TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

An Association of Civil Trial, Commercial Litigation & Personal Injury Defense Attorneys - Est. 1960

FALL/WINTER 2021

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TADC CALENDAR OF EVENTS

January 26-30, 2022	**2022 TADC Winter Seminar** Westin Snowmass Resort – Snowmass Village, Colorado Registration information available at www.tadc.org
March 25-26, 2022	**2022 TADC Trial Academy** Texas Tech University School of Law – Lubbock, Texas Registration information available after January 15, 2022
May 4-8, 2022	**2022 TADC Spring Meeting** Omni Grove Park Inn – Asheville, North Carolina Registration information available after March 1, 2022
July 13-17, 2022	**2022 TADC Summer Seminar** Big Sky Resort – Big Sky, Montana Registration information available after April 15, 2022
August 12-13, 2022	**2022 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico Registration information available after June 1, 2022
September 14-18, 2022	**2022 TADC Annual Meeting** La Cantera Resort & Spa – San Antonio, Texas Registration information available after July 1, 2022

President's Message

By: Christy Amuny, TADC President
Germer PLLC, Beaumont

At TADC's Annual Meeting in Memphis, I had the privilege and honor of taking over as President of this amazing organization. The baton (or gavel in this case) was passed to me by Slater Elza, who had an extraordinary year as President. The past year was difficult for a number of reasons, but he kept the ship steadily moving forward, continued our in-person meetings (while no one else in the state, or country, seemed to be doing so) and navigated expertly through a rocky legislative session (where we were once again told beforehand that the justice system had nothing to worry about because the legislature would be busy with COVID, making sure we don't lose electricity again, etc. – well not so much). He also made sure I was a part of everything that was going on and for that I am especially grateful as I assume the helm. So, Slater, thank you for your leadership, dedication and for steering me in the right direction (most of the time!).

There is a lot to look forward to this year. We have some great meetings planned – Snowmass, CO (Winter Seminar), Asheville, NC (Spring Meeting), Big Sky, Montana (Summer Seminar), Ruidoso, NM (West Texas Seminar) and San Antonio/La Cantera (Annual Meeting). As always, you can expect excellent programs and speakers at each of these meeting. TADC does not disappoint when it comes to quality CLE. And yes, the hospitality suite will be back (as long as the hotel does not get in our way).

We have lots on tap for our young lawyers as well. We just completed the 4th Annual Deposition Boot Camp and once again, the faculty was fantastic, and the registration was off the charts. Thanks to Elizabeth O'Connell Perez and Mark Stradley for doing such a great job. The TADC Trial Academy is in March 2022 at the Texas Tech University School of Law. Arlene Matthews and Greg Curry are leading that charge. We also plan to continue our Young Lawyer Lunch Webinars every other month.

We are getting back to our local events – so be on the lookout in your town. TADC will be hosting happy hours, member lunches and other events to get everyone mixing and mingling again. There will not be formal presentations or speakers, just an opportunity to get together, catch up with old friends and maybe make some new ones. It is also a great opportunity to invite someone who is not a member and show them one of the many reasons they should be a member. In addition to being at the forefront of protecting our civil justice system, fighting the good fight in the legislature and providing high quality CLE, let us not forget that one of the biggest benefits of TADC is the relationships we make along the way, both professionally and personally.

During the Annual Meeting in Memphis, TADC took on a service project to benefit the FedExFamily House, which is a home away from home for out-of-town families with children receiving treatment at Le Bonheur Children's Hospital. The project was a phenomenal success and the generosity of the TADC membership far exceeded expectations. The service project was headed up by Mary Kate Raffetto and John Stone, two of our remarkable and energetic Young Lawyers. Thank you both for a job well done and to the TADC membership for going above and beyond.

This was not a one-off deal. We intend to incorporate service projects into our Spring, Summer and Annual Meetings. We are all incredibly lucky to be doing what we do and I am a firm believer in giving back and there is no shortage of worthy causes. We will be tapping our Young Lawyer group to head these projects and if anyone has any ideas for a service project, please let us know.

TADC is the largest defense organization in the country and has so much to offer, both professionally and personally, so get involved. Come to a seminar, attend a local event, volunteer for a committee – come see first-hand what TADC is all about, and the benefits of membership.

Past President's Message

By: Slater C. Elza, TADC President
Underwood Law Firm, P.C., Amarillo

I would like to thank everyone for a great past year. We were able to have all of our major meetings in person and continue our Deposition Boot Camp virtually. We also started Young Lawyer CLE virtual lunches where our young lawyers can get free CLE from fantastic TADC members.

At our Annual Meeting in Memphis, Tennessee we had a fantastic awards dinner, rumored to be in the ballroom where Elvis had his Junior Prom. Special awards were given:

1. Mike Shipman and Trey Sandoval received Special Recognition Awards for their work with the Legislature in 2021 on behalf of TADC. It was a long and stressful year, and these two led a team of members in reviewing and addressing a multitude of bills that affect our clients, practices and the Civil Justice System.

2. Amy Stewart received a Special Recognition Award for all of her work in 2020-2021. She co-chaired the 2020 Deposition Boot Camp and the 2021 Annual Meeting. She constantly promoted TADC on social media and became a fabulous ambassador for our group.

3. Christy Amuny received the President's Award for years of hard work and dedication to TADC. On top of that, she has been my constant mentor and advisor as I continued to get in situations over my head. There is nothing she will not do for our organization, its members and our clients. A very deserving recipient – I was shocked she had never received this award and happy I got to give it to her.

4. Mike Bassett also received the President's Award for his dedication to our organization, our young lawyers and the legal profession. He co-chaired our 2020 Deposition Boot Camp and spoke at a young lawyer's virtual CLE lunch. He headed up our Transportation Committee and answered my phone calls every time I called. Mike is a true asset to TADC. Buy a copy of his new book and give it to a lawyer you care about.

5. Tom Ganucheau received the Founder's Award which is the highest honor in TADC. Tom is such a deserving recipient. I do not have room to list all of his accomplishments and contributions. But as I moved to the presidency I started to appreciate what an asset he has been for TADC. As President I believe he elevated our organization and was part of the beginning of a new TADC focused on professionalism and refining our goals, outreach and purposes. Since serving as President he has held significant positions on a regional and national level with DRI while ascending to President of the National Foundation for Judicial Excellence. This service on regional and national levels as a representative of and for TADC increases our clout across the country. We are so proud of our friend Tom and happy to honor him with this significant award.

On a final note, thank you all for allowing me to serve as President of TADC this past year. Nothing I ever do professionally will match the pride I have in leading this fantastic organization. I wish the best of luck to our dear friend Christy as she moves us forward.

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TADC Legislative Update

By: George S. Christian, TADC Legislative Consultant
The Christian Company, Austin

Legislature Completes Redistricting in Third Special Session

With time winding down in a third special session, the Legislature finally passed redrawn district maps for U.S. Congress, the Texas House and Senate, and the State Board of Education. Unsurprisingly, the new maps solidify and enhance GOP control across the board. Although the 2020 census data shows that people of color constituted about 95% of the state's population growth over the past decade, and people of color now constitute nearly 60% of Texans, white voters hold the majority in 23 of 38 congressional districts, 89 of 150 districts, and 20 of 31 Senate districts. While this breakdown alone does not determine the *partisan* makeup of these districts, judging from the 2020 presidential election Republicans can hope to win at least 25 congressional seats (up from the current 23), 85 House seats (up from 83), and 19 Senate districts (up from 18).

Who are the winners and losers? One of the biggest losers appears to be Sen. Beverly Powell (D-Fort Worth), whose Democratic-majority District 9 has been redrawn as a 55% GOP-majority District 10. Rep. Phil King (R-Weatherford) has announced his intention to run for this seat. Other than this one, all other Senate districts favor the incumbents. Sen. Dawn Buckingham's decision to run for Land Commissioner left open District 24, a sprawling Hill Country district stretching from the northwestern reaches of Austin to Abilene. The Senate redrew this district to permit Pleasanton resident and former Senator Pete Flores to run in a safe Republican seat. Flores has the endorsement of Lt. Gov. Dan Patrick and most of the state's GOP establishment. It is also worth noting that Senate District 27, currently represented by longtime incumbent Eddie Lucio, Jr. (D-Brownsville), has gone from a 57% Democratic-majority district to a 51% district.

On the House side, some strategic retirements helped smooth what had been expected to be an ugly session for rural Republicans. Rep. James White (R-Hillister) decided to run for Land Commissioner, thereby avoiding a pairing with another incumbent in Deep East Texas. As mentioned above, Rep. Phil King's jump to the Senate race avoided a potential pairing with Rep. David Spiller (R-Jacksboro). Rep. Celia Israel (D-Austin) is stepping down from her north Austin district to run for Mayor, allowing Rep. James Talarico (D-Round Rock) to jump from a redrawn Republican District 52 to Democratic District 50. In El Paso, the new maps reduce the number of seats from 5 to 4, leaving one-term incumbent Rep. Claudia Ordaz-Perez without a chair. She is considering running against incumbent Rep. Al Fierro in District 79, rather than facing incumbent Rep. Lina Ortega in redrawn District 77. Another odd-person out, Rep. Kyle Biedermann (R-Fredericksburg) will not seek re-election in District 73, which no longer includes Gillespie County. It appears that one-term incumbent Jacey Jetton (R-Richmond) and Rep. Phil Stephenson (R-Wharton) will face off in District 26, after Stephenson's District 85 was redrawn.

While I have you, several House incumbents have announced that they will not return next session. These include: Rep. Lyle Larson (R-San Antonio), Rep. Eddie Lucio III (D-Brownsville), Rep. Michelle Beckley (D-Carrollton), Rep. Dan Huberty (R-Houston), Rep. Matt Krause (R-Fort Worth, running for Attorney General), Rep. Ben Leman (R-Iola), Rep. Jim Murphy (R-Houston), Rep. Leo Pacheco (D-San Antonio, who has already resigned), Rep. Tan Parker (R-Flower Mound, who will run for the Senate seat being vacated by Sen. Jane Nelson), Rep. Scott Sanford (R-McKinney), and Rep. John Turner (D-Dallas). More may be added to this list as the December filing deadline approaches.

It wouldn't be redistricting, of course, without litigation. A lawsuit has already been filed in El Paso federal district court alleging that each of the new maps violates Section 2 of the Voting Rights Act. Section 2 authorizes judicial review of redistricting plans against claims that they deny or abridge voting rights on the basis of race, color, or membership in one of the language minority groups identified in the VRA. Although a Section 2 violation does not require a finding of discriminatory intent, the U.S. Supreme Court has established a high burden for plaintiffs. For vote dilution claim, plaintiffs must show that: (1) the affected minority group is sufficiently large to elect a representative of its choice; (2) the minority group is politically cohesive; and (3) white majority voters vote sufficiently as a bloc to usually defeat the minority group's preferred candidates. In historically less frequent vote deprivation claims under Section 2, the plaintiff must show specifically how a voting process or district disenfranchises a minority group. These claims have not widely prospered in the federal courts to date but are likely to become more numerous in the wake of SCOTUS's elimination of the VRA's Section 5 preclearance requirement in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and the spate of election security bills recently enacted in several states.

The complaint, filed by the Mexican American Legal Defense Fund (MALDEF) on behalf of the League of United Latin American Citizens, Southwest Voter Registration Education Project, American GI Forum, La Unión Pueblo Entero, Mexican American Bar Association, and the Texas Association of Latino Administrators and Superintendents, alleges that the maps dilute Latino voting strength in violation of the U.S. Constitution and Section 2 of the VRA. The plaintiffs seek a declaratory judgment that the maps intentionally discriminate against Latino voters and ask the court for a permanent injunction against any election held under them. They further request the court to draw new maps and to award costs and attorney's fees.

This case will most likely result in very few changes to the maps. Out of the post-2011 cluster of cases, for example, the courts ended up modifying only a small handful of congressional districts for the 2012 election, which subsequently held for the remainder of the decade. If 2011 is any guide, a possible scenario is that the El Paso case might result in a court-drawn map for one or more of the House, Senate, and congressional seats, which the state will immediately appeal to SCOTUS. If it does the same thing it did in early 2012, SCOTUS will vacate the district court map and remand with instructions to follow the legislative maps more closely. This could result, as it did in 2012, in a two-month delay in the primary and runoff elections. After that, the Legislature would likely codify those maps for 2024 and beyond. Of course, other parties may file additional challenges, so what will happen is anyone's guess. Still, if past is prologue, there is good reason to think that the Legislature's work will substantially prevail in the long run.

By: Vincent P. Vasquez, Goldman & Peterson PLLC, San Antonio

Discoverability of Insurance and Public Payor Reimbursement Rates to Challenge Unreduced Medical Expenses in Personal Injury Cases

Based on current Texas Supreme Court precedent, a medical provider's reimbursement rates, available pursuant to health insurance coverage or governmental programs like Medicare and Medicaid, is discoverable and relevant to determining the reasonableness of full and unreduced rates charged to uninsured patients, including those that are plaintiffs in personal injury cases.

The first development started with the Supreme Court's 2017 decision from *In re N. Cypress Med. Ctr. Operating Co.*, which involved a patient of North Cypress challenging a hospital lien for services she received in the emergency room following a motor vehicle accident.[1] Because the patient was uninsured, North Cypress billed her for services at its full "chargemaster" prices, which totaled $11,037.35.[2] She was able to negotiate a settlement with the other party to the motor vehicle accident and sought a reduction of North Cypress' bill, but the parties could not reach an agreement on the same, leading her to seek a declaratory judgment that the charges were unreasonable.[3]

In discovery, the patient propounded requests for production and interrogatories to North Cypress, which included the following:

- Please produce all contracts regarding negotiated or reduced rates for the hospital services provided to Plaintiff in which Defendant is a party, including those with Aetna, First Care, United Healthcare, Blue Cross Blue Shield, Medicare, and Medicaid.

- Please produce the annual cost report you are required to provide to a Medicare Administrative Contractor Medicare [sic], as a Medicare certified institutional provider for 2011, 2012, 2013, 2014, and 2015.

