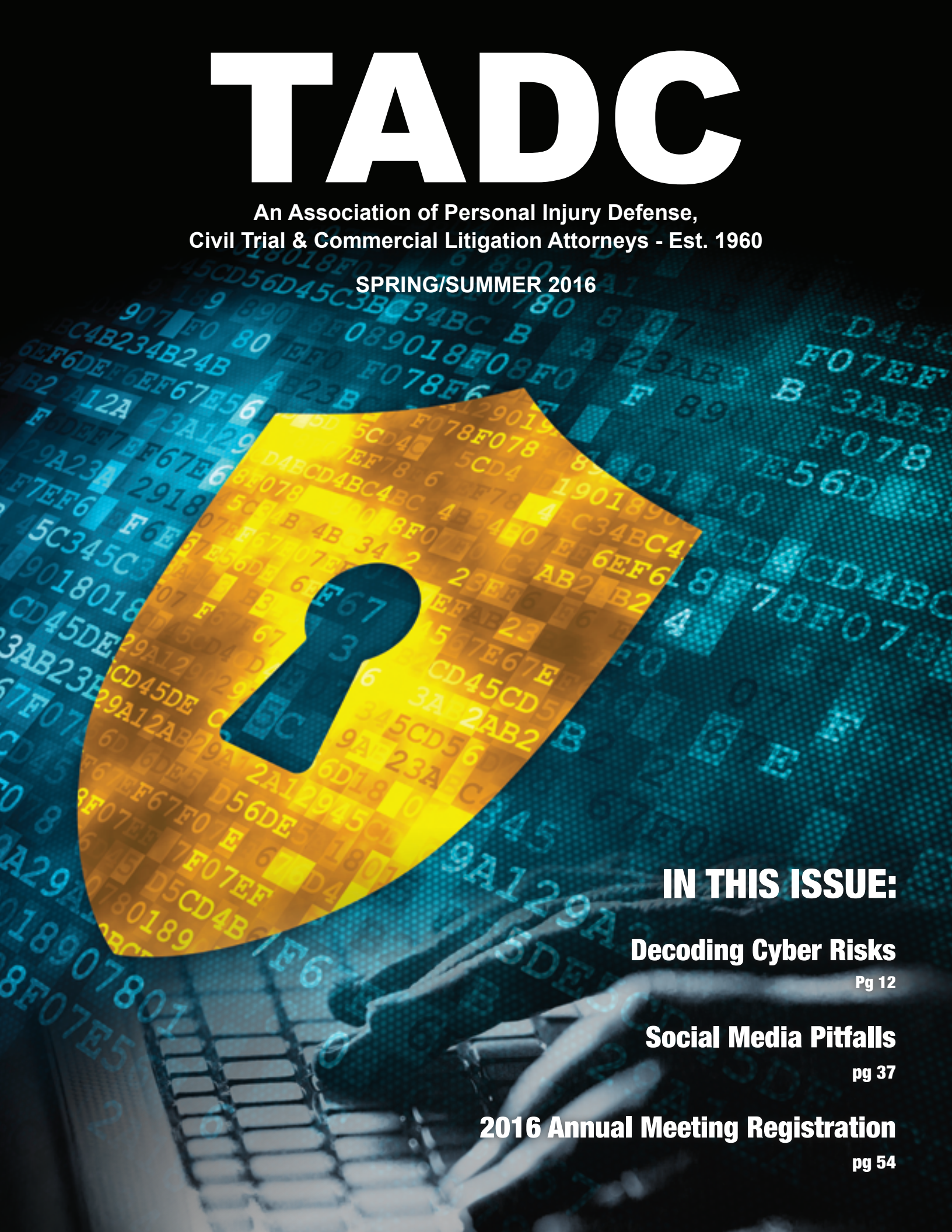
TADC

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

SPRING/SUMMER 2016



IN THIS ISSUE:

Being known for experience and expertise begins with seeking these qualities in the professionals you engage.

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THE ENGINEERING & SCIENCE BEHIND THE ANSWERS SINCE 1970

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TADC CALENDAR OF EVENTS

July 6-10, 2016	**TADC Summer Seminar** Omni Plantation - Amelia Island, Florida Slater Elza and Arlene Mathews, Program Co-Chairs
July 29-30, 2016	**TADC/NMDLA West Texas Seminar** Inn of the Mountain Gods - Ruidoso, New Mexico Bud Grossman & Mark Standridge, Program Co-Chairs
August 5-6, 2016	**Budget and Nominating Committee Meeting** Stephen F. Austin, Intercontinental - Austin, Texas
September 21-25, 2016	**TADC Annual Meeting** Worthington Hotel - Fort Worth, Texas George Haratsis and Brittani Rollen, Program Co-Chairs
November 11-12, 2016	**TADC Board of Directors Meeting** South Shore Harbors Hotel – Kemah, Texas
February 1-5, 2017	**TADC Winter Seminar** Beaver Creek Lodge - Beaver Creek, Colorado

President's Message

by Clayton E. Devin
Macdonald Devin, P.C., Dallas

"A professional organization of civil trial attorneys dedicated to promoting excellence in its members, fairness in our judicial system, and preserving the right to jury trial for all citizens."

~Texas Association of Defense Counsel Mission Statement

The Texas Association of Defense Counsel is constantly evolving. Currently, we have 1,584 members, making TADC the largest state organization of its type in the United States. Although some outsiders, and even some of our members, continue to think of TADC as an "insurance defense" organization, we are not. Today, our members practice in all areas of civil litigation in state and federal courts. Many of our members do no insurance work, and others are regularly adverse to insurance companies on behalf of their corporate and individual clients. TADC members work in diverse practice platforms, from sole practitioners to multi-national law firms. Our membership is twenty percent female, our board of directors is thirty percent female, and our executive committee is fifty percent female. Twenty percent of our membership has been in practice for less than ten years.

In recent times, TADC has reached out to other organizations such as the Texas Trial Lawyers Association and the Texas Chapters of the American Board of Trial Advocates, to support legislation favorable to the civil justice system and oppose proposals detrimental to the legal profession and the right to jury trial. Our goals and priorities will differ from these groups from time to time, but we have learned that we are more alike than different, and that together, we can better represent the interests of the civil justice system and the legal profession. Most recently, TADC teamed with TTLA and Tex-ABOTA to oppose an American Bar Association proposal to amend disciplinary rules that would have allowed non-lawyers to own and manage law firms. In the face of widespread opposition, the ABA initiative is off the table – for the time being. A copy of the joint comment can be obtained through the TADC office.

In January of this year, TADC convened a strategic planning meeting, aimed at reviewing our organization, examining its core strengths, and identifying areas where improvement and change are needed. Legislative initiatives, networking and education were identified as strengths, but improved member communication, local events, and expanding young lawyer membership were identified as weaknesses.

To maintain the momentum created by the January meeting, we established a Long Range Planning Committee of members representing a cross-section of practice areas, geographical distribution and demographics with the goal of establishing multi-year goals and plans to continue TADC's evolution.

Another committee has proposed amendments to TADC's bylaws to align our formal structure with the organization's goals, policies, and procedures. These revisions will be distributed prior to our annual meeting in September and presented to the members for vote at the annual meeting.

The 2017 session of the Texas legislature has not been convened, but the agenda for the session is being formulated now. The Speaker of the House and

Lieutenant Governor issued over 300 topics for interim studies, and committee hearings are underway. TADC's Legislative Committee is working on issues as diverse as revisions to Chapter 18 of the Civil Practice & Remedies Code (affidavits of reasonableness and necessity of medical expense), first-party insurance claim reforms, State Bar of Texas Sunset Act issues, and chancery court legislation.

TADC's Amicus Committee is recognized as a valuable ally by litigants pursuing review of numerous issues in the Texas Supreme Court. Led by Roger Hughes, the committee recently appeared in cases dealing with issues as varied as electronic information retention and discovery, expert reports in medical liability cases, claims against design professionals, limitations on arbitrations, and interpretations of the rules of civil procedure. Most of these requests for assistance come from TADC members and are carefully considered by the Amicus Committee and Executive Committee before TADC becomes involved.

The 33rd TADC Trial Academy was held in Houston at the South Texas College of Law on April 15-16, 2016. The Trial Academy is one of the best programs TADC has to offer. It is an excellent trial advocacy training program designed specifically for young attorneys licensed 6 years or less. The academy had a full contingent of thirty-six participants. K.B. Battaglini with Strong, Pipkin, Bissell & Ledyard, L.L.P. and Peggy Brenner with Schirrmeister Diaz-Arrastia Brem, both in Houston, served as academy co-chairs. A special thanks to Peggy, K.B. and all of the dedicated faculty for making the Trial Academy a success.

The TADC 2016 Spring Meeting was held in Nashville, Tennessee, April 27-May 1, 2016. The program included presentations by Federal District Judge Xavier Rodriguez, Retired District Judge Robert Dinsmoor and many talented trial lawyers. Thanks to Program Co-Chairs Chantel Crews, with Ainsa Hutson Hester & Crews LLP in El Paso, and Trey Sandoval, with MehaffyWeber, PC in Houston for their hard work on behalf of the membership.

The TADC Summer Seminar is coming up July 6-10, 2016 at the Omni Plantation Resort on Amelia Island, Florida. Program Co-Chairs Arlene Matthews with Crenshaw, Dupree & Milam, L.L.P. in Lubbock and Slater Elza with The Underwood Law Firm, P.C. in Amarillo have put together a great cast of speakers including District Judge Les Hatch and Jacksonville, Florida attorney and Florida Defense Lawyer Association officer Jill Bechtold. Amelia Island is a perfect family destination for the summer with activities for everyone. Come enjoy the beach and earn 8.25 hours of CLE!

The 2016 West Texas Seminar, held jointly with the New Mexico Defense Lawyers Association, will be at the Inn of the Mountain Gods in Ruidoso, New Mexico on July 29-30, 2016. This is a great opportunity to escape the summer heat and earn CLE for both Texas AND New Mexico. This is an affordable seminar designed with young lawyers in mind. Program Chair Bud Grossman with Craig, Terrell, Hale & Grantham, L.L.P. in Lubbock has assembled practitioners and Judges from Texas and New Mexico to deliver an outstanding program.

The TADC Annual Meeting for 2016 will be held in Fort Worth at the Worthington Hotel, September 21-25. Program Co-Chairs George Haratsis and Brittani Rollen, with McDonald Sanders P.C. in Fort Worth, have put together an outstanding program with over 11 hours of CLE and two Supreme Court Justices added to the mix. 2017 Officers and Directors will be elected at the Annual Meeting and the event will end with the traditional awards dinner.

Get meeting registration material or register online for these or any meeting at www.tadc.org

Amicus Committee News

There have been several significant amicus submissions.

Bryan Rutherford (Macdonald Devin, P.C.) submitted an amicus brief to support the petition for review in *Katy Springs & Mfg. v. Favalora*, 476 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). A motion for rehearing is planned. This is an important case concerning medical expense factoring and "paid or incurred." In this case, Favalora and the doctor signed a contract to provide surgery for a set price; MedStar then signed a contract to buy the doctor's account with Favalora at a discount; and MedStar then signed a medical expenses affidavit verifying the original sum was reasonable and the "amount incurred." The Houston Court held that the amount Favalora agreed to pay was the amount "incurred," not the discounted sum accepted by the medical provider. Further, because MedStar owned the account and its records, it was authorized to sign the medical expense affidavit under Texas Civil Practices and Remedies Code §18.001.

R.L. Florance (Orgain Bell & Tucker, L.L.P.) filed amicus briefs to support mandamus petitions in *In re State Farm Lloyds*, Case Nos. 15-903, and 15-905. The mandamus petitions address ESI orders in the 2012 Hidalgo County Hail Storm MDL. The trial court entered a standing order requiring the insurers to produce the electronic case files and other documents in "native format" with metadata intact. State Farm challenged the case management order and a discovery order in a specific claim. The Corpus Christi Court of Appeals held that TRCP 192.4 and 196.4 gave the requesting party a unilateral right to demand ESI in native format. The requesting party did not have to establish a particularized need for native format; if the responding party disagreed then it had the burden of proof to show undue burden. This is a potentially ground-breaking case that gives the requesting party a unilateral right to mandate production of ESI in native format. TADC has joined several amicus in urging that the requesting party should have the burden to show a particularized need to require production of ESI in native format.

Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus in support of the petition for review in *United Scaffolding v. Levine*, 2015 WL 5157837, 2015 Tex. App. LEXIS 9285 (Tex. App.—Corpus Christi 2015, pet. filed)(memo. op.). This is round three for the new trials granted to Levine. *See In re United Scaffolding*, 377 S.W.3d 675 (Tex. 2012) and *In re United Scaffolding*, 301 S.W.3d 661 (Tex. 2010). The first trial resulted in a verdict that Levine was 49% at fault and awarded only $178,000 for future medical expenses. The trial judge granted a new trial; after the two mandamuses, the trial judge stated that $0 for everything but future medical expenses was against the weight of the evidence. USI appealed and argued the new trial was in error. The Court of Appeals held that the grant of a new trial could be reviewed only by mandamus, not by appeal from a judgment on the second trial.

Ruth Malinas (Plunkett & Griesenbeck, Inc.) and Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus in support of the petition for review in *Columbia Valley Healthcare v. Zamarripa* 2015 WL 5136567, 2015 Tex. App. LEXIS 9268 (Tex. App.—Corpus Christi 2015, pet. filed)(memo. op.). This was a wrongful death medical malpractice appeal over the sufficiency of the expert report to establish a hospital's nurse committed malpractice by failing to oppose or prevent the patient's transfer to another hospital. The patient's doctor determined a pregnant woman could not be treated at defendant hospital in Brownsville and ordered her transferred by ambulance to a Corpus Christi hospital; the woman died during the 2 ½ hour trip to Corpus Christi. Plaintiffs' expert claimed the nurses had a duty to oppose the transfer and their failure to oppose it caused the death. The Corpus Christi court held that it would not consider that the Nursing Practice Act forbid nurses to practice medicine because the expert report did not mention the Act and the Court could not go outside the report to judge its sufficiency. Moreover, the expert report did not have to detail or explain how the nurse's failures were a cause-in-fact of the death, i.e., how their opposition would have prevented the transfer.

