TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

FALL/WINTER 2019

IN THIS ISSUE:

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TADC CALENDAR OF EVENTS

February 5-9, 2020	**2020 TADC Winter Seminar** Elevation Resort & Spa - Crested Butte, Colorado Registration materials available after November 1, 2019
February 21, 2020	**TADC Board of Directors Meeting (Fly-in, Fly-Out)** Austin, Texas - Moody Bank Bldg. – 3rd Floor Auditorium
March 27-28, 2020	**2020 Milton C. Colia Trial Academy** Texas Tech Law School - Lubbock, Texas Registration materials available after November 15, 2019
April 29-May 3, 2020	**2020 TADC Spring Meeting** Atlantis – Paradise Island – Nassau, The Bahamas Registration materials available after March 1, 2020
July 15-19, 2020	**2020 TADC Summer Seminar** Talisa Hotel & Spa - Vail, Colorado Registration materials available after May 1, 2020
July 31, 2020	**TADC Nominating Committee** Austin, Texas
August 7-8, 2020	**2020 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico Registration materials available after June 1, 2020
September 23-27, 2020	**2020 TADC Annual Meeting** San Luis Resort & Spa - Galveston, Texas Registration materials available after July 1, 2020

President's Message

By: Bud Grossman, TADC President
Craig, Terrill, Hale & Grantham, L.L.P.,
Lubbock

"The Governor Has Signed the Bill"

Founded in 1960, the TADC is now in its 59th year as one of the two largest state organizations of civil trial lawyers in the United States. Our members have served in the United States Senate, Texas Supreme Court, Federal Courts, intermediate Courts of Appeals, District/County Courts and the Texas Legislature. The TADC is known as the voice of civil litigators and is routinely called upon to provide its expertise on judicial, legislative and political issues.

TADC made a large impact in several areas of the law this year. In the 86th Session, the TADC, through tireless efforts of Mike Hendryx with Strong Pipkin Bissell & Ledyard, L.L.P. in Houston and Clayton Devin with Macdonald Devin, P.C. in Dallas, were able to assist in enacting legislation to address issues with §18.001 affidavits. The TADC continues to analyze our membership's legislative priorities that impact your practice. TADC member and law firm support of our Political Action Committee (PAC) is instrumental in this process. Contribute to the PAC!

The Deposition Boot Camp, held October 4, 2019, at the South Texas College of Law in Houston, was a tremendous success. Special thanks to Michael Golemi, Liskow & Lewis, APLC in Houston, and Jesse Beck, MehaffyWeber, PC in Beaumont, who chaired the program this year, and a special thanks to Slater Elza, Underwood Law Firm, P.C. in Amarillo, our President Elect of the TADC, who has spearheaded this event the last two years. We plan to continue offering similar programing in the future.

On November 8-9, 2019, the TADC will hold its planning sessions during the Board Meeting at the Overton Hotel in Lubbock, Texas. If you, or someone you know, are interested in being a speaker at some fabulous venues in 2020, now is the time to let us know. Below are dates of our upcoming Seminars along with the chairs of each event. Please take the opportunity to contact any of the chairpersons to become involved.

On February 5-9, 2020, the TADC is headed to Crested Butte, Colorado, at the Elevation Resort & Spa. Program Co-Chairs are: Lauren Goerbig, Jackson Lewis P.C., Austin, and Belinda Arambula, Burns, Anderson, Jury & Brenner, L.L.P., Austin.

On March 27-28, 2020, the TADC Milton C. Colia Trial Academy will be held at the Texas Tech University School of Law in Lubbock, Texas. Program Co-Chairs are: Greg W. Curry, Thompson & Knight LLP, Dallas, and Arlene C. Matthews, Crenshaw, Dupree & Milam, L.L.P., Lubbock.

On April 29-May 3, 2020, the TADC

will enjoy some sun & fun in Nassau, The Bahamas for the 2020 Spring Meeting at the Atlantis-Paradise Island. Program Co-Chairs are: Slater Elza, Underwood Law Firm, P.C., Amarillo, and Darin Brooks, Gray Reed & McGraw LLP, Houston.

On July 15-19, 2020, the TADC will venture to Vail, Colorado, for the 2020 Summer Meeting at the Talisa Hotel & Spa. Program Co-Chairs are: Christy Amuny, Germer PLLC, Beaumont, and Elizabeth O'Connell Perez, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., San Antonio.

On August 7-8, 2020, the TADC will enjoy the cool pines of Ruidoso, New Mexico, for the West Texas Seminar at the Inn of the Mountain Gods. Program Chairs are Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock and Alex Yarbrough, Riney & Mayfield LLP, Amarillo.

On September 23-27, 2020, the TADC will have its Annual Meeting in Galveston, Texas, at the San Luis Resort & Spa. Program Co-Chairs are: Fred D. Raschke, Mills Shirley, L.L.P., Galveston, and Gregory P. Blaies, Blaies & Hightower, L.L.P., Fort Worth.

The TADC will continue to host legislative events across the state providing our members with access to significant legal issues affecting your practice. Other opportunities to become involved include writing an article for inclusion in the TADC's magazine, participating in our Construction and Commercial substantive law sections, and attending these local events throughout the year.

The TADC Young Lawyers Committee led by Alex Yarbrough of Riney & Mayfield, LLP, Amarillo, and other young lawyers in our organization serve on the Board of Directors and help lead our programming, legislative, publications and membership committees.

The TADC Amicus Committee continues to make an impact in developing areas of the law. In 2019 alone, the Committee drafted and filed approximately 13 briefs. Roger Hughes, Adams & Graham, L.L.P., Harlingen, continues to lead the significant work being performed by some of the brightest appellate lawyers in the state who donate their expertise and time on issues of importance that are well-received by the Judiciary.

The TADC provides an effective network of lawyers and support staff fulfilling the needs of over 1,500 members. The relationships formed between our members serve as a basis for referrals and relationships lasting for decades. Now is the time for you to improve your practice, become more involved, and if you have not done so already, involve members of your firm. And, by all means, refer a new member! Please contact me or TADC Executive Director Bobby Walden if you would like information on how you can participate in our events.

On a final important note, I would be absolutely remiss if I did not recognize and pay extreme homage to two esteemed TADC members who have reached the century mark this year! Past President Royal H. Brin (TADC President '81-'82), formerly with Strasburger & Price in Dallas, has been a TADC member since 1965. Also, Mr. S. Tom Morris, with the Underwood Law Firm in Amarillo, has been a TADC member since 1963.

Thanks to you gentlemen, for being pioneers in the legal profession and your steadfast support of the TADC for these many years.

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Past President's Message

By Pam Madere, Immediate Past President
Jackson Walker, Austin

The TADC volunteers made this year a success! The Hotel Emma was an incredible location for the Annual Meeting in San Antonio in September. The food and service were amazing, and the program was outstanding. It was the perfect opportunity to thank our members and Board for their hard work over the last year. We were honored to have numerous Past Presidents, including Tom Ganucheau, Beck|Redden LLP, Houston, who is also serving the distinguished honor as a National Director of the Defense Research Institute, attend the Annual Meeting Awards Dinner.

The TADC Board works throughout the year, not only for members' respective districts and areas, but also through its committees.

Programs

The Programs Committee is one of our most active committees. Because of their expertise, the TADC has presented excellent meetings and CLE throughout the year, including sell-out attendance in Maui. Congratulations to our seminar chairs – David Brenner, Burns, Anderson, Jury & Brenner, L.L.P., Austin, and Megan Schmid, Thompson & Knight LLP, Houston (Winter Seminar), Mike Hendryx, Strong, Pipkin, Bissell & Ledyard, L.L.P., Houston (Spring Meeting), Mitch Moss, The Moss Legal Group PLLC, El Paso, and Diana Valdez, The Law Office of Diana Macias Valdez PLLC, El Paso, (Summer Seminar), Bud Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock (West Texas Seminar), and Mitzi Mayfield, Riney & Mayfield LLP, Amarillo, and Trey Sandoval, MehaffyWeber, PC, Houston (Annual Meeting) for their hard work. Our meeting attendance was exceptional, thanks in large part to the sophisticated programming and exciting locations. Attending a TADC seminar is the best way to make new friends and see what TADC has to offer.

Congratulations to all of the seminar chairs, the wonderful speakers, the Programs Committee, and Programs Vice Presidents Mitch Moss, Moss Legal Group, PLLC, El Paso, and Rachel Moreno, Kemp Smith LLP, El Paso, for doing such a great job with TADC Programs this year.

Legislative

This was a legislative year, and our Legislative Committee shined. Under the guidance of our lobbyist George Scott Christian, the Committee's work reviewing proposed legislation was invaluable. We appreciate all of the work the Legislative Committee has done under the leadership of Vice Presidents Gayla Corley, Langley & Banack, Inc., San Antonio, and Robert Booth, Mills Shirley L.L.P., Galveston.

A special thanks to Past Presidents Mike Hendryx, Strong, Pipkin, Bissell & Ledyard, L.L.P., Houston, and Clayton Devin, Macdonald Devin, P.C., Dallas. After four years of work, they succeeded in passing legislation addressing problems with CPRC §18.001. They gathered data and war stories from TADC members throughout the state to formulate proposed legislative changes to answer the needs of our members, our clients, and the civil justice system. Members Roger Hughes, Adams & Graham, L.L.P., Harlingen, David Chamberlain, Chamberlain McHaney, Austin, and Mike Bassett, The Bassett Firm, Dallas, were instrumental in this effort. Mr. Hendryx's and Mr. Devin's expertise

in building coalitions with other attorney groups and medical organizations was an essential part of their success.

Publications

TADC's magazines are outstanding; full of substantive material for our members. The Publications Committee, led by Vice Presidents Doug Rees, Cooper & Scully, P.C., Dallas, and Darin Brooks, Gray Reed McGraw LLP, Houston, with guidance and input from TADC Executive Director Bobby Walden, are to thank for getting the word out about the TADC in an effective way.

Membership

The Membership Committee, led by Vice Presidents Trey Sandoval, MehaffyWeber, PC, Houston, and Mitzi Mayfield, Riney & Mayfield LLP, Amarillo, has done a great job this year, not only recruiting new members, but keeping the members we have informed and engaged. We continue to see a need for young lawyers to have access to training, and the TADC works to fill those needs through the TADC Deposition Boot Camp and the Milton C. Colia Trial Academy. The Deposition Boot Camp held in October and chaired by Michael Golemi, Liskow & Lewis APLC, Houston, and Jesse Beck, MehaffyWeber, PC, Beaumont, had 65 attendees and brought in 40 new members! Providing training, and mentoring to attorneys has always been and will continue to be a focus of the TADC.

Young Lawyers Committee

The Young Lawyers Committee, chaired by Kyle Briscoe, PeavlerBriscoe, Grapevine, was very active this year working with the TADC Board committees as well as District Directors throughout Texas. The Young Lawyers Committee is where we find future leaders and we are grateful for the work they continue to do for our organization. The full Board enjoyed having the Young Lawyers Committee attend the February Board Meeting and providing their insight into issues facing their peers.

Amicus

The Amicus Committee deserves a special thanks. They work year-round responding to requests for amicus briefs and file many each year. Chaired by Roger Hughes, Adams & Graham, L.L.P., Harlingen, the Committee continues to represent the TADC's interests through quality briefing and analysis.

TADC Office

For 26 years Bobby Walden has worked for, and subsequently leads, the TADC. His historical knowledge and expertise are invaluable. With the assistance of Debbie Hutchinson, who goes above and beyond for our organization, the TADC continues to run as an efficient and effective machine. Thank you, Bobby and Debbie, for all you do for our members.

