Carbon nanotubes (CNTs) hold promise for many beneficial applications. However, there have been concerns and calls for a moratorium raised over “mounting evidence” that CNT may be the “new asbestos,” or at least deserving of “special toxicological attention” due to prior experiences with asbestos. The shape and size of some agglomerated CNTs are similar to asbestos—the most “desirable.” And because CNTs for structural utility are long and thin—characteristics thought to impart increased potency to asbestos fibers—discussions of parallels between these two substances are natural. Thus, given the legacy of asbestos-related injury and the thousands of cases litigated each year, consideration of possible implications of the use of CNTs in research and in consumer products is prudent.

First reported in 1991, CNTs epitomize the emerging field of nanotechnology, defined by some as the “ability to measure, see, manipulate, and manufacture things usually between 1 and 100 nanometers.” CNTs are a type of carbon-based engineered nanoparticle generally formed by...
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MESSAGE FROM THE EDITORS

The Co-Editors of the Commercial Transportation Litigation Committee are grateful to the individuals who authored the articles in this Fall 2015 edition of the newsletter. We look forward to future submissions from our committee members and others.

Co-Editors:
Matt Walker, Drew Eckl & Farnham, LLP, Atlanta, GA
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MESSAGE FROM THE OUTGOING CHAIR

Dear Members of the Commercial Transportation Litigation Committee:

It was my privilege to serve as Chair of our Committee in 2014-2015. I have watched as the Committee conducted a number of great programs and published a book and several newsletters, all of which provided substantive content for the membership. These and other activities of the Committee were a direct by-product of the tireless work of our members. I am pleased to report that due to everyone’s work, the Committee received the Overall Excellence Award from the American Bar Association, Tort Trial and Insurance Practice Section (ABA/TIPS) for 2014 - 2015.

In brief recap, this year the Committee held well-attended meetings at the (1) 2014 ABA Annual Meeting in Boston in August 2014; (2) Arkansas Trucking Conference in September 2014; (3) ABA/TIPS Fall Section Meeting in Napa in October 2014; (4) ABA/TIPS Spring Meeting in Philadelphia in April 2015; and (5) 2015 ABA Annual Meeting in Chicago in August 2015. Our flagship program the Transportation Megaconference XII was a great success in March 2015, boasting over 400 attendees. The Committee grew in membership by over 7% due to membership initiatives such as the creation of membership brochures, a welcome reception for first time attendees at the Megaconference, and informational meetings at the Arkansas Trucking Conference and Megaconference.

Further, the Committee published its book “Damages Compendium” - an easy reference to industry members, insurance representatives, adjusters and attorneys on the types, measures, and the general standards of damages. As a membership benefit, the entire Committee received a complimentary copy of the book. TIPS also publishes “Truck Accident Litigation,” which provides in-depth discussion of the trucking industry and legal issues pertinent to handling a commercial motor vehicle case. These two books are available at the ABA’s website, [www.shopaba.org](http://www.shopaba.org).

Everyone also received two committee newsletters with many useful articles. Congratulations are in order for Lew Wardlaw. Lew was the 2014-2015 recipient of the Committee’s Outstanding Service Award for his fine work for years as the newsletter chair.

I encourage everyone to continue to participate in the Committee. Our committee has four sites where you can find information about our Committee and the transportation industry. Please follow, like, or join the following:

- Twitter: [https://twitter.com/tips_ctlc](https://twitter.com/tips_ctlc)
- Facebook: [https://www.facebook.com/pages/Commercial-Transportation-Litigation-Committee/704038679641475](https://www.facebook.com/pages/Commercial-Transportation-Litigation-Committee/704038679641475)
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- ABA Committee webpage: [http://apps.americanbar.org/dch/committee.cfm?com=IL205400](http://apps.americanbar.org/dch/committee.cfm?com=IL205400)

Thanks again to all that contributed to the Committee’s success this year. I look forward to continuing to serve as Eric Probst begins his term as Chair. Eric is a fantastic leader and lawyer. The Committee is in great hands.

