Dallas Bar Association
HEADNOTES

November 2023 | Volume 49 | Number 11 | Focus | Business Litigation/Appellate Law

Aaron Tobin to Receive 2023 Morris Harrell Professionalism Award

BY JAMES DEETS

According to guidelines adopted by the DBA Board, the Morris Harrell Professionalism Award is to be presented to a Dallas Bar Association member who best exemplifies, by conduct and character, truly professional traits that others seek to emulate and all in the Bar admire. In order to qualify for the award, one must be a role model, particularly for younger or less experienced lawyers. He or she must be well-respected by their peers and make others proud to be a part of the legal profession.

Aaron Tobin, who graciously served the DBA as its President, skillfully and successfully navigating the organization through the second year of the COVID pandemic, has been selected as the recipient of this year's Morris Harrell Professionalism Award. Aaron joins the ranks of 24 previous award recipients, all of whom have been beacons of light in the halls of the Arts District Mansion.

"I feel very fortunate to be a lawyer and I really believe it is a privilege to practice law. With this privilege comes the important responsibility to navigate your clients through their legal issues while leading with integrity and respect for the system and your fellow officers of the court," said Tobin when asked about his perspective on professionalism.

Tobin recognizes that everyone, including opposing counsel, experiences pressure from many areas of life outside of the practice of law. "I try to remind myself that everyone feels pressure, including my adversary. This helps me focus on the substance of the message as opposed to the way it is said. Sometimes it is hard to do, but if I can remember to be tough on positions and not on people, then it tends to lead to more civil discourse."

Aaron Tobin

In addition to numerous professional mentors, Tobin also attributes his professionalism toward others to include his mother. "I was raised by a single mom in a small town, who found herself divorced with two young kids, no job and no education at the time," Tobin said. "She put herself through school, obtained two degrees, including a masters in nursing, and became the first nurse practitioner in my small East Texas hometown."

Tobin explained that his mother drove 80 to 100 miles to school, worked two jobs, which included taking emergency room shifts on the weekends. "Despite all the challenges she went through, I cannot remember her ever raising her voice. If she can go through what she went through and maintain civility, then I should strive to do the same."

Tobin stated that he had many role models in the legal profession that shaped his approach to professionalism, noting "I was fortunate to be raised by a village." **Bill Holston**, who Tobin identified as one of his first bosses and a role model, has previously described Tobin as "creative, smart, and affable, all of which have been keys to his success."

Tobin also identified **Nina Cortell**, whom he met through the Patrick E. Higginbotham Inn of Court, as another one of his role models. Not surprisingly, Cortell received the Morris Harrell Professionalism Award in 2021; she described Tobin as "a true gentleman and the epitome of professionalism." This is high praise coming from a prior award recipient!

Cheryl Murray, current DBA President, stated that Tobin "epitomizes the characteristics" that entitle someone to the award. "Aaron is such a leader, not only putting in hard work and having creative ideas, but he has the mindset to make a difference for the benefit of others," Murray said. She described Tobin as a role model for all in the profession, both young and old.

Other than a few distant cousins, Tobin is the first in his family to become a lawyer. He became interested in law growing up, noting that in many cases, those who were leading and making an impact were lawyers. Tobin understood that a law degree could form the foundation for many different careers, and this encouraged Tobin to attend law school. "In law school [at SMU], my trial advocacy instructors encouraged me to channel my competitive fire towards a career in the courtroom, and I am so happy they did," Tobin said.

Tobin is definitely an asset to our profession. He leads the trial practice at Condon Tobin Sladek Thornton Nerenberg PLLC, where he is a partner. "Aaron is such a good attorney, a gifted practitioner who goes the distance for his clients," said Murray. "Aaron is one of the most well-respected people for all that he does for our profession and our community."

Not only is he passionate about serving the Bar and the community in which he lives and works, Tobin also volunteers his time to serve on local non-profit boards and to mentor young lawyers. He frequently speaks to young lawyers and has served as an instructor in the Dallas Bar Association's Trial Academy.

Tobin is a past President of the Dallas Bar Association. He is perennially named to Best Lawyers in America and has been named one of the Top 100 lawyers in Texas by Texas Super Lawyers. Tobin is a business trial lawyer who regularly represents Fortune 500 companies, private equity, small and mid-size businesses, executives, officers, directors, and entrepreneurs in state and federal courts all over the country. He has successfully tried and obtained well into the nine figures in jury verdicts and judgments in business cases.

In spite of his successes and contributions to the DBA and the profession, Tobin remains humble and is personified by a spirit of gentleness and caring. "I'm just incredibly humbled to be selected to receive this award," Tobin said. "I feel like I do not deserve the recognition, but I want to do my part and carry the message that all those great lawyers who received the award before me have carried for so many years."

Congratulations to Aaron Tobin on his receipt of this prestigious award. Join us in celebrating him at the DBA Awards Luncheon on Wednesday, November 29, noon, at the Arts District Mansion. RSVP at dallasbar.org. **HN**

James Deets is a Senior Director at Alvarez & Marsal Taxand, LLC and is a past Chair of the Publications Committee. He can be reached at jdeets@alvarezandmarsal.com.

Thank You to Our Major Donors

The Dallas Bar Association and Legal Aid of NorthWest Texas kicked off their annual Equal Access to Justice Campaign benefiting the Dallas Volunteer Attorney Program. A number of Dallas firms, corporations, and friends have committed major support. Join us in recognizing and thanking the following for their generous gifts*:

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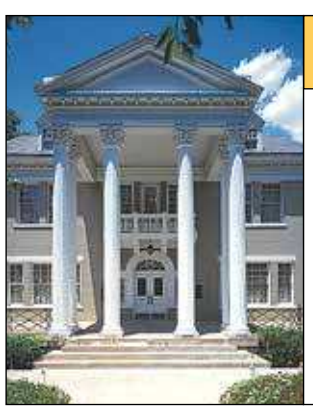

Inside

DBA MEMBER REMINDER
RENEW ONLINE MID-OCTOBER

You may now renew your 2024 DBA Dues online!
Go to dallasbar.org and click on the MyDBA button to log in and renew online or print your 2024 Dues Renewal invoice to mail in with payment. Your 2024 DBA DUES must be paid by December 31, 2023, in order to continue receiving ALL your member benefits.
Thank you for your support of the Dallas Bar Association!

Programs and meetings are presented Virtually, Hybrid, or In-Person. Check the DBA Online Calendar (www.dallasbar.org) for the most up-to-date information. Programs in green are Virtual Only programs.

Calendar | November Events

Visit www.dallasbar.org for updates on Friday Clinics and other CLEs.

NATIONAL NATIVE AMERICAN HERITAGE MONTH

November is National Native American Heritage Month. For information visit https://buff.ly/3rKDw9p. For more on the DBA's Diversity Initiatives, log on to www.dallasbar.org.

WEDNESDAY WORKSHOPS

NOVEMBER 15

Noon *"The 2023 Texas Privacy & Security Act: Coordinating Compliance & Minimizing Risks under US State Privacy Laws," Jenifer McIntosh.* (MCLE 1.00)*

WEDNESDAY, NOVEMBER 1

Noon **Employee Benefits & Executive Compensation Law Section**
"ERISA Litigation Update: Autumn 2023," Lacy Durham and Felicia Finston. (MCLE 1.00)* *Virtual only*

Solo & Small Firm Section
"The Texas Post-Pandemic Rules of Civil Procedure," Andy Jones. (MCLE 1.00)*

Allied Bars Equality Committee. ***In person only***

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

THURSDAY, NOVEMBER 2

Noon **Construction Law Section**
"Ethics for Construction Lawyers," Kendall Bryant and Rekha Roarty. (Ethics 1.00)* *Virtual only*

Admissions & Membership Committee. ***In person only***

Criminal Justice Committee. *Virtual only*

Judiciary Committee. ***In person only***

FRIDAY, NOVEMBER 3

3:30 p.m. **DBA Annual Meeting**
Reception at 3:30. Meeting starts promptly at 4:00 p.m.

SATURDAY, NOVEMBER 4

7:00 p.m. **DAYL Bolton Ball**
At the Arts District Mansion. Register at dayl.com/bolton-ball

MONDAY, NOVEMBER 6

Noon **Tax Law Section**
"Tax Traps and War Stories in M&A," Aaron Pinegar and Ashely Withers. (MCLE 1.00)* ***In person only***

TUESDAY, NOVEMBER 7

Noon **Corporate Counsel Section**
"Risk Management for In-House Counsel." (MCLE 1.00)* ***In person only***

Tort & Insurance Practice Section
"Texas: Welcome to the Lodestar State," Jody Sanders. (MCLE 1.00, Ethics 0.25)* ***In person only***

Morris Harrell Professionalism Committee. *Virtual only*

DWLA Board of Directors

6:00 p.m. DAYL Board of Directors

WEDNESDAY, NOVEMBER 8

Noon **Bankruptcy & Commercial Law Section**
"Law Clerk Panel,; Sean Burns, Abdullah Khalil, Saylor Nolan, Katie Resnick, Laryssa Sommer, and Daniel Tavera. (MCLE 1.00)* ***In person only***

Family Law Section
"Family Violence and Immigration Implications in Family Law Cases," Belinda Arroyo and Sara Barnett. (MCLE 1.00, Ethics 0.50)* ***In person only***

Public Forum
"Cultural Competency Event," Jane McBride, Mey Ly Ortiz, and moderator Nnamdi Anozie. Virtual only

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

THURSDAY, NOVEMBER 9

9:00 a.m. **Juvenile Delinquency Conference**
Free for DBA Members; Non-members $110. Presented by the DBA Child Welfare & Juvenile Justice Committee. (MCLE 6.00, Ethics 2.00)* *Virtual only*

Noon **Alternative Dispute Resolution Section**
"ADR in the Healthcare industry," Dr. John Potter. (MCLE 1.00)* *Virtual only*

Minority Participation Committee
"Part I: Talking About Our Generations: How to Build a More Equitable & Inclusive Workplace for Employees of All Ages," Al Ellis, Fred Gaona III, Hon. Rhonda Hunter, Janet Landry Smith, and moderator Alexier Barbour. (DEI Ethics 1.50)* *Virtual only*

CLE Committee. *Virtual only*

Publications Committee. *Virtual only*

FRIDAY, NOVEMBER 10

Noon **Government Law Section**
"Don't Let Bumps Lead to Blunders," Melissa Cranford. (MCLE 1.00)*

Trial Skills Section
"Cross Examination of Expert Witnesses," Shane Read. (MCLE 1.00)*

MONDAY, NOVEMBER 13

Noon **Real Property Law Section**
"Navigating the Complexities of Mixed-Use Development: A Lawyer's Perspective on RedBird Mall," Julia Beckman and Phill Geheb. (MCLE 1.00)*

Peer Assistance Committee. *Virtual only*

Senior Lawyers Committee. ***In person only***

Sand Branch Food Drive Begins
Drop off donated non-perishable food items at the Arts District Mansion. For more information contact al@textrial.com.

