TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

FALL/WINTER 2017

IN THIS ISSUE:

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The TADC Magazine is a publication of the Texas Association of Defense Counsel.
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TADC CALENDAR OF EVENTS

January 19, 2018	**TADC Board of Directors Meeting** Austin, Texas
January 31-February 4, 2018	**Winter Seminar** Madeline Hotel – Telluride, Colorado Christy Amuny & Dan Hernandez, Program Co-Chairs Registration materials available at www.tadc.org
February 23-24, 2018	**Trial Academy** Fort Worth, Texas – Tom Vandergriff Civil Courts Building George Haratsis & Doug Rees, Program Co-Chairs Registration materials available at www.tadc.org
May 2-6, 2018	**Spring Meeting** Renaissance Charleston Historic District Hotel – Charleston, South Carolina Mitzi Mayfield & Trey Sandoval, Program Co-Chairs Registration materials available at www.tadc.org after March 1, 2018
July 25-29, 2018	**Summer Seminar** Hotel Argonaut – San Francisco, California Gayla Corley & Robert Ford, Program Co-Chairs Registration materials available at www.tadc.org after May 1, 2018
August 10-11, 2018	**West Texas Seminar** Inn of the Mountain Gods - Ruidoso, New Mexico Bud Grossman, Program Chair Registration materials available at www.tadc.org after June 1, 2018
September 19-23, 2018	**Annual Meeting** La Fonda On the Plaza – Santa Fe, New Mexico Jennie Knapp & Mike Shipman, Program Co-Chairs Registration materials available at www.tadc.org after July 1, 2018

President's Message

By Chantel Crews,
Ainsa Hutson Hester & Crews, L.L.P., El Paso

Welcome to a new year with the Texas Association of Defense Counsel! It is an incredible honor and privilege to serve the TADC and work with you all.

2016-2017 and Mike Hendryx:

2016-2017 was another banner year for the TADC, due in large part to Mike Hendryx and his service as President. Mike worked tirelessly for this organization, and his love for the TADC is always evident. At the Annual Meeting in Seattle in September, Mike received the Exceptional Performance Award from the DRI, was honored by his dear friends and colleagues Don and Judge Cynthia Kent, and even received a fun memento from Safeco Field.

The officers, directors, and members of the TADC further honored Mike's service to our organization with a contribution to "One Nation, One Appeal" to assist those in need, following Hurricanes Harvey and Irma.

Mike, thank you for an incredible year, and for all that you have done and continue to do for the TADC!

The 2017-2018 TADC Year Ahead:
In many respects, I feel like I have "grown up" as an attorney in the TADC. As soon as I was licensed to practice law in Texas, I knew I wanted to be part of the TADC. Thankfully, my first firm supported my enthusiasm, and the rest is history.

My enthusiasm for this organization has not waned. The very best and brightest attorneys I have met in my career have been members of TADC, and I have learned so much from TADC members. There is no doubt that the TADC leads the way in quality legal education for our members, and the TADC's voice is respected by the Texas Legislature. We constantly work to preserve the civil justice system, to improve and enhance our profession, and to create opportunities for those who will carry the torch for this organization into the future.

For me, though, it's the personal aspects of TADC that make this organization so special. The fellowship and friendships you build and enjoy through the TADC last a lifetime. The opportunity to meet with other smart, ethical, and enjoyable lawyers at local meetings and at quarterly seminars adds great value to your professional and personal lives. The camaraderie between us, especially when we work together for the good of our profession, is invaluable.

As we build on the successes and friendships of the past, TADC's future is bright with numerous initiatives this year.

Legislative: The TADC has rightfully garnered a reputation for providing balanced input to lawmakers regarding legislation that affects our members and the civil justice system. The TADC works diligently through our Legislative Committee, special task forces, and our PAC to make the TADC's collective voice heard in the Texas Legislature.

Although this is a non-legislative year, there is still plenty of work to be done getting ready for the next legislative session. Interim charges from the House have already been issued, and

the issues are percolating for the next legislative session include the use of specialty courts, efficient organization and operation of the court system, insurance coverage and gaps and vulnerabilities therein, as well as improving judicial campaigns. The Legislative Committee is reviewing these interim charges, and will be ready to provide timely input on the TADC's position for those issues and more.

This year, Mike Hendryx is leading a task force to continue working on legislation to address issues with §18.001 affidavits; thank you to Mike, Clayton Devin, Roger Hughes, Mike Bassett, David Chamberlain, and Pamela Madere for working on this much needed legislation.

The importance of the TADC's Political Action Committee (PAC) cannot be overstated – your donations to the PAC help the TADC support legislative and judicial candidates who support the Civil Justice system and help the TADC's collective voice on legislative issues be heard. Please make your financial contribution to the TADC PAC today – you definitely want the "I BACK THE PAC" for your TADC nametag at meetings!

Programs: Speaking of meetings, the TADC will again lead the way with exceptional programming at a reasonable cost at wonderful venues! All TADC members should have received the Save the Date card listing the venues for meetings and seminars this year. The cards were also sent home to spouses so that families can mark their calendars for TADC meetings, too. I invite you and family members to join us at the quarterly seminars so you can experience firsthand the fellowship and camaraderie between TADC members:

Winter Seminar: Hotel Madeline, Telluride, Colorado, January 31 – February 3. TADC skiers rejoice! Program co-chairs Christy Amuny and Dan Hernandez have a great seminar planned with plenty of time for you to enjoy the slopes. The Winter Seminar will be held in conjunction with the Louisiana Association of Defense Counsel this year with plenty of networking opportunities and winter fun!

Milton C. Colia Trial Academy: The TADC's biennial Trial Academy, renamed in honor of past President Milton Colia from El Paso, will take place in Fort Worth February 23-24. Trial Academy provides a unique opportunity for young TADC members to hone their trial skills with input from seasoned TADC faculty members and judges. The weekend provides a full year's worth of CLE and the opportunity for young lawyers to actively learn trial skills that will help them throughout their careers. Thank you to co-chairs George Haratsis and Doug Rees for putting this year's Trial Academy together, and thank you to TADC past President Judge Mike Wallach for securing all of the courtrooms at the Vandergriff Civil Courts Building in Fort Worth.

Spring Meeting: Renaissance Charleston Historic District Hotel, Charleston, South Carolina, May 2-5. Enjoy the Southern hospitality, food, and history that make Charleston America's Favorite City and Condé Nast Traveler's No. 1 City in the U.S. and the World for five years running! Program co-chairs Mitzi Mayfield and Trey Sandoval will have an incredible line-up of speakers, and you and your families will have great opportunities to explore and enjoy Charleston.

Summer Seminar: Argonaut Hotel, San Francisco, California, July 25-28. For those of you wanting to escape the oppressive Texas summer heat, San Francisco offers you a very cool (and sometimes cold) respite. Where else can bundle up for sightseeing or a baseball game at the end of July? The program assembled by co-chairs Gayla Corley and Rob Ford will provide outstanding speakers and presentations,

and our host hotel is perfectly located for you and your family to enjoy the major sights of San Francisco.

West Texas Seminar: Inn of the Mountain Gods, Ruidoso, New Mexico, August 10-11. The West Texas Seminar has grown over the past few years thanks to Bud Grossman's excellent planning and programming. Join us in the cool pines of Ruidoso for great CLE, networking with the New Mexico Defense Lawyers Association, and fun summer activities for the entire family.

Annual Meeting and Seminar: La Fonda Hotel, Santa Fe, New Mexico, September 19-22. Our final meeting of the year will take place in the City Different - lovely Santa Fe. Santa Fe is another venue steeped in history and the arts. Santa Fe offers incredible views, world class dining, and that certain *je ne sais quoi* that makes Santa Fe unique. The program planned by co-chairs Jennie Knapp and Mike Shipman will be exceptional and a perfect way to close out a great year of programming.

Publications: The quality of our TADC publications continues to grow – from the great magazine you are reading, to our e-newsletters, to our professional law newsletters, to our social media presence, the Publications Committee works diligently to bring you quality publications pertinent to your practice. We welcome your input *and* your writing skills for publications throughout the year. If you are interested in submitting something for publications, please contact Bobby Walden at the TADC office.

Also, we want to spread the good news about TADC members through our publications. Know a TADC member who has received a special award or who got a great result in a case? Let us know – and please do not be shy about sharing your accomplishments as well!

Membership: Our members are the lifeblood of the TADC. We want to hear from you regarding how the TADC can better meet your needs as a member and stay relevant to you as a legal organization.

The TADC is exploring the formation of substantive law sections, specifically in the areas of Commercial Litigation and Construction Law. While many of our members focus on insurance defense, other members have diversified their practice into other areas of the law. The exploratory committees will be looking at whether having substantive law sections will add further value to TADC membership.

In addition to our quarterly meetings, the TADC will continue to offer and expand local programming around the state. And we don't necessarily have to have a program to meet with each other throughout the year. Your Area Vice Presidents, District Directors, Directors-at-Large, and Young Lawyer Committee members will be planning local events for programing, networking, and camaraderie.

Young Lawyers: There are plenty of opportunities for young lawyers to get involved with TADC, whether it's through local meetings, submitting information for publications, or by speaking and presenting at a TADC seminar. Encourage the young lawyers in your office and those you meet through your practice to get involved with TADC.

YOUR Organization:
Whether you are new to TADC or a seasoned member, the TADC is your organization. We want you to be engaged and involved in this great organization, and experience firsthand the value your TADC membership can provide – not only professionally, but also personally.

Welcome to the 2017-2018 TADC year; let's make it the best year yet

Amicus Curiae Committee News

There have been several significant amicus submissions.

Robert L. Florance, IV (Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P.) filed amicus briefs to support mandamus petitions in *In re State Farm Lloyds*, 520 S.W.3d 525 (Tex. 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 denied the mandamus without prejudice so that the parties and the trial judge may reconsider the rulings in light of the opinion.

Roger W. Hughes (Adams & Graham, L.L.P.) submitted an amicus in support the petition for review in *United Scaffolding v. Levine*, __ S.W.3d __, 2017 WL 2839842 (Tex. June 30, 2017). This was 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 reviewability of a grant of a new trial by direct was not reached. Instead, the Court held this was a premises liability case as a matter of law and it was improper to submit it on a general negligence charge. This is a potentially important construction liability case. USI provided and erected the scaffolding at Valero's plant for renovation work. USI was contractually obligated to erect and inspect it, but was not physically in control of it when Levine fell. The Court held that USI had a legal right to control the scaffolding (even absent physical control) and that made it a premises case requiring a premises liability question. A general negligence question did not submit any part of a premises liability theory. The case is pending motion for rehearing.

Ruth G. Malinas (Plunkett, Griesenbeck & Mimari, Inc.) and Roger W. Hughes (Adams & Graham, L.L.P.) submitted an amicus in support the petition for review in *Columbia Valley Healthcare v. Zamarripa* __ S.W.3d __, 2017 Tex. LEXIS 523 (Tex. June 9, 2017). 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 Supreme Court held Tex. Civ. Prac. & Rem. Code §74.351 required the expert report explain "but for" causation – how but for failing to oppose the transfer the patient would have lived. The report was conclusory because it did not explain how the nurses' opposition could have prevented the transfer. However, the Court remanded to allow the trial court to consider granting an amendment on another negligent act. The case is pending motion for rehearing.

