff "was not an unwitting plaintiff," as she had prior knowledge of the accident.[33] Similarly, in *Colbert v. Moomba Sports, Inc.*, the court refused recovery for NIED where the plaintiff received a call informing him that his daughter had disappeared from the back of a boat and that a search was underway for her, and then travelled to the lake where he saw his daughter's body recovered.[34] The court recognized that "where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene."[35] According to the court, "'[t]he kind of shock the tort requires is the result of the immediate aftermath of an accident.' It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene."[36]

C. Conclusion

In light of the current electronic media landscape and the advances occurring at a record pace, the instances of relatives rushing to the scene of an accident or watching the scene via some type of media are likely to continue to increase. Our courts will then face the question of whether to draw the line consistent with the courts who already addressed the issue, or to allow the tort to creep further into this new realm before finding another line to draw. The approach of the Indiana Supreme Court in *Clifton v. McCammack* is well reasoned and consistent with the considerations recognized by the Wyoming Supreme Court in *Gates v. Richardson*. Specifically, the approach of the Indiana Supreme Court serves to "balance the interests of the injured parties against the view that a negligent act should have some end to its legal consequences," and also limits the "potential burden that overly broad liability would impose on the court system."[37] The advantages of establishing a

bright line rule prohibiting recovery for NIED where the claimant arrived at the scene with prior knowledge of the accident also include providing potential claimants and counsel with a greater degree of certainty as to whether there is a valid claim and providing courts with clear guidance as to when a claimant may recover. Accordingly, in addition to the limitations imposed by the *Gates* Court,[38] Wyoming courts would be in the well-advised vanguard if they impose the additional requirement that the plaintiff not be informed of the incident before coming to the scene.[39]

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[1] *Gates v. Richardson*, 719 P.2d 193, 200-01 (Wyo. 1986).
[2] *Id.* at 195. "Compensation for emotional distress [was] not a new concept in Wyoming" at the time, however. *Id.* at 194. Wyoming already permitted recovery for emotional harm caused by false imprisonment, malicious prosecution, and work-related stress. *Id.* at 194-95 (citations omitted).
[3] *Id.* at 195 (citing W. KEETON, PROSSER AND KEETON ON TORTS § 54, at 362-64 (1984)).
[4] *Id.*
[5] *Id.*
[6] *Id.* at 196 (citing *Hunsley v. Giard*, 553 P.2d 1096, 1102 (Wash. 1976)).
[7] *See generally, id.* at 198-200.
[8] *Id.* at 197.
[9] *Id.*
[10] *Id.* (citations omitted).
[11] *Id.* at 199.
[12] *Id.* at 201.
[13] *Id.* at 200 (citing *Hollon v. McComb*, 636 P.2d 513, 516 (Wyo. 1981)). To make a person whole is to place him in the "condition he would have been in if the other party had adequately performed the duty owed." *Hollon*, 636 P.2d at 516. "The emphasis is on compensation not punishment." *Id.*
[14] *Gates*, 719 P.2d at 200.
[15] *Id.* at 198.
[16] The quotes above indicate that the court also did not anticipate the exceptionally large damages juries have awarded for emotional distress claims. For example, in 2013, a jury awarded $25,000,000 for future emotional distress and $5,000,000 for past emotional distress to a minor child who witnessed her parents and brother perish by fire while trapped in the wreckage of an automobile accident. *Asam v. Ortiz*, 2013 Jury Verdicts LEXIS 12873 (Super. Ct. Los Angeles County, Cal. Oct. 25, 2013). In 2012, a jury awarded $9,000,000 for emotional distress to the family of a woman who witnessed the woman's electrocution. *Goretzka v. Allegheny Energy, Inc.*, 2012 Jury Verdicts LEXIS 17634 (Pa. Ct. Com. Pl., 5th Jud. Dist. Dec. 6, 2012).
[17] *The History of the Mobile Phone*, WASHINGTON POST, *at* https://www.washingtonpost.com/news/the-switch/wp/2014/09/09/the-history-of-the-mobile-phone/ (Sept. 9, 2014).
[18] *The Invention of the Internet*, HISTORY, *at* http://www.history.com (search "Invention of the Internet") (2010).