Meade Mitchell is a partner at Butler Snow LLP in Jackson, MS. He can be reached at meade.mitchell@butlersnow.com or (601) 985-4560.
MESSAGE FROM THE INCOMING CHAIR

Dear Members of the Commercial Transportation Litigation Committee:

It is my privilege to serve as Chair of our Committee for 2015-2016. 2014-2015 was a great year for the Committee, as the Committee held Transportation Megaconference XII in New Orleans, one of the oldest and premier trucking conferences in the country, and won the ABA TIPS Overall Excellence Award. For 2015-2016, we want to build off of the momentum generated by the Megaconference and the Award to increase membership and provide even more benefits for the members.

To really obtain the benefit of membership you have to attend the meetings. The networking opportunities and friendships created in our Committee set us apart and add significant value beyond the issues covered in the meetings. This year we hope to incorporate an off-site “trucking education” component at one of the meetings.

This year we will meet at: 1) the Arkansas Trucking Conference in September 2015; 2) the ABA/TIPS Fall Section Meeting in Scottsdale Arizona in October 2015; 3) the Mid-Year Meeting in San Diego in February 2016; 4) the ABA/TIPS Spring Meeting in Atlanta in May 2016; and 5) the 2016 ABA Annual Meeting in San Francisco next August. I strongly encourage attendance at the Scottsdale Fall Leadership meeting. The Committee will co-sponsor a corporate counsel program where two industry leaders will speak. We hope to have those speakers attend our meeting.

I want to introduce you to the team that will lead the Committee in 2015-2016. Sergio Chavez of the Rincon Law Group is the Chair Elect, Scott Winstead of the Burleson Law Firm is Membership Chair, Art Spratlin of Butler Snow and Matt Walker of Drew Eckl are the Newsletter Co-Chairs for 2015-2016, and Matt Hefflefinger of Heyl Royster will serve as our Webinar Co-Chairs. We want to publish three to four newsletters and put on two webinars. We need volunteers for newsletter and webinar topics related to the commercial transportation industry.

Thanks again to Meade Mitchell for his leadership in 2014-2015. His dedication to the Committee and the ABA led to the successful year we enjoyed. I want to join Meade in thanking Lew Wardlaw for serving as the newsletter chair for the last couple of years. His recognition as the 2014-2015 recipient of the Committee’s Outstanding Service Award is well deserved.

Sergio Chavez and I want all members to obtain the benefit of membership, and we encourage everyone to participate in the Committee. If you have questions, or want to become a vice chair and find out ways you can help the Committee, please contact Sergio or me.

Eric L. Probst is a partner at Porzio Bromberg & Newman in Morristown, New Jersey. He can be reached at elprobst@pbnlaw.com or 973-889-4320. Sergio Chavez is a partner at The Rincon Law Group in El Paso, Texas and can be reached at schavez@rinconlawgroup.com or 915-532-6800.

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The American Bar Association Tort Trial & Insurance Practice Section will kick off the 2015 bar year with its Section Fall Leadership Meeting, held October 14-18, 2015 at the Westin Kierland Resort & Spa in beautiful Scottsdale, Arizona. The meeting will feature a number of must-attend events including:

- Complimentary CLE Program featuring Corporate Counsel Executives: *Lessons Learned in the Trenches of Litigation Management*
- Important Business Meetings and Valuable Networking Events
- Friday Afternoon Golf Tournament
- Saturday Evening Dinner featuring Music, Dancing and “Glow-Putt” Mini-Golf
- The Kirsten Christophe Memorial Award for Excellence in Trial and Insurance Law Presentation
- The Opportunity to Enjoy the Stunning and Relaxing Surroundings of Scottsdale

Register Today!
No one wants to receive the call that their driver has been involved in a serious accident and that people have been injured or killed. Catastrophic accidents rarely happen at a convenient time or location, so being prepared to quickly respond on your worst day is of critical importance. You only get one chance at an initial response to a catastrophic accident, and mistakes made early on can have dire consequences.

