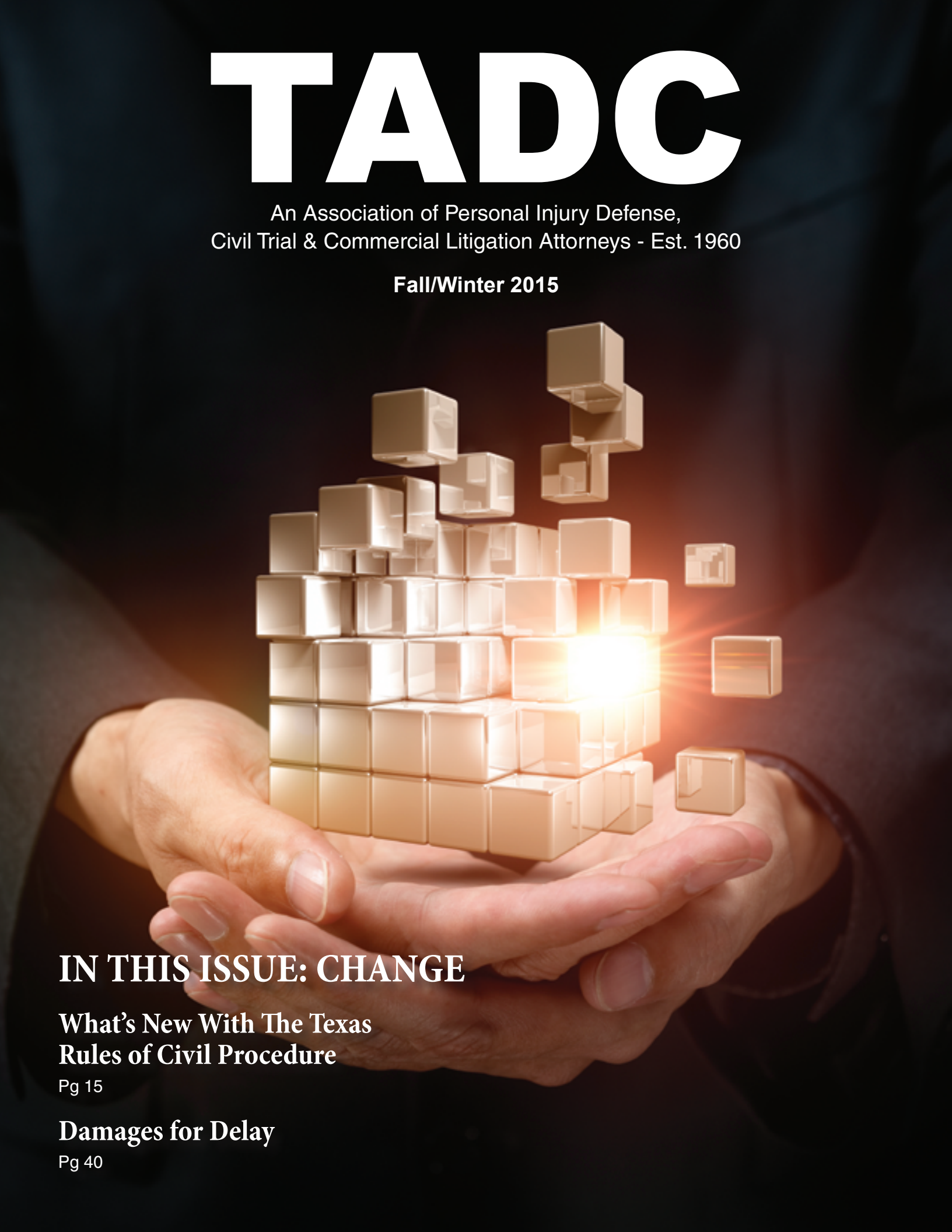
TADC

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

Fall/Winter 2015



IN THIS ISSUE: CHANGE

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TADC CALENDAR OF EVENTS

January 22, 2016	**TADC Board of Directors Meeting** Moody Bank Auditorium – Austin, Texas
January 27-31, 2016	**TADC Winter Seminar** Hotel Madeline - Telluride, Colorado Joe Hood, Program Chair
April 14-16, 2016	**TADC Trial Academy** South Texas College of Law, Houston Ron Capehart, Program Chair
April 27-May 1, 2016	**TADC Spring Meeting** Loews Vanderbilt Hotel - Nashville, Tennessee Chantel Crews & Trey Sandoval, Program Co-Chairs
July 6-10, 2016	**TADC Summer Seminar** Omni Plantation - Amelia Island, Florida Slater Elza and Arlene Matthews, Program Co-Chairs
July 29-30, 2016	**TADC/NMDLA West Texas Seminar** Inn of the Mountain Gods - Ruidoso, New Mexico Bud Grossman, Program Chair
August 5-6, 2016	**Budget and Nominating Committee Meeting** Intercontinental Stephen F. Austin - Austin, Texas
September 21-25, 2016	**TADC Annual Meeting** The Worthington Renaissance Hotel - Fort Worth, Texas George Haratsis, Program Chair

Milton C. Colia
In Memory

Every once in a while someone comes along who changes your life. A person you meet in an otherwise routine circumstance becomes a person much more important to you than you first imagined. Milton Colia was just that kind of person. I first met Milton in person when I began my service on the TADC Board in 2004. I say "in person" because before that meeting, Milton and I jointly represented a client that had cases across Texas. Milton in El Paso, and I in Beaumont, got to know each other during telephone calls we had for this mutual client. When I first met Milton in person, I had no idea what he looked like and he had no idea what I looked like. We sat by each other by happenstance at the board table and became fast and steady friends.

It is with a sad and heavy heart that I write these words about my dear friend. Even as I put pen to paper, I cannot believe Milton is gone. The incredibly fun laughs and memories we shared through the years are far too numerous to chronicle in a single page. They occurred any time we were together—Charleston (where Mitchell and I first met Margaret Ann), San Diego, Austin, San Antonio, El Paso, Beaumont, Galveston, Montana and most recently, New York and Dallas, just to name a few spots. Suffice it to say, Milton and Margaret Ann became family to Mitchell and me. We will hold those memories in our hearts and minds as time marches on.

In the days following the devastating news of Milton's passing, I received numerous emails of support and condolence from friends and I read the messages posted on the TADC Linked In page. They all resonate with the same essential bottom line: Milton was a great attorney. As a fellow of the American College of Trial Lawyers; he was the cream of the cream. Milton loved being a lawyer and was an excellent advocate. He was beloved by the members of Kemp Smith and by the attorneys he mentored over the years. A highly successful litigator, he was able to communicate with jurors on their level, a quality he possessed when communicating with anyone. Many have stated Milton's motto was "kill them with kindness." When asked to describe Milton, I told the Texas Lawyer that,

as a lawyer, all you needed to do was listen to him give a CLE presentation to hear and appreciate how his practical "every-man's" advice appealed to the audience. Milton was a "lawyer's lawyer" and his recognition as the best of the best in countless legal arenas cannot be assailed.

The reporter also asked me about Milton's qualities as a man. I could have rambled for hours. Milton ALWAYS had a smile on his face and a twinkle in his crystal blue eyes. Sometimes the twinkle meant he was up to something or that he had an idea. More often, it meant he was just welcoming you into his world. During our service together on the Board, I never saw Milton meet a stranger. He had a fantastic laugh and personality that eased anyone around him. He was loyal, kind and generous. My husband, Mitchell, recalled Milton would send him unexpected gifts just because. Milton knew Mitch liked history and reading, so he would send him an interesting book Mitch had never read or a World War II model airplane always with a kind and witty note included. Others have told me about the thoughtful notes he wrote congratulating them. At his memorial service, his friends spoke of other and varied acts of kindness. Milton did not do these things for gratitude or attention, it was just who he was.

As TADC President., Milton had already accomplished a great deal. He had creative, innovative ideas, and he had the Board working hard already to achieve the goals he had composed so thoughtfully. Thankfully, he was able to hold his first Board meeting in November and we were all able to experience him in action and observe a taste of what Milton's leadership would have been like for the entire organization. Milton did an incredible job during his short time at the helm, and he left us with a wonderful road map to follow.

Milton often said, "I am just a simple man." He WAS a simple man in the areas of life that matter most. He enjoyed life and his family to the utmost. He was an incredible and proud father and grandfather, and he beamed with pride when he spoke about or shared pictures of his new grandson, Watson. He LOVED TCU, cars, and dogs. He had strong opinions on dining locations and was never shy about commenting upon the quality of the menu options. He only let me pick the dining spot for dinner once, just this past September in New York! Fortunately, the restaurant was a big hit and we all had the greatest time. Milton was funny AND fun and never took himself too seriously. Sarcastic wit was <u>always</u> laced with love and humor. He valued friendships, as evidenced by the number of loyal friends he had around him. Milton had so many people care about him because he took the time to care. Even as busy as he was, he always found the time for you.

Milton would have wanted the TADC to thrive and continue on, and it will do so under the leadership of Clayton Devin who has so unselfishly stepped in to the role of President in Milton's absence. At its core, that is what TADC is about - incredible people who always rise to the occasion and wonderful friendships. I could not have asked for a better friend than Milton Colia, and I know that so many of you share the same sentiment. He will be missed dearly. Goodbye, my friend.

By Michele Smith, TADC Immediate Past President, MehaffyWeber, Beaumont

Members:

This article is one of several planned by TADC President Milton Colia. Milton passed away unexpectedly on December 1, 2015. A memorial appears immediately ahead of this message. Milton's own words serve to express the positive and dedicated influence he had on the TADC and its members. We will miss him.

Clayton E. Devin
TADC President

President's Message

by Milton C. Colia
Kemp Smith LLP, El Paso

As I said when the gavel was passed to me by Michele Smith, I am both honored and excited to serve as the President of TADC this next year.

When I first joined in 1982 it was a mandatory requirement of our firm for me to be a member. Why? Contacts with lawyers from around the state, not just by email, but by personal contact. It was the start of building relationships that still exist today. Because of those relationships I learned how to be a better lawyer. Because of my membership in TADC, I also learned what legal issues were pending with the legislature and how they might affect my practice of law and what TADC did to try and protect a fair and impartial judicial system. I attended seminars that were practical and covered specific issues related to the defense practice.

All of these reasons are still valid today. When I was a young lawyer, there were many more opportunities to get to trial. Those opportunities don't exist today and it is even more important for young lawyers to develop these relationships and learn from those that have actually tried cases.

TADC has changed over the years. It is not just an "insurance defense practice" organization. More emphasis in programming has been placed on commercial litigation and specialized areas, such as construction law.

TADC continues to be the voice in the legislature for the defense practice. During this last legislative session there were issues related to Chancery Courts, Net Worth, collaborative law, juror requirements, attorney admission and attorney fees.

TADC members reviewed bills, provided testimony, and strengthened our legislative relationships. Many members were involved in this but special thanks goes out to K.B. Battaglini and Michele Smith for their involvement and dedication to this process. TADC will continue to monitor potential issues in this non-legislative year. I encourage you to support TADC's efforts by volunteering your time and contributing to the TADC PAC.

TADC will continue to provide excellent CLE throughout the year. The following meetings have been set for next year:

Winter Seminar 2016
Telluride, Colorado
January 27-31, 2016
Hotel: Hotel Madeline

Trial Academy 2016
South Texas College of Law, Houston
April 15-16, 2016

Spring Meeting 2016
Nashville, Tennessee
April 27-May 1, 2016
Hotel: Loews Vanderbilt

Summer Meeting 2016
Amelia Island, Florida
July 6-10, 2016
Hotel: Omni Plantation

West Texas Seminar
Ruidoso, New Mexico
July 29-30, 2016
Hotel: Inn of the Mountain Gods

Annual Meeting 2016
Fort Worth, Texas
September 21-25, 2016
Hotel: Worthington

If you have any suggestions regarding topics or you would like to speak at any of our meetings, contact one of our programs, Vice President K.B. Battaglini or Doug Rees.

We are doing the Trial Academy this year. This is an excellent opportunity for young lawyers to "learn by doing." Experienced trial lawyers observe and provide immediate individual feedback to the young lawyer. This will fill up quickly. If you have a young lawyer that would benefit by participating let Bobby Walden, our Executive Director, know as soon as possible. If you are interested in being on the faculty, let us know.

Continuing to grow our membership is essential in keeping this organization viable. Last year, under Michele Smith's leadership, emphasis was shifted to getting younger lawyers more involved. They are the future of this organization and I will continue to emphasize their involvement in all aspects of TADC activities. The Young Lawyers Committee, under the leadership of Trey Sandoval, initiated new programs to increase young lawyer participation. Young lawyers were speakers at seminars, were involved in analyzing potential legislation, and hosted events aimed at increasing membership. Young lawyers have been placed on the board this year. I anticipate that they will be actively involved in suggesting ways for our organization to continue to thrive.

It would be impossible for me to recognize all of the people that contribute to the everyday functions of TADC. There are program chairs, newsletter editors, members of the Amicus committee, all of whom give their time and effort in keeping the TADC as the best defense organization in the nation. I thank all of those people that have been involved in the past. Our Vice Presidents of Membership, Programs, Publications, and Legislation have already put in place ideas to improve our organization in the coming year. We can always be better but can only do that with input and participation by all members. Don't hesitate to ask questions or make suggestions.

I welcome input from any member regarding any suggestion as to how to improve this organization. I look forward to seeing you at an upcoming meeting.

IT'S BACK!

Volunteer Now for the 2016 Trial Academy Faculty!

The 2016 Trial Academy will be held April 14-16, 2016, in Houston at the South Texas College of Law. If you are interested in helping to train 1-6 year attorneys for their day in the courtroom, contact Trial Academy Chair Ron Capehart (RCapehart@gallowayjohnson.com)

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Past President's Message

Michele Smith
MehaffyWeber, PC, Beaumont

TADC Rocks!

Dear TADC friends,

It was my absolute pleasure to serve as President of this incredible group for 2014-2015. Thank you for the honor of allowing me to do so. What I enjoyed the most about last year was getting to meet so many of you in person. I will miss that part of the job tremendously. I appreciate all of the well wishes and the kind comments offered me along the way. I look forward to cheering on **Clayton Devin** in the coming year.

The front row seat I had allowed me to see first-hand the real impact the TADC and its members make in protecting our civil justice system. TADC maintains broad and meaningful respect on a state and national level. That is due in no small part to the contributions of so many of you.

Last year began with an election that signaled the upcoming 84th Legislative Session and all the speculation that goes into the fall build up to the Session's kickoff in January. By the bill filing deadline in March, 6000+ bills had been filed, a record number. The Session morphed into a very active time for civil justice matters, even though many thought social issues would carry the day.

The TADC and the Legislative Committee led by **K.B. Battaglini** and **Chantel Crews** celebrated several victories during the Session. TADC stood proudly with several other groups in supporting passage of the Civility Oath (SB 534) and in strong opposition to a Chancery Court bill (HB 1603) that would have created costly special business courts. TADC actively participated with several groups in creating a revised Forum Non Conveniens statute (HB 1692) that kept our courts open to Texas citizens but curbed abuses in the system. TADC again worked with other organizations on the revisions to Texas Civil Practice and Remedies Code Chapter 41 and the admissibility of net worth evidence (SB 735). Finally, the 84th Session saw the repeal of the occupation tax (HB 2089) and a reduction in the franchise tax (HB32).

TADC remains a trusted and respected organization that looks at and analyzes bills on a case by case basis. Our leading question and guiding principle is how does the piece of legislation affect our civil justice system. We are not a trade organization and we remain proud of that independence.

Many leaders have navigated the waters of an active legislative session. You can plan for it and be prepared for it but until you are in it, you do not realize fully the pace of it. I thanked those who helped me read and analyze bills and who offered support throughout the 84th Session in my message in the June issue. A few of those names deserve mention again: **Dan Worthington, Keith O'Connell** and **David Chamberlain**--all three incredible leaders who worked tirelessly when they were President of TADC and continue to work tirelessly in support and protection of the system. And, they provided me encouragement and support I will never be able to repay. TADC member Representatives **Rene Oliveira, Travis Clardy and Ken Sheets** had an open-door policy and made TADC proud through their service in the Legislature. **Mike Eady** did yeoman's work in his calm, steady crafting of the FNC bill. Our legislative consultant, **George Scott Christian,** provided sound wisdom and guidance and effective personal counseling throughout the

Session. To all of you -- Thank you, thank you!

MEMBERSHIP

You have heard me preach about membership in several E-Blasts and other forums. Our organization is made up of more than 1,500 members who are the best of the best in our profession. As you can imagine, organizations across the country are striving to retain and obtain new members. I am pleased to report that our membership committee did an outstanding job last year and we finished the year with a net gain of members. This is due in no small part to the leadership of Membership Vice-Presidents, **Brad Douglas** and **Sophia Ramon,** and their Membership Committee.