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TADC Amicus Curiae Committee

Roger W. Hughes, Chair, Adams & Graham, L.L.P.; Harlingen
Ruth Malinas, Plunkett & Griesenbeck, Inc..; San Antonio
George Muckleroy, Sheats & Muckleroy, LLP; Fort Worth
R. Brent Cooper, Cooper & Scully, P.C.; Dallas
Scott P. Stolley, Cherry Peterson Landry & Albert LLP; Dallas
Bob Cain, Alderman Cain & Neill, PLLC.; Lufkin
Mitch Smith, Germer PLLC.; Beaumont
Mike Eady, Thompson, Coe, Cousins & Irons, L.L.P.; Austin
Tim Poteet, Chamberlain ♦ McHaney; Austin
William C. Little, MehaffyWeber PC; Beaumont
Richard B. Phillips, Jr., Thompson & Knight LLP; Dallas
George Vie III, Mills Shirley, L.L.P.; Houston

TADC Legislative Up-Date

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

What's In Store for 2017?

A couple of weeks ago, the Texas Supreme Court gifted the Legislature several billion dollars that it *won't* have to spend in the next budget cycle. In a unanimous decision, SCOTX ruled that the state's school finance system, though seriously flawed in many respects, did not violate minimum constitutional standards. Past rulings have generally found that the system either violated the constitutional ban on a statewide property tax or failed to satisfy constitutional requirements for equity in school funding, or both. This time, however, the Court made it clear that 181 legislators, not nine justices, should make education policy and punted the issue back to them. About the only thing missing from the decision was a note to school districts not to let the proverbial door hit them in the backside on the way out.

The probable upshot of the state's total victory in the lawsuit is to relieve the Legislature of the divisive and expensive necessity of overhauling the system during the 2017 regular session. This comes as good news because low oil and gas prices have resulted in declining state revenues and fears of a serious budget problem next year. Keep in mind, though, that the Legislature left $4 billion unspent in the last budget and the state's Rainy Day Fund holds more than $10 billion, so there's no real danger of a serious hiccup in state financing or, God forbid, a general tax increase. Still, the state's continuing growth causes upward pressure on Medicaid and other health and human services needs, public school and higher education enrollment, and state employee benefits, to name only three of the state's major budget drivers. Everyone also agrees that Child Protective Services and the foster care system are in absolute shambles, and we aren't spending nearly enough on transportation (at present levels, we fund about one-third of the cost of simply *maintaining the current level of congestion*). The primary source of transportation funding—the motor fuels tax—hasn't increased since 1991, and there are no signs that this Legislature will do anything about that. In short, we might see some modest increases in funding in high need areas, but the Legislature will be happy to hold the line as best it can.

With the budget more or less in *status quo* mode, we can expect the Legislature to spend a lot of time on things it can do without spending any money. The Senate is likely to focus on restraining the growth in property taxes. Lt. Governor Dan Patrick has appointed a select Senate committee, chaired by Sen. Paul Bettencourt (R-Houston), which has been barnstorming the state, hearing from enraged taxpayers and local officials. This committee will recommend tightening the ability of cities, counties, and other local governments to increase tax revenues from year-to-year without enhanced voter participation in the process. Given the influence local officials have around the Capitol, don't expect this to be an easy fight. The Lt.

Governor has already made it clear that the Senate will pass some kind of bathroom legislation, á la North Carolina, and a bunch of public school-related bills, including vouchers. Gun rights supporters will also push for constitutional carry legislation on top of the open carry legislation from last session.

Speaker Joe Straus is taking his usual deliberate approach during the interim, focusing on the state's core functions. At this relatively early stage, we can look to the House to prioritize the problems in CPS, retired teachers' health care, rising state employee health care costs, continuing challenges in transportation funding, and boosting the state's energy industry, to name a few key issues. One thing we probably won't see this session is an open challenge to the Speaker's leadership. Unlike before the last three sessions, no one has emerged as a likely challenger from the Tea Party wing of the GOP, and even if someone did, there is no indication of support within the House. The plain fact is that after four sessions as Speaker, Joe Straus has proven that he is a responsible conservative leader that allows his members to pursue their constituents' interests with as little interference from the top as possible. While no one knows for sure how many more terms the Speaker desires to serve, there is no reason to believe that 2017 will be his last.

From TADC's perspective, 2017 is shaping up to be an active session. The unfinished business of hail litigation tops the civil justice agenda. If anything, the temperature in this area has gone up, with more examples of abuses in hail litigation and fears that, if the Legislature does not intervene, the property and casualty market could seize up altogether. The key legislative players in the issue, as they were last session, include Sen. Larry Taylor (R-Friendswood), Rep. John Smithee (R-Amarillo), Rep. John Frullo (R-Lubbock), and TADC member Rep. Kenneth Sheets (R-Dallas), all highly experienced and skilled legislative practitioners who came very close to getting a bill passed in 2015 over intense opposition from the plaintiff's bar and consumer groups. Whether it gets across the finish line in 2017 remains to be seen, but the odds should be better this time.

Once again, the Legislature will have to deal with abuses of the medical costs affidavit provisions of CPRC §18.001. Ever since the Legislature enacted the "paid or incurred" statute in 2003, the plaintiff's side has launched efforts in the Legislature and the courts either to repeal the statute or find a way around it. The current controversy involves, among other things, the use of third party factors to sign the affidavit. TADC is currently involved in compiling information and drafting appropriate language to address the problems with §18.001 for the Legislature to consider next spring.

We also expect to see another attempt to create a Delaware-style Chancery Court system for business litigation in Texas. As you may recall, last session a House proposal to establish an appointed business court was considered and ultimately voted out of committee. The TADC Legislative Committee is currently working on an extensively researched policy paper for use next session. There are also a pair of charges to the House Judiciary & Civil Jurisprudence Committee that we are keeping a close eye on: (1) the implementation of the expedited trial provisions of HB 274 (2011) and whether they have been effective; and (2) issues related to jury service, including participation rates, the accuracy of jury wheel data, and methods to improve participation. On May 19, the Committee held its first interim hearing to discuss the jury service charge. The District Clerks Association testified on the enormous number of inaccuracies in DPS driver's license data, causing a 30% return rate on jury summons. Guy Choate offered testimony on behalf of TEX-ABOTA. The committee discussed the possibility of forming a stakeholder group to work on a resolution. We will keep you posted on further developments.

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!

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Enclosed is my TADC PAC Contribution in the amount of:

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TADC PAC Report

By Mike Hendryx, Chairman
Strong Pipkin Bissell & Ledyard, L.L.P., Houston

What does the TADC PAC do?

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 opposition to various acts, bills, and measures that affect our civil justice system.

Because the TADC has been seen by legislators as even handed and concerned about the health and vitatily of the civil justice system, including the right of trial by jury, we have gained credibility. 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 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 are we likely to see coming that will affect the civil justice system?

- Chancery Courts
- Insurance Reform
- Further Efforts to Restrict Trial by Jury.

Why should I support it?

So as you consider this appeal, please consider the following:

- The TADC is the ONLY voice speaking for the defense bar;
- The TADC has credibility and good relationships 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.

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.

To show our appreciation, please see below what will come your way with a contribution of $150, $250 and $300.

2016 TADC Trial Academy

K.B. Battaglini, with Strong Pipkin Bissell & Ledyard, L.L.P. in Houston and **Peggy Brenner** with Schirrmeister Diaz-Arrastia Brem LLP in Houston, served as Co-Chairs of TADC's 33rd Trial Academy which was held in Houston on April 14th & 15th, 2016 at the South Texas College of Law.

The problem used this year was a commercial litigation claim created by the National Institute for Trial Advocacy. Faculty members presented demonstrations of the problem including direct and cross examination and opening and closing statements. Presentations were made from both the plaintiff and defense perspective. Attendees were able to practice their courtroom skills in morning and afternoon breakout sessions which followed each main session demonstration.

K.B. and **Peggy** successfully enlisted an outstanding faculty, each of whom was dedicated to the progress and improvement of the attendees. The collective wisdom, experience, and enthusiasm of these seasoned trial attorneys elicited rave reviews from the attendees and was central to the success of the 2016 TADC Trial Academy.

Faculty and Presenters

K. B. Battaglini, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Suzanne Beatty, Houston
Elaine Block, Elaine Block, attorney/mediator, Houston
Robert Booth, Mills Shirley, LLP, Galveston
David Brenner, Law Office of David Brenner, Houston
Peggy Brenner, Schirrmeister Diaz-Arrastia Brem LLP, Houston
John Bridger, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Darin Brooks, Gray, Reed & McGraw, P. C., Houston
John Cahill, LeClairRyan, Houston
Mark L. Clark, Thompson Coe Cousins & Irons, L.L.P., Houston
Kevin Corcoran, Mills Shirley, LLP, Galveston
Fay Cordova, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Clayton Devin, Macdonald Devin, P.C., Dallas
Murray Fogler, Fogler, Brar, Ford, O'Neil & Gray, Houston
Michael Golemi, Liskow & Lewis, Houston
Robert D. "Bob" Green, Robert D. Green & Associates, PC, Houston
Mike Hendryx, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Laura Herring, Bracewell & Giuliani L.L.P., Houston
Don Jackson, Ware, Jackson, Lee, O'Neill, Smith & Barrow, L.L.P., Houston
Julie Jackson, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Sylvia Matthews, 281st District Court, Houston
Ed Mattingly, Mattingly Law Firm, Houston
Jason McLaurin, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Mark T. Murray, Stevenson & Murray, Houston
Yasmi Oropeza, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Shannon Ramirez, LeClairRyan, Houston
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Diane Stanley, Houston
Matthew Whitley, Beck | Redden LLP, Houston
Nick Zito, Ramey, Chandler, Quinn & Zito, P.C., Houston

Graduates

Matt Brower, Owen & Fazio, P.C., Dallas
Margaret Brown, Lindow Stephens Treat LLP, San Antonio
Matthew Coolbaugh, Cotton Bledsoe Tighe & Dawson PC, Midland
Chris Dachniwsky, Thompson & Knight, Dallas
Mary Kathleen Davidson, McCleskey, Harriger, Brazill & Graf, L.L.P., Lubbock
Alex Dimock, Thompson & Knight, Dallas
Vanessa Durante, Strong Pipkin Bissell & Ledyard, LLP, Houston
Sonny E. Eckhart, Germer PLLC, Beaumont
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Mario Franke, Dykema Cox Smith, El Paso
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Renee Hunter, Thompson & Knight, Dallas
Jessica Olivia Ireton, Chamberlain, Hrdlicka, White, Williams & Aughtry, Houston
Amanda James, Lindow Stephens Treat LLP, San Antonio
David Andrew Kirby, Strong Pipkin Bissell & Ledyard, LLP, Houston
Christopher D. Mahfouz, Strong Pipkin Bissell & Ledyard, LLP, Beaumont
Elizabeth Briggs McDonnell, Mills Shirley L.L.P., Galveston
Owen J. McGovern, Beck Redden LLP, Houston
Randall Wilson Miller, Fee, Smith, Sharp & Vitullo, LLP, Dallas
Eduardo Montemayor, Cotton Bledsoe Tighe & Dawson PC, Midland
James "Eddie" Moreno, KempSmith, El Paso
Jon Andrew Norman, Brackett & Ellis, P.C., Fort Worth
Juan G. Ramos, Atlas, Hall & Rodriguez, LLP, McAllen
Bradley J. Reeves, Coats Rose, Houston
Cody N. Schneider, Chamberlain, Hrdlicka, White, Williams & Aughtry, Houston
John C. Shelton, Kelly Hart & Hallman, Midland
Sarah E. Sibley, Cotton Bledsoe Tighe & Dawson PC, Midland
Joel Thomas Towner, Beck Redden LLP, Houston

Decoding Cyber Risks

By Jason Mclaurin,
Strong, Pipkin, Bissell & Ledyard, L.l.p., Houston

1. Introduction

Until not long ago, the concepts of cyber attacks and hacking were generally restricted to outlandish stories involving heroic hackers conducting digital capers for the good of all mankind or programmers teleporting into computer universes to physically hurl flying disc-shaped viruses into the hearts of insidious programs. While these fictitious renditions stray far from the unexciting root command lines or packet sniffing techniques used by the hackers of the real world, the dangers depicted in those fictions have become a modern reality.

Hardly a day goes by without a new headline depicting some new cyber attack utilizing new technology in a previously unheard of way. These new-age cyber attacks have expanded and moved beyond the firewall-hacking, desktop attacking methods to which most are accustomed. Indeed, as technology has moved into almost every aspect of our lives, so have the hackers. Now our phones, cars, medical devices, toys, refrigerators, and even toilets have become targets in the war.

Perhaps even more alarming is the increased rate at which cyber attacks are occurring and the ever-increasing costs associated with defending against and addressing those cyber attacks. Another major issue faced by businesses is the relative lack of available insurance to protect companies against the scale of liabilities one could face in the case of a major cyber breach.

In the changing world of cyber liability, it is important to understand the ever-expanding risks both to our clients and our own law firms. This is especially true in light of the fact that many businesses are unprepared for data breaches and the resulting fallout. To that end, this article discusses the common liabilities associated with cyber breaches, the steps a company or law firm should utilize to protect itself from those breaches, and the types of insurance available to pay for those breaches.

