

TLA Chicago Reginal Seminar and Bootcamp
24-Hour Emergency Response Team Panel

Presentation Panel:

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I. Establishing Post-Accident Protocols

- a. Importance of Establishing Post-Accident Protocols
 - i. Panic results in bad decisions and difficulty remembering important necessary steps.
 - ii. Checklists eliminate guesswork and increase the chance of compliance.
- b. An Internal Notification Checklist should include attorney(s), safety manager(s), insurer(s), and management.

II. Early Involvement of Defense Counsel

- a. When: Defense counsel should be involved immediately when there is:
 - i. Indication of a personal injury;
 - ii. Potential significant exposure; or
 - iii. Receipt of any preservation notice or spoliation letter.
- b. Why:
 - i. Protects parts of investigation with Attorney-Client Privilege.
 - ii. Provides expert guidance on investigation and preservation.
 - iii. Identify and work through conflicts.
 - iv. Any lapse of vigilance in post-incident evidence collection and preservation can be costly – perfect planning and procedures are useless without 100% execution.

III. Importance of Early Investigation

- a. Prevent plaintiff from taking the advantage.
- b. Help shape police narrative.
- c. Control the driver's story.
- d. Document/preserve evidence and avoid spoliation allegations.
- e. Early and accurate assessment in "real time".
- f. Record memories while they are fresh.
- g. Ensure compliance with post-accident drug testing.

- h. Establish rapport with client, first responders, and witnesses.

IV. Attorney's Emergency Call List

- a. Accident Reconstructionist
 - i. Human Factors
 - ii. Biomechanical
- b. Independent Adjuster
 - i. Retained by attorney – all reports go to attorney
 - ii. Can sometimes get to scene quicker
- c. Criminal Defense Attorney

V. Investigation Considerations

- a. Do you go to the scene?
- b. What do you do once you get there?
- c. What do you offer law enforcement?
 - i. Dashcam
 - ii. ECM download
 - iii. Driver statement
 - iv. Other documents (BOL, etc.)

VI. Conflicts

- a. Evaluate potential conflicts immediately and throughout the investigation.
- b. Conflict considerations:
 - i. Who do you represent?
 - 1. Conflict in representing both carrier and driver?
 - a. Was driver outside course and scope of employment?
 - 2. Employee or independent contractor? Deadhead or bobtail?
 - 3. Whose DOT Authority?
 - ii. Multiple commercial carriers involved?
 - iii. Are claims large enough to exceed coverage?
 - iv. Is a criminal attorney needed?
 - v. What do you tell the driver?
 - vi. What do you tell the police officer?
 - vii. When do you know?

VII. Preservation - General Considerations

- a. Preservation problems:

- i. What electronic information is available?
 - 1. ECM, dashcam, telematics, cell phone, GPS on trailer, etc.
- ii. Can you trust your client to know?
- iii. Claimant information:
 - 1. Who owns the vehicle?
 - 2. Can you download anything?
 - 3. Not just airbag controller – Infotainment systems.
 - 4. To whom do you send a preservation letter?

VIII. Spoliation of Evidence

- a. “Spoliation” = destruction or material alteration of evidence.
- b. All parties have a duty to preserve.
- c. Spoliation may result in sanctions or give rise to separate claims.
 - i. Tort Claims for Spoliation of Evidence
 - 1. Intentional Spoliation
 - a. Typically requires willful destruction.
 - b. Recognized by Alaska, Connecticut, Kansas, Louisiana, New Mexico, Ohio, and West Virginia.
 - 2. Negligent Spoliation
 - a. Recognized by Alabama, Florida, Indiana, Montana, and West Virginia.
 - 3. Spoliation by Third Parties
 - a. Tort for intentional spoliation recognized by Alaska, Connecticut, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio, and West Virginia.
 - b. Tort for negligent spoliation recognized by Alabama, Florida, Illinois, Indiana, Montana, New Jersey, New Mexico, Pennsylvania, and West Virginia.
 - ii. Sanctions for Spoliation of Evidence
 - 1. Federal Rule of Civil Procedure 37(e) governs a party’s failure to preserve electronically stored information.
 - a. Court has discretion to order measures it deems necessary to cure any prejudice caused by loss of electronically stored information.
 - b. If the party acted with the intent to deprive another party of the information's use in the litigation, the court may:

- i. presume that the lost information was unfavorable to the party;
 - ii. instruct the jury that it may or must presume the information was unfavorable to the party; or
 - iii. dismiss the action or enter a default judgment.
- 2. Physical/Tangible Information: Rule 37(e) does not apply to tangible, non-electronic information, such as hard copies of documents. Thus, the culpability standards and available sanctions vary by jurisdiction.
- 3. Possible Sanctions:
 - a. Most common sanction is adverse inference jury instruction, which is permitted by all federal courts of appeal.
 - b. Other possible sanctions:
 - i. Dismissal or striking of pleadings
 - ii. Granting of summary judgment
 - iii. Finding of contempt
 - iv. Evidence or witness preclusion
 - v. Attorney fees
 - vi. Allowance of punitive damage claim
 - vii. Referrals for criminal prosecution and/or attorney disciplinary action

IX. Threshold Driver Issues

- a. Locate / Protect / Comfort /Advise
- b. Hands free phone: Company policy vs. state law vs. FMCSR
- c. Hours of service
- d. Maintenance, mechanical or other problems
- e. Drug testing
 - i. Required by FMCSR?
 - 1. Fatality: Yes, regardless of citations
 - 2. Injury with immediate treatment away from scene: Only if citation issued.
 - 3. Disabled vehicle towed: Only if citation issued
 - ii. Required by Company Policy? If yes, do it
 - iii. If not required – Do you test anyway?

