



TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

FALL/WINTER 2022

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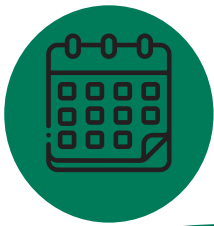
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TADC CALENDAR OF EVENTS

- January 25-29, 2023 **2023 TADC Winter Seminar**
Steamboat Grand -Steamboat Springs, Colorado
Registration materials available at www.tadc.org
- May 3-7, 2023 **2023 TADC Spring Meeting**
JW Marriott, San Jose Del Cabo, Mexico
Registration materials available after March 1, 2023
- July 19-23, 2023 **2023 TADC Summer Seminar**
Elevation Resort & Spa, Crested Butte, Colorado
Registration materials available after April 15, 2023
- August 11-13, 2023 **2023 West Texas Seminar**
Inn of the Mountain Gods, Ruidoso, New Mexico
Registration material available after May 15, 2023
- September 20-24, 2023 **2023 TADC Annual Meeting**
Hilton Hotel Midtown, New York, New York
Registration materials available after July 1, 2023



By: R. Douglas Rees, TADC President
Cooper & Scully, P.C., Dallas

PRESIDENT'S MESSAGE

It is with honor, humility and great excitement that I pen my first President's Message. The honor was passed to me at TADC's Annual Meeting in San Antonio by Christy Amuny, who had an incredible year as President. She literally took the TADC to places we had never been before, holding meetings in fabulous locations where the TADC had never been. Thank you, Christy, for your incredible leadership.

We have a great many things to look forward to this year. We have meetings planned in some incredible places, starting with Steamboat Springs, CO, for our Winter Meeting, then Cabo San Lucas for our Spring Meeting, followed by Crested Butte, CO for our Summer Meeting, and concluding with our Annual Meeting in New York City. You can, of course, expect excellent programs and speakers at each of these meetings. TADC always provides top quality CLE.

2022-2023 is already off to a great start. We just completed our Fifth Annual Deposition Boot Camp and, as always, the programming and faculty were fantastic and the registration was impressive, with over 80 attending the program. Thanks to Cathy Bailey with Steed Dunnill Reynolds Bailey Stephenson LLP in Dallas and Jennifer King with Burford & Ryburn, LLP in Dallas, for putting on such an incredible program. The TADC also held its semi-annual Trial Academy in March of this year at the Texas Tech University School of Law. Arlene Matthews, with Crenshaw, Dupree & Milam, L.L.P. in Lubbock and Greg Curry, with Holland & Knight LLP in Dallas, put together the program and it was a great success. We have also continued with our Lunch and Learn seminars with several occurring over the last few months. They are geared primarily towards our young lawyers

but are available to everyone. If you haven't checked one out, do so. They are definitely worth your while.

We are continuing our efforts to get back to more local events. These present an opportunity to get together with others in your area and strengthen relationships with fellow members, some of whom may not be very involved with TADC. They also present an opportunity to invite someone who is not a member and show them the many benefits of TADC and why they should become a member. While the TADC is focused on protecting the civil justice system and providing top-notch CLE, one of the greatest benefits of being involved in the TADC is the relationships, professionally and personally, that we develop along the way.

2023 will begin with yet another legislative session. As always, we will be monitoring any issues that affect the interests of our clients and practices and impact the administration of justice in Texas and will be prepared to move on those issues. George Christian will guide us through this process as usual and will keep us updated on a regular basis. We can expect several issues affecting the courts and civil justice system to be on the agenda. Your contributions the TADC PAC are incredibly important in those efforts so please consider making a contribution if you haven't already done so. Contributors of \$300 or more will receive a special "thank you" gift in recognition of your generosity.

TADC is an incredible organization. It is the largest of its kind in the country and has so much to offer so get involved. I hope to see you at an event soon.

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**By: Christy Amuny,
Germer PLLC, Beaumont**

PAST PRESIDENT'S MESSAGE

What a fantastic year we had! I would like to thank our incredible Board of Directors for your dedication and devotion to TADC and all of your hard work. I said at the beginning of the year that my hope was that when the year was over, we would have done a little better and done a little more. I believe we did just that. You made my job easy and I will be forever grateful to all of you.

We went to some great places last year and had top notch CLE programs. A special thanks to the seminar chairs – Robert Sonnier and Jim Hunter (Winter Meeting), Sofia Ramon and Mike Shipman (Spring Meeting), Jennie Knapp and Mike Bassett (Summer Meeting) and Trey Sandoval and Rick Foster (Annual Meeting). We met at some spectacular venues (Snowmass, Asheville, Big Sky and San Antonio) and the seminar chairs delivered in a big way with high quality speakers and relevant, practical topics.

After skipping a couple years (thanks COVID), we were finally able to hold the Milton C. Colia Trial Academy at Texas Tech School of Law in Lubbock. Thank you Arlene Matthews and Greg Curry for a phenomenal job of re-grouping and pulling this back together. Watching the young lawyers who participated and the effort they put into the preparation and presentations, I am both proud and encouraged. They were engaged, had a ton of questions and were truly interested in learning from the outstanding faculty that Arlene and Greg assembled.

I also want to thank those who gave their time to do the Lunch & Learns for the young lawyers. It is a great program started by Slater Elza and we plan to continue with topics relevant for our young lawyers. Thanks to Dan Hernandez, Mike Bassett, Trey Sandoval, Elizabeth Cantu, Sam Houston, Darin Brooks and Michael Blachly for your great presentations. We had record numbers of young lawyers who attended and there were several of us more established (sounds better than saying “older”) members who tuned in. That is a testament to the quality of the speakers/topics.

As my year came to an end, at our Annual Meeting at La Cantera in San Antonio, I had the privilege of bestowing awards on some well deserving people.

1. David Brenner, Nick Zito and Slater Elza received Special Recognition Awards for their tireless work on behalf of TADC and for always answering the call. David and Nick are a part of the backbone of this organization and their ideas, input, willingness to get involved have been invaluable. Slater is the brainchild of the Deposition Boot Camp and Young Lawyer Lunch & Learns as well as being an outstanding Past President. He has pushed our ability to reach the young lawyers to the next level.

2. Arlene Matthews, Jennie Knapp and Mike Shipman received President's Awards. Arlene hosted the Trial Academy in her hometown, juggled the faculty (no easy feat) and kept the train on the tracks. Jennie took our plan to add a service component to our meetings and ran with it. She found Project Healing Waters in Montana and TADC partnered with them at our Summer Meeting. We were honored to participate, contribute and be involved with the Veterans. Mike is involved on so many levels it is hard to keep track. He has brought his entire firm to meetings, gets them to speak at seminars, remains heavily involved in our legislative efforts and anytime I called, he answered and was on board with whatever I asked.

3. Hayes Fuller received the Founders Award which is the highest honor in TADC. It is so well deserved and I was proud to present this Award to Hayes. He is a Past President and his devotion to TADC is evident in so many ways. He is an amazing lawyer, a true gentleman, a great friend, a person of honor and integrity, and believes and fights for our right to trial by jury. Hayes exemplifies the values and goals of TADC. He has been involved in numerous organizations and been appointed to several committees/boards advocating for our civil justice system. He remains a staunch advocate for TADC and continues to fight the good fight.

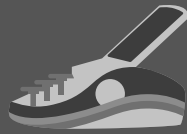
I also want to give a huge thanks to Bobby Walden, TADC's Executive Director. In many ways, he is the heart and soul of TADC. He is devoted to this Organization, strives to do what is in our best interest and as President, I would not have survived without his invaluable wisdom and gentle (sometimes not so gentle) nudging to keep things on track. Bobby – thank you for everything.

Lastly, I want to thank all of you for the tremendous honor and privilege of serving as President of TADC. This is an incredible organization full of truly amazing people. Welcome to our new President Doug Rees. We are in very good hands and I am excited about the future of TADC.





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TADC LEGISLATIVE UPDATE

**By: George S. Christian,
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The 2022 mid-term elections have produced virtually no change in the partisan make-up of Texas state government. Voter turnout failed to reach the 2018 benchmark by at least 300,000, as well over half of eligible Texans voted with their feet instead of at the ballot box. Voter apathy at that level usually means that the status quo will prevail, and that's exactly what happened.

The GOP maintained its stranglehold on statewide offices. Governor Abbott easily defeated challenger Beto O'Rourke with a shade under 55% of the vote. Lt. Governor Patrick and Attorney General Paxton polled more than a percentage point behind the Governor, but still won easily. Interestingly, down-ballot statewide Republican candidates all outpolled the Governor by small margins. The lead GOP vote-getter on Tuesday? Texas Supreme Court Justice Rebecca Huddle. She received more than 4.5 million votes in her first go-around on the ballot.

Legislative redistricting did what the GOP intended: it locked in the existing majorities in the Texas House and Senate. Republicans picked up one seat in each chamber, giving them an 86-64 edge in the House and a 19-12 margin in the Senate. The closest race occurred in South Texas, where Democrat Morgan Lamantilla defeated Republican Adam Hinojosa by about 500 votes in District 27 to replace retiring Sen. Eddie Lucio (D-Brownsville). As widely reported in the national and Texas media, the

GOP made a major push in South Texas, but in the end netted only one congressional seat and one House seat. The status quo hasn't changed that much just yet.

Last week Rep. Tony Tinderholt (R-Arlington) announced that he will challenge Speaker Dade Phelan (R-Beaumont) for the House gavel in January. Tinderholt says that he wants to see Republican platform priorities get to the House floor and will not appoint any Democratic chairs. Given that Speaker Phelan invested considerable campaign resources in the successful election or re-election of his backers in the House, Tinderholt's bid seems Quixotic at best. Other than a few voices on the far right, no one seems to be complaining about the Speaker's leadership or that he is not conservative enough.

The 88th Texas Legislature will convene on Tuesday, January 10. Speaker Phelan will have 27 freshmen members in the audience, nearly one-fifth of the entire body. A 28th new member, John Bryant (D-Dallas), is actually an old one: Bryant previously served in the House for five sessions in the mid-1970s to 1980s. The Senate has a handful of newcomers as well, including former Reps. Tan Parker (R-Flower Mound) and Phil King (R-Weatherford), who succeed Senators Jane Nelson and Beverly Powell; Kevin Sparks (R-Midland), who succeeds Sen. Kel Seliger (R-Amarillo); and, as discussed above, Morgan Lamantilla from the Valley. Former Sen. Pete Flores (R-Pleasanton) is also

back in a reconfigured District 24, formerly held by Dawn Buckingham (R-Horseshoe Bay), who won election as Texas Land Commissioner.

The legislative agenda, as always, will revolve around the budget. In July Comptroller Hegar estimated that the Legislature will have a \$27 billion surplus, but that number could go up as energy prices continue to soar. Lt. Governor Patrick has his sights set on significant property tax relief, a particularly expensive proposition if it is to make any discernible difference. Other probable priorities will include border security, the foster care system, women's health (a new emphasis in the aftermath of *Dobbs*), and public education (better school security, addressing the teacher shortage). With this much money sloshing around under the Pink Dome, everybody will want their piece of it.

