

I N S I D E T H E M I N D S

Strategies for Transportation Litigation and Dispute Resolution

*Leading Lawyers on Defending Clients Against
Claims in the Trucking, Aviation, Shipping, and
Railroad Industries*



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Where the Rubber Meets the
Road: Unique Litigation
Strategies in Highway Sector
and Motor Carrier Cases

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Introduction

Transportation litigation presents unique legal and social scenarios beyond the more simplistic “car wreck” case. When legal counsel is presented with a trucking case, it is imperative that such counsel immediately adjust any “common” litigation strategy to take into account specialized regulations and social risks. All assumptions must be set aside; regardless of the scope of counsel’s experience, a trucking case simply cannot be properly handled in a cookie-cutter fashion. From the outset of the case, a detailed litigation strategy must be considered that takes into account federal and state laws and motor carrier regulations that apply bumper to bumper, tractor to trailer, and owner to driver, and all in the context of potential social bias against large transportation vehicles.

According to the Federal Motor Carrier Safety Administration (FMCSA), the rate of truck accidents and fatalities has increased. In 2011, 3,757 people died in collisions with trucks. That is an 11.2 percent increase over 2009. Nearly three times as many people die in truck accidents as die in aviation, boating, and railroad accidents combined. The nearly 11 million trucks that travel US roads each year make up only 4.7 percent of all passenger vehicles, yet are involved in 12.4 percent of all fatal crashes. Since these statistics fail to include any matters other than fatalities, it is no surprise that every member of the potential jury pool is likely to have pre-conditioned sentiments toward truck drivers. The best way to navigate through these initial opinions is to have a focused strategy before the accident ever occurs.

Highway Sector Transportation Industry Clients and Claims

The scope of this chapter involves personal injury litigation and the associated parties in addressing personal injury transportation claims. Transportation may take place by air, water, rail, road, pipeline, or cable routes, using planes, boats, trains, trucks, and telecommunications equipment as the means of transportation. Unless a business is located directly at a sea or river port or is served by a railroad siding, it is going to receive its inputs, and ship its products, using truck transportation over the highway network; therefore, the authors of this chapter attempt to highlight workable strategies for the defense of the most common client types in the highway sector transportation industry.

- *Broker*. A broker is an entity other than a motor carrier that arranges for “...transportation by motor carrier for compensation.”¹
- *Motor Carrier*. A “motor carrier” is an entity that provides motor vehicle transportation for compensation.²
- *Shipper*. An “individual shipper” is the shipper, consignor, or consignee of a household goods shipment; is identified as the shipper, consignor, or consignee on the face of the bill of lading; owns the goods being transported; and pays his own tariff transportation charges.³

Theories of liability may center on the role of your client based upon these transportation definitions, common law negligence, negligence *per se* in the violation of individual state transportation statutes and/or the Federal Motor Carrier Safety Regulations (FMCSR), *respondeat superior* or other vicarious liability doctrines, negligent hiring/training/supervision, negligent entrustment, and usually gross negligence.

Retention in a Catastrophic Transportation Case

Whether driven by the nature of the injuries or by the nature of litigation expectations when an accident involves a motor carrier, transportation cases can be costly. Retention of counsel may come simultaneously with, after, or before the retention of different experts, and from the outset of such retention counsel needs to consider the scope and cost of the necessary investigation and ultimate litigation strategies. It is our experience that transportation cases are often contentious even from the outset of litigation due to the type of loss as to the plaintiff(s) and heightened risk as to the defendants(s).

Preparation and investigation are crucial for properly handling trucking cases, and without an understanding of the underlying regulations that govern the industry, an attorney is automatically at a disadvantage in protecting the interests of his or her client. Regardless of which side of the bar counsel is on for a particular accident, effective trucking litigation

¹ 49 U.S.C.A § 13102(2) (1995).

² 49 U.S.C.A § 13102(14).

³ 49 U.S.C.A § 13102 (13).

must start with the regulations. Every transportation litigation matter our firm has handled ultimately drills down to regulatory compliance, causal connection between such compliance and the accident, and community perceptions of the trucking industry. This means that success in a trucking litigation case requires additional effort on the part of counsel beyond a standard personal injury or “car wreck” case.

