



TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

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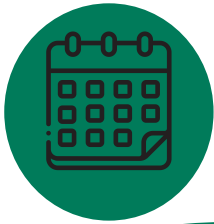
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TADC CALENDAR OF EVENTS

August 11-13, 2023

2023 West Texas Seminar

Inn of the Mountain Gods, Ruidoso, New Mexico
Registration Material available at www.tadc.org

September 20-24, 2023

2023 TADC Annual Meeting

Hilton Hotel Midtown, New York, New York
Registration Materials available at www.tadc.org

October 19, 2023

2023 TADC Deposition Boot Camp

A Virtual Seminar
Registration Materials available after August 1, 2023

January 31-February 4, 2024

2024 TADC Winter Seminar

Elevation Hotel & Spa, Crested Butte, Colorado

February 23-24, 2024

2024 TADC Trial Academy

South Texas College of Law, Houston

April 24-28, 2024

2024 TADC Spring Meeting

Marriott Key West Beachside, Key West, Florida

July 17-21, 2024

2024 TADC Summer Seminar

Harvey's Resort, Lake Tahoe, Nevada

September 18-22, 2024

2024 TADC Annual Meeting

Horseshoe Bay Resort & Spa, Horseshoe Bay, Texas



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

PRESIDENT'S MESSAGE

Greetings as we head into Summer. It's hard to believe that the year is already half over. With the guidance of our political consultant George Scott Christian, we made it through another legislative session, the 88th Legislative Session. As usual, we spent this Legislative Session focused on monitoring the Texas legislature for bills that affect our members, clients, and the civil justice system. Perhaps the biggest news coming out of this Legislative Session, unfortunately, involved two bills that the TADC strongly opposed along with our fellow trial lawyer associations, TTLA and TX ABOTA. Those two bills involve the creation of new business courts and a new 15th Court of Appeals. While the jurisdiction of the business courts was significantly curtailed from what was originally proposed, we will now have business courts in the major metropolitan areas of the state (Dallas, Fort Worth, Houston, San Antonio, and Austin). We will also have a new 15th Court of Appeals based in Austin that will have statewide jurisdiction over specific matters, namely appeals from the business courts and any actions against the State. Judges for the new business courts will be appointed while

the justices for the new 15th Court of Appeals will be elected on a statewide basis.

Another bill that passed this Legislative Session was one that was strongly supported by TADC. That bill involved judicial qualifications, providing for mandatory disclosures on applications for judicial office and mandatory judicial education as well as oversight and assistance for courts that are in need of it. Special thanks to the Legislative Committee, George Scott Christian, the Executive Committee, and numerous other volunteers who have worked very hard this Session to do what we can to protect and preserve the civil justice system.

Winter Meeting

The Winter Seminar was in Steamboat, Colorado and was a great success. Thanks to our seminar co-chairs, Gayla Corley and Mitch Smith, for putting together a wonderful program. The snow was so plentiful that some got to enjoy a few extra days in Steamboat as a bonus.

Spring Meeting

The Spring Meeting was in Los Cabos, Mexico and was a great success. Co-chairs Darin Brooks and Kristi Kautz put together a terrific program full of dynamic speakers and diverse topics. The hotel was fabulous and I believe it was the first time we have ever had a hospitality suite with a hot tub.

Summer Meeting/Annual Meeting

We are looking forward to the Summer Meeting in Crested Butte, Colorado and the Annual Meeting in New York City. Co-chairs Nick Zito and Chris Martin have put together an amazing program for the Summer Meeting. Likewise, co-chairs Dan Hernandez and Sean Sowards have an outstanding line-up of topics and speakers scheduled for the Annual Meeting in New York. If you haven't done so yet this year, join us for a meeting in Crested Butte and/or New York.

Other Programming

As you know, TADC puts on other programming throughout the year in addition to its quarterly meetings. This being a legislative year, TADC is making a concerted effort to schedule legislative luncheons in various areas around the state to inform members about what transpired in the recent legislative session. Be on the lookout for a legislative luncheon in your area. We are also continuing with the popular “Lunch

and Learn” programs that were started a couple of years ago. These topics are geared towards young lawyers and are scheduled periodically throughout the year. They are free for all TADC members. Keep an eye out for the emails concerning the Lunch and Learn series and encourage your young lawyers to attend. The TADC is also planning its annual West Texas Seminar to take place on August 11-13, 2023. Program Chair Bud Grossman along with co-chair William Anderson have put together an impressive group of speakers to cover topics pertinent to Texas and New Mexico practitioners. The West Texas Seminar is always well attended.

It has been a busy year and there is much more to come. Thank you to all of the TADC board members and volunteers who work so hard for this incredible organization. I encourage all of you to take advantage of the many benefits that TADC has to offer. Keep recruiting your friends and colleagues so that they too can benefit from all that the TADC has to offer.





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

TADC'S 88TH SESSION

LEGISLATIVE

WRAP-UP

The 88th Regular Session of the Texas Legislature has come and gone. Governor Abbott has promised several special sessions on various issues, primarily school vouchers, and the failure of the two houses to agree on how to deliver more than \$12 billion in property tax relief prompted him to call the first one the day after the regular session ended. The Senate quickly sent its bill, which gave part of the relief in the form of an enlarged homestead exemption and the rest in compressing school tax rates, to the House. The House ruled the Senate bill outside the Governor's call, passed the bill the Governor explicitly requested (property tax compression only), and adjourned sine die. Nevertheless, with the money already in the budget ready to be spent come September 1, expect the House, Senate, and Governor to come together sooner rather than later.

This session saw a lot of activity on the civil justice front, particularly with respect to the court system. As everyone knows, the Legislature passed and the Governor signed legislation creating a business court and a 15th Court of Appeals for certain administrative law matters, constitutional issues, and appeals from the business court. Legislation bolstering judicial training and ballot transparency likewise passed into law, as well as a massive omnibus court bill that created the largest number of trial courts in many moons (most dedicated to criminal matters). The biggest disappointment was the failure of a judicial pay raise to get across the finish line. Legislation raising the base pay of a district judge from \$140,000 to \$172,000 cleared the House but did not find favor in the Senate. Unless the issue makes its way into a future special session, which we have asked the Governor to consider, trial and appellate justices will continue

to operate on historically low comparable pay to that in other states. At some point, we can create all the new courts in the world, but what successful lawyer wants to take the bench at such ruinously low salary levels?

In any event, what follows is a run-down of what passed, what did not, and what got vetoed.

Bills Enacted

Business Court

HB 19 by Murr (R-Junction)/Hughes (R-Tyler). HB 19 underwent fairly significant changes during its progress through the Legislature, with most of the action coming on the House floor.

As amended in the House, the jurisdiction of the business court was narrowed and broken out into two tiers:

- Tier 1 gives the business court concurrent jurisdiction with district courts in the following actions in which the amount in controversy exceeds *\$5 million* (excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs):
 - a. a derivative proceeding;
 - b. an action regarding the governance, governing documents, or internal affairs of an organization;
 - c. an action in which a claim under state or federal securities or trade regulation law is asserted against an organization, a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity

- as a controlling person or managerial official, an underwriter of securities issued by the organization, or an auditor of an organization;
 - d. an action by an organization against an owner, controlling person, or managerial official of the organization, if the action is brought against an owner, controlling, or managerial official of the organization *and* alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization;
 - e. an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;
 - f. an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and
 - g. an action arising out of the Business Organizations Code.
- Tier 2 gives the business court concurrent jurisdiction with district courts in the following actions in which the amount in controversy *exceeds* \$10 million (again, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs):
 - a. an action arising out of a qualified transaction (that is, a transaction, other than a loan or advance of money or credit by a bank, credit union, or savings and loan, involving aggregate consideration exceeding \$10 million, or a credit transaction involving an aggregate value of at least \$10 million);
 - b. an action arising out of a contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action; and
 - c. an action arising out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization other than a bank, credit union, or savings and loan association.
 - The business court has concurrent jurisdiction with district courts in Chapter 37, CPRC, declaratory judgment actions involving a dispute based on a claim within the court's jurisdiction, as outlined above.
 - The business court has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that "forms part of the same case or controversy," but a supplemental claim can *only* proceed in the business court with the agreement of the parties and the business court judge. If the parties do not agree, the other claim will proceed in the court of original jurisdiction concurrently with the claim proceeding in the business court.
 - Unless the claim is within the supplemental jurisdiction of the business court and the parties agree to proceed with the claim in the business court, the following claims *are not* within the jurisdiction of the court:
 - a. a civil action brought by or against a governmental entity or to foreclose a lien on real or personal property;
 - b. a claim arising out of Subchapter E, Chapter 15, and Chapter 17, Business & Commerce Code (covenants not to compete and DTPA);
 - c. a claim arising out of the Estates Code;
 - d. a claim arising out of the Family Code;
 - e. a claim arising out of the Insurance

- Code;
- f. a claim arising out of Chapter 53 and Title 9, Property Code (mechanic's liens and Texas Trust Code);
- g. a claim arising out of the production or sale of a farm product;
- h. a claim related to the duties and obligations under an insurance policy;
- i. a claim related to a consumer transaction, as defined by § 601.001, Business & Commerce Code (consumer right to cancel certain transactions), to which the consumer is a party, arising out of a violation of state or federal law.
- The business court does not have jurisdiction of a claim under Chapter 74, CPRC (health care liability), a personal injury claim, or a claim for legal malpractice.
- The business court is composed of 11 divisions corresponding with the state's 11 administrative judicial regions. The bill was amended to specify the establishment of each division, but some divisions will be delayed until September 1, 2026, subject to reauthorization by the legislature in 2025 and the availability of funding through additional legislative appropriations. The following divisions are subject to the sunset provision:
 - a. The Second Business Court Division (East Texas, based in Conroe);
 - b. The Fifth Business Court Division (Corpus Christi and the Rio Grande Valley);
 - c. The Sixth Business Court Division (Hill Country and southwest Texas);
 - d. The Seventh Business Court Division (West Texas);
 - e. The Ninth Business Court Division (Panhandle); and The Tenth Business Court Division (Northeast Texas).
- The amendments changed the venue

provision to the require the business court to assign the action to a county of proper venue located in that division. The amendments permit contractual venue.

- The amendments further provided that the business court may not transfer an action if there is not an operating division of the court that includes an action of proper venue. In that event, the party who filed the action has the option to transfer the action to a district court or county court at law in a county of proper venue (this provision will presumably become operative if the Legislature does not reauthorize the six divisions that sunset after next session).
- Similarly, the amendments provided that a party may not remove to a business court an action filed in a district court or county court at law in a county of proper venue that is not within an operating division of the court.
- The amendments allowed the parties to file an agreed notice of removal to the business court at any time during the pendency of the action. If the parties do not agree, a notice of removal must be filed not later than 30 days after the party requesting removal discovered or reasonably should have discovered facts establishing the business court's jurisdiction over the action, or not later than 30 days after the date a pending application for temporary injunction is granted, denied, or denied as a matter of law.
- The amendment clarified that a hearing must be held on the transfer request.
- The amendments struck the provision in the original bill that a law professor is qualified to serve as a business court judge.
- The amendments directed the governor to appoint two judges to each of the First (Dallas), Third (Austin), Fourth (San Antonio), and Eleventh (Houston) Divisions, and one judge to each of the remaining divisions. The appointments must be made between July 1, 2024, and September 1, 2024. Senate confirmation is required. Judges serve two-year terms

beginning on September 1 of each even-numbered year and may be reappointed.

- The amendment barred a business court judge from requiring a party or attorney to remotely attend a court proceeding in which oral testimony is heard, absent good cause or agreement of the parties. It further prohibited an attorney, party, or juror to attend a jury trial remotely without the parties' consent.

The bill further:

- gives the proposed statewide 15th Court of Appeals exclusive jurisdiction over appeals;
- requires a business court judge to be at least 35 years of age, a U.S. citizen, a Texas resident for two years preceding appointment, a Texas licensed attorney with at least 10 years of experience in Texas in practicing complex business litigation or business transaction law, or serving as a judge of a Texas civil court (or any combination of the above);
- provides a salary equal to the sum of a district judge's salary and the maximum amount of county contributions and supplements allowed by law to be paid to a district judge;
- provides for filling vacancies, compensation, and removal;
- bars a business court judge from private practice while in office;
- provides for the appointment of visiting judges by the chief justice of the supreme court;
- provides that a party has a right to a jury trial where required by the constitution in the county in which venue is proper under § 15.002, CPRC, or, if the case was removed to the business court, in the county in which the case was originally filed;
- requires a jury trial in a case filed initially in business court to be held in any county of proper venue under § 15.002, as chosen by the plaintiff;
- allows the parties to agree to hold a jury trial in another county;

- requires written opinions unless the court has a well-developed body of law on the issue, is applying its own precedent, or another opinion on the issue will not significantly contribute to the development of the law;
- attaches administration of the business court to the Office of Court Administration, with judges maintaining chambers in the county of the applicable business court division, conducting proceedings in any courtroom within the boundaries of the division, and remote proceedings other than jury trials and, if a party objects, a proceeding requiring oral testimony;
- authorizes the supreme court to establish filing fees;
- authorizes the supreme court to adopt rules of procedure, including rules providing for removal and remand of cases to and from the court and the assignment of cases to judges;
- requires the OCA to produce an annual study of the number and types of cases heard by the business court in the preceding year;
- sets January 1, 2024 as the commencement date for the court.

HB 19 takes effect on September 1, 2023.

15th District Court of Appeals

SB 1045 by Huffman (R-Houston)/ Murr (R-Junction). SB 1045 establishes the 15th Court of Appeals district composed of all counties in the state based in Austin and consisting of a chief justice and four justices. Provides that for the first three years after the court's creation, the court will consist of a chief justice and two justices. Gives the court exclusive jurisdiction over matters brought by or against the state or state agency and employees thereof *except for*:

(1) a proceeding brought under the Family Code;

(2) certain proceedings under the Code of Criminal Procedure;

(3) a proceeding brought against a district or county attorney with criminal jurisdiction;

(4) a proceeding relating to a mental health commitment;

(5) a proceeding relating to civil asset forfeiture;

(6) a condemnation proceeding;

(7) a proceeding brought under Chapter 125, CPRC, to enjoin a common nuisance;

(8) a proceeding under Chapter 55, Code of Criminal Procedure (expunction);

(9) a proceeding under Chapter 22A, Government Code (3-judge district court);

(10) a proceeding under Subchapter E-1, Chapter 411, Government Code;

(11) a proceeding under Chapter 21, Labor Code (unfair employment practices);

(12) a removal action under Chapter 87, Local Government Code;

(14) a proceeding under Chapter 841, Health and Safety Code (sexually violent predators);

(15) an action under Chapter 101, CPRC (Tort Claims Act); and

(16) a claim for personal injury or wrongful death.

The bill further :

- gives the court exclusive jurisdiction over matters in which a party to the proceeding challenges the constitutionality or validity of a state statute or rule and the attorney general is a party and any other matter as provided by law;
- provides that the supreme court may not transfer cases out of the 15th Court of Appeals for docket equalization purposes or transfer cases to that court if it does not have exclusive jurisdiction;
- attaches administration of the Court to the Office of Court Administration;
- requires OCA to report annually on the number and type of cases decided by the court.

SB 1045 takes effect on September 1, 2023.

Permissive Appeals

SB 1603 by Hughes (R-Tyler)/Smithee (R-Amarillo). SB 1603 amends § 51.014, CPRC, to require a court of appeals to state the specific reason for declining to accept a permissive appeal. The bill further provides that the supreme court may review a court's decision not to accept the appeal under a de novo standard or direct the court of appeals to accept the appeal. SB 1603 takes effect on September 1, 2023.

Judicial Reform

HB 2384 by Leach (R-Plano)/Hughes (R-Tyler). The judicial training and ballot transparency legislation:

- requires a judicial candidate's ballot application to include the candidate's bar number, to disclose any public sanction or censure or disciplinary sanctions in Texas or another state, to state for the previous five-year period the nature of the candidate's practice, any legal specialization, the candidate's professional courtroom experience, and any final conviction for a Class A or B misdemeanor in the past 10 years. Further requires candidates for appellate courts to describe appellate court briefs and oral arguments for the past five years.
- makes public any sanction against a judicial candidate for making a false declaration on the ballot application.
- directs the supreme court to adopt rules on judicial training a judge must complete within one year of election to the bench. Requires the rules to provide a minimum of 30 hours of instruction on the administrative duties of the office and substantive, procedural, and evidentiary law. Requires a further 16 hours of continuing education annually. Requires the Judicial Conduct Commission to suspend a judge who does not complete the training.
- provides that a judge who is noncompliant with the education requirement for more than one year engages in "wilful

or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" sufficient to subject the judge to removal from office under Art. V, § 1-a, Texas Constitution.

- directs the director of Office of Court Administration (OCA) to develop standards for identifying courts that need additional assistance to promote the efficient administration of justice.
- directs the OCA to include disaggregated performance measures for each appellate, district, statutory county, and county court as part of its annual performance report.
- directs OCA to report the annual clearance rate for each trial court. Directs local district grievance committees to sanction attorneys that make false declarations on a ballot application.
- directs the supreme court to adopt rules establishing a specialty certification for attorneys in judicial administration and the Texas Board of Legal Specialization to make it available to judges. Provides that a judge who holds a specialty certification in judicial administration may be entitled to additional compensation if the legislature makes an appropriation for that purpose.

HB 2384 takes effect on September 1, 2023.

Tort Liability

HB 18 by Slawson (R-Stephenville)/Hughes (R-Tyler). HB 18 is aimed at reducing the exposure of minors to "harmful material" on the Internet. The bill adds Chapter 509, Business & Commerce Code, to:

- require a digital services provider (a person who owns or operates a website, app, program, or software that performs collection or processing functions with Internet connectivity) to "exercise reasonable care to prevent self-harm, suicide, eating disorders, and other similar behaviors; substance abuse and patterns of use that indicate addiction; bullying and harassment; sexual exploitation, including

enticement, grooming, trafficking, abuse, and child pornography; advertisements for products or services that are unlawful for a minor, including illegal drugs, tobacco, gambling, pornography, and alcohol; and predatory, unfair, and deceptive marketing";

- exempts (1) a state agency or political subdivision, (2) a financial institution or data subject to Title V, Gramm-Leach-Bliley Act, (3) a covered entity or business associate governed by HIPAA and the Health Information Technology for Economic and Clinical Health Act; (4) a small business as defined by the SBA on 9/1/24, (5) an institution of higher education; (6) a digital services provider who processes or maintains user data in connection with the employment, promotion, reassignment, or retention of the user as an employee or independent contractor, to the extent that the user's data is processed or maintained for that purpose; (7) an operator or provider regulated by Subchapter D, Chapter 32, Education Code (student data); or (8) a person subject to the Family Educational Rights and Privacy Act that operates a digital service;
- further exempts an Internet service provider or Internet service provider's affiliate if the provider or affiliate providing access or connection to a digital service does not exercise control of or is not responsible for the creation or provision of content that exposes a known minor to harm;
- provides that a person is not a known minor after the minor's 18th birthday;
- permits a digital service provider to enter into a user agreement with a known minor only with the specific, informed, and unambiguous consent of the minor's parent or guardian granted without any financial incentive;
- specifies the methods for obtaining verifiable consent. Prohibits a provider from collecting a minor's personal identifying information without specific parental consent except under limited

circumstances;

- requires a provider, prior to obtaining consent, to give the parent or guardian the ability to permanently enable settings to enable the highest privacy setting offered, prevent the DSP from collecting any data associated with the minor not necessary to provide the service, prevent the DSP from processing, sharing, disclosing, or transferring the data, and prevent collection of geolocation data, prevent targeted advertising, and prevent the minor from making purchases or financial transactions;
- requires a DSP to provide a process for a known minor's parents to register as the minor's verified parent;
- requires the provider to give consenting parents tools to monitor and control the minor's use of the service;
- requires the provider to permit parental access to data associated with the known minor and to provide a method by which the parent or guardian may request corrections or deletions, which the DSP must do within 45 days;
- requires the provider to disclose each advertiser on the service and whether and how it uses algorithms; bars the provider from limiting or terminating a minor's service because the minor or minor's parent withdraws consent; m
- makes a violation of the statute a DTPA violation enforceable by the attorney general;
- permits a parent or guardian of a known minor to bring a declaratory judgment action and seek injunctive relief for a violation.

HB 18 takes effect on September 1, 2024.

HB 73 by Murr (R-Junction)Springer (R-Muenster). Amends § 75.006, CPRC, to provide immunity from liability for a landowner or lessee for damages arising from an occurrence involving livestock, whether or not on the property, due to an act or omission of a trespasser or a third party who damages a fence on the property, or due

to wildlife, an act of God, or another cause beyond the control of the landowner or lessee. Extends the same immunity to the owner, lessee, or occupant of agricultural land for any damage or injury arising from the actions of a trespasser, a third party, or wildlife, an act of God, or circumstances beyond the control of the owner, lessee, or occupant. Further provides immunity from liability for damages arising from the action of an individual who enters or causes another person to enter the agricultural land without the permission of the owner, lessee, or occupant because of the actions of a trespasser, a third party, or wildlife, an act of God, or circumstances beyond the control of the owner, lessee, or occupant. HB 73 takes effect on September 1, 2023.

HB 527 by Wu (D-Houston)/Zaffirini (D-Laredo). Amends the Texas Citizens Participation Act (Ch. 27, CPRC) to exempt from the application of the Act a legal malpractice claim. HB 527 takes effect on September 1, 2023.

HB 609 by Vasut (R-Angleton)/Middleton (R-Galveston). Amends § 148.003, CPRC, to exempt from liability for injury or death a business owner or operator that does not require employees or contractors of the business to be vaccinated against a pandemic disease if the injury or death results from exposure to the disease by an employee or contractor of the business. HB 609 takes effect on September 1, 2023.

HB 1745 by Leach (R-Plano)/Nichols (R-Jacksonville): Adds Chapter 150E, CPRC, to provide that a transportation network company may not be held vicariously liable for damages in a civil action or arbitration proceeding if (1) the claimant fails to prove by clear and convincing evidence that the company was grossly negligent, or (2) the company has fulfilled its obligations with respect to the company driver under Chapter 2402, Occupations Code. Provides that a company may be held liable for negligence or gross negligence relating to the use of the company's network, including the failure to prevent a driver from logging on, if, at the time of the event giving rise to the cause of action, the company had actual

knowledge that the driver was disqualified from logging on for a reason described in § 2402.107(b), Occupations Code, that occurred after the most recent review of the driver’s driving record or criminal background check. HB 1745 takes effect on September 1, 2023.

HB 2308 by Ashby (R-Lufkin)/Perry (R-Lubbock): Amends Chapter 251, Agriculture Code, to further limit nuisance actions against agricultural operations to require the claimant to prove each element of the action by clear and convincing evidence. Expands the limits to any action to restrain an agricultural operation. Expands the definition of “agricultural operation” to include hay and other forages and raising or keeping livestock or poultry for purposes of veterinary services. Expands the liability of a person who brings an improper nuisance action against an agricultural operator to include any damages found by the trier of fact (already allows recovery of costs and attorney’s fees). Adds to the definition of “agricultural land” any land on which agricultural operations exist or may take place, regardless of the land’s qualification for appraisal as agricultural land. Adds to the definition of “agricultural improvement” an arena, implements used for management functions, and equipment necessary to carry out agricultural operations. HB 2308 takes effect on September 1, 2023.

SB 1639 by Zaffirini (D-Laredo)/Thimesch (R-Lewisville). Adds Chapter 328, Business & Commerce Code, to prohibit a person from selling, using, or causing to be used any method, technology, device, or software in the sale or resale of event tickets on a ticket issuer’s or resale ticket agent’s website that functions as a bypass in the ticket purchasing process, disguises the identity of the purchaser, permits the purchase of quantity of tickets that exceeds the maximum number of tickets that may be sold to one purchaser, or circumvents a security measure or other control in the ticket purchasing process. Authorizes the attorney general to enforce by an action for injunctive relief, costs, attorney’s fees, and investigative costs. SB 1639 takes effect on September 1, 2023.