2. Cyber Breaches On The Rise

Cyber breaches fall into a variety of categories, including hacking or malware, payment card fraud, insider breaches, loss of electronic devices (such as computers or cell phones) and unintended disclosure (posting, publishing, or sending information accidentally). The majority of data loss is, by far, caused by hacker intrusions into immense archives of information. Moreover, as we have begun incorporating technology into virtually every aspect of our lives, the data breaches have closely followed. Over the last year we've seen toys, appliances, cars, navigation systems, drones, power plants, power stations, and medical devices breached by hackers in new and unanticipated ways.

The increase in data breaches over the past few years is primarily related to a massive increase in the records being compromised by external hacking.[1] Records lost by other means—*e.g.* insider disclosures, physical loss, and lost or stolen devices have continued to drop year over year.[2] These contrasting trends can provide insight into the state of the cyber war. While we are winning on some fronts as security teams adopt new tools and techniques to prevent many of the mistakes that have led to past

[1] Williamson, Wade, "Data Breaches by the Numbers," (August 31, 2015) available at http://www.securityweek.com/data-breaches-numbers.

[2] *Id.*

breaches, the increase in hacker attacks have by far swallowed up the gains on those other fronts.

3. Donning Your Hacker-Proof Vest

The prospect of completely securing a company from hackers can be akin to putting a cap on a volcano. As technology and security methods improve, so do the hacker's methods of bypassing and overcoming those methods. Cyber attacks exploit vulnerabilities in hardware, software, or, as is often the case, human error. Further, despite the fact that a company may have well protected systems from foreign external cyber attacks, hackers can often gain access through less protected vendors or persons with whom a company's system interacts.

So what can you do to prevent and limit the damages associated with the eventual hacking of your company? The answer lies in having measures in place that take effect immediately upon learning of a cyber breach. The first and most important step is to realize you need to have a plan in place—one that gets re-evaluated on a regular basis—to protect your company from cyber attacks and, if an attack occurs, to quickly and efficiently address the problems and issues raised by that attack. The midst of a data breach is not the time to handle a breach or determine who will handle the resulting issues.

Your response plan should cover several areas, including the following:

1) Leadership Team. It is important to have a trained team in place to handle a breach, so that a breach management plan may be created and implemented efficiently and training can be facilitated throughout your organization.

2) IT & Security. You should ensure that your IT department (outsourced or not) is taking steps to maintain security protocols that meet industry standards, such as up-to-date encryption techniques, malware detection and prevention, and modern firewall technology. This is not a foregone conclusion. You should also ensure that your IT department has a plan to make breached technology secure as quickly as possible, take infected machines offline, and work with a forensics team to identify the comprised data and preserve evidence. A company should contract a forensics firm ahead of time to secure the best rates.

3) Legal. It is important to have competent legal representation to obtain advice regarding whether it is necessary to notify protected individuals, the media, law enforcement, government agencies, and other third parties.

4) PR. Depending on a company's size and the jurisdiction at issue, it may be necessary to report the breach to the media or affected individuals. If this is necessary, it is best to create a notification and crisis management procedure prior to a breach to handle negative press and information flowing from the company relating to the breach.

5) Customer Care & HR. Create a plan or hotline to manage the pipeline of communication to your clients, customers, and employees. It's best for all information to be funneled to one properly trained person or group of persons so that all inquiries are handled consistently and appropriately.

6) Law Enforcement. Depending on the size of the breach, law enforcement may need to be involved in the process. It is worth taking the time to determine who would need to be contacted in the event of such a breach and include it in your response plan. It is also important to create a channel through which law enforcement directives will be funneled so as to ensure smooth progression of an investigation.

7) Data Resolution Provider. It is important to secure a data resolution provider before a breach to help you outsource many of the issues described above, including notification, letter mailing, address verification, identity protection for affected customers (where necessary), fraud resolution, and secure a call center for the affected individuals.

8) Preparedness Training. The leadership in charge of handling a data breach should work to educate employees so as to integrate data security efforts into their daily work habits. Data security and

mobile device policies should be created, implemented, and updated regularly. Data access should be limited to employees based on seniority, with the more sensitive data only being accessible to a limited few. Methods of reporting should be established for employees that identify instances of noncompliance with internal security procedures. Finally, employee e-training should be conducted at least once a year.

Another step you can take to ensure that your security and methods are sufficient is to have a cyber security firm perform an audit of your company.[3] While the complexity and cost of these audits vary greatly depending on the sophistication of the technology and sensitivity of the information involved, performing an internal audit can have a great number of advantages for a company. For one, a cyber security audit can help your company find holes that need plugging and prevent breaches before they start. Further, a cyber security audit may be very helpful in showing a company's due diligence if claims are subsequently brought in relation to a breach.

4. I've Been Breached, Now What?

Unfortunately, even if you put the most sophisticated of security measures into place, there is no guarantee that your company will be safe from a cyber breach. As former FBI director Robert Mueller stated "there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category companies that have been hacked and will be hacked again."[4] Given that sentiment, what is a company's potential liability and what steps should you take to reduce that liability?

That question may be difficult to answer, as litigation concerns are often compounded by the piecemeal condition of state and federal laws regarding cyber breaches. These laws include fragmented statutes and regulations and continually evolving common law standards that create difficult questions for those trying to predict and protect themselves from potential liability.

A. Statutory and Regulatory Liability

Statutory liability for a data breach can arise from state or federal law. While there are many potentially applicable statutory schemes, the sources of cyber liability primarily arise from (1) state laws governing notification steps that must be taken in the event of a data breach, (2) federal and state laws that govern health-related privacy breaches, (3) federal laws governing breaches involving financial information, and (4) consumer statutes.

i. Breach Notification

Since 2002, many states have passed laws requiring written notification to affected individuals in the event of a cyber breach. As of the date of this article, forty-seven states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands had enacted legislation requiring private, governmental, or educational entities to notify individuals of security breaches involving personally identifiable information.[5]

Generally, security breach notification laws have provisions defining who must comply with the law, what "personal information" is governed by the law, what constitutes a breach, requirements for notification, and exemptions from the law.[6] However, there can be major differences between the breach notification requirements and related remedies depending on which state's law applies. For instance, some states have specific time frames for notification,[7] some states require notice to the state

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[3] Protiviti, Cybersecurity Risk Becoming a Mainstay in Annual Audit Plans, According to Protiviti's latest Internal Audit Capabilities and Needs Study" (March, 2, 2016), available at http://www.prnewswire.com/news-releases/cybersecurity-risk-becoming-a-mainstay-in-annual-audit-plans-according-to-protivitis-latest-internal-audit-capabilities-and-needs-study-300229474.html.

[4] Robert S Mueller, Director, Federal Bureau of Investigation, RSA Cyber Security Conference, San Francisco, CA.

[5] National Conference of State Legislators, "Security Breach Notification Laws" available at http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

[6] *Id.*

[7] States that require notification of a breach within a specific time frame are California, Connecticut, Florida, Maine, Ohio, Rhode Island, Vermont, Washington, Wisconsin, Alaska, and California. The availability and scope of a private cause of action varies depending on the

attorney general or some other state agency,[8] and some states include an avenue for private causes of action by customers injured by cyber breaches.[9] To even further complicate matters, each of these state's laws may be applicable to a data breach, regardless of the state in which the company resides, because it is most often the law of the state in which the affected person resides that governs the breach.[10] Although there have been attempts at the federal level to adopt a federal data privacy and breach notification statute, there is currently no congressional consensus on the issue.

In Texas, a business's notification requirements are governed by Chapter 521 of the Texas Business and Commerce Code. This chapter requires a business covered by the chapter to "implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business."[11] Sensitive personal information is defined under the Chapter as follows:

> (2) "Sensitive personal information" means, subject to Subsection (b):
>
> (A) an individual's first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted:
>
> (i) social security number;
> (ii) driver's license number or government-issued identification number; or
> (iii) account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; or
>
> (B) information that identifies an individual and relates to:
> (i) the physical or mental health or condition of the individual;
> (ii) the provision of health care to the individual; or
> (iii) payment for the provision of health care to the individual.
>
> * * *
>
> (b) For purposes of this chapter, the term "sensitive personal information" does not include publicly available information that is lawfully made available to the public from the federal government or a state or local government.[12]

Section 521.053 governs the notification requirements in the event of an "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of sensitive personal information maintained by a person, including data that is encrypted if the person

state involved. Links to each of these states laws are available at http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

[8] States that require such notification are Alaska, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Puerto Rico, Rhode Island, South Carolina, Vermont, Virginia, and Washington. Links to each of these states laws are available at http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

[9] States that have such laws are Alaska, California, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, the District of Columbia, Puerto Rico, and the Virgin Islands. The availability and scope of a private cause of action varies depending on the state involved. Links to each of these states laws are available at http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

[10] Newcombe, Tod, "States Approach Federal Data Breach Law with Caution" (October, 2014) available at http://www.governing.com/columns/tech-talk/gov-federal-cybersecurity-law.html.

[11] *See* TEX. BUS. & COM. CODE § 521.052.

[12] *See* TEX. BUS. & COM. CODE § 521.002.

accessing the data has the key required to decrypt the data."[13] Particularly the statute requires that disclosure shall be made "as quickly as possible,"[14] except if delay is requested by a law enforcement agency to further a criminal investigation.[15] In those circumstances the notification needs to be made as soon as the law enforcement agency determines that the notification will not compromise the investigation.[16]

As noted above, in the event that the consumer whose information is breached resides in another state, the notification laws of that other state would very likely apply to the breach. The Texas statute contemplates this scenario and allows for compliance with the Texas notification statute in such circumstances:

> If the individual whose sensitive personal information was or is reasonably believed to have been acquired by an unauthorized person is a resident of a state that requires a person described by Subsection (b) to provide notice of a breach of system security, the notice of the breach of system security required under Subsection (b) may be provided under that state's law or under Subsection (b).[17]

The statute next describes a company's notification requirements in the event of a breach.

> (c) Any person who maintains computerized data that includes sensitive personal information not owned by the person shall notify the owner or license holder of the information of any breach of system security immediately after discovering the breach, if the sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person.[18]

Section 521.053 provides a list of methods for providing notice depending on the circumstances and number of individuals affected:

> (e) A person may give notice as required by Subsection (b) or (c) by providing:
>
> (1) written notice at the last known address of the individual;
>
> (2) electronic notice, if the notice is provided in accordance with 15 U.S.C. Section 7001; or
>
> (3) notice as provided by Subsection (f).
>
> (f) If the person required to give notice under Subsection (b) or (c) demonstrates that the cost of providing notice would exceed $250,000, the number of affected persons exceeds 500,000, or the person does not have sufficient contact information, the notice may be given by:
>
> (1) electronic mail, if the person has electronic mail addresses for the affected persons;
>
> (2) conspicuous posting of the notice on the person's website; or
>
> (3) notice published in or broadcast on major statewide media.
>
> (g) Notwithstanding Subsection (e), a person who maintains the person's own notification procedures as part of an information security policy for the treatment of sensitive personal information that complies with the timing requirements for notice under this section complies with this section if the person notifies affected persons in accordance with that policy.[19]

Finally, this section requires notification of consumer reporting agencies of the breach of "the timing distribution and content of the notices" if "a person is required by this section to notify at one time more than 10,000 persons of a breach of system security."[20]

[13] *See* TEX. BUS. & COM. CODE § 521.053(a).
[14] *See* TEX. BUS. & COM. CODE § 521.053(b).
[15] *See* TEX. BUS. & COM. CODE § 521.053(d).
[16] *Id.*
[17] *See* TEX. BUS. & COM. CODE § 521.053(b-1).
[18] *See* TEX. BUS. & COM. CODE § 521.053(c).
[19] See *See* TEX. BUS. & COM. CODE § 521.053(e),(f) & (g)
[20] See *See* TEX. BUS. & COM. CODE § 521.053(h).

Section 521.151 governs penalties for an entity's failure to adhere to the requirements of Chapter 521 and authorizes the Texas Attorney General to bring an action to recover those penalties under the section.[21] The section contemplates a general civil penalty of "at least $2,000 but not more than $50,000 for each violation."[22] The section also contemplates additional civil penalties amounting to "not more than $100 for each individual to whom notification is due under that subsection for each consecutive day that the person fails to take reasonable action to comply with that subsection."[23] In short, a company may be liable for $100 per day, per affected person, up to a maximum of "$250,000 for all individuals to whom notification is due after a single breach."[24] These fines can add up quickly.

Section 521.151 also authorizes a court to grant certain equitable relief and "to recover reasonable expenses, including reasonable attorney's fees, court costs, and investigatory costs, incurred in obtaining injunctive relief or civil penalties, or both, under this section."[25]

Finally, section 521.152 makes a violation of the Chapter actionable under the Texas Deceptive Trade Practices Act. While the question of this section's potency to create a private cause of action is relatively untested, this section could open the gates to substantial damages under the Texas DTPA.

ii. Protected Health Information

The liabilities faced by companies in possession of personal medical records can be astronomical, at least in theory. Indeed, medical records go for a pretty penny on the black market—10 to 20 times the value of a U.S. credit card number—as those records often contain social security numbers, dates of birth, home addresses, and other extremely personal information.[26] Hackers obtaining (or secondary buyers of) this information can engage in a multitude of illegal activities, including opening false credit card and bank accounts, Medicare and tax fraud, extortion, and complete identity theft.[27] Indeed, hackers pursuing this type of information comprised some of the biggest data breaches of 2015, including the Anthem breach (100 million records exposed)[28] and Excellus BlueCross Blue Shield breach (10 million records exposed).[29]

Established law governing health-related privacy is now being interpreted and amended to apply to cyber breach scenarios. Of particular interest to entities handling private health information in Texas is the Health Insurance Portability and Accountability Act (HIPAA) and Chapter 181 of the Texas Health and Safety Code. While entire articles and papers have been written just discussing the interplay between these statutory schemes and duties of Texas entities thereunder, a discussion of the application of these laws in the cyber liability context is warranted.

