

# The Mississippi Bar Litigation Section

## E-Newsletter

Fall 2015

### SPECIAL POINTS OF INTEREST:

- **Depo Academy  
Nov. 12-13**
- **MVLP Donation**
- ***The Future of  
Cars and Trucks  
(Plus the Litiga-  
tion to Follow)***
- **Scholarships  
Awarded**
- ***Lessons Learned  
from Pro Se  
Litigants***
- **Mississippi Rules  
Annotated**
- **Litigation  
Section  
Executive  
Committee  
Members**

## Message from the Chair — Meade Mitchell<sup>1</sup>

Dear Members of the Litigation Section of the Mississippi Bar,

I am honored to serve as the Section Chair for 2015-2016 and help continue our Section's service to the state's litigators. The Litigation Section, the largest in the Bar, is involved in a wide range of activities of interest to the civil litigator, the general practitioner and the bench. Through newsletters, email services, and CLE seminars, the Section analyzes, discusses, and provides methods and services designed to promote justice in our courts. Along with the Mississippi College School of Law and the Mississippi Law Institute, the Section also periodically publishes the Mississippi Rules Annotated.



Under the leadership of Past Chair Rebecca Wiggs, we had a strong 2014-2015 year. The Section continued its support of state law students by awarding four law school scholarships at Ole Miss and Mississippi College. Additionally, the Section provided a donation of \$5000 to the Mississippi Volunteer Lawyers Project (MVLP), which has helped the needy of our state obtain legal services since 1982. The Section also hosted a CLE program at the Bar Convention, which featured a discussion of the Bar's new Professionalism Deposition Guidelines and an entertaining presentation by Will Manuel on dealing with generational differences within law firms. We also co-sponsored the Capital Area Bar Association's diversity program and worked with Mississippi College to support its public program on grand juries. Finally, the Section sponsored two law students to attend the Gandy Seminar and assisted the Professionalism Committee and the Board of Bar Commissioners in adopting the Bar's guidelines for depositions.

This year, the Section will continue its support of law students and the MVLP. The Section, along with the Young Lawyers Division, is also planning a Deposition Academy to take place on November 12 - 13, 2015. We are working on ideas for a public speaking seminar led by the professionals at New Stage Theatre. At the Bar Convention, scheduled for July 14-16, 2016 in Sandestin, the Section will again sponsor two hours of CLE. We encourage you to attend these CLE seminars.

The Section will also issue newsletters, which will include articles of interest to our members and provide a forum for thoughtful discussion about the issues we all face. We hope you will submit articles and other materials for possible inclusion in the newsletters. Your submissions are a great vehicle for sharing information with our members and networking with colleagues with similar practices.

The Section welcomes ideas and participation. If you want to assist or have ideas, please contact any member of the Section's Executive Committee. Mississippi is the proud home of some of the best litigators in the country and the Section will continue to work to provide content, programs, and publications to help us all learn and improve.

---

<sup>1</sup> Meade is a partner at Butler Snow, LLP 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157. Email - [meade.mitchell@butlersnow.com](mailto:meade.mitchell@butlersnow.com). Phone – (601) 985-4560.



## Enroll Now! - Deposition Academy

November 12-13

*Limited to 40 registrants*

The inaugural Deposition Academy will take place on November 12-13, 2015, at the Mississippi Bar Center (643 North State Street, Jackson). The two-day program will consist of one day of instruction and one day of mock depositions, during which program attendees will observe accomplished litigators conduct the deposition examination of a Rule 30(b)(6) witness, a party, and an expert witness. The Deposition Academy has been tailored to provide young lawyers practical and strategic skills and tools for conducting successful depositions of various parties and witnesses by learning from, and observing the deposition techniques of, seasoned trial attorneys. To ensure that each attendee is provided the optimal learning experience, program participation is limited to 40 registrants. Each attendee will receive 14.0 hours of CLE credit, including 1 hour of ethics, for completing the two-day Deposition Academy. For additional information and the full agenda, [download the registration brochure](#). To pay by **check**, download the [Registration Form](#) and follow the instructions on the form. To pay by **credit card**, click [here](#). For additional questions, please contact Rene' Garner at [rgarner@msbar.org](mailto:rgarner@msbar.org)

## Ethics in Deposition Practice

The Professionalism Committee of the Mississippi Bar Association, after seeking comment from various groups, including the Litigation Section, recently published guidelines on deposition of courtesy, civility and practice. The Mississippi Bar encourages its members review and adhere to the following tenants:

[Board of Commissioners Adopt Deposition Guidelines](#)

## Litigation Section donates to MVLP

The Litigation Section of The Mississippi Bar recently donated \$5,000 to the Mississippi Volunteer Lawyers Project (MVLP). Pictured at the presentation are Gayla Carpenter-Sanders, Executive Director/General Counsel of MVLP and Rebecca Wiggs, Past Chair of the Litigation Section. MVLP provides free legal assistance throughout Mississippi. To volunteer, donate, or learn more about MVLP visit <http://www.mvlp.net>



## The Future of Cars and Trucks (Plus the Litigation to Follow)



By: Meade W. Mitchell and Arthur D. Spratlin, Jr., Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland MS 39158-6010



And

**Meade W. Mitchell**

**Arthur D. Spratlin, Jr.**

Ashley (AI) Dunn, Engineer, S-E-A Limited, 7349 Worthington-Galena Rd., Columbus, OH 43085; Sebastian Van Nooten, Engineer, HryCry Consulting Engineers, Inc., 1725 North Talbot Rd., Windsor ON, N9A 6J3; and Don Page, AIC, RLI Transportation, 2970 Clairmont Road NE, Suite 1000, Atlanta, GA 30329



### **I. Passenger Vehicle Technology**

In recent decades, technology related to personal vehicles has rapidly advanced toward big brother entering your vehicle in order to monitor your driving habits. The National Highway Traffic Safety Administration (NHTSA) is behind the push for implementing these technologies. Some form of this technology is likely already installed in your personal vehicle. Some of the emerging issues in the development and implementation of this technology are, as follows:

#### **A. Event Data Recorders**

##### *1. What is an Event Data Recorder?*

Within the last three decades, there has been an emergence of new technology which literally turns a motor vehicle into a database on wheels, via an event data recorder (EDR). An EDR is a device that records a vehicle's dynamic time-series data

during the time period just prior to a crash event or during a crash event, intended for retrieval after the crash event.<sup>1</sup>

NHTSA has narrowly defined EDR as a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during or after a crash.<sup>2</sup> NHTSA is careful to exclude from its definition devices that either make audio or video recordings, or logs data such as hours of service for truck operators. As the term suggests, EDR devices record information solely related to an “event.” In terms of motor vehicles, the event is an automobile collision that is significant enough to cause the airbags to deploy.