Truck drivers can be held liable for personal injuries or wrongful death caused by their negligence and their failure to use due care in the operation of their trucks. Employers are liable for the negligence of their employee truck drivers. Employers may be directly liable if they hire untrained or incompetent drivers or if they had reason to know the driver was no longer qualified. Perhaps a broker negotiated the transport or passed through the cargo between carriers without proper verification and retention. Sometimes a truck can be loaded by a third party who may be liable for negligent loading in the event of a load shift. If the truck was defectively or not properly designed, the manufacturer of the truck or trailer or the manufacturer of the component parts may be liable for the negligence and for product liability. Attorneys that jump into representation may well miss proper parties, proper claims, or proper defenses if not properly armed with particularized knowledge of the industry.

Developing an Investigation Strategy

Fee Smith Sharp & Vitullo offers an emergency response team for this client group so that early investigation efforts are properly targeted, and further to protect the information that may be obtained by initial consulting experts or inspection if litigation is reasonably anticipated. The purposes behind a rapid response team are multifaceted, and our firm counsels its transportation clients as follows:

1. Retain legal counsel to evaluate the state (or applicable federal) law *before* losses occur, if possible. In any event, retain counsel immediately after notice of loss to assist in evaluating spoliation (and other) issues.
2. Determine the specific basis of any restriction on spoliation with respect to each loss as soon as possible. That is, search for any basis in preexisting contract or statutory or case law that might be binding on the parties.

3. Make sure the carrier's internal and third-party investigators are up-to-date on current recommended practices for investigation and evidence preservation.
4. Preserve and carefully document chain of custody of evidence with photographs, videotapes, affidavits, and/or written agreements. Ensure that storage of the evidence is not subject to potentially spoliating influences. Identify and specify persons with keys to storage facilities and evaluate the facility in terms of security.
5. Work out written agreements with all *potentially* interested parties (to any extent possible) concerning inspection and/or destruction of evidence. Develop and agree to a *written* protocol for any "destructive testing" of the evidence, including a definition of destructive testing.
6. Give all potentially interested parties to the loss reasonable written notice of destructive testing, or any other significant action with respect to the evidence. Give reasonable time to respond. If your state allows for destruction of the evidence after some "reasonable time," try to do so by agreement, and in any event, give reasonable written notice to all potentially interested parties beforehand.

Technology advancements also necessitate rapid reaction to an accident. These systems operate to capture data that can play a critical role in future litigation, so initial investigation strategies must take into account the possibility that technology has captured information that must be preserved and/or may ultimately form an evidentiary basis for liability opinions. The technology systems listed below are general systems encountered in our practice over the last few years. The Federal Motor Carrier Safety Administration also posts "technology product guides" on its website "to assist carriers, drivers, fleet managers, and other interested individuals in learning more about available safety and security systems." Understanding the role of these technology systems is vital in initial transportation accident investigation (and avoiding future allegations of spoliation):

Routing and Dispatch software, also known as Computer Aided Dispatch (CAD), generates pickup and delivery schedules and determines optimal routing based on the company's routing criteria (i.e., fastest route, toll averse,

predominately interstate highway, etc.). Importantly to accident investigation, CAD is often integrated with a carrier's other decision support software modules to track vehicle and driver utilization (hours-of-service), vehicle maintenance, calculate driver settlements, track loads, or automate the capture of mileage data.

Automatic Vehicle Location systems (AVL) make it possible to pinpoint the location of a vehicle using satellite or ground-based technologies. When combined with on-board computers and routing and dispatching software, these systems can track and document detailed truck or load information from pickup to delivery. Diagnostic and Maintenance Support systems (MSS) are used to collect information and track a variety of operational statistics and asset performance/wear data to allow timely maintenance activities. These systems can be used to analyze error codes from electronic engines and on-board computers, track the total number of hours and miles logged on the vehicle, service intervals, and flag a vehicle due for preventive maintenance work.

