



55th ANNUAL WORKSHOP ON TRANSPORTATION LAW

Sunday, July 17 – Wednesday, July 20, 2016
Mayflower Hotel
Washington, DC

ORGANIZED BY
Technical Activities Division
Transportation Research Board

SPONSORED BY
Legal Resources Group

55TH ANNUAL WORKSHOP ON TRANSPORTATION LAW

Legal Resources Group Chair, Robert J. Shea
Legal Resources Group Secretary and TRB Representative, James B. McDaniel
Committee on Transportation Law, Chair, Marcelle Jones
Committee on Transit & Intermodal Transportation Law, Chair, Robin Reitzes
Committee on Contract Law, Chair, Nancy Smith
Committee on Emerging Technology Law, Chair, Bryant Walker Smith
Committee on Environmental Issues in Transportation Law, Chair, Fred Wagner
Committee on Eminent Domain & Land Use, Chair, William E. James
Committee on Tort Liability & Risk Management, Chair, Pamela Leslie

Transportation Research Board Staff

Ann Brach, Director, Technical Activities
James B. McDaniel, Counsel for Legal Research Projects
Joanice L. Johnson, Associate Program Officer

The workshop has in the past been approved for continuing legal education (CLE) credits in states requiring such credits. Rules vary from state to state, so participants needing credit should obtain necessary forms for individual applications. Inquiries about such matters should be made to Joanice (Jo) Johnson at 202-334-2287 or by email jojohnson@nas.edu.

The registration fee covers all sessions of the workshop program and papers distributed at or following the workshop, plus the Sunday evening reception (July 17), Tuesday evening social event (July 19), Monday through Wednesday continental breakfasts, and morning and afternoon coffee breaks. Additional tickets for the Tuesday social event may be purchased for each on-site; subject to availability

TRB is one of seven program units of the National Academies of Sciences, Engineering, and Medicine, which provides independent, objective analysis and advice to the nation and conducts other activities to solve complex problems and inform public policy decisions. The Academies also encourage education and research, recognize outstanding contributions to knowledge, and increase public understanding in matters of science, engineering, and medicine. TRB's varied activities—described below—annually engage more than 7,000 engineers, scientists, and other transportation researchers and practitioners from the public and private sectors and academia, all of whom contribute their expertise in the public interest by participating on TRB committees, panels, and task forces. The program is supported by state transportation departments, federal agencies including the component administrations of the U.S. Department of Transportation, and other organizations and individuals interested in the development of transportation.

Cover Photos:

Left: U.S. Capitol

Right: Aerial view of the Washington Monument with the Capitol in the background. DoD photo by Tech. Sgt. Andy Dunaway.

AGENDA AT A GLANCE

Sunday, July 17, 2016		
3:30 p.m. – 6:00 p.m.	Registration	
6:30 p.m. – 8:00 p.m.	Reception	
Monday, July 18, 2016		
7:30 a.m. – 5:00 p.m.	Registration	
7:30 a.m.– 8:00 a.m.	Continental Breakfast	
8:00 a.m. – 8:30 a.m.	Welcome	
8:30 a.m. – 10:00 a.m.	Session 1: FHWA, FTA and FRA Chief Counsels’ Updates	
10:00 a.m.– 10:30 a.m.	Break	
10:30 a.m. – Noon	Session 2: Automation on the Ground and in the Air: Update on the Development and Federal Regulation of Automated Driving Systems and Unmanned Aerial Systems	
Noon – 1:30 pm	Lunch and Committee Meetings	
1:30 p.m. – 3:00 p.m.	Concurrent Sessions	
	Session 3: Data Encryption: What Apple’s Attempt to Keep the “Back Door” Locked Means for Transportation	Session 4: Fast Act—Implementation and Legal Issues
3:00 p.m. – 3:30 p.m.	Break	
3:30 p.m. – 5:00 p.m.	Concurrent Sessions	
	Session 5: Concept: Challenges Faced by DOTs Transitioning to MASH Testing (Manual for Assessing Safety Hardware)	Session 6: The Transit Lawyer’s Session
Tuesday, July 19, 2016		
7:30 a.m. – 3:00 p.m.	Registration	
7:30 a.m.– 8:00 a.m.	Continental Breakfast	

