EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published the Transportation Update for about seventeen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update archives.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katherine Garcia (kgarcia@alfainternational.com). Please add the 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 want to receive the 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.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers.\(^1\) 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: ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts and Settlements; Practice Tips; and Articles. We also offer non-recurring headings and in the future will offer issues focused on a particular area of trucking law.

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 the editors any verdict or settlement that you think is of interest to the trucking community. In this edition, see the excellent results achieved by our ALFA attorneys in Illinois (two cases), Kentucky and Texas.

• 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 issue, we feature the following: “Where’s Our Driver, Waldo?” by Krsto Mijanovic.

\(^1\) All hyperlinks are in blue. 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.
Articles provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, we feature the following:

- Joseph R. Swift, *The New Frontier of Discovery: Applying the Amended Rules of Electronic Discovery*

- Will H. Fulton, *Litigating the Seat Belt Defense*


The Directory of Member Firms at the end of the newsletter offers a current list of all the individuals who are active in the ALFA Transportation Practice Group by firm at the end of the Transportation Update for a number of years.

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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The regional directors help the Transportation Update Editors gather cases and articles for each issue from their areas.

If you have any suggestions for content feel free to contact them or the Editors.

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FUTURE EVENTS

Each year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2010 Transportation Seminar will be held Marco Island, Florida at the Marriott Beach Resort from April 28 to April 30, 2010. The official web site of this venue is http://marcoislandmarriott.com. On the site, the web cam tool is particularly useful. The golf course is beautiful.

Both beach lovers and golf lovers will be delighted with this wonderful facility. Our Program Chair for the 2010 seminar is P. Clark Aspy of Naman, Howell, Smith & Lee, LLP, who can be reached at (512) 479-0300 and aspy@namanhowell.com. If you have a topic that you would like to suggest, please contact Clark Aspy by email or phone.

The Chairman of the Transportation Practice Group for 2009-2010 is Danny M. Needham of Mullin Hoard & Brown, LLP in Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com. Our Vice Chair is Peter Doody of Higgs, Fletcher & Mack, LLP in San Diego, California who can be reached at (619) 236-1551 and doody@higgslaw.com. Our Chair Emeritus is Paul T. Yarbrough of Butt Thornton & Baehr PC in Albuquerque, New Mexico, who can be reached at (505) 884-0777 and ptyarbrough@btlaw.com. Please contact any of these individuals or the editors with any suggestions for the program.

For more information, please also consider contacting Katie Garcia at kgarcia@alfainternational.com.

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Fall 2009 issue of Transportation Update will be published in October, 2009.

NEWS NOTES FROM THE EDITOR

“Free” Training Material from the Federal Government

The Federal Railroad Administration (FRA) released in January 2009 an educational video for truck drivers designed to promote safety at highway-rail grade crossings. The video reviews the legal responsibilities of drivers as they approach and travel over highway-rail grade crossings and is available in both English and Spanish. The video is downloadable from the website listed below and should be of interest to your safety and training personnel. We expect the Plaintiffs’ bar and “transportation safety” experts hired exclusively by Plaintiffs will now assert in crossing cases that your company had a poor safety program if your driver had not seen this material prior to the accident. http://www.fra.dot.gov/us/content/2109

A Primer for the FMCSA’s CSA 2010 Initiative

The FMCSA is in the process of rolling out a new methodology to replace SAFER and SafeStat which have been seriously discredited. DOT’s Audit Department was so concerned by a 2004 audit of SafeStat that it barred public access to FMCSA motor carrier ratings and published a Warning. This emerging issue is a very critical one, and we will have articles on this topic in the fall. In the interim a good informational website can be found at: http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm. Contact the Editors or another ALFA attorney if you require additional information.

DISCLAIMER

The ALFA Transportation Update does not create an attorney-client relationship between the reader and any attorney nor does it render legal advice on any specific matter. No reader
should act or refrain from acting on the basis of any statement in the ALFA Transportation Update without seeking advice from qualified legal counsel on the particular facts and circumstances involved. Readers are responsible for obtaining such advice from their own legal counsel.

OF SPECIAL NOTE IN THIS ISSUE: ALFA’S GO TEAM HOTLINE

The ALFA Transportation Practice Group now presents a new service for its transportation clients. The ALFA GO TEAM HOTLINE. ALFA knows that its transportation clients must often confront time-sensitive emergencies. The ALFA GO TEAM HOTLINE is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

Here’s how the service works. An ALFA client needing immediate legal support calls the ALFA GO TEAM HOTLINE at 1-866-540-ALFA (2532), an ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts. When you contact the ALFA GO TEAM HOTLINE, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA GO TEAM HOTLINE. Remember, 1-866-540-ALFA (2532).

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

Our ALFA attorneys presented an excellent program from May 6–8, 2009 at the Hotel del Coronado in San Diego. Peter Doody was the Program Chair. We will be publishing the articles presented at the seminar over the next year for those of you who were unable to join us in San Diego.

On March 26-27, Peter Doody spoke on a panel regarding ECM download data at the Association of Southern California Defense Counsel annual meeting in Los Angeles. In April, he spoke at the Transportation Lawyers Association annual meeting on FMCSA regulation and its impact on casualty litigation and damages.

In April, Will Fulton presented a biomechanist on direct examination in “Presenting the Biomechanical Witness” at the Kentucky Defense Counsel/ Kentucky Justice Association Trial Practical Skills Seminar on the Seat Belt Defense in Lexington and in Louisville, KY.


The following ALFA members are presenting at the conference on the following topics:

- Greg Conforti of Johnson & Bell, LTD is on a panel addressing the topic titled “Truth or Consequences: The Handling of Ethical Dilemmas.”
- Will Fulton of Woodward, Hobson & Fulton, LLP is on a panel addressing the topic titled “Big Brother: Anticipating FMCSA Agenda.”
- Curtis Stambaugh of McNees, Wallace & Nurick, LLC is on a panel addressing the topic titled Extreme Makeover: Predicting Environmental Regulatory Focus”.
- Walter Zink of Baylor, Evnen, Curtiss, Grimit & Witt, LLP is on a panel addressing the topic titled “I’ve Got a Secret: Managing Electronic Data Issues.”
- Paul Yarbrough of Butt, Thornton & Baehr, PC is the moderator and Tamara Cook of Renaud, Cook, Drury, & Mesaros, PA is on the panel addressing the topic titled “Pictionary: Developments in Accident Reconstruction Techniques.”
- Bruce Menk of Hall & Evans, LLC is the moderator for a panel addressing the topic titled “Who Wants to be a Millionaire: Trends in Damages Awards.”
- Danny Needham of Mullin, Hoard & Brown, LLP is on a panel addressing the topic titled “Survivor: Collecting in Bankruptcy Proceedings.”
- Mark Scudder of Strasburger & Price, LLP is the moderator for a panel addressing the topic titled “Password: Preparing for Cross Border Operations and Issues.”
FACTS

This case involves the head-on collision of two tractor trailers. The Plaintiff suffered serious injuries in the accident. Kristina Mae Arciszewski was employed by AKJ Enterprises, Inc. (“AKJ”) which owned the tractor and trailer that Arciszewski was driving when she crossed the center line and struck the Plaintiff, Winford Dallas Jones. AKJ was under contract as a motor carrier with a broker, C.H. Robinson Worldwide, Inc. (“C.H. Robinson”). The Plaintiff claimed Arciszewski was an employee of both AKJ and C.H. Robinson and was acting in the course and scope of her employment at the time of the accident.

The Plaintiff sued for negligence, negligent hiring and supervision of AKJ, negligent entrustment, violations of the Federal Motor Carrier Act and violation of the Federal Motor Carrier Regulations. The Plaintiff never served and voluntarily dismissed all the defendants except for C.H. Robinson.

At the onset of the suit, C.H. Robinson filed a motion to dismiss all of the claims against it. Jones v. D’Souza, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. Sept. 11, 2007). The court ruled in the motion to dismiss that the defendant driver caused the collision with the Plaintiff. The court also found that the motor carrier was the employer of the at-fault driver and the motor carrier, AKJ, was an independent contractor to the broker, C.H. Robinson. Jones v. D’Souza, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. Sept. 11, 2007).

The Plaintiff asserted that C.H. Robinson was vicariously liable for the negligence of Arciszewski and AKJ. C.H. Robinson denied it was vicariously liable for their negligence because AKJ was an independent contractor and Arciszewski was AKJ’s employee. The contract between AKJ and C.H. Robinson contained a standard independent contactor clause. Because C.H. Robinson had filed a Federal Rules of Civil Procedure 12 (b) (6) motion to dismiss, the court found it premature to dismiss the claim based upon an unsubstantiated broker and carrier agreement. The Contract Carrier Agreement had been entered into between AKJ and C.H. Robinson to specify the terms and conditions of their relationship.

Plaintiff’s negligent supervision claim was dismissed by the court because this particular cause of action has not been recognized in Virginia. Negligent hiring, however, has been recognized by Virginia. In Virginia, this cause of action requires that the employer knew the hired individual had propensities that posed a threat to others. Plaintiff claimed C.H. Robinson knew or should have known that AKJ (i) had limited experience as a motor carrier; (ii) had been assigned a conditional or unsatisfactory rating by the Federal Motor Carrier Safety Administration; (iii) was impaired financially; and (iv) was otherwise incompetent and unfit to operate safely as an interstate commercial carrier. Jones v. D’Souza at 12. The court found the plaintiff had alleged sufficient facts to support the negligent hiring claim.
With respect to Plaintiff’s negligent entrustment claim, C.H. Robinson argued that it could not negligently entrust equipment that was owned by AKJ. The Plaintiff argued that it was not the negligent entrustment of equipment by the negligent entrustment of assignment to haul the cargo. Therefore, it was a negligent entrustment of an activity instead of an instrumentality. The Plaintiff argued that this claim is recognizable under Section 308 of the Restatement (Second) of Torts. Even though Virginia had not addressed the negligent entrustment of an activity, the court acting with diversity jurisdiction undertook to determine what the Supreme Court of Virginia would do if faced with this issue and determined that if presented to the Virginia Supreme Court, it would recognize a cause of action for negligent entrustment of an activity.

Finally, the court addressed Plaintiff’s claims under the Motor Carrier Act and the Federal Motor Carrier Safety Regulations. The Plaintiff claimed it was entitled to bring an action under 49 U.S.C. Sec. 14704 (a) (2) which provides:

A carrier or broker providing transportation or service subject to jurisdiction under Chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part. 49 U.S.C. Sec. 14704 (a) (2).

The court found that the legislative history did not indicate that Congress was intending to create a private cause of action to address personal injury actions under the Motor Carrier Act. Therefore, the court granted C.H. Robinson’s motion to dismiss these claims.

After what the court termed “extensive discovery,” the parties filed cross-motions for summary judgment. Previously when considering the motion to dismiss, the court found that Arciszewski was negligent and that her negligence was the proximate cause of the accident. The court revisited the claim that C.H. Robinson was vicariously liable for the negligence of AKJ and Arciszewski; however, the court was now able to review the Contract Carrier Agreement between AKJ and C.H. Robinson. Under this Agreement, AKJ was deemed an independent contractor, and thus C.H. Robinson had no control over AKJ or its driver Arciszewski. The Plaintiff attempted to make an argument that C.H. Robinson was a third party logistics company and thus exercised more control over AKJ. The court relied on the Contract Carrier Agreement, however, to find that AKJ was an independent contractor. Thus, C.H. Robinson could not be held liable under a respondeat superior theory of liability for the negligence of AKJ or Arciszewski.

The court also revisited the claim that C.H. Robinson negligently hired AKJ as an independent motor carrier. Once again the court turned to the Restatement (Second) of Torts wherein Section 411 provides a defendant may be liable for physical harm caused to third persons by failing to exercise reasonable care in employing a competent or careful contractor to do work involving a risk unless it is done skillfully and carefully. The court once again found that if faced with the issue, the Supreme Court of Virginia would extend the cause of action for negligently hiring an independent contractor if the situation involved the selection of a carrier by a freight broker or third party logistics provider when there is a threat of physical harm.

The court discussed the burden upon a plaintiff to succeed on a claim for negligent hiring of an independent contractor. The court found that the Plaintiff would have to prove that the independent contractor was indeed incompetent or unskilled to perform the job for which he was hired; that the harm resulted from that incompetence and that the principal knew or should have known of the incompetence.

It is important to note, that the court stated that the parties did not dispute the incompetence of AKJ or Arciszewski or that C.H. Robinson conducted any investigation into AKJ’s safety and fitness as a carrier other than determining it had a conditional safety rating and a valid operating authority from the Federal Motor Carrier Safety Administration (“FMCSA”). Instead the court follows the parties focus as to the duty of inquiry that is required of Robinson under the facts of this case. C.H. Robinson claimed the there was no evidence that would cause them to believe that AKJ was likely to be involved in a collision such as that
involved in this case. Plaintiff, on the other hand, argued that if C.H. Robinson would have investigated AKJ’s safety program and safety ratings, it would have know that AKJ was a carrier likely to be involved in an accident.

Important to the facts of this case was a requirement contained in the Contract Carrier Agreement that AKJ maintain a “satisfactory” safety rating with the FMCSA. There are three levels of safety rating under the FMCSA SafeStat program: satisfactory, conditional and unsatisfactory. The FMCSA gave AKJ a conditional safety rating because the FMCSA did not believe AJK had adequate safety management controls. The court also noted internal documentation wherein C.H. Robinson had noted other problems with AKJ’s performance during the time period that it had done business with the carrier.

The court turned to a decision by a federal district court in Maryland, Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004), which permitted a negligent hiring claim against C.H. Robinson to go to the jury. The court in Schramm found a common law duty of third party logistic providers to use reasonable care in the selection of carriers. The Schramm court even went so far as to delineate the duties of a third party logistics company when it stated:

This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.


To determine whether C.H. Robinson owed a duty to the Plaintiff, the court examined the conflicting testimony of the Plaintiff and the Defendant. C.H. Robinson argued that the Schramm court’s finding that there was a duty was mistaken. C.H. Robinson offered, as expert testimony, the head of the FMCSA at the time of the accident to explain the purpose of SafeStat. This testimony was not available in the Schramm case claimed C.H. Robinson. While the court found that because C.H. Robinson was a third party logistics provider and interjected itself into exercising more control over the shipment, the court found that C.H. Robinson did have a duty to investigate the fitness of AKJ prior to hiring the carrier. The court found that whether C.H. Robinson reached the appropriate duty of inquiry in selecting a competent carrier was not appropriate for a motion for summary judgment and, thus, would be submitted to the jury.

