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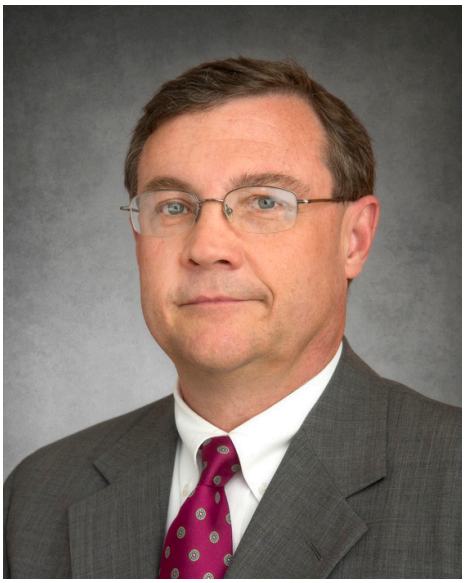

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Ensuring a Safe Workplace

To our valued TDLA Members and friends:

Here at Tennessee Defense Lawyers Association ("TDLA"), we value your membership in TDLA, and our thoughts are with those in our region and around the world contending with the impact of the COVID-19 virus.

As we continue to monitor the COVID-19 situation developing locally and around the world, our top priority is to maintain the health, safety and well-being of our team members, clients and community while maintaining a consistent level of client service.

As we adapt to the COVID-19 Coronavirus epidemic and stay abreast of both mandates and precautions, we wanted to encourage you and our legal community to embrace the importance of our essential legal services as we continue Delivering Client Services and Ensuring A Safe Workplace and Ensuring Business Continuity and Stability.

The Tennessee Bar Association has a webpage devoted to providing information to attorneys and citizens. The webpage is https://www.tba.org/index.cfm?pg=Pandemic-Resources-for-Tennessee-Lawyers.

Finally, we value and appreciate our relationship with each of you and thank you for placing your trust in Tennessee Defense Lawyers Association.

Rocky King, *President*

Support In Uncertain Times

The last few months have been challenging times. In March, DRI made the difficult but correct decision to cancel all in-person events through mid-May. This included several of the Substantive Law Committee's seminars around the country, as well as our Regional meeting that was to take place in April at The Greenbrier.

Normally in this article I would be telling you about this meeting - the sharing of ideas with other SLDOs and the networking and camaraderie of one of my favorite DRI events every year. But, we are in a new normal.

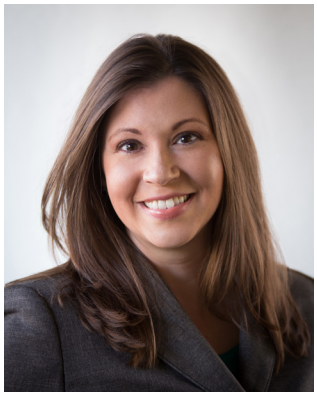
To assist its members with legal challenges in the coronavirus pandemic, DRI amped up its online education options - providing numerous webinars and OnDemand programming on topics such as information security for law firms and businesses with newly remote workforces, insurance implications in a global pandemic, how COVID-19 might impact our clients in the construction industry, and how to conduct a quality inspection remotely.

We are all being asked novel legal questions by our clients as we navigate the far-reaching implications of the recent months, and DRI is doing its best to help us answer those questions and continue to be good counsellors for our clients in times of uncertainty.

I hope you will take advantage of the many resources offered by DRI through these webinars and online offerings, as well as the DRI coronavirus information page on the website, and I hope that these resources are helpful to you in your practice.

I hope you are all continuing to stay safe and healthy!

Best,
Catherine C. Dugan, Esq.



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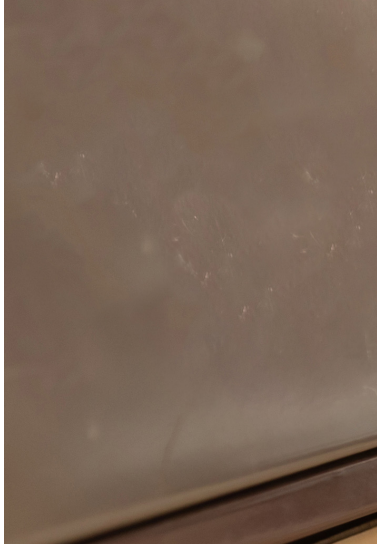
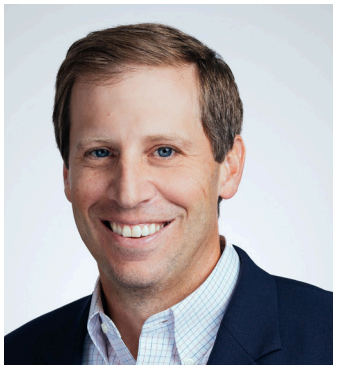


