TEXAS LAWYER

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PLUS: TEXAS FIRM FINANCIALS ▪ SPECIAL SECTIONS: FAMILY LAW AND IP

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EDITOR'S **NOTE**

MIDSIZE FIRMS ON THE MOVE

WELCOME TO TEXAS LAWYER'S SUMMER ISSUE, FEATURING TWO BIG FEATURE stories by Brenda Sapino Jeffreys. Our cover story is on how the top 100 Texas firms did the past year, followed by an analysis of Texas firm financials. In addition, there's also two big special sections on family law and IP.

In our cover story, Jeffreys analyzes how the top 100 firms in Texas jockeyed for position this past year. The big winners were apparently midsize firms, who might have grown even more if the lateral hiring market wasn't so competitive in Texas. Our second feature, also by Jeffreys, puts the spotlight on Texas firm financials and found that most large Texas firms on the Am Law 200 improved profits per equity partner in 2020.

The first of our issue's two special sections is on family law and is packed with five articles, including one that explains why Texas attorneys need to be extra cautious when they use social media to give notice of suit, and another that discusses the risks attendant to the dissolution of an informal marriage.

In our second section on intellectual property, we have a cautionary tale which warns that IP assets need to be protected earlier in the product life cycle, a piece highlighting the importance of the content and timing of notice letters, and more.

All your favorite columnists are back this month. We start with the notion that self-education is always a viable option for lawyers who want to learn to persuade others, by Michael P. Maslanka. And Randy D. Gordon writes that manipulation of the arena of the courtroom can be clever, picayune and sometimes hilarious. We've also got colums from Quentin Brogdon and John G. Browning. They are brilliant as always.

I hope you all enjoy our latest issue!

Sincerely,

Kenneth Artz
Bureau Chief
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TEXAS LAWYER

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Congratulations to our Founder & Partner Adrienne Braumiller for being recognized and ranked in Chambers and Partners, for both categories, U.S. and Global, 2015-2021

Chambers has been ranking the best lawyers since 1990 and covers 185jurisdictions. No other organization has the strength- in-depth of Chambers editorial and research team when it comes to assessing the world's best lawyers.

Chambers ranks both lawyers and law firms based on the research of more than 170 full-time editors and researchers employed at their head office on London. They speak with both lawyers and clients during the year, conducting in-depth telephone interviews in order to draw their conclusion as to who they feel is qualified to be ranked.

Adrienne has been ranked in Chambers as a Leader in her Field (international trade) for the last six years.

Adrienne was also the recipient of the prestigious

SARAH T. HUGHES WOMEN LAWYERS OF ACHIEVEMENT AWARD for 2019 via The State Bar of Texas.

Only one woman attorney is chosen for this award each year. Adrienne was singled out for this award from the 37,477 women attorneys in the state of Texas. Congrats Adrienne!!

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DISCOVERY REVELATIONS YIELD BIG RECOVERY

BEAUMONT LITIGATOR BRYAN BLEVINS credits the records he found in discovery against a Pennsylvania-based oil and gas company with securing a $24.4 million settlement in a recently closed case for royalty owners, who allow energy production companies to drill and operate wells on their land in exchange for payment.

The case might interest attorneys prosecuting and defending cases in a growing litigation area involving royalty owners suing oil and gas companies, alleging the corporations weren't paying enough for leases.

Blevins, partner in Provost Umphrey Law Firm, represented 2,700 royalty owners who accepted the multimillion dollar settlement from Repsol Oil and Gas USA, which used to be called Talisman Energy USA Inc., a production company based in Warrendale, Pennsylvania, that owns 2,900 leases in South Texas' Eagle Ford shale.

Provost Umphrey partner Michael Hamilton assisted Blevins.

Also representing the plaintiffs were Pittsburgh-based lawyers at Feinstein Doyle Payne & Kravec, including Joseph Kravek Jr., William Payne and Wyatt Lison.

The litigation came to a close after U.S. District Judge Keith Ellison of the Southern District of Texas in Houston approved the $24.4 million settlement, $9 million in attorney fees to pay nearly 5,100 hours of legal work over six years, plus reimbursements for litigation expenses and administrative costs, said a May 12 order and judgment.

"Repsol values our relationships with our Eagle Ford royalty owners, and we are pleased with the mutual resolution of these claims that will provide certainty for all parties," said an email by Repsol spokeswoman Christi Shafer. "As it has throughout its presence in Texas, Repsol remains committed to honoring its leases and paying royalty owners on their fair share of production."

PAVANT/ADOBE STOCK

Earlier in the litigation, Ellison denied the plaintiffs' request to certify a class action, but the court did approve a settlement class. Blevins said he was still able to negotiate a favorable settlement because of the information he found during discovery.

"Talisman was aware that they had some issues resulting from their comingling of gross production, and how they allocated net sales back to individual royalty owners. They spent several years internally deciding how to address that problem," Blevins said. "The documents from that process, I think, are a significant reason why they chose to settle. There was such a well-documented history of a problem—of internal concern over how to deal with that problem."

Rob Theriot, shareholder in Liskow & Lewis in Houston, who represented the defendant, declined to comment.

Reed Smith partner Michael Bernick wrote in a Texas Lawyer article that there is a growing trend of royalty litigation against oil and gas companies.

"Typically, when energy prices sink, costs remain the same, and litigation brought by landowners seeing diminished royalty returns rise," wrote Bernick, who declined to comment about the Talisman settlement. "It comes as no surprise that the fall of crude prices last spring was followed by a rise in royalty class actions brought by the plaintiff's bar."

Yet, the Talisman case isn't related to recent changes in the oil and gas markets born in the COVID-19 economic downturn.

The litigation began in 2016 in a Pennsylvania federal court, but it was moved to Texas because the royalty owners' land is located in the Eagle Ford shale in South Texas.

Rayanne Regmund Chesser, Gloria Janssen and Michael and Carol Newberry were the class plaintiffs in the litigation against Talisman Energy USA Inc.

The first amended complaint in *Regmund v. Talisman Energy* said that the defendant systematically breached its contracts by failing to calculate properly and pay the plaintiffs for oil and gas royalties between 2013 and 2016.

—ANGELA MORRIS

BAD INVESTMENTS

A DALLAS-AREA LAWYER WHO PERSUAD-ed a client to use $400,000 to invest in the attorney's misting fan business will spend the next 18 months in prison for a wire fraud conviction.

David A. Krueger of Frisco must also pay $350,000 in victim restitution, said U.S. District Judge Robert Schroeder of the Eastern District of Texas.

"As an attorney in Texas, this defendant took an oath to act honestly and with integrity. He then violated that oath by scamming his client out of hundreds of thousands of dollars," said acting U.S. Attorney Nicholas J. Ganjei.

Joey Mongaras, attorney with Udashen Anton in Dallas, who represented Krueger, wrote in an email, "Mr. Krueger's family values, deep religious faith, and kind heart underscore his acceptance of full responsibility for his criminal conduct he committed during a period of extreme personal financial distress. Mr. Krueger has already paid $50,000 in restitution to the victims and looks forward to fulfilling his restitution obligation during and after completion of his prison sentence."

The U.S. attorney's statement noted that the charge against Krueger alleged that from 2014 to 2015, the attorney defrauded his clients. He solicited them to invest in his business ventures.

Although he was not licensed to sell securities, Krueger told clients he would guarantee a 10% return on investment. In one instance, he got a client to transfer $400,000 from a settlement to fund a misting fan business. He did use the money for the misting fans, but also for other businesses and even his own personal benefit, prosecutors said.

GUNNAR3000/ADOBE STOCK

Krueger earned his law degree from the University of Oklahoma School of Law and a master of laws degree from Southern Methodist University School of Law, his State Bar of Texas profile shows. He was licensed in Texas in 2000.

He has three prior law license suspensions and has not been able to practice since April 2020, because of noncompliance with a disciplinary sanction.

—ANGELA MORRIS

TEXAS BAR HONORS MIERS

MIERS

Harriet Miers, former managing partner of a Locke Lord predecessor firm and former counsel to a U.S. president, received the Texas Bar Foundation's Outstanding 50 Year Lawyer Award, commemorating her trailblazing accomplishments as a consummate legal professional and public servant.

"As a remarkable lawyer deeply ingrained in public service, tireless advocate for women and diverse lawyers, champion for access to justice, tremendous mentor and an unfailingly kind person, Harriet's embodiment of the spirit of this award cannot be overstated," said Locke Lord chair **David Taylor**.

Miers was the first woman hired at the Dallas firm of Locke Purnell Boren Laney & Neely in 1972 and became the first woman to lead the firm, then known as Locke Purnell Rain Harrell, in 1996. In 1999, when Locke Purnell merged with Houston-based Liddell Sapp Zivley Hill & LaBoon, Miers was integral to the merger and became co-managing partner of the combined firm. She held that position until she left to serve in the administration of President George W. Bush from 2001-2007 as staff secretary, deputy chief of staff and counsel to the president. After her service in the White House, she returned to Locke Lord as a partner in 2007. She is a member of the firm's litigation department and public law and policy practice group.

Miers was the first woman to lead the Dallas Bar Association and the State Bar of Texas as president. She also served as an at-large member of the Dallas City Council. Miers has held several American Bar Association leadership roles, too

Miers also has been widely recognized for her efforts to create a more diverse, fair and equitable legal profession and applies these same values in service to the broader community. She is a past chair and current member of the Board of Directors of the Dallas Breakfast Group, an organization focused on improving the quality of local governmental institutions, and sits on the board of Big Brothers Big Sisters Lone Star.

She has received many accolades, including induction into the Texas Legal Legends, the highest award bestowed by the State Bar of Texas, for her lasting impact and extraordinary contributions to the legal profession.

For her work as counsel to the president, Miers received the Department of Justice Edmund J. Randolph Award for her "dedicated service to justice, the president, and the United States of America." She also received the Agency Seal Medal from the Central Intelligence Agency, an award given to people outside of the agency who have made significant contributions to its work.

WEIL ADDS FOUR IN DALLAS

International law firm Weil, Gotshal & Manges has added four new associates in its Dallas office: **Patrick B. Hosch**, corporate; **William Todd Keller Jr.**, banking and finance; **Josh A. Schonfeld**, tax, executive compensation and benefits; and **Samantha N. Smith**, complex commercial litigation.

Hosch earned his J.D. from the University of Florida Levin College of Law and his B.A. from Southern Methodist University in Dallas. During law school, he was executive research editor of the Florida Law Review and also served as a research assistant and coach of the University of Florida Vis Moot Court Team. Hosch previously served as a summer associate for the firm in 2019 and, before that, was a judicial extern for U.S. District Judge **Terry R. Means** of the Northern District of Texas.

Keller earned his J.D. from the St. Mary's University School of Law and his B.A. from Texas A&M University. While in law school, he served as the editor in chief and as a staff writer of the St. Mary's Law Journal. He joins Weil after being a 2019 summer associate for the firm. Keller is a State of Texas certified mediator by the Dispute Resolution Center of the Brazos Valley.

Schonfeld earned his J.D. from Yale Law School and his B.A. from Fairleigh Dickinson University. He also received his Bachelor in Talmudic Law from Bais Yisroel Institute in Jerusalem, Israel. Schonfeld joins Weil after previously serving as a summer associate for the firm in 2018. While in law school at Georgetown University before transferring to Yale, he served as a research assistant to Georgetown Law Supreme Court Institute executive director **Irving Gornstein**.

Smith earned her J.D. from the Duke University School of Law and her B.A. from the University of California, Los Angeles. During law school, Smith served as articles editor for Law and Contemporary Problems, the oldest journal published at Duke Law School, and as a research assistant for the Center for Firearms Law. She also previously served as a summer associate for Weil in 2019.

NEW PARTNER NAMED

Intellectual property and technology law firm **Patterson + Sheridan** has announced the promotion of **Abel Reyna** in the Waco office to the level of partner in the firm.

Reyna came to Patterson + Sheridan with more than 20 years of experience in criminal litigation. As a former two-term district attorney of McLennan County, Reyna handles complex business, intellectual property and criminal litigation.

"We have been so impressed with the outstanding work of Abel," said founding partner and managing director **Todd Patterson**. "His depth of knowledge and experience provides exceptional service to our clients."

In 2010, Reyna was elected McLennan County district attorney, defeating an incumbent who had held the office for 20 years. Before his election as district attorney, Reyna was in private practice, first with his father and then as managing partner of the Reyna firm, handling criminal defense and general litigation. Reyna earned his B.B.A. from Baylor University and his J.D. from Baylor University School of Law, both in Waco. ■

WE'VE JUST PICKED UP ANOTHER

TWO BIG WINS

PAYNE MITCHELL RAMSEY
LAW GROUP

PAYNE MITCHELL RAMSEY IS PLEASED TO ANNOUNCE THE RECENT ADDITION OF ATTORNEYS CINDRA DOWD AND CAMERON TYLER SALEHI. Their arrival marks the continued growth of our firm, and adds to our depth of expertise in catastrophic personal injury and wrongful death cases.

Our team is growing. And so is our tenacity. For unparalleled commitment and excellence in personal injury advocacy, call Payne Mitchell Ramsey.

