Dallas Bar Association
HEADNOTES

November 2024 | Volume 49 | Number 11 | Focus | Business Litigation/Tort & Insurance Practice

The John DeWitt Gregory Charitable Trust Makes a Difference

BY MICHELLE ALDEN

The Dallas Volunteer Attorney Program (DVAP) has been fortunate to receive the generous support of the **John DeWitt Gregory Charitable Trust** with a $25,500 donation this year. Including this gift, the trust has donated $51,000 to legal aid for low-income people in Dallas since 2023. John DeWitt Gregory was a law professor at Hofstra University for more than forty years. He came to that position after several years working in the legal aid community in Nassau County, New York, where he was born. Among other positions, he served as the Executive Director and General Counsel of Community Action for Legal Services, now known as Legal Services NYC, the largest legal services organization in the nation.

John maintained his commitment to access to justice throughout his career through long-standing service on several boards and significant donations to a variety of organizations, especially those that were devoted to addressing poverty and racism. Having come from very humble means, John was always in disbelief that he had amassed an "estate" that could continue to support the causes he held so dear. He used it to establish the John DeWitt Gregory Charitable Trust, which has been carrying out his philanthropic legacy since 2021. Among other causes, the trust has provided substantial support to the Child Poverty Action Lab, which rethinks how data can be integrated into community programs to break cycles of intergenerational poverty; the National Center for Law and Economic Justice, which uses class action litigation to challenge practices and systems that disproportionately burden low-income people; and the Southern Poverty Law Center, which focuses on strengthening democracy, countering white supremacy, and ending over-criminalization and mass incarceration.

As trustee **Joanna Grossman**, the Ellen K. Solender Endowed Chair in Women and the Law at SMU Dedman School of Law, explained, "The gift to the Equal Access to Justice Campaign is the perfect way to honor the legacy of a man who devoted his early career to working as a legal aid lawyer and whose lifelong values were shaped by that experience. As a longtime friend and colleague of John's, I have the benefit of knowing first-hand how deeply he cared about access to justice. He believed not only that the law could be a tool for broad social change but also that access to individual representation should not be available only to the rich. Through my own work as a DVAP volunteer attorney, I have seen how this program puts values like his into action. I know that if I were able to tell him about this particular gift, he would respond with only one word, in his legendary booming voice: 'Outstanding.'"

John DeWitt Gregory

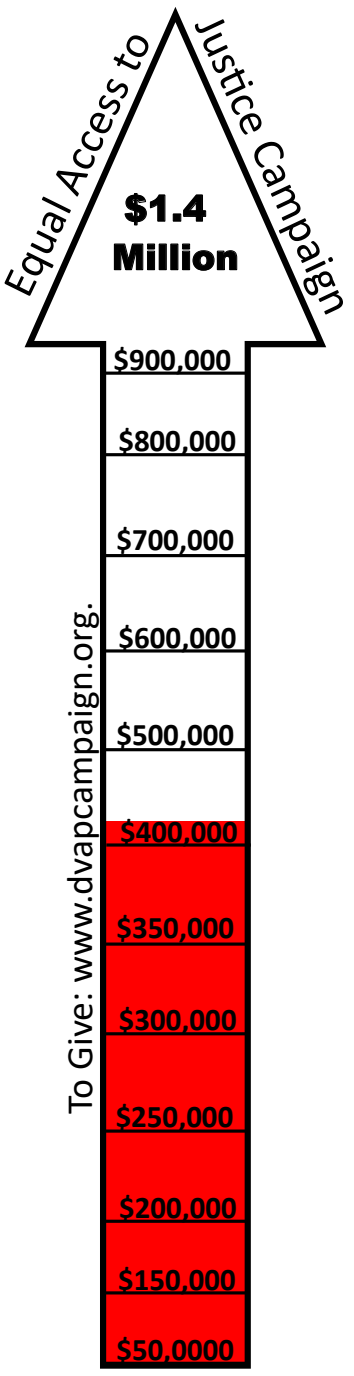
Joanna was named DVAP's Lawyer of the Year in 2023 for her exceptional pro bono work. In 2024, she has already taken on 45 DVAP cases and continues to work towards access to justice in matters large and small.

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

In one recent case, "Julia" was living in an apartment when she fell behind on rent and applied for rental assistance from the City of Irving. The city agreed to pay her rent for one year and did so, but when she moved out, she received a $6,000 bill for "unpaid rent" and reached out to DVAP for legal assistance. Attorneys **Katherine Pennetti** and **Bridget Harris** of **Nelson Mullins** accepted the case. The apartment complex continued to charge Julia, even though she had moved out and the leasing office was aware she had done so. Because of these unfounded rental charges, Julia incurred a rental lien that prevented her from renting elsewhere. The attorneys obtained an updated ledger showing that payment had been received and got the lien removed from her credit report. Julia did not have to pay the landlord any additional funds and was able to move into a new apartment.

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.



Thank You to Our Major Donors

The Dallas Bar Association and Legal Aid of NorthWest Texas have 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*:

CHAIRMAN'S COUNCIL
Burke Bogdanowicz PLLC
John DeWitt Gregory Charitable Trust
Haynes and Boone Foundation
Oncor Electric Delivery Company
Sheppard Mullin Richter & Hampton LLP
Sidley Austin Foundation

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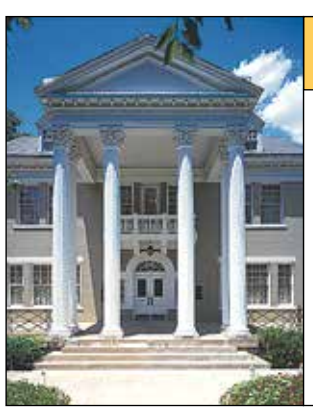
*As of October 9, 2024



Inside

MEMBERS – RENEW NOW!

You may now renew your 2025 DBA Dues online!
Renewals managed by firms coming soon.

Go to dallasbar.org and click on the MyDBA button to log in and renew online or print your 2025 Dues Renewal invoice to mail in with payment. Your 2025 DBA DUES must be paid by December 31, 2024, in order to continue receiving ALL your member benefits.

Thank you for your support of the Dallas Bar Association!

Calendar | November Events

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

NATIONAL 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 6

Noon "A Story of Empathy, Encouragement and Healing in The Legal Community," Susan Hawk, Messina Madson, and moderator Terry Bentley Hill. (Ethics 1.00)* In person only

NOVEMBER 20

Noon "Combatting Bullying in the Law," Mike Bassett, Hon. Royal Furgeson, Amy M. Stewart, and Scott Stolley. (Ethics 1.00)*

FRIDAY, NOVEMBER 1

No DBA events scheduled

SATURDAY, NOVEMBER 2

6:00 p.m. **JLTLA Foundation Gala**
Tickets at jlturnerfoundation.org/gala. At the Westing Galleria Dallas.

MONDAY, NOVEMBER 4

Noon **Tax Law Section**
"Transactions Between Partnerships and their Partners," Richard Lipton. (MCLE 1.00)* ***In person only***

TUESDAY, NOVEMBER 5

Noon **Corporate Counsel Section**
"A New Sheriff in Town? Texas Vies for Leading Privacy Enforcement Role," Gavin George and Tim Newman. (MCLE 1.00)*

Legal History Committee
"When Was the Republic of Texas No More?: Legal Issues Related to the Annexation of Texas," Keith Volanto. (MCLE 1.00)* ***In person only***

Morris Harrell Professionalism Committee

DWLA Board Meeting

5:00 p.m. **DBA Member Social Hour**
Join fellow DBA members for a social hour with drinks and hors d'oeuvres.

6:00 p.m. DAYL Board of Directors

WEDNESDAY, NOVEMBER 6

Noon **Attorney Wellness Committee**
"A Story of Empathy, Encouragement and Healing in The Legal Community," Susan Hawk, Messina Madson, and moderator Terry Bentley Hill. (Ethics 1.00)* ***In person only***

Employee Benefits & Executive Compensation Law Section
"Ethical Issues in Representing Employers and Plan Sponsors in Employee Benefits Matters," Stacey Cerrone. (Ethics 1.00)* *Virtual only*

Solo & Small Firm Section
"Deposing Dr. Strange: Managing the Multiverse of Medical Expert Depositions," Andy Jones. (MCLE 1.00)*

Allied Bars Equality Committee. *Virtual only*

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

THURSDAY, NOVEMBER 7

Noon **Construction Law Section**
"Texas Business Courts: The Next Frontier in Texas Litigation," Heath Cheek and Nathan Cox. (MCLE 1.00)* ***In person only***

Minority Participation Committee
"Mental Health and the DEI Divide: How Erosion of DEI Initiatives Contribute to the Mental State of Minority Attorneys/Law," Erica Fadel, Heather Chavez, Chris Moreland, and moderator Kandace Walter. (Ethics 1.00)* *Virtual only*

Judiciary Committee

Membership Committee. *Virtual only*

3:30 p.m. **DBA Annual Meeting**
A reception for Emeritus Members begins at 3:00 p.m., member reception at 3:30 p.m., and the Meeting starts promptly at 4:00 p.m.

FRIDAY, NOVEMBER 8

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

SATURDAY, NOVEMBER 9

6:00 p.m. **Dallas LGBT Bar Visibility Ball**
Tickets at dlgbtba.org. At the Virgin Hotel Dallas

MONDAY, NOVEMBER 11

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

Attorney Wellness Committee. *Virtual only*

TUESDAY, NOVEMBER 12

Noon **Business Litigation Section**
"Tips for Dealing with Difficult, Clients, Witnesses and Opposing Counsel Zealously and Professionally," Carrie Phaneuf, Robert Tobey, Kassi Yukevich, and moderator Kelli Hinson. (Ethics 1.00)*

Franchise & Distribution Law Section
"Conversations with In-House Franchise Counsel," Sally Dahlstrom, Katie Dinette, and moderator Wilson Miller. (MCLE 1.00)* *Virtual only*

Immigration Law Section
Topic Not Yet Available

Mergers & Acquisitions Section
"Price Adjustments & Purchase Agreements: Best Practices for Mitigating M&A Disputes," Eric Burgess, Rick Grove, and Max Mitchell. (MCLE 1.00)* *Virtual only*

Courthouse Committee. *Virtual only*

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

Legal Ethics Committee. *Virtual only*

5:00 p.m. **DBA Member Social Hour**
Celebrate Fall with the Tuesday Night Irregulars. Join fellow DBA members for a social hour with drinks and hors d'oeuvres.

5:30 p.m. **Equality Committee Movie Night**
"Black Uniforms." This film documents the African Americans time while serving in the military/ armed forces. RSVP at dallasbar.org. (DEI Ethics 1.00)* ***In person only***

6:00 p.m. **Entertainment, Art & Sports Law Section**
"The Baby Reindeer Problem: Litigation Arising from TV & Film Productions," Tim Agajanian, Morgan Bonney, Megan Dunn, and Joseph Lanius. (MCLE 1.00, Ethics 0.25)* ***In person only***

Dallas LGBT Board of Directors

WEDNESDAY, NOVEMBER 13

11:00 a.m. **Judiciary Committee**
"War Stories, Emerging Trends, and Practice Pointers from the Bench," Hon. Dianne Jones, Hon. Amanda Reichek, Hon. Ashley Wysocki, and Hon. Martin Hoffman, moderator. (MCLE 2.00, Ethics 1.00)* ***In person only***

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

Family Law Section
"Family Law Round Robin: Connect & Collaborate," Hon. Tamika Abendroth, Hon. LaDeitra Adkins, Hon. Danielle Diaz, Hon. Regina Moore, Ebony Rivon, and Hon. Sandre M. Streete. (MCLE 1.00, Ethics 0.75)* ***In person only***

Public Forum Committee. *Virtual only*

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

THURSDAY, NOVEMBER 14

Noon **Alternative Dispute Resolution Section**
"Family Law Mediation: The Good, The Bad, and The Ugly," Jennifer Grinke and Sharon Corsentino. (MCLE 1.00, Ethics 0.25)* *Virtual only*

Public Forum Committee
"The Growing Use of Eminent Domain to Meet Historic Infrastructure Investment in DFW," Clint Schumacher. (MCLE 1.00)* ***In person only***

CLE Committee. *Virtual only*

Publications Committee. *Virtual only*

4:00 p.m. DBA Board of Directors

FRIDAY, NOVEMBER 15

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.

