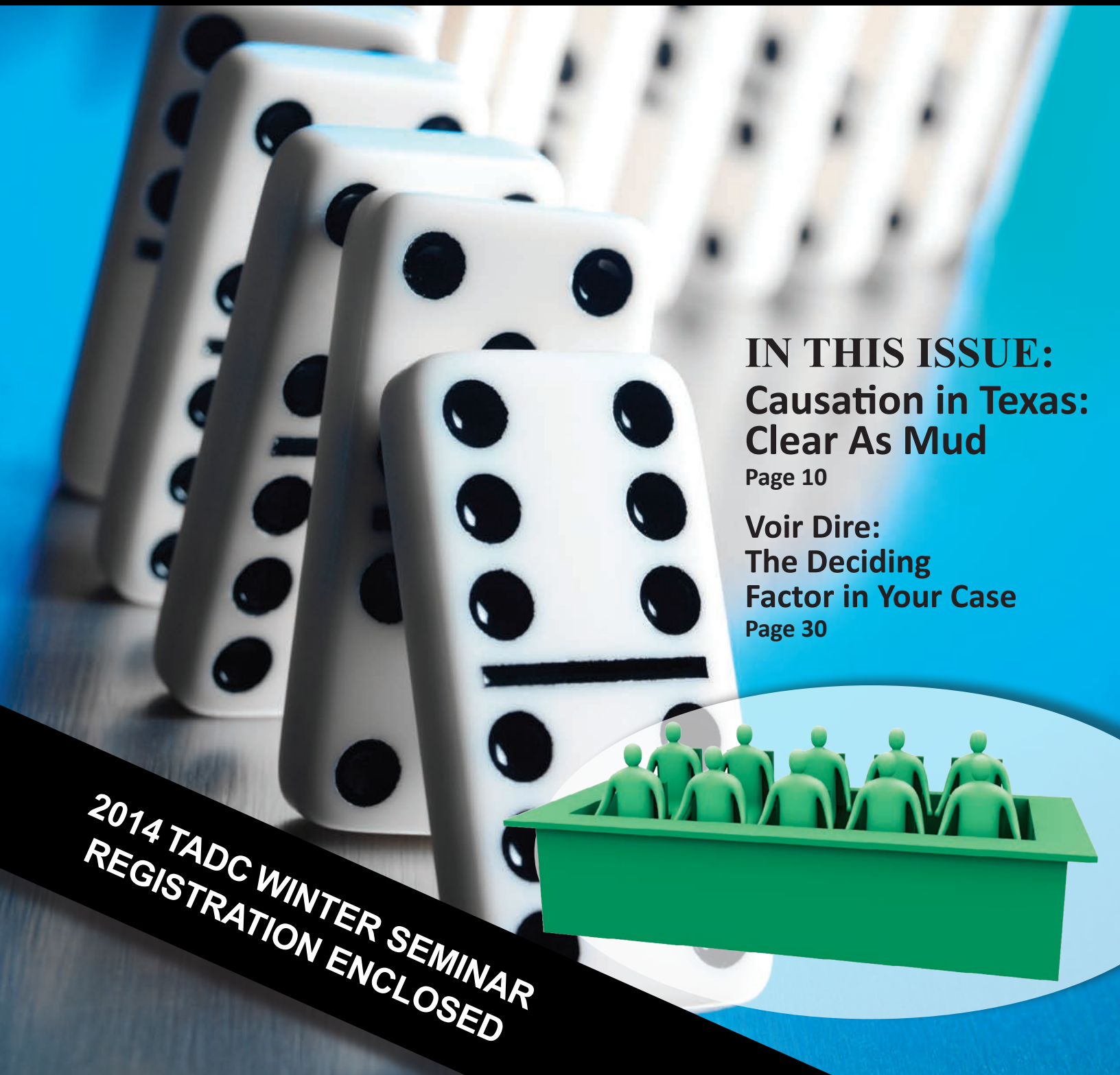
TADC

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

FALL 2013



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2014 TADC WINTER SEMINAR REGISTRATION ENCLOSED

A thousand things can go wrong out here. We can tell you which one actually did.

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TADC CALENDAR OF EVENTS

November 8-9, 2013	**TADC Board of Directors Meeting** Westin Riverwalk – San Antonio, Texas
January 24-25, 2014	**TADC Board of Directors Meeting** Radisson Town Lake – Austin, Texas
February 5-9, 2014	**TADC Winter Seminar** Elevation Resort & Spa – Crested Butte, Colorado Heidi Coughlin & Victor Vicinaiz, Co-Chairs
March 14-15, 2014	**TADC Trial Academy** Omni Colonnade – San Antonio, Texas Troy Glander & Gayla Corley, Co-Chairs
April 9-13, 2014	**TADC Spring Meeting** The Fairfax Embassy Row – Washington, D.C. Mike Morrison & Doug McSwane, Co-Chairs
July 16-20, 2014	**TADC Summer Seminar** Coeur d'Alene Resort – Coeur d'Alene, Idaho Brad Douglas & Charlie Downing, Co-Chairs
August 8-9, 2014	**West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico
September 24-28, 2014	**TADC Annual Meeting** Hyatt Hill Country Resort – San Antonio Tom Ganucheau & Mitzi Mayfield, Co-Chairs

PRESIDENT'S MESSAGE

by V. Elizabeth "Junie" Ledbetter
Jay Old & Associates, PLLC

The 2012 - 2013 TADC year closed on October 31, 2013. Dan Worthington and the 2012 – 2013 Board of Directors led TADC in state, local and national projects with thoughtful insight and actions through another year of successful outcomes. We are all looking forward to an equally successful year in 2013 – 2014.

By the time you read this article, the new board will have met and begun the hands-on work to keep TADC in the leader's role of like-minded organizations. With close to 1800 members statewide, TADC enjoys a national reputation as the largest and most engaged organization of its kind. Other states regularly contact TADC regarding their Legislative efforts, programs, publications and membership strategies.

LEGISLATIVE ACTION: Though 2014 is not a year that the legislature would normally convene to make new law, we cannot rest on TADC's successes during prior years. TADC remains dedicated to the Texas Civil Justice System and will continue to reach out to the TADC membership for evaluation and input on issues affecting your practice. TADC also expects to be called on to offer input on specific INTERIM CHARGES in the coming year.

TADC continues to be a strong, effective voice on legislative matters and we encourage you to support those efforts, not only through volunteering time and expertise, but also by contributing to the TADC PAC. We believe that there are some key legislators who will announce retirement from the lawmaking process, and TADC wants to be in a position to participate in future campaigns with meaningful access to the process. Back the PAC!

CLE Programs promise to be both substantive and interesting. We have heard repeatedly that "nuts and bolts" presentations are essential, and we expect to see a good mix of substantive law and enthusiastic presentation in all seminars this year. Look for a healthy balance between presentations by recognized and seasoned speakers and presentations by talented new members of TADC.

- **2014 Winter Seminar (February 5 – 9)** : We will be going to one of TADC's favorite locations: the charming village of Crested Butte, Colorado. You can enjoy the ski-in/ski-out amenities of Elevation Resort and Spa following morning seminars led by program chairs Heidi Coughlin (Austin) and Victor Vicinaiz (McAllen). We will be meeting in conjunction with the Illinois Defense Association. There will be Texas-only sessions and joint sessions on issues of interest for all lawyers.

- **2014 Trial Academy (March 13 – 14)**: Troy Glander and Gayla Corley will co-chair the Trial Academy in San Antonio. This seminar is the only real participation seminar that gives your young lawyers a forum for task-specific observation and individual presentation with feedback from seasoned trial attorneys. (We encourage member participation as faculty, and ask that you let us know if you are interested.) Be sure to enroll your young lawyers for this efficient and cost-effective training session.

- **2014 Spring Meeting (April 9 – 13)**: Mike Morrison (Waco) and Doug McSwane (Tyler) have scheduled a host of distinguished speakers for this meeting in Washington, DC. We are scheduled to meet during the Cherry Blossom Festival at the beautiful Fairfax Hotel, an elegant site with an intriguing history spanning more than 80 years. The Fairfax is recently renovated and located on Embassy Row near

DuPont Circle not far from many iconic landmarks of the city. Dave and Judy Pierce have agreed to serve as the Hospitality co-chairs who will offer suggestions for maximizing your time in the nation's capital.

- **2014 Summer Meeting (July 15 – 20)**: Coeur d'Alene Resort, a sophisticated, small-town jewel on a pristine mountain lake, will host TADC for a meeting in the mountains of western Idaho. Summer meetings are family friendly and offer a wide range of activities on the lake, in the beautiful national forests nearby, and even in Spokane, Washington about 30 miles to the west. A beautiful and sparsely populated section of Canada is only a few hours to the north. Glacier National Park is due east. (And surely we will all appreciate the cooler mountain temperatures come next July!) Brad Douglas (Austin) and Charley Downing (McAllen) will co-chair this meeting.

- **2014 Annual Meeting (September 24 – 28)**: TADC will hold its in-state meeting at another organization favorite, the Hyatt Hill Country Resort just outside of San Antonio. Co-chairs Tom Ganucheau (Houston) and Mitzi Mayfield (Amarillo) promise a full complement of presentations pertinent to your practice in the heart of the Texas hill country.

In addition to these wonderful meetings, TADC will continue to hold local luncheons, seminars, and other opportunities for local members to get together, exchange ideas, and enjoy the benefits of a friendly gathering. We will continue to move forward with social media initiatives. (Have you signed up for the TADC Linked-IN and Twitter sites?) The Young Lawyers Committee will continue to meet this year with the intention of learning more about the workings of TADC and of integrating themselves into active committees and projects. If you have a young lawyer who would like to participate actively in TADC, let us know and we will gladly accommodate that interest.

The Board of Directors will be meeting again next in January, 2014. If you have an idea to improve programs, publications, legislation, membership efforts, or to create a new member benefit, please contact me or your local Board Member to get your idea rolling forward to fruition.

It will be an honor and a pleasure to work with you this coming year. I look forward to visiting with you soon.

ACCESS TO JUSTICE

Pamela Madere, Chair – TADC Pro-Bono Committee

The Supreme Court Task Force to Expand Legal Services Delivery is working to increase pro bono activity and reporting among State Bar members. By reporting your qualifying pro bono and financial contributions, pro bono attorneys are helping to highlight the importance of pro bono in meeting the legal needs of indigent Texans while also providing much needed support for funding requests for legal services programs and improving the public perception of lawyers overall. To that end, pro bono reporting has now been made easier for attorneys. The State Bar has a new feature on the State Bar's website called "My Pro Bono" page, which is part of an attorney's "My Bar Page." Attorneys may now log onto www.texasbar.com/mybarpage, using their bar number and PIN or password, to report their pro bono hours. Similar to MCLE reporting, attorneys will now be able to report and track their pro bono hours and contributions cumulatively throughout the calendar year. Attorneys who report 75 hours or more of pro bono service a year will be invited to join the State Bar's Pro Bono College, which is an honorary society for legal professionals committed to pro bono. Please report your hours on "My Pro Bono" after completing a pro bono matter!