GG v. Boyd-Buchanan: CASE UPDATE



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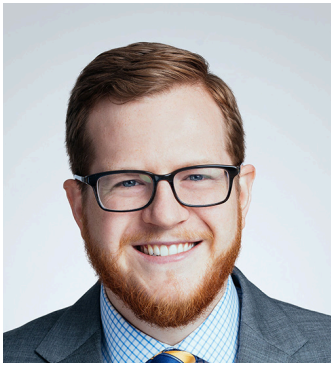

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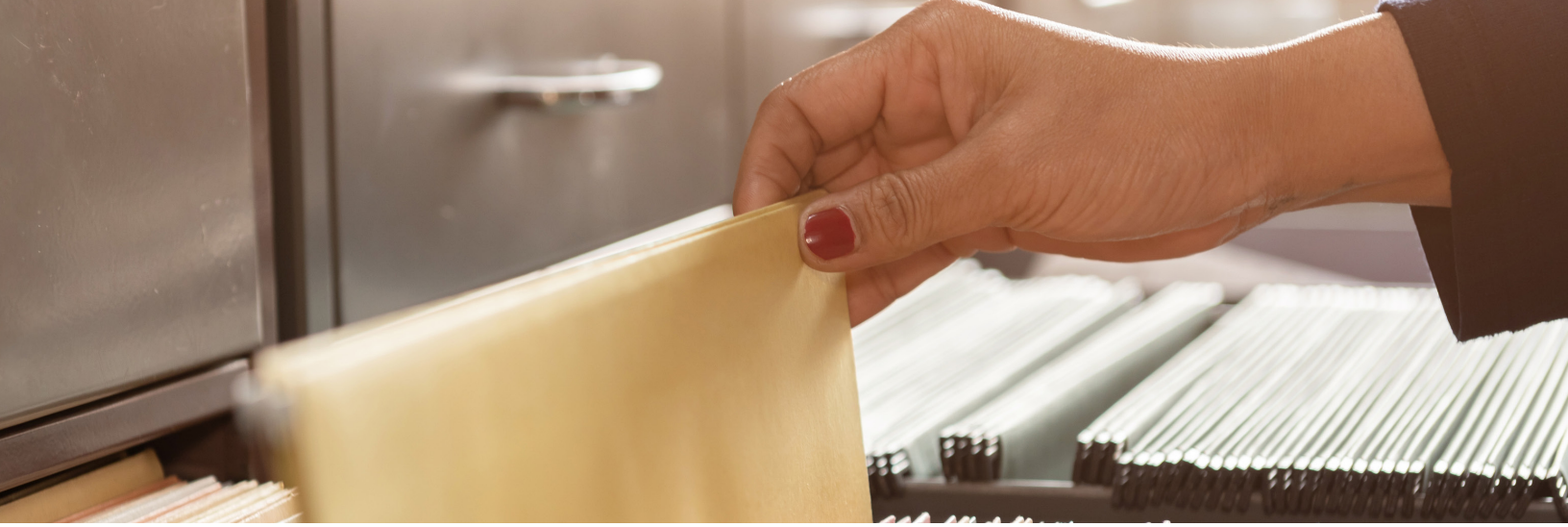
In *G.G. v. Boyd-Buchanan School*, the Tennessee Court of Appeals clarified the appropriate legal standard for analyzing discovery disputes in reinforcing that a claim for breach of contract does not authorize discovery regarding potential breaches of contracts with nonparties. No. E2018-01912-COA-R9-CV, 2019 Tenn. App. LEXIS 316 (Tenn. Ct. App. June 26, 2019).

The plaintiff, an eighth-grade student at a private school, filed suit after being expelled, in part, for sending inappropriate messages to a female student. He (and his mother, as next friend), brought an array of claims which were winnowed down to only breach of contract. *Id.* at *3. His claim was construed to mean that the school's handbook created "a written contract 'to educate,'" which the school violated by expelling him in contravention of the handbook's procedures. *Id.* at *4.

The plaintiffs requested broad discovery, including personal identifying information for previously disciplined students and complete details relating to that discipline, as well as complete employment files for the school president and school principal. *Id.* at *4-7. The school sought a protective order, which the trial court granted only in part, allowing part discovery of the requested employment files along with some (but not all) of the personal details of previously disciplined students. *Id.* at *8-9. The trial court agreed with the school that an interlocutory appeal under Tenn. R. App. P. 9(a) was justified. The Court of Appeals granted the appeal. *Id.*at *9.