Nominations Committee and Welcome President Bud Grossman!

Immediate Past President Chantel Crews, Ainsa, Hutson, Hester & Crews LLP, El Paso, led an incredibly successful Nominations Committee. The Committee lent their considerable time and expertise to evaluate and recommend new Board Members for the upcoming year. The slate of nominees was approved by the membership at the Annual Meeting, and we are excited for the year ahead to be led by TADC President Bud Grossman, Craig Terrill, Hale & Grantham, L.L.P., Lubbock. Bud has organized an eventful year with fun destinations and substantive and diverse programming. We are excited to see what 2020 brings under his leadership!

By: Mike Bassett, The Bassett Firm, Dallas

Confessions of a Mediator

6 Tips for Better Mediation

Having mediated close to 1,000 cases in over 15 years, I have noticed that the lawyers who get the best settlements (either on the Plaintiff or Defendant side), have six things in common. First, they submit to me Mediation Position Statement Papers that put their best foot forward. Second, in addition to telling me, they ***show me***. Third, they ask **me** questions. Fourth, they explain to the client (and adjuster) what is (or is not) going to happen at mediation. Fifth, they get their ducks in a row well before mediation. Finally, they understand that **no one** likes surprises at mediation.

(1) Submit Mediation Position Statement Papers

You would be surprised at how few lawyers submit anything to the mediator before mediation. Do this at your client's expense.

If I am mediating a two-party case and one side submits to me a very well written Mediation Position Statement Paper setting forth the reasons why their side should win, and the other side gives me nothing, with which side's narrative do you think I am going to start the day? That's right – the party who took the time to put in writing the reasons their case is strong.

A well written Mediation Position Statement Paper gives me the ammunition I need to help get your case settled. If you give me nothing, I've got nothing with which to work.

(2) Show; Don't Tell

Lots of lawyers ***tell me*** how great their cases are. That's all well and good; however, it's even better if you can ***show me*** how great your case is. If the only thing I can do when I go into the other room is say, "The [Plaintiff's] or [Defendant's] attorney tells me …," then I really have nothing. Chances are the other side is going to discount what you tell me.

They cannot discount, however, things that I can ***show them*** that will highlight the weaknesses in their case. Do you have great testimony from an expert? Then ***show me.*** Do you have medical records showing the Plaintiff lied to her doctors? Then ***show me.*** Do you have documents that show that the Plaintiff's actions lead to the accident and/or injuries? Then ***show me.***

(3) Ask Questions

Some of the most successful lawyers that I mediate for spend most of the mediation asking me questions. And, frankly, that's a really good idea.

Mediation is one of the few times that you are going to get to try to figure out your opponent's case. Unfortunately, I think that many lawyers (myself included) tend to spend most of their time in mediation trying to convince the other side about how strong their case is.

How about asking the mediator the things you need to be worried about concerning your case? Perhaps ask the mediator why the other side is taking a certain position or, ask the mediator what the other side is going to do in response to your great evidence/exhibit.

You'll never know unless you ask.

(4) Prepare Your Client and Adjuster

As lawyers, we attend dozens of mediations every year. It can all start to become fairly routine for us. But remember, your client (especially if you represent the Plaintiff) has likely never been through the process. They have no idea what is going to happen.

Take, for instance, the Plaintiff who showed up at mediation thinking that they were going to get ***cash money*** at the end of the day. Or, the Defendant truck driver who showed up at mediation thinking that there was a chance he was going to jail if things didn't go very well. Or, finally, the Plaintiff who nearly stormed out of mediation because the insurance company did not pay his first demand.

All of these problems (and trust me, some of them are big problems) could have easily been avoided had the attorneys taken the time to explain to their clients what was going to go on at mediation. *Let your clients know what is (and is not) going to happen at*

mediation. Explain to them that the mediator will be visiting with all sides and that everything said to the mediator is confidential.

Let your client know that mediation can be a ***slow*** process that, often times, cannot be rushed. Finally, explain to your client all of the things that you take for granted when you walk into a mediation (*i.e.*, that the defense is not going to pay the first offer; that your Defendant client is not going to go to jail at the end of the day; and that no one is bringing them an actual brief case full of money that will be exchanged at the end of the day)

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(5) Get Your Ducks In a Row

The lawyers that get the best results at mediation get their ducks in a row well before mediation starts. From the Plaintiff's side, that means the lawyers are in contact with any lien holders to let them know about the mediation and that a decision maker for the lien holder may well need to be available to help get the case settled. Nothing can kill momentum in a mediation like a Plaintiff lawyer saying, "Well, I haven't spoken with the workers' compensation lien holder yet. I guess I need to get on the phone with them now." And, of course, what the Plaintiff lawyer doesn't know is that the adjuster for the workers' compensation carrier is on a two-week vacation and no one is taking their calls. The result? A case that can get settled doesn't get settled and everybody walks away frustrated.

From the defense side, good lawyers will reach out to a Plaintiff's attorney at least 45 days before mediation to verify the economic damages that are in play. Things do not end well when a defense lawyer (and an adjuster) show up at mediation thinking that the Plaintiff has $25,000.00 in medical only to have the Plaintiff's attorney announce to everybody that the Plaintiff's medical bills are actually $178,000.00. To say that this type of information is a non-starter is an understatement.

Another thing that defense lawyers can do is reach out to the Plaintiff's attorney and make sure that everybody has the same medical records and expert reports going into the mediation. Again, it does ***no good*** for the defense to learn, for the first time at mediation, that the Plaintiff has a life care planner who has put up a life care plan worth $4,370,000.00. At that point, I feel like I am rearranging deck chairs on the Titanic.

(6) No Surprises

The lawyers who get the best settlements realize that nobody likes surprises at mediation.

If you represent the Plaintiff and your client has incurred additional medical bills - or has undergone an additional surgery - that you think the other side may not know about, then let them know immediately. It is much better to postpone a mediation so that everybody can process new information than to show up at mediation and dump a bunch of new information on an adjuster. Having done defense work for over 32 years, I can tell you that doing this almost guarantees you are **not** going to settle your case.

If you are representing the Plaintiff and you have a great piece of evidence (or great expert report or something you think is going to help get your case settled) you should really think long and hard about disclosing it to everybody well before mediation. I can't say this strongly enough – ***insurance companies and adjusters don't like surprises***. They can't process potentially case-changing information on the fly. Trust me, I have seen it happen too many times where a "new expert" is revealed at mediation by the Plaintiff's attorney in the hopes of prying more money loose from an adjuster. I've never seen that end well.

From the defense side, if there are additional layers of insurance that may ***even remotely*** play into getting the case settled, then notify all of those carriers. Nothing is more disheartening than working diligently to get all of the parties and attorneys to show up at a mediation to then learn that the target defendant has excess coverage, and, oh by the way, the excess carrier has never been put on notice. Not only do these cases not settle at mediation, but also they create ***unnecessary*** distrust and friction amongst lawyers. And it is so easily preventable.

As a mediator, I ***want to help settle your case.*** Providing me with a well written Mediation Position Statement Paper is a key first step. During mediation, show me how great your case is. Use mediation as a time to learn rather than ***speak***. Let your clients know what is (and is not) going to happen at mediation. Get your ducks in a row – **early**. Finally, while most people like surprise birthday parties, ***no one*** likes surprises at mediation.

TADC PAC Report

By: Slater Elza, Trustee Chairman
The Underwood Law Firm, P.C., Amarillo

This time last year, TADC was gearing up for the 2019 Texas Legislative Session. We faced the usual array of bills aimed at our members and our clients. With TADC PAC and Legislative Committee support, we were able to stop the renewed attempts to establish Chancery or "Business" courts in Texas – although we will face this battle again next Session. Our Legislative Team, led by Mike Hendryx with Strong, Pipkin, Bissell & Ledyard, L.L.P., Houston, and Clayton Devin with Macdonald Devin, P.C., Dallas, continued TADC efforts to curb abuses of medical cost affidavits by plaintiffs. This multi-year effort paid off with the successful passage of amendments that provide clarity related to medical expense counter-affidavits, applicable deadlines, and required procedures. We are already assessing issues for the 2021 Session.

With the 2019 Session just behind us, there is a tendency for TADC Members to take a breath and rest. But, in fighting to maintain the strength and independence of our profession and judicial system, we must begin to restock our coffers now to allow our PAC to support qualified candidates for the Texas Legislature, the Texas Supreme Court and other key elected positions throughout our State. Some facts that should encourage you to donate to the PAC:

- Over 95% of candidates and incumbents supported by the TADC PAC are elected to office;
- The TADC PAC supports candidates based on record & qualifications, NOT political affiliation;
- The TADC PAC supports candidates who favor a strong and independent judiciary, oppose infringement on the right to jury trials, and agree with the need to preserve the civil justice system;
- The TADC PAC opposes statutory employer and collaborative law legislation;
- The TADC PAC supports efforts to end the capricious enforcement of arbitration clauses and to limit their applicability to matters where the parties to the agreement have equal bargaining power;
- Your PAC Trustees represent your interests to candidates and office holders; and
- Other associations ARE giving; if you don't, then that WILL put you at a distinct disadvantage.

Our most important goal this year is to make sure we have the money to support the right candidates and incumbents in races important to our members. We thank you in advance and encourage you and your firms to contribute to the TADC PAC. Although we recommend a contribution of $300 per member, any amount is appreciated. As TADC members, we all benefit from the work of our PAC and Legislative Committee. Help us continue the good work of our PAC moving forward.

Texas Association of Defense Counsel-PAC

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

THE TADC WILL WORK TIRELESSLY DURING THE LEGISLATIVE SESSION PROTECTING THE CIVIL JUSTICE SYSTEM!
Show Your Support for the TADC PAC

Your contribution allows the TADC PAC to support ***Qualified*** candidates for the Texas Supreme Court, Texas Legislature & other key positions

CAN YOU AFFORD NOT TO CONTRIBUTE?