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Past President's Message

Dan K. Worthington
Atlas, Hall & Rodriguez, LLP, McAllen

Three years ago, Keith O'Connell, Tom Ganucheau and I sat down at the TADC office to discuss a three year plan. We framed our efforts in implementing a three year plan in terms of the advancement of the delivery of meaningful service to our members. We focused on a targeted legislative agenda, the delivery of more local and targeted continuing education programs, and the expansion of our publications to include the use of our website, LinkedIn and Twitter. I am thankful to report, that we were successful and a there will be a continuance and betterment of these programs by Junie, Michele and Milton over the next three years and into the future.

The success of this past year was due to the board of directors, the amicus committee and many others who volunteered their time to work on our behalf. While I am more than willing to take credit for their hard work, please look up the board member(s) from your area and take the time to give them a call and a "thank you." Bobby, Debbie and Regina our full-time staff were and will continue to be a critical component of all we are able to do as well. The next time you are in Austin, stop by the office and give them a "thank you." I will not be able to thank each of you for giving me the opportunity to do this job and for the chance to work closely with the board and our staff, but to all of you, thanks, it has been an honor.

At the beginning of the year, I predicted that this legislative year would be like those of the recent past. You may recall, that I referenced the low-budget, but moderately entertaining Bill Murray movie "Groundhog Day" as an example of the way in which this year would be a repeat of prior legislative years. Thankfully, for the very most part and in many fundamental ways, I was wrong.

At least as it applied to the civil justice system, this past session was unusual in both form and substance. As a preliminary matter, there was very little of the obnoxious tort reform measures targeted at gaming the system against all claims and claimants, regardless of merit, that we had seen in the past. Furthermore, we were able to work with the extremes on both sides of the civil justice system to fashion agreements on virtually every issue with which we were involved. Time will tell if this was an aberration or if we are seeing a shift in the way in which those with whom we regularly spar do business.

This shift could be seen across the board, but was most apparent on HB 1869 in which we were able to see a partial restoration of the "made whole doctrine" in HB 1869. A bill which found support from the TTLA, the TADC, Tex-ABOTA and the TLR. Not only did all of these organizations support the final bill, we each participated in its drafting. We saw this same cooperation in HB 1325, the inactive asbestos docket bill, HB 658, the medicare post judgment interest tolling proposal, SB 679, the CPRC 18.001 fix bill and several others. I would not have guessed it was possible and remain hopeful that the

dialogue and cooperative efforts will serve as a model as we move forward.

The foundation for this success can be found with Jay Old, David Chamberlain and Keith O'Connell whose investment of time and credibility were key to the continuing relevance of our voice of moderation and cooperation. This past session, both Pam Madere and Clayton Devin, who served as the legislative Vice-Presidents were critical to our success. A special thank you to Mike Hendryx for his work on Rep. Lewis' asbestos committee is warranted as well.

At least as it related to the Bar, our singularity in effort continued with our fight for a voluntary expedited process procedure. We reached out and were joined by the DRI, the TTLA, Tex-ABOTA, numerous local bar associations and even several sections of the State Bar. Regretfully, the Court rejected this unanimity in position and adopted a compulsory rule, but our ability to engage attorneys outside of our organization, with vastly different interests, to support and stand with us should be a template for success in the future.

Both Mitch Smith and Mike Morrison played a key role in our development of an analysis of the new expedited rules for which they received the 2012-2013 President's Award.

The efforts of Clayton, Pam, Mitch and Mike were repeated in virtually every other committee. If you have ever sat though a board meeting you would know that I can often sound like a broken record. However, this is worth repeating… Jerry Fazio "showed us the way" in delivering top-shelf CLE programs through partnerships with local bar associations. Bringing relevant CLE to you rather than to Austin, Dallas or Houston was an important part of the three year plan discussed above and Jerry helped give us a road map for success.

Continuing on our theme of success, Chantel Crews and Mark Stradley actually presided over a membership increase. For any of you who are involved in other organizations you know that membership in groups from the American Legion to Rotary and everything in between is down. It was through the hard work (and incessant pestering of Chantel and Mark) that we were able to see our membership increase. Their philosophy of "the best new member is keeping the one you already have" overlapped into all of our other committees and was a key point of emphasis.

Our publications committee, led by Milton Colia and Mark Walker also had a successful year. Milton and Mark oversaw a revamp to our website and worked with me in continuing our development of our social networking sites. We didn't necessarily understand everything we were trying to do, but the future is digital and Milton and Mark have put us on the right track.

There is no chance I can tell you of the good work of the board in all other respects. However, from El Paso to Tyler to Beaumont, Lubbock and everywhere in between we were active and you were very well served and represented.

I will end this report with a "shout out" to my law partners, who not only tolerated my absences on TADC business, but encouraged and supported them. I have been blessed to work in a special place with men and women who share my belief that we serve ourselves best when we put the profession first. (Of course, I will state the obvious, my wife Jeri is a rock and without her help, support and encouragement, this year would have been very tough).

Thanks to you all and let's continue to kick $#@.

CAUSATION

By Christy Amuny
Bain & Barkley, L.L.P., Beaumont

Legal causation, cause in fact, proximate cause, producing cause, causal nexus – all terms used by the courts in describing the essential element necessary in every case, regardless of the theory pled. It seems more and more the appellate courts are relying on a causation argument/analysis to weigh the evidence in the decision making process, a process that is moving away from the jury and to the appellate courts.

Common to both proximate and producing cause is the requirement of cause in fact – defendant's conduct or product must be a substantial factor in bringing about the plaintiff's injuries. However, there is very little guidance as to what makes something a substantial factor as opposed to just a factor in the chain of events. There is no bright line test of what evidence is sufficient to make conduct or a product "substantial" and the evidence required is subject to a case by case analysis.

Courts have held that legal causation is not established if defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible. In those circumstances, the conduct or product cannot be too remotely connected with injury and if too remote, then there is no legal causation. However, courts have found evidence sufficient to support cause in fact, but not legal causation. Moreover, it is sometimes hard to reconcile the holdings from one case to another. Evidence sufficient to support causation in one case does not appear to be sufficient in the next case. It is difficult to understand how this does not constitute a weighing the evidence by an appellate court. Interestingly enough, in some areas the decisions of the Texas Supreme Court and the Fifth Circuit seem to be diametrically opposed.

Product/Defect Cases

BIC Pen Corp. v. Carter, 346 S.W.3d 533 (Tex. 2011)

Brittany was severely burned when her 62 month old brother Jonas accidentally set fire to her dress with a child-resistant lighter. Carter brought a products liability action against BIC alleging manufacturing and design defects. The jury found for the plaintiff and the court of appeals affirmed the verdict on the basis of a design defect. On petition for review, the Supreme Court determined the design defect claim was preempted by federal law and remanded to the court of appeals to address the manufacturing defect claim. The court of appeals affirmed the jury's verdict based on the manufacturing defect. BIC appealed claiming that the manufacturing defect claim was preempted by federal law and plaintiff did not prove a manufacturing defect caused the injuries. After determining the claim was not preempted by federal law, the Supreme Court addressed the issue of causation. The Court found that there was legally sufficient evidence that the subject lighter did not meet the manufacturing specifications. BIC argued that even if the lighter deviated from specifications, plaintiff failed to prove that the deviation was a producing cause of the injuries. The court of appeals found there was evidence Jonas was playing with the subject lighter when he accidentally caught Brittany's dress on fire, the subject lighter did not meet BIC's child-resistant specifications and a reasonable finder of fact could infer from the circumstances that the subject lighter's defect was a substantial cause of Brittany's injuries and such injuries would not have occurred if the subject lighter complied with BIC's specifications. The Supreme Court disagreed finding that evidence that components of a

product deviated from manufacturing specifications, an accident occurred and the deficient parts were involved in the accident is insufficient evidence to support a causation finding. Rather, there must be some evidence that the fire started because of the specific manufacturing defects and that absent those defects, Brittany's injuries would not have occurred. Because the lighter is designed so when it is manufactured to specifications, it can still be operated by some children even younger than 5 years of age, Carter had the burden to prove that Jonas probably would not have operated the lighter but for the manufacturing defects, regardless of his age and physical and mental condition. While there was evidence at trial which reflected on Jonas' abilities to overcome the cognitive-based characteristics of the lighter, there was no evidence to show that his abilities related to the force-based features of the lighter – turning the sparkwheel and depressing the fork – would probably have prevented him from operating the lighter if it had met manufacturing specifications. The Court concluded there was insufficient evidence to support the finding that manufacturing defects in BIC's lighter were a cause-in-fact of Brittany's injuries.

Goodner v. Hyundai Motor Company, Ltd., 650 F.3d 1034 (5th Cir. 2011)

In this design defect case, Hyundai appeals a jury verdict in favor of Plaintiffs after their daughter Sarah was killed in an automobile accident. Sarah was reclined in the passenger seat of the SUV when the vehicle was involved in a one car accident. The SUV rolled over three complete times before coming to a stop upright. Both the driver and Sarah were wearing seatbelts, but only Sarah was ejected from the vehicle. Sarah's parents proceeded to trial on a strict liability design defect claim arguing the front passenger seat and restraint system were defective because the seat could recline to an unsafe position permitting the passenger to be ejected even though wearing a seatbelt. On appeal, Hyundai argued that Plaintiffs failed to prove (1) the product was defectively designed so as to render it unreasonably dangerous, (2) a safer alternative design existed and (3) the defect was a producing cause of the injury. Finding sufficient evidence for the jury to conclude the SUV's seat design unreasonably dangerous and that a safer alternative existed, the Fifth Circuit addressed the issue of causation. In applying the substantial factor definition, the Court held causation need not be supported by direct evidence, and circumstantial evidence and reasonable inferences therefrom are a sufficient basis for finding causation. However, proof of causation requires more than conjecture or guesswork. Plaintiffs' expert testified the seat recline caused Sarah's ejection and her ejection significantly increased the risk of serious injury or death. While Plaintiffs' expert was prohibited from testifying as to the ultimate issue – that the seat recline caused Sarah's injuries – because he was unqualified to reach this conclusion, the jury could make a reasonable inference based on his testimony and by comparing the injuries of Sarah to the driver to find the seat recline was a substantial factor in bringing about the injuries. Hyundai relied on *BIC Pen* in arguing expert testimony was required to prove specific causation. The Court concluded that because the Plaintiffs presented expert testimony on some of the causation elements, other reasonable inferences were sufficient to find the seat's design caused Sarah's injuries. The Court went on to hold that although some facts weighed against causation, there remained a conflict in substantial evidence regarding whether the seat reclination caused Sarah's injuries and thus the evidence on causation was far from being overwhelmingly in favor of Hyundai as to allow the Court to upset a jury verdict.

Trying to reconcile *Bic Pen* and *Goodner* is somewhat troubling. In *Bic Pen*, there was no question that the lighter deviated from the manufacturing specifications and that the defects played a part in the incident. But according to the Supreme Court, that was just not enough. The Plaintiff must show that the fire started because of the specific defect complained of and absent that defect, the injury would not have occurred. Apparently it

should not be left to a jury to infer that such a defect is a substantial factor in causing such an accident. While in *Goodner*, the Fifth Circuit thought that was exactly what the jury was capable of doing. While there was no evidence that a specific defect caused the accident, it was reasonable for a jury to infer causation without requiring expert testimony on the ultimate issue.

Other Causation Cases – What is "Use of a Covered Auto?"