8:00 a.m.– 9:30 a.m.	Concurrent Sessions	
	Session 7: The Rail Session	Session 8: Meet Our EPA Partners!
9:30 a.m. – 10:00 a.m.	Break	
10:00 a.m. – 11:30 am	Concurrent Sessions	
	Session 9: Recovering Fair Market Value from “Utilities” Seeking Longitudinal Occupation of Limited Access Facilities	Session 10: Legal Issues Related To Mobility on Demand
11:30 am – 1:00 p.m.	Lunch and Committee Meetings	
1:00 p.m. – 2:30 p.m.	Concurrent Sessions	
	Session 11: Design-Build Issues: Liability for Design Defects and for Delays in Property Acquisition	Session 12: NEPA 101 and Environmental Due Diligence for Condemnation Lawyers
2:30 p.m. – 3:00 p.m.	Break	
3:00 p.m. -4:30 p.m.	Session 13: Legal Issues Related to the Vulnerability of Transportation Facilities to Catastrophic Events	
6:30 p.m. – 9:00 p.m.	Dinner	
Wednesday, July 20, 2016		
7:00 a.m. – 8:00 a.m.	Breakfast	
8:00 a.m.– 9:30 a.m.	Session 14: Diversity and Discrimination: "What's Up in Civil Rights Enforcement?"	
9:30 a.m. – 9:45 a.m.	Break	
9:45 a.m. – 11:15 a.m.	Session 15: Ethics Chaos: Three Ethics Traps Controversies and Perils, and How to Avoid Them	
11:15 a.m. – 11:45 a.m.	Closing Remarks & Adjournment	
11:45 a.m. – 2:00 p.m.	Group Council Meeting (<i>Closed Meeting</i>)	

WORKSHOP AGENDA

ALL SPEAKERS ARE “INVITED”

Sunday, July 17

3:30 p.m. – 6:30 p.m.

Registration

6:30 p.m. – 8:00 p.m.

Reception

Monday, July 18

7:30 a.m. – 5:00 p.m.

Registration

7:30 a.m. – 8:00 a.m.

Continental Breakfast

8:00 a.m. - 8:30 a.m.

Welcome

Robert J. Shea, Chair, Legal Resources Executive Board and Chief Counsel, Pennsylvania Department of Transportation; Ann Brach, Director, Technical Activities Division, Transportation Research Board

8:30 a.m. – 10:00 a.m.

Session 1: FHWA, FTA and FRA Chief Counsels' Updates

Thomas G. Echikson, Federal Highway Administration

Ellen Partridge, Federal Transit Administration

Amit Bose, Federal Railroad Administration

The Chief Counsels of the Federal Highway Administration (FHWA); the Federal Transit Administration (FTA); and the Federal Railroad Administration (FRA), will update attendees on current regulations that were issued by the United States Department of Transportation and its entities. This information is very relevant to the practice of transportation law.

10:00 a.m. – 10:30 a.m.

Break

10:30 a.m. – Noon

Session 2: Automation on the Ground and in the Air: Update on the Development and Federal Regulation of Automated Driving Systems and Unmanned Aerial Systems

Bryant Walker Smith, University of South Carolina, *moderator*

Sponsored by: Emerging Technology Law Committee (AL040)

The National Highway Traffic Safety Administration and the Federal Aviation Administration are currently engaged in ambitious efforts related to automated driving systems (colloquially called self-driving vehicles) and unmanned aerial systems (colloquially called drones). If the two agencies adhere to their announced timelines, by June 2016 NHTSA will have provided policy guidance to states on automated driving and the FAA will have finalized rules on the commercial use of unmanned aircraft. Speakers from NHTSA, FAA, the automotive sector, and the unmanned aviation sector will introduce the relevant technologies, applications, existing regulatory frameworks, and ongoing regulatory activities. This introduction will be especially useful to state officials considering promoting, regulating, or using automated driving systems and unmanned aerial systems.