Collision warning systems (CWS) alert the driver of possible collisions based on rates of closure and obstacles. Obstacle detection can use closed-circuit television, infrared, or low frequency radar detection. Alerting signals can be audible or visual. These data can be downloaded or relayed via mobile communications and used for driver performance evaluation or accident reconstruction.

In conjunction with a strategy to obtain information from technology systems is the importance of an early strategy of "on the road" accident reconstruction. Fresh evidence is always better evidence. Accident reconstructions assist in the preservation of evidence and in developing an understanding of what happened on the roadway. *This is important beyond the obvious*—many highway sector transportation cases end up focusing on matters that in a different situation might prove collateral or wholly irrelevant. It is the obligation of counsel to keep the focus of the eventual

fact finder on the road. In our experience, theories of liability, scope of discovery, and opposing party trial strategies often stretch much farther than the fog lines of the highway.

Improper investigation can taint the entire future litigation if it is not undertaken with an eye toward the particularities of trucking regulations or statutes. We are seeing a greater influx of spoliation allegations that can only be prevented at the time the “rubber met the road” or the immediate hours after the accident. So be sure to act quickly to preserve written materials as well, such as:

Documents Particular to Accident Investigation

- Police Reports
- Internal Accident Review
- Witness Information
- Scene Photos or Measurements
- Bills of Lading/Contracts
- Equipment
- History/Inspections/Maintenance/Repairs/Modifications
- Employee History/Application/Discipline

Corporate Policies/Procedures/Manuals

- Document Retention
- Dispatch Policies
- Employee Manuals
- Training Materials
- Safety Plans
- Maintenance Programs

Electronic Retention

- On-Board Recording Monitoring Data
- Emails
- Electronically stored compliance documents
- Reports and Internal Memorandum

Developing a Litigation Strategy

The development of a successful litigation strategy begins with understanding the key issues in transportation litigation as well as the potentially expensive measures needed in this type of litigation. When developing a litigation strategy in transportation cases, we try to start at the end: step one requires a determination of what the jury charge in the case would look like under the pleadings. Anticipating the jury charge provides a baseline for determining what the plaintiff's theory should/will be, which naturally leads to implications of the venue, scope of experts, number and type of depositions, and depth of written discovery needed. Even if pursuing early resolution is a primary goal, it is often difficult to formulate a strategy to achieve that goal without breaking down the initial theory of the case. Of course, you can never assume a case will settle. From the moment the accident takes place you must formulate a strategy with the mentality that the case will go to trial.

The Role of the Client in the Development of the Litigation Strategy

The role of the client in developing a defense strategy largely depends on the client. Most of our direct-hire clients prefer active involvement in the progression of litigation that stretches beyond mere reporting and provision of basic information. Typically, it is our practice to encourage increased client involvement in decision making proportionate to the type of accident and initial assessments of risk. Smaller, lower risk accidents with our direct-hire clients are grounded more in trust and experience with less direct client oversight. Even in those situations where less client oversight is involved, we cannot over-emphasize the need to be meticulous in your reporting—the risk assessment of a trucking case can change quite quickly and drastically, so it is imperative that your client stay informed each step along the way. Perhaps even more importantly, the involvement of the client in the litigation strategy encourages openness in bringing “dangerous” or negative information to your attention in time to address any potential problems.

Status of the Investigation Prior to Suit Being Filed

Obviously, we always prefer being involved in the investigation as close to post-impact as possible, which is why we developed our rapid response

team. There can be many investigation pitfalls in the reconstruction of a trucking accident: (1) preservation of evidence; (2) development of evidence only available shortly after an accident; (3) media exposure and client attempts at handling media; and (4) interaction with local, state, and federal investigatory bodies. The manner in which the pre-suit investigation, if any, was conducted can greatly affect everything that comes after, whether early resolution or trial to verdict. When we are retained after initial investigation efforts, we seek documentation and information from multiple sources— independent investigators, insurance adjusters, law enforcement agencies, consulting experts, drivers, supervisors, towing companies, private investigators, witnesses/witness statements, prior counsel, criminal counsel, mandatory reporting agencies, and media coverage.

