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## Proving the trucking negligence case

How to lay a strong foundation in a trucking case, including acquisition of crucial evidence and wielding it as a weapon

In today's trucking industry, even the mom and pop trucking companies have the benefit of savvy insurers (and their lawyers) who are experts in keeping key evidence under wraps unless forced to disclose. There are standard evidentiary targets that plaintiffs' lawyers must pursue immediately to gain even footing with the industry defendants. The purpose of this article is to highlight the nature of this critical evidence, discuss effective methods of obtaining the evidence, and how to maximize the utility of this information in your case in chief.

### A broad spectrum of electronic information

Contrary to the image that trucking is an unsophisticated profession, today's trucking companies and fleets are often large, high-tech, and sophisticated companies that compile and store a wealth of electronic information and data. Even the smaller operations are utilizing cutting-edge trucking technology which can be critical to the plaintiff lawyer trying to prove-up his or her case. This universe of electronic data is vast and can include any of the following:

- **Electronic Control Modules (ECM)** from engines, braking systems, and airbag systems. Such systems are essentially small computers integrated in the vehicle component and can record information such as speed and braking.
- **Event Data Recorders (EDRs)**, otherwise known as the BlackBox). In heavy trucks, the EDRs are usually a component of the ECM. In a triggered event, data may be recovered regarding belt use, steering, braking, occupant position, speed, throttle percentage, brake application, ABS activation, tire pressure, cruise control, crash pulse, change in velocity, and airbag activation data.
- **Video footage** recorded by DriveCam, Smart Drive, DashCam and other video companies.
- **Satellite positioning systems** including GPS, electronic crash reports and e-mail

systems and other forms of tracking systems. Other electronic information can include fuel receipts, driver logs, Qualcomm satellite communication systems and cellular phone/radio records.

All of this evidence is vital to proving your client's case and it must be requested and obtained at the onset to ensure that it is not "lost" "destroyed" or "otherwise misplaced" as defendants all too often like to claim.

Many commercial trucking companies utilize dash-mounted cameras which record the driver and traffic in front of the truck. Depending on the service that the trucking company subscribes to, this video may be uploaded to a cloud-based server maintained by the DriveCam company. In certain situations, this video may be available by third-party subpoena when the trucking company claims no video exists. For example, Los Angeles County MTA uses "Smart Drive" camera systems on all newer buses, which data can be obtained from Smart Drive directly. Many camera systems also record audio files which frequently are not produced. In a recent case, the trucker was caught screaming "Ay Dios Mio!" (Oh my God!) as he suddenly realized his inattentiveness was about to cause the death of a pedestrian proved helpful in reaching a favorable settlement.

With respect to navigation devices, truckers utilize a number of different GPS systems which store key information regarding the global positioning and route



of the vehicle. This information can be critical to determining area of impact, position of rest, and trip information for liability purposes.

Once you have confirmed the existence of an ECM, EDR, and GPS, it is important that you retain a qualified engineer to properly download the data. It is recommended that a stipulation be reached with the defendants regarding the protocol of the download. Also, do not forget the value of the critical evidence obtained in your own client's ECM in their passenger vehicle which often illuminates critical evidence about speed and braking especially.

### The early bird gets the worm

This process of evidence gathering begins with a detailed preservation letter. *\*(Please contact the authors for a sample)\**. The preservation letter should list out all the items to be preserved, including but not limited to those discussed above. While such a letter is not required under California law (See *Williams v. Russ*, (2008) 167 Cal.App.4th 1215 and *Advocate* August 2012 issue, *Destruction or withholding of*

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evidence by the defense may leave the defendant defenseless, by Rahul Ravipudi and Ryan A. Casey), an early preservation letter conspicuously puts defendants on notice, and will prove highly advantageous should a subsequent motion for issue or terminating sanctions be necessary due to a defendant's spoliation of evidence.

