Dallas Bar Association

HEADNOTES

April 2021 | Volume 46 | Number 4 | Focus | Employee Benefits/Executive Compensation and Health Law

Thank You Mock Trial Judges

Booker T. Washington High School won the State High School Mock Trial Championship. Held virtually this year, Dallas Bar Association members presided over, and served, as "jurors" for the final competition on March 6. From left to right are: Derek Mergle-Rust, Gaylynn Gee, presiding judge Hon. Lana Myers, Hon. Hyattye Simmons, DBA President Aaron Tobin, Javier Perez, Jaime Olin, Megan David, Jennifer King, Tom Goranson, Marissa Hatchett, and Jim Young. Congratulations to all the participants of the Mock Trial program. And a big Thank You to all the members who volunteered their time.

DBA Board to Vote on Changing the Name of the Belo Mansion

STAFF REPORT

On April 15, the DBA board will vote on whether to change the name of the Belo Mansion. This vote follows a thorough review process and comes after the recent announcement by A.H. Belo Corporation that it will seek shareholder approval to change its name to DallasNews Corporation. CEO Robert W. Decherd said during that announcement, "we are keenly aware that the relationship of our company's name to a person who figured prominently in the Confederate Army is the source of discomfort, even pain, for many of our fellow citizens." The Belo Foundation has changed its name to the "Dallas Parks Foundation."

The DBA review began under the leadership of 2020 President **Robert Tobey** and has continued into the term of 2021 President **Aaron Tobin**. In addition to solicitation of input from past DBA presidents, this review included obtaining a history of the property including the DBA's purchase of it, its naming, and a biographical study of A.H. Belo. This article recounts some of that historical information.

A.H. Belo and the Confederacy

A.H. Belo was a prominent officer of the Confederate Army and remained known for that service over the following 37 years of his life and business career. A.H. was born in 1839 into a prosperous North Carolina family that owned and utilized the labor of 11 enslaved persons in agricultural and commercial enterprises. When North Carolina seceded, A.H. organized a company of soldiers from his hometown for the Confederate Army. He served as a Confederate officer to the end of the war.

After the war, A.H. migrated to Texas and took a position with the *Galveston News*. Using funds provided by his father, A.H. eventually purchased an ownership interest in the paper. Two years later, he married Jeannette "Nettie" Ennis, whose father was a mayor of Houston and former Confederate blockade runner.

Throughout his life, A.H. maintained connections and associations with the Old South and capitalized on his service to the Confederacy. Both in business and socially, he used his Confederate military title of Colonel throughout his life. When A.H. died, Nettie donated a bronze tablet in his honor for the then-new Museum of the

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Law Day and The Rule of Law

BY LEAH K. LANIER

Law Day is held annually on May 1st to celebrate the role of law in our society and to cultivate a deeper understanding of the legal profession. This year's Law Day theme is: Advancing the Rule of Law Now. The ABA defines the rule of law as "a set of principles, or ideals, for ensuring an orderly and just society."

The rule of law is the cornerstone of American freedom and all basic civil rights. Its importance was succinctly explained by President Dwight D. Eisenhower: "The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law." Like many other countries, the United States strives to uphold the rule of law so that the following principals identified by the ABA are met: "no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all." Now, more than ever, it is our duty as attorneys to promote the rule of law, defend liberty, and pursue justice.

Louis Freeh

This year, the Dallas Bar Association will celebrate Law Day and the rule of law by hosting a program on Monday, May 3, at noon via Zoom. The keynote speaker, **Louis J. Freeh**, is acutely qualified to opine on this matter as former Director of the FBI. Director Freeh was born in Jersey City, New Jersey. He graduated Phi Beta Kappa from Rutgers College in 1971, received a J.D. from Rutgers Law School in 1974, and received an L.L.M. in criminal law from New York University Law School in 1984.

Director Freeh served as an FBI special agent from 1975 to 1981 in the New York City Field Office and at FBI Headquarters in Washington, D.C. In 1981, he joined the United States Attorney's Office for the Southern District of New York as an Assistant United States Attorney. Subsequently, Director Freeh held the titles of Chief of the Organized Crime Unit, Deputy United States Attorney, and Associate United States Attorney.

While working for the United States Attorney's Office, two of Director Freeh's most notable cases were (1) the "Pizza Connection" case and (2) the VANPAC case. The "Pizza Connection" case involved Sicilian mobsters running an extensive drug-trafficking operation through pizza parlors as fronts for cash and heroin. At the time, it was the largest, most complex investigation undertaken by the United States government. After the investigation, Director Freeh oversaw a 14-month trial and won the conviction of 16 of 17 co-defendants. The VANPAC case involved the mail-bomb murders of Federal Judge Robert Vance of Birmingham, Alabama and civil rights leader Robert Robinson of Savannah, Georgia. Director Freeh was appointed special prosecutor by the attorney general to oversee the investigation into the mail-bomb murders. After extensive investigation, a suspect was apprehended, prosecuted, and convicted.

In July 1991, President George H.W. Bush appointed Director Freeh as United States District Court Judge for the Southern District of New York. While serving there, he was nominated to be the Director of the FBI by President Clinton on July 20, 1993. He was confirmed by the Senate on August 6, 1993 and was sworn in as Director of the FBI on September 1, 1993.

Since leaving government service, Director Freeh has been appointed by courts, corporate boards, and governments to help the world's largest companies navigate legal and compliance issues related to the FCPA and similar anti-corruption regulations. Director Freeh was founder and chairman of Freeh Sporkin and Sullivan and Freeh Group International Solutions from 2007-2020.

During his career, Director Freeh has been recognized on several occasions for his many accomplishments. In 1987 and 1991, he received the Attorney General's Award for Distinguished Service, the second highest annual honor given by the Department of Justice. He has also been the recipient of the John Marshall Award for Preparation of Litigation, awarded annually by the Attorney General, and the Federal Law Enforcement Officers Association Award.

The DBA Law Day program begins at noon on Monday, May 3, 2021, via Zoom. Register for the program at www.dallasbar.org. For more information, contact Liz Hayden at lhayden@dallasbar.org. **HN**

Leah K. Lanier is an Attorney at Condon Tobin Sladek Thornton Nerenberg and may be reached at llanier@condontobin.com.

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Don't miss your opportunity to advertise (print & online) in the #1 "Legal Resource & Expert Witness Guide" in Dallas County.

For more information, contact (214) 321-3238 or dba@legaldirectories.com

All programs are presented virtually. Check the DBA Online Calendar (www.dallasbar.org) for webinar links and the most up-to-date information.

Calendar | April Events

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

FRIDAY CLINICS

APRIL 9
Noon *"How to Use Technology to Run a Law Practice in Our Current Environment," Paul Saputo.* (MCLE 1.00)*

APRIL 16
Noon *"Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word," Hon. Bob Bacharach.* (MCLE 1.00)*

THURSDAY, APRIL 1

Noon **Construction Law Section**
"HUB/WMBE Requirements: What They Often Are – in Reality or Practice vs. What They Ought to Be – Legally and Idealistically," Kelly Car, Amy M. Stewart, and Sheri Tillman. (MCLE 1.00)*

FRIDAY, APRIL 2

DBA Offices closed in observance of Good Friday

MONDAY, APRIL 5

Noon **Tax Law Section**
"DOJ Tax & IRS Conservation Easements," Joel Crouch and Michael Villa. (MCLE 1.00)*

TUESDAY, APRIL 6

Noon **Tort & Insurance Practice Section**
"Texas Supreme Court Update," Justice Debra Lehrmann. (MCLE 1.00)*

WEDNESDAY, APRIL 7

Noon **Employee Benefits & Executive Compensation Law Section**
Topic Not Yet Available

Solo & Small Firm Section
"Social Media Marketing of your Law Practice During COVID-19," Peter Vogel (MCLE 1.00, Ethics 0.50)*

Public Forum/Media Relations Committee

Juvenile Justice Committee

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

4:30 p.m. Equality Committee

THURSDAY, APRIL 8

Noon Criminal Justice Committee

Publications Committee

2:00 p.m. CLE Committee

FRIDAY, APRIL 9

Noon **Friday Clinic**
"How to Use Technology to Run a Law Practice in Our Current Environment," Paul Saputo. (MCLE 1.00)*

Trial Skills Section
"Effective Direct Examination," Randy Johnston. (MCLE 1.00)*

MONDAY, APRIL 12

Noon **Alternative Dispute Resolution Section**
Topic Not Yet Available

Real Property Law Section
"Mechanics' and Materialmen's Liens from the Owner's Perspective," Jennifer Ryback. (MCLE 1.00)*

Golf Tournament Committee

Peer Assistance Committee

TUESDAY, APRIL 13

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

Immigration Law Section
"'I Think You Need a Family Law Attorney.' The Intersection Between Family Law and Immigration Law," Melissa Oosterhof and Carol Wilson. (MCLE 1.00, Ethics 0.25)*

Mergers & Acquisitions Section
"Purchase Price Adjustments, Earnouts and Other Purchase Price Provisions," Allen Westergard and Eric Williams. (MCLE 1.00)*

Home Project Committee

Legal Ethics Committee

WEDNESDAY, APRIL 14

Noon **Bankruptcy & Commercial Law Section**
"Managing Tenant Bankruptcies in the COVID Era," Katharine Battaia Clark and Holly E. Magliolo. (MCLE 1.00)*