MONDAY, NOVEMBER 18

9:00 a.m. **Sand Branch Food Drive Begins**
Drop off donated non-perishable food items at the Arts District Mansion. For more information contact al@textrial.com.

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

Labor & Employment Law Section
Topic Not Yet Available

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

3:30 p.m. **Judicial Investiture of Hon. Ryan Trobee**
At the Arts District Mansion, 2101 Ross Avenue

TUESDAY, NOVEMBER 19

11:30 a.m. DAYL Fellows Luncheon

Noon **Allied Bars Equality Committee**
"DEI Movie Discussion CLE: "Black Uniforms"" Robert Darwell, Rose Burbank, Robert Dabney, Jr., and John VanBuskirk. (DEI CLE 1.00)* *Virtual only*

International Law Section
Topic Not Yet Available

Antitrust & Trade Regulation Section
Topic Not Yet Available

Community Involvement Committee. *Virtual only*

Entertainment Committee

WEDNESDAY, NOVEMBER 20

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

Health Law Section
"Data Analytics - Enforcement Mitigation," Sean McKenna. (MCLE 1.00)* ***In person only***

Wednesday Workshop
"Combatting Bullying in the Law," Mike Bassett, Hon. Royal Furgeson, Amy M. Stewart, and Scott Stolley. (Ethics 1.00)*

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

Pro Bono Activities Committee. *Virtual only*

DAABA General Meeting

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

THURSDAY, NOVEMBER 21

Noon **Appellate Law Section**
"Oral Argument: From Preparation to Presentation," Chad Baruch and Allyson N. Ho. ***In person only***

FRIDAY, NOVEMBER 22

Noon **Living Legends Program**
Erleigh Wiley, interviewed by Jade Jackson. (Ethics 1.00)* *Virtual only*

MONDAY, NOVEMBER 25

Noon **Science & Technology Law Section**
"Cyber Insurance 101: Tips and Trends You Need to Know," Emily Buchanan and Ben Rauch. (MCLE 1.00, Ethics 0.50)* *Virtual only*

TUESDAY, NOVEMBER 26

Noon **Probate, Trusts & Estates Law Section**
"Firing Clients through Engagement, Notice, and Withdraw," Andrea Barr. (MCLE 1.00, Ethic 0.50)* *Virtual only*

WEDNESDAY, NOVEMBER 27

No DBA Events Scheduled

THURSDAY, NOVEMBER 28

DBA offices closed in observance of Thanksgiving

FRIDAY, NOVEMBER 29

DBA offices closed in observance of Thanksgiving

Dallas Bar Association

Santa Brings a Suit

Sponsored by the Community Involvement Committee

Friday, December 6, 2024
9:00 a.m. to 1:00 p.m.

Drop off location:
Arts District Mansion (2101 Ross Avenue)

The DBA Community Involvement Committee is collecting gently used business attire such as suits, pants, belts, purses, shirts & winter attire such as coats, sweaters, pants, socks.

Benefits the Dallas Life Foundation

DBA Annual Meeting
Thursday, November 7, 4:00 p.m.

DBA Awards Program & Luncheon
Friday, November 15, Noon

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

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.

All Continuing Legal Education Programs Co-Sponsored by the DALLAS BAR FOUNDATION.

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

President's Column

What Would You Tell Our New Lawyers?

BY BILL MATEJA

Adapted from my address to new lawyers as TYLA President at the 1997 New Lawyer Induction Ceremony at the University of Texas:

With Fall comes Bar results for most fresh-out-of-law school lawyers and the start of these lawyers promising and unwritten legal careers. What would you tell these new lawyers if you were passing on thoughts, wisdom or otherwise? Let me take a stab at it.

"Someday, You Will Be A Great Lawyer"

Believe it or not, this is a true story from my days in law school at Texas Tech. I was in the library studying with law student friends when we decided to head over to Chinese Kitchen, a reliable source of good Hunan and Szechuan. After dinner, we broke out the mandatory fortune cookies. One at a time, we read our fortunes. My friend, Barry Senterfitt, now an Austin lawyer, cracked open his cookie and read the fortune to himself while cracking a smile and chuckling under his breath. His fortune was prescient, and it was understandable why he'd be chuckling because his fortune was—"Someday you will be a great lawyer." Again, this is a true story.

Barry is a great lawyer now and has been for quite some time. But it's not because of his coincidental fortune cookie. More experienced lawyers might naturally opine on how to become a ***great*** lawyer like Barry, but I believe the better question is how does one become a ***successful lawyer*** where success isn't gauged by money, reputation, power, and the like, but rather by ***self-fulfillment***. In that vein, I'm not going to tell folks that one needs to work hard or prepare relentlessly. Or, that one needs to find a balance between work, family, faith, and service to others. Or, that one should be humble and not take oneself too seriously. People know these things intuitively.

Rather, I'm going to share with you one nugget that is essential to being a successful, self-fulfilled lawyer, one nugget that gets overlooked and one nugget that has kept me relatively sane.

That one nugget is—**Treat The Practice Of Law As A Profession First And A Business Second.**

That's not to say that you can treat the practice of law as a business first and a profession second and not have some modicum of success. But I've found that those who treat it as a profession first are generally terrific lawyers and, more importantly, they come to find law practice as their calling. They're satisfied as lawyers. They're happy practicing law. They consider themselves successful.

So, how does one put the profession of law first and the business of law second? Well, I've tried to distill a few rules that I think are helpful, inspired by my best friend, fellow Tech Law grad, hiking partner, and terrific Tarrant County personal injury attorney, **Greg McCarthy**. There should be 5, 10, or 15 rules because those numbers have a literary ring. But I'm a slug. I've got 8. And it's really only 6.

Rule 1 – The Customer Isn't Always Right

Borrowing from and adulterating Stanley Marcus' adage that the customer is always right, I'm here to tell you that your customer, the client, isn't always right. Unfortunately, you're the one who is going to have to break the news.

Some of you will have clients who absolutely despise their adversaries. If you're a litigator, you might be asked to bury this adversary in a mountain of paper—to file every motion to make life more difficult for the other side. Or you might have a client that you know is withholding responsive and damning discovery material who tells you that they are not going to let you produce such material. You've got to tell your client you won't do it. You've got to tell the customer, your client, that s/he's not right. It gets even more complicated the more experienced you get—where clients will ask you—tell you—to do things you know you shouldn't do. Don't. The client might perceive this advice as a lack of loyalty, fire-in-the belly or zealousness. It might get you fired. You might lose money.

If this were just a business, if it was only about money, you'd tell the customer what s/he wants to hear.

Because this is a profession, you tell the customer what s/he needs to hear.

Rule 2 – Don't Kick 'Em When They're Down

Each one of you is going to come across a lawyer on the other side of a deal, transaction, or case where you catch 'em when they're down and out. Maybe the lawyer just finished a three-week trial and is behind the eight ball or the lawyer has problems at home. In any event, the lawyer has a problem and needs your help. That help might be a continuance, an extension, a head's up, a listening ear—who knows what.

If this were just a business, you'd kick dirt in their face. You'd tell the lawyer 'tough luck, every person for themself.' You'd take advantage of the situation.

Because this is a profession, you extend a helping hand—so long as it doesn't unduly prejudice your client. You help the lawyer knowing the day will undoubtedly come when you need the favor returned.

Rule 3 – This Isn't A Popularity Contest

I guarantee many of you who stick it out for any length of time, whether you're a trial attorney, corporate counsel, a government attorney, or an office practitioner, will be asked to represent a client, the zealous representation of which will not be popular to others.

I spoke to a great Lubbock lawyer and former State Bar President many years ago—**Travis Shelton**—who told me he'd represented the wife in a highly publicized divorce. The wife's reputation was well known and less than sterling. Travis had friends who couldn't believe he planned on representing the wife and refused to speak to him thereafter. At the time Travis told me about this, 20 years after his representation, these former friends still didn't speak to him.

If this were just a business, you might not take the case or distance yourself from the client. You wouldn't want to hurt your pocketbook or jeopardize personal and business relationships.

Because this is a profession, you don't think twice about taking the case because you're a lawyer who is in the business of helping others; you don't worry about what others might think or the "guilt by association" attribution.

Rule 4 – Help Those Who Can't Help Themselves

There are many people in this State and the DFW community who can't afford adequate legal services. Trust me, if we don't provide legal services to them, no one will. As lawyers, we are part of a unique community and have not only a community responsibility to provide pro bono services, but also what I submit is a moral duty as well.

If this were just a business, you'd be inclined to say: "Let someone else deal with the problem. I don't have the time, and even if I did, that time could be better used billing."

Because this is a profession, you pitch in knowing the only way people with limited means will get legal help is if you and I do it. And because we as lawyers are part of a fraternity, we know we can't just say: "Let some other lawyer deal with it, it's not my problem." Not to mention that, and as our Dallas Volunteer Attorney Program frequently reminds lawyers—"Pro bono: it's like billable hours for your soul."

Rule 5 – A Lawyer's Word Is His/Her Bond

This is the one rule that I've seen erode the most over my 38 years as a lawyer. It seems handshakes have been replaced by confirmatory letters that confirm emails and phone calls. Isn't this rule a dinosaur? Am I just talking pie in the sky?

When I practiced in Lubbock from 1991-2002, coupled with frequent business trips back to the Hub City ever since, I learned this rule is alive and well. With few exceptions, if a Lubbock lawyer tells you that you've got a deal, it's a deal—consider it done. If Lubbock lawyers can do it, any lawyer in any city can do it.

If this were just a business, you'd honor handshakes when it suited you and dishonor 'em when it didn't.

Because this is a profession, a deal is a deal is a deal—all because you gave your word. Your word if your bond—it means something. As former DBA President **Frank Stevenson** said: "The world breaks neatly into two groups—the ones for whom words matter and the ones for whom they don't. There are no great lawyers in the second group." Trust is everything in the practice law.

Rule 6 – Police the Profession

We live in a society where government and its regulations permeate every facet of business. Not so in the case of our profession. We, as Texas lawyers, have been given the power to regulate ourselves. That's what the State Bar is all about. The State Bar, under the supervision of the Texas Supreme Court, a court made up of our brethren, is the master of its destiny. I don't know about you, but I like the fact that if a question is raised about my legal work, I'll be judged by my peers, using a process designed by my peers, as opposed to being judged by a governmental agency, using a process designed by regulators who know no more about

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HEADNOTES
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Established 1873

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

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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DBA Past President Jerry Lastelick Passes Away

STAFF REPORT

The Dallas Bar Association lost its 74th President on September 24, 2024, at the age of 91. **Jerry Lastelick** was President of the DBA in 1983.

Mr. Lastelick earned a B.B.A. in accounting in 1953 from Texas A&M University, where he was also a member of the Aggie baseball team. After graduating, he served as a lieutenant in the U.S. Army from 1953 to 1955. Upon his return to Dallas, he worked as an accountant and took evening classes at Southern Methodist University, receiving his J.D. degree in 1958, and then going into private practice.

Mr. Lastelick and wife his, Bettye Jo Guthrie, were married in 1959 and had a long and happy marriage of 60 years; they had three children.

A founding partner of Lastelick, Anderson & Arneson, Mr. Lastelick was also a founder and chairman of First Texas Bank, which is now part of Bank of Texas. While Mr. Lastelick was primarily a business attorney and litigator, he also became one of the first entertainment lawyers in Dallas and represented country singer Charley Pride for many years.

During his year as DBA President, the Environmental Law Section was created, At-Large positions were created on the DBA Board of Directors, and the Stephen Philbin Awards Luncheon began.

In addition to serving as President of the Dallas Bar Association, Mr. Lastelick also served as Chair of the Board of the State Bar of Texas, and President of the Dallas, Texas, and National Bar Foundations. He was also President of the Texas Aggie Bar Association, the Leukemia Association of North Central Texas, St. Rita Parish Council, and the St. Thomas More Society. He received the 1991 Distinguished Alumnus Award from Jesuit, was inducted into the Jesuit Sports Hall of Fame in 2002, and served as Chairman of the Jesuit Board of Trustees for several years.