COMMENTARY

After recognizing the general rule that “one who employs an independent contractor is not liable for injuries to third parties resulting from the contractor’s negligence,” the court gets caught up in non-legal titles to send the case to the jury. Further the court imposes on the broker responsibilities neither intended by Congress nor imposed by common law upon principals that arrange for the transportation of freight.

There is no legal entity known as a “third party logistics provider.” A third party logistics provider is an industry term that brokers use to describe their value added services to the shipper or consignee. Not only is there is no legal definition of “third party logistics provider” but also the contractual services vary by each company and can range from arranging transportation to synchronous manufacturing and beyond. Following the lead of Schramm, this court imposes a higher burden on property brokers for undertaking services that are a creature of contract and assume that all third party logistic providers are the same or provide similar services. The court presumes that a third party logistics provider exercises more control over a shipment than a broker and this control lessens the independence of the contractor.

A broker has been defined and its duties outlined in 49 C.F.R. Sec. 371 (a). This regulation provides:

(a) Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. 49 C.F.R. Sec. 371 (a)
The federal regulation recognizes that a broker may provide additional value added services. 49 C.F.R. § 371 (b) and (c) provide:

(c) Brokerage or brokerage service is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d) Non-brokerage service is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee. 49 C.F.R. § 371 (b) and (c)

The court presumes that C.H. Robinson, as a third party logistics provider, retained control of the manner and means of doing the work that is subject to the contract of carriage. Further, the court is quick to presume that AKJ was incompetent and that Arcisziewski was an incompetent driver just because C.H. Robinson did not elect to dispute their competency in its briefs. Based upon these presumptions, the court finds the general proposition that one who employees an independent contractor is not liable for that contractor’s negligence is not applicable to C.H. Robinson’s selection of AKJ.

As in Schramm, the court relies on the information contained in the SafeStat website even though the FMCSA has specifically issued a disclaimer from using the information for other than its intended purposes. Thus, the agency charged with the responsibility for determining the qualifications for operating a motor carrier states not to use this information for the purpose in which the court wants it used. To its credit, the court does state that the causal connection between the conditional rating and the accident are not strong but sufficient to withstand a motion for summary judgment.

The FMCSA has been given the authority to determine whether a motor carrier is fit to operate on the nation’s highways. If the carrier is not fit to operate on the nation’s highways, it shall be given an “unsatisfactory” status by the FMCSA and its operating authority is revoked. To determine if a carrier is fit, the government has given the FMCSA a broad range of powers to inspect and audit a carrier. In addition, the carrier under 49 U.S.C. § 385.15 is permitted to have an administrative review of an unsatisfactory rating. To place this burden on the broker, not only must the broker make these decisions regarding a carrier’s fitness without the benefit of similar investigatory powers, but also it must evaluate the differences of the state laws in which the transportation may take place. Finally, forcing such a determination to be made by the broker effectively takes away the carrier’s right to an administrative review of an unsatisfactory rating.

CONCLUSION

A string of cases, including Schramm, through this most recent decision in Jones v. C.H. Robinson has started the trip down the slippery slope of allowing a state law claim of negligent hiring and now negligent entrustment to be alleged against the broker for the acts or omissions of the motor carrier or its driver. See, Schramm v. Foster, 341 F. Supp. 2d 536 (D. Maryland 2004) (negligent hiring); Clarendon National Ins. Co. v. Johnson, 666 SE 2d 567 (Ga. App. 2008) (negligent hiring). Brokers, however, are regulated by the federal government as is the activity entrusted. The morass of differing state laws will paralyze a vital piece of the nation’s transportation puzzle if left to the courts to impose requirements on brokers that may conflict with the federal regulatory scheme. Finally, a motor carrier with any negative information in their SafeStat report may be effectively put out of business when brokers are reluctant to assign the carrier moves. Certainly, such a result was neither intended nor condoned by the FMCSA.

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**FLORIDA**

*Primary Versus Excess Coverage*


While driving an employer-owned truck, Johnny Word suffered personal injuries in an August 21, 2004 accident caused by Alberio Mejia. Mejia’s insurer paid Word its $100,000 policy limits for his claimed medical bills of $175,000 plus permanent, disabling injuries. ACE Group, owner of Illinois Union Insurance Company, provided underinsured motorist coverage to Word’s employer, Comcar. Comcar was self insured up to $3,000,000. Word demanded Illinois Union “‘tender and pay its full [policy] limit of $2,000,000 underinsured coverage.’”

The policy Illinois Union’s issued Comcar was titled “excess truckers liability policy,” and the declaration page stated the insurer would indemnify the insured for loss from bodily injury liability up to a sum certain over the retained limit. Illinois Union’s corporate representative testified the policy was excess insurance because “‘it applies in excess of a self-insured retention... [and]...if the claim is covered, a payment has to be greater than three million for our policy to respond.’” The policy read “‘[w]e will pay the insured for the ultimate net loss in excess of the retained limit...that the insured must legally pay as damages because of bodily injury...to which this policy applies caused by an accident and resulting from the ownership, maintenance or use of a covered auto.’”

Although ACE initially notified Word he was covered under the Policy’s UIM coverage, Comcar subsequently denied Word’s claim for UIM benefits based on Comcar’s risk manager’s pre-accident execution of a UIM rejection form. Comcar sent its executed UIM rejection to its insurance broker, but the broker had not in turn forwarded the rejection form to Illinois Union/ACE.

Under Florida’s UIM Statute §672.727(1), Fla. Stat., UIM coverage in an amount equal to the policy’s bodily injury limit is required and automatically included in primary insurance policies, unless coverage is specifically rejected by the named insured’s execution of a rejection form. As the Court noted, “the Florida Supreme Court has warned that ‘[b]ecause the uninsured motorist statute was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorists; it is not to be whittled away by exclusions and exceptions.’” (quoting Young v. Progressive S.E. Ins. Co., 753 So.2d 80, 83 (Fla. 2000).

In competing summary judgment motions, Plaintiffs argued that Comcar’s retained self-insurance was not insurance, and therefore, the Policy was primary as the first layer of actual insurance, while Illinois Union argued the Policy provided excess coverage only. The Court sided with Illinois Union’s reasoning that “(1) while self-insurance is not primary insurance, it does assume responsibility for the primary layer of exposure; and (2) a policy which sits above the primary layer of exposure is properly characterized as an ‘excess policy.’” The Court held that since the policy was titled excess insurance and operated as excess insurance, the policy could not be converted into something it was not intended to be by the contracting parties. (citing Travelers Ins. Co. v. Quirk, 583 So.2d 1026, 1029 (Fla. 1991).

Further, the Court provided that even if the Policy had been primary, Comcar’s risk manager’s rejection of UIM benefits was valid and served as an independent ground for granting summary judgment to Illinois Union. The failure of the insurance broker to provide the UIM rejection form to the insurer did not affect the validity of Comcar’s rejection of UIM coverage.

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shortly after the accident, J.B. Hunt retained an adjuster to investigate the accident, take pictures of the J.B. Hunt vehicle and the accident scene, and obtain a police report. The complaint further alleged that during this same time period, J.B. Hunt’s Vice President of Claims and Litigation flew to Philadelphia and visited Minto in the hospital as well as viewed the accident scene and inspected the J.B. Hunt tractor and trailer involved in the accident.

According to Minto’s complaint, on or about March 28, 2002, J.B. Hunt repaired and replaced a substantial amount of the tractor involved in the accident. Minto alleges that he was severely injured and unable to speak as a result of the accident. Indeed, his complaint alleges that the accident rendered him a quadriplegic.

According to the complaint, on May 31, 2002, Minto was fired by J.B. Hunt “for cause.” On August 22, 2002, Minto retained counsel who directed J.B. Hunt to preserve, among other things, any vehicle parts related to the accident. Minto’s counsel also requested that J.B. Hunt not destroy or dispose of the vehicle involved in the accident. According to his complaint, Minto claims that he was unable to gain access to the tractor-trailer because it was in the possession and control of J.B. Hunt.

J.B. Hunt filed an answer to Minto’s complaint. Thereafter, J.B. Hunt moved for judgment on the pleadings, arguing that Minto’s claims were barred by the pertinent provisions of the Pennsylvania Workers’ Compensation Act, 77 P.S. §481. This provision provides that the Workers’ Compensation Act is the employee’s exclusive remedy against the employer for injuries sustained by the employee in the course of employment. The trial court granted J.B. Hunt’s motion for judgment on the pleadings. Minto moved for reconsideration of the order, but the trial court ultimately reaffirmed its order and dismissed J.B. Hunt as a defendant.

Because the order which granted J.B. Hunt’s motion for judgment on the pleadings did not dispose of all claims in Minto’s lawsuit, the order was not final for purposes of appeal. The trial court issued an opinion and a “final” order as to J.B. Hunt, making the required determination required
The Pennsylvania Workers’ Compensation Act provides, in pertinent part:

The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees....in any action at law or otherwise on a count of any injury or death...

77P.S.§481(a).

The Act defines the term “injury” as follows:

...an injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto.... The term “injury arising in the course of his employment,”... shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer...

77P.S.§411(l).

Minto argued that during the relevant period in question, he was either not an employee of J.B. Hunt or, if he was an employee, was not an employee acting within the course and scope of his employment, i.e. he was not “actually engaged in the furtherance of the business or affairs of the employer”. In his complaint, Minto did not seek damages from his former employer for physical injuries that he sustained during the accident. Rather, his complaint sought economic damages as a result of the alleged actions of his former employer in repairing and/or replacing evidence that could have aided Minto’s lawsuit against the product liability defendants.

The Pennsylvania Superior Court, in its opinion, noted that “...the focus of the exclusivity provision of the Act is to limit the liability of an employer or account of injury arising in the course of the employee’s employment with the employer....” (Minto). The Court held that “...exclusivity is triggered if, when the cause of action arises, the plaintiff was an employee or ‘sustained’ ‘injury’ while ‘actually engaged in furtherance of the business or affairs of the employer.’” (Id.). The Court held that Minto’s claims against his employer were not barred by the exclusivity provision of the Workers’ Compensation Act.

In a concurring opinion, Judge Gantman noted agreement with the majority opinion that the Pennsylvania Workers’ Compensation Act did not preempt Minto’s claims against his former employer but disagreed with the majority’s interpretation of the issue on appeal as limited solely to the exclusivity provision. Judge Gantman recommended that, on remand, the trial court should revisit J.B. Hunt’s motion for judgment on the pleadings and determine if the motion should have been granted on other grounds. In particular, Judge Gantman suggested that the trial court should review the well-pleaded facts contained in the complaint to determine if the plaintiff sufficiently pled his spoliation claim as a negligence cause of action. The concurring opinion indicated Judge Gantman’s belief that the complaint may not have adequately pled the required duty, breach, causation and resulting damages against J.B. Hunt.

The Minto case should serve as reminder to trucking companies, their claims professionals, and their defense counsel, that when an accident occurs, the company driver should be notified before the company undertakes any repairs or salvage of the company vehicle, particularly where, as in Minto, the company driver is injured in the accident. At least in Pennsylvania, Minto makes it clear that if the employee is injured while operating the employer’s vehicle and is not provided some reasonable opportunity to inspect the vehicle and/or component parts before any repairs to the vehicle are undertaken, the employer may subject itself to a civil lawsuit, not barred by the Workers’ Compensation Act, if the employee brings a products liability lawsuit against the vehicle and/or component part manufacturers.

Under Pennsylvania law, an employer has a statutory lien for all workers’ compensation benefits paid to an employee in any third-party action by the employee. 77 P.S.§671.
In a situation like Minto, the employer may well want to consider cooperating with the employee since a recovery by an employee against the vehicle and/or component parts manufacturers may provide a source of reimbursement for some or all of the Workers' Compensation lien.

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VERDICTS, APPEALS AND SETTLEMENTS

Editors Note – As members of the ALFA Transportation Practice Group try many types of cases in addition to trucking cases the Editors have asked them to submit for publication here a wider variety of verdicts than those limited to trucking cases. This issue has two such verdicts. The Editors

Editors Note – This is a case that Greg Conforti was asked to come in and try three weeks before trial. The Editors

ILLINOIS

Larry G. Shreve and Debbie Shreve v. Douglas D. Swalec, Individually and as agent for Verizon North Inc., a foreign corporation, and Verizon North Inc., a foreign corporation (Client AIG), Cook County 06 L 4783

TRIED - April 28 through May 4, 2009
JUDGE - Clare McWilliams VERDICT - $3,209,188.69

ITEMIZATION

Medical Treatment - $366,688.69
Lost Wages - $242,000
Disfigurement - $500
Pain and Suffering  
  past and future - $1,000,000
  Emotional Distress  
  past and future - $600,000
Loss of Normal Life - $300,000
Loss of Society for Debbie Shreve - $700,000

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Trial Attorneys  
Gregory D. Conforti  
Lynn M. Reid

FACTS OF CASE

On April 5, 2006, a Verizon North, Inc. service van being operated by Douglas Swalec turned directly in front of Larry Shreve (51) as he rode his motorcycle in the opposite direction at approximately 45 mph. Mr. Shreve struck the passenger side of the van and was catapulted off his bike head first into the side of the van. He was air lifted to St. Anthony Hospital in Rockford, Illinois where he was primarily treated for severe facial fractures, loss of a majority of his teeth, and a displaced fracture of his elbow into the elbow joint. He subsequently underwent surgery to insert plates in his face with multiple screws to reconstruct it, surgery to his elbow, including a 7” rod and pins, dental reconstructive surgery and later had a cerebral spinal fluid leak repair surgery that involved removal of a large section of his skull in the forehead area in order to complete the repair.

DEFENSE CONTENDED

The defense admitted liability in the case but disputed the nature, extent and permanency of the injuries involved.

INJURIES

Severe facial fractures, loss of his teeth, a displaced fracture of his elbow into the elbow joint, residual permanent pain in his face, headaches, foot and back pain and a permanent mild traumatic brain injury with moderate residual affect in the areas of short term memory, attention and concentration.

