AAJ TRUCKING LITIGATION GROUP
IMPROVING PUBLIC SAFETY
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In This Issue

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From The Chair

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Dear Fellow Advocates -

The Trucking Litigation Group Executive Board met recently in Washington, D.C., to refine our vision for 2026: **Executing the Fundamentals.** As we reflect on the past year, 2025 brought seismic changes. Wall Street injected trillions of dollars into generative artificial intelligence ("AI") and automation - forces that will continue to reshape both the transportation industry and the legal profession.

TLG is working to identify meaningful AI trends and distill them into clear, usable modules you can apply immediately in your practice. AI can feel overwhelming, but it also represents an opportunity to enhance attorney wellness by reducing time spent on routine tasks and providing immediate, meaningful feedback that we can apply in our practice.

Attorney wellness is a core value of TLG. We strive to integrate wellness with education. We support our fellow advocates by providing high-quality educational programs and trial colleges powered by mentorship from the nation's top trucking lawyers. TLG hosts our free monthly T5 webinar series (Truck Talks), maintains our private members-only listserv, posts monthly "tip of the months," and publishes our peer-reviewed, bi-annual *Trucking Litigation Journal*. By sharing knowledge freely with one another, we have achieved through collective efforts something the defense bar likely never will. So long as we continue these collaborations, we will remain at the forefront of the profession no matter how rapidly technology evolves.

While some predict futures of robot lawyers and driverless trucks displacing human labor, we must also recognize that technological advancements can improve roadway safety and promote attorney wellness - benefits that ultimately flow to our

clients. Just as crash-avoidance technology can augment a truck driver's capabilities, AI can help lawyers reclaim valuable time. Less time spent on routine tasks means more time doing what we do best: formulating case strategy and developing the evidence necessary to win.

TLG AI Committee

To help meet these needs, I am pleased to announce the formation of the **TLG AI Committee**, chaired by Nathan Gaffney. The Committee's singular mission is to help our members understand and implement new technologies to improve the lives of both attorneys and clients. During October's T5 presentation, members learned concrete, practical methods for using AI in their practices, including real-time demonstrations. I personally learned how to use common software tools to create a dossier on a familiar trucking-industry defense "expert" including: (1) a deposition profile, (2) a draft deposition outline, (3) a compilation of common defenses raised in other cases, and (4) suggested lines of questioning to overcome those defenses. From that dataset, we demonstrated the ability to generate a podcast-style audio prep tool and a visual mind map to help develop and refine deposition strategy – all in a format you can listen to during daily commutes.

Think of AI not as a replacement for advocacy but as an enhancement—rocket fuel for the human lawyer.

Equally exciting is the emerging ability to use generative AI during trial to predict (for example) - on the fly - the top issues most likely to result in reversal or mistrial. This enhanced predictive reasoning gives advocates a rare opportunity to cure error in real time before the record closes.

Think of AI not as a replacement for advocacy, but as an enhancement - rocket fuel for the human lawyer. Imagine having a collaborator with the equivalent of a 155 - 160 IQ available 24/7 to help refine your thinking. Nathan explores these ideas further in his article in this issue of the *Trucking Litigation Journal.*

With the creation of the AI Committee, fellow officer **Tim Whiting** has graciously agreed to serve as Chair of TLG's Wellness Committee. It is no secret that many in our profession struggle with chronic stress, strained relationships, and potentially unhealthy coping mechanisms. Attorney wellness remains at the forefront of TLG's mission, and we are thankful for Tim's leadership. He is someone who truly leads by example.

I would also like to extend my personal gratitude to Immediate Past Chair **Joe Camerlengo** for his boundless enthusiasm and courageous leadership. My first official act as Chair was to establish the **Camerlengo Courage Award**. Fittingly, Joe is its inaugural recipient.

Special thanks to our Journal Chairs **Maxey Scherr** and **Mike Sievers** for the tireless efforts in putting together this issue of the Journal.

2025 Events

At the Annual Convention in San Francisco, we hosted an all-day seminar with the Bus Litigation Group on the theme of **Foundations for Compelling Client Stories**. Special thanks are in order for the program's tremendous success to Bus Litigation Chair, **Ken Levinson**, Moderator **Larry Simon** and our speakers **Jordan Jones, Joe Camerlengo, Allan Siegel, Ilya Lerma, Bridget Long, J.J. Burns, Jay Vaughn, Maxey Scherr, Deena Buchanan, Joe Fried, Jason Gillis, Pete Kestner, Tim Whiting, Grant Lawson** and **Eric Penn**.

In December 2025 we also held the Annual Members Only Seminar at the Breakers Hotel in Palm Beach, Florida. Special thanks to Diana Diskin and Chauncey Barnwell for all their hard work in compiling the speaker roster and to past Chair Jeanmarie Whalen for negotiating

and booking the rooms and space at the Breakers at a great discount for our members. Thanks also to our speakers, **Shannon Frankel, Michael Rainey, J.J. Burns, Bryan Roberts, Diana Diskin, Adam Slone, Alexander Kemp, Kate Feroleto, Michael Greenspan, Eric Ganci, Ken Levinson, Stefano Portigliatti, Jon Hollan, Allan Siegel, Steve Gursten, Jay Vaughn, Bridget Long, Jordan Jones, Grant Lawson, Chauncey Barnwell, Burgess Williams, Robert Collins, Ed Ciarimboli, Mike Chaloupka, Larry Simon, Rena Leizerman, Michael Leizerman, Joe Fried and roundtable participants Jeanmarie Whalen** and **Pete Kestner.**

Upcoming Events in 2026

Our Trucking Litigation Group will host a Client Advocacy Day with the Institute for Safer Trucking on Capitol Hill in Washington, D.C. on **March 24 – 25th, 2026.** This initiative represents a meaningful opportunity for truck crash victims and their families to come together, share their stories, and engage directly with policymakers whose decisions shape the safety of our nation's highways. There is no cost to attend.

Client Advocacy Day is designed not only as a forum for education and dialogue, but also as a space for connection. Participants will have the opportunity to meet others who have faced similar challenges, build supportive relationships, and collectively lend their voices to the ongoing effort to improve accountability, transparency, and safety in the trucking industry.

By combining the personal client experiences with advocacy, we aim to ensure that the realities of life after a serious truck crash are lived truths that should help inform legislative and regulatory priorities. Together, we can help advance meaningful reforms and work toward a future in which our roads are safer for everyone.

Please mark your calendars for **May 13 - 15, 2026**, when we will host the **AAJ Trucking Trial College** at the Highland Dallas Hotel in Dallas, Texas. Consistent with our theme, we will place special emphasis on "Executing the Fundamentals." As every great coach knows, victory begins and ends there. The most successful trial lawyers maintain the mind of a beginner - always curious, always learning. Our evolving curriculum will include hands-on trial skills sessions, live faculty feedback, and modules on integrating AI into everyday practice.

We will also hold the **Trucking Litigation Group Annual Meeting** at the AAJ Winter Convention on **Sunday, February 22, 2026, at 2:00 p.m. Pacific Time.** Be on the lookout for the forthcoming agenda.

As Chair, my goal is to continue expanding the ways we advance our shared mission - so that together, we may continue to protect the rights of truck-crash victims and I thank our members for the opportunity to do so.

My best,
Matthew E. Wright
Chair, AAJ Trucking Litigation Group

Bio

Matthew Wright is a Managing Partner of The Law Firm For Truck Safety, LLP. An alumnus of Vanderbilt Law School, Mr. Wright is Board-Certified in Truck Accident Law by the National Board of Trial Advocacy and dedicates his career to improving roadway safety for the benefit of truck crash victims and the public.

He serves as Co-Founder and Chair of the Amazon Litigation Group, Chair for the AAJ Trucking Litigation Group, and member of the Board of Regents for the Academy of Truck Accident Attorneys. He has presented numerous times across the country on trucking safety and published articles to trucking-related publications.

Mr. Wright has served on the Tennessee Trial Lawyers Association Board of Governors and its Ethics Committee. He is a graduate of the Gerry Spence Trial Lawyers' College, a member of the National Trial Lawyers Top 10 Trucking Lawyers, and the Multi-Million Dollar Advocates Forum.

As Chair, my goal is to continue expanding the ways we advance our shared mission—so that together, we may continue to protect the rights of truck-crash victims ...

The FMCSA's New Rule: "Restoring Integrity to the Issuance of Non-Domiciled Commercial Drivers Licenses"

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The process for issuing these licenses is absolutely 100 percent broken. It has become a threat to public safety, and it is a national emergency that requires action right now.

I. Critical Safety Issue

"We're here to talk about … a critical issue … [about] the safety of our roadways because we have a government system designed to keep American families on the road safe, but that system has been compromised. I'm talking about non-domiciled commercial driver's licenses that are issued across the country …. This is a license to operate a massive 80,000-pound truck that's being issued to foreign drivers who are not U.S. citizens or lawful permanent residents. The process for issuing these licenses is absolutely 100 percent broken. It has become a threat to public safety, and it is a national emergency that requires action right now. This isn't fearmongering. This is a serious business that entails American families and their lives …. [T]his year alone, a series of horrific fatal crashes have been caused by dangerous non-domiciled CDL drivers …. We have an obligation to keep the American people safe, and that requires action today …. We have launched a nationwide audit of non-domiciled CDLs to get to the bottom of what we think is causing this crisis. We've heard from truckers and safety advocates and news reports that something was seriously wrong."[1]

This is not an opening statement from a trial involving a catastrophic truck crash. Instead, these words come from Secretary of Transportation Sean Duffy's opening remarks at a press conference on Sept. 26, where he announced an Interim Final Rule that substantially restricts eligibility for non-domiciled Commercial Driver's Licenses and Commercial Learner's Permits, effective Sept. 29. This change is expected to affect thousands of drivers who rely on non-domiciled licenses, potentially impacting cross-border transportation and workforce availability.

Under the new regulations, CDLs and CLPs will only be available to people with lawful immigration status in the following specific employment-based nonimmigrant categories: H-2A (Temporary Agricultural Workers), H-2B (Temporary Non-Agricultural Workers), and E-2 (Treaty Investors).[2] This change excludes previously eligible groups, including asylum seekers, refugees, Deferred Action for Childhood Arrivals recipients and those with only Employment Authorization Documents.[3]

II. Previous Rule

Previously, under 49 U.S.C. Section 31311(a)(12)(A), states could issue CDLs to people who were not domiciled in the United States—that is, those who were neither citizens nor permanent residents.[4] This system allowed people from countries without commercial motor vehicle driver testing and licensing standards comparable to those in the U.S. to obtain a CDL, provided that states followed specific FMCSA regulations.[5]

States choosing to issue non-domiciled CDLs had to ensure that applicants were from eligible foreign jurisdictions outside the United States and the District of Columbia, but not Canada or Mexico, as those countries have equivalent standards.[6] Any state choosing to issue non- domiciled CDLs had to comply with all federal testing and licensing standards contained in the regulations.[7] For applicants domiciled in foreign jurisdictions, states had to verify legal status before issuing a non-domiciled CDL.[8] This meant applicants needed either an unexpired employment authorization document issued by U.S. Citizenship and Immigration Services or an unexpired foreign passport with an approved I-94 form documenting their most recent entry into the United States.[9] These requirements ensured that foreign applicants had proper authorization to be in the country while obtaining their commercial driving credentials.[10]

III. New Rule

The new documentation requirements mandate that applicants provide an unexpired foreign passport and an unexpired I-94/94A form showing one of the specified visa categories.[11] States must verify this status through the Systematic Alien Verification for Entitlements system administered by U.S. Citizenship and Immigration Services.[12] Additionally, the validity of non-domiciled CDLs and CLPs will be limited to the I-94 expiration date or one year, whichever is sooner.[13]

Annual in-person renewals are now required; mail renewal is no longer an option.[14] States must keep all supporting documentation for at least two years, and if a person's immigration status changes, mandatory downgrade provisions apply, meaning that the person's eligibility or benefits—such as their CDL or CLP—may be reduced or revoked as a result of the status change.[15]

The new rule is the FMSCA's response to safety concerns after five deadly crashes in 2025 involving non-domiciled CDL holders, which caused 12 deaths.[16] The agency's Annual Program Reviews also revealed systemic noncompliance issues, with approximately 25 percent of California's non-domiciled CDLs found to be improperly issued.[17] The FMCSA determined that the existing framework presents an "imminent hazard," necessitating immediate action without the customary notice-and-comment rulemaking process.[18] The new rule is designed to restrict

Annual in-person renewals are now required; mail renewal is no longer an option.

commercial driving credentials to people with verified lawful status and valid employment-based needs, while also addressing the issue of being unable to authenticate foreign driving records for effective safety screening.[19]

The FMCSA collected data on current CLP and CDL holders and estimates that there are approximately 200,000 non-domiciled CDL holders and about 20,000 non-domiciled CLP holders.[20] Additionally, the agency projects that State Driver Licensing Agencies will issue around 6,000 non-domiciled CDLs annually.[21] It is anticipated that the remaining 194,000 existing non-domiciled CDL holders will leave the freight market.[22]

IV. Good Cause for Immediate Effect

The Administrative Procedure Act requires federal agencies to give advance notice and allow the public to comment before a rule takes effect.[23] However, there is an exception: if an agency finds good cause and explains its reasoning in the rule, it can skip the usual notice and comment process when it would be impractical, unnecessary, or against the public interest.[24] With good cause, an agency can also make a rule effective immediately after it is published.[25] In this case, the FMCSA determined there was good cause to make the new rule effective right away.

The 2025 APRs identified widespread procedural and computer programming deficiencies ...

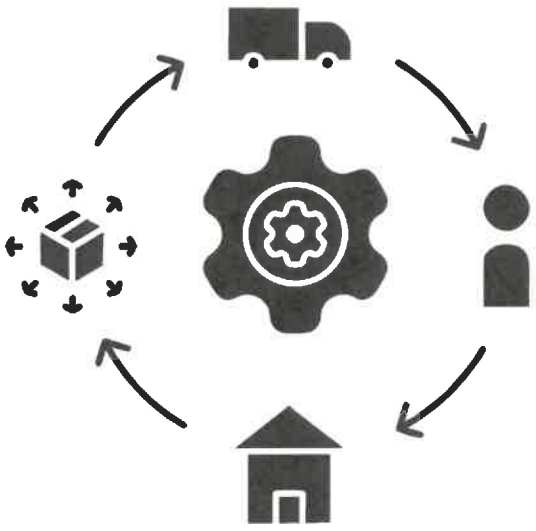
V. FMCSA Compliance Audit & States' Reactions

The FMCSA conducts Annual Program Reviews of State Driver Licensing Agencies in accordance with 49 U.S.C. Section 31311 and 49 C.F.R. Section 384.307 to assess state compliance with the CDL program. The 2025 APRs identified widespread procedural and computer programming deficiencies, notable concerns regarding staff training and quality assurance, as well as policies lacking adequate management controls related to the issuance of non-domiciled CLPs and CDLs by several SDLAs.[26] Consequently, some SDLAs have issued non-domiciled CDLs to unqualified drivers, issued CDLs extending beyond the documented expiration of lawful presence, issued CDLs without adequately validating driver eligibility under Section 383.71(f)(2)(i) and engaged in other noncompliant practices.[27]

The preliminary FMCSA audit found that California, Colorado, Pennsylvania, South Dakota, Texas and Washington did not follow federal regulations when issuing commercial licenses to non-domiciled drivers.[28] On Oct. 15, Secretary Duffy announced that $40 million in federal funding would be withheld from California, as it was the only state still not enforcing English-language requirements for commercial drivers.[29]

States have enacted varying restrictions to align with federal requirements. South Carolina will now issue CDLs and CLPs solely to U.S. citizens or permanent residents who provide valid immigration documentation confirming lawful presence; existing license holders are unaffected, as these changes pertain only to future issuances and renewals.[30] Kentucky has limited non- domiciled CDL and CLP issuance to people who have H2A, H2B or E2 visas, discontinued acceptance of Employment Authorization Documents and mandates that applicants from foreign jurisdictions present unexpired foreign passports accompanied by Form I-94 or I-94A.[31] Maryland has instituted a full suspension on all non-domiciled commercial driving privileges, including issuances, transfers, updates, replacements, duplicates and renewals.[32] Oregon has likewise suspended the issuance of limited-term non-domiciled CDLs and CLPs pending adherence to updated federal regulations.[33] Texas also has suspended the provision of non-domiciled CDLs and CLPs.[34]

VI. What Effect will the New Rule Have?



The transportation industry significantly increased its capacity after the FMCSA permitted the issuance of non-domiciled CDLs in 2019, adding 310,000 trucks to American roads.[35] The FMCSA's new rule will likely reduce capacity, which could disrupt supply chains and trigger rate increases.[36] JB Hunt recommends, "carriers should prioritize proactive workforce planning, invest in compliance infrastructure and explore operational efficiencies," while "shippers should prioritize early planning, strengthen relationships with reliable carriers, explore mode conversion strategies and budget for potential pricing volatility."[37]

The new rule should be a win for safety as compliance with the federal and state regulations will be a focus for law enforcement. Foreign national drivers who have not been vetted and who pose significant safety risks should decrease. The American Trucking Associations' president and CEO, in response to the new rule, wrote: "When it comes to safety on America's highways, rules don't mean much unless they're enforced," and the new rule is "welcome and necessary."[38] Time will tell what the true impact is.

The new rule should be a win for safety as compliance with the federal and state regulations will be a focus for law enforcement.

Bio

Burgess Williams is a founding member of Williams Caputo Injury Lawyers, an Austin-based firm that handles truck crash cases nationwide. After earning his undergraduate degree from Wake

Forest University and his law degree from Florida State University, Burgess has built a practice that extends well beyond Texas borders.

Fluent in Spanish, he dedicates a significant portion of his practice to serving Spanish-speaking clients, ensuring they receive the same high-quality representation regardless of language barriers. Burgess balances his professional life with family time as a married father of two, while staying active as an avid cyclist and passionate supporter of Austin FC, Boca Juniors, and FC Barcelona.

[1] https://www.youtube.com/live/I_SdVkHnGsg.

[2] Federal Register, Volume 90, Number 186, Monday, September 29, 2025, Rules and Regulations, pages 46509-46526.

[3] *Id.*

[4] 49 U.S.C. § 31311(a)(12)(A).

[5] Federal Register, Volume 90, Number 186, Monday, September 29, 2025, Rules and Regulations, page 46511.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 5 U.S.C. § 551 et seq.

[24] 5 U.S.C. § 553(b)(B).

[25] 5 U.S.C. § 553(d)(3).

[26] Rules and Regulations, 90 Fed. Reg. 465112 (Sept. 29, 2025).

[27] *Id.*

[28] https://www.youtube.com/live/I_SdVkHnGsg.

[29] https://www.transportation.gov/briefing-room/trumps-transportation-secretary-sean-p-duffy-announces-consequences-californias.

[30] https://scdmvonline.com/News/SCDMV-Revises-CDL-Procedures.

[31] https://drive.ky.gov/Drivers/Pages/CDL.aspx.

[32] https://mva.maryland.gov/drivers/Pages/cdl-commercial.aspx.

[33] https://www.oregon.gov/odot/dmv/pages/driverid/non-domiciled-cdls.aspx.

[34] https://www.dps.texas.gov/news/dps-suspends-issuance-certain-commercial-driver- licenses#:~:text=The%20department%20is%20now%20suspending,vehicle%20drivers%20on%20Texas%20roads.

[35] https://www.freightwaves.com/news/non-domiciled-cdl-emergency-rule-could-cause-capacity-crunch.

[36] https://www.jbhunt.com/blog/enterprise/immigration-policy-impact.

[37] *Id.*

[38] https://www.trucking.org/news-insights/tougher-cdl-enforcement-and-workforce-investment-go-hand-hand?hstc=122828436.

MCS-90 Endorsement: Public Safety Net and a Lawyer's Ally

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Congress requires motor carriers to maintain financial responsibility as a public-protection safety net, not as a backdoor expansion of insurance coverage. The MCS-90 endorsement is a surety-like obligation that compels an insurer to pay a final judgment to an injured member of the public up to federal minimums when no other collectible coverage meets those minimums. The MCS-90 is triggered only when the motor carrier's available insurance is nonexistent or insufficient, and it is subject to federal cancellation and notice rules that can keep the obligation alive even when the underlying policy is rescinded or canceled under state law. This article is an attempt to explain the why, how and when of the MCS-90.

I. The Why: Congressional Intent and the Regulatory Text

Congress enacted the Motor Carrier Act of 1980 to deregulate entry and pricing while preserving robust public protection through compulsory financial responsibility. The purpose of the implementing regulations is twofold: to create additional safety incentives and to assure appropriate financial responsibility for motor vehicles on public highways. The controlling regulation states: "This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property .... The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1.

