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In This Issue

Leadership Note

From the Chair

By Matthew S. Hefflefinger

I am not entirely sure how to start the introduction given all of the challenges that we have faced so far in 2020. What a year! Despite all the things happening in our world, our committee continues its hard work and continues to shine.

Mark your calendars—the Trucking Law Seminar is moving forward in Austin, Texas, at the Austin Marriott Downtown on November 19 through November 21. The seminar is planned to be in-person. We will conduct panel counsel meetings on November 19 and the seminar itself will proceed on Friday, November 20 and conclude on Saturday, November 21.

In addition, the DRI Annual Meeting, which this year is called the "DRI Summit," will be held October 21 through October 24. Registration is currently available on the DRI website.

Many thanks to our Publications Subcommittee chaired by Patrick Foppe. We again have four outstanding articles included within this edition of *In Transit*, addressing "Logistical Issues in 30(b)(6) Depositions" (Megan Mole), "Issues Attendant to the Evolving Technology of Autonomous Vehicles" (David Schroeter), "The Impact of Spoliation of Evidence in Trucking Litigation" (Mike Bassett), and "Changing the Perception of Truck Drivers—America's Heroes—in the COVID-19 Era" (Jennifer Hall, Chip Campbell, Shane O'Dell, and Kaitlin Kerr). If you are interested in getting an article published, you can contact to Patrick at pfoppe@lashlybaer.com.

We have an extremely active Online Programming Subcommittee chaired by Melody Kiella. Despite this year's challenges, we have already presented three excellent webinars with more to come in 2020. Looking ahead, we are putting together a number of recorded programs as well as a podcast series addressing the Reptile Theory from the start of a case through the end of litigation. We are pleased that Bill Kanasky, Jr., and Courtroom Sciences have agreed to partner with us in developing this Podcast Series, and we are excited about our future Online Programming activities as we move into the second half of 2020 and begin planning for 2021. You can contact Melody at kiellam@deflaw.com if you want to get involved in an online programming opportunity.

Steve Pesarchick and I want to thank everyone for your hard work and support. The committee would never be successful without the dedication and commitment of so many of you who we are proud to call our friends. If you have an interest in getting involved in what we do, please reach out to either Steve or myself, or anyone else that you may know involved in the committee. As we have always stated, we will find a place for you.

Keep on Truckin' – Stay Safe. Stay Healthy. Stay Cool.

Matthew S. (Matt) Hefflefinger is a shareholder in the Peoria, Illinois, office of Heyl Royster Voelker & Allen PC and is chair of the firm's Trucking Practice Group. His practice is devoted primarily to the defense of complex personal injury cases in the trucking and construction industries. Matt is an aggressive advocate who has tried many cases to verdict and is frequently contacted by clients immediately after a catastrophic loss to help develop the facts and case strategy. He is a frequent presenter on a variety of litigation related topics at local and national legal seminars. Matt is the currently the chair of the DRI Trucking Law Committee.

Don't Put Your Practice on Autopilot When It Comes to Autonomous Vehicle Technology

By David M. Schroeter

I know what you're thinking. Another article telling you that your practice—in this case, transportation litigation—is changing with the times and that you need to adapt or get left in the proverbial dust. It's true; review any legal publication within the past five years and you will undoubtedly come across an article discussing advancements in autonomous vehicle technology. However, the majority of these articles, while informative, may leave you wondering, "That's great, but how is this new technology really going to affect my day-to-day practice and relationships with my clients?" Well, the simple truth is, quite a lot. Your clients will be forced to tackle a myriad of new issues ranging from employment to insurance coverage. Meanwhile, you will be tangling with uncertain liability theories and defenses, complex discovery and document retention questions, a new landscape in expert retention, and dramatic impacts on public perception of the trucking industry.

Client Considerations

Without a doubt, one of the mostly highly discussed technological advancements in the trucking industry is autonomous vehicles ("AV"). That said, there are varying degrees of AV technology—ranging from "Level 1" to "Level 5." The majority of vehicles on the road are classified as Level 1, meaning the vehicle can do a single "automated" task, such as cruise control. Beginning at Level 2, the vehicle actually starts to assist the driver. For example, a Level 2 AV can adjust speed and correct lanes, but obstacle avoidance still requires driver intervention. Level 3 goes a step further, by making decisions as to whether to change lanes or pass other vehicles. Level 4 can handle nearly any situation without driver interference, provided the vehicle is geographically programed for specific areas. The ultimate goal for Level 5 AV requires no driver intervention, which means no steering wheel, no pedals, and the full capacity to navigate the roads to any pre-programmed destination.

Trucking manufacturers and transportation companies have been experimenting with varying degrees of automated vehicle technology ("AVT") for some time, from motion-sensing headsets to more familiar accident-avoidance features such as front-crash prevention systems. Last year, Plus.ai, a leading autonomous trucking company, successfully navigated a Level 4 autonomous tractor-trailer 2,800 miles from a shipping hub in Tulare, California to another in Quakertown, Pennsylvania on I-15 and I-75. The three-day trip was done "primarily" in autonomous mode with a safety driver in the vehicle to take over as needed. The autonomous truck drove during the day and at night and safely navigated construction zones, mountains, tunnels, and inclement weather.

While trips like the one made by Plus.ai's Level 4 autonomous truck may become the norm in the not so distant future, it is still an outlier by today's standards. That said, another trend— "truck platooning"— is becoming more and more common. Truck platooning is the electronic linking of trucks driving down the highway in which a lead truck that predominantly controls one or more other trucks following it. The trucks are designed to drive very close together, forty to fifty feet apart, in a high-speed harmony that utilizes a wireless, "vehicle to vehicle" ("V2V") network to synchronize speed, braking, and more. The idea is to reduce air turbulence between the tractor-trailers, thus reducing fuel costs.

Of course, fuel costs are only the beginning; the ultimate goal of truck platooning—and all AV technology for that matter—is the reduction of human drivers and the costly things that humans require, like sleep, restroom breaks, and air conditioning. Indeed, AVs are not paid a salary or benefits, do not need to be trained, will never need to be disciplined, cannot have a bad day, and cannot quit their jobs. Additionally, AVs, in theory, would not be subject to hours-of-service regulations

However, despite the obvious benefits of AVT, many industry experts agree that the human element of driving is indispensable and that certain tasks can only be performed by a human, such as checking and securing loads in transit and interacting with law enforcement. For now, advocacy groups for commercial truck drivers appear to agree that their drivers have an indispensable role and are not worried that automation will replace human drivers.

While the role of a commercial truck driver may be indispensable, it is rapidly evolving with the very technology

that threatens its longevity. For our clients, this means hiring "a different type of driver" and reevaluating their training and supervision policies to incorporate changes related to AVT. Drivers will be akin to pilots and need to be intimately familiar with the particular AVT and software utilized by their company. Indeed, drivers will need to commence and monitor the AVT in their respective tractors throughout a trip and be prepared to override the AVT at a moment's notice should a glitch in the program or emergency occur. This requires an awareness and familiarity with technology that is not commonplace amongst all drivers and will arguably narrow an already slim driver pool. This will result in increased competition and higher compensation for drivers.

Meanwhile, a myriad of other issues will need to be addressed by transportation companies and their counsel. For example, issues related to insurance coverage for multiple categories of AVs will have to be written, implemented, and developed. Further, if the utilization of AVs results in fewer accidents caused by human drivers (*i.e.*, a shift in responsibility from the driver to the car itself), then we are likely to see a shift from traditional auto insurance (purchased by the driver's employer), to product liability coverage (purchased by the manufacturer). Simply put, if the human driver is no longer "driving" the vehicle, then how is the human liable under a typical negligence analysis? On the flip side, if the promise of AVT proves true, then there should be fewer accidents, with fewer claims to pay, and lowered premiums for companies.

