

Essential Discovery – Documents, Physical Evidence and Beyond.

Defense Perspective and Erasing the Defense Advantages.

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Trucking and insurance companies are becoming increasingly sophisticated in the defense of truck cases. Their experts and investigators are typically on site within hours (or less) of a major wreck, they are talking with investigating officers, obtaining photographs, assuming control and inspecting the tractor-trailer, "statementizing" witnesses with leading questions while the wreck is fresh in their minds and therefore arguably more "credible" should an attempt be made to clarify the statement later. Additionally, they are doing searches of the victim's civil, criminal and medical history (in some cases this includes members of the immediate family). They will also perform an exhaustive review of your expert witnesses, not only for prior opinions, testimony and qualifications, but also as to criminal convictions, expulsion from memberships and societies, revoked licenses and any failed exams. It is critical that you are well acquainted with all the facts, your client and your expert witnesses (including doing your own background check in some cases). Just as importantly, these companies often hire defense counsel with substantial experience and expertise in trucking litigation. These attorneys are thoroughly familiar with the safety rules and document retention (destruction) timelines. Although the trucking and insurance companies often have the inherent advantages of more money, resources and the "head-start" advantage, even the smallest "one person" plaintiff's firm can match or even exceed these inherent defense advantages by taking the time and effort to read, comprehend and apply the relevant FMCSA rules to their client's case.

Additionally, within the more than 1,000 rules and regulations relating to federal motor carriers, only 10 sections of the Federal Motor Carrier Safety Act primarily target a reduction in wrecks and the daily safe operations of trucks. The abridged outline of these sections, below, along with the destruction of records timeline that precedes it, provide highlighted information necessary to assist in the evaluation of liability, help in exploring the potential for exemplary damages, beginning the search for safety rules

governing interstate trucking that may have been violated in your client’s case, and a guide in preparing for opening discovery.

Lastly, an important note should be made regarding a personal observation of this and other attorneys. There is an increasing trend of trucking defendants to hide excess insurance coverage. The need to explore available coverage in an exhaustive manner is critical in catastrophic injury cases, including taking depositions of corporate representatives regarding insurance (notice to take deposition example at the end of this material) and in some cases even deposing company accountants and billing personnel.

Document Destruction Time Line

Item	Reference	Retention
3 (three) months		
<p>Driver vehicle inspection report, the certification of repairs, and the certification of the driver's review: Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated and the report shall cover at least the following parts and accessories: Service brakes including trailer brake connections, Parking (hand) brake, Steering mechanism, Lighting devices and reflectors, Tires, Horn, Windshield wipers, Rear vision mirrors, Coupling devices, Wheels and rims, Emergency equipment.</p> <p>...</p> <p>If no defect or deficiency is discovered by or reported to the driver, the report shall so indicate. In all instances, the driver shall sign the report.</p> <p>...</p> <p>Every motor carrier shall maintain the original driver vehicle inspection report, the certification of repairs, and the certification of the driver's review for three months from the date the written report was prepared.</p>	396.11	3 months
6 (six) months		

<p>Driver's record of duty status (Driver's Log): Each motor carrier shall maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt.</p> <p>The driver shall retain a copy of each record of duty status for the previous 7 consecutive days which shall be in his/her possession and available for inspection while on duty.</p>	395.8	6 months
1 (one) year		
<p>Negative alcohol and drug tests: Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.</p>	382.401	1 year
14 (fourteen) months		
<p>Periodic inspection record keeping requirements: The original or a copy of the inspection report [completed at least every 12 months pursuant to 396.17] shall be available for inspection upon demand of an authorized Federal, State or local official. [See Appendix G for items evaluated for defects or deficiencies].</p>	396.21	14 months
2 (two) years		
<p>Collection process records: Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).</p>	382.401	2 years
3 (three) years		
<p>Accident Register: For accidents that occur after April 29, 2003, motor carriers must maintain an accident register for three years after the date of each accident. But for accidents that occurred on or prior to April 29, 2003, motor carriers must maintain an accident register for a period of one year after the date of each accident. The information required in the register may be found at 390.15(b).</p>	390.15	3 years

