2016

Wicker Smith presents

NUTS & BOLTS

OF TODAY'S CLAIMS INDUSTRY

A FREE ONE-DAY CLAIMS SEMINAR

The Risks of Distracted Driving

Presented by: Jacob J. Liro, Esq. and Mark H. Ruff, Esq.

Friday, May 20, 2016 | 7:00AM – 5:00PM
Orlando World Center Marriott

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Overview

- This presentation will focus on the hazards and common causes of distracted driving. We will discuss crash risks associated with driver cell phone use as well as other distracting behaviors that lead to higher risks of fatal and catastrophic car accidents. The seminar will also explore the legal implications and defenses of crashes involving distracted driving. Finally, we will examine possible methods of prevention and enforcement of policies designed to reduce accidents.

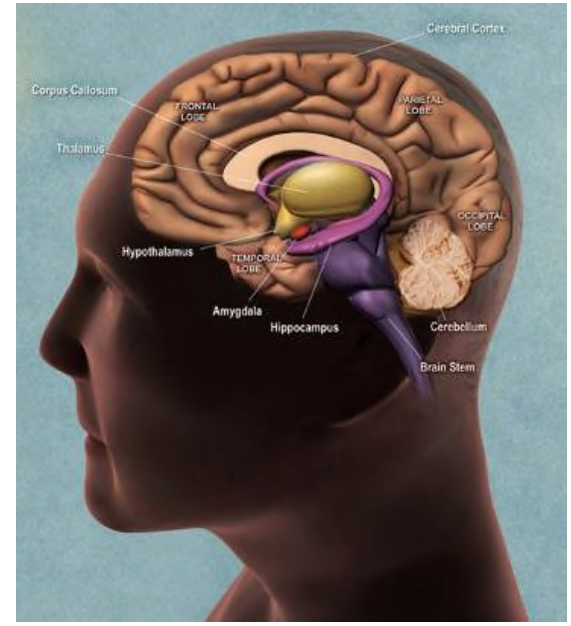


DISTRACTED DRIVING



Multitasking is a Myth

- The human brain processes sequentially, *not* simultaneously.
- Brain engages in a constant process to:
  (1) ***Select*** information brain will attend to,
  (2) ***Process*** information,
  (3) ***Encode*** to create memory, and
  (4) ***Store*** information
- The brain must also:
  (5) ***Retrieve***, and
  (6) ***Execute*** or act on information
- When brain is overloaded these steps are affected



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Multitasking is a Myth

During the ***Encoding*** stage:

- Brain filters information due to overload
- Drivers not aware of information filtered out
- Information does not get into memory
- Drivers miss critical information on potential hazards

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Not all Distractions are Created Equal

- We can walk and chew gum safely because it is not a cognitively-demanding task.

- However, driving involves a more complex set of tasks than walking, comprised of visual, manual, cognitive, and auditory components.

- How does a cell phone affect these functions?
  - Visual: takes your eyes off the road
  - Manual: takes your hands off the wheel
  - Cognitive: takes your mind off driving
  - Auditory: takes your hearing off of the road

Not all Distractions are Created Equal

By comparison:

- Adult passengers share awareness of driving situation, a safety benefit.
- Front seat passengers reduce risk of crashing by 38% compared to cell phone conversations.
- Adults with passengers have lower crash rates than adults without passengers (not true for novice teen drivers).

Not all Distractions are Created Equal

- We can walk and chew gum safely because it is not a cognitively-demanding task.

- However, driving involves a more complex set of tasks than walking:
  - Visual
  - Manual
  - Cognitive
  - Auditory

More Fatal than Drunk Driving

- Driver distractions leading factor in fatal and serious injury crashes.

- Motor vehicle accidents are the number one cause of death, resulting in an estimated 39,000 to 46,000 deaths annually.

- More than 1.6 million crashes are caused by cell phone use and texting while driving each year.

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COMMON SOURCES OF DISTRACTED DRIVING AND POTENTIAL INCREASE IN CRASH RISK

Texting

- 18% of drivers admit to texting while driving.
- Drivers' texting are 23 times more likely to have an accident or near miss, or 8 times more likely than a drunk driver.

Handheld Phone Usage

- Drivers conversing on a handheld cell phone had delayed braking reactions and were involved in more traffic accidents than when they were not conversing on a cell phone.

- People recognize the risk of talking on handheld and texting more than the risk of hands-free.

- Most legislation focuses on only handheld devices or texting.

Hands Free Devices

- Hands-free seen as solution and mistakenly believed to be safer than handheld.
- Most legislation focuses on only handheld devices or texting.
- All state laws and some employer policies allow hands-free devices.

