

TADC

An Association of Personal Injury Defense,
Civil Trial & Commercial Litigation Attorneys - Est. 1960

Summer 2015

**The 84th
Session is Over**

What Happened

Complete Session Wrap Up Inside





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TADC CALENDAR OF EVENTS

July 8-12, 2015

TADC Summer Seminar

Snake River Lodge & Spa – Jackson Hole, Wyoming
Pamela Madere & Christy Amuny, Program Co-Chairs
Molly & Dennis Chambers, Meeting Co-Chairs
Jason McLaurin, Young Lawyer Liaison

July 31-August 1, 2015

TADC Budget/Nominating Committee Meeting

Omni La Mansion – San Antonio, Texas

August 7-8, 2015

West Texas Seminar

Inn of the Mountain Gods – Ruidoso, New Mexico
Bud Grossman, Program Chair

September 16-20, 2015

TADC Annual Meeting

Millennium Broadway – New York, New York
David Chamberlain & Keith O'Connell, Program Co-Chairs

October 8-9, 2015

TADC/OADC Red River Showdown

Westin Stonebriar – Frisco, Texas
Jerry Fazio, Program Chair

January 27-31, 2016

2016 TADC Winter Seminar

Hotel Madeline – Telluride, Colorado
Joe Hood, Program Chair



Michele Smith
MehaffyWeber, PC, Beaumont

PRESIDENT'S MESSAGE

In sitting down to draft a “state of TADC” report outlining where we are a little over half way through the fiscal year, many happy memories flood my mind. It has been a busy and hectic year so far, but also a year that has been thoroughly enjoyable. I have had the pleasure of visiting many cities across the state, meeting members new and old, and seeing the benefits TADC membership offers in practice every day. For all of the support and hospitality, I am eternally grateful. Here is a quick overview of where we have been, where we are, and where we are going.

LEGISLATIVE SESSION

As I write this, there are six more days left in the Session. By the time you read this, fingers crossed, the Session will be in the books and in our rear view mirror. I start on this topic because it is the area about which most of our members have interest and concern.

I have served on the TADC Legislative Committee for several years. It is not until you are in the hot seat, however, that you see firsthand how quickly information comes at you, how rapidly decisions have to be made, and how invaluable the TADC support network is. Our mantra of analyzing legislation with a view toward protecting the civil justice system is one TADC takes seriously. TADC does not take positions on bills blindly. This may not be popular, but it is the truth.

This publication contains an extensive report on the Session. I would like to offer a few additional thoughts. First, there were more bills filed in this Session than any previous Session (6,476 bills and resolutions to be exact), and they started flowing in on November 1. At the bill filing deadline, TADC had over 274 bills on its civil justice watch list. The mere compilation of the information contained in the bills and following the evolution of them takes an enormous amount of time and attention to detail. That would not be possible without the hard work of George Scott Christian and Bobby Walden. I want to thank them

personally for shepherding this accounting major through the political process of this Session.¹

The TADC actively participated in the legislative process on many fronts. We testified against the Chancery Court bill and a bill advancing a collaborative law process. Both bills failed and both bills represented an encroachment on the right to trial by jury we all hold so dear. We worked actively with various groups on passage of new FNC and net worth bills. We also proudly supported passage of the Civility Oath. TADC carries great respect and credibility at the Capitol. More than once legislators came to me to get TADC’s trusted perspective when others had reached an impasse. Your participation and involvement in this organization matters.

There are so many people to thank for the TADC legislative effort this year. First, I thank our outstanding Legislative Committee² led by **K.B. Battaglini**, Strong, Pipkin, Bissell & Ledyard, LLP, Houston; and **Chantel Crews**, Ainsa Hutson, LLP, El Paso. They and their committee did everything I asked them to do and more. Secondly, I thank all of those people who helped just because I asked; not one of them let me down or refused. They include **Steve Browne**, Langley & Banack, Inc., San Antonio; **Ranelle Meroney**, Chamberlain McHaney, Austin; **David Chamberlain**, Chamberlain McHaney, Austin; **Junie Ledbetter**, Jay Old & Associates, PLLC, Austin; **David Davis**, Davis & Wright, PC, Austin; **Fred Raschke**, Mills Shirley, LLP, Galveston; **Dan Worthington**, Atlas, Hall & Rodriguez, L.L.P., McAllen; **Keith O’Connell**, O’Connell & Avery, L.L.P., San Antonio; **Christy Amuny**, Bain & Barkley,

¹ And a thank you to Bobby for his patience in dealing with my shoe changes.

² The Legislative Committee also includes: Clayton Devin; Mike Hendryx; Robert Booth; Ron Capehart; Monika Cooper; George Haratsis; Don Kent; Michael Morrison; Kenneth Riney; Michael Hays; Michael Shipman; Victor Vicinaiz; Patricia Weaver; Charles Downing; Robert Ford, Chris Hanslik; and Jarad Kent

Beaumont; **Pam Madere**, Coats, Rose, Yale, Ryman & Lee, PC, Austin; and, **Mitch Smith**, Germer, PLLC, Beaumont. Several MehaffyWeber members completed the team including **Pat Chamblin, Sandra Clark, M.C. Carrington, Bob Black, Bill Little, Joe Broussard, Trey Sandoval** and **Michelle McPherson**. Also, I extend a special thank you to all of our members who asked questions, offered advice and showed an interest. It takes a village! This is our profession, if we do not care, who will? THANK YOU!

In closing, here is a rundown of the Session by the numbers. Of the 6,476 bills and resolutions mentioned above, 1,329 passed the Legislature. Of those, 1,232 made it to the Governor for signature (about 19%). When you look at the 284 bills followed by TADC, 49 (17%) passed the Legislature and 8 (2.8%) have been signed by the Governor at the press deadline.

YEAR IN REVIEW

The weather has been a big story throughout this year - whether good or bad she has never been boring!

The year started with a great board meeting in Amarillo - and incredible views of the Palo Duro Canyon. An intense cold front tried, but did not prevent, the meeting from being productive and fun. Each committee took care to draft goals for and objectives to the year, giving us a strategic map to follow for the year ahead.

We hit the ground running in 2015. I attended Legislative lunches in Amarillo, McAllen, Austin, San Antonio and Tyler. Many legislators attended these luncheons held early in the Session, giving them an opportunity to hear TADC's position on issues and giving members an opportunity to ask them questions. Upcoming post-Session luncheons are scheduled in El Paso, Houston and Beaumont.

In addition to the Legislative luncheons, we held two "Transportation Seminars" in San Antonio and Fort Worth. The mostly tort reform-proof areas of law highlighted provided members with high quality CLE from some of the best in the business. Special thanks to Mitchell Smith for organizing and chairing the programs. Later this year, TADC will offer half-day commercial litigation and construction defect programs. Also, be on the look out for the West Texas Seminar, held in conjunction with New Mexico defense lawyers, and the Red River Shoot-Out, held in conjunction with the Oklahoma Defense Bar. Both

are excellent programs and provide opportunities for networking beyond Texas.

WINTER MEETING

In January, TADC visited Beaver Creek for the first time - an absolutely breath-taking venue. Mackenzie Wallace and Mitch Moss assembled an extraordinary group of speakers who delivered an informative and interesting program.

The weather was great and the snow was awesome! The "skiing" was perfect for many of our members but fate had another course planned for me, however, as the one day I was able to ski I suffered a broken finger!

LEGISLATIVE DAY

Next up was the March board meeting in Austin and our Legislative Day at the Capitol. We planned these visits earlier in the Session for the first time in many years. An uncharacteristic freeze came through the night before our meeting. This complicated the travel for many of our members (and prevented some from attending). A special thank you to those who were able to brave the weather and make the meeting.

In spite of the weather, the board visited dozens of legislators educating them about the resources TADC provides, our support of the civility oath, and our concerns about the Chancery Court bill. Also, we had lunch with Justices Brown, Devine, Green and Willett, all of whom made the special effort to attend in spite of the city shutdown.

SPRING MEETING

Galveston provided a fabulous backdrop for a great meeting. Here the weather cooperated (I guess she felt guilty from ruining Fred Raschke's planned annual meeting in 2008 - remember Hurricane Ike?).

We had a dynamite program and a record number of young lawyer attendees. Thank you to program chairs Gayla Corley, Robert Booth and Young Lawyer liaison Elliot Taliaferro. Kim and Fred Raschke compiled a great list of restaurants and activity choices, allowing the group to dine at the famous Artillery Club and the spouses to attend a cooking demonstration at a local kitchen shop.

SUMMER MEETING

Looking ahead, TADC returns to Jackson Hole, Wyoming in July. If you have not visited this area of our country, you are missing out. Jackson Hole has hiking, biking, incredible restaurants, and it is very near to the Yellowstone and Grand Teton National Parks. Your entire family will have a great time and for adult fun, the hospitality suite is pretty spectacular!

Our assembled program is top notch. Christy Amuny, Pam Madere and Young Lawyer liaison, Jason McLaurin have gone above and beyond and call of duty. You will not want to miss the meeting activities and opportunities planned by Molly and Dennis Chambers.

ANNUAL MEETING

We close the year (for all practical purposes) in New York. Speaking of great hospitality suites, you need to see this one! David Chamberlain and Keith O'Connell are putting together the program as you read this. It will be creative, it will be interesting, and it will be a must see.

As New York is one of our favorite places in the world, Mitch and I are putting together what will be a list of great activities and group opportunities. All of our meetings provide the opportunity for networking and fellowship, but there is something extra special about the Annual Meeting. We hope to see you in New York! Fingers crossed no weather event...

COMMUNICATION

TADC has made great strides in upgrading our web-based presence. Our website underwent a major overhaul and now has a pay online feature for dues and meeting registration. We also expect to launch free online programming opportunities in the coming weeks. We continue to refine our social media presence. This magazine is our stab at a "new look." Also, we have re-instituted district director reporting of our board meetings. We hope you find these measures helpful, and we look for your input on making your TADC experience as meaningful as it can be.

YOUNG LAWYERS

I end on one of the brightest spots of all - our YL Committee, led by Trey Sandoval. This group of highly motivated, creative and energized lawyers is the future of TADC. I am proud to say, our future is in great hands. This group has been so busy I can barely keep up with them in pace or in thought! We had a planning meeting in December. I had some ideas for goals; they had more. They have taken every thought and suggestion and turned it into something better. They have attended board meetings, recruited new members, signed up to speak and write, and they made our Galveston meeting one of the most fun and successful ever. They have also just completed the process of surveying our YLs to get ideas and feedback on how to get them more engaged and involved. YL board: you inspire me - thank you!

So far, the year has been one of the most rewarding of my career. Busy, yes, but very much worth it. I encourage each of you to get involved on some level, even if it is just offering suggestions to Bobby and me on how to make your experience better and more meaningful (we do listen!). Try to make one of our four large meetings or any of our local programs. The people you meet and the friendships and relationships you form will last a lifetime. If you know of people in your locales who are not members but should be, invite them, or let us know and we will. Membership is the lifeblood of any organization. TADC is no different. We have members from every conceivable firm size, from every part of the state, and in an expansive number of practice areas that are not related to just traditional insurance defense practices.

I hope to see you at a TADC event soon and look forward to making more memories as this year continues....stay tuned!



AMICUS CURIAE COMMITTEE NEWS

There have been several significant amicus submissions, one in a case resulting in landmark decisions.

