

# Committee News



Spring 2016

## Commercial Transportation Litigation Committee

### ABA TRANSPORTATION MEGACONFERENCE XIII - MARCH 9-10, 2017 SHERATON NEW ORLEANS



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## MESSAGE FROM THE EDITORS



The Co-Editors of the Commercial Transportation Litigation Committee are grateful to the lawyers who authored the articles in this Spring 2016 edition of the newsletter. We look forward to future submissions from our committee members and others. [↶](#) [↷](#)

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## MESSAGE FROM THE CHAIR



Dear Members of the Commercial Transportation Litigation Committee:

As the weather turns warmer here in the North, we are fast approaching TIPS Section Spring CLE Conference, May 11-15, at the Intercontinental Buckhead in Atlanta, Georgia. Our Committee will meet at the Conference and, as always, will have a social event planned. Sergio Chavez, Chair-Elect, and I hope many of you can make the trip to Atlanta and then to Buckhead for the Conference.


I want to send out a special thanks to Meade Mitchell (Butler Snow), Past Chair of the Committee, and Vice Chairs Art Spratlin (Butler Snow) and Dale Weppner (Greensfelder Hemker) for the fantastic webinar, Cars and Trucks of the (Not-So-Distant) Future and the Litigation Changes to Follow. Kudos to Webinar Chair Matt Hefflefinger for his efforts behind the scenes to make the webinar a reality. The webinar addressed the ever-changing technology in the automotive world for both cars and trucks. The webinar evaluated how the changes will affect litigation in the future, as old-fashioned negligence claims turn into complex product liability claims. Meade and Art discussed these topics:

- New car technology, including autonomous (self-driving) vehicles
- V2V - V2I communications and smart infrastructure
- Legal regulations and infrastructure challenges facing the autonomous car program
- Autonomous tractor trailers, the “new” truck driver and the effects on FMCSR hours of service
- The new crash investigation - from driver error to software defect
- The new defendants in automotive cases
- Whether this new technology will complicate or simplify automotive litigation

If you are interested in this topic please contact Meade, Art, and Dale. Thanks again guys.

This August at ABA’s Annual Meeting in San Francisco, August 4-7, the Committee is the main sponsor of a CLE program, titled It Could be the End of the Ballgame—Deposition and Trial Insights and Warnings for Preparing, Taking and Defending Rule 30(B)(6) Depositions. The program will be moderated by Mike Miller, of Drew Eckl & Farnham, and include Sergio Chavez from the Committee discussing Rule 30(B)(6) depositions from the trucking company’s perspective. We hope to see you there. Once again, a social event will be planned. An initial thought is Oakland A’s v. Chicago Cubs.

Finally, dates have been released for the ABA TIPS Commercial Transportation Mega Conference, one of the industry leading transportation conferences held every other year in New Orleans. Mark your calendars for March 9-10, 2017, at the Sheraton, New Orleans.

Sergio Chavez and I want all members to obtain the benefit of membership, and we encourage everyone to participate in the Committee. If you have questions, or want to become a vice chair and find out ways you can help the Committee please contact Sergio or me. 

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## The 2016 TIPS Section Conference

The TIPS Section Conference is the premier CLE conference for a wide-range of attorneys, including both plaintiffs and defense counsel, insurance industry employees, and in-house corporate counsel. With over 25 CLE hours, nationally known speakers, and a variety of unique networking events, this conference provides exceptional CLE and valuable opportunities. TIPS is excited to host the second annual Section Conference at the InterContinental Buckhead in Atlanta, GA, May 11-15, 2016.

### Program Highlights Include:

- U.S. Supreme Court Update
- Legal and Ethical Considerations for In-house Counsel
- Trial Tips: Effectively Examining Expert Witnesses
- Resolving Insurance Disputes Quickly
- Establishing a Successful Referral Relationship
- Handling and Litigating Claims of Bad Faith
- Cyber-Liability: Planning for the Risk
- Communicating with Millennial Jurors

A number of exciting social events will provide opportunities for attendees to meet with colleagues and expand their network: A young professionals event at SweetWater Brewery, the TIPS Leadership Luncheon, and multiple nightly networking receptions. The social highlight will be Friday's dinner at the Coca-Cola Museum.

