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Inaugural Women of ADTA Adventure Trip

Through the dedication and creativity of Evelyn Davis, Stacy Fode, Amanda Cialkowski and several other volunteers, we will be participating in the first annual Women of ADTA Adventure Trip January 21-23, 2023 in Las Vegas. The weekend kicks off at the Cosmopolitan Hotel just prior to the DRI Women in the Law Seminar at Caesar's Palace, making it easy to attend both. Members may bring clients as well, a unique way to engage and foster relationships along with networking opportunities. We are taking full advantage of the Las Vegas setting with a Red Rock hiking tour, a Springs Reserve tour, spa time, mimosa brunch, reception with sister organizations, Titanic exhibit, dinners, shows, dancing and, of course, gambling. One of the highlights is the much anticipated Monday morning presentation "Redefining Superwoman" a conversation led by women including Deborah Lawrence Thompson that will provide practical strategies to overcome the pitfalls associated with perfectionism, boundaries, comparisons, and expectations. We are counting down the days until we meet and connect for this trip packed with fun, adventure and opportunities for both personal and professional development. There is still time to join us –contact Evelyn, Stacy or Amanda for details.

President's Column

By Evelyn Fletcher Davis

People often ask me about my path through various legal organizations, which helped me create a web of professional connections. The theme is unexpected surprises come from consistently engaging new people and networking.



My first encounter with networking stems from when I was a law clerk, which landed me at Hawkins Parnell 25 years ago (where I have spent my entire legal career). As a first-year litigator, I chose a creative mentor who was a pioneer in the business of law and his practice area. He took time to understand what motivated me, introducing avenues that blended personal interests, business relationships, and work. This alignment kept me engaged and passionate about my practice. It also bred my loyalty to Hawkins Parnell.

Part of this mentorship was an introduction to the Georgia Defense Lawyers Association and DRI. I became active in both, appreciating the thought leadership they provided. Membership in these organizations was a foundational experience and led to my tenure on the DRI Board of Directors starting in 2008.

At that time, DRI started rejuvenating Women In The Law programming from the 1980s, and I became deeply involved. I researched and presented a proposal to the board for an official Women in the Law Committee. The project was extensive and not guaranteed to pass. The pitch was successful, and I served as the first chair, developing a structure for the committee that still survives today and has been a model for other organizations. It is one of my proudest accomplishments and is now DRI's second-largest committee.

Through my leadership at DRI, other doors opened, including membership in the three sister organizations: ADTA, FDCC, and IADC. I became very active in the FDCC and began serving on the ADTA Board of Directors in 2014. My husband Ernie and I became deeply connected with our ADTA friends, who were welcoming to our expanding family.

I enjoy promoting diversity and women in the profession. Last year, I rolled out the first Women

in the ADTA Committee at our Annual Meeting in Napa. Our first adventure retreat will be on January 21-23, 2023, in Las Vegas in conjunction with the DRI Women in the Law Seminar.

The time I devoted to these organizations has led to client referrals and an expansive attorney network. It helped me build a national practice early in my career. I am now licensed in four states and have a vast litigation practice that includes toxic torts, transportation, and general liability. I serve as national coordinating counsel to four industry leaders from different sectors. My client roles and commitment to these bar associations provide personal fulfillment and energize me.

If you want to join or discuss leadership in the sister organizations, please reach out to me. I was lucky to have a partner who connected me to the right organizations and people to learn from, and I continue to pay it forward.

I cannot wait to spend time with each of you in Charleston, SC, at our Annual Meeting in April. Peggy Schultz and Jamie and Katy Hood are working hard to create unique experiences for us. My following presidential message will be all things Charleston-related. Until then, happiest of holidays!

Looking Back at NAPA

By James B Hood, Immediate Past President

Happy New Year ADTA Nation! Last April, we descended upon Napa Valley for what was another outstanding Annual Meeting. For those familiar with Napa Valley, you are likely familiar with the Silverado Resort located in lower Napa Valley amid many wineries. The Silverado Resort sits on 300 acres, boasts



championship golf courses and a world class spa, but more importantly, it is surrounded by over 400 wineries! Our outstanding Chief Executive Officer, Peggy Schultz, made this trip to wine country a world-class experience. With the great help of meeting hosts Kasey and Mark Townsend, we were able to visit some of the iconic locations in Napa Valley as well as discovering some of Napa's best



kept secrets all while we were able to earn CLE credit from a prominent lineup arranged by our President Evelyn Davis. One of the many attributes of the ADTA is our ability visit smaller properties and arrange for access to events that you might not be able to enjoy traveling on your own, and Napa was loaded with these activities.

On Wednesday evening, our 81st Annual Meeting kicked off with the Welcome Reception where our new friend and the winemaker of William Hill Estate Winery, Mark Williams, turned the back porch of the Silverado Resort into a full ADTA style party. On Thursday, we formally welcomed our new members and first timers before we heard from one of Silicon Valleys leading litigation experts who enlightened us on the developing trends in technology litigation spreading across the country. The CLE sessions concluded with a powerful and emotional discussion from a panel of in-house counsel who shared with us their perspectives on diversity and collaboration. For those looking to blend activity with the nearby wineries, there was a sip and cycle, while the rest of us broke into small groups to visits some of Napa's most revered wineries. Our Thursday evening activity was off-site at the Culinary Institute of Arts' Greystone in idyllic St. Helena. Built in 1889, this enormous facility, once owned by the Christian Brothers, now serves as a campus for the Culinary Institute of Art whose students were on-site preparing delicious hors d'oeuvres for us, followed by dinner and dancing.

On Friday, we learned the ins and outs of wine law, our friends at R&D Strategic Solutions provided guidance on how to steer clear of nuclear verdicts, and we were fortunate to hear from our very first female president, the Honorable Pat Kerrigan who shared her perspective on the changes in the practice of law that she has seen. Friday afternoon was spent touring vineyards, and some became vintners themselves blending their own wine at Conn Creek. In response to feedback from prior meetings, we hosted the gala dinner on Friday night instead of the traditional Saturday night. In addition to a delightful dinner, wonderful wine, and plenty of dancing, Peggy turned the Silverado into the ADTA's own casino for a festive Monte Carlo night.



On our final day, we heard about the colorful journeys of three of Napa's most successful vintners including the origin of the Bordeaux root stock. That story involves smugglers, Mounties, and more, and the balance of the story can be shared in the hospitality suite in Charleston this April. Our closing session wrapped up with a tasting from Terra Valentine, Hoopes Vineyard, and Caldwell Vineyard & Winery. Saturday activities included our service project as well as pickle ball and bocce tournaments. Almost a third of our members and guests participated in the cooking competition in the vineyard at Peju followed by a seated dinner there while the rest enjoyed the traditional dine around with friends old and new.

I wanted to share all of these details to encourage those who were unable to join us in Napa to make sure you are in Charleston this April. At every meeting, Peggy and the meeting hosts work hard to make each meeting, like Napa, a turnkey, curated experience loaded with personal touches that include opening doors that are not even an option for most travelers. I would like to thank Evelyn for her diligence and creativity in bringing us cutting edge CLE and for concluding our closing session with a wine tasting! A special thank you also goes out to Kasey and Mark Townsend for their efforts as meeting hosts and

their work to provide us with a unique trip to Napa. And of course, Peggy and David! We are blessed to have them in the ADTA family, and Peggy is simply the best! Katy and I hope to see you in Charleston soon!

