Dallas Bar Association

HEADNOTES

October 2025 | Volume 50 | Number 10 | Focus | Tort & Insurance Practice/Trial Skills

Dallas Bar Foundation Receives Donation

DBF Chair Gabe Vazquez, Vice President and Associate General Counsel for Operations for Vistra Corp., and his wife Claudine, have generously donated $10,000 to support the Sarah T. Hughes Scholarship, helping to ensure the legacy of Judge Sarah T. Hughes continues to be honored. In making the donation, Mr. Vazquez stated, "It is a privilege for me, as a past Hughes Scholar, to serve as the 2025 Chair of the Dallas Bar Foundation. It provides me an opportunity to continue giving back to the Foundation in a meaningful and personal way. The Sarah T. Hughes Scholarship is a life-changing scholarship. Together, with the support of others, we can ensure that other law students will be forever changed by the Sarah T. Hughes Scholarship and be inspired by the legacy of Sarah T. Hughes."

Focus | Tort & Insurace Practice

Texas Supreme Court Clarifies Policy vs. Practice of Medicine

BY KAY VAN WEY

In a landmark decision that every Texas medical malpractice attorney should note, the Texas Supreme Court reaffirmed an often-misunderstood distinction: hospitals can and must be held directly accountable for failing to implement appropriate clinical systems and protocols—even when those failures intersect with medical decision-making.

Bush v. HCA Healthcare presented the high court with a novel but vital question: Can a hospital be held directly liable for failing to adopt administrative protocols when that failure leads to a fatal misdiagnosis by a physician? The Court's answer: yes.

Complex Systems and the Modern Hospital

Gone are the days when hospitals functioned as mere physical spaces for doctors to practice medicine. Modern hospitals are system-driven entities that coordinate teams of physicians, nurses, technicians, and administrators and must maintain protocols and procedures that safeguard patients at every point of care. These include "standing orders" and decision-support systems that guide non-physician staff in initiating appropriate tests or interventions in common clinical scenarios.

Texas law has long held that only licensed physicians may "practice medicine," a doctrine reinforced by the state's prohibition on the corporate practice of medicine. But this doctrine cannot shield hospitals from accountability when their systemic failures result in patient harm. That's exactly what *Bush* confirms.

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The John DeWitt Gregory Charitable Trust Carries on His Philanthropy

BY MICHELLE ALDEN

The Dallas Volunteer Attorney Program (DVAP) has been fortunate to receive the generous support of the **John DeWitt Gregory Charitable Trust** with a $30,500 donation this year. Including this gift, the trust has donated $81,500 to legal aid for low-income people in Dallas since 2023.

John DeWitt Gregory was a law professor at Hofstra University for more than 40 years. He came to that position after several years working in the legal aid community in Nassau County, New York, where he was born. Among other positions, he served as the Executive Director and General Counsel of Community Action for Legal Services, now known as Legal Services NYC, the largest legal services organization in the nation.

John maintained his commitment to access to justice throughout his career through his longstanding service on several boards and significant donations to various organizations, especially those dedicated to addressing poverty and racism. Having come from very humble means, John was always in disbelief that he had amassed an "estate" that could continue to support the causes he held so dear. He used it to establish the John DeWitt Gregory Charitable Trust, which has been carrying out his philanthropic legacy since 2021. Among other causes, the trust has provided substantial support to organizations such as the American Civil Liberties Union, the Child Poverty Action Lab, the National Center for Law and Economic Justice, the U.S. Holocaust Memorial Museum, and the Southern Poverty Law Center.

"I am thrilled to provide support for DVAP through the John DeWitt Gregory Charitable Trust. Having started his career as a legal aid lawyer, John understood the legal needs of low-income individuals and the crucial services lawyers could provide. In the current political moment, he would feel even more passionate about meeting those concrete needs for clients, which don't disappear simply because people are engaged in pitched political battles," said trustee **Joanna Grossman**, the Ellen K. Solender Endowed Chair in Women and the Law at SMU Dedman School of Law.

Joanna received DVAP's Lawyer of the Year Award in 2023 and the Chris Reed-Brown Pro Bono Award in 2024 for her exceptional pro bono work. Since 2021, she has accepted over 150 DVAP cases and continues to work towards access to justice in matters large and small.

John DeWitt Gregory

"I have been fortunate enough to represent DVAP clients with family law or probate issues. Providing pro bono legal assistance is the highest form of service in the legal profession, and DVAP makes it possible for every lawyer in Dallas to be of service if they so choose. While I have enjoyed representing clients with a variety of legal needs, I find it especially rewarding to secure custodial rights for a non-parent when a child has no living or fit parents or to establish a guardianship that enables a parent to continue caring for a disabled child into adulthood," she explained.

Each case placed with a volunteer attorney by DVAP can lead to life-changing results—one more parent with access to their children, one more veteran with access to benefits earned, or one more person who can finally secure employment due to an old criminal charge being expunged.

In one recent case, "Chase" applied for help with disputing erroneous charges from his former landlord. When Chase and his family moved out at the end of their lease, they were up to date on all amounts due. In August 2024, he was surprised to receive an email with an invoice for $7,000, representing damage to the apartment, two months of rent, and fees for late payments. While Chase agreed to pay for

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Inside

Calendar | October Events

Programs in green are Virtual Only programs. All in person programs are at the Arts District Mansion unless otherwise noted. Visit www.dallasbar.org for updates.

NATIONAL HISPANIC HERITAGE MONTH

September 15-October 15 is National Hispanic Heritage Month. For information about the Dallas Hispanic Bar Association, visit dallashispanicbar.com.

WEDNESDAY WORKSHOPS

OCTOBER 1
Noon *"Border Searches and Digital Devices," Rob Dunikoski.* (MCLE 1.00)*

OCTOBER 15
Noon *"Texas Business Courts in Focus: A Closer Look at Year 1 of the Texas Business Court," Mason Parham.* (MCLE 1.00)* *Virtual only*

WEDNESDAY, OCTOBER 1

Noon **Solo & Small Firm Section**
"Preservation of Error for Appeal: An Appeal is Often Won or Lost Before It Even Begins," Chad Ruback. (MCLE 1.00, Ethics 0.25)*

Wednesday Workshop
"Border Searches and Digital Devices," Rob Dunikoski. (MCLE 1.00)*

Allied Bars Equality Committee. *Virtual only*

THURSDAY, OCTOBER 2

No DBA events scheduled

FRIDAY, OCTOBER 3

Noon **Entertainment, Art & Sports Law Section**
"Sports Law Boot Camp." (MCLE 3.00)*

6:00 p.m. **DAABA Awards Night**
Tickets at www.daaba.org. At the Dallas Museum of Art.

MONDAY, OCTOBER 6

Noon **Child Welfare & Juvenile Justice Section**
The Section will be meeting to vote on Amendments to the Bylaws. Virtual only

Tax Law Section
Topic Not Yet Available

TUESDAY, OCTOBER 7

Noon **Public Forum**
"The Housing Crisis and Homelessness in North Texas," Ashley Owen Brundage, Mark Melton, Brenda Snitzer, and moderator Russ Coleman. (MCLE 1.00)*

Tort & Insurance Practice Section
"Recognition of Tort & Insurance Legends: Linda Dedman, Al Ellis, Beverly Godbey, and Joel Steed," moderated by Hon. Melissa Bellan. (MCLE 1.00)* ***In person only***

5:00 p.m. **Hearsay Speakeasy**
Join fellow DBA members for a social hour with drinks and hors d'oeuvres. Password found on page 4.

5:30 p.m. **Legal Ethics Committee**
"Your Law Firm Legacy: How to Exit Profitably (and Ethically)," Victoria Collier. (Ethics 0.50)* ***In person only***

6:00 p.m. DAYL Board of Directors

WEDNESDAY, OCTOBER 8

10:00 a.m. **Community Blood Drive**
Sponsored by the DBA Community Involvement Committee and Carter BloodCare. At the Art District Mansion and other locations. Details at dallasbar.org.

Noon **Bankruptcy & Commercial Law Section**
Topic Not Yet Available

Family Law Sections
Topic Not Yet Available

Public Forum Committee. *Virtual only*

DWLA Board of Directors

4:00 p.m. LegalLine E-Clinic. *Volunteers needed. Contact mmejia@dallasbar.org.*

6:00 p.m. DAYL Dinner & Dialogue

THURSDAY, OCTOBER 9

9:00 a.m. **Child Welfare & Juvenile Justice Section**
"Child Welfare & Juvenile Justice Conference. (MCLE 6,00, Ethics 2.00) DBA Members Free; Non-Members $145; Non-Attorneys $75; Law Students $10.* ***In person only***

Noon **Alternative Dispute Resolution Section**
"Winning at Sports Arbitration: Life on the Frontlines," Jeff Benz. (MCLE 1.00)* *Virtual only*

Construction Law Section
"What Every Lawyer Should Know About Builder's Risk Insurance," Micah Skidmore. (MCLE 1.00)* ***In person only***

New Member Welcome Lunch. RSVP sbush@dallasbar.org

CLE Committee. *Virtual only*

Judiciary Committee. *Virtual only*

Publications Committee. *Virtual only*

FRIDAY, OCTOBER 10

Noon **Trial Skills Section**
Topic Not Yet Available

SATURDAY, OCTOBER 11

Noon **Community Blood Drive**
At the Flight of the Monarch event, 2960 Epic Place, Grand Prairie. Sponsored by the DBA Community Involvement Committee and Carter BloodCare. Details at www.carterbloodcare.org.

MONDAY, OCTOBER 13

Noon **Real Property Law Section**
Topic Not Yet Available

Attorney Wellness Committee. *Virtual only*

TUESDAY, OCTOBER 14

Noon **Business Litigation Section**
"Where's the Loyalty? Recent Developments Regarding Fiduciary Duties in Corporations, LLCs, and Partnerships," Prof. Elizabeth Miller. (MCLE 1.00, Ethics 0.25)* *Virtual only*

Criminal Law Section
Topic Not Yet Available

Immigration Law Section
"Recent Supreme Court Decisions," Dan Givideon. (MCLE 1.00)* ***In person only***

Mergers & Acquisitions Section
"M&A Insurance: How and When to Shift the Risk to Third Parties," Andrew Zimmerman. (MCLE 1.00)*

Legal Ethics Committee. *Virtual only*

5:00 p.m. **Online Evening of Ethics**
"2025 Evening of Ethics," Prof. Catherine Greene Burnett, Hon. Tina Clinton, Kaitlyn Faucett, Hon. Kathryn Pruitt, and Coral Wahlen. Free for DBA members; non-members: $190. Register online at dallasbar.org. (Ethics 3.00)* *Virtual only*

5:00 p.m. **Hearsay Speakeasy**
Join fellow DBA members for a social hour with drinks and hors d'oeuvres. Password found on page 4.

5:30 p.m. **Legal Ethics Committee**
"Grow Without the Grind: Expanding Your Firm through Acquisition," Victoria Collier. (Ethics 0.50)* ***In person only***

6:00 p.m. Dallas LGBT Bar Board of Directors

JLTLA Attorney Wellness Program

WEDNESDAY, OCTOBER 15

8:30 a.m. **Relaunch Program**
"Legal Recruiter Panel: Build Your Resume and LinkedIn Profile."

Noon **Energy Law Section**
"Non-Operator Pitfalls Under Cimarex v. Anadarko," Brandon Durrett. (MCLE 1.00)* ***In person only***

Health Law Section
"'Tangoing' with Loper Bright - the First Year in Review?" Bill Mateja and Rachel Rose. (MCLE 1.00)* ***In person only***

Wednesday Workshop
"Texas Business Courts in Focus: A Closer Look at Year 1 of the Texas Business Court," Mason Parham. (MCLE 1.00)* *Virtual only*

Law in the Schools & Community Committee. *Virtual only*

Pro Bono Activities Committee. *Virtual only*

4:00 p.m. LegalLine E-Clinic. *Volunteers needed. Contact mmejia@dallasbar.org.*

THURSDAY, OCTOBER 16

Noon **Appellate Law Section**
"Appellate Issues in AI, Cybersecurity, Cloud Computing, and eCommerce," Peter Vogel. (MCLE 1.00, Ethics 0.50)* ***In person only***

3:30 p.m. DBA Board of Directors

FRIDAY, OCTOBER 17

11:30 a.m. DAYL Trial Skills Program

SATURDAY, OCTOBER 18

7:00 p.m. **DAYL Bolton Ball**
Tickets at dayl.com. At Vouv Event Space.

MONDAY, OCTOBER 20

Noon **Government Law Section**
Topic Not Yet Available

Labor & Employment Section
"A Panel Discussion on Labor and Employment Arbitrations," Gary Fowler, Cecilia Morgan, and Patricia Nolan. (MCLE 1.00)*

TUESDAY, OCTOBER 21

Noon **Education Law Section**
Topic Not Yet Available

Franchise & Distribution Law Section
"Sealing the Deal: Navigating Franchise Mergers and Acquisitions," Erica Dotras. (MCLE 1.00)* *Virtual only*

International Law Section
"Emerging Legal Trends in U.S.-Mexico Cross-Border Transportation," Ramon Concha and Marissa Rodriguez. (MCLE 1.00)* *Virtual only*

Community Involvement Committee. *Virtual only*

WEDNESDAY, OCTOBER 22

Noon **Collaborative Law Section**
Topic Not Yet Available

4:00 p.m. LegalLine E-Clinic. *Volunteers needed. Contact mmejia@dallasbar.org.*

6:00 p.m. **DBF Evening with Peter Baker and Susan Glasser**
Benefiting the Dallas Bar Foundation. Tickets at dallasbarfoundation.org.

