TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

FALL/WINTER 2020

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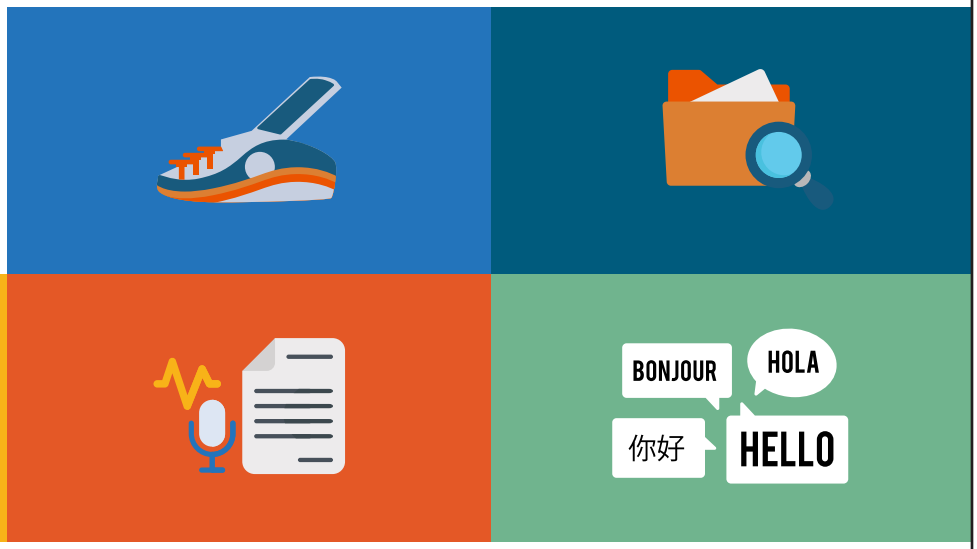
U.S. Legal Support



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From the Editor

2020 has been a year to go down in history and let's hope we don't have any more in the future! As the editor of our magazines this year, I want to express my sincerest thanks and utmost gratitude to co-chair, Darin Brooks, for his guidance and support, as well as Executive Director, Bobby "Hawaiian Shirt" Walden, the Executive Committee and all TADC Board and regular members for all the support and assistance in preparing these publications. The magazines would not have been published without you all either contributing articles and/or providing your invaluable feedback and advice.

On a side note, congratulations to my firm's newest associate, Adam Freeland, for not only receiving news he passed the bar the day before Halloween (to avoid the "trick" part of "trick or treat"), but also for agreeing to step up and author an article for this magazine about his experience (fresh out of law school) attending TADC's Deposition Bootcamp, as well as his tribute to the Bootcamp's new namesake, long and outstanding TADC member who recently passed, Barry Peterson.

Happy 60th Birthday TADC!

The TADC Magazine is a publication of the Texas Association of Defense Counsel
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2021 TADC CALENDAR OF EVENTS

February 11-12	**2021 TADC Winter Seminar** Omni Hotel – Fort Worth, Texas Registration information available after December 1, 2020
April 28-May 2	**2021 TADC Spring Meeting** Intercontinental Hotel – Chicago, Illinois Registration information available after March 1, 2021
July 7-11	**2021 TADC Summer Seminar** Snake River Lodge & Spa – Jackson Hole, Wyoming Registration information available after May 1, 2021
August 13-14	**2021 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico Registration information available after June 1, 2021
September 22-26	**2021 TADC Annual Meeting** Peabody Hotel – Memphis, Tennessee Registration information available after July 1, 2021

President's Message

By: Slater C. Elza, TADC President
Underwood Law Firm, P.C., Amarillo

It is with great excitement that I pen my first President's Message. Many things are going on in TADC and we are excited for this new year. If you have any thoughts or suggestions, my email address is slater.elza@uwlaw.com.

The Annual Meeting was fantastic, proving we are all craving some in-person contact after a long year. A special thanks to Fred Raschke who put together a great week – post Tropical Storm. We will continue to move forward with in-person programming conducted in a safe manner. Our Winter Meeting will be in Fort Worth on February 11-12, 2021. We are putting the final touches on our program and you will be receiving information soon.

In October we had our Third Annual Deposition Boot Camp. It was a huge success with an incredible faculty and almost 80 registrants. Many thanks to Amy Stewart and Mike Bassett for assembling the most outstanding and diverse faculty we have probably ever seen in TADC. There is an article in this issue about the Program, and I invite all of you to read it. Also, we are looking for a way to make the Program available to members since we did record it.

In 2021 we will begin a new Legislative Session. Our PAC and Legislative Committee are gearing up. Although we continue to hear rumors that 2021 topics will be severely limited due to COVID-19, we must be ready to move at a moment's notice to protect the interests of our professions, clients and practices. George Christian continues to guide us through this process and will keep us updated on a regular basis. Please consider a donation to our PAC so that we can be ready when called upon.

Our Construction Law Committee continues to meet and produce programming. We will be getting each of you information on multiple webinars coming up before the end of the year. Please let us know if you would like to become more involved.

Finally, we are kicking off our Young Lawyer Lunch Webinars in November. Our plan is to have these during lunch every other month. Invitations to David Chamberlain's discussion of Civility in the Practice of Law recently went out. We had 15 members sign up in the first two hours. We have great hopes for this new programming and invite everyone to get their young lawyers signed up.

If you want to become more involved, please let me know!!!

Past President's Message

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

60 years of excellence. The TADC has faced many challenges throughout the years, but none more challenging than this one. Moreover, the challenges that lie ahead will unquestionably define the way we do business as an organization, as lawyers, and in really every aspect of our lives.

The TADC has led and will continue to lead us in the right direction. We overcame some fairly daunting obstacles to providing our membership with the quality seminars and opportunities to socialize during the pandemic. Nevertheless, with the hard work and dedication of our board, we were able to move forward making strides in technology to deliver for you.

Programs

This was a year of several "Firsts". Our Spring Meeting in the Bahamas was shaping up to be one of the most well-attended meetings of all time. As with many other organizations, it would have been far easier to "punt" until next year. Instead, the TADC moved forward with its First tri-brid Summer Meeting in Vail, Colorado. Our Programs Vice Presidents, M. Mitchell Moss with the Moss Legal Group, PLLC in El Paso and Michael A. Golemi with Liskow & Lewis APLC in Houston and our program chairs went into action and along with our magnificent Executive Director, Bobby Walden, we completed our first in-person and remotely attended board meeting. Our seminar provided for in-person attendance along with in-person, remote and recorded presentations for a very high-quality presentation.

While the Inn of the Mountain Gods and the State of New Mexico was in lockdown, the TADC delivered its first *virtual* West Texas Seminar in conjunction with the NMDLA. This event was another well-attended seminar providing valuable CLE for our members.

Our President-Elect, Slater Elza, and Co-Chairs Amy M. Stewart, Stewart Law Group PLLC, Dallas, and Mike H. Bassett, The Bassett Firm, Dallas, put on TADC's First Virtual Deposition Boot Camp. This program has become extremely popular for our young lawyers. Slater also has in the works bi-monthly *virtual* CLE programs this year specifically designed for young lawyers, which will continue to provide valuable information investing in our future.

The TADC returned to in-person attendance at our Annual Meeting in Galveston. Our co-chairs, Past President Fred D. Raschke, Mills Shirley L.L.P., Galveston, and Greg Blaies, Blaies & Hightower, L.L.P., Fort Worth, capped off an outstanding meeting. This was truly a special event for our 60th year. This was a reunion of many past presidents, and a time to finally get together to see each other in person!

Darin Brooks, with Gray Reed & McGraw LLP in Houston and Roger Hughes with Adams & Graham, L.L.P. in Harlingen, received the President's Award for their outstanding efforts on behalf of the TADC and the furtherance of its mission throughout the year. Alex Yarbrough with Riney & Mayfield, L.L.P. in Amarillo was presented with the Young Lawyers Award for his leadership and service as the Young Lawyers Committee Chair. Finally, Past President Clayton Devin with Macdonald Devin Ziegler Madden Kenefick Harris in Dallas was honored with the Founders Award for his consistent, steady service to the TADC and its mission through the years toward the betterment of the civil justice system.

Legislative

Legislative Vice Presidents Robert Booth with Mills Shirley L.L.P. in Galveston and Mike Shipman with Fletcher, Farley, Shipman

& Salinas, LLP in Dallas, successfully led the TADC Legislative Committee through the array of interim charges. The Committee met monthly via conference call to discuss legislative issues likely to surface in the 2021 session and put working groups in place and developed a plan of action to deal with whatever might arise.

Publications

TADC's magazines are outstanding - full of substantive material for our members. The Publications Committee, led by Darin Brooks, with Gray Reed & McGraw LLP in Houston and Russell Smith with Fairchild, Price, Haley & Smith, L.L.P. in Nacogdoches, with guidance and input from TADC Executive Director Bobby Walden, highlighted the TADC in an effective way.

Membership

The Membership Committee, led by Vice Presidents Mitzi Mayfield, Riney & Mayfield LLP in Amarillo and Sofia Ramon with Ramon Worthington, PLLC in Edinburg has done a great job this year, not only recruiting new members, but keeping the members we have informed and engaged. We continue to see a need for young lawyers to have access to training. The TADC works to fill those needs through the TADC Barry D. Peterson Deposition Boot Camp and the Milton C. Colia Trial Academy. The Deposition Boot Camp held in October and chaired by Mike Bassett with The Bassett Firm in Dallas and Amy Stewart with Stewart Law Group PLLC in Dallas had 78 attendees and brought in 23 new members! Providing training and mentoring to attorneys has always been and will continue to be a focus of the TADC.

Young Lawyers Committee

The Young Lawyers Committee, chaired by Alex Yarbrough, Riney & Mayfield, LLP, in Amarillo, coordinated with the TADC Board committees as well as District Directors throughout the state. Alex was recognized at our annual meeting with the Young Lawyer Award. The Young Lawyers Committee is where we find future leaders and we are grateful for the work they continue to do for our organization. We look forward to the full Board having the Young Lawyers Committee attend a Board Meeting and providing their insight into issues facing their peers.

Amicus

The Amicus Committee has been incredibly busy this year. They deserve a special thanks for their numerous accolades and achievements. They work year-round responding to requests for amicus briefs and file many each year. Chaired by Roger Hughes, Adams & Graham, L.L.P., Harlingen, the committee continues to represent the TADC's interests through quality briefing and analysis.

TADC Office

For 27 years Bobby Walden has worked for, and subsequently led the TADC. Bobby wears many hats in his position as our Executive Director. His historical knowledge and expertise are invaluable. With the assistance of Debbie Hutchinson, who goes above and beyond for our organization, the TADC continues to run as an efficient and effective machine. Both Bobby and Debbie were recognized at our annual meeting for their amazing dedication to our organization. The TADC, and many other affiliated organizations, continue to praise the efforts of Bobby and Debbie.

Nominations Committee and Welcome President Slater Elza!

Immediate Past President Pam Madere, Jackson Walker, L.L.P., in Austin led our first successful *virtual* Nominations Committee. We had a great Committee of preeminent lawyers who recommended our newest Board Members for the upcoming year. The slate of nominees was approved by the membership at the Annual Meeting. We are excited for the year ahead to be led by TADC President Slater Elza with Underwood Law Firm, P.C. in Amarillo. Slater has some excellent programs lined up this upcoming year with fun destinations and substantive and diverse programming. Say goodbye to 2020. Let's emphatically welcome the new year of 2021 and what it holds in store for us!

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TADC Legislative Update

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

After an election like no other, we are about to enter unknown territory in the next few months. Now that we know who will take the oath of office in January, we can at least start to handicap the Speaker's race in the House. The GOP held its majority (with only one net Democratic pickup to make the margin 82-68), empowering a unified House Republican Caucus to select the new speaker. Candidates who have announced for the race on the Republican side include Rep. Geanie Morrison (R-Victoria) and Rep. Dade Phelan (R-Beaumont). Phelan has released a list of 85 supporters, so if that holds up, he will be the next speaker.

