TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

FALL/WINTER 2016

IN THIS ISSUE:

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The TADC Magazine is a publication of the Texas Association of Defense Counsel.
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2017 Meeting Schedule

January 20, 2017 TADC BOARD OF DIRECTORS MEETING
Moody Bank Building – Third Floor Auditorium
400 West 15th Street – Austin, Texas

February 1-5, 2017 TADC WINTER SEMINAR
Beaver Creek Lodge
Beaver Creek, Colorado
David Brenner & Belinda Arambula, Program Co-Chairs

April 19-23, 2017 TADC SPRING MEETING
Omni Royal Orleans
New Orleans, Louisiana
Tom & Ken Riney, Program Co-Chairs

July 12-16, 2017 TADC SUMMER SEMINAR
Ritz Carlton Grand Lakes
Orlando, Florida
Keith O'Connell & Elizabeth O'Connell Perez, Program Co-Chairs

August 4-5, 2017 TADC NOMINATING COMMITTEE MEETING
The Houstonian – Houston, Texas

August 11-12, 2017 WEST TEXAS SEMINAR WITH NMDLA
Inn of the Mountain Gods
Ruidoso, New Mexico
Bud Grossman, Program Chair

September 20-24, 2017 TADC ANNUAL MEETING
Fairmont Olympic Hotel
Seattle, Washington
Don & Jarad Kent, Program Co-Chairs

President's Message

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

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

~ TADC Mission Statement ~

As I sat down to prepare my remarks for the Annual Meeting, where I would begin my term as President of the TADC, I read our Mission Statement. I was reminded that we as an organization have set a high standard for ourselves. We aspire to excellence in our professional lives, fairness in the justice system, and preserving trial by jury. We are not a trade organization, but a group of lawyers who have worked together since 1960 to protect and preserve the civil justice system in Texas.

This mission has been recognized as a key part of our American society from the beginning. The founders included trial by jury in our federal and state constitutions and recognized the role of lawyers to protect the rights afforded its citizens.

In 1831, Alexis de Tocqueville was dispatched by the French government to the United States. As he travelled the country, he met citizens and closely observed our Democracy at work. Our system had been operating for nearly fifty years and had shown itself to be successful. Alexis de Tocqueville published his observations on the many aspects of American society in his 1835 treatise, *Democracy in America*. As to the role of lawyers and trial by jury, he observed:

> "In visiting the Americans and in studying their laws we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy."

And

> "I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes."

Alexis de Tocqueville, *Democracy in America,* 1835

That was 1835. You may ask whether de Tocqueville's observations are still valid today. Is our role the same today?

This past year, our President Clayton Devin, brought TADC, TEX-ABOTA and TTLA together to submit a Joint Comment opposing an effort by some in the American Bar Association to allow non-lawyers to own and control law firms. A number of our members contacted Clayton, and with their permission, some of their thoughts and wording were included in the Joint Comment. The following came from one of our members and cannot more eloquently state the importance of our role as lawyers:

> "We must not forget that the legal profession holds a special place in our society. It has stabilized society at times of crisis, righted wrongs and fought for honesty in commerce for centuries. We as lawyers are charged with upholding the honor of the law, the courts, fellow lawyers and our system of justice, even when doing so is unpopular, unprofitable or under attack by business or political interests."

I joined the TADC in 1984, and while the practice has changed in many ways since the '80s, the TADC has not lost sight of its purpose. Because we have stayed true to those goals, our organization is known and respected for its integrity and stability.

That said, I also value my years of membership for a number of important practical reasons.

First, my involvement has resulted in the establishment of strong friendships with members from El Paso to Beaumont and Abilene to Galveston. These relationships came from working together to achieve common goals and breaking bread together at meetings.

Second, because of our membership structure, our time together is collegial, rather than adversarial. I have referred business to members and had significant litigation referred to me. I have called other members to ask for information about a court or lawyer knowing I can rely on the answers. I have borrowed conference rooms from members across the state and provided conference rooms and office space for out of town members working on cases in Houston.

Third, the TADC has always supported me in my practice. The programs, publications, and services provided by the TADC have made me a better lawyer. The CLE and other professional training materials from the TADC are second to none.

Finally, I have seen firsthand how the TADC works to represent our interests before the Texas Legislature. Those efforts have taken many forms. In some instances, we are asked to draft new legislation or assist in overcoming bad drafting from prior sessions. At other times, we work to educate legislators and their staffs concerning the effects of proposed legislation, and if necessary, work to halt its passage. Generally speaking, because of the respect we have garnered over the years, we are routinely consulted on matters that will affect the civil justice system.

The question is how do we maintain our organization and continue to make a difference for our members and the bar in the years to come? We all know the changes made and those that continue to be made to our profession. How do we ensure that those who follow will have the same great organization we have enjoyed?

This is a question that all organizations of our kind are facing, whether they be national or local. To be successful, we must realize that while history and tradition matter, they only allow us to build on the future. The good news is that we have a lot of good history and tradition on which to build.

Recognizing that the young lawyers are our future, we have been working to increase their involvement in every part of the organization. More young lawyers were added to the Board of Directors, and the TADC's Young Lawyer Committee organized local events to introduce colleagues to the benefits of membership. This last year Clayton Devin appointed a Long Term Planning Committee. Half of its members were young lawyers, and they played a key part in the discussions and recommendations.

A second aspect of addressing our future concerns how members and non-members perceive who we are and what we do. With the many changes in the insurance industry, including the growth of staff counsel, guidelines and auditing, it is no surprise that many, if not most, of our older members have had to retool and change their practices. Looking at the most recent data, roughly half of our membership indicates that a significant portion of their practice is commercial litigation. If we are to effectively support what our members do on a daily basis, we must ensure that our programs and publications meet the needs of all members.

But the issue is broader than just adjusting programs and publications. In a number of recent conversations, we found that there remains a perception that TADC membership is made up of only insurance defense lawyers and that the organization exists only to support the insurance defense bar. These conversations were with individuals we were trying to recruit as well as members deciding not to renew their membership. I am certainly not suggesting that we ignore the fact that we still have a little over half of our members who primarily focus on insurance defense; I am just saying that we must work to make sure that we provide value to all of our members.

Please do not hesitate to contact me with your suggestions, criticisms and ideas. We are all working toward the same goal…excellence in our professional lives, fairness in the justice system, and preserving trial by jury.

While we can all fill a book of examples where the system stumbled or lawyers did not measure up, after nearly forty years, I still believe it is a privilege to practice law. Without question, my participation in the TADC and the friends I have made here, have played a large part in my thinking.

Amicus Curiae Committee News

There have been several significant amicus submissions.

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

Brent Cooper (Cooper & Scully) filed an amicus brief in support of the petition for review in *Levinson Alcoser Assoc. LP v. El Pistolon II, Ltd.*, 2015 WL 601983 (Tex. App.—Corpus Christi 2/15/15, pet. granted)(memo. op.). This was an interlocutory appeal over the adequacy of an expert certificate of merit (COM) under TCPRC chap. 150. The court of appeals held the COM was adequate. The core issues are whether (1) the COM must state specific facts demonstrating the claim, and (2) the expert must establish knowledge in the defendant's field apart from holding the same professional license. Review was granted and oral argument is set for Nov. 7, 2016.

Lawrence Doss (Mullin Hoard & Brown) filed an amicus brief in support of the petition for review in *4Front Engineered Solutions, Inc. v. Rosales*, No. 13-13-655-CV, 2015 Tex. App. LEXIS 2332 (Tex. App.—Corus Christi Mar. 12, 2015, pet. granted). This is a personal injury suit against premises owner 4Front by the employee of an independent contractor hired to fix the sign over 4Front's front door. The contractor borrowed 4Front's forklift to hold his employee aloft in cage. The contractor accidently drove the forklift off the sidewalk, causing injury to his employee in the raised cage. Two novel issues: (1) whether Texas will recognize a duty of negligent entrustment when 4Front loaned the contractor a forklift to do its work, and (2) whether TCPRC Chap. 95 applies to claims the premises owner negligently entrusted equipment to the contractor? Review was granted and oral argument occurred on Oct. 4, 2016.

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

Roger Hughes (Adams & Graham) submitted an amicus in support of the petition for review in *United Scaffolding v. Levine*, 2015 WL

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

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

Roger Hughes (Adams & Graham) filed an amicus to support the petition for review in *Gunn v. McCoy*, No. 14-14-0112-CV, 2016 Tex. App. LEXIS 3036 (Tex. App.—Houston [14th Dist.] Mar. 24, 2016, pet. filed)(mem. op.). This appeal raises two important issues. First, citing *Favarola*, the court approved admitting medical expense affidavits from the claimant's subrogated health insurer. Second, the court of appeals held it was harmless error to exclude defense medical expert testimony that the claimed $3.2 million in future medical was excessive by over 50%. The court reasoned the excluded expert's testimony was cumulative because plaintiff's expert mentioned the excluded expert's figures when explaining why they were wrong.

TADC filed a joint amicus brief with TTLA, ABOTA and Tex-ABOTA, in support of the trial judge's sanctions in *Brewer v. Lennox Hearth Products*, No. 07-16-0121-CV, in the Amarillo Court of Appeals. Roger Hughes (Adams & Graham) signed for TADC. This case has received national attention. Briefly, in a high visibility products liability case in a small community, defense counsel conducted a survey found by the trial judge to intimidate local witnesses and prejudice potential jurors. This could be a cutting-edge decision in Texas on the limits of pre-trial opinion surveys and this abuse to prejudice the jury pool.

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TADC Amicus Curiae Committee

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

2016 Annual Meeting

The Worthington Renaissance Hotel – September 21-25, 2016 – Ft. Worth, Tx

The TADC 2016 annual meeting was held in Fort Worth, September 21-25, 2016 and the wonderful Worthington Renaissance Hotel. Program chairs George Haratsis and Brittani Rollen amassed a program with over 11 hours of CLE including 2.75 Hours ethics. Topics ranged from *"An Update from the Supreme Court",* provided by justice Deborah Lehrmann, to *"Living a Meaningful Life in the Law"* with Lewis Sifford.

2016 President's Award Winners Bud Grossman & Rachel Moreno

DRI Southwest Region Vice President Bryan Garcia presents Clayton Devin with the DRI Exceptional Performance Award

Changing of The Guard. Mike Hendryx Receives The Gavel From Clayton Devin

2016 Young Lawyer Award Recipient Jennie Knapp

Angela Meyer & Darin Brooks With Tom & Lisa Ganucheau

Jamie Whitney & George Haratsis

2016 Annual Meeting

Gayla Corley, Mike Shipman, Jeff Pruett With Past President Mike Wallach

Lewis Sifford Talks Ethics!

Greg & Justice Debra Lehrmann, Gaston Broyles & Junie Ledbetter Broyles and Bryan Garcia

Past State Bar President Roland Johnson

Justice Debra Lehrmann

Andrew, Matthew & Margaret Ann Colia accept the TADC Founders Award on behalf of Milton Colia

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2016 Annual Meeting

Justice Eva Guzman

Jeanne & Alan Harrel With Chantel Crews

Rachel Moreno, Jennie Knapp, Jason McLaurin & Trey Sandoval

KaRynn O'Connell, Greg Perez, Elizabeth O'Connell Perez & Kate

Doug Rees, Pat Long-Weaver, Hyattye Simmons, Mark Stradley & Mike Hummert

www.tadc.org

A Past President's Perspective

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

"At night I wake up with the sheets soaking wet, and a freight train running through the middle of my head" – Bruce Springsteen, "I'm on Fire" (1984).

You know the feeling. The night before trial, or an important deposition, or a tough hearing. What trial lawyers do for a living is not for the faint of heart, nor is the stress we encounter always appreciated by those whose interests we represent. Texas trial legend and former TADC president Blackie Holmes once said, "Clients don't understand what it is like to choke on your toothbrush the first day of trial." As a Texas civil trial lawyer, you understand what Blackie meant. Of course, there are other challenges – finding and keeping clients, ever-changing schedules, deadlines, firm administration, and the elusive work-life balance required to sustain the inner being. It is perhaps not surprising that some studies estimate that 25 percent of lawyers suffer from depression, and between 18 and 25 percent of practicing lawyers have alcohol issues.

In his inaugural address, State Bar of Texas President Frank Stevenson said: "This is a challenging time to be a lawyer. And the challenges confronting us confront us as a profession, not just as this subgroup, but not that one. Yet when only this or that kind of Texas lawyer is being criticized, we sometimes gull ourselves into thinking our particular kind of Texas lawyer is untouched. It simply is not so."

Fine, you say, I have heard this before. Why would I keep reading, and what does this have to do with the Texas Association of Defense Counsel? The TADC occupies a unique position among professional organizations for Texas civil trial lawyers. While its organizational goals overlap to some degree with TTLA and Tex-ABOTA, particularly preserving the right to jury trial for all citizens, TADC is the only statewide organization representing civil trial lawyers who do not regularly and consistently represent plaintiffs in personal injury cases. For years, TADC's image was that of a group of insurance defense lawyers. Many members are still retained by insurance carriers in various capacities. But today, many of these assignments fall in categories of contractual, business and commercial disputes, and half our members describe themselves as commercial trial lawyers.

Earlier this year, TADC joined with Tex-ABOTA, and TTLA to publicly oppose a move by the American Bar Association to endorse non-lawyer ownership of law firms. The three organizations submitted a joint comment, and the ABA eventually withdrew the proposal.

Later in the year, TADC's Amicus Committee, led by Roger Hughes, co-authored an amicus brief, along with TTLA and Tex-ABOTA, in an important case pending in the Amarillo Court of Appeals, involving the use of community-wide "push polls" by a litigant in an attempt to indoctrinate potential jurors before trial. The technique may not work every time, but it will work, and if allowed to persist, jurors will show up for jury duty with predetermined ideas about case outcome. The case is pending.

Some may believe the State Bar of Texas will protect lawyers and their practices. In fact, as a quasi-governmental entity, the SBOT is strictly limited in its ability to advocate for its members in the legislative arena. As

recently illustrated by attempts by the Collaborative Law Section of the SBOT to include adoption of the Uniform Collaborative Law Act as part of the SBOT legislative program, SBOT's internal operations are political, and not always transparent. Thanks to those of you who contacted members of the SBOT Board of Directors in opposition, and to David Chamberlain for sounding the alarm and rallying TADC, Tex-ABOTA, and TTLA into action. The proposal has been removed from SBOT's legislative agenda.

While TADC's members and their clients will never agree with all positions taken by TTLA or Tex-ABOTA, the lesson learned this year is that Texas trial lawyers can and must find common ground when the civil justice system is threatened.

This was a non-legislative year. In fact, over 300 interim legislative studies have been underway, and the TADC Legislative Committee, chaired by Mike Morrison and Don Kent have been actively monitoring and evaluating those that could potentially affect your practice. These include, among others, judicial selection and compensation; first-party insurance claims, particularly weather-related claims; expansion of arbitration; water rights; and eminent domain. Additionally, the committee has worked to develop talking points and resource materials in anticipation of the re-emergence of the chancery court legislation introduced during the last session. The committee, with input from Roger Hughes, is working with TADC member and state representative Kenneth Sheets to craft legislation aimed at abuses reported in the use of Tex. Civ. Prac. & Rem. Code, Chapter 18 "Reasonable and Necessary" affidavits in civil cases. Finally, a sub-committee of the Texas Supreme Court Advisory Committee is considering an overhaul of current Texas discovery rules to more closely resemble federal rules. Two former presidents of TADC, Tom Riney and Hayes Fuller, are members of the sub-committee.

This year's Program Committee chairs, K. B. Battaglini and Doug Rees, coordinated local events, the TADC Trial Academy, and five major meetings. TADC's continuing legal education offerings are second to none. The recent annual meeting, chaired by Brittani Rollen and George Haratsis included presentations by Texas Supreme Court Justices Eva Guzman and Debra Lehrmann, who provided insights into recent decisions of the court as well as effective advocacy.

Earlier in the year, the winter meeting – Joe Hood, program chair; spring meeting – Chantel Crews and Trey Sandoval, program chairs; summer meeting – Arlene Matthews and Slater Elza, program chairs; and the West Texas/New Mexico meeting – Bud Grossman, program chair featured impressive arrays of speakers and topics. If you have not attended a TADC meeting lately, the combination of educational offerings and hospitality cannot be beat.

The Publications Committee, chaired by Mark Stradley and Slater Elza, oversaw production of the TADC magazine, as well as the substantive law newsletters. These included commercial litigation – John Bridger and Jason McLaurin, editors; construction litigation – David Wilson, editor; defamation/libel/slander – Bradley Bartlett and Carl Green, editors; energy law – Greg Curry, Greg Binns and Christopher Dachniwsky, editors; employment law – Ed Perkins, Travis Cade Armstrong, Sophia Larvicella and Mary London Fuller, editors; health care law – Casey Marcin, editor; insurance – David Clark, Brian Bagley, Scott Davis, and Kristen McDanald, editors; products liability – Joe Pevsner and Kathleen Wade, editors; professional liability – Monika Cooper, editor; and white collar defense – Lea Courington, editor.

The Membership Committee did a remarkable job of coordinating efforts among all the committees to maintain membership numbers and increase young lawyer participation. Bud Grossman and Christy Amuny employed a wide array of encouragement, persistence, organization, and occasional embarrassment to organize local events and provide member value.

The Young Lawyers Committee, chaired by Rachel Moreno, expanded TADC's outreach to this important segment of our membership, including social and educational events around the state.

As mentioned in the previous issue of this magazine, a committee composed of Mike

Morrison, Gayla Corley, Mark Walker and Kyle Briscoe undertook the tedious and important job of updating and re-writing TADC's bylaws. The resulting work was adopted at the annual meeting, and is a much improved document that reflects today's organization.

The Long Range Planning Committee was new this year. Chaired by Michele Smith, the committee included David Chamberlain, Chantel Crews, Tom Ganucheau, Bud Grossman, Mike Hendryx, Jennie Knapp, Elizabeth O'Connell, and Trey Sandoval. The committee performed important work this year, including a new mission statement, formulation of Board policies and procedures, recommendations for expansion of the role of the Young Lawyers Committee, and changes to operational, marketing, and financial practices.

The annual meeting included recognitions and awards.

The Founders Award is given in recognition of a member whose long term body of work with and for TADC has effected positive change within the organization and has earned favorable attention for TADC. This year's Founder's Award was presented posthumously to Milton Colia, a beloved and respected TADC member, who was serving as TADC President when he passed away suddenly last December. Accepting the award on Milton's behalf were Margaret Ann Colia and their sons, Andrew and Matthew.

I think Milton's contribution to TADC over many years can be likened to a quote from a speech given by Leon Jaworski in 1961: "It can never be forgotten that the greatest reward that can come to a lawyer is not measured by wealth or social position or popularity. It lies in the inner satisfaction that comes with the faithful discharge of duty. This is truly the lawyer's highest form of compensation." This is the approach Milton took toward his work with TADC. He is greatly missed.

Presidents' Awards are given to members whose extraordinary leadership and dedication during the year have enabled TADC to advance its mission and goals. Rachel Moreno and Bud Grossman were the recipients of this year's awards.

Rachel was asked by Milton Colia to chair the Young Lawyers Committee, which made considerable sense, because Rachel worked with Milton. After Milton's passing, Rachel might have been excused if her enthusiasm for the position faded. It did not. She worked tirelessly to organize and coordinate young lawyer events across the state, and TADC benefitted greatly from her efforts.

Membership Committee chair may be the most difficult position in TADC's organization. Professional groups face many challenges in maintaining and increasing membership while providing value to their members. The membership position requires constant attention and organization, and Bud certainly performed at a high level this year.

Jennie Knapp received this year's Young Lawyer Award. During the past year Jennie helped organize local events, spoke at two of TADC's meetings, and provided valuable input to the Long Range Planning Committee. TADC is fortunate to have her as a member.

When Milton Colia passed away early in his term as President, it left a void in TADC's leadership. Fortunately for me, Michele Smith and Mike Hendryx were there to help, encourage, and provide counsel when I became President. In an extraordinary year for TADC, Michele and Mike received Special Recognition Awards for their service.

Every Past President's column in my memory has included recognition of Bobby Walden, Debbie Hutchinson and the TADC office staff. A comprehensive list of the tasks and jobs performed by Bobby and Debbie would take pages. Most of the time, it seems like things get done automatically, but that is not true. Bobby and Debbie make it look easy, but maintaining that appearance takes a lot of effort. I appreciate everything the office did this year.

One thing I learned over the course of this year is that TADC has a lot of moving parts, and it requires hard work and dedication from many people to keep it moving forward. TADC will continue to evolve and change as the practice of law changes. We made progress this year, and are positioned to take on next year's challenges. Thank you to all who made it possible.

2016-2017 TADC Board of Directors

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2016-2017 TADC Board of Directors

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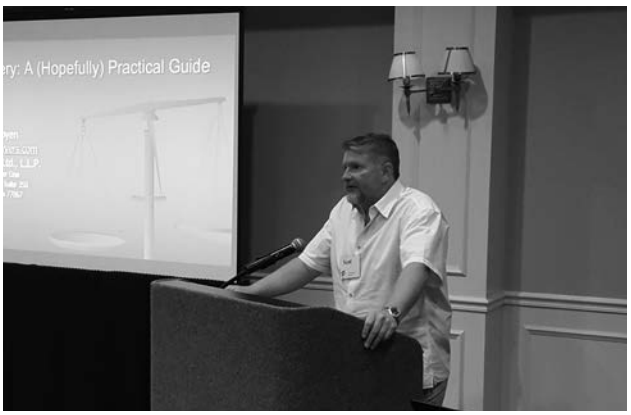

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"I BACK THE PAC!" TURN UP THE VOLUME

By Chantel Crews,
PAC Trustee Chair
Ainsa Hutson Hester &
Crews, LLP, El Paso

TADC PAC REPORT

At TADC meetings, bright green stickers on our members' nametags proudly proclaim: "I BACK THE PAC". This small, but strong declaration acknowledges the financial contributions members make each year to turn up the volume of the TADC's voice within the legislature and courts. The voice of the TADC is not a whisper – our voice is strong, respected, and effective because of the great things the TADC does for our profession and for our civil justice system.

The TADC's Political Action Committee – the PAC – helps amplify the TADC's voice through donations to various legislators and judicial candidates, regardless of their political party affiliation. The TADC does not take political sides on issues, but instead works hard to protect the civil justice system, the right to trial by jury, and our independence as a profession. The PAC donates strategically to people who are or will be in leadership positions in the legislature and those judicial candidates who have a strong track record of promoting the civil justice system.

The TADC has the only significant voice in current politics that advocates for the independence of the legal profession and fairness in our judicial system. Sometimes that means the TADC joins the chorus with other lawyers' groups. Sometimes that means the TADC goes solo by advocating positions with which our clients may disagree. However, because the TADC represents the voice of reason in protecting the civil justice system and our profession, legislators on both sides of the aisle look to the TADC to offer advice, especially during legislative sessions. Often, the TADC's advice is sought while legislation is being drafted.

On January 10, 2017, the 85th Legislature convenes in Austin. Here are a few items we expect will be considered this session this Session:

- Medical costs affidavit from CPRC §18.001: Ever since the "paid or incurred" statute was passed in 2003, the plaintiffs' bar has worked in the Legislature and the courts to either repeal the statute or find a way around it. The current controversy involves, among other things, the use of third party factors to sign the medical costs affidavit.

- Chancery Court: Last Session, the TADC worked diligently to stop an attempt to establish a Chancery Court system similar to that in Delaware. The proposal to establish an appointment business court will likely be proposed again this Session.

- Expedited trials and Jury service: The House Judiciary and Civil Jurisprudence Committee has been charged with determining whether the implementation of the expedited trials has been effective as well as determining participation rates for jury service and ways of improving participation.

- Hail litigation: This will be a hot topic with more examples of abuses in hail litigation and fears that the property and casualty market could seize up unless the Legislature intervenes.

So, how can you turn up the volume of the TADC's voice? BACK THE PAC! Every year, the TADC encourages our members to donate the equivalent of one billable hour, or more if you are able, to the PAC. Your donation not only earns you a bright green sticker proclaiming your support, but most importantly, it helps to amplify the TADC's reasoned approach to legislation and to carry that voice throughout the halls of the State Capitol and through the courts across the state.

Let us hear from you today!

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TADC Legislative Up-Date

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

2017 Legislative Outlook: More of the Same?

With the general election safely behind us, we can finally shift attention to the next legislative session, which convenes on January 10. (Prefiling of legislation commences on November 14, though most significant legislation usually does not get filed until after the session begins and sometimes not until the bill filing deadline on March 10.)

The election produced little change in the balance of legislative power. In the Texas Senate, three new senators will take the oath on January 10. Dr. Dawn Buckingham, an Austin physician won a contested GOP primary in SD 24 and replaces retiring Sen. Troy Fraser (R-Horseshoe Bay). In SD 1, the retirement of longtime Sen. Kevin Eltife (R-Tyler) left an open seat, which will be filled by Rep. Bryan Hughes (R-Mineola). Finally, Sen. Rodney Ellis (D-Houston), who resigned in order to take a seat on the Harris County Commissioner's Court, leaves his seat to former Rep. Borris Miles (D-Houston). If anything, the Senate is probably somewhat more conservative than last session, boding well for Lt. Governor Dan Patrick's agenda.

Similarly, on the House side, the election produced little change. Four Republican members elected in 2015 lost their seats to Democratic challengers: Democratic attorney Victoria Neave narrowly defeated TADC member and two-term Rep. Kenneth Sheets (R-Dallas); former Rep. Phillip Cortez (D-San Antonio) regained his seat, defeating Rep. Rick Gallindo (R-San Antonio); former State Rep. Mary Ann Perez (D-Houston) toppled incumbent Rep. Gilbert Pena (R-Houston); and Democrat Tomas Uresti (D-San Antonio) beat Rep. John Lujan (R-San Antonio). All other incumbents held on, a few with tight races, including Rep. Jason Villalba (R-Dallas), Rep. J. M. Lozano (R-Kingsville), and Rep. Linda Koop (R-Dallas).

