To Cooperate or Not…
That Is the Question!

By Brian Del Gatto and Julia Paridis

Use of response teams, as well as driver training, can limit potentially damaging statements.

Consider the following hypothetical scenario. A driver for your motor carrier client is headed to a rest stop for a much-needed break. Before moving into the exit-only lane, he or she checks his or her rear- and side-view mirrors and doesn’t notice any cars in the lane to his or her right. As the driver signals to change lanes and moves right into the exit lane, the driver’s phone rings, and he or she looks down for a second to determine who it is. The driver then looks up just as the right-front passenger side of the tractor collides with the left-back driver side of a four-door sedan.

The motor carrier’s driver pulls over and is confronted by someone yelling, “You hit me!” The person complains of neck and back pain and calls 911. The ambulance arrives and places the sedan driver on a stretcher while he or she lists the various injuries that he or she has suffered, none serious or life threatening. When an officer arrives, he or she takes the sedan driver’s statement first. The sedan driver claims that he or she saw the driver of the truck looking down at something immediately before the truck veered into the sedan’s lane and hit the car, and the truck driver never used the truck’s turn signal. The officer approaches the motor carrier’s driver for a statement.

The next few minutes are crucial and will have a profound impact on the ultimate outcome of this matter for the driver, the motor carrier, and the insurers of each.

**Postaccident Investigations**

The policeman on the beat or in the patrol car makes more decisions and exercises broader discretion affecting the daily lives of people every day and to a greater extent, in many respects, than a judge will ordinarily exercise in a week.


People sometimes don’t report minor collisions. The parties simply exchange insurance information; however, most collisions that result in property damage or physical injuries are reported. And the officer who arrives on the scene of an accident has a duty to investigate the circumstances and to prepare a report. When an officer per-
personally witnesses an accident, his or her first-hand observations become the basis for a report. If, however, as is the case with most collisions, a law enforcement officer arrives on the scene after an accident has occurred, he or she must rely on evidence or information, if any, and the statements of the parties and witnesses to the collision in preparing a report.

While motor carriers should never encourage drivers to lie to investigating officers, they should not voluntarily provide information that may imply liability.

Investigating officers use statements made by the parties during a postaccident investigation to prepare an accident report and, in some circumstances, issue citations to the parties that they’ve deduced are at fault. In extreme cases, they will arrest a party to an accident. See Brian Del Gatto & Michaeille Jean-Pierre, Admissions of ‘Guilt.’ The Boomerang Effect of Traffic Citations, For The Defense 18 (February 2010) (discussing the effect of traffic citations in civil litigation for personal injury in detail).

When police question them, truck drivers often feel compelled to make a statement or to volunteer information that is not required. Generally, motor carriers should encourage drivers to cooperate in investigations and to relate their versions of the events. A police officer will consider all parties’ statements in preparing a report, and if one driver fails or refuses to provide his or her side of the story, the officer will not have a reason to question the other party’s version of the events or assignment of blame. While motor carriers should never encourage drivers to lie to investigating officers, they should not voluntarily provide information that may imply liability belongs with them or their employers. Most states have statutes that require a party involved in a collision to cooperate in its investigation, but a driver should understand the level of cooperation and the amount of information that the law requires a driver to provide.

Liability and Police Reports
A fair suspicion may be well worthy of further investigation, and it may well be worth the expense and trouble of examining witnesses to see whether it is well founded.
—Jessel, M.R., In re Gold Co. (1879), L. R. 12 C. D. 84

While typically inadmissible as evidence to establish the cause of an accident, a police report can set the foundation for a civil negligence action. When someone initiates civil litigation, the insurance carrier of the party allegedly at fault will often begin to investigate by reviewing the police report; the plaintiff’s counsel will do the same. The insurance carrier reviews the police report to determine whether liability is questionable and whether it will defend a claim against its own insured. The plaintiff’s counsel will use the police report to formulate arguments and to prepare a litigation strategy in the prosecution of the plaintiff’s case. If liability or fault is referenced in the police report, the case will escalate into witness interviews and depositions seeking affirmation of that liability. The police report will influence the questions that attorneys ask during the depositions and later during a trial in large part.

