

The Case for Sending Attorneys to Accident Scenes

By Raymond D. McElfish and Jeffrey C. Lynn

While it is obvious that the most important responders to a major commercial auto collision scene are the police and paramedics, there is a strong strategic — and ultimately economic — case to be made for commercial auto insurance carriers to have an attorney to lead its emergency response team. In collisions involving commercial transportation, such as big-rig tractor trailers, an attorney is frequently sent to the scene the moment the insurance carrier or motor carrier is notified, as his or her presence and expertise can mean the difference between a defense verdict and a high or even runaway jury verdict.

Emergency response, by its very nature, involves either death or substantial injuries. If these responses are not handled correctly from the start, the result can be significant exposure. While the police report will provide basic information about the accident, the accuracy and details can vary wildly and unless there are fatalities or numerous injuries, it is unlikely that photographs will be taken. Since the immediate goals of the police are to assist the injured and clear the road, it is almost guaranteed that vital evidence will inadvertently be destroyed. An attorney-directed emergency response team not only supplements the police report but also ensures that crucial evidence is collected and the rights of the carriers are safeguarded.



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The protection of the insured is the most important benefit of having an attorney presence; this includes protecting drivers' rights during police interrogation and ensuring that drivers do not speak to anyone other than law enforcement officials. There have been countless situations where local newscasters have been able to record and broadcast damaging television footage of drivers admitting guilt or giving extremely harmful statements that never would have occurred had counsel been present. We have even seen commercial drivers on local newscasts tearfully apologizing for a collision or giving detailed accounts of all the mistakes they purportedly made, inadvertently destroying much of our future defense strategy.

Secondly, with an attorney on the scene, most if not all the evidence collected will be privileged. Put another way: if an attorney is not present, all evidence may become discoverable and thus subject to disclosure. In the case of commercial transport, much of the evidence will focus on the ECM data, which is the information collected from the truck's "black box." These "black box" recording devices — which have been included on trucks for the past two decades — are used to record truck operation data such as speed, the time periods during which the truck was driven, RPMs and sudden deceleration data, in addition to recording the period of time during which the truck was parked or stood idle. Obviously, this data can be pivotal in determining liability in a future lawsuit. The data may eventually be made available to the other side, but in the interim, it will be protected while counsel has time to develop an effective defense strategy.

Without the presence of an attorney-directed emergency response team, it cannot be over-emphasized how often vital evidence is overlooked, destroyed, or simply never tested. We have witnessed many situations where numerous eyewitness accounts have been disproved by a single computer chip, video disc or piece of film.

For example, the police are required to and will move damaged vehicles as soon as possible. But moving a truck can erase the "black box" data containing vital evidence, so a tech-savvy attorney can ensure that such data is downloaded as soon as possible. In situations where there are fatalities, the police may impound the vehicle(s), and if multiple deaths have occurred, a MAIT (Multi-Disciplinary Accident Investigation Team) will usually be called in to determine liability, report on compliance with California and federal rules and regulations, and note safety risks, but it can and usually does take months before these findings are made available. Being on the scene allows attorneys and investigators to access data, anticipate the MAIT report and prepare the carriers for the result, especially in a situation where a lawsuit is likely inevitable.

In addition to electronic evidence, an attorney-directed emergency response team can locate security cameras and ensure their data is immediately collected, as the film or disc is normally overwritten and lost within a couple of days, if not hours. Another example of frequently lost evidence is lighting and roadway configuration. As the average lawsuit makes its glacial pace towards litigation, it is normal for roads to be repaved numerous times and for lights to be altered, removed or replaced.

Attorneys can also find useful information that contradicts witnesses who initially claim they didn't "see anything," but then show up years later with an amazing new recall of "the facts." In one case, six eyewitnesses blamed our driver for causing a collision. After scanning the vicinity for possible security cameras, we were able to

obtain a videotape from a restaurant on an adjacent corner, which showed part of the collision in the background, and which proved that all of the alleged "eyewitnesses" were incorrect in their recollection.

