TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

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2017 TADC ANNUAL MEETING REGISTRATION ENCLOSED

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2017 Calendar of Events

July 12-16, 2017	**TADC SUMMER SEMINAR** Ritz-Carlton Grande 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, Rachel Moreno & William R. Anderson, Program Co-Chairs
September 20-24, 2017	**TADC ANNUAL MEETING** Fairmont Olympic Hotel Seattle, Washington Don & Jarad Kent, Program Co-Chairs
January 31-February 4, 2018	**TADC WINTER SEMINAR** Hotel Madeline Telluride, Colorado

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 ~

When I explain to younger members of our profession what the TADC does and what it stands for, I often refer to our Mission Statement. While it embodies our goals as an organization, it also addresses what we strive for every day….excellence personally, and excellence as lawyers.

We continue as a group to understand the critical importance lawyers play in American society. It was not long ago that the term "Rambo Lawyer" entered our vocabulary. The TADC, working with others, pushed back and refused to accept that behavior.

In 1989, a declaration of professionalism and civility, known as the Texas Lawyer's Creed, was issued by the Texas Court of Criminal Appeals and the Texas Supreme Court. We as a group welcomed that statement by the judiciary and made sure that it became a part of our ethical discussions at meetings.

Then in 2015, with strong support by the TADC, the Texas Legislature passed and Governor Abbott signed Senate Bill 534. It amended the Texas Lawyer's Oath to require the pledging attorney to "conduct oneself with integrity and civility in dealing with and communicating with the court and all parties."

These actions are important for us individually, and as a profession. They not only serve as aspirations, but also remind us of the important roles lawyers play in our communities. As leaders, our behavior is seen and modeled by others. Hopefully in this time of polarization in politics and in our society, our example of integrity and civility will be noted and followed.

As I sat down to consider and draft this column, I saw a piece of paper that I had placed under the glass of my desk some years ago. It is a listing of ten rules of how to get along with others. My mother's cousin was one of the first female deans at a major university. Her area was human resources. After she died, I found a yellowed, worn sheet of paper entitled "The Art of Getting Along With People" among her documents. It was something she had typed and kept under the glass of her desk during her many years of teaching and working as an administrator in academia. I would like to share it with you:

The Art of Getting Along With People

Here are ten simple rules for keeping out of, or getting out of, trouble – distilled for all of us mortals, from the rich mesh of collective experiences:

1. *Learn all about the problem before trying to solve it. Listen a lot, Talk a little.*
2. *See the total situation. Don't act on just a part of it.*
3. *Don't be deceived by logic. Most problems are full of emotion. Emotions are not logical.*
4. *Watch the meaning of words and mannerisms. Look behind words to get their full impact.*
5. *Make no moral judgments. Until you have diagnosed a problem, don't leap to conclusions about what's right or what's wrong.*
6. *Imagine yourself in the other fellow's shoes. See how the problem looks from where he or she sits.*
7. *When a problem gets you down, get away from it. Put it in the back of your mind for a day, or a week. When you approach it again, the solution may be obvious.*
8. *Ask yourself, "What are the forces acting upon the other person? Why does he behave as he does?"*
9. *Diagnosis must come before action. Use the Doctor's approach. Don't prescribe until you're sure what is wrong.*
10. *Easy does it. Quick solutions are often the quick route to trouble. Take your Time.*

MOST MISUNDERSTANDINGS ARE BORN OF:

Inadequate information

Insufficient evidence

Inability to express oneself accurately

Careless Listening

I have shared these rules with young lawyers and suggested that in addition to being common sense, they also serve as the foundation of civility and professionalism.

Getting along with others is essential in our personal as well as professional lives. Hopefully we as a profession can work to lessen the polarization in our current world, and help our fellow citizens to again recognize the importance of shared goals.

TADC 85TH SESSION LEGISLATIVE WRAP-UP

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

The 85th Legislature ended its regular session on Memorial Day with a fight on the House floor (over immigration and charges of racism), mutual recriminations between the Lieutenant Governor and Speaker (over failure to pass necessary Sunset legislation held hostage by the Senate), and a promise from the Governor to announce special session plans.

As everyone knows, the Governor has made good on that promise and called legislators back to Austin on July 18. But whereas most people expected the call to include a few items, such as sunset bills for the Texas Medical Board and a few other health care licensing agencies, property taxes, and possibly the use of bathrooms by transgender individuals, the Governor threw a curveball and put 20 issues on the list. Yes, the "big" issues—TMB sunset, property taxes, and bathrooms—are there, but so are the rules cities have to follow to annex property, how far they can regulate the removal of trees on private property, and how fast they have to issue building permits. We'll also have debates on insurance coverage for abortions, reporting by abortion clinics, do-not-resuscitate orders, deducting union dues from the paychecks of public employees, public school vouchers, a teacher pay raise (not paid for by the state!) and the rate of growth in state appropriations and local budgets. In fact, the "special" session looks a lot like a regular session. And some of these issues never even made it out of committee *in the first house.* We've never seen anything like it and have no idea what will happen. Only one thing is clear: on the heels of a bruising and deeply contentious legislative session, the Governor has reintroduced a slate of controversial and inflammatory issues into an already toxic political environment.

With all the focus on what the Legislature didn't accomplish, we can lose sight of what it did. No small feat given the stark differences between the Chambers, the House and Senate agreed on a $217-billion budget and a method of finance (use of the Rainy Day Fund for certain "one-time" expenses such as deferred maintenance on state buildings and a delay in transferring dedicated sales tax to highway funding). The Legislature also passed major House priorities, such as mental health and child protective services reforms, and major Senate priorities, such as sanctuary cities, abortion regulation, and voter identification changes. In addition to that, after several sessions of failure, the Legislature finally succeeded in passing sunset legislation for the Texas Railroad Commission and Texas Department of Transportation. One can hardly argue that this has been a do-nothing session.

In the midst of swirling controversy on social and budget priorities, however, civil justice had one of its most active sessions since 2011. The central focus involved hail litigation, which after a few false starts in recent sessions, finally passed both chambers, has been signed by the Governor, and takes effect on September 1. HB 1774 by Rep. Greg Bonnen (R-Galveston) and Sen. Kelly Hancock (R-Richland Hills) applies to claims arising from losses caused by a "violent act of nature, including an earthquake or earth tremor, wildfire, flood, tornado, lightning, hurricane, hail, wind, snow, or rain." The main provisions of the bill include:

- Cutting the interest penalty on late payment from 18% to prime + 5% and includes in the damages prejudgment interest on the amount of the claim and reasonable *and necessary* attorney's fees (as limited by the bill).

- A 60-day pre-suit notice requirement with detailed information about the claim and attorney's fees incurred to file the claim.

- A right of inspection by insurer.

- Immunity for an agent if the insurer accepts liability (with cost shifting if the insured still sues the agent).

- A limitation on attorney's fees (a bar on attorney's fees if the insured fails to give the required pre-suit notice).

It remains to be seen what will happen the next time a major weather event occurs, but the thrust of HB 1774 is to make litigating weather-related claims more expensive for plaintiff's lawyers with less potential return on investment. It seems to have accomplished these goals, but only time will determine to what extent.

But the hail bill wasn't the only issue taking up bandwidth in the civil justice arena. A significant effort by Texas landowner groups to reform the bona fide offer and hearing process for eminent domain cases ran parallel to the hail bill for most of the session. The centerpiece of this effort was an attorney's fees provision that would have awarded the property owner's attorney's fees and costs if the special commissioner's award exceeded the condemnor's offer by a specified percentage. The stated purpose of this provision was to force initial offers higher, though the public and private entities with eminent domain authority, who formed a coalition to oppose the proposal, begged to differ. The Senate eventually passed a bill (SB 740 by Sen. Lois Kolkhorst, R-Brenham) that made changes to the process but omitted the attorney's fees provision, but that bill died in House committee. Ultimately, the only agreement between the parties was to disagree and saddle up for 2019.

TADC's main efforts this session involved trying to negotiate an agreement with TTLA, TLR, and TCJL on changes to the current Chapter 18 medical affidavit procedure. As filed, **HB 2301** by **Rep. Mike Schofield** (R-Katy) amended §18.001, CPRC, to extend the date of service of an affidavit of medical expenses to the earlier of 60 days before trial or the date the offering party must designate experts in order to give a defendant more time to verify the records and determine whether to controvert them. The bill required a party intending to controvert the affidavit to serve a copy of the counter-affidavit by the earlier of 30 days before trial or the date the party must designate experts and allowed a party or the party's attorney to make the counter-affidavit. Finally, it provided that the affidavit of medical expenses does not create a presumption that the amount charged was reasonable or the service necessary. HB 2301 was heard in House Judiciary & Civil Jurisprudence on April 11 but did not advance from committee.

In negotiations over the bill, TADC and the other stakeholders tentatively came up with a substitute that would have moved the deadline to the earlier of 90 days before trial or the date the offering party must designate experts. A controverting affidavit would have to be filed by the earlier of 60 days before trial or the expert designation date. In either case, an affidavit could not be used as evidence of proximate cause. Finally, a party could supplement the affidavit 30 days before trial to reflect continuing services, with a controverting affidavit due 14 days before trial. Unfortunately, the proposed compromise did not receive sufficient support and time ran out before further changes could be crafted to satisfy lingering concerns with the bill. This issue will certainly be back next session.

TADC was also heavily involved, as it was last session, in successfully thwarting another attempt to advance the idea of a chancery court for business disputes (HB 2594 by Rep. Jason Villalba, R-Dallas) and a proposal to eliminate two county courts-at-law in Dallas County (SB 985 by Sen. Don Huffines, R-Dallas). The chancery court proposal would have:

- Established a seven-member chancery court located in Travis County with civil jurisdiction concurrent with the district courts for virtually all contract and business-related actions involving entities organized under the Business Organizations Code;

- Granted the chancery court statewide jurisdiction over any matter within its purview (except no jurisdiction over personal injury or death cases, or any action brought by or against a governmental entity, unless by the consent of the parties or the entity);

- Established a procedure for filing original cases in the court, removing cases filed in district courts to the court, and issuing any writ necessary to enforce its jurisdiction;

- Established qualifications for judges of the chancery court and provided for the appointment of judges by the Governor with the advice and consent of the Senate (judges would serve staggered six-year terms and be eligible for reappointment);

- Provided for appeals from Chancery Court to a Chancery Appeals Court consisting of seven active court of appeals justices appointed by the Governor.

We also weighed in favorably on proposals to enhance qualifications for district and appellate judges and lengthen their terms (HJR 10, HJR 17 by Rep. John Smithee, R-Amarillo). HJR 10, which strengthened qualifications for district judges, passed the House and cleared Senate committee, but died on the Senate calendar. The House and Senate did pass legislation (HB 25 by Rep. Ron Simmons, R-Carrollton) to eliminate straight ticket voting in *all* elections. Past versions of this proposal were limited to judicial elections, but a GOP-dominated legislature saw the opportunity to mitigate Democratic gains in major metropolitan areas in presidential elections years. The vote on HB 25 was down partisan lines, with Republicans in favor and Democrats opposed. Expect HB 25 to end up in court long before it takes effect for the 2020 elections.

TADC also took an adverse position on construction law legislation requiring a person with an interest in real property with an alleged construction defect to obtain a written report from an independent third-party licensed professional engineer prior to filing a lawsuit. HB 2343 by Rep. Paul Workman (R-Austin) would have created a right to correct a construction defect or related condition identified in the report and abated a lawsuit for up to one year on a showing of non-compliance with the inspection requirement and dismissal with prejudice if the claimant does not comply. Along with business associations and other groups, TADC expressed concerns about the legislation's potential impairment of contract remedies and access to the judicial process. The bill died on the House Calendar, and a last-ditch effort to attach it to another bill, SB 1215 by Sen. Bryan Hughes (R-Mineola), did not succeed. With respect to SB 1215, which provided immunity to a contractor from a design defect claim where the design specifications were provided to the contractor with whom the contractor had the contract, TADC decided to remain neutral. The bill passed the Senate, but mounting opposition in the House resulted in the bill being amended on the House floor to establish an interim study committee to investigate risk allocation in construction contracts. However, the Governor vetoed SB 1215, though standing legislative committees may still conduct interim studies of construction law issues.

The following is a brief summary of some of the other key bills affecting the judicial system that the Legislature passed and the Governor signed. We have also listed some of the bills not mentioned above that did not pass and that we may see again next time. If you have questions about any of these, please contact Bobby or George Scott.

BILLS PASSED AND SIGNED BY THE GOVERNOR (OR FILED WITHOUT SIGNATURE):

Civil Procedure

HB 53 by Romero/SB 1463 by Huffman: Prohibits a governmental unit from settling a claim or action for more than $30,000 if the settlement agreement bars the party seeking affirmative relief against the unit from disclosing any matter to another person, including a journalist or member of the media. Provides that the bill does not affect information made confidential under other law. The bill takes effect on September 1, 2017.

HB 214 by Canales: Requires the Supreme Court and court of criminal appeals to post video of each oral argument on the court's website, but only if funding is available. The bill takes effect on September 1, 2017.

HB 931 by Miller: Eliminates the population brackets in current law (Ch. 75, CPRC) limiting the liability of an electric utility for contracting with a private person for the public use of land leased, occupied, or owned by the utility in certain counties. The bill took effect on June 15, 2017.

HB 1066 by S. Thompson: Amends §31.002(a), CPRC, to eliminate the judgment creditor's entitlement to aid from the court if the judgment debtor owns property that cannot readily be attached or levied on by ordinary legal process. The bill took effect on June 15, 2017.

HB 1103 by Hernandez: Requires the voter registrar in each county to exclude from the jury list the names

of persons on the suspense list. The bill took effect on May 29, 2017.

HB 1463 by Smithee: Requires a claimant to give 60 days' notice to a business of intent to file a state ADA claim. The notice must detail the name of the individual asserting the claim (no more demand letters from law firms on their own behalf), each alleged violation, and the time, place, and manner in which the claimant discovered the violation. Prohibits a notice from making a demand for damages, request settlement, or offer to settle a claim without a determination of whether the condition stated by the notice is excused by law or may be remedied. Requires a claimant to prove by a preponderance of evidence that the respondent has not remedied an alleged violation. Allows a respondent an additional 60 days' abatement of an action in order to complete corrections already initiated when suit is filed. Allows a respondent to move for dismissal without prejudice or summary judgment if the respondent has corrected violations. The bill takes effect on September 1, 2017.

HB 1995 by Elkins/SB 1945 by Hughes: Makes a number of changes to the Uniform Trade Secrets Act (Chapter 134A, CPRC). The changes include: the creation of a presumption that a party is allowed to participate and assist counsel in the preparation of the case; a balancing test the court must apply in determining whether to exclude the party in spite of the presumption; a definition of clear and convincing evidence for purposes of exemplary damages; an expanded and more specific definition of "trade secret." Takes effect on September 1, 2017.

HB 3356 by T. King: Allows the court, in approving the transfer of a structured settlement, to redact the name, address or other personally identifying information of the payee if the application for approval of a transfer of structured settlement of payment rights includes a written request by the payee to conceal personally identifying information from the public. Requires an un-redacted copy of the order to be provided to the payee and each interested party and filed under seal in the public record. Allows a court on its own motion or a motion of an interested party to unseal the order after six months. Applies Rule 76a to orders issued under this section, except for a request of a payee to redact information. The bill took effect on June 15, 2017.

SB 46 by Zaffirini/HB 1136 by Y. Davis: Allows judges to use juror identification numbers when polling the jury instead of juror names. The bill takes effect on September 1, 2017.

SB 259 by Huffines/HB 1755 by Neave: Requires a jury summons to include the electronic address where a prospective juror may download and print the jury questionnaire. Allows district or criminal district judges of a county to adopt a plan for electronic jury selection and implement a system for submission of jury summons questionnaires online. The bill takes effect on September 1, 2017.

SB 944 by Hughes/HB 2122 by Clardy: Adopts the Uniform Foreign-Country Money Judgments Recognition Act. Repeals the current law governing enforcement of foreign judgments (Ch. 36, CPRC). The two provisions that have been added to current law allowing a Texas court to decline to recognize a foreign judgment are: (1) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (2) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law. Applies to pending lawsuits. The bill took effect on June 1, 2017.

HB 2776 by Smithee/SB 1441 by Creighton: Directs the Supreme Court to adopt rules providing that the right of an appellant under §6.001(b)(1), (2), or (3), CPRC, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or another rule. Provides that counter-supersedes remains available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action. The bill takes effect on September 1, 2017.

HB 2826 by Oliveira/SB 1517 by Hancock: Makes numerous changes to the service of process on a series of a domestic limited liability company or a series of a foreign entity. Makes the registered agent for the domestic liability company or foreign entity the agent for each series of the entity as well. Specifies the contents of the process. Also allows service on each governing person of a series. The bill takes effect on September 1, 2017.