We can expect another active session in the civil justice arena. It is likely that there will be an effort to strengthen the trucking litigation reform bill (HB 19) enacted last session and another attempt to establish some kind of special business court. Improving the level of judicial education and training has moved higher on the agenda, which would make a good coupling with raising judicial compensation. Restructuring the intermediate court of appeals districts, which bogged down last session, may be reconsidered, though perhaps in a more targeted fashion. There has been a lot of speculation about whether broader limits on noneconomic damages might be in the offing. In view of the fact that SCOTX has at least two cases before it that would address the "meaningful review" standard, this speculation might be a bit premature. Same with the possibility of raising the caps in medical liability cases. The medical malpractice plaintiff's bar has invested a lot of resources in

a federal constitutional challenge to the caps, so would a simultaneous legislative assault—which would require a similarly substantial sum—help or hurt the cause? We'll see.

It appears that the Supreme Court Advisory Committee has worked out a proposed rule on remote proceedings that goes a long way toward meeting the concerns of the trial bar and business groups. This is very positive news for a number of reasons, not the least of which that it probably takes the issue off the legislative agenda this time around. We should thank the TADC members who serve on the SCAC and who have communicated with SCAC members regarding the issue. They have done yeoman's work in a short period of time to get things turned around. Let's hope that a return to normalcy will help establish a new norm for the appropriate use of technology to conduct judicial business that preserves the fundamental importance of face-to-face adversarial proceedings.

As we have in the past, your TADC leadership will be deeply involved in legislative issues that affect our members and the legal profession. Legislators appreciate our input and take our views very seriously. We do not base our positions on financial self-interest but on what we think best serves the rule of law and the ability of civil defendants to get a fair and impartial trial. The jury system is hands down the best instrument ever devised for the protection of individual rights and liberties. Our first priority has always been to preserve it, and the primary goal of our legislative program is to ensure that we do everything possible to achieve that. Sometimes we take incoming fire from one side or the other for what they think we should have done or not done, but sticking to our principles has always carried us through.

Texas Association of Defense Counsel-PAC

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By: Tim Hudson and Jenna Johnson
Barnes & Thornburg LLP, Dallas

THE INTERNATIONAL TRADE COMMISSION: A FLOURISHING FRONTIER FOR TRADE SECRET LITIGATION

Trade secret litigation continues to be on the rise in Texas and across the United States. State courts in Texas have for decades served as a viable forum for trade secret disputes. And, with the passage of the Defend Trade Secrets Act, federal courts are seeing a dramatic rise in trade secret filings. Two seemingly clashing circumstances set the backdrop for the continued increase in trade secret litigation in Texas: an increase in companies

moving into the state, and a volatile workforce in the wake of the “Great Resignation.”

The influx of companies establishing themselves in Texas continues to rise, with Texas leading the nation in number of Fortune 500 companies headquartered in the state.¹ Since 2021, the state has seen more than 62 corporate relocations to Texas—among them, global

¹ Frank Holmes, *Texas Is Now Home to More Fortune 500 Companies Than Other State*, FORBES (May 26, 2022), <https://www.forbes.com/sites/greatspeculations/2022/05/26/texas-is-now-home-to-more-fortune-500-companies-than-any-other-state-and-im-not-surprised/?sh=1e36991c27d5>; see also Dale Bus, *Texas Tops 2022 Best & Worst States For Business Survey Of CEOs*, CHIEF EXECUTIVE, <https://chiefexecutive.net/texas-tops-2022-best-worst-states-for-business-survey-of-ceos/> (last visited Oct. 29, 2022); *Business Climate*, TEXAS ECONOMIC DEV., <https20,2022>, <https://www.cnbc.com/2022/07/20/40percent-of-workers-are-considering-quitting-their-jobs-soon.html>.

¹ Shawn Shinneman, *Why These Texans Joined the Great Resignation*, TEXAS MONTHLY (Mar. 10, 2022), <https://www.texasmonthly.com/news-politics/great-resignation-texas-quitters/>; Alyssa Flowers & Eli Rosenberg, *The Geography of the Great Resignation: First-time Data Shows Where Americans Are Quitting the Most*, WASH. POST (Oct. 22, 2021), <https://www.washingtonpost.com/business/2021/10/22/stat-es-labor-quitting-turnvoer-jolts/>.

¹ TRADE SECRET LITIGATION REPORT 2021, LEX MACHINA 4 (2021).

¹ *About the USITC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Oct. 31, 2022).

¹ *About the USITC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Oct. 31, 2022).

¹ *Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last visited Oct. 29, 2022).

¹ *Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last visited Oct. 29, 2022).

¹ 19 U.S.C. § 1337(a).

¹ 19 U.S.C. §

1337(d).://gov.texas.gov/business/page/business-climate (last visited Oct. 29, 2022).

companies like Hewlett Packard, Tesla, and Oracle.²

Though this relocation boom suggests an increase in job creation, the job market remains volatile in the wake of “The Great Resignation”—a term coined by Texas A&M professor Anthony Klotz.³ Record numbers of employees left their jobs since the beginning of the coronavirus pandemic, a trend which has continued well into 2022. According to the World Economic Forum, one in five workers globally are predicted to quit their jobs in 2022.⁴ In the U.S., about 4 million people left their job each month in the first half of 2022,⁵ and quitting rates in Texas aligned with this national trend.⁶ Some of these work force members may take jobs with companies abroad, or with domestic companies that have foreign affiliates.

These statistics should sound alarm bells for companies and intellectual property practitioners alike; the “departing employee” is the most common fact pattern in trade secret litigation. As employee mobility increases, particularly with the advent of post-pandemic remote work, so does the potential risk for former employees to work for domestic or foreign companies—and bring with them their former employer’s confidential information and trade secrets.

Even before the pandemic and the “Great Resignation,” trade secret court filings have remained steady since 2017.⁷ But outside of state and federal proceedings, there is another, potentially underutilized forum for trade secret disputes: the International Trade Commission (“ITC”). The ITC is located in Washington, D.C. and investigates unfair trade practices that can harm U.S. businesses and industries. In an ITC proceeding, litigants can obtain injunctive relief in the form of an exclusion order that prevents products that misappropriate trade secrets from entering the United States. In light of packed court dockets and an increasingly globalized economy, the ITC may represent an alternative, expedient forum for companies with intellectual property threatened by imported products.

Trade Secret Litigation at the ITC

The ITC is a quasi-judicial administrative agency of the federal government.⁸ Among other roles, the ITC investigates and makes “determinations in proceedings involving imports claimed to injure a domestic industry” or violate IP rights.⁹ Although the overwhelming majority of ITC proceedings concern patent disputes,¹⁰ the Commission has seen a recent steep uptick in trade secret filings.¹¹

² Frank Holmes, *Texas Is Now Home to More Fortune 500 Companies Than Other State*, FORBES (May 26, 2022), <https://www.forbes.com/sites/greatspeculations/2022/05/26/texas-is-now-home-to-more-fortune-500-companies-than-any-other-state-and-im-not-surprised/?sh=1e36991c27d5>.

³ Shawn Shinneman, *Why These Texans Joined the Great Resignation*, TEXAS MONTHLY (Mar. 10, 2022), <https://www.texasmonthly.com/news-politics/great-resignation-texas-quitters/>.

⁴ Stefan Ellerbeck, *The Great Resignation is Not Over: A Fifth of Workers Plan to Quit in 2022*, WORLD ECON. FORUM (June 24, 2022), <https://www.weforum.org/agenda/2022/06/the-great-resignation-is-not-over/#:~:text=The%20Great%20Resignation%20is%20not,plan%20to%20quit%20in%202022>.

⁵ Morgan Smith, *40% of Workers Are Considering Quitting Their Jobs Soon—Here’s Where They’re Going*, CNBC (July 20, 2022), <https://www.cnbc.com/2022/07/20/40percent-of-workers-are-considering-quitting-their-jobs-soon.html>.

⁶ Shawn Shinneman, *Why These Texans Joined the Great Resignation*, TEXAS MONTHLY (Mar. 10, 2022),

<https://www.texasmonthly.com/news-politics/great-resignation-texas-quitters/>; Alyssa Flowers & Eli Rosenberg, *The Geography of the Great Resignation: First-time Data Shows Where Americans Are Quitting the Most*, WASH. POST (Oct. 22, 2021), <https://www.washingtonpost.com/business/2021/10/22/stat-es-labor-quitting-turnover-jolts/>.

⁷ TRADE SECRET LITIGATION REPORT 2021, LEX MACHINA 4 (2021).

⁸ *About the USITC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Oct. 31, 2022).

⁹ *About the USITC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Oct. 31, 2022).

¹⁰ *Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last visited Oct. 29, 2022).

¹¹ *Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)*, U.S. INT’L TRADE COMM’N,

The ITC's authority to investigate trade secret-based claims comes from Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337(a). Specifically, Section 337 authorizes the ITC to investigate complaints concerning "unfair methods of competition and unfair acts in the importation of articles" (i.e., misappropriation of trade secrets) when the importation and sale threatens injury to a domestic industry, prevents the establishment of such industry, or restrains trade and commerce in the U.S.¹²

If the ITC determines a violation exists, it can issue an exclusion order that prevents the infringing article from entering the country.¹³ Decisions by an administrative law judge ("ALJ") are reviewable by ITC Commissioners, and the final determination is appealable to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit has held that a "single federal standard" rather than any particular state law governs trade secret misappropriation claims at the ITC.¹⁴ This "federal standard" reflects an amalgamation of sources including the Restatement of Unfair Competition, the Uniform Trade Secrets Act ("UTSA"), the Restatement of Torts, the Defend Trade Secrets Act ("DTSA"), and federal common law.¹⁵ To prevail on a trade secret misappropriation claim at the ITC, the complainant must prove:

- 1) Existence of a protectable trade secret (that is of economic value, not generally known or readily ascertainable, and for which the complainant has taken reasonable precautions to keep secret);

- 2) the complainant owns the trade secret;
- 3) the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means; and
- 4) the respondent has used or disclosed the trade secret causing injury to the complainant.¹⁶

Just as with litigating in traditional forums, the existence of a protectable trade secret is a threshold issue at the ITC. And although not required to be specifically defined in ITC complaints, the tight discovery timetables in ITC proceedings may require litigants to identify the purported trade secrets early in the proceeding—in some cases, within just three weeks of the scheduling order entry.¹⁷ This early identification underscores the importance to practitioners of defining the scope of the protectable trade secret prior to the initiation of the ITC action.

Considerations for Bringing an ITC Proceeding

Importation and Domestic Industry Requirement

The ITC is not an appropriate forum for every trade secret misappropriation case. Critically, the misappropriation alleged must involve the **import of articles**—thereby limiting its scope to physical products imported into the United States.¹⁸ Relatedly, misappropriation of "intangible" trade secrets—like electronically transmitted data—are outside the scope of the ITC's authority if they are not incorporated into a physical object.¹⁹

https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last visited Oct. 29, 2022).

¹² 19 U.S.C. § 1337(a).

¹³ 19 U.S.C. § 1337(d).

¹⁴ *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1327 (Fed. Cir. 2011).

¹⁵ *In the Matter of Certain Bone Cements, Components Thereof & Prod. Containing the Same*, Comm'n Opinion, USITC Inv. No. 337-TA-1153, 2021 WL 278860, at *3 (Jan. 25, 2021).

¹⁶ *In the Matter of Certain Bone Cements, Components Thereof & Prod. Containing the Same*, Comm'n Opinion,

USITC Inv. No. 337-TA-1153, 2021 WL 278860, at *4 (Jan. 25, 2021).