HB 2636 by Murr (R-Junction)/Flores (R-Austin). Adds Chapter 75B, CPRC, to limit the liability of a recreational vehicle park or campground for personal injury, death, or property damage of a participant in park or campground activities if the park posts a warning sign as prescribed by the statute. Does not limit liability if the park or campground’s negligence evidences disregard for the participant’s safety, the park or campground had actual knowledge of or reasonably should have known of a dangerous condition on the land, facilities, or equipment of the park or campground, failed to train or improperly trained an employee involved in the activity, or acted intentionally. HB 2636 took effect on June 10, 2023.

SB 58 by Zaffirini (D-Laredo)/ Thimesch (R-Lewisville). Adds Chapter 328, Business & Commerce Code, to prohibit the sale or use of any technology, device, or software in the sale of a good on an Internet website that: (1) functions as a bypass in the purchasing process; (2) disguises the identity of the purchaser; (3) permits the purchase of a quantity of goods exceeding the maximum number that may be sold to one purchaser as specified by the seller or operator on the website; (4) allows for the unauthorized access to or identification of gift card information; or (5) circumvents a security measure, access control system, or other control, authorization, or measure in the purchasing process. Enforcement by the attorney general, who may recover court costs, attorney’s fees, and investigation fees. SB 58 takes effect on September 1, 2023.

SB 694 by Hughes (R-Tyler)/Leach (R-Allen). Adds § 84.0067, CPRC, to confer immunity from liability to a religious organization or security personnel of a religious organization for death, damage, or injury if the personnel was acting in the course and scope of employment or volunteer duties or functions to provide security services. SB 694 takes effect on September 1, 2023.

Medical Liability

SB 2171 by Alvarado (D-Houston)/Y. Davis (D-Dallas). Amends §74.351(r)(5), CPRC, to add a chiropractor or physician to the definition of “expert” for the purpose of giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the standard of care for a chiropractor. Adds §74.403(c-1), CPRC, to permit a chiropractor to give opinion testimony in a health care liability claim against a chiropractor. SB 2171 takes effect on September 1, 2023.

HB 3058 by Johnson (D-Houston)/Hughes (R-Tyler). Adds § 74.552, CPRC, to establish an affirmative defense to liability in an action against a physician or health care provider for a violation of § 170A.002, Health & Safety Code (prohibition of abortion), including an action to recover a civil penalty under § 170A.005, that the physician or health care provider exercised reasonable medical judgment in providing medical treatment to a pregnant woman in response to: (1) an ectopic pregnancy at any location; or (2) a previable premature rupture of membranes. Extends the defense to a pharmacist or pharmacy that dispenses a prescription drug or medication order written by a physician or provider pursuant to this section. Amends § 164.055, Occupations Code, to prohibit the TMB from taking disciplinary action against a physician who exercised reasonable judgment in providing medical treatment to a pregnant woman in the above circumstances. Amends § 9.35, Penal Code, to provide that a physician or health care provider is justified in exercising reasonable medical judgment in providing medical treatment to a pregnant woman as described above. HB 3058 takes effect on September 1, 2023.

Commercial Litigation/Oil and Gas

HB 450 by Craddick (R-Midland)/Hughes (R-Tyler). Creates a cause of action for a bad faith of an overriding royalty interest in an oil and gas lease. “Washout” means the elimination or reduction of an overriding interest by the forfeiture or surrender and subsequent reacquisition of an oil

and gas lease by the same lessee). The standard for “bad faith” is knowing or intentional conduct. Remedies include actual damages, a constructive trust on the oil and gas lease or mineral estate acquired to accomplish the washout, and costs and attorney’s fees. Two-year statute of limitations running from the time the claimant obtained actual knowledge of the washout. HB 450 takes effect on September 1, 2023.

SB 502 by Hughes (R-Tyler)/Darby (R-San Angelo). Amends § 123.003, Natural Resources Code, to expand tort immunity for a producer of drill cuttings if: (1) the producer has a legal or contractual right to transfer the drill cuttings to an unaffiliated third-party permit holder in an arm’s length transaction, (2) the method and location of the use or disposal are not prohibited by law, contract, or other written agreement, and (3) the consequence was caused solely by the permit holder. Expands the definition of permit holder to include a commercial oil and gas waste disposal facility. SB 502 took effect on May 23, 2023.

HB 5232 by Spiller (R-Jacksboro)/Hughes (R-Tyler). Increases the amount of the fine payable to the state for a violation of the Texas Free Enterprise and Antitrust Act from \$1 million to up to \$30 million based on assets or market capitalization. HB 5232 takes effect on September 1, 2023.

Employment Law

HB 2459 by Vo (D-Houston). Allows a child labor investigator to assess an administrative penalty of up to \$10,000. Directs the TWC to establish child labor appeal tribunals to hear disputed preliminary determination orders finding violations with review of tribunal orders by the commission. Provides for judicial review under the substantial evidence rule. Authorizes the attorney general to bring an action to enjoin violations. HB 2459 takes effect on September 1, 2023.

Construction Law

HB 679 by K. Bell (R-Forney). Adds § 272.003, Business and Commerce Code, to make voidable an offer to contract that requires a person to have a specified experience modifier in order to accept the offer, as well as a contract solicitation that requires a person to have a specified experience modifier in order to submit a response to the solicitation. Applies only to a contract awarded by a governmental entity or contracts for public work. HB 679 takes effect on September 1, 2023

HB 2022 by Leach (R-Plano)/King (R-Weatherford). Makes several changes to Chapter 27, Property Code (residential construction liability). Provides that a contractor is liable only to the extent a defective condition proximately causes actual physical damage to the residence, an actual failure or lack of capability of a building component to perform its intended function or purpose, or a verifiable danger to the safety of the occupants of the residence. Provides that a contractor is not liable for damages caused by the failure of a person other than the contractor to timely notify the contractor of a construction defect. Provides that a contractor is not liable for normal cracking or shrinkage cracking. Provides that to maintain a breach of a warranty of habitability, a claimant must establish that a construction defect was latent ~~existed~~ in the residence on the date the residence was completed or title was conveyed to the original purchaser and the defect has rendered the residence unsuitable for its intended use as a home. Allows the contractor up to three inspections during the 35-day right to cure period. Allows a contractor to make a written offer of settlement not later than the 60th day after receiving notice of a claim. Extends the time for completion of repairs from 45 to 60 days. Provides that a court or arbitration tribunal may award attorney's fees to a contractor if the action is abated because the claimant failed to send the pre-suit notice or did not permit an inspection. Limits recoverable damages only to economic damages listed in the statute, but adds reasonable and necessary arbitration filing fees and the claimant's share of arbitration compensation. Authorizes

the court or arbitration tribunal to order that an offer of settlement by the contractor made after the applicable deadline is timely if the claimant failed to provide required written notice, failed to provide the contractor with evidence of the defect, or amended a claim to add a new alleged defect (or under circumstances beyond the contractor's control). Provides that limitations applies the same to an arbitration proceeding as to a filing in court. Amends § 27.006 to prove that the construction defect existed at the time of construction, alteration, or repaired. Repeals § 27.004(f) (limitations does not apply if the contractor fails to make a reasonable settlement offer), § 27.004(l), § 27.0042(b), and § 27.007(c). HB 2022 takes effect on September 1, 2023.

HB 2024 by Leach/King (R-Weatherford). Amends § 16.009, CPRC, to establish a 10-year limitations period in a similar action against a person who constructs or repairs the improvement. Establishes a 6-year limitations period if the defendant is a contractor who has provided a written warranty for the residence. Provides that a written warranty must provide a minimum period of one year for workmanship and materials, two years for plumbing, electrical, and HVAC, and six years for major structural components. HB 2024 became effective on June 9, 2023.

HB 3156 by Leach (R-Allen)/Lamantia (D-Brownsville). Adds § 97.003, CPRC, to provide that a professional entity or officer or employee of such entity that provides services as a consultant or subconsultant of TXDOT to monitor and inspect the progress of work on a transportation or maintenance project performed by a private contractor and report to TXDOT on the contractor's compliance is not liable to a claimant for personal injury, property damage, or death arising from an action performed in the course and scope of the entity's consulting duties if the entity substantially complied with its obligations under the contract and: (1) the entity does not have authority to direct the operations of the contractor to be monitored and inspected and did not otherwise control the work, safety precautions or programs, or any other person performing the

work of the contractor. Does not apply to a cause of action for gross negligence or wilful or wanton conduct. HB 3156 takes effect on September 1, 2023.

HB 3485 by Bell (R-Forney)/Johnson (D-Dallas). Adds § 2251.0521, Government Code, to permit a contractor or subcontractor not to proceed with additional work directed by a governmental entity if the contractor or subcontractor has not received a written, fully executed change order and the aggregate actual or anticipated value of the additional work plus any previous additional work for which the contractor or subcontractor has not received an executed change order exceeds 10% of the original contract amount. Holds harmless the contractor or subcontractor who elects not to proceed. Adds § 28.0091, Property Code, to make the same change for owner-directed additional work. HB 3485 takes effect on September 1, 2023.

Procedure/Discovery/Privileges

HB 422 by Vandaveer (R-New Boston)/Perry (R-Lubbock). Allows a juvenile court to conduct remote proceedings without the consent of the parties. Authorizes the court to conduct a detention proceeding remotely without consent of the parties. HB 422 took effect on June 13, 2023.

HB 616 by Vasut (R-Angleton). Requires at least one hour of the 20 hours of required continuing education for court clerks to concern the proper selection of grand and petit juries. HB 616 takes effect on September 1, 2023.

HB 1255 by Smithee (R-Amarillo)/Hughes (R-Tyler). Adds § 16.073, CPRC, to provide that a party may not assert a claim in an arbitration proceeding that the party could not assert in court because the applicable limitations period had expired. Allows a party to assert such a claim if the party brought suit for the claim in court before the expiration of limitations, or the parties either agreed to arbitrate the claim or the court ordered the parties to arbitrate the claim. HB 1255 took effect on May 24, 2023.

HB 2007 by Martinez (D-Weslaco)/Parker (R-Flower Mound). Amends § 150.002, CPRC, to provide that a third-party plaintiff that is a design-builder or design-build firm is not required to file a certificate of merit in connection with a third-party claim or cross-claim against a licensed or registered professional if the action or arbitration proceeding arises out of a design-build project in which a governmental entity contracts with a single entity to provide both design and construction services for a building or facility, a civil works project, or a highway project. HB 2007 takes effect on September 1, 2023.

HB 3929 by Cook (R-Mansfield)/Hughes (R-Tyler). Repeals § 20.002, CPRC (testimony required by a foreign jurisdiction), effective September 1, 2025. Authorizes SCOTX to adopt the Uniform Interstate Depositions and Discovery Act as rules of civil procedure. Provides that if SCOTX does not adopt the Act before September 1, 2025, current law remains in effect. HB 3929 takes effect on September 1, 2023.

HB 4381 by DeAyala (R-Houston)/Huffman (R-Houston). Adds § 52.007, CPRC, to direct the trial court, upon a showing that posting security in the larger amount required by § 52.006 would require the judgment debtor to substantially liquidate the debtor's interests in real or personal property necessary to the normal course of the debtor's business, to allow the debtor to post alternative security. Permits the debtor, pending appeal, to continue to manage, use, and receive earnings from interests in real or personal property in the normal course of business. Provides that if an appellate court reduces the amount of the judgment that the trial court used to set security, the judgment debtor is entitled, pending appeal of the judgment to a court of last resort, to a redetermination of the amount of security. Applies to a judgment debtor with a net worth of less than \$10 million. HB 4381 takes effect on September 1, 2023.

SB 1602 by Hughes (R-Tyler)/Cain (R-Houston). Adds Chapter 143A, CPRC, to provide that venue for an action involving censorship by social media

platforms shall be brought and maintained in Texas courts and that Texas law applies. SB 1602 takes effect on September 1, 2023.

Insurance

HB 998 by Paul (R-Houston)/Middleton (R-Galveston). Amends § 2211.051, Insurance Code, to authorize the commissioner of insurance to include in a Fair Access to Insurance Requirements Plan property owners' association insurance if the commissioner determines that such insurance is not reasonably available in the voluntary market to a substantial number of insurable risks. Adds § 2211.1515, Insurance Code, to require TWIA to make property owners' association insurance to an applicant in an underserved area up to 10 miles beyond TWIA's designated catastrophe area, if the applicant has made diligent effort (evidenced by two declinations) but has been unable to secure insurance in the voluntary market. Makes conforming changes in other sections. HB 998 takes effect on September 1, 2023.

HB 1074 by Hull (R-Houston)/Zaffirini (D-Laredo). Amends § 1806.002, Insurance Code, to authorize an insurer or insurer's agent to offer or give an insured or applicant, for free or at a discounted price in a manner that is not unfairly discriminatory to insureds or applicants of the same class and of essentially the same hazard, services or other offerings not specified in the insurance policy that relate to loss control of the risks covered under the policy. Clarifies that various non-discrimination provisions in Chapter 1806 do not permit an unfair method of competition or a false, misleading, or deceptive act or practice under the DTPA. Requires the cost to the insurer or insurer's agent of offering the product or service to be reasonable in comparison to that customer's premiums or insurance coverage for the policy class. Prohibits the insurer or insurer's agent from providing to another person any data obtained from the customer in connection with the product or service, except for loss control of risks covered under the policy. HB 1074 takes effect on September 1, 2023.

HB 1706 by Perez (D-Houston)/Schwertner (R-Georgetown). Bars an insurance policy from prohibiting an insured to contract with a public adjuster. HB 1706 takes effect on September 1, 2023.

HB 1900 by Smithee (R-Amarillo)/Kolkhorst (R-Brenham). Amends § 551.105, Insurance Code, to extend the prior written notice requirement for nonrenewal of a property and casualty policy from 30 to 60 days. HB 1900 takes effect on September 1, 2023.

HB 2065 by E. Thompson (R-Pearland)/Middleton (R-Galveston). Amends § 551.1053, Insurance Code, which requires an insurer to give the insured written notice of nonrenewal if the insured fails or refuses to cooperate with an insurer in the investigation, settlement, or defense of a claim, to limit the application of the provision to a third-party claim. HB 2065 takes effect on September 1, 2023.

HB 3311 by Lozano (R-Kingsville)/Middleton (R-Galveston). Eliminates § 2210.102(f), Insurance Code, which requires TWIA member insurers to nominate a slate of nominees to fill a vacancy in one of the three positions reserved for them on the TWIA board. HB 3311 takes effect on September 1, 2023.

SB 833 by King (R-Weatherford)/Oliverson (R-Cypress). Prohibits an insurer from considering a customer's ESG score or consideration of diversity, equity, and inclusion factors, unless the insurer's actions are based on an ordinary insurance purpose, including the use of sound actuarial underwriting principles or financial solvency considerations. Provides that an insurer is not required to file rates for any line, type of insurer, or type of insurance business that is not specifically required by statute. Provides that the chapter does not require any insurer to write any line or type of business the insurer does not write or a material change in the insurer's current business plans. Provides that the chapter creates no private cause of action or independent basis for

a civil or criminal proceeding, including any type of cause of action based on disparate impact in the field of insurance or in this chapter. Provides that nothing in this chapter is intended to prohibit the use of relevant information related to the risk being insured even if that information is used to develop an ESG score. Prohibits TDI from requiring an insurer to conduct a disparate impact analysis unless specifically required by statute and from adopting a rule requiring an insurer to use ESG factors. SB 833 takes effect on September 1, 2023.

Worker's Compensation

HB 90 by Patterson (R-Frisco)/Huffman (R-Houston). Amends Chapter 401, Labor Code, to entitle members of the Texas military forces to the same benefits under the workers' compensation system as first responders. HB 90 takes effect on September 1, 2023.

HB 471 by Patterson (R-Frisco)/Schwertner (R-Georgetown). Requires a municipality or county to provide to a firefighter, police officer, or EMS personnel a fully paid leave of absence for an illness or injury related to the person's line of duty for a period commensurate with the nature of the injury or illness and, if necessary, for at least one year. If after a year the person's leave is not extended or the person's salary falls below 60% of the person's regular monthly salary, and the person is a member of a retirement system with pension benefits, the person becomes eligible to receive pension benefits until return to duty. Provides that a first responder temporarily disabled by an injury or illness not related to the person's line of duty may use accumulated sick leave, vacation time, and other accrued benefits before the person may be placed on temporary leave or may have another first responder do the person's job while the person is disabled. Allows a return to light duty for at least one year following a temporary disability and requires reinstatement to the same rank and seniority as the person had before the temporary disability. Amends § 415.021(c-2), Labor Code, to direct the commissioner, in determining whether to assess an administrative penalty against an insurance carrier for failure to provide notice,

whether the employee or a person residing with the employee promptly and accurately responded to the carrier's inquiry regarding the use of cigarettes, e-cigarettes, or tobacco products by the employee or person residing with the employee. Amends §607.052(b), Government Code, to except from the presumption that certain diseases are occupational for first responders the responder's or person regularly residing with the first responder's use of tobacco product regularly in the seven years preceding the diagnosis of the disease or illness. Amends §607.056, Government Code, to expand the presumption that a heart attack or stroke suffered by a first responder during the course and scope of employment to no longer require the stressful or strenuous physical activity to be "nonroutine" (including a training exercise) or the heart attack or stroke to have occurred while the first responder were engaging in the stressful activity (now must be no later than 8 hours after the end of a shift in which the first responder engaged in the activity). Requires future collective bargaining agreements to incorporate these changes. HB 471 took effect on June 12.

HB 2314 by Canales (D-Edinburg)/Kolkhorst (R-Brenham). Amends § 408.182(d-2), Labor Code, to allow a parent to file a claim for death benefits directly with the insurance carrier. Amends § 409.007, Labor Code, to provide that if a person files a death benefits claim with an insurance carrier, the carrier must at the time of receiving the claim create and maintain a record documenting receipt of the claim and provide written notice to the division that the person filed the claim. HB 2314 took effect on June 10, 2023.

HB 2468 by Burrows (R-Lubbock)/Perry (R-Lubbock). Amends § 408.161(a), Labor Code, to add to the list of conditions for which lifetime income benefits are paid: a permanent major neurocognitive disorder or psychotic disorder; third degree burns on both feet, one hand and one foot, or one hand or one foot and the face; or a serious bodily injury sustained by the employee in the course and scope of employment or volunteer service as a first responder that permanently prevents the employee from performing any gainful

work. Provides for an acceleration of a contested case hearing for a first responder. Requires an employee receiving LIBs to annually certify to the carrier that the employee was not employed in any capacity in the preceding year. Allows the carrier to suspend LIBs if the employee fails to certify or the employee is employed, absent good cause. HB 2468 takes effect on September 1, 2023.

HB 3335 by Canales (D-Edinburg)/Kolkhorst (R-Brenham). Amends § 401.206, Labor Code, relating to considering travel to an emergency call as within the course and scope of employment for emergency response personnel. Adds peace officers to the list of personnel and includes travel from the emergency call in the course and scope. HB 3335 took effect on June 13, 2023.

Civil Rights

HB 567 by Bowers (D-Dallas)/Miles (D-Houston): Prohibits a student dress or grooming policy adopted by a school district or institution of higher education from discriminating against a hair texture or protective hair style commonly or historically associated with race. Prohibits an employer, labor union, or employment agency from doing the same. Prohibits a seller or lessor of residential real property from doing the same. HB 567 takes effect on September 1, 2023.

Court Records, Filing Fees, and Costs

SB 569 by Springer (R-Muenster)/Stucky (R-Wichita Falls). Amends § 22/004. CPRC, to authorize a municipality to impose a fee for the production or certification of a record under a subpoena, request for production, or other instrument related to a matter in which the municipality is not a party. SB 569 takes effect on September 1, 2023.

Judicial Matters/Administration

HB 103 by Murr (R-Junction)/Sparks (R-Midland). Allows a county judge to appoint a person who served as an active judge for at least 96 months in a constitutional county court or a

licensed attorney who served at least 48 months in a constitutional county court to sit in docketed matters before the court if the judge is absent or incapacitated. HB 103 takes effect on September 1, 2023.

HB 367 by Jetton (R-Richmond)/Zaffirini (D-Laredo). Allows the Judicial Conduct Commission to accept complaints, conduct investigations, and take any other action with respect to a candidate for judicial office (subject to Chapter 253, Election Code) in the same manner as a judge. HB 367 takes effect on September 1, 2023.

HB 841 by Ordaz (D-El Paso)/Middleton (R-Galveston). Requires the Office of Court Administration to include case-level information on the amount and character of the business transacted by courts in its judicial statistics and other information about the courts. HB 841 takes effect on September 1, 2023.

SB 372 by Huffman (R-Houston/Leach (R-Allen). Creates a criminal offense (Class A misdemeanor) if a person knowingly discloses the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding. Provides a defense from prosecution if the disclosure is authorized in writing by the judge or justice for whom the work product is prepared or under supreme court rules. SB 372 takes effect on September 1, 2023.

SB 1245 by Huffman (R-Houston)/Bonnen (R-Friendswood). Allows judicial retiree to rejoin the system if the retiree resumes judicial service and has been separated from judicial service for at least one year. Makes prospective changes to the Judicial Retirement System Plan Two to allow judges who took office after September 1, 2024, and who were not already members of the system to apply for a cash balance annuity based on certain age and service requirements. **Sent to Governor on 5/25.**

SB 1259 by Creighton (R-Conroe)/Vasut (R-Angleton). Amends § 92.0563, Property Code, to raise the amount of a judgment that may be awarded by a justice court, including an order for repair of residential real property, from \$10,000 to \$20,000. SB 1259 takes effect on September 1, 2023.

HB 3474 by Leach (R-Allen)/Hughes (R-Tyler). The omnibus court bill. The bill:

- Adds § 22.3015, Government Code, to entitle an appellate justice to traveling and other necessary expenses when engaged in the discharge of official duties in a county other than the justice's residence.
- Amends § 24.553, Government Code, to give the 411th District Court concurrent jurisdiction in Polk County with the county court over all misdemeanor cases.
- Amends § 24.591, Government Code, to allow a district court in Kendall County to sit outside the county seat in a suitable facility designated by the commissioners court.
- Adds § 24.600201, Government Code, to create the 477th Judicial District composed of Denton County.
- Amends § 24.60030, Government Code, to give the 485th District Court concurrent original jurisdiction with the county criminal courts in Tarrant County over misdemeanor cases.
- Adds §§ 24.60031, 24.60032, and 24.60033, Government Code, to create the 486th Judicial District in Harris County. Provides that the court will give preference to criminal cases. Creates the 487th Judicial District in Harris County. Creates the 488th Judicial District in Harris County, with preference for criminal cases.
- Adds § 24.60038, Government Code, to create the 493rd Judicial District composed of Collin County, with preference for civil cases.

- Adds § 24.60039, Government Code, to create the 494th Judicial District composed of Collin County, with preference for family law matters.
- Adds §§ 24.60040, 24.60041, and 24.60042, Government Code, to create the 495th Judicial District composed of Harris County, with preference for criminal cases; the 496th Judicial District composed of Harris County, with preference for criminal cases; and the 497th Judicial District composed of Harris County, with preference for criminal cases.
- Adds § 24.60043, Government Code, to create the 498th Judicial District composed of Kendall County. Grants concurrent jurisdiction with the other Kendall County district courts in all civil and criminal matters over which the county court has original or appellate jurisdiction.
- Adds § 24.6009, Government Code, to create the 465th Judicial District composed of Bastrop County.
- Adds § 60095, Government Code, to create the 472nd Judicial District composed of Bastrop County, with primary responsibility for civil matters, family law matters, and juvenile matters.
- Adds § 72.039, Government Code, to require the Office of Court Administration, at least once every two years, to conduct a district court caseload analysis. Requires the analysis to concentrate on the weighted caseload of the district courts in the 30 most populous counties in the state, considering the nature and complexity of cases heard by each court. Requires the analysis to contain disaggregated data for each county showing the number of cases filed in each court in each of the five preceding years, the clearance rate for those years, the number of estimated FTE judicial officers in the prior year, and other information OCA deems relevant.