An EDR is akin to the black box that has become associated with airplane crashes. Since September 1, 2012, vehicles equipped with EDRs are required to record the following data generally seconds before and after impact:

- (1) Vehicle’s speed;
- (2) Cumulative change in velocity;
- (3) Engine Throttle;
- (4) Whether the service brake was on/off;
- (5) Ignition cycle;
- (6) Safety belt status of driver;
- (7) Frontal air bag deployment;
- (8) Whether the frontal air bag warning lamp was on/off;
- (9) In multi-event, number of events; and
- (10) Whether the complete file was recorded.<sup>3</sup>

If a vehicle manufacturer voluntarily chooses to install an EDR, it must provide the following statement (in English) in the owner’s manual:

*This vehicle is equipped with an event data recorder (EDR). The main purpose of an EDR is to record, in certain crash or near crash-like situations, such as an air bag deployment or hitting a road obstacle, data that will assist in understanding how a vehicle’s systems performed. The EDR is designed to record data related to vehicle dynamics and safety systems for a short period of time, typically 30 seconds or less. The EDR in this vehicle is designed to record such data as:*

- How various systems in your vehicle were operating;*
- Whether or not the driver and passenger safety belts were buckled/fastened;*
- How far (if at all) the driver was depressing the accelerator and/or brake pedal; and,*
- How fast the vehicle was traveling.*

<sup>1</sup> 49 C.F.R. § 563.5 (2014).

<sup>2</sup> [Welcome to the NHTSA Event Data Recorder Research Web Site](http://www.nhtsa.gov/Research/Event+Data+Recorder+(EDR)/Welcome+to+the+NHTSA+Event+Data+Recorder+Research+Web+site), Nat’l Highway Trans. Safety Admin., available at

[http://www.nhtsa.gov/Research/Event+Data+Recorder+\(EDR\)/Welcome+to+the+NHTSA+Event+Data+Recorder+Research+Web+site](http://www.nhtsa.gov/Research/Event+Data+Recorder+(EDR)/Welcome+to+the+NHTSA+Event+Data+Recorder+Research+Web+site); see also 49 C.F.R. § 563.5 (2014).

<sup>3</sup> 49 CFR § 563.7 (2014).



*These data can help provide a better understanding of the circumstances in which crashes and injuries occur. NOTE: EDR data are recorded by your vehicle only if a non-trivial crash situation occurs; no data are recorded by the EDR under normal driving conditions and no personal data (e.g. name, gender, age, and crash location) are recorded.*

*However, other parties, such as law enforcement, could combine the EDR data with the type of personally identifying data routinely acquired during a crash investigation.*

*To read data recorded by an EDR, special equipment is required, and access to the vehicle or the EDR is needed. In addition to the vehicle manufacturer, other parties, such as law enforcement, that have the special equipment, can read the information if they have access to the vehicle or the EDR.<sup>4</sup>*

Until recently, NHTSA has been reluctant to mandate that all newly manufactured motor vehicles be equipped with an EDR, in part because the industry itself was voluntarily implementing these devices. However, in December 2012, NHTSA issued a Notice of Proposed Rulemaking to create Federal Motor Vehicle Safety Standards 405, which required most light vehicles equipped with frontal airbags manufactured on or after September 1, 2014 to install EDRs.<sup>5</sup>

## *2. Who owns the data?*

In its Notice of Proposed Rulemaking, NHTSA acknowledged consumer privacy concerns regarding EDR data. The agency, however, was careful to note that it did not have the statutory authority to address many of the privacy issues implicated by EDRs because the issues were generally matters of State and Federal law that the agency does not administer.

As of December 2013, fourteen states<sup>6</sup> had enacted legislation relating to EDRs.<sup>7</sup> The majority of this legislation addresses privacy protections for the vehicle owner, such as explicitly stating that the vehicle owner owns the data and limiting the accessibility of the data.

## *3. Is it admissible evidence?*

---

<sup>4</sup> 49 CFR § 563.11 (2014).

<sup>5</sup> Federal Motor Vehicle Safety Standards; Event Data Recorders, 77 Fed. Reg. 240 (proposed Dec. 13, 2012) (to be codified at 49 C.F.R. pt. 571) (available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-12-13/pdf/2012-30082.pdf>).

<sup>6</sup> Arkansas (ARK. CODE ANN. § 23-112-107); California (CAL. VEH. CODE § 9951); Colorado (COLO. REV. STAT. § 12-6-401, -402,-403); Connecticut (CONN. GEN. STAT. § 14-164aa); Maine (ME. REV. STAT. ANN. tit. 29-A §1971, § 1972, §1973); Nevada (NEV. REV. STAT. §484D.485); New Hampshire (N.H. REV. STAT. ANN. § 357-G:1); New York (N.Y. VEH. & TRAF. LAW § 416-b); North Dakota (N.D. CENT. CODE § 51-07-28); Oregon (ORE. REV. STAT. §§ 105.925-948), Texas, Utah (UTAH CODE ANN. §§ 41-1a-1501-04 (2013 H.B. 127)), Virginia, and Washington (WASH. REV. CODE ANN. §§ 46.35.010-.050).

<sup>7</sup>Privacy of Data from Event Data Recorders: State Statutes, Nat'l Conference of State Legislatures, <http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx>

Courts have generally concluded that data retrieved from EDR is admissible evidence.<sup>8</sup> The case of *Commonwealth v. Zimmerman*, 873 N.E.2d 1215 (Mass. App. Ct. 2007), details the admissibility of EDR data. The case involved a defendant who appealed a denial of her motion *in limine* to exclude EDR evidence as unreliable and inaccurate. The judge held extensive hearings on the reliability of the EDR data, and through the opinion of the state's expert determined that such data was generally accepted in the scientific community. The Appeals Court of Massachusetts applied *Daubert* and held that a plaintiff seeking to introduce expert testimony in the form of EDR interpretation may lay a proper foundation by showing that the theory underlying the testimony is "generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means." The court further noted that "[a]lthough as yet there are not many decisions on the admissibility of EDR data, most seem to support admission."

In *Matos v. State*, the Florida Court of Appeals addressed for the first time whether EDR data was admissible evidence. 899 So. 2d 403, 405 (Fla. Dist. Ct. App. 4th Dist. 2005). Relying in part on *Bachman v. Gen. Motors*, 776 N.E.2d 262, 281 (Ill. App. Ct. 2002), which determined that EDR data did not represent "new or novel" scientific evidence and also satisfied the *Frye* test for admissibility, the Florida court found that such data was admissible. *Matos*, 899 So. 2d at 407. Specifically, the court found that the EDR data was not a novel technique or method and, when used as a tool of automotive accident reconstruction, the EDR data was generally accepted in the relevant scientific field, warranting its introduction. *Id.*

Similarly, in *State v. Locane*, 2012 N.J. Super. Unpubl. LEXIS 1702 (N.J. Super. June 14, 2012), the court concluded that the EDR data was admissible because the evidence was generally accepted within the automotive and accident reconstruction community and, thus, met the *Frye* standards for admissibility. *See also People v. Bojaj*, 2012 Mich. App. LEXIS 2369, \*11 (Mich. Ct. App. 2012) ("[T]he admission of the EDR data absent verification of its reliability qualified as harmless error."); *but see Niemeyer v. Ford Motor Co.*, 2:09-CV-2091, 2012 U.S. Dist. LEXIS 111859, \*33-35 (D. Nev. Aug. 9, 2012), where the court granted plaintiff's motion to exclude EDR data. The plaintiff complained that the evidence was not verifiable because the company that made the EDR (but was not a party to the suit) would not release any means to verify that the program worked as intended. The plaintiff also complained that defendant's expert could not lay the proper foundation because he had no knowledge regarding the inner workings of the company's technology and how the EDR data was converted into a human readable format. The court granted plaintiff's motion *in limine* based on these two reasons. *Id.*

## B. Insurance Carriers' Electronic Data Recorders

Progressive's iconic spokeswoman, Flo, states that the insurance mogul is out to save you money. Progressive has been marketing a unique way to save its insurers money, known as its "Snapshot" program. According to Progressive, Snapshot is "a little device that is the key to saving."<sup>9</sup> While an EDR provides only seconds of data

<sup>8</sup> Jim Harris, *Event Data Recorders – State Statutes and Legal Considerations*, 18 ACCIDENT RECONSTRUCTION J. 1 (Jan/Feb. 2008), available at: [http://www.harristechnical.com/downloads/Harris\\_EDR\\_article.pdf](http://www.harristechnical.com/downloads/Harris_EDR_article.pdf).