THURSDAY, OCTOBER 23

Noon **Environmental Law Section**
Topic Not Yet Available

Intellectual Property Law Section
"The Client Oversees: A Discussion with In-House Counsel on Representing International Companies Doing Business in the U.S.," Matt Ascosta and Jessica Vittorio. (MCLE 1.00)*

Minority Participation Committee. *Virtual only*

FRIDAY, OCTOBER 24

Noon **Pro Bono Awards Celebration**
Help the Dallas Volunteer Attorney Program celebrate Pro Bono!

MONDAY, OCTOBER 27

Noon **Science & Technology Law Section**
"AI Images, Artistic Style, and Trademark Law," Sari Mazzurco. (MCLE 1.00)* *Virtual only*

Securities Section
"Foundations of Fund Counsel Series: Part 1 – Key Rules and Regulations for Counsel Advising Investment Funds and Advisers," Jason Barnes and Stephen Huschka. (MCLE 1.00, Ethics 0.50)*

TUESDAY, OCTOBER 28

Noon **Probate, Trusts & Estates Law Section**
Topic Not Yet Available

WEDNESDAY, OCTOBER 29

No DBA events scheduled

THURSDAY, OCTOBER 30

No DBA events scheduled

FRIDAY, OCTOBER 31

No DBA event scheduled

Mark Your Calendar!

DBA Annual Meeting
Thursday, November 6, 4:00 p.m.

DBA Awards Program & Luncheon
Friday, November 21, Noon

More information to come.
Stay up-to-date at www.dallasbar.org.

RENEW YOUR MEMBERSHIP DUES

Renew TODAY in order to continue receiving all your member benefits including access to FREE online CLE programs.

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If special arrangements are required for a person with disabilities to attend a particular seminar, please contact Alicia Hernandez at (214) 220-7401 as soon as possible and no later than two business days before the seminar.

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For confirmation of State Bar of Texas MCLE approval, please call the DBA office at (214) 220-7447.

President's Column

The Measure of a Mentor

BY VICKI D. BLANTON

Last month I discussed how mentoring matters. Part of mentoring is allowing mentees the opportunity to demonstrate their talents and skills in the big chair. Thus, this month, **Skyler Arbuckle**, my final formal mentee, takes the reins of the President's column.

———

Some attorneys aim to leave their legacies in courtrooms, case law, boardrooms, or monumental deals. My mentor's impact reaches far beyond her innumerable professional triumphs and accolades. Her legacy also lives in nurturing discussions, enduring encouragement, and countless moments of wisdom shared with those fortunate enough to learn from her. As an undergraduate, I experienced the power of mentorship through my first mentor, Dr. Tamra Henry. Inspired by that experience, I entered law school seeking an attorney mentor whose career I aspired to emulate. An attorney with whose poise and gravitas demanded the respect of her peers, and whose legal mastery positioned her as an authority in her practice area. With that goal, I sought **Vicki Blanton**.

I first came to know Vicki through our shared bonds of our law school and sorority affiliations. But as I had the privilege of getting to know her personally, I quickly saw in her the very essence of the attorney I hoped to become. Vicki is a poised, principled, and deeply compassionate attorney guided by her southern upbringing and values. Through countless phone calls, coffee chats, and dinners, Vicki has shaped both my professional and personal growth, from law school to practice. It was through her that I first understood mentorship as a multifaceted gift: a coach, a champion, and a confidant. As she often says, it's rare to find all three qualities in one mentor. And yet, in Vicki, I did. She's been my coach, transmitting the practical guidance, unwritten rules, and hard-earned lessons needed to excel in this profession. She has been my champion, advocating for me in rooms I could not enter and standing behind me with unwavering belief. And, she's been my confidant, creating a safe space where I could lay down my anxieties, setbacks, and uncertainties without fear of judgment. To be mentored by Vicki is to be deeply seen and steadily supported.

Mentorship at its best is never confined to a single relationship. It becomes a legacy shared across generations. The most impactful mentors leave behind a trail of wisdom, strength, and generosity that continues to shape others long after direct guidance ends. These mentors are admired not only for their professional expertise but for the grace and integrity with which they carry themselves. Whether offering a word of support or helping young professionals navigate career-defining decisions, their influence is both far-reaching and deeply personal. Their impact is woven into the careers of countless attorneys who carry those lessons forward in their own practices.

At its most powerful, mentorship creates a ripple effect of success and purpose. For as each mentor strives to attain their own goals and success, their mentee follows with admiration, inspired by achievements already realized and hopeful for the possibilities that lie ahead. The lessons a mentor imparts don't simply pass from one mentee to the next. They evolve, multiply, and deepen as each mentee becomes a mentor in their own right. Each mentor's advice is shaped by new experiences, values are strengthened through new perspectives, and encouragement is carried forward. The legacy of a great mentor doesn't end with one person. It continues through every individual they've guided, each one carrying forward not only their wisdom but also their example. The drive to excel and contribute meaningfully to the profession is often fueled by the remarkable influence of those powerhouses who came before.

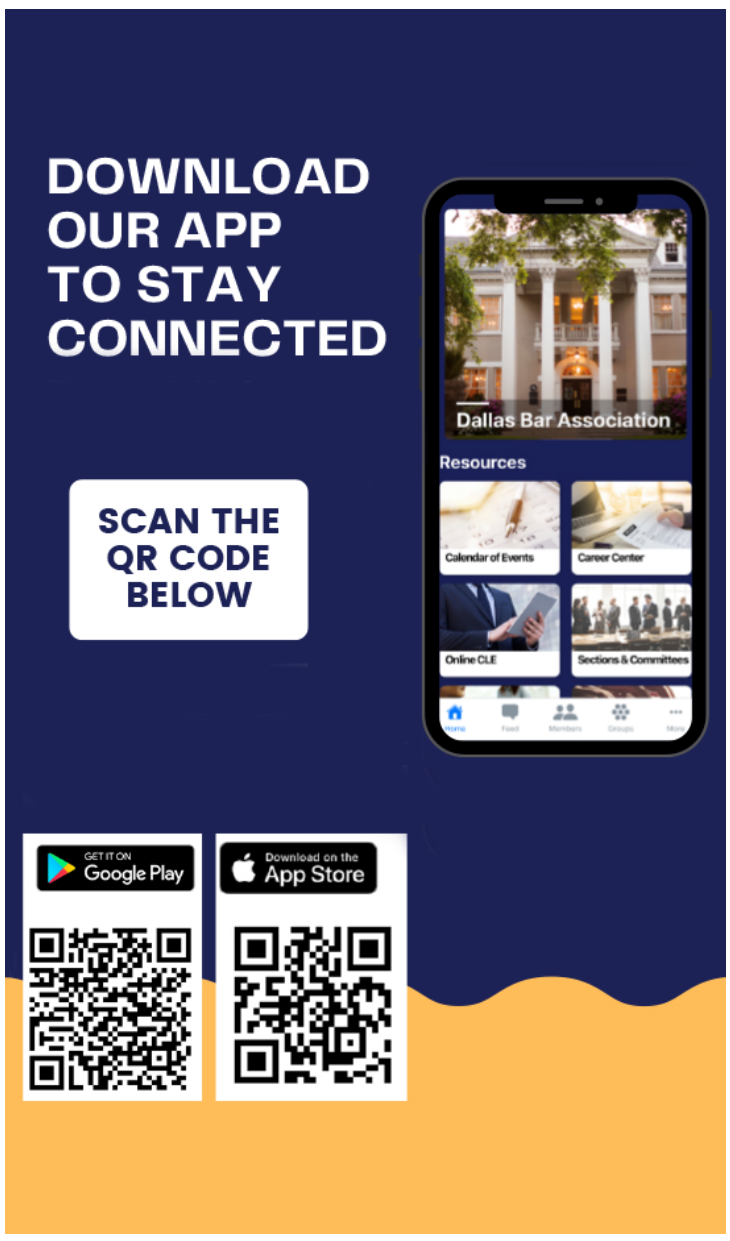
Benefiting from mentorship is not just a gift—it's a responsibility. Each of us who has benefited from the guidance of a mentor stands as a link in a much longer chain. The true measure of legacy isn't found solely in what we accomplish, but in who we help others become.

Exceptional mentors challenge us to look beyond our own achievements and ask: Who are we lifting? Who are we guiding? Who are we investing in? These mentors remind us that mentorship is a form of stewardship. It's an investment in the future of our profession; one conversation, one word of encouragement, and one act of belief at a time.

Though still early in my journey, I strive to pass on the lessons and advice my mentors have shared with me, offering support, perspective, and encouragement wherever I can. I look forward to one day stepping more fully into the role of mentor, carrying forward the values and examples that have shaped my own path. To those mentors who have shaped our journeys with wisdom, support, and intention: thank you. Your example inspires us to pay it forward with the same care and purpose.

Hearsay Password: This month's password is to name your mentor or mentee.

Vicki and Skyler



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The DBA's purpose is to serve and support the legal profession in Dallas and to promote good relations among lawyers, the judiciary, and the community.

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Focus | Tort & Insurance Practice/Trial Skills

The Role of Dashcams and Telematics in Modern Litigation

BY MIKE H. BASSETT, KATIE GREATHOUSE, AND JOHN DELGADO-RADER

A speeding car runs a red light and collides with a commercial truck. The plaintiff holds the truck driver accountable. However, dashcam footage provides a different account: clear footage of the truck's green light and full stop just before impact. In today's litigation landscape, this type of visual evidence is no longer a bonus—it is a necessity.

The Technology: What It Is and Why It Matters

Telematics and dashcams are quickly becoming standard features in personal and commercial vehicles. A dashcam is a windshield-mounted camera that captures video footage of the vehicle's surroundings. Telematics refers to a broader category of digital information gathered from a vehicle's internal systems, such as GPS location, speed, braking, acceleration, and more. Some systems combine both video and telematics to provide a comprehensive, real-time account of driver behavior and road events.

This technology has been adopted in commercial settings such as trucking, fleets, rideshare services, and delivery vehicles to improve safety, reduce risk, and streamline claims handling. However, it is also increasingly making its way into litigation files, allowing counsel to move beyond trading "he said, she said" allegations.

The Impact: How It Shapes Litigation

Visual and telematics data can transform case strategy from the moment a claim is filed. Pre-suit, this evidence allows insurers and attorneys to assess fault early in the process, potentially resolving claims before litigation begins. During discovery, it guides targeted requests and identifies inconsistencies in opposing narratives. In motion practice, it can support dispositive motions by providing objective, time-stamped evidence. And in trial, it can mean the difference between prevailing and losing: Compelling video or black box data can often outweigh witness testimony.

The Challenge: Use It or Lose It

This power comes with a caveat: Dashcam and telematics data are often short-lived. Many dashcams overwrite footage every few days, and telematics logs may only retain data for 30–60 days unless downloaded. This means delays can be costly. Attorneys must act quickly to request and preserve this evidence. The risk of spoliation is real, and courts are becoming increasingly unforgiving when critical evidence is lost due to inaction or ignorance.

Data-driven evidence isn't the future; it is the present. For litigators, understanding how to harness it from day one is no longer optional.

Legal Pitfalls and Best Practices

Dashcams and telematics can show exactly what occurred during an accident. Knowing this, it should be every attorney's best practice to acquire the footage or data as soon as possible. Spoliation applies to dashcams and telematics just as it does to other forms of evidence. These types of data can be easily lost or overwritten.

For example, a standard dashcam typically records until its storage capacity is full, after which the oldest videos are deleted to make space for new ones. Moreover, recording capacity varies from vehicle to vehicle—a 256 GB dashcam, for instance, may only store 10–20 hours of footage. Combined with long routes, this limitation can lead to the loss of critical evidence.

The fragility and importance of this evidence should encourage all attorneys to preserve its credibility, so it remains admissible in court. A key best practice is to maintain a well-documented and clear chain of custody, demonstrating that the data has been securely handled and protected from tampering. Encrypting the data or applying a digital watermark can add an additional layer of security to preserve its integrity.

Practical Tips for Every Player

The use of dashcams and telematics should be standard practice. Clients—particularly commercial vehicle drivers—should be encouraged to install a dashcam with included telematics. This can provide protection against false or frivolous claims, reduce insurance premiums, and improve safety for all drivers on the road.

Whether representing plaintiffs or defendants, attorneys should make it standard practice to obtain and preserve relevant data as soon as possible to avoid the deletion of potentially case-making (or case-breaking) evidence. It is highly recommended to send evidence preservation letters to the correct parties to prevent the loss of data. It is also in every attorney's best interest to verify the authenticity of the data by maintaining a solid chain of custody; data that has been tampered with will not meet evidentiary standards.