- **Over 95% of Candidates & Incumbents Supported by the TADC PAC are elected to office**
- **The TADC PAC supports candidates based on record & qualifications, NOT political affiliation**
- **The TADC PAC supports candidates who favor a strong and independent judiciary, oppose infringement on the right to jury trials and agree with the need to preserve the civil justice system.**
- **The TADC PAC opposes Statutory Employer and Collaborative Law Legislation**
- **The TADC PAC supports efforts to end the capricious enforcement of arbitration clauses and to limit their applicability to matters where the parties to the agreement have equal bargaining power**
- **Your PAC Trustees represent Your interests to candidates and office holders**
- **Other Associations ARE giving; if you don't, that WILL put you at a distinct disadvantage**

I BACK THE TADC PAC

Enclosed is my TADC PAC Contribution in the amount of:

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If a receipt is requested, please provide an email address

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Signature as it appears on card

2019 Summer Seminar

Hyatt Regency Resort ~ July 16-20, 2019 ~ Maui, Hawaii

The TADC held its 2019 Summer Seminar on the fabulous island of Maui, Hawaii! The Hyatt Regency in Lahaina provided the perfect venue for this family-friendly CLE. Program Chairs Mitch Moss with Moss Legal Solutions, PLLC, El Paso, and Diana Valdez with the Law Offices of Diana Macias Valdez PLLC, El Paso, assembled a top-notch program including a panel discussion on *"Civility Matters"* as well as topics ranging from Civil Rico to the Texas Supreme Court Update.\

President Bud Grossman

A full house for CLE

Keith O'Connell

A Panel Discussion; Dan Worthington, Michele Smith, Greg Curry & Program Co-Chair Mitch Moss

Mitch Smith, KaRynn & Keith O'Connell with Bud Grossman

Alan & Pam DuBois with David Chamberlain & Greg Curry

2019 Summer Seminar

Shari & John Owen with Allison, Michael, Luke and Payton Perez & Warren McCollum

Diana Valdez & Nathan Nieman

Carl Green & David Pierce

Nadia Gire, Doug Rees, Frances Brooks & April Warner

Elise Bennett, Langley Perez & Madison Madere


By Cleve Clinton and Bill Drabble
Gray Reed & McGraw LLP, Houston

Statute of Repose: Providing Peace of Mind for Texas Builders, Contractors, and Repairmen

After last call, Rebecca closes up the basement bar she manages and heads to her office for a cigarette and moment of solitude and reflection. Promising (again) that the cigarette would be her last, Rebecca finishes it, flicks the butt into a nearby wastebasket, and leaves. A butt ignites the wastebasket, and the fire quickly spreads through the manager's office. The fire-suppression system activates but fails to halt the blaze, which rapidly engulfs the rest of the bar and the high-end seafood restaurant upstairs. The fire eventually consumes—and destroys—the entire building. Not much later, the company that installed the fire-suppression system twelve years ago, Commercial Safety and Security, Inc., is served with a citation and petition. The bar is suing, alleging that Commercial negligently designed the system by using the wrong sprinkler discharge criteria and spacing. With twelve years having passed, Commercial no longer has any records of the installation; most of its employees have left; the few remaining employees have little memory of the installation. How does Commercial defend itself?

Fortunately, one of Texas's statutes of repose eliminates the threat of never-ending liability for those who construct improvements on real property. The statute, codified at Texas Civil Practice and Remedies Code §16.009, provides:

> A claimant must bring suit for damages . . . against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.[1]

For those individuals and corporations with control over substantially-completed real est improvements and no authority to access a inspect any unsafe conditions or to ensure improvements are being properly used or have been defectively altered,[2] the statute of rep provides a complete defense to a lawsuit alleg personal injury or property damage.[3]

This article addresses (i) the signific distinctions between statutes of repose (such §16.009) and statutes of limitations; (ii) §16.00 scope and application, including those who statute shields, (iii) calculation of the ten-y repose period, and (iv) the statute's exceptions

Difference Between Statutes of Repose a Statutes of Limitations

Although they both impose a deadline when claims must be filed, statutes of limitati and repose are different. Time limits establish by statutes of limitations are generally based up the date when the claim accrues.[4] For examp limitations begin to run upon a legal injury be suffered, even if the injury was not discove until later and damages had not yet occurre

[1] Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a).
[2] *S. Tex. Coll. of Law v. KBR, Inc.*, 433 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) ("The purpose of the statute is to protect someone who constructs and installs an improvement from facing never-ending potential liabi based on that work.").
[3] *See Reaves*, 949 S.W.2d at 761.
[4] *Statute of Limitations*, Black's Law Dictionary (10th 2014).
[5] *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996).

Statutes of limitations may also be extended by equitable doctrines, such as the discovery rule and fraudulent concealment, and tolling limitations, such as the plaintiff's disability or military service or the defendant's absence from the state.[6] For the defective fire suppression claim, Texas's statute of limitations is two years[7] and any lawsuit filed within two years of the fire would likely be timely.

"[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time."[8] Statutes of repose are absolute in nature.[9] They commence on a readily ascertainable date, which is typically when the defendant acted rather than when the plaintiff was injured. Statutes of repose can eliminate a plaintiff's cause of action before it ever accrued.[10] And, unlike statutes of limitation, there are no judicially-created rules of tolling or deferral for a statute of repose.[11] The "whole point" of a statute of repose is to "fix an outer limit beyond which no action can be maintained."[12]

Texas's Statute of Repose for Constructors and Repairmen

The statute of repose codified at section 16.009 of the Civil Practice and Remedies Code applies if: (1) the defendant constructed or repaired; (2) that which the defendant constructed or repaired was an improvement to real property; (3) the plaintiff's claim "aris[es] out of a defective or unsafe condition on real property or the deficiency in the construction or repair of the improvement"; and (4) the plaintiff did not file his or her claim within ten years after substantial completion of the improvement.[13]

Who Does the Statute of Repose Protect?

Section 16.009 protects those who construct or repair improvements to real property.[14] In other words, "the statute applies to those who start with personalty and transform the personalty into an improvement."[15] While those in the construction industry are clearly covered[16], section 16.009 protects any person who builds or repairs a structure for any reason. Special training or qualifications, participation in a specific trade or profession, or even being compensated for the work is not required. A dutiful amateur repairing his grandmother's fence receives the same protection as the professional who built it.

Section 16.009's protection also extends beyond the persons who "hammered the nails and turned the screws" to who are contractually responsible for the construction or repair work.[17] It applies to both the general contractor and the subcontractor who actually installed the improvement.[18] The statute also shields those that provide management and support services for construction projects.[19] For instance, the Eleventh Court of Appeals held section 16.009 applies to a machinery manufacturer hired by the property

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[6] *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.001(b), 16.063.

[7] TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a).

[8] *Methodist Healthcare Sys. of San Antonio, Ltd. v. Ranking*, 307 S.W.3d 283, 287 (Tex. 2010) (quoting *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009)); *see also Trinity River Auth. v. URS Consultants, Inc.–Tex.*, 889 S.W.2d 259, 261 (Tex. 1994) (stating that statutes of repose are "a substantive definition of, rather than a procedural limitation on, rights").

[9] *Methodist Healthcare Sys.*, 307 S.W.3d at 287.

[10] *See id.*; *Galbraith Eng'g*, 290 S.W.3d at 866.

[11] *Methodist Healthcare Sys.*, 307 S.W.3d at 287.

[12] *Id.* (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2002)).

[13] TEX. CIV. PRAC. & REM CODE ANN. § 16.009(a); *Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 24 (Tex. App.—Houston [1st Dist.] 2013), *rev'd on other grounds*, 478 S.W.3d 640 (Tex. 2016); *Williams v. U.S. Nat. Resources, Inc.*, 865 S.W.2d 203, 206 (Tex. App.—Waco 1993, no writ).

[14] *Petro Shopping Ctrs., Inc. v. Ownes Corning Fiberglas Corp.*, 906 S.W.2d 618, 620 (Tex. App.—El Paso 1995, no writ).

[15] *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995); *see also Reames v. Hawthorne-Seving*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) (stating that section 16.009 applies to "those who actually alter the realty by constructing additions or annexing personalty to it").

[16] *But see Galbraith Eng'g Consultant, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009) (incorrectly stating that section 16.008 "only precludes suits against person or entities in the construction industry that annex personalty to realty").

[17] *See S. Tex. Coll. of Law v. KBR, Inc.*, 433 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Jenkins*, 415 S.W.3d at 25; *Reames*, 949 S.W.2d at 763.

[18] *Reames*, 949 S.W.2d at 763; *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518, 519–20 (Tex. App.—Fort Worth 1988, no writ).

[19] *See S. Tex. Coll. of Law*, 433 S.W.3d at 92.

owner to "supervise and assist" in the machinery's installation, even though it did not provide any labor.[20] The property owner contracted with the manufacturer to bear the "ultimate responsibility" for the machinery's installation.[21] Due to the manufacturer's dual role, the court held that it "constructed" the improvement within the meaning of section 16.009.[22]

Nevertheless, a manufacturer acting solely as a manufacturer falls outside section 16.009's scope. In *Sonnier v. Chisholm-Ryder Co.*, the Texas Supreme Court held that the statute did not apply to materialmen or manufactures of the personalty that a third party subsequently affixes to the property.[23] In that case, a portion of a prison employee's arm was severed while inspecting a tomato chopper manufactured for use in the prison's commercial cannery.[24] When the employee sued, the manufacturer raised the statute of repose as a defense.[25] A closely divided supreme court held that section 16.009 did not apply. The five-justice majority reasoned an item does not transform from personalty to an improvement until it is affixed to the property.[26] Because section 16.009 applies only to those who construct and repair an "improvement," its applicability is limited to those that annex personalty to realty.[27] Four justices dissented, arguing that the statute should apply if "it was the objective intent of the parties at the time the object was constructed that it would become an improvement."[28]

What Are Improvements?

In addition to being directly involved, a person seeking repose under section 16.009 must have constructed or repaired an "improvement" to the real property. In *Sonnier*, the Texas Supreme Court defined "improvement" broadly, stating that it "includes all additions to the freehold except for trade fixtures which can be removed without injury to the property."[29] "An improvement can be anything that 'permanently enhances the value of the premises' and may even be something that is easily removable so long as it is attached to and intended to remain a part of the [real property]."[30] That expansive definition encompasses fixtures, which are personal property that have become so attached to realty that they become part of it while simultaneously retaining their separate identity.[31] All improvements are not necessarily fixtures, but all fixtures—except trade fixtures—are improvements.[32]

To qualify as an improvement, the item must be annexed to the real property.[33] When determining whether the item has been sufficiently annexed, the courts consider three factors: (1) the mode and sufficiency of the annexation, either actual or constructive; (2) the adaption of the item to the use or purpose of the realty; and (3) the intent of the person who annexed the item.[34]

The first factor, which addresses how securely the item is attached to the property, is ultimately a question of degree. While the item need not be permanently attached and rendered immobile, merely placing an item on property obviously does not make it an improvement.[35] Additionally, where the item is attached will affect the analysis. An item directly attached to the soil, as opposed to a structure, is more likely to be considered an improvement.[36]

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[20] *Fuentes v. Cont'l Conveyer & Equip. Co.*, 63 S.W.3d 518, 521 (Tex. App.—Eastland 2001, pet. denied).
[21] *Id.* at 521–22.
[22] *Id.* at 522.
[23] *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479–80 (Tex. 1995).
[24] *Id.* at 477.
[25] *Id.*
[26] *Id.* at 479 ("Only upon annexation does the personalty lose its characteristics as personal property and become viewed as an improvement").
[27] *Id.*
[28] *See id.* at 488 (Owen, J., dissenting).
[29] *Id.* at 479.
[30] *Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244, 246–47 (5th Cir. 1992) (quoting *Dublin v. Carrier Corp.*, 731 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1987, no writ)), *disapproved on other grounds by Sonnier*, 909 S.W.2d at 483.
[31] *Reames* , 949 S.W.2d at 761.
[32] *Id.*
[33] *Sonnier,* 909 S.W.3d at 479; *Reames*, 949 S.W.2d at 761.
[34] *Sonnier*, 909 S.W.3d at 479 (citing *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985)).
[35] *Reames*, 949 S.W.2d at 762 (holding that a movable conveyer belt was an improvement); *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 130 (Bankr. N.D. Tex. 2003).
[36] *In re San Angelo Pro Hockey Club*, 292 B.R. at 132 ("[W]hen an item is annexed to the soil, as opposed to a wall, floor, or ceiling, the appropriate legal analysis is not

The second factor—adaptation—addresses whether the item and the realty have a common purpose. An item that furthers the property's use and enhances its value will likely be considered an improvement.[37]

The third factor examines whether the person who annexed the item intended to make it a permanent addition to the property. Intent is the "preeminent" factor, and "the other two are evidence of intent."[38] Courts determine the parties' intent by looking to its external objective manifestations.[39] A bald assertion that the personalty was not meant to become an improvement cannot prevail over facts.[40]