To achieve this purpose, "No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility" set forth in 49 C.F.R. Section 387.7(a). Those minimums include $750,000 for for-hire interstate property carriers (non- hazardous) operating vehicles with gross vehicle weight ratings of 10,001 pounds or more, with higher limits for specified hazardous materials, which range from $1 million to $5 million depending on the commodity ($1,000,000 to $5,000,000 depending on commodity). *See* 49 C.F.R. § 387.9. The Federal Motor Carrier Safety Administration prescribes proof of compliance via forms and endorsements (including the MCS-90

Congress enacted the Motor Carrier Act of 1980 to deregulate entry and pricing while preserving robust public protection through compulsory financial responsibility.

insurance endorsement), with cancellation and filing procedures codified in 49 C.F.R. Section 387.313.

The MCS-90 endorsement text underscores Congress's protective aim: the insurer agrees to "pay any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles" subject to the federal financial responsibility requirements, irrespective of vehicle scheduling or territorial restrictions. The insured must reimburse the insurer to the extent payment would not have been owed but for the endorsement.

The endorsement defines public liability to include bodily injury, property damage and environmental restoration and expressly disclaims application to employee injury and cargo as such.

In short, Congress preserved a public-protection guarantee: require motor carriers to backstop negligent loss through insurance, surety or self-insurance, so injured members of the public are made whole at least to federally required minimums.

FORM MCS-90 **OMB No.: 2126-0008 Expiration: 06/30/2027**

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions or which results in bodily injury, property damage, or environmental damage which the insured neither expected nor intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Property Damage means damage to or loss of use of tangible property.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of anyone accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

In short, Congress preserved a public-protection guarantee: require motor carriers to backstop negligent loss through insurance, surety or self-insurance, so injured members of the public are made whole at least to federally required minimums.

II. The Nature and Trigger of MCS-90 Obligations

A modern consensus recognizes the MCS-90 as a surety-like obligation, not a vehicle for rewriting the parties' underlying risk allocation. The Tenth Circuit's *en banc* decision in *Carolina Casualty Insurance Co. v. Yeates* held the MCS-90 "is

intended to act as a surety" and is not triggered unless "(1) the underlying insurance policy does not provide liability coverage for the accident, and (2) the carrier's other insurance coverage is either insufficient to meet the federally mandated minimums or non-existent." *Yeates*, 584 F.3d 868, 885 (10th Cir. 2009). Once the federal minimums are satisfied, the endorsement does not apply. Yeates rejected the view that the MCS-90 converts an excess policy to primary or otherwise "fundamentally alter[s]" the underlying policy; instead, it "operates to ensure payment of a minimum amount of an injured party's judgment against a negligent motor carrier" when needed to meet the federal floor. Because another insurer there paid $750,000—the minimum applicable for non-hazardous property—the MCS-90 was not triggered.

This surety framing is consistent with FMCSA's regime: the endorsement fills a gap to protect the public but preserves coverage defenses between insurer and insured via a reimbursement right.

Federal regulations govern the forms, filing and cancellation procedures and thereby ensure continuity of the public-protection obligation until effective cancellation in the manner prescribed by federal law.

Practitioners should also attend to Section 387.313's cancellation and filing provisions. Under Section 387.313, certificates, surety bonds and other securities "shall not be cancelled or withdrawn until 30 days after written notice" filed electronically with FMCSA on prescribed forms. Industry guidance and cases further reflect that the endorsement's own text requires 35 days' written notice between the insurer and insured and 30 days to FMCSA, and failure to comply can keep an endorsement obligation alive notwithstanding state-law cancellation provisions. The federal cancellation architecture thus prevents abrupt lapses in the public-protection layer absent federally compliant notice.

III. Steps Necessary to Trigger MCS-90 Coverage: The Truck Wreck Justice Checklist

Triggering the MCS-90 requires satisfying both the federal-regulatory predicates and the case-law standard. To ensure such is triggered, our office uses the following checklist:

TRUCK WRECK JUSTICE, PLLC
National Truck and Bus Litigation & Consulting

CHECKLIST FOR MCS-90

Checklist for Referral cases. Do we need to amend the filed complaint?

☐ Alleged the defendant is a for-hire motor carrier? ____ (paragraph number)

Federal regulations govern the forms, filing and cancellation procedures and thereby ensure continuity of the public-protection obligation until effective cancellation in the manner prescribed by federal law.

☐ Alleged the motor carrier carrying property? ____ (paragraph number)

☐ Alleged the Plaintiff a member of the public? ____ (paragraph number)

☐ Alleged the motor carrier operating in interstate commerce? ____ (paragraph number)

☐ Alleged the operation, use or maintenance of a commercial motor vehicle? ____ (paragraph number)

☐ Alleged Plaintiff is not an employee of the motor carrier? ____ (paragraph number)

Specific paragraphs needed for complaint:

- (Company) is a for-hire motor carrier operating a commercial motor vehicle, a tractor trailer, while transporting property in interstate commerce at the time of the wreck.
- (Plaintiff) was not an employee of (Company) at the time of the wreck.

General Law for Motion for Default considerations:

§ 387.3(a) "This subpart applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce." Thus, pursuing an MCS-90 recovery after a default judgment is far easier if the court finds as fact in the final order that the following apply to the defendant under the facts of the case:

- **For-hire motor carrier**: FMCSR Section 390.5 states "For-hire motor carrier means a person engaged in the transportation of goods or passengers for compensation." *See also* "For- hire Carriage" FMCSR Section 387.5 (Private carriers have special rules).
- **Operation, maintenance, or use**: operation, maintenance, or use of, means while a driver is in the vehicle, running, or moving or on the road pursuant to DOT Operating Authority. I am not aware of the term being specifically defined; however, Operator is defined in FMCSR Section 390.5 and states, "See driver," and "Driver means any person who operates any commercial motor vehicle."

  See also: operating authority: 49 U.S.C. § 13902, 49 C.F.R. part 365, 49 C.F.R. part 368, and C.F.R. § 392.9a.

  "Use" is presumably broader and would include times the vehicle is not operating.
- **Motor Vehicle:** FMCSR § 390.5. *Motor vehicle* means any vehicle, machine, tractor, **trailer, or semitrailer** propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Federal Motor Carrier Safety Administration, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

§ 387.3(a) "This subpart applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce."

- **Transporting**: "Transporting" is defined exceptionally broadly to include "services related to" the movement of property. 49 U.S.C. § 13102(23)(B). Such related services include "*arranging for*, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking and interchange of ... property," *id.* (emphasis added), performed using not just the "motor vehicle" itself, but also any "vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of ... property." *Id.* § 13102(23)(A). *See Titan Indemnity Co. v. Gaitan Enterprises, Inc.*, 237 F.Supp.3d 343 (D. Md. 2017).
- **Property**: The tractor itself can be considered property. FMCSR Guidance to Section 390, Question 6, states: "Is transporting an empty CMV across State lines for purposes of repair and maintenance considered interstate commerce? Guidance: Yes. The FMCSRs are applicable to drivers and CMVs in interstate commerce which transport property. The property in this situation is the empty CMV." *See also Canal Ins. Co. v P.S. Transport*, 2010 WL 817290 (ND Miss 2010).
- **Interstate Commerce**: FMCSR Section 390.5 defines it as: Interstate commerce means trade, traffic, or transportation in the United States—
  a. Between a place in a State and a place outside of such State (including a place outside of the United States);
  b. Between two places in a State through another State or a place outside of the United States;
  c. Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.
- *Intrastate commerce* means any trade, traffic, or transportation in any State which is not described in the term "interstate commerce." (Note: some courts consider it to be trip or "leg" dependent)
- **Not an employee** of the Named insured (CDL drivers are on 24/7) "engaged in course of employment.
- **Public Liability** is defined in the MCS-90 and means bodily injury and property damage.

Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term "interstate commerce."

IV. Application Scenarios

A. Two Different Motor Carriers, Each with an MCS-90

Assume Carrier A and Carrier B are involved in a multi-vehicle collision. Each maintains its own auto liability policy with an MCS-90 endorsement. The analysis proceeds carrier-by-carrier.

First, determine each carrier's applicable policy coverage and limits, including whether scheduled or permissive-use restrictions do or do not extend coverage to the accident vehicle. If a carrier's own liability policy applies and pays at least the federal minimum, the MCS-90 attached to that policy is not triggered for that carrier under *Yeates*. *See Carolina Casualty Insurance Co. v. Yeates*, 584 F.3d 868, 880-81 (10th Cir. 2009) (*en banc*). If the policy excludes or does not cover the accident vehicle or scenario, proceed to the second Yeates step: assess whether "other insurance" available to that insured (e.g., a different applicable auto policy, a permissive user's insurer) satisfies the applicable federal minimums for that carrier's movement; if so, the endorsement is not triggered for that carrier. If not, the endorsement attached to that carrier's policy must respond to fill the gap up to the minimums, subject to the final-judgment requirement and federal cancellation compliance.

When both carriers' coverages are insufficient to meet federal minimums, both MCS-90 endorsements may be implicated up to their respective limits to assure the public minimum is met for judgments against each insured; allocation between carriers beyond the federal floor remains governed by underlying insurance law and reimbursement rights, not by the MCS-90. The MCS-90 is not an apportionment device among insurers; it is a safety net for members of the public.

Ontario's insurer, Markel Insurance Company of Canada, issued a policy that did not list the Freightliner as a covered vehicle and excluded leased vehicles; Markel denied coverage.

However, other federal courts have reached a different conclusion. In *Fairmont Specialty Ins. Co. v. 1039012 Ontario, Inc.*, the plaintiff obtained a $5 million judgment against two different motor carriers. Hummer's insurer, National Continental Insurance Company, provided $750,000 in coverage with an MCS-90 endorsement. National paid its policy limits to satisfy Hummer's liability. Ontario's insurer, Markel Insurance Company of Canada, issued a policy that did not list the Freightliner as a covered vehicle and excluded leased vehicles; Markel denied coverage. Fairmont Specialty Insurance Company issued an MCS-90 endorsement—collateral agreement—with limits of $1 million to backstop Ontario's coverage gap. The court reasoned that the Motor Carrier Act and regulations repeatedly refer to "the motor carrier" (singular), implying each carrier is held to the financial responsibility requirement individually. Each motor carrier is required to "have a bond, insurance policy, or other security, such as an MCS-90 endorsement, sufficient to pay the minimum financial responsibility and 'for each final judgment against' the motor carrier."

Congress's purpose in requiring financial responsibility is to prevent use of "leased or borrowed vehicles to avoid financial responsibility" and to "assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers." The *Fairmont* court distinguished the case from

Yeates as involving a single carrier. The court noted that *Yeates* (the Tenth Circuit's foundational case) involved one motor carrier with two separate insurance policies; here, by contrast, there were two distinct carriers, each with its own MCS-90 obligation. *See generally Fairmont*, 2011 WL 3651333 (N.D. Ind. 2011).[39]

B. Two MCS-90 Endorsements on the Same Motor Carrier (Different Policies): a sea change.

Our firm recently was able to recover two MCS-90s on the same carrier in the U.S. District Court for the Northern Georgia in the *Cagle* cases.

Summary

The *Cagle* case from the Northern District of Georgia consists of two related proceedings: (1) *Cagle v. Wesco Insurance* (Civil Action No. 2:21-cv-52-RWS) (*"Cagle I"*), which resulted in a $4.57 million default judgment against multiple motor carrier defendants following a 2019 trucking accident; and (2) *Cagle v. National Indemnity Co. of the South* (No. 2:23-CV-140-RWS) (*"Cagle II"*), a subsequent declaratory judgment action seeking recovery through federal MCS-90 endorsements that ultimately awarded the plaintiff $1.75 million from two insurance companies. The case series established important precedent regarding enforcement of judgments against "chameleon carrier" operations and the independence of federal MCS-90 endorsements from state insurance law rescission principles.

Background and Factual Context

The litigation originated from a multi-vehicle accident on July 16, 2019, involving a commercial tractor-trailer and two passenger vehicles. *Cagle v. National Indemnity Company of the South*, 772 F.Supp.3d 1316 (2025). Plaintiff Freddie Cagle was driving one of the vehicles involved in the accident, while the tractor-trailer was driven by Isidro Alex Lobaina Loloya and was transporting property for compensation in interstate commerce when it struck a vehicle driven by Kent Wilson. *Id.*

The commercial vehicle was operated under a complex web of motor carrier entities that the court would later characterize as a "chameleon carrier" operation designed to evade Federal Motor Carrier Safety Regulations. The defendants included King's Way, AC Nationwide Transport, LLC, Calzada, Ms. Cordero, One Way and First Time, all of which were found to be engaged in interstate commerce.

The court specifically found that on July 16, 2019, all defendants in default were engaged in interstate commerce as motor carriers, were carrying property in interstate commerce, and were operating commercial motor vehicles.

The case series established important precedent regarding enforcement of judgments against "chameleon carrier" operations and the independence of federal MCS-90 endorsements from state insurance law rescission principles.

Cagle, 772 F.Supp.3d 1316. These findings were crucial for establishing federal jurisdiction and the applicability of Federal Motor Carrier Safety Regulations.

Liability Determinations and Damages Award

The court in *Cagle* established liability on multiple theories, including negligent hiring, training, entrustment, retention and maintenance, as well as vicarious liability for the negligence of driver Loyola. The court found that "Defendants in Default are liable for the damages arising from their own negligence, and because they employed Loyola at the time of the accident, they are also vicariously liable to Plaintiff for Loyola's liability." *Cagle*, 772 F.Supp.3d 1316.

Following the bench trial, the court entered a final judgment on March 14, 2023, awarding Cagle $4.56 million plus interest against the defendants in default.

***Cagle II*: The Declaratory Judgment Action Initiation and Legal Framework**

Cagle filed a subsequent action against National Indemnity Company of the South and Old Republic Insurance Company. The action sought recovery through MCS-90 endorsements that these insurers had issued to defendant One Way, one of the entities found liable in default in *Cagle I*. The court reasoned the MCS-90 endorsements are federally mandated financial responsibility instruments required under 49 C.F.R. Section 387.313 to ensure that motor carriers maintain minimum insurance coverage to protect the public. *See Cagle*, 780 F.Supp.3d 1324. These endorsements serve as a form of public protection, guaranteeing that injured members of the public can recover damages even when the underlying insurance policy might be void or rescinded under state law.

Initial Ruling and Motion for Reconsideration

The court initially granted summary judgment in favor of Old Republic, finding that the underlying insurance policy was void under Georgia state law due to material misrepresentations made by the insured when applying for coverage. Under this initial ruling, the court concluded that voiding the underlying policy also voided the attached MCS-90 endorsement.

However, Cagle filed a motion for reconsideration, arguing that federal law, not state law, governs the applicability of MCS-90 endorsements and that rescission of the underlying liability policy should not automatically void the federal public protection coverage. *Cagle*, 780 F.Supp.3d 1324. This argument proved persuasive and led to a complete reversal of the court's initial decision.

This argument proved persuasive and led to a complete reversal of the court's initial decision.

Final Ruling on Reconsideration

Upon reconsideration, the court granted Cagle's motion for summary judgment

and denied Old Republic's motion, holding as a matter of first impression that an insured's failure to disclose an accident when applying for insurance did not void the MCS-90 endorsement. Cagle, 780 F.Supp.3d 1324. The court's analysis was grounded in federal regulatory supremacy principles and the public protection purpose of MCS-90 endorsements.

The court adopted reasoning from *National Independent Truckers Insurance Co. v. Gadway*, holding that rescission of the liability policy does not automatically require rescission of the MCS- 90 endorsement. The court explained that "it would defeat the purpose of the federal statutes and regulations at issue if an insurer could escape its obligations pursuant to an MCS–90 endorsement simply by seeking rescission of the underlying insurance policy." *Cagle*, 780 F.Supp.3d 1324.

Critically, the court concluded that "the MCS–90 endorsement attached to the policy remains in effect at least until the notice requirement of 49 C.F.R. § 387.313(d) has been satisfied." *Id.* This holding established that federal notice requirements, rather than state law rescission principles, govern the termination of MCS-90 coverage.

Federal Law Supremacy and Policy Independence

The court's decision hinged on what it characterized as "the regulatory supremacy of MCS-90 protections over state law rescission principles." The analysis recognized that federal motor carrier financial responsibility requirements serve important public safety purposes that would be undermined if insurers could escape liability through state law remedies. Supporting this conclusion, the court noted that the language of the MCS-90 endorsement itself expressly provides that "no condition or limitation contained in the policy ... or violation thereof shall relieve the company from liability or from the payment of any final judgment." *Cagle*, 780 F.Supp.3d 1324. This contractual language reinforced the independence of the MCS-90 from the underlying policy terms and conditions.

Final Monetary Recovery

The declaratory judgment action resulted in Cagle recovering $1.75 million total: $1 million from Old Republic's MCS-90 endorsement and $750,000 from National Indemnity's MCS-90 endorsement. While this recovery was substantially less than the original $4.57 million default judgment, it represented the maximum available under the federal minimum insurance requirements applicable to the motor carriers involved.

C. Occurrence Counting and Multiple Impacts

Occurrence counting can affect available limits and whether coverage is sufficient to meet federal minimums. In *Esparza v. Eagle Express*, 2007 WL

The court's decision hinged on what it characterized as "the regulatory supremacy of MCS-90 protections over state law rescission principles."

969585 (E.D. Tex.2007), the court held that two near-simultaneous impacts (within approximately 0.1 seconds) constituted separate occurrences, recognizing a time-and-distance analysis between impacts. Where multiple occurrences are recognized, policy limits may apply per occurrence and thereby alter whether other insurance satisfies the minimums or whether an endorsement must respond. This is a fact- dependent inquiry.

D. Compliance with Cancellation/Replacement Filings

Wolcott v. Trailways Lines, Inc., 774 So.2d 1054 (La. App. 2 Cir. 2000), illustrates that where one insurer's coverage period ended and replacement certificates clearly evidenced continuous coverage beginning on the termination date, continuity of financial responsibility could be established notwithstanding alleged imperfections in the prior cancellation filings. By contrast, *Reliance v. Reider*, 54 Conn. App. 77 (1999), underscores that, under applicable statutes and federal forms practice, failure to timely notify federal and state authorities of cancellation can render the attempted cancellation ineffective, keeping the policy—and associated obligations—in force for losses occurring before proper cancellation becomes effective. In the motor carrier context, Section 387.313(d) supplies the baseline federal notice rule for MCS-90-related filings, and noncompliance can carry consequences for both policy and endorsement continuity.

V. Potential Defenses and Counter-Arguments

Given the endorsement's limited, surety-like function and its federal notice regime, defenses fall into several clusters.

- Federal-Minimums-Satisfied Defense (*Yeates*). The leading defense is that other applicable insurance already satisfied the federal floor; consequently, the endorsement is not triggered. This requires demonstrating either policy coverage for the accident vehicle or other collectible insurance sufficient to meet the minimums for the particular commodity and carriage class. Where triggered by insolvency or refusal of the primary insurer to pay, the MCS-90 may be called to the extent necessary to reach the minimums, but not beyond.
- Non-Applicability of Subpart A. If the carrier was not a for-hire carrier of property in interstate or foreign commerce and was not otherwise within Subpart A's hazardous- materials scope, Subpart A's MCS-90 regime may not apply. This can be a fact-intensive defense. The endorsement language, however, can independently bind the insurer if it is attached to an auto liability policy even if the trip is intrastate, so long as the accident involves "motor vehicles subject to" the federal financial responsibility requirements, as courts sometimes reason from the endorsement text and the carrier's overall operations. The checklist above identifies allegations and proof supportive of applicability.

- No Final Judgment. The endorsement is a judgment-protection device. Absent a final judgment, a direct MCS-90 claim is typically premature. Default judgments that include factual findings can estop later collateral disputes, but jurisdiction and due process issues must be addressed.
- Federal Cancellation Compliance. Insurers may assert that the endorsement was effectively canceled through Section 387.313(d) procedures (30 days' notice filed electronically on prescribed forms) and as provided in the endorsement (35/30-day notice scheme). If cancellation was effective before the loss, the MCS-90 obligation no longer attaches. However, failure to comply strictly with federal notice requirements keeps the endorsement in force as to the public notwithstanding state-law rescission or cancellation.
- Replacement: Insurers will argue that their policy was automatically replaced when a new carrier files a BMC-91X form as specified by 49 C.F.R. Section 387.313: "Termination by replacement. Certificates of insurance or surety bonds which have been accepted by the FMCSA under these rules may be replaced by other certificates of insurance, surety bonds or other security, and the liability of the retiring insurer or surety under such certificates of insurance or surety bonds shall be considered as having terminated as of the effective date of the replacement certificate of insurance, surety bond or other security, provided the said replacement certificate, bond or other security is acceptable to the FMCSA under the rules and regulations in this part."
- Occurrence/Limit Arguments. Where multiple impacts occur, a carrier may argue a single occurrence to limit available policy proceeds and prompt a claim on the endorsement. Plaintiffs may argue separate occurrences under time-and-distance principles, potentially increasing available coverage and obviating the MCS-90. Fact development on sequencing and spacing is critical.

