CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
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2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

COLLECTING AND PRESERVING EVIDENCE FOLLOWING A TRUCK ACCIDENT AND AVOIDING SPOLIATION CLAIMS

I. Rapid Response: Why It Is Important and Who Should Do It

A. Why Rapid Response is Important

Once an accident has occurred, the physical evidence begins to change: vehicles are driven or towed from the point of collision, debris is cleared from the road, other traffic drives through the area, skidmarks begin to fade, fluids evaporate, and the light and weather conditions fluctuate. Similarly, witnesses begin to shape their stories: they forget important details, change their stories to make themselves look better, compare their observations with others and revise their own memories, and talk to attorneys or other professionals who may encourage them to omit or emphasize certain details. A rapid response is essential in documenting the most accurate evidence.

B. Rapid Response Team

In order to assure a true rapid response, a company should know who is on the team, and each member must know what role he or she will play.

1. Driver

The driver is the only individual actually at the scene of the accident. If physically able, the driver should do the following:

- Call 9-1-1
- Take steps to prevent secondary collisions.
- Check on occupants of other vehicles.
- Contact company dispatcher.
- Obtain license plate numbers of any vehicle stopped at the accident scene and not involved in the accident.
- *Do you want your driver to take photographs and/or notes?*

- Pros: Photographs taken immediately after the accident are the most accurate representation of the scene, and notes may help the driver remember details later.
- Cons: Both the photographs and the notes are likely to be discoverable by other parties.

2. Company Representative/Dispatcher

When a call comes in regarding an accident, the company representative needs to determine the severity of the accident and whether significant injuries or fatalities are possible. If so, he or she needs to take the following steps:

- Confirm that the driver has taken the steps noted above.
- Facilitate a conference call between the driver and defense counsel.
- Assist defense counsel in coordinating the rapid response team and preserving evidence discussed below.

3. Attorney

If possible, defense counsel should speak with the driver before he is approached by the state trooper for an interview. During that initial telephone call, counsel should:

- Assure the driver that he will look after his best interests.
- Advise the driver that he needs to identify himself and provide documentation regarding the truck and insurance but that he should not give a statement to the state trooper until after he meets with counsel and has a chance to review available ECM data.
- Obtain from the driver information about the accident.

4. Field Adjuster/Investigator

The field adjuster/investigator should be dispatched to the accident scene as soon as possible. Ideally, defense counsel should direct the individual to the accident scene in order to increase the chances that person's investigation will be protected by the work-product doctrine discussed below. The field adjuster/investigator should obtain the following information:

- Confirm that the driver has spoken with defense counsel, and if not, put the driver in touch with the attorney.
- Confirm that the driver has or will undergo an alcohol and drug test as required by 49 C.F.R. § 382.303 (alcohol within 2 hours and drugs within 32 hours).
- Speak with the investigating state trooper or law enforcement official regarding their investigation.
- Determine the location of all involved vehicles, including the name and address of any towing companies.
- Secure from the driver all logs, inspection reports, and service records.
- Identify, and if possible, interview all eyewitnesses to the accident except the driver.
    - If an eyewitness is favorable or states he or she did not see the accident, the investigator should get a recorded statement.
    - The investigator should understand that a recorded statement is discoverable if it constitutes a "statement" as defined by Rule 26(b)(3)(c) of the Federal Rules of Civil Procedure:
        - A written statement signed or otherwise adopted or approved, or

- A stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by a person making it.

5. Accident Reconstructionist

Ideally, the accident reconstructionist should have an engineering degree with extensive experience inspecting commercial trucks and downloading ECM data. The reconstructionist should have a pre-accident plan in order to avoid any mistakes or oversights. Typically, the accident reconstructionist's inspection should include the following:

- Photograph and/or videotape the accident scene and approaches to it.
- Obtain measurements with a measuring tapes/chains and/or a laser scanner.
- Accurately record road names, the road/intersection configuration, number of lanes, traffic signals, condition and type of road surface, and the location/size of any witness marks.
- Measure and photograph the tractor, trailer and involved passenger vehicles.
- Perform a mechanical inspection of the tractor and trailer, assessing the inspection decals, headlamps, tail lights, turn signals, marker lights, windshield wipers, wheel rims, hubs, tires, fuel tank, exhaust system, air and electrical lines, fifth wheel, frame and body, hoses, trailer bodies, sliding tandem, cargo securement, and brakes.
- Download data from the truck engine's electronic control module (ECM), GPS system such as QUALCOMM or PeopleNet, crash avoidance system such as VORAD, and any other electronic devices that may have recorded data.
- Determine whether data might be retrievable from any event data recorders of involved passenger vehicles, and recover any data from an airbag control module (ACM), rollover sensor (ROS), or powertrain control module (PCM).
    - Note that many recorders can be accessed through commercially available software. Hyundai and Kia have released their own kits, which are commercially available, and which are not compatible with Bosch's CDR kit (which nearly all other Auto OEMs use).
- Determine whether aerial photographs are necessary.

