

HEADNOTES



Kirkland & Ellis Provides a Helping Hand

BY MICHELLE ALDEN

As the holidays draw near, the Equal Access to Justice (EAJ) Campaign is fortunate to benefit from many year-end gifts. Kirkland & Ellis LLP has generously supported the Campaign this year and has a long history of supporting pro bono efforts in Dallas through the Campaign.

Firmwide, Kirkland is committed to providing legal services without charge to those who cannot afford counsel, with the goals of improving clients' lives, bettering communities, and deepening their own professional experiences. In 2022, Kirkland devoted nearly 150,000 hours to pro bono matters—some representing classes of individuals, some involving significant legal issues, and all important, and sometimes life-altering, to the people and organizations represented.

"Kirkland & Ellis has a rich history of instilling the importance of pro bono work with its lawyers. Partnering with the Equal Access to Justice Campaign is a critical part of Kirkland Dallas' efforts to support the wonderful work of the Dallas Volunteer Attorney Program (DVAP). For decades, DVAP has been the leading organization that provides a seamless and cohesive effort to address the legal needs of low-income people in Dallas. It is an amazing resource for the City of Dallas and a wonderful symbol of the impact that lawyers can make in a community," said Erin Nealy Cox, a litigation partner in the Dallas and Washington, D.C. offices.

Kirkland's Dallas office opened in 2018, and the firm's attorneys began volunteering with DVAP right away. One hundred fourteen attorneys and 22



Erin Nealy Cox

professional staff have dedicated more than 1,220 hours to DVAP matters since 2018. Pro bono matters handled include divorces, estate planning, record expunction, and driver's license restoration.

In 2022, DVAP launched a new project focused on restoring drivers' licenses for individuals who had their license suspended for failure to pay fines. Kirkland attorneys immediately committed themselves to the Driver's License Restoration Project, helping more than 10 individuals apply for relief within the program's first year. In exchange for only a few hours of an attorney's time, a driver's license restoration can have a profound impact on a client's ability to maintain a job and a steady income.

"I thoroughly enjoyed working with the talented staff at DVAP on a program



Steve Fahey

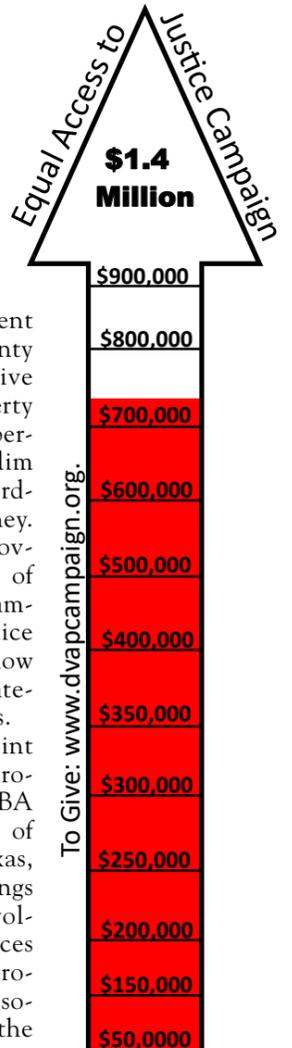
to restore the Texas driver's licenses of disadvantaged individuals who were often unable to pay minor citations that resulted in the suspension of their driving privileges, said Kirkland partner Steve Fahey, who described the impact of this driver's license initiative. "The two individuals I worked with both needed their licenses to get and maintain employment, so restoring their licenses was an impactful way to help make their lives better in a very significant way. DVAP provided amazing support to Kirkland on these matters, from offering training on driver's license restoration to collecting the records necessary for us to bring a motion to the court on our clients' behalves."

The problem of access to justice in Dallas County is one that DVAP works

to correct every day. In a country based on justice for all and access to our court system, over 25 percent of Dallas County residents live near the poverty level, and 42 percent have a slim hope of affording an attorney. With annual poverty incomes of \$37,500 for a family of four, justice is a luxury for low and moderate-income families.

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

HN



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

Thank You to Our Major Donors

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

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*As of November 8, 2023



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DBA MEMBER REMINDER – RENEW ONLINE NOW

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

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

Calendar | December Events

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

FRIDAY, DECEMBER 1

9:00 a.m. Santa Brings a Suit Drive Drop Off
Drop off donations at the Arts District Mansion. Benefiting Dallas Life Foundation.

Noon Entertainment, Art & Sports Law Section
Behind the Scenes: The Art and Business of Fictional and Nonfictional TV/Film Production. (MCLE 3.00, Ethics 1.00)* **In person only at Angelika Film Center and Café.**

MONDAY, DECEMBER 4

Noon Tax Law Section
"Cancellation of Indebtedness Income: Planning Opportunities," Michael Cannon. (MCLE 1.00)* **In person only**

TUESDAY, DECEMBER 5

Noon Tort & Insurance Practice Section
"Attorney Wellness in a Post-Pandemic Legal World," Jennifer Gibbs. (Ethics 1.00)* **In person only**

DWLA Board of Directors

6:00 p.m. DAYL Board of Directors

6:30 p.m. Corporate Counsel Section
Holiday party at Pinstack Bowl (6205 Dallas Pkwy, Plano). RSVP gcjones@munsch.com

WEDNESDAY, DECEMBER 6

Noon Employee Benefits & Executive Compensation Law Section
"DOL Updates: Greatest Hits and Hot Topics," Elizabeth Allen and Deborah Perry. (MCLE 1.00)* **Virtual only**

Solo & Small Firm Section
Business Meeting. **In person only**

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

Child Welfare & Juvenile Justice Committee. **Virtual only**

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

THURSDAY, DECEMBER 7

Noon Intellectual Property Law Section
"UDRP, URS, ACPA, and Beyond: Domain Name Enforcement and Brand Protection Strategies," Jonathan Jennings. (MCLE 1.00)* **Virtual only**

Legal Ethics Committee
"Year-End Ethics Round-Up," Jerry Hall, Prof. Fred Moss, and Lisa Tulk. (Ethics 1.00)* **Virtual only**

Judiciary Committee. **Virtual only**

DAYL Foundation Fellows Luncheon

5:30 p.m. Health Law Section
Holiday party at The Mercury (11909 Preston Rd., Dallas). **In person only**

FRIDAY, DECEMBER 8

Noon Government Law Section
"Bankruptcy 101 for Government Lawyers," Steve Holmes and Emily Wall. (MCLE 1.00)*

Trial Skills Section
"Federal Judges Panel," moderated by Hon. Rebecca Rutherford. (MCLE 1.00, Ethics 0.50)*

MONDAY, DECEMBER 11

Noon Labor & Employment Law Section
"2023 Annual L&E Year in Review," Joe

Gillespie and Christie Newkirk. (MCLE 1.00)*

Real Property Law Section
"Case Law Update," David Weatherbie. (MCLE 1.00)*

6:00 p.m. DBA Holiday Party
Enjoy pictures with Santa, face-painting, balloon animals, sing-alongs and more! Please bring an unwrapped toy to be donated to charity. For more information, visit dallasbar.org.

TUESDAY, DECEMBER 12

Noon Business Litigation Section
Topic Not Yet Available

Immigration Law Section
Topic Not Yet Available

Mergers & Acquisitions Section
"M&A Tax Primer," Aaron Pinegar. (MCLE 1.00)* **Virtual only**

Home Project Committee. **In person only**

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

JLTLA Board of Directors

WEDNESDAY, DECEMBER 13

Noon Energy Law Section
"Ethics Decisions and the New Rules," Claude Ducloux. (Ethics 1.00)* **In person only**

Public Forum Committee. **Virtual only**

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

5:00 p.m. Bankruptcy & Commercial Law Section
Judges panel featuring the Northern District of Texas Bankruptcy Judges. **In person only**

THURSDAY, DECEMBER 14

11:30 a.m. Alternative Dispute Resolution Section
Awards & Recognition Ceremony. **In person only**

Noon Equality Committee Book Club CLE
"Invisible Women: Data Bias in a World Designed by Men," Jennifer Bartkowski, Gracen Daniel, Neha Vaidya, and moderator Hon. Audrey Moorehead. (DEI Ethics 1.00)* **Virtual only**

CLE Committee. **Virtual only**

Publications Committee. **Virtual only**

4:00 p.m. DBA Board of Directors

FRIDAY, DECEMBER 15

9:00 a.m. Last day to drop off donations for Sand Branch Food Drive

MONDAY, DECEMBER 18

No DBA events scheduled

TUESDAY, DECEMBER 19

Noon Franchise & Distribution Law Section
"What Franchise Parties Need to Know About Data Breaches," Heather Barger. (MCLE 1.00)* **Virtual only**

WEDNESDAY, DECEMBER 20

No DBA events scheduled

THURSDAY, DECEMBER 21

Noon Appellate Law Section
Business Meeting. **In person only**

Environmental Law Section
"Federal Environmental Legislative Updates," David Skillman. (MCLE 1.00)* **Virtual only**

FRIDAY, DECEMBER 22

DBA offices closed in observance of Christmas holiday

MONDAY, DECEMBER 25

DBA offices closed in observance of Christmas holiday

TUESDAY, DECEMBER 26

No DBA Events Scheduled

WEDNESDAY, DECEMBER 27

No DBA Events Scheduled

THURSDAY, DECEMBER 28

No DBA Events Scheduled

FRIDAY, DECEMBER 29

No DBA Events Scheduled

MONDAY, JANUARY 1

DBA offices closed in observance of New Year's Day

Save the Date

SATURDAY, JANUARY 20, 2024

DBA INAUGURAL HONORING
2024 PRESIDENT
BILL MATEJA

ARTS DISTRICT MANSION

WEBSITE COMING SOON

DALLAS BAR ASSOCIATION

Holiday PARTY

Monday, December 11
6:00 - 8:00 p.m.

DBA members and their families are invited to join us at the Arts District Mansion for this free event. Enjoy pictures with Santa, magician, sing-alongs, clown, face-painting, tapdancing by Class Act, and more!

RSVP at DallasBar.org

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

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President's Column

Thanks for the Memories and Cheers to the Next 150 Years!

BY CHERYL CAMIN MURRAY

It is hard to believe that this is my last column in *Headnotes*. At the beginning of the year, it seemed overwhelming that I would be writing one column a month about something pertinent to the DBA that would hopefully be of interest to its members. I realize that not all members of the Dallas Bar (a little under 12,000 people) are reading this article. However, based on my recent poll, I am certain at least three people are regular readers and that does not include my mom! All this to say, having the responsibility of writing this recurring column has forced me to sit down and reflect on important occurrences impacting the DBA, its members, as well as my life as an attorney. I am honored and privileged to have had the opportunity to share my thoughts with you. I am very appreciative to those of you who took the time to read one or more of these articles.

World City Bar Leaders Conference

You may find of interest that in mid-October, on behalf of the DBA, I had the pleasure of attending the World City Bar Leaders Conference in Montreal, Canada. I had the privilege of meeting, and learning from, Presidents and other leaders from the bars in Amsterdam, Belgium, Brussels, Chicago, Frankfurt, Laval, Mexico, Montreal, New York, Paris, Philadelphia, Quebec, Tokyo, Toulouse, and Warsaw. It is amazing how many challenges we had in common, as well as how open everyone was to sharing ideas and collaborating with one another in order to support our fellow attorneys across the world.



Rule of Law Challenges

There were also different priorities and issues raised by these various bars. Of particular importance were the concerns flagged by the Mexico Bar Association (known as the Barra Mexicana Colegio De Abogados) and the Warsaw Bar Association. Both organizations are struggling with rule of law challenges especially with regard to their judicial systems. We all know that the executive, judicial, and legislative branches comprise the three branches of government. The separation of powers doctrine provides that these three branches should operate independently, without the undue influence from the other branches, in order to maintain the government's checks and balances. Our colleagues from Mexico and Warsaw described their concerns that the independence of their judiciary is in jeopardy. They explained that their other branches of government are inhibiting the operations of their judiciary, to influence judicial decisions and ensure opinions of the court are rendered in a manner favorable to them.

The basis of the rule of law is to have an open government that is accountable, accessible and delivers impartial justice. In 2023, the World Justice Project (WJP) published a Rule of Law Index, which evaluates the strength of the rule of law in 142 countries and jurisdictions around the world. (This Rule of Law Index may be found here: <https://worldjusticeproject.org/rule-of-law-index/>.) According to the WJP, for the sixth year in a row, the rule of law has declined in most countries. Based on the overall score, the United States is number 26 out of 142 countries. This is not a bad statistic, but it shows even the United States of America has work to do.

However, we are very fortunate to live in a country that generally preserves personal freedoms while respecting the independent powers of our three branches of government. We often forget how thankful we should be to live in a country whose government upholds our civil and criminal justice systems, especially compared to other countries.

In addition, we live during a time where there is significant conflict abroad. In countries around the world there is heartbreak and lives lost on an hourly basis.

The Best Bar in the World

Why am I addressing these international issues in my last *Headnotes* column? First, I believe these challenges are of great importance and require our attention. Second, I think the DBA is one of the leading bars in not only the nation, but arguably in the world. I may be biased, but if you were to consider the Dallas Bar Association as a country, I think we would end up in the top three on the WJP Rule of Law Index. The respect and camaraderie amongst the DBA lawyers and members of the judiciary are truly impressive.

I have an immense admiration for the leaders of the Dallas Bar Association. Our current Officers, Board members, Committee Chairs, and special project Chairs have accomplished so much this year. To provide you with a quick recap, at the beginning of this year, the DBA hosted investitures for Judges **Maria Aceves, LaDeitra Adkins, Veretta Frazier, Monique J. Huff, Dianne Jones, Julia Malveaux, Marilynn Mayse, Nancy Mulder, Sandre Streete, Nicole Taylor, and Dominique Torres Williams**, as well as Justices **Maricela Moore Breedlove and Nancy Kennedy**. It was truly an honor to witness these inspirational and memorable events.

