For The Defense™

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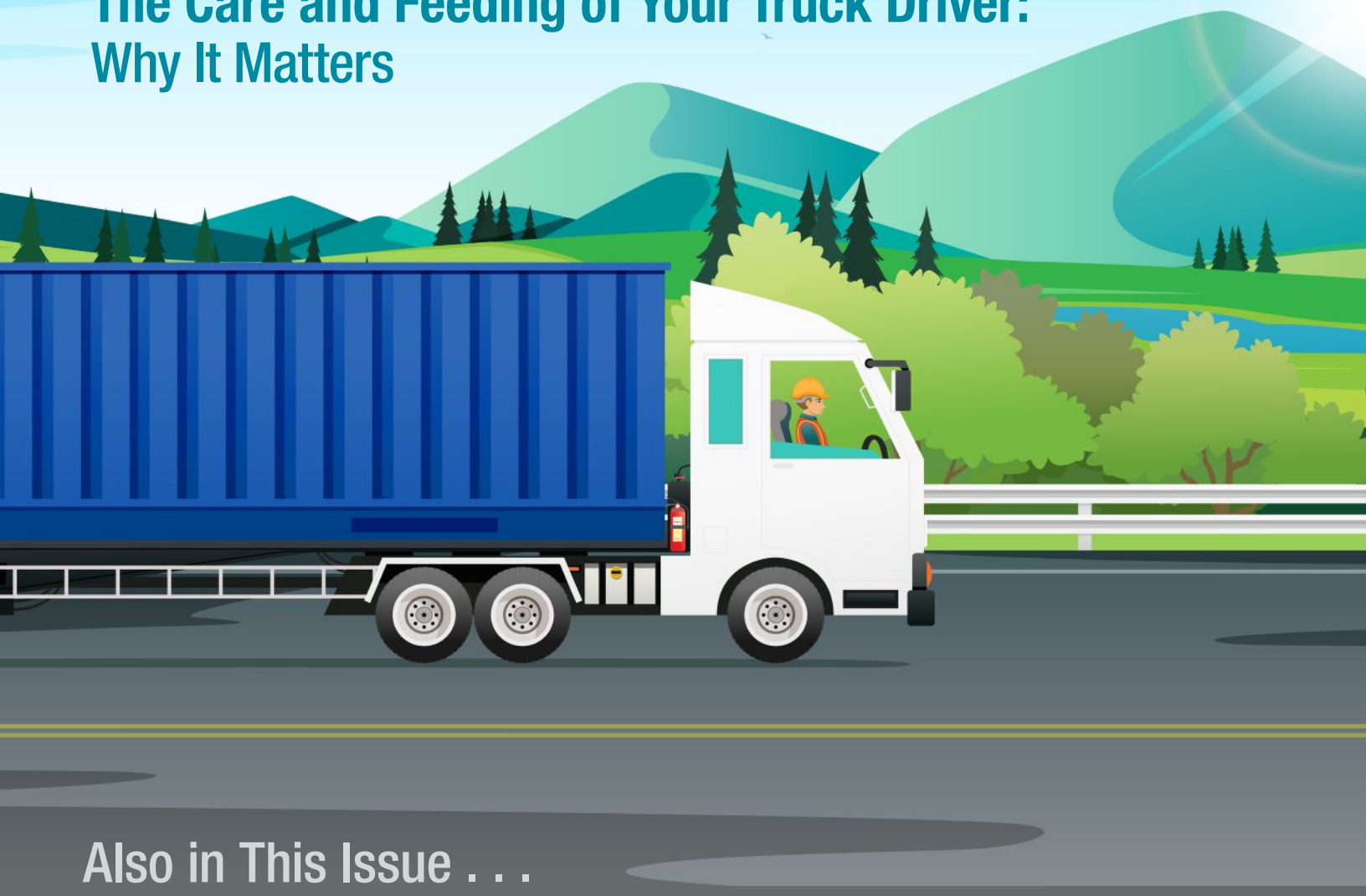
The magazine for defense, insurance and corporate counsel

November & December 2025

Trucking Law

Including . . .

The Care and Feeding of Your Truck Driver: Why It Matters



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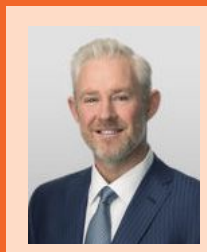
Letter from the Chair



Bradford G. Hughes is a Member of Clark Hill and an accomplished trial lawyer who also counsels commercial and transportation businesses on the management and avoidance of risk.

In June, the DRI Trucking Law Committee welcomed nearly 200 attendees to our ***Trucking Essentials Seminar*** in Denver, Colorado. Co-chaired by **Shane O'Dell** and **Whitney Greene**, the event featured interactive sessions with the industry's top thought leaders—every panel included true giants in trucking and the nation's premier defense attorneys. We're deeply grateful to our presenters and participants for making this intimate seminar (complete with our signature social events) a resounding success.

Mark your calendars: Our **bi-annual** ***Trucking Law Seminar*** returns **April 29–May 1, 2026**, in **Atlanta, Georgia**. Seminar Chair **Sergio Chavez** and Vice-Chair **Garner Berry**, alongside our Steering Committee, are crafting three exceptional days of innovative CLE, peer networking, panel-counsel meetings, and Atlanta nightlife. Early-bird registration opens in early 2026—save the date!

Nearly 20 years ago, colleagues urged me to join DRI Trucking Law because it offered the best CLE and networking in transportation. Today, as Chair, I'm honored to lead a committee of specialists—not generalists—dedicated to the critical nuances of trucking defense. As plaintiff strategies grow more aggressive, we stay ahead of trends, equipping members and clients with a decisive edge in the pursuit of fairness and justice.

We're proud to feature some of our brightest minds in this edition:

- **Terrence Graves** (Sands Anderson) and **Theresa Bratton** (National Interstate) on making defense counsel indispensable to clients.
- **Michael Noordsy** (Fee, Smith, Sharp) on preparing fact witnesses for deposition success.
- **Sergio Chavez** (Rincon Law Group) on leveraging settlement negotiations.
- **Sarah Hansen** (Burden & Hansen), **Martin Randolph** (JS Held), and **Max Brusky** (Bulkmatic) on working cases backward with experts.
- **Amanda Nardi** (Chartwell Law) and **Daniel Bray** (Gallagher Sharp), on managing difficult opposing counsel.
- **Shane O'Dell** (2025 Tom Segalla Excellence in Education Award recipient) and **Joanna Hughes** (Naman Howell Smith & Lee) on the resurgence of proximate cause post-*Werner v. Blake*.
- **Michael Bassett** (The Bassett Firm) on best practices for supporting defendant drivers through litigation.
- **Torrie Poplin** (Chartwell Law) on broker liability and the Federal Aviation Administration Authorization Act.

On behalf of the DRI Trucking Law Committee, we hope these insights become immediate tools in your practice. See you in Atlanta—**April 29, 2026!**

Best Regards,

Bradford G. Hughes

Making Yourself Indispensable

How to Become the "Go To" Associate

By Terrence L. Graves and Theresa Bratton

Many of the skills for becoming indispensable to both your internal clients and the firm's external clients are interchangeable. We explore many of these skills below in the pages that follow.

Many young lawyers begin their careers thinking that they don't have any clients and the first thing they need to figure out is how to get those clients. That is far from accurate. If you work at a firm where you are required to report to someone else or someone spends a significant amount of their time supervising your work, then you do have clients: whoever it is that supervises you.

If you also are blessed enough to have significant client contact as part of your job expectations, then you also have more traditional clients that you are responsible for pleasing. Thankfully, many of the skills for becoming indispensable to both your internal clients and the firm's external clients are interchangeable.

We explore many of these skills below in the pages that follow.

Master the Basics

Before you can excel, you need to have a solid understanding of the fundamentals. Mastering these fundamentals is so important that we will spend a lot of our space going over these elements. It doesn't mean that the other elements are less important, just that everything starts with the basics.

These fundamentals include knowing the firm's procedures and the procedures that your external clients expect you to master. This includes becoming efficient and proficient at research, knowing your external client's litigation and billing guidelines, developing writing proficiency, learning to become organized (more organized), practice critical thinking, learning to think strategically, be willing to learn from other more experienced lawyers and nonlawyers, never stop learning your craft, becoming very good at communication, and learning to understand and anticipate your clients' needs (both internal and external).

Firm Procedures/Client Guidelines/Court Rules

Many firms have the expectations for employees, including lawyers, memorialized in an employee handbook or a similar document. These expectations will include the number of billable hours, the amount of revenue expected to be collected, and the day-to-day expectations and rules for how to conduct yourself with.in the workplace among other things. Learn these and know them like the back of your hand if you want to be successful.

Similarly, most insurance company clients and many non-insurance clients have guidelines, outside counsel rules, panel counsel rules or any number of similarly named set of expectations for lawyers and their staff to follow. These guidelines will spell out the deadlines for reporting, the contents of the reports, allowable activities for representing the clients, budgeting requirements, necessity for conferences with client representatives, discovery goals and planning, trial

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planning requirements, mediation and settlement conference expectations, requirements for retaining experts, and expectations and requirements for billing the client for your firm's work. A failure to follow these requirements will in many instances lead to the client not paying for work that has been performed. In cases of continued non-compliance, it can also lead to your firm not being allowed to continue to do work for that client or in the alternative, the offending associate may be banned from doing work for that client.

Another set of rules that you will want to be proficient at are the rules of civil procedure for any court that you practice in regularly. If you practice in state and federal courts, you need to know both the state civil procedure rules and the federal rules of civil procedure. Additionally, many courts have local rules that you will need to be cognizant of in order to represent your clients in the best way possible.

We all know it can be difficult to keep multiple clients' guidelines and rules straight, especially as you are transitioning from working on one file to another throughout your workday. However, when you get a new case, take the time to make sure you understand the mies on reporting frequency and format, and put reminders on your calendar. Revisit the guidelines when you get a scheduling order from the court to make sure you're providing necessary pre-trial reporting.

Legal Research Proficiency

Legal research is a fundamental skill. Practice using legal databases like Westlaw, LexisNexis, FastCase, and others to learn how to find relevant case law, statutes, regulations and rules. Being adept at research allows you to support your arguments with citations to similar instances in which courts have ruled in a way that line up with your clients' interests.

Many firms offer opportunities to their lawyers and staff to become proficient at the use of legal databases through free training. Many of the databases offer free training programs that show lawyers how to navigate the available infonnation. Take advantage of these opportunities. They don't cost you or your firm anything and you are investing in your future for the best possible price. Even more important, many of these opportunities consist of the session leader asking for examples of searches to run. There is nothing wrong with getting them to run searches on your actual cases and have them communicate the results of the searches to you via email.

Sometimes your best resource for learning to be the best that you can be at legal research are the paralegals and professional assistants at your firm. Don't be afraid to ask them to show you best practices for engaging in legal research. Similarly, there are often senior associates and partners who excel at legal research. Get them to show you their strategies and techniques for legal research.

It is important to make a point of regularly reading legal journals, law review articles, and other legal and topical publications. This task will keep you focused on developments in the law, and it will also give you insight into how research is conducted at the highest levels of legal practice.

When one does research a legal issue, the importance of checking secondary sources, such as treatises, commentaries, and legal encyclopedias and dictionaries should not be overstated. These secondary sources are good for providing context and in many cases analysis of the issues that you will find yourself researching. They hold great potential for providing you with a more complete understanding of the legal issues you may be asked to investigate.

You should also be cognizant of the fact that artificial intelligence is becoming more prolific and more prevalent by the day. Young associates should always check citations in briefs, secondary materials and legal documents that they did not draft to make sure that the cites are not only still good law, but real legal authority.

Much of the practice of law is about learning to analyze the information that you find. Accordingly, you will want to develop and hone your analytical skills so that you will be better able to communicate and synthesize what your research finds. Take the time to learn how to break down complex legal issues by identifying key points and drawing connections between different sources and related by different legal concepts.

Develop Writing Proficiency

Strong writing skills are essential for drafting briefs, memos, and other legal

documents. Focus on clarity, precision, and persuasiveness. Regularly review and edit your work to improve your writing style.

You should seek out opportunities to write on a frequent basis. You can't become good at something unless you practice it and make it as close as possible to second nature. Ask for opportunities to practice different types of writing-briefs, memos, reports to clients, summaries of depositions, and more.

Seek out feedback on your writing. Don't get too bogged down in the fact that someone critiques your work product. Instead, focus on the constructive recommendations to get better at writing and incorporate them into your work.

It is important to read well-written examples of the work product you will be asked to create. Look at the structure utilized by great writers, as well as the language and arguments used and learn how to incorporate those tools into your writing.

If your firm offers opportunities to improve your writing skills, take advantage of them. Similarly, if you are members of a bar organization that provides seminars or workshops that focus on improving writing skills, take advantage of those opportunities.

One of the hallmarks of good legal writing is that it is clear and precise. Learn how to write in a way that your audience knows where you are headed quickly and then take them there as efficiently as possible.

A good writer will learn to understand their audience. You should figure out what the target of the writing needs to know and then make sure that your writing is directed to those needs. Please remember that a judge, opposing counsel, and clients are all different audiences who will want to know different things at different times.

As a young lawyer, many of you may be looking for writing opportunities to get your name out there in the legal community or trucking industry. Consider writing an article for a local trucking industry or legal publication, either on your own or co-writing with a partner or client.

Become (More) Organized

Many lawyers feel that they are either naturally organized or that they learned how to be organized in undergrad and/or law school. The truth is that you can never be too organized if you are going to become the best version of yourself possible.

Effective organization is key to managing multiple cases and deadlines. Using tools like calendars, task lists, and document management systems to keep track of your responsibilities and ensure nothing falls through the cracks is imperative.

Additionally, your assistants and paralegals are key components of your organizational structure. You should learn to rely upon them to keep track of key deadlines and to provide you with prompts and reminders of upcoming tasks. It is much easier to be successful when you have help.

Learn From Experienced Colleagues

You should make a point of seeking mentorship from senior associates and partners at your firm. If you don't have suitable mentors at your firm, then look for mentors at other firms or at bar organizations that you belong to.

Ask for opportunities to observe their work, ask questions, and request feedback. If your firm will allow it, make a point of tagging along at no cost to the client to depositions, hearings, client meetings, and trials. If you don't understand something that happened at the event that you are attending, ask the more experienced lawyer what happened and why they handled it in the way that they did.

Sometimes it is possible to turn these learning experiences into billable work by asking if it would be appropriate and useful to summarize the results and/or key takeaways of the hearing, deposition, or meeting.

Learning from experienced lawyers can provide valuable insights and accelerate your development. After all, it is hard to know what you don't know until you realize that you don't know it.

Practice Critical Thinking

The practice of law often involves complex problem-solving scenarios. Young associates should make a point of reading cases and analyzing the opinions.

The analyses should include identifying key issues in the cases, learning to understand how the court is approaching those issues and recognizing the development of logical arguments in support of the positions being taken by the court.

Approaching the opinions of the court from a critical standpoint would include thinking about ways to challenge the decision reached by the court. Understanding that it may be necessary to take a position counter to the ruling of a court the next time an issue presents itself is a key component of critical thinking. It also provides you with a head start on analyzing an issue that might be key to your client's position if you happen to represent a client with a different viewpoint or interests. Critical thinking prepares you to be ready for any contingency.

A great way to engage in critical thinking is to discuss problems and cases with your colleagues. It is rare that everyone will approach an issue, case or problem in the same way. If you take the time to obtain input from your colleagues on the cases you are handling, you will soon learn that a lot of the people that you talk to will be able to provide you with a point of view that you may not have considered, thus making you better at what you do.

Learn to Anticipate Your Clients' Needs

Young associates should seek to develop a client-focused approach by understanding their needs and concerns. Taking the time to build strong client relationships and providing excellent service can help to set you apart as a reliable and effective lawyer.

One of the things that many clients and supervising attorneys appreciate is when a young associate takes the time to learn about the industry, they are servicing. This applies whether we are talking about the legal industry, trucking, manufacturing, banking, construction, or you fill in the blank. If you take the time to learn about the issues that face the relevant industry, it will provide you with background and context that will help you to anticipate and recognize legal issues and to provide pertinent advice.

Taking the time to build strong relationships with your clients is key. The more you get to know them and their concerns, the better you will be able to

anticipate what matters to them. Part of this process includes not being afraid to ask questions about things you don't understand. A client or a supervisor would rather see that you are interested in learning something as opposed to having you make an incorrect assumption that leads to wasted time and effort.

It is important to keep up with the most recent trends in the industry that you service as well as in the legal industry. Keeping abreast of these changes will allow you to provide the best possible legal services and to anticipate changes that might affect your clients' legal needs.

It is equally important to become knowledgeable and proficient in the areas of law that specifically apply to your clients' industry. If you represent trucking companies, it is necessary that you become more than just familiar with the FMCSA regulations and any other state and federal regulatory framework that is applicable to the industry. You should always endeavor to keep up with new developments in the legal landscapes that apply to your clients' business concerns.

Don't underestimate the power of a simple phone call or initial strategy meeting. If you are working with someone you haven't worked with before, take the time to ask about their preferences for communication, what they are expecting of you, and what you should know about them.

Be Proactive

Don't wait for assignments to come to you. Show initiative by volunteering for projects, offering to help colleagues, and seeking out opportunities to learn and grow. Being proactive demonstrates your enthusiasm and commitment to the firm (and potentially to external clients).

Make a point of showing interest in staying updated on current trends in the industries that you serve and on legal developments that might impact your clients' business interests and/or how your firm delivers its services to clients.

A young associate should take it upon herself to work at building relationships. Those relationships can turn into billable work both internally and externally. Networking is a key component of building a law practice.

An underappreciated way of being proactive is to plan ahead for projects and opportunities. Newer associates should anticipate the slow times by lining up case studies, substantive reading materials, writing opportunities, and marketing opportunities. Setting aside time for these activities will allow you to develop your networks and learn new skills and developments in the law and the industries that you service in an organized fashion.

Don't be afraid to take ownership of a task, project or assignment. When you get an assignment from a supervisor or an assignment of a case directly from a client, you should make that assignment yours. Make sure you are clear on the goals and objectives of the assignment. You should understand the applicable deadlines and make sure that they are met. If it becomes clear that you will miss a deadline, communicate this clearly to whomever you are reporting to and work out an acceptable extension, if possible.

Be Reliable and Consistent

Becoming known for following through on your commitments and showing a high level of professionalism is a very important aspect of any associate's development into a top-level lawyer. Clients and supervisors want to know that they can trust you to get the job done in a timely, efficient, and complete manner.

One aspect of this that can be overlooked is managing one's time efficiently. A smart associate will learn to prioritize their tasks in such a way that they are actively tracking their responsibilities and making sure that nothing falls between the cracks. They will keep checklists, "to do" lists, calendars, and any number of other tools that will allow them to track where they stand on various tasks.

Learning to pay close attention to detail is another area that should be emphasized. All work should be carefully reviewed to ensure accuracy and correctness. This includes all emails and other forms of communication. If you are willing to send out simple things with grammatical mistakes and misspelled words, a client and a supervisor are well within their rights to question how you would do when allowed to handle more substantial work.

Another underrated aspect of reliability and consistency is being available. Supervisors and clients want to know that they can reach you when they need you. Do not make a habit of not answering your phone or directing your assistant to screen your calls. Pick up your phone when it rings and you are available. An associate should make a point of responding to emails and other communications as quickly as possible, even if it is just to let the person seeking your attention know that you received the communication and you are working to resolve their question.

Being a professional involves multiple factors and it can be hard to define exactly what professionalism consists of. At the end of the day, it involves being respectful of others. You should always speak to your supervisors and clients in a way that you would want them to speak to you. You should never raise your voice, make disrespectful facial expressions, show body language that suggests that you don't want to be bothered with what is transpiring. You should be punctual to any meetings with clients or supervisors. You should not speak badly about others or spread gossip, innuendo, or other malevolent content.

A young associate should be prepared to be resilient and adaptable. The practice of law will inevitably involve a high number of situations that will be challenging and stressful. You have to be prepared to face these situations head on and do whatever can be done to overcome them gracefully. Supervisors and clients that observe that an associate can handle adversity while staying calm under pressure are sure to give that associate additional opportunities to showcase their abilities.

Seek Feedback and Look to Improve

Hopefully, your firm has a structured professional development program that allows you to obtain feedback on your performance that will help you to develop the skills that you will need to become a top-tier lawyer. If not, there are still ways that a young associate can work towards their goal in this respect.

It is okay to take the initiative to schedule regular "check-ins" with your supervisors and with clients that are willing to discuss your performance with them. These can be as formal or informal as the participants

are comfortable with. Don't be afraid to ask how you are doing with various aspects of your responsibilities and how you can improve.

Similarly, you should ask specific questions about those areas that need improvement. A young associate should be honest in their assessment of areas that could use improvement and seek feedback from supervisors and clients. It is extremely important to be open and receptive to whatever feedback you might receive, whether it is positive or negative. Do not become defensive once you hear something that is less than positive, as that will derail the entire purpose of seeking feedback.

