EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published *Transportation Update* for about seventeen years. In response to the requests of clients, we updated our extensive website in 2005. We now have an archive of many recent issues of *Transportation Update* on the website including this one. If your first contact with *Transportation Update* is through our website, you can be added to our email distribution list by contacting us through Katherine Garcia at kgarcia@alfainternational.com. Please add *Transportation Update* to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you wish to receive *Transportation Update* in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

The *Transportation Update* is published on our web site, and our primary method of distribution is by email. Electronic publication allows us to include hyperlinks for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The section headings are as follows: Cases, Regulations, and Statutes; Verdicts and Settlements; Practice Tips; and Articles.

Under the **Cases, Regulations, and Statutes** section of the *Transportation Update*, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community.

The **Verdicts and Settlements** section addresses the results of litigation affecting the trucking industry. We encourage you to report to us about any verdict or settlement that you think is of interest to the trucking community. You may report all such results to the editors of the Update or to Michael K. Sheehy. Michael can be reached as follows: msheehy@plunkettcooney.com. In this edition, please see an interesting result reported by Eric Kirschner.

The **Practice Tips** section of the *Update* features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this edition of the *Update*, we feature Hal Meltzer’s insights on **Strategies for Analyzing and Assessing Traumatic Brain Injury** and **Tips on Solving the Mediation Puzzle** by R. Michael Henderson and David B. Collins.

**Articles** provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. Under the **Articles** section, we feature two articles of interest, and they are as follows: **Document Retention & the So-Called Safe Harbor of Rule 37(f)** is the last article of a three part series of articles from Will Fulton and his associates on the issue of electronic discovery.

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1 All hyperlinks are underlined. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the Contents go to specific points in the newsletter. Links to websites take you to the website, and links to email addresses open an email addressed to that person.
EDITORS’ NOTEPAD
(CONT.)

Despite Staunch Opposition on all Fronts the DOT’s Mexican Long Haul Demonstration Program Moves Forward by Said A. Taleb is a timely article that concerns the Mexican Long Haul Program under NAFTA.

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. It is our goal to provide timely relevant information to members of the trucking community. Our editors can be contacted as follows:

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FUTURE EVENTS

We are pleased to inform you that within the near future (we hope by February) ALFA will have an 800 number available for you to use to contact ALFA “Go Team” lawyers when you need a rapid response to an occurrence. We will publish the number to you as soon as the service is available. In the mean time, please continue to refer to your “Go Team” Manual. If you do not have a “Go Team” Manual, please contact ALFA at www.alfainternational.com.

The Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry each year. The 2008 Transportation Seminar will be held in Palm Beach, Florida at the Breakers from April 30 to May 2, 2008. At present, we plan to offer the following topics for discussion/presentation: Managing the Scene of the Accident; Preserving Evidence at the Scene; E-Discovery and Spoliation; Defending Independent Theories of Liability and Damages against the Company; Defending against Allegations of Criminal Conduct; and A Mock Trial.

We will likely use panel discussions to present the materials and foster the exchange of information. We will include representatives of trucking companies and insurance companies in the presentations to ensure that the program provides more perspective and insight for you. If you want us to address a particular topic or have an idea about the presentation of a subject, please let us know. Our seminars are offered in response to requests from clients and from guests who attend our conference and seminars, so we always want to hear from you.

The internet site for the venue is www.thebreakers.com.

Questions, comments and suggestions about this program can be directed to our program chair, Danny M. Needham, at the number listed below or by email at dmneedham@mhba.com. Logistical questions about the program can be directed to Katherine Garcia at the number listed below or by email at kgarcia@alfainternational.com. We will also post information on our website at www.alfainternational.com.

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FUTURE ISSUES OF TRANSPORTATION UPDATE

The spring issue of Transportation Update will be published in April.

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CASES, REGULATIONS, & STATUTES

COLORADO
COLORADO INCREASES LIMITATIONS ON DAMAGES

The Governor of Colorado has signed into a law a bill passed by the General Assembly which provides for an upward adjustment in the limitation on damages recoverable in certain actions to account for inflation. The new law affects damages recoverable in actions against the vendors or providers of alcoholic beverages; the damages recoverable for non-economic losses in personal injury actions generally; and the damages recoverable in actions for wrongful death. The adjustments mandated by the new law will be certified by the Colorado Secretary of State in early January, 2008 and will apply to claims for relief that accrue on or after January 1, 2008.

In 1986, the Colorado General Assembly passed a law limiting to $150,000 the damages recoverable for harm caused by the sale or service of alcoholic beverages. Colo. Rev. Stat. §§ 12-47-801(3)(c) and (4)(c). As adjusted for inflation on January 1, 1998, this limit was raised to $219,750. Colo. Rev. Stat. § 12-47-801(5). Although final numbers are not yet available, preliminary estimates indicate that the limit of damages recoverable under this section as adjusted for inflation on January 1, 2008 could be approximately $286,200.
The 1986, the General Assembly also passed a law limiting to $250,000 the damages recoverable for non-economic losses (i.e., pain and suffering, etc.) in an action for personal injury unless the court finds justification by clear and convincing evidence to raise the limit to $500,000. **Colo. Rev. Stat. § 13-21-102.5(3)** (a). As adjusted for inflation on January 1, 1998, these limits were increased to $366,250 and $732,500, respectively. **Colo. Rev. Stat. § 13-21-102.5(3)(c).** Although the final numbers are not yet available, **preliminary estimates** indicate that the limit of damages recoverable for non-economic losses under this section as adjusted for inflation on January 1, 2008 could be approximately $477,000 unless the court finds justification by clear and convincing evidence to raise the limit to $954,000.

In 1989, the General Assembly passed a law limiting to $250,000 the damages recoverable for non-economic loss in an action for wrongful death. **Colo. Rev. Stat. § 13-21-203(1)(a).** As adjusted for inflation on January 1, 1998, this limit was increased to $341,250. **Colo. Rev. Stat. § 13-21-203(7).** Neither the final numbers nor any preliminary estimates are currently available to indicate what the total amount of damages recoverable under this section will be when adjusted for inflation as of January 1, 2008.

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**ILLINOIS**

**Public Aid/Medicare Benefits and the Collateral Source Rule**

Two recent Illinois cases have set up a showdown in the Illinois Supreme Court over the application of the collateral source rule to Medicare payments. The Fourth District held that the collateral source rule did not apply to Medicare payments in the case of Wills v. Foster, 372 Ill.App.3d 670 (4th Dist. 2007), where the medical specials were reduced from $80,000 to $19,000. Months later, in the Third District case of Nickon v. City of Princeton, 2007 WL 3171759 (3d Dist.), the court refused to reduce an award of $120,000 to $35,000.

The collateral source rule generally provides that benefits received by the injured party from a source wholly independent of, and collateral to, the defendant will not diminish damages otherwise recoverable from the defendant. In the typical situation, when a plaintiff’s medical expenses are paid by his insurance, the defendant is not entitled to a setoff of the amount paid by the plaintiff’s insurance. The collateral source rule, then, acts as an exception to the general rule that compensatory damages are intended only to compensate the plaintiff and not to punish the defendant. The justification for this type of double recovery, as cited by both the Wills and Nickon courts, is that the defendant should not benefit “from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.” **Arthur v. Catour**, 216 Ill.2d 72, 79 (2005).

Many states, including South Carolina, North Carolina, Wisconsin, Mississippi, and Hawaii hold defendants liable regardless of the source of compensation, reasoning that defendants should be liable for the value of medical services and not the cost. Illinois, however, along with states such as Florida and Idaho, exclude gratuitous services from the protection of the collateral source rule on the policy that the plaintiff never became liable for the medical services and made no expenditures (as is the case with insurance premiums). In **Peterson v. Lou Bachrodt**
Chevrolet Co., 76 Ill.2d 353 (1979), the Illinois Supreme Court laid out this exception, stating, “[w]e refuse to join those courts which, without consideration of the facts of each case, blindly adhere to the ‘collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant.’” Id. at 363. Both of the recent decisions in Wills and Nickon acknowledge this exception, but the courts in these cases came to vastly different conclusions when interpreting the intended scope of the exception excluding gratuitous services. In Peterson, the court explained and applied this exception in a situation where the plaintiff received free hospital services from Shriner’s Hospital.

The Fourth District decided that the Illinois Supreme Court in Peterson intended the exception to the collateral source rule to be somewhat broad and include Medicare. This reading is largely backed up by the language of Peterson, which stated “the policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation.” The Fourth District went on to recognize the Illinois Supreme Court’s disfavor of double recovery citing that the “view that a windfall, if any is to be enjoyed, should go to the plaintiff, borders too closely on approval of unwarranted punitive damages, and it is a view not espoused by our cases.” Therefore, in addressing the justification of the collateral source rule, “that the defendant should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations;” the Wills court, like Peterson, focused on whether there was an expenditure by the plaintiff. This court then held, in its Wills v. Foster decision, that because a plaintiff receives Medicare without expense, much like receiving hospital services without expense, there was no expenditure and a defendant is entitled to a setoff.

The Third District read the exception in Peterson differently. It stated that the Illinois Supreme Court, “carved a single exception to the collateral source rule.” This exception applies, as it did in Peterson, only when there is a charitable provider of medical services. In other words, the exception applies only when there is no initial bill. Looking to the same justification for the collateral source rule; “that the defendant should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations;” the Nickon court focused not on expenditures, but on other relations. It found that the relationship between a plaintiff and Medicare was intended to be included in “other relations.” The court also observed that in the case of Medicare, a plaintiff’s liability for the medical services in not relieved until payment is received from Medicare. This narrow reading of the exception in Peterson fails to take account of the language of the Peterson opinion. The Third Circuit stated that any other reading of Peterson would require courts to endlessly analyze minute differences in each case related to the relationship between payor and patient. However, the Illinois Supreme Court specifically stated that it prefers not to blindly adhere to the collateral source rule without consideration of the facts of each case.

Finally, of note is that the collateral source rule acts as a rule of damages and a rule of evidence. The holding in Wills and part of the holding in Nickon dealt with a post-trial motion for reduction of damages from the amount billed to the amount paid by Medicare. The impact of the Illinois Supreme Court’s previous holding in Arthur v. Catour dealt largely with the evidentiary aspect of the collateral source rule. While the Arthur court explained the policy behind the collateral source rule, it actually did not address its holding in Peterson, much to the chagrin of the dissent. Instead, it only held that a plaintiff may present evidence of pre-discounted medical bills, and it did so in the context where the collateral source rule has traditionally been held to apply; an insurance setting.