- Amends § 659.012(b), Government Code, to make full-time associate judges of district courts, district attorneys, criminal district attorneys, or county attorneys the same base salary as appellate judges and justices that have accrued four years of contributions to JRS at the 110% tier and eight years of contributions at the 120% tier.
- Amends § 25.0005, Government Code, to give statutory county court judges service credit for prior service as district attorneys, criminal district attorneys, or county attorneys.
- Amends § 25.0023(a), Government Code, to require the commissioners court, when setting the salary of a statutory county court judge, to add prior service as a district attorney, criminal district attorney, or county attorney.
- Amends § 25.0062, Government Code, to expand the concurrent jurisdiction of a county court at law in Aransas County to include civil cases in which the matter in controversy exceeds \$250,000.
- Amends § 25.0171, Government Code, to create a third probate court in Bexar County.
- Amends § 25.0331, Government Code, to convert Cameron County County Court-at-Law No. 4 into a statutory probate court.
- Amends § 25.0592, Government Code, to exclude a county court-at-law in Dallas County only from following the same trial rules as apply to district courts in matters of concurrent jurisdiction, not the other requirements of the statute.
- Amends § 25.0732, Government Code, to designate the County Criminal Court at Law No. 2 of El Paso County to conduct the DWI Drug Court.
- Amends § 25.0932, Government Code, to give a Grayson County court-at-law concurrent jurisdiction with district courts in family law cases and proceedings.
- Amends § 25.1031(c), Government Code, to add a probate court in Harris County.
- Amends § 25.1572, Government Code, to give a McLennan County court at law concurrent jurisdiction with district courts in state jail, second degree felony cases, and family law cases on assignment from a district judge presiding in McLennan County and accepted by the judge of the county court at law. Also adds jurisdiction in Class A and B misdemeanor cases, probate proceedings, eminent domain, appeals from justice and municipal courts, and disputes ancillary to probate, eminent domain, condemnation, landlord-tenant disputes, adjudication and determination of land titles and trusts, whether testamentary, inter vivos, constructive, resulting, or any other class or type of trust, regardless of the amount in controversy or remedy sought.
- Amends § 25.1721, Government Code, to create a statutory probate court in Montgomery County. Gives the court concurrent jurisdiction with the district court in disputes relating to the creation of a constructive trust, actions in which the only relief sought is an injunction, declaratory judgment actions, actions to appoint a receiver, and eminent domain proceedings.
- Amends § 25.1892, Government Code, to expand the jurisdiction of a county court at law in Polk County to include felony cases to conduct arraignments and pre-trial hearings and to accept guilty pleas.
- Amends § 25.2223, Government Code, to give a county criminal court in Tarrant County concurrent original jurisdiction of criminal cases with a district court other than felony cases involving capital murder.
- Amends § 25.2291, Government Code, to create a second probate court in Travis County.

- Amends § 25.2293, Government Code, to give the new Travis County probate court primary responsibility for mental health matters.
- Amends § 25.2391, Government Code, to create a second Waller County court at law.
- Adds § 25.2491, Government Code, to create a statutory county court in Wilson County.
- Amends § 25.2607, Government Code, to compensate the administrative county of a multicounty statutory county court with an amount equal to 100% of the state salary paid to a district judge with comparable years of service as a multicounty statutory county court judge, including prior years of service as a judge or justice of an appellate, district, statutory county, or statutory probate court or a district attorney, criminal district attorney, or county attorney.
- Adds §§ 25.2703 and 25.2702, Government Code, to create a second multicounty statutory county court in Bee, Live Oak, and McMullen Counties, with concurrent jurisdiction with the district court in civil cases with an amount in controversy of between \$500 and \$250,000.
- Amends § 49.05(b), Code of Criminal Procedure, to allow a JP to conduct an inquest by videoconference with an individual who is designated by the JP and present with the body for a death.
- Amends § 26.315, Government Code, to expand the jurisdiction of the Stephens County court to include original jurisdiction concurrent with justice courts in all civil matters.
- Amends § 92.0563(e), Property Code, to raise the cap on an award by a justice court under this section, including an order of repair, from \$10,000 to \$20,000.
- Amends Art. 2.09, Code of Criminal Procedure, to authorize magistrates appointed by the judges of the district courts and statutory county courts in Denton County and in Grayson County. Further amends Art. 4.01 to make a conforming change.
- Amends § 54.2001(b), Government Code, to allow the judges of the district and statutory county courts in Guadalupe County to appoint magistrates by majority vote instead of unanimously.
- Adds Subchapter RR, Chapter 54, Government Code, regarding the administration and appointment of magistrates in Grayson County. Further adds Subchapter SS for Denton County magistrates.
- Amends § 201.005, Family Code, to permit a court to refer to an associate judge an action under Chapters 35 or 35A, Family Code (temporary authorization for care of a minor child or inpatient mental health services), Subchapter A, Chapter 7B, Code of Criminal Procedure (protective orders for victims of sexual assault or abuse, indecent assault, stalking, or trafficking), or Chapter 24A, Property Code (access to residence or former residence to retrieve personal property).
- Adds § 54A.219, Government Code, to regulate the appointment of visiting associate judges.
- Adds Chapter 54B, Government Code, to provide for the appointment of full-time or part-time associate judges in Duval County.
- Amends § 602.007, Government Code, to add to require a retired or former judge on the list of visiting judges to take the constitutional oath for judicial officers and appointees.
- Amends § 41.013, Government Code, to add a monthly amount of longevity pay to the state salary of a district or criminal district attorney.

- Amends § 45.315, Government Code, to direct the Stephens County attorney to represent the state in all criminal cases before the Stephens County court.
- Amends § 46.003, Government Code, to add a monthly amount of longevity pay to the annual salary for state prosecuting attorneys.
- Amends § 61.001(a), Government Code, to increase juror pay from \$6 to \$20 for the first day of service and from \$40 to not less than \$58 for each day thereafter.
- Amends § 61.0015(a), Government Code, to require the state to reimburse a county \$14 a day for the first day of juror service and \$52 for any days thereafter.
- Amends § 61.001, Government Code, to remove from the jury wheel non-citizens and non-residents exempts from jury service.
- Amends § 62.0131, Government Code, to add new information to the model jury summons.
- Amends § 62.106(a), Government Code, to raise the maximum age for exemption from jury service from over 70 to over 75.
- Adds § 62.115, Government Code, to require the clerk of the court to maintain a list of the name and address of each person who is disqualified from jury service because of a conviction for misdemeanor theft or a felony. Requires permanent disqualification, unless the person was placed on deferred adjudication and ultimately dismissed and discharged, was placed on community supervision and the period was terminated early, or was pardoned and had the person's civil rights restored.
- Amends § 52.041, Government Code, to allow the judges of two or more courts of record that are not located in the same judicial district to jointly appoint an official court reporter, provided that each court is located in a county of 125,000 or less. Further allows the joint appointment of a certified shorthand reporter. Establishes compensation levels and reimbursement of certain expenses.
- Amends § 154.105, Government Code, to allow a certified shorthand reporter to administer oaths to witnesses without being in the same locations as the witnesses.
- Amends § 154.112, Government Code, to authorize imposition of a civil penalty against an uncertified person who delivers an affidavit to the parties or to their counsel before the deposition begins stating that a certified shorthand reporter is not available who fails to file an affidavit with the court. Further authorizes injunctive relief. Enforceable by the attorney general, a county or district attorney, or the commission's legal counsel. Authorizes recovery of attorney's fees, expenses, and costs.
- Amends § 21.001, CPRC, to specify that that a deposition "on written questions" of a witness outside the state but in the United States may be taken in other state by a clerk of a court of record, commissioner of deeds, or notary public. Makes same change to taking a deposition on written questions of a witness outside the United States or a member of the US Armed Forces outside the United States.
- Amends § 30.012, CPRC, to provide that witness testimony at trial *in a district or statutory county court* may be conducted by electronic means only if the witness is deposed before trial (current law does not specify the courts). Provides that this requirement may not be waived if any party objects.
- Amends § 57.002, Government Code, to provide that a party who files a statement of inability to afford payment of court costs is

not required to provide an interpreter at the party's expense or pay the costs associated with the services of an interpreter, unless the statement has been contested and the court has ordered the party to pay costs.

- Amends § 33.105, Estates Code, governing the transmission of a file in a probate proceeding to a county of proper venue, to require the use of the electronic filing system. Makes similar changes for transfers between family courts and statutory county courts or county courts.
- Amends § 602.002, Government Code, to authorize retired JPs to administer oaths made in Texas.
- Adds §51.018, CPRC, to allow a party that files a notice of appeal to file an appendix that replaces the clerk's record for the appeal. Requires the party to notify the court of appeals that it will file an appendix not later than the 10th day after the notice of appeal is filed. Requires the appendix to be filed with the party's appellant brief. Requires the brief and appendix to be filed not later than the 30th day after the later of: (1) the date the party provided notice to the court of appeals; or (2) the date that a reporter's record, if any, is filed with the court of appeals (except by order of the court or in an expedited proceeding). Requires the appendix to contain a file-stamped copy of each document required by Rule 34.5, TRAP, for civil actions and any other item the appellant refers to in its brief. Does not allow the appendix to include any document not filed with the trial court, absent agreement of the parties. Provides that the appendix becomes part of the appellate record and does not allow the appellate clerk to charge a fee for a clerk's record if the appendix is filed.
- Amends § 80.002, Government Code, to authorize a statutory county court, district court, or appellate court to deliver through the electronic filing system to all parties

in each case in which the use of electronic filing is required or authorized all court orders the court enters for the case.

- Adds § 30.0035, CPRC, to prohibit a person from serving citation or other civil process in person on a member, officer, or employee of the senate or house during any legislative proceeding. Requires a court to quash any service made in violation and directs the supreme court to revoke the certification of a process server who commits a violation.

HB 3474 has various effective dates depending on the section of the bill.

SB 2106 by Zaffirini (D-Laredo)/J. Johnson (D-Farmers Branch). Amends § 152.203, Government Code, to authorize SCOTX to adopt rules on an applicant's ineligibility for renewing a certification, registration, or licensing by the Judicial Branch Certification Commission, including for failure to comply with commission orders or timely pay fees or administrative penalties. Amends § 153.004, Government Code, to require the commission to determine the severity of an administrative penalty based upon enumerated factors. SB 2106 takes effect on September 1, 2023.

HJR 107 by Price/Hinojosa (D-Edinburg): Amends § 1-a(1), Article V, Texas Constitution, to raise the mandatory retirement age for judges from 75 to 79. Election date 11/7/23.

Jury Matters

HB 2015 by Leach (R-Allen)/Zaffirini (D-Laredo): Amends § 62.106(a), Government Code, to raise the minimum age for a jury exemption from 70 to 75. HB 2015 takes effect on September 1, 2023.

Attorney's Fees

HB 4142 by Thompson (R-Pearland)/Birdwell (R-Granville): Mandates an award of attorney's

fees to a prevailing party in an action to enforce a motor vehicle mortgagee's lien. HB 4142 takes effect on September 1, 2023.

Practice of Law

SB 604 (R-Weatherford)/Hefner (R-Mt. Pleasant): Amends § 954.001, Occupations Code, to define "land services" provided by certified landmen for purposes of the exception to the unauthorized practice of law. Specifies the services performed by landmen to negotiating conveyances, exploration agreements, real property research to ascertain ownership, reviewing the status of title, curing title defects, doing due diligence, managing rights or obligations derived from ownership of interests, or using or pooling mineral interests or rights. SB 604 took effect on May 24, 2023.

HB 5010 by Schofield (R-Katy)/Hall (R-Edgewood): Amends § 81.073, Government Code, to require the SBOT chief disciplinary officer to classify complaints based on whether the complaint is submitted by a person who has cognizable individual interest in or connection to the legal matter or facts alleged in the grievance. Allows an attorney against whom the complaint is filed to appeal the classification of the grievance. HB 5010 takes effect on September 1, 2023.

Bills Vetoed

Construction Law

HB 2879 by Oliverson (R-Cypress)/Bettencourt (R-Houston): Adds § 15.021, CPRC, to provide that a venue provision in a contract for an improvement to real property that requires an action involving a contractor, subcontractor, or materialman who is a Texas resident to be brought outside the state is void as a matter of public policy. Provides that if a venue provision is void and the parties do not stipulate as to venue after a dispute arises, an action arising out of the contract shall be brought in the county in which the defendant resides, the cause of action accrued, or the property that is the subject of the litigation is located. Vetoed by the Governor on 6/15.

Insurance

SB 796 by Middleton (R-Galveston)/Johnson (D-Houston): Requires a surplus lines insurance contract that contains an arbitration agreement to provide that the arbitration will be conducted in Texas and governed by the laws for Texas. Provides further that the insurance contract will be interpreted in accordance with Texas law. Vetoed on June 17, 2023.

Worker's Compensation

SB 2269 by Perry (R-Lubbock)/Shine (R-Temple): Winds down the Texas self-insurance group guaranty fund and trust fund under the Texas Workers' Compensation Act. Vetoed on June 17, 2023.

Judicial Matters

SB 2275 by Hughes (R-Tyler)/Smithee (R-Amarillo): Repeals § 22.004(c), Government Code, which requires SCOTX to file with the secretary of state, at the time the court files a rule, a list of each article or section of general law or each part of an article or section that is repealed or modified in any way. Vetoed on June 17, 2023.

SB 2292 by Zaffirini (D-Laredo)/Murr (R-Junction): Raises the personal bond required of a judge presiding in the court over guardianship proceedings to \$500,000. Vetoed on June 18, 2023.

Administrative Law

HB 981 by Lopez (D-San Antonio)/Miles (D-Houston): Amends § 7.060, Water Code, to require TCEQ to send notice of a penalty to the state representative and senator representing the location where the violation occurred. Amends § 7.075(a), Water Code, to require TCEQ to send notice of a proposed administrative order or agreement to settle an enforcement action to the state representative and senator representing the location where the violation occurred. Vetoed on June 17, 2023.

Bills Not Enacted

Tort Liability

HB 1372 by Cody Harris (R-Palestine): Adds Chapter 100C, CPRC, to limit the cause of action for public nuisance. Excludes the following claims, actions, or conditions from giving rise to a public nuisance cause of action: (1) an action or condition authorized, approved, or mandated by a court order; (2) an action or condition authorized, approved, or mandated by a statute, ordinance, regulation, permit, order, rule, or other measure issued, adopted, promulgated, or approved by the federal government, a federal agency, a state, a state agency, or a political subdivision; (3) a claim based on the manufacturing, distribution, selling, labeling, or marketing of a product, regardless of whether the product is defective. Bars the aggregation of private nuisance claims to produce a violation of established public rights. Provides that this chapter controls a conflict with the common law.

HB 2955 by Bumgarner (R-Flower Mound)/HB 2117 by Oliverson (R-Cypress)/SB 1971 by Bettencourt (R-Houston): Adds Chapter 108A, CPRC, to create a cause of action against a judge or magistrate for damages arising from an offense committed while the perpetrator was released on personal bond if the offense for which the person was released on bond is an offense involving violence and the judge or magistrate released the defendant in violation of Art. 17.03(b-2), Code of Criminal Procedure. Caps the amount of damages at \$10 million and does not permit the judge or magistrate to assert judicial or other immunity.

HB 3030 by Johnson (D-Farmers Branch): Makes an employer liable in a civil action for personal injury, death, or any other damages caused by an employee whose job duties require or may require entering into a person's residence if the employer failed to verify the employee's employment history before hiring and the damages occurred in connection with the employee entering the residence of a person in the course of employment.

HB 3357 by Schatzline (R-Fort Worth): Adds Chapter 98C, CPRC, to impose civil liability against a defendant who engages in obscenity or knowingly or intentionally benefits from obscenity. Applies to information content providers and shareholders and members of business entities. Limits defenses. Authorizes recovery of actual damages, including mental anguish, costs, and attorney's fees. Authorizes recovery of punitive damages. Imposes joint and several liability.

HB 3533 by Leach (R-Allen): Amends § 16.0046, CPRC, to eliminate the limitations period for suits for personal injury arising from certain offenses against a child.

HB 3545 by Moody (D-El Paso)/SB 964 by Johnson (D-Dallas): Adds Subchapter C, Chapter 128, CPRC, to provide that a person does not have a cause of action against a federal firearms licensee operating lawfully in Texas for any act or omission arising from a firearm hold agreement that results in personal injury or death, including the return of a firearm to the owner by the licensee at the termination of the agreement. Provides that immunity does not apply to unlawful conduct or gross negligence of the licensee.

HB 3570 by Schatzline (R-Fort Worth)/HB 3585 by Leo-Wilson (R-Galveston): Creates a cause of action against a commercial entity that knowingly or intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, and that fails to verify that the user is 18 or older for damages to a parent or guardian of the minor, including court costs and attorney's fees. Creates a cause of action against a commercial entity for knowingly retaining identifying information of an individual after access has been granted. Establishes verification methods required of commercial entities or third party that performs verification for the entity.

HB 3756 by Flores (D-Austin)/SB 2421 by Zaffirini (D-Laredo): Amends Chapter 92A, CPRC, to apply the same liability standard for

removal of a domestic animal from a locked motor vehicle as currently applies to the removal of a vulnerable individual.

HB 4239 by Vasut (R-Angleton)/SB 2121 by Creighton (R-Conroe): Provides that a property owner is not liable for personal injury or death of a contractor, subcontractor, or employee of a contractor or subcontractor arising from work on an insurance restoration project if the contractor or subcontractor does not maintain workers' compensation insurance coverage. Defines "insurance restoration project" as repair of a home, business, or other structure following a fire, natural disaster, water damage, or mold damage for which the work is or will be compensated by insurance.

HB 4915 by Martinez Fischer (D-San Antonio): Amends § 17.46(b), Business & Commerce Code, to add to the list of DTPA violations "advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes."

HJR 166 by Thompson (R-Pearland): Amends § 26, Art. XVI, Texas Constitution to extend the right of recovery of exemplary damages for homicide to the deceased person's estate.

SB 1034 by Middleton (R-Galveston): Adds Chapter 100C, CPRC, to limit the cause of action for public nuisance. Excludes the following claims, actions, or conditions from giving rise to a public nuisance cause of action: (1) an action or condition authorized, approved, or mandated by a court order; (2) an action or condition authorized, approved, or mandated by a statute, ordinance, regulation, permit, order, rule, or other measure issued, adopted, promulgated, or approved by the federal government, a federal agency, a state, a state agency, or a political subdivision; (3) a claim based on the manufacturing, distribution, selling, labeling, or marketing of a product, regardless of whether the product is defective. Bars the aggregation of private nuisance claims to produce a violation of established public rights. **Referred to Senate State Affairs on 3/3.**

Medical Liability

HB 536 by Wu (D-Houston): Amends § 74.301, CPRC, to index the \$250,000 cap on noneconomic damages in health care liability cases by the CPI from September 1, 2003 to the time when damages are awarded in a judgment or settlement. Indexes both liability limits and financial responsibility amounts. **Referred to House Judiciary on 2/23.**

HB 888 by Slawson (R-Stephenville): Adds § 74.252, CPRC, to extend the statute of limitations for a claim by a minor based on the administration of a puberty suppressing drug or cross-sex hormone to or the performance of surgery or another medical procedure on the minor for the purpose of gender transitioning or gender reassignment. Provides that such that a claim must be brought by the minor's 25th birthday, rather than the 14th birthday for all other health care liability claims.

HB 1100 by Julie Johnson (D-Dallas)/SB 611 by Johnson (D-Dallas): Requires a senior living facility to conduct criminal background checks on employees and to require contractors to conduct background checks on their employees who will have access to the facility. Requires the facility to report all criminal activity to law enforcement. Prohibits the facility from preventing or inhibiting a resident from communicating with law enforcement, family member, social worker, or other interested person regarding the safety or security of the facility. Prohibits the facility from preventing a law enforcement officer from entering a common area of the facility to conduct a voluntary interview with a resident as part of an investigation of criminal activity at the facility. Prohibits a lease, rental, or purchase agreement with a resident from waiving liability, requiring arbitration, or controlling the content or execution of the resident's advance directive or testamentary documents. Imposes civil liability for damages to a resident for violations or failure to implement a safety policy or procedure and exempts actions from Chapter 74, CPRC.

HB 3063 by Moody (D-El Paso): Amends § 74.051(c), CPRC, to provide that notice of a health

care liability claim tolls the statute of limitations [n]otwithstanding the inadequacy of a medical authorization provided under Section 74.052 . . .”
Referred to House Judiciary on 3/14.

Commercial Litigation/Oil and Gas

HB 5214 by Spiller (R-Jacksboro): Authorizes the attorney general to bring a civil action against a person on behalf of an individual or entity for injury to that individual or entity’s business or property caused, directly or indirectly, by the person’s violation of § 15.05 (Texas Free Enterprise and Antitrust Act). Authorizes recovery of actual damages, interest, costs, attorney’s fees, expert witness fees. Authorizes treble damages and attorney’s fees for willful or flagrant conduct.
Referred to House Judiciary on 3/23.

Employment Law

HB 81 by Harrison (R-Midlothian)/SB 177 by Middleton (R-Galveston): Prohibits a person from compelling or coercing an individual lawfully residing in the state into obtaining a COVID-19 vaccination contrary to the individual’s vaccination preference. Requires a health care provider to obtain an informed consent for a COVID vaccine. Prohibits a person from taking an adverse action based on the person’s refusal to obtain a COVID vaccine. Authorizes the attorney general to obtain injunctive relief against a person to prevent a violation of this act. Imposes civil liability against a health care provider of \$5,000 and allows recovery of all costs and reasonable attorney’s fees.

HB 1999 by Johnson (D-Farmers Branch)/SB 1041 by Hughes (R-Tyler): Adds § 21.2545, Labor Code, to authorize a person to bring a civil suit for damages arising from an unlawful employment practice based on sexual harassment, regardless of whether the person has filed a complaint or has received a right to sue letter. Establishes a two-year statute of limitations. Makes the action subject to the § 41.008, CPRC, limits on punitive damages, not the statutory limits in § 21.2585, Labor Code. **Referred to House International**

Relations on 3/8. SB 1041 referred to Senate Natural Resources/Economic Development on 3/3.

HB 2115 by Flores (D-Austin): Amends § 21.2585, Labor Code, which limits recovery of compensatory and punitive damages against an employer in an unlawful intentional employment practices case, to exclude from the limitation an action for sexual harassment, unlawful employment practice based on sex, and retaliation in connection with an unlawful practice based on sex. Applies § 41.008, CPRC, cap on punitive damages to such actions. **Referred to House Judiciary on 3/9.**

HB 4309 by Neave Criado (D-Dallas): Adds § 25.002, Labor Code, to render void and unenforceable any provision of a nondisclosure or confidentiality agreement that prohibits or limits an employee from notifying law enforcement or a regulatory agency of sexual assault or sexual harassment committed by an employee of the employer or at the employee’s place of employment, or that prohibits an employee from disclosing to any person facts surrounding the assault or harassment. **Referred to House Business & Industry on 3/21.**

Product Liability

HB 1936 by Lozano (R-Kingsville)/SB 417 by Paxton (R-McKinney): Adds Chapter 121, Business & Commerce Code, to impose civil liability on the manufacturer of an electronic device (smartphone or tablet) that is activated in this state, does not automatically enable a filter to prevent a minor from accessing sexually explicit material, and a minor user accesses such information. Requires the filter to “reasonably prevent a user of the electronic device from circumventing, modifying, removing, or uninstalling the filter without entering a password or access code. Creates a defense if the manufacturer makes a “good faith effort” to manufacture the device that automatically enables the filter. Authorizes the attorney general to collect a \$30,000 per violation civil penalty. Authorizes a parent or guardian to

bring an action against a manufacturer for \$10,000 in damages, costs, and attorney's fees

Construction Law

HB 1963 by Leach (R-Plano): Amends § 162.001, Property Code, to provide that funds reserved by the owner during the progress of work for purposes of a mechanic's lien are trust funds. Amends § 162.003(a), Property Code, to provide that an artisan, laborer, mechanic, contractor, subcontractor, or materialman is a beneficiary of trust funds reserved under the mechanic's lien retainage requirement (§ 53.101, Property Code). Amends § 162.034, Property Code, to require a court to award costs and attorney's fees to a beneficiary who prevails in an action for misapplication of trust funds.

HB 2310 by Canales (D-Edinburg): Adds Chapter 28, CPRC, to govern commercial construction defect litigation. Requires a claimant asserting a defect to describe as to each defendant the specific defect giving rise to the claim, state the factual basis for the claim, and be verified by a person with knowledge of the facts stated in the petition. Allows a defendant to move to dismiss for failure to comply with the pleading requirement, subject to repleading to correct deficiencies. Requires a hearing on the motion to dismiss within 30 days of service of the motion, unless extended for good cause or by consent. Provides that failure to file a compliant pleading does not toll limitations. Allows a defendant to move to dismiss based on a standard that no reasonable jury could find that the defendant's services, labor, or materials caused or created the defect. Authorizes a court to award costs and attorney's fees to a party that prevails in a motion to dismiss.