## Register Here Now!

CLE Credit: This program is expected to qualify for 13.5 CLE credit hours (including 6.0 ethics/professionalism hours) in 60-minute states, and 16.20 credit hours (including 7.20 ethics hours) in 50-minute states. CE Credit: ABA-TIPS has partnered with CEU Institute to provide CE Credit for licensed adjusters in all states with a CE requirement. Credit hours awarded are based on state review and approval.



## EFFORTS TO CHANGE THE CSA: BETWEEN A ROCK AND A HARD PLACE?

By: Timothy Montgomery

As anybody that is familiar with or works in the field of commercial motor vehicles knows, the Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, Accountability Program, enacted in 2010, largely oversees the FMCSA's efforts to identify unsafe motor carriers and prioritize FMCSA enforcement resources on those carriers that pose the greatest risk under the system. The main workload prioritization tool is the Safety Measurement System (SMS).

Since its inception in 2010, the CSA Program has been met with a great deal of criticism and opposition from the transportation industry. In fact, many individuals entrenched within the industry believe an unintended byproduct of the CSA system is the fact that the system actually makes it more difficult for trucking companies to operate efficiently from an economic standpoint. As a result, many industry professionals and companies have gone to great lengths to propose changes to the CSA system.

Aside from economic issues related to excessive fines resulting from inspections and/or crash investigations, inherent problems exist with the accuracy of the CSA scoring system. One issue is that the CSA system does not differentiate between a simple citation being issued and an actual conviction. CSA scores often contain incorrect data that fails to provide an accurate reflection of the carrier's safety record. As a direct result, a motor carrier faces potentially unnecessary fines, along with costs and time spent for their efforts to correct the data, which is only at times successful.

The current CSA system also presents significant challenges for small motor carriers. For example, once a smaller carrier obtains a CSA score, the carrier does not have a base of inspections over which to spread or absorb the violations. As a result, the smaller motor carrier can be stuck with a negative score that is difficult to change, and may not be an accurate reflection of the carrier's overall commitment to safety.

Further complicating matters is this (often inaccurate) data is publicly available on the Internet. This information provides ammunition to plaintiffs' lawyers who attempt to use negative CSA scores against motor carriers, although the FMCSA disclaimer warnings indicates that conclusions about a carrier's safety should not be drawn from CSA data.

A great deal of information exists that these scores do not provide reliable predictions of a company's likelihood of becoming involved in an accident. (See Gallow, A.P. & Busche, M., CSA: Another Look With Similar Conclusions, Wells Fargo Securities Equity Research, July 12, 2012; Statistical Issues in the Safety Measurement and Inspection of Motor Carriers, Alliance for Safe, Efficient and Competitive Truck Transportation, July 10, 2012).

Often, courts will refuse to allow CSA scores and related information into evidence, citing the unreliability of such evidence. To date, courts have not looked favorably on safety

data compiled by the FMCSA, often simply because the safety data does not meet the minimum threshold of being unquestionably accurate. See FCCI Ins. Group v. Rodgers Metal Craft, Inc., 2008 WL 4185997 (M.D. Ga.); Kemper Ins. Co. v. J.B. Hunt, 2003 WL 25672797 (N.D. Ga.).

While the transportation industry logically favors reform of the CSA scoring system, revamping the system could have a potentially negative effect in accident-related litigation. While this provides no compelling argument against CSA reform, it is something to consider as the CSA system is further developed and reformed.

The Safer Trucks and Buses Act of 2014 H.R. 5532 (113<sup>th</sup>) was introduced on September 18, 2014, but not enacted. This bill was reintroduced on March 16, 2015, as the Safer Trucks and Buses Act of 2015 H.R. 1371. The main purpose of this bill was to utilize only safety data determined to be predictive of motor carrier crashes; address concerns related to the age of utilized safety data, including violations; develop a system that does not harm small motor carriers based upon the result

Since its inception in 2010, the CSA Program has been met with a great deal of criticism and opposition from the transportation industry.