The Initial Response

Many times motor carriers decline to immediately investigate a claim because initial information suggests that the accident was not their fault; however, fault is nearly impossible to determine based upon the limited information available immediately after a serious accident. Further, lawsuits filed following an accident are primarily driven by the potential for the recovery of monetary damages, not fault. Even a small percentage of fault in a catastrophic case can equate to a significant amount of monetary damages. As the severity of an accident is typically significantly understated, it is imperative to investigate the catastrophic claim immediately.

Regardless of fault, your response to a serious accident should always be the same—fully investigate and preserve evidence. It is far easier to scale back a response than to accelerate one, as critical information, including witnesses and evidence, become much more difficult to locate with the passage of time. Critical tasks must be completed within a very limited timeframe, especially those mandated by the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA). Finally, failure to preserve physical evidence at the scene can result in the inability to put forth an otherwise viable defense later.

Contact Your Insurer

If you are not self-insured, your first phone call should be to your insurance carrier. The best carriers have established teams that are ready to respond to catastrophic claims at any hour. These insurers have unique knowledge, resources and experience in handling these claims. Transportation-focused insurers also have attorneys, field adjusters, investigators and experts, who are extensions of the early response team, located in every jurisdiction. These professionals are of the utmost importance when managing any catastrophic response.

If you are self-insured, be sure to have your own nationwide network of external resources prepared to rapidly respond when the time comes.

Assign A Reliable Supervisor

If possible, you should dispatch a reliable supervisor to the accident scene immediately. If the accident is far from your home operation, assign a reliable supervisor to direct operations remotely. This person will be actively involved with your insurance carrier, and serves as your company representative at the accident scene.

Avoid sending someone who is critical to your daily operations; the reliable supervisor needs to be focused on responsibilities at the scene. The reliable supervisor will work with law enforcement and needs to get your driver to a DOT-approved drug and alcohol testing facility immediately. He or she also should be able to calmly communicate with both your driver and law enforcement in extremely stressful situations, and be well-versed in how to respond to an accident and approach the situation with a level head, without emotion.

Continued on page 12
A lawsuit is filed regarding a serious accident involving a passenger vehicle and tractor-trailer. The facts of the accident are in dispute, and both parties fully investigate the physical evidence, the electronic data, and the relevant documentation. All of the parties, witnesses, and experts are deposed. However, the question of who caused the accident is not the only issue at play. Plaintiff has alleged that the driver was unqualified and poorly trained, and that the trucking company cut corners regarding safety, and should not have entrusted a tractor-trailer to this driver. The trucking company states that the driver was fully vetted and properly trained, and that the company’s hiring and training policies are not only consistent with the federal requirements, but are the best in the industry.

These issues will be closely examined during the deposition of the trucking company safety representative. This deposition is one of the most important elements of a trucking case. For the defendant, while this deposition can contain a minefield of fair and unfair questions, it is also an opportunity to showcase the trucking company’s culture, values, and true commitment to safety.

When you prepare the corporate safety representative for a deposition, remember that what the representative does not know may be as damaging as what he or she does know. Furthermore, why the representative does not know about a certain issue may be most damaging of all. Much of the deposition (and the deposition preparation) will be focused on predictable elements such as the accident, the driver, the driver qualification (DQ) file, and other corporate safety documents and policies. However, when the first question after “What is your name?” is “As Safety Director for XYZ Trucking Company, do you know the names of the people killed in the accident we are here to talk about today?” the stakes become a bit higher.

The rule. Rule 30(b)(6) of the Federal Rules of Civil Procedure (and most corresponding state rules) allows a corporation to designate someone who will testify on its behalf as to one or more specific categories of inquiry, identified with “reasonable particularity.” The rule requires the responding corporation to designate one or more representatives whose testimony will bind the corporation. Often it is thought that the designee is the person “most knowledgeable” or with personal knowledge of the category, but that is not the standard. In fact, the responding corporation has absolute discretion in choosing the witness or witnesses to testify on its behalf with regard to the subject matter identified in the notice. It is generally advisable to educate one or two representatives regarding all or most matters identified to avoid having to produce multiple witnesses, and to decrease the potential for inconsistent positions within the corporation.