HB 2657 by Leach (R-Plano): Amends § 272.001, Business & Commerce Code, to make a construction contract between an original contractor and owner voidable if the owner does not, on written request, provide a copy of any incorporated document on or before the 10th day before the date the contract is executed. Allows the owner to redact information in the document

that is not incorporated into the contract. Imposes the same requirement on a contract between a subcontractor and an original contractor and on a contract between subcontractors. Provides that a contract provision is voidable only to the extent of its applicability to the incorporated document. Allows a party to provide the incorporated documents by a link to the document on an Internet website or file hosting service that may be accessed by the other party free of charge. Prohibits waiver of these requirements.

Procedure/Discovery/Privileges

HB 556 by Vasut (R-Angleton): Directs the supreme court to adopt rules allowing for documents containing alleged trade secrets to be filed under seal. Requires the rules to require the document to be filed with an affidavit describing the document and the basis for claiming trade secret privilege. Makes the affidavit open to public inspection. Requires the rules to provide for the unsealing of the documents on a motion by any person on a showing of a specific, serious, and substantial interest that clearly outweighs a presumption in favor of preserving the secrecy of trade secrets or a determination by the court that the document does not contain a trade secret. Requires adoption of the rule by January 1, 2024.

HB 955 by Dutton (D-Houston): Amends § 18.001, CPRC, to exempt a medical bill or other itemized statement of a medical or health care service charging \$50,000 or less, an expense affidavit is not required to support a finding of fact that the amount charged was reasonable and necessary.

HB 3200 by Leach (R-Allen): Entitles a judgment creditor to a hearing on the creditor's motion for the court's assistance in collecting a final money judgment that remains unsatisfied in justice court for longer than six months. Authorizes the court to appoint a receiver unless the judgment debtor appears and contests the appointment. Authorizes the court to issue an order that requires the turnover of all nonexempt property (except for paychecks or sales proceeds of exempt property) without

requiring the creditor to prove the existence of specific property owned by the judgment debtor.

HB 3393 by Johnson (D-Farmers Branch):

Adds Chapter 150D, CPRC, to authorize a person having legal custody of a minor to enter into a settlement agreement with a person against whom the minor has a claim if a guardian or guardian ad litem has not been appointed for the minor, the total amount of the settlement is \$25,000 or less, the person entering into the settlement agreement on behalf of the minor completes an affidavit or verified statement that the person has made reasonable inquiry and that the minor will be fairly compensated by the settlement or there is no practical way to obtain additional amounts from the other party. Requires money to be paid in the settlement to be deposited in the court registry. Provides that if the money to be paid is by payment of a premium to purchase an annuity, the payment must be made by direct payment to the provider of the annuity. Requires that money in the registry can only be paid out pursuant to court order, when the minor reaches 18, or upon the minor's death. Provides that a person acting in good faith on behalf of a minor or the other settling party is not liable to the minor for money paid in settlement or for any other claim.

HB 5299 by Vasut (R-Angleton): Amends § 134A.006, CPRC, to require a party to file any document that the party knows contains another party's or person's trade secrets to file the document under seal. Requires a party seeking to seal a document containing the party's trade secrets must file a motion and affidavit with the trial court and the supreme court, serve a copy of the motion, affidavit, and document to be sealed on all parties, and deliver a copy of the document to be sealed to the trial court in a sealed envelope. Imposes the same requirements for a document the party knows contains another person's trade secrets. Requires the party or third person who contends a document contains its trade secrets to file, within 14 days of receiving notice, an affidavit describing the information and setting forth the factual basis for contending that it constitutes a trade secret. Allows any person to intervene as a matter of right

at any time before or after judgment in a case to seal or unseal court records. Authorizes any person to move to unseal any document filed in accordance with this section. Pre-empts rules adopted by the supreme court on this subject.

SB 896 by Hughes (R-Tyler)/HB 2781 by Leach

(R-Plano): Amends § 51.014, CPRC, to provide that the denial of a motion to dismiss under the TCPA is not subject to the automatic stay if the order denying the motion states that the motion was: (1) denied as not timely filed under § 27.003(b), CPRC; (2) determined to be frivolous or solely intended to delay under § 27.009(b); or (3) denied because the action is exempt under § 27.010(a).

SB 1843 by Johnson (D-Dallas): Amends § 27.009(a), CPRC, with respect to the award of costs and attorney's fees to the moving party, to change "incurred in" to "for defending against the legal action. **Referred to Senate State Affairs on 3/20.**

Insurance

HB 150 by Julie Johnson (D-Farmers Branch)/SB 1042 by Hughes (R-Tyler):

Prohibits a claimant and an insurer that writes personal or commercial automobile insurance from entering into an oral release for claims arising out of property damage or injury for which the insurer may be liable under the policy. The committee substitute provides that a written release in exchange for money or other consideration is enforceable if the contract is a separate written agreement.

HB 287 by Julie Johnson (D-Dallas): Requires a residential property insurer in a policy that includes replacement cost coverage to pay at least 80% of the estimated cost or repair for a valid claim. Does not require the insurer to pay more than replacement cost for personal property of like kind and quality. **Referred to House Insurance on 2/23.**

HB 1320 by Geren (R-Fort Worth): Amends Chapter 1952, Insurance Code, to: (1) for

purposes of an unfair settlement practices claim (§ 541.060), allow an insurer to provide notice of a claim for uninsured or underinsured motorist coverage by providing written notice to the insurer that reasonably informs the insurer of the facts of the claim; (2) provide that a judgment or other legal determination establishing the uninsured or underinsured driver's liability or the extent of the insured's damages is not a prerequisite to recovery in a bad faith action with respect to a UM/UIM claim; and (3) provides that in a UM/UIM claim, the only extracontractual cause of action available to an insured is an action for bad faith under § 541.151 to recover damages under § 541.152.

HB 1437 by Clardy (R-Nacogdoches)/SB 554 by Hughes (R-Tyler): Adds Subchapter I, Chapter 1952, Insurance Code, to require a personal automobile insurance policy to contain an appraisal procedure. Establishes an appraisal procedure whereby: (1) the insured or insurer may demand an appraisal up to 90 days after proof of loss, (2) each party shall appoint a competent appraiser to determine the loss, and (3) in the event of a disagreement the appraisers shall appoint an umpire (or the court if the appraisers can't agree. Provides that if the appraisal ends up \$1 more than the insurer's proposed undisputed loss statement, the insurer shall refund to the insured appraisal costs.

HB 1656 by Capriglione (R-Southlake): Amends § 27.02, Business & Commerce Code, to apply the prohibition on waiving, absorbing, or declining to collect a deductible in a transaction for good or service for \$1,000 or more payable from the proceeds of a property insurance policy to automobile policies as well.

HB 3391 by Johnson (D-Farmers Branch): Requires an insurer, upon the request of a claimant asserting a claim that might be covered under a liability insurance policy between the insurer and policyholder, to provide specified information by sworn statement to the claimant, including the name of the insurer, the name of each insured, the coverage limits, and any policy or coverage defense the insurer reasonably believes is available

to the insurer. The insurer must further provide a copy of the policy. Imposes a \$500 administrative penalty for non-compliance. A claimant may also request the information from the policyholder. The insurer must provide the requested information within 30 days after receiving the request. Requires the insurer to amend the sworn statement or a policyholder to disclose a material change within two days of becoming aware of the change.
Referred to House Insurance on 3/15.

HB 3773 by Johnson (D-Farmers Branch): Amends various sections of the Insurance Code to require an insurer to accept relevant clinical records submitted by a treating physician or provider with a claim related to the records or at any time after submission of the claim. Provides that for purposes of calculating a penalty related to a claim by a physician or provider, the contracted rate for health care services is the usual and customary rate for the service in the geographic area in which the service is provided.

SB 474 by Springer (R-Muenster)/HB 1716 by Guillen (R-Rio Grande City): Raises the minimum auto liability coverage for damage to or destruction of property of others from \$25,000 to \$50,000, effective January 1, 2024.

SB 1083 by King (R-Weatherford)/HB 3476 by Leach (R-Allen): Amends § 1952.101, Insurance Code, to require an insurer to direct the use of original manufacturer's or distributor's parts to repair a vehicle that the insured has owned for three years or less and that was delivered new to the insured. Bars the insurer from limiting the insured in selecting an auto repair shop. Applies the same requirements to a third-party claim against an insured. Bars an insurer from requiring an auto repair shop to use a specific percentage of non-original equipment in the repair of a motor vehicle.

SB 1268 by Johnson (D-Dallas): Amends § 707.004, Insurance Code, to prohibit an insurer waiving a deductible owed by a policyholder under a property insurance policy for any reason from requiring as a condition the policyholder's

use of the insurer's preferred or recommended contractor for the claim. Requires the insurer to receive reasonable proof of payment by the policyholder of any deductible applicable to the claim before paying a claim for withheld recoverable depreciation or a replacement cost holdback.

SB 2229 by Menendez (D-San Antonio): Amends § 601.072(a-1), Transportation Code, to raise the minimum limits for financial responsibility from \$30,000 to \$50,000 for bodily injury or death, \$60,000 to \$100,000 for bodily injury or death of two or more persons, and \$25,000 to \$40,000 for property damage

Workers' Compensation

HB 102 by S. Thompson (D-Houston)/SB 1352 by Miles (R-Houston): Amends § 408.001(b), Labor Code, to permit a decedent's estate to recover exemplary damages based on the employer's gross negligence.

HB 3977 by Neave Criado (D-Dallas): Adds § 408.0011, Labor Code, to authorize an employee who is the victim of sexual assault to bring a cause of action against the employer if the employee's injuries arise from the employer's negligence.

HB 4556 by Lambert (R-Abilene): Amends § 401.013, Labor Code, to add to the definition of "intoxication" the state of not having the normal use of mental or physical faculties by reason of introduction into the body of an abusable volatile chemical. No longer requires that the introduction of the substance be "voluntary." Provides that an analysis of a specimen of blood, urine, or any bodily fluid collected during an autopsy that shows the presence of a substance creates a rebuttable presumption that the person was intoxicated. Provides that the presumption may only be rebutted by credible and objective evidence that the person was not intoxicated.

Judicial Matters/Administration

HB 2779 by Leach (R-Allen)/Huffman

(R-Houston): Raises the base pay of a district judge from \$140,000 to \$172,494.

HB 2865 by Raymond (D-Laredo): Amends § 74.003(b), Government Code, to reduce the service requirement for the eligibility of a judge to serve as an assigned judge to a court of appeals from 96 to 72 months. Adds a requirement that the assigned judge certify to the chief justice a willingness not to hear any matter involving a party who is a current or former client of the justice or judge for the duration of the assignment. Limits the certification of willingness not to appear as an attorney in any court to the court to which the judge is assigned. Amends § 74.055(c) to reduce the service requirement for the eligibility of a judge for listing on the list of judges qualified for assignment from 96 to 72 months and makes the same changes with respect to the judge's certifications as above.

HB 3145 by Jetton (R-Richmond): Amends §§ 33.0212 and 33.0213, Government Code, to require Judicial Conduct Commission staff to conduct a preliminary investigation as soon as practicable after a complaint is filed and, upon completion, notify the judge of the complaint, the results of the preliminary investigation, and the staff's recommendations for action, as well as of the judge's right to attend each commission meeting at which the complaint is included in the report filed with commission members. Requires staff to file a report with the commissioners no later than 10 days before a scheduled meeting (current deadline is the 120th day after the complaint is filed) of completed preliminary investigations and recommendations. Requires the commission to finalize the preliminary report not later than 120 days following the date of the first meeting at which a complaint is included in the report. Requires the commission, upon finalizing a report, to give written notice to the judge within 48 hours. Allows an extension of the date of finalizing a report of not more than 240 days (currently 270).

HB 3452 by Jetton (R-Richmond): Amends § 33.034, Government Code, to allow the Judicial Conduct Commission to appeal the decision of

a court of review to the supreme court and to eliminate de novo review of a sanction issued in an informal proceeding. Amends § 33.037, Government Code, to require the Judicial Conduct Commission upon initiating formal proceedings and appointing a special master to suspend a judge from office without pay pending final disposition unless the master recommends against suspension. Amends § 74.055(c), Government Code, to block a retired or former judge from the list of eligible visiting judges if the judge has received more than one public sanction, including a public admonition or warning, from the JCC that was determined to be warranted by a court of review.

HB 3702 by Harrison (R-Midlothian): Adds § 5.001, CPRC, to provide that an ALI publication, including a restatement or model code, may not be considered to represent the law of Texas and may not be wholly or partly relief on by a court if the publication in its final form was published after December 31, 1999. Makes an exception for restatements of common law identical to Texas law without reference to any publication after December 31, 1999.

SB 21 by Huffman (R-Houston): Amends §§ 33.0212 and 33.0213, Government Code, to require Judicial Conduct Commission staff to conduct a preliminary investigation as soon as practicable after a complaint is filed and, upon completion, notify the judge of the complaint, the results of the preliminary investigation, and the staff's recommendations for action, as well as of the judge's right to attend each commission meeting at which the complaint is included in the report filed with commission members. Requires staff to file a report with the commissioners no later than 10 days before a scheduled meeting (current deadline is the 120th day after the complaint is filed) of completed preliminary investigations and recommendations. Requires the commission to finalize the preliminary report not later than 120 days following the date of the first meeting at which a complaint is included in the report. Requires the commission, upon finalizing a report, to give written notice to the judge within 48 hours. Allows an extension of the date of finalizing

a report of not more than 240 days (currently 270). Amends § 33.01(b) to define as "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" to include "persistent or wilful violation of Article 17.15, Code of Criminal Procedure" (rules for setting the amount of bail). Amends § 33.037, Government Code, to require the Judicial Conduct Commission upon initiating formal proceedings and appointing a special master to suspend a judge from office without pay pending final disposition unless the master recommends against suspension. Provides that a public reprimand must include a 60-day suspension without pay. Amends § 74.055(c), Government Code, to block a retired or former judge from the list of eligible visiting judges if the judge has received more than one public sanction, including a public admonition or warning, from the JCC that was determined to be warranted by a court of review.

SJR 54/SB 930 by Middleton (R-Galveston): Prohibits a court from issuing a per curiam opinion.

SB 1092 by Parker (R-Flower Mound): Amends § 22.002, Government Code, to give the supreme court original jurisdiction to issue writs of quo warranto and mandamus to correct any error in a court of criminal appeals' decision finding a statute, rule, or procedure unconstitutional. Further provides that a decision of the court of criminal appeals finding a statute, rule, or procedure in violation of the federal constitution is not final until either the 60th day after the decision or the denial or dismissal of a petition filed with the supreme court.

SB 1196 by Hughes (R-Tyler)/SB 2392 by Creighton (R-Conroe)/HB 2930 by Spiller (R-Jacksboro): Provides that the supreme court has appellate jurisdiction to finally resolve a conflict between the supreme court and court of criminal appeals regarding the interpretation of a provision of the Texas Constitution on the submission of a writ of certiorari to the court by a party to any proceeding in any court in the state or certification of a question of law from any federal court.

SB 1931 by Zaffirini (D-Laredo): Amends §§ 33.0212 and 33.0213, Government Code, to require Judicial Conduct Commission staff to conduct a preliminary investigation as soon as practicable after a complaint is filed and, upon completion, notify the judge of the complaint, the results of the preliminary investigation, and the staff's recommendations for action, as well as of the judge's right to attend each commission meeting at which the complaint is included in the report filed with commission members. Requires staff to file a report with the commissioners no later than 10 days before a scheduled meeting (current deadline is the 120th day after the complaint is filed) of completed preliminary investigations and recommendations. Requires the commission to finalize the preliminary report not later than 120 days following the date of the first meeting at which a complaint is included in the report. Requires the commission, upon finalizing a report, to give written notice to the judge within 48 hours. Allows an extension of the date of finalizing a report of not more than 240 days (currently 270).

Jury Matters

HB 128 by Bernal (D-San Antonio): Exempts classroom teachers, paraprofessionals, or librarians employed by a school district or open-enrollment charter school from jury duty.

HB 1332 by Herrero (D-Corpus Christi): Exempts firefighters and police officers from jury duty.

HB 1698 by Jones (D-Houston): Requires, in a county with a million people or more, the county to summon jurors directly to a justice court, which shall hear excuses from jury duty and command a sheriff or constable to summon additional jurors if needed.

HB 5110 by Bhojani (D-Eules): Adds § 61.004, Government Code, to provide that a person may not be disqualified to have serve as a juror based on the person's age, race, ethnicity, gender, sexual orientation, national origin, economic status, religious affiliation, or political belief.

SB 2087 by Hughes (R-Tyler): Exempts the spouse of an officer or employee of the Senate, House, or legislative agency from jury service.

Attorney's Fees

HB 5253 by Johnson (D-Farmers Branch): Amends § 38.001(b), CPRC, to authorize the recovery of attorney's fees for a common law tort or cause of action created by statute for which an award of actual damages is authorized.

Practice of Law

HB 4946 by Flores (D-Austin): Adds § 30.023, CPRC, to allow a party, after delivery of the jury lists to the court clerk and before the court impanels the jury, to request the court to dismiss the array of jurors and call a new array in the case. Requires the court to grant a motion of a complaining party for dismissal of the array of jurors if the attorney representing the opposing party exercised peremptory challenges for the purpose of excluding prospective jurors based on their actual or perceived race, ethnicity, sex, gender identity, sexual orientation, disability status, national origin, economic status, or religious affiliation, and the complaining party has offered evidence of relevant facts that tend to show that the opposing attorney exercised strikes in that manner. Provides that if the complaining party makes a prima facie case, the burden shifts to the opposing attorney to explain the challenges. Requires the court to call a new array if it finds that either party improperly exercised peremptory challenges.

Administrative Procedures

SB 1432 by Hinojosa/HB 2778 by Leach (R-Plano): Makes numerous changes to the State Office of Administrative Hearings. Authorizes the chief administrative law judge to appoint one or more deputy chief administrative law judges. Directs SOAH to use the technology standards of DIR and the judicial committee on information technology. Authorizes an ALJ assigned to preside over a contested case or ADR proceeding to order the use of videoconferencing technology to conduct proceedings. Authorizes SOAH to deliver a decision or order using an electronic filing system.

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2023 WINTER SEMINAR

January 25 - 29, 2023 – The Steamboat Grand – Steamboat Springs, CO

The 2023 TADC Winter Seminar was held at the Steamboat Grand Hotel & Spa in Steamboat Springs, Colorado, January 25-29, 2023. Gayla Corley with Mehaffy Weber, PC, San Antonio and Mitch Smith with Germer PLLC in Beaumont served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 9.00 hours of CLE and great skiing!



Eddie Sikes, Karen Montemayor,
Mike Bassett and Kirk Wolf



Heather & Robert Sonnier with Lana Frazier



Valerie Lewis & Zachary DeLuna



Clayton Hayley



Curt Kurhajec, Jimmy, Karen & David Brenner with Jim Hunter



Kristi Kautz, Gayla Corley, Denise Selbst with Mike & Jeni Shipman



A crowded field!



Max & Rosemary Wright with Jordan, Denise & David Selbst Karen Gann, Mike Rogers & Eric Rich

AMICUS CURIAE COMMITTEE UPDATE

Mike Eady (Thompson Coe) filed an amicus to support the petition for review in *Virlar v. Puente*, 664 S.W.3d 53 (Tex. 2023). 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 TCPRC chap. 74, subch. K. The trial court awarded the entire \$13 million in future care costs as a lump sum; the patient died during the appeal. After oral argument to a panel, the San Antonio Court *sua sponte* concluded the Tex. Civ. Prac. & Rem. Code chap. 33 definition of ‘claimant’ for the purpose of settlement credits was unconstitutional. The Supreme Court the definition of “claimant” to include the patient’s child was proper and did not violate the Open Courts Clause; thus, it was proper to apply the entire credit against the patient’s future medical award. In this case, application of the credit did not deny the patient/mother’s common law remedy. The award of partial periodic payments for future medical expenses is mandatory when the provider proves eligibility and need not be pleaded as an affirmative defense. The case was remanded for the trial court to determine the amount of future medical was projected to be incurred between the trial and her death; the defendants should not have to pay the balance.

Roger Hughes (Adams & Graham) filed an amicus letter 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. That standard of review for factual sufficiency challenges to noneconomic damage appears to be an 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. After the Court asked plaintiff to respond to the motion for rehearing, the case settled.

Peter Hansen (Jackson Walker) to file an amicus to support the petition for review in *HMNC, Inc. v. Chan*, 673 S.W.3d 919 (Tex. App.--Houston [14th Dist.] 2021, pet. granted) (en banc). This is a pedestrian/auto death case, in which the critical issue is the legal duty of a premises owner to protect people from injury while crossing an adjacent public street. A split panel said “no,” but on m/reh a split court of appeals en banc said “yes.” The Majority did not apply any exception to the rule that the landowner owes no duty to protect people from injury while crossing an adjacent street. Instead, the Majority applied the general duty analysis to find the landowner had a duty to warn the pedestrian that it was not safe to cross at that location. There is a difficult question of using the general duty analysis as a “wild card” to trump recognized “no duty” rules. The Supreme Court has granted review.

TADC has authorized an amicus to support the petition for review on *American Honda Motor Co. v. Milburn*, No. 04-19-0085, 2021 WL 5504887, 2021 Tex. App. LEXIS 9512

(Tex. App.—Dallas Nov. 24, 2021, pet. granted) (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 the driver’s responsibility.

The Supreme Court has granted review.

Rich Phillips, Jr., and Dina W. McKenney (Holland & Knight) filed an amicus brief to support the petition for review in *Taylor Morrison of Tex. v. Fulchere*, No. 13-20-332-CV, 2022 WL 3905553, 2022 Tex. App. LEXIS 5521 (Tex. App.--Corpus Christi 2022, pet. filed) (mem. op.). This is an FAA arbitration appeal over whether the arbiter exceeded his authority to award attorney’s fees when the contract specified that each party would bear their own attorney’s fees and costs in arbitration. The Corpus Court held upheld awarding attorney’s fees but not costs. There is a split in authority over the arbiter awarding fees and costs when the arbitration agreement expressly requires the parties pay their own fees and costs in arbitration. Merits briefing has been requested.

TADC Amicus Curiae Committee

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HOW TO AVOID COMMON SUMMARY JUDGMENT PITFALLS

With the prevalence of summary judgment practice in Texas, it can be easy to fall into complacency. Summary judgment motions and responses are often hurried, often completed just before the court's deadline. This rush and the perfunctory feel often leave attorneys overlooking certain requirements and best practices. Because of this, the nuances of Texas summary judgment practice have caught many a lawyer unawares, leaving them either frustrated and heading to trial in a matter that could have been disposed of or defending a motion on appeal that has little chance of success. This paper addresses potential problems to help lawyers successfully maneuver Texas summary judgment procedure.

1. Expressly and specifically state your grounds.

Both traditional and no-evidence summary judgment motions must be specific.¹ Summary judgment cannot be granted on grounds that are not expressly asserted. The reasoning behind this rule is that the motion must put the parties and the court on fair notice of the specific grounds. You cannot rely on reply briefs or other pleadings to meet the specificity requirement.

Traditional Motion: In drafting a traditional motion for summary judgment, it is useful to initially include the specific grounds by bullet-point for the reader to use as an outline for your briefing. This outline will also help you draft an organized brief and ensure that all pertinent

elements are addressed. Create a separate section at the beginning of your motion listing the grounds on which it is based. Use "because" statements to ensure that your grounds are not too generic. For example, asserting that "Judgment should be granted as a matter of law on the unjust enrichment claim" does little to apprise the reader *why* summary judgment should be granted. Contrast this statement: "Judgment should be granted on the unjust enrichment claim because Texas law does not recognize unjust enrichment as an independent cause of action."