¹⁷ See, e.g., *In the Matter of Certain Bone Cements, Components Thereof and Products Containing Same*, Inv. No. 337-TA_1153, Order No. 8 (May 9, 2019) (requiring final identification of all trade secret allegations by May 31, 2019).

¹⁸ See *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283 (Fed. Cir. 2015).

¹⁹ See *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283 (Fed. Cir. 2015) (holding that Section 337's use of "articles" means material things and did not cover electronically transmitted digital data).

Additionally, a complainant must also prove an actual or threatened injury to a domestic industry or trade and commerce to prevail on a trade secret claim at the ITC.²⁰ Defining the domestic industry as well as articulating the injury can be challenging. Federal regulations require the complainant to “state a specific theory and provide corroborating data to support the allegations” concerning the industry threat.²¹ For example, the complainant should provide data reflecting volume and trend of production, sales, and inventories, facility descriptions and number of workers involved, profit-and-loss information both as to the overall operations and the article at issue, and pricing information.²² This requires a fact-intensive inquiry on the part of the complainant before filing, and vague allegations as to industry and injury can be the downfall of an ITC complaint.

Condensed Discovery Period and Potential Sanctions

The speed of ITC litigations is also a double-edged sword. The compressed timetable means that litigants may only have around 5-6 months to conduct discovery,²³ a process that can last well over a year in traditional litigation forums. And at the ITC, the fact-dependent nature of trade secret litigation is often compounded by needing information from foreign countries during discovery.²⁴ Foreign companies may experience difficulties in coordinating with U.S. counsel in the compressed timeframe.

But failure to cooperate in discovery—even under time constraints—can result in sanctions from the ITC.²⁵ Sanctions can range from an inference that the withheld discovery would be

adverse to the non-disclosing party, to any other non-monetary sanction available under Federal Rule of Civil Procedure 37(b).²⁶

In situations involving egregious, bad faith conduct like spoliation—the ITC can enter a default judgment.²⁷ Indeed, several investigations in recent years have involved spoliation issues in the discovery process. As just one example, in *In Re Certain Lithium-Ion Batteries*, Inv. No. 337-TA-1159, the ALJ entered a default judgment against the foreign respondent for deleting documents directly relevant to the complainant’s claims during the pendency of the action.²⁸ Litigants should consider early discovery regarding potential spoliation issues, particularly if they suspect forensic investigations may be warranted.²⁹

Remedy: Injunctive Relief

Money damages are not available as relief in ITC litigation. A victory at the ITC results in exclusion order.³⁰ Ordinarily, the exclusion order applies to the respondent, but the ITC also has the authority to issue a general exclusion order if it determines so necessary to prevent circumvention of its limited order, or if there is a pattern and practice of violation and it is difficult to identify the source of infringing products.³¹ The ITC may also issue cease and desist orders to persons believed to be violating Section 337.³² From a practical standpoint, a prevailing complainant should spend time drafting their exclusion orders to define the articles sought to be excluded in an effort to minimize guesswork by Customs and Border Protection.³³

²⁰ 19 U.S.C. § 1337(a)(1)(A).

²¹ 19 C.F.R. § 210.12(a)(8).

²² 19 C.F.R. § 210.12(a)(8).

²³ Ross Todd, *What’s Up With All the Trade Secret Action at the ITC? Two Latham IP Litigators Weigh In*, AM. LAWYER at 2 (Mar. 1, 2021).

²⁴ § 8:13. Protective Action by the ITC—Procedure—Discovery, Corporate Counsel Guide to Unfair Comp § 8:13

²⁵ See generally 19 C.F.R. § 210.33.

²⁶ 19 C.F.R. § 210.33(b).

²⁷ 19 C.F.R. § 210.16(a)(2).

²⁸ *In the Matter of Certain Lithium Ion Batteries, Battery Cells, Battery Modules, Battery Packs, Components Thereof, & Processes Therefor Ord. No. 34: Initial*

Determination Granting Complainants Lg Chem Ltd. & Lg Chem Michigan Inc.’s Motion for Default Judgment, Contempt, & Sanctions, USITC Inv. No. 337-TA-1159, Order No. 34, 2020 WL 1504745 (Feb. 14, 2020), *aff’d by Commission*, 2021 WL 856373 (Mar. 4, 2021).

²⁹ *Expert Q&A on Recent Developments in Section 337 Trade Secret Investigations*, PRACTICE LAW INTELLECTUAL PROP. & TECH. (Nov. 5, 2021).

³⁰ 19 U.S.C. § 1337(d).

³¹ 19 U.S.C. § 1337(d)(1), (2).

³² See 19 U.S.C. § 1337(f).

³³ See Ross Todd, *What’s Up With All the Trade Secret Action at the ITC? Two Latham IP Litigators Weigh In*, AM. LAWYER, at 2 (Mar. 1, 2021).

Potential Benefits to ITC Litigation

Extraterritorial Reach

A key advantage to ITC litigation is that the ITC has extraterritorial jurisdiction that can reach acts of misappropriation occurring domestically or entirely abroad.³⁴ Relatedly, because the ITC only needs *in rem* jurisdiction over the products to issue exclusion orders, the complainant need not necessarily prove personal jurisdiction over the respondent.³⁵

Speed of Proceeding

Another potential benefit unique to ITC proceedings is their relative speed. In 2022, some cases reached a decision on the merits in less than 9 months.³⁶ On average, complainants can receive a decision from an administrative law judge in less than 18 months.³⁷ In contrast, 18 months is on the short end of the spectrum for a trade secret case to reach a merits determination in federal court. In fact, over the past five years, the median amount of time for a trade secrets case to reach trial in federal court was 26 months, and it is not uncommon for cases to take between 2.5 to 3 years to reach trial.³⁸

No Limitations Period

Unlike state and federal misappropriation actions, there is presently no limitations period applicable to ITC misappropriation actions either by statute or ITC precedent. But that's not to say

that prospective ITC-complainants should sit on their rights. Respondents may argue that filing delays invoke the equitable doctrines of waiver and laches, and the ITC may eventually address the consequences of waiting to bring suit in future investigations.³⁹

Parallel Litigation Considerations—Possibility of Preclusive Effect

Because ITC relief is injunctive, ITC actions often parallel a district court action for damages.⁴⁰ And although ITC decisions on patent issues are not preclusive in federal district court, at least one district court has applied preclusive effect to an ITC finding of misappropriation of trade secrets.⁴¹ Appellate courts have not yet considered the preclusive effect of ITC determinations regarding trade secret claims, but ITC litigants should consider pleading their ITC complaint by bringing multiple claims under DTSA, UTSA, and even state law standards in light of the potential to assert preclusion.⁴²

In sum, the ITC is a potentially underutilized forum for companies seeking injunctive relief to stop importation of products that misappropriate trade secrets. As employee mobility grows and the economy becomes increasingly globalized, the ITC presents another avenue for companies to protect their intellectual property.

³⁴ *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1335 (Fed. Cir. 2011) (concluding section 337 investigations apply extraterritorially).

³⁵ Esha Bandyopadhyay, *ITC Litigation: Introduction to Trade Secret Protection at the ITC*, FISH & RICHARDSON (Feb. 5, 2021), <https://www.fr.com/itc-litigation-trade-secret-protection/>.

³⁶ *Section 337 Statistics: Average Length of Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm#_ftnref5 (last updated Oct. 20, 2022).

³⁷ *Section 337 Statistics: Average Length of Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm#_ftnref5 (last updated Oct. 20, 2022).

³⁸ TRADE SECRET LITIGATION REPORT 2021, LEX MACHINA 14, Fig. 13 (2021). From 2015 to 2020, the

median time for a case to reach summary judgment was 20 months and to reach trial was 26 months, and many other cases in the middle 50% took up to 2.5 to over 3 years, respectively. *Id.*

³⁹ *Expert Q&A on Recent Developments in Section 337 Trade Secret Investigations*, PRACTICE LAW INTELLECTUAL PROP. & TECH. (Nov. 5, 2021).

⁴⁰ *Expert Q&A on Recent Developments in Section 337 Trade Secret Investigations*, PRACTICE LAW INTELLECTUAL PROP. & TECH. (Nov. 5, 2021).

⁴¹ *Manitowoc Cranes LLC v. Sany Am. Inc.*, No. 13-C-677, 2017 WL 6327551, at *5 (E.D. Wis. Dec. 11, 2017) (granting summary judgment and dismissing Wisconsin Uniform Trade Secret Act claims as collaterally estopped by ITC decision of misappropriation).

⁴² *Expert Q&A on Recent Developments in Section 337 Trade Secret Investigations*, PRACTICE LAW INTELLECTUAL PROP. & TECH. (Nov. 5, 2021).

2022 ANNUAL MEETING

La Cantera Resort & Spa – September 14-18, 2022 – San Antonio, Texas

The TADC Annual Meeting was held in San Antonio, Texas, September 14-18, 2022 at the beautiful La Cantera Resort & Spa. Rick Foster, Porter Rogers, Dahlman & Gordon, PC, San Antonio and Trey Sandoval, Mehaffy Weber, Houston assembled a program with 9.75 hours of CLE including 2.25 hours ethics. Topics ranged from “Let’s Find Out if we Really Have to Ride the Whole Way First: Permissive Appeal in Texas: to the ever-popular “Supreme Court Update” provided by Justice Brett Busby.



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2022 ANNUAL MEETING



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Mike Shipman, Christy Amuny, Doug Rees & Gayla Corley

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Brent Bishop



DRI Regional VP Mike Carter presents President Christy Amuny with the DRI Exceptional Performance Award



In Class

2022 ANNUAL MEETING



Justice Brett Busby



Mike Shipman receives the President's Award



President Amuny presents Past President Hayes Fuller with the TADC Founders Award



The passing of the gavel to incoming President Doug Rees



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AMICUS CURIAE COMMITTEE UPDATE

Jennie Knapp (Underwood Law Firm) filed an amicus to support the petition for mandamus in *In re East*, No. 22-0556 (Tex. Oct. 7, 2022). It is unusual because plaintiff and defendant filed a joint mandamus to overturn an order by a Harris County District Court for a virtual jury trial over the objection of all parties. The Supreme Court requested the trial judge respond, but no response was filed. This was a high visibility case that drew much attention. The petition argued that to order a remote jury trial over everyone's objection (1) is contrary to the applicable COVID emergency order, (2) violates TCPRC ch. 30, and (3) violates due course of law/due process right to an in-person jury. The Supreme Court issued an order that the trial court abused its discretion in light of its failure to give a reason to deny the joint objection, either in the order, on the record, and in a response to the Supreme Court.

Mike Eady (Thompson Coe) filed an amicus to support the petition for review in *Virilar v. Puente*, 613 S.W.3d 652 (Tex. App.—San Antonio 2020, pet. granted) (en banc). This is a med mal appeal for causing a debilitating condition – Wernicke's encephalopathy. The two critical issues are (1) allocating a \$3.3 million settlement credit between the patient and her child under TCPRC chap. 33, and (2) awarding most of the \$13 million in future medical expenses in a lump sum instead of periodic payments under TCRPC chap. 74, subch. K. After oral argument to a panel, the San Antonio Court *sua sponte* went en banc without waiting for a panel opinion; two justices on the original panel dissented and the third wrote the opinion for the en banc

majority. The majority concluded the Tex. Civ. Prac. & Rem. Code chap. 33 definition of 'claimant' for the purpose of settlement credits was unconstitutional. The Supreme Court has granted review and set argument for Oct. 26, 2022.

