

**2. “10-30, 10-34, 10-42,
10-9, 10-9, Good Buddy”**

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WELCOME TO THE REVOLUTION**

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Question #1: Why do I care about helping you do the best possible work in trucking cases?

Question #2: How can you do the best possible work?

Part one of this article answers question #1. If you're in a hurry, skip to part two.

PART ONE

1953. Connecticut.

Corner of Aberdeen Street and U.S. 1. Stamford. Neighborhood of Italian, Jewish, and Irish immigrants, their American-born children, and us, their grandchildren.

Bottom of a rising hill. U.S. Route 1, an aging concrete snake called the Boston Post Road. Winds south to Florida. Interstates not yet a gleam in Ike's eye. From Aberdeen Street downhill and then up to the Conde Nast campus, then into Greenwich and Cos Cob to New York and Philly to D.C., through swamps and tobacco and cotton down into Alabama and past alligators finally to Miami. Old snake, Route 1.

"Take me along" was every Aberdeen Street kid's last thought every night. We dozed off to unmuffled diesels growling in low gear like sirens luring us up to Conde Nast, their exhilarated roars at the crest dragging our dreams south down old snake to Miami.

We lusted to go. But we were age 11. Years later we went – all but one of us. Back in the day all we did instead was trudge the nine-tenths of a mile the other way, north to Stevens Elementary School. Sidewalks, houses, stores, people the whole way. Safe as momma home even for little kids much less us sixth-graders.

1953. October. 2:25 P.M.

Sunny day. Second floor of Stevens School. Miss damn Knapp's damn fifth grade across the hall, again five damn minutes out early, her usual reward to her fifth-graders for their damn brown-nosing. Their early freedom riles our sixth-grade Miss Burns, who

along with Miss Knapp taught us more than we'd ever need. Our Miss Burns says again she'd sooner eat a turkey neck than ruin our lives by freeing us five minutes early.

So me and Paulie Goldblatt get out at the ordained 2:30, five minutes after fifth-graders Joey LaBuglio whose momma was fat and Eileen Daily and Eileen's twin Ellene Daily. Paulie lives next door to me. Eileen and Ellene five houses down on Aberdeen. Joey LaBuglio by Eileen and Ellene. Joey is the only Italian only child on the block, or anywhere, far as I know.

Joey and Miss Knapp's other fifth-graders have a five-minute head start on me and Paulie. So me and Paulie walk fast.

Suddenly snake and rubber scream at each other. Something bangs so loud it's maybe the atom bomb we'd learned to cover our eyes for. So loud we can't tell if it's behind or out front or underground or where. So loud Paulie is crying, and almost me too. I tug Paulie's shirt so he'll keep walking.

In two blocks: smoke and people and a grey tractor-trailer on its smoking side across the road and sidewalk over onto Marie Petrone's front-yard tomatoes, trailer scissored shut against its tractor, tractor backwards on its roof, doors open, Negro driver lying out the door maybe dead or maybe out cold, blood across his poor face, eyes half shut.

Paulie stops crying. Grownups push the kids along but we don't go. Gas station guy from the corner looks at the upside-down tractor and says, "Busted rod. Rusted through. Son a bitch truck company." First time I heard a grown-up swear near kids. Garage guy says it again. "Son a bitch truck company. *Oughta be a law!*" Crowd gets angry. Police and ambulance and fire department show. Neighborhood guys still in combat boots from 1945 drift out of side streets to look and help. Cops make kids move on. Paulie and me hang on with Eileen and Ellene Daily. No Joey LaBuglio.

"We got to go!" Paulie says but Eileen and Aylene stand staring at the trailer lying across the sidewalk. "*We gotta go*" says Paulie and pulls them. They scream. I look where they are staring. Blood is coming from under the trailer onto the sidewalk. It looks real.

The guys in combat boots see it and say they're gonna go fight the truck company. Truck's sign says Oregon. They say they're going anyway. Never did. Nobody had money for Oregon and anyway what would they have done? Kick a building?

Two old ladies come with Joey's fat mother. She is screaming. She is trying to lift up the trailer. Cops drag me and Paulie and Eileen and Ellene half a block away. "Keep going" they tell us. Me and Paulie walk Eileen and Ellene home. I go home and try to tell mommy but I cry. She gets scared because she doesn't know why I'm crying and I can't tell her.

Joey LaBuglio never got over snake's crest by Conde Nast to coast down to Florida. Never got to Miss Burns' sixth grade. Banged flat before Miss Burns could teach him more than everything he'd need to know.

