



# ALFA International Webinar Series

## Trending Topics in Transportation



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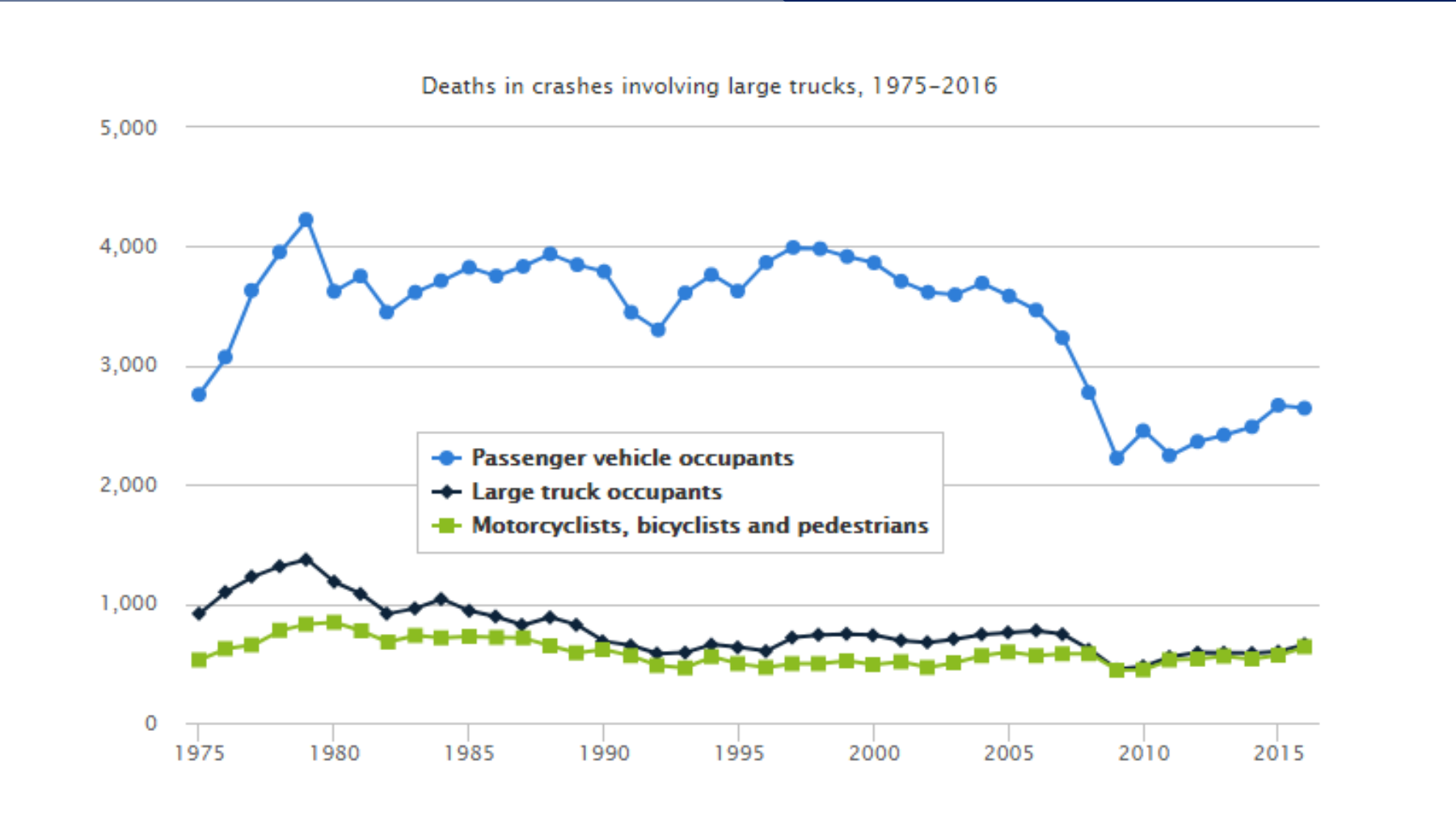


# ALFA International Webinar Series

## *What's New in Trucking Technology?*

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Whitfield & Eddy, PLC  
Des Moines, Iowa



