intent to treat brokers differently due to their limited direct control over drivers.

Finally, in applying FAAAA preemption to bar negligent-hiring claims against freight brokers, the *Volkova* and *Creagan* courts recognized that an injured plaintiff is not left without recourse, because the plaintiff may still proceed against the motor carrier, and the FAAAA mandates that a motor carrier must carry liability insurance to register. *Volkova.,* 2018 U.S. Dist. LEXIS 19877 (N.D. Ill. 2018); *Creagan,* 354 F. Supp. 3d 808 (N.D. Ohio 2018). The statutory insurance requirement specific to motor carriers likewise suggests a congressional intent to preempt claims as to more ancillary parties such as the shipper and broker, who are not explicitly required to carry insurance under the regulatory scheme.

To date, no federal circuit court has addressed the FAAAA preemption issue, leaving district courts with no binding authority or guidance. Each district court is left to reconsider the same questions on the basis of persuasive authority in every case. Given the divergent decisions in various district courts, that is likely to change in the near future. In *Creagan, Jr., et al. v. Wal-Mart Transportation, LLC, et al.*, 19-3562 (6th Cir.), the Sixth Circuit may have the first opportunity to weigh in on this important issue to freight brokers, likely setting the tone for future challenges across the country.

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Fight the Good Fight to Prevent a DOT Audit Through Written Discovery

By Bridget Boyle and Larry Hall


Watching your favorite television show, scrolling through Facebook, and commuting to work are all likely to have one thing in common. During each activity you will probably be bombarded by local and national plaintiff's lawyers advertising for clients who have been involved in collisions with commercial motor vehicles. The competition for these cases has become so intense many plaintiffs' attorneys advertise their "investigation" abilities in addition to achieving large settlements and verdicts to stand out in a crowded field. Many of these attorneys have made accident litigation look more like a Department of Transportation audit, than a legal dispute related to a specific set of facts and circumstances. These attorneys typically justify their fishing expeditions by claiming a failure to comply with each and every regulation, regardless of the relation to facts, is relevant to show a jury the driver and company are unsafe. They often retain retired motor carrier enforcement officers to conduct audits in an effort to extract a settlement where the commercial motor vehicle driver is not at fault, or, to significantly increase a case's perceived value.

Responding to written discovery requests numbering in the hundreds in a routine collision with no injuries reported on scene, forces defense counsel to thread the needle by complying with applicable discovery rules, advocating for our clients, and observing local practices and customs. The good news is that recent amendments to the Federal Rules, with some states following suit, have given defense attorneys a new approach to defend a DOT audit through discovery.

In December 2015, the Federal Rules of Civil Procedure were amended to, amongst other things, narrow discovery. Marinelli, J., *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, ABA Business Law Blog (February 20, 2016). Notably, the Advisory Committee reinstated proportionality factors into Rule 26(b)(1) and removed the broad "subject matter" standard for relevancy. *Id.* This was done in an effort to scale back the immense undertaking of written discovery, which often is

the most time-consuming and potentially hazardous portion of the case for defendants and defense counsel. *See id*. The factors provided in Rule 26 are used to determine whether discovery is proportional or not, which makes these changes universally impactful. *Id*. Under the revised rule, the trial court may consider six proportionality factors:

> (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. Pro. 26(b)(1).

Across all areas of litigation, the impact from the Rule 26 amendment was received more like a ripple than a wave. Waterworth*, Proportional Discovery's Anticipated Impact and Unanticipated Obstacle*, 47 U. Balt. L. Rev. 139, 163-64 (2017). After the implementation of the new and improved discovery rule, the proportionality factors were, of course, applied increasingly by federal courts. *Id*. Data comparing federal discovery decisions before and after the amendment, however, suggests there was only a minimal increase in discovery restrictions. *Id*. Before the change, courts gave at least some discovery restriction in 56 percent of cases. *Id*. In cases after the amendment, courts provided restrictions on discovery in 61 percent of cases. *Id*. The distinctive and intentional change to the Rule, it seems, did not have the intended impact. *Id*.

Accordingly, industry-level change has neither been loud nor vast. It is hard to tell whether this is due to lack of merit or lack of fight. Regardless, the fight is still worth it to protect your client from unreasonable burden and also to prevent defending irrelevant compliance issues meant to distract and confuse the jury. Making the effort to object on proportionality and relevancy can still pay off. For example, in *Cabarris v. Knight Transportation*, a federal district court limited discovery of a driver's logs and personnel file in a personal injury action based on an accident involving a tractor trailer truck. WL 5650012, at *1–2 (W.D.N.Y. 2018). While the plaintiff in *Cabarris* initially requested 90 days-worth of logs, the defendant only produced logs from nine days. *Id*. The plaintiff filed a motion to compel. *Id*. In response, the court ruled in favor of the defendant, holding that nine days of logs were sufficient in proportionality and relevancy. *Id*. The plaintiff also requested production of the driver's entire personnel file. *Id*. While the court directed defendants to produce information from the personnel file, the production was limited to information relating only to the driver's termination from employment. *Id*. In this case, fighting back on discovery requests significantly impacted the data available to plaintiffs.