HIPAA sets standards of confidentiality and privacy of individually identifiable health information and requires healthcare providers to maintain security protocols to avoid the release of protected health information (PHI).[30] A breach of this Act can result in civil penalties and (in some circumstances) criminal penalties.[31]

HIPAA was amended by the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH). Under these amendments, liabilities and fines are increased for

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[21] *See* TEX. BUS. & COM. CODE § 521.151.
[22] *See* TEX. BUS. & COM. CODE § 521.151(a).
[23] *See* TEX. BUS. & COM. CODE § 521.151(a-1).
[24] *Id.*
[25] *See* TEX. BUS. & COM. CODE § 521.151(e) & (f).
[26] Humer, Caroline & Finkle, Jim, "Your Medical Record is Worth More to Hackers Your Credit Card" (September 24, 2014), available at http://www.reuters.com/article/us-cybersecurity-hospitals-idUSKCN0HJ21I20140924.
[27] *Id.*
[28] Abel, Jennifer, "Anthem hacking affected 78.8 million people, including 19 million non-Anthem customers" (February 25, 2015), available at https://www.consumeraffairs.com/news/anthem-hacking-affected-788-million-people-including-19-million-non-anthem-customers-022515.html.
[29] Associated Press "Hack of Health Insurer Excellus May Have Exposed 10M Personal Records" (September 29, 2015), available at http://www.nbcnews.com/tech/security/hack-health-insurer-excellus-may-have-exposed-10m-personal-records-n424481.
[30] *See* 45 CFR 160.101 *et seq.*
[31] 42 USCS § 1320d-5.

businesses handling healthcare information.[32] The amended rules also require planning and implementation of security procedures as well as actions that must occur in the event of a breach of security.[33] Business associates must document that they have conducted a risk analysis to determine the nature of the risks and implement procedures to reduce risks to reasonable levels.[34] The regulations recognize that the amount of data and size of the business associate's operation may influence the reasonableness of security procedures. The rules also require appointment of a "security official" who oversees a business associate's implementation of security rules.[35] The law requires random inspection of business associates, so documentation and appointment of a security official is important.

HITECH also changed the HIPAA reporting and disclosure requirements in the event of a breach.[36] The Act requires a health plan or health care provider that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information and discovers a breach of the information to notify each individual whose health information has been, or is reasonably believed to have been, accessed, acquired, or disclosed as a result of the breach.[37] The scope of the notification depends upon the number of individuals whose unsecured PHI was compromised.[38]

Generally, notice must be given without unreasonable delay, but no later than 60 days after the breach is discovered.[39] In line with other breach notification laws, delayed notification is permitted for law enforcement purposes if a law enforcement official determines that notification would impede the investigation.[40] HITECH also gives the United States Department of Health and Human Services ("HHS") enforcement powers for noncompliance with these provisions, including the ability to levy penalties amounting to as much as $1.5 million per year.[41]

States have also enacted laws that expand protection mandated by HIPAA and HITECH. For instance, effective September 1, 2012, Texas enacted Health and Safety Code Chapter 181, known as the Texas Medical Records Privacy Act.[42] In many ways, the Texas scheme imposes far greater requirements on Texas entities than contemplated under HIPAA. Of particular note is the fact that a persons or business entity could be subject to Texas law as a "covered entity" if one merely comes "into possession of protected health information."[43]

The Texas Medical Records Privacy Act, creates specific training requirements for covered entities,[44] a set of penalties and injunctive relief are allowed in addition to those allowed under HIPAA, and violation of the law can subject a violator to loss of its professional licenses.[45] Audits may be conducted by the state authorities, and the Act imposes its own set of penalties that can reach up to $1.5 million a year.[46]

iii. Financial Institutions

Financial institutions often possess sensitive information, including personal identifying information, making them prime targets for persons seeking to acquire such data. Title V of the Gramm-Leach-Bliley Act (GLBA) requires financial institutions to provide customers with notice of their privacy policies and to safeguard the security and confidentiality of customer information. As part of this obligation, financial institutions are required to put protections in place against any anticipated threats or hazards and take measures to prevent unauthorized access to the use of those records or information which could result in harm to their customers.[47]

iv. Consumer Statutes

Some other statutory schemes that may be applicable in the case of a cyber breach are the Federal Trade Commission Act and the Fair Credit Reporting Act (FCRA). These schemes are discussed briefly.

The FTC has used Section 5 of the FTC Act to challenge claims companies have made about the

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[32] Before HITECH, these agreements operated to more effectively shield a business from liability for the actions of its clients and vendors.
[33] *See* 42 USC §17931.
[34] See 45 CFR 164.308.
[35] *Id.*
[36] *See* 42 USC §17932.
[37] *See* 42 USC §17932(a).
[38] *See* 42 USC §17932(e).
[39] *See* 42 USC §17932(d)(1).
[40] 42 USC 13410(g).
[41] 42 USC 13410(e).
[42] *See* TEX. HEALTH & SAFETY CODE §181.152.
[43] *Id.* at 181.151(b)(2)(B).
[44] *Id.* at 181.151.
[45] *Id.* at 181.210.
[46] *Id.*
[47] *See* 15 U.S.C. §§ 6801-6809.

privacy and security of their customers' personal information. In deceptive security claims, the FTC will often allege that the company at issue made promises to protect a customer's sensitive information and then failed to implement reasonable and appropriate measures to protect that information.[48]

The FCRA includes requirements designed to prevent identity theft and assist identity theft victims. Particularly, the Act requires financial regulatory agencies and the FTC to promulgate a coordinated rule designed to prevent unauthorized access to consumer report information by requiring procedures to dispose of such information. There are various penalties for violating the FCRA that may be applicable to a situation involving a cyber breach. For instance, the Act imposes liability for willful and negligent noncompliance.[49] The actual monetary penalties can include actual damages sustained by the consumer, plus costs and attorneys fees. In the case of a willful violation, the court may also award punitive damages to a consumer.

B. Civil Liability

On a monthly basis, we see new causes of action brought under previously unutilized legal theories for new types of third-party cyber liability claims. Moreover, given the expansion of cyber breaches into new areas and devices, this expansion may give rise to new types of third-party liability. Companies that experience data breaches often face consumer class-action lawsuits shortly after the breach. While the law in this area is still evolving, plaintiffs will commonly allege violation of a state's deceptive trade or unfair business practices laws,[50] breach of contract, negligence, or liability under privacy torts (*i.e.* intrusion upon seclusion or public disclosure of private facts).

Plaintiffs bringing contract-based actions often begin by attempting to allege breach of explicit contractual promises relating to protection of personal information.[51] If no explicit promise can be found in the contract, plaintiffs will then point to other promises to protect personal information and seek to incorporate such promises into the contract.[52] More recently, plaintiffs have alleged that implied contracts to safeguard data exist if such data is collected from customers or clients in connection with a business relationship.[53] Claims have also been brought under third-party beneficiary theories, wherein plaintiffs that don't have a direct contractual relationship with an entity that suffered the data breach attempt to enforce the terms of that company's contract with another to safeguard information.[54]

Data loss damages for breach of contract claims can be difficult for plaintiffs to prove. The primary issue is that plaintiffs in data breach cases will often have not (yet) experienced any actual damages in connection with the misuse of their personal data.[55] However, when the breach involves the loss of data or trade secret information, plaintiffs have been more successful in demonstrating that their intellectual property is being used in the marketplace.[56]

Tort theories of liability in cyber liability scenarios usually implicate negligence or negligent misrepresentation claims. Under negligence claims, plaintiffs will argue that the defendant had a duty to exercise reasonable care in protecting the plaintiffs' personal information and breached that duty by failing to establish adequate protocols or provide timely notification of the breach.[57] When a negligent misrepresentation claim is alleged, plaintiffs have the additional obligation to show a material misrepresentation upon which they detrimentally relied.[58]

In addition to civil lawsuits brought by consumers, companies that have suffered data breaches may find themselves in lawsuits with other businesses. As an example, credit card issuers could

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[48] *See, e.g.*, *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014).
[49] *See* 15 U.S.C. §1681n(a).
[50] As noted above, the Texas notification laws create a cause of action under the Texas Deceptive Trade Practices Act. *See* TEX. BUS. & COM. CODE § 521.152.
[51] *See, e.g., In re Anthem Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 U.S. Dist. LEXIS 18135 at *123-24 (N.D. Cal. Feb. 14, 2016).
[52] *See, e.g., id.* at *127-28.
[53] *See, e.g., id.* at 135-36.
[54] *See, e.g., id.* at 205-13.
[55] *See, e.g., Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 637-39 (7th Cir. 2007).
[56] *See, e.g., Four Seasons Hotels & Resorts B.V. v. Consorcio Barr*, S.A., 267 F. Supp. 2d 1268, 1325 (S.D. Fla. 2003).
[57] *See, e.g., In re Anthem*, 2016 U.S. Dist. LEXIS 18135 at *112-22.
[58] *See, e.g., In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 973-74 (S.D. Cal. 2014).

very well sue businesses for costs related to handling fraudulent charges and reissuing credit cards. Liability could also come in the form of fines levied by credit card companies on merchants for noncompliance with the companies' cyber security measures.[59] Within the last year, we have seen lawsuits filed against cyber security companies for failing to provide adequate security measures.[60] We have also seen actions contemplated against law firms for failing to adequately secure sensitive client information.[61] In other cases, we've seen directors and officers facing shareholder derivative lawsuits.[62]

5. How Much is This Going to Cost and Who is Paying The Bill?

According to the 2015 Cost of Data Breach Study conducted by the Ponemon Institute (and funded by IBM), the average total loss for US companies to respond to a data security breach was $217 per record breached. This number may seem excessive, until one considers all the various costs a company may accrue as a result of a data security breach. These costs can generally be divided into two categories: First-Party Losses and Third-Party Losses.

A. First-Party Losses

First-party losses in connection with a data breach can be substantial. These costs may include fees related to forensic experts to determine the extent and source of the breach and computer experts to restore data, software, and electronic files. In addressing injuries to third parties, costs may also include legal fees and the costs of notifying potentially affected persons, establishing and maintaining call centers to answer inquiries from those affected persons, and third-party credit monitoring companies to monitor the credit of affected persons. Costs may also include replacement and reparation of computers, drives, as well as costs of ransom payments,[63] and business interruption. In some instances, costs can also include fighting negative publicity brought on by a security breach, cyber attack, or a publicized claim that your company has suffered a cyber attack. Further, additional costs may be incurred in the event of an investigation by regulators and other governmental authorities, including required responsive action and imposed fines and penalties.

B. Third-Party Losses

Third-party losses also arise in defending against claims by parties alleging injury as a result of a breach to your networks. This includes direct monetary losses to persons due to unauthorized access to their bank account, credit card, or personal information. If a cyber breach on your system spreads into a client's computer or server, there may be losses associated with having to replace computers or other tangible property. If a breach of your system results in the release of a third-party's confidential information or trade secrets, substantial claims for damages may result. Customers and clients may also bring damage claims for loss of profits to the extent a breach prevents them from being able to conduct their business.

The scope of a company's third-party risk is greatly dependent on the nature of the business and number of potentially affected persons. For instance, businesses that handle large amounts of consumer information, health information, or personally identifiable information are at greater risk. Publicly traded companies may likewise be at risk, as it may expose those businesses to shareholder lawsuits.

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[59] For instance, companies that have not adopted credit card EMV "chip" technology could soon face greater liability for breaches.

[60] *See* Boyce, Robert, "Casino Sues Cybersecurity Company for 'Woefully Inadequate' Investigation" (January 22, 2016), available at https://cyber.ciab.com/2016/01/22/casino-sues-cybersecurity-company-woefully-inadequate-investigation/.

[61] May, Derek, "Cyber Security Attacks Focused on Law Firms and Small/Mid sized Businesses" available at http://hubcoastal.ca/technology-insurance-news-blog-Cyber-Security-Attacks-Focused-on-Law-Firms-and-Small/Mid-sized-Businesses.

[62] LaCroix, Kevin "Data Breach-Related Derivative Lawsuit Filed against Home Depot Directors and Officers" (September 9, 2015), available at http://www.dandodiary.com/2015/09/articles/cyber-liability/data-breach-related-derivative-lawsuit-filed-against-home-depot-directors-and-officers/.

[63] We learned last month that ransomware has now hit Apple for the first time. *See* Kleinman, Zoe, "Apple Macs hit by ransomware 'for first time'" (March 7, 2016), available at http://www.bbc.com/news/technology-35744416.

C. Insurance

Given the immense costs that may be involved with a cyber breach, many companies are beginning to look to their business policies and more recently fashioned cyber risk policies to foot the bill for the liabilities described above. A description of some of these policies and the potential coverage afforded under those policies follows.

i. Cyber Risk Policies

Over the last year, demand for cyber insurance products has increased immensely and the insurance market is attempting to respond by adding new capacity and coverage.[64] However, the insurance industry has yet to fully appreciate, categorize, and value cyber risks,[65] as the type of coverages needed may vary greatly depending on the size of your company, the type of information housed at your company, and industries being serviced by your company.[66] This variability has led to a disjointed and complicated application process as well as inconsistent policy forms and pricing.[67] That being said, separate cyber coverage is now widely available for most businesses.

There is no standard cyber liability policy. In some cases, cyber policies are sold as a package combining coverage for first-party and third-party liabilities. In other cases, cyber coverage may be sold in conjunction with professional liability, media tech, or D&O policies. Given the differences in cyber policy language and coverage between insurers, it is important for a business to analyze its potential risks thoroughly. At a minimum, a company should conduct a detailed review of its IT systems, *i.e.* use of portable devices, security procedures, etc. It is also wise for your company to conduct an analysis of potential cyber threats most likely to affect your business. You may wish to use internal personnel or engage outside counsel or consultants.