Ruth Malinas (Plunkett & Griesenbeck) filed amicus briefs in support of the petitions for review in *Nabors Wells Services Ltd. v. Loera*, __ S.W.3d __, 2015 WL 1264851 (Tex. 2015), and *Nabors Wells Services Ltd. v. Romero*, 456 S.W.3d 553 (Tex. 2015). These are companion cases on the admissibility of the plaintiff's failure to wear seat belts. In both cases, a collision ejected the claimant. In one case the evidence was admitted; in the other it was excluded. The El Paso Court concluded such evidence was inadmissible. In the *Romero* case, the Texas Supreme Court issued a landmark ruling that relevant evidence of the non-use of seatbelts is admissible to apportion fault for the plaintiff's injuries. In doing so, the Court overruled *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex.1974). Prohibiting the admission of seatbelt evidence was a relic of bygone era. Equally important was the holding that Texas Civil Practices & Remedies Code, Chap. 33, permits the jury to apportion fault by injury-causing negligence as well as occurrence-causing negligence.

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for review for *Genie Ind., Inc. v. Matak*, 2015 Tex. LEXIS 437, __ S.W.3d __ (Tex. May 8, 2015). This is a product liability design defect death case in which the court of appeals affirmed a \$1.3 million verdict for plaintiff. The basic issues were (a) is a proposed alternative safer design legally adequate if it violates industry and OSHA standards, and (b) is the product defective if the accident can happen only if the product is intentionally misused and the warnings against that misuse are adequate? The Supreme Court concluded the lift was not unreasonably dangerous because the product was misused, the risk of harm caused by the specific misuse was obvious, and the product carried explicit warnings that the specific misuse could cause serious injury or death.

George Muckleroy (Sheats & Muckleroy) and Roger Hughes (Adams & Graham) filed an amicus letter brief

supporting the motion for rehearing in *Fredericksburg Care Co., Ltd. v. Perez*, __ S.W.3d __, 2015 WL 1035343 (Tex. 2015). This is a landmark decision that the Federal Arbitration Act (FAA) will enforce arbitration agreements in contracts with healthcare providers operating in interstate commerce. Texas Civil Practices & Remedies Code §74.451 requires arbitration clauses be approved by counsel and contain an advisory to that effect. The FAA pre-empts state laws limiting enforcement of arbitration; however, the McCarran Ferguson Act pre-empts applying the FAA to state laws regulating the business of insurance. The Supreme Court held §74.451 is not a law regulating the business of insurance and the FAA pre-empts §74.451.

George Vie III (Mills Shirley) has been authorized to file an amicus brief to support the petition for mandamus in *In re Helle*, No. 14-0772. Helle denies he signed any agreement containing an arbitration clause and there was no such agreement. Nonetheless, the trial judge ordered arbitration. *In re Gulf Explor., Inc.*, 289 S.W.3d 836 (Tex. 2009) denied mandamus review to an order compelling arbitration and staying the case – relator has an adequate legal remedy in an appeal after the arbitration. Helle challenges that as a violation of due process and the right to jury trial if there is no agreement to arbitrate. Helle argues that mandamus must be available to challenge an order compelling arbitration in the absence of an agreement to arbitrate.

Brent Cooper (Cooper & Scully) has been authorized to file an amicus brief in support of the petition for review in *Levinson Alcoser Assoc. LP v. El Pistolon II, Ltd.*, 2015 WL 601983 (Tex. App.—Corpus Christi 2/15/15, pet. filed)(memo. opin.). This was an interlocutory appeal over the adequacy of an expert certificate of merit (COM) under TCPRC Chap. 150. The court of appeals held the COM was adequate. The core issues are whether (1) the COM must state specific facts demonstrating the claim, and (2) the expert must establish knowledge in the defendant's field apart from holding the same professional license.

TADC Amicus Curiae Committee

Roger W. Hughes, Chair, Adams & Graham, L.L.P.; Harlingen
Ruth Malinas, Plunkett & Griesenbeck, Inc.; San Antonio
George Muckleroy, Sheats & Muckleroy, LLP; Fort Worth
R. Brent Cooper, Cooper & Scully, P.C.; Dallas
Scott P. Stolley, Thompson & Knight LLP; Dallas
Bob Cain, Alderman & Cain, PLLC.; Lufkin

Mitch Smith, Germer PLLC.; Beaumont
Mike Eady, Thompson, Coe, Cousins & Irons, L.L.P.; Austin
Tim Poteet, Chamberlain ♦ McHaney; Austin
William C. Little, MehaffyWeber PC; Beaumont
Richard B. Phillips, Jr., Thompson & Knight LLP; Dallas
George Vie III, Mills Shirley, L.L.P.; Houston



**George S. Christian, TADC Legislative Consultant
The Christian Company, Austin**

TADC 2015 LEGISLATIVE WRAP-UP

Session Overview

When the 84th Legislature convened in January, two-thirds of the state leadership and a sizable proportion of the members of the House and Senate had just turned over in the 2014 election. Led by Lieutenant Governor Dan Patrick, the new members, in large part, sported Tea Party credentials, especially in the Senate. The Lt. Governor set an aggressive agenda for the new Senate, including open- and campus-carry legislation, enhanced border security, property tax relief and budget reform, and expanded parental choice in public education. Governor Greg Abbott assumed office with a more focused agenda: quality pre-kindergarten programs, franchise tax relief, ethics reform, and enhanced funding for transportation. The only returning incumbent statewide official, Speaker Joe Straus, easily won election to a fourth-term as Speaker, and set out a bipartisan agenda concentrating on transportation infrastructure funding, reducing reliance on dedicated revenue to balance the budget, broad-based tax relief, and a responsible state budget.

Early in the session, Lt. Governor Patrick set a fast pace. The Senate discarded the longstanding tradition of requiring a two-thirds vote to bring legislation to the floor, settling on a three-fifths supermajority. This change meant that 19 out of the 20 Republican Senators could bring up any bill over the objection of the 11 Democrats. The new rule quickly came in handy, as the Senate passed most of its major bills in the first 75 days of the session. On the other side of the Rotunda, the House generally put the Senate agenda on the back burner while it worked on its own priorities, which aligned more closely with Governor Abbott's program. The House passed the Governor's pre-kindergarten initiative, discarded the Senate's tax relief plan and substituted one of its own, and in due course took care of major Sunset legislation, ethics, transportation funding, and the budget. As the session began to build to a climax and the Lt. Governor's frustration with the House for failing to move the Senate agenda, many observers began to change their summer vacation plans in expectation of one or more special sessions.

Suddenly, it seemed, the air cleared. House and Senate budget conferees, led by the unflappable Chairs of the Appropriations and Finance Committees, Rep. John Otto and Senator Jane Nelson, quietly came to agreement

on major budget items: Medicaid, public education, employee retirement, and public safety (especially increased funding for border security). Negotiators worked out a plan for restructuring transportation funding (dedicating motor vehicle sales tax and surplus sales tax revenue). And the final piece, tax relief, gave each side and the Governor what it wanted: an increase in the school tax homestead exemption (Senate) and a substantial 25% cut in the franchise tax (Governor, House). Along the way, contentious issues such as open-carry, campus concealed carry, and a more stringent parental consent bill for a minor's abortion, passed both Houses, while constitutional carry, proscription of same-sex marriage, sanctuary cities, and DREAM Act repeal did not. Of the session's major leadership initiatives, only ethics reform failed to make the grade, when the House and Senate could not agree over the disclosure of "dark money." The session ended at mid-day on June 1 (we think a record for early adjournment) with something of a whimper, not quite a bang.

First Party Litigation Reform Falls Short

This 50,000-foot overview, of course, obscures a lot of details and day-to-day scrums and pugilism. In the midst of the battle of titans over the big issues, however, 2015 will go down as the most intense session for matters affecting the civil jury system since Governor Perry's loser-pays crusade back in 2011. The general context for this somewhat surprising development was the rash of hailstorm-related first party claims against private insurers. Simply put, for several years a handful of plaintiff's attorneys have used the TWIA playbook to leverage settlements of mass claims in storm-damaged areas of the state from Amarillo to the Rio Grande Valley. Property damage claims from storm damage skyrocketed from about 2% of claims to 30-35% in some parts of the state, a significant number of which were generated by public insurance adjusters going door-to-door in neighborhoods raked by hailstorms. In an effort that really began back in 2011, carriers and independent agents petitioned the Legislature for a package of changes to remediate litigation incentives (Chapters 541 and 542) and to crack down on case running by public adjusters. Consumer groups and the plaintiff's bar protested that these changes were so restrictive that consumers would be cut off from the courthouse if they could not reach a

satisfactory settlement with their insurers. The battle lines were drawn.

As the session wore on, it became increasingly apparent that no consensus or agreement could be reached between carrier and consumer advocates. Some of the major business groups, troubled by the potential effect of the changes on business as an insurance consumer, declined to take sides in the fight. The Senate passed a strong bill, **SB 1628 by Sen. Larry Taylor**, which did not get a hearing in the House Insurance Committee. Instead, **Rep. John Smithee (R-Amarillo)** laid out a more moderate version of the bill as a starting point to a workable compromise that could muster enough support in the House. The bill got out of committee late in the session, but neither side could be brought on board. SB 1628 died in House Calendars.

SB 1628 may have faltered in part because it ran parallel to major legislation overhauling the financing structure of TWIA. For the past several sessions, efforts by legislators from the coastal areas of the state to “fix” TWIA could not overcome the determined opposition from the non-coastal legislators and the carriers. This session, however, produced a different outcome. Despite heavy opposition, **SB 900 by Sen. Larry Taylor and Rep. Greg Bonnen**, passed the Legislature late in the session and now sits on the Governor’s desk. The bill establishes a tiered system of premium assessments designed to stabilize TWIA’s financial position. The bill also reduces carrier representation and reallocates positions on the TWIA board, authorizes the TDI commissioner to contract with a third party to administer TWIA, and gives TWIA the ability to use alternative risk financing mechanisms (in addition to purchasing reinsurance). If the commissioner contracts with a third party administrator, the administrator is not subject to Chapter 542.

Despite the failure of SB 1628, the Legislature made some progress in addressing the first party litigation problem. **SB 1060 by Sen. Juan Hinojosa and Rep. Ed Thompson** subjects public insurance adjusters to the criminal barratry statute, bars them from receiving referral fees or running cases for attorneys, and prohibits financial ties with contractors. **HB 1265 by Rep. Gene Wu and Sen. Kevin Eltife** similarly prohibits a licensed public insurance adjuster from directly or indirectly soliciting employment for an attorney or entering into a contract with the insured for the primary purpose of referring the insured to an attorney without the intent to perform the services customarily provided by the adjuster. We do expect, however, that first party litigation will be on the agenda when the Legislature meets again in 2017.

The Bills That Passed: *forum non conveniens*, net worth, asbestos, patent trolls

While not attracting the level of attention as first party litigation reform, other important civil justice issues did get resolved this session. **HB 1692, authored by TADC member Rep. Kenneth Sheets and Sen. Joan Huffman**, addresses recent Texas Supreme Court cases construing the Texas *forum non conveniens* statute’s definition of “plaintiff” and the scope of the “legal resident” exception. The eventual compromise worked out between TCJL, TADC, and TTLA preserves the legal residency exception for claimants and derivative claimants, but tightens the definition of “plaintiff” to exclude administrators, representatives, next friends, and guardians. The bill requires the court to determine the residency of each plaintiff, regardless of the plaintiff’s national origin or country of citizenship. We are very pleased with this positive outcome. Even in our polarized political environment, stakeholders can still work together in good faith to reach an acceptable and constructive improvement to current law.