YOUNG LAWYERS' COMMITTEE

Under the strong leadership of **Trey Sandoval**, this amazing group of lawyers set the bar for the rest of our organization. In addition to preparing the first Young Lawyers' Survey, our YL Committee recruited new members actively, spoke at every meeting, and contributed to our publications. And, just when you thought they would rest on their laurels, they stepped up and hosted successful and fun Happy Hours across the State in winding down the year. Thank you, **Trey Sandoval, Charlie Downing, Robert Ford, Christopher Hughes, Jarad Kent, Jennie Knapp, Jason McLaurin, Rachel Moreno, Elizabeth O'Connell, Blair Oscarsson, Melody Rodney, Brittani Rollen, Derek Rollins, Elliott Taliaferro, Chris Cowen** and **Mackenzie Wallace**. I cannot say enough about this outstanding group. Look for great things from them in the future!

PROGRAMS

Program VPs, **Pam Madere** and **Bud Grossman,** and their committee organized an incredibly successful year. The programming agenda emphasized local programming and "hot" areas of the practice. We held legislative luncheons in Amarillo, McAllen, Tyler, Waco, Houston, San Antonio, El Paso, Beaumont, Austin and Dallas.

Mitchell Smith chaired two innovative and interesting Transportation Seminars, **Doug Rees** organized a top flight Construction Litigation seminar and **Tom Ganucheau** and **Sam Houston** put together an excellent Commercial Litigation seminar. The West Texas Seminar, chaired by **Bud Grossman** and held in conjunction with the New Mexico Defense Lawyers' Association, had record attendance. **Jerry Fazio** led our second TADC/OADC Red River Showdown seminar in Frisco, Texas. It, too, was a success.

Our four "large" meetings were praised and well-received due in no small part to the effort of the program chairs in Beaver Creek, Galveston, Jackson Hole and New York City. Thank you, **Mackenzie Wallace, Mitch Moss, Gayla Corley, Robert Booth, Elliott Taliaferro, Christy Amuny, Pam Madere, Jason McLaurin, David Chamberlain** and **Keith O'Connell.**

PUBLICATIONS

Christy Amuny and **Mark Stradley** advanced many initiatives under the umbrella of publications. Our website underwent a complete re-vamp which included an exciting new look visually, on-line registration for meetings and dues and PAC contributions payment capability. The Publications Committee also orchestrated a new look to our magazine and our first on-line roster.

THE CELEBRATION

The year ended with a great meeting and passing of the gavel at the Annual Meeting in New York City. It was a special opportunity to highlight and acknowledge publicly those members who go the extra mile.

The Founder's Award is given to a member who has earned favorable attention for the organization, someone who has gone above and beyond the call of duty. In essence, it is somewhat of a lifetime achievement award. This year, the two Founder's Award winners exemplify all that is great about TADC.

Past-President **Greg Curry** has been involved with the TADC board in some capacity for the last 20 years. When he served as President of TADC, he chaired the 50th Anniversary celebration. He has served as State Representative for Texas in the

Defense Research Institute and continues to defend vigorously our civil justice system. He also speaks routinely at meetings and supports the TADC in every arena.

Roger Hughes needs no introduction. Our Amicus Committee is extraordinary and receives an enormous amount of respect across the country. This is due in no small part to Roger's attention to detail, legal analysis and his tireless devotion of time to the cause. Very few understand how much time Roger devotes to the committee. Its work is of vital importance. Rogers leads the committee beautifully and has worked on it for years.

For the first time, we recognized a young lawyer who exceeded all expectations and set new standards. The selection of **Elizabeth O'Connell** for this recognition was a no-brainer! Elizabeth authored the Young Lawyers' Survey, hosted a Happy Hour in San Antonio, and personally added 10+ members to our TADC membership. Look for great things from Elizabeth in the future as she is certainly a rising star in this organization and is now a new member of the board.

I was delighted to present two President's Awards as well, one to **K.B Battaglini** and one to **Bruce Williams**. The President's Award honors a member for meritorious service and leadership and recognizes that individual for continuing dedication that has resulted in raising the standards and achieving the goals of TADC during the year.

In the remarks I gave about **K.B.**, I commented I was shocked he had not received this award before. K.B. speaks at nearly every program we have. He has been a tireless resource in various legislative endeavors and this year served as Legislative Vice President. In addition, he found time to organize the Houston Legislative Luncheon and undertook coordination of the TADC response to the Texas Supreme Court on the proposed revisions to the Texas Rules of Evidence.

Bruce is a long-time TADC member and former board member. An incredible trial attorney, Bruce tried the two *Nabors* cases discussed in the amicus section. He worked hand in hand with our amicus committee to achieve a ground-breaking change in the admissibility of seat belt evidence. He shared his wisdom and experience in an incredibly educational and interesting retrospective he presented at THREE programs. Bruce also served on the TADC Nominating Committee and serves as a TADC PAC Trustee.

FINALLY…

TADC is fortunate to have so many members who devote their time and energy unselfishly to advance the goals of our fine organization. The width and breadth of that talent is simply enormous.

Thank you to our meeting chairs and those who went above and beyond to make our meetings fun and entertaining. Thank you **Heather** and **Robert Sonnier, Mitzi** and **Todd Mayfield, Tisha** and **Barry Peterson, Shanna** and **Slater Elza,** and his cooking crew, **Sandy** and **Tom Riney, Kim** and **Fred Raschke, Molly** and **Dennis Chambers** and **Mitchell Smith**.

Thank you to the editors of our newsletters. Each editor consistently turns out quality content that is useful and informative. This is a great member benefit and could not be delivered without the hard work and attention to detail put into the final product. Thank you **Scott Stolley, John Bridger, Jason McLaurin, Bradley Bartlett, Carl Green, Greg Curry, Greg Binns, Anna Kalinina, Ed Perkins, Nicolas Gavrizi, Casey Marcin, Divya Chundru, Christina Huston, David Clark, Brian Bagley, Scott Davis, Kent Harkness, Robert Horn, Joseph Hance III, Kristen McDanald, Monika Cooper and Lea Courington**.

The work of the Amicus Committee is crucial and meaningful. The analysis and legal briefing done by this committee is something of which we all can and should be proud. This year our Amicus Committee celebrated a special success in the cases of ***Nabors Well Services, Ltd. v. Romero***, **456 S.W.3d 553 (Tex. 2015)** and ***Nabors Well Services, Ltd. v. Loera*, 457 S.W.3d 435 (Tex. 2015).** These cases reversed forty years of precedent and altered the way defense vehicular lawsuits will be tried going forward. Seat belt evidence is now admissible.

Thank you **Roger Hughes, Ruth Malinas, George Muckleroy, R. Brent Cooper, Scott Stolley, Bob Cain, Mitchell Smith, Mike Eady, Tim Poteet, William Little, Richard Phillips, Jr., George Vie III** and **Larry Doss.**

The TADC Nominating Committee met in San Antonio in early August. The slate they assembled for 2015-2016 is extraordinary and is featured in this magazine. Thank you to each of these members for accepting my call to serve and for handling the role so beautifully: **Junie Ledbetter, Keith O'Connell, Jenny Andrews, Arturo Aviles, Hayes Fuller, Tom Ganucheau, Randy Grambling, Alan Harrel, Roger Hughes, Matt Matzner, Douglas Poole, Bryan Pope, Michelle Robberson, Jackie Robinson, Tony Rodriguez, Mitchell Smith, Brandon Strey, Bruce Williams** and **Stacy Yates.**

The first thing you learn as President of this organization is how hard the TADC office works. Our office is run by **Bobby Walden** and **Debbie Hutchinson** and all that the organization accomplishes is because they handle everything with aplomb. I thank them for all they did to support me this year and to run with the many crazy ideas I had. They are the heart and soul of TADC. They are generous of time, spirit and are loyally committed to TADC. Thank you!

The Executive Committee of **Junie Ledbetter, Milton Colia, Mike Hendryx, Clayton Devin** and **Jerry Fazio** were my trusted and sound advisors. Thanks to each of you for listening, offering suggestions, and helping to advance the organization in so many ways. It was a pleasure working with you. I will treasure the memories of our shared time together. I look forward to watching the organization thrive under the leadership of Milton, Mike and Clayton, and, have no doubt it will reach new heights.

Your TADC Board of Directors is an incredibly talented hard-working group, as dedicated to the cause as you would hope. In addition to the Board meetings, each of them works hard to bring the TADC to you – through local programs and personalized updates that keep you informed. Each Board member served on one of the committees discussed in this article and offered great support throughout the year. They are your eyes and ears for your district. I hope you will thank them for their work, and I certainly thank them for all of the support they provided me throughout the year.

I must thank some very special people who supported me in countless ways. First, my partners and family at MehaffyWeber. Not once did any of them complain about or question my time away from the office. Instead, they pitched in whenever I asked on cases and TADC matters – that includes program attendance and speaking, bill review and analysis, and a recent taping of the first Minute Mentor segment. Not to mention several pick me up sessions! My assistant, **Lisa Rogers**, held down the fort and accepted the added work with a great attitude. She provided the needed stability at the office to keep me sane. **Michelle Stutes** handled "me" in Lisa's absence and revised my legislative power points more than any one person should.

Finally, my family, and in particular, my husband, Mitch deserve special thanks. The number of hours they spent listening to me about the Session in and of itself was over the top. For those of you who know Mitch, I need say no more. As you can read, his name is mentioned several times in this article. He was a true partner in everything TADC did this year, including reading and proofreading this last message! To him, I say THANK YOU from the bottom of my heart.

TADC is relevant and remains relevant because of its membership. It is great and remains top notch due in large part to the people mentioned in this article. Thank you to all of you, who offered to help, did help and who offered a simple word of support. TADC ROCKS!

What's New With The Texas Rules of Civil Procedure

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I. INTRODUCTION

In preparation of the following, opinions of Texas intermediate appellate courts and the Texas Supreme Court, issued in the last eighteen months, were reviewed. Additionally, recent amendments to the Texas Rules of Civil Procedure, and recently enacted statutes impacting the rules were also reviewed. An attempt was then made to choose those cases, rules and statutes which were either the most significant or most instructive, or both.

II. JURISDICTION & VENUE

A. Workers' Compensation

The Supreme Court has clarified jurisdiction as it relates to the Texas Workers' Compensation Act**.** The Court held previously that, in view of the Workers' Compensation Act's comprehensive system for resolving workers' compensation claims, and the role of the Division of Workers' Compensation in that process, the Act provides the exclusive process and remedies for claims alleging a carrier improperly investigated, handled or settled a workers' compensation claim. *See Texas Mutual Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 444 (Tex. 2012). *Ruttiger* did not hold the Act bars every statutory or common law claim however, and under the facts of that case, held a claim for misrepresentations of a policy pursuant to Section 541.061 of the Texas Insurance Code was not barred by the Act. *See id.* at 445-46. The perceived failure of the Court in *Ruttiger* to prohibit all potential claims against a workers' compensation carrier left room for argument that claims arising out of a carrier's investigation, handling or settling of a claim were still viable outside the workers' compensation administrative system as long as the claims were not inconsistent with the Act. No more. Any such argument has been put to rest by the Court's recent holding in *In re Crawford & Co*., 458 S.W.3d 920 (Tex. 2015).

In *Crawford*, while the workers' compensation claim was still pending, an injured worker and his spouse sued the carrier and its claim service contractors ("Crawford"), alleging, among other causes of action, bad faith, Insurance Code violations, negligence, gross negligence, fraud, negligent and intentional misrepresentation, intentional infliction of emotional distress and malicious prosecution. *See Crawford*, 458 S.W.3d. at 922. The injured worker and his spouse sought, among other elements of damages, damages for physical and mental injuries, loss of income, damage to reputation and exemplary damages. *Id*. The claims clearly arose out of Crawford's conduct in the investigation, handling and settlement of the workers' compensation claim. While the injured worker and his spouse conceded their claims for workers' compensation benefits had to be pursued in the administrative process, they asserted their state court claims were for additional, independent damages and injuries unrelated to the claim for benefits, and therefore were outside of the Administrative process. *See id*. Crawford's Plea to the Jurisdiction was granted as to the claims for bad faith and Insurance Code violations, but the trial court refused to dismiss all other claims. The Court of Appeals denied Crawford's petition for mandamus. On petition for writ of mandamus to the Texas Supreme Court, the Court conditionally granted writ, and made clear the Workers' Compensation Division has exclusive jurisdiction over any claim arising out of the investigation, handling a settlement of a claim for workers' compensation benefits, regardless of how the claim is pled or the nature of the relief sought. *See id*. at 926-29.

B. Venue Selection and Mandamus Relief Available

The Texas Supreme Court has held mandamus relief is available to enforce a mandatory venue provision contained in a contract pursuant to Texas Civil Practice and Remedies Code Section 15.0642, and has addressed when an action "arises from" a major transaction for purposes of the mandatory venue provision contained in Texas Civil Practice and Remedies Code Section 15.020.

In *In re Fisher*, 433 S.W.3d 523 (Tex. 2014), Richey Oilfield, owned by Mike Richey, was sold to

Nighthawk pursuant to a stock purchase agreement, goodwill agreement and promissory note. The monetary consideration for the purchase was well over $1,000,000. Both the stock purchase agreement and the goodwill agreement contained venue provisions pursuant to which the parties agreed not to bring any action arising out of either agreement in any court other than State District Court in Tarrant County or the United States District Court for the Northern District of Texas. *See Fisher*, 433 S.W.3d at 526. Business did not go well following the acquisition, resulting in Nighthawk and Richey Oilfield both going into bankruptcy. Richey filed suit in Wise County, the county of his residence, against two limited partners of Nighthawk, alleging breach of fiduciary duty, common law and statutory fraud, violations of the Texas Securities Act, negligent misrepresentations, defamation and interference with prospective business relations. *See id*. at 526-27. Defendants filed a motion to transfer venue to Tarrant County based on the mandatory venue selection clauses of the agreements. The trial court denied the motion, the Fort Worth Court of Appeals denied defendants' petition for writ of mandamus, and defendants petitioned the Texas Supreme Court for writ of mandamus.

Richey argued Section 15.020 did not apply, because his claims did not "arise from" the purchase of his company; rather, his claims were tort claims arising from Defendants' post-acquisition conduct. The Court employed a "common-sense analysis" of the substance of the claims made in determining whether Section 15.020 applied. *See id*. at 530. It is evident from the opinion the Court ignored how the claims were labeled or pled, and focused on the source of the duty (that is, whether the source of the duty was based on contract or was one imposed by law independent of the contract) and the nature of the relief sought (that is, whether the injury was only the economic loss to the subject of the contract itself, versus a distinct tortious injury with actual damages). *See id*. at 529-31. The Court concluded, based on their common-sense analysis, the substance of Richey's claim was to recover the $6,500,000 amount owed to him pursuant to the goodwill agreement and for conduct flowing directly from the sale of his company. *See id*. at 530-21. Therefore, the trial court was directed to vacate its order denying the motion to transfer venue.

III. FORUM NON CONVENIENS

Effective June 16, 2015, Section 71.051 of the Texas Civil Practice and Remedies Code is amended to end the practice of foreign plaintiffs forum shopping their claims into Texas courts arising out of accidents occurring outside the State.

A. Forum Non Conveniens

Under the doctrine of Forum Non Conveniens, Texas courts are required to stay or dismiss claims if, based on the interest of justice and for the convenience of the parties, another forum outside the state is more appropriate. The decision to stay or dismiss is based on six factors the court must consider, contained in Subsection (b) of the statute. To ensure access to Texas courts by Texas residents, however, an exception precluding a stay or dismissal of a claim brought by a legal resident of the State existed. *See* Tex. Civ. Prac. & Rem. Code § 71.051 (amended 2015).

B. In re Ford Motor Company

In re Ford Motor Company, 442 S.W.3d 265 (Tex. 2014) involved a one car rollover in Mexico involving only Mexican citizens. *Ford Motor Co*., 442 S.W.3d at 268. Juan Tueme Mendez, the driver, was injured. His brother, Cesar, was a passenger in the vehicle and died. Juan Tueme Mendez sued the estate of Cesar, who owned the vehicle, alleging Cesar failed to maintain the vehicle and its tires. Suit was filed in Hidalgo County where Cesar's estate was being administered. The estate in turn filed a third-party claim against Ford Motor Company for survival damages. On the same day, Yuri Tueme, a Texas resident, Cesar's daughter and Administratix for Cesar's estate, and two others, filed individual claims against Ford for wrongful death. Soon thereafter Melva Uranga, a Texas resident, intervened in the suit against Ford as next friend of "J.T.," Cesar's minor daughter, also for wrongful death. J.T. was also a Texas resident. The wrongful death allegations of the estate and the intervenors' claims mirrored one another except for the damages sought (survival damages versus wrongful death damages). Months later, the Plaintiff, Juan Tueme Mendez, amended his Petition to sue Ford directly. Ford moved to dismiss the case based on forum non conveniens, contending the intervening wrongful death beneficiaries were not "plaintiffs" within the meaning of the statute and were not entitled to the Texas-resident exception, and the six factors of Subsection (b) mandated dismissal. The trial court denied the motion. The Thirteenth Court of appeals denied relief, concluding the intervening wrongful death beneficiaries were plaintiffs and thereby entitled to the Texas-resident exception; and, since at least one of the wrongful death beneficiaries was a Texas resident, the trial court did not abuse its discretion. *See Ford*, 442 S.W.3d at 269. Ford petitioned the Texas Supreme Court for writ of mandamus. The Court denied the petition, holding: (1) intervenors are distinct plaintiffs; (2) they are not third party plaintiffs; (3) the claims of the wrongful death beneficiaries were not derivative of and were separate

and distinct from the estates claims; and (4) the Texas-resident exception applied to preclude dismissal.

