TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

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IN THIS ISSUE:

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Table of Contents

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

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TADC CALENDAR OF EVENTS

January 29-February 2, 2025	**2025 TADC Winter Seminar** Steamboat Grand Resort, Steamboat Springs, Colorado
April 23-27, 2025	**2025 TADC Spring Meeting** The Historic Brown Hotel, Louisville, Kentucky
June 20-21, 2025	**2025 TADC "Catch A Wave" Seminar** Margaritaville Resort, South Padre Island, Texas
July 16-20, 2025	**2025 TADC Summer Meeting** The Grand Hyatt, Vail, Colorado
September 17-21, 2025	**2025 TADC Annual Meeting** Hotel Emma, San Antonio, Texas

President's Message

By: Mike Shipman
TADC President
Fletcher, Farley Shipman & Salinas, LLP, Dallas

At TADC's Annual Meeting in Horseshoe Bay, I was handed the gavel by my dear friend, and now Immediate Past President, Gayla Corley. I now have the privilege and honor to serve as your TADC President. Gayla is a hard act to follow. She has set the bar extremely high, and I look forward to continuing her efforts to make TADC the very best we can be. This past year we traveled to some fabulous places, including Key West, Florida, where we had never been before. I plan to follow in this tradition, but we will get to that in a minute. The programs Gayla's co-chairs put together were top notch. I believe TADC puts on the best CLE seminars of any organization, and I would encourage everyone to make it a priority to attend at least one, if not more. Gayla, on behalf of your board and all our members, THANK YOU for your dedication and leadership. I also want to congratulate Sean Swords, Mitzi Mayfield, and Christy Amuny for the awards presented to them at our annual meeting. Sean was presented the Young Lawyer Award, Mitzi the President's Award, and Christy the Founder's Award. They are all well deserving of these awards for all they have done, and continue to do, on behalf of TADC.

Now, let's move on to this year and what we have to look forward to. We have fantastic programs planned in fabulous places starting with Steamboat Springs, Colorado for our Winter Meeting (January 29-February 2) at the Steamboat Grand. Steamboat Springs is a family friendly, fun ski town that is easy to get around without a rental car. For our Spring Meeting (April 23 - 27), we will be in Louisville, Kentucky for the first time and staying at the historic Brown Hotel, home of the original Hot Brown. Local attractions include Louisville Slugger, Churchill Downs, and of course, the Bourbon Trail. When it's time to escape the Texas heat for the Summer Meeting (July 16-20), we are off to Vail, Colorado, and the lovely Grand Hyatt. Surrounded by beautiful mountains, Vail is a very family friendly, easy to get around town that offers great restaurants, shopping, and for the adventurous, lots of summer mountain activities like hiking, fishing, etc. We will conclude our year with the Annual Meeting (September 17-21) at Hotel Emma in San Antonio. The site of the old Pearl Brewery, Hotel Emma is truly a historic Texas treasure. At each meeting, the very popular hospitality suite will also be open to attendees to enjoy spending time together in a relaxed atmosphere. I encourage each of you to mark these dates on your calendar and make plans to attend. As always, no matter which event you attend, you can expect relevant topics and excellent speakers.

We will also be continuing the TADC Young Lawyers Seminar which will take place at Margaritaville on South Padre Island (June 20-22). Gayla started this event last year and it was an enormous success. This seminar is designed for our younger lawyers throughout the state and is reachable from anywhere in Texas. I am excited for this year's Young Lawyer Committee which is chaired by Catrina Guerrero. We have an outstanding group of young lawyers on this committee and I'm looking forward to seeing what they accomplish this year. It is one of my goals to get our young lawyers more involved in TADC. They are our future. We just completed our 7th Annual Deposition Bootcamp and as in past years, it was outstanding and well attended. Thanks to Kristi Kautz and Mike Bassett for their commitment and doing such an excellent job putting this program together.

We are organizing more local events. We will be hosting happy hours for our members to get more involved, invite friends who are not members, and encourage them to join. We hope these will be opportunities for everyone to get together, visit with old friends, and make new ones. Be on the lookout for these happy hours coming to your town soon. We are also continuing our efforts to be more active on social media and develop an online forum for us to share information. If you are a social media whiz, please consider getting more involved with TADC and helping in this area.

2025 is a legislative year and we expect this session to be very active. As always, TADC will be closely monitoring any issues that affect our practices, clients, and the fair administration of our Civil Justice System in Texas. We hope to keep our members informed of important legislation affecting all of us. If you have questions concerning specific legislation, please feel free to reach out to TADC.

TADC is the largest civil defense organization in the country and as I have stated many times, I believe it is the best defense organization in the country. There are so many opportunities for our membership to get involved. I would encourage each of you to attend a seminar, enjoy a happy hour, volunteer to speak at an upcoming seminar, or write an article for our amazing and informative TADC Magazine. The work TADC does each year is important, but the fruits of that work are the connections and friendships that are created and developed over the years. Please let me know how I can help you be more involved. I look forward to seeing you soon.

Past President's Message

By: Gayla S. Corley
TADC Immediate Past President
MehaffyWeber, PC., San Antonio

I'm sorry it's ending, it's sad but it's true – it's been a lovely cruise!
~ Jimmy Buffett

Since quotes have been a thing for me this year, it only seems fitting to include another in my Past President's Message. If I thought back on my personal "highlight reel," the honor and privilege to serve as TADC President would certainly be near the top. This, of course, would never have been possible without the support of my family, friends and law firm which has such a great history with this organization. They say it takes a village, and my village showed up big time!

Although it has been a blur in the year since New York City, I am pleased with the successes of the past year which were due largely to the efforts of the Board of Directors, TADC's tireless staff and, of course, our members. Those successes include increased engagement from our past Presidents, enthusiasm from our young lawyers and an improved social media profile. Also, thanks to two of our Austin members - Sean Swords and Sarah Nicolas, for arranging for TADC to participate in a stand-alone service project at the Central Texas Food Bank where our group provided 504 boxes containing 15,120 pounds and 12,600 meals to Texans in need. On a social level, TADC enjoyed more good times in hospitality suites from coast-to-coast which is such an important component of our meetings – not just for the free drinks and snacks (although those are good!) – but also for the fellowship and connections with our colleagues.

We also had an excellent year for programs which continue to provide outstanding value and opportunities for member involvement. First up was our virtual Deposition Boot Camp that was co-chaired by Chantel Crews and Jackie Robinson. Next, in TADC tradition, we decamped to Colorado for our Winter Seminar in Crested Butte that was chaired by Victor Vicinaiz and Heidi Coughlin. From there, we moved to Houston for the Milton Colia Trial Academy chaired by Christy Amuny and Dan Hernandez. As has been true in all recent years, Trial Academy was again a sell-out with a waiting list to boot. Following Trial Academy was our Spring Meeting in Key West, Florida with a great program put together by Mitzi Mayfield and Mike Shipman. In June, TADC held its Young Lawyer-centric seminar at Margaritaville on South Padre Island that was chaired by Jim Hunter and YL committee member Uzo Okonkwo. Next up was Lake Tahoe where Jennie Knapp and Arlene Matthews crafted an outstanding program. We then went virtual again for TADC's inaugural Motions Boot Camp chaired by Robert Booth.

The year capped off with our Annual Meeting in Horseshoe Bay where co-chairs Kristi Kautz and Sarah Nicolas arranged for not one but two Texas Supreme Court justices to speak. In between all this, TADC hosted two free lunch-and-learn presentations: one by Mike Bassett on law firm economics and a second by Stacey Burke on law firm marketing.

One highlight of this year's Annual Meeting at Horseshoe Bay was the honor of presenting awards to several very deserving individuals:

1. The Young Lawyer's Award went to Sean Swords who took the position to a new level this year and has never said "no" to anything asked of him. Sean undoubtedly embodies the kind of passion and dedication that will serve him well not only in TADC but in life.

2. This year's President's Award for meritorious service went to Mitzi Mayfield. Even though Mitzi's role with TEX-ABOTA has increased significantly, she nevertheless found time to co-chair the Spring Meeting which was no small feat, and the success of which was directly related to Mitzi's involvement.

3. Christy Amuny received this year's Founder's Award which is the highest honor in TADC. Despite being constantly in trial and other organizations, besides TADC, Christy co-chaired this year's Trial Academy and has never flinched when given a task.

4. Also, in going a bit off-script two new awards were presented this year. First, was the Bud Man Award to Bud Grossman who always has a welcoming smile and kind word for anyone attending a TADC event. Second, our own Bobby Walden received the inaugural Bobby-Head Award for all the guidance he provided me this year and, more importantly, for all of his behind-the-scenes work that is instrumental to TADC's success.

This year also saw the loss of three of our members: Past President Jack Maroney of Austin, Past President Lewin Plunkett and Board Member Brandon Strey. Although they are gone, their contributions to the legal profession and their legacies in TADC will never darken.

The gavel is now in the able hands of Mike Shipman, and I know he will serve our organization so well in the coming year!

By: Michelle R. M. Blair
Ware, Jackson, Lee, O'Neill,
Smith & Barrow, L.L.P., Houston

Finding the Offramps on the Road to Premises Liability:

Negating a Duty to Protect Independent Contractors from Dangerous Conditions on Property

Introduction

Premises liability is a species of negligence defined by the unique duties property owners owe to those who enter their premises.[1] For more than a century, Texas courts (and occasionally the Legislature) have defined and redefined the contours of that duty, carving out innumerable exceptions and defenses with varying levels of precision. That is particularly true with regard to the duties owed to independent contractors. As a result, there are many offramps on the road to premises liability, a great many of which avoid the imposition of any duty to the plaintiff and thus the need for any fact findings regarding breach, causation, or damages.

Because the landscape is constantly evolving, some of those offramps have disappeared or moved over time, and new ones occasionally appear. Practitioners must therefore navigate an intricate network of doctrines and statutes, the interrelationship of which is often less than clear. For example, in just the past two terms, the Texas Supreme Court has described a common conditions doctrine that, though rooted in longstanding premises liability principles, appears to identify a new means of egress.

This article attempts to map the current state of Texas law regarding premises owners' duties to employees of independent contractors working on their property. Many of the same rules apply to other plaintiffs, especially other types of invitees, but independent contractors have garnered special attention. As the Texas Supreme Court has explained:

> An independent contractor owes its own employees a nondelegable duty to provide them a safe place to work, safe equipment to work with, and warn them of potential hazards; it also controls the details and methods of its own work, including the labor and equipment employed. . . . Placing the duty on an independent contractor to warn its own employees or make safe open and obvious defects ensures that the party with the duty is the one with the ability to carry it out.

Gen. Elec. Co. v. Moritz, 257 S.W.3d 211, 215-

[1] For simplicity, this article refers to owners. With the exception of Chapter 95, which applies only to owners, the principles discussed apply equally to occupiers and general contractors.

16 (Tex. 2008).

Distinguishing Negligent Activities

A person injured on another's property could have a claim either for negligent activity or premises defect. Though the theories are closely related, they involve distinct duty analyses, and failure to charge the jury on premises liability will preclude any recovery if it is determined on appeal that was the appropriate claim. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017); *Clayton Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529-30 (Tex. 1997).

The first step for a property owner hoping to take advantage of the protections afforded by premises liability law is therefore to articulate why the claim falls into the latter category rather than ordinary negligence. The oft-repeated rule is that ordinary negligence principles apply "[w]hen the injury is the result of a contemporaneous, negligent activity on the property," and premises liability principles apply "[w]hen the injury is the result of the property's condition." *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016). While the line between the two theories can be unclear, "since almost every artificial condition can be said to have been created by an activity[,] . . . Texas courts look to whether the activity that caused the condition was ongoing or had ceased when the injury occurred." *Flores v. Oncor Elec. Delivery Co., LLC*, No. 05-22-01161-CV, 2024 WL 3982545, at *8 (Tex. App.—Dallas Aug. 29, 2024, no pet. h.).

An important concept often left unstated is that only contemporaneous activities *by the owner* give rise to a negligence claim. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010). As detailed below, premises liability principles apply when an independent contractor's work activity creates the unreasonably dangerous condition. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999).

Taking Advantage of Chapter 95

In any case involving an injury to an independent contractor—whether arising from a negligent activity or premises defect—Chapter 95 of the Civil Practice and Remedies Code may provide enhanced protection to the defendant.

Chapter 95 applies to claims that arise "from the condition or use of an improvement"—i.e. premises defect or negligent activity—where the contractor "constructs, repairs, renovates, or modifies the improvement." Tex. Civ. Prac. & Rem. Code § 95.002; *see Endeavor Energy Res., L.P. v. Cuevas*, 593 S.W.3d 307, 310 (Tex. 2019). When it applies, an owner will only have a duty to warn if the plaintiff proves the owner exercised or retained control over the manner in which the work was performed *and* had actual knowledge of the danger or condition resulting in the injury. Tex. Civ. Prac. & Rem. Code § 95.003. And when it applies, Chapter 95 is the plaintiff's "sole means of recovery." *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 51 (Tex. 2015).

A thorough analysis of Chapter 95 is beyond the scope of this article. Whether it applies, however, usually turns on how the court defines the relationship between the injury-causing condition, the improvement on which the work was being performed, and the nature of the work itself.

In the past, the Texas Supreme Court often stated it "*broadly* defined an 'improvement' to include 'all additions to the freehold except for trade fixtures [that] can be removed without injury to the property.' " *Id.* at 49 (quoting *Sonnier v. Chisholm-Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex. 1995)) (emphasis added). Despite using the same definition, the court more recently has held that the improvement in a particular case must be defined "narrowly." *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771,

784 (Tex. 2021). The change in approach, however, does not appear, at least so far, to have led to fewer applications of the statute.

