

The Audacity of "Nope"

By Douglas B. Marcello, Marcello and Kivisto, LLC

Do not take a post-accident written or recorded statement from your driver." My simple, declarative statement in a recent safety and risk presentation ignited a lengthy debate regarding the wisdom of the advice.

The safety and risk attendees were surprised at the notion. For most, the driver's post-accident statement is a standard, accepted practice. "How else can we learn the facts of the accident, address driver behavior, and document the file?" they asked.

I appreciate their reservation. I understand their concerns. I agree that change must be preceded with thoughtful consideration of the alternative. My perspective, however, is from the field of litigation. My job is to defend trucking companies and their insurers in suits arising from accidents.

From that perspective, I have seen the abuse of these statements by those who see any unfortunate accident, no matter the magnitude or the fault, as an exploitable opportunity to prey upon the carrier. I have seen the mischaracterization of any written documentation of the driver by those who view your units as eighteen-wheel ATMs.

In the end, the utility of any statement should be weighed against the cost or potential cost in litigation. The following are some considerations from my perspective in defending truckers and trucking companies in lawsuits.

Statements Help the Plaintiff

A statement from our driver greatly benefits those who sue us. It rivals the police report as their most useful documentary evidence. It tips the playing field in their favor.

Think of the great benefit we would have if we could get a statement from the plaintiff to lock him into his version of the accident. Rarely, if ever, are we able to do so. His attorney precludes contact and prevents this from occurring.

So why serve up our driver's version on a platter by taking his statement post accident? This statement, generally discoverable, is then used against us in depositions or at trial to parse conflicts with other versions of the driver or facts of the case.

Should you have any doubt as to the value plaintiff attorneys place on our self-generated statements, you should see their reactions in those cases in which we do not provide a report—incredulity bordering on skepticism. The driver statement is among the first things plaintiff attorneys request, and they often cannot hide their disappointment when they discover we've broken this age-old tradition of doing their work for them.

Without our post-accident statement, the plaintiff attorney is faced with having to get the facts by discovery. In other words, he has to work for it just like we do.

Limitations in the Recollection of the Event

An accident is multi-elemental. It is the convergence of time and distance, speed and force. Every time our driver is asked about the accident, he is invariably asked to relate a finite quantity to

each of these particular components of the accident based upon his instantaneous assessment in the fractional seconds of the event.

"How fast...?" "How far...?" "How much time...?" We seek to elicit specific facts supposedly gleaned by a driver in the instant of the occurrence as he is trying to perceive and react to the unfolding events. We ask him to remember particular facts of a time when his focus was on reacting within a fraction of a second to the unfolding events.

This is the reason that most police departments refrain from taking a statement from an officer immediately after his use of force. The ability to recall the specifics of an instantaneous occurrence is limited at best.

Why, then, should we place our drivers in the position of being forever committed to such finite facts immediately after the accident?

"Do not take a post-accident written or recorded statement from your drivers"



Potential Conflict with Other Statements

The driver's recollection will vary each time it is retrieved. This is not dishonest, but a reality of human nature. Any post-accident statement creates the potential for conflict with other statements—to the police, in deposition, or even at trial. Why create such conflict in the absence of overwhelming benefit?

Requiring the driver to commit his recollection to a statement or written report immediately after the accident creates yet one more opportunity for conflict.

Potential Conflict with Other Evidence

As noted above, we demand the driver recount and quantify the specifics of the accident from what he could glean in the fog of the accident. A post-accident statement etches these quantities in stone.

Why? Much, if not all of this evidence is ascertainable by mechanical and scientific means. The ECM download and accident reconstruction can provide precise numbers or at least ranges of each of these quantities.

These mechanically and scientifically determined times, speeds, and distances will trump any instantaneous subjective quantifications of the driver. Thus, any conflict empowers those who question the truthfulness of our driver, no matter how well meaning and honest the quantities he provided.

Limited Litigation Value

Our driver's statement is of little, if any, value to us in litigation. The only possible use is to "refresh his recollection" if he has absolutely no recall. Not a misrecollection—absolutely no recall. How do you think that looks to the jury? The driver is totally blank on a vital fact in the case and needs a piece of paper from his attorney to recall.

Sure, there are explanations. It is natural to be nervous on the stand. The statement is his recollection from shortly after the accident. However, in a medium dependent on jury perception as to who is telling the truth and has the most reliable

recollection of the facts, your case is in trouble if your driver needs a statement to remember key facts.

So, let's balance the limited use of a post-accident report to revive a recollection against the overwhelming downside. A misrecollection by the driver that conflicts with his own statement is subject to cross-examination by evidence we created, and only results in undermining his credibility.

"Now, Mr. Driver, in the statement you gave your own safety director shortly after the accident, you said...." Maybe it is the fact that I can hear this in my sleep that leads me to urge the end to taking these statements.

Potential Incrimination of Our Driver

Think about it. You take a statement from the driver who makes an admission that can be used by the police to bring criminal charges.

For example, in a rear-end accident resulting in serious injury or death, an admission by the driver of an activity that distracted his attention could result in criminal charges, including homicide by vehicle. Your subpoenaed statement could be Exhibit A in the criminal trial.

And, the impact of subpoenaed statements is not limited to the driver. His conviction or guilty plea could result in automatic negligence of your company. It could provide a spring board for punitive damages.

Conclusions

These are the primary reasons, based upon my litigation perspective, that I counsel against taking written or oral post-accident statements or written reports from our drivers. The value of doing so is far outweighed by the potential damage. 