Once you have the feedback that you were looking for, it is important to implement that feedback into something concrete that can be referred to later as a guide. A young associate is greatly benefited by creating a plan that can be followed that will serve as a roadmap to assist in their professional development.

It is important to seek as broad an array of feedback as possible. The more people you involve in the process, the better you will understand the areas that you excel in and the areas that need improvement.

Demonstrate Leadership

Many young associates make the mistake of believing that it is not their job to lead within their firms and within other organizations that involve their clients. Becoming leaders is what sets you apart from other similarly situated associates and shows that you have what it takes to perform your job at a high level. You should not be afraid to take on leadership roles within projects. Similarly, do not be afraid to volunteer to take on a task that is high-profile and that has the potential to get you noticed if you do a good job.

You should not be afraid to look outside your firm for leadership opportunities. Bar associations and community involvement are great ways to show your aptitude for leadership. Look for bar associations that are relevant to your practice and become active in those organizations. Many of them have young lawyers' sections that allow associates opportunities to take on leadership roles early in their careers.

The same can be said for churches, civic organizations, social clubs, fraternities, sororities, and similar organizations. They all have a multitude of interests that they are seeking to serve. Those interests rely upon programming that needs to be run and that needs to be successful. If you are willing to help with the programming and take a prominent place in the organization, it will likely increase your stature within the community and could even lead to business generation through the contacts that you'll make.

Conclusion

Hopefully, this article provided you with some ways that can be easily implemented that will make your development at a law firm easier to navigate. This is not meant to be a one-size-fits-all exercise, but it will give any young associate that is just starting out on their career path a good start towards becoming indispensable to their firms and the clients that they serve. If you master these strategies, you can position yourself as an indispensable asset to your law firm and your clients. Remember, becoming indispensable is not just about being good at your job; it's about being someone the firm or the clients can't imagine being without.

How to Properly Prepare for Successful Fact Witness Depositions

By Michael Noordsy

It is imperative that trucking defense attorneys (younger and older) put in the time and effort to properly prepare for the depositions of (1) the Plaintiff and (2) other key Fact Witnesses.

Anyone who's ever read an article on a "nuclear" trucking verdict knows that fact witness depositions are a minefield for trucking defense attorneys.

However, with proper deposition preparation you can help to ensure better deposition outcomes. Further, when you are properly prepared you can lay your own mines in fact witness depositions.

Just Winging It Versus Outlines

Just Winging It

When I was a young Plaintiff's attorney, I unfortunately didn't have the benefit of extensive training on how to take a deposition. Instead, I was told (often on short notice) that I had been tasked to take the deposition of (1) the Defendant driver, (2) a witness, or (3) the investigating officer.

I would scratch down what I thought was important and try to navigate through those topics during the deposition. That was (and still is today) a recipe for disaster. In doing things this way, you will leave a lot of meat on the bone and not obtain the (1) information and (2) testimony you need to further your position.

I once saw a brilliant Plaintiff's attorney cross-examine a key witness during trial for about 45 minutes with a blank legal pad (and no exhibits). It was very well done and a bit intimidating to watch. I've been around thousands of attorneys over the years and have come to the realization that this one brilliant Plaintiff's attorney has a gift. Thus, he can clearly do it, and younger (and older) trucking defense attorneys should probably not do it.

As a trucking defense attorney, I have seen time after time other defense attorneys involved in the case not being prepared for the deposition. It often seems they are simply content with (1) being a warm body and (2) billing hours. They are not invested or engaged. That does nothing but harm their clients. Just Winging It for a trucking defense attorney is inappropriate and unprofessional.

A few years ago, I attended the Plaintiff's deposition that was taking place at the Co-Defendant's attorney's office. The Co-Defendant's attorney showed up about 10 minutes before the deposition and asked me ("since I was taking lead") how long I planned to depose the Plaintiff. I told him he was taking the lead on the deposition because he noticed it. He turned pale and seemed to be in a panic leading up to the start time of the deposition. About a minute before it started, I put him out of his misery and said I would take the lead. I then watched him for four hours (1) not take one note and (2) play Candy Crush on his phone while I took the lead. He didn't even have a question when it was "his turn." Even though he (1) noticed the deposition and (2) was supposed to take the lead, I spent 12 hours getting ready for the deposition to make sure my client was protected. Good thing I did.

Outlines

I have learned that outlines are an absolute requirement for taking a deposition. They keep you on track and ensure you cover what you need to.

At Fee, Smith & Sharp, LLC, we have form deposition outlines for any type of witness you may come across. I have an extensive 40-page form outline for a Plaintiff that was involved in an accident.

Michael Noordsy is a Senior Partner at Fee, Smith & Sharp, LLC. He was a Plaintiff's attorney and criminal defense attorney for 12 years. Nearly 20 years ago, he began defending personal injury and wrongful death cases. His work is primarily trucking related. He is a member of DRI and an active member of its Trucking Law Committee. He is servant minded, a blessed father, and a proud Longhorn. Without question, his greatest accomplishment is being the father of his two wonderful children (and his rescue yellow Lab and constant shadow, Grace).

It covers all the topics one would need to cover in the Plaintiff's deposition. Of course, I use it as a start and edit or build onto it as the case dictates.

As I consume everything in the file in preparation for the deposition, I fill in the deposition outline with the information that I know is true, so that I know when the witness is lying/misleading/not being truthful. If I ask something from the outline, I already know the true answer.

Finally, if a witness strays from your outline questioning, go where the witness takes you. When you are done exploring the witness's detour, you can easily pick up where you left off in the outline.

The Plaintiff's Deposition

I believe that the Plaintiff's deposition is the most important deposition in any case I have. The Plaintiff's attorney will be hard at work building up the damages model via (1) LOP medical providers that support outrageous medical (a) treatment and (b) bills, (2) trucking and safety experts, (3) a life care planner, and (4) an economist. Of course, you will have experts pushing back on all of those, but that is not enough.

I have learned over the years that if the jury (1) doesn't like the Plaintiff or (2) believes the Plaintiff is lying, it doesn't matter what the huge blackboard numbers are. A jury is not going to award a large amount of money on a person it (1) doesn't like or (2) believes has a hard time telling the truth.

This is why extensive preparation for the Plaintiff's deposition is necessary. Without it, a trucking defense attorney simply won't know what to ask (or not ask) at the Plaintiff's deposition. Preparation = Leverage. Leverage = reasonable (1) settlements and (2) verdicts.

What to Review in Preparation for the Plaintiff's Deposition

At a minimum, the following must be reviewed by the trucking defense attorney in advance of the Plaintiff's deposition: the (1) pleadings filed to date, (2) discovery exchanged to date (be sure to question the Plaintiff on Answers/Responses to your discovery requests that were anemic, at best, and riddled with objections), (3) deposition transcripts, (4) crash report, (5) body cam or dash cam video from law enforcement, (6) photographs (scene and vehicles), (7) video from our tractor, (8) Plaintiff's (a) medical, (b) employment, (c) prescription, (d) education, and (e) insurance records (auto, health, and disability), (9) ISO Claim Search on the Plaintiff, and (10) social media posts of (a) the Plaintiff and (b) those close to the Plaintiff.

I like to dig even deeper and will also review the following in advance of the Plaintiff's deposition: (1) CARFAX Vehicle History Report on the Plaintiff's vehicle (to identify (a) pre and (b) post accidents the Plaintiff likely won't tell me about), (2) comprehensive civil and criminal background reports done on the Plaintiff through LexisNexis, (3) reports done on the Plaintiff through PACER (to obtain federal case information), (4) Calls for Service documentation obtained on every address linked to the Plaintiff by way of Public

Information Act requests to applicable law enforcement agencies, (5) actual case files for every (a) civil and (b) criminal case the Plaintiff has been involved in, (6) documentation on the Plaintiff from any law enforcement agency that has (a) arrested, (b) jailed, or (c) dealt with the Plaintiff, and (7) the Plaintiff's Driving Abstract obtained "under the radar" (simple request to the Department of Public Safety) and not through a record service.

In a bind, reviewing reports previously done on the review of the above-referenced documents is helpful. The gold standard is to be sure to review every single page of documentation you have on the (1) Plaintiff and (2) case in preparation for the Plaintiff's deposition.

Pro Tip: You can't review all the above if you are not proactive in running down all that documentation well in advance of the Plaintiff's deposition. Younger (and older) attorneys must be looking months ahead to make sure they have what they need well in advance of the Plaintiff's deposition. Record services and paralegals are not the ones to blame if you don't have the documentation in a timely manner. The onus is on the handling attorney to make sure the (1) documentation is requested and (2) appropriate reminders/pushing is done to ensure a timely arrival of the documentation.

How Much Time Does it Take to be Prepared?

Rome was not built in a day. If you only spend 1-2 hours preparing for the Plaintiff's deposition, you are doing a disservice to your client. I typically (on the low end) spend at least 3-4 hours for each hour of actual deposition testimony of the Plaintiff. It is not uncommon for me to spend 10-15 hours preparing for the Plaintiff's deposition.

News Flash: (1) insurance companies and clients will pay for work done to bring down the value of the Plaintiff's case, (2) the time will allow you to know every detail of the case better than the Plaintiff's attorney, and (3) the Plaintiff's attorney likely will have spent no more than an hour preparing the Plaintiff for their deposition. The extra time you spend preparing will tip the scales in your favor.

Exhibits

You need to have your deposition exhibits (1) identified, (2) prepared (highlighted, etc.), and (3) ready to go days before the Plaintiff's deposition. Since most depositions are still done via Zoom, you should make sure you are proficient in pulling up the exhibits. There is nothing more embarrassing than watching an attorney muck around trying to pull up exhibits during a deposition.

How to Set up the Plaintiff

As we all know, being an attorney is nothing like it seems in (1) movies or (2) television shows. There rarely is a knockout punch that tips the scales in your favor. I did once cross-examine the Plaintiff at an arbitration, and he didn't show up the next day. His attorney said, "you wore him out with the questioning yesterday and he doesn't want to come back and see you." Unfortunately, that is not typically what happens.

The questioning that "wore him out" was set up by my (1) preparation for and (2) questioning of the Plaintiff at his deposition. He walked into a buzz saw at arbitration and had no clue that was going to happen.

I have learned that cases are not won by a knockout punch, but rather (1) preparation and (2)(a) a thousand small cuts or (b) continued body blows at the Plaintiff's deposition (things that don't seem like much at the time, but in the end are too much combined for the Plaintiff to withstand when the Plaintiff is called out about them at arbitration or trial).

The Plaintiff must be boxed in with their deposition testimony, with no available wiggle room. Put another way, they need to be painted into a corner with no escape.

Key Questions

The following are Key Questions that I believe must be asked of the Plaintiff. Importantly, if the Plaintiff is not being truthful in response to these questions, the attorney must show restraint and not give the heads up that the attorney is aware of the Plaintiff's lack of veracity. Catching the Plaintiff (after proper preparation and questioning) in (1) untruthfulness, (2) half-truths, and (2) deception, will provide tangible Leverage that can be used down the road to achieve reasonable (a) settlements and (b) verdicts.

Question: Have you ever been arrested or had any criminal issue? Don't worry about (1) crimes of moral turpitude or (2) felonies in the past ten years. Just ask that question, regardless of whether the Plaintiff's attorney has a problem with it. Often, they will say no, even if they have. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.* Then, something that typically would not come in at trial will come in through impeachment. I tried a case once wherein the Plaintiff denied any (1) arrests or (2) criminal issues at her deposition. She did the same at trial.

We then discussed at trial an arrest she had while protesting in Dallas years prior, which also resulted in her getting beaten in the back with a police baton (to the point she went to the hospital). Of course, in her deposition and at trial she also denied any prior back (1) injuries or (2) treatment. After denying any other arrests beyond the protesting one, she lied yet again, and we were able to discuss a felony conviction in Houston from 20 years prior. This resulted in the (1) judge giving her a warning about perjury and (2) jury pouring her (and her seriously injured son) out.

Question: Has your driver license ever been suspected or revoked? If they respond yes, get every detail you can on it, and then ask if there are any others. *If they say no, and it has, move on to the next line of questioning.* We obtain Driving Abstracts on (1) the Plaintiff, (2) our driver, and (3) any other key individuals that may be deposed. They are often filled with information on (1) suspensions, (2) revocations, (3) ticket convictions, (4) other accidents, and (5) criminal cases involving (a) alcohol or (b) drugs. Much of the time, the Plaintiff's (1) deposition and (2) discovery responses are not consistent with what is in their Driving Abstract. That will help you down the road.

Question: Have you had any other accidents outside of this accident? Typically, you will know of others. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.*

Questions: What areas of your body were injured in this accident? Before this accident, have you ever had any (1) injuries or (2) medical treatment for any area injured in this accident? 9 times out of 10, they will say no, despite you knowing that is not true. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.*

Question: Before this accident, have you ever had any diagnostic testing (x-rays, CT scans, MRIs, etc.) done on any areas of your body that were injured in this accident? The Plaintiff likely will deny any. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.*

Question: Have you ever been injured in an accident, incident, or otherwise outside of this accident? The Plaintiff likely will deny any other injury events. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.*

Question: Have you ever been involved in any other litigation either as a Plaintiff or Defendant? The Plaintiff likely will deny any other litigation. If they tell you about one, get every detail you can on it, and then ask if there are any others. *If they say no, and they have, move on to the next line of questioning.*

Questions after each break: Have you understood my questions thus far? Is there anything you want to change in your answers at this time? The Plaintiff (99.9% of the time) will answer (1) yes and (2) no. This continues to box them in for cross examination down the road at arbitration or trial.

Preparing for Surveillance

Oftentimes, surveillance is done (pre-suit and in litigation) on the Plaintiff without really knowing what to look for. If a decision is made to do surveillance on the Plaintiff, my preference is that it is done after I have deposed the Plaintiff.

When deposing the Plaintiff, you must get firm commitments from the Plaintiff on the following: (1) physical limitations, (2) what they can physically no longer do, (3) activities they used to enjoy doing (and where they did them) but can no longer do, (4) restrictions they are currently under from a medical provider, (5) what activities cause them (a) pain and (b) discomfort, and (6) things they have to hire folks to do for them now.

Armed with all this information, surveillance done after the Plaintiff's deposition has a better chance of catching the Plaintiff doing something they testified in their deposition that they (1) can't do or (2) shouldn't be doing.

If the Plaintiff Lies/Misleads/ Fibs, Let Them Do It

Why would you let the Plaintiff do this at their deposition and not call the Plaintiff out on it when it happens? Because you want the Plaintiff locked into their questionable deposition testimony.

The court reporter will draft the original deposition transcript and provide a copy of it to the Plaintiff to (1) review and (2) make any corrections or clarifications as the Plaintiff sees fit. The Plaintiff (99.9%) of the time will either not (1) return it on time or (2) make any corrections or clarifications. This will result in the Court Reporter's Certification being filed with the Court indicating that no (1) corrections or (2) clarifications were made by the Plaintiff, despite the opportunity to do so.

Again, Leverage = reasonable (1) settlements and (2) verdicts.

Depositions of Fact Witnesses

The above-referenced tactics can be used for the depositions of various Fact Witnesses (investigating officer, accident witnesses, family members/moaners & groaners for the Plaintiff).

When the depositions of these folks take place, we know more about them than they could ever imagine. The background information we obtain is crucial in (1) uncovering their soft under belly and (2) setting them up for impeachment at trial.

We do comprehensive (1) civil and criminal background, (2) social media, and (3) online searches on each of these witnesses, just like we do for the Plaintiff. With this information, we are better equipped to set them up for failure.

The aforementioned gifted Plaintiff's attorney that didn't need an outline was stunned at trial when he found out his accident reconstruction expert had a criminal past. The expert was asked about whether he had ever been arrested or had any criminal issues in his past. Of course, he testified that he had not. Because of that, we were able to introduce documentation on a Driving While Intoxicated conviction he had 15 years prior. The Plaintiff's attorney told us afterwards on a break that he was going to reach out to every Plaintiff's attorney he knew and make sure the expert would never work again.

I also routinely investigate the backgrounds of our (1) driver and (2) company witnesses before their depositions. This must be done because an effective Plaintiff's attorney is doing the same. By doing so, I learned before the deposition of our trucking company's Director of Safety that he had a Negligent Homicide case in his past that was the result of (1) young kids drinking and driving 4-wheelers and (2) his passenger dying because of an accident while he was driving. Thankfully, it did not come up during his questioning by the Plaintiff's attorney, but we had a plan on how he was going to address it if asked.

I also have found negative articles on several investigating officers that have put responsibility for the accident largely or solely on our drivers. The articles have provided impeachment opportunities with these investigating officers.

I once listened to the Plaintiff's economist boast (at length) during his deposition about how well he knows numbers. Based on a lot of his testimony, I later had the opportunity to discuss his previous bankruptcy filing that we found. The Plaintiff's (1) economist and (2) attorney seemed deflated and quite frustrated with the revelation.

One time, based on Calls for Service documentation obtained from a law enforcement agency on the Plaintiff's safety expert (that was quite critical of my client's lack of fall protection safeguards), I was able to make a point through him that no place can be truly protected from falls, not even the Plaintiff's safety expert's home because I had Calls for Service documentation indicating his father slipped, fell, and broke his hip there.

Finally, Calls for Service documentation has also provided insight on the following issues taking place at the homes of Plaintiffs/witnesses: (1) overdoses, (2) assaults, (3) criminal issues, and (4) injury incidents. If played properly by the trucking defense attorney, these issues can be quite damaging to the credibility of the Plaintiff and witnesses.

Concluding Thoughts

It is imperative that trucking defense attorneys (younger and older) put in the time and effort to properly prepare for the depositions of (1) the Plaintiff and (2) other key Fact Witnesses.

Do your homework early. Make sure your outline is representative of the immense amount of work that truly needs to be done to properly (1) depose folks, (2) protect the client, and (3) further your position in the case. To do otherwise is inexcusable.

Proper deposition preparation will help to ensure better (1) deposition and (2) case outcomes. I can't stress this enough: Leverage = reasonable (1) settlements and (2) verdicts. Leverage does not happen without a commitment to what needs to be done, long before, leading up to, and during the deposition.

A Strong Right Hand

Capitalizing on Leverage to Maximize Settlement Negotiations

By Sergio E. Chavez

Creating and exploiting leverage allows a defendant to reach the goal of reaching resolution within a monetary range that is reasonable and commensurate to the facts of the case.

The Past Era of the Jury Trial

We have all heard stories by older and more seasoned lawyers that the 80s and 90s were decades where trial opportunities were abundant, and lawyers aspiring to develop their trial skills had plenty of trial opportunities. Practice areas involving work related injuries, asbestos, auto accidents and even medical malpractice were routinely litigated and tried to jury verdict. It was easy for trial lawyers to sharpen and fine tune their trial skills while at the same time accumulating a high number of jury trials under their belts.

During that time, institutional clients such as corporations and insurance companies had a greater tolerance for risk and would not cower at the thought of taking a case to trial. Of course, back then, juries would render verdicts considered reasonable or commensurate with the facts of the case. Juries were, for the most part, trusted by institutional clients to decide cases from a pragmatic sense and to be restrained with the number of damages awarded. That was back then, and fast forwarding to the present mid-2020s, the dynamic and risk of taking cases to trial has drastically changed and the number of civil cases which are annually tried has significantly decreased.

The current age of litigation is plagued by reports of the "nuclear verdict" which is a phrase not required to be defined amongst the civil defense bar. Juries have demonstrated an increasing trend of awarding higher verdicts and monetary damages starting in the 2000s and continuing to the present. The data from studies researching civil verdict ranges consistently show the increased verdict amounts being awarded by juries. The trend is not limited to any specific region in the country and nuclear verdicts are reported even in states historically considered as conservative venues such as Texas, Florida and Georgia.

The advent of higher jury verdict awards and reports of nuclear verdicts becoming more prevalent have caused institutional clients to scale back their willingness to take cases to trial. Institutional clients have become less risk averse and prefer to resolve cases for higher settlement amounts to avoid the risk of a bad trial outcome. The Plaintiffs' bar has taken notice of the decreased willingness of corporations and insurance companies to try cases which have motivated Plaintiffs' firms to become more aggressive, demanding and unreasonable during settlement negotiations. Plaintiffs' lawyers now start settlement negotiations in the "stratosphere" and hardly move down from their unreasonable positions during negotiations. The Plaintiffs' bar has educated itself to approach negotiations from the standpoint of not leaving any money on the table.

The New Era of Claims Resolution

The culmination of these factors has caused a transition from the era of the jury trial to the present era of reaching early resolution. The focus of corporate clients and insurance companies, with a few exceptions, is to focus on reaching resolution quickly and efficiently. Resolving claims early allows institutional clients to decrease defense expenses and overall costs of litigation. Focusing on early resolution of claims also results in fewer cases being tried and minimizes the risk of a bad trial outcome. Because of this transition, civil defense attorneys are required to explore resolution not only during the early stages of a suit, but also throughout the entire proceeding and exploit any opportunity to reach resolution prior to trial.