[19] Jimmy Daly & Cherilyn Winkler, *A Visual History of Internet Explorer*. STATETECH, *at* http://www.statetechmagazine.com (search "Visual History of Internet Explorer") (Aug. 16, 2013).
[20] *Then and now: a history of social networking sites*, CBS NEWS, *at* http://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/2/ (last visited May 31, 2016).
[21] Matt Schiavenza, *How YouTube Changed Journalism*, THE ATLANTIC, *at* http://www.theatlantic.com/technology/archive/2015/02/how-youtube-changed-journalism/385523/ (Feb. 14, 2015).
[22] *Company Newsroom: Our History*, FACEBOOK, *at* http://newsroom.fb.com/company-info/ (last visited May 31, 2016).
[23] Sarah E. Hansen, *Avoiding Problems and Pitfalls With Social Media Evidence: New York and the "Factual Predicate" Test*, DEFENSE RESEARCH INSTITUTE, THE WHISPER, Vol. 12, Issue 5, *at* http://portal.criticalimpact.com/newsletter/newslettershow5.cfm?contentonly=1&content=29338 &id=3535 (June 3, 2016).
[24] Ananya Bhattacharya, *Facebook Live is becoming a gruesome crime scene for murders*, MSN, *at* http://www.msn.com/en-us/news/crime/facebook-live-is-becoming-a-gruesome-crime-scene-for-murders/ar-AAhgFPy?li=BBnbfcL (June 19, 2016).
[25] Hansen, *Avoiding Problems and Pitfalls With Social Media Evidence: New York and the "Factual Predicate" Test*, *supra.*
[26] *Gates*, 719 P.2d at 199 (emphasis added).
[27] In *Collins v. COP Wyoming, LLC*, 2016 WY 18, 366 P.3d 521 (Wyo. 2016), the Wyoming Supreme Court considered whether a father's NIED claim against his son's employer was barred by the Wyoming Worker's Compensation Act. Another employee of COP Wyoming, LLC struck the plaintiff's son in the head with a track hoe, severely injuring him. The father, also an employee of COP Wyoming, LLC, was notified of the accident and immediately came to the aid of his son. Despite his father's attempts to save him, the son died. The father filed an NIED claim. The district court dismissed the claim, reasoning that it was barred by the Wyoming Worker's Compensation Act. The Wyoming Supreme Court reversed, concluding that the father "should be permitted to go forward to try to establish his claim . . ." The court did not consider whether the father could recover under the specific circumstances, including the father having first been notified of the accident before going to his son.
[28] *Clifton*, 43 N.E.3d at 215 (Ind. 2015).
[29] *Id.*
[30] *Id.* at 214 (emphasis added).
[31] *Id.* at 222-23 (emphasis added).
[32] *Coleman v. Am. Commerce Ins. Co.*, No. 09-5721RJB, 2010 U.S. Dist. LEXIS 95654, at *2, 10 (W.D. Wash. Sept. 14, 2010).
[33] *Id.* at *10.
[34] *Colbert v. Moomba Sports, Inc.* 176 P.3d 497, 498-99 (Wash. 2008).
[35] *Id.* at 505 (quoting *Mazzagatti v. Everingham*, 516 A.2d 672, 679 (Pa. 1986)).
[36] *Id.* at 506 (quoting *Hegel v. McMahon*, 960 P.2d 424, 428 (Wash. 1998)) (bracket in original) (internal quotations omitted) (emphasis added).
[37] *Gates v. Richardson*, 719 P.2d at 196-97 (citations omitted).
[38] *Id.* at 199.
[39] *Clifton*, 43 N.E.3d at 214 (emphasis added).

WHY YOU SHOULD STOP ARGUING AND START NEGOTIATING

By William H. McKenzie, IV
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If you want to improve your negotiation skills, the following pages of this paper will 100% flip your perspective on what works in negotiations, what doesn't, and why. While this paper contains some examples specific to litigation, the principles are transferrable to all aspects of your life. I cite excerpts of many great books in support of my points and I highly recommend that you read them all!

You need to persuade people both logically *and* emotionally

It takes more than logic to persuade someone because people also think with their feelings. You may have heard it called "cognitive biases" which are really just irrational and subconscious holdings that influence the way decisions are made. This is a little-understood but powerful concept in negotiating. For example, how would you feel if a terrorist organization sent you a $50 Amazon gift card in the mail? You would not freely accept an obvious financial gain because your emotions would put the brakes on the transaction. This is because you think both logically *and* emotionally.

I love Dan Ariely's book "*Predictably Irrational: The Hidden Forces That Shape Our Decisions.*" Ariely explains, "My goal, by the end of this book, is to help you fundamentally rethink what makes you and the people around you tick. I hope to lead you there by presenting a wide range of scientific experiments, findings, and anecdotes that are in many cases quite amusing. Once you see how systematic certain mistakes are—how we repeat them again and again—I think you will begin to learn how to avoid some of them." Ariely is an expert on behavioral economics and does an excellent job of laying out the ways people fail to think and act in linear, logical ways under different circumstances. In fact, he concludes that people are "predictably irrational" when exposed to certain stimuli.