A consequence of this potential shift in the insurance scheme is that transportation companies will move to shift exposure via indemnity agreements with manufacturers. This is the logical result of shifting responsibility from the driver to the truck itself. As such, the relationships between transportation companies and manufacturers will be dramatically changed, with manufacturers bearing significantly more risk than ever before. In turn, the cost of equipment will rise. The issue for our clients will be whether the increased cost in equipment purchases is worth the decreased exposure in personal injury suits, worker's compensation claims, and criminal proceedings.

In addition to the major issues of employment, insurance coverage, and equipment purchases, smaller issues will need to be addressed. Companies will need to address privacy concerns and implement policies for evidence retention in anticipation of litigation. Finally, the risk of cyber breaches resulting in the loss of financial and logistical data must prevented and addressed.

Theories of Liability

Despite advances in AVT, accidents are still going to occur. In the event of an accident with an AV, the question becomes, "How will liability be determined?" Perhaps more importantly, who faces exposure? Determining who or what is at fault for an accident requires an extensive analysis of several factors, none of which have been described in legislation to date. Liability will shift between accused parties based on varying levels of autonomy, human intervention, and algorithm diagnostics. For example, if a Level 4 autonomous vehicle is driving on autopilot and warns the driver of an obstacle ahead, but the driver does not override the AV in time to avoid an accident, who is at fault? Should the vehicle have warned the driver earlier? Or should the driver have paid closer attention to the road conditions? These are the questions that need to be answered as autonomous vehicles grow in popularity.

To answer these questions, thus far, most legal experts have focused on product liability. When a product is defective, or the capabilities or the benefits of a product are misrepresented the theory of Product liability may provide a remedy if damages are incurred by persons or property. Common causes of action in products liability litigation include, but are not limited to, manufacturing defects, design defects, failure to warn about a products, and misrepresentations.

Many members of the legal community believe the transportation industry will commonly face failure to warn claims in relation to AV accidents and AVT failures. A warning defect arises when a manufacturer breaches its duty to warn by failing to warn of a material risk. This duty can take multiple forms, for example, a duty to provide instructions regarding safe use of AVT, such as cautioning AV owners against installing non-factory devices, or a duty to provide in-trip warnings as to when a driver should manually override AVT.

In addition to products liability, the industry will continue to face traditional negligence claims. A prima facie case of negligence contains four elements: duty, breach, causation, and damages. In a traditional negligence claim, the conduct of an alleged negligent actor is measured against the reasonable person standard, which compares the actor's conduct against that of an ordinary prudent person under the same or similar circumstances. In the realm of AVT, negligence claims will vary in scope and cast a much wider net than that of products liability. Take the example of a Level 4 autonomous vehicle. An argument the industry will face is whether the driver should have paid closer

attention to road conditions and not relied so heavily on the AVT. But, what about his employer? Was his employer aware that he would not pay close enough attention to the AVT? Was the driver properly trained in the use of AVT? Or, to take it a step further, did his employer negligently choose to utilize an underperforming AVT program? Did his employer fail to perform routine updates of the AVT that would have provided the driver more time in which to react? On the flip side, what happens in a traditional accident where AVT is not involved? It's not hard to imagine a negligence claim against a transportation company for NOT utilizing AVT. Afterall, if the statistics are true and wide-spread use of AVT will increase safety and decrease accidents, shouldn't all companies arguably transition their fleets to AV?

Issues of liability and exposure relating to the use of AVT are rapidly evolving as regulation and legislation is developed, drafted, and enacted. A scheme for determining who or what is at fault for an accident involving AVT will be something to keep an eye on in the near future and will dramatically alter our practice for years to come.

Discovery

With the progression of AVT comes a new cache of evidence at a litigant's disposal, including the truck's movements, speed, and reaction times. This evidence will need to be extracted and retained in anticipation of personal injury litigation, worker's compensation disputes, and criminal cases. Indeed, the advent of AVT will greatly lengthen the list of computer and system checks to undertake when examining a vehicle after an accident. We already deal with extraction issues in downloading engine control modules ("ECM"), Bendix modules, and other on-board computers, which capture and store output data points, including automatic braking systems. Moving forward, newer systems must be added to this list, such as forward-looking radar or lidar. Attorneys must be familiar with new AVT components so that they can be sure to pull all available data and properly document the condition of the components after an accident.

Once the data is properly preserved and extracted, the focus will change to whether the data is discoverable and whether it must be produced. At this point, most jurisdictions will agree that ECM and similar data is discoverable. This data is commonly being used by accident reconstructionist experts to piece together contested accidents. In cases of disputed medical causation, attorneys are using speed and impact data to confirm or dispute medical causation via biomechanics. But what about data related to the coding process of a particular ATV program at issue? Or update schedules? A savvy plaintiff's attorney may make the argument that the program itself is faulty and seek this information from its manufacturer.

In addition to issues relating to the discovery of data, we, as well as our clients, will need to address data protection and cybersecurity issues. How will driver privacy be protected? How will companies ensure that data is stored and transmitted in compliance with cyber security standards? These questions could go on and on, and their answers will play out in state and federal court over the next few years.

Expert Retention

Eliminating deaths and injuries caused by car accidents is the strongest argument for AVs. It's undisputed that a majority of car accidents in the United States are caused by human error. AVT advocates argue that AVs will make our roads safer by eliminating the risks associated with human contributions to driving and thus eliminating human error. For litigation attorneys, a natural consequence of eliminating human error is a change in the role of experts witnesses formerly used to analyze the same.

One expert to consider is a human factors expert. Human factors experts study the effects of an individual's mental, perceptual, and physical capabilities and limitations on these interactions. In personal injury litigation, these experts are typically used to gauge reaction time and driver perception, among other human contributions to driving. However, with the ultimate goal of AVT being the elimination of human contributions—and consequently human error—the basic role of a human factors expert will be fundamentally narrowed. For example, instead of analyzing the reaction time of a traditional driver to brake ahead of an accident, these experts will need to assess the reaction time of a traditional driver in overriding potential errors in AVT software.

While allegations of human driving error as a basis for liability will decrease with the adaption of AVT, they will inevitably be replaced by allegations of human error in the design and manufacture of AV and the software that runs them. Indeed, no human-made system is flawless, and something will inevitably go wrong. With this, an entirely new expert will be born into personal injury litigation—the AV manufacturing/design expert. This expert will need to be proficient in the general coding, design, and manufacture of AVT, as well as the specific AVT at issue in a particular crash. In addition to analyzing potential pitfalls in a potential program, these experts will likely be used

to help bolster public acceptance of the new technology and avoid runaway verdicts based on unfounded distrust of "machine" drivers. These experts will need to be able to explain very complex systems in layman's terms, especially as these vehicles first reach the roadways.

In addition to the decrease in human error, AVT will likely decrease the rate of low-speed accidents, such as stop-and-go, rear-end accidents, because these accidents most often occur due to driver distraction. As defense attorneys, one of our best tools in combating claims of significant injuries resulting from a low-speed accident is the biomechanic. We have all been there before—the stop-and-go traffic accident that resulted in a four-level fusion surgery. One of our first thoughts is to look for a biomechanic to establish that the nature and impact of the collision did not generate sufficient force to cause the injury alleged. With the rate of these accidents decreasing, we will see the role of the biomechanic decrease accordingly.

