Dallas Bar Association
HEADNOTES

April 2019 | Volume 44 | Number 4 | Focus | Appellate Law/Trial Skills

Thank You Mock Trial Judges

Bishop Lynch High School, of Dallas, won the State High School Mock Trial Championship. Dallas Bar Association members presided over and served as "jurors" for the final competition on March 2. From left to right are: (back row) Robert Tobey, DWLA President Sarah Rogers, John Sholden, Gaylynn Gee and Thomas Goranson. (Front row) Taylor Robertson, Alexandra Guio-Rozo, DBA President Laura Benitez Geisler, Jaime Olin, Justice Erin Nowell, and James Young.

Focus | *Appellate Law/Trial Skills*

Do You Really Want to Seek Mandamus Relief?

BY GEORGANNA L. SIMPSON AND BETH M. JOHNSON

After receiving a "bad" jurisdictional order, you may want to seek mandamus relief. But, is mandamus the right decision?

Mandamus is an extraordinary remedy available only at the discretion of the court. Although mandamus is not an equitable remedy, it is largely controlled by equitable principles. While certain legal questions must be considered before filing, one should also consider practical impacts. For example, if you lose a mandamus, you will still be in front of the same trial judge who may be even more disinclined to agree with your position going forward. Of course, if you win, the trial judge may become more inclined to listen to you regarding the law.

To be entitled to mandamus relief, you must be able to establish a *clear abuse of discretion*. On questions of fact, if any evidence supports the trial court's decision, mandamus relief will be denied. Filing a petition without being able to establish a clear abuse of discretion wastes the attorney's time and the client's money. Simple mandamus issues include a trial court's refusal to act on a ministerial duty, such as jurisdictional issues or the denial of an appropriate and timely-requested jury demand.

Additionally, you must establish that you lack an adequate remedy by appeal, which is often the more difficult hurdle. Review of incidental, interlocutory rulings are generally not permitted because it unduly interferes with trial court proceedings, distracts appellate court attention to issues unimportant to the ultimate disposition of the case, and adds to the expense and delay of litigation. However, mandamus review of significant rulings may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

The filing party is referred to as the "Relator," the opposing party is the "Real Party in Interest," and the trial judge is the "Respondent", so when the petition is filed, you must serve the trial court because the judge is a party. Sometimes, upon receiving a copy of the petition, the trial court may sua sponte reverse its ruling, at which point, the appellate court should be notified that the petition has

continued on page 20

Hon. Karen Gren Scholer Keynote Speaker at Law Day Luncheon

STAFF REPORT

By proclamation of President Dwight Eisenhower in 1958, Law Day became a national observance that takes place on May 1 of each year. Law Day originated from the vision of the American Bar Association, whose leadership sought a special day aimed to help Americans appreciate their rights and liberties, and by which the legal system could be recognized for the role it plays in maintaining our way of life.

Hon. Karen Gren Scholer

The Dallas Bar Association will mark Law Day at a noon luncheon on May 3, with the Honorable **Karen Gren Scholer** as the keynote speaker.

Judge Scholer was appointed to United States District Court for the Northern District of Texas last year by President Trump. She is the first Asian American to serve as a United States District Judge in the Fifth Circuit.

Prior to her appointment to the federal bench, Judge Scholer was both a trial lawyer and state trial judge. She was elected to serve as Judge of the 95th District Court of Texas for two terms, serving from 2001 to 2008. During her tenure on the state court bench, Judge Scholer served as Presiding Judge of the Dallas County civil district judges and was appointed by the Governor of the State of Texas to serve as a temporary justice on the Tenth Court of Appeals.

While in private practice, Judge Scholer was co-managing partner at litigation boutique law firm Carter Scholer (2014-18) and litigation partner at Jones Day (2009-13), Andrews & Kurth (1996-2000), and Strasburger & Price (1982-96). She was repeatedly recognized as one of the top lawyers in Texas, selected for inclusion over the span of many years in Thomson Reuters' Super Lawyers, D Magazine's Best Lawyers, and Best Lawyers in America. She was identified as one of the Top 50 Women Lawyers in Texas by Thomson Reuters' Super Lawyers and earned an AV Preeminent (5 out of 5) Peer Review Rating by Martindale-Hubbell.

Judge Scholer received numerous recognitions for excellence in her profession and dedication to community service. These include the Dallas Asian American Bar Association Lifetime Achievement Award, the Dallas Women Lawyers Association Louise Raggio Award, the Dallas Fort Worth Asian American Citizens Council Civil Servant of the Year Award, the Girl's Inc. She Knows Where She's Going Award, the Greater Dallas Asian American Chamber of Commerce Judicial Excellence Award, and the National Asian Pacific American Bar Association Trailblazer Award. Judge Scholer is a former chair and Life Benefactor Fellow of the Dallas Bar Foundation. She served as co-chair of Attorneys Serving the Community and in leadership positions for both the Dallas Bar Association and State Bar of Texas. She also served on the boards of numerous nonprofit organizations, including the boards of Camp John Marc, Literacy Instruction for Texas, and the Dallas Women's Foundation.

Judge Scholer is a graduate of Rice University and Cornell University Law School. She previously served on the board of directors for the Association of Rice Alumni and the executive board of the Cornell Law Association. She is married to Gunnar Scholer and is mother to Alex Johnson and Nate Johnson, both graduates of the University of Texas at Austin, and to Jack Johnson, a senior at the University of Notre Dame.

The Law Day luncheon begins at noon on Friday, May 3, 2019, at the Belo Mansion. Doors open at 11:45 a.m. For tickets log on to www.dallasbar.org. For more information, contact Liz Hayden at lhayden@dallasbar.org or (214) 220-7474. **HN**

Inside

DBA Home Project: Volunteers Needed

The DBA Home Project is in need of volunteers – both individual and firms/organizations. For more information, go to https://www.facebook.com/DBAHomeProject/

Calendar | April Events

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

FRIDAY CLINICS

APRIL 5-BELO
Noon *"Missed Opportunities and More: 3 Mediators' Perspectives on Advocacy at Mediation," John DeGroote, Chris Nolland, and John Shipp.* (MCLE 1.00)*. *RSVP to yhinojos@dallasbar.org.*

APRIL 12-NORTH DALLAS**
Noon *"Importance of Cybersecurity Incident Response Plans & How to Implement Them," Michael Holmes.* (MCLE 1.00)* ***Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Ste. 240, Dallas, TX 75240. Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center.*** *Thank you to our sponsor Fox Rothschild LLP. RSVP to yhinojos@dallasbar.org.*

APRIL 26-OAK CLIFF
Noon *"How to Screen for Problematic Clients during Consultation and How to Fire a Bad Client," Heather Johnson.* (MCLE 1.00, Ethics 0.50)* ***Oak Cliff Chamber of Commerce, 1001 N Bishop Ave, Dallas.*** *RSVP to yhinojos@dallasbar.org.*

MONDAY, APRIL 1

Noon **Tax Law Section**
"Recent Developments in Federal Income Taxation," Prof. Bruce McGovern. (MCLE 1.00)*

TUESDAY, APRIL 2

Noon **Corporate Counsel Section**
"*Update – What's Happening on the Hill?" Chris McCannell.* (MCLE 1.00)*

Tort & Insurance Practice Section
Topic Not Yet Available

DAYL Solo & Small Firm Committee

5:30 p.m. Bar None Auditions at Belo

5:30 **Law on Ice V**
"Law on Ice V: Internal Governance of Legal Matters in Sports," Dallas Stars' Executives Jim Lites and Alana Matthews. (Ethics 1.00) Visit www.dallasstars.com/cle to purchase tickets. Co-sponsored by the Entertainment Committee, the Entertainment, Arts & Sports Law Section, and the Dallas Stars.*

6:00 p.m. DAYL Board of Directors Meeting

WEDNESDAY, APRIL 3

11:30 a.m. **Dallas Bar Foundation Fellows Luncheon. Recipient: Nina Cortell.** *Tickets $65/Tables $650. For more information contact ephilipp@dallasbar.org.*

Noon **Employee Benefits & Executive Compensation Law Section**
"Defined-Benefit Plans Facing Potential Liability for Aging Mortality Tables and Allegedly Unreasonable Actuarial Assumptions," Eli Burriss and Richard Pearl. (MCLE 1.00)*

Solo & Small Firm Section
"Persuasion Matters: Connecting with Your Audience to Maximize Success," Kacy Miller. (MCLE 1.00, 0.25)*

Juvenile Justice Committee

Public Forum/Media Relations Committee

DAYL Judiciary Committee

THURSDAY, APRIL 4

Noon **Construction Law Section**
"Construction Technology – Legal Issues Arising from Recent Developments," Patrick "Gene" Blanton. (MCLE 1.00)*

Judiciary/Legal Ethics Committees
"Ethical Interactions with Judges On and Off the Bench," Hon. Mark Greenberg, Justice Robbie Partida-Kipness, Hon. Craig Smith, and Justice Amanda Reichek, moderator. (Ethics 1.00)*

Admissions & Membership Committee

St. Thomas More Society

FRIDAY, APRIL 5

8:45 a.m. **Dallas Minority Attorney Program**
Join Hon. Gina Benavides, Hon. Audrey Moorehead, Robert Tobey, local Judges and others speaking on Malpractice, Evidence through Technology, Criminal Law, Office Management and more. Free event. RSVP to kwatson@dallasbar.org. (MCLE 7.00)*

Noon **Friday Clinic-Belo**
"Missed Opportunities and More: 3 Mediators' Perspectives on Advocacy at Mediation," John DeGroote, Chris Nolland, and John Shipp. (MCLE 1.00)*. *RSVP to yhinojos@dallasbar.org.*

DAYL Assisting Lawyers in Transition Committee

MONDAY, APRIL 8

Noon **Alternative Dispute Resolution Section**
"Special Issues in Bankruptcy Mediations," Frances A. Smith. (MCLE 1.00)*

Real Property Law Section
"Vapor Intrusion: The Emerging Environmental Wildcard in Texas Real Estate Transactions," John Slavich and Dr. Kenneth Tramm. (MCLE 1.00)*

Peer Assistance Committee

DAYL Membership Committee

TUESDAY, APRIL 9

11:30 a.m. **DBA/DWLA Return to Work**
"Launching a Successful Comeback: Women Lawyers' Guide to Returning to Work," Jill Lynch Cruz. CLE pending. *For questions or to RSVP, email lhayden@dallasbar.org. Co-sponsored by the Dallas Women Lawyers Association.*

Noon **Immigration Law Section**
"CDJ Consular Update and Direct Filings of I-130s," Moona Gupta and Lisa Sotelo. (MCLE 1.00)*

Mergers & Acquisitions Section
"Transition Services for Employee Benefits and Personnel Matters in M&A," Vicki Blanton, Sarah Fry, and Lindsay Murphy. (MCLE 1.00)*

Home Project Committee

Legal Ethics Committee

6:00 p.m. J.L. Turner Legal Association

WEDNESDAY, APRIL 10

Noon **Bankruptcy & Commercial Law Section**
"Energy Bankruptcies: New Round or Same Round?" Jason Kathman and Stephen Pezanosky. (MCLE 1.00)*

Family Law Section
"How to Handle Social Security and Financial Planning Issues in a Family Law Case," Guy Rogers. (MCLE 1.00)*

Bench Bar Conference Committee

Summer Law Intern Program Committee

DAYL Lunch & Learn CLE

5:15 p.m. LegalLine. Volunteers needed. Contact sbush@dallasbar.org.