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WORKPLACE NEGLIGENCE

$60K FOR INJURED OIL WORKER

A man injured working at Exxon Mobil Corp.'s Baytown refinery recovered $60,000 via a jury verdict of his resultant lawsuit. In 2018, the plaintiff was working on a turnaround at Exxon Mobil Corp.'s Baytown refinery complex. While rigging a bundle to a crane, the crane operator initiated the lift while the plaintiff was still in the zone of danger. The lifted bundle unexpectedly swung and crushed the plaintiff's pelvis and left femur. The plaintiff sustained a compound fracture of the left femur; a fracture of the left femoral head; and a crush injury to the pelvis, including multiple fractures of the pelvic girdle. The lawsuit alleged that Exxon was liable on a theory of premises liability for failing to supervise the crew properly, failing to enforce Exxon's training requirements and failing to implement adequate safety policies and procedures. Exxon denied negligence and argued that the incident was solely the responsibility of the plaintiff, the crew and their employer, JVIC. The jury found negligence and comparative responsibility of 50 percent on the plaintiff, 30 percent on Exxon Mobil and 20 percent on JVIC. It awarded the plaintiff $60,000, for past loss of earning capacity only. With the stipulated past medical, the total award was $240,000, but the comparative-negligence reduction produced net damages of $72,000.

Jeremy Souders v. Exxon Mobil Corporation, No. 2018-51413
Court: Harris County District Court, 80th
Plaintiff Attorney(s): Ben Bireley, Ryan S. MacLeod; Arnold & Itkin
Defendant Attorney(s): Liz Larson, Jay Old; Hicks Thomas

SEAMAN CLAIMED LOST EARNINGS

A man injured working on a sea vessel off of Louisiana recovered $162,500 via a jury verdict of his resultant lawsuit. In 2015, an able-bodied seaman was working on a vessel associated with an offshore rig off the shore of Louisiana. As he was helping to pull in a smaller, 14-foot vessel, his finger got caught between the rope and a bulwark of the larger vessel. Part of the finger was severed and lost. The seaman alleged negligence under the Jones Act, as well as unseaworthiness. The seaman claimed the smaller vessel should never have been launched into the rough sea conditions. Defense counsel acknowledged that the defendants were negligent, but argued that the seaman was, too. A jury found negligence and comparative responsibility of 87 percent on the defendants and 13 percent on the seaman. He was awarded $162,500, but the comparative-negligence reduction produced net damages of $141,375.

Bobby King Kelly Jr. v. Hornbeck Offshore Services LLC, No. 2017-41944
Court: Harris County District Court, 281st
Plaintiff Attorney(s): S. Reed Morgan, The Carlson Law Firm; Nick Homan, Chaffin & Homan
Defendant Attorney(s): Walter J. Gallant, Lewis Brisbois Bisgaard & Smith

MOTOR VEHICLE

DEFENSE DISPUTED INJURIES

In 2017, two long-haul truckers were in the cab of their parked 18-wheeler in the parking lot of a truck stop in Murfreesboro, Tenn. Another long-haul trucker backed an 18-wheeler into the adjacent parking space, and the right rear corner of his trailer struck the left side of the plaintiffs' cab. The plaintiffs claimed they suffered neck and back injuries. The lawsuit alleged that the defendant, who was employed by J&R Schugel Trucking Inc., was negligent and grossly negligent. Defense counsel argued that the plaintiffs' treatment was unreasonable, unnecessary, unrelated to the accident and attorney-driven, and that the impact was minor and could not have caused the claimed injuries. The jury rendered a defense verdict. Although it found negligence and comparative responsibility of 90 percent on the driver and 10 percent on J&R Schugel, the jury awarded no damages.

Ismael Garcia v. J&R Shugel Trucking, Inc.; Scott Briggs; and Eduardo Magana, No. 2018CI21379
Court: Bexar County District Court, 285th
Plaintiff Attorney(s): Roland Christensen, Matthew K. "Matt" Powell, Jose L. Rios, Claire Traver; Arnold & Itkin LLP
Defendant Attorney(s): Bryan P. Reese, Spenser Housewright, James E. Johnson; Fee, Smith, Sharp & Vitullo

FATAL HIT BY DELIVERY DRIVER

The estate of a man killed while crossing Farm to Market Road 1488 in Conroe, Texas, recovered $1,738,321.45 via a jury verdict. In 2019, Bobby Joe Nathan Johnson was walking across Farm to Market Road 1488, he was hit by a delivery driver for Golden Chopsticks and died two days later at a hospital. The investigating officer concluded that Johnson alone was at fault, for failing to yield the right of way. Johnson's estate sued Chopsticks' operator, Mingrun Inc.. Plaintiff's counsel argued that the driver was in the shoulder and not a traffic lane, did not have headlights on and had THC in his blood system. The defense argued that it was reasonable for the driver not to see Johnson crossing the street. The driver also denied having used marijuana on the day of the accident. The court found that Mingrun was liable for the accident. It awarded the estate $1,738,321.45.

Telina Wheaton, Individually and as Representative of the Estate of Bobby Joe Nathan Johnson v. Mingrun, Inc. d/b/a Golden Chopsticks, No. 20-02-02017
Court: Montgomery County District Court, 284th
Plaintiff Attorney(s): Brent Phelps, Benjamin Ruemke; PMR Law
Defendant Attorney(s): Alan Kwan, Bernard Kwan; Kwan & Associates

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From Left to Right: Taylor Pace, Wady S. Rahbani- Chavez, Alicia Roberson,Barney Dill, William Farmer, Jared Blanton

Abraham, Watkins, Nichols, Agosto, Aziz & Stogner is celebrating its 70th year anniversary in 2021. We would like to congratulate Taylor Pace, Wady Rahbani-Chavez, Alicia Roberson, Barny Dill, William Farmer & Jared Blanton who were all recently promoted to Junior Associates at the firm. These young leaders are the future of the firm and will learn from some of the best catastrophic personal injury trial lawyers in the nation! Our legal services include commercial auto accidents, maritime, aviation, products liability, workplace accidents, premises liability, medical malpractice, wrongful death, chemical plant, refinery, and residential explosions. Congratulations to these rising star as they begin their journey!

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TEXAS
TOP
100
Midsize Firms, Out-of-State Firms
Beefed Up the Most
in Texas in 2020

BY BRENDA SAPINO JEFFREYS | ILLUSTRATION BY BLIND SALIDA

MIDSIZE LOCAL FIRMS AND FIRMS HEADQUARTERED outside the state grew the most last year in Texas, as Texas lawyer head count at most of the largest homegrown firms changed little when compared with 2019.

That may reflect the continuing movement of aggressive out-of-state firms into Texas, as well as a need for midsize firms to expand to stay competitive. It also suggests that the large homegrown Texas firms are focusing on growth outside the Lone Star State.

But layered over that is the red-hot Texas lateral hiring market. While several midsize firms posted robust year-over-year growth rates in lawyer head count, managing partners of some of the midsize firms that added lawyers in 2020 said hiring was constrained by the tight lateral hiring market.

It's more than a tight market, said J.K. Leonard, president of Naman, Howell, Smith & Lee. "Ultracompetitive" is a better word, he said.

"We just flat out can't compete with the money being offered out there, but one of the fortunate things [for us] is being a firm with law schools in every city, particularly with Baylor," Leonard said, in reference to the firm's headquarters in Waco.

He said the firm has a robust first-year hiring program, which accounted for some of the firm's 19.4% growth in lawyer head count in 2020. But, Leonard said, the firm plans to scale up even more as it can, in particular adding more transactional lawyers to complement the firm's litigation strength.

The firm's lawyers are not interested in becoming part of a "monster" firm, he said, because there are tremendous numbers of large companies that look for mid-market firms, because of its lower rate structure.

Houston's Brown Sims grew by 19.2% in 2020, but managing partner Kenneth Engerrand echoed Leonard's assessment that adding lawyers has been difficult in Texas.

"We interview people, both coming out of school and laterally, and by the time we make them an offer, they've accepted something else," he said. "When we talk to people they already have interviews with a bunch of other people, and they get swept up quickly. It's kind of like the housing market—you have to make an offer right away."

Sims also hires first-year lawyers, but Engerrand said the firm also needs to bring on laterals who can hit the ground running. In his view, the out-of-state firms building offices in Texas have had the biggest impact on the hiring market recently.

Consultant Kent Zimmermann, of Zeughauser Group, said midsize firms everywhere, not just in Texas, are at a competitive disadvantage when competing with larger and more profitable firms for the same lawyers—and same clients and matters. But, he said, it doesn't mean all firms need to get larger and more profitable.

"The message is you need to play on a field on which you can win," he said. "If you don't want to do a frontal assault on somebody that's a lot bigger and a lot more profitable, better to find intersections of practices, sectors and cities where you can dominate."

A number of other midsize firms posted strong head count growth numbers in 2020, including Chamberlain, Hrdlicka, White, Williams & Martin, up by 11.7%; Shackelford, Bowen, McKinley & Norton by 22%; Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing by 10.2%; Mayer by 18.9%; Germer by 14.1%; Coats Rose by 11.1%; and Scheef & Stone by 10.2%.

Perkins Coie, which has offices in Dallas and Austin, posted the highest growth rate of 40% in 2020, followed by Bradley Arant Boult Cummings with 35.5%. Bradley Arant has Texas offices in Houston and Dallas.

Other out-of-state firms that grew by double-digit percentages are Kirkland & Ellis, up 18.9%; Reed Smith, up 15.6%; Latham & Watkins, up 10.5%; Baker & Hostetler, up 15%; Polsinelli, up 13.8%; Shearman & Sterling, up 72.5%; Gordon Rees Scully Mansukhani, up 25.5%; Mayer Brown, up 25%; Simpson Thacher & Bartlett, up 22.5%; and Willkie Farr & Gallagher, up 15.2%.

Only a few out-of-state firms shrank significantly in Texas in 2020. They include Baker McKenzie, down by 13.1%, and K&L Gates by 14.1%.

The 10 firms topping the chart are largely the same, except Kirkland & Ellis moved into the group, while Hunton Andrews Kurth dropped down. Kirkland is the only out-of-state firm among the top 10, except for Norton Rose Fulbright, which has significant Texas roots.

Vinson & Elkins had the most lawyers in Texas in 2020, as the firm did in 2019, but Jackson Walker jumped over Norton Rose to take the second spot on the chart. Jackson Walker is the largest Texas-only firm.

The list includes 105 firms, because of a tie for the last spot. A total of 45 out-of-state firms are among the firms with the most lawyers in Texas.

Senior reporter Brenda Sapino Jeffreys covers the business of law in Texas. Contact her at bjeffreys@alm.com On Twitter: @BrendaSJeffreys

TEXAS TOP 100

RANK	FIRM	MAIN TEXAS OFFICE	TOTAL TEXAS LAWYERS	LOCAL FIRM LEADER	LAWYERS FIRMWIDE
1	Vinson & Elkins	Houston	414	T. Mark Kelly, chairman; Scott Wulfe, managing partner	667
2	Jackson Walker	Dallas	385	Wade Cooper	385
3	Norton Rose Fulbright*	Houston	368	Gerry Pecht, global chief executive	3178
4	Baker Botts	Houston	361	John Martin	719
5	Haynes and Boone	Dallas	349	Taylor Wilson	531
6	Winstead	Dallas	270	David Dawson	287
7	Locke Lord	Dallas	253	David Taylor	588
8	Kirkland & Ellis*	Houston	245	Andrew Calder	2725
9	Thompson & Knight	Dallas	231	Mark Sloan	252
10	Bracewell	Houston	201	Gregory Bopp	327
11	Hunton Andrews Kurth*	Houston	200	Robin Russell	842
12	Thompson, Coe, Cousins & Irons	Dallas	186	Shawn Phelan, chair of management committee	199
13	Foley & Lardner*	Dallas	161	Michael Newman	1003
14	Clark Hill*	Dallas	152	Robert Franke	591
14	Akin Gump Strauss Hauer & Feld	Dallas	152	M. Scott Barnard	898
16	Gray Reed & McGraw	Houston	150	J. Cary Gray	150
17	Kelly Hart & Hallman	Fort Worth	143	Marianne Auld	152
18	Jones Day*	Dallas	138	Hilda Galvan	2490
19	Sidley Austin*	Dallas	135	Yvette Ostolaza	1882
19	Munsch Hardt Kopf & Harr	Dallas	135	Phil Appenzeller Jr.	135
21	King & Spalding*	Houston	126	Tracie Renfroe	1219
22	Greenberg Traurig*	Dallas	124	Mary-Olga Lovett	2171
23	Winston & Strawn*	Dallas	120	Thomas Melsheimer, Bryan Goolsby	832
24	DLA Piper*	Austin	109	Nicole Brennig, John Guaragna	3998
25	Berry Appleman & Leiden*	Dallas	104	Jeremy Fudge	175
25	Reed Smith*	Houston	104	Kenneth Broughton	1616
27	Porter Hedges	Houston	103	Robert Reedy	104
28	Husch Blackwell*	Austin	99	Lorinda Holloway	670
29	Dykema Gossett*	San Antonio	96	Marty Truss	366
30	Latham & Watkins*	Houston	95	C. Timothy Fenn	2558
31	Baker McKenzie*	Dallas	93	Robert Albaral	4699
32	Baker & Hostetler*	Houston	92	Matthew Caligur	909
33	Morgan, Lewis & Bockius*	Houston	86	Stefanie Moll	2014
33	Chamberlain, Hrdlicka, White, Williams & Aughtry	Houston	86	Larry Campagna	138
35	Lewis Brisbois Bisgaard & Smith*	Houston	85	David Oubre	1560