C. House Bill 1692

House Bill 1692 has amended Section 71.051(e) and 71.051(h) of the Texas Civil Practices and Remedies Code. Section 71.051(e) has been amended to make clear the Texas-resident exception to forum non conveniens applies only to plaintiffs who are legal residents of Texas or plaintiffs who are derivative claimants of legal residents of Texas, to provide that each Plaintiff is to be individually evaluated in the forum non conveniens analysis and without regard to any other Plaintiff's status as a Texas resident.

IV. IMMUNITY

Government immunity does not apply to a private governmental contractor. *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117, 122 (Tex. 2015). In this case, a driver was killed on a tollway when his vehicle was struck by an intoxicated driver who had entered the tollway from the wrong way. *Brown*, 461 S.W.3d at 119. The driver's estate and beneficiaries sued multiple entities, including Brown & Gay, the private engineering firm contracted to design the tollway. Brown & Gay filed a plea to the jurisdiction claiming they were an employee of the Fort Bend County Toll Road Authority, a local government unit, and were entitled to governmental immunity. *Id*. at 120. The Supreme Court declined to extend sovereign immunity to Brown & Gay. *Id*. at 124. The Court reasoned extending sovereign immunity to a private contractor does not further the rationale and purpose of sovereign immunity, that is, to guard against unforeseen expenditures associated with the cost of the government defending lawsuits and paying judgments that could disrupt government services by diverting funds allocated for other purposes. *See id*. at 123-24. The Court reasoned further that sovereign immunity does not extend to private contractors exercising independent discretion. *Id*. at 125-27. In Fort Bend County Toll Road Authority's contract with Brown & Gay, it delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, albeit subject to the Authority's approval. While an independent contractor who acts *as* the government may be entitled to sovereign immunity, here Brown & Gay was acting *for* the government; that is, the alleged cause of the injury was not action taken by the government through the contractor, but rather the independent action of the contractor. *Id*.

V. PLEADINGS

A. Amended Pleadings

In 2013, Texas Rule of Civil Procedure 47 was amended to require a more specific statement of relief sought. Tex. R. Civ. P. 47. The Rule states that a party who fails to plead both the nature and amount of damages "may not conduct discovery until the party's pleading is amended to comply." *See id*. In *Greater McAllen Star Properties, Inc*., 444 S.W.3d 743 (Tex. App.—Corpus Christi 2014, orig. proceeding), the Court clarifies the rule as it impacts discovery. At issue in *Greater McAllen* was whether a plaintiff is required to "re-propound" discovery after amending the petition to comply with Rule 47. *Greater McAllen*, 444 S.W.3d at 750-51. The Court held that an amending party need not "re-propound discovery" because the Rule does not state a party must re-issue discovery after the amendment of that party's pleadings, and requiring discovery be re-issued or re-propounded would needlessly increase the cost of litigation. The court held further, however, the Defendant's time to respond does not start to run until the amended petition, in compliance with the Rule, is filed. *Id*. at 751.

B. Affirmative Defenses

1. Waiver of Affirmative Defense/Trial by Consent

Texas courts continue to hold an unpled affirmative defense does not necessarily mean it is waived. *See RR Maloan Investments, Inc. v. New HGE, Inc*., 428 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2014, no pet.); Tex. R. Civ. P. 67.

Generally, if an affirmative defense is not pled, it is waived. *See RR Maloan*, 428 S.W.3d at 362; *Hassell Constr. Co. v. Stature Commercial Co*., 162 S.W.3d 664, 667 (Tex. App.—Houston [14th Dist.] 2005, no pet.). An unpled issue may be tried by consent, however, in the event evidence is developed and it is clear from the record that both parties understood the issue was in the case, and the other party failed to make objection or complaint. *RR Maloan Investments, Inc. v. New HGE, Inc*., 428 S.W.3d 355, 363 (Tex. App.—Houston [14th Dist.] 2014, no pet.); Tex. R. Civ. P. 67. In determining whether an issue has been tried by consent, the appellate court examines the record "not merely for evidence of the issue, but for evidence of trial of the issue." *RR Maloan*, 428 S.W.3d at 363. "A party who allows an issue to be tried by consent and who fails to raise the lack of a pleading before submission of the case cannot later raise the pleading deficiency for the first time on appeal." *Id*. (citing *Roark v. Stallworth Oil & Gas, Inc*.,

813 S.W.2d 492, 495 (Tex. 1991)).

In *RR Maloan*, Houston Gold Exchange issued a $3,500 check to Shelly McKee for the purchase of a Rolex watch. McKee endorsed the check and took it to RR Maloan, a check cashing service, who cashed the check for her. On the same day the check was cashed, Houston Gold Exchange stopped payment on the check because the alleged Rolex was counterfeit. When RR Maloan presented the check to Houston Gold's bank for payment it was refused, based on the stop payment order. RR Maloan sued Houston Gold to collect the amount of the check. *See id*. at 358. The issue on appeal was whether RR Maloan's status as a holder in due course was defeated by illegality, among other defenses. Houston Gold failed to plead the defense of illegality, and asserted the issue was tried by consent. *RR Maloan*, 428 S.W.3d at 363. Following a review of the record, the Court concluded the defense of illegality was not tried by consent. There was testimony at trial from the owner of RR Maloan, without objection, that the check on its face did not evidence the watch was counterfeit. *Id*. at 363. The owner of Houston Gold testified the watch was not authentic, and this was why Houston Gold stopped payment. *Id*. The Court held this testimony was insufficient to establish the issue of illegality was tried by consent, and did not support a finding the transaction was void on its face. *Id*. at 363-65.

2. Trial by Consent/Amendment of Pleadings

A recent 2015 decision iterates, in a non-jury trial, no amendment is necessary when an issue is tried by consent. *See Compass Bank v. Nacim*, 459 S.W.3d 95, 113 (Tex. App.—El Paso 2015). Texas Rule of Civil Procedure 67 expressly states that issues tried by consent "shall be treated in all respects as if they had been raised in the pleadings." Tex. R. Civ. P. 67. The Rule states further "in such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case for the Court or jury." Tex. R. Civ. P. 67. Additionally, Rule 67 provides that failure to amend pleadings tried by consent "shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rule 277 and 279." *See id*. Rule 277 and 279 apply to jury trials. In other words, amendment of pleadings is not necessary in a non-jury trial. In *Nacim*, the court emphasizes the portion of the rule that states failure to amend "shall not affect the result of the trial of these issues." Tex. R. Civ. P. 67. The Court noted, however, that this is not a general rule of practice. *Compass Bank v. Nacim*, 459 S.W.3d 95, 113 (Tex, App.—El Paso 2015, no pet. h.).

D. Certificate of Merit

In July 2014, the Supreme Court held, as a matter of first impression, the certificate-of-merit requirement does not apply to third-party plaintiffs or cross-claimants pursuant to Section 150.002. *See Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556, 571 (Tex. 2014); Tex. Civ. Prac. & Rem. Code § 150.002. In *Jaster*, the plaintiff homeowner sued a contractor, Comet II Construction, alleging Comet defectively designed and constructed the home's foundation. *See id*. at 559. The contractor denied liability and filed third party claims seeking contribution and indemnity against Austin Design Group, from whom the contractor purchased the foundation plans, and Gary Wayne Jaster, a licensed professional engineer who prepared the plans. *Id.* Austin Design Group in turn filed a counterclaim for contribution and indemnity against Comet, and a cross-claim for contribution and indemnity against Jaster. *Id*. Jaster filed a motion to dismiss both the third party action filed by Comet and the cross-claim filed by Austin Design Group for their respective failures to file a certificate of merit as required by Section 150.002 of the Texas Civil Practice and Remedies Code. Jaster maintained that, by virtue of filing their respective claims, both Austin Design Group and Comet were "Plaintiffs" under Section 150.002. It was undisputed Jaster was a licensed professional engineer, and the claims against him arose out of the provision of professional services. *Id*. at 560. "Plaintiff" is not defined in the statute, nor is the term "action." *Id*. at 563. Giving the words "plaintiff" and "action" their common, ordinary meaning, and considering the context in which those terms appear within Section 150.002 and the statute as a whole, the Court concluded "plaintiff" and "action" refers to a party who initiates a lawsuit, versus a third party plaintiff or a cross-plaintiff, who are merely claimants who assert an affirmative claim for relief within a lawsuit. *See id*. at 568.

VI. ELECTRONIC SERVICE AND FILING

Electronic filing became mandatory January 1, 2014 for large counties, and will be mandatory in all counties by July 1, 2016.

A. Filing and Serving Pleadings and Motions

Pursuant to Rule 21, lawyers must file documents electronically in courts where electronic filing has been mandated. Rule 21(f)(2) requires an attorney or unrepresented party who electronically files a document to include their e-mail address on the document being filed. Tex. R. Civ. P. 21(f)(2). Under Rule 21(f)(5), unless a document is required to be filed by a certain time of day,

a document is timely filed so long as it is filed by midnight the day the document is due (using the court's time zone). A document is filed by a party when it is transmitted to that party's electronic filing service provider, but there are two exceptions to this. A document transmitted on a weekend or legal holiday is deemed filed on the next day that is not a Saturday, Sunday or legal holiday. A document that requires a motion and order to allow filing is deemed filed not on the day it is transmitted, but on the day the motion is granted. Tex. R. Civ. P. 21(f)(5).

The rules now accommodate for technical failures and system outages. If a document is untimely filed because of a technical problem or system outage, the filing party *must* be given a reasonable extension of time to file. Tex. R. Civ. P. 21(f)(6) (emphasis added). As a rule of practice, in the event of a technical failure or system outage, the filing party should notify the court clerk and opposing counsel as soon as possible and prior to seeking an extension of time from the court. This will ameliorate any suspicion the failure or outage is contrived. It will also alert the court clerk to look for the filing, in the event the filed document actually goes through to the court despite the error notification.

Electronic signatures are allowed on filed documents unless the document is notarized or sworn. Tex. R. Civ. P. 21(f)(7). A document electronically served, filed or issued is also considered signed if the document includes an electronic or scanned image of a signature. Tex. R. Civ. P. 21(f)(7)(B).

Furthermore, Rule 21(f)(8) requires the document filed to be in PDF format and text-searchable. Tex. R. Civ. P. 21(f)(8). Lastly, the document cannot be locked; the court must be able to open the document and interact with it. Tex. R. Civ. P. 21(f)(8)(c).

B. Methods of Service

Rule 21a(a) now provides "a document must be served electronically . . . if the email address of the party of attorney to be served is on file with the electronic filing manager." Tex. R. Civ. P. 21a(a). Further, Rule 21a(b), has been amended to clarify when service is complete. Tex. R. Civ. P. 21a(b). The previous "mailbox rule" survives for service by mail. Tex. R. Civ. P. 21a(b)(1). It does not survive for service by fax, as noted below. Service by fax is complete on receipt, but service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Tex. R. Civ. P. 21a(b)(2). Electronic service is complete on transmission of the document to the serving party's electronic filing service provider, and the electronic filing manager will send confirmation of service to the serving party. Tex. R. Civ. P. 21a(b)(3). Additionally, under Rule 21a(c), a party can no longer add three days to a deadline to respond unless that party was served by mail. Tex. R. Civ. P. 21a(c).

C. Privacy Protection for Filed Documents

Rule 21c has been amended to protect sensitive data being transmitted through the electronic filing system. Tex. R. Civ. P. 21c. Sensitive data is defined in Rule 21c.

Sensitive data must be redacted prior to filing electronically unless the inclusion of the sensitive data is specifically required by statute, court rule or administrative regulation. Tex. R. Civ. P. 21c(b). Sensitive data is required to be removed by placing the letter "X" in place of each omitted number or character, or by removing the sensitive data in some other manner evidencing data has been redacted. Tex. R. Civ. P. 21a(c). The filing party must maintain an unredacted version of the document as long as the case remains pending, and during any appeal filed within six months of the date of the judgment. Tex. R. Civ. P. 21c(c). If an electronic filing must contain sensitive information, the clerk must be notified by the filing party. Tex. R. Civ. P. 21c(d). If the document is not filed electronically, the filing party must provide notice to the clerk by including on the document, on the upper left-hand side of the first page and in upper case, the following phrase: "NOTICE; THIS DOCUMENT CONTAINS SENSITIVE DATA." *Id*. A clerk may reject a filing that contains sensitive data in violation of this Rule. Tex. R. Civ. P. 21c(e).

VII. DISMISSAL OF BASELESS CAUSES OF ACTION

A. Notice

Texas Rule of Civil Procedure 91a.6 requires each party to have at least 14 days' notice of the hearing on the motion to dismiss. Tex. R. Civ. P. 91a.6. The trial court, however, is not required to conduct an oral hearing. *Id*. Once the motion is filed, the respondent may file a response, nonsuit the targeted cause of action, or file an amended pleading to cure the cause of action targeted by the motion. Tex. R. Civ. P. 91a.5. A response to the motion is required to be filed no later than seven days prior to the hearing. Tex. R. Civ. P. 91a.4. A nonsuit of the challenged cause of action must be filed at least three days prior to the hearing and, in that event, the court cannot rule on the motion. An amendment of the pleading to amend the challenged cause of action must also be filed at least three days before the hearing. Tex. R. Civ. P 91a.5(a). If this occurs, the movant in response may proceed with the hearing or, prior to the hearing, withdraw the motion or file an amended Rule 91a motion to dismiss challenging the amended cause of action. *Id*. An amended motion restarts the time

periods in the Rule. *Id*. A Rule 91a motion to dismiss must be ruled on within forty-five (45) days after the motion is filed. Tex. R. Civ. P. 91a(3)(a).

In *Gaskill v. VHS San Antonio Partners, Inc.*, 456 S.W.3d 234, 236 (Tex. App.—San Antonio 2014, pet. denied), a doctor and his professional association ("Gaskill") sued the owner/operator of a hospital, VHS Partners, and others for breach of contract, defamation and other personal and business torts when the hospital peer review committee reduced the doctor's privileges to the point he could no longer work at any hospital. VHS filed a Rule 91a motion to dismiss on the basis the causes of action had no basis in law. *See Gaskill v. VHS San Antonio Partners, LLC*, 456 S.W.3d 234, 236 (Tex. App.—San Antonio 2014, pet. denied). Neither VHS nor the court, however, set the motion for oral hearing or hearing by submission. *Id*. at 237. Meanwhile, Gaskill did not file a response, nonsuit or amend his pleading in response to VHS' motion. *Id*. at 237. Forty-two (42) days after the motion was filed, on December 31, 2013, VHS filed a "Motion for Expedited Hearing, Defendants' Rule 91a Notice of Deadline to Rule on Motion to Dismiss, or in the Alternative, Motion to Enlarge Time" ("Motion to Expedite/Enlarge"), explaining that the court must rule on the motion within forty-five (45) days of filing the motion, that is, by January 3, 2014. *Id*. at 237. On the afternoon of the same day the Motion to Expedite/Enlarge was filed, VHS served the Motion on Gaskill together with a fiat setting the Motion for hearing on Friday, January 3, 2014 at 8:30 a.m. *Id*. On January 2, 2014, Gaskill filed an objection to the setting, but failed to appear at the hearing on January 3, 2014. *Id*. at 237. The case was dismissed with prejudice on the Rule 91a motion to dismiss and VHS was awarded $8,320.50 in attorney's fees. *Id*. at 237.

Gaskill appealed claiming the trial court abused its discretion in expediting the hearing. *Id*. at 238. On appeal, the court rejected the notion that Rule 91a does not require notice of submission without oral hearing, reasoning that Rule 91a.6 states "[e]ach party is entitled to at least 14 days' notice of the hearing," and "the court may, but is not required to, conduct an oral hearing." *See id*. at 238. Thus, the language of the Rule itself requires fourteen (14) days' notice of the hearing, regardless of whether the hearing is oral or by submission. *Id*. The court reasoned that, in the context of a Rule 91a motion to dismiss the hearing date triggers the respondent's deadline to make a response or to file a nonsuit or amended pleading. *Id*. Otherwise, without notice of the hearing the respondent would be unaware of any approaching deadline for a response. *Id*. Further, the Court reasoned that dismissal is a harsh remedy and the notice provisions of Rule 91a should therefore be strictly construed. *Id.* at 238-39. The court held formal notice of a Rule 91a hearing must be provided to the parties, regardless of whether the hearing is oral or by submission, and reversed the trial court's decision, because Gaskill had no meaningful opportunity to respond to the Rule 91a motion. *Id*. at 239.