VI. Practical Roadmap for Litigators

Pleading and Proof. Plead the carrier's for-hire status, interstate or foreign commerce, transportation of property, operation/maintenance/use of a motor vehicle, claimant's non-employee status, and public liability damage elements. The Truck Wreck Justice checklist offers a concise set of paragraphs and definitions, including expansive statutory definitions of "transporting" and "property," to support an MCS-90 pathway in default and contested cases. Remember, a well-pleaded complaint serves as a factual basis for a default. Plead the necessary elements in your complaints.

Build the Insurance Record. Obtain all potentially applicable policies, declarations, endorsements (including each MCS-90), FMCSA filings (BMC-91/91X)

Remember, a well-pleaded complaint serves as a factual basis for a default. Plead the necessary elements in your complaints.

and cancellation notices with timestamps. You may request a very limited FOIA for all MCS-90 filings. Analyze whether any policy unambiguously covers the accident and whether payments already satisfy the federal minimums for the wreck. If so, the endorsement is not triggered. If not, identify which endorsement(s) remain in effect based on federal cancellation filings and endorsement notice provisions.

Judgment Entry. The endorsement obligates payment of final judgments. Consider sequencing coverage litigation to dovetail with obtaining a tort judgment, including default judgments with detailed findings where appropriate. Before trying to file a declaratory action, you will want to wait at least 60 days before filing. The best practice is to wait a year because the ability to set aside the judgment, in federal court, is fraud only. *See* Fed. R. Civ. P. 60(c).

VII. Conclusion

Congress's design is coherent: deregulated competition paired with an unbroken public-protection backstop. The MCS-90 fulfills that backstop by compelling payment of final judgments up to federal minimums only when the motor carrier's available insurance is absent or insufficient, and only so long as the endorsement remains effective under federal cancellation rules. Counsel navigating multi-policy and multi-carrier scenarios should rigorously explore MCS-90 avenues, including sufficiency to the federal floor, scrutinize federal notice compliance, and separate endorsement effectiveness from state-law rescission questions. Diligence may lead to recovery.

Good luck.

The MCS-90 fulfills that backstop by compelling payment of final judgments up to federal minimums only when the motor carrier's available insurance is absent or insufficient, and only so long as the endorsement remains effective under federal cancellation rules.

Bio

In March of 2018, Danny accepted a position with Truck Wreck Justice, PLLC, a firm that specialized is tractor trailer and commercial bus litigation. In October 2020, Danny received his Truck Accident Law Certification from the National Board of Trial Advocacy. With this firm, Danny is able to utilize his 20 years of experience, trial skills, and learning to best help those injured by the reckless and negligent acts of these companies and their drivers. Recently, Danny received a judgment in North Georgia for $4,565,120.42 for a negligent company hiring an unqualified driver and a similar judgment in the Eastern District of Tennessee for $1,266,922.27. In 2021, Danny was named the Tennessee Trial Lawyer of the Year, an award voted on by his peers. Danny served as the Tennessee Trial Lawyer's President from 2024-2025.

Danny has earned the reputation of being willing to try his cases and for using cutting-edge techniques to achieve full justice. Danny is also known as always willing to lend support and give helpful advice to other lawyers pursing justice. He considers being a dean of the deposition

college and a faculty member of the Keenan Trial Institute his greatest professional achievement and has taught hundreds of attorneys trial and litigation skills necessary to hold wrongdoers accountable. Danny has also authored the Tennessee chapter in the book, Negligence and Purpose, elements and Evidence, The Role of Foreseeabilty in the Law of Each State. ISBN 978-0-9980073-3-5 (2018) and a chapter in the ABA's Truck Accident Litigation, 4th edition book, ISBN 978-1-63905-573-9.

[1] The Tenth Circuit held that MCS-90 financial responsibility requirements are applied individually to each motor carrier, not per accident or claim. The court reasoned:

The Motor Carrier Act and regulations repeatedly reference "each motor carrier: as the locus of financial responsibility; the requirements are "specific to the individual motor carrier".

The MCS-90 endorsement text requires payment of "any final judgment recovered against the insured" resulting from the insured's negligence; this language is specific to the insured motor carrier.

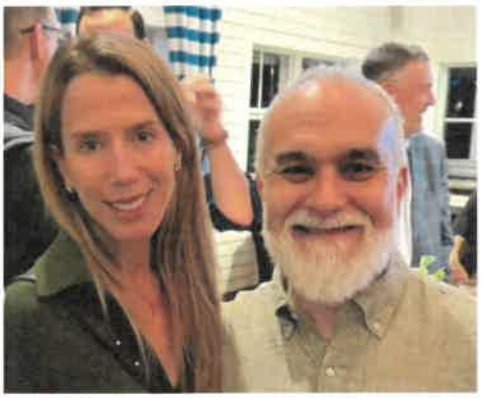
An MCS-90 insurer cannot escape its obligation by pointing to compensation received by the injured party from another motor carrier's insurer. The endorsement protects each motor carrier's liability independently.

The court clarified and limited *Yeates*, noting that *Yeates*'s statement that "once the federally- mandated minimums have been satisfied, however, the endorsement does not apply" refers to satisfaction of the minimum as against a particular motor carrier, not satisfaction via payment from a different carrier.

Wilshire had attempted to misread *Yeates*, but the court explained that *Yeates* was decided in the context of one motor carrier with two separate insurance policies. Here, there were two distinct motor carriers, each with their own independent MCS-90 obligation.

The court cited the Seventh Circuit's decision in *Carolina Casualty Ins. Co. v. E.C. Trucking*, 396 F.3d 837 (7th Cir. 2005), which rejected the argument that an MCS-90 insurer could escape liability based on compensation the injured party received from another source.

Herrod v. Wilshire Ins. Co., 499 Fed.Appx. 753 (10th Cir. 2012).



Photos from Various AAJ TLG events

When Gaming Becomes Hazard: Hidden Distractions for Drivers

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At 65 mph, the loaded truck travels more than 190 feet down the highway with the driver's attention divided.

A long-haul driver glances at his mounted smartphone. A ping echoes through the cab. On the screen flashes a red border—his base in Call of Dragons is under attack. At the same moment, a voice crackles over Discord: "We need reinforcements on the north flank! We need more infantry in the front." The driver's eyes shift for a second—maybe two—to swipe his screen to send his infantry to the fight. At 65 mph, the loaded truck travels more than 190 feet down the highway with the driver's attention divided.

That tiny moment can mean catastrophe.

Mobile gaming and live-chat platforms like Discord are no longer the niche hobbies of teenagers. They are powerful attention magnets engineered for constant engagement, and they have quietly entered the cabs of America's commercial trucks. Truckers who spend hours alone in their cabs can be drawn to these games given the community aspect of them. They make gaming friends who are scattered around the world in every time zone. Someone is always online and available for a chat. Despite federal law banning texting and handheld phone use for commercial drivers, these combined platforms create a next-generation distraction: immersive, audiovisual and social. Some truckers attempt to navigate around the ban by mounting their phones within reach so they are not "handheld." That doesn't eliminate the distraction potential.

The New Form of Distracted Driving

What once seemed harmless—games, group chats, streaming—has become a new class of distraction behind the wheel. These digital entertainment platforms are designed to demand attention, and they're finding their way into truck cabs across America.

What the Data Shows: A Crisis of Focus

According to the National Highway Traffic Safety Administration, in 2023, 3,275 people died in crashes involving distracted drivers, and more than 325,000 were injured.[40] A 2009 FMCSA study found that truck drivers who texted or interacted with devices were 23 times more likely to experience a safety- critical event.[41]

The Legal Foundation: FMCSRs and Fleet Standards

Two key provisions of the Federal Motor Carrier Safety Regulations directly address handheld device use:

- 49 C.F.R. § 392.80: Prohibits texting while driving a commercial motor vehicle.
- 49 C.F.R. § 392.82: Prohibits using a handheld mobile telephone while driving, including holding or dialing a phone.

While these rules pre-date the rise of mobile gaming and Discord, the underlying principle applies: any manual, visual or cognitive distraction involving a mobile device violates both the letter and spirit of the law.

Carriers that "require or allow" handheld use can be fined, and repeated violations can lead to driver disqualification.

What Are Mobile Games, and Why Are They Dangerous for Drivers?

Mobile games are application-based programs downloaded from app stores (Google Play Store or Apple App Store). Once installed, they run on smartphones and tablets—hardware that nearly every driver carries.

Many are "**freemium**" games, free to download but monetized through in-app purchases and advertising. Their design relies on behavioral psychology: intermittent rewards, visual stimuli and real-time notifications that create a compulsion loop. They make heavy use of push notifications and visual effects that can startle or distract even when minimized. Note that the notification settings for each application can be set and managed by the phone's user. In other words, the driver can manually choose whether a game or Discord notification is audible, visual, flashes on a phone screen, or is completely turned off.

Players have multiple ways to communicate with each other in many games. Games can include an in-game "email" system, a "world chat" system where players interact with all other players in their game server, an "alliance" or "clan" chat system where players interact with their game team, and individual chats with other players. Some players spend hours in these game chats, which often include international translation mechanics for players who speak different languages. These chats and communities are a big draw for people who are craving interaction with others and add to the addiction factor of these games.

Understanding Discord: The Gamer's "Dispatch Radio"

Discord is a cross-platform communication tool originally built for gamers but now used widely for community interaction and team coordination. Available as a free app for iOS, Android, Windows, and browsers, it allows users to join or create "servers" organized around topics or groups.

Carriers that "require or allow" handheld use can be fined, and repeated violations can lead to driver disqualification.

How Discord Works

- **Voice Channels**: Users can join persistent voice rooms, essentially open conference calls that remain active indefinitely. A truck driver can leave Discord running in the background, hearing other players talk in real time.
- **Video and Screen Streaming**: Discord supports video streaming and screen sharing. On mobile devices, that means the screen can display an active game or live broadcast from another player.
- **Notifications**: Discord's mobile app sends alerts for mentions, private messages or server announcements. Each ping is accompanied by a vibration or sound unless the user manually mutes them.
- **Direct Calls**: Discord functions like a phone. Users can make voice or video calls to individuals or groups, similar to FaceTime or Zoom, complete with ringtone alerts.
- **Game Coordination**: In alliance-based strategy games like Call of Dragons or Rise of Kingdoms, entire "alliances" hold conference-call-style briefings via Discord, issuing play-by-play battle instructions—sometimes for hours or even days.

For a driver, this creates the same level of distraction as a live conversation or streaming video call—both prohibited under FMCSR's intent and most fleet safety policies.

The NTSB has long warned that "there is no such thing as safe multitasking" behind the wheel.

Human-Factors Science: Why "Just Listening" Isn't Safe

Psychologists identify three dimensions of distraction:

- Visual: eyes off the road (checking the phone).
- Manual: hands off the wheel (tapping, swiping).
- Cognitive: mind off the driving task (strategizing or listening to chat).

Mobile games and Discord combine all three. Even an auditory notification triggers the brain's orienting response—the instinct to turn attention toward a new stimulus. Repeated pings create chronic cognitive tunneling, where situational awareness narrows.

The NTSB has long warned that "there is no such thing as safe multitasking" behind the wheel. When combined with the mass and inertia of a fully loaded semi, these distractions are catastrophic multipliers.

How to Prove It: Discovery and Forensics

Attorneys investigating potential mobile-distraction cases should consider:

1. Forensic Imaging: Recover app-usage logs and Discord data by conducting a forensic analysis of the cell phone. This can show you when and for how long each app was used.

2. System Logs: Screen Time records showing active apps.
3. ELD/Telematics: Cross-reference with motion data and any available in-cab video footage.
4. Carrier Policies: Obtain training materials and acknowledgment forms, noting the absence of any references to gaming or Discord use.
5. App Settings: Screenshots showing notification settings that were set for each application, including the Discord and game apps.
6. Discord Evidence: Preserve on-device data first.
7. Request in-game chat logs for the user during the relevant time period. These will be stored within the game app, and sometimes the game will preserve chat logs for a period of years. Some games have a much more limited preservation system.

Note that many of the companies who own and operate these mobile games are not based in the United States and therefore would be incredibly difficult to subpoena. While this is not ideal, much information can be obtained from the device itself.

Building Safer Policies

Fleet managers and carriers should explicitly ban gaming and chat apps in motion, deploy mobile-device-management tools, and educate drivers that any ping or vibration can become a deadly distraction. The CDC has published a list of recommendations for employers whose employees drive for work. This list could be a helpful reference when deposing a trucking safety director or corporate representative. One of the recommendations is that employers install phone-blocking systems while the vehicle is moving, which doesn't appear to be followed in the trucking industry.[42]

The Takeaway

Truck drivers face immense isolation and long hours, and digital entertainment offers connection. But those same tools—games, chats, and notifications—convert into lethal distractions when used behind the wheel. If it can ping, flash, or talk, it can distract.

Fleet managers and carriers should explicitly ban gaming and chat apps in motion, deploy mobile-device-management tools, and educate drivers that any ping or vibration can become a deadly distraction.

Bio

Attorney Deena Buchanan has handled trucking crash cases, wrongful death, catastrophic injury, and employment cases in more than 20 jurisdictions. As former BigLaw and in-house

counsel to a Fortune 500 company, she traveled the country advising corporate executives and litigating multi-million dollar disputes for insurance companies and large corporations. After seeing some very sad results in tragic cases, she left her defense career to represent real people and their families. Now she teaches other lawyers about how to take on these big companies using her training and experience from the other side.

She has a personal, as well as professional, understanding of personal injury claims, having been a victim of someone else's negligence herself.

Deena is board-certified by the National Board of Trial Advocacy in trucking crash cases, making her one of the first few women in the nation to achieve that honor. In 2024, Deena was elected to the American Association for Justice Trucking Litigation Group Executive Board, which oversees motor-carrier and owner-operator liability legal matters in accordance with Federal Motor Carrier Safety Regulations. The group also provides members with the necessary resources to successfully litigate trucking accident liability cases. Deena is also on the Board of Regents for the Academy of Truck Accident Attorneys and on the Executive Board of the American Association for Justice Employment Rights Litigation Group.

Deena has served as trial counsel on a number of high-profile, complex cases, including wrongful death and catastrophic injury claims. She's a highly respected trial attorney, earning praise from clients, colleagues and judges for her skill in the courtroom.

Deena spends her free time with her family unwinding in the beautiful outdoors – hiking, skiing, scuba diving, and photographing nature.

[1] *See* https://www.nhtsa.gov/risky-driving/distracted-driving.

[2] *See* https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/DriverDistractionStudy.pdf.

[3] *See* https://www.cdc.gov/niosh/motor-vehicle/distracted-driving/index.html.

Photos from Various AAJ TLG events

FMCSA's 2025 Rule Changes: Increasing Safety and Accountability in Commercial Trucking

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Every year, we see changes in the laws designed to make our roads safer. In 2025, the Federal Motor Carrier Safety Administration and the Department of Transportation implemented new rules that affect carriers of all sizes, from owner-operators to national fleets. These updates include enhanced safety standards, evolving technology mandates, stricter driver qualification requirements and modernization of identification systems.

Below, I discuss some of the recent changes that may impact our cases and the clients we represent.

Enhanced English Language Proficiency Enforcement

The FMCSA is intensifying enforcement of **49 C.F.R. Section 391.11(b)(2)**, which requires drivers to read and speak English sufficiently for safe operation, which includes reading road signs, completing paperwork and communicating with officials. This change stems from an executive order aimed at strengthening existing safety regulations.

Under the new policy, if an inspector's initial contact with a driver suggests the driver may not understand instructions, the inspector must conduct an English language proficiency assessment as part of the roadside inspection. During this assessment, no tools or aids may be used to assist the driver in communicating.

If the driver fails the assessment, the driver must be placed immediately out of service. If the driver passes, the inspector should then assess whether the driver can adequately understand U.S. highway traffic signs.

Note: This is an enforcement guidance for inspectors, not a new stand-alone regulation.

More Rigorous Oversight of Non-Domiciled CDL Drivers

The U.S. Department of Transportation issued an emergency interim final rule to strengthen federal oversight of how states issue non-domiciled Commercial Learner's Permits and Commercial Driver's Licenses. The FMCSA has implemented tighter review protocols for non-domiciled CDLs, particularly those issued to foreign drivers operating in the United States.

The new rule introduces enhanced background checks, verification of foreign driving

These updates include enhanced safety standards, evolving technology mandates, stricter driver qualification requirements and modernization of identification systems.

history and stricter application requirements. People with employment-based visas, specifically H-2A (agricultural workers), H-2B (non-agricultural workers) and E-2 (treaty investors), remain eligible to obtain or renew a non-domiciled CDL.

- Non-domiciled CDLs will now be limited to a maximum of one year or must expire on the same date as the driver's Form I-94, whichever comes first.
- All renewals must be completed in person; mail-in and online renewals are no longer permitted.

This rule applies to non-domiciled CLP/CDL issuance and renewal—not necessarily all CDLs—and may vary by state as implementation progresses.

Electronic Logging Device Revocations and Compliance Gaps

As in previous years, the FMCSA has revoked several ELD models in 2025 for failure to comply with logging regulations. These revocations apply to specific device models and not all ELDs.

Carriers have **60 days** from the date of the revocation notice to replace the affected devices or risk being cited for operating without valid logs, a violation under **49 C.F.R. Section 395.8(a)(1).**

Carriers and drivers using revoked devices must stop doing so immediately and switch to paper logs or compliant logging software until replacements are installed.

By **Dec. 16**, carriers must replace revoked devices with models listed on the FMCSA's official ELD registry. After that date, any motor carrier continuing to use revoked devices will be considered operating without an ELD, and their drivers may be placed out of service for having "no record of duty status."

Mandatory Safety Technology: AEB and ESC Systems

A **forthcoming rule will require** Automatic Emergency Braking and Electronic Stability Control systems on commercial vehicles. FMCSA and the National Highway Traffic Safety Administration are jointly rolling out these requirements for various classes of heavy and medium-duty vehicles.

- By **2027**, all new heavy trucks (Class 7–8) must have AEB systems installed.
- By **2028**, all new medium-duty vehicles (Class 3–6) must comply as well.

Implementation timelines and compliance periods are still being finalized.

Speed Limiter Mandate Withdrawn

After years of debate, the FMCSA has withdrawn the proposed **Speed Limiter Mandate**, which would have capped truck speeds between 65 and 70mph for vehicles that weigh more than 26,000 pounds. Strong opposition from the trucking industry ultimately led to the mandate's failure.

Medical Examiner's Certification Integration

The FMCSA implemented the **Medical Examiner's Certification Integration (National Registry II)** rule, replacing paper medical certificates. Paper medical

Carriers and drivers using revoked devices must stop doing so immediately and switch to paper logs or compliant logging software until replacements are installed.

certificates long have long been criticized for fraud risk as well as verification delays.

Certified medical examiners now submit results directly to state licensing databases. Once transmitted to the National Registry, the data updates the driver's record automatically, eliminating the need for drivers to manually provide paper certificates.

Motor carriers must now verify medical status through **Motor Vehicle Record** checks rather than collecting paper copies, streamlining compliance and enforcement.

MC Numbers Phased Out in Favor of USDOT Numbers

On October 1, 2025, **the FMCSA officially phased out Motor Carrier numbers, consolidating all registration under a unified** USDOT number system as part of the Unified Registration System.

This reform simplifies registration, reduces fraud and enhances safety oversight by consolidating each carrier's records under a single, permanent USDOT number.

Previously, fraudulent "chameleon carriers" could shut down and reopen under new MC numbers to erase safety violations. The new system hopes to close this loophole by linking all authority to one permanent identifier.

All carrier data will now be stored in a centralized clearinghouse, allowing for easier monitoring and enforcement against unsafe or noncompliant operators.

In Conclusion

As plaintiff trial lawyers, we look forward each year to new regulations that strive to protect the public and allow us to continue pursuing justice for our clients.

While many of these changes are final, others remain in proposal stages, and specific compliance dates may vary. Staying informed is essential for both safety advocacy and effective case preparation.

