



# Why did we say that? What experience teaches us about defending policy documents.

- Terri Parker-Assistant Chief Counsel – Project Development; Missouri Highways and Transportation Commission
- Jay Smith-Assistant Chief Counsel-Risk Management; Missouri Highways and Transportation Commission
- Julie Hunter- Regional Counsel-Sikeston; Missouri Highways and Transportation Commission



# Why are we talking about this?

- It's all about the money. Money we want to spend building and maintaining roads and bridges. Not paying to plaintiffs and especially not paying to their lawyers.

# Obvious means of communication

- E-mails
- Policies / Guidelines / Publications
- Press Releases



Just because you're paranoid doesn't mean they aren't out to get you

- Coffee shops
- Gas stations
- Conversations with family members
- Social media



# People listen when you talk





E-mail is Forever

## What Not to Say – Lessons Learned from Greene County

**Bob Cirtin**

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**From:** Bob Cirtin  
**Sent:** Friday, September 15, 2017 7:25 PM  
**To:** Harold Bengsch  
**Cc:** Trysta Herzog; Chris Coulter; Jim Arnott; Phil Corcoran; Kevin Spaulding; Justin Hill; Dan Patterson; Chris Mericle; Tina Phillips; Kate Morris; Megan Applegate; Mailyn Knight; Rick Artman; Jess Kerr; Kevin Barnes; Tom Barr; Shane Schoeller; Bill Prince; ehedlun@greenecountyoem.gov; lwoods@greenecountyoem.gov; Lee Ann Walker; Cheryl Dawson-Spaulding; Richard Kessinger; Cindy Stein  
**Subject:** Re: Education meeting

**Friends:**

If we have a meeting with two or more commissioners present we would have to post it as an open meeting. This would NOT be a good idea because we cannot run the risk of media attending. We can't have our sausage making appear in the News Leader.

# E-mail chain between Trysta Herzog and Bob Cirtin

On Oct. 25, 2017 at 5:52 PM, Trysta Herzog wrote to Bob Cirtin:

I cannot work for the PAC in any capacity in my official role as a county employee.

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On Oct. 25, 2017 at 6:02 PM, Bob Cirtin wrote to Trysta Herzog:

You can do it on your own time such as lunch break, vacation, etc.

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# Email chain between Trysta Herzog and Bob Cirtin

On Oct. 25, 2017 at 6:15 PM, Trysta Herzog wrote to Bob Cirtin:

Bob,

You're using County resources to give me an order as my boss to work on behalf of the PAC. Is this not a clear violation of the ethical guidelines set forth by the Ethics Commission?

I would be calling the newspaper about a specific ad size and date using my name to do so and then an ad on behalf of the PAC will appear at that size and date. I think a news reporter and the Ethics Commission could easily put that together and then my career and reputation will be at risk.

I believe I need to remain impartial and not engage in any advocacy efforts. That is my choice as a private citizen. I have worked tirelessly to do my job as Communications Director to educate about our initiative. I will continue to do so and I hope that my employee review is reflective of that. However, I will kindly ask that you not include me in on discussions of advocacy from this point forward.

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On Oct. 25, 2017 at 6:27 PM Bob Cirtin, wrote to Trysta Herzog:

First of all you have again over reacted. At no time did I give you an "order" and any reasonable reading of my email would agree. I would never do that. Any employee can volunteer their time if they wish to do so even to advocate for the initiative.

I will be very careful to not include you. I just thought it was a simple request to help out by getting news leader ad rates so I could make the arrangements to proceed.



# Depositions

# Deposition Excerpts – case involving traffic control plan

Q. According to your plan, if it was carried out the way you designed it—

A. Okay.

Q. --when this car was headed south on 5 on the straight, approaching this left—left curve, what was the posted speed limit?

A. Posted was 60.

Q. What signs were up showing any change?

A. Any change of speed limit, no signs were up.

Q. Do you consider that to be safe?

A. Uh, well, the – when we create our work zone traffic control plan, we try to make each situation as safe as we possibly can.

