Transportation MEDIATION

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Introduction

Typically, representatives of the transportation company (trucking company, railroad, maritime company, airline or other carrier) will be on the scene of a catastrophic injury within 24-48 hours. They will make an immediate assessment of liability and the damages. The transportation company will have a very early opportunity to determine whether and how to approach the injured parties and their families. The aware carrier will set the tone with the injured parties and their families by choosing to use either an empathic approach to the discussion or a traditional adversarial approach. That initial call is critical. It will lay the groundwork for an audience that is receptive to pre-litigation and early dispute resolution, including pre-litigation expert witness depositions, or it will escalate the anger, hurt and pain that accompany catastrophic injury cases, perhaps foreclosing forever this important option, which exists even where liability is hotly contested. This article is written with the hope of aiding parties in the early and fair resolution of these special needs cases, where clear liability exists, and in instances where liability is hotly contested.

Pre-Litigation and Early Dispute Mediation of Transportation Cases

We call the decision to use an empathic approach to pre-litigation or early dispute mediation of transportation cases "Empathic Mediation." Empathic Mediation is not shorthand for merely or necessarily advance pay compensation. It is not shorthand for a process requiring one to agree with or even like another's point of view. It does not mandate niceness. Empathic Mediation, as we use the term, is a process where two components, empathy and assertiveness, are operating in tandem with one another. Empathy is a "value-neutral mode of observation" in which the listener reflects upon, responds to and describes someone else's perception in a non-judgmental fashion. Assertiveness is describing the speaker's own perception without belligerence, domination or anger. The assumption underlying Empathic Mediation is that differing perspectives do not make one perspective valid and the other invalid. Rather, the assumption is that both are valid and it is a legitimate goal to seek to satisfy both perspectives in the negotiation process.[1] The upshot of Empathic Mediation is that one is according an opponent dignity and respect (empathy) while simultaneously seeking to satisfy one's own perspective (assertiveness). If both parties are engaged in this type of negotiation, three critical byproducts occur. First, the rage and profound hurt accompanying a catastrophic injury case can be managed so that the negotiation does not derail. Second, an honest exploration of ideas can occur. Third, the negotiation process remains balanced. By each party's willingness to seek to satisfy its opponent's perspective as well as its own, the possibilities are at least doubled.

Some advocates and parties believe that if liability is contested or the damages assessment is in dispute, the defense cannot be empathic and acknowledge the severity of the injury. As demonstrated below in the Assertiveness Dialogue, this is simply not true. Similarly, the plaintiff's attorney, whose client turns out to be a long-term homeless drug addict, who was severely injured while asleep on a train trestle, may find his credibility enhanced by acknowledging the uphill battle he faces with respect to a loss of income claim, jury appeal or ability to establish liability.

Dialogue Demonstration

In this Empathy and Assertiveness dialogue demonstration, a fourth year college student, majoring in sports management and on the verge of a professional basketball career, is rendered a paraplegic when he is struck by an intoxicated driver. In the Empathy Dialogue, the defense attorney demonstrates his ability to reflect upon, respond to and describe the plaintiff's situation, without infusing his own point of view. In the Assertiveness Dialogue, the defense attorney demonstrates his ability to set forth a perspective, though different, which is heard by the plaintiff.

1. Empathy Dialogue

P: Your drunk driver caused me to be wheelchair bound.

D: And to lose your dreams.

P: I was headed for a basketball career – and even had a chance of turning pro.

D: Your skills, drive and talent gave you a good shot at a pro ball career. You were about to begin your fourth year of college

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when the accident occurred, right?

P: Yes, I was within striking distance of the NBA.

D: Wow – that is absolutely awful timing. What a horrible disappointment. I am so sorry that a young man such as you has suffered so – and I don't just mean physically – that is certainly enough – but to have your heart and soul crushed may be even more dreadful.

2. Assertiveness Dialogue

D: You know that I represent the trucking company and the…

P: Driver – that a-hole.

D: I get those words. We, the trucking company, take responsibility for the accident.

P: Really?

D: So much so that we've implemented a number of changes: #1: Every driver will be subject to random drug and alcohol testing before all assignments; #2: We'd like you to be our spokesman for our 'Safety at the Wheel Program,' at our expense, and with a handsome salary. You could talk about safety in a way that no one else could.

P: What about my lost career?