In its most recent opinion on Chapter 95, the Texas Supreme Court explained that while it construes the relevant improvement narrowly, "the contractor does not need to be injured by the improvement itself if the claim arises from a 'condition' of the improvement." *Weekley Homes, LLC v. Paniagua*, 691 S.W.3d 911, 915 (Tex. 2024). A dangerous condition, in turn, will "constitute[] a condition of the improvement itself" if its proximity to the improvement creates the probability of harm to the contractor. *Id.* at 916. In that case, for example, the court held that the proximity of a wet driveway to a townhome on which a crew was performing siding work created the probability of harm to a crewmember who was electrocuted while moving scaffolding across it, so the electrified driveway "was a condition of the townhome itself," and Chapter 95 applied. *Id.* at 916-17. In other words, the court has moved away from broadly defining the improvement and towards broadly defining the relationship between the dangerous condition and the improvement.

The other major hurdle to application of Chapter 95 is demonstrating that the independent contractor was involved in constructing, repairing, renovating, or modifying the improvement, given that none of those terms are statutorily defined. The Fourteenth Court of Appeals, however, recently provided some useful guidance. After surveying definitions used by its sister courts, it concluded that "Chapter 95 is intended to encompass actions that effect some change upon an improvement's condition, form, or qualities." *Priority Artificial Lift Services, LLC v. Chiles*, No. 14-22-00473-CV, 2024 WL 1200546, at *9-10 (Tex. App.—Houston [14th Dist.] Mar. 21, 2024, no pet.).

When a property owner is able to show Chapter 95 applies, the plaintiff's burden to establish a duty becomes much "more difficult." *Id.* at *8. It is necessarily rare for a property owner to both control the details of an independent contractor's work and have actual (rather than constructive) knowledge of a dangerous condition.

Defining the Unreasonably Dangerous Condition

When common-law premises liability principles apply, property owners only have a duty to protect visitors from conditions of their property that pose an unreasonable risk of harm. And one of the most straightforward and efficient means of avoiding liability is demonstrating that the condition at issue was not unreasonably dangerous as a matter of law.

A condition is unreasonably dangerous if it involves "a sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Associates*, 451 S.W.2d 752, 754 (Tex. 1970). Thus, "a risk must be both foreseeable *and* unreasonable to impose a duty on a property owner." *UDR Tex. Properties, L.P. v. Petrie*, 517 S.W.3d 98, 101 (Tex. 2017); *see also Rodriguez v. Cemex, Inc.*, 579 S.W.3d 152, 164 (Tex. App.—El Paso 2019, no pet.) ("[F]oreseeability is required to establish proximate cause, but it is also a key part of the analysis for determining whether a dangerous condition existed[.]").

The Texas Supreme Court has identified a variety of factors affecting whether a condition is unreasonably dangerous, including whether it:

- caused similar accidents or injuries in the past,
- generated complaints or reports,
- violates applicable regulations,
- involves a defective product,

- was clearly marked,
- "substantially differ[s] from conditions in the same class of objects," or
- is naturally occurring.

Pay & Save, Inc. v. Canales, 691 S.W.3d 499, 502 (Tex. 2024); *United Supermarkets, LLC v. McIntire*, 646 S.W.3d 800, 803 (Tex. 2022); *Seideneck v. Cal Bayreuther Associates*, 451 S.W.2d 752, 754 (Tex. 1970).

While determining whether a condition is unreasonably dangerous is often a fact question, *Pay & Save*, 691 S.W.3d at 502, there are at least three situations that are deemed *not* unreasonably dangerous as a matter of law.

1. Unforeseeable Injuries

"For purposes of determining the existence of a duty, foreseeability is a question of law." *McIntosh v. NationsBank*, 963 S.W.2d 545, 548 n.10 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). Foreseeability refers only to the "general danger," and "does not require that the exact sequence of events that produced an injury be foreseeable." *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002).

In assessing foreseeability, courts consider (1) the general nature of the danger itself and (2) the likelihood that the particular plaintiff would have been injured by the dangerous condition. *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999). Because of its focus on the plaintiff's relationship to the danger, foreseeability is often dispositive in cases involving criminal acts by third parties. *E.g.*, *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 758-59 (Tex. 1998).

2. Naturally Occurring Conditions

"[N]aturally occurring or accumulating conditions, such as rain, mud, and ice, which, in essence, come to the property, are generally beyond a landowners' control and therefore cannot be the basis for a premises liability claim." *Vance v. Hurst Joint Venture LP*, 657 S.W.3d 141 (Tex. App.—El Paso 2022, no pet.); *see also Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 414 (Tex. 2010) ("[I]ce, like mud, results from precipitation beyond a premises owner's control."); *Johnson Cnty. Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996) ("The natural state of dirt . . . can present a hazard under the right conditions, but not unreasonably so.").

3. "Common" Conditions

The newly dubbed "doctrine of common conditions" is premised on the notion that "the standalone fact that a condition has caused an injury does not make it unreasonably dangerous." *Pay & Save*, 691 S.W.3d at 502. In a series of cases over the past three terms, the Texas Supreme "Court has held that certain innocuous or commonplace hazards are not unreasonably dangerous as a matter of law, particularly when they have not caused other injuries or been the subject of complaints." *Christ v. Tex. Dep't of Transp.*, 664 S.W.3d 82, 87 (Tex. 2023); *see also Pay & Save*, 691 S.W.3d at 502-03; *United Supermarkets*, 646 S.W.3d at 802.

In doing so, the court cited two earlier cases in which it had similarly held that the conditions at issue—a rug someone tripped over and a ramp someone fell down—were not unreasonably dangerous as a matter of law. *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 163 (Tex. 2007); *Seideneck*, 451 S.W.2d at 754. While both of those cases had assessed the traditional factors noted above, neither grounded its holding in a finding that the condition was "common."

It is currently unclear whether the recent cases regarding common conditions have defined a unique category of conditions or merely adopted new terminology to describe conditions that are not unreasonably dangerous

under the traditional factor analysis. It is also unclear what factors, other than naturally occurring conditions, transform the determination of unreasonable danger from a fact question to a legal one. The trend, however, certainly appears to be in the direction of resolving the issue as a matter of law.

Categorizing the Premises Claim

Even when the condition at issue is accepted or assumed to be unreasonably dangerous, there are still several offramps for a premises owner to avoid any duty to protect visitors from that danger. In any premises case, the owner owes no duty to the plaintiff regarding dangers that are open and obvious—a term with broad application—or of which it could not reasonably be expected to have knowledge. Because of the nature of the relationship with independent contractors, however, owners have no duty regarding dangerous conditions that arise out of the work activity after the contractors enter the premises *unless* they control the relevant portion of the work.

Cases involving injuries to employees of independent contractors[2] are thus divided into two categories depending on the nature of the injury-causing condition.

1. Pre-existing Defects

The first category includes pre-existing defects. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999). "Only concealed hazards—dangerous in their own right and independent of action by another—that are in existence when the independent contractor enters the premises fall into this first subcategory." *Id.* The focus is on the "state of being" of the property itself. *4Front Engineered Sols., Inc. v. Rosales*, 505 S.W.3d 905, 912 (Tex. 2016). For example, an open shaft that is on a job site when the contractor enters is a pre-existing defect that falls into the first category. *Smith v. Henger*, 226 S.W.2d 425, 430-31 (Tex. 1950).

With respect to pre-existing defects, an owner "has a duty to inspect its premises and warn of concealed hazards the owner knows or should have known about." *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004). The Texas Supreme Court, however, has observed that "one who hires an independent contractor generally expects the contractor to take into account any open and obvious premises defects in deciding how the work should be done, what equipment to use in doing it, and whether its workers need any warnings." *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 216 (Tex. 2008).

If a hazard is open and obvious, it is by definition not concealed. Thus, one of the easiest ways to avoid any duty to warn independent contractors about pre-existing conditions is to show they are open and obvious.[3] *See, e.g.*, *SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 563 (Tex. 2022) ("A dangerous condition that is undisputedly open and obvious . . . raises no obligation to warn as a matter of law.").

There are two potential exceptions in

[2] Or subcontractors, if the defendant is a general contractor.

[3] It is actually part of the plaintiff's burden of proving duty to show a hazard was concealed. In cases involving invitees other than independent contractors, however, the fact that a danger is open and obvious may only affect the proportionate responsibility analysis rather than the question of duty. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 772–73 (Tex. 2010) ("[A] plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence but does not operate as a complete bar to recovery as a matter of law by relieving the defendant of its duty to reduce or eliminate the unreasonable risk of harm."); *Moritz*, 257 S.W.3d at 216-17 (distinguishing independent contractors).

which a warning may not be adequate and the obviousness of the danger may not relieve the landowner of the duty to make the premises reasonably safe. *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 204 (Tex. 2015). First, the necessary-use exception "may arise when the invitee necessarily must use the unreasonably dangerous premises[] and . . . is incapable of taking precautions that will adequately reduce the risk." *Id.* It is currently an open question, however, whether the exception applies to independent contractors. *See SandRidge Energy*, 642 S.W.3d at 568 (expressing "doubt" as to its application); *but see JMI Contractors, LLC v. Medellin*, No. 04-22-00072-CV, 2024 WL 3954210, at *5 (Tex. App.—San Antonio Aug. 28, 2024, no pet. h.)[4] (holding requirements of necessary-use exception were met and applied to independent contractor despite recognizing Texas Supreme Court's doubts).

Second, the criminal-activity exception "may arise when a dangerous condition results from the foreseeable criminal activity of third parties." *Austin*, 465 S.W.3d at 204. Cases involving this exception often allege inadequate security. *See, e.g.*, *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998). Due to the unique nature of this exception, it would be a rare factual scenario in which it extended to independent contractors.

2. Contractor-Created Defects

In the second category of premises defects, the dangerous condition arises as a result of the independent contractor's work activity. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999). Appellate courts have demonstrated little hesitance in attributing worksite dangers to the work itself, leading to the overwhelming majority of cases involving independent contractors falling into this category.

For example, the Texas Supreme Court has held that the pinch point area on a premises owner's crane "posed no danger until [the independent contractor] put the crane into operation." *Id.* Similarly, it held that a loading ramp only became dangerous when an independent contractor leaned backward while securing a load in the bed of his truck. *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211 (Tex. 2008). There is also a long line of electrocution cases in which the dangerous condition was held to have not been pre-existing but to have arisen out of the contractor's work. *E.g.*, *Oxy USA WTP LP v. Bringas*, No. 01-22-00373-CV, 2024 WL 3349088, at *6-7 (Tex. App.—Houston [1st Dist.] July 9, 2024, no pet. h.); *Corpus v. K-J Oil Co*., 720 S.W.2d 672, 674 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 747 (Tex. 1973).

In this second category of cases, "the premises owner normally owes no duty to the independent contractor's employees because an owner generally has no duty to ensure that an independent contractor performs its work in a safe manner." *Coastal Marine*, 988 S.W.2d at 225. The only exception to that rule arises when the owner exercises or retains control over the independent contractor's work. *See Redinger v. Living, Inc*., 689 S.W.2d 415, 418 (Tex. 1985). Even then, the owner only has a duty to "exercise that control with reasonable care." *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004).

In application, the exception is narrow, because "[e]very premises owner must have some latitude to tell its independent contractors what to do, in general terms, and may do so without becoming subject to liability." *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999). For the exception to apply, the owner's

[4] The general contractor defendant has indicated its intention to file a petition for review with the Texas Supreme Court in November 2024.

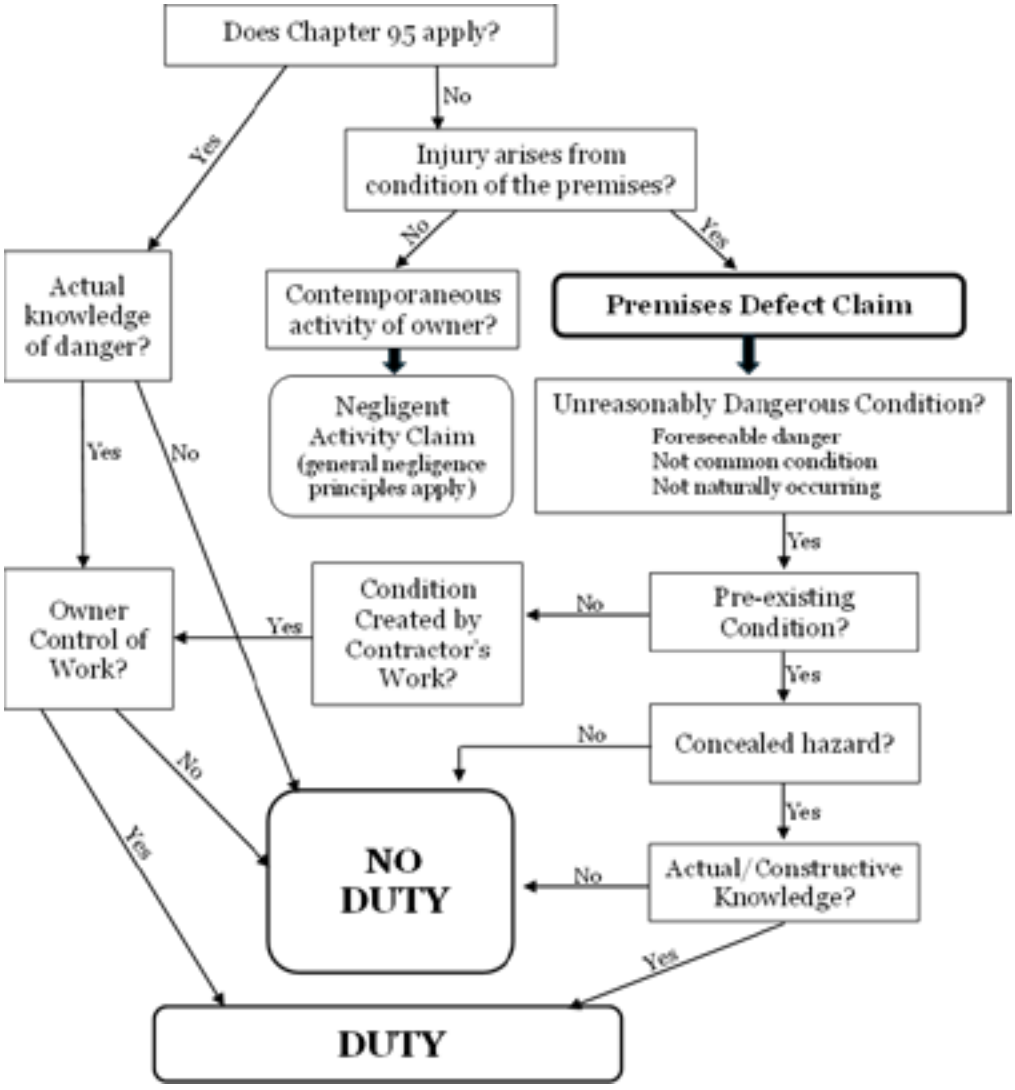
"control must relate to the condition or activity that caused the injury." *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997). It must also extend to "the means, methods, or details of the independent contractor's work." *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).