Panel Discussion

Reginald C. Govan Federal Aviation Administration; Paul Hemmersbaugh National Highway Traffic Safety Administration; Kate Browne, SwissRe; and David Strickland, Venable LLC

Noon – 1:30 pm

Lunch and Committee Meetings

Contract Law Committee (AL030)

Emerging Technology Committee (AL040)

Eminent Domain and Land Use Committee (AL060)

Tort Liability and Risk Management Committee (AL070)

1:30 pm – 3:00 pm, Concurrent Sessions

Session 3: Data Encryption: What Apple’s Attempt to Keep the “Back Door” Locked Means for Transportation

Frank Douma, University of Minnesota, *moderator*

Sponsored by: Emerging Technology Law Committee (AL040), with participation of members of the TRB Task Force on Data Privacy, Security and Protection Policy (ABJ55T)

It’s becoming common knowledge that data is becoming as important as gasoline to keep the 21st transportation system running. Whether it is information about travel time, congestion, weather or toll and fare payments, data from system users is critical to ensuring these systems perform properly. The transaction, however, is a two-way deal: in return for their data, users expect not only the primary benefit of value-added information, but also that their data will be handled properly and safely. In many cases, this latter task can be handled by encrypting data to protect it from being used by those that do not have reason or permission to do so.

The recent stand-off between Apple and the FBI regarding whether Apple had to provide the FBI access to the iPhone of the San Bernardino terrorists has now brought the question of whether law enforcement should be considered among that that should have access to encrypted data. This panel will discuss the history of law enforcement’s access to private information, the particular facts of the San Bernardino issue, types of transportation data that may be encrypted or otherwise considered private, and then address the question of how a similar question might be resolved in a transportation setting.

Panel Discussion

Lauren Smith, Future of Privacy Forum; Annie Boustead, RAND Corporation; and Thomas Bamonte, North Central Texas Council of Governments

Session 4: FAST Act—Implementation and Legal Issues

James LaRusch, American Public Transportation Association, *moderator*

Transit and Intermodal Transportation Law Committee (AL020); and Environmental Issues in Transportation Law Committee

This landmark reauthorization legislation includes important legal issues related to cooperative procurement, Buy America, tax policy, and the cap on rail liability.

Panel Discussion

Allison Fultz, Kaplan Kirsch & Rockwell LLP; and Bonnie Graves and Cecilia Comito, Federal Transit Administration

3:00 p.m. – 3:30 p.m.

Break

3:30 pm – 5:00 pm, Concurrent Sessions

Session 5: Challenges Faced by DOTs Transitioning to MASH Testing (Manual for Assessing Safety Hardware)

Lauren A. Machado, California Department of Transportation (Caltrans), *moderator*

Sponsored by: Tort Liability and Risk Management Committee (AL070)

MASH Testing (Manual for Assessing Safety Hardware): Implications for your State DOT Representatives of the California Department of Transportation will discuss challenges faced by State DOTs transitioning to MASH testing and highlight the California experience. This session will provide an overview of MASH testing, highlight challenges faced by DOTs transitioning to MASH tested products, compare and contrast state DOT staff perspectives considering using the MASH testing standard, and a discussion of how procurement process impacts risk management.

Panel Discussion

Lauren A. Machado and John Jewell, California Department of Transportation

Session 6: The Transit Lawyer’s Session

Robin M. Reitzes, San Francisco City Attorney’s Office, *moderator*

Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)

The Transit Lawyer session will cover legal issues involving public health emergencies, video surveillance, and the Super Circular:

- SARS, MERS, H1N1, Ebola. Today’s pandemics travel the globe fast and efficiently, and transportation is critical to emergency preparedness for public health concerns—from the seasonal flu to Ebola. This presentation will focus on the legal landscape of public health emergencies (including who has the power to do what), and the response mechanisms that are in place and available during a public health crisis or catastrophic health emergency. It will focus specifically on how those mechanisms may affect the transportation sector.
- Things once reserved for science fiction—flying drones, body cameras, and video surveillance—have now become commonplace. This panel will discuss legal issues associated with the many varieties of video recordings used by and affecting transportation agencies. Issues include government records laws (relating to storage, access, and retention), privacy, law enforcement, labor and employment, and public safety.
- In late 2013, the Office of Management and Budget released new guidance on Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, which has been dubbed the “Super Circular (even though it’s not a Circular, but a regulation codified at 2 CFR Part 200). The Super Circular became effective December 26, 2014. For those attorneys who have never heard of the Super Circular, or who are unclear about its scope or what it replaced, the FTA will provide the ABC’s of the Super Circular.