Family Law Section
Topic Not Yet Available

Bench Bar Conference Committee

Summer Law Intern Program Committee

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

THURSDAY, APRIL 15

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

Minority Participation Committee

3:30 p.m. DBA Board of Directors

FRIDAY, APRIL 16

Noon **Friday Clinic**
"Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word," Hon. Bob Bacharach. (MCLE 1.00)*

Corporate Counsel Section
"Boiler Plate Language? Issues in a Post Pandemic World – What We Have Learned about Contracts, Insurance, and More," Ladd Hirsch, Catherine Paulson, Gary Touchstone. (MCLE 1.00)*

MONDAY, APRIL 19

Noon **Labor & Employment Law Section**
"Protecting Trade Secrets at Trial: Navigating 76(a) in the Courtroom," Stephen Fox. (Ethics 1.00)*

TUESDAY, APRIL 20

Noon **International Law Section**
"What You Need to Know About Cyber Threats Directed at Lawyers and Clients," Peter Vogel. (Ethics 1.00)*

Community Involvement Committee

WEDNESDAY, APRIL 21

Noon **Energy Law Section**
"Bankruptcy/363 Sales," Jay Jacobs and Nick Peters. (MCLE 1.00)*

Law in the School & Community Committee

Pro Bono Activities Committee

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

THURSDAY, APRIL 22

Noon **Criminal Law Section**
"Hope, Justice, and Freedom," Brittany K. Barnett. (MCLE 1.00)*

Environmental Law Section
Topic Not Yet Available

Intellectual Property Law Section
"The Brexit Divorce - Who Got to Keep the IP Kids/House?" Carrie Johnson, John Lawrence, and Lucy Walker. (MCLE 1.00)*

FRIDAY, APRIL 23

Noon **Bankruptcy Tips, Installment II**
"Just the Tip of the Iceberg: Understanding the Scope of the Automatic Stay," Amber Carson, Gwendolyn Hunt, Davor Rukavina, and moderated by Jerry Alexander. (MCLE 1.00)*

MONDAY, APRIL 26

Noon **Health/Science & Technology Law Sections**
"The Science, Ethics, and Law of Gene Editing in a CRISPR World," Thomas Mayo and Eric Olson. (MCLE 1.00, Ethics 0.50)*

Securities Section
Topic Not Yet Available

TUESDAY, APRIL 27

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

Judiciary Committee

WEDNESDAY, APRIL 28

Noon **Dallas Bar Foundation's "A Conversation with Walter Isaacson"**
Benefiting the Sarah T. Hughes Diversity Scholarships. Sponsorships & tickets available at www.dallasbarfoundation.org. Questions? Call (214) 220-7487.

Collaborative Law Section
Topic Not Yet Available

Entertainment, Art & Sports Law Section
Topic Not Yet Available

THURSDAY, APRIL 29

11:00 a.m. 29th Annual DBA Golf Tournament
At Texas Rangers Golf Club, Grapevine. Register at www.dallasbar.org.

FRIDAY, APRIL 30

Noon **Living Legends Program**
"Hon. Maricela Moore, interviewed by Marifer Aceves and Kandace Walter." Pre-recorded program. (Ethics 1.00)*

DBA 100 Club

WHAT IS THE DBA 100 CLUB?
The DBA 100 Club is a special membership category that recognizes firms, agencies, law schools, and organizations that give 100% membership support to the DBA!

WHAT IS THE COST TO JOIN THE DBA 100 CLUB? IT'S FREE!

HOW DO YOU JOIN?
Firms, government agencies, and law schools with two or more lawyers as well as corporate legal departments can qualify if all of their Dallas office attorneys are DBA members. To join the 2021 DBA 100 Club, please submit a list of all lawyers in your Dallas office to Kim Watson, kwatson@dallasbar.org. Once approved, we will add your organization to the 2021 DBA 100 Club member recognition list!

WHAT ARE THE PERKS?
Our 2021 DBA 100 Club members will be recognized in *Headnotes*, the 2022 DBA Pictorial Directory, and at our Annual Meeting.

JOIN TODAY!

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

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

For confirmation of State Bar of Texas MCLE approval, please call the DBA office at (214) 220-7447.
For information on the location of this month's North Dallas Friday Clinic, contact yhinojos@dallasbar.org.

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President's Column

Dallas Lawyers: Stepping Up in Times of Need

BY AARON TOBIN

I am not sure about you, but my "disaster dictionary" has expanded far enough in the last two years. Microburst, pandemic, tornado, and polar vortex were either seldom used or completely absent from my vocabulary until recently.

The adverse impacts these events have had on our health, economy, and everyday life is well documented. Not surprisingly, these events have been especially difficult for the socioeconomically disadvantaged members of our community. Here in Dallas, over 25 percent of Dallas County residents live below the poverty line, and unfortunately that number has gone in the wrong direction during recent years. Now, more than ever, many friends in our community cannot afford vital legal services to assist with obtaining the protections that they are entitled to and desperately need. Many people in our community are facing eviction, foreclosure, unemployment, bankruptcy, or worse. Reports of domestic violence are on the rise. And now, with the recent severe winter storm event, homelessness, exorbitant utility costs, and the need to access insurance benefits are at a critical point.

It is times like these that I am reminded of how dedicated Dallas lawyers are to stepping up in a time of need. And fortunately, through the Dallas Bar Association, there are a number of opportunities available to lend a hand.

The Dallas Volunteer Attorney Program (DVAP) is a joint venture between the Dallas Bar Association and Legal Aid of Northwest Texas. DVAP recruits and trains volunteer attorneys to provide a wide array of legal services that the under-represented need in order to ensure access to important rights. DVAP is the largest provider of pro bono legal services in Dallas County and is vitally dependent on funding and volunteers from the Dallas legal community.

The Dallas Bar Association's Equal Access to Justice Campaign is a substantial and consistent contributor to DVAP and the fight for access to justice. Thanks to the generous efforts of the Dallas legal community, this year's campaign recently wrapped up **with a record $1.3 million in contributions**. **Vicki Blanton, Rocío García Espinosa**, and **Mey Ly Oritz**, along with the rest of their committee, did heroic work to help raise this historic amount in the face of a global pandemic. Not only was there a record total raised, but also a record number of donors gave to this year's campaign—**increasing the donor base by over 40 percent**! The net proceeds from this year's campaign will assist thousands of Dallas County families with legal services and access to justice. Way to go Dallas lawyers! As Mey likes to say, "Let's see who can make a lawyer joke out of this one!"

While this funding is essential to carry out one of our bar's most important missions, the battle does not stop there. With the need for pro bono legal services continuing to rise, an increased number of volunteers are needed to help work cases. Though the traditional in-person clinics have been temporarily suspended, DVAP has quickly pivoted to offering virtual weekly clinics to assist those in need.

Now is a great time to volunteer. Much of the work can be done virtually from the comfort of your home. With DVAP's virtual clinics, the program is able to readily assist community members, and the attorneys working the clinics have greater flexibility to provide services. Instead of hosting a clinic at one location for a limited window of time, volunteer attorneys are able contact clinic participants by phone during a 12-hour time period on the day of the clinic. More time, more flexibility, more assistance.

For those of you feeling the pandemic burn-out or struggling to stay connected and to collaborate with your peers, consider taking a DVAP case with a friend or a colleague at your firm. At our firm, we take cases as a team. It is fun and enriching to work together on a type of case that we normally do not get to handle. The only thing more fulfilling for a lawyer than helping someone in a time of need is to go through the experience with a colleague or colleagues that you know and trust.

Even if a community member does not qualify for legal aid, there are other programs through the Dallas Bar that can assist those suffering economic hardship. The DBA's Lawyer Referral service can refer a client to a Dallas area attorney. For a $20 fee, the attorney will meet with the client to discuss their legal matter. If the client and attorney decide to work together after the initial consultation, they can then negotiate an appropriate fee agreement.

Finally, DBA's LegalLine provides a great, no-cost, service to our community where our members can volunteer to help answer legal questions anonymously through a legal help line. Currently, this program is being offered remotely so that you may participate from the comfort of your home.

The need for pro bono legal services has never been greater. Whether you prefer to take a case, volunteer with intake, answer questions on a hotline, or make a financial contribution, it has never been more important, yet easier, for Dallas attorneys to make a difference through the Dallas Bar Association's wonderful programs.

For more information on assisting with the DBA's pro bono efforts, go to www.dallasbar.org, and visit the Pro Bono tab.

To get involved with DVAP clinics, cases, and other volunteer opportunities, visit www.dallasvolunteerattorneyprogram.org/volunteer/.

Aaron

BANKRUPTCY TIPS for the Non-Bankruptcy Practitioner

A Dallas Bar Association 2021 Bankruptcy Program Series

PROGRAM 2:
Just the Tip of the Iceberg: Understanding the Scope of the Automatic Stay

FRIDAY, APRIL 23, 2021 · NOON - 1:00 PM
HOSTED ON ZOOM · MCLE: 1.00 · DALLASBAR.ORG

FEATURED SPEAKERS:
Amber Carson, Gray Reed & McGraw LLP
Gwendolyn E. Hunt, Hunt Law Firm
Davor Rukavina, Munsch Hardt Kopf & Harr, P.C.
Moderator: Jerry Alexander, Passman & Jones, P.C.

Save the Date

LAW DAY CELEBRATION
Monday, May 3, 2021

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Tickets available at DallasBar.org

Dallas Bar Association
LIVING LEGENDS

Friday, April 30 | Noon | MCLE: 1.00 Ethics
Hosted virtually on Zoom. Register at Dallasbar.org.

