



## **FROM THE PRESIDENT**

**Junie Ledbetter,  
Jay R. Old & Associates, PLLC, Austin**

In this issue:

Annual Meeting

UT/OU CLE & Game Day

DRI – Go online to support Dan Worthington’s bid for board position

Dear TADC Friends,

October already and time to report on TADC’s annual meeting, first-ever Red River Shoot Out CLE, and change of leadership.

The annual meeting went smoothly in San Antonio at the Hyatt Hill County. Tom Ganucheu and Mitzi Mayfield recruited knowledgeable speakers from all across the state, and the CLE counted toward specialization hours for Civil Law, Appellate Law, and Personal Injury. (Total hours 10, including 1.5 hours ethics) Thanks to all speakers for excellent presentations.



***Mayfield***



***Ganucheu***

Allan Dubois	Ethical concerns of the Impaired Lawyer (Allan is in line to become the President of the State Bar)
Kim Askew	Hot Topics in <b>Employment</b> Law
David Beck & Eric J.R. Nichols	Dealing with the <b>Media</b> : When Your Case is Up Front and Center
Carlos Rincon	Challenges Involving the <b>Undocumented Plaintiff</b>
Mary Griffitts	Use or Mis-Use of <b>Social Media</b> by Those in the Jury Box
Lars Reinhart, MD, BRC	Integrating Advanced Technologies into <b>Injury Analysis</b>
Trey Sandoval	<b>Dismissal on the Pleadings</b> in Federal and State Court
Greg Curry  Pat Weaver  Keith O'Connell	Panel: <b>Energy Law</b> in Texas: Oil, Gas and the Litigation Climate
Jay Old	The Ever-Changing Face of Construction Litigation
Scott Stolley	Mandamus Review of the Merits of Orders Granting <b>New Trials</b>
Joseph Cohen	<b>Technology</b> in the Courtroom
Richard Basom  SEA Limited	Practice Tips for the <b>Energy</b> Lawyer
Hon. Xavier Rodriguez	New Amendments to the <b>Federal Rules</b>
Justice Jeff Brown	<b>Texas Supreme Court</b> Update
John Martin  Lewin Plunkett  Hon. Pat Kerrigan  Tom Henson	Panel: Perspective – A Look Back and a Look Forward on our Profession, Our Lawyers and our Organization    Thanks to our past presidents for contributing to this panel discussion.

Thanks go out to core sponsor [SEA Limited](#) and meeting sponsor [BRC](#) .

Papers are available on these topics from the TADC offices.

The Board of Directors met before the CLE presentations and discussed several special topics and collaborative efforts with other lawyer groups, the Supreme Court and the legislature. In addition, the new board of directors was elected and another year of great projects are already under way under the capable leadership of president-elect Michele Smith.

Several past presidents met after the meeting to discuss the state of the organization and strategies that continue meaningful projects on behalf of the membership.

Annual awards were presented at the Friday evening dinner. The Founders Award was presented to Fred Raschke for the many civic projects he leads both in his community and across the state. Bud Grossman and Mitch Moss received President's Awards for their continuing efforts in local programming over the course of years. Congratulations to all.



*Raschke*



*Moss*



*Grossman*

One last presentation was made to Bobby Walden commemorating 21 years of loyal service to TADC.

### **UT/OU Game and CLE:**



Jerry Fazio organized and led the first ever RED RIVER SHOWDOWN on the UT/OU weekend, October 9-10 in Frisco. The Oklahoma Defense Bar and TADC joined forces to combine CLE, some good cross-border lawyer networking, and some serious golfing—all leading up to the big match on Saturday. The turn out was great, and subject matter and presentations couldn't have been better. Thanks to speakers and sponsors alike. Jerry promises that plans are already in the works for another UT/OU weekend seminar next year.

### **DRI:**

Just a reminder: Dan Worthington is running for a Board of Directors position with DRI. If you are a DRI member, I urge you to support Dan in this effort and show DRI that TEXAS is fully behind him. Please go online with DRI. See links to pertinent information for online comments and for information on Dan's background. For those of you new to TADC, Dan is the immediate Past President of TADC with many years of leadership roles on special committees and projects. Several other candidates are vying for the open position on the DRI board, so your support can make a difference in his success.