HB 2891 by Smithee/SB 1872 by Creighton: Makes some changes to the statutory authorization form for

release of medical records in a health care liability claim. The bill took effect on June 9, 2017.

SB 1098 by Zaffirini: Requires a notary public to record the signer's, grantor's, or maker's mailing address (current law requires residence or alleged residence). Also applies to the address of a grantee, witness, or other person sworn. The bill takes effect on September 1, 2017.

Practice of Law/Courts

HB 1761 by Smithee: Revises the Supreme Court's jurisdiction to apply to an appeal that presents a question important to the jurisprudence of the state. Also eliminates the archaic language referring to a writ or error and clarifies that an appeal to the court is carried by a petition for review. The bill takes effect on September 1, 2017.

SB 302 by Watson: State Bar of Texas sunset legislation. Takes effect on September 1, 2017.

SB 303 by Watson: Board of Law Examiners sunset legislation. The bill takes effect on September 1, 2017.

HB 2113 by Goldman: Repeals the regulation of for-profit legal services contracts. The bill takes effect on September 1, 2019.

HB 2875 by Guillen: Authorizes an additional $20 filing fee in each civil case in district, county court-at-law, or justice courts to finance improvements to the facilities that house the Willacy and Starr County civil courts. The fees expire in 2045 or if the counties do not adopt a resolution for matching funding for courthouse improvement. The bill takes effect on September 1, 2017.

HB 3235 by Canales: Creates an additional district court in Hidalgo County. Referred to House Judiciary & Civil Jurisprudence on 3/30. This bill was added as a House floor amendment to SB 1329 on May 18.

HB 3481 by Thierry: Provides that in Harris County, each district court holds terms that commence on the first Mondays in February, May, August and November of each year. The bill takes effect on September 1, 2017.

HB 3492 by Elkins: Authorizes the Harris County or District Clerk to record or copy identifying information regarding an individual who presents a document for filing or recording or requests an ex officio service from the clerk. Prohibits the clerk from requiring a fee for copying and protects the confidentiality of the information. The bill takes effect on September 1, 2017.

HB 4284 by Price: Gives a statutory county court in Potter County concurrent jurisdiction with the district court in family law matters. The bill takes effect on September 1, 2017.

SJR 6 by Zaffirini: Authorizes the legislature to require a court to give notice to the attorney general of a challenge to the constitutionality of a statute and to require a reasonable period after notice (not to exceed 45 days) in which a court may not rule a statute unconstitutional. The election date is on November 7, 2017.

SB 42 by Zaffirini: Requires the establishment of judicial security committees in each court system. Establishes a court security officer certification program for training court security officers and requires such officers to complete training. Imposes a $5 filing fee to fund court security training. Requires OCA to establish an office of judicial security to provide guidance to state court personnel. Exempts home address information of a current or former federal or state judge and spouses from disclosure under the open records act and requires such information to be redacted from public documents. The bill takes effect on September 1, 2017.

SB 43 by Zaffirini: Makes a number of changes to the Judicial Branch Certification Commission statute. The bill takes effect on September 1, 2017.

SB 416 by Watson: With respect to the four "minority" appointees to the State Bar Board of Directors, changes the name to "at-large" directors. Requires appointees to demonstrate experience necessary to ensure that the board represents attorneys with varied backgrounds that compose the membership of the state bar. The bill took effect on June 15, 2017.

HB 1020 by Smithee: Allows an inactive member of the state bar to practice as a volunteer under rules promulgated by the Supreme Court. The bill takes effect on September 1, 2017.

HB 1234 by Martinez: Allows the $20 filing fee for civil cases in Hidalgo and Cameron counties to be used

for courthouse bonds. The bill will take effect on September 1, 2017.

SB 1329 by Huffman/HB 3372 by Smithee: Creates new district courts in Fort Bend County (1), Travis County (2, one civil, one criminal), Denton County (1), and Hidalgo County (1). Creates new statutory county courts in Fort Bend County (1), Denton County (1), Grimes County (1, with concurrent jurisdiction over family matters with the district court), and Hays County (1). The bill takes effect on September 1, 2017.

SB 1178 by Nelson: Creates an additional district court in Denton County. This court is included in SB 1329.

SB 1640 by Watson: Creates two additional district courts in Travis County, one for civil and one for criminal matters. Referred to Senate State Affairs on 3/22. These courts are included in SB 1329.

SB 1893 by Birdwell: Expands the number of administrative judicial regions in the state from 9 to 11. The changes take counties out of the First and Second Regions and create new regions in East Texas (Tenth) and Harris and surrounding suburban counties (Eleventh). The Governor has until September 1, 2017 to appoint presiding judges for the new regions. Requires the presiding judge of each region to submit information regarding the amount and character of any business transacted by the presiding judges to the Judicial Council each month. The bill took effect on June 15, 2017.

Judicial Elections

SB 44 by Zaffirini/HB 1242 by Schofield: Restores the petition requirement for a place on the ballot for a judicial office. Requires the petition to contain at least 250 signatures (500 if the candidate chooses not to pay the filing fee), except that candidates for the Supreme Court or court of criminal appeals must gather at least 50 signatures from each court of appeals district. The bill took effect on May 23, 2017.

Tort Liability

SB 179 by Menendez: Creates an action for injunctive relief against a parent, guardian, or other person standing in the place of a parent to enjoin cyberbullying. Creates the criminal offense of cyberbullying against a person under 18 years of age. The bill takes effect on September 1, 2017.

HB 478 by Israel: Provides immunity from liability for a person who removes a vulnerable individual (defined as a child younger than 7 or a person who is unable to protect the person's self from harm by reason of age, disease, or disability) from a locked car, if the person calls 911 and determines that there is imminent harm to the person. The original bill applied to domestic animals as well, but this provision was stripped from the bill. The bill takes effect on September 1, 2017.

HB 435 by K. King: Provides immunity from civil liability for a governmental unit arising from the discharge of a handgun a person who is volunteer emergency services personnel and is licensed to carry the handgun. Provides that the discharge of a handgun by that person is outside the course and scope of the person's duties as volunteer emergency services personnel. The bill takes effect on September 1, 2017.

HB 590 by Bohac: Immunizes a first responder who in good faith provides roadside assistance unless the act or omission constitutes gross negligence, recklessness, or intentional misconduct. The bill takes effect on September 1, 2017.

HB 2612 by Meyer: Imposes strict liability and joint and several liability for damages on a person who produces, sells, provides, or distributes certain synthetic substances. Provides that such activity constitutes a false, deceptive, or misleading practice and an unconscionable practice under Ch. 17, Business & Commerce Code. Provides that there is no cap on exemplary damages in an action under this law. Allows a district or county attorney to enforce the DTPA against a seller, provider, distributor, or producer of certain synthetic substances if the attorney general does not intend to pursue a claim. Provides that any penalties or damages received by the county shall be split between legal aid and law enforcement, public health programs, or drug abuse programs. The bill takes effect on September 1, 2017.

HB 2121 by Cyrier/SB 1950 by Hughes: Allows a contractor to recover attorney's fees in a breach of contract action against the state if the claim is for engineering, architectural, or construction services (or materials relating to those services) and the amount in controversy if less than $250,000 (excluding penalties, costs, expenses, prejudgment interest, and attorney's fees). The bill took effect on June 15, 2017.

SB 4 by Perry: Waives sovereign immunity of a city, county, or state criminal justice agency for damages resulting from a felony committed by a person released from custody while subject to an ICE immigration detainer request, if the felony is committed within 10 years of release, the entity did not detain the person when requested, the person was not a citizen of the US at the time of the felony, and the attorney general has petitioned the chief justice to appoint a three-judge district court to hear the action against the city or county. Expands the three-judge district court authorization to include a "sanctuary city" action against a city, county, or campus police department. Establishes civil and criminal penalties for violations. Signed by the Governor. The bill takes effect on September 1, 2017. SB 4 is already subject to challenge by several Texas counties and cities, including El Paso, Austin, and San Antonio.

Construction Law

SB 807 by Creighton/HB 1844 by Workman: Defines "construction contract" for purposes of Ch. 272, Business & Commerce Code (contract provision that provides for venue, choice of law, or arbitration in another state voidable by the party obligated to perform the work) and includes in the provision collateral agreements to a construction contract. The bill takes effect on September 1, 2017.

Attorney's Fees/Litigation Financing

HB 1704 by Kuempel: Allows a court to award attorney's fees and court costs against a municipality in action to enforce uniform permitting requirements under Chapter 245, Local Government Code. The bill took effect on May 29, 2017.

Workers' Compensation

HB 451 by Moody: Waives sovereign or governmental immunity for a suit against a state or local governmental entity brought by a first responder employed by the entity; limits damages in such a suit to $100,000 for each aggrieved claimant and $300,000 for each single occurrence. The bill takes effect on September 1, 2017.

HB 1456 by Smithee: Eliminates the current law requirement that a person must pay the amount of an administrative penalty into escrow or post a bond in order to appeal an administrative decision finding of a violation of the Workers' Compensation Act. This bill took effect on May 26, 2017.

SB 876 by Hancock/HB 2061 by Oliveira: Requires a party that seeks judicial review of an administrative workers' compensation decision to provide a copy of the petition to the Workers' Compensation Division. Also requires a party who initiated the proceeding to file a copy of the proposed judgment or proposed settlement, together with a description of the terms and all payments to be made under the proposed judgment or settlement, with the division. Exempts a proposed settlement or judgment from disclosure under the Open Records Act. Recommended for Senate Local Calendar on 4/12. The bill takes effect on September 1, 2017.

SB 877 by Hancock/SB 2057 by Oliveira: Provides that a political subdivision that self-insures is liable for attorney's fees for a workers' compensation violation without waiving sovereign immunity. Referred to Senate Business and Commerce on 2/28. The bill takes effect on September 1, 2017.

BILLS VETOED BY THE GOVERNOR

HB 1433 by Vo: Suspends the three-year statute of limitations on Texas Employment Commission actions to collect a contribution, penalty, or interest from an employer during the pendency of a judicial proceeding to re-determine liability for a contribution, penalty, or interest. Vetoed by the Governor on June 15, 2017.

BILLS THAT FAILED (BUT THAT WE MIGHT SEE AGAIN):

HB 1038 by Rinaldi: Amends §30.021, CPRC, the cost-shifting provision for a motion to dismiss for no basis in law or fact, to specify that attorney's fees and costs may only be awarded to the prevailing party that filed the motion (not to any other prevailing party).

HB 2574 by Murr: Raises the damages limit for an expedited trial process from $100,000 to $200,000, excluding attorney's fees. The committee substitute maintains the $100,000 limit, exclusive of attorney's fees, which may not exceed $50,000.

HB 2412 by Schofield: Allows anyone 18 years of age or older and not interested in the suit to serve process in this state, except for citations for forcible entry and detainer, a writ that requires actual taking or

possession of property, persons, or things, or a writ requiring physical enforcement by the person delivering the process.

HB 3110 by Longoria: Amends §130.002(b), CPRC, which voids indemnification provisions that seek to require a licensed architect or engineer to indemnify a property owner or the owner's agent from the owner or agent's own negligence, to void indemnity provisions for any other person's negligence except sole negligence of the engineer or architect.

SB 1938 by Hughes/HB 3971 by Schofield: Pegs a district judge's salary at 82.5% and an appellate judge's salary at 91% of the salary of a justice of the Supreme Court. Establishes the salary of a Supreme Court Justice, other than the chief justice, at one-third of the average salary of appellate justices, other than chief justices; one-third of a judge of the US court of appeals; and one-third of the average starting base salary of associates at the five largest law firms in Texas. Limits year over year increases in a Supreme Court justice's salary to the greater of 4% or the rate of inflation.

HJR 10/HJR 11 by Smithee: Changes the qualifications for election to the Supreme Court to require 10 years of law practice in Texas or 10 years of service on a state or statutory county court. The resolution also changes the qualifications for district court judges from four to six years of law practice or judicial service. However, earlier attempts to lengthen the terms of office of district judges from four to six years did not make it into the final version. HJR 10 was placed on Senate Intent on 5/24 but was not taken up by the Senate before the midnight deadline.

HJR 117 by Smithee: Lengthens the terms of Supreme Court and Court of Criminal Appeals justices and judges from 6 to 8 years, courts of appeals justices from 6 to 8 years, and district judges from 4 to 6 years. Provides that if a vacancy occurs in the district court, the governor shall fill by appointment until the next general election, at which the voters will fill the vacancy for the full term.

SB 409 by Huffines: Raises the general jurisdictional limit in county and justice courts to $20,000.

SB 414 by V. Taylor/HB 624 by Leach: Allows a district clerk to post an official or legal notice by electronic display instead of posting a physical document.

SJR 11 by Huffines: Limits statewide elected officials, except for statewide judicial offices, to two terms.

SJR 12 by Huffines: Requires the legislature to direct the Supreme Court to establish term limits for judicial office as specified by the legislature.

HB 1053 by Meyer: Reduces the statute of repose for construction defect claims against architects, designers, or engineers from 10 to 5 years.

HB 606 by Springer/SB 86 by Hall: Immunizes a premises owner from liability based on the owner's failure to exercise the option to forbid carrying of handguns on the premises. Does not limit liability for gross negligence.

HB 719 by Wu: Indexed the $250,000 cap on noneconomic damages in health care liability claims by changes in the CPI between September 1, 2003 and the date of the final judgment or settlement. Indexing also applies to the liability limits and financial responsibility amounts in §74.302, CPRC.

HB 2128 by Cyrier/SB 1947 by Hughes: Waives sovereign immunity for a breach of contract claim against the state (current law requires breach of an "express provision" of a contract in order to waive sovereign immunity). Allows a contractor to recover consequential damages for additional work performed at the direction of the agency. Allows a contractor to recover attorney's fees that are just and equitable (current law limits recovery to hourly rates, but only if recovery of attorney's fees is permitted to all parties to the contract).

HB 2300 by Schofield: Defines the amount actually paid or incurred to a claimant for health care expenses as the amount the treating physician normally would be paid for similar services in a non-litigation context, limited to: (1) the amount actually paid by a third-party for the service, plus any cost-sharing paid by the claimant; or (2) if the claimant had no health care coverage or did not access benefits for the service, 125% of the Medicare reimbursement rate for the service.

HB 3811 by Lozano: Makes several changes to the anti-SLAPP suit statute (Ch. 27, CPRC). Amends the definition of "communication" to limit the statute to public communications, not private. Limits the

application of the bill to the exercise of free speech, free association, or right to petition guaranteed by the federal and state constitutions. Excludes a discovery request, motion for summary judgment, motion to dismiss, or any procedural action from the definition of "legal action."

SB 875 by Hancock/HB 3869 by R. Anderson: Requires that an action against a provider of alcoholic beverages may not be commenced unless the "obviously intoxicated person" is a named defendant in the action and is retained in the action until the conclusion of the litigation by trial or settlement. Creates a rebuttable presumption that a provider of an alcoholic beverage other than provider who last sold, served, or provided an alcoholic beverage to an obviously intoxicated person did not commit an act giving rise to a cause of action. Bars a cause of action against a provider by an obviously intoxicated person or a person who bought an alcoholic beverage for or provided one to an obviously intoxicated person. Requires 120-day pre-suit notice to all providers of an alcoholic beverage, running from the date the claimant enters into an attorney-client relationship for the purposes of bringing a cause of action against a provider. Provides that all defenses available to an obviously intoxicated person are available to a provider. Bars damages for financial support, services, gifts, parental training, guidance, love, society or companionship of the alleged obviously intoxicated person. Bars suit by a parent if the other parent recovers in a separate action. Provides for the survival of a right of action to or against the deceased party's representative. In an action by a spouse, child, or parent, the general reputation of a spousal or child-parent relationship is prima facie evidence of the relationship, and the recovery of a child, spouse, or parent is the sole property of that person. Establishes a two-year limitations period from the day the cause of action accrues.

HB 2343 by Workman: Requires a person with an interest in real property with an alleged construction defect to obtain a written report from an independent third-party licensed professional engineer prior to filing a lawsuit. Requires the claimant to notify each party subject to the claim at least 10 days prior to the inspection and gives each party the right to attend the inspection. Creates a right to correct a construction defect or related condition identified in the report within 150 days. Tolls the statute of limitations for one year if the claim is brought in the final year of the limitations period. Provides for an abatement of a lawsuit for up to one year on a showing of non-compliance with the inspection requirement and dismissal with prejudice if the claimant does not comply. Except from the inspection and right to correct requirement: (1) a claim asserted by a contractor, subcontractor, supplier, or design professional; (2) a claim for personal injury, survival, or wrongful death; (3) a claim involving construction of residential property governed by Ch. 27, Property Code; (4) a defect or design claim covered by §82.119, Property Code (Uniform Condominium Act); (5) a contract entered into by TXDOT; or (6) a project that receives money from the state or federal highway fund.

HB 2422 by Schofield: Requires an affiant who produces a certificate of merit in an action against a licensed architect, engineer, surveyor, or landscape architect to establish the affiant's familiarity or experience with the practice area at issue such that they establish the affiant's to render the opinion on the issue. Requires the affiant to attach a CV to the affidavit.