II. <u>Collecting Evidence From Others</u>

A. Non-Parties May Have Valuable Evidence

Following an accident, police departments, media entities, a state's Department of Transportation or Highway Department, and even local businesses may have intentionally or accidentally recorded information that can be very valuable in an accident investigation.

B. Examples of Relevant Evidence

Possible evidence to collect from third-parties includes:

- 9-1-1 Calls – Multiple parties and witnesses often call 9-1-1 and often make a detailed description of the accident.
- Video from the dashcam of a responding officer – The video may be helpful in showing visibility and also any activity by potential plaintiffs.
- Highway Camera Footage

- This may be time sensitive. For example, both Minnesota (MnDOT) and Wisconsin (WisDOT) video is on a continuous 72-hour loop, and therefore, if the state does not preserve the evidence itself, it will likely be taped over if not requested within that time.
- For Minnesota DOT cameras, call MnDOT at (651) 234-7500.
- For Wisconsin DOT cameras, contact WisDOT-Bureau of Traffic Operations at (414) 227-2161

- Photographs and video from local media outlets
  - Obtaining footage or photographs that aired is usually easy and involves calling the media outlet to be put in touch with the appropriate department.
  - Obtaining extra footage, or any other information not made public, can be more difficult and media outlets may cite a state's "Reporter Shield Law" like Minn. Stat. § 595.023 or Wis. Stat. § 885.14.
- Postings by witnesses on social media like Facebook or Twitter
- Surveillance video from local businesses – While most surveillance cameras are pointed at the business, some record at least parts of nearby streets. Like video of the highway, these recordings are usually on a "loop" and may be erased within as little as 24 hours.

III. Preserving Evidence

A. Anticipating What Records Will Be Requested

Attorneys representing plaintiffs know that trucking companies retain a large amount of documentation. They usually take a "shotgun" approach in their requests, and many judges are willing to allow very broad discovery. In planning its document-retention policy, a company should remember what evidence is likely to be requested in the event of an accident.

B. The Most Commonly Requested Documents Include

- Driver logs
- Driver daily inspection reports
- Pre-trip inspection reports
- Bills of lading
- Load tender requests
- Fuel receipts
- Weigh tickets
- Toll receipts
- Repair/maintenance records for the tractor and trailer
- Annual or bi-annual inspection records
- Tractor's ECM data
- QUALCOMM/PeopleNet/GPS data
- Record of calls/emails/other communications to the driver
- Driver's cell phone records
- Driver qualification and personnel files
- Company policies and procedures

C. Comply With all Federal Regulations

A motor carrier should make sure that it is following all federal regulations regarding document retention, including:

- Logs – 49 C.F.R. § 395.8(k) (6 months)
- Driver vehicle inspection reports – 49 C.F.R. § 396.11(c)(2) (3 months)
- Repair and maintenance records – 49 C.F.R. § 396.3(c) (1 year)

D. Have Clear Written Company Policies Addressing Common Issues

Plaintiffs' attorneys focus on finding a cause of action to bring against a carrier. The most common claims are negligent hiring, negligent retention, negligent supervision, and negligent training. Anticipating these claims in advance can help a carrier prepare documentation to defend these claims. Each carrier is unique, and different companies will employ different strategies. And, while some strategies (additional ride-alongs) may cost money, others (safety rewards or competitions) cost little or nothing:

- Negligent Hiring – This claim is usually based on a driver's accident or violation history and a carrier's failure to either discover that history or account for it. A company can avoid this claim by completing a thorough investigation of work history and requiring some level of ride-along observation for drivers with a blemished or uncertain record.
- Negligent Retention – This claim is usually based on a driver's accidents/violations with the company, and often focuses on hours-of-service violations. A company can limit this claim by instituting a system in which any violations by a driver are addressed quickly and with some meaningful intervention.
- Negligent Supervision – Like a variation on negligent retention, this claim essentially says that the company did not pay attention to the driver's shortcomings. A company can protect itself from these claims by making sure that there is a policy assuring that new drivers are supported and violations (especially hours-of-service violations) are caught and addressed.
- Negligent Training – This is a common claim in trucking cases. Minnesota, as one example, does not recognize "negligent training" as a cause of action. *Johnson v. Peterson*, 734 N.W.2d 275 (Minn. App. 2007). However, a company can help protect itself from this manner of claim by requiring additional safety training and providing written reminders of good driving practices and updates on changes in rules and regulations.