Control may be retained in a contract or actually exercised. To impose a duty, a contract must grant the owner "at least the power to direct the order in which work is to be done." *Elliott–Williams Co. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999). To establish actual control, a plaintiff must show the owner had prior knowledge of the dangerous condition and specifically approved the dangerous act. *Bright*, 89 S.W.3d at 609.

Even when sufficient control is present, a property owner may still avoid imposition of any duty to the independent contractor if other circumstances negating such a duty exist, such as an open and obvious condition or lack of constructive knowledge.

Conclusion

A premises owner only has a duty to protect employees of independent contractors in very limited circumstances, and there are numerous circumstances in which no duty will be imposed as a matter of law. The following chart summarizes the various paths to negating such a duty.



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TADC Legislative Update

By: David Brenner
Past TADC Legislative Vice President
Burns, Anderson, Jury & Brenner, L.L.P., Austin

The 2025 legislative session is right around the corner. The bill filing period commenced on November 11. According to what we're hearing, requests for bill drafts from the Texas Legislative Council are running at record levels, perhaps reflecting the aspirations of dozens of newly-elected House members in particular. If the past couple of sessions are any indication, a significant number of these bills will in some form or fashion affect the civil justice system in terms of new liability exposure for businesses and health care providers. As always, your TADC team will stay on top of filed legislation and provide weekly updates to your Executive and Legislative Committees. These reports are also available to any TADC member who would like to receive them, so if you would be interested, contact George Christian at georgechristia@gmail.com.

The list of specific legislation we provided in our last report has not changed very much, so the following may sound a bit repetitive. These potential proposals include:

- Revisiting the 2019 commercial trucking legislation with an eye toward removing the House floor amendment that opened the door to evidence of the employer's compliance with various federal regulations in the first phase of the trial even when the employer has stipulated to course and scope;

- Reforming noneconomic damages on a broad scale to address nuclear verdicts;

- Revisiting medical expenses (again) to address letters of protection and other tactics for inflating the amount of medical damages;

- Enhancing Civil Practice & Remedies Code frivolous litigation procedures;

- Addressing problems in UM/UIM lawsuits created by *Allstate v. Irwin*; and

- Seeking further improvements in the quality of the judiciary, including increasing judicial compensation, providing incentives for better judicial performance, and expanding the disciplinary options for dealing with judges who persistently fail to rule or follow the law; and

- Revisiting the 15th Court of Appeals enabling legislation to clarify the court's jurisdiction.

A pair of broad interim legislative studies will also be likely to generate a substantial amount of legislation. The first involves the rising cost and shrinking availability of property and casualty, homeowner's, and commercial and individual coverage. This study overlaps to some extent an investigation of the use (and possible abuse) of artificial intelligence in government and the private sector. The AI study has focused primarily on privacy concerns and the threat AI poses to the integrity of political campaigns and the electoral process. But it has also implicated the use of AI

by insurers and other businesses that may use AI in lieu of human decision-making. There has also been some discussion of whether and how products liability law applies to AI and its owners and developers. If the use of AI produces a bad outcome resulting in personal injury or property damage, who can be sued and under what theories? In the procedural realm, we can expect the Texas Supreme Court to consider some kind of rule relating to the certification or authentication of evidence that could well be AI-generated. At a minimum, we can expect a disclosure rule that requires attorneys to tell the court if they used AI to produce a filing or other document and to certify that, if the filing relies on authority, they have reviewed the original sources themselves.

As many of you know, the Supreme Court Advisory Committee is currently considering whether to recommend a rule requiring disclosure of third party litigation financing agreements (TPLF). The issue has been under study by a subcommittee chaired by former district judge and Houston [1st] Court of Appeals Justice Harvey Brown. TPLF, particularly that supported by hedge funds and sovereign wealth funds, has undoubtedly contributed to raising settlement values and prolonging litigation under certain circumstances. Proponents hope that an effective disclosure rule will at least give the court and the parties information about who might be influencing the case, as well as reveal to the public the extent of non-party financial participation in Texas tort litigation.

Finally, the political climate around the Capitol is volatile, as always. Incumbent House Speaker Dade Phelan is facing challengers from all sides which is to be expected. We understand that both sides of the aisle have an issue with the House tradition of appointing senior members from opposite parties to top committees. This animosity is nothing new, as this has been a tradition since the 1970's. The issue will likely resolve itself as it has through the years but there will surely be sore feelings on both sides for a day or two! This may be the session when this venerable tradition goes the way of the dodo, but we can always hope that cooler heads will prevail. In any event, 2025 should prove to be a lively time!

Lt. Governor Dan Patrick's interim charges include 1) examining the impact on the FTC's ban on non-compete agreements on Texas Employers, 2) Criminal Justice evaluation on retail theft and financial crimes, 3) Education and improving k12 college pathways, evaluate home schooling trends, and enhanced implementation of parent -approved health education, 4) stopping DEI work and education programs and 5) election and impeachment reforms. The Lt. Governor does not identify any Civil Justice related legislation in his interim charges.

As always, we will do our best to keep you informed of relevant developments at the Capitol and how TADC is responding to issues that directly affect the independent practice of law, access to the courts, and the preservation of trial by jury. We would ask that if you hear from anyone outside of TADC about how TADC should respond to a particular issue, please let us know.

TADC's position on certain matters is not only very important to us, but it makes a difference to legislators and other interested parties who may reach out to you in some way. The more aware we can be of these communications, the better able we will be to protect our interests in the Legislature.

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2024 TADC Annual Meeting

Horseshoe Bay Resort – September 18-22, 2024 – Horseshoe Bay, Texas

The TADC Annual Meeting was held in Horseshoe Bay, Texas,, September 18-22, 2024 at the beautiful Horseshoe Bay Resort. ***Sarah Nicolas, Ramon Worthington Nicolas & Cantu, PLLC, Austin & Kristi Kautz, Fletcher, Farley, Shipman & Salinas, LLP, Dallas,*** assembled a program with 9.75 hours of CLE including 2.00 hours ethics. Topics ranged from *"Mediation/Negotiation Strategies"*, with the Honorable Lori Massey Brissett from the Fourth Court of Appeals , a distinguished Judicial Panel discussing *"Tips for Trial Lawyers"*.

Arlene, Matthews, Jennie Knapp, Bud Grossman, Cathy & Mark Stradley

Anna Garcia, Karen Grossman, Dan & Marissa Hernandez

Kelly Lea & Azaria Didley

Neal Pirkle, Karl & Adrienne Seelbach with Sean Swords

Judge Karin Crump, Justice Lori Massey
with Program Chair Kristi Kautz

President Corley with Young Lawyer
Award recipient, Sean Swords

President Corley with Mitzi Mayfield,
TADC President's Award winner

A special thanks to Gayla Corley and
Jeff Pruett for their service

Passing of the Gavel.
Congratulations President Mike Shipman!

Serving Two Masters – The Tripartite Relationship

By: Christy Amuny
Germer PLLC, Beaumont

What is the Tripartite Relationship? The relationship arises when an insurance carrier hires counsel to defend a lawsuit against an insured policy holder. There is a relationship between defense counsel and the carrier and a relationship between defense counsel and the insured – those relationships are not the same. Texas law has long held that there is one and only one client and that is the insured. *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973). If a conflict arises between the interests of the carrier and its insured, defense counsel owes a duty to the insured to immediately advise of the conflict. *Id*.

State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998) involved a motor vehicle accident between drivers Davidson and Klause, both of whom were insured by State Farm. Jordan was a passenger in Klause's vehicle and sued both drivers. State Farm retained counsel for Davidson who was found 100% negligent at trial. Shortly after trial, Davidson passed away, an excess judgment was taken. Traver, Davidson's executor, sued State Farm for negligence, breach of the duty to defend, breach of the *Stowers* duty, breach of the duty of good faith and fair dealing and violations of the DTPA. Traver specifically alleged that the attorney retained by State Farm committed malpractice which State Farm deliberately orchestrated to avoid potential *Stowers* liability. The trial court rendered summary judgment for State Farm which was reversed in part on appeal.

The Texas Supreme Court held that, as an independent contractor, defense counsel has discretion over the day-to-day details of the defense which is not subject to the client's control. While counsel may not act contrary to the client's wishes, counsel is in complete charge of the minutiae of court proceedings and can seek to withdraw if he is not permitted to act as he thinks best. *Id*. Because the lawyer owes a duty of unqualified loyalty to the insured, counsel must at all times protect the insured's interests even if those interests would be compromised by the carrier's instructions. *Id*.

The concurrence recognized the inherent problems that can arise in the tripartite relationship:

The duty to defend under a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well-documented as a source of unending ethical, legal, and economic tension.

Who Controls the Defense? Because the tripartite relationship is contractual, the carrier has two fundamental obligations – a duty to defend and a duty to indemnify the insured against certain risks and losses. These duties obligate the carrier to retain competent defense counsel, and the insured, in turn, is obligated to notify the carrier of any claims and to cooperate with the investigation, defense and settlement. Because the policy gives the carrier the exclusive right to control the defense, the carrier also pays the costs of defense. In assuming the insured's defense, the carrier is generally entitled to control the defense, which is essential to the carrier's need to manage risk and predict potential exposure. If there are no coverage issues, the carrier, which will ultimately have to pay any judgment within the policy, has an economic incentive identical to the insured's. While the end game is the same for the carrier and the insured – to win the case – there is not always agreement as to how to best accomplish

this goal. This is especially true when the case is being defended under a reservation of rights as the carrier may be motivated to establish that the claim does not fall within the policy's coverage which may interfere with the carrier's incentive to minimize its insured's liability.

In this scenario, a question may arise as to whether the insured is entitled to independent counsel rather than (or in addition to) the counsel chosen and hired by the carrier. Although Texas is often lumped in with other states holding an insured is entitled to independent counsel whenever the case is defended under a reservation of rights, not every reservation of rights creates a conflict of interest allowing an insured to select independent counsel. Rather, the existence of a conflict depends on the nature of the coverage issues as they relate to the underlying case. If the policy gives the insurer the right to control the defense, the insured cannot choose independent counsel and require the insurer to reimburse the expenses unless "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends." *N. County Mut'l Ins. Co. v. Davalos, 140 S.W.3d 685 (Tex. 2004)*. A true conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel retained by the insurer to defend the underlying claim. *Id*. When the disagreement concerns coverage but the insurer defends unconditionally, estoppel principles prevent the potential for a conflict of interest.

Who Controls the Information? Inherent in the defense of every lawsuit is the accumulation of facts and information generated by investigation, learned through discovery and gleaned from the client. Also inherent in the defense of every lawsuit is the attorney's duty to report facts and information to the carrier. The question arises as to what facts and what information can be reported to the carrier and whether the client's permission is required to report certain facts and information. Communications between the insured/attorney and carrier are generally protected by the work-product privilege, but questions arise as to the insured/attorney's duty to share information with the carrier. This is especially true when the information could give rise to a coverage defense by the carrier.

Generally, defense counsel has a duty to timely inform the carrier of relevant information concerning the lawsuit. Problems may arise when defense counsel learns confidential information from the insured that would support the carrier's basis for a coverage defense. Regardless of how the information is obtained, defense counsel must remain mindful of the ethical rules regarding confidentiality and obtain the client's consent before providing confidential information to the carrier. A major ethical dilemma can arise when defense counsel learns of extrinsic evidence that the carrier could use to bar the claim. The insured is the only client, and there is no attorney-client relationship between the carrier and defense counsel. Accordingly, defense counsel may not share extrinsic evidence that may jeopardize coverage or defense counsel could violate the ethical obligations owed to the insured, including the duty of loyalty and confidentiality.