TEXAS TOP 100

RANK	FIRM	MAIN TEXAS OFFICE	TOTAL TEXAS LAWYERS	LOCAL FIRM LEADER	LAWYERS FIRMWIDE
35	Susman Godfrey	Houston	85	Neal Manne, Kalpana Srinivasan	167
35	Gibson, Dunn & Crutcher*	Dallas	85	Rob Walters	1424
38	Hartline Barger	Dallas	83	Larry Grayson	89
39	Linebarger Goggan Blair & Sampson	Austin	81	Clif Douglass, chair of management committee	105
40	Ogletree, Deakins, Nash, Smoak & Stewart*	Dallas	79	Kristin Snyder Higgins	881
41	Cokinos | Young	Houston	78	Gregory Cokinos	80
42	Holland & Knight*	Dallas	76	Scott Wallace	1158
43	Polsinelli*	Dallas	74	Brian Bullard	874
43	Naman, Howell, Smith & Lee	Waco	74	J.K. Leonard	74
43	McGinnis Lochridge	Austin	74	Douglas Dodds	74
46	Germer	Beaumont	73	Karen Bennett	73
47	Kane Russell Coleman Logan	Dallas	72	Karen Cox	72
48	Quilling, Selander, Lownds, Winslett and Moser	Dallas	70	Lance Lewis	70
49	Shearman & Sterling*	Houston	69	Bill Nelson	833
50	Langley & Banack	San Antonio	68	Steve Brook	68
51	Munck Wilson Mandala	Dallas	67	William Munck	72
52	Littler Mendelson*	Dallas	66	Robert Friedman	1061
53	McKool Smith	Dallas	65	David Sochia	108
54	Wilson Elser Moskowitz Edelman & Dicker*	Dallas	64	Stratton Horres Jr	870
54	Martin, Disiere, Jefferson & Wisdom	Houston	64	Dale Jefferson	64
56	Weil, Gotshal & Manges*	Dallas	63	Courtney Marcus, Rodney Moore	1132
57	Fee, Smith, Sharp & Vitullo	Dallas	62	Tom Fee	62
57	Brown Sims	Houston	62	Kenneth Engerrand	77
59	Shackelford, Bowen, McKinley & Norton	Dallas	61	John Shackelford	72
59	Baron & Budd	Dallas	61	Russell Budd	82
61	Glast, Phillips & Murray	Dallas	60	Troy Phillips	60
61	Bell Nunnally	Dallas	60	Christopher Trowbridge	60
61	Spencer Fane	Houston	60	Brian Zimmerman	285
64	Gordon Rees Scully Mansukhani*	Dallas	59	Kirstie Simmerman, Jason Irvin	871
64	Walsh Gallegos Treviño Kyle & Robinson	Austin	59	Joe De Los Santos	65
66	Cantey Hanger	Fort Worth	58	Brian Newby	58
67	McGuireWoods*	Dallas	57	Jason Cook	933
67	Akerman*	Dallas	57	Charles Townsend	647
69	Coats Rose	Houston	56	Richard Rose	66
70	K&L Gates*	Dallas	55	Michael Cuda	1623

TEXAS TOP 100

RANK	FIRM	MAIN TEXAS OFFICE	TOTAL TEXAS LAWYERS	LOCAL FIRM LEADER	LAWYERS FIRMWIDE
70	Mayer Brown*	Houston	55	Neil Wasserstrom	1685
70	Fish & Richardson*	Dallas	55	J. Kevin Gray	321
73	Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing	Houston	54	John Zavitsanos	54
74	Scheef & Stone	Dallas	53	Kelly Crawford, John Scheef, Bill Stone	53
75	Carrington, Coleman, Sloman & Blumenthal	Dallas	50	Monica Latin	50
75	Sheehy, Ware & Pappas	Houston	50	Steven Grubbs	50
77	Patterson + Sheridan	Houston	49	Todd Patterson	71
77	Simpson Thacher & Bartlett*	Houston	49	Robert Rabalais	1044
79	Beck Redden	Houston	47	management committee	47
79	Scott Douglass & McConnico	Austin	47	Christopher Sileo	47
81	Bradley Arant Boult Cummings*	Houston	46	Ian Faria	526
82	Mayer LLP	Dallas	44	Zach Mayer	47
83	Alston & Bird*	Dallas	43	Darren Hauck	779
83	White & Case*	Houston	43	Jay Cuclis	2257
83	Roberts Markel Weinberg Butler Hailey	Houston	43	Shawn Isakson	43
86	Hoover Slovacek	Houston	42	Joseph Slovacek, principal	42
86	Crain Caton & James	Houston	42	Peter Nemeth	44
88	Pillsbury Winthrop Shaw Pittman*	Houston	41	Amanda Halter	650
89	Katten Muchin Rosenman*	Dallas	39	Mark Solomon	641
89	Foster	Houston	39	Charles Foster, chairman	39
89	Seyfarth Shaw*	Houston	39	Mark Coffin	888
89	Jackson Lewis*	Dallas	39	Paul Hash	895
89	Lanier Law Firm	Houston	39	W. Mark Lanier	51
94	Orrick, Herrington & Sutcliffe*	Houston	38	Adrian Patterson	992
94	Willkie Farr & Gallagher*	Houston	38	Bruce Herzog, Michael De Voe Piazza	760
94	Sprouse Shrader Smith	Amarillo	38	Michelle L. Sibley.	38
97	Eversheds Sutherland*	Houston	37	Marlene Williams	383
97	Underwood Law Firm	Amarillo	37	Gavin Gadberry	37
99	Cooper & Scully	Dallas	36	Brent Cooper, John Scully	40
100	Whitaker Chalk Swindle & Schwartz	Fort Worth	35	Tom Brandon, John Allen Chalk, Hunter McLean	35
100	Hallett & Perrin	Dallas	35	Edward Perrin	35
100	Perkins Coie*	Dallas	35	Jill Louis	1093
100	Brackett & Ellis	Fort Worth	35	Henri Dussault	35
100	Greer, Herz & Adams	Galveston	35	Andrew Mytelka	35
100	McCathern, Shokouhi, Evans, Grinke	Dallas	35	Arnold Shokouhi	41

Note: *Not headquartered in Texas Source: firms, ALM Intelligence

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FIRM FINANCIALS

Large Texas Firms had Mixed Results in 2020

BATTERED BY THE ECONOMIC EFFECTS OF THE pandemic, as well as troubles in the energy industry, the overall performance of large Texas firms on the Am Law 200 was decidedly mixed, as firms with practices that stayed busy during the pandemic largely fared better.

Despite the economic effects of the pandemic on financials, Am Law 100 firms improved revenue by 6.6%, and the Second Hundred by 5.7% in 2020, but only one of the large Texas firms on the Am Law 200 met those marks.

Am Law 100 firm Akin Gump Strauss Hauer & Feld came close, with a 6.5% increase in gross revenue in 2020 when compared with 2019; as did Haynes and Boone, with a 6.4% increase in revenue. For the Second Hundred, Winstead posted a 6% revenue increase, surpassing that 5.7% level, and Jackson Walker came close with a 5.4% increase in revenue in 2020.

The nine large firms founded in Texas on the Am Law 200 are the same as last year, but that could change for 2021 financials. Second Hundred firm Thompson & Knight is in negotiations to merge with Florida firm Holland & Knight, with the deal expected to take place in the summer. That would create a firm large enough to be an Am Law 25 firm, but cut a Texas firm from the list.

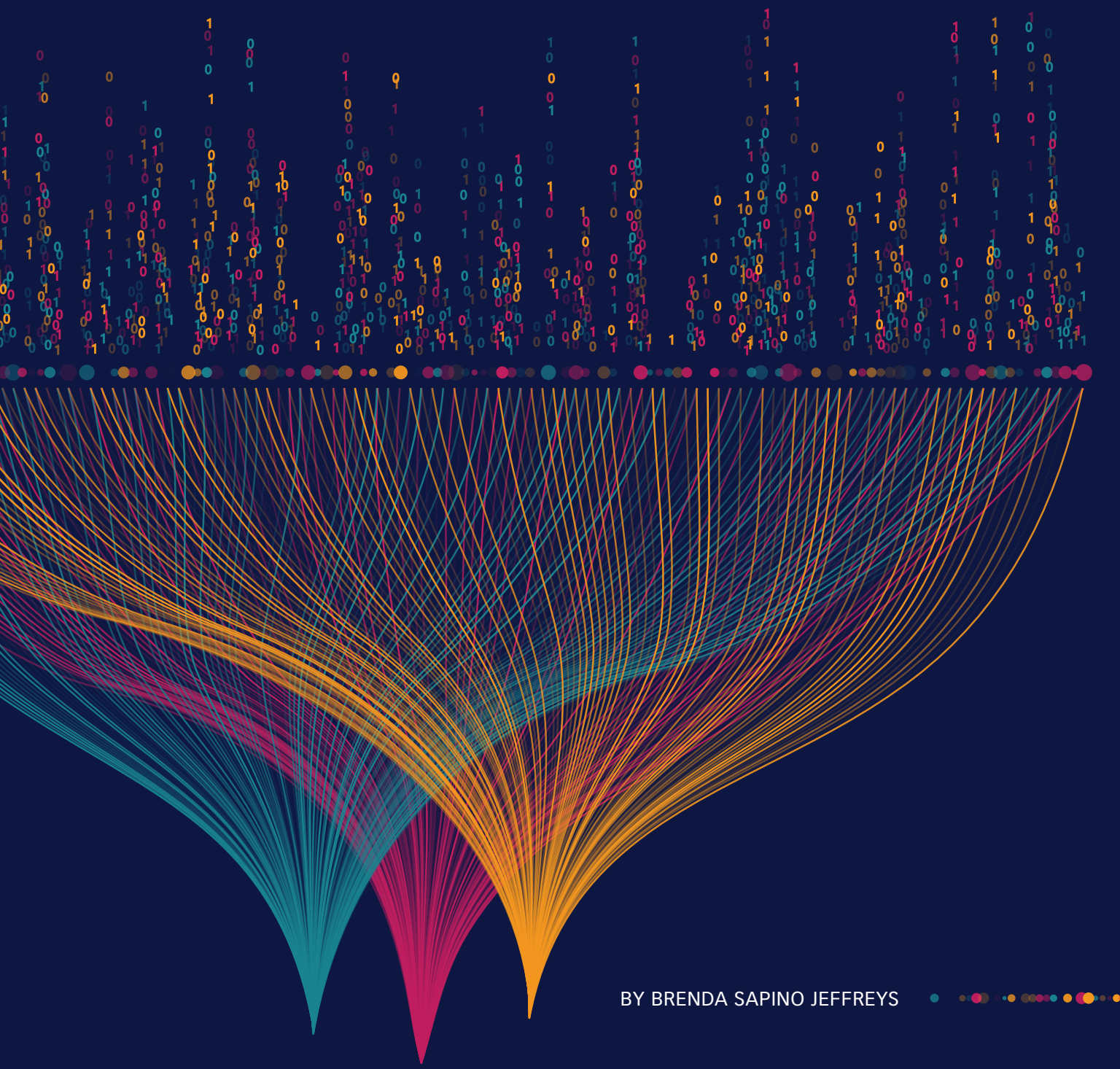
However, some other Texas firms are waiting in the wings, getting closer to making the cutoff for the Am Law 200, which was $103.8 million in revenue in 2020. Those firms include Chamberlain, Hrdlicka, White, Williams & Aughtry, Porter Hedges and Kelly, Hart & Hallman.

Chamberlain Hrdlicka, with 138 lawyers in 2020, posted revenue of $88.8 million, up 1.8% from the prior year. Revenue per lawyer was $644,000 and profits per equity partner of $755,000. At Porter Hedges, revenue improved by 4.9% to $87.3 million, and RPL was $843,000 and PEP was $1.085 million. Kelly Hart posted revenue of $83 million in 2020, up 1.2%, with RPL of $546,000 and PEP of $890,000.

Texas Lawyer has tracked the financials of several other Texas firms over many years, including trial boutique Susman Godfrey, which had revenue of $265 million in 2020, RPL of $1.587 million and PEP of $2.432 million. However, firms that derive much of their revenue from contingency fees are not included on the Am Law 200 ranking.

Akin Gump had the highest revenue among the Texas firms on the Am Law 200 at $1.209 billion for 2020, a 6.5% increase over 2019. Five of the nine firms brought in more revenue in 2020 than in 2019, and four brought in less, although margins were small except for Thompson & Knight's 10.5% drop.

Among the firms, Akin Gump also posted the highest RPL of $1.346 million, a 7.9% increase, with Vinson & Elkins also exceeding the $1 million mark. Winstead posted



BY BRENDA SAPINO JEFFREYS

the largest increase in RPL with 10.4%. RPL increased at six of the firms in 2020, and declined at three of them.