Lancer Ins. Co. v. Garcia Holiday Tours, et al, 345 S.W.3d 50 (Tex. 2011)

In a case of first impression, the question before the Texas Supreme Court was whether the transmission of a communicable disease from the bus driver to passengers is a covered loss under a business auto policy which affords coverage for accidental bodily injuries resulting from the use of the vehicle. Garcia Holiday Tours contracted with Alice ISD to provide a bus and driver for a field trip. Upon return, the bus driver was hospitalized with an active case of tuberculosis. The passengers who tested positive for latent TB filed suit against the driver and bus company. Lancer Insurance Company refused to defend the bus company maintaining that such claims were not covered under the policy. Lancer's business auto policy stated coverage is afforded for damages the insured is obligated to pay because of bodily injury caused by an accident and resulting from "the ownership, maintenance or use of a covered auto." Lancer contended that the accident and injuries did not result from the use of the bus, as the policy requires, but rather from other causes such as the use of a contagious bus driver.

The Supreme Court began its analysis with *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999). Metzer's nine year old son attempted to climb into the cab of the truck through the sliding rear window. He accidentally touched a loaded shotgun resting in a gun rack, causing the gun to discharge and strike Lindsey, who was seated in a car parked next to the truck. Lindsey made a claim on his um/uim policy and Mid-Century denied the claim. The issue before the Supreme Court was whether the injuries were caused by an accident arising out of the use of Metzer's truck. The Court held that for liability to "arise out of" the use of a motor vehicle, a causal connection or relation must exist between the accident or injury and the use of the motor vehicle. The Court adopted the following factors for determining whether an injury arises out of the use of a motor vehicle: (1) the accident must have arisen out of the inherent nature of the automobile, (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated and (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. Applying these factors, the Court concluded that Lindsey's injury arose out of the use of the Metzer truck as a matter of law. Although the boy was attempting an unorthodox method of entry into the truck, it was not an unexpected or unnatural use of the vehicle, given his size, the fact that the truck was locked and the nature of boys. It was the boy's efforts to enter the vehicle that directly caused the gun to discharge and Lindsey to become injured. The Court found that the truck was not merely the situs of activity, unrelated to any use of the truck that resulted in the accident. The injury producing act in this case – the boy's entry into the truck to retrieve his clothing – involved the use of the vehicle as a vehicle and the boy's entry caused the gun's accidental discharge. Accordingly, the Court held that Lindsey's injury was covered by the policy.

After the holding in *Lindsey*, one would think that having a vehicle in the general vicinity of an accident would be enough for the accident to "arise out of" the use of a motor vehicle. It is difficult to understand exactly how the truck caused the gun to go off, or how the court could find that the truck was anything more than the situs of the accident, but it did. As the Court goes through the analysis of *Lindsey* in the *Lancer* case, it almost seems clear where they are heading. However, if you

thought because a truck can cause a gun to go off that a bus can cause TB, you would be wrong.

The passengers in *Lancer* contend that the transmittal of TB on the bus satisfies *Lindsey's* three part test. The passengers argued that being exposed to TB while inside the bus being transported to their destination satisfied the first two factors – the accident occurred within the bus's natural territorial limits and arose out of the bus's inherent nature as a bus, which is as a means of transportation. In regard to the third factor, they argued that the use of the bus caused their TB because the closed environment required them to breathe the bacteria expelled by the infected driver and because the bus's air conditioning system exposed them to the bacteria by recirculating the contaminated air throughout the bus. Lancer contends that the bus's connection to the infectious disease is too remote or minimal to invoke coverage. The Supreme Court held that for liability to "result from" the use of a motor vehicle, there must be a sufficient nexus between its use as a motor vehicle and the injury. The insured vehicle must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. The vehicle's use must be a producing cause and when the vehicle merely furnishes a place for the injury to occur, it is not a substantial factor, and the causal link is insufficient to invoke coverage. The Court held the bus did not generate the TB bacteria or make it more virulent, but was the mere physical situs of the exposure to the infected person, which could have occurred anywhere. The Court concluded that because the bus itself was not a substantial factor in causing the passenger's injuries, the exposure to the communicable disease was not a covered risk.

National Cas. Co. v. Western World Ins. Co., 669 F.3d 608 (5th Cir. 2012)

This suit is a declaratory judgment action involving a dispute between two insurance companies to determine which policy provided primary coverage for injuries to a patient being loaded onto an ambulance. In the underlying lawsuit, Batie alleged that Rigsby was injured while EMT's loaded her into an ambulance. Batie claimed that Preferred Ambulance was negligent in failing to properly secure Rigsby to the gurney, moving Rigsby from one place to another when it was unsafe to do so, failing to provide competent personnel, failing to properly train its employees and failing to use appropriate equipment and devices. In the dec action, the district court ruled each insurer must provide primary coverage and both insurers appealed. At the time of the accident, National Casualty's Business Auto policy provided coverage for bodily injury "caused by an accident and resulting from the ownership, maintenance or use of a covered auto." National Casualty's policy also contained an exclusion for injuries "resulting from the providing or the failure to provide any medical or other professional services." Western World's CGL policy provided coverage for injuries "caused by a professional incident." The CGL also excluded coverage for injuries arising out of the use of any auto. The Fifth Circuit broke down its analysis into several parts:

The Court began by considering whether National Casualty's policy applies to the underlying lawsuit. The key issue is whether Rigsby's injury resulted from the "use" of an automobile. The Fifth Circuit interpreted the allegations in the underlying complaint to mean that Rigsby was injured while she was being placed into the ambulance. The Court focused its attention on the third prong of the *Lindsey* test that "the automobile must not merely contribute to the cause the condition which produces the injury, but must itself produce the injury." In doing so, the Court held that just as in *Lindsey*, the "sole purpose" of the alleged attempt to place Rigsby in the ambulance was to use the ambulance, this attempt to load her directly caused her injury and attempting to load a patient onto an ambulance is not an unexpected or unnatural use of the vehicle. If the truck in *Lindsey* "produced" an injury when an entering passenger accidentally discharged a gun located in that truck, an ambulance "produces" an injury when an EMT loads a passenger into

that ambulance. The Court found this case distinguishable from *Lancer*, which held that the transmission of disease can occur anywhere and that the particular transmission at issue in that case happened to have occurred in a bus was incidental. Conversely, loading passengers into automobile is integral to the use of automobiles. Injuries that occur while patients are loaded into ambulances can happen only in ambulances. As the injuries resulted from the use of an automobile, National Casualty must defend the underlying lawsuit.

The Fifth Circuit next considered whether National Casualty's professional services exclusion negates its duty to defend the lawsuit. National Casualty contends that duties such as securing and moving a patient on a gurney constitute professional services and are therefore excluded. Texas courts have defined professional services to mean the task must arise out of acts particular to the individual's specialized vocation and it must be necessary for the professional to use his specialized knowledge or training. When the underlying suit alleges injuries resulting from both professional services and non-professional services, a professional services exclusion does not negate the insured's duty to defend. Here, because the underlying complaint alleges the injury was caused in part by conduct that did not constitute professional services, the exclusion does not limit National Casualty's duty to defend.

In regard to whether Western World had a duty to defend, Court began its analysis by addressing whether the duty to defend was negated by the auto exclusion in its policy. The term "use" in the Western World policy includes operation and loading or unloading. In turn, the phrase "loading and unloading" refers only to the handling of property. The Court held that while the duty to defend is triggered by a single alleged injury that falls within the scope of the coverage provision, exclusions negate the insured's duty to defend only when all of the alleged injuries that fall into the coverage provision are subsumed under the exclusionary provision. The duty to defend is not negated by the exclusionary provision because injuries resulting from Preferred Ambulance's failure to secure Rigsby into the gurney do not arise from the "use" of an automobile and did not result from the loading or unloading of property or the operation of the ambulance. The failure to secure Rigsby occurred before the employees began to move her towards the ambulance, so the conduct causing the injury did not arise out of the operation of the ambulance. Accordingly, Western World has a duty to defend the underlying suit.

Once again, it is difficult to reconcile these cases. It might be different if both Courts did not have a thorough discussion of *Lindsey* and based their decisions on *Lindsey* – only to reach different conclusions. It is interesting that the Texas Supreme Court makes the distinctions that it does – a boy climbing into a window of a truck constitutes the use of a truck while the passengers contracting a disease inside a bus does not constitute the use of a bus. It is even more interesting that the Fifth Circuit finds loading a passenger into an ambulance is "use" of an ambulance for one policy while for the other policy, the problem arose from the failure to secure the patient to the gurney and not the loading of the patient into the ambulance and thus no "use" – hence coverage under both policies. It is hard to know what the lessons are to be learned from these cases other than the Fifth Circuit seems a lot more likely to find coverage than the Texas Supreme Court. The other lesson to be learned from the case law – no matter what your position, there is a case that supports it. The law in this area is as clear as mud.

TADC Legislative Update

By George S. Christian,
TADC Legislative Consultant

November 5, 2013 General Election

Early voting for the November 5 general election began on October 21 and closed on November 1. At issue are nine constitutional amendments, **including the critically important Proposition 6**, which establishes a long-term water infrastructure financing fund using $2 billion from the state's Rainy Day Fund. The ballot propositions were as follows:

No. 1: The constitutional amendment authorizing the legislature to provide an exemption from ad valorem taxation of all or part of the market value of the residence homestead of the surviving spouse of a member of the armed services of the United States who is killed in action.

No. 2: The constitutional amendment eliminating an obsolete requirement for a State Medical Education Board and a State Medical Education Fund, neither of which is operational.

No. 3: The constitutional amendment to authorize a political subdivision of this state to extend the number of days that aircraft parts that are exempt from ad valorem taxation due to their location in this state for a temporary period may be located in this state for purposes of qualifying for the tax exemption.

No. 4: The constitutional amendment authorizing the legislature to provide for an exemption from ad valorem taxation of part of the market value of the residence homestead of a partially disabled veteran or the surviving spouse of a partially disabled veteran if the residence homestead was donated to the disabled veteran by a charitable organization.

No. 5: The constitutional amendment to authorize the making of a reverse mortgage loan for the purchase of homestead property and to amend lender disclosures and other requirements in connection with a reverse mortgage loan.

No. 6: The constitutional amendment providing for the creation of the State Water Implementation Fund and the State Water Implementation Revenue Fund for Texas to assist in the financing of priority projects in the state water plan to ensure the availability of adequate water resources.

No. 7: The constitutional amendment authorizing a homerule municipality to provide in its charter the procedure to fill a vacancy on its governing body for which the unexpired term is 12 months or less.

No. 8: The constitutional amendment repealing Section 7, Article IX, Texas Constitution, which permits the legislature to authorize the creation of a hospital district in Hidalgo County.

No. 9: The constitutional amendment relating to expanding the types of sanctions that may be assessed against a judge or justice following a formal proceeding instituted by the State Commission on Judicial Conduct.

All nine constitutional amendments were passed by Texas voters.

2014 Elections

It has been a while since a statewide election in Texas has resulted in a fruit basket turnover, but 2014 is shaping up to be one of those years. All of the major statewide offices—Governor, Lieutenant Governor, Attorney General, Comptroller, Land Commissioner, and Agriculture Commissioner—are open. Throw in a Railroad Commission seat and four

Supreme Court races, and you have the makings of the most expensive statewide election in Texas history.