The Illinois Supreme Court has allowed appeal in the Wills v. Foster decision and will soon resolve this dispute between circuits. This decision is of great importance to plaintiffs and defendants, as can be seen in the difference in liability for medical expenses in just the two cases presented above. In both of those cases, medical liability was reduced by 70-75%. If the decision in Wills is affirmed, it will allow defendants, in cases of Medicare, and possibly other government aid cases, to reduce damages after judgment accordingly.
Melissa Congleton was killed when a steel coil weighing approximately 37,000 lbs. came unsecured from a Steel Technologies flatbed tractor-trailer. The accident occurred on KY 421, which is a two-lane road. The coil was secured by three steel chains, which failed when the truck braked for a vehicle ahead, causing the coil to fall from the flatbed into the path of Mrs. Congleton. Mrs. Congleton’s pickup truck struck the steel coil, left the road and struck a stone wall before coming to rest. Mrs. Congleton died at the scene from the impact. The allegation of negligence was that Federal Motor Carrier Safety Administration regulations required at least five chains to secure this cargo.

At the trial court level, the court refused to instruct on conscious pain and suffering because the evidence was that Mrs. Congleton was struck unconscious by the impact. Nevertheless, the court instructed on pre-impact fear. The evidence to support this element of damages included skidmarks, implying that Mrs. Congleton saw the coil before she struck it, as well as testimony that after death her face was fixed in the expression of a scream. The court concluded that the impact rule as currently applied in Kentucky means that pre-impact fear cannot serve as the basis of a claim and any damages for such a claim are not recoverable.

**KENTUCKY SUPREME COURT DENIES CLAIM FOR PRE-IMPACT FRIGHT**

In *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920 (Ky. 2007), the Kentucky Supreme Court held that a motorist’s pre-impact fear and shock could not serve as a basis for recovery of damages for negligent infliction of emotional distress. This reversed a Kentucky Court of Appeals decision affirming a jury award of $100,000 for this injury.

and natural result of the physical contact or injury sustained.” *Id.* at 145-46. The court also cited several cases holding that such a cause of action does not even accrue until a physical injury manifests. Thus, the rule in Kentucky is that the impact must precede and be the cause of the ensuing emotional distress in order for a plaintiff to recover this element of damages.

According to the court, the rationale for the rule is that pre-impact fear is simply too speculative and difficult to measure unless it is directly linked to and caused by a physical harm. To amplify this point, the court looked to the proof of pre-impact fear in this case, which was the decedent’s facial expression. The court concluded that the impact rule as currently applied in Kentucky means that pre-impact fear cannot serve as the basis of a claim and any damages for such a claim are not recoverable.
MICHIgAN

TRUCK DRIVER’S CREDIBILITY MUST BE CONSIDERED WHEN HIS MEDICAL CONDITION FORMS THE BASIS FOR HIS SUDDEN EMERGENCY DEFENSE: OVERCOMING A REBUTTABLE PRESUMPTION

In White v. Taylor Distributing Co., Inc., the Michigan Court of Appeals identified one instance in which a party-witness’ credibility would be a proper basis for deeming a trial court’s grant of a Motion for Summary Disposition “inappropriate” under MCR 2.116(G)(4). In White, Plaintiff’s vehicle, while stopped at an intersection, was “rear-ended” by a tractor-trailer owned by defendant, Penske, and driven by defendant, James Birkenheuer, who was employed by defendant, Taylor.

The trial court granted Defendant’s Motion for Summary Disposition pursuant to MCR 2.116(C)(10) based upon Birkenheuer’s deposition testimony. Specifically, Birkenheuer testified that he noticed Plaintiff’s vehicle in enough time to stop and immediately began to apply his brakes. However, before he was able to bring his vehicle to a complete stop, he suddenly felt dizzy and blacked out. He was later awakened by the impact between the vehicles.

Accordingly, the trial court found that a “sudden emergency” arose out of a severe bout of diarrhea that caused Birkenheuer to experience a “sudden and unexpected” blackout, which precluded a finding of actionable negligence.

However, the Michigan Court of Appeals reversed the trial court’s ruling, holding that in cases such as the one at bar, where the moving party has the burden of proof in overcoming a rebuttable presumption of negligence, the witness’ credibility becomes a crucial determining factor in the final outcome. Since the jury would have to witness Birkenheuer’s demeanor in assessing his credibility, the trial court’s grant of Defendant’s Motion for Summary based upon the Sudden Emergency Doctrine, was “inappropriate” under MCR 2.116(G)(4), notwithstanding Plaintiff’s failure to submit documentary evidence which would have created a genuine issue of material fact.

3 MCR 2.116(G)(4) provides in pertinent part: “... if the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.” Id. at 625-6. [Emphasis in the original.]
4 Id. at 616-7.
NEBRASKA

RESTATEMENT USED IN NEBRASKA TO EXTEND LIABILITY TO NON-OWNER SUPPLIER

In Nebraska, Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 2004) makes owners of leased trucks, truck tractors, and trailers liable to persons injured because of the operation of the leased item. In Erickson v U-Haul Intl. Inc., 274 Neb. 236, (2007) the Nebraska Supreme Court found that this statute did not prevent it from recognizing a common law duty on the part of a supplier of an item to protect foreseeable users known to the supplier. The plaintiff’s parents were helping her move from one location to another and had rented a U-Haul truck known as a 17-foot easy-loading mover. The plaintiff was holding the U-Haul truck’s loading ramp while the plaintiff’s father was backing the truck up to a porch. In the process, the plaintiff’s foot was pinned between a concrete step and the truck’s loading ramp. This prompted the suit to be filed against U-Haul, the lessor of the truck, for the plaintiff’s injuries.

In deposition testimony, the plaintiff said that she did not see any warning labels on the truck indicating that the loading ramp should not be extended while the truck was in motion. The plaintiff’s parents further said that when the truck was rented they did not receive a user’s guide with any warnings about using the ramp. U-Haul filed a motion for summary judgment contending that because it did not own the truck that caused plaintiff’s injury (only supplied it), it owed no duty to the plaintiff and further that there was no personal jurisdiction in Nebraska over U-Haul. The trial court sustained the summary judgment motion, and in doing so, the court found that U-Haul did not owe a duty to the plaintiff.

On appeal to the Nebraska Supreme Court, the plaintiff argued that it was reasonably foreseeable that friends and family would assist the parents in conducting the move. Consequently, even though U-Haul did not own the truck in question, but only supplied it, a special relationship existed. The Nebraska Supreme Court pointed out that a duty of reasonable care generally does not extend to third parties absent other facts establishing a duty and that common law traditionally imposed liability only if the defendant bears some special relationship to the potential victim. Indeed, the court said that regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship. The court then turned to § 388 of the Restatement (Second) of Torts in concluding that a supplier has a common-law duty to warn expected users that a chattel may be dangerous. The court agreed that the term “supplier” as used in the Restatement (Second) of Torts § 388 included lessors.

Recognizing that it had never previously applied Restatement (Second) of Torts § 388 to lessors, it turned to other jurisdictions and concluded that the decisions in other jurisdictions supported a finding that there exists in Nebraska a common law duty of a supplier to protect foreseeable users of its chattels from dangers known to the supplier.

The Erickson decision has now broadened the potential liability of equipment and vehicle lessors beyond the statutory ambit of Nebraska, Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 2004) to find common law liability based on the criteria set forth in Restatement (Second) of Torts § 388. Lessors of all types of chattels, including motor vehicles and trailers, appear to now have a duty to a class of users with whom there is no direct contractual relationship and where no common law duty previously existed.

10 Not surprisingly, an affidavit from U-Haul’s general manager said that an appropriate warning sticker was affixed to the leased truck and that a copy of the “U-Haul Household Moving Van User Instructions” was given to everyone who rented a truck from U-Haul. This factual dispute was not central to the Nebraska Supreme Court’s legal analysis of U-Haul’s common law duty.

11 The trial court in Nebraska had also sustained U-Haul’s challenge to personal jurisdiction overruled, but this finding was also overruled by the Nebraska Supreme Court. Since the focus of this article is on U-Haul’s duty to the user of its vehicle I don’t intend to present an analysis of the jurisdiction issue, although it seems to represent something of an expansion of the Nebraska Supreme Court’s interpretation of the application of Nebraska’s long-arm statute.

12 The Court left for determination by the trier of fact whether the plaintiff was a “foreseeable user” and therefore protected under Restatement (Second) of Torts § 388. Erickson v U-Haul Intl. Inc., at 245.
PENNSYLVANIA

ANTI-IDLING REGULATION CLEARS INITIAL HURDLE

A series of proposed regulations designed to limit commercial vehicle idling was approved by the Pennsylvania Environmental Quality Board on October 16, 2007. The draft regulations are currently open for public comment. Under the proposed regulations, it would be a violation of Pennsylvania’s clean air regulations to “cause or allow the engine of any diesel-powered commercial motor vehicle to idle for more than 5 minutes in any 60-minute period.”

Of particular interest, the current version of the proposed regulation applies to “owners and operators of diesel powered commercial motor vehicles and owners and operators of locations at which diesel-powered commercial motor vehicles load, unload or park.” This language makes the regulation applicable not only to truck drivers and their employers but to a much broader category of people and businesses. Any business that ships or receives freight could potentially violate this regulation by allowing a diesel-powered commercial motor vehicle to idle excessively while loading or unloading.

There are exemptions built into the proposed regulation. For instance, a temperature exemption allows occupied diesel-powered commercial motor vehicles with a sleeper compartment to idle more than 5 minutes in a 60-minute period when the outside air temperature is below 40 degrees or above 75 degrees Fahrenheit. However, this exemption expires in 2010 and does not apply if the vehicle is parked at a location with “stationary idle reduction technology that is available for use” (i.e. IdleAire). Other exemptions include: operation of defrosters, heaters, air conditioners or cargo refrigeration equipment in order to prevent a safety or health emergency and not for the purpose of a rest period; a passenger bus idling for up to 15 minutes in a 60 minute period to provide heat or air conditioning to passengers; active loading or unloading of property or passengers; idling required to operate work-related mechanical or electrical operations other than propulsion (i.e. boom trucks and concrete mixers); on-highway traffic, traffic control device or the direction of a person authorized to direct traffic; and idling for maintenance, service, repair or diagnostic purposes provided idling is required for this activity.