Hon. Maricela Moore
162nd District Court

Interviewed by Marifer Aceves, Aceves Law, PLLC and Kandace Walter, Walter Legal PLLC

ABA Standing Committee on Pro Bono & Public Service

Virtual Conference | May 3-May 7, 2021

NLADA
National Legal Aid & Defender Association
nlada.org

Register by May 7, 20201
For more information, contact EJC@americanbar.org

HEADNOTES
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DALLAS BAR ASSOCIATION

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Established 1873

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Column | Ethics

Ethical Considerations of Mandated Employee Vaccinations

BY MAJED NACHAWATI

When it comes to the management and operation of our own practices, we as attorneys are always wearing two hats (or perhaps a more modern example since no one wears hats in the office anymore: two suits, or these days, two bathrobes). In our outward-facing capacity, we provide our clients with advice on how to best minimize potential liability in the operation of their businesses. If a client came to us and asked whether they could mandate that their employees get vaccinated in order to return to the office, we would know just what to do. We would start with a statute—the ADA for instance—and then turn to cases interpreting and applying those laws, and so on. But as we ponder how to return our own firms to their antediluvian way of life, will we practice what we preach?

Ethical quagmires result from getting bogged down trying to answer the same age-old question: whose rights are paramount, *mine* as an individual, or *theirs* as society? With apologies for the poor pun, nothing quite brings this debate to a point like the question of mandated vaccinations. Now, this article is not an attempt to argue one way or the other for the merits of vaccination, but rather to highlight what we must consider as employers—and employees—in our own right as we begin the process of returning the daily operations of our own firms to something resembling life-as-normal in the coming months.

As always, identifying the inflection point of this issue is not the difficult part, it is knowing what to do about it that leads to a fair amount of contemplative pacing. If we mandate that employees must be vaccinated in order to return to in-person work, inevitably a few will claim that their rights to privacy or freedom of religion are being violated. However, if we grant the objecting employee an exception, then we face claims from all of our other employees that their right to a safe work environment is being corrupted by the non-vaccinated objector. With a sea monster on one side and a whirlpool on the other, narrow is the navigable channel betwixt these two sources of potential liability.

Fortunately, in December 2020 the Equal Employment Opportunity Commission (EEOC) came out with updated guidance to assist employers weighing these considerations. First, under the EEOC guidance, while an employer normally may require a medical screening only if it is job-related and consistent with business necessity, employers may require medical screenings if they suspect that the employee's condition would "pose a direct threat to health or safety," which encompasses an employee potentially suffering from COVID-19. Under the guidance, an employer acting consistently with CDC screening recommendations would not run afoul of the ADA.

Similarly, the EEOC advises that vaccination itself does not even constitute a medical examination, and thus can be mandated to ensure workplace health and safety. While accommodations must still be made for those who cannot be vaccinated due to disabilities or *sincerely held* religious beliefs, the guidelines suggest that excluding such employees from entering the workplace is permissible.

This, however, returns us a bit to exactly where we began. As always, there is a difference between what we as employers *may* do and what we *should* do. While the EEOC guidance appears to permit employers to put in place fairly stringent standards to protect the general health and safety of all of those returning to work, is the collective peace of mind that mandatory vaccination will foster worth the headaches caused by those virulently (again, apologies for the pun) opposed to vaccination? Unlike a law review or legal brief, however, this is an ethics article. Ethics is a discipline focused not on finding the right answer, but on asking the right questions, for these are questions largely without answers.

While I cannot advise you whether to require mandatory vaccinations or not, I can ask you, what is more important to your firm: the health and safety of your fellow employees, or the freedom of conscious of those stubborn few? Just because we *may* compel vaccination, *should* we? Justice is often depicted holding scales, and whether the balance favors the rights of the individual or the group will ultimately turn on how much potential liability tips the scales in either direction.

EEOC December 2020 guidance can be found at: www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. **HN**

Majed Nachawati is Founding Partner of Fears Nachawati and may be reached at mn@fnlawfirm.com.

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Thank you for your support of the Dallas Bar Association!


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Questions Raised by Surprise Medical Billing

BY ANDREW COOKINGHAM AND JAKE WINSLETT

Surprise medical billing stories are a routine feature in the news, ranging from NPR to local news publications. These stories have led to campaigns for state and federal legislative action on "surprise billing." But what is "surprise billing", and what have the Texas Legislature and Congress done about it?

Surprise billing is when an out-of-network healthcare provider "balance bills" (*e.g.*, bills a patient for healthcare expenses in excess of her copayment, coinsurance, and deductible) in certain circumstances where the balance bill was not expected. These circumstances include when (1) a patient has an emergency medical condition and is treated in an out-of-network hospital emergency department, or (2) a patient receives services at an in-network hospital, but an out-of-network professional or entity provides the services. The first situation is considered a surprise because a patient experiencing an emergency is expected to present at the nearest hospital, without deciding on a particular hospital based on whether that hospital is in- or out-of-network. The second situation is considered a surprise because the patient expected that, by receiving treatment at an in-network hospital, all of the treatment she received would be in-network, even though some practitioners at that hospital may not be part of her insurer's network.

Is Surprise Billing Allowed? An out-of-network provider's ability to balance bill a patient is becoming more and more limited, and a provider should always check each patient's specific circumstances before balance billing a patient. Texas, like several other states, sharply limited out-of-network providers' ability to balance bill patients for healthcare in certain "surprise" situations beginning January 1, 2020. And in year-end legislation (the "No Surprises Act") included in the COVID relief bill, Congress also prohibited out-of-network providers from balance billing patients for healthcare in certain "surprise" situations beginning January 1, 2022. Thus, for the next 10 months, restrictions on balance billing from the Texas statute will apply, but the federal restrictions will not (yet).

Are there Differences Between the Texas and Federal Restrictions? Yes. Though they govern roughly the same surprise situations, the Texas and federal statutes have some key differences. For example, the Texas statute applies only to certain insured health plans, as well as state employee health insurance (such as TRS and ERS). The Texas statute does not apply to self-funded employer-sponsored health plans, nor does it apply to air ambulance expenses. In contrast, the federal statute will, effective January 1, 2022, apply in both of these situations. (Interestingly, traditional ground ambulance services are not subject to the federal statute.)

The Texas statute will not become obsolete on January 1, 2022 when the federal statute becomes effective; rather, because it was in place before the federal statute, the Texas statute will still govern healthcare expenses that it applies to (*i.e.*, fully insured arrangements and the state employee health plans). The material differences between the two statutes will affect how healthcare providers can seek additional payment from the patient's health insurance.

How Do Out-of-Network Healthcare Providers Get Paid? Both the Texas and federal statutes include alternative dispute resolution processes that apply when an out-of-network provider seeks additional payment from the patient's insurer. One key difference between the statutes, however, is that under the Texas statute, out-of-network facilities are subject to a mandatory mediation process (after which they can sue the insurer if the dispute is not settled); under the federal statute, all out-of-network providers must go through a "baseball-style" arbitration process. (In baseball-style arbitration, each side submits a proposed award and the arbitrator picks between the two submissions.) Because the Texas statute will continue to apply even after the federal statute takes effect, out-of-network facilities will be permitted to continue this mediation process for expenses that the Texas statute applies to (*i.e.*, insured and the state employee health plans).

Both statutes also contain differing procedures and deadlines for their particular dispute resolution process. Because some of the deadlines are quite short, out-of-network providers should be proactive in determining which one applies and whether to pursue additional payment.

Are These Processes Effective? Although the Texas statute has only been in effect for one year, the Texas Department of Insurance (TDI) recently reported statistics showing the statute's results during its first year. First, the TDI reported receiving very few patient complaints regarding balance billing (and the ones it did receive appear to have been related to bills that the Texas statute did not prohibit). Second, the TDI reported receiving thousands of requests for dispute resolution from out-of-network providers, and that the majority of the requests settled before either mediation or baseball-style arbitration even took place. **HN**

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Virtual Health Law ADR – What's Working?

BY CECILIA H. MORGAN AND AARON B. MICHELSOHN

Health care is the fastest expanding sector of our economy, and health care costs account for a quarter of government spending. COVID-19 has been a disruptive force in the industry. However, alternative dispute resolution (ADR) processes are alive and well in the health law space. Most proceedings are now being conducted virtually in order to maintain security and follow social distancing guidelines.

ADR professionals have used virtual meeting technologies to conduct proceedings for years. Arbitration witnesses have testified by live video feed from across the country, individuals have attended mediations via videoconferencing platforms from across Texas, and administrative proceedings have been conducted remotely from all over the state. Likewise, health care professionals have used virtual communications platforms in the name of public health for decades. Health care industry records in the U.S. are electronic-only by mandate. Health care, health law, and ADR professionals were already well-suited to the contemporary virtual-first work environment.

In the wake of the pandemic, virtual meeting platforms like Zoom, Webex, Microsoft Teams, and others have allowed most health law practitioners and neutrals to continue moving their clients' matters toward resolution. Regardless of the platform, the claims, or the proceeding, ADR will continue to thrive in health law as long as neutrals are prepared and proper decisionmakers are available to resolve disputes.