Net worth discovery in punitive damages claims presented a somewhat different challenge. **SB 735 by Sen. Troy Fraser and Rep. Ken King** began its journey through the legislative process as an absolute bar to net worth discovery. As the bill ground its way through the legislative sausage-maker, the bar lifted and a threshold test of “substantial likelihood of success on the merits” dropped in behind it. No one is quite sure how trial judges will apply this standard, but a plaintiff will have to show it in order to get discovery. The bill also includes a very helpful definition of “net worth” (a first in Texas jurisprudence, as far as we know) as total assets less total liabilities on a date the trial court deems appropriate. TADC worked with TLR and TTLA to try to come up with an agreeable approach, but total agreement proved just beyond reach. Nevertheless, the Legislature passed the bill over TTLA’s objections. Undoubtedly, in a few years’ time cases should start percolating in the appellate courts regarding the “substantial likelihood” language.

For those with asbestos or silica dockets, **HB 1492 by Rep. Doug Miller and Sen. Charles Schwertner** warrants your close attention. The first part of the bill incorporates **HB 2904 by Rep. Sarah Davis**, which extends the deadline for the MDL court to dismiss inactive asbestos claims from August 31 to December 31 of this year. TADC and TTLA strongly supported this legislation to assist Judge Davidson in clearing up the docket. The remainder of the bill deals with the timing and discoverability of asbestos bankruptcy trust claims. It generally mandates that claimants file claims with each trust that may owe compensation to the plaintiff, provided that it doesn’t cost more to pursue the claim than the trust fund is likely to pay. Claimants must file claims in advance of trial and give notice to each defendant of each claim

and the amount of compensation paid. The bill allows a defendant who receives information regarding the claimant's exposure to move for a stay of trial in order for the claimant to seek recovery from a trust fund from which the claimant has not previously applied for compensation. Finally, the bill deems trust claim information authentic, relevant, and discoverable and not privileged, regardless of the existence of a confidentiality agreement. The bill takes effect on September 1, 2015, and applies to claims pending on and filed after that date.

The high volume of patent litigation in federal district court in Marshall inspired an interim study prior to the 2015 session to look into ways to protect consumers from aggressive trolling by law firms. The usual method of these firms involves sending mass demand letters threatening businesses with patent infringement lawsuits if they don't pay a specified "settlement" amount. While everyone agrees that federal law virtually pre-empts the field, several states have enacted statutes imposing liability on a patent troll for "bad faith" patent infringement claims. We can add Texas to the list of these states taking action to shut down these operations. **SB 1457 by Sen. Robert Nichols and TADC member Rep. Travis Clardy** gives the attorney general the authority to sue a bad faith patent troll for up to \$50,000 in civil penalties per violation. The bill does not create a private cause of action.

The Bills That Didn't Pass: chancery court, collaborative law, county court juries

Probably the most important bill of the session to TADC members and to the trial bar in general received no attention during the interim and was filed more than a month into the session. **HB 1603 by Rep. Jason Villalba** proposed to create a seven-member chancery court located in Travis County with statewide civil jurisdiction concurrent with the district courts over virtually all contract and business-related actions involving entities organized under the Business Organizations Code. The bill established a procedure for filing original cases in the court and removing cases filed in district courts to the court. The Governor would have appointed chancery court judges with the advice and consent of the Senate. Parties could appeal chancery court decisions to a chancery appeals court consisting of seven active court of appeals justices appointed by the Governor. TADC, TTLA, and TXABOTA, joined by numerous judges and justices across the state, objected to several aspects of the bill, including the lack of an identified need for the court, the two-tiered judicial system for "business" and everyone else, the overbroad jurisdiction, the gubernatorial appointment of judges, the override of local venue for trials and appeals, and the expense to local litigants of a single statewide court for certain types of cases. The bill eventually got out of committee in the House, but did not make it to a calendar. There was no Senate companion. Supporters of the bill, led by the Texas Business Law Foundation, will

likely try again in 2017.

A bill to adopt the Uniform Collaborative Law Act, **HB 2512 by Rep. Bill Zedler**, likewise met the united opposition of the bar. The bill would have required parties to agree in writing to conduct a collaborative law proceeding and prohibited a tribunal from ordering a party to participate in a collaborative law proceeding over the party's objection. The bill further provided that a collaborative law proceeding terminates when a party or collaborative lawyer notifies the other parties and lawyers of the termination, or when a party begins a proceeding related to a collaborative matter without consent of all parties. Finally, the bill tolled limitations on the earlier of the date of the collaborative law agreement or commencement of a collaborative law proceeding and established a privilege against disclosure of collaborative law communications. HB 2512 was heard in House Judiciary & Civil Jurisprudence in mid-April, but progressed no further in the process. 2015 marks at least the fourth session we can remember when a collaborative law proposal was filed, and we don't expect 2017 to be any different.

Into every session a little rain must fall, and this session the rain fell on **SB 824 by Sen. Joan Huffman and Rep. Clardy**. This bill would have remedied the longstanding problem of six-person juries in county courts at law with concurrent jurisdiction with districts courts. As initially filed, the bill required a 12-member jury in a civil case pending in a statutory county court in which the amount in controversy is \$200,000 or more. Drawing of jury panels, jury selection, and practice and procedure would conform to district court practice in the county in which the court is located. The bill further allowed a party to request in writing a 12-person jury if the amount in controversy exceeds \$100,000. TADC strongly supported this bill, which easily passed the Senate but bogged down in the House when several members requested exemptions for their local county courts. We applaud Rep. Clardy and Sen. Huffman for trying to keep this bill clean throughout the process, and look forward to a renewed effort to pass it in 2017.

Other Issues

TADC tracked several hundred bills this session affecting everything from legal ethics to administrative practice. A sampling of these bills reveals an extremely active legislative interest in the operation of the judicial system and the legal profession.

Professionalism and Ethics

The Legislature sent two bills affecting legal ethics to the Governor in 2015. **SB 534 by Sen. Kirk Watson and Reps. Todd Hunter, John Smithee** adds to the lawyer's oath a pledge "to conduct oneself with

integrity and civility in dealing and communicating with the court and all parties. Passed with the unanimous support of the bar, the Governor signed this legislation on May 15. In another ethics matter, **HB 2573 by Rep. Eric Johnson and Sen. Eddie Lucio** makes it a deceptive trade practice for a person to use the translation into a foreign language of a title or other word, including “attorney,” “lawyer,” “licensed,” “notary,” and “notary public,” in any written material, including an advertisement, a business card, a letterhead, or stationery, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law. The bill also authorizes a district or county attorney to prosecute a violation without obtaining the consent of the OAG and to retain for the county three-quarters of any civil penalty assessed (district or county attorney must give prior written notice to the OAG of prosecution).

Courts

This session saw a fairly typical number of court bills, though one bill in particular stands out. **SB 455 by Sen. Brandon Creighton and Rep. Mike Schofield** allows the attorney general to petition the chief justice of the Supreme Court to appoint a special three-judge district court to hear matters related to public school finance and redistricting in which the state is a defendant. Appeal of a decision of the special court goes directly to the Supreme Court. As originally filed, this bill contained a discretionary provision allowing the OAG to petition the Supreme Court for a 3-judge court in any matter of statewide significance. Working with the sponsors and the Governor’s office, TADC and other groups successfully urged the removal of this provision, and we very much appreciate their willingness to work with us. The Governor signed SB 455 on May 28.

This session’s general court bill, **SB 1139 by Sen. Joan Huffman and Rep. Smithee**, creates a few new district courts and criminal magistracies and raises the filing fee for the statewide electronic filing system from \$20 to \$30. Specifically, the bill creates new district courts in Kendall, Coryell, Ector, Harris, Collin (2) Fort Bend counties, as well as a pair of county courts at law in Cameron County, one in Collin County and one in Fort Bend County. It likewise gives appellate authority to Tarrant County courts over municipal courts in non-criminal matters and provides that if the Jefferson County judge is an attorney, the county judge gets concurrent jurisdiction with the County Court of Jefferson County in all matters (if the Jefferson County judge is not a lawyer, he or she only has jurisdiction over probate, guardianship, etc.) A separate bill, **HB 2182 by Rep. Clardy and Sen. Creighton** raises the jury fee in district and statutory county courts from \$30 and \$22, respectively, to \$40. **SB 432 by Sen. Royce West and Rep. Villalba** also extends until 2030 the authorization for the Dallas County civil courts to charge a \$15 filing fee to be used for facility

construction, renovation, or improvements.

In other court-related bills, Texas legal aid got a boost this session with the passage of **HB 1079 by Rep. Senfronia Thompson and Sen. Charles Perry**. The bill dedicates all civil penalties recovered by the attorney general and not allocable by law to other funds to legal aid. **SB 306 by Sen. Judith Zaffirni and Rep. Richard Raymond** requires the Judicial Conduct Commission’s annual report to the legislature to include more detailed information about complaints against judges and how the Commission disposed of them. Finally, **SB 1116 by Sen. West and Rep. Smithee** authorizes a court, judge, clerk, or magistrate to send any notice or document using mail or electronic mail. The bill further prescribes acceptable forms of electronic mail and includes a broad definition of “mail.”

Medical Liability

Concerns over the expanding scope of Chapter 74 medical liability claims drew some legislative attention this session, though few changes were made. **HB 1403 by Rep. Sheets and Sen. Craig Estes** amends §74.001(a) (13), CPRC, which defines “health care liability claim,” to exclude a cause of action brought against an employer by an employee or the employee’s surviving spouse or heir under Labor Code §406.033(a) (action for personal injury or death by or on behalf of an employee against a non-subscribing employer) or §408.001(b) (recovery of punitive damages by surviving spouse or heirs of deceased employee for employer’s gross negligence or intentional act). A more comprehensive proposal to restrict the scope of Chapter 74, **HB 956 by Rep. Chris Turner**, did not advance beyond the committee stage. Another bill, **HB 2641 by Rep. Zerwas and Sen. Schwertner**, extends limited immunity for health care providers who participate in health care information exchanges. Under the bill, a participating provider is not liable for the provision of patient information to the exchange for damages in a suit related to a violation of federal or state privacy laws, unless the provider acted with malice or gross negligence.

Access to Motor Vehicle Accident Reports

HB 2633 by Rep. Ana Hernandez and Sen. Perry attempts to address barratry problems by limiting access to motor vehicle accident reports. Under this legislation, reports may only be disclosed to a person directly concerned or having a proper interest in the accident, including: (1) a driver involved in the accident; (2) the employer, parent, or legal guardian of a driver; (3) the authorized representative of any party involved in the accident; (4) any person involved in the accident; (5) the owner of the vehicle or property involved in the accident; (6) a person who has established financial responsibility for the vehicle; (7) an insurance company that issued a policy covering the vehicle or any person involved

in the accident; (8) a person under contract to provide underwriting or claims information to an insurer; (9) a licensed radio or TV station, a newspaper; (10) or any person who may sue because of death resulting from the accident. When the department releases the report, it may no longer redact the date of the accident or the date the investigating officer's report was prepared.

Tort Immunity

A number of bills extending various degrees of tort immunity or narrowing the basis for liability to specific activities are heading for the Governor's desk. Some of the more notable of these include:

- **HB 1510 by Rep. S. Thompson and Sen. Sylvia Garcia**, which adds §92.025, Property Code, to provide that a cause of action against a landlord does not accrue solely on the basis that the landlord leases to a tenant, based on evidence that the tenant has been convicted of, or arrested or placed on deferred adjudication for, an offense. The section does not preclude a suit for negligent leasing if the tenant was convicted of certain offenses or has a reportable conviction or adjudication and the landlord knew or should have known of the conviction or adjudication. This section does create a cause of action or expand an existing cause of action.
- **HB 1666 by Rep. D. Bonnen and Sen. Huffman**, which amends Chapter 78, CPRC, to provide immunity from suit for damages from a person's execution of a training exercise intended to prepare the person to respond to a fire or emergency to the same extent the person would not be liable if the damages for responding to a fire or emergency. The bill also amends Chapter 79, CPRC, to provide immunity for a negligent act or omission that occurs in giving care, assistance, or advice with respect to the management of an incident to which Chapter 79 applies.
- **HB 2303 by Rep. John Kuempel and Sen. Huffman**, which mends Chapter 75, CPRC, which provides liability protection for private landowners, to include driving a recreational off-highway vehicle in the list of activities to which limited liability applies.
- **HB 2390 by Rep. Dwayne Bohac and Sen. Creighton**, which provides that a civil action may not be brought against an employer that establishes, maintains, or requires participation in an employee wellness program unless: (1) the program discriminates on the basis of a prior medical condition, age, gender, or income level; or (2) the cause of action is based on intentional

or reckless conduct. The bill explicitly does not create a cause of action or expand an existing cause of action.