THURSDAY, APRIL 11

Noon **Government Law Section**
"How to Improve Your Public Information Response System," Tamara Smith. (MCLE 1.00)*

CLE Committee

Criminal Justice Committee

Publications Committee

Christian Lawyers Fellowship

FRIDAY, APRIL 12

7:45 a.m. Dallas Area Real Estate Lawyers Discussion Group

Noon **North Dallas Friday Clinic**
"Importance of Cybersecurity Incident Response Plans & How to Implement Them," Michael Holmes. (MCLE 1.00)* ***Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Ste. 240, Dallas, TX 75240. Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center. Thank you to our sponsor Fox Rothschild LLP.*** *RSVP to yhinojos@dallasbar.org.*

Trial Skills Section
"Mandamus-When You Need Error Correction Before Appeal!-The Nuts, Bolts, and Persuasion!" Justice Douglas Lang. (MCLE 1.00)*

DAYL Deal Boot Camp Committee

DBA/DAYL Moms in Law. *Lazy Dog Restaurant & Bar (5100 Belt Line Rd. Ste. 500, Addison). RSVP rfitzgib@gmail.com.*

MONDAY, APRIL 15

Noon **Business Litigation Section**
"Business Appeals Before the Slate of Eight," Justices Robert Burns, Corey Carlyle, Robbie Partida-Kipness, Ken Molberg, Erin Nowell, Leslie Lester Osborne, Bill Pedersen, and Amanda Reichek, moderated by Scott Stolley. (MCLE 1.00)*

Labor & Employment Law Section
"Gone with the Light: Where We Are and Where We've Been on Noncompetes," Gary Fowler and Jacqueline Johnson. (MCLE 1.00)*

TUESDAY, APRIL 16

Noon **Life Skills for Lawyers**
"This Is Awkward: Understanding Race, Gender and Generational Gaps, Conquering Communication and Cultural Differences," Saba Syed. (MCLE 1.00)*

Antitrust & Trade Regulation Section
Topic Not Yet Available

Franchise & Distribution Law Section
"Litigation is Coming: What Transactional Lawyers Should Know," Sally Dahlstrom and Taylor Rex Robertson. (MCLE 1.00)*

International Law Section
"What Does Compliance with GDPR Look Like in Real Life, Including Some Ethical Consideration?" Justin Koplow, Mirjam Supponen, Andrew Tekippe, and Dana Nahlen, moderator. (MCLE 1.50, Ethics 0.50)*

Community Involvement Committee

DAYL Elder Law Committee

DWLA Board of Directors

6:00 p.m. Dallas Hispanic Bar Association

WEDNESDAY, APRIL 17

Noon **Energy Law Section**
"Texas Oil and Gas Case Law Update," Jonathan Childers. (MCLE 1.00)*

Health Law Section
"Approaching Health Care False Claims Act Cases from a Defense and Plaintiff Vantage Point (Part 2 of a Two-Part Series)," Sean McKenna and Rachel Rose. (MCLE 1.00)*

Law in the Schools & Community Committee

Pro Bono Activities Committee

Non-Profit Law Study Group

5:15 p.m. LegalLine. Volunteers needed. Contact sbush@dallasbar.org.

THURSDAY, APRIL 18

11:00 a.m. 27th Annual DBA Golf Tournament at Cowboys Golf Club, Grapevine. *Register at https://birdeasepro.com/dbagolf2019.*

Noon **Appellate Law Section**
"Criminal Legislative Update," Kenda Culpepper. (MCLE 1.00)*

Christian Legal Society

DAYL Animal Welfare Committee

Dallas LGBT Bar Association

FRIDAY, APRIL 19

DBA Offices closed in observance of Good Friday

MONDAY, APRIL 22

Noon **Science & Technology Law Section**
"Master Services Agreements in 2019: What's New, What's Different, and What to Watch Out For," Savannah Franklin and Chad King. (MCLE 1.00)*

Securities Section
Topic Not Yet Available

Golf Tournament Committee

TUESDAY, APRIL 23

Noon **Probate, Trust & Estate Law Section**
"Case Law Update," Prof. Gerry W. Beyer. (MCLE 1.00)*

Minority Participation Committee

American Immigration Lawyers Association

DAYL Lawyers Promoting Diversity Committee

WEDNESDAY, APRIL 24

Noon **Collaborative Law Section**
"Toolkit for Success: Assisting Parents and Children in Crisis," MaryAnn Kildebeck and Robin Watts. (MCLE 1.00)*

Entertainment, Art & Sports Law Section
"The State of the Art Law in Dallas," Michael Heinlen. (MCLE 1.00)*

DAYL Equal Access to Justice Committee

DAYL Foundation Board of Directors

DVAP New Lawyer Luncheon. For more information, contact griffinh@lanwt.org.

Municipal Justice Bar Association

THURSDAY, APRIL 25

Noon **Criminal Law Section**
"Innovative Technologies During Sentencing," Stephen Green and Lauren Woods. (MCLE 1.00)*

Environmental Law Section
"Remediating Contaminated Properties from Perspectives of Attorneys and Consultants," Cindy Bishop and Michael Whitehead. (MCLE 1.00)*

Intellectual Property Law Section
"Artificial Intelligence and IP," Yoon Chae and Brian McCormack. (MCLE 1.00)*

DAYL CLE Committee

3:30 p.m. DBA Board of Directors

FRIDAY, APRIL 26

Noon **Oak Cliff Friday Clinics**
"How to Screen for Problematic Clients during Consultation and How to Fire a Bad Client," Heather Johnson. (MCLE 1.00, Ethics 0.50)* ***Oak Cliff Chamber of Commerce, 1001 N Bishop Ave, Dallas.*** *RSVP to yhinojos@dallasbar.org.*

DVAP CLE
"How to Avoid Explosions in the Minefield of Law Practice," Robert Tobey. (Ethics 1.00)*

DBA/DAYL Moms in Law. Mercat in the Harwood District (2550 Harry Hines Blvd., Dallas). *RSVP christine@connatserfamilylaw.com.*

MONDAY, APRIL 29

No DBA Events Scheduled

TUESDAY, APRIL 30

No DBA Events Scheduled

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 Grecia Alfaro at the DBA office at (214) 220-7447.

****For information on the location of this month's North Dallas Friday Clinic, contact yhinojos@dallasbar.org.***

Keith Nelson

'Divorce doesn't have to hurt kids.'

After 30 years as a family lawyer, Keith Nelson still looks forward to helping his clients work through one of the most difficult times of their lives.

"I'm a father of six, so I have a particular commitment to cases in which there are children involved," says Keith, who is Board Certified in Family Law by the Texas Board of Legal Specialization. "There's no denying that divorce is difficult, but I consider it a special calling to help my clients get through it. I find it very gratifying."

YOUR FUTURE OUR FOCUS

Keith, who writes and speaks frequently on issues affecting the well-being of children during divorce, says it's easy for parents to get caught up in the conflict of divorce, but that most people truly want to shield their children from that conflict.

"In fact, in many cases, because the children were traumatized by their parents' anger at each other, the divorce came as a relief to the kids," says Keith. "In those cases, we focus on doing the best we can to ensure that the children have positive relationships with both parents after the divorce is final. Divorce doesn't have to hurt kids."

A FAMILY LAW FIRM

ONDA
orsinger nelson downing anderson

Dallas 214 273 2400 | Frisco 972 963 5459 | San Antonio 210 225 5567 | www.ondafamilylaw.com

Richard R. Orsinger, Keith M. Nelson, R. Scott Downing, Jeffrey O. Anderson, William M. Reppeto, Brad M. LaMorgese, Amber Liddell Alwais, Lon M. Loveless, Paula A. Bennett, Paul Hewett, Chris Oldner, Holly Rampy Baird and Porter Corrigan are Board Certified in Family Law by the Texas Board of Legal Specialization. Richard Orsinger is also Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. Chris Oldner is Board Certified in Criminal Law by the Texas Board of Legal Specialization.

President's Column

Raise a Glass

BY LAURA BENITEZ GEISLER

I love a reason to celebrate. Celebrations are joyful. Celebrations are a way to honor special people, events, and milestones. Celebrations give us something to look forward to, serve as a reminder to appreciate the goodness and joy in our lives, and provide an opportunity for us to honor and revel in the joy of others.

Excuses to Celebrate in April

If you need an excuse to celebrate in April and can think of none, you are in luck. According to the National Day Calendar, there are designated days in April to celebrate everything from rainbows, unicorns, and cheddar fries (I don't need an excuse to celebrate cheese fries, but if you do National Cheddar Fries Day is April 20).

Celebrate Service

But because there is no such thing as too much joy, I ask you to join me in celebrating volunteer service. This year, National Volunteer Week is celebrated April 7-13. The "official" celebration of volunteer service started in 1974 when President Nixon issued Proclamation 4288, urging all Americans to spend time in service to others, and encouraging communities to recognize and honor volunteers "who have given countless hours for the betterment of our communities and the American way of life."

As DBA President I enjoy a bird's eye view of the many ways our members volunteer their time in service to others. It is truly awe-inspiring. I wish everyone had an opportunity to witness the generosity of time and service from my vantage point because it reflects the very best of our profession and is worth celebrating. There are many unsung volunteer heroes within the DBA ranks. Volunteering in different ways for different reasons, their service often goes unrecognized beyond those who are directly affected by what they do. Their service is done quietly, behind the scenes and without expectation of recognition or accolades.

Take for instance the **Texas High School Mock Trial Committee** led by **Steve Gwinn**, along with **Brian Benitez**, **Sarah Flournoy**, **Tasha James**, **Brad Johnson**, **Allison Reppond**, and **Taylor Robertson**. This group of unsung heroes recently coordinated the 40th Anniversary Texas High School Mock Trial Competition. And what about **John Sholden** (in group photo on page 1) who judged this year's Mock Trial final round—and was also on the team to win the very first Texas State Mock Trial Championship! You have likely heard of the competition. You may have volunteered to judge a round or two. But unless you have been directly involved with the committee work, you probably do not know how just much time and effort it takes to put together.

From writing case materials, to coordinating competition logistics, recruiting volunteers, hosting award luncheons, and managing the expectations of students, coaches and parents, these unsung heroes oversee every element of both the Regional Competition and State Championship Tournament (the two competitions combined span the course of seven weeks).

You may also be unaware of the competition's impact and reach. This year alone, there were approximately 2,200 participating high school students. Testimonials make clear that this is much more than an academic tournament. Students have described the experience as an "invaluable education" and "the most rewarding experience of my life." When you consider the competition is in its 40th year, the collective impact made by the volunteer lawyers who have kept it running for so long is immeasurable and to be celebrated. That is especially true for **Steve Gwinn** who has voluntarily led this program for almost 20 years. To Steve and every lawyer who has ever served on the committee, judged a round, or coached a team, I celebrate and thank you for your service.

Celebrate Pro Bono Volunteers

When it comes to pro bono services, there are many unsung heroes to celebrate. But within that group of heroes, there are some I would describe as pro bono "Superheroes." Take for example, **Reed Allmand**, who through the Dallas Volunteer Attorney Program (DVAP), has accepted 62 pro bono clients with Chapter 7 Bankruptcy claims. By the time pro bono "Superhero" **John VanBuskirk** graduated law school at age 71, he had completed 800 hours of pro bono service. Since receiving his law license in May 2018, John has accepted 21 DVAP cases while regularly volunteering at neighborhood legal clinics. Then there is pro bono "Superhero" **Jack Fan**, who is nearing triple digits (90 to date) in the number of pro bono cases he has accepted from DVAP. To Reed, John, Jack and all of you who provide pro bono legal services, support and encourage pro bono within your firm, staff DVAP clinics, answer calls at LegalLine, or spend time fundraising for Equal Access to Justice, I celebrate and thank you.