Conclusion: A Core Litigation Tool

The utilization of dashcams and telematics has become essential in modern litigation because they are such a critical evidentiary tool in our ever-evolving data-driven age. The acquisition of this type of evidence is no longer optional. As a result, the two major questions every attorney should ask at the start of every case are "Was there any footage?" and "Where can we download it?" **HN**

Mike H. Bassett is the Founder of The Bassett Firm. He can be reached at mike@thebassettfirm.com. Katie Greathouse and John Delgado-Rader are law clerks at the firm and can be reached at kgreathouse@thebassettfirm.com and jdelgadorader@thebassettfirm.com, respectively.

Focus | Tort & Insurance Practice/Trial Skills

"Is This a Leading Question?"

BY FRED C. MOSS

No. It is not, even though the question can be answered with a "Yes" or "No." Why not?

First, some first-hand experience. I was watching a Dallas criminal trial. The prosecutor was questioning the victim of an armed assault, trying to elicit that the victim was in his house behind a screen door when the defendant came onto the porch, gun in hand, and, therefore, did not shoot in self-defense.

The DA: "Were you inside your house behind the screen door when the defendant stepped onto the porch with a gun?" A "leading" objection was sustained. After several unsuccessful tries to elicit the desired testimony, the prosecutor asked, "State whether or not you were inside your house when the defendant approached with a gun in hand." The witness answered, "Yes." Leading objection sustained. Frustrated, the judge said to the witness, "Listen to the question. You cannot answer yes or no. You must state *the facts*." The witness brightened and then answered that he was in his house behind his screen door when the defendant stepped onto the porch with a gun. The examination then continued. What was going on?

Texas Rule of Evidence 611(c) forbids leading questions on direct examination except as necessary to develop the testimony. The rule prevents the examining lawyer from singing the witness' song. But the rule does not define "leading." Nevertheless, it is accepted that open-ended "reporters' questions"–who, what, where, when, how, why, which, and describe—are rarely leading because they do not suggest an answer and cannot be answered yes or no. Whereas, questions that state facts and merely ask the witness to agree are leading. This dichotomy has led to the erroneous belief that all questions answerable with a yes or no are leading. This view would bar any questions that begin with "Are," Did," "Were," "Do," "Was," "Could," etc., regardless of their suggestiveness. And this has led to the use of what I call "the leading question runaround technique" used successfully by the prosecutor, "State the facts whether or not." Were it so simple.

What is a leading question is found in the Texas common law. It makes clear that the form of the question does not determine whether it is leading. In *Able v. Sparks*, 6 Tex. 349, 351 (1851), the court held, "The rule [against leading on direct] must have a reasonable construction. It does not exclude questions . . . designed . . . only of leading the mind of the witness to the subject of inquiry. . . [For example,] [i]n cases of conversations, admissions or agreements, the examiner may draw the witness' attention to the subject, occasion, time, place and person, and ask whether such person said anything on the subject, and what he did say."

Thus, questions that call for a yes or no response are not leading if they do not suggest a material fact. "Did you go to Tom's birthday party?" is not leading. (It may improperly assume a fact not in evidence if there is no evidence that Tom had a party.) Some might argue that the question suggests that the witness went to the party, but this is not the degree of suggestiveness Texas common law views as improper. The question simply directs the witness' attention to the (previously mentioned) party and asks if the witness attended. There are three possible answers (yes, no, and I don't remember) and the question does not suggest one over the others.

Asking the same question using the runaround technique is unnecessary, if not downright silly. There is no difference in terms of suggestiveness between, "Did you go to the party?" and "State whether or not you went to the party."

It is also wrong to believe that any question that uses the runaround technique cannot be leading. They can be highly suggestive. In *Lott v. King*, 15 S.W. 231 (Tex. 1891), the following was held to be improperly suggestive, "State whether or not you ever had any business transaction with Barnes Parker in which he paid you the sum of five hundred dollars." A major factor in gauging the "leadingness" of runaround questions is how many material facts they contain (suggest).

So, "Is this a leading question?" is not because it does not suggest the answer, and the prosecutor's "State whether or not" question was leading despite not being answerable with a yes or no because it contained too many facts material to the prosecutor's case.

For an in-depth analysis of the treatment of leading questions in Texas, see, Frederick C. Moss, *Beyond the Fringe: Apocryphal Rules of Evidence in Texas*, 43 Baylor L. Rev. 701 (1991). **HN**

Fred C. Moss, Professor (Emeritus), retired from teaching at the S.M.U. Dedman School of Law in 2009. He can be reached at fmoss@smu.edu.

Don't Tax My Golden Parachute!

BY JAMES DEETS & VANCE YUDELL

In the context of the sale of a private company, it is crucial to understand the application and impact of Section 280G of the Internal Revenue Code.

Section 280G, often referred to as the "Golden Parachute" rule, imposes significant tax penalties on certain compensation payments made in connection with a change in control of a corporation. Understanding and addressing the requirements of Section 280G is crucial for private companies and their acquirers to ensure tax-efficient transactions.

Overview of Golden Parachute Rules

Golden Parachute payments to a disqualified individual that exceed a "safe harbor" limit could trigger significant tax consequences to both the individual and the corporation. Depending on the circumstances and the number of individuals affected, the cost to the corporation and the disqualified individuals could be substantial.

Golden Parachute payments may include severance payments, deal bonuses, accelerated vesting and payment of equity awards (such as stock options, restricted stock or profits interests), and fringe benefits.

The "safe harbor" limit that determines whether the company or individuals will be impacted by the Golden Parachute rules is equal to three times the disqualified individual's Base Amount. An individual's Base Amount is calculated as the average of taxable compensation earned over the five most recent calendar years ending before the calendar year containing the CIC date.

When a disqualified individual receives payments exceeding the "safe harbor" limit, the Golden Parachute rules impose a 20 percent excise tax on the individual and disallow a deduction to the corporation for a portion of the parachute payments.

Determining Who is a Disqualified Individual

Section 280G applies to "Disqualified Individuals," as defined in the regulations. The DI population includes anyone performing personal services for a corporation as an employee or independent contractor, who is (i) an officer, (ii) a 1 percent shareholder, or (iii) in the top 1 percent of service providers when ranked by compensation.

Identifying these individuals is important for compliance with Section 280G, to determine which payments may be subject to the Golden Parachute rules. It is important that companies work with legal counsel to ensure all potential DIs are identified. However, to the extent someone identified as a DI is not subject to U.S. individual income tax, and their compensation is not deducted on a U.S. tax return, they may in many cases be excluded from the calculations.

Change in Control

A "Change in Control" (CIC) event typically refers to a significant shift in the ownership or board structure of a corporation. The regulations under Section 280G define CIC, and companies should work with legal counsel to determine whether any given transaction constitutes a CIC under Section 280G. Section 280G does NOT apply to corporations that would otherwise qualify as S-corps, to non-profit entities, or to non-corporate entities (such as partnerships or LLCs that are taxed as partnerships).

Shareholder Vote (Cleansing Vote)

For private companies, one way to eliminate these adverse tax consequences of Section 280G is a "cleansing vote." This process involves the impacted executive executing a waiver, pursuant to which they agree to forego all payments that exceed his or her safe harbor limit. The payments may only be made if they are subsequently approved by at least 75 percent of the shareholders who are entitled to vote on the matter. If the shareholders approve the "excess parachute payments," adverse tax consequences of Section 280G are eliminated.

This shareholder approval mechanism is an important tool that allows private companies to ensure that both the company and its individuals are not unduly burdened by the provisions of Section 280G. Thus, it is important that the company determine the DIs as well as the payments that may be subject to Section 280G so that any otherwise applicable negative tax consequences may be neutralized.

Conclusion

While Section 280G can have major implications in the context of a corporate transaction, utilizing the shareholder vote procedure for a private company is necessary to eliminate the negative impacts of 280G. Proper planning and adherence to the regulations are essential to avoid the adverse outcomes that can arise through noncompliance.

In the event certain executives choose not to subject their excess payments to a cleansing vote, additional mitigation approaches could be employed, such as performing a valuation of non-compete agreements, conducting reasonable compensation analyses, and/or engaging in base amount planning to increase the executive's safe harbor amount and thereby reduce the amount potentially subject to the excise tax and lost deduction.

Whether going through the shareholder vote process or seeking to mitigate the implications of Section 280G through other approaches, it is important for companies to obtain the advice of competent professionals to assist with the application of 280G. **HN**

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TRE 106. Fair's Fair.

BY AARON J. BURKE AND JEREMY T. TUFNELL

Every trial lawyer brings their toolbox full of tips and tricks to deploy when the moment arrives. This article will explore the often overlooked and misunderstood tool every trial lawyer should add to their toolbox (or dust off and have at the ready): Texas Rule of Evidence 106.

TRE 106. Remainder of or Related Writings or Recorded Statements

> If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions. Tex. R. Evid. 106.

The rule has two basic considerations: (1) the danger that the material may be made misleading by being taken out of context, and (2) the inadequacy of a delayed repair. *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied). It does *not* mean that an entire writing or recording is admissible for the sole reason that a party has offered a portion of it, but rather it permits the admission of only those additional portions *necessary* to explain the admitted portion or put it in context to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion. The bottom line is *fairness*, and what good trial lawyer doesn't love arguing "fair is fair?"

Rule 106 often gets confused with the doctrine of optional completeness—codified under Texas Rule of Evidence 107—which applies when a party offers into evidence only the portion of a writing, document, statement, conversation, or transaction favorable to its case, but admission of additional evidence is needed to counteract the harm done by an incomplete presentation. *See* Tex. R. Evid. 107. However, even under the doctrine of optional completeness, presentation of the completed statement might not get the job done when you must wait to do so during your case in chief or during cross-examination. This would otherwise be an invasion of the proponent's case in chief. *See* Goode and Wellborn, 1 Texas Practice: Guide to the Texas Rules of Evidence § 106.1 (fourth edition)

Key to understanding the strength of Texas Rule of Evidence 106 is to understand that it avoids the pitfalls of the common-law approach—found in Rule 107—by guaranteeing the presentation of a writing or recorded statement. In short, it allows you to usurp the proponent's case in chief. This can be done through the witness on the stand, or in the case of a deposition transcript you can read and show the jury the clarifying statement.

Rules 106 and 107 operate together to admit any type of evidence—acts, declarations, oral conversations, writings, or recorded statements—that should in fairness be considered when a portion has been offered by the opponent. Rule 106 is narrower, applying only to written or recorded statements, and permits the opposing party to offer the remainder at the same time that the proponent offers only a portion of a written or recorded statement. In contrast, to comply with Rule 107 and the common law doctrine of optional completeness, the opponent must wait to offer the remainder evidence for other acts and oral statements either on cross-examination or in its own case in chief.

Perhaps the most powerful feature of Rule 106 is its ability to override other exclusionary doctrines—hearsay, the best-evidence rule, or the personal knowledge requirement—when fairness requires that a clarifying statement be considered at the same time. *See Tex. R. Evid. 106.* The underlying rationale is that presenting the remainder of the writing or recorded statement ensures the jury receives the full context, thereby neutralizing any misleading impression created by introducing only one portion. *See Roman v. State*, 503 S.W.2d 252, 253 (Tex. Crim. App. 1974). The *Roman* case construes Article 38.24 of the Texas Code of Criminal Procedure which in part is the predecessor to Rule 106. The possibilities are endless. Did the other side read a portion of a deposition out of context? Is there another letter or email that gives a fuller picture?

While Rule 106 is a powerful tool, it must be remembered that the power ultimately lies with the trial court judge and is a permissive grant, not a requirement. *See Gilmore v. State*, 744 S.W.2d 630, 631 (Tex. App.—Dallas 1987, pet. ref'd). Whether it's an excluded portion of an adversary's expert report containing hearsay beneficial to your case or a redacted version of a confession that leaves out exculpatory statements, slip the ace out of your sleeve and zealously advocate that fairness requires you to take over your opponent's case-in-chief and allow the admission of the remainder of evidence. After all, it's about fairness, Judge… **HN**

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Breaking the Rules: The New Way to Win Civil Trials

BY ANDY JONES

Our world has changed in so many fundamental ways since 2020. Those changes are showing up in the attitudes of jurors. With the jurors changing, how trial lawyers try cases must change. From my pre- and post-pandemic trial experience, I can tell you that the rules by which we previously tried cases do not work anymore. It is time to break the rules and win civil trials.

Old Rule #1 – Juror Demographics Matter. No, they do not. We used to think a juror's demographics were a shortcut for a person's life experience. Their race, their gender, their job. Not anymore. In recent trials, I have seen jurors whose demographics suggested one outcome deliver exactly the opposite. Pre-pandemic, I would often rely on demographic assumptions when making jury selection decisions. Post-pandemic, I have learned that jurors who seem unfavorable on paper can become your strongest advocates, while those with "perfect" demographics may work against you.

Old Rule #2 – Jurors Trust Experts. No, they trust themselves. The pandemic and our current political climate have produced jurors who only trust themselves and who they perceive to be reliable sources. Expert witnesses need to give the appellate court what it needs. You need to give the jury what they need—and it isn't more science. Jurors are not stupid. They should be empowered with scientific knowledge. But also give the jury the human factors and commonplace motivations that win the case for your side.

Old Rule #3 – Speed Kills. No. Put the pedal to the metal! We consume information in bits and clips. A reel is worth a thousand words. Jurors want the information, and they want it now. Call only the witnesses the jury needs (always fewer than you think). Cut down your depo clips. Do short, succinct, and powerful directs and crosses of expert witnesses. You are not moving too fast for jurors.