Filing for spots on the primary ballot opens on November 9 and closes on December 9, so we won't know for sure until then how each race will finally shape up. Still, candidates have announced their intentions to a large extent, so here is the way the field looks today in the offices of greatest interest to TADC:

Supreme Court:

The resignation of Chief Justice Wallace Jefferson has added an additional high court race to the usual rotation of three seats in each election. Governor Perry appointed Senior Justice Nathan Hecht to complete the remainder of Jefferson's term, which expires at the end of 2014. Chief Justice Hecht will presumably run for a full six-year term next year.

Justice Phil Johnson has announced his intention to seek re-election to a second full term on the court (he was appointed in 2005). Justice Jeff Boyd, appointed last year to fill Justice Dale Wainwright's unexpired term will seek a full term in his first statewide election. Finally, freshly appointed Justice Jeff Brown will will run for Justice Hecht's unexpired term in Place 6. We expect each of these candidates to have opposition in the general election, and it is not out of the question that some may even draw opponents in the GOP primary (as Justice David Medina did last year).

Governor:

Attorney General Greg Abbott has retiring incumbent Rick Perry's blessing and is the prohibitive favorite for the GOP nomination. General Abbott has already raised far more money than any potential challenger and should have no trouble mounting a fully funded primary and general campaign. He is not unopposed in the Republican primary, however. Former GOP State Chair and Texas Workforce Commission Chair Tom Pauken and Austin talk radio host Lisa Fritsch are in the race. Neither are expected to pose a significant challenge to General Abbott.

If Abbott secures the GOP nomination, as expected, he is likely to face Fort Worth State Senator Wendy Davis, who will forego another term in the Texas Senate to make the gubernatorial race. Davis earned national headlines for her opposition to abortion restrictions in this summer's special session and may be able to attract significant funding to the Democratic side for the first time in many years.

As occurred back in 2004, when Governor Perry with 39% of the vote against a Democrat and two independents, a third party or independent candidacy cannot be ruled out. Former candidate Debra Medina, who ran surprisingly strongly against Perry in 2008, has indicated that she might switch from the Comptroller's race to an independent bid for Governor. If something like this develops, a three-way race could boost Senator Davis.

Lieutenant Governor:

Incumbent Lt. Governor David Dewhurst, who lost a special election to the U.S. Senate last year, has drawn multiple opponents in his bid for re-election. State Senator Dan Patrick (R-Houston), who endorsed Dewhurst in the latter's Senate race, is now taking him on, as is Agriculture Commissioner Todd Staples and Land Commissioner Jerry Patterson. While the incumbent has the most financial resources for the race, the others have shown that they can compete for support from conservative and Tea Party groups. This race will undoubtedly go to a runoff, but at this point, it is not clear who will emerge from the field.

No candidate has officially announced on the Democratic side, though State Senator Leticia Van de Putte of San Antonio has indicated interest in the race.

Attorney General:

Three GOP candidates have entered the race to succeed General Abbott. State Representative Dan Branch (R-Dallas) appears to have an early fundraising edge over both Railroad Commissioner Barry Smitherman and State Senator Ken Paxton of McKinney, though all three candidates are actively fundraising and seeking conservative support. Branch and Paxton will battle it out for their home bases in the Metroplex, while

Smitherman is expected to have fundraising success with the energy sector. This will be a competitive race.

As of today, no Democrat has announced.

Comptroller:

The GOP primary race for the state's chief fiscal officer and tax collector is shaping up as a spirited contest between State Senator Glenn Hegar of Katy and State Representative Harvey Hilderbran of Kerrville. Hegar and Hilderbran chair the respective tax committees in the Senate and House and both tout their experience in dealing with fiscal issues. Hegar has close ties to Tea Party groups in and around Harris County, while Hilderbran's long record of service in the Texas House give him a firm fundraising base. A third candidate, former State Representative Raul Torres, has announced his intention to run but has registered little fundraising so far. As mentioned above, Debra Medina initially announced for this race, but is now thinking about switching to a gubernatorial run instead.

Houston CPA Mike Collier is the only announced Democratic candidate thus far. Collier is a former partner in the accounting firm of Pricewaterhouse Coopers and currently CFO of an energy company.

Other Statewide Non-Judicial Offices:

The race for Texas Land Commissioner has two Republicans so far: attorney George P. Bush and consultant David Watts. The lone Democrat so far is former El Paso Mayor John Cook. For Agriculture Commissioner, the GOP hopefuls include former State Rep. Tommy Merritt, former State Rep. Sid Miller, Uvalde Mayor Jay Allen Carnes, and attorney Eric Opiela. No Democrat has yet come forward in this race. Finally, in the race to succeed Railroad Commissioner Barry Smitherman, seven Republicans have thrown their hats into the ring: former State Rep. Wayne Christian (R-Center), attorney Malachi Boylus, former Rep. Ray Keller, engineer Ryan Sitton, attorney Joe Pool, and geologist Becky Berger. So far, there are no Democrats in the race.

Legislative Races:

After nearly one-third of the Texas Legislature turned over in 2012, a significant number of retirements of key House and Senate members promises further to change the legislative landscape for the 2015 session.

From a civil justice standpoint, State Representative Tryon Lewis (R-Odessa) will not run for re-election, thus creating a vacancy in the chairmanship of the House Judiciary & Civil Jurisprudence Committee. In addition to Judge Lewis, a growing list of House committee chairs have decided to bow out, including: Jim Pitts (R-Waxahachie), House Appropriations Committee; Allan Ritter (R-Nederland), House Natural Resources Committee; Bill Callegari (R-Houston), House Pensions Committee; John Davis (R-Houston), House Economic & Small Business Development; and Harvey Hilderbran (R-Kerrville), House Ways & Means.

Additionally, long-time incumbent Craig Eiland (D-Galveston), vice chair of the House Insurance Committee, has decided not to run for another term. Rep. Mark Strama (D-Austin) has already resigned, and a special election to fill his unexpired term is coming up next month. House members vacating their offices to run for higher office include: Van Taylor (R-Plano), running for an open seat in Senate District 8 (Paxton); Steve Toth (R-The Woodlands), running for an open seat in Senate District 4; and Brandon Creighton (R-Conroe), running for an open seat in Senate District 4.

On the Senate side, the race is on to fill seats vacated by Sen. Dan Patrick (R-Houston), Glenn Hegar (R-Katy) Ken Paxton (R-McKinney), Tommy Williams (R-The Woodlands), and Wendy Davis (D-Fort Worth). Former Harris County Tax Assessor-Collector Paul Bettencourt has announced his candidacy for Sen. Patrick's Houston district, while Sen. Paxton's open seat has drawn State Rep. Van Taylor (R-Plano) and businessman Scott Johnson. State Representatives Brandon Creighton (R-Conroe) and Steve Toth (R-The Woodlands) are weighing a run for Senator Williams District 4 seat. The GOP primary for Senator Davis's District 10 is filling up fast: former State Rep. Mark Shelton, who unsuccessfully challenged Davis two years ago, is taking another shot and will face Tea Party activist Konni Burton and businessman Tony Pompa. It is not yet clear who will run from the Democratic side in an effort to succeed Senator Davis.

2013 Annual Meeting

W. Hotel – September 18-22, 2013 – Boston, MA

Boston provided the perfect setting for the TADC 2013 Annual Meeting. Program Co-Chairs John Weber with Norton Rose Fulbright in San Antonio and Mitch Smith with Germer PLLC in Beaumont put together a top shelf cast of presenters. Presentations ranged from "Voir Dire: The Art of Picking a Jury" to "There's an APP for That: Technology and Your Practice". Massachusetts State Representative and former District Court Judge Dan Winslow gave a fantastic luncheon presentation "From the Bench to the Statehouse: Viewpoints on the Changing Face of Litigation".

On Thursday evening, TADC members descended on Fenway Park to watch the Red Sox clinch a wildcard spot in the playoffs. Members and guests gathered on Friday evening for a special Awards Dinner at the State Room, which provided panoramic views of historic Boston and Boston Harbor.

2014 President-Elect Junie Ledbetter received the gavel from outgoing president Dan Worthington

CLE Luncheon: The Changing Face of Litigation

Congratulations to the 2013 President's Award Winners Mike Morrison and Mitch Smith

Representative Dan Winslow with the Massachusetts House of Representatives speaks to the group

2013 Annual Meeting

Robert Booth with Bud & Karen Grossman and Arlene Matthews

John & Connie Weber with Bonnie & Paul Miller

Mitch Smith, Tracy & Matt Cairns and Michele Smith

Kathy & Tom Bishop with Nancy & Mike Morrison

TADC — Ready for the Game!

2013 Annual Meeting

Kimberlee & Greg Blaies

Todd & Mitzi Mayfield with Max & Rosemary Wright

Charlie & Laura Downing with Tony & Rhonda Rodriguez

Jeff Pruett with Cathy & Mark Stradley

Junie Ledbetter, Gaston Broyles, Jane & Rusty Beard, Mark Neal, Christy Amuny with Tom & Lisa Ganucheau

TADC PAC Report

By Michele Y. Smith, Trustee Chairman
MehaffyWeber PC; Beaumont

"ALL ABOARD"

I love playing games of all types: board games, card games, charades – you name it and I will play it. Perhaps it is my competitive spirit or maybe it's just the need to learn something new. Recently, I collected a group of girlfriends that enjoys a game night every so often. They introduced me to a game with which I was unfamiliar: train dominos. This game takes strategy, an understanding of your opponents and a bit of luck. The key is never losing a turn while creating your own domino train. It strikes me that negotiating the difficult terrain of a contentious legislative session requires the same skills needed to win a game of train dominoes.

Imagine what the civil justice system would look like without the TADC actively striving to protect it. For more than 50 years the TADC has been a voice of reason at the Capitol, and has actively provided a steady hand to keep Austin in check and to keep the system balanced. You are instrumental in keeping the TADC train on track and moving it in the right direction.

ARE YOU ON BOARD?

When I am asked to contribute money the first thing I do is consider whether the donation is worthwhile – who or what does it benefit and how effective will the gift be? Many of you probably have the same questions about the TADC PAC.

We just weathered the 2013 legislative session with no damage done to the civil justice system. That result, in large part, is due to the tireless efforts of Dan Worthington, Pamela Madere, Clayton Devin, Bobby Walden, George Scott Christian and the TADC Legislative Committee.

However, the track ahead gives much cause for concern. Here are just a few matters of importance to think about as you evaluate supporting the TADC PAC:

- Certain groups have made no secret of the fact that they intend to advance bills which were shunted onto sidetracks in the past. For instance, we believe the Voluntary Compensation Fund Bill brought up at the end of the 2011 Session will be seen again in 2015. Such a bill, if it became law, would have a devastating, chilling effect on the right to a civil trial;

- Four Texas Supreme Court seats will be on the ballot next year along with the hotly contested races for Governor and Lieutenant Governor. The winners of those four seats will greatly impact, if not determine, what efforts to examine and "reform" our civil justice system the legislature undertakes in its 2015 session; and

- Several key legislators are retiring, stepping down or seeking higher office. Many of these men and women have worked tirelessly with the TADC leadership to protect the civil justice system from further erosion and attack. Familiar names not appearing on the ballot next year include House Judiciary & Civil Jurisprudence Committee Chair Judge Tryon Lewis (R-Odessa), Jim Pitts (R-Waxahachie),

Allan Ritter (R-Nederland), Bill Callegari (R-Houston), John Davis (R-Houston), Craig Eiland (D-Galveston), and Rep. Mark Strama (D-Austin). Those House members vacating their offices to run for higher office include Van Taylor (R-Plano), Harvey Hilderbran (R-Kerrville), and Brandon Creighton (R-Conroe). On the Senate side, the race is on to fill seats vacated by Dan Patrick (R-Houston), Glenn Hegar (R-Katy) Ken Paxton (R-McKinney), and Tommy Williams (R-The Woodlands). The races to determine the successors of these legislative allies ARE of CRITICAL importance to our interests.