In statewide court elections, all three Texas Supreme Court incumbents—Justices Debra Lehrmann, Paul Green, and Eva Guzman—handily won re-election. Incumbent Court of Criminal Appeals Judge Mike Keasler likewise won re-election, while Republican Mary Lou Keel defeated longtime incumbent Larry Meyers (who switched parties from Republican to Democrat for the race) and Republican Scott Walker defeated Democrat Betsy Johnson.

There were a number of contested races for seats on the courts of appeals. In Houston, incumbents Chief Justice Sherry Radack and Justice Evelyn Keyes turned back Democratic challengers for the 1st Court, while incumbent Justice Tracy Christopher and Kevin Jewell were elected to the 14th Court. In Dallas, incumbents Lana Myers and David Schenk retained their seats. Elsewhere in the state, challenger Irene Rios defeated incumbent Jason Pulliam for a seat on the San Antonio court and Leticia Hinojosa knocked off incumbent Greg Perkes in Corpus Christi.

In broad terms, tightening budget conditions will dictate much of what happens this session. Texas budget writers can expect to have $5-6 billion less to work with two years ago, so finding money to fund population growth in Texas public schools and on the state's Medicaid

rolls will be a lot harder. Although the Governor and Lt. Governor have indicated interest in further reductions in the franchise tax, lack of surplus revenue will likely shelve the issue until future sessions. And although the Texas Supreme Court upheld the current school finance system, the Legislature will nevertheless look at options for revising the system. In last week's election, Houston Independent School District voters rejected a proposition calling for HISD to send money to the state for redistribution to property poor school districts. The failure of the vote will likely compel the Commissioner of Education to detach property from HISD and assign it to an eligible property poor district. Changing the system to remove HISD from recapture could cost the state billions of dollars a year and create inequities that might make the entire system once again vulnerable to constitutional attack. Nevertheless, pressure for change from legislators representing HISD will intensify as the session goes on. In the final analysis, however, the lack of budget flexibility will make it exceedingly difficult to address school finance next year.

In any event, TADC will be very busy this session. The unfinished business of hail litigation tops the civil justice agenda. The cast of players in this issue includes Sen. Larry Taylor (R-Friendswood), Rep. John Smithee (R-Amarillo), and Rep. John Frullo (R-Lubbock), all highly experienced and skilled legislative practitioners who very nearly overcame intense opposition from the plaintiff's bar last session. The problem certainly hasn't gone away, and odds of passing a bill of some kind have probably improved somewhat. What that bill will look like remains to be seen, but it is likely to contain some combination of reducing the interest penalty in §541 and 542 claims, corralling attorney's fees in some way, requiring more detailed presuit notice, and taking individual agents out of the lawsuits.

We are certain to see legislation dealing with abuses of the medical costs affidavit provisions of Chapter 18, CPRC. Ever since the Legislature enacted the "paid or incurred" statute in 2003, the plaintiff's side has launched efforts in the Legislature and the courts either to repeal the statute or find a way around it. The current controversy involves, among other things, the use of third party factors to sign the affidavit. There are also significant problems with the expense of hiring a medical expert to controvert an affidavit and the timing of the counter-affidavit. TADC is currently involved in compiling information and drafting appropriate language to address the problems with §§18.001 and 18.002 for the Legislature to consider next spring.

We also expect to see another attempt to create a Delaware-style Chancery Court system for business litigation in Texas. Last session a House proposal to establish an appointed business court was considered and ultimately voted out of committee, though it died in Calendars Committee late in the session. The TADC Legislative Committee is currently working on a policy paper to be used to oppose this idea next session.

We have recently become aware of the possibility of legislation concerning §901.457, Occupations Code, which subjects to privilege information communicated by a client to a certified public accountant in connection with services rendered by the CPA to the client. The issue arose in a New York case involving the New York Attorney General's investigation of ExxonMobil's involvement in climate change policy and communication. The state sought the production of documents from PricewaterhouseCoopers, which asserted the Texas privilege. A New York court ordered the production, based on broad statutory language allowing disclosure in court proceedings. It is possible that business groups may try to tighten the statutory language to avoid this type of result in the future.

As we've seen in recent sessions, eminent domain continues to be a highly contested matter for landowners and entities with eminent domain authority, such as utilities and pipelines. This session a new player has joined the eminent domain game: high speed rail. We expect to see a number of proposals to expand the rights of landowners in eminent domain proceedings, including cost shifting for attorney's fees and expert fees in eminent domain litigation. We will keep an eye on these bills in the event that any of our members or their firms are involved in this practice.

Amicus Brief: A Lawyer's Use of a Push Poll During Litigation Violated the Integrity of the Seventh Amendment

By Brian P. Lauten and Christopher A. Duggan

Editor's Note:
The following pages contain a consolidated amici curiae brief filed on behalf of the American Board of Trial Advocates, the Texas Association of Defense Counsel, the Texas Trial Lawyers Association, and the Texas Chapters of the American Board of Trial Advocates in support of the Appellees and Judge Reyes' order in the appeal.

Earlier this year, TADC joined with the Texas chapters of the American Board of Trial Advocates and the Texas Trial Lawyers Association in filing an amicus brief in a case involving sanctions imposed against a Texas lawyer for his use of a "push poll" distributed to potential jury veniremen in advance of jury selection. The American Board of Trial Advocates determined that the issue is important enough to merit publication in its national magazine, Voir Dire. The article is re-printed here with permission. ~ Clayton Devin, TADC immediate past president.

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Introduction

A. "Push Polls" are neither a survey nor a poll at all, but an attempt to sway the person receiving the call; a practice that has been denounced by the authentic polling associations.

A "push poll" — "which are not really polls at all — are often criticized as a particularly sleazy form of negative political campaigning." *See* Marjorie Connelly, *The New York Times* (June 18, 2014). "[T]here is no effort to collect information, which a legitimate poll does." *Id.* "The questions are skewed to one side of an issue or candidate, the goal being to sway large numbers of voters under the guise of survey research." *Id.* "Push polling is so incompatible with authentic polling that the American Association for Public Opinion Research (AAPOR), the American Association of Political Consultants (AAPC), the Council for Marketing and Opinion Research (CMOR) and the National Council on Public Polls have all denounced the practice." *Id.*

B. Appellant's conduct undermined the Parties' Right to a Fair and Impartial Jury Trial, a Right that is at the Foundation of both our Judicial System and our Democratic Government, and compels ABOTA's rare involvement in an intermediate state court appellate matter.

The American Board of Trial Advocates rarely seeks to intervene in an intermediate state court appeal. The issues involved in this case, however, go to the core of ABOTA's mission and the foundation of our judicial system. All litigants have a right to a fair and impartial jury, untainted from efforts by any litigant or advocate to stack the deck before the case is even called. The right to a civil jury trial, enshrined in both the Seventh Amendment to the United States Constitution and Article I of the Texas Constitution, means a trial by a fair and impartial jury. *Babcock v. Northwest Memorial Hosp.*, 767

S.W.2d 705, 709 (Tex. 1989) (citing *Texas & Pac. Ry. V. Van Zandt*, 317 S.W.2d 528, 531 (Tex. 1958)).

Equally as important, society at large has both a right and an expectation that its juries will be impartial arbiters of the facts presented, and will make decisions based upon the facts presented at trial and the law as given to the jurors by the trial judge — not based upon the efforts of anyone to influence potential jurors before they are even impaneled. Nothing could be more central to the jury system — and ABOTA can imagine nothing that could be more poisonous to this ancient ideal than the behavior found by Judge Reyes below.

After a lengthy hearing consuming five full days resulting in 14 volumes of transcript, and extensive briefing by all interested parties, Judge Reyes left no doubt about what he had in front of him: a "win at all cost" approach that included deliberate attempts to force-feed the venire with false information about the case on an *ex-parte* basis nearly on the eve of the trial setting. In plain, unvarnished language, Judge Reyes set forth his findings that form the crux of the case now on appeal. Judge Reyes specifically found that attorney, William A. Brewer, III ("appellant" or "Mr. Brewer"), was justifiably subject to sanctions because, in Judge Reyes's words:

- "Mr. Brewer's conduct, taken in its entirety, is an abusive litigation practice that harms the integrity of the justice system and the jury trial process;
- Mr. Brewer's conduct was designed to improperly influence a jury pool and [/] or venire panel via the dissemination of information without regard to it[s] truthfulness or accuracy;
- The net effect of Mr. Brewer's conduct was to impact the rights of the parties to a trial by an impartial jury of their peers."

CR 1023.

Appellant's conduct, as found by Judge Reyes following extensive hearings and briefing, undermines the adversarial process, threatens the right of all parties to a fair and impartial jury, and damages the community's confidence in a system where all parties have equal access to a fair hearing. The rights at risk are guaranteed by both the Seventh Amendment and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by Article I, §15 and §17 of the Texas Constitution, which guarantees to all citizens "due course of the law of the land." [1]

Understandably, trial lawyers — on both sides of the docket — and judges nationwide are following this case with the confidence that this Court will do two things: (i) rule on the issues presented in this appeal and address the described misconduct head on without avoiding the obligation to do so; and (ii) refuse to condone a gross violation of the parties' fundamental right to a fair and impartial jury, and take this opportunity to remind all advocates and citizens of the right of all to a fair civil jury trial to resolve disputes, a right that the Texas Constitution declares to be "inviolate." TEX. CONST. ART. 1, § 15. Judge Reyes, who entertained lengthy and exhaustive evidentiary hearings on this issue, took a measured approach and got it right. ABOTA asks this Court to follow suit.

C. This Court cannot condone conduct designed, even assuming the best of intentions, to unfairly influence the venire ex-parte based on false information without threatening every litigant's right to a fair trial.

"The law is exceedingly jealous of the purity of the jury box, and always has been. It seeks to shut up every avenue through which corruption … or any other improper influence, could possibly make an approach to it." See *Pierson v. State*, 18 Tex. App. 524, 559 (1885) (emphasis added). Indeed, "[i]t recognizes the fact that impartiality is the cornerstone of the fairness, security and advantages of trial by jury." *Id.* at 559. At minimum, this means that both the litigants and society at large are entitled to a fair trial before a jury that is as impartial as the human condition permits.

Attempts to poison the potential jurors before a trial even begins is an assault on the rights of the litigants to a particular case and the community's expectation in the fundamental fairness of the system that forms the cornerstone of the judicial system.

If lawyers and the parties they represent are given unchecked power to conduct widespread *ex-parte* "push polls" using false information calculated to steer the venire toward their theory of a pending case on the eve of trial, the jury system is tainted, the very fabric of our democracy is corrupted, and disputes cannot be fairly resolved. Lawyers from coast to coast are following this appeal: This Court must make a resounding statement that this conduct, even if pursued under the auspices of zealous advocacy, cannot be tolerated.

D. A Database of 20,000 Potential Jurors was used to Generate 300 completed surveys using False Information Designed to Influence the Venire.

Appellant leaves the false impression that the survey was innocuous and limited to just 300 people. Not true. 6 RR (91:21-92:7). The push polling company hired by appellant used 20,000 names of potential jurors in Lubbock to generate completed information from 300 people. 6 RR (51:17-52:7; 91:7-14).

As the evidence below established, and Judge Reyes found, it takes far more than 300 "cold calls" to generate a completed survey from 300 people. 6 RR (91:21-92:7; 110:23-111:1).

While only 300 people may have completed the survey, thousands of future jurors were force-fed false information about the case that the trial court found, as a factual matter, was intended to influence the future jurors before they were even called into the courtroom.

It is unknown how many thousands of calls had to be made

in order to generate 300 completed surveys. 6 RR (91:7-14; 204:25-205:3); 10 RR (106). But Professor Cummins testified that between 3,000 and 10,000 cold calls would need to be made to obtain 300 completed surveys. 10 RR (197-198). Indeed, the witnesses who testified at the hearing are not included in the list of 300 because they did not complete the survey. *See infra* (fn. 3).

Contrary to appellant's assertions, the Court below found that the survey was packaged with untruths and misinformation that was clearly inaccurate. 6 RR (173:9-173:16); 10 RR (20-24). There is nothing in the record that would justify revisiting Judge Reyes' findings in that regard. Rather, the record amply supports the trial court's ruling. A few examples suffice to make the point:

In part of the survey, the caller reads to the potential juror, *inter alia*, nine reasons why the appellant's client could not be at fault in the pending lawsuit. PX 1 (p. 19, ¶¶ 17-25). One of those statements is this:

> The homebuilder did a sloppy job of supervising the contractor he hired to install the electrical wiring and the electrician did not allow for a reasonable amount of space between the electrical wiring and the CSST. The manufacturer cannot be held responsible for this type of sloppy and careless oversight.

See id. (at ¶ 20) (emphasis added)

Another statement in the push poll was designed to inject a causation defense into the potential juror's thought process by blaming other defendants, as well as the plaintiffs themselves — and this is all occurred just three weeks before the trial setting. For example, question 25 states:

> **There were many other things that contributed to this tragic incident.** The foam insulation in the attic was not properly treated, the people who were present did not heed the warnings of the smoke alarm, and electrical wiring was laying right on top of the CSST, which is in violation of the safety warnings and installation guidelines.

See id. (at ¶ 25) (emphasis added)

As Judge Reyes found, these statements contain untrue assumptions asking the potential juror to accept the argument as true. These and other examples highlighted by Judge Reyes demonstrate the obvious: the push poll was laden with statements that were not designed to illicit "open-ended" attitudes, opinions and beliefs in the community.

Only one reasonable conclusion can be drawn, and it is the one Judge Reyes drew. The push poll was designed to poison the potential jury venire, essentially stacking the deck before the parties even arrived in court. Left unchecked, nothing could be more lethal to the jury system.

Appellant goes to great lengths to explain away the fact that thousands of potential jurors were approached with this push poll and that the poll contained statements about the case that were demonstrably false. *See* Appellant Brief (p. 21-26, § I, ¶ B). However, Judge Reyes, as the fact finder, found that the push poll was ubiquitous and was deliberately calculated to mislead potential jurors and the evidence is replete with examples to sustain that finding. *See* CR 10203 (¶ 2).

Appellant also goes to remarkable lengths to spin the misleading statements as mere attempts to determine general public sentiment rather than deliberate attempts to poison the potential venire with misinformation. *See* Appellant Brief (p. 16-20, § I, ¶ A). However, Judge Reyes rejected these arguments, and appellant offers nothing new here that Judge Reyes did not already consider after days of hearing testimony, assessing the credibility of witnesses, and reviewing an extensive record.

The record shows that the Court exercised its discretion carefully and appropriately. Further, contrary to appellant's brief, lawyers have an ethical obligation to be truthful in statements made to others. TEX. R. PROF. RESP. 4.01. That includes polls like the one fashioned and approved by appellant. And the record establishes, as Judge Reyes found, that appellant was intimately involved in crafting the poll. 6 RR (20-23); PX 5; 9 RR (109-110); 7 RR (27); 7 RR (61).

The witnesses who testified at the hearing left no doubt what they thought of the push poll: it was an attempt to influence them, not to gather unbiased information.[2] 6 RR (241:1-242:3). The push poll was effective in changing people's minds in a negative way toward the home builder and its potential liability. 10 RR (126). It was Professor Cummins' expert opinion that the push poll worked in changing the recipient's attitude toward the builder's liability. 10 RR (206-208). The intent of the push poll was to persuade the potential juror to embrace appellant's theory of the case. 10 RR (185-186).

In sum, these facts, found by Judge Reyes, remain uncontested on appeal:

- Appellant made no attempt to remove the names of parties, witnesses, court staff and experts from the database of people who should not be contacted (9 RR (35:4-9));
- Witnesses, parties and experts were contacted *ex-parte* through appellant's push poll on the core issues a jury would later be asked to decide (9 RR (68-70));
- The push poll was done *ex-parte* without any disclosure to the parties who would be adversely impacted therefrom (10 RR (101-102)); and,
- The push poll was conducted less than three weeks before the June 8, 2014, trial setting. 10 RR (103).

Coupled with the fact that the push poll was infused with misleading statements designed to improperly influence potential jurors, there is no doubt that Judge Reyes' decision was correct. CR 1023.

Further, it is clear that what happened here begs for a plain and forceful statement from the Amarillo court of appeals that this conduct cannot be tolerated. Nothing less than the community's faith in a fair hearing before an impartial jury is at stake.

E. Appellant Authorized, Approved and Ratified the ex-parte Push Poll, Which Violated the Appellees' Right to Trial Before an Impartial Jury of the Community.

There is no dispute that appellant authorized the push poll and approved the final list of questions. 6 RR (20-23); PX 5; 9 RR (109-110). Appellant even made his own revisions to the poll before he approved the final draft. 7 RR (27:2-6). It was appellant who gave the "go ahead" to proceed with the poll. 7 RR (61:12-15). Appellant has engaged in this behavior "many times." 6 RR (67:11-13).

F. *Bottom Line:* This is not a Plaintiff or Defendant issue. This is a Constitutional Issue that goes to the Core of a Litigant's Right to a Fair and Impartial Jury, and Society's Faith in an Impartial Judicial System.

As a bipartisan organization, ABOTA does not pit plaintiffs against defendants. On the contrary, and consistent with ABOTA's purpose, this appeal is neither a plaintiff nor a defendant issue. The proof in this case is in the pleadings: Judge Reyes found that appellant's attempt to poison the venire impacted the right to a fair trial for both the plaintiff and the other defendants, who join in supporting the lower Court's ruling.

The issues presented in this case go far beyond the outcome of a trial for a single litigant in a discreet case. The facts, as Judge Reyes found them, and the law he applied, go to the core of a litigant's right to a fair and impartial jury as guaranteed by the Texas and United States Constitutions. Compare TEX. CONST. ART. 1, § 15, *with*, U.S. CONST. VII, AMEND.

For the reasons articulated herein below, Judge Reyes' ruling should be affirmed *in toto*.

Argument & Authorities

A. The Differential Standard of Review Is Dispositive in This Appeal

As the Dallas court of appeals recently held in an opinion affirming a trial court's order granting death penalty sanctions, Judge Reyes's order is reviewed under a deferential, "abuse of discretion" standard. *See Imagine Automotive Group, Inc. v. Boardwalk Motor Cars Ltd.*, 430 S.W.3d 620, 631 (Tex. App.—Dallas 2014, pet. denied) ("We review a trial court's imposition of sanctions for an abuse of discretion.") [citations omitted]. The court of appeals "review[s] the entire record, including the evidence, arguments of counsel, written discovery on file, and the circumstances surrounding the party's discovery abuse." *Id.* at 631 [citations omitted].

After multiple days of hearings, 14 volumes of testimony and prolific briefing on the merits, it is plain that Judge Reyes did nothing of the kind. To the contrary, the trial court showed remarkable patience but equally remarkable determination to uphold the impartiality and, consequently, the credibility of the jury panel. Far from an abuse of discretion, Judge Reyes's approach here was a model for how a hearing on a motion for sanctions should be conducted and ultimately decided.

Each of Judge Reyes's factual findings enjoys substantial support in the record. The court held extensive hearings and accepted detailed briefing from all parties. The court set forth the basis for its conclusions in detail that included both an accurate summary of the evidence in the sanctions hearing and the trial court's findings about the credibility of the witnesses based upon his patient participation in the hearings — including appellant's behavior on the stand and appellant's refusal to answer clear questions in a forthright manner, despite repeated instructions from the court. Far from being an abuse of his discretion, Judge Reyes could come to no other conclusions than the ones he set forth.

Because Judge Reyes is the factfinder and the sole judge of the credibility of the witnesses who testified at the hearing, and because the weight to be afforded their testimony is a matter for the trial judge who conducted the hearings, the standard of review is dispositive in this appeal and the trial court's order should be affirmed.

B. Plaintiffs and Defendants Have a Fundamental Constitutional Right to a Fair and Impartial Jury

"The tradition of trial by an impartial jury drawn from a cross-section of the community applies to both civil and criminal proceedings." *See Timmel v. Phillips, M.D.*, 799 F.2d 1083, 1086 f.n. 5 (5th Cir. 1986) (emphasis added) (citing *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.")) [citations omitted].

The Founding Fathers understood the critical role played by citizen juries in the fair administration of justice, because they saw what happened when juries were taken from them. To ensure convictions for alleged violations of the STAMP ACT (1765), Parliament had ordered that jurisdiction for cases brought under those acts would rest exclusively in Admiralty Courts — where judges appointed and paid for by the Crown — decided all cases without juries. The colonists recognized this to be a dangerous assault on their freedom and deprivation of rights guaranteed to them by Magna Carta. *See generally* Honorable Judge Jennifer Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE LAW REV. Vol. 3, p. 7 (2011).

These early Americans left no doubt about the feeling for the jury and its central role in protecting a free people. Decrying London's attempt to deprive Americans of the right to a fair and impartial jury, The Stamp Act Congress issued Resolutions which declared:

"Trial by jury is the inherent and invaluable right of every ... subject." (RESOLUTIONS OF THE STAMP ACT CONGRESS, Article VII, October 19, 1765).

In a poignant letter to the citizens of his hometown of Braintree, Massachusetts, John Adams wrote of the inequity of the tax as an assault on the right to a fair and impartial jury:

"We shall confine ourselves, however, chiefly to the act of Parliament, commonly called the Stamp Act, by which a very burthensome, and, in our opinion, unconstitutional tax, is to be laid upon us all; and we subjected to numerous and enormous penalties, to be prosecuted, sued for, and recovered, at the option of an informer, in a court of admiralty, without a jury."

Having been deprived of the right to trial by jury, which colonists considered a birthright of free people, the Founders were determined to preserve the jury for future generations of Americans.

In the ***Declaration of Independence***, Thomas Jefferson listed the deprivation of trial by jury as one of the reasons compelling the colonies to separate from Great Britain. When John Adams drafted the Massachusetts Constitution of 1780, the progenitor of the United States Constitution, he included provisions guaranteeing the right to trial by jury in both criminal (Article XII) and civil (Article XV) cases.

The failure of the Philadelphia Convention to include a guarantee of a right to a civil jury trial in the Constitution as signed in September of 1787 was one of the key objections to the proposed constitution raised by the Anti-Federalists during the ratification debates. Ratification could only be assured if supporters agreed to amend the Constitution to correct this omission. The result, the Seventh Amendment was adopted in 1791. U.S. CONST. VII amend.

In short, the Founding Fathers were committed to securing juries to all future generations of citizens, and this necessarily meant assemblies of impartial citizens to make reasoned and fair decisions based on evidence presented in court. It is a right not to be toyed with. "The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty." Joseph Story, COMMENTARIES ON THE CONSTITUTION, § 1762 (1833).

"The right of trial by jury in civil cases at common law ... is so fundamental and sacred to the citizen ... [that it] should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 753 (1942) (Murphy, J.). "The Supreme Court has emphasized, in no uncertain terms, the importance of the right to a civil jury trial and the need for the courts to be vigilant in guarding against the erosion of that right." *Armster v. United States District Court for the Central District of California*, 792 F.3d 1423, 1428 (9th Cir. 1986).

Citizens of Texas value the jury system no less than did the Founding Fathers and stated it plainly in the Texas Constitution. Since 1876, Article 1, Section 15 of the Texas Constitution has been clear: the right to trial by jury "*shall* remain inviolate."[3]

As John Adams declared more than two centuries ago: *"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."* Hon. John Adams (1774).

The right to a jury trial means more than just putting people in a box. It means taking action to make sure that those impaneled are fair and impartial and can decide the facts based solely on the evidence presented at trial.

In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), Chief Justice Rehnquist explained that, "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." As Justice Murphy declared in *Jacob*, the right to a fair civil jury must be "jealously guarded." *See* 315 U.S. at 752 (Murphy, J.). Judge Reyes took these prescriptions to heart in evaluating appellant's conduct and issuing his sanctions decision.

Based on the extensive evidence and the trial court's inherent authority to police any violation of a litigant's right to a fair and impartial jury, Judge Reyes properly found and held, *inter alia*:

- That appellant's "conduct taken in its entirety is an abusive litigation practice that harms the integrity of the justice system and the jury trial process";
- That appellant's "conduct was designed to improperly influence a jury pool and or venire panel via the dissemination of information without regard to its truthfulness or accuracy";
- That appellant's "conduct was to impact the rights of parties to a trial by an impartial jury of their peers"; and
- That appellant's "conduct negatively affected the due process and Seventh Amendment protection due to the litigants in the case before the Court"; and
- That appellant's conduct was intentional and in bad faith and abusive of the legal system and the judicial process specifically."

CR 1023 (¶¶ 1-4, 10).

These findings cannot be reversed absent a finding that Judge Reyes abused his discretion. *See Imagine Automotive Group*, 430 S.W.3d at 631. Because there is ample evidence in the appellate record to support Judge Reyes' findings, and because appellant's conduct violated the parties' constitutional rights to a fair and impartial jury, the trial court's order should be affirmed *in toto*.

C. Appellant Cannot Delegate to a Third Party Polling Company Authority to Perform an Unethical Act That the Attorney Could Not Do Himself Under the Rules of Court

In Texas, "it is improper to ask prospective jurors what their verdict would be if certain facts were proved." *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 751 (Tex. 2006) [citations omitted]. Indeed, a question that attempts to commit a potential juror to a particular outcome or a determination of the weight given the evidence is improper. *See Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd). *But* that is exactly what the appellant did, through an independent contractor, on an *ex-parte* basis here.

The experience of Colleen O'Neal, one of the 20,000 citizens included in the database who was contacted by the polling firm appellant hired, was typical. She was contacted by the push poll company and asked this highly charged and completely misleading question: If there is a problem with your home — is it the fault of the manufacturer of a product, the builder or the building inspection department? 5 RR (28:4-28:24). Moreover, appellant's push poll asked Neal and others "commitment questions" demanding the potential juror to take a position on what weight he or she would afford those findings, if made. PX 1 (p. 19, ¶¶ 17-25).

These types of questions would be completely out of bounds in a supervised voir dire. See *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005) ("the purpose for prohibiting improper commitment questions … is to ensure that the jury will listen to the evidence with an open mind — a mind that is impartial and without bias or prejudice — and render a verdict based upon that evidence.")