D: Your "possible" career – my law partner, who has a sports practice, has contacts with ball clubs. Your sports management degree could lead to a job with a ball club.

P: What about the money?

D: You had promise as a ballplayer, but no guarantee. I don't just mean because of our driver's negligence. Although you were being groomed, it's not a 100% certainty that you would have been picked up, which is why I said "possible" career.

P: Starting my fourth year at college – about a 75% chance.

D: So, your dream was not a certainty.

P: You're going to pay me very little?

D: I'm being transparent about my damages assessment. The money will reflect promise, but not certainty.

P: I may have been in the 25% category – I see where you're going. And still approaching ball clubs?

D: Of course. We want to satisfy you emotionally, as well as monetarily.

Empathy dialogue means that the listener, the defense counsel in the above example, is doing the proverbial 'walking in another person's shoes' in the sense of hearing and understanding exactly what the speaker is saying, both in words, emotion and meaning. Then the listener is summarizing back the words, emotion and meaning to the speaker. It is not the time for the listener to dilute the speaker's words, emotion or meaning by interjecting the listener's own interpretation of events, contrary opinions or plausible interpretations; nor is it the time to engage the speaker in a discussion about the speaker's view of the law, evidence or credibility of witnesses. The listener's goal is to keep the focus completely on the speaker, making sure that the listener's understanding is accurate and complete, and to keep the dialogue going.

Assertiveness dialogue means that the speaker, the defense counsel in the above example, is putting forth the speaker's perspective in a deliberate, but monitored manner. It is not dominating the conversation or acting up or acting out with annoyance, antagonism or impatience. It is having the confidence to express a perspective different from that of the listener, in this example the plaintiff, and being willing to provide explanations or arguments in a clear fashion. It is being willing to probe subjects that the other side may have preferred to have left untouched or may have overlooked. It is having the courage to speak a different point of view in a direct, but non-inflammatory manner, in what is, by definition, a challenging situation.

In catastrophic injury transportation cases the difference between settling a case in mediation or not may very well rest on the ability to navigate between empathy and assertiveness dialogues. The ideal situation would be where both sides understand and implement this mode of exchange. Even a one-sided effort at empathy and assertiveness dialogue can infuse the negotiation with a temperament that is more conducive to resolution. The astute counsel will have these tools in the negotiator's toolbox.

Behaviors That Support Empathic Mediation

For Empathic Mediation to have a chance at success, certain behaviors should be understood and exercised at the appropriate time. These behaviors include: dignity and respect; acknowledgment and apology; paying attention to both the rational and emotional aspects of the conflict and seeing the best in others by building bridges of appreciation and understanding. In its ultimate form, empathic mediation gives rise to forgiveness, reconciliation and restitution.

Dignity and Respect are words easy to utter but sometimes hard to define. The most important aspect of dignity and respect to keep in mind is that the content of these words differ from person to person, organization to organization or culture to culture. Dignity and respect means acknowledging differences and being willing to become vulnerable by asking what kind of conduct, attitude or words another needs to feel that he or she is being treated with dignity and respect, and then being willing to execute.

Acknowledgement and Apology requires a willingness to step across boundaries and say "I made a mistake and I am sorry for the hurt or harm it has caused." Sometimes a sincere

acknowledgement and apology can do more for easing the pain that drives the high settlement demand than hours, days, months or years of distributive bargaining. One caveat, however, is that it works only if it is delivered with sincerity that is felt by the recipient. A hollow or disingenuous pattern will be a certain setback in the negotiations. The mediator should provide guidance about the timing and manner of acknowledgment and apology, as well as lead a discussion about who should be present.

Apology and acknowledgment are similar but they are not the same. Apology entails an admission of responsibility. If it is called for, it is best delivered early and clearly. At the same time it may be combined with a forthright and assertive discussion of damages as noted in the dialogue demonstration. Where liability is contested and the core harm is sudden death, amputation, quadriplegia, etc., the basic injury can be acknowledged and accepted while the extent of harm may still be in issue.