TADC has authorized Scott Stolley to file an amicus to support the petition for review on *American Honda Motor Co. v. Milburn*, No. 04-19-0085, 2021 WL 5504887, 20212 Tex. App. LEXIS 9512 (Tex. App.—Dallas Nov. 24, 2021, pet. filed) (mem. op.). The case arises from an auto collision. The plaintiff was a passenger on an Uber ride in a Honda minivan. The plaintiff sued three Uber-related entities, the van's owner, the driver, and Honda. After settling with the Uber-related entities, the plaintiff went to trial against Honda on a design-defect claim related to the seat belt design. The case presents a number of issues of potential interest:

- What kind of expert testimony is needed to rebut the presumption of no liability under CPRC 82.008 for designs that comply with federal safety standards?
- Was the plaintiff's "human-factors" expert qualified to offer testimony on the exception and on plaintiff's design-defect claim?
- Should Uber have been submitted in the proportionate responsibility question? The court of appeals affirmed the trial court's refusal to include Uber on the basis that Uber's responsibility was merely "derivative" of the

driver's responsibility. The Supreme Court has requested merits briefing.

TADC has authorized Roger Hughes (Adams & Graham) to file an amicus brief to support a motion for rehearing on the petition for mandamus in *In re Marquez*, No. 22-0696. Marquez asks to overturn an order granting a new trial in a bodily injury case. The jury awarded \$0 for noneconomic loss, but awarded \$19,000 for past medicals, \$5000 for future medicals, and \$1000 for physical impairment. The grounds for a new trial were that \$0 was against the great weight of the evidence. The standard of review for factual sufficiency challenges to noneconomic damage appears to be issue. The Supreme Court has recently granted review in three cases challenging what is the standard for factual sufficiency challenges. However, it denied the petition in the case.

TADC has authorized Peter Hansen (Jackson Walker) to file an amicus to support the mandamus petition in the court of appeals in *In re FEDEX Ground Packaging*, 609 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2021, orig. proc.), *rev'd in part and rem'd in part*, *In re Brown*, __ S.W.3d __, 2022 WL 411236, 2022 Tex. LEXIS 862 (Tex., Sept. 9, 2022). This is a hot button issue on whether TRCP 176 permits serving a trial subpoena upon the opposing party for corporate representative witnesses. FedEx moved to quash a trial subpoena for the corporate representative; the trial court denied the motion. The 14th COA majority found TRCP 199 did not permit trial subpoenas for corp rep; the dissent would follow federal practice. The Supreme Court held the 14th COA failed to address Brown's arguments under TRCP 176 or FedEx's arguments the subpoena was abusive; it directed the 14th Court to decide the

remaining issues. The 14th Court has vacated its prior decision and taken the matter under submission.

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BANDITS AND ROBBERS AT THE WATERING HOLE: ERROR PRESERVATION IN JURY TRIALS

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Texas case law is full of great litigation wins that were overturned on appeal, with disastrous results. An appellate court may reverse and remand a defendant's winning case for another expensive trial or may render judgment that a plaintiff takes nothing on a multi-million dollar jury verdict. As defense counsel, you may have great defenses for your client, but, just like an Old West stagecoach driver, you must guard your case from "robbers and bandits" that can steal its value if you do not preserve error in the trial court.²

GENERAL RULE FOR ERROR PRESERVATION – TRAP 33.1

To preserve error, TRAP 33.1(a) requires the record to show "the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint . . . [and] complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure."³ The record must also show the trial court's ruling or refusal to rule and the complaining party's objection to the refusal to rule.⁴

This rule can be simplified into two steps: (1) make a clear, specific objection while the trial court still has time to correct the error; and (2) obtain a ruling.

For preservation of error, two fundamental principles apply: fairness and judicial economy. A party "should not be permitted to waive, consent to, or neglect to complain about an error at trial" and then surprise its opponent by raising the complaint on appeal for the first time.⁵ These requirements help avoid "gotcha" games and the expense and delay of remands and repeated litigation. This article provides a brief map of some places on the "litigation road" where you must preserve error.

BEFORE TRIAL

Pleadings. Before trial, Defendants should review TRCP 94 to make sure any applicable affirmative defenses have been pled. When an affirmative defense is not pled or tried by consent, it is waived, and may not be raised on appeal.⁶ Also review your opponent's pleadings before trial to avoid trying new issues by consent.⁷

Continuances. If you have not had adequate time to prepare for trial, you can still preserve

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² Texas Rules of Civil Procedure are referred to herein as "TRCP." Texas Rules of Evidence are referred to herein as "TRE." Texas Rules of Appellate Procedure are referred to herein as "TRAP."

³ Tex. R. App. P. 33.1(a)(1).

⁴ Tex. R. App. P. 33.1(a)(2).

⁵ *Mansions in the Forest, L.P. v. Montgomery Cnty*, 365 S.W.3d 314, 317 (Tex. 2012).

⁶ *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 135-36 (Tex. 2014).

⁷ Tex. R. Civ. P. 67.

error by moving for a continuance. Failure to ask for a continuance, or to object to a trial court's failure to grant a continuance, and obtain a ruling on the objection, will waive any error on appeal.⁸ A motion for continuance must be in writing, for sufficient cause, and supported by affidavit.⁹

Voir Dire. Common examples of error that may occur during voir dire include:

- trial court refuses to allow a permissible line of questions,¹⁰
- counsel asks an improper question or makes an improper statement,¹¹
- a panelist gives an erroneous answer or prejudicial statement,¹² or
- a juror gives an incorrect answer on voir dire examination.¹³

To preserve error during voir dire, you must have the court reporter record the complete voir dire, including bench conferences.¹⁴ A complete voir dire includes an inquiry about the subject on voir dire, specific rather than general questions, clear and unambiguous questions, and counsel's pursuit of inquiries suggested by the panelists' answers.¹⁵

To challenge the denial of a voir dire question on appeal, the record must also contain the question the party wanted to ask and the court's ruling that prevented the question.¹⁶ Although a list of all questions of an area of inquiry that

the trial court has foreclosed is not required, counsel should alert the trial court of the specific manner in which counsel intends to pursue the inquiry.¹⁷

Counsel also must object to any improper questions or statements and "pursue an adverse ruling" to preserve error. That is, if the objection is sustained, the attorney must request an instruction for the jury to disregard the improper statement or question.¹⁸ If the court grants the request and instructs the jury to disregard, counsel must then move for a mistrial to preserve any error.¹⁹

To preserve error when the trial court refuses a challenge for cause, counsel must follow the steps set out in *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 90 (Tex. 2005) and *Hallett v. Houston Nw. Med Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985). The attorney must (1) challenge the panelist for cause, obtain a ruling on the record, and make sure that the record includes any discussion with the for-cause panelist at the bench; (2) object to the exhaustion of peremptory strikes; and (3) turn in the strike list, thus notifying the court that one or more objectionable jurors remain on the panel.²⁰

A party may also make a *Batson* challenge²¹ if it believes that the other party has used a peremptory challenge to improperly exclude a

⁸ *Lemons v. EMW Mfrg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988).

⁹ Tex. R. Civ. P. 251; *Echendu v. Huerta*, No. 05-15-01351-CV, 2017 WL 1908622, at *2 (Tex. App.—Dallas May 9, 2017, no pet.).

¹⁰ *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989).

¹¹ See *Cortez ex rel Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 95 at n.3 (Tex. 2005).

¹² *Century 21 Real Est. Corp. v. Hometown Real Est. Co.*, 890 S.W.2d 118, 129 (Tex. App.—Texarkana 1994, writ denied).

¹³ Tex. R. Civ. P. 327(a); *Jefferson v. Helen Fuller & Assocs. Health, Inc.*, No. 01-11-00199-CV, 2012 WL 2357431, at *8 (Tex. App.—Houston [1st Dist.] June 21, 2012, pet. denied) (mem. op.).

¹⁴ See Tex. R. Civ. P. 13.1(a); *City of San Antonio v. Willinger*, 345 S.W.2d 577, 578 (Tex. Civ. App.—San Antonio 1961, no writ).

¹⁵ *Willinger*, 345 S.W.2d at 578-79.

¹⁶ *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2001).

¹⁷ *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 758-60 (Tex. 2006).

¹⁸ See *Tex. Emp. Ass'n v. Loesch*, 538 S.W.2d 435, 441 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

¹⁹ See *Rosewood Property Co. v. Hardy*, 05-94-01227-CV, 1995 WL 479656 (Tex. App.—Dallas 1995, no writ).

²⁰ See *Cortez*, 159 S.W.3d at 90; Tex. R. App. P. 33.1.

²¹ This type of challenge is called a *Batson* challenge after the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), holding that racially based jury challenges are unconstitutional.

jury panelist on the basis of a protected classification, such as race or gender.²²

DURING TRIAL

Evidentiary Rulings

Texas Rule of Evidence 103. TRE 103 sets forth the requirements for preservation of error regarding the admission or exclusion of evidence.²³ Error in a ruling to admit or exclude evidence is found only if it affects a substantial right of the party. In deciding whether to challenge an evidentiary ruling on appeal, remember that appellate courts review a trial court's ruling on evidentiary matters under an abuse of discretion standard; must uphold the trial court's evidentiary rulings under any legitimate basis; and will not reverse a judgment based on admitted or excluded evidence absent a showing that the error probably resulted in an improper judgment.²⁴

Timely and Specific Objection. A timely and specific objection to the admission of evidence is required to preserve error.²⁵ Testimonial evidence must be challenged as soon as the objectionable question is asked, or as soon as the witness begins to give objectionable testimony. Once the jury has been exposed, and no objection is made, error is waived.²⁶ An objection must also be specific enough for the trial court to understand it and make an informed ruling, and for the offering party to correct the problem if possible.²⁷ To preserve

error, it must specifically point out the portion of the evidence to which you object²⁸ and name the particular rule of evidence that will be violated by admission of the evidence.²⁹

Taking a Witness on Voir Dire. If you have reason to believe that a witness is not qualified to testify due to lack of knowledge, you must object, and if the objection is overruled, request the opportunity to take the witness on voir dire outside the presence of the jury before testimony begins.³⁰ Once your voir dire is complete, repeat your objection.³¹

Object Even if You Have a Motion in Limine. Even if you have obtained a ruling on a motion in limine, you must still object to the evidence when it is offered, and obtain a ruling, or you will not preserve the error for appeal.³²

Make an Offer of Proof. If your evidence is excluded, you must make an offer of proof outside the presence of the jury and obtain a ruling on your objection to preserve error.³³ First, offer the evidence at trial and, if an objection is made, explain the purpose for which the evidence is offered, why it is admissible, and obtain a ruling from the court. If the judge rules it is inadmissible, make an offer of proof through a bill of exceptions of the "precise evidence" you seek to admit.³⁴ The excluded evidence must also appear in the record for appellate review.³⁵ You can preserve testimonial evidence by a summary, or a question-and-answer format outside the

²² *United Rentals North Am., Inc. v. Evans*, 608 S.W.3d 449, 477 (Tex. App.—Dallas 2020, pet. filed).

²³ Tex. R. Evid. 103.

²⁴ *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

²⁵ *Bay Area Healthcare Grp. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007).

²⁶ *See In re R.A.*, Nos. 14-04-00863-CV, 14-04-01180-CV, 2006 WL 1735122, at *2 (Tex. App.—Houston [14th Dist.] June 27, 2006, no pet.) (mem. op.).