In another trucking collision, the eyewitness accounts regarding a red light were wildly inconsistent. A truck driver had slammed into a traffic light and half the witnesses on the scene claimed the light was green. If the traffic lights had been updated with computer chips, then data regarding the exact time the impact occurred would be available. The information on the chip empirically proved that the light was red at the time of impact, and the adverse witnesses were proven wrong.

In a case where the use of headlights was disputed and eyewitness accounts were again to our driver's disadvantage, only the response team was aware that the filaments in headlights could be tested to determine if the lights were actually on at impact. Collecting this evidence required a lengthy scouring of the scene both on the night of the accident and for weeks afterwards, something that would never have been done by the police. The light filaments were eventually located in a nearby field, matched to the accident vehicle and tested and found to support our driver's version.

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In yet another case, a motorcyclist was killed in a collision that involved a major commercial carrier. The carrier's insurance company received notice of the collision, but no one knew the name of the deceased or anything about his background. An emergency response team — headed by an attorney — went immediately to the accident scene and noticed CalTrans workers cleaning the road and putting possible evidence into trash bags. The attorney persuaded the workers to give him the trash bags, where he found small memorials created in honor of the deceased, who had an unusual nickname. Further research found Web site memorials and an unusual video of the deceased, who was shown riding a motorcycle while doing handstands and standing on the seat. Needless to say, these videos figured prominently in the defense strategy.

It is not just helpful, but imperative that motor carriers and insurance carriers dispatch attorney directed emergency response teams to the scene of catastrophic accidents or even accidents that could involve significant injuries. The amount of protection to the driver and the carriers cannot be matched in any way by law enforcement and the amount of evidence collected could never be obtained without such a team. It can easily be argued that while lawyers and experts are expensive on their face, tens of millions of dollars can be saved as result of the work of these teams. While these teams can be invaluable to motor carriers and insurance carriers in responding to commercial motor vehicle accidents, other accident related fields, i.e. construction, homeowners, nursing home, and maritime would benefit from these teams as well.



Letter to the Editor

'Third World' Is An Obsolete Term

On Sept. 28, the *Daily Journal* carried a piece entitled "Third World Countries Must Provide Their Own Access to Justice." The term "Third World" came into being in the 1950s to describe countries that were not part of the "First World" (i.e., the advanced capitalist West, including Japan and Australia and New Zealand and perhaps South Africa) or the "Second World" (the Communist bloc). Since the collapse of the Soviet Union and its satellites in 1989-1991, there is no more "Second World." (China, Cuba, and

Vietnam are Communist, but in name only, and North Korea is its own bizarre world.) The term "Third World" is thus obsolete, and is commonly used when people talk about poor, developing, or underdeveloped countries. Why not just call them "poor" or "developing" rather than perpetuate a term that hasn't had any meaning for 20 years?

Hyman Sisman

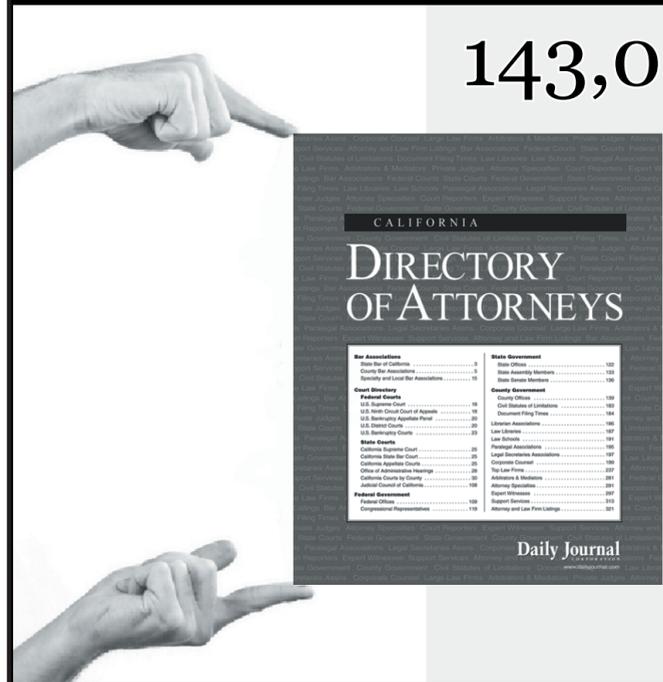
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