Defense counsel has a single client to which it owes duties and obligations while at the same time having a business relationship with the carrier. It is clear that defense counsel cannot violate the ethical duties it owes to the insured by sharing information with the carrier. This dilemma was addressed in Texas Professional Ethics Committee Opinion 669. Plaintiff sued Defendant in state court for personal injuries arising from an automobile accident, and the carrier hired defense counsel who then met with the client to explain his retention, his responsibilities in defending the suit and his obligation to keep the carrier apprised of developments in the case. Defense counsel obtained the client's informed consent, and the client initially cooperated in the defense of the case up until the time he stopped communicating. Counsel tried various ways to contact the client, including hiring an investigator. The client still refused to communicate. Defense counsel recognized that the failure to cooperate might violate the policy and result in the carrier withdrawing coverage. Defense counsel had the investigator deliver a letter to the client advising that if he did not contact the attorney, the attorney would withdraw. Still no communication.

The question presented: Under the Texas Disciplinary Rules of Professional Conduct, may

a lawyer retained by an insurance company notify the insurance company that the insured client he was assigned to represent is not cooperating in the defense of the lawsuit? The answer: Absolutely not. Although the attorney can withdraw, the attorney must continue to preserve the client's "confidential information" which includes both "privileged information" and "unprivileged client information." Under Disciplinary Rule 1.05(a), unprivileged client information is all information relating to the client or furnished by the client, other than privileged information, acquired by the attorney during the course of or by reason of the representation of the client.

At a minimum, the client's failure to communicate with counsel is considered unprivileged client information. Rule 1.05(b)(1) and (2) provide that an attorney shall not knowingly reveal a client's confidential information to third persons the client has not instructed to receive the information and shall not use a client's confidential information to the disadvantage of the client unless the client consents after consultation. Because the client is not communicating with counsel, there is no opportunity to obtain the client's instructions or consent. Thus, counsel may not disclose the client's confidential information, including the client's lack of cooperation, to the carrier, regardless of whether such disclosure may lead to the carrier's withdrawing coverage. Also, because defense counsel may not use the lack of cooperation to the client's disadvantage, counsel may not reveal the client's failure to communicate to explain to the carrier the reason for counsel's withdrawal from the representation. With respect to the reasons for withdrawal, all counsel may say to the court and the carrier is that "professional considerations require termination of the representation."

The Committee's final conclusion was that under the Rules, if an insured fails to communicate with his retained defense counsel, then counsel may withdraw from the representation. In that event, counsel must protect the client's confidential information and may not, absent consent, disclose the reason for the withdrawal to the carrier. In connection with moving to withdraw from the suit, counsel should avoid disclosing, either to the court or to the carrier, the specific reason for the withdrawal.

Interestingly, following the issuance of this opinion the Committee was asked to reconsider its opinion and received input from individual attorneys addressing the issue. While the request for rehearing was considered, the Committee declined to change its opinion. Unfortunately, for the practicing attorney, the opinion provides little guidance. The failure to disclose the client's lack of cooperation may jeopardize the ongoing relationship between the attorney and the carrier. Failing to provide relevant information to the carrier may result in the carrier deciding to hire different counsel going forward.

Control of Costs In this day and age, almost all insurance companies have billing/litigation guidelines that their chosen counsel must follow to obtain work from the insurance company. In addition, almost all insurance companies send defense counsel's invoices to outside auditors who review the invoices for compliance with the guidelines and cut any fees they determine do not comply. Billing/litigation guidelines are an attempt by the carrier to control costs and provide consistency. In most instances, guidelines go hand in hand with the carrier's right to control the defense. Problems can arise when defense counsel and the carrier disagree about certain actions that are necessary to provide the best defense for the insured, such as hiring experts, legal research, taking depositions, retaining an investigator, etc. Should the carrier refuse to pay, defense counsel's ability to defend the the client is impacted and certainly affects what counsel considers to be the best defense possible.

Texas Committee on Professional Ethics Opinion 533 addressed the issue of litigation/billing guidelines. The Committee noted that insurance companies have issued guidelines which are imposed on defense counsel that place certain restrictions on how counsel can conduct the defense. The question presented: May a lawyer, who is retained by an insurance company to defend its insured, ethically comply with litigation/billing guidelines which place certain restrictions on how the lawyer should conduct the defense of the insured? The answer: No, not under the Texas Disciplinary Rules of Professional Conduct.

The Committee began its discussion with the *Tilley* requirement of unqualified loyalty before recognizing the unanimous holdings of Texas courts that an attorney-client relationship exists between an insured and the lawyer retained by the carrier. Under the Disciplinary Rules, a lawyer shall exercise independent professional judgment to render candid advice and shall not permit a person who recommends, employs or pays the lawyer to direct or regulate the lawyer's professional judgment.

Litigation/billing guidelines which interfere with defense counsel's professional judgment not only violate the Rules but also improperly restrict counsel from fulfilling the obligations owed to a client. Loyalty to the client/insured demands that the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Although counsel is free to enter into an agreement with the insurer regarding the fee and services to be rendered for the insured/client, such agreement cannot override the lawyer's ethical responsibilities. In other words, regardless of such an agreement with the insurer, the lawyer must at all times be free to exercise independent professional judgment in rendering legal services to the client. The lawyer should recognize that a person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against counsel's independent judgment. The lawyer should be ever watchful that such persons or organizations are not seeking to further their own economic, political, or social goals without regard to the lawyer's responsibility to the client.
The final conclusion of the Committee was that it is impermissible under the Disciplinary Rules for a lawyer to agree with an insurance company to restrictions which interfere with the lawyer's exercise of his or her independent professional judgment in rendering legal services to the insured/client.

What is the practical application of this opinion? Really, nothing. All defense attorneys know that they must follow the litigation/billing guidelines or else they will not get paid. All defense counsel must work diligently to obtain permission from the carrier to carry out the tasks necessary for a zealous defense. If the carrier disagrees, defense counsel is left with the unenviable dilemma of completing the task without compensation or not doing it at all, to the possible detriment of the client.

Another significant issue that can create a conflict is the requirement by most carriers that defense counsel's invoices be submitted to third-party auditors who is responsible for making sure that all billing entries comply with the litigation/billing guidelines. If they do not, the fees are not paid. In order to comply with the billing guidelines, the billing entries have to be detailed enough to show what was done and why. The conflict arises with the potential waiver of the attorney-client privilege when detailed invoices are submitted to an outside vendor.

The Texas Committee on Professional Ethics Opinion 532 addressed the issue of whether a carrier could require defense counsel to submit invoices to third-party auditors. When the attorney is retained by the carrier, the policy provides that the carrier will pay the legal fees associated with defending the insured. The carrier requires defense counsel to submit invoices to an independent, third-party audit company retained by the carrier. The auditor's guidelines of the require the invoices to be in a certain format and set forth in detail the legal work performed in representing the insured. The stated purpose of the guidelines is to enable the outside auditor to determine and inform the insurance company whether the legal work performed by the lawyer in representing the insured was necessary and whether the time spent was reasonable.

The question presented: Without the client's informed consent, may a lawyer, who is retained by an insurance company be required by the insurance company to submit fee statements to a third-party auditor describing legal services rendered by the lawyer on behalf of the client? The answer: An attorney cannot provide invoices to a third-party auditor describing legal services rendered for the insured without first obtaining the informed consent of the insured.

Again, the Committee began its discussion by citing *Tilley*, which holds that although a lawyer defending an insured is normally selected, employed and paid by the carrier, it is established Texas law that the only client is the insured. Moreover, because a lawyer owes unqualified loyalty to the client, counsel must at all times protect the client's interests if those interests would be compromised by the insurer's instructions.

Texas Disciplinary Rule 1.08(e) provides that a lawyer shall not accept compensation for representing a client from a person other than the client unless, among other requirements, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and information relating to the representation of a client is protected. Rule 1.05(b) provides that a lawyer shall not knowingly reveal confidential information of a client to a person the client has instructed is not to receive the information or anyone else other than the client's representatives or members of the lawyer's law firm. Confidential information includes both information protected by the attorney-client privilege and unprivileged client information. The phrase unprivileged client information is defined to encompass all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client. If a lawyer's invoice or fee statement describes the legal services rendered, it includes information relating to a client acquired by reason of the representation. Therefore, it contains confidential information of the client as defined in Rule 1.05.

The Committee concluded that the lawyer is obligated to protect the client's confidential information, and an invoice or fee statement describing legal services rendered by the lawyer constitutes confidential information. Without first obtaining the client's informed consent, a lawyer cannot, at the request of the insurance company paying his fees for the representation, provide fee statements to a third-party auditor describing legal services rendered by the lawyer for the insured.

Who Controls Settlement? Often, conflicts between the insured and the carrier arise when there are settlement demands within the policy limits. The insured will normally want a case to be settled within the policy limits to avoid a trial and the possibility of an excess judgment. The carrier, on the other hand, may determine that the value of the case is not worth the demand and either refuse the demand or offer less than demanded if there is a possibility of winning outright at trial or obtaining a verdict for less than the demand.

In Texas, the insurer's duty is governed by the *Stowers* doctrine which requires that an insurer act with that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business in responding to settlement demands within the policy. *Stowers Furniture Co. v. American Indem. Co*., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). The failure to settle the case within the policy limits upon receipt of a valid *Stowers* demand could expose the carrier to additional risk beyond the policy limits. The purpose of the *Stowers* duty is to protect the insured from a carrier abusing the control of defense and settlement. The threat of having to pay a judgment in excess of the policy limits is meant to keep the insurer from putting the insured at risk by failing to settle a claim that could and should have been settled within policy limits.

Conclusion The tripartite relationship can be challenging and filled with potential conflicts for defense counsel. It is important to remember how the ethical obligations may affect the tripartite relationship. In most cases, the goals of the carrier and insured are aligned, and the goal is to win the case and/or minimize the risk to the insured which, in turn, minimizes the amount the carrier pays. These goals can be complicated by the carrier's desire to direct the defense and control costs. Defense counsel relies on the relationship with the carrier for continued business, and the refusal to comply with the carrier's guidelines diminishes that likelihood. That said, defense counsel must realize – above all else – that the insured is the only client to whom an absolute duty is owed. The struggle is real.


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Amicus Curiae Committee Update

Mike Eady (Thompson Coe) and Ruth Malinas (Mimari Anderson Cilfone & Watkins) filed an amicus in *American Honda Motor Co. v. Milburn*, 2024 Tex. LEXIS 543 (Tex. Jun. 28, 2024) (Blacklock, J., concurring) (Devine J., dissenting). The case arose from an auto collision. The plaintiff was a passenger on an Uber ride in a Honda minivan. Plaintiff used the used the over-the-shoulder part of the belt, but not the lap belt. 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. Honda asserted the presumption of no liability under CPRC 82.008 for designs that comply with federal safety standards. The jury found Honda 73% at fault and awarded $26 million dollars. The Supreme Court reversed and rendered judgment for Honda. Whether the presumption applies to the design under the applicable federal standard usually will be a question of law. Here the standard applied to the risk of misuse and authorized the specific design after considering that risk. Sec. 82.008 permits the presumption to be rebutted by proof that the federal standard is inadequate from a qualified regulatory expert. That requires more than proof the design used was defective. Milburn's expert had not read the safety standards and was unfamiliar with the regulatory history. To be sufficient, the expert must show what the agency considered to reach its decision, a comprehensive review of the various trade-offs and factors it considered. The majority left open the possibility that subsequent technological developments could show the standard later became inadequate. Here, Milburn's expert's opinions were legally insufficient to rebut the presumption.

Justice Blacklock concurred because the expert's opinion was legally insufficient to show the federal standard was inadequate. The adequacy of federal standards was both policy and political, the political decision being left to the agency. However, 82.002 makes "inadequacy" a fact question. Blacklock leaves the door open to avenues but agrees that the expert must explain why in the entire regulatory history and in balancing safety vs commercial feasibility the agency's decision was inadequate.
Justice Devine dissented. The regulation's adequacy is a fact question. The majority essentially engrafts onto 82.008 an unwritten 'deference-to-agency' clause. Regardless, Milbern should get a new trial in the interests of justice to try the case under the new standard.
A motion for rehearing was filed and denied.

Roger Hughes (Adams & Graham LLP) and Tom Wright (Wright Close & Barger) filed an amicus to oppose the motion for rehearing in *Horton v. Kansas City So. Ry*, 692 S.W.3d 112 (Tex. 2024) (Busby, J., concurring) (Young, J., dissenting). This is a *Casteel* objection case to erroneously commingling valid and invalid negligence theories in one question. In a railroad crossing case, the question submitted two alleged defects: (1) failure to replace a missing yield sign, and (2) inadequate maintenance of crossing grade resulting in a "humped crossing." The Supreme Court determined federal law did not pre-empt the "humped crossing" theory, but there was no evidence the missing yield sign caused the collision. It reversed under *Casteel*, because there was legally insufficient evidence about the yield sign. On rehearing, the majority held the *Casteel* presumption of harm can be rebutted; if *Casteel* applies, the burden shifts to the prevailing party to show from the entire record the error was harmless. The appellate court must then decide harm; it may then conclude the error was harmless if it is reasonably certain the jury was not significantly influenced by the issues erroneously submitted. Horton submitted two distinct negligence theories. Harm is less likely when the charge submits supported and unsupported theories as alternatives the jury may disregard; harm is more likely when the charge requires the jury find an unsupported theory. The *Casteel* presumption of harm will not

apply when the charge commingles a factually unsupported theory. In all cases, the parties may rely on the record to show the error was or was not harmful. Here the record showed Plaintiff's main theory was the "humped crossing." Based on the record, the Court was reasonably certain that the jury was not significantly influenced by erroneous broad-form submission.