In April and September, the newly formed DBA Law Firm Engagement and Promotion Committee sponsored Managing Partner Roundtable breakfast programs for local managing partners of mid to large law firms. In these forums, the managing partners discussed the biggest challenges that they are confronting in their firms and with their lawyers, and they shared their ideas and solutions. This Committee's wonderful Co-Chairs were **Vicki Blanton, Hilda Galvan, and former Justice Doug Lang**.

The Dallas Bar Association organized a spectacular trip to Portugal in May for its members to explore Lisbon and Northern Portugal's rich cultural delights, diverse wines, and vibrant culinary scenes. Also in May, the DBA hosted its annual Law Day event at the Arts District Mansion. We were very honored to have the **Consulate General of Ukraine, Vitalii Tarasiuk**, join us as our keynote speaker along with the student winners of our Law Day essay, photo, and poster contests.

In addition, we formed the new Dallas Bar Association Professional Personal Parity Program Committee, which was Co-Chaired by **Lauren Black and Jennifer King**. In June, this Committee hosted an event entitled Secret Strategies to Lessen Stress and Improve Success, which taught us skills for stress management, resilience, job satisfaction, better communication, and self-awareness.

In September, the DBA Bench Bar Committee, chaired by **Tim Newman**, organized an incredible Bench Bar Conference at the Gaylord Texan Resort & Convention Center in Grapevine. We had a terrific attendance of approximately 300 people. **Rhonda Thornton** and her team worked tirelessly to make this event a success.

Our first ADM (Arts District Mansion) Family Boo Bash Halloween Party was figuratively and literally a real treat for the DBA Members. This October event had costume contests, photo opportunities, pumpkin decorating, scavenger hunts, games, and movies, as well as cookies, candy, and punch for kids and those who are kids at heart. **Araceli Rodriguez and Rhonda Thornton** as well as the other DBA professionals made this event truly special.

I cannot write an article without mentioning the 150th anniversary of the DBA. Throughout the year, we celebrated this monumental occasion by publishing a DBA 150th Anniversary Magazine, memorable articles, and dedications, as well as an interactive timeline. In addition, the DBA hosted a sold-out anniversary party in September at the Arts District Mansion, which had close to 700 people in attendance. We very much appreciate the generous sponsors, the fabulous *Emerald City Presents Party Machine the Band*, and the terrific flash mob dancers, as well as the Co-Chairs of the 150th Anniversary Committee, **Stephanie Culpepper and Sarah Rogers, and Kandace Walter**, who served as our Ambassador of Fun. Also, **Liz Hayden, Alicia Hernandez, Mary Ellen Johnson, and Kevin Brant**, with *Culinaire*, were instrumental in helping to organize this spectacular celebration. We buried a time capsule at the Arts District Mansion in honor of this 150th birthday. If you want to know what is inside, you will have to wait a few years when we dig it up!

There are so many more events and activities that the DBA hosted throughout the year, and I am sorry I do not have enough space to describe them all. However, you can get firsthand knowledge about all the great things the DBA does by joining us at the Arts District Mansion. I challenge each of you to attend at least one DBA event a year. I think you will find it is more than just an association of lawyers, it is a family.

My Support and Appreciation

I know **Bill Mateja** will be an incredible President in 2024. I look forward to supporting him, the other talented DBA Officers (**Vicki Blanton, Jonathan Childers, Sarah Rogers, and Stephanie Culpepper**) as well as the DBA Directors. I cannot thank enough the wonderful DBA professionals for everything that they do throughout the year to make everyone else look good. My sincere appreciation to **Alicia Hernandez, Liz Hayden, and Jessica Smith** for their diligence and selfless devotion to the Dallas Bar Association and its members. Finally, many thanks to **you** for serving as a loyal member of the DBA. Please let me know what else I can do to support you. This has been such a memorable year that I will never forget. Cheers to you and the next 150 years!

Cheryl

HEADNOTES

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

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Rob Roby Receives Kim Askew Distinguished Service Award

BY J. COLLIN SPRING

Since 2017, the Dallas Bar Association (DBA) has awarded the Kim Askew Distinguished Service Award, which recognizes a DBA member who, through service to the DBA and to the Dallas community at large, has shown a lasting dedication to good works and promoting good relations among lawyers, the judiciary, and the community. It is with a heavy heart and deep gratitude for his years of service that the DBA posthumously honors **Robert R. (Rob) Roby** as the recipient of this year's Askew Award.

Roby received both his undergraduate and law degrees from SMU. After nearly 10 years of practice, wherein he had already begun to distinguish himself as one of Dallas' top litigators, he went into business with his friend and mentor **Robert A. Gwinn, Sr.**, with whom he founded Gwinn & Roby, LLP. Roby was the only managing partner that Gwinn & Roby would ever have. He grew the firm from a small shop to nearly 200 employees across three offices. As managing partner, Roby prided himself on creating a family-first environment. He made sure that he knew every employee's spouse and children, and he stressed the importance of making it home for dinner.

Usually when one says that the DBA "wouldn't be where it is today" without someone, it's a figure of speech. With Roby,



Rob Roby

however, it's quite literal. In his first year as a member of the DBA's Board of Directors, he became the General Chair of one of the DBA's most ambitious projects of all time—the expansion of the Arts District Mansion. From 2001 to 2004, Roby led the effort to fundraise, design, and construct the mansion's Pavilion addition, which now hosts hundreds of events annually. Roby and his team raised millions of dollars to finance the expansion campaign, including \$100,000 from Roby's own firm.

In addition to his work on the mansion expansion, Roby was actively involved in a multitude of DBA activities. He served as Chair of many committees, including the Admissions and Memberships Committee, the House Committee, and the Finance Committee. He received multiple DBA Presidential Citations for his work, including one for his fundraising efforts for the National High School Mock Trial Competition. He co-chaired the Amachi Program, which paired the children of offenders with adult role models to break the intergenerational cycle of incarceration. In 2001, in recognition of his many contributions, the DBA named him a "Belo Hero." He worked with the Judicial Investiture Committee, the Legislation Committee, the Bench/Bar Committee, the Juror Participation Committee—indeed, it might be more succinct to list what Roby *did* not do for the DBA.

According to **Steve Gwinn**, "there was a saying around the Dallas legal community that if you needed to raise money for a Dallas Bar program, you started with Rob Roby. And pretty much end there." As Gwinn, the son of Roby's longtime law partner, puts it: "My father wanted one man and one man only to be his primary law partner—and that man was Rob Roby."

Roby served as a Director of the State Bar of Texas for several years. He was also a member of the Texas chapter of the American Board of Trial Advocates, an invitation-only organization for the nation's leading trial lawyers. He chaired the Dallas Association of Defense Counsel from 1992 to 1993, was a member of the Defense Research Institute, served as a Life Fellow of the Texas Bar Foundation, and a Sustaining Life Fellow of the Dallas Bar Foundation.

Roby's dedication to the community did not stop at the bar association. For over 20 years, he was actively involved with Big Brothers Big Sisters of Greater Dallas, a program that pairs young people with mentors

and role models. During his time on the BBBS Greater Dallas Board of Directors, the organization grew to become the largest and top-performing BBBS agency in the nation. Shortly before his retirement, Roby served as CEO of BBBS Lonestar for five years. Perhaps the most important role that he held in the organization, however, was being a Big Brother himself. Roby maintained an active relationship with his "little" until he passed.

DBA President **Cheryl Camin Murray** notes that "Rob Roby went above and beyond in every aspect of his career. He was an exceptional litigator and devoted leader in the law firm he founded. He was a stellar member of the DBA Board of Directors. In any project he took on, Rob was committed and led with his mind, heart, and spirit. Rob Roby helped to make our profession truly special. I cannot think of a better recipient of the Kim Askew Distinguished Service Award."

Roby passed on May 7, 2023, at the age of 71. He is survived by his wife of nearly 46 years, Susan; his three sons, Mark (and wife Elisa), Christopher (and wife Mary Katherine), and Ryan (and wife Kelley); his sister Jan Loomis; his sister Susan Fernandes; his sister-in-law Elizabeth Hendrix; and his four grandchildren, Cross, Henry, Harper, and Cameron who became his "favorite people" during his brief retirement.

In recognition of Roby's legal excellence, dedication to the community, tireless efforts on behalf the DBA, and the many lives he touched, it is only fitting that the Dallas Bar Association honor Roby's memory through this year's Kim Askew Distinguished Service Award. We are grateful for the time and resources he so generously gave, and the indelible mark he has left on the Dallas Bar, on the greater DFW community, and on the State of Texas. **HN**

J. Collin Spring is an Associate in the Dallas office of Ryan Law Firm PLLC. He can be contacted at jay.spring@ryanlawyers.com.



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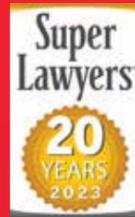
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Focus | Probate/Tax Law

Navigating Heir Disputes: 4 Pathways to Avoid a Will Contest

BY AUBREY P. BOSWELL

As a probate attorney, I often witness family fights over the assets of an estate. Sometimes fights seem inevitable due to the personalities involved or years of acrimony between children. However, not all fights are inevitable, and some can be avoided by not engaging in certain actions that are sure to raise concerns among interested parties.

Here are four ways to guarantee fighting among heirs or, potentially worse, a Will contest:

1. Deathbed Changes to a Will that Disinherits a Person or Reduces Their Inheritance. The typical scenario is that

the testator is sick and in his or her final days or months, calls an attorney and has a new will prepared to remove an otherwise natural heir of the testator. The testator likely has a good reason for removing the person. Perhaps the person never visited the testator or lived a life unbecoming of the testator's standards. No matter the validity or strength of the argument, the person who was removed from the will is not going to be happy. Rather than engaging in a last-minute removal from the will, the testator could have better handled the circumstances. Instead, the change to the will is likely to be discovered by the heir only after the testator's death and will almost certainly

produce animosity with the other heirs.

2. Signing a Will with Questionable Mental Capacity. Another scenario that produces indigestion for heirs is when a testator signs a new will while at the same time having signs of dementia, Alzheimer's, or another form of cognitive impairment. Even if the new will is substantially similar to the last one or appears to divide the estate equally, heirs view such actions as suspicious at face value. Fighting or contesting a will is not always about receiving an equal share. Many times, fights focus on non-monetary aspects, such as who is named as executor, how personal effects will be divided, and whether the inheritance will be received outright or in trust. If the new will is largely the same as the previous one, unless there is a great need for a change, it may be best to leave the will alone and avoid causing unnecessary doubts among one's heirs.

3. One Child in Control and Lack of Transparency. It is not unusual for families to have one of the children care for the parents as they age. This can take the form of handling household duties, but can also include the child managing the parents' finances and medical decisions. This can be problematic because it can be construed by the other children as the parents' favoritism toward the child receiving the additional responsibilities. The "favored" child now has access to (and power over) their parents' sensitive financial and medical information. If the favored child withholds information from the other children because the favored child perceives a lack of need or a potential misuse of the information, distrust and doubts can ensue. When the

parents pass away, they have unintentionally set their children up for a family feud without either of them around to mediate it.

4. Loans to One Child That are Not Documented as a Loan. Parents often desire to be generous with their savings as they age and to make gifts or loans to their children and grandchildren. However, if the loans are not documented carefully, they can cause major family conflicts. For instance, parents may make a loan to a child instead of a gift, thinking it will help encourage them to be productive with the money, and in an effort to not be too rigid with their children they may decide to be informal with the arrangements and not document it. When the parents pass away, it is likely that the terms of the loan either will be forgotten or viewed disdainfully by the other children because they did not receive similar interest-free or low-interest loans themselves.

The above examples are not, as you can imagine, an exhaustive list of the ways in which a person can ensure fighting among his or her heirs. However, these scenarios tend to be the common ones that give rise to hostilities among heirs and perpetuate will contests. Testators would be wise to make every effort to avoid leaving planned fights among their heirs. Although the testator will be gone when the fight ensues, not only is his or her legacy on the line, but the testator's heirs will likely have much fonder memories of them if they are not embattled with conflict after the testator exits this life. **HN**

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The Inheritance Rights of Sperm Donor Children

BY CLEVE CLINTON, GREGORY SAMPSON,
AND REES LEMAY

Surprises may await former sperm donors across the country. Genetic testing services such as 23andMe are expected to disclose unknown distant cousins, aunts, or uncles. Yet the same genetic test may uncover dozens, if not hundreds, of children previously unknown to unsuspecting sperm donors. Likewise, children conceived by artificial insemination may discover a crowd of half-siblings—and one “father”—when their DNA tests come back.

Initially imagining only supplemental income and being assured of anonymity, these formerly young men react to the discovery of their newfound children in various ways. No doubt some proceed with life as usual, hoping to remain anonymous. Others enthusiastically respond to inquiries and seek an active role in their biological children's lives. Journalists have written extensively about these situations, ranging from donor fathers hosting “family dinners” for their dozens of biological children; to weeks-long vacations and close relationships between donor fathers and

their adult children; to regular donor visits to the young children of same-sex female parents.

In one such case, profiled in the *Wall Street Journal*, a prolific 32-year-old sperm donor is actively seeking a role in the lives of his 96 (and counting) biological children. Following a divorce, Dylan Stone-Miller quit his job as a software engineer to venture across the United States and Canada, meeting as many children as possible. The parents—predominantly female couples and single women—have varied responses. Some want nothing to do with him. Others have invited him into their home, sometimes for extended periods, even allowing him to take the children on playdates with their “donor dad.”

The legal implications leap from the page. Mr. Stone-Miller may be a “donor dad,” but is he a “father” in the eyes of the law? Fortunately, family law is well ahead of this conundrum, with most states, including Texas, providing via statute that anonymous donors contributing to a pregnancy through a licensed physician are relieved of any parental obligations. But this exception may not be enforceable if records proving donor

status cannot be produced, perhaps years after the donation.