- Please state the Medicare reimbursement rate for x-rays, CT scans, lab tests and emergency room services, as you performed on the Plaintiff on June 9, 2015.

- Please state the Medicaid reimbursement rate for x-rays, CT scans, lab tests and emergency room services, as you performed on the Plaintiff on June 9, 2015.[4]

North Cypress then objected to these requests and moved for a protective order, arguing that the information sought was irrelevant and overly broad.[5] The trial court ordered the information to be produced but limited the contracts to those that covered the time period at issue in the case.[6] On a motion for reconsideration, North Cypress re-argued the original objections, but added arguments for the first time that it would suffer irreparable harm from the disclosure of its

[1] *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128 (Tex. 2018)
[2] *Id.* at 130.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

confidential and proprietary insurance contacts.[7] The motion for reconsideration was denied and North Cypress sought mandamus in response, which was denied by the intermediate court of appeals.[8] North Cypress then sought mandamus with the Supreme Court.[9]

At the outset, the Court identified that the hospital lien statute allows for a hospital to recover the full amount of its lien, subject only to the right to question the reasonableness of the charges comprising the lien.[10] In response, North Cypress argued that its negotiated reimbursement rates with health insurance carriers are not relevant to its charges of an uninsured patient and as such, are not discoverable.[11] Specifically, the medical provider contended that the patient at issue was not entitled to the benefits of negotiated rates with private insurance companies or through Medicare/Medicaid since she did not have such coverage at the time of the treatment.[12]

However, the Court concluded that North Cypress' argument was not relevant to the central issue in the case, which was not whether the patient was entitled to such benefits, but what the reasonable and regular rates for the subject treatment would be.[13] The Court recognized that because of the way full or chargemaster rates have evolved, the full or unreduced charges are not dispositive of what is reasonable since the vast majority of a medical provider's payments are from private insurers and public payers.[14] As such, the Court ruled that the trial court did not abuse its discretion in concluding that the amounts North Cypress is willing to accept as payment for services rendered from the vast majority of its patients is relevant to the reasonableness of its full or unreduced charges for the same services to uninsured patients.[15]

As for North Cypress' confidentiality arguments, there was nothing in the record that indicated that the trial court was unwilling to issue a protective order if North Cypress demonstrated its entitlement to one, nor did North Cypress establish why such relief would be insufficient to address its concerns on the disclosure of proprietary information.[16] Thus, the Court denied the request for mandamus relief on this ground.[17]

In 2021, the Supreme Court was then presented with the question of whether the holding of *North Cypress* should be extended to personal injury lawsuits and not limited to hospital lien cases.[18] *In Re K&L Auto Crushers, LLC and Thomas Gothard, Jr.*, involved a plaintiff that alleged he was injured in a motor vehicle collision with a tractor-trailer and was seeking to recover his medical expenses as a result.[19]

The plaintiff accumulated approximately $1.2 million for surgeries and related medical treatment, which he did not pay for or use private insurance/public benefits.[20] In response, defendants served discovery requests on plaintiff's healthcare providers seeking information related to their billing practices and rates over several years.[21] Three of the medical providers filed motions to quash in response and argued that they were overbroad, unduly burdensome and harassing, not reasonably calculated to lead to the discovery of admissible evidence, and sought information that was irrelevant, inadmissible, confidential, proprietary, and protected as trade secrets.[22] Initially, the trial court granted the providers' objections and quashed the subpoenas.

Defendants then moved for reconsideration with the trial court and narrowed its requests to the following:

(1) the amounts the providers charged insurance companies, federal insurance programs, and in-network healthcare providers for the services, materials,

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* (citing *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 309 (Tex. 1985).
[11] *Id.* at 131.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 136.
[16] *Id*. at 137.
[17] *Id*.
[18] *In re K & L Auto Crushers, LLC and Thomas Gothard, Jr.*, No. 19-1022, 2021 WL 2172535 (Tex. May 28, 2021)
[19] *Id*.
[20] *Id*.
[21] *Id*. at *2.
[22] *Id*. at *2.

devices and equipment billed to plaintiff as of the date of plaintiff's treatment;

(2) the amounts the providers paid for the devices and equipment billed to plaintiff; and

(3) the providers' chargemaster (full) rates for the devices and equipment billed to plaintiff and how the providers determined those rates.[23]

The defendants also re-iterated in the motion for reconsideration that they were willing to enter into any reasonable and necessary protective orders with the medical providers to address concerns about confidentiality of their contractual agreements with third-party payers and insurers.[24] Despite this, the providers continued to complain that the narrowed requests were as problematic as the original, but did not produce evidence to support their objections that the narrowed requests imposed an undue burden or implicated confidential information.[25] The trial court denied the motion for reconsideration without explanation and the court of appeals subsequently denied defendants' writ of mandamus before further relief was sought with the Supreme Court.[26]

The Court first started with examining whether the information sought by defendants was relevant. First, the Court pointed out that Section 41.0105 of the Texas Civil Practice & Remedies Code limits a claimant's recovery from a tortfeasor to the amount of medical expenses that the claimant actually paid or incurred or pursuant to any other limitation in law, which, in turn, limits the amount that the claimant's provider has a legal right to be paid.[27] One such "other limitation in law" is the common law requirement that the amount of recoverable medical expenses be reasonable.[28] Further, the Court identified that it is well settled in Texas that proof of the amount charged does not itself constitute evidence of reasonableness in cases involving the recovery of medical expenses.[29] Thus, the Court held that the reasonableness of a claimant's medical expenses is as germane in a personal injury suit as it is when challenging the validity of a hospital lien, which results in the relevance holding from *North Cypress* being equally applicable to a motor vehicle lawsuit.[30] Thus, the trial court was found to have abused its discretion by denying the motion for reconsideration to the extent that it was based on any relevancy objections by the medical providers.[31]

As for the medical providers' overbroad objections, the Court recognized that an overbroad request is essentially a discovery request that seeks irrelevant information.[32] Further, discovery requests and orders are overbroad if they are not properly tailored with regard to time, place, or subject matter.[33] The Court then concluded that defendants' subsequent narrowed discovery requests were nearly identical to those approved in *North Cypress*, and as such, were sufficiently tailored and narrowed to the time period, devices, and services at issue in the case.[34] Thus, the trial court was also found to have abused its discretion by denying the motion for reconsideration to the extent that it was based on any overbroad objections by the medical providers.[35]

The Court then inquired into the objections of undue burden and harassment, which is a distinct objection from unduly burdensome or harassing.[36] This analysis is based on whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[37] A party opposing discovery must make more than a conclusory allegation that the requested discovery is unduly burdensome and support proportionality complaints with evidence.[38] Here, the medical

[23] *Id.* at *3.
[24] *Id.*
[25] *Id*.
[26] *Id*.
[27] *Id*. at *5.
[28] *Id*.
[29] *Id*.
[30] *Id.* at *6.
[31] *Id*.
[32] *Id.* at *7.
[33] *Id*.
[34] *Id*. at *8.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at *9.

providers failed to do nothing more than make conclusory estimates of the time, effort, and expenses that they would incur in responding to the requests, which were too conclusory to establish that the narrowed requests were unduly burdensome.[39]

Further, the Court pointed out that non-parties can be required under the applicable rules to be compelled to produce relevant information.[40] Notably, the medical providers at issue here had entered into letters of protection with the plaintiff, which gave them a direct financial stake in the resolution of plaintiffs' claims and resulted in a forfeiture of a degree of protection of the rules available to disinterested third parties.[41]

Additionally, the Court held that the fact that the defendants may have been able to obtain some of the information, such as federal Medicare or Medicaid reimbursement rates, from other sources, does not allow for a blanket rejection of all the information sought from the medical providers.[42] As for proportionality, the damages at issue in *North Cypress* were only $8,278.31 and discovery of the subject medical provider's insurance and public payor reimbursement rates was proper.[43] While the defendants had not conceded liability for causing the subject accident, the reasonableness of the medical expenses sought by the plaintiff was central to their defense and depriving them of the information sought would put them at a significant disadvantage.[44] Collectively, because the requests were narrowed to the type and amount of discovery approved of in *North Cypress*, and there was no evidence quantifying the burden of responding to the narrowed requests, the trial court was found to have abused its discretion in denying the narrowed requests.[45]

As for the last objections that the information sought was privileged, confidential, proprietary, and constitutes trade secrets, the same argument was made in *North Cypress* and the trial court responded that it would consider a protective order if the parties could not come to an agreement on their own.[46] Because there was nothing in the record that suggested the trial court was unwilling to issue a protective order, the Court declined to quash the discovery on grounds that the information was privileged, confidential, or constituted trade secrets.[47] With the narrowed discovery requests sought by the defendants, the court held that the trial court should have taken the same approach and determined whether it would provide reasonable protection for the information sought.[48]

Practical Considerations

Despite the fairly strong holdings of the Supreme Court from *North Cypress* and *K&L*, medical providers are not willingly providing information on reimbursement rates and are frequently seeking relief from trial judges from the same through their own retained counsel and appearances in the underlying litigation. Further, some judges are granting these objections (often without providing specific reasons) even when they mirror those rejected in these two cases.

At the outset, the initial consideration in drafting discovery requests for reimbursement rates should be to ensure that the discovery sought from medical providers is limited specifically to the topics approved by the *North Cypress* and *K&L c*ourts and to the time frame at issue (i.e., the year(s) of the subject party's treatment). Deviating from these topics, as the defendants did in *K&L*, provides the opposing party with an obvious and straightforward argument that the requests are improper extensions from what the Supreme Court has allowed. Ideally, defendants should utilize hybrid discovery requests under *North Cypress* and *K&L* in seeking this information.

As for what amount of medical expenses justifies discovery on reimbursement rates, that must be decided on a case by case basis. To date, there is no bright line rule of what the medical expenses should be to allow a party to seek this discovery. Practically speaking, the higher the medical expenses, the more likely the Court is to allow

[39] *Id*.
[40] *Id*.
[41] *Id. at *9-10.*
[42] *Id*. at *10.
[43] *Id.*
[44] *Id*.
[45] *Id*.
[46] *Id*. at *11.
[47] *Id.*
[48] *Id*.

discovery of reimbursement rates as the amount at issue is relevant to what discovery is proportional. However, the medical expenses at issue in *K&L* varied greatly from those in *North Cypress*. The former involved approximately $1.2 million in medical expenses, while the expenses in the latter were $8,278.31 and the discovery of the subject medical provider's insurance and public payor reimbursement rates was determined to be proper. While plaintiffs will argue that discovery of reimbursement rates is improper unless the subject medical expenses are similar to the amounts in *K&L*, *North Cypress* provides an appropriate counter-argument. Ultimately, defense counsel should make it clear that this information is essential to defendants' ability to contest claimed medical expenses, whatever that amount may be.

It is also apparent that medical providers are seeking to distinguish cases from *K&L* if there is no letter of protection with the plaintiff on file. Of course, having a letter of protection is ideal as it will allow defense counsel to argue that the medical provider has taken a direct financial interest in the litigation and should not be able to hide behind the same objections that an uninvolved third party could. Because of this, subpoenaing the records directly from the medical provider at the outset of the case should be considered instead of solely relying on plaintiffs to produce all records from the provider on their own, especially when these documents could include a letter of protection that "mistakenly" gets left out. However, even without a letter of protection, K&L did not hold that there has to be one to engage in this discovery.

Further, medical providers are frequently utilizing affidavits that claim to establish that it is a burden to identify and produce these documents. However, this is a disingenuous argument because failing to identify the extent of the documentation prohibits the provider from accurately identifying how much time will be spent in complying with the requests, thus making the affidavit conclusory in nature. Defense counsel must review the affidavit in question carefully and highlight the general allegations that are not supported by specific evidence for the case at hand in response.

Finally, medical providers will also argue that the information sought by defendants should be protected from disclosure as it constitutes confidential information, proprietary information, and is considered trade secrets. At the outset of a hearing on the same, defense counsel should make it clear (ideally on the record) that it would be willing to enter into such an agreement to protect the information sought. This will then shift the burden to the medical provider to produce evidence that a confidentiality agreement would be insufficient to protect against improper dissemination of the subject information. Merely insisting that this information is confidential in nature should not be sufficient on its own to warrant a conclusion that a protective order is not proper to protect the provider. But, be careful as to the language of the protective order as some providers' counsel attempt to put limitations that the information can only be reviewed by attorneys, leaving out retained expert witnesses. Such an order renders obtaining the information useless if you cannot disclose it to the necessary witnesses.

Moving forward, it is clear that obtaining information on reimbursement rates is helpful in challenging unreasonable medical expenses and should be used judiciously for the totals and providers that truly warrant it. Overuse of the tools provided in *North Cypress* and *K&L* should be avoided to prevent judges from becoming stricter on what expenses justify it (and creating arguable precedent as a result) or motivating the legislature to get involved. Further, we are only through half the battle so far as neither case has held how, or even if, this information should be admissible at trial. To date, securing the right to obtain the information has actually been more helpful in negotiating settlements due to the ability of a plaintiff to convince the medical provider to accept a certain total to resolve a case in lieu of complying with an order from the court. This appears to be the biggest benefit so far since the admissibility issue remains unclear. Either way, determining how to rely on the authority from these cases should be contemplated from the initial receipt of medical expenses in personal injury cases, both in what discovery is to be performed in response and when.

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TADC PAC Report

By: R. Douglas Rees, Trustee Chairman
Cooper & Scully, P.C., Dallas

We have reached the end of a legislative year that included three special sessions. While the Legislature will presumably be taking a much-needed break in 2022, parties that are interested in pushing legislation that advances their interests are already planning for what they would like to accomplish when the 88th Legislature begins in 2023.

The TADC is actively involved in every legislative session. The TADC's work on legislative issues, however, is not limited to the legislative session. Like the efforts of the special interest groups seeking to enact legislation that will benefit them, the TADC's work in this area is also ongoing. The fight to preserve our civil justice system never stops. The TADC's political action committee, or PAC, is critical to these efforts.