Collecting Information During the Discovery Process

The purpose of the discovery process in these cases is to develop case theories as well as documentation to substantiate those theories. Documents relating to training and safety programs, as well as prior accidents, are also requested/produced, along with information related to the driver/operator and his/her driving history. Depending on the injuries to the plaintiff and claimed damages, medical information and documents are also requested. Collecting all of this information is a must prior to the scheduling of depositions.

Generally speaking, this information is generated by the lawyer for the transportation company and their client—i.e., the company and driver/operator. The key differences in terms of information collection would be in relation to the severity of the accident (plaintiff injuries, allegations against the driver/operator).

The client's role in supplying this information is very important as it relates to the production of the operator file and documentation related to accident prevention, as well as the existence of a safety program and "risk" management.

Recent changes in regulating safety reporting have had significant impact on the discovery process in transportation cases. Safety concerns involving trucking companies now fall under the aegis of the FMCSA's Safety Measurement System (SMS), which according to the FMCSA's

website uses a motor carrier's data from roadside inspections, including all safety-based violations, state-reported crashes, and the federal motor carrier census to quantify performance. Generally, discovery (and theories of liability) will track the same seven areas that the Department of Transportation has decided are key to preventing crashes, based on federal motor carrier safety regulations and prolonged analysis of crash statistics. These seven line items are called BASICS (behavioral analysis and safety improvement categories):

- Unsafe Driving—Operation of commercial motor vehicles (CMVs) by drivers in a dangerous or careless manner. *Example Violations:* Speeding, reckless driving, improper lane change, and inattention.⁴
- Fatigued Driving (Hours-of-Service)—Operation of CMVs by drivers who are ill, fatigued, or in non-compliance with the Hours-of-Service (HOS) regulations. This BASIC includes violations of regulations pertaining to logbooks as they relate to HOS requirements and the management of CMV driver fatigue. *Example Violations:* HOS, logbook, and operating a CMV while ill or fatigued.⁵
- Driver Fitness—Operation of CMVs by drivers who are unfit to operate a CMV due to lack of training, experience, or medical qualifications. *Example Violations:* Failure to have a valid and appropriate commercial driver's license and being medically unqualified to operate a CMV.⁶
- Controlled Substances/Alcohol—Operation of CMVs by drivers who are impaired due to alcohol, illegal drugs, and misuse of prescription or over-the-counter medications. *Example Violations:* Use or possession of controlled substances/alcohol.⁷
- Vehicle Maintenance—Failure to properly maintain a CMV. *Example Violations:* Brakes, lights, and other mechanical defects, and failure to make required repairs.⁸
- Cargo-Related—Failure to properly prevent shifting loads, spilled or dropped cargo, overloading, and unsafe handling of hazardous

⁴ 49 C.F.R. §§ 392.1 *et seq.* & 49 C.F.R. §§ 397.1 *et seq.* (West).

⁵ 49 C.F.R. §§ 392.1 *et seq.* & 49 C.F.R. §§ 395.1 *et seq.* (West).

⁶ 49 C.F.R. §§ 383.1 *et seq.* & 49 C.F.R. §§ 391 *et seq.* (West)

⁷ 49 C.F.R. §§ 382.1 *et seq.* & 49 C.F.R. §§ 392.1 (West).

⁸ 49 C.F.R. §§ 393.1 *et seq.* & 49 C.F.R. §§ 396.1 *et seq.* (West).

materials on a CMV. *Example Violations*: Improper load securement, cargo retention, size and weight, and hazardous material handling.⁹

- Crash Indicator—Histories or patterns of high crash involvement, including frequency and severity. It is based on information from state reported crashes.¹⁰

Deposition Organization and Planning

Deposition planning is not as simple as identifying “persons with knowledge of relevant facts.” We make every effort to control the number of employee or corporate witnesses made available for deposition, and we investigate our own witnesses prior to deposition just as we anticipate the opposing party is investigating their background as well. There are few things more uncomfortable in the discovery process than hearing about negative personal information or negative actions for the first time during the course of the deposition. Usually, these surprises are more likely to happen because we as counsel did not take the time to properly prepare the witness, or ourselves, for the deposition.