HB 744 by Farrar: Amends §38.001, CPRC, to clarify that attorney's fees cannot be recovered under this section from the state, a state agency or institution, or political subdivision of the state. The bill also clarifies that attorney's fees can be recovered under this section against any legal entity, in addition to individuals and corporations.

HB 2457 by Meyer/HB 2843 by Burrows: HB 2457 amends §38.001, CPRC, to include business organizations (in addition to corporations) for purposes of the recovery of reasonable attorney's fees in a claim for rendered services, a sworn account, etc. HB 2843 amends the same section to expand to any "business entity."

HB 1678 by Schofield: Creates a privilege from disclosure for a communication between an insurance company or its representative and a policyholder or its representative relating to the investigation, evaluation, or resolution of a claim, or resolution disputes relating to a claim.

By Craig L. Reese
Fletcher, Farley, Shipman & Salinas, L.L.P., Dallas

The Shifting Sands Regarding Burdens of Proof in Coverage Cases

It is important to understand the rules regarding burdens of proof on insurance coverage, regardless of whether you are a coverage geek or defense counsel. The Texas Supreme Court and the Texas Legislature have created a burden-shifting framework for insurance disputes. While the announced rules appear similar for both first party and third party coverage, there may be some slight differences in application. Understanding the burden-shifting framework in insurance coverage disputes is somewhat like trying to follow a fast-moving ping pong game. Just when you think you understand the rules and are finally following the game, things can change.

Let us begin with a simply stated rule. An insurer has no duty to indemnify its insured if the policy does not provide coverage for the loss.[1] Initially, the insured has the burden of establishing the existence of coverage under the terms of the policy at issue.[2] The initial serve sounds pretty straightforward, doesn't it? The insured simply finds some language in the policy that provides coverage for his or her loss. Of course, it can never be that easy. An insured cannot meet its initial burden of establishing coverage by relying on exemptions or exceptions to exclusions.[3] Exceptions to exclusions are not equated to an affirmation of coverage.[4] For example, many policies contain a self-defense exception to the intentional act/injury exclusion. That does not necessarily mean that the insured's invocation of defense of self will necessarily result in coverage. Assuming the insured shows a covered loss, the burden shifts to the carrier to plead and prove that the loss falls within an exclusion.[5]

The Texas Legislature has weighed in on this issue. Chapter 554 of the Texas Insurance Code addresses the issue of burden of proof and pleading. Specifically, section 554.002 provides:

> In a suit to recover under an insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded.

[1] *See Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.—Dallas 2015, no pet.).
[2] *JAW the Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015) (first party coverage case); *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (third party coverage dispute).
[3] *Praetorian Ins. Co. v. Arabia Shrine Ctr. Houston*, 2016 WL 687564, at *6 (S.D. Tex. 2016).
[4] *Id.*
[5] *American Home Assurance Co. v. Cat Tech L.L.C.*, 660 F.3d 216, 220 (5th Cir. 2011); *Likens v. Hartford Life & Acc. Ins. Co.*, 794 F. Supp. 2d 720, 725 (S.D. Tex. 2011), *aff'd*, 688 F.3d 197 (5th Cir. 2012).

> Language of exclusion in a contract or an exception to coverage claimed by the insurer or health maintenance organizations constitutes an avoidance or an affirmative defense.

While the volley back seems relatively straightforward, it is important to note that the rules require the carrier to plead policy exclusions as an affirmative defense in any lawsuit that arises out of a coverage dispute.[6] Of course, everything that might sound like an exclusion, such as a claim that the loss did not occur during the policy period, is not. The Texas Supreme Court has determined that the timing of an event allegedly triggering coverage is a precondition to coverage and is not considered a defensive matter to be pleaded and proved.[7] Once the insurer proves an exclusion applies, the burden shifts back to the insured to show that an exception to the exclusion brings the claim back within coverage of the policy.[8]

So far, so good. The rules seem fairly simple, at least on paper. The insured initially proves the existence of a covered loss. The carrier then proves that an exclusion applies to preclude coverage for the otherwise covered loss. The insured must then come back with an exception to the exclusion so as to bring the claim back within coverage. So, you rightfully ask – if it is that easy, why the need for this article? The answer: nothing in the law is ever that simple.

We turn to the area of concurrent causation and separate and independent causation. While the courts use these concepts interchangeably in first party and third party coverage cases, it is not clear that the ideas necessarily mean the same thing depending upon whether you are looking at a first party or third party coverage issue. This may simply be an issue of language or it might reveal a deeper problem in application.

Under the concurrent causation doctrine, when excluded and covered events combine to cause a loss and the two causes cannot be separated, concurrent causation exists and the exclusion is triggered such that the insurer has no duty to provide the requested coverage.[9] However, when a covered event and an excluded event each independently cause a loss, separate and independent causation exists, and the insurer must provide coverage despite the exclusion.[10]

For example, in *Guaranty Nat'l Ins. Co. v. North River Ins. Co.*, a psychiatric patient died after jumping out of the window at a hospital.[11] The general liability policy provided that the carrier would pay all sums the insured became legally obligated to pay as damages because of bodily injury to which the insurance applied. The policy also contained a malpractice and professional services exclusion that excluded coverage for bodily injury that occurred due to the rendering of or failure to render any service of treatment conducive to health or of a professional nature.[12] The carrier claimed that the exclusion precluded coverage because the hospital's liability was founded, at least in part, on the hospital's failure to properly supervise a psychiatric patient. The excess carriers argued that the primary carrier could not escape liability because the hospital's liability was founded, in part, on the hospital's failure to safeguard the window.

Finding that the failure to secure the window did not arise out of the exercise of judgment in obedience to an established medical policy, the court turned to the issue of whether the carrier could be liable for a judgment that is

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[6] *See Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) (must plead exclusion under Rule 94); *see also Standard Waste Sys. Ltd. v. Mid-Continent Cas. Co.*, 612 F.3d 394, 398 (5th Cir. 2010) (noting that under federal rules of pleading, a failure to affirmatively plead an exclusion or exception may lead to waiver on the part of the carrier).

[7] *Ulico Cas. Co.*, 262 S.W.3d at 778.

[8] *JAW the Pointe, L.L.C.*, 460 S.W.3d at 603.

[9] *JAW the Pointe, L.L.C.*, 460 S.W.3d at 608. This was a first party coverage case arising out of hurricane damage to an apartment complex. The Texas Supreme Court cited to its earlier opinion in *Utica Nat'l Ins. Co. v. American Indem. Co.*, 141 S.W.3d 198 (Tex. 2004), a case involving third party liability coverage, for these rules.

[10] *Id.*

[11] 909 F.2d 133 (5th Cir. 1990),

[12] *Id.* at 135.

founded in part on a covered action and in part on an excluded action.

> The answer clearly is yes. In Texas, an insurer is not liable only when a covered peril and an excluded peril concurrently cause a loss. Where a loss, however, is caused by a covered peril and an excluded peril that are independent causes of the loss, the insurer is liable. The failure to maintain the window and the failure to observe properly were independent causes, because the hospital's acts of negligence separately was a proximate cause of Wagner's death. We conclude, therefore, that North River is liable under its policy, notwithstanding that the loss was caused, in part, by an excluded loss.[13]

The Texas Supreme Court cited the foregoing case as an example of a case involving separate and independent causation.[14]

In *Burlington Ins. Co. v. Mexican Am. Unity Council, Inc.*, a resident of a youth home was physically and sexually assaulted by an unknown person while off the premises of the home.[15] She sued the youth home alleging it negligently allowed her to leave the premises. The liability policy for the home contained an endorsement excluding coverage for bodily injury or property damage arising out of assault and battery.[16] The insured sought to avoid application of the exclusion arguing there was concurrent causation: (1) the negligence of the home in allowing the resident to leave; and (2) the assault. The court rejected the insured's argument.

> The present case is similar to *Commercial Union* in that the allegations of negligence against [the insured] and the allegations of assault and battery against the unknown assailant are related and interdependent. The assault and battery was not "mere happenstance." Without the underlying assault and battery, there would have been no injury and no basis for suit against [the insured] for negligence.
>
> Our review of the cases cited by both parties leads to but one conclusion: Assuming the truth of the factual allegations contained in [the plaintiff's] second amended original petition, the origin of her damages is the assault and battery, which is not separate and independent from the alleged negligence of [the insured]. Accordingly, the petition alleges a claim outside the scope of coverage of the insurance policy because of the assault and battery endorsement. Therefore, since the face of the petition establishes that there is no coverage, Burlington

[13] *Id.* at 137 (citations omitted).

[14] *Utica Nat'l Ins. Co.*, 141 S.W.3d at 204.

[15] 905 S.W.2d 359 (Tex. App.—San Antonio 1995, no writ),

[16] *Id.* at 360.

> has no duty to defend….[17]

The Texas Supreme Court cited the foregoing case as an example of a case involving concurrent causation.[18]

Up to this point, the doctrines of concurrent causation and separate and independent causation, while obviously difficult to apply in many cases, seem relatively straightforward in scope.[19] In first party coverage cases, courts use the concept of concurrent causation in a different manner. In first party cases, under this doctrine, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damages caused solely by the covered peril.[20] Courts have noted that this doctrine embodies the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy.[21]

The burden is on the insured to allocate between covered and non-covered loss.[22] It is essential in seeking to allocate loss that the insured produce evidence which will afford a reasonable basis for estimating the amount of covered damage or the proportionate part of the damage caused by a risk covered by the insurance policy.[23] The insured is not required to establish the amount of its covered damages with mathematical precision, but there must be some reasonable basis upon which the fact finder's determination rests.[24] The burden of segregating the damages solely to the covered event is a coverage issue for which the insured bears the burden of proof.[25] Because allocation is central to the claim for coverage, an insured's failure to carry its burden of proof on allocation is fatal to his or her claim.[26]

It appears the courts have simply utilized terms across the spectrum of coverage in a way they may never have intended. Concurrent causation should not mean different things depending upon whether the concept is utilized in a first party or a third party coverage dispute.

Of course, we need to briefly discuss one more wrinkle. Many property policies contain an anti-concurrent cause provision – "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[27] When a policy contains this language, the court is going to evaluate coverage under this clause, not the common-law concurrent causation doctrine (whatever that might be).[28]

This has been a brief review of the rules regarding burdens of proof in insurance coverage disputes. The rules are fairly simple to recite, but can be problematic in application.

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[17] *Id.* at 363.
[18] *Utica Nat'l Ins. Co.*, 141 S.W.3d at 204.
[19] *See Utica Nat'l Ins. Co.*, 141 S.W.3d at 204-205 (noting that the court could not determine whether doctrine of concurrent causation applied because there had been no findings as to whether the infection at issue was caused by the breach of a professional standard of care which would be excluded or whether the doctor breached both professional and non-professional standards of care).
[20] *Farmers Group Ins., Inc. v. Poteet*, 434 S.W.3d 316, 325 (Tex. App.—Fort Worth 2014, pet. denied); *Wallis v. USAA*, 2 S.W.3d 300, 302-303 (Tex. App.—San Antonio 1999, pet. denied).
[21] *See All Saints Catholic Church v. United Nat'l Ins. Co.*, 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.).
[22] *Dallas Nat'l Ins. Co.*, 458 S.W.3d at 222.
[23] *Id.* at 223.
[24] *National Union Fire Ins. Co. v. Puget Plastics Corp.*, 640 F. Supp. 2d 613, 650 (S.D. Tex. 2009), *aff'd*, 454 Fed. Appx. 291 (5th Cir. 2011) (noting that under doctrine of concurrent causation, the insured bore the burden of presenting evidence by which the court could reasonably apportion the damages awarded). I know what you are thinking. Craig, you simply have confused the doctrines between first party and third party cases. Nice try. The *Puget Plastics Corp.* case involved indemnity coverage under a commercial general liability policy for a third party claim. *Dallas Nat'l Ins. Co. v. Calitex Corp., supra*, likewise involved indemnity coverage under a commercial general liability policy.
[25] *Poteet*, 434 S.W.3d at 326.
[26] *Dallas Nat'l Ins. Co.*, 458 S.W.3d at 223.
[27] *See JAW the Pointe, L.L.C.*, 460 S.W.3d at 604.
[28] *Id.* at 608.

Texas Association of Defense Counsel-PAC

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TADC PAC Report

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

The TADC's voice was loud and clear during the 85th Legislative Session. TADC members were actively involved in the regular session working tirelessly with legislators and other lawyers' groups on issues involving the civil justice system. Thank you to President Mike Hendryx, Past President Clayton Devin, the entire TADC Legislative Committee, and of course to George Christian, the TADC Legislative Consultant, and Bobby Walden, our Executive Director, for keeping the membership informed and involved in this legislative session.

Although the regular session has concluded, interim studies are coming soon, as is the 2017 election cycle. There will be many important legislative and judicial races ahead, and the TADC's voice is truly needed. Now is the time that the TADC PAC can make a real impact. Your contribution to the PAC is so important, and allows the TADC's voice to be heard for important work on important issues. We need your support!

Thank you to the TADC PAC Board of Trustees for all of their work and support of the PAC. 100% of the Board of Trustees have set the shining example by making financial contributions to the TADC PAC. Join us, and make your PAC contribution today!

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Lien Foreclosures & Oil & Gas Leases

The New Law in Texas

By Roger D. Scales, of Counsel,
Coats Rose, P.C. Austin

For many years, the well-established law in Texas has been that a mortgaged property could be sold by the foreclosing party to satisfy the debt owed. How did this affect an oil and gas lease executed subsequent to the date of a pre-existing mortgage? Foreclosure upon a lien generally acted to terminate any oil and gas lease which had been executed subsequent to the date of the pre-existing lien. In other words, if a borrower took a mortgage on his property, and afterwards entered into an oil and gas lease, that oil and gas lease would usually terminate if the borrower defaulted on his note and the property was foreclosed upon.

Historically, most onshore oil and gas wells were drilled and completed in rural areas, where larger tracts of land were the norm. Part of the process of leasing, drilling, and producing on oil and gas properties is securing a title opinion covering the land. A critical element of the title examination is to determine whether there were any outstanding liens on the property, since, as mentioned above, foreclosure could lead to termination of the oil and gas lease. Therefore, if the title attorney's examination revealed the existence of a lien, mortgage, deed of trust, or other similar instrument acting to encumber the property, he usually made a requirement similar to the following:

> ***REQUIREMENT:*** *You should obtain and furnish for our examination either a recorded release or a subordination of any unreleased liens, mortgages, deeds of trust, or other similar instruments identified in the Encumbrances on Title section of this Opinion. In the alternative, it will be necessary for you to assume the attendant business risk with respect to any claims that may be asserted by the grantees of such instruments regarding payments made to the owners of interest in the Subject Lands.*

Usually, the release is obtained in a situation where the note had been fully paid but, for whatever reason, the release was not initially located by the landman in his search through the official public records of the county where the property is located or the release was not properly filed in said records. A subordination agreement is one where the lending party agrees to assign the pre-existing lien a lower priority to a subsequent oil and gas lease. As a result, it is as if the lease had been executed and recorded prior to the lien.

Why was the title attorney's requirement necessary? It is a common practice for lessees to take oil and gas leases on lands which are subject to previously recorded mortgages, liens, or deeds of trust, or similar instruments. Texas being a "first in time, first in right" state, these leases were considered "junior" or inferior to the previously recorded lien. Therefore, foreclosure on a pre-existing lien, without subordination, generally caused the oil and gas lease to terminate.

You may have noted that a foreclosure on a pre-existing lien *generally* caused an oil and gas lease to terminate. Foreclosure did not always cause the oil and gas lease to terminate. Factors to consider included:

(a) Did the lien attach to the real property, as opposed to simply a structure or other improvement?

(b) Were the minerals already severed from the surface? In other words, did the borrower only have the right to encumber the surface?

(c) Did inverse order of alienation apply? This is a whole other topic for discussion, but basically it concerns the order in which the property interests of encumbered property are sold.

Notwithstanding these possible exceptions, the mere risk of lease termination made the title attorney's requirement necessary and prudent.

Beyond a release or subordination from the lender, was there anything else that the lessee could do to protect the lease? The answer is yes. The clever lessee often included a Lease Subordination Clause in the oil and gas lease, which generally read as follows:

> ***Lease Subordination Clause:***
> *Lessee, at its option, may pay and discharge any taxes, mortgages, or other liens existing, levied, or assessed on or against the leased premises and, in the event it exercises such option, it shall be subrogated to the rights of any holder or holders thereof, and in addition to its other rights, may reimburse itself by applying to the discharge of any such mortgage, tax, or other lien, any royalty or rentals accruing hereunder.*

However, this solution was not without problematic issues of its own. The lessee was forced to constantly monitor for foreclosure notices on the property. The lessee often saw this clause as a justification to waive or ignore the release/subrogation requirement. The lessee could be placed in a position requiring it to deal with the lending parties. The amount of the outstanding loan might render its repayment from the borrower's production revenue improbable. The size and location of the leased property would certainly call into question whether the lease was worth saving.