Need more incentive to buy a ticket? Consider these points:

- 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
- This is YOUR profession – Can you afford not to give??

Historically, a very small percent of our members contribute to the PAC. Each year TADC suggests the contribution of only one billable hour. A contribution of $250 or more, however, will earn you a special gift. We ask you to consider the derailment potential if we are not able to have a voice in Austin and to consider GETTING ON BOARD!

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The Texas Association of Defense Counsel Political Action Committee

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

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

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2013 Summer Seminar

Westin Resort & Spa ~ July 17-21, 2013 ~ Whistler, Vancouver

The 2013 TADC Summer Seminar was held in the cool mountains of Whistler, Vancouver, July 17-21, 2013. Program Co-Chairs Greg Binns, with Thompson & Knight, L.L.P. in Dallas and David Chamberlain with Chamberlain ♦ McHaney in Austin assembled an outstanding cast of lawyers to present over 8 hours of CLE. The TADC joined with the Washington Defense Trial Lawyers Association to have, in conjunction with individual "state specific" CLE, joint CLE that included both states. The seminar was a great success and provided networking opportunities and the chance to meet like-minded attorneys from another state.

The TADC Summer Seminar has become a great event for not only the education, but as a family oriented meeting.

Darin Brooks with George & Betsy Christian

Katherine & George Haratsis

Arva Reyna, Fred Raschke, Karynn & Keith O'Connell and David Chamberlain

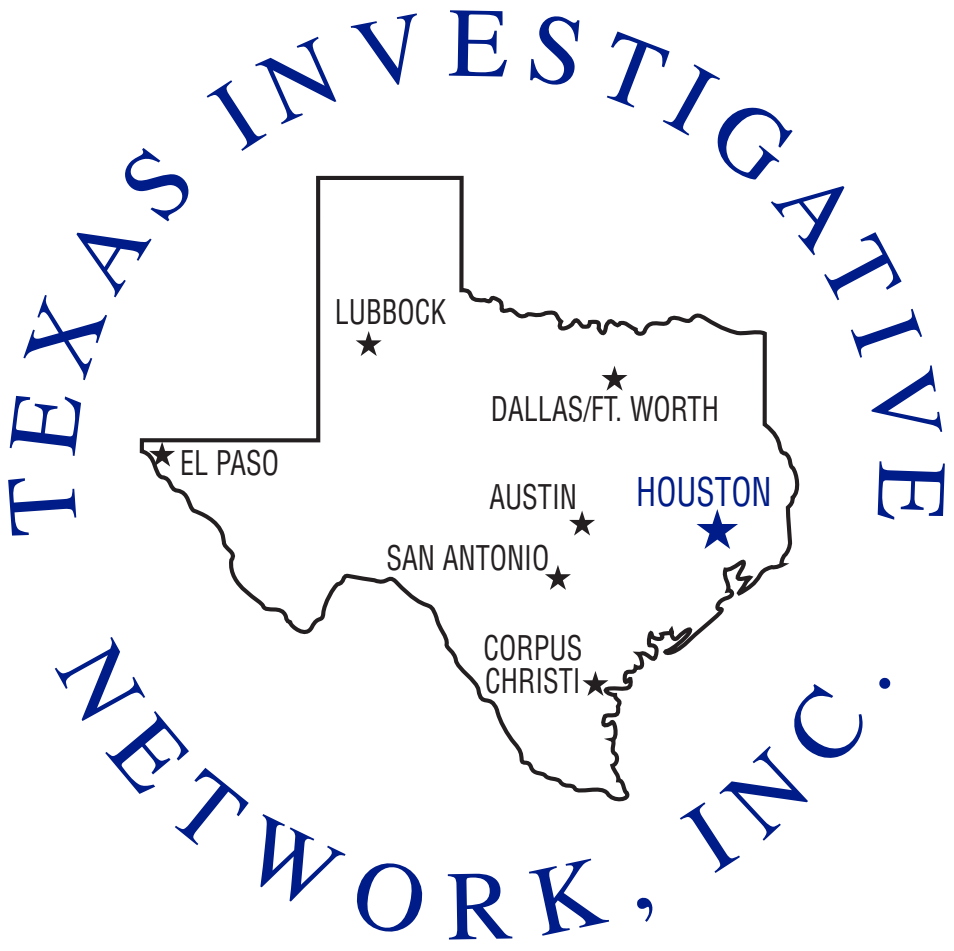
2013 Summer Seminar

Victor & Ileana Vicinaiz with Sofia & Jim Ramo

Frances & Andrew Brooks

Shanna, Slater & Sterling Elza

Stephanie & Derek Rollins



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AMICUS CURIAE COMMITTEE NEWS

Ruth Malinas (Plunkett & Griesenbeck) and Roger Hughes (Adams & Graham) filed an amicus brief in support of the petition for mandamus in *In re Toyota Motor Sales USA, Inc.*, __ S.W.3d __, 2013 WL 4608391 (Tex. 8/30/13). On August 30, 2013, the Texas Supreme Court issued a landmark decision agreeing that the substantive grounds given to vacate a verdict and grant a new trial may be review by mandamus. The trial court found defense counsel argued matters not in evidence in final argument and sanctioned the defendant by granting a new trial. The Supreme Court determined it could review this by mandamus and that the evidence was admitted so no basis existed for sanctions. This overturns over a century of decisions that, except for two narrow grounds, the grant of a new trial was unreviewable.

Michael Eady (Thompson Coe) filed an amicus brief in support of *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 474 (Tex. App.—Dallas 2001, rev. granted). This is a fascinating statutory interpretation case. Tex. Civ. Prac. & Rem. Code. §82.008 creates a rebuttable presumption of no liability if a product complies with mandatory government safety standards applicable to the product and to that specific risk. The question is whether §82.002 applies to 'performance standards,' i.e., a government mandated standard that the product pass a test rather than follow a specifically mandated design. The Dallas Court concluded §82.008 did not apply to 'performance standards,' which is directly contrary to a U.S. Fifth Circuit decision. The Supreme Court granted review and the case is set for oral argument on Sept. 9, 2013.

Brent Cooper (Cooper and Scully) filed an amicus brief in support of Petitioner in *Brookshire Bros., Ltd. v. Aldridge*, Case No. 10-0846. This is a spoliation issue in a premises liability case. The trial court gave a spoliation instruction because the storeowner preserved only eight minutes of security video that covered the fall; plaintiff argued that Brookshire should have preserved the entire day so as to show how long the spill had been there. The trial court found Brookshire did not destroy the rest of the tape in "bad faith," but gave the instruction anyway. TADC argues for a "bad faith" standard. Review was granted, and argument was on Sept. 12, 2012.

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for mandamus in *In re Discount Tire*, Case No. 13-0118. This mandamus challenges whether the trial court properly granted plaintiffs a new trial based on a factual sufficiency challenge to the verdict. This was a wrongful death suit arising from an accident caused by tire failure. Plaintiffs settled with the manufacturer and pursued Discount Tire for negligence in using a spare tire that was too old. The trial judge decided there was insufficient evidence that a manufacturing defect in the spare tire also was a producing cause of the failure; the judge also decided that the jury's award of $0 for the parents' loss of companionship and society was against the great weight of the evidence. This mandamus raises the issues of (a) does the trial judge apply the same factual sufficiency review standard as the courts of appeal, (b) can the merits of the ruling be reviewed by mandamus, and (c) how does the 'abuse of discretion' standard apply to judge the trial court's ruling? Merits brief has been requested.

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for review for G*enie Ind., Inc. v. Matak,* 2012 WL 6061779 (Tex. App.--Corpus Christi Dec. 6, 2012, pet. filed)(memo. opin.). This is a product liability design defect death case in

which the court of appeals affirmed a $1.3 million verdict for plaintiff. The basic issues are (a) is a proposed alternative safer design legally adequate if it violates industry and OSHA standards, and (b) is the product defective if the accident can happen only if the product is intentionally misused and the warnings against that misuse are adequate? Merits briefing has been requested.

Ruth Malinas (Plunkett & Griesenbeck) has been authorized to file amicus briefs in support of the petitions for review in *Loera v. Fuentes*, __ S.W.3d __, 2013 WL 351140 (Tex. App.-- El Paso Jan. 30, 2013, pet. filed), and *Nabors Wells Services Ltd. v. Romero*, __ S.W.3d __, 2013 WL 350992 (Tex. App.--El Paso Jan. 30, 2013, pet. filed). These are companion cases on the admissibility of the plaintiff's failure to wear seat belts. In both cases, a collision ejected the claimant. In one the evidence was admitted; in the other it was excluded. The El Paso Court concluded such evidence was inadmissible.

Roger Hughes (Adams & Graham) filed an amicus brief in support of the petition for mandamus *In re Champion Indust. Sales*, __ SW3d __, 2012 WL 5362204 (Tex. App.-- Corpus Christi, Oct. 29, 2012, orig. proc.), now Case No. 12-0952 in the Texas Supreme Court. Unfortunately, the Texas Supreme Court denied the petition on Sept. 20, 2013. This was an important case concerning transfers to the MDL court designated to handle silica products liability claims. Rather than move to remand the case, Plaintiff "non-suited" any respiratory injury caused by silica and then moved to "dismiss" the transfer to the MDL for lack of jurisdiction. This case raises important questions for MDL courts. By phrasing this as a jurisdictional issue claimants can raise it at any time and avoid the interlocutory appeal for orders remanding the case.

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TADC Amicus Curiae Committee

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VOIR DIRE

By David Brenner, Burns, Anderson Jury & Brenner, L.L.P., Austin

As courtroom practitioners, we spend hours contemplating our trial strategy. From the minute our case first lands on our desk, we begin to formulate our theme. Through discovery, we obtain, organize, and identify our evidence. All in preparation for the dramatic unfolding of our case at trial. All with the hope that the twelve, the jurors, those we charge to observe, listen and decide, find our story compelling,

However, even the greatest trial lawyer cannot succeed if and when he faces a jury who is biased from the onset. Hopefully, we are cognizant of confirmation bias, a tendency of people to favor information that confirms their beliefs. When people display this bias, they gather or remember information selectively, or interpret what they hear in such a way as to confirm their bias. The effect is stronger for emotionally charged issues and deeply entrenched beliefs. For example, in reading about current political issues, people usually prefer sources that affirm their existing attitudes. They tend to interpret ambiguous evidence as supporting their existing position.

The Texas Constitution grants litigants a right to trial by jury and authorizes the Legislature to pass laws to maintain its purity and efficiency TEX. CONST. ART. I, sec. 15. *Voir dire* examination protects the right to an impartial jury by exposing possible improper juror biases that form the basis for statutory disqualification. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006). Through *voir dire*, counsel or the court inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with the court's instructions and oath. *Id.* The *voir dire* process is the only tool at our disposal that permits us to identify and root out those potential venire members who would ignore our presentation from the outset.