The school argued on appeal that the requested material was irrelevant, and even if relevant, discovery of sensitive, confidential information about non-party minor children requires establishing a "compelling" showing of relevance, which the plaintiffs had not done in this case. The plaintiffs argued that the rules authorize "generally wide open discovery," and the school's handbook establishes no right to privacy for other students implicated in the case.

The majority began by revisiting the Tennessee Supreme Court's decision in *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015). A court evaluating a discovery request must make a threshold determination that the requested material is "(1) not privileged and (2) relevant to the subject matter of the lawsuit." *Id.*at *10 (quoting *West*, 460 S.W.3d at 121). "Relevant" discovery is broader than "relevant" evidence at trial. It includes all "germane" information, that is, information having "some logical connection to proving his



case and/or obtaining his prayed-for relief." *Id.*(quoting *West*, 460 S.W.3d at 125). Once the relevance threshold is crossed, the court must balance whether the need for the information outweighs any harm in production, such as disclosure of private information or undue burden. *Id.*at *11-12 (quoting *West*, 460 S.W.3d at 127-28).

Applying that approach, the Court of Appeals' analysis stopped at the threshold, concluding the information plaintiffs sought was irrelevant:

> Although a pattern of selective enforcement might support a discrimination claim, it is unclear what type of "pattern" would support plaintiffs' breach of contract claim. First, discovering a pattern of selective enforcement would not help plaintiffs prove that the handbook constituted a valid and enforceable contract. Second, a pattern of selective enforcement would not demonstrate that the school breached the alleged contract in this specific instance. *Cf. Steinkerchner v. Provident Life & Accident Ins. Co.,* No. 01A01-9910-CH-00039, 1999 Tenn. App. LEXIS 639, 1999 WL 734545, at *3 (Tenn. Ct. App., filed Sept. 22, 1999) (holding that an insurer's "conduct regarding the unique insurance claims of others is not relevant to whether it properly handled the claim at issue."). Third, a pattern of selective enforcement would not help plaintiffs establish the existence of damages. Finally, plaintiffs have failed to explain why discovery of such a "pattern" is "reasonably calculated to lead to the discovery of admissible evidence."

Id. at *16. The trial court's determination that the plaintiffs' requests were relevant was an abuse of discretion, so the appellate court reversed and remanded for entry of the protective order in its entirety. Judge McClarty dissented on the grounds that the plaintiffs' requested discovery could be relevant to a contract claim against the school. A Tenn. R. App. P. 11 petition to the Tennessee Supreme Court was denied.

The *G.G.* court's holding is encouraging for defense counsel faced with overbroad discovery requests across a breadth of contract claims. Cases in which a plaintiff's counsel might request evidence of potential breaches against nonparties include:

- Employee relations/employment discrimination. Because employment litigation so often involves discrimination claims, discovery requests by plaintiff employees generally seek information regarding actions against third parties, even if discrimination is not a claim at issue.
- Breach of warranty. Warranties are a common feature in construction and sales of goods litigation, and plaintiff's counsel often seek evidence of warranty claims by nonparties. Depending on the type of claim, evidence of breaches as to another party may be irrelevant, like in *G.G.*
- Termination of franchise, distributor, or dealer relationship. It is not uncommon, for example, for franchisees to try and assert that there was no "good cause" to terminate a franchise agreement, based on the treatment of some other dealer. *G.G.* may help to preclude such arguments.

From a broader perspective, *G.G.* indicates that the appellate courts are giving teeth to the discovery standard explained in *West*. It is likely that many courts in Tennessee hold the same view of discovery as being "generally wide open," as the plaintiffs did in *G.G. West* installed a framework which should become more and more familiar over time to trial judges, the result hopefully being some meaningful limits on discovery *before* appeal.

G.G.'s reasoning applies outside the discovery context as well. The foundation of the court's holding was that evidence of breaches against nonparties does not make a plaintiff's claim for breach any more likely to be true. The court referred to such evidence as "parol evidence." *Id.*at *17. *G.G.* can be used to help limit the type of evidence that might be used to try and explain the meaning of a contract. ■

When Evidence Grows Legs:
SPOLIATION & TRUCKING CASES

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I. INTRODUCTION

Preservation of evidence is an essential component in all areas of civil litigation. The result of not preserving 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.