TUESDAY, NOVEMBER 14

Noon **Business Litigation Section**
Topic Not Yet Available

Education Law Study Group
"Pi-Yay!" Felicia Webb. (MCLE 1.00)* *Virtual only*

Immigration Law Section
Topic Not Yet Available

Mergers & Acquisitions Section
"The Corporate Transparency Act: What You Need to Know," Bart Nebergall. (MCLE 1.00)* *Virtual only*

DVAP CLE
"How to Handle your First (or 10th) Termination/Adoption Case." (MCLE 1.00)* *Virtual only*

Community Involvement Committee. *Virtual only*

Courthouse Committee. *Virtual only*

Home Project Committee. ***In person only***

Legal Ethics Committee. *Virtual only*

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

WEDNESDAY, NOVEMBER 15

Noon **Energy Law Section**
"Extracting Value from Oilfield 'Waste'," Lee Gill. (MCLE 1.00)* ***In person only***

Health Law Section
"AI Risks in the Healthcare Space," Jody Rudman. (Ethics 1.00)* *Virtual only*

Wednesday Workshop
"The 2023 Texas Privacy & Security Act: Coordinating Compliance & Minimizing Risks under US State Privacy Laws," Jenifer McIntosh. (MCLE 1.00)*

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

Pro Bono Activities Committee. *Virtual only*

Public Forum Committee. *Virtual only*

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

THURSDAY, NOVEMBER 16

Noon **Appellate Law Section**
"Recent Changes to Permissive Interlocutory Appeals in Texas," Rich Phillips. (MCLE 1.00)* ***In person only***

Minority Participation Committee
"Part II: Creating a Culture Where Everyone Thrives: Disability Inclusion in the Workplace," Prof. Katherine Macfarlane. (DEI Ethics 1.50)* *Virtual only*

4:00 p.m. DBA Board of Directors

6:30 p.m. **DBA & SMU Pickleball Mixer**
Held at Chicken N Pickle Grand Prairie. Registration fee $18 at dallasbar.org.

FRIDAY, NOVEMBER 17

No DBA events scheduled

SATURDAY, NOVEMBER 18

7:00 p.m. **Dallas LGBT Bar Association Visibility Ball**
Email info@dallaslgbtbar.org for more information. Held at the Virgin Hotel.

MONDAY, NOVEMBER 20

No DBA events scheduled

TUESDAY, NOVEMBER 21

Noon **Antitrust & Trade Regulation Section**
Topic Not Yet Available

Entertainment Committee. *Virtual only*

WEDNESDAY, NOVEMBER 22

No DBA events scheduled

THURSDAY, NOVEMBER 23

DBA offices closed in observance of Thanksgiving

FRIDAY, NOVEMBER 24

DBA offices closed in observance of Thanksgiving

MONDAY, NOVEMBER 27

Noon **Science & Technology Law Section**
Topic Not Yet Available

Securities Section
Topic Not Yet Available

TUESDAY, NOVEMBER 28

9:00 a.m. **Giving Tuesday**
Celebrate giving by giving back to DVAP – www.dvapcampaign.com

Noon **Probate, Trusts & Estates Law Section**
"Presentation on Collecting Fees," Jeanne Huey. (Ethics 1.00)* *Virtual only*

WEDNESDAY, NOVEMBER 29

Noon **DBA Awards & Court Staff Luncheon**
All members invited. We will honor DBA award recipients, present our Committee and Section awards, and recognize court staff. RSVP to lhayden@dallasbar.org.

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

THURSDAY, NOVEMBER 30

Noon DBA CSF Board of Directors

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

Get to Know the DBA Executive Director, Alicia Hernandez

BY CHERYL CAMIN MURRAY

Many of you know **Alicia Hernandez**, the Dallas Bar Association Executive Director. However, do you really know her? I had the opportunity to interview her, so you can learn more about her on both a professional and personal level.

By way of background, Alicia was born in Baltimore, Maryland. Her family moved to Puerto Rico when she was a baby, and they lived there for two years. Thereafter they returned to Maryland and then later moved to Shreveport, Louisiana, for a new career opportunity for her dad. Alicia spent most of her childhood in Shreveport along with her older sister and younger brother. Alicia is the only lawyer in her immediate family.

Alicia Hernandez

Alicia is happily married to Domingo and has three children, Martín (age 20), Anna Rose (age 19), and John (age 17). I learned that Alicia loves genealogy—in other words researching and studying her family tree. Her son, Martín, had a Boy Scout project where he was required to research his ancestry in order to obtain a genealogy badge. He was not very interested in the project, but Alicia found it fascinating.

Alicia became a lawyer because she wanted to help people, which is no surprise to anyone who knows Alicia. She is always doing whatever she can for others.

Her first legal job was with the federal government, working at the U.S. Department of Health and Human Services, in the Office of General Counsel. Thereafter, she found a position at Legal Services of North Texas (which is now known as Legal Aid of NorthWest Texas). Alicia worked in the pro bono clinic in law school, and she loved it. She knew this new legal aid position was right for her.

At Legal Services of North Texas, she served as a legal aid staff attorney and was later promoted to Director of Pro Bono. Alicia was encouraged to get involved in the DBA and work on the DBA Pro Bono Activities Committee. This is how Alicia got to know **Cathy Maher**, the DBA Executive Director at that time.

Cathy ultimately recruited Alicia to work full-time for the DBA as the Director of DVAP and Director of Community Services. During this time, Alicia was very involved in the Belo Mansion (now known as the Arts District Mansion) Expansion initiative, which had a goal of raising millions of dollars to expand the footprint and parking for the Mansion so it could be the incredible DBA headquarters that it is today.

I asked Alicia if she had any mentors over the years. She mentioned **Lois Bacon**, who unfortunately passed away about 14 years ago. Lois was an attorney and steadfast DBA member, who went back to law school as a second career and worked at legal aid as a volunteer. She was vested in helping Alicia and her career. We could all use a Lois in our lives.

Thanks to Alicia's time working at Legal Services, she learned about the non-profit industry and management of not-for-profit companies. As a result, when Cathy was planning to step down as DBA Executive Director in January 2017, Alicia dusted off her interview skills and put her name in the hat for this prestigious position. After intensive rounds of interviews, Alicia was enthusiastically offered the role. Alicia recalls being very nervous the night before her first day as DBA Executive Director. However, after a few hours on the job, it hit her that she was working at the same place she had for many years, but with an expanded role. Her butterflies quickly flew away.

As Executive Director of the DBA, Alicia manages the overall operations of our Association and along with the President, Officers, and Directors, oversees projects, activities, financing, budgeting, and strategic planning. She is running the Dallas Bar Association like any CEO would run a business and ensures the organization stays in the black, while continuously monitoring it and looking for ways to improve it for the benefit of its members.

Alicia loves serving as the Executive Director and enjoys the people she works with on a regular basis. She still has the opportunity to help people through pro bono, as well as to help the DBA members with mentoring opportunities.

In particular, Alicia feels lucky she had the opportunity to help organize and participate in the DBA Transition to Law Program, which assigns young lawyer mentees to more experienced attorney mentors. Alicia believes mentorship is crucial because it has a lasting, positive impact on individuals and, through this program, our legal profession.

I asked Alicia to describe what she has learned about the DBA—both the positive and challenging aspects. Alicia explained that the challenges are also the positive points. For example, the DBA is a large organization with close to 12,000 members. This means it has something for everyone because of all the sections, committees, activities, events, and opportunities for every type of lawyer. However, its large size also means that those running the organization must work very hard at communicating to the members, in different ways, in order for them to be aware of everything that the DBA has to offer.

Alicia feels very fortunate to have a wonderful team of DBA professionals working by her side. The DBA professionals are a cohesive group with a family spirit. They have a common goal of serving other people and supporting the DBA members. They rally around each other on a professional and personal level and are there for each other on a daily basis.

In honor of the DBA's 150th birthday, I asked Alicia where she sees the DBA in 20 years. She explained that we have many of the same core values that we had 150 years ago. We remain committed to professionalism, excellence, and supporting the members and each other. Access to Justice is a recurring theme for the DBA throughout the years, as well as the commitment to the rule of law and diversity, equity, and inclusion. The core values of the DBA's members and professionals seem to be constant through the years, but how we address them through our specific programs continues to evolve over time.

Alicia believes we need to put more focus on young and new lawyers in order for the Association to stay relevant to them and their needs, to get them more involved, and to keep our edge at being the best Bar in the country. The DBA will hopefully continue to be a way of life for all lawyers in the Dallas community and beyond because they will know its value.

Finally, I requested that Alicia let us know what the DBA membership can do to support her and her team. She flipped the question back to us and asked that we provide feedback on what is going well, and what the DBA can do better. She wants to know. Her response to this question goes back to why she became a lawyer—to serve others. She wants to know how the DBA can help you.

We congratulate Alicia for her years of incredible service to the Dallas Bar Association, its members, and the Dallas community. The DBA's continuous success is in large part due to Alicia's conscientiousness, sincere dedication, and very hard work along with her devoted and talented team. Alicia, we applaud and appreciate you!

Many thanks,
Cheryl

HEADNOTES
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Headnotes serves the membership of the DBA and, as such, editorial submissions from members are welcome. The Executive Editor, Editor, and Publications Committee reserve the right to select editorial content to be published. Please submit article text via e-mail to jsmith@dallasbar.org (Communications Director) at least 45 days in advance of publication. Feature articles should be no longer than 800 words. DISCLAIMER: All legal content appearing in Headnotes is for informational and educational purposes and is not intended as legal advice. Opinions expressed in articles are not necessarily those of the Dallas Bar Association.

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Aldous\Walker Supports EAJ to Help Others

BY MICHELLE ALDEN

The Dallas Volunteer Attorney Program (DVAP) is very fortunate this year to receive the support of Aldous\Walker LLP, with a $25,500 donation. This makes an impressive total of $52,250 from **Charla Aldous** since 2011.

The attorneys at Aldous\Walker try cases because they are passionate about helping people. They try all types of civil cases, from wrongful death to birth injuries to truck accidents to sexual assault. The firm aims to help clients get through tough times and come out stronger.