He is survived by his daughter Karen (Marie) Lastelick Higginbotham and her husband, Tim Higginbotham, and his son, Joseph Jerome (JJ) Lastelick, and his grandchildren, Knox Higginbotham and wife, Casey, Hattie Higginbotham, Tanner Lastelick, Trevor Lastelick, Luke Lastelick, and Ryan Lastelick.

In lieu of flowers, memorials may be made to the Jerry & Bettye Jo Lastelick Family Faculty Fund at Jesuit College Preparatory, 12345 Inwood Road, Dallas, TX 75244, or to the charity of your choice. **HN**

Jerry Lastelick

What Would You Tell Our New Lawyers?

CONTINUED FROM PAGE 4

the profession than the man in the moon.

This power and privilege comes with a price. It means we must police our own. If we don't, no one will. And if no one will, the day will undoubtedly come when the government says enough and steps in to regulate our profession. This means you must be on the lookout for lawyers who take advantage of their clients, have substance abuse problems, misapply client funds, and the like. You must take action even though the easy thing to do is look the other way.

If this were just a business, you'd look to government to do the policing. Quite frankly, if this were just a business, you'd have no choice, we'd already be regulated by the government.

Because this is a profession, you must see to it that we police ourselves, lest we lose the power and privilege of self-governance forever.

Rule 7 – Clients Are Family

We are family,
I got all my sisters with me …
—Sister Sledge

By and large, I think most people love their families—or at least their chosen families—and show up for those families. No questions asked.

Wearing our lawyer hats, consider treating clients like you would family. Given the import of your legal advice, why would you ever treat a client any less than you would a family member. In my world, I routinely counsel people on staying out of jail—to insure their liberty interests. Others counsel on things that are incredibly important such as family law, immigration, personal injury, and the list goes on. And even though many lawyers provide advice and counsel on business and financial matters, saying that it's only about money, doesn't do justice to the import of such advice and counsel.

If this were just a business, a client would be just like any other person.

Because this is a profession, you treat clients like, as Sister Sledge put it, "We Are Family!"

Rule 8 – Treat Others Like You Want To Be Treated

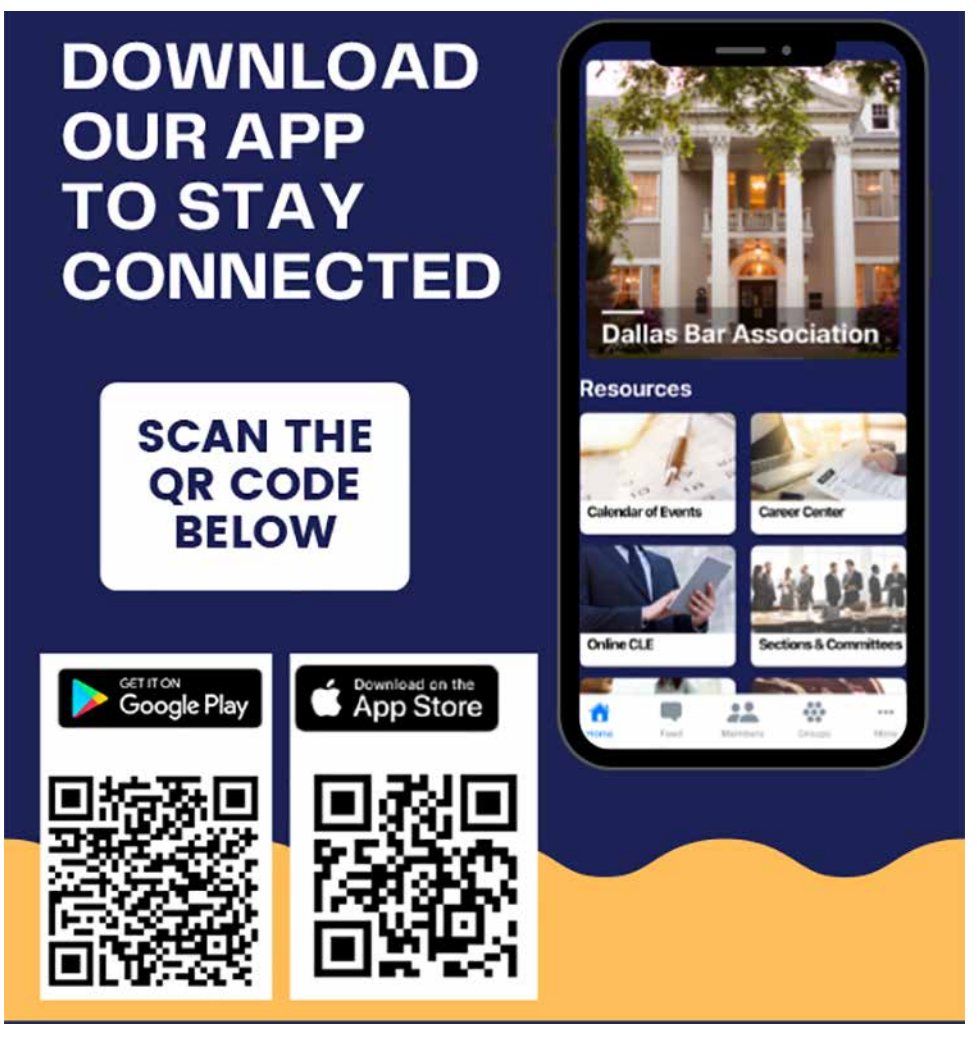
I've included the Golden Rule amongst these 8 rules because the hustle and bustle of the practice makes it easy to lose sight of this simple rule, especially when money drives so much of what lawyers do. This rule doesn't mean you can't compete for clients, you can't try to work harder than the lawyer on the other side or you can't try to win. All it means is that you play fair, be above board, and be nice.

If this were just a business . . . well, you get the picture.

THE BOTTOM LINE

It's up to you. Do you want to be part of a profession marked by civility, honor, and tradition? Do you want to be part of a profession that is allowed to police itself and called upon, matter of factly, to make decisions that impact and change lives? Or do you just want to be part of a business? If you want to be part of a profession, perceive and act in a manner that puts the profession first and business second. Think about and live out these 8 rules. If you do, not only will you become a member of a profession, but you will also receive the benefits and privileges that come with it, which, from my personal experience, are worth all the effort.

Good luck congratulations and welcome to the practice of law!



DBA Annual Meeting

The Annual Meeting is Thursday, November 7, in the Pavilion.
A reception for Emeritus Members begins at 3:00 p.m., member reception at 3:30 p.m., and the Meeting starts promptly at 4:00 p.m.

If you have prior DBA service and wish to run for a position, please contact Alicia Hernandez (ahernandez@dallasbar.org (214) 220-7401), no later than T**uesday, November 5, at 5:00 p.m.** to receive information about service on the Board. You are required to complete a biographical form prior to the meeting.

Following the meeting all DBA resident members with an e-mail address on file will receive an online ballot. If you wish to vote online, please make sure the DBA has your e-mail address by visiting the DBA website at www.dallasbar.org, or call Membership at (214) 220-7414 before **5:00 p.m. on Tuesday, November 5, 2024**.

Please update your spam software to allow the e-mail ballot to enter your inbox from noreply@ballotboxonline.com.

Focus | Business Litigation/Tort & Insurance Practice

Checking In on Exceptions to the Eight-Corner Rule

BY RHONDA THOMPSON AND YUNJU "ROSA" SUNG

A fundamental principle of insurance litigation is whether a liability insurance carrier's defense obligation has been triggered by a particular pleading. Put simply, when an entity or individual is sued, a duty to provide a defense may be triggered when the allegations fall within the insurance contractual terms. In determining whether an insurance company has a duty to defend, Texas courts apply the "eight-corners" rule, where an evaluation of the "four corners" of the plaintiff's petition is compared to the "four corners" of the insurance policy.

Generally speaking, the truth or falsity of the allegations is not considered, and not surprisingly, an incentive is generated to force a defense through possible collusion between the plaintiff and the defendant. This scenario was considered by the Texas Supreme Court in *Loya Ins. Co. v. Avalos*, when the Court expressly recognized an exception to the "eight-corners" rule. 610 S.W.3d 878 (Tex. 2020). The *Avalos* decision allowed for the development of and reliance upon extrinsic evidence to the pleading to demonstrate collusion.

In *Avalos*, the policyholder's husband, who was expressly excluded from the relevant automobile liability insurance policy was driving the covered automobile when he collided with another car carrying the plaintiffs. The plaintiffs, the policyholder, and the policyholder's husband all agreed to falsify their reports to the responding police officer and to the insurance company that the named policyholder was driving the insured vehicle rather than the husband. The policyholder eventually admitted under oath that the parties had agreed to make false statements.

Upon learning that the parties had colluded, the insurance company denied a defense and coverage. Contrary to the claimants' argument that the "eight-corners rule" required the insurance company to provide a defense and coverage, the Texas Supreme Court held that courts may consider extrinsic evidence regarding collusion to make false representations of facts for the purpose of invoking an insurer's duty to defend. The Court reasoned, "the insured has not paid for, a duty to defend the insured against fraudulent allegations brought about *by the insured* itself."

Not surprisingly, there have been subsequent attempts to test the boundaries of the *Avalos* exception since the Texas Supreme Court's ruling, although efforts to expand *Avalos*' application have largely failed. The most common distinction made by courts to reject application of *Avalos* is when a case involves a plaintiff's "artful pleading," a pleading filed by plaintiffs after discovery and review of the defendants' insurance policy and apparently amended with an eye towards triggering otherwise unavailable insurance coverage.

One such case is *Club Adventure Learning Center, LLC*, where a parent of a minor child sued the daycare for physical abuse of the child. 674 F. Supp. 3d 362 (W.D. Tex. 2023). The defendant daycare's insurance policy contained a physical abuse endorsement, and the insurance company asserted it owed no duty to defend or indemnify because of the alleged physical abuse. After the insurer sought a declaratory action, the plaintiff amended the pleading and omitted any allegations of physical abuse. The insurance company argued the *Avalos* exception should apply, given the sequence of events and amendment to pleadings after the coverage issues were identified. The court rejected the argument, stating the application of *Avalos* "requires evidence of collusion among the parties to the underlying suit—not just suspicious amendments to the pleadings." Suspicious pleading amendments were not sufficient to allow the insurance company to introduce extrinsic evidence of the previously pleaded physical abuse allegations.

The evidence of collusion must also be conclusive to trigger the *Avalos* exception. For instance, in *Certain Underwriters at Lloyd's, London v. Keystone Development, LLC*, the insurer urged consideration of extrinsic evidence that the parties in the underlying suit colluded to plead the suit under insurance coverage. 2022 WL 865891 (N.D. Tex. Mar. 23, 2022). However, the carrier submitted as evidence documents implicating only one party. The court rejected considering extrinsic evidence for the purpose of determining the insurance company's duty to defend after first finding "[t]he extrinsic evidence Underwriter submits does not contain the same conclusive evidence of fraud as in *Avalos* and, therefore, is distinguishable."

Avalos remains a viable, but admittedly narrow, exception to Texas' eight-corner rule. *Avalos* was cited by the Texas Supreme Court when the Court allowed for an additional category of exception in *Monroe Guaranty Insurance Company v. BITCO General Insurance Corporation*, 640 SW.3d 195 (Tex. 2022). The *Monroe* exception allows courts to consider extrinsic evidence when there are information gaps in plaintiff's pleadings. The Texas Supreme Court specifically found the *Monroe* exception should be applied differently from the *Avalos* exception. These two exceptions open the door to further efforts to allow for consideration of evidence extrinsic to combat artful, vague pleadings and efforts to invoke insurance beyond the bargain for liability risk:

"A contrary rule that ignores conclusively proven facts showing the absence of coverage would create a windfall to the insured, requiring coverage for which the insured neither bargained nor paid. Such a windfall would come at the expense of all consumers of insurance, who ultimately shoulder the expense of the insurer's increased defense costs through higher premiums." **HN**

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Focus | Business Litigation/Tort & Insurance Practice

Navigating Ethical Considerations in Litigation Finance

BY WENDIE CHILDRESS

Litigation finance has become a prevalent feature in the commercial litigation landscape, offering new opportunities for litigators and clients to pursue good claims while managing their risk and legal spend. Indeed, the industry has grown to $15.2 billion in size, with utilization by "Big Law" driving its growth and accounting for more than one third of total capital commitments in two of the past three years. As the industry grows, understanding its ethical considerations and how to be thoughtful in one's approach to funding are critical for legal professionals and clients alike. This article explores some of these considerations and provides guidance on how to navigate them.