Roger W. 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 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 W. 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.

Roger Hughes (Adams & Graham) has filed 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. Oral argument is set in December 2017.

J. Mitchell Smith (Germer PLLC) filed 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 was whether the trial court erred in excluding evidence that 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 was 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 on 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.

Roger W. Hughes (Adams & Graham, L.L.P.) filed an amicus to support the petition for review in *Medina v. Zuniga*, No. 04-16-0360-CV, 2017 WL 2261767 (Tex. App.—San Antonio, May 24, 2017, pet. filed)(memo. op.). This is a potentially important case concerning sanctions under Tex. R. Civ. P. 215.4(b) for denying a request to admit negligence and proximate cause. The trial court granted a directed verdict on those issues and plaintiff then moved for sanctions. This was an auto/pedestrian collision case; while exiting a parking lot, Medina ran over Zuniga because he did not look in her direction before driving out.

After denying the admissions, Medina admitted in deposition that his interrogatory answers lied about looking both ways. At trial, his lawyer told the jury in opening argument the issue was damages and Zuniga asked too much. After a favorable verdict on damages, the plaintiff moved under Rule 215.4 to recover attorney's and expert witness fees for proving negligence and causation. The trial court awarded $37,000 in sanctions. The San Antonio court held Zuniga did not waive sanction by waiting until after trial because she did not clearly know until trial Medina should not have denied the admission. Whether Medina had a reasonable belief he could prevail was a fact question and the judge did not abuse his discretion to conclude Medina knew he would lose.

TADC has authorized an amicus brief to support the Texas Windstorm Ins. Association's opposition to mandamus relief in *In re City of Dickinson*, Case No. 17-0020; the City seeks to reverse *In re Texas Windstorm Ins. Ass'n*, No. 14-16-677-CV, 2017 WL 7234466 (Tex. App.-Houston [14th Dist.], Dec. 13, 2016, orig. proc.). This is a first-party insurance dispute for windstorm benefits and extra-contractual liability. It presents a potentially important question about the attorney-client privilege for discussions with party employees who may become testifying experts. After TWIA's claims examiner gave an affidavit on causation, the City demanded all communications between TWIA's counsel and the examiner, claiming counsel had "corrected" the affidavit. The trial court held that TRCP 192.3(e) implicitly waived the privilege for communications with a party-employee who was a testifying expert. The Houston Court granted mandamus to vacate the order, finding TRCP 192.3 did not waive the privilege. The Supreme Court has ordered merits briefing.

TADC has authorized an amicus brief to support relator in *In re Cervantes,* No. 13-17-306-CV, 2017 Tex. App. LEXIS 5575 (Tex. App.—Corpus Christi, 6/16/17, orig. proc.), now Case No. 17-0482 in the Supreme Court. This challenges the trial court's denial of discovery into a co-defendant's pretrial settlement to discover how settlement monies were allocated between plaintiffs to an auto collision that killed the wife and severely injured the children. The deceased's parents brought a wrongful death action against the husband/driver and the Defendant truck driver; the deceased's sister sued as next friend of the minors for their injury. Shortly before trial, Plaintiffs accepted a confidential offer from the husband/driver's insurer for a single global sum, the allocation to be determined later. The trial court approved the settlement for a global amount and denied the non-settling defendant's discovery into the allocation. The Corpus Christi court denied mandamus relief, reasoning that public policy favored all settlements; it found no rule required the terms be reduced to writing and no rule required the parties decide on an allocation before trial. It rejected the argument this was an illegal quasi-Mary Carter agreement. The Supreme Court stayed trial and has ordered merits briefs. This is a potentially important case on settlement credits. It may allow plaintiffs to use a global settlement to postpone allocating settlement monies until after trial and deny discovery into unwritten allocation agreements.

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2017 Annual Meeting

The Fairmont Olympic Hotel – September 20-24, 2017 – Seattle, WA

The TADC Annual Meeting was held in Seattle, Washington, September 20-24, 2017 at the historic Fairmont Olympic Hotel. Program Chairs Don and Jarad Kent amassed a program with over 9 hours of CLE including 1.75 hours ethics. Topics ranged from *"Ethics in the Courtroom",* provided by Judges Christi Kennedy and Cynthia Kent to *"Chapter 74: Gems & Pearls"* with Joel Steed.

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Marsha Dykeman, Mike Hendryx, Curry Cooksey, Greg Dykeman, Dave Kirby & Brad Reeves

Rosemary Wright, Don Kent, Max Wright & Keith O'Connell

Jarad Kent & Mark Stradley

Pam Madere, Karen Gann, Michele Smith & KaRynn O'Connell

Doug Rees, Karen & Bud Grossman with Trey Sandoval

Christy Amuny & Jim Hunter with Greg Schuelke

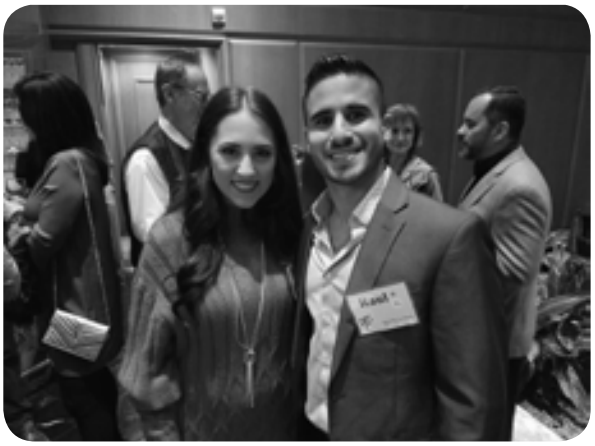
Charlie Cilfone, Peggy Brenner, David Oliveira & Victor Vicinaiz

2017 Annual Meeting

Carol Chavez, Judge Cynthia Kent with Doug & Mo McSwane

Mike Hendryx, Chantel, Claire & Michael Ancell with Jeff Pruett & Gayla Corley

Marissa & Dan Hernandez with Jennie Knapp



Peyton Kampas & Raul De La Garza

JAG Julia Farinas

Hard at work

Joel Steed

2017 Annual Meeting

Awards Luncheon

President Mike Hendryx with Founders Award Recipient Keith O'Connell

President Mike Hendryx with Presidents Award recipients Gayla Corley & Slater Elza

President Mike Hendryx with Young Lawyer Award recipient David Kirby

Past President Clayton Devin with Special Recognition Award recipient Don Kent & Mike Hendryx

Changing of the Guard!
2018 TADC President Chantel Crews takes the reins from 2017 TADC President Mike Hendryx

DRI Southwest Regional Vice President Brian Garcia presents Mike Hendryx with the DRI Exceptional Performance Award

Past President's Message

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

We Had A Little Rain In Houston

You may have heard that Houston recently had a bit of a rainstorm. Even for those of us who experienced it, the statistics are hard to grasp. An estimated half million cars totaled, 50 inches of rain and thousands and thousands of homes flooded. It was an equal opportunity disaster. Rich and poor were equally affected by the flooding.

But out of all of this destruction and pain, we saw something that has been missing in our world of late. Similar to what occurred after the 9-11 attack, everyone came together. Neighbor was helping neighbor, strangers with boats rescued those who were trapped. We were not Republican or Democrat; liberal or conservative; black, white or brown. We were just fellow citizens reaching out to those in need. And the help came from across the state and from beyond. The "Cajun Navy" literally saved hundreds of lives.

I spoke of this at the September Annual Meeting in Seattle and urged those present to consider the meaning of what we had just experienced. We saw unity and selflessness shown by friends and strangers alike. It was a reflection of the basic character of Americans. It stood out, because of late, we have seen pervasive distrust across our society, rising racial bitterness and political dysfunction.

I talked about the unique position we lawyers hold in society. I suggested we could and should help our fellow citizens in a revival of our basic values and a return to civility and fraternity.

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

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

I suggest that as leaders in our communities, we are in the position to start the process of healing and that requires listening to one another. We can demonstrate that talking with one another, rather than talking at one another, can lead to fair-minded discussion. As trial lawyers, we most generally find that there is no simple answer to the issues we face. We generally see that there are two or more views of what occurred, each of which possess a part of the truth. There most always is counter evidence.

Although as trial lawyers we function in an adversarial system, we are hired to bring resolution to our client's problems. And we are charged to work with one another in a civil manner as we solve our client's problems. Civility plays such an important part of our profession that we in Texas put it into words with The Lawyer's Creed. I suggest that as leaders in our communities, we are in a special position to share that approach and help return our fellow citizens to a world where we listen to other view points and find ways to works toward common goals.

Let's work together to build on the many examples of good will and kindness seen during Hurricane Harvey and demonstrate to others the value of listening and recognizing the value of other viewpoints.

Finally, a word of thanks to you for allowing me to serve as your President. It has been a privilege and without question, a high point of my career. The TADC is unique among legal organizations, and I have seen time and again what sets it apart. First, we care about one another as individuals. We willingly take a call from another member, whether he or she is across the street or across the state, and answer questions and assist where we can without thought of gain. Second, we are recognized by government officials, legislators and other lawyers for our efforts to support and protect the civil justice system. We are seen as a resource that can be relied on to give honest advice. Thank you for allowing me to be a part of this great organization.

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Reptile Theory

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I. Introduction

"Reptile theory" is an old strategy with a trendy new name.

It is the most recent incarnation of a trial strategy that seeks to make use of the primal, inherent and often subconscious instincts and/or fears of jurors. Don Keenan, a trial lawyer, and David Ball, a jury consultant with a theatre background, articulated their version of the theory for the plaintiffs' bar in their book *Reptile: the 2009 Manual of the Plaintiff's Revolution*. The theory, rather than focusing on creating sympathy for the plaintiff, emphasizes alleged failures of the defendant to keep the plaintiff and the community, including the jurors, safe.[1] Keenan and Ball claim that the strategy has resulted in more than $6.3 billion in verdicts and settlements.[2]

The origin of the reptile theory is compelling, if questionable. The significance of the strategy is debated amongst litigators. Yet, the common sense of it all implores defense attorneys not to ignore or dismiss the tactics before or during trial.

II. From MacLean's "Triune" Brain and the "Reptilian Complex" to Keenan and Ball's "Reptile"

In the 1960s, neuroscientist Paul MacLean, of Yale Medical School and The National Institute of Mental Health, introduced what he called the "Triune" model of the brain.[3] MacLean suggested that the human brain consists of three parts – reptilian complex (reptile brain), the paleomammalian complex (limbic system), and the neomammalian complex (neocortex).[4] According to MacLean's theory, the reptilian complex or "reptilian brain" is the oldest part of the brain and consists of the brain stem and cerebellum.[5]

In 1990, Dr. MacLean explained his theory in a book intended for specialists, "The Triune Brain in Evolution: Role in Paleocerebral Functions." There have been countless papers and articles published on the subject since that time.