SOUTH CAROLINA

THE EXISTENCE OF JOHN DOE

In a recent opinion, the South Carolina Court of Appeals declined to extend insured motorists’ ability to reach their uninsured motorist coverage in instances in which the identity of the offending vehicle—and its driver—is unknown. In its ruling in Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007), the court analyzed the applicability of S.C. Code §38-77-170 to the facts at hand. Shortly after leaving a restaurant where he had dined with his son and a friend, Bradley swerved to avoid a large, white object which was situated directly in his path and within the roadway. Bradley lost control of the vehicle and struck a tree. After the accident, Bradley flagged down a passing motorist, Douglas, who testified that as he turned around to assist Bradley he saw...
a white trash bag in the road. While helping Bradley, Douglas heard another vehicle hit the bag and drag it down the roadway. When Bradley’s son arrived from the restaurant, he observed the trash bag with its contents strewn across the roadway. A third witness, Bosley, had dined with Bradley and had left the restaurant prior to when Bradley had left. Bosley testified that he had narrowly avoided the trash bag and that he had seen a street-sweeper drop a similar bag into the roadway in the same vicinity a few minutes later.

On the basis of these three witnesses’ observations, Bradley claimed that under the applicable statutory framework there was confirmation of his story—that the street-sweeper, driven by John Doe, had caused the accident—sufficient for him to obtain underinsured motorist benefits. The trial court granted summary judgment in favor of Doe, reasoning that the “independent witness” requirement under the statute was not satisfied by the three witness’ testimony. After an exhaustive review of the statute’s underlying policy and the case law interpreting it, the court of appeals affirmed.

Section 38-77-170 reads, in pertinent part:

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision unless... the accident [was] witnessed by someone other than the owner or operator of the insured vehicle.

Strictly enforced in the early cases, the statute’s “independent witness” requirement had been relaxed in a 2004 opinion, giving Bradley an opportunity to argue for further whittling down of the requirement.

In discussing the statute’s history and purpose, the court noted preliminarily that as a matter of statutory construction, section 38-77-170 should be strictly enforced strictly it is altogether lacking in ambiguity, reasoning that the statute “expressly requires that someone other than the insured vehicle witness the accident.” Bradley at 629, 649 S.E.2d at 157. Interestingly, the court found inapplicable the ubiquitous—and so frequently dispositive—principle that all questions shall be resolved in favor of coverage:

Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Id. (citing Collins v. Doe, 352 S.C. 462, 467-468, 574 S.E.2d 739, 741-742 (2002)). Beneath this unyielding interpretive template, the court found no quarter for recovery on the basis of the “functional equivalent” of an independent witness.

Yet in a later case South Carolina’s Supreme Court retreated slightly from its previous hard-line stance. In Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004), the insured driver had run off the road and hit a tree, according to her own testimony, as a result of having been run off the road by a John Doe driver. Gilliland offered as her independent witness a motorist who had seen a second set of headlights in Gilliland’s vicinity prior to the accident; Gilliland’s actual collision with the tree; and a pair of headlights seemingly fleeing from the scene immediately after the accident. Yet the witness had not seen the behavior on the part of the second car that Gilliland claimed had been the cause of her accident. Id. at 158, 592 S.E.2d at 631. Softening its earlier position, the court found that this witness’ testimony was sufficient to meet the requirements of the statute, reasoning that the witness’ testimony constituted circumstantial evidence that the John Doe driver had caused the accident. Id. Certainly it is reasonable to puzzle over how the Gilliland ruling can be squared with the Collins pronouncement that the statute leaves no room for the “functional equivalent” of a witness’ having actually observed the accident.

In any event, Bradley relied upon Gilliland in arguing that his three witness’ testimony provided sufficient circumstantial evidence that the street-sweeper had caused his accident. However the court ruled against Bradley on the basis that (while Gilliland’s independent witness had not seen John Doe’ actual negligent conduct) she had witnessed the actual collision as...
well as John Doe both before and after the accident. Identifying the key factual distinction, the court explained:

Here, Bradley was the only witness to the accident. None of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree. By Bradley’s own testimony, he initially thought it was an injured dog lying in the road that caused him to veer off and lose control. The fact that three people saw the bag of trash in the same roadway does not implicate involvement of another vehicle. Testimony that a sweeper truck a quarter-mile down the roadway dropped a similar trash bag likewise fails to establish a sufficient causal link between the sweeper truck and Bradley’s collision.

Bradley, 374 S.C. at 633-634, 649 S.E.2d at 159-160. The court then provided its specific ruling:

Bradley’s affiants had no personal knowledge of the facts of the accident. Their observations before and after the accident did not establish with reasonable certainty a causal connection between Bradley’s injury and an unknown vehicle. The affidavits of independent witnesses must contain some independent evidence of an unknown vehicle’s involvement in the accident.

In short, under this most recent case interpreting Section 38-77-170—which the court properly describes as an anti-fraud device—circumstantial evidence can suffice to provide the necessary causal link, but such evidence must include a firsthand account that the John Doe vehicle was in fact involved in the accident.

VERDICTS AND SETTLEMENTS

INDIANA

JUST DRIVING A TRUCK DOESN’T MAKE YOU LIABLE FOR EVERYTHING

On a snowy morning in December 2004, the plaintiff parked his Ford F150 on the shoulder of northbound Indiana S.R. 49 at its intersection with U.S. 6 and remained inside because there was blowing snow and limited visibility. Later, another 4-wheeler exited U.S. 6 on the off-ramp and entered the northbound lane of S.R. 49. Simultaneously, an 18-wheeler was proceeding northbound on S.R. 49 at the overpass of U.S. 6 traveling past the ramp upon which the second 4-wheeler was operating his vehicle. When the second 4-wheeler got to the end of the ramp, he hit a patch of ice, fishtailed and collided with the side of the passing 18-wheeler. The 4-wheeler then spun across S.R. 49 and hit the plaintiff’s pick-up truck causing injuries. The 18-wheeler promptly pulled over to the side of the road. It was estimated that the 18-wheeler was moving about 40 miles per hour in a 55 mph zone. The plaintiff employed a very high profile lawyer and filed suit against all parties within 100 feet. The claim against the driver of the 18-wheeler was that he was going at an unreasonably high rate of speed given the road conditions.
The trucking company moved for summary judgment for themselves and the driver, and the trial court concluded that regardless of how well the truck driver maintained his duty of care he could still not prevent the second 4-wheeler from striking his tractor trailer after it spun out on the ramp. The court stated that the law does not require motorists to do the impossible to avoid a collision. Here the 18-wheeler had already crossed under the overpass of U.S. 6 when the 4-wheeler lost control and ricocheted off the 18-wheeler. The truck driver had no time to react to the 4-wheeler’s loss of control, and a reasonable jury could not infer that he could be negligent.

The plaintiff argued that if the truck driver had avoided driving until the road conditions were safe he would not have been involved in the collision. The court accepted the reality of that statement though it did not establish proximate cause. The court, with language from another opinion, Milam v. State Farm, 972 F.2d 166, 169 (7th Cir. 1992), commented that “‘but for’ is rarely an adequate notion of cause. We do not say that since, in all probability, [a plaintiff] would not have had an accident on I-70 if Columbus had not discovered America, Columbus caused the accident.”

The plaintiff also argued that had the 18-wheeler been traveling at a crawl, he would have had time to stop without striking the out-of-control 4-wheeler that was fishtailing and would have avoided the accident. However, there is no evidence to support that assertion. In addressing the allegation, the court stated that whether a defendant’s speed of travel is by itself sufficient to establish a genuine issue of material fact on the question of proximate cause is an issue of first impression in Indiana. The court adopted case law from the Court of Appeals of Washington and stated that the speed was only a remote, rather than a proximate cause. There was no evidence that the truck driver’s speed in any way affected his ability to avoid the collision through control of his vehicle as the out-of-control 4-wheeler struck the side of the 18-wheeler and gave the truck driver no time to react. The Indiana Court of Appeals then affirmed the dismissal of the trucking company and driver.

This is one of the few state court cases where the truck driver is exonerated when a crash occurs near him in nasty weather.


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**PRACTICE TIPS**

**STRATEGIES FOR ANALYZING AND ASSESSING TRAUMATIC BRAIN INJURY:**

**INVESTIGATING NEUROPSYCHOLOGICAL AND NEUROIMAGING EVIDENCE IN THE TRAUMATIC BRAIN INJURY (TBI) CLAIM.**

Anyone who has handled tractor-trailer or other motor vehicle cases has likely encountered the TBI claim. This sometimes vague or mysterious constellation of symptoms can transform a minor-impact property damage claim into one that causes you (or those looking over your shoulder) to seriously consider a six-figure reserve. While some traumatic brain injuries are legitimate, innovative members of the plaintiff bar have learned to create symptoms of TBI in their clients; develop, manipulate and legitimatize these symptoms through a team of plaintiff-friendly medical, psychological experts; and attempt to frighten unwitting defendants into settling at a premium. In addition, new technologies which provide “images” of the brain premised on function are also being offered as objective evidence to prove TBI. It is imperative to remove the mystery of the “evidence” being presented to support each claim in order to make an informed assessment as to which claims

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13 Thanks to Jerry Sallings of ALFA member Wright, Lindsey & Jennings LLP in Little Rock, Arkansas, for his prior contribution to this material from Course Materials originally presented by him and this author at the 2005 ALFA Transportation Practice Group Seminar.
are legitimate (their nature and extent) and identify those that are not. This article offers some tips to lead you in the direction for demystifying the TBI claim.

**What is TBI?**

Traumatic brain injury or TBI is generally a concussion of the brain; that is, a traumatic injury to the brain as a result of a violent blow, shaking, or spinning. A brain concussion can cause immediate and usually temporary impairment of brain function such as cognition or thinking, vision, equilibrium and consciousness.

**Objective signs of concussion:**
The signs of concussion observed by medical staff in athletes with a concussion may include the following:

- Player appears dazed
- Player has vacant facial expression
- Confusion about assignment
- Athlete forgets plays
- Disorientation to game or score
- Inappropriate emotional reaction
- Player displays clumsiness
- Player is slow to answer questions
- Loss of consciousness
- Any change in typical behavior

**Subjective symptoms of concussion:** The symptoms of concussion reported by athletes with a concussion may include the following:

- Headache
- Nausea
- Balance problems or dizziness
- Double or fuzzy vision
- Sensitivity to light or noise
- Feeling slowed down
- Feeling “foggy” or “not sharp”
- Change in sleep pattern
- Concentration or memory problems
- Irritability
- Sadness
- Feeling more emotional

**Causes:** A concussion is not a bruise to the brain caused by hitting a hard surface. In fact, no physical swelling or bleeding is usually seen on radiological films, including MRI and CT.

**Impact:** The concussion occurs from impact when the head accelerates rapidly and then is stopped, or from spinning when the head is spun rapidly and then is stopped. Impact to the brain can occur when the head slams into a hard surface. The movement of the skull is stopped by the hard surface but the brain, floating in cerebrospinal fluid (CSF), can still move and can be “shaken”.