Akin Gump also posted the highest PEP in 2020, $3.023 million, and the firm also posted the largest percentage increase of 16.3%. Two firms weren't far behind in PEP growth—Baker Botts up 15.3% and Locke Lord up 15%.

All of the nine firms improved PEP except for Thompson & Knight, which posted a 15.1% decline.

Senior reporter Brenda Sapino Jeffreys covers the business of law in Texas. Contact her at bjeffreys@alm.com On Twitter: @BrendaSJeffreys

REVENUE PER LAWYER

RANK ON AM LAW 200	FIRM	2020 EQUITY PARTNERS	2020 LAWYERS	REVENUE PER LAWYER	GROWTH
34	Akin Gump Strauss Hauer & Feld	172	898	$1,346,000	7.9%
55	Vinson & Elkins	122	667	$1,174,000	-2.8%
58	Baker Botts	165	719	$989,000	-3.3%
113	Bracewell	65	327	$901,000	7.5%
132	Winstead	80	287	$841,000	10.4%
76	Locke Lord	185	588	$820,000	1.0%
94	Haynes and Boone	145	531	$811,000	4.4%
111	Jackson Walker	110	385	$793,000	1.7%
156	Thompson & Knight	84	252	$773,000	-1.4%

GROSS REVENUE

RANK ON AM LAW 200	FIRM	2020 EQUITY PARTNERS	2020 LAWYERS	2020 GROSS REVENUE	GROWTH
34	Akin Gump Strauss Hauer & Feld	172	898	$1,208,738,000	6.50%
55	Vinson & Elkins	122	667	$782,352,000	-1.30%
58	Baker Botts	165	719	$710,770,000	-5.40%
76	Locke Lord	185	588	$482,096,000	-2.90%
94	Haynes and Boone	145	531	$430,200,000	6.40%
111	Jackson Walker	110	385	$305,454,000	5.40%
113	Bracewell	65	327	$295,000,000	3.9%
132	Winstead	80	287	$241,415,000	6.0%
156	Thompson & Knight	84	252	$195,082,000	-10.5%

PROFITS PER PARTNER

RANK ON AM LAW 200	FIRM	2020 EQUITY PARTNERS	2020 LAWYERS	PROFITS PER EQUITY PARTNER	GROWTH
34	Akin Gump Strauss Hauer & Feld	172	898	$3,023,000	16.3%
55	Vinson & Elkins	122	667	$2,941,000	5.1%
58	Baker Botts	165	719	$1,848,000	15.3%
113	Bracewell	65	327	$1,616,000	7.4%
132	Winstead	80	287	$1,471,000	8.1%
111	Jackson Walker	110	385	$1,217,000	8.7%
94	Haynes and Boone	145	531	$1,077,000	6.8%
76	Locke Lord	185	588	$1,075,000	15.0%
156	Thompson & Knight	84	252	$906,000	-15.1%

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Electronic Divorce

Serving notice through social media

BY BRAD LAMORGESE AND MEGHAN BURNS

COUPLES HEADING TOWARD A DIVORCE now have another avenue to communicate the end to their marriage—serving divorce papers through social media.

Effective Dec. 31, 2020, adoption of new amendments to the Texas Rules of Civil Procedure 106 and 108a allows a party to make a motion to the court to service "in any other manner, including electronically by social media, email, or other technology that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit."

While Texas has taken the lead in many other ventures, such as the invention of the margarita machine in 1971, creation of Liquid Paper in the 1950s, and the establishment of Whole Foods Market in 1980, the state was not the first to modernize the legal system by utilizing apps that approximately 3.96 billion people use each day.

Alaska, New York and other states have already allowed service of process via social media whether by amendments to the rules or by relying on case law to allow such alternative service.

In theory, the amendment makes perfect sense. What better way to notify people of important information than to post it to social media, i.e., COVID-19-related information, natural disasters, Amber Alerts, party invites, or even a meme to encourage a significant other to help around the house? However, a review of how this new amendment will impact family law cases quickly reveals that attorneys need to be extra cautious.

According to the new amendment, service of process may be allowed when a statement or other evidence shows that the method requested "will be reasonably effective to give the defendant notice of the suit." Additionally, the comment to the amendment states the following:

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"*In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology.*"

As attorneys, when determining whether social media will be reasonably effective to give an individual notice of the suit, consider the following:

THE IMPOSTOR ACCOUNT

Unfortunately, many have been victims of "impostor" accounts or have at least received friend requests using a friend's profile picture that isn't owned by the friend. Identifying these accounts can be tricky, especially if an impostor account is not immediately shut down. The account could make it appear as though the individual owns the account, regularly uses it, and/or recently used the account.

THE FAN ACCOUNT

Additionally, there are "fan accounts." Many social media profiles appear owned and operated by the individuals portrayed in the posts and stories; however, "fan accounts" are set up for the sole purpose of growing and promoting an individual's fan base. Many of these individual social media accounts are complete with photos of an individual's work, family, quotes and even posts about their children and everyday lives; however, upon closer inspection the

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accounts are not the "official" account of the portrayed individual. These "fan accounts" can be deceiving, making regular posts that indicate recent and even visible use of direct messaging. In reality, these accounts have no connection to the individual and would not be reasonably effective for giving the individual notice of a suit.

Finally, as with all rules, there will be people who are malicious enough to work the system by creating a social media page with a long history, relevant followers, with regular and recent use that includes likes, messages, posts and stories.

In family law, attorneys see individuals who sometimes plan for their divorce almost as long or longer than their wedding. For some, playing the long game and including a social media page for the purpose of litigation is not so far-fetched.

AS COMMON AS SOCIAL MEDIA HAS BECOME, THERE ARE STILL SERIOUS RAMIFICATIONS IF SERVICE OF PROCESS IS NOT COMPLETED IN ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE.

Attorney reputations are on the line when presenting motions to the courts. That means diligence is required in ensuring that what is asked of the court is always in line with the Texas Lawyers Creed. Despite a client's need and desire to hurt their spouse or co-parent, lawyers must do their homework. If requesting service in an alternative method, specifically by social media, attorneys must take extra precautions to ensure that the social media pages allow posts from the public, allow direct messaging, and that the individuals being served actually own and operate the page or site.

As convenient and commonly used as social media has become, there are still serious legal ramifications if service of process is not completed to the right individual and in accordance with the Texas Rules of Civil Procedure.

Brad LaMorgese is managing partner at the family law boutique Orsinger, Nelson, Downing & Anderson, representing clients in trials and appeals involving high-stakes family law legal disputes, including matters involving interstate jurisdiction disputes, prenuptial agreement litigation, property divisions, custody and visitation.

Meghan Burns is an associate at the firm, with expertise in collaborative law and family law matters, including mediation, litigation and informal settlement agreements.

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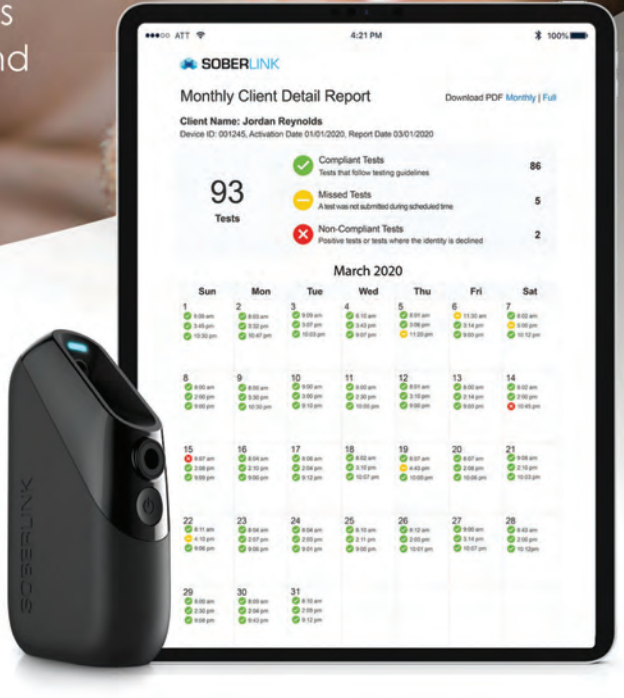

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Dissolving an Informal Marriage

Hidden risks for Texas common-law couples

BY CURTIS HARRISON

MANY TEXAS TWOSOMES, ESPECIALLY among the millennial and older Gen Z couples, choose a life partner while skipping the marriage ceremony. Reasons vary, but include wanting to save money, avoid family conflict or religious pressure or bypass the paralyzing prospect of a future divorce.

In so doing, they are exchanging one set of well-known risks for an entirely different, lesser-known, but equally challenging, set of potential problems. At its core, the nature and extent of their property rights at the end of the relationship will hinge on the existence or nonexistence of a marriage.

Texas has recognized informal, or "common-law," marriages since the mid-1800s. That recognition has now been extended to same-sex couples, following the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*. Therefore, states that recognize common-law marriages must also recognize same-sex informal marriages.

The elements of an informal marriage include (i) an agreement to be married; (ii) cohabitation as spouses; and (iii) representation to others, or "holding out," as spouses (Tex. Fam. Code Ann. §2.401). All three of these elements must coexist simultaneously to establish a valid informal marriage. Once established, an informal marriage is considered to be as valid as a ceremonial marriage, with all of the same rights, duties and privileges.

Upon divorce, Texas law rebuttably presumes that both spouses are entitled to a "just and right" division of property acquired during the marriage, regardless of who paid for it or in whose name the asset is deeded or titled (Tex. Fam. Code Ann. §7.001). Alternative legal theories for property division are much less generous than the "just and right" standard set out in the Family Code. For this reason, at the end of the relationship, the existence or nonexistence of an informal marriage is frequently and fiercely disputed, and the burden of proof rests solely on the proponent of the marriage. An adverse finding can lead to harsh, even draconian, results.

UNMARRIED COUPLES IN TEXAS ARE EXCHANGING ONE SET OF WELL-KNOWN RISKS FOR AN ENTIRELY DIFFERENT, LESSER-KNOWN, BUT EQUALLY CHALLENGING, SET OF POTENTIAL PROBLEMS.

For example, in high-conflict cases, it is not unheard of for one partner to unilaterally lock the other out of the home with little or no notice. The remedies are clear and straightforward in the context of a divorce. Yet, in the absence of a provable marriage, the ousted party could be required to demonstrate that he or she possesses a legal right to remain in the home under an alternative legal theory. Such theories include unlawful lockout, retaliation, constructive eviction, partition, and trespass to try title. The problem with these options is that the movant has to establish either that an ownership interest or a landlord-tenant relationship exists. If the movant's name does not appear on the deed or on the lease agreement, proving either basis can be just as challenging as proving the existence of an informal marriage.

Another risk comes in the form of retirement plans. Pensions, 401(k)'s; IRA's; 403(b)'s; teachers', military, and federal retirement plans; stock options; and restricted stock units are governed by very specific laws that make few allowances for what Texas law deems a meretricious relationship. (Texas case law defines a meretricious relationship as a sexual relationship of cohabitation between two unmarried individuals. See *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex.App.—Austin 1978, writ ref'd n.r.e.)). While most federal and

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state regulated plans allow the plan participant to designate an alternate payee without declaring the person as a spouse, they are not necessarily required to do so. Private plans also vary in their requirements. In the absence of an affirmative designation, the alternate payee could be left without any retirement following an adverse ruling on the informal-marriage issue.

When it comes to other assets, such as cars, bank accounts, art collections and other kinds of personal property, the analysis can quickly become granular. Without the benefit of Texas' community property laws, the court could first look to titling documents, receipts and other records to identify the legal owner of each asset. Beyond that, the unpropertied spouse could be forced to pursue even more obscure theories to prove ownership, such the existence of a partnership, constructive trust or a recovery under quantum meruit.

THE DISSOLUTION OF AN INFORMAL MARRIAGE THROUGH THE JUDICIAL SYSTEM PRESENTS A NUMBER OF HIDDEN RISKS TO THE DIVORCING COUPLE. BUT THERE ARE MITIGATION STRATEGIES.

The dissolution of an informal marriage through the judicial system presents a number of hidden risks to the divorcing couple. However, there are several advance risk mitigation strategies available to couples. They could sign a written declaration of marriage at any point in time and register it as provided by §§2.402 and 2.404 of the Texas Family Code. Another option is to enter into a written premarital or postmarital agreement in conformance with the requirements of Chapter 4 of the Texas Family Code, presumably while the relationship is still healthy. But perhaps the best advice we could offer our clients is to take the trip down the aisle after all.

Curtis Harrison is a board-certified family law attorney and partner with the law firm GoransonBain Ausley. For the last 27 years he has worked to help divorcing individuals resolve their family law conflict in the least destructive way possible under the circumstances.

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Children at Risk

Polarization and bottlenecks intensify conflict in family courts

BY JUSTIN SISEMORE

IN THE HIGHLY CHARGED CULTURE WE live in today—with respect to race, national origin, religion and politics—divisiveness within families has increasingly put the health and welfare of children at risk. When you combine a polarized society with the bottlenecks we're experiencing in the family court system due to COVID-19, you have:

- Families with complex disagreements to resolve (property, child custody, child support, mental health issues, medical procedures, etc.) who can't get a timely court date.
- Family law attorneys pressed to argue complex issues in a fraction of the time previously allowed to present a case, when a family needs extraordinary relief quickly.
- Children who pay the price when health issues (physical and mental) are not addressed promptly or a parent tries to force extreme religious views or moral teachings on their child but the courts won't intervene.