THE PROCESS

Many of us focus our practice in one general region and are well familiar with the practice of our courts. In my career, I have practiced across Texas, in state courts, and in federal courts. There is no question that *voir dire* examination falls within the sound discretion of the trial court. *Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005). Depending on your venue, how that discretion is exercised may vary. For example, in Austin, Dallas, or Houston, judges allow each attorney to perform their general panel questions and individual panel questions as they see fit. In San Antonio and South Texas, generally, the attorneys must ask general questions. Then after both sides complete general questions and juror number cards have been raised identifying those jurors with a response to questions, each attorney is then allowed to engage individual venire members about their specific response to the general questions.

In federal courts, most judges request counsel to provide written questions that the judge will evaluate and decide which to ask to the panel. After the federal judges have completed *voir dire*, some allow limited time for attorney *voir dire*, but rarely on written questions submitted but not asked.

Some judges require for-cause challenges to be addressed as they arise, but must reserve for-cause challenges to be raised only after *voir dire* is completed. To prevent waiver, be familiar with the court's practice.

A party is generally allowed broad latitude during *voir dire* to enable the party to discover bias or prejudice of potential jurors and intelligently exercise peremptory

challenges. *Hyundai*, 189 S.W.3d 743. A trial court abuses its discretion in controlling *voir dire* if its denial of the right to ask a proper question prevents the determination of when grounds exist to challenge for cause or denies intelligent use of peremptory challenges. *Hyundai, supra*; *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App.—Texarkana 2001, no pet.); *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229 (Tex. App.—Texarkana 1992, writ denied); *TEIA v. Loesch*, 538 S.W.2d 435 (Tex. App.—Waco 1976, writ ref'd n.r.e.).

JURY SHUFFLE

The venire panel should appear random. At times, however, the panel appears skewed by the parties' age, sex, education, or other characteristics. At a party's request, a trial court must grant a jury shuffle if one is timely requested. You must request the shuffle after the panel is assigned but before *voir dire*. TEX. R. CIV. P. 223. Only one shuffle is allowed in each case. *Id.*

TIME LIMITATIONS

Ever more frequently, trial courts are limiting the amount of time allocated to conduct *voir dire*. Again, one should ask the court well in advance of the *voir dire* what time limitations may be imposed by the court. If insufficient time is allowed, preservation of error requires clear identification to the court as to why and how the time limitations are insufficient, an identification of the areas of inquiry that the time limitations precluded you from making, and identification of the venire members you could not question based on the limitations.

In evaluating whether time limitations imposed in *voir dire* resulted in an abuse of discretion, the Texas Court of Criminal Appeals identified a three-prong test. First, did counsel prolong *voir dire* by asking irrelevant, immaterial, or superfluous questions; second, were the questions that counsel sought to ask proper *voir dire* inquiries; and third, did the jury include venire members whom counsel was not allowed to examine. *Ratliff v. State*, 690 S.W.2d 597 (Tex. Crim. App. 1985). This approach was adopted in a civil case by the Texarkana Court of Appeals in *McCoy,* 59 S.W.3d 793. The *McCoy* court held that attorneys have a duty to appropriately budget their time for *voir dire* questioning within the reasonable limits set by the trial court. Additional questioning by plaintiff's counsel of jury panel members as to two members' acquaintance with one of defendant's attorneys, and as to one member's bad experience involving defendant, which were elicited by defense counsel during *voir dire*, was not warranted after the *voir dire* time limit set by court had expired. The court indicated that plaintiff's counsel was not prohibited from pursuing those matters during his own *voir dire* exam, and the only reasons for his failure to do so were that he ran out of time, or it did not occur to him to ask about those matters. *Id.* at 800. The court held that the parameters set for *voir dire* questioning should always be fair and reasonable, and should take into consideration the complexity and uniqueness of each case, and these boundaries should also be flexible, subject to exceptions as justice and the circumstances require. *Id.* at 801.

In *Odom v. Clark*, 215 S.W.3d 571 (Tex. App.—Tyler 2007, pet. denied), plaintiffs, bringing a medical malpractice claim, filed a motion to enlarge time for *voir dire*, which did not include any potential questions but merely stated broad areas of inquiry. The trial court ruled that the parties would have no more than one hour per side to conduct their *voir dire* examination. At the end of the one-hour time limit, plaintiffs again requested additional time. After permitting two additional questions, the court ended counsel's *voir dire*. Counsel then reasserted the motion to enlarge time for *voir dire*, indicating he had not yet had an adequate opportunity to question the venire about ten areas of inquiry, but did not present the trial court with the questions he wished to ask. The trial court denied the request.

The appellate court held that error was not preserved for review under Texas Rule of Appellate Procedure 33.1(a) because the trial court was not timely presented with any information that would have identified the nature of the potential questions. The court noted that the questions were neither before the trial court nor apparent from the context in which the areas of inquiry were stated. *See also*, *Greer v. Seales*, No. 09-05-001 CV, 2006 Tex. App. LEXIS 1524 (Tex. App.—Beaumont 2006, no pet.).

CHALLENGES FOR CAUSE

Generally a challenge for cause may be made during *voir dire* or after its completion. TEX. R. CIV. P. 229. Usually, a challenge for cause is based on the statutes governing the qualification of jurors, like the venire members' bias, interest, or medical impairment, etc. However, a juror may be excused for other reasons. *See Tex. Power & Light Co. v. Adams*, 404 S.W.2d 930 (Tex. Civ. App.—Tyler 1966, no writ); *Guerra v. Wal-Mart Stores, Inc*., 943 S.W.2d 56 (Tex. App.—San Antonio 1997 writ denied). Counsel must elicit the disqualifying information from the challenged juror to challenge for cause. *Bailey v. Rains*, 485 S.W.2d 837 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.). There is no limit to the number of challenges for cause.

To serve, a juror must be at least 18 years of age; a citizen of this state and of the county in which the person is to serve as a juror; qualified under the constitution and laws to vote in the county in which the person is to serve as a juror; of sound mind and good moral character; able to read and write; have not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court; not been convicted of misdemeanor theft or a felony; and not under indictment or other legal accusation for misdemeanor theft or a felony. TEX. GOV'T CODE § 62.102. These qualifications should have been determined by the court during the qualification process prior to *voir dire*. However, it is not infrequent that the prospective juror passed the qualification process without apprising the court that he is disqualified.

A. BIAS AND/OR PREJUDICE

Bias is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not act with impartiality. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true. *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).

Specific examples of for-cause application of bias or prejudice include bias against counsel; *Gum v. Schaeffer*, 683 S.W.2d 803, 807-08 (Tex. App.—Corpus Christi 1984, no writ.); a predisposition against a witness; *Employer's Mut. Liab. Ins. Co. v. Butler*, 511 S.W.2d 323, 325 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.); and a refusal to apply the law applicable to a case. *Smith v. State*, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974). Another example of disqualifying bias or prejudice is a predisposition against a party, relation by consanguinity or affinity within the third degree to a party in the case, or previous jury service in the same case. TEX. GOV'T CODE § 62.105. Disqualification, as opposed to bias and prejudice, requires the venire member be dismissed. TEX. GOV'T CODE § 62.105(4); *Houghton v. Port Terminal R.R. Ass'n,* 999 S.W.2d 39, 46 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998).

B. EVIDENCE AND REHABILITATION

Traditional notions of the nature of *voir dire* for evaluating bias and prejudice have changed. Bias and prejudice cannot relate to the evidence that will be presented in a case, and arguing your case during *voir dire* might destroy your ability to preserve error relating to the denial of a for-cause strike.

For-cause challenges must focus on predetermination unrelated to evidence to be practical. Further, as a defendant, a focus on rehabilitating venire persons is not only permissible, it is wise.

In *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989), the trial court granted a motion in limine preventing counsel for addressing the litigation crisis, insurance crisis, malpractice crisis, and media attention to that crisis. A prospective juror stated that he had read about the crisis. He was stricken for cause, but plaintiffs renewed the request to address the area of inquiry. The judge denied the request. The Texas Supreme Court reversed the case noting that plaintiffs were denied the opportunity to intelligently exercise challenges. The trial court's refusal to allow questions directed at exposing bias or prejudice resulting from the controversy over tort reform denied the Babcocks the right to trial by a fair and impartial jury. *Id*.

In *In re Commitment of Seth Hill*, 334 S.W.3d 226 (Tex. 2011), the State had the burden to prove that Hill (1) was a repeat sexually violent offender and (2) "suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence." As such, much of Hill's trial focused on his sexual history, which formed the basis for the State's expert witness's conclusion that Hill suffered from a behavioral abnormality. During its pretrial deposition of Hill, the State explored Hill's sexual activity with other inmates in an all-male facility. In the deposition, Hill admitted to these acts. The State's expert testified at trial that if somebody has heterosexual preferences and then they later begin practicing homosexual acts, it infers there is an instability within their personality which again, is more evidence of why he diagnosed Hill with a personality disorder.

During *voir dire*, Hill's attorney inquired, without objection, whether potential jurors could be fair to a person they believed to be a homosexual. Several stated they would not be able to give a fair trial to such a person. The court then instructed Hill's attorney to terminate that line of questioning. When Hill's attorney attempted several more times to raise the issue, the trial court directed him not to ask a direct question about Hill's homosexuality. In finding an abuse of discretion, the court rejected the argument that these questions pertained to weighing facts but, instead, were pertinent to the venire persons' ability to follow the legislative requirement for commitment. *Id*. at 230.

Cortez, 159 S.W.3d 87, was a nursing home negligence case. A venire member stated that he was an automobile insurance adjuster and "he would feel bias but could not answer anything for certain." When the trial judge asked him to explain his bias, he said that he had seen "lawsuit abuse . . . so many times." He said that "in a way," the defendant was "starting out ahead," and explained: "Basically—and I mean nothing against their case, it's just that we see so many of those. It's just like, well, I don't know if it's real or not. And this type [of] case I'm not familiar with whatsoever, so that's not a bias I should have. It's just there." Upon further questioning, he agreed that at times, when he evaluated automobile claims, he found that they had merit, and that he was "willing to try" to listen to the case and decide it on the law and the evidence. The plaintiff challenged the venire person for cause arguing he had demonstrated bias. The trial court denied the challenge. Plaintiff preserved error by demonstrating he used his last peremptory challenge to strike that venire member in question and venire member 7 was empaneled. Plaintiff never challenged venire member 7 for cause, and never stated why he found 7 objectionable, but maintains that he would have struck 7 had he been able.

The *Cortez* court first held that plaintiff adequately preserved error by using a peremptory challenge against the venire member involved, exhausting his remaining challenges, and notifying the trial court that

a specific objectionable venire member will remain on the jury list. *Id*. at 90.