One of the TADC's primary missions is to preserve and enhance the civil justice system. One of many ways the TADC does that is through the PAC. There are a host of special interest groups who are constantly attempting to reform, reshape, and erode the civil justice system to advance their own interests and agendas. Through the PAC, the TADC seeks to preserve the independence of the legal profession and foster justice and fairness in our judicial system. The TADC PAC is not a political organization in the sense that it does not take political sides on issues. In fact, it works hard to stay out of political fights and debates. Instead, its focus is on protecting the civil justice system, the right to trial by jury, and the independence of the legal profession. In furtherance of those efforts, the TADC donates strategically to legislators who have demonstrated an interest and passion in promoting those issues and to judicial candidates who have a strong track record of preserving and promoting the civil justice system.

The TADC has earned a well-deserved reputation as an independent organization without a political agenda. It is perhaps the only voice in current politics that advocates for the independence of the legal profession and fairness and justice in the judicial system and its voice is not insignificant. The TADC's independence often creates interesting alliances in our approach to issues or a particular piece of legislation. Sometimes that involves joining with the trial lawyers and other groups representing the legal profession, sometimes it involves working with industry groups, and sometimes it involves going it alone. The TADC has a well-deserved reputation for its independence and as a voice of reason. Legislators from both sides of the aisle look to the TADC for that voice of reason both during and between legislative sessions.

The PAC's activities are funded almost exclusively by your donations along with those who volunteer their time and services. The power of the TADC PAC is not found in its financial prowess. It is found in what it stands for as a result of the TADC's long history and passionate support for the legal profession and the civil justice system. Support from the TADC PAC carries weight not because of the amount of any contribution but because of its source.

If you have been to a TADC meeting, you have probably noticed the green stickers on name tags with the slogan "I BACK THE PAC." Those stickers are designed to recognize those who have made a contribution to the PAC and encourage others to do so. The TADC encourages each member to donate $300 or roughly one hour worth of billable time; more if you are able to do so. Your contribution allows our voice to be heard and supports the vital and important mission of promoting justice and fairness, the independence of the courts and the legal profession, and helps preserve the civil justice system.

Contributions can be made online through the TADC's website (www.tadc.org) or through the TADC office. A contribution of $300 or more entitles you to a special TADC PAC gift. Make your contribution today.

Texas Association of Defense Counsel-PAC

The Political Action Committee of the Texas Association of Defense Counsel ~ TADC-PAC

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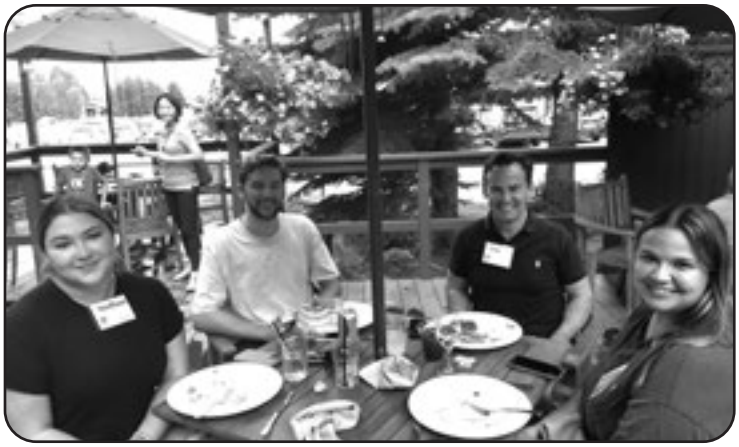

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By: Blain Donnell, The Lopez Law Group, Houston

House Bill 19 and its Effect on Commercial Motor Vehicle Cases

House Bill 19, passed during the most recent Texas legislative session, aims to decrease the likelihood of nuclear verdicts in commercial auto cases. HB 19's procedural and evidentiary changes take some of the uranium out of commercial auto cases by limiting the use of common reptile theory tactics.

HB 19 amends Chapter 72 of the Texas Civil Practice and Remedies Code. Chapter 72 now contains deadlines, evidentiary rules, and procedural provisions, with which all commercial auto litigants should be familiar. HB 19's most significant provision is one requiring a bifurcated trial upon a defendant's timely motion.

I. HB 19'S SCOPE

HB 19's changes to Chapter 72 of the Texas Civil Practice and Remedies Code apply to actions commenced on or after September 1, 2021. HB 19's most significant changes are codified as Chapter 72, Subchapter B of the Texas Civil Practice and Remedies Code. Subchapter B's definition of "civil action" limits the applicability of the subchapter. Subchapter B defines "civil action" as an action in which a claimant seeks recovery for bodily injury or death, and a defendant operated, owned, leased, or otherwise held or exercised legal control over a commercial motor vehicle or an operator of a CMV.[1] Thus, Subchapter B applies only to commercial auto cases.

II. COMMERCIAL AUTO DEFENDANTS CAN NOW MOVE FOR BIFURCATED TRIALS

On a defendant's motion, the court shall provide for a bifurcated trial.[2] **In most cases, a defendant's deadline for requesting a bifurcated trial is 120 days after it files an answer.**[3] However, if a claimant files an amended pleading adding a claim or cause of action against a defendant, that defendant has 30 days after the claimant files the amended pleading to file a motion for bifurcated trial.[4]

In the first phase of the bifurcated trial, the jury will determine liability for and the amount of compensatory damages.[5] In the second phase, the jury will determine liability for and the amount of exemplary damages.[6]

III. BIFURCATED TRIALS COME WITH BIFURCATED EVIDENCE

The effect of the bifurcated trial procedure is to focus evidence on the drivers during the first phase of trial. During the second phase of trial, more evidence about the employer defendant is admissible, as well as evidence of gross negligence.

Section 72.053 of the Texas Civil Practice and Remedies Code limits the admissibility, during the first phase of trial, of evidence that a defendant failed to comply with a regulation or standard. A defendant's violation of a regulation or standard is admissible only if the rule is specific, applicable to the defendant, relevant to proximate causation, and otherwise admissible by law and the rules of evidence.[7] Thus, for example, evidence that an employer violated 49 C.F.R. 393.3 by using "additional equipment or accessories in a manner that decreases the safety of operation of a commercial motor vehicle" should not be admissible because the regulation is not specific.

[1] Tex. Civ. Prac. & Rem. Code Ann. § 72.051(2).
[2] Tex. Civ. Prac. & Rem. Code Ann. § 72.052(a).
[3] Tex. Civ. Prac. & Rem. Code Ann. § 72.052(b)(1).
[4] Tex. Civ. Prac. & Rem. Code Ann. § 72.052(b)(2).
[5] Tex. Civ. Prac. & Rem. Code Ann. § 72.052(c).
[6] Tex. Civ. Prac. & Rem. Code Ann. § 72.052(d).
[7] Tex. Civ. Prac. & Rem. Code Ann. § 72.053(b).

An employer defendant can further limit the evidence offered against it by stipulating that its driver was acting in the course and scope of employment when the accident happened. If the employer timely makes this stipulation, its liability for damages caused by its employee's negligence is generally limited to *respondeat superior* liability.[8] **The employer defendant must make this stipulation within the time period for making a motion for a bifurcated trial.[9]** If an employer defendant makes this stipulation, then a claimant cannot present evidence of ordinary negligence against the employer during the first phase of trial if the ordinary negligence claim requires a finding that the driver was negligent. Negligent entrustment is an example of an ordinary negligence claim against an employer that requires a finding that the driver was negligent.[10] On the other hand, an employer's stipulation does not affect a claimant's presentation of other claims, such as claims that the employer negligently maintained its vehicle.[11]

However, even if an employer defendant stipulates its driver was in the course and scope of employment, the claimant can still present certain evidence of negligent entrustment if the employer defendant is regulated by the Motor Carrier Safety Improvement Act of 1999 or Chapter 644 of the Transportation Code.[12] When an employer defendant is regulated by one of these two laws, Section 72.054(c) allows for a laundry list of evidence to come in during the first phase of trial. For example, Section 72.054(c) allows a party to offer evidence of whether an employee driver was licensed, subject to an out-of-service order, and several other potential violations of various laws and regulations. Likewise, Section 72.054(c) includes a few potential violations by the employer defendant that a party can offer into evidence, such as whether the employer allowed the driver to operate its vehicles on the day of the accident in violation of alcohol use regulations.

IV. PHOTOGRAPHS AND VIDEOS OF VEHICLES ARE NOW PRESUMED ADMISSIBLE

Section 72.055 of the Texas Civil Practice and Remedies Code provides that authenticated photos and videos of vehicles or objects involved in an accident are presumed admissible. Photos and videos are admissible even if they tend to support or refute an assertion regarding the severity of damages or injuries in the case. Further, courts cannot require expert testimony for admission of such photos or videos unless necessary to authenticate the photos or videos.[13] This provision will be helpful to defendants in low-impact cases where claimants often argue crash photos are prejudicial and should not be admitted without expert testimony.

V. PRACTICAL CONSIDERATIONS

Strategically, defense attorneys should make a case-by-case decision on whether to bifurcate. Bifurcation should not be something commercial auto defendants do just because they can. The first phase of trial's focus on the drivers will be advantageous in cases where liability is contested. The focus on the drivers in the first phase will keep claimants from using their negligent hiring claim against the employer to backdoor prejudicial evidence to inflame the jury. If liability is obvious, however, then bifurcating trial will merely delay the blows that come when the employer defendant's liability is presented to the jury.

Bifurcating liability for and the amount of compensatory and exemplary damages is not necessarily beneficial either. A professor once told me about a federal case he tried with a bifurcated trial. The professor was happy with the jury verdict at the end of the first phase. The professor didn't expect the jury to award exemplary damages in the second phase, but they did. When the professor questioned the jury about their exemplary damage verdict, one juror explained, "well, we figured we didn't award enough the first time; otherwise, the judge wouldn't have sent us back to award more."

[8] Tex. Civ. Prac. & Rem. Code Ann. § 72.054.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Tex. Civ. Prac. & Rem. Code Ann. § 72.055(a).

Amicus Curiae Committee Update

There have been several significant amicus submissions.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In Re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021). This is a major case about contesting medical billing affidavits under Texas Civil Practice and Remedies Code §18.001. First, the Court found that a registered nurse with experience in medical billing and auditing was a competent expert to challenge the bill; the Court rejected the argument that hospital or medical bills could be challenged only by a health-care professional in the same field. Second, a counteraffidavit need give only reasonable notice of the basis to contest the bills, which is analogous to the 'fair notice' standard for pleadings. Third, §18.001 does not require trial courts assess or determine if the opinions are reliable under *Daubert/ Robinson* or Tex. R. Evid. 702. Fourth, §18.001 has no exclusionary rule. An uncontroverted bill comes into evidence, but the failure to serve a compliant counteraffidavit has no impact on the opposing party's ability to challenge reasonableness or necessity at trial. Finally, appeal was not an adequate remedy because the trial court forbid the defendant from contesting or arguing against the medical bills, thereby crippling its defense on that issue.

Henry Paoli (Scott Hulse, P.C., El Paso) submitted an amicus to support the petition for mandamus in *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2018). This is an important case that decided *In re North Cypress* extends to personal injury cases and permits discovery of third-party agreements on negotiated rates. The Court holds that a medical provider's negotiated rates with third parties is relevant on the reasonableness of the amounts charged to plaintiff, even if the plaintiff has agreed to pay an unreasonable amount. The request was not overbroad because it was limited to negotiated rates for same or similar services to those rendered the plaintiff. Any undue burden to produce the materials was mitigated by letters of protection that gave the providers a financial stake in the outcome of the lawsuit. Given the alleged medical expenses were $1.2 million, the requested discovery could be proportional to the issue. The trial court should have considered granting a protective order to protect confidentiality of the agreements. It was error to deny all discovery; the trial court retained discretion to issue a protective order and impose limits if the discovery is not proportionate. Nonetheless, it could not deprive K&L of all discovery on the narrowed categories of information.

Richard Phillips (Holland & Knight LLP, Dallas) and Roger Hughes (Adams & Graham, L.L.P., Harlingen) filed an amicus brief to support Emerson Electric's motion for rehearing in *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197 (Tex. 2021). This is an important decision concerning preserving error for reversal under *Casteel* when the charge submits an erroneous liability question. In a products liability case, the Supreme Court held that any error in submitting an erroneous jury question on defective warnings was waived because defendant failed to object to the question apportioning responsibility between the parties. However, the motion for rehearing was denied.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Guevara*, 624 S.W.3d 920 (Tex. 2021). Mandamus relief was granted on the basis of *In re Allstate Indemnity*, but without prejudice to challenge the billing affidavits on proper grounds.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petitions for mandamus in *In re Hub Trucking Group*, 625 S.W.3d 315 (Tex. 2021); in *In re Savoy*, No. 20-0843, 2021 WL 2603814, 2021 Tex. LEXIS 631 (Tex. June 25, 2021); and in *In re Parks*, No. 20-0345, 2021 WL 2603690, 2021 Tex. LEXIS 638 (Tex. June 25, 2021). All were denied without prejudice to allow the trial court to reconsider in light of *In re Allstate Indemnity*.

Mitch Smith (Germer PLLC, Beaumont) filed an amicus to support the petition for review in *Kenyon Ins. v. Elephant Ins. Co., LLC*, No. 04-18-0131-CV, 2020 WL 1540392, 2020 Tex. App. LEXIS 2686 (Tex. App.—San Antonio Apr. 1, 2020, pet. granted) (*en banc*). This is a permissive interlocutory appeal on the

issue of duty from a summary judgment (traditional and no evidence) on whether Elephant had a legal duty. The core issue is whether an insurer owes a legal duty to an insured to prevent bodily injury to its insured when it asks the insured to photograph property damage to the insured vehicle to support a claim. While the insured husband was taking a photo of the insured vehicle for the claim, a driver ran off a wet road and hit him. After a divided panel affirmed summary judgment for Elephant, the San Antonio Court *en banc* reversed, and the original panel majority became the dissent. The Supreme Court has granted review.