Even when one party to an accident does not initiate a civil negligence action against another party, an insurance carrier will analyze a police report to determine whether it will seek subrogation from the carrier of the other party for the payments made to its insured for damages resulting from the accident.

Admissibility of Police Reports in Civil Actions
The admissibility of a police report in a civil action varies throughout the states and is governed by the rules of evidence of each state. In most states, a police accident report generally is inadmissible on the basis that the report violates the hearsay rule. Under Federal Rule of Evidence 801(c) hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Federal Rule of Evidence 801(d)(2) specifies that certain statements made against a party to a particular action are not hearsay and, therefore, admissible. These statements include those made by the party, those of which the party “has manifested an adoption or belief in their truth, and those made by the party’s agent concerning a matter within the scope of his or her agency or employment.

All other statements defined as hearsay are admissible only when they fall under one of the enumerated exceptions of Federal Rules of Evidence 803 and 804. Federal Rule of Evidence 804 provides hearsay exceptions if a declarant is not available, and Federal Rule of Evidence 803 enumerates exceptions for situations in which a declarant’s availability is immaterial. The Federal Rule of Evidence 803 exceptions include, among others, business records prepared in the regular course of business and public records setting forth matters observed under a duty to report.

In Alabama, for example, a statute expressly makes police reports inadmissible: they “shall not be used as evidence in any trial, civil or criminal, arising out of an accident.” Alabama courts have found, however, that this is not an absolute inadmissibility, and while police accident reports are deemed inadmissible because they are hearsay, they can gain admission if they fall within an applicable hearsay exception. See Stevens v. Stanford, 766 So. 2d 849, 852 (Ala. Civ. App. 1999).

For instance, a police report can gain admissibility under the business records exception when the report consists of the reporting officer’s personal observations made while carrying out official police duties. Holliday v. Hudson Armored Car & Courier Serv., 301 A.D.2d 392, 396 (N.Y. App. Div. 2003). However, when information in a police report is based on statements or observations of witnesses under no business duty to make such statements, the report is generally inadmissible. Id. See also Yeargans v. Yeargans, 24 A.D.2d 280 (N.Y. App. Div. 1965); Kratz v. Exxon Corp., 890 S.W.2d 899, 905 (Tex. App. 1994).

Drivers’ Postaccident Duties—Reporting Statutes
Many states’ reporting statutes require
motorists as well as other persons involved in accidents to report the accidents to the police. The information required by such reporting statutes typically includes identifying information such as the driver’s name, address, and driver’s license number, and the vehicle’s insurance and registration cards.

For instance, under N.Y. Vehicle and Traffic Law, §600 any person operating a motor vehicle who, knowing or having cause to know that personal injury has been caused to another person, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the said personal injury occurred, stop, exhibit his or her license and insurance identification card for such vehicle… and give his or her name, residence, including street and street number, insurance carrier and insurance identification information including but not limited to the number and effective dates of said individual’s insurance policy and license number, to the injured party, if practical, and also to a police officer, or in the event that no police officer is in the vicinity of the place of said injury, then, he or she shall report said incident as soon as physically able to the nearest police station or judicial officer.


Under N.Y. Vehicle & Traffic Law §605, in the event of an accident in which anyone is killed or injured, or in which property damage exceeds $1,000, individuals have a duty to report the accident to the commissioner in writing within 10 days of the accident. New York’s motor vehicle accident form MV-104 requests specific information regarding the accident, as required by the commissioner, mainly standard identifying information, such as the driver’s license number and the insurance policy number and vehicle registration number, as well as information pertaining to the accident, such as a description of the accident, the location, the estimated cost and damages sustained by the vehicles, and the injuries sustained by all the involved parties.

Form MV-104 also requests information pertaining to the traffic, weather, and roadway conditions and, more notably, pre-accident vehicle action. This section offers 20 choices for selection, including “making right turn on red” or “making left turn on red,” two selections that imply a statutory infraction. Interestingly, the options also include “making right turn” and “making left turn,” which carry no such implication. These reports typically are inadmissible in a civil action to prove the truth of the matter asserted; courts may, nonetheless, admit them into evidence for impeachment purposes. Motor carrier companies should encourage drivers, therefore, to prepare these reports cautiously to avoid selecting options or making statements that someone may later use against them in civil actions.