Probate law is behind the curve though. It is well settled that biological children stand to inherit as heirs from a deceased parent whose estate passes by intestacy. But what of Mr. Stone-Miller's 96 children or the growing number of other children with “donor dads”? Are they “heirs” in the eyes of a probate court? The answer is unclear.

While the Texas Estates Code incorporates some elements of the Texas Family Code in defining parenthood and descent, it contains no clear statement exculpating the estates of sperm donor fathers from claims by their many children (excepting children who were not born when their “father” died). In fact, one statute appears to leave a substantial opening for donor children to squeeze their feet into the doors of Texas probate courts.

Paternal inheritance by a child is governed by Section 201.052 of the Texas Estates Code. While subsection (a) incorporates standard family law guidelines defining a “child” for inheritance, subsection (c) appears to veer off course, stating that a person may petition a probate court to determine inheritance rights if he or she claims to be the decedent's biological child but are not otherwise presumed to be the decedent's child (or if they claim to inherit through such a person). Subsection (d) states that if the court finds by clear and convincing evidence that the decedent was the child's biological father, the child is treated as any other child for purposes of inheritance. The Estates Code also pro-

vides for court-ordered DNA testing in such cases.

To the authors' knowledge, subsections (c) and (d) are unexamined by Texas case law in the context of anonymous donors. Practitioners are left with a statute that, on its face, suggests that any child found by clear and convincing evidence to be a biological child of a deceased father stands to inherit from the intestate estate.

Families of former sperm donors in Texas are thus left to foresee hundreds of biological children queuing up in the probate court for an intestate share upon the donor's death. Absent the original waiver paperwork, the estate planning prospects for a now unprotected donor may be grim. While executing a valid Will may be satisfactory to address the issue, potential intestate heirs seeking rights under state intestacy law may still scrutinize the Will to try to invalidate the will's intended protective provisions. Moreover, property not accounted for by the Will may pass through intestacy.

Until further action by the legislature or the courts, practitioners should advise any former sperm donor to (1) retain a competent probate and estate planning attorney; (2) carefully execute a valid Will; and (3) triple check that the Will accounts for all property in his estate.

HN

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Impact and Implications of the Texas Digital Assets Act

BY SAM SHEFFER

In 2017, the Texas Legislature enacted the Texas Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADA) in Chapter 2001 of the Texas Estates Code, providing clarity and guidance to trustees, guardians, and other fiduciaries about accessing digital assets of their principals. With the increasing availability of smartphones, easy, affordable internet access, and the creation of cloud storage, the lives of everyday Texans will increasingly shift online. TRUFADA is a key piece of legislation for fiduciaries because there may come a time when a fiduciary needs to access the digital assets of their principal—whether it is sentimental photographs, emails and text messages, or financial information—and it provides the necessary authority to fiduciaries to obtain them, because obtaining digital assets may not be as simple or easy as one would assume.

Key Definitions

TRUFADA broadly defines “digital assets” to include “electronic records in which a person has a right or interest.” TEX. EST. CODE § 2001.002(8). Examples of digital assets include photographs, text messages and emails, social media accounts, and online banking and brokerage accounts. Another key definition is the “custodian,” defined as the “person that carries, maintains, processes, receives, or stores a digital asset of a user.” TEX. EST. CODE §2001.002(6). Examples of custodians include Google, Facebook, Apple, and Bank of America.

The Roadmap

In attempting to access digital assets of their principals, fiduciaries generally must submit a written request for disclosure to the custodian, certified copies or originals of the document(s) granting them the authority to access

the digital assets, and a verification of the agent’s authority.

“Catalogue” vs. “Content”

TRUFADA significantly distinguishes “catalogue” and “content” electronic communications, and the process for obtaining these separate types of information differ. “Catalogue” information consists of basic digital information, such as the recipient of a text or the date an email was sent. On the other hand, “content” information is the substance of a communication, meaning the message itself. Catalogue electronic communications are much easier to obtain, and the process for obtaining content electronic communications is far more stringent and requires express consent from the principal. See TEX. EST. CODE § 2001.131. Custodians may generally be reluctant to disclose any content information without a court order to protect themselves from liability for disclosing a user’s private information, so keep that concern in mind when drafting a will or powers-of-attorney for a testator or principal.

Custodian Protection

While TRUFADA grants agents and fiduciaries the ability to recover and obtain their principal’s digital assets, it also has granted custodians enormous protection. For example, TRUFADA requires that custodians disclose the requested information within 60 days of the demand, but does not punish them for failure to comply—and even if a request complies with TRUFADA, a custodian is free to demand further information from the principal prior to

its potential compliance. TEX. EST. CODE § 231.132. If a custodian still refuses to comply, then the agent may obtain a court order directing compliance.

Practical Effects of TRUFADA

- TRUFADA considerations:
1. Consider express authorization. When estate planning, consider expressly granting the agent the ability to access the content of your electronic communications, which may be vital information if a will contest is filed.
 2. Be prepared for a fight. Custodians loathe to expose themselves to any potential liability that could arise from disclosing a user’s digital assets and information, so be prepared to seek relief from the court when attempting to obtain it.
 3. Bypass TRUFADA. When setting up an online account, be mindful of all that you are opting into. Many services, including Google and Facebook, provide specific mechanisms allowing users to provide others with access to an account post-death. You should store login credentials in a safe place so that your loved ones can easily access your accounts after your death, including social media, financial, and brokerage accounts, especially if you opt to go “paperless.”
- The rules promulgated by TRUFADA provide a useful roadmap for fiduciaries of all kinds to access digital assets of their principals when the need arises. As the lives of Texans increasingly shift online, TRUFADA figures to have increasing influence on estate planning, fiduciaries, and probate, estate, and trust litigation. **HN**

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Residential Real Estate and Revocable Trusts

BY KRISTIN L. BROWN

In recent years, it has become relatively common for a revocable trust, rather than a will, to serve as the centerpiece of a foundational estate plan. To maximize the potential benefits of a revocable trust, the settlor must fund it during their lifetime. Some assets, such as brokerage and savings accounts, can easily be transferred to a revocable trust. Others, such as residential real estate, require more patience and attention to detail, but the effort is often worthwhile.

One of the primary benefits of transferring residential real estate to a revocable trust is the avoidance of probate. This benefit is particularly pronounced if the settlor owns real property outside of Texas, as transferring that property to the revocable trust will eliminate the need for ancillary probate in a state where probate

may be more costly and time-consuming than it is in Texas. In some cases, transferring property to a revocable trust may also provide enhanced privacy. To maximize privacy, the name of the trust should have no obvious ties to the settlor, and a third party should serve as trustee to create another degree of separation from the settlor. Lastly, ownership by a revocable trust ensures continuity of management, as the successor trustees can seamlessly step in and manage the settlor's real property following an incapacity event.

As one might expect, residential real estate is transferred to a revocable trust with a deed. But before the deed is executed and recorded, there are several other steps a settlor should take. First, if the property is subject to a mortgage or lien, the settlor should contact the lender to ensure that a property transfer will not trigger the acceleration of the loan. While the Garn-St

Germain Depository Institutions Act of 1982 generally provides that a lender may not exercise a due-on-sale clause following a transfer of residential real property to a borrower's revocable trust, the settlor should still advise any lender of the transfer in advance and confirm its consent to the same to ensure there are no complications or other penalties.

The settlor should also reach out to the property and casualty insurance company to confirm that the transfer of an insured property to a revocable trust will not void coverage under the existing policy and that any accommodating changes to the policy will be made to include the trustee of the trust as an insured. Similarly, the settlor must also examine the title insurance policy to ensure the transfer of real property to the revocable trust will not void that coverage. The title policy for Texas residential real property is often issued on Form T-1R promulgated by the Texas Department of Insurance. The current version of that form expressly provides that the policy coverage will continue for a transferee who is the trustee of a revocable trust established by the original insured, but older versions of the form are less clear. If the settlor's title policy is older, did not utilize the Texas Department of Insurance form, or is from another state, it may be necessary to request a rider or endorsement from the title company to expressly provide that coverage will continue following the transfer.

If the residential real property is the settlor's homestead, then it is imperative that the revocable trust include the lan-

guage found in Texas Property Code § 41.0021 and Texas Tax Code § 11.13 to qualify for the homestead exemption. This goal is often accomplished by including a provision in the revocable trust instrument giving the settlor the right to live in the residence at no cost, rent-free, and without charge for the settlor's lifetime. Following the transfer of the property to the revocable trust, the trustee must reapply for the homestead exemption. The Residence Homestead Application issued by the Dallas Central Appraisal District requires a trustee-applicant to submit a copy of the trust instrument, but other counties may have different requirements. In some cases, the appraisal district may accept a certification of trust or a partial copy of the trust instrument so long as the pages with the qualifying language are included.

Settlors who own a second home with an enhanced liability risk (e.g., a lake house, hunting lodge, or rental property) should consider transferring it to a limited liability company or limited partnership to achieve more asset protection. The revocable trust can then own the entity interest to achieve the available benefits. Before transferring real property to an entity, the owner should take similar steps as those mentioned in this article with respect to third parties such as lenders and insurers. Lastly, an entity should never be used to own a primary residence, as it will no longer qualify as the homestead in that event. **HN**

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Estate Tax Basics for Married Couples

BY ROXANNA HALL, KRISTEN SILLERS,
AND KEELIN GRANAHAN

The unified estate and gift tax exemption (i.e., how much an individual can give away without incurring a federal gift or estate tax) has reached an all-time high, which gives Texas couples enormous flexibility in creating a tax efficient estate plan.

In 2023, each U.S. resident can give away \$12.92 million without incurring an estate or gift tax. This amount is not permanent, but even when the current law expires in 2026, the exemption is projected to be a whopping \$6.2 million. In addition, there is an unlimited marital deduction, which allows a married individual to transfer an unlimited amount of property to his or her citizen-spouse—either outright or in a qualified trust—without utilizing any portion of his or her exemption. Finally, the exemption is “portable” for married couples, which

means a surviving spouse’s estate can utilize the predeceased spouse’s unused exemption by filing a Federal Estate Tax Return within five years of the first spouse’s death (though we do not recommend waiting that long). Awesome, right?

So, since many couples are no longer worried about the estate tax, they can now focus on *income* tax minimization. For federal income tax purposes, when an individual dies, all of his or her assets, excluding retirement assets, will acquire an adjusted tax basis equal to the property’s fair market value as of his or her date of death. In other words, if a person purchases stock for \$100 and later sells the stock for \$1,000, then he or she will pay capital gains tax on the \$900 of appreciation. If that same person dies when the stock is worth \$1,000, then the stock will receive an adjusted basis of \$1,000 in the hands of the beneficiary. When that beneficiary later sells the stock,

his or her gain will be the selling price less the \$1,000 adjusted basis. Capital gains tax is avoided, or at least minimized.

Married couples receive an added benefit insofar as their entire community estate (including the *surviving spouse’s* share of community property) receives an adjusted basis at the first spouse’s death. Then, when the surviving spouse dies, all of his or her property (including any property inherited from the deceased spouse) will again receive a new adjusted basis.

As a result, a couple can shield up to \$25.84 million (or \$12.4 million in 2026) from estate taxes and receive two basis adjustments using nothing more than a simple will. Other couples may choose to jazz up their estate plan by using a revocable trust or adding the spendthrift protection of an irrevocable Qualified Terminable Interest Property (or QTIP) Trust, which can also help ensure their assets end up with their intended beneficiaries. But the tax results are the same.

Though a simple will could lead to an estate and income tax efficient plan, we are lawyers and want to cover our bases. Enter the Disclaimer Trust. Including a Disclaimer Trust in your will or revocable trust can be thought of as “back-up” estate tax planning. After consulting with a tax professional, the surviving spouse may choose to disclaim assets if it appears that his or her estate may exceed his or her exemption at his or her death. Any disclaimed assets will pass to the Disclaimer Trust. Although the assets of the Disclaimer Trust (plus any appreciation) will

not be taxed at the surviving spouse’s death. They will still be available to the surviving spouse during his or her lifetime. So, the surviving spouse forfeits a step up in basis (and associated capital gains tax savings), but also avoids the estate tax (which caps out at 40 percent).

It all sounds too good to be true, right? Well, in a way it is. With great flexibility comes great responsibility. Couples still need an experienced estate planner to walk them through their options and the possible pitfalls of the new portability or disclaimer regime. For example, a deceased spouse’s unused exemption is forfeited if the surviving spouse (i) remarries and (ii) also survives his or her second spouse. If a spouse decides to disclaim assets, there are very strict rules and timelines (9 months after death) which must be followed for Texas law and the IRS to recognize the disclaimer. Finally, if a couple decides to create a QTIP Trust at the first spouse’s death, it is very important that (i) the Trust contain certain IRS-required terms (for example, distributing all income annually to the surviving spouse), (ii) the QTIP election is made on a timely filed Federal Estate Tax Return (filed within 9 or 15 months of the first spouse’s death), and (iii) the surviving spouse is a U.S. citizen.

Now, go forth and (estate) plan. **HN**

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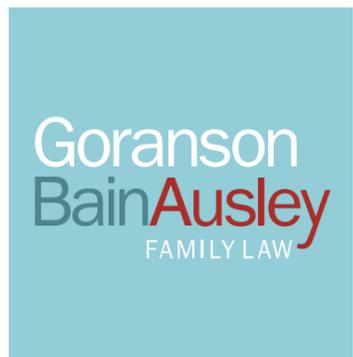
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A Taxpayer's Brief Guide to Market Valuation

BY ALEXANDER MAZERO

The Texas Tax Code provides two remedies for a taxpayer who wishes to appeal a property's appraised value. A taxpayer is entitled to relief for excessive appraisal if the taxpayer proves to the court "that the appraised value of property according to the appraisal rolls exceeds the appraised value required by law." Tex. Tax Code § 42.25. A taxpayer may also claim a property was appraised unequally if "the appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted." Tex. Tax Code § 42.26(a)(3). At the core of every appeal filed under Sections 42.25 and 42.26(a)(3) of the Texas Tax Code is the issue of market value.