Old Rule #4 – Demonstratives are Made at Trial. Nope. Visuals are everything, and you must have a visual strategy for your entire case. You must have visuals for your key points at trial made well before trial. Pictures and PowerPoint are not enough. In a pre-pandemic trial, I had pictures on paper of the surgical instrument at issue. The defendant had the instrument. In my post-pandemic med mal trial, I had pictures; I had models; I had the instruments. The defendant did not. You cannot decide mid-trial that you want a detailed visual. And your hand drawing of it on a paper tablet will not work. Plan your visual strategy from the beginning of your case.

Old Rule #5 – Preponderance is the Standard. Only legally. To win a civil trial, you must present beyond-a-reasonable-doubt-caliber evidence. Preponderance allows the jurors to give the other side the benefit of the doubt. Preponderance allows experts to get away with "judgment calls." You don't need to just get across the goal line. You need to run the ball through the end zone and hand it to a fan in the stands. In a pre-pandemic car wreck case, I did not call the police officer to testify; the police report said what I needed. I lost. In a post-pandemic car wreck, I called the police officer (by Zoom), even though the police report said what I needed. I won. The injuries were the same. The venue was the same. The parties were similar. The only thing I changed was to drive home liability by calling the officer. Just admitting the report? That is preponderance. Admitting the report and calling the officer? That is so much more. And, it is a winning strategy.

With the old rules in doubt, here are some new rules to help you win your case:

New Rule #1 – Pick Jurors by What They Say.

New Rule #2 – Jurors Need Motivation Not Education.

New Rule #3 – Momentum is Your Friend.

New Rule #4 – Start Your Visual Strategy When You File Your Case.

New Rule #5 – Prove Your Case at Trial Beyond a Reasonable Doubt.

With these new rules, I wish you success and a few more trial victories! **HN**

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Lost in Translation: Why Voir Dire Fails with Modern Juries

BY SHANE READ

William Butler Yeats once advised, "Think like a wise man but communicate in the language of the people." Although this adage applies just as much to attorneys conducting voir dire, many lawyers neither think wisely nor effectively communicate with modern juries.

First, lawyers often fail to think wisely during voir dire because they approach the process using shortcuts. For example, when making decisions on strikes, they often start with mistaken assumptions of jurors' attitudes based on superficial demographic profiles (e.g., age, gender, race, and occupation) and surface-level assumptions (e.g., media consumption, economic status, and appearance). Drawing these sorts of conclusions oversimplifies complex decision-making.

Instead, the modern approach to jury selection recognizes that the panel consists of distinct individuals who will be favorable, unfavorable, or neutral based on their individual life experiences, not the lawyer's assumptions. Even a lawyer who has the significant benefit of conducting a mock trial to identify broad patterns of juror profiles still needs to focus on learning each juror's individual story during voir dire.

Lawyers also do not think wisely when they fail to realize that jurors fall into two distinct information-processing groups: digital natives and digital immigrants. Unlike demographic assumptions, the digital divide reflects a difference in analyzing information, not a stereotype. Digital natives (those from the Millennial and Gen Z generations) were born in 1980 or later. They grew up with technology and are fluent and comfortable with it. That is why they are referred to as digital natives. This group makes up 50 percent of the jury pool.

The second group, known as digital immigrants (members of the Silent Generation, Baby Boomers, and Gen X), consists of people who were born before 1980 and adapted to technology later in life but keep one foot in the past. For example, a digital immigrant might find it standard to print an important email, an additional step that a digitally fluent native would consider odd.

This divide between those who adapted to digital technology as adults versus those who have used it since childhood significantly impacts how jurors process information and respond to questioning.

For example, digital immigrants like information to be presented in chronological order, while natives are comfortable with a non-linear presentation. Unlike immigrants, natives favor pictures over text. They also like fast-paced information and form quick judgments. Digital natives also mistakenly think they can multitask. On the other hand, both digital immigrants and natives share a common love for stories that have an emotional hook.

Given these insights, how does one reach both groups? First, one needs to start strong. The axiom that there is no second chance to make a first impression applies when trying to connect with digital immigrants but even more so with digital natives. Therefore, speak with confidence and sincerity. Then, explain your case chronologically to connect with digital immigrants, while layering this explanation with images and continuing to use visuals when asking questions to maintain native engagement. For example, when explaining the burden of proof, use a demonstrative that visually describes it. When asking a scaled question to the panel, visually display the question on a PowerPoint slide.

Beyond visual engagement, consider what interests both groups share. Natives and immigrants both value a compelling story that has an emotional hook. Can you explain why the jury should care about your case?

In addition, in telling your story, take advantage of confirmation bias with both groups by getting your themes out early. Confirmation bias is the process where, once the brain forms an opinion, it will look for evidence to support that opinion and discount evidence that discredits that opinion. Use powerful themes to your advantage.

That said, effective communication requires more than a strong theme presentation. No matter how wise you think you are, consider that digital natives and immigrants alike seek cognitive ease through simple language. Shakespeare himself understood the power of simple language, using one- and two-syllable words to explain one of life's most profound dilemmas in *Hamlet*: "To be or not to be, that is the question." Simple language carries complex ideas across any generational divide.

Finally, listen. As Ernest Hemingway observed, "When people talk, listen completely. Don't be thinking what you're going to say. Most people never listen." The modern voir dire is based not on superficial stereotypes but on communicating effectively with digital immigrants and natives and learning about the individual life experiences that will affect how a juror views your case. The key to listening is to show empathy for jurors' opinions, even if you disagree with them. By valuing what they have to say, you will learn their biases and encourage others to engage with you.

Attorneys who can master this dual approach of wise thinking and communicating in the language of jurors will connect with jurors whom their less prepared opponents will never reach. **HN**

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Texas Courts Clarify Anti-Indemnity Act's Reach

BY TRAVIS M. BROWN AND SAM CRECELIUS

The Texas Legislature passed Subchapter C of Chapter 151 of the Texas Insurance Code, the Texas Anti-Indemnity Act (TAIA), effective January 1, 2012, which applies exclusively to "construction contracts," as that term is defined in the statute. Section 151.102 of the TAIA voids indemnity provisions to the extent they require an indemnitor to defend or indemnify an indemnitee for the indemnitee's own negligence or fault. Unlike previous anti-indemnity statutes, such as the Texas Oilfield Anti-Indemnity Act, the TAIA also expressly prohibits additional insured coverage, "the scope of which is prohibited under [Section 151.102]."

Before the TAIA, a Commercial General Liability (CGL) carrier's duty to defend a party seeking additional insured coverage was determined by two questions: (1) Is the party an additional insured under the policy based on the additional insured requirements in the construction contract and the provisions in the insurance policy addressing additional insured status; and (2) If so, is there even a single allegation in the pleading that potentially states a claim covered under the policy? If the answer to both questions was "yes," the CGL carrier owed the additional insured a defense against the entire lawsuit.

After the passage of the TAIA, with its prohibition on "additional insured" coverage for the additional insured/indemnitee's own fault, many insurers argued that rather than having to defend the entire lawsuit if there was a single covered allegation, they were now entirely relieved of their duty to defend (even covered allegations) if there was a single allegation for which providing a defense or indemnity would violate the TAIA.

Until recently, there was little guiding case law to resolve this recurring dispute. A recent series of Texas federal district court cases has clarified the issue. A uniform approach emerges from these cases where courts first evaluate whether the contractual indemnity and additional insured provisions comply with the TAIA. If they do, courts readily find a duty to defend the entire suit, despite any allegations of the additional insured's own fault for which, standing alone, a defense would be prohibited under the TAIA.

The first of these cases, *BNSF Railway Co. v. Jones Lang Lasalle Americas, Inc.* (N.D. Tex. Feb. 24, 2022), was not an additional insured case. But the court expressly rejected the indemnitor's more moderate argument that, because of the TAIA, rather than a defense to the entire lawsuit, the indemnitor could only owe a defense to those claims involving the indemnitor's own negligence. The court disagreed, noting that if the underlying complaint "includes even one covered claim, the insurer must defend the entire suit."

In *Knife River Corp. – S. v. Zurich American Insurance Co.* (N.D. Tex. Mar. 8, 2022), decided a few weeks later, the court did not specifically address the issue of whether the duty-to-defend applied to the "entire lawsuit," but it established the proper order of analysis, evaluating the issue of compliance with the TAIA before turning to an "eight corners" analysis of the allegations in the pleadings.

In *Phoenix Insurance Co. v. Knife River Corp. S.* (S.D. Tex. July 27, 2023 & Sept. 11, 2023), the court adopted this same order of the analysis. *Id.* (citing *Knife River* and following that court's approach of "assessing whether insurance policy violated TAIA ***prior to*** conducting the duty to defend analysis"). That case tied the concepts from *BNSF* and *Knife River* together, first evaluating whether the contract provisions complied with the TAIA and, finding that they did, holding there was a duty to defend the entire lawsuit in face of mixed allegations of both the indemnitor's and indemnitee's negligence.

At first glance, the most recent case, *Allied World Assurance Co. (U.S.) Inc. v. Acadia Insurance Co.* (E.D. Tex. Sept 9, 2024), would seem to contradict the cases above and revive the argument that a single allegation of the indemnitee's negligence excuses the additional insurer from its defense obligation. The court appeared to reference an insurer's duty to defend "the entire suit" as a basis for holding that there could be no duty to defend when there were allegations of the additional insured's fault. But in fact, the court conducted the analysis in the same order as the cases above, first finding the additional insured provision invalid because it provided coverage for bodily injury "caused, in whole or in part, by" the indemnitor's negligence—meaning it expressly provided coverage for bodily injury that was also caused in part by the indemnitee's negligence, violating the TAIA.

Considering these recent opinions, general contractors working in Texas should evaluate the indemnity and insurance provisions of their subcontracts to ensure compliance with the TAIA. They should consider requiring additional insured endorsements that comply with various state anti-indemnity acts, like the TAIA, such as those the Insurance Services Office has recently promulgated. **HN**

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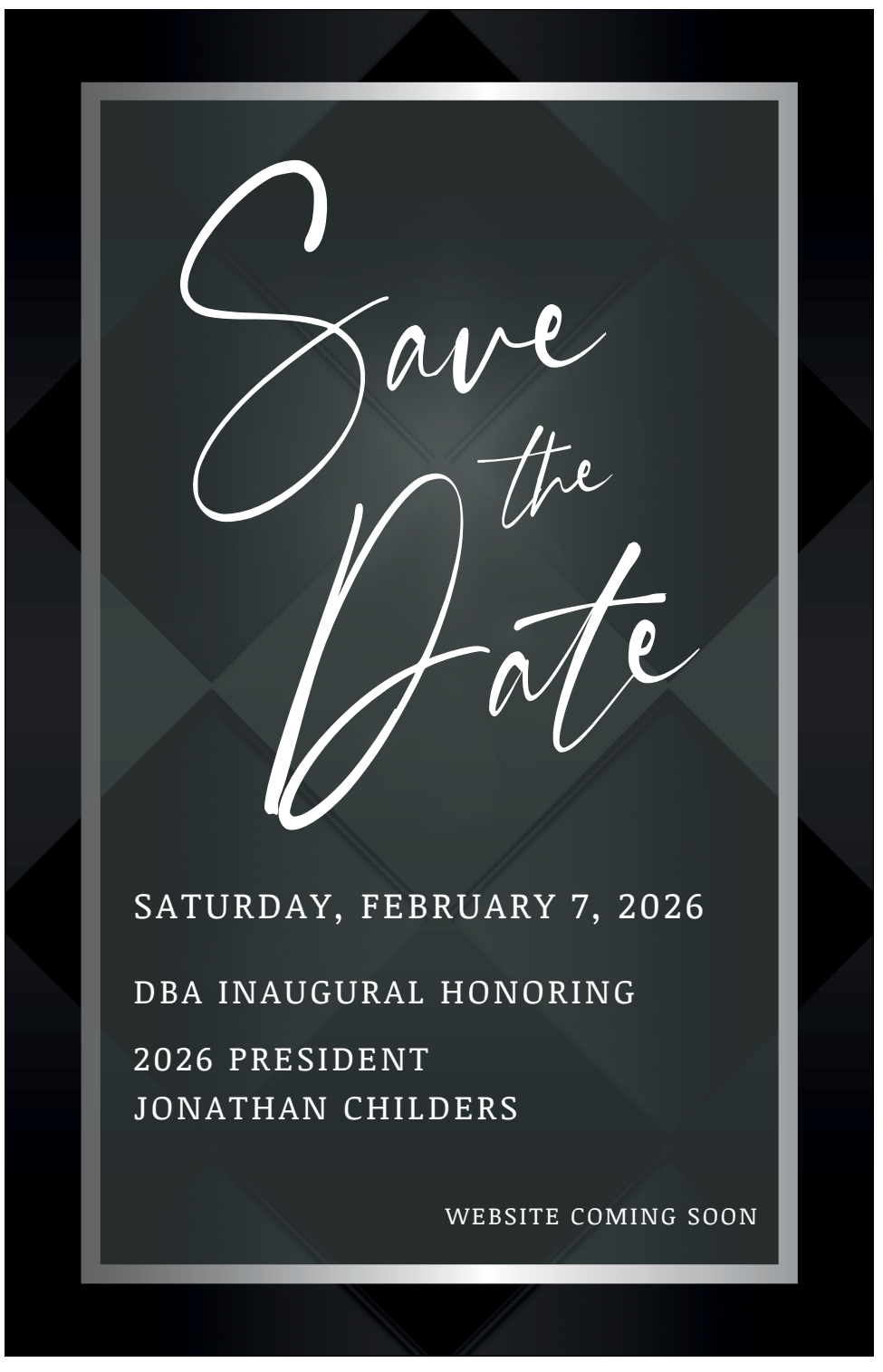

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Refreshing Witness Recollection, But Hopefully Not With a Shoe

BY LELAND C. DE LA GARZA

While attending law school, my evidence professor taught that anything can be used to refresh a witness's recollection, even a shoe. I imagined one day being in trial, exasperated by a witness's failure to remember the scripted testimony and throwing my shoe at the witness to refresh their recollection. Forty-four years later, I have yet to throw a shoe. But I have found that my professor was right. Anything can be used to refresh a recollection, and refreshing a recollection can save the examination, and possibly the case.