How can you support Dan in his bid for a board of directors position? Submit written comments in favor of Dan's candidacy and file them with DRI, or speak in person to the committee in favor of Dan. For those of you who are not attending the meeting, written support of Dan can be made to John Kouris at:

John R. Kouris

DRI  
55 W. Monroe  
Suite 2000  
Chicago, IL 60603  
[johnrkouris@dri.org](mailto:johnrkouris@dri.org)

Dan is not only a great lawyer, he is an even more outstanding person and will effectively represent our voice and concerns to the DRI. [Dan's Declaration and CV](#) Please take a few minutes to offer your support of Dan and his role as TADC advocate on the DRI stage.

One last note: we are saddened by the death of past president James “Blackie” Holmes earlier this month. Blackie was a strong leader and friend who advanced high standards in his dignified practice of law, both within the TADC organization, and in the larger legal community. We will miss him dearly.

Thanks to each of you for the work that you do on behalf of TADC. It has been an honor to serve you as president of the organization through the 2013 – 2014 TADC year.

Best wishes,  
Junie Ledbetter

## **LEGISLATIVE/POLITICAL UPDATE**

Texans will go the polls on November 4 to elect a new slate of statewide candidates. The last Democrat to win a statewide election was Lt. Governor Bob Bullock in 1994, and Democrats will probably have to wait a little longer to break a two-decade long losing streak.

Attorney General Greg Abbott is a prohibitive favorite to defeat Sen. Wendy Davis (D-Fort Worth) and to succeed Governor Rick Perry, who has held the office since 2000. While some people expect the race for Lieutenant Governor to be marginally closer, Sen. Dan Patrick (R-Houston) should comfortably defeat Sen. Leticia Van de Putte (D-San Antonio). In the Attorney General’s race, Sen. Ken Paxton (R-McKinney) is favored against his Democratic opponent, Houston attorney Sam Houston. GOP candidates Glenn Hegar (Comptroller), George P. Bush (Land Commissioner), Sid Miller (Agriculture Commissioner), and Ryan Sitton (Railroad Commissioner) are likewise expected to ride the Republican wave into office.

Three Texas Supreme Court justices, including recently appointed Chief Justice Nathan Hecht, face Democratic opposition in the upcoming November election. Chief Justice Hecht has drawn El Paso District Judge Bill Moody, who is making his fourth campaign for a seat on the high court, as well as Libertarian Tom Oxford. Moody lost a 2010 challenge to incumbent Justice Don Willett. Chief Justice Hecht is seeking a full six-year term. Governor Perry’s most recent appointee to the Court, Justice Jeff Brown faces longtime Court of Criminal Appeals Judge Larry Meyers. One of the first Republicans to be

elected to a statewide judicial office, Judge Meyers switched parties in order to challenge Justice Brown. This race also has a Libertarian candidate, Mark Ash. In Place 7, Justice Jeff Boyd has three opponents: 13<sup>th</sup> Court of Appeals Justice Gina Benavides, Libertarian Don Fulton, and Green Party candidate Charles Waterbury. Justice Phil Johnson has no Democratic opposition, but does face Libertarian and Green Party candidates.

Of the three open seats on the Texas Court of Criminal Appeals, only Place 3 is fully contested. Republican Bert Richardson, a criminal district judge from San Antonio, faces El Paso lawyer John Granberg, as well as Libertarian Mark Bennett. Richardson also has the distinction of presiding over the state's case against Governor Perry for official oppression. In the other two races, GOP nominees Kevin Yeary in Place 4 and David Newell in Place 9 have Libertarian and Green Party opposition.