The rule not only requires the corporation to designate one or more witnesses, but it also requires the corporation to prepare the witness(es) to testify not only on matters known to the corporation, but also on matters reasonably available to it. This requirement encompasses a duty to investigate. Thus, if the corporation cannot present a witness with personal knowledge, or chooses not to present such a witness, it must prepare the testifying witness to testify about facts within the corporation’s collective knowledge. Such testimony will be binding on the corporation. Further, the designee not only has to testify about facts within the corporation’s knowledge, but also the subjective beliefs, opinions, and interpretations of documents and events of the corporation.

In a trucking case, the safety manager or director is the most common corporate designee for purposes of a 30(b)(6) deposition. However, as noted above, the company can select the designee. Therefore, the initial preparation for such a deposition consists of selecting the proper individual to testify on behalf of the company. Once this selection is made, the deposition preparation can begin.

The traps. As obvious as it may seem, it is imperative that the designee is actually capable of testifying on the
Christmas came early for the trucking industry as the fall of 2014 marked positive changes for commercial drivers and motor carriers. The trucking industry is reaping the effects of two positive regulatory developments. First, the Federal Motor Carrier Safety Administration (FMCSA) issued in the Federal Register a final rule on December 18, 2014, wherein the FMCSA eliminated a commercial driver’s obligation to maintain “no defect” Driver Vehicle Inspection Reports (DVIR). Secondly, bilateral action on the part of Congress and President Obama resulted in the passage of the Collins Amendment on December 16, 2014, which immediately repealed the changes to the 34 hour restart which became effective in July of 2013. Both of these regulatory developments translate into more efficient operations for motor carriers, and will save the industry nearly two billion dollars annually. These recent regulatory changes have the trucking industry saying—thanks Santa!

No-Defect DVIRs are No Longer Required

The requirement for commercial drivers to document and report vehicle defects stems back to the World War II era. In 1939, the Interstate Commerce Commission (ICC) issued regulations that required commercial drivers to prepare a written report regarding the condition of the vehicle at the end of each work day or trip. See Inspection, Repair, and Maintenance; 79 Fed. Reg. 75437, 75438 (December 18, 2014) (to be codified at 49 C.F.R. pt. 396). This regulatory requirement was revised by the ICC in 1952 to improve a motor carrier’s inspection, maintenance, and record keeping procedures. Id. The ICC revised this regulation to require that commercial drivers prepare a vehicle condition report at the end of each work day regardless of whether a mechanical or equipment defect was discovered. Id. The ICC noted in a report dated April 14, 1952, that the underlying reason for requiring a vehicle inspection report even when no mechanical deficiencies were found was “…to provide a continuous record of vehicle condition and to insure that the reports, particularly those involving defects, will be made out currently and maintained on a current basis.” Id.

Presently, a commercial driver’s vehicle inspection report is referred to as a DVIR. The current day federal regulations continued to require commercial drivers to prepare DVIRs under 49 CFR § 396.11. Specifically, the statutory language of section 396.11(a)(2) required that “[i]f no defect or deficiency is discovered by or reported to the driver, the report shall so indicate.” 49 C.F.R. § 396.11. However, as of December 18, 2014, commercial drivers no longer have to prepare a DVIR when no mechanical or equipment defects are identified, or the driver is not made aware of such defects. See Inspection, Repair, and Maintenance; 79 Fed. Reg., 75437, 75438 (December 18, 2014) (to be codified at 49 C.F.R. pt. 396). In other words, “no defect” DVIRs are no longer required under federal regulations. This significant change to federal law is attributable to President Obama’s Executive Order No. 13563 which launched a government wide review of federal regulations with an eye for eliminating out-of-date, ineffective, or overly burdensome rules, and reducing regulatory burdens on the private sector. Id. Eliminating a commercial driver’s requirement to prepare daily “no defect” DVIRs relieves motor carriers from burdensome paperwork, and the FMCSA estimates that the trucking industry will reap savings of 1.7 billion dollars annually, and approximately 12 to 15 billion over the next 10 years. Id.