Psychologist Clotaire Rapaille adopted and further developed the theory, ultimately employing the research and resulting tactics in successful national marketing campaigns.[6] Rapaille also suggested that research could be useful in the context of civil litigation.[7] Rapaille explained the theory in a Frontline

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[1] Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* at 1.
[2] http://reptilekeenanball.com
[3] Paul Wojcicki, *The Reptile's In Our Midst – Defending against the "Triune Brain" trial strategy*, https://drivingvalue.com/2015/05/04/the-reptiles-in-our-midst-defending-against-the-triune-brain-trial-strategy, (May 4, 2015)
[4] Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* at 3.
[5] David C. Marshall, *Legal Herpetology Lizards and Snakes in the Courtroom*, 55 No. 4 DRI for Def. 64 (April 2013).
[6] Minton Mayer, Wiseman Ashworth Law Group, *Make Boots Out of that Lizard,* DRI 9/25/13 vol 12 issue 38
[7] *Id.*

interview published online in 2004.[8] According to Rapaille, "[w]hen we are born, we have the reptilian brain… Its part of survival; its breathing, eating, going to the bathroom. But then, in relationship with the mother, we develop the second brain, which is the limbic brain – emotions – …. Then, after 7, we have in place the cortex. The cortex is the last part of the brain that we develop, and that's what we suppose to be 'intelligent.'"[9] Rapaille claims to have been highly successful using this theory in developing marketing campaigns for companies including Nestle and Chrysler, among others.[10]

Then, in 2009, Keenan and Ball co-opted the theory and published the now infamous "Reptile: The 2009 Manual of the Plaintiff's Revolution." They contend that the reptilian brain controls our basic life functions, including breathing and hunger, as well as survival and the "fight or flight" response.[11] The reptilian brain's primary function is self-preservation.[12] They claim that whenever our life functions are threatened, the reptilian brain instinctively overpowers the cognitive and emotional parts of the brain.[13]

While the idea of "Reptile Theory" is alive and well in the legal community, and it functions in other areas, including marketing/advertising and politics, MacLean's Triune brain theory has long been discredited as inaccurate and has fallen out of favor with a majority of comparative neuroscientists.[14]

However, the developing field of neurobiology confirms some of the more practical aspects of MacLean's theory and findings. For example, the human brain tends to be more receptive to, and to better retain, negative information than positive information.[15] This is known as "the negativity bias."[16] Negative information and ideas based on or motivated by fear or anger are more powerful than positive ones. This could account for the reptile effect that Keenan and Ball have been taking credit for since 2009. People tend to retain and be more motivated by the negative rather than the positive. We see this every day in litigation.

Everyone knows that reptile strategy has been widely used in negligence cases, including personal injury, products liability and commercial transportation.[17] In Texas, reptile theory is also often used, with varying degrees of effectiveness, in medical malpractice cases.

The common thread amongst these varied types of litigation is that each category of defendant – healthcare providers, manufacturers, and those who transport goods on public roadways – all have potential impact on every single juror. Everyone purchases goods. Everyone travels on roads. Everyone needs healthcare. These make for ideal characters in the reptile narrative because they not only impact (positively or negatively) the individual jurors and their loved ones, but also the community as a whole.

However, the highly fact-specific nature of healthcare liability claims does not easily lend itself to reptile theory. Juries are able to recognize that healthcare is not one-size-fits-

[8] http://www.pbs.org/wgbh/pages/frontline/shows/persuaders/interviews/rapaille.html
[9] *Id.*
[10] *Id.*
[11] Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 Nev. L.J. 605, 614.
[12] *Id*.
[13] *Id*.
[14] Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* at 2.
[15] Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 Nev. L.J. 605, 606.
[16] Id. at 606, 618.
[17] *Id*. at 2.

all and that it requires judgment particular to the patient and their circumstances, in contrast to the arguably universal best practices claimed to govern manufacturing and driving commercial vehicles. Yet, there is a big push in Texas, and nationally, to let the reptile loose in healthcare liability claims in order to maximize verdicts in the face of limits on non-economic damages.

III. To Evoke a Juror's Reptile Brain…

A. Generate Fear of the Defendant From the Beginning

Ultimately, the goal of the strategy is to convince the jury to (1) go beyond the level of harm or damages actually caused; (2) consider the maximum potential harm the conduct could have caused within the community, rather than the actual harm caused; and (3) believe the defendant has endangered the community by its conduct and unwillingness to accept responsibility.[18]

The emphasis shifts from the individual to the community, which gives the jurors the impression they are protecting the community's safety, a more honorable stance than just protecting oneself.[19] The thought is that jurors' survival instincts will override logic and reason in order to protect themselves, as well as their community.

B. Replace the Standard of Care

Reptile attorneys, in addition to gathering evidence centered on the themes of safety and danger (policies, signage, handbooks, training materials, etc.), elicit testimony designed to equate safety with the standard of care.

The appropriate standard of care in any professional liability case is reasonableness and ordinary care, not strict liability.[20] A physician in Texas, for example, is required to render care as would any reasonably prudent physician under the same or similar circumstances.[21] Whether the care at issue is "reasonable" is most often dependent on expert testimony. Note that in contrast, in transportation claims for example, the standard of care depends far more on rules and regulations than experts' opinions. Reptile theory attempts to replace the reasonableness standard of care, which is intended to be established by qualified expert testimony, with the safest care.

However, Keenan and Ball argue that the standard of care, which requires "prudent" care, actually elevates the standard of care above ordinary.[22] The "only allowable choice is the safest available choice."[23] This is essentially a strict liability standard. It "makes no difference if the defendant met *other* standards of care. In medicine, *every* choice must meet the risk/benefit requirement: 'No unnecessary risk,' which translates to 'safest available choice'" in reptile-speak.[24]

C. Feed the Reptile Before and During Trial

Reptile theory is put into action throughout the course of litigation, including in written discovery, depositions of parties, fact witnesses and experts, as well as during

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[18] David C. Marshall, *Legal Herpetology Lizards and Snakes in the Courtroom*, 55 No. 4 DRI for Def. 64 (April 2013).
[19] Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* at 5.
[20] *Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007).
[21] *Chandler v. Singh*, 129 S.W.3d 184, 188 (Tex.App.—Texarkana 2004, no pet.).
[22] Keenan & Ball, *Reptile: the 2009 Manual of the Plaintiff's Revolution,* at 63.
[23] *Id*. at 64.
[24] *Id.* at 63.

trial in voir dire and opening statement.[25] Nothing is safe from the reptile.

The deposition is the foundation of the reptile strategy.[26] The reptile attorney must establish with the witness that there was a "safety rule" in place to protect the community from the danger the particular defendant(s) posed, regardless of any codified or common-law rule. The reptile attorney will attempt to lead the defendant into an admission that a safety rule existed.[27] They begin by asking a series of general safety and danger questions, ostensibly about general safety principles. Some examples include:

- Safety is your top priority, correct?
- You have an obligation to ensure safety, right?
- It would be wrong to needlessly endanger someone, right?

These types of propositions are difficult for the witness to deny without adversely impacting their credibility. The result is that the witness agrees that safety is important and danger should be avoided.[28]

Next, the reptile attorney must link the safety and danger to specific conduct.[29] Examples of questions in a medical malpractice case include:

- If a patient's status changes, **the safest thing to do** is call a physician immediately, right?
- If a patient is having chest pain and shortness of breath, **the best way to ensure the patient's safety** is to send them to the ER immediately, correct?
- Documentation in the medical chart must be thorough, **otherwise a patient could be put in danger**, right?[30]

Agreements to these questions force the witness into an inflexible stance on safety issues and lay the foundation to introduce specific facts.[31] There are no take-backs to these types of questions.

The reptile attorney then presents facts specific to the case that appear to contradict the previous agreements regarding safety and danger, which inevitably, and irreversibly, results in admissions of fault.[32] Examples include:

- Failing to call a physician at 4 p.m. was a safety rule violation, correct?
- It exposed my client to unnecessary risk and harm, right?[33]

By trial, the defense is contending with a stack of admissions about safety rules and violations which will be used in an effort to replace the reasonableness standard of care in the jurors' minds.

Voir dire is another opportunity to indirectly elicit similar admissions from the jury. For example:

- Who here believes they have the right to be safe when they are in the hospital?

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[25] Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* at 1.
[26] Bill Kanasky Jr., Ph.D & Ryan A. Malphurs, Ph.D., *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, at 3, http://www.iadclaw.org/assets/1/7/Reptile_Theory_2015_Trial_Academy.pdf.
[27] *Id.* at 5-6.
[28] *Id*. at 6.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 9.
[33] *Id*.

The jury is ready to hear about safety and danger from the very beginning of jury selection, long before they see or hear a single piece of evidence. Perhaps the most twisted result of letting the reptile slither into jury selection is that the jurors themselves start out feeling as if they must agree with the general safety rules they will hear or they will become the threat to their community.

Then the reptile attorney uses opening argument to lay out the witnesses' admissions for the jurors' reptile brains, which they have just woken in voir dire.

IV. Conclusion - Snake Charming Before and At Trial

Every litigator, whether on behalf of a plaintiff or a defendant, seeks to capitalize on every opportunity to win over the jury. The "science" of the triune brain, though colorful, has not withstood the test of time. However, given recent findings in the field of neurobiology, the tactic of stoking the fear and/or anger of the jurors, rather than seeking their sympathy, whether you call it "reptile theory" or "negativity bias," should not be dismissed.

Anticipating and recognizing reptile-style discovery and deposition examinations is critical to minimizing the effectiveness of the strategy in the courtroom.

As always, the defense should make timely and appropriate objections to broad discovery requests, particularly those that seek policies and procedures, handbooks, training documents, advertisments, etc.

Defense litigators will expect that any good plaintiff's attorney will attempt to use every apparent directive that was not followed to prove a violation of the standard of care, presented as a reasonable interpretation of the policies or procedures. That is nothing new. However, the reptile strategy, when used as designed and intended, goes a step beyond seeking to establish the typical "violation of a policy." The reptile attorney will also extract every mention of safety or danger in the policies, on the website, and even in personnel files, for example, to create a deposition cross-examination aimed at completing replacing the reasonableness standard of care with the most strict language, often isolated words or phrases taken wildly out of context.

Fact and expert witnesses can and should be prepared to recognize the reptile-style examination questions discussed above and to use caution in agreeing to anything related to safety or rules, whether general and hypothetical questions or misleading excerpts of documents.

In trial, the defense can consider motions in limine on improperly characterizing the standard of care, as well as irrelevant evidence regarding safety and danger that is intended only to prejudice the jury by awakening the reptile.

While there are no guarantees in litigation, the best defense against the reptile is preparation. Research opposing counsel to find out if they use the reptile techniques. Know the jurisdiction and potential jurors, particularly whether the demographic might be more susceptible than average to fear and anger. Consider jurors as part of a community and understand their shared history. Be vigilant in objecting and responding to discovery where the known or suspected endgame is to awaken the fear and primal instincts of the jury. Prepare witnesses to recognize the formula of the reptile cross-examination and to reframe in terms of reality and reasonableness, rather than strict liability.