However, no matter how diligently you have timely pursued the evidence-gathering stage of your case, there is no question the defendant already has a head-start on you. It is not unusual for commercial carriers to receive notice of a motor vehicle accident by one of their insureds and immediately send out an investigation team. Likewise, many trucking companies have a risk management team who immediately report to the scene of the collision to document physical evidence and interview potential witnesses. This evidence is critical to obtain and recent case law has strengthened your right to seek it. (See *Coito v. Superior Court* (2012) 54 Cal.4th 480, which held that witness statements were only entitled to qualified work product protection and rejected the dicta in *Nacht & Lewis*, (1996) 47 Cal.App.4th that, "recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's impressions, conclusions, opinions, or legal research or theories.") Consequently, in addition to sending out a detailed preservation letter, at the earliest possible date you should be propounding discovery to obtain this evidence.

Your discovery plan should be comprehensive and it is recommended to propound request for production of documents at the earliest possible stage, in order to further ensure that you are preserving critical evidence. These requests should seek all the pertinent electronic forms of data discussed above, as well as all the documents created during that initial investigation including witness statements, reports, and photographs they have of the scene and of the two vehicles involved. Typically the insurance carrier will have detailed vehicle damage information, including repairs, which become critical for the accident reconstruction. You are entitled to this evidence, including witness statements pursuant to *Coito*, so don't be afraid to fight for it. \*(For a sample Requests

for Production of Documents on these trucking issues please contact the authors.)

At the outset, you should ask for the driver's full "Driver Qualification File" and personnel file including any disciplinary action. If the trucking company has not formally admitted course and scope, you are entitled to this discovery. In a recent trial against J.B. Hunt, we determined through this discovery that prior to the incident the defendant driver had been fired twice by J.B. for being an unfit driver. When J.B. Hunt re-hired him a third time, he was on the job less than three months before he ran a red light and broadsided our client, causing a brain injury, and then fled the scene. The information contained in his personnel file became the basis of a punitive-damage claim at trial.

If defense counsel claims privilege, ensure that they provide you with a detailed privilege log explaining the substance of all documents withheld on the basis of privilege including the author, recipient, date created, and number of pages. As discussed above, the law is generally that physical evidence or witness statements are not considered protected attorney work product especially if there is no other means available to obtain this information. (See *Coito*, 499-500.)

In addition to seeking the above documents, data, and other evidence, you should also serve written discovery directed at obtaining the trucking company's internal policies and procedures regarding training, hiring, safety, and vehicle operation. As set forth in more detail below, the information contained in these documents, or in many cases the absence of the documents, will provide the framework for establishing the negligent actions of the defendant driver.

These materials vary from case to case, but as a general outline you should request the following:

Materials related to driver qualification file, standards for hiring, driver training documents, testing conducted prior to hiring of drivers, continuing driver educational materials including videos, manuals, handouts, recurrent driver testing materials, safety meeting minutes and schedules, log book auditing procedures, drug testing programs and results, identities and descriptions for

members of the various departments at the trucking company. \*(Please contact the authors for a discovery sample.)

Should defendant object or improperly attempt to limit your access to any of the above materials, then don't be afraid to pursue law and motion to force the defendant's compliance. In fact, if your case is venued in Los Angeles Superior Court, the new local rules require that you request an informal discovery conference prior to filing motions to compel further responses. Take advantage of this procedure as a way to inform the court of the importance for the documents you are requesting and frame the issues in your favor.

### Using the evidence

Now that you have obtained all of this important documentary evidence, it is imperative that you maximize the effectiveness of it, but how do you do this? First and foremost, it is imperative that you take the time required to study all of the documents produced in detail and compare and contrast the various sources of data for inconsistencies. In trucking cases there will often be multiple documentary sources you can look to in order to obtain a certain piece of information. These records can shed light on certain violations including maximum consecutive hours, speeding violations, and even can establish trucker fatigue.

The rules you need to follow in order to establish these violations are contained in the *Federal Motor Carrier Safety Regulations* (FMCSR) §§ 395.3 and 395.5. (See <http://www.fmcsa.dot.gov/rules-egulations/administration/fmcsr/fmcsrguidedetails.aspx?menukey=395> for the complete text of these rules.)