# Yes, sir, I consider that to be safe

Q. So my question is, do you consider that to be safe?

A. I don't know.

Q. Would this temporary plan be safe as a permanent plan?

A. As a permanent plan, no.

# Plaintiff's counsel wants to know how to make the traffic control plan safer

Q. Why?

A. Probably because there are, you know, the situation as far as, you know, the reverse curve and "Stop Ahead" sign. I would say that.

Q. What else?

A. Uh, I—I just—I think maybe the—maybe a little bit of warning, that was it, I think, so –

Q. A little bit of warning of what?

A. Of what's coming up ahead.

# Tell me more, says plaintiff's counsel

Q. Such as?

A. The situation. It's a –

Q. I need specifics here.

A. Okay. I would probably warn them that there is a stop coming up ahead.

Q. What else?

A. And there's probably a reverse curve coming up ahead.



# That's actually quite enough from you !

Q. Also a T intersection?

A. No. I think – I think maybe the stop ahead and the – and the curve would be enough.



# Good Answers in a Deposition

- Yes.
  - No.
  - I don't know.
  - I can't remember.
- 
- Unless you are the expert – then you should know.



# George Jackson Deposition

Q. So, when you got your check less than a week ago do you know what your hourly rate was?

A. No.

Q. Okay. When you report in at 7:00 in the morning on this project the one out here on the 63 Highway bypass what's the first thing you would do?

A. I don't know.

Q. Would there a meet -- would there be a meeting, kind of, a safety meeting or tailgate meeting or some sort of a meeting in the early morning to discuss what was going to take place that day?

A. I don't know.

Q. You can't tell us what you would do when you got to work?

A. I don't know.

Q. Well, would you -- would you meet at any particular location at the beginning of the day?

A. I don't know.

Q. Would you drive over by yourself or would some coworkers ride over with you?

MS. WITTEN: Objection. Vague. Do we have a timeframe we're talking about?

Q (By Mr. Henry) Yeah, I'm talking about April of 2013.

A. I don't know.

Q. You don't know if you carpooled with other workers or whether you drove over by yourself?

A. I don't know.

Q. Say, in April of 2013 did you ever drive your personal vehicle, your car or your truck, over here to the West Plains project?

A. I don't know.

Q. This project was 3.258 miles in length. Did you know that?

# He really just doesn't know much, does he ?

Q. Okay. Did you know that this project extended or began out around 160, the 160 Highway intersection, and ran out to just past ZZ Highway out past Dairy Queen south of town?

A. I don't know.

Q. We're talking about a project now that you worked just a little over a year ago and you don't know?

A. I don't know.

Q. How would you know where to go when you got to work at 7:00 in the morning?

A. I don't know.

Q. Would you just wander around until you found somebody?

MS. WITTEN: Objection. Argumentative.

A. I don't know.

Q (By Mr. Henry) Did you ever meet at Ramseur Road early in the morning?

A. I don't know.

Q. Did you ever meet at the veterinary clinic, the red veterinary clinic, Doc Ulmanis clinic out at the intersection of 17 and Highway 63?

A. I don't know.

Q. Did you ever meet at the Dairy Queen out near the south end of this project?

A. I don't know.

Q. Can you tell me any place that you met up with your coworkers and with the job superintendent on this project in April of 2013?

A. I don't know.

Q. Mr. Jackson, you're not on any medication or anything that would affect your memory today, are you?

A. I don't know.

MS. WITTEN: Let's take a quick break.



## “Policy” Language

- Call them standards, guidelines, best practices, or policy.
- They still instruct us how to do our work. If we don't like how they are written, we should change them.

# MoDOT's Challenge

## Category: Minor Routes Shouldering Project Guidelines

From Engineering Policy Guide

Jump to: [navigation](#), [search](#)

Shoulders of any width provide the proven safety benefit of extra recovery area for errant vehicles. The public perceives shoulders as an enhancement to the transportation system and have consistently identified them as a top tier desire. In response, MoDOT has challenged their districts to assemble funding from any source possible and provide as many miles of shoulders on its minor routes as possible. The following guidelines are offered as an aid to facilitate the design of these projects.