While party control of the Senate has never been in doubt, the size of the GOP majority took a hit when Rep. Roland Gutierrez (D-San Antonio) defeated incumbent Sen. Pete Flores (R-Pleasanton) in Senate District 19, which is centered on San Antonio but runs west nearly to El Paso. When Senator-elect Gutierrez is sworn in in January, Lt. Governor Dan Patrick's majority will slip from 19-12 to 18-13. Recall that when Patrick became lieutenant governor, he convinced his GOP senators to cede power to him by changing the 2/3 rule, which required 21 out of 31 senators to concur in order to bring up a bill out of the regular order of business. Patrick wanted to set that threshold at 60%, or 19 votes. Now what? Another rule change? A simple majority? We shall see. In any event, it is unlikely that Democrats will be able to stop any legislation the Lt. Governor really wants because he can manipulate the order of business to establish any regular order of business he wants.

The election also continued a recent trend of electing Democratic candidates to the major court of appeals districts. In the Austin Court of Appeals, incumbent Chief Justice Jeff Rose lost his re-election bid to longtime Travis County District Judge Darlene Byrne. Other courts of appeals races went as follows:

- 1st District Court of Appeals (Houston): Veronica Rivas-Malloy (D) defeated incumbent Justice Russell Lloyd (R); Terry Adams (R) defeated Amparo Guerra (D)
- 2nd District Court of Appeals (Fort Worth): incumbent Justice Mike Wallach (R) defeated Devonian Watson (D);
- 4th District Court of Appeals (San Antonio): Rebecca Martinez (D) defeated Renee Yanta (R) for Chief Justice;
- 5th District Court of Appeals (Dallas): Bonnie Goldstein (D) defeated incumbent Justice David Evans (R); Stephen Smith (D) defeated incumbent Justice David Bridges (R); and Denise Garcia (D) defeated incumbent Justice Bill Whitehill (R);
- 13th District Court of Appeals (Corpus Christi): incumbent Justice Jaime Tijerina (R) defeated Migdalia Lopez (D); Clarissa Silva (R) defeated incumbent Justice Nereida Singleterry (D);
- 14th District Court of Appeals (Houston): Justice Tracy Christopher (R) defeated Jane Robinson (D); incumbent Justice Ken Wise (R) defeated Tamika Craft (D).

The four incumbent justices on the Texas Supreme Court held their seats with fairly comfortable margins of victory. Chief Justice Hecht won with 53% of the vote over Austin District Court Judge Amy Clark Meachum, Justice Jane Bland

with 55.5% over Houston lawyer Kathy Cheng, Jeff Boyd with 53.6% over Dallas District Judge Staci Williams, and Justice Brett Busby with 53.7% over Third Court of Appeals Justice Gisela Triana. These margins are a little bit tighter than in past elections, but only just. The only statewide race on the ballot, a seat on the Texas Railroad Commission, went to Republican Jim Wright by a 53-42 margin over Democrat Chrysta Castaneda.

Based on the record-shattering voter turnout and an influx of new Texans from other parts of the country, many observers thought Texas may perhaps stand on the brink of a transition from red to blue. But we are clearly not there yet, though a dozen or so House Republican incumbents retained their seats only by narrow majorities. The botton line is that the GOP still controls both houses of the Legislature and all the statewide offices. This continued dominance means that they will maintain control over congressional and legislative redistricting, which is supposed to happen this spring. If the Legislature does not get redistricting done in the regular session, the issue may pass to the Legislative Redistricting Board, which is dominated by Republicans: the Speaker of the House, the Lt. Governor, the Comptroller, the Land Commissioner, and the Attorney General. Republicans will thus have the opportunity to draw districts designed to maintain their legislative majorities for another decade, if not longer. Given that the U.S. Supreme Court has virtually gutted the Voting Rights Act, it is unlikely that any judicial decision overturning GOP-drawn maps would stand up. Though we can expect the usual extended litigation that ensues after every redistricting session, we can expect the next set of maps to favor Republicans. At the same time, however, the next set of maps have to create some new House districts in areas with rapidly rising populations, such as the Rio Grande Valley, the Houston and Dallas-Fort Worth metroplex, and along the I-35 corridor. These new districts will come at the expense of rural districts that have either lost population or not gained nearly enough to offset massive increases elsewhere. How the GOP mapmakers walk this line will be the story of redistricting next session.

What will the next session even look like? How can the Legislature conduct business in the midst of a global pandemic? An ordinary day during a session, more than 6,000 people stream in and out of the Capitol building: members, staff, agency personnel, lobbyists, visitors, tourists, school children—you get the idea. No one seriously thinks that business as usual will work this time, not even the most strident of COVID deniers. Upwards of 50 members are 50-59 years of age, 34 are between 60 and 69, and 18 are 70 or over. That's 102 House members and senators out of a total of 182. Not a very safe place with a deadly pandemic in the air. At this point, however, no plans have been set for handling legislative business while meeting what the members view as their constitutional duty to conduct business *in person*.

If that is indeed how things shake out, do not expect very many bills to be considered this spring. Because only a small number of committee rooms (as well as the two chambers) can accommodate appropriately distanced members, staff, and witnesses (and a limited number of those to boot), about 55 standing House and Senate committees will be squeezed into about a half-dozen spaces. In an ordinary session, House committees meet once a week beginning in the latter part of February (except House Appropriations, which meets in subcommittees daily through budget markup in early March), whereas Senate committees meet at least once a week and, as the session goes on, twice a week as bills begin to come over from the House. Scheduling space for committee hearings will be difficult at best, and hearing time will be very limited. It may be that the number of bills each member can file will be limited, or that most bills will never be referred to committee, or that bills will be referred but never scheduled for hearing. In any event, expect only major agenda items—the budget, coronavirus response, and redistricting, and perhaps a few others—to get the lion's share of airtime this session.

What might we expect in a COVID liability protection bill? Though a majority of states have enacted varying levels of liability protection for health care providers, businesses, and other entities,

either legislatively or by executive order, Texas has yet to join the crowd. Governor Abbott has not extended any additional protections by executive order, probably because he does not believe he has the authority to suspend the operation of common law. He has also resisted some legislators to call a special session for COVID relief purposes, partly on account of the logistical difficulties of holding one and partly because he is taking enough heat for his executive orders without it. That leaves the issue to the regular session, which kicks off on January 12. We already know that at least two liability-related bills will be filed, one that covers health care providers and another that broadly applies to businesses, product manufacturers, health care providers, non-profit entities, local governments, and educational institutions. Most states that have enacted liability shields have raised the threshold of liability from ordinary to gross negligence, or even higher, as in the health care provider context, where the standard may be intentional conduct or reckless, wanton, or willful misconduct. Some have further required clear and convincing evidence to support a jury verdict. With respect to product liability claims, many states require that the manufacturer have actual knowledge or have acted intentionally, maliciously, or recklessly before liability may be imposed. It is likely that the proposed Texas legislation will follow a similar path. As we understand it, current proposals will treat all COVID-related claims the same, whether brought by an employee against an employer, a customer against a business, a subcontractor against a contractor, or in any other setting. If distinctions are to be made, the bill proponents will leave them to the Legislature. One other note: the proposed legislation will both apply retrospectively to the beginning of the emergency and to any pandemic emergencies that may occur in the future.

We have every reason to believe that legislation of this kind will receive a very high priority in the Governor's and Lieutenant Governor's office. Given that the GOP has apparently retained a numerical majority in the House and will likely elect a Republican speaker, we anticipate that COVID liability legislation will be at the top of the priority list there as well.

But COVID liability will not be the only tort legislation on the agenda. Eight-figure awards against commercial truckers have attracted a lot of attention since last session, and we believe that a very substantial trucking litigation reform bill will be introduced this session. We don't yet know the precise contours of this legislation, but both sides of the issue are gearing up for a tough and bitter fight.

We had hoped at the conclusion of last session to report that Texas might be making progress on improving the judicial selection process. The Texas Commission on Judicial Selection has met regularly since January, both in Austin and around the state (Dallas, San Antonio, Odessa, Corpus Christi). In its two remaining meetings, currently scheduled for November 13 and December 18, the Commission will finalize its report to the Legislature, which is due on December 31. The Commission has considered a broad range of issues involved in elective and appointive processes. It has also considered judicial qualifications and possible changes to legislative involvement in the selection, ratification, or removal of judges. TADC's testimony to the Commission in June expressed support for an appointment/ratification/retention system, as we have advocated since the advent of the organization. While at this point we do not know where the Commission will come down, or whether it will even recommend any specific reforms. Moreover, given the constraints under which the Legislature will operate this spring and the tightening partisan margins in the House and Senate, it will be extremely difficult to get consensus on significant changes to the current system.

That's all for now but stay tuned to this channel for future updates. This session is shaping up to be more chaotic and unpredictable than any since 2009, the last time the margins in the House were so thin.

2020 TADC Annual Meeting

September 23-27, 2020 – Galveston, Texas

Congratulations to the 2020 TADC Awards Recipients and to 2021 President Slater Elza

Past President Clayton Devin receives the Founders Award

Darin Brooks receives a Special Recognition Award for his work on TADC Publications

Daniel Hernandez, Sr. receives the TADC President's Award

Alex Yarbrough receives the TADC Young Lawyer Award

President Bud Grossman receives the DRI Exceptional Performance Award from DRI Regional Vice President Jason Hendren

2021 President Slater Elza receives the gavel from outgoing President Bud Grossman. Congratulations President Elza!

COVID-19: A NEW WAY OF LIFE?

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

Coronavirus. Pandemic. COVID. The Roni (Behind the Pine Curtain, nickname). Quarantine. Lockdown. Social distancing. Sound familiar? Ten months after its original detection in the United States and seven months after it first confined Americans to their homes, COVID-19 remains a part of our lifestyle and daily vocabulary. The pandemic's ramifications persist, as the many adjustments made in its wake endure with an inclination of permanence. Masked faces still abound, talk of a vaccine drones on, and, most notably for the legal industry for the most part, computer screens continue to serve as courtrooms and to take depositions.

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. After the CDC declared the Coronavirus as a pandemic on March 11th, President Trump took initiative at the federal level two days later 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. Varying approaches have been taken since school reopened for the 2020-2021 school year. The decision to reopen and how to do so safely fell largely to the discretion of individual districts, as Governor Abbott held on July 31st that there would be no statewide blanket order protocol for reopening schools. Some urban districts in Texas delayed reopening into September or October, while others implemented adjustments and opened at a more normal date. A combination of physical and virtual classes in some districts has left teachers with the task of instructing two groups of students in a particular subject instead of one. Some students at post-secondary institutions have demanded refunds or tuition reductions as they were forced to attend virtual classes at home in lieu of the traditional campus experience. Some of us parents are paying for an apartment across the street from the university while our college-age children literally attend all classes virtually from that apartment!

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. Even though district, county, and probate courts were allowed to begin reopening per a September 18th order from the Texas Office of Court Administration, proceedings are still encouraged to be conducted virtually to a great extent.

Throughout the summer, in-court proceedings were nearly nonexistent as many counties began to utilize virtual face-to-face technology to conduct business. Some courts, like the Northern District Court of Texas, successfully developed a socially distanced method of in-person jury proceedings, including face masks and temperature checks. However, many of these methods were abandoned after a second wave of the virus struck the state. As courts now begin to reopen, the safety measures applied into our way of life this year will surely be adapted to the courtroom setting to ensure the safety of all individuals. As Texas Supreme Court Chief Justice Nathan Hecht has said, "It's not going to reflect well on the justice system if we force people to come to the courthouse and make people sick. We've got to be careful about that and make sure it's done the right way."

Some firms sent everyone home, while others did not, or allowed some individual flexibility. Some attorneys have opted for using cloud storage as opposed to the traditional physical filing system. A smoother than anticipated transition to virtual working in many instances shows that many pandemic-induced adaptions may outlive the Coronavirus. One law partner quipped that it may be hard to "put the genie back in the bottle" now that the virtual proceedings have prevailed with such success. The impact could be lasting as attorneys in the market for a job will likely favor firms that allow them to work from the comfort of their own homes. In one of my cases in Travis County, the big Austin firm lawyer recently moved to California and continues to handle the case and attend all hearings and depositions virtually.

After several months in precarious situations, restaurants and other businesses open to public crowds are finally able to operate to an extent much closer to normal. Restaurants adhering to Governor Abbott's October orders are allowed to open at 75% capacity, given that patrons wear masks inside until they are seated at their table. Bars, notorious for being close-contact zones, remain confined to 50% capacity. Many bar owners, as well as some owners of other businesses that host public crowds, condemn the Governor's orders as disingenuous and detrimental to their livelihood. Quite a few restaurants remain voluntarily drive-through only while others have closed permanently.