Mike Eady (Thompson, Coe, Cousins & Irons, L.L.P., Austin) filed an amicus to support the petition for review in *Virlar v. Puente*, 613 S.W.3d 652 (Tex. App.—San Antonio 2020, pet. filed) (*en banc*). This is a med mal appeal for causing a debilitating condition – Wernicke's encephalopathy. The two critical issues are (1) allocating a $3.3 million settlement credit between the patient and her child under TCPRC chap. 33, and (2) awarding most of the $13 million in future medical expenses in a lump sum instead of periodic payments under TCRPC chap. 74, subch. K. After oral argument to a panel, the San Antonio Court *sua sponte* went *en banc* without waiting for a panel opinion; two justices on the original panel dissented and the third wrote the opinion for the en banc majority. The majority concluded the Tex. Civ. Prac. & Rem. Code chap. 33 definition of 'claimant' for the purpose of settlement credits was unconstitutional. The Supreme Court requested merits briefing.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Flores*, No. 20-0602, to overturn the denial of mandamus relief denied by *In re Flores,* No. 05-19-1058-CV, 2020 Tex. App. LEXIS 4162 (Tex. App.—Dallas June 2, 2020, org. proc.) (Whitehill, J., dissenting). The trial court struck defendant's two counteraffidavits, the two medical experts, and an accident reconstruction expert. The majority held Flores had an adequate remedy by appeal; the dissent argued that striking the experts went to heart of defendant's case and the ruling vitiated any defense on liability or damages. The Supreme Court requested merits briefing.

Brent Cooper (Cooper & Scully, P.C., Dallas) has been authorized to file an amicus to support the petition for review on *Columbia Valley Healthcare System v. Andrade*, No. 13-18-0362-CV, 2020 Tex. App. LEXIS 5974 (Tex. App.--Corpus Christi July 30, 2020, pet. filed). This is a birth injury case in which the jury awarded $9M future med expenses through age 18 and $1.2 future med expenses after age 18. The judge ordered $7.3M be paid now in a lump sum and five periodic payments of $604K each. The core issues are (1) failure to submit jury questions on the minor's life expectancy and annual yearly future medical expenses, and (2) the limits of judicial discretion to award most of the medical expenses as a lump sum. The Supreme Court requested merits briefing.

TADC has authorized Brandy Manning (Alston & Bird LLP, Fort Worth) to file an amicus to support the mandamus petition in *In re Willis*, No. 21-0472. The core issue is Defendants' objection to a virtual jury trial instead of an in-person jury trial. This is a substantial personal injury trial. After the Houston Court of Appeals overturned the trial judge's decision to strike Defendants' jury demand, the trial court set it for a virtual jury trial over defense objection. Defendants claimed they could try an in-person jury trial on the trial date, they had a constitutional right to an in-person jury trial, and the 38th COVID order did not permit virtual jury trials over objection. The Supreme Court initially granted an emergency stay of the trial date pending briefing. However, the mandamus has been abated because the case was transferred to a different trial judge.

TADC Amicus Curiae Committee

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Alston & Bird LLP, Fort Worth

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Holland & Knight LLP; Dallas

2021 ANNUAL MEETING

The Peabody Hotel – September 22-26, 2021 – Memphis, Tennessee

The TADC Annual Meeting was held in Memphis, Tennessee, September 22-26, 2021 at the Historic Peabody Hotel. Program Chairs Tom Ganucheau with Beck|Redden, LLP, Houston and Amy Stewart with The Stewart Law Group PLLC, Dallas assembled a program with over 10 hours of CLE including 2.75 hours ethics. Topics ranged from *"The 84th Legislative Session: How the Law Changed"* a panel discussion, to the ever-popular *"Supreme Court Update"* provided by Justice Brett Busby.

Michael Ancell, Trevor Ewing, Darin Brooks & Joshua Smeltzer

Doug Rees, Betsy Christian & Gina Rees

David Kirby & Christy Amuny

Mike & Jeni Shipman

Mitch & Michele Smith, Heather & Trea Southerland with Chantel Crews & Shanna Elza

2021 ANNUAL MEETING

Michael Golemi with Marissa & Dan Hernandez

Robert Booth & Sara Martin

Jeff Pruett, Gayla Corley, Jane Beard & Amy Stewart

Karen Gann & Jay Old

Welcome TADC to the STAX Museum!

2021 ANNUAL MEETING

President Slater Elza receives the DRI Exceptional Performance Award from DRI President Elect Douglas Burrell

Rosemary Wright, Christy Amuny & Max Wright

Gay Chalfant, Shanna Elza & Amy Stewart

Betsy Christian, Justice Brett Busby & George Christian

Robert Booth, Sara Martin with Kelsey & Alex Yarbrough & family

2021 ANNUAL MEETING

Awards Dinner!

Lars Daniel with Cathy & Mark Stradley

Mike Shipman receives the 2022
Special Recognition Award for Legislative Service

Christy Amuny receives the 2021 Presidents Award

Past President Tom Ganucheau receives the
2021 TADC Founders Award

President Slater Elza passes the gavel to
2022 TADC President Christy Amuny

FMCSR's: The Trucking Defense Lawyers' Keys to Success

By: Mike Bassett, The Bassett Firm, Dallas

I. INTRODUCTION

Defending trucking cases is not always easy and requires lawyers to know a lot about the trucking industry. It also requires lawyers to have the ability to anticipate the different aspects of the trucking industry that Plaintiff's lawyers will likely try to attack. A large part of anticipating these attacks and finding the best way to defend against them is to have a good working knowledge of the Federal Motor Carrier Safety Administration ("FMCSA") and Federal Motor Carrier Safety Regulations ("FMCSR").

The FMCSA is a department within the Department of Transportation ("DOT"). The Motor Carrier Act of 1935 authorized a federal government agency to regulate interstate truck and passenger companies and brokers. Public Act 255, 74th Congress. 1st Sess. The FMCSA was established on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999. It was created with the goal of reducing the number of crashes, injuries, and fatalities that could be caused by large trucks and buses. http://fmcsa.dot.gov/mission.

With this goal in mind, the FMCSA created the FMCSRs, a set of regulations governing trucking companies and drivers operating in interstate commerce. FMCSRs contain information regarding the registration as a motor carrier, freight forwarder, or broker, financial responsibility, driver qualification, safety, and more. *Id.*

This paper will provide an outline and review of the key sections of the FMCSRs that lawyers need to know when defending a trucking case. The first section will focus on the general regulations that cover the entities involved, to whom the regulations apply, and how key records should be kept. The next section will cover the general duties, responsibilities, and liabilities that arise within the trucking industry. The third section will focus on the key sections of the FMCSRs that should be addressed on the day of the crash and what lawyers should be thinking about the moment they get the case. The fourth section will cover issues involving the equipment necessary to operate a commercial motor vehicle ("CMV"), securing cargo before a drive, the pre- and post-trip inspections, repairs, and maintenance of the vehicle. The fifth section will cover the qualifications necessary to become a CMV driver, including the qualification process and the disqualifications that may arise. And the final section will address the issues of drugs and alcohol and the different tests that need to be administered.

II. THE GENERAL REGULATIONS

In trucking cases, there are a few general regulations that all defense lawyers need to know. First, it is necessary to know to whom the FMCSRs apply. Lawyers need to know who they need to be concerned with and who could potentially be liable if/when there is an accident. Next, it is essential to understand what legally qualifies as a CMV. Understanding the language of the trucking industry is crucial to effectively defending motor carriers in litigation. Not every truck out there is a CMV and understanding the difference between a CMV and other trucks is essential.

Next, it is necessary to know what entities are involved. There is little to no chance of mounting a successful defense without understanding the players. Lastly it is important to understand how records are supposed to be kept, where to keep them, and how long they should be kept.

It is important to note that §392.2 tells us that:

Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Safety Administration must be complied with.

49 C.F.R. § 392.2. Therefore, if there exists both a jurisdictional law, ordinance, or regulation and a FMCSA regulation where the commercial motor vehicle is being operated, the higher standard under the federal regulation controls. Further, §390.3 provides that the FMCSRs serve only to provide a minimum and thus a motor carrier may impose and enforce more stringent health and safety requirements than the FMCSRs. 49 C.F.R. § 390.3.

A. Application of the Regulations and the Entities Involved

The FMCSRs apply to "all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce." *Id.* This means that the regulations apply to drivers, brokers, freight forwarders, mechanics, technicians, and CMVs that transport property or passengers in interstate commerce. If the person operates and/or deals with CMVs involved in interstate commerce in some way, it is more likely than not that they fall under this list.

§390.5 of the FMCSRs defines CMVs as "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property" that:

- Weighs more than 10,001 pounds (4,536 kg); or
- Is designed or used to transport 9 or more people, including the driver, for direct compensation; or
- Is designed or used to transport 16 or more passengers, including the driver, not for direct compensation; or
- Transports hazardous material in a quantity requiring placarding.

49 C.F.R. § 390.5.

§390.5 of the FMCSRs also provides definitions of the entities involved. There are seven main players to keep in mind.

Starting at the very beginning of the trucking process there is the "shipper." The shipper is the person whose goods, property, or hazardous materials are given to a commercial carrier or driver to be moved. 49 C.F.R. § 390.5.

The second player is the "freight forwarder." The freight forwarder is the person or company that holds itself out to the public as a provider of transportation of property for compensation. During their normal course of business, the freight forwarder assembles and consolidates shipments and assumes responsibility for the transportation of goods from the pickup location to the delivery location. 49 C.F.R. § 390.5.

The third player is the "broker." The broker is the person who arranges for the transportation of property by a motor carrier or driver for compensation – "the middleman" between the driver and the shipper. The broker is different than the motor carrier and the freight forwarder because the broker does not transport the property themselves (unless they are both a broker and a driver) and does not assume responsibility for the property being transported. 49 C.F.R. § 390.5.

The fourth player to keep in mind is the "logistics provider." The logistics provider, like a supply chain, provides management and services over the flow of cargo between the point of origin to the end destination. 49 C.F.R. § 390.5.

The fifth player is the "motor carrier." The motor carrier is the entity that transports passengers or property for compensation. This is a very broad term and includes the "motor carrier's agents, officers, and representatives as well as employees responsible for hiring, supervising, training, assigning, etc." 49 C.F.R. § 390.5.

The sixth player is the "consignee." The consignee is the person (usually the buyer) who receives the goods that are being transported.

And the last player that should be kept in mind is the "consignor." The consignor is the person or firm (usually the seller) who delivers a consignment to a motor carrier to be transported to the consignee named.

B. **Record Keeping**

Maintaining records is a very important part of the trucking business – so important that the FMCSRs devote all of Part 379, Appendix A to Part 379, and some of §391.51 to the preservation of records. These rules regarding record keeping are applicable to motor/water carriers, brokers, freight forwarders, and any other entities that help maintain records on behalf of the various companies. Preserving records is especially important if a plaintiff seeks sanctions for spoliation of evidence due to the company's failure to keep records according to the FMCSRs.

Pursuant to Part 379, generally all records, personnel or driving related, must be kept in their original format as well as in a manner that prevents alteration, destruction, or unauthorized access to the records. The records may be kept using any technology that would enable the information to remain accurately accessible later. 49 C.F.R. § 379.7. If for some reason the records are altered, destroyed, or accessed by an unauthorized person, the entity must notify the Secretary. 49 C.F.R. § 379.5.

Also, the companies may retain these records for the minimum retention period according to the specific record. Thereafter, the company may make the decision whether they are going to destroy the records or continue to retain them. 49 C.F.R.§ 379.3. The records may also be destroyed if the company goes out of business and is completely liquidated. But this is only after the dissolution is complete and all transactions and claims are closed. 49 C.F.R. § 379.9.

Also, pursuant to §390.29 and §391.51(a), "a driver's qualification file may be combined with his/her personnel file" and kept in the motor carrier's principal place of business for the duration of the driver's employment plus an extra 3 years following. The driver's qualification file must include all the following: application, driving record received from each State in which he or she was employed by a Department of Transportation regulation employer, road test certificate, yearly inquiry and notes of review of driving records, list of motor vehicle violations, and the certificate from the medical examination. 49 C.F.R. §391.51. All records must also be available for inspection by the FMCSA within 48 hours of request. *Id.*

When records are not properly retained or kept, a person with personal knowledge of why the records were not retained or kept must execute a statement, which will be placed in the file, explaining the reasons. *Id.* Despite this written statement, lawyers defending these cases may still have to worry about a potential spoliation claim after an accident.

Therefore, it is important to help clients preserve all their records. This could be challenging in some cases, but there are a couple good tips to keep in mind. Lawyers should always inform their client(s) about the record keeping requirements under the FMCSRs both orally and in writing. It is always better to guarantee that clients hear these requirements as a review rather than dealing with the problems that could arise later if there is an accident.

Also, it is possible that the regulations could have changed, so ensuring that the client knows the current regulations regarding record keeping is always a good thing to do. Also, lawyers should spend the time to get familiar with the method the client uses to maintain records and where the records are located so that later, if the records are needed for some reason, the client and/or the lawyer will have no problem getting to those records quickly.

It is also important that lawyers help the client identify all relevant documents that should be preserved. Some key documents to identify and preserve following an accident include:

(1) Safety performance history of the driver;
(2) Annual driver MVR or related documents;
(3) Medical examiner's certificate(s);
(4) Negative or cancelled alcohol/controlled substance tests;
(5) Positive alcohol/controlled substance test;
(6) Documents showing refusal to submit to controlled substance/alcohol test;
(7) Maintenance records for tractor and trailer;
(8) Annual inspection report of tractor and/or trailer;
(9) Entry-level training for driver;
(10) Certificate of all training throughout the employment of the driver; and
(11) Signed receipt of policy/educational materials.

Further, the lawyer should consider whether the client's computers should be forensically examined and copied to ensure the safe keeping of data. Even seemingly secure computers can be accessed, so it is important to ensure that documents are kept in a way that will prevent just anyone from obtaining or corrupting them. And lastly, it may also be a good idea to decide whether the records, in the event a future lawsuit occurs, should be maintained by the client or the attorney.

III. DUTIES, RESPONSIBILITIES, AND LIABILITY

In trucking cases, it is important to know who owes which duties and who is responsible for what. Thus, it is important to understand the different duties and responsibilities of the motor carrier, the freight forwarder, and the broker. Sure, sometimes their duties and responsibilities overlap, but oftentimes you will find that they are just different enough that it may be easy to mix them up. So, who owes which duties?