No-Evidence Motion: A no-evidence motion should be clear as to the specific elements challenged.² Courts have found statements like these insufficient: "There is no evidence to support one or more of the elements . . ." and "There is no evidence to support any of the elements . . ."³

Similarly, it is not enough to challenge a non-essential element. The Texas Supreme Court held the following language insufficient: "[There is] no evidence of any element of [tortious interference with contract]. By way of example, there is no evidence: that [PSC] engaged in unlawful interference with the contract."⁴ The court held "unlawful interference" is not an element of a tortious interference with contract claim, and the motion was therefore insufficient.

To ensure that you have the right elements, always look at recent case law. Do not rely on

¹ *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 545-46 (Tex. 2017); *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 566 (Tex. 2016).

² Tex. R. Civ. P. 166a(i).

³ See, e.g., *Jose Fuentes Co., Inc. v. Alfaro*, 418 S.W.3d 280, 283 (Tex. App.—Dallas 2012, pet

denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 4 (Tex. App.—San Antonio 2000, pet. denied).

⁴ *Cmty. Health Sys. Pro. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 696 (Tex. 2017).

memory! Reviewing court decisions shows you “magic” language that has worked in other cases as well as language that has been deemed insufficient. This can be the difference-maker in your motion.

Hybrid motion: Combining a traditional and no-evidence motion in the same document is, of course, allowed.⁵ However, you should be wary of this as courts of appeals have begun holding litigants to exacting standards. If you file a combined motion, clearly delineate which portion of the motion is which. You should also use caution in your word choice. For example, courts have held a phrase like “as a matter of law,” when used in the no-evidence portion of a motion can convert your entire motion to a traditional motion (and leave the burden with you).⁶ A wiser practice is to file two separate motions.

Responding to an insufficient motion: If a traditional summary judgment motion is not specific enough, the nonmovant should file special exceptions at least seven days before the summary judgment hearing.⁷ The nonmovant must also obtain a ruling on the special exceptions to preserve the issue for appellate review.⁸ Special exceptions to a summary judgment motion, while less common, mirror the use and requirements for special exceptions in other pleadings and are used to identify deficiencies in the motion itself.

There is a split in the intermediate appellate courts on the proper procedure if a no-evidence motion is insufficient. Some courts hold that the motion itself is legally insufficient and can be

challenged as such on appeal for the first time.⁹ Others hold that a non-movant waives the issue by not specially excepting in the trial court.¹⁰ Until the Texas Supreme Court decides this issue, the best practice is to specially except and protect your record.

2. Beware of unpled claims/defenses.

As a general rule, you cannot rely on an unpled claim or defense in summary judgment practice.¹¹ However, you may rely on claims or affirmative defenses that have not been raised in the pleadings *if* the other side does not object.¹² Failing to object to an unpleaded claim or defense essentially results in trial by consent. The failure to object cannot be cured on appeal.¹³

Pleading amendments are generally allowed during summary judgment practice. If a pleading is amended to add a new theory or claim, the movant should consider whether the motion for summary judgment is broad enough as it stands. If it is, the motion does not need to be amended. For example, in *Lampasas v. Spring Center*, the defendant moved for summary judgment, and the plaintiff amended his petition to address additional theories of why the defendant was negligent.¹⁴ The defendant did not amend his summary judgment motion. The court determined the pending motion was sufficient because while the plaintiff had added theories, the cause of action was the same.

⁵ *Binur v. Jacobo*, 135 S.W.3d 646, 650-51 (Tex. 2004).

⁶ *Cohen v. Landry's Inc.*, 442 S.W.3d 818, 823 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

⁷ *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993); *Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 123 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (“When a non-movant believes a motion for summary judgment is unclear, ambiguous, or lacks specificity, it must file special exceptions.”).

⁸ *Grace Interest, LLC*, 431 S.W.3d at 123.

⁹ *See, e.g., Jose Fuentes Co.*, 418 S.W.3d at 287.

¹⁰ *See, e.g., Flory v. Daimler Chrysler Corp.*, No. 12-02-00270-CV, 2003 WL 22872407, at *1 n.2 (Tex. App.—Tyler Dec. 3, 2003, no pet.).

¹¹ *Brumley v. McDuff*, 616 S.W.3d 826, 831 (Tex. 2021).

¹² *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

¹³ *Id.* at 495 (holding that in the summary judgment context, “[t]he party who allows an issue to be tried by consent and who fails to raise the lack of pleading before submission of the case cannot later raise the pleading deficiency for the first time on appeal”).

¹⁴ *Lampasas v. Sprint Ctr., Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

3. Be mindful of burdens.

It's easy to sink into the quagmire of burdens of proof. Even the Texas Supreme Court Justices are split on these issues. If there is any doubt as to the burdens, consider filing traditional and no-evidence motions, which can help ensure your judgment gets affirmed on appeal under various burden scenarios. If you are the non-movant, think about filing a competing motion for summary judgment to help identify and shift burdens in your favor.

No matter what, if your opponent is trying to shift their burden to you – point this out! A failure to do so can result in waiver.¹⁵

The role of presumptions: For a traditional motion, the burden will shift to the nonmovant only if the movant first establishes its right to judgment.¹⁶ A presumption cannot be used to satisfy the movant's initial burden.¹⁷ Texas courts "never shift the burden of proof to the non-movant unless and until the movant has established his entitlement to a summary judgment . . . by conclusively proving all essential elements of his cause of action or defense as a matter of law."¹⁸ This is because "summary judgments must stand or fall on their own merits" and the nonmovant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right to judgment.¹⁹

There is not as definitive an answer of how presumptions play into no-evidence summary judgment practice. Some courts have allowed the non-movant to shift the burden by using a presumption.²⁰ In one such case, the movant filed

a no-evidence motion, claiming that no evidence supported the plaintiff's undue influence claims.²¹ The non-movant argued that the movant owed a fiduciary duty, which gave rise to a presumption of unfairness. Therefore, the movant would have the burden to prove lack of undue influence, rather than the non-movant having to raise a fact issue as to each element of an undue influence claim. The court of appeals agreed, holding that the presumption of unfairness shifted the burden back to the movant. It is imperative that the drafter know and understand how presumptions can affect their motion.

The Beaumont court of appeals has held the opposite.²² In *Fielding v. Tulllos*, the plaintiff responded to defendant's motions for summary judgment by asserting the existence of a fiduciary duty, which gave rise to a presumption of undue influence. The court acknowledged that once the presumption was raised, the burden of coming forward with evidence to rebut the presumption shifted to the party against which it operates. However, the court expressly noted that "[a] rebuttable presumption does not shift the ultimate burden of proof."

Exceptions to affirmative defenses: Who has the burden to plead or prove an exception to an affirmative defense? This was the situation the Texas Supreme Court faced in *Draughon v. Johnson*.²³ Draughon signed a deed conveying realty to Johnson. Draughon later filed a declaratory judgment seeking to quiet title on the property, claiming that he did not have the mental capacity to sign the deed to Johnson. Johnson moved for traditional summary judgment on

¹⁵ *Roark*, 813 S.W.2d at 494-95.

¹⁶ *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23-24 (Tex. 2000) (per curium).

¹⁷ *Draughon v. Johnson*, 631 S.W.3d 81, 87 (Tex. 2021) (citing *Missouri-Kansas-Texas R.R. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981)) ("[T]he presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.").

¹⁸ *Id.* (citing *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989)) (internal citations omitted).

¹⁹ *Robnett v. City of Big Spring*, 26 S.W.3d 535, 539 (Tex. App.—Eastland 2000, no pet.); *see also*

David F. Johnson, *Summary Judgments in Texas*, STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE (2017).

²⁰ *Estate of Danford*, 550 S.W.3d 275, 281-82 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Estate of Klutts*, No. 02-18-00356-CV, 2019 WL 6904550 (Tex. App.—Fort Worth Dec. 19, 2019), withdrawn pursuant to settlement, No. 02-18-00356-CV, 2020 WL 1646581 (Tex. App.—Fort Worth Apr. 2, 2020, no pet.).

²¹ *Estate of Danford*, 550 S.W.3d at 281-82.

²² *Fielding v. Tulllos*, No. 09-17-00203-CV, 2018 WL 4138971, at *7 (Tex. App.—Beaumont Aug. 20, 2018, no pet.) (mem. op.).

²³ *Draughon*, 631 S.W.3d 81.

limitations and Draughon raised the unsound-mind tolling statute.

The parties disagreed about what a party moving for traditional summary judgment must prove to conclusively establish that the applicable statute of limitations expired. Draughon claimed that Johnson should have to conclusively negate equitable tolling. Johnson argued it should be Draughon's burden to offer some evidence of equitable tolling to avoid summary judgment.

The Texas Supreme Court agreed with Draughon, holding that a “defendant who moves for summary judgment based on limitations must conclusively establish the elements of that defense” and “must also conclusively negate application of the discovery rule and any tolling doctrines pleaded as an exception to limitations.”²⁴ The court reasoned that the defendant has the burden on any issues actually raised that affect which days count toward the running of limitations. These include accrual, the discovery rule, and tolling. If the defendant carries that burden, the plaintiff can avoid summary judgment by raising a genuine issue of material fact on any equitable defense that its suit should not be barred even though the limitations period has run—such as fraudulent concealment, estoppel, or diligent service.

The court added that for a traditional motion for summary judgment to be granted on limitations, the movant must prove when the cause of action accrued, and that suit was filed thereafter. If the plaintiff alleges issues affecting the calculation of the accrual date or when limitations runs, the defendant has the burden to overcome these. If a plaintiff invokes the discovery rule or a tolling doctrine that it would have the burden to prove at trial, the defendant urging limitations can file a hybrid motion for summary judgment that asserts a no-evidence ground as to that element – requiring the plaintiff to come forward with evidence raising a genuine issue of material fact.

In that case, Johnson had moved for *traditional* summary judgment on limitations and defendant raised the unsound-mind tolling statute.

²⁴ *Id.* at 85 (quoting *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019)).

²⁵ Tex. R. Civ. P. 166a(c).

The plaintiff therefore had the burden to “conclusively negate” the assertion of mental incapacity. Because Johnson offered no evidence regarding Draughon's soundness of mind (and did not move for a no-evidence summary judgment), the court ruled that she failed to carry her burden.

4. Watch out for evidentiary issues.

You can rely on deposition transcripts, interrogatory answers, discovery responses, pleadings, admissions, affidavits, (including sworn or certified papers attached to the affidavits), stipulations of the parties, and authenticated or certified public records as summary judgment evidence.²⁵ To be admissible, you should prove up the evidence such that it would be admissible at trial.²⁶

The admissibility of summary judgment evidence is historically highly litigated, and much of it is beyond the scope of this paper. Instead, we highlight a few issues that may arise.

Attach all important evidence: In more cases than lawyers would like to admit, significant evidence is not actually included in the summary judgment record. Check, double-check, and re-check your evidence to make sure nothing is missing. If you reference a factual issue in your brief, there must be evidence included to support that point. It is good practice to list your exhibits (and attachments to the exhibits) specifically in the motion to ensure you have a complete record. Use this as a checklist.

Deposition transcripts can be especially problematic if all relevant parts are not attached as evidence. Always confirm that you have included the first pages of the deposition to identify the witness. Also ensure that enough pages of testimony are included to give the reader context. It is especially hard to decipher what witnesses are talking about when the excerpted testimony merely refers to a document as “it” or a person as “she.” Incomplete excerpts also invite doubt from a judge who sees only random, seemingly incomplete fragments of testimony. The antecedents are critical! Include them.

²⁶ *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Hidalgo v. Sur. Sav. & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971)).

Authentication of court records: In *Fleming v. Wilson*, the Texas Supreme Court considered whether a trial court abused its discretion in allowing uncertified copies of court documents as summary judgment evidence.²⁷ This case arose when approximately 4,000 plaintiffs sued their former lawyer who had deducted funds from their settlement for time he spent evaluating cases from other potential plaintiffs. The defense attorney attached uncertified copies of the jury verdict and judgment in support of his motion for summary judgment. The plaintiffs objected to inclusion of the uncertified documents, contending they were not authenticated. The plaintiffs relied in part on Texas Rule of Civil Procedure 166a(f), which requires parties to attach or serve sworn or certified copies of all papers or parts thereof referred to in an affidavit submitted to support or oppose a summary judgment.²⁸ The trial court found the records authentic.

The Texas Supreme Court first held that the trial court had not abused its discretion in overruling objections to authentication under the Texas Rules of Evidence. The court held that extrinsic evidence was not required to authenticate these documents which had indicia of authenticity on their face.²⁹ The court further reasoned that the records were competent under Rule 166a because the rule permits evidence that was “authenticated or certified.”³⁰ Having been deemed authentic under the Texas Rules of Evidence, the uncertified copies also met the requirements of Rule 166a and were admissible as summary judgment evidence.

What is “on file”: In *Lance v. Robinson*, the Texas Supreme Court considered whether deeds admitted at a temporary injunction hearing were “on file” for the purpose of summary judgment.³¹ The defendants argued that no evidence existed to support the motion because the deeds were not attached to the motion.

²⁷ *Fleming v. Wilson*, 610 S.W.3d 18, 20-21 (Tex. 2020).

²⁸ *Id.*

²⁹ *Id.* at 21.

³⁰ *Id.* at 22.

³¹ *Lance v. Robinson*, 543 S.W.3d 723, 731-32 (Tex. 2018).

³² *Id.* at 732 (cleaned up).

³³ *Id.*; see also Tex. R. App. P. 34.5, 34.6.

In ruling that the deeds sufficed as summary judgment evidence, the court restated, “[the] rules require a trial court to grant a summary-judgment motion if the evidence on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, establishes that the movant is entitled to judgment as a matter of law.”³² Accordingly, the Texas Supreme Court confirmed that when deciding a summary judgment motion, a court may consider evidence not attached to the motion as long as the evidence is on file with the trial court at the time of the hearing.³³ It is further immaterial whether the evidence was included within the clerk’s record of the summary judgment proceeding.³⁴ That argument had nothing to do with whether – at the time of the summary judgment – the evidence was “on file” with the trial court.³⁵

Sham affidavits: The Texas Supreme Court adopted the sham affidavit rule in 2018.³⁶ This rule allows summary judgment affidavits to be struck in certain situations where they contradict prior sworn statements. A sham affidavit, by definition, is not genuine, and the trial court is therefore within its discretion to disregard statements in affidavits that are mere shams.³⁷ In application, the rule may prove less helpful than attorneys wish.

The Texas Supreme Court cautioned, “[W]hether to apply the sham affidavit rule to disregard sworn testimony is a case-specific inquiry not easily amenable to the rote application of multi-part tests.”³⁸ “Examination of the nature and extent of the contradiction is essential.”³⁹ “The sham affidavit rule is not a free-standing rule of procedure to be mechanically applied in the same way to every case” but “is a flexible concept” to “aid[] courts grappling with the ultimate case-specific inquiry on summary judgment: Are the proffered fact issues genuine or not?”⁴⁰

³⁴ *Lance*, 543 S.W.3d at 733.

³⁵ *Id.*

³⁶ *Lujan v. Navistar, Inc.*, 555 S.W.3d 79 (Tex. 2018).

³⁷ *Id.* at 87.

³⁸ *Id.* at 88.

³⁹ *Id.*

⁴⁰ *Id.*

5. Object. And get a ruling.

Generally, to preserve error on grounds that the summary judgment evidence is inadmissible, you must complain to the trial court in a timely request, object to the evidence, and the trial court must rule or refuse to rule.⁴¹ Like other objections, an objection to summary judgment evidence should be specific.⁴² If the purported summary judgment evidence presents a defect in “form,” that defect cannot provide “grounds” for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.⁴³ This can be easier said than done.⁴⁴

You should present your objections in writing and get an explicit ruling.⁴⁵ Last year, the Texas Supreme Court affirmed several intermediate appellate courts in holding that rulings on summary judgment objections may be on the record in open court instead of in writing.⁴⁶ The Texas Supreme Court reasoned that:

As a practical matter, sometimes summary judgment hearings are transcribed, and sometimes they are not; the best practice for a party objecting to summary judgment evidence is to secure a written order on the objection from the trial court. But if no such order is issued, and the reporter’s

record of the hearing reveals an unequivocal oral ruling on the objection, that ruling is sufficient for error-preservation purposes.⁴⁷

This is an important decision for practitioners. A court reporter should now be requested if there are outstanding evidentiary objections.

To help get a ruling, consider submitting a separate order the judge can use to “check the box” on whether your various objections are sustained or overruled. Try to ensure that the objections are ruled on before the summary judgment. Otherwise, they may be waived.⁴⁸

If your opponent’s objections to your evidence are sustained, you may also need to object – to the sustaining of the objections. A failure to do so can result in waiver, at least according to some intermediate appellate courts.⁴⁹

6. If your response is late, make sure it’s considered.

By rule, responses are due seven days before the hearing.⁵⁰ Trial courts have discretion whether to allow or refuse a late response to a motion for summary judgment.⁵¹ Non-movants seeking to file late responses must obtain leave of court.⁵² If

⁴¹ *Pojar v. Cifre*, 199 S.W.3d 317, 327 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied).

⁴² *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.).

⁴³ *Id.* (citing Tex. R. Civ. P. 166a(f)).

⁴⁴ I commend the reader to the excellent paper by Steven Hayes, Hannah Cline Shoss, and Henry Segelke, *Selling Your Case at Trial, Selecting Appellate Issues to Pursue, and Other Implications of Error Preservation Rulings*, for a more in-depth discussion of this topic.

⁴⁵ *Id.*; *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 163-64 (Tex. 2018).

⁴⁶ *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838 (Tex. 2022) (listing appellate court decisions holding that rulings need not be reduced to writing to satisfy Rule 33.1).

⁴⁷ *Id.* at 838-39.

⁴⁸ *See Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 589 (Tex. App.—Houston [1st Dist.]

2005, no pet.) (“An objection . . . must be made before the summary judgment is granted or the objection is waived.”).

⁴⁹ *Du Bois v. Martin Luther King, Jr., Family Clinic*, No. 05-16-01460-CV, 2018 WL 1663787, at *4 (Tex. App.—Dallas Apr. 6, 2018, no pet.) (mem. op.) (noting criticism of this approach, but following *Brooks v. Sherry Lane Nat’l Bank*, 788 S.W.2d 874, 878 (Tex. App.—Dallas 1990, no writ)); *Cnty. Initiatives, Inc. v. Chase Bank of Tex.*, 153 S.W.3d 270, 281 (Tex. App.—El Paso 2004, no pet.); *but see Miller v. Great Lakes Mgmt. Serv., Inc.*, No. 02-16-00087-CV, 2017 WL 1018592, at *2 n.4 (Tex. App.—Fort Worth Mar. 16, 2017, no pet.) (mem. op.) (holding the opposite).

⁵⁰ Tex. R. Civ. P. 166a.

⁵¹ *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App.—Fort Worth 1996, no writ).

⁵² *Neimes v. Ta*, 985 S.W.2d 132, 138 (Tex. App.—San Antonio 1998, pet. dism’d by agr.) (citing Tex. R. Civ. P. 166(a)(c)).

a court allows a late response, the court must make an affirmative indication in the record that the late filing was accepted.⁵³ An “affirmative indication” in the record is any proof that the court granted leave to file a late response.⁵⁴ The Texas Supreme Court explained:

That indication may arise from “a separate order, a recital in the summary judgment, or an oral ruling contained in the reporter’s record of the summary judgment hearing.” So while a “silent record” on appeal supports the presumption “that the trial court did not grant leave,” courts should examine whether the record “affirmatively indicates” the late-filed response was “accepted or considered.”⁵⁵

In contrast, in *INA of Texas v. Bryant*, “nothing appear[ed] of record to indicate that the late filing was with leave of court.”⁵⁶ The Texas Supreme Court therefore held that “we must presume that the trial court did not consider it in rendering a take nothing judgment in favor of [defendant].”⁵⁷

A prevailing movant can use this issue to its benefit in drafting the summary judgment order (more on this later). And, a non-movant who filed a late response should ensure the record reflects that it was considered.

7. Get a record. If you can.

Traditionally, stenographic records were not taken of summary judgment hearings. After the *FieldTurf USA* case addressed above, they are certainly advisable, if only to record the objections and rulings on them.⁵⁸ This shift may require educating judges and court reporters beforehand to ensure that a court reporter is available at the scheduled hearing time.

You should also consider whether a record may be needed for a collateral matter. For

example, *Daubert/Robinson* challenges, motions for continuance, and motions for leave to file late evidence are all evidentiary motions that are commonly heard in conjunction with a summary judgment motion and require a record.

There are other times a record may be useful. The opposing party may very well admit to facts or provide important admissions and/or concessions at the hearing. In *Lujan v. Navistar Inc.*, the Texas Supreme Court cited statements from the trial judge to establish background facts relevant to the court’s decision on sham affidavits.⁵⁹ The lesson: get a record if you can.

Of course, many summary judgments are heard by submission. Set yourself up for success by ensuring that you have submitted orders on all evidentiary and other collateral issues. And make sure those orders actually get to the judge and not just the clerk.

8. Be careful in crafting (or agreeing to the form of) an order.

Orders can be tricky. Here are some areas to look out for in drafting an order or deciding whether to agree to its form.

Recitals: That stuff at the beginning of an order really does matter. Ambiguous, boilerplate recital language may cause issues on appeal. For example, in *Encore International Investment Funds, LLC v. 2608 Inwood, Ltd.*, the Dallas court of appeals held that recital language in a summary judgment order contained “an explicit limitation on the evidence considered by the trial court.”⁶⁰ There, the parties’ dispute concerned whether a lease provision granted the defendant-tenant the right to possess a generator installed on the property of an office building owned by the defendant-tenant.⁶¹ Upon expiration of the lease, the defendant-tenant was permitted to “remove all *unattached* trade fixtures.” To show attachment as a matter of law, the defendant-tenant pointed to a

⁵³ See *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Farmer*, 919 S.W.2d at 176.

⁵⁴ *B.C. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259-60 (Tex. 2020).

⁵⁵ *Id.*

⁵⁶ *INA of Tex.*, 686 S.W.2d at 615.

⁵⁷ *Id.*

⁵⁸ See *FieldTurf USA*, 642 S.W.3d at 839.

⁵⁹ *Lujan*, 555 S.W.3d at 83-84.

⁶⁰ *Encore Int’l Investment Funds, LLC, v. 2608 Inwood, LTD.*, No. 05-19-00070-CV, 2020 WL 1685420, at *6 (Tex. App.—Dallas Apr. 7, 2020, no pet.) (mem. op.).

⁶¹ *Id.* at *1.

late-filed declaration submitted to the trial court one month after the summary judgment hearing and one week after the parties submitted their additional briefing on the attachment issue.⁶²

The trial court's subsequent order contained language expressly stating that it considered only evidence "properly before it."⁶³ The court of appeals presumed that the trial court did not consider the declaration because of the limiting language, and the absence of a signed order or other indication the trial court granted leave to file the declaration.⁶⁴

Finality: Generally, an appeal may be taken only from a final judgment.⁶⁵ A judgment or order is final so long as the court intends it to be final and it "disposes of all pending parties and claims in the record, except as necessary to carry out the decree."⁶⁶ Interlocutory judgments are not final and can be appealed only in certain cases, typically authorized by statute.⁶⁷ To determine whether an order disposes of all pending claims and parties, the court looks to the record in the case.⁶⁸ Whether or not a judgment is in fact final will be determined from both the language of the judgment and the record in the case.⁶⁹ An example of unambiguous language expressing the court's intention to issue a final judgment could look something like: "This judgment disposes of all parties and claims and is appealable."⁷⁰ However, this alone is not enough to guarantee finality.

For example, a judgment is not final if it conditions recovery on "uncertain events and is based on what the parties might or might not do

post-judgment."⁷¹ In *Paxton v. Simmons*, the Dallas Court of Appeals considered whether an amended "final" judgment was definite enough for appeal purposes.⁷² There, the trial court entered a purportedly final judgment, amended by handwriting, that reserved for the trial court the right to modify the judgment and award trial-level fees if an intervention is filed in the case. The appellate court noted that even though the judgment contained *Lehmann* finality language, the judgment was not sufficiently definite because "the potential modification the judgment contemplates is not incidental to settled legal issues and rights, but instead, . . . is a significant judicial decision."⁷³

While an adverse judgment may not be final, the best course is to file a notice of appeal. You don't want to be on the wrong side of that gamble!