II. THE DEVELOPMENT OF TEXAS SPOLITATION LAW

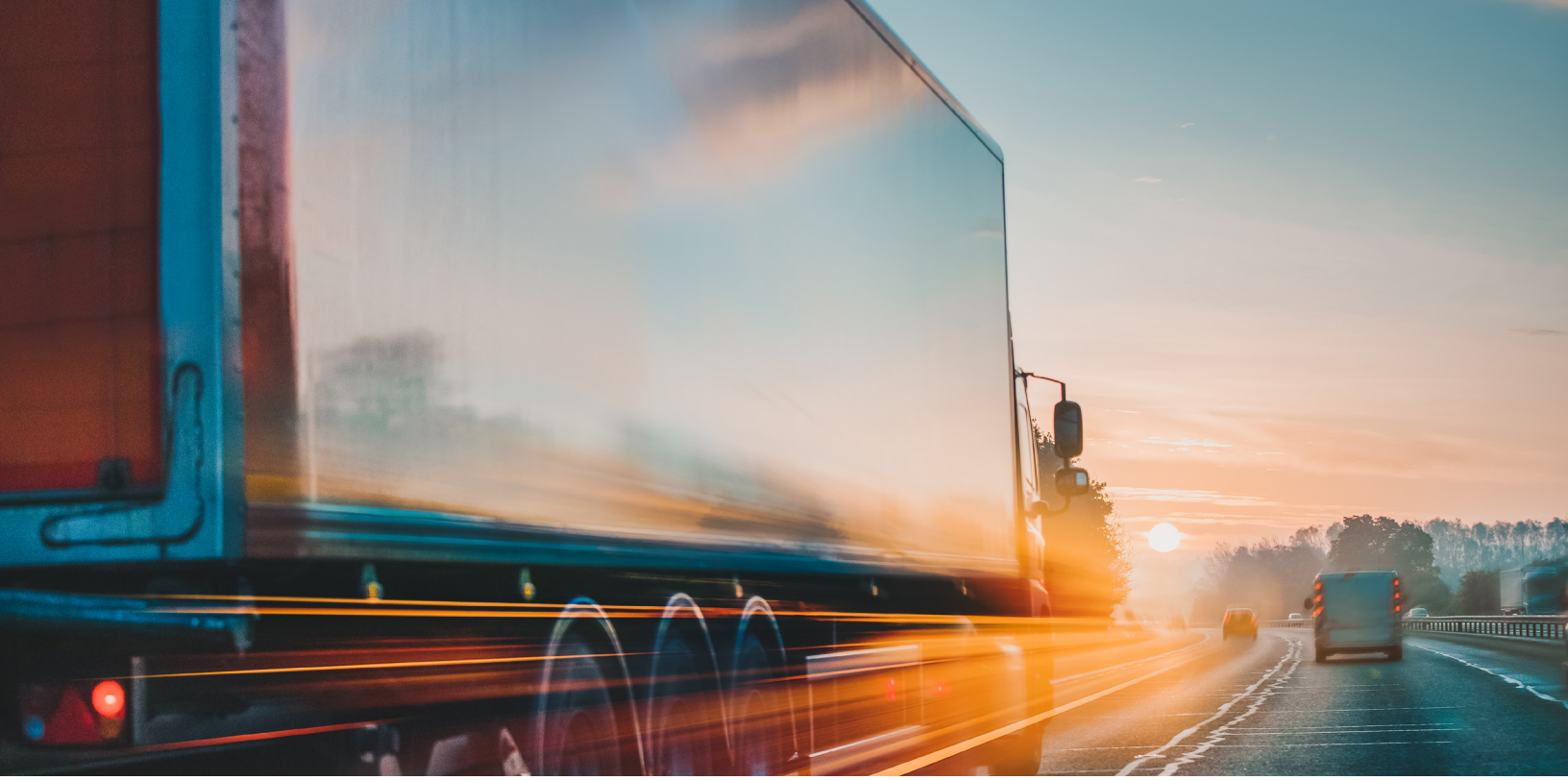
While the law regarding spoliation has changed over the years, spoliation continues to be an evidentiary concept and not a separate cause of action. *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998). The Texas Supreme Court first recognized this concept back in the mid-1800's and it has continued 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).

III. 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*.

A. 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 that the trial court's submission of a spoliation instruction to the jury was erroneous because there was no evidence that 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.

B. 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. *continued on p. 10*

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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 up 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 solutions 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.

C. Wackenhut Corp. v. Gutierrez

Then, in *Wackenhut Corp. v. Gutierrez*, the 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 recorded 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 all of this 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.*

D. 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 maintainingits 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 from it. *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. Additionally, 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.