Conflicts of Interest

An ethical issue that is commonly overlooked by practitioners is the potential conflict of interest that arises when counsel is advising a client who is seeking litigation finance. Indeed, it is too often the case that the negotiation of a litigation finance transaction involves litigation counsel, the client, and the funder, with litigation counsel or its firm advising the client in the negotiation of the transaction. While counsel's intentions are surely intended to provide good service to their client, an inherent conflict of interest exists in such a scenario.

The rules of professional conduct impose a duty of loyalty on attorneys and require them to provide conflict-free representation. A conflict arises where counsel's representation might be limited by a personal interest. The rules also command an attorney to exercise independent judgment in the representation of a client.

By its nature, a litigation finance agreement dictates the fee proceeds to litigation counsel and its law firm that the funder will pay. This means that counsel and the firm have an independent and personal financial stake in the agreement, separate and apart from (and potentially adverse to) the client's interests. A conflict arises when that counsel is advising the client directly on the negotiation and terms of the agreement.

At a minimum, this conflict requires the client's consent. Best practices would dictate that the client should obtain third party advice and representation in the negotiation of the agreement, thus relieving counsel of the conflict and providing peace of mind.

Disclosure

When clients and firms inquire about litigation finance, their first questions often relate to issues of privilege, specifically how they can protect confidential information shared with a funder from discovery in the underlying suit. Funders will typically discuss the merits of a potential funded case with counsel as well as review work product and other case materials. These discussions and diligence are necessary for the funder to evaluate potential investments, which are typically nonrecourse in nature.

Meanwhile, counsel is obligated to protect client confidentiality and may only reveal confidential information with the informed consent of its clients and when it has been expressly authorized to do so to carry out the representation. Counsel also must ensure that work product is only shared with parties with a common interest, and not at risk of disclosure to an opposing party.

To account for these obligations, it is imperative for counsel and their clients to ensure that a Non-Disclosure Agreement (NDA) is in place before sharing confidential information with a funder. The NDA should include explicit confidentiality expectations and work product protection clauses. In most instances, such an NDA will protect information shared with a funder from disclosure. Indeed, most courts that have weighed in on this issue have denied disclosure because the NDA alleviates the risk of disclosure to opposing parties and because the information sought is irrelevant to the underlying case.

Nonetheless, counsel should be well-versed in caselaw and the local rules on disclosure in the jurisdiction in which its funded case is pending. There are a few jurisdictions in which the local rules of the district court require some disclosure of a litigation funding agreement. Even in these jurisdictions, however, discovery is typically limited to the funding agreement itself and whether the funder has control over case strategy or settlement.

Control

Another question counsel and clients seeking funding often ask is, "Will the funder control the litigation or the ability to settle a case?" The short answer is that reputable funders will not seek control of a funded case, and the litigation agreement should explicitly speak to this issue.

Funders cannot interfere with a lawyer's independent professional judgment or a client's ability to control its litigation. Unlike an insurance company paying the costs to defend litigation, funders do not control the litigation that they fund, including the client's right to hire or discharge counsel and to make decisions regarding settlement.

Counsel should be deliberate about whom to approach with a funding opportunity, seeking to work with funders who will abide by ethics rules and not seek to control litigation, and paying careful attention to the terms of the investment agreement itself. Navigating this market can be difficult and it is best to utilize market expertise when determining which funders to work with.

Conclusion

As litigation finance grows in utilization, it is vital for users to take the time to understand its ethical considerations and changing landscape. Staying informed and seeking expert guidance from impartial advisors is an important first step in leveraging litigation finance responsibly. By prioritizing ethical compliance, attorneys can confidently use this tool to benefit their clients and practice while upholding professional standards. **HN**

Wendie Childress is Managing Director and Counsel at Westfleet Advisors. She can be reached at wchildress@westfleetadvisors.com.

Column | Ethics

Navigating Client Trust Amid a Firm Departure

BY NARMADA SAPKOTA

The legal profession has experienced a significant shift in recent years. Today, it is increasingly common for attorneys to change firms in search of better career opportunities, professional growth, or improved work-life balance. This trend poses unique challenges to firms that handle cases on a contingency fee basis. When a lawyer leaves a firm and clients follow, it raises important questions about the balance between a client's right to choose his or her legal representation and that firm's ability to enforce the terms of the original fee agreement. Understanding how to navigate these transitions while maintaining fairness, ethical responsibility, and financial accountability is critical.

Balancing a Client's Right to Choose Representation and the Attorney's Right to Enforce the Contract. Texas Disciplinary Rules of Professional Conduct 1.02 and 1.15 detail the unequivocal right of clients to choose their legal representation and terminate the attorney-client relationship at any time, regardless of cause. However, terminating the attorney-client relationship does not absolve the client of any financial obligations incurred under the original agreement, including fees and expenses. The discharged attorney or firm may choose to recover attorney's fees either by quantum meruit or by enforcing the contract. For example, in *Mandell & Wright v. Thomas*, the client terminated her original law firm but was still obligated to pay the originally agreed-upon attorney's fees from a later settlement. 441 S.W.2d 841 (Tex. 1969). The Texas Supreme Court ruled that the discharged attorney was entitled to compensation, despite a large portion of the settlement going toward legal fees for the client's prior firm.

Similarly, in *Johnston v. California Real Estate Investment Trust*, parents of an injured minor switched attorneys after a settlement had been reached. 912 F.2d 788 (5th Cir. 1990). The original attorney sought recovery of the attorney's fees outlined in the initial contingency fee agreement. The United States Fifth Circuit Court of Appeals enforced the original fee agreement, ruling that while the result seemed inequitable, it was not legally unconscionable.

This result highlights the delicate balance between client autonomy and the enforceability of fee agreements under Texas substantive law.

Balancing Financial Interest and Ethical Obligation. Careful attention is required when a contingency-fee attorney moves to a new firm and a client follows him or her. When a departing lawyer is responsible for or plays a key role in a client's representation, the client must be informed about the (a) departure, (b) the client's right to choose representation, and (c) any contractual or financial implications.

The departing attorney must make it clear that the client's financial obligations will include two separate contingency fees to multiple firms, if the prior firm is terminated without cause. The departing lawyer also owes a fiduciary duty to his or her former firm, and as such, they must not encourage the client to terminate the relationship with the former firm.

After leaving, the lawyer must enter into a new written legal services agreement with the client. This new agreement should clearly specify that it is separate from the prior firm's arrangement and outline that the client's financial obligations to the prior firm remain unaffected by the new agreement.

In contingency fee matters, departing lawyers and their former firms often negotiate a fee-sharing arrangement that complies with Rules 1.04(f) and (g). If no agreement is reached, the departing lawyer must evaluate whether the proposed fee is unconscionable under Rule 1.04(a), as clients could be responsible for two full contingent fees. A fee is considered unconscionable if a competent lawyer could not reasonably believe it is fair, based on factors such as time, skill, case complexity, local norms, and the lawyer's experience. Clear communication about fee calculation is essential, as a failure to do so may suggest that the fee charged is unreasonable on its face.

Conclusion

Balancing clients' rights to choose their legal representatives with the financial obligations of contingency fee agreements is challenging. Texas generally law upholds the enforceability of contingency fee agreements. But each fee agreement must be fair and not exploitative. Lawyers must fully inform clients of potential financial consequences and should negotiate fee divisions that respect both client choice and professional obligations. By adhering to legal and ethical standards, lawyers can maintain client autonomy, financial fairness, and integrity in the profession. **HN**

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Texas Business Court: Essentials, Strategies, and Advocacy

BY MITCH GARRETT AND HUNTER POLVI

On September 1, 2024, the new Texas Business Court opened in five of the 11 judicial administrative regions across Texas, encompassing the Dallas, Fort Worth, Houston, Austin, and San Antonio divisions of the new Court. This was the culmination of years of anticipation. But after one month of operation, these five Business Court divisions only had approximately 20 cases. This article gives a brief introduction to essentials, strategies, and points of advocacy in this new system.

1. Is there a set point in time for the amount in controversy necessary for jurisdiction? There is no set point in the statute. Looking at federal precedent, the relevant point in time for jurisdiction regarding the amount in controversy is the time of filing. But if the parties agree to removal, a party may file a notice of removal at *any time* during the pendency of the action. Tex. R. Civ. P. 355(c)(1). If not agreed, a notice of removal must be filed within 30 days after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the Business Court's authority to hear the action. Tex. R. Civ. P. 355(c)(2)(A). So, theoretically a party can remove to the Business Court on the eve of trial by agreement or if the removing party somehow recently discovered facts that cross the $5 million amount in controversy threshold. This is not very likely.

2. Can you remove a case that was filed in district court before September 1, 2024? No. The changes in law apply to civil actions *commenced* on or after September 1, 2024. HB 19 § 8. This is in line with the general rule that a statute is prospective unless expressly made retrospective. Govt' Code § 311.022. Thus, the Business Court's enabling act—and therefore the Court's power—does not apply to actions commenced before September 1, 2024. Litigants are testing this temporal limitation in several divisions, which will likely garner one of the first written opinions before the end of the year.

3. If a plaintiff pleads an amount in controversy for less than $5 million, can it recover a verdict for more than $5 million in actual damages? It depends. Currently, Rule 47 requires a plaintiff to plead a damage range, and the maximum category of damages is simply "over $1 million." The specific statements of relief under Rule 47(c)(2) to (5) do not affect a party's substantive rights. So, if a plaintiff simply pleads "over $1 million," then the burden is on the defendant to get an order under Rule 47(d) requiring the plaintiff to state its maximum damages amount before the 30-day removal clock expires. However, if a plaintiff affirmatively pleads or stipulates that its damages do not exceed $5 million, it will be held to that stipulation.

4. Where can someone find written opinions? As of October 1, 2024, all filings are available for free on re:SearchTexas. The goal is for opinions to be available on commercial services like Westlaw soon. More information can be found at www.txcourts.gov/businesscourt/records-hearings-search.

5. Where does precedent for the Business Court's written opinions come from? Eventually, it will come from the Fifteenth Court of Appeals, which will hear all appeals from orders or judgments of the Business Court. But while we wait for a body of case law from the Fifteenth Court of Appeals, the Business Court will take guidance from the other 14 courts of appeals, federal law, and even the laws of the states where the parties are incorporated. Note, however, this is only for disputes pending in the Business Court. Other business disputes that are not in the Business Court for whatever reason are still governed by the existing fourteen courts of appeals in Texas.

6. Will the Business Court remain with so few cases? While the current snapshot shows the Business Court probably will not be overwhelmed like county and district courts, it will likely get busier. With time, more cases that are within the Business Court's jurisdiction will exist. Parties will file directly into the Business Court, and the district and county judges may start requesting transfers from the administrative judge. Once requested, the administrative judge may transfer the case if it finds that a transfer would facilitate the efficient administration of justice. Tex. R. Civ. P. 355(c).

7. Does the Supreme Court's *In re Dallas County* opinion affirming the Fifteenth Court of Appeals mean the Business Court is constitutional? No. *In re Dallas County* may answer whether the Business Court's statewide jurisdiction will be challenged, but the Court did not analyze the Business Court's structure. So, there still may be challenges to the Business Court—like its system of appointed judges—but the statute anticipated some issues and provides solutions that are less restrictive than striking the entire Court. **HN**

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Focus | *Business Litigation/Tort & Insurance Practice*

The Role of Coverage Counsel in Tort Litigation

BY PATRICK J. WIELINSKI AND TIMOTHY P. DELABAR

An insured tort defendant's lead counsel is most often the attorney hired by the defendant's insurer to defend the lawsuit. If the insurance company accepts the claim, then this is often the only attorney the defendant needs. But when the insurance company either rejects coverage of the claim or defends the lawsuit under a reservation of rights to later raise coverage issues, the defendant may need insurance coverage counsel. Both plaintiff and defense attorneys should understand coverage counsel's role to best protect their clients' interests.