Virtual Security and Confidentiality Measures

Early in the mid-2020 transition to a virtual-first paradigm, meeting platforms struggled to build out their digital infrastructures to meet increasing user demand. This led to some high profile and well-publicized security scares. Practitioners and neutrals had well-founded concerns about information security and confidentiality in conducting proceedings involving Protected Health Information (PHI). As platforms began instituting increased security measures, those concerns have largely subsided.

Practitioners know, however, that all communications and information sharing platforms are susceptible to security breaches. Health law practitioners and neutrals handle PHI regularly and take pains to remain HIPAA complaint. Those compliance duties extend to the exchange and use of PHI in ADR proceedings. To stave off potentially costly HIPAA violations, best practices by all parties should include transferring confidential and sensitive documents and files to and from each other and neutrals only via secure, password-protected means.

Virtual Proceedings

Most ADR professionals in the Texas market use Zoom for virtual mediations. Health law-related administrative bodies in Texas use a number of platforms to conduct business. Peer reviews are conducted via Zoom, while the Texas Medical Board uses Microsoft Teams. The Texas State Board of Dental Examiners originally continued to require in-person appearances but has since begun to offer virtual options. "Balance billing" ADR before the Texas Department of Insurance is conducted solely via written submission with teleconferencing used only when necessary. Federally, the Drug Enforcement Administration is resolving matters using Webex.

Anecdotally among neutrals, resolution rates using these virtual platforms have not dropped significantly across the health law sector compared to pre-pandemic, in-person resolution rates. Regardless of the platform, practitioners and neutrals have continued resolving disputes for their clients during the pandemic.

Working Virtually

The shift to virtual-first presents new considerations for health law practitioners and neutrals. Foremost is that virtual ADR is here to stay. Neutrals and practitioners must stay up to date with and practiced in multiple platforms because of the diversity of software in use. The legal community has not coalesced around a single platform, so we will need a working knowledge of many. For those unwilling or unable to invest the time to learn the various virtual platforms, it is imperative to have a technically proficient assistant at hand to administer your virtual appearances. A lack of knowledge in the technical aspects of a platform may hinder efficient resolution of your clients' matters.

Neutrals have reported a discernible rise in executive-level management participating in virtual ADR. The perceived inconvenience of in-person participation is significantly lower for virtual attendance. With the time and money previously spent on travel to a proceeding no longer a hindrance, there is little excuse for their non-participation. Participation of high-level decisionmakers in the ADR process from an early stage means neutrals have been able to settle matters more quickly and cost-effectively.

As more people are vaccinated and begin to feel more comfortable with in-person meetings, we may see an increase in hybrid ADR proceedings with some participants on site and others joining remotely. We should anticipate an increase in mediations and arbitrations of malpractice claims involving long-term care facilities and in False Claims Act actions against medical practices after CARES Act and Paycheck Protection Program audits are complete. ADR in such matters will continue to be conducted to a large degree via virtual platforms. They are safer, more cost-effective, and they work. **HN**

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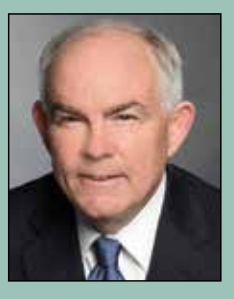
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Use Caution with Self-Directed IRA Investments

BY JIM GRIFFIN

Most people know what an IRA is. IRA stands for "individual retirement account." An IRA is a special bank or brokerage account that individuals can set up to hold money for the future. Lots of people "roll over" savings from their employer's 401(k) and retirement plans into IRAs so that they can have greater control over their investment choices and fees. Rollovers allow retirement funds to grow without being subject to income taxes until later. Texas law also provides creditor protection for IRAs, but I am not writing about that today.

IRAs can be invested in stocks, bonds, and mutual funds. The IRS says that there are some things IRAs cannot be invested in like collectibles. I am not writing about that today either. Entrepreneurial IRA investors look for ways to self-direct their IRAs to investments with greater potential returns. Self-directed investments include private stock, real estate and investment lending. This is where things get complex, and the IRS starts to pay more attention.

Brett Ball had an IRA with J.P. Morgan Chase Bank. He thought that he had a good investment opportunity in 2012 to make a $200,000 real estate loan with his Chase IRA funds. He took a distribution from his Chase IRA and transferred the funds to his personally owned limited liability company. The LLC was not owned by Brett's IRA, but it could have been. Brett's LLC made the real estate loan that listed Brett's IRA as the lender. The security for the loan was also in the name of Brett's IRA. Repayments on the real estate loan were made out to Brett's IRA and were deposited into Brett's IRA.

Benjamin Franklin said that nothing can be certain in life except death and taxes. The modern addition to that is that no tax can be as certain as one that is triggered by a Form 1099 that is filed with the IRS. Poor Richard, meet Poor Brett.

Brett made the $200,000 loan with funds that he received in a distribution from his Chase IRA. That means that Chase was duty bound to report the distribution to the IRS on a Form 1099-R. If there is one thing that the IRS computers are really, really good at, it is checking each of our income tax returns to make sure that we report income that the IRS already knows about because of a Form 1099.

After Brett filed his 2012 income tax return, the IRS computers started their work and discovered that Brett did not report any of the $200,000 from his Chase IRA as taxable income. The computers did their work well and issued a letter to Brett along with a bill for $80,000 in back taxes, interest, and penalties.

Brett did not enclose his $80,000 check by return mail. Instead, he tried to convince the IRS employees that their computers were wrong and that he had handled the investment loan correctly and all on behalf of his IRA. In short, he did not owe $80,000 more in taxes. Brett's main argument was that because the loan was made in the name of his IRA, the funds never effectively left his IRA and were part of a "conduit agency arrangement." Brett and his lawyers had three good cases to support their argument, but the Tax Court just wasn't willing to connect the dots represented by those cases. The court concluded that Brett personally owned his LLC, and through his LLC, he had "unfettered" control over the funds that he received from his Chase IRA. When a court uses the word "unfettered," that is often a bad sign, as it was for Brett.

Brett's case shows us all the need to be especially careful in making self-directed IRA investments. There are some self-directed investments that are just fine, others that are taxable, some that are impermissible and others that are prohibited. Different sections apply to each kind of investment. The rules are complex, tricky, and unforgiving. A few cases have been decided that help take the edge off some of the potentially bad tax results, but those cases may be narrowly applied. Brett may have fared better if he had his IRA form its own LLC instead of using Brett's personal LLC. That would have given the investment loans the benefit of both form and substance, which together support a better tax outcome. **HN**

Jim Griffin is a Partner at Scheef & Stone, LLP. He may be reached at jim.griffin@solidcounsel.com.

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COVID-19 Legislation Risks & Liabilities for Healthcare Providers

BY NEIL ISSAR

The COVID-19 pandemic spurred legislative and regulatory changes to provide funding to the healthcare industry. But these changes have also created new risks and avenues for liability for recipients of federal funding.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act created a $175 billion "Provider Relief Fund" to send payments to healthcare providers on the front lines of the coronavirus response. Recipients of Provider Relief Fund payments, including doctors and hospitals, must certify that they meet certain terms and conditions. Among other things, they must certify that they (1) provide or provided diagnosis, testing, or care for individuals with "actual or possible cases of COVID-19," and (2) will only use the funds to prevent, prepare for, and respond to coronavirus and to serve as reimbursement for healthcare-related expenses or lost revenues attributable to coronavirus.

But these required certifications may implicate the False Claims Act (FCA). Because compliance with the Provider Relief Fund's terms and conditions is a prerequisite to receiving federal funds, falsely certifying compliance with any of those terms and conditions may be considered a violation of the FCA.

Importantly, ambiguities in the terms and conditions may lead to inadvertent false certification. For example, it is unclear what it means to be a "possible case" of COVID-19. While the Provider Relief Fund FAQs state that the Department of Health and Human Services (HHS) "broadly views *every patient* as a possible case of COVID-19," the FAQs do not carry the force of law and may not provide a shield against FCA liability. To mitigate this risk, healthcare providers should carefully document all treatment for which they seek reimbursement under the CARES Act.

In addition, what counts as "expenses or lost revenues attributable to coronavirus" is similarly ambiguous. HHS has stated that it is a "broad term that may cover a range of items and services purchased to prevent, prepare for, and respond to coronavirus." Confusingly, HHS defined "lost revenues" in a circular way, stating "[t]he term 'lost revenues that are attributable to coronavirus' means any revenue that you as a healthcare provider lost due to coronavirus."

Fortunately for fund recipients, the FCA has a scienter requirement that forces plaintiffs to show that a defendant acted "knowingly." To act "knowingly," a defendant must have acted with "actual knowledge of the information" or in "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information." If a fund-recipient's conduct is based on a reasonable interpretation of an ambiguous requirement in the absence of official government guidance, such conduct will not satisfy the FCA scienter requirement. As a result, providers and their counsel can mitigate risk of FCA liability by actively reviewing all program rules, monitoring official government guidance, and developing a reasonable rationale for their interpretation of any ambiguous funding requirements.

The pandemic has also led to increased funding for telehealth initiatives and the relaxation or temporary waiver of certain telehealth regulations. But the resulting increase in telehealth utilization also means greater potential for fraud, and the federal government has made telehealth fraud an enforcement priority. HHS Operations Officer Michael Cohen explained, "There are unscrupulous providers out there, and they have much greater reach with telehealth … Just a few can do a whole lot of damage." A former Assistant Attorney General Brian Rabbitt said, "[T]elemedicine offers great promise to Americans, especially during this difficult time, and [the Department of Justice] remain[s] committed to ensuring that that promise is not undermined by fraud and abuse."

