ATA "Preventable" Guideline: Protection For Your Company

By Douglas B. Marcello

Your driver had an accident. You determine that it was "preventable". You file the determination away. Case closed.

Closed, that is, until a lawsuit is filed. The Plaintiff's attorney not only requests your determination in discovery, but the information you gathered.

In fact, he may want to depose everyone involved in the process, including all of the members of your review committee. Ultimately, the Court may hold that, based upon your company's definition of "preventable", you have admitted fault by find the accident was preventable.

You can protect your company. Over the last year, an ATA task force that included PMTA members Ron Uriah of Pitt Ohio, Rich Kaczynski of A. Duie Pyle, and myself developed guidelines geared to align the "preventability" determinations with the legal principles that provide protection.

The new ATA "Preventability Guidelines" provide the framework for the maximum protection from the discovery of your process and determination as well as from admitting fault as part of the process. The guidelines are available from the ATA.

Discoverability

Discovery is the process by which the parties request information and documents and respond to the requests. Generally, information is "discoverable", must be provided, if it is "relevant" or it would lead to the discovery of "relevant information". Thus, the scope is broad.

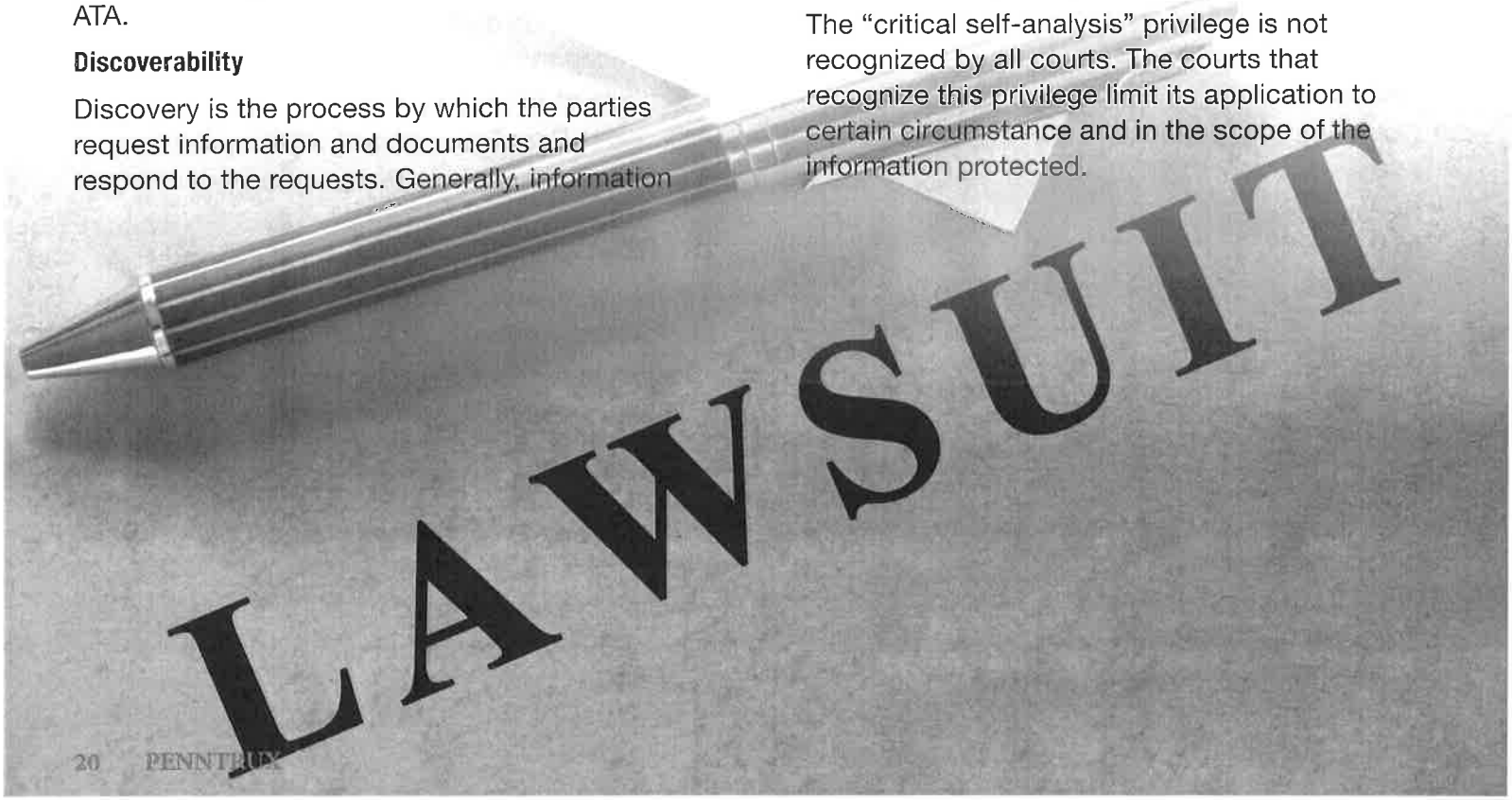
However, there are exceptions. These exceptions include evidence that is protected by privilege, such as attorney-client privilege or doctor-patient privilege.

A privilege that may provide protection from the discovery of "preventable" determinations is the "critical self-analysis" privilege. It is based on the concept that society encourages fixing a problem to avoid injuries to others.

For example, someone trips on an uneven crack in your sidewalk and sues. The law generally holds that they can't use it against you that you repaired your sidewalk afterward. The logic is that society would rather that you repaired it and avoid an injury to other people and not penalize your for fixing the defect.