To recognize and understand the particular snake in a given case – what will the jury fear, not who will the jury feel sorry for – is to be able to charm the snake.

TADC Legislative Update

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We don't usually begin the legislative update with talk about the weather, but Hurricane Harvey's destructive impact on the Texas Gulf Coast has transformed the state's economic and political landscape in ways that could not be predicted three months ago.

Houston, Beaumont, and other Texas cities face years of painful and costly rebuilding with little money to do it with. The staggering cost of insurance claims from the storm will almost certainly trigger premium increases that will hit all Texas property owners between now and the next legislative session. The potentially catastrophic loss of property value in the state's largest county will have as yet unknown effects on the school finance system, which is heavily dependent on rising property values. And the storm's long-term impact on the state budget and tax revenues will not be fully known for months.

From a political perspective, the response to Harvey thrust three figures into the spotlight: Governor Greg Abbott, Houston Mayor Sylvester Turner, and Harris County Judge Ed Emmett. By all accounts, their performances during and in the aftermath of the storm have been praiseworthy. But as the City of Houston and Harris County reckon up the public costs of the disaster, they are bound to come into conflict about the extent of state responsibility for paying for them. Governor Abbott has already provided $50 million in state funds to meet immediate needs, but no one has any illusions that a lot more will be needed in the months and years ahead.

Part of the political debate will center on the use of the state's Economic Stabilization Fund, or "Rainy Day Fund," to assist local governments in rebuilding. More than $10 billion currently sits idle in the fund, but getting it out requires a supermajority of the Texas Legislature. It would seem that a storm of Harvey's magnitude would meet the definition of a "rainy day," but not to hardline conservatives who see virtually any use of the fund as fiscally irresponsible. One might ask whether putting billions of taxpayer dollars in a coffee can and burying it in the backyard is fiscally responsible, but there is likely to be a bloody fight in the legislature over whether to dig up the can and part with some of the money for flood control projects in Harris County. In any event, issues related to Harvey will dominate the interim and the 2019 session. We shall see.

The political fallout from the storm remains a developing story, but one thing seems clear: the possibility that Lt. Governor Dan Patrick might challenge Governor Abbott in next March's GOP primary seems to have vanished. The Lt. Governor emerged from this summer's special session as perhaps the most divisive politician we have seen in Texas politics in a very long time, and Governor Abbott's steady performance during the storm presents a powerful contrast in style and substance. The

Governor also retooled his executive staff in the aftermath of the special session, bringing in legislative veterans such as former Rick Perry aide Luis Saenz, who replaces Daniel Hodge as chief of staff, former Senate Parliamentarian Walter Fisher, and former Sen. Tommy Williams. These and other changes are likely to improve Governor Abbott's relations with the legislature.

One thing that the Governor won't have to do next session is repair his frayed relationship with House Speaker Joe Straus. Speaker Straus's steadfast opposition to the so-called "bathroom bill" and his differences with the Governor and Lt. Governor on property tax "reform" led by some hard conservatives in the House GOP caucus to call for his removal during the special session, but Straus pre-empted the opposition by announcing that he will retire from the House at the end of his current term. Moreover, since the session ended, the caucus has held two meetings to discuss election of the Speaker by the majority caucus, rather than by a vote of the whole House. This plan would presumably nullify the ability of a Speaker candidate to put together a bipartisan coalition, thus making the Texas House exactly like the U.S. Congress. Thus far, only one House member has actually filed for election as Speaker, Rep. Phil King (R-Weatherford). Others are known to be interested, but in the interest of accuracy, we won't speculate about that until they take more concrete actions.

With only a few months to go until the March primary, it appears that we will see an unusually high number of contested primary races, especially on the GOP side. Already a number of prominent incumbents have decided not to run for re-election, including Rep. Larry Phillips (R-Sherman), Rep. Larry Gonzales (R-Round Rock), Rep. Cindy Burkett (R-Sunnyvale), Rep. Byron Cook (R-Corsicana), and Rep. Jodie Laubenberg (R-Parker). We expect more to follow. Several more Straus lieutenants have announced primary opposition, including Rep. Charlie Geren (R-Fort Worth), Rep. Wayne Faircloth (R-Galveston), Rep. Dan Flynn (R-Canton), Rep. Giovanni Capriglione (R-Southlake), Rep. Sarah Davis (R-Houston), and Rep. Lyle Larson (R-San Antonio). Stay tuned for additions to this list as well.

On the Senate side, Sen. Van Taylor (R-Plano) departs to run for Congress, leaving an open seat in Senate District 8. Angela Paxton, wife of Attorney General Ken Paxton, and Phillip Huffines, brother of Sen. Don Huffines (D-Dallas), have announced for this seat. Longtime incumbent Sen. Craig Estes (R-Wichita Falls) faces a challenge by hard conservative Rep. Pat Fallon (R-Frisco) in the increasingly suburban District 30. In District 2, incumbent Sen. Bob Hall (R-Edgewood) draws Rep. Cindy Burkett. Incumbent Sen. Kel Seliger (R-Amarillo) has two opponents from the right, Amarillo restaurant owner Victor Leal and former Midland Mayor Mike Canon. Like the Democrats of old, the GOP is now enjoying the fruits of one-party rule: ideological warfare.

2018 will also be a crucial year for judicial elections. The appointment of Justice Don Willett to the Fifth Circuit has the potential to create a real mess in 2018. It does not appear likely that Justice Willett's confirmation will occur before late spring of next year, meaning that Justice Willett will be on the 2018 primary ballot. It is unclear at this point whether, and to what extent, Justice Willett can campaign for the Texas Supreme Court while under Senate consideration. Former State Rep. Rick Green (R-Dripping Springs), who has twice lost primary bids for the Court and has no judicial, trial, or appellate experience whatsoever, has announced that he will file for Willett's seat, setting up a contested primary in which the incumbent may not be able to run a full-out

campaign. If Justice Willett wins the primary and is subsequently confirmed prior to about August 24, it will create a vacancy on the ballot that may be filled by an election of the members of the State Republican Executive Committee. Rick Green is already soliciting SREC members for that vacancy, and others will likely do that as well. If confirmation does not occur until after that date, Justice Willett will appear on the November ballot. If he is confirmed between that date and the November election, he would resign from the Court, but still be on the ballot. If elected, the Governor would appoint Justice Willett's successor in the ordinary course. Whatever happens, the odd timing of Justice Willett's appointment opens up the very real possibility of a wildcard candidate for the Court on the GOP side. Two other members of the Court will seek re-election as well, Justices Jeff Brown and John Devine. So far, we do not know of any primary opposition for them, so stay tuned.

About half of the 40 courts of appeals justices are on the ballot in 2018, and we already know that many will be contested. Much of the focus will be on the Corpus Christi and San Antonio courts, which have seen partisan sweeps in the past few election cycles. In Corpus Christi, the open seat for Chief Justice already has three candidates, Democrats Dori Contreras, who currently serves on the Court, and Ray Thomas, and Republican (TADC member) Ernest Aliseda, a McAllen lawyer and member of the University of Texas Board of Regents. In Place 4, incumbent Justice Nelda Rodriguez has drawn one Democrat, Rudy Delgado, and one Republican, former District Judge Jaime Tijerina. Thus far, Place 2 incumbent Justice Nora Longoria and Place 5 incumbent Justice Gina Benavides have no opposition.

On the San Antonio Court, five seats are up for grabs and all are contested. Incumbent Justices Marialyn Barnard (Place 2), Pat Alvarez (Place 3), Luz Elena Chapa (Place 3), and Rebecca Martinez (Place 7) all have general election opponents. San Antonio appellate lawyer Beth Watkins seeks to unseat Justice Barnard; former Rick Perry appointee to the Fourth Court Jason Pulliam will challenge Justice Alvarez; criminal lawyer Patrick Ballantyne will face Justice Chapa; and appellate lawyer Shane Stolarczyk will try to take down Justice Martinez. Finally, in the open seat for Place 5, former Fourth Court Justice Rebecca Simmons will potentially face off against Bexar County Court-at-Law Judge Liza Rodriguez. Justice Barnard is currently the only Republican on the court, so 2018 will see a concerted GOP effort to regain a majority.

As the December 11 filing deadline approaches, we will continue to update you on changes to the primary ballot. We are also awaiting interim committee assignments (for issues other than those related to Hurricane Harvey), which we do not expect for a few more weeks.

TADC PAC Report

by Pamela M. Madere, Trustee Chairman
Coats Rose, P.C., Austin

"I BACK THE PAC!"

Step foot in downtown Austin when the state legislature is in session and you will feel the energy in the air. It is not unlike arriving in Las Vegas or Washington D.C. - you can feel the movement. Restaurants are full, deals are being made, and everyone is running around trying to negotiate their position with limited time and shifting allegiances. The TADC is an integral part of each legislative session, being called upon by legislators to provide legal and practical advice, bill analysis and testimony on a variety of legislation that impacts our practices and the justice system as a whole.

TADC's members dedicate an incredible amount of time to preparing for and working with the legislature. The influence of the TADC is not always in the headlines - influencing decisions behind the scenes is a strategic and important aspect of TADC's successful legislative advocacy. Intervening to prevent or modify legislation that interferes with the jury system and access to justice and "fixing" existing legislation are just as important as proposing new legislation. The TADC is respected and has influence on both sides of the political aisle and is the only significant independent voice that advocates for the independence of the legal profession. The PAC is a powerful vehicle to ensure that the TADC is at the table on issues of importance to its members.

The success of TADC's PAC is evident in the 50 years of involvement the TADC has had at the legislature. The TADC has had substantial impact on court reorganization, indemnification and additional insured provisions, paid or incurred issues, loser pay proposals, expedited trials, barratry, eminent domain and tort reform, just to name a few of the pressing issues that impacted the legal profession over the last couple of decades.

It is a unique time in Texas politics, and our presence at the legislature is essential. Your PAC contributions are instrumental in shaping future legislation. We welcome PAC contributions of all amounts. As a special thank you for a contribution of $250.00 or more, we will send you a TADC battery brick, so that you can keep your phone charged wherever you are. Please also let us know if you would like to become more active in the TADC as we gear up for the next legislative session. The TADC will benefit from your experience and relationships in your community. We urge you to join the PAC!

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Texas Association of Defense Counsel-PAC

The Political Action Committee of the Texas Association of Defense Counsel ~ TADC-PAC

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2017 Summer Seminar

Ritz-Carlton Grande Lakes ~ July 12-16, 2017 ~ Orlando, FL

The TADC held its 2017 Summer Seminar in fabulous Orlando, Florida! The Ritz-Carlton Grande Lakes provided the perfect venue for this family friendly CLE. Program Chairs Elizabeth O'Connell Perez and Keith O'Connell assembled a top-notch program including Lewis Sifford speaking on *"A Meaningful Life in the Law"* as well as topics ranging from Appellate Issues for the Trial Lawyer to the always favorite Supreme Court Upda

.