Divorced parents often find co-parenting challenging but the deep polarization in our society has intensified parental conflict for many families. Today, parents disagree strongly about children receiving the COVID-19 vaccine, the results of the presidential election, what medical procedures are necessary or voluntary, whether a child should see a psychologist or "buck it up," which type of school is best (public or private), etc.

Unfortunately, the ambiguous manner in which many Texas custody agreements are written further deepens the parental divide. Too often, Texas custody agreements allow both parents the right to make decisions about the important parental rights and duties enumerated in the Texas Family Code, including medical decisions, where the child resides and attends school, how to direct the moral upbringing of the child and others.

While it may seem logical for both parents to have a say in how their child is raised, what happens when parents disagree? If the custody agreement doesn't include tiebreakers that define which parent has the final say regarding specific decisions (absent a written agreement otherwise), the parents end up back in court.

DIVISIVENESS WITHIN FAMILIES HAS INCREASINGLY PUT THE HEALTH AND WELFARE OF CHILDREN AT RISK. AND THE RISK IS COMPOUNDED WITH BOTTLENECKS IN THE FAMILY COURT SYSTEM.

Recently, Texas legislators submitted an Equal Parenting Bill (H.B. No. 803), which proposes an amendment to Section 153.134 of the Family Code. If the bill passes (it was still pending in the Juvenile Justice and Family Issues Committee on the date this article was submitted), parents appointed as joint managing conservators would no longer default to the Texas standard possession order. Instead, they would enter into an equal, 50/50 parenting arrangement (unless the court determined the order was not in the best interest of the child).

The bill doesn't make any mention of or require tiebreakers, which our family law firm and most family court judges believe should be required in shared parenting agreements.

Again, if the bill passes as is, more parents will end up with 50/50 agreements and no way to resolve disagreements without going back to court. The combination of an increased percentage of 50/50 agreements (absent tiebreakers) and a growing number of disagreements wrought by our polarized society, along with the current bottleneck in the family courts, will be very detrimental to Texas families, especially children.

The court system is already so backed up that parents with complex cases that need to be specially set can't get Band-Aid orders that last long

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*Partners Natalie Webb and Greg Beane are Board Certified in Family Law by the Texas Board of Legal Specialization and are also certified family law mediators.

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enough to protect the safety and welfare of a child. Many lawyers are now giving up on the concept of "I may need two hours, or let's look at trial." If I need a full day, we're set in May 2022. If I need two days, we're set in December 2022.

Our divided society has made the aforementioned parental rights and duties more important than ever, including the right to direct religious and moral training of one's child.

Any experienced Texas family court judge will tell you that the right to direct religious and moral training is the only parental right the Texas courts will not enforce. Yet it's a subject many parents vehemently disagree about. If you have one parent with very extreme religious views, the court will automatically default to freedom of religion, one of our constitutional rights.

While we don't want our constitutional rights taken away, when effecting those rights involves acts or philosophies outside the norms of human decency, the courts must step in. Parents shouldn't be allowed to bend the will of a child in a way that is harmful to the child's psyche or do so in a one-sided manner to the detriment of the other parent, thereby thwarting the opportunity to co-parent.

Making that argument in a court system where bottlenecks prevent parents from getting in front of a judge quickly or having adequate time or resources to effectively present a complex case exacerbates the problem.

As family law attorneys, we think: "I need to condense my client's case, so I can get in front of the judge quickly and present it." However, the question then becomes, "Do I have enough time to present the evidence effectively?" We know cases involving complex property and child custody issues—along with any type of physical abuse, mental abuse, drug abuse—take a long time to prove because we're asking for extraordinary relief, which the courts don't give out freely.

In addition, when you don't have the ability to involve counselors or allow them adequate time to consider issues from both perspectives—races, nationalities, religions, moral beliefs—the level of polarization can escalate further and fast. Bottlenecks in the court system will only get worse as disagreements widen and take more time to resolve, which is exactly what we're experiencing today.

During these cycles of polarization, which our country has experienced many times in the past, people are afraid to talk to each other openly. We don't want to offend someone for fear of retaliation for expressing our views.

If we want to move forward as a country and past the divisiveness, we need to start engaging in some tough conversations. With our kids, spouse, significant other, the father or mother of our children, a judge or client, we must start talking honestly and listening with respect. Those tough conversations will make us stronger as a country and as human beings. We've got to stop walking on eggshells and start talking openly and without judgment now.

Texas families will be forced to navigate the bottleneck for years to come. By working proactively and together, the Texas legal community and Legislature can ensure we get to the other side more quickly, so we can do right by the children residing in our state.

Justin Sisemore is the founder of Sisemore Law Firm, a leading family law practice in Fort Worth. He can be reached at https://www.thetxattorneys.com/contact.

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How Much Will it Cost?

A tale of 2 divorces

BY SUSAN MYRES

EVERY FAMILY LAW CLIENT HEADING into a divorce asks, "How much will this cost?" This is a cautionary tale outlining how two very similar divorces, in terms of accumulated assets, valuation, division of property and issues involving methods of resolution, can result in wildly divergent costs. In both of the cases described below, the couples divorcing were middle-aged and separating after a marriage of more than a decade with a substantial estate to divide. These stories are based on real cases but details have been changed.

In Case No. 1 the marital estate was about $18 million in real estate, financial accounts and employment benefits, which were not all taxed or fully vested. This couple participated in the collaborative divorce process, pursuant to Texas Family Code §15.001-15.116. Identifying, valuing and dividing the financial assets was a thorny and challenging slog.

Each party had an attorney, but the attorneys and their clients agreed to hire a single expert to examine and value the real estate properties and a single financial expert to identify and quantify investment accounts, tax-deferred assets, capital gains, stock options and restricted stock units.

The financial expert helped analyze the probable tax impact of the asset division. Some of the financial assets in the investment accounts showed gains; others were underwater. If these assets were divided equally, each party would share equally in the profits, losses and taxes. The effects of stock options not yet fully vested and the tax consequences could also be estimated based on the history of the stock. The real estate expert determined the value of those properties and estimated the cost of, say, selling the family home and dividing the proceeds equally both before and after the divorce, versus one party keeping the house and continuing to meet the costs of caring for it, as the value of the property appreciated.

TWO VERY SIMILAR DIVORCES, IN TERMS OF ACCUMULATED ASSETS, VALUATION, DIVISION OF PROPERTY AND ISSUES INVOLVING METHODS OF RESOLUTION, CAN RESULT IN DIVERGENT COSTS.

ETIAMMOS VIA SHUTTERSTOCK

Through the collaborative process, both parties were fully informed about every issue involved in dividing the property they owned together. They were offered a variety of options and were able to make intelligent decisions. They set the pace of the case to meet their needs. It's fair to say that neither party felt an ideal arrangement had been achieved, but each felt the final settlement was acceptable. The overall cost of the divorce, completed through the collaborative process, was in the $80-90,000 range.

Couple No. 2 had a sizable marital estate configured somewhat differently than the estate of No. 1. They had a second vacation residence in addition to the primary family home, and a closely held family business in addition to the usual investment accounts. In Texas judges generally will not hear a divorce case until a couple has made an effort to resolve their differences first through mediation. This couple had a hard time agreeing on the time of day and could not arrive at an agreement on the division of property, even after two mediations.

In this case each party hired his/her own financial expert, which doubled the cost of obtaining expert advice. The two experts did not agree. The valuation of closely held businesses is notoriously difficult in the best of times: now add the difficulties posed by a pandemic. A crystal ball to predict the post-pandemic performance of the business was not available! Would it be a treasure trove of income, a hellhole sucking away every investment, or something in-between? Typically, the personal goodwill generated by the owner of an established business is not included in any analysis of its value; all that counts are black and white financial documents and expert analysis.

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The couple fought ferociously over the valuations produced by their dueling experts and ended up having to resort to litigation. The cost of the divorce so far is over $300,000 with the court resolving the issues in a manner the judge deemed to be "just and right"—the standard established by Texas law. Both parties are dissatisfied, and there are still post-divorce details and costs to be addressed.

All too often, in high-net-worth, high-conflict divorces like this one, parties get so caught up in the fight that they struggle to be reasonable or even to act in their own best interests. One party can become so determined to keep the house, no matter what, that he ends up without enough liquid assets to buy groceries. Or one party is so determined to hang on to her stock options, no matter what, that she ignores the possibility that her company may go broke, leaving her options worthless.

IT IS FAR BETTER, IF AT ALL POSSIBLE, TO PUT ASIDE ONE'S OWN GRIEVANCES AND SEEK A FAIR AND HONEST SETTLEMENT EVERYONE CAN LIVE WITH, RATHER THAN BE BENT ON A TAKEDOWN.

It is far better, if at all possible, to put aside one's own grievances and seek a fair and honest settlement everyone can live with, rather than be bent on achieving some kind of ultimate takedown—which can turn out to be a Pyrrhic victory in which the gains are meager compared to the costs. Divorcing spouses should always bear in mind that the cost of the divorce is money that is taken out of their estate forever. They have hired lawyers versed in the practical resolution of conflicts. Listening to the advice of these trained and experienced professionals is key: balancing cost with the value gained is essential. When clients ask, "How much will it cost?" the answer will always be, "It depends on the clients."

Susan Myres is a board-certified family law attorney at Myres & Associates. She has been practicing in Houston for over 35 years and has served in leadership positions locally, statewide and nationally. She is also the immediate past president of the American Academy of Matrimonial Lawyers.

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Who Decides?

Co-parenting and vaccines

BY HOLLY RAMPY BAIRD AND PAULA BENNETT

WITH COVID-19 VACCINATIONS UNDER-way around the world, and now available in Texas to everyone 16 and older, clinical trials are testing the safety of the vaccines in children.

COVID-19 vaccinations for children, and especially participation in clinical vaccine trials, may raise issues for parents who are co-parenting with a former spouse or partner.

In determining what a parent can and cannot consent to without agreement from the other parent, it is important to first have a basic understanding of parents' rights regarding medical care on behalf of their children in Texas.

Under the Texas Family Code, unless limited by court order, a parent has the right at all times to provide medical treatment during an emergency. During custody periods, a parent can provide medical care not involving invasive procedures.

Regarding invasive medical procedures, a custody order in Texas should outline how that right is held. Typically, the right is held one of three ways: (1) jointly by the parents, subject to the agreement of the other parent; (2) independently by each parent, meaning either parent may consent to treatment without the agreement of the other parent; or (3) one parent holds the right exclusively and may make all such decisions without the agreement of the other parent.

COVID-19 VACCINATIONS FOR CHILDREN MAY RAISE ISSUES FOR PARENTS WHO ARE CO-PARENTING WITH A FORMER SPOUSE.

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WHAT CONSTITUTES AN INVASIVE PROCEDURE?

While the Texas Family Code uses the term "invasive procedure" when discussing medical care, it does not include a definition. Some courts rely on the Texas Health and Safety Code, which defines an invasive procedure generally as the surgical entry into tissues, cavities or organs, or the repair of certain major traumatic injuries. Under this definition, vaccinations don't seem to be invasive procedures. Still, there are courts in Texas that interpret this differently, and some have ruled vaccines are invasive procedures.

CAN I CONSENT FOR MY CHILD TO PARTICIPATE IN A CLINICAL TRIAL OR RECEIVE THE VACCINE OVER THE OBJECTION OF MY CO-PARENT?

The question of whether a parent can allow a child to participate in a COVID-19 vaccination trial or get the vaccination over the objection of the co-parent is a novel issue. As with so many things during this pandemic, the questions that arise have not previously been reviewed or decided by courts, so the answers may vary.

If a parent wants her child to participate in a clinical trial, the parents should first look at the current order in place. If a parent has the exclusive right to make decisions about medical care involving invasive procedures that parent probably has the right to allow the child to participate in the clinical trial. However, even if a parent holds this exclusive right, the other parent may still raise an objection, which could bring the case before the court.

In court, the primary consideration for the judge will be what is in the best interest of that specific child. Because a clinical trial is experimental, with no assurances from the medical community yet that the vaccine is safe for children, the court may have a difficult time ruling that the clinical trial is in the best interest of that child.

The clinical trial may be in the best interest of the medical community and for the greater good of the population, but it could have the potential to harm

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THESE ARE NOT EASY QUESTIONS FOR CO-PARENTS WHO MAY NOT AGREE ON SIMPLE MATTERS IN THE BEST OF TIMES. THE POLARIZING NATURE OF THE VACCINE CONTROVERSY ONLY ADDS TO THE UNCERTAINTY.

that individual child. It is possible that the court might ultimately require the parents to agree for the child to participate in the clinical trial, and absent an agreement, order that the child not participate.