Property tax is *ad valorem* in principle and thus requires property to be taxed in proportion to its market value.

While courts typically have broad discretion, they have consistently held that market value should be determined by three generally accepted methods: (1) the sales comparison method, (2) the income method, or (3) the cost method.

Under the sales comparison method, market value is determined by comparing the subject property to a reasonable number of comparable properties that are similar to the subject property which have recently been sold or listed for sale. Market value is achieved by studying the market's reaction to comparable properties as they relate to the subject property. The points of comparison generally include location, physical characteristics (e.g., age, size, style, and condition), economic characteristics (e.g., operating expenses and net income), and zoning or use laws.

The subject property will always be

the baseline when performing a comparative analysis. Therefore, comparable properties will always be adjusted to make them similar to the subject property. If a comparable property is superior to the subject property, a downward adjustment is made to the sales price of the comparable. If the comparable property is inferior to the subject property, an upward adjustment is made to the sales price of the comparable. The best comparable properties are ones that require little to no adjustments. Once the appropriate adjustments have been made, the indication of value is reached. The sales comparison method is most applicable when an abundance of properties similar to the subject property have recently traded hands. It is often touted as the most reliable method of appraisal because sales are primarily based on the actions of buyers and sellers in the marketplace. However, its reliability is often questioned when the availability of comparable properties is limited.

The income method is generally best suited for appraising income-producing properties. Income-producing properties typically include rental properties, hotels, office buildings, retail centers, and other properties which owners use to produce an income. The income method is based on the fundamental concept of anticipation, which states that value is created by the anticipation of future income. The rate of return or capitalization rate (calculated by dividing the annual net operating income by the subject property's current market value) is applied to the estimated future income and then converted into an indication of value or the present worth of future income. The indication of value must also

account for expense forecasts and the subject property's remaining economic life. Naturally, reliability is called into question when applying the income method to properties that do not produce income such as single-family homes (that are not leased out to others), specialized industrial properties (which generally do not sell on the open market), and single tenant offices (i.e., corporate headquarters).

In cases where unique, special purpose, or newly constructed properties require appraisal, the cost method is typically the recommended method. Under the cost method, market value is determined by comparing the cost to replace or rebuild the subject property with the cost of construction of similar properties with similar utility (as the subject property) plus the value of the land. Once determined, the value must be adjusted to account for the cost of depreciation and any other improvements that exist on the property. The cost method will arguably provide the most reliable estimate of value when market data such as sales or income information is unavailable as both the sales comparison and income method depend on market data to formulate an accurate value. However, reliability is weakened by subjective elements, assumptions about depreciation, and the often lack of consideration for market factors (i.e., supply and demand).

A basic understanding of the three traditional methods of appraisal and their applications will better prepare any taxpayer contesting appraised value under Sections 42.25 and 42.26(a)(3) of the Texas Tax Code. **HN**

Alexander Mazero is an Attorney at Ryan Law Firm, PLLC. He can be contacted at alex.mazero@ryanlawyers.com.

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Focus | Probate/Tax Law

Joined at the Hip: Coordination of Non-Probate Property

BY BROOKS CASTON

Clients often mistakenly believe that the estate planning process is complete upon execution of their estate plan documents. In reality, for many, there is still much work to be done, specifically in coordinating the client's non-probate assets with their estate plan. This article focuses on identifying specific types of non-probate assets that require coordination, potential issues that can arise in the absence of non-probate asset coordination with the estate plan, and remedies to such risks.

in which the account owner designates the beneficiaries who will take ownership of such account upon the death of the account owner.

- **Life Insurance and Retirement Accounts.** Life insurance proceeds and retirement accounts automatically pass at the death of the insured or retirement account owner. These are passed pursuant to the beneficiary designation form associated with any life insurance policy or retirement account.

Examples of Potential Risks Associated with Non-Probate Assets

- **Improper Estate Tax Planning.**
 - Example: Assume spouses create a joint revocable trust that provides for funding of a bypass trust with the first spouse to die's remaining federal estate tax exemption amount. Also assume that the first spouse to die failed to name the bypass trust as the beneficiary of his or her life insurance policy and instead named the surviving spouse, individually, as the beneficiary. The result is an underfunded bypass trust and an outcome that potentially will waste the deceased spouse's exemption amount.
- **Loss of Divorce and/or Creditor Protections.**
 - Example: The client's will directs that all assets passing to the client's brother shall be retained in trust for the brother's benefit. However, the

client's POD investment account names the brother individually as beneficiary. The result may be a loss of creditor and divorce protections offered by the brother's testamentary trust.

- **Disinheritance.**
 - Example: Assume that there is a blended family in which each spouse has children from a prior marriage. Spouses have JTWROS property, which automatically passes to the surviving spouse at the death of the first spouse to die (in lieu of an irrevocable trust for the surviving spouse's benefit). In such case, the surviving spouse can redirect such property to the surviving spouse's own children (potentially cutting out the children of the first spouse to die).

assets (e.g., real property, personal property, financial accounts, etc.) need to be retitled in the name of the trust so that, upon client-settlor's death, assets held in trust are immediately available for administration and distribution in accordance with the terms of the revocable trust.

- For life insurance and retirement accounts specifically, the client may want to name the desired primary beneficiary on the respective beneficiary designation form. In addition to naming a primary beneficiary, consider designating a contingent beneficiary to address the situation in which the primary beneficiary fails to take (less of a concern if the primary beneficiary is a non-individual, e.g., a trust or charitable organization). Note that, after a divorce, it is necessary to affirmatively remove the ex-spouse as beneficiary of any retirement plans governed by ERISA (401k) as divorce does not result in automatic revocation of the ex-spouse as beneficiary because federal law (ERISA) supersedes Texas spousal-beneficiary-revocation statutes.

As reflected by the discussion herein, a failure to give the necessary time and attention to properly coordinating an individual's non-probate assets with his or her overall estate plan can thwart an otherwise precise plan of distribution of the individual's estate to their intended beneficiaries. **HN**

Brooks Caston is Of Counsel at Steptoe & Johnson PLLC. He can be reached at brooks.caston@steptoe-johnson.com.

Types of Non-Probate Assets

Unlike probate assets, which pass per the terms of one's will or under the applicable laws of intestate succession, non-probate assets, unless payable to the estate, bypass the probate process entirely by way of contract, operation of law, or by trust. A few common examples of non-probate assets include:

- **Property held as Joint Tenants with Rights of Survivorship (JTWROS).** JTWROS property is property in which two or more parties retain equal ownership of an asset (e.g., real property or financial accounts). Upon the death of one joint tenant, such deceased tenant's interest in the asset automatically passes to the surviving joint tenants.
- **Transfer on Death (TOD) or Pay on Death (POD) Accounts.** A TOD/POD account is a financial account

Remedy: Force Assets to Pass Pursuant to Terms of Estate Plan

A Couple of Planning Techniques to Consider:

- For jointly held property, parties may want to hold the property as tenants in common (TIC) without rights of survivorship. That is because, for TIC property, no survivorship rights exist for joint tenants. As a result, a joint tenant's share of TIC property will pass pursuant to the terms of a tenant's will at the tenant's death.
- For a client who desires revocable trust planning, the client can create or fund a revocable trust prior to his or her death. To do so, the client's

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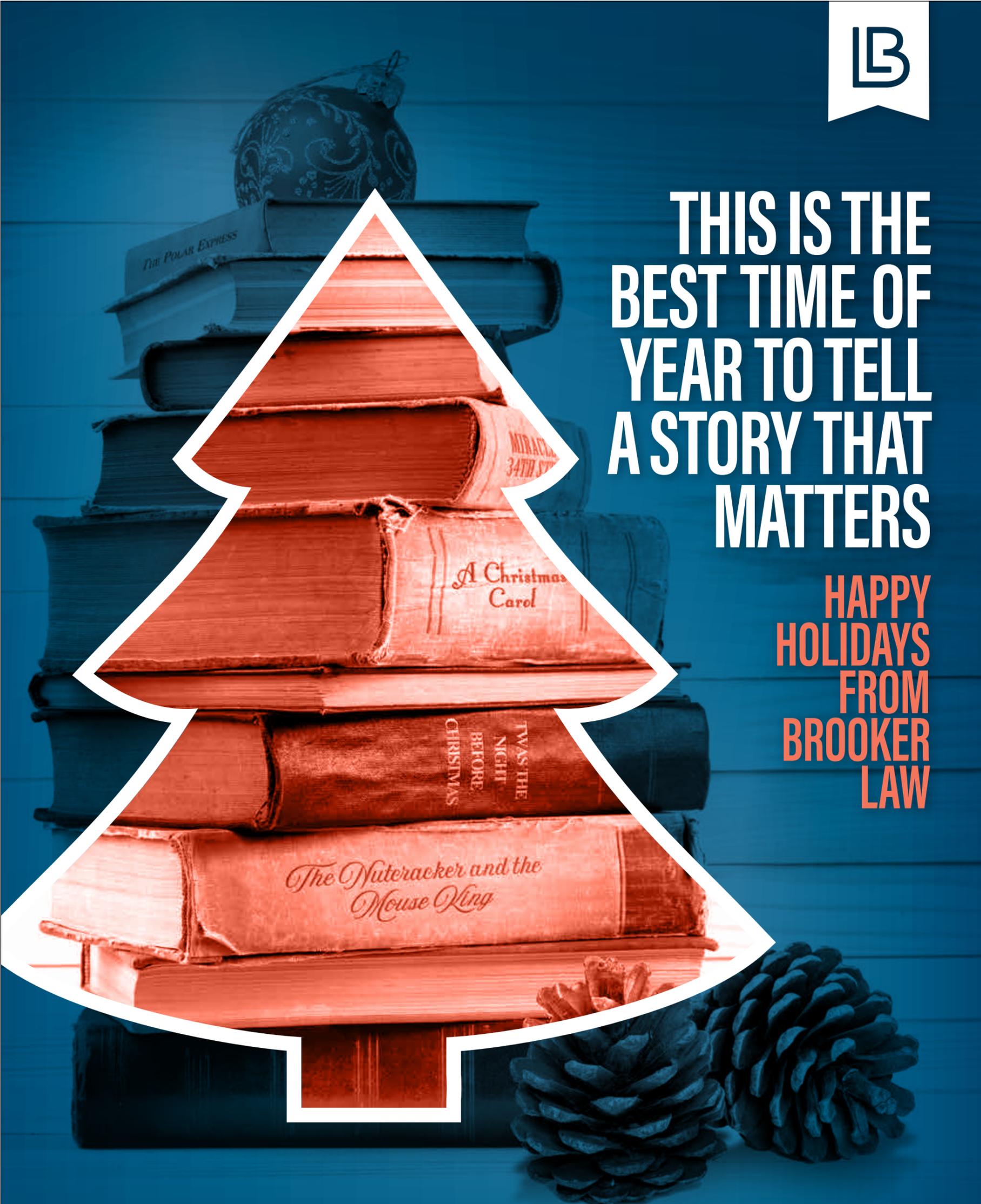
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Focus | Probate/Tax Law

Questions to Ask Before Agreeing to Draft a Will

BY JOHN C VANBUSKIRK

1. Before committing to draft a simple will or estate plan, there are a few steps to help assess whether the work will be straightforward or more complicated, how fees will be calculated, or if the representation should be declined.
 - Start with the Texas driver's license or identity card. Seeing the license prompts questions relevant to certain aspects of the estate plan.
 - Expiration date? Reviewing the identification first allows time to renew the license, if needed, so the Will can be notarized.
 - Is the name the same as entered on the Will application paperwork? Being able to identify the testator at probate is vital.
 - The last three digits of the appli-

cant's license (and Social Security Number) are needed for probate per Section 256.052 of the Texas Estates Code.

- Is the applicant an organ donor? Reviewing the license is a good place to start. A heart symbol ♥ on a Texas-issued license is one indication that the applicant is a registered organ donor. The applicant may be an organ donor even if not shown on the license, so ask the question. If the applicant is an organ donor, it may prompt certain changes when completing the estate plan forms, for example, address disposition of remains.
- Is the testator a veteran? The license may show that the client is a veteran, but the client may be a veteran even if the license does not indicate it, so ask. The client may have other documentation of

military service. This is important because veterans may be eligible for veteran-specific benefits for burial.

2. Go over the Will Signing Ceremony (WSC) sheet during intake. This document provides a step-by-step procedure of tasks (e.g., administering oath, signing affidavit, etc.) to follow for the ceremony. The WSC sheet will be signed at the Will execution. It is good practice to go over the WSC at the first meeting, at a minimum as an initial screening that client has the testamentary capacity. Completion of a WSC at execution can document how the testator responded at will signing. For further reference, Will Execution Ceremony guidance is available at the Texas Bar Online Library, including a good checklist for a will execution ceremony.
3. Ask questions about the client's forms of communication. Can the client email? Print a document? Sign it? Send it back? Many clients (not just older people) do not have email or internet access, or have limited ability to use electronic communication forms. Knowing these limitations at the outset will help determine how labor-intensive the matter will be, which could require documents to be snail-mailed or hand-delivered and affect the time required to complete the Will.
4. Have the potential new client (PNC) fill out basic information for his or her prospective Will.
 - Does the PNC return it right away, or does it take prodding and several weeks?

- It is good practice to have the client show the detail that he or she intends to include in the drafting of the Will. A client who wants multiple clauses inserted and many bequests will require more time and effort, and that is better determined before the representation agreement is signed.

5. Will a bank accept a statutory durable power of attorney (POA)? Sometimes a bank (or other financial entity) refuses to accept a properly drafted POA. There may be a reason, such as a miscommunication or other roadblocks. There also may be legal solutions, but those may be time consuming and costly. It is better to discover and remove obstacles while the client has capacity. Perhaps an advance warning to the PNC ahead of drafting the POA is prudent. It is strongly recommended to take your Statutory Durable Power of Attorney to your financial institution(s) to see if they will honor the form when presented by a designated agent acting on your behalf. Sometimes organizations want certain wording or their own form documents used, and it is best to know and adjust to those requirements before your client signs.