Kate, Greg & Elizabeth Perez

Greg Curry, Lewin Plunkett & Dan Mabry

Keaton, Doug, Reagan & Gina Rees

Lewis Sifford

Hard at work!

2017 Summer Seminar

The Troy Okruhlik family

Abby, Larry & Matthew Doss

Gail, Mike & Caroline Hendryx

Haley Watts, Shirley Curry, Reese Curry,
Kristen Watts, & Austin Watts

Taylor Burkhalter, Lewin Plunkett, Caroline Hendryx,
Canda Plunkett, Marsha & Dan Mabry with
Gail & Mike Hendryx



by Slater C. Elza, Jennie C. Knapp & Caitlyn Lindsey
Underwood Law Firm, Amarillo

Deposing Experts Like A Pro

Everyone has heard about the great litigators and their talent for cross-examination. While talent is certainly important, cross examining experts also requires a great deal of practice and preparation. As more and more cases become decided by experts, the ability to depose an expert like a pro is vital.

This article is a collection of tips, ideas, and thoughts on how to effectively handle opposing experts. These tips have been collected from articles, blogs, websites and experience. While every case is different, and each expert is unique, there are many common themes and threads that can be useful with any sort of expert.

I. Always Depose the Expert – Right?

Although it has become commonplace to depose almost every designated expert in a given case, this practice is viewed by some as overkill. As litigation counsel, it is important to assess each expert in each case to decide what benefit the client receives if expensive depositions are taken of every expert.

A. Federal Lawsuits

1. Retained Experts

Federal Rule of Civil Procedure 26(a)(2)(B) sets forth a strict standard for disclosures related to expert witness:

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[1] SLATER C. ELZA

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JENNIE C. KNAPP

Jennie C. Knapp is a litigator and appellate attorney, serving as counsel to many business and governmental entity clients in a variety of commercial disputes. She has served as lead counsel on multiple appeals in the intermediate Texas appellate courts, Texas Supreme Court, and Fifth Circuit. Jennie serves as Young Lawyer Chair for the Texas Association of Defense Counsel and is a current Director for the Amarillo Area Bar Association. She also serves on the State Bar Appellate Section Committee and State Bar Law Practice Management Committee.

CAITLYN LINDSEY

Caitlyn Lindsey's practice is focused primarily on public education law and employment litigation. She attended Texas A&M University in College Station where she received a Bachelor of Business Administration in Business Management in 2014. Caitlyn attended Baylor Law School and graduated with a Doctor of Jurisprudence in April 2017, and is currently awaiting Bar results.

- **All Opinions:** a complete statement of all opinions the witness will express and the basis and reasons for them
- **Full Factual Basis**: the facts or data considered by the witness in forming them.
- **All Exhibits**: any exhibits that will be used to summarize or support them.
- **Qualifications and Publications**: the witness's qualifications, including a list of all publications authored in the previous ten years
- **Prior Testimony**: a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
- **Compensation**: a statement of the compensation to be paid for the study and testimony in the case.

In addition to requiring detailed, mandatory reports from retained experts, this rule also provides a basis for tactically determining whether to take the deposition at all.

Without a deposition, the party sponsoring an expert is restricted to the substance of the expert's required report. Taking the deposition risks allowing the expert to expand his opinions beyond those contained in the report and may very well cure the omission of such material in the Rule 26 report. Rule 26(e)(1)(a) requires supplementation of discovery, "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process…" Surely the disclosure of new and different information in a deposition makes such information "otherwise known" to the adverse party. Although some judges protect litigants if such "supplementation" takes place after the disclosure deadline, excluding such information at trial is more difficult if the expert is deposed.

Accordingly, it is worth considering whether not deposing the expert benefits the client. Relying on the mandatory report prohibits the expert from setting forth additional facts and opinions in their trial testimony since facts and opinions not in the required report are presumptively excluded. Choosing not to depose the expert has the added tactical advantage of maintaining the element of surprise in cross-examination at trial and inhibits the witness's ability to prepare his testimony based on the deposition experience.

Often, litigators believe an opposing expert should be deposed in order to obtain the expert's file at the deposition, but these materials are available even if the expert is not deposed. A request for production under Federal Rule of Civil Procedure 34 for items in the responding party's possession, custody or control requires production expert's file. In addition, litigants may also exercise the subpoena power under Federal Rule of Civil Procedure 45 as a separate avenue for requesting an expert's file materials.

2. Non-Retained Experts

Non-retained experts present their own set of issues since they are not required to prepare reports but are still allowed to testify. Federal Rule of Civil Procedure 26(a)(2)(C) only requires the disclosure of:

- the subject matter on which the witness is expected to present evidence; and
- a summary of the facts and opinions to which the witness is expected to testify.

Because Rule 26(a)(2)(C) requires only a summary—and no detail of credentials—it will never be as comprehensive as an expert report. Further, these disclosures are typically prepared by counsel rather than the

witness. Thus, there is an increased need to depose non-retained experts.

On the other hand, some of the same benefits of not deposing retained experts hold true for non-retained experts. The federal rules prevent non-retained experts from testifying to topics not disclosed in the pre-trial disclosures or elsewhere in discovery. Surprise during cross-examination is, of course, another benefit to consider. Counsel must determine whether these benefits tip the balance in favor of no deposition.

B. Texas Lawsuits

State court expert disclosure requirements are not as thorough as their federal counterparts. The Texas Rules of Civil Procedure do not require a party to produce an expert report upon disclosing their testifying experts. Litigation counsel should consider adding language mimicking the federal expert disclosure rules to any scheduling order. Under Texas Rule of Civil Procedure 194.2(f), opposing parties are entitled to the following information:

- the expert's name, address, and telephone number;
- the subject matter on which the expert will testify;
- the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them
- all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
- the expert's current resume and bibliography.

Notably, the Texas rule requires only that the lawyer give the "general substance" of the expert's opinions and a "brief summary" for the basis of those opinions. While the goal of the rule was probably full disclosure of the substance of and basis for the expert's mental impressions, a comprehensive report written by the expert is not required unless ordered by the court. Without a comprehensive report, it is much more difficult to determine whether to depose an opposing expert in state court.

One concern is that the trial judge will not hold a testifying expert to the facts and opinions set forth in their written report and may let the expert expand on such opinions at trial. As discussed above, taking a lengthy deposition that covers all types of topics—whether included in the report or not—will certainly lead to an expansion at trial of those opinions contained in the original report. One school of thought that it is, in fact, easier to restrict an expert's opinion through use of a brief written report as opposed to a lengthy deposition.

II. Successfully Deposing The Adverse Expert

Once the decision is made to depose an opposing expert, it is important to identify the purpose(s) for doing so. Examples of legitimate objectives include:

- Pinning down the expert's opinions, and the basis for such opinions;
- Discovering weaknesses in the client's case;
- Laying the foundation for a *Daubert/Robinson* challenge;
- Laying the groundwork for trial; and
- Assessing the effectiveness of the expert as a testifying witness.

If information is needed beyond that provided by the expert's report and counsel's disclosure, the deposition should be used as a

tool to better understand both sides of the case. Leaving an expert deposition with anything less than a full understanding of these issues is a failure.

A. Preparation

Preparation is the key. In this day and age, many expert witnesses are professional testifiers. They have been coached on every possible trick to avoid being tied down, and they know how to provide the least amount of information with the greatest amount of "wiggle room." So, it is simply not a successful approach to walk into a deposition with such foundational questions as (1) "what are your opinions?" and (2) "what is the basis for those opinions?" In this scenario, the client is better served by relying strictly on the expert report and/or designation.

The purpose of the deposition should drive preparation. Know up front whether the deposition will be used to enhance cross examination at trial or whether the deposition is an opportunity to better position the case for settlement. If the belief is that the matter will proceed to trial, it is not uncommon to hold back certain parts of the cross-examination to maintain the element of surprise. If trying to achieve a favorable settlement, it obviously makes sense to be more aggressive during the deposition.

One of the most valuable means of preparing to depose an expert is working with a party's own experts to address the proper issues to cover with the opposing expert. The defense experts can assist in preparing for the opposing expert's deposition, answer questions about subject matter, point out weaknesses in the opposing expert's approach, identify areas for questioning, and recommend secondary resources to assist litigation counsel in fully understanding deposition topics.

Counsel should also fully and completely learn the law governing the case. Knowing the elements of the other party's claims helps tailor questions to the expert and attack the opposing party's claims. Without understanding the governing law, it is difficult if not impossible to elicit favorable testimony from an opposing expert.

In addition to a thorough understanding of the applicable law, it is crucial that counsel taking the deposition know the facts of the case better than the expert. While attorneys will rarely have the education, experience, and knowledge on the expert's given topic, they can–and should–have a detailed understanding of the facts of the particular case. Chances are that the expert has not studied the discovery responses, pleadings, and deposition transcripts as thoroughly as the attorney or may have been provided only with summaries. Therefore, an in-depth understanding of the facts of the case allows effective cross examination by questioning the expert about facts he does not know or that contradict his position.

Everything needed to depose an expert is likely not already in the litigation file. Many professional testifiers have their own websites advertising their services. These advertisements often list an expert's "area of expertise." Additionally, experts register with expert witness services, providing access to advertising information on what they consider themselves to be qualified to opine on. This is often prime fodder for cross-examination. Can one person really be an expert on every topic he advertises?

More general internet searches can lead to books, articles, verdict reports, credentials, professional information, prior litigation experience, speaking engagements, website articles, advertising "puffery," disciplinary records, news, discussion board posts, public records, court opinions, *Daubert* tracker, prior transcripts, and video. Although there are all kinds of useful information to uncover, one of the most valuable categories includes information

inconsistent with the expert's testimony or positions in the current matter.

Finally, read as many of the expert's prior depositions as possible. Professional witnesses have many deposition transcripts which provide a deeper understanding of how the expert testifies and, possibly, what the expert's testimony might be in your case. While experts try to provide consistent testimony, there will also undoubtedly be inconsistencies to find and exploit.

B. Deposing With *Daubert* In Mind

Conventional wisdom on deposing experts insists on tying down the expert's opinions, but a successful *Daubert/Robinson* challenge requires more than that. Disagreeing with an expert's conclusions is insufficient to disqualify him or her. Exploring their methodology in arriving at those conclusions provides the ammunition to challenge the expert's testimony. Experts can be attacked in three primary areas:

- Credentials and qualifications;
- Methodology in arriving at opinion; and
- Conclusions or opinions themselves.

Rather than challenge all three areas, consider focusing on a single area. Simultaneous attacks may come at the expense of attorney credibility. Worse, they may bolster the expert by allowing him to highlight certain areas of expertise while weakening the attack on the meaningful issue.