X. Preservation at the Scene

- a. Take physical possession and secure all paper documents (Log books, Bills of lading, toll and fuel receipts, scale receipts, etc.)
- b. Preserve data/communications:
 - i. Imaging of phone(s)
 - ii. Download SD card
 - iii. Physically check phone for texts and emails
 - iv. Watch out for social media streaming

XI. Identify and Document Others on the Scene

- a. Emergency Responders – Medical, DOT, Law Enforcement, Rescue
- b. Tow company and personnel
- c. Investigating officers
- d. Government accident reconstructionist (usually for fatality)
- e. Witnesses
 - i. Get contact information separately from police
 - ii. Photograph car, tag, and them
 - iii. Get statement, if willing – favorable and unfavorable
 - iv. Record if possible (including first responders)

XII. Questions to ask First Responders

- a. Opinions on negligence and cause?
- b. Will charges be filed?
- c. Who is the investigating officer in charge?
- d. Will there be a police hold on vehicles and equipment?
- e. What type of accident reconstruction will police conduct?
- f. What agencies will produce reports?
- g. To what hospital are injured being transferred?
- h. Was injured party conscious? Speaking?

XIII. Identify and Document All Equipment

- a. Make, model, year and VIN of all vehicles/trailers (photos)
- b. Driver communication devices, including other driver's cell phone.
- c. Dash cams of all vehicles
- d. Vehicle telematics systems (OmniTracs, Peoplenet, Samsara, etc.)
- e. Vehicle safety systems (cameras, forward radar, lane change, etc.)

XIV. On Scene Preservation

- a. Tractor and Trailer
 - i. Impound
 - ii. Do not drive, move, or turn on the ignition
 - 1. moving/towing truck risks loss of ECM data
 - iii. Electronic Logging Device (ELD)
 - 1. Issues vary with company
 - 2. Log image is not everything (e.g., Lytx collects Omnitrac data but only uses part of it)
 - 3. Background data used to create log image but not part of image
 - iv. Other Safety systems – Radar, lane change, camera, etc.
 - v. Location tracking device/data
 - vi. Camera(s)
 - 1. Camera characteristics vary widely
 - 2. If local recording -- Secure SD card
 - 3. If cloud recording
 - a. Records “event” – Just a few seconds with limited retention
 - b. Vendor may have more video and longer retention period that may be unknown to client
 - 4. May have other close calls or accidents
 - a. Training/supervisory issues
- b. Identify and document other physical evidence
 - i. Property Damage - Bridges, guardrails. signs, gouge/skid marks etc.
 - ii. Environmental and hazmat
 - iii. Cameras - Look for cameras and take immediate action to obtain video
 - 1. Nearby homes or businesses (Google Earth)
 - 2. News on Scene? Download clips from website
 - 3. State DOT intersection cameras
 - 4. If any witnesses are taking video, ask for a copy
- c. Statements
 - i. Driver should not give statements to anyone but attorney
 - ii. Police statements – Beware body-worn cameras

1. If recorded, was there a Miranda Warning issued?
2. Try to avoid written statements, if possible
- iii. Did police take statements from other witnesses
- iv. Are claimant's investigators/counsel taking statements

XV. Tasks for an Independent Adjustor

- a. Obtain all official reports – police, ambulance, death certificate
- b. Obtain 911 tapes -- Dash cam, body cam and cruiser videos
- c. Canvass area for possible surveillance video (and witnesses)
- d. Speak to witnesses identified in police report
- e. Get media accounts - Newspaper (obituary), internet, TV
- f. Obtain victim information – Including Social Media
- g. Take photographs (if asked)
- h. Do not take driver's statement

XVI. Tasks for Reconstructionist

- a. Document, photograph, and inspect:
 - i. Accident scene –Roadway debris/damage, markings, lane and shoulder info
 - ii. Vehicles – Including on/off positions of lights/flashers
 - iii. Traffic control devices/signs in each direction (and distance)
- b. Identify point of impact
- c. Calculate speeds
- d. EDR (event data recorder) downloads of all vehicles
- e. Obtain and analyze all videos
- f. Give preliminary opinion on liability and damages

XVII. Preservation Demands

- a. To Potential Claimants
 - i. Vehicle and contents
 - ii. Dashcam, GPS, EDR and “Infotainment” equipment
 - iii. Cell phone and records (including texts, photos or videos)
 - iv. Social media accounts (perform search first)
 - v. Blood and urine samples
 - vi. Request opportunity to inspect vehicle and download electronic equipment

- b. To Insured / Driver / Motor Carrier
 - i. Difference of opinion on whether to send preservation letter to your client.
 - 1. If large, sophisticated client – Send general reminder letter/email. A Detailed list is not necessary
 - 2. If small, unsophisticated – Send a detailed reminder. Make sure to stop normal document retention/destruction procedures
- c. To Investigators
 - i. Police Department
 - 1. Written documents, notes
 - 2. Dash and body cam video
 - 3. Photographs
 - ii. Coroner / Forensic Labs
 - 1. Blood and tissue samples
 - 2. Reports
 - 3. Photographs
- d. To Other Third-Parties
 - i. Cell Phone Providers
 - ii. ELD/Telematics Providers
 - 1. Log file info -- Date to create image
 - 2. Position data collected as part of log file
 - iii. Surveillance video owners
 - iv. Tow yard
 - v. Insurance carriers for other drivers
 - vi. Equipment owners (Dashcam/GPS/EDR)
 - vii. Hospitals/coroners

XVIII. Proper Scene Response Protects You

- a. Claims not Resolved = Trial
- b. Best Trial Results = Best Prepared
- c. Best Prepared = Best Command of Facts
- d. Best Command of Facts = Immediate Investigation and Action