Qualcomm Usage

- QualComm provides a variety of mobile communications and fleet management systems including OmniTracs, OmniExpress, and Fleet Advisor.
- Many fleets rely on QualComm as the primary communications device to update status information from drivers (ETA, route info, driver notifications).
- QualComm is intended to be used when stationary, however, lockouts are optional and customizable.
- Many organizations do not implement lockout restrictions and there is NO uniform adopted practice for dealing with the devices.

Tobacco Use

- Includes smoking, lighting up, putting ashes in tray.
- Roughly one percent of all accident based police reports cite tobacco use as a factor or cause of the accident.

Sleep Apnea, Tired Driving

- A 2005 survey, approximately 60 percent of people admit to having driven while asleep.
- While incapable of measure, generally, people sleeping less than 5 hours increased their risk four to five times.
- A study by researchers in Australia showed that being awake for 18 hours produced an impairment equal to a blood alcohol concentration (BAC) of .05, and .10 after 24 hours; .08 is considered legally drunk.

Drugs, Medication, and Energy Drinks

- In 2009, 18% of fatally injured drivers tested positive for at least one drug (illegal, prescription and/or over-the-counter).

- Driving under the influence (DUI), also known as driving while intoxicated (DWI), drunk driving, or impaired driving is the crime of driving a motor vehicle while impaired by alcohol or drugs, including those prescribed by physicians.

Personal Electronics

- Drivers who reached for their GPS device or headphones accounted for around two percent as well.

Eating and Drinking

- Roughly two percent of distracted drivers were either eating or drinking when the fatal crash occurred. A morning pit stop at Starbucks or a local coffee shop can avoid this careless, unnecessary risk.

Map/GPS Usage

- Seemingly innocent behaviors, such as adjusting rearview mirrors, seats, or using an OEM navigation system accounted for another one percent of fatal distractions.

LEGAL APPLICATION

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Bans on Cell Phone Usage

1. 39 states have banned some form of cell phone usage while driving.
2. 11 states, DC and the Virgin Islands have total bans on handheld devices.
3. Executive Order 13513, signed in 2009, mandates:
   A. No texting & driving in Federal Government vehicles.
   B. No texting & driving by Federal Government employees, or contractors, with a mobile device provided by the Federal Government, *even if in a POV*.
4. Certain drivers have additional regulation:
   A. Novice Drivers: 31 states & DC ban all cell phone use.
   B. School Bus Drivers: 19 states & DC ban cell phone use.
5. Chapel Hill, NC bans all cell phone use while driving.

Punitive Damages

- Florida Statute §768.72(3) establishes that an employer may be held liable for the actions of an employee if the employer knew and actively engaged in the grossly negligent conduct.

- Punitive damages cannot be assessed for mere negligent conduct, but must be based on behavior which indicates a wanton disregard for the rights of others.

Punitive Damages

- **Carraway v. Revell**, 116 So.2d 16 (Fla. 1959)

A guest under the statute may not lawfully recover from an owner or operator of a vehicle for simple or ordinary negligence. He may recover for gross negligence which is that kind or degree of negligence which lies in the area between ordinary negligence and willful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter.

Punitive Damages

- **U.S. Concrete Pipe Co. v. Bould**, 437 So.2d 1061 (Fla. 1983)

Held that if instruction given by trial court allowed jury to award punitive damages against company for negligent hiring or on vicarious liability, the burden fell upon insurer to request additional instructions or to use special verdicts and, where neither was done, insurer was properly held liable for punitive damage award against company.

Fla. Stat. §316.305 – Cell Phone Usage

- "Florida Ban on Texting While Driving Law"
- Allows law enforcement to issue a citation as a secondary offense.
- A person may still use a cell phone for navigation, weather, or radio broadcast purposes.

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FMCSA Regulations §392.82

- Comprehensive ban against cell phone use by drivers of commercial motor vehicles (CMV) except when stationary or in the event of an emergency.

- Prohibits employers from requiring drivers of CMV's to use cell phones while driving.

Respondeat Superior

- The legal theory of *respondeat superior*, *or* vicarious responsibility, means an employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his/her employment at the time of a crash, including government employees.

Respondeat Superior

- **Ford v. McGrogan & International Paper** (2008)

Employee of International Paper rear-ended another car while distracted by use of a mobile phone. The plaintiff, whose arm had to be amputated as a result of the crash, sued International Paper under a theory of vicarious responsibility. Even though International Paper had previously adopted a policy banning employees from using a cell phone while driving, it nevertheless agreed to settle the case for $5.2 million.