Commercial drivers and motor carriers, however, are still required to adhere to the fundamental elements of sections 393 and 396 of Part 49 of the Code of Federal Regulations. For instance, commercial drivers are still required to conduct pre-trip inspections of equipment’s condition, and prepare DVIRs if any defects or deficiencies are found or reported during the work day. The FMCSA was careful to stress the importance that only “no defect” DVIRs were no longer required to be reported by the trucking industry.
Changes to 34 Hour Restart Provision

The results of the 2014 mid-term elections sent a clear message to both Democrats and Republicans in Washington that the American public did not want another government shutdown from political bickering over the budget. On the heels of the election results, Congress passed a 1.1 trillion spending bill for the 2015 fiscal budget on December 13, 2014, which President Obama signed three days later on December 16. The spending bill was closely being watched by the trucking industry because it contained the so-called Collins Amendment proposed by Senator Susan Collins of Maine. The amendment proposed to suspend the changes to the 34 hour restart which became effective in 2013.

July of 2013 marked the start of regulatory changes to the 34 hour restart. Effective July 1, 2013, commercial drivers were required to include two consecutive periods between 1-5 a.m. within a 34 hour restart period. Commercial drivers were also required —for the first time in trucking history— to take a 30 minute break before driving more than eight hours. As of July 1, 2013, the 34 hour restart provision in 49 CFR § 395.3 required the following:

(c)(1) Through June 30, 2013, any period of seven consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of seven consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

(2) Through June 30, 2013, any period of eight consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of eight consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

These regulatory changes obligating commercial drivers to include two time periods of 1-5 a.m. within the 34 hour restart period was foreseeably not well received by the trucking industry. The Collins Amendment, which took effect immediately after the President signed the spending bill on December 16, 2014, now requires motor carriers and commercial drivers to operate under the pre-July 1, 2013, restart provision. Thus, the 34 hour restart provision at 49 CFR § 395.3 which requires two consecutive 1-5 a.m. periods to be included within any 34 hour restart period is no longer effective.

The Collins Amendment also suspended the limitation contained by § 395.3(d) which restricted commercial drivers from taking more than one 34 hour restart period in a seven day period. Commercial drivers are now authorized to take as many 34 hour restart periods during their work week.

The FMCSA is expected to prepare a notice for the Federal Register that will explain the impact of the Collins Amendment with respect to commercial vehicle enforcement.

Sergio E. Chavez is the senior equity and managing partner of the Rincon Law Group in El Paso, Texas. He serves as a Vice-Chair and Membership Chair for the American Bar Association’s Commercial Transportation Litigation Committee. His practice focuses on defending motor carriers in personal injury suits, and conducting emergency accident response investigations. Sergio can be reached via email at schavez@rinconlawgroup.com.

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Thursday, October 15, 2015
3:30 PM – 5:00 PM

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Our experienced panel of in-house counsel and claims professionals will discuss trends, issues and approaches to the most difficult problems facing clients and lawyers alike in managing their litigation. Panelists include:

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Porzio, Bromberg & Newman, P.C.
Morristown, NJ

Jay Pricher, Senior Corporate Counsel
Best Western International
Phoenix, AZ

Douglas Betkowski, National Litigation Manager
Mohave Transportation Insurance Company
Phoenix, AZ

Craig Orraj, Head of Business Insurance Claims
Farmers Insurance Group
Westlake Village, CA

Leslie Leazer, Corporate Claims & Litigation Manager
Knight Transportation Inc.
Phoenix, AZ

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YOUR WORST DAY:...