Civil defense attorneys have come to understand and realize that clients expect

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and desire quick resolution over prolonged litigation. More and more defense attorneys have understood that clients disfavor continuing and mounting defense costs in civil litigation, especially where there is a lack of a clear strategy for reaching resolution or an end game to the suit. Client dissatisfaction is becoming more common in situations where a favorable outcome was reached but at too high a cost. Increased defense costs and protracted litigation are factors that now dictate the development and direction of defense strategy. These factors are to be avoided by civil defense counsel because clients are internally focused on decreasing legal expenditures and generally have developed a low interest to dig in and fight a case. Defense attorneys have also realized that preserving good client relations means having a heightened awareness of avoiding mounting defense costs and lengthy litigation whenever possible.

Identifying Early Opportunities for Creating Leverage

Since reaching early resolution is now the focus and desire of institutional clients, defense counsel must be vigilant for opportunities to reach an early resolution of a case. During the early stages of litigation, a sound defense strategy identifies opportunities to create leverage through potential venue challenges, removal to federal court, jurisdictional challenges, motions to dismiss, expert challenges, dispositive motions and evidentiary exclusions.

Challenging County of Venue

Challenging the venue (county) where a claimant elects to file suit is a source of leverage since more often than not, claimants attempt to file suits in favorable venues for a myriad of reasons. The driving factors for a claimant's selection of venue are generally centered on filing suit in counties where the jury pool and the trial judges are more liberal. Plaintiffs' lawyers are aware of these factors, and will seek to avoid filing suit in a county of proper venue even if it means the failure to comply with legal venue requirements. Plaintiffs' lawyers will file suit in a county of improper venue with the hope that the defense will not challenge the improper venue selection.

However, challenging an improper venue, or even challenging a proper venue because a more appropriate or convenient venue exists, is a sound strategy for creating leverage early in the case. Once the defense mounts a challenge to the claimants' venue choice, if the risk of having the case transferred to another venue more favorable to the defense is likely to occur, then leverage is created, and the opportunity to move the case toward early resolution should be exploited along with the venue challenge.

Removal to Federal Court

Another opportunity to create leverage early in a case exists with the potential of removing the case from state court to federal court. It is widely known that plaintiffs' lawyers strongly prefer to prosecute cases in state court and avoid, at all costs, litigating a case in federal court. It is much more advantageous for a corporate defendant, especially a motor carrier, to defend a suit in federal court versus a state court. Rare are the circumstances where a motor carrier will decide for strategic reasons not to remove a case to federal court. Federal judges are more willing to apply the law and rule on the facts, especially in the context of dispositive motions, since federal judges are immune from the political pressures regarding election results and campaign financing. A successful removal of a suit to federal court could, in of itself, be enough to generate the necessary leverage to move a case into early settlement negotiations and reach resolution especially where the removal results in the case landing with a federal judge known to be defense oriented or to be a conservative judge.

Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

Removal to federal court also allows a defendant to challenge the allegations and claims contained by a plaintiffs pleading for failure to state claim under Federal Rule of Civil Procedure 12(b)(6) (Rule 12(b)(6)). Rule 12(b)(6) motions are early opportunities for a defendant to obtain dismissal of certain claims (such as direct liability claims for negligent entrustment and hiring) or even the dismissal of the

entire suit in certain situations. One area where a Rule 12(b)(6) motion could achieve complete dismissal of a suit and provide significant leverage for settlement negotiations is in the context of freight broker liability claims asserted against a freight broker.

Freight brokers which are sued in a personal injury suit arising from a motor vehicle accident have the ability, in some federal circuits, to remove the suit to federal court while concurrently mounting an early Rule l 2(b)(6) challenge focused on the global dismissal of the freight broker claims. Freight brokers can argue that as federally licensed freight brokers, the claims based on state law against the freight broker are preempted by the Federal Aviation Administration Amendments Act ("F4A") which bars the state law claims for negligent hiring and selection of a motor carrier. *See Aspen Am. Ins. Co. v. Landstar Ranger, Inc.,* 65 F.4th 1261, 1265 (11th Cir. 2023); *see also Ye v. Globa!Tranz Enters., Inc.*, 74 F.4th 453, 456 (7th Cir. 2023). There is, however, a split of legal authority amongst the various federal circuits regarding preemption under the F4A, and there are even divisions on the issue amongst federal district courts within a federal circuit. *See Torres v. Minnaar*, No. 23-cv-486, 2024 U.S. Dist. LEXIS 32266, 2024 WL 778383, at *5 (E.D. Tex. Feb. 26, 2024) ("Unlike the statutory provisions ... considered by the Supreme Court in Avco, Metropolitan Life, and Beneficial, the FAAAA includes no federal remedy or civil enforcement scheme, much less a scheme authorizing a cause of action that may be heard by federal courts."); *see also Nesbitt v. Moonlight Logistics, Inc.,* No. 23-cv-l 8 l-OLG-HJB, 2023 U.S. Dist. LEXIS 121373, 2023 WL 4535480, at *3 (W.D. Tex. June 20, 2023) ("Section 14501, however, does not contain any cause of action, let alone one that meets the complete preemption standard.").

Freight brokers which are sued in federal circuits with favorable legal precedent on the issue of preemption under the F4A are able to create leverage during settlement negotiations and seek early resolution by removing the case to federal court and filing a Rule 12(b)(6) motion to dismiss the state law claims.

Forum Non Conveniens

When a trucking accident occurs in a different state where the suit is later filed, the opportunity exists to challenge the location where the suit is filed based on forum non conveniens (FNC). The legal standards for dismissal of a suit for FNC vary amongst the states and federal circuits. FNC standards are generally high and difficult to satisfy, but there are occasions when a suit was clearly filed in an incorrect state to gain an advantage based on the potential jury pool or venue.

FNC is not limited to situations where an accident occurring domestically was filed in an incorrect state. FNC also arises in situations where an accident or event occurring in a foreign country results in claimants filing suit in the United States usually because a corporate defendant has nominal ties to the accident or event that occurred abroad.

The most common examples of these types of situations are claimants involved in a foreign motor vehicle accident, airplane crash, bus accident and even vacation related accidents at a beach resort. The claimants are usually American citizens or legal residents who travel abroad and are then involved in an accident resulting in significant bodily injuries or death. Case on point, an accident at a beach resort involving an American couple from Texas recently made media headlines when the couple was electrocuted in a jacuzzi at a beach resort in Rocky Point, Mexico (Puerto Penasco) in June of 2024. Other tourists at the resort noticed something was wrong with the couple in the jacuzzi, and attempted to help the couple. The husband did not survive, but the wife was rescued from the jacuzzi and flown to Phoenix by ambulance helicopter for treatment.

The surviving wife filed suit in Texas against the beach resort and multiple other defendants who owned vacation rentals at the resort. For most, if not all, of the party-defendants, FNC will be a major defense strategy which will be utilized to create leverage during settlement negotiations. In the context of settlement negotiations, the defendants may argue that the suit should be litigated in Mexico rather than in a Texas state court. The filing ofFNC motions by the party-defendants will pressure the claimants because the potential for dismissal of the suit to allow for the case to be litigated in Mexico will mean a significantly less recovery because of the caps on monetary damages that are prevalent in personal injury suits under Mexican law.

Challenging Personal Jurisdiction

Asserting challenges to a state or federal court's ability to exercise personal jurisdiction over a defendant is always a defense strategy for defendants who do not have sufficient minimum contacts in the forum state where the suit is pending. The legal standards regarding a state court's exercise of personal jurisdiction over a defendant who has not availed itself to the privileges of conducting business in the forum state are intricate and complex which involve issues regarding general and specific jurisdiction, the level of minimum contacts, and whether a tort was committed within the forum state by the defendant.

Despite the complexities of these legal standards, the increased defense costs, and the reality that asserting a challenge to personal jurisdiction is a "mini-lawsuit" within the broader litigation, a defendant which challenges personal jurisdiction creates leverage which can be exploited during settlement negotiations. Challenging personal jurisdiction allows a paity to negotiate from the standpoint of highlighting the risks and possibility of the suit being dismissed in the forum state and the claimant being forced to re-file the suit in a more advantageous forum for the defendant. Even in situations where the trial court rules against the defendant which challenges personal jurisdiction, all is not lost because the ruling can be appealed on an interlocutory basis, in most states, to the appellate court. A subsequent appeal to an intermediary appeals court and possibly to the state's highest court would take years to conclude and could result in a complete stay of the underlying litigation pending in the trial court. All of these factors create significant leverage during settlement negotiations for defendants who have the legal basis to mount a challenge to a court's exercise of personal jurisdiction.

Statute of Limitations

Perhaps the most obvious legal defense a defendant could assert is based on the

applicable statute of limitations. Suits filed after the expiration of the statute of limitations are dismissed as a matter of course in state and federal courts. Defendants with a solid statute of limitations defense would hardly consider entering into settlement negotiations with a claimant during the time a dispositive motion is being litigated to finality. There would be some instances where the leverage generated from the statute of limitations defense would be so strong that a defendant would consider a nominal settlement amount simply to obtain a release of all claims and avoid having to proceed with the hearing and incurring additional defense costs.

The statute of limitations defense is not straightforwardly applied in circumstances when a suit was filed before expiration of the applicable statute of limitations, but the defendant was then served after the expiration of the limitations period. In those situations, Courts generally analyze the due diligence utilized by the claimant to execute service of process on the defendant in deciding whether to relate back the date service was effectuated to the date the suit was initially filed. Any periods of time for which the claimant is not able to show due diligence was exercised will be deemed to constitute a lack of due diligence on the part of the claimant and result in the barring of the suit under the applicable statute of limitations. In such cases, asserting a dispositive motion creates leverage for a defendant to engage in settlement discussions given there is a risk the Court would find that the claimant failed to exercise due diligence in accomplishing service on the defendant after expiration of the limitations period.

Identifying Opportunities for Creating Leverage in Later Stages of Litigation

There are amble opportunities for creating leverage during the later stages of litigation. Once written discovery, depositions and expert discovery has been conducted, opportunities will arise for creating leverage in preparation of settlement discussions or mediation.

Summary Judgment Motions

Summary judgment motions are the most important tool a party can utilize to challenge claims or elements of damages. After a substantial amount of discovery has been conducted, it becomes apparent that the claimant will not be able to survive a summary judgment challenge to some of the claimant's causes of action or elements of damages. The most common claims which are generally challenged through summary judgment practice in the context of personal injury suits against motor carriers are direct liability claims asserted against the motor carrier.

The direct liability claims which are the most commonly challenged through summary judgment are negligent entrustment and negligent hiring, training, supervision and retention. The legal standards for proving these claims vary across the states. However, these claims generally require a claimant to prove that the motor carrier's negligence in the entrustment, hiring, supervision, training or retention of a driver was the proximate cause of an accident and of the claimant's injuries. It is usually not sufficient from a legal standpoint for a claimant to show that a wrongful act or omission was committed by the motor carrier relative to the entrustment, hiring, training, supervision or retention of a driver if the wrongful act or omission did not cause or contribute to the accident. When claimants lack the necessary evidence to prove direct liability claims against the motor carrier, the opportunity exists to challenge these claims though a summary judgment motion.

A summary judgment motion challenging direct liability claims will always create advantageous leverage for a defendant because claimants want to spray the jury at trial with evidence of wrongful acts on the part of the motor carrier. Direct liability claims are the vehicle by which a claimant shows a jury the deficiencies in the hiring process, little or no training provided to the driver, lapses in supervision of the driver and violations of DOT regulations. These are the types of wrongful conduct which a claimant relies on to persuade a jury that the motor carrier is a bad company whose unsafe practices and careless internal culture resulted in the accident which caused the claimant's injuries. However, if the claimant is at risk of having direct liability claims dismissed because of a motor carrier's summary judgment motion, or worse, the claimant fails to survive such a summary judgment, then the motor carrier has created significant leverage in preparation of settlement discussions or mediation.

A claimant who has lost direct liability claims through a summary judgment challenge is left in a weakened position. Such a claimant knows that the ability has been lost to tum the jury against the motor carrier. The jury will be left to focus on the facts related to the accident and the resulting injuries and damages of the claimant which are generally not the ingredients which drive the value of the case and a high verdict. The claimant's weakened position will allow a motor carrier to negotiate during settlement negotiations or mediation from a strong and advantageous position, paving the way for the case to be resolved at a favorable settlement amount.

Expert Challenges

Another area which can result in creating leverage in the later stages of litigation is challenging the claimant's testifying experts. Whether the challenge is against an expert related to liability, a treating physician, medical causation or the claimant's damages, challenging a claimant's experts through a Daubert/Robinson motion automatically generates leverage for a defendant.

Mounting an expert challenge puts the claimant in a position of peril by potentially losing the expert proof required for an important part of the claimant's case, especially if the merits supporting an expert challenge are strong and meritorious. The filing of an expert challenge as the parties are preparing for mediation, or who are engaged in settlement negotiations, generates leverage for the defendant since a claimant is at risk of losing a vital component of their case should the challenge be successful for the defendant.

Evidentiary Challenges

During the discovery process and development of a case, a claimant never stops looking for negative evidence against a defendant. The same is true for a claimant prosecuting a personal injury suit against

a motor catTier and commercial driver. A claimant's strategy is to introduce at trial and present to the jury as much negative and bad evidence possible regarding the defendants regardless of whether the rules of evidence bar the introduction of such evidence. The examples are limitless but the most prevalent types of evidence which claimants attempt to improperly introduce at trial involve the following:

I. DOT regulatory violations by the motor carrier which lack a causal nexus to the underlying accident or resulting injuries,
II. CSA BASIC ratings related to a motor earners ratings for accidents, out of service, alcohol/drug, equipment violations
    a. Prior accidents which are not substantially similar to the subject accident
    b.Driver's prior criminal convictions
    c.Driver's previously failed random drug/alcohol testing
III. Driver's social media posts
IV. Driver's consumption of alcohol or illegal drugs without proof of impairment at the time of the subject accident.
    • Post accident events such as the driver's termination, preventability determinations and changes in policy and protocol
    • Driver's involvement in subsequent accidents
    • Driver's theft from the employing motor carrier through diesel credit cards

The list of improper evidentiary matters which a claimant may attempt to improperly introduce at trial is infinite, and each case presents its own unique set of facts. Evidentiary matters which are barred by the rules of evidence, or for which a meritorious argument can be made for exclusion, should be challenged through a motion to exclude. A motion to exclude places the claimant in a position of losing important evidence that is negatively impacting, prejudicial or harmful to the defense. A defendant who asserts a motion to exclude and succeeds in convincing the trial court that the evidence is not admissible at trial creates significant leverage for settlement negotiations or mediation. Even when a motion to exclude is lost at the trial court level and the evidence is improperly introduced to the jury, the groundwork for an appeal is put into place which could assist in post-verdict settlement negotiations.

Tort Reform Statutes

In some states like Texas and Iowa, tort reform statutes focused on suits against motor carriers and commercial drivers have been enacted. These statutes are aimed at facilitating a fairer playing field for motor carriers defending personal injury suits and eliminate unfair trial tactics. Invoking the protections provided by these tort reform statutes automatically creates leverage for a motor carrier defending a personal injury suit.

Texas enacted its motor carrier tort reform statute in 2021. The statute allows motor carriers to bifurcate a trial into 2 phases. The first phase adjudicates only compensatory damages, and limits the type of direct liability claims which are tried against a motor carrier. The second phase adjudicates exemplary damages. The protections afforded by the Texas tort reform statute are being invoked as a matter of course in litigation across the state which is providing significant leverage during settlement negotiations for motor carriers in personal injury suits.

The Iowa tort reform statute provides for caps on pain and suffering in suits involving commercial vehicles. The Iowa statute which was enacted in 2023, caps noneconomic damages to 5 million.

Texas and Iowa are the first states to pass and enact tort reform measures aimed at curbing excessive and nuclear jury verdicts. Motor carriers which invoke and take advantage of these statutes gain significant leverage during settlement negotiations and mediation which culminates in facilitating reaching resolution of suits.

Exploiting Leverage During Settlement Negotiations

The hard work focused at posturing the defense in the best possible position culminates in creating important leverage to be utilized during settlement negotiations or mediation. During settlement negotiations, the defense capitalizes on the leverage gained by raising defense themes and continuously noting the procedural victories which have left the claimant in a weakened position. The victories gained by the defense will have a sobering effect on the claimant and cause the claimant to accept and make peace with the time value of the case. Claimants who have "cooled-off their jets" due to the defense victories generally approach settlement negotiations or mediation with a more reasonable attitude and an increased willingness to negotiate in good faith.

The defense exploits its leverage during negotiations by continuously reminding the claimant of its defense victories simultaneously with each settlement offer extended. Each settlement offer includes communicating the heightened defense posture which works to redirect the true value of the case within the range of a reasonable settlement commensurate with the facts of the case. Every time the claimant stubbornly communicates a settlement demand that is outside the reasonable value of the case or a demand that is in "the clouds", the defense responds by reminding the claimant of the losses and of the claimant's weakened position with a settlement offer that falls within the true range of the value of the case. After several moves where the defense maintains its position, the claimant comes to realize the feasible settlement range the defense is willing to entertain, and the claimant is left to decide between reaching resolution or proceeding to trial.

Creating and exploiting leverage allows a defendant to reach the goal of reaching resolution within a monetary range that is reasonable and commensurate to the facts of the case. In those unfortunate situations when the defense has not been able to create leverage throughout the pendency of the litigation, a case will likely have to be resolved above the reasonable evaluation by overpaying above the value of the case. Such emphasizes and shows the importance of setting defense strategy goals early in the case which allow the defense to achieve the creation of leverage in preparation of seeking resolution of them.

A Strong Right Hand

Working the Case Backwards Through Effective Use of Trucking Experts

By Maxwell (Max) Brusky, Sarah E. Hansen and Martin W. Randolph

In evaluating your expert needs, consider the "5 Ws" (who, what, when, where, why) as a framework for organizing your thoughts and determining what will be the most effective in your case.

The retention and presentation of expert witnesses is an important part of any lawsuit, but particularly so in trucking litigation. As vehicle technology becomes more prevalent and complex and regulatory oversight becomes more complicated and ever-changing, trucking attorneys are faced with having to explain hard-to-follow concepts and theories to normal, everyday folks off the street, with a variety of life experiences, educational backgrounds and work histories. The task can seem daunting—how do I, as a trucking defense lawyer, get this point across to John or Jane Smith, when I am trying to wrap my mind around something that may be outside of my wheelhouse?

This is where finding the right expert is critical, and someone who has both the expertise and education to testify credibly on the subject, but also the capability to explain it in layman's terms so that virtually any grown adult could follow. There are many considerations that go into retaining an expert, including need and associated cost (a significant consideration for your client). In evaluating your expert needs, consider the "5 Ws" (who, what, when, where, why) as a framework for organizing your thoughts and determining what will be the most effective in your case.

It bears noting at the outset that the use of experts is heavily dependent on the jurisdiction in which you practice. This could include the timing and content of expert disclosure, the standard by way of the court's acceptance of scientific evidence (including whether your jurisdiction follows *Daubert*[1], *Frye*[2] or some modified version or other standard), the necessary

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). The general premise is that the judge acts as the gatekeeper in determining admissibility of evidence under a number of factors including 1) whether the expert's technique or theory can be tested and assessed for reliability, 2) whether the technique or theory has been subject to peer review and publication, 3) the known or potential rate of error of the technique or theory, 4) the existence and maintenance of standards and controls, and 5) whether the technique or theory has been generally accepted in the scientific community.

[2] *Frye v. United States*, 293 F. 1013 (DC Cir. 1923). The general premise is that an expert opinion is admissible if the scientific technique upon which the opinion is based is "generally accepted" as reliable in the relevant scientific community.

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qualifications for a particular expert, and other considerations relating to what discovery can be gathered from experts in advance of a trial. Know your jurisdictional rules relating to experts as they could have a significant impact on your strategy as you prepare for trial. What might be the best strategy in one jurisdiction may not be in another.

What (kind of expert are you looking for)?

In a trucking case, you have a bevy of possible liability and damages experts at your disposal. Know what kind of experts are out there and what situation might trigger the need to retain someone. Although not exhaustive by any means, below is a list of some of the experts commonly seen in trucking litigation:

Liability

Accident Reconstruction

Probably the most often-used liability expert in a trucking case is your accident reconstruction expert. An accident reconstruction expert uses scientific methods and evidence to determine the events leading up to, during or after a collision. They apply principles of physics and engineering to calculate vehicle speeds, acceleration and impact forces. In doing so, they look at scene evidence, vehicle evidence and environmental factors including weather and road conditions. Accident reconstruction experts can testify at trial as to their opinions on the casual factors of an accident. They can also be used to introduce demonstrative evidence that might help a jury understand the happening of the accident, including animations (a computer generated depiction of the accident) and video re-enactments.

They are one of your first points of contact if you have a catastrophic accident which requires an emergency response to preserve evidence at the scene and from the vehicles involved. You should have an accident reconstruction expert at your disposal who is quick and responsive in the event you have an emergency response and they are needed immediately to preserve evidence. They should be able to tell you what technology is present both on your client's truck and on any other vehicles involved, and be ready to capture and preserve that data before it is lost. Coordinate with your accident reconstruction expert to ensure that the vehicles are moved and secured in a manner that does not destroy data.