What is Coverage Counsel

Coverage counsel specializes in analyzing insurance policies and providing guidance to clients (both the insured and the claimant or plaintiff) on the terms, exclusions, and limitations in an insurance policy. Coverage counsel can review the allegations in the underlying suit and advise whether there are additional insurance policies that may provide coverage, respond to denial and reservation of rights letters, and represent parties in coverage litigation.

Unlike defense counsel, whose focus is defending their client on the merits of the case and minimizing the amount of exposure to a judgment; coverage counsel's focus is on insurance coverage and maximizing an insurer's obligation to pay a claimant (instead of the insured defendant paying out-of-pocket).

When Defendants Should Involve Coverage Counsel

The most obvious situation in which a defendant should retain coverage counsel is when the insurance company denies the claim entirely. In that case, the defendant may be on the hook for both the costs of defending the lawsuit and paying any settlement or judgment. Coverage counsel can provide additional information to get the insurance company to reevaluate its position. Even where the insurance company still denies any duty to indemnify, having the insurance company pay for associated legal costs protects the defendant. Often it may be defense counsel that recommends the defendant to retain coverage counsel as part of the obligation to protect the interests of the client.

Coverage counsel should be involved for more than just coverage denials. In some cases, an insurance company will defend the case under a reservation of rights. This can create a conflict of interest between the defendant and the insurance company. If so, the defendant may be entitled to choose his or her own defense counsel at the insurance company's expense. But if the defendant is wrong as to the degree of conflict created by the reservation of rights letter, then it may breach the policy's cooperation provision and forfeit both its defense and indemnity. Coverage counsel can review the insurance policy, the pleadings, and the insurer's coverage position to advise if there is a conflict that rises to the level of permitting the defendant to select independent counsel.

In other cases, a lawsuit will include covered claims under the insurance policy as well as excluded claims. When that occurs the insurance company is obligated to defend the entire suit, but the defendant may want to retain coverage counsel to analyze issues this situation poses.

When Plaintiffs Should Involve Coverage Counsel

Plaintiffs should consider retaining coverage counsel where there is a question if the claims are covered under the defendant's insurance policy. Coverage counsel can help draft pleadings with an eye towards avoiding common reasons insurers deny a duty to defend or indemnify. Coverage counsel can also provide guidance at other critical junctures including *Stowers* demands, dispositive motions, and jury charge issues. Because the duty to indemnify is determined by what facts are found at the trial, if the jury in the tort lawsuit does not resolve all of the essential coverage questions, then the plaintiff may be forced to litigate those in a subsequent coverage suit. No attorney wants to tell a client after securing a favorable judgment that it will have to litigate for two more years because of avoidable issues with the way the jury charge was drafted.

In some cases, the insurance company may file suit under the declaratory judgment act seeking a declaration that it has no duty to defend or indemnify the defendant. If the plaintiff is named in that suit, then any declaration would be binding on the plaintiff, giving the plaintiff a strong incentive to vigorously participate in the coverage suit.

Conclusion

Coverage counsel can be a valuable resource for both plaintiff and defense counsel to protect their clients' interests even when there is no coverage lawsuit pending. Attorneys on both sides should consider whether to consult coverage counsel early in the case. Coverage counsel can be most effective when brought in early in the process. **HN**

Patrick Wielinski is a Partner and Timothy Delabar is an Associate at Cokinos | Young. They can be reached at pwielinski@cokinoslaw.com and tdelabar@cokinoslaw.com, respectively.

Client Development—Speak at a DBA Program

Interested in sharing your legal knowledge and expertise with your colleagues?

The CLE Committee is looking for speakers and hot topics for the Wednesday Workshop programs it holds throughout the year. Please submit a short bio, title, and 2-3 sentence description of your presentation to Araceli Rodriguez at arodriguez@dallasbar.org. Submissions will be discussed at monthly CLE Committee meetings.

HELP PRESERVE OUR HEADQUARTERS: BECOME A SUSTAINING MEMBER

All Sustaining Members will be recognized in Headnotes, on our website, and at our Annual Meeting.

Your 2025 dues statements have arrived and we ask that you consider renewing as a Sustaining Member ($535). More than 200,000 members and guests use our building each year and your contribution at the Sustaining Member level will help us continue the essential upkeep needed to preserve our beautiful building—as the premiere bar headquarters in the nation. Thank you for your support.

Focus | *Business Litigation/Tort & Insurance Practice*

The Rise of Contingent Liability Insurance in Complex Cases

BY DEAN GRESHAM AND KIRSTINE ROGERS

With the economy facing continued inflationary pressures and uncertainty, law firms and clients alike are seeking ways to mitigate the risks and costs associated with complex litigation. How do you advise clients to stay the course when the merits of their case are strong but the path to victory is long and costly? Enter contingent risk insurance.

Most practitioners know little about these policies and how they can be leveraged to help their clients during litigation. Familiarizing yourself with them will help you counsel your clients about their options.

Contingent risk insurance policies are not like commercial general liability policies with which most litigators are familiar. They are bespoke policies tailored to the specific legal issues and facts of particular cases. In general, they can be obtained by plaintiffs and defendants alike to insure a certain minimum recovery, or, in the case of a defendant, insure against a certain amount of potential liability. If appropriate, even counsel and third-party funders can take advantage of the policies to insure a certain financial outcome. The premium charged for a policy is a percentage of the overall coverage and is dependent on the contours of the specific risk. There is no standard market rate.

A brief overview of the basic policy structures (and whose interests they typically insure) is helpful when considering the options available for a case or portfolio of cases:

- **Judgment Preservation Insurance (JPI)** is generally issued to a plaintiff. It allows a plaintiff to insure all or part of a damages award while an appeal is pending or, depending on the strength of the case, before judgment is even entered.
- **Adverse Judgment Insurance (AJI)** is issued to a defendant. It guarantees a certain amount of coverage in the event of an adverse final judgment. This type of policy is also used to facilitate the completion of merger and acquisition transactions as it ring-fences a seller's specific legal exposure so the transactions can close.
- **Contingent Fee Insurance** is generally purchased by litigation counsel. It provides a law firm with downside protection to prevent a total loss of expenses or work in progress (WIP) incurred in the prosecution of litigation by insuring some portion of the attorneys' time and expenses.

As an example, a plaintiff obtains a $25M judgment after a jury trial. The defendants intend to appeal and believe that, as a matter of law, the plaintiff has no viable claim and should take nothing. Any appeal will delay the plaintiff from collecting on the judgment and will remain a potential liability on the defendants' balance sheet. Both parties are convicted in their positions, but in limbo as to the timing and substance of the outcome. Is the uncertainty worth the wait? Contingent risk policies can be used to provide assurance that it is.

Here, in exchange for a premium, the plaintiff could seek JPI for some or all the award. After the premium is paid, the plaintiff would be guaranteed a minimum recovery after a final, non-appealable judgment. Conversely, if the defendants have the stronger of the arguments, they could seek AJI guaranteeing that if, after all appeals are exhausted, the policy will pay some or all the ultimate judgment. At bottom, what determines whether a case is suitable for contingent risk insurance is whether the potential insured has the stronger of the factual and legal arguments in the case. It is that simple.

It is important to note, however, that not all cases or risks are suitable for contingent risk insurance. Factors to be considered when exploring whether a case is appropriate for a contingent risk insurance are:

- *Procedural posture*: the legal and factual issues in the pre-filing or pre-trial stage may not be sufficiently developed for an insurer to fully assess the risk.
- *Money*: without cash in hand to pay the premium, insurance may not be a viable consideration (unless the client is able to finance the premium at little to no out-of-pocket cost).
- *Type*: not all cases or risks are appropriate for contingent risk insurance. For example, many insurers may not insure treble or punitive damages, and most policies do not insure collection risk.

There is no doubt that, when used properly, contingent risk insurance can be an effective tool in case and client management. These policies preserve the status quo and give parties and their counsel certainty as to the economic impact of specific litigation. And, they have increasingly become a way to make capital more accessible to litigants and their counsel by eliminating some of the risks inherent in even the strongest of cases.

Dean Gresham and Kirstine Rogers are Attorneys at Certum Group and can be reached at dean@greshamlawgroup.com and krogers@lkrpllc.com, respectively.

Thank You, 2024 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.

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DBA ANNUAL MEETING

Thursday, November 7, 4:00 p.m.
at the Arts District Mansion

A reception begins at 3:30 p.m. The meeting starts promptly at 4:00 p.m., with voting to start shortly after.

MOVIE NIGHT - BLACK UNIFORMS

presented by the Allied Bars Equality Committee

Tuesday, November 12, 5:30 p.m.
at the Arts District Mansion

This film documents the African Americans time while serving in the military/armed forces. The film's director, Bob Darwell with Sheppard Mullin, will attend.

Complimentary salsa bar and sodas will be provided and a cash bar will be available.

DBA AWARDS LUNCHEON

Friday, November 15, Noon
at the Arts District Mansion

All members are invited to attend.

GET BACK! to the DALLAS BAR ASSOCIATION

VISIT DALLASBAR.ORG FOR MORE INFORMATION

Column | *Veterans Services*

Employment Rights of Texas State Military Forces

BY LANTIS G. ROBERTS

You may not know that Texas has its own military force, separate from the U.S. Military. But it's true. The Texas Military Department (TMD) comprises the Texas Army National Guard (TXARNG), Texas Air National Guard (TXANG), and the Texas State Guard (TXSG). All three are subject to Texas law when ordered to State Active Duty or training.

Texas's state military force is the TXSG, the largest State Defense Force in the United States. In 2022, the TXSG was recognized as the State Defense Force of the Year and received a Superior Unit Citation for exceptionally meritorious service in response to the border crisis in Operation Lone Star—Border Surge (OLS-BS). TXSG provides community service and emergency response activities and is an authorized State Defense Force under federal law.

While under orders for duty or training, Texas military service members are entitled to certain job protections and employment rights under Texas law. Section 437.204 of the Texas Government Code prohibits an employer from terminating the employment of a service member of the Texas military forces *or a member of the military forces of any other state* due to the employee being ordered to authorized training or duty. If called to duty or training, the employee cannot be subjected to a loss of time, efficiency rating, vacation time, or any employment benefit during or because of the absence from work related to State military duty or training. If an employer violates the job protections of a Texas military service member, it constitutes an unlawful employment practice, and the employee may file a complaint with the Texas Workforce Commission's Civil Rights Division.

When Texas service members are ordered to State Active Duty or state training and other duties by the governor or another proper authority under Texas law, they are entitled to some of the same benefits and protections as U.S. military service members. These rights are provided by Section 437.213 of the Texas Government Code, which adopts key parts of the Uniformed Services Employment and Reemployment Rights Act (USERRA). This also means that Texas service members have the right to retain private legal counsel and file a civil action in a district court in Texas if they are aggrieved or denied a benefit or protection guaranteed under Texas law.

Through Texas's adoption of 38 U.S.C. § 4311, Texas employers cannot discriminate against or deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis that an individual is a member of, applies to be a member of, performs, has performed, applies to performs, or has an obligation to perform service in a uniformed service. In other words, if a person is a prospective, current, or past member of a uniformed service, the employer cannot deny certain employment benefits based on their military service status, even if such service is with the TXSG, a State Defense Force.

It is important to note that federal employers are not required to follow Texas law regarding the TXSG. Still, the law applies to private employers with 15 or more employees and counties, municipalities, state agencies, or state instrumentality, regardless of the number of individuals employed.

Our Texas military forces are professional service members who proudly serve Texas and our nation. In previous speaking engagements, I discussed the employment rights of members of the TXSG. I polled the audience to see if anyone was familiar with the organization and the rights of our servicemembers. In some instances, only one or two individuals raised their hands. In other instances, no hands were raised.

The public, employers, and service members should all be aware of the employment rights of our Texas State Military Forces service members. When a service member is called upon for service, we answer. When a service member calls upon an employer to comply with the law for their employment rights, the employer should be knowledgeable enough to comply.