Justice Busby's concurrence call on the US Supreme Court to clarify the federal implied preemption doctrine.

Justice Young dissented. First, the *Casteel* presumption of harm applied because it prevented the court from knowing if the jury relied on an improper theory. There is no sound basis to distinguish factually unsupported from legally invalid theories. Likewise, there is no sound basis to rebut the presumption. The majority is simply doing a "gut check." Second, the new standard injects more uncertainty into trial practice and discourages clarity in jury charges.

Jeanne Knapp (Underwood Law Firm) filed an amicus in *Alonzo v. John*, 689 S.W.3d 011 (Tex. 2024). This is an 18-wheeler rear-end collision case; jury awarded $12 million for pain and mental anguish. Critical issue were (1) argument that "anchors" noneconomic damages to unrelated values, and (2) voir dire questions that ask jurors to commit to consider large amounts for hypothetical noneconomic loss. In this case, counsel compared the value of a Van Gogh painting, athletes' salaries, and the value of defendant's trucking fleet. The Court reversed and remanded based on an appeal to racial bias during closing argument. However, in a footnote, the Court condemned "unsubstantiated anchoring" to sustain damages. It did not comment on the commitment questions.

Stephen Bosky (Ramon Worthington Nicolas & Cantu) filed an amicus to support the petition for review in *Werner Entr. v. Blake*, 672 S.W.3d 7554 (Tex. App.--Houston [14th Dist.] 2022, pet. granted) (en banc) (Christopher, C.J., dissenting). There are a number of important issues in a highway trucking accident on an icy interstate highway during freezing rain. First, the majority concluded that the truck driver's speed caused the collision when the passenger vehicle lost control on any icy road and crossed a forty-foot wide median into the truck's lane. Plaintiff argued that, had the trucker driven at 15mph instead of 50mph, he could have braked or swerved to avoid collision. Second, stipulating that the truck driver was in scope of his employment did not preclude submitting direct negligence in supervision and training. Third, a *Casteel* objection that the liability question commingled valid with invalid theories was insufficient because the objection failed to specify the invalid theories. The Supreme Court has granted review. Oral argument is in December.

Brandy Manning (Dykema) submitted an amicus to support the mandamus petition in *In re State Farm Mut. Auto. Ins. Co.*, No. 23-0755. This raises several unresolved issues in UM/UIM litigation – staying extra-contractual claims, corporate representative depositions, and restricting discovery of pre-accident medical records. The trial court (1) denied severance and abatement of extra-contractual claims, (2) denied motions to quash corporative representative deposition and deposing the adjuster, and (3) restricted DWQs to post-accident medicals of plaintiff's providers for accident treatment. The Dallas Court of Appeals summarily denied mandamus relief. The Supreme Court set oral argument in October 2024.

Peter Hansen (Jackson Walker) filed an amicus to support defendants' petition for *Posada v. Lozada*, No. 08-22-0101-CV, 2023 WL 5671449, 2023 Tex. App. LEXIS 7019 (Tex. App.--El Paso Sept. 1, 2023, pet. filed) (mem. op.) (Soto, Jr., dissenting). This is a highway trucking accident between defendants' 18-wheelers and plaintiff's truck; the trial court granted a no-evidence MSJ on breach of standard of care and causation; the court of appeals reversed, with a dissent. This raises the question of whether ending up jack-knifed on the road is some evidence the driver was negligent in reacting to an unexpected tire-blow out. The majority concluded that evidence that Lozada driving his truck somehow resulted in blocking the lanes was "some evidence" of a failure to use ordinary care. The majority does not clarify what was the failure in driving. The dissent argues that merely blocking of the highway is not

itself evidence of negligence in causing the truck to jack-knife or failure to regain control. This is an important opinion because it arguably requires all jack-knife collisions to go to the jury. Merits briefing has been requested.

Mike Eady (Thompson Coe) has been authorized to file an amicus brief for defendant's PFR in *Hyundam Ind. Co. Ltd. v Swacina*, 2023 WL 8262721, 2023 Tex. App. LEXIS 8964 (Tex. App.--Corpus Christi Nov. 30, 2023, Rule 52.7 mtn filed). This is a special appearance in a products liability case by a Korean component part manufacturer; Corpus affirmed the denial finding specific jurisdiction. Applying the stream-of-commerce-plus theory, it decided Hyundam intended to serve a Texas market because it developed the pump to meet North American specifications. Citing *State v. Volkswagen*, 669 SW3d 399 (Tex. 2023), Corpus decided designing the product for use in North America was designing it for use in Texas; it was not necessary that it be particularly designed for Texas. This is a potentially important case in which a component part manufacturer is subject to Texas jurisdiction because the finished product manufacturer designed the product for a "North American" market." Merits briefs have been requested.

An amicus brief has been authorized to support Home Depot's petition in *Santander v. Seward*, 2023 SL 4576015, 2023 Tex. App. LEXIS 5223 (Tex. App.--Dallas 7/18/23, pet. gramted) (mem. op.) (Carlyle, J., concurs in part and dissents in part) (Rosenberg, J., concurs in part and dissents in part). The Dallas Court reversed a summary judgment for defendants; a person detained by an off-duty security guard at Home Depot shot a police officer who came to arrest him. In a nutshell, the Dallas Court decided that Home Depot was negligent in failing to tell the arresting officers that the detainee had not been frisked for a weapon and could be dangerous, and in failing to handcuff him or tell the officers he was not restrained. The Supreme Court has requested merits briefing and there is already one amicus supporting Home Depot. This case has serious implications for premises security liability for retailers. The Supreme Court has granted review; oral argument is scheduled for December.

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Summary Judgments, Nonsuits, and Sanctions: Strategies for Obtaining Finality

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As defense attorneys, the primary goal must always be to successfully resolve the claim asserted against our client. However, if successful resolution is the primary goal, the secondary goal is certainly ensuring finality. Put bluntly- while our clients want to prevail, the vast majority tell us that they just want the litigation to be over. Under Texas law, success and finality are often intertwined and this paper will discuss procedural mechanisms for obtaining both as well as the ethical implications of certain resolutions.

I. Summary Judgment- the ultimate weapon in the defense arsenal

"If you don't have the facts, argue the law." – Carl Sandburg

Frequently cases are won not because our clients have not done what is alleged but because our clients cannot be liable under the applicable law. The easy example is when our clients are sued after the expiration of the statute of limitations for the asserted claim. Another example is when our client is sued for the actions of a third party for whom they are ultimately not liable based on principles of control or employment. In these scenarios, our clients may seek dismissal via a Motion for Summary Judgment. Summary judgment procedure is well known to defense attorneys and therefore will not be recounted in detail in this paper. However, some review of the basics is helpful to the strategies set forth in this paper.

Summary judgment procedure is established by Rule 166 of the Texas Rules of Civil Procedure. Rule 166a establishes the procedure for a traditional summary judgment; i.e. a summary judgment that the evidence disproves liability as a matter of law. Rule 166a(i) establishes the procedure for a no evidence summary judgment; i.e. that discovery has been conducted and there is no evidence sufficient to establish one or more elements of the asserted cause of action. The distinction between these two procedures is key: a movant in the traditional (166a) summary judgment practice bears the burden to produce evidence; a movant in the no evidence (166a(i)) summary judgment practice shifts that burden to their opponent.

It is important to note that a summary judgment motion, regardless of whether it is brought traditionally or on no-evidence grounds, is a powerful procedural device. First, it is a statement to the Court that a cause of action has been brought which should not be heard in a trial by either the judge or a jury. Second, it is a challenge to an opponent to justify the continued existence of the litigation on the cause of action. Third, it is a potential trap for the unwary with strict procedural requirements and harsh consequences for noncompliance.

A. Traditional Summary Judgment Motions

A traditional summary judgment motion is filed and should be granted when "(i) the deposition

transcripts, interrogatory answers, and other discovery responses . . . and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any . . . show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion. . . .” TEX. R. CIV. P. 166a(c).

A defendant seeking a summary judgment under Rule 166a(c) must either negate as a matter of law at least one element of the plaintiff’s cause of action or plead and prove as a matter of law each element of an affirmative defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the defendant is successful in demonstrating that plaintiff’s cause of action is unmeritorious or in establishing each element of his affirmative defense that negates liability, the defendant is entitled to a dismissal of the challenged causes of action. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

While the defendant bears the burden of proof on a traditional summary judgment, it can serve multiple strategic purposes. Obviously, the ideal outcome is an order granting summary judgment on all causes of action asserted against our client. This is necessary to accomplish the secondary goal of finality (at least at the trial court level) because a judgment issued without a conventional trial on the merits is final for purposes of appeal if it: (1) actually disposes of all claims and all parties before the court; or (2) states with unmistakable clarity it is a final judgment as to all claims and all parties.

Lehman v. Har-Con Corp., 39 S.W. 3d 1919, 195 (Tex.2001); *see also Texas Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc*., 300 S.W.3d 348, 361 (Tex. App. –Dallas 2009, pet. denied). A traditional summary judgment which is granted on only some of the causes of action asserted by the plaintiff is typically interlocutory[1] and does not become final until it is incorporated into the final judgment entered after either trial on the merits or subsequent dismissals or dispositive motions on the remaining claims. *Id.*

Is there any benefit to the defendant of filing a traditional motion for summary judgment which is unlikely to be granted or which would not resolve all causes of action? It is the opinion of this author that there is still a place for a long-shot or partial summary judgment as part of the overall defense strategy. One of the reasons is that it requires the plaintiff to demonstrate how they intend to oppose the arguments and evidence presented. When a traditional motion for summary judgment is filed, the non-movant may file and serve opposing affidavit or other written response not later than seven days before the hearing date. Tex. R. Civ. P. 166a(c). Although the nonmoving party is not required to marshal its proof in response to a summary judgment motion, it must present countervailing evidence that raises a genuine fact issue on the challenged elements. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). You will now see what the plaintiff believes are their best arguments and pieces of evidence in support of their case. This is a powerful tool for effective trial preparation.

Another reason is because the non-movant bears the burden to assert objections to the summary judgment evidence. Objections to the form of the summary judgment evidence which are not made timely and on which a ruling is not obtained before the trial court rules on the motion are waived and will not be grounds for reversal on appeal. *Allen ex rel. B.A. v. Albin,* 97 S.W.3d 655, 663 (Tex. App.-Waco 2002, no pet.); *Dolcefino v. Randolph,* 19 S.W.3d 906, 926–27 (Tex. App.-Houston [14th Dist.] 2000, pet. denied); *McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 343 n. 7 (Tex. 1993) *see also* TEX.R.APP.P. 33.1(a)(2); TEX.R.CIV.P. 1 66a(f) (“Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.”).

A good example of where the objection procedure can benefit the defendant is when the evidence supporting a traditional summary judgment motion is an affidavit from the client. Importantly, objections to an affidavit typically include that 1) it is an affidavit of an interested witness which is not clear, positive, direct, credible, uncontradicted, or readily

[1] In the interest of brevity, this paper will not address summary judgments on statutory claims which do afford the right of interlocutory appeal.

controvertible; (2) it contains hearsay; and (3) the person making the affidavit lacks personal knowledge. Because each of these are "form" objections, a plaintiff who fails to make these objections will not be able to raise them on appeal. *Choctaw Properties, L.L.C. v. Aledo I.S.D.,* 127 S.W.3d 235, 241 (Tex. App. Waco 2003, no pet.). Conversely, objections that an affidavit lacks the requisite jurat or is conclusory are objections of substance which can be reviewed on appeal even if not properly preserved before the trial court. *Id.*

As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion. *See* Tex.R.App. P. 33.1(a). If the nonmovant fails to properly object to summary judgment evidence, the long-shot motion may not only be successful, it may also survive an appellate challenge. If nothing else, you have just obtained a preview of your opposing counsel's evaluation of evidence, ability to both identify and assert appropriate objections, and their understanding of and attention to error preservation.

Finally, a traditional summary judgment motion which is only successful on some of the claims still has value to your client. A partial summary judgment can narrow the issues for trial, allowing for a more focused defense on the causes of action remaining. A partial summary judgment can also reduce the client's risk- a successful summary judgment on a breach of contract allegation which is unsuccessful on a negligence allegation is a good example. The client is still facing a judgment but is no longer facing a claim for attorney's fees. Another example that is common is a summary judgment on allegations of gross negligence which is not dispositive of the entire case but does eliminate the possibility of exemplary or punitive damages.

B. No-Evidence Summary Judgment Motions

Summary judgment is also appropriate when there is no evidence to support one or more specified elements of the plaintiff's cause(s) of action. TEX. R. CIV. P. 166a(i). In other words, once a party files a no-evidence motion for summary judgment, the motion must be granted unless the plaintiff is able to meet his burden to produce evidence raising a triable issue of fact on each element essential to his case. See *LMB, Inc. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006); *Espalin v. Children's Med. Ctr. of Dallas*, 27 S.W.3d 675, 683 (Tex. App.—Dallas 2000, no pet.); see also *Forbes Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 172 (Tex. 2003) (summary judgment proper where non-movant fails to produce more than a scintilla of evidence raising genuine issue of material fact on challenged elements).

