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The Motor Carrier Under Oath: Deposition Preparation of the Company Representative

An American College of Transportation Attorneys White Paper

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The American College of transportation Attorneys is a non-profit association consisting of a select group of experienced transportation defense lawyers who have joined together to serve as a confidential, reliable, and supplemental legal resource to the trucking industry. ACTA bylaws limit membership to 25 members, each with over 20 years of trucking industry service. A roster of current ACTA members is appended to this paper.

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Among the most arduous and potentially dangerous phases of discovery in a serious truck accident case is the testimony of the motor carrier corporation through designated representatives. Notices of Deposition addressed to the corporation pursuant to Rule 30(b)(6) (or an equivalent rule under the applicable state rules of civil procedure) often strain the boundaries of discovery with numerous subject matter designations. Among the more burdensome designations are those aimed at developing evidence of poor hiring practices, inadequate driver training, lack of driver supervision, driver disqualification, violations of the Federal Motor Carrier Safety Regulations, spoliation of evidence, patterns of hours of service violations, failure to monitor hours of service compliance, and any inconsistencies between the conduct/ supervision of the driver and the policies and procedures of the company. The vulnerability of motor carrier corporate representatives in this setting has been exacerbated by recent development of document retention practices; increased duties arising out of Federal Motor Carrier Safety Regulations and interpretations from the Federal Motor Carrier Safety Administration; and various decisions on the federal trial court level and in-state appellate court recognizing a connection between such deficiencies and truck accidents. Given these factors, careful preparation of the corporate representatives is essential.

Plaintiff Objectives in Company Witness Depositions Along With Potential Pitfalls and Opportunities for the Company Witness

Perhaps the single most painful occurrence for a trucking company in a jury trial is to watch a series of videotaped deposition segments that feature some of their most revered and capable company leadership coming across as argumentative, defensive, evasive, less than competent, or worse, less than honest. Most of these segments occur during the

plaintiff's case in chief, and the only counter-punch at that moment is to offer segments of video deposition that are more flattering. Unfortunately, the trucking company is often left having to wait until its own case in chief to call these same witnesses live to context and clarify the video testimony; by that time, the negative video segments have been lingering in jurors' minds for days.

Experience tells us that in the vast majority of cases, plaintiff lawyers who focus on the trucking company at trial do so because the underlying facts are unfavorable. By focusing the jury's attention on the company's actions or inactions far removed from the accident (including allegedly subpar record keeping, evidence preservation procedures, etc.), the actual facts of the accident become less important. Further, juries will often "forgive" a plaintiff's failure to meet the burden of proof if the plaintiff's lawyer can demonstrate that the trucking company fell short on potentially significant safety fronts that have absolutely no connection to the accident and determining who is at fault.

Most of the time, when company witness depositions go bad, it is because the witness does not understand his/her role and is potentially misguided into believing that systemic *I don't knows* are acceptable answers to a deposition questions. It is important to realize that pitfalls arising from these misunderstandings can and should be avoided. The following discussion is a road map of items to consider when preparing for a deposition of a trucking company employee acting as a spokesperson on a particular issue.

a. Is this particular company witness the correct person for the particular issue?

In virtually every state of the union, the law is uniform in requiring plaintiff lawyers to identify well before a company deposition the areas of inquiry in which a company witness is sought to testify. If the designation is unclear, objections may be raised to force the plaintiff's lawyer to clarify the described areas. The Federal Rules of Civil Procedure state that when once the corporate deposition is noticed, "The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." (FRCP 30b(6)).[1]

The purpose of Rule 30b(6) is to allow discovery of the knowledge of the corporation more than the knowledge of the individual deponent. The courts have held that one of the purposes of Rule 30(b)(6) is to curb any temptation a corporation might have to shunt a discovering party from "pillar to post" by presenting deponents who each disclaims knowledge of facts clearly known to someone in the organization. The testimony of a Rule

[1] In determining who is a "managing agent" the decisions hold that some of the practical considerations to be appraised are (1) whether there is any danger that the proposed deponent's interests at the time of the taking of the deposition are adverse or hostile to the party whose managing agent he is alleged to be; otherwise stated, whether the deponent's interests are still identified with his principal's and whether he is loyal to his principal; (2) whether the deponent is invested by his principal with general powers to exercise his judgment and discretion in dealing with his principal's matters with respect to the subject-matter of the litigation; (3) whether the deponent is a person who could be depended upon to carry out his principal's direction to give testimony at the demand of a party engaged in litigation with the principal; (4) what are the deponent's functions, powers and duties (as well as his rank or title) with reference to the subject-matter of the litigation; (5) whether any person or persons in higher authority than the deponent sought to be examined are in charge of the particular matter or possessed of the information as to which the examination is sought. Curry v. States Marine Corporation of Delaware, D.C.S.D.N.Y.1954, 16 F.R.D. 376; Rubin v. General Tire & Rubber Co., D.C.S.D.N.Y.1955, 18 F.R.D. 51; Warren v. United States of America, D.C.S.D.N.Y.1955, 17 F.R.D. 389; Aston v. American Export Lines, Inc., D.C.S.D.N.Y.1951, 11 F.R.D. 442; Williams v. Lehigh Valley Railroad Company, D.C.S.D.N.Y.1956, 19 F.R.D. 285; Duncan v. United States, D.C.S.D.N.Y.1954, 16 F.R.D. 568; Denoto v. Pennsylvania Railroad Co., D.C.S.D.N.Y.1954, 16 F.R.D. 567.