Bio

Tom has been practicing law for 21 years. He is admitted to practice law in New York and Florida. Tom's passion to help others began before he was an attorney. At age twenty-one, he became a police officer in Buffalo, New York. Tom worked full-time as a police officer while attending law school. He worked as a patrol officer, K9 officer, senior crash investigator and detective. Tom investigated thousands of traffic crashes, as well as gained tremendous courtroom experience.

Tom graduated from the University at Buffalo, School of Law. He was a member of his law school trial team. In 2004, Tom began practicing law in Buffalo, New York representing catastrophically and seriously injured clients, while simultaneously working full-time as a police officer.

Tom has used his experience gained from his 21 years in law enforcement and 20 years as an attorney to obtain justice for his clients. He takes pride in knowing that in addition to obtaining justice for his clients, Tom has been able to make the community safer.

Tom is a certified crash reconstruction expert. He utilizes his law enforcement knowledge, training, and experience while representing his clients. Tom's background gives him an advantage while he is investigating cases, looking for evidence, and working with witnesses.

Tom lives in Buffalo, New York with his wife, Stephanie, and their three children. Tom enjoys spending time with his family, as well as traveling and playing golf.

Motor carriers must now verify medical status through Motor Vehicle Record checks rather than collecting paper copies, streamlining compliance and enforcement.

The Virtual Jury: Using ChatGPT as a Low-Cost Focus Group Tool

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The use of a large language model like Chat GPT or Claude can help attorneys use focus group insight with little time and investment.

Every trial lawyer knows the value of a good focus group. Whether it's testing liability theories, framing damages, or evaluating how jurors will perceive a plaintiff's story, the insights can be invaluable. But traditional focus groups take time, money, and logistics. The use of a large language model like Chat GPT or Claude can help attorneys use focus group insight with little time and investment.

While artificial intelligence will never replace the emotional nuance of a real human juror, it can serve as a surprisingly effective tool for testing case themes, identifying blind spots, and simulating jury reactions.

This approach can be especially valuable in lower-value cases, where a live focus group might not be justified, or in the early stages of a high-value case, where you're still developing liability and damages theories before investing in full-scale testing. It allows you to gauge likely reactions, refine your narrative and identify potential weaknesses all before committing major resources.

This article walks through how to run a focus group using ChatGPT, how to use real demographic data to make the simulated jurors realistic, and how to scale it to larger "jury panels."

Step 1: Framing the Case for AI
Start by giving ChatGPT the kind of summary you would provide a real focus group: a neutral, fact-based statement that fairly presents both sides of the story. Avoid legal talk and don't argue your case.

Example setup prompt:
"You are acting as a jury focus group moderator. The case involves a tractor-trailer rear-ending a passenger vehicle on an interstate. The plaintiff underwent multiple surgeries and suffered a career-ending injury. I want to understand how potential jurors might view liability, comparative fault, and damages. Please create five mock jurors from Erie County, New York, each with realistic demographic and attitudinal backgrounds. I will then present facts for discussion."

This kind of prompt establishes context and lets the model reflect the kind of questions or concerns real jurors might raise.

Step 2: Building Realistic "Jurors"
To get meaningful results, your simulated jurors need to reflect the people who would actually appear in your venue's jury pool. You can get ChatGPT to create these profiles in detail using publicly available data such as census data, Pew Research, or local demographic statistics.

Prompt example:
"Using current demographic and attitudinal data for Erie County, New York, create a mock jury of 12 citizens for a civil case. Include each juror's age, gender, occupation, political leaning, and general attitude toward lawsuits and large verdicts."

You can also instruct ChatGPT to search and integrate this kind of real-world data automatically:

"Search publicly available sources to find the most recent demographic and political trends for Erie County, New York, and use that data to create a representative jury pool of 12 citizens for a mock civil trial."

This ensures your virtual jurors reflect real regional demographics, attitudes, and diversity.

Step 3: Presenting the Case to the "Jury"
Once your jurors are created, present your neutral case summary like you would present to a live focus group.

Prompt example:
"Here is a neutral summary of the case. Please read it and have the eight jurors discuss it in a focus group format. Each juror should respond in their own voice, with realistic tone and reasoning. After their discussion, summarize the group's consensus and any divisions."

ChatGPT will simulate a dynamic discussion between jurors, often capturing contrasting viewpoints, skepticism, or empathy.

For example, one juror may say:

"I drive for a living, and truckers get blamed too easily."
While another says:
"Those companies should be responsible — they push drivers too hard."

You can then probe further:

Follow-up prompts:
- "Juror #4, please expand on why you believe the plaintiff may have some fault."
- "Moderator, ask jurors how they feel about awarding pain and suffering damages."
- "Jurors, what evidence or testimony would you most want to see before deciding damages?"

To get meaningful results, your simulated jurors need to reflect the people who would actually appear in your venue's jury pool.

These exchanges often surface insights that mirror what you'd see in a live group: how certain facts trigger skepticism, or how damages stories resonate differently across backgrounds.

Step 4: Testing Theories and Themes
Use ChatGPT to test how to tell your story. Try presenting the same case in two or three narrative frames and ask the AI-jurors to vote or react.

Example prompts:

- "Now the defense argues that the plaintiff stopped abruptly. Have jurors discuss how this changes their view of liability."
- "The plaintiff's lawyer argues that the trucking company ignored federal hours-of-service rules. Does this change the discussion?"
- "Have the jurors deliberate on a damages number after discussing both sides."
- Here are two possible opening statement themes for the plaintiff:
  (1) "This case is about a trucking company that chose profit over safety."
  (2) "This case is about a preventable mistake that changed one family's future."
  Please have each juror react to which theme they find more persuasive and why.

Use ChatGPT to test how to tell your story.

By introducing new facts or reframing themes, you can evaluate jury sensitivity including which facts move them, what evidence they find persuasive, and what phrases turn them off.

Step 5: Expanding to a Large-Scale Data Group
For more robust testing, you can scale beyond a six- to 12-person jury to a virtual panel of 100 or even 1,000 simulated jurors.

Prompt example:
"Create a dataset of 100 simulated jurors based on U.S. Census and Pew Research demographic data for Western New York. Each juror should have an assigned demographic profile, political tendency, and basic views on lawsuits, corporations, and damages. Then, summarize how this larger group might respond to the plaintiff's liability and damages case."

AI can synthesize aggregated sentiment summarizing trends like:

- 60 percent of jurors likely to find the trucking company primarily liable.
- 25 percent skeptical of noneconomic damages.
- 15 percent view both parties as sharing fault.

This type of simulation can help guide venue decisions, settlement strategy, or voir dire preparation.

If you want to add realism:

Prompt example:
"Using recent Pew Research and Gallup data, create a mock survey showing how

jurors in Erie County, New York differ from those in Cook County, Illinois in terms of trust in corporations and support for personal injury claims."

Step 6: Interpreting and Applying the Results

Treat the AI-simulated focus group as a strategic brainstorming partner, not empirical data. Ask the AI tool to help you summarize patterns and themes. The insights aren't predictive, but they help:

- Identify which case themes need clarity or emotional grounding.
- Anticipate defense narratives that may resonate.
- Test your story structure before spending money on a real focus group.

Prompt Example:

"Review all juror comments and identify the three most common reasons participants sided with the plaintiff and the three most common reasons they sided with the defense. Rank them by frequency." Or even:

"What phrases or ideas in the plaintiff's presentation seemed to create doubt or resistance among jurors? What framing might overcome that resistance?"

This analysis helps you pinpoint emotional triggers, credibility issues and juror confusion. Keep in mind AI models only replicate patterns in human reasoning rather than feeling human emotion. The benefit is not in prediction but in perspective. It's a structured way to surface assumptions you may not have considered.

Step 7: Combining AI with Real Data Tools

To make your focus groups more realistic, pair AI with publicly available data, such as from the U.S. Census Bureau, Pew Research Center, and voter registration databases. This helps your simulated jurors reflect local attitudes that may shape verdicts in your venue. You can prompt AI to summarize and integrate these sources automatically.

Prompt example:

"Using publicly available demographic and political data for Erie County, New York, create a focus group of 12 jurors that statistically represents likely jurors in this region. Include realistic variance in education, employment, and income. Use this dataset to simulate a mock deliberation on a trucking negligence case."

This allows your focus group to reflect real regional biases that impact each case.

Step 8: Ethical and Practical Considerations

When using AI for focus groups, be sure to treat the results as exploratory and not empirical, avoid confidential client information, keep your discussions anonymous, and use as a supplement to real juror testing.

Done thoughtfully, AI-assisted focus groups can sharpen your trial preparation, make you a better storyteller, and help you test multiple versions of your case narrative in hours.

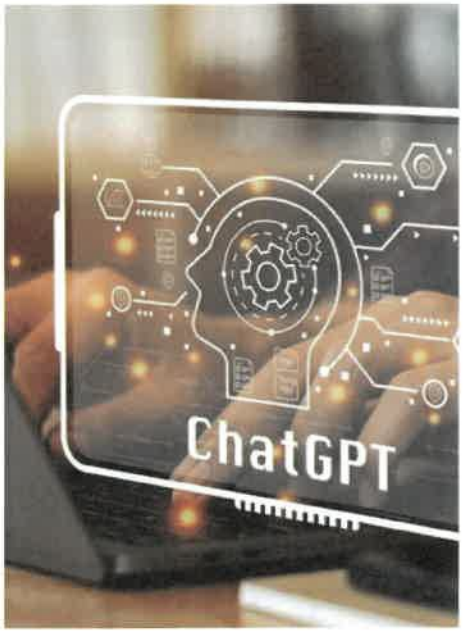
To make your focus groups more realistic, pair AI with publicly available data, such as from the U.S. Census Bureau, Pew Research Center, and voter registration databases.

Final Thoughts

The best plaintiff lawyers are part advocate, part psychologist, part storyteller. AI helps strengthen the storytelling side by simulating how different people might receive your case.

It's a fast and inexpensive way to surface insights you might otherwise miss, especially when your mock jurors reflect realistic community demographics and regional attitudes.

Whether you're trying to understand juror biases, refine your damages presentation, or decide how to frame fault, ChatGPT can help you test, iterate, and adjust before you do your first live focus group or step into voir dire.



AI helps strengthen the storytelling side by simulating how different people might receive your case.

Bio

Kate Feroleto focuses her practice on catastrophic and wrongful death cases. Although she spent 10 years working at defense law firms, she now uses the skills she learned to fight for individuals facing some of the most challenging times of their lives.

Kate serves as the President of the New York State Trial Lawyers Association – Western Region Affiliate and is a Dean of the New York State Trial Lawyers Institute. She is also the past Co-Chair of the Women's Caucus for the Academy of Truck Accident Attorneys, reflecting her leadership and dedication to supporting fellow attorneys.

Kate remains connected to her community, having established a scholarship fund at her high school and serving as the 2023 commencement speaker.

Her legal excellence has been recognized by the New York State Bar Association, and she has presented at both national and state legal conferences.

Photos from Various AAJ TLG events

The Basics of BASIC Scores: Leveraging Them for Negligence Claims

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Background of BASIC Scores

A cornerstone of the Federal Motor Carrier Safety Administration's Compliance, Safety, Accountability program is the Safety Measurement System. The SMS assesses motor carrier on-road performance and compliance by organizing data into seven Behavior Analysis and Safety Improvement Categories.[43] These BASIC scores provide a quantifiable measure of a motor carrier's performance, acting as an ongoing report card for the motor carrier in each category. The FMCSA utilizes these BASIC scores to "identify carriers with potential safety problems."[44] Since BASIC scores outline a motor carrier's systemic safety failures, these scores can help establish and enhance a direct negligence claim against a motor carrier.[45]

There are seven BASIC categories, each targeting specific safety issues:

- Unsafe Driving: Operation of commercial motor vehicles in a dangerous or careless manner.
- Crash Indicator: Historical pattern of crash involvement, including frequency and severity.
- Hours-of-Service Compliance: Operation of CMVs by drivers who are ill, fatigued or not in compliance with the HOS regulations.
- Vehicle Maintenance: Failure to properly maintain a CMV, failure to prevent shifting loads, spilled or dropped cargo, or overloading a CMV.
- Controlled Substances/Alcohol: Operation of CMVs by drivers who are impaired by alcohol, illegal drugs or misuse of prescription or over-the-counter medications.
- Hazardous Materials Compliance: Unsafe handling of HM on a CMV.
- Driver Fitness: Operation of CMVs by drivers who are unfit to operate a CMV because of lack of training, experience, or medical qualifications.

The FMCSA gives a score to each motor carrier in each category. These scores are based upon information collected from roadside inspections, state-reported CMV crash records and Acute and Critical violations[46] from investigations.[47] Each violation has a severity rating and a time-weighted rating. The severity rating of each violation is assigned a score from 1 to 10 depending on its seriousness. Those violations are also time-weighted, where violations in the past six months receive a time weight of 3, six to 12 months a time weight of 2, and 12 to 24 months a time weight of 1.[48] Only violations within the last 24 months are

Since BASIC scores outline a motor carrier's systemic safety failures, these scores can help establish and enhance a direct negligence claim against a motor carrier.[69]

used, as violations older than 24 months are not included in the calculations.

The FMCSA then ranks motor carriers against similarly sized motor carriers in each of these categories on a percentile ranking, 0 to 100, with 100 being the worst. For example, a percentage of 95 percent in Unsafe Driving shows that the specific motor carrier is worse than 95 percent of similarly sized motor carriers in that category. This data, used by the FMCSA to see which motor carriers may need intervention, is recorded in the Motor Carrier Management Information System.

The FMCSA will also flag motor carriers for intervention when they exceed certain thresholds in the various BASIC categories. The threshold is between 65 and 80 percent depending on the category for motor carriers transporting property, with lower thresholds for motor carriers transporting hazmat or passengers. Also, if the motor carrier has one or more acute or critical violations within the past 12 months during an investigation, the motor carrier will receive an alert in that BASIC category.

Table 2–2. BASIC Intervention Thresholds

BASIC	Intervention Thresholds		
	Passenger Carrier	HM	General
Unsafe Driving, Crash Indicator, HOS Compliance	50%	60%	65%
Vehicle Maintenance, Controlled Substances/Alcohol, Driver Fitness	65%	75%	80%
HM Compliance	80%	80%	80%

The FMCSA will also flag motor carriers for intervention when they exceed certain thresholds in the various BASIC categories.

How to Obtain the Information

One of the best places to start is FMCSA's Safety and Fitness Electronic Records System.[49] There, you can look up motor carrier information, including safety ratings. Notably, you can also download the complete SMS profile for a motor carrier, which includes the violations and inspections for each of the BASIC categories. The information in the SMS profile is published on a rolling two-year period, so be sure to download it as soon as possible; otherwise, that information may be lost. Note that the SMS profile does not include Crash Indicator or Hazardous Materials Compliance, as they are not publicly available. However, the information from the two BASIC categories that are not publicly available can still be requested in discovery, as the motor carrier has access to the information.

Next, the BASIC percentile ranking of a motor carrier can be obtained by sending a Freedom of Information Act request to the FMCSA. While many things can be gathered from these FOIA requests, there are various aspects that are pertinent to BASIC scores. First, request the MCMIS profile for the motor carrier, which will identify its BASIC scores relative to other motor carriers. Ideally, at least three years leading up to the collision should be requested to establish an ongoing trend leading up to the collision. Second, request any correspondence, alerts or warning letters regarding all BASIC categories to see whether the motor carrier was put on notice to take corrective action. Finally, request any and all audits and compliance reviews to see what the FMCSA determined regarding its analysis of adequate safety management controls for the motor carrier.

Plead Your Direct Negligence Claim

There are various types of direct negligent claims that can be alleged against a motor

carrier, including negligent hiring, training, retention, entrustment, supervision and monitoring. While some claims may be stronger than others depending on the facts, a claim can be enhanced or established with the use of BASIC scores. This is especially the case when a specific driver who was involved in the crash may not have a poor driving record, but the motor carrier does have poor BASIC scores.

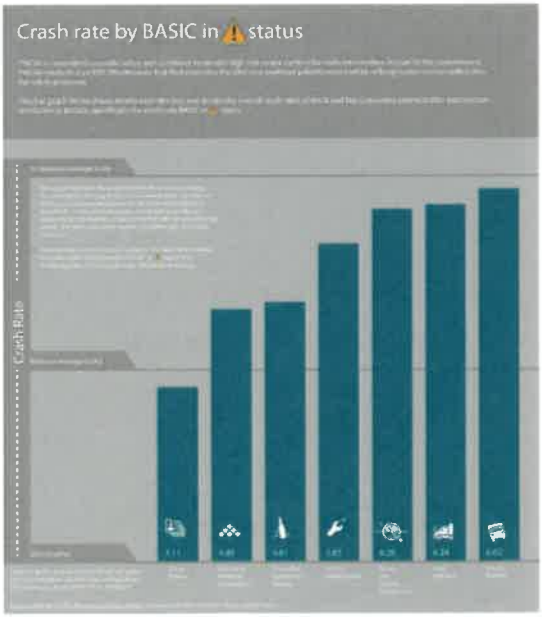
When drafting the complaint, it is helpful to use specific language to lay the foundation for that direct negligence claim against the motor carrier. Under 49 C.F.R. Section 385.5, the FMCSA establishes safety fitness procedures, requiring motor carriers to maintain adequate "safety management controls" to ensure compliance with federal regulations and prevent accidents.[50] Those are great terms to use in the complaint. For example, you can allege that the motor carrier failed to design, implement or enforce adequate safety management controls, including but not limited to having adequate systems, policies, programs, practices or procedures to ensure compliance with applicable safety regulations and the safe operation of commercial motor vehicles, thereby creating a culture of risk reasonably anticipated to cause injury and/or death to the traveling public, including the plaintiff. By alleging this, you don't just bring into question the motor carrier's supervision of that specific driver involved in the collision, but also the motor carrier's entire safety system involving all drivers.

Attorneys practicing in a fact-pleading state, as opposed to a notice-pleading state, can take this even further by specifically referencing the motor carrier's specific BASIC scores leading up to the collision and alleging that the BASIC scores are statistical reflections of noncompliance and a failure of adequate safety management controls. To support this argument, the Federal Motor Carrier Safety Regulations even state that various violations compared to similar carriers is evidence of inadequate safety management controls: "Violations, accidents or incidents substantially above the norm for similar carriers will be strong evidence that management controls are either inadequate or not functioning properly."[51] Additionally, studies prove motor carriers that have higher BASIC scores are more likely to cause a collision. If a motor carrier has higher BASIC scores, a future collision is foreseeable. If that motor carrier failed to monitor their BASIC scores and take appropriate action, that may have been negligent.

Additionally, studies prove motor carriers that have higher BASIC scores are more likely to cause a collision.

Use Studies to Bolster Your Claim

BASIC scores are important because the FMCSA, in a 2014 study, determined motor carriers that have one or more categories identified for intervention (*i.e.*, an alert), have a 79 percent higher future crash rate.[52] Some categories identified for intervention have an even higher increase in future crash rate, such as Unsafe Driving, where a motor carrier has a 93 percent higher future crash rate.[53]



Additional studies, such as the American Transportation Research Institute's Predicting Truck Crash

Involvement, support these findings. ATRI has identified "most of the violations that fit into a BASIC violation are statistically significant in increasing crash likelihood."[54] A trucking expert can rely upon these studies as reliable authorities in the trucking industry to lay the foundation for his or her opinions to prove the motor carrier was negligent.

Defendants will typically argue that one cannot draw conclusions about a carrier's overall safety based upon BASIC scores, so those violations by other drivers have no relevance to the driver involved in the collision. However, these studies show otherwise and can rebut these arguments, with the assistance of a trucking expert to explain the studies.

The Role of the Motor Carrier's Safety Rating

Related to BASIC scores is a motor carrier's safety rating. Following a compliance review of a motor carrier, the FMCSA will assign a safety rating to the motor carrier.[55] This rating can be satisfactory, conditional or unsatisfactory.[56] A motor carrier can also be unrated if a compliance review has not taken place. A safety rating, if one has been given, is based upon whether the motor carrier has adequate safety management controls in place.[57] A safety rating is based upon safety reviews, compliance reviews and other data.

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A safety rating can help further support inadequate safety management controls. For example, an unsatisfactory rating "means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard which has resulted" in various violations or crashes.[58] A motor carrier with an unsatisfactory safety rating is prohibited from operating a commercial motor vehicle.[59]

A conditional safety rating "means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result" in various violations or accidents.[60] This shows that the FMCSA determined the motor carrier lacked adequate safety management controls, making this information extremely helpful in a direct negligence claim. Notably, defining a motor carrier as one whose lack of adequate safety management controls "could result" in future violations helps establish the foreseeability of future crashes.

