Reconsidering the Concept of Taking your Driver's Post-Accident Statement

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You are the truck pusher, dispatcher or safety director of a mid-size motor carrier with a good safety record who strives to comply with the Federal Motor Carrier Safety Regulations. This morning, the phone rings; one of your drivers has just been involved in a fatal accident. Your job is to respond to the accident and advise your driver on what to do. Your first instinct (probably reinforced over the years by formal training and past experience) is to get a written or recorded statement from your driver.

Don't Do it!
In Texas—and most jurisdictions—your driver's statement will be discoverable and admissible in future litigation. In my experience, a statement given by a commercial driver in the aftermath of a severe accident often becomes a burr in the saddle of the driver and trucking company if they are later sued.
Whether at fault or not, your driver likely feels he is in an adversarial position with you, your company, and possibly law enforcement. His career, livelihood, and freedom may be on the line. So, this may cause him to be nervous, distracted and even dishonest, and the resulting statement can create substantial problems down the road. Once your driver puts pen to paper, he is married to the content of that statement forever!

Here are three examples of well-intentioned written statements (given before counsel became involved) that resulted in significant defense problems.

Example 1: A vehicle (V1) struck my client's driver while attempting to pass my driver on a two lane road. My driver stopped in his northbound lane of travel, exited his vehicle, and ran ahead to check on the driver of V1—without activating his hazard lights or putting out emergency reflective triangles. A few minutes later, another northbound motorist struck the back of my client's trailer (having apparently never noticed my driver's rig in the road). That second motorist later died from his injuries and litigation ensued.

This accident happened less than a mile from the driver's dispatch location. So, right after the accident, the safety director asked the driver to provide a written statement. The driver's statement explicitly states the driver turned on his hazard lights and put out his reflective triangles **before** checking on the driver of V1.

Police dash cam video contradicted this statement. My driver's hazard lights were off, and the video shows him putting out reflective triangles after the second accident!

Now, a difficult but manageable case has turned into one where the driver has blatantly lied in his statement to account for his own mistakes following the first accident. We conducted multiple focus groups on this case, and the majority of mock jurors completely disregarded credible arguments that the decedent could have easily avoided this crash. Instead, the jurors could not get past the dishonesty of my driver and wanted to punish him because of the lies in his statement.

Example 2: My driver was westbound on an extremely narrow county road when he was struck by an oncoming belly dump rig. The impact diverted the belly dump rig into the westbound lane, causing a second collision that resulted in the death of an 18-year-old. Right after the accident, my driver wrote out a statement—at his supervisor's direction. The statement said the driver of the belly dump rig "began driving out of his lane into mine. I yelled and alerted my co-driver we were about to be hit then I moved as far over to the edge of the road as I could attempting to avoid the collision."

At first review, this looks to be a fairly innocuous, if not beneficial, statement. But the measured width of the roadway (which had ho shoulder) coupled with the track width of my driver's tractor showed my driver had almost no room to move to the right unless he had been over the center line when he started this maneuver. Tire marks at the scene supported a very credible argument that the collision occurred with the belly dump rig having crossed the center line. Unfortunately, my driver's well-intentioned attempt to bolster his lack of fault actually provided the other side with a means to argue that my driver was the one that crossed the center line and initiated this collision.

Example 3: Early in the morning, my driver was making a left turn out of his dispatch yard and an oncoming motorist failed to slow down, crashing into my driver's trailer. My driver's statement said the oncoming motorist's lights were not on, so he did not see oncoming vehicle. But, in the same statement, he irreconcilably claimed the oncoming driver was speeding.

During my driver's deposition, opposing counsel effectively discredited my driver because of this conflict. If my driver never saw the plaintiff, how could he claim the plaintiff was speeding? Generally, my driver was a likeable and credible witness, but this discrepancy greatly undermined his testimony.

Good plaintiff's lawyers will pounce on every word of a written or recorded statement and will make a truck driver pay dearly for the slightest inaccuracy. Truck drivers have no idea their statements will be picked apart like this. They do not understand the potential repercussions of even the most benign statement. The driver, still reeling from the accident, will frequently try to bolster his side of the story and include needless details, setting himself up for an uncomfortable cross examination.