Taking evaluative steps before agreeing to represent a client in the preparation of his or her Will is critical to a successful representation. While a potential client is evaluating whether to hire the attorney, a wise attorney also evaluates whether to take on a new client.

HN

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DBA We Lead Graduation



The 2023 DBA We Lead held its Graduation on November 14, with keynote speaker Amy M. Stewart, interviewed by Laura Benitez Geisler. Thank you to class program directors Ophelia Camiña and Mary Scott.

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Dallas Bar Elects 2024 Officers

Vicki Blanton Elected President-Elect

STAFF REPORT

Members of the Dallas Bar Association proudly elected its 2024 officers during the Annual Meeting on November 3. **Vicki Blanton** was elected President-Elect and will serve as the Association's 116th President in 2025.

Ms. Blanton is Assistant Vice President – Senior Legal Counsel Tax & Benefits at AT&T. A graduate of SMU Dedman School of Law, she specializes in ERISA litigation. She has been on the DBA Board of Directors since 2018 and is currently the Board Advisor to the Morris Harrell Professionalism Committee and the Corporate Counsel Section. In addition to her DBA Board service, Ms. Blanton served as President of the J.L. Turner Legal Association in 2007, and was a Co-Chair of the 2021-2022 Equal Access to Justice Campaign, which raised more than \$1 million dollars for access to justice.

Other officers elected at the Annual Meeting were: **Jonathan Childers**, of Lynn Pinker Hurst & Schwegmann, elected First Vice-President; **Sarah Rogers**, of Thompson, Coe, Cousins & Iron LLP, elected Second Vice-President; **Cheryl Camin Murray**, of Kattan Muchin Rosenman LLP, will serve as Immediate Past President, and **Bill Mateja**, of Sheppard Mullin Richter & Hampton LLP, will serve as President in 2024.

Additionally, on November 9, ballots for director positions were sent to members and one of the following will assume the position of



2024 Officers include: (Front row): Bill Mateja, 2024 President, and Cheryl Camin Murray, Immediate Past President. (Back row, left to right): Sarah Rogers, Second Vice President; Vicki Blanton, President-Elect; and Jonathan Childers, First Vice President.

Secretary/Treasurer: **Britney Harrison** or **Chelsea Hilliard**; and six of the following nominees will assume director positions in 2024: **Lauren Black**, **Rob Cañas**, **Andrés Correa**, **Rocío García Espinoza**, **Nicole Muñoz Huschka**, **Jennifer King**, **Tim Newman**, **Javier Perez**, **Drew Spaniol**, and **Kandace Walter**. Ballots were due back November 20, and results were not available at press time. The 2024 presidents of the allied bar associations will also serve on the board as Directors, and the president-elects of these associations will serve on the board as Advisory Directors.

On November 29, the DBA will host its annual Awards program where several award recipients will be recognized. Each year, the Texas Center for Legal Ethics & Professionalism co-sponsors the presentation of the Morris Harrell Professionalism Award with the DBA. The award was created in 1999 in honor of DBA Past President **Morris Harrell** to recognize an attorney who best exemplifies, by conduct and character, truly professional traits who others in the Bar seek to emulate. This year's Morris Harrell Professionalism Award recipient is **Aaron Tobin**, of Condon Tobin Sladek

Thornton Nerenberg.

In 2017, the DBA created the Kim Askew Distinguished Service Award. The award recognizes DBA members who have demonstrated a lasting dedication to the DBA and Dallas community, consistently given back, and who gone above and beyond traditional service of DBA members. This year's award recipient is **Rob Roby**, posthumously, for his many years of dedicated service to the DBA, especially for his work on the Mansion Expansion Project, where he not only fundraised, but was also General Chair of the expansion of the Mansion.

The DBA created the Al Ellis Community Service Award in 2019 to honor and recognize those DBA members who exemplify the spirit of community involvement and service. This year's recipient is **Terry Bentley Hill** for her work with the Texas Lawyers Assistance Program (TLAP) and willingness to appear before groups to speak about mental wellness issues for attorneys. The Karen McCloud Outstanding Minority Attorney Award will be presented to **Ashley Jones Wright**, of Winston & Strawn LLP. And, the firm of **Hunton Andrews Kurth LLP** will receive the Judge Merrill Hartman Support Award, for its continued support of the DBA Home Project.

The Jo Anna Moreland Outstanding Committee Chair Award and the Cathy Maher Special Section Award will also be presented at the luncheon, as well as Presidential Citations for behind-the-scenes members who have faithfully performed often time-consuming tasks for the Association. The Outstanding Court Staff Awards will also be presented. **HN**

~ In Memoriam ~

Since 1875, the DBA has honored recently deceased members by passing resolutions of condolences. This tradition continues through the work of the DBA Memorial & History Committee. To view the Memorial Resolutions presented to the families of deceased members, visit www.dallasbar.org.

Frederick Hagaman Benners (1930-2023), a 1954 graduate of Southern Methodist University School of Law	Frederick William Fraley, III (1932-2022), a 1957 graduate of University of Michigan Law School	William Norman Hamilton (1922-2022), a 1949 graduate of The University of Texas School of Law	Arthur Stephen Linn (1953-2022), a 1999 graduate of Texas Wesleyan University School of Law	Hon. Reedy Macque Spigner, Jr. (1948-2023), a 1975 graduate of Texas Southern University School of Law
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What a Ride! The DBA's 150th Milestone

BY JESSICA D. SMITH

We've saved the last three years of this 150-year journey for this December issue of *Headnotes*. And while three years may not seem like a long time, there were many changes that took place as the Dallas Bar Association navigated unprecedented times.

The year 2020 brought unique challenges and opportunities to the DBA and its members. After celebrating DBA President **Robert Tobey's** Inaugural in January of that year, the Belo Mansion would close its doors in early March due to the worldwide Coronavirus pandemic. It would not reopen its doors for 15 months. This was unprecedented as the Mansion had never been closed for a long period of time.

As we adjusted to COVID-19 by being on lock down at home, "homeschooling" our children, and pivoting to a virtual workplace, so too did the DBA. The leadership formed a COVID-19 Task Force to stay abreast of changes and to update its members of the ever-changing unknowns. The DBA staff quickly adjusted, creating a COVID-19 webpage of up-to-date information, offering live-streamed Virtual CLEs, 'Rona Pep Talks, mental health webinars, a weekly President's video, and interactive virtual happy hours to stay in touch with members.

While we were learning to function in this surreal environment, the country was also dealing with the tragedy



of George Floyd, riots, and a frustrated nation as race relations were pushed to the forefront. The DBA again pivoted and created the Allied Dallas Bars Equality Task Force to respond to these events. The Task Force issued a Joint Resolution with the Allied Bars affirming our commitment to social and racial justice, and issued a Call-to-Action Plan, which was not only a guideline, but a plan actually put into action.

The plan's mission was to collectively espouse and promote liberty, truth, fair-

ness, justice, due process, and equality. It was the hope of the Task Force that the Call to Action would assist in facilitating the powerful intersection of deeds and words—for the betterment of our Bar, our community, and our nation. In 2021, the Task Force became the Allied Dallas Bars Equality Committee and their mission continues today.

In early 2021, the Mansion reopened and continued to present Virtual CLE webinars, but also began offering Hybrid CLEs—a mix of virtual and in-person

programming—as well as the traditional in-person CLEs. The return was slow, but gradually DBA members returned to attend in-person CLEs, dinners, and special events.

After much thought, research, and many conversations with members of the DBA and its Allied Bar Associations, another big change took place. On April 15, 2021, the DBA Board of Directors unanimously voted to change the name of the Belo Mansion to the Arts District Mansion.

The Association continued to grow and change that year by welcoming the Dallas LGBT Bar Association to the Board of Directors with an advisory seat on the Board, and a voting seat in 2022.

The momentum continued, as the Association hit 11,000 members! In addition, the DBA launched its own App which offers up-to-date content, communication, and networking via Groups.

We end our current year—2023—having celebrated our 150th Anniversary all year long with an interactive timeline, special commemorative magazine, monthly articles in *Headnotes*, and, saving the best for last—a celebration party attended by nearly 700 of our closest friends held on September 9.

Thank you for taking this journey with us in *Headnotes* as we recapped the DBA's past 150 years! You can see more about our history, the timeline, and commemorative magazine online at tinyurl.com/DBA150th. **HN**

Looking Back on the DBA

- 2020: Belo Mansion is closed for 15 months due to the COVID-19 pandemic.
- 2020: DBA creates the Allied Dallas Bars Equality Task Force.
- 2020: DBA begins offering live-streamed Virtual CLEs.
- 2021: Belo Mansion reopens.
- 2021: Allied Dallas Bars Equality Task Force becomes Allied Dallas Bars Equality Committee.
- 2021: Dallas LGBT Bar Association receives an advisory seat on the DBA Board of Directors.
- 2021: DBA begins offering hybrid format CLE programming.
- 2021: DBA renames home to Arts District Mansion.
- 2022: DBA hits 11,000 members.
- 2022: Dallas LGBT Bar Association receives a voting seat on the DBA Board of Directors.
- 2022: DBA launches its mobile App.
- 2023: DBA Celebrates its 150th Anniversary.
- 9/9/2023: DBA hosts its 150th Anniversary party at the Arts District Mansion.



Focus | Probate/Tax Law

Side Hustlers Beware the Tax Hobby Loss Rules!

BY CHRISTINE ROBINSON

“Skyfall” cybervillain Mr. Silva regales James Bond with the myriad of secret missions Silva can undertake with a mere “point and click.” Bond’s dismissive retort is, “Well, everybody needs a hobby.” If Mr. Silva is a U.S. taxpayer and his cyber side hustle is merely a hobby, then he is taxed on all revenue from that activity yet cannot take any business deductions for payroll, business travel, office supplies, or depreciation on his cool, high-dollar tech equipment.

If an activity is not engaged in for profit, then the IRS dubs it a “hobby,” not a business, and tax deductions are limited. And after the Tax Cuts and Jobs Act, such deductions are severely limited! An individual’s not-for-profit activity expenses are only deductible as miscellaneous itemized deductions, an entire category of individual expenses that the TCJA suspended for tax years 2018 to 2025. The 11th Circuit confirmed the miscellaneous itemized deduction categorization of hobby expenses in a 2023 case, disallowing all of the taxpay-

ers’ yacht chartering hobby operational expenses. Unlike for-profit business owners who currently deduct their ordinary and necessary business expenses against their taxable income, hobbyists can no longer offset their fully taxable hobby revenue with related (and often higher) hobby expenses.

What, then, is a not-for-profit hobby activity versus a for-profit business activity? Section 183 of the Internal Revenue Code tells us that an activity is presumed “engaged in for profit” if it shows a profit for at least 3 out of 5 years (or 2 out of 7 for horse racing and breeding). Failure to satisfy this statutory profitability presumption can be overcome by considering nine regulatory factors:

1. whether the taxpayer conducts the activity in a businesslike manner;
2. the taxpayer’s or his advisors’ expertise in the activity;
3. the time and effort the taxpayer expends on the activity;
4. the expectation that assets used in the activity may appreciate in value;

5. the taxpayer’s success in carrying on other business activities;
6. the activity’s income or losses history;
7. the amount of any occasional profits earned;
8. the taxpayer’s financial status and sources of other income; and
9. elements of personal pleasure or recreation in the activity.

Consider this hypothetical example of a lawyer who races hot air balloons and earns \$200,000 in law practice income, spends \$40,000 on ordinary and necessary expenses on the balloon racing activity, and collects \$10,000 in racing prize money (so a \$30,000 balloon activity loss). He experiences similar balloon racing losses during 4 out of the last 5 years. Under the not-for-profit activity presumption, the balloon racing activity is not engaged in for profit. Alternative success under the 9-factor regulatory test seems unlikely given the facts that the lawyer has a high-earning day job, no significant profit history as a balloonist, and the stratospheric weekend fun from the balloon racing activity. Consequently, his \$10,000 prize money is fully taxable, and his \$40,000 of hobby expenses are disallowed miscellaneous itemized deductions.

The Section 183 statutory and regulatory rules have been relatively unchanged for 50 years, and a wealth of case law exists on this fact-intensive federal income tax issue. In 2021, the IRS published its “Activities Not Engaged in for Profit Audit Technique Guide,” a 60+ page deep dive into this topic. Although the 7th Circuit has called the

IRS’s 9-factor list “goofy,” and the tax regulations themselves admit that no one factor or combination of factors is determinative, this factors analysis seems to be where the action is in the courts.

Here is a sample of taxpayers who lost their hobby loss cases in 2023: casual video poker players who kept no records (married taxpayers taxed on reported casino gambling winnings and denied deductions for video poker losses); an ER doctor who generated no sales from his vanity music website and lacked basic business records and receipts (no deductions allowed for the taxpayer’s high-end recording equipment); a horse breeder with a decades-long history of losses who failed to run the breeding business in a businesslike manner (the 3rd Circuit upheld the Tax Court’s disallowance of the taxpayer’s multi-million-dollar flow-through partnership losses); a retiree who did not operate his Alaskan charter boat fishing activity like a business, had no business plan, and incurred significant airplane expenses (the Tax Court disallowed his \$131,000 of net losses over a 3-year period).

Lawyers can help their business clients bolster the tax treatment of a potentially not-for-profit “hobby” activity as a for-profit business by stressing the importance of maintaining detailed business records and proof of a profit motive. Side hustlers need to beware the tax limitations imposed on so-called hobby activities and the burden of proof necessary to overcome these obstacles. **HN**

Christine Robinson teaches the federal income tax courses at Baylor Law School. She can be reached at christine_robinson@baylor.edu.