Over time, the reduction in low-speed accidents will have another unexpected consequence—limiting accident history for plaintiffs and thereby narrowing the need for independent medical examinations. We have all encountered the plaintiff with multiple prior motor vehicle accidents, often rear-end accidents, that suffers from a multitude of chronic conditions, including neck and back pain with a history of chiropractic or pain management treatment. While this technology will not entirely eliminate pre-existing conditions, a reduction in low-speed accidents will likely result in an overall pool of plaintiffs with fewer pre-existing conditions. One of the defense attorney's strongest arguments today is medical causation. We argue that a plaintiff's injuries were not caused by the incident at issue in the lawsuit, but rather, are a result of his or her pre-existing conditions. One of a defense attorney's best tools to support this defense is the independent medical examination. This examination delves into a plaintiff's accident history and the effects of same on their present-day complaints. A world with fewer low-speed accidents is a double-edged sword. It will decrease the need for independent medical examinations, but also deprive the defense bar of one of its primary defenses.

Jury Effects

As AVT becomes more popular, the total accident rate may drop, improving the public perception of tractor-trailers. The belief that tractor-trailers are more dangerous than your average vehicle may improve. For example, imagine an accident where a human-operated vehicle comes into contact with an AV-operated tractor trailer. As the public begins to perceive AVs as errorless, the implicit burden will be on the *human* driver to prove that he or she committed no error because a jury will understand that human error is much more likely than computer error. However, this change in public perception will come with a catch: the argument that if a transportation company does not utilize AVT then they are not serious about safety and simply prefer to cut costs by not having AVs in their fleet.

The Road Ahead

Looking ahead, every aspect of trucking litigation will be impacted by the adaption of AVT. From pre-suit advice to potential jury impacts, the defense bar, as well as our individual practices, will be dramatically changed. That said, while adapting to these changes may seem daunting, as new AVT continues to roll out, there is ample opportunity to prepare your practice and clients for this new world order and carve out a niche for yourself. Those who familiarize themselves with AVT now, will be able to guide their clients through this change and provide information to potential clients. In sum, our industry is changing, and we need to adapt to those changes to better serve our clients—do not be caught on autopilot when it comes to AVT.

David M. Schroeter is an Associate with Simon, Peragine, Smith & Redfearn, L.L.P., in New Orleans, Louisiana. Mr. Schroeter represents trucking and logistics companies, as well as their insurance carriers. His practice includes the handling of commercial transportation accidents, compliance with federal and state safety regulations, evaluation of risk management practices, and other transportation related disputes. Mr. Schroeter can be reached at davids@spsr-law.com or 504-569-2909.

When Evidence Grows Legs: Spoliation and Trucking Cases

By Mike H. Bassett

Preservation of evidence is an essential component in all areas of civil litigation. The result of failing to preserve evidence can lead a court to determine that spoliation has occurred, which is "the intentional destruction, mutilation, alteration, or concealment of evidence" relevant to a legal proceeding. *Black's Law Dictionary* (Westlaw10th ed. 2014). When a Texas court finds that spoliation has occurred, it has wide latitude in the type of remedy it may fashion, from monetary sanctions to striking the spoliating party's pleadings.

The purpose of this paper is to provide an overview of the law regarding spoliation in light of the Texas Supreme Court's recent decisions in *Brookshire Bros.*, *Petroleum Solutions*, and *Wackenhut*. In addition, the paper will specifically address spoliation as it relates to litigation involving trucking accidents.

The Development of Texas Spoliation Law

While the law regarding spoliation has changed over the years, spoliation continues to be an evidentiary concept and not a separate cause of action. *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998). The Texas Supreme Court first recognized this concept back in the mid-1800s and it has continued developing over the years. *Cheatham v. Riddle*, 8 Tex. 162, 167 (1852). Until 2014, the courts of appeals used two different frameworks in a spoliation analysis, but this changed when the Supreme Court clarified the appropriate framework in *Brookshire Bros. Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 19 (Tex. 2014).

The Current State of Texas Spoliation Law

In 2014, in *Brookshire Bros., Ltd. v. Aldridge*, the court "enunciate[d] with greater clarity the standards governing whether an act of spoliation has occurred and the parameters of a trial court's discretion to impose a remedy." *Id.* at 14. In the following year the court applied this standard set out in Brookshire Bros. and issued opinions in *Petroleum Solutions, Inc. v. Head* and *Wackenhut Corp. v. Gutierrez*. Then, in 2016, the framework was applied again in *In re J.H. Walker.*

Brookshire Bros., Ltd. v. Aldridge

This case involves a Brookshire Brothers grocery store where Aldridge was shopping at when he slipped and fell. *Id*. at 15. He left the store without informing any employee of the fall, but later began experiencing pain and went to the emergency room. *Id*. Five days later Aldridge returned to the Brookshire Brothers store and reported the accident. *Id.* A vice-president of risk management retained a copy of the video on which the fall was recorded and saved the eight-minute portion that recorded the incident. *Id.* The rest of the recording was written over with new footage 30 days after the incident. *Id.*

After Brookshire Brothers denied responsibility, Aldridge asked for a copy of two and a half hours of the footage. *Id.* However, Brookshire Brothers could not provide it to him because all but the eight minutes that captured the fall had been taped over. *Id.* Aldridge filed a personal injury suit and during trial, Aldridge's attorney argued that Brookshire Brothers' failure to preserve a longer portion of the video amounted to spoliation. *Id.* at 16. The court allowed introduction of evidence regarding the possible spoliation and submitted a spoliation instruction to the jury. *Id*. The jury returned a verdict for Aldridge, and Brookshire Brothers appealed. *Id.*

The case made its way to the Texas Supreme Court which held that the judge was the appropriate decision maker to determine whether spoliation had occurred. *Id*. at 20. The court clarified that the duty to preserve evidence arises when a substantial chance of litigation arises. *Id.* This duty extends to all evidence in the party's control that "will be material and relevant." *Id*. Then, the court clarified that a party breaches a duty to preserve evidence by failing to exercise reasonable care. *Id*. In considering remedies, the court set forth that the remedy must simply be proportionate. *Id.* at 21. Lastly, the court noted that a jury instruction on spoliation can only be given if a party intentionally spoliates evidence or if the spoliated evidence "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense." *Id*.

Applying this new framework, the court determined the trial court's submission of a spoliation instruction to the jury was erroneous because there was no evidence Brookshire Brothers intentionally destroyed the video. *Id*.

Additionally, the exception regarding negligent spoliation would not warrant an instruction to the jury, because Aldridge was still able to present his case. *Id.* at 28.

Petroleum Solutions, Inc. v. Head

Just a week after *Brookshire Bros.*, the court issued its opinion in *Petroleum Solutions, Inc. v. Head* finding that the trial court abused its discretion in submitting a spoliation instruction to the jury. *Petroleum Solutions, Inc. v. Head*, No. 11-0425, 2014 SW3d 482 WL 7204399, *1 (Tex. Dec. 19, 2014).

This case involved a lawsuit brought by Bill Head Enterprises (Head) who alleged Petroleum Solutions, Inc.'s (Petroleum) faulty manufacture and installation of a fuel tank system resulted in a large fuel leak. After Petroleum discovered the large fuel leak was because of a faulty flex connector, it informed its insurer and counsel was retained. *Id.* at *2. The attorney sent the connector to a metallurgist for inspection and analysis where it was destroyed when the laboratory that it was being stored in was demolished. *Id.*

Both Titleflex, the actual manufacturer of the product, and Head alleged that Petroleum spoliated evidence by not producing the flex connector and moved for sanctions. *Id.* at *3. The trial court determined that a spoliation instruction would be given to the jury. The jury found in favor of Head and Titleflex even though there was no evidence that Petroleum knew the laboratory was going to be demolished. *Id.* at *2–*3. Petroleum appealed to the Texas Supreme Court. *Id.* at *4.

When the case reached the Texas Supreme Court, it found that the submission of a spoliation instruction to the jury was an abuse of discretion by the trial court. *Id.* Applying the test set out in *Brookshire Bros.*, the court found that there was insufficient proof to establish Petroleum intended to conceal discoverable evidence, or acted negligently and caused the non-spoliating party to be irreparable deprived of any meaningful ability to present a claim. *Id.* at *5.