First, the motor carriers. Motor carriers -- the people responsible for transporting property and passengers -- have the heavy responsibility of ensuring that their company and all its employees are adhering to FMCSRs . Thus, the motor carrier is responsible for the freight and the driver. 49 C.F.R. §365. But keep in mind, these regulations are continually changing, and it is the motor carrier's duty to comply with all the regulations even as they change. And with this responsibility comes the financial responsibility.

Pursuant to §387.7, motor carriers are required to obtain minimum financial responsibility levels. The minimum levels of liability insurance as of the last couple years have been from $750,000 to $5 million depending on the type of carriage and commodity being transported. 49. C.F.R. §387.9. The full breakdown of financial responsibilities of motor carriers can be found in §387 of the FMCSRs, but this is the general range that they could land in as of January 1, 2021.

As recently as June 4, 2021, members of the U.S. House Committee on Transportation and Infrastructure introduced a bill that would increase the minimum insurance liability for motor carriers from $750,000 to $2 million. https://www.govtrack.us/congress/bills/117/hr3684/text. Although H.B. 3684 was provisionally dead due to a failed vote for cloture on July 21, 2021, since then a motion to proceed to consideration of the measure was agreed to in the Senate and multiple amendments have been proposed, considered, and agreed to in the Senate. H.R.3684 - 117th Congress (2021-2022): INVEST in America Act | Congress.gov | Library of Congress (http://www.congress.gov/bill/117th-congress/house-bill/3684).

The next key party with important duties and responsibilities is the freight forwarder. Freight forwarders are the ones that arrange for the transportation of goods from the motor carriers. They are responsible for the assembly and consolidation of shipment and issuance of bills of lading to the shippers. https://www.fmcsa.dot.gov/registration/op-1-ff-application-freight-forwarder-authority.

The freight forwarders are also responsible for the freight. Therefore, they are the ones that are responsible if any of the goods are lost or damaged during the delivery. Thus, the FMCSA requires that freight forwarders purchase a $75,000 surety bond to receive their license. *Id.* Like the motor carrier, the freight forwarder also has responsibilities for the driver's conduct, but this only applies if the freight forwarder operates the vehicle. 49. C.F.R. §365.

And lastly there are the duties and responsibilities of the broker. §371 of the FMCSRs regulates the general requirements for brokers as well as the duties of the brokers. Generally, the brokers, unlike the motor carrier and the freight forwarder, do not have responsibilities for the freight or for the driver conduct. https://www.fmcsa.dot.gov/registration/types-operating-authority. But the FMCSA still requires the broker, like the freight forwarder, to purchase a $75,000 surety bond. 49. C.F.R. §365.

It may appear that the broker is able to escape a lot of the liability that could arise from trucking accidents, but don't be fooled. Plaintiffs will sometimes find ways to argue different theories of liability such as negligent hiring, negligent retention, or negligent entrustment with hopes that they will reach the broker. Justin J. Kaszuba, Emerging Trends in Freight Broker Liability in Catastrophic Trucking Accidents, DuPage County Bar Association.

Up to this point in time, brokers have generally been able to avoid liability but there could be big changes if the Supreme Court decides to take on the case of *C.H. Robinson Worldwide Inc. v. Allen Miller*. In the case of *C.H. Robinson Worldwide Inc.*, the Supreme Court of the United States has been asked to answer the question of whether brokers should be liable for an accident caused by a motor carrier it hires. 976 F.3d 1016, 1021 (9th Cir. 2020) pet. writ cert. Petition for a Writ of Certiorari was filed with the Supreme Court on April 8, 2021.

If the Supreme Court chooses to hear this matter, it could potentially impact a lot of companies involved in the trucking industry. It is not unusual for Plaintiff's attorneys to bring negligence claims against brokers, but historically the argument that the federal law preempts causes of actions brought against the broker has been successful. Steve Brawner, Supreme Court Asked, Should Brokers Be Liable, Arkansas Trucking Report (2021).

IV. ON THE DAY OF THE CRASH

Lawyers should keep in mind that trucking cases are *not* the same as simple car wreck cases. And with this difference comes vastly different responsibilities for defense lawyers. Typically, after a catastrophic accident occurs involving a trucking company, the trucking companies and their insurers will call in "rapid response teams" and at the head of the team is the defense lawyer. So, knowing what to do on the day of the accident and when arriving at the accident site is crucial. Time is of the essence.

One of the very first things that an attorney should do when they are hired is to call the client's representative. It is necessary to ensure that an attorney-client relationship has been formed and developed. It is also important at this point to establish the designated point of contact with the client. Attorneys need to ensure that they know where the best place is to send all information throughout the course of the investigation and the case.

Next, lawyers need to let their client(s) know that neither the client nor any of the client's employees should talk to anyone, but instead should refer people to their lawyer or their lawyer's law firm. It is critical to stress the importance of cooperating with all the investigating agencies.

Next, it is necessary to make sure that all post-accident testing is completed, all necessary information is obtained or in the process of being obtained, and a locked and secure location is found to hold all equipment (tractor, trailer, etc.).

The day of the accident is when information and document gathering begins. Some key information to try to obtain is (1) a list of all persons with knowledge of the relevant facts, (2) a narrative of how the accident happened, (3) the client's opinions regarding how the accident happened, (4) who was responsible, (5) how it could have been prevented, (6) any outside forces, and (7) the status of the driver.

It is also important at this point to start thinking about gathering other information that could help throughout the course of litigation. This could include details of any accident the client has had that is even remotely like the current one (including accidents involving the same driver or others), the identity of the attorney(s) who are even suspected of getting involved, the identity of any other insurance, and all underlying documents. Some of this information is going to take some time to track down and thus the earlier the lawyer starts trying to get ahold of it the better off both the client and the lawyer will be.

It is always better to err on the side of obtaining too much information. That means that anything that pertains to the client, the company, the driver, or the vehicle that can be obtained should be obtained. It is much better to know everything that could be used during the case than to find out about it later down the line. In addition to considering all the information that should be obtained, there are also regulations that should be kept in mind on the day of the accident -- regulations regarding drug and alcohol testing and regulations regarding cellphones.

A. Drug and Alcohol Testing

Pursuant to §382.303(a) and (b), any required post-collision alcohol or controlled substance testing must occur "as soon as practicable" following an accident for each surviving commercial motor vehicle driver involved. Therefore, a driver must remain available for testing after the accident during the required time or he or she will be deemed to have refused to submit to the required testing. 49 C.F.R. § 383.303(a)-(b).

In some instances, following an accident, an alcohol test must be administered. An alcohol test will be administered to each of the drivers if: (1) the accident involved a fatality or (2) the CMV driver receives a citation within 8 hours of the accident **and** the accident involved bodily injury to any person who received immediate medical treatment ***or*** at least one of the vehicles was towed from the scene. If an alcohol test is not done within 2 hours of the accident the employer must execute and file a statement explaining why the testing did not occur. *Id.* Further, if the alcohol test is not done within 8 hours of the accident, the employer must execute another statement explaining why it didn't occur as well as stop any efforts of obtaining the alcohol test. These records, upon request, must be submitted to the FMCSA. 49 C.F.R. § 382.303 (a) - (d)(1).

A controlled substance test must be done after some accidents as well. A controlled substance test must be done if: (1) the accident involved a fatality or (2) the CMV driver receives a citation within 32 hours of the accident **and** the accident involved bodily injury to any person that required immediate medical treatment ***or*** at least one vehicle had to be towed away from the scene. 49 C.F.R. §382.303 (b) - (d)(2). If the test is not conducted within 32 hours of the accident, then the employer must stop any efforts to administer the test and must prepare and file a statement explaining why the test was not given within the allotted time. *Id.* Upon request, the employer must submit the records to the FMCSA. *Id.*

The FMCSRs include a handy table summarizing the circumstances under which alcohol and controlled substance testing must be performed: 49 C.F.R. §382.303(c).

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	YES NO	YES YES
ii. Bodily injury with immediate medical treatment away from the scene	YES NO	YES NO
iii. Disabling damage to any motor vehicle requiring tow away	YES NO	YES NO

Additionally, it is important to always refer to the motor carrier's alcohol/drug testing policies and procedures. Lawyers on both sides of the case may find that motor carriers sometimes have higher standards than the FMCSRs. And if this is the case, then the motor carrier's alcohol/drug testing procedures will control and must be followed.

B. **Hand-Held Mobile Telephone Use**

Pursuant to §392.82 of the FMCSRs, a driver should never be using a **hand-held** cellphone while driving a CMV even if the laws, ordinances, or regulations of the jurisdiction in which the CMV is being operated say differently. This includes:

(1) Using one or more hands to hold the hand-held cellphone while making a voice communication;

(2) Dialing or answering a hand-held cellphone by pressing 2 or more buttons; or

(3) Reaching for a cellphone in a way that would require the driver to move in such a way that he or she would no longer be seated. 49 C.F.R. §390.5.

Drivers also must not text while driving a CMV while the vehicle's motor is running – even if this means the vehicle is temporarily stationary for any reason. The only exception to using a hand-held cellphone to call or text is if it is necessary to communicate or contact any emergency services or law enforcement officials. 49 C.F.R. §392.80(d); 49 C.F.R. §390.82(c).

But the FMCSRs do not make any mention of hands-free devices. Therefore, these restrictions do not apply to hands-free devices and there are no restrictions on the use of hands-free cellphones at this point.

V. BAD EQUIPMENT

Plaintiff's lawyers will often focus on the condition of the tractor and trailer and the role maintenance played in causing a crash. In our experience, such an approach can be highly effective – especially if the lawyer defending the case isn't well versed in the FMCSRs in this area. It is important before, during, and after a trip to ensure that all CMV's are equipped with all the correct equipment to ensure the safety of the driver, the cargo, and everyone else on the road. This means that motor carriers need to ensure that all equipment is in order and all inspections have been done before, during, and after each trip.

A. Equipment Necessary for Operation

The first step is to ensure that the vehicle is equipped with all the necessary equipment. §392.7 states that to operate a CMV, the driver must be satisfied that the necessary parts and accessories are in good working order and must ensure that they are used when it is necessary. The necessary equipped is fully discussed and explained in §393 but §392.7 summarizes the list as including the following:

> (1) "Service brakes, including trailer brake connections;
> (2) Parking (hand) brake;
> (3) Steering mechanism;
> (4) Lighting devices and reflectors;
> (5) Tires;
> (6) Horn;
> (7) Windshield wiper or wipers;
> (8) Rear-vision mirror or mirrors;
> (9) Coupling devices; and
> (10) Wheels and rims."

49 C.F.R. §392.7(a).

B. Inspection and Securing of Cargo

Not only does the driver have to ensure that the equipment is in proper working order and everything that needs to be on the vehicle is on the vehicle, but the driver also must ensure that the cargo is ready and correctly secured. §392.9 states that the cargo must be "properly distributed and adequately secured per §§393.100 through 393.136, the CMV's tailgate, tailboard, doors, tarpaulins, spare tire and other equipment are secured; and the cargo does not obscure the driver's view." 49 C.F.R. §392.9(a). Generally, all cargo must be "firmly immobilized or secured on or within a vehicle by structures of adequate strength, dunnage or dunnage bags, shoring bars, tiedowns or a combination of these things." 49 C.F.R. §393.106(b).

C. Pre and Post Trip Inspections, Repairs, and Maintenance

All motor carriers must also be concerned about - and keep up with - all inspections, repairs, and maintenance of the CMVs. 49 C.F.R. §396.3(a). The motor carrier must ensure that there are annual inspections, daily inspections, and systematic maintenance programs in place to ensure that the vehicles continually comply with all equipment regulations under the FMCSRs. 49 C.F.R. §396.3. A record should also be kept for all inspections, repairs, and maintenance done on all vehicles under the motor carrier's control. 49 C.F.R. §396.3(b).

Further, CMVs should never be operated in conditions that are unsafe and likely to cause an accident and/or cause the vehicle to breakdown. 49 C.F.R. §396.7(a). The one exception is if the vehicle becomes unsafe while being operated and it is safer to move the vehicle from the current road than to leave it on the highway. 49 C.F.R. §396.7(b). This is where the importance of pre-trip inspections come in.

Before beginning any trip, a driver must conduct a pre-trip inspection. This includes inspecting the vehicle to make sure that they are satisfied with safety of the CMV's operating condition, reviewing the last driver's vehicle inspection report, and if the last driver noted defects or deficiencies, ensuring the necessary repairs are done and signing the report to acknowledge that the required repairs have been performed. 49 C.F.R. §396.13. The CMV should not be driven until the required repairs have been done and signed off on. *Id.* Once all pre-trip inspections have been done, the driver can begin his or her trip.

After the driver has completed the trip, the driver must complete a post-trip inspection of the vehicle and a signed report must be submitted in writing by each driver after each day of their trip. 49 C.F.R. §396.11. The report must discuss all the required equipment in addition to the emergency equipment that is required to be on the CMV for each trip. 49 C.F.R. §396.11(a).

The report must also make note of all defects and deficiencies that were discovered during or after their trip to ensure the CMV has the proper maintenance done. *Id.* If the vehicle for some reason is found to have a mechanical or loading problem that would affect the vehicle's safe operation and likely cause an accident or breakdown, the vehicle may be marked as out of service. 49 C.F.R. §396.9(c). Once the vehicle is marked out of service, the vehicle must not be driven until all necessary repairs have been successfully completed. *Id.*

VI. UNQUALIFIED DRIVER

Plaintiff's lawyers will often argue that CMV drivers should be held to a higher standard of care than the other drivers on the roads because they drive potentially more dangerous vehicles, and they are regulated more strictly by the FMCSRs. But most states reject this argument and find that regardless of the vehicle that they drive, their training, their years of experience, etc., CMV drivers should be held to a standard of ordinary care. See, *e.g., Jackson v. Reardon,* 392 So. 2d 956 (Fla. 5th DCA 1980), *Cervelli* v. *Graves,* 661 P.2d 1032 (Wyo. 1983), *Fredericks v. Castora,* 360 A.2d 696 (Pa. 1976), and *Thomas v. Settle,* 439 S.E.2d 360 (Va. 1994). The only state that appears to hold CMV drivers to a higher standard of care is Louisiana. *Theriot v. Bergeron,* 939 So. 2d 379 (La. App. 1 Cir. 2006). To identify and counter the "higher standard of care" arguments, it is crucial that the defense attorney be familiar with the regulations and qualifications of the drivers.