Public Health Legal Issues in Transportation—Current Trends

Trudy Henson, University of Maryland Center for Health and Homeland Security

Big Brother in the Sunshine: How to Balance the Demands of Transparency, Privacy, and Public Records Law in the Age of Drones and Body Cams

Jayme L. Blakesley, Utah Transit Agency; and John I. Kennedy, San Francisco City Attorney's Office

The Super Circular

Cecelia Comito, Federal Transit Administration

Tuesday, July 19

7:30 a.m. – 3:00 p.m.

Registration

7:30 a.m. – 8:00 a.m.

Continental Breakfast

8:00 am – 9:30 am, Concurrent Sessions

Session 7: The Rail Session

Allison Fultz, Kaplan Kirsch & Rockwell LLP, *moderator*

Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)

Recent developments in technology and transportation policy have had a direct impact on the rail industry in the past year:

- The use of unmanned aircraft systems (UAS or drones) by railroads for various activities such as asset management, surveying, safety inspections, and intrusion monitoring is expanding even as the FAA finalizes regulations to govern the use of UAS for commercial purposes. Our panel will address the current UAS regulatory picture and the interplay of aviation and rail issues relevant to this rapidly developing field.
- Issues relating to the shared use of the nation's rail network by freight and passenger operations continue to evolve. Our panel will address the mandate under the Passenger Rail Investment and Improvement Act of 2008 to provide dispatching preference to intercity and commuter passenger operations conducted by Amtrak, and what this requirement means to the freight rail industry, Amtrak and commuter rail providers whose service Amtrak operates.

UAS Use in the Rail Industry

Steven Osit, Kaplan Kirsch & Rockwell LLP

Freight Perspectives on Shared Use and Preference

Sean Craig, CSX

Passenger Perspectives on Shared Use and Preference

T. Byron Smith, Maryland Transit Administration

Amtrak Perspectives on Shared Use and Preference

Jad Roberts, Amtrak

Session 8: Meet Our EPA Partners!

Fred Wagner, Beveridge and Diamond, PC, *moderator*

Sponsored by: Environmental Issues in Transportation Law Committee (AL050)

The U.S. Environmental Protection Agency plays an important role in the permitting and review of major transportation projects. The panel discussion will explore the various aspects of project planning, review, development and implementation in which EPA participates. Participants will include EPA representatives in a variety of program offices and the Federal Programs office, responsible for NEPA reviews. Understanding EPA's perspective and its mission will allow attendees to better appreciate how to work positively with the agency to promote project development.

Panel Discussion

Clark Wilson; Robert Goo; Karina O'Connor; and Jamie Higgins, U.S. Environmental Protection Agency

9:30 a.m. – 10:00 a.m.

Break

10:00 a.m. – 11:30 am, Concurrent Sessions

Session 9: Recovering Fair Market Value from "Utilities" Seeking Longitudinal Occupation of Limited Access Facilities

Toni Clithero, Vermont Department of Transportation, *moderator*

Sponsored by: Eminent Domain & Land Use Committee (AL060)

Panel Discussion

James Thiel, Wisconsin Department of Transportation (Retired); Edward V.A. Kussy, Nossaman; and Chris Huffman, Huffman Corridor Consulting

Session 10: Legal Issues Related To Mobility on Demand

Dorval Carter, Jr., Chicago Transit Authority, *moderator*

Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)

Some cities are planning each transit ride based on real time. Transit agencies are developing and implementing seamless interaction with customers so as to provide the most cost-effective trip, using Uber/Lyft, zip cars, walking, bike share, buses, and commuter rail. Technology binds the trip together, with several agencies involved in planning and providing the trip. The panelists will discuss these initiatives and legal issues associated with them, including ADA, privacy, and fare technology issues.

Panel Discussion

Dorval Carter, Chicago Transit Authority; Ellen Partridge and Dana Nifosi, Federal Transit Administration; Kenneth Shiotani, National Disability Rights Network; and Andrew Salzberg, Uber

11:30 a.m. – 1:00 p.m.

Lunch and Committee Meetings

[Transportation Law Committee \(AL010\)](#)

[Transit and Intermodal Transportation Law \(AL020\)](#)

[Environmental Issues in Transportation Law Committee \(AL050\)](#)

1:00 p.m. – 2:30 p.m., Concurrent Sessions

Session 11: Design-Build Issues: Liability for Design Defects and for Delays in Property Acquisition

Nancy C. Smith, Nossaman LLP, *moderator*

Sponsored by: Contract Law Committee (AL030)

Use of the design-build methodology involves a number of legal considerations that are much more significant for design-build projects than is the case for projects delivered using a different methodology. This session will explore two areas of concern to attorneys whose clients are using design-build—namely liability relating to design defects and liability associated with the property acquisition process.