²⁷ *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex.1989).Tex. R. Evid. 103(a)(1).

²⁸ *Sunl Grp., Inc. v. Zhejiang Yongkang Top Imp. & Exp. Co.*, 394 S.W.3d 812, 816 (Tex. App.—Dallas 2013, no pet.).

²⁹ *City of Mesquite v. Moore*, 800 S.W.2d 617, 619 (Tex. App.—Dallas 1990, no writ).

³⁰ *See Parrish v. Rice Foods Market, Inc.*, No. 14-01-00100-CV, 2002 WL 517134, at *1-2 (Tex. App.—Houston [14th Dist.] April 4, 2002, no pet.).

³¹ *See Marling v. Maillard*, 826 S.W.2d 735,739 (Tex. App.—Houston [14th Dist.] 1992, no writ).

³² *Blommaert v. Borger Country Club*, No. 07-12-00337-CV, 2014 WL 1356707, at *2 (Tex. App.—Amarillo 2014, pet. denied).

³³ Tex. R. Evid. 103(a)(2).

³⁴ The offer must show on the record the substance of the evidence that was excluded, and the correct rule of evidence and theory of admissibility. *See Sandberg v. STMicroelectronics, Inc.*, 600 S.W.3d 511, 531 (Tex. App.—Dallas 2020, pet. denied).

³⁵ Tex. R. App. P. 33.1(a)(1)(B).

presence of the jury.³⁶ But if a party requests the question-and-answer format, the court must direct the offer of proof be made in such format.³⁷ Documentary evidence is preserved by asking the court reporter to mark the document as an offer of proof, identify it with an exhibit number, and file it in the reporter's record with the other exhibits.³⁸

Obtain a Ruling. “An instruction to ‘move along’ is not a ruling.”³⁹ If the trial court refuses to rule on your objection, object to the court's refusal to rule and make sure that the appellate record contains your original objection, the trial court's refusal, and your objection to the trial court's refusal to rule.⁴⁰

Waiver of Objection. If similar evidence to the same effect is offered and admitted without objection, objections to later evidence may be waived.⁴¹

Running Objections. Avoid running objections unless continuing objections are likely to turn a judge or jury against your client. If you do use a running objection, request it on specific grounds; obtain a ruling; make a new request if similar testimony is sought from another witness; and be sure to make proper objections to any other objectionable testimony while you have a running objection in place.⁴²

Motion to Strike. Once testimony has been heard by the jury, it remains before it even if an

objection has been sustained, unless the jury has been instructed to disregard it.⁴³ To preserve error, request the court to have the answer struck from the record and to instruct the jury to disregard the testimony.⁴⁴

Motion for Mistrial. The last step to preserve error when a jury has heard inadmissible evidence is a motion for mistrial. If counsel has promptly and properly objected to the evidence, requested a motion to strike and an instruction to disregard, if the court grants those requests, it will be presumed that the jury followed the instruction, curing any error.⁴⁵ Thus, counsel must “pursue an adverse ruling” by moving for a mistrial to preserve error.⁴⁶

Expert Witnesses

Expert Testimony. Objections to an expert's reliability or qualifications can be waived if not properly raised and ruled upon in the trial court. “[W]hen a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis.”⁴⁷ Failure to object to an expert's qualifications will waive that objection to his testimony.⁴⁸ Objections to an expert's testimony must also be timely – either

³⁶ Tex. R. Evid. 103(b); *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.], pet. denied).

³⁷ Tex. R. Evid. 103(c).

³⁸ See Tex. R. Civ. P. 75a; *Owens-Illinois Inv. v. Chatham*, 899 S.W.2d 722, 731 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

³⁹ *Nguyen v. Lijun Zhang*, No. 01-12-1162-CV, 2014 WL 4112927, at *4 (Tex. App.—Houston [1st Dist.] Aug. 21, 2014, no pet.).

⁴⁰ See Tex. R. App. P. 33.1(a)(2)(B), 33.2; *Goodchild v. Bombardier-Rotax GMBH Motorenfabrik*, 979 S.W.2d 1, 6-7 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

⁴¹ *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 2011).

⁴² *City of Houston v. Riggins*, 568 S.W.2d 188, 190 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.—Fort Worth 1988, writ denied); *Denbury Green Pipeline-Texas, LLC v. Star-L Land Co.*, No. 09-10-00475-CV,

2012 WL 585105, at *2 (Tex. App.—Beaumont Feb. 23, 2012, no pet.).

⁴³ See *State Bar v. Evans*, 774 S.W.2d 656, 658 n. 6 (Tex. 1989).

⁴⁴ *Brown v. N. River Ins. Co. of New Jersey*, No. C14-89-00960-CV, 1990 WL 98520, at *2 (Tex. App.—Houston [14th Dist.] July 12, 1990, no writ).

⁴⁵ See *Tisdall v. Varebrook*, No. 04-19-00538-CV, 2021 WL 3173914, at *10 (Tex. App.—San Antonio July 28, 2021, no pet.).

⁴⁶ *In Int. of O.Z.O.*, No. 14-14-00768-CV, 2015 WL 5093198, at *2 (Tex. App.—Houston [14th Dist.] Aug. 27, 2015, no pet.).

⁴⁷ *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

⁴⁸ *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 143-44 (Tex. 2004).

before trial or as soon as it is offered.⁴⁹ Where appropriate, you can also take an expert witness on voir dire.⁵⁰

If your expert is excluded from testifying, preserve error by making a specific objection, an offer of proof, and obtaining a ruling, all on the record.⁵¹

Amendment of Pleadings

Sometimes it is necessary to amend pleadings during trial, such as when you introduce evidence that is unsupported by the pleadings or you learn of a defect, fault, or omission in your pleadings.⁵² You must request amendment before the charge is submitted to the jury to conform the pleadings to the evidence presented at trial.⁵³ Pleadings may be amended to correct errors and defects, to add or delete claims or defenses, or to conform the pleadings to the evidence or the verdict.⁵⁴ The right to amend is subject only to the opposing party's right to show surprise or prejudice.⁵⁵ If the opposing party does not show surprise or prejudice, courts freely permit amendments when they serve the presentation of the merits of the case.⁵⁶

If a plaintiff moves to amend, defense counsel should object if the pleading attempts to add new claims or damages, or if the plaintiff does not seek leave to amend or does not file written amended pleadings.⁵⁷ Amended pleadings that

add a new cause of action (or defense) are prejudicial on their face.⁵⁸

When an issue is tried by consent, no amendment of pleadings is necessary, but a party may amend its pleadings to conform them to the evidence when the unpleaded issue was fully developed at trial without objection.⁵⁹ To avoid trial by consent, you must object to evidence unsupported by the pleadings, and to the submission of any jury question on such an issue.⁶⁰

Motion to Reopen Evidence

TRCP 270 “allows a trial court to permit additional evidence to be offered at any time, when it clearly appears to be necessary to the due administration of justice.”⁶¹ In deciding whether to reopen evidence, the trial court considers the moving party's diligence in obtaining the evidence; whether the proffered evidence is decisive; any possible undue delay; and any injustice the granting of the motion could cause.⁶² You must object to a motion to reopen evidence to preserve error.⁶³

Jury Argument

In rare instances, you may need to object to jury argument. An improper jury argument can be either curable or incurable.⁶⁴ If an instruction to disregard can eliminate the harmful effect of the jury argument, the argument is curable.⁶⁵ When a jury argument is improper but curable, the objecting party must

⁴⁹*Dallas Cty. v. Crestview Corners Car Wash*, 370 S.W.3d 25, 43 n. 15 (Tex. App.—Dallas 2012, pet. denied).

⁵⁰ Tex. R. Evid. 705(b).

⁵¹ *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex. App.—Dallas 2008, no pet.).

⁵² See Tex. R. Civ. P. 63, 66; *Dallas City Limits Prop. Co., L.P. v. Austin Jockey Club, Ltd.*, 376 S.W.3d 792, 797 (Tex. App.—Dallas 2012, pet. denied).

⁵³ See *State Bar v. Kilpatrick*, 874 S.W.2d 656, 657-58 (Tex. 1994) (amendment at charge conference).

⁵⁴ Tex. R. Civ. P. 63, 66.

⁵⁵ *Dallas City Limits*, 376 S.W.3d at 797-98.

⁵⁶ See Tex. R. Civ. P. 63, 66.

⁵⁷ See Tex. R. App. P. 33.1; *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex. 2000).

⁵⁸ *Zarate v. Rodriguez*, 542 S.W.3d 26, 37-38 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). The trial court may, in its discretion, allow amendment of pleadings even if a new cause of action is introduced. *Id.*

⁵⁹ See Tex. R. Civ. P. 66, 67.

⁶⁰ *Id.*; see also *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009).

⁶¹ *Naguib v. Naguib*, 137 S.W.3d 367, 372-73 (Tex. App.—Dallas 2004, pet. denied); Tex. R. Civ. P. 270.

⁶² *Id.*

⁶³ *MCI Telecomms. v. Tarrant Cty. Appr. Dist.*, 723 S.W.2d 350, 353 (Tex. App.—Fort Worth 1987, no writ).

⁶⁴ See *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 721 (Tex. App.—Dallas 2011, pet. denied).

⁶⁵ *Living Ctrs. of Tex. Inc. v. Penalver*, 256 S.W.3d 678, 680-81 (Tex. 2008) (per curiam).

promptly object at the time the argument is made, obtain a ruling on the objection, and if sustained, request an instruction to disregard.⁶⁶ If the trial court grants a party's objection and issues an instruction to disregard, it can cure any probable harm.⁶⁷ In the rare case where an improper jury argument is considered incurable, a contemporaneous objection is not required.⁶⁸ An incurable argument is one that is so inflammatory and prejudicial that an instruction to disregard cannot undo its harm.⁶⁹

Jury Charge Error

Preserving error in a jury charge is vital to your appeal. A party must make the trial court aware of the complaint, timely and plainly, and obtain a ruling.⁷⁰

Informal Charge Conference. Typically, the trial court will hold an informal charge conference before closing arguments. Be sure to submit your proposed jury charge by the court's scheduling order deadline.⁷¹ The trial court usually assembles the charge from the proposed charges submitted pretrial or with the attorneys during the informal charge conference. Remember, *objections made during the informal charge conference do not preserve error.*⁷²

Time to Examine the Charge. Once the court prepares the proposed charge, the parties must have a reasonable time to inspect it and make objections.⁷³ If the trial court refuses to allow a

reasonable time to examine the charge, object on the record and obtain a ruling before the charge is read to the jury, explaining how much time was given to review the charge; how much time was necessary; why the charge was too complex and lengthy to examine in the time given; and that the party's lack of time prevented it from making an adequate record for appeal.⁷⁴

Formal Charge Conference. The formal charge conference, with the court reporter present, is the critical time for the parties to make all of their objections to the charge, present requests for additional questions and instructions, and obtain rulings on all objections and requests. To preserve error, a party must challenge defective submissions in a charge, or submit written requests for additional questions, instructions, and/or definitions that are omitted from the charge.⁷⁵ Objections to the charge, requests for additional questions, instructions, and definitions are *not* interchangeable.⁷⁶ This is a highly technical area of trial practice. For details on this procedure, parties should review TRCP 271-279 to ensure parties are making proper objections and tendering proper requests during the jury charge conference.⁷⁷

Motion for Directed Verdict

A motion for directed verdict asks the court to render judgment without submitting a question to the jury "because there is nothing for a jury

⁶⁶ *Wal-Mart Stores v. Bishop*, 553 S.W.3d 648, 676 (Tex. App.—Dallas 2018, pet. granted, aff'd as modified w.r.m.).