VIII. DISCOVERY

A. Rule 202 Depositions

Texas Rule of Civil Procedure 202 allows a person to "petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit." Tex. R. Civ. P. 202.1. Further, the petition must be filed in a "proper court." Tex. R. Civ. P. 202.2. In 2014, the Supreme Court held that the "proper court" must have personal jurisdiction over the potential defendant to issue an order permitting pre-suit discovery under Rule 202. *In re Doe*, 444 S.W.3d 603, 604 (Tex. 2014); *see* Tex. R. Civ. P. 202.1.

In *In re Doe*, 444 S.W.3d 603 (Tex. 2014), an anonymous blogger was launching an on-line attack against Reynolds & Reynolds and its chairman ("Reynolds"). *In re Doe*, 444 S.W.3d at 605. Reynolds sought to discover the identity of the anonymous blogger by filing a Rule 202 petition in Harris County, Texas attempting to depose Google, the blog provider. *Id*. Google did not oppose the petition, but the anonymous blogger did. *Id*. The blogger filed a special appearance "asserting that his only contact with Texas is that his blog can be read on the internet" in Texas. *Id*. Thus, because that is not enough to meet the minimum contacts test, the blogger argued that neither the Harris County court nor any other court in Texas was a "proper court" under Rule 202. *Id*; *see* Tex. R. Civ. P. 202.2.

No court before *In re Doe* has had the opportunity to interpret what "proper court" means. *See In re Doe*, 444 S.W.3d at 607. The court noted a proper court, historically, has been one with venue over the anticipated action and, if no action was anticipated, the court where the witness resides. *See Doe*, 444 at 607-08. The court noted further a proper court by implication has had to have subject matter jurisdiction. *Id.* Rule 202 specifically states the petition must be filed in a county with proper venue over the action, if suit is anticipated, or where the witness resides, if no suit is yet anticipated. *Id*. at 608; Tex. R. Civ. P. 202.2(b). As with Rule 202's predecessor statutes, the court reasoned further it is implicit the court must have subject matter jurisdiction, although Rule 202 is silent

on the requirement of subject matter jurisdiction.[1] At issue in *Doe*, then, was whether a proper court must also have personal jurisdiction over the potential defendant. *Id*. at 608.

The Supreme Court held a proper court must have personal jurisdiction over the potential defendant. The Court gave two primary reasons for its holding: first, "to allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford" (that is, the protection afforded by Texas Rule of Civil Procedure 120a); and second, "to order discovery without personal jurisdiction over a potential defendant unreasonably expands the rule." *Id*. at 609-10. With regard to the first reason, the Court noted the burden on the potential defendant could be significant if the protection of Rule 120a was eviscerated. *See id*. at 609. The Court noted further a potential defendant not amenable to jurisdiction in Texas otherwise would be forced to choose between defending discovery in a forum where the anticipated suit cannot be prosecuted or ignoring the Rule 202 and risking the discovery obtained will be used later against the anticipated defendant in a proper forum. *See id*. With regard to the second reason for their holding, the Court noted Rule 202 is already "the broadest pre-suit discovery authority in the country," and if personal jurisdiction over the anticipated defendant was not required "the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject matter jurisdiction." *See id*. at 610.

IX. SUMMARY JUDGEMENT

A. Affidavits

A case decided in Houston this year provides a good example of how not to draft an Affidavit.

Rule 166(f) sets out the requirements for an affidavit. Tex. R. Civ. P. 166(f). "An affiant's belief about the facts is legally insufficient evidence." *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Similarly, affidavits that are conclusory cannot raise a fact issue, as "[t]hey are not credible, nor susceptible to being readily controverted." *Ryland Group*, 924 S.W.2d at 122; *see Brownlee*, 665 S.W.2d at 112. "A conclusory statement is one that does not provide the underlying facts to support the conclusion." *Rizkallah v. Lonner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ). In *Contractors Source Inc. v. Amegy Bank National Association*, 462 S.W.3d 128 (Tex. App.—Houston [1st Dist.] 2015, no pet.), Contractor Source had a bank account with Amegy Bank. Over a period of years its in-house bookkeeper misappropriated money in the bank account, in large part to pay her personal creditors. Over time, the bookkeeper misappropriated at least $844,358.80. This ultimately included the bookkeeper's forgery of two checks on which she forged the name of Contractor Source's co-owner, which were then presented to Amegy and which Amegy paid. *See Amegy*, 462 S.W.3d at 131-32. When Amegy did not reimburse Contractor Source for most of the funds that had been misappropriated, Contractor Source sued Amegy for breach of contract, breach of warranty and negligence. *Id*. at 132. Amegy filed a no-evidence and traditional motion for summary judgment as to all claims, which was granted. *Id*.

One of the issues on appeal was whether Amegy exercised ordinary care in paying one of the forged checks. *Id*. at 136. Contractor's Source contended it raised an issue of fact as to whether Amegy exercised due care, relying on the affidavits of two experts on banking practices. *Id*. In each affidavit each expert expressed an opinion as to what constituted ordinary care in the banking industry, and opined that Amegy did not act with ordinary care. *Id*. The affidavits, however, were verbatim duplicates of one another, except for the experts' names and work histories. *Id*. The affidavits even contained the same identical grammatical errors. *Id*. To make matters worse, the affidavits lacked any factual basis evidencing that Amegy failed to follow best industry practices. This, according to the court, demonstrated an absence of any personal knowledge about the facts of the case, and merely reflected the experts' personal beliefs about the facts in conclusory fashion. *Id*. at 136-37. Accordingly, the affidavits constituted no evidence to raise an issue of fact to defeat Amegy's motion. *Id*.

X. INJUNCTIONS AND VOID ORDERS

A recent case from the Texarkana Court of Appeals reinforced the express language of Texas Rule of Civil Procedure 683: an order granting a temporary injunction that does not meet the procedural requirements of Rule 683, including the requirement the order set the case for trial on the merits, is void. *See* Tex. R. Civ P. 683.

Texas Rule of Civil Procedure 683 requires an order setting the case for trial when a temporary injunction is issued. Tex. R. Civ. P. 683. If an order setting a case for trial is not issued, the temporary

[1] "The rule cannot be used, for example, to investigate a potential federal antitrust suit or patent suit, which can only be brought in federal court." *Id*. at 608.

injunction is void. In *Conway v. Shelby*, 432 S.W.3d 377, 380-81 (Tex. App.—Texarkana 2014, no pet), the beneficiary of a trust who jointly owned a farm/ranch in Bowie County sued the trustee of the trust for conversion of property. *See Conway*, 432 S.W. 3d at 379. In connection with the suit the beneficiary obtained a temporary injunction prohibiting the trustee from (1) interfering with the beneficiaries possession and use of the property; (2) removing personal property from the real property; (3) destroying or concealing records regarding management of the property; and (4) setting foot on the property except on at least two days' notice to the beneficiary. The temporary injunction did not order a trial setting on the merits. *See id*. at 380.

The trustee took an interlocutory appeal from the order granting the temporary injunction, contending the order failed to meet the specificity requirements of Rule 683 and should be dissolved, and contending further the beneficiary failed to meet her burden of proof for such extraordinary relief. *Id*. The trustee did *not* contend on appeal the injunctive order was void for lack of a trial setting. *Id*. at 380.

The Texarkana Court of Appeals did not address either of the trustee's appellate points, and did not have to. The court first noted that Rule 683 required that "[e]very order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought" (citing the rule and *Qwest Communications Corp. v. AT&T Corp*., 24 S.W.3d 334, 337 (Tex. 2000). The court explained that the requirement of an order setting the case for trial on the merits prevents the temporary injunction from becoming permanent. *See id*. The court stated further "the procedural requirements of Rule 683 are mandatory and must be followed" (citing *Qwest*, 24 S.W.3d at 337 and *InterFirst Bank San Felipe, NA v. Paz Constr. Co*., 715 S.W.2d 640, 641 (Tex. 1986). "An order granting a temporary injunction that does not comply with the Rule is subject to being declared void and dissolved, regardless of whether the defect was raised or briefed on appeal." *Id*. at 380. The court held that because the order granting temporary injunction did not set the case for trial as required by the Rule, thereby failing to comply with Rule 683, it was void. The court reversed and dissolved the injunction order. *See id*. at 381.

XI. SETTLEMENT

A. Withdrawal, Acceptance, and Rejection of Offer

Rule 167.3 of the Texas Rules of Civil Procedure states the procedural requirements for fee shifting associated with the offer and acceptance of settlement.

In *Amedisys v. Kingwood Home Health*, 437 S.W.3d 507 (Tex. 2014), two employees of Amedisys left for employment at Kingwood Home Health Care, an Amedisys competitor, and began soliciting business from Amedisys' clients. *See Amedisys*, 437 S.W.3d at 509. Amedisys brought suit against Kingwood, alleging tortious interference with Amedisys' non-solicitation agreements with its employees. *Amedisys*, 437 S.W.3d at 509. During subsequent settlement negotiations, Amedisys reportedly stated it would not accept less than a "six-figure" offer. *Id*. Kingwood subsequently invoked Rule 167[2], based on the belief the amount was significantly more than Amedisys would ever be able to recover at trial, to take advantage of Rule 167's fee shifting provisions. *Id*. Kingwood made a written offer pursuant to Rule 167 "to pay Amedisys $90,000 within fifteen days after Amedisys' acceptance of the offer." *Id*. Kingwood gave Amedisys fourteen (14) days to accept the offer, or it would be deemed rejected, in accordance with the Rule. *Id*.

Amedisys received the settlement offer, and five days later filed its designation of expert witnesses. *Id*. Kingwood filed its designation of experts after an additional five days. *Id*. Kingwood also filed a motion to strike Amedisys' experts, contending Amedisys, as the party seeking affirmative relief, was required to designate its experts thirty days earlier. *Id*. To Kingwood's surprise, four days after that, and within the deadline imposed by Kingwood for acceptance of the settlement offer, Amedisys faxed and e-mailed a letter to Kingwood accepting the settlement agreement.[3] *Id.*

Over the course of the following two weeks, Amedisys' attorney attempted to correspond with Kingwood's counsel regarding the terms of the settlement. *Amedisys*, 437 S.W.3d at 510. Kingwood eventually responded it would send "a letter shortly explaining [Kingwood's] position on why the consideration fails for the offer that was previously extended to [Amedisys]."[4] *Id*. No such letter was received by Amedisys, and Amedisys threatened to file an emergency motion to enforce the settlement offer. *Id*.

A few days later, Kingwood appeared at the previously scheduled hearing on its motion to strike Amedisys' experts. *Id*. Amedisys did not file a response to Kingwood's motion to strike, nor did Amedisys attend the hearing, based on the belief that the settlement mooted the motion. *Id*. The Court granted Kingwood's motion to strike. *Id*. After learning of the hearing, Amedisys filed an emergency motion to enforce the settlement agreement. *Id*. Amedisys also filed a motion to reconsider the order striking expert designations and for a stay of the case until the settlement issue

was resolved. *Id*. Kingwood argued in response the agreement was unenforceable because it lacked consideration and was fraudulently induced. *Id*. Later, Kingwood filed a "Notice of Withdraw[al] of Consent to Alleged Settlement Agreement." *Id*. Amedisys filed its "Notice of Rule 11 Agreement" on the same day. *Id*. Additionally, Amedisys amended its pleadings to include a claim for breach of the contractual settlement agreement and moved for summary judgment on that claim. *Id*. The Court granted Amedisys' motion, and Kingwood appealed. *Id*. The court of appeals, with one justice dissenting, reversed the summary judgment, apparently persuaded by Kingwood's argument that no agreement was made because the acceptance did not mirror the terms of the offer and therefore constituted a rejection of Kingwood's offer. According to Kingwood, the offer it made was to settle all claims asserted *or which could have been asserted*, while the letter from counsel for Amedisys only offered to settle monetary *claims asserted*, thereby failing to include as part of the settlement claims not asserted. *Id*. at 511.

On appeal to the Texas Supreme Court, Amedisys argued that the common law rule, requiring the acceptance mirror the material terms of the offer for acceptance to be effective, was not applicable, because Rule 167 and Chapter 42 governed the validity of the settlement agreement, to which the common law rule was inapplicable. *See id*. at 512. The Supreme Court disagreed, stating that common law contract principles applied in this case, requiring Amedisys to prove a valid acceptance under contract law to prevail on its breach of contract claim.[5] *Id*. at 512. The Court explained that Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code provide a method by which parties can make a settlement offer to shift litigation costs. *Id*. at 513. This applies only to "an offer made substantially in accordance with" these rules, and a "settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party." *Id*; *see* Tex. R. Civ. P. 167.7. Therefore, by way of example, if the issue was whether Kingwood could recover Plaintiff's litigation costs, Rule 167 and Chapter 42 would apply. *Id*. Here, however, the issue was whether Amedisys submitted sufficient summary judgment evidence to prove a valid contract and breach, so common law contract governed. *Id*. According to the Court, ". . . Chapter 42 and Rule 167 govern the requirements for awarding litigation costs, not the requirements for breach of contract claims." *Id*.

The Court then analyzed whether, under common law contract principles, Amedisys accepted Kingwood's offer. *Id*. at 514. The Court stated: "Under the common law, an acceptance may not change or quantify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance." *Id.* The Court recognized the importance of the materiality of the alleged contract term, but noted an "immaterial variation" between the offer and acceptance does not prevent the formation of an enforceable agreement. *See id*. A change in the terms between an offer and acceptance that does not change the legal affect is not material. *Id*. Furthermore, "the materiality of a contract term is determined on a contract-by-contract basis, in light of the circumstances of the contract." *Id*. The Supreme Court held the variation in language between Kingwood's offer and Amedisys' acceptance was not material and, therefore, Amedisys accepted Kingwood's offer of settlement. *Id*.

XII. CONCLUSION

If you were present in New York at the presentation of this paper, this brings to mind the relationship between Bubbles the elephant and Bella the black lab.[6] Bubbles the elephant is large and, at least as a species, old and perhaps antiquated. There is a large body of law related to the Rules, and the Rules have been around a long time, too. Bubbles is endangered. So is the civil justice system here in Texas, and jury trials in particular.

In a sense, the Rules are Bubbles the elephant, and we are Bella the black lab. Let's spring into action and guard and protect our old friend! Let's use the Rules and the body of law behind them as a great friend and a spring board! Let's jump! Have fun! Be creative! And maybe do a few tricks.

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[2] Rule 167 "authorizes a party to recover certain litigation costs if the party made, and the party's opponent rejected, a settlement offer that was significantly more favorable than the judgment obtained at trial." *Amedysis*, 437 S.W.3d at 509 (citing Tex. R. Civ. P. 167.2(a) and Tex. R. Civ. P.167.4(a)).

[3] According to the Court, "as it turns out, Kingwood did not want Amedisys to accept the offer and made it only because Amedisys said it would not accept an offer under six figures. Instead, Kingwood made the offer merely to trigger a right to recover its litigation costs under Rule 167." *Amedisys*, 437 S.W.3d at 509.

[4] According to the Court, "as it turns out, Kingwood did not want Amedisys to accept the offer and made it only because Amedisys said it would not accept an offer under six figures. Instead, Kingwood made the offer merely to trigger a right to recover its litigation costs under Rule 167." *Amedisys*, 437 S.W.3d at 509.

[5] The Court ruled Chapter 42 of the Texas Civil Practice and Remedies Code and Rule 167 of the Texas Rules of Civil Procedure do not govern here. *Amedysis*, 437 S.W.3d at 512.

[6] https://www.youtube.com/watch?v=RR0BlQzbOUk

Amicus Committee News

There have been several significant amicus submissions.

George Muckleroy (Sheats & Muckleroy) and Roger Hughes (Adams & Graham) filed an amicus letter brief supporting Respondent Perez's motion for rehearing in *Fredericksburg Care Co., Ltd. v. Perez*, 461 S.W.3d 513 (Tex. 2015, cert. filed). The Supreme Court denied the motion. Perez has filed a petition for certiorari to the U.S. Supreme Court; TADC will join TEX-ABOTA's amicus brief to support the petition. 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) filed an amicus brief to support the petition for mandamus in *In re Helle*, No. 14-0772. Helle denied 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. The Supreme Court denied the petition.

Diana Faust (Cooper & Scully) filed an amicus brief to support the petition for rehearing in *Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co.*, 795 F.3d 496 (5th Cir. 2015). TADC joined St. Paul in requesting the Fifth Circuit certify the issues to the Texas Supreme Court; the Fifth Circuit denied the motion. This is an important case concerning the Texas Prompt Payment Action, Texas Ins. Code chap. 542. The Fifth Circuit held (1) the 18% penalty interest accrues from the first violation of any deadline under the statute, and (2) the interest accrues on the entire amount ultimately owed from the date of the earliest violation. In doing so, the Fifth Circuit distinguished *Lamar Homes v. Mid-Continent Cas.*, 242 SW3d 1 (Tex. 2007).