All the more reason that misleading statements to potential jurors out of view of the trial judge or opposing counsel cannot be tolerated with undermining the entire adversarial process. Putting poll questions to Mrs. O'Neal was especially egregious.

Colleen's husband, Steven, is the Chief Building Inspector for the City of Lubbock who was deposed in the lawsuit shortly before the cold call was made. 5 RR (27:5-13). The fault, if any, of the building inspector was a hotly disputed issue in the lawsuit. Contacting the O'Neal family *ex-parte* regardless of what was asked over the telephone is a violation of the Texas Rules of Professional Conduct. TEX. R. PROF. RESP. 4.02(a). Prior to this contact, appellant was told by the city attorney, John Grace, all contact was to be communicated through the city attorney who represented all city personnel in the case.

As Judge Reyes correctly found, appellant cannot use the polling company he retained as a shield to deflect the findings that this poll was improper and the appellant knew it.

Lewis Sifford, an ethics expert who has practiced law for more than 40 years, and a veteran of more than 100 civil jury trials, explained on the stand what should be self-evident: a lawyer cannot use a third party to perform an unethical act that the attorney could not do himself. 10 RR (93-95; 111-112). The law cannot allow a trial lawyer to avert responsibility for unethical conduct by deftly handing it off to a non-lawyer contractor.

This Court must not accept appellant's attempt at plausible deniability. Otherwise, litigation, especially where the stakes are high, will become a game in which the outcome is decided before the jury is even impaneled, dictated by the interested party who spends the most money. Nothing could be more injurious to the right of all citizens to equal protection of the law, and nothing could be more damaging to the community's faith in a fair judicial process.

Because appellant used a third party to engage in behavior calculated to manipulate the venire, and because appellant is precluded from doing so under the Texas Constitution, this Court should, and indeed must, affirm the trial court's order.

D. "Willful Blindness" That Thwarts the Administration of Justice Is No Defense to Attorney Misconduct

Contrary to appellant's argument, his claimed willful blindness to his own unethical conduct that thwarted the administration of justice and sought to taint the venire is no defense to a sanction. Indeed, "willful blindness" is sufficient to prove "knowing" misconduct. *See Devaney v. Continental American Ins. Co.*, 989 F.2d 1154, 1161-1162 (11th Cir. 1993) ("The phrase "attorney advising such conduct" does not, however, exclude either an attorney's willful blindness or his acquiescence to the misfeasance of his client; to the contrary, the phrase instructs that when an attorney advises a client in discovery matters, he assumes a responsibility for the professional disposition of that portion of a lawsuit and may be held accountable for positions taken or responses filed during that process. Sanctions exist, in part, to remind attorneys that service to their clients must coexist with their responsibilities toward the court, toward the law and toward their brethren at the bar.") [citations omitted]; *United States v. Thomas*, 484 F.2d 909, 913 (6th Cir. 1973) ("Construing 'knowingly' in a criminal statute to include willful blindness to the existence of a fact is no radical concept in the law.") [citations omitted]; *United States v. Mapelli*, 286 F.2d 284, 286 (9th Cir. 1997) ("willful blindness, where a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended.") [citations omitted]. The result is no different here.

Appellant's dubious claim that "he did not know" he was engaging in misconduct when he authorized and approved the push poll does nothing to alter the analysis in this appeal. Judge Reyes rejected that assertion after a lengthy hearing and carefully itemized his findings of fact and the support for them. Given his findings, the court reached the only legal conclusion that was possible. There is more than sufficient evidence to support Judge Reyes' findings that appellant's behavior was intentional and in bad faith. CR (p 10203, ¶ 10).

The appellant's misplaced reliance on *Foust v. Hefner*, 2014 WL 3928781, *3 (Tex. App.—Amarillo 2014, no pet.), is telling.

Rather than support appellant's request to reverse the trial court's order, *Foust* instead provides a dramatic contrast to the situation presented in the instant appeal. In *Foust*, there was no evidentiary hearing to validate the attorney's alleged devious mental state when he filed an allegedly groundless pleading. *Id.* at *3.

In stark contrast, Judge Reyes conducted five full days of hearings, accepted hundreds of pages of briefs from all interested parties, and, most importantly, had the opportunity to evaluate appellant's credibility and other witnesses as they testified about the salient issues. *See id.* at *3 ("In addressing the accuracy of the trial court's findings and decision, we initially note that it did not conduct a separate evidentiary hearing on the motion for sanctions before levying them. So, we do not have before us sworn testimony from Foust's legal counsel describing the extent of his investigation, if any, into the factual or legal basis underlying the defamation claim or what he believed with regard to the components encompassed within section 10.001 of the Civil Practice and Remedies Code.").

Unlike the fact pattern in *Foust*, appellees have brought this appellate court an extensive record of sworn testimony that cannot be ignored. Judge Reyes generously gave the appellant a full, fair and impartial evidentiary hearing – the very right he sought to steal from the appellees prior to the trial; the fact that appellant's testimony sunk his own ship is no reason to revisit the trial court's well-reasoned analysis. Nothing presented in this appeal justifies a result contrary to the trial court's decision.

Conclusion

Appellant's misconduct crosses well-defined constitutional lines and ethical boundaries. If such conduct is condoned, our civil justice system will be irreparably undermined and the trust the citizens have in the jury system will unnecessarily be eroded. This Court should affirm the trial court's order. ■

Bar Groups Urge Upholding of Sanctions for Attorney's Use of 'Push Poll' to Sway Jury Pool

John Council, Texas Lawyer
August 15, 2016

Four bar groups have asked a Texas appellate court to uphold sanctions leveled against a prominent Dallas attorney who was disciplined for attempting to use a telephone survey to influence a jury pool.

The professional organizations submitted the amicus brief in the sanctions appeal of William Brewer III that argues upholding Brewer's discipline for using a so-called "push poll" during litigation is so important that the integrity of the Seventh Amendment right to a trial by jury in civil cases depends on it.

Brewer, of Dallas Brewer Attorneys & Counselors, was sanctioned by 72nd District Court Judge Ruben Reyes of Lubbock in January. Reyes ruled that Brewer was responsible for conducting a poll over issues in a case captioned Teel v. Titeflex. In that case Brewer was defending Titeflex, a company accused of manufacturing faulty flexible gas tubing that allegedly caused a deadly house fire.

Brewer approved of poll questions that were "designed to influence or alter their opinions or attitude of the person being polled," Reyes ruled. And the pollster Brewer hired to conduct the survey eventually contacted witnesses and parties involved in the Titeflex litigation to ask them the questions, according to Reyes' ruling.

Brewer argued that he did nothing wrong, his "jury focus exercise" was ethical and no state law, rule or court decision prevents lawyers from commissioning jury surveys. Brewer also "expressed sincere regret for the unforeseen, inadvertent contact made with certain people related to the case." But Reyes, who discovered his own name on the pollster's database call list, was unimpressed with Brewer's response and ordered him to pay $124,000 in attorney's fees to the plaintiffs in the case and complete 10 additional hours of ethics continuing legal education.

Brewer later appealed the sanction to Amarillo's Seventh Court of Appeals, arguing that the "public opinion survey" he and his firm commissioned was ethical. Brewer also contends in his lengthy appellate brief that surveys are not a bad-faith abuse of the judicial process as a matter of law and that Reyes abused his discretion by sanctioning him.

On August 12, the American Board of Trial Advocates, the Texas Chapter of the American Board of Trial Advocates, the Texas Trial Lawyers Association and the Texas Association of Defense Counsel all weighed in on Brewer's sanction by submitting a

consolidated amicus brief to the Seventh Court. The groups note in their brief that they are all committed to preserving the Seventh Amendment right to a jury trial — something they believe will be harmed if Brewer escapes punishment for utilizing what they describe as a "push poll".

The groups' brief defines a push poll as a series of skewed questions asked to a large number of people in order to sway them to one side of an issue.

"Brewer's conduct undermines the adversarial process, threatens the right of all parties to a fair and impartial jury, and damages the community's confidence in a system where all parties have equal access to a fair hearing," according to the group's brief, which notes there is great interest in Brewer's sanctions appeal from lawyers all across the country.

"Lawyers from coast to coast are following this appeal: This court must make a resounding statement that this conduct, even if pursued under the auspices of zealous advocacy, cannot be tolerated," according to the brief.

Brian Lauten, a Dallas attorney who submitted the amicus brief on behalf of the four attorney groups, believes the integrity of the jury selection process is at issue in Brewer's appeal. "If an appellate court in Texas were to condone this type of behavior, it would forever corrupt a party's constitutional right to a fair and impartial jury if people think they can get away with this type of conduct," said Lauten, a partner in Deans & Lyons.

Guy Choate, president of the Texas Chapter of the American Board of Trial Advocates, said all of the lawyer groups — which include plaintiffs and defense attorneys — are equally concerned with the effect Brewer's appeal could have on the right to a fair and impartial jury if his punishment is overturned.

"When you start polluting that process in any respect, the potential for mischief and damage is great. I don't know Mr. Brewer personally. But the conduct is disturbing," said Choate, a partner in Webb, Stokes & Sparks. "I practice in San Angelo and I can travel 15 miles and be in a county with 6,000 or 10,000 people. Infecting a jury is not difficult in a county that size and we can't have a court approving that kind of behavior."

George Kryder, a partner in the Dallas office of Vinson & Elkins who represents Brewer, said they have great respect for Judge Reyes but appealed the sanctions because they disagree him. "Mr. Brewer and his firm take seriously their professional responsibilities and ethical duties and the survey in question was fully consistent with Mr. Brewer's ethical obligations and his duty to zealously represent his client," Kryder said.

[1]This Court need not decide whether the Seventh Amendment to the U.S. Constitution, like each of the other first eight Amendments, is incorporated on the States through the concept of Liberty in the 14th Amendment. For the issues presented in this appeal, the right to a fair and impartial jury is secured to litigants by Article I, § 15 of the Texas Constitution. In this case, whether the right to a fair trial is grounded in the U.S. or Texas Constitution is not at issue. The concept of a fair trial, through "due course of the law of the land" is firmly grounded in both documents, whose origins date back to Chapter 39 of the Magna Carta. See Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America*, UNIV. OF VA. PRESS (1968) (outlining the origin the phrases "law of the land" and "due process of law").

[2]Steven O'Neal, the Chief Building Inspector for the City of Lubbock, was a witness with knowledge of relevant facts who was deposed in the underlying lawsuit. 5 RR (27:5-13). Steven's wife, Colleen O'Neal, testified at the sanctions hearing. Colleen testified that Steven's involvement in the Titeflex lawsuit had been very stressful on their family and that she feared that *Titeflex* may seek retribution against them. 5 RR (27:19-28:3).

Shortly after Steven was deposed, Colleen received a call. One of the questions Colleen was asked was, if there is a problem with your home – is it the fault of the manufacturer of a product, the builder or the building inspection department? 5 RR (28:4-28:24). Of course, Steven is in charge of the building inspection department. 5 RR (28:19-29:3). The followup question was whether Colleen was familiar with CSST, the very product at issue in the lawsuit. 5 RR (30:2-10). Colleen hung up. 5 RR (29:20-23).

Colleen was understandably angry that the caller was trying to influence her – an attempt to steer her toward blaming her husband's department for the liability question in the case. 5 RR (30:11-31:18). Colleen was infuriated that the caller was trying to sway public opinion in Titleflex's favor. 5 RR (37:12-19). Colleen's phone records, admitted into evidence, established that she had been contacted four times – twice before she answered, once when she answered, and once again after she hung up. 5 RR (31:19-32:5); PX 1.

Six days after Colleen hung up the phone, appellant's law firm filed an unfounded ethics complaint against Steven, which was published to the City Council. 5 RR (33:20-35:1). This occurred just weeks before the trial. 5 RR (34:17-35:1).

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Christopher A. Duggan is a partner with the Boston law firm of Smith & Duggan. He serves as a National Board representative for the American Board of Trial Advocates and is the Chair of the Amicus Committee. He is a past contributor to VOIR DIRE.

A Past President's Perspective

Royal Brin, Strasburger & Price, L.L.P., Dallas
TADC President – 1981-1982

Royal Brin was born, raised and currently resides in Dallas, Texas, where he has lived his whole life except for when he attended college and law school, a brief time working in Washington, DC, and his time in the Navy. Royal and Carol will celebrate their 70th wedding anniversary in January 2017. They have one daughter, Janice, who also lives in Dallas.

Royal graduated from Forest Avenue High School (now known as Madison High School) in Dallas. He then attended The University of Texas on a six-year combined undergraduate and law school program. Royal was able to take the bar exam before graduating because he gained credit working one summer in his uncle's law office. He spent a semester doing graduate study on a James Autrey Lockhart Fellowship at Harvard Law School until right after Pearl Harbor, when he joined the legal staff of the newly-formed Office of Price Administration, and then enlisted in the Navy a few months later. Royal was never in the Judge Advocate General's corps, but when the Navy realized he was a lawyer while he was at the Guadalcanal Advanced Naval Base, they began assigning him to legal duties.

When Royal was stationed at Great Lakes Naval Station as the war was winding down, he wrote to all the Dallas AV firms and wound up at the firm now known as Strasburger & Price, where there were five partners and he became the third associate. He started out doing all kinds of litigation work – things that the other lawyers didn't want to do – and did lots of pleas of privilege, depositions, hearings, and trials. After several years, Royal gravitated toward appellate practice, because everyone in the firm knew how to do trial work but the firm's only appellate lawyer, Hobert Price, needed some help.

Royal served as President of TADC in 1981-1982. Royal celebrated his 97th birthday on October 9, 2016. This year he also celebrated his 70th year with Strasburger, and on most days you can still find him in his office!

Q. What made you want to become a lawyer?

A. I'm not sure, but I never seriously considered any other career. Perhaps it was the many uses for legal training, not only in law practice but in business, government, and the like.

Q. Most rewarding thing about being a lawyer?

A. I have enjoyed the opportunity for intellectual satisfaction, along with the idea that the ultimate objective of a lawyer is to achieve justice, a very high ideal indeed.

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

A. I don't have a single favorite book. Over the years, I have enjoyed reading science fiction, but today the facts have caught up with the fiction and there really aren't any new ideas in the books. I also enjoy mysteries, and John Grisham is my favorite author. My eyesight doesn't permit me to read books any more, but I listen to them on tapes or DVDs.

Q. What is your favorite sport and team?

A. Football, and the Cowboys – when they're winning!

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

A. We have spent a lot of time at beach resorts.

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

A. When I was very little, I wanted to be an eye doctor, because I had eye problems and liked the doctor that treated them.

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

A. The *Pennzoil v. Texaco* appeal, because of its size and because it was very different from the usual appeal, with briefs written by committee and an oral argument in a law school auditorium.

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

A. I joined TADC just a few years after it was founded.

Q. Why did you join TADC?

A. I was invited to speak at a meeting in Corpus Christi, and greatly enjoyed the meeting and the people we met there.

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

A. The opportunity to keep up with relevant developments in the field through meetings and presentations has been very valuable for me.

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

A. Nothing bad happened! Our main job was to keep the trial lawyers from getting bad legislation passed; this was just at the threshold of our role in working on legislation. I was also proud that we received a certificate from DRI for outstanding performance as a local organization.

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

A. The tort trial practice has completely changed. There is almost no workers' compensation litigation, no trial of pleas of privilege, and a bigger percentage of cases are settled.

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

A. TADC has grown in size and influence.

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

A. I see TADC's future role as an extension of its past role.

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

A. First, be thoroughly prepared on the facts and law at the very beginning of each case, before filing pleadings. Second, be as cooperative as you can with your opposition; practicing law is hard enough without making it harder on each other. Work out matters by agreement, and accede to requests for extensions and scheduling accommodations for hearings and depositions when your client's rights won't be affected. Finally, adopt a practice of civility from the very beginning of your career.

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The Reptile: It's Coming To A Courtroom Near You

In 2009, trial consultant David Ball and attorney Don Keenan teamed up to author a trial advocacy book entitled "Reptile-The 2009 Manual Of The Plaintiff's Revolution". The book is perhaps the plaintiff bar's answer to the impact of tort reform on verdicts. Keenan is a successful trial lawyer who early on in his career became heavily involved in the use of jury focus groups. Ball has authored various trial advocacy books such as "Damages", "Theater Tips and Strategies for Jury Trials" and "How to Do Your Own Focus Groups".

Keenan and Ball have taken their work on the road and offer "reptile" seminars across the country. Some are tailored to specific types of cases, such as those involving 18 wheelers. The two have published a new book, "Reptile in the MIST and Beyond" for use in "small cases", but that book is not available for review. A few years ago an article appeared which claimed that a defense lawyer used Keenan's "Reptile" book against him in a trial. Now the "Reptile" authors' website makes it clear that "sale of this product will not be completed or shipped until the purchaser is verified as a Plaintiff's lawyer or as a member of a Plaintiff's firm". Also a confidentiality agreement must now be signed in order to purchase this book or to attend any of the "reptile" seminars.

The original book contains a caveat which advises that terms used in the book such as, "Reptile," "Code," and "Tentacles of Danger," ***are not for the jury.*** Evidently, the authors are afraid that this might tip some jurors off to the fact that they are being manipulated.

The reptile strategy is based upon an alleged scientific theory that the primitive part of the brain (reptile brain), which is designed to ensure survival against threats, is activated in jurors through certain methods used in the presentation of evidence. The strategy is to focus upon getting the defendant to agree to a broad safety rule designed to protect the public in general. In theory, the attorney is then able to convince the jury that the "rule" protects the community and, in turn, the juror. The goal is to overcome the conditioning jurors have undergone through tort reform that "large verdicts" are bad and to instead obtain a large verdict because the defendant has endangered the community and the juror.

The "reptile" litigation approach is used to convert an alleged negligent act of a defendant into a "community danger". The formula used is: **Safety Rule + Danger = Reptile.** Keenan and Ball advise lawyers to answer three questions for the jury:

-How likely was it that the act or omission would hurt someone?

-How much harm would it have caused?

-How much harm could it cause in other kinds of situations?

Reptile, at 31-34, 38. The answers to these questions are intended to give a jury the impetus to find fault because, in the authors' words, "the tentacles of danger" extend outward to threaten the entire community as well as the individual juror. Id. at 35. The theory is that such a presentation will cause a jury to award higher damages in a case because the actual harm caused is no longer the yardstick to be used. Instead, they are convinced to base damages upon the maximum damages a defendant "could have caused".

One other key part of the reptile strategy is to suggest to the jury that returning a large verdict is a way for them to eliminate or reduce the dangerous conduct. The reptile strategy is a clever way of breathing new life into the "Golden Rule" which most courts have disallowed. Appendix B-1 of Keenan and Ball's book analyzes Golden Rule opinions in virtually every state for a total of 59 pages. The authors understand fully the underlying premise for their theory. This is an area in which the theory is vulnerable to attack through motions in limine which will be discussed below.

The reptile strategy has resulted in larger settlements and larger verdicts as the technique works when used properly. It is debatable, however, whether the "science" involved is valid. This article will not delve into the scientific research that gave rise to this new "trial tactic", but will instead set forth the methods used for creation of "safety rules", the potential strategies for use in challenging these types of tactics, and methods that have been used to try to keep the reptile strategy out of the courtroom.

Tips for spotting the reptile

Teresa Beck's article in The Voice, *"How to Tell If You Are Getting 'Reptiled' Prior to Trial"* (Vol. 12, Issue 37) provides several useful tips for spotting the strategy and for dealing with the reptile tactics. The reptile strategy can begin as early as the first paper discovery in the case. Be on alert for overbroad discovery requests that ask very general questions about safety and safety rules. Requests for information that seem overbroad and unrelated to the case, but which might deal with safety, may be another sign that the tactic will be used in the case. Requests for admissions may be served which are overbroad and seek to elicit an admission that some broad, general safety rule applies. Examples may be:

-Safety is not an option at the ABC Company.

-Your truck drivers are not allowed to needlessly endanger other motorists.

-A company should never needlessly endanger the public.

Since Plaintiff experts are often role players in the reptile strategy, one needs to be aware of signs that they are on board the reptile train. You will see this when they are present at sight or equipment inspections when they pay a lot of attention to safety signs that may be posted. You will also find evidence of this in their files when they are produced.

Ms. Beck's article also lists key words or phrases to keep an eye out for such as: **good health, mobility, endanger, safety, policy, procedure, potential harm,** and **community safety.** Other words or phrases to look out for are **needlessly endanger,**

duty to provide a safe environment, safety rules, require or reasonable. Keep in mind that Keenan and Ball know that the defense bar is starting to tune in to the reptile litigation strategy, so they are refining the terms used in an attempt to disguise the tactic.

The reptile strategy begins with establishing an "umbrella safety" rule, typically one that uses the phrase "needlessly endanger". You can plug in anyone of the following and apply it to almost any type of case: "A [driver, physician, plant owner, property owner] cannot (should never) needlessly endanger the public [patient/other motorists/patrons/tenants]."

Once the umbrella safety rule is established, the questions then become a little more specific. A series of questions which typically use the word "must" will be used in questioning your witnesses. The goal here is to create a new safety rule that the defendant is forced into agreeing with. This then makes it an easy task to convince a jury that this "safety rule" is the standard of care the defendant violated.

At one point, Keenan and Ball had a link that would allow you to find out who their "reptile Allstars" were so you could determine if a particular lawyer was recognized for using the reptile. The link appears to no longer be available.

The Reptile Deposition

Much of the damage is done in depositions, however. Keenan and Ball list specific types of questions that are to be asked during depositions. The goal is to get each witness to agree to a general safety rule and that a violation of the rule would needlessly endanger the community. The questions are phrased in such a manner that they are difficult for most lay witnesses to handle correctly. This in turn causes difficulty for defense counsel in preparing the witnesses for deposition. Keep in mind the goal of the strategy is to create sound bites for use at mediation to command larger settlements and to lock in the defendant or its employees to the "umbrella safety rule" for trial.

Rules of the road, a stepping stone to the reptile:

Keenan and Ball recommend reading "Rules of the Road" by Patrick Malone and Rick Friedman, in conjunction with their Reptile book.

A "rules of the road" deposition will have questions like these:

Q. Do you consider yourself to be a professional driver?

Q. Is driving an essential part of your job description?

Q. When you are driving do you follow the rules of the road?

Q. By rules of the road, do you understand that to mean the traffic safety laws of Texas?

Q. Do you agree that rules of the road exist to keep drivers safe?

Q. Some examples of the rules could be stopping at a red light or driving at or below the speed limit, right?

Q. Do you agree that drivers must keep a proper lookout at all times?

Q. Do you agree that drivers must control their speed at all times?

Q. Do you agree that drivers must keep a safe distance from other vehicles at all times?

Q. Do you agree that drivers must obey traffic signals and traffic lights at all times?

Q. Do you agree that the rules of the road should be followed at all times?

Q. Do you agree that if all those rules I just mentioned are followed, accidents like this one shouldn't occur?

Q. And this accident happened because one of those rules wasn't followed, right?

Reptile Questions:

Safety (sometimes questions are even more general such as these)

Q. Safety is your top priority, correct?

Q. You have an obligation to ensure safety, correct?

Q. You have a duty to put safety first, correct?

Danger

Q. It would be wrong to needlessly endanger someone, correct?

Q. You would agree that exposing someone to unnecessary risk is dangerous, correct?

Q. You always have a duty to decrease risk, right?

Specific questions that follow the general questions

Q. You agree you did not put safety first when you……,correct?

Q. You agree that by doing (not doing) (*example:* checking your brakes)……..you violated the safety rule?

Q. You agree that you exposed ……to unnecessary risk, correct?

Questions that establish the maximum amount of harm that can be caused

Q. How much harm could your faulty brakes have caused?

Q. This wreck could have occurred anywhere, on any roadway, in a small town or in a big city?

Q. These faulty brakes could have resulted in a deadly wreck where parents and even children could be killed?

Defensive Strategies

Once you have determined the likelihood that the reptile strategy is being used in your case you must develop a theme of your own which can be used to undercut the reptile. This involves identifying the general safety rule the other side is going to try to use and then developing your own theme, typically a theme of reasonableness under the circumstances. One must keep in mind that the standard of care is reasonableness and not the general safety rule made up by the plaintiff's counsel. The difficulty is in coming up with ways to "sell" the reasonableness standard. That must be done by developing evidence as the case progresses which support your position. Potential themes that can be used are: "A physician should be judged on the reasonableness of his actions under the circumstances presented" or "A truck driver must operate his vehicle reasonably under the existing circumstances".

The plaintiff attorney's goal is to try to make the questions such that anything other than the desired answer will make the witness look bad or in Keenan and Ball's words "stupid". So, both lay witnesses and experts will require extra preparation in order

to effectively deal with the general safety rule questions that will be thrown their way. Although witness preparation can be very difficult and can be a subject for an additional article, some tips do follow.

Witnesses should be instructed to avoid agreeing with generalizations. They should be taught to deal with a hypothetical question with the response "it depends". Whenever possible they should bring the discussion back to the facts of the case. Witnesses should be prepared so that they understand that a "safety rule" that may be posed by the plaintiff attorney is not the standard of care. An important part of witness preparation will also involve making sure they can explain why their actions depended upon the specific situation that they encountered.

Examples of how to counter "Rules of the Road" type Questions:

Q. Do you consider yourself to be a professional driver?

A. I am not sure what you mean by that, my job does involve some driving.

Q. Is driving an essential part of your job description?

A. I am not sure what you mean by that, please explain.

Q. When you are driving do you follow the rules of the road?

A. I don't understand your question, can you rephrase?

Q. By rules of the road, do you understand that to mean the traffic safety laws of Texas?

A. That's a broad question, can you be more specific?

Q. Examples could be stopping at a red light or driving at or below the speed limit.

A. Could you be more specific? I don't see how that applies here.

Q. Do you agree that the rules of the road should be followed at all times?

A. That's a broad question. You'd have to be more specific as it depends upon the circumstances.

Or "Not necessarily in every situation, again that is a very general question."

Or "It can in certain circumstances-every situation can be different."

Examples of how to counter "reptile" questions:

First, recognize that these general questions are just that. They lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague general question is a vague general answer.