Did the bleeding Negro truck driver die there? Or years later of old age? Or in Korea or 'Nam? Or get hit by some other truck? Or is he still alive in some old age home, crazy that his trailer banged down Joey LaBuglio?

On the last day of sixth grade I thanked Miss Burns for never letting us out five minutes early.

1953, a rusted rod. 1953, '54, '55 2005,6,7,8 . . . now it's negligent hiring, negligent training, negligent supervision, overtime driving, backing onto a road at two a.m. in fog, 30-foot concrete wall tied down wrong falls off a flatbed into the oncoming lane, more rusted-through rods: *Oughta be a law*.

Miss Burns, long gone. Joey LaBuglio, long dissolved in his little-boy grave. And all we got, friends at the bar, is you.

PART TWO:

So, dear Trial Lawyer, three important things about trucks:

First: Of all instruments of negligence, vehicles are the most ubiquitous.

Second: Of that ubiquity, trucks are by far the most dangerous.

Third: Those trucks are all over the place. This is obvious, of course, but its importance to trial strategy may not be so obvious. Jurors en route to and from trial day after day see dozens of trucks, just as everyone sees trucks every day of their driving lives.

Together, these three facts shape your early plan of attack in every trucking trial. Jurors base decisions on what they see in real life more than on anything they hear in trial. In trucking cases, you have the unusual opportunity of controlling how jurors view the defendant in real life before and after every trial day: trucks. You can have the jurors thinking your thoughts as they look at the 18-wheeler three feet away at a stop light or on a freeway.¹

If you have not carefully read and mastered the techniques in this masterful little volume, stop reading this article and study *Rules of the Road*. Then come back to this article.

Here's how this works.

Early in trial, starting with mid-opening,² familiarize jurors with everything on a truck that can be dangerous. Include everything that can make trucks dangerous. Include even those that did not contribute to the wreck in this case (they are material to deciding what constitutes ordinary care for a truck driver, because the more dangerous something is, the more carefully it must be controlled.).

Explain to jurors that they need to know these things so they can see 1) the high level of care that constitutes ordinary care for a truck driver and the company, and 2) the ease with which a truck driver and the company can meet that level, and 3) the obligation of the company to make sure its driver knows how to and in fact does meet that level. Explain that these things are all life-or-death requirements. No driver or company has any right to endanger anyone. Whoever has a hand in creating a potential danger is required to protect against it.

There are at least five categories of possible dangers:

1. All the external things on a truck that a driver and company must make sure are in good shape and working properly. Lights, rear crash-bars, mirrors, reflectors, hoses, etc.
2. Those things not externally visible: brakes, couplings, etc.
3. Vehicle characteristics that increase danger levels in comparison to cars: truck weight, height, momentum, mass, size, visibility problems, stopping distance, inability for a truck

¹ The term "truck" in this article means 18-wheeler plus tractor.

² The optimal structure for a plaintiff's opening is described in *David Ball on Damages*, 2nd Edition. National Institute for Trial Advocacy.

driver to recover from a lapse in judgment or attention, high and shifting center of gravity, lack of maneuverability, etc.

4. The quality, competence, and mental condition of the driver.

5. The care the driver takes.

An art appreciation class teaches what to see in a painting. In trial, you must give a “truck danger appreciation” class to teach jurors what to see next time they are near a truck. You want jurors to think, “Look at the size of that tire compared to my whole car! Thank God the driver is supposed to check that it’s on tight, and thank God that’s simple for the driver to do!”

The next step is to develop the rules for your case – rules which exist because of the dangers you just taught.³ Above all, remember that a rule is not a rule until both sides agree on it. So having the rules affirmed by the defense witnesses becomes an important part of discovery. One important rule in every trucking case – which the defense will have to agree with – is this: “**The more dangerous something is the more care it requires.**” This flows easily out of your “truck danger appreciation course.” It is fundamental both to law and common sense. Ordinary care as well as grandma dictates that you carry a live rattlesnake more carefully than a dead rattlesnake.

With even just that one rule in place, it is easy for you to show how rigorously high “ordinary care” is for truck drivers and trucking companies.

Simultaneously, you need to show how easy it is to maintain that rigorously high level of care. Do not show the former without *simultaneously* showing the latter, or jurors will excuse the defendants’ failure to meet that rigorously high level.