Insurers writing this coverage will be interested in risk-management techniques applied by the business to protect its network and its assets. The insurer may wish to evaluate the business' disaster response plan and risk management of its networks, website, physical assets, and intellectual property. Depending upon the complexity of your business and the insurance you are seeking, the insurer may inquire as to how employees and others are able to access data systems. At a minimum, the insurer will want to know about antivirus and anti-malware software, the frequency of updates, and the performance of firewalls.

Although cyber liability policies vary, they generally cover the following liabilities:

- Liability for security or privacy breaches. This would include loss of confidential information by allowing, or failing to prevent, unauthorized access to computer systems.

- The costs associated with a privacy breach, such as consumer notification, customer support and costs of providing credit monitoring services to affected consumers.

- The costs associated with restoring, updating, or replacing business assets stored electronically.

- Business interruption and extra expense related to a security or privacy breach.

- Liability associated with libel, slander, copyright infringement, product disparagement or reputational damage to others when the allegations involve a business website, social media, or print media.

- Expenses related to cyber extortion or cyber terrorism.

- Coverage for expenses related to regulatory compliance for billing errors, physician self-referral proceedings and Emergency Medical Treatment and Active Labor Act proceedings.[68]

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[64] PartnerRe, "Cyber Liability Insurance Market Trends Survey" (October 27, 2015) available at http://www.partnerre.com/opinions-research/cyber-liability-insurance-market-trends-2015-survey#.Vw_1RE32Z9A.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] National Association of Insurance Commissioners Cyber Security Overview, available at http://www.naic.org/cipr_topics/topic_cyber_risk.htm.

Given the fact that cyber insurance policies are not standardized, it is important to review the terms of the cyber liability policy before purchasing this type of coverage. In conducting this review, the following are some of the primary issues one seeking coverage should keep in mind:

1) **Insuring Agreements.** The major carriers offer many different forms of cyber insurance. The variance between these forms can determine whether separate grants of coverage such as data loss, business interruption, privacy notification, credit monitoring, reputational response, and cyber extortion are covered. When considering a particular policy form, a policyholder should be careful to ensure that coverage under the particular cyber liability policy fits the particular company at issue. For example, cyber extortion may be a concern for companies operating with a large public profile, while it may be an inconsequential risk to others.

2) **Policy Limits, Retentions, Deductibles.** In assessing a cyber policy, one should assess the number of retentions or deductibles that must be satisfied to entitle the insured to coverage and the extent to which the policy is governed by single or aggregate limits.

3) **The Insured.** The "wrongful acts" definitions in these policies should be broadly stated to include not only the conduct of the insured, but anyone for whom the insured may be liable or a service provider or contractor responsible for the insured's computer systems, networks, or website.

4) **Trigger.** Cyber policies are typically written on a "claims made" basis, and many of these policy forms will include retroactive dates requiring the underlying "wrongful act" to occur after a specific date. Thought should be given to this retroactive date in the context of potential liability, as prior acts coverage can usually be obtained for an additional premium. Moreover, loss-type cyber policies are sold on the market, but they are more expensive. However, the expense may be worth it, given that there is little authority on the subject of the timing of cyber risk claims and losses.

5) **Claim.** Cyber policies address the definition of "claims" in a similar manner to a D&O or E&O policy. When negotiating these provisions, policyholders should seek to include as broad a definition of this term as possible. For instance, an ideal policy would include, tolling agreements, demands for mediation or arbitration, other dispute resolution processes, appeals, and regulatory investigations of insured persons or organizations.

6) **Damages.** One should ensure that the definition of "damages" or "loss" in a cyber liability policy includes amounts paid for defense costs, settlements, judgments, and pre- and post-judgment interest. While most fines are excluded, policies should cover amounts ordered to be paid under HIPAA, HITECH, the GLBA, and state privacy and notification laws. One should also ensure that policies will cover both corporate and individual clients, as some policies only provide coverage for damages to natural persons.

7) **Coverage.** There are a wide variety of coverage packages available, so policies must be carefully reviewed to ensure that certain risks are covered. If your business or firm is at risk for the theft of intellectual property, care should be given to evaluating the exclusions and coverage provisions governing such property. Indeed, many cyber policies exclude coverage for claims arising out of misappropriation or infringement of trade secrets, copyrights, trademarks, patents, or other intellectual property. As another example, if your company accepts payment by credit card, you will need to examine those provisions carefully, as some policies provide much broader protection than others for this type of liability. You will also want to insure that the policy protects information in the care of third parties or on unencrypted devices.

8) **War Exclusions.** Some cyber policies aim to exclude coverage for loss arising from claims attributable to war, invasion, acts of foreign enemies, hostilities, and warlike operations. Given the loose language of these exclusions and the potential for certain cyber breaches to be viewed as originating from a foreign source, these policy provisions should be carefully considered.[69]

ii. Liability Policies

Liability policies, including commercial general liability (CGL) coverage, directors and officer's liability (D&O) coverage, or professional liability/errors and omissions (E&O), have been interpreted to provide coverage for cyber events in certain contexts. For instance, CGL policies have been found to provide coverage for cyber-related liability involving data loss or business interruption in some jurisdictions,[70] while other jurisdictions have excluded liability on the basis of an absence of "physical injury" to "tangible property."[71]

For some companies, D&O and E&O policies may provide a source of coverage from cyber related incidents. For instance, some D&O policies would probably cover cyber breaches that result in shareholder derivative actions against insured officers and directors. Similarly, E&O coverage may cover insured persons for covered wrongful acts committed in rendering or failing to perform particular professional services.

In response to cases extending cyber coverage to certain liability policies, carriers have moved quickly to add provisions excluding this type of liability. For instance, ISO recently promulgated endorsement (CG 21 06 05 14), excluding coverage "arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information."[72] In excluding this liability, carriers hope to push insureds into purchasing cyber liability coverage to cover those risks.

iii. Commercial Property Policies

Commercial property insurance may also provide an avenue of recovery in cases where parties can demonstrate a loss of tangible physical property, such as a computer or other electronic hardware.[73] This becomes particularly interesting when a cyber breach results in the destruction of actual physical property.

Although there are not many examples, it is quite conceivable that hacking into an electronically controlled device could lead to substantial property damage. For instance, it is not hard to imagine the damage that could be caused if one were to hack into a moving vehicle or, even worse, a nuclear power plant. Interestingly, the cyber liability policies being issued today do not cover this type of property damage. Thus, as insurers seek to exclude cyber-related property damage and bodily injury damages from policies that are generally designed to cover those risks, cyber coverage will have to grow to fill the vacuum.

6. Bottom Line

Cyber liability is a very real risk that our firms and clients face, and the damages related to those risks can be astronomical. In order to have adequate protection against the associated liability, law firms and businesses—where practical—should seek to protect themselves with solid breach-handling procedures and insurance to cover liability when those procedures fail. It is the writer's hope that the advice in this article will help provide guidance to those seeking to affect those ends.

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[69] *See* Riley, Michael and Robertson, Jordan, "China-Tied Hackers That Hit U.S. Said to Breach United Airlines," available at http://www.bloomberg.com/news/articles/2015-07-29/china-tied-hackers-that-hit-u-s-said-to-breach-united-airlines.

[70] *See, e.g., Eyeblaster, Inc. v. Fed. Ins. Co.*, 613 F.3d 797 (8th Cir. 2010).

[71] *See generally, e.g., Sony Comput. Entm't Am., Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007 (9th Cir. 2008); *see also Union Pump Co. v. Centrifugal Tech., Inc.*, No. 05-0287, 2009 U.S. Dist. LEXIS 86352 (W.D. La. 2009) (data breach losses not covered because electronic data losses specifically excluded from CGL policy).

[72] A full copy of this endorsement can be found at http://www.independentagent.com/Education/VU/SiteAssets/Insurance/Commercial-Lines/CGL/Endorsements/WilsonDataBreach/CG21060514.pdf.

[73] *See, e.g., Greco & Traficante v. Fid. & Guar. Ins. Co.*, No. D052179, LEXIS 636, at *1 (Ct. App. Jan. 26, 2009).

2016 Winter Seminar

Hotel Madeline – January 27-31, 2016 – Telluride, CO

The 2016 TADC Winter Seminar was held jointly with the Louisiana Association of Defense Counsel at the magnificent Hotel Madeline in Telluride, Colorado, January 27-31, 2016. **Joe Hood** with the El Paso law firm of Windle Hood Norton Brittain & Jay, LLP, served as Program Chair. The program featured practical topics for the practicing litigator. Members enjoyed 8.25 hours of CLE and fresh powder every day!

A full classroom

Christy Amuny

Heather & Robert Sonnier

Andrea & Jim Hunter

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2016 Winter Seminar

Ricky, Stacey & Sophie Chrisler with Pam & Madison Madere

Jennie Knapp & Wendy Ciolino with Nick Knapp & Dane Ciolino

Ileana & Victor Vicinaiz with Charlie Madere

Lisa Richard with Belinda & John Arambula and family

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A Past President's Perspective

Richard Grainger, The Law Offices of Richard Grainger, Tyler, TADC President – 1976-1977

Richard Grainger was born, raised and currently resides in Tyler, Texas. He graduated from John Tyler High School and attended both undergrad and law school at The University of Texas at Austin. He received his BBA in 1957 and his LLB in 1959. He has two sons, Rick and Greg, and one daughter, Cindy, who is deceased. He married Tommy Fontenot in 2013. Richard's primary area of practice is insurance and corporate defense in personal injury cases. He runs The Law Office of Richard Grainger and currently limits his practice to all types of mediation (except family law matters.) He is a certified mediator, ABOTA member and a Past President of the U.S. District Court, Eastern District of Texas. Richard served as President of TADC in 1976-1977.

Q. What made you want to become a lawyer?

A. Since I was a young boy all I have ever wanted to do was become a lawyer, so I achieved my childhood dream.

Q. Most rewarding thing about being a lawyer?

A. Client satisfaction.

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

A. My favorite book is ***To Kill a Mockingbird*** and I am currently reading ***The Accidental Super Power*** by Peter Zeihan and ***The Life We Bury*** by Allen Eskens.

Q. What is your favorite sport and team?

A. My favorite sport is football and my favorite team is my Alma Mater, The University of Texas Longhorns.

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

A. My favorite vacation destination has to be New Zealand and Australia.

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

A. Ministry.

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

A. Ranger Insurance Company vs. Peden and Guinn; The Supreme Court of Texas changed the law as to the insurance companies' responsibilities for the action of the defense attorney. The Supreme Court has now overruled their own case.

Pool vs Ford Motor Company; The Supreme Court of Texas for the first time announced the grounds upon which it would review a finding by the court of appeals as to the sufficiency of the evidence to sustain the lower courts judgement. This is still good law.

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

A. I have been a member of TADC for over 50 years.

Q. Why did you join TADC?

A. Because I was a defense lawyer and I wanted to fellowship with other attorneys representing the same interest.

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

A. TADC has had a very positive impact on my career in that it has allowed me to network with outstanding attorneys across the State of Texas. The association honored me by permitting me to serve as its President in 1976.

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. At the time I was called the "Paper President" because I flooded the association with more information than had ever been done before. This was done without the benefit of today's technology.

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. The lack of civility and the impulse of some defense attorney to churn or bill a file for monetary purposes.

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

A. It has grown and prospered and has also become a very respected association of high caliber attorneys.

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

A. Continue with its process of training young lawyers, keeping abreast of what is happening in the legislature and continuing with the good work it is currently doing.

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

A.
1. Listen
2. Prepare
3. Execute

****

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(*Deceased)

2016 Spring Meeting

Loews Vanderbilt – April 27-May 1, 2016 – Nashville, Tennessee

The TADC held its 2016 Spring Meeting in Nashville, Tennessee from April 27-May 1, 2016. The weather was Chamber of Commerce and the Loews Vanderbilt provided the perfect setting for a fantastic meeting!

Chantel Crews, with Ainsa Hutson Hester & Crews, LLP, El Paso and **Trey Sandoval** with MehaffyWeber, PC in Houston did a masterful job as Program Co-Chairs of the meeting. The program included many high profile speakers including **Judge Xavier Rodriguez**, **Retired Judge Robert Dinsmoor** and Sony Music attorney **Matthew Adams**. Topics ranged from Construction Defense and Effective Powerpoints at Trial, to Electronic Discovery. A fantastic presentation of an actual Voir Dire was one of the highlights.

Michael Ancell & Chantel Crews Ancell with Eddie & Rachel Moreno

Kyle Briscoe, Michele Smith & Doug Rees

Jeff & Lisa Ryan

Mike Hendryx, Elizabeth O'Connell & Greg Perez

Bill Bogle & Max Wright

Ileana Vicinaiz, Christina Huston & Victor

2016 Spring Meeting

Reagan & Gina Rees, Judge Cynthia & Don Kent, Jeff & Lisa Ryan

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2015 Amendments to the Federal Rules of Civil Procedure

By: W. Heath Hendricks
Riney & Mayfield, LLP, Amarillo

The most recent amendments to the Federal Rules of Civil Procedure went into effect on December 1, 2015, and govern in all pending proceedings (insofar as just and practicable) and proceedings commenced after this date. They are the most significant amendments to the Rules in more than 20 years. The following chart summarizes notable amendments to the Rules:

RULE	SUMMARY OF 2015 AMENDMENTS TO FRCP
1	Both the courts *and the parties* are given responsibility "to secure the just, speedy, and inexpensive determination of every action and proceeding." The 2015 Advisory Committee Notes emphasize the parties "share the responsibility to employ the rules" and "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay."
4(d)	New forms are appended to Rule 4 addressing waiver of service and the consequences for not waiving service, namely the assessment of costs for refusal to waive service.
4(m)	The time for service of a summons and complaint is reduced by 30 days, from 120 days to 90 days after the complaint is filed.
16(b)	Rule 16(b)(1) no longer provides for scheduling conferences by "telephone, mail, or other means." The 2015 Advisory Committee Notes encourage "direct simultaneous communication" in person, by telephone, or by more sophisticated electronic means. The time for a court to issue a scheduling order is reduced by 30 days. It is now the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. Scheduling orders may now include: • an order governing preservation of ESI; • agreements for asserting claims of privilege and work-product protection under FRE 502; and • an order requiring a conference with the court before any discovery motion.
26(b)	Rule 26(b)(1) now mandates that discovery be relevant to any party's claim or defense and PROPORTIONAL to the needs of the case based on the considerations outlined in revised Rule 26(b)(1).

