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“Roger that. Counsel enroute to the accident scene.”

LEVELING THE PLAYING FIELD WHEN THE TRUCKING COMPANY DEPLOYS A RAPID-RESPONSE LEGAL TEAM

As plaintiffs’ trucking lawyers, we are often hired days, weeks or months after a crash, whereas defense rapid-response teams begin investigating a crash hours after it occurred. In order to minimize the defense’s initial advantage, it is critical to know what defense rapid-response teams are, what they do and how we can fight to obtain the fruits of the defendant’s investigation.

What is a defense rapid-response team?

A defense rapid-response team is the trucking company’s first responders to a crash. The team is comprised of defense lawyers, experts and specialists who work to accomplish two main goals: 1) mitigate risk by influencing the crash investigation in favor of the trucking company; and 2) protect the fruits of the crash investigation.

How is a defense rapid-response team formed?

The creation of a defense rapid-response team begins with the trucking company hiring a defense lawyer. A litigation-savvy trucking company will memorialize the hiring in a letter, which will state something to the effect of, “In anticipation of litigation, XYZ Trucking Company hires John Smith, Esquire, to investigate the crash that occurred on March 1, 2025.” If the trucking company later claims in discovery that its initial investigation is privileged, we will want to request the engagement letter.

The defense lawyer is the leader of the rapid-response team. Immediately after being hired by the trucking company, the defense lawyer will direct the trucking company, in anticipation of litigation, to investigate the crash and perform a self-critical analysis. By directing the trucking company to investigate and critically analyze the crash, the defense lawyer is attempting to prevent the discovery of an activity that the trucking company would normally perform in the regular course of business.

Breaking through the shield

To defeat the trucking company’s effort to shield its investigation, we must depose trucking-company employees and get them to admit that investigating and analyzing crashes is a normal, routine business practice. Moreover, we must get these employees to admit that it is the trucking company’s longstanding policy and procedure to investigate and analyze crashes. Finally, we need to request the documents that memorialize the trucking company’s longstanding policy and procedure to investigate and analyze crashes.

In summary, we want to be able to show the court that the trucking company investigates and reports on its crashes in the ordinary course of business and not in anticipation of litigation.

After directing the trucking company to conduct its investigation, the defense lawyer will either activate or hire the remaining members of the rapid-response team. When lecturing on this topic in the past, I often get curious looks when I say “activate.” Occasionally, a hand will shoot up in the audience, “Do defense lawyers have specialists and experts on retainer that they can mobilize when a crash occurs?” The answer is “yes” and, if you are lucky, the defense lawyer in your truck-crash case will expose the members of their rapid-response team on the internet.

For example, a defense firm’s website in Arizona proudly boasted that it has a “dedicated group of attorneys, experts and specialists that are on-call to assist whenever there is a trucking/transportation accident.” The firm highlighted that its rapid-response team is available 24/7. This firm’s website also featured its “Recommended Experts,” which contains the names of “Truck Accident Reconstructionists,” “Transportation Adjusters,” “ECM Download Experts,” and an “ASE Master Heavy Truck Technician.”

During the cross-examination of a defense expert, we often look to challenge their credibility and highlight their biases. Without a doubt, the information on this firm’s rapid-response team webpage is excellent material for cross-examination. We should always search the internet for information about the defense firm’s rapid-response team, including YouTube and other online media sources, where some firms post videos or images promoting their teams.

As part of your internet search, conduct a thorough review of the defense lawyer’s website, including blogs and social media pages. In recent times, I have seen plaintiffs’ lawyers advertising their own versions of crash-response teams. While I am not suggesting that plaintiffs’ lawyers should avoid this practice, I would caution them that such material can be used as a sword against them.

If the defense lawyer does not have a roster of specialists and experts on retainer, he or she will begin hiring these individuals. Most commonly, the team will be comprised of an accident reconstructionist, an event data recorder (“EDR”) download expert, an electronic logging device download expert, a component expert, i.e., brakes, steering, tires; an investigator, and a photographer or videographer.

Despite the fact that one expert may be qualified to do an EDR download and examine the truck’s brakes, the defense lawyer will intentionally hire two different experts in case a problem arises. For example, let’s assume that an EDR expert does a download and also looks at the truck’s brakes. The brake inspection reveals a problem and the expert determines that the brakes are out of adjustment. The EDR expert writes a report focusing on the download. At deposition, the plaintiff’s lawyer asks the EDR expert if he or she looked at any other components of the truck and now the bad-brake issue is exposed.

Alternatively, if the EDR expert only performed a download and did not look at any other parts of the truck, he or she knows nothing about the brake issue. The brake expert who discovered the problem can be quarantined and the facts and opinions that he or she possesses are protected, absent a showing of exceptional circumstances under F.R.C.P. 26(b)(4)(B).

This leads me to my next suggestion, which is to take an inventory of the experts and specialists that the defense lawyer discloses and ask yourself, who is missing? Further, in discovery, request a list of the people who inspected the truck, when they inspected the truck and where they inspected the truck. Finally, if the truck was kept in a tow yard following the crash, go there and conduct your own investigation. Ask the tow-yard operators if there is a sign-in book and review the entries. Ask them who came to see the truck from the trucking company. Ask them if anyone left a business card when they came to look at the truck.

