



# THE LAWYER'S LOGBOOK®

For Plaintiff Lawyers Only

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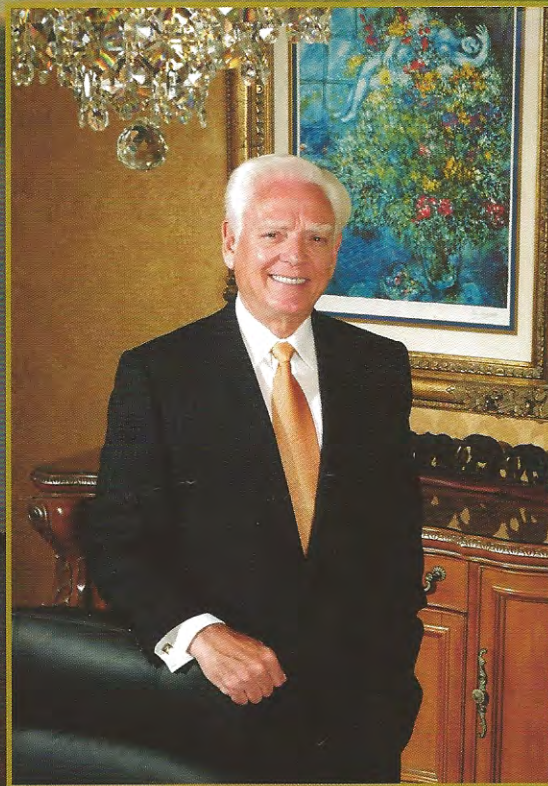
## PLAINTIFF INTERSTATE TRUCKING LITIGATOR

*Howard Nations*

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**APITLA Emergency Response Team and APITLA Learning Center**

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**"Putting the Brakes on Unsafe Trucking Companies"**

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# **APITLA** *Creates Regional Directors Of Litigation* **To Implement Emergency Response Teams And Expand Member Resources**



BY  
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The Nations  
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Association of Plaintiff Interstate Trucking Lawyers of America  
*Learning • Litigation • Legislation*

## **I. THE VIEW FROM BEHIND THE EVIDENTIARY CURVE**

A tragic truck–auto collision occurred on January 3, 2012. As we reviewed the referring attorney’s file for the first time on June 6, we had no doubt that we were once again beginning to prosecute an eighteen-wheeler case from far behind the evidentiary curve.

As we studied the law enforcement photos from the accident scene my worst fears were confirmed as, in the background of several photographs, we identified the trucking company’s risk manager, defense lawyer and accident reconstruction/EMG expert gathering evidence. Their investigator and forensic photographer/videographer were also recording crucial evidence at the scene before the vehicles were moved and taking statements from witnesses with fresh memories of events.

As is too often true, the Defense Crash Response Team was immediately on the accident scene, identifying, accumulating and preserving evidence while formulating their defenses. Within a few days after the crash the response team had downloaded and reviewed the data from the truck’s on-board technology, including the Electronic Control Module; carefully scoured the truck’s interior to remove implicating evidence; re-

viewed all accident scene photos and videos; debriefed the driver; rectified the driver’s log; deleted calls from his cell phone; developed a defensive story of the events; and taken statements from everyone at the accident scene that were carefully crafted to support their trial story. They had also purchased the plaintiff’s totaled vehicle and analyzed data from the Event Data Recorder.

Within one month of the crash, the defense team of experts were retained and developing data to support defense theories, based primarily on the crash site investigation; download of the on-board data from both vehicles and the Total Station survey of the accident scene and both vehicles. At this point, six months post-accident, the Defense Crash Response team was sitting atop a mountain of evidence and we were looking up from the valley, just beginning the climb.

## **II. THE APITLA EMERGENCY RESPONSE TEAM**

The purpose of this article is to begin implementing a plan by APITLA leadership to level the playing field for plaintiffs’ attorneys and our clients by joining forces to initiate the APITLA Emergency Response Team.

APITLA has established a group of Regional Directors of Litigation who are available to offer immediate assistance 24 hours per day, 7 days per week to any APITLA member who needs guidance in responding to a crash or at any time during the prosecution of a trucking accident. The Regional Directors are volunteers who are building teams within their regions to implement this assistance program, which will be available to all APITLA members as a perquisite of membership.

The success of the program will depend on the willingness of our members to share knowledge and, in some cases, their work product for the benefit of all members and our clients. The quid pro quo is that you get the benefit of the genius, the experience and the work product of the finest personal injury truck lawyers in America.