Duty.Honor.Texas **HN**

Lantis G. Roberts is an Employment Attorney and Arbitrator. He serves as a JAG Officer in the Texas State Guard. He can be reached at lantis@kreativelaw.com.

DVAP Veterans Legal Clinic

1st Friday each month at 1:30 p.m.

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Focus | Business Litigation/Tort & Insurance Practice

When Limited Partnership Agreement Provisions May Not Matter

BY WADE MCCLURE
AND G. ADRIAN GALVAN

Partnership agreements will often have restrictions on the sale or transfer of a partnership's interest. However, what happens when the agreement also provides that partners do not have the right to petition a court or an arbitrator to wind up or partition the partnership? What if the limited partner disagrees with the general partner and other limited partners concerning a critical issue for the limited partnership going forward? Is the limited partner stuck until the business dies or sells?

History Lesson on Dissolution, Termination or Winding Up?

For context, prior to the implementation of the Texas Uniform Partnership Act, courts used terms like dissolution and termination without uniformity and sometimes interchangeably. While the Texas Uniform Partnership Act implemented distinct meanings for concepts like dissolution, winding up, and termination of a partnership, case law continued to occasionally use the terms interchangeably or inconsistently. In an effort to fix the confusion, in 1994, the Texas Revised Partnership Act moved away from using the term "dissolution" of a partnership and instead defined the events requiring the "winding up" of the partnership (which would result in its termination) and events that simply led to a partner's "withdrawal."

In contrast, the Texas Revised Limited Partnership Act still used the term "dissolution." However, the current governing law—the Texas Businesses Organization Code (BOC)—now refers to events requiring the winding up or withdrawal of a partner in the context of limited partnerships. In addition, the BOC governs all limited partnerships in Texas despite whether they were created prior to the enactment of the BOC.

Exiting the Limited Partnership – Withdrawal or Wind Up?

For a limited partnership, a voluntary decision to wind up the entity requires the written consent of all partners unless otherwise provided in the agreement.

If, for example, only one of the limited partners wishes to exit, he or she would need to request a withdrawal from the partnership for fair market value. However, under the BOC, a limited partner may withdraw "only at the time or on the occurrence of an event specified in a written partnership agreement." Many times, limited partnership agreements do not specify how a partner may withdraw, or do not allow a limited partner to withdraw at all.

No Current Right to Withdraw

Prior to September 1, 1997, limited partners had the statutory right to withdraw, if they provided six months' notice to the partnership, *even if* a limited partnership agreement did not provide a way for a partner to withdraw. But the BOC does *not* provide any such provision for limited partners.

Interestingly, the BOC does list events permitting a withdrawal of a partner in a general partnership but does not provide similar list of events permitting a withdrawal of a limited partner. While some courts have applied the events of withdrawal from the general partnerships chapter to limited partnerships, case law allowing this crossover to the general partnership provisions is limited and there is no guarantee how other courts may hold on this issue.

Pursuing a Judicial Wind Up May Be a Better Option

When a limited partner's agreement is silent on how a limited partner may withdraw, or prohibits this withdrawal, the BOC may be a "lifeline." The BOC permits a partnership agreement to waive or modify *certain* provisions, but some provisions concerning a wind up are *nonwaivable*. One of the *nonwaivable* provisions is the ability to petition a court to wind up the partnership in certain situations.

Pursuant to the BOC, a limited partner has the *nonwaivable right* to petition a court to wind up the partnership by asserting and establishing that the economic purpose of the entity is likely to be unreasonably frustrated; another owner has engaged in conduct relating to the entity's business that makes it unreasonably impracticable to carry on the business with that owner; or it is not reasonably practicable to continue the business in conformity with its governing documents.

A limited partner who is provided an offer for the limited partnership that the general partner refuses because of his self-interest, and the partnership agreement does not provide a manner for a partner to withdraw, should consider an Application for a Wind Up. If the Application for a Wind Up is approved, the disposition of assets would be paid or transferred as outlined in the BOC, which would generally go first to creditors to satisfy liabilities; then to partners to satisfy liability for distributions; then to partners for the return of their capital; and finally, to partners in accordance with their partnership interests.

The Downside of a Judicial Wind Up

Pursuing a judicial wind up has its risks. While the limited partner may have the ability to invoke the judicial process to wind up the partnership agreement, the end result of the wind up would still be unclear. And there is still a risk that such action could result in counter claims for breach of contract. Specifically, the other partners may assert that the partner who invoked the judicial process breached their contractual agreement and is liable for any resulting damages. **HN**

Wade McClure is a Partner and G. Adrian Galvan is an Attorney at Mayer LLP. They can be reached at wmcclure@mayerllp.com and agalvan@mayerllp.com, respectively.

Focus | *Business Litigation/Tort & Insurance Practice*

Navigating the Minefield of Fiduciary Duty Claims in Business

BY MICHAEL K. HURST AND JULIE PETTIT

Fiduciary duties form the bedrock of ethical business conduct, imposing stringent legal obligations on those in positions of trust and power. Traditionally encompassing loyalty, obedience, and due care, these duties have long been a cornerstone of corporate governance. However, as business practices evolve, so does the scope and application of fiduciary responsibilities.

Traditional Corporate Fiduciary Duties

In conventional settings, fiduciary duties manifest in three primary forms. First, there is a duty of loyalty. Directors, officers, and managers must act in good faith, prioritizing the company's long-term interests over personal gain. There is also a duty of obedience, which prohibits illegal acts or those beyond the decision-maker's authority (*ultra vires*). And there is a duty of care, in which directors, officers, and managers must manage the business with the prudence and diligence of an ordinarily prudent person.

Fiduciary Duties Beyond the Boardroom

Modern business practices are pushing the boundaries of fiduciary relationships far beyond traditional corporate structures. Texas courts are increasingly becoming battlegrounds where the existence and implications of these duties are contested. Key areas of expansion include informal fiduciary relationships and vendor relationships, as well as employment relationships now that its clear employees can owe a fiduciary duty to their employer even when they do not have a non-compete or non-solicitation agreement.

Informal Fiduciary Relationships

Close, personal, or special relationships can also give rise to fiduciary duty allegations. However, plaintiffs must prove these obligations as a matter of fact, not law. To establish an informal fiduciary relationship, the plaintiff must demonstrate reliance and trust on the defendant; the defendant must have acted from a position of authority; the relationship must exist independently of the transaction in question, mere subjective trust is insufficient; and objective evidence is necessary.

Shareholder Oppression

In closely held companies, disputes between majority and minority shareholders are highlighting issues of oppression and mismanagement. The Texas Supreme Court in *Ritchie v. Rupe* defined oppressive conduct as actions inconsistent with the honest exercise of business judgment by the board of directors. Note that *Rupe* has made shareholder oppression claims in Texas rarer and more difficult to win.

Employee and Vendor Relationships

Litigation often centers on the misuse of confidential information or trade secrets. It has become common to have cases involving former employees establishing new businesses using proprietary information from their previous employment, leading to temporary restraining orders and injunctions.

In the realm of vendor relationships, plaintiffs are beginning to scrutinize long-term, exclusive arrangements for potential fiduciary obligations. The sharing of sensitive business information and reliance on a vendor's expertise can potentially create fiduciary-like duties, even in arms-length commercial relationships.

A vendor and a company can have a fiduciary relationship, and a breach of fiduciary duty can occur when one party fails to act in the other party's best interests. For example, an allegation of breach of fiduciary duty could arise in a situation where a company fails to communicate known demand changes to its supplier. This evolving area of law underscores the need for clear contractual language and careful management of business partnerships to avoid unintended fiduciary obligations and potential breaches.

Prosecuting Claims

Effective prosecution of corporate fiduciary duty claims demands a multifaceted approach. Litigators must stay on top of evolving business practices and maintain clear communication with their clients regarding formal and potentially informal fiduciary relationships. Meticulous record-keeping is paramount. Detailed documentation of business interactions can prove instrumental in establishing fiduciary obligations. Employment agreements, non-disclosure agreements, bylaws, and member agreements must be scrutinized.

Defending Against Claims

Defending against fiduciary duty claims requires a similar strategic approach. A primary defensive strategy is to attack the existence of the alleged fiduciary relationship, particularly in cases involving informal fiduciary duties. Key to this process is demonstrating the absence of a prior relationship to the business transaction in question or showing that the relationship lacked the necessary elements of trust, reliance, and authority to qualify as fiduciary in nature. Demonstrating adherence to relevant duties, if they are found to exist, becomes the next line of defense. Mitigating potential damages is crucial, often involving a detailed analysis of the alleged harm and its direct link to any purported breach of duty.

Adapting to a Changing Landscape

The scope of the age-old legal existence of fiduciary duty continues to evolve, with modern business practices giving rise to new forms of litigation. Understanding how traditional duties are being reinterpreted in informal settings is crucial. As disputes become more complex, so must our approaches to both prosecuting and defending these claims. By staying informed and adaptable, business professionals and litigators can effectively navigate the intricacies of fiduciary duty claims in today's dynamic business environment. **HN**

Michael K. Hurst is a Partner at Lynn Pinker Hurst Schwegmann and Julie Pettit is a Partner at The Pettit Law Firm. They can be reached at mhurst@lynnllp.com and jpettit@pettitfirm.com, respectively.

Professionalism Tip

"I will advise my client of proper and expected behavior."

- Excerpt from the Texas Lawyers Creed

Find the complete Creed online at https://shorturl.at/FQX26

Renew Now and Continue to be a Part of the DBA Community!

The DBA has been busy over the past few months—we have hosted happy hours, judicial panels, welcomed special guest Jeffrey Rosen, author of The Pursuit of Happiness, and received the Dallas Hispanic Bar Association's President Award! Join or Renew now at dallasbar.org and join a vibrant and dynamic community of legal professionals.

DBA Past Presidents Laura Benitez Geisler, Rhonda Hunter, Michael Hurst, Mark Sales, Paul Stafford, and Red Dog Jones, joined DBA President-Elect Vicki Blanton at a recent DBA member social.

The Business Litigation Section hosted a panel that included Jonathan Childers, Jason Dennis, Trey Cox, Hon. Dale Tillery, and Justice Bonnie Goldstein.

The DBA was honored to receive the President's Award from the Dallas Hispanic Bar Association.

DBA President Bill Mateja, Jeffrey Rosen, and Talmage Boston.

The September 4 Wednesday Workshop was very well attended. The topic was Screening for Victims of Human Trafficking and Understanding the Law Enforcement Reporting Process.

Dallas Bar Association

LIVING LEGENDS

Friday, November 22 | Noon - 1:00 PM

MCLE: 1.00 Ethics

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Erleigh Wiley
Criminal District Attorney,
Kaufman County

Interviewed by
Jade Jackson
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Focus | Business Litigation/Tort & Insurance Practice

Raising (or Defeating) the "Waiver of Liability" Defense

BY WALKER M. DUKE

Imagine this scenario: your family is arriving for the holidays when you see your niece Suzie hobbling up the sidewalk on crutches. She tells you she was at a bar a couple weeks ago and thought the mechanical bull looked like fun. Before getting on, she signed a waiver form full of fine print without reading it. Suzie saw the mechanical bull operator pounding a few drinks beforehand. He got a little rough with the controls and, unfortunately, your niece got bucked off and broke her leg. Now she wants to sue the operator and asks you if she has a claim.

Waiver and release of liability provisions have become commonplace and range in use from contracts between sophisticated commercial parties to warning signs at amusement parks. The Texas Supreme Court holds that a release, at its heart, is a contract. And absent fraud, misrepresentation, or deceit, signatory parties are bound by the terms of the contract signed, regardless of whether they read it.

Release is an affirmative defense that must be pleaded. The Texas Supreme Court has expressly ruled that limitation of liability clauses are generally valid and enforceable. *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 231 (Tex. 2019). Parties can agree to limit liability for future negligence unless the agreement violates the constitution, statutes, or public policy.

In determining whether waiver is against public policy, courts look to the relationship between the parties; if there is disparity of bargaining power, the agreement will not be enforced. A disparity of bargaining power exists when one party has no real choice in accepting an agreement limiting the liability of the other party. On Suzie's facts, she had equal bargaining power and was free to walk away. Suzie may not get a pass for not reading what she signed.