So, the bottom line under Texas law had been that when there was a mortgage, deed of trust, or other similar encumbrance recorded prior to the oil and gas lease, the lessee should always seek a release or subordination, because depending on the surrounding facts, a foreclosure may put the lease in jeopardy of termination.

The Barnett Shale: The Basis for Change

The Barnett Shale is a massive geological formation, the productive part of which is estimated to stretch from the City of Dallas west and south, covering 5,000 square miles and at least 18 counties in Texas[1]. Some experts have said that the Barnett Shale formation is the largest onshore natural gas field in the United States[2]. A large portion of the formation lies under the Fort Worth metropolitan area. The formation had been well-known for many years, but the large-scale development of the formation did not occur until certain horizontal drilling and hydraulic fracturing ("fracking") technologies were perfected.

The heyday of the Barnett Shale leasing began in the early to mid-2000's which led to the unprecedented leasing of many thousands of urban properties in Fort Worth and surrounding communities. Those properties included typical residential lots, shopping centers, church properties, public parks, airports, and so on. Many of these residential lot properties were subject to pre-existing mortgages, and lessees were submitting to lending institutions requests for subordinations by the thousands. Lenders soon became overwhelmed with these subordination requests, and were sometimes slow to respond. Some lenders were uncomfortable with issuing subordinations, as they were unfamiliar with the oil and gas business, and were unsure of the impact of such a subordination.

Oil companies would group hundreds of leased residential lots, along with other urban properties, to form a pooled "unit." These units were pooled together to form larger tracts of land for purposes of horizontal drilling. The Texas Railroad Commission (the "RRC") governs issues such as well location and spacing. The RRC established the Barnett Shale Field Rules, which provided that no well shall be drilled nearer than 330 feet to any property line, lease line, or subdivision line.

This led to a significant problem. Each unit consisted of hundreds of residential lots, among other types of properties. Many of these lots were subject to pre-existing mortgages, and many of which the lessees did not secure lien subordinations. The sub-prime mortgage crisis of the mid to late 2000's led to a large decline of home prices, mortgage delinquencies, and eventually, massive numbers of foreclosures on residential properties. As these residential properties were foreclosed upon, the oil and gas lessees found themselves in the precarious position of having a large number of their Barnett Shale leases terminated. The now-unleased lands created new lease boundaries

[1] "Barnett Shale Information," from the Website of the Railroad Commission of Texas found at http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/barnett-shale-information/

[2] Ibid.

with the previously formed units, which caused the lessees to have to seek other cures, such as securing a new lease from the bank or the new owner of the foreclosed property, change the drillpath location, or apply for a Rule 37 spacing exception to the RRC.

The Cure

The State of Texas has put forth its solution to the problem. On January 1, 2016, Section 66.001 of the Texas Property Code, titled "Sale of Property Subject to Oil or Gas Lease," became effective. Here is a brief overview of the statute:

- Foreclosure will not terminate an oil and gas lease if (a) the lease has not terminated or expired on its own terms and (b) the lease was executed and recorded in the real property records of the county before the foreclosure sale.

- The borrower's interest in the lease, including the right to receive royalties or other payments due and payable after the foreclosure date, passes to the purchaser of the foreclosed property.

- The foreclosure sale terminates any right granted under the oil or gas lease for the lessee to use the surface of the real property. This eliminates the traditional dominate nature of mineral rights over surface rights.

- An agreement, including a subordination agreement, between lessee and lender or lessee and purchaser of foreclosed property controls over any conflicting provision of the statute.

- This statute does not apply to a lien not attached to a mineral interest in hydrocarbons in the mortgaged property.

- The statute applies only with respect to a foreclosure sale for which (a) the notice of sale is given on or after the effective date of the statute (January 1, 2016), or (b) a judicial foreclosure commenced on or after the effective date of the statute.

- This statute is retroactive in nature.

What does the future hold? Depending on who you are, is the cure worse than the disease?

The impact of the new statute varies depending on the party. Lessees find themselves with greater certainty as to their oil and gas lease not being terminated by foreclosure. However, the lessee must consider the impact of losing the rights to use the surface if there is a foreclosure. This is usually of no consequence in non-drillsite locations, but if the property is the drillsite location, this is obviously critical. Losing surface use may require the lessee to obtain a surface use agreement from the lender or new property owner, or from an owner of an adjacent tract for directional or horizontal drilling purposes.

In many cases, the lessee will likely waive the title opinion's subordination requirement for non-surface use tracts.

Lending institutions may find that they have lowered collateral value because of the lender's uncertainty as to whether, in case of foreclosure, they will be in a position to sell the mineral estate unencumbered by oil and gas leases. The retroactive nature of the new law may have a negative impact on lenders and parties that acquire foreclosed properties. Constitutional challenges for an improper taking may be on the horizon. On the positive side, lenders will likely find that they have fewer requests for subordinations.

Borrowers may be faced with restrictions on their ability to enter into oil and gas leases due to anticipated changes in language in new loan documents. Anticipated new language includes a consent clause, under which lenders may start to require that borrower obtain lender's consent before leasing minerals, and a recourse clause, under which lenders may seek to establish recourse in the form of damages or penalties if borrower leases minerals without consent.

Loss of surface rights opens up a number of areas of concern, such as (a) when the property is a well site, (b) determining the plugging and abandonment requirements, (c) ownership of surface equipment and facilities, and (d) good faith and bad faith trespass issues.

Notwithstanding the new statute, the prudent lessee should strongly consider securing a subordination agreement (a) if the leased property might ever be used as a surface location and (b) due to potential challenges to the new law.

What your client does next could make or break the case.

Help them make the right decision.

With over 100 years of engineering and investigative experience, our staff will solve your problem. Our internationally recognized professionals provide forensic investigation services, engineering, scientific testing, thorough analysis, and expert witness testimony.

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Amicus Curiae Committee News

There have been several significant amicus submissions.

R. Brent Cooper (Cooper & Scully, P.C.) filed an amicus brief in support of the petition for review in *Levinson Alcoser Assoc. LP v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017). This was an interlocutory appeal over the adequacy of an expert certificate of merit (COM) under TCPRC chap. 150. The Court held under the 2009 amendment to chap. 150, the expert affidavit must demonstrate the expert is knowledgeable about the area of practice at issue in the litigation. The court may not infer such the expert possesses such knowledge from being licensed or the generalized knowledge associated with the license.

R. L. Florance (Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P.) filed amicus briefs to support mandamus petitions in *In re State Farm Lloyds*, __ S.W.3d __, 2017 Tex. App. LEXIS 482 (Tex. May 19, 2017). This is a landmark discovery decision on ESI and the proportionality in discovery generally. The mandamus petitions address ESI orders in the 2012 Hidalgo County Hail Storm MDL. The opinion makes proportionality of co-equal importance with discoverability – because information and materials could be discovered does not mean they should be discovered. Proportionality is a cooperative standard that both sides should consider when making or responding to ESI discovery. Neither side may dictate the format for producing ESI. The requesting may designate a format; the responding party may object and produce in a "reasonably usable" format. The court determines reasonableness based on a seven-factor test that emphasizes proportionality. Production in native format is not always valuable or burdensome – this is a fact intensive inquiry. The Court denies the mandamus without prejudice so that the parties and the trial judge may reconsider the rulings in light of the opinion.

Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus in support the petition for review in *United Scaffolding v. Levine*, 2015 WL 5157837, 2015 Tex. App. LEXIS 9285 (Tex. App.—Corpus Christi 2015, pet. granted)(memo. op.). The Supreme Court granted review and oral argument has been held. 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 error. The Court of Appeals held that the grant of a new trial could be reviewed only by mandamus, not by appeal from a judgment on the second trial.

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

i.e., how their opposition would have prevented the transfer.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support the petition for review in *Gunn v. McCoy*, 489 S.W.3d 75 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). 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, L.L.P.) 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. The case was set for argument on May 1, 2017.

Roger Hughes (Adams & Graham, L.L.P.) will file an amicus brief to support Respondent in *Painter v. Amerimex Drilling, Ltd.*, 511 S.W.3d 700 (Tex. App.—El Paso 2015, pet. granted). This is potentially a landmark case to define the employer's vicarious liability. This is an injury/wrongful death suit arising from an auto accident; the critical issue is the proper legal test to make an employer vicariously liable. Amerimex rented a bunkhouse 50 miles from the drilling rig; it reimbursed the crew leader $50 a day if he drove the employees to the rig. The El Paso court upheld the summary judgment for the employer because the employer did not have a right of control over the crew leader as he drove between the bunkhouse and the rig. Plaintiffs argue a formal right to control travel is unnecessary for vicarious liability; it is enough the transportation was assigned to the employee and it served the employer's interests.

TADC has authorized J. Mitchell Smith (Germer PLLC) to write an amicus brief to support the petition for review in *JBS Carriers v. Washington*, 513 S.W.3d 703 (Tex. App.—San Antonio 2017, pet. filed)(Barnard, J., dissenting). This is an interesting auto/pedestrian wrongful death case; the jury put 50% on JBS Carriers and its driver and 20% on the pedestrian/deceased. The critical issue is whether the trial court erred in excluding evidence that the deceased suffered from mental illness, had been prescribed medications but was not taking them, and evidence the deceased had been drinking and taking cocaine and oxycodone. The trial court excluded it under TRE 403 as unfairly prejudicial. The court of appeals reversed, holding that the evidence unfairly prejudicial because it was not really probative. The dissent stressed that Rule 403 is to be used sparingly. If the defendant driver had this history and toxicology, it would come in – "sauce for the goose, sauce for the gander."

R. Brent Cooper (Cooper & Scully, P.C.) has been authorized to file an amicus to support petitioner in *Rayner v. Dillon*, 501 S.W.3d 143 (Tex. App.—Texarkana 2016, pet. filed) (Moseley, J., dissenting). This is an important case from trucking accidents involving the use of circumstantial evidence and inference as "clear and convincing" evidence for gross negligence to prove the employer's subjective awareness that the driver was fatigued at the time of the accident. There is a companion issue on whether driver fatigue must be proven by clear and convincing evidence or only that the driver was generally incompetent.

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

2017 Spring Meeting

Omni Royal Orleans – April 19-23, 2017 – New Orleans, Louisiana

The TADC held its 2017 Spring Meeting in New Orleans, Louisiana from April 19-23, 2017. The weather was picture-perfect and the Omni Royal Orleans provided the perfect setting for a fantastic meeting!

Tom Riney, with Riney & Mayfi ld LLP in Amarillo and **Ken Riney** with Kane Russell Coleman & Logan PC in Dallas did a masterful job as Program Co-Chairs of the meeting. The program included many high-profile speakers including **Federal District Judge Joseph Anderson and Justice Jeff Boyd.** Topics ranged from "Thi d Party Litigation Financing" to "The Application of Settlement Credits." A fantastic luncheon presentation, "Tips and Trial Tactics" was one of the highlights.

President Mike Hendryx, Judge Joseph Anderson with Gayla Corley & Jeff Pruett

Eric J.R. Nichols with Ileana & Victor Vicinaiz

Art Aviles, David Kirby & Kyle Briscoe

Pam Madere, Brandon Cogburn, Rachel Moreno & Trey Sandoval

Steve Browne & Don Jackson

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Jay Old, Hayes Fuller & Barry Peterson

Dennis Chambers & Clayton Devin

Scott Stolley

Robert Ford


In Class

Brad Douglas

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Malerie Anderson

Heather Hughes


Elizabeth Hill


Program Chair Tom Riney, Justice Jeff oyd & President Mike Hendryx

Lamont Jefferson

A Past President's Perspective

By Dewey Gonsoulin, MehaffyWeber, PC, Beaumont
TADC President – 1978-1979

Dewey Gonsoulin was born in Houston, Texas. He grew up in Houston and Louisiana, but has lived in Beaumont for the past 60 years. He went to St. Thomas High School in Houston. Dewey graduated from Rice University in 1951 and received his J.D. from The University of Texas in Austin in May 1954. He married to the lovely Jean Johnson and they had three children, Jean Gonsoulin, Anne Gonsoulin Figueiras and Dewey J. Gonsoulin, Jr. Jean passed away in 2015.

Dewey began practicing law on October 1, 1956 with the law firm of Mehaffy, McNicholas and Weber, which was primarily a trial firm. He has been with what is now MehaffyWeber for 61 years. Dewey served as President of TADC in 1978-79.

Q. What made you want to become a lawyer?

A. I wanted to become a lawyer because a lot of my friends graduating with me from Rice University also wanted to become lawyers. Further, we did not have any lawyers in our family.

Q. Most rewarding thing about being a lawyer?

A. The most rewarding thing about being a lawyer was that I was able to help many people over my 60 years of practice.

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

A. My favorite book is the Bible and I have been reading a book called "The Hoot Owl Man" recently.

Q. What is your favorite sport and team?

A. My favorite sport is baseball and the Houston Astros are my favorite team.

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

A. The best vacation that I ever took was with my wife. We went with some of our couple friends to the Fiji Islands, Australia, New Zealand, and the Great Barrier Reef.

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

A. If I had not become a lawyer I would probably have become a CPA, certified public accountant.

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

A. The most memorable trial and appeal that I ever had was on behalf of B. F. Goodrich in the Federal District Court of Beaumont, Texas with Judge Joe J. Fisher presiding. We lost in the trial court but got the judgment reversed and rendered in the Fifth Circuit Court of Appeals.

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

A. I have been a member of the TADC for approximately 55 years.

Q. Why did you join TADC?

A. I joined the TADC because I was primarily a civil defense lawyer and wanted to learn how to be a better defense lawyer.

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

A. The TADC has been a good help to me because I learned from other great defense lawyers that were members of the TADC and became great friends. Also, they had seminars biannually and I always learned a lot from the speakers at those seminars.

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. The greatest accomplishment that I had as President of the TADC was to have the TADC join with the Louisiana Association of Defense Counsel when we went to London on a joint seminar/vacation.

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 biggest change I have seen in the practice of law over the years is the slow diminishing of jury trials in both state and federal court. When I started practicing law, I helped defend many clients in jury trials, sometimes several trials in a week or month. I think it is a bad change in the profession because it does not enable young lawyers to gain experience in the courtroom.

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

A. Since I have not participated in the TADC in many years, I cannot describe what changes have been made within the organization.

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

A. I would hope the TADC would start giving mock trials at some of their seminars to assist young lawyers in learning how to try cases before a jury.

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

A. If I could give three tips to new lawyers just starting out, I would recommend that they do the following:

(1) Attend jury trials with senior lawyers within their law firm at every opportunity to learn how a jury trial is held.

(2) Try to help pro bono clients as much as possible because they need the help and the assistance of a lawyer and it gives you some experience with helping other people. I believe lawyers should take the time to help those that cannot afford a lawyer because of impoverished circumstances.

(3) Nothing beats preparation.

El Paso Baseball & CLE

Southwest University Park – May 18, 2017 – El Paso, Texas

El Paso area TADC Offic s and Directors once again organized a very successful event for El Paso area members. Baseball and CLE at Southwest University Park with the Chihuahuas has become a fix ure for El Paso Members!

President Mike Hendryx provided an update on "What Happened in the 85th Legislative Session and How it Affects the Practice of Law". Look for this event to be back next baseball season!

By Jeff Jury
Burns, Anderson, Jury & Brenner, L.L.P.

Mediation As Process Not Ritual, In Business Disputes

Let's play some word association. First topic: "Business litigation." Someone on the front row called out, "Fees!" Someone else said, "Complex!" Another, "High stakes!"

Next topic: "Mediation." After a short pause, that same person on the front row called out "Fewer fees." Someone else said, "Time-consuming." Another, speaking softly with the inflection of a question, "Efficient?"

Now, let's introduce the topic. "Mediation in Business Disputes." No answers yet, please. For the next few pages, let's do some meta-thinking: thinking about how we think about mediation in the context of business disputes. Is mediation another stop on the road to the courthouse or is it something that attracts your strategic and tactical attention? Stated without judgment, the thesis of this article is that lawyers will deliver better client service, and increase chances of maximizing client satisfaction, if mediation is incorporated as *a process, not a ritual*, into the life of a business dispute. But first, two important disclaimers.

Disclaimer Number One: this article is not a critique, or a criticism, of lawyers. Too many contemporary discussions spin off-track into criticism of another person who sees, or approaches, the world differently. I hope these ideas will cause you to reconsider how you think about mediation. As mediators, we experience your clients' dispute, and work through the mediation process, in ways unlike how you and your clients live with the dispute. That doesn't mean our ideas are better; they are just different.