Celebrate Those Who Have Inspired Generations

There are some people who deserve to be celebrated for their lifelong commitment to volunteer service. People like **Al Ellis**. A past-president and self-appointed DBA President for Life, Al is one of the most generous volunteers I know. With examples of service too numerous to list, suffice it to say Al should be celebrated for his lifetime commitment to serving others. His kindness and generosity is inspiring. Thank you Al. I honor and celebrate you and all of the mentors who encourage and inspire service in others.

Celebrate Yourself

You may identify with the commitment made by these individuals. Just because you are not mentioned by name in this column does not mean your service is not appreciated it just means I have a word limit. For all the unsung volunteer superheroes of the DBA, I celebrate and thank you too.

You may not engage in volunteer service or identify with the volunteers I have mentioned. But if the stories I have shared inspire you, then I encourage you to find a place where you feel connected and engaged to give back no matter how much or how little time you can comfortably share.

If for no other reason, consider volunteering for yourself. There is research confirming the health benefits associated with volunteer service. Although you do not need peer-reviewed data to confirm that volunteering feels good, and it does not require a Superhero's sacrifice of time to experience. If you do not believe me, try it or ask someone like **Steve Gwinn** why he has devoted so much time toward mock trial. I do not know for certain, but I suspect it probably started with the joy he saw within the students who participate in mock trial. That sort of raw joy resonates and leaves an imprint on your mind and soul. It is contagious. And that kind of joy is something to celebrate. **HN**

HEADNOTES
Published by:
DALLAS BAR ASSOCIATION

2101 Ross Avenue
Dallas, Texas 75201
Phone: (214) 220-7400
Fax: (214) 220-7465
Website: www.dallasbar.org
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 (ISSN 1057-0144) is published monthly by the Dallas Bar Association, 2101 Ross Ave., Dallas, TX 75201. Non-member subscription rate is $30 per year. Single copy price is $2.50, including handling. Periodicals postage paid at Dallas, Texas 75260.

POSTMASTER: Send address changes to Headnotes, 2101 Ross Ave., Dallas, TX 75201.

Column | Wellness

Financial Planning for Attorneys

BY KEITH PILLERS

Legal professionals suffer disproportionately higher rates of anxiety relative to the population as a whole. There are many factors that contribute to anxiety—personal finance is one.

For lawyers, financial stressors range from managing education debt to managing family finances in concert with managing firm finances. Managing our finances can be daunting and law school is not designed to make us astute in this area. There is a solution: formulating, implementing, and monitoring a personal financial plan.

Below is a basic process to help you think through your personal financial plan.

Step 1: Goals

Define your financial goals and put them on a timeline. Your goals may include: eliminate debt, buy a house, set up a firm, leave a firm, fund a child's education, achieve financial independence, and so on. Write them all out. You will prioritize them in the planning phase.

Step 2: Assess Your Current Situation

Assessing your current situation can be emotionally exhausting, but it is critical. You have to know where you are in order to determine a path to achieving your financial goals. Here is an example checklist:

- What is my current net worth (assets minus liabilities)?
- Do I track my spending?
- What are my non-discretionary exp-enses and do I have sufficient cash to cover three to six months of non-discretionary expenses?
- Is my total debt to gross income (housing costs plus all monthly debt payments divided by gross income) less than 36 percent?
- How far out in time is retirement and other financial goals?
- What is my current savings rate (savings plus any employer contributions divided by gross income)?
- Am I funding a qualified retirement plan?
- Do I have adequate insurance to cover prolonged income loss and all known liabilities?
- What is my current investment assets to gross pay ratio? Here are some rules of thumb: at age 25, .2 to 1; at 35, 1.5 to 1; at 45, 4 to 1; at 55, 9 to 1; and at 65, 16-20 to 1.

Step 3: Plan

After defining your goals and assessing your current financial status, you can write out a financial plan. When determining how to allocate your funds across your goals, think in terms of risk mitigation and the amount of time available to achieve each goal. Here is an example plan:

- Fund a cash reserve of three to six months of non-discretionary expenses within by year-end.
- Pay minimums on all debt obligations until cash reserve is funded.
- Once the emergency reserve is funded, allocate funds directed to the cash reserve toward high interest debt (6-8 percent and higher) and set up automatic payments sufficient to pay the debt down over an 18-month period.
- Shop for disability insurance that will cover 60-70 percent of base income, inflation adjusted.
- Shop for term life insurance sufficient to cover expected income and savings for the remainder of my working career plus all known short and long term liabilities (mortgage, education funding, day care costs, etc.).
- Estimate savings required to be able to sustain my current lifestyle in retirement:
  - ♦ Determine pre-tax amount needed to cover current monthly expenses (ex: $5000 per month);
  - ♦ subtract any sources of post-retirement income (ex: expect approx. $1000/month in Social Security);
  - ♦ multiply by 12 ($4000 x 12 = $48,000);
  - ♦ inflate by .03 for X years until retirement (Future Value = $48,000 x (1+.03)^20 = $86,693 (in 20yrs, it will take $87k to purchase what $48k will today);
  - ○ then divide by .045. ($86,693 / .045 = $1,926,518.
- Considering contributions and timeline, use a reliable online asset allocation tool or consult a financial planner to determine an asset allocation that is most likely to generate the rate of return needed to fund the estimated retirement goal.
- Set up Health Savings Account and automate funding.
- Set up and automate extra payments toward student loan with highest interest rate.

Step 4: Monitor

Check in quarterly to see how you are doing as to your overall plan.

Conclusion

Financial planning is a long-term commitment and process for managing controllables (savings rate, defining goals, clarifying cash flows, asset allocation, insurance, consumption, etc.), so you can worry less about non-controllables (week-by-week market performance, sudden emergencies, etc.). Contemplate creating a 1,000-day plan. One thousand days is long enough to make gradual changes to your cash flows and make a meaningful progress, yet short enough to require day-to-day commitment. Ultimately, financial planning is an effective means of mitigating financial anxiety. **HN**

Keith A. Pillers is an attorney, Certified Financial Planner® and Certified Private Wealth Advisor®. He currently Chairs the DBA Public Forum and Media Relations Committee. He can be reached at kpillers@gmail.com.

Together We Lunch

Wednesday, May 29, Noon at Belo

Join us as we engage in safe and open conversations about race.

RSVP to jsmith@dallasbar.org.

Sponsored by the Public Forum/Media Relations Committee

Column | *Ethics*

"You're fired!" . . . "No, I quit!" – The Ethics of Withdrawal

BY JEANNE M. HUEY

It is rare that a client and attorney sever their relationship on good terms during a case. And, no matter the reason, withdrawal requires simultaneously protecting yourself and your client—a trick that is never easy. It is therefore important to frequently review the disciplinary rules that govern withdrawal in order to avoid possible landmines.

The right to withdraw from representing a client is not absolute. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct (the Rules) sets out the specifics of withdrawal, and part (d) requires a lawyer to take all reasonable steps to mitigate the consequences of withdrawal to the client regardless of why it has occurred. This is usually thought of primarily as a litigation problem—you cannot withdraw on the eve of trial—but it can arise in a transactional practice as well. For deals that cannot wait, pulling out at the last minute will inevitably damage the client.

The solution to not having your withdrawal negatively affect the client's interests is to act promptly when the need arises. Client issues rarely appear without warning, so when dealing with problem clients, keep your eye on the calendar. As much as you would like to believe you can fix the relationship, if you wait too long it may be too late.

Withdrawal by mutual agreement or substitution of counsel is easy—the courts do not require an explanation—although you should always follow the Local and Court Rules to make the procedure as quick and painless as possible. On the other hand, withdrawal without client consent must be explained in order to obtain the Court's approval—and you are not out until the Court approves. The obligation to explain your withdrawal does not, however, trump the obligation to preserve client confidences found in Rule 1.05, and the definition of "confidential information" is broad enough to include things like whether the client is paying its bills on time, has lied to you, or even just won't cooperate in the case. The exceptions that allow you reveal client confidences do not include obtaining permission to withdraw from a court, so you must be careful what is said in a motion to withdraw and to the Court if the motion requires a hearing. Sticking with something like "differences between the attorney and client that make continued representation impossible" is the safest bet and, if you do not wait too long, will be enough for most courts.

The file belongs to the client and so when you withdraw you must return the entire file upon request (Rule 1.15(d), 1.14(b)). Texas is a "whole file" state, meaning everything generated in the course of the representation is part of the file. (Ethics Opinion 570). There are exceptions related to duties to third parties and legitimate attorneys' liens, but, as a practical matter, everything about the case, including purely internal emails and notes, belongs to the client and must be turned over to the client or its new counsel. This raises the possibility of embarrassment at least and malpractice liability at worst when email conversations within the Firm are not written with care. The internal email in which one lawyer blames another for missing a deadline or complains about the client with colorful language is all part of the file. If you do not want the client to read it later, do not write it down in the first place.

Withdrawal can also be time consuming and if you have not been paid you will not be eager to drop your billable work to withdraw and pull together the file. However, since time is not billable unless it is performed on behalf of the client, you cannot charge the client for filing your motion, attending a hearing, or gathering, reviewing and copying the file no matter what your fee agreement says. To do so would be a violation of Rule 1.04—the prohibition against charging an unconscionable fee. (*Lee v. Daniels & Daniels*, 264 S.W.3d 273).

Withdrawing from representation is never easy and usually involves an unhappy client, an unhappy lawyer, or both. For lawyers, that unhappiness does not excuse strict compliance with all the applicable ethical obligations, so care is always required. **HN**

Jeanne M. Huey is the Managing Partner at Hunt Huey PLLC and can be reached at jhuey@hunthuey.com

Focus | *Trial Skills/Appellate Law*

Turnover Receiverships: A Hybrid Model Fraught With Issues

BY SUSAN M. HALPERN

A banking client is served with a receivership order issued pursuant to the Texas Turnover Statute (CPRC §31.002). The order directs the bank to turn over a customer's "nonexempt" assets, without identifying any. The bank holds depository accounts (including an IRA) and assets in a safety deposit box. When you receive the papers, you note that this is not a garnishment lawsuit, and that the bank received a turnover order and a certified copy of a receivership order, both issued *ex parte*. It appears that the bank's customer has received no notice. What is your advice?

To formulate our answer, we must consider the turnover statute and, in particular, its amendments. Originally enacted in 1985, the statute applied to assets that could not "readily be attached or levied on by ordinary legal process." (former CPRC §31.002(a)(1)). To obtain relief, creditors were required to present evidence of nonexempt assets that were difficult to execute on (stocks, debentures, bonds, etc.) or that the debtor was attempting to make assets unavailable to creditors. *See, e.g., Rotella v. Mid-Continent Cas. Co.*, 2009 U.S. Dist. LEXIS 44110 (N.D. Tex. 2009) (creditor failed to establish the unavailability of ordinary legal remedies).

The statute was amended four times: (1) Subsection (f) was added, expressly prohibiting entry of an order regarding exempt property, except as it related to child support (1989); (2) Subsection (g) was added, stating that a receiver's rights to property held in a financial institution did not attach until service of a certified copy of the receivership order (1999); (3) Subsection (h) was added, rejecting case law that required specification of nonexempt assets in the turnover order, and expressly providing the opposite (2005); and (4) Subsection (a)(1) was deleted, eliminating the burden to establish that the nonexempt asset could not "readily be attached or levied on by ordinary legal process." These amendments broadened the availability of the turnover statute and lessened the burdens on judgment creditors.