As a result, several enforcement actions have been brought against providers related to telehealth fraud. Typical fraud schemes targeted by the government include payments of kickbacks in exchange for physicians prescribing or ordering medical tests or equipment; promoting or selling fake COVID-19 testing or unapproved treatments through telemarketing calls and online platforms; and submitting false or fraudulent claims for medically unnecessary services, services that were never provided, more expensive services or procedures than were actually provided or performed, or services furnished under the telehealth flexibilities enacted in response to the pandemic without complying with regulatory requirements.

To avoid government scrutiny and enforcement, providers and their counsel must stay abreast of and comply with the changing regulations in light of the increased and necessary reliance on telehealth as millions of Americans isolate, quarantine, or otherwise restrict their face-to-face interactions. **HN**

Neil Issar is an Associate at Haynes and Boone, LLP. He may be reached at neil.issar@haynesboone.com.

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Innovations in Diversity, Equity, Inclusion & Belonging, Part 1

On March 4, the DBA hosted "Why It Matters: Innovations in Diversity, Equity, Inclusion & Belonging, Part I," with speakers (left to right): Vicki Blanton, Courtney Barksdale-Perez, Emmanuel Ubinas, Hon. Maricela Moore, Chasity Wilson Henry, Robert Walters, DBA President Aaron Tobin, and Amber Rogers. The program accompanied the release of the Allied Dallas Bars' Diversity Survey, which can be viewed at www.dallasbar.org.

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DBA Board to Vote on Changing the Name of the Belo Mansion

CONTINUED FROM PAGE 1

Confederacy in Virginia.

During their marriage, the Belos purchased land and built the house at 2101 Ross Avenue, the present home of the DBA. A.H. lived in the home for less than a year before he passed away in 1901.

A.H. also contributed money to the Sons of Confederate Veterans, which in modern times has named one of its Dallas chapters for him. That group encourages its members to visit the Belo Mansion as a Confederate "heritage site' due to Belo's Confederate service.

The DBA Acquisition

The DBA home is regarded as one of the nation's premier bar headquarters and widely credited for the Association's vibrant membership and robust legal education, free to members. But its acquisition in 1977 was risky and controversial. After decades of meeting in courtrooms and law offices, the Association's first formal meeting place was the Adolphus Hotel in the 1950s (thanks in large part to **Henry Strasburger**, who promised to pay the rent if the experiment failed).

In the mid-1970s, membership exceeded the hotel's accommodations and bar leaders looked for a new home. **Jerry Jordan** (then Chair of the Association's Finance Committee) represented Loudermilk-Sparkman Funeral Home, which occupied the house at 2101 Ross Avenue under a 50-year lease from the Belo family. Sparkman wished to vacate early due to encroachment from widening streets in downtown Dallas. Mr. Jordan believed the dilapidated building held promise for a new Association headquarters.

Mr. Jordan shared his idea with Dr. **Gail Thomas**, Dallas civic leader and spouse of future DBA President **Bob Thomas**. Mr. Jordan recalled: "I figured that if I could sell Gail on the idea, the battle was at least half won." Following a site visit by the Association's board, the Thomases accompanied DBA President **Waller Collie** and his wife Elaine to North Carolina to meet with Helen Belo Morrison, the granddaughter of A.H. and Nettie Belo.

Initially hesitant, Ms. Morrison warmed to the Association's plans to restore her childhood home to its original condition. Serendipitously, Mr. Thomas's mother had been a guest at the Belo home for Ms. Morrison's 12th birthday celebration in 1914, a valuable icebreaker 63 years later.

The Association obtained an option to purchase the home. But many members expressed concern over both the expense and uneasiness guests might feel entering a former funeral home—particularly one that served many of their families. The *Dallas Times Herald* wrote an article predicting the purchase would bankrupt the Association.

Undaunted, a visionary collection of bar leaders, spouses, and friends galvanized efforts to raise money, secure lending, soothe member concerns, and scrape layers of paint from walls to make the Association's new headquarters a reality.

Naming the Property

Much effort went into naming the Association's new home. When A.H. and Nettie occupied the house, the *Dallas Morning News* referred to it as the "Belo residence." Later articles referenced the "Belo home" or "Belo mansion." In 1975, Ms. Morrison obtained the listing of the house in the National Registry of Historic Places as the "Alfred Horatio Belo *House*." Association leaders settled on "Belo Mansion."

The Association's naming decision was motivated by two factors. First, DBA leaders sought multiple income streams to maintain the Association's financial health and low membership fees. They wanted a name that would attract lucrative social bookings, including weddings, while upholding the dignity of the Association.

Second, at the time of the naming, the A.H. Belo Corporation—which owned the *Dallas Morning News*— played a central role in the rapidly growing City of Dallas. A.H. founded the newspaper in 1885 and hired George Dealey to run it. When Dealey purchased the newspaper from the Belo family in 1926, he continued using "A.H. Belo" in the company name to recognize his predecessor and mentor.

The Present DBA Consideration

As previously mentioned, the A.H. Belo company announced recently its plans to change its name to remove any reference to A.H. Belo as a result of his links to the Confederacy. This follows decisions over the past year by numerous colleges and universities to remove the names of Confederate officers from school buildings. In a similar vein, the DBA board is considering whether to rename its headquarters.

After all, A.H. was not a lawyer, had no role in the DBA, and did not participate in the development of the legal profession in Dallas. The Bar had no connection with A.H. or Nettie. The sole link today between the Belo name and the DBA is that a Belo heir sold the house to the Bar Foundation, long after A.H. and Nettie had died.

Despite this lack of connection to A.H., the Association previously displayed artifacts and elements honoring A.H.'s service in the Confederacy, including a portrait of A.H. in military uniform, a military saber and revolver, and references on the history page of the Association's website—all since removed. As part of the current review process, two official historical markers affixed to the building are under revision in coordination with the respective historical agencies.

DBA President **Aaron Tobin** shared the following thoughts about the issue: "DBA enjoys a well-deserved reputation as one of the strongest local bar associations in the country. Our ability to hold events in a venue that is welcoming to every member of our diverse association is vital to that strength. The present review was necessary to ensure that the name of our headquarters remains welcoming to all our members, properly reflects who we are as an Association and who we wish to be, and is consistent with our commitment to diversity and inclusion."

The DBA board, in consultation with the Dallas Bar Foundation, will vote on April 15 on whether to change the name of the building. The vote will not contemplate alternative names. If you have questions or comments, please reach out to a member of the Association's Board of Directors.

Research collected and organized by Josiah Daniel and Rob Crain. **HN**

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ECL Thrives in Dallas Legal Community

BY LINDSAY DRENNAN

Two years after its launch, the Entrepreneurs in Community Lawyering (ECL) program is thriving and providing a unique pathway for Dallas attorneys to combine their entrepreneurial spirit with a commitment to providing affordable legal services.

Started in 2019 by **Laura Benitez Geisler** during her year as DBA president, the program provides mentoring, office space, and training specific to starting a successful small business. The ECL attorney incubator program is the first of its kind in Dallas and, as the name suggests, provides its participants with a year of "incubation" in addition to business training. Not only do ECL participants launch their own firms, but as part of the program, they commit to performing 200 hours of pro bono service per year.

Saedra Pinkerton, director of the program, is proud of the progress the first ECL class has made. Reflecting on the inaugural class, she said, "helping the first group of ECL attorneys start new practices in the fall of 2019 was an exciting process I thought couldn't be topped. But seeing them pivot to meet the challenges of the pandemic, all while hustling to create these thriving businesses, has been absolutely remarkable. Their hard work and dedication to serving everyday people continues to impress me, and I hope that the entire Dallas Bar Association shares my pride."

"It's the best thing I could have ever done," said **Kate Kim.** In the short time her business law, IP, probate and estate planning firm has been open, she has been able to meet 160 percent of her revenue goal for 2020, hire on her first employee and join the Board of an emerging legal nonprofit. She attributes her success in part to the business skills she learned through ECL. She noted that not all law firm owners know how to be entrepreneurs, but ECL provided great resources in business building, bookkeeping, firm management and marketing—important skills for a small business, but not skills typically covered in law school.

Justin Bynum also credits the skills he learned in ECL with helping him weather the changing business conditions of the ongoing pandemic. At a time when many have seen business slow, he has experienced nearly 30 percent growth in his mixed family and civil law practice. The flexibility in his practice to help the community through pro bono and "low bono" representation has been a highlight of building his business through ECL. Those individuals who benefit from "low bono" representation form an often-overlooked group of individuals who earn too much to qualify for many pro bono options, but would struggle to pay steep legal fees for an unexpected legal need. ECL's unique approach develops firms with the capacity to serve this portion of the Dallas community.

Meanwhile, **Megan Erinakes** says she could not have started her own firm so quickly without participating in ECL. Like her fellow participants, Ms. Erinakes highlights the important business skills she developed as well as the capacity to pursue her passion for community service. Ms. Erinakes had not even received her bar results when the program started, but now runs a thriving family law firm. Since opening her firm, she has assisted the low-income community by providing over 67 hours of pro bono work in the last six months, but has also used the knowledge she gained from ECL to expand her marketing efforts, starting both a blog and newsletter to share the word about her firm.