Safety:

Q. Safety is your top priority, correct?

Q. You have an obligation to ensure safety, correct?

Q. You have a duty to put safety first, correct?

Possible answers:

A. It depends upon the circumstances.

A. Not necessarily in every situation.

A. Not always.

A. Sometimes that is true, but not all the time.

A. It can be in certain circumstances. Every situation can be different.

Danger

Q. It would be wrong to needlessly endanger someone, correct?

Q. You would agree that exposing someone to unnecessary risk is dangerous, correct?

Q. You always have a duty to decrease risk, right?

Possible answers

A. I don't understand what you mean by "needlessly endanger"; that is very vague.

A. I don't understand what you mean by "unnecessary risk?

A. That is a very broad question. What specific circumstance are you referring to?

A. Can you be more specific?

Use of Motions and Educating Judges

Despite several articles published on this topic and seminars addressing the use of the "reptile", most lawyers that I have asked are not familiar with the reptile strategy. If that is true, then your trial judge is probably not familiar with the reptile either. Most likely you will not be in front of the judge on anything "reptile" related until your pre-trial. One approach that can help is to file a motion to exclude under TRE 104 and to set it for oral hearing in advance of trial.

> **"The court must decide any preliminary question about whether … evidence is admissible."**

This will be your first opportunity to educate the judge on the reptile strategy and you should fully expose the strategy with quotes from the "Reptile" book, examples of the questions asked in depositions, and be armed with case law which supports exclusion of "Golden Rule" arguments. You must be prepared to meet counter arguments that the "Golden Rule" only deals with jury argument and not evidence at trial. You have to tie in the use of the "general safety rule" as part of a strategy designed to circumvent the relevant standard of care in the case and show that this "safety rule" will be used to then equate the defendant's conduct as a "community threat", thus invoking the "Golden Rule".

So far we have found only one appellate opinion which discusses the "reptile strategy", *Regaldo v Callaghan,* __P.3d __(Court of Appeal, Fourth App. Dist, CA, Sept. 16, 2016). The appellate court found the closing argument "urging the jury to base its verdict on protecting the community" amounted to misconduct of plaintiff's counsel, noting that "The law, like boxing, prohibits hitting below the belt. The basic rule prohibits an attorney to pander to the prejudice, passion or sympathy of the jury." Unfortunately, the appellate court found that the defendant waived the point by failing to timely object and to ask for a curative instruction.

We have found state court rulings on motions in limine and motions for protection filed as to anticipated reptile strategy, evidence or questioning of witnesses involving cases in Arkansas, California, Florida, Kentucky, Washington, Wisconsin, West Virginia, and Wyoming. Please note that DRI's Trial Tactics group has a library online with a few reptile motions in limine available. There are at least two in the library worth taking a look at because the defense attorney in each of those motions cited to excerpts from the Reptile book. Excerpts from one such motion filed in a California case is set forth below:

"Such an approach will attempt to present "Reptile Theory" evidence or argument at trial based on the popular 2009 manual created for plaintiffs' attorneys across the nation. The "Reptile Theory" is an impermissible "Golden Rule" argument because it attempts to appeal to jurors' concerns about their own safety and the safety of the community, rather than the evidence regarding plaintiffs. The theory purports to require that employers or schools must make the "safest possible choice" in all circumstances regardless of any actual standard of care. Because the "Reptile Theory" and the Golden Rule" arguments are improper, this Court should prohibit plaintiffs from presenting any such irrelevant and prejudicial evidence or argument. Defendant makes this motion pursuant to Evidence Code sections 350, 352 and 402 and the Court's inherent power to exclude irrelevant evidence.

The motion in limine needs to make clear that the "reptile strategy" evidence/questioning of witnesses is an attempt to present evidence that is not relevant. It is important to stress that allowing such a strategy to be used will result in prejudice to the defendant because the plaintiff is seeking to offer evidence of potential harm to the community, which is not the issue to be decided by the jury. The motion should point out that the very goal of the reptile strategy is to prejudice the jury against the defendant, while at the same time creating an "umbrella safety rule" so as to avoid the actual standard of care that applies.

"Read the book, Judge...

The motion in limine should quote actual portions of the "Reptile" book in order to educate the judge on how the plaintiff attorney is attempting to avoid the standard of care while at the same time causing prejudice among the entire jury panel. The "Reptile" advises lawyers that their trial goal is to put a juror's mind in a "reptile protective mode" and *"when the Reptile (shorthand for the reptilian portion of the brain) sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." (Reptile. at p. 19.)*

The motion in limine should also give specific examples from the "Reptile" on the "umbrella rule" and how it is used to avoid the actual legal standard of care:

"A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients]."(Id. at p. 55.)

The motion should also address how this "umbrella rule" is used to avoid expert testimony that sets forth the actual standard of care. The "Reptile" explains how this is to be accomplished:

"The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows - demands! - only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, no matter how many "experts" say it's okay, always violates the legal standard of care. Here's how:

1. A doctor [or whatever] is never allowed to needlessly endanger a patient [or whoever]. In other words, a "prudent" [or careful, depending on the instruction] doctor does not needlessly endanger a patient.

2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.

*3. So a "prudent" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger. * * **

The standard of care is not what other doctors do. It is -- exclusively -- what prudent doctors do. It makes no difference if the defendant met other standards of care. In medicine, every choice must meet the risk/benefit requirement: "No unnecessary risk," meaning "safest available choice." (Id. at pp. 62-63.)

The motion should also use deposition excerpts illustrating how opposing counsel has questioned witnesses by repeatedly raising a general safety rule and dwelling on questions involving protection of the community, as opposed to focusing on the actual case facts. Such questions are not relevant and are designed to divert the jury's attention from the facts in the case and to instead focus them on the "safest possible action" and potential harm to the community.

The reptile strategy takes the "Golden Rule" argument and permeates the entire case with improper comments from voir dire through the very end of the trial. The improper argument no longer begins at the end of the case. The "Golden Rule" argument asks a juror to put themselves in the shoes of the plaintiff and to "act as the conscience of the community" in arriving at a verdict. The concept is to ensure a finding of fault, as well as enhance damages. Judge Gray Miller of the Houston Division of the Southern District includes the following in his standing order in limine:

23. Golden Rule. Any argument or suggestion that the jurors should put themselves in the position of a party.

The Fifth Circuit issued an opinion condemning "community conscience" arguments. See *Westbrook v General Tire & Rubber Co.,* 754 F.2d 1233, 1268 (5th Cir. 1985). In *Philip Morris USA v. Williams,* 549 U.S. 346 (2007), the Supreme Court invoked the Due Process Clause in holding that a punitive damage award could not be used to punish a defendant for injury that it inflicts upon non-parties…i.e., those who are strangers to the litigation.

Be sure to preserve error

If you are not successful in excluding the "reptile strategy" at the pre-trial stage, you need to be prepared to object every time an offer is made of "umbrella safety rule" questions or testimony on the grounds that it is not relevant (TRE 401) and also that the

probative value is outweighed by the prejudicial effect (TRE 403).

A party is entitled to an impartial jury. Therefore, voir dire questions which ask or suggest that "we are better protected when a jury holds a company responsible for violating safety rules that cause harm" are improper. In the Reptile book, Chapter 10 is devoted to voir dire and questions designed to indoctrinate the jury panel to the reptile strategy. Some of the suggested questions in a motor vehicle case are:

> "Some folks feel that highway travel is safer these days than, say, ten years ago. Others think it is less safe. From your own experience, which are you closer too?"
>
> "When you drive, what do you want other drivers to do in terms of safety?"
>
> "What dangers have you found yourself in-close calls or even wrecks-because someone else did something dangerous?" Id. at pp.121-122.
>
> In all cases the book suggests other questions such as these:
>
> "What local cases can you think of whose outcome had an effect on the community?"
>
> "Some folks are uncomfortable about making decisions on a jury that might have an effect on the community. Others are ok with it. Which are you closer to?" Id., at p. 124.

In opening statements, the reptile strategy calls for emphasizing the violation of safety rules and how the defendant's conduct needlessly endangered others. The opening will also suggest the maximum amount of potential harm that could be caused. The reptile strategy directs the lawyer to dwell on these points as opposed to discussing the actual facts involved in the case.

You will need to object during opening statement, trial and closing argument. Be sure you know the case law which prohibits "Golden Rule" arguments and have the case law handy. Do not back down from requesting limiting instructions followed by a motion for mistrial.

Using the reptile strategy against your opponent

An interesting article by Kyle J. White appeared in the DRI Product Liability Section's "Strictly Speaking" publication entitled "*Can Defense Lawyers Co-Opt the Reptile Strategy?"* Mr. White suggests ways that the reptile strategy can be turned on plaintiff counsel in the appropriate type of case where affirmative defenses exist. The same strategy is used to show the existence of a safety rule the plaintiff was required to follow which also was designed to protect others. The next step is to show that the plaintiff "needlessly endangered" others when he violated the "safety rule." The downside, of course, in using this strategy is that you can be undercutting your ability to object to the use of the strategy against you, as well as preserving error in the event you are on the losing end of a verdict.

One of the examples in White's article involves a worker who has filed suit because of an on the job injury (must have been a non-subscribing employer). Some

suggested reverse reptile questions for the employee "plaintiff" are as follows:

> -Mr. Doe, you would agree that it is never ok to needlessly endanger yourself or your co-workers?
>
> -Your employer gives you safety information which tells you how to avoid needless danger to yourself and your co-workers?
>
> -The plant that you work at has people from the community come in to look around every now and then-students, employees' spouses, and customers?
>
> -And you are never allowed to needlessly endanger visitors to the plant?
>
> -And the safety information your employer gives you is in writing and you should read it?
>
> -And this safety information you were given by your employer told you to read the machine's operation manual before using it?
>
> -And you admit that you did not read the section of the manual that told you to…….?

The article goes on from there to paint a picture of how to use the "reptile" in presenting your affirmative defense. The article suggests other ways of casting a defendant company in a good light before a jury.

Below I have listed in the notes several articles that are recommended reading on the "reptile strategy" and how to defend against it. The most difficult task for defense lawyers remains properly preparing witnesses for this new litigation strategy that is growing in popularity across the country.

Notes:

Teresa M. Beck, "How to Tell if You Are Getting 'Reptiled' Prior to Trial", DRI The Voice, Vol. 12, Issue 37 (9-18-13);

Jill Bechtold, "Reptile Tactics: A Defense Guide to the Reptile Strategy in Discovery", RX for the Defense, DRI Drug and Medical Device Committee, Vol. 23, Issue 2 (3-26-15);

Bill Kanasky, "Debunking and Redefining the Plaintiff Reptile Theory", DRI For The Defense (April 2014);

Ken Lopez, "Repelling the Reptile Trial Strategy as Defense Counsel-Parts 1-5, The Litigation Consulting Report-on line blog posts 2015;

David C. Marshall, "Lizards and Snakes in the Courtroom", DRI For The Defense (April 2013);

Minton Mayer, "Make Boots Out of That Lizard-Defense Strategies to Beat the Reptile", DRI The Voice, Vol. 12, Issue 38 (9-25-13);

Carlos Rincon, "Coaxing the Reptile Back Under the Motor Carrier Rock", Presentation at FDCC Winter Meeting (March 2013);

Kyle J. White, "Can Defense Lawyers Co-Opt the Reptile Strategy", DRI Product Liability Section-Strictly Speaking.

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Problems With Medical Expense Affidavits After *Haygood:*

Is Texas Civil Practice & Remedies Code Chap. 146 A Solution?

The Civil Practice & Remedies Code contains an uneasy tension between medical expense affidavits and limiting medical expenses to those "actually paid or incurred." Section 18.001 was intended to provide an inexpensive means to prove expenses without the burden to call experts live. Section 41.0105 was intended to protect defendants from inflated medical expenses while fairly compensating claimants.

In practice, this shifts to the defense on a short fuse basis the burden to obtain expert proof to contest medical expenses. Moreover, the claimant does this with affidavits from persons who are unqualified to give the opinions in them. Finally it has encouraged claimants and providers to avoid submitting medical bills to government payors, insurance, etc., because this would legally discount the 'incurred' medical, sometimes by as much as 80%.

Texas Civil Practice & Remedies Code §146.001, et seq., may remedy in part the problem of claimants and health care providers who willfully refuse to submit bills to insurers, benefit plans, or government sponsored third-party payors. Obtaining proof that §146.001 bars recovery may be difficult within the §18.001 deadlines.

Another alternative would be to amend §18.001 altogether and treat "actually paid or incurred" as a pure question of law. This would afford a much needed opportunity to synchronize the §18.001 procedure with handling experts under the current Texas Rules of Civil Procedure.

I. Overview of Medical Expense Affidavits.

The statute provides an inexpensive exception to the hearsay rule to prove expenses are reasonable in amount and necessary to repair damage or treat a condition.

A. Tex. Civ. Prac. & Rem. Code § 18.001.

1. The affidavit must be verified by either (a) the person who provided the service, or (b) the person in charge of the records showing the services provided and the charges made.

2. The affidavit must include an itemized statement of the services and the charges.

3. The party offering the affidavit into evidence must serve a copy of it at least 30 days before the first day of evidence at trial; the records attached to it need not be filed with the court clerk before trial commences.

4. A party intending to dispute a claim in the affidavit must serve a counter-affidavit not later than 30 days after receipt of the affidavit and not less than 14 days before the first day of evidence. The judge may grant leave to file the

counter-affidavit at any time before evidence commences.

5. The counter-affidavit must:

   a) be signed by an expert qualified to testify at trial to dispute any matter contained in the initial affidavit; and,

   b) give notice of the grounds the party intends dispute the claim in the initial affidavit.

6. If a counter-affidavit is not timely served, the initial affidavit is sufficient evidence to support a finding that the amount charged was reasonable and the service was necessary.

B. Tex. Civ. Prac. & Rem. Code §18.002

1. Section 18.002 provides three form affidavits.

   a) §18.002(a) – provides a form affidavit to be verified by the person who provided the services that the services were necessary and the charges in the attached itemization were reasonable.

   b) §18.002(b) – provides a form affidavit by the person in charge of the records showing the services provided, the services were necessary, and the charges in the attached itemization were reasonable.

   c) §18.002(b-1) – provides a form medical expense affidavit by the records custodian that (i) the services were necessary, (ii) the charges in the attached itemization were reasonable, and (iii) that custodian's employer has a right to be paid a specific balance after all credits and adjustments.

2. If the bill or records attached to the §§(b-1) medical expense affidavit reflects a charge that is not recoverable, then that charge is not admissible.

II. General Overview of Expense Affidavits.

A. General purpose: provide an inexpensive alternative for proving undisputed expenses.

Generally, before a claimant can recover an expense as damages in a civil case, it is necessary to prove the expense is reasonable and was necessary to treat the injury or repair the damage. The bills and expense records are normally hearsay. Absent §18.001, the claimants must obtain live testimony from the service provider or an expert on both reasonableness and necessity.

In personal injury cases, this usually required a medical expert. Obtaining the required expert testimony in admissible form could be expensive. This could increase litigation expenses for expert fees, depositions, etc. This expense was unwarranted if the opponent did not seriously dispute that the charges were reasonable.

Section 18.001, et seq., provides a means to cheaply prove reasonableness and necessity. If the opponent disputes the charges by filing a counter-affidavit, the claimant knows to obtain expert testimony.

B. Legislative history.

Section 18.001 was derived from former Revised Civil Statute art. 3737h. As enacted in 1979, art. 3737h applied only to all civil suits, except sworn accounts for debt. Acts 1979, 66th Leg., cha. 721 (HB 540). No later than 14 days before trial the claimant could file an affidavit to authenticate the bill and prove it was reasonable. The opposing party had 10 days to file a counter-affidavit, which could be signed on information by the party or counsel.

In 1985, art. 3737h was repealed and re-enacted as Texas Civil Practices and Remedies Code §18.001. Acts 1985, 69th Leg., ch. 959 (SB 797). However, by a separate bill, art. 3737h was amended without reference to the repeal. Acts 1985, 69th Leg., ch. 617 (SB 344). The amendment to art. 3737h required the initial affidavit be filed no later than 30 days before trial; the counter-affidavit must be filed within 30 days after the receipt of the original affidavit but no later than 14 days before trial. It was further amended to require a qualified expert sign the affidavit.

In 1987, the confusion ended. Section 18.001 was amended to increase the deadline to file the initial affidavit from 30 to 14 days before trial, and to respond to 30 days. Also, it was amended to require the counter-affidavit be verified by a qualified expert instead of the party or counsel on information.

In 1993, the Legislature added §18.002 to provide two form affidavits: one from the service provider and the other from the person in charge of the records.

In 2007, §18.001 was amended to permit the claimant to serve the affidavit on the opposing party instead of filing it with the clerk. This was done to reduce the storage costs to courts and to protect the parties' personal identifying information from identity theft and fraud.

In 2008, §18.001 was amended to excuse attaching records to the affidavits before they are filed. The concern was that medical records are often voluminous and also contain considerable personal information. Until the records are offered during trial, there was no need to file medical records; only the parties needed to see them.

C. "Paid or Incurred" and Medical Expense Affidavits.

Texas Civil Practices and Remedies Code §41.0105 altered the medical expense landscape. The courts have not determined its full scope.

The amounts initially charged for medical expenses are frequently discounted due to government regulation or insurance. Agreements with insurance networks usually require healthcare providers to reduce the "sticker price" for medical services rendered to the insureds. Likewise, Social Security, Medicare, and Workers Compensation laws provide a government agency will determine what is a reasonable amount for covered services; the provider cannot legally charge or recover more. In many instances, this reduces the "sticker price" by 70-80%.

However, the providers would sign §18.002 affidavits that the original, unreduced charges were reasonable. This allowed claimants to prove medical expenses without the legal or contractual adjustments. Claimants argued these "adjustments" were collateral sources and the jury should not learn of them. They argued that jurors evaluate the injury's seriousness based on the total amount charged and the jury should consider the original bills while awarding noneconomic loss.

In 2003, the Legislature enacted §41.0105, that provided that recovery of medical or health care expenses incurred is "limited to the amount actually paid or incurred on behalf of the claimant." A vigorous debate ensued over how to handle discounts and insurance during trial.

In *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) the Texas Supreme Court

addressed charges reduced by Social Security/Medicare. It held under §41.0105:

a) only evidence of recoverable expenses is admissible;

b) charges that the health care provider could not legally charge or recover were not "actually incurred"; and,

c) only expenses the provider has a legal right to be paid are "actually incurred."

After *Haygood*, the Legislature in 2013 amended §18.002 to add a form medical expense affidavit. The records custodian may now authenticate the amount the provider had a right to be paid after offsets and credits. The legislature history indicates a concern that the existing form affidavits were defective after *Haygood*.

III. Current Medical Expense Affidavit Problems and Issues.

1. Who may sign expense affidavits?

Currently, §18.001(c)(2) permits either the service provider or someone in charge of the records to sign the affidavit. For small businesses, one might expect either the provider or their billing clerk to have knowledge of the usual and customary charges in the area. However, to avoid cross-examination on their bills, doctors often profess they are unaware of their charges and to ask their billing clerks. Their billing clerks may have no familiarity with local charges for the same services by other providers and have no training to say any specific treatment was appropriate to treat a given condition. Clerks who are incompetent to testify live may nonetheless make the affidavits. *Castillo v. American Garment Finishers Corp.*, 965 S.W.2d 646, 653-54 (Tex. App.–El Paso 1998, no pet.). Nonetheless, their affidavits shift the burden of proof on medical expenses to the defendant.

Next, §18.001 does not permit the opposing party to exclude or negate the affidavit on the basis the records custodian lacks personal knowledge about the reasonableness of the charges or their necessity. Proof at trial the custodians who signed the §18.001 are unqualified did not negate the affidavits. *Wald-Tinkle Packaging & Distr., Inc. v. Pinok*, 2004 WL 2966293, *9, 2004 Tex. App. LEXIS 11721, *27 (Tex. App.–Houston [1st Dist.] 2004, no pet.)(memo. opin.).

Finally, the statute does not clearly require that the records custodian or person in charge of the records have any relation to the service provider. Arguably §18.001(c) implies that "person in charge of the records" refers to the service provider's clerk, but the Fourteenth Court of Appeals holds otherwise. In *Katy Springs Mfg. v. Favalora*, 476 S.W.3d 579 (Tex. App.–Houston [14th Dist.] 2015, pet. denied), the providers assigned their fees at a 60% discount to a medical factoring company, MedStar. The Houston court held that the MedStar's owner could sign the expense affidavit and that the original charges are the amount "actually incurred." In *Gunn v. McCoy*, 476 S.W.3d 579, 108ff (Tex. App.–Houston [14th Dist.] Mar. 24, 2016, pet. filed), the court held the claimant's health insurer could sign the medical expense affidavit. This ultimately would permit affidavits from anyone who possesses the records.

2. The burden to obtain counter-affidavits to dispute any part of the expense affidavit.

Section 18.001(f) requires an expert qualified to testify in court on the disputed billing issue. While this avoids frivolous disputes, it imposes a substantial and expensive burden on the opponent. To contest an affidavit from an unqualified records custodian, the defendant must retain a medical professional to review the medical treatment records, compare them to the bills, and give an opinion. Those fees and expenses can offset any reduction in the

dispute expenses. They increase exponentially when the claimant has numerous providers.

Second, §18.001(f) requires an expert to dispute anything in the affidavit. This forces defendant to hire an expert just to prove the charges must be reduced because Medicare reimbursed the charges or the health care provider has an agreement with the claimant's insurance to accept less than originally charged. The same applies if the provider has erred in calculating the credits and offsets.

Third, one court has held the counter-affidavit allows the claimant to depose the expert who gives the counter-affidavit. *In re Mendez*, 234 S.W.3d 105 (Tex. App.–El Paso 2007, orig. proc.). Normally, the identity and opinions of a non-testifying consultant expert is privileged. The El Paso court held that by serving the counter-affidavit, the defendant waived the privilege and plaintiff could depose the expert on any subject in the affidavit. By serving the counter-affidavit, the opposing party has potentially provided the claimant with a free expert on medical issues. In medical malpractice suits, plaintiff must provide an expert report to sue, but the report is inadmissible and cannot be used for deposition or trial. Texas Civil Practice and Remedies Code §74.351 requires an expert report to file a medical malpractice suit, but it provides that the report is not admissible or no one may use it for deposition or trial.

3. The short time period to file a counter-affidavit.

The deadline for a counter-affidavit runs from when the initial affidavit is served. Thus, a claimant could serve the affidavits as soon as the defendant answers requiring the defendants obtain counter-affidavits before it can obtain discovery about the nature of the injury, obtain the medical records for comparison with the bills, etc. In many cases, the bills contain unexplained charges or obscure coding, making expert analysis difficult. Thirty days often is insufficient time to analyze the bill.

Also this short fuse allows claimants to get affidavits before submitting his bills to his insurer, Social Security, Medicare, etc., for reimbursement. The original amount charged gets reduced or discounted after the 30 days have run. Moreover, the defendant may be unable to discover the existence of insurance or eligibility for Social Security or Medicare until after 30 days. Alternatively, if the affidavits are served 30 days before trial, the opponent has only 14 days to obtain the affidavit.

While §18.001 permits the judge to extend the deadline for the counter-affidavit, this is discretionary.

Moreover, most civil litigation has tightly controlled witness designation deadlines. The parties are usually required to designate their experts, months before trial. Because §18.001 permits claimants to serve their affidavit as late as 30 days before trial, the defendant's deadline to name its experts has gone by. In order to file a counter-affidavit the defendant must either (a) get an extension from the court, or (b) designate its expert on expenses before the expense affidavits are filed.

4. The effect of an uncontested affidavit.

Section 18.001(e) provides a person intending to controvert a claim in the initial affidavit must file a counter-affidavit. Section 18.001(b) provides that if no counter-affidavit is timely served, then the initial affidavit is "sufficient evidence" to support a finding the amount charged was reasonable and the service was necessary.

The effect of an uncontested affidavit on trial is uncertain. First, the affidavit is some but not conclusive evidence that the charges are reasonable and necessary. An uncontroverted affidavit is not conclusive evidence that plaintiff is entitled that amount; the jury is free to reject it and award less or nothing. *Beauchamp v. Hambrick*, 901 SW.2d 747, 749 (Tex. App.–Eastland 1995, no writ); *Horton v. Denny's, Inc.*, 128 S.W.3d 256, 259 (Tex. App-Tyler 2003, pet. denied); *Sloan v. Molandes*, 32 S.W.3d 745, 752 (Tex. App.–Beaumont 2000, no pet.). Nonetheless, there are reports that if the jury

does not award the amount in an uncontested affidavit, some trial judges will grant a new trial.

Second, the affidavit does not prove a causal connection between the accident and the condition treated. The expense may be necessary to treat a condition, but the defendant asserts the accident did not cause that condition.

Third, the courts are unclear about whether the defendant can dispute the uncontroverted affidavit at trial. Several hold that, absent a timely, proper counter-affidavit, the trial court must exclude all evidence contrary to the initial affidavit. *Hong v. Bennett*, 209 S.W.3d 795, 803 (Tex. App.–Fort Worth 2006, no pet.); *Beauchamp*, 901 SW.2d at 749. Some have stated that the defense nonetheless may cross-examine witnesses on expenses and argue against them. *Grover v. Overby*, 2004 WL 1686326, *6, 2004 Tex. App. LEXIS 6822, *17 (Tex. App.–Austin 2004, no pet.)(memo. opin.); *Gutierrez v. Hambrick*, 2008 WL 5392033, *12 (Tex. App.–Houston [1st Dist.] 2008, no pet.)(memo. opin.); *Wald-Tinkle Packaging & Distr., Inc. v. Pinok*, 2004 WL 2966293, *9, 2004 Tex. App. LEXIS 11721, *27 (Tex. App.–Houston [1st Dist.] 2004, no pet.)(memo. opin.).

5. Using a form affidavit to establish "actually paid or incurred."

The new §18.002(b-1) form medical expense affidavit has the records custodian swear the provider has "a right to be paid" the stated balance. Whether the provider has a legal right to be paid a specific amount is usually a pure question of law. Witnesses generally are not permitted to give a purely legal opinion.