Since the outbreak of COVID-19, many firms have become overwhelmed with the plethora of new cases and legal issues that have arisen. Many issues including price-gouging, employee endangerment, and constitutional rights issues have become quite common. However, contract breaches have become an increasingly popular issue, specifically when it comes to force majeure clauses and the hinderance of a party's ability to fulfill their contractual duties. The uncertainty of the COVID-19 pandemic accompanied by the varying impacts it had on many industries, which have had their contractual obligations interrupted by the pandemonium of the virus, are beginning to construct arguments for exercising the use of a force majeure clause, if they were fortunate enough to have incorporated an applicable one into the contract. Specific language of a force majeure clause will be the driving factor. Language specific to a virus, pandemic, or health crisis will be far more likely to prevail, while otherwise creative arguments are being made as to why the historically used language should apply. However, stay-at-home orders and other various government actions that have made meeting contractual requirements far more difficult could also be argued as an unforeseeable act. The widespread effects of COVID-19 have resulted in

the inability and impracticability of the fulfillment of contracts in numerous fields from employment law to commercial and insurance litigation. In the coming months, we will most likely begin to gain a clear consensus on whether the COVID-19 pandemic, along with the government actions that have accompanied it, will be classified as force majeure (a "superior force") or be subject to future legislative interpretation or action.

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. By the time of publication of the last TADC magazine in the summer of 2020, Texas reported 97,271 cases of the virus. As of November 17th, the total number of confirmed cases of Coronavirus in the United States stands at approximately 11.3 million. Approximately ten percent of these cases belong to Texas, which has reported roughly 1.1 million confirmed cases of the virus. The United States has suffered 247,000 deaths from the virus, with 20,000 of them belonging to Texas. Total worldwide cases sit at about 55.1 million with approximately 500,000 new cases per day; however, as we have learned more about the virus, recent trends show the rate of overall numbers steadily declining. Still, certain areas erupt as viral hotspots. Disaster medical assistance and trauma critical care teams have been deployed in various parts of Texas during the last two months.

On a personal note, I finally had a court set an in-person contested hearing in a smaller county in the Central Texas area. What joy and excitement came over me when hearing such news. When the day came, it felt like forever since I had actually driven several hours anywhere related to my law practice, much less to a court for a hearing. Of course, as is typical in smaller venues, the day's docket was filled with local matters, primarily all uncontested. I do recall one of two pro se divorce parties objecting to the Judge about the hearing going forward as he wanted to get counsel, which of course the Judge allowed and continued the matter. At last, me, my opposing counsel, college law clerk from my office and my client were the last ones in the room and our case was called. Of course, we had to have masks on to enter the courtroom that morning and had had them on all day. Upon approaching the counsel table (only one table for both of us to share), I asked the Judge if we had to keep masks on and received a prompt response of "absolutely not." After about an hour and a half of both sides making arguments and going through quite a few exhibits and documents, then we went off the record. The long-time Judge stated how nice it was to have two "old school" lawyers knocking it out with each other, with professionalism and courteous attitudes (which he stated he didn't see much anymore). My opposing counsel was older than me, so the "old school" comment hit me the worst. We visited with each other and the Judge for a while before heading home. It was a pleasurable day in the modern world, though a typical day in the past, for which no doubt I had many times taken for granted.

Please, all be safe and prudent in your daily activities based on your beliefs and any protocols you are subject to, and most of all, keep the faith and pray all of us (regardless of personal or political persuasion) will survive this ordeal and COVID-19 will be extinguished, or at least better managed, as soon as possible.

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/

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Application of the RCLA Beyond Construction Defect Cases

The Texas Residential Construction Liability Act (RCLA), found in Chapter 27 of the Texas Property Code, was enacted by the Texas Legislature in 1989 to govern resolution of construction disputes between contractors and homeowners. Usually raised in construction defect cases, the RCLA provides defendants with an effective tool to encourage early settlement and limit a claimant's damages. However, due to a broad definition of "construction defect" within the statute, multiple courts have concluded that claims need not involve defective construction to be governed by the RCLA. These opinions have significantly expanded application of the RCLA and have the potential to considerably limit damages available to claimants. Before detailing those opinions, a brief overview of the RCLA is in order to explain how and why defendants should invoke the statute.

I. Overview of the RCLA

The Texas Legislature enacted RCLA "as a reaction to construction industry claims that the Deceptive Trade Practices Act was used as a sword to litigate against builders." *Timmerman v. Dale*, 397 S.W.3d 327, 330 (Tex. App.—Dallas 2013, pet. denied) (internal quotation marks omitted). "Its intent was to provide an appropriate balance between the residential contractor and owner, with respect to the resolution of construction disputes." *Id*. (internal quotation marks omitted).

The RCLA modifies causes of action that already exist by providing defenses and limiting damages. *Mitchell v. D. R. Horton-Emerald, Ltd.*, 579 S.W.3d 135, 137 (Tex. App.—Houston [1st Dist.] 2019, pet. denied). The RCLA does not create a cause of action or derivative liability. *Id*.; Tex. Prop. Code § 27.005. It does, however, prevail over any conflict between it and any other law, including the Deceptive Trade Practices Act (DTPA) or a common law cause of action, except in limited circumstances. *Id*. at § 27.005. The most notable provisions of the RCLA are discussed below.

a. Pre-Suit Notice, Opportunity to Inspect, and Settlement Offer

The RCLA mandates that claimants send a written notice to the contractor "specifying in reasonable detail the construction defects that are the subject of the complaint" at least 60 days before filing suit. Tex. Prop. Code § 27.004(a). The contractor then has the option of requesting additional information concerning the defect and, upon written request within 35 days of receipt of the notice, must be given a reasonable opportunity to inspect the property. *Id*. The contractor may make a written offer of settlement to the claimant within 45 days of receiving the notice. *Id*. at § 27.004(b). The form of the offer may include an agreement to repair or have repaired the alleged defect or may include a monetary settlement or an offer to purchase the residence. *Id*. at §§ 27.004(b), 27.004(n).

b. Damages Cap

Whether an offer of settlement under the RCLA was reasonable is determined by the jury. *See Perry Homes v. Alwattari*, 33 S.W.3d 376 (Tex. App.—Fort Worth 2000, pet. denied). If it is determined that the claimant rejected a reasonable settlement offer, the amount of that offer serves as a cap on the claimant's recovery. Tex. Prop. Code § 27.004(e). An offer to repair is valued at its fair market value. *Id*. § 27.004(e)(1)(a). Such a rejection also limits the recovery of attorney's fees and costs to those "incurred before the offer was rejected or considered rejected." *Id*.

c. Abatement

If a claimant files an action subject to the RCLA without abiding by the notice, inspection, or settlement offer procedures, a defendant can move to abate the action. *Id*. at § 27.004(d). If it is determined after a hearing that the claims are governed by the RCLA and the claimant failed to abide by the statute's procedures, "[t]he court or arbitration tribunal shall abate" the action. *Id*. If the motion is verified and not controverted by affidavit, the action is automatically abated beginning on the eleventh day after the motion is filed. *Id*.

d. Limits on Recoverable Damages

The RCLA also limits the damages available to a claimant. Under the statute, claimants "may recover only the following economic damages proximately caused by a construction defect:

> (1) the reasonable cost of repairs necessary to cure any construction defect;
>
> (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence;
>
> (3) reasonable and necessary engineering and consulting fees;
>
> (4) the reasonable expenses of temporary housing reasonably necessary during the repair period;
>
> (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and
>
> (6) reasonable and necessary attorney's fees."

Id. at § 27.004(g). Fees are not recoverable under the RCLA unless the claimant pleads and proves "an underlying cause of action for the recovery of such fees." *Mitchell v. D. R. Horton-Emerald, Ltd.*, 579 S.W.3d 135 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

II. Relevant Definitions

a. Application

The RCLA applies to:

> (1) any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods; and
>
> (2) any subsequent purchaser of a residence who files a claim against a contractor.

Tex. Prop. Code Ann. § 27.002(a). The RCLA does not apply to an action to recover damages that arise from a violation of Section 27.01 of Business & Commerce Code (fraud in real estate and stock transactions), a contractor's wrongful

abandonment of an improvement project before completion, or a violation of Chapter 162 of the Texas Property Code (construction payments, loan receipts, and misapplication of trust funds). *Id*. at § 27.002(d).

b. Construction Defect

"Construction defect" is defined by the RCLA as:

> [A] matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor. The term may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.

Id. at § 27.001(4).

c. Contractor

"Contractor" is defined as:

> (i) a builder, as defined by Section 401.003, contracting with an owner for the construction or repair of a new residence, for the repair or alteration of or an addition to an existing residence, or for the construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence;
>
> (ii) any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of that person; or
>
> (iii) a person contracting with an owner or the developer of a condominium for the construction of a new residence, for an alteration of or an addition to an existing residence, for repair of a new or existing residence, or for the construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence[.]

Id. at § 27.001(5)(A).

III. Interpretation of "Construction Defect" and Expansion of the RCLA

Texas courts have long made clear that "a plaintiff cannot by artful pleading recast" a construction defect claim to avoid application of the RCLA. *See*, *e.g.*, *In re Kimball Hill Homes Texas, Inc.*, 969 S.W.2d 522, 526 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (holding RCLA applied to claims based on "purported misrepresentations and false promises," where claims existed solely by virtue of alleged construction defects). However, courts have also construed the RCLA's definition of "construction defect" to encompass claims beyond those involving defective construction.

a. In re Wells

In re Wells, 252 S.W.3d 439 (Tex. App.—Houston [14th Dist.] 2008, no pet.) involved claims for DTPA violations, common law fraud, breach of contract, and breach of warranty. The plaintiff, Roberts, alleged that Wells Roofing promised but failed to (1) remove all old roofing materials before installing a new roof and (2) install a roof carrying a thirty-year manufacturer's

warranty. *Id*. at 447. In response to Wells Roofing's contention that the RCLA applied to his claims, Roberts argued he would have claims for breach of contract, fraud, and deceptive trade practices even if Wells Roofing had flawlessly performed the construction aspects of its work. *Id*. Therefore, he concluded, the claims could not arise from a "construction defect" under the RCLA. *Id*.

The Fourteenth Court of Appeals disagreed with Roberts, concluding that because he asserted "that Wells Roofing's improper installation of the roof forms at least part of the basis for his complaints" then "his action arises, to some degree, from defective construction, and the action is thus subject to the RCLA." *Id*. Significantly, however, the court then went one step further, opining that "[m]oreover, under the RCLA, an action can arise out of a 'construction defect' without involving defective construction or repair work." *Id*. at 448. The court explained:

> Under the express language of the statute, the complaint against the contractor must merely *concern* the design, construction, or repair of a new or existing residence (or of an alteration or addition thereto). Even if we ignore Roberts's contention that installation of the roof was defective and consider only his claim that Wells Roofing induced him to enter the roofing contract by making promises it did not intend to keep and in fact did not keep, we would nonetheless conclude that Roberts's action *concerns* the construction of an alteration to, or the repair of, an existing residence. Accordingly, Roberts's action arises from a "construction defect" as that term is defined under the RCLA.

Id. (emphasis in original) (internal citation omitted).

The notion that a claim can be subject to the RCLA without involving defective construction or repair has significant implications, most notably concerning damages available to claimants. As discussed above, the RCLA only provides for six categories of recoverable economic damages, most of which relate to repairs. Tex. Prop. Code § 27.004(g). If there is no defective construction or repair work at issue, and thus nothing to repair, claimants could find themselves without much, if anything, left to recover. Such was the case in *Timmerman v. Dale*, 397 S.W.3d 327 (Tex. App.—Dallas 2013, pet. denied).

b. Timmerman

Timmerman involved breach of contract claims arising from the remodeling of an upscale condominium. *Id*. at 329. The parties settled all issues except a delay claim in which the plaintiff, Dale, sought the fair market rental value of the condominium after the time remodeling should have been completed. *Id*. The contractor, Timmerman, filed a motion for summary judgment arguing that Dale's claim was governed by the RCLA and that the rental value of the home under construction was not recoverable as damages under the statute. *Id*.