1. Credentials/ Qualifications

Most experts will be, at first blush, qualified to give their opinions. It is, therefore, advisable to analyze the expert's opinions to determine which he or she may be "reaching" for. Ask questions that limit the expert to one particular field of study. For example, if deposing a neurologist, have him testify that he is not an emergency room physician, not a surgeon, not a physician's assistant, etc. This helps if the expert later tries to state an opinion as to a standard of care for which the expert is not qualified.

2. Methodology

Courts have offered a number of factors to explore when determining the reliability of an expert's methodology. For scientific and technical experts, counsel's questions should focus on testing of the theory, error rate for methods used, publication of findings, and whether other professionals endorse the methodology used. This requires a total examination of each step of the expert's analysis to assist in determining whether the methodology used is reliable.

One focus of exploring an expert's methodology is to understand the data on which the expert's conclusions are based:

- Were they provided all of the data;
- How was data provided to them;
- Was certain data withheld;
- Was certain data discounted;
- Does their report address different factual scenarios/ data from different witnesses;
- Did they make a determination of credibility of data or witnesses;
- Did they attempt to replicate data; and
- What are the differences in the data reviewed by your own expert.

This is where preparation by the deposing attorney is vital. The attorney should know the facts and available data well enough to intelligently probe the expert's methodology. Knowledge of the case facts and data provide the flexibility to match the expert's testimony; otherwise, a valuable opportunity

to succeed on a *Daubert/Robinson* challenge may be lost.

Make sure to explore how the expert reached his conclusions. Did they rely on scientific articles? If so, determine how those experiments or data may differ from the facts of the instant case. If the opinion is based on a new experiment, there is room to cross examine the expert because the methodology or technique has not been tested, tried, or peer reviewed.

3. Conclusions/Opinions

The conclusions themselves can also be attacked, and defense experts can help tremendously in this area. Highlight for the opposing expert any articles or studies that disagree with his opinions. Ask hypotheticals that change the fact pattern and if and how they change his opinion.

Some other useful questions to ask are: [2]

- What assumptions did you make in arriving at your opinions?
- Did you make any credibility determinations in arriving at your opinion?
- What do you see as your purpose/function in this case?
- If someone disagreed with your opinion in this matter, what steps would you go through to analyze and assess the opinion to identify any error(s)?
- Do you have any criticisms of my experts in terms of their methodology?
- Does the report contain your final opinions?
- Are you prepared to give your final opinions?
- Are you waiting on additional information?
- Has all necessary work been completed prior to deposition?
- What is your history with the retaining firm?
- What conversations have you had with counsel and client?
- Are there any limitations put on your work?
- How was the report prepared?
- Who else has worked on the matter?

C. Quality v. Quantity

Litigators often fall victim to the "I'm-the-smartest-person-in-the-room" mentality and feel compelled to prove it to anyone (any juror) who may be listening. Remember that a long cross-examination provides a well-trained expert the welcome opportunity to review, repeat, and reestablish his primary points. A long cross-examination also greatly enhances the risk that solid points get lost. Do not give the expert unnecessary opportunities to demonstrate his expertise. Instead, exploit the expert's weaknesses and wrap up the cross examination.

D. Make The Expert Your Witness

Almost every expert will have at least some opinions that support his opponent's case. Hearing these areas of support from the opposing expert will have far more impact on a jury than hearing it from a friendly expert. Begin the expert examination with these areas of common ground. Also, elicit possible ulterior explanations of the case from the expert.

Conclusion

In conclusion, as litigators it is important to remember and acknowledge the importance of experts in all cases. In this day and age, approaching an opponent's expert witnesses can be the key to success or failure in a case. Successful expert depositions require more preparation than talent. Remembering that, and spending the hours necessary to prepare, make all the difference in the world.

[2] Neckers and Millar, The Opponent's Expert: Preparing for the Most Important Deposition in the Case.

2017 West Texas Seminar

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

The TADC held its 7th installment, 5th held jointly with New Mexico, of the 2017 West Texas Seminar in nice and cool Ruidoso, New Mexico on August 11-12. The Inn of the Mountain Gods provided the perfect venue for this family friendly CLE. Program Chairs Bud Grossman and Rachel Moreno from TADC and Bill Anderson from NMDLA assembled a top-notch program including lawyers and judges from both states. With reciprocity well underway, this seminar needs to be on your radar if you hold both a Texas and New Mexico Law License and if not, the weather is outstanding for a nice cool, inexpensive August CLE.

Deena Buchanan, Tom Ganucheau, Cody Rogers, Bud Grossman, Bill Anderson & Mike Hendryx

Judge Roy Ferguson

Rachel Moreno, with Dan & Marissa Hernandez

2017 West Texas Seminar

Carol Chavez, Jaedee & Kinzie Johnson with Erin & Bill Harriger

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Hard at work

Hurricane Harvey: A Judicial Perspective

by The Honorable Patricia J. Kerrigan
190th Judicial District, Houston

On August 25, 2017, Hurricane Harvey hit Houston with an enduring vengeance. Despite days of warnings and much anticipation, the impact and damage caused by Harvey was stunning. Most of us were mesmerized by the nonstop television coverage capturing heartbreaking and horrifying images we will never forget - families walking away from flooded homes in waist-deep water carrying children, pets and mementos, families being evacuated by boat, elderly people sitting patiently in deep water awaiting transport, highway flooding and the crazy unstoppable flow of water into downtown areas bringing devastation to Houston's cultural and justice centers.

The impact of those images was, however, overshadowed by the images of Houstonians responding with energy, commitment and kindness to this catastrophe. Earlier this year Houston was in the national sports news for our hospitality, energy, beauty and vibe but that was nothing compared to our recent showing of energy, beauty, vibe and warmth through the volunteer efforts made by people all over town in response to Harvey. Strangers appeared in mass to help shell-shocked homeowners pull floorboards, cut sheetrock, carry debris to the curb, and assist in any way possible. Many homeowners have said that without this army of unknown volunteers they would not have been physically or emotionally able to face the cleanup task. Many of these volunteers came through organized efforts of temples, mosques and churches, but many were people who just got up and walked or drove into areas where they could be of service. It was a wonderful reminder of all that is great about Houston - that is, the people.

Another area of town which received a quick and unified response was in the downtown courthouse complex where the flood waters raged like rivers. The courthouse complex includes a 20- story Criminal Justice Center (2000), an 18-story Civil Justice Center (2005), the 1910 Courthouse which after a multi-million dollar historical renovation houses the 1st and 14th Courts of Appeal, the 9-story Juvenile Justice Center (1951), the Jury Assembly Hall (2011) and a Family Law Center which in recent years was used only as the venue for child support cases as the Family Courts had earlier been relocated to the Civil Courthouse.

The Criminal Justice Center, which houses almost 40 misdemeanor and felony criminal courts, sustained significant damage on every floor due to floodwaters, the backup of external sewage and burst pipes. The Juvenile Justice Courthouse, which houses four district courts, suffered damage while the 1910 Courthouse and the Civil Justice Center were spared any significant flood damage. With many courtrooms and court facilities out of commission, a plan to keep the wheels of justice rolling had to be quickly devised and executed. The challenge was complicated by the loss of the jury assembly building which created physical obstacles to calling juries and, thus, for giving litigants in civil and criminal cases access to jury trials.

Before the flood waters had fully receded from Buffalo Bayou, Hon. Robert Schaffer - Harris County Administrative Judge, Hon. Sylvia Matthews - Administrative Judge for the Civil Division, Hon Susan Brown - Administrative Judge for the Criminal Division, Hon David Farr - Administrative Judge for the Family Division and Hon. Paula Goodhart - Administrative Judge for the County Criminal Court Division, were assessing the damage to the courthouse complex and working out a plan to give the citizens of Harris County any necessary access to the courts. Their focus was to ensure the continued administration of justice throughout the court system. While the courtrooms were unavailable, the Judges were ready to get back to work and the constitution still mandated access to justice. Accordingly, even during the storm, district and county criminal court judges were conducting priority hearings in the jailhouse and, in the civil district courts, ancillary matters were being heard at venues outside the downtown area.

By Labor Day, the Administrative Judges had put together a plan to accommodate the continuation of court proceedings. Within the next few days, Harris County Judges agreed to the plan and it went into effect the week of September 4, 2017. At that time, the criminal district courts were relocated to court space made available by non-criminal court judges entering into sharing arrangements with some judges giving up their courtrooms. Twenty of the 22 criminal district courts are now sharing ten previously occupied civil courtrooms in the civil courthouse. The judges of those ten civil courtrooms who relinquished their courtrooms are sharing courtroom and clerk space within the civil courthouse. One courtroom in the juvenile justice system was given over to two criminal judges, and the judge from the juvenile justice court is sharing space with another juvenile justice court. The transition to this sharing arrangement, for the most part, went very smoothly. The district courts and the probate courts located within the civil courthouse are actively participating in the sharing arrangements so that the criminal courts can conduct their business. Thus, the criminal courts are able to hold proceedings in designated civil courtrooms and are also still conducting hearings in the jails in order to meet constitutional demands.

The relocation of the courts did not just involve judges and staff moving, it required Herculean efforts by the technology department to get all the court computer systems and each courts system moved and in operation at a new location in a very short period of time. The

preparations were completed in time for the criminal judges to hold hearings in their new space on September 11th, just two weeks after the storm.

As a result of the loss of the Jury Plaza and due to the personal devastation sustained by many citizens, jury call was temporarily suspended from the time Harvey arrived thru October 13, 2017. Using temporary space located in the basement of the County Administration Building, 1001 Preston Street, jury service resumed on October 16, 2017. Because the temporary space is smaller than the former space, it cannot accommodate the normal number of jurors brought in per call. To increase the yield and obtain the number of jurors needed, juror calls have been increased from two calls per day, to, on some days, three calls per day. But even with the restart of jury call, courtroom space for jury trials is limited and plans are being carefully set up to assign available courtrooms to litigants in a fair and organized manner.

The response of the lawyers in Harris County has been remarkable as well. The increased traffic in the civil courthouse coupled with the pre-existing elevator problems has made getting to courtrooms a challenge. Many lawyers are using staircases or are arriving substantially ahead of time in order to allow travel time from the court lobby to their hearings. The system has been in place now for several weeks and, with the cooperation of many groups of people, seems to be working.

As for the future, Harris County is evaluating different options for a new jury assembly facility. Until the County makes a decision, jury service will continue in a temporary space. The remediation and repair on the criminal courthouse will probably also include some reworking and renovation of design problems which existed since the opening of the criminal courthouse in the lobby area and elevators. All in all, it is currently expected that the work on the criminal courthouse will take at least a year. Therefore, the current sharing of courtrooms will continue until the reopening of the criminal courthouse. For further information on the location of the courts, check www.justex.net.

We have all learned many lessons from Harvey, but the rapid and effective response of the Harris County Judiciary to devise systems to meet constitutional mandates and to maintain access by citizens to the courts is particularly noteworthy. It is a reminder to the citizens that the Harris County Judges serve the people well, often at some personal cost, and with great dedication. Some of the judges who were first responders to the courthouse complex devastation and who worked tirelessly, had themselves personally suffered devastating flooding in their homes, the loss of vehicles and some were even relocated to temporary housing. But their focus and priority was not to themselves, but to the courts and the administration of justice. How reassuring to know that the Harris County Judges are committed to fulfill their obligations to the people and the Constitution.