Moreover, the scope of "paid or incurred" after *Haygood* is unresolved. Therefore, custodians may sign expense affidavits that omit credits and adjustments that §41.0105/*Haygood* may require.

Haygood did not address cases where the provider's agreement with the claimant's insurer requires a discount. Likewise, there are cases when the claimant, the provider, or both deliberately decide not to seek reimbursement from the insurer, Medicare, workers compensation, etc. In those cases, the provider claims the original charges have not been reduced and thus are the amount "actually incurred." In those cases, there is a question whether the amount "actually incurred" is the initial charge or the amount which the provider would be forced to accept if it had sought reimbursement.

The impact of §41.0105 on medical expense factoring is a major issue. This form of factoring involves two agreements. The first is an agreement between the claimant and the health care provider to provide treatment for a specific amount. The second is agreement between the provider and the factor that the provider will assign its payment right to the factor at a discount. Although the provider gets only a fraction of the price the patient agreed to pay, the factor claims it is entitled to the original amount. In *Favalora*, the Houston court held that the original amount is "actually incurred" for the purposes of §41.0105.

IV. Texas Civil Practice & Remedies Code §146.001, et seq.

A. Statutory language.

The statute concerns how a health care provider may bill the patient if the provider's services may be paid by insurance, a health benefit plan, worker's compensation, Medicaid or Medicare. Typically, providers have insurance network agreements that reduce charges for covered patients. Similarly, Medicare and workers compensation set the fees providers may charge. In most cases, the provider must bill the insurer, etc., by a deadline. The insurer, etc., can deny untimely claims, which leaves the patient on the hook – but for how much?

First, §146.002 sets deadlines for billing. Under §146.002(b), the health care provider must bill the insurer or benefit plan by the later of (a) the deadline set by contract with the insurer or benefit plan, or (b) eleven months after the service was provided. Under §146.002(c), if the provider may bill a government sponsored program like Medicaid or Medicare, the health care provider must submit the bill to the payor by the later of (a) the deadline set by contract with the payor, (b) the deadline set by federal or state law, or (c) eleven months after the service was provided. Otherwise, §146.002(a) requires the provider bill the patient or responsible person with eleven months of service.

Missing the §146.002 deadline has consequences. Under §146.003(a), a provider

who fails to send the bill by the deadline may not recover from the patient either (a) an amount equal to the sum the patient would have received from the insurer, benefit plan, or third-party payor, and (b) the amount the patient would have been obligated to pay had the provider billed on time. Next, if §146.003(a) bars recovery from the patient, then §146.003(b) bars the provider from recovery against "any other individual, who because of a family or other personal relationship with the patient, would otherwise be responsible for the debt."

B. Legislative history.

Sections 146.001, et seq., were enacted in 1999. Acts 1999, 76th Leg., chap. 650, §1 (C.S.H.B. 213). The official House analysis noted that medical providers do not always bill the insurer within the company's time limits, causing patients to receive bills after the insurer denies an untimely claim. CSHB 213 intended to limit the amount that a provider may recover from the patient to that amount the patient would have paid had the bill been timely submitted. House Civil Practices Committee Report on CSHB 212, Mar. 22, 1999. It summarized §146.003 as barring recovery of either (a) the amount the patient would have received from the insurance policy or benefit plan, or (b) the amount patient would not have paid had the provider timely billed the insurer. It barred recovery from either the patient or other individuals who, because of a family 'or other personal relationship,' would be responsible for the bill. See also Bill Analysis HB 213, Senate Research Center, May 13, 1999.

C. Judicial decisions.

The only decision is *Speegle v. Harris Methodist Hosp. Systems*, 303 S.W.3d 32 (Tex. App.–Fort Worth 2009, no pet.). In *Speegle*, the patient was covered by Medicare; after treating Speegle for an accident, the hospital missed the statutory deadline to bill Medicare, but filed a hospital lien for its unreduced bills. The Fort Worth court held that the deadline under §145.002(c) to bill Medicare was pre-empted by federal law – the Medicare Secondary Payor Act that makes Medicare's obligation secondary to the tortfeasor's liability insurance. Therefore, §146.003 could not be applied to Medicare eligible patients.

V. The "willfully uninsured" claimant and "actually incurred."

A. Section 146.003 may reduce the amount "actually incurred."

In *Haygood*, the Texas Supreme Court addressed charges reduced by Social Security/Medicare. The Court held under §41.0105 charges that the health care provider could not legally charge or recover were not "actually incurred"; only expenses the provider has a legal right to be paid are "actually incurred."

There are considerable reports of "willfully uninsured" claimants, i.e., plaintiffs or their health care providers who refuse to submit bills to insurers, benefit plans, or other third party payors so that the medical expenses are not reduced. There is no purpose to this other than increasing the medical expenses presented at trial. Likewise, there are reports of hospitals that deliberately chose not to bill the insurers, etc., in order to file a hospital lien on the patient's tort recovery for the unreduced bills. This allows hospitals to hold the settlement hostage to obtain payments exceeding the amounts that insurance or third party payors would force them to accept.

Arguably, §146.003(b) does not directly bar recovery from the tort defendant. The legislative history indicates it was intended to bar recovery from the patient and family members legally responsible for the bill.

However, §146.003(a) states the provider may not recover from the patient or family members liable for the bill. Under *Haygood*, any amount the provider cannot legally recover from the patient is not "actually incurred." Thus, because the patient does not owe the entire bill, §41.0105 says the plaintiff cannot recover the part not legally owed.

For example, if the hospital ordinarily charges $10,000.00 for a procedure, but its agreement with the insurer reduces that fee to $1,500.00. Of that, the insured has a $100 deductible and a 10% co-pay. If the hospital misses the deadlines, it can only charge the patient $250.00 ($100.00 deductible, and $150.00 co-pay). By missing the deadline, the hospital cannot recover from the patient (1) the $8,500.00 write-off, and (2) the $1,250.00 the insurer would have paid. Under §41.0105, the patient has "actually incurred" only $250.00, because the hospital cannot legally recover more.

Same hypothetical, but the patient has a $3,000.00 deductible. The hospital can recover from the patient no more than $1500.00, because that is within the patient's deductible. That is the amount "actually incurred" under §41.0105.

B. Difficulties in using §146.003 to challenge medical expense affidavits.

Texas Civil Practices and Remedies Code §18.001, et seq., has proof problems to counter the medical expense affidavit that claims amounts barred by §146.003. First, the §18.002(b-1) form affidavit concerning the amount legally owed the provider does not require the custodian affirm compliance with §146.002 deadlines. By implication, §18.002(b-1) permits unqualified custodians to give a legal opinion on what is lawfully owed that disregards §146.003.

Second, how does the defendant controvert the affidavit to show that §146.003 bars all or part of the changes? Section 18.001(f) requires a counter-affidavit from a qualified expert. Finding an expert on medical expenses, let alone one familiar with the rates set by the government or by provider agreements are hard to find. Moreover, the affidavit is due with 30 days, but no later than 14 days before trial. The discovery necessary to support a challenge under §146.003 can be difficult to obtain in short order. Claimants resist providing discovery on their insurance, benefit plans, Medicaid/Medicare eligibility, etc. Then, the defense needs the information on the billing rates for the various insurers, information providers usually refuse on grounds of confidentiality and trade secret. *But see In re Jarvis*, 431 S.W.3d 129 (Tex. App.---Houston [14th Dist.] 2013, orig. proc.)(provider agreements with insurer discoverable).

VI. Considerations to amend Tex. Civ. Prac. & Rem. Code §18.001.

This suggests some changes to §18.001, et seq., particularly for medical expense affidavits. It is uncertain that §18.002 medical expense affidavits save money. Whether medical and billing records are sought by affidavit or subpoena, both sides of the bar find providers charge the same fees to produce and copy them; the only added expense is the court reporter fee, which has become nominal.

One change to consider is abolishing the §18.002(b-1) form affidavit. *Haygood* is complex; the amount that the provider has a legal right to be paid is a law question. Form affidavits from "actually paid or incurred" pave the way for the 'willfully uninsured' problem. One alternative would be amending the §18.002(b-1) form affidavit to state facts showing compliance with §146.002's deadlines.

Also, the affiant should be limited to either service provider or the service provider's record custodian. This was the original statutory intent. The justification for shifting the burden to the defense is that the affiant's position supports the conclusion the affiant is familiar with the affidavit's subject matter. Without that, there is no justification to require the opponent hire experts to refute an affiant who knows nothing about the services or the charges.

Next, §18.001 could dispense with counter-affidavits and require instead a response (signed by the party or counsel) stating specific objections and the general factual basis. Claimants could make defendants clarify vague objections by special exception; frivolous objections to expense affidavits can be punished under Tex. R. Civ. Proc. 13. Claimants would be entitled to discovery on whether defendants have expert testimony supporting the objections. Good faith but unsupported objections can be defeated by summary judgment. This is no more onerous for claimants than the current disputes over the sufficiency of counter-affidavits that §18.001 currently permits.

Next, §18.001 could dispense with both deadline to serve affidavits and the short-fuse deadline to contest them. Section 18.001 was drafted before the extensive revisions to the Texas Rules of Civil Procedure. Those Rules have extensive provisions concerning deadlines to designate experts, provide their opinions and reports, and to complete discovery. It would be more efficient to synchronize the filing and contesting of expense affidavits with expert deadlines under the Rule of Civil Procedure.

Finally, if the §18.001 counter-affidavit practice is retained, then the expert should be exempt from discovery and the affidavit should be inadmissible at trial.

Issues Of Coverage In The Tripartite Relationship

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Must Counsel Protect the Client-Insured's Coverage Interests?

I. Introduction

The tripartite relationship, or that relationship between an insurer, the insurance defense attorney it hires, and the insured, is a volatile one. It is often fraught with tension, conflict, and on occasion, subterfuge. Over the years, case law has squarely addressed what an insurance defense attorney may not do—actively undermine his or her client-insured's coverage interests. But what has not been addressed is whether an insurance defense attorney functioning within the tripartite relationship has an affirmative responsibility or commitment to protect his or her client-insured's coverage interests. This article addresses this seemingly unanswered question and ultimately provides the most profoundly lawyer-like answer imaginable: "It depends."

In confronting this important issue, this article begins with a brief review of the duties and responsibilities all attorneys practicing in Texas owe to their clients. It then examines a number of cases from Texas courts grappling with the issue of determining which party, the insured, insurer, or both, are the clients of the insurance defense attorney for purposes of effectuating those responsibilities. Finally, this article discusses how these two topics intersect in the tripartite context and require an insurance defense attorney to protect the coverage interests of the client-insured, unless otherwise limited.

II. Responsibilities Arising from the Attorney-Client Relationship

Perhaps the best place to start when discussing the complicated relationship between insurer, insurance defense counsel, and insured is the responsibilities that attorneys practicing in Texas have with respect to their clients.[2] After all, any discussion of the tripartite relationship between these players is simply an analysis of which player is the beneficiary of such responsibilities—or, complicating the issue, which *players* are the *beneficiaries*. These obligations flow from two main sources: (A) the fiduciary relationship between attorney and client and (B) the Texas Disciplinary Rules of Professional Conduct ("Rules of Conduct"). A brief discussion of each follows.

A. Duties Arising From the Fiduciary Relationship

It is well-settled that in the attorney-client context a fiduciary relationship[3] arises as a matter of law.[4] This relationship is a result of the "position of peculiar confidence" attorneys hold with respect to their clients.[5] It is rooted in fidelity and integrity and contemplates fair dealing and good faith.[6] A number of duties are recognized to articulate the responsibilities of a fiduciary to the beneficiary, and these duties have been described as the most exacting sanctioned by law.[7]

Generally, fiduciaries owe six duties: (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure.[8] These six duties can be distilled, however, into two overarching fiduciary duties: The duty of loyalty and good faith (incorporating the duties to refrain from self-dealing and to act with integrity) and the duty of full disclosure (incorporating the duties of candor and fair, honest dealing).[9] In certain contexts, specific fiduciary duties are recognized.

In the attorney-client context, there exist six additional, specific duties, four of which are relevant to this discussion. First, attorneys have a duty to represent their clients with undivided loyalty.[10] Second, attorneys have a duty to act

with candor, openness, and honesty with their clients.[11] Third, attorneys have a duty to inform the client of material matters.[12] Finally, attorneys have a duty to timely inform their clients of a conflict of interest.[13] Again, these specific fiduciary duties can fairly be said to branch from the two overarching fiduciary duties set out above.

These duties, both general and specific, are significant. The breach of any one of these duties by an attorney practicing in Texas could give rise to civil liability.[14] Thus, they strike at the heart of the responsibilities flowing from the attorney-client relationship. These duties, together with the responsibilities recognized under the Rules of Conduct, are the bedrock of the attorney-client relationship.

B. The Texas Disciplinary Rules of Professional Conduct

Unlike the duties addressed above arising from the fiduciary relationship, the Rules of Conduct do not define standards for civil liability of lawyers; meaning, a violation of one or more of these rules does not necessarily give rise to a private cause of action or create a presumption that a legal duty to a client has been breached.[15] But that neither makes them unimportant nor less a part of an attorney's overall responsibilities to his or her clients.[16] To the contrary, they are "rules of reason" that set forth "proper conduct for purposes of professional discipline" with respect to, in part, the attorney-client relationship.[17] To that end, they are imperative in defining the responsibilities attorneys practicing in Texas owe to their clients. The Rules of Conduct provide standards for, among other things, attorney communication with clients, confidentiality, recognizing and resolving conflicts of interest, and payments of fees, as discussed briefly below.

1. Rule 1.01 Competent and Diligent Representation

The first Rule of conduct concerns the level of competence required of an attorney to handle a given matter and how the attorney should attend to the matter once retained.

> (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
>
> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
>
> (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.
>
> (b) In representing a client, a lawyer shall not:
>
> (1) neglect a legal matter entrusted to the lawyer; or
>
> (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.[18]

"Neglect" as used in this Rule refers to inattentiveness involving a conscious disregard for the responsibilities owed to a client.[19] The comments to the Rule indicate that a lawyer need not have special training or experience to accept employment involving legal issues of a type the lawyer is unfamiliar; instead, the level of proficiency required is that of a general practitioner.[20] Indeed, the comment notes that the most fundamental skill consists of determining what kind of legal problems a situation may involve, which transcends any particularized special knowledge.[21]

2. Rule 1.03 Communication

Ancillary to an attorney's duties of candor and full disclosure is the communication requirement:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[22]

As noted in the comments to this Rule, the "guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation."[23] Unlike other Rules of Conduct, this rule cannot be modified or excluded

by agreement. Doing so would disrupt the very fabric of the attorney-client relationship—that of open dialogue.

3. Rule 1.05 Confidentiality of Information

This Rule of Conduct is unique to the extent that is does not have a direct analogue under the fiduciary duty framework. The rule provides, in part:

> (b) Except as permitted [elsewhere] . . . a lawyer shall not knowingly:
>
> (1) Reveal confidential information of a client or a former client to:
>
> (i) a person that the client has instructed is not to receive the information; or
>
> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
>
> (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
>
> (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
>
> (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.[24]

Thus, attorneys have a responsibility to their clients to hold certain information in confidence, even if that information could assist the attorney in its dealings with another client or third party, such as an insurer. This responsibility reinforces and is more expansive than the attorney-client privilege, as it extends ethical protection to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client.[25] This responsibility is mutable, however, with the consent of the client whose information the attorney is holding in confidence.

4. Rule 1.06 Conflict of Interest: General Rule

Like the fiduciary duties, the Rules of Conduct also contain a prohibition on representations in which a conflict of interest may arise.

> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> (1) involves a substantially related matter in which that persons interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.[26]

This Rule is based on the principle of loyalty to the client. Where such loyalty could be compromised based on a conflict, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary.[27] A conflict involving "directly adverse" interests is one in which the attorney's independent judgment on behalf of a client or the attorney's

ability or willingness to consider, recommend, or carry out a course of action will be or is reasonably likely to be adversely affected by the attorney's representation of or responsibilities to the other client.[28] Again, the prohibitions to representation in the general conflict rule may be waived with the express consent of the client and potential client.

5. Rule 1.08 Conflict of Interest: Prohibited Transactions

The important aspect of this rule in terms of this discussion is from whom, other than the "client," an attorney may accept compensation for legal services.

> (e) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.05.[29]

The comments to this rule specify that where an insurance company is paying the attorney's fee for representing an insured, under normal circumstances the insured has consented to the arrangement by the terms of the insurance contract.[30]

III. WHO IS THE CLIENT—OR WHO ARE THE CLIENTS—IN THE INSURANCE DEFENSE CONTEXT?

Having discussed the responsibilities attorneys have with respect to the representation of their clients, the remaining inquiry is: Who is the client? In many instances, the answer to this question is easy. Where an attorney is hired and paid directly by a company or individual in relation to a legal matter, the company or individual is the client. But in the insurance defense context, the insurer is the proverbial "third wheel" to what would otherwise be a bilateral relationship. Generally, the insurer is the party that hires and pays the attorney to defend the insured in a legal matter. This creates what is commonly referred to as the tripartite relationship.[31]

In the tripartite relationship, the insurer and the insured are connected in privity by virtue of the contract of insurance. The insurer and the insurance defense attorney it hires are generally connected *via* a contractual relationship of some nature.[32] Similarly, the insurance defense attorney and the insured are connected by means of a contractual relationship, express or implied.[33] This begs the question: Is the insured the insurance defense attorney's only client, or are both the insured and the insurer clients? The answer is of seemingly paramount concern to the insurance defense attorney, as only after this question is answered can the attorney determine how the responsibilities discussed above may be effectuated appropriately. As it turns out, and to the dismay of insurance defense practitioners in Texas, there is no clear answer to this question. But that does not mean the Texas Supreme Court and the intermediate appellate courts haven't wrangled with the issue for over forty years.

A. *Employers Casualty Co. v. Tilley* – The Majority Opinion

Tilley is the seminal case in Texas regarding the tripartite relationship created in the liability insurance context.[34] There, Employers Casualty Company ("Employers") issued a liability insurance policy to Joe Tilley, doing business as Joe's Rental Tools ("Tilley").[35] On November 25, 1967, Tilley was furnishing tools and employees to lift casing pipe off a Prudential Drilling Company ("Prudential") platform. Douglas Starky ("Starky"), a Prudential employee, secured a "catline" to a pipe prior to it being moved by Tilley's crew. In the process of moving the pipe, it slipped and fell on Starky, causing him injury that eventually resulted in the amputation of his right arm.[36] Grady Fore ("Fore") was Tilley's foreman on the job. It was undisputed that Fore witnessed and was aware of the accident, but it was disputed as to whether Fore or anyone else told Tilley what had happened.[37]

Starky instituted a lawsuit against Tilley on September 19, 1969, nearly two years after the accident.[38] Tilley notified Employers of the suit. On October 6, 1969, Employers secured a broad form non-waiver agreement from Tilley.[39] Through the non-waiver agreement, Employers reserved its right to deny coverage under the insurance policy based on Tilley's failure to provide timely notice of the accident, but otherwise conceded coverage.[40] Employers took the position that Tilley had actual or imputed knowledge of the accident soon after it took place; Tilley maintained that he had no knowledge of the accident until he was sued on September 19, 1969.[41] Employers then engaged

an attorney, Dewey Gonsoulin ("Gonsoulin"), to represent Tilley in the personal injury action.[42]

Over the next 18 months, Gonsoulin defended Tilley against Starky's lawsuit. However, it was undisputed that Gonsoulin was also developing evidence that would support Employers' "late notice" coverage defense, at Employers' request.[43] Specifically, Gonsoulin:

1. Took a statement from Fore to establish that Tilley had notice through Fore of the accident;
2. Took four other statements from Tilley's employees seeking to establish that they had informed Tilley of the accident, which at the time was contrary to Tilley's position;
3. Briefed the legal question of "late notice" for employers without advising Tilley of his findings;
4. Interviewed two other people at the request of Employers to establish the "late notice" coverage defense; and
5. Wrote numerous letters and had numerous conversations with Employers regarding the development of the "late notice" coverage defense.[44]

In addition, neither Gonsoulin nor Employers ever notified Tilley of any conflict of interest relating to the foregoing actions.[45] Eventually, Gonsoulin withdrew from representing Tilley and Employers filed a declaratory judgment action seeking a determination that it owed no duty to defend or indemnify Tilley based on the "late notice" provision and the evidence developed by Gonsoulin.[46]

Both parties moved for summary judgment in the declaratory judgment action.[47] The trial court denied Employers' motion, as Tilley raised disputed issues of fact with respect to his imputed knowledge of the accident.[48] However, the court granted Tilley's motion, rendering judgment that Employers had a duty to defend Tilley and that Employers was obligated to indemnify Tilley up to the limits of the insurance policy.[49] On appeal, the intermediate court affirmed the holding, but struck the lower court's judgment with respect to Employers' indemnification responsibilities.[50] This ruling was appealed to the Texas Supreme Court.

The Court identified the two questions controlling the outcome of the appeal: (1) whether the summary judgment evidence established as a matter of law that Employers waived or was estopped from asserting the policy defense of "late notice" and, if so, (2) whether a standard non-waiver agreement protected Employers against any waiver or estoppel based on its conduct.[51] The Court made a point of noting that

> these are serious questions involving legal ethics and public policy with which this Court has not yet dealt under like circumstances. Counsel for both parties apparently concede that similar situations often confront insurers and attorneys employed by them to represent insureds under comprehensive liability insurance policies and that guidelines from the Court would be welcomed, even though the parties disagree as to what the guidelines and consequences should be.[52]

In discussing the first controlling question, the Texas Supreme Court examined the unique tripartite relationship of insurers, insurance defense counsel, and insureds. It then reiterated that in such a relationship, the insurance defense counsel "becomes the attorney of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured."[53] The Court continued, advising that if a conflict arises between the interests of the insurer and the insured, the insurance defense attorney owes a duty to immediately advise the insured of the conflict.[54] In implicit support for these positions, the Court quoted Cannon 5-16 of the Code of Professional Responsibility, which read

> EC 5-16. In those circumstances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.[55]

The Court also drew a parallel between situations implicated by Cannon 5-16—a lawyer representing multiple clients with conflicting or potentially conflicting interests—and the representation of "an insurer and his insured."[56]

Moreover, the Court "approved" of two of the American Bar Association National Conference of Lawyers and Liability Insurers' "guiding principles" for lawyers practicing in the insurance defense context.[57] It quoted both principles at length:

> IV. Conflicts of Interest Generally – Duties of Attorney.
> In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. . . .
>
> V. Continuation by Attorney Even though there is A Conflict of Interests.
> Where there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation of the coverage question, the insured acquiesces in the continuation of such defense . . . .[58]

The Court stated that these "guiding principles" conformed with the public policy of the state, as enunciated in the Court's Canons of Ethics.[59] Finally, the Court observed that violation of the above-referenced ethical edicts had been condemned by the highest courts of several jurisdictions, where it was ultimately held that such conduct would estop an insurer from denying coverage or liability.[60]

The Texas Supreme Court likewise recognized that an insurer could be estopped from denying coverage when it has a duty to speak but is silent, and that failure worsens or prejudices the position of the insured.[61] Turning to Employers' and Gonsoulin's conduct, the Court found that Tilley was prejudiced as a matter of law.[62] The Court also found that the non-waiver agreement could not relieve Employers and Gonsoulin of their duty to notify Tilley of the specific conflict or exculpate them from the consequences of their failure to do so.[63] Thus, the Court held that Employers was estopped as a matter of law from denying its duty to defend, positing that "it would be untenable to permit Employers to disclaim liability for the defense of Tilley in the Starky suit on account of the late notice defense" given that its conduct was violative of the "guiding principles" and public policy of Texas.[64]

B. *Employers Casualty Co. v. Tilley* – The Concurring Opinion

The majority opinion is confusing. On the one hand, it seems to take the position that Texas is a "single client" jurisdiction based on its forceful language regarding an insurance defense attorney's "unqualified loyalty" to the insured. On the other hand, it suggests that Texas is a "dual client" jurisdiction to the extent it cites as support for its holding Cannon 5-16 and the "guiding principles," which both presuppose that the insurance defense attorney has two or more clients. Associate Justice Sam Johnson was keenly aware of this issue when he penned his concurring opinion in *Tilley*.

Agreeing only with the result, Justice Johnson opined that "[t]he representation by [Gonsoulin] more appropriately should be construed as representation of a single client, Tilley."[65] He disagreed with the majority's framing of the issue as one of dual representation, arguing instead that the conduct should have been "measured by the first of the ethical considerations under Cannon 5 which relates to the lawyer's duty, obligation and loyalty to the client," which read:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.[66]

Based on the language of the foregoing rule, Justice Johnson believed that the tripartite relationship could only be proper if the control of the defense remained with the insured and the responsibilities of the lawyer were solely to the insured.[67] In closing, he emphatically stated that the Court "should not be considering the ethical obligation, whatever it may be, which is required of a commercial enterprise to its customer; this court should be considering the fiduciary relationship inherent in the attorney-client relationship and the effect of its transgression upon the rights of the parties."[68]

C. The Confusion is Perpetuated

That the *Tilley* majority opinion left something to be desired in terms of clarity is evident based on the cases that followed. In 1994, the First Court of Appeals in Houston dealt with a complicated matter involving insurers and the counsel they hired to defend their insureds.[69] One of the many issues considered on appeal was whether the insurers could be held liable for the conduct of the attorneys they hired.[70] The court determined that they could not. Citing *Tilley*, the court unequivocally stated that no attorney-client relationship exists between an insurer and an attorney hired by the insurer just to provide a defense to an insured.[71] Heaping on, the court explained:

> Even though such an attorney is typically selected by the insurer, paid by the insurer, and periodically reports to the insurer about the progress of the case against the insured, these facts do not mean that the insurer is the client. In the context of insurance, the client is the insured. It is the insured to whom the attorney owes his allegiance in such a case, and the insured's interests that he represents.[72]

Four years later, the Texas Supreme Court had the opportunity to clarify its holding in *Tilley*, but instead buttressed the apparently antithetical position that the insurer is not also a client of the insurance defense counsel. In *State Farm Mutual Automobile Insurance Co. v. Traver*, the Court was tasked with determining whether an insurer could be liable for the malpractice of an attorney it hires on behalf of its insured, similar to the issue addressed in *Bradt*.[73] And as in *Bradt*, the Court answered the question in the negative.