9. Post-judgment motions (usually) don't save you.

You can move for new trial or for reconsideration after a motion for summary judgment is granted. You cannot raise new grounds for judgment. Generally, you cannot attach new evidence. Several intermediate appellate courts have held the evidence attached to a motion for new trial or motion for reconsideration in the trial court – but not included in the original summary judgment record – should not be considered on appeal.⁷⁴ But, if the evidence is newly discovered, it may be allowed in the motion for new trial.⁷⁵ That said, as long as there is still plenary power, a trial court is within

⁶² *Id.*

⁶³ *Id.* at *3.

⁶⁴ *Id.* at *6.

⁶⁵ *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001).

⁶⁶ *Id.*; see also *Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020).

⁶⁷ See *Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 757, 759 (Tex. 2019).

⁶⁸ *Lehmann*, 39 S.W.3d at 205-06.

⁶⁹ *Id.*

⁷⁰ *Id.* at 206.

⁷¹ *Paxton v. Simmons*, 640 S.W.3d 588, 597 (Tex. App.—Dallas 2022).

⁷² *Id.* at 596.

⁷³ *Id.* at 597-98.

⁷⁴ See, e.g., *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 734 (Tex. App.—Texarkana 2003, no pet.) (evidence attached for first time to motion for reconsideration was not properly considered by appellate court when there was no evidence that the trial court considered it); *Priesmeyer v. Pac. Sw. Bank, F.S.B.*, 917 S.W.2d 937, 939 (Tex. App.—Austin 1996, no writ) (evidence attached for first time to motion for new trial was not proper summary judgment evidence).

⁷⁵ See Tex. R. Civ. P. 324(b)(1); *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 909 (Tex. App.—Beaumont 2000, pet. denied) (party may not present new evidence in motion for new trial unless such evidence is newly discovered).

its discretion to consider late-filed summary judgment evidence even after an order is signed.⁷⁶ The record, however, must affirmatively indicate that it was considered.

If you file a motion for reconsideration from a denied summary judgment, raise all the same grounds as in your original motion. *State Farm Lloyds v. Page* is a cautionary tale.⁷⁷ The trial court denied State Farm's traditional and no-evidence motions for summary judgment. Following the denial, a change in the law affected the traditional motion. State Farm filed a motion for reconsideration addressing only the grounds raised in the traditional motion. The trial court granted the motion. The case made its way to the Texas Supreme Court, which refused to consider the no-evidence points because they were not presented to the trial court in the motion for reconsideration.

Note, too, that a motion for rehearing or for new trial following a summary judgment motion will extend the deadline to file a notice of appeal.⁷⁸ However, a request for findings of fact and conclusions of law will not.⁷⁹

10. Consider next steps if your motion is denied.

Remember that the denial of a motion for summary judgment preserves nothing! Raise your arguments again at trial, whether in objections to the jury charge, motion for directed verdict, or otherwise.

Generally, a denial is not appealable. But be aware of Texas Civil Practice and Remedies Code Section 51.014, which sets out several situations in which a denial may be appealed (on an accelerated basis). A permissive appeal is another possible avenue to have a denied

summary judgment considered on appeal. This appeal is available only when certain procedural requirements are met and the appeal "involves a controlling question of law as to which there is a substantial ground for difference of opinion" that may "materially advance the ultimate termination of the litigation."⁸⁰

Summary judgment practice can be a great way to dispose of case before trial. Texas courts are often willing to grant such motions, especially when the issues are laid out clearly and succinctly. Start early, get the evidence you need, make sure it is in admissible form, and present a good case to the trial court. Being aware of the tricks and traps addressed in this paper can help your summary judgment practice in the trial court and on appeal.

⁷⁶ *Stephens v. Dolcefino*, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing *Oryx Energy Co. v. Union Nat'l Bank*, 895 S.W.2d 409, 412-13 n.3 (Tex. App.—San Antonio 1995, writ denied)); *SP Terrace, L.P. v. Meritage Homes of Tex., LLC*, 334 S.W.3d 275, 281-82 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

⁷⁷ *State Farm Lloyds v. Page*, 315 S.W.3d 525 (Tex. 2010).

⁷⁸ *Phillippi v. Citi Residential Lending, Inc.*, No. 10-12-00302-CV, 2013 WL 1558108, at *2 (Tex.

App.—Waco Apr. 11, 2013, no pet.) (citing Tex. R. App. P. 26.1(a)).

⁷⁹ *Flathers v. Tex. Dep't of Pub. Safety*, 279 S.W.3d 789, 790-91 (Tex. App.—Amarillo 2007, no pet.). The reasoning for this is that there should be no fact finding at a summary judgment hearing, so a request for findings of fact and conclusions of law is improper.

⁸⁰ Tex. R. App. P. 28.2(c); see also Tex. Civ. Prac. & Rem. Code § 51.014(d); Tex. R. Civ. P. 168.

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2023 SPRING MEETING

May 3-7, 2023 – JW Marriott Los Cabos – Los Cabos, Mexico

The TADC held its 2023 Spring Meeting beautiful Los Cabos, Mexico at the JW Marriott Resort & Spa, May 3-7, 2023. Kristi Kautz with Fletcher, Farley, Shipman & Salinas, LLP in Dallas and Darin Brooks with Gray Reed in Houston did a masterful job as the Meeting Program Chairs. The program included many great subjects for the practicing trial lawyer including “Nuclear Verdicts in a Post-COVID Age”. A highlight included a luncheon presentation, “Preventing Bench Erosion” with Justice Kevin Jewell with the Fourteenth Court of Appeals in Houston.



Jenny & John Stilwell with Mike Shipman



Justice Kevin Jewell



Mary Kate Rafetto & Barbara De Pena



The ever attentive crowd!



Robert & Paige Allen



Christy Amuny



Heather & Warren Wise, David Brenner, Kourtney Benton, Karen Miller & Elizabeth Boateng



Craig Reese, Doug Reese with Darold and Mamie Bittick



Trey Sandoval, with Stephanie & Diego Snyder-Zuasnabar & Akansha Khandelwa & Jordan Selbst



Britt Pharris, Arlene Matthews & Kevin Jewell



Gina & Reagan Rees, with Gayla Corley, Kimberly Munson & Jeff Pruett



PLAYING THE COVID CARD IN STATUTE OF LIMITATIONS DISPUTES-UPDATE ON TEXAS CASES

By: Colin R. Hatcher & Semaj Garrett,
Stewart Law Group, Dallas

In 2020 due to the COVID-19 pandemic and its devastating effects on human health, economic activity in the DFW area, including the courts, was largely shut down by government mandate, and the practice of law became more difficult.

One of the areas of litigation emerging from the COVID-19 pandemic is the issue of the Statute of Limitations and the extent to which the pandemic obstructed Plaintiffs' ability to timely file or serve claims.

To what extent can the shutdown caused by the COVID-19 pandemic of 2020-2021 provide Plaintiffs with an effective defense (excuse) to a Defense Motion for Summary Judgment on Statute of Limitations grounds for Plaintiffs who filed or served lawsuits in 2020-2021 after the Statute of Limitations had expired? Existing case law to date shows the Appellate Courts following the explicit Emergency Orders that extended the Statute of Limitations in 2020 but still applying the pre-Covid rules concerning due diligence for service.

BRIEF SUMMARY OF STATUTE OF LIMITATIONS LAW

FILING

¹ See *American Star Energy and Minerals Corporation v. Stowers*, 457 S.W.3d 427, 434 (Tex. 2015); *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188 (Tex. 2003); *Wagner & Brown, Ltd. v. Horwood*, 2001 58 S.W.3d 732 (Tex. 2001).

² See *ConocoPhillips Company v. Ramirez*, 534 S.W.3d 490, 503 (Tex. App.—San Antonio, 2017, pet. filed), citing *In re Estate of Denman*, 362 S.W.3d 134, 144 (Tex. App.—San Antonio 2011, no pet.). See also *Honea v. Morgan Drive Away, Inc.* 997 S.W.2d 705, 707 (Tex. App.—Eastland, 1999, no pet.).

The purpose of the Statute of Limitations is to compel the assertion of claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses, where the opposing party has a fair opportunity to defend while witnesses are available, and prevent litigation of stale or fraudulent claims.¹

To be entitled to summary judgment on the affirmative defense of limitations, a Defendant must prove as a matter of law: (1) the date on which the limitations period commenced, i.e., when the cause of action accrued, and (2) that the Plaintiff filed their Petition outside the applicable limitations period.²

SERVICE

Merely filing a lawsuit, however, is insufficient to avoid the expiration of a statute of limitations. To bring suit, a Plaintiff must both file their action and have the Defendant served with process.³ A timely filed suit will not interrupt the running of limitations unless the Plaintiff exercises due diligence in the issuance and service of citation.⁴ Only if service is diligently effected after limitations have expired, will the date of service relate back to the date of filing the suit.⁵ The duty

³ See *Rodriguez v. Crutchfield*, 301 S.W.3d 772, 775 (Tex. App.—Dallas, 2009, no pet.); *Tate v. Beal*, 119 S.W.3d 378, 380–81 (Tex. App.—Fort Worth 2003); *Boyattia v. Hinojosa*, 18 S.W.3d 729, 733 (Tex. App.—Dallas 2000, pet. denied).

⁴ See *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007); *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex.1990); *Crutchfield, supra.*, 301 S.W.3d, at 775.

⁵ See *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex.1990); See also *Boyattia, supra.*, 18 S.W.3d at 733.

to exercise diligence continues until service of process is achieved.⁶ If no excuse is offered for a delay in procuring service of process, or if the lapse of time and the Plaintiff's acts are such as conclusively negate diligence, a lack of diligence will be found as a matter of law.⁷

In short, failure to proceed with due diligence in service of a Petition will not halt the Statute of Limitations even if the Petition was timely filed.

TEXAS SUPREME COURT EMERGENCY ORDERS

On March 13, 2020, Governor Abbott declared a COVID-19 State of Disaster for Texas. That state of disaster continues to this day.

Between March 13, 2020, and January 27, 2023, the Texas Supreme Court issued a total of sixty "EMERGENCY ORDERS REGARDING THE COVID-19 STATE OF DISASTER". Many of these orders do not concern the Statute of Limitations in the Courts. There are thirteen relevant Emergency Orders for our purpose, listed as follows:

First Emergency Order, dated March 13, 2020.⁸
Eighth Emergency Order, dated April 1, 2020.⁹
Twelfth Emergency Order, dated April 27, 2020.¹⁰
Seventeenth Emergency Order, dated May 26, 2020.¹¹
Eighteenth Emergency Order, dated June 29, 2020.¹²

⁶ See *Boyattia, supra.*, 18 S.W.3d at 733. See also *Tate, supra.*, 119 S.W.3d, at 380–81.

⁷ See *Perry v. Kroger Stores*, 741 S.W.2d 533, 534 (Tex. App. —Dallas 1987, no writ); *Crutchfield, supra.*, 301 S.W.3d, at 775.

⁸ *First Emergency Order Regarding the COVID-19 State of Disaster*, 596 S.W.3d 265 (Tex. 2020)..

⁹ *Eighth Emergency Order Regarding the COVID-19 State of Disaster*, 597 S.W.3d 844 (Tex. 2020).

¹⁰ *Twelfth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 14 (Tex. 2020).

¹¹ *Seventeenth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 119 (Tex. 2020).

¹² *Eighteenth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 122 (Tex. 2020).

¹³ *Twenty-First Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 128 (Tex. 2020).

¹⁴ *Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 129 (Tex. 2020)..

Twenty-First Emergency Order, dated July 31, 2020.¹³

Twenty-Second Emergency Order, August 6, 2020.¹⁴

Twenty-Sixth Emergency Order, September 18, 2020.¹⁵

Twenty-Ninth Emergency Order, November 11, 2020.¹⁶

Thirty-Third Emergency Order, January 14, 2021.¹⁷

Thirty-Sixth Emergency Order, March 5, 2021.¹⁸

Thirty-Eighth Emergency Order, May 26, 2021.¹⁹
Fortieth Emergency Order, July 19, 2021.²⁰

EMERGENCY ORDERS EXPLICITLY EXTENDING THE STATUTE OF LIMITATIONS TO SPECIFIC DATES

When we review and consolidate all of these 13 Emergency Orders, we see that during the COVID-19 State of Disaster, five Emergency Orders explicitly tolled all Statutes of Limitations in Texas between March 13, 2020, and September 15, 2020, as follows:

- (1) By Order 4/1/2020, all filings due between March 13, 2020-June 1, 2020, were extended until June 2, 2020 (*Eighth Emergency Order*)²¹;
- (2) By Order 4/27/2020, all filings due between March 13, 2020-June 1, 2020, were extended until July 15, 2020 (*Twelfth Emergency Order*)²²;
- (3) By Order 5/26/2020, all filings due between March 13, 2020-July 1, 2020, were extended until August 15, 2020 (*Seventeenth Emergency Order*)²³;

¹⁵ *Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 135 (Tex. 2020).

¹⁶ *Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 863 (Tex. 2020).

¹⁷ *Thirty-Third Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 179 (Tex. 2021).

¹⁸ *Thirty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 897 (Tex. 2021).

¹⁹ *Thirty-Eighth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 900 (Tex. 2021).

²⁰ *Fortieth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 911 (Tex. 2021).

²¹ *Eighth Emergency Order Regarding the COVID-19 State of Disaster*, 597 S.W.3d 844 (Tex. 2020).

²² *Twelfth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 144 (Tex. 2020).

²³ *Seventeenth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 119 (Tex. 2020).

(4) By Order 6/29/2020, all filings due between March 13, 2020-August 1, 2020, were extended until September 15, 2020 (Eighteenth Emergency Order)²⁴;

(5) By Order 7/31/2020, all filings due between March 13, 2020-September 1, 2020, were extended until September 15, 2020 (Twenty-First Emergency Order)²⁵;

In short, for any Plaintiff with a claim where the Statute of Limitations expired between March 13, 2020-September 15, 2020, the Texas Supreme Court gave that Plaintiff until September 16, 2020, to file that claim. In other words, only claims required to be filed between March 13, 2020-September 15, 2020, were excused due to the COVID-19 pandemic, and they were all required to be filed by September 16, 2020.

NINE EMERGENCY ORDERS GIVE THE TRIAL COURTS GENERAL DISCRETION TO EXTEND DEADLINES IF THEY CHOSE

In addition to the five orders identified above, nine of the Emergency Orders are orders that gave the Courts additional powers to extend Statute of Limitations deadlines, if they so chose, as follows (Note: these were NOT mandates):

(1) On March 13, 2020, all courts in Texas were given the discretionary power to extend the statute of limitations in any civil case for a stated period ending no later than 30 days after the Governor's state of disaster had been lifted.²⁶

(2) On April 27, 2020, all courts in Texas were given the discretionary power to extend the statute of limitations in any civil case for a stated period ending no later than 30 days after the Governor's state of disaster had been lifted.²⁷

(3) On August 6, 2020, all courts in Texas were given the discretionary power to extend the statute

of limitations in any civil case for a stated period ending no later than September 30, 2020.²⁸

(4) On September 18, 2020, all courts in Texas were given the discretionary power to extend the statute of limitations in any civil case for a stated period ending no later than December 1, 2020.²⁹

(5) On November 11, 2020, all courts in Texas were given the discretionary power to extend the statute of limitations in any civil case for a stated period ending no later than February 1, 2021.³⁰

(6) On January 14, 2021, all courts in Texas were given the discretionary power to extend the statute of limitations in any civil case for a stated period ending no later than April 1, 2021.³¹

(7) On March 5, 2021, all courts in Texas were given the power to extend the statute of limitations in any civil case for a stated period ending no later than June 1, 2021.³²

(8) On May 26, 2021, all courts in Texas were given the power to extend the statute of limitations in any civil case for a stated period ending no later than August 1, 2021.³³

(9) On July 19, 2021, all courts in Texas were given the power to extend the statute of limitations in any civil case for a stated period ending no later than October 1, 2021.³⁴

DALLAS COURTS NEVER ACTED ON THESE DISCRETIONARY POWERS

You will note that the language in these nine Emergency Orders is "May" not "Must". Did any Texas Courts use these discretionary powers? This would require a County-to-County analysis of each County's COVID-19 Emergency Orders (beyond the scope of these notes). But as an

²⁴ *Eighteenth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 122 (Tex. 2020).

²⁵ *Twenty-First Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 128 (Tex. 2020).

²⁶ *First Emergency Order Regarding the COVID-19 State of Disaster*, 596 S.W.3d 265.

²⁷ *Twelfth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 144.

²⁸ *Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 129.

²⁹ *Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 135.

³⁰ *Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 863.

³¹ *Thirty-Third Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 179.

³² *Thirty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 897.

³³ *Thirty-Eighth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 900.

³⁴ *Fortieth Emergency Order Regarding the COVID-19 State of Disaster*, 629 S.W.3d 911.

example, I have reviewed Dallas County's sixty COVID-19 Emergency Orders.

A review of Dallas County Emergency COVID orders indicates that between March 2020 and March 2022, through County Judge Clay Jenkins, Dallas County issued a total of sixty COVID-19-related Emergency Orders. Not one single Order addresses the Statute of Limitations. In short, Dallas County courts never acted upon these discretionary powers.

For Dallas County, then, we are left only with the five Emergency Orders explicitly extending the Statute of Limitations (7th, 12th, 17th, 18th, and 21st).

APPELLATE CASES

COVID-19-related Statute of Limitations issues have been litigated at the Appellate level a total of nine times to date, in the following cases:

- *Prescod v. Tkach*, No. 02-21-00162-CV, 2022 WL 246858 (Tex. App. —Fort Worth Jan. 27, 2022, no pet). Appeal from the 393rd District Court, Denton County, Texas.
- *Jenkins v. Taylor*, No. 14-21-00175-CV, 2022 WL 1463797 (Tex. App.—Houston [14th Dist.] May 10, 2022, no pet.) (mem. op). Appeal from the County Court of Law No. 2, Harris County, Texas.
- *Broadway v. Lean on 8, Inc.*, No. 03-21-00663-CV, 2022 WL 3691678, (Tex. App.—Austin Aug. 26, 2022, no pet.) (mem. op). Appeal from the 274th District Court of Hays County, Texas.
- *Harris County v. Davidson*, 653 S.W.3d 318 (Tex. App.—Houston [14th Dist.], 2022, no pet.). Appeal from the 133rd District Court of Harris County, Texas.
- *Devault v. Giannakis*, No. 09-21-00040-CV, 2022 WL 17841310 (Tex. App. —Beaumont Dec. 22, 2022, no pet.) (mem. op.). Appeal from the 284th Judicial District of Montgomery County, Texas.
- *Ramos v. Veracruz Foods*, No. 02-22-00116-CV, 2022 WL 17986027, (Tex. App.—Fort Worth Dec. 29, 2022, no pet.) (mem. op). Appeal from County Court of Law No. 3, Tarrant County, Texas.
- *Scott v. Teel*, No. 12-22-00142-CV, 2023 WL 165857 (Tex. App. —Tyler Jan. 11, 2023, no pet.) (mem. op). Appeal from the

294th Judicial District of Van Zandt County, Texas.

- *Segovia v. Stebbins*, No. 14-21-00078-CV, 2023 WL 1832623 (Tex. App. —Houston [14th Dist.], Feb. 9, 2023, no pet) (mem. op). Appeal from the 295th Judicial District of Harris County, Texas.
- *Smith v. Ramos*, No. 09-21-00153-CV, 2023 WL 2418927 (Tex. App. —Beaumont Mar. 9, 2023). Appeal from the 284th Judicial District of Montgomery County, Texas.

I discuss four of these below:

PRESCOD V. TKACH

The first appellate case where COVID-19 issues arose (in passing) in a defense to a SOL MSJ was *Prescod v. Tkach*, which was decided on January 27, 2022.

On November 23, 2016, Prescod and Harte were involved in a collision with Tkach. They filed suit on November 9, 2018, just shy of the two-year statute of limitations.

Over the next six hundred twenty-six days, Plaintiffs periodically attempted to obtain service of process using two servers. Service attempts were suspended in March 2020 (due to the COVID-19 pandemic), and service was finally achieved through electronic means (Facebook) on July 27, 2020.

Tkach moved for summary judgment on Statute of Limitations grounds. Tkach argued that because Appellants did not exercise diligence in achieving service after limitations had expired, the suit should be disposed of as a matter of law.

Part of the defense to this Motion argued by Plaintiffs was that as of March 2020, the COVID pandemic forced Plaintiffs to suspend their efforts at service. Plaintiffs argued that the trial court had abused its discretion by refusing to extend limitations for their claims. Plaintiffs argued that the trial court had the authority to extend limitations under the Texas Supreme Court's emergency orders concerning the COVID pandemic. According to Appellants, the trial court abused its discretion by declining to invoke that authority to save Appellants' claims from a

service throughout the second four-month period of inactivity between May 2020 and early September 2020.”⁴¹

The Appellate Court denied the appeal.

BROADWAY V. LEAN ON 8, INC.

In *Broadway*, Plaintiff Broadway claimed that she was injured on June 4, 2018, when she purchased and consumed undercooked chicken nuggets at Lean on 8’s restaurant. The unmodified 2-year Statute of Limitations required filing by June 4, 2020. Broadway filed her original petition on September 14, 2020, incorrectly naming only Chik-Fil-A as the sole Defendant. Plaintiff filed an Amended Petition on October 12, 2020, naming Lean on 8 as the Defendant. The trial court granted summary judgment on Statute of Limitations grounds.

The Appellate Court noted that pursuant to the Texas Supreme Court’s Twenty-First Emergency Order Regarding the COVID-19 State of Disaster: “Any deadline for the filing or service of any civil case that falls on a day between March 13, 2020, and September 1, 2020, is extended until September 15, 2020.” See Twenty-First Emergency Order Regarding COVID-19 State of Disaster, 609 S.W.3d 128, 129 (Tex. 2020). Thus, no Statute of Limitations would have been violated had Plaintiff named Defendant in the September 14, 2020, Petition. However, Plaintiff did not name Lean on 8 until October 12, 2020, almost a month after the (COVID-altered) limitations period expired.⁴²

The Appellate Court commented:

“Broadway suggests that the trial court erred by granting summary judgment on limitations because the Texas Supreme Court’s Twenty-Sixth Emergency Order and its Twenty-Ninth Emergency Order gave the trial court discretion to modify or suspend “any and all deadlines and procedures, whether prescribed by statute, rule, or order” to December 1, 2020, and February 1, 2021, respectively. Those two orders were promulgated after Broadway filed suit against Chick-fil-A, Inc., and they omitted the mandatory language

contained in the Twenty-First Emergency Order (the operative order when Broadway sued) stating, “Any deadline for the filing or service of any civil case that falls on a day between March 13, 2020, and September 1, 2020, is extended until September 15, 2020.” 609 S.W.3d at 129. We construe Broadway’s argument as contending that the trial court abused its discretion by refusing to extend the limitations period under the authority granted by the Twenty-Sixth and Twenty-Ninth Emergency Orders.”⁴³

The Court rejected this argument and strictly construed that the Statute of Limitations expired on the modified deadline of September 15, 2020, stressing that the authority granted by the Twenty-Sixth and Twenty-Ninth Emergency Orders to alter that date further was discretionary, not mandatory:

“Broadway has not suggested either that some constitutional imperative required the trial court to extend the statute of limitations or what health risks might have been avoided by the trial court’s retroactive extension of the statute of limitations that passed in September 2020. Under these circumstances, we cannot conclude that the trial court abused its broad discretion by declining to suspend the statute of limitations in the absence of any compelling reason to do so.”⁴⁴

The Appellate Court denied the appeal.

RAMOS V. VERACRUZ FOODS, LLC,

In *Ramos*, Ricardo Ramos appealed a summary judgment on Statute of Limitations grounds in his personal injury claim against Veracruz Foods, LLC. Mr. Ramos suffered his alleged injuries on October 26, 2018. He filed suit two years later in a timely manner on October 26, 2020.

Six months after Ramos filed the case with no activity, the trial court issued notice that it would dismiss the case for want of prosecution. However, fourteen months after Ramos filed the case, a citation was issued and served on El Rancho.

⁴¹ *Jenkins*, 2022 WL 1463797, at *3.

⁴² *Broadway*, 2022 WL 3691678, at *2.

⁴³ *Id.*, at *4.

⁴⁴ *Id.*

service throughout the second four-month period of inactivity between May 2020 and early September 2020.”⁴¹

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⁴¹ *Jenkins*, 2022 WL 1463797, at *3.