Human Factors

The role of a human factors expert is to analyze how people interact with technology, equipment and their environment, including in normal, abnormal and emergency conditions. They have specialized knowledge of people's mental, perceptual and physical capabilities and how they interact with systems, products and environments. These experts apply scientific knowledge of human capabilities, judgment and decision-making and human performance, needs, and motivations to determine the appropriateness of a person's response to a situation. A human factors expert applies research principals to evaluate things such as perception and response time, attention and distraction, learning and memory, driver behavior, fatigue and risk perception, and to assess the reasonableness of the actions of motorists and pedestrians within their particular environment. They can also speak to conspicuity (how visible something is) and the impact of lighting levels on a driver's ability to respond.

This is an expert you should consider retaining if a driver's perception/response time is a major issue in your case, particularly if it may be impacted by lighting, weather and/or other environmental factors. This expert will work with your accident reconstruction expert to identify how the accident happened with focus on the human element, and explain the behavioral factors that may have contributed to same, both on the part of your driver, but also other motorists and/or pedestrians.

Trucking Expert/Trucking Standards

The role of a Trucking or Trucking Standards expert is to provide specialized knowledge about the trucking industry, which can include a variety of fields including transportation safety, logistics management, vehicle maintenance, commercial driving regulations and regulatory compliance, broker/shipper liability and freight and cargo handling, including specialized cargo issues such as transportation of hazardous materials and load securement. This includes guidance on the interpretation and application of Federal Motor Carrier Safety Act, corresponding state-level regulations, and industry standards.

With an increased focus on trucking litigation, more aggressive plaintiffs firms are more frequently relying upon an expert to scrutinize motor carrier compliance in an effort to create leverage in seeking high value verdicts and settlements. When looking to retain your own expert to combat this, it is key to finding someone with a strong background in industry regulatory enforcement and development and implementation of trucking industry protocols, and someone who can explain the "business of trucking" to a jury that may be coming in with their own preconceptions about trucks and truck drivers.

Traffic Engineering

Depending on your case, you may need a traffic engineering expert to discuss the traffic conditions, including signage, traffic signals, road closures, and construction zone setup. These experts are sometimes used to interpret technical data regarding operation of traffic lights, including traffic light intervals, to evaluate who had the right-of-way, or determine if the signal interval may have contributed to the happening of the accident. These experts are also helpful in confirming whether a road closure, modified traffic pattern and/or construction zone was designed and implemented in a way that was compliant with federal, state and/or local requirements, which could be a basis for a cross-claim or third-party claim against another responsible entity.

Toxicologist

If your case involves possible intoxication and/or impairment by drugs or alcohol, either on the part of your driver or another party such as the plaintiff or co-defendant, you may need to retain an expert to review the toxicology reports and testify about the effect, if any, of certain substances on the person's ability to drive. If your driver is found to have drugs or alcohol in their system on federally mandated post-accident testing, consider retaining your own toxicologist to evaluate whether the substances found would, in fact, result in impairment, as it is possible for certain substances to remain in the body for days after use and the method of testing can play a factor in whether the substances may have impacted their driving ability.

Damages

Medical Expert/Pathologists

Depending on the injuries alleged in your case, you may need one or more medical experts to assess the plaintiff's injury claims. The specialty will depend on the kind of case you have and the injuries alleged. Examples of experts you may need to retain could include an orthopedic or neurologic expert to opine as to physical injuries such as spinal complaints or shoulders, knees or hips, a radiologist to interpret medical imaging, a psychologist to assess a claimed mental health injury, a neuropsychologist to evaluate the presence and/or extent of an alleged head injury, a forensic pathologist to opine as to cause of death in a wrongful death case, or others. Medical experts may opine as to causality of the injuries, necessity of treatment including surgeries, a plaintiff's ability to work, whether medical restrictions are necessary, and permanency.

Medical experts can be retained to review records and films and issue a report, and in federal court and most jurisdictions, there is a method to compel the plaintiff to submit to an "independent medical examination" or IME with your designated expert. Bear in mind, however, that in certain situations, you may not want a medical expert to conduct an IME, for example, if you know the injury is clearly traumatic and the plaintiff has made a good recovery. You may also want to consider retaining a medical expert to review films and records and give their initial impressions verbally before moving forward with the cost of a full IME, which can be very expensive. This can help evaluate the potential value of your case and develop your case strategy, and provide leverage during settlement negotiations.

Biomechanical Engineer

A biomechanical engineer investigates and analyzes the forces at play in an accident, including magnitude and direction of loading, to evaluate whether those forces can cause the specific injuries alleged. Using information gleaned from the accident reconstruction regarding speed and direction of force, the biomechanical

engineer evaluates the mechanism of the impact to determine whether the motions and loading experienced by a vehicle occupant are of the nature that could result in the injury claimed. They can also help determine whether pre-existing conditions played a role based upon their impact analysis and review of a plaintiff's medical records.

Biomechanical engineers may be helpful to demonstrate to the jury that the forces involved in the accident would not have resulted in the structural damage to the body claimed by the plaintiff and can be particularly helpful in LIST (low impact soft tissue) type cases. Biomechanical engineers can also be used to opine as to the impact of use of safety features in a vehicle on the biomechanics of an accident, for example, whether failure to use a seatbelt caused or contributed certain injuries claimed by the plaintiff. Biomechanical engineers rely on crash data, crash test data, and in some cases computer modeling studies and incident-specific simulations to evaluate the physical forces of an accident injury causation.

Vocational Rehabilitation Expert

If you have a claim involving considerable wage loss and questions over whether the plaintiff can work in some other capacity, you should consider retaining a vocational rehabilitation expert. A vocational rehabilitation expert assesses the plaintiff's ability to work and identifies potential job opportunities consistent with their limitations. They can also speak to a plaintiff's transferable skills, and discuss methods that the person can engage in retraining or additional education to allow for a transition to work consistent with their post-accident capabilities.

Their work typically involves review of the plaintiff's work history, an interview and testing of the plaintiff, review of pertinent records and including medical records, employment and academic records, and evaluation of other jobs available in the geographical area, including amount of potential earnings. They can identify things the plaintiff could have done to mitigate wage loss and transition into other employment consistent with their medical restrictions. What a vocational rehabilitation expert cannot do, however, is opine as to disability level or ability to work from a medical perspective; they rely instead on your medical expert to speak to whether the plaintiff can work and in what capacity/with what restrictions.

Medical Billing Expert

You may consider retaining a medical billing expert, whose role is to analyze and evaluate plaintiff's medical bills to determine the reasonableness of charges, whether they are accurate, consistent and appropriate for the services provided, or whether medical expense charges are inflated or incorrect. A medical billing expert can prepare reports for use in negotiations that may bolster your settlement position, or in some situations can be used to testify at trial in an effort to combat claims for medical expenses.

Economic Expert

Economic experts can be used to combat special damages claims, including wage or business loss and medical expenses. They are the "numbers guys" who calculate the value of the alleged loss based on the information provided, projected out into the future. A forensic economist can be very helpful in a case with complicated wage or business loss claims, to ascertain the true value of the alleged loss for the purposes of valuation and settlement negotiations. At trial, an economist can be used "behind the scenes" to review the plaintiff's economist's projections, identify areas to attack, and help you prepare to cross-examine plaintiff's economist as to their projections on special damages.

Who (exactly, should you retain)?

The question of *who* you should retain is patently different from the question of *what specialty* you are looking for. This question pertains to the specific person you want in front of the jury and the traits of that person that could affect their credibility in the eyes of a jury. The objective is to select an expert that has the capacity to distill and convey complicated and complex matters in a way that the jury can understand (a skill in and of itself) and who will hold up during what may be aggressive questioning from plaintiff's attorney. The most knowledgeable person on the subject may not be the best expert to choose.

How an expert may be perceived by a jury can be condensed into four factors: 1) likeability, 2) believability, 3) trustworthiness, and 4) intelligence.[3] In selecting your expert, you need to consider how he or she will come across in all categories, with greatest consideration of the first factor. The most educated expert will do you no good if he or she is unlikeable to a jury or easily triggered by the plaintiff's attorney in answering questions at a deposition or on the stand at trial.

In 2018, Forensic Science International ran a study entitled "Juror's Perceptions of Forensic Science Expert Witnesses: Experience, Qualifications, Testimony Style and Credibility," which examined what aspects of an expert witness appealed to jurors in real case scenarios.[4] This study included observing expert witnesses testifying in court followed by paper surveys and telephone interviews with real jurors hearing real cases (focused on forensic pathologists used in homicide trials).

When jurors were asked to identify what an "expert" was, typical responses included descriptors such as "knowledgeable," "specialized" and "received training." Some jurors identified licenses, certifications and credentials as a component of what it means to be considered an "expert."

In terms of qualifications, jurors ranked years of experience as the most important factor in assessing qualifications, followed by university education and certifications and working in an accredited lab, with external training/conferences/workshops and on-the-job training. However, there

[3] Broadsky, S.L., M.P. Griffin, R.J. Cramer, "The Witness Credibility Scale: An Outcome Measure for Expert Witness Research," BEHAV. SCI. LAW 28, p. 892-907 (2010).

[4] McCarthy Wilcox. A., N. NicDaied, "Jurors' perceptions of forensic science expert witnesses: Experience, qualifications, testimony style and credibility," FORENSIC SCIENCE INTERNATIONAL, p. 100-108 (Vol. 291, Oct. 2018).

was no one qualification that all jurors found to be the most important, indicating that how jurors view these factors of qualification varies from person-to-person significantly. Overall, years of experience and university education were flagged as one of the top three considerations by 3/4ths or more of the study participants, with jurors identifying years of experience as more important than educational qualifications.

As to credibility, the jurors evaluated factors such as 1) qualifications, 2) confidence and demeanor, 3) whether the expert worked in the public versus private sector, 4) how they explained the evidence, and 5) their style of testimony and definitiveness of conclusions. Jurors wanted to hear about the expert's background first and foremost, with the length of time the expert had been working in the respective field being a significant factor in how credible the jurors believed that expert to be. This level of experience, coupled with a confidence on the stand that paints the expert as a "seasoned veteran" made a strong impression. Jurors responded best to experts who could convey information in a clear manner and who were not seen to "back track" upon prodding by opposing counsel. They found experts who were able to show them things through visual displays to be most effective.

In selecting your specific expert, whether on liability or damages, each of these of these considerations should be weighed, including qualifications, experience level, education, how they present and can explain concepts, whether they can effectively show a concept through demonstrative evidence and whether they can communicate in a "natural" manner and with a sense of confidence. If you have not seen your potential expert testify before, there are other means to assess how they will come across at trial as opposed to simply on paper. Ask for recommendations from fellow attorneys that you trust. Meet with the prospective expert in advance to see how clearly and effectively they can explain things to you. As to review prior testimony if available from a videotaped deposition.

If you are not trying your case before a jury, but instead in a bench trial, the considerations could be different. The Forensic Science International examiners noted that when judges were asked to perceive the credibility and persuasiveness of expert witnesses, they ranked experience as the most important factor followed by education, with communication style also being important. Overall, judges found experts to be more persuasive when they spoke clearly, avoided use of jargon or technical terms, and appeared impartial. The expert's history of involvement with publications or prior testimony had little influence on their perceived credibility to judges.

Where (should your expert be located)?

Where your expert is from is a consideration from both a practical perspective and manner of appearance. First and foremost, what is the expense associated with the location of your expert, and secondarily, how will a jury perceive your expert based on where they come from, which can also be a consideration.

From a practical perspective, an expert from outside your geographical location will cost more to come in and testify at trial then someone who is local. However, you should not decide who to retain as your expert simply based on where they are located or forego looking to experts outside of your geographical location simply based on cost. Make no mistake, cost is always a consideration, and what might be the right call for a case with a $20 million demand may not be the appropriate course for a lawsuit with limited injuries and a $500,000 demand.

However, if you have a high value case, you should be looking to find the *right* expert for your case, notwithstanding where they may be located and how much it might cost for them to come in for inspections, depositions and/or trial. Depending on where you are, you may not have the caliber of expert needed for your case available in your area or even in your state. You may also need someone with specific qualifications or experience, in which case, expand your search to find the right person, even if they are not in your backyard. In many situations, the benefit of having the right person to put on the stand will far outweigh the cost of bringing an expert in from out of town.

It is also important to consider how where an expert is from could impact a jury's perception of them. Consider how the jurors' potential experiences and biases impact how they could view an expert and their acceptance of that expert as an authority and as someone to be believed. For example, how will a jury in rural and agrarian Upstate New York view an expert flown in from New York City? How would they view an expert who came in to testify from Canada? Both situations would likely have a notable impact on how that jury could view the expert, regardless of what he or she says. Does the expert have a regional dialect or accent that would potentially appeal to or be off-putting to members of the jury where you are located? These are all questions you should be considering when selecting your expert.

When (do you retain them)?

Another important consideration is when to retain your expert in the context of your case, and by comparison, when not to. Again, no one approach applies to every situation, however, there are things to keep in mind that will make your use of experts more effective based on when you retain the expert.

First and foremost, you should not be waiting for the 60 days before trial to decide to bring an expert on board to testify at the trial. You will not be able to effectively prepare an expert (amongst other trial preparations) if you wait until the last minute to do so. There may be scenarios where you have no other choice because of some unexpected occurrence, but more likely than not, if you are looking to bring on an expert on the eve of trial, it is simply because of your failure to look forward and consider what proof you need to introduce at the trial to fortify your client's defense. Worst off, you will have a carrier or client who is now faced with increased trial expenses that were not previously budgeted and a limited timeline to decide whether to authorize the last minute retention, which will not make them happy.

How early to retain your expert is one of those balancing considerations with respect to cost versus benefit. Earlier retention of an expert could benefit you and your client in a variety of ways. Retaining an expert early will allow for a better understanding

of the strengths and weaknesses in your case and help guide your strategy, including early attempts at case resolution. Your expert may be able to uncover something that the plaintiff or claimant's counsel does not yet know or clue you into a potential soft spot in the case that calls out for shutting the file down. Similarly, you may feel more confident in pushing forward with litigation knowing that from the get-go, you have an expert that will opine in your favor, and can use expert opinions to bolster your position during settlement negotiations or mediation.

You should also not ignore the role your expert could play in terms of discovery, including assisting with crafting document demands and interrogatories to other parties to gather what is needed to defend the case (especially when dealing with a technical issue outside of your expertise), helping prepare questions for witnesses (both fact and expert) and sometimes helping with affidavits to justify discovery demands on a motion where plaintiff refuses to produce certain information or documentation in discovery. To some extent, retaining an expert to assist with discovery is an act of having them "help you help them." Whatever information you gain you are able to turn over to them to ensure they have everything they need to be best prepared for trial.

None of this is free, however, and the more you expect from your expert, the more your client will be paying them to assist with the case. This is why you will need permission to loop in your expert at each juncture and should seek approval and update your carrier with the budgeted cost of each action and a concise and clear explanation for why it is appropriate and beneficial to the defense of the case. If you have a case you are targeting for settlement with low risk exposure, you may want to table bringing in your expert for a later time in the case while you try early resolution efforts, although you should still make clear to your carrier that you recommend retaining the expert later on if the case cannot be reasonably resolved, and the projected cost of same, so they can set their reserves accordingly.

Why (are you retaining an expert, and what do you expect to get from them)?

Why you are retaining an expert may be the most important consideration of them all. If you cannot answer that question, consider whether an expert is truly needed, or if there is a way to get your point across by other means. You do not want to "oversaturate" your case with experts who are not needed. This is an individualized assessment which is best made after open and honest discussion with the carrier or client. If you chose not to retain an expert, document that in an e-mail or letter so that there are no questions later on that this was considered and an educated decision was made not to go down that route.

A good exercise at the inception of any case is to sit down and think about 1) what plaintiff has to prove at trial and how you expect they will try to get there (incorporating what you may know about their attorney's typical *modus operandi,* including asking other defense attorneys you know if you have no familiarity with this person or firm), and 2) what you need to prove at trial and how you expect to get there. Map out your theme and think about what you expect to show a jury at trial, including what fact and expert witnesses may be called. Having a tentative strategy from the get-go and communicating that to your carrier or client will put you on a path to being in the best position to be prepared when you do actually get to the courthouse on the first day of proof.

That being said, your answer to the question of "why" will likely change as the case develops, and it is important to be flexible. What might fit your case at the outset of the litigation may not work later on for a variety of reasons. If you have not already disclosed your expert, and no longer feel confident that they are the right fit for your case, consider whether the benefit of moving on outweighs the expense associated with doing so. This is a discussion you should have with your client, and be prepared to explain what has changed or what new information has developed that no longer supports using your expert in the manner you initially intended.

Additionally, there are situations where you may consider retaining an expert to assist on a case where you know that it is possible or even likely that they may not be called at a trial. An expert may be able to assist in other ways throughout the case, including bolstering your position for settlement purposes if that is your ultimate objective. Experts can also be used "behind the scenes" to evaluate possible theories or defenses simply to assist you in crafting your strategy. That being said, you should be very clear, up front, that there is a possibility that your expert might not be permitted to testify at trial on some or all of the areas you are looking to cover, or that a component of their work may not be used (for example, an expensive animation or recreation of the accident). This should be confirmed with your carrier or client in writing and outlined in your reporting.

Conclusion

Experts are not "one size, fits all" and each case should have its own individualized assessment of what is needed, including a reasoned consideration of what you are looking to accomplish with the expert at a trial and consideration of the impact of your venue. Moreover, retention and use of experts is a skill that is developed with experience, trial and tribulation, and through development of relationships with other defense attorneys, both nationally and in your geographic area, and professionals in a variety of industries. The people you meet through membership in defense organizations like DRI, both national and local, are one of the primary resources you should look to in order to evaluate who you want to retain as an expert. Talk to other attorneys about their experiences with certain experts, how they present at trial and what their reputation is in the community. If you do not know, then ask.

Vet your options, carefully consider your needs, clearly and concisely report not only your recommendations but your reasoning to the client, and do so early enough for your experts to be effective. Proactive and early consideration and retention of experts will help bolster your case throughout litigation and ensure you are not scrambling to buttress your defense on the eve of trial.

When You Just Want to Scream

The Ethics of Dealing with Toxic Personalities

By Daniel L. Bray and Amanda Nardi

Lawyers have a heightened standard of responsibility in performing our jobs efficiently and ethically. We can use the framework of ethics and duties established within the Model Rules and our own state-specific rules to help guide us when we come across a difficult situation.

In the age of the keyboard warrior, toxic personalities abound which can create ethical dilemmas. As attorneys and claims professionals, we have certain ethical duties to uphold while ensuring we do right by our clients. Toxic personalities can make this responsibility feel difficult, and at times, impossible. To preserve our peace, and ultimately, ensure that we can perform our job effectively, it is important that we explore and implement ways to set boundaries, practice assertiveness, and know when to walk away from a difficult interaction. In doing so, we can seek guidance from the Model Rules of Professional Conduct and other ethical frameworks. It is inevitable that we will encounter difficult personalities in our careers; the effect those personalities have on us is determined by how we navigate them.

Ethical Framework: The Model Rules of Professional Conduct

The Model Rules of Professional Conduct serve as the bluep1int for lawyering ethics. They are rules of reason that presuppose a larger legal context shaping the lawyer's role. In dealing with toxic personalities, we can seek guidance from the Model Rules. The following Model Rules further touch on ethical violations that can arise from toxic personalities. Further, attorneys can be subject to sanctions should they fail to abide by the professional rules of lawyering.

A. Preamble and Scope:

The Preamble and Scope section of the Model Rules outlines the following duty: "A lawyer...is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." This section further clarifies that "a lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs... A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others... A lawyer should demonstrate respect for the legal system and for those who serve it..."

B. Model Rule 3.1:

Model Rule 3.1 outlines the ethical bounds of meritorious claims and contentions. This Rule states that, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

C. Model Rule 3.2:

Model Rule 3.2 enforces the duty of a lawyer to expedite litigation. Specifically, it states that, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

D. Model Rule 3.3:

Model Rule 3.3 explains the necessity of candor toward the tribunal. This Rule

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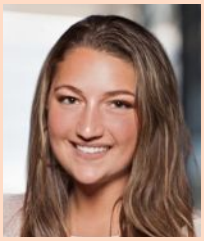

states that, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer... "

E. Model Rule 3.4:

Model Rule 3.4 outlines the duty to engage in fairness to opposing parties and counselors. This Rule states that, "A lawyer shall not... unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document... falsify evidence... knowingly disobey an obligation under the rules of a tribunal... make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party... "

F. Model Rule 8.3:

Model Rule 8.3 outlines duties for reporting professional misconduct. "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

G. Federal Rule of Civil Procedure 11:

F.R.C.P. 11, which requires signature of pleadings to confirm "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and "the claims, defenses, and other legal contentions are waiTanted by existing law or by a non-frivolous 'argument for extending, modifying, or reversing existing law or for establishing new law"'.