Continued from page 7

Retain Counsel

As noted earlier, a transportation-focused insurance carrier will have a team of attorneys, field adjusters, investigators and experts at the ready to respond to a catastrophic claim. If you are self-insured, a local attorney should be retained to respond to the scene and begin a privileged investigation. The attorney will work with you and your insurer to hire and direct the field adjuster, accident reconstruction expert and any other appropriate experts. An attorney is a critical part of the accident investigation because of the attorney-client privilege and/or the attorney work-product privilege that attaches to an attorney’s investigation.

Retain A Field Adjuster

If you have an insurer, it will dispatch a local field adjuster. If you are self-insured, a local field adjuster should be assigned—preferably by your attorney—to maintain privilege. In both instances, the field adjuster will interview and identify all witnesses, locate possible claimants, take accident scene photographs and determine the severity of any injuries. If the reliable supervisor is working remotely, then the field adjuster should be tasked with taking the driver to receive DOT-approved drug and alcohol testing. The field adjuster will also assist in the identification of any on-scene accident participants, including police officers, emergency medical technicians, firefighters, tow truck drivers and all others present.

Reconstruct The Accident

Depending on the circumstances, an accident reconstruction expert may need to be added to the rapid response team. The “accident recon” is responsible for a number of tasks at the accident scene, including preserving all electronics for download, documenting all physical evidence, and engaging in strategic surveys and photography. A failure to collect and preserve this information in an accident where you may have a viable liability defense could result in your inability to assert that defense if a claim is made at a later date.

Obtaining (And Retaining) Electronic Evidence

The accident recon will coordinate downloading all electronic control modules (ECMs) and retrieving any data from dashboard cameras, sometimes known as automated event recorders (AERs). Do not assume that your local truck dealer can perform a download of the ECM or AER. Often, it is much more complicated and may require factory-trained personnel.

On certain units, the existing data is wiped out when the engine is restarted. Even if a vehicle is drivable after a severe accident, you should “tow until you know” that a download of the ECM is not necessary. If ECM or AER information is destroyed, serious problems are sure to follow. In select jurisdictions, plaintiff attorneys can argue that the data was destroyed intentionally to hide evidence of fault. Spoliation of evidence can allow a judge to instruct the jury that they may draw an adverse inference that the evidence was destroyed because it was harmful.

Managing The Driver

Your driver is the most critical piece of the post-accident puzzle. In a perfect world, the driver should not be permitted to make a formal statement to anyone outside the presence of your attorney. Frequently, however, the driver may have already spoken to the authorities immediately after an accident. It is important to learn to whom the driver has spoken and what was said.

Your driver must be prepared and understand his or her responsibilities at the accident scene, as the driver is effectively the first company representative at any catastrophic accident. He or she must be able to accurately convey information without fear, be trained to remain calm and professional, secure the scene, take appropriate photographs, deploy reflectors, and seek immediate help from the authorities.

Perform Drug And Alcohol Testing

You must test your driver after a catastrophic accident. As mandated by FMCSA regulations, the driver must submit to drug and alcohol tests “as soon as practicable” following an accident when:

- a fatality has occurred,
- a citation has been given and injury occurred to anyone, or
- one of the vehicles involved was towed from the scene.

Remember, many municipalities can issue citations days, even weeks, after an accident. Be aware of your company drug and alcohol testing requirements. If they are more stringent than the FMCSA regulations, then you must follow them.
Handling Criminal Citations

It is possible that your driver will receive a criminal citation, which will trigger different responses, processes and obligations for everyone involved in the accident. Advise your insurance carrier immediately of any citations of any kind received by the driver or by the company.

The Paper Chase

Truck litigation is often won or lost “on the paper,” i.e., the Driver Vehicle Inspection Reports, the maintenance and service records, the registration file, the logs, the driver’s cell phone records, and the driver qualification file. Before the accident scene is even clear, you must begin to assemble all records that may possibly be needed to defend the claim. It is always far easier to assemble the data immediately after the accident than years later when suit is filed. A failure to preserve this information can lead to separate spoliation claims.

(Social) Media Management

In a YouTube world, you can expect media coverage almost immediately. If the media calls, you should contact your insurer immediately. Never try and handle the media on your own. Your driver and all of your employees should be reminded that it is inappropriate to comment on, or discuss, the accident on social media.