In coming to this conclusion, the Court repeatedly referred to the insurance defense attorney as an "independent contractor" to justify a limitation of vicarious liability.[74] Interestingly, the Court found that the requisite degree of control for vicarious liability could not be met "*even assuming* that the insurer possesses a level of control comparable to that of a client."[75] It noted further that to the extent the insurance defense attorney owes unqualified loyalty to the insured and must at all times protect the interest of the insured, the insurer cannot be vicariously liable for the lawyer's conduct.[76] The Court even quoted a case from the Middle District of Pennsylvania that stands for the proposition that the insured is the insurance defense attorney's only client.[77] If anything, this language from the Court suggests support for the "single client" as opposed to the "dual client" framework.

Lastly, the Fourth Court of Appeals in San Antonio weighed in on the issue in *Safeway Managing General Agency, Inc. v. Clark & Gamble*.[78] That case concerned the flip-side of the debate in *Bradt* and *Traver*: Does an insurer have standing to sue the attorneys it hires to represent its insureds for breach of a fiduciary duty? The court determined that it did not.[79] Central to the analysis was whether an attorney-client relationship existed between the insurer and the insurance defense counsel.[80] Writing for a unanimous court, Justice Paul W. Green[81] stated in no uncertain terms that "[i]n Texas, the law is well settled that no attorney-client relationship exists between an insurance carrier and the attorney it hires to defend one of the carrier's insureds."[82]

Considering the foregoing, the post-*Tilley* opinions from the Texas Supreme Court and the Courts of Appeals addressed above strongly suggest that the insured is the only client of the insurance defense counsel. That being the case, the responsibilities arising from the attorney-client relationship would be owed to, and only to, the insured. But this moment of perceived certainty—whether or not it was in fact based on a confused interpretation of *Tilley*—would not last long.

D. Clear as Mud

In *Unauthorized Practice of Law Committee v. American Home Assurance Co.*, the Texas Supreme Court took up the highly charged issue of the legality of so called "captive counsel"—or insurance defense attorneys that are actually employed by and on the payroll of the insurer.[83] At issue was whether such staff counsel were engaging in the unauthorized practice of law by defending claims against their employer's—the insurance company—insureds. Ultimately, the Court held that such representation was not prohibited so long as the insurer's and insured's interests are congruent, or without conflict. Further, the Court placed a duty on such staff counsel to fully disclose to the insured his or her affiliation with the insurer.[84]

But of importance here is the Court's discussion of the attorney-client relationship in the tripartite context. In response to a claim by the plaintiff that insurance defense counsel represent only the insured, not the insurer, the Court cautioned that it had "never held that an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer."[85] In support, it cited to Rule of Conduct 1.06, which

sanctions the representation of more than one client if not precluded by conflicts between them.[86] In closing on the subject, the Court made clear that whether or not an insurer is also a client of the insurance defense counsel is a matter of contract between them.[87]

More recently, in 2012, the Texas Supreme Court reiterated this point. *In re XL Specialty Insurance Co.* concerned a bad faith action brought by an injured employee against a workers' compensation insurer.[88] It addressed whether the attorney-client privilege protected the communications between the insurer's lawyer and the employer during the underlying proceeding.[89] In discussing if the joint client rule of privilege protected such communications, the Court did not exclude the possibility that an insured and an insurer may have a common lawyer in the workers' compensation context.[90] The Court then cited *American Home* with approval, noting again that the character of the relationship is a matter of contract. So, over the course of nearly forty years, the State of Texas apparently went from a "dual client" jurisdiction, to a "single client" jurisdiction, to an "it depends" jurisdiction.

IV. THE INSURANCE DEFENSE ATTORNEY'S COMMITMENT TO PROTECT THE COVERAGE INTERESTS OF THE CLIENT-INSURED

Where does this leave us with respect to the responsibilities that arise under the attorney-client relationship? We know that the insurer can possibly be a client of the insurance defense practitioner given the appropriate contractual relationship between the two. But we also know, and the case law is unwavering on this point, that the insured is always a client of the insurance defense attorney. And while the relationship between insurer and insurance defense attorney is a matter of contract, even where an insurer is also a client, the interests of the insured reign supreme.[91] It seems clear, then, that the fiduciary duties and responsibilities under the Rules of Conduct must always flow to the insured, even when the insurer is also a client and even if the fulfillment of such responsibilities would lead to a conflict of interests as between the insurance defense attorney and the insurer-client.

In practice, this operates similarly to the "single client" framework, except that the insurance defense attorney must be concerned with conflicts of interest, assuming there is a contract between the attorney and insurer sufficient to implicate an attorney-client relationship. Under a true "single client" system, the insurance defense attorney need not be concerned with conflicts, as there is but one client, the insured. The insurance defense attorney's relationship with the insurer is simply contractual with specifically delineated obligations, and will not give rise to an attorney-client bond. Unfortunately, this simple, straightforward framework does not appear to be the state of the current law in Texas. Accordingly, insurance defense practitioners are left no choice but to operate in a system that requires them to protect the insured, even when such protection may lead to a conflict of interests with the insurer.

In the tripartite relationship, there exists no larger conflict causing calamity than the dreaded "c" word—coverage. Many insurance defense attorneys try their best to steer far clear of any issues relating to coverage as between the insurer and the insured. But, given the client-insured's position as the unquestionable beneficiary of the responsibilities arising from the attorney-client relationship, is this appropriate? Certainly the law is clear that an insurance defense attorney may not work against the client-insured to assist in formulating and evidencing coverage defenses.[92] But is the converse true? May an insurance defense attorney neglect a client-insured's coverage issues arising from the subject of the representation?

Seemingly, the answer is "no." By virtue of the attorney-client relationship, the insurance defense attorney may be committed to protect the insured's coverage interests related to the underlying liability claim. Even if it were to cause a conflict of interest. Why? Because the insurance defense attorney has a fiduciary duty of undivided loyalty, candor, fair and honest dealing, and full disclosure with respect to the client-insured. The lawyer is also tasked with not neglecting a matter entrusted to the lawyer and is responsible for explaining legal matters to the client-insured to the extent reasonably necessary so that an informed decision may be made. These duties and responsibilities require that the insurance defense attorney keep the client-insured informed of matters within the representation. Liability insurance coverage is a valuable asset. Just as the insurance defense attorney's goal in defending the liability lawsuit is to protect the insured's economic interests by limiting or eliminating its financial exposure, so too should the attorney's goal be to protect the insured's valuable insurance coverage. Thus,

unless otherwise restricted, the coverage interests of the insured arising from the liability suit are likely within the representation.

This commitment does not mean that the insurance defense attorney need act as coverage counsel or indeed represent the insured in a coverage action stemming from the underlying liability case. Nor does it mean that the insurance defense attorney needs to be an expert insurance coverage practitioner. What is required to satisfy the commitment is an understanding of the law commensurate with that of a general practitioner; specifically, the ability to "spot the issue," to borrow a law school phrase. Such knowledge is likely to be within the general understanding of the ordinary insurance defense attorney. Most insurance defense attorneys have some knowledge of the scope of coverage provided under standard general liability policies. Further, it should be common practice among insurance defense attorneys to request a copy of any reservation of rights letter issued to the insured and a copy of the insurance policy under which the defense is being provided.[93] This information alone should be sufficient to key the insurance defense attorney in on potential coverage disputes and facts or circumstances in the liability case that may have a bearing on coverage.

How may this commitment be implicated during the course of an insurance defense attorney's representation of a client-insured in a liability case? The situations are legion. But it will be helpful to identify some potential real-world circumstances and how the insurance defense attorney may best respond.

A. Covered and Un-Covered Claims

Imagine a case in which the plaintiff has alleged covered and un-covered causes of action. The insurance defense attorney has expertly elicited testimony from plaintiff that will disprove, as a matter of law, one or more of the elements of the plaintiff's covered claims. The insurer is pressing counsel to file a motion for summary judgment to knock out the covered claims. However, doing so may cause the insurer to pull its defense of the client-insured. In such a circumstance, the insurance defense attorney should explain the situation to the client-insured, including the implications to coverage should such a motion be granted. Informing the client-insured of the ramifications to its coverage is likely required by Rule of Conduct 1.03, which dictates that an attorney must explain a matter to the extent reasonably necessary to permit the client to make informed decisions. The fiduciary duties of candor and full disclosure are also likely implicated here.

If the client-insured decides that moving forward with the summary judgment is not in its best interests, the insurance defense attorney must abide by the insured's wishes.[94] This result is required by the duty of unqualified loyalty to the client-insured. Assuming there also exists an attorney-client relationship with the insurer, the insurance defense attorney should notify the insurer of the conflict and work towards a resolution. As an example, the insurance defense attorney could seek an agreement from the insurer that it will continue to defend the client-insured even after the covered claims are disposed of. In this sense, the insurance defense attorney has protected the client-insured's interests in having its defense paid for by its insurer and also remedied a conflict of interests. Keep in mind that this resolution has no bearing on the client-insured's indemnity under the insurance policy, as regardless of what happens in the underlying suit the insurer could disclaim a duty to indemnity the insured for the un-covered claims.

B. Unknown Coverage Defenses

Next, assume that an insurance defense attorney is preparing a corporate representative of its client-insured for deposition. During the course of a discussion the corporate representative confides in the insurance defense attorney that a material misrepresentation was made on the application for coverage involving the insurance policy responding to the underlying liability claim. The corporate representative is concerned about the implications of this misrepresentation and requests assistance from the attorney. Rule of Conduct 1.05 governs and prevents the insurance defense attorney from ever sharing such information with the insurer, even where the insurer may also be a client. If the comment of the corporate representative was merely made in passing, does that change the outcome? Likely not. The insurance defense attorney should always err on the side of confidentiality with respect to information it gathers from the client-insured that could have a bearing on coverage.

A more interesting question is whether the insurance defense attorney could actively assist the client-insured with respect to its coverage problem. The answer appears to be "it depends." If the insurer is also a client of the

insurance defense attorney, there could likely be no separate coverage representation unless the insurer waived the clear conflict of interest that would arise. However, if there were no attorney-client relationship between the insurance defense attorney and the insurer, then there would likely be no impediment to acting as the client-insured's coverage counsel. This outcome necessarily depends on the nature of the contractual relationship between the insurance defense practitioner and the insurer.

C. Facts that Could Arise that Jeopardize Coverage

Consider a situation where a chemical manufacturer is sued by the neighboring property owner for polluting its property with waste that is now known to contain serious carcinogens. It is the chemical manufacturer's position that such wastes were always carried off site by a third party service, so there is no way they could have polluted the neighbor's land. The insurance defense attorney is preparing a former employee of the chemical manufacturer for a deposition related to his duties with respect to managing the pick up and disposal of these wastes. During the preparation session, the former employee explains to counsel that from time-to-time he would dispose of a small amount of the waste at issue near the neighbor's property by pouring it in a small ditch. The former employee makes clear that, at the time, the waste material was believed to be completely harmless.

The insurance defense attorney, in addition to determining how these new facts may affect the liability suit, should also recognize that an insurer would likely use these facts to formulate a coverage defense. Most older general liability policies define "occurrence" to exclude property damage that was expected or intended from the standpoint of the insured, and newer policies have a standalone exclusion for bodily injury or property damage that is expected or intended. The insurance defense attorney should be generally aware of this common limitation to coverage and should notify the insured that the witness could be prompted to give testimony that could be harmful to the client-insured's coverage. Where the insurer is not also a client of the insurance defense attorney, counsel may attempt to handle the issue by clarifying the witnesses testimony during the deposition; for example, eliciting facts that while the witness intended to dispose of the waste in the ditch, he did not intend that his actions would cause the pollution and property damage now complained of. If the insurer is also a client of the insurance defense attorney, counsel may advise the insured to hire separate coverage counsel to more ardently protect the insured's coverage interests at the deposition.

D. Client-Insured's Right to Independent Counsel

Does the insurance defense attorney have a commitment to put herself out of a job? Under Texas law, an insured may be entitled to hire independent counsel that is not under the control of the insurer when there is an actual conflict of interest between the insured and insurer. Just as an insurance defense counsel has a duty to inform the insured of conflicts of interest, the insurance defense attorney likely has a responsibility to inform the client-insured that they may be entitled to independent counsel given the existence of an actual conflict related to coverage.

The justification for this rule is that an insured should be protected from "an insurer-hired attorney who may be tempted to develop facts or legal strategy that could ultimately support the insurer's position that the underlying lawsuit fits within a policy exclusion."[95] Justice Gonzales wrote at length in his dissent in *Traver* regarding the extraordinary pressures that are placed on insurance defense attorneys to control costs, retain repeat business, and, in essence, serve two masters.[96] He cautioned that given these considerations, insurance defense attorneys may be loathe to bite the hand that feeds them. But even those insurance defense attorneys fully aware of their ethical duties to their client-insureds may be required to notify the insured that it may be able to hire independent counsel. This has everything to do with the client-insured being vested (or re-vested) with its right to control its defense in the liability suit, which would otherwise be controlled by the insurer.

"Whether an insurer has a right to conduct its insured's defense is a matter of contract."[97] Most insurance policies containing a duty to defend provide that the insurer may control the defense of its insured. But that contractual right of control may be extinguished under certain circumstances. For example, when an insurer issues a reservation of rights it creates a potential conflict of interest.[98] But issuing a reservation of rights in and of itself is not sufficient to create an actual conflict of interest.[99] To rise to the level of an actual conflict, the facts to be "adjudicated" in the liability lawsuit must be the "same facts" upon which coverage

depends.[100] But what exactly does this mean? The Texas Supreme Court has given no guidance on how this standard, that it created, should be applied.

Federal courts sitting in Texas, however, have. In *Partain v. Mid-Continent Specialty Insurance Services,* the Southern District of Texas agreed with the insurer that for the "same facts" to be "adjudicated" in the underlying suit and the coverage dispute they must actually be ruled on by the fact finder in the underlying suit.[101] That court then looked to the jury charge in the underlying case to determine if a discrete fact (whether a copyright was infringed in an advertisement) would be ruled on by the trier of fact. In determining that it would not, the court noted that the question to be answered by the jury—"Do you find by a preponderance of the evidence that [Company A] infringed the copyrights of [Company B]?"—could never adjudicate whether infringement occurred *in the advertisement*.[102] Other federal courts have similarly framed the issue narrowly when confronted with investigating whether the "same facts" will be "adjudicated" in both disputes.[103] Such rulings have led some insureds to argue that the standard is meaningless because it can only be satisfied when the underlying plaintiff alleges intentional wrongdoing and the insurance policy contains an exclusion for intentional conduct.[104]

In practice, given the case law, the insurance defense attorney may go a lifetime without ever encountering a scenario whereby independent counsel may be due under a liability insurance policy on account of an actual conflict. Nevertheless, such counsel should be generally aware of the possibility so that should the possibility arise, the client-insured may be informed of their potential right to independent counsel and advised to discuss the issue with coverage counsel.

V. UNTANGLING THE MESS

For those insurance defense attorneys that are weary of any commitment to protect the insured's coverage interests that may arise out of the tripartite relationship, either because of the potential for conflicts or because they don't believe it exists in the first instance, there is a one-size-fits-all solution. That is to define the scope of the representation being provided to the insured very specifically. The Texas Supreme Court has held that a lawyer's fiduciary duties to a client "extend[] only to dealings within the scope of the underlying relationship of the parties."[105] Thus, the nature of the attorney-client relationship defines and may limit the attorney's duties to the client along with the professional services to be rendered.[106]

In the non-insurance defense context, retention agreements are standard practice. This is not usually the case in the insurance defense world. Typically, after an insurer is notified of the liability suit the matter is assigned to insurance panel counsel, or captive counsel, in the relevant jurisdiction and the insurance defense attorney simply starts work. A contractual, attorney-client relationship arises as a matter of law based on the conduct of the parties, but the scope of the representation is not clearly defined. Alternatively, panel counsel may have a standing contract with an insurer regarding work to be performed on an ongoing basis, but that contract may not specify the scope of the specific representation at issue in each assigned case or even address the nature of the contractual relationship between the insurance defense attorney and the insurer.

Rarely, at least in this author's experience, is a written retention agreement specifying the scope of representation provided to the client-insured. It is good practice to do so for many reasons. But pertinent to this discussion, it is important to the extent that the insurance defense attorney desires to limit or eliminate his or her responsibilities to the client-insured to protect its coverage interests. In the same vein, a retention agreement specific to the individual claim could be prepared for the insurer. If the insurance defense attorney wants to ensure that no attorney-client relationship will arise with respect to the insurer, language to this effect could be included in the retention agreement.

This is not a new idea,[107] but the concept of specifically defining the scope of an attorney's duties and responsibilities within the tripartite relationship contractually does not appear to have gained much traction in practice. It would seem that the Texas Supreme Court would rather have these matters decided on the basis of contract. So why not play ball? The insurance defense practitioners would be wise to take note and institute a retention agreement program within the tripartite relationship that bests represents the responsibilities they wish to owe to their client-insureds, and possibly even their client-insurers.

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[2] This section discusses responsibilities that arise as a matter of law when an attorney-client relationship is created. To be sure, attorney and client may contract for additional responsibilities, and in some cases, may waive or alter the responsibilities that arise as a matter of law.

[3] Although obvious, it bears noting that a condition precedent to the formation of a fiduciary relationship in the attorney-client context is an attorney-client relationship. *See Avery Pharm., Inc. v. Haynes and Boone, L.L.P.*, No. 2-07-317-CIV, 2009 WL 279334, at *6–7 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (noting that because the movant failed to produce summary judgment evidence demonstrating the existence of an attorney-client relationship, movant's breach of fiduciary duty claim failed as a matter of law).

[4] *See Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

[5] *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002).

[6] *See id.*

[7] *See* Richel Rivers, *Fiduciary Aspects of the Attorney-Client Relationship*, State Bar of Tex., Fiduciary Litig. (2004), at 1.

[8] *See* Brett Kutnick et al., *Fiduciary Duty Update*, State Bar of Tex., 34th Annual Advanced Civil Trial Course (2011), at 10 (listing duties and supporting case law).

[9] *See id.*

[10] *See Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999) ("Pragmatically, the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages.").

[11] *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("[T]he attorney-client relationship is one of most abundant good faith, requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception." (internal quotation marks omitted)).

[12] *See Willis*, 760 S.W.2d at 645 ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation.").

[13] *See Trousdale v. Henry*, 261 S.W.3d 221, 232 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

[14] As an aside, although the aforementioned duties are "fiduciary duties," they may also act as the basis for liability sounding in professional negligence. In a legal malpractice claim, a plaintiff must prove that the attorney owed the plaintiff a duty, the duty was breached, the breach proximately caused injury, and the plaintiff sustained damages. Thus, if an attorney breaches the duty of candor implicit in the fiduciary relationship a malpractice action may lie. Whether the breach of one of the aforementioned duties constitutes malpractice, breach of fiduciary duty, or both is dependent on the facts. The non-fracturing rule, like the economic loss rule, specifies how the action may proceed. If the gist of the complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then the claim sounds in negligence. If, however, the breach concerns allegations of self-dealing, deception, or misrepresentation that go beyond mere negligence allegations, a breach of fiduciary duty claim is appropriate. *See Tousdale*, 261 S.W.3d at 227–28.

[15] *See* TEX. R. PROF'L CONDUCT PREAMBLE ¶ 15.

[16] Like the fiduciary duties previously discussed, the responsibilities under the Rules of Conduct generally arise only after the attorney-client relationship is established. *See id.* ¶ 12.

[17] *See id.* ¶ 10.

[18] *See id.* R. 1.01(a)–(b).

[19] *See id.* R. 1.01(c).

[20] *See id.* R. 1.01 cmt. 3.

[21] *See id.*

[22] *See id.* R. 1.03(a)–(b).

[23] *Id.* R. 1.03 cmt. 2.

[24] *Id.* R. 1.05(b).

[25] *See id.* R. 1.05 cmt. 4.

[26] *See id.* R. 1.06(b)–(c).

[27] *See id.* R. 1.06 cmt. 1.

[28] *See id.* R. 1.0 cmt. 6.

[29] *Id.* R. 1.08(e).

[30] *See id.* R. 1.08 cmt. 5.

[31] For purposes of this article, and unless otherwise noted, when discussing insurance policies reference is being made to a standard form, primary general liability policy containing a duty to defend. There are many varieties of insurance products on the market, and the variability between products is legion, even among products of the same general nature. A discussion of how the tripartite relationship and the responsibilities of insurance defense attorneys practicing within that relationship vary based on the specific language of different types of coverage is beyond the scope of this paper. But it bears noting that the type of coverage or specific language of any given policy of insurance could have a dramatic effect on analyzing who the client is and, in turn, to whom the responsibilities arising as a result of the attorney-client relationship are owed.

[32] As will be discussed below, this contractual relationship can apparently either be of a simple nature, where no attorney-client relationship is established, or of a more significant nature, where an attorney-client relationship is established.

[33] Also discussed below, this relationship is universally considered one of attorney and client. Under Texas law, the attorney-client relationship is a contractual relationship, where the attorney agrees to render professional services for a client. This agreement may be explicit or established impliedly from the conduct of the parties. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dims'd).

[34] 496 S.W.2d 552 (Tex. 1973).

[35] *See id.* at 554.

[36] *See id.* at 555.

[37] *See id.*

[38] *See id.* at 554.

[39] *See id.*

[40] *See id.* at 555.

[41] *See id.* 554–55.

[42] *See id.* at 554.

[43] *See id.* at 554, 556.

[44] *See id.* at 556.

[45] *See id.*

[46] *See id.* at 554.

[47] *Id.*

[48] *See id.* at 555.

[49] *See id.* at 554.

[50] *See id.* at 554–55.

[51] *See id.* at 557–58.

[52] *Id.* at 557.

[53] *Id.* at 558.

[54] *See id.*

[55] *Id.* (internal quotation marks omitted).

[56] *See id.*

[57] *See id.* at 559.

[58] *Id.* (internal quotation marks omitted).

[59] *See id.*

[60] *See id.*

[61] *See id.* at 560.

[62] *Id.*

[63] *See id.* at 559–60.

[64] *See id.* at 561.

[65] *Id.* at 563 (Johnson, J., concurring).

[66] *Id.* (internal quotation marks omitted).

[67] *See id.*

[68] *Id.* at 564.

[69] *See Bradt v. West*, 892 S.W.2d 56, 60–61 (Tex. App.—Houston [1st Dist.] 1994, no writ).

[70] *See id.* at 60.

[71] *See id.* (citing *Tilley*, 496 S.W.2d at 558).

[72] *Id.* (citing *Tilley*, 496 S.W.2d at 558 and *Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir.1991)) (citations omitted).

[73] 980 S.W.2d 625, 626 (Tex. 1998).

[74] *See id.* at 627.

[75] *Id.* (emphasis added).

[76] *See id.* at 628 (citing *Tilley*, 496 S.W.2d at 558).

[77] *See id.* (citing and quoting *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 454–55 (M.D. Pa. 1997)).

[78] 985 S.W.2d 166 (Tex. App.—San Antonio 1998, no pet.).

[79] *Id.* at 170.

[80] *See id.* at 168.

[81] Paul W. Green is currently an Associate Justice of the Texas Supreme Court.

[82] *Id.* (citing *Bradt*, 892 S.W.2d at 77 and *State Farm Mut. Auto. Ins. Co. v. Traver*, No. 96-1201, 1998 Tex. LEXIS 136 (Tex. Aug. 25, 1998), withdrawn and substituted for *Traver*, 980 S.W.2d at 626)).

[83] 261 S.W.3d 24 (Tex. 2008).

[84] *See id.* at 26–27.

[85] *Id.* at 48–49.

[86] *See id.* at 49.

[87] *See id.*

[88] 373 S.W.3d 46, 48 (Tex. 2012).

[89] *See id.*

[90] *See id.* at 54–55.

[91] *See, e.g.*, *Tilley*, 496 S.W.2d at 558 ("Nevertheless, such [an insurance defense] attorney becomes the attorney of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured.").

[92] *See, e.g.*, *id.* at 558.

[93] *See* Robert M. Browning, *Ethics for Insurance Defense Counsel* at 22 (2008).

[94] On a related note, if an insurer requires that an insurance defense attorney abide by its litigation guidelines, which many insurers require, those guidelines cannot interfere with how the insurance defense practitioner best feels the defense of the insured should be conducted. This was the subject of an ethics opinion issued by the Texas Commission on rofessional Ethics. *See* Opinion 533, 63 Tex. B.J. 8 (2000). The TADC was instrumental in requesting and obtaining this opinion.

[95] *Rx.com v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 564, 559–60 (S.D. Tex. 2006).

[96] *See, e.g.*, *Traver*, 980 S.W.2d at 631–34 (Gonzalez, J., dissenting).

[97] *N. Country Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004).

[98] *See id.* at 689.

[99] *See Partain v. Mid-Continent Specialty Ins. Servs.*, 838 F. Supp. 2d 547, 567 (S.D. Tex. 2012).

[100] *See Davalos*, 140 S.W.3d at 689.

[101] 838 F. Supp. 2d at 569.

[102] *See id.*

[103] *See, e.g.*, *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 686 F.3d 325, 329 (5th Cir. 2012) ("If the insurance policy between Downhole and Nautilus excluded coverage for Downhole's negligent conduct, and Nautilus accordingly reserved its right to disclaim coverage based on whether Downhole had negligently performed its work, then the 'facts to be adjudicated' . . . would be equivalent to the 'facts upon which coverage depends.'").

[104] *See id.* at 330.

[105] *Rankin v. Naftalis*, 557 S.W.2d 950, 944 (Tex. 1977); *see also Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159 (Tex. 2004).

[106] *See Joseph v. State*, 3 S.W.3d 627, 639 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

[107] *See, e.g.*, Charles Silver and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995).