"I can't imagine walking away from this career one day and saying only, 'I did a good job for my clients.' I will only sleep well at night if I can point to those cases where I didn't stand to earn a single dollar, but I did the work anyway—and did it well—because it was the right thing to do. I have always operated that way and always will," said Charla.

In addition to supporting the Equal Access to Justice Campaign, Aldous\Walker handles various pro bono matters. Charla and Brent represented a woman identified only as Jane Doe, a local restaurant employee who, in May 2020, at the height of the pandemic, simply wanted to wear a face covering at work to protect herself and others. The restaurant refused to let her do so and declined to give her any hours to work until, or unless, she ceased wearing the covering. Aldous\Walker went to court on her behalf and secured a temporary restraining order allowing their client to wear a face covering and prohibiting the restaurant from retaliating against her.

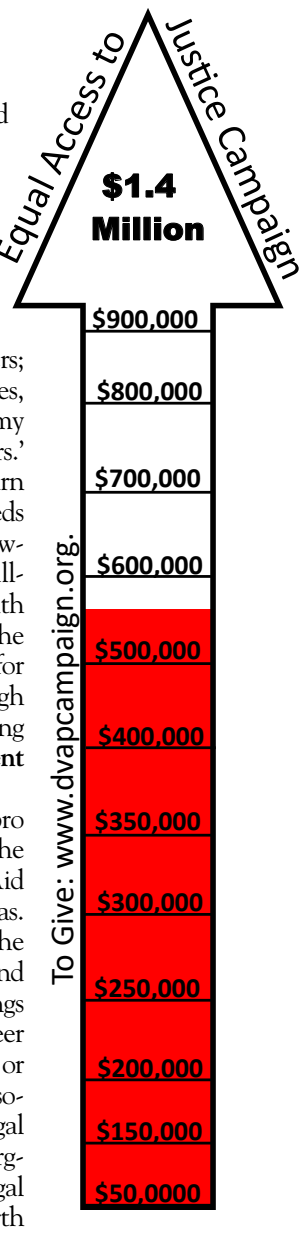
Charla Aldous

Brent Walker

Similarly, 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, one more grandparent able to adopt a child whose parents are absent, or one more person who is able to finally secure employment due to an old criminal charge being expunged.

In one recent case, an elderly and indigent resident, Matilda, was being evicted during the summer heat wave from senior housing. She had no friends or family and was current on rent; indeed, housing assistance programs compensated the landlord for the unit. She was being evicted over a series of disagreements with the landlord, which the landlord's representative admitted on the stand were non-threatening and non-violent. "Thanks to DVAP, we were able to step in and obtain an agreed dismissal of this action, allowing Matilda to stay in her unit well past the heatwave and enabling her to move out in peace," explained **Eugene Temchenko** of Vinson & Elkins LLP.

"Our jobs can be demanding and stressful and run you down. But the reward in knowing you helped bring goodness and light into someone's life makes it all worthwhile. I tell my kids every day before school to do good for others; for their whole lives, I have described my job as 'helping others.' I want them to learn how that view feeds the soul. I hope all lawyers can feel the fulfillment that comes with helping others for the right reasons, not for pay, whether through pro bono or supporting DVAP," added **Brent Walker**.



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.

Focus | *Business Litigation/Appellate Law*

Mastering the Mechanics of Mandamus

BY NEIL STOCKBRIDGE

Drat! You know the familiar feeling. Your mandamus petition just got denied. You even had a compelling case for mandamus relief this time. Oh well. At least you managed everyone's expectations, explaining that mandamus petitions have an incredibly low success rate, right? Think again.

True, mandamus petitions are rarely granted. But the likelihood of success is higher than your instinct tells you when the petition is filed properly. You may not have realized it, but the reason your petition was denied may have had nothing to do with its merits. Petitions are commonly denied simply because they are defective. And the appellate rules impose no obligation on the appellate courts to explain the basis for a denial, alert you to any procedural defect, or give you an opportunity to cure any defect standing in the way of a merits review before denying your petition. Ouch.

There is good news, though. These procedural technicalities are easy to comply with once you have mastered a few basic mechanics of mandamus petitions. Mandamus petitions (and other original proceedings) are governed by Rule 52 of the Texas Rules of Appellate Procedure. The most common procedural pitfalls are Rules 52.3(j) and 52.7(a). These rules function to ensure (1) the record on which your petition is based is complete, (2) your petition accurately reflects the record, and (3) the court may rely on your record and petition. If you cannot follow these two rules, then do not pass go, do not collect $200.

Rule 52.7(a) requires two things: (1) include with your petition every document that is material to your claim for relief and that was filed in any underlying proceeding, including any transcript of any relevant testimony, and (2) make sure it is all properly authenticated. Most have little issue providing all the material documents. But try not to go overboard. Generally, it will suffice to include the live petition, answer, relevant motion, briefing, evidence, reporter's record, and order at issue.

What trips up most people under Rule 52.7(a) is twofold. First is forgetting to either include a transcript of the relevant testimony or specifically state there was no testimony adduced in connection with the matter complained. The best practice here is to always include a copy of the reporter's record for any relevant hearing. Second is failing to properly authenticate the documents in the record. The rule requires certified or sworn copies. Certified copies may be ordered from the appropriate court clerk. Simple attorney certifications à la a certificate of service will not suffice. Documents become sworn copies when they are attached to an affidavit or to an unsworn declaration stating under penalty of perjury that the person making the affidavit or unsworn declaration has personal knowledge that the copies of the documents attached are correct copies of the originals. Swearing to the authenticity yourself is simple, convenient, and cost-effective. But beware. Affidavits and unsworn declarations are subject to perjury. So, it behooves you to find the person with complete familiarity and personal knowledge of your file, the trial court's file, and everything included in the mandamus record. If you use an unsworn declaration, be sure it complies with Chapter 132 of the Texas Civil Practice and Remedies Code. As a bonus tip, be sure to include an index of every document included in the record. Indexes are helpful, and Rule 52.7(c) requires them.

The other rule you need to master is Rule 52.3(j). It requires you to certify that you have "reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record." Avoid including a 52.3(j) certificate with your petition without ensuring the record supports your factual statements. Include precise record citations; they are necessary and help ensure your certification is accurate.

Reasonable people can disagree on whether an appellate court should be able to deny a petition on what some may call a minor technicality without allowing an opportunity to cure the defect—let alone providing notification of the defect. Indeed, the Supreme Court Advisory Committee recently debated the wisdom of the current iteration of Rule 52 and recommended that the Supreme Court amend Rule 52 to provide notice and an opportunity to cure procedural defects. However, the recommendation was not unanimous (16 committee members favored the amendment and nine opposed it). Notably, the recommendation is not binding, and it is yet to be seen whether the Supreme Court will adopt it. Until and unless it does, master these mandamus mechanics to ensure your petition is reviewed on the merits. **HN**

Neil Stockbridge is a Staff Attorney for the Fifth Court of Appeals. He can be reached at neil.stockbridge@txcourts.gov. Any views expressed in this article are solely the author's and do not represent any view of the Court, any justice, or any court staff.

Focus | Business Litigation/Appellate Law

Securing Your Judgment Assets Before Judgment

BY TATE HEMINGSON

Attorneys (and their clients, in particular) can be dismayed to find after hard-fought litigation that a once-promising judgment is now worth nothing more than the paper it is written on. Texas law, however, provides several pre-judgment remedies that give a potential judgment creditor the chance to secure money or property belonging to the defendant before a judgment becomes final. These remedies are most useful when there is a concern that the defendant has limited assets that may no longer be available once litigation is done. A few common pre-judgment remedies include garnishment, sequestration and attachment, receivership, and injunctive relief.

Do Your Homework

It is important early on (ideally *before* suit) to research the defendant's assets, through public records or a private investigation firm. The more you can find out on the front end, the better your chances of success when it matters in the future.

Pre-Judgment Garnishment

If you know or suspect the defendant has a bank account in the state, then a pre-judgment writ of garnishment might be a good option to secure any of the defendant's funds or other property (e.g., stock certificates, safety deposit contents, etc.) held by the bank or other financial institution. While often considered a post-judgment remedy, garnishment is available before judgment, though a few additional steps are required under Chapter 63 of the Civil Practice and Remedies Code and corresponding procedural rules.

First, the debt must be liquidated and not contingent (i.e., no tort claims or damages to be decided by the jury). Second, the application for the writ must be supported by an affidavit stating: (1) the debt is just, due, and unpaid, (2) the defendant does not have property within Texas sufficient to satisfy the debt, and (3) the garnishment is not sought to injure the defendant or garnishee.

Once filed, the court must hold a hearing (which can be ex parte) on the application and determine a bond amount. A bond is required for the writ to be issued. Once issued, the writ is served on the garnishee, who must freeze the garnished funds or hold property of the defendant. The defendant has options to try to dissolve the garnishment or post a replevy bond to regain access to the frozen assets.

Sequestration & Attachment

Sequestration and attachment provide two similar pre-judgment remedies. Both allow a creditor to secure a debtor's property (real or personal) in immediate danger of being concealed, disposed-of, ill-treated, wasted, destroyed, or removed from the court's jurisdiction.

Sequestration mainly differs from attachment in that the creditor must have a valid security interest in the to-be-sequestered property. Sequestration thus most commonly involves disputes over real or personal property. Attachment does not require a security interest—generally, only a liquidated debt.

Both remedies require a separate application to the court supported by an affidavit to establish the requisite elements, a hearing, and the posting of a bond. If issued, the sheriff or constable will seize or secure the property at issue, which will usually be held pending final judgment. Though in cases where the property seized may significantly diminish in value or go to waste during the lawsuit (think perishables), the assets may be sold before judgment.

Receivership

Another option in certain cases is to request the appointment of a receiver over the defendant. There are specific requirements set forth in Chapter 64 of the Civil Practice and Remedies Code. This option could be useful to preserve a business or asset to avoid its loss during the pendency of the litigation.

Injunctive Relief

Finally, a plaintiff can look to traditional injunctive relief to preserve potential judgment assets. This could be useful in situations in which a defendant is known to be selling or transferring assets during (or in anticipation of) suit to render a future judgment uncollectible. In such cases, a plaintiff must meet the traditional injunctive relief requirements to show there is no adequate remedy at law and, unless the defendant is enjoined, the plaintiff will suffer immediate and irreparable harm.