Next the court evaluated whether a venire member could be rehabilitated after expressing bias. First, the court noted that if the record, taken as a whole, clearly shows that a venire member was materially biased, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the venire member's disqualification. *Id*. at 92. However, statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely loose words spoken in warm debate. *Id*. If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may prevent an impartial venire member from being disqualified by mistake. The discretion accorded trial judges in ruling on challenges for cause should not be arbitrarily limited in cases involving rehabilitation. Because trial judges are actually present during *voir dire*, they are "in a better position . . . to evaluate the juror's sincerity and his capacity for fairness and impartiality..." Therefore, trial courts exercise discretion in deciding whether to strike venire members for cause when bias or prejudice is not established as a matter of law, and there is error only if that discretion is abused. *Cortez*, 159 S.W.3d at 93.

Next, the court addressed whether the statement "that one party is starting ahead" demonstrated bias. The court held that asking a venire member which party is starting out "ahead" is often an attempt to elicit a comment on the evidence. Such attempts to preview a venire member's likely vote are not permitted. Asking which party is "ahead" may be appropriate before any evidence or information about the case has been disclosed but, here, the plaintiff's attorney gave an extended and emotional opening statement summarizing the facts of the case to the venire. A statement that one party is ahead cannot disqualify if the venire member's answer merely indicates an opinion about the evidence. A statement that is more a preview of a venire member's likely vote than an expression of an actual bias is no basis for disqualification. Litigants have the right to an impartial jury, not a favorable one. *Id.* at 94.

Vasquez, 189 S.W.3d 743 was a product liability case resulting from a child fatality following airbag deployment. The child in question was sitting in the front seat and not wearing a seat belt. Hyundai took the position that the fatality would not have occurred had the child been properly wearing a seat belt. The trial judge dismissed two jury panels before seating a third. During the first two panel's *voir dire*, plaintiff's counsel inquired as to whether the fact that the child was not wearing a seat belt would be outcome determinative to the verdict. Many venire persons indicated it would, resulting in panel dismissal. During the third panel's *voir dire*, the trial court allowed counsel to ask general questions about belting and to inquire about jurors' personal seat belt habits, but did not allow disclosure that the child was not wearing one at the time of the accident. Counsel asked questions about whether the jurors buckled their seat belts on short trips, before leaving the garage, before exiting a driveway, and before leaving a parking spot. At the conclusion of the third *voir dire*, the trial court excused three of the first twenty-eight jurors for cause and seated a twelve-member jury and one alternate. After a defense verdict, Plaintiff appealed alleging an abuse of discretion in denying *voir dire* relating to the facts of the case.

The court held that although a juror may be statutorily disqualified because of a bias or prejudice against a type of claim or a general inability to follow the court's instructions regarding the law, statements that reflect a juror's judgment about the facts of a case as presented, rather than an external unfair bias or prejudice, do not amount to a disqualifying bias. *Id*. at 751. It is improper to ask prospective jurors what their verdict would be if certain facts were

proved. Fair and impartial jurors reach a verdict based on the evidence, and not on bias or prejudice. *Voir dire* inquiries to jurors should address the latter, not their opinions about the former. *Id*. at 752. Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight. If the *voir dire* includes a preview of the evidence, a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts. If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias. *Id*. at 754.

Murf v. Pass, 249 S.W.3d 407 (Tex. 2008) was a healthcare liability case. In this case, the court stated that after a confusing line of questioning a venire person stated they would hold the plaintiff to a clear and convincing standard of proof. The defense counsel objected arguing the jury was confused, and the trial judge clarified that the standard of proof was a preponderance of evidence. Later, defense counsel asked the panel if they would require a standard of proof different than that instructed by the judge. None would. Later, the judge refused to disqualify for cause those venire persons who initially indicated they would require a clear and convincing standard.

The court held that statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely loose words spoken in warm debate, and do not necessarily establish disqualification. When a venire person expresses bias or confusion, the trial court has the discretion to stop the line of questioning to clarify that person's response. Because trial judges are present in the courtroom and are in the best position to evaluate the sincerity and attitude of individual panel members, they are given wide latitude in both conducting *voir dire* proceedings and in determining whether a panel member is impermissibly partial. Thus, the court must consider the entire examination in reviewing whether a trial court abused its discretion in deciding that a juror was or was not disqualified. *Id*. at 411. The court concluded that from the *voir dire* as a whole, the trial court could have concluded the venire members were confused by the *voir dire* questions and further rehabilitation was not necessary. *Id*.

C. PROCEDURE IF COURT REFUSES TO STRIKE JUROR FOR CAUSE

If the court refuses to strike a juror for cause, the challenging party must either advise the court, before exercising any peremptory challenges, that the challenging party will exhaust its peremptory challenges and that after exercising such challenges, specific objectionable jurors will remain on the jury list, or must exercise all peremptory challenges and then identify by name the specific jurors on the panel who are objectionable. *Hallett v. Houston Northwest Medical Center*, 689 S.W.2d 888 (Tex. 1985). If the appellant demonstrates he suffered a detriment from the loss of the strike by being forced to accept a juror he would have otherwise struck, reversible error is shown. *Id.* After the challenge for cause has been made during *voir dire*, the record must show the party made an objection to the exhaustion of peremptory strikes before the party gave its peremptory strikes to the clerk. *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669 (Tex. App.—Amarillo 1991, writ denied). If the party does not make the objection before it turns in its peremptory strikes, it waives the error. *Operation Rescue v. Planned Parenthood, Inc.*, 937 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1996), *modified on other grounds*, 975 S.W.2d 546 (Tex. 1998). The party

asserting such an objection should inform the court that because of the court's refusal to grant the challenge for cause, a specific objectionable panelist will remain on the jury (identify the juror and state the reason why they are objectionable, and then request that the court reconsider its ruling on the challenge for cause or to grant an additional peremptory strike). *Hallett*, 689 S.W.2d at 890. Only after those requests are denied should the strikes be handed to the clerk.

The Texas Supreme Court has held, however, that such a showing is required only when a challenge for cause is overruled, and not when the trial court improperly apportions peremptory challenges. *See Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 5 (Tex. 1986).

PEREMPTORY CHALLENGES

After the conclusion of *voir dire*, a party may challenge jurors without assigning reason. This is the peremptory challenge. TEX. R. CIV. P. 232, 233. The attorneys retire and exercise their peremptory challenges, and from their lists, the clerk designates the first (12 in district court–6 in county court) who will serve on the jury. A peremptory challenge may be used for any reason other than on improper discriminatory grounds.

A. NUMBER OF PEREMPTORY CHALLENGES

Generally, each party is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. TEX. R. CIV. P. 233. Each side is also entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled. Each side may exercise two additional peremptory challenges, if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and none of the normal peremptory challenges may be used against an alternate. TEX. GOV'T CODE ANN. § 62.020(e). *Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.,* 848 S.W.2d 724 (Tex. App.—Dallas 1992, writ denied).

Side is not synonymous with party but means one or more litigants who have common interests on matters with which the jury is concerned. TEX. R. CIV. P. 233. Thus, the Court must decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. *Id*. In addition, upon the motion of any litigant in a multiparty case, it is also the trial court's duty to "equalize" the number of peremptory challenges so that no litigant or side is given an unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges. *Id*.

BATSON CHALLENGE

In *Batson v. Kentucky,* 476 U.S. 79, 106 Sup. Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that a criminal defendant is denied equal protection under the United States Constitution if a prosecutor uses peremptory challenges to exclude members of the venire panel solely on the basis that their race is the same as the defendant's. *Batson* was extended to apply to civil cases in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 618–28, 111 Sup. Ct. 2077, 2081–87, 114 L.Ed.2d 660 (1991). The United States Supreme Court held that race-based exclusion of civil jurors violates the equal protection rights of the excluded juror. *Edmonson,* 500 U.S. at 616, 111 Sup. Ct. at 2080–81. Other extensions of *Batson* include *J.E.B. v. Alabama,* 511 U.S. 127, 130–31, 114 Sup. Ct. 1419, 1422–23, 128 L.Ed.2d 89 (1994) (prohibiting peremptory challenges based on sex); *Georgia v. McCollum,* 505 U.S. 42, 59, 112 Sup. Ct. 2348, 2359, 120 L.Ed.2d 33 (1992) (prohibiting criminal defendant's exercise of peremptory challenges in a racially discriminatory manner); and *Powers v. Ohio,* 499 U.S. 400, 406–09, 111 Sup. Ct. 1364, 1368–70, 113 L.Ed.2d 411 (1991) (prohibiting racially motivated peremptory challenges even when excluded jurors are

of a different race than the defendant). As in *Edmonson,* these decisions reflect the Supreme Court's recognition of the equal protection rights of both the excluded jurors and the litigants. *See, e.g., J.E.B.,* 511 U.S. at 140–41, 114 Sup. Ct. at 1427–28.

The Texas Supreme Court adopted *Edmonson* in *Powers v. Palacios,* 813 S.W.2d 489, 490–91 (Tex.1991), holding that the use of a peremptory challenge to exclude a juror on the basis of race violates the equal protection rights of the excluded juror.

It should be noted that a pattern of discrimination is not necessarily limited to strikes against a protected class, but can be applicable to a pattern of strikes against a particular race or sex, protected or not. *See Brown v. Kinney Shoe Corp*., 237 F. 3d 556 (5th Cir. 2001).

A. PROCEDURE FOR MAKING *BATSON* CHALLENGE

To challenge an opposing party's use of peremptory challenge for a discriminatory purpose, the party must lodge an objection as to the use of peremptory challenges before the jury is sworn and the remainder of the venire discharged. *Pierson v. Noon*, 814 S.W.2d 506 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Such an objection triggers a three-stage process. *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex.1997). At the first step of the process, the opponent of the peremptory challenge must establish a *prima facie* case of racial discrimination. *Id. at* 445. If no *prima facie* case is made for discrimination in the use of the peremptory challenges, the objection to the challenge should be overruled. During the second step of the process, the burden shifts to the party who has exercised the strike to come forward with a non-discriminatory explanation for why the juror was stricken. *Id.* The appellate court does not consider, at the second step, whether the explanation is persuasive or even plausible. The issue for the trial court and the appellate court at this juncture is the facial validity of the explanation. *Id*. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral for purposes of the analysis at step two. *Id*. However, if no nondiscriminatory explanation is offered for the strike, then the objection to the use of the strike should be sustained. At the third step of the process, the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. It is at this stage that implausible justifications for striking potential jurors "may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination." *Id.* The burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the peremptory strike. Whether the race-neutral explanation should be believed is purely a question for the trial court. *Id.* at 445-446.

In *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508 (Tex. 2008), the Texas Supreme Court struggled with applying *Batson* and its progeny in the Court's review of an allegation that the defendant based its peremptory strikes on race. Davis was an African American alleging that racial discrimination formed the basis of his termination from Fisk Electric Co. At trial, Davis urged a *Batson* challenge when five of six African Americans were peremptorily struck from the venire.

The Court concluded that its rules generally permit each party in a civil action to exercise six peremptory strikes, which are challenges made to a juror without assigning any reason. However, peremptory strikes exercised for an improper reason, like race or gender, are unconstitutional. The Court held that when the respondents used peremptory challenges at trial to exclude five of six African Americans from the venire, when viewed in conjunction with the 83 percent removal rate and a

comparative juror analysis, defied neutral explanation. The Court concluded that at least two of the strikes were based on race and reversed and remanded the case for a new trial.