These are not easy questions for co-parents who may not agree on simple matters in the best of times. The polarizing nature of the vaccine controversy only adds to the uncertainty and makes the specific wording in court orders and the definition of "invasive procedures" even more important. If a parent has the exclusive right to consent to invasive procedures, that parent should be free to allow the vaccination over the objection of the other parent. Ideally, a parent who wishes to proceed over the objection of the other parent should contact a board-certified family law attorney for further guidance.

Holly Rampy Baird and Paula Bennett are family law partners in the Dallas and Frisco offices of Orsinger, Nelson, Downing & Anderson. Both are board certified in family law by the Texas Board of Legal Specialization.

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The Competition Problem

How to quickly protect intellectual property for consumer products **BY GARY B. SOLOMON**

PRODUCT COMPANIES IN THE 21ST CEN-tury must be nimble and capable of fast execution. Competition has never been so fierce because of the proliferation of the global economy, including typical market competitors, former manufacturers and future competitors who currently work within the company.

Historically, companies mainly faced competition within the U.S., but the ease of transportation and marketing via the web makes anyone a potential competitor. While technology increases speed of product development, technology, such as 3D laser scanners and mass spectrometry, increases speed of reverse engineering or copying others' products.

Manufacturers, most notably non-U.S. manufacturers, will sometimes continue to produce and sell your products to other distribution channels after you switch to a new manufacturer.

Companies always face the challenge of current employees or contractors, such as computer programmers, who leave the company. Employees often have access to software and sometimes confidential or trade secret information.

CONSUMER PRODUCT COMPETITION CHALLENGES

As a result of the ease of copying, reverse engineering, and unscrupulous manufacturing partners, consumer product companies often find themselves with competitors shortly after releasing a new product, oftentimes within a few months. And, the more popular the brand, the faster the competitors show up. To make business even more challenging, the ability for competitors to distribute knock-offs has become much more pervasive on internet sales platforms (e.g., Amazon, eBay).

COMPANIES ALWAYS FACE THE CHALLENGE OF CURRENT EMPLOYEES OR CONTRACTORS WITH ACCESS TO CONFIDENTIAL INFO, SUCH AS COMPUTER PROGRAMMERS, WHO LEAVE THE COMPANY.

Two possible competition defenses include having intellectual property (IP) protection and out-marketing the competitor. Out-marketing can be challenging with today's low-cost online marketing tools. Meanwhile, takedown policies for IP infringement varies for each major sales site.

IP HOUSEKEEPING

Intellectual property generally includes patents, trademarks, copyrights, trade secrets, trade dress and know-how. It's important for companies to complete some IP housekeeping to protect their ideas. These include:

Patent assignment provision: All executives, employees and contractors/consultants need to be under a duty to assign intellectual property, most notably inventive ideas. Without a written assignment, the invention owner is the employee, and their ability to leave your company with the idea to become or join a competitor, or worse yet, license your technology to a competitor (yes, it is legal)! Having the patent assignment should help to deter executives, employees and contractors from becoming a competitor.

Copyrights: For products that include software, a copyright application should be filed with the U.S. Copyright Office for each and at each major update. File within three months of publication to be guaranteed statutory damages (and attorney fees) in the event of infringement.

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Trade secret protection: Maintain a list of trade secrets and limit access to individuals with a need-to-know.

INTELLECTUAL PROPERTY FOR CONSUMER PRODUCTS

Such fast-paced competition has placed a higher burden for securing IP earlier in a product life cycle. How can you do that? A systematic working relationship between a product developer and IP counsel needs to exist.

Here's a strategy for better integrating your IP program with product development to secure the IP earlier in the product life cycle. Communications should occur in three phases:

1. After concept acceptance but before design/engineering: For consumer products, because the cost of patent infringement is so high, it is strongly recommended to conduct a Novelty Search and/or Freedom-to-Operate Search to help ensure that the concept has innovative features that are potentially patentable and help avoid patent infringement. From the search results, the patent counsel can focus on inventive features to protect the product, and guide the company how best to avoid patent infringement. Consider filing a provisional utility patent application and/or design application(s) at this time.

2. After engineering design is completed: Once the inventive features are learned, file patent application(s). These should be either provisional or nonprovisional depending on the potential for the product to further evolve. Budget may also play a factor in the decision. (Note: for products with unique ornamental design features, file design application(s) to avoid unintentional loss of international rights.)

3. After prototyping is complete and prior to production or product announcement: Perform a final check to see if any additional product features need to be protected.

Make sure the company's workflow includes the IP attorney to sign off to ensure all patent filings are complete before announcing or releasing the product. Also, ensure trademarks and copyrights are filed, and patent and trademark clearance assessments are within acceptable risk tolerances.

PATENTS

A utility patent normally takes 18 to 30 months to grant (expedited: six to 12 months) while design patents applications take between 12 to 18 months to grant (five to nine if expedited).

For consumer products, the goal is to obtain a granted patent ASAP to enforce against competitors. Both utility and design patent applications can be filed with an expedited examination request. When patent examiners examine accelerated applications, a more "cooperative" examination typically occurs. Design patent applications filed for expedited examination (under 37 CFR 1.155 must include form PTO/SB/27) require a preexamination search to have been performed and a listing of classes/sub-classes along with an Information Disclosure Statement.

TRADEMARKS

Trademarks generally take 12-18 months, and no expedited filings are possible). Once desired product names are determined, clear the names to reduce chance of having to later rename/rebrand due to infringement of another mark, and submit for a federally registered trademark as early as possible so that a registered trademark is granted prior to or early in the life of the product.

COPYRIGHTS

Copyrights take six to 12 months to grant, possibly 10 days if expedited. Be sure to copyright as much of your product as possible, including manuals, photos, software, etc. Remember to copyright your company logo in addition to trademarking as a knock-off often includes the company logo on the knock-off products.

A formal copyright program is helpful to ensure copyrights are part of the IP protection program. Registering software makes programmers more sensitive to taking software when leaving the company. And, because a copyright is required to be registered to initiate a copyright lawsuit, you may as well timely file for statutory damages. For software registrations, be sure to file the software with redactions to show that trade secrets are in the software, thereby supporting later trade secret enforcement.

TRADE SECRETS

These are instantly granted. For software and life science technologies, it is recommended to have a formal trade secret program in place that documents the actual trade secret and to maintain formal protection for the trade secrets. The court will want to know what the trade secret is and how did you protect the trade secret.

MARKETING

When marketing the product, mark your product with appropriate IP identifiers, such as "Patent Pending," patent number once granted, proper trademark symbol, and/or copyright notice. Marking the product and packaging will at least make your competitors think twice about producing a knock-off or similar product. Remember to remove the patent marking when patent expires.

BEAT THE COMPETITION

Because of the speed of competition with consumer products, intellectual property assets need to be protected earlier in the product life cycle for maximum protection. As such, intellectual property should be properly integrated during product development, and each IP asset should be considered and timely filed. If patent applications are expedited and granted before competition shows up, competitors are reduced and infringing products are removed from the market—allowing your company to thrive.

Gary B. Solomon is a partner in the Dallas office of Foley & Lardner. He is a member of the firm's electronics practice. Solomon focuses his practice on patent preparation, prosecution and the monetization and protection of these intellectual property assets.

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Protect Your IP

Patents, pending patent applications and notice letters

BY EDGAR GONZALEZ

WHETHER YOU ARE A PATENT APPLICANT with a currently pending application or an established company with a portfolio of patented products available on the marketplace, you may encounter competitors with a product that appears to infringe your patent or your currently pending patent application. A potential first step to protect your intellectual property is to send a letter to the potential infringer. But what type of letter should you send? What risks do you face by sending a letter? What issues may arise with a letter for a pending patent application versus an issued patent? This article briefly describes broad issues to consider when taking the first steps to communicating with a potential infringing competitor.

The purpose of sending a letter to the potential infringer is generally to stop the infringement and/or protect pre-suit damages. The preferred way to protect pre-suit damages is through patent marking, including virtual patent marking. In the absence of patent marking, notice letters serve two purposes: (1) to protect pre-suit damages; and (2) to build a case of enhanced damages under willfulness.

One risk to consider when drafting a letter is creating a "substantial controversy" that triggers declaratory judgment jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. This means that the substance of your letter may provide the competitor with a sufficient basis to file an action for declaratory judgment in its preferred forum in order to get a ruling that your asserted patent is not infringed, is invalid and/or is not enforceable. The competitor may be seeking a "home field" advantages, such as a convenient geographical location or having a desired jury pool. With this risk, you must be prepared to litigate the matter with fully developed infringement contentions that can withstand a declaratory judgment action.

WHAT TYPE OF NOTICE LETTER SHOULD YOU SEND? WHAT RISKS DO YOU FACE BY SENDING SUCH A LETTER? WHAT ISSUES MAY ARISE WITH A LETTER FOR A PENDING PATENT APPLICATION?

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What language in a letter may be construed as a substantial controversy that triggers jurisdiction? If you send a general notice letter merely informing the competitor of your issued patent and perhaps requesting information, you likely do not trigger declaratory judgment jurisdiction, but you would at least put the competitor on notice of the patent. However, if you send a cease-and-desist letter asking the competitor to stop using, selling, offering for sale, etc. the accused product due to infringement of your patent, declaratory judgment is likely triggered. Also, licensing discussions may or may not be considered a substantial controversy. Therefore, to mitigate the potential of creating substantial controversy, any letter should avoid having any analysis, infringement determination, or offer to license your patent.

What if you have a pending patent application? Assuming the application is not related to any previously issued patents, your pending patent application is not enforceable. While you can still send a pre-issuance notice letter informing the potential infringer of your pending patent application, you may not gain any significant advantage in future litigation since monetary damages for infringement are primarily available after the patent issues. If you do sue for infringement after your patent issues and seek monetary damages, a

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pre-issuance notice letter could allow you to collect a reasonable royalty for the competitor's infringement prior to the issuance of your patent based on "provisional" patent rights under 35 U.S.C. § 154(d). This statute requires that the patentee provide the infringer with actual notice of the pending patent claims (i.e., a pre-issuance notice letter) while the application was pending. Collecting pre-issuance damages may be challenging because this damages period is only available (1) if the invention as claimed in the published patent application is substantially identical to the invention as claimed in published patent application; and (2) for the time period between the publication date and the issuance date of the patent application. 35 U.S.C. § 154(d). If the claims of the published patent application were amended during prosecution, such claims may differ significantly from the claims of the published patent application.

REGARDLESS OF YOUR STRATEGY TO PROTECT YOUR INTELLECTUAL PROPERTY, THE CONTENT AND TIMING OF NOTICE LETTERS ARE IMPORTANT ISSUES TO CONSIDER BEFORE GIVING NOTICE.

Once the pending patent has issued, there are some timing considerations with regard to sending letters. There are different ways to challenge the validity of a patent, including a post grant review (PGR) or an inter partes review (IPR). You may want to wait nine months after issuance to send a letter to avoid PGR, which is typically a more powerful proceeding for a petitioner, because it allows the petitioner to raise more grounds of invalidity than an IPR, which is available nine months after issuance of the patent. Another timing consideration is the product life cycle of your patented product. Subject to some caveats, a patentee can generally seek up to six years of past damages when suing for patent infringement (assuming the patent issued at least six years prior to the filing of the patent infringement lawsuit). If the product life cycle is between two to six years, you may consider issuing a notice letter or cease-and-desist letter on or close to the issue date in order to maximize the potential monetary damages.

Your follow-up actions after sending a notice letter are also important. Sending a letter and failing to sue for a period of time could give the competitor additional defenses in an eventual suit. If you send a notice letter to the competitor and do not file an action within six years (or do not reply to a competitor's response), the competitor may raise a laches or equitable estoppel defense against you, which may eliminate pre-suit damages or all damages.

You may decide not to send a letter at all. Rather than sending a letter to protect your pending patent rights, you might consider strategic prosecution of your patent application to ensure your claims cover the accused product (assuming the accused product came after you filed your patent application). Regardless of your strategy to protect your intellectual property, the content and timing of notice letters are important issues to consider before giving notice to potential infringing competitors.

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Buyer Beware

What every purchaser of IP should understand about ownership

BY MICHAEL DUBNER

UNDERSTANDING INTELLECTUAL PROPerty (IP) is challenging. Understanding IP ownership is even more difficult. Regardless, it is imperative that purchasers have a firm grasp of the core principles surrounding IP ownership. A lack of understanding can, among other things, result in a failure to receive exclusive IP rights, overpayment for such IP, or even worse, receiving no rights to the IP. While a purchaser may have a cause of action against a seller for a breach of representations and warranties or fraud, it may be a costly or time-barred effort. Whether a startup or a well-established company, understanding IP ownership is critical for any business.

There are many ways to define IP rights. Generally speaking, however, IP rights are rights given to a person to protect their creations and are subject to ownership throughout the world. IP is protected most commonly with patents, copyrights, trademarks and trade secrets, each having their own unique ownership criteria. This article provides an overview of each category, with ownership criteria and practical considerations for purchasers.

UNDERSTAND PRECISELY WHO OWNS THE PATENT.

In the United States, a patent grants "the right to exclude others from making, using, offering for sale, or selling" inventions or "importing" an invention into the country. The invention must be new, useful and not obvious in view of what is already known. In the U.S., ownership of a patentable invention vests with the inventor(s). This default rule applies even when an inventor invents in the course of their employment, or when a third-party service provider is engaged to provide work produced for the benefit of the company. Thus, to acquire legal ownership of an employee or a contractor's patentable invention, a company must obtain a written assignment from the inventor.

