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2023 TRANSPORTATION PRACTICE GROUP SEMINAR

APRIL 26-28, 2023 | MARRIOTT HARBOR BEACH RESORT & SPA | FORT LAUDERDALE, FLORIDA

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# **Wearing the Other Hat: Proactive vs. Reactive Litigation Strategies**



# Panelists



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# Proactive vs. Reactive

## Strategy and Calculated Risk

- Do not assume you will lose; you don't know until you ask
- Control the lawsuit
- Resources – Share the Information
- Create leverage

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# Quit Giving Away the Farm



Opposing Counsel will Gladly Take What We Give

- Protect the Driver
  - Personal Information – Redacting the DQ File
- Protect the Company

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# Early Investigation Tools



- Social Media – Deep dive, and act on it
- Claimant's Personal Insurance
- Other incidents
- Other lawsuits (“repeat offenders”)

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# Spoliation Letter Responses



## NOTICE TO PRESERVE EVIDENCE

Dear Safety Director:

Please be advised that this firm has been retained as counsel by [REDACTED] relating to any and all claims arising out of a collision which occurred on or about [REDACTED] TN. This letter is a formal request that you preserve and not alter any and all equipment that was involved in the collision, along with photographs, video recordings, recorded audio or computer media, measurements, real evidence, documents, materials, and all other evidence and things relating to the crash which are presently in your possession or the possession of your employee or agent. This includes, but is certainly not limited to all documents, whether paper, electronic or otherwise stored, relative to the driver and truck company in general, as well as anything that shows if the company or the driver either contributed to the cause of the crash or did nothing to contribute to the cause of the crash.

**IF YOU BELIEVE THAT DOCUMENTS EXIST THAT SHOW THAT THE COMPANY OR THE DRIVER HAD NO FAULT FOR THE WRECK, SOME FAULT, OR COMPLETE FAULT, YOU MUST SAVE THOSE DOCUMENTS UNTIL THE TRIAL OR SETTLEMENT OF THIS MATTER SO A FULL ANALYSIS OF THE CAUSE OF THIS WRECK CAN BE MADE AND THE PERCENTAGE OF FAULT OF EACH PARTY CAN BE DETERMINED. IF YOU FAIL TO SAVE THESE DOCUMENTS IT WILL PROVE THAT YOU DELIBERATELY DESTROYED THE DOCUMENTS TO HIDE YOUR FAULT FOR THIS WRECK.** (See FMCSR 379, App. A(F)(2)(a) and Note A)

You should save all documents that show you were a safe company and that you fully complied with the Federal Motor Carrier Safety Regulations and properly hired, supervised, trained, and retained the driver and maintained the vehicle.

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# Spoliation Letter Responses



“Plaintiff's counsel served the equivalent of interrogatories and requests for production on [motor carrier] ten days after the accident before any lawsuit had been initiated. In fact, if the court were to count the requests in Plaintiffs fifteen-page letter, it would likely exceed the number permitted under the federal rules. **Such an extensive request for materials certainly would lend itself to an effort on any plaintiff's part to sandbag a defendant in the event that any of those materials were not preserved.** The legal system does not permit discovery to begin in a lawsuit until after a party has been served with a complaint and answered, so it is difficult to allow a potential plaintiff to make an end run around the Federal Rules of Civil Procedure by filing a preemptive ‘spoliation’ letter.”

*Frey v. Gainey Transp. Servs.*, NO. 1:05-CV-1493-JOF, 2006 U.S. Dist. LEXIS 59316, \*25-26 (N.D. Ga. Aug. 22, 2006).

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# Accident Register



- Required under 49 CFR 390.15
- Not discoverable or admissible under 49 USC 504(f)
  - *Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009)
- Does not protect preventability determinations
  - *Laws v. Stevens Transp., Inc.*, No. 2:12-cv-544, 2013 U.S. Dist. LEXIS 32221 (S.D. Ohio Mar. 8, 2013)
  - *Laney v. Schneider Nat'l Carriers, Inc.*, No. 09-CV-389-TCK-FHM, 2010 U.S. Dist. LEXIS 120069 (N.D. Ok. Nov. 10, 2010)

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# DQFs – Driver Certifications



- As of June 2022, drivers are no longer required to provide an annual Certificate of Violations (“COV”)
- Motor carrier must still run an annual MVR for each driver and, for 3 years, retain COVs acquired before the effective date of new rule

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# Cell phone preservation and EDRs



Cell phone number reverse searches

[www.carrierlookup.com](http://www.carrierlookup.com)