Mark Your Calendars

Behind the Screens:

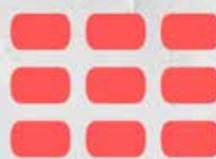
The Art and Business of Fictional and Nonfictional TV/Film Production

December 1, Noon-5:00 p.m. | MCLE 3.00, Ethics 1.00
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www.dallasbar.org

Presented by the DBA Entertainment, Art & Sports Law Section

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Year-End Ethics Round Up

Thurs, December 7

Noon - 1 PM

MCLE: 1.00 Ethics

Hosted on Zoom



Sponsored by the DBA
Legal Ethics Committee



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Haynes and Boone, LLP Named Pro Bono Law Firm of the Year

Joanna Grossman Named Pro Bono Lawyer of the Year

STAFF REPORT

At the Annual Pro Bono Awards program on October 27, the Dallas office of **Haynes and Boone, LLP** was recognized as **Pro Bono Law Firm of the Year**.

Each year, the Dallas Volunteer Attorney Program (DVAP), a joint project of the Dallas Bar Association and Legal Aid of NorthWest Texas, honors the lawyers, judges, and other legal professionals who donate pro bono legal services.

The firm of Haynes and Boone, LLP believes that a meaningful professional career is much more than just handling major business transactions or trying complex lawsuits. Their lawyers actively use the law for helping those people and organizations who need it

most but are least able to pay. Haynes and Boone attorneys are a fixture in the pro bono world, often recognized for their pro bono work with DVAP and other legal aid organizations. They staff a DVAP clinic each month in which they field inquiries from Dallas-area residents facing a range of legal issues, such as eviction proceedings, divorce

HAYNES BOONE

and custody disputes, and property-repossession claims, among other concerns.

Haynes and Boone is the recipient of Law Firm of the Year award due to their exceptional dedication to pro bono work within the last year. In addition to being a regular DVAP Clinic Sponsor, last year alone, 52 attorneys served at 12 DVAP Virtual clinics, totaling over 400 hours of clinic work. In addition to their clinical work, 46 cases were placed with their attorneys. Haynes and Boone continues to lead the charge in

pro bono work and is a vital law firm partner to DVAP!

Lawyer of the Year

Joanna L. Grossman, a professor of law at SMU Dedman School of Law, was named **Pro Bono Lawyer of the Year**. Ms. Grossman has provided 260 hours of pro bono service to DVAP this year.

A law professor for more than 24 years, Ms. Grossman is the inaugural Ellen K. Solender Endowed Chair in Women and the Law Professor of Law at SMU Dedman School of Law.

Though she had written a lot of pro bono amicus briefs in areas related to her research and teaching, she said it wasn't until she moved to Dallas in 2016 that she began to get involved in pro bono representation of individual clients. That's where DVAP comes in. A frequent volunteer at DVAP's Wills Clinics, Ms. Grossman has also represented numerous DVAP clients, mostly in the area of family law.

"As the saying goes, with great privilege comes great responsibility. There are many inequities in our society, and access to justice is no exception. Lawyers have a duty to help people without the means to hire lawyers. But I benefit as much from the experience as the clients do," said Joanna.



Joanna L. Grossman

"Pro bono service has helped me learn more about how the law works in practice, which is an oft-neglected part of legal education. I am a better classroom teacher because of my casework, and I have been able to get my students involved in pro bono cases, which helps instill in them the value of public service," she added.

DVAP and the DBA congratulate Haynes and Boone and Joanna Grossman! Thank you for all you do for Pro Bono! **HN**

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2023 Pro Bono Awards

<p>Lawyer of the Year Joanna L. Grossman SMU Dedman School of Law</p> <p>Law Firm of the Year Haynes and Boone, LLP</p> <p>Pro Bono Appreciation Award Cheryl Camin Murray Katten Muchin Rosenman LLP</p> <p>Chris Reed-Brown Pro Bono Award Nina Melanie Orendain Akin Gump Strauss Hauer & Feld LLP</p> <p>Pro Bono Coordinator of the Year Crystal Doyle DLA Piper</p> <p>Clinic Coordinator of the Year Belinda Martinez Seymour Haynes and Boone, LLP</p> <p>Outstanding In-House Attorney Jenae Ward Weil, Gotshal & Manges LLP</p> <p>Outstanding Government Attorney Karen Young Texas Attorney General's Office</p> <p>Outstanding Sole Practitioner Morgan Armbrust Armbrust Law PLLC</p> <p>Outstanding Virtual Clinic Attorney Emma Jones O'Melveny & Myers LLP</p>	<p>Outstanding Eviction Clinic Attorney Eugene Temchenko Vinson & Elkins LLP</p> <p>Outstanding Virtual Veterans Clinic Attorney Wendi Campbell Rogaliner Bradley Arant Boult Cummings LLP</p> <p>Outstanding Virtual Clinic Sponsor SMU Dedman School of Law</p> <p>Outstanding Clinic Attorney South Dallas Charles Katz</p> <p>Outstanding Clinic Attorney South Dallas Jack Manning Manning & Meyers</p> <p>Gold Award for Pro Bono Service O'Melveny & Myers LLP Hunton Andrews Kurth LLP Holland & Knight LLP</p> <p>Silver Award for Pro Bono Service Fish & Richardson P.C. Weil, Gotshal & Manges LLP Baker Botts L.L.P.</p> <p>Bronze Award for Pro Bono Service Cozen O'Connor Sidley Austin LLP Kirkland & Ellis LLP</p>
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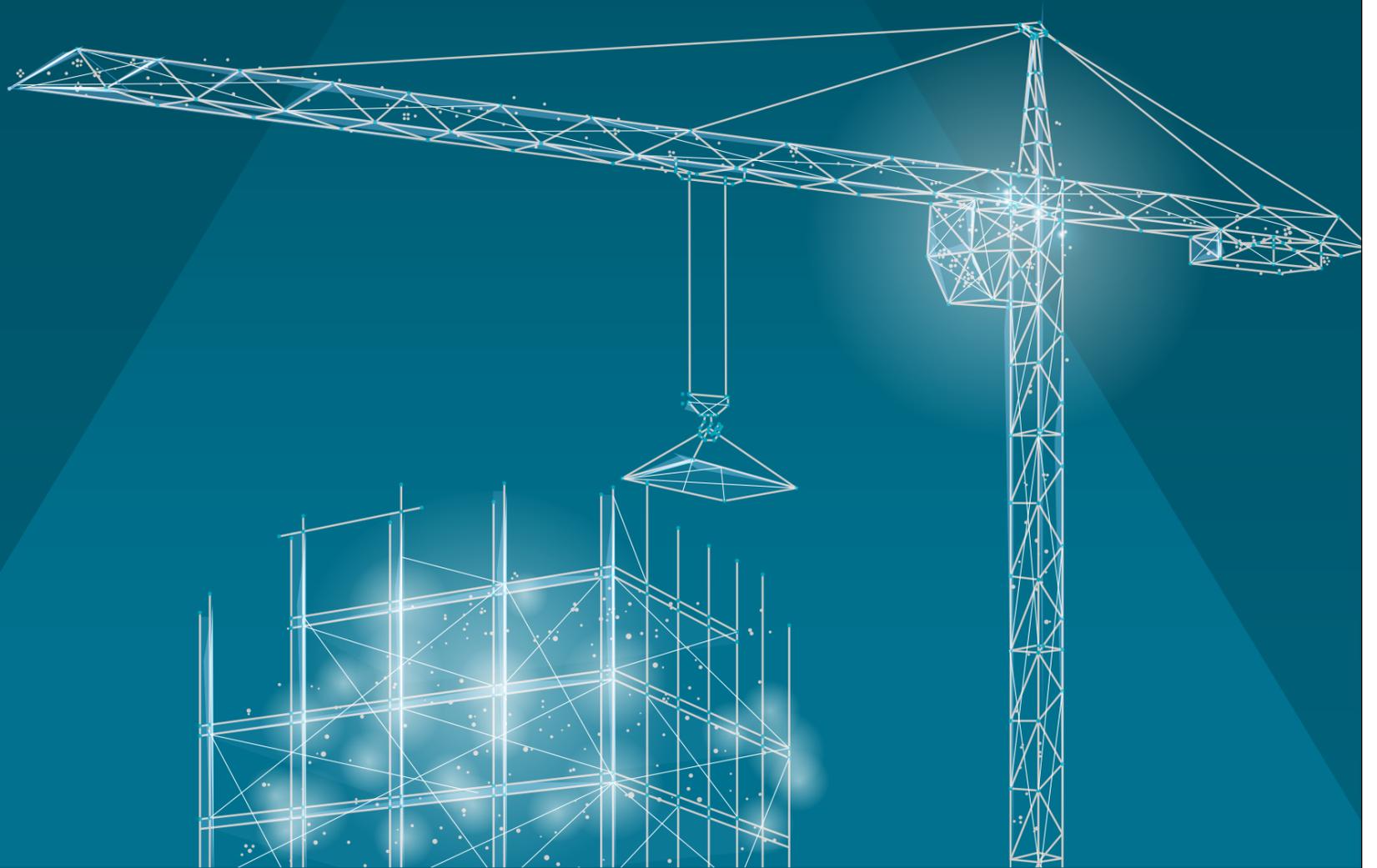
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*STEER is formerly known as the Dallas Bar Association Transition to Law Program.

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Focus | Probate/Tax Law

Revamp Your Trusts: Understanding the Concept of Decanting

BY PATRICK NORWOOD

Trusts, typically designed to stand the test of time, can become outdated or suboptimal by failing to incorporate modern provisions. In such cases, the concept of “decanting,” as defined in the Trust Code under the term “Distribution of Trust Principal in Further Trust,” comes into play, allowing for the modernization of certain trust provisions. Termed after an aeration method for wines and spirits, “decanting” involves a trustee’s transfer of assets from an irrevocable trust to a separate trust with different provisions.

The decanting power is broad, but not unlimited. Many trusts permit distributions for health, education, maintenance, or support (HEMS). Trustees

bound by HEMS purposes can decant with “limited authority” under certain Texas Property Code provisions; for example, the new trust cannot make changes to beneficiaries or beneficiary classes, distribution standards, or powers of appointment. And this decanted trust cannot diminish, restrict, or modify a beneficiary’s existing vested right to mandatory distributions or specific withdrawals (commonly known as “5 by 5” Powers).

Before 2017, under the Texas Property Code, decanting was not allowed if it “materially impaired beneficiary rights,” a vague term that raised concerns about potentially infringing upon the beneficiary’s rights. This provision was subsequently removed, but it remains as a prohibition on the com-

bination or division of trusts, which is a separate technique. This distinction makes decanting a more feasible option, and the code still guides to exercise decanting in good faith, aligned with the terms and purposes of the trust and in the best interests of the beneficiaries. See TEX. PROP. CODE § 112.073(f).

Though the old language still dissuades many attorneys, the current statute enables a non-taxable transfer of assets because the new trust, which can exist before decanting, is considered to have the same settlor.

The recommended best practice is to create a new trust specifically for decanting. After identifying the provisions to be retained, you can begin making updates and improvements as needed to solve problems or frustrations trustees and beneficiaries may be experiencing under the previous terms. It is crucial to ensure that no provision adversely affects the tax benefits of the original trust. By keeping the distribution standard (and beneficiaries, withdrawals, etc.) consistent between the two trusts, you are less likely to run afoul of the Property Code’s prohibition of decanting that results in negative tax consequences. After conducting the analysis, the trustee should

send a notice and waiver of further notice to current and presumptive remainder beneficiaries, explaining when and how the trustee intends to carry out the decanting, alongside providing information about their rights in relation to the decanting process.

In conclusion, the decanting technique for trusts offers a powerful tool for trustees and beneficiaries to adapt trusts to changing circumstances. While its scope has broadened significantly in recent years, the process still comes with certain limitations to protect beneficiaries’ rights and the integrity of the original trust. The careful construction of a new trust specifically for decanting, the preservation of tax benefits, and a transparent communication process with beneficiaries are all key aspects of a successful decanting strategy. As the legal landscape continues to evolve, understanding and effectively utilizing decanting provisions can play a crucial role in ensuring that trusts remain effective and relevant in the ever-changing world of estate planning. Today, not tomorrow, is the time to familiarize yourself with aspects discussed in this article and beyond. **HN**

Patrick Norwood is an attorney at Jordan, Esq. He can be reached at ptrcknrwd@gmail.com

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All Emeritus members (licensed 50+ years) are invited to make an optional \$100 gift to support the DBA and its programs.

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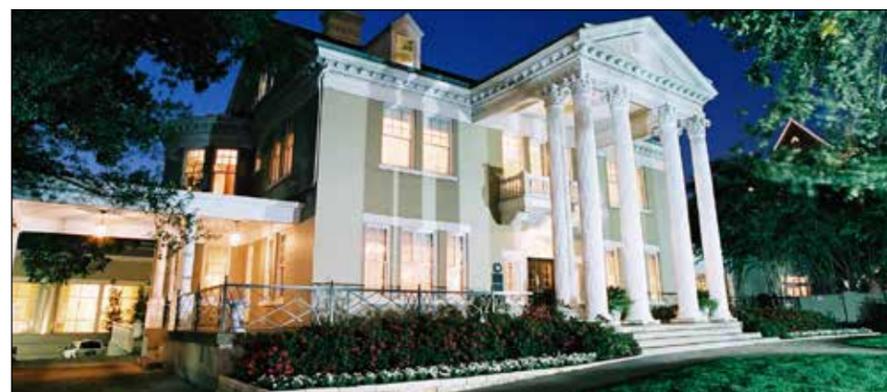


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Focus | Probate/Tax Law

When Legal Ethics and Personal Ethics Collide

BY TANNER HARTNETT

A lawyer practicing in probate (and certain other areas of the law) may sooner or later find themselves representing a client as attorney ad litem. These appointments can often bring complicated questions, particularly when the client suffers from diminished mental capacity. An attorney ad litem's job is to represent the wishes of the client, whatever those wishes are. There will be times an attorney's personal beliefs do not conform with the client's wishes, the attorney simply cannot take the requested action in good faith, or the attorney feels the client needs assistance outside the scope of their role. So, what happens when the attorney ad litem's professional duty conflicts with their personal beliefs?