Each of these options require careful planning and execution to ensure that all the applicable statutory and procedural requirements are met, and they do not come without some risk. For those planning to seek such remedies, it is equally important to know the requirements in advance so that, if possible, you are prepared to avoid future impediments to recovering on a judgment. **HN**

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Focus | Business Litigation/Appellate Law

Securing Judgment for Appellate Attorney's Fees

BY BETH M. JOHNSON

Some people just cannot handle losing. Even if the trial judge followed the law and issued orders well within the court's discretion, the losing party still might appeal. Facing an appeal after winning at trial can be frustrating because even if the appeal is arguably not "frivolous," it might be destined to lose. The appellee must then choose whether to ignore the appeal and hope the appellate court makes the right decision or pay more attorney's fees to defend the judgment.

To help ease this decision, the winning party can ask for conditional appellate attorney's fees. Because the award is sought before an appeal, the award must be made conditional on the appellant's unsuccessful appeal. In other words, the award is granted only if the "losing" party wastes the "winning" party's time by delaying finality of the case without changing the trial's outcome.

The request must be made while the trial court still has plenary power. When an appeal begins, the trial court's plenary power would have already expired, and without a remand, the trial court would lack authority to do anything after the appeal, much less award fees. Thus, to protect the appellee from having to pay more attorney's fees, the request should be made during the trial. Note: a judgment for conditional appellate fees will not force the appellant to pay fees up front, but it will require payment at the end of the appeal if the appellant loses.

In 2019, in *Rohrmoos Venture*, the Texas Supreme Court issued an opinion describing how to present sufficient evidence to support awards for attorney's fees in fee-shifting situations. In 2020, in *Yowell*, the Texas Supreme Court further explained that the *Rohrmoos* standard also applies to requests for appellate fees; however, because those fees have not yet been incurred, the evidence will necessarily be speculative. An expert—i.e., an attorney—must present opinion testimony regarding who will represent the appellee, what hourly rates will be charged, and what services will be necessary to ensure appropriate representation.

Testimony that the court should award $10,000 in the event of an appeal is conclusory and provides no information about what must be done in an appeal, what kind of attorney is going to do the work, or how many hours the appeal will require. Unfortunately, awards of appellate attorney's fees are regularly reversed because conclusory testimony was all that was offered. As the *Yowell* court stated, "uncertainty does not excuse a party seeking to recover contingent appellate fees from the need to provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services."

If appellate counsel has not yet been selected, the trial attorney should be able to determine the reasonable fee for appellate counsel. Typically, the bare minimum tasks to defend an appeal would be to file a notice of appearance; review the appellant's brief, record, and relevant legal authority; draft an appellee's brief; present oral argument if necessary; and review the final opinion to explain it to the client. The trial attorney should have an idea based on trial about what issues are likely to be presented on appeal and provide estimates as to the number of hours that will be required. Alternatively, the trial attorney could consult with an appellate attorney for a more accurate idea of the potential work involved. Also, the trial attorney can ask for fees if the winning party has to respond to a motion for rehearing in the appellate court or a petition for review in the Texas Supreme Court.

As mentioned above, the trial court would lack authority to grant fees after an appeal in the absence of a remand. In a recent Dallas opinion, the appellant was granted a remand for the consideration of appellate attorney's fees because the appellant partially succeeded on appeal. Generally, an appellee cannot request any relief beyond what was already granted by the trial court unless the appellee files a cross-appeal. Thus, an appellee could file a cross-appeal for the sole purpose of seeking a remand for appellate attorney's fees if the appellant's issues are all overruled on appeal. A cross-appeal would require additional briefing (more fees) and could require segregation of fees between those necessary for the appeal versus those necessary for the cross-appeal. Further, this cross-issue could be overruled based on waiver if the request was not already made in the trial court. So, the moral of the story: add a reminder to "request appellate attorney's fees" to your trial checklist. If nothing else, it will make your client happy and could deter the other side from appealing in the first place. **HN**

Beth M. Johnson, Attorney at Law, may be reached at beth@bethmjohnson.com.

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Unleashing the Power of Injunctions: Will Yours Withstand Scrutiny?

BY JULIE PETTIT GREESON AND ROBERT GREESON

In the world of business litigation, the battle for injunctive relief can be make or break. Whether you are a seasoned practitioner or a newly licensed attorney, mastering the art of drafting an effective Temporary Restraining Order (TRO) is paramount. When a client walks in the door seeking or defending injunctive relief, there is not a lot of time for research and analyzing the issues that come up. Knowing Texas Rules of Civil Procedure 680 and 683 is critical, as is knowing in advance how to draft an effective TRO application. A flawed TRO can shatter dreams of enforcement and leave your client exposed to potential harm. Even if a sound reason for granting relief appears elsewhere in the record, the Texas Supreme Court has stated in the strongest terms that rules regarding TROs are mandatory. *State v. Cook United, Inc.*, 464 S.W.2d 105 (Tex. 1971).

With that in mind, here are five quick tips to guide you through the process of crafting an ironclad TRO in Texas.

1. Clearly identify all parties involved. This tip seems like a "no-brainer," but an essential requirement of a TRO is to clearly and sufficiently identify the parties you seek to enjoin. Especially in a business case with multiple entities or related entities, it is crucial to ensure your TRO is effective against the specific legal entity you need to enjoin. If you neglect this essential requirement, you may be left with a TRO that allows harm to continue to be inflicted upon your client.

2. If your TRO is granted without notice to the adverse party, be ready to explain why that was necessary. Although courts generally disfavor ex parte hearings, notice of a TRO to an adverse party is not required if you can show your client will suffer harm before notice can be served. But if you choose to go down this path, you will need to explain why the order should be granted without notice. Reasons for choosing not to provide notice are limited—such as the risk of evidence destruction, preventing further harassment, or imminent danger to one's well-being.

3. Articulate the irreparable harm your client will suffer without the TRO. Under Texas law, a TRO that fails to identify imminent, irreparable injury giving cause to its issuance will not suffice. It is not enough that your application for TRO address the irreparable injury. The court's order granting the TRO must identify the irreparable injury as well. But be careful that the order is not conclusory. Simply claiming that an injury to your client is irreparable is not sufficient. An "irreparable injury" is one that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded later. Examples of irreparable injuries include harm to one's reputation or even something more abstract, such as pollution. TROs can be void if they do not define the injury they were designed to prevent and explain why such injury would be irreparable.

4. You must include a bond amount…and you must pay it! When your TRO is signed by the court, a bond amount must be included in the order specifying how much security needs to be provided. In other words, the law requires that an applicant put forth money or a "bond" in case the TRO is dissolved. This is a vital part of the process because a "TRO that fails to set bond is void and unenforceable." *In Re St. Mark's Sch. Of Tex.*, No. 05-23-00369-CV, 2023 WL 3220937, at *4 (Tex. App.—Dallas May 3, 2023, orig. proceeding) (mem.op.). The court is bound by this rule and cannot waive this requirement. And note that the TRO is not enforceable unless the bond is paid.

5. Include a detailed description of the relief sought. Specifying the relief your client is seeking in the TRO is essential. Be thorough and explicit about what the defendant is prohibited from doing and the possible consequences of violating the TRO. Do not be overly broad. While laying out every minor detail of your TRO may seem excessive, leaving no room for ambiguity makes it easier for the parties involved to understand and comply with the order. This level of detail facilitates understanding and compliance, reducing the likelihood of inadvertent violations and misunderstandings.

In a world where legal matters can be complex and emotionally charged, mastering the art of drafting a TRO does not have to be daunting. Using these five tips, you will be better prepared to navigate the process and help protect your client when it matters most. Remember that a well-drafted TRO provides the peace of mind and protection your client needs when all is at stake. **HN**

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Thank You, 2023 Legacy Club!

All Emeritus members (licensed 50+ years) are invited to make an optional $100 gift to support the DBA and its programs. In addition to a free Emeritus membership that includes free CLE, Headnotes, and more, **Legacy Club** members also receive special recognition in *Headnotes*, on the DBA website, and at the Annual Meeting.

As of October 6, 2023

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The DBA in the Late 90s & 2000s: Groundbreaking in Many Ways

BY JESSICA D. SMITH

To say that the DBA started off the 21st century with a bang would be an understatement. The Association grew in size, diversity, and CLE options. It added more meeting space, elected history-making presidents, and brought CLE online. An already busy Association took on even more major projects and redefined leadership.

Beginning in 2001, to meet the increasing demands of its growing members of over 8,000, the DBA made plans to construct additional meeting space. During this first year of growth, our nation suffered an unimaginable tragedy with the September 11 attack. The DBA responded with support, programs, and outreach. Even through this tragedy, the leadership recognized the need to push forward for the advancement of its members. They continued to raise the funds needed for the project, and after two years raised $14 million dollars! Law firms and members made up by far most of the contributions, although both of the largest gifts came from the Dallas Bar Foundation (DBF) and the Belo Foundation, as well as a sizeable donation from Culinaire International.

Groundbreaking of the Pavilion, August 28, 2003.

DBA leaders such as **Nancy Thomas** and **Mark Shank** took on the majority of the project, with Executive Director **Cathy Maher** heavily involved. Groundbreaking occurred on May 17, 2002, and on August 28, 2003, the Pavilion officially opened its doors. The Association's home could now offer 20,000 square feet of event space and 250-plus parking spaces. Members no longer had to fight for parking under the dreaded grackle trees. Soon recognized as one of the most remarkable venues in Dallas, the Pavilion received First Place in the Associated Builders and Contractors 2003 Excellence in Construction Competition.

More welcomed change happened in 2004 when **Rhonda Hunter** became the first African American President of the Dallas Bar Association. During her year as President Rhonda held several events marking the 50th anniversary of the landmark decision *Brown v. Board of Education*. Ushering in more diversity in leadership, **Paul Stafford** became the first African American male President of the Association in 2012. During his year, Paul focused on hosting a German Marshall Forum and establishing the DBA Trial Academy. In 2019, **Laura Benitez Geisler** became the first Hispanic President of the DBA and under her leadership the DBA created the Relaunch program, which focused on women reentering the legal profession, and the DBA Entrepreneurs in Community Lawyering Program—Dallas' first legal incubator program.

Keeping on the diversity track, in 2016 the DBA welcomed the Dallas Women Lawyers Association with a seat on the DBA Board of Directors.

Pivoting before it soon became necessary, in 2019 the DBA began offering Online CLE courses via their newly created Online CLE Catalog. This gave members access to additional CLE courses to view at their convenience. This idea would soon grow even more in the following year as online courses would be at an all-time high. **HN**

Looking Back on the DBA

2001-2003 To meet the increasing demands of its growing membership of over 8,000, the DBA raises $14 million and builds the Pavilion.

