



ALFA International
THE GLOBAL LEGAL NETWORK

2026 Transportation Seminar

April 28-30, 2026

Before the Storm Breaks: Proactive Navigation of Transportation Claims

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Best Practices for Handling Transportation Claims Pre-Suit

When a company or insurer first learns of an accident, early strategic action is key. It helps to control exposure, shape the case narrative and potentially position the case for either resolution or a strong defense before litigation even begins.

Immediate Response & Scene Preservation

As soon as the driver contacts his supervisor to report an accident, there should be a company-wide protocol for how the company will respond. This often requires creating a trained response team. Drivers should also be trained to ensure that the first step after the accident occurs is to contact emergency services, render aid if safe to do so, and to avoid making any statements about fault.

One of the resources available to trucking companies and insurers is the ALFA Transportation Go Team – providing you immediate access to field adjusters, accident reconstruction experts, and experienced attorneys to promptly respond to the scene of the accident. This ensures that the company secures a statement from the driver while the facts are fresh as well as photographing vehicle positions, roadway markings, debris fields, and weather conditions. It is equally important to preserve physical evidence, including vehicle electronic control modules (ECM) and/or black box data, GPS information, and dash cam videos. It's also important to have counsel present in serious injury or fatality cases where potential exposure is high to oversee any investigation by law enforcement, preserve privilege, and prevent any spoliation of evidence. In addition, the response team to the accident will need to determine whether there may be witnesses to the accident or other video that may be available from nearby businesses and/or residences.

It is equally important that all relevant documents be gathered and preserved by the company, including driver's logs, hours of service, driver's personnel file, training materials provided to the driver, bills of lading, maintenance history of the vehicle, and if applicable, post-collision drug/alcohol test results.

Once evidence has been gathered from the scene and preserved, the next steps should be to begin utilizing investigative tools to gather as much information as possible about the claimant. This would include the use of social media, conducting informal background checks, and potential Examinations under Oath of the injured party.

Early Liability Assessment

Once the facts have been gathered from the accident scene and the early investigation has been completed, the next step should be to identify all potential theories of liability as it relates to the driver as well as the trucking company and potentially the broker. You will need to evaluate exposure before positions harden. Is the liability clear? Are additional experts needed such as human factors or medical experts? Often, early expert involvement can reduce long-term costs of a claim. Depending on the facts of the accident, there may also be comparative fault either by the potential plaintiff or other third parties that may have caused the accident. By identifying the strengths and vulnerabilities of the case early, you will be able to determine whether early resolution of the claim will be necessary.

If liability is clear and early resolution is preferred, there will need to be strategic communication with the claimant. It's important to set the tone early by maintaining professionalism and being responsive. Strategy may change when you are dealing with an unrepresented claimant as opposed to a represented claimant. Once the claimant obtains representation, it is extremely important to avoid making statements that can be used later during litigation as admissions.

Early Damages Investigation

Next, you will need to gather all medical records from the claimant and determine what future medical needs the claimant may have. In addition, identify and evaluate any pre-existing conditions that they may suffer from to determine whether such conditions have any impact on the causation issues raised in the case. You may need to retain causation experts to evaluate whether the allegations are valid. In addition, you will want to utilize the background investigation materials that you have gathered to determine if the plaintiff's alleged damages may be exaggerated. You will also need to consider whether the potential plaintiff may have a lost wage claim or potential disability as a result of the accident. All economic damages need to be evaluated realistically, keeping in mind that there can be ongoing care needed by the injured party.

Defense Counsel's Role

By involving counsel early on during the pre-litigation phase, counsel can manage evidence preservation and avoid spoliation. Defense counselors are versed in managing scene documentation, retaining and evaluating potential experts, and interviewing witnesses. Early missteps here can create spoliation problems later in litigation, especially in catastrophic-injury cases.

In some instances, defense counsel can act without the constraints of formal discovery. However, each jurisdiction has different rules as to what counsel can do. Some jurisdictions will only allow preservation of evidence through perpetuation of testimony from witnesses while others are significantly more expansive in nature. In general, however, any pre-litigation discovery must serve a purpose and the purpose must be specific to the case and defensible to the Court as to why such discovery is needed.

Defense counselors help align investigation strategy with coverage obligations and reservation-of-rights issues by providing an early assessment of coverage. Additionally, counsel will monitor and manage regulatory exposure whether under the FMCSA, local DOT or OSHA units, or even law enforcement. Defense counsel may be best equipped to field inquiries by a plaintiff's attorney to handle client communications tactically in order to position the company in the best light should litigation occur.