Applying that three-factor test, Texas courts have held that a wide variety of items qualified as improvements, including a furnace,[41] a garage-door opener,[42] an air-conditioning unit,[43] industrial kilns,[44] underground gasoline storage tanks,[45] asbestos-containing fireproofing materials,[46] and a heat exchanger at a refinery.[47] In fact, the Texas Supreme Court suggested in *Sonnier* that a motel could bolt a painting to the wall of one of its rooms with the intent that it not be removed and thereby transform a painting into an improvement.[48]

As another example, in *Reames v. Hawthorne-Seving, Inc.*, the Fifth Court of Appeals held that a movable conveyer belt in a ceramic tile plant was an improvement under section 16.009.[49] The conveyer belt, which carried powder that was later pressed into tiles, was located under the plant's drying system.[50] The conveyer belt was placed on wheels to facilitate cleaning the dryer.[51] Workers would periodically move the conveyer belt four to five feet and then return it to its original position after they finished cleaning.[52] Even though the conveyer belt was readily moved, the court held that it was an improvement. The conveyer belt was constructively annexed to the property, because the property owner "never intended to move it more than few feet as necessary for [the plant's] operations and never moved it for any other purpose."[53] Additionally, the court stated that the conveyer belt was well adapted to the property "because a critical phase of the [tile-making] process, transporting dried power from the dryer to the storage silo, could not be performed unless [the conveyer belt] was in place."[54] Finding those facts evidenced the property owner's intent, the court held that the conveyer belt was an improvement as a matter of law.[55]

Though broad, the definition of improvement has its limits, and it expressly excludes trade fixtures. Trade fixtures have a "well-established and commonly understood meaning in Texas law."[56] They are items "annexed to the realty by the tenant to enable him to properly or efficiently carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to

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to look at such items as a fixture or a trade fixture but as an improvement.").

[37] *See Dow Chem. Co. v. Abutahoun*, 395 S.W.3d 335, 345–46 (Tex. App.—Dallas 2013), *aff'd*, 463 S.W.3d 42 (Tex. 2015).

[38] *Sonnier*, 909 S.W.at 479.

[39] *See State v. Clear Channel Outdoor, Inc.*, 463 S.W.3d 488, 494 (Tex. 2015).

[40] *Id.*; *see also Logan*, 686 S.W.2d at 608 (stating that "even testimony of intention that the chattel was not meant to become a fixture will not prevail in the fact of undisputed evidence to the contrary").

[41] *Dedmon* , 950 F.2d at 250.

[42] *Ablin v. Morton Sw. Co.*, 802 S.W.2d 788, 791 (Tex. App.—San Antonio 1990, writ denied).

[43] *Rodarte v. Carrier Corp.*, 786 S.W.2d 94, 95 (Tex. App.—El Paso 1990, writ dism'd by agr.), *overruled by Petro Shopping Ctrs., Inc. v. Ownes Corning Fiberglas Corp.*, 906 S.W.2d 618 (Tex. App.—El Paso 1995, no writ).

[44] *Cofer v. Ferro Corp.*, No. 12-02-00151-CV, 2003 WL 21804821, at *4 (Tex. App.—Tyler Aug. 6, 2003, no pet.).

[45] *Big W. Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800, 803 (Tex. App.—Amarillo 1992, no writ).

[46] *Brown & Root, Inc. v. Shelton*, 446 S.W.3d 386, 390–91 (Tex. App.—Tyler 2003, no pet.).

[47] *Karish v. Allied-Signal, Inc.*, 837 S.W.2d 679, 681 (Tex. App.—Corpus Christi 1992, no writ).

[48] *Sonnier*, 909 S.W.2d at 479–80.

[49] *Reames*, 949 S.W.2d at 762.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 762.

[54] *Id.*

[55] *Id.*

[56] *C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P.*, 295 S.W.3d 748, 755 (Tex. App.—Austin 2009, no pet.).

the freehold."[57] Courts have held that trade fixtures remain personal property "because the intent of [their] annexation is to further the purpose of the tenant's trade, not to improve the realty."[58] Given that purpose, trade fixtures are typically intended to be temporary additions and retained by tenant when the lease ends.[59] Thus, trade fixtures are a narrow exception to the broad definition of improvements.

What Claims Are Barred by the Statute of Repose?

Moreover, the types of claims covered by §16.009 are expansive. The statute applies to claims for: "(1) injury, damage, or loss to real or personal property; (2) personal injury; (3) wrongful death; (4) contribution; or (5) indemnification" if they arise out of "a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement."[60] Notably, section 16.009 applies when the alleged injury results from any dangerous condition on the property, even if it is not the improvement that the defendant constructed or repaired.[61]

How Is the Repose Period Calculated?

Section 16.009's ten-year period to assert those claims begins to run upon "the substantial completion of the improvement."[62] "Substantial completion" is left undefined by the statute. While Texas courts have not interpreted term in the context of section 16.009, they have elsewhere defined "substantial completion" to mean "so completed that the [improvement] is capable of being utilized for its intended purposes . . . , even though there may be incompleted aspects of construction."[63] And, that interpretation is consistent with similar statutes of repose in other states.[64]

Determining when section 16.009's ten-year period begins is a party-specific inquiry. For example, in *Gordon v. Western Steel Co.*, the plaintiff sued its general contractor for alleged defects in the construction of condominiums.[65] The general contractor, in turn, filed claims against two of its subcontractors who had delivered and erected the structural steel.[66] Because they had completed their work more than ten years before they were sued, the subcontractors asserted the statute of repose as defense.[67] In response, the general contractor argued that the claims were timely because the condominiums, as a whole, were finished within nine years of the filing of the lawsuit.[68]

The Thirteenth Court of Appeals agreed with the subcontractors and has held that, when different persons are responsible for distinct parts of the construction or repair work, the statutory period begins upon the substantial completion of each person's portion of the work.[69] The court concluded that "[s]tarting the statute of repose when each [person] finishes its improvement conforms with the legislative intent of preventing indefinite liability for those who construct or repair improvements to real property."[70] And, the court stated that the practicalities did not militate in favor of an alternative construction. The substantial completion of the various improvements within a larger project is unlikely to "stretch beyond several years, and general contractors and beneficiaries ordinarily have

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[57] *Id.* (quoting *Boyett v. Boegner*, 746 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1988, no writ); *see also Reames*, 949 S.W.2d at 761 (defining a "trade fixture" as "an item, which can be removed without material or permanent injury to the free hold, that a tenant annexes to the realty to enable the tenant to carry on its business").

[58] *Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 110 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

[59] *C.W. 100 Louis Henna, Ltd.*, 295 S.W.3d at 755 (quoting *Jim Walter Window Components v. Turnpike Distr. Ctr.*, 642 S.W.2d 3, 5 Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.)).

[60] TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a)–(b).

[61] *Id.* § 16.009(a).

[62] *Id.*

[63] *See Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 514 (Tex. App.—Fort Worth 1988, writ denied).

[64] *See, e.g., Hill Cnty. High Sch. Dist. A v. Dick Anderson Constr., Inc.*, 390 P.3d 602, 605 (Mont. 2017); *Lamprey v. Britton Constr., Inc.*, 37 A.3d 359, 366 (N.H. 2012); *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 636 (Minn. 2006); *Ocean Winds Corp. of Johns Island v. Lane*, 556 S.E.2d 337, 419 (S.C. 2001); *Gordon v. W. Steel Co.*, 950 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1997, writ denied) (quoting *Patraka v. Armco Steel Co.*, 495 F. Supp. 1013, 107–20 (M.D. Pa. 1980)).

[65] *Gordon*, 950 S.W.2d at 744.

[66] *Id.*

[67] *Id.* at 745.

[68] *Id.*

[69] *Id.* at 748.

[70] *Id.*

opportunities to supervise or disapprove of the work along the way."[71] And, the court further remarked that "it is not overly burdensome to decipher when respective contractors substantially complete their improvements (*e.g.*, when they submit their final bills and/or walk away from the project)."[72] Thus, when applying section 16.009, the court must determine when the defendant substantially completed its work, not when the entire project was substantially complete.

What Are the Exceptions to the Statute of Repose?

If the defendant shows that section 16.009 applies and the plaintiff did not file his claim within the ten-year period, then the burden shifts to the plaintiff to show an exception or defense to the statute of repose.[73] Section 16.009 contains three exceptions.[74] It will not bar claims: "(1) on a written warranty, guaranty, or other contract that expressly provides for a longer period; (2) against a person in actual possession or control of the real property at the time that the damage, injury, or death occurs; [and] (3) based on willful misconduct or fraudulent concealment with the performance of the construction or repair."[75] The second exception is the most significant, as it preserves the property owner's continuing duty to warn or make safe dangerous conditions on the property.

In addition, section 16.009 allows potential plaintiffs to extend the repose period by providing a written claim for damages, contribution, and indemnification to the potential defendant within the ten-year period.[76] Providing a written claim will extend the period for two years from the date the claim is presented.[77]

Conclusion

Section 16.009 of the Civil Practice and Remedies Code is useful in defending negligence or personal-injury claims arising out of a dangerous condition on real property. With a few narrow exceptions, the statute applies broadly to any person who constructed or repaired any improvement on the property. And, the statute's protections are substantial. It provides a complete defense to any claim filed beyond the statute's inflexible and absolute ten-year deadline.

About the Authors

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With a client list full of families navigating business and generational transitions, Fortune 500 companies and risk-taking mavericks who won't take "no" for an answer, Cleve Clinton knows what it takes to develop creative solutions when big ideas result in big problems. Whether he's serving as lead counsel in one of the growing number of fiduciary litigation claims within family businesses, advising a family in transition, or helping a developer sidestep a legal and public relations disaster in a new residential community, Cleve's focus is always the same – understand and achieve the client's goals, either in or out of the courtroom. His clients span nearly every industry, including beverage distribution, real estate, manufacturing, telecommunications and transportation.

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Bill Drabble focuses his practice on representing property owners, landlords, tenants and developers in real estate litigation before courts throughout North Texas, including disputes over land sales, breaches of lease agreements, premises-liability claims and other disputes involving commercial and residential properties. He also handles a wide variety of intra-company disputes, such as prosecuting and defending claims for breaches of shareholder or company agreement, breach of fiduciary duty claims against directors and officers, and contests for control over the company. Bill's practice also includes appeals. He was the principal author of briefs filed in the Fifth Circuit, intermediate appellate courts and the Texas Supreme Court.

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[71] *Id.*
[72] *Id.*
[73] *See Nw. Austin Mun. Util. Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 836 (Tex. App.—Austin 2008, pet. denied); *see also Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam) (rendering summary judgment for the defendant because the plaintiff failed to raise a fact issue on an exception to the statute of repose).
[74] TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e).
[75] *Id.*

2019 – 2020
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TADC Legislative Update

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

With an apparently successful legislative session in the books, legislators began looking to the crucial 2020 election cycle almost immediately after they got home in June. Having given teachers a big pay raise, limited property tax growth, and otherwise taken care of business in Austin with a minimum of fuss, they had good reason for optimism heading into an uncertain presidential election year.

But, politics has a way of taking a right turn just when you think you have clear sailing. Within weeks of the end of the session, Speaker Dennis Bonnen and chair of the House Republican Caucus Dustin Burrows (Lubbock) held a meeting in the Capitol with Michael Quinn Sullivan of Empower Texans, who had in the past criticized the Speaker and helped recruit candidates against GOP incumbents deemed insufficiently conservative. After the meeting, Sullivan claimed that the Speaker and Burrows had promised Empower Texans privileges to the House floor during the 2021 session in return for financial help against specified Republican incumbents. He also reported that the Speaker had made disparaging remarks about Democrats in general and certain Democratic members in particular. He further revealed that he had taped the conversation but would not release the recording to the public at that time.