<sup>9</sup> <http://www.progressive.com/auto/snapshot>

before and after a significant crash, Progressive can use the same technology to monitor its drivers' daily driving habits.

The Snapshot device is approximately the size of a garage door opener and is designed to plug into a vehicle's onboard diagnostic port, which is usually located near or beneath the steering column.<sup>10</sup> Participants of the Snapshot program are required to accept the "Terms and Conditions for Snapshot" prior to their participation in the program.<sup>11</sup> The Terms and Conditions provide that Progressive owns the Snapshot device, which may not be altered by the participant.<sup>12</sup> The participant must return the device once the program ends or he/she will be charged fifty dollars (\$50).<sup>13</sup> The participant can unplug the device at any time, but he will receive notification from Progressive that the data transmissions have stopped and could risk losing any potential discount. Once the participant opts into the program, Progressive sends the Snapshot device to the participant who is expected to engage the device. The driver's habits are then monitored for thirty days. On day thirty-one, the insured's rate is "fully personalized; [and] any discount [he/she] earned is in full effect."

However, is Progressive really rewarding the "good drivers?" Progressive uses the data retrieved to rank its customers as high, medium, or low risk.<sup>14</sup> In order to receive a discount, Progressive recommends that drivers not drive more than an average of thirty (30) miles per day. The program rewards drivers who travel at times that pose lower risks for accidents, such as during the day rather than during rush hour. The program also rewards drivers who have fewer "hard brakes."<sup>15</sup> None of these factors necessarily indicate whether a driver is a "good driver;" rather, they indicate whether the driver is a low risk driver.

When the Snapshot program first began, Progressive claimed that it would not raise rates based on the data gathered.<sup>16</sup> However, at the end of 2013, Progressive began hinting of a change. On August 14, 2013, *Forbes* reported Progressive's general manager as stating "Next year we will likely move to a model where we can offer a discount to more people. Some, maybe 80% of the people will get a discount, but then some people will actually have to pay a little more."<sup>17</sup> The new program will cap the surcharge at around 10% of the cost of the policy.

---

<sup>10</sup> Snapshot @ Common Questions, PROGRESSIVE INS., available at: <http://www.progressive.com/auto/snapshot-common-questions/>. Onboard Diagnostics is a computer based system built into all 1996 and later light-duty vehicles and trucks as required by the Clean Air Act Amendments of 1990. See On-Board Diagnostics (OBD), U.S. ENVTL. PROT. AGENCY., available at: <http://www.epa.gov/obd/>; See also Does My Car Have OBD-II, The OBDI II Homepage, available at: <http://www.obdii.com/connector.html>.

<sup>11</sup> Terms and Conditions for Snapshot@, PROGRESSIVE INS., available at: <http://www.progressive.com/auto/snapshot-terms-conditions/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; See also Snapshot FAQs...Saving Money on Your Auto Insurance in Anthem, AZ, MAKI INS. GRP., available at: <http://timmaki.com/snapshot-faqs-saving-money-on-your-auto-insurance-in-anthem-az/>.

<sup>14</sup> M. Joy Hayes, Ph.D., The Hidden Cost of Cheap Car Insurance, DAILY FINANCE (Aug. 27, 2012), available at: <http://www.dailyfinance.com/2012/08/27/the-hidden-costs-of-cheap-car-insurance/>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Adam Tanner, Data Monitoring Saves Some People Money On Car Insurance, But Some Will Pay More, FORBES (Sept. 2, 2013), available at: <http://www.forbes.com/sites/adamtanner/2013/08/14/data-monitoring-saves-some-people-money-on-car-insurance-but-some-will-pay-more/>.

Progressive is not the only U.S. insurer to use this big brother technology. For example, State Farm has “Drive Safe & Save with In-Drive” and Allstate has “Drive Wise.” This could be the future of car insurance. British insurer, Insure the Box, requires a professionally installed recorder that stays in for the duration of the policy.<sup>18</sup> It is estimated that the number of monitored drivers worldwide will rise to 89 million drivers by 2017.<sup>19</sup>

### C. Vehicle-to-Vehicle Technology

In recent decades, the United States Department of Transportation (DOT) has worked with the automobile industry to develop vehicle-to-vehicle technology (V2V), which allows cars to communicate with each other, and in turn, the respective drivers, by transmitting data wirelessly between vehicles.<sup>20</sup> These efforts focused on developing:

- 1) In-vehicle components such as hardware to facilitate communications among vehicles;
- 2) Safety software applications to analyze data and identify potential collisions;
- 3) Vehicle features that warn drivers; and
- 4) A national communication security system to ensure trust in the data transmitted among vehicles.

The V2V technology merely sends warnings to drivers as opposed to autonomous vehicle technologies which control steering, acceleration, and braking without a driver’s input, generally referred to as Collision Avoidance Systems. V2V technologies facilitate the communication of data between vehicles to warn drivers of imminent dangers such as the other vehicle’s speed and location.

The data is shared wirelessly among vehicles using dedicated short-range communications (DSRC). DSRC is a technology similar to Wi-Fi that can transmit messages over a range of about 1,000 to 1,600 feet. While sensor-based technologies are only capable of alerting drivers to dangers that are visible to the sensor, V2V technologies can alert drivers to potential dangers not visible to existing sensors. For example, V2V technology can detect a car located around the corner of a building that would be undetectable by sensor-based technologies. It would also be able to aid a driver in deciding whether it is safe to pass on a two-lane road or whether to make a left turn across oncoming traffic.<sup>21</sup> V2V technology does not record personal information or track vehicle movements.

The DOT is also researching vehicle-to-infrastructure (“V2I”) technologies, which are similar to V2V technologies, except they share data between vehicles and infrastructure, such as traffic signals and traffic signs.<sup>22</sup> V2I technologies offer additional safety features such as warnings that a traffic signal was about to change or conditions of the upcoming roadway.

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> GAO-14-13 Intelligent Transportation System

<sup>21</sup> U.S. Department of Transportation Announces Decision to Move Forward with Vehicle-to-Vehicle Communication Technology for Light Vehicles, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Feb. 3, 2014), [available at: http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/USDOT+to+Move+Forward+with+Vehicle-to-Vehicle+Communication+Technology+for+Light+Vehicles](http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/USDOT+to+Move+Forward+with+Vehicle-to-Vehicle+Communication+Technology+for+Light+Vehicles)

<sup>22</sup> GAO-14-13 Intelligent Transportation Systems



NHTSA has indicated a move toward mandating that all newly manufactured vehicles come equipped with V2V technology, but such a mandate has not yet been adopted. On February 3, 2014, NHTSA announced that it will begin taking steps to enable V2V technologies for light vehicles.<sup>23</sup>

## **II. Heavy Truck Technology**

Heavy Truck manufacturers only produced a small percentage of trucks with Event Data Recorders (EDR) fifteen years ago. Currently, every truck coming off the assembly line has some type of EDR associated with its engine. The familiar types of EDR that have been used to investigate accidents over this time are not related to the brand of the truck, but rather, the make of the engine in the truck. Presently, many trucks are equipped with multiple EDR that can be found in other safety related options.