- **SB 378 by Sen. Jose Rodriguez and Rep. J. D. Sheffield**, which amends §84.003, CPRC, to include licensed social workers in the list of health care providers with immunity from suit for providing volunteer services.
- **SB 627 by Sen. Huffman and Rep. Todd Hunter**, amends §73.005, CPRC, to apply the truth defense to an accurate reporting of allegations made by a third party regarding a matter of public concern. The bill also adds a provision stating that it does not abrogate or lessen any other defense, immunity, remedy, or privilege available under other constitutional, statutory, case, or common law provisions. The Governor has already signed SB 627.
- **SB 450 by Sen. Schwertner and Rep. Sheets**, which amends §101.064, CPRC, to expand the exception from the tort claims act for liability arising from a condition of land acquired by a city by foreclosure on a lien. SB 450 expands the exception to cover land acquired by any political subdivision, either by foreclosure of a lien or by a conveyance of real property in payment of property taxes.

Construction Liability

The 84th Legislature likewise made a pair of relatively significant changes to construction liability. **HB 1455 by Rep. Phil King and Sen. Creighton** adds §82.119, Property Code, to require a condominium association (representing 8 or more units), before filing suit or initiating an arbitration proceeding to resolve a claim pertaining to the construction or design of a unit or the common elements, to: (1) obtain an inspection and third-party report from a licensed professional engineer that identifies the units or common elements subject to the claim, describes the current physical condition of the units or common elements, and describes any modification, maintenance, or repairs to the units or common elements by the owners or association; (2) obtain approval from unit owners holding at least 50 percent of the votes in the association at a regular, annual, or special meeting.

The bill requires the association to provide at least 10-days' advance notice of the inspection and any party is entitled to attend. At least 30 days before the meeting of unit owners, the association must provide a copy of the inspection report to each owner and a detailed description of the proposed lawsuit. The notice must be prepared and signed by someone other than the attorney or law firm representing the association in the claim or someone

affiliated with the attorney or firm. Limitations are tolled for one year of the date these procedures are initiated if the procedures are initiated during the final year of the applicable limitations period. Finally, the bill prohibits the association from amending the declaration to modify or remove a binding arbitration requirement to make it retroactively apply to a claim arising before the date of the amendment.

HB 2049 by Rep. Darby and Sen. Eltife amends §271.904, Local Government Code, to render void and unenforceable a covenant or promise in a contract for engineering and architectural services to which a governmental agency is a party requiring an architect or engineer to defend a party, including a third party, against the sole or concurrent negligence of or breach of contractor by the governmental agency or other entity over which the agency exercises control. The covenant may provide that the agency may seek reimbursement of attorney's fees in proportion to the engineer's or architect's liability. The contract may also require the engineer or architect to name the agency as an additional insured on its liability policy and to provide any defense provided by the policy. The bill includes a statutorily prescribed standard of care for the engineer or architect, any contractual change of which is void and unenforceable.

Administrative Law and Procedure

After failing to pass last session, the State Bar Administrative Law Section's APA clean-up bill made it through the process in 2015. **SB 1267 by Sen. Estes and Rep. Clardy** makes a number of changes to Chap. 2001, Government Code (the Administrative Procedures Act) with respect to contested case hearings involving the suspension or revocation of a license. The changes are primarily designed to make the process more efficient and to establish certainty regarding deadlines for agency action.

Kudos

All in all, TADC had a very successful legislative session. Much of the credit for this success goes to the three TADC members who hold key leadership positions in the Legislature and who were always available and eager to work with us and consider our views. We cannot adequately express our thanks and gratitude for the work of **Travis Clardy, Ken Sheets and Rene Oliveira**. These outstanding Texas leaders balance full-time law practice with the exhausting demands of public service. They also uphold the highest standards of integrity and professionalism in everything they do in their practices and in the Capitol. Please take a moment to send a brief note to each one of these members thanking them for their service and dedication to the profession and the people of Texas.

We must also recognize the TADC Legislative Committee for its dedicated work this session. While

President Michele Smith was in Austin almost every week for hearings and meetings with legislators, we also held weekly or biweekly conference calls throughout the session. In addition, committee members pored over hundreds of bills and prepared analyses and position papers on many of them. On major bills, such as first party litigation reform, chancery court, and net worth discovery, we particularly thank Chairman K. B. Battaglini, Dan Worthington, Victor Vicinaiz, Steve Browne, and Chantel Crews for their help in evaluating successive drafts of this and other legislation. The next time you see a member of TADC's wonderful legislative committee, please let them know how much you appreciate their service to the association.

One more issue warrants a mention here. Late in the session, when it appeared that Texas judges who decide whether a minor may receive an abortion without parental consent might be publicly disclosed and placed in physical danger, TADC, along with TCJL, TXABOTA, and other groups mobilized to encourage the Legislature to amend HB 3994 to retain the judge's anonymity. Given the sensitive and controversial nature of the issue, as well as the late date at which the bill came up for debate, it proved a difficult challenge to communicate our concerns and amend the bill in a timely manner. Fortunately, with the invaluable assistance of the judiciary and the Office of Court Administration, the bill's sponsors, **Rep. Geanie Morrison and Sen. Charles Perry**, were persuaded that the bill as proposed could pose a significant risk to the safety of individual judges. We deeply appreciate their willingness to work with us on language protecting the anonymity of judges in these extremely tough circumstances. We particularly want to thank Fred Raschke for coordinating contacts with the judiciary, as well as all the Legislative Committee members who made calls and to House and Senate offices expressing our concerns.

Our activities this session prove once again that TADC takes very seriously its responsibility to preserving the jury system and the integrity of the profession. We are sometimes accused of putting personal financial interests above these larger ideals. The historical record indicates quite the opposite, and this session added a new chapter to that history. It is a privilege to work with this outstanding group of lawyers!



Texas Association of Defense Counsel-PAC

The Political Action Committee of the Texas Association of Defense Counsel ~ TADC-PAC



THE TADC WILL WORK TIRELESSLY DURING THE LEGISLATIVE SESSION **PROTECTING THE** **CIVIL JUSTICE SYSTEM!** SHOW YOUR SUPPORT FOR THE TADC PAC

Your contribution allows the TADC PAC to support *Qualified* candidates for the Texas Supreme Court, Texas Legislature & other key positions

CAN YOU AFFORD **NOT** TO CONTRIBUTE?

- Over **95%** of Candidates & Incumbents Supported by the TADC PAC are elected to office
- The TADC PAC supports candidates based on record & qualifications, **NOT** political affiliation
- The TADC PAC supports candidates who **favor** a strong and independent judiciary, oppose infringement on the right to jury trials and **agree** with the need to preserve the civil justice system.
- The TADC PAC **opposes** Statutory Employer and Collaborative Law Legislation
- The TADC PAC supports efforts to end the capricious enforcement of arbitration clauses and to limit their applicability to matters where the parties to the agreement have equal bargaining power
- Your PAC Trustees represent **Your** interests to candidates and office holders
- Other Associations **ARE** giving; if you don't, that **WILL** put you at a distinct disadvantage

I BACK THE TADC PAC

Enclosed is my TADC PAC Contribution in the amount of:

\$150.00 _____ \$200.00 _____ \$250.00 _____ Other \$ _____

_____ Yes, My contribution is for \$200.00 or more, please send me the rechargeable phone charger with the TADC Brand

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Make checks payable to the TADC PAC, return order form and payment to the
TADC, 400 West 15th Street, Suite 420, Austin, Texas 78701 FAX: 512/476-5384

I am paying by: (circle one)
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Cardnumber _____

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Signature as it appears on card



Michael Morrison
Baylor University School of Law, Waco

EXPEDITED ACTIONS IN TEXAS

The Expedited Civil Action; The First Year, Redux¹

Over two years have passed since the Texas Supreme Court, in obedience to a legislative mandate, imposed an expedited process on most civil actions that seek purely monetary relief not exceeding \$100,000. The legislative intent was stated as providing a cost-effective avenue to the courtroom for litigants. Its adoption by the Supreme Court, which chose on its own to make the process mandatory, was accompanied by the hopes of the trial bar that, whatever its faults, the process might help stem the erosion of the civil jury trial as a rational choice for resolving disputes. Now, following two years of experience, it's time to take a reckoning of its effectiveness.

The new rules govern and shrink the trial calendar and process from pleading, through discovery, trial setting, and presentation of evidence, and the maximum judgment that may be entered whatever the verdict. Beyond that, though, not much else is clear. While the process is “mandatory”, as noted in an earlier edition of this magazine, as designed, it “leaves ample room for artful pleading in all but the most straightforward monetary damage claims. It remains to be seen to what extent claimants will opt into or out of this new process.”² Two years later, that uncertainty lingers.

Conference of Chief Justices Study

In an attempt to gauge the use and effectiveness of the process, the Texas Conference of Chief Justices (CCJ) recently engaged the National Center for State Courts and the Texas Office of Court Administration (OCA), to conduct a research study to evaluate the impact and effectiveness of the Texas Rules of Civil Procedure governing expedited actions. The NCSC will prepare an

empirical analysis of data collected and formatted by the Texas Office of Court Administration.

Phase 1 of the study, conducted in November and December of 2014, was to collect data from 2,500 online case files for cases that satisfy the criteria for expedited actions that were filed between July 1, 2011 and December 31, 2011 (pre-implementation sample) in Dallas, Lubbock, Fort Bend, Travis, and Harris Counties.

Phase 2, conducted from January through March of 2015, was to collect data from 2,500 online case files from similar cases filed in the same five counties between July 1, 2013 and December 31, 2013 (post-implementation sample).

Data collected from cases that satisfy the criteria for expedited actions will allow a comparison of two 6-month periods: a pre-rule base-line period and a post-rule period. The comparison data will be studied to determine the nature of the claim and the manner of disposition; e.g., by settlement, summary judgment, A.D.R., bench or jury trial, etc.

The study will also include interviews of judges and attorneys, in those five counties who have had cases subject to the expedited-action that have been “fully resolved”, concerning their experience with the rules with respect to costs, timeliness, and litigant satisfaction. Hopefully, among the outcomes of the interviews will be answers to questions such as the following:

-Are courts requiring compliance with TRCP 47 before allowing discovery?

-Are attorneys requesting and judges setting trial dates within the ninety-day period following the conclusion of the 180-day discovery period?

¹ For an extensive treatment of the Texas and National experience with expedited civil actions, See Morrison, Wren and Goleczka, Expedited Civil Actions in Texas and the U.S.: A survey of State Procedures and a Guide to Implementing Texas's New Expedited Actions Process, 65 Baylor Law Review, No. 3, Pgs 824-937, 2013.

² Expedited Civil Actions in Texas, Texas Association of Defense Counsel Magazine, Summer 2013.

-Are challenges to experts being treated as objections and excluded from the time allotted for trial under TRCP 169(d)(3) and (5)?

-Are courts ordering the limited ADR authorized by TRCP 169(d)(4)(A) or have parties chosen more extensive ADR processes by TRCP 169(d)(4)(C)?