Recent Decision of Illinois Supreme Court May Chill All Defense Lawyers

By Donald Patrick Eckler

The Illinois Supreme Court in *Midwest Sanitary Service, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2022 IL 127327, has held that civil defense lawyers whose negligence causes their client to be liable for punitive damages are subject to those damages being sought in a subsequent legal malpractice action as compensatory damages. In so holding, the Illinois high court has joined Kansas and Colorado in subjecting defense lawyers to this liability despite an Illinois statute, 735 ILCS 5/2-1115, that precludes lawyers from being liable for punitive damages and a prior holding, *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006), where the same court held that civil plaintiffs' lawyers are not subject to the recovery of punitive damages in a later legal malpractice action that are not able to be obtained because of the lawyer's negligence.

The court held that the punitive damages assessed against Midwest Sanitary in the underlying matter as a result of their former lawyers' alleged negligence are compensatory damages flowing from that negligence, not punitive damages against the lawyers. In coming to this conclusion, the court answered the following certified question in the negative:

Does Illinois' public policy on punitive damages and/or the statutory prohibition on punitive damages found in 735 ILCS 5/2-1115 bar recovery of incurred punitive damages in a legal malpractice case where the client alleges that, but for the negligence of the attorney in the underlying case, the jury in the underlying case would have returned a verdict awarding either no punitive damages or punitive damages in a lesser sum?

This decision has essentially created two classes of lawyers: those that represent plaintiffs against whom unrecovered punitive damages cannot be obtained and defense lawyers who are now in the position of insuring their clients against the

assessment of punitive damages and are subject to the recovery of those assessed punitive damages on a finding of mere negligence by the defense lawyer.

The *Tri-G* court supported its conclusion to bar such damages being sought against plaintiffs' counsel stating "imposing liability for lost punitive damages on the negligent attorney would neither punish the culpable tortfeasor nor deter that tortfeasor and others from committing similar wrongful acts in the future." The *Midwest Sanitary* court came to a contrary conclusion and resolved this inconsistency by finding the total award in the underlying case, punitive damages and all, compensatory in nature. The court did not address the result of this decision which is to turn the merely negligent defense lawyer into the insurer of their client who committed conduct that was so egregious that it was found by a jury to require punishment and the imposition of punitive damages. The court also ignored its own holding in *Tri-G*, where it rejected the bundling of punitive damages with compensatory damages in a subsequent legal malpractice action:

Section 2-1115 of the Code of Civil Procedure (735 ILCS 5/2-1115 (West 2002)) expressly bars recovery of punitive damages in a legal malpractice action. By characterizing lost punitive damages as 'compensatory,' *Tri-G* is attempting to evade reach of this statute. In our view, its efforts are ultimately unpersuasive. If the General Assembly has determined that lawyers cannot be compelled to pay punitive damages based on their own misconduct, as section 2-1115 decrees, it would be completely nonsensical to hold that they can nevertheless be compelled to pay punitive damages attributable to the misconduct of others. Any construction of the law that permits such a result would be absurd and unjust.

Though there is no national consensus among the courts on this issue, the weight of authority outside of Illinois supports the contrary position to that taken by the Illinois Supreme Court. Comment h to Section 53 of the Restatement (Third) of the Law Governing Lawyers (2000), which was cited by the *Tri-G* court states:

Whether punitive damages are recoverable in a legal-malpractice action depends on the jurisdiction's generally applicable law. Punitive damages are generally permitted only on a

showing of intentional or reckless misconduct by a defendant.

A few decisions allow a plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

In *Tri-G*, the Illinois high court recognized the problems with putting that burden on plaintiffs' lawyers and stated "allowing malpractice plaintiffs to recover lost punitive damages would exact a societal cost. Exposing attorneys to such liability would likely increase legal malpractice premiums, cause insurers to exclude coverage for these damages, or discourage insurers from providing professional liability insurance in the jurisdiction. This financial burden on attorneys would probably make it more difficult and costly for consumers to obtain legal services, or to obtain recovery for legal malpractice."

However, in *Midwest Sanitary*, the court brushed aside this concern stating "there is no risk of a societal cost—potentially subjecting attorneys to a greater financial liability or consumers running the risk of not being able to obtain legal services or obtain recovery from legal malpractice— because the damages recoverable in this case are based on (1) proof of the attorneys' negligent acts and (2) the attorneys' negligence being the proximate cause of the damages actually paid." This, of course, ignores that lawyers may not be willing to take on cases where substantial punitive damages are in play, whether they can get insurance or not, and given the rise of nuclear verdicts, often accompanied by substantial punitive damage awards, insurance premiums are sure to rise. This will make it difficult for defendants to find lawyers who are willing and able to take on matters where there is such potential exposure.

Notwithstanding the court's conclusion that this will not impact broader concerns of availability of defense counsel and liability insurance premiums, the reality is likely different as lawyers will have to take these matters into consideration. Prior to *Tri-G*, Illinois defense lawyers were largely confident that

they were not exposed to such damages given that their plaintiffs' attorney brethren were not, but that is no longer the situation.

Few, if any, states have the kind of statutory protection that Illinois lawyers have in the form of insulation from punitive damages and despite that, and despite a holding shielding plaintiffs' attorneys from the mirror image of this kind of claim, Illinois defense lawyers are now subject to this liability. Given this development, it is critical that defense lawyers, whether they are in Illinois or not, take this exposure into account when evaluating the risks of the kinds of cases that they take on and obtaining proper professional liability insurance coverage. This is a consideration because it is likely that given the Illinois Supreme Court decision, plaintiffs' lawyers may try to seek these damages in other cases against defense lawyers accused of malpractice. Defense lawyers will need to review their policies to ensure they have coverage for these kinds of damages, so that in the event of a verdict that includes punitive damages where they are accused of malpractice, they are covered.

Additional prophylactic efforts will need to be taken by defense counsel in cases where punitive damages are sought to make sure the alleged kinds of errors that were alleged to have been made by the defense lawyers in *Midwest Sanitary* are not made. Those allegations of professional negligence included failing to preserve evidence and failing to properly object or submit an alternative limiting instruction regarding the missing evidence, failing to name witnesses that could have rebutted the plaintiff's claims resulting in six witnesses being barred. The mistakes allegedly made by the defense lawyers, if true, would surely seem to support a finding of negligence, but nothing resembling conduct that would support the imposition of punitive damages.

In the end, it was the legal malpractice plaintiff, *Midwest Sanitary*, that committed the conduct that led to the imposition of punitive damages against it in the underlying matter (the causal relationship between the professional negligence and the imposition of damages was not before the court on the certified question), but it is the defense lawyers who have agreed to settle the matter following the decision of the Illinois Supreme Court. Defense lawyers are wise to heed the lesson of this case and adjust their practice accordingly.

The ADTA Over the Years – A Fond Recollection

By Robert E. Tait, Past President

In the fall of 1985, the then Managing Partner of our law firm, John Elam, asked me to come to his office. John had hosted the Columbus meeting of what was then known as the Association of Insurance Attorneys (AIA) in 1963 and served as its President in 1968. However, the press of different commitments – among other things John was serving as President of the American College of Trial Lawyers – had resulted in John and his wife Ginny missing more of our Annual Meetings than they attended, and he asked if I would like to replace him as the Prime Member from Columbus. He told me that the group was composed of great lawyers and even better people, and he was sure that Donna and I would both enjoy ourselves and develop lasting friendships. My application was accepted in early 1986, and we immediately made plans to attend the Vancouver meeting that April.

We arrived in Vancouver excited but apprehensive, since we did not know a soul. On top of that the meeting featured perhaps the worst weather in our history, causing us (mostly me since Donna read much of the time) to spend the majority of my days and nights in the Hospitality Suite – which featured a grand piano and, but for the rain and fog would have undoubtedly been a breathtaking view of the harbor. There, mostly at the bar and the piano I met Bill and Jean Lockett, wonderful people and two of the real “characters” of the ADTA. Unfortunately, the weather resulted in Donna developing pneumonia, causing her to spend nearly our entire flight home in the plane’s “luxurious” lavatory, but despite this auspicious beginning, we greatly looked forward to next year.