There are several interesting and potentially competitive races in the Courts of Appeals. In the Houston First Court of Appeals, former District Judge Russell Lloyd is trying to unseat incumbent Justice Jim Sharp (D) in Place 3. In the Third Court of Appeals (Austin), where Justice Woody Jones's retirement has created an open seat, Justice Jeff Rose (R) and former Justice Diane Henson (D) are vying for Chief Justice. A similar battle in San Antonio, where Fourth Court of Appeals Chief Justice Catherine Stone has decided to move on, pits 12-year incumbent Justice Sandee Bryan Marion (R) against Democratic attorney Irene Rios. In Corpus Christi, incumbent Justice Dora Contreras Garza (D) is heavily favored over Republican attorney Doug Norman. Finally, in the Fourteenth Court of Appeals (Houston), incumbent Chief Justice Kem Frost faces District Judge Kyle Carter, while in Place 7 Democratic attorney and businessman Gordon Goodman is challenging incumbent Justice Ken Wise (R).

A few district court races have drawn statewide attention as well. In the 92<sup>nd</sup> District Court in Hidalgo County, Governor Perry's appointee Judge Jaime Tijerina (R) faces a challenge from lawyer Luis Singleterry. Judge Pat Kerrigan of the 190<sup>th</sup> District Court in Harris County has yet another tough race, this time against Democratic challenger Farrah Martinez. And in San Antonio, former Perry appointee and District Judge Renee McElhaney, who lost her initial election bid in 2012, is running for the open 150<sup>th</sup> District Court bench against Democrat Edna Elizonda.

Moving on to legislative races, only a handful of contested races dot the landscape. In Senate District 10 (Fort Worth), Republican Konni Burton and Democrat Libby Willis are vying to replace incumbent Wendy Davis, the Democratic gubernatorial nominee. In District 28, State Rep. Charles Perry (R-Lubbock) won 53% of the vote in a special election to succeed Sen. Robert Duncan, who was recently named Chancellor of the Texas Tech University System. Perry will now have the advantage of running for a full term as an incumbent. In Senate District 4, where incumbent Sen. Tommy Williams (R-The Woodlands) resigned in order to take a post at Texas A&M University, State Rep. Brandon Creighton (R-Conroe) defeated Rep. Steve Toth to win the seat. When added to Dallas businessman Don Huffines's upset victory over incumbent Sen. John Carona (R-Dallas) and Bob Hall's win over incumbent Sen. Bob Deuell (R-Greenville) in the March primary, the Texas Senate looks to be even more conservative than in 2013. And one other thing: if Sen. Glenn Hegar (R-Katy) wins his bid for Comptroller, as expected, a special election will have to be held sometime early next spring to fill his Senate seat. Rep. Lois Kohlhorst (R-Brenham) has already announced her intention to run.

In the Texas House, incumbent and TADC member Rep. Sarah Davis (R-Houston), faces a re-election challenge from Democrat Allison Ruff in what has been a fairly competitive district. Another Houston area race of interest pits incumbent Rep. Hubert Vo (D) against challenger Al Hoang (R) in another close district. In Dallas, TADC member and incumbent Kenneth Sheets (R) faces a competitive challenge from Democrat Carol Donavan. In the Kingsville-based District 43, incumbent Rep. J. M. Lozano and Democrat Kim Gonzalez are going after each other with the gloves off, while in District 23, Galveston District Judge Susan Criss and Republican Wayne Faircloth are engaged in a hotly contested campaign to succeed retiring Rep. Craig Eiland (D).

\*\*\*\*\*

## **CALENDAR OF EVENTS**

**November 14-15, 2014**

**TADC Board of Directors Meeting**

Amarillo, Texas

**January 21-25, 2015**

**TADC Winter Seminar**

Beaver Creek Lodge – Beaver Creek, Colorado

MacKenzie Wallace & Mitch Moss, Co-Chairs

**March 5, 2015**

**TADC Board of Directors Meeting/Legislative Day**

Austin, Texas

**April 29-May 3, 2015**

**TADC Spring Meeting**

The San Luis Resort – Galveston, Texas

**July 8-12, 2015**

**TADC Summer Seminar**

Snake River Lodge & Spa – Jackson Hole, Wyoming

**September 16-20, 2015**

**TADC Annual Meeting**

Millennium Broadway – New York, New York

## **LEGAL NEWS - CASE UPDATES**

*Case Summaries prepared by  
Melody Rodney with Donnell, Abernethy & Kieschnick, P.C., Corpus Christi*