By any measure, the program has been, and continues to be, a success. ECL's first class launched nine firms across a wide spectrum of practice areas, each positioned for success in both business and pro bono representation. The 2019-2020 class, which also includes lawyers **Blessing Ananti** (estate planning, business law), **Robert Anderson** (family law, estate planning, and immigration), **Tonyce Gustave** (business law and estate planning), **Tonya Jones-Craig** (family law, child welfare, and estate planning), **Noelle Vinson Saint-Jean** (special education law), and **John Vanbuskirk** (wills, trusts and probate), has already proved its commitment to providing community service and valuable legal representation through their firms. Each of these attorneys has weathered their first year of business facing not just the typical challenges of business ownership, but the added complication of a global pandemic.

As the second year of the program draws to a close, the first class provides inspiration not just for the ECL graduating class, but for the Dallas Bar at large.

Interested in learning more or applying for a future class? Get more information on the ECL at www.dallasbar.org/ecl or https://fb.me/DBAECL. **HN**

Lindsay Drennan is a Partner at Thompson Coe and may be reached at ldrennan@thompsoncoe.com.

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The DBA sincerely appreciates the following Sustaining Members whose financial contributions enhance the preservation of the historic Mansion. Thank you.

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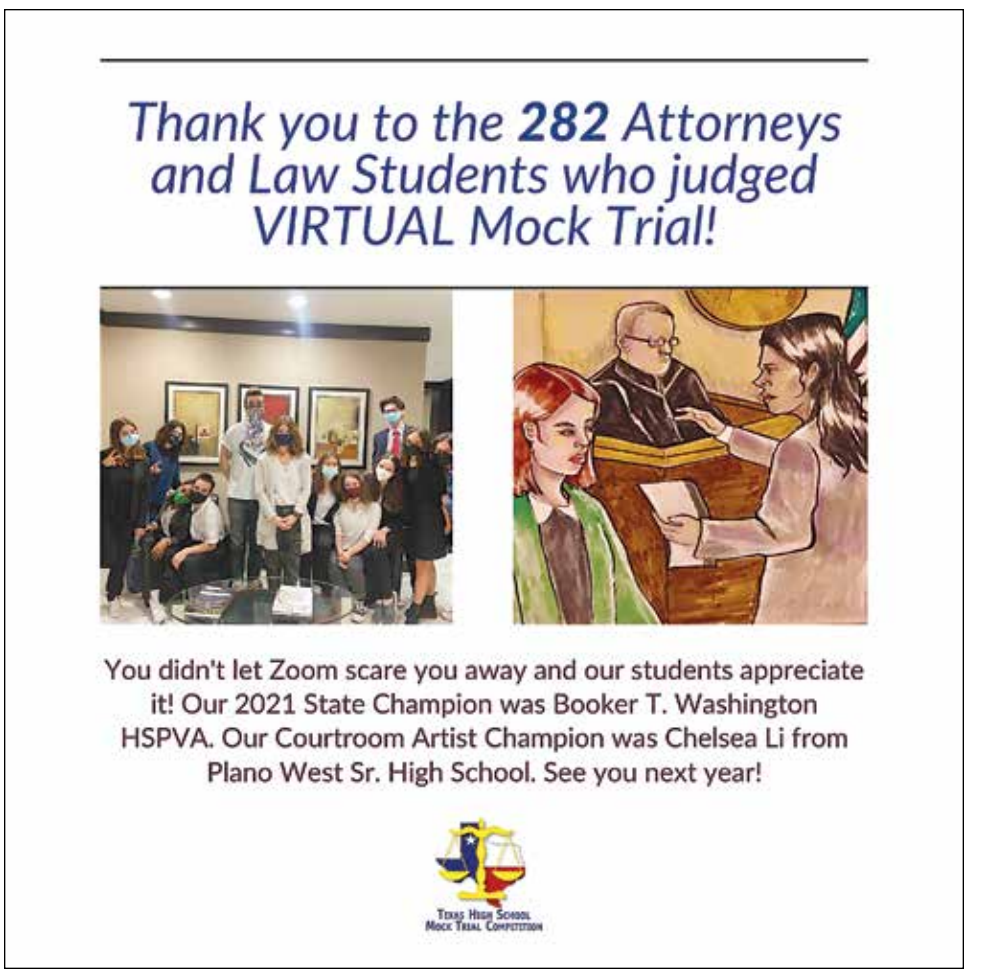

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Dallas Bar Foundation Hosts Conversation with Walter Isaacson

BY TALMAGE BOSTON

On April 28, 2021 the Dallas Bar Foundation will host *A Conversation with Walter Isaacson* to benefit the Sarah T. Hughes Diversity Scholarships. Originally planned for last fall, the event will now be held live, via Zoom, from noon to 1:00 pm. Toyota Motor North America and Toyota Financial Services are the Presenting Sponsors for the event. Information about sponsorships and ticket purchases is available at www.dallasbarfoundation.org.

Dallas Bar Foundation Chair **Talmage Boston**, Shackelford, Bowen, McKinley & Norton, LLP, will interview Walter Isaacson about his newly released book, *The Code Breaker: Jennifer Doudna, Gene Editing, and the Future of the Human Race*. Signed copies of the book will be included with various sponsorship levels.

Boston recently authored a review of Isaacson's book which appeared in *Washington Independent Review of Books* and which he agreed to share here.

"No historian enjoys writing about science more than Walter Isaacson. In the last 20 years, his bestselling books have moved from Benjamin Franklin's inventions to Albert Einstein's theories to Steve Jobs' technology wizardry to Leonardo da Vinci's innovations. Now, with *The Code Breaker: Jennifer Doudna, Gene Editing, and the Future of the Human Race*, Isaacson puts himself on the cutting edge of human biology, where the moral questions are as complex and numerous as the scientific.

Branch Rickey, the man who brought Jackie Robinson to the Brooklyn Dodgers, liked to quote John Milton for the proposition, "Luck is the residue of design." The adage certainly holds true for Mr. Isaacson and *The Code Breaker*. After the author shrewdly seized on the story of Dr. Doudna and her emerging field of gene editing as being book-worthy over three years ago, and then neared the home stretch of finishing his latest blockbuster, manna fell from heaven onto his plate in 2020.


Walter Isaacson

Last March, the pandemic triggered the application of his protagonist's specialty, because the technology was necessary for the creation of effective vaccines against coronavirus. Seven months later, her profile skyrocketed when Doudna won the Nobel Prize in chemistry. From a book-selling standpoint, these two events are somewhere north of highly fortuitous.

Although *The Code Breaker* is a fascinating story, that doesn't mean it's an easy read. Isaacson cogently details the developments in gene editing over the last decade, but the subject is not instantly understandable to those (like this reviewer) who have not studied it before.

Regardless of the reader's learning curve, what makes the book worth the somewhat heavy lifting needed to absorb it are the critically important scientific developments conveyed and the looming questions framed as the world faces the prospect of future generations whose genetic makeup is likely to change.

For those who have no prior experience with biotechnology, Isaacson succeeds in moving the needle toward the layman's having a more active engagement with nature's mysteries by frequently comparing his subject's appeal to the pull of detective stories.

In both fields, no one advances toward his/her goal of finding answers to challenging problems without a high level of curiosity, dogged perseverance, and the competitive drive to triumph over foils. Jennifer Doudna has these traits in abundance, and what makes her an especially appealing heroine are her talents for team-building and collaborating with colleagues while challenging them to pursue their own discoveries.

Dr. Doudna's specialty is CRISPR, an acronym for the "clustered regularly interspaced palindromic repeats," found in the bacteria in everyone's DNA. CRISPR have the capacity to "remember and destroy viruses that attack them"—meaning they comprise "an immune system that can adjust itself to fight each new wave of viruses."

She, her team at Berkeley, and other scientists around the world have led the movement to "use CRISPR to engineer inheritable edits in humans that will make our descendants less vulnerable to virus infections," and this "could permanently alter the human race."

Isaacson does a good job discussing the moral questions that arise once genes can be edited; surprisingly, executing the editing sequence doesn't require a Ph.D. in chemistry, as demonstrated by the author's being taught how to do it by one of Doudna's laboratory lieutenants.

When it comes to wrestling with the ethical issues, it's probably not hard for most people to get comfortable with the idea of editing genes to bring an end to sickle cell anemia, Huntington's disease, cancer, blindness, or COVID-19. But what about using it to increase height, enlarge muscle development, and raise intelligence?

How would allowing wealthy people to enhance their children with expensive gene editing affect the American ideal that "all men are created equal"? How would it impact athletic competition? Should there be laws that restrict gene editing or should it be each individual's decision whether to implement it? As noted throughout *The Code Breaker*, it doesn't take long before the moral questions lead down a slippery slope.

The book vividly depicts how, prior to the pandemic, those involved in CRISPR research were battling constantly to get their papers published and patents issued first. The intense rivalries became "the fire that stokes the engine" of discovery. Yes, they had that upside, but the competition also produced protracted patent litigation and turf battles of varying scales. It didn't take long for the inventions to lead to the formation of biotech companies fueled by venture capitalists, and the wonder and beauty of scientific development soon became tarnished by the pursuit of the almighty dollar.

When COVID-19 hit, however, the scientists stopped their jockeying for position and showed their true altruistic colors. Casting aside past discord, Doudna and other researchers locked arms and shared their work in a coordinated effort to bring an end to the suffering and dying as quickly as possible. The book's account of this heroic effort in response to the coronavirus ends on a happy note:

"COVID was the biological event catalytic enough to bring science into our daily lives…Its legacy is to remind scientists of the nobility of their mission."

