TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

SUMMER 2020

IN THIS ISSUE:

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

July 15-19, 2020	**2020 TADC Summer Seminar** Grand Hyatt Vail & Spa - Vail, Colorado Christy Amuny & Elizabeth O'Connell Perez, Program Co-Chairs Eric Rich, Young Lawyer Liaison
July 31, 2020	**TADC Nominating Committee** Austin, Texas TADC Past President Pam Madere, Chair
August 7-9, 2020	**2020 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, NM
September 23-27, 2020	**2020 TADC Annual Meeting** San Luis Resort & Spa - Galveston, Texas Fred Raschke & Greg Blaies, Program Co-Chairs Andy Soto, Young Lawyer Liaison
October 2, 2020	**2020 Barry D. Peterson Deposition Boot Camp** Dallas, Texas Mike Bassett & Amy Stewart, Program Co-Chairs

President's Message

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

Do you hear that noise? That is the sound of the litigation log jam about to explode! As the economy begins to roll, so does the court system, albeit at perhaps a more methodical rate. No doubt by now you have been inundated on how to proceed safely in your practice and every-day life. The TADC joins in the commitment to participating responsibly with the health and welfare of our membership being paramount.

I want to again provide you with our progress, and our positive outlook for what remains to be an extraordinary 2020. The TADC began its 60th year with the very successful Winter Seminar in Crested Butte, Colorado in early February. Due to the hard work of our program chairs, Arlene Matthews, Crenshaw, Dupree and Milam, L.L.P., Lubbock, and Greg Curry, Thompson & Knight LLP, Dallas, the Milton C. Colia Trial Academy was on track to have the largest faculty and attendance in TADC history. Despite the program being sidelined this year, we are on track to reschedule for the same time period and venue (March at Texas Tech University School of Law) in 2021.

Similarly, the 2020 Spring Meeting at Atlantis-Paradise Island, The Bahamas, was postponed. Our program chairs Slater Elza, Underwood Law Firm, P.C., Amarillo, and Darin Brooks, Gray Reed & McGraw LLP, Houston, put together an outstanding program and speakers. Due to popular demand, this event appears to now be on track to be rescheduled for January 2021. Updated information will follow in the near future.

Registration has been sent for the 2020 TADC Summer Seminar, to be held in Vail, Colorado at the fantastic Grand Hyatt Vail, July 15-19. The TADC is working closely with the Hyatt to ensure a safe and successful seminar. I'm sure like me, many of you are ready to get out and back to a reasonable sense of normalcy, as safely as possible. What better place than Vail in the summer? Christy Amuny, Germer PLLC, Beaumont, and Elizabeth O'Connell Perez, MehaffyWeber, PC, San Antonio, prepared a great program. I encourage everyone to put the Summer Seminar on your calendar and register today!

There is plenty of great programming planned for the remainder of 2020 including the West Texas Seminar to be held jointly with the New Mexico Defense Lawyers Association on August 7-9 at the Inn of the Mountain Gods in Ruidoso, New Mexico, and the TADC Annual Meeting on September 23-27 at the San Luis Resort in Galveston. Our local ambassador of Galveston and former TADC President, Fred Raschke, Mills Shirley L.L.P., Galveston, and Greg Blaies, Blaies & Hightower, L.L.P., Fort Worth, have a line-up of preeminent speakers and timely topics which I am sure you will enjoy. As always, we especially would like to extend an invitation to our past presidents to attend this event.

Be on the lookout for more local programming, both online and in person. The TADC is open for business and continues to provide the member services it is known for including, expert witness service, a full-service website with archived publications and case updates, monthly E-Updates, timely and relevant membership email as needed and more. We will keep you informed. Otherwise, please call us and reach out to other fellow members, as we are all in this together.

Get rid of your cabin fever. We have missed you! Please take a look at the TADC calendar and start planning now. I look forward to seeing everyone in Vail this July.

TADC Legislative Update

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

Since my last update in March, the world has changed, and the 2020 legislative landscape along with it. Whereas at that time, I reported on issues such as judicial selection, trucking litigation, paid or incurred, and judicial redistricting. Those issues will still be present in 2020, but when compared to the immensity of the COVID-19 economic and health care crisis, the full impact of which won't be known until at least next Spring, they may drop down the priority list a bit. When added to the uncertainty surrounding the pandemic's adverse revenue impact on the state budget (the legislative leadership has already directed state agencies to cut their current budgets by 5%) and its effect on the federal census (which puts legislative and congressional redistricting at risk), we can expect COVID-related issues to be priorities one, two, and three.

The COVID Dilemma

But what does that mean exactly? What can and should the Legislature do? For starters, a number of states, including some of the hardest hit, such as New York, New Jersey, and Massachusetts, have enacted liability protections for health care providers for the duration of the pandemic. In other states, such as Alabama, Arizona, Connecticut, Georgia, Illinois, and Michigan, governors have extended protections to health care providers by executive order. Thus far, no state has taken action to expand immunity to the broader business community. At the direction of Senate Majority Leader Mitch McConnell, however, Senator John Cornyn has begun work on federal liability protection for businesses, in addition to health care workers, facilities, and entities. Senator McConnell has stated that such legislation will be a "red line" for Republicans in negotiations over a third stimulus package. We can expect those negotiations to be extremely difficult indeed, and we should probably not hold our breath for the result.

Regardless of what Congress does, the Texas Legislature will almost certainly forge its own path next Spring. In addition to dealing with the present contingencies, the Legislature is likely to consider various changes to the law that will trigger if and when a future pandemic occurs, rather than relying solely on the Governor's executive authority. To this end, the Texas Civil Justice League has established a COVID-19 Task Force to study the issues and present proposed legislation in the 2021 session. Some of the issues this Task Force will consider are as follows:

1. **Liability protection:** From an employer standpoint, liability exposure may occur in a number of different contexts: employer/employee, business/customer, business/contractor, general contractor/subcontractor, or even government/employer. Whether an employer may have liability for negligence or gross negligence in any of the contexts listed above will depend on a number of fact variables, but we expect this litigation to revolve around these central questions: To what extent does the coronavirus survive on surfaces? How long can the virus survive? Does it live longer on certain surfaces? How does anyone know for certain whether a potential plaintiff may have contracted the virus? To what extent did employers follow CDC, state, or local guidelines? Depending on the eventual scope of the pandemic in Texas, this litigation could persist for years. If this threat does indeed develop, should the multi-district litigation process be activated to make sure we get consistent decisions

about discovery and other pre-trial orders? Should businesses and health care providers be retrospectively judged for their response based on an ordinary negligence standard, or should liability only be imposed if a business or provider acted recklessly, intentionally, or with gross negligence?

2. **Workers compensation:** There is widespread concern about the scope and cost of workers' compensation claims arising from COVID-19. This is unknown territory at the moment, and there is little precedent for the current crisis. The National Council on Compensation Insurance (NCCI) has called on states to adopt rules holding employers harmless in terms of their experience ratings for COVID-19 claims. If this can be done, then it will at least hold down premium cost increases for employers trying to re-open their businesses and to operate for the foreseeable future. Aside from that, we are likely to see a significant level of contention over whether COVID-19 is an occupational disease and thus compensable, whether a covered employee contracted the virus in the course and scope of employment, and the cost and scope of health care and income benefits. We may also see a spike in gross negligence claims against employers who allegedly did little or nothing to protect employees from exposure.

3. **Business interruption insurance coverage:** This issue is also of national concern. Most Texas business interruption policies, as I understand them, exclude pandemic viruses from coverage. Nevertheless, we are seeing growing pressure on the insurance industry, including a call from at least one Texas state representative, for the industry to pay claims even when a legitimate coverage issue exists. Given the scope of the losses, this would undoubtedly destroy the industry or make insurance so costly that no Texas business could afford it.

4. **Property & casualty coverage:** Some state departments of insurance around the country (not in Texas), as well as local officials (some here in Texas), are characterizing the virus as causing "property damage." This has in no way been established, but the issue has been broached by public officials and may come up in the legislative context. A second coverage issue I have heard about from realtors and real estate brokers involves possible claims against errors and omissions coverage (professional liability policies) for failure to follow relevant COVID-19 guidelines. This could become an issue for other professionals who carry E&O coverage as well, such as architects, engineers, and others.

5. **Mass torts:** Is there a risk that a mass tort or a class action could arise from the pandemic? We are already seeing class action litigation against Juul, for example, alleging that vaping increases susceptibility to COVID-19. The concern here is not only about mass actions by claimants afflicted with the virus, but also about the possibility that hard-hit states and local governments may, as they did in the tobacco litigation, attempt to recoup some of the costs of their response from one or more private industries. While this concern may seem a bit far-fetched, once litigation like this gets a footing in one place, it becomes a legitimate alternative for all places—especially if Congress continues to refuse direct aid to state and local governments.

This list of issues is not exhaustive, but it does indicate the potential scope of a legislative response next session. In the event that some sort of omnibus bill does emerge, it might also become a carrier for other necessary items, such as paid or incurred or supersedeas bond reform. It might also provide a home for some of the trucking litigation ideas I outlined in my March update, such as allowing discovery of the plaintiff's health insurance and/or customary third-party reimbursement rates for services provided to the plaintiff (*i.e.*, codify the

North Cypress decision), requiring disclosure of letters of protection, requiring disclosure of the existence of third-party litigation funding in the plaintiff's case, clarifying that the defendant may use a billing expert to make a controverting affidavit and to testify at trial, or requiring the custodian of the plaintiff's medical records to be either the provider who treated the plaintiff or another person with knowledge of the reasonableness of charges in the local area (*i.e.*, no out-of-state administrators).

Judicial Selection Redux

Even as the coronavirus rivets everyone's attention, the work of the Texas Judicial Selection Commission continues. TADC presented testimony before the Commission at its meeting on June 5. We reminded the Commission of our consistent and steadfast support for reform over the entirety of TADC's existence. Right now, the only comprehensive plan that has been presented to the Commission is the "Texas Plan," proposed jointly by TLR and TCJL. The major components of the plan are as follows:

1. ***Nominations by the Governor.*** The Governor nominates judges to the Texas Supreme Court, Texas Court of Criminal Appeals, the fourteen intermediate appellate courts, and all district trial courts (not county courts at law, probate courts, justice of the peace courts, or municipal courts). All judges sitting on the bench at the time the constitutional amendment becomes effective will serve out their terms.

2. ***Review by an Independent Panel.*** The nominee's qualifications are assessed by either a statewide panel or one of 12 regional panels specific to the judge's local district. Based on statutorily prescribed criteria, the panel rates a nominee as "not qualified," "qualified" or "well qualified." The panel's rating and explanation are provided to the Senate.

    - Each panel is comprised of non-lawyer citizens, current or retired judges, and members of the Texas House of Representatives appointed by the Lieutenant Governor, Speaker of the House, Chief Justice of the Supreme Court and Presiding Judge of the Court of Criminal Appeals.

    - Seats on each panel have staggered six-year terms. A person may not serve for more than 12 consecutive years on a panel.

3. ***Senate Confirmation.*** The nominee must be confirmed by an affirmative vote of a majority of the members of the Texas Senate. The Senate bases its decision on the panel's assessment, its own application of the statutory list of qualifications, and other factors it deems relevant. A nominee assumes office only upon confirmation by the Senate.

4. ***Voter Ratification of Appointment.*** The appointed judge will face the voters in a "ratification election" held at the first general election occurring more than one year after the date the person is confirmed by the Senate. If a majority of voters ratify the judge's appointment, the judge continues serving in office; otherwise, the judge must step down. There will be no partisan designation on the ballot for a judge in a ratification election.

5. ***Twelve-Year Terms.*** All judges serve a 12-year term, subject to winning a ratification election and subject also to removal for cause through established procedures. At the end of an appointed term, a judge can be nominated to serve in the same or another judicial office.

6. ***Enhanced Constitutional Qualifications.*** The constitutional qualifications for serving as a judge are enhanced, including, for example,

that a person must have prior judicial experience to be appointed to either the Texas Supreme Court or the Texas Court of Criminal Appeals.

6. ***Enhanced Removal Mechanisms.*** Existing mechanisms for removing judges are clarified and strengthened, making certain that judges who are corrupt, convicted of a crime, incompetent, inattentive to the judge's responsibilities, persistently abusive, extremely prejudicial, or blatantly discriminatory or unfair can be removed by the Legislature or the Judicial Conduct Commission.