Witnesses struggle to recall events, even recent events. Fortunately, life leaves little reminders along the way. For example, what a person did on a particular day may be noted in a calendar or diary and showing that calendar or diary to a witness will help the witness to remember details of the day. A time entry in a lawyer's bill will help a lawyer to recall what he did on a particular day. A resume may help a witness remember a job reflected in the resume. And a witness's prior deposition may help the witness remember facts contained in the transcript. The refreshing material may also trigger memories that go beyond the facts reflected by the refreshing material.

A great example of the process of refreshing a witness's recollection was demonstrated in a recent trial. The witness had phone conversations with a party the night before a big deal closed, but was struggling to recall the details. I knew that the witness had those calls while driving to a Chicago White Sox game. So, I showed the witness his prior deposition testimony that he went to a White Sox game the night before the closing. The witness's memories rushed back to him because he associated them with a memorable night at the White Sox game. The association with the White Sox game improved his memory 100 percent and the recollection went well beyond attending the game.

The right to refresh a witness's recollection does not come from a rule of evidence. Permitting a witness's recollection to be refreshed is largely within the discretion of the trial court. Rule 612 of the Texas Rules of Evidence provides protection for the other party when this procedure is used. Under Rule 612, the adverse party is entitled to have the writing or object produced at trial, to inspect it, to cross-examine the witness about it, and to introduce as evidence the part that relates to the witness's testimony. Only the adverse party has the right to introduce the writing or object. The party using a writing or object to refresh the witness's recollection may not introduce the writing or object unless it is otherwise admissible.

The procedure for refreshing recollection is simple: (1) establish that the witness previously had a recollection of the events; (2) demonstrate that the witness does not presently have recollection; (3) confirm that the witness believes the writing or object will refresh his or her recollection; (4) show the witness the writing or object; and (5) establish that the witness's recollection has been refreshed. At that point, the witness will continue testifying to the events, including the events that have now been recalled aided by the refreshing material. Sometimes refreshing a recollection can cure an evidentiary problem. For example, in

Arthur J. Gallagher & Co. v. Dieterich, 270 S.W.3d 695, 707 (Tex. App.—Dallas 2008, no pet.) the plaintiff did not produce in discovery a summary of his attorney's fees and the summary was excluded. When the plaintiff's attorney was testifying to his attorney's fees, he nevertheless attempted to use the fee summary to refresh his recollection about the amount of the fees, but not as direct evidence. The trial court allowed the fee summary to be used for that limited purpose and the court of appeals affirmed.

While refreshing a recollection may be beneficial, the sponsoring attorney must carefully evaluate the potential adverse consequences flowing from Rule 612. The writing or object may also contain damaging evidence, which may never have come into evidence absent Rule 612. A good example would be hearsay statements. Furthermore, attorney-client privilege can be waived by using privileged materials to refresh recollection. *City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, no writ).

A distinction exists between refreshing a witness's recollection and impeaching the witness. When refreshing recollection, the prior statement is not admitted; when impeaching the witness, the prior statement may be admitted if the witness does not admit to the inconsistency. A further distinction exists between refreshing a recollection and admitting a "recorded recollection," which is governed by Rule 803(5) of the Texas Rules of Evidence. Understanding these distinctions ensures proper use of each procedure and avoids evidentiary errors that could compromise the case. **HN**

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TRAIGA is Shaping AI Governance and Negligence Law in Texas

BY MADISON GAONA

Emerging technologies, particularly artificial intelligence (AI) and autonomous systems, are rapidly transforming the regulatory and tort landscape. As these tools become increasingly integrated into sectors such as health care, transportation, and consumer products, courts and lawmakers are grappling with how to define "reasonable" behavior in a world where technology can both prevent and cause harm. Nowhere is this more evident than in Texas, where the recent passage of the Texas Responsible Artificial Intelligence Governance Act (TRAIGA) marks a significant step in regulating AI's role in society.

Signed into law on June 22, 2025, and taking effect on January 1, 2026, TRAIGA represents one of the most comprehensive state-level efforts to regulate AI. It aims to balance the promotion of innovation with the protection of consumers and the public.

Key Provisions of TRAIGA

1. Scope and Applicability: TRAIGA applies to both private and public sector entities that develop, deploy, or use AI systems within Texas. However, certain provisions—such as those related to health care—apply specifically to governmental entities and contractors.

TRAIGA defines "artificial intelligence system" to include "any machine-based system that, for any explicit or implicit objective, infers from the inputs the system receives how to generate outputs including content, decisions, predictions, or recommendations, that can influence physical or virtual environments."

2. Transparency Requirements: The Act mandates that organizations deploying AI systems provide clear disclosures about the use of AI, especially in high-risk contexts. For example, if an AI system is used to make decisions affecting individuals' rights or access to services, the affected individuals must be informed of the AI's involvement.

3. Risk Assessment and Mitigation: Entities are required to conduct risk assessments for AI systems that could significantly impact health, safety, or fundamental rights. These assessments must identify potential harms and outline measures to mitigate them. Documentation of these assessments must be maintained and made available to regulators upon request.

4. Prohibited Practices: TRAIGA prohibits (1) Manipulation of Human Behavior to Cause Harm or Encourage Criminal Activity; (2) Social Scoring to the Detriment of a Person/Group Based on a Protected Characteristic; (3) Capture of Biometric Data without Consent; (4) Infringement of a Right Guaranteed under the U.S. Constitution; (5) Unlawful Discrimination Against a Protected Class; and (6) Certain Sexually Explicit Content and Child Pornography.

5. Intent Liability Standard: TRAIGA requires proof of intentional misconduct. Disparate impact alone is insufficient. Instead, TRAIGA requires a specific intent to discriminate against individuals based on protected characteristics.

6. Health Care-Specific Provisions: TRAIGA imposes additional requirements on health care providers using AI. These include ensuring that AI tools used in clinical decision-making are subject to rigorous validation and that patients are informed when AI is involved in their care.

7. Enforcement and Penalties: The Act grants enforcement authority to the Texas Attorney General, who can investigate violations and impose civil penalties. TRAIGA also provides for a private right of action in certain cases, allowing individuals harmed by non-compliant AI systems to seek remedies.

8. Exemptions and Limitations: TRAIGA contains exemptions for research and development activities, as well as for AI systems used solely for internal business operations that do not impact external stakeholders.

The Role of AI in Negligence Claims Across Sectors

As use of AI becomes more widespread, Texas courts are increasingly confronting negligence claims that evaluate the role of AI. This is particularly true in the health care and transportation sectors.

Health care professionals are increasingly using AI to augment clinical decision-making. While AI can potentially improve diagnoses, treatment, and efficiency, significant risks remain including the perpetuation existing biases in training data, inaccurate diagnoses, over-reliance by clinicians, and conflicts with patient preferences or values.

Autonomous vehicles are already operating on Texas roads. Under the current regulatory scheme, these vehicles must comply with the same traffic laws as human drivers and be equipped with video recording devices. In the event of a collision, courts will be tasked with evaluating the decision-making algorithms of an autonomous vehicle rather than the split-second decisions human drivers make daily.

Looking Ahead

Courts are increasingly looking to industry standards, regulatory requirements like TRAIGA, and the specific capabilities of AI systems when determining what constitutes "reasonable" behavior. As technology continues to advance, the standard of care in negligence claims will likely continue to evolve, raising expectations for both individuals and organizations that develop and deploy AI-driven solutions. **HN**

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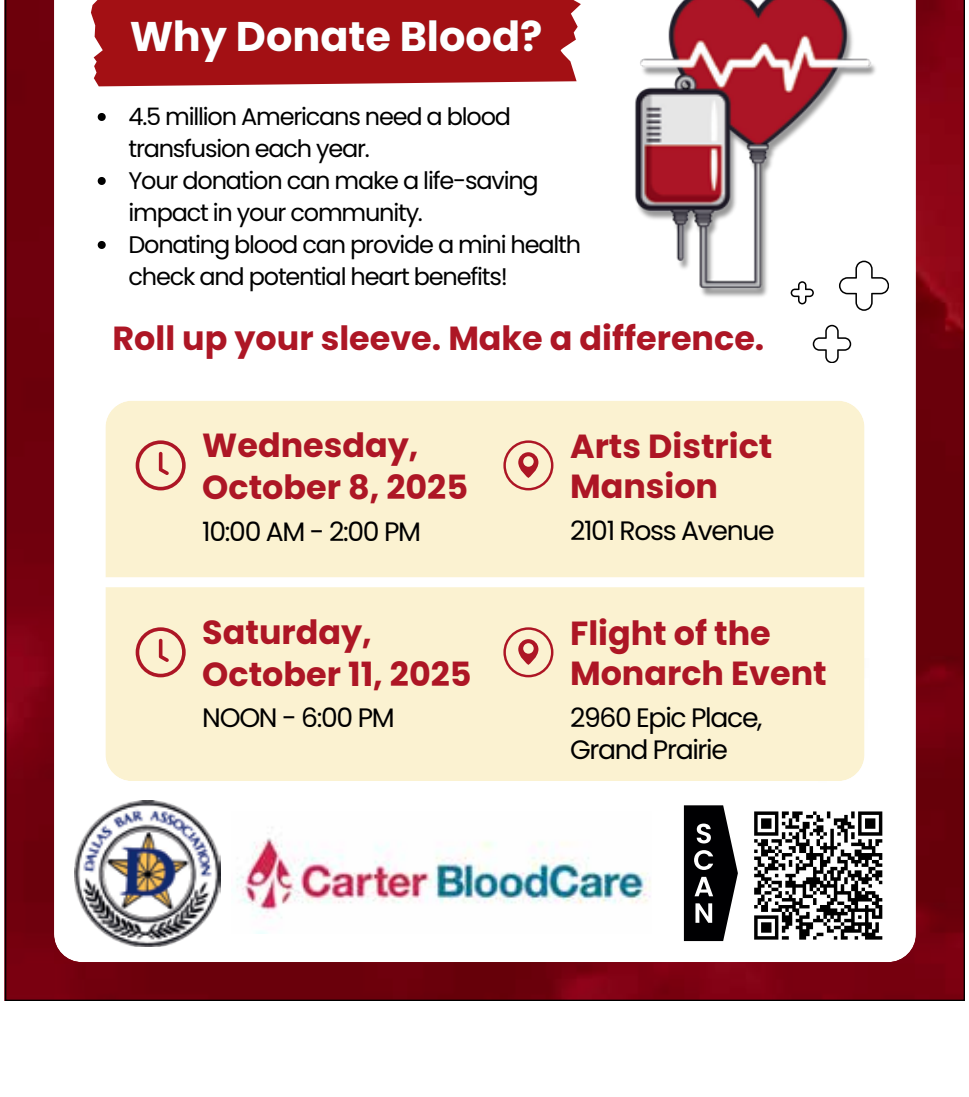

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Pros & Cons of Filing Personal Injury Suits in Texas JP Courts

BY KATELYN C. LOGIE

When representing an injured client in Texas, the venue you choose can have a major impact on both the speed and the outcome of the case. For smaller personal injury matters where the recovery is unlikely to exceed $20,000, our Texas Justice of the Peace (JP) Courts can be an attractive option. These courts, often thought of for landlord-tenant or small debt disputes, can also hear personal injury claims within their jurisdictional limits.

According to available settlement data, a substantial percentage of personal injury cases in Texas (estimates range from 50 percent to 60 percent) resolve for under $20,000. That means many cases could potentially fit within the JP court's jurisdictional cap, making it worth examining this venue as a strategic choice.

Advantages of Filing in JP Court

Faster Trials. In Dallas County, a personal injury case in county or district court may not reach trial for two to three years—or longer if court dockets are particularly congested. In contrast, JP courts can often set a trial date within months of filing, offering a significant advantage for clients who need resolution sooner rather than later.

Simplified Discovery Process. JP courts have a streamlined discovery process. Parties are not bogged down with lengthy interrogatories, complex expert designations, or multi-day depositions. This simplicity keeps litigation costs down and makes the process more manageable for smaller cases.