The 1987 meeting was set at the famous *Breakers* resort in Palm Beach, and after barely surviving the Ohio winter, we couldn’t wait to spend our days basking on the sand. There was only one problem; the high that week was an all-time low for April of 62 degrees. Back to the Hospitality Suite -- which

this time was located in a corner unit next to the beach -- where we soon met John and Carole Anderson. John was famous for not only bringing to the meetings his own Bloody Mary mix, but also his personal Styrofoam cup, apparently believing that those furnished were inadequate for his needs. While Donna and I still knew very few people, we were soon rescued by Russ and Martha Roberts and James and Anne Jennings, who immediately took us under their wing and anointed us “honorary members of the Virginia delegation”.

Our subsequent ADTA journey -- until this year’s soiree in Napa, we’d never missed a meeting – introduced us to many more “characters”, and we soon realized that people came to the Hospitality Suite even when it wasn’t raining or cold. But most of all, we learned that the kindness shown to us by the Roberts’, Jennings’, and so many others was very much the Rule, not the exception, and that our association was unique in so many ways. That’s as true today as it ever was.

On the business side – we are, after all, a professional association – however, the face of the ADTA has changed remarkably since I first joined its ranks. Although I came from a relatively large law firm, in 1986 the AIA was still mostly made up of lawyers – many from small towns -- whose practice was dependent on Insurance Defense work. The “*One in a Million*” concept

had its roots in the idea that if there was only one designated member in any city or town, the business would naturally come his way. For many years the most important ADTA publication was our *Roster*, which was not only provided to our group, but also distributed to literally thousands of insurance company reps and other clients. Many members never attended a meeting, but simply being listed in the *Roster* was worth the price of membership, since potential clients needing a lawyer in a locale where they were not previously represented could be confident that they would be well-served by an elite ADTA member.

Still, although this system had served us well since 1941, by the time I joined “the writing was on the wall”. My firm had long before “priced ourselves out” of the Insurance defense market and many





of our members -- especially those new to the group -- did little if any of that work. Recognizing this new reality, we changed our name to the *Association of Defense Trial Attorneys*, and, while remaining cognizant of our need for exclusivity, started to actively recruit lawyers from the larger cities. We also soon amended our Constitution to allow more than one Prime Member from a single firm, as long as that member was from a different office. However, these changes were not without controversy. Many members, especially those from small towns, believed that the referral system which had set us apart would now "dry up".

As the numerous annual nominations for the *We Prefer to Refer* award aptly demonstrate, those fears were unfounded. Our members continue to benefit from ADTA referrals, and I was fortunate enough to be the beneficiary of one of the most well-known when a Hospitality Suite conversation in Galveston with Fred Raschke culminated years later in a four-month jury trial and over seven figures in fees for my firm.

There are many more things of which we can be proud. Our membership now includes lawyers from five different countries as well as all 50 states and Puerto Rico. With the election of Pat Kerrigan in 1997, the ADTA became the first of the Defense Organizations led by a woman President, and since that time -- especially with a renewed emphasis on bringing in Associate Members -- we have continued to show that we can be exclusive without being exclusionary. But through it all, we've never strayed far from our roots and, to use the phrase first coined by Frankie Colon, "*The Tradition of Excellence Continues*".

When John and I had our conversation in 1985, I could not have imagined how important the ADTA would be for me, both personally and professionally.

Some of Donna's and my dearest friends are members and for us, like so many others, the Annual Meetings are more like reunions than business gatherings. Although the time has come for us to step aside, I'm excited to see what our Association will yet become, and envious of those who are now beginning their journey.

The Federal Motor Carrier Safety Regulations: The Trucking Defense Lawyer Keys to Success (Part 2)

By Mike H. Bassett

DUTIES, RESPONSIBILITIES, AND LIABILITY

In trucking cases, it is important to know who owes which duties and who is responsible for what. Thus, it is important to understand the different duties and responsibilities of the motor carrier, the freight forwarder, and the broker. Sure, sometimes their duties and responsibilities overlap, but oftentimes you will find that they are just different enough that it may be easy to mix them up. So, who owes which duties?

First, the motor carriers. Motor carriers -- the people responsible for transporting property and passengers -- have the heavy responsibility of ensuring that their company and all its employees are adhering to FMCSRs. Thus, the motor carrier is responsible for the freight and the driver. 49 C.F.R. §365. But keep in mind, these regulations are continually changing, and it is the motor carrier's duty to comply with all the regulations even as they change. And with this responsibility comes the financial responsibility.

Pursuant to §387.7, motor carriers are required to obtain minimum financial responsibility levels. The minimum levels of liability insurance as of the last couple years have been from \$750,000 to \$5 million depending on the type of carriage and commodity being transported. 49 C.F.R. §387.9. The full breakdown of financial responsibilities of motor carriers can be found in §387 of the FMCSRs, but this is the general range that they could land in as of January 1, 2021.

As recently as June 4, 2021, members of the U.S. House Committee on Transportation and Infrastructure introduced a bill that would increase the minimum insurance liability for motor carriers from \$750,000 to \$2 million. <https://www.govtrack.us/congress/bills/117/hr3684/text>. Although H.B. 3684 was provisionally dead due to a failed vote for cloture on July 21, 2021, since then a motion to proceed to consideration of the measure was agreed to in the Senate and multiple amendments have been proposed, considered, and agreed to in the Senate. H.R.3684 - 117th Congress (2021-2022): INVEST in America Act | Congress.gov | Library of Congress (<http://www.congress.gov/bill/117th-congress/house-bill/3684>).

The next key party with important duties and responsibilities is the freight forwarder. Freight forwarders are the ones that arrange for the transportation of goods from the motor carriers. They are responsible for the assembly and consolidation of shipment and issuance of bills of lading to the shippers. <https://www.fmcsa.dot.gov/registration/op-1-ff-application-freight-forwarder-authority>.

The freight forwarders are also responsible for the freight. Therefore, they are the ones that are responsible if any of the goods are lost or damaged during the delivery. Thus, the FMCSA requires that freight forwarders purchase a \$75,000 surety bond to receive their license. *Id.* Like the motor carrier, the freight forwarder also has responsibilities for the driver's conduct, but this only applies if the freight forwarder operates the vehicle. 49. C.F.R. §365.

And lastly there are the duties and responsibilities of the broker. §371 of the FMCSRs regulates the general requirements for brokers as well as the duties of the brokers. Generally, the brokers, unlike the motor carrier and the freight forwarder, do not have responsibilities for the freight or for the driver conduct. <https://www.fmcsa.dot.gov/registration/types-operating-authority>. But the FMCSA still requires the broker, like the freight forwarder, to purchase a \$75,000 surety bond. 49. C.F.R. §365.

It may appear that the broker is able to escape a lot of the liability that could arise from trucking accidents, but don't be fooled. Plaintiffs will sometimes find ways to argue different theories of liability such as negligent hiring, negligent retention, or negligent entrustment with hopes that they will reach the broker. Justin J. Kaszuba, Emerging Trends

in Freight Broker Liability in Catastrophic Trucking Accidents, DuPage County Bar Association.

Up to this point in time, brokers have generally been able to avoid liability but there could be big changes if the Supreme Court decides to take on the case of *C.H. Robinson Worldwide Inc. v. Allen Miller*. In the case of *C.H. Robinson Worldwide Inc.*, the Supreme Court of the United States has been asked to answer the question of whether brokers should be liable for an accident caused by a motor carrier it hires. 976 F.3d 1016, 1021 (9th Cir. 2020) pet. writ cert. Petition for a Writ of Certiorari was filed with the Supreme Court on April 8, 2021.