This plan is similar to appoint/retain proposals from past sessions (which TADC has always supported), but it does have some new twists designed to beef up judicial qualifications, removal provisions, and voter involvement. It also applies to *all* state trial and appellate courts. Prior plans have generally been limited to the appellate courts and perhaps district courts in populous counties. While we don't know at this point what the Commission will recommend to the Governor and Legislature, it will likely reflect some combination of these elements.

Supersedeas Bond Reform On Deck?

There is growing interest in legislation next session to address problems with §52.006, CPRC, which governs security for money judgments. The last time the Legislature visited the statute occurred in 2003 as part of the omnibus H.B. 4 reform bill. That change allowed a judgment debtor to post security in the amount of 50% of the debtor's net worth, but the statute did not provide a definition of that term. Instead, Texas Rule of Appellate Procedure 24.2 supplies the definition of net worth as "the difference between total assets and total liabilities as determined by Generally Accepted Accounting Principles (GAAP)." The debtor may establish prima facie evidence of this amount by affidavit, which the judgment creditor may contest, shifting the burden of proof to the debtor. Review of the trial court's determination of net worth is under an abuse of discretion standard.

The rule has created hardship for certain judgment debtors. According to James Holmes, whose law review article "Superseding Money Judgments in Texas: Four Proposed Reforms to Help the Business Litigant and to Further Improve the Texas Civil Justice System" [*St. Mary's Law Journal* 51.1 (1-2020): 71-128] has sparked the reform effort,

> However, requiring security at fifty percent of net worth does not benefit a judgment creditor whose assets consist primarily of real estate or other non-cash holdings, against which banks will not readily issue letters of credit to support supersedeas bonds. Further, even for a relatively low net-worth valuation . . . most banks hesitate to enter any financing transaction involving litigation risk, such an appeal of a civil judgment. Even banks that are normally comfortable with real estate-based financing become quite resistant to any financing transaction involving the risks of litigation or appeal. (95)

Exacerbating the problem, in the calculation of a debtor's net worth, Texas appellate case law (SCOTX has yet to rule on the issue) does not permit the debtor to use the balance-sheet liability for the judgment to reduce its net worth for purposes of the calculation. This contravenes GAAP, which requires a debtor to disclose on its balance sheet to creditors, banks, auditors, shareholders, or business partners. Courts thus value the debtor's business much differently—and at a much higher level—than the real world does. The most important reform, according to Holmes, would make the civil judgment an existing liability for determining net worth, as GAAP require.

Three other reforms suggested by Holmes would: (1) give the judgment debtor the right to provide alternate security, which may include real or personal property (this helps debtors who have little liquidity and cannot readily liquidate holdings without doing untold damage to an ongoing business); (2) enable the redetermination of judgment security during the appeal to reflect appellate determinations reducing the original judgment; and (3) allow the debtor to subordinate or remove judgment-related liens when necessary to liquidate real estate or other assets in order to raise cash or obtain a bond. It is extremely likely that legislation will be introduced next session.

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The Virus Looms / Trials Zoom

By: James R. Old, Jr.
Hicks Thomas LLP, Austin

It was a Friday afternoon post-quarantine. I was attending a routine Rule 166 status conference from my office in Austin – my first hearing by Zoom. Up until that time, my Zoom experience constituted a few calls with family or co-workers and think happy hours disguised as "staff meetings"; nothing too serious.

That afternoon, I wore my navy blazer, tie and button down shirt, and sat uncomfortably in my office chair trying to make sure the Judge could not tell I had on blue jeans and checking to make sure the "Tiger King" virtual backdrop on my computer was not being displayed. The Judge was in his courtroom, in full regalia, in Houston. The Court clerk was in the courtroom on a separate feed and could not be seen or heard, but he was running the show. Meantime, my opposing counsel (also in Houston, but at his office) showed up in a golf shirt claiming he did not know he had to cover our hearing. Lesson #1, don't do that.

We all received a little admonishment from the Judge concerning his virtual dress code, then our conference quickly came to the question *du jour*: How were we going to try an attorney's fees dispute when the Plaintiff's lawyer insisted on giving live testimony rather than submitting the fees evidence to the court by affidavits? That question sent us on a 5-day odyssey leading to the first "trial by Zoom" to the bench in Harris County.

Sure enough, the Judge offered to try the case at a distance, using Zoom. Neither lawyer had the guts to suggest they had no clue how to do that, so we agreed. Then, in the time it took to hit the "Leave this Meeting" button on our computers, we were set to go to trial the next Wednesday – that's right, five days later.

The lump suddenly swelling in my throat when I hung up from the call/hearing told me I had just essentially asked to be put in a situation that I was ill-prepared to handle. I had no idea what it really meant at that time, but I knew I had a very steep learning curve ahead of me. I needed to figure out what I didn't know, so I could then learn what I needed to know, and fast!
The next few hours, rather than joining a little late afternoon "Zoom Happy Hour" I was immersed in learning the nuances of electronic distance hearings and the virtual tools at my disposal. I will share some tips I learned with you here:

Get help. I got lucky. My first call was to my expert witness, Dwayne Newton. He not only was "available" to testify by Zoom (from his California quarantine location) but he had already taken about a dozen depositions using Zoom and was highly proficient. Dwayne spent as much time preparing me as he did preparing for his testimony, and I will be forever grateful. Having someone (a kid stuck at home, a neighbor, co-worker or even expert witness) available to help you master Zoom is a big deal, so do not let your ego keep you from seeking help.

Plan ahead. This process is new, so it takes time to practice it, and get things to "work" before

the lights go up during the actual trial. I had to reconfigure monitors, incorporate previously unknown hardware, and do all sorts of things to make things work. There is no way to do that on the fly, as it requires lots of front-end time for preparation along with ample technology support handy if you're not proficient.

Zoom Tools. You can set up a "personal call" on Zoom and practice using it by way of a call with yourself! I must have set these up a dozen times, and it works. But I also suggest pre-planning calls with your witness, your paralegal or some forgiving co-worker (preferably a younger one who has "real" experience with the product) who can offer critiques you would miss. Rehearsing in the Zoom world is more ballet than lawyering, and it is essential.

Subject matter expertise on Zoom to practice:

- **Share Screen**. It means what it says. If you have a document up on share screen, everyone can see your entire screen, not just the document. So, don't hit that share button until you are ready. Be sure to have the document set on "full screen" mode so your desktop is not visible *before* you hit the share button. Be sure to "Stop Sharing" when you are ready to take it down. You can also select which window you want to share, meaning you do not have to share the whole screen. It just takes practice.

- **Share tools**. There is a drop-down tool bar when you're sharing documents. That tool bar allows you to highlight, draw, and do all kinds of neat tricks to make your presentation better. There is even a "whiteboard" function which is really useful. However, the little additions you use when presenting stay on the screen and are not actually attached to the document. It gets awkward to use this tool if you're moving from page to page, or document to document.

- **More Share tools**. You can *save* as screen shots any mark-ups of documents as you go and before you erase them to go to another page. This is helpful, as you can create exhibits as you go, and then offer them, and send them to the clerk at the conclusion of the hearing (this is also helpful for depositions).

Another tip is to work out with your witness in advance how you and your witness want things to flow. If your witness is better at Zoom than you, let the witness run the presentation (sort of like asking the witness to "walk over to the chalkboard" in a live courtroom).

Document Management. This is my phrase, not a technical one.

Exhibits. Our judge did not allow us to use any document that was not exchanged and on our exhibit list, even for refreshing recollection or impeachment. Find out how your judge will handle these issues and then be over-inclusive on your exhibits, even if that means you have to give up some super-secret strategy issues.

Demonstrative Aids. We were in a trial to the bench, so both sides used demonstrative aids. We marked them as exhibits, but things got awkward when the other side objected to our demonstrative aid and the court sustained. We then had to work out a way to identify the document as a "court exhibit."

Presentation. You may not be present in person, but you still have an audience and maybe one much bigger than you think. The Judge is watching, of course, but in our case the trial was live-streamed and we had over 2,000 other members of the "gallery" watching as well (including clients, friends, other lawyers, reporters and who knows what other kinds of bored stuck-at-home Perry Mason types).

Mind your manners. While it is difficult to pick up on non-verbal clues with a headshot as your only visual, facial expressions are magnified. Rolling your eyes is not a good look and will be noticed. Fidgeting, moving around, getting up and walking around (out of camera), simply do not "work well" in this environment.

Be heard. First, I used a headset because the Judge told me that he had a hard time hearing me during our status conference. I suggest a Bluetooth one, as you then do not have to fiddle with a tether. It felt goofy at first, but I forgot about it after a while. Plus no one notices that you have this "thing" on your head. Sacrifice looks for functionality.

Second, if you do not use a headset, you (and your witness) need to maintain a constant distance from the microphone so your voice does not modulate in and out of the sound.

Third, do not speak over anyone. I know this is hard to do when you are in the heat of battle, but Zoom only allows one speaker at a time. No one will hear you when you talk over someone else anyway, so do not do it. This also means the court reporter will not hear you. Preserving your record means more than making the right objections, but also making sure your objections are actually heard by the right people.

Fourth, silence any background noise. This means cell phones, computer calendar reminders, office phones, and of course any other potential noise interruptions.

Be seen. Remember, this is "your show" of which you are the director, producer, lead actor and stagehand. This means check your lighting, your backdrop and your camera angle before you start the proceeding. I set mine up the night before. My opposing counsel chose to put an American flag behind him while he testified, which was a nice touch, but he had it over the wrong shoulder. Any Boy Scout would have noticed. I suggest a solid background that fills the space behind you as opposed to a solid colored backdrop that only partially does so, which is a distraction. Please also clean up your cluttered credenza or background, as I did.

Do not forget your witness. Check with your witness on all these points too (backdrop, microphone, clothing, lighting, Zoom skills, etc.). Obviously, you want your witness to be prepared for this just like you are, which means a lot of extra front-end work by both of you.

Be able to see. Seeing is tricky, and not necessarily what you think.

Two monitors should be used for your own presentation; one that is dedicated to sharing documents, and one for seeing the court and witnesses.

It is imperative that you can see what the court sees. It is impossible to see what Zoom is displaying when you are looking only at your screen. In our case we had a lot of extraneous markings, and even documents, displayed on screen that neither side (when presenting) had any idea they were showing. We also had instances when we assumed the witness (and court) could see documents we *thought* we were sharing, yet we had not hit that little "share" button.

I can identify two options that might correct this problem. First, log in on another computer as a viewer and have that screen close by in your line of sight so you can see what everyone else sees. Second, have an assistant "run" your presentation who pulls up your documents, does the marking, etc. You can still do additional marking using the Zoom drop down tools if you wish to highlight things as you go. This latter option serves several purposes and frees you up to concentrate on the Q&A, and also allows you to see what the court is seeing without using an added computer or device.

Streamline things. I suggest highlighting or marking up your exhibits *before* trial, which saves time and avoids fumbling around. I used the Adobe features on the .pdf files that were set up as our exhibits. Go to the top right-hand corner of the document and tap on "Comment" and a drop-down menu of tools falls into your hands. You can highlight, draw, put in arrows, etc. and save the document and have it ready to go before the judge says "call your first witness."

Witness identification. It threw me a bit when the judge first asked us to identify our witnesses for the record. However, it makes sense for all involved, especially the court reporter.

Timing. Just like with most things we do, when lawyers estimate a time to complete a task, it typically takes twice as long. We told the judge we could do this trial in an hour and a half. It took over four. Why? Well, the technology is still a little clunky, and there are unforeseeable issues. Things like needing to break so the court reporter can check on her home-schooled children, or dropped sound feeds, or technical glitches in the feeds. Further, it just takes a little longer when the lawyers are transitioning in and out of .pdf files and adding, erasing, or saving document mark-ups, while trying to "move along" in their presentations. While you try to eliminate any extraneous materials on the front end, always plan to spend more time doing what you need to accomplish than you think.

Strategery. It goes without saying that we all thrive on courtroom drama. We would not be trial lawyers if we did not get excited to be "on stage" cross-examining witnesses and the like. Yes, you get that same little tingly feeling when in a Zoom environment. However, we must remember that we are still professionals. Areas to think about ahead of time are noted below.

Witness communication. If one side invokes the rule excluding witnesses, how do you ensure that the witness does not have access to any communication from any third party viewing the proceedings, or otherwise does not stream the proceedings? The Zoom waiting room feature may be the ticket. We did not have that issue in our trial.