Whether you were hired by a client, or appointed by a court, your job starts

the same. Interview the client, get a feel for the client's wishes, review the client's rights, and discuss the legal options he or she have moving forward. These conversations do not always provide straightforward or thoughtful responses. In such cases, an attorney ad litem may be in an uncomfortable situation, perhaps thinking "I'm not sure my client can fully understand this discussion or the consequences of their decisions. I think this individual really could use some help." If these concerns involve diminished capacity, you have options.

The first step should be to ask questions of yourself—Am I judging them too harshly? Am I overstepping? Am I reading too much into this? Am I letting my own opinions or experiences cloud my judgment? If at the end of that period of self-reflection you still have concerns about the client's well-being, there are resources to help you both do your job *and* ensure

that your client is protected.

In probate, the easiest option is to seek the appointment of a guardian ad litem. That request alone can be a red flag to the court that there are problems here that need addressing. The guardian ad litem's role is to consider the client's best interests. When a client's interests and wishes do not align, the guardian ad litem is better positioned to pursue specific assistance.

When a guardian ad litem is unavailable as a remedy, or an attorney ad litem needs to act quickly, turn to the Texas Disciplinary Rules of Professional Conduct (TDRPC). Rule 1.16 addresses the Client-Lawyer Relationship in handling clients with diminished capacity. First and foremost, the rule requires that, to the extent possible, you maintain a normal client-lawyer relationship because that is what you were hired or appointed to do. However, the rule does not ignore our humanity.

If an attorney ad litem encounters a situation in which his or her professional responsibility requires advocacy for a client's wishes that are detrimental to the client's interests or well-being, TDRPC 1.16(b) allows a lawyer to take "reasonably necessary protective action." The rule even provides a non-exhaustive list of actions the lawyer can take to assist the client. The most striking of these is the suggestion that the lawyer consult with individuals or entities that are better able to take protective actions for the client. While this broad permission may be helpful, it brings its own slate of problems. Will the lawyer have to divulge confidential information to seek this protection? The rules say that "the lawyer may disclose the client's confidential information to the

extent the lawyer reasonably believes it is necessary to protect the client's interests." TDRPC 1.16(c). But could revealing that information have unintended consequences for the client—such as discord among the client's support system or even an involuntary commitment of the client? The rules say that attorneys should take careful consideration of all these potential pitfalls, potentially even discussing avenues of assistance with the client or requesting consent to divulge confidential information. After weighing the client's best interests, the lawyer may choose to take that step.

Many of us entered the legal field with a desire to help others. It is only natural to want to utilize all available resources to do that. But in choosing a path forward, the lawyer must first be guided by the client's autonomy (when able), their wishes, and their values—not those of the lawyer. There have been many times in an attorney ad litem appointment where I am brought to a boundary and faced with the question of when, if ever, to cross it. Sometimes that boundary can be a little foggy. Sometimes my desperation to help an individual tries to pull me away from my duty. If you find yourself in a similar situation, the best thing you can do is ask for a guardian ad litem when available to explore any gray areas, while remembering that TDRPC 1.16 gives us the authority to pursue another avenue when the client's immediate well-being may be at risk. And, of course, you can always call the State Bar Ethics Hotline at (800) 532-3947. **HN**

Tanner Hartnett is a Partner at The Hartnett Law Firm. She can be reached at tanner@hartnettlawfirm.com.

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2023

Dallas Bar Association

DEI CLE Challenge

The DBA encourages its members to aspire to complete 3 hours of CLE training in the areas of diversity, inclusion, and equity each calendar year. The DBA will recognize members who complete and self-report their 3 hours of DEI CLE by December 31, 2023. Programs that qualify will be identified on the DBA's online calendar.

Join the Challenge

to be recognized in the February 2024 *Headnotes*, in DBA Online, and receive your electronic DEI CLE Challenge badge.

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Access to justice is hard to come by. There is less than one full-time legal services attorney for every 7,100 Dallas citizens living in poverty. That means that if you filled AT&T Stadium to its maximum capacity, you'd have 11 attorneys to service them. And if each client received a single 30-minute session, it would take those attorneys nearly five months of round-the-clock work, with no breaks, just to meet with everyone.

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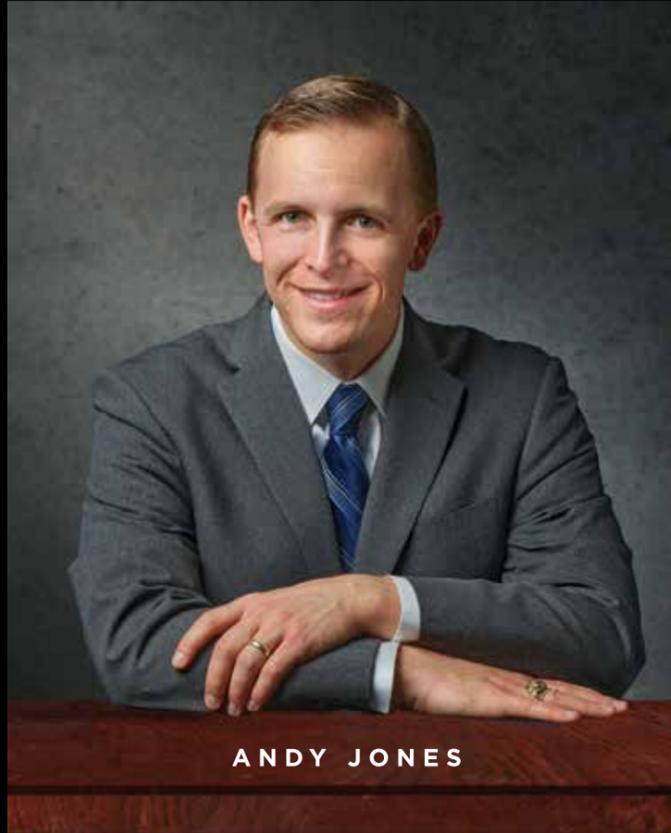


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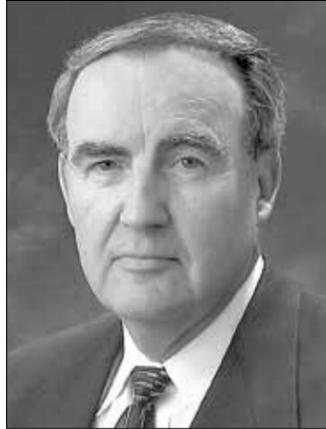
Thank you for Fifty Years of Service to the DBA

STAFF REPORT

Helping to obtain new court facilities, implementing new Sections, and creating the Lawyer's Creed and the Guidelines of Professional Courtesy. These are just a few of the interesting activities accomplished by some of our longest-serving Past Presidents during their years in office. **George Chapman, Jerry Lastelick, Vee Perini, and Louis Weber** have served the Dallas Bar Association for more than 50 years. From the early 70s through today, these members have continued to give their time, ideas, and support to the DBA.

Here are just a few highlights of these legacy members.

George C. Chapman, President in 1987, is most known for his work on helping to create the Lawyer's Creed. On becoming President, he appointed a task force to address "a growing deterioration" of professionalism, and to help fulfill this goal he created a Task Force on Professionalism, which prepared a "Lawyer's Creed" and a set of Guidelines of Professional Courtesy. On November 7, 1989, the Supreme Court of



George Chapman



Jerry Lastelick



Vee Perini



Louis Weber

Texas and the Court of Criminal Appeals promulgated and adopted the Texas Lawyers Creed – A Mandate for Professionalism. In 2008, the DBA honored Mr. Chapman with the Morris Harrell Professionalism Award.

Jerry Lastelick served as President in 1983. During his year, the Environmental Law Section was formed, the dues check-off was created, the Stephen Philbin Awards luncheon began, and at-large positions were

created on the Board of Directors.

"In 1983, we had the memorable experience of the changes in the Dallas County Law Library. Common belief was that the Library was operated by the County, but in fact a District Judge was in charge, hiring personnel, taking trips to library conventions with Library personnel without authorization from anyone, and exercising sole control over the \$600,000 Library account. After public hearings, this situation was rectified," he recalled.

Vincent Walker "Vee" Perini's leadership began at an early age when he served as president of his high school. He went on to win at the University of Texas Moot Court Competition, and in 1970 served as President of the Dallas Association of Young Lawyers. By the time he took the reins of the Dallas Bar Association in 1986, he was no stranger to leading by example. Among other activities during his year, Mr. Perini played an important role in getting the court facilities at Lew Sterrett Justice Center up and running. He also taught a course at SMU Law School titled "Texas Criminal Trial Practices."

While **Louis J. Weber, Jr.** was President in 1974, the DBA set the goal to obtain new

court facilities for Dallas County. In furthering this cause and others that year, he demonstrated not only leadership, but also motivation. When his term ended, the Board passed a resolution stating that he charted a course "which shall serve as a challenge and inspiration to his successors in office for years to come." That year, Mr. Weber's actions were noted not only by the DBA, but also recognized at the State Bar of Texas level, where he received the President's Award for Outstanding Service to the State Bar and was given the ABA's Award of Merit.

"My year as President was the happiest year of my career surrounded by professionals like JoAnna Moreland, Betty Bond, Cathy Maher, and a dedicated Board of true community servants. At that time, the practice of law was still based on a lawyer's word and a handshake. I absolutely loved being President and wish everyone could have the experience," he recalled.

We salute these dedicated Past Presidents and thank them for their continued involvement in the Dallas Bar Association.

Note: Hear interesting stories from Mr. Perini and Mr. Weber as part of the DBA's Oral History videos at <https://shorturl.at/LNTXY>.

HN

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KATE EBERHARDT

Kate Eberhardt is a senior attorney at Hunton Andrews Kurth LLP.

How did you first get involved in pro bono?

I had exposure to pro bono in law school, but my substantive involvement began when I joined Hunton Andrews Kurth in 2019. The firm's commitment to pro bono is outstanding, and soon after joining the firm I took a case pro bono with the Genesis Women's Shelter.

Which clinics have you assisted with?

I have done dozens of the DVAP weekly intake clinics, both in person and virtual. I have also done the DVAP Small Business Clinic at the Dallas Library and the DVAP Wills Clinic at the Senior Source.

Describe your most compelling pro bono case.

My most rewarding cases have been divorces with a history of domestic violence. It is hard to put into words the relief those divorces provide to my clients and I feel proud to be part of delivering that closure.

Why do you do pro bono?

Equal access. Underserved people and communities deserve legal protection and advocacy. Pro bono representation provides those services to people who would not otherwise have access to those remedies.

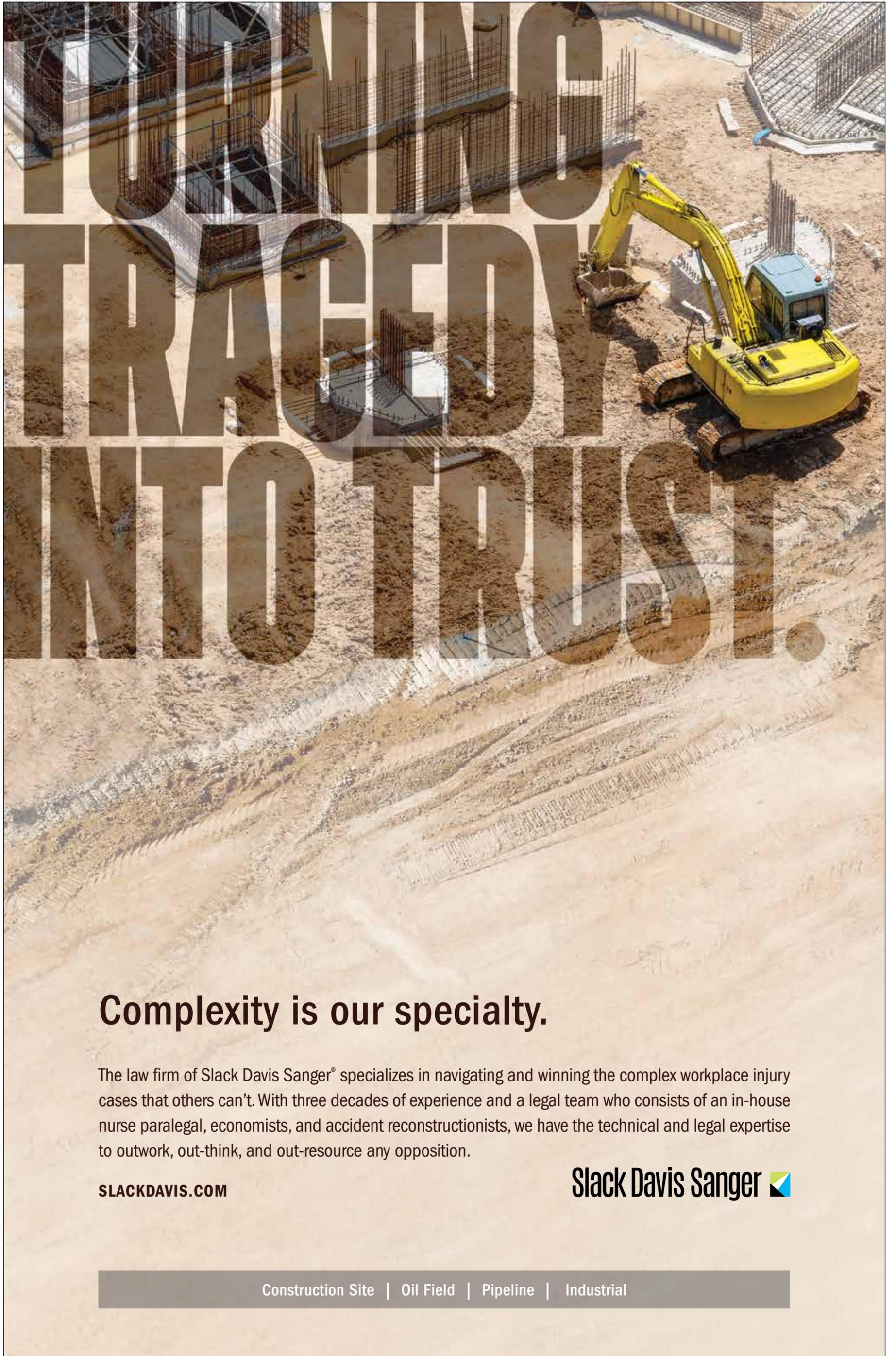
What impact has pro bono service had on your career?