⁶⁷ *Alonzo v. John*, 647 S.W.3d 764, 784 (Tex. App.—Houston [14th Dist.] 2022, pet. filed).

⁶⁸ *PopCap Games*, 350 S.W.3d at 721.

⁶⁹ *Nguyen v. Myers*, 442 S.W.3d 434, 442 (Tex. App.—Dallas 2013, no pet.). A complaint of incurable jury argument may be brought and preserved in a motion for new trial. See *id.*; Tex. R. Civ. P. 324(b)(5). Examples of incurable jury argument include "appeals to racial prejudice; unsupported charges of perjury; unsupported, extreme, and personal attacks on opposing parties and witnesses; and baseless accusations of witness tampering." *Hopkins v. Phillips*, No. 05-18-01143-CV, 2019 WL 5558585, at *2 (Tex. App.—Dallas Oct. 29, 2019, pet. denied).

⁷⁰ See *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919-920 (Tex. 2015).

⁷¹ See Tex. R. Civ. P. 166(k).

⁷² See *Meyers v. 8007 Burnet Holdings, LLC*, 600 S.W.3d 412, 421-22 (Tex. App.—El Paso 2020, pet. denied).

⁷³ Tex. R. Civ. P. 272; *King Fisher Mar. Serv. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014).

⁷⁴ See, e.g., *Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

⁷⁵ See Tex. R. Civ. P. 273; *Railroad Comm'n of Texas v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 571 (Tex. 2016).

⁷⁶ See Tex. R. Civ. P. 273.

⁷⁷ See Tex. R. Civ. P. 271-279.

to decide.”⁷⁸ It may be made orally or in writing and shall state the specific grounds for the motion.⁷⁹ Trial courts may direct a verdict because the movant is entitled to judgment as a matter of law when there is no evidence to support a finding for its opponent’s claim or defense; the evidence in support of the claim or defense is conclusive; or some rule of law is determinative of the case.⁸⁰

A motion for directed verdict can be made after plaintiff rests⁸¹ or after defendant rests.⁸² Either party may also make a motion for directed verdict after both sides close.⁸³ If the trial court overrules a motion for directed verdict made earlier in the trial, you must re-urge the motion at the close of evidence to preserve error and obtain a ruling before the verdict is returned.⁸⁴

Jury Deliberations

Jury Questions to Trial Court and Supplemental Instructions. During deliberations, the jury may need assistance from the court. The jury may communicate with the trial judge either “verbally or in writing,” through its presiding juror in open court.⁸⁵ When the jury desires further instructions, the jury shall appear in open court as a body and make a request in writing through its presiding juror.⁸⁶

The court may also give additional instructions to the jury on matters of law.⁸⁷ These additional

instructions may be given in response to a jury request or on the court’s own motion.⁸⁸ Rule 286 also requires additional instructions to be given in writing.⁸⁹ The trial court must also give counsel the right to object to any supplemental instructions before they are read to the jury.⁹⁰ In its discretion, the trial court may also allow additional argument by counsel.⁹¹ If the attorneys are absent from the courtroom during supplemental instructions, or otherwise fail to object, error is waived.⁹²

“Dynamite” Charge. When a jury is having difficulty reaching a verdict, the court may issue an “Allen charge,”⁹³ or “dynamite charge.”⁹⁴ Such supplemental charges may not be impermissibly coercive.⁹⁵ To preserve error that the supplemental charge is impermissibly coercive, the party must object before the court submits the supplemental charge to the jury and identify and explain each coercive statement.⁹⁶

Post-Verdict Motions

These motions are filed after the jury verdict but before the judgment is signed.⁹⁷

Motion for Judgment on the Verdict. After the jury reaches its verdict, the winning party may move for judgment on the verdict. The motion should include a proposed judgment for

⁷⁸ *Griffin v. Am. Zurich Ins. Co.*, No. 05-19-00630-CV, 2021 WL 1558736, at *4 (Tex. App.—Dallas Apr. 21, 2021, pet. denied); Tex. R. Civ. P. 268.

⁷⁹ 2021 WL 1558736, at *4.

⁸⁰ See *Prudential Ins. Co. v. Fin. Rev. Servs.*, 29 S.W.3d 74, 77 (Tex.2000).

⁸¹ See *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 82 (Tex.2003).

⁸² See *id.*

⁸³ See *Stearns v. Martens*, 476 S.W.3d 541, 546 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

⁸⁴ Tex. R. App. P. 33.1(a); *Am. Pride Xpress Logistics, Inc. v. Joe Jordan Trucks, Inc.*, No. 05-20-00281-CV, 2021 WL 5754807, at *4 (Tex. App.—Dallas Dec. 3, 2021, no pet.) (mem.op.).

⁸⁵ Tex. R. Civ. P. 285; *Bellino v. Comm. For Lawyer Disc.*, 124 S.W.3d 380, 389 (Tex. App.—Dallas 2003, pet. denied).

⁸⁶ *Id.*; Tex. R. Civ. P. 286.

⁸⁷ Tex. R. Civ. P. 286; see also *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ).

⁸⁸ *Id.*

⁸⁹ Tex. R. Civ. P. 286; *Bellino*, 124 S.W.3d at 389.

⁹⁰ *Interest of E.M.*, 494 S.W.3d 209, 230 (Tex. App.—Waco 2015, pet. denied).

⁹¹ See *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 433 (Tex. App.—Fort Worth 1978, writ dism’d).

⁹² *Interest of E.M.*, 494 S.W.3d at 230.

⁹³ *Allen v. U.S.*, 164 U.S. 492 (1896).

⁹⁴ *Stevens v. Travelers Ins.*, 563 S.W.2d 223, 226 (Tex. 1978).

⁹⁵ *In re Commitment of Jones*, 602 S.W.3d 908, 915 at n. 3 (Tex. 2020).

⁹⁶ See, e.g., *Golden v. First City Nat’l Bank*, 751 S.W.2d 639, 642 (Tex. App.—Dallas 1988, no writ); see also *Jones*, 2022 WL 325390, at *7.

⁹⁷ See Tex. R. Civ. P. 301, 305.

the court to sign.⁹⁸ Losing parties may move the court to render a judgment on the verdict while reserving their right to challenge the judgment on appeal. A losing party's motion should state that it disagrees with the result of the proposed judgment and its contents, only agrees to the form, and intends to challenge the judgment on appeal.⁹⁹ A losing defendant may also file a motion to require the plaintiff to elect its damages under the "election of remedies" doctrine.¹⁰⁰ A motion for judgment on the verdict preserves error if the trial court rejects or modifies the proposed judgment,¹⁰¹ and is automatically overruled by the entry of a different judgment than the one presented.¹⁰²

Motion for Judgment Notwithstanding the Verdict. A motion for JNOV requests the trial court to disregard the findings of the jury and enter judgment for the movant. It must be made in writing,¹⁰³ identify the findings the court should disregard, give the reasons and legal authority for why they should be disregarded, and request that the court enter a judgment on the proper findings, or enter judgment contrary to all of the jury's findings.¹⁰⁴ It should also include a draft of the movant's proposed judgment. Both a JNOV motion and a motion to disregard preserve arguments based on "no evidence" and "as a matter of law" for appeal.

Motion to Disregard. A motion to disregard asks the court to disregard only some of the jury's findings and sign a judgment on the remaining portions of the verdict.¹⁰⁵ A court may also disregard a finding based on an immaterial jury question.¹⁰⁶

Post-Judgment Motions: Motion for New Trial

A motion for a new trial must be filed when evidence must be heard (such as jury misconduct, newly discovered evidence, or the failure to set aside a default judgment), the evidence is factually insufficient to support a jury finding, a jury finding is against the great weight and preponderance of the evidence, the jury's damages award is inadequate or excessive, or an incurable jury argument occurred.¹⁰⁷ A timely motion for new trial will preserve factual sufficiency complaints and extend the timetable to appeal.¹⁰⁸ An order granting a motion for new trial must be in writing and signed by the judge,¹⁰⁹ and must "provide litigants with 'an understandable, reasonably specific explanation' for setting aside a jury verdict and ordering a new trial."¹¹⁰ This is satisfied when the court gives "a reason for which a new trial is legally appropriate" and "is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand."¹¹¹

In conclusion, at trial, always remember the basic rules of error preservation. If you see the trial court making an error, follow TRAP 33.1 by making a specific objection on the record, and getting a ruling from the court. By doing so, you will help bring your client safely to the end of the litigation road by preserving error for appeal.

⁹⁸ See *Hooks v. Samson Lone Star, L.P.*, 457 S.W. 3d 52, 67 (Tex. 2015).

⁹⁹ See *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989).

¹⁰⁰ See *Waite Hill Servs. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998).

¹⁰¹ See, e.g., *Emerson v. Tunnell*, 793 S.W.2d 947, 947-48 (Tex. 1990).

¹⁰² Tex. R. App. P. 33.1(a)(2)(A); see also *Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997).

¹⁰³ Tex. R. Civ. P. 301; see also *Law Offices of Windle Turley, P.C. v. French*, 140 S.W.3d 407, 414 (Tex. App.—Fort Worth 2004, no pet.).

¹⁰⁴ *Byun v. Hong*, 641 S.W.3d 821, 830 (Tex. App.—Tyler 2022, no pet.).

¹⁰⁵ See Tex. R. Civ. P. 301.

¹⁰⁶ See *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 890-91 (Tex. 2020).

¹⁰⁷ Tex. R. Civ. P. 324.

¹⁰⁸ See Tex. R. App. P. 26.1(a); Tex. R. Civ. P. 324.

¹⁰⁹ Tex. R. Civ. P. 329b(c); *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009).

¹¹⁰ *In re Bent*, 487 S.W.3d 170, 173 (Tex. 2016).

¹¹¹ *Id.*

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By: Raj Auja & Brandon Coony
Porter Rogers Dahlman & Gordon, P.C.,
San Antonio

THE CURRENCY CHANGES ALONG THE ROAD: PAID AND INCURRED AND DISCOVERY OF USUAL AND CUSTOMARY CHARGES FOR MEDICAL EXPENSES POST - *K&L AUTO CRUSHERS*

It is common in personal injury cases to have medical expenses based on excessive billed charges for medical treatment provided pursuant to letters of protection. In cases where there is a surgical recommendation, you can expect the Plaintiff's physician to provide a surgical recommendation with an estimated cost for the proposed medical care based on inflated, excessive billed charges, sometimes exceeding high six-figures.

Whether the Plaintiff will even consider undergoing the proposed treatment becomes almost irrelevant because the excessive billed charge estimate becomes the driving force in settlement negotiations and risk assessment when advising your client on potential exposure. In addition, the ease with which a Plaintiff-friendly physician can come up with a billed charge estimate for future medical care is disproportionately convenient compared to the work a Defendant must do in order to rebut the inflated damage estimate. The risk is minimal for the Plaintiff to advance excessive billed charges because the Plaintiff-friendly providers accept a fraction of the billed charges as payment at the conclusion of the case.