Witness coaching. Witness coaching can occur *while* the witness is testifying. Zoom allows private "chat" communications between individual participants during a call. That means one can easily send "chat" messages between witness and counsel while on camera, and no one would know. Also, a witness can easily have a separate monitor (iPhone, iPad, etc.) in front of them, on a desk, or even in their hands during the examination that would allow a means of separate communication. Explicit instructions and/or agreements should be made on this subject. Cell phone text chimes during examinations also create suspicion, even if they are entirely innocent.

Strategic Interruptions. While this was a trial, it was also a phone call and informal at times. Avoiding interruptions is important. However, beware that if you set your Zoom settings on "mute" during your opponent's witness examination, the witness and your opposing counsel will see that and assume that you cannot possibly get a timely objection on the record. Take time to learn how to use the space bar to override the "mute" feature in Zoom, which is a big help.

Witnesses, like the lawyers, should also be aware that their physical demeanor while on a Zoom broadcast is magnified. Normal physical reactions (such as moving away from the camera when stressed or feeling challenged) are more visible and can create awkward moments (like when the judge said that one witness seemed harder to hear on cross than he did on direct).

Stage presence. I have never been more aware of my physical reactions when I was *not* the one asking questions. Be aware of the need to "smile and look at the camera" when not actually asking questions of the witness. Not only did I feel awkward looking at the camera, but also down or away from the camera at first. It really is just like being in the presence of the jury in the courtroom, but magnified with the camera only a few feet away from your face and a "live-stream" audience to boot.

All in all, despite the short lead-in and steep learning curve, this was a good experience for all involved. I was forced to get comfortable with a technology I did not know, and honestly did not plan to get to know. I had hoped, like the rest of us, that all of "this" was just temporary.

The truth is social distanced law practice and trials are not going away anytime soon, if ever. As things currently stand, most Texas counties are not expecting to call juries until July, which sounds optimistic. It also seems getting jurors to show up after July will be a major problem even if the courts re-open.

On the other hand, most judges (and lawyers) are growing accustomed to using Zoom or other similar platforms for hearings and depositions. In fact, many judges have noted that they "like" the Zoom system better than the old-school, in-person way of doing things. Some suggest that Zoom hearings are here to stay regardless of whether things ever return to "normal" again.

Also, keep in mind things are about to change with your client relationships. Clients can now live-stream hearings or depositions from their offices (at home or work). Perhaps more importantly, clients will lose interest in paying their lawyer to go across the state or country to interview witnesses, attend hearings or even to take depositions now that the genie is out of the bottle. Since much can now be done by Zoom, lawyers will have to justify being "old school" and wanting to meet with witnesses, experts or even perhaps judges, in person. The technology is cheap, quick, efficient, and little is lost in the translation (well, sort of). Lastly, it is not all that bad to make it home for dinner, either!

Papers Available

2020 TADC Winter Seminar ~ Crested Butte, CO ~ February 5-9, 2020

72 Hours and Counting: How to Prepare for a Data Breach – Rachel Ehlers – 18 pg. PPT

California Consumer Privacy Act: What You Need to Know – Rachel Ehlers – 9 pgs.

Cybersecurity Update – Amanda Harvey – 7 pgs. + 25 pg. PPT

To Arbitrate or Not? – Curtis J. Kurhajec – 17 pg. PPT

Wipeouts and Avalanches: Recognizing and Addressing the Obstacles to Attorney Well-Being – Christopher R. Mugica – 67 pg. PPT

Trade Secrets/Unfair Competition – Patrick Richter, Mical Lin – 31 pg. PPT

2018 Headline News: An Employment Law Update – Beth D. Adamek, Derek T. Rollins – 8 pgs. + 28 pg. PPT

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2020 Winter Seminar

February 5-9, 2020 – Elevation Resort & Spa – Crested Butte, CO

The 2020 TADC Winter Seminar was held jointly with the Louisiana Association of Defense Counsel and the Alabama Defense Lawyers Association at the Elevation Resort & Spa in Crested Butte, Colorado, February 5-9, 2020.

Christy Amuny with Shanna & Slater Elza and Victor Vicinaiz

John Crowder with Steffi, Andrea & Jim Hunter

M.C. & Mary Sue Carrington

David Brenner & John Scully

Our esteemed ethics panel: John Browning, Dominik Cvitanovic, Craig Alexander, Jessica Engler and Program Co-Chair Lauren Goerbig

2020 Winter Seminar

February 5-9, 2020 – Elevation Resort & Spa – Crested Butte, CO

Belinda Arambula with Burns, Anderson, Jury & Brenner, L.L.P. in Austin and Lauren Goerbig with Jackson Lewis, P.C. in Austin served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 9.25 hours of CLE and great skiing!

Program Co-Chairs Belinda Arambula & Lauren Goerbig

The Judge's Pitman

Nick Zito & Laura Kemp

Chris Mugica & Pamela Madere

Three States Learning

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Website: www.tadc.org Email: tadc@tadc.org

June 20, 2020

TO: Members of TADC

FROM: Bud Grossman, TADC President
Pamela Madere, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2020-2021

OFFICES TO BE FILLED:
*Executive Vice President
*Four (4) Administrative Vice Presidents
*Eight (8) Regional Vice Presidents
*District Directors from odd numbered districts
(#1, #3, #5, #7, #9, #11, #13, #15, #17, #19)
*Directors At Large - Expired Terms

Nominating Committee Meeting – July 31, 2020

Please contact Pam Madere with the names of those TADC members whom you would like to have considered for leadership through Board participation.

Pamela Madere
Jackson Walker, L.L.P.
100 Congress Ave., Ste. 1100
Austin, TX 78701
PH: 512/236-2000 FX: 512/236-2002
pmadere@jw.com

NOTE:

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

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

2020 TADC
Awards Nominations

PRESIDENT'S AWARD

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

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

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

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

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

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

FOUNDERS AWARD

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

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

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

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

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

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

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

Leonard R. (Bud) Grossman
Craig, Terrill, Hale & Grantham, L.L.P.
9816 Slide Rd., Ste. 201 PH: 806/744-3232
Lubbock, TX 79424 FX: 806/744-2211
budg@cthglawfirm.com


By: Mike Bassett, The Bassett Firm, Dallas & Mitzi Mayfield, Riney & Mayfield LLP, Amarillo

When Evidence Grows Legs: Spoliation & Trucking Cases

I. INTRODUCTION

Preservation of evidence is an essential component in all areas of civil litigation. The result of not preserving evidence can lead a court to determine that spoliation has occurred, which is "the intentional destruction, mutilation, alteration, or concealment of evidence" relevant to a legal proceeding. *Black's Law Dictionary* (Westlaw10th ed. 2014). When a Texas court finds that spoliation has occurred, it has wide latitude in the type of remedy it may fashion, from monetary sanctions to striking the spoliating party's pleadings.

The purpose of this paper is to provide an overview of the law regarding spoliation in light of the Texas Supreme Court's recent decisions in *Brookshire Bros*., *Petroleum Solutions*, and *Wackenhut*. In addition, the paper will specifically address spoliation as it relates to litigation involving trucking accidents.

II. THE DEVELOPMENT OF TEXAS SPOLIATION LAW

While the law regarding spoliation has changed over the years, spoliation continues to be an evidentiary concept and not a separate cause of action. *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998). The Texas Supreme Court first recognized this concept back in the mid-1800's and it has continued developing over the years. *Cheatham v. Riddle*, 8 Tex. 162, 167 (1852). Until 2014, the courts of appeals used two different frameworks in a spoliation analysis, but this changed when the Supreme Court clarified the appropriate framework in *Brookshire Bros. Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 19 (Tex. 2014).

III. THE CURRENT STATE OF TEXAS SPOLIATION LAW

In 2014, in *Brookshire Bros., Ltd. v. Aldridge*, the Court "enunciate[d] with greater clarity the standards governing whether an act of spoliation has occurred and the parameters of a trial court's discretion to impose a remedy." *Id.* at 14. In the following year, the Court applied this standard set out in Brookshire Bros. and issued opinions in *Petroleum Solutions, Inc. v. Head* and *Wackenhut Corp. v. Gutierrez*. Then, in 2016, the framework was applied again in *In re J.H. Walker.*

A. Brookshire Bros., Ltd. v. Aldridge

This case involves a Brookshire Brothers grocery store where Aldridge was shopping when he slipped and fell. *Id*. at 15. He left the store without informing any employee of the fall but later began experiencing pain and went to the emergency room. *Id*. After five days Aldridge returned to the Brookshire Brothers and reported the accident. *Id.* A

vice-president of risk management retained a copy of the video on which the fall was recorded and saved the eight-minute portion that recorded the incident. *Id.* The rest of the recording was written over with new footage 30 days after the incident. *Id.*

After Brookshire Brothers denied responsibility, Aldridge asked for a copy of two and a half hours of the footage. *Id.* However, Brookshire Brothers could not provide it to him because all but the eight minutes that captured the fall had been taped over. *Id.* Aldridge filed a personal injury suit and during trial, Aldridge's attorney argued that Brookshire Brother's failure to preserve a longer portion of the video amounted to spoliation. *Id.* at 16. The court allowed introduction of evidence regarding the possible spoliation and submitted a spoliation instruction to the jury. *Id*. The jury returned a verdict for Aldridge, and Brookshire Brothers appealed. *Id.*

The case made it to the Texas Supreme Court, which held that the judge was the appropriate decision maker to determine whether spoliation had occurred. *Id*. at 20. The Court clarified that the duty to preserve evidence arises when a substantial chance of litigation arises. *Id.* This duty extends to all evidence in the party's control that "will be material and relevant." *Id*. Then, the Court clarified that a party breaches a duty to preserve evidence by failing to exercise reasonable care. *Id*. In considering remedies, the Court set forth that the remedy must simply be proportionate. *Id.* at 21. Lastly, the Court noted that a jury instruction on spoliation can only be given if a party intentionally spoliates evidence or if the spoliated evidence "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense." *Id*.

Applying this new framework, the Court determined that the trial court's submission of a spoliation instruction to the jury was erroneous because there was no evidence that Brookshire Brothers intentionally destroyed the video. *Id*. Additionally, the exception regarding negligent spoliation would not warrant an instruction to the jury, because Aldridge was still able to present his case. *Id*. at 28.

B. Petroleum Solutions, Inc. v. Head

Just a week after *Brookshire Bros.*, the Court issued its opinion in *Petroleum Solutions, Inc. v. Head* finding that the trial court abused its discretion in submitting a spoliation instruction to the jury. *Petroleum Solutions, Inc. v. Head*, 4054 sw3d 482 (Tex. 2014).

This case involves a lawsuit brought by Bill Head Enterprises (Head) who alleged Petroleum Solutions, Inc.'s (Petroleum) faulty manufacture and installation of a fuel tank system resulted in a large fuel leak. After Petroleum discovered the large fuel leak was because of a faulty flex connector, it informed its insurer and counsel was retained. *Id*. at 485. The attorney sent the connector to a metallurgist for inspection and analysis where it was destroyed when the laboratory that it was being stored in was demolished. *Id.*

Both Titleflex, the actual manufacturer of the product, and Head alleged that Petroleum spoliated evidence by not producing the flex connector and moved for sanctions. *Id*. at 487. The trial court determined that a spoliation instruction would be given to the jury. The jury found in favor of Head and Titleflex even though there was no evidence that

Petroleum knew the laboratory was going to be demolished. *Id*. Petroleum appealed up to the Texas Supreme Court. *Id*. at 488.

When the case reached the Supreme Court, it found that the submission of a spoliation instruction to the jury was an abuse of discretion by the trial court. *Id*. at 489-90. Applying the test set out in *Brookshire Bros.*, the Court found that there was insufficient proof to establish that Petroleum intended to conceal discoverable evidence or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim. *Id*. at 490-91.