*Indemnity Ins. Co. of N. America, et al. v. W&T Offshore, Inc.—756 F.3d 347 (5<sup>th</sup> Cir. 2014):*

In this appeal from the lower court’s granting of a summary judgment on a declaratory judgment in favor of umbrella policy issuers, the Fifth Circuit sought to determine whether the umbrella policies provided coverage for hurricane losses sustained by W&T Offshore, Inc. W&T Offshore, Inc. (“W&T”) sustained damages to offshore platforms as a result of Hurricane Ike. W&T had three types of insurance in place to cover hurricane losses, including 4 umbrella/excess policies that were all identical in all relevant aspects pertaining to the type of coverage provided and when the coverage was triggered. The umbrella policies only covered damages resulting from claims against W&T by a third-party and all were endorsed to cover “removal of debris” claims. Because the damages sustained by W&T were so vast, W&T sought to submit expenses for damages not covered under the umbrella policies to the companies that wrote the policies that did cover such damages (which would exhaust the limits of those policies) and intended to submit all “removal of debris” damages to the umbrella insurers.

The umbrella insurers sought declaratory judgment that the policies did not cover the losses for W&T’s “removal of debris” claims because the Retained Limit of the underlying policies had not been met by payment of claims that would have been covered under the umbrella policies. The Fifth Circuit disagreed and held that the plain language of the umbrella policies did not specify how the Retained Limit had to be reached, only that the Retained Limit had to be met to trigger coverage under the umbrella policies. The Court further held that if the policies were intended to govern how the Retained Limit had to be met, the policies should so state. [Read The Opinion HERE](#)

*Vak v. Net Matrix Solutions, Inc.—No. 01-13-00385-CV (Tex. App.—Houston [1<sup>st</sup> Dist.] 2014):*

This was an interlocutory appeal of a personal jurisdiction challenge pertaining to a forum-selection clause. Vak, a California resident, entered into a written employment contract with Net Matrix, a Houston based computer consulting firm, to work on a contract basis for a California company. Vak was paid by Net Matrix and Net Matrix billed the California company. As part of the written contract, the parties agreed that the agreement would be construed by the laws of the State of Texas, that the agreement was made in Harris County, and that exclusive venue for any litigation in connection with the agreement would be in Harris County. Vak quit two weeks later and was sued by Net Matrix.

The Court determined from the face of the contract that the debated

clause was in fact a forum selection clause and not the venue selection clause that Vak argued. The Court noted that the language of the agreement is what controls and stated that clauses providing for *exclusive venue* in a particular place are treated as forum-selection clauses as opposed to clauses that provide for a particular place to be *a proper venue* which are viewed as venue selection clauses. [Read The Opinion HERE](#)

*Allstate Indemnity Company v. Memorial Hermann Health System*—No. 14-13-00307-CV (Tex. App.—Houston [14<sup>th</sup> Dist.] 2014):

The Court was asked to determine whether an insurance company that settled a negligence action without satisfying a properly filed hospital lien had standing to request declaratory relief concerning the company's rights to contest the reasonableness of the charges for services by the hospital. The Court held that the insurance company did have standing. The Court further held that the Uniform Declaratory Judgment Act applies to anyone whose rights are affected by a statute if a justiciable controversy exists. The Court determined that Allstate's rights were affected by the hospital lien statute because the lien attached to the proceeds of the settlement that Allstate negotiated. The Court further held that Allstate alleged a real and distinct injury by alleging that the reasonable cost of treatment provided by the hospital was less than the amount billed by the hospital. [Read The Opinion HERE](#)

*Boerjan v. Rodriguez*—436 S.W.3d 307 (Tex. 2014):

This case involved an analysis of the duty owed by a landowner to a trespasser. In this case the driver of a pickup truck (a coyote) entered a ranch while transporting a family in the truck. After being confronted by a ranch employee, the driver fled at a high speed and rolled his vehicle after traveling approximately 5 miles, resulting in the death of the family that he was transporting. The ranch employee followed the fleeing pickup. There is a dispute about exactly what the actions were of the ranch employee while he was following the pickup.