This paper addresses the emerging technology, associated EDR found on heavy trucks outside of the engine-based EDR, and looks at new technology expected in the near term. Some of those are as follows:

### **A. Emerging Technologies Currently Available**

#### *1. Vehicle Telematics.*

In 1988, Qualcomm (now called Omnitrac) started marketing a satellite-based vehicle communication and tracking system that allowed fleet operators to easily send messages to drivers anywhere in North America and instantly determine their location to within about a quarter of a mile. This was revolutionary in an age where cell phones were not reliable and were carried around in small hand bags.

Over the years, the number of vehicle telematics suppliers grew and just as our cell phones have changed, the telematics unit in the cab of the truck has evolved to perform multiple tasks. Some of these tasks include electronic driver logs and vehicle EDR.

Today, these systems integrate GPS location and speed calculation with the data from other vehicle controllers (including engine and brake controllers), which is available on a vehicle information network (aka, the CAN bus). Now a fleet manager can get an email on his/her cell phone within minutes of one of their drivers slamming on the brakes. Omnitrac devices have the option to provide what is referred to as a "Critical Event Report" that provides three minutes of second-by-second speed data prior to the hard deceleration and two minutes afterwards. The fleet operator can obtain this report remotely, meaning that he/she will have accident data within minutes, regardless of where it happened. Other brands, including XRS Corporation (formally Xata) and Peoplenet, provide comprehensive second-by-second event data reports that are obtained remotely by fleet operators.

Fleet managers and forensic experts struggle to keep current on these rapidly evolving systems. Many fleet managers are not aware of all the EDR capabilities and are unfamiliar with the necessary procedures to retrieve said data from the "cloud" before the expiration date for that data.

---

<sup>23</sup> U.S. Department of Transportation Announces Decision to Move Forward with Vehicle-to-Vehicle Communication Technology for Light Vehicles, *Supra*, n. 21.

## 2. *Video-Based Event Data Recorders*

Not all EDR contain only numerical data. The next step in technology will provide a video recording of the events prior to and after a collision or a near collision. In 1998, DriveCam (now Lytx) was an early pioneer in this technology. Today, there are multiple systems available to fleets. These systems not only record video in an accident, but many embed numerical time-based data into the video files. The data and video from these systems is often used to assist in coaching drivers to operate more safely in near-accident situations. An event is triggered when the vehicle experiences acceleration greater than a pre-set threshold. Just like their numeric data cousins, some of these systems will transfer the video (and possible numeric) data to a remote "cloud" server. Now a fleet operator can remotely view a video of driver and what the driver should have been looking at within minutes of the event happening. In addition to Lytx, Meritor Wabco OnLane, SmartDrive, and Bendix Safety Direct systems can provide integrated video and event information.

## 3. *Collision Mitigation Systems*

Eaton, the heavy truck parts supplier, was the early pioneer of collision mitigation systems when they introduced their VORAD technology in the early 1990's. VORAD used forward and side looking RADAR to detect other vehicles in front of the truck and warn the driver if he/she was violating or risking their assured and clear distance. The VORAD system could be downloaded, providing speed, steering, and braking data not only from the host vehicle, but also from all the other vehicles it was detecting with its forward looking RADAR. The adaptive cruise functionality maintained a safe following distance by controlling the vehicle's speed without the driver's input. While this technology has been around for a while, it was not widely used because of high cost and poor performance. Eaton's VORAD technology was acquired by Bendix and now is sold as the Wingman system. The hardware of the Wingman System is used by Volvo in their proprietary system.

Meritor Wabco introduced the OnGuard system, which similarly warns the driver of impending loss of assured and clear distance, and can provide automatic braking to avoid a collision. Meritor Wabco's system will even brake to avoid a vehicle that it detects coming to a stop in front of it. Detroit Diesel's Assurance is another collision mitigation system on the market today.

The capability and dependability of these systems has increased to where they will now not only warn a driver about an impending collision, but will also apply the brakes without the driver's input. The systems have not yet developed to the point where they can confidently detect a stationary object on the roadway and apply the brakes, but they will warn the driver of the hazard. When a collision mitigation system triggers an event, some vehicle telematics systems can message the fleet operator that an event has taken place. Further advances in this emerging technology are expected.

## 4. *Lane Departure Warning*

In order to prevent drivers from unintentionally drifting from their lanes, camera based vision systems can detect roadway markings and alert the driver. This technology is similar to what is available on many passenger vehicles; the lane departure warning systems provide an alert if the vehicle changes lanes when the turn

signals have not been activated. Some of these systems incorporate a blind spot detector, providing additional warning to a driver if there is a vehicle alongside the tractor. If the system is programmed to do so, Meritor Wabco's OnLane system has the ability to record video prior to and after the lane departure. The current suppliers of these systems are Meritor Wabco OnLane, Mobileye, and Detroit Diesel's Assurance. Some vehicle telematics systems are capable of being programmed to provide notices to the fleet manager when the Lane Departure Warning system was activated.

#### *5. Portable GPS Navigation Devices*

Many truck drivers use a portable navigation device such as a Magellan, Garmin, Rand McNally or TomTom. Some of these devices are recording the position and speed at various times along a vehicle's route. While they may not provide a second by second account of speed, they usually provide it at a sufficient frequency to be of assistance in reconstructing an accident.

#### *6. Refrigerated Trailer Tracking*

An often overlooked source of event data can be found on a refrigerated trailer, which can be equipped with trailer tracking software that records their location. Some trailers, such as Carrierweb, can provide information from the tractor and record it in their system. These trailer tracking systems also use GPS receiver to locate the position of the trailer, and report that in the event data logs.

#### *7. Heavy Truck Stability Control Systems*

The NHTSA mandated that all light vehicles (under 10,000 lbs.) be equipped with Electronic Stability Control (ESC) systems by 2011. Some studies have claimed that thousands of highway traffic fatalities have been avoided as a result. The NHTSA currently has a Notice of Proposed Rulemaking (NPRM) in its docket that will mandate stability control systems in heavy trucks. Currently, roll and yaw stability controls are optional on trucks, tractors, and semitrailers. The current systems monitor the vehicle's steering and kinematics (vehicle speed, yaw, lateral and longitudinal accelerations) and can intervene with throttle control and brake control to mitigate an impending stability loss. Brake control can use the entire brake system, or control specific brakes, such as braking the left side only to encourage a vehicle to yaw counterclockwise (to its left).

### **B. Technology Still in Research and Development**

Realistically, the idea of a fully self-driving car is in future, since there are significant infrastructure and legal challenges that need to be addressed, besides the more obvious technological challenges. However, the idea of a "semi-automated" vehicle, where there still is a driver present, is an idea that is not far away. In 2014, Mercedes announced it has developed a prototype "Future Truck 2025" that allows the driver to drive hands free for periods on the interstate. On this side of the Atlantic, there has been work in that direction as well with passenger vehicles.

#### *1. SuperCruise or AutoPilot?*

General Motors has announced it is currently working on technology that will allow a driver to operate hands free for portions of their trip that may be introduced by the end of the decade in their Cadillac models. This system is described as "semi-

automated driving” by General Motors and uses radar, ultrasonic sensors, cameras and GPS map data to navigate the car on the freeway or in bumper to bumper traffic. The vehicle will perform steering, braking and speed control in limited conditions. The technology has already been developed to allow this to happen, it is now simply being refined.