In ruling on the motion for summary judgment, the *Timmerman* court first noted that the RCLA "is broadly written to encompass 'any action' that arises from a construction defect." *Id*. at 331 (quoting Tex. Prop. Code Ann. § 27.002(a)). Then, citing *In re Wells*, the court noted the statute's broad definition of "construction defect," concluding that "[u]nder the statute's express definition of construction defect, the complaint against the contractor must merely arise from a matter that *concerns* the construction of a new or existing residence. It need not necessarily involve

defective construction or repair." *Id*. (emphasis in original) (internal citation omitted). The court went on to hold:

> While "construction defect" is defined in the statute, the term "construction" is not. To properly construe an undefined statutory term, we begin with the plain meaning of the word. In common parlance, construction means "the act of putting parts together to form a complete integrated object." Webster's Third New Int'l 489 (1981). Dale alleges Timmerman failed to use reasonable diligence in completing the remodeling of his condominium. Giving the statute its plain meaning, we conclude a claim regarding delay in constructing a residence is an action arising from a matter concerning its construction, that is, the act of putting the parts together to form a complete object. In other words, while Dale's complaint may not go to the quality of construction, it clearly concerns the manner in which Timmerman performed the construction and is thus governed by the RCLA.

Id.

Dale, to his credit, alleged the RCLA was never intended to govern delay claims, contending the statute's "fundamental tenets" were its notice, inspection, and repair provisions and arguing the statute provided no procedure for resolving a delay dispute or compensating a claimant for unreasonable delays. *Id*. The court disagreed, stating "a dissatisfied owner can just as easily give notice of unreasonable delay as he can of an item of defective work so that the builder has an opportunity to cure." *Id*. The builder could, for example, "offer to pay for replacement housing, double the crew to finish more quickly, provide a rebate on the contract, or any combination of these measures." *Id*. Regarding Dale's argument that the RCLA left him without recoverable damages, the court pointed to the statute's allowance for temporary housing expenses during the repair period. *Id*. "So while a claimant seeking damages for unreasonable delay is not entitled to recover lost rental value of the property under the statute," the court concluded, "he may be entitled to the reasonable expenses of temporary housing." *Id*. at 331-32. Accordingly, the court concluded the RCLA applied to Dale's claim for delay damages and did not provide for such a recovery. *Id*. at 332.

The implications of *Timmerman* are potentially far-reaching. Building on what was arguably dicta from *In re Wells*, *Timmerman* applies the RCLA to claims that merely concern construction or repair of a residence and therefore limits claimants to recovery of the six categories of damages allowed under the statute. In addition to typical delay damages, *Timmerman* would extinguish recovery of liquidated damages, diminution in value without a structural failure, and other customary direct and consequential damages.

IV. Conclusion

The broad interpretation of the RCLA proposed in *In re Wells* and enforced in *Timmerman* has the potential to significantly expand application of the statute beyond the construction defect claims it has largely been limited to. According to these cases, the RCLA should be invoked any time the claims at issue involve the construction or repair of a new or existing residence or the sale of a new residence.

2020 - 2021 TADC

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Defending Minority Shareholder Claims After *Ritchie v. Rupe*

Following the Texas Supreme Court's 2014 decision in *Ritchie v. Rupe* not to acknowledge a cause of action for minority oppression claims, minority shareholders in Texas have and will continue to make new arguments and bring different causes of action to get around the Texas Supreme Court's holding. This article seeks to provide a basic understanding of what types of claims may arise and what defenses are available. Post-*Ritchie* minority shareholder claims, as will be discussed in detail herein, will likely involve the strategy of pursuit of "derivative actions" for pre-existing causes of action identified by the *Ritchie* court. Inasmuch as the Texas Supreme Court in *Ritchie* held that the fiduciary duties of an officer or director are owed to the corporation, rather than to the shareholders, it will be important to force plaintiffs to demonstrate how the minority shareholder's claim is harmful to the corporation. Specific strategies for defending against attempts to circumvent *Ritchie's* rejection of a Texas cause of action for minority shareholder oppression claims are discussed herein following a summary of the Texas Supreme Court's decision in *Ritchie v. Rupe*.

Prior to the Texas Supreme Court's Decision in Ritchie v. Rupe in 2014, courts of appeals permitted minority oppression claims under the common law or under the receivership statute.

Before *Ritchie v. Rupe*, courts of appeals allowed trial courts to order the buyout of a minority shareholder's interest at a price set by the court where a minority shareholder could establish that a majority shareholder's conduct was "oppressive." [1] Those courts defined oppressive as:

> (1) majority shareholders' conduct that substantially defeats the minority's expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to invest; or
>
> (2) burdensome, harsh, or wrongful conduct; a lack of probity and fair dealing in the company's affairs to the prejudice of some members; or a visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely.[2]

Some courts relied upon the "Receivership Statute," in Section 11.404 of the Texas Business Organizations Code (TBOC), as the source of the courts' power to order a buyout for minority shareholder oppression. [3] Those

[1] Elizabeth S. Miller, *Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, pp. 6-7 (2019).

[2] *Id.*

[3] *Ritchie v. Rupe*, 443 S.W.3d 856, 863-64 (Tex. 2014).

courts relied upon the statute because it authorized the appointment of a receiver where a shareholder established "that the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent."[4] Though the statute provided for the appointment of a receiver to take control of the assets and business of the corporation "to conserve the assets and business of the corporation and to avoid damage to parties at interest," courts relied upon the language "all other remedies at law or in equity . . . are determined to be inadequate" to provide a basis for applying equitable relief other than the appointment of a receiver.[5]

The Texas Supreme Court refused to recognize minority shareholder oppression as a cause of action.

In 2014, the Texas Supreme Court "decline[d] to recognize or create a Texas common law cause of action for 'minority shareholder oppression.'"[6] In *Ritchie v. Rupe*, the court reversed a decision by the Dallas Court of Appeals affirming a buyout of a minority shareholder under the "Receivership Statute."[7] It first held:

> [A] corporation's directors or managers engage in "oppressive" actions under [the statute] when they abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.[8]

The Court further held that the receivership statute only authorizes one remedy: the appointment of a rehabilitative receiver.[9]

Having held that the minority shareholder was not entitled to a buyout under the receivership statute, the court evaluated whether it should recognize a "new cause of action" for minority shareholder oppression.[10] In analyzing the adequacy of existing protections, it noted that "when we are addressing corporations and the relationships among those who participate in them . . . we have consistently recognized [they] are largely matters governed by statute or contract."[11] It further noted that "various common-law causes of action already exist to address misconduct by corporate directors and officers," including "(1) an accounting, (2) breach of fiduciary duty, (3) breach of contract, (4) fraud and constructive fraud, (5) conversion, (6) fraudulent transfer, (7) conspiracy, (8) unjust enrichment, and (9) quantum meruit."[12]

The court concluded that the established duties that an officer or director owes to a corporation "are sufficient to protect the legitimate interests of a minority shareholder by protecting the well-being of the corporation."[13] It further held:

> Absent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation's business in a manner

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[4] *Id.*

[5] *Id.* at 873.

[6] *Id.* at 860.

[7] Tex. Bus. Orgs. Code § 11.404.

[8] *Ritchie*, 443 S.W.3d at 871.

[9] *Id.* at 877.

[10] *Id.* at 877-78.

[11] *Id.* at 880.

[12] *Id.* at 882.

[13] *Id.* at 888.

> that suits an individual shareholder's interests when those interests are not aligned with the interests of the corporation and the corporation's shareholders collectively.
>
> We recognize that our conclusion leaves a "gap" in the protection that the law affords to individual minority shareholders, and we acknowledge that we could fill the gap by imposing a common-law duty on directors in closely held corporations not to take oppressive actions against an individual shareholder even if doing so is in the best interest of the corporation.[14]

After Ritchie, minority shareholders will continue to file lawsuits, but they will change their strategy, which necessitates the adoption of a defense tailored to the new strategy.

Although the Texas Supreme Court clearly held that there is no common-law cause of action for minority shareholder oppression in Texas, angry minority shareholders in Texas are going to look for new ways to present their complaints in court. The most likely strategy they will adopt in an attempt to circumvent *Ritchie*'s prohibition on minority oppression claims is to file "derivative actions" for the pre-existing causes of action noted by the Texas Supreme Court.

In practice, this may mean fewer claims against majority shareholders, in their capacity as shareholders, and more claims against directors and officers, purportedly on behalf of the corporation. With the lines drawn on the new playing field, practitioners defending such claims need to adopt new defensive strategies. The appropriate defenses will necessarily be case-specific, but the following are possible defenses to the end-run claims likely to arise in the future:

Force the plaintiff to state a claim on behalf of the corporation. While many minority shareholders will call their claims derivative, they are more often aggrieved by conduct that arguably injures them individually rather than the corporation. Indeed, in claims against closely-held corporations, minority shareholders will be tempted to seek direct recovery under Section 21.563(c) of the TBOC.[15] This election alone will often illustrate that the plaintiff's interests are not aligned with the corporation.

Demonstrating how the corporation has been harmed will often be difficult for a plaintiff. Putting the plaintiff to this burden not only may provide a good legal defense, but, if necessary, it may also illustrate for the fact-finder that the plaintiff is entirely self-interested.

Remember the Business Judgment Rule. The business judgment rule in Texas generally protects non-interested corporate officers and directors from liability under the duty of care for acts that are "within the honest exercise

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[14] *Id.* at 889. *See also id.* at 888 ("Though we recognize that the directors may endeavor in such conduct to harm the interests of one or more individual minority shareholders without harming the corporation (*i.e.*, without giving rise to damages in a derivative suit), for the reasons discussed below, we cannot adopt a common-law rule that requires directors to act in the best interests of each individual shareholder at the expense of the corporation").

[15] TBOC Section 21.563(c) provides that "(1) a derivative proceeding brought by a shareholder of a closely held corporation may be treated by a court as a direct action brought by the shareholder for the shareholder's own benefit; and (2) a recovery in a direct or derivative proceeding by a shareholder may be paid directly to the plaintiff or to the corporation if necessary to protect the interests of creditors or other shareholders of the corporation."

of their business judgment and discretion,"[16] as long as the officer or director was informed of all material information reasonably available before making the decision.[17]

As the Texas Supreme Court reiterated in *Sneed v. Webre*, "courts will not interfere with the officers or directors in control of the corporation's affairs based on allegations of mere mismanagement, neglect, or abuse of discretion."[18] Rather, to constitute a breach of the duty of care and merit relief, a claim against an officer or director must be "characterized by ultra vires, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority, or of a shareholder, and which, without such interference, would leave the latter remediless."[19]

In non-interested director and officer transactions, requiring the plaintiff to prove ultra vires or fraudulent acts will often create an insurmountable burden.

Put the plaintiff to his, her or its burden in establishing a breach of the duty of loyalty. When a derivative suit challenges a transaction between the corporation and another company in which an officer or director has certain interests, the common law shifted the burden to the interested officer or director to demonstrate the validity of the transaction by proving it was fair to the corporation.[20] It is currently an open question in Texas, however, whether the burden still shifts under the relatively new interested-director statute, Section 21.418,[21] which provides that an interested transaction is "valid and enforceable" if any of three conditions are met, with one of such conditions being fairness to the corporation (discussed in more detail below).

Plaintiffs will undoubtedly argue that, once they establish an interested transaction under the statute, the burden continues to shift to defendants to avoid liability. Defendants should not accept that burden lightly and should endeavor to preserve any argument against burden-shifting for potential appeal. But regardless, the plaintiff always bears the burden in a derivative suit of proving duty, causation, and damages *to the corporation*. It is often particularly difficult for a plaintiff shareholder to prove damages to the corporation or the shareholders collectively, rather than damages to the plaintiff's individual interests.

In cases involving corporate conglomerates, plaintiffs may also attempt to establish that directors and officers generally have interests in the interrelated companies, rather than identifying specific transactions between those

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[16] *Sneed v. Webre*, 465 S.W.3d 169, 173 (Tex. 2015).

[17] *Pace v. Jordan*, 999 S.W.2d 615, 624 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Section 3.102 of the TBOC further provides protections for governing persons who rely in good faith and with ordinary care upon information, opinions, reports, or statements, including financial statements and other financial data presented by certain professionals.

[18] 465 S.W.3d at 186.

[19] *Id.* at 186.

[20] *E.g.*, *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *11 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.).