The majority opinion acknowledged that peremptory strikes are often based on instinct rather than reason, and can be difficult to justify. The trial lawyer's failure to do so does not suggest personal racial animosity on the lawyer's part. A zealous advocate will seek jurors favorably inclined to his client's position, and race may even serve as a rough proxy for partiality. But whatever the strategic advantages of that practice, the Constitution forbids it. The question is not whether the particular advocate harbors ill will, but whether the record explains, on neutral grounds, a statistically significant exclusion of black jurors. The holding depends not on the personal sentiments of the advocate but on the state of the record. *Batson's* promise cannot be fulfilled if its requirements may be satisfied merely by ticking off a race-neutral explanation from a checklist. Because the race-neutral reason could not be reconciled with the record as a whole, the Court reversed.

In *Cunningham v. Hughes & Luce, L.L.P.*, 312 S.W.3d 62 (Tex. App.—El Paso 2010, no pet.) eight of the first twenty-five venire persons were African Americans, as was Cunningham, the plaintiff. Cunningham contended that appellees challenged all eight for cause and then exercised three of their six peremptory challenges to exclude those African Americans who were not stricken for cause. Cunningham lodged a *Batson* challenge with regard to Eric Oliver and Richard Askew and appellees were given an opportunity to provide race-neutral explanations for the strikes. Appellees reminded the court that both men had been challenged for cause, albeit unsuccessfully. Ms. Blue, counsel for appellees at trial, then explained Oliver was struck because he was favoring Cunningham before hearing any of the evidence. Askew was struck because of his attitude toward attorneys, legal fees, his hostile demeanor, and his body language.

The court found that answers to Ms. Blue's questionnaire as well as answers during *voir dire* to questions posed by Ms. Blue supported race-neutral reasons for defendants' peremptory strikes against both Oliver and Askew. The court concluded that the trial court did not abuse its discretion in overruling Cunningham's *Batson/Edmonson* challenges and affirmed the judgment of the trial court.

B. EXAMINING *VOIR DIRE* NOTES OF COUNSEL

It should be noted that in *Goode*, 943 S.W.2d 441, the Texas Supreme Court held that an *Edmonson* movant has the right to examine the *voir dire* notes of the opponent's attorney when the attorney relies upon these notes while giving sworn or unsworn testimony in the *Edmonson* hearing. Absent such reliance, the *voir dire* notes are privileged work product, and the movant may not examine them

2013 West Texas Seminar

Inn of the Mountain Gods ~ August 8-9, 2013 ~ Ruidoso, NM

The second TADC West Texas Seminar was held in Ruidoso, New Mexico, August 8-9, 2013 at the scenic Inn of the Mountain Gods. The New Mexico Defense Lawyers Association joined with the TADC for this seminar which was started to provide a cost effective program for young lawyers and their families and to provide the opportunity for lawyers who are licensed in both Texas and New Mexico the opportunity to earn CLE credit to fulfill requirements for both states.

Jean & Bob Gibson with Dan Hernandez

Shanna Elza, Tekla & Scott Mann and Slater Elza

Milton Colia, Rachel Carver and Eddie Moreno

Dan Worthington, Joe Hood with Pat & David Weaver

Alarie & Bryan Garcia

TADC 2014 WINTER SEMINAR
February 5-9, 2014 ~ Elevation Resort & Spa ~ Crested Butte, Colorado

Heidi A. Coughlin, Wright & Greenhill, P.C., Austin & Victor Vicinaiz, Roerig, Oliveira & Fisher, LLP, McAllen – Program Co-Chairs

CLE Approved for: 8.25 hrs, including 1.5 hrs ethics

Wednesday, February 5, 2014

6pm – 8pm TADC Welcome Reception

Thursday, February 6, 2014

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Junie Ledbetter, TADC President
Law Offices of James R. Old, Jr., Austin
Heidi Coughlin, Wright & Greenhill, P.C., Austin – Program Co-Chair
Victor Vicinaiz, Roerig, Oliveira & Fisher, LLP, McAllen – Program Co-Chair

7:30 - 8:15am *ONCE UPON A TIME IN THE (SOUTH) WEST: WINDSTORM FIRST PARTY CASES*
Jeff & David Roerig
Roerig, Oliveira & Fisher, LLP, Brownsville

8:15 – 8:50am *BLAZING SADDLES: TRIAL BY DEPOSITION, LEAVING YOUR OPPOSITION IN THE DUST*
J. Matt Breeland
Wright & Greenhill, P.C., Austin

8:50- 9:35am *MEDICAL MALPRACTICE CASES GOVERNED BY TX CPRC 74*
Terri Harris
Ewbank & Harris, P.C., Austin

9:35 - 10:15am *TRUE GRIT: INSURANCE LAW FOR THE TRIAL LAWYER*
Christy Amuny
Bain & Barkley., Beaumont

Friday, February 7, 2014

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Junie Ledbetter, TADC President
Heidi Coughlin, Wright & Greenhill, P.C.
Victor Vicinaiz, Roerig, Oliveira & Fisher, LLP

7:30 – 8:15am *A GUNFIGHT: DEALING WITH THE PLAINTIFF'S SO-CALLED "REVOLUTION"*
Timothy A. Weaver
Pretzel & Stouffer, Chartered, Chicago, IL

8:15– 8:50am *HIGH PLAINS DRIFTER: AMENDMENTS TO FRCP 45, FEDERAL NON-PARTY SUBPOENA REQUIREMENTS*
McKenzie Wallace
Thompson & Knight, L.L.P., Dallas

8:50 – 9:25am *BORDER RANGERS: JURISDICTION AND VENUE AFTER THE FEDERAL COURT'S JURISDICTION AND VENUE CLARIFICATION ACT*
Peter R. Jennetten
Quinn, Johnston, Henderson, Pretorius & Cerulo, Peoria, IL

9:25-10:10am *THE GOOD, THE BAD AND THE UGLY: MANAGING LITIGATION STRESS AND OTHER THINGS I WISH I'D KNOWN 25 YEARS AGO (.75 hours ethics)*
Greg W. Curry
Thompson & Knight, L.L.P., Dallas

Saturday, February 8, 2014

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Junie Ledbetter, TADC President
Heidi Coughlin, Wright & Greenhill, P.C.
Victor Vicinaiz, Roerig, Oliveira & Fisher, LLP

7:30 – 8:05am *MAVERICK: VOIR DIRE*
Michele Smith
Mehaffy Weber, Beaumont

8:05-8:35am *RUSTLER'S RHAPSODY: TRENDS IN LITIGATION – AN EXPERT'S POINT OF VIEW*
Micayla Brooks
Rimkus Consulting, San Antonio

8:35 – 9:10am *THE WILD BUNCH: DO'S AND DON'TS FROM THE BENCH*
The Honorable Carlos Cortez
44th Judicial District, Dallas

9:10 – 9:55am *TOMBSTONE: LEGAL MALPRACTICE – CAUSES AND AVOIDANCES (.75 hours ethics)*
Thomas E. Ganucheau
Beck Redden, Houston

9:55 – 10:30am *THE RETURN OF DESPERADO: PRESERVATION OF ERROR*
Belinda Arambula & David Brenner
Burns, Anderson, Jury & Brenner, L.L.P., Austin

Sunday, February 9, 2014

Depart for Texas!

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Children Age 12 and Older	$100.00
Children Age 6-11	$70.00

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Spouse/Guest CLE credit for Winter Meeting	$75.00

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For hotel reservations, **CONTACT THE ELEVATION RESORT & SPA DIRECTLY AT 888/443-6715 and reference the TADC Winter Seminar.** The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block will fill quickly***. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

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February 5-9, 2014

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Supreme Court Update/June 1, 2012 – May 31, 2013 – Justice Phil Johnson – 92 pgs.

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- 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 speciality, please include as much information as possible. For example, accident reconstruction can include experts with a speciality 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 depositions, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
- Approximately three 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 $50.00 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.

The TADC Expert Witness Service Deposition Library can provide copies of depositions. The TADC Expert Witness Library can provide copies of depositions, CVs, trial transcripts, etc. The fee for locating and copying or printing material is $40.00 for an electronic (diskette) copy; hard-copy is $40.00, plus a $0.05 per page

TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

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

Expert Witness Search Request Form

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

Date: _____ ☐ NORMAL ☐ **RUSH** (Surcharge applies)

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

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

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

Designated as: Plaintiff Defense Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

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

Areas of expertise: _____

_____

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

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

_____

_____

_____

_____

_____

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

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

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INCLUDED ON THIS CD ARE THE FOLLOWING NEWSLETTERS:

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  Editors: John J. Bridger & Jason McLaurin, Strong, Pipkin, Bissell & Ledyard, L.L.P.; Houston

- **Defamation**
  Editor: Michael D. Morrison, Baylor Law School, Waco

- **Energy Law**
  Co-Editors: Greg W. Curry, Gregory D. Binns & Jane Cherry, Thompson & Knight, L.L.P., Dallas

- **Employment Law**
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- **Health Care Law**
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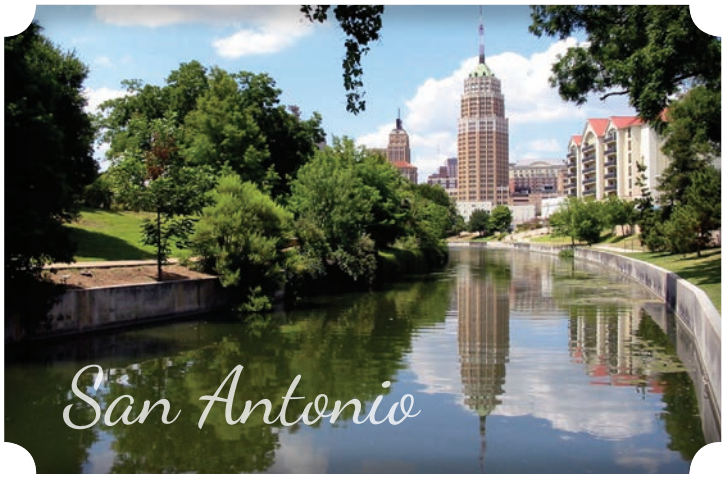
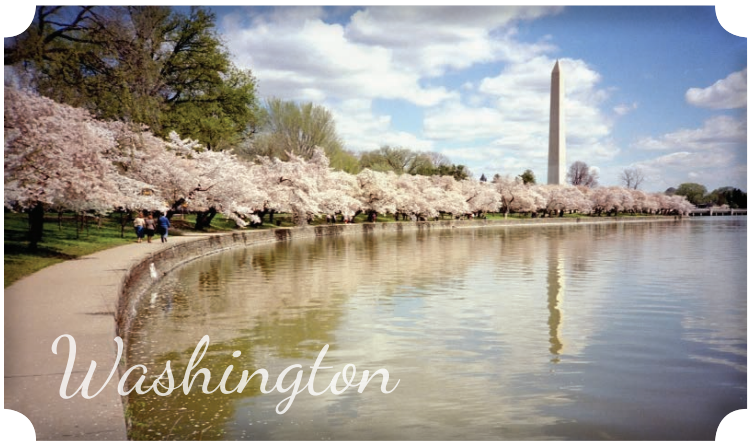
Elevation Resort & Spa - Crested Butte, CO



March 14-15, 2014
TADC Trial Academy
Omni Colonnade - San Antonio, TX



April 9-13, 2014
TADC Spring Meeting
The Fairfax Embassy Row - Washington, DC

Mark Your
CALENDARS