C. *Wackenhut Corp. v. Gutierrez*

Then, in *Wackenhut Corp. v. Gutierrez,* the Supreme Court provided even more guidance on this issue. *Wackenhut Corp. v. Gutierrez*, 453 s.w.3d 917 (Tex. 2015). This case involved a bus accident that was caught on video and then taped over. *Id.* at 918. The bus was equipped with four surveillance cameras that recorded video on a continuous loop for seven days, and then the oldest footage was automatically recorded over. *Id.* Two days after the accident, the Plaintiff sent a demand letter asserting that Gutierrez was injured as a result of the accident and assigning fault to Wackenhut's bus driver. *Id.* Despite the demand letter, the video was not preserved. *Id.*

Gutierrez brought a negligence suit against Wackenhut and the driver of the bus. The trial court granted Gutierrez's motion requesting sanctions be imposed on Wackenhut finding that Wackenhut's failure to preserve the video from the bus amounted to negligent spoliation and submitted a spoliation instruction to the jury. *Id.* at 919. The jury returned a verdict in favor of Gutierrez and Wackenhut appealed on the grounds that the trial court erred in submitting a spoliation instruction to the jury. *Id.*

The Texas Supreme Court determined that there was other evidence available for Gutierrez to support his claim such as testimony of other witnesses and statements prepared at the time of the accident, the police report, Wackenhut's report, photos, and medical records. *Id.* at 921. Given all of this other evidence, the Court determined that Gutierrez was still able to adequately present his case without the video and that a spoliation instruction to the jury was improper. *Id. at 922.*

D. In re J.H. Walker Inc.

In 2016, the Dallas Court of Appeals utilized the *Brookshire Bros*. framework to support a finding of spoliation. This case involves a lawsuit brought by the decedent's children and their mother ("Graham") who alleged that Walker Trucking was negligent in maintaining the truck and intentionally destroyed the tractor and maintenance records following the accident. *In re J.H. Walker, Inc.,* 05-14-01497-CV, 2016 WL 819592, at *2 (Tex. App.—Dallas Jan. 15, 2016, no pet.).

On December 15, 2010, decedent was driving an eighteen-wheeler on Interstate 45 in Dallas as an employee of Walker Trucking when the truck went off the road, fell into a concrete ditch, and caught fire. *Id.* at *1. The decedent passed away due to the explosion of the truck. *Id.* After the truck was towed, the president of Walker Trucking and a maintenance manager went to see what parts of the truck were salvageable but determined that nothing was. *Id.* However, they did retrieve the electronic control mechanism ("ECM") from the truck, even though it was

so damaged that no data could be extracted from it. *Id.* On January 7, 2011, the president of Walker Trucking decided to destroy the remains of the truck and about ten days later, Walker Trucking received a letter regarding the preservation of evidence. *Id.* at *2.

Graham filed suit, alleging that Walker Trucking was negligent in maintaining the truck and that Walker Trucking "intentionally and purposefully destroyed the tractor and some maintenance records." *Id.* Graham filed a motion for sanctions against Walker Trucking for spoliation of evidence; the court announced it would include spoliation instructions in the jury charge. *Id.*

Following the court's decision, Walker Trucking sought mandamus relief in the Dallas Court of Appeals. The Dallas Court of Appeals found that "Walker Trucking acted with the subjective purpose of concealing or destroying discoverable evidence." *Id.* at *8. Additionally, the Court found that the trial court's remedy did not have a direct relationship with the act of spoliation. *Id.* at *10. It noted that the trial court abused its discretion on the standard set out in *Brookshire Bros*. which states that a spoliation remedy should "restore the parties to a rough approximation of their positions if all evidence were available." *Brookshire Bros.,* 438 S.W.3d at 21. Here, the trial court "put Graham in a better position." *Walker Inc.,* WL 819592, at *9.

IV. *ASHTON V. KNIGHT*

TRANSPORTATION – A *KNIGHTMARE* SPOLIATION CASE

Ashton v. Knight Transportation involved a particularly egregious case of alleged spoliation that occurred after a truck driver drove into an automobile accident scene, hit and allegedly killed one of the parties, fled the scene, cleaned his truck, falsified his driver's logs, replaced broken and damaged parts, and then "lost" the old parts. *See Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 776 (N.D. Tex. 2011).

Husband and wife, Kelly and Don Ashton, were struck by a 1988 Chevrolet Camaro, and subsequently struck by an eighteen-wheeler owned by Knight Transportation ("Knight"). *Id* at 775. According to the Plaintiff, Kelly Ashton, Don survived the first wreck and crawled out onto the highway where the defendant, George Muthee ("Muthee"), struck him with the eighteen-wheeler. *Id*. The Defendants alleged that Don died due to the initial accident. *Id*.

The Plaintiff further alleged that the Defendants spoliated evidence, specifically: (1) the evidence on Muthee's tires and truck after the accident and (2) Qualcomm communications between Muthee and Knight that occurred after the accident. *Id* at 776. According to the Plaintiff, Don Ashton survived the initial accident and was hit by Muthee, who then fled the scene, stopped a short distance away to inspect his truck, and then drove 1,400 miles to a Nevada town where he had his tires replaced. *Id.* at 776-77. After fixing the truck, Muthee drove to a parking lot in California where Knight employees retrieved the truck and stored it at one of their facilities. *Id.* at 777. From there, Knight hired an attorney and an investigator who inspected the truck and removed "flesh" samples from the truck and placed them into baggies. *Id.* Worse, Knight refused to cooperate with law enforcement investigators and failed to disclose its investigator's inspection until about three years later. *Id*. The only way the truck was traced to the accident was by a damaged piece that broke away and was found at the scene. *Id.* at 776.

The Court determined that a "wealth of circumstantial evidence" led to the "inescapable conclusion that [Knight and Muthee] engaged in spoliation" of the physical evidence on the vehicle and the Qualcomm communication. *Id.* at 795.

The Court found that Knight and Muthee had a duty to preserve the evidence from the truck and the Qualcomm communications, and it breached that duty in bad faith. *Id*. at 802. The Court further found that the spoliation severely prejudiced the Plaintiffs because their actions destroyed the only direct physical evidence available that could have proved that Knight's truck struck the decedent (the piece left at the scene only proved that the truck hit one of the vehicles at the scene, not the decedent). *Id* at 803. As a result of the bad faith spoliation, the Court imposed the harsh penalty of striking all of the Defendants' pleadings and defenses to liability and allowed the Plaintiffs to amend their petition to plead for punitive damages. *Id.* at 805.

V. DOCUMENT RETENTION REGULATIONS UNDER THE FEDERAL MOTOR CARRIER SAFETY ACT

Regulations under the Federal Motor Carrier Safety Act ("FMCSA") require trucking companies to maintain a trove of document and records. A trucking company's failure to maintain requisite records will almost certainly become a spoliation issue during civil litigation. For the purposes of this paper, the most relevant regulations are 49 CFR §§ 40, 382-83, 387, and 390-399. These sections list the documents that trucking companies and employees must retain, the length of time a company must store the retained documents, and specific locations where employers and employees must store the documents. For simplicity, these documents can be categorized into four broad categories: (A) Driver Qualification and Training; (B) Alcohol and Drug Testing; (C) Vehicle Inspection and Maintenance Documentation; and (D) Driving Documentation.

A. Driver Qualification and Training

Upon hiring a driver, a trucking company must begin storing the employee's driver qualification and training documents. This category includes basic training documents, the employment application, driver certifications, driving records, and medical exams. *See* 49 C.F.R. §§ 380, 391. Some of these documents, such as the driving record and medical exam, must be ordered from a third party (*i.e*., the Texas Department of Public Safety) within 30 days of the employment start date. *See* 49 C.F.R. §391.23.

A trucking company should retain all initial qualification and training records for the duration of an employee's employment period plus three years after termination. Even if regulations allow a document's destruction two years after employment, destroying a document in violation of a company retention policy may look very suspicious and could lend credence to spoliation accusations.

B. Alcohol and Drug Testing

Essentially, FMCSA regulations require trucking companies to maintain all records related to alcohol and drug testing and training. *See generally* 49 C.F.R. §§ 40, 382. The golden rule of alcohol and drug testing is this: document and retain everything, even the most remotely related document. This means documenting actual drug test results, details about the testing program, information about the officials performing the testing, and everything in between.

Trucking companies must retain positive drug test and alcohol test results with a concentration of .02 for five years; on the

other hand, negative drug tests and alcohol tests with a concentration of less than a .2 are only required to be maintained for a single year. *See* 49 C.F.R. §§ 40.333, 382.401. Any documentation associated with negative results, refusals to test, or substance abuse evaluation or referral records must be maintained for 5 years. *See id*.

C. Vehicle Inspection and Maintenance Documentation

For any vehicle a company controls for 30 days or more, the company must maintain records that identify the vehicle, its upcoming maintenance and inspection due dates, and its inspection, repair, testing, and maintenance records. *See* 49 C.F.R. § 396. A company must maintain such records for at least 18 months after the vehicle leaves the company's control. Periodic inspection reports and similar documentation must be updated and kept in the vehicle or displayed properly on the vehicle (*i.e*., an inspection sticker). *See* 49 C.F.R. §§ 396.17(c), 396.23(a).

D. Driver Logs, Time Logs, and On-Board Recording Devices

Driver and time logs play a key role in litigation. The type of records that a company must maintain depends on the type of driver the company employs. All "100-air-mile-radius drivers" must maintain accurate records showing: (1) the time the driver reports for duty and leaves each day, (2) the total hours worked each day, and (3) the total time on duty for the preceding seven days (note: this last requirement only applies to drivers used by a company for the first time or intermittent drivers). *See* 49 C.F.R §395.1(e)(5). Additionally, drivers used intermittently must provide a signed statement declaring (1) the total time on duty during the preceding seven days, and (2) the time the driver was last relieved from duty. *See* 49 C.F.R. § 395.8 (j)(2).

Different or additional requirements are imposed on trucks with on-board recording devices. First, for a driver to even use an on-board recording device, the company must obtain a certificate from the manufacturer certifying that the design meets the requirements of 49 C.F.R. §295.15(i)(1). If a driver is utilizing an on-board recording device, then the driver must keep a record in his vehicle that includes (1) detailed instructions for storing and retrieving data from the device and (2) a supply of blank driver's records and documents sufficient to record and document the trip in case the device fails. *See* 49 C.F.R §395(g). Lastly, a trucking company must create and maintain a secondary backup of the electronic files organized by month. *See* C.F.R. §395.15(i)(10).

VI. CONCLUSION

The preservation of evidence is vital in all cases, but especially in trucking cases. In order to assure no allegations of spoliation occur, parties must be mindful and cognizant when evaluating what evidence could be material to a claim or defense. Texas courts have determined two instances where spoliation instructions are appropriate: "(1) a party's deliberate destruction of relevant evidence, and (2) a party's failure to produce relevant evidence or explain its nonproduction." *Brookshire Bros.*, 438 S.W.3d at 19. Failing to properly preserve evidence could be extremely harmful to a case and can lead to monetary sanctions, spoliation instructions, or even the striking of pleadings.

Amicus Curiae Committee Update

By: Richard B. Phillips, Jr.
Thompson & Knight LLP, Dallas

The Amicus Curiae Committee has been active in submitting amicus and joining briefs in cases of interest to the membership of TADC. The Amicus Committee reviews requests for amicus support and makes recommendations to the TADC Executive Committee about which cases warrant TADC's involvement. After the Executive Committee approves participation, members of the Amicus Committee take the lead in drafting and filing the briefs.

TADC has filed or joined amicus briefs filed in the following recent cases:

Brewer v. Lennox Hearth Products, 63 Tex. Sup. Ct. J. 863, 2020 WL 1979321 (Tex. Apr. 24, 2020) — The Texas Supreme Court granted review of a sanction order against attorney Bill Brewer arising from a controversial jury pool survey. TADC joined in an amicus brief with TTLA, ABOTA, and Tex-ABOTA in support of the sanctions. The Supreme Court reversed the sanction award, holding that sanctions require evidence of bad faith beyond the violation of a rule, statute, or ethical standard, and that there was no evidence Brewer acted with bad faith. TADC has joined an amicus brief with TTLA, ABOTA, and Tex-ABOTA in support of the petition for rehearing, urging the Court to reconsider the bad-faith standard and whether there is evidence that Brewer acted with bad faith.

Loya Insurance Co. v. Avalos, 63 Tex. Sup. Ct. J. 969, 2020 WL 2089752 (Tex. May 1, 2020) — Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief for TADC in support of the petition for review. The insured's husband was an excluded driver under the Loya insurance policy. While driving the insured vehicle, the husband had an accident with his friend. The insured, her husband, and the friend then colluded to tell the police the insured was driving, and the friend sued claiming the insured was driving. During the ensuing suit, the insured confessed that she lied, her husband was driving, and the friend's allegation that the insured was driving was the result of agreed fraud. Loya withdrew from defending her. In the resulting bad faith suit, the trial court granted Loya a summary judgment. The court of appeals reversed on the eight-corners rule. The Supreme Court agreed with the petition and TADC and recognized an exception to the eight-corners rule allowing court to consider "extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they would not otherwise exist."