Should an attorney violate this Rule, the court may impose sanctions upon that attorney responsible for the violation. Instructional comments to this Rule indicate that when an attorney signs a complaint or other paper in court, the attorney represents that the filing has legal and evidentiary support and is not filed in bad faith. This baseline of fair play is

enforced by F.R.C.P. 11. The purpose for sanctions under this Rule is to punish the abuse of court process and to reimburse litigants for the costs of unfounded or abusive filings.

Ethical Framework: Nationwide

A. Ohio

1. Ohio Rules of Professional Responsibility:

1. Preamble:
   - Ohio removed language of "zealously advocate" to "the rules of the adversary system".
2. Rule 3.1: Meritorious Claims and Contentions
3. Rule 4.1: Truthfulness in Statements to Others
4. Rule 4.4: Respect for Rights of Third Persons
   - Ohio incorporated the Model Rules into its own rules of professional responsibility with regard to meritorious claims and being truthful and respectful of others.

a. Ohio's "Rule 11" - Ohio Rule of Civil Procedure Rule 11:

- Good faith basis
- Scandalous or indecent matter
- Sanctions

b. Ohio's Frivolous Lawsuit Statute - O.R.C. 2323.51:

(i) Harass or maliciously injure another party
(ii) Unnecessary delay (iii)Increase in cost of litigation
(iv) Not warranted under existing law or no good faith basis for new law
(v) Allegations have no evidentiary support

Georgia

Georgia incorporated the Model Rules into its own statewide rules of professional conduct. The Preamble for Georgia's Rules of Professional Conduct is identical to the Model Rules, emphasizing that a lawyer is responsible for the quality of justice and should use the law's procedures for legitimate purposes rather than to harass or intimate others. Georgia also embraced the exact language of the Model Rules with regard to its Rule of Professional Conduct 8.3, emphasizing the duty of a lawyer to report misconduct.

1.Georgia Rule of Professional Conduct 3.4:

Georgia's Rule 3.4 states that, "A lawyer shall not use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." To expand on this duty, Georgia included an instructional comment advising that "the responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of the opposing party or counsel. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence."

2.Georgia's "Rule 11" - O.C.G.A. § 9-11-11:

This statute is Georgia's state-specific version of F.R.C.P. 11. The statute states that signature on pleadings and documents "constitutes a certificate by [him] that [he] has read the pleading and that it is not interposed for delay." O.C.G.A. § 9-11-11 further allows for sanctions should an attorney violate this rule.

3.Georgia's Frivolous Lawsuit Statute - O.C.G.A. § 9-15-14:

Georgia also has a specific statute that contemplates litigation costs and attorney's fees for frivolous actions and defenses. The statute provides that, "... reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim... with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim... "

Texas

A. Texas Rules of Professional Responsibility:

a. Preamble: A Lawyer's Responsibilities - "zealously pursue client's interests"
b. Rule 3.02: Minimizing the Burdens and Delays of Litigation
c. Rule 3.03: Candor to the Tribunal
d. Rule 3.04: Fairness in Adjudicatory Proceedings

1. Texas' "Rule 11" - Rule of Civil Procedure 13:

a. "groundless" and "good cause"

a. Texas' Frivolous Lawsuit Statute:

A. Chapter 9 - Texas Civil Practice and Remedies Code
   a. Sanctions
B. Chapter 10 - Texas Civil Practice and Remedies Code
   a. Sanctions

B. Real-World Examples

The following real-world case examples show textbook violations of the ethical rules that resulted in sanctions.

A. Attorney Grievance Commission of Maryl and v. Stephen E. Whitted, AG No. 47, September Term, 2021.

After attorney Mr. Whitted chronically failed to pay child support to his ex-wife, Ms. Jordan, who had custody of the children, Ms. Jordan filed a motion in the Superior Court of Fulton County asking the court's permission to relocate the minor children. Mr. Whitted subsequently filed a *separate* lawsuit in that same court, naming as defendants Ms. Jordan; her attorney, the attorney's law firm, and a John Doe, alleging that: (l) Ms. Jordan's attorney harassed, intimidated, and maliciously injured Mr. Whitted by filing a petition alleging that he committed emotional crnelty against Ms. Jordan; (2) Ms. Jordan altered court orders; (3) certain court orders were illegal; (4) Ms. Jordan converted "to her own use" money from her 40l(k) plan that had been awarded to Mr. Whitted; and (5) John Doe had a "tryst" with Ms. Jordan that resulted in a child born. Following court rulings on the issues, Mr. Whitted continuously disobeyed the orders and filed additional claims against Ms. Jordan. The Supreme Court of Maryland ultimately sanctioned Mr. Whitted with an indefinite suspension for "repeatedly filing retaliatory meritless claims against his ex-wife, her new husband, her attorneys, and judges who ruled against him; filing meritless appeals; repeating failed arguments and ignoring rulings."

B. Attorney Grievance Commission v. Rheinstein, 466 Md. 648 (2020).

In this case, the Court disbarred an attorney who made misrepresentations to the Court to intimidate his opponents, made baseless and unsubstantiated claims,

and attempted to disqualify every attorney retained by his opponents.

C. Ethics in Action: 6 Practical Tips

Now that we are familiar with the Model Rules of Professional Conduct, state-specific ethical frameworks, and real-world examples of how there are consequences for engaging with toxic personalities, we can take away the following 6 tips to put into practice:

C. **Put the client's interests first.** At the end of the day, regardless of the type of personalities we deal with, the ultimate goal is to achieve the best outcome for our clients. We can protect client interests and continue to move cases forward by asking ourselves whether what we are about to say or do will cause a reaction that could be harmful to the client. If the answer to that internal question is "yes", then we can reset, and respond in a more productive way.

D. **If you encounter a keyboard warrior, consider picking up the phone.** In today's world, it is easy to hide behind a screen and type as we wish. Many of the professionals we deal with on a daily basis take an aggressive approach to email communications to appear "assertive". However, a majority of the time, this aggressive approach leads to more miscommunications and sour feelings rather than progressing a case forward. If you notice that a specific adversary is taking the "keyboard warrior" approach to communicating, and you find yourself stuck going back and forth with no progress, consider calling the individual to see if you can talk through the issues. There is a benefit to hearing the voice on the other side of the emails, and many times, a phone call can clarify things that were lost in digital translation.

IV. **Document everything in writing.** Even though picking up the phone can be beneficial to resolving disputes and creating a relationship with the other side, some professionals take advantage of the lack of documentation that comes with a phone call. A prime example of this is where an attorney tells you one thing on the phone but then sings a very different tune when it comes to the email you receive afterward. If you encounter this issue, make sure you document the contents of your phone conversations in writing with a follow-up email and save all communications.

A. **It is never too late to deescalate.** It is very easy to get caught up in a back-and-forth with opposing counsel, especially when counsel is rude, aggressive, or makes personal attacks on your credibility or experience. Despite any of the strong words that may come your way, it is important to always be thinking of how you will be perceived by a judge or jury. "Lawyer fighting" is universally frowned upon by both the court and members of a jury. If you feel emotions running high, and well, you just want to scream, consider the outward appearance of the disagreement before a judge or members of the public deciding your case. Do you want to be perceived as unprofessional or petty? Or would you rather be perceived as the attorney who remained calm and professional despite opposing counsel stomping their feet? It is never too late to deescalate a situation and attempt to bring focus back to what is important about the case.

B. **Consider whether the issue in dispute is truly important.** Not every aspect of a case needs to be an argument. There wiII inevitably be things that you and opposing counsel disagree on; the important takeaway is to stay focused on the issues that are truly important and pick your battles accordingly. When dealing with toxic personalities, it can be very tempting to dig your heels in on any and all disagreements because you do simply do not want to "give in" to opposing counsel. Just as we must always think about what is best for our clients, we must also be willing to compromise in situations where compromise is the answer. Ask yourself, "is there something that I can give up here or compromise on in order to find common ground that could help my client win in the bigger picture?" This mentality will help keep your eyes on the prize and help filter out issues that may not be important to your case.

C. **Remember that we are all human.** Intangible relationships and soft skills can make or break a case. It can be difficult to establish a relationship with opposing counsel if they have a toxic personality. However, to the extent possible, laying a foundation for a positive relationship can be the difference between opposing counsel convincing their client to settle their case or not. It is human nature to not want to help people who treat you poorly. Developing a mutual respect and good repour with opposing counsel will make the difficult conversations easier, and your life a lot less stressful.

Conclusion

Lawyers have a heightened standard of responsibility in performing our jobs efficiently and ethically. We can use the framework of ethics and duties established within the Model Rules and our own state-specific rules to help guide us when we come across a difficult situation. The unfortunate truth is that we are all guaranteed to encounter toxic personalities at different points in our careers. With this truth must come the understanding that (1) there are repercussions for acting unethically, and that lawyers have a duty to report any unethical behavior should a toxic personality go that far, and (2) there are ways to deal with toxic personalities that will benefit both your mental health and your client's interests. Next time you encounter a difficult communication that makes you want to scream, remember our 6 practical tips to help get you through. We are not only lawyers, but we are humans, and we can all do better to make everyone's lives a little bit easier.

Werner Enterprises, Inc. v Blake and the Return to Traditional Tort Principles:

A Game-Changing Decision Restores Balance to Commercial Motor Vehicle Litigation

By Joanna Hughes and Shane O'Dell

For businesses, insurers, and defense counsel, Werner offers both immediate tactical advantages and long-term strategic clarity in an area of law that had become increasingly unpredictable and plaintiff tilted.

Introduction: A Seismic Shift in Texas Tort Law

On June 27, 2025, the Texas Supreme Court issued a landmark decision that fundamentally reshaped the landscape of commercial motor vehicle litigation in the Lone Star State. In *Werner Enterprises, Inc. v. Blake*, No. 23-0493 the Court not only reversed a staggering $100+ million verdict but also breathed new life into the foundational tort principle of proximate causation—a doctrine that had been steadily eroded by decades of plaintiff-friendly interpretations and expansive liability theories.

This decision represents far more than a single case victory for the defense bar. The decision marks a purposeful correction by Texas courts, reaffirming traditional tort principles and rejecting the gradual expansion toward near strict liability in commercial vehicle litigation. For businesses, insurers, and defense counsel, *Werner* offers both immediate tactical advantages and long-term strategic clarity in an area of law that had become increasingly unpredictable and plaintiff tilted.

The Factual Foundation: A Perfect Storm Meets Legal Precision

The facts in *Werner* illustrate what was, at its core, an unavoidable accident that was transformed by creative lawyering into a massive liability verdict. On an icy West Texas afternoon, a pickup truck traveling eastbound on Interstate 20 suddenly lost control and careened across a 42-foot grassy median into the westbound lanes, striking an 18-wheeler head-on.

The plaintiffs sued Werner Enterprises and their driver, alleging that the driver's unsafe speed and the company's supervision and training practices were negligent and proximately caused the injuries. Evidence showed that the driver, operating below the speed limit, had less than half a second to react once the pickup became visible—a reaction time that experts deemed appropriate under the circumstances.

Despite these undisputed facts, a jury assigned 84% of the blame to the Werner Enterprises and their driver, resulting in an $89 million verdict. The Court of Appeals affirmed en banc, accepting the plaintiff's theory that the truck's speed, while lawful, somehow made the carrier responsible for an emergency entirely created by another driver's loss of control.

The Texas Supreme Court's reversal was both decisive and doctrinally significant, holding that the commercial defendants could not be held liable as a matter of law because their conduct was not a proximate cause of the injuries.

The Doctrinal Revolution: Substantial Factor Plus Responsibility

Rejecting Philosophical Causation

The Supreme Court's analysis begins with a fundamental distinction that had been increasingly blurred in modern

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litigation: the difference between but-for causation and proximate causation. While acknowledging that Werner's truck's presence on the highway was a but-for cause of the collision (absent the truck, no collision would have occurred), the Court emphatically rejected the notion that this philosophical observation could support legal liability.

"Proximate cause," the Court explained, "incorporates not only but-for causation but also 'the idea of responsibility.'" This formulation represents a return to tort law's foundations—the principle that legal liability should attach only to those whose conduct bears a meaningful relationship to the harm that results.

The Substantial Factor Test Reborn

Central to the Court's analysis was its reinvigoration of the substantial factor test, which requires that a defendant's conduct have "such an effect in producing the harm as to lead reasonable men to regard it as a cause." This standard, while long recognized in Texas jurisprudence, had been increasingly diluted by courts willing to find liability based on tenuous causal connections.

The Supreme Court's application of this test was rigorous and principled. The commercial driver's speed, even if negligent, was merely "the condition that made the injuries possible" rather than a substantial factor in causing them. The sole proximate cause was the pickup truck's loss of control and subsequent crossing of the median—an independent act that broke any meaningful causal chain between the truck's conduct and the resulting harm.

The "Happenstance of Place and Time" Doctrine

Perhaps most significantly, the Texas Supreme Court found that what occurred was a "happenstance of place and time", Citing *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991)(quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. L. INST. 1965)). The Court recognized that being present at the wrong moment, even with some degree of negligent conduct, may constitute mere happenstance that is legally insufficient to support liability.

This doctrine provides crucial protection for commercial defendants who become the targets of litigation simply because they possess the deepest pockets at an accident scene. It restores the principle that tort liability requires genuine responsibility, not merely unfortunate timing.

Highway Design and Reasonable Expectations

The *Werner* decision also breaks important new ground in its analysis of modern highway design and driver expectations. The Court distinguished this case from earlier precedents, like *Biggers v. Continental Bus System, Inc.*, 303 S.W.2d 359 (Tex. 1957), which involve head-on collisions on two-lane highways, emphasizing "the vast difference between a 24-foot-wide two-lane highway and an

interstate highway divided by a 42-foot grassy median."

This analysis recognizes that modern highway engineering creates legitimate expectations of separation between opposing traffic flows. Drivers operating in their proper lanes on divided highways are entitled to rely on the reasonable assumption that vehicles will remain on their designated side of the roadway. When that assumption is violated by another driver's loss of control, the resulting collision is not a foreseeable consequence of lawful highway operation.

This principle has profound implications beyond commercial vehicle cases, potentially affecting liability analysis in any situation involving divided highways and median crossings.

Corporate Liability and the Derivative Theory Firewall

One of *Werner's* most practically significant holdings involves the relationship between employee liability and employer exposure. The Court held that when an employee's conduct is not a proximate cause of harm, all derivative corporate theories—including negligent hiring, training, supervision, and entrustment—fail automatically.

This creates what might be termed a "derivative theory firewall." Plaintiffs can no longer pursue corporate defendants through these secondary theories when the underlying employee conduct lacks proximate causation. The decision thus protects employers from the increasingly common litigation strategy of bypassing weak driver liability claims by focusing on corporate practices and policies.

Importantly, the Court left open the possibility of truly independent corporate negligence claims—those based on corporate conduct entirely separate from the employee's actions by not expressly adopting the Admission Rule—whereby a corporate defendant cannot be held liable if it admits that the driver/employee was operating in the course and scope of their employment. The Admission Rule will likely result in a new battleground for the defense bar.

The Death of Speed-Based Liability Theories

Werner delivers what may be a fatal blow to the plaintiff bar's most favored argument in commercial vehicle cases: that speed alone can establish liability regardless of other circumstances. The Court argues against plaintiff's argument that had Werner's driver been driving slowly the accident would not have occurred by arguing that in the same way, had the driver been driving 100 mph the driver would have not collided with the plaintiffs. Even further, had either driver been driving slower or faster the accident would not have occurred.

This holding recognizes that speed, standing alone, is merely a condition that affects the severity of unavoidable accidents, not a cause of collisions initiated by other parties' negligent conduct. While excessive speed may still support liability in appropriate cases, *Werner* ensures that speed arguments must be grounded in genuine causal relationships rather than speculative "but-for" theories.

Practical Implications for Defense Strategy

Immediate Motion Practice Opportunities

Werner provides immediate tactical advantages for defense counsel facing similar fact patterns. Cases involving cross-median accidents, weather-related emergencies, and minimal reaction times are now prime candidates for early summary judgment motions based on proximate causation grounds. Defense counsel should consider filing Motions for Summary Judgment on a wide range of case facts applying the same principles set forth in *Werner v. Blake*.

The decision also strengthens Daubert challenges against plaintiff experts who rely on discredited "but-for" causation theories or who ignore the substantial factor requirement. Expert testimony that fails to address the "idea of responsibility" inherent in proximate causation should face heightened scrutiny under *Werner*.

Discovery and Case Development

The opinion also affects discovery strategy, providing grounds to limit the scope of corporate investigation when driver conduct is not at issue. Defense counsel can now object to broad fishing expeditions into corporate policies and practices when such evidence is irrelevant to establishing proximate causation.

Conversely, the decision supports more focused discovery on the actual causes of accidents—weather conditions, road design, other drivers' conduct, and reaction times—rather than allowing unlimited exploration of tangential corporate activities.

Settlement Positioning and Risk Assessment

Werner fundamentally alters the economics of commercial vehicle litigation. Cases that previously carried significant exposure due to "deep pocket" theories may now merit aggressive defense rather than settlement. Insurance adjusters and corporate risk managers should reassess their evaluation criteria to account for the decision's protective effects.

The Broader Implications: Restoration of Tort Law Principles

A Rejection of Result-Oriented Jurisprudence

Werner represents a deliberate rejection of result-oriented tort jurisprudence that prioritizes compensation over principled legal analysis. By requiring genuine proximate causation rather than mere but-for presence, the Court restores tort law's focus on moral responsibility and meaningful causal relationships.

This approach serves broader societal interests by ensuring that liability incentives align with actual risk-creating behavior. When liability attaches only to those whose conduct substantially contributes to harm, the tort system more effectively promotes safety and deterrence.

Economic Efficiency and Litigation Costs

The decision also promotes economic efficiency by reducing the universe of potential defendants in multi-party accidents. Rather than allowing plaintiffs to cast ever-widening nets based on tenuous causal theories, *Werner* requires focused analysis of actual causation—reducing litigation costs and promoting more efficient dispute resolution.

Interstate Commerce Considerations

For commercial motor carriers operating across state lines, *Werner* provides a crucial bulwark against forum shopping

and inconsistent liability standards. The decision's clear doctrinal framework should influence courts in other jurisdictions, promoting more uniform application of proximate causation principles in commercial vehicle cases.

Legislative and Regulatory Harmony

Werner also aligns with federal regulatory frameworks governing commercial motor vehicle safety. By focusing liability on actual safety violations and causal negligence rather than mere presence at accident scenes, the decision supports the comprehensive federal regulatory scheme designed to promote highway safety through appropriate industry standards.

This alignment reduces conflict between state tort liability and federal regulatory compliance, providing clearer guidance for carriers seeking to operate safely within established legal frameworks.

Challenges and Opportunities for the Plaintiff Bar

While *Werner* bolsters key defense arguments, it does not close the door on commercial vehicle liability. Instead, it raises the bar for plaintiffs, who must now craft more nuanced claims grounded in true corporate negligence rather than relying solely on driver conduct.

In the post-*Werner* landscape, plaintiffs are expected to rethink how they approach commercial vehicle cases. Rather than focusing narrowly on driver error, many will turn their attention to the companies themselves—arguing that route selection or deployment decisions created unreasonable risks, that safety technology was ignored or inadequately maintained, or that corporate policies placed profits above safety. We can also expect to see an increased emphasis on alleged federal regulatory violations as plaintiffs look for new avenues to establish independent corporate liability and keep these claims alive in court. This evolution may ultimately improve the quality of commercial vehicle litigation by focusing attention away from mere deep-pocket targeting.

Looking Forward: The Resurrection's Lasting Impact

Precedential Value and Future Development

Werner's precedential impact extends well beyond commercial vehicle cases. The decision's rigorous approach to proximate causation should influence analysis in premises liability, product liability, and other tort contexts where creative causation theories have expanded liability beyond traditional bounds.

Lower courts applying *Werner* should focus on the decision's core principle: proximate causation requires not just but-for causation, but substantial factor causation incorporating "the idea of responsibility." This framework provides clear guidance for distinguishing between genuine liability and mere happenstance.

Industry-Wide Risk Management

For the transportation industry, *Werner* enables more rational risk management and safety planning. Rather than attempting to guard against unlimited liability theories, carriers can focus resources on addressing conduct that creates genuine safety risks and legal exposure.

This clarity promotes more effective safety programs and better allocation of industry resources toward meaningful accident prevention rather than litigation defense.

Insurance Market Stabilization

The decision should also contribute to insurance market stabilization by reducing the uncertainty that drives elevated premiums and coverage restrictions. When liability exposure aligns more closely with actual risk-creating behavior, insurance markets can price coverage more accurately and predictably.

Conclusion: A Return to Principled Tort Law

Werner Enterprises, Inc. v. Blake represents nothing less than the resurrection of proximate causation as a meaningful limitation on tort liability. After decades of erosion through expansive interpretations and result-oriented applications, this foundational principle has been restored to its proper place as a guardian against unlimited liability.