-Are courts granting continuances when reopening discovery following a case's removal from the expedited process under TRCP 169(c)(3) and 169(d)(2)?

-What showing has been found to be sufficient to establish good cause: (1) under TRCP 169(d)(3), to extend trial time; (2) under TRCP 169(c)(1)(A), to remove a case from the expedited process; (3) under TRCP 169(c)(2), when a motion to remove is untimely; and (4) under TRCP 190.2(b), to modify the extent of and time for discovery?

Whatever the outcomes, the Conference of Chief Justices is to be commended for initiating the study which, upon completion, may answer these and other questions.

Baylor Survey³

Pending the results of the CCJ's study, the only known attempt to gauge the state wide use of and reaction to the expedited civil action is a survey conducted at the Baylor Law School. In April of 2014, in an attempt to gain some idea of the extent to which the expedited civil action had been utilized during the first year of its existence, every district judge, district clerk, and county clerk in Texas was contacted and asked if expedited civil actions had been filed in the respective court or county. While the survey was quantitative in nature and not expected to render a complete picture of the impact or extent of use of the expedited process during its first year it did yield some interesting and potentially useful information.

Responses were received from 201 (79.13%) of the 254 counties contacted. The results are as follows:

53	(20.86 %)	Did not respond to the request
27	(10.63 %)	Did not track these actions
116	(45.67 %)	Reported none had been filed
58	(22.83 %)	Reported 1 or more filings

The experience of the 58 counties reporting one or more is as follows:

³ Conducted as part of the author's presentation and materials prepared for "Practicalities for the New Expedited Civil Action Process", Morrison and Wren, Baylor Law School, General Practice Institute, April 25, 2014.

Twenty-two counties reported fewer than 10 filings:

Armstrong, Bailey, Blanco, Bosque, Camp, Carson, Cherokee, Concho, Coryell, Culberson, Grayson, Hardeman, Harrison, Haskell, Houston, Lampasas, Loving, Matagorda, Medina, Refugio, Smith, and Stonewall.

Eight counties reported 10 to 50 filings:

Bowie, Callahan, Henderson, Jackson, Motley, Parmer, San Patricio, and Tom Green.

Seven counties reported 51 to 100 filings:

Crosby, Gregg, Jack, Orange, Rains, Reeves, and Tarrant.⁴

Nine counties reported 101 to 250 filings:

Bell, Burleson, Erath, Hidalgo, Jefferson, La Salle, McLennan, Polk, and Waller.

The remaining nine counties accounted for 79.53% of all expedited actions reported:

Angelina	445	2.72%
Montgomery	596	3.65%
Cameron	600	3.67%
Harris	758	4.64%
Lubbock	761	4.66%
El Paso	970	5.21%
Fort Bend	1,194	7.30%
Dallas*	2,136	13.07%
Bexar*	<u>5,659</u>	<u>34.62%</u>
	16,347	79.53%

* Together, Bexar and Dallas accounted for almost half of the reported filings

These results suggest that the often heard "common wisdom" that "no one is filing expedited actions" is incorrect. However, to the extent that information received from the survey is any guide, the lion's share of cases, not surprisingly, appear to be claims with liquidated damages such as small contract claims and debt and credit card collections.

Representative Comments From Judges and Clerks

In addition to the quantitative data requested by the survey, a significant number of respondents volunteered comments concerning the process. The following is a fair and representative sampling:

⁴ Only 3 Tarrant County courts reported.

- I am in receipt of your request for expedited civil action filings. I have looked at the bottom of the Civil Case Information sheet and find nothing regarding your request. Any clarification would be appreciated. Sorry, we have no way of tracking that information.
- I'm not sure what you are asking in the way of expedited civil actions. If it is concerning the new discovery rules, that is something that is not really on the radar of clerks.
- I received your letter requesting information regarding expedited civil actions. We do not track that information.
- I have learned there is no way for our record system to distinguish those filings from traditional civil actions.
- We would appreciate a copy of your results and any information you have on the Civil Case Information Sheet and what other counties are doing with it. The feedback we have received about the form from attorneys is that it is a waste of time and so any information to counter-act that would be beneficial.
- I know it has been labeled mandatory but we have not done it yet! I truly apologize for not being able to provide the information you have requested.
- [T]hese expedited cases have been irrelevant to case management. We have been setting (and almost always been able to reach) cases within the relevant time frame (9 months) anyway. If the parties want to plead and/or agree around other restrictions, they do. In sum, nothing has changed, and I do not foresee any changes in the way cases are managed.
- As you are aware, the expedited trial regime was a legislative solution without a problem. Indeed, it was the proverbial "camel outcome, intended to be a horse created by committee" scenario. Indeed, it was a face-saving, end product compromise to make it look as if the legislature were doing something to address a perceived (but not real) problem that the courts were swamped with meritless cases and were unable to cope with the numbers. If anything is to be learned from this legislation, is that the Legislature should consult with the Judiciary before enacting "case management" legislation, as opposed to taking marching orders from lobby groups / political donors. I hope this assists in your research.
- Although you didn't ask, I have found in talking to lawyers that they do not use the process because it is too limited and frankly too difficult to figure out and apply. Plaintiff's lawyers have said they feel using the process would be tantamount to committing malpractice. I hope your report will help make this a better rule.
- I feel embarrassed but I am not aware of this mandatory expedited civil action. Please explain that to me. Then I will be able to tell you if we have had any of these.
- Mr. Morrison, I do not have a way to create a report with this parameter. However, I was curious and decided to search all the case types in which I believe this might be indicated on the info sheet. I opened each case and opened the Civil Case Info Sheet. Out of 148 cases, I found 41 that had the first category marked.
- I apologize for the delay in responding to your request for the # of expedited civil actions. However, your question is not easily answered because there is no record kept of the number filed. In addition, many pleadings do not include a statement regarding the amount of monetary relief sought (as required by Tex. R. Civ. P. 47) or the discovery control level (as required by Tex. R. Civ. P. 190.1). Further, many new petitions do not include the case information sheet (as required by Tex. R. Civ. P. 78a).
- When the new rules regarding expedited actions became effective, there was much discussion about what to do when the pleadings are not clear. To date, many pleadings still are not clear. Therefore, your question is difficult to answer where there is no compliance with the "new rules."

Conclusion

After two years of experience with the expedited civil action, there is still considerable confusion concerning the process. What is clear is that the roll out suffered from breakdowns in, for lack of a better characterization, "getting the word out" to lawyers, judges and clerks. Clearly, additional efforts such as the study by the National Center for State Courts and the Office of Court Administration are necessary if we are ever to know whether the expedited civil action has or ever can fulfill the legislative intent of providing a cost-effective avenue to the courtroom for litigants or the trial bar's hope that it might stem the erosion of the civil jury trial as a rational choice for resolving disputes.

2015 SPRING MEETING

San Luis Resort – April 29-May 3, 2015 – Galveston, Texas

The TADC held its 2015 Spring Meeting in Galveston, Texas from April 29-May 3, 2015. The weather was Chamber of Commerce and the San Luis Resort provided the perfect setting for a fantastic meeting!

Gayla Corley, with Langley & Banack, Inc., San Antonio and **Robert Booth** with MillsShirley LLP in Galveston did a masterful job as Program Co-Chairs of the meeting, with the able assistance of Young Lawyer Liaison Elliott Taliaferro with Strong, Pipkin, Bissell & Ledyard, L.L.P., Houston. The program included many high profile speakers including **Judge Patricia J. Kerrigan, The Honorable Craig Eiland and State Bar President Trey Apfell** as well as the finest practicing trial lawyers from around the state. Topics ranged from Spoliation and Venue to Electronic Discovery.



Nancy Morrison, Gayla Corley, Jeff Pruett & Mike Morrison



Mike Hendryx, Jason McLaurin & Don Kent



Rusty Beard, Greg Perez, Elizabeth O'Connell, Mitzi Mayfield & Arlene Matthews



David & Pat Weaver with Canda & Lewin Plunkett & Milton Colia



CLE at its finest!



Paula & Jerry Campbell



Mike Morrison, The Honorable Craig Eiland & Robert Booth



Mitch & Michele Smith with Nathan & Chelsea Brandimarte



TADC President Michele Smith & State Bar President Trey Apffel



Judge Patricia J. Kerrigan



TADC Young Lawyers and Past Presidents Luncheon



Brian VanReet, Heidi Coughlin & Cecilia



Kleber C. Miller – TADC President '79-'80
Shannon, Gracey, Ratliff & Miller, L.L.P., Fort Worth

THE LAWYER'S CREED REVISITED

*"AS THE LAW BECOMES MORE OF A BUSINESS AND LESS OF A PROFESSION,
 WE BEHAVE MORE LIKE BUSINESSMEN (PERSONS) AND LESS LIKE HONORABLE PROFESSIONALS.
 ALMOST MAKES ONE LONG FOR WHITE WIGS AND BLACK ROBES FOR ALL."*¹

"I am a lawyer; I am entrusted by the people of Texas to preserve and improve our legal system." Thus begins the Texas Lawyer's Creed whose 25th birthday was celebrated in November 2014.

In the 1980's, there was increasing incivility in the practice of trial law. Professional courtesy, honesty and openness in dealing with opposing counsel and respect for differing views was at a low ebb and diminishing.

Under the leadership of Texas Supreme Court Justice Eugene A. Cook, a bipartisan committee co-chaired by Fred Hagans and James H. "Blackie" Holmes, III authored the Texas Lawyer's Creed which was adopted by the Supreme Court of Texas and the Court of Criminal Appeals on November 7, 1989. It was widely held as a giant step in the legal profession's effort to quell unsavory behavior and unprofessional conduct.

As time passed and a new generation of lawyers appeared, the Creed was taken for granted, ignored and many new lawyers never read it. Over the years, it appears that many lawyers have fallen back into the same practices that existed prior to the development of the Texas Lawyer's Creed. It is not unusual today to see "Ramboism" or "gotcha" tactics being used in the development and trial of cases. In a 2003 survey, judges were asked whether they perceived a civility problem amongst attorneys - over 95% answered in the affirmative.¹ Such incivility exists among lawyers, between lawyers and court personnel, and between lawyers and judges.

As many appellate opinions have pointed out, the Lawyer's Creed is aspirational and its breach will not be enforced in the courts. While a breach of the code might also be a breach of the Texas Rules of Civil Procedure and be sanctionable, the Lawyer's Creed in and of itself is not. It is up to the lawyers and the profession to enforce it and through peer pressure to see that it is followed and adhered to.

¹ Civility in the Legal Profession: A Survey of the Texas Judiciary, 36 St. Mary's Law Journal, 115.

² 36 St. Mary's Law Journal, 115.

In 2013, attorney Buck Files, then president of the State Bar of Texas, worked with both the Texas Supreme Court and the Texas Court of Criminal Appeals to reaffirm the Creed. All Texas trial lawyers should do likewise. Among other things the Creed urges lawyers to:

- achieve the client's objectives as quickly and economically as possible;
- treat opposing parties and witnesses with fairness and due consideration;
- avoid pursuing tactics that are intended primarily for delay;
- be courteous, civil and prompt in oral and written communications;
- avoid disparaging personal remarks or acrimony toward parties, witnesses and other lawyers;
- conduct themselves in a professional manner in court;
- treat counsel, opposing parties, judges and court staff with courtesy and civility;
- avoid conduct that offends the dignity and decorum of the proceedings;
- avoid misrepresenting, mischaracterizing or misquoting facts or authorities to gain an advantage.

The Creed should be the little voice in every lawyer's mind that urges the lawyer to be honest, sincere, courteous and diligent, and it reminds us that we can follow this mandate without interfering with or giving up a single right of the client.