In his epilogue, Isaacson laments that if he could live his life all over again, he "would focus far more on the life sciences." Fortunately for readers, he instead chose to pursue a career as a journalist and historian. His unique skill as a master storyteller of scientific development over the centuries has educated not only his fellow Baby Boomers, but also succeeding generations, helping people of all ages and backgrounds travel down the long and winding road toward understanding how life works." **HN**

Talmage Boston is a Partner at Shackelford, Bowen, McKinley & Norton, LLP. He may be reached at tboston@shackelford.law.

DVAP's Finest

PATRICK LEWIS

Patrick Lewis is an associate at Andrea Sager Law PLLC.

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

I had just wrapped up my first year of practice. I made a commitment to myself that I would make pro bono work a staple and a routine in my practice. I had heard great things about DVAP and the support they provide attorneys, so I decided to start taking cases. Taking on cases in unfamiliar areas of law can be scary as a young attorney, but DVAP provided great support and made it easy to get involved.

2. Describe your most compelling pro bono case.

My main practice area is trademark law. I recently assisted a small local business with their trademark application through DVAP. I loved being able to help out a small business in my community. Having a registered trademark is such a critical part of any business, but filing a trademark application without an attorney is tough. I'm glad I was able to assist someone who otherwise wouldn't have had access to a trademark attorney.

3. Why do you do pro bono?

I think about a quote from Spider Man where he says, "with great power comes great responsibility." There is a lot of power that comes along with having a law license. I feel like I have a responsibility as an attorney to use that power to help people. I think it's so important to be able to give people access to attorneys who otherwise would not have access.

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

Pro bono work has made me a better all-around attorney. I like being able to branch out into other areas of the law that I don't normally deal with.

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

I love seeing the impact my work has on the lives of my clients. Doing pro bono work really puts things into perspective. I think that perspective is something that really benefits me in my practice.

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Five Takeaways from the New Stark/Anti-Kickback Regulations

BY BRADLEY M. SMYER AND NATHAN FISH

The Physician Self-Referral Law (Stark) and federal Anti-Kickback Statute (AKS) impact almost everything in the health care industry. These laws play a role in many health-care business arrangements, transactions, and government-enforcement actions. Late last year, the government updated its regulatory interpretation of these laws and published hundreds of pages of new guidance in the process. Although there is much to master within the new guidance, here are five high-level takeaways about just some of the many changes in the regulations.

1. The regulations facilitate the transition from volume-based reimbursement to value-based reimbursement. Historically, the Stark and AKS regulations focused on addressing fraud and abuse risks traditionally associated with fee-for-service reimbursement, where payments are tied to volume. Over the past 10 years, however, many governmental programs and commercial payors have transitioned to value-based payment models that tie reimbursement to improved quality of care, reduced costs, enhanced care coordination, and better outcomes. The intent of the new rules was to recognize and further facilitate the transition to a value-based delivery and payment system while reducing unnecessary regulatory burdens on healthcare providers and other industry stakeholders.

2. The regulations provide new protections for value-based arrangements. The new regulations include a new, three-tiered Stark exception for value-based arrangements, along with three similar, but not identical, AKS safe harbors. To qualify for these protections, two or more providers must partner to form a value-based enterprise (VBE) and satisfy specified requirements that vary based on the characteristics of the arrangement and the level of financial risk assumed by the parties, with more flexibility for VBEs assuming more financial risk. Although these new protections have complex regulatory requirements, and there are differences between the Stark exception and the corresponding AKS safe harbors, they should increase opportunities to appropriately align incentives in value-based arrangements.

3. The regulations clarify, and arguably narrow, the primary Stark exception for settlement agreements, sales of a physician practice, and the acquisition of property. Stark can impose hefty penalties on a party who enters into a financial arrangement with a physician unless that arrangement satisfies a specific regulatory exception. Physicians and other health care providers frequently rely on the "isolated financial transaction" exception to ensure that one-time payments, such a settlement of a bona-fide dispute or the sale of property or a physician practice, do not implicate Stark. The new regulations narrow this exception. For example, the new regulations specify that the exception only applies to a "one-time" transaction, but does not cover a single payment for multiple or repeated services, like a single payment to a physician for call coverage services for a year. The new regulations also recognize that while parties may use this exception to settle a bona fide dispute, those settlement payments will not retroactively cure other noncompliant arrangements between the parties.

4. The regulations simplify Stark compliance efforts for inpatient hospital services. Under Stark, if a hospital discovers it has a non-compliant arrangement with a physician, it could be forced to repay all money received from Medicare for specified services referred by that physician. Under the old rules, the refund process could be particularly complicated and onerous for hospitals who provide inpatient services because they generally receive a set amount of reimbursement for a bundle of services provided during an inpatient visit. This meant a hospital could be required to refund the entire inpatient reimbursement even if the non-compliant relationship had no impact on the amount the hospital received. The new regulations ease that burden by excluding a hospital's bundled payment for inpatient services from consideration under Stark when referrals from the non-compliant relationship did not increase the amount of reimbursement.

5. The regulations adopt a more flexible approach to independent contractor arrangements under the AKS. The new rules enhance flexibility under the personal services and management contracts safe harbor to the AKS by protecting certain arrangements for which aggregate compensation is not known in advance and by removing the requirement to specify the exact schedule of part-time arrangements. As a result, certain arrangements that were previously outside the scope of the safe harbor, such as hourly fee arrangements, may now qualify for protection, provided that they adhere to the safe harbor's other conditions. In addition, this safe harbor contains a new outcomes-based payments provision, which is intended to protect arrangements that reward enhanced quality of care or lower costs of care.

Health-care transactions and government enforcement actions are on the rise, and each frequently involve analysis of compliance with Stark and AKS. These five introductory takeaways should help jumpstart your understanding of the government's new regulatory interpretation of these statutes and how they may affect your practice or your clients' businesses going forward. **HN**

Bradley M. Smyer is a Senior Associate at Alston & Bird and may be reached at brad.smyer@alston.com. Nathan Fish is an Associate at Greenberg Traurig and may be reached at fishn@gtlaw.com.

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HIPAA in the Pandemic: How Much Has Changed?

BY KARIN ZANER

Health care lawyers know that compliance with the Health Insurance Portability and Accountability Act (HIPAA) is crucial, especially if their clients are covered entities (CEs) and they (as lawyers) are their business associates (BAs). After all, HIPAA governs an individual patient's protected health information (PHI), and both criminal and civil penalties can be imposed for HIPAA violations. But, how has HIPAA compliance changed during the public health emergency (PHE) that was declared in January 2020 due to COVID-19?

HIPAA's Privacy Rule

HIPAA's Privacy Rule (enacted in 2000) outlines the protections of PHI by CEs (i.e., health plans, health care clearinghouses, health care providers conducting certain financial and administrative transactions electronically such as claim submission, billing, and fund transfers) and their BAs (i.e., an entity to whom a covered entity discloses PHI to perform a function for such covered entity). The Privacy Rule covers the specific requirements for authorizations for PHI as well as business associate agreements (BAAs). Various other individual rights are set forth in the Privacy Rule, including giving an individual notice of how their PHI will be used.

HIPAA's Security Rule

HIPAA's Security Rule (enacted in 2003) focuses on how to protect electronic PHI (e-PHI) given the technology threats to security now present in the digital age. The Security Rule considers: (1) the size, complexity, and capabilities of the CE or BA; (2) the CE's or the BA's technical infrastructure, hardware, and software security capabilities; (3) the costs of security measures; and (4) the probability and criticality of potential risks to e-PHI. The rule sets forth certain administrative requirements (risk analysis and management, employee sanction policies for failed compliance, information system review, authorization and supervision processes, training and security implementation, and monitoring of logins and passwords). Physical safeguards include plans for disaster recovery, media re-use, disposal, accountability and maintenance records of hardware and electronic media, data back-up, and storage. Also required are technical safeguards ensuring a unique user identification, an emergency access procedure, an automatic logoff, and encryption and decryption.

HITECH/Enforcement Rule

The HITECH/Enforcement Rule (enacted in 2009) specifies permitted uses of PHI, which include treatment, payment, health care operations (e.g., medical peer review, compliance, business planning, financial/legal activities) as well as other very specialized uses. It also covers required notice when PHI protections are compromised (a "breach"). There is a presumption of a breach "[u]nless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the [PHI] has been compromised based on a risk assessment of at least the following factors: (i) the nature and extent of the [PHI] involved, including the types of identifiers and the likelihood of re-identification; (ii) the unauthorized person who used the [PHI] or to whom the disclosure was made; (iii) whether the [PHI] was actually acquired or viewed; and (iv) the extent to which the risk to the [PHI] has been mitigated." Whether the breach was intentional or caused by negligence also comes into play. And while a recent Fifth Circuit opinion indicates that HIPAA compliance does not have to be "bulletproof," such compliance requirements remain onerous.

Limited HIPAA Enforcement Discretion in the PHE

So, has there been any relief as to HIPAA compliance during the PHE? The Department of Health and Human Services (HHS) Office of Civil Rights (OCR) enforces the various standards of HIPAA. OCR announced in March 2020 that it would not impose penalties for non-compliance in connection with the "good faith provision of telehealth" during the PHE. OCR also indicated that certain virtual platforms (FaceTime, Facebook Messenger, Google Hangouts, Skype, or any other "non-public facing" audio and video communication technology) would be acceptable for telehealth services. However, "public-facing" applications, such as Facebook Live, Twitch, and TikTok, are specifically prohibited. OCR reminded providers that they must continue to safeguard the PHI by continuing to meet all HIPAA requirements.