[21] Tex. Bus. Org. Code § 21.418; *Landon v. S & H Mktg. Group, Inc*., 82 S.W.3d 666, 673 (Tex. App.—Eastland 2002, no pet.). Under Section 21.418, three kinds of transactions implicate the duty of loyalty: (1) transactions between a corporation and its directors or officers; (2) transactions between a corporation and another entity with common directors or officers; and (3) transactions between a corporation and another entity in which the first corporation's directors or officers have a financial interest.

companies. Having done so, plaintiffs will argue that the officer or director holds fiduciary duties to each company and must therefore demonstrate that all transactions between the companies are fair. When put in this position, defendants should argue that plaintiffs have the burden to prove the officers or directors are on both sides of specific transactions and that the burden shifts to the defendant, if ever, only once an interested transaction has been identified.

Defend interested transactions with the statutorily-provided protections. Section 21.418 of the TBOC identifies three circumstances under which an interested transaction is valid and enforceable and is not void or voidable:

> (1) approval by a majority of uninterested directors after full disclosure;
>
> (2) approval by shareholder vote after full disclosure; or
>
> (3) fairness to the corporation.[22]

If at least one of these conditions is satisfied, the transaction is valid.[23]

It is therefore important to parse through the corporate records to find evidence of the votes that led to challenged corporate actions. If evidence of disinterested votes or shareholder approval is not available, attention should be devoted to proving the transaction was fair to the corporation. Importantly, this evidence will substantially overlap with the evidence that proves that a claim is not derivative, *i.e.*, it will show that the plaintiff is complaining about harm to himself, herself or itself, rather than the corporation.

Carefully review the corporate governing documents and agreements. As noted in *Ritchie*, the TBOC authorizes (1) shareholders to waive many rights and duties in shareholder agreements, (2) companies to provide certain significant indemnities, and (3) director and officer liability to be limited to a certain extent. Moreover, the failure of corporate documents to include certain provisions may give rise to default provisions under the TBOC, of which counsel will need to be aware (*e.g.*, the failure to provide that each member of a limited liability company holds a voting percentage for member votes proportionate to his/her/its agreed relative contribution percentage, will result in each member having an equal vote at a meeting or consent vote) [24] . An understanding of the corporate documents, in context with the limitations under the TBOC, will therefore be instrumental in defending a claim by a minority shareholder.

Tender. Claims made against officers or directors in their capacity as officers or directors should immediately be tendered to the appropriate insurance carrier. Any delay could be catastrophic because many of these policies will be claims made and reported policies.

Each claim will inevitably be different and will require an individualized strategy and approach. Ware Jackson hopes that this outline will nonetheless be helpful as a starting point and will be glad to help clients or lawyers in the future in tailoring a defense to individual claims.

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[22] Tex. Bus. Orgs. Code § 21.418(b).

[23] *Id*. at § 21.418(e).

[24] Tex. Bus. Orgs. Code §§ 101.354; 101.052.

TADC PAC Report

By: Christy Amuny, Trustee Chair
Germer PLLC, Beaumont

We find ourselves in a new and different world with the pandemic. The 87th Legislature convenes in Austin in January 2021 and normally the city is buzzing and the halls of the Capitol are bustling with people. I expect it will be a very different scene this session. Regardless, make no mistake, there is much to be done and TADC will again play a prominent role in protecting our civil justice system and right to a jury trial. Whether appearing virtually or in the halls of the Capitol, TADC will be involved in the session and will continue to be called upon to analyze bills, meet with legislators and provide testimony on proposed legislation that affect the justice system.

The TADC's Political Action Committee – the PAC – helps get TADC heard through donations to judicial candidates and legislators. TADC does not support only candidates of a particular political persuasion, but supports candidates who will protect our system of justice. The PAC reviews all candidates and donates to those who seek to promote and maintain our civil justice system, right to a jury trial and fair and equal representation for all. Our presence in the legislature is essential and our presence carries a strong voice.

As mentioned above, in many ways this will be a different legislative session and in other ways, we will see some of the same legislation we have seen in years past. We can expect to see proposed legislation on the following:

- COVID LIABILITY. It is expected we will see some form of liability but it is unknown how specific the legislation will be and how it will affect businesses, employers, etc. You can expect that the legislation will be a myriad for multiple other issues.

- BUDGET. Given the pandemic and the closures around the state, this is expected to be a hotly contested issue.

- REDISTRICTING. We expect this to be at the forefront.

- CHANCERY COURTS. The special interest groups have brought this legislation forward in the last several sessions and we anticipate we will see it again. As always, TADC will continue working diligently to stop the attempts to create a Chancery Court system.

- INSURANCE. Last session there were bills attempting to overturn UM/UIM case law (*Brainard*) and change the procedural requirements for bringing a lawsuit under the Insurance Code.

How can you help? How can you assure that TADC remains in the forefront and gets our voice heard? **BACK THE PAC!** The donations from the PAC to those in leadership help get us in the door. Those in leadership, or those seeking to be in leadership, seek our endorsement and our involvement. Every year we ask that you donate the equivalent of one billable hour, or more if you are able, to the PAC. Your contribution of $300.00 will not only help keep our voice loud and strong in the State Capital and courts across the state, it will get you a special PAC gift.

Don't wait, make your contribution now. Help make a difference. **BACK THE PAC!**

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Jury Trials During The COVID-19 Pandemic A Guide For Courts and Lawyers

By Steve Quattlebaum

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"Even during a global pandemic, it is vital to our democracy that our justice system function in a manner consistent with the principles upon which it was founded. This includes the resolution of civil disputes through the means of trial by jury…. As James Madison wrote in 1789, 'Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the preexistent rights of nature.'"[1] The right to a trial by jury is deeply rooted in our society and one guaranteed by our Constitution for civil as well as criminal cases. "How are we going to have jury trials when we are in the midst of a global pandemic?" That was one of the questions pondered by judges and trial lawyers across the country as we struggled with the realities of stay-at-home orders, courthouse closures, and the safety considerations occasioned by the pandemic.

National President Luther Battiste of the American Board of Trial Advocates ("ABOTA") recognized that ABOTA was well positioned to assist in the reopening of the courts for civil jury trials. President Battiste created the ABOTA COVID-19 Task Force with the request that it draft a white paper to guide courts in the best practices for conducting civil jury trials during the pandemic. The task force consisted of 12 ABOTA members from around the country representing the plaintiff and defense bars and the judiciary and was assisted by three scientific experts to advise regarding the safety issues involved. I was privileged to serve as the chair of the task force.

Distribution of the Covid-19 white paper

The work product of the task force was a white paper titled "Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic." The white paper can be found on the ABOTA website at www.abota.org.

Since its publication on June 9, 2020, the white paper has been widely distributed to all ABOTA members and federal and state trial judges in many jurisdictions, circulated by the National Center for State Courts, and published in the ABOTA magazine *Voir Dire*. ABOTA also sponsored a five-hour webinar on the topic on July

Steve Quattlebaum is a managing member of Quattlebaum, Grooms & Tull PLLC in Little Rock. He is a current national board member and former national secretary of ABOTA. He served as the chair of the ABOTA COVID-19 Task Force.

ABOTA is a national organization consisting of 7,600 plaintiff and defense trial lawyers and has as its mission the preservation of the right to trial by jury in civil cases as guaranteed by the Seventh Amendment to the Constitution of the United States. It is the desire of those involved in drafting the white paper that it serve as an example of the commitment and aspirations of the American Board of Trial Advocates to be an organization of service to our profession and the judicial system and a guardian of the Seventh amendment right to trial by jury in civil cases.

"The objective was to 'provide our courts with information, ideas and innovations that provide a functional approach to conducting jury trials under these challenging circumstances.'"

21, 2020, featuring panels of federal and state court judges, court administrators, jury consultants, scientific experts, and trial lawyers from jurisdictions throughout the country. The panelists discussed jury trials that have occurred during the pandemic; steps taken to mitigate risks to jurors, lawyers, litigants, and court personnel; and the effects of the pandemic on the composition of jury panels, as well as how the pandemic has affected jurors' attitudes and decision-making. This webinar was attended by over 800 people.

ABOTA also participated in a national survey designed to obtain data from potential jurors to evaluate their willingness to participate in jury trials and how risk-mitigation efforts by the courts impact their comfort level in serving as jurors.

The purpose of this article is to provide a summary of the recommendations contained in the white paper and some points discussed during the ABOTA webinar.

As explained in its introduction, the white paper focused on the challenges posed by the pandemic and procedural alternatives and innovations that will allow civil jury trials to proceed safely. The white paper was to provide suggested guidelines designed to maximize the safety of all participants while providing a fair forum for adjudication as guaranteed by the Seventh Amendment. The task force also recognized the diverse circumstances that exist in various jurisdictions, and even community to community and courthouse to courthouse. It noted that the recommendations were prepared to address fundamental principles involved in civil jury trials. The objective was to "provide our courts with information, ideas and innovations that provide a functional approach to conducting jury trials under these challenging circumstances."

The paper addresses specific issues that arise in the following stages of a civil jury trial:

1. Pre-trial hearings and conferences;
2. Jury selection and *voir dire*;
3. Opening statements and closing arguments;
4. Presentation of evidence; and
5. Jury deliberations.

The paper also includes a list of resources for additional information, including mandates and orders that have been issued by courts that have conducted or scheduled jury trials during the pandemic, a pre-trial checklist of issues to be considered, and a model order of conduct applicable to all trial participants.

Screening protocols

Some of the more universal screening requirements include the following:

First, before entering the courthouse, all jurors, lawyers, witnesses and staff should be screened through a series of questions regarding health and exposure. Each person's temperature should be checked for temperatures above 100.3 Fahrenheit. Further, all persons should be required to wear masks meeting the requirements of the court upon entering the courthouse. It is true for everyone. This is especially true for jurors who may be confined to tighter spaces than are lawyers and witnesses. The courtrooms should undergo sanitation each day, including but not limited to wiping down high-touch surfaces such as chairs, tables, door handles, etc., with disinfectant wipes such as those included on the EPA's List N found at https://www.epa.gov/pesticide-registration/list-n-disinfectant-use-against-sars-cov-2. The courtroom can be marked to indicate where counsel should stand when addressing the court or jury to

ensure social distancing at all times. The Court may prohibit the use of a shared podium. Similarly, all available space in the courtroom should be utilized to ensure adequate social distancing. Jurors must remain a minimum of six feet apart at all times. Finally, courthouses should prohibit attorneys from approaching witnesses, staff and the judge during all phases of the trial, absent specific leave of the Court. In all circumstances, as mentioned, a minimum social distance of six feet should be required.

Safety practices

The recommended safety practices specifically designed to provide extra protection for jurors include:

1. Avoid having jurors report until actually needed. For example, if the Court anticipates any other business will be conducted, such as a civil settlement, guilty plea, or parole revocation, schedule jurors to arrive after such matters have concluded.
2. Limit the number of jurors assembled in one location by asking jurors to report for service on a staggered schedule.
3. Provide hand sanitizer and masks to jurors.
4. Consider impaneling extra alternates to guard against delays or mistrials for any reason.
5. Require that jurors report directly to a courtroom as opposed to a jury assembly room.
6. To the extent possible, avoid passing exhibits between jurors (please see below).
7. Require jurors to report by phone each morning of trial, confirming that the juror has not experienced any symptoms consistent with COVID-19. The manifestations of COVID-19 are protean. If a juror reports symptoms consistent with COVID-19 by phone, the juror should not be allowed to come to the courthouse. If a juror experiences symptoms consistent with COVID-19 while at the courthouse, the juror should be subject to immediate quarantine and a test administered. To walk through this: If a person becomes ill, he or she will be immediately removed from the room and courthouse, sent home and asked to contact a physician. The Court cannot tell someone with symptoms to go into quarantine or get a test. The juror should be excused and, if alternates are impaneled, an alternate juror should be substituted.
8. To the extent possible, certain restrooms should be designated for juror-only use and should be cleaned with disinfectant after each break, lunch and at the end of the day. Ideally, restrooms should have an open window. If that is not possible, engineering should address the air flow in the restrooms. These places are particularly problematic as many people use restrooms and they are usually small rooms. Additionally, disinfectant wipes should be readily available in the jury room and the restroom for use throughout the day.