For years, an autonomous vehicle technology race has been fueled by initiatives such as the Defense Advanced Projects Research Agency (DARPA) Challenge. DARPA ran competitions in 2004, 2005, and 2007 that drew autonomous vehicle entries from across the globe. During these competitions, major truck manufacturers competed with universities and private firms to autonomously navigate rural and urban landscapes.

## 2. *Vehicle Platooning*

Instead of relying on the vehicle itself for navigation, the concept of vehicle platooning allows a driver to use that technology in the vehicle to follow a lead vehicle. Each vehicle would be equipped with V2V communications and the lead vehicle in the platoon would wirelessly communicate with vehicles behind it. The V2V communication would allow the vehicles to respond in milliseconds after the driver in the lead vehicle either applies the brake or makes a steering input. Vehicles would be able to follow each other at close distances, allowing them to take advantage of increased fuel economy due to improved aerodynamics. There are infrastructure and technological improvements that would be required, but basic technology to allow this to happen is currently available.

## 3. *Integrated Glass Cockpit*

Commercial truck instrument panels similar to those available on modern commercial aircraft are being developed. These multi-function displays (MFDs) will allow fleets or drivers to customize the information presented to the driver. Other technologies that might accompany these displays are EDR and/or telematics systems that can transmit all the information on the panel to a remote terminal in real time.

## 4. *Drive-by-Wire Technology*

Drive-by-wire technology has been evolving in passenger cars and heavy trucks for the last few decades. During the early 1990's, heavy truck engines began to evolve from the decades-old mechanical fuel injection distributor to the modern electronic engine control module (ECM) we are all familiar with today. This technology, which was necessary to get more power and lower emissions from diesel engines, replaced the physical pushrod connection from the driver's foot to the engine with what amounts to a potentiometer, or volume control connected to a pedal. Drivers of modern trucks and passenger cars today electronically control the engine power output.

As technology marches forward, passenger cars and heavy trucks will incorporate more drive-by-wire subsystems, including steering and brakes. Commercial vehicle brakes, traditionally controlled via pneumatic signals, have been electronically controlled on new European trucks for many years. One reason for brake-by-wire technology is the possibility of shorter stopping distances that might result from quicker brake system response times. Other advantages include improved response time and fidelity in stability control systems. Steer-by-wire technology will allow stability control



systems to have the ability to control the steering on a vehicle, in addition to the throttle and brake intervention on vehicles today.

### **III. Impact of Technology on Litigation**

The ongoing evolution of motor vehicles will unquestionably impact the legal landscape in commercial transportation. Indeed, approximately one-third of all state court civil trials are related to automotive crashes.<sup>24</sup> On the other hand, non-asbestos products liability cases account for only 1% of state court trials.<sup>25</sup> The emerging truck and automotive technologies may well impact this balance. Vehicles now are, and are becoming more so, complex computers on wheels.<sup>26</sup> Today, automotive networks often consist of sensors – some combination of camera, radar, lidar, ultrasound and GPS – to detect position and objects. These systems impact a myriad of aspects of a vehicle's functionality, including engine control, safety and diagnostics. Already, systems such as adaptive cruise control, automatic emergency braking, lane departure warning, collision warning, automated parallel parking, etc. have entered the marketplace.

Vehicle automation is expected to dramatically increase over the next decade. Automated research vehicles are being tested and several companies suggest they will market a self-driving automobile by 2020.<sup>27</sup> While the advances may mean new reservoirs of profits for automakers, it may also expand the seller's point-of-sale and post-sale obligations to people potentially endangered by their products.

Bryant Walker Smith, a fellow at the Center for Automotive Research at Stanford, has written a number of papers on this subject. His most detailed paper on this subject suggests automation changes could seriously impact product-related claims in several areas, including breach of implied warranty, defect in design or information, and negligent enabling of a third parties tortious behavior.<sup>28</sup> With the increasing information, access and control that commercial sellers have with their automated products, product users and product uses, the obvious next question is what additional duties the law will begin to impose on those sellers.

Section 2-315 of the Uniform Commercial Code provides an implied duty of fitness for a particular purpose, as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for the purpose.<sup>29</sup>

<sup>24</sup> See Civil Bench and Jury Trials in State Courts, 2005, Bureau of Statistics, U.S. Dep't of Justice 2 (2009), available at: <http://www.bjs.gov/content/pub/pdf/cdjtsco5.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Bryant Walker Smith, *Proximity – Driven Liability*, 102 GEO. L.J. 1778 (2013).

<sup>27</sup> *Id.* at 1792 (citing Tom Krisher, *GM Says Almost – Driverless Cars Coming by 2020*, ASSOCIATED PRESS (Aug. 28, 2013); Press Release, Nissan, *Nissan Announces Unprecedented Autonomous Drive Benchmarks* (Aug. 17, 2013); Joseph B. White, *Mercedes Makes Driverless Ride*, WALL ST. J. (Sept. 10, 2013).

<sup>28</sup> *Id.* at 1779.

<sup>29</sup> U.C.C. § 2-315.

If not disclaimed, the claim centers around what the sellers know or should know when the buyer relies on the seller's skill or judgment to select suitable goods. Courts look at a seller's knowledge as a source of liability. In the context of vehicle automation, many sellers of autonomous products know a great deal. As such, the massive data collection of sensors and other devices can have a potential downside for the product manufacturers. The more the product use or misuse should be known to them, the more exposure the seller has under this theory.

Design and/or information defect claims are expected to further emerge. If a defensive argument is that the driver is not to blame because of automation, then it is reasonable to expect that another class of defendants will emerge. Imagine the growing case of software defect claims relating to the automated systems in vehicles. If the sensors, the platooning systems, the automated braking, or the countless other automated features fail, the sellers of those products will be at risk. The more automated a vehicle, the more one can envision the focus shifting from driver error to software design flaws or malfunction. If an automaker receives real time notice of system errors or unusual braking patterns, what will the law expect it to do with this information? This type of claim is already in existence and the prevalence of those claims is only expected to grow.

The advancing technology might also create liability for post-sale duty to warn. The Restatement (Third) of Products Liability contemplates liability for seller's failure to warn after the sale of the product.<sup>30</sup> However, presently post-sale duty to warn laws does not exist in any uniform manner in the states. The duty is often not recognized since constantly monitoring product performance after a sale is traditionally considered too burdensome. Yet, with automation and the increased incidence of close monitoring of automated or semi-automated systems, the likelihood that risks will be seen by sellers after the sale increases as well as the ability of the sellers to communicate those risks to the users post-sale. The control and knowledge of sellers post-sale may expand tort liability in this area. Indeed, Dr. Smith suggests that the duty could even be further enlarges to encompass a post-sale duty to update, i.e. recall and/or retrofit, but that is beyond the scope of this submission.<sup>31</sup>

Perhaps automation also will spark negligent enabling torts. These torts are on the edge of the current tort laws. However, we are all familiar with one variety, since negligent entrustment is an enabling tort. These are torts in which one actor sets the stage for a second wrong-doer to injure another. In the vehicle automation context, the theory would be based on a seller's continuing control over an item – his ability to permit or prohibit use. If a seller of automation continues to retain levels of control over an automated feature, its continuing control may require it to restrict access to those incompetent to handle it.