# Please don't call our scrub seals "disastrous"

**From:** Dennis Brucks  
**Sent:** Wednesday, October 25, 2017 9:36 AM  
**To:** Keith Smith; Timothy A. Jackson; Michael Shea; Jason Blomberg; Jeremy Kampeter  
**Cc:** Juanita McQuay  
**Subject:** RE: Scrub Seal in the EPG

Keith,

I would recommend deleting 413.6 since it is not accurate, unless MT has reason to object. We still use this treatment occasionally on STIP projects and I believe SE maintenance still uses it. I seem to recall a temporary ban on scrub seals back in the early 2000's after some disastrous scrub seals with some bad StyR oil that didn't cure and picked up on tires. When done properly, it is a very good seal for low volume routes and for shoulders on high volume routes.

Recommend deletion:

## 413.6 Scrub Seal Treatment

The scrub seal treatment is no longer in use.

Category: [413 Surface Treatments and Preventive Maintenance](#)

Dennis Brucks, P.E.  
MoDOT  
Construction Liaison Engineer  
(660) 385-8270

# Please remove the word “dangerous”

## **409.2.5 Construction Requirements (Sec 409.5)**

### **Weather Limitations (Sec 409.5.2)**

See Weather Conditions in Paving Operations.

### **Application of Bituminous Material (Sec 409.5.4)**

See Distributor in Paving Equipment. Excess binder works upward to the surface of the pavement and creates a black, sticky surface condition (i.e., flushing, bleeding, etc.). In wet weather, **the surface may become slippery and dangerous.** A black appearance in the surface can also be the result of insufficient cover aggregate or a loss of cover aggregate.

Applying too little binder to the surface leads to a loss of cover aggregate because insufficient binder is present to hold the aggregate in place. Generally, the use of too little binder occurs less frequently than the use of too much.



# Maybe we should explain how to seal correctly ?

## 409.4.3 Chip Seal Failures

It would be extremely misleading to give the impression that all seal coat/chip seal jobs are successful even though proper materials are used. Failures do occur and the important thing is to know why they occur and how to prevent them.

1. Streaking results when alternate longitudinal strips of the seal coat/chip seal contain different quantities of asphalt binder. This is due to lack of uniformity of application. Some of the more common causes of streaking are mechanical faults, improper spray bar adjustment, and careless operation of distributors. Another frequent cause is applying the asphalt at a temperature so low that it is not fluid enough to fan out properly from the nozzles on the spray bars. Streaking can generally be avoided by using a clean and properly adjusted distributor and applying the asphalt at the correct temperature. Careful spray bar adjustment is important to prevent streaking when high viscosity materials are used.
2. The use of too much asphalt in seal coat/chip seal work is a common fault as well as a serious one because of the safety hazard it presents. Excess asphalt works upward onto the pavement surface and is the origin of the black and sticky surface condition referred to as flushing, bleeding, fattening up, etc., which becomes slippery and dangerous to traffic in wet weather. It should be pointed out that a black appearance can also be caused by insufficient cover aggregate or may in part, be due to loss of a portion of cover aggregate.
3. The application of insufficient asphalt binder leads to loss of cover aggregate because not enough binder has been applied to cement the aggregate particles into place. Generally, the use of too little asphalt occurs less frequently than the application of too much. This emphasizes the need for very careful attention to proper application quantities.

# Guardrail Length of Need

- Section 4-09.8(4) of the Policy Procedure and Design Manual (PPDM) currently specifies use of a 15-degree encroachment angle in determining length of need for guardrail.
- Using this 15-degree rule for determining amount length may result in an inadequate length of guardrail.
- A future revision of the PPDM will address this issue. Until that revision is completed, guardrail length of need should be based on the tables for run out length in Section 5.6 of the AASHTO Roadside Design Guide instead of the 15-degree rule.