⁴² *Broadway*, 2022 WL 3691678, at *2.

⁴³ *Id.*, at *4.

⁴⁴ *Id.*

El Rancho answered and pleaded a Statute of Limitations defense based on the delay before service. El Rancho then filed a Motion for Summary Judgment, contending that limitations barred Ramos's suit because the gap between filing suit and service was so significant that it established as a matter of law that he had not exercised due diligence in effecting service. The Court granted the Motion. Ramos appealed. In a section titled "The emergency orders issued by the Texas Supreme Court during the pandemic cannot save Mr. Ramos from his failure to exercise diligence in effecting service," the Appellate Court commented:

"Based on the arguments made on appeal and in the trial court, we construe [Plaintiff's argument] to be that provisions of the emergency orders issued by the Texas Supreme Court during the COVID-19 pandemic excused Mr. Ramos's lack of diligence and that the trial court erred by failing to follow the orders."⁴⁵

The Appellate Court continued:

"We have recently held that the provision of the applicable emergency order appears to grant the trial court discretion to suspend the statute of limitations. [citation]. The trial court refused to suspend the obligation of diligence based on Mr. Ramos's COVID-based excuse, and that decision was not error. The emergency order that arguably had the greatest impact on the question of diligence in this case is the Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster, which was issued by the Texas Supreme Court on September 18, 2020. See *Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 135, 135–38 (Tex. 2020). This was the emergency order in place when Mr. Ramos filed his suit on October 26, 2020."⁴⁶

The Appellate Court concluded:

"We will follow our holding in *Prescod*. The terms of the Twenty-Sixth Emergency Order did not command the trial court to suspend the limitations period but left that decision to the trial court's discretion. [citation]. With Mr.

Ramos's protracted period of inactivity in effecting service appearing to last more than a year, we cannot conclude that the trial court erred by refusing to suspend the diligence requirement placed on Mr. Ramos to effect service of his suit. Indeed, Mr. Ramos was apparently able to electronically file his original suit and other pleadings as the case progressed and also was able to e-file a Service Issuance Request Form. With the availability of e-filing, his argument—that he could not act more quickly because the fear of COVID-19 kept him out of the courthouse—rings hollow. By the same token, e-filing negates any argument that the trial court had to excuse his lack of diligence as a means to protect litigants from the risk of COVID-19."⁴⁷

The Appellate Court denied the appeal.

CONCLUSION

The available case law suggests that the COVID-19 pandemic defense is likely to feature in many Summary Judgment Response Briefs submitted by Plaintiffs in response to Statute of Limitations Summary Judgment Motions addressing claims filed and/or served during 2020.

The case law shows that attempts by Plaintiff to argue that the trial courts abused discretion by refusing to exercise their discretionary powers to extend Statute of Limitations deadlines due to the COVID-19 pandemic are likely to continue to fall upon deaf ears at the Appellate level. To date, no trial court to date has been found to have abused discretion by refusing to extend deadlines.

Thus, we are left with the mandatory six-month extension. Essentially, the COVID-19 pandemic resulted in a grace period for Plaintiffs, wherein all claims that were required to be filed within the Statute of Limitations period March 13, 2020–September 15, 2020, were given an extended deadline of September 16, 2020. However, other than this six-month COVID-19 grace period, the law has not changed as regards defenses to Motions for Summary Judgment on Statute of Limitations grounds.

⁴⁵ *Ramos*, 2022 WL 17986027, at *4.

⁴⁶ *Id.*

⁴⁷ *Id.*, at *5.

2023 TADC AWARDS NOMINATIONS

PRESIDENT'S AWARD

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

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

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

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

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

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

FOUNDERS AWARD

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

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

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

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

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

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

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

R. Douglas Rees
Cooper & Scully, P.C.
900 Jackson St., Ste. 100 PH: 214/712-9500
Dallas, TX 75202 FX: 214/712-9540
doug.rees@cooperscully.com



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Bobby L. Walden, Austin

July 15, 2023

TO: Members of TADC

FROM: Doug Rees, TADC President
Christy Amuny, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2023-2024

OFFICES TO BE FILLED:

- *Executive Vice President
- *Four (4) Administrative Vice Presidents
- *Eight (8) Regional Vice Presidents
- *District Directors from even numbered districts
(#2, #4, #6, #8, #10, #12, #14, #16, #18, #20)
- *Directors At Large - Expired Terms

Nominating Committee Meeting – August 4, 2023

Please contact Bud Grossman with the names of those TADC members who you would like to have considered for leadership through Board participation.

Christy Amuny
Germer PLLC
P.O. Box 4915
Beaumont, TX 77704
PH: 409/654-6700 FX: 409/835-2115
camuny@germer.com

NOTE:

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

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



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By: Melissa Casey
Mehaffy Weber, P.C., San Antonio

PLAYING OFFENSE:

A NEW PERSPECTIVE ON DEFENSE STRATEGIES AND COUNTERING THE “ATTORNEY DRIVEN MEDICAL” CASES

We’ve all been dealing with “reptilian theory,” and overinflated medicals in otherwise simple cases. Plaintiff’s attorneys are winning big verdicts by submitting bills from health care providers for MRIs and surgeries and by playing upon a juror’s fears regarding safety and protection, facts and evidence be damned. It’s a problem because it works.

Not unlike the Playboy expose done by the notorious feminist, Gloria Steinem, this die-hard defense attorney is going to take you behind the scenes of one the biggest, most aggressive plaintiff’s practices in the US. I am going to share with you how they are playing the game and then offer some offensive strategies to counter these cases. As a former plaintiff’s attorney, I am probably more aggressive than most defense attorneys, and after reading this article, I urge you to be more so, too.

THE CURRENT DEFENSE MINDSET

Many defense lawyers are just that- defense lawyers. They play defense and always have. What does this mean? It means responding to pleadings and discovery and occasionally reporting what’s happening to a client. It means assessing the likelihood of prevailing at trial. It means taking depositions, hiring experts, and trying to settle cases with or without a mediator’s help within the reserves as set by your client, which is often an insurance company.

But you can’t win a football game just playing defense. At best, you won’t LOSE a football game, at least in regulation. At some point, somebody must play offense. Most defense verdicts can be characterized as the result of the plaintiff’s failure to make his case. This is not to say that the defense attorney was not brilliant and eloquent and prepared- and that these skills were what caused the plaintiff to fail to make his case. It is simply meant to convey that the brilliance was used defensively. The defense attorney performed an amazing cross examination and got the plaintiff to admit his own culpability for the collision. The defense expert was the best at his game and caused the jury to question the methodology of the plaintiff’s expert. The damages were attacked by a skillful investigation into the plaintiff’s social media, which revealed him mountain climbing despite his claims of back injury. Defense.

Playing not to lose has been for the most part, what the defense bar has settled for and called a victory. But meanwhile, defense costs were incurred and often more money was paid out with the mindset that it was less than the cost of defense, or at least it was an amount certain which beat the unknown jury verdict. But it wasn’t what the adjuster or his attorney really felt was a reasonable amount to pay out on the claim.

So, what, exactly, is meant by “an aggressive defense strategy?” The aggressive defense strategy is a way to turn cases on their head and push back on unscrupulous plaintiff’s

attorneys. It is hoped that if utilized effectively by the defense bar, it will serve to curtail lawsuits with questionable liability, but more importantly, stem the hemorrhaging of paying excessive settlements and judgments.

Playing offense means bringing dispositive motions. It means attacking the medicals more aggressively. It even means finding all the ways your client can recover from the plaintiff. That's right, it means turning the tables on the plaintiff and bringing counterclaims and settlement offers using Texas Rule of Civil Procedure 167 early on. Creating litigation where the plaintiff and his attorney stand to lose something, not just one in which they win or not. This puts more pressure on the plaintiff and serves as a balance of power. Litigate in a way that the plaintiff may have to pay your client. Fight back against the pleadings which were not based on facts and seek sanctions where appropriate. Use discovery to uncover the unethical and impeachable relationships that exist between the plaintiff's medical providers and the plaintiff's attorney. If nothing else, you will cause the plaintiff's attorneys to spend time defending themselves, which is time you've kept them from coming after you.

SOME UNSCRUPULOUS PLAINTIFF TACTICS

Many of you have also worked on the other side of the aisle. Most Plaintiff practices are made up of friends and colleagues and law school chums. They are good people, who, let's face it, keep us employed as if no lawsuits were filed, there would be no one to defend. Many cases deserve to be filed, and settled or tried, as someone really was negligent and someone else was really hurt by it. This article is not about THOSE cases.

Unfortunately, there are a whole slew of other cases, cases which are either based on zero liability or involve a minimal injury but are being "worked up" so that an entire commercial policy is being demanded by a plaintiff's attorney with

a large ego and an even larger jet fuel bill to pay. This article is about those cases, which I am going to coin as "attorney driven medicals," or "ADM," and the associated practices which hurt the bar in general. None of us look good when these practices are allowed to continue unchecked. The consumer of these practices is hurt by receiving medical treatment, even surgeries, they did not want or even need. The consumer is further hurt when the eventual large payout for their claim is reduced to pennies on the dollar by their attorney who has gauged them with high fees, medical bills, and usurious loans. On a less direct, but no less impactful, way, we are all impacted by the rising costs of insurance.

Let's take a deeper look at what is going on in these ADM cases.

- **The Pleadings Always Claim Exemplary Damages and Negligence Per Se**

One of the first clues that you are dealing with an ADM case (other than the signature line of the firm representing the Plaintiff), is that the pleadings claim the conduct of your client was so bad, so egregious, that they should be punished, and the plaintiff is entitled to exemplary damages. Only, it is a simple rear-ender with minimal property damage. Horrific, I tell you! The defendant (and more likely the company who hired said driver) should be strung up and shot by a firing squad! Or better yet, argues plaintiff's attorney, ordered to pay out the entire multi-million-dollar insurance policy to "set an example" for everyone else who rolls forward at red light.

So, how to attack?

Bring as many motions as you can to dismiss the pleadings. File Special Exceptions when the claim is vague. Bring a motion to dismiss for failing to state a cause of action in federal court where applicable. Seek Summary Judgement as soon as practicable, even if it is on less than all

causes of actions. Look to get exemplary damages tossed out way before trial. Bring a Motion to Bifurcate. Plaintiff's attorneys do not get paid by the hour. They put a lot of money and time into every case, and if there is no recovery, they lose that money and time. If we make it harder for them, they may reign it in some, if for no other reason than to save themselves the effort.

"Offensive defense" level two: bring a motion for sanctions. The rules allow for the imposition of sanctions against a plaintiff *and his attorney* for the filing of frivolous claims. When the entire cause of action meets this standard, go on the offense and seek this. When certain claims meet this standard, ask the plaintiff in writing to amend their petition to remove the unsubstantiated causes of action, and when he does not, move for summary judgement on those claims along with sanctions and attach your request of plaintiff to voluntarily withdraw.

- **The Damages Alleged Total the Net Worth of Some Small Countries**

Ever wonder just how the Plaintiff in said simple rear-ender wound up with \$463,782.94 in medical bills and another \$352,765.22 in future surgical recommendation? It is not because the injuries were that extensive, or even related to the accident. It is because there exists a most unholy trinity comprised of Plaintiff, his doc and his lawyer. Plaintiff never even sought treatment for his "injuries" following the accident. But once he called the number everyone knows by heart, he was sent to treaters. These treaters provide medical treatment to the plaintiff without expecting any kind of payment whatsoever, even when the plaintiff has a great employer sponsored health plan. Instead, they provide treatment after the plaintiff's attorney provides them with a letter, known as either a "Notice of Responsible Insurance," or "Letter of Protection." This letter allows, or rather directs, the health care provider to rack up those bills for submission to the defense attorney and ultimately the jury, proving just how

injured this plaintiff is. Proving just how much they are entitled to recover from the defendant. In Illinois, where I am from, the value of a case was generally three times specials. Here in Texas, the value of a case is how much insurance is on the other side. Thus, Plaintiff's attorneys will work that case up until the specials can justify that insurance amount.

What is particularly egregious is that the providers don't actually expect to recover the amount they billed from the plaintiff and/or his attorney. After submitting the fictitious and glorified amounts for medical treatment, most of which was entirely unnecessary, the providers actually collect much less. In fact, certain providers will submit two separate statements to the plaintiff's attorney following the treatment of their client. One statement is entitled "on the record," which, you guessed it, is the bill produced to the defendant and the amount that is put in the specials chart. The second statement is called "off the record," and that is the amount the provider actually expects to be paid. These amounts are hugely disparate. One orthopedic surgeon would submit an "on the record" bill with amounts well over 150k, and then the "off the record" bill showing just 37k in charges.

More than one client of the ADM scenario has felt pressure to treat and even to undergo invasive surgical procedures. Underling attorneys at the big plaintiff firms are graded on how often their clients go for treatment. If a plaintiff has not seen some health care provider within the past thirty days, their attorney will be dinged for that transgression. The attorneys are provided a script for explaining to a client just how much their case will be worth without a surgery, with a surgical recommendation, and then... (wow- the big bucks!), with a surgery performed. If clients do not want surgery, they are asked to sign a form acknowledging that they recognize it will impact the value of their case.

The attorney is contacted by the medical providers for authorization prior to performing medical treatment. Allegedly it is to ensure that the anticipated value of the case merits the performance of the epidural steroid injection or the like, but last I checked our *juris doctorate* did not mean medical doctor, and certainly does not enable us lawyers to practice medicine. Furthering the ADM, these lawyers are schooled to “train their clients to complain.” Literally, lawyers are taught to pump up the plaintiff’s ability to whine and moan about the pain they are in and to, by all means, make sure to tell every health care provider about the pain.

Let’s say the attorney has done a bang-up job of getting a plaintiff to the health care providers. The plaintiff went for MRIs, chiropractic care, pain management and when none of that was terribly effective, they were referred to a surgeon, who not surprisingly provided a surgical recommendation. Remember, all this treatment has been provided *au gratis*, or seemingly so to the plaintiff who has yet to pay a dime and is being promised the equivalent of a lottery winning for being so compliant. Now the time has come to have that back fusion. Lawyer counsels plaintiff through his reluctance and fears by sagely advising how beneficial this surgery will be (to lawyer’s pocketbook more than plaintiff’s back, but that’s beside the point). Even with the reduced rate for said surgery, it now becomes a little hefty to carry on the if-come of a settlement or verdict, and the surgeon wants to be paid upfront.

Even the plaintiff with health insurance will be counseled to take out a loan for this surgery. This loan gets approved through the attorney, and low and behold, for a mere 42% interest, the plaintiff can have the surgery. Ostensibly, this financing company is independent of the lawyer, but one has doubts.

So how to attack?

I feel a little like the Wizard of Oz when I say, “back where I come from,” but honestly, in Chicago where I spent most of my career, attorneys were not allowed to be involved with a client’s medical treaters. We took our clients as we found them, requested their records and bills, and then felt lucky when we could speak to them (albeit briefly) before their deposition to ensure that they would say the treatment was related to the injury at issue, or at least not unrelated and then we could have our expert connect the dots. How is it that in Crook County, the land of Greylord and Al Capone, the practice was, shall we say, less corrupt? The reality is the plaintiff’s bar feared defense impeachment of those medical treaters should they interfere with the treatment.

Short of legislative or AMA changes, best practices to counter the ADM are as follows:

Ask multiple questions about the plaintiff’s treatment in Interrogatories, Requests to Admit, and at deposition. Ask the client about the payment of the medical bills and when objected to, bring to a judge in that a paid/incurred evaluation is entirely relevant. Delve deeper into the Plaintiff’s medical history. Often times, defense attorneys only ask for and receive the medical bills and records related to the treatment for the injury at issue; most DWQs specifically ask for records from the date of the accident. But it’s in the past medicals that gold can be found with evidence of pre-existing injury. Another source of gold are in the plaintiff’s current primary care provider’s medical records where the complaints of pain made at the chiropractor’s office are denied at his checkup. Hire a billing expert to counter the inflated medical values and where reasonable, hire defense medical experts to counter the necessity of the treatment and/or the causation.

Interestingly enough, social media has been a great tool for defense counsel. Prior to Facebook,

Instagram and the like, we used to have to hire private investigators to catch the plaintiff dancing away at a nightclub despite having testified that they need a cane to walk. Now, the plaintiffs often post these activities for the world to see. Always spend a few minutes researching your plaintiff's social media. I once found the plaintiff's vacation photos from a trip to Egypt where she was photographed crouching in pyramids, climbing hundreds of stairs, and canoeing down a river. Mind you, she had claimed permanent and debilitating back injuries. Another time, I learned the plaintiff had had plastic surgery the day following the fender bender, and thus, her lost wages were from the days she was told to stay home and recover from the tummy tuck. Look to find ways to counter the plaintiff's claims of injuries and assume there is dirt to dig up somewhere.

“Offensive Defense” Level Two: Serve discovery on the providers themselves. Ask them about the “on the record” “off the record” billing. Ask them about their normal and customary rates. Ask them about the number of cases they take on referral from lawyers. Seek legislative oversight into this reprehensible practice. Complain about it to the American Medical Association and state board of medical examiners.

- **Settlement Considerations**

So, let's say you've made a reasonable settlement offer and the Plaintiff's attorney summarily rejects it. This is a violation of the Rules of Professional Conduct and yet it happens all the time. The egotistical plaintiff's attorneys want the multi-million-dollar verdict for their new billboards and are willing to take their chances at charming a jury, it really does not matter to them what the plaintiff wants.

So how to attack?

When you have a strong defense, but a difficult and bullying plaintiff's attorney, send

them an Offer of Settlement pursuant to Tex. R. Civ.Pro. 167. If you have never utilized this little tool in our arsenal, I urge you to investigate it. Essentially, it provides that following a settlement offer (which can be sent to both the plaintiff's attorney and the plaintiff, by the way, thus overcoming the situation where the attorney is not relaying offers to Plaintiff) the plaintiff will be on the hook for defense costs, including attorney's fees, which accrue from the time the offer is made, should a verdict be less than 80% of the offer.

What this does is put more skin in the game for Plaintiff and his attorney. It is one thing to bully and bluster and demand millions of dollars. It is quite another to have to pay the fees and costs incurred by the other side. Consider the use of Rule 167 Offer of Settlement as some leverage when your case is strong, and your offer is fair.

In conclusion, I am advocating from a lofty place, idealistic even, that the defense bar “fight back” to re-establish a system where litigation is necessary but fair and individuals are compensated for their injuries, thanks to the efforts of a skilled counselor. Let us put an end to certain practices which only serve to deceive a jury and pervert the goal of justice. And by all means, we need to curtail excessive verdicts and bullied settlements which only amount to giant paydays for plaintiff attorneys.



2023 TADC ANNUAL MEETING

September 20-24, 2023 • New York Hilton Midtown • New York, NY

Program Co-Chairs: *Dan Hernandez, Ray Pena McChristian, P.C., El Paso & Sean B. Swords, Chamberlain McHaney, PLLC, Austin*
CLE Approved for: 9.00 hours, including 1.75 hours of ethics

Wednesday, September 20, 2023

6pm – 8pm TADC Welcome Reception

Thursday, September 21, 2023

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements
Doug Rees, TADC President
Cooper & Scully, P.C., Dallas
Dan Hernandez, Ray Pena McChristian, P.C., El Paso
Sean B. Swords, Chamberlain McHaney, PLLC, Austin

7:45-8:15am *PRACTICAL TRIAL DEFENSE*
Robert B. Burns, Burns Anderson Jury & Brenner, L.L.P.; Austin

8:15-8:50am *OIL & GAS FIRE & EXPLOSION SCENE DOCUMENTATION & EVIDENCE PRESERVATION*
John L. Schumacher, MCHE, PE, CFI, CFPS, AEI Corporation, Littleton, CO

8:50-9:25am *INSURANCE LAW YOU NEED TO KNOW*
Jason McLaurin, McLaruin Law, PLLC, Houston

9:25-10:00am PROTECTING THE APPELLATE RECORD/
HOW APPELLATE COUNSEL CAN HELP AT TRIAL
Richard B. Phillips, Jr., Holland & Knight LLP, Dallas

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

10:15-11:00am *SUPREME COURT UPDATE (.25hrs ethics)*
Justice Debra Lehrmann, Texas Supreme Court, Austin

11:00-11:45am *JURY SELECTION AND OPENING STATEMENT*
Darrell L. Barger Hartline Barger, LLP, Houston

11:45-1:15pm LUNCHEON: *WHEN TO USE A BIOMECHANICAL/
HUMAN FACTORS EXPERT*
Mike Bassett The Bassett Firm, Dallas

1:15-2:15pm *LEGISLATIVE UPDATE – THE 88TH SESSION IN REVIEW (.25hrs ethics)*
Doug Rees, Cooper & Scully, P.C., Dallas
David E. Chamberlain, Chamberlain McHaney, PLLC, Austin
George S. Christian, The Christian Co., Austin

Thursday Afternoon free to enjoy New York!

Friday, September 22, 2023

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements

7:45-8:45am *A LOOK AT A FICTIONAL COMPANY: DO THEIR ACTIONS COMPLY WITH ABA MODEL RULES OF PROFESSIONAL CONDUCT (1.0hrs ethics)*
Brent Truman, Bell Nunnally, Dallas

8:45-9:15am *USE OF SUMMARY MOCK JURY TRIALS AND FOCUS GROUPS FOR TRIAL PREPARATION*
Christina Marinakis, Psy.D., J.D., IMS Consulting and Expert Services

9:15-9:45am *DEFENDING THE COPORATE REP DEPOSITION*
William Thorne, Mehaffy Weber PC, Beaumont

9:45-10:00am *B R E A K*

10:15-10:45am *CHAPTER 72 BIFURCATION IN TRUCKING CASES*
Dan Hernandez, Ray Pena McChristian, P.C., El Paso

10:45-11:15am *TIPS FOR PRACTICING AND BRIEFING IN FEDERAL COURT (.25 hr ethics)*
The Honorable Dustin Howell, Magistrate, Western District of Texas, Austin

11:15-11:30am *TADC BUSINESS MEETING*

*11:45am-1:15pm
TADC Awards Luncheon*

Friday Afternoon free to enjoy New York!

Saturday, September 23, 2023

7:00-9:00am Buffet Breakfast

Saturday free to enjoy New York!

Sunday, September 24, 2023

Annual Meeting Adjourned

2023 TADC ANNUAL MEETING

September 20-24, 2023

Hilton Midtown New York • New York, NY • 1335 Avenue of the Americas • New York, NY 10019

Pricing & Registration Options

Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, Awards Luncheon, CLE Program each day and related expenses. If you would like CLE credit for a state other than Texas, check the box below.

Registration for Member Only (one person) \$985.00
Registration for Member & Spouse/Guest (2 people) \$1,400.00

Spouse/Guest CLE Credit

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

Spouse/Guest CLE credit for Annual Meeting \$75.00

Hotel Reservation Information

For hotel reservations, CONTACT THE HILTON MIDTOWN DIRECTLY AT 212-586-7000 or use the PASSKEY LINK [Passkey Reservation Link](#) and reference the TADC 2023 Annual Meeting. The TADC has secured a block of rooms at a FANTASTIC rate. It is IMPORTANT that you make your reservation as soon as possible *as the room block will sell out*. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS AUGUST 21, 2023

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (SEPTEMBER 6, 2023) to the meeting date. A \$100.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 6, 2023 IS NON-REFUNDABLE

2023 TADC ANNUAL MEETING REGISTRATION FORM

September 20-24, 2023

For Hotel Reservations, contact The Hilton Midtown DIRECTLY at 212-586-7000 OR [Passkey Reservation Link](#)

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- \$ 985.00 Member ONLY (One Person)
 \$ 1,400.00 Member & Spouse/Guest (2 people)
 \$ 75.00 Spouse/Guest CLE Credit
 \$ (no charge) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting

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PROTECTING YOUR CLIENTS' FIFTH AMENDMENT PRIVILEGE

Co-authors: **Sadie A. Horner**, The Bassett Firm, Dallas; **Melissa K. Daniels**, 2L University of North Texas – Dallas College of Law; **Anthony M. Remis**, 2L University of North Texas – Dallas College of Law

I. Introduction

There are few rights more well-known than the right to remain silent. As a staple of TV shows featuring police, arrests, and hot pursuit, we expect to hear officers say those magic words: “You have the right to remain silent... anything you say can and will be used against you in a court of law” — or something to that effect. This language comes from the landmark Supreme Court case *Miranda v. Arizona*, but the right to remain silent is not merely case law. 384 U.S. 436, 467–68 (1966). The right to remain silent may be invoked by both the guilty and innocent. In fact, one of the basic functions of the privilege is protecting the innocent from being “ensnared by ambiguous circumstances.” *Ohio v. Reiner*, 532 U.S. 17, 21 (2001).