2003 DBA opens Pavilion at the Belo Mansion.

2004 Rhonda Hunter becomes the first African American President of the DBA.

2010 DBA hits 10,000 members.

2012 Paul Stafford is elected first African American male President of the DBA.

2015 The Equal Access to Justice Campaign hits $1 million for first time.

2017 Dallas Women Lawyers Association receives seat on the DBA Board of Directors.

2017 DBA begins offering an Online CLE Catalog with CLE video content.

2019 Laura Benitez Geisler becomes the first Hispanic President of the DBA.

The timeline continues in each issue of Headnotes this year. Look for the final article in the December issue.

Focus | *Business Litigation/Appellate Law*

More Effective Amicus Briefs

BY STEPHEN J. HAMMER

Amicus briefs can be powerful tools for grabbing the attention of an appellate court and shedding new light on the key issues in a case. But amicus briefs vary widely in effectiveness—spanning the gamut from must-read literature to expensive paperweights. Drafting a needle-moving amicus brief on behalf of your client may be more art than science, but keeping a few basic pointers in mind can help.

Show Support

Appellate courts do not decide cases by counting noses. But it never hurts to show the court that a party's position enjoys a broad base of support. These types of amicus briefs often come from the usual suspects—friendly trade associations and likeminded corporate defendants chiming in to signal that the case carries far-reaching significance. Even more effective is the "odd-bedfellows brief"—an amicus brief filed on behalf of what is usually considered an ideological *opponent* of the supported party. Demonstrating that the importance of the case transcends the usual partisan divides can pique the court's interest.

Call in the Experts

Another helpful angle for an amicus brief is to provide the views of experts on the issues before the court. For example, an amicus brief on behalf of professors of bankruptcy law can help situate the niche question in the case at hand within the broader corpus of the Bankruptcy Code and give generalist judges comfort that a decision in favor of the supported party will not unsettle the legal landscape. Briefs on behalf of economists or computer scientists can likewise lend credibility to a party's arguments in a complex antitrust or tech case.

But beware. Some jurists, including the late Justice Scalia, take the view that "[a]dvocacy and scholarship do not go well together." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 103 (2008). Piling up dozens of scholarly signatories on a boilerplate brief will not necessarily impress the court. The bottom line is that the *arguments* an amicus brief offers are generally more important than the *names* attached to those arguments.

Illuminate Context and Implications

Amicus briefs can also add value by diving into the broader context and policy implications of a case. Because of space constraints in the principal briefs, the supported party may be unable to fully flesh out a case's factual context. An amicus can assist the court by explaining in greater detail the critical nuances that might otherwise escape the judges, such as how the complex technology at issue in a case actually works. An amicus can also help by unpacking the practical effects of the court's decision—for example, explaining in concrete terms how an unfavorable ruling could stifle industry, pollute the environment, or harm public health.

Complement, Don't Repeat

One strategy to avoid as an amicus is the "back-up brief." Unless the supported party's merits brief is in dire need of rehabilitation, it is usually ineffective to draft an amicus brief as a retread merits brief. Briefs of that kind shed little new light on the issues before the court. In contrast, an amicus brief that approaches the issues in the case from a different but complementary perspective to the merits brief can be quite effective. For example, an amicus brief can reinforce the supported party's merits brief by laying out a key provision's statutory history or unearthing additional historical support for the party's reading of the Constitution. Or an amicus brief can offer a narrower alternative legal ground for the court to rule in the supported party's favor—providing the court with a fallback solution if it is concerned that the party's stance is too aggressive.

In sum, a well-crafted amicus brief can capture a court's interest, elucidate the critical issues in the appeal, and ultimately shape the decision in a way that furthers the interests of the amicus. To maximize the chances that your brief makes its way toward the top of the judges' reading list, stay focused, above all, on being helpful to the court and assisting it in doing the difficult job of resolving the issues before it. And always bear in mind that, in the end, the credibility of the advocate drafting the amicus brief is one of the most important factors in the brief's ultimate power to persuade. **HN**

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ECL Attorney Spotlight

JANE ASARE

Incoming Entrepreneurs in Community Lawyering member Jane Asare was born and raised in Ghana, West Africa, where she obtained her Bachelor of Arts Degree in Political Studies. Ms. Asare emigrated to the United States in 2012 through the Diversity Visa Lottery Program and received her law degree from North Carolina Central University School of Law before taking the Texas Bar Exam.

Having been away from family for years, Ms. Asare, a mother to four young boys, understands the importance of keeping families together. She has a deep sense of compassion for immigrants and started her solo practice focusing on family-based immigration cases.

During her time in law school, Ms. Asare interned with the United States Committee for Refugees and Immigrants (USCRI). She looks forward to serving immigrants and families in the Dallas community.

Entrepreneurs in COMMUNITY LAWYERING

Focus | *Business Litigation/Appellate Law*

Financial Regulators Are Coming After AI

BY ERIC HAIL AND TED HUFFMAN

Banks and finance companies have aggressively adopted Artificial Intelligence (AI) technologies in recent years. The teller at your local bank branch may not be a robot just yet, but many other banking roles that typically required human-level intelligence are now being performed by computers. Banks are increasingly deploying AI to crunch data to underwrite loans and determine the creditworthiness of borrowers. Virtual assistants are used to service loan accounts or fulfill other customer service positions. Banks are even using AI-powered applications to assist with regulatory and legal compliance activities, when those functions previously required teams of compliance specialists and lawyers.

While AI proponents may applaud recent innovations in the banking sector, government regulators have raised concerns and they are growing louder in expressing those sentiments. This past summer, the Federal Reserve Board cautioned that the advent of quantum computing and generative intelligence poses risks to the U.S. financial system that may merit future action, including "collective actions across government . . . in advancing measures to understand and mitigate risks." Increased government intervention appears to be imminent.

(Un)-Intelligent AI Systems

Some regulatory agencies have already taken affirmative action to police AI. In one high-profile case, the Consumer Financial Protection Bureau (CFPB) took administrative enforcement action against a mega bank due to the bank's alleged usage of faulty software systems that lacked proper controls to protect bank customers. The software in question was claimed to have (i) assessed borrowers with incorrect interest and fees, (ii) frozen customer accounts for weeks or more based on automated criteria within the bank's software programs, and (iii) triggered premature repossessions of customer vehicles that secured car loans. The bank ultimately paid $2 billion to remedy the harm that affected over 16 million bank consumers and a separate $1.7 billion civil penalty. The CFPB also has warned banks and finance companies that the use of chatbots to manage account and loan-servicing obligations must comply with the myriad of laws that otherwise apply to human service representatives.

Bias in AI Systems

Government regulators have targeted algorithms used for underwriting and making creditworthiness determinations. Regulators are focused on whether these state-of-the-art systems are resulting in "bias" in lending or other decisions by banks and financial institutions. For example, the New York Department of Financial Services alleged that Goldman Sachs and Apple employed AI-based systems that disproportionately granted male Apple Card holders with longer lines of credit than women. The New York regulators later withdrew this case after further investigation showed that Apple's algorithmic criteria did not actually target any protected class. The CFPB separately has issued announcements admonishing finance companies that they must ensure that AI systems do not result in any bias or discrimination, such as redlining in mortgages. The regulators have made their point clear that they intend to aggressively enforce existing laws and rules to root out any bias and discriminatory outcomes from the use of AI-based systems.

AI and Privacy Concerns

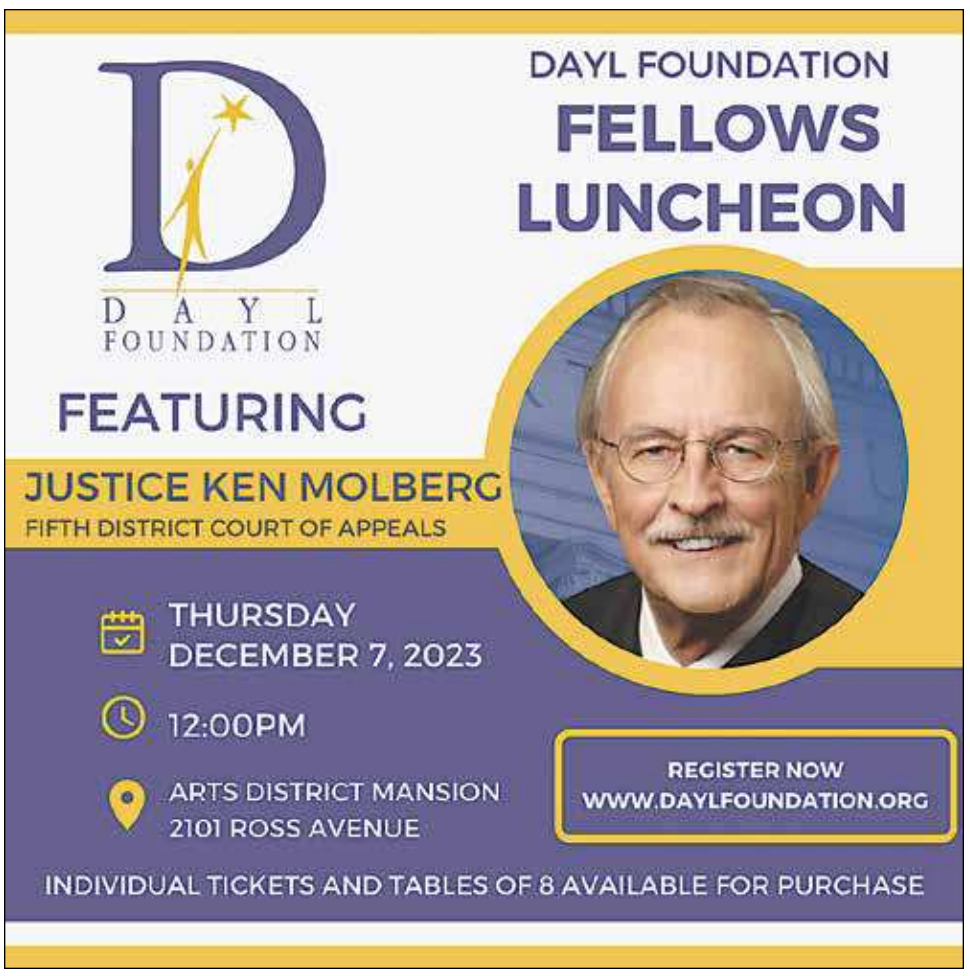
One of regulators' greatest AI concerns is the potential for some of these software systems to trip over consumer privacy laws. Many AI systems—especially in the financial sector—are powered by harvesting massive amounts of personal customer data that is subject to privacy laws. If that data is used or obtained improperly from the consumer, or the underlying software does not adequately protect such data in accordance with existing privacy laws, the bank may face problems with the regulatory authorities. And prior cases show that regulatory enforcement action in the privacy law arena can result in severe consequences for infringing parties. For example, the Federal Trade Commission (FTC) often uses an enforcement tool requiring companies to delete not only the improperly leveraged data but also any algorithmic data models developed using that data. If a bank service provider develops an algorithmic software product (e.g., a self-learning AI data tool) with illegally-obtained data sets, the agency may order deletion of the entire software product. That can be a costly outcome for a party that has spent significant time and money toward the software's development.

