

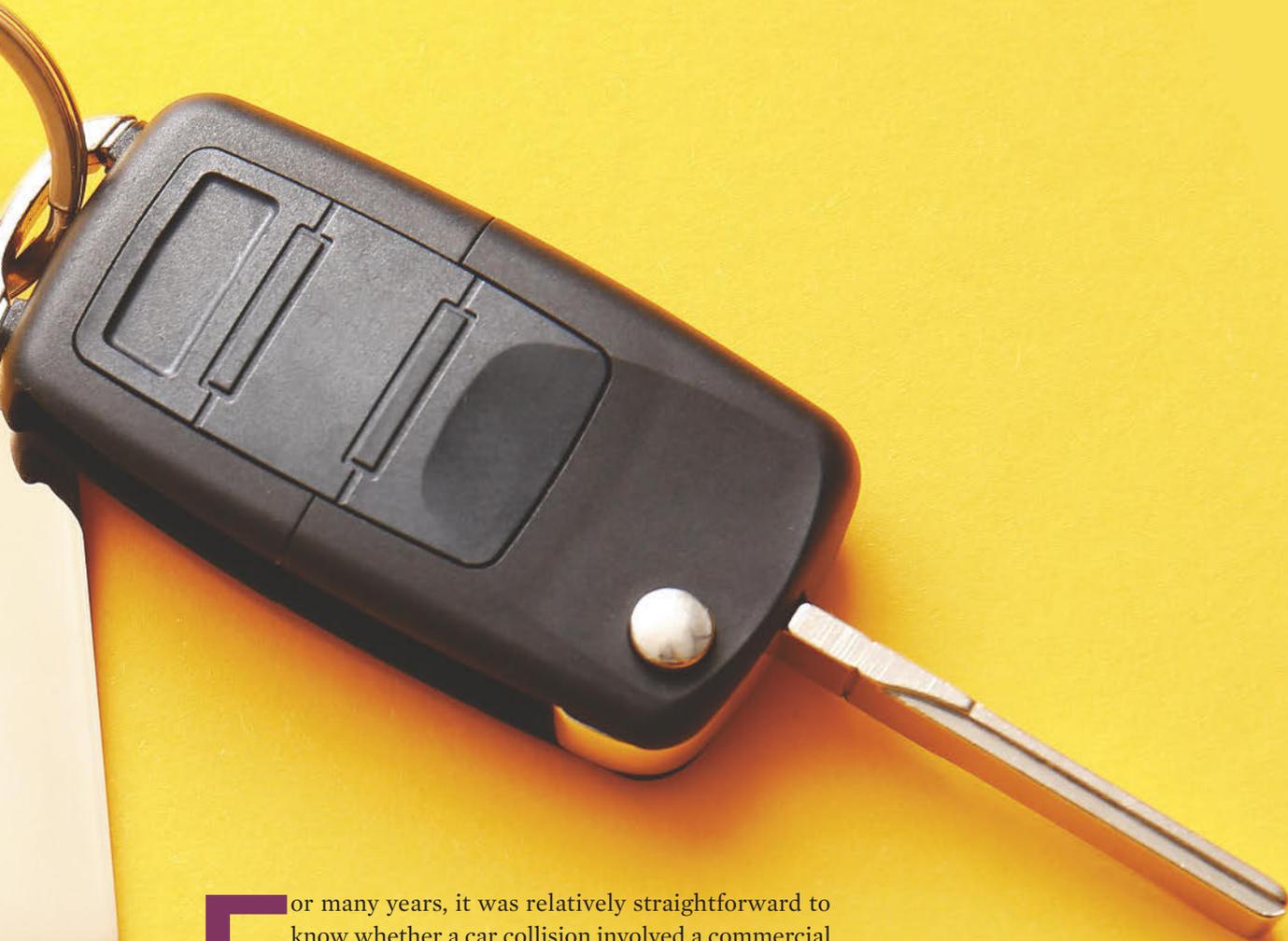
KEYS

TO 'ON-DEMAND' TRANSPORTATION CASES



Know what to seek in discovery and what to ask in depositions when bringing a personal injury case against a ride-hailing company.