In re K & L Auto Crushers, LLC, No. 05-19-01061-CV, 2019 WL 5558597 (Tex. App.—Dallas Oct. 29, 2019, orig. proceeding [mand. filed]) — This case addresses whether the Supreme Court's decision in *In re North Cypress Medical Center Operating Co.,* 559 S.W.3d 128 (Tex. 2018), restricts discovery of third-party reimbursement agreements to disputes between the patient and the provider. The plaintiff argued that the agreements are not discoverable in personal injury cases. The trial court quashed the discovery and the court of appeals denied mandamus relief. Henry Paoli (Scott Hulse, P.C.) submitted an amicus brief to support the petition for mandamus in the Texas Supreme Court, and the Court has requested that the plaintiff respond to the petition.

BBB Indus. v. Cardone Indus., No. 02-18-00025-CV, 2019 WL 2042233 (Tex. App.—Fort Worth May 19, 2019, pet. filed) — In this special appearance case, the issue is whether shared facts and judicial convenience excuse the plaintiff from establishing personal jurisdiction for each alleged cause of action. The defendant filed a general appearance as to the original pleaded actions. Plaintiff then amended its petition to allege new claims that do not have a connection to Texas, and

the defendant filed a special appearance as to those claims. The Fort Worth Court held that, if the new claims were properly joined to the original claims, then plaintiff did not have to prove personal jurisdiction for the new claims. Brandy Manning (Long-Weaver & Manning LLP) submitted an amicus brief to support the petition for review.

In re Allstate Indemnity Co., No. 13-19-00346-CV, 2019 WL 5866592 (Tex. App.—Corpus Christi Nov. 8, 2019, orig. proceeding [mand. filed]) — This mandamus proceeding arises from a dispute about affidavits on the reasonableness of past medical expenses under Texas Civil Practice and Remedies Code Chapter 18. The trial court struck counter-affidavits 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. The Corpus Christi Court denied mandamus relief. Roger Hughes (Adams & Graham L.L.P.) and Mike Bassett and Sadie Horner (The Bassett Firm) submitted an amicus brief to support the petition for mandamus in the Supreme Court. The Supreme Court has requested a response to the petition.

In re Parks, No. 05-19-00375-CV, 2020 WL 774107 (Tex. App.—Dallas Feb. 18, 2020, orig. proceeding [mand. filed]) — This is another case involving Chapter 18 affidavits. The trial court struck counter-affidavits and the court of appeals denied mandamus relief. Roger Hughes (Adams & Graham L.L.P.) and Mike Bassett and Sadie Horner (The Bassett Firm) submitted an amicus brief to support the petition for mandamus in the Supreme Court. The amicus brief urges the Court to clarify that mandamus is a proper avenue for seeking review of an order striking counter-affidavits and to address whether section 18.001 precludes offering any evidence to contradict an affidavit if counter-affidavits are struck.

In re Guevara., No. 05-19-01049-CV, 2020 WL 772830 (Tex. App.—Dallas Feb. 18, 2020, org. proceeding [mand. filed]) — This is another Chapter 18 case. The trial court struck counter-affidavits from a chiropractor because he did not practice in the same county as plaintiff's providers and he relied on third-party reimbursement databases. The Dallas Court denied relief based on its decision in *In re Parks*. Roger Hughes (Adams & Graham, L.L.P.) and Mike Bassett and Sadie Horner (The Bassett Firm) submitted an amicus brief to support the petition for mandamus in the Supreme Court.

In re Savoy, No. 03-19-00361-CV, pending in the Austin Court of Appeals — In this Chapter 18 case, the trial court struck counter-affidavits from a medical billing professional and a doctor. The plaintiff argues that counter-affidavits must state grounds showing the opinions are reliable under standards applicable to expert witnesses. Roger Hughes (Adams & Graham, L.L.P.) and Mike Bassett and Sadie Horner (The Bassett Firm) submitted an amicus brief to support the petition for mandamus in the Austin Court of Appeals urging the court to follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2019, orig. proceeding), which held that a counter-affidavit can be based on comparing billing records to databases showing usual and customary charges.

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COVID-19: Affecting 2020 and Beyond

By: Russell R. Smith
Fairchild, Price, Haley & Smith, L.L.P., Nacogdoches

Interruptions are frequent in the lives of all Americans, but Coronavirus (or COVID-19) has affected the lives of almost everyone in the world. Whether referring to the COVID-19 disease that the virus causes or the global pandemic that ensued as a result of its spread, Coronavirus and COVID-19 are now daily terms of familiarity. 2020 has been characterized by dramatic lifestyle changes in almost every sector of society including the legal field, which often experiences stability and immunity to most disasters, if not increased business.

The pandemonium began at the end of 2019; China announced in December that dozens of people were being treated for pneumonia and determined many of these patients had recently visited a live animal market in the city of Wuhan. By January, China attributed its first death to a novel Coronavirus. Just 10 days later on January 21st, the first case of the virus was confirmed in the United States. This patient had recently returned home to Washington State after visiting Wuhan, China. On February 29th, the first reported death in the United States indicated that the Coronavirus was spreading locally and confirmed that the virus could be transmitted between humans, as the decedent had not traveled to China.

Official measures began to be issued on a daily basis. On March 13th, President Trump took initiative at the federal level by declaring a national emergency, which established vast funding for combating the spread of the Coronavirus. In response, the Centers for Disease Control (CDC) advised the cancellation or postponement of gatherings of more than 50 people.

On March 19th, Governor Abbott of Texas ordered that schools across the state close until at least April 3rd. At the time of this order, Texas had 161 confirmed cases of Coronavirus. As cases continued to increase, the Texas school closure was extended into May and eventually until the next school year. The abrupt cancellation of school for an extended period of time placed a major childcare burden on parents, including many who work in the legal field. Parents were faced with the decision between keeping their younger children home while they try to work or placing their children in daycare. Many opted for the former, as daycare involved both unexpected expense and a risk of exposure to the virus. For parents who lost their jobs, staying at home (with or without children) became their new normal.

By March 29th, the United States became the world leader of Coronavirus cases, with over 82,000 confirmed and over 1,000 reported deaths.

Governor Abbott issued an executive order on March 31st that directed Texans to avoid leaving their homes except when necessary until April 30th.

By April 27th, the Texas Office of Court Administration issued guidance to avoid in-person proceedings until June. Additionally, the Texas Supreme Court, under Texas Government Code Section 22.0035, issued an emergency order until at least May 8th, stating that Texas

courts may modify or suspend deadlines and procedures for 30 days after the governor's state of disaster has been lifted and allow or require remote attendance at proceedings. Federal courts and districts followed suit with their own orders. Litigation took on new forms as the pandemic forced lawyers to turn to digital platforms. In-person mediations ceased. Many attorneys opted to conduct them remotely via video conferencing applications such as Zoom, FaceTime and Skype.

Lawyers and staff across Texas adapted to the stay-home order and court closures by working from home via digital communication systems. While some firms made plans to reopen only gradually, many reported that working from home proved successful. Some firms believe their clients' legal needs were completely and competently handled from home and are, therefore, in no hurry to return to their offices and face health and safety risks. It has been interesting to note how specific firms and/or specific cities have handled matters differently. Some firms sent everyone home while others did not or allowed some individual flexibility. Some cities instituted mask-wearing requirements when in public with the threat of being fined, yet it appears most of those new rules were not enforced.

Just as cities and firms addressed the pandemic in different ways, specific judges and courts have taken varying approaches to transitioning to virtual litigation. For example, one of my cases had a minor settlement hearing by Zoom in Harris County without any major problems, yet another in a different county is still not scheduled, as the judge and some staff are in self-quarantine (or perhaps just think that the matters can wait).

I had my first experience with a part of this transition in February in an East Texas court, when opposing counsel requested to take my client's deposition by Zoom. I objected for a variety of reasons. Since my client cares for his elderly mother and did not want to risk exposure to the Coronavirus, he was not comfortable with meeting even with me to prepare for a deposition. I, too, have an 88-year-old mother-in-law living with my family and understand the precautions we must take to ensure the health of our loved ones who might face a higher risk to this virus. Additionally, my client's home internet was not reliable. He only had a work computer available to him, which he was uncomfortable using for personal, and especially lawsuit-related, reasons. The judge ruled in my favor and did not require my client's deposition to go forward and reset for a continuation hearing and status in early May. The other side backed off during that status and continuation hearing and was then willing to agree on some August dates, in hopes that the pandemic would abate. Both sides reserved the right to seek intervention before August in the event that COVID-19 resurges. If I were seeking to take an important deposition, I would not want to be forced to do so through a computer. Body language and demeanor are not as easily observable and documents must be provided in advance, which erodes the element of surprise present with on-the-spot questioning over documents for which the other side might not be prepared.

My second challenge was in a large city with counsel from that city on the other side and a judge who was not traditionally favorable to defendants. However, the judge decided that it would be unfair to my client, who is a truckdriver, to have to appear for a remote deposition, surprising perhaps both sides. The judge suggested we wait for the Coronavirus pandemic to subside and do all parties' depositions in person and at the same time, perhaps later in the summer if the virus permits. This decision was welcomed, even if it might have been encouraged by the fact that one of the judge's relatives was a truckdriver. The judge was also well aware of the long hours truckdrivers, in particular, were working all across the country, which may have encouraged understanding of my client's situation.

My third experience with the transition to virtual litigation was with a Texas Federal Court Judge who already did not like my New Jersey client, as no discovery had been answered (allegedly due to my client being forced to stay at home, having his office closed, and having no access to documents and other relevant information). Opposing counsel was adamant about taking a 30(b)6 deposition of my client (who had not left his house or been to his office in over two months) on May 8th in New Jersey. Obviously, I was not going to fly to New Jersey, even if I could. I knew that opposing counsel would back off and ask for a remote deposition, which he did. I filed a Motion for Protection. Between the time opposing counsel responded and I filed a reply, cases of the Coronavirus exponentially multiplied in that specific area, which was the second worst hotspot of the virus in the country at the time. However, with the judge's prior disapproval of my client's lack of discovery responses and not filing disclosures, he ordered the deposition by Zoom on May 8th. Of course, it would have been short, as my client had no documents or even the ability to respond to most of the categories requested. Opposing counsel postponed it to allow more time for settlement discussions as he likely knew that the deposition would be a waste of time.

Although Governor Abbott allowed most businesses to reopen in May at 25% capacity and June at 50% capacity, residents are still urged to stay home. Per the governor's June 12th order, a 75% regulation (on counties with 10 or fewer cases) on restaurant capacity will last into late June or July as Texans await the next phase of reopening the state.

Though successful in some cases to some extent to date, virtual litigation and depositions raise concerns. Defense attorneys must assure or opine that a virtual deposition will not prejudice the defense of insured parties. When determining whether prejudice may result from a particular deposition, counsel should ensure that a lack of in-person interaction with insureds will not hinder their ability to be thoroughly prepared. Similarly, it must be clear that witnesses can be properly prepared and represented by an attorney on screen rather than in the same room. Can counsel sufficiently evaluate witnesses from afar and make sure that improper coaching does not occur? Other concerns include participants talking over each other, objections not being heard, stenographer ability, transcription, translation, improper videotaping, and HIPAA security and delays due to internet viability and/or electronics' capability. Additionally, any individual working in health care in our system or dealing with the Coronavirus on a personal level should not be expected to prepare for or participate in depositions at this time.

While courts and attorneys across the Lone Star State adapt to new litigation methods and procedures, new strategies and modalities are being discovered, tested and utilized due to the virus.

The COVID-19 outbreak has provided attorneys with new areas of practice and unique issues. While new engagements and activities in many areas have subsided during the pandemic, litigation has exponentially increased regarding contract breaches. The pandemic has inhibited the fulfillment of many contractual obligations, which has spawned new litigation. Many contracts contain force majeure clauses which allow parties an excuse from performance. Attorneys are increasingly tasked with presenting and defending clients in contractual matters, whether utilizing force majeure clauses if included or otherwise. This pandemic highlights the need to utilize force majeure clauses in future contracts with concise and particular wording. For clients being sued for breaching contracts, counsel must also consider using other defenses such as impracticability, lack of intent, frustration of purpose, or prevention by a government order.

The issue of contractual exclusions is ubiquitous in insurance litigation now. A drastic and sharp

rise of lawsuits are being filed against insurance companies from policyholders who allege that their claims have been wrongfully denied. The importance of specific contract language and coverage is exemplified by the Coronavirus pandemic.

While contract litigation may be surging, the energy sector and transactions are suffering. Corporate lawyers have watched the demand for their services diminish as mergers and acquisitions are put on hold. However, activity is increasing in other fields, such as bankruptcy.