- **Kane Furniture Corp. v. Miranda**, 506 So.2d 1061 (Fla. 2d DCA 1987)

Wrongful death action where plaintiff died after Perrone, principal carpet installer at Kane's store, ran a stop sign while drunk, killing the plaintiff. Summary judgment finding Perrone to be Kane's sub-employee and a jury verdict of $2.3 million were reversed, finding Perrone was an independent contractor, absolving Kane of vicarious responsibility.

PREVENTION AND ENFORCEMENT

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Policies

- "It is the employer's responsibility and legal obligation to have a clear, unequivocal, and enforced policy against texting and driving." OSHA, 10/2/2010.

- Employers can and should design cell phone policies to follow best safety practice, reduce significant risks and minimize liability. Employers should implement cell phone policies which include:
  - Handheld and hands-free devices
  - All employees
  - All company vehicles
  - All company cell phone devices
  - All work-related communications – even in a personal vehicle or on a personal cell phone

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Policies

In 2011 ZoomSafer surveyed more than 500 corporate managers and found:

- 62% of companies have adopted written policies prohibiting employees from using mobile phones while driving for company business.
- 32% of all companies have knowledge or evidence of vehicle crashes that have occurred as a result of distractions stemming from employee use of cell phones while driving.

Education

- Companies must be proactive in requiring training

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Enforcement

- Companies must be proactive and not merely show their teeth when a violation occurs.

THE BOTTOM LINE

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- Risk can never be entirely eliminated, and different companies are comfortable assuming risk at different levels.

- However, by following the basic best practices outlined above, you should be able to appropriately minimize the risk to your agency from the distracted driving practices of employees.

- **The best solution is to have**:
  1. Restrictive Policies,
  2. Training,
  3. Monitoring, and
  4. Proactive Enforcement appropriate to the risk threshold of the agency.

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THANK YOU!

Jacob J. Liro
jliro@wickersmith.com

Mark H. Ruff
mruff@wickersmith.com

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Electronic Data Logs, Cell Phones, ECM's: Big Brother is Watching Us

Presented by: Chad E. Leeper, Esq. and Jacob J. Liro, Esq.

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Today's Goal

We will take an in depth look at how several of the emerging technological innovations aimed at improving a motor carrier's safety record are rapidly changing the landscape of third party injury claims and litigation.

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Fast Facts

- CDC: Fatal vehicle collisions are one of the leading causes of death in the United States
  - One death every 15 minutes due to an auto collision
  - Over 90% of these collisions are deemed preventable
- 2014 Statistics
  - 3,660 total deaths in large truck crashes
    - 16% higher death toll than 2009 total
    - 31% increase from 2009 for truck occupants
  - 97% of those killed in two-vehicle crashes involving a large truck were occupants of passenger vehicles
  - 11% of all motor vehicle crash deaths resulted from large truck crashes
  - Only 3% of fatally injured large truck drivers had BACs at or above 0.08%, down from 17% in 1982
  - For comparison, 32% of fatally injured passenger vehicle drivers had BACs at or above 0.08%, down from 51% in 1982

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Reference: http://www.iihs.org/iihs/topics/t/large-trucks/fatalityfacts/large-trucks

Use of Technology

- Technologies to be discussed today are designed to improve safety, are being widely implemented in the industry, and are changing the face of claim handling and injury litigation
- Data collection and monitoring can assist in limiting liability for motor carriers

Specific Technologies

I. Electronic Data Logs
II. DriveCam® (and other video recording devices)
III. Event Data Recorders
IV. Collision Avoidance Systems
V. Onboard Communication Devices

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I. Electronic Data Logs

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Electronic Data Logs

- On December 10, 2015, the Federal Motor Carrier Safety Administration (FMCSA) published a Final Rule making electronic logging devices (ELDs) mandatory within two years

Electronic Data Logs

- Phased in Compliance deadline for ELD - **12/18/17**
  - Phase allows for use of any ELD system before the phase-out deadline, permitting motor carriers to temporarily use devices that were not otherwise adopted by the FMCSA
- Full Compliance deadline for ELD - **12/16/19**

ELD Benefits vs. Paper Logs

- Paper logs have been long-scrutinized for inaccuracy and unreliability
  - Hours of service violations
  - Fail to match up with GPS, ECM, or Qualcomm data
  - Keeping two books
  - Routinely referenced by Plaintiffs' trucking experts as "comic books"

ELD Effects on Litigation

- Struggle between Plaintiff and Defense trucking experts
  - Was the system broken?
  - Are ELD necessary?
  - Is it currently unreasonable for a motor carrier to not have adopted an ELD system?
    - Plaintiff-friendly experts are already adopting the opinion that it is unreasonable for a motor carrier to allow its drivers to still use paper logs, despite the fact that final compliance deadline is over 3.5 years away
  - Is it currently unreasonable for a motor carrier to utilize an ELD that is not on the approved FMCSA list?