One important creditor burden was left untouched by these amendments. Specifically, creditors seeking turnover relief must identify particular property and prove that it "is not exempt from attachment, execution, or seizure." (CPRC §31.002(a); *see Moyer v. Moyer*, 183 S.W.3d 48, 52 (Tex. App. – Austin 2005, no pet.)). Indeed, the statute continually references "nonexempt" property. That reference extends to turnover receivers: "The court may . . . appoint a receiver with the authority to take possession of ***the nonexempt property***." (CPRC §31.002(b)(3)) (emphasis added). The use of "the" before "nonexempt property," when combined with cases like *Moyer*, confirms that turnover receivers can only be empowered to take possession of property identified and proven to be nonexempt.

Despite this clear requirement, we see the increasingly common use of broad receivership orders that don't identify any particular property. These orders purport to place turnover receivers "in the shoes" of the debtor and/or describe nonexempt property as being *in custodia legis* (in the custody of the law). The broad reference to "nonexempt property" begs the question of what is covered by the order, leaving third-parties to fend for themselves in deciding what is or is not exempt, and how to comply with the order. The burden of proving "what specific assets are exempt" is turned on its head, leaving decisions about what is turned over to everyone but the court (and the judgment debtor). This is entirely inconsistent with the statute and case law. (*See Bergman v. Bergman*, 828 S.W.2d 555, 557 (Tex. App. – El Paso, 1992).

What our hypothetical and this discussion demonstrate is that *in custodia legis* receiverships do not fit with the purposes and scheme of the turnover statute. Creditors seeking broad *in custodia legis* receiverships should be required to comply with the more stringent requirements of CPRC Chapter 64, including with respect to eligibility and the ever-important posting of bonds. Turnover receiverships should be limited to specifically identified nonexempt property, consistent with the express terms of subsection (b)(3), and regardless of whether that property is specifically identified in the turnover order. Whatever the order does or does not say cannot extend its reach beyond what is permitted by the statute and case law.

Our advice to our hypothetical banker must include protecting the client from liability for (a) failing to turnover nonexempt assets as required, and/or (b) turning over exempt assets without authority to do so. In the end, that compels either agreement amongst all interested parties or the intervention of a court that can appropriately characterize the debtor's property. **HN**

Susan M. Halpern is the founding partner of The Halpern Law Firm PLLC and can be reached at shalpern@shalpernlaw.com.

Focus | *Appellate Law/Trial Skills*

Using Texas' Proportionate Responsibility Scheme

BY JADD F. MASSO

People often ask me what I enjoy most about being an appellate lawyer—and are surprised to hear my answer: "going to trial." One of the more surprising things I have seen as an appellate specialist at trial is how often defense counsel, particularly in business cases, miss opportunities to spread the blame for a plaintiff's alleged injury. Such a missed opportunity unnecessarily exposes the defendant to 100 percent of the potential liability.

Consider, for example, a simple breach of fiduciary duty case against a trustee alleging disbursement of trust funds to an unauthorized party. Even if the trustee *was* in the wrong, was she really the *sole* party responsible? Did she get inadequate or confusing instructions from the plaintiff? Did others lead her astray? Could the plaintiff have claims against someone else for the loss? Asking questions like these should reveal parties whose fault should be considered at trial, potentially reducing the defendant's ultimate liability.

What kinds of claims are subject to a comparative fault assessment? Chapter 33 of the Texas Civil Practice and Remedies Code provides our statutory scheme of proportionate responsibility. It applies to any claim sounding in tort (with a few limited exclusions) or brought under the Deceptive Trade Practices Act. Business torts are no exception: tortious interference, breach of fiduciary duty, and common-law fraud are all subject to allocation of comparative fault. The same goes for professional malpractice, defamation, premises, product, and theft liability claims.

As always, it is the substance of a claim that matters, not its pleaded title. In a business case, that may mean considering the economic loss doctrine to determine whether the claim truly sounds in tort or contract. Note also that Chapter 33 applies to federal diversity cases that apply Texas law.

To whom can the blame be spread? The plaintiff and other defendants are obvious targets, as are any settling parties. But do not forget about non-parties that could be designated as "responsible third parties" for allocation purposes, including unknown criminal actors. Responsible third parties can include persons or entities who are not subject to the court's jurisdiction or are immune, bankrupt, or for some other reason cannot be sued.

In a business case, think about what other actors could have contributed to the alleged harm. Aside from the plaintiff, what about the plaintiff's business partners, advisors, accountants, or lawyers? Did they breach a duty or otherwise contribute to the plaintiff's predicament?

When is the deadline to designate? Seeking a determination of comparative fault is an affirmative defense that must be pleaded in the defendant's answer. If an unknown criminal actor is to be designated a responsible third party, the issue must be raised within 60 days of the defendant's original answer. Otherwise, a motion to designate responsible third parties must generally be filed (1) before the statute of limitations expires and (2) at least 60 days before the initial trial date.

What is the evidentiary threshold for designation? To warrant submission to the factfinder for allocation of comparative fault, there must be legally sufficient evidence (i.e., more than a mere scintilla) that the party was negligent or otherwise caused or contributed to the plaintiff's injury by violating a legal standard.

Is mandamus available if the trial court gets it wrong? Yes! Mandamus relief is never a given, but a trial court has no discretion to refuse a responsible third party designation if the facts support it. Likewise, mandamus may be warranted if the trial court improperly allows a designation. In either case, the trial will be skewed—by the improper exclusion or admission of evidence relating to the acts or omissions of others that may have contributed to the plaintiff's injury. Under those circumstances, Texas appellate courts have been willing to intervene pre-trial to prevent an inherently flawed trial from going forward.

What evidence can be considered at trial? The trial court should admit evidence that is relevant to a party's actions in conforming or failing to conform to the appropriate standard of care. In *JBS Carriers, Inc. v. Washington*, a wrongful death case, the Texas Supreme Court recently held that evidence of the decedent's mental illness and drug and alcohol use was relevant to her comparative fault for the pedestrian-truck collision that caused her death. The Court explained that any prejudice of such evidence was outweighed by its importance to the jury's evaluation of her decision-making processes.

What must the charge include? If the negligence or other fault of the plaintiff or another party is contested, a jury question is a necessary predicate to the assessment of comparative fault. So be sure to request appropriate questions regarding *both* the fault of all responsible parties *and* their proportionate responsibility. **HN**

Jadd Masso is a member at Clark Hill Strasburger and can be reached at jadd.masso@clarkhillstrasburger.com.

Expanding online payments in your firm with eChecks

BY MICHELLE LOWE

Electronic forms of payment have become the preferred choice among consumers. Card payments have largely replaced cash because of the convenience they provide. Another popular form of electronic payment is eCheck. If you have been curious about how eChecks work and if they would make sense for your practice, keep reading! We are breaking down everything you need to know about eCheck payments.

What are eCheck Payments?

Essentially, eCheck is an electronic version of a traditional paper check, allowing a payer to electronically send funds directly from their bank account to a payee's bank account. eCheck payments are assisted by a network of interconnected financial institutions called the Automated Clearing House network (ACH). If you haave ever made a mortgage or car payment, or any other large payment electronically, you have made a payment using the ACH network.

Advantages of eCheck Over Paper Checks

eChecks eliminate many of the steps paper checks still have to go through to process and deposit, making it significantly faster. Without the need to mail or deliver a physical check, processing begins as soon as the money is moved online.

Switching to eCheck can future-proof your payments system. Recent trends show paper checks have been on a steady decline over the last decade. In fact, over 50 percent of consumers do not carry checkbooks, while 38 percent of people never write personal checks. Overall, paper check usage to pay bills dropped by as much as 20 percent in the last 10 years.

The bottom line? The faster you offer your clients online payment options, the better off your practice will be.

Four Stages of eCheck Processing

Authorization. The payee must receive authorization from the payer that the transaction is valid. This can be handled through an online payments solution, online form, contract, or over the phone.

Processing. The payment processor can now transfer funds between the payer and payee. The payee will need to manually enter the dollar amount and the proper account numbers into the payments processor or an online form.

Finalize. At this stage, the payment processor goes through a verification procedure to ensure the account and routing numbers between banks are accurate. If everything is correct, the transaction is officially submitted and enters the ACH system.

Deposit. In this final step, the payer's funds are deposited into the payee's bank account (after a certain number of days have passed). Both parties typically receive confirmation of the transaction.

Are eChecks Safe?

Thanks to foresight on the part of a handful of financial institutions, government agencies, and telecommunications firms, the answer to the question, "Are eChecks safe?" is **yes!** Here are a few reasons you can feel confident about accepting eChecks.

eChecks Are Safer Than Paper Checks

Per the most recent AFP Payments Fraud and Control Survey, 74 percent of participating organizations experienced check fraud in 2017. But less than half were the targets of electronic fund transfer (EFT) fraud.

Paper checks pass through more hands than eChecks which creates more opportunities for interception by criminals. But with eChecks, the information is transmitted directly to the financial institution.

Additionally, a paper check can be missing important details and still be processed and cleared. But if something is wrong with an eCheck, the transaction won't be initiated until the issue is resolved.

Check Acceptance Services Automatically Detect Potential Fraud

When a client's checking account information is entered (either directly into your payment processing software or via a secured payment page), the payment gateway provider verifies the person providing the information has the authority to use the account via a check acceptance service.

The acceptance service compares the provided client information (first name, last name, and address) to what the issuing bank has on file for the account and confirms it matches. If it does not, the payment is declined. The eCheck authentication process ensures you do not receive fraudulent payment information and that only authorized individuals are using an account.

As part of the verification process, the check acceptance service will scan a database of individual and company bank histories and flag a transaction if the account has a history of fraudulent activity.

With the rise of online payments, it's more important than ever for professionals to begin accepting them. Offering online payment options gives you more ways to get paid, and sends a strong message to your current and future clients—you are a tech-savvy attorney who runs your practice intelligently and efficiently. **HN**

Michelle Lowe is the Finance and Technology Expert for LawPay. She can be reached at mlowe@affinipay.com.

Moms in Law Events APRIL

Being a working mom can be challenging. Being a working lawyer mom can be a different ballgame with its own unique challenges. Moms in Law is going on its third year of being a no pressure, no commitment, informal, fun, support group for lawyer moms. The April events are:

Thursday, April 12: Noon, Lazy Dog Restaurant & Bar (5100 Belt Line Rd, Ste. 500, Addison)
RSVP rfitzgib@gmail.com

Friday, April 26: Noon, Mercat in the Harwood District (2550 Harry Hines Blvd.)
RSVP christine@connatserfamilylaw.com

Email christine@connatserfamilylaw.com to join the Moms in Law email listserv.

Focus | *Appellate Law/Trial Skills*

Voodoo Internet Information: Admitting Electronic Evidence

BY ALEXANDER J. TONEY

Despite its prevalence, some courts still view electronic evidence with skepticism. As one district court judge wrote, "While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation." *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (Kent, J.). In the same opinion, the court decried "voodoo information taken from the Internet," and required the plaintiff to find a hard copy of the evidence he wished to offer. *Id.* at 775. Because this judicial reticence persists, lawyers must be ready to answer objections to electronic evidence. This article considers the three most common objections—authenticity, hearsay, and best evidence—and suggests solutions.

Authenticity

In order to authenticate evidence, the Federal Rules of Civil Procedure require only that a proponent of that evidence provide facts sufficient to support a jury finding that the evidence is what the proponent claims it is. As a result, a trial court need only make the preliminary determination that a reasonable jury could find the evidence genuine. The supporting testimony courts tend to require for that threshold determination varies with the facts and circumstances of each case—and with the kind of electronic evidence at issue.