MEDICAL WITNESSES

Plaintiff  
Dr. Dorman, Family Practice,  
Dr. Ghaly, Neurosurgery,  
Dr. Rabin, Orthopedics, Dr.  
Kean, Physiatry, Dr. Taha,  
Podiatry, Dr. Silverman,  
Neuropsychology, Dr. Fenger,  
Psychologist, Dr. Kirsch, ENT,  
Dr. Meyer, ENT, Dr. Daw,  
Plastic Surgery, Dr. Tsang,  
Pain Management, Dr. Lerrohl,  
Reconstructive Dentistry,  
Michelle Fay, Speech and Cognitive Therapy, Dr. Binger,  
Emergency Medicine.

Defendant None

EXPERT WITNESSES

Plaintiff  
Dr. Steven Rothke, Dr. Robert Kohn, Neuropsychology
Defendant
Dr. David Price,
Neuropsychology

MEDICAL BILLS
$366,688.69

LOST INCOME
$242,000 as a part time laborer and equipment operator

LAST DEMAND
$3.9 million

ASKED OF JURY
$7-8 million

LAST OFFER
$3.25 million

PLAINTIFF AGE
(at time of accident)
51-year old male

PLAINTIFF’S OCCUPATION
Retired from Caterpillar prior to accident but working seasonally for his brother’s soil sales company. Volunteer firefighter.

OTHER NOTEWORTHY FEATURES
Defense theme at trial was that the plaintiffs were overreaching in their damages claims and pointed out to the jurors in closing that although Mr. Shreve did in fact suffer serious and permanent injuries, plaintiffs’ calling of both emergency room doctors, two different neuropsychologists and 11 video evidence depositions was geared toward an attempt to have the jury render an award that was not fair and reasonable based on the evidence. The defense also pointed out to the jurors that one of plaintiffs’ neuropsychologist was somewhat critical of the other of plaintiffs’ neuropsychologist and that the plaintiffs’ neuropsychologist had not seen some significant information that established that the plaintiff had made a better recovery than had been shown in the last records reviewed by the plaintiffs’ expert, including the plaintiff’s ability to drive an automobile, hold a limited part-time job, work as a handyman for neighbors and friends and to work on a very limited basis with the volunteer fire department that he had previously worked very closely with before his accident.

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ILLINOIS

Johnson & Bell, Ltd. shareholders, John W. Bell and Robert R. McNamara, received a directed verdict in favor of their client, Commonwealth Edison, one of the largest electric utilities companies nationwide. Prior to the trial, the plaintiff was seeking $950,000.00 and a waiver of his worker’s compensation lien. The plaintiff asked for $3.5M in closing and lost the case.

The case involved a plaintiff who was a laborer employed by a plumbing and heating company. On April 11, 2005, the plaintiff was digging a trench for water and sewer connections for two new townhouses in Chicago and drilled into a 138,000 volt line. He was not wearing protective eye glasses nor a hard hat. Consequently, he lost vision to his right eye requiring surgical procedures including two corneal transplants. Johnson & Bell’s client had been called to perform underground locates for the area in February and March of 2005. They placed stakes, flags, and red paint in the area to identify its underground lines. The plaintiff claimed that the City of Chicago, on April 4 and 5, 2005, came to the site to repair a water main leak in the area and excavated dirt that was placed on the existing underground electrical markings. On April 10, 2005, the plaintiff alleged that he did not see any markings but after digging into an empty conduit asked his boss if it was alright to proceed. His boss said that it was safe. The plaintiff drilled into the energized line on April 11, 2005 at the start of his workday. The plaintiff’s theory against Commonwealth Edison was that they should have discovered that the underground utility locates had been obscured because the
Commonwealth Edison locaters routinely patrol the lines and remark if they observe that markings have been covered and work is being performed in the area. Commonwealth Edison maintained that no duty was created by it’s voluntary procedure of patrolling the lines and that plaintiff had presented no evidence that anyone from Commonwealth Edison saw the condition of the marks obscured or should have seen the condition between the time the City of Chicago finished it’s work and the date of the accident. Judge Irwin Solganick of Cook County granted Johnson & Bell’s client’s motion for a directed verdict on June 25, 2009. The case continued against the City of Chicago.

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KENTUCKY

Lin West and Guy Hughes of Woodward, Hobson & Fulton’s Lexington office recently obtained a defense verdict for CSX Transportation in Hazard, Kentucky. On May 5, 2009, after a six day trial of a railroad machinist’s Federal Employers Liability Act occupational claims, a Perry County Circuit Court jury returned a verdict for CSXT.

Plaintiff, a machinist, began work for a predecessor railroad in 1984. He worked most of his career in the CSXT locomotive shop in Corbin, Kentucky. Plaintiff alleged that his bilateral carpal tunnel syndrome and two trigger finger conditions, which required four surgeries, were caused by CSXT’s negligence in exposing the plaintiff to excessive vibration and repetitive job activities.

CSXT defended by relying on the testimony of former safety director Al Fritts (Ormond Beach, FL), former director of occupational health programs R. Todd Brown, Ph.D. (Jacksonville, FL), biomechanical engineering consultant John Trimble, Ph.D. (Wood Dale, IL), and hand surgeon Richard DuBou, M.D. (Louisville, KY).

The railroad’s proof was that the jobs performed by the plaintiff have not been shown by scientific literature to cause repetitive stress injuries. CSXT also established that it had a safety program for employees which included ergonomics and that the plaintiff was provided with a reasonably safe workplace. CSXT’s expert witnesses visited the Corbin shops to observe and videotape work similar to that performed by the plaintiff, and Dr. DuBou testified based on his medical examination that the plaintiff’s injuries were probably caused by factors other than work.

(Michael Rossi v. CSX Transportation, Inc., Perry (Kentucky) Circuit Court, No. 04-CI-00018, May 5, 2009. The case may be appealed.)

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TEXAS

J.K. Leonard of Ball & Weed, PC, San Antonio, Texas, teamed with his appellate partner to successfully defend Electrolux Home Products Inc., the manufacturer of a Frigidaire home refrigerator, in a recent product liability trial. The plaintiffs alleged that a manufacturing defect in the refrigerator’s wiring caused a fire during the early morning hours of February 4, 2007, resulting in the death of one individual and seriously injuring another.

The refrigerator had been purchased “used” approximately three months before the fire. The circumstances of the refrigerator’s use and the identity of its former owner(s) were unknown. The plaintiffs claimed that the compressor wiring contained a manufacturing defect, either in the form of sub-standard PVC insulation or resulting from damage to the conductor itself, which the plaintiffs alleged led to series arcing, overheating and degradation of the insulation. The plaintiffs claimed that this defect caused an arcing event to occur between the compressor wiring and a cover plate on the back of the refrigerator, igniting other control wiring and nearby combustibles and eventually spreading to the structure itself. One individual in the home suffered fatal injuries, leaving behind two daughters (ages 17 and 4 at the time), as well as an adult daughter and mother.

A friend of the decedent who was staying at the home suffered minor burn injuries but significant inhalation injuries.

The plaintiffs’ claims against Electrolux were based primarily on the absence of arcing activity found in the home, except for the arc on the refrigerator and the major damage to the house structure directly behind the refrigerator. Electrolux contended that there was no manufacturing defect in the refrigerator, that the refrigerator was too old at the time of the fire to reasonably infer that a manufacturing defect was the cause and that the arc was the result of the refrigerator being attacked by a fire, not the cause of the fire. Electrolux offered evidence of an alternate origin in close proximity to the refrigerator (not within or on the refrigerator itself), but the cause of the fire was undetermined.

During closing arguments, the plaintiffs asked the jury to award approximately $41 million against Electrolux. On March 12, 2009, after a week-long trial and approximately 70 minutes of deliberations, the jury returned a unanimous verdict absolving Electrolux of any responsibility.

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PRACTICE TIPS

“Where’s our Driver, Waldo?” (Avoiding a Default Judgment from Imputing to the Company)

FACTUAL SCENARIO

On Monday morning, at approximately 4:00 a.m., you receive a telephone call from the safety manager for a large trucking company that transports freight throughout the country. A multi-vehicle accident has just been reported on Interstate 10 in Pomona, California, involving one of the company’s trucks and a passenger van with a family of five. There are serious injuries to a number of occupants in the van. As a result of your quick response to the accident scene, you determine the other driver was responsible for the accident, and your truck driver was clearly not at fault; moreover, your driver is articulate, well-mannered, and will make a terrific impression on a jury.

A year later, the other driver sues the truck driver and the company, claiming the trucking company is vicariously liable for the negligent acts of the employee. The driver, however, unexpectedly quits his job because he believes the company gave him the “run-around” by failing to pay $1,500 of his medical bills arising out of the incident. You make every effort to locate and re-establish contact with the driver. But he refuses to return your calls and disappears after he and the company are served with process. You answer the complaint on behalf of the company; however, the driver’s answer is past due. The plaintiff is threatening to take a default judgment against the driver so as to pursue the company under respondeat superior. What do you do?

What is the effect of a default judgment against the driver on the company? Is it possible the employer could be held vicariously liable due to the truck driver’s non-cooperation, even though the other driver was clearly at fault? Is there a risk that the default judgment will be imputed to the company?

SERVICE OF PROCESS

As a threshold matter, care must be taken to ensure the driver was properly served. A driver who does not want to be found will avoid contact with all strangers, especially process servers. Thus, defense counsel must scrutinize the proof of service to determine whether the driver was personally served versus some other form of service, such as substituted service. In California, for example, defense counsel may specially appear to challenge substituted service with evidence that the driver did not reside at the subject residence at the time substituted service was effected. By successfully challenging service, defense counsel will buy more time to locate the driver and avoid the driver’s default. But that’s not the only option.

DRIVER APPEARS THEN DISAPPEARS

A driver who refuses to cooperate with his employer will likely refuse to cooperate with defense counsel because the driver views them as one and the same. What if this happens after defense counsel has already made a general appearance for the driver? Defense counsel will not be able to respond to written discovery, which will cause plaintiff’s counsel to immediately notice the driver’s deposition and eventually request entry of default as a sanction. As discussed below, under these circumstances the company (or insurer) has the option of intervening to prevent the entry of default, or, even if the plaintiff takes the driver’s default, the court will not enter a default judgment until the court adjudicates the liability of the trucking company.

TRUCKING COMPANY’S ANSWER GENERALLY INURES TO THE BENEFIT OF DEFAULTING DRIVER

Generally, the defense of an answering co-defendant inures to the benefit of a defaulting defendant where the co-defendant is alleged to be vicariously liable, thus preventing the entry of a default judgment. Moreover, to

2. 46 Am Jur 2d, Judgments § 282; see also Dade County v. Lambert, 334 So. 2d 844 (Fla. Dist. Ct. App. 3d Dist. 1976) (where a county was allegedly vicariously liable for the negligence of a bus driver, and denied liability, the bus driver’s failure to answer and resulting default would not deprive the county of its right to a jury determination of the defense that it was asserting in common with the bus driver.)
avoid potentially inconsistent judgments, the entry of a default judgment against a defaulting defendant typically must await the resolution of the liability of the other defendants that are being sued under a joint liability theory.³

The issue of “how the entry of a default against an employee affects the liability of an employer where the employer’s sole source of liability is vicarious” was addressed by the Michigan Supreme Court in Rogers v. J.B. Hunt Transport, Inc., 649 N.W.2d 23 (Mich. 2002). Rogers was killed when his vehicle went off the road and struck a tractor-trailer parked on the shoulder. The plaintiff sued the driver and company that owned and insured the tractor-trailer. After the driver failed to appear for depositions, the plaintiff obtained an order of default against him. The trucking company, however, participated in the litigation, and was not included in the default. The trial court and the court of appeals ruled that as a result of the default, the defendant could not contest the negligence of its employee because he did not properly participate in the litigation, but the default did not bar the trucking company from litigating the driver’s negligence because it had participated in the litigation.

The Michigan Supreme Court disagreed. The Michigan Supreme Court held that the principles of respondeat superior or vicarious liability did not support imposing liability on the trucking company on the basis of the driver’s default because the driver was not acting within the scope of employment when he failed to participate in the litigation. The Court then reasoned that the default of one party is not an admission of liability on the part of a non-defaulting co-party. Accordingly, the Court concluded that the default precluded the driver from contesting the issue of his negligence because he did not properly participate in the litigation, but the default did not bar the trucking company from litigating the driver’s negligence because it had participated in the litigation.

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Courts have also applied this general rule to intervening parties seeking to protect their interests. INTERVENING PARTY AS ANSWERING DEFENDANT

As illustrated in Rogers, a driver who is in default does not deprive the company of putting on a defense, which, if successful, will inure to the benefit of the driver. A savvy plaintiff’s attorney, however, may attempt to circumvent this safeguard by dismissing the trucking company (without prejudice) so that it may obtain and enforce a default judgment against the missing driver. In California, if the driver is an insured under the company’s policy, California Insurance Code section 11580 permits an injured person to file a direct action against an insurer to enforce a judgment against the insured. This outcome would deprive the trucking company from putting on a defense.

Where, as in this hypothetical, a trucking company’s interests cannot be adequately represented by a truck driver who refuses to appear in the action and cooperate with defense counsel, the California legislature has seen fit to provide an absolute right for a party to intervene where the party’s ability to protect its interests would otherwise be impaired. The language of Code of Civil Procedure § 387(b) provides:

If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person’s ability to protect that interest, unless that person’s interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene.

By its express language, section 387(b) is mandatory, requiring the court to allow a non-party to intervene in the litigation when it claims an interest in the property or transaction involved and is so situated that any judgment rendered in its absence may impair or impede its ability to protect that interest.

This intervention issue was addressed in Nasongkhla v. Gonzalez, 29 Cal.App.4th Supp. 1 (1994), where State Farm insured an individual who was sued for injuries sustained by another in an automobile

³ 46 Am Jur 2d, Judgments § 282.
accident. During the pendency of the litigation, State Farm’s insured could not be located by defense counsel and failed to respond to discovery. Following motions to compel the discovery and for sanctions, the court ordered the insured’s answer be stricken and that his default be entered. Thereafter, State Farm filed a motion for an order granting leave to intervene for all purposes, a proposed complaint-in-intervention and a motion to vacate the default. Following the trial court’s denial of the motion to intervene, State Farm appealed and the Court of Appeal reversed the trial court ruling and held that “unless State Farm is allowed to intervene, it may have no other opportunity to litigate fault or damage issues in any action brought by plaintiff on its judgment under Insurance Code section 11580.”