Mediators view the process as "successful" in many different ways. We don't have a specific target, or range of value, that will make our client happy. If a case does not resolve on mediation day, the dispute lives on and will be tenant in a mediator's mind rather than a houseguest who consumes resources. Even though a mediator's idea of success will vary from those of a lawyer trying to satisfy a client, we share the common goal of building a solution to a shared problem. Mediators and advocates need to let each other play their respective roles. For example, it isn't up to mediators to deliver a magical process that suspends reality to make everyone nice, and it isn't up to advocates to become kinder, gentler people when they walk into the mediator's conference room.

Disclaimer Number Two: my ideas and comments draw on almost 30 years of attending mediations, almost 20 years of mediating and more than 10 years teaching others about the process and are offered to help make the mediation process work for your client and you. The confidentiality requirements of section 154.073(a) of the Texas Civil Practice and Remedies Code will be protected, and no remarks made in this paper will disclose any confidential communications made in any mediation.

Mediation Delivers Value to Your Business Client

Whether it is a transactional lawyer drafting a dispute resolution clause for inclusion in a contract or a litigator explaining a scheduling order to a client, both will likely need to describe the mediation process to their respective clients. After all, the businessman expects his contract will prevent lawsuits, and the litigation client may want her "day in court" but has never heard of a

[1] Burns Anderson Jury & Brenner, LLP, Austin, Texas, 512-338-5322, jjury@bajb.com. © Jeff Jury 2017. All rights reserved.

"day in mediation." Even clients who have been through prior mediations will benefit from a description of the process and an explanation of how the process adds value. After all, business decision-makers want to make good business decisions. Good business decisions must be supported by good data.

There is no metric or formula for estimating the monetary value generated—or saved—by mediation. It is difficult to assign value to the avoidance of a future event where the variables are projected costs and avoidance of an array of possible results. What can't be denied, and the client should be told, is that the cost savings achieved through mediation is recognized, even with the inherent difficulties in estimating cost avoidance. Usually, the discussion with a business client involves some estimation of "go forward" costs, compared to the inherently unknowable prediction of a future outcome. Sometimes, models like decision trees—graphic tools that compare cost estimates with outcome probabilities—are used to crystallize the client's thinking about the risks of settlement today balanced against the risks of going to trial at some point in the future.[2]

The truth is, no one knows, and no lawyer guarantees, results. Likewise, no mediator can guarantee a settlement. What practical experience tells us, whether discussed conceptually or engineered visually in the framework of a decision tree, is that mediation saves money. The General Services Administration published research in 2002 that estimated ADR saves tens—and up to hundreds—of thousands of dollars when used by the United States Air Force in employment, tort and contract cases.[3] A published study conducted on behalf of the European Union concluded in 2011 that mediation as a process yields substantial cost savings to litigants and ameliorates burdens on the civil justice system to an extent that justifies national policies "incentivizing" the use of mediation.[4] More recently, a meta-study of literature drawing data from the United States, Canada, the United Kingdom and Australia, concluded that "the vast bulk of available empirical evidence supports mediation as a cost-effective way of resolving legal disputes and workplace conflict"[5]

With experience and intuition arguing that mediation is a creator of value in business cases, how will the advocate best prepare the case, and the client, to use mediation as part of an affirmative strategy?

Mediation As Process, Not Ritual

A "ritual" is a formal ceremony, containing particular elements, conducted in the same way, according to an established order of events. A "process" is a series of actions taken to execute a task. Sometimes the process steps are identical. If you feel that your relationship with mediation is tired, lacking in enthusiasm and no longer stimulating, your relationship with mediation may have become ritualized. Do you approach mediation as another step on the way to a final hearing or do you approach mediation as a useful process that can help all sides solve a common problem?

Parallels between your other relationships may be helpful: people usually don't derive satisfaction from perfunctory, repetitive tasks, performed because "I gotta." Mediation is no different. Mediation approached as another "must-do" that stands in the way of more fulfilling tasks such as depositions or trial will probably yield a less-than-satisfactory experience. Some signs of fatigue with mediation as a process are[6]:

[2] *See,* J. DeGroote: "Decision Trees in Mediation: A Few Examples, "viewable at http://www.mediate.com/articles/DeGrooteJbl20100426.cfm

[3] GSA Office of Equal Employment Opportunity, "The Cost Savings Associated With the Air Force Alternative Dispute Resolution Program," May 2002, viewable at http://www.mediate.com/articles/airforceadr.cfm

[4] *See, Quantifying The Cost of Not Using Mediation – A Data Analysis,* Directorate-General for Internal Policies European Parliament, 2011

[5] S. Vander Veen, A Case For Mediation: The Cost-Effectiveness of Civil, Family and Workplace Mediation, Report to Mediate BC (containing numerous citations to supporting studies), January 2014 at 32

[6] Certainly, this is not a set of diagnostic criteria. Many of these same signs can be explained by schedule challenges and other realities of life that command our attention.

Mediation Representation

- Not discussing mediation with the client at an early stage of the representation;
- Preparing for mediation day at the last minute;
- Sending complete pleadings or discovery responses to the mediator, without analysis;
- Sending nothing, or not speaking with the mediator before mediation day;
- Making overly brief comments in an opening session, such as, "We are here in good faith."

If your mediation preparation looks and feels the same for each case, it may mean that your preparation has become ritualized.[7] One helpful step in evaluating how you are performing in mediation is to ask whether you are deploying mediation and negotiation skills or advocacy skills.

Mediation Representation Involves Different Skills Than Other Forms of Advocacy

One of the themes of my first paper on mediation "advocacy" was the notion that "mediation advocacy" differs from trial (or other types of advocacy.) At the time, there was an emerging debate in the literature among academics, and some practitioners, over the very use of the phrase "mediation advocacy" since that term may be seen as misidentifying the role of the lawyer as advocate of an adversarial position as opposed to a collaborative problem-solver.[8]

At the time, many people accepted the thought that "mediation advocacy" is merely a specialized type of advocacy. A decade and a half later, my view is different. I now appreciate the simple difference between fighting and building.

Advocacy, in a litigation sense, is largely about fighting and winning. The advocate's task at an administrative hearing, appellate argument, arbitration or trial is to gather and present evidence to support the client's desired outcome. The goal is to convince a stranger—or group of strangers—that the advocated outcome is the *correct* decision[9] under the law when applied to the facts or under the facts when applying the law. Outcomes tend to be zero-sum: a "winner" and a "loser."

Mediation representation is about problem-solving. We can trail off into definitional quicksand, where we can quarrel, and eventually drown, over whether the lawyer's job includes "fighting" to support a position at mediation, but let's avoid that for now. The truth is, the skills that help you be a fine advocate in litigation are not always transferrable to problem-solving roles. The mediation outcome will not be decided by who did a better job presenting and arguing the facts. Instead, the outcome of mediation will be determined by whether a durable solution to the problem has been constructed in a manner acceptable to all participants.

The language of negotiation and mediation is often phrased in "win-win" terms. In the business world, decision-makers are constantly engaged in "tolerate-tolerate" decision-making. Will the company tolerate this result today, rather than incur costs tomorrow? How does the immediate need for a "win" balance against what a "win" looks like in the long-term? These are examples of the questions that business decision-makers must answer internally to support a decision. A skilled lawyer will help the business client by asking questions that stimulate thinking and evaluation, rather than by simply listing possible outcomes, and projecting the probability of each.

In one sense, litigation is a lens focused backward—looking at past events to find truth and justice. Mediation is a process that focuses from the present forward—looking at what can be achieved through settlement now and visualizing the effects of certainty tomorrow and going forward, versus the uncertainties and challenges of continued litigation.

Think of a settlement as a durable bridge between two opposing positions or interests. On some level, the bridge must be built. Building anything doesn't happen by accident; it takes planning,

[7] It may also be that your cases are similar and require similar approaches.

[8] C. Menkel-Meadow, "Ethics in ADR Representation: A Road Map of Critical Issues," 4 *Dispute Resolution Magazine*, no. 2, 3-6 (Winter 1997)

[9] "Correct" can mean anything from "fair"/"true"/"warranted by the facts" to "what I want."

materials, tools and execution. Rather than keeping the focus on the fight, the lawyer in mediation is bridge-building. Recognizing that the skills to achieve the best result at trial are not the same set of skills to achieve the best result at mediation is helpful in those frustrating moments when the mediation feels stalled or a waste of time, and the desire to fight threatens to overtake.

Familiarity Has Bred Contempt of "Opening Sessions"

Nowhere is fatigue with the mediation process more on display than during the "opening," "joint" or "plenary" session.[10] This segment of the mediation process is one of the most discussed—and bemoaned—topics among mediators across the United States.[11] In some markets, advocates refuse to participate in joint sessions. In some markets, the opening session is conducted like an exchange of opening statements at trial, followed by pressure to get to a final number—or a mediator's proposal—before lunch. In many markets, both advocates and parties want to skip the joint session out of the feeling that it won't help—and may hurt—the negotiating process.

One root cause of this phenomenon is familiarity and experience with delivering messages in joint sessions. Experienced advocates have probably made more opening statements in mediation than at trial. It may be difficult to think of something new, exciting or, at least, different to say in a mediation opening session. Here is where an approach focused on building—rather than defaulting to fighting—is illustrated very well. Opening sessions viewed as rituals have little value. In these scenarios, one side plans to "lay it on the line" while the other side stares blankly and silently at a slide presentation found to be painful. Similarly, responding to an emotionally-charged opening statement with, "I'm just going to talk about the facts" or "We all feel sorry for you, but here are the top 20 reasons your case is awful" and concluding with "But we are here in good faith" sets the stage for little more than a few rounds of argument. People then walk to their rooms feeling the opening session was a waste of time, and they are probably correct. Constructive participation in a joint session is harder to deliver than it looks.

Negotiating Rounds and the Illusion of Control

After a period of time following an unproductive opening session, everyone's brain will cool to some degree. From that point forward, many people want to be in control of the situation. No one wants to say to a client "I have absolutely no control over what is going on here," and no client will feel confidence in a lawyer who does not seem to have some measure of control.

Your business decision-maker is accustomed to processing information and making sound decisions that advance the business' purpose. Business people are experienced with this reality: you will probably not gain "control" of a negotiation. You will be unable to achieve this because your adversary is too smart to be controlled, just as you are. Rather than trying to win each move and maintain control throughout the process, your business client wants the activity in the negotiation to promote the objective. The realities of operating a business have taught your client that no one wins every move at every step of the way. There will be stops, starts, turns and corrections on the path. As long as the result can be tolerated, it's a good day.

This reality may not merge well with your desire to be a zealous advocate. A problem that sometimes emerges from the desire to be the best advocate, who fights or defends a position at every round, is the "illusion of control" bias. This cognitive bias, first identified over 40 years ago in the literature, suggests that people trying to achieve an outcome believe they are in control of events, even when the outcome would have occurred independently of their behavior.[12] Applied to mediation, lawyers in different rooms could both believe they are completely in control of negotiating momentum—and both be equally wrong. Your mediator probably won't correct

[10] I try not to call them anything other than "get-togethers" and "visits."

[11] Galton and Allen, "Don't Torch the Joint Session," viewable at http://www.mediate.com/Allen/pg13.cfm

[12] Langer "The Illusion of Control, 32 *Journal of Personality and Social Psychology,* 311–328 (1975).

that misimpression, because it would only start an argument.

Think about whether your business client needs or wants to be in control (or feel in control) at every step of the process. People may want to be in control and think they are in control. To most mediators, it doesn't matter whether one party has truly achieved control as long as the process is moving forward. You can demonstrate wise strategic thinking by working with your client through the various *business* objectives in play at each step of the negotiation. Your business client is used to the internal dialogue of, "How will this action help my business be profitable?" so you have the opportunity to connect your thinking with the client's at a level that makes the most sense. Think dancing, not puppeteering.

Don't Allow Tactics To Interfere With Your Strategy

Things seem to be going fine, until your counterpart doesn't make the move you wanted or expected. This may prompt a response such as, "If he's only dropping X dollars, then I'm only making a tiny move." Humans react this way all the time. Someone makes us mad, and then it's time to send a message. They need to get their thinking right. This is often followed with a corresponding move, by your counterpart, in an effort to urge you to get *your* thinking right. What is happening now?

The truth is, both sides are probably ceding control of the negotiation to the other side. When your behavior is driven by a reaction to what someone else is doing, then they are controlling your movement—a reality that people have a hard time seeing and a harder time accepting. Be careful not to let the other side deflect you from your path. Unfortunately, this can happen when you are constructing a negotiating move, or a number, in reaction to what your counterpart has done. You want to "win" the next move. But think about this: in another hour, who will care? Will this help, or hurt, my business client at the end of the day, and is your client keeping track of the number of moves "won"?

Have an Exit Strategy

People in business are accustomed to thinking about how the business, how the process, how the operation ends. Businesspeople know that every venture has a lifecycle; therefore, the endpoint must be considered, and a plan in place. This is commonly called an exit strategy. An exit strategy is not a top dollar or bottom line; those are more akin to goals and objectives. By comparison, an exit strategy is a planned means of extraction from a situation that becomes unprofitable or undesirable with a plan for going forward. Sounds familiar, doesn't it?

The point here is to encourage you to think beyond the money question, and invite your client to think through the dispute—and the process—with you, in a businesslike framework. It will be familiar and comfortable to anyone experienced in business, and will reveal you as a creative, wise counselor. You will demonstrate that you understand the client's thinking *process* which brings us back to the original suggestion: respect mediation as a process, not a ritual.

Conclusion

We are blessed to practice in a developed mediation market here in Texas. With that experience and familiarity comes the risk of failing to optimize the process because it becomes perfunctory, tiresome, or infused with subtle biases that may take you off of your best efforts. Hopefully, these ideas will cause you to think about some aspect of how you represent your clients in the mediation process. Good luck.

Texas Association of Defense Counsel

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

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July 10, 2017

TO: Members of TADC

FROM: Mike Hendryx, President
Clayton E. Devin, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2018

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

Nominating Committee Meeting - August 5, 2017

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

Mike Hendryx
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodeay Dr., Ste 1200 PH: 713/651-1900
Houston, TX 77056 FX: 713/651-1920
Email: mhendryx@strongpipkin.com

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

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

2017 TADC
Awards Nominations

PRESIDENT'S AWARD

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

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

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

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

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

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

FOUNDERS AWARD

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

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

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

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

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

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

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

Mike Hendryx
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodway Dr., Ste 1200 PH: 713/651-1900
Houston, TX 77056 FX: 713/651-1920
Email: mhendryx@strongpipkin.com

Common Issues With Additional Insured Coverage

By William Pugh and John Almy
Liskow & Lewis, Houston

In the oilfield, parties often allocate the risk of bodily injury and property damage through the use of "regardless of fault" releases and indemnities. The parties broadly expect that the person or entity that owns the property or employs the personnel is in a better position to value and manage the risk. By allocating those risks to specific individuals, each party can theoretically make more efficient decisions regarding its business and risk exposure, knowing that in most instances it will only face liability associated with the people and property it has brought to the worksite. Each party, while an indemnitor of the worksite for its own people and property, generally seeks to be an indemnitee of at least its counterparty, if not every other person or entity at the site, with respect to claims relating to all other people and property.

Along with the contractual allocation of risk, parties routinely support their indemnity obligations with insurance. Generally speaking these insurance requirements provide the parties with confidence that there is a solvent entity standing behind the indemnity promise. In addition, in certain jurisdictions insurance is a critical part of creating an enforceable indemnity obligation.

For many parties to oilfield contracts, simply knowing that the indemnitor carries insurance is not enough, and they seek to be named as additional insured on their indemnitor's insurance policies, with a waiver of subrogation and a statement that coverage provided to the additional insured shall be primary and non-contributory as respects any other coverage available to the additional insured.[1] Additional insured coverage is an affirmative extension of coverage under an insurance policy to include someone other than the named insured. The coverage allows an otherwise unprotected party to receive the benefits and protections of insurance coverage under the relevant policy. While simple in theory, there can be a significant amount of nuance and detail in properly managing additional insurance coverage, both in terms of granting it and receiving it.

This article will discuss several key benefits and pitfalls associated with additional insurance coverage and provide insight into how best to manage additional insurance coverage to maximize your risk allocation program.

ASKING FOR ADDITIONAL INSURED COVERAGE

Perhaps the biggest benefit of receiving additional insured coverage is that there are circumstances in which an indemnity may be unenforceable, but additional insured coverage will still be available. In such circumstances, an indemnitee can still receive the benefit of the

[1] The three main insurance protections are additional insurance, waiver of subrogation, and making sure the counterparty's additional insurance coverage is primary and non-contributory to any other insurance available to the additional insured(s).

protection they bargained for, despite the fact that the indemnity is not enforceable and their indemnitor has been relieved of its direct obligations.