The decision's impact extends far beyond the specific facts of one tragic accident. It signals a judicial commitment to principled legal analysis over sympathetic plaintiff circumstances, to genuine causation over philosophical speculation, and to moral responsibility over deep-pocket targeting.

For defense attorneys and corporate clients alike, *Werner* brings welcome clarity to a once-murky area of law. By defining a more structured approach to proximate causation, the decision helps create consistent standards for evaluating claims, shaping litigation strategy, and managing risk across the industry.

Perhaps most importantly, *Werner* restores balance to a legal system that had tilted increasingly toward expansive liability theories disconnected from traditional tort principles. By requiring plaintiffs to prove substantial factor causation incorporating "the idea of responsibility," the Court ensures that liability follows fault rather than mere financial capacity.

This resurrection of proximate causation serves not only defendant interests but also the broader goal of a just and efficient legal system. When tort liability aligns with genuine responsibility, the law better serves its fundamental purposes of compensation, deterrence, and accountability.

The *Werner* decision thus stands as a landmark not just in Texas jurisprudence, but in the broader evolution of American tort law toward principled analysis and away from result-oriented expansion. Its influence will likely extend well beyond Texas borders and well beyond commercial vehicle litigation, marking a turning point in the ongoing effort to restore balance and principle to our civil justice system.

For those who have long advocated for a return to traditional tort principles, *Werner* represents both vindication and opportunity—vindication of the view that proximate causation matters, and opportunity to build upon this foundation for continued restoration of principled tort jurisprudence. The resurrection is complete; the work of building upon this foundation has just begun.

The Care And Feeding Of Your Truck Driver

By Mike Bassett

A well-prepared driver—a driver that trusts you and believes in you—is one of the strongest pieces of evidence you have at trial.

Why It Matters

Your truck driver can make or break your case. Liability facts can create exposure, but a poorly prepared driver can make a bad case worse—and a worse case catastrophic. On the flip side, a driver who is prepared, who trusts their attorney, and who understands their role in the case, can be the ticket to a defense verdict in disputed liability cases or to a meaningfully reduced number in a damages-only case.

This article will explore (1) why investing early in your driver matters, (2) how to turn your truck driver into one of your strongest pieces of evidence, and (3) how those choices show up at trial.

Why Investing in Your Driver Matters

Being involved in an accident, particularly a catastrophic one, can be extremely traumatic for the driver, even when they walk away physically unharmed. Research on commercial motor vehicle (CMV) drivers shows elevated rates of post-traumatic stress symptoms after serious incidents, and broader road-traffic literature consistently links crash exposure with PTSD and related sequelae. FMCSA and industry resources now emphasize driver wellness and support. (*See* Saberi, H R et al. "Post-traumatic stress disorder: a neglected health concern among commercial motor vehicle drivers." *The International Journal Of Occupational And Environmental Medicine* vol. 4,4 (2013): 185-94; Wise, Jenni M et al. "Mindfulness, sleep, and post-traumatic stress in long-haul truck drivers." *Work (Reading, Mass.)* vol. 67,1 (2020): 103-111. doi:10.3233/WOR-203256)

Here's the practical effect: You will likely meet your truck driver for the first time on the worst day of their professional life. That first meeting with your driver may be no different than the 14 previous meetings you had with other drivers in the 60 days prior. But it is very likely the first time your driver has ever found themselves in such a situation. That day may be routine for you; it is anything but routine for them.

Add in the fact that litigation is a foreign land to 99.9% of the population—whose understanding is shaped by TV dramas—and you have a client who needs clarity, context, and, above all, trust. While it is something that we do every day, your average person has no idea what happens during the pendency of a lawsuit.

That is why building trust with your driver cannot start on the day of their deposition or the morning of trial. Establishing trust with your driver—so you will get the best version of them at trial—starts the very first time you shake their hand. Because if a driver does not trust you or does not believe you are listening to them, you can hire all the witness coaches in the world, and it will not make a bit of difference.

So, what does this look like?

First, it means getting to the driver just as quickly as you can. Many of us have the privilege of working for motor carriers who have very sophisticated rapid response protocols. In those situations, you may be able to meet the driver for the first time at the accident scene.

Other motor carriers, however, may not hire you on a catastrophic accident until weeks or months later. In either scenario, a good piece of advice is to start every interaction with a new truck driver very slow, and very low key.

If the first words out of your mouth when you first meet your driver are, *"I need your name, address, and date of birth,"* that driver is going to lock up faster than an overheated radiator on a July day in Texas. A better approach is to say something like this, *"Hi, my name is Mike. I am your lawyer. You and I are going to get through this thing together."*

To put it simply: "Slow is Smooth, Smooth is Fast." High reliability professions (military, aviation, emergency medicine) use a simple principle: If the goal is precision under stress, go deliberately at the start. Slow down to establish safety, set expectations, and reduce cognitive overload; the work goes faster later because you make fewer mistakes and spend less time preparing them. The same is true

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here—if you want to connect with a driver, resist the urge to dive straight into the heart of the matter. Earn the right to go fast by starting slow.

A poorly prepared driver (or a driver who feels that they are an afterthought) only creates greater exposure a trial. Like it or not, fair or not, jurors will often judge a motor carrier by how they perceive the driver.

If your driver is defensive, dismissive, or appears to be put out by the process, do not be surprised if a jury takes a dim view of the motor carrier--no matter how great your corporate representative may be.

By contrast, if your driver is involved, understands their role, and feels respected and trusted, that is going to come through to a jury. In cases that are often gut-wrenchingly sad, a well-received truck driver can be the difference between an outsized verdict and a take-nothing judgment for the Plaintiff.

How To Make Your Truck Driver One of Your Strongest Pieces of Evidence

Day one matters. While responding to any catastrophic accident presents a multitude of issues that need to be addressed simultaneously, I cannot emphasize the importance of carving out time to visit with your driver in an *unhurried* manner.

Your driver is likely still processing the events of the accident. They may not quite understand how everything went down. Giving your driver the impression that you are in a hurry and simply need to "wrap this up," is not going to engender any trust by your driver.

Follow up early and often. Check in with your driver quite frequently in the days and weeks after an accident. Encourage the motor carrier (when possible) to offer the driver counseling resources if it seems such services would be beneficial. FMSCA and industry partners now centralize driver health/wellness materials that can help carriers connect drivers with support without overstepping clinical lines. (*See* **Federal Motor Carrier Safety Administration**. *Driver Resources.* U.S. Department of Transportation, ***https://www.fmcsa.dot.gov/driver-resources.***)

Afterall, if you put a truck driver on the stand who has not processed all their emotions about an accident, that, my friends, is a disaster waiting to happen. That driver will be even more particularly vulnerable to the questions opposed by an aggressive, well prepared Plaintiff's attorney.

Do more listening than talking. Especially in early interactions with your driver, aim to speak 25% of the time (if you absolutely must), and listen 75% of the time. Let me tell you why I know this works.

Since early 2020, I have hosted a podcast. I have interviewed over 220 different people. During these interviews, I *rarely* share information about myself. Instead, the conversations are all about me asking my guest questions.

You would be amazed at how many people, at the end of the interview and after we have stopped recording, say things like, *"Mike, this was amazing. I feel like we really connected."* And yet they know nothing about me! The lesson?

Remember why you were given two ears and one mouth. Hosting these interviews taught me the same lesson jurors reward: People feel seen when they're heard. That connection pays dividends when the driver eventually faces cross-examination.

Explain the process—then re-explain it. I cannot stress enough the importance of explaining to the driver how the process is going to play out. While it is certainly not the first topic you will cover with your driver, it is something you need to cover early in the relationship.

And you need to keep coming back to it. Why? Well, let me tell you another story.

In 2016, my older brother was diagnosed with cancer. My wife and I were in the examining room when the doctor gave us the news. Later that evening, when we were unpacking the events of the day, my wife and I tried to cobble together all the things that the doctor told us.

Between the two of us, we probably came up with about 25% of what the doctor said. Why? Because after the doctor said that my brother likely had terminal cancer, that part of our brain that comprehends things just shut down. Under stress, people retain very little of what they hear.

Your driver, facing a fatality investigation or even criminal exposure, will be the same. Expect them to miss 75% - 80 % of the first explanation. Re-plow that ground again, and again.

Maintain the relationship. Let me tell you yet another story. Many, many years ago I went through a rather rough patch in my career. I ended up having to hire lawyers to help me out. I was now the client.

One of the things that I distinctly remember is that one of my lawyers would always start every conversation or meeting with a variation of this question, *"How are you doing? What is on your mind?"* Then, he would pause throughout the conversation, and ask, *"Does what I am telling you make sense so far?"* And he would always end every meeting by asking, "*What other questions do you have? And what do you need from me?"*

I will never forget how that made me feel and I think we would all do well to remember that we are dealing with human beings, not just clients.

During the pendency of the case, make sure that you touch base with your driver regularly--often via text messages. It can be something as simple as, *"Hey, Sally, checking in on you. How are you doing? Do you need anything from me?"* Or can be something more important such as, "*Please call me so that we can set up a time for you to come in and go over some discovery that we need you to answer."*

The key is to keep the lines of communication open with your driver. This is especially important because many drivers are no longer with the motor carrier by the time of deposition or trial. If the next time they hear from you after the scene is the week before their deposition, you are already behind.

Use the right witness coach for the driver. On the topic of depositions, I am more and more convinced that hiring a witness coach is the minimum standard of care for lawyers defending trucking accidents. And remember this: Not all witness coaches are built the same.

There may be one consultant you work with that is very, very good with a certain type of person. But if your driver is not that kind of person, I would suggest expanding your horizons to find other, just as qualified, consultants to help you. The goal is to help the driver communicate clearly and confidently—not to squeeze them into someone else's style.

Meet in multiple, shorter sessions. When it comes to preparing your driver, as we talked about earlier, fast is slow and slow is fast. In the last 5-7 years, I have started meeting with my driver at least three separate times prior to their deposition— in addition to meeting with them the day of. Doing this accomplishes two important goals:

First, it gets your driver prepared for what is likely going to be many of the "make or break" of events in the case. Second, it sends a subliminal message that you are there to protect the driver and are committed to making sure he or she is empowered to do the best possible job they can.

Stage trial preparation 30 days out. If your case appears headed to trial, I highly suggest beginning short meetings with your driver a month before.

The first meeting can be as simple as explaining what the trial will look like, where the trial will take place, and what sort of time commitment you are going to need from the driver.

Remember, these truck drivers are people too and they have lives outside of your lawsuit. They may have childcare issues they need to address. They may need to let their employer know that they are not going to be able to work for 4 or 5 days. Springing things on people at the last minute not only causes stress, but it can also piss people off. And the last thing you want is to have an angry driver sitting next to you at counsel table. Avoid last-minute surprises that create avoidable stress and resentment.

What it Looks Like at Trial

As I stated earlier, jurors immediately pick up on whether a truck driver is phoning it in or is committed. The disinterested driver generally shows up at the last minute or, God forbid, late for Court every morning. They tend not to be put together. And their body language shouts, *"I would rather be eating broken glass than sitting in this courtroom."*

And juror's pickup on every one of these signals.

By contrast, the truck driver that you invested in early is likely going to be waiting for you when you get to the courthouse. He or she will be dressed appropriately and understand their role in the case. During trial, they are attentive, and, if so inclined, taking notes. The jurors look at this driver and think, *"Wow, this lady is taking this very seriously."*

Our job as trial lawyers is to tell a story. And to do that, we have to reduce and simplify. We must create a trial theme that *makes sense.*

And we can't do our job if we have a truck driver who doesn't trust us, doesn't understand their role, or hasn't been supported and empowered to tell their story in front of the jury.

Conclusion

Being involved in a catastrophic accident can be incredibly traumatic for a driver. That stress and anxiety is only ramped up if an accident results in litigation.

Establishing a relationship with your driver early— laying the groundwork for that driver to *trust you*— is one of the most important jobs we have as lawyers who defend truck crash cases. Your relationship with your driver starts day one.

And like any relationship, it needs care and feeding. Which means communicating with your driver early and often.

As the case progresses, invest in a witness coach to help your driver be the best version of themselves at trial. Explain the process to your driver again and again.

A well-prepared driver— a driver that trusts you and believes in you— is one of the strongest pieces of evidence you have at trial. It is not a quick or easy process, but it is worth its weight in gold.

Broker Liability and the Federal Aviation Administration Authorization Act (FAAAA)

By Torrie N. Poplin

Freight brokers operate in a federally regulated environment designed to promote efficiency, consistency, and economic stability across state lines.

A Legal Crossroads

Freight brokers play a significant role in the U.S. transportation industry as they often act as intermediaries between shippers and motor carriers. Yet they're increasingly being targeted in litigation for the actions of motor carriers they don't own, operate, or control. At the center of this legal storm is the Federal Aviation Administration Authorization Act of 1994 (FAAAA), a statute designed to prevent states from imposing inconsistent regulations that disrupt interstate commerce.

In recent years, plaintiffs have pursued state-law claims against brokers alleging negligent hiring and selection practices. These claims typically assert that brokers failed to exercise reasonable care in selecting safe and qualified carriers, thereby contributing to the harm caused by the unsafe carrier. Plaintiffs argue that brokers should be held liable under state tort law for negligent hiring and selection, but this approach threatens to unravel the very uniformity Congress sought to protect. This trend has sparked a significant legal debate: Do such state-law claims conflict with, and therefore get preempted by the FAAAA?

The FAAAA was designed to promote uniformity in the regulation of the trucking and freight industry and prevent states from imposing inconsistent laws that could disrupt interstate commerce. It includes a broad preemption clause that bars states from enforcing laws "related to a price, route, or service of any motor carrier… broker… or freight forwarder with respect to the transportation of property." However, the statute also contains a "safety exception," which preserves "the safety regulatory authority of a State with respect to motor vehicles."

Section 14501(c)(2)(A) exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). To determine whether the exception applies, a court must address two issues: (1) whether common law tort claims like negligent hiring are part of a state's "safety regulatory authority," and (2) whether said claim is "with respect to motor vehicles.

This exception has become a focal point of litigation, particularly in cases involving freight brokers. Federal courts have increasingly applied the FAAAA's preemption clause to bar state tort claims, especially those alleging negligent hiring, loss or damage to goods, or disputes over carrier selection and routing. Yet, the scope of the safety exception remains unsettled. A growing divide among federal circuit courts over whether it permits negligent hiring claims against brokers has led to inconsistent legal standards nationwide. This fragmentation has now drawn the attention of the U.S. Supreme Court, which is poised to clarify the boundaries of federal preemption in this context.

The Evolution of Negligent Hiring Claims Against Brokers

Reasonable Care Standard

The first major case to allow a negligent hiring claim against a freight broker was *Schramm v. Foster* which was decided in 2004 by the District Court of Maryland. In *Schramm*, the freight broker (CH Robinson) was sued for negligently hiring an unsafe carrier. The Court held that freight brokers have a duty to exercise reasonable care in selecting motor carriers. It rejected the argument that simply verifying a carrier's federal operating authority and insurance was enough. The Court emphasized that brokers must go further such as checking safety ratings and compliance history. *Schramm* established the modern "negligent hiring" standard for freight brokers. It opened the door to plaintiffs

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to hold brokers liable under state tort law when the brokers fail to properly vet the carriers they hire.

Building on the standard set forth in Schramm, courts have continued to clarify what constitutes "reasonable care" in broker liability case. State courts now evaluate broker liability under a "reasonable care" standard. To meet this standard, freight brokers are expected to take proactive and well-documented steps when selecting and monitoring motor carriers. These steps include:

- Verifying the carrier's active operating authority
- Ensuring the carrier maintains sufficient insurance coverage
- Reviewing safety ratings and FMCSA BASIC (Behavior Analysis and Safety Improvement Categories) scores
- Examining the carrier's accident and violation history
- Thoroughly documenting each stage of the vetting process
- Keeping detailed records of carrier performance over time
- Implementing systems for continuous safety monitoring and compliance tracking

This evolving standard reflects a broader shift toward heightened accountability and risk management in the freight brokerage industry.

Control

Schramm laid the groundwork for a vicarious liability claim in *Sperl vs. CH Robinson*. In *Sperl*, an Illinois State Court jury awarded $23 Million against CH Robinson after the carrier they hired caused multiple fatalities in an accident. In 2011, the Appellate Court of Illinois expanded broker liability under the "control" theory. The Court held that CH Robinson exercised enough control over the carrier, via delivery instructions, to be considered vicariously liable. This opened the door to holding brokers being held liable for not just negligent hiring but also for actions of a carrier.

Freight brokers may be held liable under the "control theory" if they exercise (or appear to exercise) substantial control over a motor carrier's operations. Courts have found that certain broker practices can give rise to this type of liability, including:

- Mandating specific delivery routes or methods
- Imposing behavioral expectations on drivers (e.g., speed, rest breaks)
- Enforcing penalties for missed deadlines or service failures
- Requiring the use of particular equipment or vehicle configurations
- Issuing direct operational instructions to drivers
- Dictating loading and unloading procedures

These actions can blur the line between broker and carrier responsibilities, potentially exposing brokers to vicarious liability if an accident occurs.

Courts generally apply the "reasonable care" standard, which assesses freight broker liability, especially under negligent hiring and selection theories. The "control" standard, by contrast, is typically used to determine whether a broker exerts direct oversight over the carrier or driver, which could trigger liability under agency principles like *respondeat superior*. However, most courts find that brokers do not have sufficient control over independent carriers to meet this threshold. As a result, liability for brokers is far more commonly based on failure to exercise reasonable care rather than control over operations or personnel.

State Court's Analysis of Pre-Emption

Kaipust v. Echo Global Logistics, Inc., 2025 IL App (1st) 240530-U, is a significant recent decision addressing whether Illinois state law tort claims against freight brokers are preempted by federal law. Illinois falls within the Seventh Circuit, a jurisdiction that has historically and consistently found that negligent selection or hiring claims against freight brokers are preempted by the FAAAA. Given this precedent, it would be reasonable to expect the Illinois Appellate Court in *Kaipust* to adhere to the Seventh Circuit's approach.

However, the *Kaipust* court split from the federal appellate precedent. Specifically, the court rejected the Seventh Circuit's logic that negligent selection claims are "too attenuated" from the statutory language concerning "safety regulatory authority of a State with respect to motor vehicles" and, therefore, not covered by the safety exception. Instead, *Kaipust* held that Congress would not have intended to allow brokers to act negligently without recourse for injured parties and reasoned that the safety exception should preserve such claims from complete preemption. The court found the FAAAA's text ambiguous on this point and used statutory

interpretation principles to rule that state law claims like negligent hiring are not categorically blocked by federal law if they implicate safety concerns.

This decision is particularly noteworthy because it creates further confusion and inconsistency, as Kaipust did not follow the federal circuit law in its own jurisdiction. The departure from Seventh Circuit precedent underscores the need for Supreme Court intervention to resolve the growing discord among state and federal courts, and to provide a clear, nationally applicable standard regarding the scope of FAAAA preemption and its safety exception in broker liability cases.

The Federal Circuit Court Split: Diverging Interpretations of the FAAAA's Safety Exception

Preemption Favored: Seventh and Eleventh Circuits

Seventh Circuit

In 2021, the Northern District of Illinois addressed this issue in *Ye v. GlobalTranz Enterprises, Inc.*. In *Ye*, Plaintiff sought to recover against a freight broker for the death of her husband alleging that the broker negligently hired the motor carrier that employed the driver of the truck who caused the accident. The Northern District of Illinois held that the FAAAA barred the claim as the safety exception did not save the claim. The negligent hiring claim had a direct relationship to broker services under the FAAAA and the safety exception did not preclude preemption because Congress required motor carrier, not brokers, to bear responsibility for motor vehicle accidents. The case was appealed and the Seventh Circuit affirmed. The court reasoned that broker services, such as selecting carriers, are not sufficiently connected to motor vehicles to trigger the exception. It emphasized that allowing such claims would interfere with the economic regulation of broker services, which Congress sought to protect.

This case was appealed to the United States Supreme Court in 2023. However, the Supreme Court declined to grant certiorari.

Eleventh Circuit

The Middle District of Florida confronted this issue in 2022 in *Aspen American Insurance Co. v. Landstar Ranger*. In *Aspen*, an insurer alleged negligence and gross negligence against a transportation broker for its selection of a motor carrier to transport property in interstate commerce. In this case, the complaint did not purport to enforce any standard or regulation on ownership, maintenance, or operation of a vehicle, machine, trailer or semi-trailer used on a highway in transportation. The Court held that the connection between the insured's claims and motor vehicles were too attenuated to fall within the safety exception. The Eleventh Circuit affirmed. The Eleventh Circuit specifically stated, "a claim against a broker is necessarily one step removed from a "motor vehicle" because the "definitions make clear that… a broker… and the services it provides have no direct connection to motor vehicles." Therefore, a broker does not fall within the safety exception.