By || **RYAN CASEY AND IAN SAMSON**



For many years, it was relatively straightforward to know whether a car collision involved a commercial vehicle. The police report would indicate that a large tractor-trailer, work van, or box truck was involved. But today, that question is not always as clear because of the ubiquity of so-called “ride-share” vehicles operated for on-demand transportation companies such as Lyft and Uber.¹ A vehicle operated by an individual may be an on-demand transportation vehicle. If it is, litigating the case against these companies requires special considerations and strategies and an awareness of the changing legal landscape.

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Although the industry is barely a decade old, on-demand rides seem like an ingrained convenience. Capitalizing on the rise of the smartphone, these companies used technology to make for-hire transportation quick and easy for riders. They applied the ethos of ride-sharing—splitting gas on a long-distance trip, for instance—to frame their commercial driving businesses. But ride-sharing is not what the companies provide; they provide on-demand, commercial transportation.²

As the on-demand transportation companies grew, the relationship between them and their drivers came into focus. Many drivers, fed up with working conditions and payment structures, fought for employee benefits. And people injured through the companies' drivers looked to the companies to take responsibility for their drivers' actions. But they refused, claiming the drivers were independent contractors. Thus, the companies argued, they neither had to provide the benefits and guarantees of employment nor assume vicarious liability for drivers' wrongdoing.

The Vicarious Liability Question

States have either enacted statutes or promulgated rules requiring on-demand transportation companies—also known as transportation network companies—to carry minimum insurance. For crashes involving an on-demand transportation company driver during a ride or on the way to pick up a passenger, most states require \$1 million in insurance.³ Minnesota, Nevada, New Jersey, North Carolina, and Rhode Island require \$1.5 million.⁴ This insurance coverage applies regardless of whether a plaintiff establishes vicarious liability against the on-demand transportation company—the policy must be written to cover the drivers too.

Many cases, however, have damages

that exceed those minimum amounts. The on-demand transportation companies carry substantially more insurance than the state-mandated minimum, but, unlike in those mandated policies, the drivers are not named insureds. Instead, the on-demand transportation companies contend those policies only apply to them.

This is why the vicarious liability question is a central consideration in these cases. Absent vicarious liability, or proving the companies' direct liability (through negligent hiring, supervision, or training), the excess insurance does not automatically apply to the on-demand driver. In these excess damages cases, you must gather the relevant facts to prove vicarious liability.

What to Seek in Discovery

The legal landscape surrounding on-demand transportation companies is far from settled, and awareness of the current state of the law in your jurisdiction is essential.⁵ Conducting focused and targeted discovery to prove your client's case is critical to have any chance at success.

Company documents. When serving written discovery, it often is best to deploy a broad net initially (before depositions) and follow up with targeted, surgical requests to explore key issues and contentions. The exact type of written discovery you deploy can vary greatly depending on your jurisdiction. Some jurisdictions, such as federal court or certain states, have mandatory disclosure rules requiring all parties to disclose relevant documents and insurance information.⁶ In California, by contrast, there are no mandatory disclosures, requiring you to take a more proactive approach by directly requesting initial documents and information through requests for production and interrogatories.

Regardless of whether your

jurisdiction requires mandatory disclosures, seek documents that focus on company policies and procedures, as well as other evidence that demonstrates the company's oversight of and control over the driver. Some examples of the types of documents that can establish this link include those regarding

- hiring (employment applications, background checks, and vehicle lease and approval information)
- job performance (reviews, ratings, and complaints)
- discipline administered to the driver (suspensions, deactivations, and revocations from using the on-demand transportation app)
- training provided to the driver (written documents, videos, websites, applications to complete, manuals, and any documents confirming the driver's completion of any training)
- communications with the driver (texts, emails, app-based communications, trip records, and audio communications)
- trips the driver made for the company, as well as the scheduled route on which the collision occurred
- the company's monitoring of the driver's activities, including tracking the driver's cell phone, messages sent to the driver, and other forms of communication.