Regulation and litigation of AI technologies continue to grow in a previously nascent space. There currently is no comprehensive federal legislation dedicated solely to AI regulation. But that has not deterred regulators or other interested parties from asserting other federal laws to go after banks and corporate parties that use software systems in objectionable ways. The FTC Chair recently summarized: "There is no AI exemption to the laws on the books, and the FTC will vigorously enforce the law to combat unfair or deceptive practices or unfair methods of competition." That view is pervasive within many federal government agencies, and regulators have shown they are willing to combat AI when they believe it is necessary. **HN**

Eric Hail and Ted Huffman are Partners at Katten. They may be reached at eric.hail@katten.com and ted.huffman@katten.com, respectively.

War Stories and Practice Pointers from the Bench

On October 19 the Judiciary Committee hosted a judges panel on "War Stories, Emerging Trends, and Practice Pointes from the Bench." (Left to right): Judiciary Committee Chair Michael Baum, Hon. Martin Hoffman, Hon. Monica Purdy, Hon. Melissa Bellan, Hon. Tonya Parker, Hon. Maria Aceves, Justice Bill Pedersen, and Judiciary Committee Co-Vice Chair Kristina Williams.



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Column | *Ethics*

Legal Ethics and the Use of Large Language Models in Litigation

BY HERSHEL R. CHAPIN

New technology is changing the way Texas lawyers approach work. Large Language Models (LLMs) that employ artificial intelligence (AI) such as ChatGPT and others open new opportunities for lawyers, reducing the time and effort required to complete even complex tasks. One area where AI is impactful is in drafting litigation documents, but its use poses ethical issues for Texas lawyers.

Texas Disciplinary Rule of Professional Conduct (TDRPC) 1.01 requires lawyers to provide competent representation to their clients. Competent representation includes the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Using AI to compose litigation documents may assist lawyers in meeting their obligations under Rule 1.01 by improving the accuracy, speed, and efficiency of their work. However, using AI must also be in accordance with other ethical rules and principles, including those related to confidentiality, conflicts of interest, and the unauthorized practice of law.

One of the most important AI-related ethical considerations is confidentiality. TDRPC 1.05 requires Texas lawyers to maintain confidentiality of information relating to their representation. This includes not only privileged information, but also other information about their representation. When using AI to compose litigation documents, Texas lawyers must ensure that the AI system is secure and that the information contained in the document generation prompt is protected from unauthorized access or disclosure. While private LLMs do exist commercially, the popular, free ones like ChatGPT are not private. You should fully expect that whatever information you feed into one of these AI tools can easily wind up in a public domain or elsewhere in the wrong hands.

Another important ethical consideration is how TDRPC 1.06 requires Texas lawyers to avoid conflicts of interest with their clients. When using AI to compose litigation documents, lawyers must ensure that the AI system they use does not have any conflicting interests with their clients or the other parties involved in the litigation. For example, if the AI system is owned by a party that has a financial interest in the outcome of the litigation, the lawyer may be faced with an impermissible conflict that would prevent him or her from using the AI system.

The use of AI in composing litigation documents raises questions about the unauthorized practice of law. TDRPC 5.05 prohibits Texas lawyers from assisting in any unauthorized practice. The use of AI to compose business or appellate litigation documents could be seen as assisting in the unauthorized practice of law if the AI system is making legal determinations or providing legal advice without the supervision and direction of a licensed Texas lawyer. *See also* TDRPC 5.03 (requiring lawyers to take reasonable measures to ensure that non-lawyer assistants do not engage in conduct that would be a violation of the TDRPC if performed by a lawyer).

There are widely-reported news stories demonstrating AI software's tendencies to "confidently lie" in litigation documents, for example, by fabricating fictional authorities, citations, or statements of law to support AI-generated compositions. Such dishonest practices, when employed by lawyers, constitute violations of TDRPC 8.04(a)(3). Notwithstanding, another important issue is that many of these AI tools, such as ChatGPT, have a hard "knowledge cut-off date" for the information they use. This means that AI tools are not necessarily able to access the latest legal case information, which could result in them making even astute conclusions based on outdated or bad legal precedents. These reasons have led some courts, such as the Northern District of Texas Bankruptcy Court, to issue standing orders requiring careful supervision of AI-generated documents under penalty of sanctions. And one North Texas federal judge now requires practitioners to *certify* their supervision over AI tools in all pleadings, briefs, and motions. To sum up this point, in the immortal words of my former boss, Steve Sather, "Software does not have a law license; *you do*."

In conclusion, the use of AI in the composition of litigation documents can be a valuable tool for Texas lawyers, but it must be approached with vigilance over ethical considerations. This article is by no means an exhaustive treatment of the subject. But Texas lawyers must ensure that the AI systems they use do not breach confidentialities, do not create conflicts of interest, and do not assist in the unauthorized practice of law or other misconduct. By carefully considering the ethical implications of the use of AI in their practice, Texas lawyers can provide competent representation to their clients while embracing the benefits of new technologies. **HN**

Hershel R. Chapin is a Texas civil litigator and bankruptcy lawyer. He can be contacted at hchapin@dallaslawhero.com. Full disclosure: an AI tool was used to assist with researching portions of this article, under the author's careful supervision.

Sand Branch – Poorest Community in Dallas County

BY MISTY FARRIS

What if I told you there is a community in Dallas County just 20 minutes from downtown Dallas that has no running water, and you can easily help that community? Well, my fellow colleagues, read on!

Sand Branch, Texas is an unincorporated, impoverished community in southeastern Dallas County. A former Freedman's town, it once had hundreds of families. Less than 100 residents remain. It was established in the 1800s, and its population is 87 percent Black. Sand Branch has no running water or sewage system, no fire service, streetlights, or local government.

The community relied on well water for more than 100 years until, in the early 1980s, people began getting sick. The Dallas County Health and Human Services Department found many of the wells were contaminated by E. coli. Now residents must rely on donated bottled water for drinking, cooking, and bathing.

There have been efforts toward getting Sand Branch water service for decades. The problem came to national and even international attention in 2016. But nothing has panned out. Most recently, in April of this year, County Judge Clay Jenkins stated that there was "a renewed interest in getting something done and getting it done quickly." He estimated that the costs could be $12 million or more to complete the project and that, because Sand Branch is unincorporated, it might require a special utility corporation to service the community. U.S. Congresswoman Jasmine Crockett, who represents the area where Sand Branch sits, said that she is working with Judge Jenkins and others on finding funding and developing solutions for the community. Because of the price tag to pursue water service for the small community, others say relocation is the only realistic option. However, prior efforts to relocate the Sand Branch residents only amounted to a few thousand dollars per family, making relocation efforts unfeasible. Moreover, many community members are committed to staying in the community.

Until there is a long-term solution in Sand Branch, members of the Dallas Bar Association and many others have reached out to help where they can. DBA Past Presidents **Nancy Thomas** and **Mark Shank** have worked with the Sand Branch community for the past 26 years, along with other DBA members and friends. The group provides food and much needed items to the Sand Branch community, especially around the holidays. In December, they deliver a U-Haul full of canned food, donated turkeys, water, and much more to our friends at Sand Branch. The DBA's Community Involvement Committee officially became a sponsor of the event in 2021.

It is so rewarding to see all of the Sand Branch residents turn out to participate in the event! To know that the DBA is helping a community in so much need is really what the holidays are all about.

The delivery requires a large effort and fortunately, there is something for everyone who wants to support the Sand Branch community. Volunteers are needed to collect and sort the food, coordinate the turkey delivery, rent and load the U-Haul, and to help onsite on the delivery date. The group always needs donations—both canned food and financial contributions—which are used to buy the bulk of the food. You can make a donation at Paypal.ME/Sandbranch or by mailing a check to Mark Shank, 2711 N. Haskell, Suite 3100, Dallas, TX 75204. The funds will be deposited into a special account for Sand Branch. All donors will receive donor acknowledgement forms for tax purposes.

Juanita Bean, who is beloved by the volunteers, is 92 years old and has lived in Sand Branch most of her life. She says "God has blessed us with our friends. They have fed us for so many years. We don't know what we would have done without them. We thank them from the bottom of our hearts" **HN**

For more information, see:

- Mariana Rivas and Nataly Keomoungkhoun, *Curious Texas: Why Doesn't Sandbranch Have Running Water?* Dallas Morning News, June 4, 2021.
- Ken Kalthoff, *New Effort to Get Running Water in Former Dallas Freeman's Town of Sand Branch*, NBCDFW, April 28, 2023.
- Patti Vinson, *How Neighbors Help a Community Without Running Water*, Lakewood Advocate, December 15, 2020.

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Overlooked Issues with Two-Member Limited Liability Companies

BY WADE MCCLURE

Because of flexibility and reduced formalities, limited liability companies continue to be a very popular form of business organization for Texas entrepreneurs. But foresight, planning, and consideration of the business and structure of the LLC is still needed before the new business starts. Such analysis is even needed when dealing with a two-member LLC. Everyone's intentions and interests are aligned to begin, but there needs to be a protocol in place in case disagreements arise within a two-member, 50-50 LLC. Your LLC Company Agreement should be tailored so that a fair and quick dispute resolution is implemented and the parties can move forward with their business.

All Dispute Resolution Provisions Should Not Be Created Equal

Dispute Resolution Provisions (DR Provisions) used in an LLC Company Agreement (or Operating Agreement) are often formulaic with the same type of provisions that are used for other LLCs and ownership structures. The DR Provisions typically state that LLC members should resolve any dispute by going to mediation and, if that is not successful, to arbitration. Many provisions even pick the mediation or arbitration service to use. These provisions are very useful in certain situations, but sometimes the two-member LLCs would be better served by an inexpensive and accelerated preliminary procedure.