When it comes to emails, courts understand that more than one person may have access to an email account. To establish that an email was sent by a particular person, the sponsoring attorney may need to supply testimony that the sender regularly uses that email address. However, attorneys should remember that such testimony is not usually necessary if the email has been produced by the opposing party in response to a discovery request. In that case, the email bears a presumption of authenticity that the opposing party would need to rebut.

Websites present their own problems. Some courts require only that the person who accessed the website provide an affidavit describing the time and method of access. When the website is under the control of a government entity, courts tend to be more trusting, and will likely admit the website as a self-authenticating public record. In other instances, particularly when the authenticity or authorship of a website is in doubt, courts have required authenticating testimony from the site's webmaster, whether or not that person is a party. Attorneys should be specific about whether they are offering the content of the website for its truth or merely to show that a particular statement was made: when the website is not offered for the truth of its contents, courts tend to require less evidence to make a determination of authenticity.

Hearsay

When considering whether electronic evidence runs afoul of the hearsay rules, an attorney should first evaluate whether the evidence constitutes a "statement." When electronic evidence is generated automatically by a machine—as with headers, time stamps, the results of telephone tracing equipment, and the results of blood tests—the evidence does not constitute a statement and so does not fall within the ambit of the rule. When electronic evidence does amount to a statement, it may qualify as a business record. In the case of bank statements, some courts have gone so far as to judicially recognize the record-keeping practices of banks, obviating the need for the testimony of a custodian. Attorneys should note, however, that emails generally do not qualify as business records: they are not regularly made.

Best Evidence

The best evidence rule generally poses few problems for emails. Courts have consistently held that an accurate printout of an email, website, or spreadsheet qualifies as an "original" for purposes of the rule. However, text messages may produce more taxing problems. Because text messages are more likely to be permanently deleted than emails, attorneys should provide evidence that the text messages were not deleted in bad faith: this evidence will cure a best evidence objection, and the court should permit a witness to testify to the contents of a text message, even if the witness cannot produce a copy.

Conclusion

On balance, judicial attitudes have changed since Judge Kent wrote *St. Clair*. But, whether fair or not, the standards for the admission of electronic evidence do seem to be more stringent than those for the admission of tangible evidence. Attorneys offering electronic evidence should draft thorough affidavits and pay careful attention to the rules. They may also need to remind the court that the Federal Rules only require supporting testimony sufficient for a reasonable jury to conclude that the electronic evidence is what it purports to be. Attorneys will often find that juries are far more trusting of "voodoo information" than the courts are. **HN**

Alexander J. Toney is an associate at Squire Patton Boggs and can be reached at alexander.toney@squirepb.com

"New" Standards in Error Preservation

BY RYAN D. STARBIRD

In 1997, Texas Rule of Appellate Procedure 33.1(a) was amended to state the trial court may rule on an objection "either expressly or implicitly." Applying this alteration led to a divide among appellate courts over whether a trial court "implicitly" rules upon an objection to summary-judgment evidence by simply ruling on the summary-judgment motion itself. However, the Texas Supreme Court addressed this split of authority in *Siem v. Allstate Texas Lloyds*, No. 17-0488, 2018 WL 3189568 (Tex. June 29, 2018).

Before diving into the details, there are a few key procedural points to note. Generally, to preserve a complaint for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion that was sufficiently specific, and the trial court: (1) ruled on the complaint; or (2) refused to rule, and the complaining party objected to the refusal. But, in the context of affidavits—which are frequently used as summary judgment evidence—certain defects may be raised for the first time on appeal.

Defects in affidavits fall into two categories: defects of substance or form. For preservation purposes, objections to "form" and "substance" are treated differently. Substantive defects cannot be waived; formal defects may be waived by failing to object and obtain a ruling, and if waived, the evidence is considered.

Defects are formal if the evidence is competent but inadmissible; they are substantive if the evidence is incompetent (i.e., legally insufficient, such as affidavits consisting of legal or factual conclusions). Formal defects may encompass a wide array of issues, including, for example: objections to hearsay; lack of foundation or personal knowledge; sham affidavits; statements of an interested witness that are not clear, positive, direct, or free from contradiction; best evidence, self-serving statements; and unsubstantiated opinions.

The *Siem* case arose out of a dispute over a homeowners' insurance policy between the homeowners (the Siems) and their insurer (Allstate). Allstate moved for traditional and no-evidence summary judgment, and the Siems timely filed a response seven days before the hearing date; however, they failed to attach any evidence at that time. On the day of the summary-judgment hearing, the Siems filed an amended response with evidence, including expert reports and an affidavit from a professional engineer.

Allstate filed written objections to the engineer's affidavit on multiple grounds and provided the trial court with two proposed orders—one granting summary judgment and the other sustaining the objections to the Siems' evidence. The trial court granted Allstate's summary judgment, signing an order reflecting that the court considered (among other things) all competent summary-judgement evidence. However, the court did not sign the order on Allstate's evidentiary objections.

The *Seim* Court ultimately concluded Allstate's objections concerned formal defects; thus, Allstate needed to both object *and* obtain a ruling to preserve its objections. Because there was no express ruling, the Court considered—and rejected—the argument that the trial court's order granting summary judgment constituted an implicit ruling on the objections.

In forming its opinion, the *Siem* Court examined the divergent opinions among appellate courts, focusing on two cases from the Second Court of Appeals—in which that court held that by granting the movant's motion for summary judgment, the trial court created an inference that it implicitly reviewed and overruled the evidentiary objections—and contrasting those opinions with cases out of the Fourth and Fourteenth Courts of Appeals.

The high court held that the Fourth and Fourteenth Courts of Appeals "have it right." In different contexts, the Texas Supreme Court has previously recognized that an implicit ruling may be sufficient to present an issue for appellate review, but the record in *Siem* was devoid of a clearly implied ruling on Allstate's objections. Indeed, even without the objections, the trial court could have granted summary judgment—a point Allstate actually argued in its briefing. As the Supreme Court asked rhetorically, "if sustaining the objections was not necessary for the trial court to grant summary judgment, how can the summary judgment ruling be an implication that the objections were sustained?"

Because Allstate did not obtain a ruling on its objections to the affidavit's form, the court of appeals improperly disregarded it. Accordingly, the Court reversed and remanded the case to the court of appeals for further proceedings, setting new precedent in the process. **HN**

Ryan D. Starbird is an associate at Parsons McEntire McCleary PLLC. He can be reached at rstarbird@pmmlaw.com.

Judicial Investitures at Belo

The DBA hosted the Judicial Investitures of five new judges of the Criminal Courts (shown with DBA President Laura Benitez Geisler): Chika Anyiam; Lela Lawrence Mays, Remeko Edwards, Pamela Luther, and Raquel "Rocky" Jones.

April Friday Clinics

Friday, April 5, Noon at Belo
"Negotiation Skills," John DeGroote, Chris Nolland, and John Shipp. (MCLE 1.00)

Friday, April 12, Noon at Two Lincoln Centre
(5420 Lyndon B. Johnson Frwy., Ste. 240, Dallas, TX 75240)
"Importance of Cybersecurity Incident Response Plans & How to Implement Them," Michael Holmes. (MCLE 1.00)
Thank you to our sponsor Fox Rothschild LLP.

Friday, April 26, Noon at Oak Cliff Chamber of Commerce
"How to Screen for Problematic Clients during Consultation and How to Fire a Bad Client," Heather Johnson. (MCLE 1.00, Ethics 0.50)
RSVP to yhinojos@dallasbar.org.

Focus | *Appellate Law/Trial Skills*

Show Me The Money: Prejudgment Remedies in Texas

BY KATHERINE VALENT

Your client did not get paid. There are concerns that the defendant will take off with the money or property at issue. *What next?*

Aside from injunctive relief or filing a lien, the most common pre-judgment remedies in Texas include: (1) sequestration, (2) attachment, and (3) garnishment. Because these remedies are considered *extraordinary* relief, it is very important to closely follow the requirements of Texas Civil Practice & Remedies Code Chapters § 61.000-63.000 and Texas Rules of Civil Procedure 661-679 (Garnishment), as well as Rules 592-607 (Attachment) and Rules 696-712 (Sequestration).

First, you will need to file a petition along with an application supported by an affidavit as outlined by the rules above. The hearing can be *ex parte* if there is a danger that property could be moved or hidden. At the hearing, you will need to put on live testimony, post bond, and identify an amount required for the replevy bond (i.e., the debtor's bond required to take the property back).

Garnishment

As a prejudgment remedy, this is only available if the debt is for a liquidated (i.e., fixed) amount and allows you to obtain funds held in a bank account, stock certificates, bonds, settlement proceeds, precious metals, property in a safe deposit box, or other non-exempt items.

Your application for a writ of garnishment requires an affidavit stating that: (1) you are filing suit for a debt, (2) the debt is just, due and unpaid, (3) to your personal knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt, and (4) the garnishment is not sought to injure the defendant or the party to be garnished (the Garnishee). Tex. Civ. Prac. & Rem. Code § 63.001.

Once served with the writ, the financial institution must freeze all funds or property and file a verified answer.

Practice tips*

- Make sure the defendant has an account with a financial institution in Texas.
- If you required a credit application before you dealt with the defendant, it may have the banking information you can provide your attorney to file the application.
- Generally, public entities are not subject to garnishment.
- *Not sure of the owner?* Your writ of garnishment should name the nominal (i.e., apparent) owner of the property, and the Court can determine the true owner.

Sequestration

This is a useful remedy when seeking possession or title to property, or foreclosure on a mortgage. The Application must set forth (1) specific facts stating the nature of the claim, (2) the amount in controversy, and (3) the facts justifying the writ. Tex. Civ. Prac. Rem. Code 62.001. The order for sequestration needs the following information: (1) specific findings of fact supporting the statutory grounds for the issuance of the writ found by the court to exist; (2) a clear description of each item of property to be sequestered; (3) the value of each item of property to be sequestered; (4) the county in which each item is located; and (5) the amount of bond required of the defendant to replevy. Tex. R. Civ. P. 696.

Practice tips*

Call the constable who will be executing on the writ of sequestration to make sure that the property is specifically identified so that the order can address any concerns or requirements for that office.

Make sure the constable has somewhere to store the sequestered property. If not, provide for an alternative storage facility in your order and have it insured.

Attachment

This remedy is typically used when the property subject to seizure could be disposed of, transferred or sold before judgment, and you do not have an ownership or security interest in the property. Unlike sequestration, the property does not need to be subject to a security interest. Attachment is available if: (1) the defendant is justly indebted to you; (2) you are not seeking the attachment to injure or harass the defendant; (3) you will probably lose the value of the debt unless a writ of attachment is issued; and (4) specific statutory grounds for the writ exist. Tex. Civ. Prac. & Rem. Code § 61.001.

****Practice Tips****

It cannot be emphasized enough—strict compliance with the statutory and procedural requirements is critical. Failure to follow them could result in a counterclaim for violations of the Texas Debt Collections Act. Strategically, you may also consider whether the use of prejudgment remedies could result in the debtor filing a petition for bankruptcy to invoke the automatic stay. **HN**

Kate Valent is an attorney at Scheef & Stone, LLP. She can be reached at kate.valent@solidcounsel.com.

Meet Your New Judges: 5th District Court of Appeals

STAFF REPORT

In an unprecedented turn of events, the 5th District Court of Appeals has eight new justices—four of whom are women. Let's meet them now.