II. DriveCam®

(and other video recording devices)

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DriveCam®
(and Other Video Recording Devices)

- What is DriveCam®?
  - In use since 1998
  - Originally marketed to the passenger carrying market
  - Beginning to gain wide popularity with all commercial carriers
  - In 1,400 fleets
  - Video-capture system with two cameras.
    - a forward-facing camera (of the road ahead), and
    - A second camera monitoring the driver and interior cab
- Why is it being used?
  - Fleet tracking
  - Assist with driver improvement/training efforts
  - Improves early liability evaluation
  - Provides video evidence of an incident
  - Can provide liability and causation defenses
  - Reduces indemnity payouts
- What if the camera does not trigger?
  - Minimal forces involved in incident

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DriveCam®
(and Other Video Recording Devices)

- What constitutes a recordable event?
  - Hard brake
  - Sudden swerve
  - Sudden acceleration
  - Operator activation

DriveCam® Footage Examples

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DriveCam® Footage Examples

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DriveCam® Footage Examples

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DriveCam® Red Flags

- Plaintiffs' attorneys are now familiar with the existence and features of the system
- Potential spoliation issue if the motor carrier or driver fails to preserve footage
- Allows a Plaintiff's attorney to scrutinize the defendant drivers' actions for the subject incident
- Crafty Plaintiff's attorneys have been known to request a copy of all video clips involving a driver in the hopes of piecing together a negligent training or retention claim

DriveCam®
(and Other Video Recording Devices)

- *Fortune* Article: There's Pressure in the Industry to Monitor Truck Drivers – and Drivers Aren't Happy
  - by David Z. Morris
  - http://fortune.com/2015/05/26/driver-facing-truck-cameras/

- PR Newswire News Release: Lytx DriveCam Named ATA Featured Product for Fifth Straight Year
  - http://www.prnewswire.com/news-releases/lytx-drivecam-named-ata-featured-product-for-fifth-straight-year-300245765.html

- Results
  - DriveCam and the American Trucking Association tout that DriveCam reduces collision-related costs by up to 80%.

III. Event Data Recorders

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Event Data Recorders

- Functions like a "black box" for data – speed, hard brakes, engine on/off times, engine traveling, etc.
- Types: Electronic Control Modules (ECMs), GPS, Safety Restraint Systems (SRS), etc.
- Clock drift

Event Data Recorders & Effects on Litigation

- Creates a potential spoliation issue
- Important to ensure all available evidence is captured
- Relevant data can “make or break” a case

IV. Collision Avoidance Systems

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Forward Collision Avoidance Systems

- What are they?
  - Bendix system
- Becoming increasingly more common
- UPS fleet has implemented the technology

Forward Collision Avoidance Systems

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Collision Avoidance & Effects on Litigation

- Should dramatically reduce rear-end collisions
- Rear-end cases usually result in motor carrier liability
- Fewer accidents = fewer claims

Forward Collision Avoidance Systems

- Plaintiff's attorneys are beginning to argue the failure of a motor carrier to utilize such technology is an unreasonable risk for the public to bear.

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BLOG

Collision Avoidance Systems Save Lives

Posted on Monday, November 2nd, 2015

In the last month, dozens of people in the U.S. were killed and many more severely injured when their vehicles were rear-ended by tractor trailer drivers that were distracted, fatigued or just not paying attention. In March 2015, Declan Culclager lost his wife and three children when they were inexplicably rear-ended by an 80,000-pound semi and died in a fiery crash. They had been broken down for more than five minutes on the flat portion of the Buckman Bridge when they were struck. There was nothing blocking the truck driver's view from 8 feet high in the tractor cab. There was even a Nissan Murano stopped behind the Culclager family with three people that were seriously injured when the semi struck their vehicle first. Yet the truck driver did not hit the brakes until the time of impacting the Culclager family's Tahoe. We may never know what that truck driver was really doing in the cab of that semi, but we do know that this tragedy and many others should have never happened. No family should have the image of a semi like this bearing down on them as their last memory together.