Each Regional Director will have available the names and contact information for the various types of experts that may be needed, either at the crash scene, or in subsequent handling of the truck litigation. The APITLA Regional Director will not recommend the hiring of a particular expert but will provide information as to the location and availability of



a number of experts, either proximal to the crash site or experts who are available nationally.

It is the intention of APITLA'S leadership to create and vet a comprehensive list of highly qualified experts, based upon recommendations of our members and upon research by leadership designed to identify the most qualified experts in each specialty that may become relevant to the prosecution of a trucking case.

Our criteria for inclusion in our list of experts is that they be highly qualified in their field, experienced in the nuances of trucking litigation, experienced in serving as witnesses, either for the plaintiff or the defense in trucking litigation and have a full understanding of proper preservation of evidence and the chain of custody. We are not seeking experts who will tell us what they think we want to hear. When investing large sums of money in major litigation, we need experts who will give us their honest appraisal of data and their honest professional opinion that they can swear to under oath in deposition or trial and which will withstand scientific scrutiny and severe cross examination by our brethren in the defense bar.

The Regional Directors of Litigation will also direct our members to relevant materials to assist members to conduct a complete investigation, retain the proper types of experts, identify all potential defendants, identify all potential causes of action and seek additional insurance coverage. They will also maintain forms that may be needed for preservation of evidence at the inception of the investigation.

It is also the intention of APITLA'S leadership to hold regional seminars to familiarize our members with the Emergency Response Team concept and to expand the database of shared documents, articles, expert witnesses, and eventually a deposition bank

of defense experts, with the goal of leveling the playing field for injured plaintiffs in trucking litigation. This system can only be successful with the full cooperation of our membership. We are soliciting recommendations on experts in the numerous truck litigation specialties who meet the expert criteria listed above and who have served you and your clients well.

### **III. APITLA's Emergency Response Team: Experts and Data Collection**

Establishing an Emergency Response Team begins with identifying the experts who will be available to our members when called upon and who will approach their important tasks with expertise, specialized skill and integrity in assisting our clients to achieve a just result. In no particular order of importance, the following is a discussion of the types of experts that we are seeking to assist our members in leveling the playing field.

#### **A. Professional Trucking Accident Investigators:**

As with many other aspects of trucking litigation, investigation of the trucking accident is nuanced and requires special skills, experience and expertise.

The factors we seek in a private investigator include a) proper licensing; b) the ability to effectively interview witnesses; c) one who understands the importance of attention to detail; d) experience in investigating truck collision cases; e) a law enforcement background with training in handling evidence and chain of custody; and f) an unbiased approach to the acquisition of evidence.

Many cases turn on evidence discovered through a detailed inspection of the interior of a truck, which raises issues of misconduct by the driver, e.g., pills, alcohol, drugs, radar detectors, duplicate logbooks, receipts with date/time stamps and various forms

of energizers and "uppers" to stay awake.

Ideally, the plaintiff's attorney should be available for the truck inspection and all investigations of defendant's equipment to assure the integrity of the evidence and the chain of custody. However, the starting point of a successful investigation is a highly detail-oriented investigator who is tenacious in the pursuit of information and is honest and ethical in handling evidence. There are many horror stories of "evidence" uncovered by an investigator, which fell apart in Court because the investigator altered the facts, misled a witness or created evidence that didn't really exist.

#### **B. Accident Reconstruction Engineers**

The advantage of having a highly qualified accident reconstruction engineer at the scene of a trucking accident before the vehicles are moved cannot be overemphasized. The primary role of the accident reconstruction engineer, combined with the on-board technology expert, is to document the accident scene and to accumulate, preserve and analyze all of the relevant data regarding the vehicles involved, including their on-board technology. In ideal circumstances, this process begins at the crash site immediately after the event. There are a number of important physical factors that degrade rapidly and cannot be replicated without photos or video, such as ABS skid marks, impending skid marks, debris patterns and paint transfers.

If the plaintiff's accident reconstruction engineer is not at the crash site and does not get access to Total Station analyses or the vehicles on-board technology before data is downloaded, the plaintiff's expert is often relegated to working with the data accumulated and produced by the defense experts, which may or may not be carefully cherry-picked.



We should neither assume that our professional brethren in the defense bar are dishonest nor that defendants and their insurance carriers are honest.

In the high-tech world of trucking accident reenactments and animations that have become such an important part of the persuasive process, it is essential to have an accident reconstruction engineer who is very detail-oriented in preserving all of the evidence that will be needed for future testing, data calculation and generation of animations, simulations and multimedia reconstructions of the event.