OLIVIER LE MOAL/ADOBE STOCK

Consider: Do not assume that a seller owns a patent because either an employee created the invention, or the seller paid a third party to create it. Look for and request written assignments from all inventors, including company founders and executives. As a practical matter, inventor assignments should be obtained early, preferably prior to filing the patent application. Applications can remain pending in the Patent Office for many years. Another dynamic is that as time continues, employees depart, retire or become unavailable, and contractors are oftentimes difficult to locate. For these reasons, purchasers should always check ownership records via the U.S. Patent and Trademark Office (USPTO) Assignment database to ensure record ownership is consistent with the seller's representations.

SIMILAR TO PATENTS, DETERMINE THE EXACT OWNER OF A COPYRIGHTED WORK.

A copyright is a form of protection provided to the authors of "original works of authorship." Such "works" can include, for example, company software, marketing materials, product manuals, photographs or website content. The Copyright Act gives the owner of the copyright the exclusive right to, among other things, reproduce and prepare derivatives of the copyrighted work. Similar to patents, ownership of a copyrightable work initially vests in the individual creator unless the work is considered a "work made for hire," in which case the employer automatically owns the copyright. Unbeknownst to many, a "work made for hire" is defined by statute and falls into two categories: first, works created by an employee in the scope of their employment, or secondly, a specially commissioned work under the categories specifically listed in Section 101 of the Copyright Act. To acquire legal ownership of a work that is not a work made for hire, a company must get a written assignment from the author.

Consider: Hiring a third party to create on your behalf is not "a work made for hire" and, in most instances, that work is not automatically owned by the customer. Thus, for third-party vendors such as outside programmers, web designers, photographers or marketing firms, it is important to ensure that a written assignment is executed. These are commonly negotiated by way of a "services agreement," where the scope of services, the work product, and

the ownership thereof can be negotiated. As a practical matter, negotiate these agreements prior to commencement of work. Of course, for any employees performing services outside of their normal job duties that results in a work product, the employer must obtain a written assignment from the employee, since this typically falls outside of the definition of a "work made for hire."

PROTECT TRADE SECRETS TO SAFEGUARD ANY FUTURE LEGAL RULINGS.

Under both federal and state law, trade secret protection is available for business, financial or technical information if all of the following conditions are met:

- The information is not generally known or ascertainable outside of the owner's organization and control.
- The owner derives independent economic value or business advantage from the information not being generally known.
- And the owner makes reasonable efforts to preserve its secrecy.

Business owners should have specific guidelines and procedures in place to ensure the secrecy of the information; otherwise, a court may rule that the information is not a trade secret.

Consider: During due diligence prior to purchase, purchasers should obtain a written schedule specifically identifying trade secrets, should investigate the procedures used by the seller to protect its trade secrets and other sensitive information. This will enable the purchaser to assess the following: if access to the sensitive information is restricted to those employees who need to know the information; if the sensitive information is maintained in a physically secure environment; or if adequate confidentiality agreements are in place with employees, vendors and other applicable third parties. If the answer is "no" to one or more of these conditions, it is possible that a court could conclude that the information is not a "trade secret." Moreover, the value of a deal could change should the "trade secrets" be found to have been unprotected.

UNDERSTANDING IP OWNERSHIP IS NOT EASY AND REQUIRES ALL BUYERS TO BEWARE. WHEN ANY TRANSACTION INVOLVES IP, IT IS HIGHLY RECOMMENDED TO SEEK ADVICE ON THE MATTER EARLY ON.

TRADEMARKS GET TRICKY IF THEY'RE NOT PAID CLOSE (AND TIMELY) ATTENTION.

A trademark or service mark is a word, name, symbol or device that is used in the trade of goods or services to indicate the source and to distinguish them from others. Trademark rights may be used to prevent others from using a confusingly similar mark with the same or similar offering. Trademark rights are based on use in commerce and may be registered with the USPTO. In the U.S., the party who is first to use a name is generally the party with superior rights.

Consider: Prior to any acquisition, a purchaser should ensure that all trademark registrations and applications are registered and owned by the seller. This can be confirmed via a publicly available assignee database at the USPTO. Identify situations where record ownership is not up to date and correct, if correctable, before the purchase date. Furthermore, purchasers should investigate whether there have been issues of abandonment. Use of a trademark must be continuous; otherwise, the owner may have abandoned and lost rights to the trademark. This is true even if a registration appears to be "live" on the trademark register.

BECAUSE OF IP'S COMPLEXITY, CONSIDER A SPECIALIST'S PERSPECTIVE.

The discussion above is just the beginning. For example, purchasers should ensure that all purchased domain names are registered to the seller and not the web developer or other third party (including employees) who might unreasonably demand compensation in order to transfer. Further, ask if any IP is jointly owned. Joint ownership of patents and copyrights can be complicated. Case in point: joint patent owners can independently sell or license the patent without the approval from the other owner. Yes, really. Also, there is no requirement to account to the other owner for licensing revenues. Even more troubling, a co-owner can license a patent to the other owner's competitor, potentially diminishing the value of the patent and market potential for the co-owner. Finally, consider where the IP was created. If created abroad, the laws of that local jurisdiction could be inconsistent with U.S. law.

Understanding IP ownership is not easy and requires all buyers to beware. When any transaction involves IP, it is highly recommended to seek the advice of an intellectual property specialist early on in the process to minimize surprises and help bring the transaction to a smooth close.

Michael Dubner is a partner at the Dallas office of Foley & Lardner. As a registered patent attorney, his practice involves all aspects of intellectual property law, with particular emphasis on domestic and international patent and trademark procurement and representing clients in connection with technology transactions, including negotiating professional services agreements, technology development agreements, cloud-based service agreements, technology and software licenses, and service level agreements. In addition, he regularly counsels clients regarding the avoidance of third-party intellectual property rights by identifying such rights, giving opinions concerning non-infringement and validity, and counseling clients with respect to non-infringing alternatives.

Legal Influence

Five rules to follow on the road to persuasion

BY MICHAEL P. MASLANKA

LAWYERS MUST PERSUADE OTHERS. IN A traditional law school education, training in persuasion is sparse; in the traditional practice of law, well, the deep end of the pool awaits. But do not despair.

REMIND, DON'T LECTURE

That's a paraphrased quote from Samuel Johnson. He was right. Harry Beckwith, an ad agency owner, writes about Johnson's lesson in his classic, "Selling the Invisible: A Field Guide to Modern Marketing." The U.S. government wanted to increase seat belt use, so it launched two seat belt campaigns: (a) "Buckle Up, It's the Law!" and (b) "Click it or ticket." That's right, (b) zoomed to the pantheon of successful persuasion stories while (a) flamed out. Why? (a) was a mandate while (b) was a choice. I have watched juries recoil from a closing argument when told what to find yet embrace a closing argument when suggested what to find.

Adam Grant takes this idea a critical step further in his book, "Think Again: The Power of Knowing What You Don't Know," when he discusses motivational interviewing. Want to convince resisting parents to vaccinate their child? Do not bombard them with facts or demean their motivations. Instead, acknowledge that they, like you, want a healthy child:

> "We don't know what motivates someone else to change, but we are genuinely eager to find out. The goal isn't to tell people what to do; it's to help them break out of overconfidence cycles and see new possibilities."

How? Asking open-ended questions; engaging in reflective listening; affirming the desire and ability to change.

REFLECT ANOTHER'S THINKING

In an amazing new book, "What's Your Problem?: To Solve Your Toughest Problems, Change the Problems You Solve," Thomas Wedell-Wedellsborg gives us a life lesson from Chris Voss,

an FBI hostage negotiator. Imagine this: Law enforcement corners three fugitives on the 27th floor of a building. The rational mind tells us: Let them know they are trapped—there is no way out—and if they do not come out now then things are going to go very badly. Instead, Voss tells the fugitives: "It looks like you don't want to come out. It seems like you worry that if you open the door, we'll come in with guns blazing. It looks like you don't want to go back to jail."

Voss explains that there is something powerful when a person hears their problems described accurately. Doing so builds trust and fruitful collaboration.

"YES, I AM THAT KIND OF PERSON!"

I was the managing partner of the local office of a national law firm. One month, because of a trial, I did not get my billables to accounting timely. I get an email from the regional managing partner that is in all-caps. It exhorts me in unpleasant language about my time. My reaction? Nothing, though I knew, in my heart of heart that I should have clicked my heels and set at once to the task. But I did not, although there was ultimate, albeit grudging compliance.

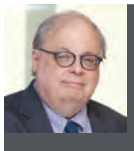
Chip and Dan Heath suggest a more effective persuasive technique—with no collateral damage—in their book, "Switch: How to Change Things When Change Is Hard," which is gleaned from cognitive research and Socrates. Appeal to the better angels of human nature. Say this: "Mike, I know you are the type of partner that cares deeply about the firm and its cash flow. I believe we can count on you 100% of the time. So, please get your time in ASAP. Thank you!" The result? Mike thinks to himself, "You know what, I am that kind of person!"

ESCHEW THE WHY; EMBRACE THE HOW

Ever have a disagreement that ends with, "let's just agree to disagree?" That's a failed conversation and that phrase ends any opportunity to persuade another. There's a better way. Back to Grant. He counsels us to frame a discussion as a debate with an exchange of ideas, not as a zero-sum conflict with a clear winner and loser. Studies show that when we ask others "why" they hold a certain belief, they then double down on their convictions, digging into their position emotionally. Grant counsels to ask others "how"—as in "how" will your ideas work in practice or "how" would you explain your idea to an expert.

CANDID OPINION, MODESTLY SHARED

Let's stay with Grant. Want to get a shot at a job whose profile you don't fit? State so up front. Preempting the argument against you preempts a knee-jerk rejection and demonstrates your discernment. But follow up with your core strengths, not with every single and tedious reason you would do well at the job. Piling on leads to argument dilution. And yes, one of the hardest tasks for a lawyer is to leave something out.



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Courtroom Drama

Certain concepts of stagecraft are expressed during trials

BY RANDY D. GORDON

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IN "THE PRESENTATION OF SELF IN Everyday Life," Erving Goffman uses "the term 'performance' to refer to all the activity of an individual which occurs during a period marked by his continuous presence before a particular set of observers and which has some influence on the observers." He labels as "front" the "expressive equipment" that a performer deploys. The front can be atomized into a couple of different parts: the "setting" and "personal front," which itself has two components, "appearance" and "manner." Each of these concepts finds concrete expression in the drama of trial.

Goffman identifies a "setting" with "furniture, decor physical layout, and other background items which supply the scenery and stage props for the spate of human action played out before, within, or upon it." In previous installments, we discussed how the particular trial setting—courthouse and courtroom—impacts the human interaction taking place within. But it remains for us to demonstrate how personal fronts are important to trial in critical but less obvious ways than testimony, exhibits and arguments. What we'll find is that Robert Ferguson is onto something when he suggests that "Setting and performance reinforce each other through the forms of blocking, proxemics, kinesics, and paralanguage. … Manipulation of the arena of the courtroom can be clever, picayune, and sometimes hilarious, but every movement has three goals in mind: to be seen clearly, to be heard distinctly, and to fill as much of the arena as the court will allow."

Although a front may serve in many social situations (the suit I'm wearing as I write this in my law office would serve just as well at a business lunch or for attendance at an afternoon wedding), Goffman allows that "in highly ceremonial occasions, setting, manner, and appearance may all be unique and specific, used only for performances of a single type of routine, but such exclusive use of sign-equipment is the exception rather than the rule." Trial is an example of such an exception to the rule of interchangeability. It is, as Miriam Aziz observes, "a performance with rules of engagement that govern interaction" and, ultimately, a "choreography … with a lot of improvisation!"

We know that the formal setting of trial encourages attention to appearance and manner. The judge wears a black robe. The lawyers wear suits. Nobody wears hats. But we also know that the setting and the various personal fronts convey meaning. Indeed, it's received wisdom that this is so, and the only point of dispute is whether in certain circumstances a jury has been so tainted by appearance-based messaging that a defendant's due-process and fair-trial rights have been violated. Those "circumstances" often pivot around the question of whether the messaging is sponsored by the state. A couple of recent cases from Texas flesh out what's at stake—again, without challenging the notion that more than what's strictly in evidence is communicated at trial.

An analysis typically starts with the truism that the Sixth Amendment guarantees the right to a fair trial and is a fundamental liberty. Embedded in the concept of a fair trial is the presumption of innocence, which calls upon judges to police proceedings for factors suggesting unfairness. But, given the uncertainty of human psychology and the black box of the jury, the actual impact of any message on jurors (or any other trial participant for that matter) can't be known. To dodge inquiries into the unknowable, the Supreme Court has laid down what amounts to a per se prohibition of certain state-sponsored practices, those that it deems "so inherently prejudicial that they deprive the defendant of a fair trial." Forcing an accused to wear

identifiable prison attire at his trial is the paradigm here. But the standard is high: the message conveyed must brand the defendant with "an unmistakable mark of guilt." And private-actor courtroom messaging stands on even less certain ground, with some courts following the state-sponsored line of cases and some not.