Panel Discussion

Steven E. Knott, Nossaman LLP, Capital Project Strategies, LLC; Rick E. Rayl, Nossaman LLP; and Edward S. Harris, Maryland State Highway Administration

Session 12: NEPA 101 and Environmental Due Diligence for Condemnation Lawyers

Fred Wagner, Beveridge and Diamond, PC, *moderator*

Sponsored by: Eminent Domain and Land Use Committee (AL060)

A panel discussion of the relationship between right of way acquisition and environmental review process. The environmental review process may take many years to complete making timely acquisition of right of way problematic. The discussion will include an overview of NEPA and the value of conducting environmental due diligence,

including a discussion of NEPA in the context of project development, scheduling, right of way acquisition and right to take challenges, using real world examples and case studies. Attendees will learn to recognize NEPA and environmental issues that may affect right of way scheduling and acquisition, and have a context in which to formulate solutions and advice for their public agency clients.

Panel Discussion

Fred Wagner, Beveridge and Diamond, PC; and Barbara U. Rodriguez-Pashkowski, Gust Rosenfeld, PLC

2:30 p.m. – 3:00 p.m.

Break

3:00 p.m. – 4:30 p.m.

Session 13: Legal Issues Related to the Vulnerability of Transportation Facilities to Catastrophic Events

Bryce Little, WSP—Parsons Brinckerhoff, *moderator*

Sponsored by: Committee on Transportation Law (AL010)

Agency Liability and Feasibility of Contractual Risk Transfer When Designing and Constructing Major Transportation Facilities

Frederick Schranck, Delaware DOT (retired)

Liability, Indemnification, Contractual Responsibility, and Insurance Coverage Considerations When Highways and Bridges Are Damaged by Natural Disasters

Tamar Graham Scott, Oklahoma Department of Transportation

PHMSA's Emergency Special Permit Authority

Adam Horsley, Pipeline and Hazardous Materials Safety Administration

6:30 p.m. – 9:00 p.m.

Dinner

Wednesday, July 20

7:30 a.m. – 8:00 a.m.

Continental Breakfast

8:00 a.m. – 9:30 a.m.

Session 14: Diversity and Discrimination: "What's Up in Civil Rights Enforcement?"

Tamar Graham Scott, Oklahoma Department of Transportation, *moderator*

Sponsored by Transportation Law Committee (AL010)

A panel discussion of reoccurring and new issues in Title VI, Title VII and Environmental Justice.

Panel Discussion

Edward V.A. Kussy, Nossaman LLP; Kevonne Small, U.S. Department of Justice; and Yvette Rivera, U.S. Department of Transportation

9:30 a.m. – 9:45 a.m.

Break

9:45 a.m. – 11:15 a.m.

Session 15: Ethics Chaos: Three Ethics Traps Controversies and Perils, and How to Avoid Them

Edward V.A. Kussy, Nossman, *moderator*

Sponsored by: Legal Resources Group (AL000)

The past two years have witnessed a dizzying upheaval in prior assumptions about what constitutes the competent, ethical practice of law. "Ethics Chaos" will explore significant legal ethics developments that practitioners will ignore at their peril in 2016, using recent cases that mere rules cannot solve, and addressing the tension between being an ethical lawyer and an ethical citizen and human being. We will include references to the relevant rules of professional responsibility. This fast-moving, entertaining and interactive seminar will be led by lawyer and ethics expert Jack Marshall, with commentary from Bruce Smith and Ed Kussy.

Panel Discussion

Jack Marshall, Pro Ethics, Ltd.; and Bruce M. Smith, Apperson Crump, PLC

11:15 a.m. – 11:45 a.m.

Closing Remarks & Adjournment

11:45 a.m. – 2:00 p.m.

Group Council Meeting (Closed Meeting)

The National Academies of
SCIENCES • ENGINEERING • MEDICINE

The nation turns to the National Academies of Sciences, Engineering, and Medicine for independent, objective advice on issues that affect people's lives worldwide.

www.national-academies.org

TRANSPORTATION RESEARCH BOARD

500 Fifth Street NW
Washington, DC 20001
www.TRB.org