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## SIX DAYS ON THE ROAD: AMPHETAMINE AND TRUCK ACCIDENTS - KEEPING TRANSPORTATION LAWYERS BUSY SINCE 1963 (WITH A NOD TO FREDDY FENDER)

By: [Scott Breitenwischer](#)

*"I got a ten forward gears  
and a Georgia overdrive,  
I take little white pills and my  
eyes are open wide,*

*I just passed a Jimmy and a White,  
I'm smokin' everything in sight;  
Six days on the road and I'm gonna make it  
home tonight."*

- Freddy Fender, "Six Days On The Road."

Trucking transportation is the lifeblood of American commerce. And everyone has been practically blown off the road by a roaring big rig, on a dark and rainy interstate. You look high up at the dark window and mutter, "What madman is driving that beast?"

As long as there are truckers, there will be accidents. Trucking accidents are good for the lawyer business. And one component that drives the cost of litigation is the interjection of substance abuse in an accident.

### SOME STATISTICS

Statistics reveal there are more than 4,000 fatal accidents every year involving heavy trucks (45,000 lbs or greater) in the United States. Heavy trucks are 20% to 55% more likely to be involved in a fatal crash than a passenger car. If lawyer blogs and advertisements are accurate, there are more than 500,000 truck accidents a year in this country. There is certainly no shortage of truck accident lawyers advertising on the Internet.

### IS IT THE NATURE OF THE JOB?

To compound these statistics, truckers have always and will always use psychoactive substances while on the road. The nature of the job – isolation, boredom, tight schedules and a never ending road – lends itself to abuse.

Both the National Safety Transportation Board and other worldwide studies show truckers use a variety of stimulants to get them down the road – with alcohol, marijuana and amphetamine being the most common.

It is amphetamine – the "little white pills" Freddy sang about – that seem most commonly associated with over the road truck driving in American pop culture. The image of the white line fever-crazed trucker, grinding gears, belching smoke and terrorizing the road, is a time honored music and film genre.

Culture also plays a role in truckers' amphetamine use, and it is not limited to the United States. It varies wildly by country. For example, some studies show:

- Italy – 1%
- Norway – 0.2 %
- USA – 9%
- Brazil – 70%
- Thailand – 83%

Although the reasons why truckers use amphetamine on their endless journey may seem innocuous, the downside is the side effects. These are the accident producers: vertigo, agitation, hallucinations, perception and reaction impairment.

### DRIVING THE COST OF LITIGATION, VERDICTS AND SETTLEMENT

The interjection of substance abuse in a trucking accident changes the entire complexion of liability analysis and how a case is handled. It is either problematic from a damage control perspective or a major damage model enhancer, depending which side of the case you are on. Jurors are not sympathetic to impaired truckers who cause mayhem, or to the companies that employ them.

### MODERN SCIENCE AND THE FOLLY OF MAN

Human nature is what keeps lawyers busy. And truckers were not the first to abuse amphetamine. Amphetamine has been around since 1887, when it was first synthesized in Germany by Romanian chemist Lazar Edeleanu.

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**The image of the white line fever-crazed trucker, grinding gears, belching smoke and terrorizing the road, is a time honored music and film genre.**



## EVOLVING THEORIES OF NEGLIGENCE IN TRUCKING ACCIDENT CASES AND HIRING CONCERNS

By: Elizabeth Haecker Ryan and Amanda Wingfield Goldman

Although nearly every trucking accident case involves basic theories of negligence and driver error, plaintiffs' attorneys are increasingly adding claims of negligent hiring to up the ante against commercial transportation companies. The addition of negligent hiring claims increases exposure to punitive damages and allows prejudicial evidence of unrelated accidents, incidents, and violations into evidence to inflame the jury.

### “Let the Master Answer”

*Respondeat superior* is the primary theory of liability in trucking cases, whereby a plaintiff seeks to hold an employer liable for the wrongful acts committed by its employees or agents. The doctrine of *respondeat superior* imputes the employee's liability to the employer, making the employer liable for the employee's negligence to third parties when acts or omissions are committed during the course and scope of employment. Because this liability is derivative, it is not necessary for the plaintiff to show any negligence on the part of the employer.

In recent years, courts have defined “scope of employment” broadly, as long as the injury occurs while the employee is working. Negligence of an employer may still be imputed even if an employee disobeys an employer's explicit instructions, thereby causing injury to a third party. Although state laws differ regarding what constitutes “scope of employment,” there are a number of common factors which guide resolution of this issue: (1) employee's intent; (2) nature, time and place of employee's conduct; (3) type of work employee was hired to perform; (4) incidental acts employer should reasonably expect the employee to do; (5) amount of independence employee was given in performing duties; and (6) amount of time consumed in “frolic and detour” (personal activity).