Wackenhut Corp. v. Gutierrez

Then, in *Wackenhut Corp. v. Gutierrez,* the Texas Supreme Court provided even more guidance on this issue. *Wackenhut Corp. v. Gutierrez*, No. 12-0136, 2015 WL 496301 (Tex. Feb. 6, 2015). This case involved a bus accident that was caught on video and then taped over. *Id.* at *1. The bus was equipped with four surveillance cameras that recorded video on a continuous loop for seven days, and then the oldest footage was automatically record over. *Id.* Two days after the accident, the plaintiff sent a demand letter asserting that Gutierrez was injured as a result of the accident and assigning fault to Wackenhut's bus driver. *Id.* Despite the demand letter, the video was not preserved. *Id.*

Gutierrez brought a negligence suit against Wackenhut and the driver of the bus. The trial court granted Gutierrez's motion requesting sanctions be imposed on Wackenhut finding that Wackenhut's failure to preserve the video from the bus amounted to negligent spoliation and submitted a spoliation instruction to the jury. *Id.* The jury returned a verdict in favor of Gutierrez and Wackenhut appealed on the grounds that the trial court erred in submitting a spoliation instruction to the jury. *Id.*

The Texas Supreme Court determined that there was other evidence available for Gutierrez to support his claim such as testimony of other witnesses and statements prepared at the time of the accident, the police report, Wackenhut's report, photos, and medical records. *Id.* Given the other evidence, the court determined that Gutierrez was still able to adequately present his case without the video and that a spoliation instruction to the jury was improper. *Id.*

In re J.H. Walker Inc.

In 2016, the Dallas Court of Appeals utilized the *Brookshire Bros.* framework to support a finding of spoliation. This case involves a lawsuit brought by the decedent's children and their mother ("Graham") who alleged that Walker Trucking was negligent in maintaining its truck and intentionally destroyed the tractor and maintenance records following the accident. *In re J.H. Walker, Inc.,* 05-14-01497-CV, 2016 WL 819592, at *2 (Tex. App.—Dallas Jan. 15, 2016, no pet.).

On December 15, 2010, decedent was driving an eighteen-wheeler on Interstate 45 in Dallas as an employee of Walker Trucking when the truck went off the road, fell into a concrete ditch, and caught fire. *Id.* at *1. The decedent passed away due to the explosion of the truck. *Id.* After the truck was towed the president of Walker Trucking and a maintenance manager went to see what parts of the truck were salvageable, but determined that nothing was. *Id.* However, they did retrieve the electronic control mechanism ("ECM") from the truck, even though it was so damaged that no data could be extracted. *Id.* On January 7, 2011, the president of Walker Trucking decided to destroy the remains of the truck and about ten days later, Walker

Trucking received a letter regarding the preservation of evidence. *Id.* at *2.

Graham filed suit alleging that Walker Trucking was negligent in maintaining the truck and that Walker Trucking "intentionally and purposefully destroyed the tractor and some maintenance records." *Id.* Graham filed a motion for sanctions against Walker Trucking for spoliation of evidence. The court announced it would include spoliation instructions in the jury charge. *Id.*

Following the court's decision, Walker Trucking sought mandamus relief in the Dallas Court of Appeals. The Dallas Court of Appeals found that "Walker Trucking acted with the subjective purpose of concealing or destroying discoverable evidence." *Id.* at *8. However, the court found that the trial court's remedy did not have a direct relationship with the act of spoliation. *Id.* at *10. It noted that the trial court abused its discretion on the standard set out in *Brookshire Bros*. which states that a spoliation remedy should "restore the parties to a rough approximation of their positions if all evidence were available." *Brookshire Bros.,* 438 S.W.3d at 21. Here, the trial court "put Graham in a better position." *Walker Inc.,* WL 819592, at *9.

Ashton v. Knight Transportation: A Knightmare Spoliation Case

Ashton v. Knight Transportation involved a particularly egregious case of alleged spoliation that occurred after Knight's truck driver drove into an automobile accident scene, hit and allegedly killed one of the parties, fled the scene, cleaned his truck, falsified his driver's logs, replaced broken and damaged parts, and then "lost" the old parts. *See Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 776 (N.D. Tex. 2011).

Husband and wife, Kelly and Don Ashton, were struck by a 1988 Chevrolet Camaro, and subsequently struck by an eighteen-wheeler owned by Knight Transportation ("Knight"). *Id* at 775. According to the plaintiff, Kelly Ashton, Don survived the first wreck and crawled out onto the highway where the defendant [and Knight's driver], George Muthee ("Muthee"), struck him with the eighteen-wheeler. *Id*. The defendants alleged that Don died due to the initial accident. *Id*.

The plaintiff further alleged that the defendants spoliated evidence, specifically: (1) the evidence on Muthee's tires and truck after the accident; and (2) Qualcomm communications between Muthee and Knight that occurred after the accident. *Id* at 776. According to the plaintiff, Don Ashton survived the initial accident and was hit by Muthee, who then fled the scene, stopped a short distance away to inspect his truck, and then drove 1,400 miles to a Nevada town where he had his tires replaced. *Id.* at 776–77. After fixing the truck, Muthee drove to a parking lot in California where Knight employees retrieved the truck and stored it at one of their facilities. *Id.* at 777. From there, Knight hired an attorney and an investigator who inspected the truck and removed "flesh" samples from the truck and placed them into baggies. *Id.* Worse, Knight refused to cooperate with law enforcement investigators and failed to disclose its investigator's inspection until about three years later. *Id*. The only way the truck was traced to the accident was by a damaged piece that broke away and was found at the scene. *Id.* at 776.

The court determined that a "wealth of circumstantial evidence" lead to the "inescapable conclusion that [Knight and Muthee] engaged in spoliation" of the physical evidence on the vehicle and the Qualcomm communication. *Id.* at 795. The court found that Knight and Muthee had a duty to preserve the evidence from the truck and the Qualcomm communications and it breached that duty in bad faith. *Id*. at 802. The court further found that the spoliation severely prejudiced the plaintiffs because Knight's actions destroyed the only direct physical evidence available that could have proved that Knight's truck struck the decedent (the piece left at the scene only proved that the truck hit one of the vehicles at the scene, not the decedent). *Id* at 803. As a result of the bad faith spoliation, the court imposed the harsh penalty of striking all of the defendants' pleadings and defenses to liability and allowed the plaintiffs to amend their petition to plead for punitive damages. *Id.* at 805.

Document Retention Regulations Under the Federal Motor Carrier Safety Act

Regulations under the Federal Motor Carrier Safety Act ("FMCSA") require trucking companies to maintain a trove of document and records. A trucking company's failure to maintain requisite records will almost certainly become a spoliation issue during civil litigation. For the purposes of this paper, the most relevant regulations are 49 CFR §§40, 382–83, 387, and 390–99. These sections list the documents that trucking companies and employees must retain, the length of time a company must store the retained documents, and specific locations where employers and employees must store the documents. For simplicity, these documents can be categorized into four broad categories: (A) Driver Qualification and Training; (B) Alcohol and Drug Testing; (C) Vehicle Inspection and Maintenance Documentation; and (D) Driving Documentation.

Driver Qualification and Training

Upon hiring a driver, a trucking company must collect and maintain the employee's driver qualification and training documents. This category includes basic training documents, the employment application, driver certifications, driving records, and medical exams. *See* 49 C.F.R. §§380, 391. Some of these documents, such as the driving record and medical exam, must be ordered from a third party (*i.e.*, the Texas Department of Public Safety) within 30 days of the employment start date. *See* 49 C.F.R. §391.23.

A trucking company should retain all initial qualification and training records for the duration of an employee's employment plus three years after termination. Even if regulations allow a document's destruction two years after employment, destroying a document in violation of a company retention policy may look very suspicious and could lend credence to spoliation accusations.