Rational and Emotional elements are present in all conflicts. Thoughts about conflict in our society emanate from belief systems about human nature, advanced by philosophers such as Saint Augustine, or psychoanalyst Sigmund Freud. The predominant belief, namely, that human beings are inherently evil, led to the conclusion that conflict, being unavoidable, must be overcome by coercion, power or violence. From Greek philosopher Plato is the precept that insofar as rationality and emotion, "rational ability must take priority over our senses." The modern neurosciences speak to this faulty thinking. "Rationality does not have priority over emotions, but, in fact, the opposite is true. "… human beings may act from preconscious brain processes of which there is no conscious awareness. In fact, humans are 98 percent emotional and about 2 percent rational.[2]" In fact, a more current viewpoint is that emotions inform decision making.[3] Counsel who are studied about the role of emotion in conflict and its resolution, and who are able to conform their "moves" and behaviors to parallel current research will lean away from denigrating the role of emotion in settlement negotiations and will achieve better results.

Appreciation and Understanding is one of the core concerns that motivates people.[4] Feeling appreciated is something that impacts anyone, be it a corporate CEO, child or employee. Extending appreciation and understanding triggers positive feelings and thus contributes to creating a good negotiation exchange. A 3-step template provides a useful framework about how to deliver a successful appreciation: 1) understand the other's point of view; 2) find merit in what the other person thinks, feels or does; and 3) communicate this understanding back to the other person.[5] Few people will remain unaffected by an expression of appreciation and understanding.

Not all cases are good candidates for Empathic Mediation and these attendant behaviors. The optimal circumstances that make Empathic Mediation attractive are:

1. Parties and counsel who are committed to this approach;
2. Parties who are willing to open their files;
3. Clear liability with or without aggravating circumstances;
4. Severe and/or catastrophic injuries without any causation issues;
5. Injured parties with whom the jury will identify;
6. A commitment by both parties to recognize transactional cost savings;
7. Participation of decision makers;
8. Pre-mediation contact between the parties and the mediator:
   (a) to assist in the design of the mediation, and
   (b) to assure the exchange of necessary information;
9. Good faith respectful negotiations with some or all of the following behaviors:
   (a) Use of the "Talking Stick", and/or
   (b) Use of the Condensed Negotiation; and
10. A target defendant which, understanding that liability is virtually certain, wishes to demonstrate remorse and manage/reduce the ultimate dollars paid out.[6]

Special Negotiation Techniques Useful for Empathic Transportation Mediations

The Talking Stick

The Talking Stick is a "stick" of varying compositions and designs used by many Native American tribes in handling important tribal and intertribal issues. There is a special reverence that surrounds the "Talking Stick." It calls for silence, listening, and reflection. It symbolizes the Native American adage that "the Creator gave us two ears and one mouth so we can listen twice as much as we speak." The "Talking Stick" approach is used in mediations to give one person the floor while creating the obligation of others to listen with respect. As the "Talking Stick" makes its way around the table, just as it might in a Tipis or a Hogan, people learn from each other and honor the other's point of view. In modern mediations this old symbol, borrowed from America's indigenous people, enables people to connect with each other, if they wish to do so. (See, Joe Epstein, Native American Wisdom: Lessons Learned from Mediation, Preventative Law Reporter, (Fall 2003), Vol. 22, No. 1, Pgs. 27-31.).

The Condensed Negotiation

"In a number of cases we have effectively used a three to five move mediation process rather than "mediation by a thousand cuts." This condensed negotiation process requires thoughtful moves. This negotiating approach is particularly appropriate in high value pre-litigation and early dispute mediation. The three-step process walks the talk of apology and respect, and requires that each party move only three to five times to get to

its "best" number. When we get each party to put his or her best number on the table in the third, fourth or fifth move, there are several scenarios that may unfold. First, the plaintiff may accept the defendant's last number. Second, we can use what is referred to as a mediator's number that is somewhere between the brackets set by the parties in their "last" move. Third, we can convert the parties' last numbers to a variation of baseball arbitration. With this alternative we write down a secret mediator's number and then have the parties give us a number that is shared only with us. The number that is closest to the mediator's secret number becomes the final number and the case is over. We find that this abbreviated process helps the parties to walk the talk of respect, acknowledgment, reconciliation, restitution, forgiveness and resolution. By avoiding the often frustrating processes of multiple moves, the ploy of "I have to call my supervisor or home office," the trashing of the plaintiff, or the raising of false or tangential issues, the result is less posturing, fewer negotiation moves and a negotiation dance that has finality. This negotiation process works in these cases because the nature of the damages and the clarity of liability require a different tone if mediation is to be a financial and emotional success. (See, Joe Epstein with Susan Epstein, Pre-Litigation and Early Dispute Resolution, Trial Talk (April/May 2007), *Trial Talk*, Pgs. 23-25.).