Other cases have also shown the value of fighting back against overbroad and abusive discovery. Commercial motor carriers have successfully prevented plaintiff's counsel from seeking Rule 30(b)(6) designees through interrogatories without stating with reasonable particularity the issues or topics on which the company is to provide testimony. *Merriweather v. United Parcel Service, Inc.*, 2018 WL 3572527 (W.D. Ken.). In the same case, the Court found the wreck register for one year prior to the accident was not discoverable, as "it is unlikely that any information listed in the wreck register would have any bearing on the foreseeability of the wreck or show any similarities of the wreck itself. *Id.* at *16–*17. Additionally, the Court found a request for "all company manuals, policies, and guidelines covering truck safety," and similar requests, overly broad and limited to the discovery to only the training and materials provided to the driver involved in the collision at issue. *Id.* at *17–18. (*See also Francois v. Colonial Freight Systems, Inc.*, 2007 WL 679998 (S.D. Miss. 2007) (granting the motor carrier's protective order in response to a 30(b)6) notice preventing plaintiff's counsel from inquiring about "safety policies, procedures, regulations and/or standards employed by Colonia during, preceding and subsequent to the accident in question," past complaints or civil actions, and all individuals responsible for management, supervision and control of the company); *Dalka v. Sublett*, 2002 WL 1482532 (W.D. Tenn.) (denying plaintiff's request for driver's worker's compensation file, medical records, and documents filed with Department of Labor).

The change in the Federal discovery standard is now impacting some state courts as well. For example, this past summer Missouri changed its Supreme Court Rules in relation to discovery. Harris, R., *What you need to know about Missouri's updated discovery rules*, Thomp. Cob. Publications (September 17, 2019). The changes to the discovery rule, Rule 56.01(b), came into effect in late August, and adjusted Missouri's discovery rules to better align with the Federal Rules. *Id*. As a result, Missouri now requires discovery to be proportional to the needs of the case. *Id*. Furthermore, the new Rule gives the court discretion to limit discovery in certain circumstances. Mo. Sup. Ct. R. 56.01(b). The court must, on motion or on its own, limit discovery if it determines that a party seeks discovery that is duplicative, outside the scope of the rules, or can be obtained through less burdensome means. *Id.* Following the rule change, our firm has successfully challenged discovery in commercial motor vehicle accident litigation where it was clear plain-

tiff's counsel had little desire to litigate the accident itself, instead focusing solely on every technical aspect of Federal Motor Carrier Safety Administration compliance. We have found explaining to the Court what plaintiff's counsel is doing and why it is improper is helpful.

The change to Rule 26(b) of the Federal Rules of Civil Procedure was intended to empower courts and parties to limit discovery by providing a new avenue to object. Despite the statutory intent, fighting discovery in commercial motor vehicle accidents remains an arduous task. The typical audit that occurs in trucking cases, masked as discovery, is the perfect opportunity to push back with the proportionality factors and insistence that discovery requests are relevant to the claims rather than the broad subject matter. Breaking the mold takes dedication and a unified front, but limiting access to irrelevant motor carrier data, in any degree, is worth the fight.

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The Ring of Fire

Tips for Defeating the Reptile—Avoiding Low-Road Cognition in Depositions

By Paul W. Murphy

The Ring of Fire is the most deadly and destructive part of a hurricane or other major storm system. Of course, if you're already inside the storm, the eye is the safest place to stay—but that's easier said than done. Although conditions might be sunny and clear within the storm's peaceful eye, it's challenging to stay inside it. Because the eye is constantly moving, you must move *with* the storm until it subsides. A slight drift in any direction could mean a visit to the Ring of Fire.

For our clients, each lawsuit represents a potential storm, and an unfavorable deposition can mean a one-way ticket to the Ring of Fire. Unfortunately, even when factually well-prepared, witnesses can still fall prey to the emotional, psychological, and cognitive stressors of the deposition environment. Even with the best of intentions, defense attorneys do not always have the time, ability, or budget to prepare their witnesses for the full spectrum of challenges they may face during the deposition.

The goal of this article is to give you tools and tips for preparing your witnesses, especially those unaccustomed to giving deposition testimony. In doing so, we discuss the plaintiffs' goals, the story they're trying to tell, and the image of defendant they want to create for the jury. By shedding light on some of the most common tricks used by plaintiff attorneys, we hope to make it more difficult for plaintiffs to view or paint our clients in a negative light.

Who's Telling Your Client's Story?

When it comes to litigation, Lady Justice may be blind, but she certainly doesn't move very quickly. Due to any number of factors, civil lawsuits can last two, three, or four years (or more) before ever getting to trial. Within this vast expanse of time, the few hours comprising a defendant's deposition represent a miniscule percentage of the length of the case. A proverbial drop in the bucket. However, as most of us have experienced, a defendant's poor performance at deposition can change the trajectory of the entire case, making that "drop" critical.

Yet how many times has it happened that, despite excellent preparation, a defense witness totally bombs a deposition? They become hostile, stammer, make damning admissions, give incorrect answers (inadvertently lie), or say something exactly opposite from how they were prepared. At some point, every defense lawyer will face the fallout from these types of experiences. And although they seem bizarre when they happen ("*I don't get it—we spent hours reviewing that concept!*"), poor deposition