30(b)(6) designee "represents the knowledge of the corporation, not of the individual deponents. A corporation has a duty under Rule 30(b)(6) to provide a witness who is knowledgeable in order to provide "binding answers on behalf of the corporation".. A Rule 30(b)(6) designee is not required to have personal knowledge on the designated subject matter. The designating party has a duty to designate more than one deponent if necessary to respond to relevant areas of inquiry on the noticed topics.

The duty to prepare a Rule 30(b)(6) designee goes beyond matters personally known to the witness or to matters in which the designated witness was personally involved. The duty to produce a prepared witness on designated topics extends to matters not only within the personal knowledge of the witness but on matters reasonably known by the responding party. By its very nature, a Rule 30(b)(6) deposition notice requires the responding party to prepare a designated representative so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known by the responding entity.

For example; while most *Safety* professionals will cast a broad net over subject areas of which they are knowledgeable, a 30(b)(6) deposition requires the trucking company commit to producing a *knowledgeable* person in a particular area. That said, a company must consider producing more than one witness if not doing so will require someone to delve into an area that, while familiar, is nonetheless outside their expertise. This is especially true in cases where hiring and retention protocols (that invariably involve many human resource issues) are also to be discussed with subjects such as tractor on-board electronic capability, driver training and on the road DOT compliance. One must remember that every case is

different, and that every trucking company is different; however, considering that a video deposition can roll as-is in front of a jury, serious thought should be given to ensuring that all 30(b)(6) depositions are staffed appropriately.

Often, the Plaintiff's lawyer will couch the description of the person being deposed as the "person most knowledgeable" on the subject. That is not a correct legal description. There is no requirement that the person designated by the company be the most knowledgeable on the subject. Although the witness must be prepared to discuss the topics, the company has discretion in who to designate.

b. Be familiar with the documents produced in the 30(b)(6) subpoena *duces tecum* request.

Relative to documents, the company witness should focus his/her attention on those that were produced in response to written discovery, and particularly those produced in response to the deposition notice. (Company witness depositions typically contain a request known as a *duces tecum* that requires the witness to produce documents.) For this reason, when it is learned that a company witness deposition is being sought or has been noticed, communication about the scope and detail on the deposition notice itself must be initiated. All company witnesses deposed in this context will be asked whether they had seen the notice prior to their deposition, as well as to explain the procedures that were initiated to respond. It is true that such an inquiry may delve into confidential matters that would draw an objection from defense counsel; however, it is certain that a plaintiff's lawyer will be entitled to inquire into document depositories, as well as what company employees the witness conferred with in order to locate responsive documentation. To the extent several persons

within the organization were conferred with, the trucking company witnesses should not hesitate to identify who those persons are. Their identity is discoverable and the effort demonstrated by this due diligence is further evidence of the sound organizational structure of the company and the seriousness taken to respond to the requests contained in the notice. Developing amnesia as to who within the company was contacted to aid the witness to respond to the notice will unnecessarily create a bad impression of the company. The reality is that a plaintiff's lawyer is not entitled to depose every company employee but is rather limited to designated corporate representatives on general issues. Consequently, very little is given up in being responsive to this line of questioning.

c. Realize that the plaintiff's bar has access to the internet.

If your designated company witness has given previous depositions in personal injury cases, you must assume that transcripts from those depositions are in the hands of the plaintiff's lawyer. Just as the defense bar through its industry-based organizations has information sharing on plaintiff's experts, the plaintiff's bar shares information, and deposition banks are readily available, particularly matters involving large fleet operators. Consequently, the practice of reviewing prior transcripts is a good starting point in identifying who the 30(b)(6) witness will be, and identifying the areas in which the tough questions will be asked. In this regard, it is very important that all company depositions and all attached exhibits be retained by trucking company counsel. (Note that as a normal course, it is unadvisable for the trucking company to maintain all prior 30(b)(6) depositions in its possession, as then those transcripts would become discoverable in response to a standard document request)

d. The deposition is about the company position, not the deponent's personal opinion.

Another common trap is the blended question which seeks to join the deponent's individual answer and the corporate answer. In a recent deposition, the corporate representative was asked, "What do you think that the corporation's policy should be on testing for sleep apnea?" Counsel then asked, in a corporate representative capacity, "Why has the corporation not adopted the proposed policy?" This haziness clearly works to the benefit of the interrogator to bind the corporation on all of the testimony. In an effort to avoid such confusion, it is important to clarify which questions are being answered solely as an individual and which are being answered on behalf of the corporation. Nevertheless, the opinion of someone in a safety role, whether it binds the corporation or not, can still be very damaging if it is not adopted by the corporation.

e. A Perfect Safety Program Does Not Eliminate Accidents.