Alcohol and Drug Testing

Essentially, FMCSA regulations require trucking companies to maintain all records related to alcohol and drug testing and training. *See generally* 49 C.F.R. §§40, 382. The golden rule of alcohol and drug testing is this: Document and retain everything, even the most remotely related document. This means documenting actual drug test results, details about the testing program, information about the officials performing the testing, and everything in between.

Trucking companies must retain positive drug test and alcohol test results with a concentration of .02 for five years; on the other hand, negative drug tests and alcohol tests with a concentration of less than a .2 are only required to be maintained for a single year. *See* 49 C.F.R. §§40.333, 382.401. Any documentation associated with negative results, refusals to test, or substance abuse evaluation or referral records must be maintained for five years. *See id.*

Vehicle Inspection and Maintenance Documentation

For any vehicle a company controls for 30 days or more, the company must maintain records that identify the vehicle, its upcoming maintenance and inspection due dates, and its inspection, repair, testing, and maintenance records. *See* 49 C.F.R. §396. A company must maintain such records for at least 18 months after the vehicle leaves the company's control. Periodic inspection reports and similar documentation must be updated and kept in the vehicle or displayed properly on the vehicle (*i.e.*, an inspection sticker). *See* 49 C.F.R. §§396.17(c), 396.23(a).

Driver Logs, Time Logs, and On-Board Recording Devices

Driver and time logs play a key role in litigation. The type of records that a company must maintain depends on the type driver the company employs. All "100-air-mile-radius drivers" must maintain accurate records showing: (1) the time the driver reports for duty and leaves each day, (2) the total hours worked each day, and (3) the total time on duty for the preceding seven days (note: this last requirement only applies to drivers used by a company for the first time or intermittent drivers). *See* 49 C.F.R §395.1(e)(5). Additionally, drivers used intermittently must provide a signed statement declaring (1) the total time on duty during the preceding seven days and (2) the time the driver was last relieved from duty. *See* 49 C.F.R. §395.8 (j)(2).

Different or additional requirements are imposed on trucks with on-board recording devices. First, for a driver to even use an on-board recording device, the company must obtain a certificate from the manufacturer certifying that the design meets the requirements of 49 C.F.R. §295.15(i)(1). If a driver is utilizing an on-board recording device, the driver must keep a record in his vehicle that includes (1) detailed instructions for storing and retrieving data from the device and (2) a supply of blank driver's records and documents sufficient to record and document the trip in case the device fails. *See* 49 C.F.R §395(g). Lastly, a trucking company must create and maintain a secondary backup of the electronic files organized by month. *See* C.F.R. §395.15(i)(10).

Conclusion

The preservation of evidence is vital in all cases, but especially in trucking cases. To assure no allegations of spoliation occur, parties must be mindful and cognizant when evaluating what evidence could be material to a claim or defense. Texas courts have determined two instances where spoliation instructions are appropriate: "(1) a party's deliberate destruction of relevant evidence, and (2) a party's failure to produce relevant evidence or explain its nonproduction." *Brookshire Bros.*, 438 S.W.3d at 19. Failing to properly preserve evidence could be extremely harmful to a case and can lead to monetary sanctions, spoliation instructions, or even the striking of pleading.

Michael H. Bassett is senior partner at The Bassett Firm in Dallas. He has been representing truck drivers and trucking companies for over 33 years and has tried over 185 cases to verdict in counties throughout Texas, Louisiana and Florida. Mike is a frequent speaker on handling trucking

cases and trial tactics. A member of DRI, Mike also belongs to the American Bar Association (Litigation Section), Dallas Bar Association, American Trucking Association, Texas Association of Defense Counsel, International Association of Defense Counsel, Association of Defense Trial Attorneys, and American Transportation Lawyers Association.

Avoiding Rule 30(b)(6) Deposition Risks

By Megan Mole

Federal Rule of Civil Procedure 30(b)(6) depositions are a popular discovery tool intended to "secure the just, speedy, and inexpensive determination of every action and proceeding" by eliminating the process of bandying. *See* Fed. R. Civ. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970). The rule was designed to eliminate wasteful corporate depositions where a series of deponents would testify to a lack sufficient knowledge regarding relevant topics. In theory, at least, 30(b)(6) depositions allow corporations the necessary control and flexibility to designate their own corporate representatives, and to be able to provide their designees with sufficient corporate knowledge to answer questions truthfully and favorably on behalf of the deponent corporation–a win-win for both sides.

Pursuant to Federal Rule 30(b)(6), in its notice or subpoena (to a non-party), a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency, and must describe with reasonable particularity the matters for examination. *See* Fed. R. Civ. P. 30(b)(6). The organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on the organization's behalf. It may set out the matters on which each person designated will testify. The designated individuals must testify about information known or reasonably available to the organization. *See Id.*

Although the rule was intended to be fair and equitable to both sides, 30(b)(6) depositions can, in fact, easily turn into a trap for the unwary. As noted in a Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules, submitted July 5, 2017, by the Lawyers for Civil Justice,

> Unfortunately, practice under Rule 30(b)(6) has not kept up with the rule's promise to be advantageous to both sides. It allows the requesting party to impose significant burdens that do not result in any benefit to the case. Because 30(b)(6) depositions are not discussed in Rule 26(f) conferences or addressed in Rule 16, it has become a catch-all for the kinds of disproportional demands, sudden deadlines and "gotcha" games that the Committee has removed from other discovery rules. Because there is no procedure for objections, 30(b)(6) notices force a Hobson's choice between attempting to comply despite overbroad topics, vaguely written descriptions and duplicative requests, or filing a motion for protective order, which could result in an even worse outcome including sanctions. And because there is doubt about the binding effect and no express ability to supplement testimony, 30(b)(6) depositions cause unhealthy tension between counsel.
>
> Rule 30(b)(6) depositions by their nature generate controversy. Preparing a witness to testify regarding the full extent of information reasonably available to an organization often inflicts an enormous burden of business disruption and expense on the responding party. That burden may be justified where the information is important to the case, but not when the noticed topics have no relevance to the claims or defenses or when the burden is disproportionate to the needs of the case. Also, a failure of the Rule 30(b)(6) notice to describe the subject matters of the deposition with "reasonable particularity" renders compliance an impossible task.

Lawyers for Civil Justice, Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules, July 5, 2017.

By carefully anticipating and preparing for the logistics of defending Rule 30(b)(6) depositions, however, a thoughtful practitioner can avoid traps waiting to trip up the unwary.

Limit the Scope of the 30(b)(6) Deposition Notice

At any point during the pendency of a lawsuit, an organization may be served with a Rule 30(b)(6) notice. This notice must be served according to applicable Federal discovery rules and orders, including the manner and timing of service. It must be drafted in compliance with the rule, indicate the names of the organization to be deposed, set for a procedurally proper date and time of the deposition,

and must identify with "reasonable particularity" the topics that will be the subject of the deposition. *See, generally,* Fed. R. Civ. P. 30.

Once the 30(b)(6) notice is received, it is critical that receiving counsel closely examine the notice for potential issues. In particular, be alert for vague, overly broad, unduly burdensome requests, and topics that are not reasonable, that may serve as grounds for objection, and ultimately, may require a Motion for Protective Order pursuant to FRCP 26(c) to preserve any objections. In short, a defendant must be able to identify "the outer limits of the areas of inquiry noticed." *Reed v. Bennett,* 193 F.R.D. 689, 692 (D. Kan. 2000). It is important to take note of phrases such as "including but not limited to," which can place the organization in the untenable position of preparing to testify on an indefinite and infinite number of subject areas. *Id.* Where possible, the 30(b)(6) notice should "be limited to a relevant time period, geographic scope, and related to claims" that are at issue in the case. *Young v. United Parcel Serv. of Am., Inc.,* No. DKC-08-2586, 2010 U.S. Dist. LEXIS 30764, at *25 (D. Md. Mar. 30, 2010). David B. Markowitz and Joseph Franco, *Preparing and Responding to the Rule 30(B)(6) Notice*, https://www.markowitzherbold.com/press-room/Articles/Preparing-and-Responding-to-the-Rule-30-b-6-Notice (last accessed May 20, 2020).