A robust pretrial conference

A robust and comprehensive pre-trial hearing is vital to avoiding cumbersome and unnecessary delays during the trial caused by bench conferences or sidebars. Courts should establish clear rules about the designated location for each participant in the trial, including court personnel, to maintain proper social distancing. The handling of exhibits is also important. To the extent possible, documentary exhibits should be displayed electronically to avoid touching. To the extent physical exhibits must be handled, precautions should be taken to sanitize the exhibits between handlings. Of course, the rules regarding the use of face coverings, movement about the courtroom, podium or document presenter (Elmo) use, and questioning from counsel table should be clearly communicated at the pretrial. Observation of the trial by the public must also be considered by the Court, and one possibility is allowing a section of the gallery to be designated for the public or providing for livestream video in another room of the courthouse.

Jury selection and *voir dire* present particularly difficult challenges because of the number of potential jurors on the panel. The use of video conferencing platforms like Zoom are being utilized by some courts, but difficulties arise with that option. Maintaining control over those on the panel, adequately identifying those who respond to the *voir dire* questions, handling jurors speaking over each other, and such issues are likely to require more time and much more interaction with the court than live *voir dir*e would involve. A probing jury

Pre-Trial Checklist

- ❑ Requirement of personal protective equipment (masks, shields, gloves, sanitizer, plexiglass dividers)
- ❑ Screening of all participants for temperature, exposure risks, other symptoms
- ❑ Procedure for jury orientation
- ❑ Procedure for jury screening
- ❑ Seating of the jury panel
- ❑ *Voir dire* procedure and the use of jury questionnaires
- ❑ Communication of for-cause strikes
- ❑ Communication of preemptory strikes
- ❑ Seating of jury
- ❑ Public access
- ❑ Seating of counsel
- ❑ Whether movement in the courtroom and use of the podium is allowed
- ❑ Procedure for use and disinfection of common equipment such as white board, document presenter (Elmo), enlarged exhibits and physical exhibits or demonstratives
- ❑ Presentation of documentary exhibits (paper or electronic)
- ❑ Handling of documentary exhibits
- ❑ Jury breaks and bathroom protocol and disinfecting facilities
- ❑ Anticipation of objections
- ❑ Procedure for side bar conferences with court
- ❑ Disclosure of exhibits in advance for direct and cross-examination
- ❑ Breaks and protocol during breaks
- ❑ Number of cleanings (wipe downs) of the courtroom that will occur each day
- ❑ Sanitary storage of jury exhibit books, notebooks and other items at night
- ❑ Consequences of positive testing or symptomology of any participant during trial (mistrial, adjournment, testing of all participants exposed?)
- ❑ Bathroom protocol and cleaning

questionnaire is a mechanism for reducing questioning of jurors and minimizing the likelihood of something occurring that could jeopardize the trial. Conducting hardship challenges and even some general *voir dir*e by video to reduce the panel to a manageable size is another option. Finally, bringing in qualified jurors in groups small enough to assure proper distancing in the courtroom is a step that should assist in balancing safety and efficiency.

When the jury is selected, the Court should consider having sufficient alternate jurors in case someone fails the prescreening mid-trial. Seating jurors should be accomplished utilizing as much of the courtroom as necessary to assure proper social distancing. Some courts have also provided plexiglass partitions separating jurors. The jurors should be afforded a jury room that is adequate to allow for social distancing. A second courtroom may be necessary for doing so, depending on the circumstances of the particular courthouse. Some courts are also looking to facilities like auditoriums and theaters to use for *voir dire* or even the entire trial. Chief Judge Barbara Lynn of the United States District Court for the Northern District of Texas noted during the ABOTA webinar that she is considering a trial outdoors at a nearby law school when weather permits.

There may be challenges getting witnesses to appear live at trial based on government-mandated travel restrictions or a witness's medical condition. Courts may elect to utilize live video presentation of witnesses by Zoom, or a similar platform, or require that the testimony be preserved by deposition.

Jury deliberation is of the utmost importance because it is the time for the jury to work together, evaluate the evidence, and reach an informed decision. Thus, it is especially important that the jury be allowed to congregate in person; have access to the jury instructions, verdict forms, and exhibits (preferably digitally or with a set in a binder for each juror); and be in a location where they feel comfortable and can maintain proper distance from one another.

The white paper covers other considerations and contains more detailed recommendations. The references at the end of the paper also provide valuable information sure to be of assistance to courts and counsel considering jury trials during the pandemic.

Adapting to the challenges

The trial by jury in civil cases has been a hallmark among the guarantees provided by our Constitution. We have made many adjustments and adaptations to the circumstances peculiar to the exigencies of the time. We must do so during this pandemic, as well. As ABOTA National President Battiste noted in the foreword to the white paper:

> The American experiment in self-government is certainly being tested, yet we remain confident that our system will thrive. Madison reminded us of the need for a "chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

We must balance the desire to resolve civil disputes in a manner consistent with our guaranteed rights with the need to maximize the safety of all trial participants. With the recommended safeguards set forth in the white paper and being utilized by forward-looking courts throughout the country, we hope jury trials can be conducted during these turbulent and challenging times in a safe and effective manner.

Endnote:

1. Guidance for Conducting Civil Jury Trials During the Covid-19 Pandemic, page 5.

General Order Regarding Rules of Conduct for Trial Participants

The court hereby issues the following order regarding conduct applicable to all trial participants in this Court, including but not limited to lawyers, clients, witnesses, client representatives, members of the jury, court reporters, law clerks, and security personnel:

1. All entrances to the courthouse must be well marked with restrictions.
2. Start times must be altered to allow for slower admission of persons into the courthouse.
3. All persons entering the courthouse will be screened. This screening will include a non-invasive temperature check for temperature exceeding 100.3 and a series of questions regarding known exposure circumstances, recent illnesses and travel. Any persons who have traveled to a high-risk area in the preceding 14 days will be denied entry to the courthouse.
4. All persons in the courthouse must stay a minimum of six feet away from all other persons at all times. Exceptions to this rule may only be granted by the trial judge. For example, counsel may be permitted to approach a testifying witness for limited purposes. In this instance, the court may direct that counsel and the witness must cease speaking and wear their respective face masks. The Court may also require other measures to avoid encroachment within six feet, such as leaving an exhibit on a table to be retrieved by the witness.
5. All persons in the courthouse must wear an approved mask at all times unless an exception is granted by the presiding judge. (Specifications for masks may be designated by the Court). Due to difficulty of hearing speakers with masks, people may be permitted by the Court to speak and testify free from obstruction (i.e. without a mask or through the use of a transparent facial mask, face shield, or Plexiglass partitioning).
6. Personnel in the courtroom will be limited to as few as possible as determined by the Court.
7. Media may require remote viewing options to reduce the number of persons in the courtroom.

Order continued on next page.

Order continued from previous page.

8. Witnesses must be on call or scheduled for their appearance to reduce exposure and unnecessary waiting.
9. The jury will only be brought to the courtroom for trial. Waiting pools of jurors are discouraged.
10. The use of shared podiums found in courtrooms will only be allowed by permission of the court.
11. Counsel, along with their clients and client representatives, must stay at their designated counsel table at all times except when speaking. Breaks will be liberally given to allow counsel to speak to their clients without the risk of being overheard.
12. Sidebar conferences are not permitted absent specific approval of the court. Participants may need to remove themselves from the courtroom and use a room that allows for proper social distancing.
13. When counsel is speaking, he or she should stay at his or her designated counsel table, or alternatively, must remain on the designated mark in the courtroom.
14. Physical handling and transfer of exhibits is discouraged. All exhibits, with the exception of tangible exhibits that cannot be reproduced for the purpose of trial, must be shown electronically. All trial participants must have adequate viewing of the electronic exhibits either by shared screen in the courtroom or individual screens or tablets.
15. If a tangible exhibit must be passed among jurors, they will be provided hand sanitizer, instructed on the proper hand hygiene and offered court-supplied, disposable gloves. Further, jurors will be instructed to avoid touching of the face, eyes and mouth. Court personnel will assist in the proper handling and disinfecting of exhibits.
16. Each juror will be given his or her own copy of exhibits unless the volume or other characteristics of the exhibit render individual copies impracticable. In such cases, precautions will be taken to protect against transfer of contamination.
17. During breaks or deliberations, jurors will be taken into a jury room where there is adequate space to maintain a minimum distance between one another of six feet. Before entering the deliberation room, jurors will be required to use hand sanitizer. Upon exiting the deliberation room, jurors will be required to use hand sanitizer. As previously stated, jurors must wear masks at all times, including when speaking in the deliberation room.
18. Breaks generally will be longer to allow for staggered trips to the restroom.
19. Courthouse cleaning crews will be responsible for ensuring that each courtroom undergoes cleaning each day, including but not limited to wiping down all chairs, tables, door handles, etc. with disinfectant solution or wipes.
20. Bathrooms designated for jurors' use will be cleaned and disinfected by court personnel after the morning and afternoon breaks, lunch and close of court business for the day. Disinfectant wipes will be available for use by jurors in the jury room and bathrooms.
21. Courthouse security is empowered to enforce social distancing and other orders including the removal of persons showing signs of COVID-19.

The foregoing rules have been recognized by this Court as necessary to ensure adequate protection of all trial participants. Failure to comply with these rules of conduct constitutes a violation of a court order. IT IS SO ORDERED.

Amicus Curiae Committee Update

There have been several significant amicus submissions.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) submitted an amicus to support the petition for review in *Loya Ins. Co. v. Avalos*, No. 18-0837, 2020 Tex. LEXIS 373 (Tex. May 1, 2020). The issue is whether the eight-corners rule on the duty to defend has an exception for undisputed evidence the insured has colluded with the plaintiff to conceal that the loss is excluded from coverage. Here, the insured's husband was an excluded driver under the Loya policy. The husband, while driving the insured vehicle, had an accident with his friend, Guevara. The insured, her husband and Guevara then colluded to tell the police the insured was driving, and that Guevara could sue claiming she was driving. A lawsuit ensues, and the insured answered discovery that she was driving. Before her deposition, the insured confessed that she lied, her husband was driving, and Guevara's allegation she was the driver was the result of agreed fraud. Loya withdrew from defending her; Guevara got a summary judgment based on the insured's earlier discovery responses. In the resulting bad faith suit, the trial court granted Loya a summary judgment. The Supreme Court affirmed, holding (1) the eight-corners rule did not apply when the insured and claimants conspired to make false statement to create coverage that did not exist, and (2) the insurer could withdraw from defending the insured without first getting declaratory relief on the duty to defend. A motion for rehearing is pending.

Henry Paoli (ScottHulse, P.C., El Paso) submitted an amicus to support the petition for mandamus in *In re K & L Auto Crushers, LLC*, Case No. 19-1022. This is an important case on whether *In re North Cypress* restricts discovery of third-party reimbursement agreements to disputes between the patient and the provider. Plaintiff argued the agreements are not discoverable in personal injury cases and the trial court quashed the discovery. The Texas Supreme Court has requested Plaintiff respond to the petition.