There will always be accidents as long as human beings drive trucks. The perfect safety program will lessen, but not eliminate, accidents. There is always something more that the safety department could do with an unlimited budget. Failing to take that further step is not negligence.

f. Don't Try to Win the Case at the Deposition.

Answer the questions, and do not elaborate. You will not make the plaintiff give up the case regardless of how reasonable and logical your explanations are. Don't try.

g. This Is NOT a Pop Quiz.

It is okay to say I don't know. You will only lose credibility if you try to answer every question. Even if counsel ridicules you for not knowing the answer, stand your ground.

h. Don't Throw Your Co-Workers Under the Bus.

Unless you are asked, don't volunteer that others in the company know more about the subject than you do.

i. Silence is Okay.

This is not a radio broadcast. Be comfortable with periods of silence. We often feel discomfort at silence in a conversation and fill it with jumble. Counsel will leave periods of silence to elicit a further response or explanation.

j. What is the objective of the plaintiff's lawyer in noticing the 30(b)(6) deposition?

In actuality, the discovery of information rates very low on the order of priorities for plaintiff lawyers deposing trucking company witnesses. What plaintiff lawyers want is to give their case jury appeal and they intend to use trucking company witnesses to: **1) get very good sound bites that can serve as the hallmark of their case themes at trial; and 2) make the trucking company look either incompetent or dishonest.** Understanding those factors as the plaintiff's lawyer's objectives, how do they go about accomplishing these goals?

1*) Plaintiff lawyers hope that the trucking company witness is unprepared*

Good lawyering is time consuming, but good testifying is even more so. It requires a dedicated, focused and thorough job of understanding the issues to which the witness is

likely to be asked to speak, as well as understanding the nuances of documents that questions will arise from. Careful but focused study by the company witness is critical. Also, avoid the pitfall of ***study long but study wrong.*** Consequently, active planning with defense counsel for the anticipated areas of inquiry is necessary, saves time and will ensure that preparation is not wasted. In any lawsuit, there are material issues, less material issues, and irrelevant issues; as a result, the time invested must be on the matters that will determine the outcome of the particular case. Experience tells us that when company witnesses know the subject matter, they tend to be more responsive and precise to questioning. This leads a plaintiff's lawyer to the conclusion that efforts to stray the witness into areas that will aid in achieving their jury appeal goals, will not be fruitful. Thus, there is a premium in preparation.

2) Getting the trucking company witness to guess, speculate and "think and go outside the box."

All witnesses have a box of knowledge. For fact witnesses, that box includes: what they observed, what they said, what they wrote, what they read and what they heard. The "box" of fact witnesses such as drivers and team drivers tends to be smaller as compared to a 30(b)(6) witness. That said, even a 30(b)(6) witness has a "box" of knowledge, and as tempting as it may be to "think and go outside the box", it is rarely helpful to do so. On this point, it is important to realize that the deposition is not the opportunity for the company to tell its side of the story through its witnesses, but instead is simply an opportunity for the plaintiff's lawyer to ask questions. Further, because a corporation must give depositions through designated representatives produced in response to pre-identified subject matter inquiries, the scope of the questioning is limited by law. Therefore, trucking company

witnesses should be reminded that they are to remain within their zone of ***designated*** expertise and not attempt to win a case by engaging the plaintiff's lawyer on questions that go beyond the designated areas in the deposition notice. Questions that begin "Would you agree that" or "Would it be fair to say that" are usually very good signals that the plaintiff's lawyer is wanting the company witness to agree with a global statement that is all-encompassing; this is inviting the witness to speak to many matters outside that particular witnesses' "box". While defense counsel is likely to make objections to such questions, the rules of procedure require witnesses to answer despite the objection, and because of that, the best approach is to force the plaintiff's lawyer to ***clarify*** the question or to break it down. Otherwise, to agree to global generalizations really is tantamount to speculating or giving *one size fits all* generalizations to potentially specific issues. This can be avoided by the company witness by simply understanding what the role of the 30(b)(6) witness is.

3) Bad documents being met with "I don't know", "You need to ask him", "That cannot be correct – must be an error."

In 1972 when the Miami Dolphins had the "perfect" season going 17-0 and winning a Super Bowl, it is more probable than not that there were many points of imperfection along the way. Law suits are no different. There is no such thing as a perfect case. Even in the most defensible of matters, document issues will arise that may be confusing, seem very bad at first glance, or may reflect matters out of context. In these instances, it is important to embrace those documents and react proactively in explaining them. The company witness deposition is a perfect opportunity to get that done. The current technology climate features the use of e-mail, text messages and other communications that are often generated

instantaneously by company employees. These employees may not have time to place a response in full context, or even to reflect the best use of language or manners. It is imperative that company witnesses be prepared to embrace those communications. It is important to recognize that good employees and good people send bad communications all the time, and while much times and resources continue to be spent on electronic communication etiquette, company witnesses must be prepared to deal with the ill-worded note or memo.