<p>Driver Qualification File (partial, see “Indefinite”, infra): The following records may be removed from a driver's qualification file three years after the date of execution: The response of each State agency [every State in which the driver held a commercial motor vehicle operator's license in the prior 12 months] to the annual driver record inquiry required by §391.25(a); The note relating to the annual review [who preformed the review and the date of the review] of the driver's driving record as required by §391.25(c)(2); A list or certificate relating to violations of motor vehicle laws and ordinances [other than parking] required by §391.27; The medical examiner's certificate of the driver's physical qualification [See 391.41(b) for <u>disqualifying physical/mental conditions</u>] to drive a commercial motor vehicle or the photographic copy of the certificate [form at 391.43(f)] as required by §391.43(f); and The letter issued under §391.49 [Skill Performance Evaluation] granting a waiver of a physical disqualification, if a waiver was issued under §391.49.</p>	391.51	3 years (from date of execution)
<p>Dispatch Records: Dispatchers’ sheets, registers, and other records pertaining to movement of transportation equipment.</p>	Appendix A to Part 379	3 years
<p>Expenditures: Vouchers, paid and canceled vouchers, expenditure authorizations, detailed distribution sheets and other supporting data including original bills and invoices, if not provided for elsewhere. Paid drafts, paid checks, and receipts for cash paid out.</p>	Appendix A to Part 379	3 years
<p>Accountant’s, Auditor’s and Inspector’s Reports</p>	Appendix A to Part 379	3 years
<p>5 (five) years</p>		
<p>Driver alcohol test results indicating an alcohol concentration of 0.02 or greater, driver verified positive controlled substances test results, Documentation of refusals to take required alcohol and/or controlled substances tests: The following records shall be maintained for a minimum of five years: Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater, Records of driver verified positive controlled substances test results, Documentation of refusals to take required alcohol and/or controlled substances tests, Driver evaluation and referrals, Calibration documentation, Records related to the administration of the alcohol and controlled substances testing programs, and a copy of each annual calendar year summary required by §382.403. [See 382.401 for drug and alcohol documents/records to be maintained]</p>	382.401	5 years

Indefinite period (often time limit runs after termination, control, expiration, etc. – see 3 rd column, “retention”)		
<p>Inspection, Repair and Maintenance Records/Documents: Inspection, repair and maintenance records/documents shall be retained where the vehicle is either housed or maintained for a period of 1 year and for 6 months after the motor vehicle leaves the motor carrier's control. [See 396.3 and “Part 393 – Parts and Accessories Necessary for Safe Operation” for details on inspection measures in general and required records].</p>	396.3	Indefinite (duration of motor carrier's control of the vehicle plus 18 months)
<p>Driver Qualification File (partial, see “3 years”, supra): The driver's application for employment completed in accordance with §391.21 [See 391.21 for required <u>Background and Character</u> application information]; A copy of the response by each State agency [every State in which the driver held a motor vehicle operator's license or permit during preceding 3 years] concerning a driver's driving record pursuant to §391.23(a)(1) *[391.23(a)(2) states the same applies to the inquiry with DOT as to its employees] [See 391.23 for required <u>Investigations/Inquiries</u>]; The certificate of driver's road test issued to the driver pursuant to §391.31(e), or a copy of the license [CDL, also see 383.23] or certificate which the motor carrier accepted as equivalent to the driver's road test pursuant to §391.33.</p>	391.51	Indefinite (duration of employment plus three years)
<p>Education and training: Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.</p>	382.401	Indefinite (duration of employment + performance, plus two years)

<p>Proof of minimum insurance: Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of: "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS 90) issued by an insurer(s); "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS 82) issued by a surety; or A written decision, order, or authorization of the Federal Motor Carrier Safety Administration authorizing a motor carrier to self insure under §387.309, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Motor Carrier Safety Administration under Part 385 of this chapter. [NOTE: APPENDIX A TO PART 379(F)1c, RIGHT, DOES NOT REFERENCE JUST MINIMUM INSURANCE, IT INCLUDES ALL POLICIES].</p>	<p>387.7/387.31 ... Appendix A to Part 379</p>	<p>Ongoing ... Until expiration of coverage plus one year</p>
<p>Financial Ledgers: General and subsidiary ledgers with indexes, and general journals.</p>	<p>Appendix A to Part 379</p>	<p>Until discontinuance plus 3 years</p>

See Appendix A to Part 379 for other miscellaneous schedules of retention.