Brandy Manning (Long-Weaver & Manning, Big Spring) submitted an amicus brief to support the petition for review in *BBB Indus. v. Cardone Indus.,* No. 02-18-0025-CV, 2019 WL 2042233, 2019 Tex. App. LEXIS 3781 (Tex. App.—Fort Worth May 19, 2019, pet. denied) (mem. op.). This is a special appearance case; the issues are whether shared facts and judicial convenience excuse plaintiff from establishing personal jurisdiction for each alleged cause of action. Defendant filed a general appearance as to the original alleged actions; then, plaintiff amended to allege new claims, to which defendant filed a special appearance. 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. The Texas Supreme Court has denied review and there has been an appeal to the U.S. Supreme Court.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In Re Allstate Indemnity Co.*, No. 20-0071, to reverse *In re Allstate Indemnity Co.,* No. 13-19-0346-CV, 2019 WL 5866592, 2019 Tex. App. LEXIS 9795 (Tex. App.—Corpus Christi Nov. 8, 2019) (mem. op.), now Case No. 20-0076 in the Texas Supreme Court. The trial court struck counteraffidavits by a forensic medical billing professional that challenged medical expense affidavits on orthopedic and pain management care. Plaintiff argues that the experts were not qualified because they were not of "the same school" as the treating providers. The Corpus Christi Court denied the petition. Allstate refiled the petition in the Supreme Court where is it pending review. TADC urged the Supreme Court follow *in re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.). The Supreme Court asked for a response to the petition.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Parks*, Case No. 20-0345, which seeks to overturn *In re Parks,* No. 05-19-0375-CV, 2020 Tex. App. LEXIS 1329 (Tex. App.—Dallas Feb. 18, 2020, orig. proc.)(Schenck, J., dissenting). The panel majority held mandamus relief was unavailable because defendant had an adequate legal remedy for erroneously striking the counteraffidavit. Justice Schenck's thoughtful dissent challenged whether striking a counteraffidavit barred offering controverting evidence at trial. His dissent made a forceful case that such a rule impaired the right to trial by jury and posed due-course-of-law problems. TADC urged the Supreme Court follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.) and to decide whether striking counteraffidavits barred offering controverting evidence at trial.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) have been authorized to submit amicus brief to support the petition for mandamus in *In re Hub Group Trucking, et al.,* No. 20-0041, to overturn *In re Ben E. Keith*, No. 05-19-0608-CV, 2020 Tex. App. LEXIS 1357 (Tex. App.—Dallas Feb. 19, 2020, orig. proc.) and *In re Hub Group Trucking, Inc.,* No. 05-20-00082-CV, 2020 Tex. App. LEXIS 1329 (Tex. App.—Dallas Feb. 18, 2020, orig. proc.). In both cases, the trial court struck counteraffidavits by a forensic medical billing professional that challenged medical expense affidavits. In both cases, the Dallas Court denied mandamus based on *In re Parks*.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus *In re Guevara*, No. 20-0343 to overturn the denial of mandamus by *In re Guevara.,* No. 05-19-1049-CV, 2020 Tex. App. LEXIS 1326 (Tex. App.—Dallas Feb. 18, 2020, org. proc.). The trial court struck counteraffidavits 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., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Flores*, No. 20-0602, to overturn the denial of mandamus relief denied by *In re Flores,* No. 05-19-1058-CV, 2020 Tex. App. LEXIS 4162 (Tex. App.—Dallas June 2, 2020, org. proc.)(Whitehill, J., dissenting). The trial court struck defendant's two counteraffidavits, the two medical experts, and accident reconstruction expert. The majority held Flores had an adequate remedy by appeal; the dissent argued the experts went to heart of defendant's case and the ruling vitiated any defense on liability or damages.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Savoy*, No. 03-19-0361-CV, 2020 Tex. App. LEXIS 5954 (Tex. App.—Austin July 30, 2020, orig. proc.). The trial court struck counteraffidavits from a medical billing professional and a doctor that challenged medical expense affidavits, and denied an IME. The panel granted mandamus relief to order the IME, but denied mandamus striking the counteraffidavits. One of the counteraffidavits was from the doctor that will do the IME, leaving one to wonder if the IME results will be excluded along with the counteraffidavit.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Koser.,* No. 04-20-00017-CV (Tex. App.—San Antonio Jan. 21, 2020) (mem. op.). The trial court struck counteraffidavits from a medical billing professional. The San Antonio Court denied mandamus relief and the case settled prior to applying to the Texas Supreme Court.

Peter Hansen (Jackson Walker, L.L.P., Austin) has been authorized to file an amicus to support Dr. Ojo's petition for review on *Mason v. Amed-Health, Inc.*, 582 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2019, pet. filed). The accident was patient Vance's oxygen tank exploded at Mason's home when Vance smoked a cigar; the question is the duty owed to bystanders by Dr. Ojo to warn patient more extensively and not to prescribe drugs that would make him forget all the warnings not to smoke

around the tank. Also, there is a causation question if plaintiffs had already received warnings and of gross negligence.

Brent Cooper (Cooper & Scully, P.C., Dallas) has been authorized to file an amicus to support the petition for review on *Columbia Valley Healthcare System v. Andrade*, No. 13-18-0362-CV, 2020 Tex. App. LEXIS 5974 (Tex. App.--Corpus Christi July 30, 2020, Rule 53.7(f) mtn filed). This is a birth injury case in which the jury awarded $9M future med expenses through age 18 and $1.2M future med expenses after age 18. The judge ordered $7.3M be paid now in a lump sum and five periodic payments of $604K each. The core issues are (1) failure to submit jury questions on the minor's life expectancy and annual yearly future medical expenses, and (2) the limits of judicial discretion to award most of the medical expenses as a lump sum.

Mitchell Smith (Germer PLLC, Beaumont) will be filing an amicus to support the petition for review on *Kenyon Ins. v. Elephant Ins. Co., LLC*, No. 04-18-0131-CV, 2020 Tex. App. LEXIS 2686 (Tex. App.—San Antonio Apr. 1, 2020, pet. filed) (en banc). This is a permissive interlocutory appeal on the issue of duty from a summary judgment (traditional and no evidence) on whether Elephant had a legal duty. The core issue is whether an insurer owes a legal duty to an insured to prevent bodily injury to its insured when it asks the insured to photograph property damage to the insured vehicle to support a claim. While the insured's husband was taking a photo of the insured vehicle for the claim, a driver ran off a wet road and hit him. After a divided panel affirmed summary judgment for Elephant, the San Antonio Court en banc reversed, and the original panel majority became the dissent.

An amicus has been authorized to support the mandamus petition in *In Re SCS SP, LLC*, No. 20-0694, to overturn mandamus relief granted in *In re Smith*, No. 05-20-497-CV, 2020 WL 4669805, 2020 Tex. App. LEXIS 6413 (Tex. App.—Dallas Aug. 12, 2020, orig. proc.). This is a med mal case. The Dallas Court of Appeals held that plaintiff was entitled to discovery of defendant nursing home's policies and procedures despite the general stay of discovery until the initial expert report is provided. The Supreme Court has stayed the decision pending a decision on SCS's petition for mandamus to overturn the Dallas Court.

TADC Amicus Curiae Committee

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TADC Barry Peterson Deposition Bootcamp: A Recent Law School Graduate's Perspective

Every attorney knows the "Three P's" of litigation: pleadings, proof, and persuasion. However, all through law school, students are handed the facts without any indication of what amount of work actually goes into establishing each set of facts as the facts. It is this author's opinion that the second "P" is the most important, the proof. It is not cliché to say that it is in the puddin'—puddin' time and effort into your depositions. As attorney Victor Vital has said, "defensibility is the key."

So why do new attorneys fresh out of law school lack the skills necessary to take a good deposition? They don't. New attorneys know more law than they will ever know; they know what facts are good for them and which are bad. The driving element of a good deposition, however, is not as much an understanding of the law as an understanding of people. Most attorneys at the Texas Association of Defense Counsel's ("TADC") Bootcamp spoke of a species of vigilance and mental endurance new attorneys must develop when seeking to depose key witnesses. This skill, of course, cannot be mastered alone. Therefore, it is incumbent upon legal organizations, such as TADC, to develop resources for new attorneys who will soon be taking depositions, as well as the big deposition.

Nearly three years ago at the TADC Trial Academy, young attorney attendees indicated that there was a need for a more disciplined approach to deposition training and expressed an interest in a bootcamp of sorts. Part of this was out of frustration – they were afraid they would never get to try a case. Of course, they did not lack vigilance or mental endurance, and this of course added to the frustration. More importantly, they realized that depositions have a more significant and important place in a litigation practice than they had previously thought. These young lawyers wanted to learn how to take great depositions. TADC saw a need and filled it.

Current TADC West Texas Vice-President, Jennie Knapp, began putting together a curriculum. Looking at the calendar, Fall of 2018 seemed the ideal time to hold the very first TADC bootcamp. TADC quickly assembled incredible faculty, true veterans of the profession, and reserved space at the Texas Tech Law School. TADC sent out the first invitations and prayed for at least twelve or fifteen participants. The day of the event, there were twenty-eight young lawyers who attended and enjoyed the program and provided great feedback.

Hoping to build on what seemed like a small success, in 2019, TADC took the event to Houston. Registrations exceeded eighty, and the feedback was consistent—this was a program that filled a need for TADC members and most especially, younger lawyers in TADC firms.

October 2020, of course, brought its own challenges. The Coronavirus pandemic persisted, and social gatherings continued to see limitations, necessitating a virtual Deposition Bootcamp on October 2nd. Program Co-Chairs Amy Stewart and Mike Bassett put together an incredible and diverse faculty, not only in terms of gender and

race, but also geographically. The program was indeed one of the most impressive courses TADC assembled and organized for any CLE in Texas this year, according to the current TADC President, Slater Elza. As the program was marketed, the comments about the topics and faculty promised success. By showtime, seventy-eight participants were in attendance. The feedback proved that the TADC Deposition Bootcamp was satisfying young attorneys' curiosity and educating them in a personal, meaningful way about an aspect of practice they feared truly needed guidance.

From the perspective of a recent graduate from South Texas College of Law - Houston, I (and my new employer) envisioned the bootcamp as a necessary initial milestone to the practice of the law in Texas, much like the Texas Bar Exam. Cases are stories that have legal significance, and stories win trials. My law student colleagues and I have heard this stated a thousand times and different ways in law school, especially in the T. Gerald Treece Summer Trial Academy. However, in the context of the bootcamp curriculum, cases and their stories would take on a new, unaccounted for meaning.

No doubt, attorneys have heard and/or read their client's and the plaintiff's (in written discovery) tale several times by the time taking the parties' depositions. However, many times unexpected testimony surfaces, which can set a young attorney back in the deposition. The TADC Deposition Bootcamp taught me that if you aren't listening to the witness, your story is going to have holes. You have to listen to the answers and be prepared to explore those answers. Otherwise, you are leaving untold stories on the table. This necessary mindset is part of the vigilance and mental endurance required. Of course, attorneys have their scripts, outlines, and the information that they think they want, but more crucial than canned questions are the golden nuggets of information gleaned from a witness **if you just take the time to listen**.

Moreover, the Deposition Bootcamp teaches young attorneys how to be considerate and professional. It is not that you must be nice to everyone during the deposition. What is important is to ensure a clean, accurate, and thorough record. Young attorneys achieve this by being considerate of the court reporter, his or her ability to comprehend a shy witness, to take down words when people talk over one another, and the need to sometimes stop a line of questioning to ensure that a word or phrase is clarified or spelled correctly. Young attorneys should note to advise the witness of the roles of each person at the deposition: the job of the attorney to ask questions and receive answers; the job of the court reporter to accurately take down spoken word; and the job of the witness to express him or herself clearly and concisely and ask for clarification if he or she does not understand the question. Taking the small amount of time to explain such will go a long way to ensure, at least, more clear and concise depositions.

Finally, the TADC Deposition Bootcamp explores the nuance and strategies of deposing both laymen and expert witness. For example, young attorneys will learn whether to designate a police officer as either an expert or a fact witness and what significance such designation has to a specific case. A strategy even exists for deposing the foreign language speaking witness and having the translator work with your court reporter.

Young attorneys will learn how to take the deposition of the all-knowledgeable expert witness. Mike Bassett of TADC says, "Fighting the expert is like wrestling a pig. You have to know the facts better than the expert in order to beat him." Personally, in East Texas and Behind the Pine Curtain, if you tussle with a wild pig without a knife or gun, you better know you are stronger (and faster), as the case may be (such as knowing the facts better for an expert deposition)! The best way to beat the expert is to exhaust his knowledge about all aspects of the event giving rise to the claim, and if there is ever an inconsistency in their opinion, don't belabor it in the deposition. Wait for trial. Get a statement and a restatement to box the expert into his testimony. Young attorneys will get great, practical tips and a working checklist to prepare for taking an expert's deposition.

The bootcamp also gives guidance on coaching your expert witnesses for both the deposition and trial. "What's important," Amy Stewart of TADC says, "the witness sees how you present yourself, and if they see someone who is in control, they will have more confidence and will have control over themselves." Attorneys want to avoid an expert or someone from the client's C-suite bobbling their head or saying "yes" to all of the questions because either they do not really know the answer or they are not confident to state what the true answer might be. Every law student will tell you what the answer is in school: "it depends!" The TADC Deposition Bootcamp will help young attorneys to coach their witnesses on giving good "it depends" answers.