For example, if the two members simply decide to "go their separate ways" and want to avoid formal dispute resolution procedures, there are other options; the members could identify a mutual mentor that they trust and respect and ask that mentor to resolve their separation issues and propose a simple division of company assets.

On the other end of the spectrum, members occasionally are so distrustful of one another that they cannot even agree on a mediator or arbitrator to use. In this situation, a tie breaker provision would be useful to trigger the selection of a mediator or arbitrator. Mediation and arbitration services usually provide a manner to resolve the selection dispute if no agreement can be reached. The third-party "mentor" discussed above could also be used as a tie breaker in these situations.

Push–Pull Provisions

A common process to resolve disputes especially with a two-member, 50-50 LLC is a buy-sell provision that provides a procedure for one member to offer to buy the other member out. If one member's buy-out offer is rejected, then the other member must buy out the offering member for that price. Such provisions are very efficient if they work, but often lead to future disputes and may not completely resolve all issues.

Who Gets the Intellectual Property?

In today's world, every business has a website, a logo, customer lists, and potential trade secrets. The members will develop intellectual property (IP) and trade secrets together. But what happens when the members decide to go in different directions? Some divisions make sense. Agreements are typically easy when the members have their own sets of customers and associated trade secrets for those customers. The challenge is finding a formula or agreed process to divide up the commonly owned and controlled IP and trade secrets. The issue should be discussed by the prospective members at the beginning of their relationship. The wisdom of Solomon may not be available later.

The members should consider an upfront agreement to capture all IP and trade secrets as assets of the LLC. Covenants not to compete should also be considered and implemented early on. On rare occasions, a renegade member may decide to depart and to take all IP to compete against the former company. That member may try to rationalize that there was no non-compete agreement between the members of the LLC and so the exiting member believes he or she can just take the IP and trade secrets that he or she helped to create. It should be noted that some Texas case law tends to favor the former LLC in such a dispute. Nonetheless, an agreement at the beginning of the relationship that all IP and trade secrets used by the LLC are owned by the LLC and cannot be used for any other purpose, could help mitigate a potential IP dispute later.

Should She Stay, or Should She Go?

At times, a member's conduct may require his or her removal from the LLC. Member removal provisions are common in Operating Agreements, but typically require a "super" majority vote. Such provisions are useless in a two-member LLC or in which there are two members with equal voting power. A foreseeable situation exists when one of the two members is primarily in charge of the bookkeeping for the LLC and gets caught with his or her hand in the cookie jar. The member must go, but how can the member be removed quickly and still have his other membership rights protected? The original process would be to "lawyer up" and head down to the courthouse for a TRO to remove the member. But thought should be given to how to handle this process without the time, costs, attorney's fees, and risks associated with litigation. One possible solution could be to implement a self-help procedure to block the member's access to the bank accounts until the "mentor, mediation, arbitrator" process takes place. In such a situation, an accelerated process would be advisable.

Conclusion

This article discusses only three types of issues that are concerning for two-member, 50-50 LLCs. Many more situations could arise for any LLC whether it has two or 100 members. The best approach is to go into business with people you trust and attempt to discuss and address potential issues at the beginning of the relationship. While every Company Agreement will have flaws and provisions that can be manipulated, some detailed provisions and the implementation of a "mentor, mediator, arbitrator" dispute process, may serve to be an efficient and cost-effective way to go. **HN**

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Top-Rated Apps for Lawyers and Law Firms

BY CATHERINE BROCK

Apps designed for lawyers address key functions within your practice, from managing case files to getting paid. The primary benefit of using these apps is efficiency. This efficiency improves the bottom line by enabling faster client responses, more billable time, and quicker payments due to seamless mobile access to case files, timecards, and billing information.

Read on to learn how apps can help you work smarter and to discover apps that lawyers are raving about.

1. LawPay for Online Payments

The LawPay mobile app brings LawPay's state bar-approved payment functionality to your smartphone. Accept payments using your phone's camera to collect card numbers quickly, capture digital signatures, and direct payments into trust or operating accounts as needed. You can also view and manage past transactions while you are on the go or meeting with a client offsite.

2. MyCase for Practice Management

The MyCase app, available for iOS and Android, allows you to access case and law firm files, manage calendars, add time entries, complete tasks, and send client messages from anywhere. The app directly and automatically updates your firm's files, calendars, and task lists in the cloud, ensuring all information remains synced and current across devices.

3. LawStack for Legal Research

LawStack is another one of the more popular legal apps. It downloads the U.S. Code, Code of Federal Regulations, and state regulations to your mobile device. A user-friendly search function then allows you to find the statutes you need, quickly and easily. As a result, you can research on the go without having to carry bulky books or even a computer. Also, once you download the app's content, you can access it without an internet connection.

4. Evernote for Notes and Organization

Evernote organizes thoughts, notes, files, voice memos, and files into folders. You can also create tasks inside your notes, clip and store web pages, and locate anything in your account with a keyword search. Evernote also has a team plan with collaboration and sharing capabilities.

5. Penultimate for Digital Handwriting

Penultimate is a handwriting app, ideal for those who prefer to jot down their thoughts via written notes or sketches. Simply open the app on your iPad and start writing with your Apple Pencil or Adonit stylus. As you work, the page seamlessly adjusts to accommodate your writing size and speed. Penultimate also connects to and syncs with Evernote for easy organization. Your handwritten notes are also searchable.

6. Otter for Recording and Transcribing Notes

Otter records and transcribes the human voice. Turn it on to record the great idea you had while driving or use it to document entire meetings with clients or your team. You can then review, edit, share, and organize your recordings. You can also import audio files from other sources for transcription. Otter connects with Google Calendar and Contacts, Dropbox, Microsoft Calendar and Contacts, and Zoom.

7. Adobe Scan for PDF Scanning and Searching

The Adobe Scan app scans documents, receipts, business cards, whiteboards, and forms into searchable, editable PDFs. Scans are saved to your Adobe cloud storage account.

Combine Adobe Scan with the Adobe Acrobat Reader app and you can mark up your scans with notes and highlights. With a paid Acrobat Pro account, your scans become fully editable and accessible from any device or location.

When you use Adobe Scan for business cards, the contact information automatically imports to your device's contacts. You can even scan multiple cards and select ones that you want imported.

8. Feedly for Content Monitoring

Feedly combats information overload by aggregating and organizing news from websites, blogs, and newsletters. You specify the content streams for the app to follow and prioritize the topic areas that interest you most. You can also share relevant insights or stories with your team.

Feedly is available for Android and iOS. You can follow up to 100 feeds and maintain three organizational folders for free.

Final Notes

The right legal apps for you are the ones that address tasks you repeat regularly. Putting that functionality on your smartphone or other portable device increases your daily productivity and streamlines your work. **HN**

Catherine Brock is a content writer for LawPay and MyCase.

VOTE NOW! DALLAS COUNTY COURT STAFF AWARDS

The Dallas Bar Association Judiciary Committee developed these awards to encourage court staff to do their personal best. The awards recognize the court staff team (court clerks, court coordinator, bailiff, etc.) that has consistently demonstrated a friendly and polite attitude, helpfulness, professionalism, and spirit of cooperation. Awards will be presented at the **DBA Awards Luncheon** in November. For questions, contact lhayden@dallasbar.org.

Deadline to vote November 3.

Visit: tinyurl.com/2023courtawards to vote.

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Tips for Preparing for Oral Argument

BY CHAD BARUCH

During my 25-year career as a college and high-school basketball coach, I learned that the key to winning is not brilliant game-day motivation and coaching but rather the dogged preparation that occurs day after day, practice after practice. Preparation breeds success in sports—and in oral argument. We devote too much time to parceling out advice on presenting oral argument and not enough on preparing for it. This article presents a few of my thoughts on the latter point.

Master the record. Be the authoritative voice in the room on the record. Review the record, then review it again. If the judges are likely to have specific questions about the record, note the relevant citation and have it handy during argument.

Start early. Starting early does more than just give you extra time. It vaults the case to the fore of your thoughts and gives you additional time to think about what you may have missed during the briefing process.

Focus on your weakest points. We all like to be right. And we all like it when things go easy. So, the natural human tendency leans toward focusing on our best arguments. But judges rarely need help with the easy points. From the get-go, focus instead on your weakest points—the ones the judges need help to decide.

Be selective. Do not try to cover everything. Focus on the most important and difficult issues, directing the judges to your briefing on the others.

Prepare a strong introduction and know it by memory. In almost every oral argument, the judges will allow you to provide an introduction without interruption. To be safe, I never count on more than 30 seconds. So, prepare a forceful 30-second introduction. And do not start with a factual summary. Dive right into the heart of the matter and explain why your client should win.

Visit the court before your argument. If you are presenting argument for the first time in a court, attend an argument before appearing yourself. Familiarizing yourself with the surroundings and how the court conducts its business can put you at greater ease during your argument.

Scrutinize the relevant cases. The judges have multiple arguments to prepare for; you have one. You should be an expert on all the principal cases cited by the parties in their briefs. Do not just rely on the descriptions in your briefing. Re-read the cases. You will be surprised at what you missed on the first go-around.

Make a list of likely questions (and answers). As you review the briefs, list as many likely questions as you can formulate and prepare answers to them. These questions should range from the elementary to the intricate. You would be surprised how many lawyers get tripped up on questions as basic as: "What is our standard of review on this issue?" or "Where was error on this point preserved?"

Check your authorities at the latest possible moment. The day before the oral argument, take some time to ensure that your most important authorities (and your opponent's) remain valid. Research the major issues in the appeal to ensure the absence of any new decisions since the briefing.

Arrive early and organized. Getting caught in traffic and rushing through the courtroom door 30 seconds before oral argument is not a pathway to success. Better to kill an hour in the courthouse than approach the podium feeling hurried.

Moot the argument. Prevail upon partners, friends, and colleagues to assemble a three-member moot panel and practice your argument. You will hear insightful questions you had not previously anticipated.

Practice, practice, practice. In the days leading up to the oral argument, present the argument multiple times. I like to practice oral arguments while walking through my neighborhood. My neighbors have grown accustomed to seeing me walk past their homes, talking out loud to no one in particular.

If you prefer an outline, use the module method. Do not let anyone tell you there is anything wrong with using an outline for your argument. An outline is just fine. The mistake many lawyers make concerning outlines is being inflexible about using them. Instead of preparing an overall outline for the argument, prepare modules: short outlines of each issue. Then, be flexible about changing the order in which you address issues based on the judges' questions.