One of the violations you can prove by applying these rules to the information you obtain in discovery, is to show that a defendant driver is in violation of the maximum consecutive hours rule. For property carrying vehicles, this rule is set forth in FMCSR § 395.3(b)(1) and (2), and in §395.5(b)(1) and (2) for passenger carrying vehicles. These regulations state that a driver shall not be permitted to operate a vehicle if he has been on duty a total of 60 hours in any period of seven consecutive days if the employer does not operate commercial motor vehicles every day of the week; or

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having been on duty 70 hours in any period of eight consecutive days if the employer does operate commercial motor vehicles every day of the week.

To prove these violations, you need to obtain a driver's logs, his time sheets, fuel records, bills of lading, and other documents discussed above and then compare and contrast the hours he is working to ensure compliance, or a lack thereof, with these regulations. It is important to note that this rule pertains to a driver's *total number of hours on duty*, regardless if that time is being spent driving, filling up with gas on duty, or on duty waiting on a load to be delivered. Keep this in mind as in many situations a driver may not be driving for the maximum number of hours permitted but his total on-duty time exceeds the maximum.

In conjunction with maximum hour rules is the issue of driver fatigue. There are multiple articles and studies that demonstrate that fatigued driving is as dangerous as drunk driving and yet it is an issue which regularly arises in trucking collision cases. Violation of the maximum hour rule is one way to establish driver fatigue, but additional sections contained in FMCSR 395.3 and 395.5 can also be used to establish driver fatigue.

First, FMCSR §395.3(a) and §395.5(a), govern driving time and rest breaks that a driver must take. §395.3 (a)(1) and §395.5 (a)(1) prohibit a driver from starting a driving shift without first taking 10 consecutive hours off duty. Secondly, §395.3 (a)(2) and §395.5 (a)(3), state a driver may drive only for a period of 14 hours after coming on duty following 10 consecutive hours off, and after the end of this 14 hour period he must not drive again until he has taken 10 consecutive hours off duty. Lastly, §395.3 (a)(3) and §395.5 (a)(3), state that the driver may only drive 11 hours during the 14 hour period of being on duty, and may not drive more than eight hours without at least an off duty or sleeper berth period of 30 minutes.

Commercial drivers must comply with these rules, and recent modifications to them are set to take effect on June 30, 2013. You should consult them religiously when analyzing the evidence you obtain in discovery such as Driver Daily Logs, Bills of Lading, GPS data and other electronic

data. The evidence can routinely be used in connection with the regulation to establish that a driver is in violation of these basic safety rules in place to prevent driver fatigue. Often the evidence on its face will show that a driver is violating the regulations, however, in cases where companies are doctoring their driver's service hours, which unfortunately for the motoring public occurs far too often, then comparing and contrasting the data in these various documents can help prove these inconsistencies and catch the defendant red-handed.

For example, assume a driver's logs show that the driver is properly complying with all driving regulations. If you have only this data the story stops there. However, in this case you also have fuel receipts, bills of lading, and meal reimbursement receipts showing that while the driver was reporting in his logs that he was "sleeping" in Fontana, he was actually filling up in Fresno after dropping off a load and was therefore violating this important hour of operation rule in place to ensure the safety of the motoring public.

This example should also make it clear how GPS data that can plot the real-time locations of trucks during operation can also be vital to obtain. In a recent case, a truck driver crossed over the center line, striking our clients head-on. The defense was a sudden tire failure. The log records were used to establish that the driver made several unexpected stops throughout his route on the date of the subject incident. Turns out these were naps the driver was taking because of his fatigue. This testimony combined with the expert testimony of a sleep expert established that the defendant driver was fatigued at the wheel.

A third way you can use this evidence to establish violations of safety rules is to calculate the driver's speed while operating his vehicle and to establish whether or not he was running on time or late. The benefit of obtaining bills of lading and driver logs is that these documents give you a time of departure from the point where a driver's trip began before the injury-causing incident. Taking this time and the total distance traveled before the collision, you can calculate an average speed of the driver on the trip. Often this will show that the driver during the trip

was averaging above the maximum 55 mph speed limit for tractor trailers as set forth in California Vehicle Code section 22406(a).