Robert Burns, III

Chief Justice **Robert Burns, III** grew up in Dallas, Texas, graduated from Austin College, and earned his juris doctor from the SMU Dedman School of Law. Chief Justice Burns began his career as an Assistant District Attorney in Dallas and, within six years, tried over 150 jury trials to verdict, including numerous capital murder cases. After 10 years in private practice, Chief Justice Burns was elected to the Criminal District Court No. 1, where he served the citizens of Dallas County for 12 years before being elected Chief Justice of the Fifth Court of Appeals. Chief Justice Burns is board certified in criminal law by the Texas Board of Legal Specialization and served two terms on its Advisory Board.


Robert Burns, III

Chief Justice Burns' public service has included six years presiding over Dallas County's DIVERT court (treatment court for first-time felony drug offenders), three terms on the Dallas County Juvenile Board, four years as the Local Administrative District Judge for Dallas County, and three years on the Dallas County Criminal Justice Advisory Board. Prior to taking the bench, he also served as an officer for the Dallas Criminal Defense Lawyers Association and the criminal law section of the DBA.

Cory Carlyle

Justice **Cory L. Carlyle** started his legal career in the Dallas County DA's Office. For two years, Justice Carlyle represented the State in appeals, evaluated past convictions for DNA testing, and handled the State's responses in writs of habeas corpus.


Cory L. Carlyle

Though he never planned to leave the Great State, a confluence of personal and professional opportunities led Justice Carlyle to Washington, DC. Following a stint drafting appellate opinions for an administrative law judge at the Department of Veterans Affairs, Justice Carlyle was offered a chance to return to criminal work, prosecuting cases for the Office of the Attorney General for the District of Columbia. Jumping at the chance to resume his career in criminal litigation, he worked for a year in that office, then opened his own practice primarily representing indigent criminal defendants.

Justice Carlyle's solo practice quickly grew from trial representation to appellate and other post-conviction representation. Upon returning to Texas, he added state-civil-appellate and federal-criminal-appellate litigation to his practice. Justice Carlyle is a North Texas native, graduated from Irving's Nimitz High School, the University of Texas at Austin, and the University of Houston Law Center.

Robbie Partida-Kipness

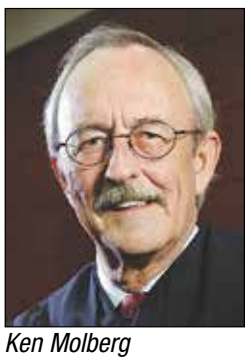
Justice **Robbie Partida-Kipness** is the first Hispanic to serve on this court. Justice Kipness attended the Universities of Texas at Austin and San Antonio and received her law degree from St. Mary's University School of Law where she was a member of Phi Delta Phi Legal Honor Society. She put herself through law school while clerking for The Law Offices of Jeffrey Anderson in San Antonio focusing on medical malpractice cases in both federal and state court.


Robbie Partida-Kipness

Upon graduation, Justice Kipness moved to Dallas to begin her legal career as a civil litigator with the law firm of Morgan & Weisbrod. She went on to join the law firm Silber Pearlman where she litigated thousands of products and premises liability cases throughout Texas. In 2008, Justice Kipness opened The Kipness Law Firm, P.C., where she specialized in automobile accidents, premises liability, and medical malpractice cases. For the past 10 years she was frequently appointed to serve as a court appointed guardian ad litem in personal injury cases in Dallas District and County Courts. She brings 21 years of civil litigation experience to the bench.

Ken Molberg

Justice **Ken Molberg** was born in Houston, Texas, and received his BA, with high honors, from the University of North Texas, where he served as an editor-in-chief of the *North Texas Daily*, and his J.D. degree from Southern Methodist University in 1976.


Ken Molberg

Justice Molberg began the active practice of trial law in 1975 and spent the first five years of his legal career with the Law Offices of James C. Barber. In 1981, he became a founder of and shareholder in the law firm of Wilson, Williams & Molberg, P.C. The firm dissolved some 28 years later following Justice Molberg's election to the district bench in 2008. Prior to his election to the 5th District Court of Appeals, he was Judge of the 95th Judicial District Court for 10 years; four of those years as the Local Administrative District Judge of Dallas County. He was previously the Presiding Judge of the Civil District Courts of the county for three terms.

Justice Molberg and his wife Linda, a registered nurse, are the parents of four grown children and they have three grandchildren.

Erin Nowell

"I am dedicated to the making sure we have a diverse and inclusive legal community here in Dallas, as I think this is one of the best ways to improve our communities as a whole," said Justice **Erin Nowell**.


Erin Nowell

Justice Nowell spent time prosecuting claims and defending lawsuits, having spent time on both sides of the courtroom. She began her career at a nationally recognized plaintiffs' firm specializing in toxic-tort litigation where the skills to manage and litigate large-scale mass torts. In 2007, Justice Nowell joined an international firm to explore other avenues of litigation and quickly developed an interest in class action litigation. She cultivated significant experience by participating in the defense of several class action cases in federal court. In early 2010, Justice Nowell returned to a plaintiffs' practice, again specializing in mass torts and catastrophic injury cases.

While in private practice, Justice Nowell was also involved in the Dallas legal community, serving on various committees and boards. She is a member of the DBA and serves on its Board of Directors and she is currently the president of the J.L. Turner Legal Association.

Justice Nowell is a graduate of Wake Forest University and the University of Texas School of Law.

Leslie Lester Osborne

Justice **Leslie Lester Osborne** is a sixth generation North Texas native. Justice Osborne attended Oklahoma State University and earned her law degree from the University of Arkansas at Fayetteville.

After graduating from law school, Justice Osborne returned to North Texas and began her career as a civil defense litigator with the Law Offices of Richard E. Harrison, where she gained extensive trial, briefing, and deposition experience in the areas of first and third party insurance defense, nursing home, employment law, sexual abuse, and residential construction liability. In 1997 Justice Osborne moved to Dallas and continued her practice in both commercial and insurance defense litigation at Hale Aston Seckel & Taubenfeld, LLP. In 2001 she opened her own firm, Leslie Osborne, P.C., and practiced in the areas of asbestos defense, insurance defense, and commercial litigation while raising her children and working 'Of Counsel' to firms including Brown McCarroll, LLP, and Martin Disere Jefferson & Wisdom, LLP, amongst others.


Leslie Lester Osborne

In addition to 23 years of civil litigation experience, Justice Osborne brings a wealth of life experience to the Bench.

Bill Pedersen, III

Justice **Bill Pedersen, III**, was born and raised in Nacogdoches, received his BA in history from Texas Tech University, and his law degree from Baylor University School of Law. His father, Bill Pedersen, Jr., is also a Baylor lawyer. While at Baylor, he was admitted to the Order of Barristers and as a student assistant to the professors administering Baylor Law School's Practice Court program.


Bill Pedersen, III

Immediately after graduating from Baylor Law School, at the age of 24, Justice Pedersen went to work as a Collin County Assistant Criminal District Attorney. Justice Pedersen tried over 60 criminal jury trials to verdict as a prosecutor. While at the Collin County District Attorney's Office, he also served as Chief of the Domestic Violence section of the Family Justice unit.

In September of 2003, Justice Pedersen left the Collin County Criminal District Attorney's office to enter private practice. Justice Pedersen represented clients in criminal and civil litigation matters in both Texas and Federal courts. He has managed complex litigation matters for foreign corporations, local businesses, and individuals.

Amanda Reichek

Justice **Amanda Reichek** worked for several prominent plaintiff-side employment law firms before starting her own practice where she continued to represent employees in employment disputes and unions in labor disputes.


Amanda Reichek

While in private practice, Justice Reichek held numerous leadership positions within the labor and employment law field, including the DBA's Labor and Employment Law Section, the Texas Employment Lawyers Association, and the Dallas-Fort Worth Employment Lawyers Association. She was also a frequent speaker on labor and employment law matters. She is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

Justice Reichek is a Houston native, and earned a bachelor's degree in sociology and political science from Texas Tech University, a Master's degree in sociology from North Carolina State University, and her Juris Doctor from Texas Tech University, where she graduated with honors. **HN**

Focus | *Appellate Law/Trial Skills*

When is An Issue Tried by Consent?

BY DAVID COALE AND JOHN VOLNEY

An unpleaded claim or defense is generally waived unless the parties consent to its trial. In two opinions last year, the Dallas Court of Appeals summarized and applied the rules for trial by consent; finding it in one case but not the other. Those rules are useful for any trial lawyer in the Dallas area.

The two cases agree on the basic principles. An issue is not tried by consent just because evidence about that issue is admitted. This is because if evidence is relevant to pleaded as well as unpleaded issues, the offer of that evidence would not be calculated to draw an objection. The court of appeals examines the record "not for evidence of the issue, but rather for evidence the issue was tried."

Consent Not Found

Applying those rules, the court found no trial by consent in *Garcia v. Nunez*, No. 05-17-00631-CV (Tex. App.—Dallas Nov. 20, 2018, no pet.) (mem. op.) Nunez was injured while installing a new window in the defendant's home. He sued for negligence, pleading several types of damages. In particular, he sought damages for "pain and physical impairment," but did not plead "disfigurement" as an additional type of damage. On appeal, Nunez argued that disfigurement damages were tried by consent, citing this testimony:

Q. What parts of your body were in pain?

A. In the arm.

Q. Do you also have a scar from the operation to your arm today?

A. Yes, of course.

Q. Can you show the Court the scarring of the arm?

A. It's right here (indicating).

…

Q. How long did it take for the elbow and the hand, the bones anyway, to heal?

A. More than half a year.

Q. Okay. And were you in pain during that time period?

A. Yes, of course.

The court found that because this testimony was relevant to types of damage for which Nunez had pleaded, its admission without objection did not create trial by consent. "This is, at best, a doubtful case for applying trial by consent, and trial by consent should not be inferred in doubtful cases."

Consent Found

The second case found trial by consent. *Lemelin v. BB&T*, No. 05-17-00381-CV (Tex. App.—Dallas June 21, 2018, pet. denied) (mem. op.). A bank sued to collect on several individuals' guaranties of a business loan. The guarantors asserted the statute of frauds as a defense. On appeal, the bank made arguments about the "counter-defense" of waiver; the guarantors said the defense had not been pleaded and should not be considered.

The court agreed with the bank that the defense could nevertheless be considered because it had been tried by consent. It observed that "the Bank's claims … were based on the loan documents," which included the underlying note, the guaranties—and a "statute of frauds notice"—all of which were admitted without objection.

Each of the guarantors then "testified about the statute of frauds notice and the lack of a written agreement modifying the terms of the Note or the guaranties," and the issue of waiver was discussed with the trial judge after the evidence closed. Accordingly, because the defendants "did no object to the evidence, the arguments, or the trial court's questions on the ground they related to an issue not pleaded by the Bank," the issue of waiver was tried by consent.

Conclusion

These recent opinions from the Dallas Court of Appeals make clear that trial by consent cannot occur simply because evidence on an unpleaded claim or defense is admitted without objection, if that evidence is also relevant to a pleaded claim or defense. Once admitted, the likelihood of a trial-by-consent finding increases as the parties' engage in more questioning and argument about that evidence—particularly if that litigation activity clearly refers to matters about the unpleaded issue. Parties and judges may want to consider adding to these guidelines by provisions in scheduling orders and pretrial orders. **HN**

David Coale and John Volney are partners at Lynn Pinker Cox & Hurst LLP and can be reached at David Coale dcoale@lynnllp.com and jvolney@lynnllp.com, respectively.