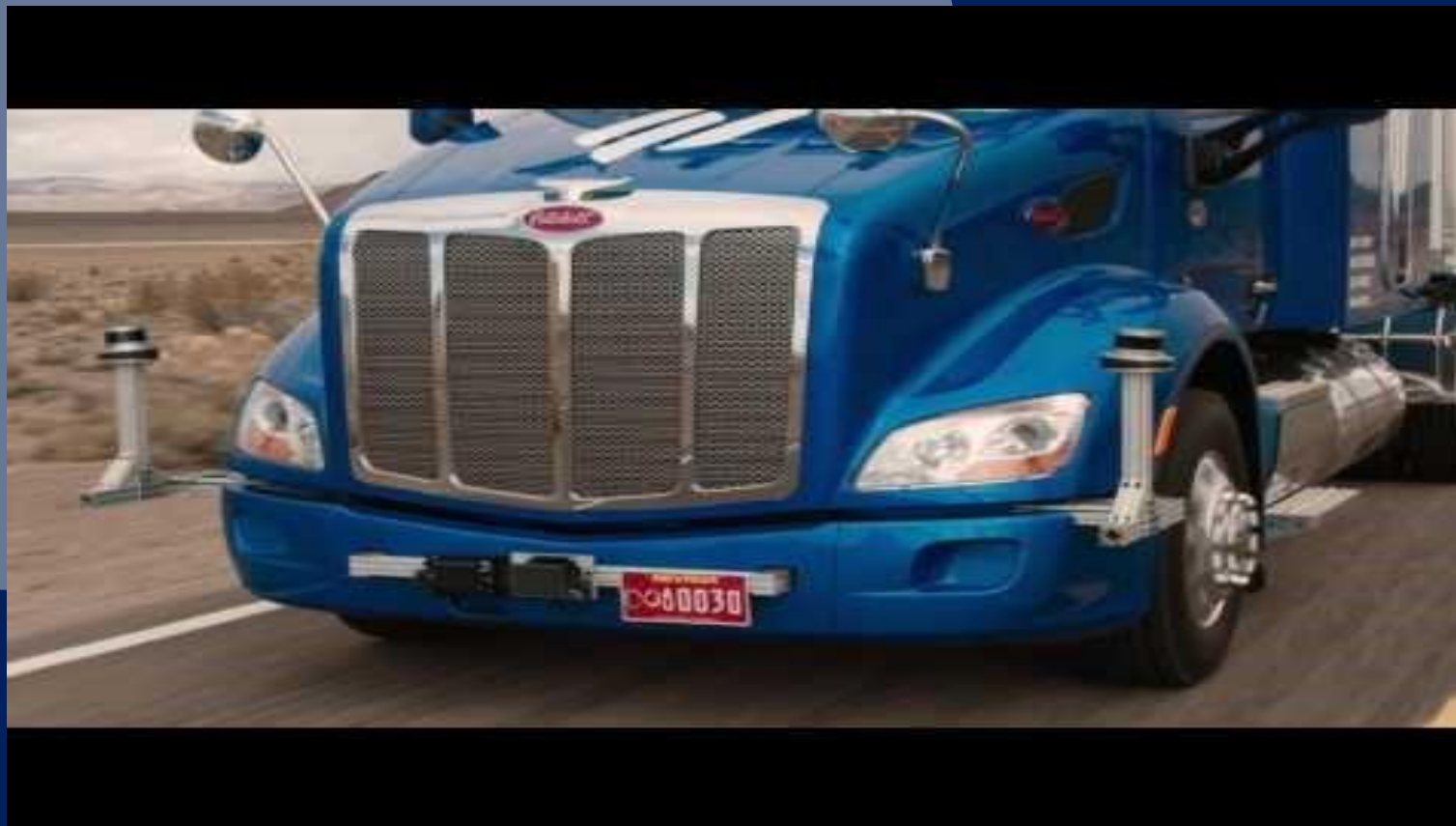


Source: [Insurance Institute for Highway Safety - Highway Loss Data Institute](https://www.iihs.org/)

# Self-Driving Trucks

- Generally: Sensors, cameras, radars, and satellite tracking operate in conjunction.
- Two general types:
  - Fully autonomous
  - Partly autonomous, with driver on standby to operate as needed

# Self-Driving Trucks



# Self-Driving Trucks

- Google
- Tesla
- Mercedes-Benz
- Volvo
- Embark
- Uber
- Einride

# Self-Driving Trucks

- Theoretical benefits:
  - Payroll savings
  - Driver shortages
  - Efficiency - No hours restrictions
  - Safety?
- Practical issues:
  - Jobs
  - Politics
  - Will this function properly?
  - Public perception
- Legal issues:
  - Negotiating liability through legislatures and contracts – If an autonomous vehicle causes an accident and is sued, who foots the bill: Tech manufacturer? Trucking company? Both?