Sullivan's disclosures created a furor. Speaker Bonnen denied wrongdoing, as well as the existence of a list of targeted incumbents, as Sullivan claimed. He admitted that he may have made ill-advised comments about some of his colleagues and apologized for those. Governor Abbott, coming under increasing pressure to call a special session on gun violence, declined to do so, partly at least some believe, to protect the Speaker from a potential vote to remove him from the chair and hand over the House to someone else. Lt. Governor Patrick, breaking from the Governor, called for the release of the Sullivan tape, so that everyone could hear exactly what was said. Sullivan responded by offering to play the tape for any GOP incumbent named therein who wanted to hear it. Burrows, who has never commented publicly about the tape, abruptly stepped down as chair of the Caucus.

The Speaker's damage control efforts seemed to have made a little headway, at least until last week. A few days in advance of a scheduled meeting of the House Republican Caucus on Friday, October 18th, Sullivan released the tape to the public when appearing on a radio show in Dallas. The recording substantiated Sullivan's claims, but hearing the voices of the Speaker and Rep. Burrows made it sound much worse. Though the Speaker once again claimed that the tape showed no wrongdoing on his part, the response from members of the House was overwhelmingly censorious. At their Friday meeting, the House GOP Caucus condemned the Speaker and Rep. Burrows, stating that they had "violated the high standards of conduct we expect of our members." While the statement did not call on the Speaker to step down, it acknowledged that while there is no constitutional mechanism to remove a Speaker outside of a legislative session, the Caucus would

follow its procedure of nominating a candidate prior to the next regular legislative session. By Tuesday of the following week, however, about 30 GOP House incumbents, including the chairs of many powerful committees, had called on the Speaker to quit. Speaker Bonnen took the hint and issued a statement that he would not run for re-election to the House next year.

The consequences of this self-inflicted political catastrophe for the 2020 election cycle remain to be seen. Speaker Bonnen sought support for his candidacy partly on the basis that he would punish House members who campaigned or tried to recruit opponents to run against their colleagues. Many members view the Speaker's attempt to make a deal with Sullivan to do just that violates that pledge and undermines the confidence of the House in its leadership. There is also a greater worry in GOP ranks that this controversy will weaken the party in the 2020 election more generally. Speaker Bonnen states on the tape that the President's problems may hurt some GOP incumbents next fall. Some feel that as long as the Speaker tries to hold onto office, the worse things might get for incumbents in swing districts.

So, how many swing districts might there be? The latest "ORVS" numbers showing Republican and Democratic voting strength in House and Senate districts demonstrate just how competitive 2020 might be. According to the numbers, which are based on historical results through the 2018 elections, two GOP House incumbents, Sarah Davis (Houston) and Angie Chen Button (Dallas), represent districts that shade Democratic. Another, Morgan Meyer (Dallas), represents an essentially 50-50 district. On the other side, Vicki Goodwin (Austin) and Erin Zwiener (Driftwood) have close to 50-50 districts, with Michelle Beckley (Carrollton), Jon Rosenthal (Houston), and Gina Calanni (Katy) representing districts that shade Republican (*i.e.*, they leaned to Abbott in 2018 and Trump in 2016). Looking at these numbers, one might reasonably believe that the GOP has a good chance to improve its numbers in 2020 if they win back all or some of the seats they narrowly lost to these Democrats.

But, that's not the whole story. There are about seven other suburban districts currently held by Republicans that Beto O'Rourke won in 2018, but that went for Abbott in 2018 (in the mid-50s) and somewhat more narrowly for Trump in 2016. What happens in these districts may make or break the House elections for either party in 2020. If for some reason GOP numbers rebound and Trump runs strongly in those areas, then Republicans should do well and perhaps even increase their 83-67 majority by a few seats. But, if things don't go well at the top of the GOP ticket, just a few Democratic pick-ups will whittle down that majority to a handful.

While there is no threat to the GOP majority in the Senate, that isn't the whole story, either. Sen. Pete Flores (R-Pleasanton) was elected in a special election last year to represent historically Democratic SD 19, which runs from San Antonio to West Texas. This district went for O'Rourke and Clinton pretty handily, and even the Democratic gubernatorial candidate outpolled Governor Abbott there. If the Democrats win the seat back, then they will have the necessary 13 votes to defeat the Republican supermajority needed to bring bills to the floor for debate. If this occurs, then it will make it much more difficult for Lt. Governor Patrick to get his legislative agenda to the floor, meaning that any single Democrat has a lot of leverage for horse-trading.

One more thing: 2020 will be the first election without a straight-party vote. Nobody quite knows how that might play out, or whether it will affect outcomes down the ballot. There will be more on that in our next update.

2019 West Texas Seminar

Inn of the Mountain Gods ~ August 9-10, 2019 ~ Ruidoso, NM

The TADC held its 9th installment, the 7th held jointly with New Mexico, of the West Texas Seminar in nice and cool Ruidoso, New Mexico on August 9-10. The Inn of the Mountain Gods provided the perfect venue for this family-friendly CLE. Program Chairs Bud Grossman with Craig, Terrill, Hale & Grantham, L.L.P., Lubbock, and William Anderson with O'Brien & Padilla, P.C., Las Cruces, assembled a top-notch program including lawyers and judges from both states. 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.

Cody Rogers & Rob Benavidez

Kinzie & Jaedee Johnson

Mike Bassett, Dan and Marissa Hernandez with Carol Chavez

Bill Anderson, Bud Grossman, Mark Strandridge, Craig Grossman & Alex Yarbrough

Michael & Becky Dean

Dick Holland with Sarah & David Lauritzen

Hard at work!


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Preservation Letters Sending and Responding

By: Slater C. Elza & Jennie C. Knapp
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The goal of a preservation letter is to remind your (potential) opponent or third-party witnesses to preserve evidence, to make sure the evidence does not disappear, and to serve as a key piece of its own evidence if there is a subsequent claim of spoliation. While a preservation letter does not automatically create a duty to preserve evidence, it is good evidence to argue that the duty to preserve has arisen, and that subsequent document destruction was in bad faith. In other words, sending this letter before documents are destroyed gives you the "I told you so" argument. It is important to think through the implications of sending these letters and also the importance of responding appropriately to them to best defend your client's position.

I. Sending preservation letters.

A. Do you want to send one?

If you are considering sending a preservation letter, then think very carefully about whether you want to do it. A preservation letter is not specifically sanctioned by the Rules of Civil Procedure; so it may not have the privileges that other discovery has. Using a preservation letter to put pressure upon, for example, lost customers or other third parties may set you and your client up for a counterclaim based on libel or tortious interference. It also may highlight to the recipient that it, he or she has potential claims that it, he or she might not have otherwise considered or felt compelled to pursue. Or, it may cause them to consider filing a declaratory judgment action, giving them a chance to choose venue. This is not to say not to send the letter, but you should be aware of potential negative consequences and help your client make an informed decision.

B. Be specific.

In writing a preservation letter, do not be overly cryptic in your description of what kinds of documents and evidence you are seeking. All you are trying to do is keep the other side from destroying relative evidence. The preservation letter should be "reasonable," understandable, and well thought out.

In particular, watch out for phrases like "any and all" with respect to electronic evidence. It is impossible for a company to save any and all electronic evidence. For example, electronic communications would include phone calls. If what you are really looking for is emails, then say so. If you really want recorded phone calls, then say that. Other types of evidence you might seek to preserve include text messages, temporary files, deleted files, and archival tapes. Be specific as to the types of files you are seeking, and also where such files may be located (such as desktop computers, mainframes, mobile phones, flash drives, etc.).

If you know which specific persons, divisions, or departments have relevant data, then include their names specifically. Consider sending the letter to them as well as to the officers of the company, the head of the IT department, the registered agent, and the insurance adjuster. On top of that, you should include a request that the preservation letter be sent to all records custodians, including third party vendors who may be in possession of relevant data.

C. Educate your opponent.

To be effective, you need to educate your opposing party on what the evidence is, how it might be deleted or overwritten if they don't take steps to stop it, and who some of the identified key players are. A good preservation letter should halt routine business practices geared toward the destruction of potential evidence. Educate your opponent on stopping server backup tape rotation, electronic data shredding, scheduled destruction of backup media, re-imaging of drives, and the like.

If the letter is pre-suit, then spell out the nature of the claim in detail so that your opponents know what the claim is about and can better identify what information might need to be retained. As much as possible, be fact specific. Name specific persons, dates, business units, office locations, events, etc. Do not forget to request that physical documents also be maintained.

At the same time, you should not ask your opponent to keep more information than your client would reasonably keep. Your request might well be flipped back on you.

It is also a good idea to include a paragraph that invites the recipient to contact you if he or she does not understand that letter. State your willingness to meet and confer with the recipient regarding your notice.

D. When to send (and when not to send).

A key point in a successful preservation letter is thinking about when you want to send it. Usually, you will want to send it as soon as you can identify who the potential parties and what the possible claims are. You should keep in mind, however, that just sending a letter does not create any legal rights or obligations and does not change the rules of procedure. It is generally a good idea to send a preservation letter when there is evidence you think would be destroyed otherwise, whether maliciously or innocently. The letter will also put the putative defendant on notice that they are about to be embroiled in a lengthy, costly, and complicated discovery battle, and it can help support an argument later that the defendant was warned from the beginning to preserve evidence.

There are some occasions that you will want to delay sending a preservation letter. For example, if you think the defendant will not hesitate to destroy evidence, it might be more effective to seek a TRO, or include the preservation letter with your petition (or even in it).

E. Don't forget third parties.

The preservation letter may also need to be sent to an accountant, banker, or another third party, if you believe that they have documents that are relevant to the dispute and are not likely to be preserved. Alternatively, you could request in your preservation letter to the other party that it, he or she contact those third parties directly. This will depend on the dynamics of your specific situation.

II. How to respond to a preservation letter

A. Instituting internal litigation holds

Once you receive a preservation letter, you should ensure that your client has a litigation hold in place. The litigation hold should be thought out for each case as opposed to sending a "form" letter that is the same in each matter.

1. What to save

The "save everything" approach is often unwieldy and very expensive. You should instead carefully tailor a document hold that captures the relevant data, but still allows irrelevant data to be destroyed within your client's routine policies. You should save the data that is known to be relevant, reasonably should be known to be relevant, reasonably calculated to lead to the discovery of admissible evidence, reasonably expected to be requested, and subject to an existing request.

To institute a litigation hold, you must first investigate. You should determine who is potentially involved and interview them. They will help you answer the next sets of questions. Be sure that the persons you interview are aware

they should not destroy data (including data on their home computers, external hard drives, and cell phones). You should also think about interviewing outside third parties such as IT companies, vendors, accountants, payroll companies, auditors, and the like.[1]

These people can help you determine what the relevant data is, what is available, and where and how it is saved. Think about what information the other side will want (and you will want), and make sure that it is saved. Err on the side of too much data rather than too little data. A lot of discovery disputes arise when, for example, backups of data are destroyed. Also don't forget drafts of documents, shadow files, and paper documents. Think through when the dispute arose and how far back you should go back to preserve data.