The employer’s intervention rights have also been upheld in the employment context as well. In an action by an employer for declaratory relief regarding an employment contract, in which the State Division of Labor Law intervened as assignee of the employee’s right to payment, the court held in Marc Bellaire, Inc. v. Fleischman, 185 Cal. App. 2d 591 (2d Dist. 1960), that where the Division prevailed, the employer was not entitled to a judgment against the employee, despite the employee’s default, since the intervenor and the employee had the same litigation interests. The court explained that the intervenor was effectively a codefendant, and the defense addressing an alleged modification of the employment contract was directed at the plaintiff’s entire right to recover, not to a particular personal defense.

**PRACTICAL IMPACT OF THE NO-DEFAULT RULES**

In sum, defense counsel can choose either option to ensure that a defaulted driver does not affect the company’s ability to defend the case on its merits. A smart plaintiff’s attorney will recognize, however, that a missing driver does not amount to a default judgment that can be imputed to the company. This realization usually leads to a dismissal of the driver because plaintiff’s counsel does not stand to gain anything by obtaining a default judgment. More importantly, the smart plaintiffs’ attorneys will drop the issue altogether because they prefer the missing driver to stay missing so that the driver will not dispute the plaintiff’s version of the incident. By following these procedures, defense counsel can avoid the pitfalls created by the disappearing driver.
ARTICLES

The New Frontier of Discovery: Applying the Amended Rules of Electronic Discovery

Technological innovations have revolutionized the business world. For example, changes in communication technology allow a cell phone user to make calls, send text messages, browse the internet and even send and receive email. These changes have affected the way companies run, and the legal system is beginning to incorporate these changes.

The digital revolution of the 1990s caused emails to replace memos, water-cooler conversations, and even formal letters. Approximately 60 billion emails are sent across the internet each day. Additionally the availability of computers, cell phones, and instant messenger has changed the way data is stored. Documents are not necessarily placed on paper. It is estimated that seventy percent of all electronic files are never converted to paper form. These electronic files are a hidden treasure trove of information and may become the difference between winning a case and losing it.

In December 2006, the Federal Rules of Civil Procedure were amended to incorporate requests for electronic discovery. The old smoking guns of litigation, memoranda, hand written notes and letters are gone; replaced by emails and documents found on servers, back-up tapes, and the murky regions of unallocated space. As attorneys and the courts become more comfortable with electronic discovery, companies must be prepared to handle requests for electronic documents, and counsel must be prepared to assist them. This article focuses on addressing developments in case law and its applicability since the adoption of the amended Federal Rules.

I. WHAT THE FEDERAL RULES REQUIRE

The Federal Rules of Civil Procedure govern the discovery process in Federal Court. Although discovery of electronically stored information (ESI) was not unheard of prior to the amendments, attorneys and courts are becoming more familiar with the process and thus are more comfortable with the idea of requesting the information. In 2006, the Federal Rules were amended to specifically include the discovery of electronic information throughout the discovery process.

The Rules require the parties to discuss electronic discovery during the pre-trial conference. Additionally, the parties must include their “views and proposals” regarding electronic discovery, including the form in which it should be produced, in the discovery plan. Because these conferences must be held within 120 days of the defendant being served, these rules introduce the issue of electronic discovery at the very beginning of a law suit.

The Federal discovery process demands the parties initially disclose certain information. The 2006 Amendments require the initial disclosures into the discovery process. Although the initial disclosures must be made, the rule also places protections on producing them. The traditional discovery privileges such as attorney-client privilege and work-product apply to ESI. Electronically stored information does not have to be produced if it is not “reasonably accessible because of undue burden or costs.”

Requesting the production of documents will increasingly involve ESI. Parties may request this information and even specify the form in which the information should be produced. Generally, a party must produce the information in the form kept in the usual course of business. However, a particular form

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or forms may be requested, but a party does not have to produce this information in multiple forms unless an agreed stipulation exists or an order by the court. A party may object to the requested form, but must supply in its objection, the form in which it intends to produce the information. Parties have the option of producing business records, including ESI, when answering interrogatories.

The rule drafters placed a final restraint on discovering ESI. Discovery sanctions may not be imposed without “exceptional circumstances” when information is lost as a result of “routine, good-faith” operation of the storage system. Although this “safe harbor” provides some protections, litigants should not rely on it. If a party fails to suspend the deletion of electronic files, the courts may impose sanctions such as adverse jury instructions or exclusion of evidence at trial.

II. WHAT THE RULES MEAN

The Amendments to the Rules of Civil Procedure may seem rather minor but they result in monumental changes. The amount of data stored on even a personal computer may be immense, and the information on a company’s system borders on mind-boggling. To understand what the Rules require, it is important to know how the Rules took shape.

A. How We Got There - The Sedona Principals

As digital mediums began to spread through corporations, court decisions hinted that electronic mediums may be included in discovery requests. The Sedona Conference Working Group sought to establish guidelines for lawyers on how to address electronic discovery. Sedona created fourteen principles which covered many of the issues facing courts today. The duty to preserve electronic data; preservation and production of metadata; production of documents in their normal business form; production of “deleted” data; and sanctions were all covered in the principles. These principles assisted judges in the early cases involving electronically stored information (ESI) and formed the bedrock of the new electronic discovery rules.

B. The Zubulake Opinions

Although the opinions in Zubulake were rendered prior to the amendments to the Federal Rules of Civil Procedure, the opinions formed the foundation of the substantive changes. Zubulake I provided a discussion of how electronic information is stored and whether that data was “accessible”. The court looked

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14 Id.
15 Id. 34(b)(2)(D)
16 Id. 33(d).
17 Fed. R. Civ. P. 37(e) (in this 2006 Amendments, this was subsection (f). The subsection was re-titled to its current designation in 2007).
18 See infra footnote 36.
19 See Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993); Sattar v. Motorola, Inc., 138 F.3d 1164 (7th Cir. 1997); Playboy Enterprises, Inc. v. Welles, 60 F.Supp. 1050 (S.D. Cal. 1999).
20 The Sedona Principles, preface (July 2005).
21 Id.
22 Id.
24 See in supra footnote 36.
26 Id. at 290.
27 Id.
28 Id.
Zubulake IV and V demonstrate the repercussions of failing to produce electronic data.29 The court ordered the defendant to pay the expenses associated with re-deposing certain witness regarding newly discovered documents.30 The court also found that the defendant willfully failed to preserve documents and issued an adverse inference instruction to the jury.31

C. Following the Leader

Emboldened by the changes to the Rules of Civil Procedure and following the Southern District of New York’s example, the courts are now handing down opinions regarding discovery of electronically stored information. The courts are placing a large burden on counsel to know the preservation and deletion procedures of their clients.32 Attorneys are expected to know the methods of data retention used by their clients early in the litigation process.33 This may need to be one of the initial questions asked after being hired. Not knowing how electronic data is stored may result in a swift reprimand from judges. Judges are expecting that attorneys be “fully familiar with [a] client’s document retention policies, as well as the client’s data retention architecture.”34 Attorneys are also responsible for ensuring their clients comply with discovery requests in a timely manner.35

In addition to knowing how the client maintains their information, attorneys must also be aware of how the opposing party maintains their documents and the correct way to request the information. Courts have no sympathy for parties requesting discovery which results in numerous pages of information based on the search parameters provided by the requesting party.36 Courts have also not been very sympathetic to those parties who fail to request the ESI in particular forms.37 The courts will not require the reproduction of the documents but may order that all future disclosures be in the native forms.38

Ideally, discovery should occur with minimal or no involvement from the courts.39 However, failing to comply with electronic discovery has caused the courts to intervene in the process—sometimes repeatedly.40 These “discovery shenanigans” have forced some courts to impose severe discovery sanctions when parties are uncooperative with producing electronically stored data.41 Monetary sanctions, attorneys’ fees, adverse instructions and dismissals have all resulted from parties failing to comply with discovery requests.42

D. And the States Join the Bandwagon

Nearly half of the states have enacted rules that either adopt the federal rules or provide specific language about ESI particular to that state including: Alaska, Arizona, California, Delaware, Florida, Illinois, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Mexico, New Hampshire, New Jersey, Ohio, Tennessee, Texas, Utah, Virginia, and the District of Columbia.43 Some of the states have declined to adopt aspects of the federal rules such as the meet and confer provision or the safe harbor provision under Rule 37.44

In addition, the courts have not shied from tackling electronic discovery issues. The Georgia and Colorado courts have even introduced their own electronic discovery protocols to handle disputes between parties.45 Minnesota state courts have amended their rules of civil procedure to incorporate aspects of the federal rules, including protection for reasonably inaccessible ESI due to undue


44 Id.

As the federal courts become more comfortable with electronic discovery, more states will eventually address the issue.\(^{51}\)

### E. Where to Look – Potential Sources of ESI

When evaluating where ESI might reside it is important to realize that it encompasses everything from the hardware consisting of desktop computers, flash drives, backup disks, etc. to the software and the word processing documents, emails, spreadsheets, databases, etc. created by that software. It can even include deleted data and data created on old or obsolete hardware and/or software. It would be impossible to provide an exhaustive list of potential sources of ESI, but the courts have begun to recognize many different sources including text messages,\(^{52}\) RAM,\(^{53}\) cell phone images,\(^{54}\) and web chats.\(^{55}\)

The courts have been divided about the production of hard drives. The production or mirror imaging of data from hard drives can be costly and can compromise the privacy and confidentiality of information. Some courts have required the production of hard drives, especially when plaintiffs have been able to show that a defendant failed to produce documents that are contained on a hard drive.\(^{56}\)

The courts have been consistent about ordering non-parties and third-parties to produce ESI.\(^{57}\) However, some courts have required the requesting party to pay for the production of the non-party’s ESI.\(^{58}\) One case tackled both of the issues of third-party ESI.

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57 See In Re Rule 45 Subpoena Issued to Robert K. Kochan, 2007 WL 4208555 (E.D. N.C. November 26, 2007) (Court granted motion to compel non-party’s production but refused to impose sanctions); Tomlinson v. El Paso Corp., 245 F.R.D. 474 (D. Colo. 2007) (Court orders defendant to produce documents in third party’s possession where ERISA language required the defendant to maintain the documents for inspection or examination).

58 See United States v. Premera Blue Cross, 2007 WL 852080 (S.D. Ohio March 16, 2007) (Court ordered non-party to produce additional emails despite argument that unduly burdensome and costly, but ordered plaintiff requesting the emails to pay the costs associated with production).
party discovery and hard drive production.\textsuperscript{59}

However, a court initially found that where discovery of backup tapes is not discussed at the Fed.R.Civ.P. 26(f) conference, then the tapes are not readily accessible even if the responding party fails to disclose the presence of backup tapes in its initial response.\textsuperscript{63} Nevertheless, the court found good cause to order production of the backup tapes based on the following factors: 1) resources of the parties; 2) discoverability of the information; 3) specificity of the request; 4) unavailability of the information for other more accessible sources. The court reserved the right to shift the cost of the production to plaintiff after defendant produced the documents and showed evidence of time and costs.\textsuperscript{64}

A potentially new area of interpretation for the court is the language included in Rule 34(a) (1)(A) which states “...after translation by the responding party into a reasonably usable form.”\textsuperscript{65}

Courts will have to determine what translation requires and what is considered a reasonably usable form. A Pennsylvania court addressed the issue with regard to the production of computer printouts and records.\textsuperscript{66} The court ruled that Rule 34(a)(1)(A) did not require a responding party to “create” responsive material, but did require the party to produce the computer printouts.\textsuperscript{67}

Identifying what types of ESI are discoverable, relevant, and should be preserved are important aspects of developing an effective litigation hold to make certain the ESI is available if it should be requested. It also provides counsel with essential information to discuss during the Fed.R.Civ.P 26(f) conference.

Failing to understand or comply with the new electronic discovery rules can be costly. Defensible cases may be lost for failing to provide the electronic documents. The following sections will provide a practical guide to the new discovery rules.

III. WHAT COUNSEL MUST DO - PRACTICAL GUIDES

Two keys to successfully navigating the minefield of electronic discovery are proper client preparation and communication and effectively utilizing the Rule 26(f) and Rule 16(b) conferences to negotiate as many anticipated e-discovery issues. By focusing one’s efforts on these two tasks, hopefully one will avoid numerous contentious motions regarding electronic discovery and the potential spoliation and dreaded sanctions that can follow.

A. Where To Start – The Meeting with the Client

The first step in properly preparing a client to deal with electronic discovery is to review the guidelines established in the Zubulake cases prior to the meeting. As described above, these cases provide somewhat
of a road map in educating a
client about electronic discovery.
In addition, they identify
when a client needs to begin
“preserving” any ESI under
a litigation hold. A litigation
hold and its importance will be
discussed in a latter section.
Armed with this knowledge, it is
important to meet with the client
to develop a plan for managing
the possibility of having to
produce ESI.

One will need to discuss several
issues with the client about
appropriately handling the
preservation, retention, and
production of ESI. Counsel
should become familiar with
and learn about the client’s
document retention policies,
document handling policies, and
any ongoing business practices
involving deletion or destruction
of data. The client would be well-
served to have written policies in
place which will provide evidence
if any problems should arise
regarding potential destruction of
relevant ESI. Crafting effective
document retention policies
is an important component
to being able to comply with
the production of ESI. Written
policies will also help to insure
employees are adhering to the
systems in place to preserve,
retain, and destroy ESI.