Outreach

If a fatality or critical injury occurred, special care should be taken in claimant communications. Your insurance carrier should be consulted before any outreach is made. Take advantage of the collective experience of your insurer before inadvertently making a bad situation worse.

Practice, Practice

You should prepare for and practice what to do in the event of a serious accident. Like a fire drill, make it a routine for your operation. Your response drills must involve your drivers and reliable supervisors. Practice these drills several times a year. Being prepared and knowing how to respond to a catastrophic accident can save your company from potentially dire consequences.

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DEFENDING THE DEPOSITION...

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requested matters. A corporate representative’s inability to answer relevant questions regarding the designated material may be considered a “nonappearance” by the corporation and could prevent the corporation from presenting testimony related to the subject at a later point in the litigation. A better method, when 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 who has better knowledge on the subject.

Another common trap is the blended question, which seeks to join the deponent’s individual answer and the corporation’s answer. For example, a corporate safety representative was asked, “What do you think that the corporation’s policy should be regarding testing for sleep apnea?” Plaintiff’s counsel then asked, in a corporate representative capacity, “Why has the corporation not adopted the proposed policy?” The confusion caused by blending the questions clearly works to the benefit of the interrogator to bind the corporation with regard to 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 questions 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.

Preparation. As with most everything in life, there is no substitute for preparation. In preparing the corporate safety representative for a deposition, make sure he or she understands the rules (e.g., whether the representative can ask counsel for assistance, take a break and discuss his or her testimony with counsel, request documents to refresh his or her recollection, etc.). Even when dealing with an experienced and knowledgeable representative, be sure to cover all of the potentially relevant facts, details, and areas of concern.

Know the facts of the accident. As noted above, the facts include not just the date and location of the accident, but personal information about the injured or deceased. Knowing this information not only shows that the safety team performed an appropriate investigation, but also that the safety team (and, therefore, the company) care enough to learn about the other people impacted by the accident. If possible, have the representative travel to the scene or study photographs of the scene to become familiar with the details of the accident. Also, make sure the representative knows the weather conditions, the time of day, and what the driver was doing at the time of the accident (e.g., talking on a CB radio or cell phone, checking the mirrors, changing the radio, etc.).

Know the driver. In order to truly know the driver, the representative must investigate the driver’s hiring, training, work history, habits, dispatch requirements, and any other available information in order to anticipate plaintiffs counsel’s questions. For purposes of the litigation, the driver will be the face of the corporation. Knowing about the “skeletons in the closet” is critical to the corporate safety representative’s ability to address potentially problematic issues in a reasonable and articulate manner. The representative must be prepared to justify the driver’s hiring and retention through reliance on the application, references, and other documents in the DQ file. Also, if necessary, be prepared to discuss why documents that should be in the file are not there.

For example, plaintiff’s counsel may ask what documents should be in a company driver’s DQ file. After receiving a detailed list of required documents from the corporate safety representative, plaintiff’s counsel will present the involved driver’s actual DQ file, and will compare the contents of this file to the list of required documents provided by the representative. With proper preparation, the corporate safety representative will already know what is not there (if anything), and will be prepared to respond to the questioning in an informed manner.

Know the equipment. Just as the driver is often the face of the company, the equipment is the embodiment of the company. Knowing the make, model, and configuration of the truck and tractor is important. Knowing the maintenance and repair history is important. However, knowing the details and capabilities of the electronic data-gathering mechanisms may be the most important of all. In the modern era of GPS systems and engine control modules, information is gathered and stored regarding almost every aspect of driving—from hard braking events to speed and location to the condition of the tractor immediately before the accident. The corporate safety representative must be prepared to discuss the relevant equipment on the subject truck. Alternatively, if the interrogation becomes too technical or detailed, the representative must be able to refer the interrogator to a more knowledgeable person within the company.