My pro bono work has broadened my comfort zone of the types of cases I work on. I am a transactional attorney by trade and the idea of appearing in court before a judge used to make me a little queasy. While it might be a little uncomfortable at first to step out of the comfort zone of our main practice area, we can all provide so much value to our communities with the same skills that got us through law school and the bar exam.

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Myths vs. Facts: Cloud's Impact on Law Firm Efficiency

BY MORGAN MARTINEZ

Times are a-changin'. Most lawyers are transitioning data storage and essential workflows to the cloud in this digital age. Yet, some attorneys are still hesitant to take the plunge. This reluctance often stems from misinformation or a lack of clarity around cloud technologies' benefits, cost, and ease of use. Below, we will correct some of the most common myths about cloud technologies.

What is Cloud Computing?

First things first—what in the world does “the cloud” even mean? According to Amazon Web Services, “cloud computing is the on-demand delivery of IT resources over the internet with pay-as-you-go pricing.” Allow us to translate:

- Cloud servers exist in data centers around the globe.

- Users can access the same files and applications anytime, anywhere via an internet connection.

- This differs from the traditional model of software, where businesses must run applications on their own machines and manage their own physical servers and data centers.

There are several types of cloud computing, with SaaS (software as a service) being the most common among law firms. Examples of SaaS for law firms include time-tracking software, billing and payment tools, legal accounting software, and document management capabilities.

Companies typically pay for these SaaS services on a subscription and/or per-user basis. In addition to providing services and handling data security to protect clients' sensitive information, SaaS companies may also offer migration and onboarding services, support, and access to software integrations and mobile apps.

Sounds great, right? So, why are some lawyers still working with outdated spreadsheets and antiquated pen-and-paper methods? The following myths may be holding them back.

Myth: Cloud Software Isn't Secure

A locked filing cabinet or a password-protected computer folder may seem like a secure document storage solution. But can it compete with cutting-edge security?

The best technology for law firms, such as SaaS tools and online payment processing software, uses high-level protection like military-grade 256-bit AES encryption. Payment processors may also be regularly evaluated by independent auditors to ensure they meet Level 1 Service Provider standards for Payment Card Industry Data Security Standard (PCI DSS) compliance.

Finally, cloud software can also mitigate the risk of lost data with automatic updates. That means no more worrying about losing valuable files if a computer goes down.

Myth: Cloud Technology Is Expensive

SaaS software allows solo practitioners, small, and mid-sized firms to access resources that may otherwise be cost-prohibitive. For example, you may not be able to afford an in-house accountant, but you can use legal accounting software to track your law firm's finances, reconcile transactions, and stay compliant when managing trust accounts.

Many of these SaaS tools are very affordable because they are offered on

a subscription basis—typically monthly or annually. This pricing structure offers a suite of benefits, such as smaller, consistent fees and the flexibility to scale to your firm's individual usage.

Myth: Cloud Software Isn't Worth It

Also known as “cloud technology won't impact our bottom line that much, anyway.” No disrespect, but we beg to differ. Here is what the research and anonymized customer data shows:

- Law firms that accept online payments **get paid 32 percent faster** than those that do not.

- More than 60 percent of surveyed legal professionals said their law firm **collected more money** due to online payment processing software.

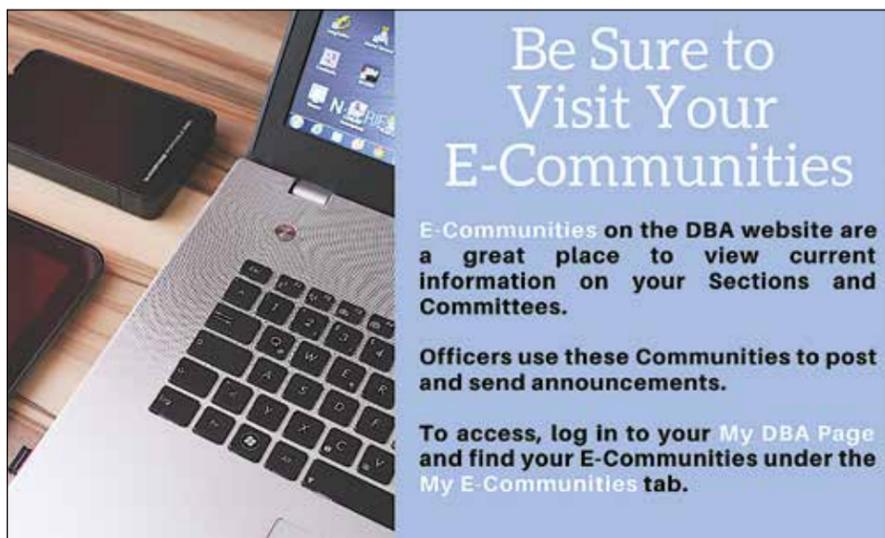
- 54 percent of firms **captured more leads** using online (software-enabled) client intake forms. Additionally, 94 percent of legal professionals said document management software made document sharing easier, and 92 percent believed it facilitated document collaboration.

- Attorneys who use an industry-leading SaaS tool can see a **38 percent average increase in caseloads** and gain **3+ billable hours per day**.

What Does This Mean?

Using everyday legal cloud technology is a simple way to streamline time-consuming workflows and make your firm more efficient and profitable. It can help you track time, invoice quickly, get paid securely in seconds, and ensure compliance with IOLTA and ABA guidelines.

Morgan Martinez is the Content Manager at LawPay.







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In The News

FROM THE DAIS

Katherine Anand, of Martin Powers & Counsel, PLLC, spoke on a panel at the American Bar Association Business Law Fall Meeting in Chicago.

KUDOS

Jera Bradshaw, of Bradley Arant Boult Cummings LLP, has been named co-chair of the Regional and Community Banks Subcommittee of the American Bar Association's Banking Law Committee.

Ira Silverman, of Silverman Goodwin, LLP, received the Meyer L. Bodoff Memorial Award of the Dallas Jewish Community Foundation.

Marcos Ronquillo, co-founder of Riney Ronquillo Soule, has been named Hispanic Business Arbitration and Litigation Attorney of the Year, by London-based Lawyer International.

Dr. Juanita DeLoach, of Barnes &

Thornburg LLP, was presented the Charlye Ola Farris Award at the 40th Annual Sparkler of the Dallas Black Women Attorneys of J.L. Turner Legal Association.

Meghana Wadhvani, of Cortez Law Firm, PLLC, received the 2023 Dallas Trial Lawyers Association John Howie Award.

Larry "Max" Maxwell, of Max Maxwell Law Practice P.C., received the Distinguished Service Award from the Health Law Section of the State Bar of Texas.

Terry Bentley Hill, of The Law Offices of Terry Bentley Hill, received the Dean Emeritus Frank W. Elliott Dean's Advocate Award from the Texas A&M School of Law.

Lauren Black, of Dallas County District Attorney's Office, received the Public/Non-Profit Sector Achievement Award from the Texas A&M School of Law.

Hisham Masri, of Flowserve Corporation, received the Rising Star Award from the

Texas A&M School of Law.

Jenae Ward, of Weil, Gotshal & Manges LLP, received the Outstanding In-House Attorney Award from the Dallas Volunteer Attorney Program.

Al Ellis, of Sommerman, McCaffity, Quesada & Geisler, L.L.P, has been named the 2023 Texas Legal Legend by the State Bar of Texas Litigation Section.

ON THE MOVE

Amy LaValle joined Frost Brown Todd LLP as Partner.

Kelly Gibbons joined Durham, Pittard & Spalding, LLP as Of Counsel in the Dallas office.

Stephen Kaplan joined the Atlanta firm of Hecht Walker Jordan, PC as Of Counsel.

Aimee Guidry Szygenda rejoined McGlinchey Stafford PLLC as Of Counsel.

Matthew Nickel rejoined Dentons US LLP, Dallas as Partner.

State Senator **Nathan Johnson** joined Thompson Coburn LLP as Member. **Tom Reddin** also joined the firm as Partner.

Melissa Gray is the Founder and Managing Attorney at The Law Spot, PO BOX 181957, Dallas, TX 75218. Phone (407) 595-0729.

Jason Ray joined Blank Rome LLP as Partner.

Paul Genender joined Paul Hastings LLP as Partner at the Houston office.

Randa Barton joined Seyfarth Shaw LLP as Of Counsel; **Tricia Macaluso** and **Amy**

Simpson joined as Partners.

Christine "Chrissi" Hathaway joined Forshee Law, 100 Crescent Court, Suite 700, Dallas, Texas 75201 as Co-Founding Partner.

Mitchell McCrea joined Slack Davis Sanger, LLP as Partner.

Mark Fritsch, **Jacob Kring** and **Scott Weber** joined Husch Blackwell LLP as Partners. **Brooke Ginsburg Guerrero** joined as Senior Counsel; **John Norris III** and **Colin Byrne** joined as Counsel and Associate, respectively.

Amber Hamilton Gregg joined DART (Dallas Area Rapid Transit) as Senior Assistant General Counsel.

Namrita Notani joined Spencer Fane LLP as an Associate in the firm's Plano office. **Josh Hedrick** joins the firm's Dallas office as Partner. **Tamara Hyndman** and **Andrew Johnson** joined the Dallas office as Associate and Partner, respectively.

Richard Tubb joined Farrow-Gillespie Heath Wilmoth LLP as Partner.

Karen Bryson joined GoransonBain Ausley PLLC, Dallas office.

Gracen Daniel joined Crawford, Wishnew & Lang PLLC as Associate.

Michelle Claverie and **Helena Hager** joined Huddleston Law Group as Associates.

Emma Conde joined Weil, Gotshal & Manges LLP as Associate.

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

Education Law Study Group

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

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

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Focus | Probate/Tax Law

Decoding Attorney/Client Privilege in Will Contests

BY KELLY C. WALKER

One of the most practical safeguards provided by the attorney-client relationship is that it protects communications with a client based on the attorney-client privilege. Specifically, Texas Rule of Evidence 503 states that a client has a privilege to prevent disclosure of confidential communications made in facilitating and rendering professional legal services to the client. *Tex. R. Evid. 503*. That is a valuable tool routinely used to protect client confidentiality, and the privilege can be claimed by the client, the client’s guardian or conservator, the deceased client’s personal representative (e.g., administrator, executor), a successor trustee, or a similar representative of an entity. Likewise, the attorney may claim the privilege on the client’s behalf. Normally that privilege survives the decedent’s death. *Tex. R. Evid. 503(c)*.

However, two important evidentiary exceptions to that rule change the game in litigation involving contested documents related to a decedent’s estate. See *Tex. R. Evid. 503(d)(2), (4)*. Texas Rule of Evidence 503(d)(2) negates the privilege “[i]f the communication is relevant to an issue between parties claiming through the same deceased client.” This exception is key in handling estate and trust litigation in which multiple persons may be fighting over a decedent’s estate. The effect is that if an attorney communicates with a client who later dies, and then disputes arise among parties claiming through that decedent, the decedent’s communications with that attorney will not be privileged.

The impact of this exception allows the deceased client’s beneficiaries, heirs, or others who are asserting a claim regarding that client to discover communications, oral or written, that client had with an attorney. This rule applies to not only the estate planning attorney but also to any attorney representing that decedent at or near the time of the execution of dispositive documents. That broad application can thus reach attorney ad litem or any attorneys representing that decedent on any legal issues if some relevance can be shown. Especially in a will contest, this exception allows all parties to learn of any previously privileged communications that may affect the validity of a will. In addition, parties to a will contest can depose an attorney who represented the decedent regarding any facts relating to the will’s validity, the testator’s capacity, communications regarding the disposition plan, and other attorney communications that may be relevant to the challenged will. The parties may also serve written discovery on the attorney including a deposition on written question or a subpoena duces tecum which the attorney cannot avoid by claiming privilege.

This rule is broadly applied to cover even earlier estate planning efforts. In one relevant case, two attorneys claimed privilege as to communications in which they offered estate planning advice to a decedent who later made a disputed *inter vivos* gift. *In re Texas A&M-Corpus Christi Foundation*, 84 S.W.3d 358, 362 (Tex. App.—Corpus Christi, 2002, orig. proceeding). The appellate court found an abuse of discretion by the trial court

in not permitting discovery from those two prior attorneys. The court further found that the “plain meaning” of Rule 503 mandated production of the attorneys’ files. Such cases show that, while typically attorney-client communications will be protected when appropriate steps have been taken to protect the privilege, Texas courts will readily enforce the exception under Texas Rule of Evidence 503(d)(2) in matters involving a deceased client.

The second exception to the privilege is found in Texas Rule of Evidence 503(d)(4) as to matters relating to a *Document Attested By a Lawyer*. That section holds that the privilege will not apply “[i]f the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.” Typically, estate planning attorneys are not the attesting witnesses

to a will, but may serve as a notary. Indeed, good practice requires the use of two neutral witnesses so the attorney can operate as a notary. However, if the attorney does execute the will as one of the two attesting witnesses, the attorney-client privilege is lost as to all communications with that testator.

Clearly these two exceptions are unique in a will contest and using them in litigation can lead to a wealth of information about the decedent, the decedent’s capacity, and his or her dispositive intent. Any attorney approaching issues related to a deceased person needs to be aware of these exceptions and how they can dramatically impact contested litigation involving that decedent’s estate.

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Kelly C. Walker is an Attorney at Staubus & Randall, L.L.P. and can be reached at kcw@srllp.com.

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