After you initially request and obtain these documents, follow up on the information you receive, or don't receive, with thorough depositions.

Beware of protective orders. Companies may insist on having a protective order in place before producing records, making the discovery process cumbersome. Those orders typically permit any party to the litigation to mark documents or testimony as "confidential." No court approval is required for this initial

marking, though it bestows confidential treatment on the document. However, you can challenge the designation, and, if the parties cannot agree, the court decides whether the document will continue to be treated as confidential.⁷

While there may be some legitimate bases for on-demand transportation companies seeking protective orders, avoid agreeing to blanket protection or permitting a narrowly drafted order to be abused. And if an order is going to be submitted to the court for entry, ensure certain provisions are included.

First, be sure the party seeking confidentiality bears the burden of proving confidentiality is appropriate. Watch for orders that place the burden on the party seeking confidentiality but still require the party challenging a confidentiality designation to explain why the document should not be treated as confidential. The default should be that documents are *not* confidential—it is the proponent’s duty to explain why they should be.

Also include specific deadlines for responding to challenges, and, if necessary, for filing motions to maintain the designation. Some orders leave a gray area: Although it is the designating party’s obligation to bring a motion to maintain the confidentiality designation, there is no express statement about what happens when they fail to do so. Avoid that limbo.

Framework for Depositions

No matter where your on-demand transportation case is being litigated, depositions are the best way to obtain the evidence you need. Depending on the case, there may be many witnesses who you need to depose.

Deposing the defendant driver.

Consider making this your first deposition. That way, you can lock in the testimony without a whole library



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of other testimony the driver could have the opportunity to review.

As with any defendant driver deposition, the facts of the collision and its aftermath are crucial topics to examine.⁸ In an on-demand transportation company case, however, the driver also can provide information relevant to the company’s vicarious liability. In addition to the obvious important liability information regarding the collision itself, the key issue that you want to target with this witness is the degree of

control that the on-demand transportation company exercises. Asking the driver about all aspects of control and direction before the company takes a position on those topics may lock in key differences with the company’s expected positions.

Questions to ask include:

- How much time does the person drive for the company?
- How is the driver paid?
- Who controls the pay rates?
- How are rides awarded?
- What incentives does the company provide to encourage the driver to drive more, or less, or at certain times?
- Did the company assist the driver in getting a car to drive?
- Does the driver know if the company helps drivers obtain vehicles to drive for it?
- Does the company oversee what kind of car the driver drives?
- Does it regulate what types of rides the driver can provide based on the car?
- What vehicle inspections does it require?
- What kind of training was provided to the driver?
- What documents does the driver have regarding communications with the company?
- What documents does the driver have regarding his or her work that were provided by the company?
- Was the driver ever disciplined by the company? If so, how?
- Has the driver ever been involuntarily logged out of the company’s app? If so, why?⁹

This list of questions is not exhaustive, but it covers topics that can provide useful testimony and evidence. You can also ask “person most qualified” (PMQ) witnesses (discussed later) all of these questions, but it’s typically better to get those witnesses’ answers after hearing what the driver has to say.

The person most qualified or knowledgeable. When dealing with an on-demand transportation case, the PMQ deposition is critical to establish your case.¹⁰ The companies often take the position that they are technology companies, not transportation companies. They make that distinction to argue that their drivers are not engaged in an essential company service but instead are using the company's platform as independent contractors.

Start with a good notice. Take some time to carefully construct a thorough deposition notice that covers all the topics and categories of information relevant to your case. A good start is to use the document requests already directed to the on-demand

transportation company. That way, you can question a witness about the documents produced by the company and receive binding testimony and admissions about those documents. You also can uncover whether there are additional items that are responsive to the document requests but have not been produced. For example, a witness might reveal that there is a policy manual the company uses that hasn't been produced.