**Attempting to avoid negligent hiring claims with proper hiring processes is a double-edged sword for employers.**

There is an exception to the doctrine of *respondeat superior* for intentional torts committed in the course and scope of employment. The rationale for the exclusion is that the employer's needs are not being met when the employee's act (i.e., the tort) is not related to the business enterprise.

### Statutory Employment Relationship

Historically, trucking companies have sought to avoid vicarious liability by classifying their truckers as independent contractors, or by leasing the trucks. However a trucking company may still be held vicariously liable under the Federal Motor Carrier Safety Regulations (“FMSCR”). The FMSCR creates vicarious liability for trucking companies by requiring that lease agreements contain provisions that give the trucking company “exclusive possession, control, and use of” and “complete responsibility for the operation of the equipment for the duration of the lease.” 49 C.F.R. § 376.12(c)(1). This essentially creates an employment/agency relationship, making the trucking company the trucker's statutory employer.

A trucking company may be held vicariously liable as a statutory employer for the negligence of its independent contractors. Elements of a statutory employment relationship vary by jurisdiction.

### Negligent Hiring

While a typical trucking accident case seeks to hold a trucking employer vicariously liable – either through a direct employment relationship or a statutory employment relationship – for the negligent acts of its drivers, claims of negligent hiring, training, supervision and retention seek to hold trucking companies directly liable for accidents.

Plaintiffs argue that a trucking company knew or should have known, if it exercised due diligence throughout the hiring process and employment relationship, that its driver was likely to cause an accident. Attempting to avoid these claims with proper hiring processes is a double-edged sword for employers.



The premise of these claims is that an employer owes an affirmative duty to the general public and its other employees to determine the qualifications and competence of new hires, especially when those employees are engaged in occupations that require skill or expertise that affect the safety of others. Negligent hiring claims stem from an employer's failure to properly screen new hires. Examples of poor screening include failing to obtain a copy of an applicant's driving record or failing to conduct a criminal background check.

When conducting background checks, it is important to proceed cautiously, as employers may run afoul of several federal laws, including potential discrimination claims. For example, nineteen states and over one hundred cities have adopted legislation to "ban the box" on job applications. This legislation prohibits questions about criminal conviction history. It often requires an employer to wait until later in the hiring process to inquire about criminal background to enable a job applicant to make a good impression.

Blanket policies banning all applicants with criminal convictions are dangerous policies. They may result in an EEOC complaint of discrimination and/or disparate impact. Rather, employers should inquire as to the nature of the conviction and the time that has elapsed since the conviction to determine if exclusion based on the conviction is consistent with business necessity. For

example, if a job applicant with a trucking company has a 40-year-old conviction for disturbing the peace for protesting the Vietnam war, exclusion is likely not job-related and not consistent with business necessity. If a job applicant has a 5-year-old DUI, exclusion would be job-related and consistent with business necessity. Employers can further protect themselves with handbooks that describe workplace values, such as having safe or drug-free workplaces. These documents will justify why a trucking company did not hire a job applicant with an assault or a drug conviction, while maintaining the integrity of a defense to a negligent hiring claim.

### Conclusion

By reviewing existing hiring policies and handbooks, an employer can avoid a potential negligent hiring claim and prevent possible discrimination and/or disparate impact claims, as well as possible state law violations that may be impacted during the hiring process. ⚖️

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## EFFORTS TO CHANGE:...

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of limited safety data availability; address differences between motor carriers transporting passengers and those transporting freight; allow motor carriers to be effectively compared; utilize accurate safety data; and develop a better system by which it can be determined that a motor carrier was free from fault.

Since CSA's inception in late 2010, there have been other changes not only proposed but also implemented. In December 2012, CSA changes were implemented to provide more precise information when assessing a company's over-the-road performance. Some of the notable changes were:


- Changes to the fatigued driving BASIC to the more specific hours of service compliance to more accurately reflect violations, and weighing hours of service paper and electronic logbook violations equally;
- Including intermodal equipment violations that should be found during drivers' pre-trip inspections;
- Modifying the safety management system to more accurately display crash information that is available to the public. The agency used more descriptive terms for the data it collected on motor carrier violations for each BASIC. For instance, the website quit using terms like "inconclusive," but rather "less than five violations," or "zero violations."
- Insuring all recorded violations accurately reflect the inspection.