If the Supreme Court chooses to hear this matter, it could potentially impact a lot of companies involved in the trucking industry. It is not unusual for Plaintiff's attorneys to bring negligence claims against brokers, but historically the argument that the federal law preempts causes of actions brought against the broker has been successful. Steve Brawner, Supreme Court Asked, Should Brokers Be Liable, Arkansas Trucking Report (2021).

I. ON THE DAY OF THE CRASH

Lawyers should keep in mind that trucking cases are not the same as simple car wreck cases. And with this difference comes vastly different responsibilities for defense lawyers. Typically, after a catastrophic accident occurs involving a trucking company, the trucking companies and their insurers will call in "rapid response teams" and at the head of the team is the defense lawyer. So, knowing what to do on the day of the accident and when arriving at the accident site is crucial. Time is of the essence.

One of the very first things that an attorney should do when they are hired is to call the client's representative. It is necessary to ensure that an attorney-client relationship has been formed and developed. It is also important at this point to establish the designated point of contact with the client. Attorneys need to ensure that they know where the best place is to send all information throughout the course of the investigation and the case.

Next, lawyers need to let their client(s) know that neither the client nor any of the client's employees should talk to anyone, but instead should refer people to their lawyer or their lawyer's law firm. It is critical to stress the importance of cooperating with all the investigating agencies.

Next, it is necessary to make sure that all post-accident testing is completed, all necessary

information is obtained or in the process of being obtained, and a locked and secure location is found to hold all equipment (tractor, trailer, etc.).

The day of the accident is when information and document gathering begins. Some key information to try to obtain is (1) a list of all persons with knowledge of the relevant facts, (2) a narrative of how the accident happened, (3) the client's opinions regarding how the accident happened, (4) who was responsible, (5) how it could have been prevented, (6) any outside forces, and (7) the status of the driver.

It is also important at this point to start thinking about gathering other information that could help throughout the course of litigation. This could include details of any accident the client has had that is even remotely like the current one (including accidents involving the same driver or others), the identity of the attorney(s) who are even suspected of getting involved, the identity of any other insurance, and all underlying documents. Some of this information is going to take some time to track down and thus the earlier the lawyer starts trying to get ahold of it the better off both the client and the lawyer will be.

It is always better to err on the side of obtaining too much information. That means that anything that pertains to the client, the company, the driver, or the vehicle that can be obtained should be obtained. It is much better to know everything that could be used during the case than to find out about it later down the line. In addition to considering all the information that should be obtained, there are also regulations that should be kept in mind on the day of the accident -- regulations regarding drug and alcohol testing and regulations regarding cellphones.

A. Drug and Alcohol Testing

Pursuant to §382.303(a) and (b), any required post-collision alcohol or controlled substance testing must occur "as soon as practicable" following an accident for each surviving commercial motor vehicle driver involved. Therefore, a driver must remain available for testing after the accident during the required time or he or she will be deemed to have refused to submit to the required testing. 49 C.F.R. § 383.303(a)-(b).

In some instances, following an accident, an alcohol test must be administered. An alcohol test will be administered to each of the drivers if: (1) the accident involved a fatality or (2) the CMV driver receives a citation within 8 hours of the accident **and** the accident involved bodily injury to any person who received

immediate medical treatment **or** at least one of the vehicles was towed from the scene. If an alcohol test is not done within 2 hours of the accident the employer must execute and file a statement explaining why the testing did not occur. *Id.* Further, if the alcohol test is not done within 8 hours of the accident, the employer must execute another statement explaining why it didn't occur as well as stop any efforts of obtaining the alcohol test. These records, upon request, must be submitted to the FMCSA. 49 C.F.R. § 382.303 (a) - (d)(1).

A controlled substance test must be done after some accidents as well. A controlled substance test must be done if: (1) the accident involved a fatality or (2) the CMV driver receives a citation within 32 hours of the accident **and** the accident involved bodily injury to any person that required immediate medical treatment **or** at least one vehicle had to be towed away from the scene. 49 C.F.R. §382.303 (b) - (d)(2). If the test is not conducted within 32 hours of the accident, then the employer must stop any efforts to administer the test and must prepare and file a statement explaining why the test was not given within the allotted time. *Id.* Upon request, the employer must submit the records to the FMCSA. *Id.*

The FMCSRs include a handy table summarizing the circumstances under which alcohol and controlled substance testing must be performed:

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	YES NO	YES YES
ii. Bodily injury with immediate medical treatment away from the scene	YES NO	YES NO
iii. Disabling damage to any motor vehicle requiring tow away	YES NO	YES NO

49 C.F.R. §382.303(c).

Additionally, it is important to always refer to the motor carrier's alcohol/drug testing policies and procedures. Lawyers on both sides of the case may find that motor carriers sometimes have higher standards than the FMCSRs. And if this is the case, then the motor carrier's alcohol/drug testing procedures will control and must be followed.

B. Hand-Held Mobile Telephone Use

Pursuant to §392.82 of the FMCSRs, a driver should never be using a **hand-held** cellphone while driving a CMV even if the laws, ordinances, or regulations of the jurisdiction in which the CMV is being operated says differently. This includes:

1. Using one or more hands to hold the hand-held cellphone while making a voice communication;
2. Dialing or answering a hand-held cellphone by pressing 2 or more buttons; or
3. Reaching for a cellphone in a way that would require the driver to move in such a way that he or she would no longer be seated.

49 C.F.R. §390.5.

Drivers also must not text while driving a CMV while the vehicle's motor is running – even if this means the vehicle is temporarily stationary for any reason. The only exception to using a hand-held cellphone to call or text is if it is necessary to communicate or contact any emergency services or law enforcement officials. 49 C.F.R. §392.80(d); 49 C.F.R. §390.82(c).

But the FMCSRs do not make any mention of hands-free devices. Therefore, these restrictions do not apply to hands-free devices and there are no restrictions on the use of hands-free cellphones at this point.

II. BAD EQUIPMENT

Plaintiff's lawyers will often focus on the condition of the tractor and trailer and the role maintenance played in causing a crash. In our experience, such an approach can be highly effective – especially if the lawyer defending the case isn't well versed in the FMCSRs in this area. It is important before, during, and after a trip to ensure that all CMV's are equipped with all the correct equipment to ensure the safety of the driver, the cargo, and everyone else on the road. This means that motor carriers need to ensure that all equipment is in order and all inspections have been done before, during, and after each trip.

A. Equipment Necessary for Operation

The first step is to ensure that the vehicle is equipped with all the necessary equipment. §392.7 states that to operate a CMV, the driver must be satisfied that the necessary parts and accessories are in good working order and must ensure that they are used when it is necessary. The necessary

equipped is fully discussed and explained in §393 but §392.7 summarizes the list as including the following:

1. "Service brakes, including trailer brake connections;
2. Parking (hand) brake;
3. Steering mechanism;
4. Lighting devices and reflectors;
5. Tires;
6. Horn;
7. Windshield wiper or wipers;
8. Rear-vision mirror or mirrors;
9. Coupling devices; and
10. Wheels and rims."

49 C.F.R. §392.7(a).

B. Inspection and Securing of Cargo

Not only does the driver have to ensure that the equipment is in proper working order and everything that needs to be on the vehicle is on the vehicle, but the driver also must ensure that the cargo is ready and correctly secured. §392.9 states that the cargo must be "properly distributed and adequately secured per §§393.100 through 393.136, the CMV's tailgate, tailboard, doors, tarpaulins, spare tire and other equipment are secured; and the cargo does not obscure the driver's view." 49 C.F.R. §392.9(a). Generally, all cargo must be "firmly immobilized or secured on or within a vehicle by structures of adequate strength, dunnage or dunnage bags, shoring bars, tiedowns or a combination of these things." 49 C.F.R. §393.106(b).