Separate and part from these electronic communications (that can come from employees of all levels of the organizational hierarchy), poorly written memorandums that are copied to the trucking company's highest leadership may have to be explained. Too often, trucking company witnesses faced with a "bad document" in a deposition elect to not engage the plaintiff's lawyer and clam up. Unfortunately, all aspects of that reaction arrive before the jury, both the bad answer and the body language that accompanied it. Understanding that the standard by which trucking companies are judged is "reasonable care", it is important to understand that there is no requirement that trucking companies be perfect. All companies have employees that author insensitive or potentially inappropriate memorandum or email. Very few organizations, if served with a subpoena for all documents relating to a particular issue, would be proud of every piece of writing produced. That said, it is critical that the company witness be prepared to speak about all of the "hot" documents and explain and give context to what was being written, the timing of the writing, and why particular individuals would have been copied on such communications. While no explanation will ever completely nullify a particular singular bad document, juries tend to pick up tendencies; if the trucking

company witness appears knowledgeable, honest, forthright and sincere in answering questions explaining problems with particular documents, the witnesses' (and the company's) credibility will remain intact. While juries cannot be made to like and agree with the trucking company witness, it is important that a jury respect the witness from a standpoint of truth, honesty and sincerity. A company witness that knows the documents – well but not perfectly – will generally be well-received by a jury.

4) Hoping that the company witness is out of touch with the defense story line and contradicts a fellow company witness on an important point

Both the plaintiff and defense case development will evolve around a theme that can be presented in Court. It is therefore important for the trucking company witness to understand where his/her testimony fits within the global presentation. In this regard, while not all designated corporate representative witnesses will testify at trial, it is important that those that do testify via deposition, testify consistently with the theme that will ultimately be portrayed before the jury. In all injury-based tort cases, trucking companies will want to demonstrate that they are safety conscious and safety compliant and that they not only have a philosophical commitment to running a safe fleet, but also invest the necessary institutional resources to put teeth behind this stated commitment. In this regard, it is important that company witnesses be consistent in speaking about the policy reasons behind the particular protocols they are asked to address during questioning. Additionally, it is important that company witnesses be consistent and informed (but not rehearsed) when identifying company-wide priorities relative to safety and the procedures available to implement those priorities. In those instances where more than one company witness will be produced, it is

very helpful for at least a portion of the deposition preparation process to take place in a group setting to allow for the interchange of ideas. Further, it is important to have dialogue about likely inquiry into key documents or issues that may be at play in the particular case. In the setting of corporate representative depositions, duplicative questioning on the same issues can often be avoided by limiting the subject areas to which particular witnesses will speak; however, even the most proactive efforts to restrict questioning to pre-defined issues will invariably result in questions designed to draw contradictory testimony on the same issues. Note that if a company witness is confronted with a different answer by a fellow company witness, that witness can explain his/her answer but defer to the colleague if the issue is more precisely within that person's box of knowledge.

5) Turn up the heat and hope the company witness loses their composure.

While juries do not appreciate lawyers badgering witnesses, they are willing to give plaintiff lawyers latitude on being aggressive with company witnesses who seem evasive or ill-qualified to speak to the issues on which they have been designated. An overriding motive to "push the envelope" on these issues necessitates evaluating whether the company witness will oblige the plaintiff's attorney and respond with less than civil demeanor. Whether fair or unfair, juries expect company witnesses to remain poised and composed even in the face of very aggressive cross examination.

A company witness losing his/her composure is likely to be viewed as defensive and likely defensive for a reason. On the other hand, a firm, direct and reasoned response to a hostile tone of questioning will score points with any jury and, in short order, should earn plaintiff's counsel disfavor with a jury. Obviously, once a defense counsel detects that a

situation is beginning to deteriorate, defense counsel has much at his/her disposal to attempt to limit attempted badgering. As noted, however, badgering is in the eye of the beholder, and because access to court intervention is rarely an option in the deposition setting, the best defense counsel can do is to admonish plaintiff's counsel on appropriate behavior - most of which will be stricken from the record when the video deposition is ultimately played before a jury. The best preparation for this type of barrage is to view videotaped segments of depositions from other cases, preferably involving the same plaintiff's lawyer, along with mock deposition exercises. There is no substitute for preparation: with the company witness well-counseled on what approach and techniques the plaintiff's lawyer will employ to reach their true objectives, many of the minuses that often result in these depositions can be avoided.

6) Hope that the company witness has not been briefed and falls into common plaintiff attorney parlor tricks in the 30(b)(6) deposition.