It is important to meet with
the individuals responsible for
handling the management of the
client’s ESI. These are individuals
who will be responsible for
preserving the information and
enforcing the litigation hold for the
ESI. It would also be advisable
for the client to appoint one or
two individuals from this staff to
serve as liaisons to counsel for

the purpose of electronic discovery.
Those individuals should be able
to explain the client’s policies and
procedures both to a court and a
jury, as well as provide guidance
and reassurance to counsel that
the proper measures are being
taken to satisfy the litigation
hold. They should also be familiar
with how to search for relevant
information, since failure to do
so may be cause for sanctions.68
Discussing counsel’s possible
needs with these employees will
prepare them to be able to produce
documents in an expedient and
cost-effective manner. This will
save the client money and the
counsel time. The better organized
the systems and procedures for
recovery and production of the

68 See Barker v. Gerould, 2008 WL 850236
(W.D.N.Y. Mar. 27, 2008) (Where defendant
failed to provide an adequate affidavit
attesting to the search procedures used to
review relevant accessible emails, the Court
ordered defendant to identify individuals
with knowledge of the search procedures
and permitted the plaintiff to depose these
individuals); Heartland Surgical Specialty
1054279 (D. Kan. April 9, 2007) (Court
ordered additional depositions after plaintiff
produced deponent who was unknowledgeable
about electronic data. However, the court
refused to enforce monetary sanctions
because the parties failed to discuss the
issue of a Fed.R.Civ.P. 30(b)(6) deposition
at the Fed.R.Civ.P. 26(f) initial conference);
(Court held that defendant required to pay
costs associated with accessible discovery
of ESI where defendant failed to adequately
search all places on hard drive for email
evidence, even if the costs of obtaining
data is now burdensome. Question of
cost-shifting only arises after determination
that data is reasonably inaccessible; the
cost of reasonably accessible data is to
be borne by the producing party); See also
Peskoff v. Faber, 2006 WL 1933483 (D.D.C.
2006) (Court ordered defendant to explain
search efforts used to locate discoverable
documents); Canon U.S.A., Inc. v. S.A.M.
Inc., 2008 WL 2522087 (E.D. La. June
20, 2008) (Court orders defendant to bear
cost of third-party forensic analyst following
insufficient production responses because
defendant’s searches had been conducted
“lackadaisically.” Plaintiff was awarded
sanctions for costs incurred in issuing a third-
party subpoena).

ESI, the more likely electronic
discovery will flow smoothly and
hopefully avoid sanctions.

Counsel should learn as
much information from these
employees about what types
of hardware and software the
client uses. It is necessary to
understand what data is readily
accessible and that which is
difficult to access.69 This
information will be critical in
achieving a productive Rule 26(f)
conference with opposing counsel
and developing a comprehensive
electronic discovery plan. It will
also help in formulating what
ESI will be initially disclosed
and what ESI may require an
explanation to the court for being
unduly burdensome and costly to
produce.

It is also important to discuss
how preservation of the ESI will
be disseminated to all other
employees, so to avoid the
accidental deletion or destruction
of relevant data which could
result in sanctions.70 These
discussions should include

69 See Mikron Indus., Inc. v. Hurd Windows
& Doors, Inc., 2008 WL 1805727 (W.D.
Wash. April 21, 2008) (Court denied
defendant’s motion for protective order
and cost-shifting where defendant failed to
sufficiently demonstrate inaccessible of
ESI or an undue burden. Defendant only
provided a cost estimate, but did not show
evidence of the number of backup tapes,
different methods used to store ESI, or
document retention policies).

70 See Google Inc., v. Am. Blind &
Wallpaper Factory, Inc., 2007 WL
1848665 (N.D. Cal. June 27, 2007) (Court
ordered evidentiary sanctions including
acknowledgment of several judicially
determined facts and monetary sanctions
of $15,000 for defendant’s failure to
preserve, collect, and produce evidence.
Plaintiff showed evidence that defendant’s
employees did not recite a preservation
plan after litigation began, that employees
regularly deleted documents, and defendant
only produced documents between the two
companies, even though plaintiff already
maintained these).
providing specific instructions about ceasing all ongoing business practices of deleting or destroying possibly relevant ESI. An inclusive and specific litigation hold letter is the proper vehicle for accomplishing this task.

It is possible that more meetings will be required, depending on the amount of information and types of systems in place. This initial meeting is critical to gathering the information necessary to issue an effective and comprehensive litigation hold for the purpose of preserving ESI related to the anticipated or pending litigation. It is important for counsel to monitor the compliance of the litigation hold since counsel’s production of ESI certifies that the proper methods and procedures were followed to produce all relevant accessible information. When necessary one should issue additional litigation holds to encompass more information or scale back the scope of a prior litigation hold. One should reconvene with the client to make sure the litigation hold is being enforced. All of these steps will assist in being properly prepared for the Rule 26(f) conference and for the eventual production of ESI.

B. Meeting with Opposing Counsel – The Rule 26(f) Conference

Federal Rule of Civil Procedure 26(f) requires the parties to perform three tasks: 1) “discuss any issues related to preserving discoverable information,” 2) “develop a proposed discovery plan, [and] any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced”, and 3) discuss “any issues relating to claim of privilege or of protection.”71 Counsel should take the opportunity at the conference to negotiate as much as possible regarding the production of ESI. This includes determining how ESI will be produced (whether native format or TIFF/PDF),72 whether metadata will be included,73 what is readily accessible, what is reasonably inaccessible ESI, what is relevant ESI, what types of searches will be conducted to locate relevant materials,74 what keywords will be used to conduct any searches,75 who will be conducting the searches, whether a third-party forensic expert may be necessary,76 setting a deadline for the production of discovery,77 drafting any proposed orders regarding clawback agreements and other aspects of electronic discovery regulation that the parties want memorialized in the pre-trial order under Rule 16(b).

It may also be beneficial to review some of the jurisdictions that have developed guidelines for the electronic discovery. The District Courts for Delaware78, Kansas79, and Maryland80 provide good foundations for addressing all the issues.

72 See Autotech Techs. Ltd. P’ship., 248 F.R.D. 556 (In response to defendant’s motion to compel production of plaintiff’s ESI in native form with metadata, the court held that ESI must be produced in the form in which it is ordinarily maintained or in a reasonably usable form, despite prior production by plaintiff in PDF and document form. However, the court held that defendant “was the master of its production requests,” and as such the original request did not include metadata); Wyeth v. Impax Lab. Co., 248 F.R.D. 169 (D. Del. 2006) (Court refused to order native format production); Williams v. Sprint/United Mgmt. Co., 245 F.R.D. 660 (D. Kan. 2007) (Court denied motion for sanctions where defendant failed to produce documents in native format because defendant lacked bad faith and parties had previously agreed that documents could be produced in TIFF format).
73 See Michigan First Credit Union v. Cumis Ins. Soc’y, Inc., 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007) (Court denied plaintiff’s request to produce metadata where the previous court order did not address retrieval of metadata or native files and where the production of metadata would be overly burdensome to defendant because defendant did not store metadata for easy retrieval).
75 See Wingnut Films, Ltd. v. Katja Motion Pictures Corp., 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007) (Court ordered a third party vendor to conduct keyword searches when defendant failed to produce any discovery after failing to comply with court orders to produce. Court imposed monetary sanctions on defendant of $125,000.00).
76 See Peskoff v. Faber, 2008 WL 2649506 (D.D.C. July 7, 2008) (Court refused to shift costs for third party forensic investigator due to responding party’s inadequate search efforts, failure to preserve ESI, and unwillingness to adhere to discovery obligations which caused need for forensic investigator).
77 See Race Tires Am., Inc. a Div. of Specialty Tires of Am., Inc. v. Hoosier Racing Tire Corp., 2008 WL 2487835 (W.D. Pa. June 16, 2008) (Parties failed to specify a completion date for discovery, so defendant was producing documents on “rolling basis.” Court threatened sanctions upon defendant for failure to produce documents four months ago and warned parties about further discovery motions (beyond the five already filed)).
regarding electronic discovery that arise during the Rule 26(f) and Rule 16(b) conferences.

C. How to Preserve ESI – The Litigation Hold

A litigation hold is an instruction issued by the party’s attorney ordering that all materials potentially relevant to the anticipated or pending litigation be preserved.81 While the amended rules and even the Zubulake cases do not intend for every piece of paper and file to be saved by a client, once litigation is anticipated, anything relevant to the litigation should be preserved, including inaccessible data.82 The responsibility of counsel does not stop at issuing the litigation hold.83 It requires counsel to manage the litigation hold by enforcing its compliance.84 By taking these steps, a party is more likely to avoid the potential consequences of failing to adhere to the litigation hold.

Some courts have been very strict in sanctioning for failure to properly enact, monitor, or enforce litigation holds.85 However, other courts have refrained from issuing sanctions depending on the degree of the violations.86

When a plaintiff requested a defendant to produce its litigation hold for inspection, an Illinois court held that a defendant’s litigation hold is protected under the work product doctrine.87 However, the court found defects in the defendant’s privilege log. The defendant failed to identify all of the recipients of email messages and used ambiguous job title descriptions. The court ordered the defendant to revise the privilege log for an in camera inspection to determine privilege protection, but refrained from issuing sanctions.88

The consequences of failing to issue a litigation hold can be devastating and severely damage the viability of a winnable case. A Connecticut court found that the defendants were not protected under the Fed.R.Civ.P. 37 “safe harbor” provision because the new rules require a party to act affirmatively in preventing the destruction or alteration of potentially relevant information.89

...that he had not received the litigation hold, but was encouraged to review and eliminate as many files as possible. Court did not find plaintiff’s non-compliance willful for order to produce, but ordered plaintiff to pay all costs for defendant’s filing of the motion and re-deposing witnesses).

D. How to Protect ESI – The Clawback Agreement

With the continued increase in the amount of information and data stored electronically, the potential for parties to inadvertently disclose privileged materials also rises. As the amount of ESI to be disclosed rises, so do the costs to review those massive amounts of information for privilege prior to disclosure. In an effort to balance costs against the potential for disclosing privileged information, parties are attempting to use “clawback” agreements. Clawback agreements specify how each party should handle inadvertent disclosures of privileged materials.

The defendants made a good faith argument that the destruction occurred in the regular course of business; however the defendants failed to suspend their normal business practice of scrubbing the hard drives, including email, and failed to initiate a litigation hold. The court held that such destruction was not due to routine operation, but was in fact grossly negligent, and potentially in bad faith. As a result, the court ordered an adverse jury instruction and reimbursement to plaintiff of costs associated with its motion for spoliation sanctions.

83 Id. at 217. See also, Treppel v. Biovail Corp., 249 F.R.D. 111, 119 (S.D.N.Y.2008).
84 Id. at 218. See also Treppel, at 118.
85 See Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y.2004) (”Zubulake V”). See also Treppel at 118.
86 See Consolidated Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (E. D. La. 2006) (Delayed litigation hold warrants monetary sanctions); Bd. Of Regents of Univ. of Nebraska v. BASF Corp., 2007 WL 3342423 (D. Neb. Nov. 5, 2007) (Court ordered that no bad faith required for sanctions against plaintiff because plaintiff continued to produce documents after the discovery deadline and a previous court order for production of documents. This included producing documents after plaintiff’s deposition. Plaintiff’s employee testified
88 Id.
89 Doe v. Norwalk Cnty. Coll., 248 F.R.D. 372 (D. Conn. 2007), See also in re NTL, Inc. Sec. Litig., 244 F.R.D. 179 (S.D.N.Y. 2007) (Court ordered an adverse instruction against the defendant and payment of plaintiff’s attorney’s fees and costs for “grossly negligent” preservation of ESI and failure to issue a litigation hold when litigation was anticipated prior to the split of a company into two separate entities. The court found that the old company had a duty to preserve ESI for the two new entities); In re Krause, 367 B.R. 740 (Bankr. D. Kan. June 4, 2007); Edmondson v. Tyson Foods, Inc., 2007 WL 1499973 (N.D. Okla. May 17, 2007).
The Federal Rules actually provide a detailed procedure for protecting inadvertent disclosure of privileged materials in Fed.R.Civ.P. 26(b)(5)(B). Unfortunately, the courts have not always relied upon this rule when making rulings about the waiver of privilege. Some courts have imposed a strict standard that any inadvertent disclosure waives the privilege, regardless of intent.90 More lenient courts have ruled that a party only waives the privilege for any inadvertent disclosure if the party was grossly negligent.91 Most courts have adopted an approach similar to the Federal Rule, but that requires the parties to be proactive about managing potential inadvertent disclosures.92 This includes discussing this risk at the Rule 26(f) conference prior to the initiation of discovery.

As advised above, one of the ways to combat the waiver of privilege is to develop a clawback agreement with counsel at the Rule 26(f) conference. Parties may obtain further protection by requesting the court implement the clawback agreement in its pre-trial order. However, not all courts recognize clawback agreements, and some only apply those agreements to the parties involved in the litigation, thus allowing non-parties to have access to the privileged materials if an inadvertent disclosure occurs.93 As a result, parties must weigh the risk of inadvertent disclosure against the skyrocketing costs of meticulously analyzing every piece of mounting ESI for privilege concerns.

Hopefully some relief is on the horizon. At the time of this writing, a bill (S. 2450) has been passed in Congress that should provide relief for the waiver of the attorney-client privilege due to an inadvertent privilege disclosure through ESI. The bill is designed to amend Fed.R.Evid. 502 and reinforce the procedure outlined in Fed.R.Civ.P 26(b)(5)(B). The amendment would protect the privilege of an inadvertent disclosure if the holder of the privilege took reasonable steps to prevent the disclosure and takes reasonable steps to remedy the error.94 The amendment would also make federal court orders protecting the privilege enforceable in state and federal courts, as well as against non-parties.

Of course the amendment still relies on the courts to determine what are reasonable measures to prevent and protect against the inadvertent disclosure. However, with this amendment, the courts should become more accommodating to clawback agreements developed in the Rule 26(f) conference, and thus more inclined to adopt them in the pre-trial orders. In addition, the amendment should hopefully prevent disclosure of inadvertently disclosed privileged information to non-parties.

IV. WHAT HAPPENS IF YOU DON’T PRODUCE ESI

The best way to avoid spoliation and sanctions for electronic discovery is to employ the strategies discussed above regarding meeting with the client, managing the litigation hold, and effectively utilizing the pre-conference with opposing counsel. Unfortunately, no matter how meticulous a party may facilitate electronic discovery, the potential for spoliation is always present.

A. What Constitutes Spoliation

Spoliation is not a new term in the law; however, under electronic discovery, spoliation can include many forms.95 Spoliation arises when parties negligently, intentionally, or mistakenly destroy, alter, or hide ESI that is relevant or discoverable to the anticipated or pending litigation. Some of the sanctions that courts have

91 Id. See also Williams v. Sprint/United Mgmt. Co., 2006 WL 1867478 (D. Kan 2006) (Court refused to recognize waived privilege for inadvertent disclosure of electronic spreadsheets).
92 See Victor Stanley, Inc., v. Creative Pipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008) (Based on balancing several factors from Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 244-246 (D. Md. 2005), regarding waiver of privilege, Court held defendants waived their privilege because defendants failed to take reasonable precautions to prevent inadvertent disclosure and waived the usage of a clawback agreement); St. Cyr v. Flying J, Inc., 2008 WL 2097611 (M.D. Fla. May 16, 2008) (Court held that Fed.R.Civ.P. 26(b)(5)(B) applies to both paper and electronic documents regarding waiver of privilege. However, plaintiff in this case voluntarily disclosed the work product document thereby waiving the privilege).
93 Rohner, supra, n. 87.
enforced for spoliation include monetary damages, adverse jury instructions, recognizing judicially determined facts, preventing cross examination of plaintiff’s expert, and even default judgment.