Attorneys may also have the opportunity to raise constitutional law issues during and as a result of the pandemic. Many Texans are contending that their individual liberty is being violated by government restrictions aimed at slowing the spread of the virus. Many groups are pushing for the government to be more transparent in its response to the pandemic and to provide better access to vital records and court proceedings. These efforts attempt to prevent the government from taking advantage of a very restricted citizenry. One controversial concept is the use of extensive data surveillance and release in order to track Americans and alert others who may have come in contact with an individual who tests positive for COVID-19. While some experts contend that a system of digital contact tracing is essential to containing the virus, other groups argue that such a method cannot accurately identify contacts within a range close enough to determine who has been exposed. Instead, a digital system purporting to do just that would severely encroach on an individual's rights and privacy. Such invasions of personal privacy could lead to constitutional litigation. Combined with challenges such as those from religious entities, the entirety of the government's response to the outbreak could supply plenty of opportunities in the legal field for liberty violation cases. No doubt state and federal legislatures are seriously contemplating the passing of laws to prevent, thwart, discourage, and/or limit or more efficiently manage lawsuits due to the effects of COVID-19.

Further, citizens are levying accusations of overreach against government orders issued in response to the Coronavirus. One Dallas salon owner defied Dallas County orders to close her business and was sentenced to seven days in jail. However, the Texas Supreme Court ordered that person's release after only two days. Some hailed that person as a hero who decided to resist tyranny by opening her business against an unlawful State Executive Order.

When the pandemic was declared a national emergency in the United States on March 13th, the number of confirmed Coronavirus cases in Texas was 44; the total number of cases worldwide was 145,417. By April 27th, when Texas court proceedings were modified, Texas accounted for 25,516 of the 3,055,800 total worldwide cases. As of June 17th, the wordwide number of confirmed cases of Coronavirus reached 8,379,121. Slightly over one percent of these cases belong to Texas, which reported 97,271 confirmed cases of the virus.

As our world slowly opens back up and confirmed cases continue to rise, please be safe and use due diligence in your activities. Remember to protect yourself, your family, coworkers, friends, and the general public as best you can.

Some resources to consult for more information and official updates:

Official CDC site (federal perspective)
https://www.cdc.gov/coronavirus/2019-ncov/index.html

WHO site (global perspective)
https://www.who.int/emergencies/diseases/novel-coronavirus-2019

Texas DSHS site (state perspective)
https://www.dshs.texas.gov/coronavirus/

Interactive Map by State and County from usafacts.org
https://usafacts.org/visualizations/coronavirus-covid-19-spread-map/

TADC 2020 SUMMER SEMINAR
GRAND HYATT VAIL RESORT & SPA ~ VAIL, COLORADO
JULY 15-19, 2020

Christy Amuny, Germer PLLC, Program Chair
Elizabeth O'Connell Perez, MehaffyWeber, PC, Program Co-Chair
CLE Approved for: 9.75 Hours, including 1.75 Ethics Hours

Wednesday, July 15, 2020

6:00-8:00pm ***Welcome Reception***

Thursday, July 16, 2020

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements
Bud Grossman, TADC President
Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
Christy Amuny, Program Co-Chair
Germer PLLC, Beaumont
Elizabeth O'Connell Perez, Program Co-Chair
MehaffyWeber, PC, San Antonio

7:45-8:30am ***EMERGING TRENDS IN CYBER SECURITY AND LEGAL WARFARE***
Adrian Senyszyn, MehaffyWeber, PC, San Antonio

8:30-9:15am ***THE LATEST ON PREMISES LIABILITY IN TEXAS***
Gregory Perez, McCoy Leavitt Laskey LLC, San Antonio

9:15-10:00am ***LABOR AND EMPLOYMENT LAW: A GUIDE FOR THE DEFENSE TRIAL LAWYER***
Tiffany Cox Stacy & Kelly Preston, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., San Antonio
Raven Applebaum, Clear Channel Outdoor, San Antonio

10:00-10:15am B R E A K

10:15-11:00am ***PROSECUTING AND DEFENDING ATTORNEYS' FEES***
John Bridger, Strong Pipkin Bissell & Ledyard, L.L.P., Houston

11:00-11:45am ***CROSS EXAMINATION OF THE PLAINTIFF'S TRUCKING SAFETY EXPERT: EIGHT STEPS TO NEUTRALIZE ONE OF YOUR BIGGEST THREATS***
Mike Bassett, The Bassett Firm, Dallas
Donna Peavler, PeavlerBriscoe, Grapevine

11:45-12 Noon BREAK

12 Noon-1:15pm *LUNCHEON PRESENTATION:*
LITIGATION IN TEXAS: PROCEEDING IN UNPRECEDENTED TIMES
Jennifer Doan, Haltom & Doan, Texarkana

1:15-2:00pm ***GAME PLAN TO PREPARE CORPORATE REPRESENTATIVES AND ADJUSTERS FOR PRIME-TIME DEPOSITIONS***
Amy Stewart, Stewart Law Group PLLC, Dallas

Thursday Afternoon Free to Enjoy the Mountains!

Friday, July 17, 2020

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements

7:45-8:30am ***YOU CAN'T ALWAYS GET WHAT YOU WANT: A DISCUSSION ABOUT DAMAGES***
Mitzi Mayfield, Riney & Mayfield LLP, Amarillo
Kathy Snapka, The Snapka Law Firm, Corpus Christi

8:30-9:15am ***DRAFTING DISCOVERY REQUESTS AND OBJECTIONS: DISCOVERY RULES EVERY LAWYER NEEDS TO KNOW***
Nicole Akin, Brockett & McNeel, LLP, Midland

9:15-10:00am ***JURY SELECTION IN THE AGE OF PARTISAN POLARITY, UNCIVIL DISCOURSE AND OPINION AS TRUTH***
Christopher Martin, Martin, Disiere, Jefferson & Wisdom, L.L.P., Houston

10:00-10:15am B R E A K

10:15-11:00am ***TRO'S AND TI'S: HOW TO DEFEAT FROM THE DEFENSE PERSPECTIVE***
Megan Schmid, Thompson & Knight LLP, Houston

11:00-11:45am ***THE LATEST AND GREATEST ON PRODUCTS LIABILITY***
Mary Kate Raffetto Beck|Redden LLP, Houston

11:45am-12:30pm ***LET'S GET PHYSICAL: EXAMINING IME'S***
Saige Lee, Sprouse Shrader Smith PLLC, Amarillo

Friday Afternoon Free to Enjoy the Mountains

Saturday, July 18, 2020

7:00-9:00am Buffet Breakfast

Saturday free to enjoy the Mountains!

Sunday, July 19, 2020

Return to Texas!

Thanks to Meeting Sponsors:

Exponent AEI Robson Forensic

2020 TADC SUMMER SEMINAR

July 15-19, 2020 • Grand Hyatt Vail Resort & Spa • 1300 Westhaven Dr., Vail, CO 81657

Pricing & Registration Options

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)	$875.00

Children's Registration

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

Children Age 12 and Older	$125.00
Children Age 6-11	$100.00

Spouse/Guest CLE Credit

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

Hotel Reservation Information

For hotel reservations, **CONTACT THE GRAND HYATT VAIL DIRECTLY AT *970/479-1530 OR*** reserve online at https://www.hyatt.com/en-US/group-booking/EGEGH/G-TXDC **and reference the TADC Summer 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 FOR HOTEL RESERVATIONS IS JULY 1, 2020

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) DAYS PRIOR (July 8, 2019) to the meeting date. A $125.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after July 8, 2019 IS NON-REFUNDABLE.

2020 TADC SUMMER SEMINAR REGISTRATION FORM

JULY 15-19, 2020

CONTACT THE GRAND HYATT VAIL DIRECTLY AT *970/479-1530 OR* reserve online at
https://www.hyatt.com/en-US/group-booking/EGEGH/G-TXDC

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$675.00 Member ONLY (One Person)**
- ☐ **$875.00 Member & Spouse/Guest (2 people)**
- ☐ **$75.00 Spouse/Guest CLE Credit**
- ☐ **(no charge) CLE for a State OTHER than Texas - You will receive a certificate of completion for out-of-state CLE**
- ☐ **$ 125.00 Children 12 & Older _____**
- ☐ **$ 100.00 Children 6-11 _____**

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:_____

PAYMENT METHOD:

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

MAKE PAYABLE & MAIL THIS FORM TO: TADC, 400 W. 15th St., Ste. 420, Austin, TX 78701

CHARGE TO: (circle one) Visa Mastercard American Express - or register online at www.tadc.org

_____

Card Number **Expiration Date**

Cardholder Name (please print):_____

TADC
400 W. 15th St.
Ste. 420
Austin, TX 78701
PH: 512/476-5225
FAX: 512/476-5384
tadc@tadc.org

(For TADC Office Use Only)

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


What to Know About Force Majeure Clauses in Light of COVID-19 & How You Can Plan Now

By: Christopher A. Lowrance & Kate J. Copperud
Royston, Rayzor, Vickery & Williams, LLP, Corpus Christi

The economic impact of the COVID-19 virus will result in parties across many industries breaching their contracts. As a result, disputes will arise from breaching parties seeking to excuse their failure to perform by reliance upon contractual language commonly referred to as "force majeure" clauses. Black's Law Dictionary defines force majeure as a "superior or irresistible force," but it commonly refers to a failure to perform an obligation due to a cause outside the control of the failing party, such as an "act of God." Common law and statutory defenses to performance failures, such as impossibility of performance and commercial impracticability doctrines, rarely resulted in a performance failure being legally excused. Therefore, use of force majeure language arose in part to contract around the limitations of these doctrines. No accepted standard wording for a force majeure clause exists. Because the specific language of a force majeure clause varies per agreement, courts review the clauses on a case-by case basis and their analysis is extremely fact specific. Despite this, there are a few general guidelines to force majeure clauses that typically apply under Texas law. First, courts will look for a specific reference to the cause of the performance failure. Second, if the cause of the breach was not specifically listed, Texas courts will rely on canons of contract interpretation, with special emphasis on the placement of any "catch all" phrases. Third, Texas courts may require the cause of the breach to have been unforeseeable and/or outside the control of the party asserting relief under force majeure. Finally, any notice requirements in the contract for declaring a force majeure event should be strictly followed.

Most important consideration: the words of the clause

Courts will first look to see if the force majeure clause identified specific causes of nonperformance. Some clauses contain a "laundry list" of events excusing performance, but outside of the healthcare industry and contracts for entertainment events, few clauses will specifically identify viral outbreaks or pandemics. Many clauses will include "act of God." "Act of God" in the context of a force majeure clause remains undefined under Texas law. Absent a definition in the applicable contract, courts may use the Texas Pattern Jury Charge definition of an act of God defense to tort liability: "An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care." This definition requires the force majeure event to be the sole cause of the breach and to be unforeseeable. Whether a pandemic like COVID-19 will be considered an "act of God" remains an open question under Texas law.

Force majeure clauses also often list acts of governments as excused events. Such language raises the issue of what exactly was the cause of the breach: the virus or any shutdown ordered by a governmental authority? The actual cause is

important because specifically listed causes in a force majeure clause can be foreseeable and still be enforced, but only unforeseeable events can be excused by a "catch all" provision. Courts have reasoned that a specifically enumerated force majeure event does not need to be unforeseeable because the parties obviously had some foresight into the possibility of such events occurring; hence, the inclusion of such events in the clause.

Catch-all clauses

Many force majeure clauses contain "catch all" language, often referring to all events beyond the reasonable control of a party. Under Texas law, when a force majeure clause lists events giving rise to the defense—fire, government regulation, oil spill, plant explosion, etc., then lists a catchall provision such as "and all other events outside the control of the asserting party," those "all other events" are limited to events similar to those specifically enumerated. In contrast, if the catch all provision is listed first, then the specific events are listed as examples ("including but not limited to"), Texas courts have found that the listed events do not limit the scope of the triggering events.

Foreseeable?

An event must be unforeseeable to be excused by the catch all provision of a force majeure clause under Texas law. *See, e.g., TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App. – Houston [1st Dist.] 2018 pet. denied). Generally, Texas courts have found that economic or financial causes of breach, such as failures of funding a project or sudden changes in prices or expenses, are foreseeable. We expect that Texas courts may reach differing conclusions on the issue of foreseeability related to COVID-19 contract breaches, even under similar underlying circumstances.

When force majeure fails, or if the contract contains no force majeure clause, look to the Restatement or the Uniform Commercial Code.