Being unrated "means that a safety rating has not been assigned to the motor carrier by the FMCSA."[61] This rating is helpful in that the FMCSA has not determined that the motor carrier has adequate safety management controls in place. Therefore, the best determination of whether the motor carrier has adequate safety management controls in place would be the motor carrier's BASIC scores.

Finally, a satisfactory safety rating means that a motor carrier has "in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in § 385.5."[62] When a motor carrier has a satisfactory safety rating, it will commonly allege that this rating means it had adequate safety management controls in place. However, this defense can easily be defeated. First, the safety rating is assigned immediately following a compliance review. That means at that snapshot in time, the FMCSA determined that safety rating. If months or years went by while violations occurred with elevated BASIC scores, the rating is no longer indicative of truly adequate safety management controls. Second, the FMCSA has stated that "a carrier can have a 'satisfactory' safety rating but exceed an intervention threshold in a BASIC."[63] Given that BASIC scores are "to identify the specific areas in which a carrier

has regulatory compliance or safety problems," just because a motor carrier has a satisfactory rating does not mean it does not have any safety problems.[64] Third, be sure to request from the FMCSA the full compliance review, including changes to the safety rating. This can show that the motor carrier had a conditional safety rating and was only changed to a satisfactory safety rating during that snapshot in time where they momentarily improved, only to fall back into their normal violations.

Use the Safety Management Cycle

The Safety Management Cycle is FMCSA's six-step model for motor carriers to assess how well a motor carrier's safety management controls support safe operations. Below are the six different Safety Management Processes the FMCSA identifies:

The FMCSA explains that the SMC is "useful in helping motor carriers identify and take actions to improve their safety compliance."[65] Motor carriers are encouraged to review violations and crashes, assess their SMPs to determine where and why the breakdowns occur, and to "monitor and track progress and the effect on the company's BASIC percentile ranks over time."[66] The FMCSA's encouragement of motor carriers to review their Safety Management Processes and BASIC scores on an ongoing basis, as well as taking meaningful action to correct any issues, helps establish the duty owed by the motor carrier to take such action. A reasonable motor carrier would monitor its BASIC scores and take meaningful action when needed. If the motor carrier does not take meaningful action, and a collision occurs, there is a breach of that duty and therefore the motor carrier is liable for its direct negligence.

Obtain Admissions Through Depositions

Depositions are a powerful way to obtain admissions by the defendants or show that they failed to take action when they should have. This can help establish that the motor carrier did not develop adequate safety management controls given its BASIC scores. While this would be small sample, various questions for a safety director or corporate representative may include:

- Do you have access to this data online for you to view anytime?
- Is there anything preventing you from accessing this information?
- Are you regularly monitoring your BASIC scores and violations?
- What are you looking for when you review this information?

The FMCSA explains that the SMC is "useful in helping motor carriers identify and take actions to improve their safety compliance."[70]

- What action did you take after receiving an alert or elevated BASIC score?
- Do you believe it's important to have a culture that emphasizes safety?
- Do you believe if you have a culture that emphasizes safety, that leads to having adequate safety management controls?
- Do you believe it's important for a company to know where they can potentially improve upon their safety as a company?
- Would you agree the more information you have regarding the safety of the company, the better?
- During [time frame], [motor carrier] had a worse safety rating than [percentile] of similar companies regarding [BASIC category], true?
- Is having those scores leading up to the collision a concern for you?
- Do you agree these scores show that [motor carrier] did not have a culture emphasizing safety?
- Do you believe there is anything [motor carrier] could have done differently to change or improve their safety culture?

A great way to bring it all together to support your direct negligence claim against the motor carrier is to use an expert.

Additionally, the FMCSA recommends that motor carriers ask themselves various questions to verify they are properly applying and enforcing the Safety Management Cycle.[67] These are great questions to ask a safety director or corporate representative.

Use a Trucking Expert

A great way to bring it all together to support your direct negligence claim against the motor carrier is to use an expert. For instance, a trucking expert can interpret what the elevated BASIC scores mean and opine how that motor carrier compares to other motor carriers. He or she can also discuss the above referenced studies to show how a motor carrier's elevated BASIC scores make it more likely there will be a future collision.

The following excerpts are from a case where the defendant driver arguably had an acceptable driving record, but the motor carrier had poor BASIC scores:

safety-performance record in the months leading up to this crash where they were on alert in two of the seven basic categories, which is rare that you will find a motor carrier with two alerts at the same time. That puts you in rare company in the nation's massive US DOT motor carriers. Now this is a company -- and

A trucking expert can also discuss how a reasonable motor carrier would monitor its BASIC scores and violations and take steps to bring BASIC scores down by developing a culture that emphasizes safety.

Transportation. This is a company that just either doesn't get it or doesn't care to modify, change and develop a culture that drives safety performance, and

Finally, a trucking expert can give the opinion that the motor carrier with those BASIC scores did not have adequate safety management controls, thereby creating an unsafe culture, which was a cause of the collision.[68]

they shouldn't have. I think all of these are just reflective on their culture which I believe is a contributing factor.

Help a Jury Visualize the BASIC Scores

A motor carrier's BASIC scores are essentially a report card for its ongoing safety in the respective categories. Let the jury see that report card. But not just that motor carrier's report card. Give that report card context and compare that motor carrier's BASIC scores to the average BASIC score, which would be the 50th percentile.

In the same case above, here were the motor carrier's BASIC scores in Unsafe Driving in the months leading up to the September 2019 collision compared to average scores:

Let the jury see that report card. But not just that motor carrier's report card.

This helps the jury visualize that the problem was not a one-time thing but an ongoing issue for many months or years leading up to the collision. After all, these violations are time weighted. stock-photo-damaged-cars-after-a-car-accident-crash-involving-a-big-rig-semi-truck-with-semi-trailer-at-a-city-2048747018 If a motor carrier continues to have elevated scores despite the time decay of the prior violations, it reflects an ongoing issue—a failure to maintain adequate safety management controls.

Conclusion

The FMCSA provides us with a treasure trove of information with a motor carrier's BASIC scores. When a motor carrier has elevated BASIC scores, a future crash is more likely. Use these BASIC scores to show that a motor carrier failed to have adequate safety management controls in place and created a culture of risk, which was a cause of the collision.

Use these BASIC scores to show that a motor carrier failed to have adequate safety management controls in place and created a culture of risk, which was a cause of the collision.

Bio

Alexander Kemp is an attorney at Michigan Auto Law in Farmington Hills, Michigan where he focuses on catastrophic truck and car crashes. He earned his undergraduate degree from Michigan State University in East Lansing, Michigan and his Juris Doctor from Wayne State University Law School in Detroit, Michigan. Alexander prides himself on providing every client with the care and compassion they deserve during the difficult time after a crash. He believes in holding all defendants responsible to obtain justice for his clients, where he has litigated claims against corporate defendants, brokers, and road construction companies. Alexander frequently lectures around the country regarding commercial motor vehicle and car crash cases. He is a member of the AAJ Truck Litigation Group and Academy of Truck Accident Attorneys.

Alexander has been selected as a Michigan Super Lawyers Rising Star every year since 2018. The National Trial Lawyers has named Alexander to the "Top 40 Under 40" and "Top 10 Trucking Trial Lawyers" for 2023-2025. Alexander has been named to DBusiness Magazine's list of Top Lawyers in Metro Detroit for 2023-2025. He has also been recognized as Best Lawyers "Ones to Watch" in 2025-2026. Alexander consistently obtains seven-figure recoveries each year where he is recognized by Michigan Lawyers Weekly in their Top Verdicts and Settlements, including having the highest reported settlement in Michigan in 2024.

In his free time, Alexander enjoys traveling and golfing with his wife, spending time with his dog, Henry, and rooting for the Detroit Lions.

[1] Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status, Federal Motor Carrier Safety Administration, September 2025, p.1-1.

[2] *Id.*

[3] Utilizing BASIC Scores is also effective in helping establish direct negligence claims against brokers for negligent selection of a motor carrier. However, this article will focus on direct negligence claims against motor carriers.

[4] An Acute Violation, also known as a one-time occurrence violation, is triggered by noncompliance discovered during an investigation that is so severe that immediate corrective action is required. A Critical Violation, also known as a pattern of occurrence violation, is triggered by a pattern of noncompliance related to the carrier's management or operational controls that is found during an investigation.

[5] For a list of Acute and Critical Violations, which includes their severity rating, *see* https://csa.fmcsa.dot.gov/Documents/SMS_AppendixA_ViolationsList.xlsx.

[6] Federal Motor Carrier Safety Administration, "Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status," pp. 3-2 (September 2025).

[7] https://safer.fmcsa.dot.gov/CompanySnapshot.aspx.

[8] Safety Management Controls are defined as "the systems, policies, programs, practices, and procedures used by a motor carrier to ensure compliance with applicable safety and hazardous materials regulations which ensure the safe movement of products and passengers through the transportation system, and to reduce the risk of highway accidents and hazardous materials incidents resulting in fatalities, injuries, and property damage." 49 C.F.R. § 385.3.

[9] 49 C.F.R. § 385.7(a).

[10] Federal Motor Carrier Safety Administration, "The Carrier Safety Measurement System Effectiveness Test by Behavior Analysis and Safety Improvement Categories," January 24, 2014. https://csa.fmcsa.dot.gov/Documents/CSMS_Effectiveness_Test_Final_Report.pdf.

[11] *Id.*

[12] American Transportation Research Institute, "Predicting Truck Crash Involvement: 2022 Update," at 25.

[13] 13 49 C.F.R. § 385.9.

[14] 49 C.F.R. § 385.3.

[15] 49 C.F.R. § 385.5.

[16] 49 C.F.R. § 385.3.

[17] 49 C.F.R. § 385.13.

[18] 49 C.F.R. § 385.3.

[19] *Id.*

[20] *Id.*

[21] FMCSA, "How can a carrier have a satisfactory safety rating but exceed an intervention threshold in a BASIC?" available at https://csa.fmcsa.dot.gov/HelpCenter/GetFAQsPage.

[22] *Id.*

[23] https://csa.fmcsa.dot.gov/Documents/FMC_CSA_12_002_SMC_Overview.pdf.

[24] *Id.*

[25] *See* FMCSA, "What can a motor carrier do to improve?" available at https://csa.fmcsa.dot.gov/HelpCenter/GetFAQsPage.

[26] This motor carrier had a "satisfactory" safety rating. This shows how even if a motor carrier has a satisfactory safety rating, that does not mean it has adequate safety management controls in place at the time of the collision.

Photos from Various AAJ TLG events

How to Obtain the Best Result for Your Client: Get Help!

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Having dealt with MCS-90 cases a few times, I knew the coverage denial was invalid. I figured the best way to get these folks to do something was to file suit.

It all started on March 2, 2021. A lawyer in Missouri called me with a potential referral. The lawyer was representing a truck driver with a wreck case in Missouri, and the client subsequently had another wreck with injuries in Tennessee. The second wreck occurred in February 2021 in a parking lot in Jefferson County, Tennessee, with another tractor-trailer colliding with the client's rig. After taking the case, I was at once met with a denial of coverage. According to the insurance company, the at-fault driver, who was from Mexico, had driven too far from the port of entry in Texas at the time of the wreck and thus violated the "radius exclusion" contained in the liability policy for the trucking company.

Having dealt with MCS-90 cases a few times, I knew the coverage denial was invalid. I figured the best way to get these folks to do something was to file suit. I thought I would never track down the driver, and in Tennessee, he wasn't a necessary party, so I filed suit against the trucking company only. I demanded less than $75,000 in the complaint and obtained valid service through the defendant motor carrier's BOC-3 agent. A few months went by with not a word from the defendant or the insurer.

At that point, two things happened. First, I figured out that my client may have had UM/UIM coverage through his employer. My client's employer would not cooperate, claiming he was limited to workers' compensation, and his insurer would not confirm coverage. Second, I realized the value of the claim was going to be more than $75,000. Based on these two facts, I served the UM/UIM carrier and amended my complaint to seek $750,000 in damages.

I then moved for a default judgment. But before I could get the default set for hearing, the UM/UIM carrier, though not a party, filed a notice of removal. The federal court immediately noticed that the motor carrier defendant had not filed an answer, and as a result, the court issued an order requiring me to move for a default judgment if there was no answer within 10 days. Meanwhile, I did not think the removal was proper, and thus, I filed a motion to remand. I also moved for entry of default against the named defendant per the court's order.

While this was happening, a deal was struck with the UM/UIM carrier, and they were dismissed. The dismissal prompted the federal judge to grant my motion to remand, and we were back in state court. Now it was time to once again move for a default judgment against the motor carrier. I double checked online and was able to confirm—

and download—the MCS-90 endorsement issued by the insurer to the motor carrier defendant. I had my client drive 10-plus hours from Louisiana for the hearing on my motion for default. At the hearing, the judge entered judgment in favor of my client for $750,000.

Now it was time to try to collect. The insurer was based in Texas. I considered filing it myself in Texas, but I had to decide: what was best for the client? After answering that question, I contacted Robert Collins, and he agreed to help. Bracken Millar and Robert Collins filed suit in federal court to collect from the insurer. As procedural battles were taking place in Texas, the insurer hired counsel in Tennessee to move to set aside the default judgment.

In Tennessee, default judgments are jurisprudentially disfavored and thus routinely set aside. However, in this case, the facts were in our favor because of how many times the defendant had been properly served both in state and federal court.

The matter was thoroughly briefed and the trial judge heard oral argument. At the conclusion of the defendant's argument, the judge said he was planning to either set aside the judgment or allow discovery on the issue of whether there was actual notice. The judge advised, though, that he would let me argue my side of things. After hearing argument, the judge denied the defendant's motion. I knew what was coming next: an appeal.

For the second time in the case, I had to decide if this was something that should be handled by me or another lawyer. After honestly answering that question and considering the best interests of the client, I contacted Donald Caparella in Nashville, the best appellate lawyer I know in the state of Tennessee. Caparella had experience with the issue facing us on appeal, and he was excited to help.

While on appeal, the case in Texas was put on hold. Eventually, the Tennessee Court of Appeals upheld the trial court's order. The decision was not only important for purposes of our case, but it implicitly found that service on a BOC-3 agent was proper and legal service in Tennessee. The defendant then sought review with the Tennessee Supreme Court, which was denied. Soon thereafter, the insurer paid the entire judgment.

I have no doubt that the result obtained in this case would not have been possible without Robert Collins, Bracken Millar and Donald Caparella.

The decision was not only important for purposes of our case, but it implicitly found that service on a BOC-3 agent was proper and legal service in Tennessee.

Bio

Patrick A. Cruise is Board Certified in Truck Accident Law by the National Board of Trial Advocacy, and has been rated by Mid-South Super Lawyers as one of the top plaintiff's personal injury lawyers in Tennessee. He focuses on serious injury and death cases, including wrecks involving tractor trailers, trucks and other commercial vehicles, as well as car wrecks and premises liability cases. He is a member of the Academy of Truck Accident Attorneys, and has earned Martindale Hubbell's highest peer rating standard of AV Preeminent. He is licensed in Tennessee, Georgia and Louisiana. During his nearly 22 year career as a trial lawyer, he has recovered millions and millions of dollars in compensation for injury victims and their families, while always adhering to the highest professional and ethical standards. He combines an aggressive approach to the investigation and pursuit of justice for his clients, with compassion and understanding for the difficulties faced by those struggling with the loss of a loved one, those facing months of rehabilitation after a bad injury, those facing mounting medical bills, and those facing a lifetime of disability and loss of capacity to earn a living.

Using Jury Instructions as a Case Map in Personal Injury Cases

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Great plaintiff's work starts—not ends—with the jury instructions. Pattern instructions, or charges, tell you what you must prove, what the defense will try to carve out, and how the judge will speak to the jury. Treat them as your map from intake through verdict: they drive your discovery plan, deposition outlines, motion practice, experts, exhibits and the architecture of *voir dire*, opening and closing.

Jury instructions are the DNA of personal injury litigation.

Jury instructions are the DNA of personal injury litigation. They define the duty, breach and causation frameworks that jurors will be told to apply, and they give lawyers the roadmap for what evidence actually matters. Begin with the instructions at intake, and use them to build discovery, expert testimony and trial themes to fit those precise words.

This approach is especially critical in trucking and roadway-construction cases, where federal regulations, the Manual on Uniform Traffic Control Devices and complex contracts create overlapping duties. Jury instructions—whether pattern or modified—are how those abstract standards become enforceable at trial.

Why Core Negligence Elements Matter Early

Across jurisdictions, model civil instructions converge on a familiar triad: duty, breach and causation—often "substantial factor" or "legal cause" —with damages addressed separately. For example:

- **California (CACI)**: negligence series and "substantial factor" causation (CACI 400s, esp. 430). The word "substantial" means more than remote or trivial; it need not be the only cause. Use it to block "sole cause" themes and to prepare for multiple-cause questions.
- **Illinois (IPI Civil)**: standard negligence and proximate-cause definitions (e.g., IPI 10.xx on negligence/contributory negligence; IPI 15.01 on proximate cause). Duty to use ordinary care for safety of the plaintiff means defendant had a duty to be free from negligence. Plaintiff's contributory negligence reduces damages if the claim is that defendant was willful and wanton, but not if the defendant's conduct was intentional. Helpful for structuring interrogatories on foreseeability and concurrent causation.

- **Florida (SJI Civil)**: 401.4 (negligence) and 401.12 (legal cause), plus targeted traffic-duty and evidence-of-violation instructions—useful in motor-vehicle and work-zone cases. Negligence need not be the only cause to be regarded as a legal cause.
- **New Mexico (UJI Civ)**: Negligent acts must be foreseeable by a reasonably prudent defendant as involving an unreasonable risk of injury. UJI 13-1601.
- **Arkansas (AMI Civil)**: proximate-cause series (e.g., AMI 501–503) highlights concurring and intervening causes. Does not mean only one proximate cause exists.

Litigation takeaway: Build your element matrix from these charges on Day 1. Every request for production, depo topic, and expert opinion should plug directly into (1) duty source, (2) breach proof and (3) causation language you'll read to jurors.

Negligence *Per Se* & Regulatory Violations—Your Fastest Lane to Duty/Breach
Trucking and road-construction cases often invite negligence *per se* or evidence-of-violation instructions.

For CMV/trucking specifically, anchor breach in the Federal Motor Carrier Safety Regulations and then decide whether your jurisdiction treats them as *per se*, evidence of negligence or standard-of-care context:

- **Hazardous Conditions/Speed Management**: 49 C.F.R. Section 392.14 requires "extreme caution," speed reduction and even discontinuation of operations when conditions (fog, rain, smoke, etc.) affect visibility/traction. This pairs naturally with "substantial factor" or "legal cause" charges and combats "it was just the weather" defenses.
- **Hours of Service (HOS)**: Part 395 limits driving and defines the 14-hour window/11-hour driving cap (and 30-minute break rule). Use logbooks/ELD data to tie violations to fatigue and then to your causation instruction.

Practice tip: When your state's pattern instruction says "statute, ordinance, or regulation," make a clean offer of proof tying specific FMCSRs (e.g., §§ 392.14, 395.3) to the protected class (road users) and the harm type (rear-end in low-visibility; lane- departure after fatigue), then use the *per se* or evidence-of-violation instruction accordingly.

Construction & Work-Zone Cases—MUTCD as a Duty Source
In roadway construction claims, the MUTCD and its Part 6, Temporary Traffic Control, are foundational. The MUTCD stresses maintaining safe, efficient road-user movement and worker safety; Part 6 details TTC principles for changing work-zone conditions. Use MUTCD provisions to define contractor/agency duties for advance warning, taper design and queue protection.

Trucking and road-construction cases often invite negligence per se or evidence-of-violation instructions.

Litigation takeaway: Plead and prove duty using MUTCD-based specs and traffic-control plans. Then ask for (1) your jurisdiction's negligence or negligence *per se* instruction keyed to MUTCD adoption (many state DOTs adopt the MUTCD by statute/reg), and (2) a clean "legal cause"/"substantial factor" charge. (Example support that MUTCD is the national standard for TCDs and widely adopted: state DOT adoption manuals.)