Brent Cooper (Cooper & Scully) filed 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. op.). 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.

Lawrence Doss (Mullin Hoard & Brown) filed an amicus brief in support of the petition for review in *4Front Engineered Solutions, Inc. v. Rosales*, No. 13-13-655-CV, 2015 Tex. App. LEXIS 2332 (Tex. App.—Corus Christi Mar. 12, 2015, pet. filed). This is a personal injury suit against premises owner 4Front by the employee of an independent contractor hired to fix the sign over 4Front's front door. The contractor borrowed 4Front's forklift to hold his employee aloft in cage. The contractor accidently drove the forklift off the sidewalk, causing injury to his employee in the raised cage. Two novel issues: (1) whether Texas will recognize a duty of negligent entrustment when 4Front loaned the contractor a forklift to do its work, and (2) whether TCPRC Chap. 95 applies to claims the premises owner negligently entrusted equipment to the contractor?

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TADC Amicus Curiae Committee

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A Message from the State Bar President

By Allan K. DuBois
Law Office of Allan K. DuBois, San Antonio

We have accomplished so much in what seems like a whirlwind six-month period. As the holiday season approaches, I am amazed that the first half of my term is coming to a close.

I am very thankful and fortunate to be able to serve the members of the State Bar of Texas. It is inspiring to travel the state and see so many old friends taking the opportunity to shine a spotlight on the Texas Lawyers' Assistance Program and the Sheeran-Crowley Memorial Trust. My primary presidential initiative is to support and promote these two outstanding resources.

TLAP provides confidential help for lawyers, law students, and judges who suffer from substance abuse, depression, and related mental health diseases. The Sheeran-Crowley Trust offers financial assistance to Texas attorneys who need, but cannot afford, treatment.

We have created an inspirational video ("Courage, Hope, Help - TLAP is There") explaining the benefits of TLAP with the goal that attorneys struggling with substance abuse or mental health issues will realize there is hope and help. You can view it at ***texasbar.com/tlap.***

This is a very personal mission to me, speaking publicly about my own successful battle against the disease of alcoholism, and joy of my 24-plus years in recovery. That recovery support included the benefit of strong peer-assistance offered by other Texas lawyers in Lawyers Concerned for Lawyers.

With your help we have raised more than $350,000 for the Sheeran-Crowley Trust to ensure that treatment is available for those who need it. You can make a difference by contributing to this fund at: ***texasbar.com/sheeran-crowley-trust/donate***

Recently, it was a unique honor to join hundreds of new and practicing lawyers in Austin on "swearing in" day to recite the new lawyers oath, which – thanks to support from the Texas Association of Defense Counsel, and all of the state's major legal trial and ethics-related constituencies – contains a new civility and integrity clause.

This addition to the oath, passed by the 84th Texas Legislature, is yet another step in the tradition of promoting integrity in the legal profession. Our State Bar leadership invited all existing lawyers to join us in reciting this pledge alongside those who had just passed the bar. It was an historic moment, and many TADC members were present, led by David Chamberlain, chair of the State Bar of Texas Board of Directors.

I am excited about the next six months; continuing to promote the State Bar of Texas's efforts to serve its members, and the people of Texas through pro bono service. Please join me in encouraging struggling lawyers to seek help and ensuring they have the financial means to do so, and in my upcoming efforts to re-engage our "senior" attorneys. By always setting an example of integrity in our profession and promoting access to justice of all, we are fulfilling the TADC tradition!

Allan K. DuBois is president of the State Bar of Texas and the owner of the Law Office of Allan K. DuBois in San Antonio, where he handles civil litigation and appeals, mediation, and arbitration.

TADC Legislative Up-Date

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

2016 Legislative Elections Heating Up

Although 2016 is an off year for the major statewide offices, a number of key legislative races are already in full swing. The candidate filing period for the March 4, 2016 party primary elections opens on November 14 and ends on December 14. Early voting runs from February 16 to February 26.

Historically speaking, Texas voter turnout is abysmally low, even in presidential election years. In 2012, about 8 million Texans voted in the general election, or about 40% of the state's registered voters. In the 2012 Democratic primary, for example, fewer than 600,000 voters bothered to show up. This year's primary battle between Hillary Clinton and Bernie Sanders should generate turnout well above that level, but it will take some doing to bring back to the polls the 2.9 million voters who gave Clinton her victory over President Obama in the 2008 Texas primary.

Turnout generally runs higher in the GOP primary, 1.4 million in 2008 and slightly higher in 2012. With the large number of GOP candidates on the ballot, including Sen. Ted Cruz, we can expect the Republican numbers to be higher than those levels. Any way you cut it, however, Texas remains a solidly red state on the national scene. The difference this year is that the Super Tuesday primary is likely to have a substantial influence on the outcome of the GOP nomination, so Republican voters should be highly motivated.

The effect of increased turnout in both parties will affect races down the ballot. As of the date of this article, the 2016 ballot will include 14 open House seats and 2 open Senate seats. Of the open House seats, Republicans hold 10 and Democrats 4. The GOP currently holds both of the open Senate seats, District 1 (retiring incumbent Kevin Eltife, Tyler) and District 24 (retiring incumbent Troy Fraser, Horseshoe Bay). In addition to the open seats, about 35 House incumbents and at least one Senate incumbent (Sen. Jose Menendez, San Antonio) have, or are rumored to have, opponents.

Although the elections will have little impact on the overall current partisan balance in the House and Senate, they could make a big difference to the ruling philosophy, especially in the House. The movement from the right to oust Speaker Joe Straus continues apace. The Speaker himself has two primary opponents, and some of his key lieutenants, including Rep. Byron Cook (Corsicana), Charlie Geren (Fort Worth), John Frullo (Lubbock), Doug Miller (New Braunfels), Paul Workman (Austin), J.D. Sheffield (Gatesville), Kenneth Sheets (Dallas), and John Cyrier (Lockhart) will or may, face challengers. On the other hand, more traditional conservatives are challenging prominent "Tea Party" legislators, including Jonathan Stickland (Bedford), Matt Rinaldi (Irving), Molly White (Belton), and Stuart Spitzer (Kaufman). Other Tea Party House incumbents have decided to move on, including past Speaker candidates Scott Turner (Rockwall) and David Simpson (Longview), as well as Bryan Hughes (Mineola). But on the flip side, Speaker Straus has lost some longtime House stalwarts to retirement, including House Appropriations Chair John Otto (Dayton), Public Health Committee Chair Myra Crownover (Denton), Public Education Committee Chair Jimmie Don Aycock (Lampasas), and Energy Resources Chair Jim Keffer (Eastland). Most of these open seats have drawn multiple candidates from different points on the GOP spectrum, so the outcomes in these races could nudge the House a little further to the right.

The two open Senate seats likewise involve crowded GOP primary fields with a spectrum of candidates.

In District 1, the current lineup includes Rep. Bryan Hughes, Rep. David Simpson, and General Red Brown of Tyler. Hughes has the endorsement of Lt. Governor Patrick. In District 24, the candidates include Dr. Dawn Buckingham (Lakeway), Jon Cobb (Bee Cave), Reed Williams (San Antonio), Gary Mayes (Fredericksburg), CJ Grisham (Temple), and Rep. Susan King (Abilene). We can expect runoffs in both races, but we have no idea yet who will be in them. On the Democratic side, Rep. Trey Martinez Fischer (San Antonio) is widely rumored to be running against incumbent Jose Menendez, who defeated Martinez Fischer earlier this year in a special election to replace former Sen. Leticia Van de Putte. As is the case in the House, these races won't have any affect on the partisan balance.

SCOT and Courts of Appeals Primaries

Unlike the 2014 primary election, in which challengers went after three sitting justices of the Texas Supreme Court, only a single justice—Debra Lehrmann—has drawn primary opposition so far. Justice Lehrmann will face Houston First Court of Appeals Justice Michael Massengale in March. While Justice Lehrmann has garnered most of the endorsements, including those of most of the former SCOT justices, Justice Massengale has gotten a pair of big ones from Texans for Lawsuit Reform and TEXPAC, the political arm of the Texas Medical Association. Both candidates are running active campaigns, so this race should be competitive. Justices Paul Green and Eva Guzman do not have opponents, and we have heard of none contemplating the primary race.

In the Houston Fourteenth Court of Appeals, incumbent Justice Sharon McCally has drawn a primary challenge from Kevin Jewell. Rumors abound, however, that Justice McCally will not run for re-election, so this seat may not involve a contested primary after all.

Senate Interim Charges

Lt. Governor Dan Patrick has released his interim charges for 2015-16. Of particular interest to TADC, the Senate State Affairs Committee is charged with examining "the need to adjust Texas judicial salaries to attract, maintain, and support a qualified judiciary capable of meeting the current and future needs of Texas and its citizens." The committee will also investigate the effect of eliminating straight-party voting for judicial candidates. Senate Business & Commerce will look broadly at occupational licensing in Texas "to determine the extent to which continued state regulation and licensure is required to protect public health and safety." The committee will also "monitor the number of lawsuits" related to hailstorm and other weather-related events, "examine negative consumer trends that may result in market disruption such as higher premiums and deductibles, less coverage, non-renewals, and inability to secure coverage due to insurance carrier withdrawal from the state." In a related charge, B&C will review the prompt pay statutes to determine if the penalty provisions should be modified, specifically with respect to whether unregulated billed charges are the appropriate basis for determining penalty amounts.

House Interim Charges

Speaker Joe Straus issued his interim charges on November 4. At least three committees—House Insurance, House Judiciary & Civil Jurisprudence, and House Business & Industry—will study issues of interest to TADC. The Speaker has asked House Insurance to examine the litigation and other costs associated with hailstorm and other weather-related claims. The committee will further consider the impact of these claims on both the property & casualty market and policyholders. House Judiciary has three relevant charges: (1) the implementation of the expedited trial provisions of HB 274 (2011) and whether they have been effective; (2) issues related to jury service, including participation rates, the accuracy of jury wheel data, and methods to improve participation; and (3) the rights, duties, remedies, and procedures available to consumers under the so-called Texas "Lemon Law." House Business & Industry *did not* receive a charge relating to last session's Chancery Court proposal, but the committee will look at recent Texas cases involving the rights and remedies of shareholders of corporate entities.

Something New!

Welcome to the newest installment in the TADC Magazine. Each issue will now feature an interview with a Past President. We hope to give you some insight into these outstanding individuals and provide an opportunity for them to share their thoughts and insights with you. We hope you enjoy this series. A special thanks to Hayes Fuller, who agreed to be the first guinea pig in our project.

A Past President's Perspective

L. Hayes Fuller, III, Naman, Howell, Smith & Lee, PLLC, Waco, TADC President – 2005-2006

Hayes Fuller was born in Corsicana, Texas. As an Army Brat, he grew up all over, moving 14 times in 21 years. He went to grade school in Texas and Oklahoma, junior high in Kansas, high school in Germany and college in England. Hayes has lived in Waco since graduating from Baylor Law School in 1979. He is married to Rosanne Fadal Fuller and they have two children, both married, Eric Alexander and Lillian Ann "Annie" Kicia. Hayes is the President (Managing Partner) of Naman, Howell, Smith & Lee, PLLC, a full service mid-size firm with offices in Austin, Fort Worth, San Antonio and Waco. He is Board Certified in Personal Injury and Civil Trial Law and a Certified Third Party Neutral for the Western District of Texas. Hayes served as President of TADC in 2005-2006.

Q. What made you want to become a lawyer?

A. When I was going through junior high, high school, and college, it was the lawyers who seemed to be the catalysts of positive change in the country. Whether it was civil rights or Watergate, I don't remember, but I wanted to be part of it.

Q. What has been the most rewarding thing about being a lawyer?

A. It seems that most of our time is spent making a living--every once in while you get to make a difference. That's the most rewarding thing about being a lawyer--making a difference in your client's lives.

Q. What is your favorite book and what are you reading now?

A. This is a tough question. I read all the time so picking a favorite book is close to an impossible task. Including the Bible, those I've read more than once are *Moby Dick*, *Don Quixote*, and *The Brothers Karamazov*. Currently, I'm reading a book about D-Day by Anthony Beevor, *The Complete Sherlock Holmes* (a must read for anyone who has not read these stories already), and a really scary book titled *The Failing Law Firm* published by the ABA.

Q. What is the best vacation you ever took or your favorite vacation destination?

A. Our favorite vacation destinations are Charleston, New Orleans and London, but our favorite vacation would have to be the week we spent in Provence last year with "Friends in France"--our host rented a villa

and served as chef, sommelier, tour guide, and translator.

Q. If you had not become a lawyer, what would you have done?

A. Probably a foreign service officer or a college professor.

Q. What is your most memorable trial or appeal? And why?

A. Oddly enough, my most memorable trial was a capital murder case involving David Wayne Spence who was accused of committing "the Lake Waco Murders" in the mid-80's, which is the subject of Carlton Stower's book *"Careless Whispers"*. It was memorable because never before had I worked so hard to achieve so little. Taught me that even when you do your best sometimes your best is not good enough but that when you do your best, your client will know it and appreciate it even if the outcome is the worst of all possible outcomes.

Q. How long have you been a member of TADC?

A. I've been a TADC member since 1981.

Q. Why did you join TADC?

A. Because the legendary Bob Sheehy told me to and back then senior partners actually cared about the professional development of their baby lawyers. Bottom line -- I think Bob thought I would benefit greatly from attending Martha Miller's finishing school for young lawyers. As usual, he was right.

Q. How has TADC been relevant to your career/what impact has TADC had on your career?

A. TADC introduced me not just to the finest defense lawyers but to the finest lawyers with the finest law firms in the State of Texas. Period. And as they had mentored others they also mentored me. Talk about impact!

Q. What do you consider the greatest accomplishment or what are you most proud of during your year as President of TADC (whether personally or as an organization)?

A. Gosh, after 10 years I'm not sure I can remember what all we were able to accomplish during my year as President. It was a non-legislative year. However, we did have to deal with tax reform. I also was very proud to honor Tom Riney and Joe Crawford with Founders Awards. Above all, we survived Martha Miller's retirement and had the good sense to hire Bobby Walden as her replacement.

Q. What are the biggest changes you have seen in the practice of law and/or profession over the years (whether good or bad)?

A. I could talk about this for hours but I suppose the biggest changes I have seen in the practice of law are those brought about by the last decade of tort reform and the "Great Recession" of 2007, including limitations of liability, damage caps, growth of in house legal departments, increase in lateral hire "free agency", greater emphasis on process improvement and project management, mandatory arbitration, and disruption caused by technology and non-lawyer provision of legal services. Most of these changes have been "good" for business, but "bad" for the profession. How the civil justice system and the right to trial by jury ultimately will be impacted remains to be seen.

Q. What changes have you seen in TADC over the years?

A. TADC has done a great job of maintaining its relevance to members of the defense bar over the years. Probably the greatest change I've observed is the transition from an

organization of primarily insurance defense personal injury lawyers to the organization identified by its current mission statement

Q. What role do you see TADC playing for lawyers in the future?

A. TADC has and will continue to be the "voice of the defense bar" in Texas through legislative advocacy, cutting edge CLE, insightful publications, and outreach to like-minded professionals.

Q. If you could give three tips/pieces of advice to new lawyers just starting out, what would they be?

A. 1. Challenge yourself -- don't be afraid to go up against the best of the best -- they make the best teachers and will make you a better lawyer. 2. Embrace change because change is most assuredly going to embrace you -- always focus on ways to improve and get better. 3. Never fail to advocate on behalf of the civil justice system and the right to trial by jury -- without this guarantee you will find it difficult if not impossible, to protect your client's rights.

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2012-2013	**DAN K. WORTHINGTON, McAllen**
2013-2014	**V. ELIZABETH LEDBETTER, Austin**
2014-2015	**MICHELE Y. SMITH, Beaumont**

(*Deceased)

TADC PAC Report

By: **Michael Hendryx**, **Trustee Chairman**
Strong Pipkin Bissell & Ledyard, L.L.P., Houston

WHAT DOES THE TADC PAC DO? WHY SHOULD I SUPPORT IT?

No doubt in this election season you and your law firm receive requests for support every day from local, state, and national candidates. We support individuals for many reasons. Some are friends. Some are seeking judicial office and we approve of their skills and demeanor. Others run for political office and we approve of their past record and/or philosophy. So why should you make one more contribution to the TADC PAC?

The stated purpose of the TADC PAC is to promote the quality and effectiveness of the legal defense of litigated matters and to raise funds for this purpose. We have a Board of Trustees and their job is to identify those seeking election or re-election to political offices, without regard to political affiliation, which are deserving of such support and to make campaign contributions in support of or in opposition to various acts, bills, and measures that affect our civil justice system.