C. Pre and Post Trip Inspections, Repairs, and Maintenance

All motor carriers must also be concerned about - and keep up with - all inspections, repairs, and maintenance of the CMVs. 49 C.F.R. §396.3(a). The motor carrier must ensure that there are annual inspections, daily inspections, and systematic maintenance programs in place to ensure that the vehicles continually comply with all equipment regulations under the FMCSRs. 49 C.F.R. §396.3. A record should also be kept for all inspections, repairs, and maintenance done on all vehicles under the motor carrier's control. 49 C.F.R. §396.3(b).

Further, CMVs should never be operated in conditions that are unsafe and likely to cause an accident and/or cause the vehicle to breakdown. 49 C.F.R. §396.7(a). The one exception is if the vehicle becomes unsafe while being operated and it is safer

to move the vehicle from the current road than to leave in on the highway. 49 C.F.R. §396.7(b). This is where the importance of pre-trip inspections come in.

Before beginning any trip, a driver must conduct a pre-trip inspection. This includes inspecting the vehicle to make sure that they are satisfied with safety of the CMV's operating condition, reviewing the last driver's vehicle inspection report, and if the last driver noted defects or deficiencies, ensuring the necessary repairs are done and signing the report to acknowledge that the required repairs have been performed. 49 C.F.R. §396.13. The CMV should not be driven until the required repairs have been done and signed off on. *Id.* Once all pre-trip inspections have been done, the driver can begin his or her trip.

After the driver has completed the trip, the driver must complete a post-trip inspection of the vehicle and a signed report must be submitted in writing by each driver after each day of their trip. 49 C.F.R. §396.11. The report must discuss all the required equipment in addition to the emergency equipment that is required to be on the CMV for each trip. 49 C.F.R. §396.11(a).

The report must also make note of all defects and deficiencies that were discovered during or after their trip to ensure the CMV has the proper maintenance done. *Id.* If the vehicle for some reason is found to have a mechanical or loading problem that would affect the vehicle's safe operation and likely cause an accident or breakdown, the vehicle may be marked as out of service. 49 C.F.R. §396.9(c). Once the vehicle is marked out of service, the vehicle must not be driven until all necessary repairs have been successfully completed. *Id.*

New Members

Yvonne Benson Gordon Thomas Honeywell LLP

Ms. Benson focuses her practice on civil trial litigation in claims involving bodily injury and medical conditions, construction injuries, premises liability, product liability, real estate and neighbor disputes, automobile related lawsuits, retail and hospitality, and business litigation. She possesses extensive defense litigation experience, personally defending or prosecuting well over five



hundred cases throughout the state of Washington. Her appellate work includes successful appeals to the Washington State Court of Appeals and Washington Supreme Court. In addition to her day-to-day work, Yvonne serves as the Board of Directors President for New Beginnings, an organization that works to put an end to domestic violence. Yvonne also volunteers her time to provide pro bono legal services to unaccompanied minor children in asylum applications and related proceedings. Yvonne is married with two children. She enjoys skiing with her family, traveling, and being an active participant in her children's activities.

Jonathan M. Brown Valentine O'Toole, LLP

Jon is a graduate of the University of Wisconsin School of Law and is Managing Partner of Valentine O'Toole, LLP. Jon practices in Nebraska, Iowa, South Dakota, and Wisconsin as a full-time litigator who represents clients in complex commercial litigation and insurance defense matters. He is skilled at resolving all types of disputes according to client outcome goals – through settlement, alternative dispute resolution, litigation or trial.



Oscar J. Cabanas Wicker Smith

Oscar J. Cabanas works in the Miami office of Wicker Smith where he has been a shareholder since 1999. He holds an AV rating from Martindale-Hubbell and focuses his practice in healthcare, professional liability, products liability, commercial litigation, and transportation. Mr. Cabanas has been honored as Best Lawyers in America's Miami Medical Malpractice Law – Defendants "Lawyer of the Year" in 2022 and 2018 and American Board of Trial Advocate's Miami Chapter "Defense Lawyer of the Year" in 2020. Oscar is admitted to practice in Florida before the Southern and Middle District Federal Courts and in Illinois before the Northern District Federal Court and the United States Court of Appeals, Fifth Circuit. He has held various leadership positions in a number of professional organizations



including the American Board of Trial Advocates, where he served as past president and executive committee member to the Miami chapter and additionally served on the organization's national board of directors. Mr. Cabanas has also held section-chair and vice-chair positions within the Federation of Defense and Corporate Counsel. From 2019 to 2022, he served as Chair of the Trial Tactics and Procedure Section for the Federation of Defense and Corporate Counsel and now serves as Chair Emeritus. He is an active member of USLAW NETWORK, Inc. Oscar received his Bachelor of Arts from Northwestern University in 1981 and earned a Juris Doctor from the University of Miami in 1984. He was born in Havana, Cuba and is fluent in Spanish.

**Stacey Canaday
Tupper, Grimsley & Dean, P.A.**

Stacey Canaday grew up in Beaufort, SC and, after obtaining her degree in English from Lander University in 1997 and her Juris Doctor from Louisiana State University in 2000, she returned to her hometown to practice law in 2000. She practices primarily in the area of insurance defense litigation, including construction defect and personal injury defense. She is admitted to all South Carolina State Courts and the United States District Court for the District of South Carolina. Stacey holds an AV rating from Martindale-Hubbell. Stacey has been active in both the Beaufort County Young Lawyer's Association, as well as the Beaufort County Bar Association, having previously served as President (2017-2018). She is also a member of the South Carolina Bar Association, the Construction Law Section of the South Carolina Bar Association, the South Carolina Defense Trial Lawyers Association, the South Carolina Women's Lawyer Association, and the Defense Research Institute. Outside of practicing law, Stacey also is involved in her community. She was selected as a member of the 2007 Leadership Beaufort Class, has been a volunteer for the all-volunteer run Beaufort Water Festival for over ten years, and served as the Commodore of the 63rd Annual Beaufort Water Festival in 2018.

Additionally, Stacey serves as a board member of the Child Abuse Prevention Association (CAPA) (2012- present), Friends of Caroline Hospice (2015



to present), and is a former board member of the Wardle Family YMCA (2010-13).

**Stephen Coxhead
Fowler, White, Burnett, PA**

Stephen received his J.D. from Stetson University College of Law and his undergraduate degree from the University of Florida. His experience in product liability matters includes the representation of heavy equipment manufacturers in litigation involving aerial lift devices, cranes and wood chippers. He has also handled both litigation and transactional matters for numerous maritime interests including domestic and international insurers, cargo carriers, cruise lines, commercial and pleasure vessel owners, operators and charterers, marina and terminal owners and operators. Focused on issues important to the aviation industry, Stephen has represented manufacturers of aircraft, airframes and component parts in cases arising from crashes throughout the world involving general aviation and commercial aircraft. Steven's public service extends to significant involvement in several nonprofit organizations within the South Florida community. He has been a member and served on the boards of such groups as the Center for Orthopedic Research and Education of the University of Miami; Coral Gables Community Foundation; League of Prosecutors; Miami Citizen's Board; and Miami Children's Hospital Founder's Society. Additionally, he has been involved in fundraising for the Miami Project to Cure Paralysis.



**Tracee E. Davis
Seyfarth Shaw LLP**

Throughout her multi-decade litigation career, Tracee has represented Fortune 500 companies with a particular focus on traditional financial institutions, fintech start-ups, global insurance institutions, as well as SAS, cybersecurity, and supply chain management firms. She is considered an expert of matters of ESG-integration, data privacy and data security enforcement, corporate governance and anti-discrimination law. In 2021 and 2022, Davis



was named to New York State's 2021 and 2022 "Law Power 100" list and was Appointed Chair of New York City Bar's Judiciary Committee which reviews the qualifications of state and federal judges sitting within NY City. Davis served on the Ethics Commission of New York's Unified Court system.