Setting up Punitive Damages from the Start

From case intake, using Arkansas as an example, evaluate whether the facts support the "clear and convincing evidence" standard under Arkansas Model Jury Instruction 2218. This requires proof that the defendant knew or ought to have known their conduct would likely cause injury and still proceeded with conscious indifference. Early discovery should target corporate policies, safety audits and prior violations to establish systemic indifference rather than mere negligence. During depositions, questions should frame the defendant's conduct as profit-driven disregard for public safety, setting up the moral fault necessary for punitive damages. By summary judgment and pretrial motions practice, the record will then show that punitive damages are supported by intentional policy choices or failures to act. At trial, use AMI 2218 and 2219 to remind jurors that punitive damages serve to punish and deter—not compensate—and that a corporation is liable for the willful acts of its managing agents. This throughline—from intake through verdict—ensures that punitive exposure remains central to case themes, reinforcing the narrative that safety violations are conscious choices that should be punished and deterred.

During depositions, questions should frame the defendant's conduct as profit-driven disregard for public safety, setting up the moral fault necessary for punitive damages.

Punitive Damages

What must you decide?

JURY INSTRUCTION 2218

In addition to compensatory damages for any actual that plaintiffs may have sustained, they ask for punitive damages from the defendant. Punitive damages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct.

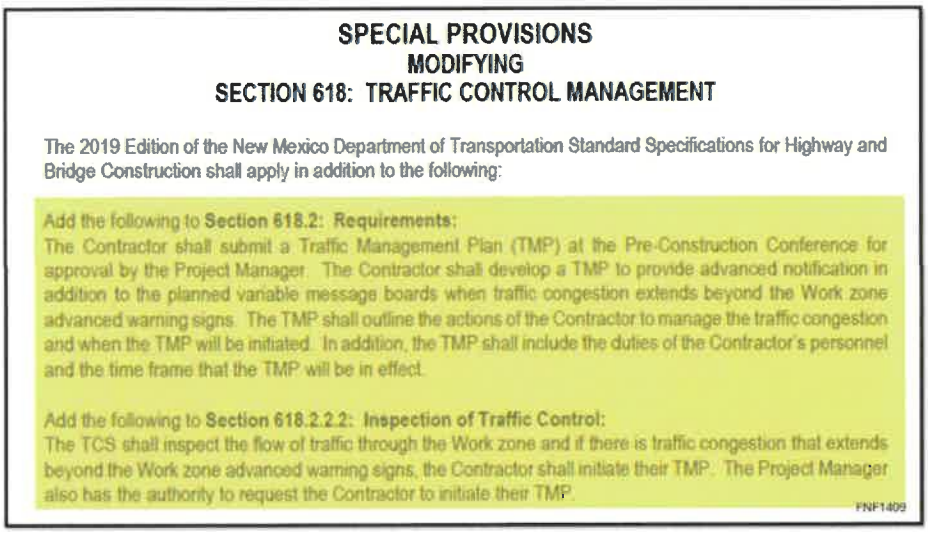
Jury Instruction – AMI 2218

AMI 2218 Punitive Damages

In addition to compensatory damages for any actual loss that (plaintiff) may have sustained, *[he][she]* asks for punitive damages from (defendant). Punitive damages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct. In order to recover punitive damages from (defendant), (plaintiff) has the burden of proving by clear and convincing evidence *[either, first]*:
[That (defendant) knew or ought to have known, in the light of the surrounding circumstances, that *[his][her][its]* conduct would naturally and probably result in *(injury)(damage)* and that *[he][she][it]* continued such conduct *(with malice or)* in reckless disregard of the consequences from which malice may be inferred]
[Or, second]
[That (defendant) intentionally pursued a course of conduct for the purpose of causing *(injury)(damage)*]
[Or both].
[In arriving at the amount of punitive damages you may consider the financial condition of (defendant), as shown by the evidence.]
"Clear and convincing evidence" is proof that enables you without hesitation to reach a firm conviction that the allegation is true.
You are not required to assess punitive damages against (defendant) but you may do so if justified by the evidence.
[You may consider an award of punitive damages only if you found that (plaintiff) is entitled to recover compensatory damages.]

Using Jury Charges as a Litigation Map

1. **Intake & Early Case Map**
   Build a one-page grid: elements from the model charge in Column A; proof targets (witnesses, data, regs) in Column B; exhibits in Column C; likely defenses matched to corresponding committee notes in Column D. (California's "substantial factor," Illinois' proximate cause, and Florida's legal-cause formulations work well for this grid.)
2. **Discovery & Depositions**
   - For trucking: tailor 30(b)(6) topics and driver depositions to the verbs in Section 392.14 ("reduce speed," "discontinue operations") and the HOS clock mechanics. Then you'll have clean plugs for *per se*/evidence-of-violation language.
   - For construction: lock down MUTCD Part 6 compliance, TTC plans, queue-warning strategy and who had authority to halt work or modify TTC as conditions changed.



SPECIAL PROVISIONS
MODIFYING
SECTION 618: TRAFFIC CONTROL MANAGEMENT

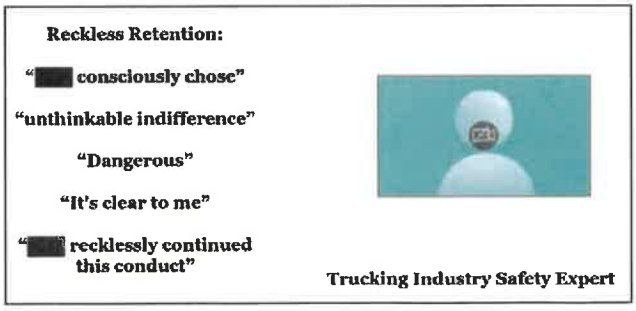
The 2019 Edition of the New Mexico Department of Transportation Standard Specifications for Highway and Bridge Construction shall apply in addition to the following:

Add the following to **Section 618.2: Requirements:**
The Contractor shall submit a Traffic Management Plan (TMP) at the Pre-Construction Conference for approval by the Project Manager. The Contractor shall develop a TMP to provide advanced notification in addition to the planned variable message boards when traffic congestion extends beyond the Work zone advanced warning signs. The TMP shall outline the actions of the Contractor to manage the traffic congestion and when the TMP will be initiated. In addition, the TMP shall include the duties of the Contractor's personnel and the time frame that the TMP will be in effect.

Add the following to **Section 618.2.2.2: Inspection of Traffic Control:**
The TCS shall inspect the flow of traffic through the Work zone and if there is traffic congestion that extends beyond the Work zone advanced warning signs, the Contractor shall initiate their TMP. The Project Manager also has the authority to request the Contractor to initiate their TMP.

FNF1409

3. **Motions *in Limine***
   Use the committee comments and the jurisdiction's instruction philosophy to exclude argumentative "instructions" smuggled into testimony (e.g., "only one cause can exist") and to pre-clear your *per se*/evidence instructions for trial. (New Mexico's UJI overview is unusually quotable on what belongs in instructions vs. counsel argument.)
4. **Experts**
   Disclose opinions that mirror the instruction language. Example: a human-factors expert ties poor TTC to MUTCD Part 6 and explains why the absence of advance queue warning was a "substantial factor" in the rear-end chain reaction; or a trucking safety expert explains why the evidence is clear and he is convinced that the defendant's reckless conduct was a proximate cause of the death or injuries.



Use the committee comments and the jurisdiction's instruction philosophy to exclude argumentative "instructions" smuggled into testimony.

5. ***Voir Dire*, Opening and Themes**
   Translate charge verbs into juror-friendly commitments ("When fog rolls in, trucking rules require slowing or stopping—not just 'being careful'"). That sets you up to show the jury exactly where the judge will land on duty and causation.
6. **Charge Conference & Verdict Form**
   Fight hard for pattern language first, which reduces appeal risk, then for modifications tethered to the evidence (e.g., adding FMCSR references as the "regulations" in a jurisdiction that allows it; selecting multiple-cause/substantial-factor where the defense blames weather/roadway).

Drafting Checklist (plug-and-play)

- Identify your duty sources: pattern negligence instruction + FMCSRs (Section 392.14; Part 395) + MUTCD Part 6 + contract specs.
- Choose the causation frame that fits your jurisdiction (e.g., "substantial factor" vs. "legal cause"), and highlight concurrent causes where you expect weather/secondary-actor defenses.
- Decide *per se* vs. evidence-of-violation and cite the precise instruction number.
- Tie facts to verbs in the instruction (e.g., "failed to reduce speed," "failed to discontinue operations," "failed to provide TTC to protect road users").
- Use punitive language from the start in the complaint and discovery.

Use punitive language from the start in the complaint and discovery.

Arkansas Statute: §16-55-206, 207

(1)The defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences, from which malice may be inferred; or (2)The defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.

207- A plaintiff must satisfy the burden of proof required under § 16 55-206 by clear and convincing evidence in order to recover punitive damages from the defendant.

- Keep committee notes handy to defend your requested instructions and resist argumentative language.

Conclusion

Jury instructions are the clearest statement of what the law expects—and what the jury will be told when your case is over. Treating them as the organizing principle of your litigation transforms every step—from discovery planning to closing argument—into a deliberate march toward a verdict grounded in the court's own language.

In trucking and construction-zone cases, where federal and state safety codes intertwine, charges are the bridge between regulations and accountability. By building your case around them from day one, you ensure the jury hears the story the law was written to tell.

Bio

Andrea McCurdy is a trial attorney at Oliver Law Firm in Rogers, Arkansas, where she has been practicing since 2023 after years of general practice. Andrea's role with Oliver's trial team focuses primarily on legal research and writing and motions practice. She is a member of the Arkansas Trial Lawyers Association, Arkansas Bar Association, Benton County Bar Association, American Association for Justice's Trucking Litigation Group, the Academy of Truck Accident Attorneys (ATAA), and Sisterhood of the 8 women trial lawyers. Andrea grew up in Shreveport, Louisiana, but has been a long- time Northwest Arkansas resident and Razorback fan. She serves on several legal committees, is active in her church, and outside of fighting for trucking safety, she focuses her time on her family.

Photos from Various AAJ TLG events

In trucking and construction-zone cases, where federal and state safety codes intertwine, charges are the bridge between regulations and accountability.

Navigating the Pitfalls of Multistate Trucking Litigation

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By its nature, trucking litigation almost always crosses state lines in both fact and law.

A call comes in from a former client about a potential new case. His brother-in-law from New Jersey just died while on the job in a truck wreck in Virginia. The truck driver was from Missouri and worked for a motor carrier headquartered in Madison County, Illinois. The load may have been brokered by a large broker out of Tennessee. The former client wants you to talk to his sister about her options in pursuing a wrongful death claim while others handle the worker's compensation, criminal and probate cases. Also, the deceased had two biological daughters he fathered as a sperm donor, adopted later in life, but the adoption was rescinded a few years before his death. Your head starts spinning about all the possible multistate legal hurdles and pitfalls.

By its nature, trucking litigation almost always crosses state lines in both fact and law. A tractor-trailer may be owned by a motor carrier headquartered in one state, leased through a parent company in another state, hauling freight brokered from a third entity, with a driver from a state far across the country who is involved in a collision hundreds of miles away from everything else. Moreover, the victims of truck wrecks are often injured or killed traveling for work or leisure away from their home state. As a result, in many high-stakes trucking cases with significant damages, the resulting lawsuit rarely fits neatly within one jurisdiction's borders.[71]

Plaintiff attorneys handling these cases must navigate a sometimes-perilous landscape of venue, jurisdiction, probate and choice-of-law considerations, each

of which can dramatically affect case value and outcome. Multistate trucking litigation requires strategic foresight and procedural vigilance in selecting the forum, identifying the proper parties and coordinating with local counsel under varying state laws. This article highlights key pitfalls and practical strategies for plaintiff lawyers litigating interstate trucking cases.

1. Choice of Venue and Personal Jurisdiction

Venue selection is one of the most consequential strategic decisions in a trucking case. The carrier may be incorporated in Delaware, maintain its principal place of business in Illinois, and operate throughout the Southeast. Trucking cases often present multiple options for venue based on the multiple parties involved. One might be tempted to simply file in the venue that seems most plaintiff friendly. However, understanding whether the court will have jurisdiction is also key.

Daimler AG v. Bauman and *Bristol-Myers Squibb Co. v. Superior Court* narrowed general jurisdiction, limiting where a corporate defendant can be sued. Because general jurisdiction now typically exists only in the defendant's place of incorporation or principal place of business, most trucking cases must rely on specific jurisdiction.[72] That means the plaintiff must show the defendant purposefully directed activities toward the forum and that the cause of action arises out of those activities. Thus, factors for establishing jurisdiction include:

- Where the trip originated and was dispatched;
- Where the load was brokered;
- Where driver supervision or maintenance occurred; and
- Whether the carrier holds local business licenses or has a terminal in the state.

A well-pleaded complaint that ties the carrier's conduct to the forum state can deter early dismissal motions, but a motion for *forum non conveniens* will likely be filed whenever a lawsuit is filed outside of the state where the wreck occurs. If that occurs, remember deference to the Plaintiff's choice of forum is an automatic fact in the plaintiff's favor. Apart from that, many of the factors going into a *forum non conveniens* analysis are antiquated concepts that are not as concerning in a digital age. Witness availability matters less in a world with Zoom. The location of documentary evidence matters less in the world with digital scanning and Dropbox. While you may ultimately be successful and the payoff for fighting to keep venue may ultimately be worth the fight, getting too creative with venue can result in motions practice that delays the case for months or longer.

2. Probate Court Issues and Establishing an Estate

When a trucking crash results in death, the first procedural challenge may arise

Venue selection is one of the most consequential strategic decisions in a trucking case.

not in civil court but in probate court. Each state has distinct requirements for opening an estate and appointing a representative to bring a wrongful death or survival action. If the decedent resided in one state but died in another, counsel must determine whether to open an estate in the domicile state, the accident state or both. Some jurisdictions require ancillary probate to confer standing on a personal representative litigating out of state.

To avoid costly delays and potential standing challenges:

- Confirm who qualifies as the proper personal representative and statutory beneficiaries under applicable wrongful death statutes; and
- Identify whether survival actions must be filed separately or jointly.

Track statute of limitations differences for wrongful death versus personal injury claims.

Early probate coordination prevents jurisdictional pitfalls and ensures that the right plaintiff brings the right claim in the right court. That is why it is essential to research who the local probate lawyer or lawyers are who work with the plaintiffs' bar to set up estates in major death cases in the forum state. That person will understand the interplay between civil procedural and probate law better than a probate lawyer who has no experience with wrongful death tort cases.

Early probate coordination prevents jurisdictional pitfalls and ensures that the right plaintiff brings the right claim in the right court.

3. **Choice of Law and Conflicts Analysis**

Determining which state's substantive law governs the case can alter liability standards, available damages and recovery caps. Most courts will apply the forum state's conflict-of-laws rules, and those rules vary widely. Some states follow the "most significant relationship" test (Restatement (Second) of Conflict of Laws §§ 6, 145), which is a multi-factor test that focus on the location where the parties have the most significant relationships. Others still adhere to the *lex loci delicti* or "place of the wrong" rule. For example, Georgia follows *lex loci deliciti*, so if a crash in Georgia involves a Tennessee carrier and an Alabama resident, then Georgia courts will apply Georgia law to control the ensuing tort.

The governing law could dictate whether punitive damages are available, whether negligent entrustment is recognized or whether joint and several liability applies. Moreover, be mindful of foreign migrant clients who are injured in states that follow the "most significant relationship" test. In states like Texas, for example, with large populations of foreign migrants from Latin American countries, trucking companies will argue the unfavorable damages law of the plaintiff's home country should be applied to limit damages. Therefore, before filing, it is worth conducting comparative law research to identify the most favorable jurisdiction for your client.

4. **Varying Laws of Liability and Damages**

Even once the applicable law is identified, differences in state tort regimes can dramatically affect outcomes. Key variations include:

- Comparative versus contributory negligence: A few states still follow contributory negligence bars that preclude a plaintiff's case if they are even 1 percent at fault. Others allow recovery even when plaintiffs are 50 percent at fault, while some have pure comparative schemes. For the states that have a contributory negligence bar, like Virginia,[73] the advantage is those states typically have joint and several liability, which often assists plaintiffs in finding a defendant who can pay the judgment, and there is an exception to the contributory negligence bar if a case of punitive damages can be made.
- Punitive damages: Caps and pleading requirements differ, with some states requiring clear and convincing proof of specific intent, while others apply more lenient standards.
- Wrongful death valuation: States such as Georgia measure "the full value of the life," while others, like New York and New Jersey,[74] limit recovery to pecuniary loss.
- Joint and several liability: Some jurisdictions have abolished it entirely; others permit full recovery from any liable defendant.
- Caps on non-economic damages: Many states have caps on noneconomic damages, which often account for the largest portion of a case's value. Cases in states with these caps require looking at building up special damages through life care plans and lost earnings analysis.
- Collateral Source and other evidentiary issues: Value can also be impacted by the forum state's rules on admissibility of collateral source payments, seatbelt use, etc.

These distinctions are not merely academic—they can swing value by millions of dollars. Early choice-of-law research and damages analysis should be part of every multistate trucking case strategy.

5. Local Rules, Discovery Practices and Expert Disclosures

Engaging solid local counsel to understand the forum state's law on damages, case value and overall strategy is a must. Procedural pitfalls often arise not from substantive law but from local practice variations. Federal and state courts differ on expert disclosure deadlines, page limits and discovery scope. Some districts require early expert identification or court approval before more than a certain number of depositions. Local rules may dictate when preservation letters must be issued or how to compel production in discovery.

Practical tips include:

- Review standing orders and local rules for each judge and district. Make sure to understand the local customs for discovery disputes, whether local counsel must be present at depositions and hearings, and rules for whether attorney/client conversations during deposition breaks are privileged.
- Consult local counsel on customary scheduling and discovery practices, getting trial dates, judges and jury pools.

Engaging solid local counsel to understand the forum state's law on damages, case value and overall strategy is a must.

Failure to follow local procedure can result in exclusion of key experts or sanctions for discovery violations—mistakes that can devastate a complex liability case.

6. **Coordinating with Local Counsel and Pro Hac Vice Admission**
Few plaintiff lawyers can personally appear in every jurisdiction where their trucking cases arise. Partnering with qualified local counsel is both a logistical necessity and a strategic asset. Each court sets its own *pro hac vice* requirements; some require sponsorship by a local attorney who must sign every pleading or appear at all hearings; others require annual fees or local bar registration.

   Beyond compliance, local counsel provide invaluable insight into regional jury tendencies, judicial expectations and local mediator reputations. Choose co-counsel who are experienced, communicative and aligned with your litigation philosophy. Formalize relationships through written agreements covering division of responsibilities, client communication and fee allocation.

7. **Dealing with Lien Laws and Subrogation Across States**
Lien resolution in multistate trucking cases presents its own maze of conflicting rules. The governing law may depend on where treatment occurred, where the case was filed or where the lienholder is located.

   For example:
   - Hospital and medical provider liens differ in notice, filing and priority requirements.
   - Workers' compensation subrogation rights vary dramatically—some states require consent to settlement, others allow full reimbursement, and still others mandate equitable reduction.
   - ERISA and Medicare liens overlay federal law but interact differently with state lien statutes.

   Failure to resolve liens properly can expose clients and attorneys to personal liability and delay settlement disbursement. Identify lienholders early, open communication channels and document all reductions or compromises in writing.

Distribution of settlement funds may require court approval under differing minor settlement, wrongful death settlement or probate supervision rules.

8. **Post-Settlement Procedures**
Even after settlement, multistate complications persist. Distribution of settlement funds may require court approval under differing minor settlement, wrongful death settlement or probate supervision rules. Out-of-state estates may need ancillary approval before disbursing funds to heirs. Lien resolution must be finalized under the correct jurisdiction's procedures, including notice to Medicaid or hospital lienholders. Federal Medicare compliance adds another layer of complexity.

   In addition, carriers and insurers based in other states may require court-approved

releases or structured payment plans subject to their home-state law. Be cautious when settling with multiple defendants from different jurisdictions; verify that releases satisfy all parties' state- specific language requirements to avoid future enforcement disputes.

Finally, consider tax implications for heirs or plaintiffs residing in other states. Certain jurisdictions impose inheritance or estate taxes that affect net recovery. Coordinating with local probate and tax counsel ensures that settlements are distributed efficiently and lawfully. Post- settlement diligence may not be glamorous, but it protects clients and safeguards the attorney's fee from future disputes.

Conclusion

Success in multistate trucking litigation comes from combining national expertise in trucking law with local adaptability in procedure and practice. The plaintiff lawyer who anticipates jurisdictional challenges, coordinates effectively with local counsel and manages lien and probate complexities will not only avoid costly pitfalls but also maximize recovery for the client.

Bio

Briant G. Mildenhall is a Board-Certified trucking attorney at Fried Goldberg in Atlanta, Georgia. He has handled trucking cases in 23 different states and serves on the Board of Regents for the Academy if Truck Accident Attorneys.