Transportation counsel should reasonably anticipate questions regarding social media, online safety reports, safety scores, accident history, and of course, regulatory compliance. We have been in plenty of depositions that painstakingly take each deponent through all significant regulatory categories in pursuit of “violations” to stack against the motor carrier or driver.

Expert Consultation and Retention

The resume of an expert witness is very important. Preferably, you will be working with an expert who has been retained by both plaintiff and defense lawyers, as such experts have greater credibility. You should also consider whether the expert has ever testified at trial, as well as the age of the expert, and how the expert will “play” to jurors in a particular venue.

⁹ 49 C.F.R. §§ 392.1 *et seq.*, 49 C.F.R. §§ 393.1 *et seq.* and 49 C.F.R. §§ 397.1 *et seq.*; HM Violations.

¹⁰ U.S. DOT, Compliance, Safety, Accountability, www.csa.fmcsa.dot.gov.

A meeting with an expert can also be beneficial as far as providing another set of eyes to look at the case. Additionally, if the expert is familiar with the expert on the other side, that information provides insight into how that person is going to testify and what evidence he/she typically relies on in a case.

Trial Preparation Considerations—Applying Your Litigation Strategy to Venue and Jury Pools

The Federal Highway Office of Motor Carriers conducted a series of focus groups of car and truck drivers around the country to assess attitudes toward trucks and truck drivers. The focus group results indicated that:

- Focus group participants said that they liked truck drivers, but disliked trucks.
- The public feels intimidated by the size, weight, and speed of trucks.
- Most of the participants believe that commercial driver license training should be upgraded (longer training, periodic retesting).
- People see a need for public education programs on safety when sharing the road with trucks.
- Large trucking companies are seen as having better equipment and better trained drivers than smaller companies.

Opposing counsel often play to the public's generic trepidation in sharing the road with large trucks. Motor vehicle litigation, with skillful verbal and visual reenactments of accidents, can push these emotional buttons. Understanding these preconceived notions of danger, opposing counsel often takes the focus off of what happened on the roadway and demands that the jury use its position to conduct safety oversight over an entire industry. Selecting a jury in a catastrophic truck crash case requires an awareness of the fact that despite what people say they believe about trucks, there is a potential reservoir of fear and anger that an aggressive plaintiff presentation can activate.

Carefully developed case themes and theories can help a defense attorney overcome these elements of juror decision making. To do this, the attorney must consider all the different ways a juror might analyze an accident and develop a plan of attack to break those theories and perceptions down

before jurors have an opportunity to build them up. Even with a solid investigation and litigation strategy, if you fall short of capitalizing on your preparation in jury selection then it may all be for naught. *Voir dire* in trucking cases must take into account the “fear factor” often associated with such a highly regulated industry.

Trial Preparation Considerations—Applying Your Litigation Strategy to Pre-Trial Rulings

We adhere to a simple mantra: Always be the most prepared person in the room. This means staying abreast of state and federal legislation and significant case authority in the jurisdiction. Not only does this assist the progression of the case, and its effect on the court’s perception and trust in our arguments, but it enables us to keep the accident on the road where the accident occurred rather than develop into a trial of an entire company or the industry itself. Translating our knowledge into articulate trial briefs in support of limine arguments enhances trial strategy and serves to protect the record. Indeed, motions in limine assist both you and the trial court, in tempering opposing counsel’s trial strategy:

- Barring admission of irrelevant logs
- Barring admission of irrelevant ECM data
- Barring admission of Preventable Accident Determinations
- Barring admission of other accidents
- Barring admission of CSA data

Settlement Methods and Considerations

Alternative dispute resolution (ADR), such as mediation, is required in a number of jurisdictions. Depending on the experience of the lawyer, as well as the experience of the mediator (i.e., a former trial lawyer, or someone who knows the venue and the tendencies of the judge), mediation can be a very useful tool in getting a case resolved. A trial verdict is something that cannot be predicted. Thus, ADR often provides closure as well as a way to control the situation, to some extent.

Based on the increasing costs of litigation, there has been a slight increase in negotiating matters pre-lawsuit and reaching agreements in relation to exchanging information in this regard. We are also seeing a

trend toward early mediation in the event the parties cannot come to a settlement themselves.

