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## "Fustest with the Mostest"

By Robert E. Barton

A well-regarded cavalry commander in the Civil War, albeit for the losing side, explained his string of battlefield successes by proclaiming simply that he struck "fustest with the mostest."

Oddly enough, that homey and grammatically tortured maxim has direct application to trucking accidents involving serious injuries, death, or significant property damage. Unfortunately, in many cases of truck-involved crashes, it's an automatic assumption that the truck is at fault. More often than not, the insurance or trucking companies who promptly dispatch investigators and accident reconstruction experts under the guidance and supervision of attorneys to serious accidents benefit themselves immeasurably when the inevitable claims or lawsuits arise months or even years later. Rapid response to a serious accident enables the company to interview witnesses while their recollections are fresh; to counsel emotionally distraught drivers that are frequently prone to make damning and even incriminating concessions; to locate, document, and preserve forensic evidence at the scene; and to provide meaningful advice to the company regarding how best to proceed going forward.

All this may seem like a blatant attempt to solicit legal work for the author or other defense lawyers, but the evidence is compelling that engaging in proactive accident responses pays substantial dividends in the long run. Including an attorney on your incident response team may, at first, seem like an unnecessary expense; however, based on decades of defending trucking and motor coach carriers in countless cases involving catastrophic injuries and death, I can state unequivocally that the initial short term, relatively modest costs of dispatching to accident scenes experienced transportation defense attorneys and their teams of experts and investigators far outweighs the significant costs of later defending claims or suits in which an inadequate or incomplete investigation was done or worse, no rapid response occurs at all.

Unfortunately, in recent years local and state law enforcement agencies have cutback, laid off, or "early retired" their most experienced, capable, trained accident reconstruction officers. As a result, those who do respond often lack the expertise to know what evidence should be preserved, are motivated to reach early judgments regarding who is at fault (again, frequently the truck driver), and obtain superficial, inaccurate witness statements. Worse, a number of law enforcement agencies are prone to issue citations, often against commercial drivers, due to pressure from their superiors. The adverse consequences of a guilty plea or court decision can have long-term adverse effects on a driver retaining his job or his CDL.

As suppositions are made on scene and investigators work quickly, sometimes too quickly, to gather information and clear the crash, valuable eyewitness testimony can be overlooked. Did the behavior of the other drivers involved contribute to the accident? What type of forensic evidence can be preserved? Were there other contributing factors? These are the areas that, even if the truck driver is ultimately responsible, can make a difference in a settlement. Two past cases stand out for me. Example one, a truck driver did not properly secure a hand truck to his tractor behind the cab. It came loose, bouncing along the freeway until it lodged beneath a speeding car, sadly killing the car's driver after he lost control of the vehicle. Yes, the truck driver was at fault in this scenario; however, through the witness statements we gathered at the scene, we discovered the car's driver was traveling at speeds approaching 100 mph, likely contributing to the resulting accident and leading to a more favorable settlement. Example two, police investigators quickly concluded that a bus driver made an unlawful left turn directly across the path of a pickup truck. Our team of an experienced paralegal and veteran accident reconstruction expert got to the scene within a few hours. Once there, they interviewed several



high school students on the bus (whom the police had not questioned) and eventually pieced together enough video to prove that the pickup truck and another vehicle were, in fact, drag racing at speeds well above the posted limit. With the evidence we provided, the local police determined that the bus driver was not at fault and, instead, criminally charged the teenage pickup truck driver. A thorough, timely response from your own investigative team can insulate you not only from citations, but from personal injury claims or lawsuits.

Accidents are traumatic for everyone involved, causing confusion and heightened emotions. Often, drivers who are nervous and upset, particularly when there are serious injuries, feel inclined to agree with leading questions or suggestions by police officers trained and well-versed in interrogation techniques. This is not to suggest that law enforcement officers are adversaries in these situations. Indeed, on many occasions we work collaboratively with police to investigate serious accidents. Having counsel on-site reassures our drivers and produces more constructive conversations with police and investigators. Having other experts familiar with police procedure is also beneficial when working with responding officers to evaluate the causes of accidents, collecting evidence and documenting the scene.

Why is a lawyer even necessary when the company or its insurer could directly hire an investigator to interview the witnesses and driver, and retain an accident reconstruction expert to evaluate the accident? The answer is simple. If a company directly hires an investigator or expert, that person and his/her work, including reports, conclusions, photos, diagrams, recorded interviews, etc., do not fall within legally recognized attorney–client privilege and attorney work product protections. Oregon and virtually every other state recognize that experts, investigators, etc., who are retained by attorneys to assist in the attorney's representation of a client fall within those legal privileges. (See Oregon Evidence Code Rule 503; see also Oregon Rule of Civil Procedure 36 B(3)(a).) Consequently, the work product of the expert or investigator is typically (with some minor exceptions) not subject to disclosure to an adverse claimant/plaintiff and his or her lawyer. In contrast, the work product of an expert or investigator hired directly by an insurer or company is usually subject to disclosure. As a result, damaging information such as unfavorable admissions by a driver during an internal interview or negative findings by an expert, can be accessed by the opposing side.

The bottom line, to apply another well-worn adage, is that "an ounce of prevention is worth a pound of cure." Even if a serious accident never generates a significant claim or lawsuit, it is far better to spend the time and effort while events and evidence are still fresh to proactively protect your company's interests than to find out months or years later that valuable, helpful evidence was not obtained or preserved. Promptly contacting a defense firm such as ours, which employs the "rapid response" approach to serious accidents even on weekends or in the wee hours of the morning, typically will pay huge dividends down the road.