RULE	SUMMARY OF 2015 AMENDMENTS TO FRCP
26(c)	Rule 26(c)(1)(B) now includes a cost allocation provision which allows the court to issue cost-shifting orders for certain discovery.
26(d)	Rule 26(d)(2) now permits requests for production to be sent more than 21 days after that party has been served, even if this is before the Rule 26(f) conference. The time to respond to Rule 34 requests for production served before the Rule 26(f) conference is 30 days after the Rule 26(f) conference.
26(f)	Rule 26(f)(3) now requires the discovery plan to state the parties' positions regarding the preservation of ESI.
30-33	Rules 30-33 now take into account the proportionality requirement of Rule 26(b)(1).
34(b)	Rule 34(b)(2) now requires objections be stated "with specificity" and indicate whether any responsive material is being withheld on the basis of the objections. Further, responses must state whether copies of documents and/or ESI will be produced rather than allowed for inspection, and if they are to be produced, production must occur within the time specified for inspection or another reasonable time to be specified.
37(e)	Rule 37(e) focuses on the preservation and loss of ESI. It addresses the measures the court may employ if ESI that should have been preserved is lost and cannot be restored or replaced.
55	Rule 55 clarifies that a default judgment that does not dispose of all of the claims among all parties is not a final judgment, unless so directed by the court, and thus may be revised by the court until final judgment is entered.
84	Deleted

Rule 26(b): Proportionality

The explosion in the volume of ESI, an ill-defined duty to preserve, and broad discovery under which the producer is responsible for costs of production has resulted in years of excessive and unnecessary discovery and demands for over-preservation of data. Three previous Civil Rules Committees in three different decades (1983, 1993 and 2000) all reached the same conclusion as the Committee that prepared the 2015 amendments – proportionality is an important and necessary feature of civil litigation in federal courts. Yet one of the primary conclusions of comments and surveys at meetings where the 2015 amendments to the Rules were discussed is that proportionality is lacking in too many cases. The 2015 Advisory Committee Notes to Rule 26 explain that the amendment to Rule 26(b) is intended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse" by emphasizing the need to analyze proportionality before ordering production of relevant information.

The amendment to Rule 26(b) has the potential to significantly impact the scope of

civil discovery. It eliminated the former "reasonably calculated to lead to the discovery of admissible evidence" language which was often used to justify a broad approach to discovery in favor of an emphasis on the parties' obligation to consider proportionality throughout the discovery process. Under Rule 26(b) (1), information is discoverable only if it is relevant to the party's claim or defense and "proportional to the needs of the case," given the following factors:

(1) the importance of the issues at stake in the action;
(2) the amount in controversy;
(3) the parties' relative access to relevant information;
(4) the parties' resources;
(5) the importance of the discovery in resolving the issues; and
(6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

In the 2015 Year-End Report on the Federal Judiciary, Chief Justice Roberts described the amendments as "significant change" and stated that they "address the most serious impediments to just, speedy, and efficient resolution of civil disputes." 2015 Report at 4-5. He noted that the amendment to Rule 26 "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Id. at 6.

District courts are taking into account the renewed emphasis on proportionality under revised Rule 26(b). *See, e.g.*, *Wilmington Trust Co. v. AEP Generating Co.*, No. 2:13-CV-1213, 2016 WL 860693, at *2-3 (S.D. Ohio Mar. 7, 2016) (finding that plaintiff's discovery requests sought relevant documents but were not proportional to the needs of the case); *Vaigasi v. Solow Mgmt. Corp.*, No. 11-CV-5088, 2016 WL 616386, at *13-15 (S.D.N.Y. Feb. 16, 2016) (finding that plaintiff's numerous document requests were not proportional to the needs of the case); *Henry v. Morgan's Hotel Group*, No. 15-CV-1789, 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016) (finding that the discovery sought in subpoenas to plaintiff's non-party former employers was not proportional to the needs of the case and noting that language "long relied on by counsel to seek wide-ranging discovery has been eliminated"); *Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-CV-4057, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (stating that "[n]o longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence…the old language to that effect is gone" and, further, a party seeking discovery of relevant information must show the discovery is proportional to the needs of the case).

Rule 37(e): Remedies for Loss of ESI

Corporate legal departments will likely welcome the amendment to Rule 37(e). It addresses the sanctions which courts may impose for ESI spoliation, and clarifies the circumstances in which they may be imposed. It permits the most serious sanctions only when there is proof of "intent to deprive" a party of the use of ESI in the course of the case.

The amendment to Rule 37(e) applies only to lost ESI, not lost evidence in general. The old Rules did not provide a uniform standard for courts to apply when determining sanctions for loss of ESI. The purposes of the amendment to Rule 37(e) are to:

(1) establish a uniform national standard for sanctions;
(2) avoid punishing meaningless loss of ESI;
(3) emphasize the avoidance of over-preservation;
(4) provide *de facto* safe harbor for reasonable steps; and
(5) emphasize perfection is not required and proportionality is to be considered.

The amendment to Rule 37(e) presents a three-part balancing test to determine if ESI was properly preserved. The test includes a genuine safe harbor for taking timely "reasonable steps" to preserve ESI. If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

a. presume that the lost information was unfavorable to the party;
b. instruct the jury that it may or must presume the information was unfavorable to the party; or
c. dismiss the action or enter a default judgment.

The flowchart appended to this article summarizes the test which must be applied before sanctions may be imposed for lost ESI.

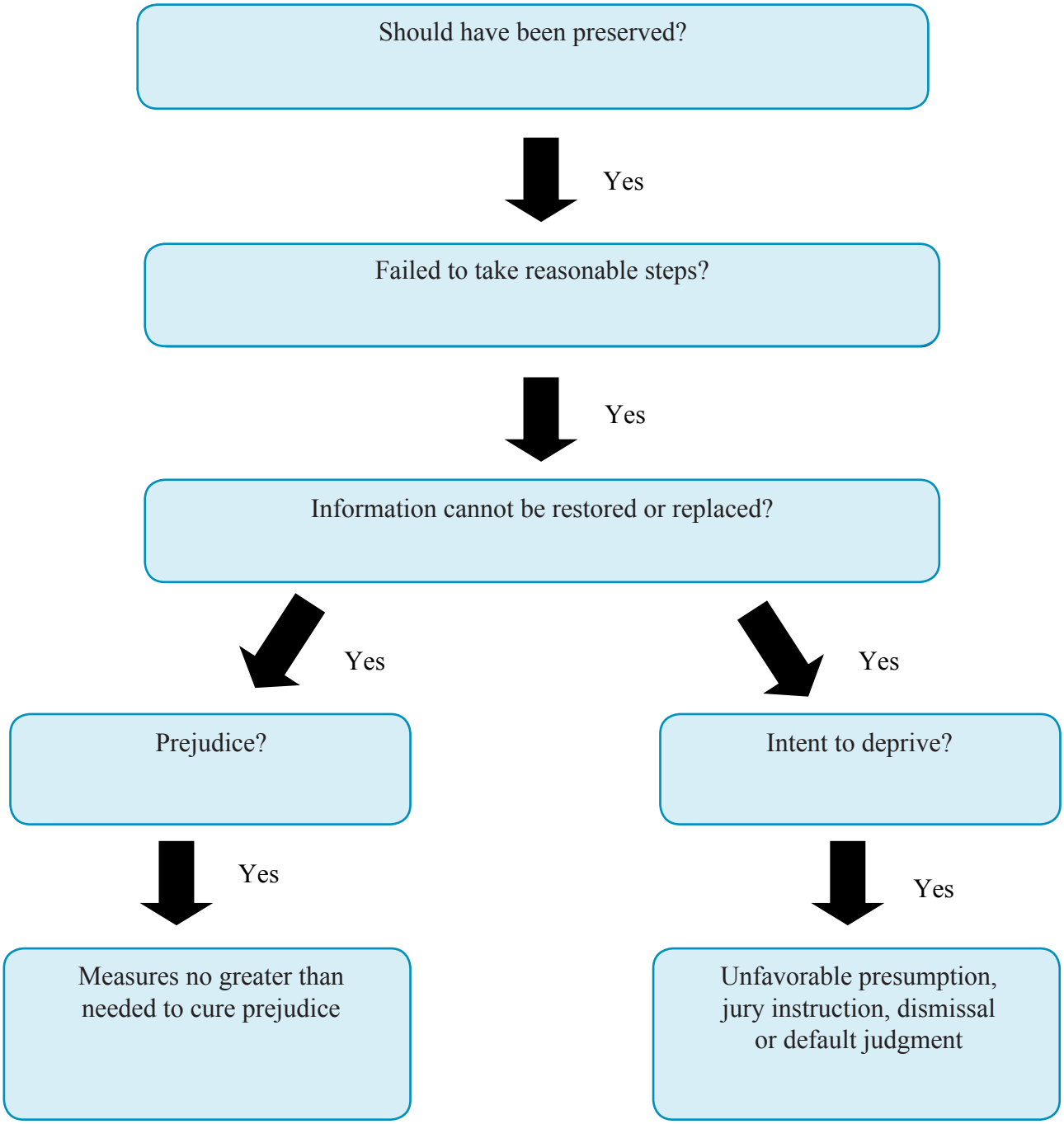
Only upon a finding of prejudice due to lost ESI may the court impose remedies to cure that prejudice, but nothing more. The most serious remedies may be utilized only if the court finds an "intent to deprive" the harmed party of the lost ESI. It is important to note that findings of prejudice and findings of intent to deprive are separate, and satisfying the prejudice finding is not necessary to move for an intent-to-deprive finding.

Federal courts have already started to implement the amendment to Rule 37(e). *See, e.g.*, *Living Color Enter., Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *4-6 (S.D. Fla. Mar. 22, 2016) (finding that failure to turn off the automatic text message deletion setting was mere negligence and did not constitute an "intent to deprive" sufficient to justify adverse inference instruction); *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924, 2016 WL 792396, at *3-6 (E.D.N.Y. Feb. 26, 2016) (denying request for adverse inference instructions for ESI spoliation in absence of bad faith "intent to deprive"); *Ericksen v. Kaplan Higher Educ., LLC*, No. RDB-14-3106, 2016 WL 695789, at *1 (D. Md. Feb. 22, 2016) (rejecting request for dismissal as a sanction for spoliation because amended Rule 37(e) requires remedies "no greater than necessary to cure the prejudice").

Conclusion

The 2015 amendments to the Federal Rules of Civil Procedure present both courts and parties with the opportunity to limit overuse and abuse of the discovery process by focusing on the renewed emphasis to implement reasonableness and proportionality. Defense attorneys should endeavor to accomplish the purposes of the amendments by (i) challenging parties' efforts to overreach in discovery, and (ii) encouraging courts to enforce the amendments' renewed emphasis on reasonableness and proportionality throughout the discovery process.

Rule 37(e) Flowchart



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Potential Pitfalls of LinkedIn Endorsements and Other Social Media

By: Rachel Moreno
Kemp Smith LLP, El Paso

WHAT IS SOCIAL MEDIA?

I started this process asking myself a basic question: how would I define social media? My gut starting point was something along the lines of, "an online exchange of social messages." But of course, that's much too narrow of a definition. So I did what any responsible researcher would do and consulted Wikipedia. Wikipedia defines social media as "the social interaction among people in which they create, share or exchange information and ideas in virtual communities and networks." This article will only discuss a handful of the literally dozens of various social media platforms in our world today.

The "Big 5" of social media, according to a 2014 Advocate article, includes Facebook, Twitter, Pinterest, Google+ and the first-billed star of our show, LinkedIn. (I think that list has probably changed since the article was published.) We won't discuss Pinterest or Google+ here because, at least for now, they do not have much of a presence in the legal realm. However, we will address the other three and also include blogs, which are rapidly gaining momentum in the legal world.

Facebook

When Facebook broke onto the scene in 2004 (and when I heard of and joined it in 2006), most of us had never even heard the term "social media" or "social networking." Even though social networking had been going on for about a decade already via AOL instant messenger (remember that one?); online communities like AOL and Yahoo!; web logs, or blogs, as they came to be known and are now referred to; and various other forms; it was not until Mark Zuckerburg created Facebook that social networking became enough of a movement to earn its own moniker.

Facebook began as a way for college students to join a network within their university to connect with fellow students, share class schedules and notes, and share personal information. In less than ten years, it evolved into a worldwide network of "friends" who can share photos, statuses, messages, webpages, news stories, and, most importantly, cat videos, with the people they care about (or, with people they don't care about or know at all).

Twitter

Twitter was created in 2006 as a 140-characters-or-less way to share yourself with the world. Using Twitter, or "tweeting," became the fastest way a person could get a little bit of information out to a large group of people (before group text messaging via mobile device was easily done). In fact, news spread so quickly on Twitter with users' ability to "retweet" messages tweeted by others, that people started hearing about news online via Twitter before news stations even had a chance to issue a breaking news bulletin online. For instance, I first heard about the death of Osama bin Laden via Twitter. Social media and Twitter, specifically, were credited in part as contributing to the Arab Spring of 2011 in Egypt and Tunisia.