E. *Should You Keep Documents Longer Than Required?*

- Pros: Documents may put the driver in a good light and producing the documents may put the company in a good light.
- Con: You may have to produce unfavorable documents that you kept under a company policy that you were not required to retain under the federal regulations.

IV. Spoliation – A Two-Edged Sword

A. Federal Law on Spoliation

Spoliation is the destruction, alteration, or failure to preserve property for another's use as evidence in pending or reasonably forseeable litigation. Spoliation of evidence can result in sanctions including dismissal of a suit or an adverse inference instruction (the jury is told that it may assume that the missing evidence would have been harmful to the party that destroyed the evidence). There is a split in the federal courts regarding what level of intent or knowledge is required to impose a sanction for spoliation. *See, Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). In the 8th Circuit, for example, the moving party must show "bad faith" on the part of the party that destroyed the evidence. *SDI Operating Partnership v. Neuwirth*, 973 F.2d 652 (8th Cir. 1992). That is, there must be a

finding of "intentional destruction indicating a desire to suppress the truth" before an adverse inference instruction should be given. *Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004). In contrast, the 4th Circuit will grant a sanction for spoliation of evidence where the loss of evidence was inadvertent if there is significant prejudice to the opposing party. *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).

B. Minnesota Law on Spoliation

Under Minnesota law, sanctions may be imposed for spoliation of evidence regardless of intent. *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995). A finding of bad faith or willfulness is not required. Note that this is different from a federal suit in Minnesota, often making it preferable to remove cases to federal court in Minnesota. In a relatively recent decision, the Minnesota Supreme Court provided a roadmap for counsel to follow to avoid sanctions for spoliation. That case, *Miller v. Lankow*, 801 N.W.2d 120 (Minn. 2011) said the following:

- Duty to preserve evidence exists not only after formal commencement of litigation, but whenever party knows or should know that litigation is reasonably foreseeable.
- Even when breach of duty to preserve evidence is not done in bad faith, district court must attempt to remedy any prejudice that occurs as result of destruction of evidence.
- Duty to preserve evidence must be tempered by allowing custodial parties to dispose of or remediate evidence when situation reasonably requires it.
- Custodial party with legitimate need to destroy evidence may be absolved of failure to preserve evidence by providing sufficient notice and full and fair opportunity to inspect evidence to noncustodial party.
- Notice and full and fair opportunity to inspect will not excuse failure to preserve evidence where party destroys evidence without legitimate need to do so, or destroys evidence in bad faith.
- When considering whether to impose sanctions for spoliation of evidence, court should consider totality of circumstances in determining whether notice given was sufficient to satisfy custodial party's duty to preserve evidence.
- When custodial party with legitimate need to destroy evidence gives notice that is sufficient for noncustodial parties to protect themselves by taking steps to inspect or preserve evidence and noncustodial parties nevertheless do nothing to inspect evidence, sanctions for spoliation may not be appropriate.
- In determining whether sanction is appropriate for spoliation of evidence, court should consider: (1) degree of fault of party who altered or destroyed evidence; (2) degree of prejudice suffered by opposing party; and (3) whether there is lesser sanction that will avoid substantial unfairness to opposing party and, where offending party is seriously at fault, will serve to deter such conduct by others in future.

C. Wisconsin Law on Spoliation

1. In General

In Wisconsin, a spoliation sanction is appropriate where the "offending party" knew that litigation was possible and knew that the evidence destroyed would constitute evidence relevant to the potential litigation. *Insurance Co. of North America v. Cease Elec. Inc*, 674 N.W.2d 886, 890 (Wis. App. 2003). Like in Minnesota, the federal court in Wisconsin applies a different standard. In the 7th Circuit, a party seeking a sanction based on spoliation must be able to show that the other party "intentionally destroyed the documents in bad faith." *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008).

2. Destruction After Notification

In 2009, the Wisconsin Supreme Court issued a significant case regarding spoliation, *American Family v. Golke*, 768 N.W.2d 729 (Wis. 2009). The court in *Golke* ruled that the duty to preserve relevant evidence is discharged when a party with a legitimate reason to destroy evidence provides other interested parties with reasonable notice:

1) of a possible claim,
2) the basis for the claim,
3) the existence of relevant evidence to the claim,
4) a reasonable opportunity to inspect the evidence.