Flexible Rules of Evidence. The Texas Rules of Evidence (TRE) do not automatically apply in JP court. This can make it easier to admit certain evidence that might otherwise face technical objections in a higher court. However, either party may file a motion to request that the TRE apply at trial. If granted, the JP judge will sign an order, and the trial will proceed under the same evidentiary standards as in county or district court.

Practical Appeal Considerations. While JP court verdicts can be appealed de novo (meaning a brand-new trial) to county court, insurance companies rarely appeal verdicts under $20,000. It is generally not a sound business decision for them to invest more in legal fees to potentially save a small amount.

Drawbacks of Filing in JP Court

No Official Record and Strategic Risk if Appealed. JP courts do not create a written trial record unless the parties arrange for and pay a court reporter. Without a record, an appeal to county court is essentially a complete do-over—the trial starts from scratch. If the defense appeals, they will come into county court already knowing your entire trial strategy and all of your evidence. That allows them to prepare a more targeted and potentially stronger defense the second time around.

Varying Qualifications of Judges. Not all JP judges in Dallas County are attorneys. While many have significant experience and strong knowledge of the law, others may not have formal legal training. This makes judge selection critical. Filing in JP court works best when you have confidence in the judge's understanding of tort law and evidentiary rules. The decision to file should be based on the judge's reputation, knowledge, and fairness, as well as the specific facts of your case.

When It Makes Sense

Choosing JP court for a personal injury case is not a one-size-fits-all solution. It is most effective when:

- The expected recovery is well within the $20,000 jurisdictional limit.
- The client values a quicker resolution over the potential of a higher verdict in county or district court.
- The case can be effectively presented under the more flexible rules of JP court.
- There is trust in the judge's knowledge of applicable tort law and evidentiary principles.

For example, if a client's medical bills and other damages clearly fall under $20,000, and the defense has shown no willingness to settle, filing in JP court could provide a trial date within months instead of years. For many injured clients, that speed and finality can make a world of difference.

Conclusion

Justice of the Peace courts offer Texas personal injury practitioners a faster, more cost-effective way to resolve smaller cases. While there are legitimate concerns like the lack of a record and the possibility of a de novo appeal, these risks can be outweighed by the benefits in the right circumstances. With careful venue selection, particularly in JP courts where the judge has a strong grasp of tort law and evidentiary rules, plaintiffs with smaller claims can avoid years of delay, reduce litigation expenses, and still have their day in court.

In short, for certain personal injury cases in Texas, JP court is not just the "small claims" option, it can be a strategic, client-centered choice that gets results faster and with less cost, without sacrificing the right to a jury trial. **HN**

Katelyn C. Logie is the owner of Logie Law Firm, PLLC. She can be reached at katelyn@logielawfirm.com.

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How Lazy Service Can Violate the Statute of Limitations

BY ANDY RYAN AND SARAH LONG

In an ideal world, a plaintiff will give his or her lawyer plenty of time to file a lawsuit, obtain citation from the clerk, and serve the defendant before the statute of limitations expires. But as the filing deadline approaches, lawyers must remember that Texas law requires a plaintiff to both sue and serve the defendant before the limitations period expires. Beating the clock on filing suit does not mean the case is safe from a potential limitations bar. If the plaintiff files suit in time, but serves the defendant after the deadline, the defendant has a limitations defense the plaintiff must overcome.

To counter a limitations defense, the plaintiff must show evidence about his or her attempts to serve the defendant and explain every lapse in effort or period of delay. Any unexplained delay can result in summary judgment or a directed verdict for the defendant. For example, the Dallas Court of Appeals recently held that an unexplained delay of just over thirty days warranted a directed verdict. So, what should lawyers do if the defendant is timely sued, but not served until after the limitations period expires?

First, defendants should not forget to assert the limitations defense. A defense attorney should not assume that the defense will fail just because the plaintiff timely sued. Indeed, the Dallas Court of Appeals recently ruled that a plaintiff's reliance on the mere proof of filing and proof of service was insufficient as a matter of law to overcome a limitations defense.

Second, plaintiffs should not assume the clerk will timely complete service. Texas courts are uniform that service is the plaintiff's responsibility, which cannot be escaped by claiming the plaintiff was waiting on the clerk. Moreover, the plaintiff will have trouble finding admissible evidence of the clerk's efforts, particularly as testimony from a paralegal or staff member is textbook inadmissible hearsay. Although clerks are extremely busy and may not immediately respond to a request for citation, a diligent plaintiff must check the docket and follow up with the clerk to ensure citation is timely issued and served.

Third, consider using a private process server for hand delivery. Many plaintiffs rely on clerks to effectuate inexpensive but effective service, like service through the secretary of state. That makes sense in most cases. But given the risk that untimely service could deprive the plaintiff of any recovery, spending more on service in the beginning may be a better choice.

Fourth, take discovery on the defense. Defendants should ask about the plaintiff's efforts to complete service and explore any lapse in effort or period of delay. Meanwhile, plaintiffs' counsel should remember that the lawyer's office—not their clients—will be the witnesses or record custodians on service efforts Plaintiffs' lawyers should identify their paralegals and staff as witnesses with knowledge about the defense and produce all relevant documents. It might get them deposed, but failure to disclose them may trigger the automatic exclusion rule and prohibit the plaintiff from contesting the defense at summary judgment or trial.

Ultimately, the watchword of any limitations inquiry is diligence. Did the plaintiff diligently try to serve the defendant after the limitations period expired? Diligence is usually a fact question, but a lack of diligence, if unexplained and long enough, can be found as a matter of law. Under recent Dallas Court of Appeals cases, merely referencing the citation and proof of service is insufficient as a matter of law, and an unexplained delay of around 30 days may be too much. A plaintiff must build a record of the diligent steps taken to secure service of process. The defendant, in turn, should poke as many holes as possible in the plaintiff's alleged diligence.

Nevertheless, no matter which side of the case you are on, limitations can make or break it for your client. No plaintiff's lawyer wants to tell his client that the case was dismissed because the attorney could not show diligence in his service efforts. And no defense lawyer wants to realize too late that she missed a meritorious affirmative defense. When the statute of limitations is involved, no matter your side of the case, be diligent—it just might make or break your case. **HN**

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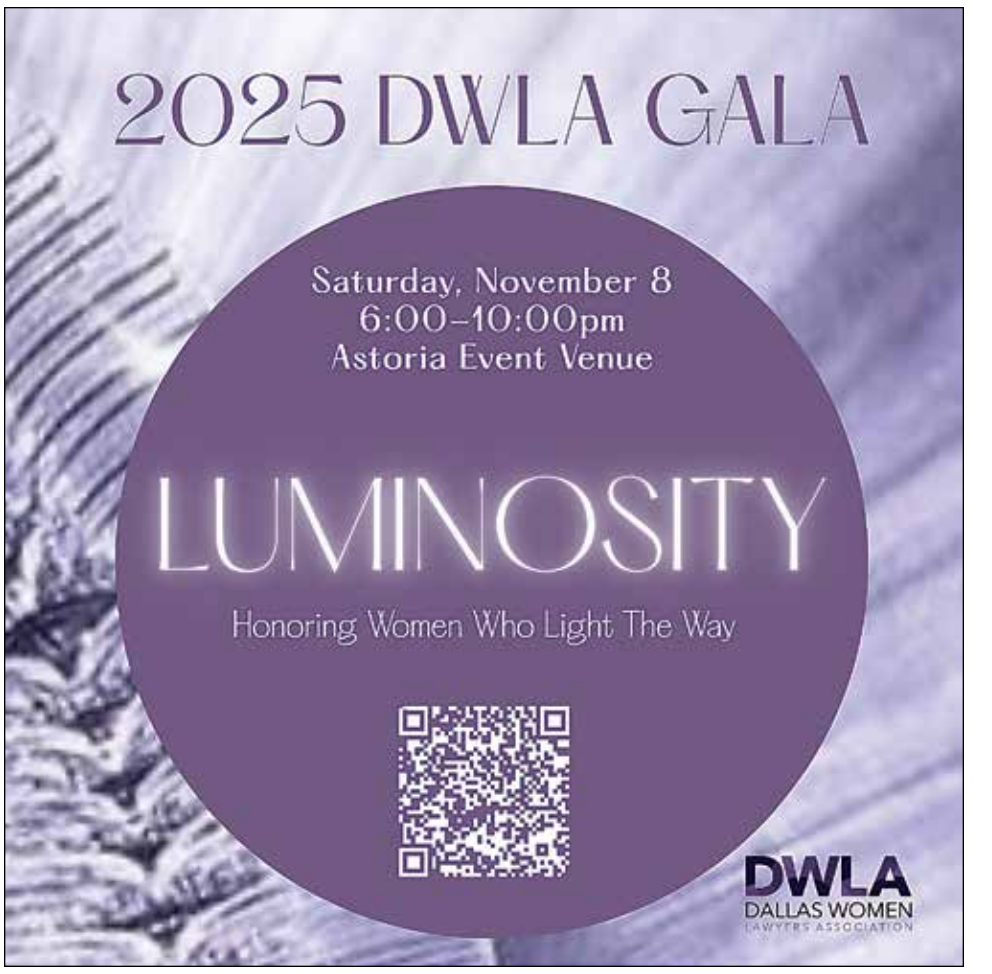

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Entrepreneurs in Community Lawyering Class of 2025

STAFF REPORT

This year, the Dallas Bar Association's Entrepreneurs in Community Lawyering (ECL) program welcomed new participants who are launching solo practices to serve Dallas residents of modest means. Throughout the year, these attorneys will receive mentoring, business development training, practice management resources, and one-on-one coaching to help them build sustainable practices.

"I am excited to welcome the aspiring solo practitioners into our attorney incubator program," said ECL Director **Stephanie Walker**. "With the support of the Dallas Bar Association, attorneys who have completed the program have gone on to build practices that serve everyday people in our community who previously could not afford representation."

Seeking flexibility to assist clients with business-related matters, **Kyla Duncan** is eager to establish her own practice.

"I hope to gain valuable networking and marketing advice on how to launch and maintain a successful practice and grow in areas that I might not otherwise have access to," she said.

Katelyn Kaske plans to use her background to support clients navigating CPS, custody, and other family law matters.

"Through my law firm, I plan to serve low- and moderate-income families by offering sliding-scale options, limited-scope services, and educational workshops," she said.

After nearly two decades in public service and policy work, **Sabrina Thomas** is turning her focus to clients in the sports and entertainment industries. She hopes to protect their intellectual property, guide them through estate planning, and assist with real estate transactions.

2025 ECL Class

"I want to build relationships with clients where I can see the tangible difference my work makes," she said.

Amy Cummings intends to open an immigration-focused practice.

"Clients deserve attorneys who treat them as individuals worthy of dignity," she said. "Meeting the hurting person, the scared person, the confused person where they are is how we show respect and that we care. Law is a beautiful thing when it is used to help the people who live under it."

Drawing on her own experiences and bilingual fluency in Portuguese and English, **Nathasha Amaral da Rocha** hopes to reduce language barriers to legal services.

"I aim to deepen my leadership and management skills, particularly in financial planning, strategic client development, and lean team building," she said.

Kelechi Onwumere is expanding her employment law practice to also include civil litigation.

"Work is central to most people's lives, and workplace issues can profoundly impact both individuals and organizations," she said.

Focusing on family-based, humanitarian, and deportation defense matters, **Claudia Vanessa Cubias** looks forward to launching her immigration practice.

"My vision is to provide legally sound, honest, affordable representation to low- and moderate-income individuals," she said.

The ECL program was established in 2019 under then-DBA President **Laura Benitez Geisler**, who structured it to require each participating attorney to complete 200 hours of pro bono service during the program year.

"Past ECL cohorts continue to increase the accessibility of legal services in their communities by offering sliding-scale fees, continuing pro bono work, and providing unbundled services," Walker added. "I look forward to seeing this new cohort build on that tradition."

To connect with the ECL program attorneys or Director Stephanie Walker, email ecl@dallasbar.org.

The DBA's Entrepreneurs in Community Lawyering (ECL) helps lawyers start solo practices that cater to everyday people. ECL is a year-long program that provides:

- Extensive training on establishing a successful practice
- One-on-one coaching from an experienced solo/small firm practitioner
- Free practice management resources
- Mentoring from lawyers in successful specialized practices
- Free access to legal research resources
- Networking/business development opportunities

The John DeWitt Gregory Charitable Trust Carries on His Philanthropy

CONTINUED FROM PAGE 1

the damage, he had proof that the remaining amounts were paid. Attorney **John Walker** of Sidley Austin accepted the case. He sent a demand letter outlining the unjust charges, attaching proof of rent payments, wrongful fees, and the landlord's failure to return the security deposit. With John's help, Chase obtained a settlement of $1,228.83, which represented three times his security deposit, along with a correction of his record, removing the $7,000 the landlord claimed he owed. Chase was relieved to have these issues resolved and glad to enjoy his new home with his family.

DVAP is a joint pro bono program of the DBA and Legal Aid of NorthWest Texas. The program is the only one of its kind in Texas and brings together the volunteer resources of a major metropolitan bar association with the legal aid expertise of the largest and oldest civil legal aid program in North Texas. For more information, or to donate, visit www.dallasvolunteerattorneyprogram.org. **HN**

Michelle Alden is the Director of the Dallas Volunteer Attorney Program. She can be reached at aldenm@lanwt.org.