IV. *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.

V. 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 390-399. 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.

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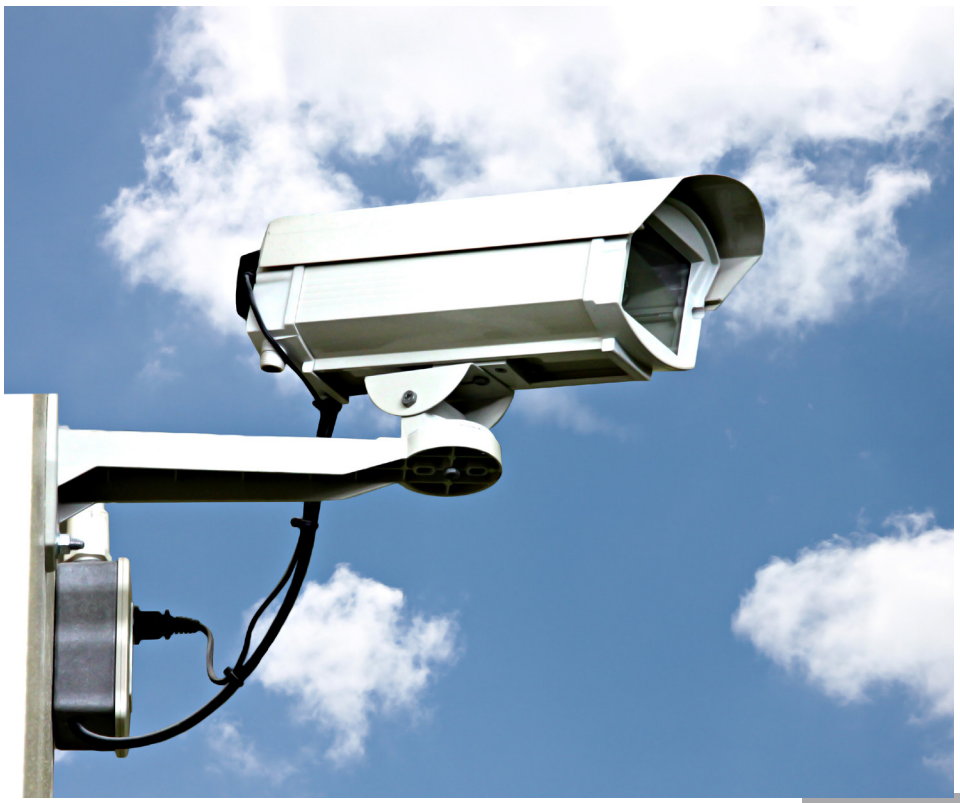

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A. Driver Qualification and Training

Upon hiring a driver, a trucking company must begin storing 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 period 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.

B. 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 5 years. *See Id.*

C. 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).

D. 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).

VI. CONCLUSION

The preservation of evidence is vital in all cases, but especially in trucking cases. In order 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 pleadings. ■

LINKEDIN FOR LAWYERS

[an excerpt from Frank Ramos' new book, LinkedIn for Lawyers, published/available for free by the Defense Research Institute]

WHAT IS LINKEDIN?

LinkedIn is the largest business social media platform with professional users from around the world. You will not find a business social media site with more lawyers, business leaders, insurance professionals and potential clients. You don't post family vacation photos, or discuss politics or share memes on LinkedIn. It is for professionals to discuss topics professionals discuss. It is a forum to meet and get to know prospective clients and share your expertise and market your practice. It is an easy platform to learn and use. There is an app you can download for your tablet or phone. The folks behind the platform are regularly tinkering and improving the platform to make it more user friendly and make it easier to reach out and connect with other professionals. In fact, by the time this book is published and circulated, there will likely be a half dozen new features that didn't exist when I wrote it. So, if you're considering putting your toe in the social media pond to generate leads and develop business, LinkedIn is the platform to consider and use.

WHY LINKEDIN?

Still not convinced? Why use LinkedIn? Most every professional I know has a profile on LinkedIn. Most every professional I know scrolls through their feed on LinkedIn. If you Google someone, one of the first hits will be their LinkedIn profile. More and more of us interact with others daily through social media and no one does business social media better than LinkedIn. Each day, hundreds of new professionals join LinkedIn to meet and get to know lawyers like you. LinkedIn allows you to interact with others from around the world whenever and wherever you want and like. You can build relationships with others you would never have met if person. You can get referrals from prospective clients who learned about you through the platform. Why LinkedIn? Because it works for building your brand, expanding your name recognition and creating relationships with prospective clients.