State reporting statutes only uncommonly require a driver to make a statement or answer questions regarding causation. However, some statutes only uncommonly require a driver to make a statement or answer questions regarding causation; the driver simply is required to identify him- or herself in the manner mandated by law. Short of providing the identifying information required by statute, a driver normally does not have an obligation to answer the questions of an investigating officer or to make a statement regarding an accident. See State v. Avnayim, 185 A. 2d 295, 298 (Conn. Cir. Ct. 1962).

Obstruction of Justice
When does a driver’s refusal to cooperate with an investigation amount to an obstruction of justice? Typically, during an accident investigation a driver must provide the investigating officer with identifying information, but nothing more. An investigating officer is free to investigate evidence and to draw conclusions based on his or her own observations; however, no one is required to admit culpable conduct, although simply identifying oneself in certain accidents may become enough to infer culpability. Failing to provide or delaying an investigation by withholding such information can amount to an obstruction of justice.

The North Carolina Court of Appeals has held that investigating an automobile accident was a duty of a highway patrolman, and the refusal of a driver to respond to a trooper’s repeated inquiries pertaining to the accident was sufficient evidence to allow a jury to find that the driver obstructed and delayed the trooper in the performance of his duties. State v. Graveran, 2008 N.C. App. Lexis 15 (N.C. Ct. App. Jan. 15, 2008). The driver in Graveran failed to produce his driver’s license and speak with the officer regarding the accident despite the officer’s several requests.

The Supreme Court of Washington has held that a driver’s refusal to produce his driver’s license during an accident investigation was sufficient grounds for an arrest for obstructing a law enforcement officer. Sunnyside v. Wendt, 755 P.2d 847, 852 (Wash. Ct. App. 1988). The court emphasized that the applicable ordinance did not require someone to make a statement when an officer requested one. Insofar as a police officer’s duty to prepare an accident report is reasonably aided by production of a driver’s license, the court reasoned that failure to produce the license could amount to an obstruction of a public servant’s discharge of his or her official duties.

In Avnayim, the Superior Court in Connecticut reviewed the constitutionality of a statute proscribing disorderly conduct. 185 A.2d 295, 298 (Conn. Cir. Ct. 1962). The defendant in Avnayim was involved in an accident, and during the police investigation was described as “belligerent and boisterous, was sarcastic and evasive in his answer, kept shouting ‘None of your business; you are here only to take down numbers; I can say what I want.’” The court held that although the defendant was not obliged to answer the questions asked by the police and the police legally could not arrest the defendant for refusing to do so, his belligerent and boisterous conduct, apart from his right to refuse to answer questions and apart from his right to protest his innocence, “create[d] a commotion or disturbance and thus render[ed] him liable to arrest for disorderly conduct.” Id. at 298.
A driver’s refusal to provide identifying information required by a statute is actionable; the driver’s refusal to provide a statement or answer questions usually is not.

The Fifth Amendment—Criminal Versus Civil Liability

If an accident has criminal implications, the tone of the investigation will change accordingly. Cases involving fatalities or intoxicated drivers, for example, typically will lead to criminal charges and arrests. The investigation of such accidents will become more involved. For example, under N.Y. Vehicle & Traffic Law §603-a, when an accident results in a serious physical injury or death to a person, the police officer’s investigation must cover the following: (1) the facts and circumstances of the accident; (2) the type or types of vehicles involved; (3) whether pedestrians were involved; (4) the contributing factor or factors; (5) whether the investigating officer can determine if a violation or violations occurred, and, if so, the specific provisions that were violated and by whom; and (6) the cause of the accident, if the investigator can determine the cause.

Furthermore, when an accident threatens criminal prosecution, the case will invoke constitutional protections, such as the U.S. Constitution’s Fifth Amendment privilege against self-incrimination. An officer is required under the Fifth Amendment to give the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), to a suspect before the officer asks questions that may elicit an incriminating response. In Miranda, the Supreme Court held that the Fifth Amendment privilege against self-incrimination prohibits admitting into evidence statements made by a suspect during “custodial interrogation” without first warning someone of the right against self-incrimination, now commonly referred to as the “Miranda warning.” Custodial interrogation is defined as questioning “initiated by law enforcement officers after a person was been taken into custody.” Id. at 444. And “custody” can take place anywhere, including on a roadway.