Safety Exception Applies: Sixth and Ninth Circuits

Ninth Circuit

In *Miller v. C.H. Robinson Worldwide, Inc.*, the plaintiff sustained injuries after being struck by a semi-tractor trailer while driving. He filed suit against the freight broker that arranged for the trailer's transport, alleging the broker negligently selected an unsafe motor carrier. The Court noted that the FAAAA does not define the phrase "the safety regulatory authority of a State," and observed that the statute provides little additional guidance regarding the scope of this language. The Ninth Circuit explained that courts have interpreted the safety exception broadly, emphasizing that "Congress's clear purpose in enacting the safety exception… was to ensure that its preemption of States' economic authority over [the transportation] industry did not restrict the States' existing power over safety."

The Court held that the phrase "with respect to" in the safety exception is synonymous with "relating to." As a result, the FAAAA's safety exception exempts from preemption any safety regulations that bear a connection to motor vehicles, whether directly or indirectly. Regulations that genuinely address the safety of vehicles and individuals involved in the towing process may also fall within the exception. Therefore, negligence claims against brokers, when they arise from motor vehicle accidents, possess the requisite "connection with" motor vehicles to avoid preemption under the FAAAA.

This case was appealed to the United States Supreme Court in 2021. However, the Supreme Court declined to grant certiorari.

Sixth Circuit

In 2024, the Northern District of Ohio addressed the issue in *Cox v. Total Quality Logistics, Inc.*, initially ruling that the plaintiff's negligent hiring claim was preempted by the FAAAA. However, on appeal, the Sixth Circuit reversed the district court's decision, holding that negligent hiring claims are not preempted because they fall within the FAAAA's safety exception. In *Cox*, the plaintiff alleged that Total Quality Logistics ignored publicly available data from the Federal Motor Carrier Safety Administration indicating that the motor carrier it hired had a history of safety violations and posed a risk to public safety.

The court explained that the U.S. Supreme Court has consistently recognized that a state's "regulatory authority" includes not only statutes and regulations but also common-law duties and standards of care. For example, in *Kurns v. R.R. Friction Products Corp.*, 565 U.S. 625, 637 (2012), the Court affirmed that common-law claims can constitute state regulatory authority. Similarly, in *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008), the Court held that references to a state's "requirements" in preemption statutes encompass common-law obligations.

The Sixth Circuit found that the negligent hiring claim was 'with respect to motor vehicles' because it directly concerned motor vehicle safety. The court further held that the claim sought to enforce a common law duty requiring brokers to exercise reasonable care in selecting safe motor carriers. The Court reasoned that "brokers are ultimately responsible for placing such motor vehicles on the road, even if those motor vehicles are driven and owned by a different entity."

The rationale is that common-law duties serve as a powerful form of regulation, establishing standards of conduct and imposing liability when those standards

are breached. As the Court explained in *Kurns*, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), these duties remain "a potent method of governing conduct and controlling policy."

A petition for certiorari was filed with the United States Supreme Court on August 4, 2025. To date, the Court has not decided on whether it will grant certiorari. However, it is anticipated that the petition will be granted and the case be consolidated with *Montgomery v. Caribe Transport II, LLC,* as both cases address the same legal issue have differing opinions.

Cases Pending in Other Circuits

Fifth Circuit

Crane v. Liberty Lane, LLC, a case out of the Southern District of Texas is now being heard by the Fifth Circuit Court of Appeals. In *Crane*, plaintiffs alleged that the freight broker, Penske Logistics were negligent in hiring and supervising the motor carrier which caused the fatal accident. The Plaintiffs argued that the broker failed to properly vet the carrier and should be held liable under state tort law. The District Court dismissed the claim holding that the FAAAA preempts state law negligent hiring claims against brokers. The Court found that such claims would have a significant impact on a broker's ability to arrange transportation services which falls under the FAAAA's preemption clause. The Court rejected plaintiffs' argument that the claim fell within the FAAAA's "safety exception", which allows certain state laws related to motor vehicle safety to survive preemption.

Fourth Circuit

On October 24, 2025, the Fourth Circuit will hear oral arguments in *Fuelling v. Echo Global Logistics, Inc*. In *Fuelling*, plaintiff sued Echo Global for negligent hiring alleging that Echo Global hired an unsafe carrier. The District Court of South Carolina held that wrongful death and personal injury claims against a freight broker based on its negligent hiring of an unsafe trucking company are not sufficiently related to motor vehicles to fall within the safety exception and are preempted by the FAAAA. The Court explained that there was an insufficient "link" between "motor vehicles and Echo's alleged negligent hiring" for the exception to apply.

Supreme Court Intervention: *Montgomery v. Caribe Transport II, LLC*

Montgomery v. Caribe Transport II, LLC, is a case out of the Southern District of Illinois where Plaintiff was injured when his truck was hit by a tractor-trailer driven by an employee of Caribe Transport. The shipment was brokered by CH Robinson. Plaintiff asserted a claim against CH Robinson for negligent hiring. The court relied on its recent decision in *Ye v. GlobalTranz Enterprises, Inc.*, which held that the FAAAA preempts state law claims against freight brokers for negligently hiring motor carriers and drivers. The Seventh Circuit stated that "a broker does not dictate how a driver performs a delivery when it uses software applications or check-in calls to monitor its status." Therefore, the Seventh Circuit affirmed and reiterated that the preemption provision of the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C.S. 14501(c)(1), bars state law claims against freight brokers for the negligent hiring of motor carriers and their drivers. This decision was appealed to the Supreme Court. On October 3, 2025, the U.S. Supreme Court granted certiorari.

The Supreme Court will now address the central question: Does § 14501(c) of the FAAAA preempt a state common-law claim against a broker for negligently hiring a motor carrier or driver?

The Supreme Court's decision to grant certiorari in *Montgomery v. Caribe Transport II* will draw significant attention from industry stakeholders, legal scholars, and advocacy groups. Several amicus briefs have already been filed on this issue leading up to the appeal to the Supreme Court which reflects a wide range of policy concerns.

The National Association of Manufacturers (NAM) in *Montgomery*, filed an amicus brief supporting the respondents, arguing that allowing state-law negligent hiring claims against brokers would disrupt national supply chains by imposing inconsistent liability standards, undermine federal oversight by duplicating the role of the FMCSA, and expose manufacturers and shippers to indirect liability.

In *Cox*, the Transportation Intermediaries Association (TIA), representing freight brokers, warned that the current legal uncertainty poses an existential threat to small and mid-sized brokers. Their brief emphasized that the safety exception should not apply to brokers who do not operate motor vehicles, and that state tort claims create redundant regulation conflicting with the FAAAA's deregulatory purpose.

In contrast, the Institute for Safer Trucking in *Ye*, filed an amicus on behalf of the "survivors of truck crashing and families of victims", wanting to ensure that the FAAAA preemption provision preserved state law personal injury claims against freight brokers arising from truck crashes based on the brokers' negligent hiring of unsafe motor carriers.

The Supreme Court's upcoming decision in *Montgomery v. Caribe Transport II* presents an opportunity to restore clarity and balance. A ruling in favor of preemption would reaffirm Congress's intent to deregulate broker services and preserve the integrity of interstate commerce. It would also send a strong message that brokers should not be held liable for the manner in which freight brokers conduct business.

Supreme Court Ruling Impacts

If the Supreme Court Finds That Negligent Hiring Claims Are Preempted by the FAAAA

If the Supreme Court affirms negligent hiring claims against brokers are preempted by the FAAAA, brokers would gain broad immunity from state-law tort claims related to carrier selection. This in turn would substantially reduce litigation exposure and legal uncertainty across jurisdictions. This would also curtail forum shopping, promote uniformity and reinforce Congress's intent to deregulate the transportation industry.

This decision could lead to lower insurance premiums and operational costs for brokers, as the risk of liability for hiring decisions would be minimized. However, the argument from the Plaintiff's bar is that removing this layer of accountability will weaken incentives for brokers to thoroughly vet motor carriers. Without the

threat of legal consequences, brokers will inevitably rely more heavily on minimal compliance checks rather than conducting robust safety evaluations, potentially increasing risks on the road.

Ultimately, while preemption would streamline regulatory burdens and clarify legal standards, it raises important questions about balancing efficiency with public safety and accountability in the freight brokerage industry.

If the Supreme Court finds that negligent hiring claims are not preempted by the FAAAA

Should the Supreme Court decide that negligent hiring claims against brokers are not preempted by the FAAAA, brokers could be held liable under state tort law for negligent hiring motor carriers. This means that negligent hiring claims would fall under the FAAAA's "safety exception" which preserves state authority over motor vehicle safety. This would leave brokers facing lawsuits across the county, each with different standards for what constitutes as "negligent hiring". This leads to legal uncertainty and higher defense costs.

Brokers would need to implement more rigorous due diligence procedures for selecting motor carriers including regularly reviewing FMCSA safety scores, verifying insurance and licensing, investing past violations or accident history, and documenting all vetting procedures. This would lead to a slower carrier selection process and higher insurance premiums. Some insurers have begun excluding negligent hiring coverage, leaving brokers exposed to personal or business-level financial risk.

In order to minimize risk, brokers would likely avoid working with smaller or newer carriers. This would reduce competition in the freight market and increase costs for shippers due to fewer options.

Small freight brokers suffer the greatest impact. Small brokers often lack in-house legal teams and must rely on outside counsel. The risk of being sued for negligent hiring, even when following FMCSA guidelines, creates a financial burden that larger firms can absorb more easily.

How Far Will the Supreme Court Go?

In *Montgomery v. Caribe Transport II, LLC* (which is a 7th Circuit case), the issue in front of the Supreme Court is the negligent hiring claim. However, will the Supreme Court only decide if negligent hiring and/or selection claims are preempted by the FAAAA or will it expand the FAAAA to all claims against brokers? The 7th Circuit is currently divided on the issue if the FAAAA will expand to other claims against broker.

In *Hartman et al vs. Thompson et al* (21 C 1409), the Northern District of Illinois recently allowed claims for statutory employment and *respondeat superior* to be alleged against brokers. The court specifically stated that the parties "spill much ink over whether Western [Express] was a broker or motor carrier for the shipment at issue in this case, but resolution of that specific question is not essential to this analysis." While the Plaintiffs in the case did not have enough proof to support their claims for statutory employment and *respondeat superior*, it is still important to note that the Court did not find the FAAAA preempted those claims.

Conversely, in *Tischauser et al vs. Donnelly Transportation, Inc, et al* (20 C 1291), the Western District of Wisconsin, the Court has found that ***any*** claim against a broker is preempted by the FAAAA including *respondeat superior* claims, statutory employment, and joint venture. The Court specifically stated the following:

> "[N]othing in Ye suggests that either the jurisdictional provenance of a plaintiff's tort claims or the precise nature of those tort claims should alter the outcome. Ye dealt specifically with only negligent hiring and vicarious liability claims under Illinois' common law brought against a broker. In addition to their negligent hiring and vicarious liability claims, Plaintiffs brought Wisconsin common law tort claims for joint enterprise/venture. However, all common law claims have the force and effect of law. And each of Plaintiffs' claims here 'would have a significant economic effect on broker services,' just as the negligent hiring claim in Ye would have."

Accordingly, Plaintiffs' claims against the broker in this case were preempted by the FAAAA. This Court in this case also held that claims against the **shipper** were preempted by the FAAAA.

If the Supreme Court only looks at the negligent hirings/selection claims, brokers still may have liability under theories of liability including *respondeat superior* or statutory employment. However, it is important to keep in mind that regardless of which approach the Supreme Court will take regarding preemption and how far the FAAAA extends to liability, a broker may still be found liable if it takes on the roles of a motor carrier.

Strategic Guidance for Freight Brokers

Freight brokers operate in a federally regulated environment designed to promote efficiency, consistency, and economic stability across state lines. Subjecting brokers to a patchwork of state tort laws undermines this framework and exposes them to unpredictable liability for decisions made in good faith and in compliance with federal standards.

In preparation for the Supreme Court decision, freight brokers should consider doing the following:

- Verify FMCSA authority and insurance, avoid unsafe carriers, use monitoring platforms, and document vetting steps.
- Include indemnification clauses, define carriers as independent contractors, specify insurance minimums, avoid control language, and include warranties regarding compliance with laws and regulations.
- Maintain contingent auto liability, cargo coverage, and broker legal liability policies.
- Implement automated monitoring systems for ongoing monitoring, use AI tools, and maintain real-time alerts.
- Apply criteria uniformly, update policies regularly, and train staff in legal standards.
- Only provide information or instructions that are contained in the bill of lading.
- Do not identify as a motor carrier on the bill of lading.

Trade Secrets

By Scott F. Gibson

A Soliloquy on Damages

"I feel... stupid," Emilio says. "I can't believe Verica did this to me. I can't believe that I let her."

He sighs, closes his eyes, and shakes his head in disbelief.

"This is not your fault, Emilio. We'll get you through this mess."

Emilio's company, Nanoptic, is a budding superstar in the field of medical nanotechnology. Backed by robust investor support, the company has developed proprietary ways to use nanoparticles to deliver drugs to targeted cancer cells. Nanoptic's meteoric growth is tied to the genius of its founder, your long-time client Emilio Quintero.

But fate dealt Nanoptic a cruel blow. The company teeters on the precipice of financial ruin, battered and bruised by illegal competition.

"Let's review what happened," you say. "Start at the beginning."

Emilio methodically recounts the story. After seven long years, Nanoptic's technology received FDA approval for use with cancer patients. When sales began three years ago, the company had difficulty keeping up with physician demand. And the patients... well, they thrived.

At the same time sales were soaring, corporate discord arose. Rufus Johannson, Nanoptic's Vice President of Sales, relentlessly challenged Emilio's vision for growth. After months of infighting, Nanoptic fired Rufus and purchased his stock. Rufus left the company with a noncompete agreement and a seven-figure severance package.

The dispute was resolved, or so it seemed.

Unbeknown to anyone else, Rufus had a mole inside the company. That mole – Emilio's administrative assistant, Verica Farkas – fed Rufus a steady stream of research and development, marketing plans, and other confidential information. Emilio depended on Verica's weekly summaries of corporate activities, so no one suspected foul play when she accessed confidential information. She was, so it seemed, intensely devoted to Emilio and to the company.

About five months ago, Emilio began hearing about a new competitor, Slaytec Enterprises, with Rufus at the helm. Rufus was outside the noncompete term in his severance agreement so Emilio did not give much thought to the new competitor. Shortly afterwards, Verica abruptly left the company, ostensibly to care for her young children.

Customers couldn't stop talking about Slaytec. Emilio was surprised at how quickly the competitor unveiled new products, many which contained features that mimicked those that Nanoptic developed after Rufus' departure.

Emilio ordered a forensic investigation to determine if Rufus was hacking the company's computers. He was floored when he learned that Verica had delivered mountains of confidential information to Rufus. The forensic proof was overwhelming and incontrovertible. In exchange for Nanoptic's crown jewels, Verica received a six-figure payout and an equity position in Slaytec.

"I've really messed this up, Counselor," Emilio says with a sigh. "What can we do?"

"The first thing we do is stop the bleeding. We need an injunction."

Electronic data lives forever.

Scott F. Gibson is a proud husband, father of four, and grandpa to the three cutest kids you'll ever meet. He's a partner with the Mesa, Arizona law firm of Denton Peterson Dunn, PLC. Since 2008, he has taught a class on trade secrets and restrictive covenants at the Sandra Day O'Connor College of Law at Arizona State University. He is a long-time member of DRI and its Employment and Labor Law Committee.

Both state and federal law protect trade secrets. All states except New York have adopted some form of the Uniform Trade Secrets Act; New York protects trade secrets based common principles derived from the Restatement of Torts. Since 2016, the Defend Trade Secrets Act has established a private civil cause of action in federal courts.

The UTSA and the DTSA define trade secrets similarly. A trade secret is information that (a) has independent economic value (b) because it is not generally known or (c) ascertainable by proper means by persons within the relevant industry and (d) is subject to efforts that are reasonable under the circumstances to protect its secrecy. *See* Uniform Trade Secrets Act § 1(4); 18 U.S.C. § 1839(3).

Both statutory schemes protect trade secrets from misappropriation by "improper means" such as theft, breach of fiduciary duty, or other dishonest means. And the UTSA and DTSA provide considerable authority to address misappropriation of trade secret information.

Critically, the UTSA and DTSA give courts the authority to issue an injunction to prevent the "actual or threatened misappropriation of a trade secret." *See* UTSA § 2(a). Injunctive relief is the preferred remedy in trade secret cases "because it is the most effective way to prevent use or disclosure of a trade secret by a potential defendant that may extinguish its value." Henry H. Perritt, Jr., *Trade Secrets: A Practitioner's Guide,* 491 (Practicing Law Institute 1994).

A party seeking a preliminary injunction must establish four traditional equitable criteria: (1) a strong likelihood of success at trial on the merits; (2) irreparable harm that is not remediable by damages; (3) the balance of hardships favors the plaintiff; and (4) public policy favors granting the injunction. *E.g., Justice v. Nat'l Collegiate*

Athletic Ass'n, 577 F.Supp. 356, 363 (D. Ariz. 1983).

In addition to injunctive relief, the DTSA authorizes an *ex parte* seizure of any "property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(A)(1). The party seeking seizure must through show "extraordinary circumstances" justifying the need for the order by way of an affidavit or verified Complaint. 18 U.S.C. § 1836(b)(2).

If you want to enjoin misappropriation or seize goods *ex parte*, you will need a compelling witness to persuade the court that you are entitled to the extraordinary relief. On the whole, lawyers and judges are smart people who aren't good at math or science. Your witness must be able to explain the trade secret in common terms, describe how the trade secret differs from the general knowledge in the industry, and show why the trade secret deserves judicial protection.

In preparing your witness, remember the adage given to would be authors: Show, don't tell. The witness must do more than make conclusory statements about the virtue of your position. Your witness must be able to describe your position coherently and convincingly so that the judge will conclude on her own that you are entitled to the relief sought.

You pull into your parking space at 6:47 a.m. The sun has just started to peak over the mountain and you are bone tired already. The past two weeks have been a whirlwind of activity from investigating claims and drafting pleadings to preparing witnesses and holding an evidentiary hearing the end of last week.

You were pleased to get an accelerated hearing, but the ruling was a mixed bag. The court granted a portion of your request for injunctive relief, but refused your request to seize the Slaytec's product. "That ship already has sailed, Counselor," she said. "You'll have to seek damages."

And so your litigation team is gathering to evaluate your damage claims. At 8:00 a.m. sharp, Emilio and Nanoptic's general counsel, Myrtle Potter, join the meeting via Zoom. After a few pleasantries, you broach the reason for the meeting.

"Our damages theories will impact our discovery plan, settlement strategy, and trial preparations. The good news is that we have a lot of flexibility in calculating damage."

Emilio gives a sigh of relief.

"We can recover damages based on the harm you have suffered and on the benefit that Rufus has received," you explain. "As long as we don't double count, we can recover damages using multiple theories."

"Tell me more, Counselor."

Courts have "considerable flexibility" in calculating appropriate damages for misappropriation of trade secrets. Restatement (Third) of Unfair Competition § 45, comment b. "The proper measure of damages for misappropriation of trade secrets cases can be elusive, and courts are encouraged to be 'flexible' and imaginative'" *Computer Assoc. Int'l Inc. v. Am. Fundware, Inc.*, 831 F.Supp. 1516, 1526 (D. Colo. 1993).

This "flexible" and "imaginative" approach allows the court to tailor relief based on the specific nature of the case. So in addition to injunctive relief, a plaintiff may recover damages for the "actual loss caused by misappropriation" as well as for the defendant's unjust enrichment "that is not taken into account in computing damages for actual loss." UTSA § 3(a).

Courts typically use four different methods for calculating damages for misappropriation: (1) the plaintiff's loss from the misappropriation, (2) the defendant's profits from sales attributable to the trade secret, (3) the savings the defendant enjoyed based on the misappropriation, and (4) a reasonable royalty for the defendant's use of the trade secret. Restatement (Third) of Unfair Competition § 45, *comment d*. As long as no "double recovery" occurs, a plaintiff may recover damages both to compensate him for his losses and to deprive the defendant of his unjust enrichment.

"Our sales are down 17.8% over the last six months," Emilio says. "Can we recover lost profits from those sales?"

Myrtle grimaces and shakes her head slowly.

"Torts class wasn't my strongest subject in law school," she says, "but I know that we have to show that the misappropriation caused our loss. I'm not sure we can do that."

"Remember, the court has considerable flexibility in formulating a damage award," you say. "Although we're required to prove that Nanoptic suffered damages, the level of proof is relaxed. We have to prove that you suffered a loss, but don't have to prove the amount of your loss with the same specificity required in typical tort cases. We only need evidence sufficient to allow the court to reasonably estimate your lost profits."

Myrtle looks relieved.

"A good expert witness can help us prove your lost profits," you continue. "I have a good relationship with an accountant who is a great teacher. She can provide clear testimony tying your lost sales to the misappropriation. I'll reach out to her today."

A successful plaintiff may recover its actual losses arising from the misappropriation. "The plaintiff's loss usually consists of profits lost on sales diverted from the plaintiff, loss of royalties or other income that would have been earned by the plaintiff but for the appropriation, or the value of the trade secret if it has been destroyed through a public disclosure by the defendant." Restatement (Third) of Unfair Competition § 45, comment d.