When Informal Pre-Contractual Dealings Give Rise to Liability

BY ANGELA ZAMBRANO, LORA CHOWDHURY, AND ANDI GRECO

Business development often involves organic, informal dealings frequently paired with some amount of substantive "pitch" work that is done free of charge and in hopes of securing a formal engagement. Although most parties believe such pre-contractual work does not create legal obligations, courts have drawn a (somewhat blurry) line as to how much free work is too much.

To avoid creating unintentional legal liabilities, it is critical to understand how courts view various types of preparatory and pre-contractual work by professional service firms and where they draw the line between free work and legal liability under theories such as implied-in-fact contract, unjust enrichment, and *quantum meruit*.

A recent case in the United Kingdom, *H&P Advisory v. Barrick Gold*—decided under principles similar to those applied on this side of the pond—provides an extreme example of the liability that can arise under those doctrines. In that case, a small investment bank engaged in substantial pre-contractual work with two companies contemplating a merger—making critical introductions between key players, creating slide decks, and developing the companies' respective positions—all with the hope of ultimately being retained to complete the merger. Notably, much of this work was informal, with key meetings even occurring during a ski trip. When both companies hired other investment banks, the plaintiff sued, seeking $18 million. Although the court held that no oral fee agreement existed, it nevertheless found that the defendants had benefited from the work that the plaintiff had undertaken and awarded $2 million under *quantum meruit*.

Courts in many jurisdictions throughout the U.S., including Texas, New York and Delaware, have reached similar conclusions and have awarded plaintiffs substantial sums for providing valuable services without a formal agreement. In Texas, New York and Delaware, implied-in-fact contracts arise from the conduct of the parties, industry custom, or course of dealing. *Amcat Global, Inc. v. Greater Binghamton Development, LLC* is a good example from New York. Moreover, courts in these three states generally will impose liability based on *quantum meruit* where one party renders valuable services to another under circumstances that would reasonably notify the recipient that the provider expected compensation. For instance, in one Texas case, *Vortt Exploration Co. v. Chevron USA Inc.*, the fact that the parties had negotiated an agreement for years and the plaintiff provided proprietary information in furtherance of those negotiations gave rise to liability under *quantum meruit*. Even emails can create a deal, such as in *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.*, a Delaware case, where all material terms of a settlement agreement were set out in an email chain, thereby creating a contract.

But importantly, in all three jurisdictions (and unlike in the U.K.), mere pre-contractual services like pitch work, done in the hopes of ultimately winning the contract, typically will not give rise to an implied-in-fact contract or a successful *quantum meruit* claim. Something more—such as *Vortt*'s lengthy negotiation of a particular deal—is generally required.

Given this legal landscape, practitioners should remain aware of a number of considerations, as summarized below.

Risk Factors

Relevant case law reveals significant risk factors for business-side clients, including:

- When professional services are solicited or requested, a failure to clearly communicate that work will not be compensated, while leading the party to believe it will be, may create an obligation to pay.
- When counterparts send a string of casual emails, haphazard responses like "Deal" can unintentionally create binding agreements, including settlement agreements.
- When parties previously had a contract, but that contract has expired or been held invalid, operating as if the contract is still in force may give rise to a new deal.

Practice Tips

To help clients avoid these pitfalls and stave off legal liability, attorneys should follow the following best practices when recommending a particular course of action to their clients:

- Remind clients that a legally binding contract is not necessarily a formal written document—it can spring from conversations on the golf course, a string of emails, or the parties' conduct.
- Emphasize the importance of clear communication. Most of the cases in which courts have imposed liability involved a breakdown in communication between parties.
- To that end, explain to clients that they can expressly make deals conditional—for instance, by characterizing deal terms as "tentative" or conditioning an oral agreement on the execution of a written agreement.

Special Considerations for Lawyers

Finally, these principles can create unique problems for lawyers, as indicated below:

- Lawyers, too, can provide pre-contract work that could form the basis of an implied contract.
- Courts have found that a binding settlement agreement can arise even when lawyers communicate over email on behalf of their clients.
- Rules governing the creation of an attorney-client relationship often coincide with when a lawyer is formally engaged, and these concepts may complicate that analysis.

Understanding the doctrines expressed in the case law around pre-contractual dealings is critical for in-house and outside counsel. Careful attention to potential pitfalls and faithful application of these best practices can prevent unwelcome surprises. **HN**

Angela Zambrano is a Partner at Sidley Austin LLP and co-leader of the firm's global Litigation practice group. Lora Chowdhury is a Senior Managing Associate and Andi Greco is an Associate at the firm. They can be reached at angela.zambrano@sidley.com, lchowdhury@sidley.com, and andi.greco@sidley.com, respectively.

Come Be a Part of the Dallas Bar Association!

With events happening almost every day, the Dallas Bar Association has something for everyone! Whether it is monthly CLEs in our 30 Substantive Law Sections, hosting Conversations with Corporate Counsels, updating members on the world of AI, participating in Attorney Wellness activities, or presenting the annual DEI Privilege & Perspective program, we've got you covered! Join or Renew now at dallasbar.org.

State Bar of Texas President Santos Vargas (left, pictured with DBA President Vicki Blanton) came to the DBA to give a SBOT President's Update.

On September 10, the DMAP program hosted an AI half-day program titled "Say 'Hello' to the Future: Harnessing Generative AI in Your Law Practice." (from left) Tim Newman, Wei Wei Jeang, Rhonda Hunter, Victor Vital, and Andrew Gardner, who presented on Harnessing AI.

The Allied Dallas Bars Equality Committee hosted their signature Privilege & Perspective program on September 4 with a panel that included Ellen Gillis, Susan Krinskey, Carla Pratt, and Joseph Wright. In addition, attendees played the Game of Legal Life, which help participants visualize how their own privileges and disadvantages have shaped their careers.

In September, as part of The Privilege General Counsel Series, the DBA hosted A Conversation with Stephanie Gause Culpepper, Senior Managing Director, General Counsel, and Tyler Griffin, President of Mortgage Banking, of Lument. (From left): Mey Oritz, program co-producer; Mrs. Culpepper, Mrs. Griffin, DBA President Vicki Blanton, and program co-producer Rocío Cristina García Espinoza.

Legal Fee Financing: What Is It and How to Offer It

BY HANNAH DEFREITAS

What if you could receive your total fee upfront at the beginning of an engagement while still allowing your clients to pay in installments?

With legal fee financing, you can start taking advantage of this modern payment option today. Adding it as one of your firm's payment methods can help your practice reach more clients and increase your profitability.

What Is Legal Fee Financing?

Legal fee financing is an installment loan option that enables your clients to receive legal services while paying for them in installments. By establishing a direct relationship with the merchant, the consumer can avoid using credit cards to cover the cost of the purchase, eliminating the associated fees and interest charges associated with them.

Clients may use legal fee financing to pay various types of legal fees, including attorney hourly fees, flat fees, contingency fees, retainers, and statutory fees. Financing can also help clients cover additional expenses such as court fees, travel expenses, expert witness fees, and investigator fees.

By easing the burden of large, one-time bills, law firms can make their services more accessible to those who need them most.

Is It Ethical to Offer Financing for Legal Services?

Are third-party financing arrangements ethical? As of 2018, the ABA has clarified the issue with its helpful ethics decision, Formal Opinion 484, which addresses scenarios in which lawyers may assist their clients with third-party financing.

The opinion notes that lawyers may participate in these arrangements but should comply with specific model rules to ensure transparency and avoid conflicts of interest.

Additionally, many people who need access to legal representation can find the services expensive. By offering the option to pay for your legal services in smaller increments, you are providing access to a service that can have a positive impact on a person's life.

As with any new process you consider implementing in your firm, we recommend researching the nuances of offering legal services financing to your clients.

Who Is a Good Candidate for Legal Fee Financing?

Law firms that cater to first-time legal clients report cost as the primary deterrent for customers who decide not to retain legal counsel. With 67 percent of Americans living paycheck to paycheck and the hourly rate for legal representation ranging from $162 to $392, law firms must utilize the best available tools to help potential clients afford services.

Legal fee funding opens up access to legal representation to people in a variety of circumstances, including:

- Those with lower or unpredictable income
- Those who want an alternative to credit cards
- Those who have credit cards but would prefer to charge a manageable amount

When offering legal fee funding to your clients, it is crucial that you clearly communicate their financial responsibility from the start. It is possible that hiring a lawyer will be one of the most expensive decisions your client will ever make.

To spare them from unexpected bills and to ensure that you receive timely payment for your work, set clear expectations as to what clients can expect to see on legal invoices, when they will receive them, and how they will be able to pay.

Why Should Law Firms Offer Options for Legal Fee Financing? The shift toward alternatives to traditional legal billing is creating new opportunities for firms that offer flexible financing solutions. Here are some of the potential benefits.

Long-Term Client Relationships

Firms should consider offering legal fee financing as a potential avenue for establishing longstanding relationships with first-time clients, particularly younger consumers.

More Reliable Cash Flow

Fee funding improves the consistency and reliability of your cash flow. One of the most common reasons lawyers hesitate to let clients pay over time is that traditional payment plans can have a higher incidence of late and non-payments. The advantage of offering financing for legal fees is that it helps mitigate the risk of both.

Faster Payments

Legal financing enables firms to collect their full fees at the start of an engagement, rather than receiving smaller payments over time

More Ways for Clients to Pay

Your clients expect you to provide modern payment methods for their convenience. By offering fee financing and other flexible payment options, your firm can spend less time trying to collect unpaid legal fees and more time focusing on work that matters to you. **HN**

Hannah DeFreitas is a Senior Content Writer 8am™ LawPay.

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Digital Jury Selection: Leveraging Data Analytics in Voir Dire

BY JULIE PETTIT

The traditional voir dire process—relying on cursory questionnaires and brief in-court exchanges—is rapidly becoming inadequate for high-stakes litigation. Modern jury selection demands a comprehensive understanding of prospective jurors that extends far beyond what can be gleaned from conventional methods. As litigators, we should leverage ethical advantages, and today that means embracing the sophisticated data analytics and artificial intelligence tools that are transforming how we evaluate and select juries.

The Current Landscape of AI-Powered Jury Selection

The jury selection technology ecosystem has evolved dramatically over the past five years. Platforms like Jury Analyst, Jury-X, and JuryMapping now offer comprehensive juror profiling that would have been impossible to achieve manually within typical voir dire timeframes. These systems deploy natural language processing to analyze social media posts, public records, voting histories, and other digital footprints to construct detailed juror profiles. This process is done in moments, so you quickly have the results presented on your iPad or laptop as you pick your jury.

In a recent complex commercial case where I served as the jury consultant, we experienced firsthand the transformative power of these technologies. With a jury pool of over 100 potential jurors, we received the juror list an hour before starting voir dire. Our team employed an AI-driven platform that processed publicly available data to reveal political affiliations, voting patterns, educational backgrounds, and employment histories that would have been impossible to uncover through traditional research methods. The system identified specific graduate degrees and professional certifications that directly related to our case's technical aspects—information that proved crucial in making informed strikes and selections.

Beyond individual profiling, these platforms now offer household-level analysis, revealing family voting patterns and social networks that can provide additional context for understanding a juror's likely predispositions. The granular detail available through these systems represents a quantum leap from the surface-level-information traditionally available during jury selection.

Ethical Boundaries and Professional Responsibility

The power of these technologies naturally raises important ethical considerations. The American Bar Association's recent Formal Opinion 517, published in July 2025, provides crucial guidance for practitioners navigating this evolving landscape. The opinion makes clear that lawyers violate Model Rule 8.4(g) when they know or reasonably should know that their exercise of peremptory challenges constitutes unlawful discrimination.

However, the ABA's guidance also clarifies that discriminatory but lawful exercises of peremptory challenges do not violate professional conduct rules. This distinction is critical for practitioners using AI tools, as many legitimate strategic considerations—age, marital status, and educational background—remain permissible grounds for jury selection decisions.

The key ethical obligation is one of due diligence. As Opinion 517 emphasizes, lawyers using AI-assisted jury selection must "conduct sufficient due diligence to acquire a general understanding of the methodology employed by the juror selection program." This mirrors the ABA's broader guidance on AI competence, requiring lawyers to either understand the tools they're using or seek appropriate expertise.

Implementing AI Technology Responsibly

Successful integration of AI jury selection tools requires a structured approach that balances technological capabilities with ethical obligations. First, practitioners must thoroughly vet their chosen platforms, understanding the data sources, algorithmic methodologies, and potential bias indicators inherent in each system.

And second, these tools should augment, not replace, human judgment. While AI can rapidly process vast amounts of data and identify patterns invisible to manual review, the final selection decisions must remain grounded in legal strategy and courtroom experience. The technology excels at providing comprehensive background intelligence, but the art of reading body language, assessing candor, and evaluating responses to voir dire questioning remains fundamentally human.

The Competitive Imperative

Perhaps most importantly, recognize that this technology is not optional in sophisticated litigation. Your opposing counsel is likely already leveraging these tools, giving them significant advantages in jury selection.

The data advantage these systems provide is substantial. Traditional jury research might reveal that a prospective juror works in finance; AI-enhanced research reveals their specific educational background, professional network, social media activity patterns, and household voting history. This granular intelligence enables more precise strategic decisions about challenges and jury composition.