The good news about the chicanery that plaintiff lawyers may attempt in a company witness deposition is that most approaches have been tried and tested, and virtually all can be anticipated. That said, here are some additional insights into what can be expected:

a) *Be prepared to be asked to issue a letter grade for the trucking company's performance on certain issues.*

Juries are not asked to issue letter grades, but plaintiff lawyers are all too ready to ask company witnesses to issue letter grades for the performance of their peers or departments. Most jurors would expect any company witness to issue a letter grade as a simple way of evaluating performance on a particular issue. Whatever the grade, the trucking company witness should be prepared to explain the basis for the grade. Remember that grading is highly subjective and juries will want to hear a fair rationale for the grade issued. Again, the

jury may not agree with the grade or may disagree with the rationale for it, but juries will rarely become angered with well-reasoned answers. Additionally, well-reasoned answers hardly make good sound bite fodder for plaintiff lawyers, thus further frustrating their objectives.

b) *Be prepared to speak to how particular written policies or procedures would be more effective if written differently (this includes being asked to come up with revised policies while on the record).*

Company witnesses can be expected to be asked to voice criticisms of their own company's policies and to articulate how particular policies could have been written to more effectively meet policy goals, particularly safety policy goals. In so doing, plaintiff's counsel will be attempting to make a case that any responsive answers to questions of this nature are tantamount to admissions that particular policies are deficient. This impression cannot and should not be left with the plaintiff's attorney or the jury. Instead, questions of this nature should be viewed as opportunities for the company witness to espouse the success and adequacy of the written policies that may be the subject of negative plaintiff lawyer scrutiny. In this regard, it is particularly helpful if the company witness can interject how company-written procedures and policies exceed government standards or private industry state of the art. Keep in mind that since the plaintiff's lawyer will want to show company witness deposition excerpts during the plaintiff's case in chief, the 30(b)(6) video deposition must be viewed as a golden opportunity to disrupt the plaintiff's case and create "sound bites" for the defense.

c) *Be aware that the only case the jury cares about is the one that the company witness is testifying in - therefore, the company witness must invest themselves in the facts of the case.*

Plaintiff lawyering 101 will require that the company witness be asked for basic accident facts such as date, place and time, along with the names of all those impacted by the occurrence. A company witness that does not know the name of the decedent, the family or the identity of key fact witnesses comes across as insensitive. While these facts will rarely play into the testifying role of the trucking company witness, juries place significant stock in the human element and how much the trucking company officials know about the facts and persons involved in the subject case. When company witnesses, in addition to being well-prepared and knowledgeable, come across as being legitimately concerned for a family impacted by a loss, juries will virtually always associate this with a good company deserving of fair treatment.

k. Look confident.

Body language is as important as your verbal response – especially in a video deposition. Practicing with a video camera in advance can help eliminate quirky/distracting habits.

l. Dress appropriately

Remember this could be shown to a jury and you are the corporate representative.

m. Be very careful with the use of definitive terms such as "never" and "always."

Remember your mother said "never say never" and "anything is possible."

n. Do not assume.

If you are not certain ask that the question be repeated or rephrased. If still not sure, DO NOT ANSWER! Ask for additional time to obtain the information.

o. Take frequent breaks.

Tired witnesses make mistakes.

Issues Regarding the Substance of the Accident and Your Company

With these corporate deposition guidelines in mind, the following discussion evaluates specific evidentiary issues that will arise in most trucking-related 30(b)(6) depositions.

a. Company Investigation and Accident Analysis

Plaintiff's counsel may question the corporation on its investigation and its assessment of the accident. The defendant and its counsel need to decide whether and to what extent inquiry should be allowed in this area. Typically, the work and attorney-client privileges are available to limit discovery on this topic with respect to the conduct and thought processes of the motor carrier representatives. This protection is by no means complete. Information and evidence obtained in the investigation process is generally discoverable. By the time the corporate representatives are being deposed, written discovery has already occurred in which evidence and information obtained in the investigation stage has been exchanged.

Regarding such information, the motor carrier is likely to be asked about the driver's initial report of the accident. The motor carrier driver guide may provide for the driver's written report of an accident. In serious accidents, the motor carrier may advise the driver not to submit a written report. Drivers may be caught off-guard in deposition when asked

whether they complied with the reporting requirement in the driver guide, particularly when the testimony is taken years after the accident. An unprepared driver may be cajoled into admitting submission of a written report in compliance with the driver guide when, in fact, it was not done. This, of course, is a joyous moment for the plaintiff's attorney who will claim spoliation by the motor carrier. Plaintiffs claim that the statement is discoverable and is not protected by work product because it is part of the routine procedures of the motor carrier, as set forth in the driver guide. If, in fact, the driver did submit a written report of the accident, defense counsel needs to be prepared to deal with the potential discoverability of the statement, depending on the applicability of the work product doctrine. The corporate witness needs to have a clear understanding of the extent to which questioning will be permitted regarding the investigation, starting with initial communications with the driver.

Plaintiff's counsel may also seek to delve into the preventability decision by the motor carrier. The preventability determination should not be admissible in evidence. Motor carriers designate preventability in accordance with 49 C.F.R. § 385.7, which provides that the Department of Transportation/Federal Motor Carrier Safety Administration may consider a motor carrier's "preventable accident rate per million miles" for purposes of determining the carrier's safety fitness. By federal statute "[n]o part of a report of an accident occurring in operations of a motor carrier …and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation." (49 U.S.C.A. § 504(f)) This statute may allow the motor carrier to avoid any discovery on the assessment of preventability. If you allow questioning on this subject, it is probably best to

preserve the objection and claim of privilege under the federal statute. The motor carrier representative needs to be prepared to explain that a preventability decision is not a decision of fault or negligence.