Briant received his undergraduate degree from Brigham Young University in Foreign Literature and Russian and received his Juris Doctor from the University of Georgia.

Besides specializing in trucking law, Briant has also dedicated many hours to judicial reform in Eastern Europe. He speaks Russian and has taught trial advocacy skills to law students in Ukraine and Moldova.

Briant and his wife live in Roswell, Georgia, with their five children and two dogs, where they enjoy hiking, mountain biking, soccer, and fine pizza.

Bio

Nathan Gaffney is a partner at Fried Goldberg and has a national practice that is dedicated to catastrophic truck accident cases. Nathan works closely with Joe Fried on Fried Goldberg's biggest cases And is known for being a being a legal strategist and thinker. Nathan is an emerging voice and thought leader in legal AI innovation. He chairs the ATAA AI Committee and the TLG AI Committee, and sits on the executive board of the AAJ's Technology Section. Nathan brings a blend of strategic insight and hands-on expertise to catastrophic trial law, while passionately helping shape the future of the profession through a forward-thinking AI lens.

[1] Most states follow the most significant injury test from the Restatement (Second) of Conflict of Laws for determining the choice of law in a tort action. Restatement 2d of Conflict of Laws §§ 6, 145.

[2] But see Georgia and Pennsylvania statutes, 42 Pa. Cons. Stat. § 5301(a)(2) and O.C.G.A. § 14-2-1505(b), which provide corporate general jurisdiction when corporations register to do business in those states.

[3] *See Thomas v. Snow*, 162 Va. 654, 660 (1934); *Griffinv. Shively*, 227 Va. 317, 321-22 (1984).

[4] New Jersey Revised Statutes Section 2A:31-1 et seq.; New York Estates, Powers and Trusts Law 5-4.1 et seq.

Success in multistate trucking litigation comes from combining national expertise in trucking law with local adaptability in procedure and practice.

The Lawyer's Mind in the Age of AI: Protecting Judgment in an Accelerated Profession

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Introduction

The biggest misunderstanding in the legal profession today is the belief that AI's purpose is to automate our work as lawyers and replace professional judgment and skill. Its real power lies in amplifying a lawyer's ability to think faster and deeper. Yet in the winter of 2025, most lawyers still treat AI like a shortcut: a way to draft faster, summarize faster or shave a few minutes off routine tasks. Very few are openly discussing using it to think more clearly or to expand the depth and structure of their legal reasoning.

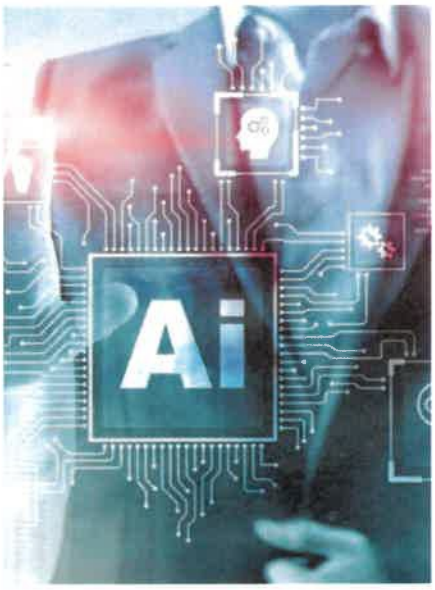
Here is the central argument of this article: lawyers should be using AI to think more, not less.

To me, the conversation around AI feels a little chaotic and shallow. Privately, almost everyone is experimenting. Lawyers use AI behind closed doors or in the quiet moments before client meetings, depositions and hearings. They often "ChatGPT everything" when overwhelmed, then downplay it in publicly when discussing AI. That unstructured approach has already caused serious problems. The rush to let AI automate legal arguments/research and the press of time, coupled with stress, have produced hallucinated cases and nonexistent facts. Courts have responded with reprimands, disqualification, monetary sanctions and mandatory disclosure.[75] Bar ethics committees have issued opinions on competence, supervision, confidentiality and billing transparency.[76]

Here is the central argument of this article: lawyers should be using AI to think more, not less. Not outsourcing judgment but refining it. Not replacing the lawyer's mind but expanding the workspace in which that mind operates. Imagine treating AI not as a robot that automates but as a seasoned law partner who can tirelessly test your logic, sharpen your trial themes and push your preparation to a higher level.

The pages that follow focus on that shift in thinking on how lawyers should use AI. They examine AI as a tool for human thought enhancement, a way to think more deeply, more broadly and more creatively than without AI. We will discuss concrete methods for turning AI into a thought partner[77]: conversational prompts that sharpen strategic thinking, document-anchored tools that prevent drift, and cognitive safeguards that help lawyers maintain clarity and intellectual control. All these practices aim at a single goal: helping lawyers build a larger and more resilient cognitive workspace without surrendering the one thing the profession cannot afford to lose: the lawyer's own human mind.

Human Enhancement v. Human Replacement



To understand this shift fully, lawyers must begin with the right mindset about what AI actually is. One of the most persistent myths is that AI allows lawyers to practice law without human effort, skill or judgment. Some attorneys still imagine it as a push-button briefing machine.[78] Others assume its usefulness is limited to high-volume, low-skill work that produces routine pleadings or boilerplate documents. These misconceptions lead some practice owners to treat AI as little more than a way to cut overhead or replace task-oriented staff. And while AI does perform repetitive administrative work well, that capability represents only a small fraction of its potential.

It is time to think about AI differently. Instead of functioning as an automated demand or brief writer, think of AI as enhancement and support for a lawyer's mind that helps them process complex issues more efficiently, explore arguments from multiple perspectives and refine their reasoning through structured dialogue.

For these higher-level tasks, the key is to recognize that AI's value depends entirely on the lawyer's own knowledge, effort and engagement.[79] When lawyers think with AI, it does not save time in the traditional sense. Instead, it shifts time away from mechanical steps and toward deeper conceptual work. A lawyer who might have identified three sound reasons a motion should be denied will often uncover five when they use AI to iterate through the same reasoning process.

That mindset shift is essential. AI is not a tool for human replacement; it is a tool for human enhancement. It works at its highest level only when paired with strong human judgment, creativity and domain expertise. The lawyers who excel in the coming era will not be those who think less, but those who use AI to think more deeply, more broadly and more creatively than they ever could on their own.

This shift in mindset becomes concrete when we look at how lawyers actually think with AI in practice.

How to Use AI Like an External Thought Space and Thought Partner

When I talk about thinking with a language learning model, I am not referring to delegating or outsourcing my judgment. I am referring to externalizing my internal reasoning into an interactive pace where it can be examined, refined and expanded through iterative dialogue. Without AI, a lawyer spends the day reasoning, structuring arguments and weighing contingencies inside their own head. For many of us, that process begins with an internal dialogue that functions as a private cognitive workspace.[80]

That mindset shift is essential. AI is not a tool for human replacement; it is a tool for human enhancement.

Generative AI allows that private workspace to become external and visible. On the screen, your reasoning interacts with a highly articulate and tireless assistant who responds immediately and helps you test, strengthen or redirect your thoughts. Unlike a human associate, this AI thought partner has no emotions, no fatigue, no need for safe spaces and no limits on its capacity to iterate through a problem.

A practical example makes this clear: I might present ChatGPT with a delicate deposition theme. Instead of drafting questions immediately, the AI and I begin by exploring the strategic landscape. Recently, I needed a motor carrier's safety director to speak openly about an employee's training gaps without triggering defensiveness. Rather than asking the model to draft questions, I iterated with it on framing, tone and psychological approach. We considered how different phrasing might lead the witness to speak candidly. A starting prompt for that kind of work might be:

Generative AI allows that private workspace to become external and visible.

I'm preparing to depose a motor carrier's safety director. My goal is to help him open up about gaps in a driver's training without triggering defensiveness. Act as a thought partner and help me brainstorm strategic angles, psychological dynamics, and narrative frames that will encourage honest, non-protective answers. Ask me one question at a time to clarify the case theory, the witness's personality profile, and the specific training gaps I need to surface. Don't draft questions yet. Help me shape the theme and approach.

This kind of conversational prompt reframes AI from a drafting tool into a cognitive partner. It pushes the lawyer to develop a strategy, anticipate human reactions, and calibrate tone before a single question is written. I am not telling the AI what to do, and it is not telling me what to do. Instead, I am setting up a structured conversation between my mind and the model. This process reliably produces more thoughtful and substantive work than developing ideas entirely on my own.

The same approach applies to broader liability analysis. For example:

Using the uploaded reports, diagrams and witness accounts, help me explore potential theories of liability. Do not draft arguments. Instead, map factual patterns, pressure points, contradictions and weaknesses. Ask me one question at a time, and do not move forward until we have fully refined the current theory. I will share my leading theories first.

Here, the AI is not writing anything for you. It is thinking with you. The rhythm is simple: have a conversation with AI by developing a theory, asking a question, refining it and then moving to the next. This is how you externalize your inner monologue with AI. The lawyer remains in command of the reasoning process, while the AI functions as a disciplined thought partner. It does not replace professional judgment. Instead, it broadens the terrain on which judgment is exercised and gives the lawyer a second mind with which to explore solutions in real time.

Confidentiality in the Age of AI

In my opinion, confidentiality, not hallucinations, is the greatest obstacle to the legal profession's adoption of generative AI. Lawyers can tolerate a tool that occasionally produces a false or weak answer; after all, human beings produce incorrect answers every day. What the profession cannot tolerate is even the hypothetical possibility that privileged or sensitive information could leave the protective boundaries of the attorney-client relationship. Confidentiality is not simply an ethical rule. It is one of the structural pillars that allows clients to speak candidly, lawyers to advocate freely, and the justice system to function at all.

As generative AI entered mainstream use, lawyers responded with an immediate and visceral fear:

If I type something into an AI model, am I disclosing confidential information?

The fear is understandable, but the conversation that has followed often blurred facts with theory. In reality, there are two primary confidentiality questions that matter when it comes to AI: (1) server-side access by employees of the AI company; and (2) the model using confidential information to "train" and then disclosing it to a third party. The first concern is similar to the risks lawyers already accept when they use secure non-AI cloud platforms such as Dropbox, NetDocuments or Clio.[81] The second concern—the idea that an LLM might "absorb" confidential text and later reveal it to another user—remains one of the most persistent concerns in the profession.

If I type something into an AI model, am I disclosing confidential information?

To date, there appears to be only one publicly documented case of a large-language model platform disclosing privileged material from one user to different users—the March 2023 ChatGPT incident[82]—though the law and technology are still evolving. Despite the isolated nature of this incident, speculation about cross-user data exposure has dominated the discourse, while actual documented cases remain extremely rare or involve user errors and hacking.[83]

Nothing in this article should be construed as encouraging lawyers to upload confidential documents indiscriminately or not follow ethical guidelines related to using artificial intelligence. The ethical framework governing AI use is already well developed. ABA Formal Opinion 512—together with a growing number of state-bar opinions—sets out the core duties of confidentiality, reasonable safeguards, vendor due diligence, client consent and firm-level AI policies.[84] Those operational and governance requirements form the ethical floor for responsible AI use. They are critically important, but they fall outside the scope of this piece. My focus is what

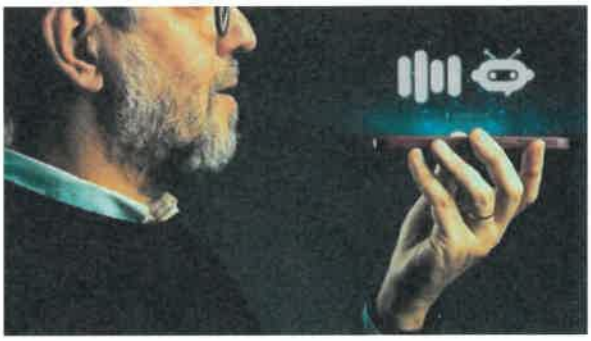
lawyers can and should do *after* those baseline obligations are satisfied—namely, how AI can serve as a thinking companion, externalize your inner monologue and deepen the quality of legal reasoning.

For lawyers seeking additional reassurance about confidentiality, encrypted legal domain platforms such as Supio and Anytime AI, enterprise versions of ChatGPT, and "no-training" models provide further protection against disclosure. And as with any digital workflow, anonymizing identifying details remains a simple, effective safeguard—especially when the dialogue with AI is conceptual rather than case specific.

When lawyers understand the true contours of confidentiality risk, they gain the confidence to use AI in the way it is actually most powerful: as a tool for thought partnership and expanding their cognitive workspace. And that expansion does not happen by accident. It arises from the lawyer's specific mindset and modes of interaction with AI that allow lawyers to think more clearly, more deeply and with far less friction than before.

Using ChatGPT Advanced Voice Mode to Think at the Speed of Speech

Typing is the governor on the engine of thought partnership with AI. Remove the governor, and the entire system accelerates.



Having briefly discussed the ethical obligations surrounding confidentiality, we can now return to the central question of this article: How can AI actually make a lawyer think better? We've covered the mindset shift and the basics of using AI as a thought partner, but now we turn to a tool that removes the input/output bottlenecks that traditionally slow down complex legal thought. We think at the speed of speech, but we write at the speed of typing. Most people type between 50 and 60 words per minute.[85] The average person speaks between 120 and 200 words per minute (a court reporter recently clocked me at 260).[86] Audiobooks are typically recorded at about 150 to 160 WPM, while some people choose to listen to content at speeds of 1.5 times or even 2 times faster than normal.[87]

Typing is the governor on the engine of thought partnership with AI. Remove the governor, and the entire system accelerates.

This is where Advanced Voice Mode becomes transformative. It lets lawyers externalize ideas at the speed of natural language. You can interject stream-of-consciousness thoughts—exploratory, half-formed, unfinished—and the AI organizes, clarifies and tests them while they are still fluid. This is the moment where AI stops being a document generator and becomes a true thinking companion.

Here is a concrete example of how dramatic this can be. I recently loaded the briefs for an upcoming hearing into ChatGPT's Advanced Voice Mode and began preparing oral-argument strategy out loud. For lawyers who want to replicate it, the workflow is simple: upload your briefs, motions, and key documents into the desktop version, turn on Advanced Voice Mode, and give a structured command like:

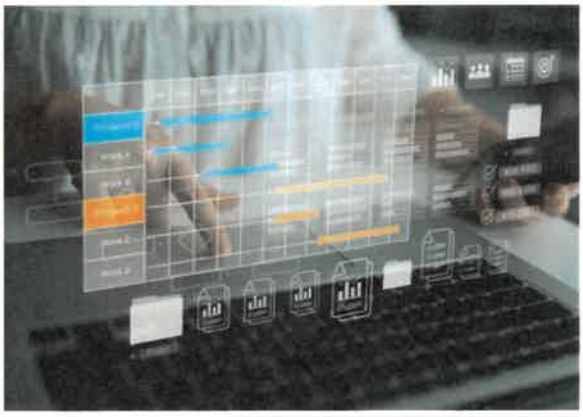
**"I'm going to use Advanced Voice Mode to prepare for my upcoming oral argument. In this mode, I'd like you to help me in three stages:

1. First, help me develop a clear oral-argument outline based on the uploaded briefs. Guide me step-by-step through the structure.
2. Second, once the outline is ready, help me rehearse and memorize it by practicing the key points out loud.
3. Third, let's do a role-play where you act as the judge or opposing counsel and ask me challenging questions so I can practice responding in real time."**

This prompt forces an oral conversation with the AI to refine the theory, generate a clean outline and walk through oral-argument rehearsal. It helped me memorize the structure, pressure-test the logic and anticipate adversarial questioning. It became a fully interactive simulation lab for argument preparation—and because I was working at the speed of speech, nothing got lost or slowed down.

This reduction in friction is amplified through iterative conversational modes. Prompts like, "Ask me one question at a time and wait for my answer" **or** "Help me shape the theme before drafting" slow the process just enough to expose assumptions, tighten theories and sharpen analysis. These conversational structures create a psychologically safe space where half-formed ideas can be explored without judgment, reflected back with clarity and refined into something precise—all through the natural rhythm of human speech.

Use Google Notebook LM to Anchor Sources When You Need Factual Precision



Large language models are extraordinary at speeding up legal reasoning, but they are not equally strong at every task. Some excel at brainstorming and rapid idea generation, like ChatGPT. Others excel at document-anchored analysis.[88] Those differences matter because prompt drift and hallucinations usually appear when the model is forced to juggle too much information at once, such as multiple PDFs, multiple transcripts and multiple issues all competing for attention inside a single context window.

A standard chat interface blends all those inputs together. Upload a trial transcript, a brief, and a statute, and the model places everything into the same conceptual bucket. That blending is ideal for creative ideas and big-picture thought generation but risky for evidentiary and factual precision. It is why a model may confuse one expert for another or import a fact from a different case. The model predicts what should come next based on patterns, not what the record actually says.

Large language models are extraordinary at speeding up legal reasoning, but they are not equally strong at every task.

This is where a document-grounded LLM like Google Notebook LM becomes essential for lawyers. Notebook LM does not blend your documents; it compartmentalizes and anchors them. It treats the uploaded PDFs as the entire universe of authority unless you tell it otherwise. When you ask a question about a fact-witness deposition transcript, Notebook LM pulls only from that transcript. When you ask it to compare fourteen cases, it reads each one separately, clusters the issues, and builds a legal map without drifting beyond the record or inventing an argument that is not there.

Notebook LM does not blend your documents; it compartmentalizes and anchors them.

Here is a real example. In one of my cases, I uploaded a four-volume trial transcript into Notebook LM, which was reversed on appeal due to an error the court made in giving a spoilation charge. I used the following prompt: *"Using only the four-volume transcript, (1) identify every issue my opponents could raise in a motion for new trial, (2) quote or cite the exact testimony they would rely on, and (3) provide the strongest factual and legal response supported by transcript."* Within minutes, it generated numerous potential grounds for a motion for a new trial, and the leading ground was ultimately the issue that got the trial court reversed on appeal.

Another example: I once uploaded 14 case PDFs—cases my opponent said demanded summary judgment. I uploaded PDFs of all the cases my opponent cited in the brief. Because of Notebook LM's technology, the AI stays locked in to those authorities, and so I can do a deep dive on just the information and details contained in those cases.[89] I needed to factually distinguish the defense's cases with my clients, and an easy head start on that task was to upload the cases to Notebook LM and ask the AI to help me develop a report of the defense's cases and why they are factually distinct or otherwise do not apply to my client's case.

In addition to its analytical precision, Notebook LM can also translate information into multiple formats that help lawyers absorb and internalize a case. It can generate audio overviews, short video summaries, mind maps, structured reports, flashcards and quizzes. These outputs may feel a little camp for a profession built on seriousness, but they are surprisingly effective. An audio overview helps a lawyer learn the arc of a case during a commute. A mind map reveals relationships between witnesses, facts and legal issues that are harder to visualize in text. Flashcards and quizzes reinforce key dates, testimony and doctrines. Video summaries and narrative reports provide digestible frames for sprawling factual records. None of these formats replace legal analysis, but they broaden the cognitive workspace in which analysis occurs and make it easier to inhabit the facts of a case.

For lawyers who prefer or need a closed-system environment, tools like Supio and Anytime AI offer document-anchored chat functions that keep all analysis fully contained within an encrypted, non-training ecosystem. This allows attorneys to work with sensitive records while preserving the same anchoring and precision benefits without exposing documents to any open-model architecture.

Conclusion: Holding Onto the Human Mind Behind the Machine

There is a dimension of AI use that many lawyers feel but few talk about openly: these tools don't just shape how we think; they shape how we think and communicate with others. Spend enough time in an iterative session with a large language model and you begin to feel your own tempo speeding up. Ideas arrive faster. Responses form faster. Your mind starts expecting instant clarity. And then, when you return to a normal human conversation, the contrast can feel jarring.

I first noticed it when my girlfriend, only half joking, asked me to stop "iterating with her the way I iterate with ChatGPT." It was funny, but it struck a nerve. AI had subtly changed the way I was talking—sharper, faster, more structured, almost as if I expected her to return optimized answers in real time. It made me realize how easily these tools can overwrite the natural rhythm of human communication. And I'm not alone. Heavy AI users across law, academia, engineering and creative fields report the sense of changes in tempo and cognitive load.[90]

Layered on top of this is a second, quieter risk: cognitive offloading.[91] As AI performs more of the heavy lifting—drafting, summarizing, structuring arguments—lawyers may gradually rely on the model for tasks that once reinforced our memory, reasoning and narrative construction. The danger is subtle: skills don't vanish suddenly, but through disuse. Without realizing it, lawyers may lose the mental habits that underpin judgment simply because the machine did the earlier steps for them.[92] Protecting cognitive encoding, the brain's ability to absorb, retain and integrate information, is quickly becoming a new professional competency with AI users.