A no-evidence summary judgment involves two key strategic evaluations: 1) has legally competent evidence been discovered that would support each element of each causes of action alleged and 2) has the case been on file for a sufficient amount of time that the trial court can safely determine that the non-movant had sufficient opportunity to conduct discovery. If there is a reasonable basis for the motion (more on this later), a no-evidence motion for summary judgment should be filed by defendants whenever possible. The reason of course is that procedurally, this is the only way a defendant can force a plaintiff to "show their cards" before trial because the plaintiff's response will necessarily reveal the evidence the plaintiff believes proves their case, whether or not the plaintiff has been able to obtain that evidence in admissible form, and the arguments the plaintiff intends to present to the court and jury.

The defendant proceeding on a no-evidence summary judgment motion should note that it bears the obligation of asserting objections to summary judgment evidence (discussed previously herein) and doing so in a way which properly preserves the objections for potential appeal.

Another benefit to a no-evidence summary judgment for defendants is the procedural traps laid for the plaintiff. A party with the burden of proof on a summary judgment motion must file all argument and evidence with the court not later than seven (7) days before the scheduled hearing. Tex. R. Civ. P. 166a(c). In a no-evidence motion for summary judgment filed by the defendant, this burden is borne entirely by the plaintiff. The seven-day deadline is a firm deadline. A plaintiff who cannot meet the deadline has two options: 1) request a continuance of the hearing or 2) file a motion for leave to file a response after the deadline.

Continuances: A no-evidence motion for summary judgment procedurally shortens the time that a plaintiff has to prepare their case since it is akin to a pre-trial directed verdict. *Stierwalt v. FFE Transportation Servs., Inc.,* 499 S.W.3d

181, 191 (Tex. App. –El Paso 2016, no pet.). Now, instead of being able to work on preparing their case for a trial date, the plaintiff must prepare at least the minimum of their case before a hearing date the defendant can at least somewhat control. The first clue that this change in deadline has impacted the plaintiff is when a motion for continuance of the summary judgment hearing is filed. When a party moves for continuance of a no-evidence summary judgment hearing, they typically do so on additional time being necessary for discovery to obtain responsive evidence. The defendant now knows the plaintiff has an evidentiary problem. When this is the basis for the continuance, the plaintiff will face an inquiry of whether they were diligent in seeking the discovery alleged to be necessary. *Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). The trial court has discretion in ruling upon a request for a continuance. *Id.*

Note that although the rules do not require that a motion for continuance be filed on or before the summary judgment response date, filing the motion after that date is evidence of a party's lack of due diligence. *Landers v. State Farm Lloyds,* 257 S.W.3d 740, 747 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (court took into account fact that party did not file its motion for continuance of a summary judgment hearing until after the deadline had passed for filing a response to a summary judgment motion in determining whether party used due diligence); *Harden v. Merriman*, No. 02–12–00385–CV, 2013 WL 5874708, at *1–4 (Tex. App.–Fort Worth Oct. 31, 2013, no pet.) (mem. op.) (a trial court does not abuse its discretion by denying a motion for continuance when the movant first informs the trial court about the reason for a continuance shortly before the setting at issue).

Leave to File Late Response: A trial court has discretion to grant leave for the non-movant to file its summary judgment response after the statutory deadline. *Carpenter v. Cimarron Hydrocarbons Corp.,* 98 S.W.3d 682, 685 (Tex. 2002). In *Carpenter,* the Texas Supreme Court held that in considering a motion for leave, the trial court should grant leave and permit the non-movant to file a late response when the non-movant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. *Id.* at 688.

Whether the non-movant has demonstrated good cause is within the trial court's discretion. *Id.* In *Carpenter,* the Supreme Court found that the trial court did not abuse its discretion in denying leave when the excuse was only that of a "calendaring error." Other denials of leave have been upheld when the excuses consisted of unsworn assertions by counsel of a mistake (*Duchene v. Hernandez*, 535 S.W.3d 251, 256–57 (Tex. App.—El Paso 2017, no pet.) ("[T]he trial court was entitled to overlook [counsel's] unsworn statements in determining whether to grant or deny leave."); see also *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (attorney's statements must be under oath to be considered evidence)), when the excuse is inability to communicate with key witness without explanation of witness' lack of availability for the entire response period (State Office of Risk Mgmt. v. Alonso, 290 S.W.3d 254, 258 (Tex. App.—El Paso 2009, no pet.) (good cause element not established where witness was on vacation when response was due but party knew summary judgment was pending and record was silent regarding any communications or efforts to communicate with witness to obtain affidavit needed for response)), and when the missed deadline is part of a pattern (*Levine v. Shackelford, Melton & McKinley*, 248 S.W.3d 166, 169 (Tex. 2008) (upholding default judgment because pattern of ignoring deadlines and warnings from opposing party amounted to conscious indifference)).

The non-movant must also plead and prove that the late response would not cause undue delay or otherwise injure the moving party. *Carpenter,* 98 S.W.3d at 688. It is not an abuse of discretion by the trial court to deny leave when the non-movant fails to prove lack of undue prejudice or delay. *Swett v. At Sig, Inc.*, No. 02-08-00315-CV, 2009 WL 1425161, at *2 (Tex. App.—Fort Worth May 21, 2009, no pet.) (mem. op.) (no abuse of discretion because affidavits failed to discuss undue prejudice or delay). Undue prejudice or delay can be found by the trial court when the non-movant waits until the day of the hearing to attempt to respond, affording the movant no meaningful opportunity to review the alleged evidence presented. *Verhalen v. Akhtar,* 2023 WL 5969084 (Tex. App.—Dallas 2023, pet. filed). Although there is no case law on the specific issue, many trial courts have deadlines to have summary judgment motions filed and heard. An argument that should be made by defendants to show undue delay and prejudice is when the motion has been filed in compliance with the

scheduling order and the hearing is set at the latest time permitted by the order. The argument is that the plaintiff knew that they would have a summary judgment response due in that general timeframe and therefore any delay is "undue."

If the plaintiff fails to meet this burden, either because the response deadline is missed or because the evidence submitted is inadmissible and defendant properly objects, the defendant should prevail.

II. The Nonsuit: Rule 162 and the absolute (maybe) right of nonsuit

While a nonsuit may accomplish a client's goal of ending the active litigation, the nonsuit may not accomplish the ultimate goal of finality.

Rule 162 of the Texas Rules of Civil Procedure allows for a plaintiff to nonsuit at any time before evidence is presented. Tex. R. Civ. P. 162. A nonsuit is effective when filed; i.e. the plaintiff cannot seek any further affirmative relief once a nonsuit has been filed. *Referente v. City View Courtyard, L.P.*, 477 S.W.3d 882 (Tex.App.-Hous. (1st Dist.) 2015, no pet.). However, a nonsuit is final for purposes of appeal when the trial court performs the ministerial act of signing an order entering the nonsuit. *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex.1982); *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex.1995).

Often, a nonsuit is described as an "absolute right" of a plaintiff to terminate the litigation they filed. In general practice, this is a true. A plaintiff who files a lawsuit and determines that the suit is not viable, i.e. they discover a lack of insurance or assets, may elect to cut their losses and nonsuit. Generally, a nonsuit which is taken early in litigation upon discovery of lack of viability or some emergency will not be disturbed on appeal. *Id.*

However, it is mistaken to assume that the plaintiff's power to nonsuit is absolute. It is generally known that a plaintiff's nonsuit may not preclude the defendant from seeking judgment on any counterclaims asserted by defendant. *Morath v. Lewis,* 601 S.W.3d 785 (Tex. 2020). However, it is less well-known that a nonsuit, as with any other pleading, must be filed in good faith. *J.A. Walsh & Co. v. R. B. Butler, Inc.,* 260 S.W.2d 889, 890 (Tex. App.—Waco 1953, writ dism'd). A nonsuit cannot be used to better the plaintiff's position or worsen the position of his adversary. *McCormick v. Hines,* 498 S.W.2d 58, 62 (Tex. App.—Amarillo 1973, writ dism'd). Finally, a nonsuit cannot be used to avoid sanctions, including those imposed *sua sponte* by the trial court. *In re Bennett,* 960 S.W.2d 35, 38 (Tex. 1997).

These exceptions to the "absolute" right of nonsuit should be noted by the defendant. There is now a somewhat significant body of case law concerning the defendant's options to obtain finality when a nonsuit is not filed in good faith, potentially worsens the defendant's position, or seeks to avoid a sanction.

Let's apply these exceptions to the following scenario, using our summary judgment discussion as a guide:

> Facts: Plaintiff is involved in a car accident with defendant in 2019 and files suit six months later against the defendant, his alleged employer (Company A), and the company which retained his employer to provide transportation services for customers (such as plaintiff) (Company B). Litigation ensues and extensive discovery is conducted. Additionally, a Level 3 Scheduling Order is entered by the Court which establishes pleading, discovery, and dispositive motion deadlines. In late 2021, approximately one month before the statute of limitations on negligence causes of action, Company A files a No-Evidence and Traditional Motion for Summary Judgment arguing that they owed no duty and that there is no evidence of any breach of duty that might have been owed. Company B files a similar motion. While the summary judgment motions are pending, plaintiff files an untimely amended petition – without leave of court- in an attempt to avoid the summary judgments.
>
> Company A and Company B move to strike Plaintiff's untimely amended petition and the trial court orally states that the motion will be granted. Company A and Company B also successfully move to strike Plaintiff's only expert on the element of breach. Company A and Company B then set their summary judgment motions for hearing. During the summary judgment hearing, the trial court begins by sustaining objections to

Plaintiff's summary judgment evidence. The trial court also confirms that the court struck the untimely amended petition. After hearing those rulings, Plaintiff's counsel announces on the record that his client nonsuits all claims against both defendants.

Approximately one week later, Plaintiff refiles the lawsuit with the same pleading which had been struck. The newly filed case is pending before the same court as the prior nonsuited lawsuit. Company A and Company B now face renewed litigation on the same claim. Plaintiff's counsel argues that his right to nonsuit is "absolute." The trial court is less than amused but questions whether he has any remedy.

Question: **Just how absolute is the right of a Plaintiff to nonsuit at any time before they have presented all of their evidence?**

In 2011, the Texas Supreme Court issued an opinion in *Epps v. Fowler* which addressed the right of a plaintiff to nonsuit while a summary judgment motion is pending. 351 S.W.3d 862 (Tex. 2011). In *Epps*, the case concerned allegations of breach of a real estate contract. After over two years of litigation, it became apparent that plaintiff could not sustain their case. When the defendant filed a summary judgment motion, the plaintiff nonsuited. The defendant requested that the trial court determine the defendant to be the prevailing party in the dispute under the subject contract based on the nonsuit. The trial court agreed and found that the nonsuit was taken to avoid an adverse judgment on the merits that would have been granted and therefore the defendant was the prevailing party.

The Texas Supreme Court in *Epps* took guidance from a decision from the United States Court of Appeals for the Fifth Circuit issued ten years before, evaluating the same scenario under the corresponding federal dismissal rule, Rule 41. In *Dean v. Riser,* the plaintiffs brought a 42 U.S.C. §1983 action against the defendant. After a year of litigation, the plaintiffs voluntarily moved to dismiss their claims with prejudice under Rule 41 of the Federal Rules of Civil Procedure. The defendant moved for attorney's fees as a prevailing party, which the plaintiffs opposed, citing their right to voluntarily dismiss their claims. In a statement which has now been widely adopted by other federal courts, the Fifth Circuit wrote:

> *With respect to the more calculating plaintiff, who voluntarily withdraws his complaint "to escape a disfavorable judicial determination on the merits," the balance tips in favor of the counter policy to discourage the litigation of frivolous, unreasonable, or groundless claims. Any rule that categorically forecloses the possibility of a defendant being found a prevailing party in such circumstances could seriously threaten the effectuation of this policy.*

Following *Dean,* federal courts facing this issue must determine whether the plaintiff's case was voluntarily dismissed to avoid judgment on the merits. Once this affirmative determination has been made, the defendant must then establish that the plaintiff's suit was frivolous, groundless, or without merit. Upon reaching the above two conclusions, the district court may then in its discretion award the defendant attorney's fees under the applicable statute.

Dean v. Riser, 240 F.3d 505, 510 (5th Cir. 2001).

Since *Epps,* the argument from the plaintiffs' bar has been that the opinion had limited application to cases where a contract was involved and there was a contractual provision providing for determination of prevailing parties. However, recent cases have extended *Epps* to non-contract cases based on the argument that *Epps* was less about the terms of the contract than about the principle behind the decision:

Cox v. Vanderburg: In this case the Texarkana Court of Appeals addressed whether *Epps* permitted a defendant in a negligence case to be adjudicated the prevailing party when the plaintiff nonsuited in the middle of the defendant's summary judgment hearing. In finding that *Epps* applied, the Court held that the principle of *Epps* is that the right of nonsuit is not absolute but is constrained by the requirement that a nonsuit, as a pleading, is required to be made for a proper purpose under the rules. A nonsuit filed to avoid judgment of the merits is not filed for a proper purpose as a matter of law. 2021 WL 4055487 (Tex. App. –Texarkana 2021, pet. denied).

In *In re Bennett*, the Texas Supreme Court evaluated whether a nonsuit taken to avoid a particular jurist constituted a pleading filed for an improper purpose. In *Bennett,* the plaintiff's

counsel desired to have a significant injury case heard by a certain, apparently friendly judge, in Nueces County. As required by the Government Code, the Nueces County District Clerk operates a random assignment system whereby cases are assigned to the various district courts randomly upon filing. Bennett filed the same suit multiple times until one of the lawsuits was randomly assigned to the preferred judge. He then nonsuited all of the cases which had been randomly assigned to other courts. One of the judges discovered the scheme and *sua sponte* issued sanctions against Bennet. In upholding the sanctions, the Texas Supreme Court noted, as in *Epps*, that a nonsuit is not absolute, but is governed by the same rules and requirements of any other pleading. 960 S.W.2d 35 (Tex. 1997).