The "critical self-analysis" privilege is something like that. Society would rather have you analyze an accident and correct the conduct to avoid a similar one in the future than hold the investigation against you at trial.

The "critical self-analysis" privilege is not recognized by all courts. The courts that recognize this privilege limit its application to certain circumstance and in the scope of the information protected.



Generally, your chances of the protection of the privilege are greatly increased if the determination was made pursuant to a governmental mandate. Most of the federal courts which have recognized this privilege have done so where the critical self-analysis was compulsory or part of an effort to comply with legal or regulatory requirements.

Applying this concept to the trucking industry, performance of the critical self-analysis to comply with an FMCSA or state regulatory requirement provides the optimum basis for asserting the privilege. Of such information, the most likely to be protected are conclusions, recommendations, and remedial actions.

The ATA "Preventability Guidelines" address this issue by expressly stating the FMCSA regulations for which the determination is being made. They state that guidelines were developed to "meet the Federal Motor Carrier Safety Administration's (FMCSA) provisions for the submission of accident preventability determinations in response to safety audits and the determination of safety ratings; and, to meet FMCSA provisions for the submission of accident preventability determinations in relation to application for hazmat safety permits per 49 CFR 385.407(A)(2)(ii)."

By stating the purpose of compliance, the guidelines seek to meet the first requirement by courts recognizing the "critical self-analysis" privilege—the analysis was performed for a mandatory government report. In light of the short time provided by the FMCSA Audit Guidelines for a company to respond to preventability issues, it is necessary for a company to keep current and make the determinations on a case-by-case basis.

The guidelines go on to explicitly state that they are intended as a means of performing a critical self-analysis, stating "Standardized recording of fleet motor vehicle accidents affords a means of developing statistics for self-critical analysis of the accidents for the purpose of developing training and/or procedures to correct, improve, rectify, or act in a manner to prevent, avoid, or minimize future accidents, or degradation in the accident experience of the trucking industry, and the individual motor vehicle fleet."

In contrast, objective information obtained in the regular course of business is rarely afforded the protection of the privilege. This includes factual information generated by the accident investigation, such as accident reports, photographs, or other evidence.

Similarly, accident reports or investigations made as a normal practice are unlikely to be protected. This is because such practices are unlikely to be terminated because the production is required.

Admissibility

Just because information must be produced in discovery does not mean it is admissible at trial. There are additional considerations as to whether the material produced will be presented to the jury.

The "preventable" determination itself may be excluded from being admissible. However, this decision may turn on the wording of your definition of "preventable".

Negligence is generally defined as the failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not.

If your company defines the term "preventable" with wording that is consistent with the legal definition of "negligence", your determination may well be admissible at trial as an admission of fault by your company. However, if your definition is not synonymous with "negligence", you are more likely to have it excluded as an opinion which is part of the corrective process.

In the ATA "Preventability Guidelines" define the term as follows:

> **Preventability:** Pursuant to FMCSR 49 CFR 385.3 a "Preventable accident on the part of the motor carrier means an accident (1) that involved a commercial motor vehicle, and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver." For purposes of these guidelines this definition is also applicable to all fleet motor vehicles.

This definition is important for several reasons. First, it adopts the FMCSA definition and further aligns the process with the federal requirements. Second, it removes the concept of "reasonableness" from the determination, distinguishing your determination from a determination of negligence.

List the Other Cause—Including the Other Driver

The guidelines have other elements that afford protection in litigation. First they recommend that if you make a written determination of "preventability" that you enumerate other causes of the accident. The guidelines state, "The safety professional should enumerate other causes of the fleet motor vehicle accident including other driver actions such as the other driver's acts or omissions that would have prevented the accident where applicable to present the entirety of the causative factors of the accident."

Thus, while determining that the accident may have been preventable by your driver, enumerate the other contributing factors such as the other driver's acts or omissions where applicable. This is a means of counterbalancing a plaintiff's attempt to present your determination to the jury.

If a court would decide that your determination was discoverable and admissible, the plaintiff's attorney would have to decide if it was worth reading the document of your determination that would result in his reading his client's faults to the jury. This may well dissuade the attorney from trying to present the evidence.

Delay Your Decision Until After Trial

The guidelines specifically provide for deferring your determination until all the evidence has been assembled. They state that "There are occasions when post-accident investigation is controlled and managed by your company's legal counsel. In those situations, a preventability analysis and determination may not be made by your company until the conclusion of any related litigation so that all applicable facts, testimony and expert analysis can be considered."

This is a possible course even if it means after the trial, so long as you do so based upon a consistent standard of cases, such as at-scene injuries. The key here is consistency. Have a policy as to which accidents this applies and do it in all such instances.

By forgoing the "preventability" determination until after all the evidence is in, you are being fair to both your driver and the other party. It is not unusual for facts to come to light late in the case. Expert reports, analyzing the data and giving opinions as to the cause, are rarely completed until after all the discovery is completed so that they can have the benefits of all the facts.

Additionally, by waiting until after all the facts, and potentially after the trial, the issue of discoverability and admissibility is avoided. There is nothing to discover There is nothing to admit.

Conclusion

Your "preventability" determination can be costly to your company if not done in a way that maximizes protection from discovery, avoids an admission of fault, and is protected by privilege. The ATA "Preventability" Guidelines will give you the framework to maximize your protection while promoting safety with your determination.

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