In June 2015, there were additional proposed changes to the CSA program. Notably, the agency wanted to lower the intervention threshold of the vehicle maintenance category (BASIC) to 75 percent from its current 80 percent targeting more carriers. In addition, the agency wanted to raise the intervention threshold

of the controlled substances BASIC to 90 percent from its current 80 percent targeting fewer carriers. These proposed changes, like the changes mentioned above, are to better reflect the correlation between crash risk in rankings in the BASIC within the CSA safety measurement system.

While the above referenced reforms and attempts at reform are unquestionably beneficial for the industry, the cautionary phrase "be careful what you wish for" seemingly can be applied regarding the potential effect these reforms may have on litigation. These proposed changes, by way of illustration, would lead to a system where more accurate data is being used to predict carriers that are most likely to have crashes. The more accurate, reliable and predictive the data becomes, the more likely it logically follows that courts may allow such information into evidence in accident-related litigation. Even if the industry succeeds in getting that information removed from the public domain, it will still likely be discoverable after a lawsuit has been filed.

It is anticipated that, to the extent the reliability of the CSA evidence argument weakens, carriers will be forced to rely on and develop other arguments such as the CSA score's relevance to the litigation, unfair prejudice, etc. It may also result in more motor carriers admitting allegations of vicarious liability and/or *respondeat superior* to nullify direct negligence claims against the motor carrier making any evidence of the motor carrier's CSA score irrelevant to the claims.

The trend towards CSA reform is one which should be followed with the developing case law concerning the admissibility of CSA related information. Since its inception in 2010, the CSA has raised significant problems for the trucking industry. Based on the reforms that have already been proposed and/or implemented, it is now evident that the evolution and reform of the CSA system has the potential of creating significant questions and issues which will need to be addressed. 

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## SIX DAYS ON THE ROAD:...

*Continued from page 7*

Its use became widespread by both Allied and Axis forces in WWII for its stimulant and performance enhancing effects. Aviators were given variations to improve concentration in the face of sleep deprivation.

The Allies used Benzedrine, in little white pills and “flyer’s chocolate,” a jacked up energy bar of the era. Germans used Pervitin, produced in 1938 by German pharmaceutical company Temmler Werk. It was promoted as an “alertness aid.”

The Russians and Japanese used “Vint” (methamphetamine), first synthesized by Japanese chemist Nagai Nagayoshi, also in 1887. It was originally issued to ground troops under the name “Shabu” during the Russo-Japanese war of 1905.

Following WWII, the legal use of methamphetamine rose in post war America, being marketed as decongestants and diet or “pep” pills. Its use in the U.S. Air Force was documented, tongue in cheek, by B-52 Major T.J. “King” Kong in the movie “Dr. Strangelove:”

Survival kit contents check. In them, you will find one .45 caliber automatic, two boxes of ammunition, four days concentrated emergency rations, one drug issue containing antibiotics, morphine, vitamin pills, pep pills, sleeping pills, tranquilizer pills, one miniature combination Russian phrase book and bible; \$100 in rubles, \$100 in gold, nine packs of chewing gums, one issue prophylactics, three lipsticks, three pair nylon stockings. Shoot, a fella’ could have a pretty good weekend in Vegas with all that stuff.

## THE GENIE GETS OUT OF THE BOTTLE

After decades of reported abuse, the U.S. Food and Drug Administration banned most amphetamine products in 1965 and made it a schedule II controlled substance in 1971.

Widespread use by truckers decreased after the U.S. Department of Transportation initiated mandatory

random drug testing of all truck drivers and employees of other DOT regulated industries in the 1980s. However, this has had little effect on its availability to truckers who seek it out.

## THE PATRON SAINT OF TRANSPORTATION LAWYERS

Freddie Fender did not write “Six Days On The Road.” It was written by two songwriters at the famous Muscle Shoals Sound Studio in Alabama. First released in 1963, the song has been covered by dozens of artists and hailed as the definitive celebration of the American truck driver.