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EMERGING STANDARDS OF COMPETENCE WHEN DEALING WITH PROTECTED INFORMATION

I. INTRODUCTION

Clients trust their lawyers to protect them; this expectation includes safeguarding the client's personal and sensitive information. In safeguarding personal and sensitive information of employees or clients, law firms must comply with applicable laws as well as professional duties of confidentiality. The confidential information used by attorneys and law firms faces great security threats. These threats range from malicious software attacks to inattentive personnel. Accordingly, law firms must address firm procedures, employees, and technology.

If a law firm inadvertently discloses a client's information, the client could suffer significant and irreparable losses. In addition, there may be no recovery for a law firm's reputation after an inadvertent disclosure of sensitive information.

Lawyers have legal and ethical duties to protect the personal and sensitive information of their clients. Given the risks associated with the use of personal and sensitive information, it is important law firms understand privacy and data security issues relevant to their practice.

II. DEFINING PROTECTED PERSONAL OR SENSITIVE INFORMATION

A good starting point to address law firm security of confidential issues is defining what "personal" or "sensitive" information is. The Texas

> information that alone or in conjunction with other information, identifies an individual, including an individual's name, social security number, date of birth, government-issued identification number, mother's maiden name, unique biometric data, including the individual's fingerprint, voice print, or retina or iris image, unique electronic identification numbers, and some telecommunication access device.[1]

The Texas Business and Commerce Code defines "sensitive personal information" as:

> an individual's name, or first initial, and last name in combination with any or more of the following items if the name and the items are not encrypted: social security number, driver's license number or government-issued identification number, account number, credit card or debit card number in combination with any required security code, access code or password that would permit access to an individual's financial account, or information that identifies an individual and relates to the physical or mental health condition of the individual or the provision of health care to the individual or payments for health care to the individual.[2]

The central concept in defining personal or sensitive information is information that relates to or can be used to identify an individual. Personal and sensitive information is considered Personal Identity Information ("PII").[3]

[1] TEX. BUS. & COM. CODE ANN. § 521.002 (West 2009).
[2] *Id.*

[3] *See* TEX. BUS. & COM. CODE ANN. §§ 501.001-523.052.

III. Professional Duty to Protect Clients' PII

Protecting clients' PII is smart business. Some clients can be reluctant to continue doing business with a company after they hear it experienced a data breach.[4] In addition to being a good business practice, lawyers have ethical obligations to maintain the confidentiality and security of clients' PII. The ABA Model Rules of Professional Conduct give rise to ethical obligations for protecting a client's confidential information. A violation of these ethical rules could possibly lead to disciplinary action against the lawyer and/or law firm.

Rule 1.6(a) of the Model Rules of Professional Conduct[5] provides:

> a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

The Model Rules give an additional obligation to lawyers, stating:

> a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[6]

Inadvertent disclosure could include mistakes such as leaving a laptop or phone in a public location or sending a confidential email to the wrong recipient. Unauthorized disclosure can also include threats from hackers, thieves, and even insiders—such as employees.

Model Rule 1.6 requires lawyers to "make reasonable efforts to prevent inadvertent disclosure …" What efforts are considered reasonable? There is no simple answer to this question. "Reasonable efforts" in this context must be determined by the technology reasonably available at the time. The term "reasonable efforts" is difficult to precisely define. In the context of technology, an inflexible definition risks becoming obsolete quickly. Comments to the Model Rules add clarification to the factors to be considered in determining the reasonableness of a lawyer's efforts to prevent disclosure.

> The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[7]

Reasonable security does not mean absolute security.[8] A guarantee of absolute security is impossible. The ABA recognizes there is often a trade-off between security and usability.[9] More security can make technology more difficult to use, while more convenient technology might be less secure. Striking the correct balance between these factors is difficult and requires an analysis of many factors. The ABA recognized this reality in the comments to Model Rule 1.6

The Model Rules require lawyers to provide "competent representation" to a client.[10] Comment 8 to Rule 1.1 states a lawyer:

> should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.[11]

Thus, lawyers are obligated to stay updated with relevant technology in order to comply with the

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[4] *See* Ponemon Institute, *The Aftermath of a Data Breach: Consumer Sentiment* (Apr. 2014).
[5] Model Rules of Prof'l Conduct r. 1.6(a) (Am. Bar Ass'n 2012).
[6] Model Rules of Prof'l Conduct r. 1.6(c) (Am. Bar Ass'n 2012)
[7] Model Rules of Prof'l Conduct r. 1.6 cmt. 18 (Am. Bar Ass'n 2012).
[8] *Id.*
[9] *Id.*
[10] Model Rules of Prof'l Conduct r. 1.1. (Am. Bar Ass'n 2012).
[11] Model Rules of Prof'l Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2012).

ethical duties imposed by the Model Rules regarding duties of competence.

The Texas Disciplinary Rules of Professional Conduct give rise to similar obligations. The Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from knowingly revealing confidential information of a client or a former client to a person the client has instructed not to receive the information or anyone else other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.[12]

The Texas Committee on Professional Ethics has addressed Rule 1.05[13] in the context of sending confidential information via email.[14] In its Opinion, the Committee addressed the question of whether a lawyer may communicate confidential information by email. Having read reports of the National Security Agency obtaining email communications without a search warrant, Texas lawyers were concerned about whether it was proper for them to continue using email to communicate confidential information.[15]

The Committee noted its concern that sending confidential information by email risks unauthorized access to the confidential information. Opinion No. 648[16] notes the use of email, including unencrypted email, is an acceptable method of communicating confidential information. However, the Opinion states some circumstances may require the lawyer to advise a client regarding risks incident to sending or receiving emails and to consider whether it is prudent to use encrypted email or another form of communication.[17] For example, if a lawyer represents an employee of a company, and this employee uses his or her employer's email account to communicate with the attorney, the attorney should advise the client there may be a risk the employer could access the employee's email communications.[18] Other examples of circumstances that may give rise to a duty to advise the client regarding risks incident to email use could include:

(1) communicating highly sensitive or confidential information;
(2) sending an email to or from an account the email sender or recipient shares with others;
(3) sending an email to a client when it is possible a third person (such as a spouse in a divorce case) knows the password to the email account;
(4) sending an email from a public computer or a borrowed computer or where the lawyer knows the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
(5) sending an email if the lawyer knows the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password;
(6) sending an email if the lawyer is concerned the NSA or other law enforcement agency may read the lawyer's email communication.[19]

In circumstances such as those identified above, it may be appropriate for the lawyer to advise and caution a client of the risks inherent in sending or accessing emails.[20]

Ultimately, Opinion 648[21] states a lawyer must not knowingly reveal confidential client information. Opinion 648[22] explains "knowingly" denotes actual knowledge of the fact in question. More importantly, a person's knowledge may be inferred from circumstances. Thus, "each lawyer must decide whether he or she has a reasonable expectation that the confidential character of the information will be maintained if the lawyer transmits the information by email.[23]

IV. Ethics Opinions of Other Jurisdictions Concerning Confidentiality and Technology

Other states have also addressed the ethical duties associated with protecting clients' confidential information and technology.

[12] Tex. Disciplinary Rules Prof'l Conduct R. 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G, app. A (West 2013) (Tex. State Bar R. Art. X § 9).
[13] *Id.*
[14] *See* Tex. Comm. on Prof'l Ethics, Op. 648 (2015).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).
[19] *See* Tex. Comm. on Prof'l Ethics, Op. 648 (2015).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

The Florida Bar, in addressing lawyer use of devices containing storage media, reasoned that competent representation requires the lawyer to keep up-to-date of changes in the law and its practice, and this includes a duty to keep up-to-date of changes in technology to the extent the lawyer can identify potential threats to maintaining confidentiality.[24] This could potentially be a difficult burden because of the constantly changing field of technology and data security.

The Colorado Bar Association addressed a lawyers' duty to use reasonable care to guard against the disclosure of confidential information, specifically, the information in metadata.[25] The Opinion describes how a lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing confidential information.

> The duty to provide competent representation requires the sending lawyer to insure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary.[26]
>
> A sending lawyer may not limit the duty to exercise reasonable care in preventing the transmission of metadata that contains confidential information by remaining ignorant of technology relating to metadata or failing to obtain competent computer support. The duty to provide competent representation requires a lawyer to insure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata.[27]

The Maine Professional Ethics Commission, in Opinion No. 196, is fairly direct about a lawyer's obligations in transmitting confidential information and requires lawyers to understand when they are transmitting confidential information, including metadata.

> [W]e also do not believe it reasonable for an attorney today to be ignorant of the standard features and capabilities of word processing and other software used by that attorney, including their reasonably known capacity for transmitting certain types of data that may be confidential… the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information.[28]

The State Bar of California Standing Committee on Professional Responsibility and Conduct has also addressed whether a lawyer violates the duties of confidentiality and competence when the lawyer uses technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties. California Formal Opinion No. 2010-179[29] explains an attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure his or her use of technology in the course of representing a client does not subject the clients protected information to undue risk or unauthorized disclosure.[30]

The Opinion also explains an attorney should consider security before using a particular technology, stating:

> … an attorney must take appropriate steps to evaluate
>
> 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
> 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;
> 3) the degree of sensitivity of the information;
> 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;

[24] Professional Ethics of the Florida Bar Op.10-2 (Sept. 2010).
[25] *See* Colorado Bar Association Ethics Comm. Op. 119 (May 17, 2008).
[26] *Id.*
[27] *Id.*
[28] Maine Bd. of Overseers of the Bar Prof'l Ethics Comm., Op. No. 196.
[29] *See* The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Op. No. 2010-179.
[30] *Id.*

5) the urgency of the situation; and
6) the client's instructions and circumstances, such as access by others to the client's devices and communication.[31]

The fundamental requirements from these various opinions on attorneys' use of technology mandate reasonable measures to safeguard a client's protected information. In addition to State Bar and ABA expectations, clients expect their confidential information to be protected. Therefore, firms should take preventative measures to safeguard their clients' personal and sensitive information.

V. Information Security Risks to Law Firms

Since 2009, the FBI has warned managing partners of large United States law firms their computer files are targets for cyber spies or thieves in China, Russia, and other countries, including the United States, because law firms often have valuable information on corporate mergers, intellectual property, litigation plans, and more.[32]

> If you're a major law firm, it's safe to say that you've either already been a victim, currently are a victim, or will be a victim,

says Chad Pinson, a managing director at Stroz Friedberg, a New York-based cyber security firm.[33]

Law firms are repositories of protected information, which makes them valuable targets for cyberattacks.[34] In addition to being valuable targets, law firms can be easy targets for cyber criminals because generally law firm digital security remains below the standards of other industries.[35]

According to the cybersecurity firm, Mandiant Corp., law firms can be "one-stop shops" for hackers because law firms have intellectual property, health care information, financial account information, or other protected information for hundreds, possibly thousands, of people.[36] In short, law firms hold a lot of valuable information and do not always do a good job protecting it.

Global Cyber Risk CEO, Jody R. Westby, has argued that law firms should budget effectively for an enterprise security program which involves:

> a robust set of activities, including establishment of a cross-organizational security team setting high-level policies for cloud services or mobile devices, as well as keeping a detailed inventory of software systems and data used by the firm.[37]

Law firm insiders also pose a threat to protecting confidential information.

> In terms of vulnerable to the insider threat, I usually say that organizations that are the most vulnerable are organizations that are connected to the internet, that have sensitive information, and that have employees working for them …[38]

Insider threats include employees and vendors with access to protected information. Insider threats are less sensational in nature (and thus get less media attention) than outside hackers, but insider threats can still be costly to firms and clients.[39] The Ponemon Institute estimates approximately 31 percent of data breaches are due to human error from insiders.[40] However, some estimates put this number as high as 50 percent.[41] Insider threats are not necessarily employees deliberately causing harm, but can be

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[31] *Id.*
[32] Susan Hanson, *Cyber Attacks Upend Attorney-Client Privilege,* Bloomberg Business (Mar. 19, 2015, 1:56 PM), http://www.bloomberg.com/news/articles/2015-03-19/cyber-attacks-force-law-firms-to-improve-data-security.
[33] *Id.*
[34] *See* James Podgers, *A Breach Too Far*, ABA Journal (Feb. 1, 2010, 8:30 AM) www.abajournal.com/magazine/article/a_breach_too_far/.
[35] Matthew Goldstein, *Citigroup Report Chides Law Firms for Silence on Hackings*, N.Y. Times, Mar. 26, 2015.
[36] Joe Dysart, *New Hacker Technology Threatens Lawyers' Mobile Devices*, ABA Journal (Sept. 1, 2013, 8:10 AM) http://www.abajournal.com/magazine/article/new_hacker_technology_threatens_lawyers_mobile_devices.
[37] Steve Brachmann, *A Lax Attitude Toward Data Security Could Leave Law Firms in the Lurch* (Oct. 2015), www.ipwatchdog.com.
[38] Eric Field, *Insider Threat: 'You Can't Stop Stupid',* Bank Info Security (July 14, 2010), http://www.bankinfosecurity.com/interviews/insider-threat-you-cant-stop-stupid-i-622.
[39] *See* PricewaterhouseCoopers, *U.S. Cybercrime*: *Rising Risks, Reduced Readiness*, *Key Findings from the 2014 U.S. State of Cybercrime Survey* (2014).
[40] Ponemon Institute, *Cost of Data Breach Study: United States* (May 2014).
[41] *See* Field, *'You Can't Stop Stupid.'*

employees accidently causing it.[42] These breaches from insiders are often due to careless acts, such as clicking on phishing emails, disclosing information via social media, or leaving a laptop, tablet, or phone unattended.[43]

For example, in 2011, an associate with a Baltimore law firm brought home a hard drive containing backup date to ensure that the firm had an off-site backup. She took the Baltimore light rail home and left the drive on the train. Although she returned only a few minutes later to recover the drive, it was gone. The drive was not encrypted and contained medical records for 161 patients.[44]

Another example of an insider threat, although this one was intentional bad conduct and not carelessness, comes from New York. In 2002, a paralegal in New York City was sentenced to prison after pleading guilty to downloading files from his firm and offering to sell them to the opposing counsel.[45]

Inadvertent disclosure of protected information is a substantial and growing threat to law firms and clients. It is important for law firms to recognize possible threats and make efforts to protect their clients.

VI. SUGGESTED PRACTICES

Given the ethical and legal obligations for lawyers to protect a client's personal information, here are some steps to consider.

A. Document Disposal

Maintain document disposal policies that require documents to be shredded and electronics to be sanitized or destroyed. Many states, including Texas, have laws governing the disposal of documents containing personal information.[46] Texas Law requires a business to shred, erase or modify by other means, documents containing PII so as to make the information unreadable or undecipherable when disposing business records.[47] Section 72.004(d) allows the attorney general to bring an action for a civil penalty of up to $500 for each business record against a business that fails to comply with § 72.004(b).

In addition to initiating procedures to properly dispose of documents within their own firms, lawyers should consider requiring opposing counsel to do the same. It may be counsel can request the return of all PII at the end of the case. Alternatively, consider the following language regarding the destruction of information produced to opposing counsel:

> Upon the earlier of (a) expiration of the applicable limitations period for legal malpractice claims or (b) six years from the date of full and final resolution of this action via settlement or otherwise, counsel for the parties will provide opposing counsel with an affidavit confirming all paper documents, electronic media, or contents of electronic media produced by the opposing litigants and designated as confidential have been destroyed in accordance with the following procedures:
>
> a. Any paper documents designated as confidential, such as by way of example documents containing social security numbers, driver's license numbers, bank account numbers, credit card numbers, debit card numbers, or dates of birth are to be cross-cut, shredded, burned, or pulverized in order to make such documents unreadable.
>
> b. Electronic media, including computer hard drives, audio tapes, videotapes, discs, DVDs, and CDs, designated as confidential information should be completely sanitized prior to destruction so all information contained in the electronic media is unreadable, undecipherable, or impossible to practically reconstruct.[48]

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[42] *Id*.
[43] *Id*.
[44] Tricia Bishop, *Law Firm Loses Hard Drive with Patient Records*, Baltimore Sun (Oct. 10, 2011), http://articles.baltimoresun.com/2011-10-10/health/bs-md-stent-hard-drive-20111010_1_hard-drive-firm-stent-patients.
[45] U.S. Department of Justice Press Release, Manhattan Paralegal Sentenced for Theft of Litigation Trial Plan (Jan. 30, 2002).
[46] *See* TEX. BUS. & COM. CODE ANN. §§ 72.001-72.051.
[47] *See* TEX. BUS. & COM. CODE ANN. § 72.004(b).
[48] Matthew H. Meade, *Lawyers and Data Security: Understanding a Lawyer's Ethical and Legal Obligations That Arise from Handling Personal Information Provided by Clients*, 28 THE COMPUTER AND INTERNET LAWYER 1 (Oct. 2011).

Failure to properly dispose of documents can lead to disciplinary actions. In 2010, the Indiana Supreme Court issued an opinion calling for a public reprimand of an attorney for failing to safeguard sensitive client information.[49] The attorney asked his children to dispose of over a dozen banker boxes of client files. The children took the boxes to a recycling bin and left them on the ground next to the dumpsters. After being notified of what his children had done with the boxes, the attorney retrieved the boxes. The Supreme Court of Indiana's reprimand gave no indication as to whether personal information of the clients was included within those exposed files, but publicly reprimanded the attorney for his failure to safeguard sensitive client information.[50]

Law firms without a proper document disposal policy should implement one. Proper disposal of documents and devices is an important procedure in protecting clients' privacy.

B. Suggested Controls for Theft and Loss

Lost or stolen hardware (laptops, tablets, phones, drives etc.) are among the most common causes of information loss or exposure.[51] Losing assets is more common than theft, which is important to understand because law firms can make efforts to minimize the impact of lost devices.[52] There are some things firms can do to mitigate the risk of lost or stolen devices. Encrypting devices is one of the easiest solutions to implement in regards to lost or stolen assets.

The law firm Imhoff & Associates PC had to notify an undisclosed number of people their personal information, including their names, social security numbers, and driver's license numbers, was possibly exposed because it was on a hard drive that was stolen from the locked trunk of an employee's vehicle. The hard drive was not encrypted.[53]

In 2006, a laptop and external hard drive containing the personal information of more than 28 million veterans was stolen.[54] After this theft, the security guidelines for federal agencies added the requirement of encryption of all data on laptops and portable devices unless the data is considered "non-sensitive."[55]

> Encryption is now a standard security measure for protecting laptops and portable devices—and attorneys should be using it.[56]

Indeed, attorneys should use full disk encryption. Full disk encryption protects the entire hard drive.[57] It encrypts everything and provides decrypted access with a proper log in.[58]

Section 521.053 of the Texas Business and Commerce Code requires a person who conducts business in Texas and owns or licenses computerized data that includes sensitive personal information to disclose any breach of system security. This includes the unauthorized access of encrypted data if the person accessing the data without authorization has the key required to decrypt the data.[59] Full disc encryption (as long as the unauthorized party does not have the key to decrypt) could create a safe harbor for firms if a device is lost or stolen and help firms avoid civil penalties, embarrassment, and possibly lawsuits. Employees lose things, and people steal things.

Most laptop manufacturers offer models with full disk encryption built in, so law firms do not have to go that far out of the way to encrypt portable devices.[60]

In addition to encrypting devices, law firms should implement policies to protect mobile devices. For instance, firms should encourage employees to keep devices in their possession and in sight at all times.[61] This may be inconvenient in some situations, but it is better than leaving a device unattended with strangers.

Law firms should also regularly (if not automatically) back up data. Backups allow firms to

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[49] *In the Matter of Litz*, 950 N.E.2d 291 (Ind. 2010).
[50] *See id.*
[51] Verizon, *2014 Data Breach Investigations Report*.
[52] *Id.*
[53] Adam Greenberg, *Backup Hard Drive Stolen from Law Firm Contained Personal Info*, SC Magazine (Aug. 27, 2014), http://www.scmagazine.com/backup-hard-drive-stolen-from-law-firm-contained-personal-info/article/368427/.
[54] David G. Ries, John W. Simek, *Encryption Made Simple for Lawyers*, GP Solo (Dec. 2012), *available at* http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/encryption_made_simple_lawyers.html.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *See* TEX. BUS. & COM. CODE ANN. § 521.053.
[60] *See* Ries, Simek. Encryption is not just about stopping the NSA, it is about protecting your clients—and your firm—from the damage that can accompany a disclosure of confidential information.
[61] Verizon, *2014 Data Breach Investigations Report*.

salvage otherwise irrecoverable work, become productive with minimal down time, and can help establish what data was on a lost or stolen device to determine whether disclosure of a potential data breach is necessary.[62]

Lock up devices and restrict access to them. Verizon's 2014 Data Breach Investigations Report indicates 43 percent of device thefts occur within the victim's work area. In light of the fact that so many thefts occur in the office, firms should move assets with sensitive data to a separate and secure area.

Many devices have lock-out options. Check with your IT departments to determine if lock-out options are available and how those options can be used to lock the device or erase the data from the device if it is lost or stolen.

C. Avoid Public Wi-Fi

It is relatively easy to capture sensitive communication in most public hotspots—like cafes, coffee shops, restaurants, airports, hotels, and other public places.[63] Public Wi-Fi leaves emails, passwords, and unencrypted instant messages vulnerable to surreptitious monitoring.[64]

> Individuals should avoid hotel wired and wireless internet services all together, and instead rely on a company provided mobile hotspot device, or tether via their mobile device. When individuals are required to leverage a hotel's wired or wireless internet, they should avoid performing any system administrative tasks or updates.[65]

It is worth noting the State Bar of California has addressed the use of public wireless connections:

> With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.[66]

Public Wi-Fi is convenient, but it is not secure. Therefore law firms should implement policies prohibiting employees from using public internet access. The benefits to firm data security outweigh the inconvenience of not being able to use public wired and wireless services.

D. Use Strong Passwords

Law firms should create a password policy. Passwords should be at least 12 characters.[67] Passwords should be changed regularly and not repeated. Generally, passwords should be changed every 90 days. Creating and enforcing a password policy for all firm employees is an effective and inexpensive program to safeguard protected information.[68]

Password security is often not taken seriously. For example, the most popular password in the United States for the past five years has been "123456." The second most common password has been "password."[69] Law firms have no excuse not to implement a strong password policy.

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[62] *See id*.

[63] Eric Geier, *Here's What an Eavesdropper Sees When you Use an Unsecured Wi-Fi Hotspot*, PCWorld (June 28, 2013 5:35 AM), http://www.pcworld.com/article/2043095/heres-what-an-eavesdropper-sees-when-you-use-an-unsecured-wi-fi-hotspot.html.

[64] *See id*.

[65] Tony Bradley, *DarkHotel Malware Attacks Target Poorly Secured Networks, Especially in Hotels*, PCWorld (Nov. 12, 2014 3:00 AM), http://www.pcworld.com/article/2846238/darkhotel-malware-attacks-target-poorly-secured-networks-especially-in-hotels.html.

[66] The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Op. No. 2010-179.

[67] John D. Sutter, *How to Create a Super Password,* CNN (Aug. 20, 2010 9:49 AM), http://www.cnn.com/2010/TECH/innovation/08/20/super.passwords/.

[68] John W. Simek and Sharon D. Nelson, *Essential Law Firm Technology Policies and Plans,* Law Practice Magazine, (Apr. 2012) *available at* http://www.americanbar.org/publications/law_practice_magazine/2012/march_april/hot-buttons.html.

[69] Darlene Storm, *Worst Most Common Passwords for the Last Five Years,* Computerworld (Jan. 20, 2016, 10:36 PM), http://www.computerworld.com/article/3024404/security/worst-most-common-passwords-for-the-last-5-years.html.

E. Phishing

Phishing campaigns usually involve emails that appear to be coming from a trusted source. The message might be asking the recipient to change their passwords, provide some piece of information, or indicate a bill is past due.[70] Often the email recipient's willingness to fix a non-existent problem leads to the installation of malware.[71]

Phishing as a cybercrime tactic has been around for a relatively long time, but it is surprisingly effective.[72] Twenty-three percent of recipients open phishing messages and 11 percent click open links or attachments in phishing message.[73] Verizon noted legal departments were particularly vulnerable to phishing scams because they are more likely than others to open a phishing email because opening email is a central (and required) part of the job.[74] In 2014, Google determined the most believable phishing emails deceived users 45 percent of the time, while average phishing emails deceived users 14 percent of the time.[75] If someone in your firm is deceived only 14 percent of the time, the risk is still significant for a data breach.

So how can law firms fend off phishing attacks? One of the most effective ways to minimize phishing threats is through awareness and training.[76] Law firms should consult their IT departments to create procedures on how to deal with suspicious emails. In addition, email filtering before messages arrive in the end user's in-box can stop a phishing attempt before it reaches the recipient.[77] Another important step is to improve response capabilities.[78] Law firms deal with a lot of email, so it is likely, at some point, a firm employee will open a phishing email and click on an attachment. When this happens, employees who have had instruction and response training will understand how they should respond and hopefully mitigate possible damage.

F. Evaluate Your Vendors

A Ponemon Institute Research Report determined employees and other insiders posed the greatest threat to an organization's sensitive data.[79] Insiders includes third party vendors and partners. Even organizations with relatively robust data security measures are vulnerable to breaches from negligent employees, negligent vendors, or missing equipment, *i.e.*, lost or stolen laptops, mobile devices, etc.