# Samsung's "Safety Truck"



# Forward-Facing and In-Cab Cameras

- Type 1: Saved video triggered based on hard braking or similar event
- Type 2: Continuously saves video

# Legal Considerations with New Technologies

## **Federal Rule of Civil Procedure 37(e): Failure to Preserve Electronically Stored Information.**

If electronically stored information 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 a party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

# Legal Considerations with New Technologies

- Double-edged sword: can give both good evidence and bad evidence.
- Can make company more sympathetic.
- Can also create unrealistic expectations.

At the very least: Need to be knowledgeable about this technologies, and in the event of a lawsuit, need to be prepared to address them.



# ALFA International Webinar Series

*Preservation of all things Technology*

*Timothy L. Spencer*

FRANDEN | FARRIS | QUILLIN

GOODNIGHT + ROBERTS

Tulsa, Oklahoma



# DISCOVERY AND THE PRESERVATION OF RELEVANT DOCUMENTS

- Generally, what is the duty to preserve documents?
  - It is clearer to view it as your duty to avoid spoliation of relevant evidence.

# WHAT IS SPOILIATION?



- Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

# FEDERAL RULES OF CIVIL PROCEDURE 37(E)

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# WHEN DOES YOUR DUTY TO PRESERVE BEGIN?

- **The Easy Answer:** Your duty begins when you have notice that the evidence/document is relevant to litigation (litigation has commenced or a governmental investigation)
  - BUT you may also have a duty to preserve when you reasonably anticipate litigation to follow (including pre-suit knowledge).
  - Determining when the duty to preserve is triggered is fact-specific question.
  - A “LITIGATION HOLD” SHOULD BE PUT IN PLACE AT THE TIME LITIGATION IS REASONABLY ANTICIPATED.

# WHAT FACTUAL SCENARIOS TRIGGER PRESERVATION?

## Triggering:

- Service of Process
- Written request to preserve
- Criminal charges against an employee
- Employee threatens suit during termination argument
- Fatality accidents

## Potentially Non-Triggering:

- Simple Disagreements
- Minor motor vehicle accidents

Err on the side of caution, as the Court will weigh the facts at hand and determine when you should have reasonably anticipated litigation.

# WHAT ARE YOU EXPECTED TO PRESERVE?

Everything . . . REASONABLY KNOWN to be related to the issue at hand.

- You are NOT obligated, upon reasonable anticipation of litigation, to “preserve every shred of paper, every e-mail or electronic document, and every backup tape.” *Zublake*, 220 F.R.D. at 217.
- Depending on the situation, preservation could include any type of document or information, such as Electronic Data records, log books, photographs, cell phones, text messages, emails, memoranda, plans, time records, contracts, and correspondence.
  - This includes individuals who are likely to have discoverable information like EMPLOYEES.
- Preservation is required until litigation is completed OR litigation is no longer possible.

# FAILING TO PRESERVE CAN PROVE COSTLY

- Failing to take reasonable steps to preserve data in anticipation of litigation then opens the door for potential sanctions, under FRCP 37 and/or a Court's inherent power.
- Generally a court will consider two things: (1) level of culpability (was the failure intentional?) and (2) was the other party prejudiced by the spoliation?
  - Intent? – The Court can order sever sanctions such as dismissal or negative inferences.
  - Unintentional? – The Court may order sanctions which appear necessary to resolve the prejudice.

# HOW DO YOU PROTECT YOURSELF AND YOUR COMPANY?

- The implementation of a scheme / policy should be as formal as possible, with specific guidelines on how to handle preservation.
  - The policy should include the process for maintaining / identifying: relevant record holders; relevant records; emails; driver files; etc.
  - The Policy should also include a document destruction plan, supporting and outlining the process for destroying documents after a specific timeframe has expired. (e.g. phone messages a shorter time than driver road test results)
- Every company's policy will be unique as no one company is the same. A company with more financial ability may be more apt to save every possible document and bite the bullet on the cost of preservation; however, a smaller company may need a more specific set of preservation guidelines to only keep necessary documents.