2017-2018
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Milton C. Colia Trial Academy Registration

February 23-24, 2018

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by Gregory Perez
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Utilizing Social Media Information In Litigation

I. Introduction

In the new age of social media, a little investigation can yield a wealth of information which could influence a case from start to finish. As methods of communication and information evolve over time, attorneys should be diligent to evolve their litigation practices with them. Therefore, this article explores where to locate social media information, how to obtain and use this evidence in pre-litigation through discovery, and finally, how to utilize this evidence at trial.

II. Social Media Platforms

In the world of litigation, a party's social media profile is priceless. For those unfamiliar with social media, it can seem like a daunting task to uncover; however, social media is readily accessible, and easier to access than one might think.

You may be asking where to find this potential wealth of information. The answer: it may only be a click away, posted publicly for the entire world to see, or privately for "followers" and "friends" to enjoy. Whatever the social media method, courts are generally allowing attorneys to discover a party's social media information and even utilize this information at trial.[2]

From 2010 to 2015, the total number of social media users worldwide more than doubled, from 970 million to 2.14 billion people.[3] As of January 2017, there were 2.8 billion active social media users worldwide, and it's estimated that number will rise to 2.95 billion in 2020.[4] Facebook alone has 1.9 billion unique monthly users and 75% of users spend 20 minutes or more on Facebook every day.[5] Millennials and Generation X users, which encompass individuals ages 18-49, spend an estimated seven hours per week on social media.[6] However, Facebook is not the only social media platform an attorney can access. Twitter, Instagram, YouTube,

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[2] *See e.g.* Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 Ill. B.J. 366, 367 (2010).

[3] *Number of Social Media Users Worldwide from 2010 to 2015*, Statista: The Statistics Portal (2017), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/.

[4] *Id.*

[5] Andrew Hutchinson, *Top Social Network Demographics 2017 [Infographic]*, Social Media Today (March 21, 2017), http://www.socialmediatoday.com/social-networks/top-social-network-demographics-2017-infographic.

[6] *Id.*

Pinterest, LinkedIn, and Snapchat are just a few of the hundreds of platforms that people use to share the ins and outs of their daily lives. With the rise of Millennials and Generation X, social media information is only going to become more and more prevalent.

While an attorney has the ability to perform a search on each individual platform, sites such as Spokeo.com and Pipl.com, which are social network aggregator sites, accumulate data concerning individuals from a variety of online and offline sources. Any attorney who possesses an individual's e-mail address can immediately identify any and all social media profiles opened by that e-mail address. This is important to remember, as all social media platforms require an e-mail address to set up an account.

III. Pre-Litigation Use of Social Media Information

With the growing number of individuals on social media, it is advisable while working up a case to perform a social media search on all litigants at the earliest possible opportunity. This practice should be implemented by all trial lawyers, as the information posted on social media platforms at the beginning of a case can be imperative to building a defense. It is not uncommon for information to become more difficult to find as a case trucks on and as opposing counsel is made aware of what is on their client's pages.

Younger attorneys who utilize social media platforms for personal use can run these searches in little to no time. However, for those less familiar with social media platforms, they may seem foreign. Therefore, it is important to note that running theses searches is something *anyone can do* and can be delegated to paralegals, support staff or even summer law clerks. Find someone well-versed in social media to monitor it – in anticipation of litigation, lawyers should, at a minimum, conduct social media research on the potential parties, opposing counsel, and potential witnesses.

An investigating lawyer should seek out as much relevant, public social media content as possible, in part because it can form the basis for disclosure of non-public information. Conversely, counsel should try to protect their own client's social media content from an adversary by maximizing the client's privacy settings. Most social media platforms contain privacy settings which enable or limit who can see the information.

For those wondering whether viewing a litigant's social media profile is ethical, the answer is **YES**, as long as the attorney does not engage in deception. Many state and city bar associations have issued ethical guidelines and opinions on the appropriate ways to access social media content. Most of these rules stem from the basic prohibition on directly or indirectly contacting a represented party, absent consent from that party's lawyer.[7]

Generally, a lawyer investigating a case:

1) May access the public portions of a party's or witness's social media account, regardless of whether or not the party or witness is represented.

2) May not access private or non-public portions of a represented party's or witness's social media account if the lawyer is required to "friend" or "follow" the account or account user.

3) May "friend" or "follow" an unrepresented party or a witness

[7] *See* MODEL RULES OF PROF'L CONDUCT R. 4.2.

on social media if the lawyer does not engage in deceptive behavior.

Social media content has typically been deemed public if the information is "available to anyone viewing a social media network without the need for permission from the person whose account is being viewed," including "content available to all members of a social media network and content that is accessible without authorization to non-members."[8]

Ultimately, the investigation of social media content in a pre-litigation context can be highly effective to help develop a case, frame potential causes of action, or resolve a dispute before reaching full-blown discovery. By way of example, in a recent pre-litigation matter, a claimant alleged hip pain and the inability to put weight on her legs allegedly as the result of a fall. A quick social media search immediately revealed a time-stamped photograph three weeks post-accident showing the claimant wake-boarding while carrying a friend on her back. Talented? Yes. Beneficial to her claim? No. Upon sharing this information with opposing counsel, the claim was quickly resolved before it reached litigation.

Yet, the vast majority of matters attorneys handle have already proceeded to litigation, and utilizing social media information during the discovery process can both resolve a case before trial or set one up for success at trial.

IV. Social Media Information in Discovery

Once litigation has commenced, attorneys should ensure that all discovery efforts cover social media content. Some important points to remember are:

1) Draft appropriate document requests and interrogatories to reach relevant social media content through party discovery.

2) Follow-up on social media content in depositions of litigants.

3) Determine whether to utilize social media evidence in settlement negotiations or save for trial.

A) Crafting Written Discovery

Often, the discovery of social media information can be more successful through party discovery. As a rule of practice, attorneys should craft document requests to reach social media information as they would any other documents. Attorneys should pay heed to the fact that, as with all discovery requests, case law makes it clear that social media discovery directed to a party must be narrowly tailored to the issues relevant in the case. Texas decisions, although limited on the subject, favor this approach. In *In re Indeco Sales, Inc.*, No. 09-14-00405-CV, 2014 WL 5490943 (Tex. App.—Beaumont 2014, no pet) (mem. op.), the Beaumont Court of Appeals held that a district court did not abuse its discretion by granting an injured plaintiff's motion for protection as to a discovery request seeking information, data, posts, and conversations from plaintiff's Facebook page, because the request sought every photograph posted since the accident, regardless of when the photograph was taken, and another request seeking all posts or messages she sent or

[8] *See* Mark A. Berman, Ignatius A. Grande, & Ronald J. Hedges, *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section*, NEW YORK STATE BAR ASS'N, May 11, 2017, at A-42, *available at* http://www.nysba.org/socialmediaguidelines17/; see also Committee on Professional Ethics, Opinion No. 843, New York State Bar Association, Sept. 10, 2010, *available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=5162.

received, regardless of topic.[9] Conversely, in *In re Christus Health Se Tex.*, 399 S.W.3d 343 (Tex. App.—Beaumont 2013, no pet. h.), the Court concluded that a request without a time limit for posts [from Facebook] is overly broad on its face.[10]

Below are some sample interrogatories and requests for production that attorneys can use in cases where they may be relevant:

Interrogatories

1) State the name, web address, and user name for all blogs, online forums, social media sites and applications (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, YouTube, or any similar sites or applications) that Plaintiff has registered with, belonged to, or had membership to, from _____ to the present.

2) State the name, web address, and user name for all blogs, online forums, social media sites and applications (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, YouTube, or any similar sites or applications) that Plaintiff has used to communicate from the date of the Accident to the present.

Request For Production

1) Please produce all photographs posted, uploaded, or otherwise added to any social networking sites, applications, or blogs (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, YouTube, or any similar sites or applications) posted since the date of the Accident alleged in the Complaint.

2) Please produce all communications posted, uploaded, or otherwise added to any social networking sites, applications, or blogs (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, YouTube, or any similar sites or applications) posted since the date of the Accident concerning any allegations or events referenced in Plaintiff's Complaint.

3) Please provide copies of all instant messaging logs or transcripts associated with any accounts identified in response to Interrogatory No. __ concerning any allegations or events in Plaintiff's Complaint.

4) Please produce all postings by Plaintiff on any social media site or application (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, YouTube, or any similar sites or applications) that refer or relate to the accident in question.

5) Please provide an electronic copy of your complete Facebook history, including any and all profile information, postings, pictures, and data available pursuant to Facebook's "Download Your Own Information" feature.

6) For each Facebook account maintained by you, please produce your account data for the period of _____ through present. You may download and print your Facebook data by logging onto your Facebook

[9] *In re Indeco Sales, Inc*., No. 09-14-00405-CV, 2014 WL 5490943 (Tex. App.—Beaumont 2014, no pet) (mem. op.).

[10] *In re Christus Health Se Tex*., 399 S.W.3d 343 (Tex. App.—Beaumont 2013, no pet. h.).

account, selecting "Account Settings" under the "Account" tab on your homepage, clicking on the "learn more" link beside the "Download Your Information" tab, and following the directions on the "Download Your Information" page.

7) Please produce all postings by Plaintiff on any social media site or application (including, but not limited, to, Facebook, Snapchat, Twitter, LinkedIn, Instagram, Pinterest, Youtube, or any similar sites or applications) that refer or relate to emotional distress or physical injuries that Plaintiff alleges he/she suffered as a result of the accident and any treatment that he/she received subsequent to the accident.

Although it is common sense among practicing attorneys, remember to always request that a sworn verification be produced along with Plaintiff's written discovery responses. The sworn responses to interrogatories, such as those listed above, may be particularly important if the opposing party does not produce social media information and a motion to compel is required to reach that information.

After written discovery has been completed, attorneys should practice following up on social media in a parties' deposition.

B) Following Up On Social Media In Depositions

If attempts to gain social media information in written discovery have failed, depositions are another time to press the opposing party, under oath, for social media information.

Questions to consider incorporating include:

Q: Do you have any social media accounts where you post personal information about yourself?

Q: Which social media platforms do you use?

Q: Have you had other social media accounts that you no longer use?

Q: What name(s) do you use for yourself for your social media account(s)?

Q: What e-mail addresses do you use to access your social media accounts?

Q: Since the DOL, have you posted any information related to the accident on any of your social media accounts?

Q: Since the DOL, have you posted any information related to your alleged injuries or damages on your social media accounts?

Q: If we wanted to see the information you post on your social media account(s), what would be the best way to see it?

If previous social media searches have proved fruitful, depositions are the time to try to impeach the opposing party's testimony by questioning them on any adverse information you have found. By way of example, in a case involving claims of neck and back injuries, Plaintiff's post-accident time-stamped social media posts included the following:

"Thank God I am healed"

"Woke up 2day feeling great"

"I don't need painkillers anymore"

"I haven't felt this good in a long time."