2. How to save it.

Send a litigation hold letter to the relevant records custodians. A good litigation hold letter should be very clear and straightforward as to what the dispute is about so that the custodians can determine what information is relevant and should be saved. Do not leave them to guess. It should also explain *how* the information should be saved – placed in a central repository, flagged in emails, or other methods. The letter should set out reasons why the information is important and the potential consequences of failing to preserve it. Be specific in the types of data that should be saved and the types of automatic document destruction or data deletion policies that should be suspended. Invite recipients to ask questions about the hold or how to implement it.

Next, you should actually collect the data, again erring on the side of too much rather than too little. Create repositories for paper and electronic copies of documents. Collect documents from the outside parties that you have identified such as the IT companies, vendors, accountants, payroll companies, auditors, and the like. Be sure that you and the IT people you are working with are communicating clearly what data needs to be saved, and what does not need to be saved. Run searches of key words and people through emails and other databases, and make sure that the documents are preserved.

As the case progresses, follow up on the litigation hold and the categories of documents that should be preserved. It might be possible that the developments of the matter or suit could affect the categories of documents that need to be saved.

3. Working with the other side

When litigation is filed, talk with the other side early if it looks like electronic discovery is going to be voluminous. Many federal courts require the parties to discuss, at the 26(f) conference, how electronic evidence will be stored, produced, and maintained, but it is a good rule of thumb for any case. It is a good idea to, when possible, reach an agreement with the opposing counsel regarding what will be preserved, how it will be preserved, the date range of preservation, and what search terms will be. If you do this, then (1) you will allow your client to delete data outside of the agreed-upon scope, (2) you will force your opposing party to be responsible for electronic documents that they have, and (3) it will provide certainty to your obligations.

B. Practical considerations.

When you receive a preservation letter, also be sure that your client contacts their insurer. If you believe the scope of the preservation letter is overly broad, then write a letter back explaining why you think so, what the proper scope of the preservation should be, what steps your client is taking, and why these steps are reasonable. This will put the proverbial ball back in your opponent's court to explain why you are acting unreasonably. And, if your client violates the original preservation letter, but you have informed your opponent of such concerns, then it will look better in front of a judge.

[1] Care should be exercised, as communications with these persons may not be privileged, and the sharing of a litigation hold letter with them may destroy the privilege.

2019 Annual Meeting

Hotel Emma – September 18-22, 2019 – San Antonio, Texas

The TADC Annual Meeting was held in San Antonio, Texas, September 18-22, 2019 at the spectacular Hotel Emma. Program Chairs Mitzi Mayfield with Riney & Mayfield LLP, Amarillo, and Trey Sandoval with Mehaffy-Weber, PC, Houston assembled a program with over 9 hours of CLE including 1.5 hours ethics. Topics ranged from *"Civility in the Courtroom"* provided by Justice Patricia Alvarez to the ever-popular *"Supreme Court Update"* provided by Justice Paul Green.

Arlene Matthews, Mitzi Mayfield, Gayla Corley & Michele Smith

Molly Chambers, Tom & Lisa Ganucheau & Dennis Chambers

The Knapp Family

David Kirby & Brian Pidcock

Sofia Ramon & Jim Hunter

Michael Golemi & Karen Gann

2019 Annual Meeting

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Christy Amuny & Clayton Devin

April Warner, Paul Smith & Russell Smith

Rusty Beard, Rachel Moreno & Bud Grossman

Class is in session

Max Wright, Justice Patricia Alvarez & Jo Ben Whittenburg

Lamont Jefferson: a voir dire demonstration

2019 Annual Meeting

Justice Paul Green

Thanks to our volunteers for the voir dire demonstration from St. Mary's Law School & special thanks to Justice Alvarez and Lamont Jefferson

Tracey & Jason Hendren with Rosemary and Max Wright

Mark Carlson, M.D., Courtney Green, Ann Hennis & Justice Paul Green

The Mitch Moss Family

Ileana Vicinaiz,, K.B. Battaglini, & Victor Vicinaiz

2019 Annual Meeting

Kyle Briscoe receives the Young Lawyers Service Award from Pam Madere

Darin Brooks receives the President's Award from Pam Madere

The gavel passes to 2020 TADC President Bud Grossman from Pam Madere, 2019 TADC President

Clayton Devin & Mike Hendryx receive Special Recognition Awards for their work with the Legislature from Pam Madere

President Madere receives the DRI Exceptional Performance Award from DRI Southwest Regional Vice President Jason Hendren

TADC Past Presidents at the Annual Meeting: Dennis Chambers, Clayton Devin, Mike Hendryx, Chantel Crews, Pam Madere, Tom Bishop, Bud Grossman (current President), Tom Ganucheau & Keith O'Connell

Amicus Curiae Committee News

There have been several significant amicus submissions.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) filed an amicus to support Petitioner in *Medina v. Zuniga*, Case No. 17-0498, 2019 WL 1868012, 2019 Tex. LEXIS 387 (Tex. Apr. 26, 2019). This is an important case concerning sanctions under Tex. R. Civ. P. 215.4(b) for denying a request to admit negligence and proximate cause. 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 counsel conceded liability in opening argument, the trial court granted a directed verdict on liability; the jury found gross negligence and awarded punitive 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 Supreme Court reversed and rendered on sanctions and punitive damages. Merits preclusive requests to admit are disfavored. Counsel may deny such requests on which the opposing party has the burden of proof. Because counsel had some ground to believe defendant could prevail on those issues, it was error for the judge to grant sanctions; the decision to deny the request and later concede is not a basis for sanctions. There was no evidence defendant's conduct objectively created an extreme risk of harm. There was no speed limit or stop sign at the exit and pedestrian traffic was not heavy. His failure to look both ways made an accident more likely, but does not amount to gross negligence.

TADC joined an amicus brief with TTLA, ABOTA and Tex-ABOTA, in support of the trial judge's sanctions in *Brewer v. Lennox Hearth Products*, 546 S.W.3d 866 (Tex. App.—Amarillo 2018, pet. granted). The Texas Supreme Court has granted review; oral argument was heard on Oct. 10, 2019, in Fort Worth. This case has received national attention. The decision merits study to determine when juror pool studies cross the line into jury tampering. Briefly, in a high visibility products liability case in a small community, defense counsel conducted a survey that the trial judge found was used to intimidate local witnesses and prejudice potential jurors. The lawyer was sanctioned. The Texarkana Court held the trial judge had inherent authority to protect the venire and judicial process from intentional, bad faith conduct. The trial judge must conclude there was intentional conduct that interfered with the court's ability to empanel a fair and impartial jury. The possibility that the opponent can *voir dire* jurors to detect bias is not sufficient to avoid sanctions.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) filed an amicus to support petitioner in *DLA Piper LLP v. Linegar*, 537 SW3d 512 (Tex. App.--Eastland 2017, pet. denied). This is the appeal from the remand of *DLA Piper v. Linegar*, 495 S.W.3d 276 (Tex. 2016). This is a legal malpractice case arising from DLA's alleged failure to perfect the security for a loan resulting in nonpayment after default. Linegar caused the trust holding his retirement funds to loan the money. DLA designated as responsible third parties the trustee who loaned the money made an illegal loan and the assignee of the loan settled it too cheap after default. The trial court excluded all evidence about the trustee and assignee, and then refused to submit them in the charge. The court of appeals found no error, because (1) their alleged acts did not cause DLA's failure to timely perfect the security interest, and (2) all evidence of their actions was irrelevant because the acts were too remote to cause the loss. The Supreme Court denied review.

Lawrence Doss (Mullin Hoard & Brown, LLP,

Lubbock) submitted an amicus to support Truck Insurance's petition for review in *Hernandez v. Truck Ins. Exchange*, 553 S.W.3d 689 (Tex. App.—Fort Worth 2018, pet. denied); Roger Hughes (Adams & Graham) has submitted an amicus to support a motion for rehearing. The Supreme Court has asked Hernandez to respond to the motion for rehearing. This is a suit to collect an alleged *Stowers* claim against a medical malpractice insurer after a judgment against the insured for wrongful death was affirmed in *Yagnik v. Hernandez*, 2013 WL 1668304 (Tex. App.—Fort Worth Apr. 18, 2013, pet. denied) (mem. op.). The first issue is whether the former art. 4590i, §11.02(c) [repealed], created a direct action/*Stowers* claim for plaintiffs against a medical malpractice insurer without first obtaining an assignment of the claim from the insured healthcare provider. The second issue is whether art. 4590i, §11.02(c), authorizes the plaintiff sued the insurer under *Stowers* for the difference between the verdict and judgment after the damage caps are applied. Here, the jury awarded a $2.7 million verdict against Dr. Yagnik, but the judgment reduced the award to $1.8 million. After an unsuccessful appeal, the insurers paid the judgment. Then, the Hernandez family sued the insurer under art. 4590i, §11.02(c), arguing it created a direct action under *Stowers* to recover the difference between the capped judgment and the verdict. The trial court held they had no standing and granted summary judgment; the Fort Worth Court reversed, holding they had standing under the statute to sue Dr. Yagnik's insurer for difference between the judgment and the verdict.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) submitted an amicus support the petition for review in *Avalos v. Loya Ins. Co.*, No. 04-17-0070-CV, 2018 WL 3551260, 2018 Tex. App. LEXIS 5629 (Tex. App.—San Antonio July 25, 2018, pet. filed) (mem. op.) (Angelini, J., concurring). This case presents an issue of applying the eight-corners rules on the duty to defend when the injured person and the insured collude to conceal from the liability insurer (Loya) that the accident is an excluded loss. Here, the insured's husband was an excluded driver under the Loya policy. The husband, while driving the insured vehicle, had an accident with his friend, Guevara. The insured, her husband and Guevara then colluded to tell the police the insured was driving and that Guevara could sue claiming she was driving. A lawsuit ensues, and the insured answered discovery that she was driving. Before her deposition, the insured confessed that she lied, her husband was driving, and Guevara's allegation she was the driver was the result of agreed fraud. Loya withdrew from defending her; Guevara got a summary judgment based on the insured's earlier discovery responses. In the resulting bad faith suit, the trial court granted Loya a summary judgment. The San Antonio court reversed, holding the eight-corners rule precluded evidence the allegations within coverage were false and the result of collusion with the insured. The Supreme Court has requested merits briefing.

Roger Hughes (Adams & Graham,, L.L.P., Harlngen) filed an amicus to support the petition for mandamus in *In re Buchanan, M.D.*, Case No. 19-0193, to reverse *In re Echols*, 560 S.W.3d 776 (Tex. App.—Dallas Dec. 19, 2018, orig. proc.). The issue is the designation of an unknown assailant as a responsible third party. Echols is a pimp who was shot in the head by one of his girl's customer during a dispute. He brought a medical malpractice suit against ER Doctor Buchanan, who allegedly failed to detect a bullet fragment in his skull, resulting in a serious infection. In his deposition, Echols claimed not to know the customer's identity; Dr. Buchanan then filed a motion to designate 'John Doe' as a responsible third-party. The trial court granted it, but the court of appeals granted mandamus to vacate the designation, because Tex. Civ. Prac. & Rem. Code §33.004(j) required Dr. Buchanan identify unknown criminal RTPs within 30 days of his answer. Dr. Buchanan argued that he is entitled to designate non-criminal RTPs under §33.004(a). The Supreme Court denied review.