The Plaintiff's losses also may include loss of royalties or other income that the plaintiff would have earned if the misappropriation had not occurred. *Id*. Courts often assess a reasonable royalty in two circumstances. First, when injunctive relief is impractical, the court may "condition future use [of a trade secret] upon payment of a reasonable royalty for no longer than the period of time the use

could have been prohibited." Uniform Trade Secrets Act § 2(b).

Second, some states allow the court to assess a reasonable royalty as a measure of compensatory damages. The royalty is based on a hypothetical license for the trade secret technology, with the court often calculating the royalty using methods suggested under patent law. A reasonable royalty approximates "the price that would be set by a willing buyer and a willing seller for the use of the trade secret made by the defendant." Restatement (Third) of Unfair Competition § 45, comment g.

"Because the primary concern in most cases is to measure the value to the defendant of what he actually obtained from the plaintiff, the proper measure is to calculate what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place." *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 539 (5th Cir.1974). "Where there is a 'real-world' "comparable" close on point,' the court may view that as the 'starting point' for the hypothetical negotiation." *Ajaxo, Inc. v. E*Trade Fin. Co.*, 48 Cal.App. 5th 129, 161 (Cal. App. 2020) quoting *Oracle Am., Inc. v. Google Inc.*, 798 F.Supp. 2d 1111, 1121 (N.D.Cal. 2011).

The court may then adjust the "real-world comparable" up or down for other comparable data points. *Ajaxo*, 48 Cal. App. 5th at 161. Courts "examine a broad range of factors including the effect on the parties' competitive posture; the terms of other licenses; the value of the secret to the plaintiff, including the cost of its development; and the nature and extent of the defendant's intended use." Trade Secret Case Management Judicial Guide § 2.6.2.2.2 at 2-44 (Federal Judicial Center 2023)

Emilio perks up.

"Before all this mess arose, we were in negotiations with MysticNano to license some of our technology. I did my MBA with their CEO, Merwin Johansen, and we've remained friends after school. Our companies service different segments of the market, so it seemed like a win-win for us to share the technology – for a fee."

"That's a good starting point for our discussions on royalties," you say. "Let's gather any documentation you have about the negotiations."

"And I'm certain that Merwin would be willing to testify about those negotiations," Emilo says. "He's aware of what Rufus did... and he's nearly as upset about it as I am."

"A hypothetical license is intriguing," Myrtle says. "But what about our lost profits? What do we need to show to recover lost profits?"

"I'm glad you asked," you say.

Misappropriation of a trade secret is a tort. But because misappropriation typically occurs in secret, the level of proof is relaxed. As in any other tort case, the plaintiff must show a causal link "between the fact of its damages (if not their precise amount) and the defendant's misappropriation." Marc J. Pensabene & Christopher E. Loh, *How to Assess Trade Secret Damages,* Managing Intellectual Property (June 1, 2006) located at ***http://www.managingip.com/Article/1254372/How-to-assess-trade-secret-damages.html***.

"The general rule that prohibits evidence of speculative profits does not apply to uncertainty as the amount of the profits which would have been derived, but to uncertainty or speculation as to whether loss of profits was the result of the wrong and whether any such profits would have been derived at all." *Tri-Ton International v. Velto*, 525 F.2d 432, 437 (9th Cir. 1975). Nonetheless, a claim for lost profits "must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness." *Home Pride Foods v. Johnson*, 262 Neb. 701, 711, 634 N.W.2d 774 (2001).

Under appropriate circumstances, the court may presume that the plaintiff would have made all the sales in the area if the defendant had not misappropriated the trade secret. *Clark v. Bunker*, 453 F.2d 1006, 1011 (9th Cir. 1972).

"Recovering our lost profits is a good start," Myrtle says, "but the harm goes much deeper than that. Without our stolen trade secrets, Slaytec would be another competitor scrambling to catch up with Nanoptic. But instead, we have a competitor that is using our proprietary techniques to compete against us."

Emilio nods in agreement.

"It's particularly unfair because Slaytec didn't have to spend any time or resources to develop those techniques," he says.

"You're right," you say. "It is unfair. And that's one reason why the law gives courts lots of flexibility in calculating damages in trade secret cases."

You explain that in addition to awarding damages to compensate for a plaintiff's loss, the law also allows a successful plaintiff to recover damages based on the defendant's unjust enrichment. That recovery may take various forms, ranging from the defendant's profits attributable to the trade secret to so-called "head start" damages to a reasonable royalty for use of the trade secret.

"Not only can we recover lost profits from your drop in sales, a good expert witness can help us calculate the profits and other benefits that Slaytec received from stealing your trade secrets," you say.

Emilio rubs his chin and grins for the first time in weeks.

Flexibility is key in determining damages associated with the defendant's unjust enrichment. That flexibility manifests itself in many forms. For example, a plaintiff may recover the profits that the defendant earned on "sales that are attributable to the trade secret." Restatement (Third) of Unfair Competition § 45, comment d.

In addition, the trade secret owner may recover damages under the "standard of comparison," which measures the savings that the defendant enjoyed by using the misappropriated trade secret. *Id*. These damages for "saved costs of development" quantify the benefit received from the defendant's "ability to avoid incurring certain research and development costs by using the confidential information and trade secrets." *Sabre GLBL, Inc. v. Shan*, 779 F. App'x 843, 851 (3d Cir. 2019).

But the trade secret owner is not limited to recovering the saved costs of development. The court may also award head start damages representing the defendant's "unjust enrichment specifically arising from any temporal advantage obtained by the misappropriation." *Alifax Holding Spa v. Alcor Scientific, Inc.*, 387 F. Supp. 3d 170, 171 (D. R.I. 2019).

Head start damages quantify the defendant's increase in value from being "further along than it otherwise would have been in developing and commercializing its products and services." *Sabre GLBL,* 779 F. App'x at 851. "Establishing damages for the benefit conferred does not require proof that the defendant has succeeded in making a profit and can be based on the value of what was received." Trade Secret Case Management Judicial Guide § 2.6.2 at 2-46.

"What about attorneys' fees?" Myrtle asks. "Are fees available as a remedy and, if so, what do we need to show?"

"We don't have a presumptive right to recover fees if we are successful," you note. "But the UTSA gives an opening to recover both attorneys' fees and exemplary damages. I don't want to give any false expectations. It's an uphill battle to prove our case. But I believe we have a reasonable opportunity to make the required showing."

You explain that the UTSA authorizes an award of attorneys' fees and exemplary damages for "willful and malicious" misappropriation of trade secrets, which requires you to show an elevated type of misappropriation.

Misappropriation is an intentional tort. When a jury finds misappropriation, it necessarily finds that the defendant's actions were deliberate. But the law distinguishes between "ordinary" misappropriation (which is intentional) and "willful and malicious" misappropriation (which is "something more" than intentional). Even if a defendant's "misappropriation was improper, it does not necessarily follow that the misappropriation was willful and malicious." *API Ams. Inc., v. Miller*, 380 F.Supp.3d 1141, 1151 n. 6 (D. Kan. 2019). The relevant question is, what constitutes "something more?"

Neither the UTSA nor the DTSA define the terms "willful" or "malicious." And so courts often define those terms by looking to other areas of the law. Courts tend to adopt one of two different approaches, "with the real difference of opinion relating to how to define the malice prong." *KPM Analytics N. Am. Corp. v. Blue Sun Scientific,* LLC, 729 F.Supp. 3d 84, 104 (D.Mass.2024).

The majority approach finds that a defendant's acts are "willful" when they are "done with actual or constructive knowledge of the probable consequences" and "malicious" when the defendant acted "with intent to cause injury." *KPM Analytics N. Am. Corp. v. Blue Sun Scientific*, LLC, 729 F.Supp. 3d 84, 104 (D.Mass. 2024) *quoting* 1 Roger M. Milgrim, Milgrim on Trade Secrets § 1.01[2][c][iv][C]; *see also Nucar Consulting, Inc. v. Doyle*, 2005 Del. Ch. LEXIS 43, at *49-50 (Del. Ch. April 5, 2005) (willfulness is "an awareness, either actual or constructive, or one's conduct and a realization of its probable consequences" and malice is "ill-will, hatred or intent to cause injury").

The minority view finds actions "malicious" based on the defendant's "conscious disregard for the rights of another" *Steves & Sons., Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 726-27 (4th Cir. 2021).

Under the majority view, "malice may be proven either expressly by direct evidence probative of the existence of ill-will, or by implication from indirect evidence." *Int'l Med. Devices, Inc. v. Conrell*, 2024 U.S. Dist. LEXIS 56663, at *20-22 (C.D.Cal. Mar. 28, 2024).

It's important to note that the statute does not implicate the state standards for awarding punitive damages. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1111 (9th Cir. 2001) ("We conclude that the Montana legislature did not incorporate the definition of punitive damages into the trade secrets act"); *Zawels v. Edutronics, Inc.*, 520 N.W. 2d 520, 524 (Ct. App. Minn. 1994) (the "plain language" of the statute shows that exemplary damages under the UTSA differ from an award of punitive damages).

Because the UTSA does not implicate the state standards for punitive damages, a plaintiff has an easier pathway to an award of exemplary damages. See *Orca Comm's Unlimited, LLC v. Noder*, 236 Ariz. 180, 183 ¶ 13 (2014) (statute "does not adopt the common law or impose a heightened standard of proof for a punitive damages award"); *Bimbo Bakeries United States v. Sycamore*, 2017 U.S. Dist. LEXIS 157050 (D. Utah Sept. 23, 2017) (legislature did not deviate from the standard burden of proof and the court will not presume to do so). And so a plaintiff need not prove clear and convincing evidence to receive exemplary damages.

We have a strong basis for claiming exemplary damages," you note. "Rufus knew that Verica had a confidentiality agreement with Nanoptic – he signed the same agreement with the company."

"And they used confidential bids to undercut our proposals to our existing customers," Emilio notes. "Rufus was angry when he left the company. I'm certain that we'll find other examples of willful and malicious conduct."

Emilio reviews some of the most egregious pieces of evidence that the forensic review disclosed thus far: Verica's secret drop box account used to ferry confidential information to Rufus; her condescending SMS messages mocking company executives; emails contemplating the best ways to hurt Nanoptic. Her electronic communications with Rufus outlined a fertile field for discovery.

Electronic data lives forever. It's exhilarating when the evidence favors your case.

You turn to your associate, who has been taking notes during the meeting. "Let's talk after the call. I'd like your input, but I have a good idea on the direction our discovery needs to go."

Emilio nods his head and grins. "Go get 'em, Tiger. Let's bring down the bad guys."

Bulk Purchases,* Interstate Transportation of Lottery Tickets, and Influencing the Selection of the Winner

By Katherine C. Tower

New state regulations prohibit purchasing all combinations of a lottery game, make retailer agents report bulk purchases, add restrictions on lottery terminals to prevent a concentrated buying effort.

*"Bulk Purchase" means the coordinated effort between a single entity or group and a retailer or group of retailers, to facilitate the sale and purchase of a large quantity of lottery tickets for a particular game.

In the past decade, there have been a number of investment groups worldwide purchasing vast portions of all possible mathematical combinations of a state lottery game to guarantee a jackpot win, otherwise known as "brute-force" lottery playing. These investment groups have scored major wins across the U.S. in states like Missouri, Maryland, Indiana, Washington, District of Columbia, Massachusetts, Oregon, Illinois, Texas, and Montana, For scratch-off or Fast Play tickets, this entails buying entire books or a series of tickets in a row from a retailer to increase the odds of winning multiple smaller prizes or even a large within the same book. In addition to purchasing large volumes of a single book, these investment groups use algorithms and the state lottery's website to verify the number of top prizes remaining for a particular game. As a result, this undermines the public trust in the fairness of lottery games, when wealthy investment groups can use resources to buy top prizes. It shatters the dream that anyone could strike it rich, thereby diminishing the integrity and credibility of the lottery.

In response to this growing concern, many state regulators have moved to ban bulk ticket purchases to prevent these activities. In general, the new state regulations prohibit purchasing all combinations of a lottery game, make retailer agents report bulk purchases, add restrictions on lottery terminals to prevent a concentrated buying effort.

Prohibiting bulk lottery ticket purchases maintains fairness, as well as plays a crucial role curbing money laundering, influencing the selection of the winner, using third-party couriers and other illegal schemes in contravention of state and federal criminal statutes. Specifically, the federal statute 18 U.S.C. 1301, enacted by Congress in 1895 to restrict interstate transfer of lottery tickets. However, due to technological advances in communication, the sale of interests in out-of-state lottery tickets became permissible by way of online transactions, allowing no physical lottery tickets crossing state lines. (See Pic-A-State Pa. v. Pennsylvania, No. 93-0814, 1993 WL 325539 (M.D. Pa. July 23, 1993)).

In response to this loophole, Pennsylvania Senator Arlen Specter was instrumental in sponsoring the Interstate Wagering Amendment in 1994 which states as follows:

> "Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or

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similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift,[1] enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both."

Purchasing lottery tickets in person within another state's borders does not violate federal law. However, Pic-A-State Pa., Inc., a Pennsylvania-based corporation operated by taking orders and purchasing out-of-state lottery tickets on behalf of its customers. Pic-A-State's operations were designed to circumvent the century old ban on the interstate traffic in lottery tickets by keeping the tickets themselves in the state of origin and solely providing customers with computer-generated receipts. Repeatedly, the Commonwealth of Pennsylvania attempted to halt Pin-A-State's operations but to no avail until 1993 when the Pennsylvania legislature passed Act 8 of 1993, prohibiting the sale of any interest in another state's lottery. The Appellate Court then reversed the District Court's ruling citing an intervening change in federal law, the Interstate Wagering Amendment, which made the Pennsylvania statute fully consistent with federal law and not unduly burdensome on interstate commerce. (*See Pic-A-State Pa. v. Pennsylvania*, 42 F.3d 175, 178-80 (3d Cir. 1994)).

Subsequently, Pic-A-State filed a suit seeking injunctive relief and a declaratory judgment alleging that the Interstate Wagering Amendment was unconstitutional. The district court dismissed Pic-A-State's complaint, finding its arguments meritless. (*See Pic-A-State Pa. v. Reno*, No. 94-1490 (M.D. Pa. Feb. 23, 1995). Following the passage of the amendment, Pic-A-State ceased its operations. The Interstate Wagering Amendment was necessary to preserve the state's right to regulate lottery within its borders; to prevent businesses from undermining projected state revenue; support state's bans on out-of-state lottery ticket sales; and to maintain public trust in the integrity of the lottery. Of note, some bulk lottery purchases can be a direct violation of the lottery transportation statute 18 U.S.C. 1301:

- Being in the business of procuring lottery tickets in one state for a person in another state who is not legally authorized to participate in that lottery, except by agreement between the states;
- Funding the tickets interstate or foreign commerce;
- Transporting lottery ticket(s) across state lines;
- Using a common carrier for interstate carriage;

Transporting unauthorized lottery tickets is a Class E felony under federal law. If convicted, there is a penalty of up to 2 years in prison and a fine of up to $250,000.

Further note, that in a number of states, it is a second-degree or third-degree felony to intentionally or knowingly influence or attempt to influence the selection of a lottery winner. Bulk purchases could also be in breach of a state law.

To this end, the lottery is meant to be a game of chance. Allowing wealthy investment groups to strategically gain an unfair advantage by purchasing lottery tickets in bulk erodes the public trust and damages the integrity of the state lottery as buying in bulk, buys a win. Bulk purchases can also violate state and federal statutes carrying penalties that include both hefty fines and potential imprisonment.

Church Autonomy as an Immunity

By Jon L. Anderson

McRaney's treatment of church autonomy as an immunity from suit appears to give the best of both worlds.

The Fifth Circuit Strikes the Right Balance

The Fifth Circuit's decision in *McRaney v. North American Mission Board of the Southern Baptist Convention,* --F.4th--, 2025 WL 3012553 (5th Cir. 2025), is a must read for any practitioner representing religious organizations. It has one of the most thorough discussions of the church autonomy doctrine, also known as ecclesiastical abstention, that one can find. One particularly interesting aspect is the court's discussion of how church autonomy is to be treated.

While courts agree that when the church autonomy doctrine applies, they are prohibited from further adjudicating the matter, but "[c]ourts disagree, however, as to the prohibition's precise legal operation." *Bilbrey v. Myers*, 91 So.3d 887, 890-91 (Fla. Dist. Ct. App. 2012). Specifically, some courts, such as those in Oklahoma, Minnesota, Kentucky, and Indiana, have treated church autonomy as an affirmative defense. Other courts have treated it as a subject matter jurisdictional bar. *See, e.g., Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.*, 531 S.W.3d 146, 158 (Tenn. 2017) (the doctrine is a "subject matter jurisdictional bar" under Tennessee law); *Doe v. Diocese of Raleigh*, 776 S.E.2d 29, 34 (N.C. Ct. App. 2015) ("It is well settled that an assertion that a civil court is precluded on First Amendment grounds from adjudicating a claim constitutes a challenge to that court's subject matter jurisdiction."). In *Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 195 n.4 (2012), the United States Supreme Court stated that the related ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." Noting that "[t]hese dueling instructions have created confusion across courts," 2025 WL 3012552, at *10, *McRaney* contains a detailed, sound discussion of the debate as to how church autonomy should operate.

McRaney recognized that when referring to church autonomy as "jurisdictional," many courts use the term "in a broad, conceptual sense to describe the different spheres of authority between civil courts and religious institutions." *Id.* at *11 (internal quotations and citations omitted). Thus, the doctrine is jurisdictional "in the sense that matters falling within its ambit are beyond the power and cognizance of civil courts." *Id.* at *12. The court, however, stated that church autonomy is not jurisdictional in the narrow sense of a lack of subject matter jurisdiction under Rule 12(b)(1). *See id.* at *13 ("But that does not mean church autonomy is jurisdictional in the narrow Rule 12(b)(1) sense. Rule 12(b)(1) is used to raise a defense of lack of subject matter jurisdiction. That means the court lacks jurisdiction over the case as a whole. And that precludes the federal courts from entering judgment on the merits. In our view, the church autonomy doctrine generally is not jurisdictional in this narrower Rule 12(b)(1) sense.") (citation omitted). One of the court's rationales was that when a court lacks subject matter jurisdiction under Rule 12(b)(1), that enables a plaintiff to simply refile the case elsewhere, such as in state court, in an attempt to get a second bite at the apple. *See id.* at *14 ("[W]hen a court grants a Rule 12(b)(1) motion, that leaves the plaintiff free to refile elsewhere. But if our dismissal allowed McRaney to refile in Mississippi state court, that would undermine rather than protect the ecclesiastical organizations' autonomy. Mississippi's courts are not bound by what we say—even when we're interpreting the

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First Amendment. So if we treated church autonomy as a jurisdictional defense in the Rule 12(b)(1) sense, McRaney could refile in state court, get discovery, and perhaps even proceed to judgment.") (citation omitted). The court's solution was to treat church autonomy as an immunity from suit akin to qualified immunity raisable under Rule 12(b)(6). Treating church autonomy as an immunity under Rule 12(b)(6) has two distinct advantage. First, "treating church autonomy as an immunity from suit akin to qualified immunity—which is raiseable under Rule 12(b)(6), not 12(b)(1)—means our judgment is binding in all courts under *res judicata*." *Id.* Second, treating church autonomy from suit, like other immunities, gives rise to an immediate appeal:

> The church is constitutionally protected against all judicial intrusion into its ecclesiastical affairs—even brief and momentary ones. And, as with any other immunity from suit (including sovereign immunity and qualified immunity), such intrusions cannot be remedied after the district court renders final judgment. For example, if the district court orders discovery into a pastor's sermon notes to adjudicate a plaintiff's claim, the pastor cannot be made whole by a take-nothing judgment months or years later. See Whole Woman's Health, 896 F.3d at 373–74. Thus, if a district court denies the invocation of church autonomy, that denial is subject to immediate appellate review—under the collateral order doctrine (as with sovereign and qualified immunity), under 28 U.S.C. § 1292(a) (if the church loses a motion for injunctive relief), under 28 U.S.C. § 1292(b) (if the district court certifies the question), or other authorities.

Id. at *13; *see also id.* at *14 ("In sum, the church autonomy doctrine has numerous features of a jurisdictional bar. It limits the powers of federal courts. It immunizes ecclesiastical organizations from suit, not just liability. And, when it is denied, it gives rise to an immediate appeal. But "[t]he jurisdictional question... is not binary." And the fact that some religious questions are beyond our judicial power does not mean that all church autonomy disputes are properly dismissed under Rule 12(b)(1). Nor does it preclude federal courts from rendering judgment on the merits in cases like this one.") (citation omitted).

McRaney's treatment of church autonomy as an immunity from suit appears to give the best of both worlds. It ensures that decisions will be made on the merits with *res judicata* effect, but also that any denials of motions to dismiss will be immediately appealable. Hopefully other courts will take note of *McRaney's* well-reasoned analysis.