The legal professional has a long and glorious history. Every one of us should be proud to be a lawyer. So long as lawyers remember that we are professionals and not businessmen and that we render a service and not sell a product, and so long as we render that service with honesty, sincerity and civility we will continue to be a grand and glorious profession. The American civil justice system, with its blend of judge and jury, is the greatest resolution system ever devised. It is head and shoulders above any other system. So long as professionalism remains the aspirational goal of each lawyer, and lawyers practice in accordance with the Texas Lawyer's Creed, the American legal system will continue to serve society and those who participate in it.

LAWYERS CIVILITY OATH

SIGNED BY THE GOVERNOR

By: Watson, et al.

S.B. No. 534

A BILL TO BE ENTITLED AN ACT

relating to the oath of a person admitted to practice law in the State of Texas.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 82.037(a), Government Code, is amended to read as follows:

(a) Each person admitted to practice law shall, before receiving a license, take an oath that the person will:

- (1) support the constitutions of the United States and this state;***
- (2) honestly demean oneself in the practice of law;***
- (3) discharge the attorney's duty to the attorney's client to the best of the attorney's ability; and***
- (4) conduct oneself with integrity and civility in dealing and communicating with the court and all parties.***

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. This Act takes immediate effect upon signature.



(L-R) Don Jackson, immediate past president of TEX-ABOTA, Mark Kincaid, TTLA, Justice Phil Johnson, Supreme Court of Texas, Senator Kirk Watson, Senate Sponsor of SB 534, Chief Justice Nathan Hecht, Supreme Court of Texas, Trey Appfel, President of the State Bar of Texas, Pam Madere, TADC, Rep John Smithee, House Co-sponsor of SB 534, David Chamberlain, President of TEX-ABOTA and 2015-16 Chair of the State Bar Board of Directors. , (Center) Governor Greg Abbott



Christopher C. Hughes

FAIRCHILD, PRICE, HALEY & SMITH, L.L.P., Nacogdoches

SEAT BELT EVIDENCE ADMITTED?

How to Charge the Jury: An Analysis of Apportionment after *Nabors v. Romero*

On February 13, 2015, Justice Brown released the Texas Supreme Court's unanimous opinion in *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142. The decision effectively overruled over 40 years of law that deemed seat belt evidence inadmissible in civil trials.

A) Historical Context:

The Texas Supreme Court first ruled that failure to use a seat belt was inadmissible in car-accident cases in 1974. *Carnation Co. v. Wong*, 516 S.W. 2d 116 (Tex. 1974). Part of the reasoning behind *Carnation* was the contributory negligence bar that then existed. See *Nabors* at *1. Put simply, the all or nothing scheme that existed at the time seemed overly harsh if evidence of failure to use a seat belt was admitted. *Id.* Moreover, the Court reasoned that the failure to use a seat belt did not cause a car accident but may only exacerbate a plaintiff's injuries. *Id.* The Legislature joined in the ban in 1985 and statutorily prohibited the introduction of use or nonuse of seat belts in civil cases in 1985. See Act of June 15, 1985, 69th Leg., R.S., ch. 804, § 1, sec. 107C, 1985 Tex. Gen. Laws 2846, 2846-47, repealed by Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1870, 1870-71. The new law stated "[u]se or nonuse of a safety belt is not admissible evidence in a civil trial." *Id.* In 2003 (as part of the sweeping House Bill 4 tort-reform legislation), the Legislature repealed the prohibition but stood silent on the admissibility issue. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 9.01, 2003 Tex. Gen. Laws 863 (repealing Tex. Transp. Code §§ 545.412(d), 545.413(g)). Therefore, *Carnation* stood alone without the support of a stricter statutory prohibition. This brings us to *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, in which the Texas Supreme Court overruled the holding in *Carnation* and held that relevant evidence of use or nonuse of seat belts is admissible "for the purpose of apportioning responsibility in civil lawsuits." See *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *2.

B) Analysis of Effect on Jury Charge Post-Nabors v. Romero:

Assuming you succeed in properly admitting seat belt evidence, how should you now charge the jury as to apportionment of responsibility?

Currently, Texas Civil Practices and Remedies Code Section 33.003(a) provides:

"The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

- (1) each claimant;*
- (2) each defendant;*
- (3) each settling person; and*
- (4) each responsible third party who has been designated under Section 33.004."*

In *Nabors v. Romero*, Justice Brown expounded upon the language in CPRC 33.003 and said "the directive is clear---fact-finders should consider each person's role in causing, "in any way," harm for which recovery of damages is sought." *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *15. The Court posed the question of whether the "sharp distinction" drawn in *Kerby v. Abilene Christian College* between occurrence-causing and injury-causing negligence was still viable in light of the current legislative language. *Id.* (referencing *Kerby v. Abilene Christian College*, 503 S.W.2d 526, 526 (Tex. 1973). Put simply, can a plaintiff's failure to use a seat belt, though not the cause of the "accident", limit his recovery if shown that the non-use caused or contributed to his "injuries"? See *Id.*

First, the Court considered whether to treat the evidence as a failure to mitigate damages - a doctrine typically applied to post-occurrence action (i.e. failure

to seek reasonable care and treatment). *Id.* However, the Court concluded that historically it has proved difficult to instruct juries on failure to mitigate when applied to pre-occurrence actions. *Id.* at *16.

Instead, Justice Brown made it clear that the previous holdings (that a plaintiff's injury-causing negligence cannot reduce a plaintiff's recovery) cannot stand if today's proportionate-responsibility statute contradicts those precedents. *Id.* at *19. And "it does." *Id.*

The Court pointed out a valid distinction when stating that "plaintiffs do not sue simply because they were involved in a car accident; they sue because they suffered damages for which they have not been compensated." *Id.* at *21. The question is not simply who caused the car accident, but who caused the plaintiff's injuries. *Id.* at *22. Therefore, failure to use a seat belt is one way in which a plaintiff can "cause or contribute to cause in any way" his own "personal injuries" or "death" Tex. CIV. PRAC. & REM. CODE 33.003(a), 33.011(4).

The Court went on to state the following:

"[O]ur holding should likewise not introduce any confusion into how to construct a jury charge when seat-belt evidence or any other pre-occurrence, injury-causing conduct is admitted. *Nabors Well Services, Ltd. v. Romero*, 2015 WL 648858. Under section 33.003(a), the fact-finder may consider relevant evidence of a plaintiff's failure to use a seat belt as a "negligent act or omission" or as a violation of "an applicable legal standard" in cases where the plaintiff was personally in violation of an applicable seat-belt law. And in cases in which an unrestrained plaintiff was not personally in violation of a seat-belt law, the fact-finder may consider whether the plaintiff was negligent under the applicable standard of reasonable care. *Nabors Well Services, Ltd. v. Romero*, 2015 WL 648858. This scenario is likely to arise when children are among the passengers of the plaintiff's vehicle. Most children do not violate seat-belt laws by failing to restrain themselves; rather, it is the driver upon whom the law places the responsibility to properly restrain them. Nonetheless, a minor is still held to the degree of care that would be exercised by an "ordinarily prudent child of the same age, intelligence, experience and capacity...under the same or similar circumstances." The jury may further apportion third-party responsibility to the person upon whom the law places the burden to properly restrain the child. *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *25-6.

In conclusion, we should continue using a single apportionment question. *Id.* at *27. It is my opinion, along with others, that the Court's language as to the continued

use of a single apportionment question could be interpreted to mean that there should be a single apportionment question "per plaintiff." Regardless, the jury can now consider a plaintiff's pre-occurrence, "injury-causing" conduct alongside his and other persons' "occurrence-causing" conduct. *Id.*

The tell-all question is who could be considered responsible, based upon the evidence, for the "harm" for which the plaintiff seeks to recover. The answer, as it relates to failure to wear a seat belt, is as follows:

- All persons 15 years or older have the responsibility to belt themselves anywhere in the vehicle;
- Drivers have the responsibility to belt all passengers under the age of 17;
- Parents may have a responsibility to belt their children even if they were not the driver. See Texas Family Code sections 151.001, 153.074, and 153.133; and
- Children have a "child's" duty/responsibility to belt themselves.

On the pages that follow, you will find three separate factual scenarios involving non-use of seat belts. For each scenario, I have outlined what I believe to be a proper apportionment question that would follow the initial negligence question. Following each sample apportionment question is an analysis/explanation of each scenario.

C) Apportionment Examples

SCENARIO #1

Plaintiff driving a vehicle with no passengers. Plaintiff collides with Defendant Driver. Plaintiff was unrestrained.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or

proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**, find the percentage of responsibility, if any, attributable to each:

a) Defendant Driver _____
b) Plaintiff Driver _____
TOTAL: 100%

Analysis:

- **As to Plaintiff Driver**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Plaintiff driver as it relates to his failure to wear his seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.

SCENARIO #2

Plaintiff driving a vehicle with Passenger Wife and their 10 y/o child. The Plaintiffs' vehicle collides with Defendant's vehicle. All three occupants of the Plaintiffs' vehicle were unrestrained at the time of the accident.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**, find the percentage of responsibility, if any, attributable to each:

c) Defendant Driver _____
d) Plaintiff Driver _____
TOTAL: 100%

Passenger Wife

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Passenger Wife**, find the percentage of responsibility, if any, attributable to each:

a) Defendant Driver _____
b) Plaintiff Driver _____
c) Passenger Wife _____
TOTAL: 100%

Minor Child

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Minor Child**, find the percentage of responsibility, if any, attributable to each:

a) Defendant Driver _____
b) Plaintiff Driver _____
c) Passenger Wife _____
d) Minor Child _____
TOTAL: 100%

Analysis:

- **As to Plaintiff Driver**, the jury should apportion in the same way as described in Factual Scenario #1 as to Plaintiff Driver's harm for which recovery is sought.
- **As to Passenger Wife**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Plaintiff Wife as it relates to her failure to wear her seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.
- **As to Minor Child**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident AND as it relates to his failure to buckle Minor Child, 3) negligence of Passenger Wife as it relates to her failure to buckle her Minor Child and 4) negligence of Minor Child for a child's duty to buckle self. *In practice, consideration should be given to the strategy of not submitting the Minor Child and focusing mainly on the responsibility of Plaintiff Driver and Passenger Wife, depending upon the age of the child.*

SCENARIO #3

Plaintiff driving a vehicle with Passenger Wife, an unrelated Adult Passenger and Adult Passenger's 10 y/o child (Minor Child)(Minor Child is unrelated to Plaintiff Driver and Passenger Wife). The Plaintiffs' vehicle collides with Defendant's vehicle. All four occupants of the Plaintiffs' vehicle were unrestrained at the time of the accident.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**, find the percentage of responsibility, if any, attributable to each:

e) Defendant Driver	_____
f) Plaintiff Driver	_____
TOTAL:	<u>100%</u>

Passenger Wife

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Passenger Wife**, find the percentage of responsibility, if any, attributable to each:

g) Defendant Driver	_____
h) Plaintiff Driver	_____
i) Passenger Wife	_____
TOTAL:	<u>100%</u>

Adult Passenger

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Adult Passenger**, find the percentage of responsibility, if any, attributable to each:

a) Defendant Driver	_____
b) Plaintiff Driver	_____
c) Adult Passenger	_____
TOTAL:	<u>100%</u>

Minor Child (child of Adult Passenger)

If you answered “Yes” to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Minor Child (child of Adult Passenger)**, find the percentage of responsibility, if any, attributable to each:

a) Defendant Driver	_____
b) Plaintiff Driver	_____
c) Adult Passenger	_____
d) Minor Child	_____
TOTAL:	<u>100%</u>

Analysis:

- **As to Plaintiff Driver**, the jury should apportion in the same way as described in Factual Scenario #1 as to Plaintiff’s harm for which recovery is sought.
- **As to Passenger Wife**, the jury should apportion in the same way as described in Factual Scenario #2 as to Passenger Wife’s harm for which recovery is sought.