A. Minimum Standards

The FMCSRs have established - and lay out - several minimum standards for drivers of CMVs in §380 and §383. *Yellow Freight System, Inc.* v. *Amestoy,* 736 F. Supp. 44 (D. Vt. 1990). §380 of the FMCSRs lays out the minimum training requirements for drivers of longer-combination vehicles ("LCVs"). Generally, all drivers of LCVs must go through training to drive LCV doubles and/or LCV triples and also must meet all of the requirements of LCV drivers for the specific LCV they are wanting to drive. 49 C.F.R. §380.201(a); 49 C.F.R. §380.107(b).

The prospective drivers must successfully complete the LCV-specific training program which teaches the necessary knowledge and skills for driving either LCV doubles or triples. The training must include an orientation, training on basic operations, training on safe operating practices, training on advanced operations, and training on non-driving activities. 49 C.F.R. §380.201(a). The training must include classroom training sessions and behind the wheel training sessions. 49 C.F.R. §380.201(b). The prospective drivers must pass all the knowledge and skills tests throughout his or her training with a score of 80% or higher to successfully complete the training program. But if the prospective driver does not obey traffic laws or gets into a preventable accident during any of the tests, then the prospective driver will automatically fail the program. *Id.*

§383 of the FMCSRs lays out the minimum commercial driver's license standards. This section is there to ensure requirements are put in place to reduce and/or prevent accidents, deaths, and injuries that could occur. Pursuant to §383.21 and §383.23, a driver must have successfully passed the required tests for a Commercial License Permit or Commercial Driver's License in order to operate a CMV and cannot have more than one driver's license.

Any person that operates a CMV, who receives a conviction for driver violations in any motor vehicle, must notify his or her employer and the driver's State of domicile within 30 days of the conviction. 49 C.F.R. §383.31. The driver must also notify his or her employer of any suspension, revocation, or cancellation of his or her CDL license by the close of business of the day following his or her suspension, revocation, or cancellation. 49 C.F.R. §383.33.

§383 also lays out the 20 general areas that all CMV drivers must learn and be tested on during his or her CDL knowledge and skills tests mentioned in §380. These general areas include: (1) safe operating regulations; (2) safe vehicle control system; (3) CMV safety control systems; (4) basic control; (5) shifting; (6) backing; (7) visual search; (8) communication;

(9) speed management; (10) space management; (11) night operation; (12) extreme driving conditions; (13) hazard perceptions; (14) emergency maneuvers; (15) skid control and recovery; (16) relationship of cargo to vehicle control; (17) vehicle inspections; (18) hazardous materials; (19) mountain driving; and (20) fatigue and awareness. 49 C.F.R. §383.111.

This section also lays out the specific skills that drivers must have as well as the requirements to obtain the various other endorsements needed to drive additional vehicles and materials. But keep in mind that these are only the minimum standards; the employer can require more stringent standards if he or she sees fit. 49 C.F.R. §390.3(d).

B. **The Qualification Process**

The FMCSRs also lay out a list of minimum qualifications for CMV drivers. First, to be qualified as a CMV driver, the person must be at least 21 years old, read and speak English sufficiently, be able to safely operate the type of CMV he or she drives, physically qualify, provide the employer with the violations or certificate required by §391.27, not be disqualified from driving, and successfully completed a driver's road test. 49 C.F.R. §391.11. But the process of qualifying is much more than these 8 general qualifications.

First, the driver must complete and submit an application that contains all the background and character information required under §391.21 to his or her employer, signed by the driver.

Next, it is the motor carrier's obligation to contact all past DOT-regulated employers for the prospective driver from the past 3 years, obtain all driving records in the states that the prospective driver has lived and/or worked the past 3 years, and make a written record of everyone that he or she contacted. 49 C.F.R. §391.23. The motor carrier also must obtain all records relating to the prospective driver's drug/alcohol testing from all previous DOT employers. 49 C.F.R. §382.413; 49 C.F.R. §391.23.

Next, the prospective driver must participate in a drug and alcohol test as described in §382.103 and as discussed later in this paper. The prospective driver must also participate in a road test. 49 C.F.R. §391.31. The driver must be tested on the vehicle that he or she is intending to drive, on his or her skills at performing the required operations, and for a duration to provide an accurate evaluation of his or her skills. *Id*. The driver must also have a medical examination done. 49 C.F.R. §391.43.

Prospective drivers also have a couple items that must be completed each year of employment. The first is an annual inquiry and review of driving records. 49 C.F.R. §391.25. Motor carriers, at least once a year, must receive and review each driver's driving record for the last 12 months to determine whether they are qualified to continue driving. *Id*.

And lastly, the driver must provide the motor carrier "a list of all violations of motor vehicle traffic laws and ordinances (other than violations involving only parking) of which the driver has been convicted of or forfeited bond or collateral on." 49 C.F.R. §391.27. In addition, according to §391.51(a), the motor carrier must keep a "driver qualification file for each driver that it employs."

C. **Disqualifications**

There are also several factors that could disqualify a driver from driving a CMV. And if a driver has a CDL or CLP and is disqualified, then they are not allowed to drive a CMV, and an employer cannot allow a disqualified driver to drive for any reason. 49 C.F.R. §383.51. Generally, a driver is disqualified if (1) the driver loses his or her driving privileges by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege or (2) the driver is convicted of a criminal and/or other disqualifying offense while on-duty and is employed by a motor carrier. §391.15(a)-(c).

A disqualifying offense consists of "driving under the influence of alcohol," driving under the influence of a prohibited drug, using, possessing, or transporting a prohibited drug, leaving the scene of an accident, or being convicted of a felony while using a CMV. 49 C.F.R. §391.15(c)(2). §383.51 separates the disqualifications into 4 main sections: major offenses, serious traffic violations, railroad-highway grade crossing offenses, and violating out-of-service.

Depending on the type of vehicle and the number of previous offenses, the driver will receive

disqualifications for differing periods of time. 49 C.F.R. §383.51. Major offenses include offenses such as driving a CMV with a revoked, cancelled, or suspended CLP or CDL, refusing to take an alcohol test, and negligently causing a fatality. Major offense penalties can range from 1 year to life. 49 C.F.R. §383.51(b).

One step down are the serious traffic violations. The serious traffic violations consist of the following: driving 15 mph (24.1 kmph) above the speed limit; reckless driving; improper/erratic lane changes; following a vehicle too closely; a traffic violation in connection with a fatal accident; driving without a CLP or CDL; driving without a CLP or CDL in your possession; driving a vehicle/material without the proper CPL, CDL, or endorsement; texting while driving; and using a hand-held phone while driving. 49 C.F.R. §383.51(c). The penalty for a serious traffic violation can range from 60 days to 120 days. 49 C.F.R. §383.51(c).

The next step down are the railroad-highway grade crossing violations. Railroad-highway grade crossing violations consist of the following: failure to slow down and check that tracks are clear; failure to stop before reaching a crossing that is not clear; failure to stop before driving onto the crossing when required; failure to have sufficient space to drive through a crossing; failure to obey an enforcement official or traffic control device; and "failure to negotiate a crossing because of insufficient undercarriage clearance." 49 C.F.R. §383.51(d). The penalty for a railroad-highway grade crossing violation can range from no less than 60 days to no less than 1 year depending on the violation and the number of previous violations. 49 C.F.R. §383.51(d).

Lastly, there are the out-of-service violations. The penalty for out-of-service violations can range from 180 days to 5 years. 49 C.F.R. §383.51(e).

D. **Hours of Service**

Hours of service is a subject any competent Plaintiff's attorney is going to try and exploit. And it makes sense. In our experience, if a jury believes that an accident was caused by a CMV driver being fatigued, they are likely to award significantly higher damages.

And their main focus will likely be on the 15-minute logbook, fuel and toll receipts, trip reports, speed, total miles, etc. Sarber and VanIngen, The FMCSA—It Is No Longer Just a Tool to Regulate Trucking Companies!, Trucking Law Seminar (2008). But the good news for the defense is that this is sometimes a difficult argument to prove. Hours of service violations do not necessarily create fatigue in drivers. But it is still important to have a firm grasp and understanding on the hours-of-service regulations in §395.

§395.3 states that no person should operate a property carrying CMV without meeting the maximum driving requirements under this section. The requirements the driver must meet are as follows:

> **(1)** He or she must take a "10-consecutive hour off duty" break before any trip;
> **(2)** He or she can "only drive during a period of 14 consecutive hours after coming on duty from 10 consecutive hours off duty" and he or she "may not drive after the end of the 14-consecutive hours without first taking 10-consecutive hours off duty;"
> **(3)** He or she "may drive a total of 11 hours during the 14-hour period" but the driver must take a break if more than 8 hours have passed since the driver's last sleeper-berth period of at least 30 minutes or off-duty period; and
> **(4)** He or she cannot be allowed or required to drive after having been on duty for (1) 60 hours in 7 consecutive days if the motor carrier employer doesn't operate CMVs every day, or (2) 70 hours in 8 consecutive days if the motor carrier does operate CMVs every day. And the driver is allowed to have at least a 34-hour period of off-duty time after any 7 or 8 consecutive day drive.
> 49 C.F.R. §395.3.

§395.5 provides the maximum driving time requirements for any drivers driving passenger-carrying vehicles. Drivers of passenger-carrying vehicles are not permitted to operate a CMV for more than 10 consecutive hours or for more than 15 on-duty hours after an 8 hour off-duty period. *Id.* Drivers of passenger carrying vehicles also are not permitted to drive after being on duty for 60 hours in 7 consecutive days if the motor carrier does not operate CMVs every day or for 70 hours in 8 consecutive days if the motor carries does operate CMVs every day. 49 C.F.R. §395.5.

But there are some exceptions to the hours-of-service requirements. One of the exceptions arises if there are adverse driving conditions. §395.1(b)(1) states that if a driver encounters adverse conditions while driving and is unable to complete the run safely within the maximum driver period, he or she is allowed to drive a maximum of 2 extra hours to complete the run or find a safe place to stop. Another exception arises when there is an emergency. §391.5(b)(2) states that if a driver encounters an emergency condition while driving, the driver is allowed to complete the run if it could reasonably be completed absent the emergency.

E. Out of Service Orders

If a driver were to violate the hours-of-service regulations or the driving log requirements. the driver could be declared out of service. 49 C.F.R. §395.13. A driver is required to record his or her duty status daily and must ensure that it is current for the previous 7 days. If a driver violates one of the regulations and is thus placed out of service, the driver may not operate a CMV until the driver has been off duty for 10 consecutive hours. 49 C.F.R. §395.13(d)(1).

Within 24 hours of receiving an out of service form, the driver must deliver or mail a copy to the person or place that the motor carrier has designated to receive it. 49 C.F.R. §395.13(d). After the motor carrier has been notified that a driver has received an out of service form, the motor carrier must fill out the "Motor Carrier Certification of Action Taken" portion of the form and then deliver it to the Division Administrator or State Director Federal Motor Carrier Safety Administration. 49 C.F.R. §395.13(c).

VII. DRUGS AND ALCOHOL

All regulations regarding drugs and alcohol apply to all employees, employers, and CMV operators. 49 C.F.R. §382.103(a). These regulations are important to ensure the safety of all CMV operators and the public. They are also important in preventing any accidents/injuries that could possibly arise because of a use and or misuse of drugs and alcohol while performing "safety sensitive functions."

§382 defines safety sensitive functions as "all time from the time the driver begins work or is required to be ready to work until the time he/she is relived from work." The safety sensitive functions can include waiting to be dispatched, inspecting the CMV, driving, loading/unloading the vehicle, time spent in the CMV other than for purposes of sleeping in the sleeper berth, etc. 49 C.F.R. §382.107.

A. General Regulations

Under §392.4, a driver is not allowed to "possess, be under the influence of, or use" any Schedule I substance, amphetamine, narcotic, or other drug that would prevent the driver from safely operating a vehicle while on duty. §392.5 also states that a driver is also not allowed to use, have physical possession and control of, or be under the influence of, alcohol while on duty. The driver must wait at least 4 hours after consuming alcohol to drive, operate, or be in physical control of his or her CMV.

Further, drivers are not allowed to remain on duty or even report for duty if they have an alcohol concentration of 0.04 or more. 49 C.F.R.§ 382.201. Also, employers who know that a driver has an alcohol concentration of more than 0.04 must not allow a driver to operate and/or perform any CMV functions for any reason. *Id*.

Similarly, drivers are not allowed to continue their shift or even report to duty if the driver has used any prohibited substance. The one exception is if the driver was given instructions by a doctor and has confirmed that the substance will not negatively affect the driver's ability to drive. *Id.* Further, an employer must not knowingly allow a driver to drive a CMV after having used a prohibited substance. 49 C.F.R. §382.213.

Employers are also allowed to require all drivers to provide the employer with information regarding any therapeutic substances that the drivers are using. Additionally, if the driver has completed a substance test and tests positive - or alters a test sample in any way - the driver is not allowed to continue performing his/her duties or report to duty until further instruction is given to them. *Id.*

Drivers and employers are not only regulated while the CMV is being operated, but there are also regulations governing alcohol and controlled substance consumption prior to reporting for duty and following an accident. Prior to reporting for duty, drivers are not allowed to consume alcohol within 4

hours of performing any safety-sensitive functions. 49 C.F.R.§ 382.207. Employers also have a similar duty.

No employer with actual knowledge of a driver having consumed alcohol within 4 hours of duty should allow that driver to operate a CMV. *Id*. Similarly, following an accident, a driver that is required to take a post-accident alcohol test must not consume any alcohol for at least 8 hours after the accident occurred, or until he or she completes the post-accident alcohol test. 49 C.F.R.§ 382.209.