Since you have the burden of showing that the truck driver did not exercise the care that driving a truck takes, you have the right to show why truck drivers have to be far more careful than car drivers. *Ordinary care for a truck driver means constant attention to everything dangerous there is about a truck.* The key word is “constant”. A car-driver’s minor error or omission is nowhere near as dangerous as a truck driver’s – because the truck driver cannot recover from the lapse as readily as a car driver, and the truck can do far more harm than a car. Result: Public menace. Lethal. Child threatening. Unjust way to earn money. Important to fix.

³ *Rules of the Road* by Pat Malone and Rick Friedman. TrialGuides, 2006.

These are the main points of trucking cases, yet jurors are rarely focused on them in an effective way. Get them focused by making these points the foundation of the duty truck drivers and companies have. “It’s dangerous so they have to be careful and it’s easy to be careful.” All a truck driver has to do is maintain full attention on driving safely and defensively. Follow just a few simple common-sense rules. In most cases, these rules will include but not be limited to the following:

- 1. A truck driver must *never exceed* the allowable driving hours, because:**
- 2. A truck driver’s *full attention* must always be on the road, no lapses. If a truck driver cannot do this, he must stop driving.**
- 3. A truck driver must *anticipate any dangerous situation* that either surrounding conditions or other drivers might create, so that the truck driver can take steps in time to prevent involvement in a wreck.**
- 4, etc: A truck driver must keep at a safe distance for a truck, must look where’s he’s going and see what is there to be seen, must plan ahead, must drive at a speed safe for conditions, etc. etc.**

Every defense witness will have to agree that such rules are valid. Then all you have to do is couch the behavior of the defendants in the structure of those rules.

Aside from rules, there are also *truths* that become standards as soon as the opposition agrees with them, in the same way that rules become rules as soon as the defense agrees with them. For example: “**A truck driver’s last clear chance to avoid or prevent a wreck usually comes sooner than a car driver’s.**” This is because a car is easier than a truck to maneuver out of trouble. While not a rule, this truth helps you as soon as defense witnesses agree with it, which they have to do. Other such truths:

- 1. An 18-wheeler is likely to cause far more damage than a car.**
- 2. “An 18-wheeler is one of the most dangerous things on a highway because it can kill and maim the most people.”**
- 3. “The safest person in a wreck involving an 18-wheeler is usually the 18-wheeler’s driver.”**

The defense obviously has to agree with such rules and truths. So they become the basis of your case strategy. Your “truck-danger appreciation course” focuses jurors on how dangerous trucks are, how such danger requires great care, how easy it is to be that

careful (just follow the rules), and how much harm ignoring the rules can do and in fact did in this case.

Truth: Unless the rules are followed, every 18-wheeler creates its own danger zone.

Rule: A truck driver and a truck company must make their truck's zone safe. Trucking companies make a profit by putting trucks on the road. Allowing the truck to create a danger zone around it is **negligent, because – as the rule requires – the truck company and the driver must fully contain the danger. If they cannot, they must not put the truck on the road.**

This general approach, rather than focusing only on the specifics of your particular case, makes jurors keenly aware of what they share the road with every day. This helps you make every trucking case what it should be: a matter of personal survival and the survival of one's children. Thus the duty of truck drivers and companies becomes deeply personal to jurors. Such personalization is important in every kind of case. But the ubiquity of trucks and the ease of showing how dangerous they are, and how easily a driver and company can control the monster, make such personalization easy to accomplish in trucking cases. Once you do it, the jurors will drive home that day with a new way of looking at trucks.

And that provides the necessary greater context for your case. It gives jurors a sense of proportion. It shows jurors that their welfare is affected by the outcome of the case. Ultimately, it tells jurors how important it is for them to heed and stick to the evidence, and heed and stick to what the trucking company in your case has done to cause harm.⁴

Result: an interested and deeply concerned jury attuned to the importance of the case. They will understand (because you will help them understand) that a defense verdict, or a low dollar verdict, will send a message that makes the juror's own -- and everyone else's -- survival less likely. You want jurors to see that *"This case is about me and my family."* If you don't lead jurors there, you have not done your job. Establish this

⁴ See chapter in the appendix on voir dire in *David Ball on Damages*, 2nd Edition; National Institute for Trial Advocacy. Other excellent jury voir dire resources: *Blue's Guide to Jury Selection* by Lisa Blue and Robert Hirschorn, *AAJ Press, 2004*; and *JuryWork: Systematic Techniques* by the National Jury Project, West Publishing; and *Practical Jury Dynamics* as well as *Jury Competency Juror Compassion*, both by Dr. Sunwolf, West Publishing.

point in opening and with your first few witnesses. If you do it carefully, you can also establish it to some extent in jury voir dire.