Donald Patrick Eckler Freeman, Mathis & Gary

Pat Eckler received his law degree from the University of Florida after receiving his undergraduate degree from the University of Chicago. He focuses his practice on defending lawyers, accountants, insurance brokers, and other professionals in a variety of civil disputes in state and federal courts across Illinois and Indiana. His practice ranges from representing insurers in coverage disputes to defending professionals, businesses, and tort defendants in complex litigation. Pat is licensed to practice before all state courts in Florida, Illinois, and Indiana, as well as the U.S. District Courts for the Northern, Central, and Southern Districts of Illinois, the



U.S. District Court Southern District of Indiana, and the U.S. District Court, Northern District of Indiana. He has received the distinguished Member Award, Illinois Defense Counsel, 2020, Meritorious Service Award, Illinois Association of Defense Trial Counsel, 2018, Volunteer of the Year Award, Illinois Association of Defense Trial Counsel, 2016, David C. Hilliard Award for Outstanding Committee Service, Chicago Bar Association's Young Lawyers Section Tort Litigation Committee, 2011-2012, and the Rising Star Award, Chicago Bar Association's Young Lawyers Section, 2011. He is currently a board member of the Illinois Defense Counsel and Immediate past president of the Professional Liability Defense Federation. Pat lives with his wife, Amber and child Sasha.

Laura Emmett Strigberger Brown Armstrong

Laura received an undergraduate degree in Administrative and Commercial Studies at the University of Western Ontario before receiving her law degree the University of Windsor in 2007. She practices primarily in the



areas of accident benefits, cyber liability and privacy, and personal injury defense. As a defense lawyer, she has received a number of awards, including Best Lawyers Ranking in Personal Injury, 2019 to date; Lexpert Leading Lawyer in Personal Injury, 2018, 2020 to date; recognized as a "Leading Lawyer to Watch" in the 2017 Canadian Legal Lexpert Directory for Litigation – Corporate Commercial; Lexpert "Rising Star" Award honouring Canada's Leading Lawyers Under 40 (2016); Richard B. Lindsay QC Exceptional Young Lawyer Award (2015); and 20 Under 40 Award, Business London Magazine (2014). Laura volunteers extensively throughout Western and Southwestern Ontario. She is not a drone pilot but she knows everything there is to know about drone regulations and liability in Canada.

Scott Flage Evans, Craven & Lackie, P.S.

Scott was born and raised in Sturgis, South Dakota. He earned his undergraduate degree from South Dakota School of Mines and Technology in 2007. During his undergraduate studies, he was a partner in a residential painting business. Mr. Flage graduated from Gonzaga University School of Law and was admitted into the Washington State Bar Association in 2010. He is licensed in the state and federal courts of Washington and Idaho as well as the Ninth Circuit Court of Appeals. Scott practices general tort liability with an emphasis on construction law, commercial litigation, professional malpractice and insurance issues. He was selected to the Washington Rising Stars list by Super Lawyers from 2014 to 2022. When not practicing law, Scott enjoys spending time with his wife and daughter outdoors, particularly fly fishing and backpacking.



Michael Freeman Griffith Freeman & Lipfert, LLC

Mike Freeman received his undergraduate degree from Clemson University and his law degree from the Catholic University of America, Columbia School of Law. He concentrates his practice primarily on insurance defense, including construction litigation and



construction defects across South Carolina. He has defended a variety of contractors and building product manufacturers in disputes involving moisture intrusion and faulty building components, windows, siding, Tyvek, stucco, roofing and sealants. Mike also maintains a busy general litigation practice in a wide range of disputes including governmental defense, auto torts, premises liability and personal injury. In addition to litigation, Mike provides insurance carriers with coverage opinions on a variety of legal issues. He holds AV Preeminent rating with Martindale-Hubbell and is a member of the South Carolina Defense Trial Attorneys Association; the Defense Research Institute; the Claims and Litigation Management Alliance; and the National Asian Pacific American Bar Association

Stacy Fulco
Bodell Bove LLC.

Stacy's practice centers on Retail/Restaurant/Hospitality Litigation, Premises Liability, Dram Shop disputes, General Tort Litigation, Security Law, Product Liability, Transportation Litigation and Appellate Practice. She has extensive experience handling business disputes before suit, during discovery and motion practice, in all forms of alternative dispute resolution, as well as through trial and appeal. In addition to handling litigation, she assists clients with vendor contracts, employer's liability issues and workers' compensation lien recoveries.

Stacy is the author of a retail, restaurant and hospitality law blog (www.stacyfulco.com) and she regularly provides presentations and in-house training to clients, in-house counsel and claims/risk managers and examiners.

Valerie Garcia
Hall & Evans

Valerie received her BA in Political Science from the University of Colorado – Denver before heading to the University of Denver Sturm College of Law and graduating as a Chancellor's Scholar. Her defense practice focuses on



Community Association Law; Construction & Design; Environmental, Natural Resources & Toxic Tort Law; Products Liability; Professional Liability; and Sports & Recreation Law. She is admitted to Colorado state and federal courts. Valerie was voted one of the Top 100 Lawyers (2017-2021) and Top 50 Women (2015, 2017-2022) in Colorado by Colorado Super Lawyers.

Audra Hamilton
Mitchell, Williams, Selig, Gates & Woodyard, PLLC

Audra graduated from the University of Arkansas and practices primarily in the areas of employment and labor law and commercial litigation and disputes. She has more than 20 years of experience representing employers in all phases of litigation, arbitration, and administrative conflicts.



Her extensive experience includes representation of companies of all sizes in the energy, health care, construction, public utility and service industries. She is rated AV-Preeminent by Martindale Hubbell. In addition to her private practice experience, Audra has been the in-house employment counsel and executive in charge of human resources for a publicly traded energy company. Audra is a frequent speaker and author on employment-law related matters, including a practice guide to employers on the Americans with Disabilities Act.

Eric Holway
Jackson Kelly PLLC

Eric received his BA in Psychology from St. Olaf College before earning his JD at the University of Dayton School of Law. His health care practice is focused on the representation of hospitals and individual health care professionals. Eric has extensive experience handling cases in the areas of professional negligence, insurance defense and subrogation, personal injury defense, and premises liability. He was named in the Best Lawyers' Denver, Colorado "Ones to Watch" list for Health Care Law, Medical Malpractice Law - Defendants and Product Liability Litigation - Defendants (2022-2023). In addition to his work in health care litigation, Eric also handles



a wide variety of complex commercial litigation matters, including the prosecution and defense of business and financial disputes. When he is not working, Eric loves researching cars and gets a kick out of negotiating sales and purchases for his family and friends. Eric's leisure time is spent wake surfing, golfing, and snowboarding. Eric and his wife are the proud parents of three children.

David Katzenstein
Eckert Seamans Cherin & Mellott, LLC

David received his law degree from Boston University School of Law in 1982 and his undergraduate degree from Yeshiva University in 1979. He is admitted to practice before the U.S. District Court for the District of New Jersey, all U.S. District Courts for New York, and the U.S. Court of Appeals for the Third Circuit. Recently, David has been selected for inclusion as The Best Lawyers in America 2023 for Commercial Litigation, the 2021 Top Rated Lawyers by Martindale Hubbell, and the New Jersey and New York Super Lawyers. He volunteers for the New Jersey Law and Education Empowerment Project and the New Jersey State Bar Foundation High School Mock Trial Team. David lives with his wife, Chaya, and has five grown children with over a dozen grandchildren.