In *Referente v. City View Courtyard, LP,* a homebuyer sued the seller of her home for negligence, breach of warranty, and violations of the Texas Deceptive Trade Practices Act based on alleged leaks in her kitchen ceiling. After substantial litigation, the seller moved for summary judgment. After failing to file a summary judgment response in the year that the motion had been pending, the plaintiff nonsuited six days before the motion was scheduled to be heard by submission. The seller requested attorney's fees as the prevailing party, asserting that the nonsuit was taken to avoid an unfavorable decision on the merits. The trial court granted the defendant's motion and the Houston Court of Appeals upheld the trial court's ruling. In doing so, the Court of Appeals noted that when a plaintiff nonsuits on the eve of a potentially dispositive ruling on the merits and cites no evidence of any new change in applicable law or discovery of new bad fact in the intervening time period, a trial court may determine the nonsuit to have been taken to avoid the court's judgment. 477 S.W.3d 882 (Tex. App. –Houston [1st Dist.] 2015, no pet.).

When the defendant procedurally has the plaintiff "on the ropes" and a sudden nonsuit is taken, the defendant's counsel should determine whether to seek finality under the *Epps* standard. Obviously, if the nonsuit is taken on claims for which the applicable limitations period has lapsed, there is no need. But in *Cox v. Vanderburg*, the plaintiff had nonsuited but re-filed the same suit-essentially forcing the defendant to endure the same litigation for a second time. Such conduct should be addressed under *Epps* and both trial and appellate courts have been willing to find that such tactics have no place under Rule 162, under Chapter 10 of the Civil Practice & Remedies Code, or under the ethical rules which govern the conduct of attorneys and their clients.

III. The Rules, the Ethics, and the Trial Court's Authority

Epps and the line of cases discussed herein as to nonsuits do not exist in a vacuum. In each of these opinions finding that a nonsuit was taken for an improper purpose, the courts have discussed certain requirements for pleadings and attorney conduct found in Chapter 10 of the Texas Civil Practice & Remedies Code, Rule 13 of the Texas Rules of Civil Procedure, and the Texas Disciplinary Rules of Professional Conduct. The pertinent statutes and rules are as follows:

Tex. Civ. Prac. & Rem. Code Ann. §10.001: The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

A nonsuit is a pleading which is subject to §10.001. *Cox,* 2021 WL 4055487 (Tex. App. – Texarkana 2021, pet. denied). A Court that determines that a nonsuit has been filed for an improper purpose can award sanctions which may include the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

Tex. Civ. Prac. & Rem. Code Ann. § 10.004.

Importantly, the directive to refrain from performing an act can include a directive that the violator be prohibited from re-filing suit after a nonsuit. *See Cox.*

Tex. R. Civ. P. 13: The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215 upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Under Rule 215, a trial court may impose a variety of sanctions:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

Tex. R. Civ. P. 215.2

Inherent Authority:

A trial judge has certain inherent power derived "from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities." *Dallas Cnty. Constable Precinct 5 v. KingVision Pay–Per–View, Ltd*., 219 S.W.3d 602, 610 (Tex.App.-Dallas 2007, no pet.) (quoting *Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 594 (Tex.1996) (orig.

proceeding)). A judge may call upon these inherent powers "to aid in the exercise of [the court's] jurisdiction, in the administration of justice, and in the preservation of [the court's] independence and integrity." *Id.* (quoting *Travelers Indem.*, 923 S.W.2d at 594). The trial judge also has inherent power to sanction to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the court's administration of its core functions, including hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgment, and enforcing its judgments. *Id.*; *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 147 (Tex.App.-Dallas 2011, no pet.); *Kennedy v. Kennedy*, 125 S.W.3d 14, 19 (Tex.App.-Austin 2002, pet. denied).

Determinations of sanctions for nonsuits, whether issued under Chapter 10, Rule 13, or the trial court's inherent authority, should be supported by evidence that the action was taken in bad faith. The timing and the circumstances facing the plaintiff when the nonsuit was taken can demonstrate circumstantially that the action was done in bad faith. *See Referente.* The Texas Supreme Court has also recently provided guidance to trial courts as to when an attorney's conduct constitutes bad faith. *Brewer v. Lennox Hearth Products, LLC,* 601 S.W.3d 704, 720 (Tex. 2020). In *Brewer,* the Court reminded litigants that "a court's inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process ...." and that bad faith is not just intentional conduct but "intent to engage in conduct for an impermissible reason, willful noncompliance, or willful ignorance of the facts." *Id.* at 719-720. The Court further held that bad faith includes "conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose" and that "improper motive, not perfection, is the touchstone". *Id.*

Notably, an attorney's actions must also be evaluated in light of certain disciplinary rules of professional conduct.

Texas Disciplinary Rules of Professional Conduct:

Rule 3.01 Meritorious Claims and Contentions- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Rule 3.02 Minimizing the Burdens and Delays of Litigation- A lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Lawyers are under a professional obligation to act with commitment and dedication to their clients' interests, but they are neither duty-bound nor permitted to press for every possible advantage under the imprimatur of zealous advocacy. These prohibitions must be noted in the summary judgment context as well.

IV. Procedural Steps

When an opposing party nonsuits and the nonsuit is filed while a dispositive motion is either pending hearing or pending ruling, consider filing a Motion to Dismiss With Prejudice and to be Adjudicated a Prevailing Party. This Motion must be detailed. This Motion should also be filed during the trial court's plenary power; i.e. within the first 30 days of when the order is signed on the plaintiff's nonsuit.

Remember to obtain a hearing date on the motion and a ruling within 75 days.

Finally, consider the record and obtain findings of fact and conclusions of law if needed to uphold ruling on appeal. Note that bad faith can be established with direct or circumstantial evidence, but absent direct evidence, the record must reasonably give rise to an inference of intent or willfulness. *Brewer*, 601 S.W.3d at 718–19. If you have any question as to whether the record will support that inference, you need to obtain findings of fact from the trial court as part of your appellate record.

Legal AI at Two: Prodigy, Problem Child, or Partner in Crime?

By: Hon. Larry Doss
Justice, 7th District Court of Appeals of Texas

When ChatGPT burst onto the scene in late 2022, many lawyers dismissed artificial intelligence as a novelty. Yet within four months, it had passed the Multistate Bar Exam, scoring in the 90th percentile. This rapid advancement signals a transformation in legal practice that attorneys cannot ignore—especially as work is being performed by competitors faster and at lower costs.

In this article, we'll take a deep dive into several AI products currently available to law firms. For this research, I contacted nearly forty companies offering AI-driven solutions, requesting demonstrations of their products and services. Before we explore these platforms, let's first understand how these tools approach legal analysis.

Inside the Mind of an AI "Attorney"

Think back to your law school days: under the much-feared Socratic method, you were assigned specific cases and questioned about judicial outcomes until you began to spot patterns in legal reasoning. With time and experience, this structured approach helped you develop an intuition for legal analysis. AI learns similarly, but at a vastly accelerated pace. Using sophisticated pattern recognition, AI systems process millions of legal opinions and other documents to identify relationships and predict outcomes.

However, just because information comes from a computer doesn't mean it's reliable. Think of artificial intelligence like a first-year associate: full of energy to process information and spot patterns, but sometimes prone to making irrelevant conclusions (and occasionally making things up). A seasoned attorney would never let a new associate file a brief before carefully reviewing the accuracy of every statement. AI requires the same skepticism and supervision. Understanding these limitations is crucial when evaluating AI tools for your legal practice.

Meet Your New Research Assistant and Writing Partner

Today's AI-powered legal research platforms have evolved far beyond simple keyword searches. **Westlaw**, **Lexis-Nexis**, **ROSS Intelligence**, and **Bloomberg** now directly analyze legal texts using natural language processing, allowing attorneys to pose research questions conversationally. Lawyers can ask follow-up questions and direct the system to summarize key facts and points of law, enabling faster review. These platforms help attorneys identify supporting authority and develop arguments that might otherwise remain incomplete under traditional search methods.

The real transformation in AI-driven legal technology lies in document creation. In addition to performing research-oriented tasks, platforms like **Westlaw** and **Lexis** also analyze brief persuasiveness, flag analytical weaknesses, and suggest additional arguments based on their vast repositories of legal data. By mid-2025, they are expected to generate jurisdiction-specific first drafts of correspondence, pleadings, and briefs—though human review and revision will remain essential.

Some companies focus exclusively on document creation and analysis. A company named **Personal AI**, for example, develops a customized "Personal Language Model" based on each attorney's writing style, ensuring AI-drafted documents maintain the lawyer's distinctive voice rather than defaulting to generic prose. This advancement transforms AI from mere research assistant into active participant in legal analysis and writing.

Contract drafting and review products also offer

additional specialized capabilities. **Superlegal** excels at rapid contract review, identifying inconsistencies both within single contracts and across multiple agreements. **Ontra** takes this further by automating contract negotiation processes, suggesting revisions based on millions of previous negotiations and even adjusting its approach—"collaborative" or "aggressive"—based on client preference. And, **LawGeex** streamlines the contract approval process by comparing incoming contracts to predefined policies or templates, flagging only those that require human review. This allows legal teams to focus their attention on complex negotiations rather than writing and searching for changes.

Moneyball for Lawyers: Using Data to Pick Winners

Some platforms focus on litigation analytics to inform trial strategy. **Premonition**, for example, maintains what it claims is the world's largest litigation database, analyzing attorney "win" rates across different case types and jurisdictions. The platform considers factors like case outcomes, settlement patterns, and even demographic data to help firms evaluate potential counsel. While not definitive—factors like attorney availability and cost still matter—it provides objective performance metrics sometimes unavailable to clients.

Pre/Dicta takes a different approach, focusing on predicting judicial behavior. By analyzing patterns in past rulings, judicial backgrounds, and case characteristics, the platform claims to predict federal motion outcomes with up to 86% accuracy. This tool helps attorneys tailor their strategy to specific judges, offering insights into which arguments are most likely to succeed in particular courts. With its recent acquisition of Gavelytics, Pre/Dicta plans to extend these predictive capabilities to state court outcomes as well.

Making Document Review Manageable (and Maybe Even Fun)

AI continues to make strides in improving discovery processes. Modern AI-powered discovery tools do more than organize documents—they actively seek connections and patterns human reviewers might miss. Industry standard **Relativity** now uses machine learning to group related documents and identify key information automatically. The platform can process vast amounts of data while maintaining accuracy in privilege reviews and responsive document identification. **Casepoint's** CaseAssist tool builds on this approach by continuously learning from user input to better predict and prioritize important documents, making the discovery process both faster and more thorough.

Newer entrants are also making their mark in the discovery space. **Uncover AI** helps legal teams process documents into detailed timelines and case strategies. The platform excels at deposition preparation by providing searchable transcripts and comprehensive summaries that highlight potential inconsistencies or areas for follow-up. **Everlaw** claims to process 900,000 documents per hour and includes features like Storybuilder to help create case narratives and manage trial preparation efficiently. Its predictive coding capabilities learn from attorney decisions to prioritize similar documents for review.

Beyond discovery, AI tools like Google's **Notebook LM** are revolutionizing how we grasp and summarize content. Users can upload various file types, including PDFs, websites, even videos and audio files, and NotebookLM will summarize them and attempt to identify connections in the data. The platform even creates a podcast-like discussion that presents data in an engaging audio format, allowing users to take a "Deep Dive" examination of the information in a new way.

Ethical Considerations: Navigating the AI Minefield

As AI tools become increasingly prevalent in legal practice, attorneys must navigate a complex ethical landscape. The allure of efficiency and innovation must be balanced against the fundamental duties of competence, confidentiality, and candor.

Under Texas Disciplinary Rule 1.01(a), attorneys have an obligation to provide competent representation, which includes understanding

the benefits and risks associated with relevant technology. The recent addition of Rule 1.00(f) raises the bar even higher, requiring informed client consent after a full explanation of material risks and available alternatives in some instances. Attorneys must take the time to educate themselves and their clients about the capabilities and limitations of these powerful technologies.

Confidentiality is another critical concern in the age of AI. AI systems "learn" and improve their performance through training data, which includes user inputs. When attorneys input sensitive information into AI platforms, they risk inadvertently sharing client data that may become part of the AI's training set. This means that confidential information could be exposed to the AI system and potentially be used to train the model, even if the vendor has strict security measures in place. Furthermore, if the AI provider experiences a data breach or has insufficient security protocols, this sensitive data could potentially be exposed to third parties or even the public. Before using any AI tool, attorneys must carefully review vendor security protocols, data handling policies, and AI training practices to ensure that client confidentiality is protected at all times.

One of the most publicized ethical challenges posed by legal AI is the duty of candor toward tribunals. The temptation to rely on AI-generated research or drafting without proper verification can be strong, particularly when faced with tight deadlines or complex issues. However, the consequences of presenting false or misleading information to a court can be severe, as demonstrated by the now-infamous *Mata v. Avianca* case out of New York, where attorneys were sanctioned for citing AI-generated fake cases. In that matter, some attorneys blindly relied on an AI tool to generate legal authorities that it said supported their arguments. As it turns out, the cases provided by the AI robot (and cited by the lawyers in their briefs as legitimate) were fictitious.