The Court held that Texas case law is clear that a landowner owes only a duty to avoid injuring a trespasser willfully, wantonly, or through gross negligence so any claim for simple negligence must fail. The major dispute in the case involved what actions were taken by the ranch employee and whether those actions rose to the level of gross negligence. The Court looked at the facts presented and determined that the only fact proven conclusively was that the ranch employee followed the truck which did not create a likelihood of serious injury. The Court determined that the testimony fell short of proving that the ranch employee did anything in the process of following the pickup that could rise to the level of gross negligence. The Court affirmed the trial court's rendering of no-evidence summary judgment in favor of the ranch owners. [Read The Opinion HERE](#)

*Grafer v. Mid-Continent Casualty Company*—756 F.3d 388 (5<sup>th</sup> Cir. 2014):



The Court was asked to determine whether the insurance company violated its duty to defend by refusing to pay the attorney's fees of the attorney chosen by the insured. The insured argued that a conflict of interest existed with the attorney tendered by the insurance company due to a reservation of rights letter issued by the insurance company. The lawsuit arose from allegations of copyright infringement. The Court held that no disqualifying conflict of interest existed so the insurance company fulfilled its duty by tendering the insurance company's chosen attorney.

The Court did acknowledge that a reservation of rights can create a potential conflict when the facts to be adjudicated in the underlying lawsuit are the *same facts* that would determine whether coverage exists. The insureds, principals of the company accused of copyright infringement, believed that a conflict of interest arose in their case because one of the issues centered around when the alleged copyright infringement claims *accrued* because the insureds were fighting the claims based on a statute of limitations defense. They argued that one of the main bases for the reservation of rights was when the acts of infringement *occurred* and if they were within the policy period. The Court determined that counsel would only have to argue the accrual date to establish a statute of limitations defense on behalf of the insureds and would not have to determine the occurrence date at all. The Court further determined that the *knowing violation* exclusion in Mid-Continent's policy would not be adjudicated by a finding in the underlying lawsuit of willful infringement of a copyright. The Court reasoned that it did not believe that a finding of willfulness under the Copyright Act would require proof of knowing conduct because willfulness could be proven by showing a reckless violation of the Copyright Act. The Court thus held that there was no conflict of interest. [Read The Opinion HERE](#)

*Crownover v. Mid-Continent Casualty Company*—757 F.3d 200 (5<sup>th</sup> Cir. 2014):

The Court was asked to determine whether Mid-Continent was obligated to pay for damages caused by an insured construction company for failure to comply with a repair provision in a construction contract with a homeowner. Arrow Development, Inc. contracted with the homeowners to construct a home and further agreed in the contract to provide an *express warranty to repair* any damages to the home resulting from a failure to conform to the requirements of the Contract Documents. Problems arose with the foundation and HVAC system. Arrow did not repair the damages and the homeowners went to arbitration against Arrow and received an award. Arrow then filed for bankruptcy.

The homeowners then sued Mid-Continent, Arrow's insurer, for breach of contract for failure to pay the arbitration award. Mid-Continent argued that it was not liable due to the contractual-liability exclusion in the policy with Arrow. The exclusion indicated that the insurance policy did not apply to damage for which Arrow was obligated to pay due to assumption of liability by contract. The exclusion applies if Arrow assumed liability that was greater than the liability that Arrow would have had under general law in the absence of the contract. The Court held that Arrow assumed greater liability in the contract by providing an express warranty to promptly

repair damages resulting from a failure to comply with the requirements of the contract. The Court found this contractual liability to be greater liability than the duty to perform the work in a good and workmanlike manner under general law. The Court affirmed the District Court's granting of Mid-Continent's summary judgment based on the contractual-liability exclusion. [Read The Opinion HERE](#)

## THANKS TO TADC CORE SPONSOR



Scientific Expert Analysis™

---

*Texas Association of Defense Counsel, Inc.*  
400 W. 15th Street, Suite 420, Austin, Texas 78701 512.476.5225 - 512.476.5384 FAX - [tadc@tadc.org](mailto:tadc@tadc.org)