Looking Forward

The legal profession has always adapted to technological advances that improve client representation. From computerized legal research to electronic discovery, we have consistently embraced tools that enhance our effectiveness while maintaining ethical standards. AI-powered jury selection represents the next evolution in this progression.

The choice is clear: Embrace these technologies within appropriate ethical boundaries or cede a significant advantage to opponents who have already made that decision. The tools are available, the ethical framework is established, and the competitive landscape demands their use. **HN**

Julie Pettit is the founder of The Pettit Law Firm. She can be reached at jpettit@pettitfirm.com.

In The News

KUDOS

Hon. Audrey Moorehead, of County Criminal Court No. 3, has been appointed to the American Bar Association Standing Commission on Legal Education.

Erica Eslinger, of Katie L. Lewis, P.C., has been promoted to Partner.

Jonathan J. Bates, of Kinser & Bates, is the 2025 recipient of the Dan Price Award from the Family Law Section of the State Bar of Texas. He is also the co-recipient of the President's Award for 2025 from the Texas Chapter of the American Academy of Matrimonial Lawyers.

Hilda Galvan has been elected President of Center for Women in Law for 2025-26.

Juanita DeLoach, Ph.D., of Barnes & Thornburg LLP, is now an Advisory Board Member at NSBE DFW Professionals.

ON THE MOVE

Gregory Brassfield has taken a position as Vice President Legal; Deputy General Counsel, Litigation at Coupang, South Korea.

Jeffrey M. Harvey has joined Bradley Arant Boult Cummings as Partner.

Former Federal Judge **Barbara M.G. Lynn**, of the Northern District of Texas, has joined Lynn Pinker Hurst & Schwegmann.

Steven R. Smith has joined Thompson Coburn LLP as Partner.

Brett Pinkus has joined Spencer Fane LLP as Partner. **Joey Blake** has joined the firm as Associate.

Brian R. Carter has joined Integra Mission Critical as General Counsel and CLO.

Melinda Sims and **Logan Miller** joined Scheef & Stone LLP as Partner and Associate, respectively.

Katherine Gnadinger has moved to Zoom as Senior Commercial Counsel.

Nate Christensen has rejoined Weil, Gotshal & Manges LLP as Partner.

Matthew N. Smith has joined Polsinelli PC as Shareholder.

Rachael Jones has joined McKool Smith as a Principal in the Dallas office.

Christina Koenig has joined Sheppard Mullin Richter & Hampton LLP as Associate.

Chalon Clark, of Husch Blackwell LLP, has been promoted to Equity Partner.

News items regarding current members of the Dallas Bar Association are included in Headnotes as space permits. Please send your announcements to Judi Smalling at jsmalling@dallasbar.org

Texas Supreme Court Clarifies Policy vs. Practice of Medicine

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The Tragic Facts and the Legal Question

The plaintiff, a 35-year-old wife and mother of two, arrived at the emergency department with symptoms strongly suggestive of a pulmonary embolism (PE). Instead of undergoing the necessary diagnostic testing, she was diagnosed with a type of heart attack, admitted, and worked up for cardiac causes only. She was discharged without ever being screened for a PE. Three days later, she was found at home gasping for breath. She was rushed to the hospital but died shortly thereafter. An autopsy confirmed the cause of death: pulmonary embolism.

In their Chapter 74 expert reports, the plaintiffs alleged that the hospital was directly liable—not for any act of medical judgment, but for failing to adopt a "Triple Rule Out" protocol that would have empowered staff to initiate PE screening when patients presented with certain signs and symptoms, such as chest pain and shortness of breath. Had such a protocol existed, the appropriate testing would have been triggered at intake, the proper diagnosis most likely would have been made, and her life spared.

The hospital moved to dismiss these claims, arguing that only a physician can order tests or make a diagnosis, and that the plaintiffs' theory impermissibly implicated the hospital in the practice of medicine.

The trial court disagreed. But on appeal, the Fort Worth Court of Appeals reversed, concluding that the plaintiffs' expert failed to explain how his criticism did not amount to accusing the hospital of practicing medicine. The appellate court essentially required the plaintiff to negate, within the four corners of the report, any potential defense based on the corporate practice doctrine.

The Supreme Court's Ruling

Writing for the Court, Justice Lehrmann emphasized that the plaintiffs' expert "draws a line directly" from the hospital's failure to implement necessary protocols to the cascade of failures that led to the patient's death. The expert explained that the absence of a Triple Rule Out policy led to a breakdown in communication among interdisciplinary providers and a failure to initiate appropriate testing.

The Court found that the report met Chapter 74's standard by clearly articulating how the hospital's administrative shortcomings breached the standard of care and proximately caused the patient's death.

Crucially, the Court rejected the notion that a plaintiff must affirmatively refute potential statutory or constitutional defenses in a pre-suit report. The Court called this requirement a "hurdle that is neither statutorily nor judicially mandated." In so doing, it pushed back on two dangerous trends: (1) requiring plaintiffs to anticipate and rebut defensive theories in Chapter 74 reports, and (2) conflating hospital administrative obligations with medical judgment.

The Court acknowledged that hospitals may lawfully adopt protocols that guide clinical care—such as standing orders or escalation procedures—so long as those protocols do not *mandate* medical judgment. The ruling reaffirmed that "hospital policies may guide or suggest treatment paths without...running afoul of the prohibition on the corporate practice of medicine."

Why This Decision Matters

For practitioners, this decision provides some clarity. When a hospital fails to implement protocols that ensure timely and appropriate diagnostic screening, it can and should be held accountable—regardless of whether a physician ultimately made a fatal judgment call.

The Court's decision ensures that hospitals cannot use the corporate practice doctrine as a shield against their own administrative negligence. As Texas hospitals grow increasingly reliant on standing orders, decision trees, and team-based care, this ruling may prove essential in holding them accountable.

Final Thought

As Justice Cardozo once observed, "The law has its epochs of faith and epochs of skepticism." In *Bush*, the Texas Supreme Court affirmed its faith in the law's ability to evolve alongside modern medicine—recognizing that systemic failures deserve systemic accountability. **HN**

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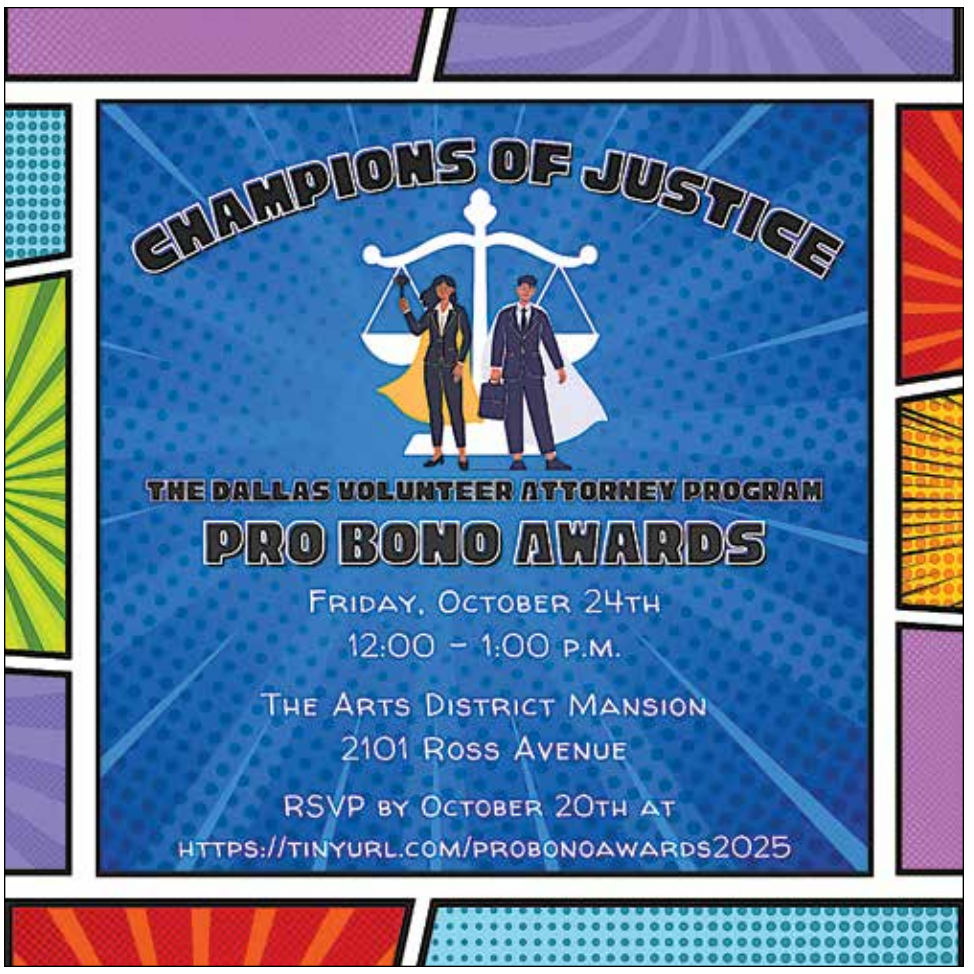

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Focus | Tort & Insurance Practice/Trial Skills

Locating All Sources of Insurance Coverage in Truck Crash Cases

BY QUENTIN BROGDON

Lawyers representing victims of truck crashes and lawyers representing truck drivers and carriers share an interest in locating all available insurance policies. The crash victim's lawyer needs to ensure that his victim has sufficient funds available to fairly and adequately compensate the victim, while the lawyer for the truck driver and carrier needs to minimize the probability of a verdict that exceeds the insurance policy limits.

Truck crash lawyers on each side of the dispute should investigate the following three sources of insurance coverage in every case:

1. coverage provided to the carrier that leases the tractor and trailer equipment—the lessee,
2. coverage provided to the owner-operator of the tractor and trailer equipment—the lessor, and
3. coverage provided for the equipment itself—the tractor and trailer equipment.

The insurance policy most often directly in play in truck crash cases is the policy providing coverage to the carrier. This policy usually is a commercial auto liability policy issued to the insured motor carrier, covering accidental losses arising out of the carrier's business. Too often, however, truck crash lawyers begin and end their analysis of potential insurance coverage with this policy.

Truck crash lawyers instead should locate not just these commercial auto policies, but all of the carrier's commercial general liability (CGL) policies. Although most CGL policies exclude auto liability, frequently the CGL policy is sold as part of a larger package that includes a commercial auto policy. There may also be a "hired and non-owned auto endorsement" within the CGL policy.

Coverage disputes arising out of the carrier's commercial auto policy are governed in the same manner as coverage disputes arising out of other automobile policies, with one important difference—commercial trucking policies contain a mandatory MCS 90 endorsement that has the potential to dramatically change the policy's coverage. The Motor Carrier Safety Act of 1980 requires all interstate motor carriers to have a Motor Carrier Safety (MCS) 90 endorsement attached to their policies. The MCS 90 endorsement protects the public by nullifying any attempt to reduce the statutory minimum coverage limits, notwithstanding coverage defenses and exclusions that might otherwise exist in the absence of the MCS 90 endorsement. The MCS 90 endorsement can turn an excluded insured into a covered "insured," and the endorsement can turn an excluded auto into a "covered auto."

Nevertheless, the reach of the MCS 90 endorsement is not unlimited. The consensus of the authorities is that the MCS 90 endorsement does not apply to interstate trips or to accidents that occur outside the United States. Nor does it apply to protect drivers or employees of the trucking company. Most courts hold that the MCS 90 endorsement does not create coverage when the driver is "bobtailing"—that is, driving a tractor without an attached trailer—because the endorsement applies only when the truck is being used to transport property, and that the endorsement does not impose any separate duty to defend claims or persons not otherwise covered under the policy. The MCS 90 endorsement is no guarantee of coverage, and the endorsement does not survive the exhaustion of the policy's coverage limits, according to the Fifth Circuit and other courts.

Meanwhile, the owner-operator—the lessor—may be covered under a non-trucking use policy, also known as a bobtail policy. Generally, this coverage includes only non-trucking operations, and there is a "business use" exclusion for operations occurring while the equipment is being used to carry property for any business or while the equipment is being used in the business of anyone to whom the auto is leased or rented.

Coverage disputes arising out of bobtail policies often arise out of whether the bobtailing trucker's activity at the time of the loss was in furtherance of the business interests of the lessee and whether the activity therefore should be excluded from coverage under the bobtail policy's "business use" exclusion. Courts have found the bobtail policy's "business use" exclusion applies, even in cases in which a tractor without a trailer attached was en route 1) to pick up a load, 2) to have an oil change, or 3) to pick up a trailer to get the trailer repaired, in each case because the tractor's operation nevertheless was furthering the commercial interests of the lessee.

Lawyers in truck crash cases also must locate copies of all insurance policies that may provide coverage for the equipment, especially the trailer. The trailer's insurance policy may provide additional coverage for the crash.

Plaintiffs' and defense lawyers in truck crash cases share an interest in locating all available sources of insurance coverage because doing so serves the bests interests of all parties in the case. Counsel should be aware, however, that this process involves more than simply locating the insurance policies that provide coverage to the carrier. Policies that may cover the owner-operator and the equipment itself are equally as important. **HN**

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