WHY YOU SHOULD CONSIDER LINKEDIN

If you're deciding how to market your firm and your practice, and you're looking to do so on a limited marketing budget with a schedule that doesn't permit you much free time for long lunches or cocktail parties, LinkedIn may be your solution. LinkedIn allows you to reach out to other professionals in a professional setting, connect with and message them and lay the foundation for a mutually beneficial business relationship that you can take offline. All business is based upon and premised on relationships. Most folks on LinkedIn are there to create new relationships and foster existing ones and are open to meeting and getting to know and referring work to lawyers like you. Online relationships aren't all that different than in person ones and an online community provides you access to folks you may not have ever met otherwise.

HOW LINKEDIN COMPARES TO OTHER PLATFORMS

The major social media platforms include LinkedIn, Facebook, Twitter and Instagram. Lawyers use all these platforms to generate leads and develop relationships. Each has its own approach, tone, expectations and content. Facebook is primarily for friends and family where you share laughs and loss, opinions and humor. Photos are posted from vacations, meals, weddings, birthdays, graduations, funerals, losses, fundraisers and personal events. Some use it to promote their firms and their brand but they do it as part of a larger, more personal strategy, revealing items about themselves, their hobbies, interests and feelings. Instagram is a photo sharing site where you promote yourself and your business largely through visuals and short messages and videos. Like Facebook, it's more of a fun site, where you can promote your business, but in an eye-catching manner. Twitter is a quick take website, where folks share their opinions and hot takes on a whole host of topics. It's a good site to share articles, blog posts and other items with potential clients. Twitter, though, is full of trolls and those looking for an online fight. So often, I've seen even the best meaning and innocuous tweets result in needless Twitter wars. Folks with thin skin should not apply. That leaves LinkedIn as the best platform for business relations. If you're going to pick one online platform to conduct business, choose LinkedIn.

HOW MARKETING HAS CHANGED

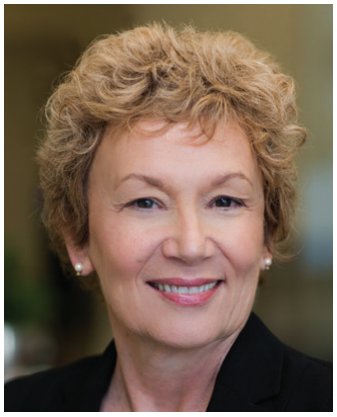
There was a time all attorney marketing was done in person – over meals or drinks or at a conference. These efforts were supplemented with calls, letters and hard copy promotional materials. Though the personal touch will never be replaced, and is integral in every attorney's business development plan, more and more marketing is going online through social media. Beyond the firm websites and attorney blogs, beyond the e-newsletters and e-mail blasts, more and more firms are turning to social media to promote themselves, their practice areas and their attorneys. Many firms have found their ways onto social media and have created their space and have spread their influence across various social media platforms. If done right, done well and done consistently, legal social media marketing pays off – it pays off in influence, in relationships and in new business.

HOW WE RECEIVE INFORMATION HAS CHANGED

We receive more and more information on our phones. We receive news, calls, texts, messages, alerts, movies, shows, podcasts, blogs – you name it - on our phones. And we want the information to be concise, visual and easily digestible. We've lost our patience and our attention spans and we simply process information differently. Our brains work differently. Our brains our wired now for social media. Social media knows this because they've played a role in reprogramming us. The way we scroll down on our phones and tablets, the visual cues, the headlines and content – social media has trained us and transformed how we process and consume digital data. So if you want to reach others, LinkedIn allows you to tap into this Pavlovian response we've all become conditioned to. If social media has become the proverbial ringing bell, when it comes to professionals, LinkedIn rings the loudest. ■

FRANK RAMOS is the Managing Partner of Clarke Silverglate in Miami, Florida, where he practices in the areas of commercial litigation, drug and medical device, products liability and catastrophic personal injury. He is a past president and member of the Florida Defense Lawyers Association, and member of DRI and FDCC. He may be reached at framos@cspalaw.com

Common Issues Encountered in Evaluating Pecuniary Damages



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We have encountered a variety of issues with plaintiff expert's opinion of pecuniary damages in matters involving personal injury, as well as wrongful termination and wrongful death matters. The items discussed below can and have occurred in our analyses of plaintiff's expert calculations of damages in all these matters.

In these types of matters, damages presented by a financial expert normally include lost past earnings, lost future earnings, and often, the value of lost household services. Not surprisingly, the most common issues lie in the area of forecasting and quantifying future lost earnings or earnings capacity. This calculation normally represents the largest portion, if not all, of the damages being presented by the plaintiff.