**Spinning:** Spinning of the brain can occur when a blow causes the head to snap rapidly. The skull then stops spinning but the brain, floating in cerebrospinal fluid (CSF), can still move and can be damaged in the presence of sufficient forces.

**Violent trauma:** Violent trauma, whether it be from shaking or spinning, causes the brain cells to become depolarized and fire all their neurotransmitters at once in an abrupt cascade, flooding the brain with chemicals --there is a sudden flood of ions (including sodium, potassium, and calcium) -- and potentially impairing receptors in the brain that are associated with learning and memory.

**Second impact syndrome:** Sometimes a person has a second concussion before their brain has recovered from the first. This can lead to what is called second impact syndrome. In the second impact syndrome, massive swelling of the brain causes pressure inside the skull that chokes off or impairs the flow of fresh blood which can lead to irreparable brain damage or death.

**Recovery from concussion:** It may take considerable time and energy for the brain to correct this chemical imbalance. Some changes in the brain start to resolve immediately, but the recovery time seems to vary. The duration and degree of recovery depend not only on the severity of the blow but also on how many previous concussions a person has had.

Immediately post-concussion, the arteries in the brain begin to constrict which reduces blood flow to the tissue and lowers the rate at which oxygen is delivered to the brain. At the same time the demand rises for the sugar glucose which provides energy to the brain for healing. But the need for more glucose may not be met by the narrowed arteries, and this discrepancy (“mismatch”) can create a metabolic crisis. Eventually, the surviving brain cells that have been damaged do slowly repair themselves, the demand for glucose eases, the arteries to the brain open wider, and blood flow to the brain returns to normal. However, the brain may remain in a diminished metabolic state, a quiescent condition, for a considerable length of time before returning to normal.
Investigation

The typical scenario for the CHI (closed head injury) or pseudo-TBI claim goes like this: A motor vehicle collision occurs. The impact force can range from nominal to severe. You receive a settlement packet that includes an elaborate report from a neurologist and a psychologist or neuropsychologist that concludes that the plaintiff suffered a traumatic brain injury in the accident and now has serious cognitive losses that may include complaints of memory loss, diminished IQ, marked change in behavior, depression, etc. The report lists elaborate test results that show how plaintiff is suffering from all of these symptoms. The reports further indicate – through seemingly complex and technical language – that plaintiff was tested for malingering and the results show that he was not malingering. A quick check reveals that the healthcare provider (neurologist, psychologist or neuropsychologist) is “adequately credentialed.” You are faced with the prospect of sinking money into the defense of a “losing case”----or you can settle the case now “at a bargain.” You must investigate the claim before you jump to the conclusion that plaintiff has an indefensible brain injury.

1. **Raw test data.** If you get nothing else to investigate a CHI or TBI claim, you must get the “raw test data” and all of plaintiff’s medical records. This is the information that plaintiff’s expert relied upon in reaching the conclusions that he included in his or her report. Your expert must have the same data in order to check the conclusions reached by plaintiff’s expert. Reference to a recent case provides a good example of the importance of obtaining the data. Plaintiff’s settlement brochure included a report that stated that plaintiff had passed the Test of Memory Malingering (TOMM)—one of the “validity tests” some experts regard as part of the “generally accepted methodology.” However, review of the raw data revealed that her scores were actually consistent with failing the test. Plaintiff’s expert testified that there were other reasons to explain her failing score on the malingering test such as fatigue, anxiety, etc. Based upon his belief that these other reasons explained plaintiff’s failure on the malingering test, plaintiff’s expert completely discounted the scores and noted that she passed. Of course, only his interpretation of the raw data was included in his report that was shown to the defendant company. Without the raw data, no one would have been the wiser. If you have a case where the claimant fails or scores poorly on the TOMM, you will find an intriguing trial exhibit in the manual devised to grade the TOMM. This manual happens to use as a test class, a group of people who were claiming TBI and were in litigation. That test group scored worse on the memory test than any other group, including those with dementia. The only explanation for the extremely poor performance was malingering in the test group. Plaintiff in the referenced case scored almost the same as the malingering test group in the manual. The grading data from the TOMM was an extremely powerful exhibit in obtaining a successful result. There are numerous other examples of plaintiff’s experts mis-scoring or altering the recognized test protocol for one reason or another – or even no reason, but the effect of which is to be able to report an “abnormal test result.” Moreover, raw test data and medical records are essential in determining the chronology and correlation of events, findings, symptoms, functioning and treatment which, in turn, is the basis for applying recognized methodology and epidemiological analysis to the facts in order to effectively evaluate and defend the claims.

2. **Education records.** Historical records that pre-date the accident provide a base line from which to judge whether symptoms and alleged cognitive dysfunction were caused by the event. School records and those of vocational institutions are valuable in laying out the mental aptitude that the claimant had documented throughout his life. In many instances, the school records will also contain IQ test results and scores for other standardized tests that prove invaluable in rebutting false TBI claims. Post-accident school records,
particularly in cases that involve children, often prove recovery or lack of change compared to pre-accident functioning and performance, thus raising serious doubt about injury or effect.

3. **Employment records.** These historical records will help complete the full picture of the claimant’s aptitude before the event. Job performance, attendance, duties and responsibilities, and even the occupation itself can be instructive on the issue of aptitude. There also may be documented performance evaluations and instances of unusual behavior that could defeat or mitigate claims that the accident caused aberrant conduct. Again, post-accident records may also document or facilitate evidence of recovery or lack of change compared to pre-accident functioning and performance.

4. **Tax returns.** Again, the idea is to get as much information as you can to document the complete biographical and evidentiary story of who the claimant was and is. You will then have objective evidence to rebut and defend claims manufactured out of whole cloth.

5. **Accident/Incident Reports.**

6. **Pre-Accident/Incident and Post-Accident/Incident Medical Records.** This category of records is the second-most important in defending the TBI claim, including ambulance, EMT records, Emergency Department, Hospitalization, inpatient and outpatient records, all pre-accident medical records from hospitals and outpatient (physician and mental) health care providers, and substance abuse records. The significance of obtaining these records is obvious. In addition, all neuroradiological films should be obtained and reviewed by a consulting neuroradiologist who can explain the findings or absence of findings and their respective significance.

7. **Other.** Each case will have unique facts that may require creative discovery. As experienced claims handlers or trial lawyers, you will know to search criminal records, social security records, military or armed services records, workers compensation claims, divorce/child custody records, other lawsuits, and other insurance claims. While it is important to gain these records in any personal injury case, the potential relevance of information in these records may be increased with certain TBI claimants.

**Consultation**

1. **Neuropsychologist:** A psychologist who has completed special training in the neurobiological causes of brain disorders and who specializes in diagnosing these illnesses and consulting with neurologists in treatment using a predominantly medical (as opposed to psychoanalytical) approach. Neuropsychology is the study of behaviors mediated by brain function and of the interrelationship between brain dysfunction with measurable and observable behavioral and cognitive deficits. Scaled qualitative and objective tests are used to evaluate and monitor the functional aspects of brain output and function.

2. **Neuroradiologist:** A radiologist who specializes in the use of x-rays and scanning devices (MRI, CT, Arteriography or Angiography, etc.) for the diagnosis and treatment of diseases of the nervous system, also known as neuroimaging. A neuroradiologist may be concerned with the clinical imaging, therapy, and basic science of the central and peripheral nervous system, including but not limited to the brain, spine, head and neck.

3. **Neurologist.** A doctor who specializes in the diagnosis and treatment of disorders of the nervous system.

**Neuroimaging**

1. **CT (Computerized Tomography).** Pictures of structures within the body created by a computer that takes the data from multiple X-ray images and turns them into pictures on a screen. CT stands for computerized tomography. The **CT scan** can reveal fluid, some soft-tissue and other structures that cannot even be seen in conventional X-rays. Using the same dosage of radiation as that of an ordinary X-ray machine, an entire slice of the body can be made visible with about 100 times more clarity with the CT scan. The
tomograms (“cuts”) for CT are usually made 5 or 10 mm apart. The CT machine rotates 180 degrees around the patient’s body. The machine sends out a thin X-ray beam at 160 different points. Crystals positioned at the opposite points of the beam pick up and record the average absorption rates of the varying thicknesses fluid, tissue and bone within that 5 to 10 mm slice. The data are then relayed to a computer that turns the information into a 2-dimensional cross-sectional image.

2. MRI (Magnetic Resonance Imaging). A special radiological technique designed to image internal structures of the body using magnetism, radio waves, and a computer to produce the images of body structures. In magnetic resonance imaging (MRI), the scanner is a tube surrounded by a giant circular magnet. The patient is placed on a moveable bed that is inserted into the magnet. The magnet creates a strong magnetic field that aligns the protons of hydrogen atoms, which are then exposed to a beam of radio waves. This spins the various protons of the body, and they produce a faint signal that is detected by the receiver portion of the MRI scanner. A computer processes the receiver information, and an image is produced. The image and resolution is quite detailed and can detect tiny changes of structures within the body, particularly in the soft tissue, brain and spinal cord, abdomen and joints.

Newer MRI techniques for evaluation of brain tissue are associated with sophisticated software that create images of significant diagnostic and evidentiary value, but they require expert analysis and consultation for interpretation, explanation and presentation.

3. PET (Positron Emission Tomography). A specialized imaging technique that uses short-lived radioactive substances to produce three-dimensional colored images of those substances functioning within the body. These images are called PET scans and the technique is termed PET scanning. PET scanning provides information about the body’s chemistry not available through other procedures. These scans are usually done by a nuclear medicine specialist. Unlike CT (computerized tomography) or MRI (magnetic resonance imaging), techniques that look at anatomy or body form, PET studies metabolic activity or body function. PET has been used primarily in cardiology, neurology, and oncology.

The use of PET scanning in forensic situations including criminal, personal injury, product liability, medical malpractice, and toxic torts remains controversial. When there are few controlled experimental studies and no available sensitivity and specificity rates, the forensic application of non-replicated, unpublished or anecdotal PET observations has been deemed inappropriate by the Society of Nuclear Medicine Brain Imaging Council. Although the Society of Nuclear Medicine Brain Imaging Council has not recommended that all functional imaging studies should be summarily excluded as evidence in legal proceedings, it has set forth in its clinical applications guidelines that the appropriateness of findings and conclusions offered in the form of expert testimony based on PET studies in any but the few generally accepted clinical situations are difficult and virtually impossible to substantiate based on the current level of scientific and clinical knowledge. The admissibility of PET scans and expert testimony based on PET scan interpretation is clearly a subject for application of the evidentiary tests articulated in Daubert and F.R.E. Rules 702 and 703, and the other various and sundry state statutory and decisional rulings regarding the admissibility of scientific evidence. One of the key factors in the use of PET scanning in cases alleging TBI is the lack of norms for comparative purposes. This is an area where a consulting expert is clearly needed to ferret out the limitations and insufficiencies of the methodology relied upon by plaintiff’s expert in the interpretation of a PET scan. In short, a reliable role of PET scanning in the evaluation of closed head injury has not currently been established and is, at best, controversial, nor is

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14 Ethical Clinical Practice of Functional Brain Imaging. Journal of Nuclear Medicine, Vol. 37; 7; 1256, 1257.
there any substantial body of scientific evidence that supports the correlation of PET scan findings with neuropsychological test results in patients with closed head injury or alleged TBI. We address challenging this imaging technique (as well as SPECT and QEEG) as evidence of TBI in more detail later in this article.