G. Martina Lanfersiek
Milber Markis Ploudsadis & Seiden, LLP

Martina's practice is focused on cases involving wrongful death and catastrophic injury, automobile negligence, premises liability, and general liability. She graduated magna cum laude from the Florida State University in 2002, with a B.A. in Advertising, and she received her J.D. from Stetson University College of Law in 2007. Martina has been a Martindale-Hubbell AV Preeminent rated attorney since 2013. She is a member of the Florida Defense Lawyers Association and Defense Research Institute, and she is admitted to all Florida State courts, as well as the United States District Courts for the Southern and Middle Districts of Florida.



Amy Bice Larson
BSP Law

Amy received both her undergraduate and JD degree from Brigham Young University. She practices in both Michigan and Texas, with a focus on handling catastrophic product liability cases. A National Truman Scholar, Amy has been included in The Best Lawyers in America: Product Liability Litigation from 2022 through the present. She is admitted before the U.S. District Court for the Eastern District of Michigan, all U.S. District Courts in Texas, all Michigan State Courts, and all Texas State Courts. In her personal time, she enjoys live music and events. An inveterate traveler, Amy has visited over 25 countries and 49 of the 40 United States. She lives in Houston with her husband, Chad, and their two boys.



Jordan Mayfield
Naman, Howell, Smith & Lee

Jordan received both his undergraduate and law degrees from Baylor University. He regularly represents clients in general civil litigation, trucking and automobile litigation, Texas motor vehicle law, commercial litigation, premises liability, construction disputes, products liability litigation, DTPA/business litigation, employment discrimination, and toxic tort defense. He is licensed in Texas and in the U.S. District Court for the Western, Northern, Eastern and Southern Districts of Texas. He is an AV Preeminent rated lawyer and is a member of the Defense Research Institute, the Waco-McLennan County Bar Association, the National Association of Dealer Counsel, and the Texas Association of Defense Counsel.



For more information on ADTA please contact:

Peggy Schultz, Executive Director
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 304-552-7794
 pschultz@adtalaw.com

Daniel Nolan Batson Nolan

Mark attended college at Austin Peay State University and the University of Tennessee Knoxville where he received a B.S. in Business Administration (1989), followed by law school at Mississippi College School of Law (1992). Mark has been with the firm of Batson Nolan, PLC over 30 years now, having clerked before and during law school and then beginning his practice full time in 1992. Mark represents clients in both State and Federal Courts in a variety of issues including Civil Rights, Municipal Liability, Personal Injury, Employment Disputes and varied civil litigation. He is licensed to practice law in both Tennessee and Kentucky, as well as in the United States District Courts of the Western District of Tennessee, Middle District of Tennessee, Western District of Kentucky and the Sixth Circuit Court of Appeals. Mark is a member of the Montgomery County Tennessee, Tennessee Bar Association and American Bar Association. He is also a member of the Tennessee Defense Lawyers Association and the Tennessee Council of School Board Attorneys. He is a member of the IADC and DRI. Daniel lives in Tennessee with his wife Terri. They have five adult children and two grandchildren. In his free time, he enjoys hobbying with model trains.



Committee Reports

Harness the Competitive Advantage of Diversity and Inclusion!

By The ADTA Diversity Committee

In most industries, including law, the failure to develop new products is fatal. Economic development is driven by product development: New products create new opportunities, expand businesses, and forge industries. However, as technologies make things more efficient, this cycle must be repeated to ensure that new people and ideas are continually engaged and employed. Critically, consistently delivering excellent and innovative products requires a breadth of insight that can only be created through diverse leadership. Why? **Because insight into customer perspective requires leadership composition that mirrors ever-diversifying and inclusive customer composition.**

Numerous studies make clear that entities with more diverse leadership outperform their peers. As reported by McKinsey & Company:

[C]ompanies in the top quartile for gender or racial and ethnic diversity are more likely to have financial returns above their national industry medians. Companies in the bottom quartile in these dimensions are statistically less likely to achieve above-average returns. And diversity is probably a competitive differentiator that shifts market share toward more diverse companies over time.¹

This disparity can be directly traced to the competitive advantage of diversity and inclusion in developing new products and creating new lines of business. And, like every industry, law firms must take advantage of diversity and inclusion to develop new products.



Our customers invest in lawyers and expertise - these are our "legal products." However, to ensure that our products are attractive to our clients, we must leverage the competitive advantage of diversity and inclusion, specifically in firm leadership. **Leadership diversity creates diversity of thought diversity and spurs new - and different - opportunities, products, and industries. Thus, understanding the competitive advantage of diversity and inclusion - using the broadest possible definition - is critical when analyzing how best to develop new legal products.**

What are the competitive advantages of diversity and inclusion?

Thriving regions are often the most diverse and inclusive in workforce and leadership. And industry leaders recognize the strategic benefits of both, including:

- A better understanding of customer

- needs and markets
- Better communication with customers
- Ability to attract, recruit and retain top talent
- Eligibility to participate in programs focused on diverse businesses
- Enhanced corporate image and public goodwill
- Different perspectives on problem-solving and decision-making

Successful companies recognize that building effective, diverse, inclusive internal and external networks, especially in leadership, is critical to developing new products and spurring economic development for their businesses and regions.

Is this an issue for the legal profession?

Despite the precise relationship between diversity and business success, most corporate boards and executive suites are primarily white men. This reality is the same, if not more pronounced, in law firms. **As an industry, we are failing to reflect our client's values and priorities, and, as importantly, it means we are failing to create the necessary competitive advantage.** As noted in "The High Cost of Big Law's Lack of Diversity:"

[C]orporations want to partner with law firms that have similar priorities. Corporate clients spend 25% more with legal teams that they consider "very diverse" than they spend with teams they see as "not at all diverse" or strictly male, according to legal research firm Acritas. So the sluggish-to-nonexistent progress reflected in Law360's 2016 Diversity Snapshot does not bode well for the future of firms that fail to move the needle.

Competitive advantage will be derived by "those firms that invest in diversity and understand the changing landscape" ... "The demographics are so obvious to all now, and to be successful, over time you're going to have to be a leader in this space, particularly as corporations wise up and understand that a lot of the work they do with the external world is done through their law firms."²

Our failures mean we aren't serving our clients to the best of our ability. As another former in-house lawyer plainly stated, "corporations don't just want to hire a law firm – they want to form a relationship that can add value to the corporation's brand, and law firms add value when they are more diverse."³

Becoming more diverse and inclusive cannot be seen as a way to satisfy RFP requirements. It is much

more complicated than that. We must hire, develop, and promote diverse populations in every aspect of our business so we can better serve and understand our clients' population needs. **In sum, it requires being more diverse and inclusive regarding the clients we seek and leveraging diverse backgrounds in leadership to ensure we see the world through multiple lenses and build better legal and business strategies for our clients.**

How can our industry create its competitive advantage?

Decision-making, especially hiring and promotion decisions, often follow the path of least resistance. When considering potential leaders, we often hire people whose backgrounds and views are similar to ours, meaning they often look like historically homogeneous decision-makers. This unfortunate predisposition creates barriers to innovation and a loss of competitive advantage, which kills organizations. Accordingly, law firms must be creative and innovative when apportioning leadership opportunities. For example, before hiring decisions are made, consider the diversity of the candidate pool. If everyone you meet looks the same - which often means they look like you - you are losing a potential competitive advantage.

Diversity and inclusion are high priorities for our clients' business strategies in our global, multicultural business market. So, to diversify our client offerings, we must diversify the leadership that creates, directs, and provides expertise and commercial insight. Failing to do so will cause our industry to stagnate. To stay relevant and competitive in an increasingly flat market, firms must develop new strategies to compete and approach the market in different and innovative ways. In the long run, considering, hiring, and creating more diverse and inclusive leaders will help law firms develop new products, grow their businesses, and serve clients better.