Rule 30(b)(6) deposition testimony is ultimately binding on the organization and 30(b)(6) depositions can constitute a significant expense to an organization in order to properly prepare, educate, and produce corporate witnesses. Because this notice may ultimately define the breadth and depth of a corporation's admissible "knowledge" on the topics defined in the notice, and because an overly broad and open-ended topic served within a notice open the door to sanctions upon an organization for failing to provide a witness to answer those undefined and overly broad topics, it is incumbent upon a defense practitioner to narrow the topics to a clearly defined breadth and depth. Note, however, that reasonable particularity does not necessarily favor a fewer number of 30(b)(6) topics. In fact, courts have allowed more than 40 topics as long as they are specific. *See generally, Tamburri v. SunTrust Mortg. Inc.,* No. C-11-02899, 2013 U.S. Dist. LEXIS 53624, at *7 (N.D. Cal. April 15, 2013). *See e.g. Krasney v. Nationwide Mut. Ins. Co.,* No. 3:06 CV 1164, 2007 U.S. Dist. LEXIS 90876, at *4 (D. Conn. Dec. 11, 2007).

After careful consideration of a notice, defense counsel should not only issue written objections to their opponent, but should also meet and confer regarding the topics as soon as feasible. Further, because a stay of discovery may not be automatic when a Motion for Protection is filed, it may also be worthy of consideration to file a Motion for Stay pending resolution of any 30(b)(6) notice issues you wish to work out with opposing counsel. If counsels can agree to narrow the scope, issuing counsel should provide an amended 30(b)(6) notice with the agreed topics clearly defined. Remember, though, "the proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order." *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D. N.C. 2014). A corporate deponent cannot simply make "objections and then provide a witness that will testify only within the scope of its objections." *Id.* Markowitz and Franco.

If counsel cannot quickly agree on whether and how to narrow the notice topics, defense counsel should immediately seek a protective order from the court to proceed before the deposition occurs or risk waiving its objections to the Notice. The motion may seek to have the entire notice quashed, or to have specific topics modified or quashed. If the notice generally lacks specificity or is otherwise full of correctable defects, then courts may quash the entire notice and provide leave for the notice to be re-issued consistent with the court's opinion. *See Murphy v. Kmart Corp.,* 255 F.R.D. 497, 518 (D. S.D. 2009); *Reed v. Bennett,* 193 F.R.D. 689, 693 (D. Kan. 2000); *Gulf Production Co., Inc. v. Hoover Oilfield Supp., Inc.,* Nos. 08-5016, 09-2779, 09-0104, 2011 U.S. Dist. LEXIS 73196 (E.D. Louisiana, July 7, 2011). If, however, the protective order is sought on grounds that cannot readily be cured with an amended notice, the court may quash the notice in its entirety. *See SEC v. Buntrock,* 217 F.R.D. 441, 444, 448 (N.D. Ill. 2003). *Id.* Markowitz and Franco. Defense counsel may open itself to sanctions by refusing to provide the requested testimony and waiting until later to provide objections in response to a propounding party's Motion to Compel.

Designate the Right Corporate Representative(s)

An organization is required to choose a corporate representative or representatives to answer questions pursuant to the Notice. This representative may be an employee, non-employee, or even a paid consultant. *Ierardi v. Lorillard, Inc.,* No. 90-cv-7049, 1991 U.S. Dist. LEXIS 11887 (E.D. Pa. Aug. 23, 1991). There is no rule regarding who may be selected to represent the corporation in response to a 30(b)(6) notice. However, the testimony provided at the 30(b)(6) deposition will be binding on the organization. Additionally, it is nearly impossible to later amend or

supplement the representative's responses to questioning pursuant to the 30(b)(6) notice. It is essential that the organization make a strategic choice in deciding who to present in response to the Notice. Importantly, an organization is not required to choose a "person with the most knowledge" on a particular topic or topics—the only requirement is that the organization must educate the individual or individuals with the "corporation's knowledge" on the topics outlined in the Notice. The organization can disclose more than one corporate representative, if one person cannot be adequately prepared to answer questions on every topic. As for any documents utilized to educate the corporate representative, the organization should prepare to disclose the same, even if those documents have not been produced to the opposing party.

Rule 30(d) limits a deposition to seven hours absent leave of court. Rule 30(b)(6) depositions have, at times, been treated differently in light of the Committee Notes on the subject. Specifically, the Committee Notes state that: "[f]or purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." FED. R. CIV. P. 30, advisory committee's note to 2000 amendment. If a defendant wishes to designate more than one 30(b)(6) witness, it is advisable that the defendant either seek an agreement to limit all depositions to a cumulative seven hours, and/or make an immediate Motion for an Order of Protection with the Court so that all parties proceed with the same understanding of a limited duration. As an alternative, if an organization feels the need to designate more than one 30(b)(6) witness, an unorthodox consideration may be to use a "deposition by committee" if issuing counsel will agree. This type of deposition would allow more than one 30(b)(6) witness to sit for deposition and answer questions at the same time, thus allowing for more streamlined and consistent responses, the ability for witnesses to understand the same context for questioning, and for witnesses to supplement each other's answers when appropriate, based on their field of knowledge.

It is important to choose a witness or group of witnesses who are articulate and savvy. Furthermore, selecting a witness who has an excellent memory, can withstand an exhausting day of questioning, and understands the distinction between personal knowledge and the knowledge of the organization is imperative. Moreover, the organization should understand the risks of producing certain types of witnesses as corporate representatives–including corporate or in-house counsel or paid consultants. Presenting corporate counsel and/or consultants can lead to potential waiver of attorney-client privilege, as well as the possibly requiring the disclosure of work-product. Moreover, paid consultants will inevitably face credibility challenges to the extent that they receive compensation for their testimony.

Meticulously Prepare the Witness

The noticed corporation must engage in "due inquiry" including searching its files and conducting interviews of its employees so that the representative is prepared and can answer fully and completely without evasiveness. *Mitsui v. Puerto Rico*, 93 F.R.D. 62, 67 (D. P.R. 1981). Corporate knowledge can include company records, prior depositions, and interviews with current or former employees. *In re JDS Uniphase Corp. Securities Litig.*, No. C-02-1486 CW, 2007 U.S. Dist. LEXIS 8523, *1 (N.D. Cal. Jan. 29, 2007) ("While a corporation is not relieved from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available . . . it need not make extreme efforts to obtain all information possibly relevant to the request.")

It is important to note that failing to know an answer at the time of deposition may bind the organization to that lack of knowledge, even if the organization learns the answer at a later date. This newly acquired knowledge is likely not admissible at trial or for summary judgment, even if the information was within the possession of a third-party outside the control of the organization. Courts are inconsistent about supplementation. While some courts have permitted supplementation of Rule 30(b)(6) testimony, or have allowed a party to impeach its own witness and pay the price at trial, others have declined to do so and have stricken subsequent evidentiary submissions as inconsistent with Rule 30(b)(6) testimony. *See* Keepers, Inc. v. City of Milford, 807 F.3d 24, 34-35 (2d Cir. 2015); Dixon Lumber Co., Inc. v. Austinville Limestone Co., 2017 U.S. Dist. LEXIS 88642, at *13–15 (W.D. Va. June 9, 2017); *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of New Mexico*, 2010 U.S. Dist. LEXIS 127390, at *8 (D.N.M. Nov. 15, 2010); *Thomas E. Perez v. Five M's*, 2017 U.S. Dist. LEXIS 28476, at *21–23 (N.D. Ind. Mar. 1, 2017); *Rainey v. Am. Forest & Paper Assoc., Inc.,* 26 F. Supp. 2d 82 (D.D.C. 1998). Lawyers for Civil Justice, Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules, July 5, 2017.