**Neuropsychological Evaluation**

There are batteries of neuropsychological tests and evaluations designed to focus in on particular brain functions that are typically associated with TBI. Although some experts may agree on the validity of the results produced by certain test batteries, there is disagreement as to which batteries and how many batteries should be used to attain valid results. These batteries of tests form the basis of most TBI claims where neuroimaging such as the MRI and CT scan are diagnostically normal. The claimant’s neuropsychologist will administer one or more batteries of tests in order to offer “scientific proof” of permanent neurologic injury and residual cognitive sequelae. In these instances, it is absolutely crucial to consult with your own neuropsychologist for assistance in interpreting the raw data, determining whether the chosen battery of tests was appropriate, and otherwise understanding the claim and its potential for defense. A comprehensive neurophysiological evaluation may include any or all of the following as circumstances warrant.

<table>
<thead>
<tr>
<th></th>
<th>1. <strong>Record Review.</strong> See Section III, (1) through (7), above, for non-comprehensive list of records to be obtained for review by the consulting/testifying neuropsychologist.</th>
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<tbody>
<tr>
<td></td>
<td>(h) Malingering or symptom exaggeration</td>
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<td></td>
<td>(i) Sensory-perceptual functioning</td>
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<td></td>
<td>(j) Language abilities (e.g. naming objects, comprehension and following directions, word finding difficulties, word substitutions and writing)</td>
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<td>(k) Personality testing</td>
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<td>(l) Assessment of emotional sequelae (interfering with or affecting neurocognitive abilities)</td>
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<td>(m) Personality and psychological tests (e.g. PTSD)</td>
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<td>(n) Assessment of reading comprehension and academic achievement</td>
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<td></td>
<td>2. <strong>Clinical Interview (focusing on):</strong></td>
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<td>(a) Presenting chief complaints and post-accident symptom presentation patterns.</td>
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<td>(b) Pre-accident medical, psychiatric and social history.</td>
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<td>(c) Developmental history</td>
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<td>(d) Family medical and psychiatric history</td>
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<td>(e) Educational and employment history</td>
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<td>(f) Substance abuse history, if any.</td>
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<td></td>
<td>3. <strong>Administration of Neuropsychological and Psychological Tests (to evaluate):</strong></td>
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<td>(a) Memory functioning (e.g. verbal and visual as well as immediate, delayed recall and recognition memory)</td>
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<td></td>
<td>(b) Mental processing speed</td>
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<td></td>
<td>(c) Attention and concentration (immediate and sustained)</td>
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<td>(d) Executive functioning (e.g. deductive-analytical reasoning, problem solving, sequential planning)</td>
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<td>(e) Pre-morbid level of cognitive functioning</td>
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<td>(f) Novel/New learning abilities</td>
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<td></td>
<td>(g) Motor functioning (e.g. motor speed, motor sequencing, and fine motor control)</td>
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</tbody>
</table>

A careful review and analysis of the original test protocol, raw data and interpretive statistical analysis available in the literature is often necessary – but rarely undertaken by most consulting experts and defense counsel – to effectively assess the apparent importance, perceived reliability, and potential defenses with respect to particular neuropsychological test results and findings in certain circumstances. The
Challenging The Use of “New” Technologies to Prove Mild Traumatic Brain Injury

The attempt to use nuclear medicine studies like PET scans and SPECT scans as well as quantitative EEG to prove mild traumatic brain injury resulting from trauma or toxic exposure has grown in popularity and is no longer a rarity. Our approach to evaluating and ultimately excluding evidence based on these imaging techniques, however, is generally framed by an analysis under Daubert and F.R.E. Rules 702 and 703 (or their state counterparts).

1. Description of PET Scan

PET (Positron Emission Tomography) is a nuclear medicine study that utilizes positron emitting radiopharmaceuticals which are incorporated into biologically active compounds (e.g. FDG – fleurine-18 fleurodeoxyglocuse) which, in turn, are injected in to the bloodstream. PET scan of the brain generally measures regional cerebral metabolism. Unlike EEG, which provides information regarding events occurring at the surface of the brain in proximity to electrodes, PET measures glucose metabolism and substrate utilization in three dimensions throughout the complete volume of brain tissue. This qualitative analysis represents the relative differences between the most active area of the patient’s brain and all other areas of the patient’s brain. This does not represent the absolute utilization of glucose (in micromoles) which is a quantitative analysis.

2. Description of SPECT Scan

SPECT (Single-photon-emission computed tomography) is a computer process which evaluates cerebral perfusion after a radioactive tracer is injected into a patient’s bloodstream intravenously. In general, the radiopharmaceutical attaches primarily in the gray matter because chemicals like glutathione are more prominent there. Using the techniques of CT, a rotating gamma camera is able to view the distribution of the radiopharmaceutical within the brain after the tracer has set and accumulates in different areas depending on the rate blood flow being supplied to that region of brain tissue. A computer analyzes the photons counted by the camera which primarily concentrate in the brain’s gray matter in a ratio of approximately 4:1 as compared to the white matter of the brain. The cameras identify the cerebral perfusion in the patient’s brain which can then be compared with expected patterns in “a normal brain” or even to the average cerebral perfusion activity in the same “slice” of the patient’s brain. Again, this qualitative analysis of cerebral perfusion activity generally represents relative differences of perfusion within the patient’s brain rather than a reliable measurement or quantitative analysis of absolute blood flow volume or speed.

3. Description of QEEG

QEEG (Quantitative electroencephalogram) is the mathematical processing of digitally recorded EEG in order to highlight specific wave form components, transform the EEG in to a format that elucidates relevant information or associate numerical results with EEG data for subsequent review or comparison. QEEG provides a measure of neurophysiologic activity.

Clinical Use/Misuse of PET, SPECT and QEEG

The correlation between PET or SPECT neuroimaging findings and neurocognitive outcome based on functional observation or neuropsychological testing is weak at best. Some studies find no correlation, and for the purposes of challenging the admissibility of this evidence one should look for the absence of statistical or clinical significance.

1. PET

In general, neither PET or SPECT are accepted for use in forensics. The physician statements of the American Academy of Neurology are a strong support for this position. In general, neither PET nor SPECT results can be used to prove that abnormal or aberrant behavior was due to an organic brain dysfunction. In the evaluation of head trauma, PET and SPECT are generally considered to be investigational. For example, PET fails to demonstrate specificity
for diagnosis of head injury or mild TBI (e.g. brain injury caused by head trauma or toxic exposure). PET scans are “abnormal” in several psychiatric disorders including depression, bipolar disorder, obsessive/compulsive disorder, anxiety, and schizophrenia. PET has yet to demonstrate diagnostic specificity and routine clinical utility within the context of head trauma. By clinical specificity, we mean that the test or image result is specific to a particular clinical population or condition but not to others. On the other hand, the accepted uses of PET in clinical practice include Alzheimer’s, Parkinson’s, Huntington’s, chorea, Pick’s disease, stroke, epilepsy (with respect to diagnosis and focal origin location), rating tumors (with respect to growth patterns and differentiating recurrent high grade tumors from chemotherapy-induced necrosis), HIV encephalopathy, and in determining brain death.

2. SPECT

The use of functional neuroimaging in forensic situations remains especially controversial. When there are few controlled experimental studies and no available sensitivity or specificity rates (e.g. potential rate of error concept under Daubert), the forensic application of non-replicated, unpublished and/or non-peer reviewed anecdotal PET or SPECT observations is inappropriate and has ominous implications. This can lead to unsupportable conclusions if introduced as objective evidence linking neuropsychological parameters (such as blood flow or metabolism) to judgment, insight, motives, or as an “offer of proof of a dramatically caused or substance [toxicity] – induced coma or injury.”

3. QEEG

As for QEEG, it generally has no statistically significant incremental utility. There are no clear QEEG/EEG features which are unique to mild traumatic brain injury. Late after head injury, there is only poor correlation between electrophysiologic findings and clinical symptoms. There are no proven pathognomonic signatures on QEEG/EEG for identifying head injury as the cause of particular clinical signs and symptoms – particularly late after injury. Indeed, anxiety and motor activity may affect QEEG data.

The accepted usage of QEEG is presently limited to epilepsy in that this type of study may be useful in locating an epileptic focus and suggesting the type of epilepsy, but QEEG is not diagnostic for whether a patient has epilepsy. QEEG is used clinically for monitoring in the operating room and the ICU in some institutions. Potentially, QEEG may have utility with cerebralvascular disease, dementia, and epilepsy (particularly with respect to pre-surgical mapping and evaluations).

In addition, PET scans and SPECT scans are qualitative in nature; they are not measuring the absolute utilization of glucose or cerebral profusion, respectively. A patient’s PET scan or SPECT scan only represents a study of the relative differences between the most active area of brain metabolism or blood flow, compared to the metabolism or blood flow of other areas of the same patient’s brain at the same approximate time of examination.

Consequently, a number of questions are warranted regarding admissibility of medical and/or scientific evidence of brain injury. These include:

- Has the method been adequately tested in the index situation (present circumstances) based on substantial peer review and publications that form the scientific basis for its admission? Is the scientific or clinical method technically adequate?
- What can you make of the pattern of relative differences? Are there signature patterns?
- Is there clear distinction between what is termed “normal” compared to “abnormal”?
- Is there sufficient scientific reliability and validity? What is the accepted efficacy for a specific scientific or clinical application of the tool, technique or method at issue? (The rate of error and existence and maintenance of standards for controlling the use of the tool, technique or method for clinical applications must be demonstrated.)

PET scans and many neuropsychological tests offered as evidence today do not meet these requirements and there are no double blinded studies comparing normal patients with head injury patients without
traumatic brain injury and with patients diagnosed as having traumatic brain injury in an identical format, hence the challenge. There is no substitute for comprehensive medical and neuropsychological research, consultation, and analysis in order to effectively evaluate and defend these head injury and TBI claims.