B. Testing Regulations

There are several drug and alcohol tests required prior to and during employment. All employers must ensure that all required drug and alcohol testing is conducted in accordance with §40 of the FMCSRs. §40 provides the parties with instructions regarding who can conduct drug/alcohol testing, what procedures to use to conduct these tests, how to conduct them, and the responsibilities that different parties have. Generally, all employers must meet all the requirements and procedures under §40 and all employers are responsible for all actions of their employees in carrying out the DOT requirements regarding drug and alcohol testing. 49 C.F.R. §40.11. It is also important to ensure that only authorized persons according to §40 are conducting the required and or necessary tests.

1. Pre-Employment Testing

Prior to employment there are several tasks that need to be completed regarding drug and alcohol testing. First, the employer must request and/or obtain all drug and alcohol information regarding the employee from any of his or her employers in accordance with §40.25. Second, the new employee must undergo pre-employment drug testing before he or she is allowed to operate a CMV, unless the new employee meets one of the exceptions. 49 C.F.R.§ 382.301. The exceptions are as following:

> (a) The driver has been drug tested through a drug testing program within the previous 30-days; *and*
>
> (b) Was tested within the last 6 months or was randomly tested within the last 12 months while participating in the program; *and*
>
> (c) There is no knowledge of violating the drug use rules within the last 6 months from the former employer. 49 C.F.R.§ 382.301(b).

The employer also may - but is not required to - have new employees participate in a pre-employment alcohol test. If the employer chooses to perform a pre-employment alcohol test on new employees, it must be done after making an offer of employment and prior to the driver conducting any safety-sensitive functions The employer also must treat all employees the same.

Therefore, if the employer chooses to perform a pre-employment alcohol test on one employee, then the employer must perform such testing on all incoming employees. Lastly, if the employer chooses to perform pre-employment alcohol tests, the employer must not allow the employee to begin work unless the result of the test is less than 0.04. 49 C.F.R.§ 382.301(d).

2. Post-Accident Testing

Another required test related to drugs and alcohol, as mentioned earlier in this paper, centers around post-accident testing. Following an accident, an alcohol test will be administered to each of the drivers involved if: (1) the accident involved a fatality or (2) the CMV driver receives a citation within 8 hours of the accident ***and*** the accident involved bodily injury to any person who received immediate medical treatment **or** at least one of the vehicles was towed from the scene. 49 C.F.R.§ 382.303(a).

Also, a drug test must be done after certain accidents. It must be done (1) if the accident involved a fatality or (2) the CMV driver receives a citation within 32 hours of the accident if the accident involved bodily injury to any person that required immediate medical treatment **or** at least one vehicle had to be towed away from the scene. 49 C.F.R.§ 382.303(b). It is also important to note that an employer may allow a driver to continue to drive pending the results of a drug test if there are no restrictions imposed by § 382.307.

3. Random Testing

While under employment, every driver will be subjected to random drug and alcohol testing. All employers must follow all the requirements

of random drug testing under §382.305. Pursuant to §382.305, all drivers must submit to all random drug and alcohol testing during the course of their employment. 49 C.F.R.§ 382.305(a).

As of February 2019, the "minimum annual percentage rate for random alcohol testing shall be 10 percent of the average driver positions." 49 C.F.R.§ 382.305(b)(1). Further, as of January 1, 2020, the minimum annual percentage for random drug testing has increased from 25 percent the previous year to 50 percent of the average number of driver positions. *http://disa.com/news/dot-drug-testing-requirements-for-2020.*

When making the selection for random drug and alcohol testing, this must all be done by a "scientifically valid method such as a random number table or a computer-based random number generator" which uses some number that corresponds to the different drivers. 49 C.F.R.§ 382.305(i)(1). Each driver must have an equal chance of being selected for the random drug and alcohol testing each time there is a selection and each driver that is selected must be tested during the allotted time. 49 C.F.R.§ 382.305(i)(2)-(3).

Even if an employee has previously been selected for testing, the employee will still have the same chance of being selected for all other random drug and alcohol testing that may be done. The random drug and alcohol testing must not be announced, and the selections are reasonably spread throughout the year. 49 C.F.R.§ 382.305(k). The driver has the potential to be tested at any point and if selected must report for testing as soon as possible. 49 C.F.R.§ 382.305(l)-(m).

4. **Suspicion Testing**

There are also occasions during employment in which the employer may be suspicious of drug or alcohol use. If an employer has *reasonable suspicion* to believe that a driver has violated the rules against drugs and alcohol, the employer must require the driver to submit to a drug and alcohol test. 49 C.F.R.§ 382.307(a)-(b). The employer has reasonable suspicion if he or she has "specific, contemporaneous, articulable observations concerning appearance, behavior, speech, or body odor of the driver." 49 C.F.R.§ 382.307(a)-(b).

Another key to requiring a reasonable suspicion drug and/or alcohol test is who the observer is. The observation must be "made by a supervisor or company official who is trained in accordance with 382.603." 49 C.F.R.§ 382.307(c). Also, the supervisor or company official that made the observations cannot also be the person that conducts the drug and/or alcohol test. 49 C.F.R.§ 382.307(c). The observation required for an alcohol test must also be made "during, just preceding, or just after the period of the workday that the driver is required to be in compliance with this part." 49 C.F.R.§ 382.307(d).

When the required observations have been made, the supervisor or company official who made the observation must produce a written record. The record must be made before the results of the test(s) have been released and must include a statement describing the observations that led to the reasonable suspicion drug and/or alcohol test. 49 C.F.R.§ 382.307(f).

After making the required observations for an alcohol test, the employee should take the test within 2 hours. If he or she has not taken the alcohol test within the 2-hour time period, the employer must make a statement in the employee's file regarding why the test was not taken within this window. Further, if the test still has not been done within 8 hours, the employer should stop any efforts of administering the test and then must note in the employees record why the test was not given. 49 C.F.R.§ 382.307(e)(1).

A driver is not allowed to perform safety-sensitive functions until either (1) his or her alcohol concentration is below 0.02, or (2) 24 hours have passed since there was a determination of reasonable suspicion. 49 C.F.R.§ 382.307(e)(2).

5. **Return-to-Duty and Follow-up Testing**

An employer may allow an employee/driver to later return to his or her safety sensitive functions after a drug and/or alcohol violation. If the employer decides that he or she wants the driver to come back to work, the driver must take a return-to-duty test. But to be allowed to take the return-to-duty test, a substance abuse professional ("a person who evaluates employees who have violated a DOT drug and alcohol regulations and makes recommendations concerning education, treatment,

follow-up testing, and aftercare") must find that the driver has successfully finished any treatment and/or education that was assigned to him or her following the violation. 49 C.F.R.§ 40.305(a).

The return-to-duty test must result in an alcohol concentration below 0.02 before a driver may return to duty. 49 C.F.R.§ 40.305(a). But the ultimate decision as to whether the driver returns to work is up to the employer, subject to other agreement or requirements. 49 C.F.R.§ 40.305(b).

If a driver wishes to return to performing safety-sensitive functions, following a drug and/or alcohol violation and successfully completing all recommended treatment and/or education, the driver must be given a written follow-up testing plan. 49 C.F.R.§ 40.307(a). The driver will be subject to at least 6 unannounced drug and/or alcohol tests within the first 12 months of the driver returning to work. 49 C.F.R.§ 40.307(d). The dates of the follow-up tests will be determined by the employer(s) and must not exceed the number required by the substance abuse professional. 49 C.F.R.§ 40.307(d)(3)-(4). Additionally, a cancelled follow-up test cannot be counted as one of the required follow-up tests. 49 C.F.R.§ 40.309(d).

6. **Refusal to Submit to Testing**

Pursuant to §383.72, a person who holds a commercial driver's license - or who drives a commercial motor vehicle - is assumed to have consented to drug and/or alcohol tests as required under any of the FMCSRs. But a problem arises if the driver decides that he or she does not want to take the designated drug and/or alcohol test that is required of them and therefore refuses. A refusal is defined in §382.107 as follows:

> (a) Does not appear for a test in a reasonable time;
>
> (b) Altering and/or substituting a test specimen;
>
> (c) Does not remain at the testing site for the entire time the test is completed;
>
> (d) Does not provide, or does not provide enough of a urine sample upon request;
>
> (e) Does not allow observation or monitoring when required;
>
> (f) Does not take the second test requested of them;
>
> (g) Does not take a medical evaluation; or
>
> (h) Does not cooperate in some way.

If a driver refuses any test, it will result in the same consequences as if they had taken it and failed and the test must be reported to the Clearinghouse. *https://csa.fmcsa.dot.gov/safetyplanner/MyFiles/SubSections.aspx?ch=23&sec=70&sub=187*. Also, if an employee/driver refuses any required drug and/or test, an employer cannot allow the employee to perform any and safety-sensitive functions. 49 C.F.R.§ 382.211.

VIII. CONCLUSION

The goal of the FMCSRs is to provide standards to ensure safety and reduce crashes, injuries, and fatalities that involve CMVs. Defending a lawsuit arising out of a CMV accident can be full of challenges and requires an understanding about how the trucking industry works and the regulations included in the FMCSRs. Lawyers defending such cases need to be able to anticipate the strategies and tactics that the Plaintiff's bar may use against their client. Staying focused on the key regulations and understanding what should be done from the day you get hired will allow you to build a great foundation on which to aggressively defend your clients.

And you build this foundation by first knowing the general regulations that cover the entities involved, to whom the regulations apply, and how all the records should be kept. Second, know the general duties, responsibilities, and liabilities that arise within the trucking industry. Third, pay particular attention to the key sections of the FMCSRs that need to be addressed on the day of the crash. Fourth, be well versed in the regulations dealing with the equipment necessary to operate a commercial motor vehicle ("CMV"), securing cargo before a drive, the pre- and post-trip inspections, repairs, and maintenance of the vehicle. Fifth, know like the back of your hand the qualifications necessary to become a CMV driver. Finally, have a solid working knowledge of the issues surrounding drugs and alcohol and the different tests that need to be administered.

Good luck!

TADC 2022 WINTER SEMINAR

January 26-30, 2022 — The Westin Snowmass Resort — Snowmass Village, CO

Program Co-Chairs: Robert Sonnier, Germer Beaman & Brown PLLC, Austin
Jim Hunter, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville
CLE Approved for: 9.00 hours including 1.25 hours ethics

Wednesday, January 26, 2022

6pm – 8pm TADC Welcome Reception

Thursday, January 27, 2022

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Christy Amuny, TADC President
Germer PLLC, Beaumont
Robert Sonnier, Germer Beaman & Brown PLLC., Austin, Program Co-Chair
Jim Hunter, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville, Program Co-Chair

7:30 - 8:15am *SUPREME COURT UPDATE (.25 ethics)*
Richard B. Phillips, Holland & Knight LLP, Dallas

8:15 – 8:45am *ROLLING, ROLLING, ROLLING DOWN THE CHAPTER 72 HIGHWAY*
Belinda Arambula, Burns, Anderson, Jury & Brenner, L.L.P., Austin

8:45-9:15am *UPDATE ON PAID AND INCURRED LAW*
Eddie Sikes, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville

9:15- 9:45am *COVID 19 BUSINESS INTERRUPTIOIN LITIGATION*
Victor Vicinaiz, Roerig, Oliveira & Fisher, L.L.P, McAllen

9:45 - 10:30am *WHO DO I REPRESENT? AND WHO CAN I TALK TO? (.75 ethics)*
Christy Amuny, Germer PLLC, Beaumont

Friday, January 28, 2022

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Christy Amuny, TADC President
Robert Sonnier, Program Co-Chair
Jim Hunter, Program Co-Chair

7:30 – 8:15am *INSURANCE LAW UPDATE FOR THE LITIGATOR*
Sarah Nicolas, Ramon Worthington Nicolas & Cantu, P.L.L.C., Edinburg

8:15–9:15am *TRIALS AND COVID: WHAT IS THE NEW REALITY – PANEL DISCUSSION*
Gayla Corley, Shelton & Valadez, P.C., San Antonio
Russell Smith, Fairchild, Price, Haley & Smith, L.L.P, Nacogdoches
Jim Hunter, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville

9:15-10:00am *LEGISLATIVE UPDATE: THE IMPACT OF THE 84TH LEGISLATIVE SESSION (.25 ethics)*
Mike Shipman, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

10:00-10:30am *THE EXPERT AND THE LITIGATOR*
Darold Bittick, SEA Limited, Houston

Saturday, January 29, 2022

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Christy Amuny, TADC President
Robert Sonnier, Program Co-Chair
Jim Hunter, Program Co-Chair

7:30 – 8:00am *PAY AND CHASE ALLOCATION: CONSIDERATIONS FOR SETTLING IN PREPARATION OF CHASING*
Lara Albright, Cooper & Scully, P.C., Dallas

8:00-8:45am *ARE YOU A BOSS, FRIEND, PARENT OR COLLEAGUE? EFFECTIVE MENTORING IN THE CHALLENGING AND CONSTANTLY CHANGING LEGAL WORLD*
Mitch Smith, Germer PLLC, Beaumont

8:45 – 9:15am *EMERGING EXCEPTIONS TO THE EXCLUSIVE REMEDY DEFENSE – SKIING THE MOGULS OF EMPLOYER LIABILITY BEYOND THE WORKER'S COMPENSATION ACT*
David Brenner, Burns, Anderson, Jury & Brenner, L.L.P., Austin

9:15 – 9:45am *THE ATTACK ON QUALIFIED IMMUNITY AND THE SPILLOVER EFFECT TO YOUR NON-CIVIL RIGHTS PRACTICE*
Matt Matzner, Crenshaw, Dupree & Milam, L.L.P., Lubbock

9:45-10:30am *SEXUAL HARASSMENT IN TEXAS – CHANGES IN THE LAW YOU NEED TO KNOW*
Lauren Whiting, Jackson Lewis PC, Austin

Sunday, January 30, 2022

Depart for Texas

2022 TADC Winter Seminar

January 26-30, 2022 — Westin Snowmass Resort — Snowmass Village, CO

100 Elbert Lane – Snowmass Village, CO 81615

Pricing & Registration Options

Registration fees include Wednesday evening through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, CLE Program each day and related expenses.