By the end of the bootcamp, I was relieved to confirm that good defense counsel (during the deposition) do not beat their chests or, over an objection, try to recite the most law the loudest. Civility—not trampling the dignity of the other party—wins the deposition. The other party is still a person. Good defense counsel gets what they want without celebrating in front of the opposition. We are further aware of social controversies of the present day, aware of the perceptions that exist between differing groups of people, and able to conduct the deposition as appropriate in any given scenario. We are considerate. Again, vigilance, mental endurance, and professionalism are the skills one must master to take a truly great deposition.

As to the namesake of the bootcamp, I decided to find out more about Barry Peterson, the program's namesake. Mr. Peterson. As it turns out, he lived a busy, industrious career as a civil defense and trial attorney. He was a part of many organizations, including TADC, Texas Young Lawyers Association, and Kiwanis Club, and he served as a board member for several social clubs and venues around the state and particularly in Amarillo, the staging grounds for Mr. Peterson's famous trial in the 90's alongside Oprah Winfrey.

Mr. Peterson represented the rancher Howard Lyman, who had appeared on "The Oprah Winfrey Show" to speak about problematic practices in the cattle industry. Now, this discussion followed what had been a large disease outbreak among Britain's cattle population. Ms. Winfrey sensationalized beef consumption to a degree to which other Texas ranchers disagreed, thus setting the battleground for one of Mr. Peterson's most famous trials. Speaking to his success in Mr. Lyman's defense, Mr. Peterson recalled the role of scientific evidence used to persuade the jury that Mr. Lyman's belief, whether wrong or right, had empirical support. Suitably so, Mr. Peterson's legacy is best represented through the TADC Barry Peterson Deposition Bootcamp, where young lawyers can learn to develop evidence, whether scientific or not, into persuasive arguments for the jury.

On behalf of all attendees who most likely feel as I do, I want to thank TADC for an incredibly, beneficial and instructive program. The Deposition Bootcamp was an engaging and action-packed orchestration that I know took time and considerable effort to produce. I also want to thank all of the presenters who, somehow in a pandemic, volunteered their time and were able to condense the vast amount of information for this crucial aspect of the practice into a single day of informed presentations. I want to thank the current TADC President, Slater Elza, Executive Director, Bobby Walden, as well as Mike Bassett, Amy Stewart, Victor Vital, Courtney Perez, Sofia Ramon, Amy Witherite, Megna Wadhwani, Shawn Thompson, Craig Myers, Mitzi Mayfield, and Dr. Bill Kanasky, for one of the most enlightening, enjoyable and educational programs I have had the pleasure of attending.

TADC expects the Deposition Bootcamp to continue to provide sound and practical guidance to young attorneys and to remain a staple of the TADC calendar. It makes young attorneys and the firms they work for in Texas better. TADC, and young attorneys, no doubt look forward to the 2021 TADC Deposition Bootcamp.

Answers From Ashes

By: Jeff Berino, Senior Fire Investigator
AEI Corporation, Denver, Colorado

As smoke drifted across the entire U.S. from a very active wildfire season creating some apocalyptic looking sunsets, upwards of more than 30,000 firefighters were engaged in a relentless battle to save lives and structures. According to the National Interagency Fire Center (NIFC) as of late October 2020, over 2.1 billion dollars have been spent on suppression costs with over 7,900 structures lost and 38 fatalities. The cost to the insurance industry with claims related to the loss of structures, agriculture, timber and minerals, along with the economic impact losses will certainly add billions of additional dollars in addition to suppression costs.

Why is 2020 heading toward the record books yet again? Is this the new norm? Years of drought in many portions of the U.S. combined with record setting high temperatures have rendered the landscape a virtual tinderbox. Decades of aggressive fire suppression have contributed to a large fuel load in many forested areas. This synergistic effect of drought, high temperatures and high fuel loads is contributing to the recently coined term of *mega fires*. In addition, more and more homes are being constructed in what is called the wildland-urban interface (WUI) areas thus adding to the complexity of the claims process.

The western United States has seen most of these fires with over 8.53 million acres consumed in the first ten months alone in 2020. There have been approximately 6.53 million acres lost annually in the U.S. for the past 20 years. Colorado alone has seen the three largest wildfires in its history in 2020. One fire in California reached the unheard-of mark of over one million acres. As these fires are suppressed either by the tireless efforts of firefighters or the coming winter months, the claims and the associated rebuilding process begins. The daunting challenge of determining blame or liability if the fire has been human caused begins. It might shock some to learn that according to the U.S. Department of the Interior and the National Park Service approximately 85 to 90% of all wildfires are human caused!

Just as the COVID-19 pandemic has changed all of our lives, fire managers and incident commanders have had to make adjustments on how firefighters interact with each other on these large wildfires to prevent them from coming down with the illness while working in close proximity to each other. Add this challenge to the thousands of people who have been evacuated to shelters and it leads to a herculean effort for all emergency managers. Over 500,000 people in Oregon alone were under evacuation orders or warnings in September.

As the claims process begins in the aftermath of these wildfires, determining the origin and cause of the fires becomes significant. Many think that a wildfire would destroy evidence of where it originated; however, the opposite is true. As a wildfire burns it creates fire pattern indicators on rocks, trees, unburned objects, and grass which aid in origin determination.

The origin of the wildfire must first be determined prior to attempting to discover the cause. This is done via a systematic approach using approximately eleven proven fire-pattern indicators, to first establish a General Origin Area, then a Specific Origin Area, and (hopefully) an Ignition Area with a Point of Origin. These eleven fire-pattern indicators include: protection, grass stem, foliage freeze, angle of char, spalling fire, curling fire, sooting, staining, white ash, cupping, and V & U patterns. Weather reports as well as witness interviews also play an important role in origin determination. Some wildfire investigators incorporate the use of drone photography and LiDAR analysis to assist in origin determination. Most wildfire investigators use different colored flagging as a tool to depict advancing, lateral and backing movements of the wildfire. Once a Specific Origin Area has been identified, a meticulous and detailed grid search, done on one's hands and knees, using magnets and magnifying glasses is performed to determine an Ignition Area and cause.

There is a wide range of factors that can be attributed to a human caused ignition. The more frequent human causes include but are not limited to: debris burning, unattended or improperly extinguished campfires, improper cigarette disposal, fireworks, cutting/welding/grinding, logging operations, diesel exhaust particles, utility lines, railroads, firearms, blasting, catalytic converters, electric fences, sparks/friction from mechanical devices or vehicles, arson, and juvenile fire play. Some less common causes include coal seam fires, flying lanterns, wind turbines, structure fires, and glass reflection.

Wildfire investigation involves a different methodology than that used on structure fires. In many cases the wildfire investigator progresses from the areas of most damage to the areas of less damage which is the opposite of structure fire investigation. A specific skill set, a lot of patience and considerable additional training is required to be a competent wildfire investigator. Additionally, obstructions such as unsecured scenes, delays in arriving at the scene, unintentional spoilation by suppression crews and time and cost restraints can make the investigation more challenging. Early engagement of a qualified wildfire investigator can assist with origin and cause determination which will serve as a useful tool for everyone involved in the claims process and help to uncover the answers hidden in the ashes.

Jeff Berino is a state and nationally certified wildfire investigator and incident commander. He has recently retired with over 40 years in the fire service to work as a wildfire investigator for the private sector with AEI Corporation in Colorado. He can be reached at Jeff@aeiengineers.com or 303-756-2900. You can find more detailed information about Jeff in the "People" section of the AEI website, www.AEIengineers.com.


One Size Does Not Fit All: Tailoring Preparation to your Witness

By: Jennifer Tomsen & Anna Robshaw
Greenberg Traurig, LLP, Houston

All fact witnesses are not alike. The people you need to prepare for deposition or trial testimony have different personalities, backgrounds, and expectations for the process. If you employ a one-size-fits-all preparation style, you may overlook important differences that could impact not only how well your witness testifies, but the sense of comfort he or she has with the process, and with you.

The "I'm so nervous" witness. The nervous witness has likely never been involved in a legal proceeding before and may dread public speaking in such a setting. These witnesses may not understand much about the process and may fear aggressive cross-examination such as they see on television. Taking the time at the outset to walk the nervous witness through every aspect of the process will almost certainly bear fruit. If you can, prepare witnesses for deposition in the room where it will take place and show them where each participant will sit; prepare for trial by describing in detail what the courtroom will look like and who will attend. Take more time than you might ordinarily spend to discuss types of questions and possible ways of answering. Also let nervous witnesses know that no single witness makes or breaks an entire case. Assure them that they do not need perfect recall and that they are not expected to testify to facts outside their own knowledge. Explain the role of their counsel (you) in the process, including your ability to object to flawed or inappropriate questions (make sure you are clear about the more limited ability to stand on objections in depositions versus at trial). Once the witnesses understand the process, they should feel more confident and will likely be grateful that you took the time to help them become more comfortable.

The "I got this" witness. The converse of the nervous witness is the overconfident witness. Overconfident witnesses may not realize how quickly their testimony can go sideways with a too-casual story-telling approach to testifying or with argumentative responses to cross-examination. A blistering mock cross-exam early in the preparation process can be used to illustrate the importance of bedrock principles like listening carefully to the question; answering only the question asked and not volunteering additional information; and being alert for false assumptions built into the question. For an overconfident witness who may have been unwilling to set aside sufficient time for preparation, such a mock cross-examination may be just the thing to convince the witness to invest in the process.

The "tell me what to say" witness. What lawyer has not encountered the witness who responds to attempts to draw out the story during prep with "just tell me what to say." Witnesses may make such a statement out of fear that their testimony will not be good enough, or it may reflect frustration – perhaps the process is hard to understand or seems too complicated. Regardless of the reason, you should take care not to put words in the witness's mouth during your preparation sessions. Explain that the testimony must be the witness's own. Make sure the witness understands the purpose of preparation: to help witnesses learn what to expect and understand how to present the facts as they know them most effectively, not to give them a script with the

"right" answers. As with the nervous witness, take the time to increase the witness's confidence in his or her own testimony by exploring possible questions and the witness's answers in detail.

The "I really don't know anything" witness. This witness may not understand the case or the process sufficiently to see where he or she fits in. Alternatively, the witness may be attempting to downplay his or her role, possibly due to nervousness. Be cautious about accepting such a statement at face value. There is a reason why either you or your opponent wants to hear from the witness. Provide these witnesses with as much context about the case and the process as you can to help them understand their role. Be sure to gently but thoroughly probe their involvement in and recollection of the events at issue. While "I don't know" and "I don't recall" are perfectly acceptable answers, make sure the witness understands that relying too much on such responses can be problematic. These should be thoughtful and truthful responses, not just reflexes.

The "this is so ridiculous" witness. A witness with this attitude typically feels defensive, resentful, or angry about his or her involvement in a legal proceeding. Sometimes the witness may be a named defendant, but not necessarily. Expressions of resentment may mask fear or lack of understanding of the process as well. Empathy is important with these witnesses: point out that they are not bearing the burden alone (for example, their colleagues may also be providing testimony) and explain that while the legal system can at times seem frustrating and unfair, it is designed to allow the truth to come out. Their testimony will help to accomplish that goal. Again, spend time explaining the process, before discussing substantive issues, to encourage this witness to engage and open up.

The "I thought about law school" witness. Unlike the nervous witness who would rather be doing just about anything else, this witness finds the legal process fascinating, sometimes even sharing that he or she considered going to law school. While these witnesses typically want to be helpful and are invested in the process, they may spend too much time trying to outwit the opposing attorney. For example, on cross examination, these witnesses may believe they "know where [the questioner] is going" with his or her line of questions and may veer away from answering the question asked. Such attempts to outguess the questioner may make the witness appear cagey or less than forthcoming. Frequently reminding the witness in a good-natured way to "let me be the lawyer" should help. Point out that the witness's credibility will be enhanced by doing so, because a fact witness attempting to be an advocate may be perceived as partisan. Since the process does not intimidate them, these witnesses may also be inclined to be overly talkative, even expansive, in their testimony. As with the overconfident witness, a mock cross-exam may be the best antidote to quickly illustrate the pitfalls of enjoying the process too much.

Ultimately, most witnesses present some combination of the traits above, and most if not all will benefit from techniques like mock cross-examination. By being aware of and sensitive to each witness's particular characteristics and needs, you can tailor your preparation to bring the best out of every witness.

This article reflects the opinions of the authors, and not of Greenberg Traurig, LLP. The article is presented for informational purposes only and it is not intended to be construed or used as general legal advice nor as a solicitation of any type.

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