With testimonial evidence from the driver, you should obtain the time the driver left his last stop prior to the incident, and also the time he was required to arrive at his intended destination. When you have this information, along with the area of impact and time of impact, you can use driver logs and bills of lading to determine if he had to have been speeding. A simple time/distance calculation can show that the driver was running late and had to travel in excess of the speed limit to reach his destination. Lastly, in situations where you have electronic data from the ECM module or black box, this can also be used to show the average speed of the truck, and provide additional information such as the speed just before impact, the maximum speed the driver was traveling on the trip and whether he ever applied the brakes.

As can be seen from above, it is clear that this evidence can be used in a number of ways to prove important safety violations including the speed limit, and the basic speed law, maximum hours and evidence of driver fatigue. However, the utility of this evidence goes even further.

## Deposing the PMKs

The law is well established that the violation of internal safety rules is evidence of negligence. (See *Dillenbeck v. City of Los Angeles*, (1968) 69 Cal.2d 472, 481.) "[T]he jury is entitled to conclude that the mere fact of violation of a safety rule promulgated by the employer is evidence that the employee conducted himself carelessly." (*Ibid.*) Therefore, the next step is to pore over the trucking company documents regarding internal policies and procedures for training, hiring, safety, and vehicle operation so that you can use these documents to force the defendant's own employees into becoming your most powerful witnesses.

This is accomplished by noticing up a string of person most knowledgeable (PMK) depositions on the subjects and issues most important in your particular case. Consequently, what you are trying to prove will govern who you need to depose.

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***Are you trying to prove that the company negligently hired and retained the driver?***

Then you are going to want to notice up a deposition of the PMK deposition on the subjects of:

- The driver qualification file, the company standards for hiring employees, background checks, drug testing, moving violations, certification, training, qualifying drivers, etc.

***Are you trying to prove that the driver was simply negligent in the operation of his vehicle?***

Then you are going to want to notice up a deposition of the PMK deposition on the subjects of:

- The Federal Motor Carrier Safety Regulations, company safety rules, safe operation of the vehicle, safety standards for truck driving.

***Is this a case of a negligently maintained vehicle that contributed to a collision?***

Then you are going to want to notice up a deposition of the PMK deposition on the subjects of:

- Vehicle maintenance procedures, scheduling of vehicle maintenance, pre-trip inspections, post trip inspections, mandatory inspections and repair, etc.

Regardless of the specific issue in your case, prior to deposing these witnesses you need to make certain of a few things, 1) that you have been provided with the person who is in fact the most knowledgeable on the subject matter you are seeking and there is not another person with more knowledge; and 2) that you know what it is that you want to achieve. What concessions do you need from him/her and what do you need to establish in your particular case? Obviously this will vary from case to case, but for the

purposes of this article, I will briefly outline a strategy for deposing a PMK on safety.

When taking this deposition you are being provided with access to the person charged by the defendant with ensuring that company drivers operate their vehicles safely, in accordance with the law, and in accordance with the company's established policies and procedures. He or she should be able to correctly identify the rules and regulations his drivers must follow, including the FMCSR. If this individual cannot identify the mandatory Federal Regulations, then it is no wonder that the defendant driver didn't follow them.

If the witness knows the rules, then it is your job to get him to confirm the existence of, and the reasoning behind, the rules you know the defendant driver violated. Get the witness to confirm that the purpose of these rules is safety, and obtain concessions that the drivers must follow them. Try and then get the witness to admit that the defendant driver violated the rules in your case. If the PMK won't go that far, get them to admit the type of conduct that would constitute a violation of the safety rule. Try to empower this witness and get a concession that no job is more important than safety, and that safety is everyone's responsibility.

All of these concessions are incredibly effective at helping you establish the importance of the regulations and policies you will be arguing constitute the standard of care that the defendant breached.

### **Conclusion**

The trucking insurance industry spends millions each year in collision

response and early investigation. As plaintiffs' lawyers, we must act aggressively to even the playing field and obtain the critical evidence trucking companies routinely "lose" or simply refuse to disclose.

Handling a trucking case properly is not checkers; it's chess. It requires anticipating the correct issues at the beginning of the case, setting out a discovery plan to obtain the necessary pieces for your particular case and then deploying them strategically and methodically to obtain an advantage over your opponent. Following the steps discussed above will help to establish a solid foundation for your case.

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