# ALFA International Webinar Series

*Rapid Response in the Automated World*

Daniel J. Bristol  
Hall & Evans, LLC  
Denver, Colorado



# Rapid Response in the Automated World



Daniel J. Bristol







# Have a Plan

- Preserve Evidence
- Assemble a Team
- Site Inspection
- Interviews
- Vehicle Inspection
- Search for Evidence / Surveillance Video
- Social Media Capture
- Crisis Communications Plan

# Preserve Evidence

- Spoliation of Evidence
  - Adverse Inference
  - Has become a “sword” rather than a “shield”
  - Some Courts Enforce Sanctions for Even “Negligent” Destruction of Evidence
  - *Pfantz v. Kmart Corp.*, 85 P.3d 564, 566 (Colo. App. 2003)
- Send Internal Preservation Email to Employees
  - ELD’s, Qualcomm, Dash Cam, Trip Records, Driver Files, etc.
- Do Not Drive Truck
- Send Preservation Letter to All Parties

# Assemble a Team

- Counsel
- Independent Adjustor
- Accident Reconstruction Expert
- Company Representatives / Point People
- Public Relations Professionals

# Rapid Response: the Attorneys' Role

- Facilitate and Direct Investigation
- Cloak the Investigation in Privilege
- Protect the Client on Multiple Levels
- Assess Liability and Damages

# Site Inspections

- As Soon as Possible
- Independent Adjustor Usually First Member of Team on Scene
  - Good Adjustors Are Well-Connected
- Build Relationships
  - Law Enforcement / Towing Company / Witnesses
- Should Counsel Go to the Scene?
- Accident Reconstruction Expert
  - Document the Scene ASAP
  - Three-Dimensional Scanning / Drones

# Incident Reports and Witness Interviews

- Attorney Should Interview Driver / Employees in Person
- Attorney and Driver Should Work Together on Incident Report
- Independent Adjustor May Interview Witnesses on Scene
- All Interviews Should Be in Person if Possible
- Memories Fade: Memorialize Facts
  - Obtain Affidavits From Useful Eyewitness

# Vehicle Inspections

- Preserve Your Vehicle and Provide an Opportunity for Inspection
- Ask Opposing Party to Preserve Their Vehicle
- Accident Reconstruction Expert
  - Pictures, Three-Dimensional Imaging, Downloads
- Get Permission
- Have All Parties Present for Inspections of All Vehicles

# Walk the Neighborhood / Look for Evidence

- Get the Lay of the Land
- Speak With Neighbors or Workers in the Area
- Request Surveillance Video



# Social Media Capture

- Get ASAP Before Claimant Catches On
- Capture Meta Data
- Update Social Media Capture Periodically

# Real Life Social Media Capture

Josh claims he can't work out anymore or practice Jiu Jitsu—yet Josh continues to work out and practice Jiu Jitsu.



# Crisis Communications

- Have a Crisis Communications Plan in Place
- Consider Retaining a Public Relations Firm
- Identify Your Spokespeople
- Spokespeople Training

# Conclusion

- Prepare, Prepare, Prepare
- Preserve Evidence
- Assemble a Team
- Site Inspection
- Interviews
- Vehicle Inspection
- Search for Evidence / Surveillance Video
- Social Media Capture
- Crisis Communications Plan



# ALFA International Webinar Series

## *Dealing with Law Enforcement*

Andrew L. Douberly  
Dickinson & Gibbons, PA  
Sarasota, Florida



# Patience

Recognize that traffic crashes and property damage claims are NOT the top policing priorities in your area—nor should they be.

It often takes weeks if not months for officers to complete their reporting, especially Traffic Crash Homicide Reports.

In some jurisdictions, law enforcement will not allow anyone near a traffic crash, making early information gathering more difficult.

# Contacting the Officer

Local counsel is usually quite helpful. We deal with these people quite a bit. Personal relationships are very helpful.

Get the officer's direct line AND email address from the police department front desk. Leave a message with your phone number AND email address.

Officers routinely shift their hours of service between the day and night shift (i.e. they rotate). Very commonly their work shift is when you're asleep. Email them.

If you simply cannot get ahold of the officer, ask the front desk for the officer's Sergeant. This is their direct supervisor and often times the best way to get a call back.

# Property and Evidence

When you speak with the officer, be sure to ask about any and all evidence collected. Often times they will have secured something that could be helpful or critical to your early evaluation. For example, I once had an officer pick up a drive-cam in the woods surrounding a nearby crash. The owner-operator of the tractor was in a coma, so we did not know of its existence until much later.

Property and Evidence Department will only provide items to the vehicle owner or family. Best to have written agreements with owner-operators that the company can obtain the property if the driver is unable (or unconscious). Or, be sure to have driver's family members' contact information to facilitate obtaining that evidence.



# Helping Law Enforcement Investigate Claims

Do NOT assume that officers have all the information they need. Do assume that they are very busy with other matters. Providing them with helpful information is the best way to facilitate a quicker outcome.

In theft claims, provide the officer with information that singles-out and identifies the property, including a description of the property, unique markings, where the VIN and/or ID number can be located, etc.