Another potential trap involves comparing the capabilities of the on-board technology with the actual usage and application of the technology by the company.
For example, in a deposition, plaintiff’s counsel asked the corporate safety representative if “hard-brake events” were indicative of unsafe driving. The representative responded that such events could be representative of an unsafe incident, under certain circumstances. Plaintiff’s counsel asked if such events were actively monitored by the company. The representative responded that the company was not able to do so. Then plaintiff’s counsel asked if the corporate safety representative was aware of a “simple add-on” (to the electronic control module) that could monitor and record hard-brake events. The representative was not prepared for the question and did not know about the existence or cost of the add-on. Thus, in a few short questions, plaintiff’s counsel established the relatively low cost of making a fleet safer, while undermining the credibility of the corporate safety representative. Detailed preparation could have helped the corporate safety representative to anticipate these types of questions, and to be prepared with an appropriate answer.

**Know the policies and procedures.** Even if the corporate safety representative wrote the policies and procedures for the company, it is important to review each and every policy and procedure in preparation for the deposition. Plaintiff’s attorneys compare notes and share information very efficiently. Therefore, even if you have not produced the documents in the current litigation, plaintiff’s counsel may have secured copies (or, worse yet, copies of prior inconsistent policies and procedures). Also, it is imperative to review the safety policies to ensure that the driver did not violate any policies; or, if he or she did, to be able to address those violations in an honest and forthright manner.

**Know the safety department.** When all else fails, plaintiff’s counsel may try to show that the company (which is often very large and sophisticated) has a very small (and poorly trained) safety department. Therefore, it is essential to confirm that the corporate safety representative knows the background, training, and capabilities of everyone within the safety department. Then, when plaintiff’s counsel asks about training or experience in one area or another, the corporate representative will be prepared to properly answer the question.

**Conclusion**

Knowing the rules, avoiding the traps, and preparing properly will ensure not only a smooth deposition, but a successful one as well. The corporate safety representative’s deposition is often one of the most important depositions in a case. Make sure that you treat it as such, and allow sufficient time for preparation, reflection, and more preparation.

**Michael L. Miller** is a partner at the law firm of Drew Eckl & Farnham, LLP in Atlanta, Georgia, where he represents carriers in accident cases, coverage issues, and employment matters. He is a past chair of the ABA TIPS Commercial Transportation Litigation Committee.

This article was written with contributions from **Kurt Rozelsky**, a partner in the Greenville, South Carolina, office of Smith Moore Leatherwood LLP.
2015-2016 TIPS CALENDAR

October 2015
14-18  TIPS Fall Leadership Meeting  Westin Kierland Resort
      Contact: Felisha A. Stewart – 312/988-5672  Scottsdale, AZ
22-23  2015 Aviation Litigation National Program  Ritz Carlton Hotel
      Contact: Donald Quarles – 312/988-5708  Washington, DC

November 2015
4–6    2015 FSCLC & FLA Fall Meeting  Liaison Capitol Hill
      Contact: Donald Quarles – 312/988-5708  Washington, DC

January 2016
20-22  Fidelity & Surety Committee Midwinter Meeting  Waldorf Astoria
      Contact: Felisha A. Stewart – 312/988-5672  Hotel, New York, NY

February 2016
3-9    ABA Midyear Meeting  Manchester Grand Hyatt
      Contact: Felisha A. Stewart – 312/988-5672  San Diego, CA
18-20  Insurance Coverage Litigation Midyear Mtg.  Arizona Biltmore
      Contact: Ninah Moore – 312/988-5498  Phoenix, AZ

April 2016
6-9    Motor Vehicle Product Liability Program  Arizona Biltmore
      Contact: Donald Quarles – 312/988-5708  Phoenix AZ
8-9    Toxic Torts Midyear Meeting  Arizona Biltmore
      Contact: Felisha A. Stewart – 312/988-5672  Phoenix, AZ

May 2016
11–15  TIPS Section Spring CLE Conference  Intercontinental Buckhead
      Contact: Felisha A. Stewart – 312/988-5672  Atlanta, GA
      Speaker Contact: Donald Quarles – 312/988-5708