Be Curly the Cowboy. Remember Curly from *City Slickers*? The three things? One of the best appellate lawyers in the country once told me that the most important thing he takes to the podium is a small piece of paper containing a list of the three or four things he absolutely must tell the court before sitting down. In some cases, it may just be one thing. In other cases, five or six. Whatever the number, make sure these points get made.

You do you. Despite all the preceding advice, here is the most important point: We all are different. So, while I hope these suggestions prove helpful, I also am mindful of and will adapt the final words of the reluctant messiah in Richard Bach's *Illusions*: "Everything in this article may be wrong." **HN**

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Education Law Study Group

Does your practice entail school or education law? Would you be interested in participating in a DBA Education Law Section to connect with others in this practice area and where CLEs will be presented on education law topics?

If so, email Sandy Lauro (sandra@slauro.com)
who is assisting the DBA to create an Education Law Section.

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Five Things to Know About the Fifteenth Court of Appeals

BY J. COLLIN SPRING

For the first time since 1967, the Legislature has created a new court of appeals—and it did so in a way Texas has never seen before. While historically the Texas Courts of Appeals have been divided into distinct geographical districts, the new Fifteenth Court of Appeals located in Austin has jurisdiction statewide although limited by subject matter. This article briefly surveys a few things that members of the bar should know about this new appellate court.

Jurisdiction

The Legislature granted the Fifteenth Court of Appeals jurisdiction over two primary categories of cases: (1) matters appealed from the soon-to-be-created business courts; and (2) civil cases in which the State or one of its subdivisions is a party. On the business side, the Fifteenth's jurisdiction is simple. It has jurisdiction over any appeal or mandamus suit arising out of an action in the business courts.

The governmental side of the Fifteenth's jurisdiction is more complicated. Generally, the Court will have jurisdiction over suits by or against the State and its executive agencies. This grant, however, is limited by several statutory exceptions, including ones for personal injury actions, suits under the Family Code, and eminent domain proceedings. Finally, the Fifteenth will have jurisdiction over appeals from suits involving the Attorney General when any party challenges the constitutionality or validity of a state statute or rule.

For suits within its statutory grant, the Fifteenth's jurisdiction is exclusive. The existing courts of appeals will no longer have authority to hear those matters granted to the Fifteenth. No matter whether a case arises in El Paso or Texarkana, if it falls within the Fifteenth's demesne, it will be heard in Austin.

Transfer of Cases Limited

Not all cases currently heard by the Court of Appeals have geographic jurisdiction. The Supreme Court has implemented a procedure for "equalization transfer," which permits cases in courts of appeals with busier dockets to be removed and heard by courts with fewer cases per justice. Equalization transfers, however, are explicitly prohibited for cases that ordinarily should be heard by the Fifteenth.

The Supreme Court will develop rules for transferring cases that (1) should have been filed in the Fifteenth Court of Appeals, or (2) were improperly filed in the Fifteenth. Given the ambiguity as to the breadth of the jurisdictional language, it is likely that this new procedural device will lead to significant opinions of the Texas Supreme Court in the session following the establishment of the new appellate court.

Effective Date Retroactive to September 1, 2023

The Fifteenth Court of Appeals will be created on September 1, 2024, and will have prospective application to appeals perfected on or after that date. It also will decide any then-pending appellate cases within its scope that were filed on or after September 1, 2023. All such cases will be automatically transferred to the new Court. In 2022, the average time from filing an appeal to disposition was six and a half months. This means that many cases that are already on file will undoubtedly fall to the Fifteenth to finally decide.

Court Composition

The Court will be composed initially of three justices (including one Chief Justice) appointed by the Governor. This will put the new Court on par with the smallest of the courts of appeals (only one-fourth the size of the Dallas Court of Appeals). On September 1, 2027, the court will expand to five justices, making it larger than the smallest rural courts, but still significantly smaller than the largest courts of appeal serving metropolitan areas. Over time, the appointed judges will be required to stand for statewide reelection to maintain their positions on the court.

Constitutionality

Proponents and detractors of the bill establishing the new Court of Appeals have debated at length whether the manner in which the Fifteenth has been established—with its jurisdiction defined by subject matter rather than geography—comports with the State constitution. Skeptics have pointed to constitutional language requiring that the state be "divided" into appellate districts to suggest that non-geographic divisions are not allowed. Supporters point to the coextensive jurisdiction of the First and Fourteenth Courts of Appeals in Houston as evidence that the constitution does permit overlapping appellate districts.

The Legislature has provided that the Supreme Court will have exclusive original jurisdiction over any challenges to the constitutionality of the Fifteenth Court of Appeals. This challenge, which seems to be more a question of when than if, will require the Supreme Court to grapple with unanswered constitutional questions and will have serious implications for governmental actors and Texas businesses alike. **HN**

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DVAP's Finest

CAMIE MCKEE

Camie McKee is an Associate at Haynes and Boone, LLP.

1. How did you first get involved in pro bono?
My first pro bono experiences were at UT Law. I worked with the INCLUDE Project, where we counseled special education students and their caregivers/supporters in Austin and Laredo about guardianship, probate, and Supported Decision-Making agreements. My first pro bono project with Haynes Boone involved drafting a DVAP client's estate planning documents while a summer associate.

2. Which clinics have you assisted with?
I have volunteered with DVAP's monthly intake clinics both by phone and in-person at the Dallas VA Medical Center.

3. Why do you do pro bono?
Pro bono work not only allows me to give back to the community but also reminds me to appreciate the education and training that a law degree and license afford.

4. What impact has pro bono service had on your career?
Pro bono service makes me a better lawyer. I can practice my communication and writing skills while researching about a different area of the law. More importantly, I can practice connecting with someone and figuring out how we can solve the problem at hand.

5. What is the most unexpected benefit you have received from doing pro bono?
I genuinely enjoy speaking with DVAP's potential clients during monthly intake clinics. Many of us, including those that I have contacted through DVAP, need someone to listen compassionately and hear our stories from start to finish. These clinics teach me how to be more empathetic—as an attorney, colleague, wife, sister, daughter, and friend.

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Third-Party Discovery in Arbitration: A Trap for the Unwary

BY DAVE WISHNEW AND T.J. JONES

One of the most overlooked considerations in planning for arbitration is the availability of third-party discovery. Modern litigation rarely avoids the need for documents or testimony from third parties. Most arbitration associations, such as the American Arbitration Association, have specific rules governing subpoenas, so third-party discovery is not considered a significant factor in deciding whether to pursue arbitration. This, however, is a trap for the unwary because the availability of third-party discovery in arbitration is far from a sure thing, even if both parties and the arbitrator agree the discovery is necessary.

The Federal Arbitration Act (FAA) is the most common statutory framework for arbitration and applies to arbitrations involving interstate commerce unless the parties' agreement invokes a state arbitration statute. The FAA also applies if an arbitration agreement specifically adopts the FAA, which many do.

Section 7 of the FAA provides the method of enforcing third-party subpoenas. The statute provides a two-step process that seems simple, but is far from it. First, the FAA states that an arbitrator, or the majority of them if more than one, may "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case." In practice, this means that litigants must first have their subpoena signed by the arbitrator(s) instead of simply issuing the subpoena themselves. Most arbitration associations have rules that mimic this requirement. Second, the FAA requires that, to enforce the subpoena, the party seeking enforcement must petition the "United States district court for the district in which [the arbitrator], or majority of them, are sitting" to compel the third party to comply with the subpoena.

This process is more complicated than it appears because there is little consensus among federal courts on the limitations of these two steps. For instance, the majority approach, first articulated by the Second and Third Circuits, interprets Section 7 of the FAA to have a strict "presence" requirement; meaning, an arbitrator can only summon third parties to testify and bring documents in their "physical presence," such as at the final arbitration hearing. This interpretation can significantly impede a party from obtaining discovery or testimony from witnesses before the final hearing. However, litigants in some jurisdictions have circumvented this interpretation using a "mini-hearing" approach, in which litigants set a perfunctory, quasi-evidentiary hearing (before the final hearing) where the third party appears merely to deliver the documents sought or give testimony while the arbitrator observes. The "mini-hearing" approach is not uniformly adopted in all jurisdictions due to the strict "presence" requirement. Even when acceptable, this process can exponentially increase the cost and time required to obtain documents or testimony from third parties.

You may be thinking the recent popularity of video-conference hearings and depositions eases the burden inherent to the "mini-hearing" method. However, some courts hold that an arbitrator's subpoena power does not reach to the limits of a subpoena issued in federal court (under Rule 45), and an arbitrator has no authority to summon a witness to appear by remote means for any purpose. That means the "mini-hearing" must be in person.

The minority approach, followed by the Eighth Circuit, relaxes the standard. It holds that there is no strict "presence" requirement articulated in Section 7 of the FAA and that it is implicit in the arbitrator's power to issue subpoenas requiring testimony or document production prior to the final hearing. Some district courts following the Eighth Circuit's interpretation go even further, holding an arbitrator's subpoena power reaches to the extent of Rule 45. This is a common-sense approach; however, few courts outside of the Eighth Circuit have adopted a relaxed interpretation.

Making matters more convoluted, state courts' ability to enforce a subpoena under Section 7 of the FAA is equally muddled. The FAA states that, to compel compliance, the party seeking discovery must petition the "United States district court," implying that federal courts are the only method of enforcing a subpoena in arbitration. But the FAA does not provide federal question jurisdiction; meaning, a litigant seeking third-party discovery could face a jurisdictional challenge that, if successful, would result in the litigant having a valid arbitration subpoena that is unenforceable in any court.

State arbitration statutes, such as the Texas General Arbitration Act (TAA), are more relaxed and provide for the ability to seek pre-suit discovery. In some circumstances, state law such as the TAA and the FAA apply concurrently, with federal law governing substantive issues and state law governing procedural issues. Thus, a litigator considering arbitration when the FAA applies should also consider the benefit of first filing in state court to compel the arbitration. That potentially would allow the parties to use the open state court matter as a vehicle to compel discovery under state procedural law. The potential success of this method, especially in Texas, is far from certain. But it does provide one more procedural option when the time comes for third-party discovery.

The pitfalls highlighted above can be mitigated, if not avoided entirely, through early analysis and planning. Simple questions to consider at the outset of arbitration are: (1) to what extent the FAA applies, including any limitations or choice of law under the parties' agreement; (2) whether third-party discovery is needed and where the third parties are located; and (3) whether state law provides an avenue for third-party discovery. At the very least, litigants should allow ample time in arbitration scheduling to deal with any anticipated third-party discovery issues. **HN**

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