The Supreme Court's Advisory Committee on Civil Rules has put forth a proposed amendment to Rule 30(b)(6) requiring that "[b]efore and promptly after the notice of subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters

for examination….” In many respects this duty to confer in good faith should protect trucking companies from malicious, unreasonable, or otherwise improper requests from the plaintiffs’ bar.

It appears a significant change to the rule is coming soon. Until then, it is essential that defense counsel remain vigilant and be prepared to deal with the logistics of defending a 30(b)(6) deposition. Preparation is key for counsel to avoid the risks and traps awaiting the unwary.

Megan Mole is a 2011 graduate of DePaul University in Chicago. After spending eight years in civil defense litigation in Chicago, she now works as Safety and Insurance Counsel for Uber.

Changing the Perception of Truck Drivers—America’s Heroes—in the COVID-19 Era

By Jennifer Hall, Chip Campbell, Shane O’Dell, and Kaitlin Kerr




Since the start of the COVID-19 pandemic, it has been virtually impossible to turn on the TV without hearing the negative publicity stemming from COVID-19. Despite the negatives of COVID-19, the trucking industry has gained some unexpected positive publicity. As a result of the pandemic, the public has found a new appreciation for truck drivers.

Most recently, President Donald Trump hosted an event at the White House celebrating the trucking industry. At the event, he gave a speech on the front lawn wherein he praised truck drivers as America’s Heroes, stating:

> At a time of widespread shutdowns, truck drivers form the lifeblood of our economy -- the absolute lifeblood. For days, and sometimes weeks on end, truck drivers leave their homes and deliver supplies that American families need and count on during this national crisis and at all other times. They’re always there. Their routes connect every farm, hospital, manufacturer, business, and community in the country. In the war against the virus, American truckers are the foot soldiers who are really carrying us to victory….To every trucker listening over the radio or behind the wheel, I know I speak for the 330 million-plus Americans that we say: Thank God for truckers. That’ll be our theme: Thank God for truckers.

Thank a Trucker: President Trump Honors American Truckers at White House (Apr. 16, 2020), https://www.youtube.com/watch?v=KMh9M3XLreU.

President Trump was only one of many that have come to acknowledge the sacrifice of truck drivers since the start of COVID-19. A simple internet search reveals an abundance of articles thanking truck drivers and the trucking industry, while recognizing their sacrifices. There are also countless stories of kindness and goodwill shown to truck drivers by strangers wanting nothing more than to show their appreciation. Moreover, there are articles wherein gas station attendants and patrons provided statements acknowledging the public’s shift in attitude towards truck drivers and the trucking industry—no longer seeing them as a threat to avoid on the roadway, but a father, son, husband, neighbor, employee, and fellow stranger to thank for what they are providing the American economy in a time of crisis.

The question becomes how can defense attorneys and the trucking industry harness this new, positive perception of truck drivers and the trucking industry? How can we maintain the goodwill during and long after COVID-19?

First, by using their personal experiences during COVID-19 to help jurors and the public remember that truck drivers are also “human”—they too have experienced the resulting highs and lows of COVID-19. Second, by helping others understand the essential nature of the trucking industry, what would be lost without it, and how trucking companies balance safety—of their employees and the general public—and efficiency to keep America supplied and thriving. Finally, recognizing and addressing what we as defense attorneys can do to help foster and maintain a positive image of both the trucking company and the driver with the public from before accidents even begin through trial.

Personal Experiences During COVID

Truck drivers, like many other Americans have experienced the ups and downs resulting from the COVID-19 pandemic. On the down side, some studies have shown that seven out of ten truck drivers report lower pay and more hazardous conditions. Molly Hennessy-Fiske, *On the Open Road, U.S. Truck Drivers Face the Coronavirus and New Risks*, L.A. Times (Apr. 28, 2020), https://www.latimes.com/world-nation/story/2020-04-28/u-s-truck-drivers-face-coronavirus-new-risks-on-open-road. Many drivers work without health insurance and continue to put themselves at risk to deliver essential goods to the American public and, as a result, some who have fallen ill reported that they were too afraid to go to the hospital because of the medical bills. Other drivers have reported increased isolation, loneliness, and fears of being robbed for their essential cargo—things like toilet paper, food, and hand sanitizer that have been difficult, if not virtually impossible to find on grocery store shelves. All the while, nearly every truck driver working during the pandemic has experienced an increased risk and/or fear of exposing their family to the virus.

Despite the drawbacks, many drivers have seen the positive effects the pandemic has had on the industry. The increase in demand has led to increased goods being delivered and, therefore, increased hours leading to more job stability. Almost unanimously, many have reported a noticeable difference in appreciation and recognition from the public, which has also led to an increase in morale.

Balancing Essential Industry, Safety, and Delivery of Goods

Before the pandemic, if you asked 100 Americans to name essential industries, trucking likely would not have been listed. However, as one truck driver noted, "Look around the room and show me something that wasn't on a truck at one time." Trevor Hughes, *Truckers Brave Coronavirus Outbreak to Deliver Goods: 'If We Stop, The World Stops,'* USA Today (Mar. 22, 2020), https://www.usatoday.com/story/news/nation/2020/03/22/trying-buy-tiolet-paper-us-truck-drivers-have-your-back/2865277001/. Whether realized or not, the reality is that the trucking industry is "essential"—it is absolutely necessary to continued critical infrastructure viability and those who support crucial supply chains and enable functions for critical infrastructure. Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, Department of Homeland Security Cybersecurity & Infrastructure Security Agency (Apr. 17, 2020).

Ultimately, what constitutes an essential business varies from state to state and county to county. However, nearly every state and county recognize that an essential business is one the public relies on in their day-to-day life. Consider what would be lost if the trucking industry was non-existent—industries that would virtually disappear—groceries, transportation, manufacturers, jobs, construction, waste removal, retail, medicine and medical equipment, etc. While this realization may be easy for those working in or with the trucking industry, the difficulty becomes finding ways to help the public come to the same realization.

Statistics and data support that the trucking industry is an essential industry. During the pandemic, there have been approximately 3.5 million truck drivers delivering essential goods daily. Hughes, *supra* Meanwhile, trucking makes up 70 percent of all freight moved in the United States and truck drivers deliver 11 billion tons of commodities. Steven John, *11 Incredible Facts About the $700 Billion US Trucking Industry*, Business Insider (Jun. 3, 2019), https://markets.businessinsider.com/news/stocks/trucking-industry-facts-us-truckers-2019-5-1028248577#. In sum, truck drivers are vital to our economic stability.

Despite the essential nature of the trucking industry and the public's need for the goods and commodities which are being delivered, there must be balance between safety and efficiency. In fact, the primary purpose of the Federal Motor Carrier Safety Act is to prevent commercial motor vehicle-related fatalities and one way of accomplishing this is to enforce data-driven regulations that balance safety with efficiency. U.S. Department of Transportation, *Understanding the Federal Motor Carrier Safety Administration (FMCSA)*, https://www.transportation.gov/transition/fmcsa-understanding-federal-motor-carrier-safety-administration (last updated Apr. 28, 2017).