It made me realize how easily these tools can overwrite the natural rhythm of human communication.

This is why lawyers should incorporate a maintenance practice into their routines: brief periods of digital walking journaling or short post-AI decompression sessions where you manually write out or speak about the work you did with AI. These are simple audio reflections recorded where the lawyers who used AI attempts to restate the work product without a screen to encode that process in their brain so they can retain it later when they need it in oral argument or when advising a client. For me, these practices may restore natural pacing, re-engage memory, clarify what the lawyer actually thinks and re-anchor the cognitive process back in human experience. In an accelerated environment, these small, analog rituals function as a break, helping the brain reabsorb information instead of outsourcing it entirely.

AI can expand our mental workspace and serve high-level thought partner. It can speed up drafting and broaden our thinking. But it cannot replace the grounding, paced, creative, emotionally intelligent human mind behind the analysis.[93] As the tools become faster and more integrated into daily legal practice, the responsibility shifts to us: to incorporate practices that intentionally cause us to slow down, to protect our natural cadence and to ensure we remain the ones steering the thought process and

not merely keeping up with it. And that brings us back to the central theme: in the age of AI, the lawyer's most valuable asset is still the mind behind the machine. These tools can accelerate our thinking, but only we can safeguard the judgment, restraint, and deliberation that define the profession. The future belongs to lawyers who can think faster *without forgetting how to think deeply.*

Bio

Nathan Gaffney is a partner at Fried Goldberg and has a national practice that is dedicated to catastrophic truck accident cases. Nathan works closely with Joe Fried on Fried Goldberg's biggest cases And is known for being a being a legal strategist and thinker. Nathan is an emerging voice and thought leader in legal AI innovation. He chairs the ATAA AI Committee and the TLG AI Committee, and sits on the executive board of the AAJ's Technology Section. Nathan brings a blend of strategic insight and hands-on expertise to catastrophic trial law, while passionately helping shape the future of the profession through a forward-thinking AI lens.

[1] *Mattox v. Product Innovations Research, LLC et al.*, Case No. 6:24-cv-235-JAR, (E.D. Oklahoma, Oct. 22, 2025) (providing a 3-factor analysis for AI Hallucination cases under Fed. R. Civ. P. 11(b)).

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Keeping the Company on Its Ropes:

Utilizing Federal Rule of Evidence 411 and Its Counterparts to Ensure Introduction of Non-Owned Commercial Insurance Policies to Establish Control and Agency

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As trucking attorneys, our practice is nationwide and spans across a variety of jurisdictions throughout North America. We commence lawsuits against trucking companies of all shapes and sizes. Potential defendants range from small, localized outfits with one or two power units to large monoliths, composed of hundreds or even thousands of power units. The claims can involve drivers, carriers, brokers, shippers and other people or entities involved in the stream of transportation. In many instances, larger companies rent or lease portions of their tractor and trailer fleet from third-party vendors. Now more than ever, we are seeing an influx of cases involving companies from Mexico and Canada, in addition to those in the United States. We are also seeing an increase in "hidden motor carrier" claims, where brokers and freight forwarders are assuming the duties and responsibilities of a traditional motor carrier. A common factor in each of these cases, from the most routine to the most complex, is the existence of insurance. This article is an overview on how to introduce a defendant's commercial auto insurance policy for purposes of proving control, agency and ownership.

We commence lawsuits against trucking companies of all shapes and sizes.

Introduction of the commercial auto policy is most advantageous in your "hidden motor carrier" claims. Typical claims of this nature involve "Company A," which has motor carrier, broker and/or freight forwarding authority. Company A then hires another motor carrier to move the load. A crash occurs, and Company A denies all liability for the driver. In these cases, you must prove Company A was the real motor carrier.

Showing that Company A either controlled or had the right to control the driver is vital to these cases. Make no mistake, this is a very fact-specific inquiry. The hallmark of an employer-employee relationship is that the employer controls the result of the work and has the right to direct how it is accomplished. Moreover, it is the existence of the right to control that is significant, not whether that right to control is actually exercised. Further considerations include:

- Whether the work is part of the alleged employer's regular business;
- Whether the employer is responsible for the result only;
- The terms of agreement between the parties;

- The nature of the work or occupation;
- The skill required to perform the work;
- Whether the employer is engaged in a distinct occupation or business;
- Which party supplies the tools or equipment;
- Whether the alleged employer has the right to terminate employment at any time; and
- Whether payment is by the hour or by the job.

Variations of the "right to control" test have been widely incorporated into numerous statutes as either the sole test or as part of the test used to determine employment status. This framework, coupled with the statutory employer analysis contained in the FMCSRs, is critical in "hidden motor carrier" cases.

Variations of the "right to control" test have been widely incorporated into numerous statutes as either the sole test or as part of the test used to determine employment status.

The final nail in the coffin for proving agency and control in "hidden motor carrier" cases is whether coverage was afforded to the driver of the non-owned commercial auto under Company A's commercial auto policy. In this scenario, it is imperative to understand non-owned policies and how they work. Companies have the option to add a "non-owned" coverage endorsement to their existing commercial auto liability policy to include the tractors or trailers rented, leased and/or borrowed from a third party.[94] It is important to understand that the commercial motor vehicles covered under a non-owned policy are not owned by the business or trucking company. "Non-ownership motor vehicle coverage insures an employer and its executive officers against liability imputed to them [under *respondeat superior*] by reason of the negligence of employees and other persons using vehicles not owned by the insured on the business of the insured."[95] The phrase "and other persons" becomes key when you want to use this policy under Rule 411 to establish control, ownership and/or agency over the driver who was not directly employed by Company A.

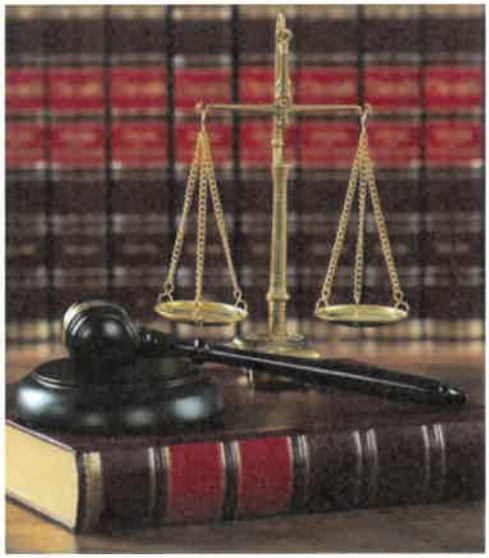
The following is a hypothetical of how this issue may play out in your case. You are engaged by a client who suffered catastrophic injuries as result of a commercial motor vehicle crash involving a tractor-trailer operated by the employee of Company A. The driver was operating a tractor leased to Company A in the scope of his employment hauling goods in interstate commerce. You commence litigation by filing a complaint against Company A. Through your thorough investigation, it comes to light that the defendant tractor was covered under a "non-owned" endorsement on the commercial auto liability policy of Company A, and you demand a tender of the policy. Company A claims that the driver of the tractor-trailer is not an employee of Company A but rather an employee or agent of some other company, and that company has its own DOT number and motor carrier authority. The discovery deadline is rapidly approaching, and settlement negotiations have broken down. You have plenty of facts under the control and right-to-control analysis, as well as the framework of the FMCSRs, that point toward agency.

It is now abundantly clear, however, that you are going to try the case and that Company A will file a motion for summary judgment on the agency issue, as well as file a motion *in limine* to preclude you from introducing evidence of the insurance policy should the case make it beyond the summary judgment stage. How are you going to combat the motions? Simply look to the rules of evidence to find your answer.

Federal Rule of Evidence 411 pertains to limited admissibility of liability insurance.[96] According to the Rule:

> Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.[97]

When working with Fed. R. Evid. 411 or a similar state counterpart, we must begin with the basic premise that liability insurance is generally inadmissible to show that the company was negligent.[98] However, the rule carves out a list of situations in which the general principle of inadmissibility does not apply. It is important to note that "[t]he situations listed in the rule are illustrative rather than exhaustive."[99] Put plainly, the basis for admitting liability insurance evidence listed in the second sentence of Fed. R. Evid. 411 is not an exhaustive list. Indeed, most states across the United States have adopted an identical or a similar iteration of Rule 411 in their state laws pertaining to admissibility of liability insurance evidence.[100]



Courts across the country have allowed the introduction of liability insurance for the purpose of proving agency. In *Clarke v. Vandermeer Clarke v. Vandermeer*, 740 P.2d 921 (Wyo. 1987), the Wyoming Supreme Court upheld the introduction of liability insurance on the issue of whether Mr. Clarke was an employee of Auto Driveaway, *i.e.*, agency.[101] The court reasoned that "[t]he theory behind admitting evidence of insurance to prove this relationship is that 'a party is highly unlikely to purchase insurance to cover contingencies for which he is not responsible.'"[102]

Courts across the country have allowed the introduction of liability insurance for the purpose of proving agency.

Similarly, in *Cage Bros v. Friedman*, 312 S.W. 2d 532 (Tex. Civ. App. – San Antonio 1958, writ ref'd n.r.e.), the court held that inquiring into the workers' compensation coverage of an employer passed muster under the Rules of Evidence to establish agency of the employee by the employer.[103]

In the Third Circuit case of *Hunziger v. Scheidermante*, 543 F. 2d 489 (3d Cir. 1976), in a footnote, the court contemplated that evidence of liability insurance between two co-defendants may be admissible to prove an agency relationship so long as the exclusion would be more prejudicial to the plaintiff than admission would be for the defendants.[104]

Last, in *Moore v. Sullivan*, 2000 Tex. App. LEXIS 1083, (Tex. App. – Houston 2000) (unpublished), evidence of liability insurance was admissible to prove an agency relationship between an employer and its employee who was required to carry automobile insurance with his employer listed as an additional insured.[105]

The cases above show that introduction of the liability insurance is 1) relevant to the issue of agency where the defendants deny such agency exists and 2) introduction of liability insurance is not prejudicial to the defendants because the factual predicate upon which coverage is being afforded to the defendants is direct evidence supporting your allegations of agency and/or control.

Just as important, many courts have ruled that evidence of liability insurance is admissible to prove ownership. In *Jacobini v. Hall*, 719 S.W. 2d 396 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.), the court allowed evidence of liability insurance to be admitted into evidence to prove ownership in a negligent entrustment case.[106] Similarly, in *Costa v. Hicks Costa v. Hicks*, 98 A.D. 2d 137, 470 NYS 2d 627 (1983), imposition of a vicarious liability claim on the defendant father for his son's negligent operation of a motorcycle triggered the admissibility of liability insurance to prove ownership of the motorcycle.[107]

To put your client's case in the best position possible for introduction of the commercial auto policy ...

While these cases speak directly to the issue of ownership, the same logic can be advanced on whether the defendant had control over the non-owned vehicle and, more importantly, whether it was being used in furtherance of the defendant's business purpose. You must carefully analyze the policy language and pick it apart in relation to admission under Rule 411, especially in cases where agency, ownership and control are critical.

To put your client's case in the best position possible for introduction of the commercial auto policy, you must fight tooth and nail to obtain the entire underwriting file from the insurance company, which includes any reservation of rights or coverage denials. There is gold in this file! This file will show you how Company A applied for coverage, what the insurance company reviewed to determine coverage, and ultimately why and how the insurance company is affording coverage under the facts and circumstances in your case. This will most assuredly be a dog fight, with both the defendant and insurance company fighting production. However, doing the control or right-to-control analysis under both common law and the statutory employer framework of the FMCSRs will put you on a solid foundation with the court whenever you ask for information to illustrate that the defendant's denial of liability is a complete farce.

Applying F.R.E. 411, its state counterparts, and this case law gives you the basic framework that you need to employ to respond to the motions of Company A and the ensuing discovery battle to obtain the insurance underwriting file. Armed with this knowledge, you have the tools to pave the way for plaintiffs' attorneys nationwide on our path to creating favorable precedent on this important issue.

Bio

Ed Ciarimboli is a founding partner at Fellerman & Ciarimboli Law. Over the last 20 years his focus has been on tractor-trailer and transportation litigation achieving verdicts and settlements for victims and their families throughout the United States. Ed is a frequent national lecturer on trial strategy, deposition technique, and the power of demonstrative visuals in the courtroom. He teaches regularly at Trial Lawyers University, the Academy of Truck Accident Attorneys (ATAA) and the AAJ's Advanced Deposition College, where his hands-on approach and real-world perspective have made him a trusted voice among lawyers who try the toughest cases.

Away from the courtroom, Ed is known to friends as "Spaghetti," a nickname that has somehow stuck through decades of trials and travels. Ed has four beautiful children that are as close as close can be, a grandson and granddaughter who light up all of our lives, three dogs, two cats and some wild animals on our farm in Northeast Pennsylvania. His big Italian family loves, laughs, yells, cries, eats and drinks with more passion than words can describe. He skis in the winter, fishes in the summer, loves an occasional all night poker game, enjoys chasing his two grandchildren around and once surprised everyone by sticking to a vegan lifestyle for over a year. Whether he's teaching lawyers how to find the truth in a deposition or reeling in trout on a quiet Pennsylvania morning, Ed brings the same energy and heart that have defined his life and career.

[1] The Federal Motor Carrier Safety Regulations do not require companies to carry the non-owned coverage designation on their policy.

[2] *Encompass Ins. Co. v. Quincy Mut. Fire Ins. Co.*, 2014 N.J. Super. Unpub. LEXIS 2684, at *12 (N.J. Super. 2014) (quoting *Insurance Co. of North America v. Government Employees Ins. Co.*, 162 N.J. Super. 528, 535 (N.J. Super. 1978)); *see also Legendre v. Hill*, 263 So. 2d 25 (La. 1972), aff'g 250 So. 2d 127 (La. App. 1971); *MacLellan v. Liberty Mutual Ins. Co.*, 193 N.E. 2d 577, 578 (Mass. Sup. Jud. Ct. 1963); *Linenschmidt v. Continental Cas. Co.*, 204 S.W. 2d 295, 300 (Mo. 1947).

[3] *See* Fed. R. Evid. 411.

[4] *Id.*

[5] *Id.*

[6] *Burress v. Mr. G & G Trucking, LLC*, 2021 U.S. Dist. LEXIS 189961, at *5 (W.D. Wis. 2021) (citation omitted) (finding that evidence of a defendant's liability insurance policy was admissible to show that corporate designee relied on the insurance company's determination that tortfeasor driver was fit to drive).

[7] *See* Ala. R. Evid. 411; *see also* Alaska R. Evid. 411; Ariz. R. Evid. 411; Colo. R. Evid. 411; Conn. R. Evid. 4-10; Del. R. Evid. 411; Ga. Code § 24-4-411 (2014); Haw. R. Evid. 411; I.R.E. 411; Ill. R. Evid. 411; Ind. R. Evid. 411; Iowa R. Evid. 5.411; Ky. R. Evid. 411; Md. R. Evid. 5-411; Mass. R. Evid. 411; Mich. R. Evid. 411; Minn. R. Evid. 411; Miss. R. Evid. 411; MT Code § 411; NE Code § 27-411; N.R.S 48.135; N.H. R. Evid. 411; N.J. R. Evid. 411; N.M. R. Evid. 411; N.C. R. Evid. 411; N.D. R. Evid. 411; 12 OK Stat. § 12-2411; Ohio R. Evid. 411; ORS 40.205; Pa. R.E. 411; R.I. R. Evid. 411; S.C. R. Evid. 411; S.D. Codified L § 19-19-411; Ten. R. Evid. 411; Tex. R. Evid. 411; Utah R. Evid. 411; Vt. R. Evid. 411; Va. Sup. Ct. 2:411; Wash. R. Evid. 411; W.Va. R. Evid. 411; Wis. Stat. § 904.11; Wyo. R. Prac. & P. 411.

[8] *Clarke v. Vandermeer*, 740 P.2d 921, 924 (Wyo. 1987).

[9] *Id.* (citing 2 D. Louisell and C. Mueller, Federal Evidence § 194 at 583 (Rev'd 1985)).

[10] *Cage Bros v. Friedman*, 312 S.W. 2d 532, 535-536 (Tex. Civ. App. – San Antonio 1958, writ ref'd n.r.e.).

[11] *Hunziker v. Scheidemantle*, 543 F.2d 489, 501 (3d Cir. 1976).

[12] *Moore v. Sullivan*, 2000 Tex. App. LEXIS 1083, at *2 (Tex. App. – Houston 2000) (unpublished).

[12] *Jacobini v. Hall*, 719 S.W. 2d 396, 401 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.) (Since the main point of contention in this lawsuit was the matter of ownership of the vehicle, evidence of insurance was admissible under rule 411) (citation omitted).

[14] *Costa v. Hicks*, 98 A.D. 2d 137, 146, 470 NYS 2d 627 (1983).

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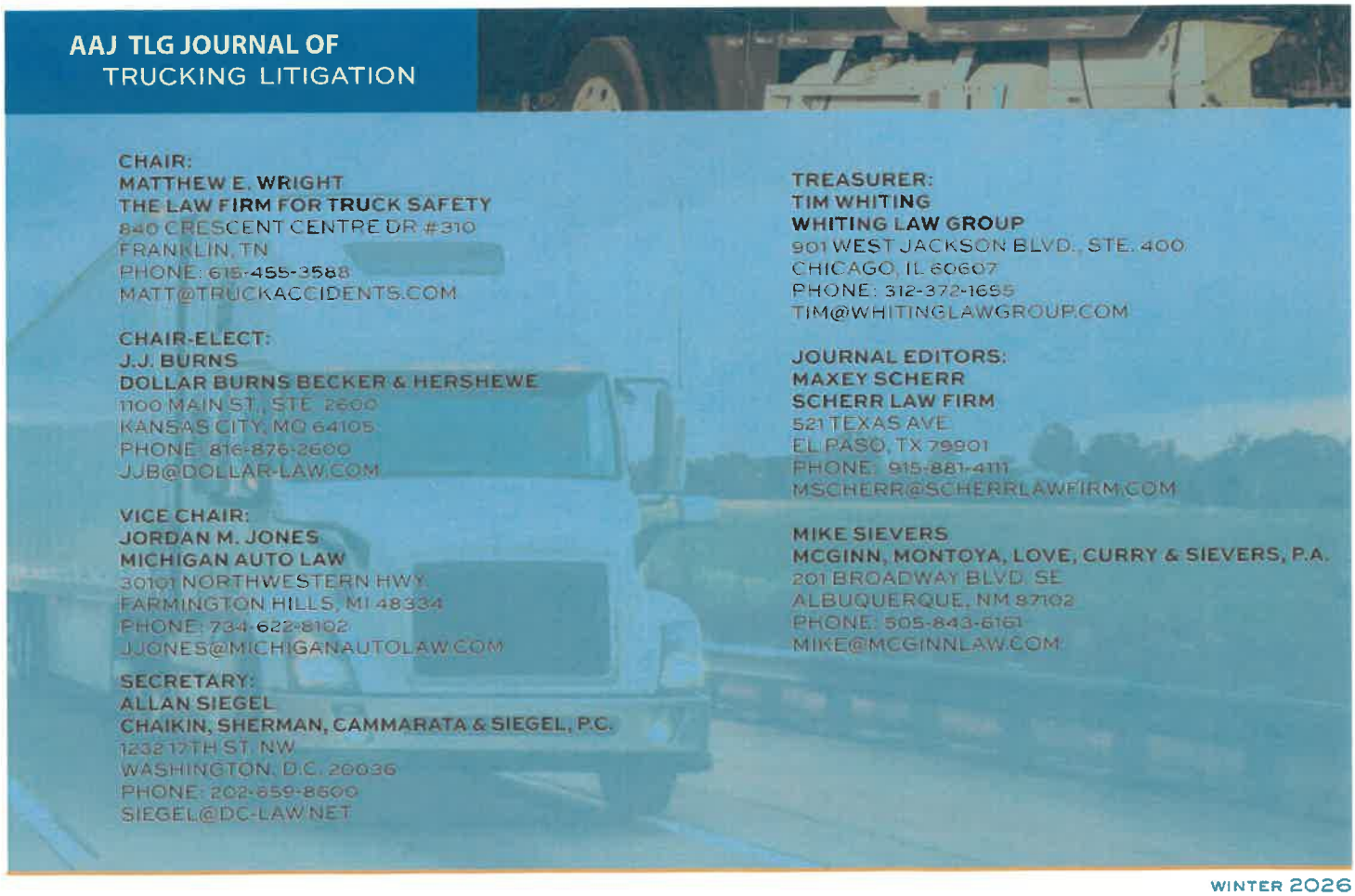

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