

MOTOR CARRIER OBLIGATIONS AND RESPONSIBILITIES IN ACCIDENT PREVENTION AND INVESTIGATION; AVOIDING LITIGATION PITFALLS

AARON D. WISELEY
HOLMES & WISELEY, P.C.

WWW.HOLMESWISELEY.COM

OFFICE PHONE: (616) 447-9610

CELL PHONE: (616) 485-0529

FAX: (616) 447-9630

E-MAIL: AWISELEY@HOLMESWISELEY.COM

BEFORE AN ACCIDENT

KNOWLEDGE AND TRAINING OF KEY PERSONNEL (DISPATCH, MAINTENANCE, HIRING/QUALIFICATION, RISK MANAGEMENT, LOSS PREVENTION)

- DO THEY KNOW THE TEN COMMANDMENTS OF THE MOTOR CARRIER ACT?

THE TEN COMMANDMENTS OF THE MOTOR CARRIER ACT

- I. FIRST COMMANDMENT: 49 CFR 382,
CONTROLLED SUBSTANCE AND ALCOHOL
USE TESTING
- II. SECOND COMMANDMENT: 49 CFR 383,
CDL STANDARDS; REQUIREMENTS;
PENALTIES
- III. THIRD COMMANDMENT: 49 CFR 385,
SAFETY AND FITNESS

- IV. FOURTH COMMANDMENT: 49 CFR 387,
MINIMUM LEVELS OF FINANCIAL
RESPONSIBILITY**
- V. FIFTH COMMANDMENT: 49 CFR 390, FMCSR**
- VI. SIXTH COMMANDMENT: 49 CFR 391,
QUALIFICATION OF DRIVERS**
- VII. SEVENTH COMMANDMENT: 49 CFR 392,
DRIVING OF COMMERCIAL MOTOR VEHICLES**
- VIII. EIGHTH COMMANDMENT: 49 CFR 393, PARTS
AND ACCESSORIES FOR SAFE OPERATION**

**IX. NINTH COMMANDMENT: 49 CFR 395,
DRIVERS' HOURS OF SERVICE**

**X. TENTH COMMANDMENT: 49 CFR 396,
INSPECTION, REPAIR AND MAINTENANCE**

DRIVER EDUCATION

- **CALL IMMEDIATELY WITHOUT EXCEPTION; “800” NUMBER;**
- **SHUT DOWN VEHICLE AND COMPLY WITH ALL EMERGENCY WARNING REQUIREMENTS;**
- **CONTACT LOCAL AUTHORITIES BUT DO NOT ADMIT FAULT OR APOLOGIZE;**
- **LISTEN BUT DO NOT PARTICIPATE IN ANY CONVERSATIONS AT SCENE;**
- **OBTAIN NAMES, ADDRESSES, COMPANY NAMES, VEHICLE LICENSE PLATE NUMBERS, INSURANCE INFORMATION FROM PARTIES INVOLVED AND OTHER WITNESSES;**

DRIVER EDUCATION (CONT.)

- DO NOT GIVE A STATEMENT, RECORDED OR OTHERWISE, TO ANYONE BUT YOUR LAWYER, INSURANCE COMPANY REPRESENTATIVE, OR THE POLICE;
- SECURE YOUR LOG BOOK AND PROVIDE A COPY OF IT ONLY TO THE POLICE, YOUR OWN COMPANY, THE INSURANCE COMPANY REPRESENTATIVE, OR YOUR LAWYER;
- ACCIDENT KIT?

MOTOR CARRIER RESPONSE POST-ACCIDENT

- NO DRIVING POST-ACCIDENT, COMPANY POLICY, NO EXCEPTIONS;
- ARRANGE LOAD TRANSPORT OR REMOVAL;
- ARRANGE DRIVER TRANSPORT;
- DRUG AND ALCOHOL TESTING;
- SECURE DRIVER;
- MEET THE PARTICULAR NEEDS OF A DRIVER (FAMILY, BILLS, MEDICAL ATTENTION OR COUNSELING, ETC);
- SECURE COMPANY VEHICLES INVOLVED;
- PRESERVE DOCUMENTS AND “ESI”;
- CONTACT INSURANCE COMPANY; AND

MOTOR CARRIER RESPONSE (CONT.)