**Manipulation or Improper Use of Results**

1. **Administration Protocol must be proper, accepted and peer reviewed. For example:**
   - A radiopharmaceutical preparation
   - Patient preparation
   - Radiopharmaceutical intake
   - Image acquisition
   - Image processing
   - 3-dimensional
   - Proper filters
   - Window settings (cutoffs for input) (i.e. background settings or cutoffs are critical)
   - Vertex through the cerebellum (complete brain for comparison)

2. **Data Display**
   - Digital pictures (black and white plus actual volume numbers)
   - Color pictures are generated
   - Electronic data preservation/collection
   - Gamma camera emissions that are measured have no color
   - The data collected from the slice is averaged within the volume surface (typically 4-5 mm slices)
   - Black and white studies show gradual gradations of brightness (flow or metabolism), contrary to color presentations – particularly those with inappropriate color cutoffs. Black and white studies must be obtained, viewed and reviewed with color studies *because* black and white studies do not acknowledge what otherwise can appear as glaring contrast in a color presentation, thereby preventing unwarranted comparisons and unjustified conclusions.

3. **Interpretation and Reporting**
   - Specificity: Test/Image result specific to a particular clinical population or condition, but not to others
   - Sensitivity in mild disease is poor
   - Study on patient must be compared with normal subjects (studies on normals, not studies “read as normal”) without knowing that the patient was, in fact, normal.)
   - Can’t determine the timing of defect
   - Insufficient evidence of patterns of abnormality for specific ailments/injuries for most disease entities, injuries, or exposures and most are unrelated in time or origin to the subject of the lawsuit
   - Normal space is critical, therefore injury base for CHI in TBI is critical

   - Variable factors of inter-subject metabolic measurements
     - Special resolution of the PET camera at the institution
     - Age of the patient
     - Patient gender

   - Study conditions (e.g. patients scanned with eyes open v. closed; patients scanned with ears plugged v. unplugged) Timing of PET scans (e.g. >60 minutes post-injection of trace F)

   - Lumped constant

   - Whole brain metabolic rate calculation (e.g. gray matter ROI’s, average of gray and white matter ROI’s all brain slices which includes CSF

   - Mental state of patient (e.g. anxiety, sadness, happiness, restlessness)

   - Biological Variability of Patient/Subjects Chemical characteristics of an individual’s brain (e.g. those associated with neurological and/or psychiatric illnesses)

   - Inter/Intra observer variability

   - Doctor’s interpretation

   - Miscellaneous Measured versus calculated attenuation correction (affects air during repositioning)

   - Method of obtaining blood time – activity

   - Method of defining ROI’s

   - Use of caffeine and nicotine (these change CBF and brain glucose metabolism)

   - Time of day (e.g. Circadian Rhythm affect of glucose metabolism)
For these reasons, and probably some not addressed here, a “normals” database and an “injury” base for patients with CHI or TBI are both critical.

**Relevant Medical Literature for Review and Consideration Regarding PET, SPECT & QEEG**

**PET**


**SPECT**


QEEG


Relevant Judicial Decisions for Review and Consideration Regarding PET, SPECT & QEEG

A. General standards for admissibility of scientific evidence


B. Some cases addressing PET scans


C. Some cases addressing SPECT scans


D. Some cases addressing QEEG

- Head v. Lithonia Corp., Inc., 881 F.2d 941 (10th Cir. 1989).

Final Thoughts

Clearly there are a number of practical considerations for evaluating purported evidence from PET/SPECT scan and neuropsychological testing, not the least of which are the determination of the “normals” base. “Normals” in the context of PET scans, for example, are not scans of patients which the “expert” says he has read as “normal”, rather they should be scans of patients who are reportedly normal by their own subjective reports and those of their treating clinicians – those without TBI or head injury whose PET scans are used as examples of “normal” scans. The key question, of course, is: What can be concluded from the “pattern” of relative differences between the patient’s neuropsychological test battery results and neuroimaging and the test battery results and reliable neuroimaging of clinically normal patients? If there is no “normals” database or it is inadequate or flawed in design, the patient’s neuropsychologist test battery and neuroradiological scans cannot be compared for clinical significance; in short, the methodology changes the conclusion.

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TIPS ON SOLVING THE MEDIATION PUZZLE

More and more, parties to lawsuits are considering alternate means of resolution. If cases cannot be settled among the parties, mediation appears to be the most currently popular fall-back position. Consideration of certain topics may ease the process of fitting together the mediation puzzle.

Litigation versus Alternative Dispute Resolution (ADR)

For decades, cases that could not be settled have been determined through litigation. More recently, factors such as cost, crowded dockets, delays in resolution, uncertainty of outcome, emotion factors, fear of adverse publicity and resolution of auxiliary issues have led parties to consider ADR.

ADR can be as flexible as the imagination of the parties and their willingness to agree. A rather notorious solution demonstrates the flexibility of ADR. When Southwest Airlines was first starting, a conflict arose with another, smaller airline regarding the use of the name. Rather than expend millions in costly, lengthy trademark litigation, the parties agreed that the conflict would be resolved by an arm wrestling contest between the CEO’s of the two companies. After considerable training and publicity, the event was held in conjunction with a party, and the issue settled.

The parties can elect arbitration. Arbitration can be binding or non-binding. It can incorporate high-low agreements. It can require the arbitrator to decide issues in addition to or other than the ultimate settlement amount. It can mimic “baseball arbitration” in which each side chooses its most reasonable demand or offer with the arbitrator allowed to choose only one or the other as the ultimate award. The variations on the above are limited only by the creativity of the parties.

Mediation is the more commonly chosen form of ADR. A mediator is selected by parties and attempts to facilitate settlement. This article will discuss points to consider once the decision to mediate has been made.

Mediator Background

- Actively practicing litigator;
- Retired litigator;
- Rent-A-Judge;
- Mediation firm or company;
- Member of a mediation panel;
- Member of national mediation organization;
- Current or former member of court annexed mediation panel;
- Formally trained versus practical experience;
- Present or former plaintiffs’ lawyer;
- Present or former defense lawyer.

Selection Considerations

The selection of a mediator may be driven by a number of considerations:

Complexity of Issues:

In a more complex case, a mediator with expertise in the type of litigation might be advisable. For example, in a trucking accident case, it may be advisable to have a mediator familiar with Federal Motor Carrier Safety regulations.

In certain types of injury cases, a mediator with expertise in a particular injury may be advantageous. For example, in a case involving a brain injured plaintiff, a mediator with experience litigating, settling and/or involving brain injuries may be beneficial.

The expertise of a mediator in regard to a particular type of litigation or a specific type of injury is often able to “cut through” issues that are sidetracking the attorneys and/or parties from resolving the matter.

Peculiarities of Venue:

If the attorneys for one or more of the parties are unfamiliar with the venue, then a current or past litigator with experience in that venue and knowledge of results in cases tried there might be a good choice.

Cost Considerations:

What are the mediator’s fees? Will he/she have to travel a considerable distance to mediate the case? If so, lodging and travel expenses are an issue. Does the mediator have a reputation for short or long drawn-out mediations?

Mediator’s Reputation:

Unquestionably, some mediators are more effective than others. What do attorneys and adjusters who have participated in mediations have
to say about the proposed mediator? What is his/her track record? What percentage of the mediator’s cases get settled during the mediation? Within weeks or months after the mediation?

**Client Control Problems:**

Is it perceived that plaintiff’s attorney is unable to control his/her client? It is not unusual for plaintiffs to have unrealistic expectations. These can be driven either by “optimistic” statements made by plaintiff’s attorney at the beginning of the relationship or by media reports of huge verdicts and settlements. Frequently an experienced plaintiff’s attorney (one in high standing with both the plaintiff and defense bar) can be an effective mediator. He/she can be seen by the plaintiff as a person of such stature and reputation that his/her evaluation is of value. Likewise, a retired judge who can truthfully tell parties that he has presided over dozens of similar cases and has a good feel for the potential value of the particular case should it go to trial, might be considered.

Similarly, a revered defense attorney who has settled hundreds of similar cases can be effective in helping both claims personnel and plaintiffs better evaluate the claims’ potential.

Whatever the background of the mediator, certain characteristics are required: a mediator involved in a case with a difficult client or clients must be persistent, diligent, patient, responsive, impartial, in control, resilient and professional. Each potential mediator can be judged by those characteristics.

**Perception of Type Mediator Needed:**

Mediators differ in their approach to the process. Some act as judges; others as evaluators, messengers, peacemakers or facilitators.

If liability is not an issue, an evaluator or peacemaker may be needed. If the case involves a close question of liability, perhaps a judge or facilitator is needed.

Many mediators employ each of the above techniques to one degree or another. Discussions with attorneys who have been involved with potential mediators can define the techniques employed and the success of those techniques. Personal interviews can be employed.

**Other Considerations**

**Site of Mediation:**

Many litigants prefer a neutral site such as a hotel conference room, courthouse, library, etc. On occasion, one of the parties will request/demand that the mediation take place at his/her office. While giving up “home turf” to the adversary seems counterintuitive, some experts feel that, in fact, the gesture may be productive.

First, it is helpful to have secretarial assistance, photocopying equipment, faxes and telephones available.

Law offices also afford the amenities of coffee, soft drinks and facilities. Some commentators believe that the “host” in fact may become more reasonable based on appreciation of the concession by the adverse party. See, for example, Richard M. Calkins & Fred Lane, *Lane & Calkins Mediation Practice Guide* (2006).

**Persons Present at Mediation:**

The conventional wisdom is that, at least, the attorneys for each party, the plaintiffs and representatives of the insurers and/or defendants should be present. Oftentimes, logistics require concessions.

Also, under some circumstances, structured settlement specialists who can convert a dollar settlement offer to a stream of payments over years can be an effective aid to a successful mediation.

If a subrogated lien (medical insurance, workers’ compensation, physician or hospital lien) is a serious impediment, inviting a representative of the lienholder to the mediation might be considered. The mediator, then, can seek the assistance of that representative in getting the matter settled.

**Non-monetary Issues:**

Although most settlements hinge on the dollar amount demanded and offered, some cases require that other issues be considered. Is confidentiality of the
fact and amount of the settlement important? If so, a confidentiality clause can be negotiated. Is an apology being demanded? A news release? These, and other issues, may have some value to both sides of the dispute and must be addressed early in the mediation so that they come as no surprise to any party.

Conclusion

ADR, and specifically, mediation, is becoming more and more prevalent. It is important to select a qualified, experienced mediator who understands the issues and can focus the parties and their attorneys on the points that will lead to resolution.