In *Getty Oil Company v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992), the Texas Supreme Court held that while the Texas Oilfield Anti-Indemnity Act ("TOAIA"), Tex. Civ. Prac. & Rem. Code §127.001, *et seq.*, required indemnity obligations to be supported with insurance in order to meet the requirements of §127.005, there was nothing to prevent the parties from agreeing to an obligation to provide additional insured coverage that was separate from the supporting insurance. Thus, if the TOAIA invalidates a contractual indemnity obligation it would invalidate any supporting insurance as well, but it would NOT affect a second, separate obligation to name the indemnitee as additional insured. As such, a request that a party be named as additional insured on the insurance of its indemnitor provides a "belt-and-suspenders" level of protection in the event that the underlying indemnity is not valid.

In Louisiana, the Louisiana Oilfield Indemnity Act ("LOIA") La. R.S. 9:2780 invalidates all regardless of fault indemnities for bodily injury or death claims,[2] and there is no statutory exception for insurance.[3] However, the *Marcel* exception (as developed in *Marcel v. Placid Oil*, 11 F.3d 563, 569 (5th Cir. 1994), and its progeny) provides a path for the would-be indemnitee to preserve its additional insured status by paying the premium to be named as additional insured. The indemnity remains unenforceable, but the additional insured is allowed to use the insurance of another to pay its liability.

[2] The LOIA does not prohibit indemnity for loss or damage to property.

[3] La. R.S. 9:2780(D)(1) provides that the LOIA does not affect any insurance contract "except as otherwise provided in this Section," but 9:2780(G) has been interpreted as preventing circumvention of the indemnity prohibition with insurance.

The Wyoming Anti-Indemnity Act, Wyo. Stat. Ann. § 30-1-131, invalidates all regardless of fault indemnities. However, the Act expressly provides that it does not address insurance obligations, and the 10th Circuit recently confirmed in *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219 (10th Cir. 2016), that such language allows enforcement of obligations to provide additional insured coverage.

Getting named as additional insured is fairly straightforward. The typical additional insured endorsement is provided to the named insured on a "blanket" basis and usually only requires that the named insured agree to name the other party as additional insured in a written contract prior to the date of the loss. In the past, it was common for additional insureds to need to be expressly scheduled in the policy, but that hurdle is rarely encountered in the oil and gas industry today.

There is one potentially significant pitfall in the naming stage; that is, many additional insured endorsements require not only that the naming happen in a written contract, but also that there be an "insured contract" which is often defined as one where the named insured assumes the tort liability of another. In *True Oil Co. v. Mid-Continent Cas. Co.*, 173 Fed.Appx. 645 (10th Cir. 2006), the court interpreted True Oil's assertion that it was an additional insured in light of the Wyoming Anti-Indemnity Act. The Wyoming Act expressly invalidates all regardless of fault indemnities in oilfield contracts, and the court held that with the indemnities "knocked out" there was no "assumption of the tort liability of another." Without the assumption of the tort liability of another, the agreement in question did not qualify as an "insured contract;" therefore, True Oil could not meet the definition of an additional insured. Left unresolved was the question of whether or not Pennant, True Oil's counterparty, had breached the contract by not obtaining insurance that would cover True Oil as an additional insured.

The "insured contract" language is a common restriction in additional insured endorsements,

and if it applies, it is possible that the application of an anti-indemnity act like Wyoming's could, in fact, result in the denial of additional insured coverage as well. Parties should be aware that the "insured contract" issue may be present in their counterparty's policy, and take that into account while drafting their contracts.

The biggest issue for parties requesting additional insurance is to make sure that the insurance actually covers the risks and liabilities that the parties expect to be covered. As a general rule, additional insured coverage is provided through an endorsement to a Commercial General Liability insurance policy, and, in recent years, insurers have steadily chipped away at the level of protection offered under various endorsements.

The "gold standard" of additional insured endorsements is generally thought to be the ISO CG 20 10 11 85 endorsement. The 20 10 11 85 form provided:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you

This endorsement made the full coverage of the policy available to the additional insured, clearly to the benefit of the would-be additional insured. In other words, if the claim was one covered by the policy, then the additional insured almost certainly had coverage for it as well. Over time, however, insurers felt that this endorsement expanded their liability too far and sought to limit its reach. Insurers began restricting the coverage provided under these endorsements, first by separating "ongoing operations" from "completed operations," and later by limiting the amount of coverage available and denying coverage in the event the loss was the sole fault of the additional insured.

Today it is not uncommon to see an additional insured endorsement like the ISO CG 20 10 04 13 which only provides limited additional insured coverage:

> A. Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" cause, in whole or in part, by:
>
> > 1. Your acts or omissions; or
> > 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
> However:
>
> > 1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
> >
> > 2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by contract or agreement to provide for such additional insured.
>
> B. With respect to the insurance afforded to the additional insureds, the following additional exclusions apply:

> This insurance does not apply to "bodily injury" or "property damage" occurring after:
>
> > 1. All work [. . .] at the location of the covered operations has been completed; or
> > 2. That portion of "your work" out of which the injury or damage arises has been put to its intended use [. . .].
>
> C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits of Insurance:
> If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:
>
> > 1. Required by the contract or agreement; or
> > 2. Available under the applicable Limits of Insurance as shown in the Declarations; whichever is less.
>
> This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

Under the 04 13 endorsement, an additional insured would not have any protection for liability arising out of its sole negligence, or its partial negligence, if the named insured was not at least partially at fault. Further, many contractual risk allocation provisions are part of master contracts that provide that indemnitors will bring "at least" a minimum amount of insurance expecting that most counterparties will have more, but doing away with the need to negotiate those amounts. Under the 04 13 endorsement, the policy may have a significantly higher limit of coverage than the "minimum amount," but the insurer will argue that coverage for the additional insured is limited to the "minimum" because that is the amount "required" by the contract. If the additional insured endorsement limits coverage to the "minimum" limits required by the contract, the insurer's argument would be even stronger, despite the fact that both the additional insured and named insured may have intended for the additional insured to have access to the full amount of coverage under the policy. In the event an indemnitee is compelled to rely solely on its status as an additional insured, it may find itself with much less protection than it bargained for.

One way to address this issue is to require that the additional insured coverage provide coverage for the additional insured's sole negligence, require that the additional insured receive coverage for both ongoing and completed operations, and that it be clear that the additional insured is entitled to the full limits of each applicable policy. Of course, in the event the relevant additional insured endorsement is one like the CG 20 10 04 13, and the named insured is unable to convince its insurer to provide the required coverage, the would-be additional insured may have to decide on whether or not to proceed knowing that its additional insured protections are not as robust as it would like.

One area of particular concern with respect to the breadth of coverage provided arises in the context of Protection and Indemnity ("P&I") insurance. P&I insurance is typically a vessel owner's insurance policy that covers the named insured for liability arising "as owner of the vessel," which makes sense because the insurance is designed to cover a shipowner's liabilities. However, when a contract between a vessel and a platform owner provides for regardless of fault indemnities between the parties, the vessels' P&I insurance provides coverage to the platform owner in the event the

platform owner negligently injures a member of the crew. In those situations, if the negligence of the platform owner is not considered liability incurred as "owner of the vessel" (or as charterer of the vessel) coverage can be denied. This was the holding of the Fifth Circuit in *Lanasse v. Travelers Ins. Co*.[4] In the wake of *Lanasse*, oil companies began including provisions in their charter agreements requiring vessel operators to have the "as owner" coverage limitation deleted from their P&I policies.[5] In what is probably dicta, the Fifth Circuit in *Helaire v. Mobil Oil Co.*, agreed that deletion of the "as owner" restriction expanded the scope of P&I coverage to include liability that an oil company may have in its capacity as a platform operator.[6] However, the ability to delete the "as owner" clause was arguably negated by the Fifth Circuit in *Tex. E. Transmission Corp. v. McMoRan Offshore Exploration Co.*[7] There, faced with an oil company's non-vessel owner liability and a contractual provision calling for deletion of the "as owner" restriction in the vessel owner's P&I policy, the Fifth Circuit held, without discussion or citation of *Helaire*, that there was no language in the policy that could be deleted to extend coverage to non-shipowners. There is no plausible way to reconcile the favorable discussion in *Helaire* with the holding in *Texas Eastern*. Following *Texas Eastern*, the best solution is to require contractually that the P&I policy be endorsed to provide full coverage to the additional insured without regard to whether its liability is incurred "as owner of the vessel."

A related issue to the "as owner" problem is that it is possible for insurers to attempt to limit their liability by riding the coattails of the shipowner's right to limit its liability under the Limitation of Liability Act, 46 U.S.C. § 183. Unfortunately for the additional insured, however, limitation is only available to owners or bareboat charterers of the vessel. Therefore, it is advisable to include language prohibiting the insurer from lowering coverage limits for the additional insured in the event of limitation of liability, along with changing the "as owner" language.[8]

Having been named as additional insured, it is important to ensure that the additional insured coverage is primary as respects any other insurance that might provide coverage to the additional insured.[9] As a threshold matter, most of the risks that are typically the subject of insurance have been carved up into sectors that are served by specific policies; *e.g.* auto insurance covers liability arising out of the use of a car, P&I insurance covers liability arising out of the use of a vessel, and general liability insurance covers most other liability risks. However, there are still areas where it is possible that two or more policies might cover the same loss. In those instances, the policies generally contain "other insurance" clauses that attempt to determine which policy should pay, or how the policies should share the loss. Unfortunately, those "other insurance" clauses have been interpreted to apply between insurance policies that provide coverage to an individual as a named insured and those providing coverage as an additional insured. The result is that in instances where a party intends to rely on its coverage as an additional insured to cover a particular liability, despite the fact that it was the intent of the parties that the additional insured carrier be responsible, the carrier can attempt to use its "other insurance" clause to pass some or all of the primary responsibility back to the

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4 450 F.2d 580 (5th Cir. 1971).

5 In addition, the indemnity provision should be expanded to include loading, unloading, ingress, and egress of cargo and personnel to expand the scope of the indemnity beyond that allowed in *Lanasse* and its progeny. *See Gaspard v. Offshore Crane and Equipment, Inc.* 106 F.3d 1232 (5th Cir. 1997).

6 709 F.2d 1031, 1042 (5th Cir. 1983).

7 877 F.2d 1214, 1227-28 (5th Cir.).

8 *See Crown Zellerbach Corp. v. Ingram Indus.*, 783 F.2d 1296 (5th Cir. 1986).

9 Indemnity obligations are typically owed to the indemnified party and its group (which is defined to include the related people and companies that are also intended to receive protection). However this group is defined, the insurance protections (additional insured, waiver of subrogation, and being primary) should also be extend to the group.

additional insured's own insurance. In other words, despite the existence of an enforceable additional insured coverage, the additional insured's own insurance might have to respond instead.[10]

In order to remedy this issue, it is advisable—and typically sufficient—to require that the additional insured coverage be primary as respects any insurance available to the additional insured(s).

GIVING ADDITIONAL INSURED COVERAGE

On the flip side of this issue, the party granting additional insured coverage needs to be careful that it does not accidentally agree to provide coverage that is broader than intended, or agree to provide coverage that its insurance policies do not provide.

In *Ogea v. Loffland Bros. Co.,*[11] Phillips and Loffland entered into a drilling contract where each agreed to indemnify the other from loss or damage to their own people and property. However, the contract also required Loffland to procure insurance and name Phillips as co-insured, which Loffland did. Cecil Ogea, an employee of another contractor of Phillips suffered an injury after a fall on Loffland's rig. Loffland tendered the indemnity to Phillips, and Phillips filed a counter-claim asserting that Loffland's insurance was supposed to protect Phillips for such liability. The court reasoned that although the indemnity provisions would allocate Ogea's claims to Phillips, the contract, taken as a whole, indicated that Phillips was to be protected from all claims that were covered by Loffland's insurance before the indemnities took over. Since Ogea's claims were settled for less than the minimum amount of insurance coverage required in the contract, Loffland's insurance should respond. Because Loffland did not place any restriction on the scope of the coverage provided to Phillips, *i.e.*, did not limit the claims for which insurance coverage was provided to just those claims Loffland was agreeing to assume in the indemnity section, Loffland was compelled to pay for a claim that the parties had specifically allocated to Phillips.

In general, the *Ogea* issue can be addressed with language stating that the additional insured is only named as additional insured for risks assumed by the named insured, or some other language to that effect. This generally limits access to the indemnitor's insurance to only those instances in which the named insured intends to provide coverage to the additional insured.

However, while such limiting language should protect the grantor of additional insured coverage, recent case law suggests that such a limitation might not be enough in particular circumstances. Following the Deepwater Horizon catastrophe, BP (the operator) made a claim against its drilling contractor's insurance policies as an additional insured for costs to clean up pollution in the Gulf of Mexico. BP argued that although the drilling contract may have allocated those risks to BP, Transocean's (the drilling contractor) insurance policies did not incorporate those limitations and therefore should provide full coverage to BP. BP contended that the additional insured endorsement on Transocean's policies stated that anyone to whom Transocean was obligated to provide additional insurance in a written contract, was an additional insured without any restrictions. The Eastern District of Louisiana disagreed, holding that Transocean's umbrella insurance policy language only required Transocean's insurers to include BP as an additional insured to the extent that Transocean was obligated to indemnify BP under the drilling contract.[12]

A unanimous panel of the Fifth Circuit initially reversed, finding the case indistinguishable from

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[10] *See Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996).

[11] 622 F.2d 186 (5th Cir. 1980).

[12] *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,* MDL No. 2179, 2011 WL 5547259 (E.D.La. Nov. 15, 2011).

prior Texas Supreme Court cases and holding that "only the umbrella policy itself may establish limits upon the extent to which an additional insured is covered," so long as the additional insured provision is separate from the indemnity provisions in the underlying contract.[13] As to the "separate from and additional to" requirement, all that is required is that "the additional insured provision be a discrete requirement." The additional insured provision "need not be an entirely separate provision of the contract, and its independent status is not altered by the fact that the contract also includes a provision requiring the relevant party to obtain insurance to cover its liability under the contract."

The Fifth Circuit therefore held that BP was entitled to full coverage as an additional insured under Transocean's policy as a matter of law. However, the court thereafter withdrew the opinion and certified two questions to the Texas Supreme Court:

> 1) Whether *Evanston v. ATOFINA Petrochemicals, Inc.*, compels a finding that BP is covered for damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?[14] and
>
> 2) Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under *ATOFINA* given the facts of this case?

[13] *In re Deepwater Horizon*, 710 F.2d 338.

[14] 256 S.W.3d 660 (Tex. 2008).

The Texas Supreme Court responded in February of 2015, but did not completely address the questions presented. Instead, the Texas Supreme Court determined that the language of the relevant policy, which called for BP to be an additional insured "where required" by written contract and where Transocean is "obliged," meant that the policy intended to incorporate the limitations on additional insured coverage in the drilling contract. The Texas Supreme Court held, therefore, that the restrictions on coverage in the drilling contract applied, and BP was not an additional insured for the relevant pollution claims.

While it is very important that a grantor of additional insured status do what is necessary to limit the grant of coverage to only those areas where coverage is intended to be granted, it is arguably even more important that the grantor understand what coverage it actually is capable of conferring, and to ensure that it does not overpromise and/or under deliver. Just as the recipient of additional insured status should be concerned with the language of the additional insured endorsement, so too, should the grantor. If the contract requires coverage broader than allowed under its policy, the grantor is subject to a breach of contract claim equal to the value of the insurance that it promised but failed to provide. That breach of contract claim is almost certainly not going to be covered by grantor's insurance, and the grantor will now be faced with an uninsured claim. For example, if the grantor agrees to name the counterparty as additional insured, including sole negligence, but its additional insured endorsement does not allow such additional insured coverage, the grantor will be liable for the claim but will have no insurance coverage.

Another example of a grantor committing to coverage that its insurance policy does not provide involves the distinction between indemnity for another party's tort liability (which is typically covered under the contractual liability coverage of the grantor's general liability policy) and indemnity for the other party's contractual liability (which may not be covered under the grantor's contractual liability

coverage, even if the risk is no different). Although not arising out of an additional insured provision, a very good example of this issue is the case of *Colony Nat'l. Ins. Co. v. Manitex, L.L.C.*[15] JLG manufactured crane trucks and sold them to an entity called Powerscreen, with a provision that Powerscreen would protect JLG from claims arising out of the use of the trucks. Powerscreen later sold the trucks to Manitex with a promise that Manitex would protect Powerscreen from any liability arising out of the use of the trucks, including Powerscreen's contractual liability to JLG. Later, an incident occurred leading to a personal injury claim and products liability claim against JLG. JLG tendered the claim to Powerscreen who, in turn, tendered it to Manitex. Colony Insurance, Manitex's carrier, objected to coverage, arguing that the policy clearly contained a contractual liability exclusion that restricted coverage for contractual liability to the named insured's contractual assumption of the tort liability of another. In this case, Manitex had contractually assumed Powerscreen's contractual liability to JLG. Therefore, no coverage was available even though the same risk would have been covered if Manitex had agreed to indemnify Powerscreen and JLG for their respective tort liability rather than agreeing to indemnify Powerscreen for its contractual liability to indemnify JLG for JLG's tort liability.