Some of the most common issues we have encountered include:

- **Failing to obtain a thorough understanding of the employment history, earnings history and education of the plaintiff**

This can lead to erroneous assumptions as to the plaintiff's future employment opportunities or future business opportunities. For example, a misunderstanding as to the plaintiff's education and certifications can lead to the presumption that he/she has the capacity for earnings for which the plaintiff is actually not qualified. This presumption will cause a subsequent overstatement of future earnings capacity.

Likewise, a misunderstanding as to the nature of sales or service contracts of a self-employed business can lead to erroneous forecasts of future revenue for that business.

- **Inclusion of one-time income, such as a bonus, in the basis of future annual lost earnings**

Some bonuses, for example, a Christmas bonus, may be a regular annual event. However, a discretionary bonus that is neither regular in amount or occurrence would not be reasonably included in the basis for projecting future annual earnings.

Likewise, failing to identify one-time income which occurred in a single year of a Schedule C business could lead to an overstatement of forecasted future revenue for that business.

- **Basing future lost income on the gross income per the plaintiff's personal income tax returns without adequate consideration of the sources of that income**

Examples of income that would not necessarily be impacted by a personal injury would include dividends and interest, investment

income and rental income. Therefore, the failure to consider whether other income would be affected by the event can lead to the overstatement of damages.

- **Basing the lost earnings of a self-employed individual solely on the net income reported on Schedule C**

We have seen instances of "down" years being excluded for one reason or another, resulting in the future lost earnings being based on only the most profitable years. We have also seen instances in which the taxable business income in the years after the injury was less than prior to the injury, but not because of the injury, but rather because of the tax deduction allowed for the cost of equipment and other assets acquired in those years.

- **In the case of a self-employed individual, failing to consider whether the plaintiff's personal services could have reasonably been replaced**

We have seen instances in which the plaintiff's expert calculated future lost income for a self-employed individual who closed the business when his or her services to the business could have been replaced by hiring someone to perform those duties.

- **Failing to "step back" and evaluate the amount of damages calculated from an overall, reasonableness perspective**

We have seen instances in which year-over-year growth in the future revenues and profits of a Schedule C business are forecasted without considering issues such as capacity, additional equipment needs or availability of labor. Such forecasts can run into trouble when one realizes that it would not be possible to achieve the forecasted revenue without the cost of additional facilities or equipment, overtime or higher wages and these costs have not been considered.

Another area in which we have encountered issues with the calculation of plaintiff damages in personal injury matters involves the number of years over which future lost earnings are calculated. This determination is centered on the worklife expectancy of the individual.

Some of the issues we have seen here include:

- **Misunderstanding of the generally accepted worklife expectancy tables and the methodology behind those tables**

Some plaintiff experts have made the assumption that the worklife expectancy per these tables is not correct or does not apply to their case because the plaintiff's age plus the worklife expectancy does not equal full Social Security retirement age. Some experts are unaware that the worklife expectancy tables are intended to predict the average number of years a person will remain in the workforce and factor in such components as education, gender, age, the probability of life, labor force participation and employment.

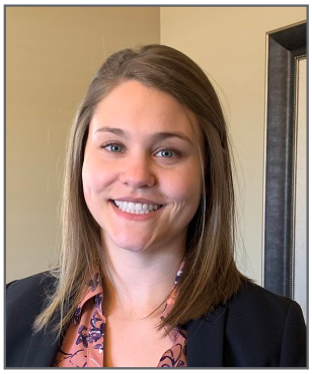
In some instances, we have seen plaintiff experts accept an individual's contention that he/she would still be working at the same level for years well beyond the worklife expectancy tables, simply because the individual states that he/she is in excellent health, or exercises, or eats well and has no intention of retiring.

Other issues we have encountered are the failure to address the question of mitigation, the effects of technological and economic changes in the industry in which the plaintiff works, the failure to adequately account for personal consumption and the failure to consider changes in family and children in calculating the value of lost household services.

Finally, changes in the US economy have led to issues with the growth factor applied in forecasting future lost wages and the determination of an appropriate discount rate for use in calculating the present day value of these future lost wages. An often-used source for the growth rate in earnings is the data on changes in wage and salaries as reported by the Bureau of Labor Statistics. For the discount rate, financial experts normally use a factor based on "safe" investments, such as federal government treasuries. We have observed that the growth rate often employed by financial experts is based on historical wage data, but the discount rate is based on current treasury rates. With the extremely low interest rates we are seeing on treasury securities, the effect of this combination can be to calculate a present value of future lost earnings equal to or in excess of the sum of each year's loss. The reasonableness of the rates employed and their relation to one another should be evaluated by the financial expert in conjunction with the facts of the case in determining the appropriate growth and discount rates.