Include a document production request with your notice. Even if you have documents from a mandatory disclosure or a prior request for production, always include a request for production of documents with the notice. In most jurisdictions, the witness has a duty to go and search for documents responsive to the

requests, and this can lead to additional documents being produced.

Be thorough. Review everything you have obtained in discovery, and prepare an outline for each witness covering the key topics in your case. But don't get stuck to it and miss out on good evidence. A good outline is more like a checklist that you can come back to.

At the start of the deposition, go through the deposition notice and the document production requests with the witness. Ask about other documents that may exist but haven't been provided, as well as other witnesses who may have information on the topics you asked for. It may be time consuming, but we very often have found key documents and witnesses that we otherwise wouldn't have obtained.

CALIFORNIA'S PROPOSITION 22

Although "transportation network company" laws are now on the books in several states,¹ California has been ground zero in the independent contractor versus employee battle. Following the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*,² which established an "ABC" test for worker classification, the California legislature enacted Assembly Bill 5 (AB 5). Mirroring the *Dynamex* opinion, AB 5 applied directly to on-demand transportation companies and established that on-demand drivers should largely be treated as employees and not independent contractors. Lyft and Uber opposed the law, threatened to cease operations in California, and worked to place Proposition 22 on the ballot in November 2020.³

Prop. 22 aimed to undo AB 5's protections as applied to so-called "app-based drivers." Among other things, the proposition deemed on-demand transportation company drivers independent contractors as a matter of law, required certain benefits to be provided to those drivers, and established new insurance minimums for some services such as on-demand meal delivery. The ballot initiative passed with the support of 58% of California voters.⁴ The on-demand transportation companies declared victory and indicated they would seek to have a similar law imposed in other states.⁵

But in August 2021, Alameda County Superior Court Judge Frank Roesch ruled that Prop. 22 was unconstitutional.⁶ Because Prop. 22 was a legislative initiative in that it enacted new statutes rather than amended the state's constitution, the court found that it unduly restricted the legislature's power. And this restriction, the court said, ran afoul of the state constitution.

Judge Roesch's decision has been appealed, and the constitutionality of Prop. 22 likely will be decided by the California Supreme Court—and the potential consequences of that decision could majorly impact these cases. In the meantime, Prop. 22's provisions remain in effect.⁷

NOTES

1. See, e.g., 625 Ill. Comp. Stat. 57/1 et seq. (2021); Nev. Rev. Stat. §706A (2021); N.C. Gen. Stat. §20-280.1 et seq. (2015).
2. 416 P3d 1 (Cal. 2018).
3. See, e.g., Lauren Feiner, *Uber and Lyft Are Threatening to Suspend Service in California If They Have to Classify Drivers as Employees—That Tactic May Backfire*, CNBC, Aug. 14, 2020, <https://tinyurl.com/2v9t95n9>.
4. *Statement of Vote, General Election November 3, 2020, Secretary of State Alex Padilla*, at 66, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf>.
5. Lauren Feiner & Lora Kolodny, *Uber and Lyft Eye Other States After California Ballot Victory*, CNBC, Nov. 5, 2020, <https://tinyurl.com/2p9acjsv>.
6. *Castellanos v. California*, 2021 WL 3730951 (Cal. Super. Ct. Aug. 20, 2021).
7. Christopher B. Dolan, *Prop. 22 Governing Gig Workers Found Unconstitutional, but In Effect*, San Francisco Examiner, Oct. 14, 2021, <https://tinyurl.com/2p8nwsuz>.

Once the deposition is done, promptly follow up on what you learned. For instance, if you learned of additional witnesses that seem more qualified and will have the information you need, then line up their depositions. If you learned of additional documents,

you need to obtain them.

The on-demand transportation litigation landscape is far from settled. Regardless, approaching these cases with key themes and goals in mind will set you up for successful discovery and trial preparation. 