**RETAIN AND/OR REQUEST
COUNSEL BE ASSIGNED TO
COORDINATE AND LEAD
INVESTIGATION**

WHAT MOTOR CARRIERS SHOULD EXPECT OF THEIR COUNSEL

- IMMEDIATE RESPONSE AND LETTER ACKNOWLEDGING RETENTION;
- ADJUSTER/INVESTIGATOR ON SCENE WITHIN 2 HOURS PER ATTORNEY;
- MEET WITH AND INTERVIEW DRIVER;
- MEET WITH WITNESSES AND WORK WITH INVESTIGATING AUTHORITY;
- COORDINATE DOCUMENT RETENTION;
- REPORTING QUICKLY, ACCURATELY AND CANDIDLY;
- RETAIN EXPERTS AND ACTIVELY PARTICIPATE IN THEIR INVESTIGATION:
 1. ACCIDENT RECONSTRUCTION;
 2. DRIVER CONDUCT/EQUIPMENT COMPLIANCE;
 3. BIOMECHANICS;
 4. HUMAN FACTORS/VISIBILITY/CONSPICUITY.

MOTOR CARRIER OBLIGATIONS

- MAINTAIN THREE (3) YEAR ACCIDENT REGISTER;
- “PREVENTABLE” OR “NON-PREVENTABLE”;
- FOLLOW COMPANY PRACTICE AND POLICIES TO THE LETTER: WANKE V. LYNN’S TRANS CO, 836 FSUPP 587 (ND IND 1993);
- DOCUMENT PRESERVATION.

MOTOR CARRIER OBLIGATIONS FOR PRESERVATION OF RECORDS: 49 CFR 379

**§ 379.1: APPLIES TO MOTOR CARRIERS, BROKERS,
WATER CARRIERS AND FREIGHT FORWARDERS OF
HOUSEHOLD GOODS.**

**§ 379.3: THESE ARE MINIMUM REQUIREMENTS.
AFTER THE TIME REQUIRED, RECORDS MAY BE
DESTROYED AT THE DISCRETION OF EACH
COMPANY'S MANAGEMENT.**

49 CFR 379 (CONT.)

§ 379.5: PRESERVATION REQUIREMENTS. THE COMPANY SHALL PROTECT DOCUMENTS FROM FIRE, FLOOD, AND OTHER HAZARDS OR FROM UNNECESSARY EXPOSURE TO DETERIORATION DUE TO HUMIDITY, DRYNESS OR LACK OF VENTILATION. SECRETARY OF TRANSPORTATION TO BE NOTIFIED IF DESTROYED PREMATURELY.

§ 379.7: CAN PRESERVE THEM BY OTHER MEANS OF TECHNOLOGY SO LONG AS THEY CAN BE PRESERVED UNALTERED.

**49 CFR 379 (CONT.)
HOW LONG?**

PART 379

APPENDIX A

APPENDIX A

▣ F. INSURANCE AND CLAIMS

- CLAIM REGISTERS, AND OTHER RECORDS WHICH RECORD PERSONAL INJURIES AND OTHER CLAIMS AGAINST THE COMPANY AND ALL SUPPORTING DATA (1 YEAR AFTER SETTLEMENT)
- REPORTS, STATEMENTS AND OTHER DATA PERTAINING TO PERSONAL INJURIES (3 YEARS)

▣ J. TRANSPORTATION

- DISPATCHER SHEETS, REGISTERS, AND OTHER RECORDS PERTAINING TO MOVEMENT OF TRANSPORTATION EQUIPMENT (3 YEARS)

- ▣ NOTE A: MINDFUL OF REQUIREMENTS OF STATE AND LOCAL JURISDICTIONS. COMPANIES SHALL EXERCISE REASONABLE CARE IN CHOOSING RETENTION PERIODS, AND THE CHOICE OF RETENTION PERIODS SHALL REFLECT PAST EXPERIENCES ... [AND] PENDING LITIGATION ...

WHAT DOCUMENTS SHOULD BE PRESERVED POST-ACCIDENT?