Contributing to Twitter's rapid spread of information was its use of trending topics and hashtags. Hashtags are a way for a topic to be designated in the tweet so that people tweeting could identify others tweeting about the same subject matter. Trending topics identify hashtags and subject matters being discussed by the greatest amount of people in a given area or even worldwide. Trending topics allow users to easily see what the most people are talking about at any given moment. Hashtags allow users to find other people talking about a subject, regardless of the subject's proliferation through the Twitterverse.

Blogs

Blogs are, in my opinion, an often over-looked form of social media. Other forms, like Facebook, Twitter, Pinterest and Instagram, showcase such a rapid exchange of information that it is easy to identify them as a social media platform. A blog operates a little bit more subtly but no less socially than the other platforms. Blogs offer their users an opportunity for more than a mere tidbit of information exchange at a time, like Facebook and Twitter. Instead, a blogger can and often will present large swaths of information; including photos, anecdotal accounts, social and political commentary, videos, mp3s... the list is endless; at a time that has to do with a certain subject-matter.

While platforms like Facebook and Twitter seemingly encourage a social snapshot of the user's life (140 characters or less for Twitter, remember), a blog allows the user's subject matter of choice to receive the attention the user believes it deserves, while also allowing the user virtually endless creative license to convey the information. And, just like the other platforms, blogs allow the communication to go two ways. Blog readers can follow the blogs they like, comment on blog entries, "like" blog entries, and share blog entries.

LinkedIn

LinkedIn is a social media platform devoted exclusively to professional networking. Users "connect" with others via, you guessed it, "Connections." LinkedIn also shows potential connections based upon the connections a user already has, in a way that is similar to Facebook's suggestions of persons "you may be friends with." LinkedIn is, at its core, an online curriculum vitae that allows users to update in relative real-time their professional developments. There is a summary section that is a sort of "at a glance" version of your professional profile. You also have the ability to import your entire resume and professional employment history, as well as your education and professional experience.

Much of the interaction that occurs between users on LinkedIn, aside from being able to view updates to a user's profile, occurs when users endorse each other for particular skills. For example, I have listed commercial litigation as a skill on my LinkedIn profile and have been endorsed as having that skill by some of my colleagues at the law firm I worked at previously.

Users also have the ability to share updates which are then published to their connections, similar to the Facebook status update. At its core, LinkedIn encourages professional networking between colleagues both within and outside of a user's field, which allows users to find other connections quickly and easily based upon the connections he or she already has.

THE BASICS OF SOCIAL MEDIA AND LAW PRACTICE

At this point, you may be asking yourself, "What role can social media play in my practice?" The answer is: a big one, so much so that the Texas Bar Journal devoted basically an entire issue to social media in 2013. The Texas Young Lawyer's Association created a guide to social media for lawyers in November of 2013, which was headed by its 2013 President, Kristy Blanchard. It was created specifically to educate attorneys about the role of social media in law and how to avoid the veritable cornucopia of ways to get in trouble in online socializing.

Of course, beyond getting in trouble through social media, attorneys can and do use social media to advance their careers and their practices in a number of creative ways. Solo practitioners, Big Law firms, even judges, have and use social media as a platform to share their practices with the world. Much, if not all, of early social media was devoted solely to personal use, whereas in 2013, for example, 78% of American Lawyer's top 200 law firms in the United States published blogs. Those that did, on average, rose in rankings from the previous year as well as experiencing increased revenue compared to those who did not.

Much of this growth can apparently be attributed to the increased levels of trust that clients and potential clients place with lawyers who can answer the questions they have about, for example, the Affordable Care Act, before they are even retained for business. Additionally, it brings a level of personality and humanity to a profession that has, at times, come across as intimidating. Engaging in social media has also given attorneys who otherwise might be in a seemingly isolated practice the ability to join an extensive online discussion about their field. In doing so, many are able to expand their knowledge and, therefore, their practice, through the power of digital networking.

Social media offers lawyers and law firms the ability to reach an audience much larger than their existing client base or geographic locale. A presence on the internet means the potential for global exposure. One report published in 2013 indicated that nearly 85% of U.S. law firms use social networking as a marketing device. There is no question that social media can be a valuable tool

for lawyers and law firms when done the right way. Blatant self-promotion, or "push" marketing, rarely accomplishes the task. Instead, thoughtful dissemination of articles discussing emerging issues related to one's area of practice can attract hundreds, if not thousands, of new followers to a user's profile, resulting in an increase in both reputation and credibility as well as, hopefully, business.

The "why" of using social media in your practice may be just as important as the "how" we just discussed. In 2010, a Nielson survey revealed that people spend an average of 22.7% of their time online devoted to social media. That number was up from only 15.8% in 2009, and has undoubtedly increased substantially in the four years since the survey was taken. With over a billion Facebook users and well over half a billion Twitter users, it is obvious that getting the attention of a desired audience may be best accomplished via social media, as long as it is done responsibly and ethically. Unfortunately, that is not always as straight forward as it may seem.

AVOIDING THE PITFALLS OF SOCIAL MEDIA

The meat and potatoes of this article is how to avoid getting into trouble using social media in your practice. It can be done with relative ease as long as the user is mindful of the ethical rules that are implicated by engaging in social media both personally and professionally. An important thing to remember is that ethical rules vary from jurisdiction to jurisdiction and the jurisdiction where you practice governs your social media interactions (and if you practice in more than one jurisdiction, your social media presence will have to comply with both). The biggest issues related to attorney conduct online seem to involve misleading practices by attorneys and their agents in social media and unethical marketing by attorneys via social media.

Misleading others and misrepresenting oneself in social media

The genesis of this paper arose out of a post on a blog from 2012. The title of that entry was "Do LinkedIn Endorsements Violate Legal Ethics?" and discussed how casual endorsements of attorneys' skills might constitute a misleading claim about the attorneys' services. Specifically, ABA Model Rule 7.1 proscribes a lawyer from making false or misleading claims about his or her services.

When LinkedIn introduced endorsements in September of 2012, users were given the ability to "endorse" the skills an attorney has attributed to him or herself as well as being able to attribute additional skills to the lawyer. For example, I have listed "commercial litigation" as a skill on my LinkedIn profile, which has been endorsed by some people I currently or have previously worked with. In addition, although I did not list it as a skill explicitly, others have endorsed me for things like writing and legal research, which they added as skills of mine on their own. I am careful to censor the endorsements made public on my profile as skills that I actually possess, and, to date, no one has attempted to endorse me for something of which I have zero skill.

The endorsements become an issue when, for example, someone tries to endorse my skills in criminal law or family law, or some other area of law I know virtually nothing about. If I accept these endorsements, my LinkedIn profile would, for all practical purposes, violate Rule 7.1 as a misleading claim about the types of services I am capable of performing.

The plot thickens further when someone I do not directly know and perhaps am only "connected with" on LinkedIn endorses me for a skill I actually have, but they have not seen that skill first-hand. There seems to be some discrepancy on the permissibility of these types of endorsements. One camp feels that if the endorsement is true and not given in quid pro quo for another endorsement, it is acceptable since it contains no false statement. Another group feels even more strongly that these types of endorsements cannot be attributed to the attorney since they are not a statement made by the attorney, so long as the endorsement is actually true when accepted by the attorney.

Some states' rules, like California, require attorney endorsements on LinkedIn to carry a disclaimer as a testimonial. Additionally, LinkedIn users have the ability to "hide" an endorsement that is not accurate so it cannot be seen by viewers of his or her profile.

When an inaccurate endorsement is accepted by an attorney user, however, the attorney is effectively allowing the communication of misleading information about his or her practice, which runs contrary to Model Rule 7.1.32.

In Texas, Rule 7.02(4) also prohibits comparing one lawyer's services to another unless substantiated by verifiable objective data. A client who proclaims, via social media, that you are the best medical malpractice attorney in town should be asked to revise his opinion unless there is objective data to prove the contention (which there likely isn't).

Rule 8.4 of the ABA Model Rules is also implicated in the discussion of misrepresentation and dishonesty. That rule states that lawyers must avoid "dishonesty, fraud, deceit or misrepresentation" in all facets of their professional and personal lives. The breadth of this rule, on its face, requires attorneys to exercise extreme caution in what they post online, even on their personal websites.

For example, one New York personal injury attorney and social blogger posted an April Fool's hoax that some people claimed should subject him to prosecution under the ethical rules. In other words, it is better to err on the side of caution with respect to anything that might be construed as dishonest if you are an attorney participating in social media.

Another issue related to misleading oneself on social media relates to the conduct of attorneys with judges, witnesses, parties and jurors. For example, multiple legal jurisdictions including Pennsylvania, Oregon and New York have condemned attorneys who have misrepresented themselves (or an agent of the attorney has misrepresented him or herself) in order to gain access to the social media accounts of potential jurors, adverse parties, or witnesses.

That is not to say that attorneys are not allowed to access the public profiles of jurors, parties or witnesses in building their case and/or preparing for trial. In fact, the State Bar of New York has explicitly stated that lawyers "may look at the public portion of a person's social media accounts, even if the individual has counsel in the matter, and even for the purpose of uncovering impeachment material."

ABA Model Rule 1.1 has also been discussed as a source encouraging use of social media and "digital digging" in meeting the standard required for keeping up with "relevant technology." Moreover, some bar associations have said an attorney may request access to the private portions of a party's or witness's profile as long as the attorney uses her real name and profile when sending a "friend" request.

Jurors pose a particularly interesting issue for digital digging. While it appears several jurisdictions allow a lawyer to access a juror's social media information, it must be done in a way that the attorney has no communication whatsoever with the juror. This can be especially difficult for certain social media platforms, like LinkedIn, that notify a user of persons who have viewed their profile since their last log in. While due diligence may require an attorney to access juror information prior to trial or in an effort to ascertain whether juror misconduct has occurred, it must be done so without the juror's knowledge that the access has occurred.

Attorney marketing and solicitation

Another potential problem attorneys face in social media are the issues surrounding what, of the content they put online, constitutes legal marketing and is subject to the ethical rules. The American Bar Association Standing Committee on the Delivery of Legal Services indicated in 2012 that it does not believe Rule 7.1 discussing Attorney Advertising applies to blogs and other social networking. Specifically, as long as a lawyer publishes something that is not commercial speech (or a misleading communication, as previously discussed herein), it is not subject to state ethics rules for lawyers. Commercial speech is speech that "beckons business" or "proposes a commercial transaction." Thus, attorney blogs that discuss issues in the law or engage in political discourse should not fall into the category of attorney marketing.

The New York State Bar Association ("NYSBA") published a "Social Media Ethics Guidelines" handbook for its attorneys, which provides an excellent reference for use by attorneys in other jurisdictions as well. Specifically with respect to marketing issues and solicitation, the NYSBA prohibits any type of solicitation through "live" communication, including instant messaging and chat-room type venues. The only exception to this is when a client initiates a request for legal services through that medium. Any response, however, must be sent through a secure, non-public format so as to preserve confidentiality.

Texas Rule 7.03(a), prohibiting "regulated telephone or other electronic contact" to solicit business may be of particular concern to attorneys using Twitter. Regulated electronic contact includes electronic communication that occurs in a "live, interactive manner," which, according to Comment 1, includes Twitter.

It appears the distinction here of what is permissible and what is not hinges on whether a Twitter user openly seeks legal representation. For instance, a user who states, "My business partner just sued me for millions" has not openly sought legal representation. A user who states, "Anyone know a good business litigation attorney?" has sought legal representation and an attorney would be allowed to contact them for purposes of soliciting business. Again, these examples are still subject to the usual exceptions, so these rules might not apply to certain prior relationships.

CONCLUSION

In summary, what you put online can rocket your business into the stratosphere or plummet you into the ethics tribunal. At the end of the day, the most important thing is to be familiar with your local jurisdiction(s)'s rules and err on the side of caution. Operate yourself honestly online, segregate your personal and professional online dealings, and, if unsure whether something violates the rules of professional conduct, don't hit the submit button.