Vendors can lead to inadvertent disclosures of protected information. In 2011, files from a Louisiana law firm containing PII were left below an interstate highway along a sidewalk for anyone to pick up.[80] The law firm hired a third party to dispose of the documents, but the vendor failed to dispose of the documents properly.[81]

In a well-known example, hackers gained entry into Target's network via stolen credentials from a third party HVAC vendor. As a result, approximately 40 million credit and debit card accounts were stolen.[82]

In 2014, Lowe's Home Improvement reported a possible data breach after a third party vendor possibly exposed employee information to the public. Lowe's had contracted a third party vendor to provide a computer system to store compliance documentation and information related to current and former drivers of Lowe's vehicles. Personal information in the vendor's file may have included names, addresses, dates of birth, social security numbers, and driver's license numbers. When Lowe's learned the vendor had unintentionally backed up this data to an unsecured computer server that was accessible from the internet, Lowes had to notify employees their personal information was potentially exposed.[83]

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[70] Verizon, *2015 Data Breach Investigations Report*.
[71] *See id*.
[72] *See id*.
[73] *Id*.
[74] *Id.*
[75] Google, *Behind Enemy Lines in Our War Against Account Hijackers* (Nov. 2014).
[76] Verizon, *2015 Data Breach Investigations Report*.
[77] *See id*.
[78] *Id*.
[79] Ponemon Institute, *Aftermath of a Data Breach Study* (Jan. 2012).
[80] *Documents with Personal Information Found Around LSU Lakes*, WAFB (Oct. 27, 2011 8:22 PM), http://www.wafb.com/story/15895902/documents-with-personal-information-found-around-lsu-lakes.
[81] *Id*.
[82] Brian Krebs, *Target Hackers Broke in Via HVAC Company,* Krebs on Security (Feb. 5, 2014, 1:52 PM), http://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company/.
[83] Steve Ragan, *Vendor Error Forces Lowes to Issue Breach Notification Letters*, CSO (May 22, 2014, 4:00 AM), http://www.csoonline.com/article/2158122/identity-management/vendor-error-forces-lowes-to-issue-breach-notification-letters.html.

In 2014, Goodwill reported a data breach after hackers compromised the security of a third party vendor that provided payment card processing services for Goodwill. As a result, over 800,000 payment card numbers and expiration dates were exposed.[84]

These examples make it clear law firms must confirm their vendors have security policies and procedures in place and require vendors to comply with applicable laws and regulations. Law firms may want to consider conducting audits of vendors to assure data and files are secure.[85] All law firms need to consider Business Associate Agreements with their vendors who receive, maintain, or transmit their PII. This is one additional step to show your firm is using all reasonable efforts to protect your clients' PII.

G. Metadata

Metadata was discussed above in Section IV. However, all firms should train staff on removing all metadata from any document electronically sent from your firm. Not all documents will contain PII, but training staff to remove all metadata each time a document is created will prevent any disclosure of PII.

H. Other Considerations

Consider discussing with clients at the beginning of the engagement whether any special circumstances require protection of sensitive information and what might be the best method to insure the protection of this data and monitor technology and keep abreast of threats to the confidentiality of clients' sensitive information. [86]

VII. Legal Obligations to Protect Personal and Sensitive Information

In addition to professional obligations, Texas has imposed legal obligations that can result in civil penalties for a firm's failure to comply.[87] Many other states have adopted legislation restricting the use and disclosure of PII.[88]

A. Requirements and Penalties Under the Texas Business and Commerce Code

Section 521.052 of the Texas Business and Commerce Code states, in relevant part:

> a business shall implement and maintain reasonable procedures, including taking any appropriate corrective action to protect from unlawful use or disclosure of any sensitive personal information collected or maintained by the business in the regular course of business.

Section 521.052 also requires a business to destroy or arrange for the destruction of customer records containing sensitive personal information by shredding, erasing, or otherwise modifying the sensitive personal information in records to make the information unreadable or indecipherable.

Texas law requires notice to be given to customers in the event of a breach of security of computerized data. The notification requirements under TEX. BUS. & COM. CODE ANN. § 521.053 (West Supp. 2013), require a business to disclose any breach of system security after discovering or receiving notification of the breach to any individual whose sensitive information was or is reasonably believed to have been acquired by an unauthorized person. "Breach of system security" is defined as the

> unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of sensitive personal information maintained by a person, including data that is encrypted if the person accessing the data has the key required to decrypt the data.[89]

This obligates law firms to notify clients when it is "reasonably believed" the client's PII was acquired by an unauthorized person.

Under Section 521.053(c), a person who maintains computerized data that includes sensitive personal information must notify the owner of the

[84] Jeffrey Roman, *Goodwill 868,000 Card Compromised*, Bank Info Security (Sept. 3, 2014), http://www.bankinfosecurity.com/goodwill-868000-cards-compromised-a-7268.

[85] John D. Finerty, Jr. and Ben Kaplan, *Liability for Third-Party Vendor Conduct,* Today's General Counsel, (Jan. 2016).

[86] *See* Matthew H. Meade*, Lawyers and Data Security: Understanding a Lawyer's Ethical and Legal Obligations That Arise from Handling Personal Information Provided by Clients*, 28 THE COMPUTER AND INTERNET LAWYER 1 (Oct. 2011).

[87] *See* TEX. BUS. & COM. CODE ANN. § 521.151.

[88] *See* ARIZ. REV. STAT. ANN. § 44-1373; CAL. CIV. CODE § 1798.85; COLO. REV. STAT. § 6-1-715; HAW. REV. STAT. ANN. §§ 487J-2; 815 ILL. COMP. STAT. ANN. 505/2RR; MD. CODE ANN., Com. Law §§ 14-3402; MINN. STAT. ANN. § 325E.59; N.J. STAT. ANN. § 56:8-164; N.M. STAT. ANN. 1978, § 57-12B-3; N.C. GEN. STAT. § 75-62; OKLA. STAT. ANN. tit. 40, § 173.1; OR. REV. STAT. § 646A.620; R.I. GEN. LAWS § 6-48-8; S.C. CODE ANN. § 37-20-180; TEX. BUS. & COM. CODE ANN. § 521.052; VT. STAT. ANN. tit. 9, § 2440.

[89] TEX. BUS. & COM. CODE ANN. § 521.053 (West Supp. 2013).

information of any breach of system security *immediately* after discovering the breach if the sensitive personal information is, or is reasonably believed to have been acquired by an unauthorized person. There are certain exceptions to providing immediate notification of a breach when law enforcement requests the notification be delayed.[90]

The party who gives notice of a breach may give written notice, or electronic notice if the notice is provided in accordance with 15 U.S.C. § 7001.[91] If giving notice will exceed $250,000 in cost or if the number of affected persons exceeds 500,000, notice may be given by email, posting on the website of the party reporting the breach or broadcast on major statewide media.[92]

Section 521.151 of the Texas Business and Commerce Code allows the attorney general to bring an action to recover a civil penalty of at least $2,000 but not more than $50,000 for each violation of Chapter 521. The attorney general may bring an action for damages for failure to notify:

> In addition to penalties assessed under Subsection (a), a person who fails to take reasonable action to comply with Section 521.053(b) is liable to this state for a civil penalty of not more than $100 for each individual to whom notification is due under that subsection for each consecutive day that the person fails to take reasonable action to comply with that subsection. Civil penalties under this section may not exceed $250,000 for all individuals to whom notification is due after a single breach.[93]

It is important to note an action to recover these penalties must be brought by the attorney general.

In the wake of one of the largest reported data breaches in the United States, plaintiffs filed a class action suit against Target Corporation for losses associated with the unauthorized disclosure of financial information.[94] In *In re Target*, the court acknowledged the plaintiffs had alleged sufficient injuries to have standing, but dismissed the plaintiffs' Texas data-breach notice claims because the Texas data-breach notice statute provides only for attorney general enforcement.[95] The Section 521.151 civil penalties, while possibly onerous, must be brought by the attorney general.

VIII. Federal Rules of Civil Procedure Require Protection of Sensitive Personal Information

Rule 5.2(a) of the Federal Rules of Civil Procedure requires certain information to be redacted prior to filing. Rule 5.2 was adopted to comply with the E-Government Act of 2002 and is meant to address privacy concerns due to public access to electronic case files.[96] Rule 5.2(a) provides:

> Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social security number, taxpayer identification number, or birth date, the name of an individual known to be a minor, or a financial account number, a party or non-party making the filing may include only:
>
> (1) the last four digits of the social security number and the taxpayer identification number;
> (2) the year of the individual's birth;
> (3) the minor's initials; and
> (4) the last four digits of the financial-account number.

Rule 5.2(b) provides for exemptions from the redaction requirement. The redaction requirement does not apply to the following:

> (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
> (2) the record of an administrative or agency proceeding;
> (3) the official record of a state-court proceeding;
> (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
> (5) a filing covered by Rule 5.2(c) or (d); and
> (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

Courts will impose various sanctions for violations of this rule. In *Allstate Ins. Co. v. Linea Latina de Accidentes, Inc.*, 2010 WL 5014386 (Dist. Minn. Nov. 24, 2010), plaintiff's counsel filed a complaint with 160 pages of exhibits containing the names of minors, their dates of birth, financial

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[90] *See* TEX. BUS. & COM. CODE ANN. § 521.053(d) (West Supp. 2013).
[91] *See* TEX. BUS. & COM. CODE ANN. § 521.053(e) (West Supp. 2013).
[92] *See* TEX. BUS. & COM. CODE ANN. § 521.053(f) (West Supp. 2013).
[93] TEX. BUS. & COM. CODE ANN. § 521.151(a-1) (West Supp. 2013).
[94] *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154 (D. Minn. 2014).
[95] *Id.* at 1159, 1168-69.
[96] FED. R. CIV. P. 5.2 advisory committee's note.

information, and even social security numbers. The court gave plaintiff's counsel time to amend the exhibits, but plaintiff's counsel failed to properly redact the information. The court ordered plaintiff's counsel to notify the individuals of the breach and offer a year of credit monitoring. The court also rebuked the plaintiff's counsel in its opinion:

> The days of attorneys being able to ignore the computer and shift blame to support staff in the event of an error are gone. The consequences are simply too serious. To the extent there are attorneys practicing in federal court who are under the impression that someone in the clerk's office will comb their filings for errors and call them with a heads up, the court delivers this message. It is the responsibility of counsel to insure that personal identifiers are properly redacted … Attorneys who are slow to change run the very real risk of sanctions.[97]

Penalties for disclosing sensitive information in filings can vary. In *Carpenters' Dist. Council of Greater St. Louis & Vicinity v. Neier Serv. Co., Inc.*, 2015 WL 3971070 (E.D. Mo. June 30, 2015), the United States District Court for the Eastern District of Missouri ordered the attorney who furnished electronic filings with sensitive information without redacting this information to read a copy of Rule 5.2 of the Federal Rules of Civil Procedure and to instruct his legal assistants and any other personnel in his law firm who engage in electronic filing to also read the rule.[98] This sanction was far less severe than the sanctions handed out in *Allstate Ins. Co. v. Linea Latina de Accidentes, Inc.,* but potentially damaging to this attorney's reputation nonetheless. In order to avoid the potential costs for violating Rule 5.2, law firms should create internal federal filing protocols to ensure Rule 5.2 redaction requirements are met.

IX. Texas Rules of Civil Procedure Require Protection of Sensitive Personal Information

Rule 21c of the Texas Rules of Civil Procedure is meant to provide privacy protection for documents filed in state civil cases.[99] Rule 21c prohibits the filing of documents containing sensitive data, which includes a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number, a bank account number, credit card number, or other financial account number, date of birth, home address, and the name of any person who was a minor when the underlying suit was filed.[100]

Sensitive data must be redacted prior to electronic filing unless the inclusion of the sensitive data is specifically required by statute, court rule or administrative regulation.[101] Sensitive data is required to be redacted by placing the letter "X" in place of each omitted number or character, or by removing the sensitive data in some other manner indicating data has been redacted.[102] The filing party must maintain an unredacted version of the document as long as the case remains pending, and during any appeal filed within six months of the date of the judgment.[103] If a document is filed electronically, and if it must contain sensitive information, the clerk must be notified by the filing party by designating the document as containing sensitive data when the document is electronically filed.[104] If the document is not filed electronically, the filing party must provide notice to the clerk by including on the document, on the upper left-hand side of the first page the following phrase:

> NOTICE; THIS DOCUMENT CONTAINS SENSITIVE DATA.[105]

A clerk may identify the error in non-conforming documents and state a deadline for the part to resubmit a redacted, substitute document.[106]

X. Conclusion

Lawyers have ethical and statutory obligations to safeguard clients' confidentiality. Meeting these obligations may require ongoing review of technology. Law firms should understand information security requires training and ongoing attention. A critical component of a law firm security program is constant vigilance by all employees. Another critical factor is recognizing when to seek qualified assistance. Law firms should expect to face threats to information security. An inadvertent disclosure of confidential client information can have far reaching consequences, including the loss of client trust. While the creation of a firm-wide information security plan may seem difficult, expensive, and time consuming, it can prevent the occurrence of a costly and embarrassing information security breach

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[97] *Allstate Ins. Co. v. Linea Latina de Accidentes, Inc.*, 2010 WL 5014386, at *2-3 (Dist. Minn. Nov. 24, 2010)
[98] *Carpenters' Dist. Council of Greater St. Louis & Vicinity v. Neier Serv. Co., Inc.*, 2015 WL 3971070, at *9 (E.D. Mo. June 30, 2015).
[99] TEX. R. CIV P. 21c.
[100] *Id.*
[101] TEX. R. CIV. P. 21c(b).
[102] TEX. R. CIV. P. 21a(c).
[103] TEX. R. CIV. P. 21c(c).
[104] TEX. R. CIV. P. 21c(d.
[105] *Id.*
[106] TEX. R. CIV. P. 21c(e).

An Open Look At Open Carry: What It Means For Business

By James M. Summers & Blake W. Stribling
Norton Rose Fulbright US LLP

handguns. While there are many different perceptions and opinions on guns and the right to carry, the issue for business owners comes to whether they want to allow open carry on their premises or if they would prefer to restrict it. No matter what the answer is, it's important that they follow the letter of the law.

Open Carry: An Overview

The law authorizes individuals to obtain a license to openly carry a handgun in a shoulder or hip holster and individuals with a concealed handgun license may openly carry a handgun in a shoulder or hip holster without obtaining a new license.

Existing rules under Texas' concealed handgun law remain in effect and generally apply to open carry. Current holders of concealed handgun licenses are allowed to carry (openly or concealed) handguns and individuals who are currently licensed will not be required to attend additional training.

Texas has allowed residents of the state to obtain a license to carry a concealed handgun since 1996, subject to certain restrictions, however, there are certain places where concealed handguns are not allowed to be carried.

In 1997, Texas adopted a law stating that any person, including a license holder, who enters or remains on property or in a building of another carrying concealed handgun without effective consent to carry and who has notice that concealed handguns are forbidden commits a criminal offense.

lawful firearms and ammunition in their locked private vehicles in employer-provided parking lots and garages.

Carrying, whether open or concealed, is prohibited in a number of places, including:

- schools and school buses
- polling places (at statutorily defined times)
- courts and court offices
- racetracks
- secured airport areas
- businesses where alcohol is sold if 51 percent or more of revenue is from sale of alcohol for on-premises consumption
- locations where high school, college or professional sporting events are taking place
- on the physical premises of a primary or secondary school or educational institution
- the grounds or building where an activity sponsored by a school or educational institution is being conducted.

If statutory signage is properly posted, carrying, whether open or concealed, may also be prohibited at hospitals or nursing homes; amusement parks; places of worship, and government meetings.

Following the Law

So what does that mean for businesses? By relying on criminal trespass statutes, companies have the right to prohibit both employees and customers from carrying

handguns, whether concealed or open, into their places of business.

In order to arrive at an effective prohibition against license holders carrying on their premises, private businesses must provide notice by oral or written communication to the person carrying a handgun that entry on the property by a license holder carrying a handgun is forbidden.

"Written communication" is defined as a card or document with specific statutory language; or a sign posted on the property that includes the statutory language in both English and Spanish. The language must appear in contrasting colors with block letters at least one inch high and must be displayed in a conspicuous manner clearly visible to the public. And in the case of open carry, the signs must be located at each entrance to the property.

The criminal trespass law states that the following language must be used to provide notice that concealed carrying is forbidden:

PURSUANT TO SECTION 30.06, PENAL CODE (TRESPASS BY LICENSE HOLDER WITH A CONCEALED HANDGUN), A PERSON LICENSED UNDER SUBCHAPTER H, CHAPTER 411, GOVERNMENT CODE (HANDGUN LICENSING LAW), MAY NOT ENTER THIS PROPERTY WITH A CONCEALED HANDGUN.

The following language must be used to provide notice that open carrying is forbidden:

PURSUANT TO SECTION 30.07, PENAL CODE (TRESPASS BY LICENSE HOLDER WITH AN OPENLY CARRIED HANDGUN), A PERSON LICENSED UNDER SUBCHAPTER H, CHAPTER 411, GOVERNMENT CODE (HANDGUN LICENSING LAW), MAY NOT ENTER THIS PROPERTY WITH A HANDGUN THAT IS OPENLY CARRIED.

It's important to note that if a business wants to ban both concealed and open carry, it must post two signs, one for each. Then, if anyone carrying a handgun, either openly or concealed, chooses to enter the premises despite these visible signs, they will be committing a criminal offense and the police can be called to handle the criminal trespass.

Equally important: all employees should be trained on the company policy so they understand what their businesses allow. If patrons may not carry handguns, employees need to clearly understand the policy and what they should do if someone violates the policy.

As far as employees themselves are concerned, since most employers are private businesses, they can create and enforce handbook policies that prohibit the carrying of guns by their employees into the workplace. However, employers should be mindful that Texas law allows employees to store lawful firearms and ammunition in their locked private vehicles in employer-provided parking lots and garages.

If an employee handbook or employment policies already prohibit the carrying of weapons of any kind into the workplace, the employer should consider reminding its employees of the existing policy and make clear that the company will continue to prohibit the open carrying of weapons in the workplace.

If an employee handbook or employment policies do not currently address or prohibit the carrying of weapons into the workplace, companies may want to consider adopting a policy to specifically address the issue in light of the open carry law.

The bottom line on open carry: businesses have options, but must be sure to comply with the statute. If companies have questions, they should be careful not to fall victim to hype or hearsay—take guidance from your legal counsel or official sources.

Papers Available

2016 TADC Summer Seminar – Amelia Island, FL – July 6-10, 2016

Employment Law: What's Happening! – Katie Beaird – 31 pgs. PPT

The Law on Voir Dire – The Honorable Les Hatch – 92 pgs. + 23 pgs. PPT

Insurance Defense Litigation: A Review of the Tripartite Relationship and Considerations in Protecting the Coverage Interests of the Client-Insured – David A. Kirby – 27 pgs. + 38 pg. PPT

Dos and Don'ts of Settlement Agreements – Jennie C. Knapp, Andrew Bird – 7 pgs. + 36 pg. PPT

Emerging Standards of Competence When Dealing with Protected Information – Mitzi S. Mayfield – 21 pgs. + 69 pg. PPT

Updates in Legal Malpractice in Texas: What's New and What's Next – Alex B. Roberts – 19 pgs. + 45 pg. PPT

Mediation in Texas: Twenty-Five Years of Bumps and Bruises – Clayton Devin, Tom Pitts, John Simpson – 25 pgs.

Reptile Tactics: A Defense Counsel's Guide – Jill Bechtold – 65 pg. PPT

Cathodic Protection and Corrosion Investigations – Brian J. Brackensick – 28 pgs. PPT

Appellate Issues for the Trial Lawyer – Lawrence M. Doss – 28 pgs. PPT

E-Discovery: A (Hopefully) Practical Guide – Scot G. Doyen – 32 pgs. PPT

Application of Settlement Credits and the One Satisfaction Rule – Bill Gardner – 35 pgs. PPT

2016 West Texas Seminar – Ruidoso, NM – July 29-30, 2016

Litigating Like a Hometowner – Deena Buchanan, Dan Hernandez, Michael Dean – 14 pg. PPT

Common Claims, Remedies and Defenses Under the Uniform Commercial Code ("UCC") Article 2 (Sale of Goods) – Sid Childress – 16 pgs. + 2 pg. exhibit

Law and Strategy in Taking Depositions – Slater C. Elza – 39 pg. PPT

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7 Things You Need to Know About 18.001 – Mike Bassett, Sadie Horner, Robin Featherston, Jacqueline Deelaney – 28 pgs. + 24 pg. PPT

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February 1-5, 2017 | Beaver Creek Lodge | Beaver Creek, Colorado

David Brenner & Belinda Arambula, Burns, Anderson, Jury & Brenner L.L.P., Austin – Program Co-Chairs

CLE Approved for: 8.5 hours, including 1.25 hours ethics

Wednesday, February 1, 2017

6pm-8pm TADC Welcome Reception

Thursday, February 2, 2017

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Hendryx, TADC President
Strong Pipkin Bissell & Ledyard, L.L.P., Houston
David Brenner & Belinda Arambula, Program Co-Chairs
Burns, Anderson, Jury & Brenner, L.L.P., Austin

7:30-8:05am *THE HIRED GUN: IN-HOUSE COUNSELS' GOOD, BAD AND UGLY OF SELECTING THEIR TRIAL LAWYERS*
George Green
DCP Midstream, LP, Denver

8:05-8:40am *THE QUICK AND THE DEAD: ANTI-INDEMNITY IN TEXAS*
J. Mitchell Smith
Germer PLLC, Beaumont

8:40-9:40am *THE MAGNIFICENT 7: TOOLS TO PREPARE YOUR CLIENT TO TESTIFY*
Robert Swafford
Strike for Cause Trial Consulting, Austin

9:40-10:15am *THE WILD WILD WEST: HOW THE NEW TEXAS GUN LAWS AFFECT YOUR PRACTICE AND YOUR CLIENTS*
Sabrina Karels
Riney & Mayfiel LLP, Amarillo

Friday, February 3, 2017

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Hendryx, TADC President
David Brenner & Belinda Arambula, Program Co-Chairs

7:30-8:05am *COWBOYS AND ALIENS: USING THE WORKERS' COMPENSATION ACT IN DEFENDING YOUR TORT CLAIM*
Darryl Silvera
The Silvera Firm, Dallas

8:05-8:40am *UNFORGIVEN: OPENING AND CLOSING – TELLING THE STORY*
Curtis Kurhajec
Naman, Howell, Smith & Lee, PLLC, Austin

8:40-10:10am *NO COUNTRY FOR OLD MEN: CHANGING PRACTICE OF LAW - PANEL*
R. Edward Perkins
Sheehy, Ware & Pappas, P.C., Houston
Max E. Wright
Kelly Hart & Hallman LLP, Midland
Christy Amuny
Bain & Barkley, Beaumont

Saturday, February 4, 2017

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Hendryx, TADC President
David Brenner & Belinda Arambula, Program Co-Chairs

7:30-8:05am *THE MAN WHO SHOT LIBERTY VALANCE: PROFESSIONAL LIABILITY IN TEXAS*
Jackie Cooper
Cooper & Scully, P.C., Dallas

8:05-8:40am *THE SEARCHERS: DISCOVERY PRACTICE IN TEXAS*
Mackenzie Wallace
Thompson & Knight LLP, Dallas

8:40-9:40am *TRUE GRIT: UNIQUE CHALLENGES AND TIPS FOR WOMEN IN DEFENSE LITIGATION - PANEL*
Belinda Arambula
Burns, Anderson, Jury & Brenner, L.L.P., Austin
Laura Enriquez
Mounce, Green, Myers, Safi Paxon & Galatzan, P.C., El Paso
Pamela Madere
Coats Rose Yale Ryman & Lee, PC, Austin

9:40-10:25am *BLAZING SADDLES: SERIOUS TACTICS AND HILARIOUS MISTAKES DURING MEDIATION*
Jeff Jury
Burns, Anderson, Jury & Brenner, L.L.P., Austin

Sunday, February 5, 2017

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February 1-5, 2017

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☐ **$ 75.00 Spouse/Guest CLE Credit**
☐ **$ 110.00 Children 12 & Older _____**
☐ **$ 80.00 Children 6-11 _____**

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

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In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2016.

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

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

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

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

Email Address: _____ Cell Phone: ___/_____

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: ___/_____

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

Dues Categories:

***If joining November – July:**	**$185.00 Licensed less than five years (from date of license)**	**$295.00 Licensed five years or more**
If joining August:	$ 50.00 Licensed less than five years (from date of license)	$100.00 Licensed five years or more
If joining September:	$ 35.00 Licensed less than five years (from date of license)	$ 50.00 Licensed five years or more
If joining October:	$ 25.00 Licensed less than five years (from date of license)	$ 35.00 Licensed five years or more

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

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

_____
(TADC member) Please print name under signature

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

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

Card #: _____ Exp. Date: ___/_____

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

Referring TADC Member:

_____
(print name)

For Office Use

Date: _____

Check # and type: _____

Approved: _____

Expert Witness Research Service Overall Process

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

Expert Witness Service Fee Schedule

Single Name Request

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

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

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

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

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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: o Plaintiff o Defense o 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:** o INCLUDE Internet Material o DO NOT Include Internet Material

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

Texas Association of Defense Counsel Facsimile: **512 / 476-5384**

TADC Expert Witness Library

THANK YOU FOR YOUR CONTRIBUTION TO THE EXPERT WITNESS DATABANK:

Ms. Whitney J. Broadwater, Naman, Howell, Smith & Lee (San Antonio)

Mr. William Dixon Wiles, Hiersche, Hayward, Drakeley & Urbach (Addison)

Mr. Philip Robert Brinson, LeClairRyan (Houston)

Mr. Richard M. McRory II, Ramsey & Murray (Houston)

Mr. Oscar L. De la Rosa, De la Rosa Law Firm (Houston)

Mr. Nicholas E. Zito, Ramey, Chandler, Quinn & Zito, P.C. (Houston)

Mr. Thomas C. Riney, Riney & Mayfield LLP (Amarillo)

Ms. Tamara Rodriguez, Vidaurri, Lyde, Rodriguez & Haynes, L.L.P. (Edinburg)

Mr. Andrew L. Kerr, Strasburger & Price, L.L.P. (San Antonio)

Ms. Ann S. Taylor, Knolle, Holcomb, Kothmann & Callahan (Austin)

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

EXPERT WITNESS DATABASE

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

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

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

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TADC
CALENDAR OF EVENTS

February 1-5, 2017
2017 TADC WINTER SEMINAR
Beaver Creek Lodge - Beaver Creek, Colorado

April 19-23, 2017
2017 TADC SPRING MEETING
Omni Royal Orleans - New Orleans, Louisiana

July 12-16, 2017
2017 TADC SUMMER SEMINAR
Ritz Carlton Grand Lakes - Orlando, Florida

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