"I am happy to say I am completely healed…I can literally run now, no pain at all."

When asked in deposition whether Plaintiff had ever experienced any relief from pain, he

responded, "No, I have never had any relief since the accident." Upon further questioning about his post-accident activities, Plaintiff testified that he was unable to go to the gym and was limited in his activities. Plaintiff was obviously unaware that defense counsel was in possession of Plaintiff's post-accident social media postings stating, *"Day 5 at the gym…ran 4 miles today…played full court basketball…sparred two 3 minute rounds…"*

This type of contradictory testimony tees up a case for success at the next cross-roads of litigation: settlement or trial.

C) The Choice: Utilizing Social Media Evidence In Settlement Negotiations Or Saving For Trial.

Timing, as they say, is everything. As trial attorneys, it is important to reveal information when it is most beneficial to the case. Thus, there is often a decision as to whether to reveal potential impeachment evidence at mediation in an attempt to facilitate settlement or save the evidence for the time of trial.

Such decision depends both on the amount of social media evidence acquired and the likelihood of a given case to go to trial. If a case is more likely to settle at mediation, then it is beneficial to bring social media evidence to mediation to be presented in negotiations as a way to achieve a favorable settlement. If, however, a case is unlikely to settle, then the preferable course may be to retain the social media evidence until disclosure is absolutely required either through discovery or, ideally, at trial to impeach Plaintiff's testimony, attack his credibility, or give the jury a reason to limit Plaintiff's damages.

V. Social Media Information At Trial

At trial, common issues concerning the use of the social media evidence include:

1) Demonstrating the relevance of social media content for use at trial.

2) Assessing how to authenticate social media content for use at trial.

A) Relevance Of Social Media

Obviously, as with any other evidence, social media information has to be relevant to issues in the case. Texas Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[11] Further, "[i]n deciding whether evidence is relevant, a trial court should ask whether a reasonable person, with some experience in the real world, would believe the evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit."[12] Therefore, in determining relevancy, courts look to the purpose for offering the evidence—the material fact to be proved—and whether there is a direct or logical connection between the offered evidence and the proposition to be proved.[13] If there is any reasonable logical nexus, the evidence will survive the relevancy test.[14]

Social media evidence may be relevant to nearly every type of legal dispute primarily because use of social media has become commonplace. Thus, more than likely, litigants are "posting" statements, photographs, 'tweets', etc. that "have the

[11] TEX. R. EVID. 401; FED. R. EVID. 401.
[12] *Hernandez v. State*, 327 S.W.3d 200, 206 (Tex.App.—San Antonio 2010, pet. ref'd) (citations omitted).
[13] *See e.g.*, *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009).
[14] *See Reed v. State*, 59 S.W.3d 278, 281 (Tex. App.—Fort Worth 2001, pet. ref'd).

tendency to make the existence of any fact more or less probable."[15]

Further, some courts have imposed severe sanctions on a party who fails to produce relevant evidence in discovery. In *Lester v. Alliance Concrete Co.*, 285 Va. 295 (2013), a Virginia state court reduced a jury award by over four million dollars and ordered the plaintiff and his counsel to pay the defendants over $700,000 in fees and expenses because of deliberate deletion of Facebook photos responsive to discovery requests.[16]

While the burden of demonstrating relevance is low, just because evidence is relevant does not mean that it is admissible.[17]

B) Authenticating Social Media Information

Authenticating social media content for use at trial can be challenging, particularly for static screenshots that do not contain time-stamps, or for a source that is constantly being revised. Courts examining the proper methods to authenticate social media evidence have reached different conclusions on the standard a party must satisfy.

Federal Rule of Evidence 901 establishes the requirements for authentication or identification as a condition precedent to the admissibility of non-testimonial evidence.[18] Under Rule 901, before an item may be admitted, the proponent must offer "evidence sufficient to support a finding that the matter in question is what its proponent claims."[19] Federal Rule of Evidence 901(b) gives examples of how authentication can be accomplished.[20]

Some state courts have found that a party may use any form of evidence to authenticate social media content if the party demonstrates to the trial judge that a jury could reasonably find that the proffered evidence is authentic.[21]

Generally, the proponent of an internet printout must provide testimony by live witness or affidavit that the printout is what it purports to be.[22] In *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), the court discusses how Federal Rule of Evidence 901 works with Federal Rule of Evidence 104 and the necessity for the court to decide authentication as a preliminary question.[23] The *Lorraine* Court determined that, "An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it."[24]

Several courts have also followed varying approaches to authentication challenges. For example, a circuit court of appeals held that photographs on a defendant's Facebook page were not properly authenticated because a "photograph's appearance on a personal webpage does not by itself establish that the owner of the page possessed or controlled the items pictured."[25] On the other hand, a United States District Court found that statements made by a plaintiff on her Facebook page were authenticated by her deposition testimony and admissible as a party admission under

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[15] TEX. R. EVID. 401; FED. R. EVID. 401.
[16] *Lester v. Alliance Concrete Co.*, 285 Va. 295 (2013).
[17] TEX. R. EVID. 403.
[18] *See* FED. R. EVID. 901.
[19] TEX. R. EVID. 901(a); FED. R. EVID. 901(a).
[20] *See* FED. R. EVID. 901(b).
[21] *See Tienda v. State,* 358 S.W.3d 633, 638, 642 (Tex. Crim. App. 2012); *see also Parker v. State,* 85 A.3d 682, 687 (Del. 2014).
[22] *See In re Carrsow Franklin*, 456 B.R. 753, 756-57 (Bankr. D.S.C. 2011) (noting that blogs are not self-authenticating and rejecting blog evidence due to failure to present authentication testimony).
[23] In *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007); *see also* FED. R. EVID. 901; FED. R. EVID. 104.
[24] *Id*.
[25] *United States v. Winters,* 530 F. App'x 390, 395-96 (5th Cir. 2013).

Federal Rules of Evidence 901(a) and (b)(1).[26]

Other courts have employed different rules to authenticate and admit social media evidence. In one example, a United States District Court admitted Facebook posts under the residual hearsay exception in Federal Rule of Evidence 807 based on credible evidence that the posts were authentic.[27] In another case, a circuit court held that screenshots of Facebook pages and YouTube videos retrieved from a Google server were self-authenticating business records under Federal Rule of Evidence 902(11) where they were accompanied by certifications from Facebook and YouTube records custodians.[28]

Since it appears that courts have not yet reached a consensus on the authentication of social media content, attorneys should carefully consider authentication issues during discovery to prepare for trial. For example, ensure that all photographs taken from social media platforms are in color and time stamped, with the date of posting by the litigant attached to the photograph, or use the assistance of a vendor or collection software, which will help minimize authentication challenges. This will provide the basis for a better argument as to why the social media images should be admitted. Authentication may also be something that an attorney can choose to address in depositions, should you have the evidence available and decide to utilize it during that time, so as to avoid a denial or mishap at trial.

VI. Conclusion

An estimated 70% of U.S. adults use some form of social media. In the U.S., statistics show that 72% of women and 62% of men use at least one social media platform. 76% of Facebook accounts are used daily, 52% of Instagram accounts are used daily, and 42% of Twitter accounts are accessed daily.[29] These statistics do not even include all of the hundreds of other social media platforms in the world today. With this sea of information flooding daily onto the world-wide web, you can bet that litigants/potential litigants are posting, tweeting, and uploading information that may be relevant to current and future litigation.

As lawyers we are tasked with competent and diligent representation of our clients. Therefore, as technology changes, lawyers must adapt and utilize new sources of information if they are to continue to represent their clients competently. These new sources of information include social media platforms.

Changing age-old legal practices can be hard, and for many well-practiced attorneys, social media can be intimidating, but as explained in this paper, accessing this information and monitoring it is doable. Most importantly, utilizing social media information throughout the litigation process can potentially open the doors to case results not previously apparent.

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[26] *Targonski v. City of Oak Ridge,* No. 11-269, 2012 WL 2930813, at *10 (E.D. Tenn. July 18, 2012; *see* FED. R. EVID. 901(a); FED. R. EVID. 901(b)(1)

[27] *Ministers & Missionaries Benefit Bd. v. Estate of Clark Flesher,* No. 11-9495, 2014 WL 1116846, at *6 (S.D.N.Y. Mar. 18, 2014); *see* FED. R. EVID. 807.

[28] *United States v. Hassan,* 742 F.3d 104, 132-34 (4th Cir. 2014); *see* FED. R. EVID. 902(11).

[29] *Social Media Fact* Sheet, PEW RESEARCH CENTER (Jan. 12, 2017), *available at* http://www.pewinternet.org/fact-sheet/social-media/ (last visited June 21, 2017).

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Will Aldrete, Ray, McChristian & Jeans, P.C., El Paso

8:05 – 8:40am *BIAS, SYMPATHY & PREJUDICE... HOW DO ATTORNEYS ENSURE THEIR OWN BIAS, SYMPATHY, AND PREJUDICE DO NOT LEAD THEM ASTRAY DURING VOIR DIRE?*
Belinda Arambula, Burns, Anderson, Jury & Brenner, LLP, Austin

8:40- 9:25am *THE IPHONE GENERATION - SELECTING TODAY'S JUROR*
Brandon Berg, Thompson, Coe, Cousins & Irons, L.L.P. Houston

9:25 - 10:00am *DEFENDING OIL AND GAS LITIGATION*
Greg Binns, Thompson & Knight LLP, Dallas

10:00-10:35am *MANAGING THE MILLENIAL WORK FORCE*
Derek Rollins, Ogletree, Deakins, Nash, Smoak & Stewart, Austin

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Ralph E. Kraft, Kraft Lege LLC, Lafayette

7:30 – 8:45am *MOTIONS PRACTICE ACROSS STATE LINES – PANEL DISCUSSION (.5 hrs ethics)*
William Corbett, Louisiana Association of Defense Counsel, Baton Rouge
Elizabeth Liner, Baker Donelson, Baton Rouge
Michele Smith, MehaffyWeber, PC, Beaumont
Mitch Smith, Germer PLLC, Beaumont

8:45–10:00am *ETHICS & TECHNOLOGY: IN THE COURTROOM AND BEYOND (1.25 hrs ethics)*
The Honorable Frances Pitman, Second Circuit Court of Appeals, Shreveport
The Honorable Mike Pitman, First District Court, Shreveport

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Christopher Martin, Martin, Disiere, Jefferson & Wisdom, L.L.P., Houston

8:45-9:20am *PICKING THE DEEP POCKET – PARTICIPATORY AND VICARIOUS LIABILITY*
Tom Riney, Riney & Mayfield LLP, Amarillo

9:20 – 9:55am *HIGH (OR NOT) IN THE MOUNTAINS (.5 hrs ethics)*
Max Wright, Kelly Hart & Hallman LLP, Midland

9:55 – 10:30am *THE INS AND OUTS OF A FIRST PARTY UM AND UIM AUTO CASE*
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