You have experienced this yourself. Let's say you and your spouse are choosing a place to go out to eat. You want Mexican. Your spouse wants sushi. An argument breaks out and kills the mood. You park in front of the sushi place (yes, you let your spouse "win") but you can't shake off the fight you just had. Yet, you are about to spend $60 on a dinner and don't want to waste the money. You know you should make yourself smile and say something romantic. That would be rational. However, your emotions allowed you to pout, ruin dinner and essentially waste $60. You were predictably irrational.

Let's apply this principle of predictable irrationality to one of your trucking cases. Imagine your company gets sued and you catch wind that your company's insurance carrier is going to deny your claim and refused to defend you. So you have your attorney contact them to force the issue. Consider the tone and effectiveness of your attorney's first email approach:

Dear Cathy: We are shocked by Global Insurance's failure to immediately accept coverage for this claim. This is classic bad faith conduct. If I do not hear from you in five (5) business days we will file a Declaratory Judgment action seeking a determination of coverage, plus attorney's fees, consequential damages, expenses and interest. Please immediately acknowledge coverage and we will send you our past invoices, so you can reimburse us for our defense costs already incurred.

Regards, William McKenzie

Now, compare that with this email:

Hi Cathy: I hope you enjoyed your weekend. I am coverage counsel for Insured. They have asked me to look into coverage for this matter. And I know you are much more knowledgeable about the underlying case than I am. So I would love to get your thoughts so I can better advise my client. Hopefully, I can also provide you with some helpful information. My client is feeling a lot of pressure because the plaintiff's attorney has been so aggressive in this case. We would really appreciate a chance to speak this week when you get a free moment.

Best, William

Which email do you think will start things off on the right foot for negotiations? Which email will get the quicker call back? You guessed correctly. Here is why: People think both logically *and* emotionally. No one wants to do business with someone they do not like. If you are a difficult or critical person, or if you talk too much instead of listening, your file gets moved to the bottom of everyone's to-do list. This is because you are *taking* people's emotional energy instead of giving it to them. Therefore, to be an effective negotiator you need to be able to persuade people both logically and emotionally. One is just as important as the other.

EQ and IQ:

In his 1996 book "*Emotional Intelligence"*, author and psychologist Daniel Goleman suggested that EQ (or emotional intelligence quotient) might actually be more important than IQ. Why? Some psychologists believe that standard measures of intelligence (i.e. IQ scores) are too narrow and do not encompass the full range of human intelligence. In other words, it takes more than just being smart to be successful. This is why the smartest attorneys are not always the most successful attorneys. And this is why being "street smart" or good with people often trumps being "book smart." Hon. Clarence Thomas, a sitting U.S. Supreme Court Judge said: "Good manners will open doors that the best education cannot." That is a powerful and insightful statement from a man who makes his living using his high IQ.

EQ measures the emotional intelligence of a person. This refers to a person's ability to perceive, control, evaluate, and express emotions. Researchers like John Mayer and Peter Salovey as well as writers like Daniel Goleman have helped shine a light on emotional intelligence, making it a hot topic in areas ranging from business management to education.

EQ is centered on abilities such as:

- Identifying emotions
- Evaluating how others feel
- Controlling one's own emotions
- Using emotions to facilitate social communication
- Relating to others

This is a key principle in understanding how to become a better negotiator. If you want to increase your effectiveness, concentrate less on your IQ and instead develop your EQ. This will put you well on your way to persuading people both logically *and* emotionally. In the next phase of this paper, I will unpack practical ways to help you do this in negotiations.

Practical Negotiation Tactics

What not to do:

Do not criticize, condemn or complain:

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

Do not argue:

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

Dale Carnegie's section on "How to Win People to Your Way of Thinking"[1] says "The only way to get the best of an argument is to avoid it." He shares this story:

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

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

Do not be fake or insincere:

Human instinct can sense insincerity. You must be genuine in your kindness or it will backfire as perceived manipulation. However, you can force yourself to smile and be more thoughtful in

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

editing the tone of your communications. Actions lead, feelings follow. So be yourself. But be yourself on your most polite, sincere and courteous behavior.

Do not get rattled:

Just like other humans you have a desire to comply with societal norms and feel accepted. You can expect your emotions and fight-or-flight response to kick in some time during negotiations. You *should* expect and prepare for it, so you will not undermine your goal and make emotional concessions. As Theodore Roosevelt said, "If you could kick the person in the pants most responsible for your trouble, you would not sit for a month." Besides the obvious delay tactic to give yourself a break to calm your heart rate down before responding during tense moments, there are a couple of other useful tips.