Because the TADC approaches this task with a vision of preserving and protecting the civil justice system, including the right of trial by jury, we have found ourselves in a unique place among organizations that look at these issues. Because we are not a trade organization, we have gained credibility among those in the legislature who want to maintain a fair and balanced system. Because the TADC isn't seen as pushing some agenda, we have developed good relationships on each side of the aisle and are consulted while legislation is still being drafted. Our input is routinely sought to provide alternatives or changes to bills pushed by those whose agendas are to restrict or change our civil justice system to their benefit.

So why should you contribute now….when the Legislature is not in session?

First, the PAC cannot make contributions once the Legislature goes into session. We will need to make contributions for the next election cycle next spring and fall. Second, the non-legislative years are times when plans are made and bills are drafted. Third, with the large turnover in the Legislature, we need to continue to support old friends and contribute to those new men and women who value the civil justice system as we do. Finally, the PAC also supports judicial candidates who respect our civil justice system and the lawyers who appear before them.

So what kinds of legislation has the TADC addressed on your behalf in the past? Here are a few examples:

- An effort to create a new and separate chancery court system, to hear all business cases;
- Establish a "voluntary compensation fund" procedure that would abate trials, block access to the courts for other defendants, and regulate attorneys' fees;
- Impose a mandatory expedited trial process that would deprive many defendants of a fair and full defense;
- Adopt a loser pays system for tort cases;
- Eliminate statutory remedies for businesses under property and casualty policies;
- Mandate binding arbitration for insurance disputes;
- Allow service of process by social media;

- Create a state agency to resolve construction defect disputes;
- Prohibit net worth evidence in exemplary damage claims;
- Allow people who did not go to an accredited law school to take the bar exam; and
- Establish specialty courts to hear "complex cases" without regard to venue rules.

Your contribution to TADC PAC has helped us defeat or substantially modify these and other proposals.

Looking to the next session, we expect that there will be another effort to establish a separate chancery court system. It did not pass this last session, but its proponents have given notice of their intent to continue pursuing this separate court system. The bill put forward this last session called for a seven member, appointed chancery court, located in Travis County. It would have had civil jurisdiction concurrent with the district courts for virtually all contract and business-related actions involving entities organized under the Business Organizations Code. Appeals from the chancery court would be to a separate chancery court of appeals, consisting of seven active court of appeals justices appointed by the Governor.

So as you consider this request for a contribution, keep in mind that:

- The TADC is the ONLY voice speaking for the defense bar;
- The TADC has credibility and good relation ships on BOTH sides of the aisle;
- The TADC is the ONLY significant independent voice in current legislative politics that advocates for the independence of the legal profession, and
- Your contribution makes it possible for TADC, as a representative institution, to help elect qualified candidates dedicated to a fair and balanced trial.

Now that you have decided to contribute to the PAC and are asking yourself how much, please know that any contribution is appreciated. Our request for many years has been for an amount equal to one billable hour. I would also note that this past Legislature, with TADC's support, eliminated the annual $200 Occupation Tax. I urge you to direct that amount to the TADC PAC and if possible add one billable hour.

Our civil justice system and the right to trial by jury are under attack from a number of groups. Please consider this contribution as a key investment in your profession and future.

The Texas Association of Defense Counsel Political Action Committee

Serves to help elect and retain in office qualified candidates of both political parties, for the Texas Legislature and Texas Supreme Court.

YOUR SUPPORT OF THE TADC PAC IS NECESSARY TO GUARANTEE BROAD-BASED BI-PARTISAN REPRESENTATION

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or online at www.tadc.org
Visit the TADC website to see our gift to you for your contribution.

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**

As a thank-you for your support, contributions of $250 or more will receive a a high quality fleece reactor vest with the TADC Brand. Contributions of $150 or more will receive a heavy canvas tote, for $300 or more you will receive both!

I BACK THE TADC PAC

Enclosed is my TADC PAC Contribution in the amount of:

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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

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2015 Summer Seminar

SNAKE RIVER LODGE & SPA ~ JULY 8-12, 2015 ~ JACKSON HOLE, WY

The TADC held its 2015 Summer Seminar in fabulous Jackson Hole, Wyoming! The Snake River Lodge & Spa provided the perfect venue for this family friendly CLE. Program Chairs Christy Amuny and Pam Madere assembled a top-notch program including renowned writer Mark Curriden speaking on "Contempt of Court" as well as topics ranging from Oil and Gas Litigation in Texas to a complete Legislative wrap-up.

Michele Smith and Mark Curriden

Monica, Greg, Henry and Emily Wilkins

Michael, Bella, Dominic, Alexandra and Catarina Golemi

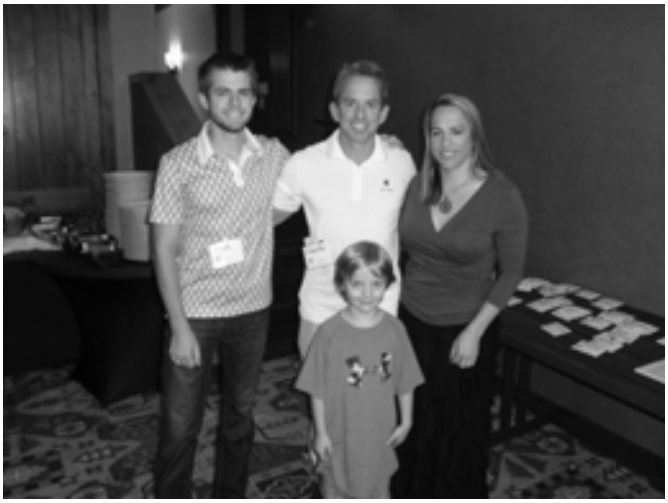
Debbie Reese, Jeni Shipman, Jan and Doug Fletcher with Craig Reese

2015 Summer Seminar

Cathy Jo and Mike Eady

Andrea, Jim, Myrna, Alex and Steffi Hunter

Dennis and Molly Chambers with Alan and Jeanne Harrel



Nick, Charlie, Pam and Blake Madere

Christy Amuny, Laura Kemp, Nick Zito and Monica Wilkins

How to Create a Miserable and Inept Associate

By Jennie C. Knapp
The Underwood Law Firm, Amarillo

While, statistically speaking, most partners have mastered the various techniques discussed in this article, there are no doubt a few stragglers who can benefit from some guidance. For those who already have miserable inept associates, it never hurts to have a little refresher.

Associates are fungible

One of the best ways to turn those spring chickens into bitter and miserable souls is to keep in mind that new lawyers are a dime a dozen. They have very few usable skills and even less intelligence. Most importantly they do not have any relevant personalities, dreams, or desires. One practical way to let them know how you feel is to not remember their names and refer to them as "you over there." You should never show interest in their personal lives, ask how their weekend was, or inquire about their interests.

On a related note, if you wanted the people working for you to be fulfilled in their work, they would love the work that they do. To really annoy associates, don't bother to ask what kind of cases they like or where their strengths are, and don't make assignments based on those things.

Wait until Friday afternoon to assign projects

. . . and tell them that the project is due on Monday! That will really show them! This trick is most effective when the associate knows that you have already used up all of the procrastination time and could have prevented their weekend all-nighters.

If you want to drive the associate particularly bonkers, assign a discrete and disembodied project without any background to the case. This will stifle any interest that might otherwise spring up in the associate and further ensure that they will be ill-equipped to handle similar cases in the future.

Once the work is complete, never, under any circumstances, should you update the associate on the outcome of the project that caused them to forego family time or a night out with friends. Giving them this information will only serve to create an attitude of entitlement and a chance to evaluate the effectiveness of their work.

You should be invisible

As a busy and established attorney, your unavailability to the associate should be

consistent. Keep your door shut. Whatever you do, do not ever step foot in an associate's office. If you did that, you would be showing them that you actually care and give them a certain level of power – to be avoided at all costs. When at all possible, communicate only by email. The shorter and the more cryptic, the better.

Associates should be invisible too

If you wanted your associate to actually be interested in the projects they would be working on, you would let them attend hearings, depositions, and mediations. You would explain case strategy along the way.

So, don't do those things! Keep your associates locked behind closed doors. When they ask to do anything that sounds like something a real lawyer would do, just say "No!" After all, if they have never taken a deposition before, or even been to one, how could they possibly take a good one? No, keep all the real work to yourself, and use associates for more boring busywork.

If your firm makes you take an associate out of the office to a hearing or deposition, act like their only job is to take notes. Don't introduce them to the client, other lawyers, or the judge. Let them scribble their (worthless) notes and rush them back to their ~~dungeon~~ cubicle as quickly as possible.

Need to Know

Knowledge is power. Associates should never have power, and there are consequently a number of things they should never know. For example, never explain the inner workings of the law firm. Associates should be blindly grateful for their jobs without knowing how they could make partner someday, how their bonus is calculated, or how the firm is managed.

Above all, there is no reason to tell an associate why you are writing off 70% of their time. There is no reason to give them a real chance to improve their billing skills and to become an efficient attorney. Instead, you should employ the next strategy:

Criticize, criticize, criticize

Always, always highlight the associate's mistake to anyone who will listen, including their peers and other partners in the firm. This includes critiques of billing practices, hours worked, wardrobe choices, and – most importantly – work product. Over time, this will demoralize them and crush any spirit they have. Associates are particularly annoyed by criticism when they had no example or guidance to assist with their project in the first place. Keep that in mind when assigning projects too.

…. Or take all the credit!

If there is by some miracle a work product that you can actually use, slap *your* name on it and take the associate's off completely. That will really drive them nuts!

To be fair to the partners out there, no associates interviewed for this article described themselves as miserable or inept. Nor did they view their supervising attorney as mean or horrid people. Yet many voiced the idea that often lawyers who have practiced for years have forgotten what it is like to start out in this brand new world of practicing law. The "tips" and "tricks" mentioned in this article are intended as a reminder of the fledging experience and in hopes of encouraging the mentoring of the younger legal generation.

J. Matthew Shadonix
Stuber Cooper Voge, PLLC, Frisco

Damages for Delay–What a Contractor Can Recover in the Absence of a No Damages for Delay Clause

When evaluating a potential construction claim, much of the focus of late has been on the enforceability of a No Damages for Delay clause, thanks to the *Zachry*[1] case. But what happens when a claimant presents a delay or inefficiency claim in the absence of a No Damages for Delay Clause? Contractors' damages can be for termination or non-payment, but also for inefficiencies encountered during the project, acceleration of work to avoid delays, and increased costs due to actual delay of the completion of the project.

Claims can result from inefficiencies encountered on a project whether the date of substantial or final completion is achieved. This is because inefficiencies caused by differing site conditions or mid-project delays can be made up for by accelerating or changing the sequence of work. However, in most occasions, such changes come with an increase in cost that should be accounted regardless of whether the project completion is actually delayed. In evaluating purely lost efficiency claims, there are a few standard methodologies that can determine damages.

I. Methodologies

The following methodologies are not strictly applicable for contractors in loss of efficiency claims. In fact, they have been effectively employed by contractors and owners on termination/cost to complete claims, as well as in pure delay claimsbB. However, each methodology referenced below is most effective for inefficiency claims, which is why they are given treatment here.

A. Total Cost Approach

The total cost method measures damages by subtracting the original bid estimate or contract price from the total actual cost of the contractor's performance.[2] It is

[1] *Zachry Constr. Corp. v. Port of Hous. Auth.*, 449 S.W.3d 98 (Tex. 2014).

[2] *Gilbane Bldg. Co. v. Two Turners Elec. Co.*, 2007 Tex. App. LEXIS 1406, 23, 2007 WL 582252 (Tex. App.—Houston [14th Dist.] 2007) (mem. op.); *A.B.F. Freight Systems, Inc. v. Austrian Import Service, Inc.*, 798 S.W.2d 606, 615 (Tex.App.—Dallas 1990).

most often discussed in the context of a lump sum or guaranteed maximum price contract in delay claims where there are allegations of time and cost impacts or other events that cause an increase in the total cost of the work, and the claimant then seeks to hold respondent responsible for all of those increases without making a causal link.

The total cost method is generally rejected because of two inherent issues. The first is that the method assumes that the contractor's bid was without error and was accurate.[3] The second is that by using this method, a claimant may circumstantially prove causation between the damages alleged and the defendant's wrongdoing.[4] Or, in other words, the assumption is made that the defendant was solely responsible for the claimant's damages.[5] While many courts across the country have rejected the theory as speculative and remote, or so seriously flawed in concept that it should not be utilized, no Texas court has specifically barred its application. In fact, in a memorandum opinion, in deciding that the total cost method was not being applied in the case at bar, the 14th District court acknowledged that its use was allowed by other jurisdictions.[6] While not specifically accepted by Texas courts, and though the total cost approach is typically disfavored, its use may be allowed as a proper method to calculate damages where:

(1) it is impossible or highly impracticable to prove the contractor's actual losses directly;
(2) the contractor's bid or estimate was realistic and reasonable;
(3) the contractor's actual costs were reasonable; and
(4) the contractor was not responsible for any added expenses, costs or delays.[7]

B. Modified Total Cost Approach

Even though the total cost approach has not been specifically rejected, because of its nature, it is preferable to apply other more developed methodologies. The first of which is the modified total cost approach. The origin of this method is, as its names indicate, the total cost method, whereby the claimant still subtracts its planned costs from actual costs. The modification is made in that the claimant then attempts to account for any increased costs caused by the claimant, whether in the prosecution of work[8] or in the bid itself.[9]

Whether utilizing the total cost or especially the modified total cost approach, there is no uniform requirement for expert testimony. However, more credence as to

[3] *Concrete Placing Co. v. United States,* 25 Cl. Ct. 369 (1992).
[4] Matthew Bender (rev. Steven G.M. Stein et al.), 1-11 Construction Law P. 11.02[5][b][i] at 45 (Lexis 2000).
[5] *Id.*
[6] *Gilbane Bldg. Co. v. Two Turners Elec. Co*., 2007 Tex. App. LEXIS 1406, 23, 2007 WL 582252 (Tex. App.—Houston [14th Dist.] 2007) (mem. op.).
[7] *Id.* at note 6 (citing *Propellex v. Brownlee*, 342 F.3d 1335, 1339 (Fed. Cir. 2003); *Cavalier Clothes, Inc. v. United States*, 51 Fed. Cl. 399, 418 (2001); *Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 47 Fed. Cl. 248, 260 (2000); *United States v. R. M. Wells Co*., 497 F. Supp. 541, 545 (S.D. Ga. 1980).
[8] *Thalle Constr. Co. v. Whiting-Turner Contracting Co*., 945 F. Supp. 652 (S.D.N.Y. 1996) (where the method was used to account for inefficiency, inadequate supervision, incompetent personnel, or unavailability of materials.)
[9] *Servidone Const. Corp. v. U.S.*, 931 F.2d 860, 862 (Fed. Cir. 1991).

the reasonable cost of work in circumstances where the work was supported with expert testimony.[10]

C. Jury Verdict Approach

The jury verdict approach does not solely rely on the jury to determine damages, rather the claimant provides an approximation of the costs to the trier of fact for consideration.[11] As with the total cost method, the claimant must prove that there was no other more reliable methodology for establishing damages before its application.[12]

D. Discrete Analysis of Events and Pricing

Various other methodologies tied directly to a specific project have been approved in a variety of circumstances. The purpose of using a discrete cost approach is to eliminate uncertainties typically associated with the above-referenced methodologies, and tailor an approach to establish the casual link between project events giving rise to the claim and increases in costs. In this process, a contractor will price each item impacted using detailed cost information and segregate and attribute each increase in cost to a particular event – the claimed event. Using this approach, a contractor can track both direct and indirect impacted costs. In other words, the contractor the costs attributable purely to delay are priced separately by categorizing time-related costs and evaluating them over the period of delay. Then, the contractor can evaluate indirect costs of delay, such as labor increases, using another approach and pricing separately. Not surprisingly, these methods are more difficult to manage, and require detailed project accounting – both on the financial and the field levels.

E. Measured Mile Approach

The measured mile approach compares unaffected project productivity with the productivity during periods of claimed delays or inefficiencies.[13] It is the most applied method to price and compare the difference between the actual productivity level during a "normal period" on the project, against the productivity level during the impacted period. Because it is a uniformly accepted method, and because it is, by its nature, project specific, it is the preferred method for analyzing acceleration and disruption claims related to labor productivity. Using typical job reporting, such as job cost reports and daily logs, a contractor can paint a credible picture of actual performance price and compare it with the performance price during the affected period.

II. Acceleration

To prove an acceleration claim, the contractor must show either actual or constructive acceleration. Actual acceleration occurs where the owner issues a change order in accordance with the contract, and the contractor accelerates its work and incurs additional costs as a result.[14] As long as the contractor proves that its attempts to accelerate

[10] *Neal & Co. v. United States*, 36 Fed. Cl. 600 (1996), aff'd, 121 F.3d 683 (Fed. Cir. 1997); *Sovereign Constr. Co., Ltd.,* ASBCA No. 17792, 75-75-1 B.C.A. (CCH) ¶ 11,251 (1975); *Hewitt Contracting Co*., ENG BCA Nos. 4596, 4597, 83-83-2 B.C.A. (CCH) ¶ 16,816 (Sept. 1983); *Bagwell Coatings, Inc. v. Middle S. Energy, Inc*., 797 F.2d 1298 (5th Cir. 1986).