Additionally, preventability determinations may also be subject to an objection based on the "critical self analysis" privilege, which is currently emerging from the courts. This doctrine is based on the policy that the public is based served by having companies have the ability to freely evaluate past accidents without the danger of this analysis being blown up on a screen in a courtroom.

Plaintiff's counsel may question the corporate representative about the corporation's view of liability, causation and potential aggravated conduct. This can be an extremely difficult subject for your witness. The corporate representative may appear for the deposition with no actual knowledge of the accident, investigation, witness statements, depositions and discovery except as reported to the corporation by counsel or field adjuster. Defense counsel may instruct the witness not to answer questions probing the witness' knowledge of these communications. Where this occurs, plaintiff's counsel may choose to question the witness hypothetically. This can be an awkward process for the less competent plaintiff counsel and may lead to vague responses from the witness. A skilled plaintiff's attorney will put the corporate representative in a position of condoning or condemning the critical behavior in contrast to the safety policies and practices of the motor carrier. In preparing the witness for this area of questioning, it is important to explain to the witness to avoid characterizations and to try to speak in factual terms: Driver's logs are not "horrible," "terrible" or "awful." Rather, particular log entries are correct or incorrect. Also, the witness needs to fully understand the

defense view of these critical topics so that he or she may truthfully avoid being bullied into embracing the perspective of the plaintiff.

In some cases, it may benefit the corporation to allow direct questioning of the company's assessment of the accident. Accident analysis is, in fact, an important part of safety management for motor carriers. Most motor carriers have a process for determining the cause of preventable accidents, looking for accident trends and analyzing whether or not additional safety measures are needed to avoid such accidents in the future. This may be a process that the defendant will want to share with the jury. A deposition of a corporate representative who successfully avoids discussion of the accident analysis by reason of attorney-client communication and work product may leave the impression that the company paid little attention to the event. In cases involving punitive exposure this could be exactly the wrong message to give.

Even in those situations where the corporate representative's information about the event is well shrouded by the attorney-client and work product protection, plaintiff counsel is able to effectively question the witness on matters of qualification, retention, supervision, training and hours of service. If the corporate representative appears at the deposition without having reviewed and analyzed the motor carrier documentation in the hopes of not having to answer questions in any detail about them, the witness is likely to be disappointed. A careful plaintiff's attorney will force the representative to conduct the analysis in the deposition. What may appear to be discrepancies or errors in driver logs or driver files may have perfectly reasonable explanations. The corporate witness caught off guard with these discrepancies in the deposition may fail to perceive the explanations and admit to problems

that do not exist. For that reason, it is, in most cases, better to carefully prepare the motor carrier representative with the company records before the deposition.

b. Driver Logs

Driver logs are seldom, if ever, perfect. It will help the corporate witness to understand the degree to which the logs are flawed and what those errors may mean in the context of the accident. Errors in driver logs do not cause accidents. Fatigue may cause accidents. It is therefore essential in looking at flawed driver logs to understand whether or not the driver had adequate time for rest. This information may not be apparent from the logs themselves and may require other investigation and information. If in fact the driver did have adequate time for rest, and this information can be obtained, it is best to arm the corporate representative with this information in advance. It is also important to understand with respect to the days leading up to the event whether the particular trips taken by the driver were capable of being completed lawfully. There are several ways to do this. One simple technique is to recalculate the actual miles driven and apply a reasonable average speed. It may be worthwhile to determine actual speed limits and traffic conditions on the route. Keep in mind that many commercial motor vehicles are electronically governed at speeds below 70 miles per hour. The witness may be asked to acknowledge that average speed must be some specific mile per hour less than the speed limit. In fact, the company may use an assessment of this sort for analyzing driver logs. It is important that the representative understand that this “rule of thumb” is not necessarily true on any particular day. In other words, a driver traveling on Interstate 10 in New Mexico from one truck stop to another may well average very close to the speed limit. This is not likely to be true on interstate travel though large

metropolitan areas. Arming the representative with specifics about the trip may help avoid incorrect interpretations of the logs.

c. Record Retention

Invariably, plaintiff's counsel will attempt to establish that the motor carrier improperly destroyed evidence following the accident. Document retention is a controversial issue. The obligation to collect and preserve data should apply where there is a statutory or regulatory obligation to do so or when the party in possession of the data should reasonably know that the data will be relevant to some issue in the anticipated litigation. The very extensive investigation that occurs almost universally in serious truck accident cases establishes that the motor carrier anticipated litigation at an early stage. Plaintiffs will argue that the anticipation of litigation in any truck case raises issues of qualification, training, supervision and regulatory compliance, including hours of service regulations. This, of course, is not true. A truck rear ended at a stoplight by a drunk driver raises no issue with respect to the truck driver's qualification or hours of service compliance. Despite this, many motor carriers have adopted document retention programs aimed at protecting data in any serious accident case. Plaintiff's experts will disagree with this, but there is, in fact, no standard of the industry on this point. You may rest assured however, that your corporate representative will be questioned thoroughly about available data, the integrity of the data and whether it has been preserved. It is always best to go through this in some detail with the representative before the deposition. If certain data is no longer available, it is essential to know precisely what that data would have shown and what it would not have shown and to understand the reason why it was not preserved. The explanation may be that the issue was not anticipated because of

the circumstances of the event. The witness needs to be able to articulate the explanation. Corporate witnesses unprepared for this line of questioning may give inaccurate information that could advance the plaintiff's conspiratorial accusations of a corporate cover-up.

d. The Deposition Notice.