In "*Getting to Yes with Yourself*" (the must-read prequel to the classic negotiation book "*Getting to Yes*"), author William Ury explains the importance of preparing *YOURSELF* for negotiations. Among other things, he suggests "going to your balcony" during tense moments to view the situation from afar as if watching the situation play out on a theater stage from a balcony. This psychological exercise allows for detachment and objectivity to reenter the negotiation room with you.

Ury's other tactic is for you to develop your "BATNA" before you enter negotiations. BATNA stands for Best Alternative to a Negotiated Agreement. "Your BATNA is your best course of action for satisfying your interests if you cannot reach agreement with the other side," Ury explains. In other words, it's the commitment you make to yourself to take care of your needs independently of what the others will agree to do in negotiations. Having already thought this through before you begin negotiations, it will help keep your irrational fear of loss at bay. You will not feel as vulnerable and desperate during the ebb and flow of counteroffers because there is less fear of the unknown. Your "Plan B" has been well planned in advance so you are not a hostage to the other side's willingness to negotiate.

Do not offer to "meet in the middle":

This is what bad negotiators do. You are more creative than this. For example, in the late hours of a mediation after several negotiated moves closing the gap, the plaintiff gives a new lower demand of $500,000 to your offer of $450,000. Instead of coming back at $460,000 hoping to "meet in the middle" at $475,000 to settle the case, try to signal that you are completely out of money. Offer $450,000 again with the new offer to pay the mediator's fee. This is probably only another $2,000 but it sends a strong and scary message to the other side that you are out of money. You are appealing to plaintiff's emotions after a long day: her innate fear of loss. The midpoint should move below $475,000 to settle the case.

What to do:

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

Mirror their words:

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

Ask questions:

One of the best ways to respond to a demand from your adversary is to ask: *How am I supposed to do that*? This makes them further explain themselves and reveal their strategy. It also invites them to join you in trying to find a solution and see things from your angle. It also invites them to negotiate against themselves without you even rejecting their offer. Remember not to say "no" but to ask a question instead. For example, in "*Never Split the Difference*" the kidnappers asked the family of the victim for thousands of dollars for her ransom. The family responded: "how are we supposed to do that when we don't even know if she is ok?" The kidnapper then put the victim on the phone. Bingo. Proof of Life without giving anything in return. It came simply by asking a question. (The negotiations successfully continued for her release.)

Another great question for negotiations that have laid dormant for a while is: "*have you given up on this deal*?" This appeals to your counterpart's instinct to avoid losing something. And it almost always elicits a quick response of "no" which opens the path to rekindle negotiations.

In Richard Paul Evans' book "*The 5 Lessons Millionaires Taught Me*" he describes another great question to ask when you are negotiating. He calls it the "7 Golden Words" which are: *Is that the best you can do?* Try this question the next time you are engaged with a salesman or negotiating an extension of time with an opposing attorney. It is another tactic to shift the weight back on your counterpart.

There are even more reasons to ask questions. Patrick King's book "*The Science of Likability*" explains some different ways you can get people to like you. One of the suggestions is to "show your belly" by asking a person for their advice. It is remarkable how we like the people who submit to our counsel. So doesn't it make sense to ask your counterpart for their thoughts?

I like to use this principle with opposing attorneys. I tell them that I need to be able to clearly explain their position to my client. So I ask them to articulate their position for this purpose. Next, in a sincere way, I ask them: *will you please help me understand how you think we can get this resolved*? I am asking for their counsel. Sure, they may skew it favorably towards their client and try to manipulate me. But more often than not I gain their collaboration. And they often tell me what they are ultimately going to advise their client to do. Boom, I just learned their end game strategy simply by asking genuine and humble questions.

Label their feelings:

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

our emotions can cloud our judgment. That's why it is so important to remove this "cognitive bias" during negotiations. It can save your client so much money.

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

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

Use your leverage:

For years people only knew of white-colored swans. Everyone assumed the next species of swan that would be discovered would also be white. However, once a scientist traveled to another continent and saw a black swan, the whole frame of reference of that species changed. Our counterparts in negotiations have some "Black Swans" that we need to discover. Once discovered, it changes the landscape of the negotiations by giving you leverage. For example, if you are buying a house wouldn't you love to discover that the sellers are moving out of state and must close in the next 30 days? This "Black Swan" would give you considerable leverage in negotiating the price of the house.