[11] *Dawco Constr. V. United States*, 930 F.2d 872 (Fed. Cir. 1991).

[12] *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968); *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991).

[13] William Schwartzkopf & John J. McNamara, Calculating Construction Damages §2.09[A] 2nd ed. 2001).

[14] *Granite Constr. Co. v. United States*, 24 Cl. Ct. 735 (1991).

were reasonable, it may have an acceleration claim regardless of whether it completed the project on time.[15] Where the owner does not specifically order acceleration, a contractor may prove constructive acceleration. In order to recover damages for constructive acceleration, a contractor must show that:

1. any delays were excusable (i.e., the contractor would have been entitled to an extension of time);
2. a time extension was requested;
3. the requested extension was either refused or not granted/ acted upon by the owner or the owner's representatives;
4. the contractor was ordered by the owner to accelerate performance or the contractor was ordered to complete performance on a date which did not take into account the allowable extension of time (constructive acceleration); and
5. The contractor must actually accelerate.[16]

Whether proving actual acceleration or constructive, claimant must show a link between the owner's order to accelerate and the increase in costs.

In proving acceleration claims, the claimant should provide expert testimony in support in order to meet the burden of proof of the actual acceleration and the actual losses as a result of owner's actions.[17] While company employees can provide expertise and testimony to support the underlying facts of the work and the accelerated work, an expert should be employed to provide technical analysis.

Specifically, an expert should perform in depth schedule analysis using the critical path method. A typical CPM analysis will begin with a loos at the baseline or as-planned schedule for project performance and compare with an as-built schedule. While in many cases this analysis should be enough to determine impact and need for acceleration, the CPM analysis should include an adjusted CPM schedule in order to account for any excusable or non-owner caused delays or other impacts. The expert, with the assistance of in house employees, can then support the impacts and need for acceleration using project records.

While acceleration costs are often encountered in conjunction with other delay damages, which are discussed below, the most typical methods for establishing acceleration damages is using one of the typical project methodologies – total cost, modified total cost, or discrete cost approaches.[18] Special attention should be given to productivity losses, increases in material or equipment costs, increases in labor or supervision, or overhead. In addition, consider any potential or actual claims made by subcontractors for damages or extra work as a result of the acceleration.

III. Differing Site Conditions

When proving damages for differing site conditions, the claimant may rely on one of the above referenced methodologies to determine actual damages for its direct costs. When encountering differing site conditions, the most common impact to a contractor is a loss of productivity. As a result, the most effective method for calculating damages is the measured mile approach. The goal

[15] Matthew Bender (rev. Steven G.M. Stein et al.), 1-11 Construction Law P. 11.02[5][a] (Lexis 2000).
[16] B. Bramble & M. Callahan, Construction Delay Claims § 6.05 (4th ed. 2011).
[17] *Nat Harrison Assocs. v. Gulf States Utils. Co.*, 491 F.2d 578, 588 (5th Cir. 1974).
[18] *See* Section V.a, *supra*.

of the approach is to identify progress and cost of work during an unaffected period of performance and juxtapose with the increase of cost and decrease of performance. A project level comparison detailing the affected work items and the impact in unit cost is the most effective first step. An expert should be retained to compare the conditions of the un-impacted time at issue with the affected time period due to the differing site condition.

At the project level when a potential differing site condition presents, the contractor should endeavor to track the impacted costs contemporaneously. This can be done by assigning sub-cost codes to the affected work items, showing the increased cost and documenting the increase, as well as the attempts to mitigate. With this information, it is easier to return to the affected time period and seek to identify any other additional affected costs that may not have been expected during the impact. These items could include workforce loss of productivity due to inconsistent workflow.

As far as additional direct costs, contractors will often encounter increases due to different and/or additional materials and increased subcontractor costs. Those damages can be fully evaluated by utilizing a variation on the total cost methods adapted to each particular case. As for its indirect costs, a claimant may choose to seek delay damages, as further described in the section below.

IV. Disruption Claims

Disruption claims typically lead to time-related costs, which are fully taken up in the delay section of this paper. However, in terms of the activity-related costs, a claimant can typically recover for an increase in costs due to additional scope of work or additional work necessitated by the disruption. A claimant can also seek loss of efficiency damages. However, disruption claims are arguably the most difficult to prove using one of the methodologies detailed above. This is because, while it is relatively straight forward to show increase in costs, it is more difficult to prove loss of efficiency.

A pure disruption case may occur where a contractor encounters a problem where the design of the project was insufficient. The contractor must stop its crews while the design team plans and institutes a fix. The contractor works around the problematic work as best as it can, and returns to the work once the new plans are in place. Eventually, the contractor completes its work on time, but at an increased cost. Generally, that increase in cost is the "acceleration" paid. To that end, the damages are measured in the same way as damages for acceleration – which is to say that they are most often determined using the measured mile approach. Courts have allowed proof based on comparisons of productivity during unaffected periods when compared to the productivity obtained during or as a result of disruption.[19] Reference might also be made to "bid comparisons, industry manuals, learning curve studies and expert testimony" in an effort to determine inefficiency.[20]

V. Delay Claims

Whether due to acceleration, extra work, differing site conditions, termination, or myriad other reasons, almost any increase in cost can be calculated, or should be considered in light of, delay damages. In most cases, an excusable delay to the contractor may only result in more time for the contractor to

[19] B. Bramble & M. Callahan, Construction Delay Claims § 12.08[B] (4th ed. 2011).
[20] *Id.* at § 5.07.

complete the work. When proving a delay claim, the contractor may recover monetary damages in the event that it establishes that it experienced a compensable delay and that the owner was the cause of the delay.[21] Delay claims can be in addition to the direct cost methods for calculating other claims for breach of contract, including those claims referenced above that result in damages for inefficiencies regardless of whether the project completed on time.

Where there is an excusable and compensable delay caused by the owner, the contractor may recover its increased general conditions costs, the increased costs of labor (including costs associated with idle labor, costs of additional labor, premium time and escalated wage costs), materials (including increased costs due to price escalations, and additional costs associated with handling, taxes and insurance) and equipment (including additional rental costs on idle equipment or ownership costs relating to equipment).[22] Contractor may also recover for any delay claims alleged by its subcontractors where the delays are caused by the owner.[23] Lastly, the contractor is able to recover unabsorbed home office overhead.[24]

A. Proof of Delay

As detailed in Section V.c.i.1 *supra*, establishing a delay claim is often the purview of an expert analyzing the critical path of a project. "The critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate projects. Each subproject is identified and classified as to the duration and precedence of work."[25] A computer analyzes the data to determine the most efficient schedule for the entire project. Some subprojects may be performed at any time without any effect on the completion of the project. Other subprojects must be performed on schedule; otherwise, the entire project will be delayed. "These latter items of work are on the 'critical path.'"[26] During construction, the critical path can change and items not originally on the critical path can become critical. "Thus, if the CPM is to be used to evaluate delay on the project, it must be kept current and must reflect delays as they occur."[27]

By utilizing further parameters, each task has an early start date (the earliest date the task can commence), a late start date (the date by which a task must commence), the early end date (determined by adding the task duration to the early start date) and late finish date (the last specified date an activity may complete without delaying a milestone). The items that are critical to project completion are said to be "on the critical path." Those dates that, if missed, will not immediately impact the completion date, are said to be "non-critical" items. For those non-critical items, "float" exists. Float is the amount of time that an item may be delayed before it impacts the completion date."[28] The priority

[21] Robert F. Cushman et al., Proving and Pricing Construction Claims 5 (3rd ed. 2001).
[22] Matthew Bender (rev. Steven G.M. Stein et al.), 1-11 Construction Law P. 11.02[5][a] (Lexis 2000) and citations from notes 192-196.
[23] *Wilner v. United States*, 23 Cl. Ct. 241 (1991).
[24] *Chilton Ins. Co. v. Pate & Pate Enterprises, Inc.*, 930 S.W.2d 877, 892 (Tex.App—San Antonio 1996); *VIV Elec. Co. v. STR Constructors*, 2000 Tex. App. LEXIS 4327, 36 (Tex. App.—Houston [14th Dist.] June 29, 2000) (unpublished).
[25] *Haney v. U.S.*, 230 Ct. Cl. 148, 676 F.2d 584, 595 (1982).
[26] *Id.*
[27] *VIV Elec. Co.*, 2000 Tex. App. LEXIS 4327, 57-58 (quoting *Fortec Constructors v. U.S.*, 8 Cl. Ct. 490, 505 (1985), *aff'd*, 804 F.2d 141 (Fed. Cir. 1986)).
[28] Robert F. Cushman et al., Proving and Pricing Construction Claims 44 (3rd ed. 2001).

and entitlement to project float is often defined by contract.

An expert analyzing a project CPM is subject to the same scrutiny as other technical experts, and thus must use typically adopted methodologies to evaluate delay.[29] The expert will start with the baseline, or as-planned, project schedule put together at the outset of the project by the contractors. The baseline CPM is generally updated throughout the project, reflecting delays on the project. A schedule that is not consistently and contemporaneously updated might be disregarded by the courts as inaccurate.

[30] Most contracts will define how adjustments to the CPM should occur during the project, with the most common method being the "time impact" analysis. This type of update uses discrete project occurrences and analyzes any related schedule impacts by projecting the impact of the delay on the projected as-built schedule. The as-planned completion date is then compared to the projected as-built schedule to assess the impact of the delay. The cause of any delay is then extrapolated into the "effect" on the overall schedule, so that entitlement can be determined. Other methods can be used given project circumstances, including concurrent or excusable delays.

B. Pricing Delays

As with each of these claims, the first step in pricing the claim is to evaluate the appropriate damage methodology available. While courts have allowed for the total cost method to be applied, it is preferable for the contractor to identify each individual element of claimed damages and apply discrete analysis.[31] For instance, in evaluating increased labor costs, the contractor should evaluate the as-bid projections for labor with the actual cost of labor during the project, taking into account any deviations caused by change orders or causes other than the delay itself. This way, the contractor may adjust for any concurrent delays or increases in labor costs due to inaccuracies of the bid. The general rule is to show that but for the delay, the project would have been completed prior to any wage increase.

1. Example – Labor Cost Increase

An example of this discrete analysis would be to analyze the work flow on a project. If claimant shows that it planned to utilize 500 man hours per month over a year, and the agreed-upon wage rate was $10.00/hour, then the baseline for expenditures per month was $5,000.00. The project proceeded as planned, except for a 2 week delay during the project. The impacted period occurred in the middle of that year, and the claimant was only able to supply 250 man hours to the project due to compensable delay, but had to work those remaining 250 hours in the next year. But in the following year, the agreed-upon wage rate increased to $11.00/hour. Thus, the cost of the additional 250 hours increased by $1.00/hour as a result of the delay, and the compensable increase in labor costs is that delta of $250.00.

The above analysis is so clean that it could be calculated using the total cost method – i.e., subtracting the planned expenditures from the actual expenditures and claiming for the difference. However, performing the analysis using a discrete approach allows for the claimant to make adjustments for non-compensable delays or adjustments. For

[29] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-150 (1999).

[30] Robert F. Cushman et al., Proving and Pricing Construction Claims 49 (3rd ed. 2001).

[31] *Id.* at 56.

instance, if the as-bid budget expected labor rate was $10.00/hour, but the actual rate paid over the project was $10.10/hour due to fluctuations between bid and award, then the contractor is limited to recover only the $.90 difference between the actual cost of labor during the extra work period caused by the delay and the actual cost of labor on the project.

2. Example – Material Cost Increase

The same is true when analyzing a materials claim, and the contractor should account for increased prices due to the specific owner delays that affected when the contractor purchased the materials. The contractor should also consider whether it lost any preferred or special pricing from suppliers for purchasing in sporadic periods, rather than a single bulk purchase.[32] A contractor can also recover for its expenses related to storing materials for time periods longer than contemplated.[33] When evaluating a material increase, claimant can look to historical pricing data in *ENR Quarterly Compilation of Construction Costs* or the *Dodge Building*

3. Example – Equipment Cost Increase

Slightly more difficult is evaluating the cost incurred for idle equipment. Once a contractor has established the days of delay, it is straightforward to evaluate costs related to rented equipment (i.e. compensable extra days multiplied by the rental rate equals claimed amount). However, when it comes to contractor's owned equipment, the main issue is evaluating at what rate to charge the equipment per day. Resources include the AGC's *Contractor's Equipment Ownership Manual*, the AED *Associated Equipment Distributor's Manual* and the *Rental Rate Blue Book*. The best evidence is generally what the actual cost of ownership or rental is, but having those values in line with these resources can also solidify the claim.

C. Overhead

There are two types off overhead: project overhead and home office overhead. The former is easier to establish as it includes costs relating to the construction trailer, utilities, office equipment, labor cost, project management, insurance, or security. Each element of the project overhead is likely a line item on the bid sheet or schedule of values and can be given a cost per day, multiplied by the days of delay.[34] Those items without specific line items are likely extractable as project general conditions costs. However, home office overhead is a more difficult cost to establish and assign to the project.

Home office overhead is categorized as either extended overhead or unabsorbed home office overhead. Extended overhead is easier to account as it represents the amounts that reflect the home office cost attributable for each day that a project is delayed beyond as-planned completion.[35] These costs are incurred as work progresses.[36] However, "unabsorbed overhead" includes those expenses, generally in a manufacturing context, allocated to a fixed period of production time, which must be absorbed by fewer jobs because a job designated for that given period has been

[32] *Samuel N. Zarpas, Inc.*, ASBCA No. 4722, 59-1 B.C.A. (CCH) ¶ 2170 (1961).

[33] *American Bridge Co. v. State*, 245 A.D. 535 (1935).

[34] *Foster Constr. v. United States*, 435 F.2d 873, 193 Ct. Cl. 587 (1970).

[35] *Chilton Ins. Co. v. Pate & Pate Enterprises, Inc.*, 930 S.W.2d 877, 892 (Tex.App.—San Antonio 1996).

[36] W. Sneed, *Proving Overhead Claims*, from Construction Contracts and Litigation 439-89 (K.M. Curran ed., 1987).

delayed.[37]

To prove unabsorbed overhead damages, the contractor must first prove that the delay prevented it from performing other work which could have spread out or "absorbed" its home office overhead.[38] The most common method for calculating unabsorbed home office overhead, though not explicitly accepted by Texas Courts, is the *Eichleay* formula.[39] The *Eichleay* method should be used only where a true suspension of work occurred and in cases where the supporting documentation demonstrates an increase in overhead because of the delay and that contractor attempted to, but could not, secure other work to mitigate against the delay.[40] In situations not as clear, other, less well known methodologies can be used given the circumstances of the project.

The formula is a three-step process in which the total home office overhead allocable to the contract is determined by multiplying the total home office overhead costs for the contract period by a ratio equal to the total billings of the delayed contract divided by the total of all billings for the contract period. Allocable overhead is then divided by the actual number of days of performance of the contract (including the period of the delay) resulting in a figure representing daily overhead costs allocable to the contract. The daily overhead cost figure is then multiplied by the number of days of delay to determine the total amount of extended home office overhead cost attributable to the delay which can be recovered by the contractor.[41] The *Eichleay* formula is calculated as follows:

Contract billings/ Total Billings for the Full Contract Period	X	Total Home Office Overhead for the Full Contract Period	=	Home Office Overhead Allocable to the Contract
Allocable Overhead / Days of Performance	\	Days of Performance	=	Daily Contract Overhead
Daily Contract Overhead	X	Number of Days of Delay	=	Amount Recoverable

In order to apply the *Eichleay* formula, the contractor must show that "he necessarily suffered actual damage because the nature of the delay made it impractical for him either "to understake performance of other work … or [to cut back on] Home Office personnel or facilities."[42]

Regardless of whether *Eichleay* has been adopted by Texas courts, inherent problems with the formula should encourage a practitioner to consider other calculations. Namely, *Eichleay* often results in a positive claim for home office overhead even where

[37] *Chilton Ins. Co.*, 930 S.W.2d at 892 (citing *Southwestern Eng'g Co. v. Cajun Elec. Power Co-op.*, 915 F.2d 972, 978 (5th Cir. 1990)).

[38] W. Sneed, *Proving Overhead Claims*, from Construction Contracts and Litigation 439-89 (K.M. Curran ed., 1987).

[39] *Eichleay Corp.*, ASBCA 60-2 BCA ¶ 2688, aff'd on reconsideration, 61-1 BCA ¶ 2894. Interestingly, while Texas courts have not specifically adopted *Eichleay*, the San Antonio Court of Appeals overruled a party's appeal of a trial court decision in which claimant sought damages in the trial court based on an *Eichleay* calculation. In *Alamo Cmty. College Dist. v. Browning Constr. Co.*, ACCD cited *Chilton* "for the proposition that Texas law does not recognize the *Eichleay* method of calculating damages. *Chilton*, however, expressly declines to decide that issue." *See* 131 S.W.3d 146, 161 (Tex. App.—San Antonio 2004).