'Bar None' Auditions

Tuesday, April 2 ~ 5:30 to 7:00 p.m. ~ Belo Mansion

Auditions for Bar None XXXIV: Lawquaman will take place April 2 at Belo!

All who audition will be cast. The Bar None show, to be held at the Greer Garson Theater June 12-15, benefits the Sarah T. Hughes Diversity Scholarships. If you have been in the show before, you do not need to audition again.

Questions? Contact Bar None's Director, Martha Hardwick Hofmeister, at (214) 780-1400 or martha@marthasnet.com.

Do You Speak Emoji?

BY CAROL PAYNE AND TERAH MOXLEY

It all started with a 😀. Throw in a 🦌, 🍴, 🚤, 🍗, 🐓, and a 🐇 and two would-be renters in Tel Aviv found themselves on the wrong side of a judgment in favor of a landlord who took a vacant apartment off the market based on enthusiastic text messages he received from the prospective tenants. After the emoji-loving couple flaked on renting the apartment, the landlord sued and recovered reliance damages after the judge determined that the symbols conveyed great optimism and misled the landlord into thinking everything was in order regarding the couple renting the apartment. *See Yaniv Dahan v. Nir Chaim Sacharoff, File No. 30823-08-16 Small Claims (Herzliya), Nevo* Legal Database (Isr.) (2017).

Over 10 billion emojis are sent each day. As emojis become ubiquitous in everyday communications, it should come as no surprise that emojis (and their more antiquated cousins, emoticons) are popping up with more frequency in lawsuits and criminal cases. However, courts differ in the ways they view emojis—as important or irrelevant.

For example, in a 2015 case, the United States Court for the Eastern District of Michigan determined that an emoticon—a "-D," which the court viewed as a wide open-mouth smile—"did not materially alter the meaning of a text message" included in an affidavit in support of a search warrant. Conversely, in a 2014 opinion from a Michigan appellate court, a similar emoticon—":P"—sank a defamation case brought by a public official. In that case, the public official sued several users of an online message board after a user posted a comment that appeared to accuse the official of corruption. The court concluded that the emoticon, a face with its tongue sticking out, denoted a joke or sarcasm, meaning the comment on the message board "on its face cannot be taken seriously as asserting a fact" and could not reasonably be viewed as defamatory.

Two practice areas that have seen emojis and emoticons used as evidence with increasing frequency are employment law and criminal law. On the criminal side, in what Pittsburgh prosecutors called a case of "emoji-cide," a text message with a trio of emojis depicting a man running, an explosion, and a gun helped police identify the sender of the message as a potential suspect instead of a victim.

Also, one of the more high-profile uses of emojis as evidence came during a 2015 trial involving Silk Road, an online black market. In that case, the federal district judge presiding over the trial sustained an objection by the defense after the prosecutor read text messages without mentioning smiley-face emojis contained in the messages. The judge instructed the jury that it should take note of any such symbols in the messages, explaining "that is part of the evidence of the document."

In the employment law context, emoticons have been successfully used by employers to win summary judgment and by employees to survive summary judgment. In 2014, a plaintiff asserting an FMLA retaliation claim survived summary judgment in a New Jersey case by relying on smiley-face emoticons in an email exchange between HR and the plaintiff's skip-level supervisor. In the email, the two discussed the plaintiff's termination, and the court concluded that a reasonable jury could find that the emoticons in the email were evidence that the employer was happy to be able to terminate the plaintiff because her FMLA leave was inconvenient. On the flip side, in several sexual harassment cases, employers have prevailed on summary judgment by pointing to smiley-face emoticons used by the plaintiffs in emails and self-assessments as evidence that the plaintiffs did not subjectively believe their working conditions were abusive.

So, what does all this mean? For one thing, employers should have strong electronic communications policies that explicitly cover symbols like emojis and emoticons (and even GIFs, hashtags, and memes). Second, litigators should carefully consider the evidentiary role emojis and emoticons might play as they evaluate the strengths and weaknesses of their cases.

One significant challenge—what does a particular emoji mean? We took a poll of our colleagues, asking them what they thought this emoji means—😑. Though dubbed the "unamused face" by Emojipedia, our office poll came up with a variety of answers, including exhaustion, disagreement, annoyance, disappointment, sadness, and skepticism. Couple this with the fact that different operating platforms sometimes display emojis differently, it can be a real challenge to establish the original, true intent of a specific symbol. So, emoji with caution. **HN**

Carol Payne is a member of, and Terah Moxley is a partner, at Estes Thorne & Carr PLLC. They can be reached at cpayne@estesthornecarr.com and tmoxley@estesthornecarr.com, respectively.

Do You Really Want to Seek Mandamus Relief?

CONTINUED FROM PAGE 1

become moot.

One of the more obvious considerations before filing the petition is cost. Depending on the complexity of the issue, drafting the petition and compiling the appendix can take a significant amount of time, plus there will be a filing fee. Sometimes, there might be a less expensive means of reaching the client's goals without going to the appellate court. For example, you may consider whether a motion for rehearing would be persuasive to the trial judge.

Generally, there must be a clearly-drafted written order signed by the trial court such that the error can be determined by the appellate court. The appellate courts are hesitant to grant mandamus relief to oral rulings—no matter how clearly stated on the record—or to vaguely-drafted memorandum rulings. Additionally, if a petition is not filed relatively soon after the offending order, the appellate court will not reward a relator who has "slept on his rights." Thus, the window in which a petition must be drafted and filed is narrow.

The relator may request a stay of the underlying proceedings until the appellate court rules on the petition. This can be useful when the challenged order requires the disclosure of privileged documents or orders that a child be released for possession to a party lacking standing to request that right.

Any party may respond to a petition, but a response is not mandatory. However, the appellate court cannot grant the requested relief unless a response is explicitly requested. The relator may file a reply to a response, but the court may reach a decision at any point after a response is filed. So, if a relator wants to reply to a response, time is of the essence.

The appellate court can deny a petition for writ of mandamus without requesting a response, issuing an opinion, or giving any indication as to the reasons for the denial. This can be frustrating. Sometimes, the trial court did clearly abuse its discretion, but the appellate court may have believed that an adequate remedy by appeal existed and that mandamus relief was not appropriate. However, the trial court may interpret the denial of mandamus as an affirmation that the challenged order was legally correct.

Mandamuses are difficult to win and have their pros and cons, but in certain situations, they are necessary. To best advocate for your client, appellate counsel with mandamus experience should be consulted in determining whether mandamus is appropriate and for the drafting process. **HN**

Georganna Simpson is a solo practitioner whose practice focuses on family law appellate matters. Beth Johnson is a solo practitioner and is of counsel to Georganna L. Simpson, P.C. They can be reached at georganna@glsimpsonpc.com and beth@bethmjohnson.com, respectively.

Focus | *Appellate Law/Trial Skills*

Top Five Ways to Waive Error on Appeal

BY KARRI BERTRAND

The biggest challenge most attorneys encounter on appeal is the waiver doctrine. Silence or inaction alone may waive a complaint, which is why attorneys must proactively assert proper, timely objections on the record, obtain rulings on those objections, and provide the appellate court with a complete and accurate record of all relevant trial court proceedings for review.

Below are the top five most common ways to waive error on appeal:

1. Improper objections

Global objections, profuse objections, or overly general objections do not preserve error. Specific grounds for the objection must be stated or must be apparent from the context of the objection. The complaint raised on appeal must also be the same as the complaint presented to the trial court. Attorneys must state specific, clear objections as to why the trial court must rule in their favor.

With evidentiary objections, a specific objection is one which enables the trial court to understand the precise issue to make an intelligent ruling, while also permitting the offering party an opportunity to remedy the defect if possible.

2. Untimely objections

The timing of objections is key. Premature objections do not preserve error. The same applies to late objections. However, with legal arguments, never assume it is too late to object. Legal arguments raised post-verdict are timely because they do not involve jury issues. The only exception to untimely objections is in the case of fundamental error, when an objection is unnecessary because the error is on the face of the record.

For evidentiary objections to be timely, they must be made before the admission of evidence. An objection to evidence previously admitted without objection is too late. An objection should be lodged each time the evidence is offered. The objecting party also has an obligation to request that the trial court limit the purpose for which evidence might be considered. Absent such a limiting instruction, the evidence is received for all purposes.

3. No rulings on objections

An objection must be overruled in order to preserve error for review. It is the attorney's duty as an advocate to persist until the judge either makes a ruling or refuses to do so on the record. If the trial court refuses to rule, the objection still preserves error so long as the complaining party objects to the judge's refusal to rule.

4. No record

The record is the appellate court's only view into the trial court. Although it is technically error when a court reporter fails to make a full record of the court proceedings, this error is waived if the party seeking the transcription fails to object to the lack of recording. The request for a record is subject to a due diligence test, whereby a party must exercise due diligence and show that through no fault of its own, it was unable to obtain a proper record of the proceedings. *Practice tip: beware of judges holding hearings or making rulings in chambers!*

5. Insufficient record

The party complaining on appeal must present to the appellate court a record sufficient to show error requiring reversal. Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court's judgment or ruling was correct and that it was supported by any omitted portions of the record. The absence of a full record is further judged according to the harmless error analysis. Before a judgment can be reversed, the challenging party must show that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

The preservation of complaints and waiver must be carefully distinguished from harm. Appellate courts will apply the harmless error rule in instances where it finds evidence was improperly admitted or excluded. Even if the trial court erred, it the error did not cause harm, then the reviewing court will not reverse. The unpreserved complaint cannot be reviewed on appeal, regardless of any error which may be present. **HN**

Karri Bertrand is an associate at O'Neil Wysocki Family Law. She can be reached at karri@owlawyers.com.

Column | In The News

FROM THE DAIS

Mike Villa, of Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P., spoke in Austin, TX at the Handling Your First (or Next) White Collar Crime Case sponsored by the Texas Bar CLE.

Angela Stockbridge, of Wilkins Finston Friedman Law Group LLP, participated in a panel discussion at the National Association of Stock Plan Professionals and she spoke at the Compensation & Benefits Round Table Leaders of Dallas.

KUDOS

Edwin Buffmire, of Jackson Walker LLP has been elected Partner.

Jennifer Kinney Parnell, of Locke Lord LLP, has been selected as a member of the 2019 Fellows Program for the Leadership Council on Legal Diversity. **Marc Cabrera** is serving as the Locke Lord LCLD Fellow for 2018. **Art Anthony**, of the firm, has been selected by the National Bar Association (NBA) as a 2019 recipient of the prestigious Heman M. Sweatt Award.

Mitchell Griffith, **David Lawrence**, **Lee Meyercord**, **and Meghan Nylin**, of Thompson & Knight LLP, have been promoted to Partners.

Hon. Barbara M.G. Lynn, of the U.S. District Court Northern District received the 2019 Samuel Pessarra Outstanding Jurist Award from the Texas Bar Foundation.

Talmage Boston, of Shackelford, Bowen, McKinley & Norton, LLP, received the 2019 Terry Lee Grantham Memorial Award from the Texas Bar Foundation.

Aaron Borden and **Mark McMillan**, of Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P., have been selected to be part of the 2019-2020 Leadership Academy Class of the State Bar of Texas Tax Section.

ON THE MOVE

Former Judge **Scott Becker** joined McCathern, PLLC as Partner in their Frisco office.

Chelo Carter joined Sheppard Mullin's Dallas office as Special Counsel.

Susan Fisher joined Thompson & Knight LLP as Associate.

Laura Benitez Geisler, has joined Somerman, McCaffity, Quesada & Geisler, LLP, as new name partner.