Black Swans are leverage multipliers. Leverage, or the ability to inflict loss and withhold gain, can always be manufactured. But leverage is fluid; so you should always be aware of which side, at any given moment, feels they have the most to lose if negotiations collapse. This is the time to apply pressure.

Positive leverage is the ability to provide or withhold things that your counterpart wants. Negative leverage is the ability to make a counterpart suffer and is based on threats. It preys on loss aversion. Using Black Swans as negative leverage involves threatening your counterpart with what is important to them, such as what signifies status to them or what worries them (i.e. their business reputation). It always pays to take the time to analyze leverage points and identify potential Black Swans. This is another reason to keep your adversary talking by using mirroring, labeling and asking questions. It is worth it to discover a Black Swan to multiply your leverage.

Consider offering an "extreme anchor" and using the 65/20/10 Rule:

Hopefully you are convinced by now that human beings think emotionally. So you have to overcome your own desire to not be rejected or offensive when it is time to throw out an "extreme anchor" (a/k/a "low ball" offer). The purpose of an extreme anchor is to bend your counterpart's reality. Although we often expect "extreme anchors" when opening negotiations, they are nevertheless effective. 65% of your target price is a good place to start.

Sometimes it is preferable, however, to let the other side anchor monetary negotiations, when you don't know enough to open with confidence. Either way, you control your initial messaging by your first offer or response.

After you offer your extreme anchor (say 65% of your target price), consider using the 65-20-10 Rule. For example, if your target settlement number is $100,000, start with $65,000 (65%), then raise it to $85,000 (another 20%), then $95,000 (another 10%) before finally arriving at $100,000. This

is the 65-20-10 rule which gives your counterpart a feeling that you are really being squeezed. But there is an even better way to present these numbers.

Numbers that end in 0 just feel like temporary placeholders. Numbers that sound less rounded feel serious and permanent to your counterpart- like you have really made some calculations and thought carefully about what you could afford before offering the number. So when asked to give a number to a monetary demand, always give a non-rounded number such as $94,532 instead of $95,000. These numbers give a sense of precision and reason behind them, regardless if such a reason really exists. In our example above, with the extreme anchor and the 65/20/10 rule, the numbers could be $64,940, $84,786, and $94,532. The other side would spend a lot of energy trying to analyze your reasoning while you are strategically bending their reality.

Say "no" without saying "no":

One of your main goals is to figure out ***why*** your counterpart wants what they are asking for. Is it really just money? Or do they want their freedom back by getting the lawsuit over with, or to have closure from an offense (an apology could work wonders here), or to punish your client? As discussed, you can learn these motivations by asking questions, mirroring and labeling. But you also do not want to say "no" and shut communication down.

To keep them talking, it is important to say "no" without saying "no." Instead ask "How am I supposed to do that?" or "How am I supposed to accept such a low offer?" Have them work out the solution for you. When they respond, ask another "How am I supposed to …" question. Against immediate and improbable demands, this question works magic. It buys time, and it shows the counterpart how "unreasonable" his demand is.

For example, the phrase "Your offer is very generous, but I'm sorry, we just can't make that work" is a way of saying "no." Or saying "I'm sorry, but I'm afraid I just can't do that" is a little more direct way of saying "no".

Have excellent research in support of your position:

While you are being kind, friendly and respectful, this is not enough. Remember, you must also persuade people *logically*. So you must have perfectly-articulated arguments for your position. In fact, when you are a good listener and cooperative the other side will often wonder if you might really be a push-over in the courtroom. This perfectly sets the stage for you to lay out your persuasive position to a now-receptive audience. I like to think of presenting my client's position as "steel wrapped in velvet." In other words, we are rock-solid in our position and reasoning but kind, enjoyable and intentional in building rapport.

Conclusion

Negotiation is simply communication with a purpose. You are not going to reach your goal or change your opponent's mind by arguing, criticizing or complaining to them. So don't waste your time or ruin relational margin by falling into these natural, counterproductive behaviors. You will become much more successful in resolving your conflicts and preserving your relationships if you will stop arguing and start negotiating.

You have to be intentional in preparing yourself for effective negotiation. It is all about having the right mindset. So, make a conscious effort to work on your EQ and to empathize with the other side. This will help you build rapport and avoid sabotaging the process with defensive reactions. Commit to asking questions, mirroring and labeling your counterpart during negotiations.

Use your leverage wisely and try to spot potential "Black Swans" that underpin your counterpart's position. By utilizing these effective techniques, you will gain valuable insight into your counterpart's motives and strategy. This will not only help you ultimately get what you want, it might help you leave the negotiations with a new friend.

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