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2016 TADC
Awards Nominations

PRESIDENT'S AWARD

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

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

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

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

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

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

FOUNDERS AWARD

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

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

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

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

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

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

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

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Macdonald Devin, P.C.
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400 West 15th Street, Suite 420, Austin, Texas 78701 **512/476-5225 Fax 512/476-5384**
Website: www.tadc.org **Email: tadc@tadc.org**

June 15, 2016

TO: Members of TADC

FROM: Clayton E. Devin, President
Michele Y. Smith, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2016-2017

OFFICES TO BE FILLED:
*Executive Vice President
*Four (4) Administrative Vice Presidents
*Eight (8) Regional Vice Presidents
*District Directors from odd numbered districts
(#1, #3, #5, #7, #9 ,#11, #13, #15, #17, #19)
*Directors At Large - Expired Terms

Nominating Committee Meeting - August 5, 2016

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

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

NOTE:

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

1.) Districts 14 & 15
2.) Districts 1 & 2
3.) District 17
4.) Districts 3, 7, 8 & 16
5.) Districts 10 & 11
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7.) Districts 5 & 6
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and a *Special Thank You* to all the Members who completed and returned the Expert Witness Follow-up Forms

EXPERT WITNESS DATABASE

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

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

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Overall Process

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

Expert Witness Service
Fee Schedule

Single Name Request

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

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

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

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

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Expert Witness Search Request Form

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

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

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

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

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

Areas of expertise: _____

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

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

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➢ ☐ **INTERNET:** o INCLUDE Internet Material o DO NOT Include Internet Material

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

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

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

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

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

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

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

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2016 West Texas Seminar

A Joint Seminar with the

TADC & NMDLA

Texas Association of Defense Counsel, Inc.
400 W. 15th Street, Suite 420
Austin, Texas 78701

PH 512-476-5225
FX 512-476-5384
tadc@tadc.org

July 29-30, 2016 ~ Inn of the Mountain Gods ~ Ruidoso, NM

PROGRAM AND REGISTRATION

Approved for 6.0 Hours CLE, including 1.0 hours ethics

Program Co-Chairs: **Leonard R. (Bud) Grossman**, Craig, Terrill, Hale & Grantham, LLP, Lubbock & **Mark Standridge,** Jarmie & Associates, Las Cruces

Friday, July 29, 2016 ***(All times Mountain Time)***

6:00-8:00pm	Opening Reception

Saturday, July 30, 2016

7:00am-9:00am	Buffet Breakfast
7:30am	Welcome & Introductions **Clayton Devin,** TADC President Macdonald Devin, P.C., Dallas **Leonard R. (Bud) Grossman**, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock **Mark Standridge,** Jarmie & Associates, Las Cruces
7:45-8:15am	APPELLATE UPDATE FOR NON APPELLATE LAWYERS, WHAT YOU NEED TO DO TO PRESERVE ERROR **Brandy Manning**, Long-Weaver, Manning, Antus & Antus LLP
8:15-8:45am	DECIPHERING PUNITIVE DAMAGES: A COMPARISON OF TEXAS AND NEW MEXICO **Elizabeth G. Hill**, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
8:45-9:15am	NAVIGATING CASES INVOLVING HIGH DAMAGES AND LOW LIABILITY **Bill Gardner**, Macdonald Devin, P.C., Dallas
9:15-9:45am	A VIEW FROM THE TRIAL BENCH TO THE APPELLATE COURT *(Ethics)* **The Honorable Mackey K. Hancock,** 7th Court of Appeals, Amarillo
9:45-10:00am	B R E A K
10:00-10:30am	UPDATE ON DAMAGES AND OTHER ISSUES IN UIM CASES **Rachel Moreno,** Kemp Smith LLP, El Paso
10:30-11:00am	LITIGATING LIKE A HOME TOWNER **Deena Buchanan**, Ray, McChristian & Jeans, P.C., Albuquerque
11:00-11:30am	KEYS TO A SUCCESSFUL MEDIATION AND PROFESSIONALISM *(Ethics)* **The Honorable Alan C. Torgerson,** (Ret.), ADR Offices of Alan C. Torgerson, Albuquerque
11:30-12:00pm	NEW MEXICO HOUSE BILL 270 AND ITS IMPACT ON HEALTH CARE PROVIDERS IN TEXAS AND NEW MEXICO **Larry Hicks,** Hicks & Llamas, P.C., El Paso
12:00-12:30pm	AN UPDATE ON UNPUBLISHED OPINIONS IN TEXAS AND NEW MEXICO **Mark Standridge,** Jarmie & Associates, Las Cruces
12:30-1:00pm	COMMON CLAIMS, REMEDIES AND DEFENSES UNDER THE UCC - ARTICLE 2 (SALES) **Sid Childress**, Sid Childress, Esq., Santa Fe
1:00-1:30pm	ARBITRATION AGREEMENTS IN TEXAS AND NEW MEXICO **Bruce A. Koehler**, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso
1:30-2:00pm	LAW AND STRATEGY IN DEPOSITIONS **Slater C. Elza**, Underwood Law Firm, P.C., Amarillo
2:00pm	ADJOURN TO ENJOY RUIDOSO

Sunday, July 31, 2016

7:00-9:00am	Buffet Breakfast

2016 TADC West Texas Seminar
July 29-30, 2016
Inn of the Mountain Gods ~ Ruidoso, NM
287 Carrizo Canyon Road ~ Mescalero, NM 88340
Ph: 800/545-9011

Pricing & Registration Options

Registration fees include Friday & Saturday group activities, including the Friday Evening welcome reception, Saturday & Sunday breakfasts, CLE Program and related expenses. This program will be approved for both Texas and New Mexico Continuing Legal Education.

Registration for Member Only (1 person)	$140.00
Registration for Member & Spouse/Guest (2 people)	$160.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE INN OF THE MOUNTAIN GODS DIRECTLY AT 800/545-9011 and reference the TADC West Texas Seminar.** The TADC has secured a block of rooms at a FANTASTIC rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block is limited***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS
June 27, 2016

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (JULY 15, 2016) to the meeting date. A $25.00 Administrative Fee will be deducted from any refund. Any cancellation made after July 15, 2016 IS NON-REFUNDABLE.

2016 TADC WEST TEXAS SEMINAR

July 29-30, 2016

For Hotel Reservations, contact the Inn of the Mountain Gods DIRECTLY at 800/545-9011

CHECK APPLICABLE BOX TO CALCULATE YOUR REGISTRATION FEE:

☐ **$140.00 Member ONLY (1 Person)**
☐ **$160.00 Member & Spouse/Guest (2 people)**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY_____ZIP_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____
☐ *Check if your spouse/guest is a TADC member*

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by June 27, 2016. This coincides with the deadline set by the hotel for hotel accommodations.

PAYMENT METHOD:

A CHECK in the amount of $_____ is enclosed with this form.

MAKE PAYABLE & MAIL THIS FORM TO: TADC , 400 West 15th Street, Suite 420, Austin, Texas 78701 OR register online at www.tadc.org

CHARGE TO: (circle one) Visa Mastercard American Express

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Card Number **Expiration Date**

Signature:_____
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400 W. 15th Street, Ste. 420, Austin, TX 78701
PH: 512/476-5225 FAX: 512/476-5384

(For TADC Office Use Only)

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TADC 2016 ANNUAL MEETING
The Worthington Renaissance Fort Worth Hotel
Fort Worth, Texas ~ September 21-25, 2016

Program Co-Chairs: George Haratsis & Brittani Rollen, McDonald Sanders, P.C., Fort Worth

CLE Approved for: 11.25 hours, including 2.75 hours ethics

Wednesday, September 21, 2016

6pm – 8pm TADC Welcome Reception

Thursday, September 22, 2016

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements
Clayton Devin, TADC President, Macdonald Devin, P.C., Dallas
George Haratsis & Brittani Rollen, McDonald Sanders, P.C., Fort Worth

7:45-8:15am *LEASE FIGHTS: HELPING OIL & GAS COMPANIES DRILL WELLS WITHOUT GETTING DIRTY*
Conrad Hester, Thompson & Knight LLP., Fort Worth

8:15-8:45am *SECTION 18.001 OF THE TCPRC: 7 THINGS YOU NEED TO KNOW*
Mike Bassett, The Bassett Firm, Dallas

8:45 -9:30am *HIPAA, HB 300 & DATA BREACH NOTIFICATION LAWS*
Heather Hughes, U.S. Legal Support, Houston

9:30-10:00am *COMMUNICATING WITH YOUR JURORS: FROM BABY BOOMERS TO MILLENNIALS*
John Proctor, Brown, Dean, Wiseman, Proctor, Hart & Howell, L.L.P., Fort Worth

10:00-10:15pm *B R E A K*

10:15-11:00am *PETITIONS FOR REVIEW: WHAT GRABS THE COURT'S ATTENTION?*
Justice Eva Guzman, Texas Supreme Court, Austin

11:00-11:30am *MEETING THE ETHICAL CHALLENGES OF JOINT REPRESENTATION (.5 ethics)*
Tom Ganucheau, Beck Redden LLP, Houston

11:30am-12:00pm *MANDAMUS CHALLENGES TO NEW TRIAL ORDERS*
Scott Stolley, Cherry Peterson Landry Albert LLP, Dallas

12:00-1:15pm LUNCHEON WITH SPEAKER: *ISSUES FACING LAW SCHOOLS AND LAW STUDENTS TRANSITIONING TO THE PRACTICE OF LAW*
Dean Andrew Morriss, Texas A&M University School of Law, Fort Worth

1:15-1:30pm *B R E A K*

1:30-2:00pm *UNDERSTANDING THE GRIEVANCE PROCESS (.5 ethics)*
Monika Cooper, Shannon, Gracey, Ratliff & Miller, L.L.P., Fort Worth

2:00-2:30pm *DISPOSITIVE ARROWS IN THE QUIVER*
Brandon Strey, Plunkett & Griesenbeck, Inc., San Antonio

*2:30-3:00*pm *AN UPDATE ON INDEMNITY PROVISIONS AND INSURANCE PROCUREMENT REQUIREMENTS IN CONSTRUCTION CONTRACTS*
Sandra Liser, Naman, Howell, Smith & Lee, PLLC, Fort Worth

3:00-3:15pm *B R E A K*

3:15-3:45 pm *ERROR PRESERVATION: WHAT DO I HAVE TO LOSE? PERHAPS THE MERITS OF THE APPEAL*
Steven K. Hayes, Law Office of Steven K. Hayes, Fort Worth

3:45-4:15pm *NLRB'S IMPACT OUTSIDE OF THE TRADITIONAL LABOR CONTEXT*
Justin Malone, Lacy, Lyster, Malone & Steppick, PLLC, Fort Worth

4:15-4:45pm *ETHICAL ISSUES THAT ARISE IN PRESERVATION AND COLLECTION (.5 ethics)*
Trenton L. Walton, U.S. Legal Support, Houston

5:00 pm - 6:00 pm
Reception
Hosted by Texas A&M University School of Law

Friday, September 23, 2016

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements

7:45-8:15am *ETHICAL SOCIAL NETWORKING (.5 ethics)*
Nick Bettinger, McDonald Sanders, P.C., Fort Worth

8:15-8:45am *TRENDING AND WINNING IN ARBITRATION*
Roland K. Johnson, Harris, Finley & Bogle, P.C., Fort Worth

8:45-9:15am *HOLD YOUR HORSES: LIVESTOCK & AG LIABILITY DEFENSES*
Kenneth C. Riney, Kane Russell Coleman & Logan, PC, Dallas

9:15-10:00am *LIVING A MEANINGFUL LIFE IN THE LAW (.75 ethics)*
Lewis R. Sifford, Sifford Anderson & Co. P.C., Dallas

10:00-10:15am *B R E A K*

10:15-11:00am *SUPREME COURT UPDATE*
Justice Debra Lehrmann, Texas Supreme Court, Austin

11:00-11:30am *CYBER SECURTY BREACHES*
Mackenzie Wallace, Thompson & Knight LLP, Dallas

11:30-11:45am TADC Business Meeting

7:00 pm - 9:00 pm
TADC Awards Dinner
Fort Worth Club

Saturday, September 24, 2016

7:00-9:00am Buffet Breakfast

Saturday free to enjoy Fort Worth

Sunday, September 25, 2016

Annual Meeting Adjourned

2016 TADC Annual Meeting
September 21-25, 2016

The Worthington Renaissance Fort Worth Hotel • Fort Worth, Texas • 200 Main Street • Fort Worth, Texas 76102

Pricing & Registration Options

Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, hospitality room, all breakfasts, CLE Program each day and related expenses. If you would like CLE credit for a state other than Texas, check the box below and a certificate of attendance will be sent to you following the meeting.

Registration for Member Only (one person) $685.00
Registration for Member & Spouse/Guest (2 people) $895.00

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Annual Meeting for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.
Spouse/Guest CLE credit for Annual Meeting $75.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE WORTHINGTON RENAISSANCE HOTEL DIRECTLY AT 800-468-3571 and reference the TADC 2016 Annual Meeting.** The TADC has secured a block of rooms at the FANTASTIC rate of $179 per night. It is **IMPORTANT** that you make your reservation as soon as possible ***as the room block will sell out***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS AUGUST 29, 2016

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) Business days prior (SEPTEMBER 7, 2016) to the meeting date. A $75.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 7, 2016 IS NON-REFUNDABLE.

2016 TADC ANNUAL MEETING REGISTRATION FORM

September 21-25, 2016

***For Hotel Reservations, contact the Worthington Hotel DIRECTLY at* 800-468-3571**

Register online at www.tadc.org or complete the form below and send it to TADC at the address listed below

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

☐ **$ 685.00 Member ONLY (One Person)**
☐ **$ 895.00 Member & Spouse/Guest (2 people)**
☐ **$ 75.00 Spouse/Guest CLE Credit**
☐ **(*no charge*) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**

TOTAL Registration Fee Enclosed $_____

NAME:_____ **FOR NAME TAG:**_____

FIRM:_____ **OFFICE PHONE:**_____

ADDRESS:_____ **CITY:**_____ **ZIP:**_____

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

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

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by August 29, 2016. This coincides with the deadline set by the hotel for hotel accommodations.

PAYMENT METHOD:

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CHARGE TO: (circle one) **Visa** **Mastercard** **American Express**

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- **Construction Litigation**
  Editor: David V. Wilson, LeClairRyan, Houston

- **Defamation/Libel/Slander**
  Editors: Bradley Bartlett & Carl Green, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso

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  Editors: Joseph Pevsner & Kathleen V. Wade, Thompson & Knight, LLP, Dallas

- **Professional Liability**
  Editor: Monika Cooper, Shannon, Gracey, Ratliff & Miller, L.L.P., Fort Worth

- **White Collar Defense**
  Lea Courington, Dykema Cox Smith, Dallas

Where ARE the Professional Newsletters/Case Updates?

In an effort to be more efficient and address the needs of the TADC membership, Professional Newsletters are available in the members' section of the TADC website, aloing with past editions, available for viewing or download at **www.tadc.org**

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CALENDAR OF EVENTS

July 29-30, 2016
TADC/NMDLA West Texas Seminar
Inn of the Mountain Gods - Ruidoso, New Mexico

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

February 1-5, 2017
TADC Winter Seminar
Beaver Creek Lodge - Beaver Creek, Colorado

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