In our ever-changing economy, the calculation of damages in a personal injury case is not simply a matter of making calculations based on the same assumptions and methodology in every case. Judgment and experience are key components in making calculations based on sound assumptions and facts which are unique to each case. The team at Elliott Davis can provide the judgment and experience needed in evaluating the assumptions and methodology utilized by the plaintiff's expert in your case. ■

Motherhood vs. The Billable Hour Model



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According to the American Bar Association's 2019 annual report, more than half of all U.S. law students are women. However, women only make up 38% of our lawyers and 27% of our federal judges. At first, I thought these statistics had to be incorrect. Surely, women make up an equal, if not almost equal, percentage of the legal profession as men? Then I thought of the numerous multi-party depositions I have participated in where I am in the only female attorney in the room.

Then I remembered the time a potential employer skirted around asking a female friend and law school classmate if she planned to have children. I can still hear my friend, who was on law review and near top of the class, telling me that her male interviewer eventually directly questioned her commitment to her career, adding, "Most women just get married, have babies, and quit anyways."[1] Is that true? Are we really putting ourselves through the stress of law school and the bar exam just to quit a few years into practicing? And if so, why? I believe the answer in many cases can be boiled down to work/life balance and, more specially, motherhood.

"Women are expected to work like they don't have children and mother like they don't work." This statement never resonated with me until I became a working mother and quickly realized that balancing work expectations and parental responsibilities is not always easy. While this balancing act is not unique to the legal field, it does have one unique obstacle: the billable hour model. Under this model, an associate's productivity or worth to a firm is measured based on the amount of time spent on projects or in the office. Depending on a firm's specific requirements, this method can place a working mother's desire for career success and progression in direct conflict with her desires or objectives as a mother.

I recently read an article on Law.com entitled "Redefining Hard Work in the Legal Profession for Working Mothers"[2] by U.S. District Judge Rodolfo Ruiz and Fabiana Cohen. Ms. Cohen was the first clerk hired by Judge Ruiz following his confirmation to the U.S. District Court for the Southern District of Florida. She is also a working mother. The article discusses the traditional definition of hard work and the emphasis placed on young lawyers being in the office at all hours of the day. One line reads: "[W]orking mothers, many of whom shoulder the burdens of after-school pickups, sick days and the like, are disadvantaged by a system that conflates hard work with rigid success metrics like the number of hours spent in the office."[3]

I have had many conversations with my female colleagues who are also working mothers. The most common complaint is that the pressure to adhere to the traditional model without flexibility. Each of these women has the desire and drive necessary to succeed in their careers. However, each struggles to balance the demands of her career with the demands of motherhood and family life. Each has noted feelings of maternal guilt during those times when they have to "choose" between their career and their family. As noted by Judge Ruiz and Ms. Cohen, none of this is meant to diminish the hard work it takes to be a successful attorney.[4] Productivity and drive are essential for success in the legal field, and personal sacrifice is also a requirement at times.

What the legal profession needs is more flexible schedules, more training and access to new and improved technology, and an increased ability to work from home. These changes would make help alleviate some of the extra stress placed on working mothers by allowing them more control over their work/life balance, creating happier and overall healthier female attorneys. Additionally, a shift in focus from hours billed to efficiency would benefit more than just working mothers. The traditional model discounts hard working and efficient lawyers who may not obtain a required amount of time in the office or hours billed *even* if they are accomplishing more than their contemporaries who do obtain or surpass such requirements. When motherhood or family obligations are the reason a lawyer "falls short" in their career goals or job requirements, it can quickly become discouraging. In that case, it isn't too difficult to understand why women "have babies and quit anyways." Working mothers should not be expected to choose between working long hours for recognition or attending a child's soccer game or dance recital. Instead, they should have the flexibility to attend those events while simultaneously achieving their career goals through hard work and efficiency. ■

[1] For the purposes of this article, I am choosing not to acknowledge the numerous problems with the statement made by this interviewer.

[2] Cohen, Fabiana and Ruiz, Rodolfo. Redefining Hard Work in the Legal Profession for Working Mothers." Law.com, 14 Oct. 2019, https://www.law.com/dailybusinessreview/2019/10/14/redefining-hard-work-in-the-legal-profession-for-working-mothers/.

[3] Id.

[4] Id.

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* DRI = Defense Research Institute

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Primary area(s) of practice _____

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