Closer to home, in *Ex Parte Lee*, 673 S.W.3d 755 (Tex. App.--Waco 2023), an attorney's reliance on AI-generated fake cases resulted in a lost habeas petition for his client. This case underscores the fact that the risks of AI-generated content are not limited to sanctions or reputational damage—they can have real, devastating consequences for clients.

These cautionary tales highlight the importance of thoroughly vetting any AI-produced content before relying on it or presenting it to a tribunal. Attorneys must take the time to independently verify the accuracy and legitimacy of AI-generated research, citations, and analysis. This may involve cross-referencing AI-provided information with traditional legal databases, consulting with colleagues, or even reaching out to the AI vendor for clarification on the sources and methods used to generate the content.

Embracing AI Responsibly

The rapid advancement of AI in the legal industry presents both exciting opportunities and significant challenges. From streamlining legal research and document review to predicting case outcomes and automating routine tasks, AI tools have the potential to revolutionize the practice of law. However, as with any powerful technology, AI must be approached with caution and responsibility. Before adopting any AI platform, law firms should:

1. Review vendor security protocols and data handling policies;

2. Update engagement letters to address AI use;

3. Establish verification procedures for AI-generated content;

4. Create clear policies for appropriate AI use within the firm; and

5. Ensure all attorneys understand both the capabilities and limitations of AI tools.

The future belongs not to those who resist technology, but to those who harness it responsibly while maintaining the highest standards of professional practice. The key is finding the right balance between innovation and ethical obligation—leveraging AI's power while preserving the essential human judgment that lies at the heart of effective legal representation.

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TEXAS ASSOCIATION OF DEFENSE COUNSEL

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I Mr. / Mrs. / Ms. (circle one) _____ (Please print) hereby apply for membership in the Association and certify that I am a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Personal Injury Defense and Commercial Litigation. I am not now a member of any plaintiff or claimant oriented association, group, or firm. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

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

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Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: /

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

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***If joining October – July:**	**$185.00 Licensed less than five years (from date of license)**	**$295.00 Licensed five years or more**
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*If joining in October, November or December, you will pay full Dues and your your Membership Dues will be considered paid for the following year. However, New Members joining after October 15 will not have their names printed in the following year's because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

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

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tadc.org

Papers Available

2024 TADC Winter Seminar ~ Crested Butte, CO ~ Jan. 31 – Feb. 4, 2024

AI: It's Here! Part 2: "The Good, The Bad & The Unknown" - Arturo M. Aviles – 7 pg. PPT

Daubert; Crafting and Planning Your Motion to Strike - Stephen Barron – 14 pg. PPT

Legislative Update - David Brenner – 18 pg. PPT

AI: Part 1 - Slade Cutter – 6 pg. PPT

Strom Litigation/Chapter 542A Update - Raul De La Garza – 30 pg. PPT

The Current Social Milieu and Civil Litigation: Reptile Tactics, Third-Party Litigation Funding, and Legal Advertising - Donald Patrick Eckler – 34 pg. PPT

Social Media & Litigation - Callie Haley – 14 pg. PPT

Effective Use of Jury Research - David Oliveria – 42 pg. PPT

Ethical Lessons Learned The Hard Way; A Guide to Avoiding Discipline, Sanctions, and Client Complaints in Defense Cases - Lauren Ross – 50 pg. PPT

Updates and Trends in Personal Injury Defense - Morgan Shell – 21 pg. PPT

K & L Auto Crushers: Refuting "Reasonable" Medical Expenses, Discovery and 18.001 Update - Victor V. Vicinaiz – 22 pg. PPT

2024 TADC Spring Meeting ~ Key West, FL ~ April 24 – 28, 2024

The Tripartite Relationship and Stowers - Christy Amuny – 62 pg. PPT

AI and the Future of Law: Opportunities and Challenges - Robert Booth – 27 pg. PPT

Playing Offense As A Defense Strategy - Melissa Casey – 28 pg. PPT

Preservation of the Jury Trial - Is it Worth Preserving? - Greg W. Curry – 54 pgs. + 43 pg. ppt

Gregory v. Chohan: Some Legal Issues With the Opinion - Elizabeth M. Fraley – 14 pgs.

The New Case for Non-Economic Damages: Gregory v. Chohan One Year Later - Adam C. Gallegos – 9 pgs.

No, Not All Investigations are a Root Cause Analysis: An Exploration into RCA's and How They May (or May Not) Help You - Ryan Hart, Emily Brady – 22 pg. PPT

Summary Judgments, Nonsuits, and Sanctions: Strategies for Obtaining Finality - Kristi L. Kautz – 18 pg. PPT

Indemnity Issues, Additional Insureds Clauses, & MCS-90 Endorsements - Allison D. Kennamer – 35pgs. + 44 pg. PPT

The Patterson Rule: The Status of Employer's Direct Liability - Jennie C. Knapp – 32 pg. PPT

Papers Available

2024 Spring Meeting Papers Continued

Perspective from an Associate: Training Young Laywers to Transition from No Chair to First Chair - Jake McClellan – 11 pg. PPT

Considerations for Arbitration vs Jury Trial in Construction Defect Cases - Steve Snelson, Maria Moffatt – 14 pg. PPT

Evaluation and Treatment of Back Pain - R. Alexander Mohr – 49 pg. PPT

Huddle Up: Preparing Corporate Representatives for Deposition - Amy M. Stewart – 42 pg. PPT

Supreme Court of Texas Update - Kelly Canavan, Martha Newton, Amy Starnes – 120 pgs.

Texas Supreme Court Update - Gina Benavides, Scott P. Stolley – 41 pg. PPT

2024 TADC "Catch a CLE Wave" – A seminar for Young Lawyers South Padre Island, TX ~ June 7-9, 2024

Legal Billing - Getting it Right - Liz Cantu – 54 pg. PPT

Case Handling 101: Practical Tips & Strategies - James H. Hunter Jr., Shauna A. Lozano – 22 pg. PPT

What Partners Are Looking For in an Associate - Trey Sandoval – 7 pg. PPT

Wrecks-N-Effect: A Crash Course on Car Wreck Cases - Monica Wilkins – 28 pg. PPT

Deposing the Police Officer - Dan Worthington – 35 pg. PPT

COST OF PAPERS

10 pages or less $10.00	**41-65 pages……..$40.00**
11-25 pages.....$20.00	**66-80 pages.....$50.00**
26-40 pages.....$30.00	**81 pages or more $60.00**

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You may order these papers by e-mail, Online or U.S. MAIL.

Please indicate the title of the paper, the author & meeting where the paper was presented when ordering.
TADC will invoice you when the papers are sent.
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A searchable database of papers is available on the TADC website:

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TADC 2025 WINTER SEMINAR

January 29-February 2, 2025

Steamboat Grand Hotel & Spa – Steamboat Springs, CO

Program Co-Chairs: Darin Brooks, Gray Reed & McGraw LLP, Houston
Sean Swords, Chamberlain McHaney, Austin

CLE Approved for: 11 hours including 2.25 hours ethics

Wednesday, January 29, 2025

6:00 – 8:00pm TADC Welcome Reception

Thursday, January 30, 2025

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Shipman, TADC President
Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Darin Brooks, Gray Reed & McGraw LLP, Houston, Program Co-Chair
Sean Swords, Chamberlain McHaney, Austin, Program Co-Chair

7:30-8:15am *PROTECTING PRIVILEGED DOCUMENTS AND COMMUNICATIONS FROM RAIDERS (.25 ethics)*
Jim Hunter, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville

8:15-8:45am *PREMISES LIABILITY UPDATE: SLIPPING & SLIDING*
Victor Vicinaiz, Roerig, Oliveira & Fisher, L.L.P., McAllen

8:45-9:30am *EMPLOYMENT LAW UPDATE*
Michael Kelsheimer, Gray Reed & McGraw, Dallas

9:30-10:15am *I PLEAD THE FIFTH: ENCOUNTERING THE 5TH AMENDMENT IN CIVIL LITIGATION (.25 ethics)*
Mike Bassett, The Bassett Firm, Dallas

10:15-11:00am *A DEFENSIVE APPROACH TO THE CORPORATE REP DEPOSITION (.25 ethics)*
Jeff Saenz, McCoy, Leavitt, Leskey LLC, San Antonio

Friday, January 31, 2025

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Shipman, TADC President
Darin Brooks, Program Co-Chair
Sean Swords, Program Co-Chair

7:30-8:15am *MORE CLAIMS THAN COVERAGE? SETTLING COMPETING STOWERS DEMANDS UNDER SORIANO (.25 hrs ethics)*
Brian Waters & Darin Brooks, Gray Reed McGraw LLP, Houston

8:15-9:00am *PROFESSIONALISM IN THE LAW (.75 hrs ethics)*
David Chamberlain, Chamberlain McHaney, Austin

9:00-9:30am *CONSTRUCTION LAW UPDATE*
Doug Rees, Cooper & Sculley, P.C., Dallas

9:30-10:15am *PRODUCTS LIABILITY: THE YEAR IN REVIEW*
Cathy Kyle, Chamberlain McHaney, Austin

10:15-11:00am *A LITTLE ETHICS, A LITTLE EVIDENCE AND A LITTLE PROCEDURE–ROUND 2 (.25 ethics)*
Christy Amuny, Germer PLLC, Beaumont

Saturday, February 1, 2025

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Mike Shipman, TADC President
Darin Brooks, Program Co-Chair
Sean Swords, Program Co-Chair

7:30-8:15am DEFENDING COMMERCIAL TRUCKING CLAIMS: NEGLIGENT HIRING AND TRAINING
Dan Hernandez, Ray, Pena McChristian, P.C., El Paso

8:15-9:15am *THE FIFTEENTH COURT OF APPEALS – WHAT TO KNOW AND HOW IT'S GOING SO FAR (.25 ethics)*
Justice April Farris, Fifteenth Court of Appeals, Austin

9:15-9:45am *HOW YOUR EXPERT ASSISTS AT TRIAL*
Carol Chavez, AEI Corporation, Denver, CO

9:45-10:30am *RISK TRANSFER AND RESPONSIBLE THIRD PARTIES*
Brandon Coony, Espey & Associates, P.C., San Antonio

10:30-11:15am *ARTIFICIAL INTELLIGENCE – IMPACT ON COURTROOM TECHNOLOGY*
Robert Booth, Mills Shirley L.L.P., Galveston

Sunday, February 2, 2025

Depart for Texas

2025 TADC Winter Seminar

January 29-February 2, 2025 | Steamboat Grand | Steamboat Springs, CO

2300 Mt. Werner Circle - Steamboat Springs, CO 80487

Pricing & Registration Options

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

Registration for Member Only (one person)	$695.00
Registration for Member & Spouse/Guest (2 people)	$895.00

Children's Registration

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

Children Age 12 and Older	$120.00	Children under 6 – no charge
Children Age 6-11	$80.00	

Spouse/Guest CLE Credit

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

Spouse/Guest CLE credit for Winter Meeting	$75.00

Hotel Reservation Information

For hotel reservations, CONTACT THE STEAMBOAT GRAND DIRECTLY AT 877-269-2628 and reference the TADC Winter Seminar. The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is IMPORTANT that you make your reservations as soon as possible as the room block will fill quickly. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE FOR HOTEL RESERVATIONS IS DECEMBER 20, 2024

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) BUSINESS DAYS PRIOR (JANUARY 20, 2025) to the meeting date. A $100.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 20, 2025 IS NON-REFUNDABLE.

2025 TADC WINTER SEMINAR REGISTRATION FORM
January 29 - February 2, 2025

***For Hotel Reservations, contact the Elevation Resort DIRECTLY at* 877-269-2628**

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

☐ **$ 695.00 Member ONLY (One Person)**
☐ **$ 895.00 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

☐ **$ 120.00 Children 12 & Older _____**
☐ **$ 80.00 Children 6-11 _____**
☐ **No charge for children under 6**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG:_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY:_____ZIP:_____

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

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

CHILDREN'S NAME TAGS:_____

EMAIL ADDRESS:_____BAR CARD#_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2024. This coincides with the deadline set by the hotel for accommodations.

PAYMENT METHOD:

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

MAKE PAYABLE & MAIL THIS FORM TO: TADC, P.O. Box 92468, Austin, TX 78709 OR register online at www.tadc.org

CHARGE TO: (circle one) Visa Mastercard American Express

TADC
P.O. Box 92468
Austin, TX 78709
PH: 512/476-5225

_____

Card Number **Expiration Date**

Cardholder Name (please print) _____**Signature**_____(as it appears on card)

(For TADC Office Use Only)
Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

Expert Witness Research Service Overall Process

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

Expert Witness Service Fee Schedule

Single Name Request

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

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

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

The amount of time to perform a specialty search depends upon the difficulty of the requested specialty, but usually requires an hour to extract, format, and transmit.

TEXAS ASSOCIATION OF DEFENSE COUNSEL
P.O. Box 92468 * Austin, Texas 78709 * 512/476-5225

Expert Witness Search Request Form

Please EMAIL this completed form to: **tadc@tadc.org**

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

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

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

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

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

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

Areas of expertise: _____

_____

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

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

_____

_____

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_____

_____

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

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

Texas Association of Defense Counsel, Inc. tadc@tadc.org

NOTES

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TADC

Calendar of Events

January 29-February 2, 2025
2025 TADC Winter Seminar
Steamboat Grand Resort
Steamboat Springs, Colorado

www.tadc.org

April 23-27, 2025
2025 TADC Spring Meeting
The Historic Brown Hotel
Louisville, Kentucky

June 20-21, 2025
2025 TADC "Catch A Wave" Seminar
Margaritaville Resort
South Padre Island, Texas