The Fifth Amendment Privilege against self-incrimination has ancient roots. See *Brown v. Walker*, 161 U.S. 591, 596–597 (1896); *Miranda*, 384 U.S. 436, 458–463; *Maness v. Meyers*, 419 U.S. 449, 461 (1975). It appeared in 17th-century English courts as a rebellion against unjust inquisitorial methods and found its way across the pond to the Colonies; and, eventually, these United States. *Miranda*, 384 U.S. 436, 458–459.

Today, both the United States Constitution and the Texas Constitution guarantee the right of a person not to be compelled to testify against him or herself. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10. The privilege protects

not only evidence that may lead to a criminal conviction but any evidence that could provide “a link in the chain of evidence” that could lead to prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

I. Relevance of the Fifth Amendment in Civil Cases

The Fifth Amendment protection against self-incrimination doesn't apply to just criminal cases. The privilege protects individuals in *any* proceeding, whether criminal, civil, administrative, judicial, investigatory, or adjudicatory. *Maness*, 419 U.S. 449, 464. Thus, the privilege against self-incrimination may be asserted in a civil case whenever the answer might tend to subject the witness to criminal responsibility. *Texas Dep't of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995).

However, the fundamental difference between asserting the Fifth Amendment privilege in civil and criminal cases is that adverse inferences may be drawn when the privilege is claimed in civil litigation. Generally, the invocation of one's Fifth Amendment privilege should not be penalized. *Spevack v. Klein*, 385 U.S. 511, 514–515 (1967). However, the Texas Rules of Evidence explicitly exclude civil cases from the rule against adverse inferences when the privilege against self-incrimination is asserted. Tex. R. Evid. 513(a)–(c).

Sometimes, the possible ramifications of a witness testifying or producing evidence are clear-cut. Other times, it is less obvious. Nevertheless, the trial court is tasked with determining whether the assertion of the Fifth Amendment privilege is "based upon the good faith of the witness and is justifiable under all of the circumstances." *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975). It is the court's duty to carefully consider the evidence and argument for each assertion of the privilege made by the witness when making determinations on each assertion's merit. *In re Speer*, 965 S.W.2d 41, 46 (Tex. App.—Fort Worth 1998, no pet.).

In Texas, a "trial court may compel the witness to answer ...[only if the court is] perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Butler*, 522 S.W. 2d 196, 198. Nevertheless, "because all parties should have a reasonable opportunity to litigate a civil case fully – courts should seek out ways to permit as much testimony as possible to be presented in the civil litigation, despite the assertion of privilege." *Davis–Lynch, Inc. v. Moreno*, 667 F.3d 539, 547 (5th Cir. 2012) as revised (Jan. 12, 2012).

II. Scope of the Fifth Amendment in Civil Cases

Generally, the Supreme Court has construed Fifth Amendment protections broadly to ensure that individuals are not compelled to produce evidence that may later be used against them in a criminal action. *Maness*, 419 U.S. 449, 461 (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) and *Arndstein v. McCarthy*, 254 U.S. 71, 72–73 (1920)). Further, the Court cautions that the United States Constitution limits "the imposition of any sanction which makes an assertion of the Fifth Amendment privilege 'costly.'" *Spevack*, 385 U.S. 511, 515.

The Texas Constitution guarantees the right of Texans to "not be compelled to give evidence against [themselves]." TEX. CONST. art. I, § 10. The Supreme Court of Texas has

repeatedly affirmed the assertion of Fifth Amendment privilege in civil cases. *See, Butler*, 522 S.W.2d 196, 198; *Ex Parte DeLeon*, 972 S.W.2d 23, 25 (Tex. 1998). However, persons and parties cannot make "blanket assertions" of the privilege. *In re Verbois*, 10 S.W.3d 825, 828 (Tex. App.—Waco 2000, no pet.). Blanket assertions are not permitted because the privilege can be asserted to any question and should be used on a question-by-question basis. *Speer*, 965 S.W.2d 41, 45–46.

Generally, a court will not permit a complete stay of civil proceedings over the threat of possible criminal indictment because such action is an "extraordinary remedy." *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391, 397 (S.D. Tex. 2009) (quoting *In re Piperi*, 137 B.R. 644, 646–47 (Bankr. S.D. Tex. 1991). Moreover, an assertion of the privilege is unlikely to stand when the criminal statute of limitations has passed for the conduct at issue because the issue of self-incrimination has passed. *Batson v. Rainey*, 762 S.W.2d 717, 720 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding).

III. Asserting the Fifth Amendment Privilege

A. Individuals

The privilege to refuse to answer a question because it may be self-incriminating is a privilege belonging to the witness alone, and no one else may assert it on their behalf. *Campbell v. State*, 172 Tex. Crim. 431, 358 S.W.2d 376, 377 (1962). In *Lefkowitz*, the Supreme Court stated that the Fifth Amendment allows individuals "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." 414 U.S. 70, 77 (1973).

When asserting the privilege, the witness must show that the requested answer is likely hazardous to them. *Butler*, 522 S.W. 2d 196, 198 (Tex. 1975). A witness wishing to assert the privilege must do so in response to each specific inquiry, and each assertion must stand on its own merits. *Gebhardt v. Gallardo*, 891 S.W.2d 327,

330 (Tex. App.—San Antonio 1995, no writ). In order to support the privilege, the party invoking it must show that a responsive answer or explanation to the inquiry cannot be answered as it may tend to suggest criminal culpability. *Hoffman*, 341 U.S. 486–87.

A trial court may not compel a witness to nevertheless testify unless it is “*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) *cannot possibly* have such tendency to incriminate.” *Hoffman*, 341 U.S. 479, 488 (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)) (emphasis in original). The “perfectly clear” standard is important because “[t]he immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.” *Id.* at 490 (quoting *United States v. White*, 322 U.S. 694, 698 (1944)).

B. Sole Proprietors, Agents, And Business Entities

Unlike individual citizens, corporations cannot claim Fifth Amendment privilege to avoid potential self-incrimination. Only natural persons acting as individuals or sole proprietors may assert their Fifth Amendment privilege. *Braswell v. United States*, 487 U.S. 99, 101 (1988). Accordingly, business entities like corporations, partnerships, and LLCs generally cannot assert a Fifth Amendment privilege to avoid providing documents or testimony. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906); *Bellis v. United States*, 417 U.S. 85, 89–90, 100 (1974) (partnership); *White*, 322 U.S. 694, 701 (1944) (labor union).

Documents prepared by or in possession of others are not protected, regardless of any incriminating details they may contain. *Fisher v. United States*, 425 U.S. 391, 398–99 (1976). In *Bellis*, the Supreme Court held that a partner in a law firm was required to produce partnership financial records despite claiming Fifth Amendment privilege. 417 U.S. 85, 101. The

Court noted that the documents were being held in a representative capacity for a partnership with a distinct identity. *Id.* at 97. In other words, the privilege does not protect documents that belong to the collective entity.

Nevertheless, documents of a personal or private nature may fall under Fifth Amendment protection even when demanded from a corporate representative or custodian of records. *Warford v. Beard*, 653 S.W.2d 908, 912 (Tex. App.—Amarillo 1983, no writ). The Court in *Bellis* also wrote that “the [Fifth Amendment] privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual’s private life.” 417 U.S. 85, 87–88.

Courts may exercise discretion when it comes to an employee who as a non-party witness asserts their Fifth Amendment privilege. In those situations, the trial court may decide on a case-by-case basis whether to allow the Fifth Amendment to be invoked by the (present or former) employee. *F.D.I.C. v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995).

The court in *LiButti* highlights several non-exclusive factors from the evolving case law for courts to consider when evaluating whether jurors should be permitted to hear evidence of a nonparty’s invocation of the Fifth Amendment. 107 F.3d 110, 123–24 (2d Cir. 1997). These factors include:

- (1) The nature of the relationship between the party witness invoking the privilege and the witness’ loyalty to the party.
- (2) The degree of control the party has over the witness concerning key facts of the suit.
- (3) The interests of the party and witness and whether the assertion of privilege advances the interests of both the witness and the party in the outcome of the litigation.

- (4) The witness' role in the litigation and whether they played a key role with respect to any of its underlying issues.

LiButti v. United States, 107 F.3d 110, 123–24 (2d Cir. 1997).

When permitted by the court, a jury may draw adverse inferences from the invocation of an agent's Fifth Amendment privilege. In *Wil-Roye*, the court found that Texas Rule of Evidence 801(d)(2)(D) justified the admission of evidence relating to a party's agents' invocation of their Fifth Amendment Privilege because the questions were substantially related to the defendant's defense. *Wil-Roye Inv. Co. II v. Washington Mut. Bank, FA*, 142 S.W.3d 393, 406–7 (Tex. App.—El Paso 2004, no pet.). The court highlighted that barring that evidence would have given the plaintiffs an unfair advantage by permitting them to present the favorable portions of the agents' testimony while precluding the unfavorable portions. *Id.* at 407.

V. Discovery & The Fifth Amendment Privilege

While we often see the Fifth Amendment invoked in trials on TV, the privilege is pivotal in the discovery process. As the Fifth Circuit noted, “[a] party may invoke the Fifth Amendment privilege during the discovery process to avoid answering questions at a deposition, responding to interrogatories or requests for admissions, or to produce documents.” *Davis-Lynch, Inc.*, 667 F.3d 539, 547, as revised (Jan. 12, 2012).

A. Documentary Evidence

The Supreme Court has recognized that the “act of producing” a document can be testimonial even when the document itself is not. *United States v. Hubbell*, 530 U.S. 27, 34–37 (2000). The Court explained that compelling a witness to produce documents can implicitly communicate “statements of fact” such as the document's existence and authenticity. *Id.* “[T]he seizure of a man's private books and papers to be used in

evidence against him' is not ‘substantially different from compelling him to be a witness against himself.’” *Warford*, 653 S.W.2d 908, 912 (quoting *Boyd v. United States*, 116 U.S. 616, 633 (1886)). Thus, individuals have a constitutionally protected right to refuse to produce personal documents that could communicate information about the document's existence, possession, or authenticity when the document may be self-incriminating.

B. Depositions

Depositions serve as a great opportunity to authenticate (and discover) evidence and secure testimony, but they may also cause strife when the witness may be faced with questions that could lead to self-incrimination. Lawyers can take steps to address this before the deposition even takes place. To do this, you should confer with opposing counsel and ask them to agree to stipulations regarding potentially self-incriminating questions and reiterate those agreed-upon stipulations on the record at the time of the deposition.

If opposing counsel will not agree to any stipulations, the witness still has the right to assert their privilege to each question that may tend to incriminate him or her. The witness need not plead the Fifth verbatim after each and every question. The witness can clearly and plainly state their assertion of the privilege to the first question giving rise to the issue of self-incrimination and respond “same answer” to each hazardous question that follows.

C. Written Discovery & Requests for Admission

Filing a verified denial does not prevent a party from later invoking their Fifth Amendment privilege in response to interrogatories. *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, no writ). Moreover, answering some interrogatories seemingly related to questions objected to on the grounds of the privilege does not waive the party's right to assert the privilege. *Speer*, 965 S.W.2d 41, 46 (“Because the privilege against self-incrimination must be asserted selectively in civil litigation, it follows

that selective assertion of the privilege does not result in waiver.”).

In Texas proceedings, however, an admission made in a Request for Admission by one party may be protected from being used in any other actions. In *Ferguson*, the First Court of Appeals examined a wrongful death case where the defendant asserted the Fifth Amendment to the plaintiff’s requests for admissions. 445 S.W.3d 270, 273–74 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The court’s analysis turned on Texas Rule of Civil Procedure 198.3, which states, “Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding.” Tex. R. Civ. P. 198.3.

Given the lack of information or record indicating how or why the trial court overruled the assertion of Fifth Amendment privilege, the First Court of Appeals found insufficient evidence to conclude that the trial court acted arbitrarily or unreasonably in ordering Ferguson to respond to requests for admission in spite of the assertion of Fifth Amendment privilege. *Ferguson*, 445 S.W.3d 270, 278. The court also made clear that blanket assertions of Fifth Amendment privilege are not valid – the privilege must be asserted and evaluated question-by-question. *Id.* at 275.

D. Waiver

When it comes to issues concerning self-incrimination, inadvertent waiver of the privilege is a pressing concern because higher courts cannot always “unring the bell” once the information has been released. *Maness*, 419 U.S. 449, 460. Testifying on one topic related to the subject matter can “open the door” to further questioning because “disclosure of a fact waives [the] privilege as to [the] details.” *Rogers v. United States*, 340 U.S. 367, 372–73 (1951).

However, because of the harsh impact waiver can have, the courts “must indulge every reasonable presumption against waiver.” *Emspak v. United States*, 349 U.S. 190, 196–98 (1955). Thus, when considering whether disclosure waives any

privilege, the court should consider whether the disclosing party *intended* to waive the privilege. See Tex. R. Civ. P. 193.3(d), cmt. 4 (emphasis added). Nevertheless, it is generally advised that a client assert the privilege to all substantive questions that could give rise to a waiver of the privilege.

Inadvertent or accidental disclosure of otherwise privileged information does not automatically waive the privilege. See *In re Living Ctrs.*, 175 S.W.3d 253, 260 (Tex. 2005). Generally, however, opposing counsel has no duty to notify the disclosing party of their mistake. See *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992). When inadvertent disclosure happens, the disclosing party must follow TRCP 193.3(d) and use its snap-back provision to preserve its privilege.

A party attempting to “snap back” privileged material has only ten days to discover the mistake and amend their response, identifying the material inadvertently produced and the privilege(s) asserted. See Tex. R. Civ. P. 193.3(d). Thus, counsel and paralegals must remain vigilant in reviewing items produced in discovery to avoid inadvertent disclosure and remedy those mistakes when they happen.

E. Withdrawal

Generally, a party may withdraw its claim of privilege so long as the withdrawal is done in good faith and does not unnecessarily prejudice the opposing party. *Alief Independent School Dist. v. Perry*, 440 S.W.3d 228, 243 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). However, a party withdrawing the privilege late in litigation runs the risk that the court could find the withdrawal unfair if it leaves the other side at a disadvantage with little to no time to depose the withdrawing party and investigate the previously privileged material. See, Tex. R. Civ. P. 193.4(c); *Alief Independent School Dist.*, 440 S.W.3d 228, 243. This is consistent with the rule requiring parties to supplement any incomplete or incorrect discovery responses. See Tex. R. Civ. P. 193.5.

A court is more likely to permit a witness to withdraw their claim of privilege if it is communicated to the court and parties to the suit in a timely manner. Waiting too long to withdraw the privilege runs the risk of prejudicing the other side.

F. Offensive Use

Beware of the offensive use of one's Fifth Amendment privilege. A party may not use their shield as a sword, and a civil plaintiff's right to remain silent is not absolute. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087–88 (5th Cir. 1979). A plaintiff's use of their Fifth Amendment privilege can constitute offensive use when their silence would result in unfairness to the defendant. *Id.* at 1088. A plaintiff who nevertheless chooses to use the privilege offensively risks waiver, sanctions, or dismissal of their suit. *Id.*; *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 161–63 (Tex. 1993).

The Texas Supreme Court has held that there are three elements to prove offensive use:

- (1) The party invoking the privilege is seeking affirmative relief;
- (2) The party is using the privilege to protect information that could be outcome determinative; and
- (3) The privileged information is not otherwise available to the defendant.

Republic Ins. Co., 856 S.W.2d 158, 163.

Offensive use by a plaintiff can result in the action being dismissed when the plaintiff's silence is unfair to the defendant(s). In *Wehling*, the Fifth Circuit held that courts may delay civil cases in which a plaintiff asserts Fifth Amendment privilege until the threat of criminal liability has ended. 608 F.2d 1084, 1087–89. The case had originally been dismissed with prejudice due to the plaintiff claiming Fifth Amendment privilege in a deposition. *Id.* at 1085. The Fifth Circuit remanded the case so that the trial court could order a stay of further discovery until the statute of limitations had run on the potential criminal charges against the plaintiff. *Id.* at 1089.

Generally, the assertion of Fifth Amendment privilege does not remove your right to have your day in court. However, the Fifth Circuit made it clear that “[a] plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party...sue[d].” *Id.* at 1087. Discovery is a two-way street of information, and defendants have the right to adequately defend against allegations by a plaintiff even when that plaintiff can properly claim Fifth Amendment privilege.

G. Jury Charge

While jurors are generally permitted to draw adverse inferences when a witness invokes their Fifth Amendment privilege, counsel can and should attempt to mitigate that risk in its proposed jury charge. At trial, the judge has “considerable discretion” as to how jurors should be instructed. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). However, in some cases, an instruction balancing or mitigating adverse inferences arising from a witness's assertion of their Fifth Amendment Privilege is appropriate. *Texas Capital Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 780 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

For example, in *Sandefer*, the Texas First Court of Appeals held that an instruction to minimize adverse inferences may be appropriate when the evidence gives rise to two equally consistent inferences whereby neither is more probable. *Id.* There, the witness's assertion of his Fifth Amendment privilege could lead to an inference that the defendant collaborated in the illegal conduct, but it could also lead to an inference that the defendant had no knowledge of the witness's allegedly illegal conduct. *Id.* Thus, the Court reasoned that because either inference was equally probable, neither could be made. *Id.*

Mitigating or balancing instructions are especially important when repeated invocations of the privilege have the potential to rise beyond mere suspicion, absent probative evidence to that effect. *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 489 (Tex. App.—Eastland 2009, no pet.). This is because, as

the Texas Supreme Court has held, “suspicion and conjecture are not evidence.” *Lozano v. Lozano*, 52 S.W.3d 141, 152 (Tex. 2001).

Moreover, a negative inference drawn from an assertion of Fifth Amendment privilege is not a substitute for probative evidence. *Webb v. Maldonado*, 331 S.W.3d 879, 883 (Tex. App.—Dallas 2011, pet. denied). Thus, any attorney who believes their client may benefit from a mitigating or balancing instruction should ensure that it is in their proposed charge at the charge conference and be ready to argue that *Sandefur* applies.

VI. Common Missteps in Handling Fifth Amendment Rights

When your client needs to claim their Fifth Amendment privilege—time is of the essence. It is crucial to act timely because a party can waive its right to claim privilege or assert objections to discovery requests and must produce the discovery. See Tex. R. Civ. P. 193.1, 193.2(e); *In re National Lloyds Ins.*, 507 S.W.3d 219, 223 (Tex. 2016). However, this notion cuts both ways. If opposing counsel fails to object to your discovery responses before trial, knowing the responses are inadequate, their objections are waived. *E.g.*, *Interceramic, Inc. v. South Orient R.R.*, 999 S.W.2d 920, 930 (Tex. App.—Texarkana 1999, pet. denied).

As counselors we are obligated to ensure that our clients can and *should* be candid with us about any and all issues that may arise in handling their case. When a client discloses facts that are related to pending criminal action or could provide a “link in the chain” to an indictment, the attorney has the onerous task of considering all of the implications of those facts and how to best address them. When making these assessments and decisions attorneys should consider what evidence can be used for or against your client and whether:

- the statute of limitations for the alleged criminal conduct has passed;
- the client has been indicted, is under investigation or whether either could be imminent;
- the client is a good witness; and
- the client’s testimony is believable.

VII. Conclusion

The Fifth Amendment’s protection against self-incrimination remains a fundamental right worth protecting, whether in civil or criminal litigation. Understanding the intricacies of Fifth Amendment jurisprudence, especially in civil litigation, may make the difference between your client asserting their Fifth Amendment privilege and losing the opportunity to do so.

Remember that in civil litigation, adverse inferences may be drawn from the invocation of Fifth Amendment privilege — thus, the assertion of privilege is a strategy question requiring careful consideration and re-evaluation as circumstances evolve. A court may, at its discretion, delay civil proceedings until such time as the privilege is no longer required. However, courts must balance the competing interests of the parties as they consider each assertion of privilege in turn. And on the flip side, if the opposition’s witness asserts their Fifth Amendment privilege in a civil suit, that doesn’t erase your right to discovery or to have your day in court.



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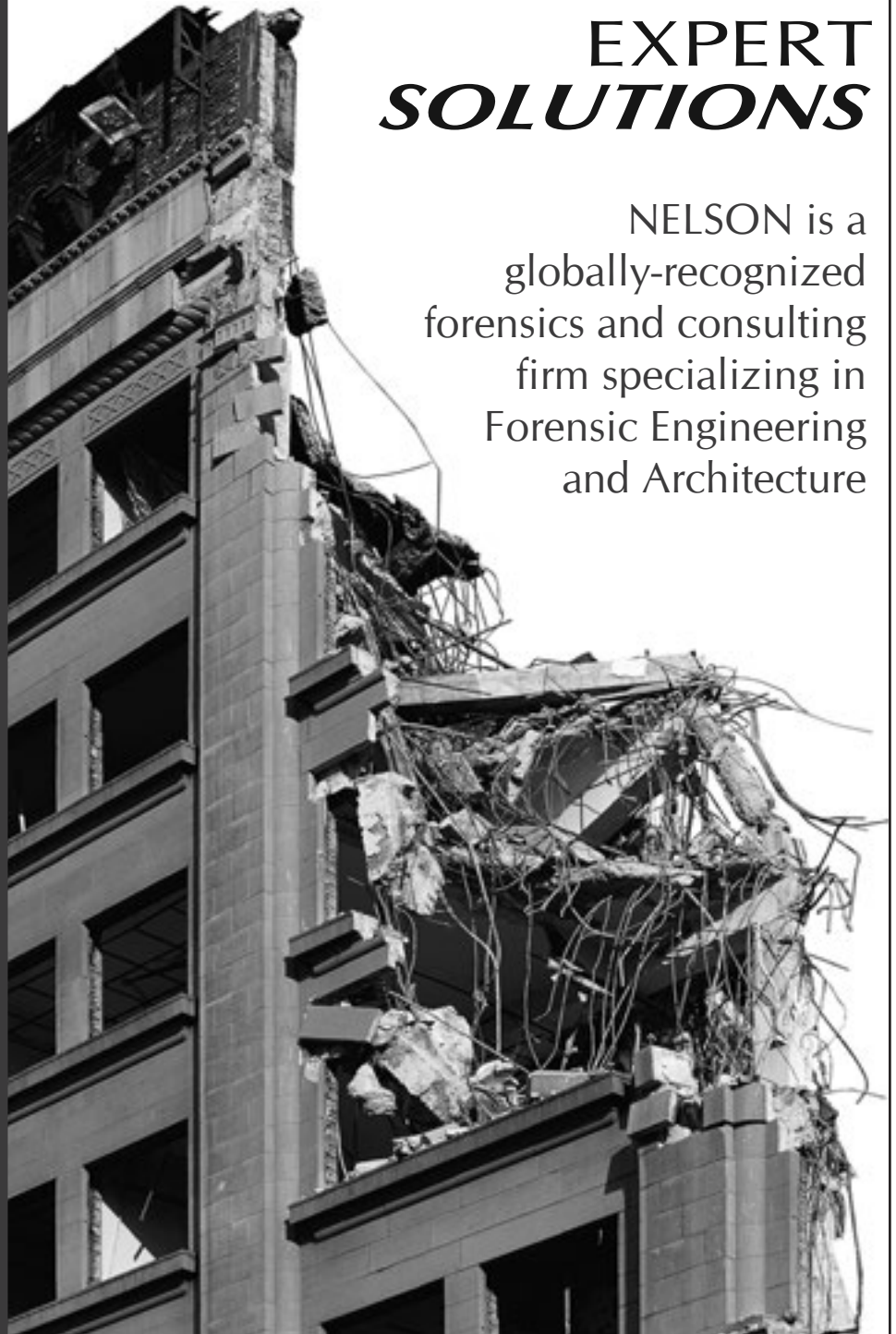
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