The courts have not been hesitant to enter a default judgment for violations of discovery. In a 2007 California district court case, the court applied a five factor test for determining if default judgment should be granted for defendants’ spoliation of evidence. The test consisted of the following criteria: 1) expeditious resolution of litigation; 2) court’s docket management; 3) risk of prejudice; 4) public policy in deciding cases on their merits; and 5) the availability of lesser sanctions. The court granted a default judgment on the basis that the defendant had engaged in efforts to destroy evidence and provide false testimony under oath. In addition, the court had previously sanctioned the defendant with monetary sanctions of $30,000 for prior violations.

The consequences of sanctions for spoliation and other violations can be disastrous. A California case involving several court sanctions resulted in jury awards of more than $604 million in compensatory damages and $850 million in punitive damages. The court imposed sanctions for spoliation, failure to produce documents, and failure to disclose obligations. The sanctions included an adverse jury instruction for certification violations and sluggish discovery and production. They also included a default judgment instruction where the liability allegations of the complaint were read to the jury who was instructed that those allegations were considered admitted for purpose of trial. Fortunately for the defendants, those damages were overturned by the appellate court on other grounds. The appellate court did not reach the issue of whether the sanctions enforced were an abuse of discretion. Therefore, this case serves as a reminder of the potential consequences of flaunting the requirements of e-discovery.

The courts have also dismissed cases when a plaintiff fails to comply with e-discovery rules and orders. A Mississippi case dismissed a case when plaintiff failed to comply with two discovery orders requiring production and did not respond to the defendant’s attempt to resolve the discovery issues pursuant to Fed.R.Civ.P. 37. Although sanctions as severe as those described above are uncommon, sanctions for noncompliance with rules and orders are quite prevalent.

B. What Constitutes Sanctions

Besides the court’s inherent authority to issue sanctions for discovery violations, the courts have authority under Rule 37(e) to issue sanctions specifically for violations of electronic discovery.

The best example of the potential damages one can suffer for failure to comply with

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96 See Sterle v. Elizabeth Arden, Inc., 2008 WL 961216, (D. Conn. April 9, 2008) (Court ordered defendants to pay reasonable fees and expenses of plaintiff and plaintiff’s consultant’s expenses for a hampered inspection for failure to comply with an inspection order without special circumstances to justify non-compliance. Court also ordered electronic records to be inspected and further non-compliance would warrant a default judgment); In re Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (Court ordered insurer to pay $1.25 million in sanctions under Fed.R.Civ.P. 11 and 37 for deleting essential electronic documents and failing to produce a paper version of the same documents for over three years).

97 See Connor v. Sun Trust Bank, 546 F.Supp.2d. 1360 (N.D. Ga. 2008) (Despite defendant’s assertion of a 30-day email destruction policy which destroyed relevant emails, Court granted plaintiff’s motion for sanctions and issued an adverse jury instruction because plaintiff provided evidence of some of the relevant emails using other means).


99 See United Med. Supply Co., Inc., v. United States, 2007 WL 1952680 (Fed. Cl. June 27, 2007) (Despite argument by defendant that it acted in good faith, but negligently, Court ordered spoliation sanctions that defendant was prohibited from cross-examining plaintiff’s expert on gaps in the record and was ordered to reimburse plaintiff for additional discovery costs arising out of defendant’s failure to produce. For 4 years, the defendant had failed to contact the proper custodians about the litigation and preservation requirements. Court held no requirement for bad faith to enforce spoliation sanctions).


102 Id.


the electronic discovery rules and court orders is a California case where the plaintiffs were required to pay over $8.5 million in attorney’s fees.\textsuperscript{107} The court found that the plaintiffs failed to produce thousands (nearly 46,000 very important emails out of 1.2 million pages) of documents requested during discovery. In addition, the court required nearly twenty of plaintiffs’ attorneys to show cause as to why they should not be personally sanctioned. The court also ordered six of plaintiffs’ attorneys to be reviewed for further disciplinary action by the California State Bar. However, the court issued an order permitting the six attorneys who filed objections to the sanctions to be permitted to present a self-defense based on attorney-client privileged information against the allegations.\textsuperscript{108}

In addition to monetary sanctions, the courts have also prevented parties from utilizing ESI at trial. In another California case, the defendant produced ESI after the discovery deadline.\textsuperscript{109} The defendant argued it was an “honest mistake.” The court held under Fed.R.Civ.P. 26(g) and Fed.R.Civ.P. 37(c) that an “honest mistake” is not substantial justification for an incorrect certification and that defendant failed to timely supplement initial disclosures without substantial justification. On this basis, the court ordered monetary sanctions and precluded the ESI produced beyond the discovery deadline.\textsuperscript{110}

With respect to the issue of timely production of documents, the courts have provided differing results. In a Florida case, the court imposed sanctions on the defendant’s for a purposefully sluggish production of discovery.\textsuperscript{111} The defendants failed to produce documents in accessible or useful formats, missed deadlines, refused to consult with plaintiff about keyword searches, failed to produce single document TIFF files, and omitted attachments and relevant emails.\textsuperscript{112}

In addition, the courts have been careful to only grant default judgment for electronic discovery violations when the violations are truly in bad faith. In a 2007 Florida ruling, the court issued monetary sanctions and granted a default judgment against defendants for withholding “smoking gun” evidence.\textsuperscript{113} The defendants argued that they failed to produce a critically dispositive email and attachments because the email was deleted as part of the defendants’ ongoing business practices.\textsuperscript{114}

However, even when bad faith is present, the courts are not inclined to grant default judgment. In a 2007 Illinois ruling, the court found that the defendant acted in bad faith by discarding his computer after receiving notice of the complaint.\textsuperscript{115} The plaintiff moved for default judgment, sanctions, and attorney’s fees. The court declined to award default judgment, but ordered the plaintiff to pay for a third-party’s discovery due to the computer’s destruction and retention of a computer expert.\textsuperscript{116} The court also awarded nearly $100,000 in attorney’s fees.\textsuperscript{117}

In some cases it is difficult to discern whether the courts are issuing sanctions under their inherent authority to manage discovery or if they are specifically referencing Fed.R.Civ.P. 37(e). Regardless, as the courts move further away from the enactment of the amended rules and into the future of electronic discovery, they are holding parties more accountable for dilatory discovery production and failure to conduct responsive search for past two years).\textsuperscript{109} R&R Sails, Inc. v. Ins. Co. of Pa., 2008 WL 2232640 (S.D. Cal. April 18, 2008).

\textsuperscript{110} Id.

\textsuperscript{111} In re Seroquel Prod. Liab. Litig., 244 F.R.D. 650 (M.D. Fla. 2007).

\textsuperscript{112} Id.


\textsuperscript{114} Id.


\textsuperscript{116} Id.

E-Disclosure is quickly becoming a major issue for those industries that often are involved in litigation. Recent studies have found that 17.5% of companies are “not ready to handle complex discovery requests.”118 Almost twelve percent of the companies had not established a policy regarding e-discovery.119 These policies are critical especially when faced with litigation in federal court. Attorneys are expected to be familiar with their client’s policies on electronically stored information early in the litigation process.120 Written policies allow the court to see the efforts the company has made in following the requirements of litigation. Although the policies may not completely protect against sanctions, the policies may demonstrate that “good faith” was exercised by the party. Further, developing and enacting company-wide policies may save a corporation during litigation when it is estimated that the electronic discovery process may account for as much as 20% of all litigation costs.121 Established policies allow for the efficient collection of documents and may prevent expensive sanctions.

As e-discovery becomes more prevalent, there are a variety of solutions available to handle these demands. Companies may internalize the process and create a team responsible for handling the requests. Software companies are developing programs that may automate the process. Finally, third-parties are available to outsource the task. Regardless of how companies handle electronic discovery, failing to consider how to manage electronically stored information “can cost companies thousands if not millions of dollars in unnecessary expenses, fines, and judgments.”122

A. The E-Discovery Team

The E-Discovery Team is an integral part of a company’s effective and timely response to e-discovery. Companies need to “create a core response team” that is “equipped to respond to e-discovery requirements quickly.”123 Included on this team should be representatives from the IT, human resources, and legal departments.124 These departments are critical to the team. The “protracted timelines and unpredictability” of litigation requires HR to be an integral part of the E-Discovery Team.125 This team will be responsible for “managing e-discovery issues and updating the company’s record-retention policy.”126

1. I Speak Geek

When preparing an E-Discovery team, it will be important to include an individual or two who can effectively communicate with counsel, judges, and juries about the data retention processes in layman’s terms. This will be especially true when dealing with sanctions under Rule 37(e) for routine deletions of information. Companies will need a person on their E-discovery Team that is fluent in “Geek”. This critical member of the team should be able to understand the technological side of how a company is retaining its data, storing system, and the programs controlling routine deletions. This person must then be able to relay and explain the processes in laymen’s terms. If a judge cannot understand a company’s witness, the judge cannot rule in the company’s favor and could possibly award sanctions for data lost through routine, good faith operations of a program.

The geek-speaker will also be the link between legal counsel and the IT department. Because attorneys are expected to be familiar with the document retention policies of his or her client, the geek-speaker will be able to

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119 Id.
121 Harmon, supra, n. 1.
122 Kevin F. Brady and Chad Breckinridge, Avoiding the Preservation Predicament, 17-OCT Bus. L. Today 21 (Oct. 2007).
123 Stephanini, supra, n. 116.
124 Id.
125 Id.
126 Brady, supra, n. 120
127 Id.
effectively explain the policies in place to counsel.128 Having a contact person for counsel will allow counsel to identify where potential electronically stored information may be found during the Rule 26(f) conference.129 Providing this information allows the discovery process to flow more efficiently and potentially cut discovery costs. If counsel specifies where particular information may be located, the company may avoid the unnecessary costs of retrieving irrelevant data because opposing counsel limited ESI discovery requests to only relevant information.

2. “Always be prepared”

The need for an e-discovery team is reflected in the rules requiring a proactive approach to data retention.130 Courts imposed considerable sanctions prior to the new federal rules—it is not any stretch of the imagination to believe that these fines may dramatically increase now that companies are officially on notice.131 Preparation will also benefit companies in the long run. If a company has a data retention plan in place and is actively attempting to comply with discovery requests, courts may compel production but will probably not order sanctions. These good faith efforts may protect those cases which are defensible from becoming disastrous jury verdicts or default judgments.

129 Id.
130 Brady, supra, n. 120.
131 Id.

B. Software

Software companies are coming to the aid of corporations involved in litigation by creating programs to assist in the collection of electronically stored information. The software automatically sorts email and other documents based on set parameters. Software may be extremely useful in “de-duplicating” the discovery to be produced.132 Memos and emails may have multiple versions and were received by multiple people.133 The software can also sort the discovery into clusters based on sender, recipient, or subject.134 Thus, the software may cut discovery cost since emails directed or sent by any of the company’s attorneys may be clustered and set aside initially as privileged, allowing the privilege review to focus on other documents that may not be obviously privileged.

C. Third Party Vendors

Some companies may wish to outsource their e-discovery team. The benefit of using third-party vendors is that they will be computer experts. Companies that may not focus on technology or where it would be too costly to hire an e-discovery team should consider this alternative. Third-party vendors may be found throughout the country and with the network capabilities, companies are not required to choose a local vendor. Companies may search the country to find a vendor that satisfies their needs and budget constraints.

VI. WHAT THE FUTURE HOLDS FOR ELECTRONIC DISCOVERY

As Zubulake ushered in the era of electronic discovery prior to the enactment of the amended rules, new cases are helping to shape the future of electronic discovery within the context of the amended rules. Currently, a New York case that is very similar to Zubulake is being considered by the court regarding sanctions for defendant’s failure to preserve evidence.135 The court employed a three-part test to determine if plaintiff’s motion for sanctions is warranted. The court is considering the following factors: 1) the defendant’s obligation to preserve the information; 2) destruction with a culpable state of mind (which includes ordinary negligence); and 3) relevancy.136 At this time, the court has yet to rule on the motion because it has allowed the defendant to search its email servers and backup servers to establish whether any evidence is present and whether it is relevant. The case has the potential to redefine how the amended rules are applied in light of the Zubulake cases and all of the above case law that has only recently molded the emerging world of electronic discovery.

Electronic discovery continues to explode and litter the battlegrounds of litigation with new issues and questions to grapple. The time is coming when practitioners will have

132 Harmon, supra, n. 1.
133 Id.
134 Id.
136 Id. at 120.
that: (1) the claimant’s failure to utilize an available seat belt was contributory fault in the circumstances of the case; and (2) such contributory fault was a substantial factor in contributing to the cause of or in enhancing his injuries, the defendant is entitled to have the question of contributory fault submitted to the jury under the general duty to exercise ordinary care. The jury must decide whether the plaintiff negligently failed to exercise ordinary care in the circumstances presented as well as the causation of injuries issues.

The key issues now in these cases involve the factual question of whether or not the belts were in use and the opinion question of what injuries if any would have been sustained if the belt had been in use. As the facts are frequently in dispute (or at least inconsistent) on the question of whether or not the belt was worn, this question is usually, if not always, the subject of expert testimony as well. As this type of litigation always involves experts Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and its progeny frequently are heavily involved in these cases.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), controls the admissibility of scientific expert testimony under FRE 702. Under Daubert, a trial court must perform the “gatekeeping” role of screening out junk science by ensuring that an expert’s proffered testimony is sufficiently reliable and relevant to assist the jury. The Kentucky Supreme
Court adopted Daubert, as applied to KRE 702, in Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995), overruled on other grounds by Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999).