- **As to Adult Passenger**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Adult Passenger as it relates to her failure to wear her seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.
- **As to Minor Child (child of Adult Passenger)**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident AND as it relates to his failure to buckle Minor Child, 3) negligence of Adult Passenger as it relates to her failure to buckle her Minor Child and 4) negligence of Minor Child for a child’s duty to buckle self. *In practice, consideration should be given to the strategy of not submitting the Minor Child and focusing mainly on the responsibility of Plaintiff Driver and Adult Passenger, depending upon the age of the child.*

E) Conclusion

It should be noted that the above examples are not necessarily the only ways to draft a jury charge considering the factual scenarios and admissible seat belt evidence. Instead, the above is merely a suggestion of what I consider to be the most appropriate method (at the time) considering the language in *Nabors v. Romero*. I hope after reading this article you have a better understanding of how seat belt evidence may affect the jury charge in your particular case.

ACKNOWLEDGMENTS: Special thanks to W. Bruce Williams, in Midland, TX. Bruce tried the underlying case in Nabors v. Romero and companion case Loera v. Nabors. He was also heavily involved in the appeals of both cases. Bruce was a great source of information and knowledge as it relates to this article and topic. Bruce deserves a lot of credit for the development of this article.

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Saturday, August 8, 2014

7:00am-9:00am Buffet Breakfast

7:30am Welcome & Introductions
Michele Smith, TADC President
MehaffyWeber, P.C., Beaumont
Lorena Olmos, DLA President-Elect
Modrall Sperling, Albuquerque

7:45-8:15am AN UPDATE ON DEPOSING EXPERTS
Leonard R. (Bud) Grossman, Craig, Terrill,
Hale & Grantham, LLP, Lubbock
Pat Long Weaver, Burleson, LLP, Midland

8:15-8:45am UPDATE ON NON-COMPETE CLAUSES IN
TEXAS AND NEW MEXICO
Andrew Curtis, Craig, Terrill, Hale &
Grantham, LLP, Lubbock

8:45-9:15am FEE SHIFTING IN NEW MEXICO,
WHEN AND HOW
Richard Olson, Hinkle Shanor, LLP, Roswell

9:15-9:45am CRIMINAL LAW CONSIDERATION
IN CIVIL CASES – THE ETHICS INVOLVED
The Honorable William R. Eichman, II
364th District Court, Lubbock

9:45-10:00am B R E A K

10:00-10:30am THE NEW RECIPROCITY OF NEW MEXICO
Mark Standridge, Jarmie & Associates,
Las Cruces

10:30-11:00am THE TWILIGHT ZONE REVISITED: BAD
FAITH IN NEW MEXICO
Bill Anderson, Acosta, Anderson & Obrey-
Espinoza, Las Cruces

11:00-11:30am A VIEW FROM THE BENCH: COMES NOW,
SAID COURT & MULTIJURISDICTIONAL
PRACTICE - ETHICS ARE IMPORTANT!
The Honorable James M. Hudson, 5th Judicial
District of Chaves County, New Mexico,
Division VI

11:30-12:00pm PRESERVING THE RECORD DURING
TRIAL IN TEXAS & NEW MEXICO
Lawrence M. Doss, Mullin, Hoard &
Brown, LLP, Lubbock

12:00-12:30pm ETHICAL CONSIDERATIONS ON
ATTORNEY INVOLVEMENT IN
RECORDING CONVERSATIONS
Mark Standridge, Jarmie & Associates,
Las Cruces

12:30-1:00pm LIABILITY OF HOSPITAL – WHEN A
PATIENT LEAVES AGAINST MEDICAL
ADVICE
Rachel Moreno, Kemp Smith, LLP, El Paso

1:00-1:30pm THE CHANGING CHARGE – THE TEXAS
LEGISLATURE HAS SPOKEN, BUT IS
ANYONE LISTENING?: THE STANDARD
TO BE USED IN COMPARATIVE
RESPONSIBILITY.
W. Bruce Williams, Cotton, Bledsoe, Tighe &
Dawson, PC, Midland

1:30pm ADJOURN TO ENJOY RUIDOSO

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Following the education session, members and their guests headed to Southwest University Park for an evening of El Paso Chihuahuas baseball!



Eddie & Rachel Moreno



Valerie McClelland, Diana Valdez with Ray & Melissa Baeza



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El Paso Club/Southwest University Park – June 5, 2015 – El Paso, Texas



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R. Douglas Rees, Dallas
District Directors
District 1
Russell R. Smith, Nacogdoches
District 2
Nathan M. Brandimarte, Beaumont
District 3
Arlene C. Matthews, Lubbock
District 4
Rusty Beard, Abilene
District 5
Michael J. Shipman, Dallas
District 6
Gregory D. Binns, Dallas
District 7
Mark C. Walker, El Paso
District 8
Slater Elza, Amarillo
District 9
Robert Booth, Galveston
District 10
G. Robert Sonnier, Austin
District 11
Michael D. Morrison, Waco
District 12
Sid Lange, Fort Worth
District 13
Monika Cooper, Fort Worth
District 14
Rebecca Kieschnick, Corpus Christi
District 15
James H. Hunter, Jr., Brownsville
District 16
Miles R. Nelson, Odessa
District 17
Jeffrey A. Webb, San Antonio
District 18
Darin L. Brooks, Houston
District 19
Michael S. Hays, Houston
District 20
Chris Hanslik, Houston
Directors at Large
Douglas R. McSwane, Jr., Tyler
Casey P. Marcin, San Antonio
Kenneth C. Riney, Dallas
Mitzi S. Mayfield, Amarillo
Brandon C. Cogburn, Texarkana
Barry D. Peterson, Amarillo
Peggy Brenner, Houston
Patricia Long Weaver, Midland
Alison D. Kennamer, Brownsville
Seth Isgur, Houston
Immediate Past President
V. Elizabeth Ledbetter, Austin
DRI State Representative
Greg W. Curry, Dallas
Young Lawyer Committee Chair
Bernabe G. Sandoval, Houston
TADC Executive Director
Bobby L. Walden, Austin

June 20, 2015

TO: Members of TADC

FROM: Michele Y. Smith, President
V. Elizabeth "Junie" Ledbetter, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2015-2016

OFFICES TO BE FILLED:

- *Executive Vice President
- *Four (4) Administrative Vice Presidents
- *Eight (8) Regional Vice Presidents
- *District Directors from even numbered districts
(#2, #4, #6, #8, #10, #12, #14, #16, #18, #20)
- *Directors At Large - Expired Terms

Nominating Committee Meeting - August 1, 2015

Please contact Junie Ledbetter with the names of those TADC members who you would like to have considered for leadership through Board participation.

V. Elizabeth "Junie" Ledbetter
Jay Old & Associates, PLLC
111 Congress Avenue. Suite 1010
PH: 512/632-7535 FX: 409/419-1733
Austin, TX 78701
Email: junie.ledbetter@jroldlaw.com

NOTE:

ARTICLE VIII, SECTION I - Four Vice Presidents shall be elected from the membership at large and shall be designated as Administrative Vice Presidents. One of these elected Administrative Vice Presidents shall be specifically designated as Legislative Vice President. A Fifth Administrative Vice President may be elected and specifically designated as an additional Legislative Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Programs Vice President. A Sixth Administrative Vice President may be elected and specifically designated as an additional Program Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Membership Vice President. A Seventh Administrative Vice President may be elected and specifically designated as an additional Membership Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Publications Vice President. An Eighth Administrative Vice President may be elected and specifically designated as an additional Publications Vice President. Eight Vice Presidents shall be elected from the following specifically designated areas

- | | |
|-----------------------|------------------------------|
| 1.) Districts 14 & 15 | 2.) Districts 1 & 2 |
| 3.) District 17 | 4.) Districts 3, 7, 8 & 16 |
| 5.) Districts 10 & 11 | 6.) Districts 9, 18, 19 & 20 |
| 7.) Districts 5 & 6 | 8.) Districts 4, 12 & 13 |

2015 TADC AWARDS NOMINATIONS

PRESIDENT'S AWARD

A special recognition by the President for meritorious service by a member whose leadership and continuing dedication during the year has resulted in raising standards and achieving goals representing the ideals and objectives of TADC.

Possibly two, but no more than three such special awards, to be called the President's Award, will be announced annually during the fall meeting by the outgoing President.

Recommendations for the President's Award can be made by any member and should be in writing to the President, who will review such recommendations and, with the advice and consent of the Executive Committee, determine the recipient. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee.

Following the award, the outgoing President will address a letter to the Managing Partner of the recipient's law firm, advising of the award, with the request that the letter be distributed to members of the firm.

Notice of the award will appear in the TADC Membership Newsletter, along with a short description of the recipient's contributions upon which the award was based.

Members of the Executive Committee are not eligible to receive this award.

FOUNDERS AWARD

The Founders Award will be a special award to a member whose work with and for the Association has earned favorable attention for the organization and effected positive changes and results in the work of the Association.

While it is unnecessary to make this an annual award, it should be mentioned that probably no more than one should be presented annually. The Founders Award would, in essence, be for service, leadership and dedication "above and beyond the call of duty."

Recommendations for such award may be made by any member and should be in writing to the President. The President and Executive Committee will make the decision annually if such an award should be made. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee. If made, the award would be presented by the outgoing President during the fall meeting of the Association.

Members of the Executive Committee are not eligible for this award.

In connection with the Founders Award, consideration should be given to such things as:

- Length of time as a member and active participation in TADC activities;
- Participation in TADC efforts and programs and also involvement with other local, state and national bar associations and/or law school CLE programs;
- Active organizational work with TADC and participation in and with local and state bar committees and civic organizations.

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

Michele Y. Smith
MehaffyWeber, PC
P.O. Box 16 PH: 409/835-5011
Beaumont, TX 77704 FX: 409/835-5177
Email: michelesmith@mehaffyweber.com

WELCOME NEW MEMBERS!