However, regardless of whether the Plaintiff's damages are based on past medical care or the purported need for future medical care, Texas law mandates that recovery of medical expenses is limited to expenses that are reasonable. *E.g.*, *Haygood v. De Escabedo*, 356 S.W.3d 390, 391

(Tex. 2011) ("Damages for wrongful personal injury include the reasonable expenses for necessary medical care."). Of course, what constitutes a "reasonable" expense depends on which side of the case you are on; nevertheless, the standard for recovery of medical expenses is clear: a claimant is limited to recovery of reasonable medical expenses which have either been paid or incurred. *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 249 (Tex. 2021) ("But section 41.0105 is not the only limit on a claimant's recovery of medical expenses. In fact, it expressly imposes the "paid or incurred" limitation '[i]n addition to any other limitation under law.' One such "other limitation" is the common-law requirement that the amount of recoverable expenses be reasonable.").

While the standard governing recovery of medical expenses is clear, what constitutes a "reasonable" expense is less clear. Moreover, how and where to get evidence of a reasonable medical expense has been subject to debate. However, the recent *K & L Auto Crushers* case provides a roadmap for Defendants to obtain evidence of reasonable medical expenses from the healthcare providers who submit bills and estimates for future care based on excessive billed charges. This paper examines the *K & L Auto Crushers* case and how to utilize it to minimize the effect of excessive billed charges in Texas personal injury litigation.

I. *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 133 (Tex. 2018)—the predecessor to *K & L Auto Crushers*

Prior to the Texas Supreme Court’s May 2021 *K & L* opinion, the Court in, *In re North Cypress Medical Center Operating Company, Ltd.*, 559 S.W.3d 128 (Tex. 2018) examined whether the trial court abused its discretion by requiring a hospital to disclose its reimbursement rates from private insurance and public payers for the services it provided to a personal injury plaintiff. *North Cypress*, 559 S.W.3d at 129 (“The trial court’s order at issue in this mandamus proceeding requires the defendant hospital to produce information regarding its reimbursement rates from private insurers and public payers for the services it provided to the plaintiff.”). *North Cypress* involved a hospital lien dispute between a personal injury Plaintiff and a hospital pertaining to emergency care provided to the Plaintiff after an automobile accident. *Id.* The hospital filed a lien seeking payment in the amount of \$11,037.35 which reflected its billed charges for the services at issue. *Id.*

The personal injury Plaintiff settled her case against the tortfeasor for \$17,380, “attributing \$9,404 to medical expenses stemming from North Cypress’s services.” *North Cypress*, 559 S.W.3d at 130. When it was time to settle Plaintiff’s hospital bill, the hospital refused to accept the \$3,500 offered by Plaintiff as the “reasonable and necessary charges” for the services at issue. *Id.* at 130 n.1. Plaintiff then filed suit seeking a declaratory judgment that the hospital’s charges were unreasonable and that its “hospital lien was invalid.” The hospital counterclaimed with a suit on a sworn account claim. *Id.* at 130. In connection with the hospital lien case, the Plaintiff served discovery requests on North Cypress seeking documents related to reimbursement rates from private insurers and public payers. *North Cypress*, 559 S.W.3d at 130. The hospital objected to the requests, sought protection from the trial court and the Plaintiff filed a motion to compel. *Id.* After being ordered to produce a narrowed scope of documents and being denied mandamus relief at the court of appeals, North Cypress sought relief in the Texas Supreme Court.

Upon reviewing the trial court’s discovery order compelling the hospital to produce the

information requested pursuant to the discovery requests quoted above, the Court determined that the information requested was relevant to the enforceability of a hospital lien. *North Cypress*, S.W.3d at 131. The hospital asserted that the amounts it received from private insurers had no relation to the amount Plaintiff owed for the services at issue because Plaintiff’s insurance carrier was not implicated and because no bills were submitted to an insurance carrier. However, the Court rejected the hospital’s argument, finding instead that the “central issue in a case challenging such a lien is what a reasonable and regular rate would be.” *North Cypress*, 559 S.W.3d at 133. *North Cypress*, 559 S.W.3d at 133.

In sum, *North Cypress* was a significant opinion that recognized information regarding reimbursement rates paid by private insurers and certain federal government health plans are relevant when determining what constitutes reasonable medical expenses. While *North Cypress* was not a personal injury case, it set the stage for numerous mandamus filings on trial court discovery orders allowing or denying discovery requests seeking private insurer and government plan reimbursement rates from Plaintiff’s treating physicians.

II. *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 251 (Tex. 2021)

Three years after its *North Cypress* opinion, the Court was presented with the same question, in a different context. This time the Court was tasked with determining whether a trial court abused its discretion in a personal injury case by denying the Defendants the opportunity to obtain *North Cypress* discovery from physicians who provided care to the Plaintiff under “letters of protection”. In particular, the Court framed the question presented and its holding in *K & L* as follows:

This case presents the same [*North Cypress*] issue, but in a different context. Here, the defendants in a personal-injury suit argue that the trial court abused its discretion by quashing their discovery requests, including those for information regarding the plaintiff’s medical providers’ negotiated rates and costs. We hold that the information we found relevant to the reasonableness of the provider’s

rates in *North Cypress* is equally relevant here.

In re K & L, 627 S.W.3d at 244. Notably, the Plaintiff did not pay for any of the \$1.2 million in medical care but instead entered into “letters of protection” with the treating physicians. *Id.* at 245.

A. Relevant? Yes, just as the Court pronounced in *North Cypress*

The medical providers in *K & L* attempted to distinguish *North Cypress* by arguing that *North Cypress* should not apply to personal injury litigation because that case pertained to a hospital lien dispute and the Plaintiff in *K & L* could recover “whatever amount was ‘actually paid and or incurred’ by him or on his behalf.” *In re K & L*, 627 S.W.3d at 249. The Court disagreed, citing the common-law requirement that the amount of recoverable expenses be reasonable, thereby bringing the *North Cypress* holding squarely into play. *Id.* at 249-50. With respect to the relevancy question, the Court concluded:

The reasonableness of the claimant's medical expenses is as germane in a personal-injury case as it is in a suit to challenge the validity of a medical lien. Our relevance holdings in *North Cypress* thus apply equally here: while certainly ‘not dispositive,’ the negotiated rates the providers charged to private insurers and public payors for the medical services and devices provided to Walker, and the costs the providers incurred to provide those services and devices, are ‘at least relevant’ to whether the chagemaster rates the providers billed to Walker for the same services and devices are reasonable.

In re K & L, 627 S.W.3d at 251. Accordingly, the Court expressly recognized the relevancy of the discovery requests for information pertaining to the negotiated reimbursement rates the providers received from private insurers and government payors.

B. Overbreadth, Undue Burden Confidentiality Concerns and Proportionality

After determining that the requests were relevant, the Court then addressed the providers’ concerns regarding overbreadth, undue burden as well as concerns regarding confidentiality of the reimbursement rates. With respect to overbreadth, the Court made it clear that the Defendants’ revised requests tracked the information permitted in *North Cypress* and were not overly broad in that the requests were appropriately tailored in time and scope. *In re K & L*, 627 S.W.3d at 252-53.

In response to the providers’ undue burden and harassment objection, the Court analyzed that objection under the proportionality standard that “requires a case-by-case balancing of jurisprudential considerations.” *In re K & L*, 627 S.W.3d at 253. In support of their undue burden objection, the providers submitted affidavits asserting that they would incur expenses in searching for the requested pricing information because their electronic records were not easily searchable. *Id.* at 253-54. The Court determined that the undue burden objections were too conclusory. However, the Court recognized the providers’ non-party status factored into the undue burden question but placed emphasis on the fact that the providers treated the Plaintiff pursuant to letters of protection thereby setting them apart from other “non-parties” and making them subject to an intrusion on their time by repeated deposition on written questions and subpoenas. *In re K & L*, 627 S.W.3d at 254.

The Court also addressed the providers’ arguments that some of the requested information, namely Medicare and Medicaid reimbursement rates, was publicly available from other sources. *Id.* In addition, the Court considered the fact that Defendants had engaged expert witnesses to rebut the providers’ billed charges. *Id.* Despite the fact that Defendants could have obtained some of the requested information from other sources and that Defendants had engaged expert witnesses to rebut the billed charges, the Court reaffirmed its *North Cypress* holding by recognizing “the rates healthcare providers charge to private insurers and public payors and their costs for providing services to a patient constitute relevant facts and data.” *Id.* at 254.

In response to the providers' confidentiality concerns, the Court noted that those concerns could adequately be addressed by the entry of a protective order. *In re K & L*, 627 S.W.3d at 256.

In sum, the Court held that "[t]he reasonableness of the providers' charges goes to the heart of K & L Auto's defense: if the charges are unreasonable, they are not recoverable." *In re K & L*, 627 S.W.3d at 256–57. Because the Defendants had no adequate remedy by appeal, the Court conditionally granted their request for mandamus. *Id.* at 257.

C. Considerations when drafting *North Cypress/K & L* discovery requests

One thing is clear—*North Cypress* discovery requests are permissible in personal injury cases and seek relevant information that goes to a central issue in every personal injury case, the reasonableness of Plaintiff's medical expenses. However, Justice Huddle's concurrence makes clear, there are additional matters to consider when drafting pricing discovery requests that one must take into consideration to ensure that the requests survive a motion to quash and/or motion for protection.

The discovery requests at issue in *North Cypress* were limited to the following areas:

- Please produce all contracts regarding negotiated or reduced rates for the hospital services provided to Plaintiff in which Defendant is a party, including those with Aetna, First Care, United Healthcare, Blue Cross Blue Shield, Medicare, and Medicaid.

....

- Please produce the annual cost report you are required to provide to a Medicare Administrative Contractor Medicare [sic], as a Medicare certified institutional provider for 2011, 2012, 2013, 2014 and 2015.

....

- Please state the Medicare reimbursement rate for x-rays, CT scans, lab tests and emergency room services, as you performed on the Plaintiff on June 9, 2015.

- Please state the Medicaid reimbursement rate for x-rays, CT scans, lab tests and emergency room services, as you performed on the Plaintiff on June 9, 2015.

In re North Cypress, 559 S.W.3d at 130. It should be noted that the trial court in *North Cypress* limited the production of provider contracts to the time period at issue in the case. *Id.* Therefore, these four subject matter areas were deemed both relevant and appropriately tailored to meet the proportionality test discussed by the Court in *K & L*. As such, these types of requests are likely to survive a challenge from a provider and Plaintiff's counsel. Thus, the safest way to draft your discovery requests to Plaintiff's treating physicians seeking private insurer and government payor reimbursement rates is to follow the *North Cypress* requests quoted above.

III. Concluding Remarks

K & L Auto Crushers is a significant opinion that allows Defendants to seek non-party discovery in personal injury litigation that can be used to establish what a reasonable amount is for past and future medical expenses. The state appellate and federal district court opinions following *K & L Auto Crushers* have all permitted discovery of reimbursement rates paid by private insurers and public-entity payors to providers who treat Plaintiffs under letters of protection or similar deferred payment arrangements. However, courts review *K & L* discovery requests under a proportionality inquiry so a requesting party must exercise caution when drafting requests to ensure they are narrowly tailored and that the requests are no more broad than necessary given the specific needs of the case. If a requesting party follows the guidelines set forth by the Texas Supreme Court in *North Cypress* and *K & L Auto Crushers*, it can obtain pricing information that is key in rebutting the excessive billed charges that distort settlement value and exposure in Texas personal injury litigation.