In the event that pre-suit settlement cannot be effectuated, tailored written discovery can assist with early litigation resolution. Written discovery helps narrow the scope of allegations and defenses, and streamlines the issues in dispute. This information is then conveyed to the client, and an honest discussion takes place regarding the pros/cons of the case and what the client wants to achieve. Determining a settlement range is important, and counsel must be careful not to allow trial ego to circumvent smart settlement decisions. Costs are great in transportation litigation and a proper settlement evaluation takes into account the resources that must go into the defense as well as the value of the case based upon the scope of damages, venue, and risk of a punitive recovery. The transportation client needs counsel's expertise in this cost/benefit analysis considering its concerns may also include matters such as publicity, insurance/self-insured coverage complications, and federal safety scoring.

Conclusion

Transportation attorneys must be prepared to handle transportation liability claims throughout the entire claims process—from immediate post-accident investigation and reconstruction through verdict and appeal. Since immediate post-accident investigation and reconstruction is essential to the management of the potential exposure in transportation-related cases, the transportation client needs counsel to be prepared from the moment the accident occurs.

Key Takeaways

- A solid litigation plan is grounded in a well-formulated post-accident investigation. Getting an idea of what happened leading up to and after the accident occurred is crucial to future success.
- Spoliation affects the determination of the merits of the case. Seek and save all available data in a timely manner.
- Meet with opposing counsel to determine if early resolution is something he/she is open to. Never assume a case will settle.

Formulate a case strategy with the mentality that the case will go to trial, but be willing to explore ADR options.

- Determine what the jury charge in the case will look like. Also consider (1) what the theory should/will be; (2) venue; (3) what experts will be needed; (4) what depositions will need to be taken; and (5) what depositions will more than likely be requested.
- Make sure that corporate representatives are prepared for depositions, and insist upon properly tailored corporate representative topics prior to producing a corporate witness.
- Know your audience if you hope to litigate these cases successfully. What works in a rural venue might not be successful in a metropolitan area. Know your judge and what he or she will allow you to do during trial.

William M. Toles, a partner with Fee Smith Sharp & Vitullo LLP, has handled over forty-five civil trials to a successful conclusion and jury verdict. Mr. Toles has trial experience throughout the state of Texas in tort litigation ranging from simple negligence cases to more complex premises liability, DTPA, commercial, and contractual dispute matters.

Mr. Toles is active in his church and community. He is a member of the Steward Board of Christian Chapel CME Church. Mr. Toles has previously served as a United Way grant panel member and chairman. He was a member of the Leadership Dallas Class of 2012 and was selected as a class advisor for the Leadership Dallas Class of 2013. He is also a frequent speaker at continuing legal education seminars and was one of three course directors for the 2011 Advanced Personal Injury Course CLE hosted by the State Bar of Texas. Mr. Toles is also a former member of the Washington & Lee Alumni Board. He currently serves as chair of the Washington & Lee Law Annual Fund, member of the Dallas ABOTA Chapter Executive Committee, and vice president of the Law Council at Washington & Lee School of Law (2013-2014).

Rebecca E. Bell is a partner with Fee Smith Sharp & Vitullo LLP and represents companies and individuals in high-exposure and high-profile disputes in federal and state courts. In recent years, Ms. Bell has been appellate and trial litigation counsel for clients in a broad range of catastrophic tort cases involving trucking, construction, insurance bad faith, deceptive trade practices, and premises liability matters. She also litigates complex professional responsibility actions, and is further retained as coordinated counsel for

national clients, appearing in multiple states to protect the corporate interests of such clients in catastrophic litigation.

Ms. Bell's experience provides a foundation for handling the exigent circumstances that often accompany high-exposure cases, resulting in Ms. Bell being called to assist in complex pre-trial matters, summary dispositions, mandamus petitions, and trial support throughout the firm in addition to handling her own extensive docket. Despite her demanding schedule, Ms. Bell finds time to contribute to the education and advocacy of students through her work with local high school mock trial teams and Southern Methodist University law students.



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