1. DRIVERS' LOGS (INCLUDING SUPPORTING DOCS);
2. DDEC/ECM, "BLACK BOX";
3. MAINTENANCE RECORDS (ALL VEHICLES);
4. Q FILE/PERSONNEL FILE;
5. BILL OF LADING AND ALL SHIPPING DOCUMENTS;
6. CONTRACTS;
7. QUALCOMM/PEOPLENET/TTRACS/GPS/EATON VORAD, COMMUNICATIONS, ETC.;
8. TITLE AND REGISTRATION (ALL VEHICLES);
9. ANNUAL INSPECTIONS;
10. DISPATCH RECORDS;
11. ELECTRONICALLY STORED INFORMATION ("ESI").

WHAT IS ESI?

- ▣ **FOR LAWYERS, ESI IS DEFINED AS ELECTRONICALLY STORED INFORMATION REGARDLESS OF FORMAT, SYSTEM, OR PROPERTIES. MCR 2.310(A)(2).**

- ▣ **IN PRACTICE, IT MEANS INFORMATION FROM THE FOLLOWING DATA SOURCES:**
 - **EMAIL;**
 - **ANY DIGITAL DOCUMENTS - WORD DOCUMENTS, SPREADSHEETS, VIDEOS, IMAGE FILES, SOUND RECORDINGS, BUSINESS RECORDS CREATED USING DEDICATED SOFTWARE;**
 - **DATA FROM A CUSTODIAN'S DESKTOP COMPUTER, A COMPANY SERVER OR COMPUTER SYSTEM, HARD DRIVE;**
 - **DATA FROM CLOUD APPLICATIONS;**
 - **MOBILE DATA OR MESSAGES ORIGINATING FROM A CELL PHONE;**
 - **DATA FROM AN INTERNET OF THINGS (IoT) DEVICE (E.G., BROWSER HISTORY);**
 - **DIGITAL SCANS OR OTHER ELECTRONIC RECREATIONS OF PHYSICAL DOCUMENTS;**
 - **INFORMATION POSTED ON SOCIAL MEDIA.**

SANCTIONS FOR FAILURE TO PRESERVE ESI

- ▣ **MCR 2.313(D) FAILURE TO PRESERVE ESI.** IF ESI THAT SHOULD HAVE BEEN PRESERVED IN THE ANTICIPATION OR CONDUCT OF LITIGATION IS LOST BECAUSE A PARTY FAILED TO TAKE REASONABLE STEPS TO PRESERVE IT, AND IT CANNOT BE RESTORED OR REPLACED THROUGH ADDITIONAL DISCOVERY, THE COURT:

(1) UPON FINDING PREJUDICE TO ANOTHER PARTY FROM LOSS OF THE INFORMATION, MAY ORDER MEASURES NO GREATER THAN NECESSARY TO CURE THE PREJUDICE, OR

(2) ONLY UPON FINDING THAT THE PARTY ACTED WITH THE INTENT TO DEPRIVE ANOTHER PARTY OF THE INFORMATION'S USE IN THE LITIGATION, MAY ORDER APPROPRIATE REMEDIES, INCLUDING:

(A) A PRESUMPTION THAT THE LOST INFORMATION WAS UNFAVORABLE TO THE PARTY;

(B) A JURY INSTRUCTION DIRECTING THAT THE JURY MAY OR MUST PRESUME THE INFORMATION WAS UNFAVORABLE TO THE PARTY; OR

(C) DISMISSAL OF THE ACTION OR ENTRY OF A DEFAULT JUDGMENT.

WHY IS DOCUMENT RETENTION AND PRESERVATION IMPORTANT?

PROPER DOCUMENT RETENTION WILL ALLOW THE MOTOR CARRIER TO EFFECTIVELY DEFEND LITIGATION AND AVOID LITIGATION PITFALLS

1. MOTOR CARRIERS ARE TARGETS, MORE NOW THAN EVER;
2. THEORIES OF LIABILITY ARE EXPANDING;
3. FRE/MRE TRUMPS FMCSR;
4. AVOID SPOLIATION OF EVIDENCE CLAIMS, AND NEGATIVE INFERENCES DRAWN, TO ALLOW CASES TO PROCEED ON THEIR MERITS;
5. MINIMIZE SETTLEMENTS OR VERDICTS.