Accident Reconstruction Engineers use the Total Station survey device to document the crash scene and the damage to the vehicles, which can provide data for two-dimensional or

three-dimensional scale diagrams, animations and simulations as well as a vitally important crush profile to determine the principle direction of force. This combines with the work product of two other skilled professionals, the on-board technology expert and the photographer to enhance and preserve data accumulation.

### ***C. On-Board Technology Expert***

All heavy-truck engines have an Electronic Control Module (ECM), which controls the engine's performance and monitors the operation of the vehicle. In truck crashes the ECM, depending on the engine make, model and year, may record such important data as vehicle speed, brake application, percent throttle, engine RPM, cruise on/off, a hard brake, quick stop, sudden deceleration and an incident. Some ECM's may also record vehicle

operational data around an engine fault code that might be set during an accident.

While ECM data is important, it is not infallible. The Module is subject to loss or corruption of data during a severe crash and/or during the downloading process. Downloading of ECM data is an art that may result in corrupted data if it is not performed properly. Never accept the testimony or report of the defense expert who downloaded ECM data without careful scrutiny as it can be a partial download or exclude important data that was corrupted in the process. The data is subject to cherry-picking by the downloader/interpreter. Thus, the ECM data must always be coordinated with the physical evidence to avoid relying on corrupted, cherry-picked or incomplete data. For this reason, it is important that the Accident



Reconstruction Engineer coordinate findings with the On-board Technology expert. This leads to the obvious advantage of having one expert who is fully qualified in both areas, as long as the qualifications in either area do not suffer from the combined areas of study.

If the Accident Reconstruction Engineer is also an expert in downloading and analyzing data from the ECM, he may successfully counter a contrary defense interpretation of the ECM data. Often the defense expert will conduct the download of data from the ECM due to superior and immediate access to the heavy truck. Cherry-picking of data is not an uncommon process and it is often important to prove which data was not available for download due to partial data corruption.

In addition to downloading the data from the truck's ECM Module, the plaintiff's expert should also conduct the Total Station analysis, when possible, and download vital data such as pre-crash speed, impact speed, post-crash speed and Delta V from the Event Data Recorder in the plaintiff's vehicle. The more physical evidence and other data that is acquired by the plaintiff's expert, the greater the chance of overcoming adverse interpretations of the ECM data by the defense expert.

An increasing number of heavy-trucks are using Electronic On-Board Recorders (EOBR), which, among other items, document hours of service compliance; Critical Event Recorders (CER); and On-Board Monitoring System (OBMS). It is obviously critical to be certain that your expert is qualified in each type of on-board technology that is in use on the defendant's vehicle.

### **Forensic Photographer/ Videographer**

A professional forensic photog-

rapher/videographer, who is experienced in using trucking accident protocols, is crucial to the proper, detailed recording and preservation of accident scene and vehicular evidence. Skid marks, gouge marks, paint transfers, debris patterns and physical objects are available to be recorded for only a short period of time. Photographs of licenses, permits, labeling, advertisements and other postings on trucks may save a lot of discovery effort in identifying the proper/potential defendants in your case.

Quite often seemingly unimportant factors at the accident scene become outcome determinative at trial. Preservation of such evidence requires a professional that is attuned to attention to detail. Careful documentation of the accident scene and vehicles by a photographer/videographer, combined with the expert's Total Station survey, and/or careful and thorough download of the on-board technology of all vehicles may produce the finely tuned point that is the evidentiary tipping point at trial.

With millions of travelers carrying cameras in their cell phones, the search for photos and videos among all present at the accident scene may prove quite productive. We routinely check the websites and social media sites of everyone at the accident scene for amateur photos or videos that may be valuable a la Abraham Zapruder's filming of the Kennedy assassination. Also, in business and residential areas, security cameras and home videos have often recorded important videos that became crucial courtroom evidence a la the beating of Rodney King.

### **D. Technology for Multimedia Presentations**

The complexity of heavy-truck on-board technology has led to simple auto/truck crashes becoming complex litigation. Since it is crucial for the plaintiff, in carrying the burden of proof, to simplify the complex for the

jury, we often do so with animations, simulations and computer-generated reenactments as part of a multimedia method of telling our client's story.

However, even the best of today's storytelling technology such as photogrammetry, photo match, video match, photo rectification and interactive animation requires completely accurate baseline data such as that provided by photographs, videos, data recorders and the Total Station survey device. So there is obviously a significant temporal urgency to the early acquisition of this crucial evidence. This time element is one of the factors that led us to the development of APITLA'S Emergency Response Team.