The loss of life and serious injuries from these tractor trailers causing catastrophic rear-end crashes are easily preventable using readily available and relatively inexpensive technology already on the market. The National Transportation Safety Board recommended earlier this year that all semi tractors be equipped with forward facing collision avoidance systems with automatic emergency braking. This technology uses either radar or sonar sensors to detect objects in the roadway in front of the semi tractor and then automatically stop or significantly slow the tractor trailer before impact. The cost ranges somewhere between $600 for a basic forward facing system that gives the tractor trailer driver an audible warning of a vehicle or object ahead to $5,000 for a system that will sense the vehicle ahead and stop the tractor trailer before impact. Considering many of these tractors cost well over $100,000, this is a cost that should not be avoided.

In a telling move, the American Trucking Association's Board of Directors just voted at its annual meeting on October 20, 2015 to support Original Equipment Manufacturers installing collision avoidance

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V. Onboard Communication Devices

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Onboard Communication - Qualcomm

- Messaging system with built-in GPS that is tied into the truck's computer and allows motor carriers to track a driver's location, monitor the truck, and send and receive messages with the driver, much like email or text messaging
- Data may include location, speed, miles per gallon, "engine over speed" alerts, cruise control usage, idle time, and other customizable information
- Companies can program their systems to meet their specific needs – to capture certain data, or to pre-program messages and responses for convenience and efficiency

Onboard Communication - Qualcomm

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Onboard Communication - Qualcomm

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Cell Phone Statistics

- When texting while driving, the average person spends **five seconds** with their eyes off the road. At 55mph, that's enough time to cover the length of a football field
- At any given moment across America, an average of **660,000 drivers** are using cell phones while driving
- As of 2014, **2.2% of drivers were visibly texting while driving** and has only increased since
- As of December 2014, **169.3 billion text messages** were sent in the US **every month**.

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Cell Phone Restrictions

- Increased restriction on cell phone use via FMCSA § 392.82
- Carriers are monitoring drivers' usage VERY closely
- Expected that cell phone usage will soon be completely prohibited in a commercial vehicle
- Plaintiff's attorneys are frequently moving for punitive damages anytime they can find where a cell phone call or text overlapped the defendant driver's driving time in the minutes leading up to the accident

Onboard Communication & Litigation

- Qualcomm usage promotes driver safety, provides information to drivers and motor carriers, and allows for convenient communication
- Plaintiffs' attorneys now seeking punitive damages just for speaking on cell phone
- Distracted driving (through cell phones or otherwise) can lead to massive fines and liability for motor carriers

Statutory
&
Regulatory Update

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FMCSA Changes

- 1/21/16 – Proposed rule to enhance Safety Fitness Determination
  - There would no longer be three safety ratings: satisfactory, conditional or unsatisfactory. Rather, only one safety rating: "unfit."
  - "Carriers that we identify as unfit to operate will be removed from our roadways until they improve." - Scott Darling, FMCSA Administrator
  - Integration of on-road safety data from inspections with the results of carrier investigations and crash reports, plus records for unsafe driving and hours of service compliance to **determine a motor carrier's overall safety fitness on a monthly basis**
  - FMCSA analysis shows that carriers identified as "unfit" have crash rates of almost **four times** the national average
  - SFD rule will permit FMCSA to assess the safety fitness of approximately **75,000 companies per month**. By comparison, only 15,000 motor carriers are currently investigated annually

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FMCSA Changes

- Under the new safety measurement system, regulators will focus on seven Behavior Analysis and Safety Improvement Categories, or BASICs
- Each category will receive a 0 to 100 rating based on the volume of "adverse safety events" such as regulatory violations, accidents, the intensity of these incidents, and how recently they occurred
- The seven BASICs are:
  - Unsafe driving
  - Hours-of-Service compliance
  - Driver fitness
  - Controlled substances/alcohol
  - Vehicle maintenance
  - Hazardous materials compliance
  - Crash indicator
- A carrier could be proposed unfit by **failing two or more BASICs** through inspections, investigative results, or a combination of both

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Major Takeaways

- The use of technology in commercial vehicle operations is steadily increasing and needs to be inquired upon in a new claim situation
- Whether technology becomes an asset or hindrance in the defense of a claim is dependent on the facts
- Be prepared for the argument that is growing with plaintiff's experts that the lack of technology is a liability issue in and of itself.
- FMCSA rules are changing
  - examples

Current State of Litigation

- Plaintiffs' attorneys are adapting to the new technology and are becoming more creative in their attacks
- Video footage and data provided by electronic logs and data recorders can be a double-edged sword for liability and accountability
- Attorneys seeking punitive damages for cell phone usage

THANK YOU!

Chad E. Leeper
cleeper@wickersmith.com

Jacob J. Liro
jliro@wickersmith.com