Assuming a liability waiver does not violate public policy, the provision must satisfy the two-prong fair notice test. *Dresser Indust., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507 (Tex. 1993). The waiver provision must be both (1) conspicuous, and (2) satisfy the "express negligence" test. Compliance with fair notice requirements is a question of law for the trial court to decide.

In *Dresser*, the Texas Supreme Court ruled that a clause is conspicuous when it is written in a way that a reasonable person against whom it is being enforced should have noticed it. Examples of what is generally considered "conspicuous" are printed headings in capitals (*i.e.*, "Non-Negotiable Bill of Lading"), language in the body of a form in larger or other contrasting type or color, or language in an extremely short document.

The express negligence rule states that if a party intends to be released from its own future negligence, it must express that intent in clear, unambiguous terms within the four corners of a contract. The waiver clause should contain language that states the releasor is releasing all claims, even if caused by the releasee's own negligence.

Even though the form Suzie signed was full of legalese she did not understand, it did state that she was releasing the mechanical bull operator from all claims—and even specifically referenced releasing liability caused by the operator's own negligence. It passed the express negligence test. Lucky for Suzie, however, the form was printed in tiny 6-point typeface, all the same font, on the front and back of a full-sized sheet of paper. She never noticed the waiver, and neither would most people. Because the waiver and release provision were not conspicuous, it likely failed the fair notice test, and thus, would not be enforceable.

But what if the operator's waiver and release language was in bold font and conspicuous? What about a claim for gross negligence because the mechanical bull operator was drunk? Suzie may be in luck. The majority of Texas courts of appeals have held that waivers of gross negligence are against public policy and are, therefore, unenforceable. So, while Suzie may have waived a claim of ordinary negligence, Suzie did not release the mechanical bull operator from gross negligence.

As you sit around the table with Suzie and the rest of the family, you can impress them with tales of conspicuousness and express negligence, and stories of unequal bargaining power and public policy considerations. And you can tell Suzie she probably can bring a lawsuit, but next time, leave the bull riding to the professionals. **HN**

Walker M. Duke is a Partner at Duke Seth, PLLC. He may be reached at wduke@dukeseth.com.

Join the Texas UPL Committee

The **Unauthorized Practice of Law Committee** (UPLC) is comprised of nine volunteers who are appointed for three-year terms. The UPLC is authorized to investigate and eliminate the unauthorized practice of law. Members of the UPLC volunteer to help with cease-and-desist letters and injunction lawsuits. Serving on this committee is an excellent opportunity to get involved, network, meet people, and develop business.

Sign up at https://buff.ly/3E8qadk

DVAP's Finest

FERNANDO AVELAR

Fernando Avelar is a partner at Dorsey & Whitney LLP.

What types of cases have you accepted?
I have primarily taken on divorce cases and probate matters on a pro bono basis.

Describe your most compelling pro bono case.
One of my most compelling cases I had the privilege of handling involved representing a single mother seeking a divorce from her husband due to physical abuse. This was not only a legal battle but also an emotional journey for my client. The husband, who had moved to another county, was uncooperative and elusive, refusing to provide his address. Through investigation of property records, we were able to pinpoint his location. Once located, I worked with the sheriff's office in that county to locate and serve process on him. Despite the challenges, the court granted the divorce, and my client was able to put the previous relationship behind her and move forward with her life. The relief my client experienced reaffirmed the importance of pro bono work and the impact it can have on individuals' lives.

Why do you do pro bono?
I volunteer my time towards pro bono work because I believe in the transformative power of the law to help and protect vulnerable individuals in our community. Pro bono service is a way to ensure that legal services are accessible to all, regardless of their financial means. It allows me to give back to the community and use my skills to make a tangible difference in people's lives. Knowing that my efforts can provide relief and support to those in difficult situations is incredibly fulfilling and aligns with my core values as an attorney.

What impact has pro bono service had on your career?
Pro bono service has profoundly impacted my career by broadening my legal experience. I am a corporate attorney primarily focusing in the areas of mergers and acquisitions and venture capital. Dedicating time to pro bono service has allowed me to hone my skills in areas of law that I would not otherwise have the opportunity to participate in. It has allowed me to work on a diverse array of issues and develop a deeper understanding of the human aspect of law. This experience has made me a more compassionate and effective advocate for my clients.

What is the most unexpected benefit you have received from doing pro bono?
The most unexpected benefit of doing pro bono work has been the deep connections I've formed with clients and community organizations. These relationships have provided me with a sense of community and support that goes beyond professional networking. Additionally, the gratitude and positive impact I've witnessed in the lives of those I've helped has been immensely rewarding.

DVAP
Dallas Volunteer Attorney Program

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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 on November 15** to court staff teams in each of the following categories:

• Dallas Appellate Courts • Dallas Civil District Courts • Dallas County Courts at Law
• Dallas Criminal District Courts • Dallas County Criminal Courts • Dallas Family Courts
• Dallas Probate Courts

For questions, contact lhayden@dallasbar.org.

Deadline to vote November 1.

Visit: tinyurl.com/2024courtawards to vote

DALLAS ALLIED BARS COMMITTEE

DEI MOVIE NIGHT

"BLACK UNIFORMS"
NOVEMBER 12 · 5:30PM
ARTS DISTRICT MANSION

This film documents the African Americans time while serving in the military/armed forces. The film's director, Bob Darwell with Sheppard Mullin, will attend the movie showing.

Complimentary salsa bar & sodas will be provided and a cash bar will be available. The movie will begin promptly at 5:45 p.m.

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Focus | *Business Litigation/Tort & Insurance Practice*

How AI is Shaping Legal Strategies

BY ALEXANDRA WAHL

Artificial intelligence (AI) is creeping into every nook of the legal world, and litigation is no exception. Whether you are drowning in research or fine-tuning a closing argument, AI tools are ready to lend a hand—or perhaps more accurately, a brain. But before we get too comfy with our digital assistants, we should look at how AI is changing legal strategies, what it can (and cannot) do, and the ethical tripwires to avoid.

Legal Research with Westlaw's CoCounsel

Forget the days of scrolling endlessly through case law databases. Westlaw's CoCounsel is the AI sidekick you did not know you needed. Do you have a burning legal question? Fire off a 1 to 2 sentence inquiry into CoCounsel that includes the relevant practice area, cause of action, governing law, the remedy you are after, desired outcome, and any material facts—and then sit back and watch the answer roll in. Associates today are living the dream. But even beyond answering these legal queries with state-specific references, its real magic lies in QuickCheck.

Drop your opponent's brief—or your own—into QuickCheck, and it will analyze the research, determine whether the authorities are still good law, review quotations for accuracy, suggest relevant cases you may have missed, point to secondary sources, and even poke holes in your arguments. And, if you want a peek into how your judge has ruled on similar motions in the past, CoCounsel has your back. It is almost like having a cheat sheet for court.

Similarly, Bloomberg Law's Brief Analyzer plays referee by scanning briefs and flagging any missing cases or content. These tools mean you can stop worrying about missing key arguments and focus on winning.

Grammarly: Advanced Grammar and Style

If you are still relying on Microsoft Word's Clippy to catch typos, it is time for an upgrade. Grammarly does not just fix grammar anymore; its plugin is constantly at the bottom of your screen catching everything you type—emails, pleadings, motions—for tone, clarity, and even ambiguity. Grammarly can check for consistency to maintain uniformity in capitalization and legal terminology throughout your 50-page brief or catch anything that may be considered plagiarism in a publication. It is like your second set of eyes so; you will never want to hit "send" without running a quick check first.

ChatGPT: Your Friendly (But Fickle) AI Assistant

Now for the wildcard—ChatGPT. This AI tool has become notorious for confidently delivering wrong answers (remember that infamous case where lawyers used ChatGPT to write a brief, only to discover it had *invented* case law? Oops).

But you should not write off ChatGPT just yet. It can be handy for things like rewriting emails, brainstorming deposition questions, or generating fresh angles for your closing arguments. Think of ChatGPT like a clever first year—you still need to double-check its work before presenting to the boss.

Try these prompts for ChatGPT:

- "Rewrite this email to sound professional but not too formal."
- "Prepare deposition questions based on this fact pattern: [insert the factual background section from your petition]."
- "Summarize the key points of this contract."
- "Draft an outline for a closing argument in a breach of contract case."

Just remember: *always double-check its output*. ChatGPT and other large language models (LLMs) tend to "hallucinate," meaning they occasionally make things up. A 2024 study from Stanford found that LLMs like ChatGPT hallucinate 75 percent of the time when answering questions about court rulings. Yikes.

Ethical Considerations: AI and Legal Practice

We cannot talk about AI without addressing the ethical requirements governing lawyers. Sure, AI tools like ChatGPT and CoCounsel are great for boosting productivity, but there is a fine line between using them wisely and overreliance. Lawyers are ethically bound to provide competent representation, which means you cannot just hand your tasks to an AI and call it a day.

AI tools can speed up research and drafting, but they are not flawless. A misplaced citation or wrong case reference could not only weaken your argument but also harm your client's case. So, while AI can assist, the final responsibility still rests with you to ensure the accuracy and quality of your work.

AI: A Boost, Not a Replacement

Despite all the buzz, AI is not here to replace lawyers—it is here to make us faster, smarter, and a little less stressed. Whether it is drafting a motion, checking your opponent's brief, or just keeping your grammar in check, AI can slash time-consuming tasks and give you a head start. But remember, AI can make mistakes, so you are still in charge of making sure your final product is solid.

So, should you hop on the AI bandwagon? Absolutely—just do not forget to steer. **HN**

Alexandra Wahl is a Partner at Wick Phillips Gould & Martin, LLC and can be reached at alex.wahl@wickphillips.com.

Building the DBA's 34th Habitat for Humanity Home

Thank you to all who participated in this year's build – the DBA's 34th home. The DBA began building Habitat homes in 1991 and is the longest running whole-house sponsor in Dallas.

There is still time to donate to help us reach out goal of $100,000. For more information, log on to www.facebook.com/DBAHomeProject.

Mail donations to the Dallas Bar Association, 2101 Ross Avenue, Dallas, TX 75201.

Focus | *Business Litigation/Tort & Insurance Practice*

Challenging Privileges in Large Document Production Cases

BY GREG ZIEGLER AND TY VESSELS

Navigating the process for asserting and challenging privileges under the Texas Rule of Civil Procedure requires careful attention. This is particularly true in cases involving voluminous, rolling document productions. Practical approaches exist to avoid pitfalls.

Objections Prohibited

Although Rule 193.3 is titled "Asserting a Privilege," the process for privilege assertion begins at Rule 193.2(f), titled "No Objection to Preserve Privilege." Parties should not object to discovery requests on privilege grounds. Instead, parties must comply with the protocol outlined in Rule 193.3. Objecting will not waive the privilege but compliance with 193.3's procedure must occur when the requesting party points out the erroneously lodged objection.

Withholding Statement

Per Rule 193.3(a), in lieu of objecting, a party who "claims" responsive material is privileged may withhold the material but must state in the response or in a separate document:

1. Responsive material has been withheld;
2. The request to which the withheld material relates; and
3. The privilege asserted, e.g., "work product" or "allied litigant" privilege.

Privilege Log

In accordance with Rule 193.3(b), after receiving a withholding statement, the requesting party can serve a written request that the withheld material be identified sufficiently to enable assessment of the privilege. The responding party must, within 15 days of the request, describe in writing:

1. The withheld material, without revealing privileged information; and
2. The privilege asserted for each document or group.

Exemption

Under Rule 193.3(c), a party can withhold without identifying in the privilege log attorney-client communications and attorney work product material created for the purpose of and concerning the ongoing litigation.

Premature Privilege Log Request

The right to request a privilege log does not exist until the responding party provides a withholding statement. Triggering the 15-day timeframe to provide a privilege log will not occur until a withholding statement is provided.

Consequences of Untimely Privilege Logs

Rule 193.3 does not provide consequences for failing to timely and properly respond to a proper privilege log request. However, the requesting party may move to compel and request other relief when a privilege log is not provided as required.