### **E. Commercial Trucking Expert**

If the conduct of the driver is at issue, a commercial trucking expert, preferably with actual professional driving experience, can be valuable in explaining the specialized trucking regulations, industry standards and rules of the road to judges and jurors.

Since generations Y and W comprise an increasingly large percentage of our jurors and since they are particularly attuned to the importance of following rules, an expert as to a trucker's violation of safety rules may be particularly useful in establishing liability.

Focus groups reveal that we mistakenly assume that jurors understand that there are special rules and regulations that apply to commercial truck drivers that are more stringent than those which apply to jurors driving their personal vehicles. We have often seen in focus groups in trucking cases that, in the absence of being educated as to the stricter rules that apply to professional drivers, focus group members will hold truck drivers to the same standards as an automobile driver. Once they are advised of the



stricter trucking rules, they generally hasten to apply them.

### ***F. Additional Trucking Experts***

In addition to the usual and customary experts that frequently appear in trucking cases, the Regional Directors of Litigation are requesting recommendations from our members as to expert witnesses in specialized areas such as biomechanical engineering, freight loading and shifting, human factors engineering and conspicuity, wind shear and cell phone data capture. Also, if there are other types of experts that you have used in trucking accident cases that you can recommend to our fellow members, please advise as this is intended to be a starting list rather than the finished product.

The case discussed above in which we began far behind the evidentiary curve, is in stark contrast to an earlier case in which a former client called

us immediately from the crash scene when his wife was killed in an intersection collision with a heavy truck. From his experience in his earlier case in which he was severely injured, he knew the importance of notifying his attorney from the crash scene. Within minutes we activated our investigator, accident reconstruction/ECM expert, and photographer/videographer and within an hour, while the police investigation was ongoing, we were working the crash scene together.

Imagine the chagrin of the Defense Crash Team when they arrived at the scene to find us well under way in locating and preserving evidence, photographing everything in sight, taking written and video witness statements, gathering crash information on both vehicles, recording and preserving the skid marks, gouge marks, debris pile and paint transfers, along with preserving the rest of the scene with the Total Station, while materially as-

sisting the understaffed/overburdened investigating officer.

The result of our joint presence at the scene was the immediate sharing of technical data with the defense and full cooperation in the voluntary exchange of information, since the defense had no place to hide and we had the upper hand in evidence gathered at the scene. The bottom line of the case was that we funded a seven-figure settlement exactly 70 days from the date of the crash.

While arriving at the crash site ahead of the Defense Crash Team will not happen often, it is important to initiate expert action against trucking companies as soon after the crash as possible. As part of the ongoing service to our members and clients, APITLA is establishing this system with the goal of leveling the playing field with our own Emergency Crash Response system. ➔

#### **IV. APITLA'S LEARNING CENTER**

THE APITLA Learning Center, available exclusively to APITLA members, comprises the world's largest collection of highly authoritative and indispensable information to aid plaintiff's attorneys to negotiate the complex field of interstate trucking litigation. The Regional Directors of Litigation will serve as tour guides to the APITLA Learning Center where there are currently more than 100 recorded APITLA CLE speeches from the nation's top trial lawyers, complete with supporting articles, many with accompanying PowerPoint presentations. The Learning Center also contains more than 85 papers published to date in The Lawyer's Logbook that provide precisely the information needed for the successful prosecution of a trucking case. These speeches, articles and published papers are the shared work product

of our fellow APITLA members and experts that work to bring justice to our injured clients. The tried and tested materials are straight from the files, the mediations and the trials of trucking cases.

#### **V. INTERSTATE TRUCKING LITIGATION FORMS**

In addition to assisting our members to build a crash response team and providing a guided tour through the APITLA Learning Center in search of directly relevant materials that will provide immediate guidance to members seeking assistance, The Regional Directors of Litigation will also supply forms to assist our members in the preservation of evidence including a) spoliation letters; b) restraining orders; c) FOIA requests; d) open records requests, and e) relevant online search sites.

#### **VI. APITLA'S GROWING MISSION**

The mission of APITLA continues to embrace the concept that a rising tide lifts all ships. The ongoing participation of our members is indispensable to our joint efforts to achieve a just award for our clients. The power of the trucking industry is exceeded only by the exponential power of their insurers as they combine forces to deny just compensation to our clients. In order to prevail in this ongoing battle, we must join forces, unselfishly share our work product, continue to educate each other and rise together to the challenges of achieving justice for victims of the trucking industry.