TADC has authorized an amicus to support the mandamus petition from *In re McAdoo*, 559 S.W.3d 589 (Tex. App.—San Antonio 2018, orig. proc.)(Barnard, J., dissenting). Dr. McAdoo seeks mandamus relief to vacate a new trial order after the jury unanimously gave a defense verdict. The trial judge held the failure to find negligence and causation was against the great weight of the evidence. The original panel split; Justice Rios (joined by Martinez) summarily denied relief; Justice Barnard wrote a lengthy dissent. Rehearing *en banc* was summarily denied, but Chief Justice Marion and Justice Angelini joined the dissent. In short, the court split 4/3, the majority being unwilling to explain itself in the face of a detailed dissent. However, the case settled and the mandamus petition will be dismissed.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Savoy*, No. 03-19-0361-CV, in the Austin Court of Appeals. The trial court struck counteraffidavits from a medical billing professional and a doctor that challenged medical expense affidavits. Plaintiff argues that counteraffidavits must state grounds showing the opinions are reliable under *Robinson/Gammill* standards and reliance on third-party reimbursement rates is unreliable. TADC urged the Austin Court follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.).

Roger Hughes (Adams & Graham) and Mike Bassett and Sadie Horner (The Bassett Firm) submitted an amicus brief to support the petition for mandamus in *In re Parks,* No. 05-19-0375-CV, in the Dallas Court of Appeals. The trial court struck counteraffidavits by a chiropractor and neurologist that challenged medical expense affidavits on chiropractic, orthopedic, and pain management care. Plaintiff argues that the experts were not qualified because they were not of "the same school" as the treating providers and lacked board certification in orthopedics, family practice, or pain management. TADC urges they are qualified if they have familiarity with treating the plaintiff's complaints. TADC urged the Dallas Court to follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.).

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Ben E. Keith Co.,* No. 05-19-0608-CV, in the Dallas Court of Appeals. The trial court struck counteraffidavits by a forensic medical billing professional that challenged medical expense affidavits on orthopedic and pain management care. Plaintiff argues that the experts were not qualified because they were not of "the same school" as the treating providers. TADC urges they are qualified if they have familiarity with treating the plaintiff's complaints. TADC urged the Dallas Court to follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.).

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Allstate Indemnity Co.,* No. 13-19-0346-CV, in the Dallas Court of Appeals. The trial court struck counteraffidavits by a forensic medical billing professional (also a R.N.) that challenged medical expense affidavits on orthopedic and pain management care. Plaintiff argues that the experts were not qualified because they were not of "the same school" as the treating providers. TADC urges they are qualified if they have familiarity with treating the plaintiff's complaints. TADC urged the Dallas Court to follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.).

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TADC Amicus Curiae Committee

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November 10, 2019

To: TADC Members

From: Mike Bassett and Heath Hendricks

Re: TADC Transportation Section

TADC Members:

We are excited to announce the formation of the Transportation Section of the TADC. The goal of this new Section is to create networking, publishing, and learning opportunities for TADC members by including transportation-related articles in upcoming TADC magazines and newsletters.

Our new Section also is working on securing speaking slots for transportation-related issues at upcoming TADC conferences, which began at the Summer 2019 Seminar in Maui, Hawaii.

If you have just started handling transportation cases, or you have been doing it for years, this Section is for you.

We look forward to seeing this Section grow and invite you to participate. If you have any questions or comments – or would like to directly contribute – please contact one of the following Committee Members:

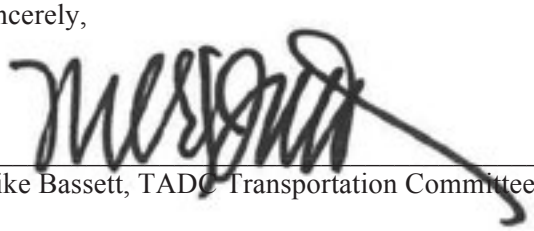
(1) Mike H. Bassett, The Bassett Firm, 3838 Oak Lawn Ave., Suite 1300, Dallas, Texas, 75219, 214.219.9900, mbassett@thebassettfirm.com, or

(2) W. Heath Hendricks, Riney & Mayfield LLP, 320 S. Polk Street, Suite 600, Amarillo, Texas 79101, 806.468.3204, hhendricks@rineymayfield.com.

Our hope is that this Section can add value to both your TADC membership and transportation law practice. There is ***no fee*** to join this Section and participation is encouraged.

Please email Bobby Walden at bwalden@tadc.org and he will add you to the Transportation Section roster.

Sincerely,



Mike Bassett, TADC Transportation Committee Chair

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By: Michael A. Golemi, Don Haycraft, and Jody M. Schisel-Meslin, Liskow & Lewis, APLC, Houston

Settling the Split: The Supreme Court Clarifies Unavailability of Punitive Damages for Seamen in *Dutra Group v. Batterton*

On June 24, 2019, the United States Supreme Court issued its decision in the landmark case *Dutra Group v. Batterton*, a long-awaited opinion addressing a circuit split of whether a Jones Act seaman could recover punitive damages on a claim for unseaworthiness under general maritime law.[1] Despite a long history of awarding punitive damages in maritime claims,[2] punitive damages have not been available to seamen claiming personal injury or death under either the Jones Act or unseaworthiness following the Supreme Court's decision in *Miles v. Apex Marine Corp.* in 1990.[3] Since that time, however, a circuit split developed, making the issue ripe for resolution by the Supreme Court.

Historically, seamen have been precluded from recovering punitive damages under the Jones Act and general maritime law. In *Miles v. Apex Marine Corp.*, the United States Supreme Court unanimously held that a Jones Act seaman could not recover nonpecuniary damages in a wrongful death action.[4] The Court noted that Congress directly addressed the question of recoverable damages on the high seas through legislation and did not provide for nonpecuniary damages when it passed the Jones Act. Holding course with maritime law's principle of uniformity, the Court limited recovery under both the Jones Act and general maritime law to pecuniary damages, stating that "[t]oday we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under [the

[1] *Dutra Group v. Batterton*, 193 S.Ct. 2275 (2019).
[2] *See* Thomas J. Schoenbaum, Admiralty & Maritime Law 186 (5th ed. 2012) (discussing generally punitive damages under maritime law).
[3] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).
[4] *Id.*

Death on the High Seas Act], the Jones Act, or general maritime law."[5]

However, the Supreme Court carved out an exception to that uniform rule in *Atlantic Sounding Co., Inc. v. Townsend*, where it held, in a 5-4 decision, that punitive damages were available for the arbitrary and capricious denial of maintenance and cure.[6] The Court's reasoning for this deviation relied on three principles. First, the Court noted that punitive damages had long been available for willful, wanton, and outrageous conduct. Second, the tradition of punitive damages under common law extended to claims arising under federal maritime law. And third, nothing in maritime law undermined that general rule's applicability in the maintenance and cure context. The Court addressed maritime law's principle of uniformity by concluding that "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action."[7]

Miles and *Townsend* left lower courts grappling with how to reconcile these two decisions and ultimately led to a circuit split in two of the most active admiralty circuits in the United States.

The Fifth Circuit's position was that the Supreme Court's decision in *Miles* controlled the issue of nonpecuniary damages under the Jones Act and general maritime law. In *McBride v. Estis Well Service, L.L.C.*, the Fifth Circuit, sitting *en banc*, held that punitive damages for personal injury and wrongful death claims were barred under both the Jones Act and general maritime law.[8] In that decision, the Fifth Circuit limited *Townsend* to a maintenance and cure context and held that under general maritime law, unseaworthiness claims were limited to pecuniary damages.[9] The Fifth Circuit likewise extended this holding to preclude seamen from recovering nonpecuniary damages from third party non-employer tortfeasors.[10]

Alternatively, even before the Supreme Court's decision in *Townsend*, the Ninth Circuit had held that punitive damages may be available under general maritime law for unseaworthiness claims. In *Evich v. Morris*, the Ninth Circuit distinguished unseaworthiness and failure to pay maintenance and cure from Jones Act claims and allowed the recovery of punitive damages.[11] The Ninth Circuit followed this rationale in *Batterton v. Dutra Group*.[12] In *Batterton*, a Jones Act seaman sought punitive damages for injuries he claimed resulted from the vessel's unseaworthiness.[13] The plaintiff, a Jones Act seaman employed by Dutra Group, was injured on the defendant's dredge vessel on the West Coast when a hatch blew open and crushed his hand. The district court denied the defendant's motion to strike the punitive damages claim; the Ninth Circuit affirmed. The Ninth Circuit reasoned that *Townsend* implicitly held that the Supreme Court's decision in *Miles* was limited to claims of loss of society and lost future earnings but did not limit the availability of remedies for actions under the general maritime law such as unseaworthiness claims.[14] As such, the Ninth Circuit awarded the plaintiff punitive damages for his unseaworthiness claims.[15] This variance from the Fifth Circuit created an opportunity for the Supreme Court to

[5] *Id.* at 33.
[6] 557 U.S. 404 (2009).
[7] *Id.* at 424.
[8] 768 F.3d 382 (5th Cir. 2014).
[9] *Id.*
[10] *See Scarborough v. Clemco Indus.*, 391 F.3d 660 (5th Cir. 2004).
[11] 819 F.2d 256 (9th Cir. 1987).
[12] 880 F.3d 1089, 1091 (9th Cir. 2018).
[13] *Id.*
[14] *Id.* at 1091-92.
[15] *Id.*

offer guidance and long-awaited clarification on the issue.

In seeking *certiorari*, the Dutra Group argued that Supreme Court precedent precluding the recovery of punitive damages under the Jones Act and general maritime law controlled the issue and that any limit that Congress had placed on damages in a negligence action under the Jones Act "forecloses more expansive remedies in a general maritime law action founded on strict liability."[16]

Justice Alito wrote the Court's majority opinion, joined by Chief Justice Roberts and Justices Thomas, Kagan, Gorsuch, and Kavanaugh. Justice Ginsburg dissented, joined by Justices Breyer and Sotomayor.

Justice Alito's opinion focuses on an historical approach that finds an absence of punitive damage awards in unseaworthiness cases. Accordingly, the opinion notes that once the Jones Act was passed by Congress in 1920, legislative remedial schemes for seamen should be the watchword for courts sitting in admiralty. Justice Alito clarifies that the Jones Act negligence action allows only compensatory damages and warns that its twin, general maritime law's unseaworthiness cause of action, should not overstep legislative limitations. Thus, the uniformity principle expressed in *Miles* prevails with its admonition that courts should not exceed legislative limits. The opinion distinguishes *Townsend* by noting that in contrast to unseaworthiness claims, there is a historical record of punitive damages being awarded in the maintenance and cure context. Finally, Justice Alito notes that policy considerations disfavor allowing punitive damages for unseaworthiness claims because many competitor shipping nations do not allow punitive damages. Justice Alito warns that affirmance of the Ninth Circuit view would harm American shipping interests.

In dissent, Justice Ginsburg opines that *Townsend* should control because there is a long history of punitive damages being awarded as part of the general maritime law, albeit a paucity in the specific context of unseaworthiness. While the Jones Act provided a new negligence cause of action, Congress did not curtail preexisting remedies, including punitive damages. Justice Ginsburg states that statutory and historical analysis contains "not a hint" that the Jones Act limited seamen's remedies already in place. In her policy analysis, she counters that the availability of punitive damages in maintenance and cure actions has not created a "tidal wave" of such actions; instead, she writes, punitive damages for wanton and willful creation of an unseaworthy condition in a vessel will deter such conduct.

The Court's decision provides long-awaited clarification on this murky issue. The varying law between jurisdictions forced shipping companies to consider the geographic regions in which they operated and created uncertainty and unpredictability for litigators. This decision restores maritime law's hallmark of uniformity across courts sitting in admiralty in the United States.