The United States Supreme Court subsequently held in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), that the trial court is to apply the Daubert analysis in connection with all forms of expert testimony, not just that which is deemed “scientific knowledge.” In Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000), the Kentucky Supreme Court adopted the reasoning of Kumho Tire and held that the Daubert analysis applies to expert testimony based upon “technical” or “other specialized” knowledge, as well as “scientific” expert testimony. Id. at 577. Kumho Tire and Goodyear have been widely followed by Kentucky federal and state courts. See Demaree v. Toyota Motor Corp., 37 F. Supp.2d 959 (W.D. Ky. 1999) (applying Daubert factors and excluding plaintiff’s airbag expert who could not produce any publications or peer reviews of his theory and who had not performed tests or gathered any quantitative data to corroborate his theory); Gray v. General Motors Corp., 133 F.Supp. 2d 530 (E.D. Ky. 2001) (while plaintiff’s expert survived the Daubert analysis, he could not identify any specific defect with the seatbelt in question, thus warranting a directed verdict for the defendants); Clephas v. Garlock, Inc., 168 S.W.3d 389 (Ky. App. 2004) (opinions of industrial hygienist sufficiently reliable in asbestos case).

The Sixth Circuit held in Smelser v. Norfolk So. Ry. Co., 105 F.3d 299 (6th Cir. 1997), that it was reversible error to allow plaintiff’s expert, Ronald Huston, to render his opinion that a seat belt was defective, where he failed to show that his tests were based on scientifically valid principles, were repeatable, had been the subject of peer review or publication or were generally accepted methods for testing seat belts in the field of biomechanics. Similarly, in Clark v. Takata Corp. 192 F.3d 750 (7th Cir. 1999), the Seventh Circuit affirmed the lower court’s order excluding the opinion testimony of the plaintiff’s seatbelt expert, James Lafferty, finding that Lafferty assumed facts, failed to consider facts, including the occupant’s height and weight, and that his opinions had not been subjected to peer review.

The appellate standard of review for evidentiary rulings is abuse of discretion, and Daubert does not alter this rule for reviewing decisions to admit or exclude expert evidence. General Electric Co. v. Joiner, 522 U.S. 136 (1997). In Joiner, the Court held that the trial court did not abuse its discretion by excluding expert testimony relying upon animal studies that were factually dissimilar to the human medical facts at issue. Nor did the court abuse its discretion in finding the experts’ opinions to be without sufficient basis, scientifically and factually, to rise above “subjective belief or unsupported speculation.” Nothing in Daubert requires the court to admit opinion evidence connected to data only by the “ipse dixit” of the expert. Kentucky appellate courts also utilize the abuse of discretion standard under KRE 702. Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 39 (Ky. 2004); Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002).

A case of interest in these files is Tuttle v. Perry, 82 S.W.3d 920 (Ky. 2002), where the Kentucky Supreme Court overruled prior case authorities and held that experts can be cross-examined at trial as to the compensation paid to them. The Kentucky Supreme Court observed that “expert witnesses are often paid handsomely and it is widely believed that they may be expected to express opinions that favor the party who engaged them and who pays their fee.” 82 S.W.3d at 923. Biomechanists are typically extremely highly educated and their rates are significant if they are thorough in their work. Experienced trial attorneys have varied opinions about the impact of testimony of this kind. My experience has been that juries are not terribly impressed by this issue. If your cross starts with, “Q. Aren’t you a long way from home?” and then finishes with, “Q. Didn’t you charge a lot of money?” then your case probably has lots of serious problems. There are better areas of cross and you should use them.

An additional consideration in these cases is the issue of intervening superseding cause. It is rarely argued since Wemyss, supra, but see on this issue Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, Appellant, v. Robin L. Babbitt, 172 S.W.3d 786, (Kentucky 2005).
THE TECHNICAL BASICS

If you are going to handle these cases you have to understand the science. I very strongly recommend that you build a basic library on the subject and start reading before the first case comes in the door. I feel the only alternative is to work with someone with lots of experience. It can be an attorney or an expert, preferably both. This caution applies to both the defense and the plaintiff’s bar.

The physics of the restrained vs the unrestrained occupant is a very simple application of Newton’s laws of motion. For our discussion the First Law identified by Newton is by far the most significant:

FIRST LAW

There exists a set of inertial reference frames relative to which all particles with no net force acting on them will move without change in their velocity. This law is often simplified as “A body persists its state of rest or of uniform motion unless acted upon by an external unbalanced force.” Newton’s first law is often referred to as the law of inertia. So in other words “every object in motion will stay in motion until acted upon by an outside force.”


A better restatement of this law as it applies to accident reconstruction and the seat belt defense is found in materials prepared at Rice University to assist teachers in bringing home this fundamental concept for students: “An object in motion continues in motion with the same speed and in the same direction unless acted upon by an unbalanced [outside] force.”

http://teachertech.rice.edu/Participants/louviere/Newton/law1.html. (Emphasis added).

This same cite uses an unbelted occupant animation as an example for teachers to use.

The unrestrained occupant simply keeps going in the direction the vehicle was heading at the moment before impact. Injury patterns flow from both the vehicle behavior in the accident and the resultant occupant kinematics. The injury patterns for a restrained occupant would be very different as would the interior damage to the vehicle itself. In more severe impacts the restrained occupant(s) in the front seats often sustain extremity injuries. The engineering tradeoffs are more difficult with more serious impacts and the only reasonable goal is avoidance of fatal injuries. For the practitioner the devil is in the details in these cases and a thorough (and convincing) analysis is necessary by the experts. This makes these cases typically more expensive for all parties. They need good investigation and experienced and thorough experts.

IV. MAKING DISCLOSURE

FACTUAL INVESTIGATION

Unquestionably, the factual investigation of a possible seat belt defense in auto litigation is the most critical phase of the litigation. For defendants in particular, you need to move very quickly to amass the facts. I feel that the following are the most important things to do initially. It should be remembered that even the best experts will have a great deal of difficulty analyzing the questions that typically arise in a seat belt defense case if they do not have the best factual basis.

1. Preservation of Evidence

The police rarely take the types of photographs you need to prevail upon your position concerning seat belt issues. The first thing is to preserve, for the balance of the litigation, the damaged vehicles. Since this is not always possible, you need to gather the best quality photographs available. Even if a vehicle has been sold, after varying degrees of repair, it is unlikely that the seat belt has been changed and the seat belt itself is the best evidence of whether it was used in an accident. Parties often wonder if finding and storing the vehicle (in accident condition) are worth the expense. For defendants, this is absolutely critical to the seat belt defense and I would argue that it is just as important to plaintiffs. The expert for plaintiff who examines the vehicle and does not examine and carefully photograph the restraint system is doing his client a disservice. My experience has always been that clients want to know the bad and good facts. It is easy to subject an accident reconstructionist and, in particular, a biomechanist to...
withering cross-examination if no attempt has been made to fully photograph the interior of the vehicle, including the restraint system. Good experts want to know all the facts to preserve their good reputation and name.

If you can not get direct access to the vehicles as soon as you enter the case, get a spoliation letter to both the real owners of the vehicles and to those that may have the vehicles in their possession.

2. Photographs

Whether or not you can find the vehicles, you will need to locate all photographs taken of the vehicles post-impact. Do not settle for color copies. Either obtain the digital files or have a good set of 5x7 prints made. Later, if it turns out that specific photographs are essential and originated on film, you can fight the fight to get direct access to the negatives. Do not forget all first responders such as fire departments and rescue personnel who responded to the scene. Smaller departments often photograph and/or videotape their squads at work. They then use the photos and video in their training sessions. This is a much better source for good, on-scene photographs of the restraint system then the vast majority of police departments.

Exceptionally detailed photographs of components of the restraint systems allegedly worn by the plaintiffs who were occupants of the vehicle in the accident will be necessary for assembly which mates with the buckle assembly when the belt is in use. The tongue is constructed of die formed metal and is encapsulated with a molded structural polymer again to reduce friction as the belt passes over the polymer. The webbing passes through the slot in the tongue and is routed over the occupant’s hips to form the lap portion of the belt assembly. The lap belt is terminated at a structural anchor fastened to the floor pan at the outboard side of the seat. If the belt was worn, the polymer of the D ring “records” this with a fabric like imprint or witness mark in the polymer which matches the weave of the belt. A similar mark is found on the pass through subassembly polymer at the male portion of the buckle assembly when the belt was actually worn.

The following basic diagram of a typical front passenger seat and three point restraint assembly identifies the location of the D ring as point A and the pass through location as point B.

The most important component to get detailed photographs of is the D-ring on the B-pillar for 3-point belts. The most common name for this component is “D ring.” In a typical three point restraint the D-ring assembly is constructed of a stamped metal substratum. The stamping is then over-molded with a structural polymer to provide a low friction surface over which the webbing is routed. When properly worn, the webbing exits the D-ring and is routed diagonally across the occupant’s chest to a single slot pass-through tongue

The following photos first show a belt witness mark on a D ring when a belt was worn in an impact. A detail from this photo
is also shown in the second photograph.

A third photo shows a D ring on a belt that was not worn during impact. There is the normal wear and tear of a high mileage vehicle but no loading mark in the polymer itself, a critical finding.

CONTEMPORANEOUS WITNESSES

Get all names of individuals who were at the scene when any of the occupants were belted. This includes, at the very least, the occupants of all vehicles in the vicinity, whether or not they were involved in the accident, police officers, fire department personnel, EMS personnel and other similar first responders. We had one case where we were certain that a belt was used in a child restraint and held from the physical evidence. We obtained photos from all first responders and were able to identify thirty-eight individuals in the scene photos. As the first responders from this rural area all knew each other we identified everyone even though many backs were to the camera and were finally able to put all the pieces together. A travelling salesman based in Chicago but who called to ask about the child was the key fact witness on the use of the restraint seat belt.

EXPERTS

1. Overview
   Who to use

This topic is discussed in detail in See Litigating the Complex Motor Vehicle Case 1992: Accident Reconstruction, Biomedical Analysis, and the Seat Belt Defense, Neil Goldberg, Patrick S. Kennedy and Samuel Goldblatt, Practicing Law Institute (1992). This article offers excellent insights on what flavor(s) of experts to use in these cases.

In a Kentucky case, a Kentucky-based accident reconstructionist testified on the issue of injury reduction through the use of belts:

Agent testified that he had a Bachelor’s degree and a Master’s degree in civil engineering from the University of Kentucky. He stated that he was a registered professional engineer, a member of the Institute of Transportation Engineers, and a member of the National Academy of Science. Agent further testified that he had been affiliated with organizations associated with the National Highway Transportation Safety Board. He also testified concerning his extensive work in the study of motor vehicle accidents, the effect that seat belt use/nonuse has on accidents, and the reports and studies he has published in that field. Over Tetrick’s objections, the court accepted Agent as a qualified expert witness. He then testified that Tetrick would not have had the injuries he suffered had he been wearing his seat belt . . .

Tetrick’s last argument is that the trial court erred “by permitting Kenneth Agent, a traffic engineer and accident reconstruction expert, to offer medical testimony at trial.” As we have noted, Agent testified that Tetrick would not have had the injuries that he did had he been wearing a seat belt. Tetrick argues that this testimony “is clearly a medical opinion” and that the court erred by allowing Agent, a civil engineer, to testify in this regard. See Hill v. Sextet Mining Corp., 65 S.W.3d 503, 507 (Ky. 2001).

We disagree with Tetrick’s argument that Agent gave a medical opinion. Agent did not testify as to the extent of injuries and their physiological effects on the body. Rather, he
testified that the seat belt, by restraining Tetrick’s motion on impact, would have prevented the “secondary impact” between Tetrick and the forward interior of the car. Furthermore, this court held in Bass v. Williams, Ky.App., 839 S.W.2d 559 (1992), that to qualify as an expert witness concerning the seat belt defense, “the witness must possess sufficient training, special knowledge, or skill to testify on the subject dealing with the effect of non-usage of seatbelts in collisions.” Id. at 566. Further, the court in Bass stated that “[w]hat must be shown is a causal relation between the claimant’s failure to wear a seatbelt and the degree of subsequent injury.” Id. We agree with the trial court that Agent was qualified to testify as an expert witness on the subject of seat belt use.

Tetrick v. Frashure, 119 S.W.3d (Ky. App.Ct., 2003). (Emphasis added.) In light of the rationale for this decision I recommend that you use considerable caution when trying to establish a basis for a seat belt defense using only an accident reconstructionist and I would be particularly careful about using this expert for injury causation. I think that we ask reconstructionists to try to cover too many disciplines and I rarely ask one to cover this area for that reason. It is important to remember that the burden of persuasion is often far more important than whether or not you can escape a Daubert, supra, motion as you want to convince on this issue rather than just survive.

One additional point when engaging experts even when you have worked with them in the past is to always check them on Google™. Clients are not very understanding when you learn in a mediation that a crucial expert has a felony conviction.

2. Accident Reconstruction

There is a temptation in these cases to go with one expert on liability. Some accident reconstructionists are willing to get into the area of occupant kinematics to greater and lesser extents. Some are even willing to get into injury mechanism. Similarly, there are biomechanists who have at least the education to do accident reconstruction. I have found that the best accident reconstructionists will not go beyond occupant kinematics (the movement of occupants in the vehicle, when both belted and unbelted) and biomechanists are typically qualified to discuss occupant kinematics but don’t want to get into vehicular accident reconstruction.

I like to have an accident reconstructionist who talks generally about occupant kinematics and use the biomechanist to discuss it in more detail. While some lawyers are uncomfortable with it, I see no problem at all with these experts consulting with each other. Their fundamental role is as scientific colleagues performing an analysis. I always use an accident reconstructionist even if the question of fault is conceded when I assert a seat belt defense. I have found that the biomechanists I work with in this area always have issues related to the movement of the vehicles and the change of velocity seen by the vehicle in which the plaintiff is riding that are important to the biomechanist’s own analyses. These questions in my view are best handled by an accident reconstructionist. When liability is not conceded, the motion of the vehicles and timing of events in the accident, as well as the change of the velocity of the vehicles during all impacts are critical issues for resolving liability questions. Accident reconstructionists can also readily handle the line of sight questions which often arise.

BIOMECHANICS

Biomechanists who are used in litigation come from a variety of disciplines. Typically the best are trained as doctors and practice medicine and also have degrees in engineering. Some of these experts have engineering degrees specializing in the area of biomechanics as opposed to a more generalized mechanical engineering degree. You often find biomechanists who teach in medical schools and, as you might expect, this includes some of the most prestigious medical schools in the country. Some courts have allowed doctors to testify in the area of biomechanics and others have also allowed engineers to testify in biomechanics even when they have not had specific training in engineering school in the area of biomechanics.