The Miranda warning was meant to preserve the privilege during “incommunicado interrogation of individuals in a police-dominated atmosphere,” said to generate “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Id. at 445 & 467. The Fifth Amendment is not intended to be a refuge for those facing civil liability, according to People v. Kroncke, 70 Cal. App. 4th 1535, 1557 (Cal. Ct. App. 1999).

In California v. Byers, 402 U.S. 424, 427 (U.S. 1971), the United States Supreme Court reviewed California’s “hit-and-run” statute to determine whether it infringed on the constitutional privilege against compulsory self-incrimination. Similar to many states, California’s reporting statute requires a motorist involved in an accident to stop at the scene of the accident and give his or her name and address to the other motorists. The respondent in Byers was charged with passing another vehicle without maintaining a safe distance and with failing to stop and identify himself as required by California law. Focusing on the “[t]ension between the State’s demand for disclosure and the protection of the right against self-incrimination” and “balancing the public need on the one hand, and the individual claim to constitutional protections on the other,” the U.S. Supreme Court found there was no conflict between the hit-and-run statute and the self-incrimination privilege. Id. at 427. The Court further stated that the California statute was “directed at the public at large” and the group subject to the statute was neither “highly selective” nor “inherently suspect of criminal activities.” Id. 429.

In New York, it is a misdemeanor to fail to comply with N.Y. Vehicle & Traffic Law §600, which requires “every motor vehicle operator, whether culpable or not, involved in an accident causing property damage or personal injury, to remain at the scene of the accident, exhibit his license, and identify himself to the party sustaining damage and, in the case of personal injury, to a police officer.” People v. Samuel, 29 N.Y.2d 252, 258 (N.Y. 1971). Following the logic in Byers, the court in Samuel concluded that “the incidental and limited risk of inculpation by identification and report of motor vehicle operators whose conduct involves, or is likely to involve, criminal accusations is insufficient to inhibit the regulatory power by the interposition of the privilege against self[-]incrimination.” Id. at 257.

Conclusion

Weighest thy words before thou givest them breath.

—Othello, act 3, scene 3, William Shakespeare

While a police report and any citations issued as a result of an investigation typically are typically inadmissible in a civil negligence action to establish culpability, attorneys may offer them as evidence in certain situations. Even when a court does not admit a police report into evidence in trials, the statements made by the parties immediately following the accident can have a profound impact on the outcome of a case. It would, therefore, benefit motor carriers to conduct seminars to train their drivers regarding postaccident investigation requirements. Drivers should know what information generally they must produce under the reporting statutes of the states in which they travel. As demonstrated above, this information typically includes identifying information such as the driver’s license and the vehicle’s insurance and registration cards. Motor carriers should also encourage drivers to provide their version of the events; however, they should be advised to use discretion when making such statements.

While it is true that drivers have the statutory duty to provide information to law enforcement officers, emphasize to drivers that it is uncommon for a reporting statute to require a party to make a statement or Postaccident, continued on page 82

When an accident threatens criminal prosecution, the case will invoke constitutional protections, such as the U.S. Constitution’s Fifth Amendment privilege against self-incrimination.
respond to an inquiry regarding the cause of an accident. It is critical to the defense of an action emanating from an accident that a truck driver refrain from making statements from which someone may later infer that liability lies with the driver or his or her employer. In the hypothetical scenario at the beginning of this article, for example, the driver should state only that he or she did not see a vehicle in the truck mirrors when he or she checked them immediately before changing lanes. The driver should not volunteer that he or she was tired or was distracted by his or her cell phone immediately before the accident.

Law firms often immediately dispatch emergency response teams to an accident scene upon notification by the motor carrier if a motor carrier’s exposure is significant. These attorneys understand the applicable reporting statutes and can assess the situation and assist in an investigation in a way that will limit a motor carrier’s exposure. See the article by Durward D. Casteel and Aaron J. Messer, “Investigation of Catastrophic Accidents by Rapid Response Teams,” also in this issue of *For The Defense,* for more about response teams. A response team can limit potential damaging statements by making immediate contact with a driver and can perform other critical functions that can protect a motor carrier after a trucking accident.

In the end, the dual efforts of training drivers and dispatching attorney emergency response teams can limit postaccident causative statements.