The Wisconsin Supreme Court also ruled that mailing a letter with the foregoing information via first class mail constituted proper notice.

The Wisconsin Supreme Court went on to state that when determining whether the content of the notice is sufficient, the trial court may consider the following:

- The length of time evidence can be preserved.
- The ownership of the evidence.
- The prejudice posed to possible adversaries by the destruction of the evidence.
- The form of notice.
- The sophistication of the parties.
- The ability of the party in possession of the evidence to bear the burden and expense of preserving it.

D. Avoiding Spoliation Claims

The biggest reason to retain documents is to avoid a sanction from the court for spoliation of evidence. Plaintiffs' attorneys are becoming more sophisticated with regard to information available in cases involving a commercial truck accident. In addition to pre-suit letters requesting access to a truck's ECM or the ECM data, plaintiffs' counsel frequently include a list of records they want preserved. The following are good practices to avoid sanctions for spoliation of some of the most common sorts of evidence:

1. ECM Data – Cooperative Opposing Counsel

- Identify all potentially interested parties, which could include injured parties, plaintiffs' counsel, injured parties' insurers, and auto manufacturers.
- Notify the interested parties of the location of the involved tractor and trailer and ask if they have any interest in inspecting it.
- If an interested party requests permission to download ECM data, confirm with the motor carrier's accident reconstructionist and all other parties the time and protocol for the download.
- Once all interested parties have inspected the tractor and trailer, or declined to do so, send a letter confirming that the tractor and trailer will be placed back in service or sold to the highest bidder.

2. ECM Data – Uncooperative Opposing Counsel

- Following an accident, there are competing interests with regard to the tractor and trailer. The carrier wants to get the unit back on the road. The

plaintiff's attorney wants to hold the unit for inspection. Many plaintiffs' attorneys are sympathetic to the company's need, but that is not always true.

- When the attorney refuses to cooperate with a timely inspection, the carrier's rights can be protected with an additional letter.
- The letter should list a final inspection deadline.
- The letter should also offer to continue to hold both the tractor and trailer beyond the stated deadline provided the plaintiff agrees to reimburse the company for the cost of replacing the tractor and trailer for the days it remains out of service after the deadline

3. Record Retention

As discussed before, plaintiffs' attorneys generally request a laundry list of records. Since most lists are overly broad and unduly burdensome, it is best to respond to any such letter by objecting to the broad nature of the list and noting the federal regulations regarding record retention requirements. In addition to objecting to the overly broad nature of the list of records requested by plaintiffs' counsel, it is generally a good idea to list for opposing counsel those records which you believe are relevant and which you plan to preserve. The letter can also possible to put the onus on opposing counsel to take affirmative steps to force preservation of additional records. In Minnesota, for example, the letter can advise opposing counsel that if he or she disagrees with the defense counsel's list of records, he or she can and should seek pre-suit discovery pursuant to Rule 27.01 of the Minnesota Rules of Civil Procedure. That rule focuses on pre-suit depositions of witnesses who might die or disappear, but the language of the rule also makes clear that a court can order production of documents under Rule 34 if the court deems it appropriate.

E. Laying the Groundwork for Your Own Spoliation Claims

Spoliation can also be used for you. Once a motor carrier receives a letter of representation from a plaintiff's attorney, defense counsel should send that attorney a pre-suit preservation letter. Typically, the preservation letter should request the following:

- The opportunity to inspect the injured party's vehicle and download any available data from the vehicle's event data recorder (EDR).
  - If the vehicle is one that will require the assistance of the manufacturer to recover the data, the request should include an authorization.
- That the injured person not remove any content from his or her social media sites. (For a detailed discussion on social media discovery, see the article by John Crawford and Ben Johnson entitled *How to Get Damaging Evidence From Litigant's Social Media Sites: Practice Tips in Dealing With The Stored Communications Act*. The article is available at www.johnsonlindberg.com.)
- That the injured person preserve all e-mail and other electronic communications regarding the accident and his or her injuries.
- That the injured person take steps to preserve all pre-accident medical records for future discovery.