Force majeure is not implied by law in the United States. If a contract fails to include a force majeure clause, defenses such as impracticability, prevention by a governmental regulation or order, and frustration of purpose may be asserted in its place.

Impracticability

A party may assert the defense of impracticability when their performance was made impracticable due to a supervening event and the occurrence or non-occurrence of that event was a basic assumption of the contract. (*See,* Restatement (2d) of Contracts § 261). Many courts will also require the supervening event to be unforeseeable.

In the context of COVID-19, this section can be asserted along with Restatement (2d) of Contracts § 264—Prevention by Governmental Regulation or Order. For example, pursuant to an executive order, all gyms must be shut down indefinitely. A gym may be able to assert § 264 in defense to a breach of contract claim because the gym was required by law to comply with the government order and shut down.

Note that both §§ 261 and 264 have been adopted by Texas law. *See Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992).

Frustration of purpose

To assert the frustration of purpose doctrine**,** the frustration must be substantial and hinder the very purpose of the contract. (Restatement (2d) of Contracts § 265). In some circumstances, a court will temporarily excuse timely performance if the court views the supervening event as temporary. Depending on the context, this temporary suspension may be more just than discharging the obligation altogether. However, note that Texas law has not adopted § 265.

UCC § 2-615

If the contract is for sale of goods, then UCC § 2-615 may apply. § 2-615 acts much like the impracticability doctrine of the Restatement. Pursuant to § 2-615**,** a delay in delivery (or non-delivery) in whole or part by a seller ... is not a breach of his duty under the contract if performance has been made impracticable by the occurrence of a contingency that the non-occurrence of that contingency was a basic assumption on which the contract was formed.

In preparation for litigation

Pay attention to notice requirements

If you are asserting a force majeure claim or attempting to recover under a business interruption or other insurance policy, then review the contract immediately for notice requirements. Bear in mind that notice deadlines may vary depending upon the cause of the force majeure event, and you may want to send multiple notices based on different events as alternatives, especially as the governmental response to the pandemic has resulted in incrementally greater business restrictions and/or effects.

What is the standard of care of the breaching party?

Force majeure clauses vary as to the standard of care required for the breaching party to have its performance excused: was performance illegal, impossible, commercially impractical, or not reasonably possible? Documentation of efforts to meet the performance standard should be created and preserved.

Mitigation

Many force majeure clauses delay performance as opposed to excusing it completely. Documentation of efforts to perform when possible should be created and preserved.

Burden of proof

The burden falls on the party asserting the claim to prove the force majeure event, and the claiming party may also have to prove that it was unforeseeable. Therefore, if you anticipate asserting this defense, begin to collect evidence supporting the claim early. Conversely, parties responding to the defense should also practice document and evidence retention to refute the force majeure claims—showing there were alternatives available, extension of time options, notice failures, and the like.

Moving forward

Because some sources claim COVID-19 may return next year, review your contracts and consider adding force majeure language or revising your force majeure clauses to include specific reference to COVID-19. Also, consider including specific force majeure language in new contracts. And consider the impact that choice of law clauses may have on your force majeure language.

Conclusion

In summary, Texas courts will typically ask the following general questions:

- What specific causes of breach did the contract language excuse?
- What actually caused the breach?
- Was the actual cause specifically listed, or an event within the catch-all provision?
- Was the cause of the breach foreseeable?
- What standard of care is required of the party in breach?
- Did the party in breach comply with any notice requirements?

Start preparing now to provide the answers.

Appraisal Payments, Prompt or Not

By: Steve Bosky
Ramon Worthington, PLLC, Austin

The Texas Supreme Court's 2019 opinions in *Barbara Techs. Corp. v. State Farm Lloyds* and *Ortiz v. State Farm Lloyds* largely clarified which claims survive an insurer's timely payment of an appraisal award. Appraisal is a policy provision in which both parties select an appraiser, and those appraisers set the amount of the loss, sometimes with the assistance of a neutral umpire. *Barbara Tech* holds an insurer's payment of an appraisal award does not as a matter of law bar claims under the Texas Prompt Payment of Claims Act ("TPPCA"). 589 S.W.3d 806, 828 (Tex. 2019). *Ortiz* additionally concluded the timely payment of an appraisal award generally bars claims for breach of contract and bad faith. 589 S.W.3d 127, 133-35 (Tex. 2019). This article examines post-*Barbara Tech* and *Ortiz* caselaw to see how courts have responded.

The Supreme Court itself has issued three related opinions, though two of them were pending before the Court when the *Barbara Tech* and *Ortiz* opinions were issued, and the Court simply remanded them for reconsideration of the TPPCA claims based on the new opinions. *Alvarez v. State Farm Lloyds*, No. 18-0127, 63 Tex. Sup. Ct. J. 772, 2020 Tex. LEXIS 318 (Tex. Apr. 17, 2020); *Lazos v. State Farm Lloyds*, No. 18-0205, 63 Tex. Sup. Ct. J. 773, 2020 Tex. LEXIS 324 (Tex. Apr. 17, 2020).Bottom of Form

The third Supreme Court opinion, *Biasatti v. GuideOne Nat'l Ins. Co.*, involves a unilateral appraisal clause where only the insurer had a right to demand appraisal. *Biasatti v. GuideOne Nat'l Ins. Co.*, No. 18-0911, 63 Tex. Sup. Ct. J. 780, 2020 Tex. LEXIS 319, at *1 (Tex. Apr. 17, 2020). This is unlike the four cases described above, all of which involved bilateral appraisal clauses where either party could demand appraisal. *See id.* Like *Alvarez* and *Ortiz*, the Court remanded the TPPCA claim based on *Barbara Tech*. *Biasatti*, 2020 Tex. LEXIS 319, at *5. But, the Court remanded the breach of contract and bad faith claims so the trial court could "consider whether payment of an appraisal award under a unilateral clause would have the same effect" as a bilateral appraisal clause. *Id.* The ultimate outcome of this case bears monitoring, especially for those who represent insurers using a unilateral appraisal clause.

A TPPCA argument that continues to be developed is a "reasonable pre-appraisal payment" argument that originated in *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 345 (Tex. App.—Corpus Christi 2004, pet. denied) and was more recently adopted by the Fifth Circuit in *Mainali Corp. v. Covington Specialty Ins.*, 872 F.3d 255, 259 (5th Cir. 2017). In short, if the insurer made a reasonable payment *before* appraisal, an insured cannot sustain a TPPCA claim as a matter of law. *Id. Barbara Tech* cites favorably to both *Mainali* and *Breshears* in concluding "use of the contract's appraisal process does not vitiate the insurer's earlier determination on the claim." *Barbara Tech.*, 589 S.W.3d at 823.

Since *Barbara Tech*, several federal District Court judges have concluded a "reasonable pre-appraisal payment" bars TPPCA claims as a matter of law, with the "reasonableness" of the payment based on a comparison of the amount of the pre-appraisal payment versus the amount of the appraisal award. *See, e.g.*, *Hyewon Shin v. Allstate Tex. Lloyds*, No. 4:18-CV-01784, 2019 U.S. Dist. LEXIS 149330, at *4 (S.D. Tex. 2019) (Ellison, J.); *Crenshaw v. State Farm Lloyds*, 425 F. Supp. 3d 729, 740 (N.D. Tex. 2019) (O'Connor, J.); *Reyna v. State Farm Lloyds*, No. H-193726, 2020 U.S. Dist. LEXIS 42866, at *9 (S.D. Tex. 2020) (Rosenthal, J.); *Serrano v. Ocean Harbor Cas. Co.*, No. H-19-1050, 2020 U.S. Dist. LEXIS 58653, at *8-9 (S.D. Tex. 2020) (Miller, J.); *Lakeside FBBC, LP v. Everest Indem. Ins. Co.*, Civil Action No. SA-17-CV-491-XR, 2020 U.S. Dist. LEXIS 62253, at *38 (W.D. Tex. 2020) (Rodriguez, J.). Courts have found pre-appraisal payments reasonable even where the appraisal award was 6.8 times the pre-appraisal payment. *Lakeside FBBC*, Civil Action No. SA-17-CV-491-XR, 2020 U.S. Dist. LEXIS 62253, at *29 (*citing Hinojos v. State Farm Lloyds,* 569 S.W.3d 304, 313 (Tex.App.—El Paso, pet. filed)). *Hinojos* should be the next major case in this arena as it is currently pending before the Supreme Court, and a reply brief on the merits was filed just last month.

2020 West Texas Seminar

A Joint Seminar with the
TADC & NMDLA

August 7-9, 2020 ~ Inn of the Mountain Gods ~ Ruidoso, NM

Texas Association of Defense Counsel
400 W. 15th Street, Suite 420
Austin, Texas 78701

PH 512-476-5225
tadc@tadc.org

PROGRAM AND REGISTRATION

Approved for 5.25 hours CLE, including 1.0 hours ethics

Program Co-Chairs: Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock, **William R. Anderson,** O'Brien & Padilla, P.C., Las Cruces

Friday, August 7, 2020
(All times Mountain Time)

6:00-8:00pm Opening Reception

Saturday, August 8, 2020

7:00am-9:00am Buffet Breakfast

7:30am Welcome & Introductions
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock, TADC President and Program Co-Chair
William R. Anderson, O'Brien & Padilla, P.C., Las Cruces, NMDLA President-Elect and Program Co-Chair
Alex Yarbrough, Riney & Mayfield LLP, Amarillo, TADC Young Lawyer Chair

7:45-8:15am TRANSPORTATION UPDATE
Mike Bassett, The Bassett Firm, Dallas

8:15-8:45am NMDLA AMICUS AND APPELLATE UPDATE - Torres v. Madrid, a 4th Amendment case
Mark D. Standridge, Jarmie & Associates, Las Cruces

8:45-9:15am TADC AMICUS AND APPELLATE UPDATE
J. Mitchell Smith, Germer PLLC, Beaumont

9:15-9:30am B R E A K

9:30-10:00am UPDATE ON ENERGY LITIGATION
David W. Lauritzen, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland

10:00-11:30am LITIGATING LIKE A HOMETOWNER: AN OVERVIEW OF NM & TX
Michael Dean & Dan Hernandez, Ray Pena McChristian, P.C., Albuquerque, Fort Worth, El Paso
William R. Anderson, O'Brien & Padilla, P.C., Las Cruces

11:30-12:00pm TRYING CASES WITH MILLENNIAL JURORS AND YOUNG JUDGES
Slater C. Elza, Underwood Law Firm, P.C., Amarillo

12:00-12:30pm TEXAS SUPREME COURT UPDATE *(ethics)*
Justice J. Brett Busby,
Texas Supreme Court, Austin

12:30-1:00pm NEW MEXICO SUPREME COURT UPDATE *(ethics)*
Justice Gary L. Clingman, retired
New Mexico Supreme Court, Hobbs

1:00pm ADJOURN TO ENJOY RUIDOSO

Sunday, August 9, 2020

7:00-9:00am Buffet Breakfast

2020 West Texas Seminar

August 7-9, 2020
Inn of the Mountain Gods ~ Ruidoso, NM
287 Carrizo Canyon Road ~ Mescalero, NM 88340
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Pricing & Registration Options

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

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

Hotel Reservation Information

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

DEADLINE FOR HOTEL RESERVATIONS IS
July 21, 2020

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) business days prior (JULY 31, 2020) to the meeting date. A $25.00 Administrative Fee will be deducted from any refund. Any cancellation made after July 31, 2020 is NON-REFUNDABLE.

2020 TADC WEST TEXAS SEMINAR

August 7-9, 2020

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CHECK APPLICABLE BOX TO CALCULATE YOUR REGISTRATION FEE:

☐ **$150.00 Member ONLY (1 Person)**
☐ **$175.00 Member & Spouse/Guest (2 people)**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY_____ZIP_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____
☐ *Check if your spouse/guest is a TADC member*

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by July 21, 2020. This coincides with the deadline set by the hotel for hotel accommodations.

PAYMENT METHOD:

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

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

CHARGE TO: (circle one) Visa Mastercard American Express

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Card Number **Expiration Date**

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Expert Witness Research Service Overall Process

- Complete the TADC Expert Witness Research Service Request Form. Multiple name/specialty requests can be put on one form.
- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
- If the request is for a defense expert within a given specialty, please include as much information as possible. For example, accident reconstruction can include experts with a specialty of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return email 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.