About the authors

Michael A. Golemi, Don Haycraft, and Jody M. Schisel-Meslin are part of Liskow and Lewis's Maritime, Oilfield, and Insurance Practice Group.

Brief Summary

Michael A. Golemi, Don Haycraft, and Jody M. Schisel-Meslin summarize the recent United States Supreme Court decision in *Dutra Group v. Batterton*, which settled a long-running circuit split between two of the most active maritime circuits in the country on the issue of punitive damages for injured Jones Act seamen.

[16] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

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CLE Approved for: 9.25 hours including 3.5 hours ethics

Wednesday, February 5, 2020

6pm – 8pm TADC/LADC/ADLA Welcome Reception

Thursday, February 6, 2020

6:45-9:00am Buffet Breakfast with LADC & ADLA

7:15-7:30am Welcome & Announcements
Bud Grossman, TADC President
Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
Lauren Goerbig, Jackson Lewis P.C., Austin, Program Co-Chair
Belinda Arambula, Burns, Anderson, Jury & Brenner, L.L.P., Austin, Program Co-Chair

7:30 - 8:15am *TEXAS TRADE SECRETS/UNFAIR COMPETITION*
Patrick S. Richter, Jackson Lewis P.C., Austin

8:15 – 9:00am *EMPLOYMENT LAW UPDATE*
Derek Rollins & Beth Adamek, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Austin

9:00- 9:45am *SUPREME COURT UPDATE*
Scott Schneider & Paige Duggins-Clay, Husch Blackwell LLP, Austin

9:45 - 10:30am *CYBER SECURITY UPDATE*
Amanda Harvey, Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., Dallas

Friday, February 7, 2020

6:45-9:00am Buffet Breakfast with LADC & ADLA

7:00-7:15am Welcome & Announcements
Bud Grossman, TADC President
Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
L. Victor Gregoire, Jr, LADC President
Kean Miller LLP, Baton Rouge
Christina May Bolin, ADLA President
Christian & Small LLP, Daphne

7:15 – 8:45am *ETHICAL QUESTIONS POSED BY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE*
Craig Alexander, Rumberger, Kirk & Caldwell, Attorneys at Law, Birmingham
John Browning, Spencer Fane LLP, Plano
Jessica Engler, Kean Miller LLP, New Orleans

8:45–9:00am *B R E A K*

9:00-9:30am *DATA BREACH AND RESPONSE*
Rachel Ehlers, Jackson Lewis P.C., Austin

9:30-10:00am *EMOJIS | SOCIAL MEDIA AND THE LAW*
Matthew Smith, Kean Miller LLP, Baton Rouge

10:00-10:30am *JUDGE'S CONSIDERATION OF EMOJIS, SOCIAL MEDIA & THE LAW, INFORMAL DISCUSSION WITH APPELLATE AND TRIAL JUDGES*
The Honorable Frances Pitman, Second Circuit Court of Appeals, Shreveport
The Honorable Mike Pitman, First District Court, Shreveport

Saturday, February 8, 2020

6:45-9:00am Buffet Breakfast with LADC & ADLA

7:15-7:30am **Bud Grossman,** TADC President
Lauren Goerbig, Program Co-Chair
Belinda Arambula, Program Co-Chair

7:30 – 8:15am *TO ARBITRATE OR NOT?*
Curt Kurhajec, Naman, Howell, Smith & Lee, PLLC, Austin

8:15-9:00am *WILLS, PROBATE, & COMMON LAW MARRIAGE*
Elizabeth Brenner, Burns, Anderson, Jury & Brenner, L.L.P., Austin

9:00 – 9:45am *MENTAL HEALTH AND THE LAW*
Chris Mugica, Jackson Walker, L.L.P., Austin

9:45 – 10:30am *WHO DO I REPRESENT? AND WHO CAN I TALK TO?*
Christy Amuny, Germer PLLC, Beaumont

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Registration fees include Wednesday evening through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, CLE Program each day and related expenses and hospitality room.

Registration for Member Only (one person)	$675.00
Registration for Member & Spouse/Guest (2 people)	$850.00

Children's Registration

Registration fee for children includes Wednesday evening welcome reception, Thursday, Friday & Saturday breakfast

Children Age 12 and Older	$120.00
Children Age 6-11	$80.00

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Winter Seminar for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.

Spouse/Guest CLE credit for Winter Seminar	$75.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE ELEVATION HOTEL DIRECTLY AT 970-251-3000. and reference the TADC Winter Seminar.** The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block will fill quickly***. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE F0R HOTEL RESERVATIONS IS DECEMBER 20, 2019

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) DAYS PRIOR (JANUARY 29, 2020) to the meeting date. A $75.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 29, 2020 IS NON-REFUNDABLE.

2020 TADC WINTER SEMINAR REGISTRATION FORM
February 5-9, 2020

***For Hotel Reservations, contact the Elevation Resort & Spa DIRECTLY at* 970-251-3000.**

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$ 675.00 Member ONLY (One Person)**
- ☐ **$ 850.00 Member & Spouse/Guest (2 people)**
- ☐ **$ 75.00 Spouse/Guest CLE Credit**
- ☐ **$ 120.00 Children 12 & Older _____**
- ☐ **$ 80.00 Children 6-11 _____**
- ☐ **No charge for children under 6 _____**
- ☐ **$ *(no charge)* CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**
- ☐ **Save $50 on your total registration fee if postmarked by December 20, 2019. If registering online, use discount code EB50 and register by December 20, 2019**

TOTAL Registration Fee Enclosed $_____

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

FIRM:_____ **OFFICE PHONE:**_____

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

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

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

CHILDREN'S NAME TAGS:_____

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2019.

PAYMENT METHOD:

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

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

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

_____

Card Number **Expiration Date**

Signature:_____ (as it appears on card)

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

(For TADC Office Use Only)

Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

By Drew York, Gray Reed & McGraw, LLP, Houston

Defining a Win in Litigation: Flexible Goals and Open Communication Establish a Solid Foundation

Does a "win" in litigation require a final judgment in your favor? Not necessarily. Litigation "wins" are defined by the circumstances facing a party at the outset of litigation, and how those circumstances change as litigation progresses.

If I got $100 for every time a client told me during an initial consultation that they wanted to extract a pound of flesh from the other side, then I'd probably be living the island life right now. These clients aren't individuals looking to sue some international conglomerate; most are entrepreneurs or business executives. And I guarantee you that I am not alone. Most lawyers would tell you they hear the same thing from clients during their initial consultation. Sometimes clients continue that mantra for several months. Some even go so far as to say something like, "I don't care what it costs. I want justice!" I get it, too. When a client first contacts a lawyer about litigation, it's because the client believes: (1) somebody did something that hurt the client (physically, emotionally or economically); or (2) somebody brought a bogus lawsuit against them.

Allowing emotion to dictate your litigation strategy is like Pickett's charge at Gettysburg – you will be decimated one way or another. Litigation is costly, time consuming, distracting and emotionally draining on the parties. It is important that a client walk into an initial meeting with their lawyer willing to listen objectively to their lawyer's counsel. Likewise, it is important for clients to make sure that their lawyer is giving them an unvarnished analysis of their case. That's something that many people forget – lawyers are also counselors. It is our job not only to be a client's advocate in the courtroom, but also to provide frank, objective scrutiny of the strengths and weaknesses of a client's case.

Flexible Goals and Strategies are Key

Early conversations between the lawyer and client should also identify the client's goals in the dispute. The client and lawyer should acknowledge that those goals, and the strategy to achieve them, are based on the information known at the time. Clients will achieve an acceptable outcome when they are willing to modify the goals and strategies based on developments along the way – such as the discovery of bad facts.

Two-Way Communication is a Must

Clear communication, and a willingness to control emotions during conflict is vitally important to achieve a successful result, even if it is not the "home run" the client initially wanted. Take, for example, a client who has been sued for breach of contract and believes that certain language in the contract excuses the client's obligations. The lawyer determines during his initial review of the contract that it does not say what the client thinks it says. Furthermore, the contract says that the prevailing party is entitled to recover their attorney's fees. If the lawyer clearly communicates his analysis to the client early on, and the client objectively absorbs that information, the client and the lawyer usually can achieve the client's secondary goal: quick resolution of the litigation for less than full price. Moreover, the

client avoids the double whammy of paying its own lawyer to litigate through trial, and paying the other side's lawyer through a judgment.

This article is ***not*** intended to convey that every client should throw in the towel early on. Different circumstances dictate different strategies. But having an open mind, and clear communication, will put the client in the best position to choose the path that the client believes provides the best return for the least amount of risk.

Stay Tuned

The article is part of a series featured on Gray Reed's Tilting the Scales blog. To follow the monthly series, visit TiltingTheScales.com. Over the next few months, Gray Reed Partner Drew York will talk about other issues that help define a win in litigation such as:

- *Good navigators: why constantly re-evaluating litigation is crucial to meeting your goals;*
- *Why the distraction of litigation is a "hidden" additional cost to your company;*
- *The benefits of resolving a dispute prior to litigation;*
- *Mitigating the plaintiff's damage recovery at trial can be just as good of a win;*
- *Reputation matters: how your stance in litigation conveys a message to your vendors, competitors, and even your employees; and*
- *The big picture: how will the outcome of this litigation affect my business relationships going forward?*

IT'S BACK!

Volunteer Now for the 2020 Trial Academy Faculty!

The 2020 Trial Academy will be held March 27-28, 2020, in Lubbock at the Texas Tech University School of Law. If you are interested in helping to train 1-6 year attorneys for their day in the courtroom, contact Trial Academy Chairs Greg Curry (greg.curry@tklaw.com) or Arlene Matthews (amatthews@cdmlaw.com)

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Download Your Membership Application Today!

www.tadc.org

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

400 West 15th Street, Suite 420, Austin, Texas 78701 512/476-5225 Fax 512/476-5384 Email: tadc@tadc.org

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

a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Commercial Litigation and Personal Injury Defense and do not regularly and consistently represent plaintiffs in personal injury cases. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

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

Email Address: _____ Cell: ___/_____

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Spouse Name: _____ Home Phone: ___/_____

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

Dues Categories:

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

*If joining in October, November or December, you will pay full dues and your Membership Dues will be considered paid for the following year. However, New Members joining after October 15 will not have their names printed in the following year's TADC Roster because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature & Printed Name of Applicant's Sponsor:

_____
(TADC member) **Please print name under signature**

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

Please charge $_____ to my ☐ Visa ☐ MasterCard ☐ American Express

Card #: _____ Exp. Date: ___/_____

Please return this application with payment to:
Texas Association of Defense Counsel
400 West 15th Street, Suite 420
Austin, Texas 78701

For Office Use

Date: _____

Check # and type: _____

Approved: _____

Expert Witness Research Service Overall Process

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

Expert Witness Service Fee Schedule

Single Name Request

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

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

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

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

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

Expert Witness Search Request Form

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

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

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

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

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

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

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

Areas of expertise: _____

_____

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

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

_____

_____

_____

_____

_____

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

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

Texas Association of Defense Counsel, Inc. Facsimile: **512 / 476-5384**

TEXAS ASSOCIATION
OF DEFENSE COUNSEL

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TADC
Calendar of Events

www.tadc.org

February 5-9, 2020
2020 TADC Winter Seminar
Elevation Resort & Spa - Crested Butte, Colorado

March 27-28, 2020
2020 Milton C. Colia Trial Academy
Texas Tech Law School - Lubbock, Texas

April 29-May 3, 2020
2020 TADC Spring Meeting
Atlantis – Paradise Island – Nassau, The Bahamas