ARTICLES

DOCUMENT RETENTION & THE SO-CALLED SAFE HARBOR OF RULE 37(F)
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This is the third in a series of articles on electronic discovery by members of the Louisville, Kentucky ALFA firm. The first two articles in the series can be found in previous issues of Transportation Update archived on the ALFA website. Ms Guillory is a senior associate at Woodward, Hobson & Fulton. Mr. Fulton is a partner. Feel free to contact the authors with questions.

It’s happening right before your eyes. You are negotiating an important contract with a well-financed and well-armed (legally-speaking) opponent. The negotiations – often conducted via email – have been contentious and, although you finally reached an agreement, you are concerned that the deal could sour in the long term. How do you protect yourself and your company in the event that this contract turns you into a plaintiff or a defendant?

You’ve spent the last few months reading Bar Briefs’ e-discovery series and you know that the ESI created during your negotiations is very important. You also know that the very nature of emails and other ESI makes preservation problematic because file content can change each time a file is accessed. In addition, you are not sure how your company emails are stored and whether they are routinely deleted. What steps can you take to protect your company before litigation is anticipated?

Do the Federal Rules offer some sort of protections if information is deleted in the months and even years between the contract signing and the decision to litigate? Although much interpretation remains to be done by the federal courts, you can find some comfort in a good document retention policy and in Rule 37(f).

This article will discuss the creation of Rule 37(f), its meaning and the benefits and burdens of its so-called “safe harbor.” This article will also share practical document retention tips that will assist you in navigating the safe harbor.

I. The Language of the Amendment.

A. The Evolution of Good Faith

Subsection (f) of Rule 37 was added as part of the e-discovery amendments. It specifically addresses the deletion and alteration of ESI that occurs everyday during ordinary use. The new subsection reads as follows:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

At first glance, this language is deceptively simple, but the exact phrasing is very significant. When the Members of the Civil Rules Advisory Committee began work on the e-discovery
amendments, one of the most important issues was the level of culpability involved in the destruction or spoliation of ESI.\textsuperscript{15} What level of fault was necessary for sanctions? Simple negligence? Recklessness? Willful conduct? In the end, the Committee decided upon the “good faith” culpability standard which implies some level of intent or willful blindness beyond mere negligence. However, the initial drafts of Rule 37(f) were much different than its final form.

One proposal from the Discovery Subcommittee required parties to maintain one full day of backup tapes and limited sanctions to willful or reckless actions.\textsuperscript{16} The primary proposal submitted for public comment discussed sanctions in terms of reasonableness:

Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

1. the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
2. the failure resulted from loss of the information because of the routine operation of the party’s electronic information system.\textsuperscript{17}

Another proposal submitted to the public required a much higher level of culpability:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party’s electronic information system unless (1) the party intentionally or recklessly failed to preserve the information; or (2) the party violated an order issued in the action requiring the preservation of the information.\textsuperscript{18}

As a result of the very different proposals, many of the public comments centered on culpability. The primary proposal required mere negligence and created a dangerous trap even when a party acted in good faith. On the other hand, a reckless or willful standard opened the door for abuse by parties who approached, but did not cross, the line of reckless or willful destruction of ESI.\textsuperscript{19}

Ultimately the Advisory Committee chose the “intermediate culpability standard” based upon good faith.\textsuperscript{20} This middle ground enables courts to consider each case of ESI destruction within the context of the party’s document policy and the facts and circumstances of the litigation.

B. Analysis of Word Choice

In its final form, the amendment contains some key words and phrases that form the basis for its future interpretation and application. We will consider each in turn. First, the term “sanctions” is undefined and leaves courts free to use all of the traditional punishments for evidence spoliation. We know from case law that sanctions for the destruction of ESI can include adverse inference instructions, such as that used in Zubulake, the granting of enhanced damages and even the ultimate sanction of dismissal of plaintiff’s claims or striking of defendant’s answer.\textsuperscript{21} The Rule prevents the imposition of these types of sanctions if a party meets all of the other requirements. However, the Rule does not “prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information.”\textsuperscript{22} A court can still order additional discovery meant to compensate for the missing information. Additionally, the Rule does not foreclose upon the ability of a court to make evidentiary rulings based upon the origin and completeness of proffered electronic evidence.\textsuperscript{23}

“Routine” and “good faith” are the second and third key phrases in Rule 37(f). The interpretation of these concepts and their necessary intersection will undoubtedly form the primary subject for interpretive decisions.

\textsuperscript{16} \textit{Id}.
\textsuperscript{17} Advisory Committee Report of May 17, 2004, as revised on August 3, 2004, p. 54.
\textsuperscript{18} \textit{Id}, at 57.
\textsuperscript{19} Allman, supra, at p. 10.
\textsuperscript{20} Minutes, Advisory Committee Meeting, April 14-15, 2005, at 43.
\textsuperscript{21} See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. October 22, 2003) (\textit{Zubulake IV} (adverse inference instruction));
\textsuperscript{22} Technologies, Inc. v. Microsoft Corp., 2006 WL 2401099 (E.D. Tex.) (enhanced damages); Leon v. IDX Systems Corp., 464 F.3d 951 (9th Cir. 2006) (dismissal).
on subsection (f). For example, can a “routine” operation include the involvement of humans and voluntary decision-making? Or does “routine” mean the automatic actions of a computer program, operating without the need for human interaction and decision-making? What about decisions on whether to maintain backup tapes, the type of tapes used and their rotation within the system? The Advisory Committee Notes mention that “[t]he ‘routine operation’ of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy.”

While “routine” implies some type of semi-automated system, the term “good faith” implies just the opposite, and “may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”

The good faith requirement stems from the substantive duty to preserve evidence independent from obligations imposed by the Rules. At the same time, this human-based component can be at odds with the more automated “routine” component of the safe harbor. For example, it is possible for people, acting in bad faith, to turn a blind eye while ESI is destroyed by a “routine” system function. By the same token, it is possible for a computer error (i.e., something not routine) to destroy ESI despite the good faith actions of people involved. The language of the Rule requires both “routine” and “good faith,” and this requirement creates a balancing act for both counsel and client. The client must create a document retention plan that includes both routine operations (such as the automatic destruction of general email after 60 days) and good faith procedures (such as litigation holds) whereby the automatic processes can be temporarily halted or altered if litigation is reasonably anticipated. According to the Advisory Committee Notes, good faith is a multi-factor analysis which can include (1) “whether the party reasonably believes that the information is likely to be discoverable,” (2) whether the information is available from alternative sources, and (3) “the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.”

II. Guidance from Case Law

In addition to the language of subsection (f), you can also look to some recent decisions for guidance on acceptable document retention practices. Although Kentucky courts have remained silent on Rule 37(f), recent cases from neighboring Sixth Circuit states, such as Ohio and Michigan, are instructive. Some courts are reluctant to impose sanctions without some evidence of bad faith or gross negligence. In addition, whether the other party is prejudiced is a key factor. For example, in Goldman v. Healthcare Mgmt. Sys., Inc., the plaintiff alleged that several lines of source code had been deleted. The plaintiff also claimed that the relevant lines proved defendant’s copyright infringement. The defendant argued that the “clean up” was performed in the ordinary course of business, prior to learning of plaintiff’s allegations. The defendant further argued that the deleted lines did not contain any relevant information, and several other sources of evidence were available to the plaintiff. The court did not impose sanctions because there was no affirmative showing of bad faith, and the plaintiff was not prejudiced by the lost information.

Similarly, in Floeter v. City of Orlando, a district court declined sanctions even though the defendant failed to preserve relevant backup tapes after litigation was reasonably foreseeable. The defendant argued that the duty to preserve did not arise until it was served with discovery requests. The court rejected this argument but refused to impose sanctions because the backup tapes were overwritten as part of an existing document retention policy. There was no evidence of bad faith or even gross negligence by the defendant. Furthermore, the important emails could be found in other sources, thus minimizing prejudice to the plaintiff.
At the same time, courts have been quick to impose sanctions when a party’s conduct is egregious. In *PML North America, LLC v. Hartford Underwriters, Ins. Co.*, a court entered a default judgment, plus fees and costs, against a defendant who failed to produce servers and files after repeated requests.\(^{31}\) There was also evidence that data that was produced had been altered. Although the spoliation in *PML* was obvious, courts have also imposed sanctions in the absence of proof that any spoliation occurred. In *May v. Pilot Travel Centers, LLC*, a court ordered the defendant to pay plaintiff’s costs associated with filing a motion for sanctions.\(^{32}\) The defendant waited to produce ESI until so late in the litigation that the plaintiff could not use it in depositions or dispositive motions. The defendant argued that Rule 37 sanctions are not available unless a party first files a motion to compel. The court rejected this argument and also excluded the subject ESI.

As mentioned above, much interpretation remains to be done, but these cases are a good reference point for actions taken immediately before and during litigation.

### III. Taking Advantage of the Safe Harbor

Although the contours of the safe harbor are still evolving, attorneys and clients alike can still fashion document retention policies that, if implemented and enforced, will go a long way in meeting the “routine” and “good faith” requirements of Rule 37(f). First, some preliminary steps to consider. In order to be effective and, thereby routine and in good faith, a document retention policy ("DRP") must be implemented with top-down support. Without this support, the policy is more likely to be neglected or just partially-implemented. Also, consider assembling a document team consisting of department heads, in-house and outside IT experts and attorneys. The team will be charged with formulating, enforcing and revising the DRP. Document all major decisions such as what software to use, document categories, time periods for retention, etc . . . . Make certain that the team develops both the paper policy and the procedures and tools to enforce it. This should include procedures for suspending the policy, if necessary, to preserve evidence for litigation or investigations. Then consider when to implement the policy. It should be created at a time in which the client has little or no ongoing or reasonably-anticipated litigation or investigation. If this is not possible, do everything to ensure that the implementation does not inadvertently destroy files that are potentially relevant to pending or anticipated claims. An ill-timed or shoddy implementation could be viewed as an act of bad faith by a court.

Once you have addressed these preliminary considerations, it is important to keep four helpful questions in mind:

1. What do we have?
2. What do we have to keep?
3. What do we do if we anticipate litigation?
4. What do we do now?

These four questions will guide the team in preparing and implementing an effective DRP. As a result, you will have taken the first steps toward the safe harbor of Rule 37(f).

#### A. What Do We Have?

In answering this question, the team should define the entire universe of documents (paper and electronic) used and stored at a company. This includes laptops, PDAs, thumb drivers, printers, fax machines, and even access keycards used by employees. Remember to also consider whether third parties hold information that could be relevant to potential litigation. Do you use off-site storage or vendors for services such as transcription of records? Do employees work from home? Also consider what types of programs you are already using to manage your files and storage space? The team must know all of the potential sources of documents before they can formulate a plan to manage those documents.