V. Privileged Information

A. Attorney-Client Privilege

Communications between an attorney and a client are privileged and cannot be discovered by an opposing party. The privilege is considered to be the oldest in common law. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). Some states have codified the privilege. For example, in

Minnesota, the attorney-client privilege appears in Minn. Stat. § 595.02, subd. 1(b). Once a party establishes that there are communications between an attorney and client seeking legal advice, there is a presumption of confidentiality. *Upjohn Co.*, at 389; *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Minn. 1998). The attorney-client privilege belongs to the client, but the attorney or an agent acting with the client's express or implied authority may waive the privilege. *See, State v. Thompson*, 306 N.W.2d 841 (Minn. 1981) (stating that the privilege was waived with the disclosure to non-clients of the results of an internal investigation). A corporation is entitled to attorney client protection. Generally, a corporate employee is entitled to the attorney-client privilege if the communication is made for the purpose of securing legal advice. There may be some limits to the protection of communication with employees. For example, the Minnesota Supreme Court has indicated that it will not apply to a corporate employee who merely witnesses an accident but is not a party or a potential party to a lawsuit. *Leer v. Chicago, M., St. P. & P. RY. Co*., 308 N.W.2d 305 (Minn. 1981).

B. Work Product Privilege

1. In General

The law regarding work product privilege is quite complicated. Interpretation of the privilege differs between the states and there is a split in the federal courts. Rule 26(b)(3) of the Federal Rules of Evidence says: "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." The rule provides an exception, those items can be discovered where they are otherwise discoverable and "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

2. The Federal Courts – "Ordinary" vs. "Opinion" Work Product

Decisions in federal court have drawn a distinction between "ordinary work product," and "opinion work product." *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997). Ordinary work product includes such items as photographs and raw information and can be discovered after a showing of substantial need and an inability to obtain the substantial equivalent without undue hardship. *Gundacker v. Unisys Corp*., 151 F.3d 842, 848 (8th Cir. 1998); *Pittman*, at 988. In contrast, opinion work product includes "mental impressions, conclusions, opinions, or legal theories regarding the litigation" and can only be discovered in extraordinary circumstances. *Pittman*, at 988.

3. Federal Court - "Prepared in Anticipation of Litigation"

The federal courts are split on when the privilege attaches. Some courts, including the 8th Circuit, have adopted the Wright and Miller, or "fact specific," test which says:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970). Under this test, the materials do not need to be prepared in anticipation of a specific lawsuit.

In contrast, other courts, including the 7th Circuit, follow the *Thomas Organ* standard under which the materials must have been prepared in anticipation of specific litigation. *See, Thomas Organ Co. v. Jadronska Slobodna Plovida*, 54 F.R.D. 367 (N.D.Ill. 1972).

4. Minnesota Law

In contrast to the federal courts' distinction between "ordinary" and "opinion" work product, Minnesota focuses on the second sentence of the state rule:

> In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Minn. R. Civ. P. 26.02(d); *See, Brown v. Saint Paul City Ry. Co.*, 62 N.W.2d 688, 701 (Minn. 1954). The Minnesota Supreme Court has held that "materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product and are discoverable." *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986). The *Dennie* decision has been relied on by multiple courts to find that information that does "not reveal counsel's mental impressions, trial strategy, and legal theories" is not work product. *State ex rel. Humphrey v. Philip Morris Inc*., 606 N.W.2d 676, 696 (Minn. App. 2000). The supreme court revisited the issue in *City Pages v. State*, 655 N.W.2d 839 (Minn. 2003). In that decision, the court stated that, for an item to be protected by the work product doctrine, it must meet a two-part test: "to be protected by the doctrine, material must contain opinions, conclusions, legal theories, or mental impressions of counsel, **and** it must have been prepared in anticipation of litigation." *Id*., at 846 (*emphasis added*).

5. Steps to Take

Determining which rules for the work product privilege will apply to a case is difficult. However, there are some general steps that can be taken that can help protect the evidence that is collected:

- Involve an attorney – While the involvement of an attorney does not automatically convert materials into trial preparation matters, the inclusion of an attorney significantly influences the conclusion that they were prepared in anticipation of litigation and may help in an argument that they contain the opinions or theories of an attorney. In low-impact accidents that may not require defense counsel, one strategy to enhance the possibility of using the work product doctrine is to take the following steps:
  - Call defense counsel and briefly describe the accident.
  - During the call, discuss the company's plan to conduct investigation without counsel's involvement.
  - Get counsel's feedback regarding the proposed investigation.
  - Document in the file that the investigation was undertaken only after consulting with defense counsel on the necessity of investigation.
- Document the reason for the collection – Remember that materials which are gathered in the ordinary course of business typically do not qualify as trial

preparation material. Therefore, if there appears to be a likelihood of litigation following an accident, that fact should be noted in the claim file as the reason for authorizing the collection of any evidence.

6. Sometimes The Items May Still Be Discovered

Under the federal rule and state rules like Minnesota's, an opposing party can still obtain discovery where that plaintiff has a substantial need for the items and is unable "without undue hardship" to obtain the substantial equivalent of those materials.