This all leaves the practicing lawyer in a bit of a quandary. Often, we simply use anyone
who is willing to testify on this subject and “hangs out their shingle.” I avoid this approach but obviously you want to deal with those individuals based on their detailed credentials on an individual basis. I prefer to use individuals who have engineering training with specialized training in biomechanics. This field initially started as a result of the American military’s concern about the affect on pilots of ejection seats and similar devices as well as all the forces astronauts see in space flight. The auto industries also made early use of biomechanists and the schools responded with programs to meet these needs by often conducting government research and developing degree programs in this area. See *Litigating the Complex Motor Vehicle Case 1992: Accident Reconstruction, Biomedical Analysis, and the Seat Belt Defense*, Neil Goldberg, Patrick S. Kennedy and Samuel Goldblatt, Practicing Law Institute (1992).

**TRIAL**

1. **Fact Witnesses**

As indicated above, the testimony of the fact witnesses about whether a seatbelt was worn or not is often contradictory. Indeed, it is not unusual for medical records, particularly at the hospital, to be in disagreement. My experience has been that the farther in time the preparation of the medical records are from the accident itself, the less likely they are to be accurate. The records of the fire department sometimes contain information related to belt use as they are responsible for extrication and often have medically trained first responders with them. You will often find (depending upon the department) that anyone suspected of a spinal injury is already on a backboard with neck and head bracing before the ambulance even arrives.

During this process it is often necessary for these first responders to radically change the exterior of the vehicle and they also frequently have to unbelt vehicle occupants or cut belts to gain access to assist the injured. Typically, the police officers who are thorough will talk to all first responders about the question of belt use if the police are not first on the scene. If the vehicle occupants are already out of the vehicle, they will also usually talk to the occupants and bystanders who may have assisted. When I choose from among these individuals who may have knowledge of belt use, I tend to bring professionals whose job it is to be there. They are used to the hubbub surrounding and accident scene and have more frequently been witnesses in a deposition or a trial. I don’t think these witnesses should be ignored; however, I rely far more on the physical evidence and its interpretation than I do eye witnesses. I feel that juries understand the logic of that approach and I tend to use what has been successful for me.

2. **Experts**

If you have any choice at all in these cases, pick both an accident reconstructionist and a biomechanist who are really knowledgeable about restraint systems. If they are not then you need a different expert. These experts have to stand up to strong cross-examination and juries reasonably expect them to now a great deal of relevant information about motor vehicles. Usually real professionals in each discipline know a great deal about cars generally and restraint systems in particular. Finally these professionals should be able to make suggestions for the names of those in this area. Some consulting groups are too entrepreneurial and will only suggest others in their own group. *Caveat emptor.*

I prefer to always use a biomechanist on the questions of whether or not the belt was in use, whether the belt was used correctly and the nature and extent of the injuries, if any, which would have occurred if the belt had been properly used. Often the argument is made that a belt is not necessary when an available airbag actuates in the accident. This is also an issue that most biomechanists can cover. Seat belt design and testing engineers many aspects of these questions and typically are also used in addition to biomechanists in automotive crashworthiness cases. A good discussion of these issues and the choice of proper experts is found in *Litigating the Complex Motor Vehicle Case 1992: Accident Reconstruction, Biomedical Analysis, and the Seat Belt Defense*. This article is particularly good as a resource for attorneys new to this area and as a checklist for those who have handled many of these cases.
Although the entire jury is extremely familiar with seat belts, few will really know how they work mechanically. Almost all jurors in these cases enjoy learning how restraints work and appreciate it when you teach them this information. In tort cases, I divide up teaching the jury about seat belts between the accident reconstructionist and the biomechanist.

Usually in these cases one side has the weakest facts, weakest physical evidence and the weakest expert. A party which has all these problems usually spends a great deal of time dragging fish and tells the jury a great deal about common sense. Occasionally they will have a very strong expert but the expert simply does not target a particular party. If you have that party you are in excellent shape. When you are lucky enough to be in the strong position it is essential that you spend enough time on your experts credentials, investigation and analysis for the jury to unequivocally accept that the experts really do know a great deal and have carefully figured everything out. Do no neglect to explain important concepts to the jury.

I use exhibits as the principal outline for expert testimony in these cases. Diagrams and particularly photos are essential. They should be the framework for your entire case. I also try to prove as much of my case during cross so that the jury has seen the various photos and diagrams when I use them with my own experts. Also Judges pressure trial lawyers more and more to “move along” in direct examination but allow much more time often in cross. If as a defendant you feel you are pushed for time in your case but that the Plaintiff has been allowed all the time they want you should use this approach. Often the short “scathing” cross is what you want. If you know an expert is weak in these cases the jury doesn’t and they will not learn it unless you show them how weak that expert is with a longer cross. I have gone over three hours on cross with adverse experts that I considered to be weak witnesses in complex accident cases such as these but have not lost a verdict in a case where I did that.

3. Exhibits

Exhibits and ideas for exhibits can be found in a very wide variety of locations. Your expert should be your best source but there are certainly others. As you would expect, the internet is an excellent source for materials of this kind. With my indifferent search skills I located the following un-copyrighted diagram on a university website. The website is listed in the Annotated Bibliography. The site is very educational as well. If you learn something from material, the jury will as well. Crash videos can also be found at many locations on the internet. Good starting places are at the National Highway Transportation Safety Administration and Insurance Institute for Highway Safety sites. Local car dealerships are almost always willing to print a copy for you from their parts manuals, now in digital format. Owner’s manuals often have good diagrams which can be used in part for exhibits. Their line drawings are excellent to help a jury understand how they work where a photo may present too much information.

Do not forget that almost all engineers can rapidly draw diagrams in the courtroom. I have found that this seems to give the witness additional credibility. Jurors have told me that when an engineer started drawing components they really felt the witness knew what they were talking about.

Do not neglect the use of exemplar components. If you and your witnesses are totally comfortable with them it also lends credibility. Further seeing things in three dimensions helps jurors learn.

The following is the type of diagram you can readily find on the internet. If it is copyrighted it can still give you ideas.
This basic diagram also comes from the internet at [http://www.wescoperformance.com/seat-belt-install-3-point-retract.html](http://www.wescoperformance.com/seat-belt-install-3-point-retract.html).

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Laura Ruhl Genson and Anita M. Kerezman, Editors

CHAPTER 31, PART I

The Defense Perspective - Can You Protect the Investigation?

**INTRODUCTION**

A party to litigation may discover from any other party to that litigation any matter that is “relevant to the subject matter involved in the pending action” that is “not privileged.”

A rule of privilege gives a person a right to refuse disclosure of information that he or she otherwise would be required to provide based on various policies favoring confidentiality over the general principle that “the law is entitled to every person’s evidence.”

The successful defense of many commercial vehicle accidents depends upon early intervention and investigation; thus, the trucking company and its counsel must be cognizant of that fact and conduct their investigation in such a manner as to minimize the likelihood that opposing counsel may ultimately discover the fruits of their labor. A carrier’s investigation of the causes of a motor vehicle accident can be protected, in certain situations, through the attorney-client privilege and the work-product doctrine.

**Attorney-Client Privilege**

The attorney-client privilege is an absolute privilege barring inquiry into communications between a client and the client’s counsel in the course of legal representation. The rationale is that effective representation requires full and frank communications between a lawyer and a client. Such communications would be inhibited if opposing counsel could essentially “listen in” on them by asking about them at trial or in discovery.

The party claiming the privilege has the burden of proving each of the following four elements:

1. The asserted holder of the privilege is a client or is sought as a client;

2. The person to whom the

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137 *FED. R. Civ. P. 26(b)(1).*
communication was made (a) is a member of the bar of a court, or his or her subordinate and (b) in connection with this communication is acting as a lawyer;

3. The communication relates to a fact of which the lawyer was informed (a) by the client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not the purpose of committing a crime or tort; and

4. The privilege has been (a) claimed and (b) not waived by the client.139

However, even if all four elements are proven, the privilege protects only disclosure of confidential communications—it does not protect disclosure of the underlying facts by those who communicated with the lawyer.140

In Upjohn v. United States, the United States Supreme Court recognized that the attorney-client privilege extended to the corporate client. However, the privilege to corporations does not bestow greater privileges than are bestowed upon natural persons.141 Thus, the underlying facts remain discoverable by an opposing party.

In order for an investigation report to qualify for the attorney-client privilege, corporate management must show the existence of circumstances justifying the recognition of such a privilege.142 The Court in Upjohn enunciated a six-prong test for determining whether corporate communications justified the protections of the privilege:

1. The communications were made by corporate employees to corporate counsel upon the order of superiors so that the corporation could secure legal advice;

2. The information needed by corporate counsel to formulate legal advice was not available to upper-level management;

3. The information communicated concerned matters bearing on the employee’s corporate duties;

4. The employees were aware that the reason for communications with counsel was so that the corporation could seek legal advice;

5. The communications were ordered to be kept confidential and they were kept confidential; and

6. The identity and resources of the opposing party.143

Further, in order for corporate communications to be privileged, the primary purpose must be to gain or provide legal assistance.144 Finally, a corporation cannot funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.145

A common issue arising when attorney-client privilege is claimed involves independent or pre-existing documents. No privilege attaches to an instrument by reason of its passage from a client to a lawyer where the instrument existed prior to the formation of the relation of lawyer and client, or where a document, although coming into existence subsequently, did so from independent causes.146 However, a document privileged at the time it is delivered to a lawyer retains whatever privilege it had in the hands of the client.147 Thus, where the client cannot be compelled to produce papers or documents, the lawyer, having the documents in his or her possession, also cannot be compelled to produce them.

Because assertions of privilege can result in the suppression of relevant facts, courts often tend to construe the privilege narrowly and resolve doubtful cases against a finding of privilege. In many instances, when precedent is not absolutely clear, the resolution of a dispute concerning privilege depends

140 Upjohn, 449 U.S. at 395.
143 Upjohn, 449 U.S. at 394-95.
146 See Grant v. United States, 227 U.S. 74 (1913).
more on the particular judge’s attitude toward liberal discovery than on a detailed analysis of the law of privilege. Nonetheless, if a report of an investigation is prepared in response to a motor vehicle accident, confidential communications (not underlying facts) between the employees of a transport company and its counsel can be protected if the investigation was conducted at the direction of counsel for the purpose of anticipated litigation.

WORK-PRODUCT DOCTRINE

The work-product doctrine is separate from and broader than the attorney-client privilege. Unlike the attorney-client privilege, the work-product doctrine is not designed to protect client confidences but, rather, seeks to shelter the mental processes of the lawyer, thus providing a privileged area within which the lawyer can analyze or prepare a client’s case.148 Under the work-product doctrine, documents and tangible items prepared in anticipation of litigation by or for another party may not be discovered except on a showing of substantial need for case preparation and inability, without undue hardship, to obtain the substantial equivalent by other means.149 This doctrine applies to material gathered by the party or by the party’s lawyer, consultant, surety, indemnitor, insurer, or other agent.

In the seminal case of Hickman v. Taylor,150 the United States Supreme Court recognized the work-product doctrine as limiting the scope of discovery in two ways. First, tangible materials, such as witness statements, prepared by or for a party or the party’s representative in anticipation of any litigation or for any trial (“ordinary work-product”) can be discovered only upon a showing of substantial need and inability without undue hardship to obtain the substantial equivalent. Second, the mental impressions, conclusions, opinions, or legal theories of the party’s lawyer or other representative concerning any litigation (“opinion work-product”) are even more strictly protected and indeed can perhaps never be discovered. However, these protections do not extend to prevent normal discovery of raw facts embodied in an otherwise undiscoverable document.

To be protected by the work-product doctrine, the investigation report must have been prepared in anticipation of litigation. Although almost all of the work performed by lawyers and the advice they dispense may be viewed as being in anticipation of litigation or its avoidance, work-product immunity requires a more immediate showing than the remote possibility of litigation.151 There must be a substantial probability that litigation will occur and that commencement of such litigation is imminent, or at least litigation must reasonably be anticipated.152 The fact that litigation does eventually ensue does not in and of itself cloak materials prepared by a lawyer with the protection of the work-product doctrine.153

Unlike the attorney-client privilege, the work-product doctrine is not an absolute bar to discovery, and is more akin to a rebuttable presumption. Once the party seeking work-product protection demonstrates that the document was prepared in anticipation of litigation, the party seeking discovery of such information may still obtain the document if that party can show a substantial need and the inability to obtain the information without undue hardship. A “substantial need” for materials that are sought requires a showing of: (1) the importance of the materials to be discovered; (2) inadequate alternative means of discovery; and (3) lack of the substantial equivalent of the documents sought.154 Other relevant factors in determining what constitutes undue hardship and substantial need with regard to a demand for witness statements include the availability of evidence after the accident, and whether there were any survivors.155 Further, the cost or inconvenience of taking a deposition may not by itself be a sufficient showing to meet the undue hardship requirement, but the cost of discovery is a pertinent and appropriate consideration.156

In summary, an investigation report that was prepared in anticipation of litigation can be protected from discovery unless the opposing party can

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149 FED. R. CIV. P. 26(b)(3).
150 329 U.S. 495 (1947).

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152 In re Grand Jury Investigation, 599 F.2d 1224 (1979).
demonstrate a substantial need for the material and an inability to obtain the same without undue hardship. The court, on a case-by-case basis, will make this determination using the factors previously discussed. However, if such reports contain facts that cannot be discovered elsewhere, then those facts are discoverable.

As a practical matter, a trucking company should retain and involve counsel as soon as possible following a serious accident. Counsel can then direct all facets of the field investigation conducted by on-site adjusters, engineers, and the like. By involving counsel in honest anticipation of litigation, the company increases the likelihood of work-product protection attaching to its investigation, thereby providing maximum protection against later discovery by opposing counsel.

CONCLUSION

The attorney-client privilege and work-product doctrine can, in the proper circumstances, protect an investigation report that was prepared in response to a motor vehicle accident. Confidential communications between a lawyer and a client and a lawyer’s mental impressions or personal opinions relating to trial strategy are almost always protected from discovery. However, the courts will allow discovery of the underlying facts that are contained in any such report. Finally, it is important to remember that, unless counsel is dealing with the attorney-client privilege, the protection is not absolute, and the plaintiff may still be able to obtain the documents, even if they would not otherwise be protected from discovery.

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