Special Issues Present or Intensified in Transportation Cases

Multi-Party Design and Mediation Issues

Unique issues arise when catastrophic injury cases involve multiple parties on one or both sides. It is our view that such cases require individualized case design. Counsel should confer with each other and the mediator to create the most custom designed process possible. This might be done by telephone conference call or an in-person meeting. Counsel and the mediator should address such questions as:

1. What information needs to be exchanged before the mediation?
2. Who needs to be present at the mediation?
3. Should the mediator conduct pre-mediation caucuses with individual parties or groups of parties?
4. Should the mediator make house calls or site visits before the mediation?
5. When should the mediation be held?
6. Where should the mediation be held?
7. Should there be co-mediators?
8. Should there be pre-mediation demands or bracketing?
9. Should the parties and the mediator design the structure of the mediation in advance?
10. Should there be a general session and/or specialty sessions?
11. Should settlement pods be used?
12. Should the mediation be structured to address specific issues negotiations?
13. What is the most productive way to dialogue about needs, underlying interests, and motivations without running afoul of inflaming rather than calming participants?

High Tech Portable Devices[7]

Our experience indicates that capable plaintiff's counsel are poised to argue that high tech portable devices are distractions that contribute or lead to accidents and injuries. Scientific as well as anecdotal evidence seem to support this premise. Astute plaintiff's counsel are making discovery of hand held devices a regular part of the case work up. Discovery focusing on the use of hand held devices such as cell phones (phone, text messaging, taking pictures, global positioning, email), PDA's, and MP3's is surfacing in all automotive cases. The potential liability flowing from the use of these devices seems to be having an even greater impact when raised in the context of a trucking or railroad case. Arguing that use of CB radios and maintaining electronic logs are also distractions is becoming prevalent in trucking and railroad cases. In trucking cases as in automotive cases, after-market GPS devices lend themselves to an argument that they too are creating a distraction. On the defense side, our recent experience suggests areas of training, internal regulation and early discovery are becoming more important.

MCS-90 Endorsement[8]

Knowledgeable plaintiff's counsel are using this mandate from the Motor Carrier Safety Act of 1980[9] to find coverage from the trailer's owner, the company loading the trailer, or the company shipping the goods, where, but for this endorsement, none would have existed. The MSC-90 Endorsement, best understood as an unconditional guarantee suretyship to the public, which augments the interstate motor carrier's liability policy, nullifies definitions, stipulations, conditions or provisions that serve to relieve the insured of liability. The purpose of the act is protect the public where traditional insurance would not apply due to situations such as lack of notice, policy lapse, failure to properly name the subject vehicle, etc. Recent federal regulations cast doubt on the expansive interpretation of the MCS-90 Endorsement in prior cases. Given the still unfolding interpretation of the MCS-90 Endorsement, for mediation purposes, all parties must be fully informed about necessary and potentially necessary parties at the mediation table.

Railroad Pre-emption

By 2007, federal pre-emption case law had evolved very favorably for the railroad industry which, some say, was enjoying virtual immunity from negligence claims under the Federal Railroad Safety Act (FRSA). This all

changed in 2007 with the enactment of an amendment which limits the scope of the preemption provision.[10] Now actions may be brought: (1) when a railroad carrier fails to comply with the federal standard of care, (2) when the railroad fails to comply with its own plan, rule or standard, or (3) when the railroad fails to comply with state law. It is too early to say what this will mean in terms of the outcome of railroad litigation. It is predictable, however, that parties bringing certain types of cases foreclosed from the courtroom before 2007 will now have their day in court. Undoubtedly, railroad companies, attorneys, and mediators will be handling more of the catastrophic injury cases that flow from these circumstances.