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NOTES

1. The service provided by these companies also is often referred to as “ride-hailing.”
2. California, for instance, specifically defines “ride-sharing” in its Vehicle Code and Public Utility Code. See Cal. Veh. Code §522 (West 1982); Cal. Pub. Util. Code §5353(h) (West 2007). California’s Public Utilities Commission determined in 2013 that on-demand transportation companies “do not qualify for the rideshare exemption” provided in the Public Utilities Code, as that exemption applied only when there was a “common work-related or incidental purpose.” Cal. Pub. Util. Comm’n Decision 13-09-045.
3. See, e.g., Cal. Pub. Util. Code §5433(b)(1) (West 2015); Me. Rev. Stat. Ann. 24-a §7303(3)(A) (2015); Tex. Ins. Code Ann. §1954.053(1) (West 2016).
4. Minn. Stat. §65B.472(Subd. 2.)(c)(1) (2021); Nev. Rev. Stat. §690B.470(1)(a) (2021); N.J. Stat. Ann. §39:5H-10(c) (2017); N.C. Gen. Stat. §20-280.4(a)(3)(b) (2015); R.I. Gen. Laws §39-14.2-14(c)(1) (2016).
5. In California, for example, current vicarious liability case law centers on *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341 (Cal. 1989); see also *Cal. Jury Instr. Civ. 3700 et seq.* (2021).
6. See, e.g., Fed. R. Civ. P. 26(a); Ariz. R. Civ. P. 26.1; Nev. R. Civ. P. 16.1.
7. For more on protective orders, see Hannah Brennan, *The Right of Access*, Trial, July 2021, at 30; Ilyas Sayeg, *Sharing Is the Law*, Trial, July 2021, at 40; Peggy J. Wedgworth & John D. Hughes, *Hidden in Plain Sight: Challenging ‘Attorneys’ Eyes Only’ and Improper Categorical Privilege Logs*, Trial, Dec. 2019, at 37.
8. The driver is almost always a named defendant for a variety of reasons, including the strong likelihood that he or she is a forum defendant.
9. These examples are not exhaustive, but they are indicia of the on-demand transportation company’s control over its drivers.
10. See, e.g., Fed. R. Civ. P. 30(b)(6).

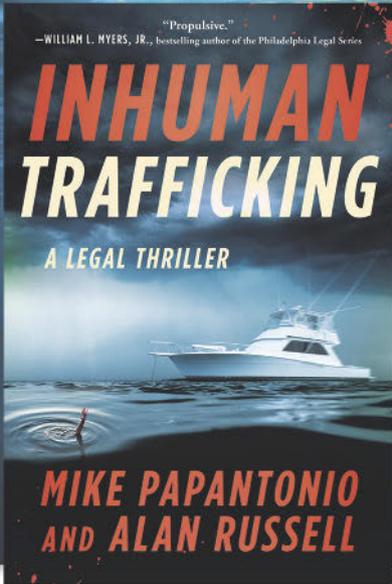
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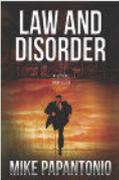
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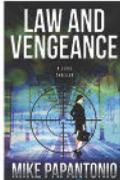
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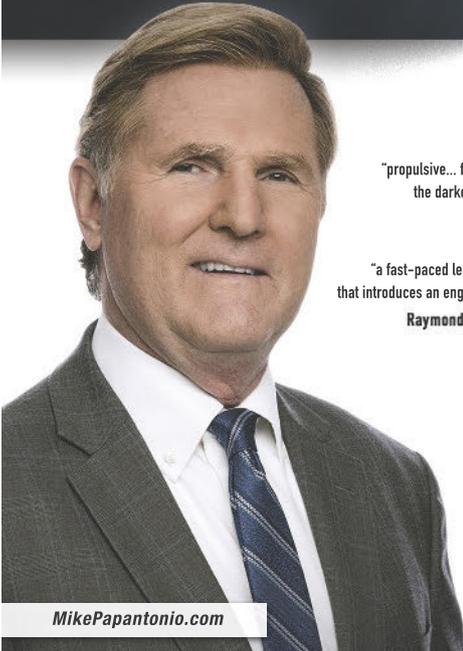


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