What does the defense rapid-response team do when they arrive?

After being deployed, the rapid-response team will conduct inspections of the scene and the vehicles involved in the crash. Remember, the rapid-response team's primary mission is to mitigate risk and influence the investigation in favor of the trucking company. With that goal in mind, the defense lawyer will speak with investigating officers, first responders and witnesses. When interviewing or deposing the investigating officers, first responders and witnesses, ask them about their conversations with the defense lawyer or their response team members. Ask them what documents, videos or photographs the defense lawyer's team provided to them. Ask them whether they took notes or exchanged emails with the defense lawyer's team. Ask them what they gave the defense lawyer's team.

The defense lawyer will also gather evidence from the trucking company and the trucking company employees who were initially involved in the crash investigation. Ordinarily, the trucking

company's employees will be the first to respond to a crash scene, after emergency personnel. This creates a vulnerability for the trucking company and the driver because the defense lawyer is not yet involved in the investigation.

In discovery ask the trucking company, "Who responded to the scene of the crash? Did those employees take video, photos or statements at the scene?" Ask the driver whether he or she took videos or photos at the scene. If the trucking company employees or the truck driver took video at the scene, be sure to request the audio that accompanies the video. Ask the driver if they used social media immediately after the crash. Ask the driver who he or she contacted at the trucking company about the crash and what they said in those conversations.

In addition to collecting evidence from the scene, the vehicles, the trucking company and its employees, including the driver, the defense lawyer will begin monitoring television and internet news sources and social media. The defense lawyer will look for information about the crash, the trucking company's driver, the victims and the victim's friends and family.

When plaintiffs' lawyers are retained in a trucking crash, we must do the following internet-based research: 1) read news articles about the crash and the corresponding comment sections; 2) read the defendant driver's social media postings, if they are publicly available; 3) search for the driver on YouTube, trucking chat forums, Reddit and other similar sources; and 4) instruct your client not to use social media and to preserve any social media activity that they have engaged in to date while maintaining the highest privacy settings. Comment sections can be particularly illuminating if friends or family of the parties involved or witnesses to the crash make remarks. You can also use the comment sections as your first informal focus group where you can learn how members of the community are reacting to the article and the facts of the crash as they are reported.

How will the trucking company attempt to hide its investigatory materials?

Most commonly, the trucking company will argue that the fruits of the defense rapid-response team's investigation are not discoverable. Specifically, they will argue that the investigation materials are protected by the attorney-client privilege and/or the work product doctrine. The attorney-client privilege attaches to information that is provided by a client to their lawyer or prospective lawyer (or information provided by a lawyer to a client), and is exchanged for the purpose of obtaining legal counsel or to assist in preparing for legal proceedings. (*In Re Teleglobe Communications Corp.* (3d Cir. 2007) 493 F.3d 349, 359.) State law governs whether or not material is privileged. While there are nuances by state, the general principal followed by most courts is that the privilege only applies if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication is made
 - (a) is a member of the bar of a court, or is his subordinate and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either
 - (i) an opinion on law or
 - (ii) legal services or
 - (iii) assistance in some legal proceeding, and
 - (d) not for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.

(*United States v. Noriega* (11th Cir. 1990) 917 F.2d 1543, 1550.)

Importantly, the attorney-client privilege does not extend to information that is purely factual in nature and can be

obtained through other, nonprivileged sources. In discovery, for each piece of evidence that the trucking company argues is privileged, evaluate the defendant's privilege log and determine whether the evidence is purely factual and whether or not the defense has met its burden to show that the evidence meets all of the elements of privilege under the applicable state law.

The trucking company will also argue that the fruits of its defense rapid-response team's investigation are not discoverable under the work-product doctrine. Pursuant to Federal Rule of Civil Procedure 26(b)(3)(A) "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)."

However, ordinary work product may be discoverable if the party seeking the discovery "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." (F.R.C.P. 26(b)(3)(A)(ii).)

If a court orders discovery of ordinary work product, the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" must not be disclosed. (F.R.C.P. 26(b)(3)(B).) Under the Rule and the interpreting case law, opinion work product enjoys near absolute immunity. It is important to note that the work-product doctrine does not protect facts concerning the creation of work product or facts contained within work product. (See *Resolution Trust Corp. v. Dabney* (10th Cir. 1995) 73 F.3d 262.) In discovery, develop facts to support a "substantial need and no substantial equivalent" argument. Seek written discovery and depositions focusing on the creation of the alleged work product, which may include noticing the deposition of the defense lawyer on the rapid-response team.

Despite the fact that the defense almost always has an investigatory advantage in truck-crash cases, understanding defense rapid-response teams will hopefully balance the scales. When analyzing discovery from a trucking company, we must focus both on what is provided and what is missing. If a defense rapid-response team was deployed after a crash, you now know what that team does and your challenge will be to uncover and discover what the trucking company is attempting to hide.

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