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

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

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The Texas Association of Defense Counsel, Inc. maintains an Expert Witness Index which is open only to TADC members or member firms. This index includes thousands of experts by name and topic or areas of specialty ranging from "abdomen" to "zoology." Please visit the TADC website (www.tadc.org) or call the office at 512/476-5225 for additional information. To contribute material to the Expert Witness Library, mail to TADC Expert Witness Service, 400 West 15th St, Suite 420 Austin, TX 78701 or email **tadc@tadc.org.**

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

By: Todd Frank, P.E., and Sarah Sharpe, Ph.D.
Vehicle Engineering and Biomechanics Practice, Exponent, Inc

When and How to Conduct a Virtual Inspection

What options do you have when an inspection must be completed and the involved attorneys and experts cannot travel due to COVID-19 concerns, scheduling conflicts, or restricted costs? Given today's technology for working remotely, there are several options that would allow for virtual attendance. This article explores the benefits of a virtual inspection and how they can be carried out successfully using careful planning and preparation. While this is discussed in the context of conducting inspections, such tools and techniques could be used in a variety of situations including testing and even courtroom demonstrations. In fact, the first virtual jury trial was recently conducted over Zoom in Collin County, Texas, possibly setting a precedent for future proceedings.[1]

Benefits of a Virtual Inspection

There are many reasons a virtual inspection may be necessary or advantageous. For example, COVID-19 has restricted travel due to health concerns; such concerns may be long-lasting and in the future individuals may be more hesitant to (or even restricted from) travel when they are experiencing any fever or cough-producing illness. Even prior to COVID-19, there were many reasons to consider taking advantage of technology and scheduling virtual inspections. Scheduling inspections that include multiple attorneys and experts can be a challenge due to conflicts. Further, with the variability of the legal environment and its constantly changing deadlines and trial schedules, even after everyone agrees on a date, it is not uncommon for that date to change at least once if not multiple times. This often leads to inspections getting pushed farther into the future, which can be problematic for various reasons, such as the owner of heavy equipment needing it returned to service or a site changing due to inclement weather conditions or construction. Cost is another factor to consider when scheduling inspections. If multiple people need to travel a long distance, then significant additional cost and time investment is required, even if the time to complete an inspection is relatively short. Virtual inspections could act as a cost-effective precursor for an in-person inspection to determine if more information is needed. Now more than ever companies are being asked to operate lean and to reduce costs. Scheduling virtual inspections may offer a cost benefit for all parties involved.

[1] Pohlman, K. (2020 May 18) Texas Court Holds First Jury Trial Via Zoom in Insurance Feud. B Goldman (Ed.) *Portfolio Media Inc.* Retrieved from http://www.law360.com

Planning and Preparation

Conducting a successful virtual inspection takes planning. Understanding the inspection environment and associated limitations are likely the first considerations that will dictate many other decisions. For example, does the location have good Wi-Fi or a cellular signal? Will the inspection be indoors or outdoors where equipment is more likely to be affected by sunlight or weather? To conduct a virtual inspection, someone will physically need to be at the inspection location to set up equipment, move cameras around, and perform required in-person tasks. Will this person be from one of the beneficial parties or will a third-party be asked to physically set up and conduct the inspection? Who will direct the inspection? With several people on the call it would be impossible to conduct a virtual inspection with everyone talking over each other with requests or questions. A better way would be to have a single individual direct the inspection. That person could be local to the inspection or remote but would take requests via a chat feature or via a "hand raise" incorporated into many of the current video conferencing software packages. Which conferencing software package will be used? What is the necessary equipment that will be compatible with the conferencing software and meet the needs of the inspection? Who will be responsible for and how will the attendees be documented? Although virtual inspections should save some costs, it will not be free. Who will be responsible for paying for the inspection or will some cost-sharing be applied?

Technical Details

The tools required to conduct a virtual inspection will vary depending on the specific needs of virtual attendees. Simple setups may consist of tripod-mounted tablets and phone communications, while more elaborate setups may include multiple camera views, in-ear audio, remotely-driven robotics, and 3D scanning. Before an inspection, the parties involved must determine the goals of the virtual inspection, the site capabilities, and the resources required including onsite personnel and equipment. Cost will vary depending on the complexity of the virtual inspection.

In the current environment, video communication is widely available and simple virtual inspections can be conducted by almost anyone with access to Wi-Fi or a cellular network. Video conferencing platforms such as Cisco Webex, Zoom, Microsoft Teams, Skype, Google Hangouts, and Group FaceTime allow a multitude of people to virtually meet and simultaneously view a screen. Before an inspection, each user should verify they have the required updates and software installed. Each software platform may have different functionality (such as enhancing the video of the loudest person talking versus the intended inspection video feed), so it is important to designate someone to test the software before the inspection to determine how to change settings and operate in a manner conducive for the inspection environment. Other important features include how to mute and unmute participants, and how to record. The use of a single webcam, phone, or tablet could be sufficient to direct the virtual inspection.

More complicated setups may consist of multiple tripod-mounted cameras, body-mounted cameras, as well as in-ear monitoring and communication. Increased use of body-mounted cameras in sports (*e.g.* GoPro cameras) and law enforcement has made these options more widely available. It is important to look for options that offer adequate resolution, good image stabilization, can be worn on the body at a location with direct views and does not

obstruct and limit mobility, and can live stream to a laptop or computer system (versus onboard recording only). Tripod-mounted cameras are a good way to provide the viewers with an overall view. However, these cameras may need to be moved several times depending on the location being inspected. "Telepresence" robots, which are remote-controlled wheeled devices with a camera, screen, speaker, and microphone, now allow a viewer to remotely adjust the camera position and view without the need of onsite personnel. And, considerations such as the inspection terrain, size of the device, and cost may restrict the use of such technology for field inspections.

Another important consideration is the ability for viewers and the onsite staff to communicate with each other in real-time; having the onsite personnel continually stop and walk back to a streaming laptop could be cumbersome and ultimately add considerable time to the inspection. In-ear audio monitoring may be critical in a situation in which someone is, for example, inside or underneath a vehicle. Several wired and wireless options are available, including headset, earbud, or clip-on types.

For multi-camera and audio setups, a switcher is needed to combine these inputs into the designated laptop, split the screen, or seamlessly switch between views. Relatively low-cost solutions, such as the Blackmagic Design ATEM Mini Pro, can provide up to four HDMI inputs for camera connections and two audio inputs that can be fed into a laptop and streamed to viewers. Such devices, which were formerly expensive and relegated to TV production, are now accessible in a simple package and at reasonable cost points due to the increased demand from video podcasting and multi-cam live webcasting events. Other options include using a wireless transmitter and receiver set, such as the Teradek 500 series video systems, which can transmit high definition video at 60 frames per second up to 500 feet with minimal delay.

Finally, high speed internet access is a critical factor to consider in order to transmit the video data to virtual attendees. While this may not be a concern when working at an engineering facility, the often-remote locations required for conducting a vehicle or site inspection may not offer such a capability. Several companies now offer portable packs that use a technology referred to as "cellular bonding" that leverages cellular networks, Wi-Fi, and/or Ethernet to connect to high speed servers with appropriate encryption. These portable packs are often available in backpack configurations, making them easy to transport.

When utilizing these technologies, portability is an important consideration, as this may dictate whether items need to be shipped or whether they can be carried onto a plane. Power sources are also a critical factor as the location may not have power, and batteries might have limited life or present challenges during travel.

As the complexity of these inspections increase, more required in-person staff may be necessary. At least one person may be needed to act as the video producer, directing footage as needed, while another person is conducting the inspection and donned with cameras and audio equipment.

Additional visualization modalities are now available to allow remote viewers to experience an environment, vehicle, equipment, or components including high-resolution 3D scanners, or drone footage. This can allow remote participants to have a more 'hands-on' experience and take additional measurements following the inspection.

It is also important to keep in mind that the video footage will allow viewers to watch the inspection and record data, but likely will not replace the high-quality still photographs that capture the presence of substances or material characteristics, and subsequently produce compelling trial exhibits. It is important that the onsite personnel is skilled at photography and can capture the data required by viewers, especially if follow-up inspections by experts are not planned.

Once the location, technical configuration, and personnel details have been determined, it is critical that the system be tested. It is highly recommended that configuration testing be completed well before the actual inspection to work out any equipment issues. If possible, it is preferable that the system also be tested on-site with the network connection and personnel that will be using the equipment during the inspection. At minimum, the on-site personnel should show up 1 to 2 hours in advance of the scheduled virtual inspection. No one wants to be troubleshooting the system with a bunch of people watching remotely or sitting in their respective offices wondering what is going on. Finally, have a backup plan. The backup plan will likely involve reducing complexity and reverting to a simplified setup. Having issues resolved ahead of time and a backup plan in place will make the inspection a more positive and productive experience.

After the inspection, it is important that someone is designated to oversee the distribution of original content and that a reasonable timeline is set. Such inspections may produce large video files that may be supplied via secure cloud-sharing or sent to individuals on physical hard-drives.

Is a Virtual Inspection the Right Choice?

In general, there is current technology which can enable virtual inspections in almost any environment and can vary in complexity. Limitations do exist and remote attendance will not be the right choice for everyone. The ability to see something in person enables the attendees to experience a site, vehicle, or equipment using the entirety of their senses. In-person attendees can quickly view fine details using different lighting and angles that might be hard to see or convey using cameras and remote personnel. However, for attorneys and experts that need to see the "big" picture, or that can work with trained staff to capture required fine details, a virtual inspection may be a good choice. Further, for time-sensitive, cost-restrictive, and travel-restrictive environments, such inspections may be the best or only means of collecting the data needed to investigate a case.

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TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

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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.

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Firm: _____

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*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: _____

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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

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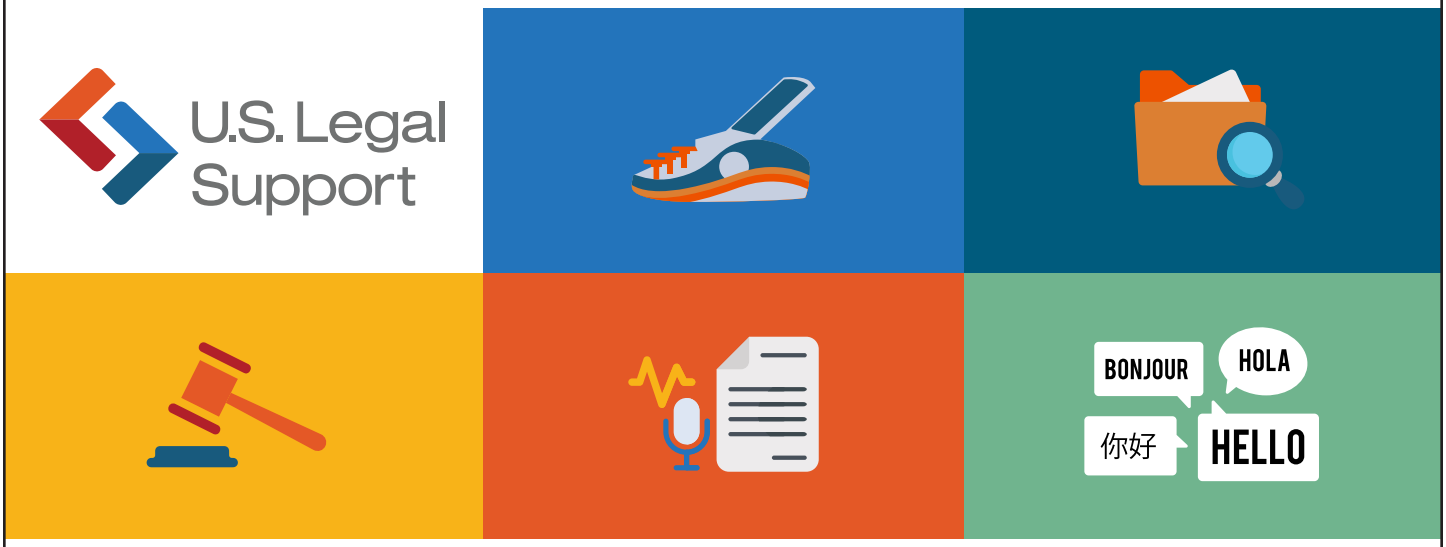

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TADC

Calendar of Events

www.tadc.org

August 7-9, 2020
West Texas Seminar
Ruidoso, New Mexico - Inn of the Mountain Gods

July 15-19, 2020
2020 TADC Summer Meeting
The Grand Hyatt Resort & Spa - Vail, Colorado

September 23-27, 2020
2020 TADC Annual Meeting
San Luis Resort & Spa – Galveston, Texas