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Working with an FMCSA Regulations / Hiring and Retention Expert

by Christopher E. Cotter and Stephen B. Chewning



An often critical expert in trucking litigation for the defense is a person qualified to offer opinions concerning the regulations promulgated by the Federal Motor Carrier Safety Administration ("FMCSA") and their application to the operations of a motor carrier in the lawsuit. The use of FMCSA regulations experts by the plaintiffs' bar has been increasing in recent years. The intention is to invoke fear in jurors of the motor carrier and as a means for introducing inadmissible evidence.

Motor carriers can and should hire FMCSA regulations experts to evaluate and explain to the jury the practices of the motor carrier and its commercial drivers, and to explain the errors in the opinions presented by the plaintiff's expert. In the manuscript and accompanying presentation, we will explore the use of an FMCSA expert, when such an expert is needed, the types of opinions typically offered by plaintiff's FMCSA expert, strategies for excluding plaintiff's FMCSA expert, and preparing for and defending the defense FMCSA expert deposition.

I. What Is an FMCSA Regulations / Hiring and Retention Expert?

An FMCSA regulations expert has knowledge, experience and training in applying the regulations to a motor carrier's operations. In the litigation context, such an expert can address in the lawsuit whether specific practices of the motor carrier, including actions by its drivers and other employees, complied with the FMCSA regulations. A motor carrier's hiring and retention practices is one such specific area that an FMCSA regulations expert is qualified to address.

For a typical personal injury trucking lawsuit, in which an injured person brings a lawsuit against a motor carrier, an FMCSA expert hired by the plaintiff may offer opinions that are critical of the motor carrier's operations and/or its commercial driver. An FMCSA regulations expert hired by the defendant motor carrier can address opinions given by the plaintiff's expert and can also independently address the motor carrier's compliance with the regulations.

II. When Is an FMCSA Regulations Expert Needed?

In a typical lawsuit where a motor carrier's operations or conduct of its commercial driver are in dispute, the plaintiff will hire an FMCSA regulations expert to present opinions critical of the motor carrier, driver, or both. Certainly, in such a situation, the defendant motor carrier will want to hire its own FMCSA regulations expert to criticize plaintiff's opinions and to address the same topics addressed by the plaintiff's expert.

Sometimes, the defendant motor carrier will want to hire an FMCSA regulations expert to address issues related to one or more of its affirmative defenses, or to address issues related to its counter-claims against the plaintiff or third-party claims against other companies that hire commercial drivers.

For example, consider the case in which the plaintiff, a CDL driver, had stopped his commercial motor vehicle on side of a highway at night and failed to place reflective triangles as required by the FMCSA regulations. While parked on the shoulder of the highway, his vehicle was side-swiped by a tractor-trailer operated by defendant driver on behalf of the defendant motor carrier. In that case, the



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defense hired an FMCSA regulations expert to support its affirmative defense of comparative fault. The expert offered opinions concerning the placement of the reflective triangles, among other matters.

III. Types of Opinions From the Plaintiff's FMCSA Regulations Expert

First, here is the most common type of statement we see from FMCSA regulations experts hired by plaintiffs:

The regulatory standards, as specifically promulgated by the FMCSA regulations, are the minimum safety standards for which all involved operators of CMVs must comply. These same regulatory standards anticipate and permit motor carriers to require and enforce more stringent standards relating to safe operations, employee safety and/or employee health. (citing 49 C.F.R. 390.3(d)).

The overall strategy with this statement is to instill in the jury the mistaken belief that compliance with the FMCSA regulations is not sufficient and to make any non-compliance with the regulations, however slight, seem as though the carrier could not even comply with the bare minimum.

This type of statement is wrong because it mischaracterizes the regulation upon which it is purportedly based. Part 390.3(d) *actually* states:

Nothing in subchapter B of this chapter shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.

49 C.F.R. 390.3(d). Notice the word "minimum" does not even appear in the regulation. The regulation simply notes that a motor carrier cannot be penalized for establishing safety policies that contain more stringent requirements. It is therefore ironic that the plaintiffs' bar attempt to use the regulation to penalize the carrier in the civil lawsuit.

Another common strategy among the plaintiffs' bar as it relates to the FMCSA regulations is to identify during discovery each and every potential violation of the regulations by the motor carrier and/or its commercial driver. The plaintiff's expert then assembles all of the violations or putative violations, however minor, distant in time, or irrelevant, and offers opinions characterizing the motor carrier and/or driver as unsafe based on an accumulation of the alleged violations.

For example, consider the same lawsuit discussed above involving the sideswipe accident. It was revealed in discovery that the defendant commercial driver may have had one log book issue earlier in the evening, he had eaten a Subway sandwich about three hours before the accident, and there was questionable testimony of an eyewitness that he saw the driver swerve in and out of his lane more than 20 minutes before the accident. The plaintiff's FMCSA regulations expert offered the following opinion based on this evidence: "[Mr. Smith's] driving on the night of [January 1, 2015] can be characterized as egregiously unsafe."

Another common strategy among the plaintiffs' bar is to latch onto the testimony of the motor carrier's driver's concerning driver training. For instance, the driver will be asked during his deposition whether he is familiar with the SMITH System, or another driver training program. He will be asked whether he agrees with statements from these training materials. The plaintiff's FMCSA regulations expert will then hold him to the standards he claims are set forth in the materials.

