

DEPOSITION AND CROSS-EXAMINATION OF THE DEFENDANT DRIVER

**ATLA'S LITIGATING TRUCKING CASES- FROM DISCOVERY TO TRIAL
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The deposition of the defendant truck driver is often the most important tool of discovery available to the plaintiff's lawyer. The reasons for taking the driver's depositions should be well understood so that the attorney who is going to take this deposition is properly prepared. The principal reasons for taking this deposition can be summarized as follows:

1. To perpetuate the witnesses testimony;
2. To explain what the driver and/or carrier did that was negligent and caused the collision in question;
3. To show the jury what the driver is really like before he/she is cleaned up for trial.
4. To build a record for arguing motions; and,
5. To facilitate settlement and/or to prepare for the cross-examination of the driver at trial.

Before the driver's deposition is taken it is necessary to obtain all of the paperwork that the carrier and the driver will have accumulated as required by the FMCSRs. It is assumed that the reader of this paper already knows the documents that have to be obtained through paper discovery of the driver and the carrier. If the reader is not familiar with this information, it is suggested that he/she join ATLA's Interstate Trucking Litigation Group which has a repository of discovery forms that can be utilized in trucking cases. It is outside the scope of this paper to set out in detail the documents that must be obtained. What follows then is a summary of the information that must be reviewed.

INSPECTION OF THE TRUCK AND TRAILER

It is important to secure the truck involved as soon as possible following the accident. This can be accomplished by filing suit and then using a protective order in conjunction with a request for inspection. You should attend this inspection with your expert witness and be prepared to photograph and videotape the truck and trailer. Information that can be obtained during the inspection include the driver's line of sight (are there any obstructions in his/her view), the condition of the cab and sometimes items that suggest that driver was eating or drinking at the time of the collision. An expert can also test the brakes on the truck and can determine if there

are Electronic Control Modules (ECMs) that can provide information about the driver's actions at the time of the collision in question. ECM information can include hard brake application, speed of the vehicle at braking, time and date, clutch position, cruise control setting and even outdoor temperature.

OBTAIN THE RECORDS THAT THE CARRIER HAS TO MAINTAIN

The FMCSRs require every trucking company to maintain a great deal of paperwork on their truck drivers. This is usually referred to as the Driver Qualification/ Personnel File. The company must determine the competency of the driver before they hire him including driving and written testing, must check his prior employment as a truck driver, obtain his driving record throughout the US. And, these records have to be maintained and updated by the company as long as the driver remains and an employee. The documents that a company has to maintain in this regard are identified in FMCSR, Title 49 CFR, Section 391.51.

The carrier also has to maintain the each driver's logs and hours of service. This paper work will include the driver's record of hours and miles driven, hours on and out of service, safety inspection records, and the driver's log sheets. It is important to request these documents as soon as possible because the company can discard any such records that are over 6 months old. Even if this becomes a problem, keep in mind that often times payroll records and time cards can be used to determine a driver's prior duty status. These latter records are required to be kept for long as the driver is employed and for three years thereafter.

The company is required to maintain maintenance records on their trucks. The driver also prepares a daily inspection report of the vehicle that is referred to as the driver's vehicle inspection report.

Bills of lading can be used to check against the driver's log entries to verify if the driver has kept accurate records when he loaded and unloaded goods for his vehicle. These records are needed by the carrier to bill customers and can be valuable as a source of information for tracing the shipping date and/or the pickup date for and load. In addition to obtaining this information from the carrier, you should also attempt to obtain documents from third party businesses that he drive visited in his trip. An example of the potential value of such documents can be illustrated from a case recently handled in our office.

We represented the Estate of a woman who was killed when she pulled out from a stop sign into the path of a large gravel truck that was traveling a preferential state highway. The witnesses were all critical of the decedent but two of them thought the truck was driving over the 50 MPH posted speed limit. After determining that the truck did not have ECMs that would answer the question of the truck's speed at the time of braking for the collision we sought other information that might assist in this determination. The trucker's logs revealed that he had his truck loaded at a gravel pit on the other side of Indianapolis from the scene of the collision. In his interrogatory answers the driver set out the route that he had taken from the gravel pit to the

scene of the collision and we were able to determine that he had driven 42 miles from the time he left the pit to the time of the collision. His logs indicated that he had covered this distance in just over one hour. Since the speed limit was 50 MPH for almost the entire distance the logs did not support our theory that he had been speeding prior to the collision. However, we subpoenaed the gravel pit's records of their transaction with the driver. These records included an receipt they had maintained that showed the time the driver had left their gated premises. This time was only 38 minutes before the collision occurred. Thus, the independent records supported our theory of the case that the primary cause of the collision was the speed of the truck driver. We were able to argue through our expert that he driver had to have averaged in excess of 60 MPH to cover the distance involved. With this information we were able to obtain a very favorable settlement for the Estate in what otherwise appeared to be a case headed for a defense verdict.