As obvious as it may seem, it is imperative that the designee is actually capable of testifying on the requested matters. A corporate witness' inability to answer questions on the designated material may be considered a non-appearance by the corporation and prevent the corporation from presenting testimony on the subject at a later point. A better method, where the deponent is not comfortable binding the corporation on a matter that is arguably an expansion of the subject matter is to merely have the witness identify the person whom they believe has better knowledge on the subject.

e. Your Website.

You are likely to be asked questions about your company's policies toward safety. For example, if your Website says that "we take pride in our safety record," you will be asked what that means in your day-to-day work. Also, if you don't have such a good safety record, counsel will make you look pretty silly for taking pride in a mediocre record. Also, you need to know what statements have appeared on your Website in the past. Old postings are available to plaintiff's counsel by using the software at waybackmachine.org.

f. Your Accident Reporting Procedures.

Did the driver in this case comply with the "call in" and reporting procedures? If not, it will be argued that he didn't follow the procedures because he knew he was at fault. Do your

policies say anything about a driver admitting fault at the scene of the accident? If so, take it out.

g. Policy Manuals.

You will be quizzed in detail about the meaning of policies set out in your company policy manual. Know it backwards and forwards. As a side note, have it reviewed by your transportation attorney. This is not a place for attempts at humor. Do you enforce what you say you will enforce? If not, take it out. Keep them by date so that as you make amendments, you can recreate what was in force at the time of the accident.

h. Applicable Federal Regulations.

Read the full text of the regulations you believe will be at issue in the case. Also read the interpretation in the "manager's" version of the regulations.

i. The Complaint in the Lawsuit.

How do you know what regulations will be at issue? Look at the Complaint. It usually contains a laundry list of the allegations against the company, at least in general terms.

j. Know the Facts of the Accident.

As noted above, the facts include not just the date and location of the accident or the name of your driver, but personal information about the injured or deceased. Knowing this information not only shows that you performed an appropriate investigation, but also shows that you, personally, and the corporation, care enough to know about the other party. If possible, travel to the scene or study photographs of the scene to familiarize yourself with the mechanism of the accident. Know the weather conditions and what your driver was doing at

the time of the accident (e.g. talking on a cb or cell phone, checking his mirrors, changing the radio, etc.).

k. Know Your Driver.

In order to truly know your driver, you must investigate his hiring, training, work history, habits, dispatch requirements and any other information that may be available to anticipate what opposing counsel may ask. In most every instance your driver is your corporation and knowing what skeletons may be in his closet are critical to your ability to address those in a reasonable and articulate manner. If you have never met the driver personally in a serious case, a face-to-face meeting is probably appropriate. The jury will have an opportunity to meet him/her, and you will be at a disadvantage not knowing what they will know.

l. Know Your Equipment.

Just as your driver is the persona of your corporation, the equipment is the embodiment of the corporation. Knowing the make, model, and configuration of the truck and tractor is important. Knowing its maintenance history is even more important. And knowing the electronics, may be the most important of all. In the modern era of engine control modules that give information about almost every aspect of driving, from hard braking events to the speed and condition of the tractor immediately before the accident, knowing what equipment is on the subject truck is important. Also, knowing what other types of electronics are employed by your corporation may be beneficial when testifying about the subject truck. In a recent deposition, counsel asked the corporate representative if hard-brake events were indicative of unsafe driving. He then asked if the corporate representative was aware of a "simple add-on" to the corporation's ECM that could monitor hard-brake events. Thus, in two

short questions, counsel established the cost of making a fleet safer. Being prepared allows the corporate representative to anticipate these types of questions to address the issue before it arises.

m. Know Your Safety Department.

When all else fails, plaintiffs' counsel try to show that Very Large Trucking Company has a very small (and poorly trained) safety department. Therefore, it is essential to know the background, training, and capabilities of everyone within the safety department. Then, when counsel asks about training or experience in one area or another, the corporate representative is capable of establishing how that area is covered by the safety department.

n. Driver Qualification File.

Be prepared to justify the driver's hiring and retention through reliance on the application, references, and other documents in his driver qualification file. Also, be prepared to discuss why documents that should be in the file are not there. Often counsel will ask what documents should be in the DQ file and the corporate safety representative rattles off a laundry list of documents. Counsel then slides the involved driver's DQ file across the table and begins to go down the laundry list, knowing that not every item is there. With specific regard to driving records, you should become familiar with the abbreviations and language used in the reports in the various jurisdictions. Not knowing what a particular violation means, and not making the effort to find out, could create a huge problem. Are there red flags in the file – questions which went unanswered?

o. Driver's Discipline Record:

Has the driver been counseled or reprimanded?

p. Discovery in the Current Case.