What if the driver writes, "the plaintiff skidded for 200 yards before the collision," but police measurements show the skid marks actually measure 100 yards? The driver is probably just trying to give his best estimate of the skidding distance, but now he has given a misguided recollection of the accident and plaintiff's counsel has an opening to exploit. Or, suppose my driver states the other vehicle was traveling 80 mph before the collision but ECM data verifies a much lower speed. Now, my driver has embellished plaintiff's speed in a desperate attempt to pass the buck! This type of perceived inaccuracy can be a key factor in deciding against the truck driver, especially in he said-she said cases where only the two drivers witness the crash. Truck drivers already start out as the "bad guy," and any hint of inaccuracy, dishonesty or untrustworthiness further tips the scales in favor of the plaintiff.

I would prefer my driver give his version of the accident for the first time at deposition as opposed to being saddled with a problematic post-accident statement given under duress or without the benefit of legal counsel.

Here are some suggestions to avoid the problems outlined above:

1. **Dispatch a lawyer to the accident site to handle the driver.** Certainly, this may be impractical and it creates added costs. But your retention of counsel strengthens arguments that you were acting in "anticipation of litigation" and discussions between counsel and the driver would be privileged. When I am retained to provide immediate post-accident defense to a truck driver, the first thing I do is call him, tell him I am his lawyer and instruct him not to give any statements until I am present.

   Once I meet with the driver, I will interview him (interview, not take his statement) and take notes about his recollection of the events. We may go the scene and review the skid marks, light sequence, location of markers, etc. Memory is, fallible. Allowing the driver to refresh himself regarding road signs, markers, skid marks and other physical evidence at the scene before giving his version of the events ensures a substantially more accurate description of the accident.

   This interview allows me to note my driver's best possible recollection of the events. Then, when he is deposed many months later, we can dust off my notes and better prepare for that deposition. Or, if his employer or law enforcement does need a statement, we can discuss the content of that statement and ensure it will not provide future ammunition for a crafty plaintiff lawyer.

   Many insurance carriers have established emergency response protocols with various defense law firms that allow for immediate response to a severe accident, so the motor carrier should always inquire about this when reporting the accident to its insurance agent or carrier.

2. **Report the accident to your lawyer then investigate the crash.** If sending a lawyer to the scene is cost-prohibitive or geographically impractical, at the very least, the motor carrier representative in charge of investigating the crash should place a phone call to the company lawyer before beginning his investigation. This is by no means an iron-clad way to ensure that all aspects of the subject investigation are privileged, but it strengthens claims that any company interviews of the driver were done in anticipation of litigation.

   After speaking with a lawyer, the procedure discussed in section 1 above should be applied. The company representative should call or meet with the driver and interview him—not take his statement! The first words out of the company representative's mouth should be something like "I have spoken with our lawyer, and it is likely that we are going to be sued, now tell me what happened…" I would also want the company representative to write atop his note pad "PRIVILEGED WORK PRODUCT MADE IN ANTICIPATION OF LITIGATION." If these steps are followed, it is more likely the company representative can complete his interview of the driver and maintain those notes as privileged work product. That said, each jurisdiction may have slightly different rules and case law on the privileged nature of this type of post-accident interview so you should research how this approach would apply in your particular jurisdiction. It may be best to avoid writing anything down, if it can be avoided.
3. **If a Statement Cannot be Avoided, Keep it Short! –** If you are not able to dispatch counsel or at least consult with counsel, and a driver statement becomes inevitable, then the best rule of thumb is "keep it short." Maybe the driver calls and reports the accident, and law enforcement is already on site asking him for a written statement. The company representative advising that driver (either at the time or in training beforehand) should encourage the driver to be honest but brief. The more detail the driver attempts to give, the more opportunity for inconsistency and error. Short statements like "the other vehicle changed lanes and hit me" or "I proceeded through the intersection with a green light and got hit" should be sufficient for any request from law enforcement. And, do not forget, a driver always has the option of not giving a statement or asking if he can delay giving the statement until after he meets with counsel (subject to laws in the particular jurisdiction that may compel a statement in certain circumstances). I have never known of an investigating officer to object to this type of request from a driver.

In summary, avoid taking a written or recorded statement from a driver in the immediate aftermath of an accident. It may come back to bite you. In any accident involving an 18-wheeler, the deck is normally stacked against the motor carrier due to its size and public disdain for the manner in which rigs crowd the roads and appear to be unsafe. But proper handling of the driver post-incident can help prevent even greater obstacles to the company's defense in subsequent litigation.

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