Purchase EDRs after vehicle is salvaged

<https://lightpointdata.com/acm>

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# Medical Funding



- Back at the trough – Sanctions for repeat offenders
- Too Cozy – Sanctions for Attorney/Physician Relations
- Medical canvassing

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# Aggressive Use of Sanctions



FILED  
11/23/2021 5:11 PM  
Mary Angie Garcia  
Bexar County District Clerk  
Accepted By: Luis Herrera  
Bexar County - 408th District Court

CAUSE NO. 2020CI06149

KARIMA RASOULLY § IN THE DISTRICT COURT  
Plaintiff §  
V. §  
CHALK MOUNTAIN SERVICES OF § 408<sup>TH</sup> JUDICIAL DISTRICT  
TEXAS, LLC, and STUART CARY §  
Defendants § BEXAR COUNTY, TEXAS

**DEFENDANT'S MOTION FOR SANCTIONS FOR PERJURY AND FALSE STATEMENTS BY PLAINTIFF KARIMA RASOULLY**

**TO THE HONORABLE COURT:**

NOW COMES CHALK MOUNTAIN SERVICES OF TEXAS, LLC ("Chalk Mountain") to file this Motion for Sanctions for Perjury and False Statements by Karima Rasouly, and in support shows as follows:

**I.**

This case involves a minor rear-end accident that occurred on November 14, 2019 in which Plaintiff claims to have suffered "severe" injuries, including but not limited to cervical, thoracic, and lumbar pain, head injury, radiculopathy, and cervical and lumbar disc herniations.

**II.**

**Relevant Testimony of Plaintiff**

On March 24, 2020, Plaintiff filed her Original Petition asserting claims of

CAUSE NO. 2020-CI-09360

HENRY LOPEZ, § IN THE DISTRICT COURT  
Plaintiff, §  
v. § 166<sup>TH</sup> JUDICIAL DISTRICT  
MESILLA VALLEY §  
TRANSPORTATION AND §  
FRANKLYN CUFFY, §  
Defendants. § BEXAR COUNTY, TEXAS

**DEFENDANTS' MOTION FOR SANCTIONS FOR PERJURY AND FALSE STATEMENTS BY PLAINTIFF HENRY LOPEZ**

**TO THE HONORABLE COURT:**

NOW COME MESILLA VALLEY TRANSPORTATION and FRANKLYN CUFFY, Defendants, to file this Motion for Sanctions for Perjury and False Statements by Plaintiff Henry Lopez, and in support show as follows:

**I.**

This lawsuit arises out of a motor vehicle accident allegedly occurring on March 27, 2020, whereby Plaintiff Henry Lopez claims to have suffered extensive

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# Medical Funding – Discovery



- Statutory and procedural rules requiring disclosure of litigation and medical funding
  - D. N.J. L. Civ. R. 7.1.1 (2021)
  - Wis. Stat. § 804.01(2)(bg) (2018)
  - W. Va. Code § 46A-6N-1, *et seq.* (2019).

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# Medical Funding – Injury Finance



- “Injury Factoring LLC, d/b/a Injury Finance ("Injury Finance") is a company that refers auto injury plaintiffs for medical care within its network of health care providers ("Providers") at no cost to plaintiffs, in return for a lien on settlement or judgment proceeds. Injury Finance purchases the injured plaintiffs' accounts receivable at a "pre-determined, contractual rate" --which is less than market-value - from these Providers; Injury Finance then receives the full amount charged by the Provider from the injured plaintiffs at the time of settlement or judgment. As evidenced by the Lien Agreement and Security Interest, by signing the Agreement, the injured plaintiff makes a "direct assignment of the insurance settlement proceeds, authorizing Injury Finance to act as [plaintiff's] agent in collecting amounts owed to Injury Finance.”
- *Olguin v. Quintero-Vega*, No. 2018CV31166, 2019 Colo. Dist. LEXIS 2783, \*2-3 (June 18, 2019).

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# Medical Funding – Injury Finance



- Injury Finance is **not** a collateral source
- *Caduff v. Luis Loma-Martinez & Young Am. Ins. Co.*, No. 18CV30425, 2019 Colo. Dist. LEXIS 1321 (D. Colo. Mar. 29, 2019)
- *Doe v. Soc’y of the Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 U.S. Dist. LEXIS 60799, (N.D. Ill. May 1, 2014)
- *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293 (11th Cir. 2018);
- *Houston v. Publix Supermarkets, Inc.*, No. 1:13-CV-206-TWT, 2015 U.S. Dist. LEXIS 10293, (N.D. Ga. July 29, 2015);
- *Rangel v. Anderson*, 202 F. Supp. 3d 1361 (S.D. Ga. 2016).

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# Proactive vs. Reactive



Questions?

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