But the song could also be an anthem for all the lawyers kept busy in trucking litigation. And maybe Freddy Fender is the transportation lawyer’s patron saint.

Born Baldemar Huerta in the small South Texas town of San Benito, he was a hometown boy made good. After a tour in the U.S. Marine Corps, he legally changed his name to Freddy Fender in 1958 to better appeal to audiences. He went on to fame with hits like “Wasted Days and Wasted Nights” and later, as a founding member of the Texas Tornados.

And there is some irony, because when he died and was buried in San Benito in 2006, the City fathers enshrined his portrait on a water tower. It sits along U.S. Route 77 in downtown San Benito, as it nears the end of its 1,286 mile length from Sioux City, Iowa to the Veterans International Bridge in Brownsville, Texas.

San Benito sits just 19 miles from the Texas-Mexico border, which averages more than 3,000,000 truck crossings each year, from Brownsville to El Paso.

High above the freeway, Freddy gazes down with a beatific smile, upon the thousands of trucks passing beneath him, as if acknowledging the lifeblood of commerce and the frailties of human nature, and blessing the transportation lawyers with an endless flow of work. ⚖️

*Scott Breitenwischer is a trial lawyer in the Houston office of Royston, Rayzor, Vickery & Williams, L.L.P. He can be reached at [scott.breitenwischer@roystonlaw.com](mailto:scott.breitenwischer@roystonlaw.com).*

## 2016 TIPS CALENDAR

### April 2016

- |              |   |  |
|--------------|---|--|
| <b>7-9</b>   | <b>Motor Vehicle Products Liability Program</b><br>Contact: Donald Quarles – 312/988-5708         | <b>Arizona Biltmore<br/>Resort &amp; Spa<br/>Phoenix AZ</b>  |
| <b>7-9</b>   | <b>Property Insurance Law Spring CLE Meeting</b><br>Contact: Ninah Moore – 312/988-5498           | <b>Wynn Las Vegas<br/>Las Vegas, NV</b>                      |
| <b>8-9</b>   | <b>Toxic Torts &amp; Environmental Law Midyear Mtg</b><br>Contact: Felisha Stewart – 312/988-5672 | <b>Arizona Biltmore<br/>Resort &amp; Spa<br/>Phoenix, AZ</b> |
| <b>11</b>    | <b>TIPS Free Member Monday CLE</b><br>Contact: Ninah Moore – 312/988-5498                         | <b>Free Teleconference</b>                                   |
| <b>16-20</b> | <b>TIPS/ABOTA National Trial Academy</b><br>Contact: Donald Quarles – 312/988-5708                | <b>National Judicial College<br/>Reno, NV</b>                |

### May 2016

- |              |  |  |
|--------------|--|--|
| <b>5-6</b>   | <b>FSLC Spring Workshop</b><br>Contact: Donald Quarles – 312/988-5708  | <b>La Quinta Hotel &amp; Spa<br/>La Quinta, CA</b> |
| <b>11-15</b> | <b>TIPS Section Conference</b><br>Contact: Felisha A. Stewart – 312/988-5672<br>Speaker Contact: Donald Quarles – 312/988-5708 | <b>Intercontinental Buckhead<br/>Atlanta, GA</b>   |

### August 2016

- |            |   |   |
|------------|---|---|
| <b>4-7</b> | <b>ABA Annual Meeting</b><br>Contact: Felisha A. Stewart – 312/988-5672<br>Speaker Contact: Donald Quarles – 312/988-5708 | <b>Westin St. Francis Hotel<br/>San Francisco, CA</b> |
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### October 2016

- |              |  |  |
|--------------|--|--|
| <b>19-23</b> | <b>TIPS Fall Leadership Meeting</b><br>Contact: Felisha Stewart – 312/988-5672 | <b>Hotel Del Coronado<br/>Coronado, CA</b> |
|--------------|--|--|

### November 2016

- |            |  |   |
|------------|--|---|
| <b>3-4</b> | <b>Aviation Litigation Committee Meeting</b><br>Contact: Donald Quarles – 312/988-5708 | <b>Ritz-Carlton, Washington DC<br/>Washington, DC</b> |
|------------|--|---|