How any of these theories will advance in the years to come is a chapter yet to be written. However, we should all expect to see these issues fleshed out in the cases we are handling over the next decade. In sum, the technological advancements are not merely interesting curiosities. Rather, they are already to an extent and will become a greater part of the issues that trucking companies, drivers, automated system sellers and lawyers see in the litigated matters in the future.

---

<sup>30</sup> Restatement (Third) of Torts: Prods. Liab. § 10 (1998).

<sup>31</sup> *Id.* at 1805-08

## Litigation Section Awards Scholarships to Law Students

### University of Mississippi Law School

The Litigation Section awarded \$1000 scholarships to two outstanding law school students at the University of Mississippi in the Spring of 2015. Pictured below, from left to right, are the Litigation Section award recipients Will Zimmer and Darian Etienne.



### Mississippi College School of Law

On behalf of the Litigation Section, Rebecca Wiggs, 2014-2015 Section Chair, along with MC Dean Wendy Scott presented Ethan Samsel and Nikita McMillian with a \$1000 scholarship each for their continuing education. The scholarships were presented at the Law Day Awards Ceremony in the Spring of 2015.



## Lessons Learned from *Pro Se* Litigants

by Rebecca Blunden  
Copeland, Cook, Taylor & Bush, P.A.

In every litigator's life, there will come a *pro se* opponent. It is with a *pro se* opponent that the at-times rote practice of law becomes brand new. Why? For a myriad of reasons, all having to do with the opponent. When a party is represented, issues may arise from the litigation, but the focus is on the case. With a *pro se* litigant, there is no "filter," no one standing between the aggrieved person and your representation of your client. Often, you will become your client in the eyes of the *pro se* litigant, representing each thing that has the *pro se* party so upset.



**Rebecca Blunden**

In my 16 years of practice, I have worked with and against some truly amazing lawyers, learning lessons from each of them. I have also handled a fair share of *pro se* cases. Sometimes the *pro se* party is an attorney simply not licensed in Mississippi. Sometimes the *pro se* litigant is someone who believes so strongly in his issue and is so knowledgeable about it, he is sure he does not need an attorney to win. Sometimes *pro se* litigants are mentally a little off or, honestly, so off they are a ticking timebomb.

We have all learned from other litigators. But what lessons have I learned from 16 years of litigation with *pro se* plaintiffs? A few – and many have proved helpful in all cases.

### **LESSON #1: Sometimes, Just Let the Plaintiff Pick the Mediator**

One of my first *pro se* cases was with a non-Mississippi attorney ("Matthew") angry about a property loss he suffered. Our focus was on educating him on the relevant law; this proved daunting due to his anger. Matthew was sure every single one of the 12 people he sued was responsible for his property damage that he refused to read any cases the dozens of Mississippi lawyers sent him about the merits of his case, including clear law on why nine of the defendants should be dismissed. I am confident we would still be litigating Matthew's property loss if it were not for a wise judge who ordered mediation.

Selecting a mediator, especially with so many parties, can often be aggravating. Since only a few defendants actually had a chance of being liable, the others let us lead the way. We decided to let Matthew pick the mediator and if his selection was not truly horrendous, we would agree. Sure enough, Matthew picked a mediator none of the defendants would have chosen and generally would not have agreed to. We stuck to our plan, though, and agreed. This created a mediation environment where Matthew already felt like he had won. Then, when the mediator talked Matthew down on his damages, pointed out the relevant law and facts, Matthew listened to him more than he would have if the suggested mediator had come from the defendants or even if the mediator was a compromise. While we spent more than we thought we should have, the case settled for all defendants.

Yes, the mediator can make a difference and it is not a decision to make lightly, but with intransigent parties (or their attorneys) who won't listen to the facts or law, having them enter mediation feeling like they have an ally can help resolve the case.



**LESSON #2: *Pro Se* Litigants Cannot Represent Anyone Else, Even If They Are Attorneys**

This seems like an obvious issue, but I have seen numerous *pro se* litigants – whether they are attorneys just not licensed in Mississippi or not even attorneys – argue for and on behalf of other parties, such as spouses and children. While Mississippi law does confer the right to represent oneself, it is limited to just that: a person can only represent him or herself. Miss. Const. Art. 3, § 25. If the other parties do not participate in the litigation, they can be dismissed. My recommendation is to check all pleadings carefully to determine if each *pro se* litigant signed each pleading.

We had a case with two *pro se* plaintiffs (“Abraham and Isaac”). Abraham was running the show, including signing all the pleadings with the exception of the original complaint (which was amended without Isaac’s signature). Even though the pleadings contained a line for Isaac’s signature, Abraham would sign on Isaac’s signature line. Isaac attended no hearings, even though they concerned motions directed at and delivered to him. After we filed a counterclaim against both Abraham and Isaac, the answer was not signed by Isaac, just by Abraham on Isaac’s behalf. We filed a motion for summary judgment based on Isaac’s admission of all allegations in the counterclaim. Isaac was dismissed. While the litigation survived, having only one plaintiff was preferable to two.

**LESSON #3: *In Forma Pauperis* and the Civil Litigant**

Often, civil litigants – whether represented by counsel or not – are not prepared for the costs of litigation. We all work hard to provide our clients with estimated costs and fees to educate them. If someone is proceeding *pro se*, he may think that once the initial filing fee has been paid, he can proceed “all the way to the Supreme Court.” Unless he is willing to pay what may be a significant amount, that is not true.

At the trial level, a plaintiff may proceed *in forma pauperis* in a civil action. Miss. Code Ann. § 11-53-17. A litigant availing himself of § 11-53-17 need only file an affidavit that attests he is a citizen of Mississippi and due to his poverty, he is “not able to pay the costs or give security for the same in the civil action” that is about to be commenced. *Id.* Such a case may, however, be dismissed if the claim of poverty is untrue. Miss. Code Ann. § 11-53-19. A hearing can be conducted on whether the litigant is unable to pay the costs. Rule 3 of the Mississippi Rules of Civil Procedure specifically allows courts “on the motion of any party, on the motion of the clerk of the court, or on its own initiative, [to] examine the affiant as to the facts and circumstances of his pauperism.” Miss. R. Civ. P. 3(c). Interestingly, at such a pauper hearing, the merits of the case can be analyzed. *Blanks v. State*, 594 So. 2d 25, 28 (Miss. 1992) (concluding “it is entirely reasonable and in the interest of judicial economy” at a pauper hearing “to determine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11”). If you have legitimate and reasonable basis to object to a § 11-53-17 pauper’s affidavit, move for a hearing and be prepared to also discuss the merits. A quick dismissal may result under either § 11-53-19 or Rule 11 of the Mississippi Rules of Civil Procedure.

What about the pauper on appeal? That is limited to just criminal cases.<sup>1</sup> Miss. R. App.

---

<sup>1</sup> An exception exists for post-conviction relief actions. *Moreno v. State*, 637 So. 2d 200, 202 (Miss. 1994) (holding that the only there is no provision for *in forma pauperis* civil appeals unless it “is an action for post-conviction relief”).