Maintaining the Goodwill

Prior to the pandemic, nuclear verdicts in trucking cases were increasing at an exponential pace. Brittany De Lea, *Nuclear Verdicts in Trucking Cases Rising at 'Exponential Pace,'* FOX Business, https://www.foxbusiness.com/lifestyle/nuclear-verdicts-trucking-exponential-pace. Studies analyzing these verdicts revealed that the increase was due to a variety of factors such as plaintiff attorneys are becoming better storytellers; the plaintiff's bar is more strategic and considers the big picture, while defense

attorneys are more tactical; plaintiff attorneys work harder given their heavy burden whereas defense attorneys just work to poke holes in opposing counsel's argument, among many others. *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, American Transportation Research Institute (June 2020). However, the positive publicity brought about by COVID has given the defense bar an opportunity to find ways to harness this goodwill long term. The question becomes how do we (defense attorneys and trucking companies alike) maintain this publicity long after COVID-19?

Before the Accident

To effect this change and maintain the goodwill, we must start by broadening the scope of each case and focusing on the bigger picture. These changes should take effect before the accident ever happens. We need to start implementing these changes immediately.

One method is that the defense bar can work to become better storytellers by utilizing tools to tell the driver's and/or company's story. Story telling has always been a part of litigation, but given the public's recent heightened appreciation towards the trucking industry, maybe people will be more willing to listen to the truck drivers' and companies' stories moving forward. Importantly, this "story" is more than just the facts of the accident; it is about the person behind the wheel on and off the clock as well as the company they work for. It goes far beyond the facts of any given case. For example, what are the driver's values? What are the company's values? What are their views on safety and the company's policies and procedures? Who is the driver when he's not working—a father, son, husband, friend, neighbor, etc.?

Trucking companies and defense attorneys alike can act to effect this change. To do this, we must work to change the narrative. We can start by learning about the company and the driver. We should know our client inside and out. Learn about the driver's interests outside of work and build rapport through common ground. We can also talk to the company about policies, procedures, and commendations of drivers. Do not hesitate to offer suggestions and discuss problematic topics and policies with the company—call the carrier and make suggestions where needed whether it be the company mission, objectives, purpose, etc. Meanwhile, find ways to introduce the public to the company. This introduction is good for morale, advertising, it is good for companies internally, and it is good for the litigation process.

We also need to work on humanizing the company. There are many ways to help bolster this image, such as finding ways to educate the public on the company and the trucking industry. Companies care about their personnel, want to make sure they get home safely; highly regulated industry to foster safety standards; extensive training, policies, and medical exams in place to ensure utmost safety on the road.

After the Accident – During Litigation

While the perception of the company, the drivers, and the industry pre-accident is important, we also need to view the litigation process differently to find ways to change the perception of truck drivers from the moment suit is filed through trial. To change the narrative, we must change the perspective of our defense beginning with discovery and continuing through trial. During every aspect of the discovery process, we need to look for ways to tell our client's story, always remembering that there are many stories that need to be told: the driver, the company, the industry, and the facts of the accident, among others.

During discovery, look for things that can be used to tell the driver's and/or company's story that are responsive to the written requests. Shy away from abusive discovery tactics of just reviewing the request, objecting, and withholding documents just to do it. Mediation is another opportunity that can be used to introduce and humanize the company and the driver. In some instances, a presentation on the company during mediation may be appropriate. During voir dire, assess whether the venire considers the trucking industry "essential" to assess their views on the industry as a whole. For example, proceed with the usual questions about the trucking industry, but ask some questions that focus upon statistics and general feelings about truck drivers and the trucking industry. Meanwhile, continue to find ways to humanize the driver and company to determine who can sign onto the defense's narrative.

Utilize the information that you have obtained about the driver and/or the company during the litigation process during opening and closing arguments and throughout trial. Continue to focus on the driver without losing the original roots of the company. During trial, consider introducing a presentation of the driver through a day-in-the-life video. Introduce your driver and help the jury understand that the defendant is not *just* a driver, but a brother, father, son, husband, friend, and neighbor, among many other things. You may also consider a presentation about the company. Again, remember to tell your client's

story. Do not shy away from the economic purpose of the company, but focus on the balance of trucking as an essential industry focused on the efficient delivery of goods versus maintaining safety. In examining the closing arguments of many nuclear verdict cases, it has been noted that defense counsel does not talk about the company or the defendants, but instead focuses on the plaintiff. We need to change the way we present opening and closing arguments and continue telling the story until the last argument in front of the jury.

As stated previously, trucking companies can also act to help effect this change and maintain the positive perception of the trucking industry long term. Trucking companies can lay

the ground work through their websites, social media, advertising, and publications by highlighting good deeds of their drivers. Companies can publicize awards and commendations of the drivers. If companies are not already doing so, encourage your clients to include these accolades in the driver's employee file. Companies can also share stories of appreciation shown by strangers towards the company or its drivers, such as when someone buys a trucker a meal at a drive through, delivers care packages to drivers at a truck stop, or drops off baked goods to a company to express their gratitude. Another idea is that companies could create Public Service Announcements to educate the public on the physics of large commercial vehicles given their size, limitations, and turn radius.

Currently, there is also the Thank A Trucker Campaign, which was started by the ATA to provide relief to truck drivers via a photo contest. *#ThankATrucker*, American Trucking Associations, https://www.trucking.org/thankatrucker. #ThankATrucker went viral on Twitter generating more than 350 million online impressions. Ideas like this also create familiarity with jurors, it fosters appreciation among the general public, and it generates narratives for hundreds of truck drivers.

Conclusion

Nations across the globe have felt the turmoil and chaos resulting from COVID-19. However, the trucking industry has experienced some unexpected positive publicity as a result of the current global pandemic. As defense attorneys, it is our job to assess how we can harness it and find ways to maintain this new perspective of the trucking industry, trucking companies, and truck drivers long term.

Ultimately, to maintain this changed perspective will require the work of both the trucking companies and defense attorneys alike. We can work together to help change the perspective of the industry before accident even happen by findings ways to keep the public informed and apprised of drivers' good deeds and positive recognition shown towards the company. After the accident, we must work to learn more about the driver so that we can humanize both the driver and the company throughout the litigation process. All of this is essential to change the jury's perspective of truck drivers and the trucking industry before litigation even begins and to open the jury's mind during litigation to show that the defendant is not a careless, negligent driver as the plaintiff's bar will argue, but an individual with his or her own unique story that also deserves to be told. In using these tools, we can become better storytellers and maintain the positive attitudes shown towards the trucking industry long after COVID-19.

Jennifer Hall is the General Counsel and Executive Vice President for legal affairs for the American Trucking Associations, the nation's leading organization representing the interests of the trucking industry. As general counsel, Hall is responsible for ATA's legal affairs, including the ATA Litigation Center. Both ATA and the Litigation Center engage in litigation to advance and protect the interests of the motor carrier industry in federal and state courts around the nation, as a direct party, an intervenor, and as an amicus curiae. ATA also monitors and educates its members about legal developments in courts and legislatures that will affect the motor carrier industry.

Chip Campbell, Director – Liability Claims and Assistant General Counsel at Old Dominion Freight Line, Inc., manages casualty claims and litigation throughout the United States and works integrally with other departments within Old Dominion. Prior to joining ODFL, Chip was a partner in a Raleigh, North Carolina, law firm where he practiced for 13 years with a focus on transportation law and complex claims.

Shane O'Dell is the Managing Member of the Fort Worth, Texas office of Naman, Howell, Smith & Lee, PLLC. Shane represents trucking clients throughout the state of Texas from the initial emergency response, to pre-suit investigation, and through trial. Shane's goal is to effectively and efficiently advise his clients to make sound business decisions from the initial investigation throughout the judicial process. Shane is a member of DRI's Trucking Law Committee and IADC.

Kaitlin Kerr is an associate in the Fort Worth office of Naman, Howell, Smith & Lee, PLLC and represents trucking clients throughout Texas. Prior to joining Naman Howell, she served as a Judicial Clerk to Senior U.S. District Judge Robert Junell in the U.S. District Court for the Western District of Texas.

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