While driving in interstate operations, the driver must have in his possession a valid CDL, a log book and a medical certificate verifying that he is physically capable of operating the truck.

IS THE DRIVER 'QUALIFIED' TO DRIVE?

Before a carrier allows an individual to drive, it has an affirmative duty to determine if the individual is 'qualified' to drive under the FMCSRs. To be qualified to drive and individual must meet the following 11 separate criteria.

1. Be at least 21 years old;
2. Be able to sufficiently read and speak the English language;
3. By reason of experience and/or training, be able to safely operate the vehicle;
4. By reason of experience or training, be able to determine whether the cargo has been properly loaded;
5. Be familiar with methods and procedures for securing cargo;
6. Be physically qualified to drive a vehicle in accordance with the applicable FMCSR subpart that in entitled *Physical Qualifications and Examination*;
7. Have a current and valid CDL issued only by one state or jurisdiction;
8. Have prepared and furnished the motor carrier that employs him with the list of violations or the certificate as required by section 392.27;
9. Be free from any disqualification contained in 391.15 (license revocations, criminal offenses, etc.);
10. Have successfully completed a driver's road test and been issued a certificate of the same under 391.31, or have presented the carrier with the equivalent documents in accordance with 391.33; and,
11. Have completed and furnished to the carrier an application for employment under section 391.21.

HAS THE CARRIER PROPERLY SUPERVISED THE DRIVER?

The carrier has to exercise due diligence not only when they hire the driver, but also during the driver's entire term of employment with the carrier. 391.25 requires the carrier to conduct an annual review of each driver's driving record for the preceding 12 months. 391.27 requires each carrier to obtain a report from each of its drivers with a list of all violations of motor vehicle traffic laws and ordinances of which the driver had been convicted or of which the driver has forfeited a bond or collateral during the preceding 12 months.

Under 391.15 the carrier is required to not only obtain the each driver's report of accidents and violations, but to analyze these reports to ensure that any driver who has a violation proscribed by the section is disqualified for driving for a period of up to one year. The disqualifying offenses include driving a truck with a BAC of .04 or more.

The carrier also has to closely monitor the hours that a driver actually drives a motor vehicle to ensure that he driver files correct logs and does not work in excess of the maximum number of hours. The failure of a company to monitor a driver's logs can create a jury question on punitive damages when an arguably fatigued driver has caused a collision. A carrier's failure to institute a program to discover the falsification of a driver's logs would violate various FMCSRs including 390.11, 390.13, 395. 3 and 385.5.

The carrier also has a duty to inspect, repair and maintain his vehicles in a safe condition. This duty includes the duty to maintain repair records and inspection reports on its vehicles, including the driver's inspection reports that are filled out each day by a driver.

TAKING THE DEPOSITION

Videotape the deposition of a truck driver every time! There are several reasons for this suggestion. First, the driver is often a party and under the trial rules of most jurisdictions the deposition of a party can be used as direct evidence at trial. You can thus play the video or parts of it, in your case in chief. You can ask leading questions which can be very effective in controlling the witness. Violations of the FMCSRs should be emphasized in the deposition. Consider the use of a projector and large screen to use with the driver. Photos of the scene, diagrams and specific provisions of the FMCSRs can be reviewed during the deposition with the driver. Often the defense does not prepare a driver as much for his pretrial deposition as they would for the driver's trial appearance and testimony. By videotaping the driver's deposition you will be able to show how he really appears before the defense attorney has had a chance to clean him up for trial.

Use visual aids during the driver's deposition so that it will be interesting and persuasive to a jury and/or to the carrier's adjustor who will be evaluating the case for possible settlement. Photos of the driver's view, of the roadway in question or of police diagrams of the collision scene should be reviewed in preparation for the deposition to see if they can be used to help advance the story of how the driver and the carrier's negligence caused your client's injuries and resulting

damages.

CROSS EXAMINATION AT TRIAL

If you have obtained the paper discovery suggested above and thoroughly prepared for and videotaped the driver's deposition you will have the ammunition necessary to conduct a successful cross of the driver at trial. Since my third year in law school I have tried to follow Irving Younger's Ten Commandments of cross examination.

1. Be brief and get to the main point.
2. Use plain words. Use a language of simplicity. Remember it is the defense's mission to create confusion, complexity and ambiguity in the case.
3. Use only leading questions.
4. Be thoroughly prepared.
5. Listen to the answers that are given. Defendants sometimes say the most extraordinary things.
6. Do not quarrel with the witness.
7. Avoid repetition.
8. Do not allow the defendant to explain. If the defendant's answer is irrational, inconsistent or absurd, then stop and sit down. You have the point you need for summation.
9. Limit the questions to those that are absolutely necessary.
10. Save the ultimate point for summation. This follows from rule number 8 above. If you get something really good on cross resist the temptation to ask the witness about it. This will only give him a chance to explain the answer and will weaken the impact of the testimony that was absurd, inconsistent and/or irrational.