[40] *Guy James Const. Co. v. Trinity Industries, Inc.*, 650 F.2d 93 (5th Cir. 1981).

[41] *Eichleay Corp.*, ASBCA 60-2 BCA ¶ 2688.

[42] *George Hyman Constr. Co. v. Washington Metro. Area Transit Auth.*, 816 F.2d 753, 757 (D.C. Cir. 1987).

the overhead was absorbed. Where a delay is caused on the project because rework is necessary, and that rework is given to the performing contractor, the *Eichleay* formula would produce a damage model that is flawed. This is because the contractor is not prevented from, but actually secures "additional work" because of the rework, so any extended home office overhead would be absorbed by the new work.

Two other methods to consider are the comparative absorption rate and burden fluctuation methods. In the former, called the *Cateret method*, the contractor determines the total amount of overhead incurred and then subtracts from that the overhead it reasonable would have incurred but for the delay.[43] The calculation looks like this:

Overhead Rate During Delay	-	Normal Overhead Rate	=	Excess Overhead Rate
Excess Overhead Rate	X	Contract Base for Delay	=	Recoverable Overhead Rate

The latter method, sometimes called the *Allegheny* method[44], allocates a rate differential between as planned and actual allocation rates for the delay period, and then multiplies that rate across an allocation base.[45] The *Allegheny* formula looks like this:

Overhead Rate During Delay	-	Projected Overhead Rate	=	Excess Overhead Rate
Excess Overhead Rate	X	Contract Base for Delay	=	Claimable Overhead Rate

[43] *Cataret Work Uniforms, Inc.*, ASBCA No. 1647,6 CCF ¶ 21,501 (1954).
[44] *Allegheny Sportswear co.*, ASBCA No. 4163, 58-1 BCA (CCH) ¶ 1684 (1958); *Allied Materials*, ASBCA No. 17,318, 75-1 BCA (CCH) ¶ 11,150 (1975).
[45] *Id.*

Suffice it to say that *Eichleay* is a good place to start, but having more discrete methods looking at the actual facts of the case should also be performed. To recover unabsorbed home office overhead is a heavy burden, so a contractor should attempt to allocate as many costs as possible to particular projects.

D. Interest Incurred from Delays

Interest costs as part of a delay damage or extra work claim are generally recoverable where the contractor borrowed specifically to finance expenses due to the delay or extra work.[46]

VI. Conclusion

As you can see, in the world where delay damages are allowed by contract, the claim presentation can vary and get very complicated, very quickly. While the above is just an outline, and all fact patterns are different, tracking these methodologies to evaluate what is and what is not allowable is a good start to know where to take your client or to know how to defend against these claims.

[46] *Bell v. United States*, 404 F.2d 975, 186 Ct. Cl. 189 (1968).

2015 Annual Meeting

Millennium Broadway Hotel – September 20-24, 2015 – New York, NY

"Start spreading the news"! The TADC 2015 Annual Meeting was held in New York, NY, September 20-24, 2015 at the wonderful Millennium Broadway Hotel. Program Chairs David Chamberlain and Keith O'Connell amassed a program with over 11 hours of CLE including 2.5 hours ethics.

Chantel Crews, Michael Ancell and Trey Sandoval

TADC Amicus Chair Roger and Esther Hughes

Clayton Devin, Jerry Fazio, Michele Smith, Milton Colia, Junie Ledbetter and Mike Hendryx

Margaret Ann Colia, Lisa and Tom Ganucheau and Lisa Hobbs

Victor and Ileana Vicinaiz

Bonnie and Paul Miller with Judge Cynthia and Don Kent

2015 Annual Meeting

Millennium Broadway Hotel – September 20-24, 2015 – New York, NY

Topics ranged from *"An Update from the Supreme Court",* provided by Justice Phil Johnson, to *"Nailing Your Closing Argument"* with Don Jackson.

Bud Grossman and Mitzi Mayfield

Tom and Kathy Bishop with Rosemary and Max Wright and K.B. Battaglini

Michelle and Don Jackson with Tom Ganucheau

TADC Young Lawyer Committee Member Jennie Knapp, with current Committee Chair Trey Sandoval and Chair-elect Rachel Moreno

Learning all day!

Justice Phil Johnson

2015 Annual Meeting

Millennium Broadway Hotel – September 20-24, 2015 – New York, NY

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*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.

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2016 TADC WINTER SEMINAR

January 27-31, 2016 | Hotel Madeline | Telluride, Colorado

Joseph L. Hood, Jr., Windle Hood Norton Brittain & Jay, LLP, El Paso – Program Chair
Margaret "Peggy" Brenner, Schirrmeister Diaz-Arrastia Brem, Houston – Meeting Chair

CLE Approved for: 8.25 hours including 2.0 hours ethics

Wednesday, January 27, 2016

6pm – 8pm TADC/LADC Welcome Reception

Thursday, January 28, 2016

6:45 – 9:00am Buffet Breakfast with LADC

7:15 – 7:30am Welcome & Announcements
Joe Hood, Windle Hood Norton Brittain & Jay, LLP, El Paso, Program Chair

7:30 – 8:15am *A REVIEW OF THE NEW "MULLIGAN" LAW*
Mark Walker
Dykema Cox Smith, El Paso

8:15 – 8:50am *HOW TO AVOID TRAPS IN MEDICAL MALPRACTICE LITIGATION*
Laura Cavaretta
Cavaretta, Katona & Francis, PLLC, San Antonio

8:50 – 9:50am *PARALLEL PROCEEDINGS: WHAT CIVIL DEFENSE COUNSEL NEED TO KNOW ABOUT TITLE 18 AND OTHER CRIMINAL LAW ISSUES*
William B. Mateja
Fish & Richardson, Dallas

9:50 – 10:25am *RECENT DEVELOPMENTS IN TEXAS NON-SUBSCRIBER LAW*
Darryl Silvera
The Silvera Law Firm, Dallas

Friday, January 29, 2016

6:45 – 9:00am Buffet Breakfast with LADC

7:15 – 7:30am Welcome & Announcements
Joe Hood, Windle Hood Norton Brittain & Jay, LLP

7:30 – 8:00am *THE MEDIATION PROCESS: ETHICAL CONSIDERATIONS FOR THE LAWYER (.5 hours ethics)*
G. Robert Sonnier
Germer PLLC, Austin

8:00 – 8:30am *RECENT DEVELOPMENTS IN LEGAL ETHICS (.5 hours ethics)*
Professor Dane S. Ciolino
Loyola University School of Law, New Orleans

8:30 – 9:15am *TEXAS vs LOUISIANA LAW: WHAT IS SO DIFFERENT AND WHAT IS SUPRISINGLY THE SAME – A GUIDE FOR THE TRIAL LAWYER LICENSED IN BOTH STATES*
Christy Amuny
Bain & Barkley, L.L.P., Beaumont

9:15 – 10:15am *ETHICS, PROFESSIONALISM AND ABRAHAM LINCOLN: HOW TO BE THE "RIGHT" KIND OF LAWYER (1.0 hours ethics)*
E. Phelps Gay
Christovitch & Kearney, L.L.P., New Orleans

Saturday, January 30, 2016

6:45 – 9:00am Buffet Breakfast with LADC

7:15 – 7:30am Welcome & Announcements
Joe Hood, Windle Hood Norton Brittain & Jay, LLP

7:30 – 8:05am *DEVELOPING LAW IN TEXAS NON-COMPETITION AGREEMENTS*
Michael Alfred
Hallett & Perrin, P.C., Dallas

8:05 – 8:40am *TRENDS IN LITIGATION – AN EXPERT'S POINT OF VIEW*
Micayla Brooks
Rimkus Consulting, San Antonio

8:40 – 9:25am *IMPORTANT DECISIONS FROM THE TEXAS COURTS OF APPEALS*
The Honorable Steven L. Hughes
Eighth Court of Appeals, El Paso

9:25 – 10:00am *ISSUES IN PROBATE AND FIDUCIARY LITIGATION*
Rene Ordonez
Blanco Ordonez Mata & Wallace, P.C., El Paso

Sunday, January 31, 2016

Depart for Texas!

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Pricing & Registration Options

Registration fees include Wednesday evening through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, CLE Program each day and related expenses and hospitality room.

Registration for Member Only (one person) $675.00
Registration for Member & Spouse/Guest (2 people) $795.00

Children's Registration

Registration fee for children includes Wednesday evening welcome reception, Thursday, Friday & Saturday breakfast

Children Age 12 and Older $120.00
Children Age 6-11 $80.00

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Winter Seminar for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.

Spouse/Guest CLE credit for Winter Meeting $75.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE HOTEL MADELINE DIRECTLY AT 866/530-0880 and reference the TADC Winter Seminar.** The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block will most likely fill quickly***. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE F0R HOTEL RESERVATIONS IS DECEMBER 20, 2015

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) BUSINESS DAYS PRIOR (JANUARY 13, 2016) to the meeting date. A $75.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 13, 2016 IS NON-REFUNDABLE.

2016 TADC WINTER SEMINAR REGISTRATION FORM

January 27-31, 2016

For Hotel Reservations, contact the Hotel Madeline DIRECTLY at 866/530-0880

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

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- ☐ **$ 795.00 Member & Spouse/Guest (2 people)**
- ☐ **$ 75.00 Spouse/Guest CLE Credit**
- ☐ **$ 75.00 CLE for a State OTHER than Texas - State(s)_____**
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- ☐ **$ 80.00 Children 6-11 _____**

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FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY:_____ZIP:_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____

☐ *Check if your spouse/guest is a TADC member*

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In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2015.

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TADC Young Lawyer Committee Update

By: Rachel Moreno
Young Lawyer Committee Chair

It is my pleasure to serve as this year's Young Lawyer Committee Chair on behalf of TADC. We have an excited and energetic committee this year, with many more young lawyers throughout the state helping us accomplish our goals as a committee and an organization.

Last year, under the leadership of Michele Smith as President and Trey Sandoval as YLC chair, young lawyers played a much more visible role in the organization and were called upon to participate at a higher level in meetings and seminars both as speakers and attendees. The increased presence of young lawyers has helped breathe new life into the organization and highlighted the needs and desires of its younger members. Among those needs are TADC mentors for young attorneys at the larger meetings, "nuts and bolts"-type seminars highlighting practice basics for budding litigators, and networking opportunities with other attorneys at both local and state-wide levels.

This year, our plan is to continue implementing the programs started by Michele and Trey, as well as expand those programs to additional cities throughout the state. Milton Colia made good on his promise to include a number of young attorneys on the TADC board in order to have a varied and diverse perspective regarding the direction of the organization. As members of the board and YLC, we hope to continue to be a voice and a resource for our young practitioners, and strive to make TADC a recognizable name among the rising stars in Texas defense litigation.

If you have any questions or comments regarding how we can better serve young lawyers in TADC, please do not hesitate to contact me (rachel.moreno@kempsmith.com) I look forward to working with you all over the coming year.

Dues Reminder

2016 TADC Dues Statements were mailed in late October and are due January 1, 2016. You may pay your dues online at www.tadc.org or if you need a copy of your dues statement, contact Debbie (debbieh@tadc.org)

2015-2016
TADC Young Lawyers Committee

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Papers Available

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Discovery and the Leviathan: Issues of Privilege When Dealing with the Government – Christopher Cowan – 12 pgs.

The Certificate of Merit – Practical Considerations – Chantel Crews – 16 pgs.

General PJC Update and Tips in Product Cases – Michael W. Eady – 21 pgs.

Texas Law Update Summer 2015 – The Legislature, Texas Supreme Court, and a Note or Two from the U.S. Supreme Court – Doug Fletcher – 15 pgs.

The Expedited Civil Action: Is It Working? – Mike Morrison – 119 pgs.

I Fought the Law and the Law Won: Understanding Sovereign Immunity – Michael Shaunessy – 187 pgs.

Defamation, Reputation and Citizen Participation – Rebooted – Mike Thompson, Jr. – 38 pgs.

2015 West Texas Seminar – Ruidoso, NM – August 7-8, 2015

A View from the Bench: Comes Now, Said Court & Multijurisdictional Practice – Ethics Are Important! – The Honorable James M. Hudson – 10 pgs.

Criminal Law Considerations in Civil Cases - The Ethics Involved - The Honorable William R. Eichman II – 41 pgs. (PPT)

Expert Depositions: Making Your Case – Leonard R. "Bud" Grossman – 33 pgs. (+ 16 pg. PPT)

Ethical Considerations on Attorney Involvement in Recording Conversations – Mark Standridge – 11 pgs.
Reciprocity Materials – Mark D. Standridge – 17 pgs.

Fee Shifting in New Mexico - Legal Considerations in Practice; Rule 1-068's Effect on Fee Shifting; Fee-Shifting and Settlement – Richard E. Olson – 16 pgs.

Patients Leaving Against Medical Advice-Minimizing the Risks for Hospitals – Rachel C. Moreno – 11 pgs. (PPT)

The Daubert Games 2015 - How to Effectively Present and Cross Experts – Pat Long-Weaver – 40 pgs. (PPT) + ***Silent Advocacy – A Practical Primer for the Trial Attorney*** – George J. Lavin; Chilton D. Varner – 10 pgs.

Texas and New Mexico Employment Non-Compete Agreements – Andrew B. Curtis; Elizabeth G. Hill – 34 pgs. (PPT)

The Twilight Zone Revisited - Bad Faith in New Mexico – Hovet – Bill Anderson – 16 pgs. + ***Raskob*** – 4 pgs. + ***The NM IPA*** – 8 pgs. (total of 28 pgs.)

Preserving the Record During Trial in Texas and New Mexico – Lawrence M. Doss – 33 pgs.

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Civility, It Matters – Justice Patricia O. Alvarez – 11 pgs.

Not Alone: Help and Hope for the Impaired Lawyer – Bree Buchanan, Chris Ritter – 24 pgs.

Legislative Update 2015: Litigation – David Chamberlain, Michele Smith, Jerry D. Bullard – 36 pgs.

800 Years of Magna Carta: A Foundation for the Modern Rule of Law – George S. Christian – 19 pg. PPT

Construction Law and Insurance Headaches – R. Brent Cooper, Julie Shehane, Robert Witmeyer – 56 pgs.

Legal Malpractice in Texas – The Basics, Causes and Avoidance – Thomas E. Ganucheau, Joel Towner – 26 pgs.

How to Use (and Love) the Law Nerd – Lisa Bowlin Hobbs, Kurt Kuhn - 8 pgs.

Top Recent Cases from the U.S. Fifth Circuit and Texas Courts of Appeal – Roger W. Hughes – 18 pgs.

Appraisal of Insurance Claims in Texas: Do's, Don'ts and Don't Knows – Jay Old, Jay Fancher – 36 pgs.

The Texas Anti-SLAPP Law: Tex. Civ. Pra. & Rem. Code Ch. 27 – Mark C. Walker – 81 pgs.

What's New with the Texas Rules of Civil Procedure – Keith B. O'Connell – 23 pgs.

Supreme Court of Texas Update – Justice Phil Johnson – 94 pgs.

2015 Commercial Litigation Seminar – Houston, TX – October 1, 2015

Arbitration in Texas: History and Enforceability – K. B. Battaglini – 35 pgs.

Arbitration: Implications and Hidden Realities – K. B. Battaglini – 62 pg. PPT

Commercial Indemnity in the Oil & Gas Industry – Seth Isgur – 11 pg. PPT

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Using Technology in Jury Selection: Why You Can't Afford Not To – Mike H. Bassett – 56 pg. PPT

Pitfalls in Proving and Challenging Damages – Matthew P. Whitley – 27 pg. PPT

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2015 TX/OK Red River Showdown – Frisco, TX – October 9, 2015

The Ultimate Inner Badger for Countering the Reptile – Malinda S. Matlock, Michael W. Brewer – 15 pgs. + 24 pg. PPT

Resolution of Medicare Secondary Payer Compliance Concerns in Liability Settlements – Clayton Devin, Daniel Anders – 44 pgs. + 32 pg. PPT

Spoliation Update – Ron T. Capehart – 39 pg. PPT

2015 Construction Law Seminar – Dallas, TX – October 29, 2015

CPRC Chapter 82 – Product Liability and Construction Defect Cases – Greg Harwell – 16 pgs. PPT

Ethics of Third Party Litigation in Construction Cases – Jay Old, Lori Daves, Rachel Crutchfield – 13 pgs. PPT

Certificates of Merit: The Construction Industry and Recent Case Developments – Richard Schellhammer – 17 pgs. + 70 pg. PPT

Damages in Construction Law: Why, How and How Much – J. Matthew Shadonix, Sarah J. Shadonix – 35 pgs. + 38 pg. PPT

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