FMCSA's "Big Ten"

1. §382: Controlled Substance and Alcohol.
 - a. Definitions at §382.107.
 - b. No driver to report for duty or remain on duty if an alcohol concentration of 0.04 or greater, §382.201, nor if the driver tests positive or has adulterated or substituted a test specimen for controlled substances, §382.215, also §382.505 states if tested and between 0.02 and 0.04 then no driving.
 - c. No driver shall use alcohol while on duty, §382.205, nor for four hours after using alcohol, §382.207, nor for 8 hours after a wreck or until after testing – whichever occurs first, §382.209.
 - d. No driver shall refuse to submit to testing, §382.211.
 - e. An employer may require a driver to inform the employer of any therapeutic drug use, §382.213.
 - f. The driver shall undergo testing for controlled substances as a condition prior to being used, §382.301.

g. Post Wreck Testing Table: §382.303

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	YES	YES
	NO	YES
ii. Bodily injury with immediate medical treatment away from the scene	YES	YES
	NO	NO
iii. Disabling damage to any motor vehicle requiring tow away	YES	YES
	NO	NO

- i. Alcohol testing should be within 2 hours and an outside limit of 8 hours; drug testing should be within 32 hours.
- h. The minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions, §382.305.
- i. An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has used alcohol or controlled substances, §382.307.
- j. Civil and criminal penalties, §382.507.
- k. Employer to have a policy on drugs and alcohol, §382.601.
- 2. §383: CDLs.
 - a. Definitions, §383.5 (employee driver defined broadly, see also §390.5).
 - b. Only a single license allowed, §383.21.
 - c. Ticket in a state other than licensed requires notification of state where licensed, and the employer, §383.31.
 - d. Table of offenses, and respective periods of disqualification for driving, e.g. DUI, felonies, leaving the scene, major traffic violations, out-of service order violations, etc. §383.51.
 - e. Special knowledge requirements relative to endorsements for double and triple trailer, §383.115, for tank vehicle, §383.119, for a Hazardous Material, §383.121/§383.141, and for a school bus, §383.123.
- 3. §385: Safety and Fitness Procedures (including assigning assign safety ratings: satisfactory, conditional, unsatisfactory and unrated).

- a. Factors to be considered, §385.7.
 - b. Unsatisfactory rating – prohibited from operating beginning the 61st day, but may get an additional 60 days. Information on motor carriers is available from the FMCSA on the Internet at <http://www.saferys.org/>, or by telephone at (800) 832-5660, §385.13.
 - c. May request a rating change, §385.17.
 - d. Safety system for Mexico domiciled carriers, Subpart B.
4. §387: Minimum Insurance (To provide an “appropriate” level of financial responsibility for motor vehicles operated on public highways).
- a. minimum levels of financial responsibility - property, §387.9
 - i. Property/Dry Freight \$750,000
 - ii. Oil/Petroleum \$1,000,000
 - iii. Hazardous Materials \$5,000,000
 - b. minimum levels of financial responsibility - passenger, §387.33
 - i. Seating for 15 or less \$1,500,000
 - ii. Seating for 16 or more \$5,000,000
5. §390: General concepts and Definitions.
- a. General definitions, §390.5.
 - b. Every employer shall be knowledgeable of and comply with all regulations, and every driver shall be instructed regarding, and shall comply with, all applicable regulations, §390.3.
 - c. Shall not aid, abet or “encourage” an employee to violate rules, §390.13.
6. §391: Minimum qualifications for drivers (21 y/o, physically fit, and speak English) and minimum duties of companies relative to the qualifications of their drivers.
- a. Subpart B: General qualifications including speak English sufficient to converse with public, §391.11; Knows how to secure and distribute weight, §391.13; Disqualifications, §391.15.
 - b. Subpart C: Background and Character investigation.
 - c. Subpart E: Physical Qualifications and Examinations.
 - d. (For more details see also, “Destruction of Records Timeline” and references).
7. §392: Driving - Follow the FMCSA rules.
- a. Follow state laws, §392.2.
 - b. Don’t drive if ability to drive or alertness is impaired, or likely to become impaired, due to fatigue, illness or other cause, §392.3.
 - c. No drugs, which includes amphetamines, narcotics, and any other drug that makes driving unsafe, §392.4.
 - d. No alcohol as per §382, and not for 4 hours before going on duty, nor have alcohol in possession, and be on duty or operate a commercial motor vehicle if, by the driver’s general appearance or conduct or by other