Registration for Member Only (one person)	$695.00
Registration for Member & Spouse/Guest (2 people)	$850.00

Children's Registration

Registration fee for children includes Wednesday evening welcome reception, Thursday, Friday & Saturday breakfast

Children Age 12 and Older	$120.00	Children under 6 – no charge
Children Age 6-11	$80.00	

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Winter Seminar for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.

Spouse/Guest CLE credit for Winter Meeting	$75.00

Hotel Reservation Information

For hotel reservations, CONTACT THE WESTIN SNOWMASS RESORT DIRECTLY AT 800/525-9402. and reference the TADC Winter Seminar. The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is IMPORTANT that you make your reservations as soon as possible as the room block will fill quickly. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE F0R HOTEL RESERVATIONS IS DECEMBER 20, 2021

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) BUSINESS DAYS PRIOR (JANUARY 12, 2022) to the meeting date. A $75.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 12, 2022 **IS NON-REFUNDABLE**

2022 TADC WINTER SEMINAR REGISTRATION FORM

January 26-30, 2022

For Hotel Reservations, contact the Westin Snowmass Resort DIRECTLY at 800/525-9402.

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

❑ **$ 695.00 Member ONLY (One Person)**
❑ **$ 850.00 Member & Spouse/Guest (2 people)**
❑ **$ 75.00 Spouse/Guest CLE Credit**
❑ **(no charge) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**
❑ **$ 120.00 Children 12 & Older _____**
❑ **$ 80.00 Children 6-11 _____**
❑ **No Charge for children under 6 _____**

TOTAL Registration Fee Enclosed $_____

NAME:_____ **FOR NAME TAG:**_____

FIRM:_____ **OFFICE PHONE:**_____

ADDRESS:_____ **CITY:**_____ **ZIP:**_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____

❑ *Check if your spouse/guest is a TADC member*

CHILDREN'S NAME TAGS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2021 This coincides with the deadline set by the hotel for accommodations.

PAYMENT METHOD:

A CHECK in the amount of $_____ is enclosed with this form.

MAKE PAYABLE & MAIL THIS FORM TO: TADC, P.O. Box 92468, Austin, TX 78709 OR register online at www.tadc.org

CHARGE TO: (circle one) Visa Mastercard American Express

_____

Card Number **Expiration Date**

Cardholder Name (please print) _____ **Signature**_____

TADC
P.O. Box 92468
Austin, TX 78709
PH: 512/476-5225
FX: 512/476-5384

(For TADC Office Use Only)

Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

Papers Available

2021 TADC SUMMER SEMINAR ~ JACKSON HOLE, WYOMING ~ JULY 7-11, 2021

Change is Coming Fast: Technology and the Deconstruction of the Practice of Law – Andrew S. Chamberlin – 31 pg. PPT

Strengthening Your DEIB Programs – Joe Cohen – 26 pg. PPT

Cell Phone Forensics – Lars Daniel – 98 pg. PPT

TADC 2021 Legislative Update – Slater C. Elza, Michael J. Shipman – 22 pg. PPT

Resource Packet for Legal Professionals – Lars Daniel – 56 pg. PPT

A View from the Bench Or, I Wish I Knew Then What I Know Now – The Honorable D. Gordon Bryant, Jr. – 11 pg. PPT

Covid and Snowvid: Insurance Lessons Learned – Kristen W. Kelly – 33 pg. PPT

Jury Selection Issues in a Post-Covid Age – Christopher W. Martin – 33 pg. PPT

Cutting Edge Cases – Carl H. Green, Mitzi S. Mayfield – 31 pg. PPT

Judicial Bias – Eileen O'Neill – 45 pg. PPT

Lonergan v Spearin: A Tale of Two Cases – Doug Rees – 34 pg. PPT

The Virtual Proceedings Playbook – Amy M. Stewart – 28 pg. PPT

2021 WEST TEXAS SEMINAR ~ AUGUST 14, 2021

Evidentiary Value and Limitations on Corporate Representative Witnesses – Slater C. Elza – 24 pgs. + 17 pg. PPT

Litigating Like a Hometowner – Daniel Hernandez, Michael Dean, William R. Anderson – 16 pg. PPT

Update on Energy Litigation – 2020-2021 – David W. Lauritzen – 35 pgs. + 26 pg. PPT

Supreme Court of Texas Update – Justice Debra H. Lehrmann – 135 pgs. + 144 pg. PPT

Transportation Law Update – Stew Schmella – 19 pg. PPT

New Mexico Civil Rights Litigation Update – Mark D. Standridge – 16 pg. PPT

Civil Rights Litigation Update from Texas Perspective – Alex L. Yarbrough – 16 pg. PPT

Papers Available

2021 Annual Meeting ~ Memphis, Tennessee ~ September 22-26, 2021

FMCSR's: The Trucking Lawyer's Keys to Success – Mike H. Bassett – 22 pgs.

Defending the Design Professional – John P. Cahill, Jr. – 14 pgs.

2021 Changes to the Texas Rules of Civil Procedure – Chantel Crews – 9 pgs.

TSC Order on Changes to TRCP – Chantel Crews – 20 pgs.

Luddite or Technophile? Stark Warnings on Technology Competency – Baxter Drennon – 10 pgs. + 23 pg. PPT

TRCP 91a – Dismissal of Baseless Causes of Action – Stephen B. Edmundson – 12 pgs.

Lawyer Ethics in the Conference Room and the Court Room – Not-So Hypothetical Case Studies – Geoff Gannaway, Mary Kate Raffetto – 22 pgs. + 103 pg. PPT

Supreme Court Update – The Honorable Brett Busby – 134 pgs.

Navigating Court Backlogs, Resolving Cases and Avoiding Creep Post-Pandemic – Kate Skagerberg – 39 pg. PPT

Tax Implications of Settlements and Judgments – Joshua Smeltzer – 14 pg. PPT

COST OF PAPERS

10 pages or less	**$10.00**	**41-65 pages**	**$40.00**
11-25 pages	**$20.00**	**66-80 pages**	**$50.00**
26-40 pages	**$30.00**	**81 pages or more**	**$60.00**

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Please indicate the title of the paper, the author & meeting where the paper was presented when ordering. TADC will invoice you when the papers are sent. Papers will be sent to you via email unless otherwise requested.

A searchable database of papers is available on the TADC website: www.tadc.org

2021 WEST TEXAS SEMINAR

Inn of the Mountain Gods ~ August 12-13, 2021 ~ Ruidoso, NM

The TADC held its11th installment, the 9th held jointly with New Mexico, of the West Texas Seminar in nice and cool Ruidoso, New Mexico on August 12-13. The Inn of the Mountain Gods provided the perfect venue for this family-friendly CLE. Program Chairs Bud Grossman with Craig, Terrill, Hale & Grantham, L.L.P., Lubbock and William Anderson with O'Brien & Padilla, P.C., Las Cruces, assembled a top-notch program including lawyers and judges from both states. Reciprocity well underway, this seminar needs to be on your radar if you hold both a Texas and New Mexico Law License and if not, the weather is outstanding for a nice cool, inexpensive August CLE.

Marissa & Dan Hernandez with Justice Debra Lehrmann & Meg & Darryl Vereen

Kelsey Yarbrough & Craig Grossman

Stew & Sam Schmella, Pat Long Weaver, Bud Grossman & Jack Nelson

Sterling, Shanna & Slater Elza with Sam & Stew Schmella

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TEXAS ASSOCIATION OF DEFENSE COUNSEL

An Association of Civil Trial, Commercial Litigation & Personal Injury Defense Attorneys ~ Est. 1960

P.O. Box 92468, Austin, Texas 78709 512/476/5225 Fax 512/476-5384 Email: tadc@tadc.org

I Mr. / Mrs. / Ms. (circle one) _____ (Please print) hereby apply for membership in the Association and certify that I am a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Personal Injury Defense and Commercial Litigation. I am not now a member of any plaintiff or claimant oriented association, group, or firm. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

Main Office Phone: / Direct Dial: / Office Fax: /

Email Address: _____ Cell Phone: /

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: /

Bar Card No.: _____ Year Licensed: _____ Birth Date: _____ ☐ DRI Member?

Dues Categories:

***If joining November – July:**	**$185.00 Licensed less than five years (from date of license)**	**$295.00 Licensed five years or more**
If joining August:	$ 50.00 Licensed less than five years (from date of license)	$100.00 Licensed five years or more
If joining September:	$ 35.00 Licensed less than five years (from date of license)	$ 50.00 Licensed five years or more

*If joining in October, November or December, you will pay full Dues and your your Membership Dues will be considered paid for the following year. However, New Members joining after October 15 will not have their names printed in the following year's because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

_____

(TADC member) **Please print name under signature**

I agree to abide by the Bylaws of the Association and attach hereto my check for $_____ ***-OR-***

Please charge $_____ to my ☐ Visa ☐ MasterCard ☐ American Express

Card #: _____ Exp. Date: /

Please return this application with payment to:
Texas Association of Defense Counsel
P.O. Box 92468 Austin, Texas 78709

Referring TADC Member:

_____
(print name)

For Office Use

Date: _____

Check # and type: _____

Approved: _____

Expert Witness Research Service Overall Process

- Complete the TADC Expert Witness Research Service Request Form. Multiple name/specialty requests can be put on one form.
- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
- If the request is for a defense expert within a given specialty, please include as much information as possible. For example, accident reconstruction can include experts with a specialty of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return email transmission. The TADC Contact information includes the attorney who consulted/confronted the witness, the attorney's firm, address, phone, date of contact, reference or file number, case and comments. To further assist in satisfying this request, an Internet search will also be performed (unless specifically requested NOT to be done). Any CV's, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
- Approximately six months after the request, an Expert Witness Research Service Follow-up Form will be sent. Please complete it so that we can keep the Expert Witness Database up-to-date, and better serve all members.

Expert Witness Service Fee Schedule

Single Name Request

Expert Not Found In Database	$15.00
*Expert Found In Database, Information Returned To Requestor	$25.00
A RUSH Request-Add an Additional	$ 10.00
A surcharge will be added to all non-member requests	$50.00

* Multiple names on a single request form and/or request for experts with a given specialty (i.e., MD specializing in Fybromyalgia) are billed at $80.00 per hour.

Generally, four to five names can be researched, extracted, formatted, and transmitted in an hour.

The amount of time to perform a specialty search depends upon the difficulty of the requested specialty, but usually requires an hour to extract, format, and transmit.

TEXAS ASSOCIATION OF DEFENSE COUNSEL
P.O. Box 92468 * Austin, Texas 78709 * 512/476-5225

Expert Witness Search Request Form

Please EMAIL this completed form to: **tadc@tadc.org**

Date: _____ ☐ NORMAL ☐ **RUSH** (Surcharge applies)

Attorney: _____ ☐ TADC Member ☐ **Non-Member** (Surcharge applies)

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

➢ ☐ **Search by NAME(S):** (Attach additional sheets, if required.)

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

Areas of expertise: _____

_____

➢ ☐ **SPECIALTY Search**: (Provide a list of experts within a given specialty.)

Describe type of expert, qualifications, and geographical area, if required (i.e., DFW metro, South TX, etc). Give as many key words as possible; for example, 'oil/gas rig expert' could include economics (present value), construction, engineering, offshore drilling, OSHA, etc. A detailed description of the case will help match requirements.

_____

_____

_____

_____

_____

➢ ☐ **INTERNET:** o INCLUDE Internet Material o DO NOT Include Internet Material

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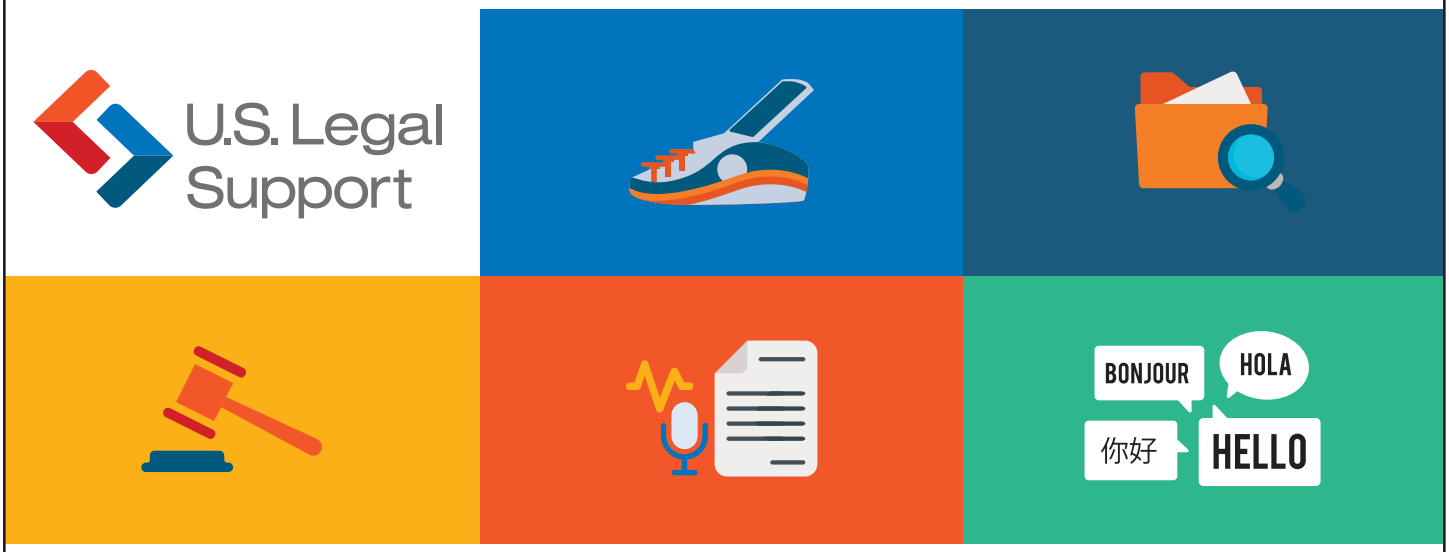

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