P. 6(a) and *Bessent v. Clark*, 974 So. 2d 928, 931 (Miss. Ct. App. 2007) (“Rule 6(a) of the Mississippi Rules of Appellate Procedure addresses *in forma pauperis* appeals incident to criminal actions, but that rule does not provide for such appeals incident to civil actions.”). The right under § 11-53-17 for a civil litigant to proceed *in forma pauperis* is limited to the trial level. *Ivy v. Merchant*, 666 So. 2d 445, 450 (Miss. 1995) (reversing trial court’s grant of leave to appeal *in forma pauperis* because the case was “a civil action seeking return of Ivy’s property” and holding “the right to appear *in forma pauperis* in a civil matter exists at the trial level only”), *Nelson v. Bank of Mississippi*, 498 So. 2d 365, 365 (Miss. 1986) (finding that Miss Code Ann. § 11-53-17 only “authorizes *in forma pauperis* proceeding in civil cases at the trial level only.”), and *Davis v. Office Max*, 131 So. 3d 588, 591 (Miss. Ct. App. 2013) (same).

Often, *pro se* litigants can and do pay the filing fee, not even invoking § 11-53-17. If the *pro se* litigants lose at the trial court level, they seek to appeal but the cost of the record proves to be prohibitive. We had a case with a *pro se* litigant (“Mark”) who attempted to appeal a grant of summary judgment in a contract matter. After learning of the costs of the record, Mark filed a motion to proceed *in forma pauperis*. We objected; the trial court agreed with us and Mark was unable to prosecute his appeal.

#### **LESSON #4: Always Remember the Rules of Civil Procedure**

Often, *pro se* litigants are not familiar with the ins and outs of practicing law. Even if their claims have merit, they are unable to comply with rules that are second nature to litigators. You do your client (and the record on appeal) a disservice if you do not request compliance.

*Pro se* litigants are “afforded latitude.” *Black v. City of Tupelo*, 853 So. 2d 1221, 1226 (Miss. 2003). Mississippi courts will take “into account” that a plaintiff is proceeding *pro se* and may “credit not so well pleaded allegations so that a . . . meritorious complaint may not be lost because inartfully drafted.” *Ivy v. Merchant*, 666 So. 2d 445, 449 (Miss. 1995) and *Zimmerman v. Three Rivers Planning & Dev. Dist.*, 747 So. 2d 853, 856 (Miss. App. 1999). Despite this latitude, *pro se* litigants are “held to the same rules of procedure and substantive law as represented parties.” *Harvey v. Stone County Sch. Dist.*, 862 So. 2d 545, 549 (Miss. Ct. App. 2003).

What does this mean for someone proceeding opposite a *pro se* litigant? Remember the obligations of the rules of civil procedure. Do not abuse the rules, do not anger the judge, but leave it to the court to “afford latitude.” What rules are particularly useful in *pro se* litigation? In my experience, three rules: Rule 11, Rule 12, and Rule 41.

#### **LESSON #5: Insist That Pleadings Make Sense**

Some *pro se* litigants file pleadings that do not make much sense. And I do not mean calling something a Motion for Judgment Notwithstanding the Verdict when the resolution of the case was an order granting summary judgment: in that case, it was clear from the body of the motion that Mark was really moving for reconsideration. I am talking about pleadings that are indecipherable, which I faced regularly with a professional *pro se* litigant we will call Luke.

Luke liked to cobble pleadings he copied from other people together. Any response to summary judgment was good enough for him to copy, but he was not just avoiding reinventing the wheel. Luke’s pleadings were like Frankenstein’s monster except the pieces didn’t make a recognizable body and never came alive. We used Rule 12 to force Luke to redraft and refile

pleadings in an effort to find out what the litigation was really about. Under Rule 12, “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading.” Miss. R. Civ. P. 12(e). A motion for more definite statement requires the movant to provide specificity regarding “the defects complained of and the details desired.” *Id.* If the motion is granted, there is a ten day window to fix the pleading or it will be stricken. *Id.*

Rule 12 does not apply simply to complaints. Mississippi law requires all written motions to “state with particularity the grounds therefor, and shall set for the relief or order sought.” Miss. R. Civ. P. 7(b). Our rules contemplate – and even encourage – responses to motions. *See, e.g.,* Miss. URCCC 4.03 (providing timeline for responding to motions) and Miss. R. Civ. P. 5(a) (requiring “every paper relating to discovery” and “every written motion” be served upon the parties) and Miss. R. Civ. P. 6 (requiring written motions be served at least five days before the hearing for the motion).

Be warned that Rule 12 is not a panacea for all inartful pleadings; instead it “is plainly designed to strike at unintelligibility rather than lack of detail.” Moore’s Federal Practice Civil § 12.36. It applies when, for example, a “complaint is so unintelligible that defendants cannot understand the allegations and are unable to respond.” *Federal Deposit Ins. Corp. v. Wise*, 758 F. Supp. 1414, 1418 (D. Colo. 1991). Luke filed three complaints before there was one that, while still inartful, stated what he was alleging against our client (bad faith denial of an insurance claim that actually had not been denied). Without a clearly-defined complaint, it is impossible to know the appropriate scope of discovery under Rule 26 let alone what actions you must take to defend your client.

Without abuse that will anger the judge, motions for more definite statements are a way to protect you from guessing what the opposing litigant – *pro se* or not – intends. Our courts have never imposed an obligation on attorneys to guess what the opposing side means. We certainly owe it to our clients to understand the case as the opponent intends, not as we presume.

## **LESSON #6: Do Not Give Up on Awarded Sanctions**

Since Rule 11 of the Mississippi Rules of Civil Procedure applies to *pro se* parties, sanctions can be awarded against them. *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 118 (Miss. 1987). Since *pro se* litigants are often so invested in the case – no filter of an attorney between the aggrieved party and the pen – some insert false, scandalous, or libelous material into their pleadings. Rule 11 provides a mechanism for awarding attorneys’ fees if such a pleading is filed. Miss. R. Civ. P. 11(b).

Toward the end of our last case with Luke – the professional *pro se* litigant – he became so angry with my client that he began filing pleadings with utterly false, but seemingly specific allegations, including claims of drug use and lying to the court. In response, we moved to strike each pleading and sought attorneys’ fees. The court granted the motions and, after the second set of identical defamatory allegations was filed, agreed to award attorneys’ fees. This was not the first time I had obtained sanctions from Luke, but we had not pushed the issue of recovery before. This time was different. After Luke failed to pay or even respond to a written request for payment, he sought to appeal the court’s grant of summary judgment. At this point, we turned to Rule 41 and moved for an involuntary dismissal of his appeal.

Rule 41 provides that if a plaintiff fails “to comply with . . . any order of court, a defendant may move for dismissal of an action or of any claim against him.” Miss. R. Civ. P. 41(b). Certainly dismissal of an action for failure to comply with a court’s order is an “extreme and harsh sanction,” but it is well within a court’s discretion to order the dismissal. *Wallace v. Jones*, 572 So. 2d 371, 375-76 (Miss. 1990). This is especially true if you can establish that the opposing party (*pro se* or otherwise) has shown repeated contempt for the court’s orders. *See, e.g., Quagliano v. United States*, 293 F. Supp. 670, 672 (S.D.N.Y. 1968) (noting a court must require a specific party’s compliance with its orders in order to ensure compliance by all who are before it).