Ask your lawyer for copies of all of the discovery that has been provided in the case to date. Know what documents the plaintiff already has. Know whether the copies that have been provided have been Bates stamped so that you can easily determine where the document came from. What are the preliminary reports from the plaintiff's trucking expert? What documents have been withheld based on privilege? You do not want to volunteer information your lawyer may have already successfully withheld.

q. Depositions Taken in the Case.

What has the driver been asked at his deposition? Are there other depositions you should read?

r. Accident File.

What is in the accident file? The FMCSA only requires accident reports and similar government investigation to be kept in these files. Do not put documents in this file that should properly be filed in a "claim file," which is stamped "privileged: anticipation of future litigation."

s. Trip Records.

Know where the driver had been for the last couple of weeks and what he was hauling. Are there particular service issues with those shippers?

t. MCMIS Downloads.

If you subscribe to this service, you should not alert plaintiff's counsel to this fact. Your data is more detailed than what the Plaintiff's attorney can obtain from the MCMIS.

u. Electronic Control Module.

What did the download show? Have other drivers been operating the tractor?

v. Drug Testing.

How did the drug testing post accident go? If there was no test, be prepared to explain why.

w. Safety Training.

What has the driver been taught? What records exist on his attendance? Were his actions consistent with the training? If there were programs that are directly related to the accident, review the curriculum taught.

x. Your SafeStat Data at the Time of the Accident.

Know where your weaknesses are based on facts, not SafeStat algorithms. Know that data on SafeStat may not be complete. Read the disclaimer online and the Inspector General's criticism of the Database. If the system were valid, the companies with the highest scores would have the most accidents. That is not the case. DO NOT GIVE VALIDITY TO SAFESTAT! It will be used against you where you do not score well.

y. Post Employment References.

What did you tell the driver's prospective employer about him? Did you make statements about his safety record or driving skills? You should keep these references, as the Plaintiff's lawyer will subpoena them from the other trucking companies.

Embracing Imaginary Duties and Standards

Motor carrier safety directors in particular may be cajoled into acknowledging exaggerated or imaginary duties. This can be done subtly by a skilled plaintiff's attorney by calling upon the witness to describe his devotion to safety practices and the recognition that deficiencies can and likely will result in serious or catastrophic injuries to the public. This portion of the deposition may appear harmless, and even philosophical. The attorney may give the impression that he or she wants the deponent to deny the connection between safety and the risk of injury. Of course, the opposite is true. Often the safety director will not only affirm this connection, but will embellish on the answers. His or her enthusiasm to demonstrate safety awareness, safety goals and aspirations may come across as outright duties of the motor carrier. For example: "We do not tolerate any violations of the hours of service regulations", when, in fact, perfection is not required. The witness may claim that the company would never hire a driver who had certain events in his or her past. Later in the deposition, the safety director may find out for the first time that the driver had that exact circumstance in his past. At this point it would be difficult to explain that the circumstance was not disqualifying due to other extenuating circumstances. To avoid this result, safety directors and risk managers must be made aware of the purpose of this line of questions. If the motor carrier's representative recognizes, as most do, that accidents will occur regardless of the quality of a particular safety program, this can be communicated through the safety professional's testimony. Even more important, the safety director should be made aware of any potential surprise disclosure that may not have been known at the time of hire or retention or other safety decision. Many times, the so called surprise event has a pacifying

explanation. Knowing this in advance will be of tremendous help to the witness. Last, the witness needs to understand that the duties and obligations of the company arise from the law (typically the Uniform Rules of the Road and the standard of ordinary care) and the Federal Motor Carrier Safety Regulations. There are no other "standards of the industry" by which to measure the conduct of the company. In responding to questions about programs and policies of the company which go beyond those laws and regulations, the witness should not embrace them as duties.

Witness Selection and Integrity

The selection of the persons designated to testify on behalf of the corporation deserves careful consideration. It is the obligation of the corporation to produce persons knowledgeable of the subject matter requested. If the person you designate has some knowledge of the topic but not complete knowledge of it, it will be important for that person to educate herself or himself further prior to the deposition. Hopefully, you are able to find someone knowledgeable in the corporation who has the communication skills to handle intense questioning, and at the same time project a favorable image for the corporation. A jury will be evaluating the corporation to some extent on the strength of the personality of its witnesses. Above all, the corporation must maintain its integrity through the testimony of its representatives. Beware of the witness who is so eager to please that he or she plays fast and loose with the facts. The jury may forgive mistakes made in the operations of the company. They are not likely to forgive deceit.

CONCLUSION

In summary, preparation and planning for the deposition of the corporate representative is a time-consuming process that cannot be cut short. It is likely that for every hour of deposition testimony there should be at least ten hours of preparation and planning. Defense counsel must take an active role in shepherding and supervising this process.

ACTA ROSTER – as of 6/18/2012

[*See website for most current version]

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