Will Pryor Mediation & Arbitration has moved to 4851 LBJ Freeway, Suite 220, Dallas, TX 75244. (214) 534-1990. www.willpryor.com.

Jason Boatright joined Canter Hanger as Partner.

Wilkins Finston Friedman Law Group PLLC has moved to Three Galleria Tower, 13155 Noel Road, Suite 900, Dallas, TX 75240.

Marilea W. Lewis and **T. Hunter Lewis** have joined Duffee + Eitzen Law as partners, and **Vanessa J. Sheppard** has joined the firm as an associate.

Shonn Brown joined Kimberly-Clark as Deputy General Counsel.

DVAP's Finest

ROB ANDERSON

Rob Anderson is a sole practitioner.

1. How did you first get involved in pro bono?

I pursued pro bono work to jump-start my work as a lawyer, which is actually my second career. After graduating from Pitt Law School 1990, I went on to get my CFA charter and spent 27 years as a wealth management advisor and private banker. After retiring from banking in 2017, I was looking for a new challenge, and I decided to return to my roots in the law. I was admitted to the Texas Bar in May of 2018, and I reached out to various pro bono organizations as an avenue to develop my network, learn the systems and processes of the justice system, and get some practical experience. Last September, I connected with Chris Reed-Brown, who was very encouraging, and I started receiving information about cases available through DVAP. From there, I jumped in with both feet.

2. Describe your most compelling pro bono case.

My most compelling case so far was a divorce that involved domestic violence. My client was quite shaken, and understandably very concerned that her spouse not learn her whereabouts. After consulting with the director of the women's shelter where the client was staying, we conducted our meetings there. This experience, and my further conversations with the center director, gave me a much clearer insight into the many challenges that victims of domestic violence face, including that of obtaining much-needed legal services.

3. What impact has pro bono service had on your career?

Certainly, the pro bono work I've done over the last several months has provided me the practical legal experience I was looking for, and I am indebted to the mentors, Katherine Saldaña and Kristen Salas, for their patience and guidance as I worked through some of those first cases. The pro bono experience has also engendered in me a much deeper connection to the community in I live in, and strengthened my desire to make that community better through my service.

4. What is the most unexpected benefit you have received from doing pro bono?

Seeing the needs of those less fortunate has given me a greater appreciation for the many blessings in my own life, and being able to help them in such a meaningful way has been immensely gratifying and inspiring.

Pro Bono: *It's Like Billable Hours for Your Soul.*

To volunteer or make a donation, call 214/748-1234, x2243.

DVAP
Dallas Volunteer Attorney Program

Classifieds | April

EXPERT WITNESS

Economic Damages Experts - Thomas Roney has more than thirty years' experience providing economic consulting services, expert reports and expert testimony in court, deposition and arbitration. His firm specializes in the calculation of economic damages in personal injury, wrongful death, employment, commercial litigation, IP, and business valuation matters. Mr. Roney and his experienced team of economic, accounting and finance experts can help you with a variety of litigation services. Thomas Roney LLC serves attorneys across Texas with offices in Dallas, Fort Worth and Houston. Contact Thomas Roney in Dallas/Fort Worth (214) 665-9458 or Houston (713) 513-7113. troney@thomasroneyllc.com. "We Count."

Economic Damages Experts-GMCO Litigation Damages Firm. Economic Damages Valuation Experts. GMCO a CPA firm with significant testifying experience. George Mendez CPA CVA has more than twenty years' experience providing economic damages, lost profits, damage calculation testimony in court, deposition and arbitration. The firm provides services regarding commercial damages, lost profits, intellectual properties, employment, personal injury/lost earnings wrongful death, and insurance litigation. George Mendez has experience in most industries including energy/oil & gas, manufacturing, transportation, hospitality, service, distribution, and construction. GMCO serves attorneys in Dallas/Ft. Worth, Houston, Austin/San Antonio. Contact George Mendez CPA CVA. Dallas/Ft Worth 469-248-4477 or Houston 713-8925037 experts@georgemendez.com

OFFICE SPACE

Virtual & Private Offices - 75 & NW Hwy. Don't Just Get An Office, Get Engaged. Virtual and private offices available at 75 & NW Hwy in Class A High Rise. ENGAGE is an innovative attorney-only workspace. Plug in to a secure & professional environment with mail/parcel handling, guest reception, conference rooms, included garage parking, coffee bar/lounge, office amenities, and networking opportunities. Please contact Chelsea at 214.865.7770 or chelsea@engagelawspace.com.

Office space in the N. Central Expressway and Forest Ln. area. 12222 Merit Drive. Three window offices are available. Two offices are 15 x 15 with Admin. space and the other is 10 x 15. Amenities include 2 conference rooms, kitchen, copier, scanner, fax, internet and VOIP phone. Building offers free covered parking, workout facilities and a deli. Please call 214-696-3200 ext. 410 for Carl Roberts or ext. 406 for Katie.

Office space available 2323 Ross Ave. Class A building with amazing views of the city. Amenities include 24/7 access, secure internet, kitchen including coffee, tea and fruit infused water. Conference rooms, reception and parking available. Flexible terms. Contact Tracey 347.860.5614 theyboer@serendipitylabs.com

Virtual Office – Available Now! Ultra-contemporary office space, 12222 Merit Drive, Suite 1200, offers 11 conference rooms, greeter, internet service, mail service, parking, fully equipped breakroom. $500 – competitive rates! Computer work space included as well. Email Amy at arobinson@englishpllc.com or 214.528.4300.

Office space available at 4303 N. Central Expressway for lease in a professional legal environment, in uptown. Share office space with experienced and established lawyers. Case referrals and other case arrangements are possible. Amenities include: Bi-lingual receptionist, fax copy machines, notary, internet, two conference rooms, two kitchen areas and plenty of free parking. Location is convenient to all Dallas Courts and traffic arteries. Please call Rosa at 214-696-9253.

Office space available at 4054 McKinney Avenue. Second floor suite with three offices and file room. This space is 1127 sq/ft and rents for $1,878.00 per month fixed rate. Two single offices available starting at $400.00. Call 214-520-0600.

Ready to Own/Reposition Your Practice? Palmer & Manuel, PLLC provides a platform in iconic Campbell Centre where you (and we) get to do what we love – practice law without the administrative hassles. Run your own practice and be part of our well-established mid-size group of respected and collegial attorneys with varied practice areas. Keep 95% of your fees plus earn on your referrals, and contribute a reasonable fixed overhead covering rent, legal assistant support (or bring your own), office administrator, PCLaw/ProDoc, Lexis, phone, internet, website, parking, malpractice insurance, etc.). See www.pamlaw.com or contact Larry, Jeff or Rebecca at (214) 242-6444.

Legacy & Tollway, Plano. Business law firm has up to 3 offices available for sublease. Reasonably priced. New building, near Legacy and the tollway in Plano, in the "5 billion dollar mile". Kitchen, lobby, and free parking. The offices are offered furnished or unfurnished. Possibility of some legal work referrals. Email Jim at: Jim.Havarford@gmail.com.

We connect lawyers who share office space. List your empty law office at www.LawSpaceMatch.com. Advertise in 40,000 zip codes instantly. Rent your law office to lawyers seeking a shared space. Show law office amenities and upload 6 photos. Search for LawSpace for free. Also, Attorneys post their profiles.

Turtle Creek Blvd./Hall St. Area -Executive office space available for lease in a professional, legal environment. Two large executive window offices available (furnished or unfurnished) to share with experienced and established lawyers. Separate areas available for assistants or paraprofessionals. Amenities include reception area, telephone, fax and copy machines, Wi-Fi, notary, conference room, fully furnished kitchen area, covered visitor parking, free secured office parking and 24/7 building access. Flexible terms. Location convenient to Dallas courts, downtown, and all traffic arteries. Please contact Judy at (214) 740-5033 for a tour and information.

POSITIONS AVAILABLE

Dallas business/construction litigation firm seeks an experienced trial attorney with bankruptcy experience. Candidate must have excellent writing skills and a minimum of 10 years of experience. Compensation is negotiable. Clientele a plus. Submit resume in confidence to: oaklawnfirm@aol.com.

Trial Lawyer: Tired of insurance adjusters being "smarter" than you? Tired of hourly billing? Want to choose your clients and wear a "white hat?" Email resume in confidence to lawyers@noteboom.com.

Fiduciary litigator sought by general business practice law firm. The lawyer should have considerable experience is trust and estate litigation, be known to the Dallas probate bench and be Board Certified in Estate Planning, Probate and Trust law. The opportunity is to be the sole trial lawyer practicing exclusively in the fiduciary litigation field for a firm of sixty lawyers, nine of whom are estate transactional lawyers. The firm offers a number of resources. It has trial attorneys who can support this lawyer. The firm has estate attorneys who can provide substantive law support in fiduciary litigation. Finally, the firm has lawyers in other substantive practice areas, which may be involved in fiduciary litigation. Our compensation system is based on performance, and some client following would be a plus. Send resumes to Troy Phillips at tphillips@gpm-law.com.

Legal Nurse Consultant. Thiebaud Remington Thornton Bailey LLP, a law firm specializing in medical malpractice defense and healthcare law, is seeking to hire a Legal Nurse Consultant with 5 years' clinical nursing experience. LNC experience, LNC certification or healthcare risk management experience preferred but not required. This is an in-house position. Candidate must have a valid, current TX nursing license. Please send your resume to: Christine Santosuosso, Adm. Mgr., Thiebaud Remington Thornton Bailey LLP, 4849 Greenville Ave., Ste. 1150, Dallas, TX 75206 or e-mail it to csantosuosso@trtblaw.com.

Insurance Coverage/Appellate Attorney Needed. Established medium sized AV-rated law firm in Dallas seeks associate attorney with litigation experience in insurance coverage and appellate matters. Two to five years experience preferred. Associate will work on all aspects of insurance coverage matters, including insurance coverage litigation in Texas state and federal courts, appellate matters, and drafting coverage opinions and reservation of rights letters. Case load lends itself to extensive summary judgment practice and brief drafting. Excellent research and writing skills required. Congenial work environment offers substantial responsibility for associates at competitive compensation level. Additional benefits include bonus program, 401(k), medical and life insurance, and parking. Replies held in confidence. Please include a writing sample of five pages or less. Reply via e-mail to personnel@tbjbs.com.

Litigation Associate Attorney Needed. Touchstone Bernays, an established medium sized AV-rated law firm in Dallas, seeks litigation associate. One to three years experience preferred. Insurance defense experience is a plus. Principal duties include interacting with clients, preparing reports, handling discovery, attending hearings, taking depositions, legal research and writing, and assisting with trying lawsuits. Congenial work environment offers substantial responsibility at competitive compensation. Additional benefits include bonus program, 401(k), medical and life insurance, and parking. Replies held in confidence. Please include a writing sample (five pages or less). Reply via e-mail to personnel@tbjbs.com.

SERVICES

The Attorney's Therapist: Kate Casey, LPC, JD. As a former practicing attorney, Kate understands the overwhelming feelings of stress, burnout, and isolation that often accompany the art of balancing life with the practice of law. Kate will help you evaluate your choices, identify areas for change, and implement an achievable plan which will allow you to become the best version of yourself both at work and home. Autumn Ridge Counseling and Wellness is conveniently located at 270 Miron Drive, Suite 112 in Southlake. Kate can be reached at 817-881-1914 or Kate@AutumnRidgeLPC.com or AutumnRidgeLPC.com.

To place an affordable classified ad here, contact Judi Smalling at (214) 220-7452 or email jsmalling@dallasbar.org.