Melissa Jeanine Ackie, Thompson Coe Cousins & Irons, LLP, Austin
Malerie Anderson, Sprouse Shrader Smith, PLLC, Amarillo
Nicole G. Andrews, Serpe, Jones, Andrews, Callender & Bell, PLLC, Houston
Brett William Arnold, Burleson, LLP, Midland
Stuart C. Atwell, Crouch & Ramey, LLP, Dallas
Anelisa Benavides, Mounce, Green, Myers, Safi, Paxson & Galatzan, El Paso
Brent A. Bishop, Atlas, Hall & Rodriguez, LLP, McAllen
David Brezik, Naman, Howell, Smith & Lee, PLLC, Fort Worth
Mark Callender, Serpe, Jones, Andrews, Callender & Bell, PLLC, Houston
Elizabeth Cantu, Atlas, Hall & Rodriguez LLP, McAllen
Jane Cherry, Thompson & Knight LLP, Dallas
David J. Coates, O'Connell & Avery, LLP, San Antonio
J. Heath Coffman, Brackett & Ellis, Fort Worth
Jessica Collins, The Collins Law Firm, Humble
Christopher Cook, Craig, Terrill, Hale & Grantham, Lubbock
Kathryn Copeland, Naman, Howell, Smith & Lee, PLLC, Fort Worth
Andrea Cortinas, ScottHulse, P.C., El Paso
Christopher R. Cowan, Beck|Redden LLP, Austin
Clint Cox, Fee, Smith, Sharp & Vitullo, LLP, Dallas
Miles M. Dewhirst, Dewhirst & Dolven, LLC, Denver
George R. Diaz-Arrastia, Schirrmeister Diaz-Arrastia Brem LLP, Houston
Robert M. Disque, Goldman & Associates, PLLC, San Antonio
Blake Downey, ScottHulse, P.C., El Paso
Paul T. Elkins, Harris, Finley & Bogle, P.C., Fort Worth
David H. Estes, Hartline Dacus Barger Dreyer LLP, Dallas
Brennon D. Gamblin, Craig, Terrill, Hale & Grantham, LLP, Lubbock
I. Cecilia Garza, Gault, Nye & Quintana, LLP, Edinburg
James W. Goldsmith, Jr., O'Connell & Avery, LLP, San Antonio
Michelle R. Gomez, Cox Smith, San Antonio
Benjamin Gomez-Farias, Kemp Smith LLP, Austin
Alexandra Lynn Habbouche, Roerig, Oliveira & Fisher, L.L.P., McAllen
Wendy H. Hermes, The Berry Firm, PLLC, Dallas
William A. Hicks, Mehaffy Weber, Houston
Vanessa Lee Humm, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville
Andrew Johnson, Steed Dunnill Reynolds Murphy Lamberth, LLP, Rockwall
Anna Kalinina, Thompson & Knight LLP, Dallas
Katherine Kassabian, McDonald Sanders, P.C., Fort Worth
Kristi L. Kautz, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Kyle Gregory Knas, Naman, Howell, Smith & Lee, PLLC, Waco
Marion Lawler, III, Lawler & Associates, P.C., Brownsville
Barrett C. Leshner, Hallett & Perrin, P.C., Dallas
Whitney Mack, Thompson Coe Cousins & Irons, LLP, Austin
Scott Mayo, Fletcher Farley Shipman & Salinas, LLP, Dallas
Randall W. Miller, Fee, Smith, Sharp & Vitullo, LLP, Dallas
Sarah R. Minter, Goldman & Associates, PLLC, San Antonio
Elizabeth A. O'Connell, O'Connell & Avery, LLP, San Antonio
Kevin J. Parks, Thompson & Knight, LLP, Houston
Gregory J. Peterson, Goldman & Associates, PLLC, San Antonio
Laurie Pierce, Cooper & Scully, PC, Dallas
Justin A. Rhodes, Germer PLLC, Beaumont
Keshia Rodriguez, Sedgwick, LLP, Houston
Susan Schwartz, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Dallas
Annalynn Sebastian, Germer PLLC, Houston
J. Baird Smith, Naman, Howell, Smith & Lee, PLLC, Austin
James Montague Stevens, Stevens & Associates, El Paso
Michael Stewart, Godwin Lewis PC, Dallas
Jason Douglas Tomlin, Fletcher, Farley, Shipman & Salinas, Dallas
Justin Woods, Goldman & Associates, PLLC, San Antonio
Michael A. Yanof, Thompson, Coe, Cousins & Irons, L.L.P., Dallas

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TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys ~ Est. 1960

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Mr.
Mrs.

I Ms. _____ hereby apply for membership in the Association and certify that I am
(circle one) Please print

a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Personal Injury Defense and Commercial Litigation. I am not now a member of any plaintiff or claimant oriented association, group, or firm. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

Main Office Phone: _____ / _____ Direct Dial: _____ / _____ Office Fax: _____ / _____

Email Address: _____ Cell _____ /
Phone: _____

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: _____ / _____

Bar Card No.: _____ Year Licensed: _____ Birth Date: _____ ☐ DRI Member?

Dues Categories:

***If joining November – July: \$185.00 Licensed less than five years (from date of license) \$295.00 Licensed five years or more**

If joining August: \$ 50.00 Licensed less than five years (from date of license) \$100.00 Licensed five years or more

If joining September: \$ 35.00 Licensed less than five years (from date of license) \$ 50.00 Licensed five years or more

If joining October: \$ 25.00 Licensed less than five years (from date of license) \$ 35.00 Licensed five years or more

*If joining in November or December, your Membership Dues will be considered paid for the following year. However, New Members joining after October 1 will not have their names printed in the following year's roster because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

(TADC member) Please print name under signature

I agree to abide by the Bylaws of the Association and attach hereto my check for \$ _____ -OR-

Please charge \$ _____ to my ☐ Visa ☐ MasterCard ☐ American Express

Card #: _____ Exp. Date: _____ / _____

Please return this application with payment to:
Texas Association of Defense Counsel, Inc.
400 West 15th Street, Suite 420
Austin, Texas 78701

Referring TADC Member:

(print name)

For Office Use

Date: _____

Check # and type: _____

Approved: _____



Expert Witness Research Service Overall Process

- Complete the TADC Expert Witness Research Service Request Form. Multiple name/specialty requests can be put on one form.
- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
- If the request is for a defense expert within a given specialty, please include as much information as possible. For example, accident reconstruction can include experts with a specialty of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via facsimile to 512/476-5384 or email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return facsimile transmission. The TADC Contact information includes the attorney who consulted/confronted the witness, the attorney's firm, address, phone, date of contact, reference or file number, case and comments. To further assist in satisfying this request, an Internet search will also be performed (unless specifically requested NOT to be done). Any CV's, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
- Approximately six months after the request, an Expert Witness Research Service Follow-up Form will be sent. Please complete it so that we can keep the Expert Witness Database up-to-date, and better serve all members.

Expert Witness Service Fee Schedule

Single Name Request

Expert Not Found In Database	\$15.00
**Expert Found In Database, Information Returned To Requestor	\$25.00
A RUSH Request Add An Additional	\$ 10.00
A surcharge will be added to all non-member requests	\$50.00

** Multiple names on a single request form and/or request for experts with a given specialty (i.e., MD specializing in Fybromyalgia) are billed at \$80.00 per hour.

Generally, four to five names can be researched, extracted, formatted, and transmitted in an hour.

The amount of time to perform a specialty search depends upon the difficulty of the requested specialty, but usually requires an hour to extract, format, and transmit. If the information returned exceeds four pages, there is a facsimile transmission fee.



TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

400 West 15th Street, Suite 420 * Austin, Texas 78701 * 512/476-5225

Expert Witness Search Request Form

Please FAX this completed form to: **512/476-5384**

Date: _____

☐ NORMAL ☐ RUSH (Surcharge applies)

Attorney: _____ ☐ TADC Member ☐ Non-Member
(Surcharge applies)

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

➤ ☐ **Search by NAME(S):** (Attach additional sheets, if required.)

Designated as: ☐ Plaintiff ☐ Defense ☐ Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

Areas of expertise: _____

➤ ☐ **SPECIALTY Search:** (Provide a list of experts within a given specialty.)

Describe type of expert, qualifications, and geographical area, if required (i.e., DFW metro, South TX, etc). Give as many key words as possible; for example, 'oil/gas rig expert' could include economics (present value), construction, engineering, offshore drilling, OSHA, etc. A detailed description of the case will help match requirements.

➤ ☐ **INTERNET:** ☐ INCLUDE Internet Material ☐ DO NOT Include Internet Material

A research fee will be charged. For a fee schedule, please call 512 / 476-5225 or visit the TADC website www.tadc.org

Texas Association of Defense Counsel, Inc.

Facsimile: **512 / 476-5384**

TADC EXPERT WITNESS LIBRARY

THANK YOU FOR YOUR CONTRIBUTION TO THE EXPERT WITNESS DATABANK:

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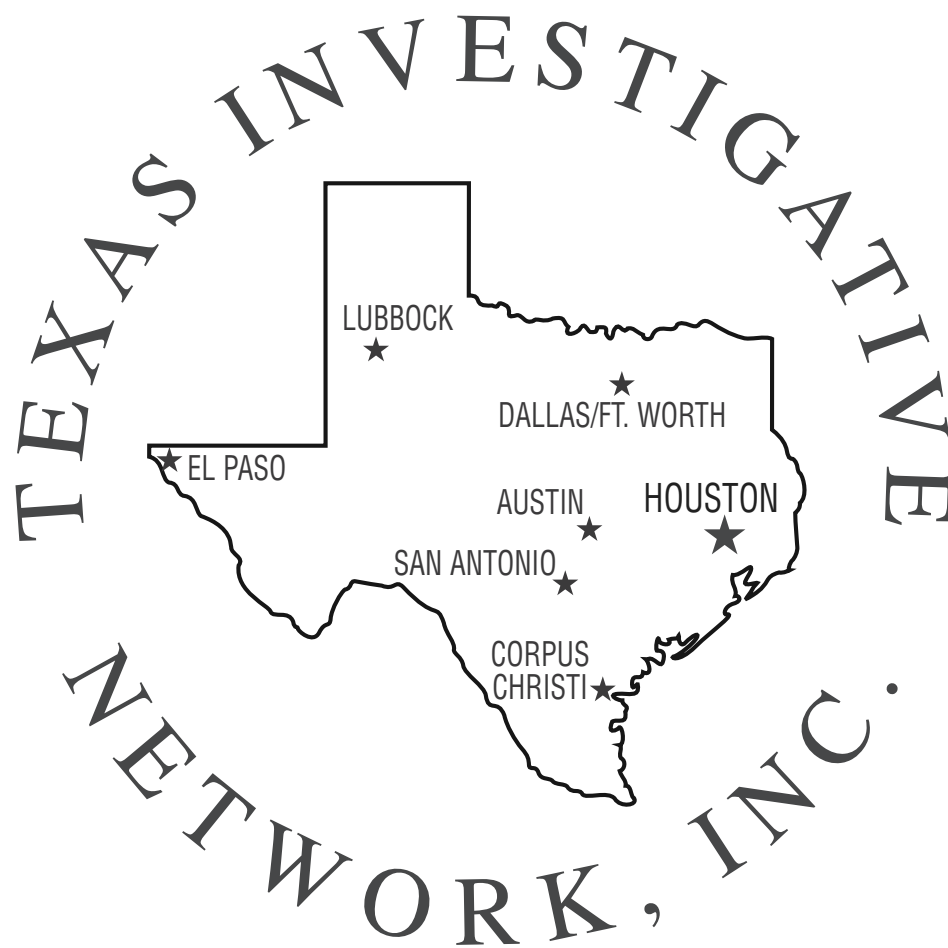
and a *Special Thank You* to all the Members who completed and returned the
Expert Witness Follow-up Forms

EXPERT WITNESS DATABASE

The Texas Association of Defense Counsel, Inc. maintains an Expert Witness Index which is open only to TADC members or member firms. This index includes thousands of experts by name and topic or areas of specialty ranging from “abdomen” to “zoology.” Please visit the TADC website (www.tadc.org) or call the office at 512/476-5225 or FAX 512/476-5384 for additional information. To contribute material to the Expert Witness Library, mail to TADC Expert Witness Service, 400 West 15th St, Suite 420 Austin, TX 78701 or email tadcnews@tadc.org.

There is a minimum charge of \$15.00, with the average billing being approximately \$25.00, depending upon research time. You can specify geographical locations, in or out of state. Note that out-of-state attorneys may only access the Expert Witness Index upon referral from a TADC member.





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Where's the CD with the Newsletters?

In an effort to be more efficient and address the needs of the TADC membership, a link to the TADC Professional Newsletters (in PDF format) was emailed to all members ahead of the TADC Magazine. The Newsletters are also available in the members' section of the TADC website, along with past editions, available for viewing or download at **www.tadc.org**



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August 7-8, 2015
TADC West Texas Seminar
Inn of the Mountain Gods
Ruidoso, New Mexico



September 16-20, 2015
TADC Annual Meeting
Millennium Broadway
New York, New York



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Calendars
_____ www.tadc.org

October 8-9, 2015
TADC/OADC Red River Showdown
Westin Stonebriar
Frisco, Texas