**By: Frank Griffin, PE, Envista Forensics
Northlake, Texas**

A LOOK BACK ON INNOVATIVE CONSTRUCTION TRENDS IN 2022

Modular Construction, Mass Timber, and 3D Printed Construction have all been around for at least ten years; but, their market share is expanding at a faster rate than ever before. These building methods and materials have already affected the construction sector, and undoubtedly will have an even larger impact on construction in the years to come. The forecast of such construction technologies, materials, and methods is catching on for a variety of reasons, given the economic state of the globe, sustainability initiatives, the shortage of qualified and skilled labor, as well as supply chain issues globally.

Modular construction technically dates back to England in the 1600s and were also employed through the California Gold Rush. Efficiency was greatly increased with modular construction and this appeal still remains today. Times have changed since modular construction was first introduced, with proponents of modular construction touting reduced project costs, accelerated schedules, consistency, and sustainability. With the global push towards more resilient and sustainable construction, coupled with the emerging supply chain issues, modular construction is gaining traction.

Cross-laminated timber (CLT) was first introduced in the early 1990s in Austria and

Germany. The engineered timber has been slow to gain wider adoption and use, but recently has seen a significant increase in the construction industry. Experts have predicted the number of mass timber buildings to be completed will continue to rise, with over 24,000 estimated in 2034. In support of the widespread adoption of mass timber, the International Building Code (IBC) expanded its building code provisions in its 2021 release. This is a significant step in expanding mass timber's influence on the construction industry.

Full scale buildings were completed around 2006 but these prototypes and one-off attempts to 3D print structures (of all sorts) were not quite a true construction methodology. The world's first 3D printed neighborhood began in Tabasco, Mexico in 2019, with the first "net zero energy" neighborhood started in Southern California in 2021. Lennar and Icon Technologies have partnered to build a 100-home community in Austin, Texas. The global 3D printing market is expected to grow at a 87.3% compound annual growth rate of 87.3 from 2022 to 2031. It is clear that these three construction technologies have already started to make their impact on the construction industry. So how far into the future do we need to go to feel their impact in insurance claims and litigation?



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❄️ 2023 TADC WINTER SEMINAR ❄️

January 25-29, 2023 | Steamboat Springs, Colorado

*Program Co-Chairs: Gayla Corley, MehaffyWeber PC, San Antonio
Mitchell Smith, Germer PLLC, Beaumont/Houston*

CLE Approved for: 9 hours including 2.25 hours ethics

Wednesday, January 25, 2023

6:00 – 8:00pm TADC Welcome Reception

Thursday, January 26, 2023

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Doug Rees, TADC President
Cooper & Scully, P.C., Dallas
Gayla Corley, MehaffyWeber PC, San Antonio,
Program Co-Chair
Mitchell Smith, Germer PLLC, Beaumont/
Houston, Program Co-Chair

7:30-8:15am *CONDUCTING AN EMPLOYMENT LAW/
DISCRIMINATION INVESTIGATION*
Jim Hunter, Royston Rayzor PC, Brownsville

8:15-8:45am *A LITTLE ETHICS, A LITTLE EVIDENCE AND A
LITTLE PROCEDURE – ONE MORE TIME*
(.5 hrs ethics)
Christy Amuny, Germer PLLC, Beaumont

8:45-9:15am *SURVEY OF POST-COVID JURY VERDICTS*
Warren Wise, MehaffyWeber PC, Beaumont

9:15-9:45am *TRIAL TACTICS-TRIAL LAWYER OPTICS*
Daniel H. Hernandez, Ray Pena McChristian,
P.C., El Paso

9:45-10:30am *ANATOMY/AUTOPSY OF A JURY TRIAL*
Clayton Haley, Fairchild, Price, Haley & Smith,
L.L.P., Nacogdoches

Friday, January 27, 2023

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Doug Rees, TADC President
Gayla Corley, Program Co-Chair
Mitchell Smith, Program Co-Chair

7:30-8:15am *A VIEW FROM THE BENCH (.5 hrs ethics)*
Honorable Dee Johnson, 47th District Court,
Potter and Randall Counties

8:15-9:15am *JURY CHARGES/CHARGE CONFERENCE*
(.5 hrs ethics)
Mike Bassett, The Bassett Firm, Dallas

9:15-10:00am *ANTI-INDEMNITY PROBLEMS*
Kristi Kautz, Fletcher, Farley, Shipman & Salinas,
LLP, Dallas

10:00-10:30am *LESSONS FROM A YOUNG LAWYER'S FIRST
CIVIL TRIAL (.25 hrs ethics)*
Uzochukwu Okonkwo, MehaffyWeber PC,
San Antonio

Saturday, January 28, 2023

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Doug Rees, TADC President
Gayla Corley, Program Co-Chair
Mitchell Smith, Program Co-Chair

7:30-8:00am *MEDIATION TIPS AND TRICKS*
David Brenner, Burns, Anderson, Jury & Brenner
L.L.P., Austin

8:00-8:45am *LITIGATION OF CONSTRUCTION DEFECTS
FROM AN EXPERT POINT OF VIEW*
Kirk Wolf, P.E., SEA, Ltd., Houston

8:45-9:15am *HOW TO OBTAIN K&L AUTO CRUSHERS
DISCOVERY FROM PLAINTIFFS' PROVIDERS
AND THE RESURGENCE OF THE FAILURE TO
MITIGATE DEFENSE*
Valerie Lewis, Germer PLLC, Houston

9:15-9:45am *DIVERSITY IN YOUR PRACTICE (.5 hrs ethics)*
Ignacio Mendoza, Gault, Nye & Quintana,
McAllen

9:45-10:30am *DEFEATING THE REPTILE – REPTILE THEORY
IS ALIVE AND WELL*
Sarah Nicolas, Ramon, Worthington, Nicolas &
Cantu PLLC, Austin

Sunday, January 29, 2023

Depart for Texas

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January 25-29, 2023 | Steamboat Grand | Steamboat Springs, CO
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Spouse/Guest CLE credit for Winter Meeting \$75.00

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 \$ 75.00 Spouse/Guest CLE Credit
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TOTAL Registration Fee Enclosed \$ _____

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Check if your spouse/guest is a TADC member

CHILDREN'S NAME TAGS: _____

EMAIL ADDRESS: _____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 23, 2022. This coincides with the deadline set by the hotel for accommodations.

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Cardholder Name (please print) _____ Signature _____

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Date Received _____ Payment-Check# _____ (F or I) Amount _____ ID# _____

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2022 TADC SUMMER SEMINAR ~ BIG SKY, MONTANA ~ JULY 13-17, 2022

10 Things Learned After Over 30 Years of Practicing – Greg W. Curry – 12 pg. PPT

A New Jury Selection Paradigm – Christopher W. Martin – 71 pg. PPT

A Personal Take on What Litigators Can Learn from the Art of Fly-Fishing – Kendyl T. Hanks – 7pgs + 32 pg. PPT

Adventures in Error Preservation – Scott Stolley – 94 pg. PPT

Care and Feeding of Rohrmoos: Attorney's Fees in Texas – Jadd F. Masso, Amy Prueger – 21 pgs. +35 Pg. PPT

Growing Your Firm Through Hiring – Daniel Hare – 17 pg. PPT

Hot Topics in the Courts of Appeals – Brian Quinn, Bobby Ramirez – 37 pg. PPT

Life After in Re: Allstate Indemnity Company – Colin Hatcher – 72 pg. PPT

Sherlocking Wildfires – Matt Strader – 37 pg. PPT

Six Things to Do to Get the Best Settlement for Your Motor Carrier – Mike H. Bassett – 8 pgs. + 57 pg. PPT

The Voir Dire Survival Kit – Lawrence M. Doss – 30 pgs. + 12 pg. PPT

What A Civil Litigator Needs to Know About Criminal Law – Slater C. Elza – 23 pgs. + 35 pg. PPT

2022 WEST TEXAS SEMINAR ~ AUGUST 12-14, 2022

A Quick Look at Recent Federal and State Court Decisions Regarding Expert Witnesses – Slater Elza – 5 pgs.

Bad Faith 101, The basic standard for bad faith claims and the best practices for avoiding bad faith claims – William R. Anderson – 23 pg. PPT

EDR Technology Update – Abraham Chairez, Daniel Hernandez, Drew Sander – 14 pg. PPT

Effective Strategies for Expert Witness Depositions – Slater C. Elza – 25 pg. PPT

Lessons Learned from A \$7.3 Billion Dollar Verdict – Mike H. Bassett – 58 pg. PPT

Litigating Like a Hometowneer - Daniel Hernandez, William R. Anderson – 16 pg. PPT

The Art of Insurance Billing – Alex Yarbrough – 81 pg. PPT

Update on Energy Litigation 2022 – David W. Lauritzen – 31 pgs. + 25 pg. PPT

2022 ANNUAL MEETING ~ SAN ANTONIO, TEXAS ~ SEPTEMBER 14-18, 2022

All Along the King's Highway: Oil Still King - Lessons on Defense of Oil & Gas Lease Disputes – Christopher M. Hogan – 16pgs. + 78 pg. PPT

Bandits and Robbers at the Waterholes: Preservation of Error in Trial – Katherine Elrich – 42 pgs. + 51 pg. PPT

Dilemmas Along the Trail - Lessons from the Movies About Ethics - Gayla Corley – 20 pg. PPT

PAPERS AVAILABLE

2022 Annual Meeting Papers Continued

Let's Find Out If We Really Have to Ride the Whole Way First: Permissve Appeal in Texas - Renee Yanta – 17 pgs. + 25 pgs. + 44 pg. PPT

Making Sense of MRI of the Lumbar Spine - Kurt A. Juergens, R. Alexander Mohr – 42 pg. PPT

Maximizing Cause Challenges: Getting Jurors to Reveal Bias and Admit They Can't be Fair - Christina Marinakis – 35 pg. PPT

Modern Day Pinkertons: Trial Lawyers Enforcing the False Claims Act - Mike Hendryx, Greg Dykeman – 21 pg. PPT

Supreme Court Update - Brett Busby – 217 pgs.

The Currency Changes Along the Road: Paid and Incurred and Discovery of Usual and Customary Charges For Medical Expenses - Raj Aujla, Brandon Coony – 12 pgs. + 14 pg. PPT

The Fight Can Wait - But Not Forever: Statutes of Limitation and Repose in Construction Litigation - William Sommers – 10 pgs.

There Will be Trials (Again) - Trial Tips Learned During 44 Years at TADC - Thomas C. Riney – 5 pg. PPT

Trucking Broker Liability - Risks of Lining Up the Moving of Wares Along the Trial - Daniel H. Hernandez – 9 pgs.

Trucking Litigation in Texas: Vicarious Liability and the Responsibility of the Company - Brent Bishop – 67 pgs. + 88 pg. PPT

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

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Case Description: _____

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Designated as: Plaintiff Defense Unknown

Name: _____ Honorable: _____

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

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Calendar of Events



May 3-7, 2023

2023 TADC Spring Meeting

JW Marriott, San Jose Del Cabo, Mexico



January 25-29, 2023

2023 TADC Winter Meeting

Steamboat Grand – Steamboat Springs, Colorado



July 19-23, 2023

2023 TADC Summer Seminar

Elevation Resort & Spa, Crested Butte, Colorado