- substantiating evidence, the driver appears to have used alcohol within the preceding 4 hours, §392.5.
- e. Properly distributed, secure and inspect cargo, including within 50 miles of start, change of duty status and after the first of either more than 150 miles driven or more than 3 hours driving, § 392.9.
 - f. Use extreme caution, which conditions exit, such as snow, ice, fog, mist, rain, etc. Speed shall be reduced in such conditions. Driver may need to cease driving. §392.14.
 - g. No obscured lamps or reflective material, §392.33/§393.9.
 - h. No radar detectors, §392.71.
8. §393: Parts and accessories necessary for safe operation.
- a. Every driver and company shall be conversant with the requirements and specifications of this part, §393.1.
 - b. Definitions, §393.5.
 - c. Specifies the requirements for lamps, reflective devices and associated equipment by the type of commercial motor vehicle, §393.11.
 - d. TV restrictions, §393.88.
 - e. Cargo securement standards, including lumber, containers, cars, etc., § 393.100 et. seq.
 - f. Braking systems, Subpart C.
9. §395: Hours of service.
- a. adverse driving conditions provide a 2 hour extension to complete a run; also the short haul exemption, §395.1
 - b. Definitions, §395.2.
 - c. Maximum Driving Time - §395.3:
 - i. 11/15 hours,
 - ii. 60 hours/7 if the company operates less than 7 days per week, or 70 hours/8 days if a 7 days a week operation,
 - iii. (recent attempts to change the hours of service, including case law, see http://www.semitrucklaw.com/hours_service_update.html, Cases re-printed from Westlaw with permission of Thomson/West.)
 - d. Drivers record of duty status, including abbreviations, required information, approved log/grids, etc., §395.8.
10. §396: Inspection, Repair and Maintenance.
- a. All concerned with the inspection or maintenance of motor vehicles, including drivers, shall comply and be conversant with the rules of this part, §396.1.
 - b. Systematically inspect, repair, and maintain, §396.3, inspection at least once every 12 months, §396.17.

- c. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle, §396.7.
- d. Driver "end of the day" report required, §396.11.
- e. Brake inspector qualifications, these documented qualifications to be maintained by the motor carrier at its principal place of business, §396.25.

Deposition Notice of a Corporate Representative Regarding Insurance Coverage
 Example –

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

JANE DOE and)	
JIM DOE,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 100CC1234
)	
ANONYMOUS TRUCKING)	
and JOHN ROE)	
)	
)	
Defendants.)	

**NOTICE TO TAKE VIDEOTAPED DEPOSITION OF JOHN ROE,
 A CORPORATE DESIGNEE OF ANONYMOUS TRUCKING, INC.**

COME NOW Plaintiffs, by and through their undersigned attorneys, and give notice that they intend to take the following videotaped deposition:

TO BE DEPOSED: A corporate designee of Defendant Anonymous Trucking, Inc., with knowledge of the liability coverage (including but not limited to umbrellas and excess) for the defendant corporation and driver that was/were in effect at the time of the incident that is the subject of this litigation, including the type(s) of coverage, the details of the coverage, and the billing and payment(s) for insurance(s) coverage; knowledge of Plaintiffs' First Set of Interrogatories, including but not limited to numbers 10 and 11, to Defendant Anonymous Trucking, Inc., and First Request for Production of Documents, including but not limited to numbers 3 and 4, to Defendant Anonymous Trucking, Inc.

DATE AND TIME: February 20, 2009, at 12 noon.

LOCATION: Anonymous Trucking, Inc., 200 West Main Street, St. Louis, Missouri, 12345.

Said deposition is to be continued from day to day at the same place and time until completed. Said deposition will be before a certified court reporter secured by Plaintiff from Alpha Court Reporting Service (314-555-1111, Facsimile: 314-555-1112).

YOU ARE FURTHER NOTIFIED, pursuant to Supreme Court Rule 57.03(c) that the recording technician will be provided by Repeat Performance (314-555-1121), or a designee of theirs.

Signature Block and
Bar Number