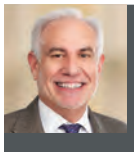
Robert Sparks was convicted and sentenced to death for the murder of his wife and two stepsons. The crime was particularly horrific, including the rape of his 12- and 14-year-old stepdaughters, as a court in the Northern District of Texas recently recounted in reviewing a habeas petition. In short, it was the type of crime that could trouble a juror otherwise opposed to the death penalty. During the punishment phase of the trial, "a bailiff wore a necktie bearing the image of a hypodermic syringe that showed his support for the death penalty." This is what Denis Brion calls a "demonstrative act"—an act intended to convey a message to the jury. Here, the intended message is something like, "I believe this guy deserves to die," a message that carries additional weight because a bailiff is an authority figure—a representative of the state—and this one has sat through this trial (and many trials before) and determined that Sparks deserves the death penalty. As Brion suggests, this is the type of opinion that would not be allowed were the prosecutor to voice it because it would be presumed to have an improper influence on the jury. So too, then, with a visually striking signal to the jury, although in this case there was a failure to prove that the jury saw the tie.

But what of unofficial spectators (as opposed to witnesses expected to testify)? Many courts have applied a state-actor analysis to spectator conduct involving emotional outbursts, wearing buttons or clothing with written messages, wearing buttons or clothing with a victim's image, wearing ribbons, and wearing identifiable law enforcement uniforms. Usually, but not always, courts find against the defendant, holding that the conduct at issue did not deprive the defendant of a fair trial. And if the conduct is equivocal or vague, the typical becomes a virtual certainty.

William Ray Parker pleaded guilty to murdering his ex-girlfriend, Angela Lopez, and a jury assessed punishment at 99 years' confinement. As the Texas Court of Appeals found, "Before trial, Parker's counsel informed the trial court that spectators supporting the family and victim intended to collectively wear the color purple to show support for the State and to make statements against family violence. … The State acknowledged that purple is the color of 'domestic violence awareness.' … On the first day of trial after jury selection … there were 'approximately 60, 70 people wearing purple.'" Jurors "had to walk through and/or pass those individuals to go into the jury room" that morning.

Although the state conceded that purple is the color of domestic violence awareness, there was no evidence that members of the jury knew that. And the association between the purple and domestic violence is not self-evident. Before looking into the matter, I had assumed the link was to Alice Walker's "The Color Purple," a novel replete with incidents of violence and domestic violence. But it appears that the association between purple and women's rights more generally is much older than Walker's 1982 novel. In any event, there's a potential gap between what the purple-wearing spectators intended to broadcast and what the purple-receiving jurors actually decoded. This does not mean, however, that no message was sent or received. Rather, it merely means that, for example, spectators wearing buttons inscribed with "Women Against Rape" during a rape trial are sending a clearer and more constitutionally objectionable message.

There's no need to labor the point with more examples (although case law is full of them) but it's a nice way to dress the stage for the next phase of our own performance, which will be to develop an image of trial that accounts for the significance of more than the arguments that counsel present and the evidence they elicit.



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Cross-Examining Experts

Important new amendments to the rules of civil procedure

BY QUENTIN BROGDON

GENERAL JAMES "MAD DOG" MATTIS famously told his troops, "Be polite and be professional, but have a plan to kill everybody you meet." Attorneys cross-examining experts would be well advised to adopt that same mindset. Experts are in almost all cases, raising their hands and swearing to tell their version of the truth. An expert is the most dangerous type of witness because an expert has the power to opine about outcome-determinative issues that jurors are asked to decide. Thus the cross-examination of an expert can make or break a case.

OLIVIER LE MOAL/SHUTTERSTOCK.COM

Important new amendments to the Texas Rules of Civil Procedure, effective in cases filed on or after Jan. 1, will change how trial lawyers cross-examine expert witnesses in state court cases.

Under the new Texas rules, parties now must disclose three new categories of information for testifying experts, based on Federal Rule of Civil Procedure 26(a)(2)(B): 1) expert qualifications, including all publications authored in the last 10 years, 2) except for attorneys' testifying about attorney fees, a list of all cases in which, during the previous four years, the expert has testified at trial or in a deposition, and 3) a statement of compensation to be paid for the expert's study and testimony in the case.

Before the amendments, attorneys cross-examining experts in state court cases often spent inordinate amounts of time on drafts of the expert's report and communications with the hiring attorney. Many of these types of inquiries are no longer allowed. Amended Rule 195 provides expert communications and draft reports with new protections based on Federal Rules of Civil Procedure 26(b)(4)(B) and (C). Communications between the expert and the hiring attorney now are protected from discovery, except when the communications relate to compensation to the expert, or when the communications identify facts or assumptions that the attorney provided, and the expert considered in forming opinions. Draft expert reports now are also protected from discovery.

Otherwise, cross-examinations of experts will remain unchanged under the new rules. Over 100 years ago, Francis Wellman wrote in *The Art of Cross-Examination* that trial attorneys must assume that "an expert witness called against you has come prepared to do you all the harm that he can, and will avail himself of every opportunity to do so which you may inadvertently give him." The imperative for cross-examiners remains: deny the opposing expert the opportunity to harm your client.

The successful cross-examination of an expert begins long before the attorney and the expert lay eyes on each other. It begins with thorough preparation. In addition to knowing the case better than the expert, the cross-examiner must locate and study the expert's previous testimony and publications, authoritative texts, standards and treatises, the expert's criminal and disciplinary history, and the expert's public representations of expertise.

The cross-examiner must set realistic, attainable goals for the expert's cross-examination. A strategy that involves attempting to get the expert to concede that the expert is a perjurer or that the expert's textbook in its fifth edition is in error almost certainly is destined to fail. On the other hand, a strategy that involves attempting to get the expert to concede that there are recognized disagreements within the peer-reviewed literature, that changing the assumptions will change the opinions, or that the expert was not given all relevant evidence or deposition testimony to review has a much better chance of succeeding.

The cross-examiner should keep in mind that the expert:

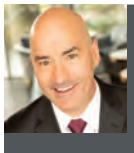
- Is a paid witness who is not disinterested in the outcome.
- May not be qualified.
- May use unreliable methodology.
- May have overstated their background and expertise.
- May change their opinions.
- May not have reviewed all of the necessary data or conducted all tests.
- May have financial or other reasons to lean one way.
- May spend most of his time in court.
- May have given selective weight to evidence and testimony.
- May claim expertise in so many areas that the expert loses credibility.
- May concede that the cross-examiner's experts are sponsoring a reasonable alternative.
- May be sponsoring a possibility instead of a probability.
- May narrow the areas of disagreement with the cross-examiner's experts.
- May bolster the qualifications of the cross-examiner's experts.
- May concede that the real dispute is a factual inquiry for the jurors.
- May affirm (or disavow with a loss of credibility) the "rules of the road."

A key threshold determination is when to play impeachment cards against the expert. The dirty secret is that most cross-examinations of *all* witnesses happen in depositions, not in court, because most cases settle. Usually there's no reason to hold impeachment evidence back.

Playing all cards in the deposition of the expert yields a number of benefits. The choicest video excerpts from the expert's deposition can be used at the mediation and at the trial of the case. In a mediation, "Here is *what I have already done* to your expert when I cross-examined him in his deposition" is always more effective than, "Here is what I *will* do your expert when I cross-examine him at trial." At trial, a concise set of video excerpts of admissions from the opposing expert's deposition can be very persuasive, and potentially outcome-determinative for the jurors.

Ultimately, the best strategy to deal with an opposing expert is to prevent the expert from ever testifying at the courthouse by getting the judge to strike the expert for lacking necessary qualifications or the expert's opinions are based on an unreliable methodology. The surest way to convince a judge to strike the expert is to extract pointed concessions from the expert's own mouth during the expert's deposition, using questions modeled on the exact language used in the controlling rules of evidence and caselaw. How has your theory been tested? What is your theory's rate of error? What do the peer reviews say about your theory? What non-judicial uses of your theory have been tried?

In addition to telling his troops to have a plan to kill everybody they meet if necessary, General Mattis gave his troops one further piece of advice that could apply to the cross-examination of experts: "There are hunters and there are victims, and by your discipline, cunning, obedience and alertness, you will decide if you are a hunter or a victim."



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Zoom Weirdness

What will happen next?

BY JOHN G. BROWNING

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BY NOW, WE'VE ALMOST GOTTEN USED to a sort of "what will happen next?" attitude when it comes to virtual legal proceedings. We've witnessed a lawyer having to reassure everyone that he's "not a cat," lawyers and even judges popping up on camera in various stages of undress, and even sexual acts being performed. One California doctor even "appeared" for traffic court in the middle of performing surgery; thankfully (for the patient), the judge decided to re-set the trial for another day.

Perhaps that doctor started something. Thanks to *Miami Herald* courts reporter David Ovalle, we've since learned that one Florida resident appeared for "Zoom court" while at a dental appointment. I know I've compared extracting information from a witness on cross-examination to "pulling teeth," but this is ridiculous. Of course, the prize for strangest Zoom appearance has to go to Ms. Niurka Aguero of Miami. According to the Miami-Dade State Attorney's office, Ms. Aguero was on Zoom awaiting her third degree grand theft charge to be heard by the judge, when participants were treated to Aguero's screen sharing a video of a needle going into a man's buttocks. The butt injection, or "derriere overshare," was apparently broadcast accidentally by Ms. Aguero, and it's not clear what her role in the procedure was. Now, I don't want to make Ms. Aguero the butt of any more jokes, and I'm behind her 100%. Maybe it really was accidental, or perhaps the cheeky incident was her version of a clever rebuttal; bottom line, she wouldn't be the first person to analogize a court proceeding to getting a butt injection.

But for sheer chutzpah, it's hard to top Joshua Slaughter. On March 8, the 32 year-old Chicago man was arrested after he was caught allegedly driving a stolen Dodge Charger. After being charged with misdemeanor criminal trespass to a vehicle and other offenses, Slaughter was released on a recognizance bond and ordered to appear in court via Zoom on March 30, 2021. Which Slaughter did—while allegedly behind the wheel of *another* stolen vehicle, a BMW X5. While the Zoom hearing was going on, police who had pulled up behind the stolen BMW walked up to the car and realized Slaughter was appearing in court via his phone. The officers had determined that the vehicle had been stolen from a car dealership in Nashville, and prosecutors later conveyed that information to a stunned Judge David Navarro, who asked, "Are you telling me that when the police approached the defendant, he was in the middle of a Zoom court hearing?" Officers seized the BMW and took Slaughter into custody before charging him with a second count of criminal trespass to a vehicle. Judge Navarro set bail for the new charges at $10,000 and ordered Slaughter to appear via Zoom for the BMW case on April 13. Hopefully, that time wasn't from yet another allegedly stolen car.

Of course, you don't have to be on Zoom to have fun with the legal system. In an April memorandum opinion and order, a Pennsylvania federal judge was inspired by the words of singer Taylor Swift. Judge Joshua Wolfson was presiding over the case of Crash Proof Retirement LLC v. Paul M. Price, a lawsuit filed in the Eastern District of Pennsylvania by a retirement planning firm against a former stockbroker who'd written about the company in an article for TheStreet.com. The suit alleged Lanham Act/trademark violations, but

See something funny in a depo, pleading or transcript? Please send it to Bureau Chief Kenneth Artz at kartz@alm.com for possible publication in Out of Order.

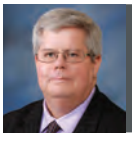
Judge Wolfson found that the article in question didn't involve the commercial speech governed by the Act. In explaining his ruling, the judge found inspiration in one of the pop singer's hits:

If freedom of speech means anything, it means you don't have the ability to sue people because you don't like their opinion of you. In the immortal words of Taylor Swift, although "the haters will hate, hate, hate . . . ," sometimes it is enough to "shake." Taylor Swift, Shake It Off, MXM (2014). "Shake it off," however, Crash Proof Retirement didn't.

That's right, Crash Proof—Judge Wolfson had a blank space, and he wrote your name. Look what you made me do.

Finally, not all the amusement the legal system has to offer comes from Zoom hearings or pop culture-loving judges. For example, take the two women who allegedly tried to pass a $1 million bill (there is no such thing) in April at—of all places—a Dollar General store in Tennessee. 61 year-old Linda Johnson disavowed knowledge of the phony bill presented by her 39 year-old companion Amanda McCormick, while McCormick told police she'd received the counterfeit currency "in the mail from a church." Although the sheriff's office classified the incident as "fraud by false pretenses" and banned the women from returning to the store, no arrests were made. And while you may have heard references to dead mobsters "sleeping with fishes," how about swimming with them? That's what one fugitive in Louisiana is wanted for. It seems that the man in question was visiting a Bass Pro Shop in Bossier City, when he suddenly decided to take a dip in the giant aquarium in the middle of the store! After doing a lap, the impromptu swimmer left the giant tank (fully clothed) and ran for the exit soaking wet. The store filed a criminal complaint (the tank had to be emptied, cleaned due to possible contamination, and refilled), but the unknown swimmer is still at large.

And that's not a fish tale.



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