Practical Tips Ensuring Privilege Preservation

1. **Avoid Prophylactic Objections/Issue Withholding Statement:** Do not lodge blanket privilege objections in response to discovery requests before reviewing responsive material for privilege. As soon as privileged responsive material is identified, supplement the response with a withholding statement. For large or rolling document productions, do not wait to issue withholding statements until the end of production. Do so at the time each tranche is produced. Do not state that a withholding statement will be provided once all documents have been produced. An email stating material is being withheld on privilege grounds can be construed as a withholding statement. Once a withholding statement is issued, be prepared to timely respond to a request for a privilege log.
2. **Privilege Log Request Prior to a Withholding Statement:** If a privilege log request is received prior to a privilege determination and before making a withholding statement, respond within 15 days that currently no documents are being withheld. Stating a privilege log will be produced later or at the end of production may be construed as an admission that documents are currently being withheld and may be construed as waiving the privilege.
3. **Do Not Wait until the End of Production to Produce a Privilege Log:** Waiting to provide a privilege log until the end of a production after receipt of an appropriate request for a privilege log is improper. Provide any privilege log covering the documents withheld from the production tranche within 15 days of the request. Supplement the privilege log as documents are withheld from subsequent productions.

Practical Tips for Challenging Privilege Assertions

1. **Request a Withholding Statement:** If a response to a discovery request is unclear about whether material is being withheld as privileged, ask for a withholding statement. A response to discovery requests that material will be produced "subject to" prophylactic objections does not qualify as a withholding statement. A privilege log request based solely on such a response may be premature.
2. **Move to Compel:** If the responding party fails to respond to requests for a withholding statement or privilege log, move to compel compliance with Rule 193.3. If claimed privileged material is being withheld, the responding party bears the burden of proving the privilege with an affidavit seven days before the hearing or live testimony at the hearing. The responding party may present a privilege log and submit responsive material for in camera inspection.

Conclusion

Successful navigation of the path to asserting or challenging privileges depends on strict compliance with Rules 193.2 and 193.3. Non-compliance can not only thwart the requesting party's discovery of relevant information, but also lead to court intervention and consequences against the non-compliant party. **HN**

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A Guide to Ensuring IOLTA Account Compliance

BY ADRIAN AGUILERA

Properly managing IOLTA accounts helps prevent the risk of being disbarred. However, the process can be confusing and cumbersome due to the commingling of prevention and client ledger/reconciliation management.

Here are some tips for the proper management of IOLTA accounts including a general overview, key tips for starting and operating these accounts, and how to help your firm ensure compliance.

IOLTA Account Overview

1. **Every Lawyer Needs to Operate a Trust Account**. A trust account is a special bank account that houses money on behalf of your clients or third parties—this is separate from your firm's operating bank account.
2. **There is No Difference Between an Attorney Trust Account and an IOLTA Account**. There is generally no difference. IOLTA, which stands for "Interest on Lawyer Trust Accounts," represents a program (created by your state) that authorizes the bank to send any interest developed in trust accounts to a state program—typically philanthropic causes or pro bono activities.
3. **You May Be Able to Use Any Bank When Starting a Trust Account**. Typically, the bank must participate in your state's IOLTA program. Before starting a trust account, confirm the bank is a "qualified" institution.
4. **Only Client Funds go into and out of a Trust Account**. Never mix operating costs or personal funds within a trust account. To prevent commingling, only unearned client funds go into trust accounts.
5. **Follow the Correct Procedure When Putting in and Taking Out Money from an Attorney Trust Account**. You are responsible for proving that funds were properly deposited and distributed. A record of all activities is required.
6. **Properly Handle all Client Trust Account Disputes**. If you receive a client dispute on the trust account money you desire to draw from, only the disputed portion needs to remain in the trust account until the matter is resolved.

Managing an IOLTA Account and Ensuring Compliance

Many state bars commonly require the information below. Visit your state bar's website for specific requirements.

1. Setup Your Trust Account Through a Bank

Below are some common bank requirements:

- Open a bank with a physical location within your state
- The bank must automatically report any overdrafts to the state bar
- Any interest earned on trust accounts must be sent from the bank directly to the state bar
- The bank must provide copies of canceled checks—either physically or digitally (copies that are digital-only must be maintained for a certain period of time, which is usually six years)

Most state bars require the bank account to be titled a "Trust Account." In addition, special business-sized blank checks must also be ordered with "Trust Account" printed on them.

2. Arrange A Recordkeeping System

Implement a recordkeeping system to track each client's funds deposited and withdrawn from your trust account. This process involves keeping an organized record of all receipts and payments for each client. Additionally, all client funds must be properly segregated from each other.

3. Generate Trust and Client Ledgers

As a part of your recordkeeping compliance requirements, you'll need to generate a trust ledger and a client ledger.

4. Prepare A Reconciliation Process

To ensure that deposits and payments are managed adequately for trust accounts, you'll need to complete a three-way reconciliation process, which includes:

- Your trust bank account
- Your trust ledger
- Your client ledgers

Three-way reconciliation is a compliance requirement that helps ensure the sum of all client ledger balances always matches your trust ledger and trust bank account activity.

Easily Operate IOLTA Accounts with Online Payment Processing

With online payment processing, you can easily and quickly receive payments from clients with online pay options—while correctly separating earned and unearned fees and protecting your trust account against third-party debiting. Additionally, you can ensure your internal trust accounting records match the activity/transactions in your bank account with built-in three-way reconciliation.

Take the stress out of trust account management today and ensure that your firm is in compliance. **HN**

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Chess and Checkers: Tips for Presenting an Expert Witness at Trial

BY BRENT A. TURMAN

Nothing gives me more joy in litigation than playing chess when the other side is playing checkers, especially when they do not realize it. French Emperor Napoleon Bonaparte famously said, "never interrupt your enemy when he is making a mistake." This is one way to create an opportunity for your enemy—opposing counsel—to make a painful mistake when cross-examining your expert witness at trial or a final hearing in arbitration.

Before delving into the details, it is important to provide a brief disclaimer: This is **not** a one-size-fits-all approach. This tactic works only when you have a seasoned expert witness who feels comfortable on the hot seat. Using this tactic in other situations may not end well for your client, and you might even end up with egg on your face.

As litigators, we sometimes encounter overly combative opposing counsel—an unavoidable reality in our profession. As you approach trial, you have had months and, perhaps, years to observe opposing counsel's conduct. By that time, you have a good feel for how they may react. Based on your assessment, you know that once trial starts, your opposition will probably lunge at any opportunity to eviscerate your witnesses on the stand. Are you scared? No. Instead, why not create an opportunity for opposing counsel to impulsively rush forward and attack your expert witness? This is how you set the bear trap that your opponent will quickly regret stepping into.

As trial attorneys, we know there are certain things an attorney cannot skip during the direct examination of a witness. You have to "check all of the boxes" that need to be covered, address all elements of certain causes of action or affirmative defenses, explain the client's damages model and the expert's methodology, etc. But when presenting a skilled expert witness, you can strategically leave a few things out of your direct examination.

To be clear, you do not want to leave out any portion of testimony that must be addressed to meet your client's burden. However, you may choose to skip over a few things. These absences will not be on the jury's or judge's radar. However, they would be glaring omissions to any person who has been figuratively swimming in the facts of this case for months, if not years. These people are likely to include you, your team, and—most important— opposing counsel.

In my experience, overzealous opposing attorneys simply cannot resist the temptation of "scoring points" on what they perceive to be layups on cross-examination. That urge blinds opposing counsel from the fact that your expert witness is about to eat their lunch because they are ready, able, and willing to rebut the counterattack and—frankly—make the opposition lose credibility. In the days leading up to the trial or final hearing, these are the specific scenarios and type of questions that I preview and practice at length with my expert. By the time my expert is on the witness stand, they are already equipped for cross-examination.

If you think your expert witness is a candidate for this tactic, give this a try at your next trial or arbitration. As long as you are not going against my firm, I wish you good luck!

This maneuver is important because it accomplishes several goals. First, it can create an interesting moment for jurors, something that more closely resembles a scene from a legal drama that jurors could watch on TV. This is important when you realize that sometimes a juror's entire exposure to the judicial system is viewing shows like *Suits*, *Law & Order*, or *Jury Duty* (the 2023 reality show on Amazon Prime, not the 1995 film starring Pauly Shore). Interesting moments result in an engaged jury.

Second, disrupting the other side's cross-examination can create a large momentum swing in your client's favor. Finally, and perhaps most important, this exchange has the ability to deflate the opposing party and counsel's credibility. It is not personal, but your charge is to present the more persuasive and credible case for the factfinder. If your opposition's credibility is damaged, then that is just icing on the cake. Maybe opposing counsel should have taken a beat before pouncing. Then, they might have realized that you were playing chess the entire time. **HN**

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Jones Paternity Case Highlights Parental Contract Rules for Minors

BY STEPHEN FOX AND JONATHAN CLARK

The Jerry Jones paternity litigation reads like a modern-day soap opera. It had everything: money, power, and a supposed cover-up. But it also raised interesting legal questions, chief among them: is a confidentiality and release agreement executed by a mother that purports to bind her daughter valid and enforceable? In July, a Texas federal court answered "yes" to that question. The ruling offers an important reminder of the broad freedom of contract that Texas law provides—even when the contract binds a one-year-old.

For background, a 25-year-old woman sued Dallas Cowboys owner Jerry Jones for defamation in the Eastern District of Texas, alleging that she was Jones's child. At central issue in the litigation was a confidentiality agreement—executed when the plaintiff was a one year old. The agreement's terms included (1) the payment of money to the plaintiff's mother; (2) required the mother and the daughter to keep the matter confidential; and (3) prohibited the daughter from seeking to establish Jones's paternity at any time in the future.

Jones denied paternity but did not dispute the existence or contents of the agreement. In fact, Jones countersued claiming the plaintiff and the mother had breached the agreement.

A foundational question looming over the entire litigation was whether the agreement was enforceable against the daughter. The daughter contended that the agreement was unenforceable because: (1) it violated public policy; (2) the daughter was not a signatory; (3) no authorized third party (such as an ad litem) signed on her behalf; and (4) even if her mother could contract for the daughter in limited circumstances, she could not do so here because the mother's interests were adverse to the daughter.

Jones's response focused on the policy and validity question. Jones argued the law on parents contracting for minors is quite clear—parents may contract for minor children. Jones further claimed there was no evidence that the mother's interests were adverse to the daughter when executing the agreement. Ultimately, Jones argued, "the law presumes that a fit parent, i.e., a parent who adequately cares for her child, acts in her child's best interests."

The court agreed with Jones, finding the agreement valid, enforceable, and binding upon the daughter. First, it held Texas law unequivocally permits parents to bind their children. This occurs frequently in other contexts—including custody and visitation, settlement of legal claims, or privacy waivers. To that end, the mother had legal authority to bind the daughter when signing the agreement. Nothing about that contract, according to the court, required a break from this norm.

Second, the court held that Texas public policy did not invalidate the agreement. In particular, the court noted that Texas law does not prohibit parents from waiving various legal rights of their children—including the right to establish paternity. The court noted with importance that the agreement also included significant financial compensation to provide for the daughter's upbringing. Those financial benefits to the daughter counseled against a finding that the agreement was void on public policy grounds.

Third, the parties' prior, historic compliance with the agreement was evidence of its validity. Both Jones and the mother had strictly followed the terms of the agreement for two decades before the litigation arose.

Finally, the court determined there was no evidence of unconscionability or coercion in the agreement's formation and execution. The daughter implied that the personal power dynamics between her (through a single, middle-class mother) and Jones (a wealthy and prominent businessman) should factor into the analysis. The Court did not take this into consideration—and the court's ruling made no mention of coercion, duress, or other indicia of unconscionability.

For some, the result may seem surprising. But Texas, like most states, follows the principle of freedom of contract. In short, individuals are generally free to negotiate and execute contracts without government oversight. While the principle is not absolute, its limitations are narrow, largely centering on illegal acts, fraud or coercion, mental capacity, or unconscionability. The latter is very difficult to prove and generally requires a showing that *both* the circumstances of the agreement's formation and its underlying terms are so grossly out of step with ordinary society that they shock the conscience.

The Jones case serves as a stark reminder that the bar to unwinding a contract on unconscionability grounds is high. **HN**

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