#### B. What Do We Have To Keep?

In other words, what can you throw away or destroy? First, consider document retention time periods imposed by federal and state government and/or by your industry’s governing body. Then consider items that you should keep for important business purposes such as documents on intellectual property rights, contentious contract negotiations, corporate historical documents and other

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\(^{31}\) 2006 WL 3759914 (E.D. Mich.).

\(^{32}\) 2006 WL 3827511 (S.D. Ohio).
items that are required by your everyday business needs. Also consider the statute(s) of limitations applicable to potential claims against you. Are you a target for employment lawsuits or premises liability lawsuits (or both)? Consider the time limits for each type of claim and apply those time periods as minimum time limits for the retention of that category of documents. Finally, consider your past litigation history. What has past experience taught you about the types of documents that may be needed for the prosecution or defense of claims?

Formulating and implementing a DRP provides the “routine” component of Rule 37(f), but there is no one-size-fits-all DRP. Each must be based upon the past experience and current challenges for each company. What works for one will not work for another. The team should take all of these factors into account when categorizing documents and choosing relevant time periods.

C. What Do We Do If We Anticipate Litigation?

This is the heart of the “good faith” component of Rule 37(f), and the applicable buzz phrase is whether litigation is “reasonably anticipated.” This term applies to both plaintiffs and defendants and it also covers government investigations. In formulating a DRP, your team should also create procedures and forms to use when litigation is reasonably anticipated. For example, the company must be prepared to take the following steps immediately:

- Send a litigation hold letter to all employees defining the scope of preservation.
- Meet with key people who will be involved in the litigation. They will know the issues and where potentially-relevant documents may be stored.
- Suspend routine archiving and deletion software.
- Consider consulting with an outside vendor on how best to preserve potentially-relevant ESI without dismantling the entire document retention system.
- Creating mirror images of important files may be one option.
- Physically segregate documents, laptops and other sources of information, if possible.

Once these initial actions are taken, periodically review and revise the litigation hold letter as the facts and issues central to the case emerge. Also, arm your outside counsel with a working knowledge of your IT department. How many servers do you use? Types of software? Locations for file storage? If counsel can gain a detailed understanding of the company’s document retention system, you may be able to avoid costly and time-consuming depositions of IT personnel.

D. What Do We Do Now?

The final question creates an ongoing duty to work on both the “routine” and the “good faith” portions of your DRP. To ensure that the policy is “routine,” perform regular audits. Are the right categories of information being held or destroyed at the appropriate time? Are there new advancements in software that can make archiving and deletion easier? Also, use top-down support to enforce the policy. Supervisors should be examples to staff. A policy is useless without enforcement. In addition, lack of enforcement endangers your ability to prove that information was destroyed as the result of the “routine, good faith operation of an electronic information system.” The only thing worse than not having a document retention policy is having one that is not followed.

Finally, as the document team to periodically review and revise the DRP as needed. The policy must grow and change just as a business grows and changes. At the same time, be mindful of the timing of any changes and their impact on existing or anticipated litigation.

IV. Conclusion

This article concludes the e-discovery series. Our goal was to provide practical tips and analysis that will assist counsel and clients in navigating the relatively uncharted waters of the new Civil Rules. Thanks to all of the authors and contributors for their dedication to this series.
DESPITE STAUNCH OPPOSITION ON ALL FRONTS, THE DOT’S MEXICAN LONG-HAUL DEMONSTRATION PROGRAM MOVES FORWARD

After more than a decade of protest and concern over the North American Free Trade Agreement (NAFTA) long-haul trucking provisions, which granted unrestricted use of U.S. highways to Mexican and Canadian domiciled trucking firms, the first Mexican trucks crossed the U.S./Mexican border on September 7, 2007 under the Bush Administration backed long-haul demonstration program (Demo-Program).

According to the Mexican Transportation Secretary, Luis Tellez, the two trucks are operated by Transportes Olympic, a Mexican corporation located near the city of Monterrey, Mexico. They hauled construction materials from their home base “directly” to New York and South Carolina. On their return trip, they picked up loads from Arkansas and Alabama and hauled them back across the border into Mexico. In exchange, Mexico granted Stagecoach Cartage & Distribution Inc., an El Paso, Texas based firm, authority to travel throughout Mexico.

Since that time, and in the face of strong opposition, the U.S. Department of Transportation (DOT) has granted more Mexican trucking firms unrestricted use of U.S. Highways, and Mexico has reciprocated the U.S. grant of authority by permitting an equal number of U.S. domiciled trucking firms unrestricted use of Mexican roads.

In the Past

Immediately after the 1993 adoption of NAFTA, opposition from labor, environmental and public watchdog organizations quickly mounted to delay the full implementation of the NAFTA long-haul trucking provisions with Mexico. Amongst other reasons, these organizations cited potential safety and negative environmental consequences as their primary concerns.

In contrast to Canadian domiciled trucking firms, Mexican domiciled trucking firms were limited to operation within the (pre-NAFTA) 25-mile border zone near the US/Mexico border, where they have been operating since 1982. Since that time, Mexican payloads bound for the U.S. (to locations outside of the 25 mile border zone) had to be transferred to trucks owned by U.S. domiciled trucking firms. The U.S. trucks would then haul the loads to their ultimate destination. In response to the U.S. decision not to fully implement the NAFTA long-haul trucking provisions with Mexico, the Mexican government refused to allow any U.S. trucks into Mexico.

In 2001, a NAFTA Arbitration Panel ruled against the U.S. position to limit its full implementation of the NAFTA provisions that allowed Mexico domiciled trucking firms unrestricted access to U.S. Highways. Despite the ruling, lawsuits and failed negotiations with Mexican authorities further delayed the full implementation of NAFTA.

NAFTA Critics

Amongst others, the U.S. Senate, U.S. House, the International Brotherhood of Teamsters, the Sierra Club, the Public Citizen, the Environmental Law Foundation and the Owner-Operator Independent Drivers Association have all voiced strong concerns relative to the opening of the U.S./Mexican border. Although they may have varying interests at stake, they have several common safety and environmental concerns.

According to some critics, Mexican truck drivers on U.S. highways pose a significant risk to U.S. motorists as they are not
including a regulation requiring Mexican trucks to be outfitted with a readily observable Commercial Vehicle Safety Agency (CVSA) decal which would only be issued to trucks (after inspection) on a 90-day interval. (Administrator Hill’s testimony to Congress outlining the safety measures taken to ensure the success of the Demo-Program can be found at: http://www.fmcsa.dot.gov/about/news/testimony/tst-031307.htm)

Finally, the Mexican Secretary of Transportation has vowed to aid Mexican trucking firms in bringing their truck fleets up to U.S. standards.

**The DOT Demonstration Program**

On February 23, 2007, the U.S. Secretary of Transportation, Mary E. Peters, announced that all congressional safety and security mandates relative to the NAFTA (Mexico) long haul provisions had been met. (A list of the 22 congressional safety mandates can be found at: http://www.dot.gov/affairs/cbtsip/congrmandates.htm) She also announced that the DOT was therefore ready to launch a one-year demonstration program aimed at evaluating the effects of full implementation
of the NAFTA (Mexico) long-haul trucking provisions. Under the Demo-Program, the DOT would gradually grant authority to 100 Mexican domiciled trucking firms to operate in the U.S. In exchange, the Mexican government agreed to grant 100 US domiciled trucking firms the same authority to operate within Mexico.

Due to various delays, including a House vote (411-3 against the Demo-Program) and a lawsuit filed by the Sierra Club, the Teamsters, the Public Citizen, the Environmental Law Foundation and the Owner-Operator Independent Drivers Association, the DOT was forced to delay the initial launch date. The lawsuit alleged that the Bush administration failed to publish proper notice and allow for public comment on the program.

After the DOT and the FMCSA announced their revised demo launch date (September 1, 2007), NAFTA critics were quick to respond by filing for emergency injunctive relief to halt the implementation of the Demo-Program in the Ninth Circuit Federal Court of Appeals. On August 31, 2007, the Court issued an order denying the Plaintiffs’ requested stay and gave the DOT the green light to launch its Demo-Program.

Due to the timing of the Court ruling, the DOT planned its new launch date for September 7, 2007. In response to the announcement, the Teamsters flocked to San Diego, California and Laredo, Texas on September 6, 2007 to protest the Demo-Program, carrying signs that read, “NAFTA KILLS,” “UNSAFE MEXICAN TRUCKS” and “SAVE AMERICAN HIGHWAYS.” Despite the protest, two Mexican owned trucks crossed the US/Mexican border as scheduled on September 7, 2007 and successfully delivered their payloads in New York and South Carolina.

On September 10, 2007, the DOT announced that it allocated $66.2 Million dollars to improve what some have dubbed the “NAFTA Super-Highway System.” The money was earmarked for improvements aimed at reducing congestion and improving freight flow by adding bypasses and truck-only lanes.

At the same time, Senators Byron Dorgan (D, ND) and Arlen Specter (R, PA) introduced Senate Amendment 2797 to H.R. 3074 for a vote scheduled for September 11, 2007. The Dorgan Amendment passed with an overwhelming 75-23 (2 not voting) vote in favor of prohibiting the “establishment of a program that allows Mexican truck drivers to operate beyond the commercial zones near the Mexican border.”

Although the House and the Senate have voted to block funding for the Demo-Program and the lawsuits are still pending, some find it hard to believe that the Bush administration will abandon its efforts to open the U.S./Mexican border as set forth by NAFTA. In fact, just one week after the Senate voted to block the program’s funding, the FMCSA announced that, “IBC Inc., a San Diego-based trucking company, and Transportes Rafa, a Mexicali, Baja-based trucking company, had both received authority to make long-haul deliveries in Mexico and the United States, respectively, as part of the cross-border trucking demonstration project.”

On September 24, 2007, Transportes Padilla, a Tijuana-based trucking company, became the third Mexican domiciled trucking company to receive authority to make long-haul deliveries in Mexico and the United States, respectively, as part of the cross-border trucking demonstration project. As of this date, there has been no indication that either the DOT or the FMCSA is allowing the funding block to halt the Demo-Program. Pursuant to the
tracking program, each truck will have to be outfitted with a GPS device which would allow the FMCSA to monitor whether truck drivers are adhering to the U.S. hours of service regulations by keeping track of origination locations and travel progress. With respect to the pending lawsuit filed by various labor and environmental organizations, the Plaintiffs’ brief was due for filing on November 19, 2007 and the Government’s brief is due on December 15, 2007. Although there is no published date for the Court’s decision, if its August 31, 2007 ruling is any indication of which way is leaning, the Demo-Program will keep on trucking.

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