Manitex highlights two concerns: first, understanding what sort of risks are being allocated, and second, ensuring that the insurance intended to cover those risks actually responds. Here, Manitex either did not understand that it was assuming Powerscreen's contractual liability instead of JLG's tort liability, or it did not understand that its own insurance policy established a difference between the two that would prevent coverage. The result is that Manitex had taken on a liability for which it had no insurance coverage, and it was compelled to pay the claim out of pocket.

[15] 461 Fed.Appx 401 (5th Cir. 2012).

HOW TO PROTECT YOURSELF

The would-be additional insured needs to know what coverages to ask for and needs to ensure that the individuals and entities that need to receive additional insured coverage (*e.g.*, other affiliates, employees, co-lessees, and other contractors and subcontractors) are named as additional insured as well. The contract in which additional insured status is required should spell out that the coverage applies regardless of the sole negligence of the additional insured, and applies in all the situations the additional insured considers appropriate. If time and resources permit, and if the counterparty is willing, reviewing a copy of the relevant additional insured endorsement would be one possible way to prevent this unintended result.

As a grantee of additional insured status, it is very important that access to additional insurance be limited solely to those risks and liabilities that the grantor intends to cover. Beyond that, care must be taken to ensure that the insurance procured actually covers the risks for which additional insurance is provided. Wherever there is a gap it will most likely have to be bridged with uninsured dollars. It is critical to know the limitations of your underlying insurance policy as well as any limitations contained in the additional insured endorsement and to ensure that there is sufficient connection between the additional insured endorsement and the underlying contract (which requires additional insured status) to allow the policy to adopt any restrictions on coverage contained in the underlying contract.

CONCLUSION

Insurance is an important tool in developing a risk allocation program. And additional insured coverage is a very important part of available insurance protection. However, it is very important to understand the potential pitfalls relating to getting, and giving, additional insured protection so as to avoid unintended, and possible uninsured, consequences.

Larry Funderburk is one of our Distinguished Members. We have recognized him for his service to the TADC with the President's Award in 2000 and the Founders' Award in 2002. After over 150 trials and thousands of cases, he published a collection of anecdotes that reflect his experiences as a trial/defense counsel in the Marine Corps and later as a civil trial lawyer in Texas from the 1960s through the 1990s. The book, Cases and Courtrooms Remembered, reflects his memory of certain cases that stand out still---ones so odd, surprising, or humorous that they still stand after his long and successful career. We are reprinting four of his stories.

Mike Hendryx,
TADC President

Cases and Courtrooms Remembered

By Larry Funderburk
Funderburk Funderburk Courtois, Houston

THE COURTROOM DEMONSTRATION THAT ALMOST BACK-FIRED

The case was filed in Robertson County (aka "Booger County") Texas. The county seat is Franklin. The county is an economically deprived, mostly rural, central Texas county. The plaintiff, Richard Boyd, was represented by Mac Gann, a wonderful trial lawyer, and a good friend. He spoke the language of Booger County, and was right at home there, although he was based in Houston. Mac was colorful, down to earth, and his specialty was trying cases in "the country" because he really connected with rural jurors.

I represented Werner Ladders, the largest manufacturer of aluminum and fiberglass ladders in the world.The hardware store in Hearne, where the ladder was purchased, was represented by Bob Burleson, a very fine trial lawyer from Temple.The case involved a 10-foot aluminum stepladder. The ladder was in the courtroom. The right side-rail was bent inward, toward the center of the ladder, below the knee brace. It was still capable of remaining up-right, and supporting a load, although it was unstable or "wobbly". The allegation was that Boyd was on the ladder, and the side-rail just bent, or buckled, causing him to fall, sustaining serious injuries. According to the plaintiff's allegations, the ladder was under-designed, weak, and failed to meet its 250-pound duty rating. Our defense was that the ladder was not defective, was strong, and had been tested to four times its duty rating. We contended that the accident occurred due to the negligence of Boyd in extending his body outside the side-rails, losing his balance, causing the ladder to tip over and fall, and that the bend or "buckling" occurred when he fell on top of the ladder.

Werner sent one of their staff engineers to act as Werner's representative at trial, and to offer expert testimony about the manufacture of the ladder, the testing thereof, and the strength of the ladder. Although I had tried several cases for Werner previously, this was the first time I had met this particular engineer; he was new to Werner, and to me. At the beginning of the trial, he told me how we were going to demonstrate the strength of this particular model of ladder; he said that we would bring a new ladder, same model, identical to the incident ladder, and we would, in the presence of the jury, saw both knee

braces in two, and saw one side-rail halfway through. Then, we would have four people get on the ladder. My response was "No, no, no.....we're not going to attempt such a stunt; if something were to go wrong, the result would be disastrous." But the young engineer would not take no for an answer. He insisted that the demonstration would work, and would be very convincing. He said that if we lost the case, he could not go back to Werner and tell them that the demonstration had not been utilized. He assured me that he knew what he was doing, and that the demonstration would be successful. His insistence finally prevailed, and against my better judgment, I consented to the demonstration.

The plaintiff rested his case on Friday afternoon. The defense was to begin its presentation on Monday morning. On Saturday, the engineer purchased a step-ladder, identical to the ladder in question. He also purchased a hack saw, and a sheet of plywood to put the ladder on, so that we did not damage or scuff the courtroom's hardwood floor. Outside the presence of the jury, we informed the judge, Judge Bartlett, what we proposed to do. Mac said he had no objection. I think he knew that the judge would probably permit it, whether he objected or not, but more importantly, I think he believed that our proposed demonstration was not going to be successful and the demonstration would backfire. To say that we got the attention of the jury would be an understatement. The jury was leaning forward in their seats as the young engineer sawed both knee braces in two, and sawed half-way through the right side-rail. Then Bob Burleson (who weighed about 250 pounds) climbed to the top of the ladder. Next, the engineer got on the ladder. Then the court reporter mounted the ladder. And finally, I stood on the bottom rung. My heart was pounding; I realized what a chance we were taking. I looked down at the side-rail which had been sawed half-way through, and I could see the side-rail bending back and forth. You could hear a pin drop as the four of us stood on the ladder. Finally Mac broke the silence, and relieved the tension when he said "Now can I get on the ladder?"

Thankfully, we all removed ourselves from the ladder without the ladder collapsing, and we won the case. I still cannot believe that I permitted the demonstration. I did so only at the insistence of the engineer who was sent by my client to represent it at trial. I do not recommend such demonstrations. I believe that we were very fortunate that the ladder did not collapse.

One final note about the case. As I have already mentioned, the plaintiff's ladder was in the courtroom. It had a bent side-rail, and was "wobbly", but would still support weight. Bob Burleson, who represented the hardware store in Hearne where the ladder was purchased, delivered his closing argument while sitting on the top of the ladder. Bob was a fine trial lawyer, and a very colorful one.

THE WRENCH WITH THE BENT HANDLE

Sometimes cases are won or lost for reasons that entirely escape the lawyers and the experts. We attorneys believe that we know what evidence will persuade a jury, and what the key factors are that will control the verdict. And sometimes we can be entirely wrong; a jury will sometimes seize upon some fact or some piece of evidence which will decide the case, and which the attorneys and experts have not even considered.

That's what happened in the case of *Joe Garcia v. Danaher Corporation.*

Joe Garcia was a long time employee of Dow Chemical and an experienced pipe-fitter. He was using a ratchet wrench to tighten nuts on a bolt, to secure a flange. As he pulled on the handle of the wrench, the ratchet mechanism failed, causing Garcia to fall backwards, and into a protective rail, resulting in a serious back injury. The wrench was manufactured by my client, The Danaher Corporation. The lawsuit which resulted was filed in Brazoria County, Texas. It was alleged that the wrench was defectively manufactured or designed, in that the ratcheting mechanism failed to withstand the load or

force which Garcia applied. If that were true, the wrench was defective, since it obviously should he designed to withstand the torque that a man could generate.

Our defense was that some additional force or load was placed on the wrench, which was beyond the capability of the wrench to withstand. A common practice with plant maintenance workers, although illegal, is the use of a "cheater bar" or "cheater pipe." This practice involves inserting the handle of the wrench into a pipe, thereby extending the length of the handle and increasing the torque. The result is that sometimes more torque is applied than the wrench is designed to withstand. Our expert's examination of the wrench revealed a small mark on the handle of the wrench which he believed represented evidence that a "cheater pipe" had been used to over-torque the wrench. OSHA and other safety organizations have condemned the use of "cheaters," for exactly this reason. They allow a worker to apply too much torque, exceeding the capability of the wrench to withstand it. Of course, Garcia denied the use of a "cheater." Our expert also offered the opinion that the wrench may have been over-torqued on some prior occasion, and the mechanism may have been compromised and weakened as a result.

The wrench in question was in the courtroom and was admitted into evidence. It was passed to the jury and examined by all 12 jurors. Our expert had thoroughly examined the wrench, as had the plaintiff's expert. And, the attorneys and parties to the case had handled the wrench over and over, both before and during the trial. None of us noted anything unusual about the wrench, other than the broken ratchet mechanism.

This was a hard-fought case, and we were in trial about a week. The jury retired to consider their verdict. After two hours, the jury had its verdict. The jury found that the wrench was not defective, and the verdict was for the defense.

The next morning, l was in my office, when I received a call from the foreman of the jury. What he told me was quite a surprise. The wrench in question was in the jury room with the jurors, and with the other evidence in the case. As the jurors were examining the wrench, one of the jurors rolled the handle across the table in the jury room. As he did so, another juror noticed that it did not roll smoothly as you would expect a perfectly round handle to do; rather, each revolution of the handle produced an indication that the handle was not straight. The handle was bent! This was clearly proof that the wrench had been over-torqued.

There is no telling how many times the wrench had been examined before and during trial, by myself, my associates, opposing counsel, the experts for both sides, and others. No one had noticed that the handle of the wrench was bent. It took the jury to discover the most important evidence in the case.

So much for the careful preparation by the lawyers, and the experts; the jury figured the case out by itself!

TRIAL BY FIRE

In the fall of 1964 I was transferred to 3rd Marine Division legal office on Okinawa. I continued to act as both trial counsel (prosecutor) and defense counsel. The more experience l gained, the greater my case load grew. In March of 1965, the first American combat troops landed in Viet Nam. They were part of the 3rd Marine Division. In May of 1965, I received my orders to Viet Nam, and spent the rest of that year there. The Division headquarters was at Da Nang. The 4th Marine Regiment, however, was assigned to provide security for a naval airfield at Chu Lai, located about sixty miles south of Da Nang. I was assigned the additional duty of Legal Officer for the 4th Marine Regiment. This meant that I split my time between Da Nang and Chu Lai. Our quarters in Da Nang were an old French army compound. But at least we had a roof over our heads. In Chu Lai, we lived in tents and the legal office was in a tent. Practicing law in this environment was challenging, to say the least. We endured the monsoon rains, mud and dust. Mildew quickly formed on any stationary object. Passing vehicles left clouds of dust in their wake. It rained incessantly during

the monsoon season. We had virtually no law library. Although we had access to Vietnamese translators, Da Nang was on a border area for local dialects and it was difficult to find a translator who could communicate with witnesses. In addition, there was a cultural gap which seemed to result in the Vietnamese witnesses trying to testify to whatever they thought we wanted to hear. We had significant translation problems. Also, locating and interviewing witnesses was extremely difficult, both Vietnamese witnesses and Marine witnesses. Vietnamese witnesses could seemingly disappear into the countryside and the small villages. Locating witnesses was dangerous. You never knew for sure who the enemy was. Many of the local citizenry were ordinary farmers by day, but Viet Cong by night. To an American, Vietnamese names were similar and confusing. Phone books and subpoenas were not an option. There was simply no practical way to require a Vietnamese witness to appear at trial. As for Marine witnesses, if he was an infantryman, he was probably on patrol or in the field. It might be difficult to even locate his company, since the companies moved often. Or he might be on R & R leave, or have rotated back to the U.S. Or he might have been killed or wounded. In spite of these challenges, we prosecuted and defended many cases. We had a high volume of negligent homicide cases in which Marines mishandled their weapons with tragic consequences. Sleeping on post was a frequent offense. Serious offenses such as homicide, rape, and robbery were tried.

U.S. V DUNBAR

One of the Marines I was assigned to represent was Corporal Larry Dunbar. I confess that I had forgotten about his case, when, in 2010, I received the following letter from him, which stirred my memory:

Feb. 1, 2010

Mr. Larry Funderburk

This past week I was thinking of an incident that changed my life, and your name came to mind. I never imagined I would be able to locate you, but with Google all things are possible.

In 1964, I was a Corporal (E-4) in the Marine Corps. I was three years into a four-year enlistment when I did a very stupid thing. I, along with another Marine, stole a transmission out of a Corvette that had been repossessed by the credit union on base. Our intention was to install it in a drag car we were building. Obviously we were not very adept at stealing and we were arrested by the authorities. We were to be tried before a general court-martial. This is where you come into the picture. When I contacted the legal department, you were assigned to represent me. The first thing you did was to get the charges lowered and I was tried at a special court-martial. You spent a lot of time explaining the legal process and preparing my defense. As I think back to that time, I realize how fortunate I was to be represented by you. You showed a lot of compassion, dedication, and put forth the effort necessary to provide me with the best possible outcome. As a direct result of your diligence, I received an honorable discharge and in effect started civilian life with a clean slate.

After the verdict was read at my trial, I don't remember thanking you. So that is really the motive behind my writing this letter. Forty-six years after the fact I do want to say thank you. I've never had any more brushes with the law since that terrible incident. I married the girl I was dating while in the service. We celebrated our 45th anniversary this past November.

Again, thank you for helping me during the darkest time of my life. May God bless you.

Sincerely,
/s/
Larry Dunbar

Member News

Th s past April, the Litigation Section of the State Bar of Texas inducted Tom Morris, long-time TADC member, as a Texas Legal Legend at the Mark and Becky Lanier Auditorium at the Texas Tech School of Law.

Morris began attending the University of Texas Law School, but in 1941 – during his fi al year of law school – he enlisted in the U.S. Navy. He was called up after the bombing of Pearl Harbor, and he served four years in the Navy, flying airplanes off an aircraft carrier in the Pacific Ocean. After that, he returned to fin sh his fi al year of law school, graduating in June of 1946. At the University of Texas, he was a member of Chancellors and Order of the Coif and served on the editorial staff of the Texas Law Review. After graduation, Morris served two years on the faculty at the University of Texas Law School teaching torts, property, and legal argument and writing, and serving as faculty director of the Texas Law Review. He was one of the fi st professors to teach African American students at the law school. Later, he began practicing law in Harlingen in June 1948 and moved to Amarillo in September 1949. He was a longtime Partner in the Amarillo law fi m of Gibson, Ochsner & Atkins, before moving to The Underwood Law Firm.

Morris continues his practice today at The Underwood Law Firm in Amarillo, where he has focused on litigation covering a broad spectrum of cases, including commercial law, employment law, insurance defense, oil and gas, patents and property law. His most famous case on appeal is *Graham v. Deere*, a major patent decision of the United States Supreme Court in 1966. The case has thousands of cites in legal opinions and secondary sources.

Morris was elected to Fellowship in the American College of Trial Lawyers in 1973. In 2001, he received the Chief Justice Charles L. Reynolds Lifetime Achievement Award. In 2005, he was honored by the Texas Bar Foundation as one of five outstanding Texas lawyers with more than 50 years in practice.

Texas Legal Legends is a project of the Litigation Section of the State Bar of Texas. Its purpose is to memorialize the stories of many legendary lawyers who have practiced in Texas and to use those stories to enhance the public's understanding of the historical importance of law students and lawyers to emulate Legends like Morris by serving others and making a difference – not just a living. Morris and the other Legends are prime examples of lawyers who have spent their professional careers serving others and taking on challenges that are much bigger than themselves.

TADC congratulates our longtime friend and member on this outstanding accomplishment.

On April 4, 2017, Clayton Devin with the Macdonald Devin law fi m in Dallas was named a Texas Trial Legend by the Dallas Bar Association.

Devin has appeared in state and federal courts in over one hundred counties in Texas and Oklahoma. Representing Fortune 500 companies, as well as individuals and small businesses, he has handled construction, personal injury and commercial cases.

Over the last four decades, Clayton has practiced with and against many smart and capable lawyers, and is grateful to them for lessons learned and the opportunity to be a member of the society of trial lawyers.

Clayton is past President of the Texas Association of Defense Counsel, and has been named a Texas Super Lawyer every year since 2005, several times as a top 100 in Dallas-Fort Worth. He is a member of the American Board of Trial Advocates and is board certifi d in civil trial law and personal injury trial law.

Clayton is married to Diane, an employee benefits lawyer who is way smarter than him. His daughter Whitney is a professional photographer, and provides technology and social media counseling for her father. Among Clayton's most prized possessions are his tractor and chainsaw. He can be found many weekends battling Johnson grass and Cedar trees in Bosque County.