Security Needs

Plaintiffs want acknowledgement and apologies where appropriate. They want the mediation process to be fair, and desire to be treated with dignity and respect, not as inanimate objects for which a pay out is necessary. This may be reflected by both words and deeds. However, the most important underlying interest in catastrophic injury cases is the Plaintiff's need for a *secure future*. A secure future consists of coverage for health care, education, food, rent, and other basic needs, while providing the ability to pay off accumulated past debts, attorney fees, costs and related items. Thus, both sides should look at protecting the catastrophically injured Plaintiff while also accounting for his/her intangible losses. The failure to address the core need of security often will result in a "failed" mediation. This urgency of paying attention to the Plaintiff's needs for a secure future is present even where a strong liability defense exists. Defendants must recognize that in failing to address the security needs of the plaintiff, defendants will find themselves in trial. Ignoring the security needs gives the Plaintiff no choice but to gamble, even on an "unlikely" win. A more proactive approach in the settlement negotiations would be to identify and designate some settlement dollars specifically for the security needs, while still articulating a percentage chance of prevailing on the liability defense. This approach should increase the chances for settlement without necessarily increasing the settlement dollars.

Security issues also apply to the defense side of a case. The defendant's risk assessment must leave the defendant in as solvent a condition as possible. Where there are catastrophic injuries, an appealing plaintiff, and/or aggravating circumstances, the security needs of the defense mandate that the defense work strenuously to cap or limit the Defendant's exposure rather than risking a run-away jury. The ability of the defendant to absorb litigation costs of settlement as part of doing business speaks to the security needs of defendant and the life blood of the business.

Presence of Fear

Fear, the number one persuasive factor, abounds on both sides of a catastrophic injury case. On the Plaintiff's side fear can be real practical issues like eating, paying the mortgage, getting medical services, dealing with an uncertain future not to mention coping with anger and grief as noted below. The Plaintiff and/or Plaintiff's counsel has to be concerned with funding the case. There are accident reconstruction experts, biomechanical engineers, life care planners, economists, graphic consultants, jury consultants, and others who are frequently called into these cases. Such experts are costly and this cost can cause additional economic pressure.

The Defense side has the same transactional costs plus the down time of having its personnel embroiled in litigation. The fear of negative publicity and fallout therefrom, including product or service reputation and fiscal impact, loom large for the Defense side. The Defense bears the risk of a jury placing more emphasis on and empathy for the catastrophically injured, the widow and/or fatherless children, irrespective of the technical or legal arguments. The Defense side risks a jury's compassion and identification with the Plaintiff's side. A healthy risk analysis, void of rose-colored glasses, will assist the Defense side in making an accurate calculation and assessment of these factors.

Another type of fear that attorneys, risk managers, in-house counsel, and adjusters face is the 'pass the buck' mentality, typified by a prideful statement to the effect of "if we're going to pay this kind of money, a jury is going to have to tell us to do it." Whereas in some situations this may be a valid response, sometimes individuals on the defense side do not have the courage to give credence to the "other side's case, lest they be labeled "traitor" by their peers, superiors, social group or any other group to which they belong or with which they identify. To surface these issues and protect the defense side from being blindsided by such normal human tendencies, an astute mediator can ask the question "if you were sitting at the other counsel table next to your attorney, what would your response be" without shaming anyone into submission. The goal is all about helping the defense engage in an objective analysis about a situation that is very far from objective. For most of us, when having to make a tough decision, isn't it tempting to avoid conflict and await a jury verdict than to press one's own side for a smart compromise?

In the end, if large risky cases are to be settled, both sides must have the courage to appreciate their own and the other side's risk factors, needs, underlying interests, and motivations. Both sides can do well by ridding themselves of the warrior's armor and assimilating "coaching" from a sharp mediator.

Emotional Needs

Emotional issues abound in wrongful death and catastrophic injury cases. With the sudden loss of a loved one there is unanticipated grief, incomprehensible loss, and no time for adjustment. Elizabeth Kubler-Ross' famous stages of grief have been described by James Harris Lord, *No*

Time For Goodbyes, Pg. 44 (2002) as denial, anger, bargaining, depression, and acceptance. Dr. Theresa A. Rando speaks of the three stages of grief being avoidance, confrontation, and accommodation. Theresa A. Rando, PHD, *How To Go On Living When Someone You Love Dies, Pg. 19 (1988)*. Whether it is 3 stages or 4 stages it is painful, gut wrenching, and life altering. There is no time for preparation and no time for goodbyes. The survivors are left with "what ifs" and "what might have been," and deep regrets.

Similar emotions arise with amputations, paraplegia, quadriplegia, and other life altering injuries. There is intense anger, a deep sense of loss, a sense of injustice, and "why me" feelings.