# Review of Twin Bridge Accidents in District 7, 2003

- IS 44 (12)**
- Bridge LO799 over Shoal Creek WB
    - Injury (too fast, improper lane change) 9-7-02
    - Fatal (driver urinating out window) 9-10-02
  - Bridge L0857 over MO 43/86 WB
    - Injury (swerved to miss car) 12-11-01
    - Fatal (improper lane change) 7-25-03
  - Bridge A0630 over MO 59 WB
    - Injury (forced off roadway) 6-10-01
    - Injury (fell asleep) 8-19-01
    - Injury (unknown) 6-13-02
  - Bridge A0543 over Jones Creek EB
    - Fatal (fell asleep) 2-12-03
  - Bridge A0976 over Union Pacific RR
    - EB Injury (medical problem) 9-29-02
    - WB Fatal (fell asleep) 6-12-03
  - Bridge A0981 over Williams Creek EB
    - Injury (fell asleep) 10-1-00
  - Bridge A0937 over Turnback Creek EB
    - Fatal (hear attack or fell asleep) 7-16-01

# Review of Twin Bridge Accidents in District 7, 2003 continued

**US 71 (15)** Bridge H0518 over Mormon Fork Creek SB  
Fatal (unknown) 4-25-02

Bridge A1098 over Possum branch NB  
Injury (swerved to miss deer) 11-17-01

Bridge 1142 over Marais Des Cygnes SB  
Injury (fell asleep) 7-9-02  
PDO (load shift, lost control) 7-12-01

Bridge A2628 over Willow Branch SB  
Injury (fell asleep) 1-20-02  
PDO (overcorrected, snow) 12-3-02

Bridge A2817 over Union Pacific RR NB  
Injury (ice, slid) 11-9-00

Bridge A3403 over Opossum Creek NB  
Injury (fell asleep) 5-20-03

Bridge A3552 over Route V (Jasper) NB  
Injury (drugs) 12-27-02

Bridge A4028 over Jackpine Road SB  
Injury (lost control) 12-26-00

Bridge A5219 over Route V (Newton) SB  
Injury (fell asleep) 11-15-02

Bridge A5540 over Mulberry Road SB  
Injury (reaching for a soda) 8-1-00

Bridge A5543 over Burlington RR SB  
PDO (unknown) 3-30-02

Bridge A5628 over Buffalo Dry Branch NB  
Injury (unknown) 2-10-02

Bridge A1395 over Indian Creek SB



## New Length of Need Policy

- This review eventually resulted in the review of guardrail length of need at twin bridges all around the state. Hundreds of locations were upgraded.

# Allegations against the Missouri Highway & Transportation Commission

17. At the times and places relevant herein, the Defendant, Missouri Highways & Transportation Commission, was careless, negligent and partly at fault in causing or contributing to cause said motor vehicle wreck in the following respects, to wit:

- a. by not installing proper roadside barriers and guardrails at Devil's Branch bridge and along U.S. 50 Highway in and around where the subject motor vehicle wreck occurred, and specifically, in the area where Dustin Thomas Cleveland drove off the roadway;
- b. by not installing effective barricades and guardrails of proper length prior to January 8, 2006;
- c. by not installing roadside barriers or guardrails greater than 400 feet in length prior to January 8, 2006, at Devil's Branch bridge;

# Allegations against the Missouri Highway & Transportation Commission, continued

- g. by installing and maintaining guardrails and barricades that were less than 200 feet in length on Highway 50 at Devil's Branch bridge prior to January 8, 2006;
- h. by not making the correct calculations as to length of the barricades and guardrails and the proper runoff on Highway 50 at Devil's Branch bridge and by not providing the proper length guardrails and the proper runoff prior to January 8, 2006;

# Wrap up

- Lesson number one – think before you send the message or open your mouth
- Lesson number two – revise drafts and revise them again
- Lesson number three – pick up the phone



Questions, comments ?