For experienced drivers in fleet service with a valid CDL, there is in fact *no* Federal Motor Carrier Safety regulation or State Law that requires specific in-service training for drivers in the fleet outside maintaining familiarity with FMCSR or hazardous materials regulations if appropriate for the individual driver.

It should be noted that drivers on the roads today are controlled by 3 items:

1. The Federal Motor Carrier Safety Regulations
2. The laws of the jurisdiction in which they are operating
3. The rules and procedures of their employer

There are a wide variety of materials related to Commercial Vehicle and CDL driver safety and compliance. These materials are published by both private and governmental organizations. These materials are *not* binding on a driver unless they have been adopted in the 3 areas listed above.



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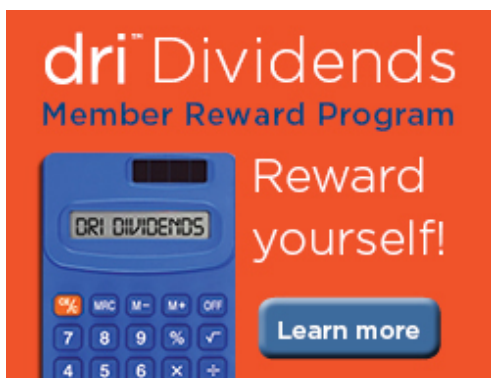
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If such a document is produced by the FMCSA expert for the plaintiff or presented to your expert in deposition, they must be immediately identified as not binding or controlling on your driver or motor carrier.

A third common strategy among the plaintiffs' bar is to equate a motor carrier's lack of a training program with negligence. This is simply wrong. It is not necessary, nor is it the industry standard of care, for a motor carrier to have a training program. So long as the carrier has adequate hiring policies and standards in place, there are many acceptable means for motor carriers to get qualified drivers behind the wheel.

Finally, a note about felony convictions. An FMCSA expert offering opinions for the plaintiff will sometimes opine or imply that a driver should not have been hired because he has a prior felony conviction. However, the prior conviction generally has nothing to do with whether someone has the requisite *skill* to drive a commercial motor vehicle. This is simply an attempt to introduce inadmissible evidence at trial. There is no FMCSR that prohibits a CDL driver from operating a Commercial Motor Vehicle on the basis of a felony conviction unrelated to driving such as fraud or burglary.

IV. Strategies for Excluding or Limiting the Plaintiff's Regulations Expert

There are often many reasons for the exclusion of plaintiff's FMCSA regulations expert. Most of them arise out of Rule 702-703 of the Federal Rules of Evidence, or the state law equivalent. The bases can be summarized as follows:

1. Not Qualified. The expert lacks the expertise to offer opinions in this specific area. Lack of a Certified Director Of Safety Designation (CDS) or Certified Transportation Professional (CTP) is a key indicator of persons who want to offer opinions but have not done the work to be certified to be a professional in this field. This lack of certification may reflect lack of underlying experience that would qualify, inability to pass the testing and certification procedures, OR the certification that may have been previously held has expired or been withdrawn.
2. Not Reliable. The expert's opinions are not supported by sufficient facts and data.
3. Not Helpful. The expert's specialized knowledge or expertise is not required. Here, watch for the double-edged sword. If the defense will be presenting an FMCSA regulations expert to offer opinions, his opinions may be stricken on this basis as well, since the basis relates to the area generally and not to the plaintiff's expert's specific opinions or qualifications.
4. Irrelevant. The expert's opinions do not bear on an issue in dispute in the case (e.g. the driver's negligence, where the driver's negligence has been admitted).
5. Unduly Prejudicial. The expert's testimony is specifically designed to inflame and anger the jury in a manner unduly prejudicial to defendants and misleading to the jury. Keep in mind, the expert brings an aura of reliability and trustworthiness to the trial that may be unwarranted and improper.
6. Cumulative. When another expert is opining on the same issue.


At some point during the litigation, the defense should file a motion in limine to exclude plaintiff's FMCSA regulations expert on one or more of these bases.

V. Play Offense With Your FMCSA Regulations Expert

When your driver and/or motor carrier exhibits excellent statistical data within the FMCSA scoring system, has a computed crash rate per million miles far below the FMCSA threshold, or has extensive Safety Management Controls in place pursuant to Part 385 of the FMCSR, use that data to defend the overbroad and frequently over reaching attacks of the plaintiff's expert who will likely ignore such data.

VI. Preparing for and Defending the Defense FMCSA Expert Deposition

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At least a day or two should be set aside to prepare the defense expert for his deposition. All facts and evidence related to the expert's opinions should be reviewed prior to deposition. He or she should be prepared to stand by the opinions contained in the expert report. All hypothetical questions should be explored in anticipation of questions that may be asked during the deposition. The expert should be ready to criticize the plaintiff's FMCSA regulations expert and be ready to articulate the reasons for the criticism.

The FMCSA expert is often a critical expert in trucking litigation for the defense. Since the use of FMCSA regulations experts by the plaintiffs' bar has been increasing in recent years, it is important for the defense to be prepared to criticize and exclude the opinions and to offer opinions from its own FMCSA regulations expert.

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