# Accident Response and the Art of Insurance Company Negotiation

*By Douglas Marcello*

Accident response and defense of the lawsuit that inevitably follows is tough enough. It can be made unnecessarily more challenging if you and your insurance company are not coordinated in principle and practice.

Are you and your insurer on the same page? Do you have the same philosophy in accident response and lawsuit defense? Are you permitted to choose, or at least suggest, the attorney and accident responders that you prefer? Is your insurer receptive to your requests as to how claims are handled?

If you and your insurers are in sync, that is great and beneficial for both of you. For insurers experienced in trucking claims, there is a willingness to coordinate efforts.

However, many trucking companies are frustrated that the answers to all of these questions are a resounding "No." They are forced to tolerate a difference in philosophy and process by their insurer. The truckers often feel that they have no alternative.

In this article, we will consider the areas in which differences frequently arise between trucking companies and their insurers. We will also look at how you can assert more control over your claims to the benefit of your drivers and your trucking company.

Accidents are a regrettable reality of our industry, the majority of which are not the fault of your drivers. However, any accident involving your driver is a critical event for which you want and expect immediate action by experienced professionals to provide the maximum protection.

You want to protect your driver, and your company, from legal exposure. You want to begin the defense of the accident immediately by involving knowledgeable counsel and, where warranted, an accident reconstructionist or other professional.

In contrast, accidents are a daily event for your insurer. They are cost conscious and time pressed, often reluctant to expend resources until absolutely necessary. Frequently their response is controlled by an instant analysis of your driver's fault based upon the limited facts available at the time.

Even where there is a potential for fault, there is often a lack of urgency in maximizing our greatest advantage--immediacy. No one knows about this accident before your company. It is during that crucial time that your defense can be maximized by documenting evidence and finding witnesses.

Yet this critical advantage is too often lost by a geographically remote adjuster who has never dealt with your company and whose concept of immediacy is inconsistent with your own. The claim then follows the same old course that follows their claims routine. It becomes a matter of completing a claims checklists rather than engaging in an aggressive defense. The case then drifts along until a settlement is made based upon bartering over the number rather than based upon its true value.

Why should you change this? The increased, immediate defense and reduced payout may impact your company down the road at the time of renewal or when shopping for new coverage. More importantly, it protects you and your company from additional consequences including criminal exposure.

The most important requirement is an immediate, coordinated response of the level appropriate for the circumstances, such as the extent of injuries and damages. Not every case requires a nuclear response. However, an accident that is handled as a "typical" claim in a rote and routine manner can quickly spiral downward into a nuclear meltdown.

Your driver needs immediate protection and guidance. Shaken by the traumatic event, he needs and deserves prompt access to an attorney who can provide advice and receive information with the protection of attorney-client privilege.

Your insurer may have a list of attorneys with whom they deal or even "house counsel" who are on their payroll. Even if these attorneys have trucking background and, by chance, some familiarity with your company, it is your insurer that makes the determination whether to involve them in the incident and, if so, when. An instant analysis of this being a "no liability" accident by a cost-conscious insurer can often result in their counsel not being involved.

Like wet cement, any evidence of an accident, good or bad, quickly hardens and remains set for the duration of the case. A misstatement by your driver because of a lack of guidance may be the handhold for a plaintiff who would not otherwise have a case to get a significant payout.

Similarly, immediate deployment of an accident reconstructionist, when warranted, can be crucial to a case. The ability to document the scene and look for evidence that may be of limited duration can be vital and maximizes our advantage of immediacy. Again, an insurer's reluctance to spend money unless and until the matter goes into suit can be damaging, if not crippling, to your case.

The need for you and your insurer to be on the same page continues through the post-accident investigation. The too frequent practice of many insurers to follow a routine checklist by rote, without thought or strategy, can be equally damaging to your defense.

The best (worst?) example of this is the insurer's preoccupation with taking a statement from your driver. This is the worst thing that they can do. Did I say it's bad?

Ask an adjuster why they want a statement from your driver. After a stunned silence because no one ever asked, and they never thought about it, listen to the "response." The mumbled "response" can be distilled to the basic reason, "because we always do." This, you will note, is the same basis for the perpetuation of urban legends and too long perpetuated practices such as using leaches to cure diseases and making human sacrifices to satisfy the gods.

Several years ago I wrote an article for this publication entitled, "The Audacity of Nope." You can find a copy in the "articles" section of our webpage, www.cdl-law.com. In that article, I set forth six reasons why neither you nor your insurer should take a statement from your driver. The reasons are as follows:

a. It helps the people who sue you. – You give them your driver's version around which the less honest can mold theirs.

b. There are limitations on recollection on the split second events of an accident. – The instantaneous nature limits what one can truly recall.

c. It creates the potential to conflict with other statements. – The more statements (police, accident form,...) the more potential for inconsistency and the unintentional appearance of untruthfulness.

d. It could potentially incriminate your driver. – In more serious cases involving criminal penalties you can undermine your driver's right against self-incrimination.

e. It could potentially conflict with other evidence, such as ECM download or accident reconstruction calculations. – Again, our driver's credibility could be undermined by an innocent discrepancy between our driver's recollection and the ECM and physical evidence.

f. It has minimal if any value in a lawsuit. – If our driver can't remember his story later or differs, the statement will not help and is usually not admissible.

Yet despite these reasons, and with no legitimate purpose in doing so, there is an insistent pursuit of your drivers to get their statement. How do you change this? You need to work with your insurance company to align their practices with your interests. Many view it as a futile effort and don't even try. They are missing out on a major opportunity to control the course of their claims.

So how do you do that? First, timing is everything. When you are shopping for coverage or negotiating your renewal include requests for increased involvement and control of your claims. Get the ability to name your attorney. Get input into the claims process.

We have clients who have negotiated with their insurers to select counsel and require their authority for settlement of claims up to a certain amount. Others have worked with insurers as to claims procedures, including a prohibition of taking driver statements written right into the insurer's claims instructions. In this way your procedures and limitations are written right into the claims system for review when each claim arises.

Second, work with your insurer to further your mutual interests. We have also worked with companies and their insurers to develop a coordinated accident response. By doing so, the company achieves the response it requires and the insurer develops a defensible claim.

Often it is a process of education. Many of the aggressive accident response and claims procedures are foreign to the SOP of the insurance industry.

In those cases, we give a presentation as to the more aggressive claims and defense strategies that can reduce exposure and contest liability. Many insurance companies appreciate the new concepts and adopt the tactics for your and their mutual benefit.

Other times it is a matter of persuasion. Frequently the insurers have to be shown that it is in their interest to use the alternative procedure, such as not taking a statement.

You and your insurer do not need to be on different courses to your mutual frustration and disadvantage. By negotiating your rights and working for change, your insurer can work with you for your mutual benefit.

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