2017 Winter Seminar

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

The 2017 TADC Winter Seminar was held at the magnifice t Beaver Creek Lodge in Beaver Creek, Colorado, February 1-5, 2017. David Brenner and Belinda Arambula with the Austin law fi m of Burns, Anderson, Jury & Brenner, L.L.P., served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 8.5 hours of CLE and fresh powder every day!

Heather & Robert Sonnier with Rosemary & Max Wright

Nick & Jennie Knapp, Belinda & Penelope Arambula, Lydia May with Heather & Warren Wise

Chris Pruitt, Monika Cooper & Chris Lyster

2017 Winter Seminar

www.tadc.org

Jim Hunter & Greg Binns

Program Chair David Brenner, Christy Amuny, Max Wright & Ed Perkins

Everybody hard at work!

TADC 2017 ANNUAL MEETING

The Fairmont Olympic
Seattle, Washington ~ September 20-24, 2017

Program Co-Chairs: Don Kent, Kent, Anderson, Bush, Frost & Metcalf, P.C., Tyler & Jarad Kent, Chamblee Ryan, PC, Dallas

CLE Approved for: 9.5 hours, including 1.75 hours ethics

Wednesday, September 20, 2017

6pm – 8pm TADC Welcome Reception

Thursday, September 21, 2017

7:00-9:00am Buffet Breakfast

7:25-7:30am Welcome & Announcements
Mike Hendryx, TADC President, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Don Kent, Kent, Anderson, Bush, Frost & Metcalf, P.C., Tyler
Jarad Kent, Chamblee Ryan, PC, Dallas

7:30-8:00am *PROTECTING AND DEFENDING ATTORNEY'S FEES*
John Bridger, Strong Pipkin Bissell & Ledyard, L.L.P., Houston

8:00-8:30am *CHAPTER 95: WHAT IS AN IMPROVEMENT?*
Bradley Reeves, Coats Rose, P.C., Houston

8:30 -9:00am *HAIL STORM LITIGATION – WHAT TO EXPECT WITH THE RECENT CHANGES IN THE LAW*
Victor Vicinaiz, Roerig, Oliveira & Fisher, L.L.P., McAllen

9:00-9:45am *THE REPTILE THEORY – A PATH TOWARD EXTINCTION*
Jeff Ryan, Chamblee Ryan, PC, Dallas

9:45-10:15am *MILITARY LAW AND THE CIVIL PRACTICE*
Julia Farinas, United States Army Reserve JAG Corps.

10:15-10:30am *B R E A K*

10:30-11:15am *CHAPTER 74 – GEMS AND PEARLS*
Joel Steed, Steed Dunnill Reynolds Bailey Stephenson LLP, Dallas

11:15-11:45am *DEALING WITH A SNAP-CHATTERBOX? SOCIAL MEDIA USE IN LITIGATION*
Caleena Svatek, Chamblee Ryan, PC, Dallas

11:45-1:00pm LUNCHEON WITH JUDICIAL PANEL: *ETHICS IN THE COURTROOM (.75 hrs ethics)*
Judge Christi Kennedy, 114th Judicial District
Judge Cynthia Kent, 114th Judicial District (Retired)

1:00-1:15pm *B R E A K*

1:15-1:45pm *YOU CAN'T NEVER ALWAYS SOMETIMES TELL – AN INTERVIEW OF CIVIL LITIGATION*
Greg Dykeman, Strong Pipkin Bissell & Ledyard, L,L,P, Beaumont

1:45-2:30pm *HIPAA, HB 300 & DATA BREACH NOTIFICATION LAWS (.5 hrs ethics)*
Heather Hughes, U.S. Legal Support, Houston

Friday, September 22, 2017

7:00-9:00am Buffet Breakfast

7:25-7:30am Welcome & Announcements
Mike Hendryx, TADC President, Strong Pipkin Bissell & Ledyard, L.L.P., Houston
Don Kent, Kent, Anderson, Bush, Frost & Metcalf, P.C., Tyler
Jarad Kent, Chamblee Ryan, PC, Dallas

7:30-8:30am *DEFENDING DAMAGE CLAIMS*
Liz Fraley, Fraley & Fraley, L.L.P., Dallas

8:30-9:00am *ETHICAL TRICKS (.5 hrs ethics)*
Barry D. Peterson, Peterson Farris Byrd & Parker, P.C

9:00-9:45am *COMMERCIAL LITIGATION: MISTAKES MADE AND LESSONS LEARNED*
David Bush, Kent, Anderson, Bush, Frost & Metcalf, P.C., Tyler

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

10:00-10:30am *DEFENDING TRUCK DRIVERS AND COMPANY REPRESENTATIVE DEPOSITIONS*
Jarad Kent, Chamblee Ryan, PC, Dallas

10:30-11:00am *TEXAS TRADE SECRETS AND COVENANTS NOT TO COMPETE: RECENT UPDATES*
Joseph Y. Ahmad, Ahmad Zavitsanos Anaipakos Alavi Mensing P.C., Houston

11:00-11:45am *DEFENSE LAWYERS AND THE NATIONAL STAGE: LITIGATION AROUND THE COUNTRY*
John E. Cuttino, DRI President, Gallivan White Boyd, Columbia, South Carolina

11:45-12:00pm TADC Business Meeting

12:30-2:00 PM
TADC Awards Luncheon
For Members, Spouses & Guests

Saturday, September 23, 2017

7:00-9:00am Buffet Breakfast

Saturday free to enjoy Seattle

Sunday, September 24, 2017

Annual Meeting Adjourned

2017 TADC Annual Meeting
September 20-24, 2017
The Fairmont Olympic • Seattle, Washington • 411 University Avenue – Seattle, WA 98101

Pricing & Registration Options

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

Registration for Member Only (one person) $875.00
Registration for Member & Spouse/Guest (2 people) $1,225.00

Spouse/Guest CLE Credit

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

Hotel Reservation Information

For hotel reservations, **CONTACT THE FAIRMONT OLYMPIC DIRECTLY AT 800-441-1414 and reference the TADC 2017 Annual Meeting.** The TADC has secured a block rooms at the FANTASTIC rate of $269 per night. It is **IMPORTANT** that you make your reservation as soon as possible ***as the room block will sell out***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS AUGUST 29, 2017

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) Business days prior (SEPTEMBER 6, 2017) to the meeting date. A $75.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 6, 2017 IS NON-REFUNDABLE.

2017 TADC ANNUAL MEETING REGISTRATION FORM
September 20-24, 2017

***For Hotel Reservations, contact the Fairmont Olympic DIRECTLY at* 800-441-1414**

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

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

☐ **$ 875.00 Member ONLY (One Person)**
☐ **$ 1,225.00 Member & Spouse/Guest (2 people)**
☐ **$ 75.00 Spouse/Guest CLE Credit**
☐ **(*no charge*) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG:_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY:_____ZIP:_____

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

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

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by August 29, 2017. This coincides with the deadline set by the hotel for accommodations.

PAYMENT METHOD:

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

MAKE PAYABLE & MAIL THIS FORM TO: TADC, 400 West 15th Street, Suite 420, Austin, Texas 78701

CHARGE TO: (circle one) Visa Mastercard American Express

_____

Card Number **Expiration Date**

Signature:_____ (as it appears on card)

TADC
400 W. 15th Street
Suite 420
Austin, TX 78701
PH: 512/476-5225
FX: 512/476-5384

(For TADC Office Use Only)
Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

Welcome New Members!

Joseph Ahmad, Ahmad Zavitsanos Anaipakos Alavi & Mensing, P.C., Houston
C. Will Aldrete, Ray, McChristian & Jeans, P.C., El Paso
Ernest Aliseda, Dykema Cox Smith, McAllen
Ernesto Alvarez, Jr., Orgain Bell & Tucker, LLP, Beaumont
Matthew H. Ammerman, Law Office f Matthew H. Ammerman, P.C., Houston
Joe R. Anderson, Burns, Anderson, Jury & Brenner, L.L.P., Austin
Caleb Archer, Smith Osburn Cross, Fort Worth
Joseph Austin, Kemp Smith LLP, El Paso
Tamara D. Baggett, Kilpatrick Townsend & Stockton LLP, Dallas
Gary Bellair, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
David Benjamin, Benjamin, Vana, Martinez & Biggs, LLP, San Antonio
Roberta J. Benson, The Benson Firm PLLC, Austin
Katie Spring Berry, Lasater & Martin, P.C., Highlands Ranch, CO
Stephen W. Bosky, Atlas, Hall & Rodriguez, L.L.P., Austin
Eric K. Bowers, Thompson, Coe, Cousins & Irons, L.L.P., Dallas
Ruth Brewer, Brewer & Lormand, PLLC, Dallas
Jay W. Brown, Winstead PC, Houston
Stuart Brown, Jr., Jackson Walker LLP, Dallas
John G. Browning, Passman & Jones, Dallas
Jennifer Buntz, Germer Beaman & Brown PLLC, Austin
Jason Burris, Fee, Smith, Sharp & Vitullo, L.L.P., Dallas
Nisha Byers, Cooper & Scully, P.C., Dallas
Gordon M. Carver III, Watt Thompson & Henneman LLP, Houston
Mandie M. Cash, Fletcher, Farley, Shipman & Salinas, LLP, Austin
Michael P. Cash, Liskow & Lewis, Houston
Alissa Christopher, Cozen O'Connor, P.C., Dallas
Catherine Clemons, Thompson & Knight LLP, Dallas
Darrell Cockcroft, Thompson, Coe, Cousins & Irons, L.L.P., Austin
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I, Ms. _____ hereby apply for membership in the Association and certify that I am
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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, Commercial Litigation and Personal Injury Defense and do not regularly and consistently represent plaintiffs in personal injury cases. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

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Unforgiven: Opening and Closing – Telling the Story – Curtis Kurhajec – 3 pgs. + 16 pg. PPT

Closing – Curtis Kurhajec – 5 pgs.

No Country for Old Men (Panel) – David Brenner, Moderator; Panelists: Christy Amuny, R. Edward Perkins and Max E. Wright – 14 pg. PPT

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August 11-12, 2017 ~ Inn of the Mountain Gods ~ Ruidoso, NM

PROGRAM AND REGISTRATION

Approved for 6.0 Hours CLE, including 1.5 hours ethics

Program Co-Chairs: Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock, **William R. Anderson**, Law Offices of Daniel G. Acosta, Las Cruces & **Rachel Moreno**, Kemp Smith, LLP, El Paso

Friday, August 11, 2017 ***(All times Mountain Time)***

6:00-8:00pm Opening Reception

Saturday, August 12, 2017

7:00am-9:00am Buffet Breakfast

7:30am Welcome & Introductions
Mike Hendryx, TADC President
Strong Pipkin Bissell & Ledyard, L.L.P, Houston
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock, Co-Chair
William R. Anderson, Law Offices of Daniel G. Acosta, Las Cruces, Co-Chair
Rachel Moreno, Kemp Smith LLP, El Paso, Young Lawyer Co-Chair

7:45-8:15am APPLICATION OF DRONES
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock

8:15-8:45am LEGAL MALPRACTICE (*ethics*)
Tom Ganucheau, Beck|Redden LLP, Houston

8:45-9:45am TX 18.001 COUNTER-AFFIDAVITS ISSUES
Mike H. Bassett, The Bassett Firm, Dallas
Mike Hendryx, Strong Pipkin Bissell & Ledyard, L.L.P, Houston

9:45-10:15am MY EXPERIENCE AS A FEDERAL JUROR, TIPS FOR THE TRIAL LAWYER FROM THE JURY ROOM
Darryl S. Vereen, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso

10:15-10:30am B R E A K

10:30-11:30am LITIGATING LIKE A HOMETOWNER: AN OVERVIEW OF NM & TX
Deena Buchanan, Michael Dean & Dan Hernandez, Ray, McChristian & Jeans, P.C., Albuquerque, Fort Worth, El Paso
William R. Anderson, Law Offices of Daniel G. Acosta, Las Cruces

11:30-12:00pm THE INTERSECTION OF CIVILITY & ETHICS (*ethics*)
The Honorable Stephan M. Vidmar, U.S. Magistrate Judge, Las Cruces

12:00-12:30pm PERFECTING THE RECORD IN TEXAS
Brandy Manning, Long-Weaver, Manning, Antus & Antus LLP, Midland

12:30-1:00pm EXAMINATION OF WITNESSES – TX/NM CONTRASTED
Pat Long-Weaver, Long-Weaver, Manning, Antus & Antus LLP, Midland

1:00-1:30pm AN UPDATE ON THE NEW MEXICO WHISTLEBLOWER ACT
Cody R. Rogers, Miller Stratvert, P.C., Las Cruces

1:30-2:00pm A VIEW FROM THE BENCH – WHAT WORKS AND WHAT DOESN'T (*ethics*)
The Honorable Roy B. Ferguson, 394th District Court of Texas

2:00pm ADJOURN TO ENJOY RUIDOSO

Sunday, August 13, 2017

7:00-9:00am Buffet Breakfast

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Pricing & Registration Options

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

Registration for Member Only (1 person)	$150.00
Registration for Member & Spouse/Guest (2 people)	$175.00

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

DEADLINE FOR HOTEL RESERVATIONS IS
July 10, 2017

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Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (JULY 28, 2017) to the meeting date. A $25.00 Administrative Fee will be deducted from any refund. Any cancellation made after July 28, 2017 IS NON-REFUNDABLE.

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August 11-12, 2017

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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 July 10, 2017. This coincides with the deadline set by the hotel for hotel accommodations.

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- 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.

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Expert Witness Search Request Form

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

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

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Phone: _____ FAX: _____

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

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

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

Areas of expertise: _____

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

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

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

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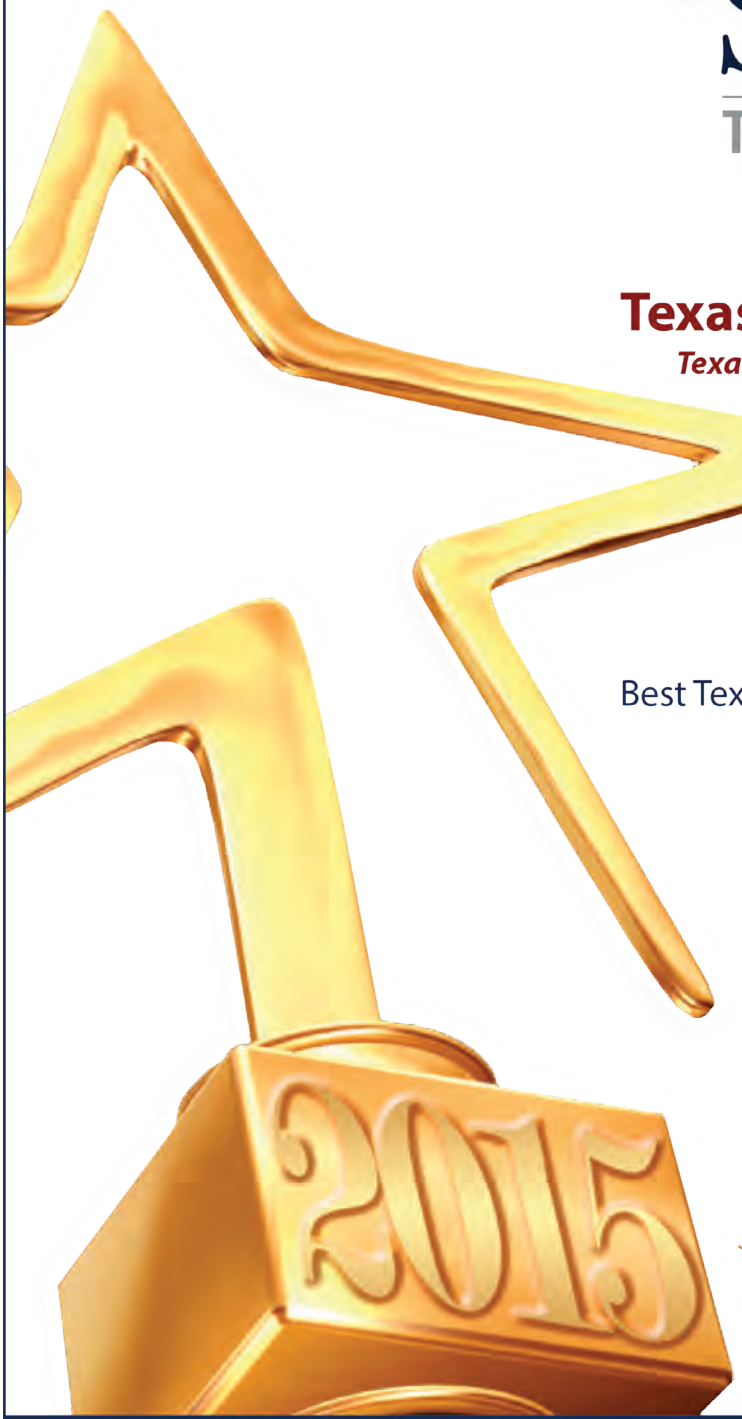

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