Anger and revenge may fuel the Plaintiff. With such intense feeling how does a defendant deal with them? First, defendants must acknowledge them and honor the loss. According the victim dignity and respect is a start. Second, dealing with survivors in a wrongful death case and victims of a catastrophic injury require integrity. Is there really a liability issue? If not, an apology and an empathic approach in the context of early dispute resolution are the most likely to lead to a resolution that has a sense of fairness about it. If liability is contested that should be respectfully presented without deprecating the loss. A conscious and concerted effort to draw the poison from the room is usually the best way to get to resolution. See, *Mediating Wrongful Death Cases*, Joe Epstein with Steve Berkowitz, Trial Talk (August/September 2005), Pgs. 35-38.

It is often mistakenly thought that emotional issues apply only on the plaintiff's side of the mediation table. This is not true. The ability of the defendant to articulate its own emotional issues can be a key to resurrecting a balance in the mediation. Underlying what might be an appearance of detachment on the part of the defense are professional risk managers and in-house counsel who take their jobs very seriously. These individuals may personalize the attacks on the motor or railroad transportation carrier as being a reflection on their own professional abilities. This is particularly evident when issues of negligent hiring, training, retention, and records retention exist. As with the plaintiff who is being shown dignity and respect, and with whom the defendant is managing empathy and assertiveness dialogues, the plaintiff's ability to mirror the same will enable the transportation carrier's representative to engage in more fruitful negotiations.

Conclusion

Where huge dollars are at stake, so too are huge emotions. Because the stakes are so high, mediation participants tend to become positional, as does their bargaining. Grays and muted colors cease to exist, and only stark blacks and whites are seen. Thus, transportation cases present unique challenges for negotiators if these cases are to resolve. Thankfully these challenges also present rewarding opportunities. What is required of plaintiff and defense counsel if a catastrophic transportation carrier case is to be resolved? The answer lies in a balance of "humanness" and the art of sophisticated advocacy. "Humanness" is being cognizant of timing, mannerisms, delivery, tone of voice, language, body language, demeanor, temperament, authenticity, and many other ethereal qualities that contribute to or detract from a fruitful mediation dialogue. Being mindful of reciprocal fears, security needs, and the importance of silence, listening, and reflection through the use of the Talking Stick will help. A perceptive mediator can provide important guidance and coaching in these endeavors. By demonstrating "humanness," the likelihood is that the partners in conflict will be heard. By demonstrating "humanness" in the situation that has befallen plaintiff, the sophisticated defense team will be able to advocate in such a manner and through such a means so as to create a bridge to conflict resolution. The goal, to allow the stark blacks and whites to fuse into and create grey tones, will be achieved. Both parties can address their own and their opponent's security needs and eliminate their fear.

Endnotes

1. Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, Beyond Winning (The Belknap Press of Harvard University Press, Pgs. 46-47.
2. Douglas Noll, Peacemaking (Cascadia Publishing House 2003), Pg. 148.
3. Druskat, Sala & Mount, Linking Emotional Intelligence and Performance at Work (Lawrence Erlbaum Associates, Inc. 2006).
4. Roger Fisher and Daniel Shapiro, Beyond Reason (Penguin Group 2005).
5. *Id.*, Pg. 27.
6. In medical malpractice cases, not unlike catastrophic injury cases, it is clear that a human, empathetic touch of authentic understanding of a horrific loss triggers feelings of forgiveness for which no amount of money can substitute and does impact settlement figures. Hyman et al., "*Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project* (2006 25, No. 5 *Health Affairs*, Pg. 1394); *Apology and Medical Error Full Disclosure Programs: Is Saying "I'm Sorry" the Answer to Reducing Hospital Legal Costs?* (Bhavani S. Reddy, 2006, Health Law Perspectives, http://www.law.uh.edu/healthlaw/perspectives/homepage.asp).
7. Sachs, *Txt Msgs and Other Driving Distractions*, (Feb 2008), Trial, at Pg. 20.
8. 49 U.S.C. §13906 (2000); 49 C.F.R. §387.7, §387.15 (2002).
9. *Id.*
10. The amendment is in section 1528 of the Implementing Recommendations of the 9/11 Commission Act, signed into law by President Bush on August 3, 2007 and codified as 49 U.S.C. §20106.