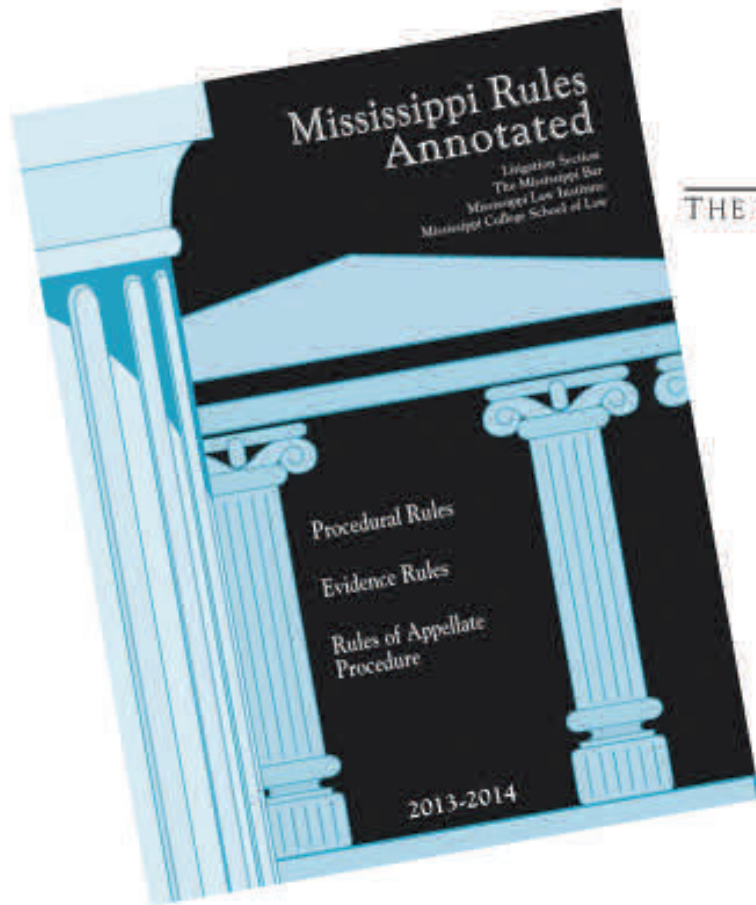
Even in the face of clear contempt, courts will generally consider lesser sanctions than dismissal. *Harvey v. Stone Cnty. Sch. Dist.*, 862 So. 2d 545, 551 (Miss. App. 2003). Remind the court that the awarded attorneys’ fees were the lesser sanctions. Most courts will, however, want to provide “explicit warnings” prior to dismissal. *Harvey*, 862 So. 2d at 551. *See also Hillman v. Weatherly*, 14 So. 3d 721, 728 (Miss. 2009) (noting lesser sanctions include “explicit warnings”). You can get your ducks in a row for a Rule 41 involuntary dismissal if you request deadlines for payment of sanctions in your motion for sanctions with the explicit warning that dismissal may result if payment is not made.

### **LESSON #7: Reason Is Good, But So Is Passion**

Often, litigation with attorneys is just business. While our clients and we care about the outcome, we generally encourage our clients to make decisions based on rational and reasoned analysis. Not so with *pro se* litigants. Their passion can be contagious and that can be a good thing. Passion is important to a healthy career, including the practice of law. It is never a bad thing to be passionate about your case and your career – so long as you stay within the bounds of our rules and procedures.



# Mississippi Rules Annotated



recently published by the  
*Litigation Section of*



and



**PROCEDURAL RULES  
EVIDENCE RULES  
RULES OF APPELLATE PROCEDURE**

Mississippi Rules Annotated is the most comprehensive compilation of case annotations for the civil procedure, evidence and appellate court rules available on the market. Annotations are arranged topically, making it easier to pinpoint cases that discuss a particular portion of a rule.

Cost: \$135.00 plus shipping and handling per book. If you are in the Jackson area, you may save the shipping and handling fee by picking up copies at MLI Press, 151 E. Griffith Street in Jackson.

If you are a member of the Litigation/General Practice Section of The Mississippi Bar, you will receive a \$15.00 discount, and your book will cost \$120.00 plus shipping and handling.

## Mississippi Rules Annotated Order Form

Name \_\_\_\_\_

Firm \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_

E-mail \_\_\_\_\_

Enclosed is my check.  
Make check payable to  
MLi Press

_____ copies @ \$135.00/book = \$	
(MS Bar Litigation/General Practice members only pay \$120.00/book.)	
Plus shipping & handling	+ _____
\$10 for 1 book	
\$15 for 2-4 books	
\$22 for 5-10 books	
\$40 for 11-20 books	
<b>Total = \$</b>	_____

Charge my order to:  
 Visa  MasterCard

Account No. \_\_\_\_\_

Exp. Date \_\_\_\_\_ Security Code \_\_\_\_\_

Signature \_\_\_\_\_

Mail to:  
**MS Rules Annotated**  
P.O. Box 1122  
Jackson, MS 39201  
or Fax: 601-925-7114



### MAIL

Mail request and check to:  
MLi Press  
P.O. Box 1122  
Jackson, MS 39205



### PICK-UP

Purchase your book at the Mississippi College School of Law  
151 E. Griffith St.  
Jackson, MS 39201  
(save the S&H fee)



### FAX

Fax request to MLI Press at:  
601-925-7114



### INTERNET

Order on-line:  
[www.law.mc.edu/publications](http://www.law.mc.edu/publications)

## Litigation Section Executive Committee:

**Chair**

Meade Mitchell  
Butler Snow LLP  
P O Box 6010  
Ridgeland, MS 39157-6010  
Phone: (601) 985-4560  
Fax: (601) 985-4500  
Email: [meade.mitchell@butlersnow.com](mailto:meade.mitchell@butlersnow.com)

**Vice Chair**

Kelly Sessoms  
Dogan & Wilkinson PLLC  
PO Box 1618  
Pascagoula, MS 39568-1618  
Phone: (228) 762-2272  
Fax: (228) 762-3223  
Email: [ksessoms@dwwattorneys.com](mailto:ksessoms@dwwattorneys.com)

**Secretary**

Matt Miller  
Copeland Cook Taylor & Bush  
P O Box 17619  
Hattiesburg, MS 39404-7619  
Phone: (601) 264-6670  
Fax: (601) 264-5660  
Email: [mmiller@cctb.com](mailto:mmiller@cctb.com)

**Past Chair**

Rebecca Wiggs  
Watkins & Eager  
P O Box 650  
Jackson, MS 39205-0650  
Phone: (601) 948-6470  
Fax: (601) 965-1901  
Email: [rwiggs@watkinseager.com](mailto:rwiggs@watkinseager.com)

**Member at Large (8/2013-7/2016)**

Clarence Webster  
Bradley Arant Boult Cummings LLP  
188 E Capitol St Ste 400  
Jackson, MS 39201-2100  
Phone: (601) 592-9906  
Fax: (601) 592-9906  
Email: [cwebster@babco.com](mailto:cwebster@babco.com)

**Member at Large (8/2014-7/2017)**

Rachel Waide  
Waide & Associates  
P O Box 1357  
Tupelo, MS 38802-1357  
Phone: (662) 842-7324  
Fax: (662) 842-8056  
Email: [rpierce@waidelaw.com](mailto:rpierce@waidelaw.com)

**Member at Large (8/2015-7/2018)**

Brian Hyneman  
Hickman Goza & Spragins PLLC  
P O Box 668  
Oxford, MS 38655-0668  
Phone: (662) 234-4000  
Fax: (662) 234-2000  
Email: [bhyneman@hickmanlaw.com](mailto:bhyneman@hickmanlaw.com)