Here is your next fundamental point: The job of a truck driver is not merely or even mainly to drive. *The primary job of a truck driver is safety.* That is based on rules the defense witnesses either must agree with or seem dishonest or willingly careless. **“In a truck driver’s job, safety is first and everything else is second.”** And, **“A truck driver is never allowed to sacrifice safety for any reason.”**

Remember that these become rules only when the defense agrees – as they will have to, unless they choose to appear stupid or willingly careless.

Here are more crucial rules:

1. “A trucking company’s first consideration when hiring must be safety.”
2. “A trucking company’s most important training job is *safety*.”
3. “A trucking company must *supervise its drivers for safety* more carefully than for anything else.”
4. “A trucking company’s first consideration when deciding *whether to keep a driver* is to gather the information necessary to seeing if the driver is safe.”

Such rules always make sense, but in the context of the approach described in the first part of this article – the danger of a truck, the ease with which it can be kept safe, the high risk of enormous harm – those rules become gold standards.

If you try your case without all of the above, jurors will tend to gauge the truck driver’s actions by their own as they drive their cars, and assume that that is all the company had to make sure of. But in the full glare of your showing how dangerous trucks are and how simple and necessary it is for the drivers and companies to make them safe – and how any failure to do so threatens everyone and their families – jurors become far more demanding of the level of care that constitutes ordinary trucking care. And you will have transformed the case from being only about the defendants to being about the jurors as well – jurors looking at that giant monster alongside them at the light on or the freeway, with echoes of your teaching in their heads.

To jurors, a well-prosecuted trucking case can have more to do with public (and thus their own) safety than almost any other kind of case.

CONTRAST:

Once you have shown the extreme danger trucks pose, and the ease of making trucks safe, show that the defendants know very well how to be careful when they want to – *when it impacts their money instead of public safety*. Simply show the level of care the defendants are using here in trial to protect their money as compared to the level of care they used to protect the public out on the highway.

- In trial the defendants use no lawyers or experts hired at random without background checks.
- In trial the defendants left no stone unturned to protect their 20 million dollars; they used the highest possible level of care to protect their 20 million.
- If the defendants had exercised even a tenth of this level of care in how they hired, supervised, trained, retained, obeyed the rules, or drove, there would have been no wreck.
- They are careful only when caring for their \$20 million.

Depending on the case, argue something like this: “Ladies and gentlemen. Please imagine how careful the company would have been if in that trailer they had their \$20 million in cash instead of someone else’s insured freight. Would the company have used a driver like Mr. Martin? Would they have left the safety of their \$20 million to chance the way they left the safety of the public highway to chance in this case? Or to protect their \$20 million would they have checked and re-checked and then checked again to make sure the driver had a safe record – and checked and rechecked and then checked again to make sure the driver had not driven too many hours to keep his attention on the safety rules?”

“Would they have risked their 20 million to an unsafe [or untrained or unsupervised or carelessly retained or carelessly hired] driver who was too tired to concentrate? Would they have allowed a wreck to maybe burst open the trailer and endanger their 20 million?”

“Their first obligation, as they admit, is public safety. But if they had been protecting their \$20 million instead of the public, they’d have been a thousand percent more careful. Just like they have been in this trial. Their driver would have been one thousand percent more attentive. Just like their lawyers and witnesses have been in this trial. They’d have told their driver that he’d be fired if he endangered their \$20 million in

the back of that truck in any way. But the company does not say anything like that when the only thing at stake is irreplaceable life and limb, instead of the company's replaceable \$20 million."

We have discussed four steps: First, comprehensively show the ubiquitous danger of trucks. Second, show how easily the truck driver and trucking company can prevent that danger, and that the rules require that they do. Third, show that this case is about the juror and his family. And fourth, show that the company knows how to be careful, and that we are only asking that they be as careful with their trucks as they are now being to protect their \$20 million.

Step five is just for you, counsel: Route 1 still winds south from Aberdeen Street to Miami. But by now, innumerable highways go in every direction to and from everyplace. That makes the job of saving the next Joey LaBuglio more pressing than ever, and only you can do it. In other words, if you do trucking cases, you owe an even higher level of care than truckers owe. You owe it to your client, to the public, and to every potential Joey LaBuglio.

We have different jurors than even just a couple of years ago. They are getting worse and more numerous. So you must adjust tactics. Here's your rule: **"Counsel must look where s/he's going with the case, see what is now there to be seen, and adjust to it."**

Otherwise the companies will go on getting away with it over and over and over. And the image in my head of Joey's blood seeping onto the sidewalk from under the trailer can never start to fade.