(Endnotes)

1 "Why Diversity matters" by Vivian Hunt, Dennis Layton, and Sara Prince; McKinsey & Company (January 2015) (<http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>).

2 The High Cost Of Big Law's Lack Of Diversity" by Melissa Maleske, Law360, Chicago (May 17, 2016) (https://www.law360.com/articles/795768/the-high-cost-of-biglaw-s-lack-of-diversity?article_related_content=1).

3 *Id.*

Publications Committee Report Publications Committee Report for Newsletter

Obviously as you are reading this, the Publications Committee has published the latest issue of the

ADTA Press. We have a great group of folks working on the Press in true lawyer tradition – long period of inactivity followed by short but intense period of frantic work. Fortunately, the larger our committee, the less individual work for each member – so please think about joining up. If you like to read, write, and edit, then we're a good fit. Just let me or either co-chair, Rose Marie Joly and Deedee Gausch, know about your interest and we'll bring you on board. We'll be hitting the ground running as in our next issue, readers can expect a preview of our 2023 Annual Meeting – number 82! – in Charleston, South Carolina. At the excellent suggestion of President-Elect James Craig, the issue will also focus on lawyer wellness, an especially apropos subject in today's post-pandemic world. On behalf of our entire committee, thank you for taking your time to work through this newsletter and please feel free to send or suggest any future articles on anything from hard hitting legal issues to simply fun stories we will all appreciate.

ADTA National Membership Committee

By Jeanne Loftis

ADTA National Membership Chair

As we discussed during the ADTA Annual Meeting in Napa, California, ADTA President Evelyn Fletcher Davis launched a membership drive in Spring 2022. This membership drive involves bringing in a record 75 new ADTA members during the Spring 2022 to Spring 2023 membership drive! Membership opportunities exist in three primary sectors: (1) Encouraging prime members to bring in associate members; (2) Encouraging state chairs to consider whether there are rural areas with no members that could be targeted; and (3) Analyzing whether all of our emeritus members have a built in ADTA-succession plan with a prime and associates ready to get active! The membership drive has involved participation of a membership subcommittee comprised of National Membership Vice Chair Williams Toles and ADTA Board Members Johnston Cox, Chelsey Golightly, and Bruce Barze, along with close involvement by President Evelyn Fletcher Davis.

Keep in mind, based on the foundation of ADTA grounded on building relationships between members to foster and encourage referrals, it is important for members to attend ADTA's annual

meetings. Under ADTA By-laws, prime members or their associates who have not be able to attend an annual meeting in the last four years risk losing their exclusivity.

During the last several months, we've welcomed new District of Columbia state chair Vince Palmiotto. We've welcomed the following new district chairs: Megan Coluccio for the West Region and Tony Novak for the Midwest Region.

Membership Vice Chair William Toles and I would like to thank the following members who have referred new members to ADTA in the last several months: three from Evelyn Davis; two from Ed Wallis, Jim Craig, Heather Mills; and one each from Kevin O'Connor, Oscar Cabanas, Erin Dean, Amanda Good, Jeanne Loftis, Steve Heine, Matt Bailey, Kori Carew, Jerry Fazio, Joanne Blackburn, Lindsey Gergley Vechik, Megan Coluccio, DeeDee R. Gasch, John Owen, Tyler Pratt, Jennifer Whelan, Jen Mitchell, Jamie Hood, Hayes Fuller, Laura Emmett, James Davidson, Tom Hurney, and Johnston Cox. Not only did these ADTA members bring in new ADTA members, but they did so keeping in mind ADTA's DEI initiative. Through their efforts, the ADTA continues to diversify its overall membership by identifying attorneys who meet ADTA's diversity initiative.

The membership drive has been a huge success. Since it started, ADTA has added over 33 new members and should be able to meet the goal of bringing in 75 new members before April 2023. We can do this.

We Prefer to Refer Committee

ADTA Nation: the countdown to the 82nd Annual Meeting in Charleston, South Carolina is on! With an eye towards Charleston, we want to remind everyone to get your Referral Reporting Forms in for the We Prefer to Refer Award, also known as The Strubinger Award, named after the first ADTA President. Self-reports are welcome and encouraged!

Submissions are taken year-round, and there is no better time than the present to get in your referral reporting forms either on your behalf or in nomination of another ADTA member. These submissions are a crucial means of tracking any and all activity in our client referral network. We encourage all ADTA members to get in the habit of



In 2022, the We Prefer to Refer Committee received 44 submissions for 29 different ADTA members, including rollover submissions from 2020 and 2021. Out of five finalists, our current ADTA President Evelyn Davis was announced as our 2022 winner of the Strubinger Award. With your help, we know we can successfully track all referral activity amongst our membership and

submitting a Referral Reporting Form for all client referral activity between members, no matter how formal or informal.

Did someone recently refer a case to you?
Fill out a Referral Reporting Form!

Did you refer a case to another ADTA member?
Fill out a Referral Reporting Form!

Were you referred a case, but it settled before you could bill to the file? Fill out a Referral Reporting Form!

Were you referred or did you refer a case by or to an ADTA member who was conflicted out? Fill out a Referral Reporting Form!

Did an ADTA member refer a case to another attorney in your office because you do not handle that type of litigation? Fill out a Referral Reporting Form!

All submissions will be reviewed by the We Prefer to Refer Committee, with the winner of The Strubinger Award announced at our Annual Meeting in April 2023. Finalists receive prizes, and those who submit/nominate will also be eligible. Also, keep in mind that submissions carry over for up to three years, so there is more than one opportunity to be selected for each submission received.

recognize those ADTA members who best exemplify our commitment to refer business to other ADTA members.

The We Prefer to Refer Committee works to help further the ADTA mission of referring clients to other ADTA members and recognizing those who exemplify this key tenet of our organization. The submission process is vital to ensuring that all of those who deserve recognition will have the opportunity to be duly considered for this prestigious award.

For more information on the process and format, as well as an explanation of the procedure for selection of the winner, please visit the We Prefer to Refer portion of the ADTA website. You can also submit your forms online using the Online Nomination Form link.

If you have any questions, please reach out to the current chair of the We Prefer to Refer Committee, Kelly Brilleaux, by emailing her at kbrilleaux@irwinllc.com or by phone at 504-310-2233, or Vice-Chair, Megan Coluccio, by emailing her at megan@christielawgroup.com or by phone at 206-620-0528.

Happy referring!

Association of Defense Trial Attorneys (ADTA)

12507 Palomino Court
Tampa, FL 33626

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I would like to nominate _____
(proposed member's name)

for (Prime)(Associate) membership in the Association of Defense Trial Attorneys (ADTA). Please send an application to

_____ (name of applicant)

Firm _____

at _____

(city) (state) (zip code)

Office telephone _____ Office Fax _____

Year admitted to practice in my state _____ Email _____

Name of Member (Print)

Signature of Member

Name of applicant's spouse (if available) _____

Home Address (if available) _____

Return to: **A. Johnston Cox, Gallivan, White & Boyd, P.A., 1201 Main Street, Suite 29201, Columbia, SC 29201**

Telephone: (803) 724-1728 Fax: (803) 779-1767 Email: jcox@gwblawfirm.cox

Membership Requirements:

A trial lawyer doing principally civil defense work in insurance and self-insurance activities, with more than five (5) years defense trial experience is eligible.

Prime Members: The first lawyer member from a firm is the prime member. There can only be one Prime Member from any town, city or metropolitan area of less than a million population. One additional Prime Member is allowed for each additional one million population, or portion thereof, for a city or metropolitan area.

Association Member: Partners or associates of a Prime Member are eligible and encouraged for membership as Associate Members, at the will of the Prime Member.