HIPAA Remains Very Much Intact

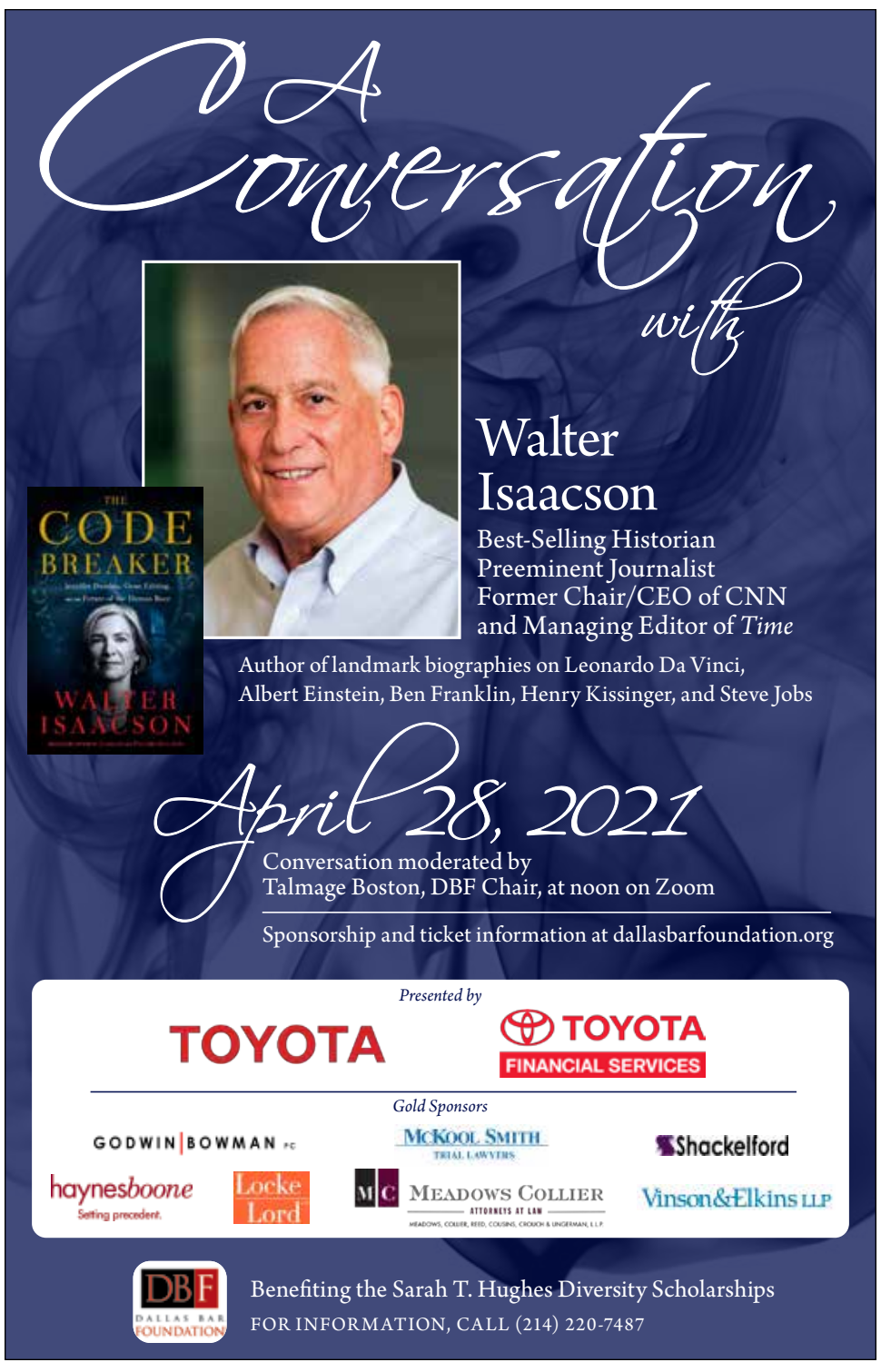
Various federal and state laws have been adjusted in order to provide patients with much-needed access to health care through "socially-distanced" avenues during the PHE, such as telemedicine. But the basic requirements of HIPAA still remain mandatory. Thus, health-care lawyers and their clients must continue to remain vigilant in their HIPAA compliance efforts now, as well as once the PHE (now "likely" extended by HHS through the end of 2021) comes to an end. **HN**

Karin Zaner, JD, of Zaner Law PC, may be reached at karin@zaner.law.

In the News

FROM THE DAIS

Rogge Dunn, of Rogge Dunn Group, spoke on Handling Commercial Disputes during the Pandemic for the Knowledge Group. **Rogge Dunn** and **Greg McAllister**, also of the firm, spoke on Practical Tips for Obtaining a TRO Against Former Employees for Thomson Reuters.



KUDOS

Jack Gannon, of McGuire, Craddock & Strother, has been promoted to Shareholder.

Brady Cox, **Matthew Durfee**, and **Christopher Huffaker**, of Alston & Bird, have been elected to Partner.

Brad LaMorgese, of Orsinger, Nelson, Downing & Anderson, is the new Managing Partner.

Brent Hockaday, **Brent Turman**, and **David Webster**, of Bell Nunnally & Martin LLP have been elected Partners.

Kent Piacenti and **Jeremy Reichman**, of Vinson & Elkins LLP have been promoted to Partner.

Andrew Guthrie, **Jason Jordan**, **Vera Suarez**, and **Laura Whitley**, of Haynes and Boone, LLP, have been promoted to Partner. **Raquel Alvarenga, Natalie Dubose**, and **Scott Thompson** of the firm have been promoted to Counsel.

Hon. Brenda Hull Thompson, of the Probate Court No. 1 of Dallas County, has been elected National President of the National College of Probate Judges.

Alison Battiste, **Sarah Lopano**, and **Jordan Strauss**, of Munck Wilson Mandala have been elected to Partner.

Ladd Hirsch has joined Bradley Arant Boult Cummings LLP as Partner.

Kristen Cox and **Jeffrey Glassman**, of Meadows Collier have been promoted to Partner.

2021 Texas Bar Foundation Award Recipients are **Harriet Miers**, of Locke Lord, for the Outstanding 50 Year Lawyer Award; **Frank L. Branson**, of The Law Offices of Frank L. Branson, P.C., for the Ronald D. Secrest Outstanding Trial Lawyer Award; and **Terry Bentley Hill**, of The Law Office of Terry Bentley Hill for the 2021 Terry Lee Grantham Memorial Award.

Heather Bell, of Bell Law Group; **Brooks Caston**, of Clark Hill Strasburger; **Laura Chavero**, of the Chavero Law Firm; **Jack Fan**, of the Fan Law Office; **Angelica Farinacci**, of Ford + Bergner; **Joshua Gold**, of Housing and Urban Development; **Nelson Hunt**, of Bisignano Harrison Neuhoff; and **Kimberly Loveland**, of Loveland Law Firm, were accepted into the State Bar of Texas' Real Estate Probate Trust Law section's 2020-2021 Leadership Academy.

Elizabeth Mack, of Locke Lord, has been named the Dallas Office Managing Partner.

Kirby B. Drake, of Klemchuk LLP, and **Hon. Rhonda Hunter**, of 303rd District Court, received the TexasBarCLE Standing Ovation Award for their exceptional contributions in 2020 to the State Bar of Texas' continuing legal education efforts.

Sonya D. Hoskins, co-founder and partner at Robinson & Hoskins, L.L.P, was elected as Large Section Representative to the State Bar of Texas Board of Directors for a three (3) year term.

ON THE MOVE

Roxanne Edwards and **Alexandria Risinger** have joined Bell Nunnally & Martin LLP as Partner and Associate, respectively.

Vishal Patel joined Cole Schotz P.C. as Member.

Scott Beckmen joined Bradley Arant Boult Cummings LLP as Partner.

Greg McAllister has joined the Rogge Dunn Group as Partner.

Wade Emmert and **Whitney Keltch Green** have joined Carrington, Coleman, Sloman & Blumenthal, LLP as Partners.

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

Focus | *Employee Benefits/Executive Compensation and Health Law*

Powers of Attorney in ERISA Employee Benefit Plans

BY KAREN SUHRE

Durable powers of attorney are useful when the principal party becomes disabled or incapacitated and is unable to manage his or her affairs. They are authorized under state law, such as the Texas Durable Power of Attorney Act. Among the many financial affairs that may need management in cases of disability or incapacity are the principal's retirement accounts and group disability, medical, and life insurance coverage.

The Employee Retirement Income Security Act of 1974, as amended (ERISA), regulates employee benefit plans that comprise many of these financial arrangements. Title I of ERISA generally covers employment-related 401(k) plans, pension plans, employee stock-ownership plans, and group health, life, and disability insurance programs (other than church and governmental employee benefit plans, plans that only cover self-employed individuals, and typical individual retirement accounts and insurance policies that lack employer involvement).

Title I of ERISA broadly preempts most state laws. For example, state laws regarding bequeathment of retirement funds at death, and the effect of divorce on prior designation of beneficiaries for employer-provided life insurance, are displaced by ERISA. A detailed explanation of the ERISA preemption analysis is more complex than this short space allows, but a few examples may shine some light on the possible problems with powers of attorney in ERISA plans.

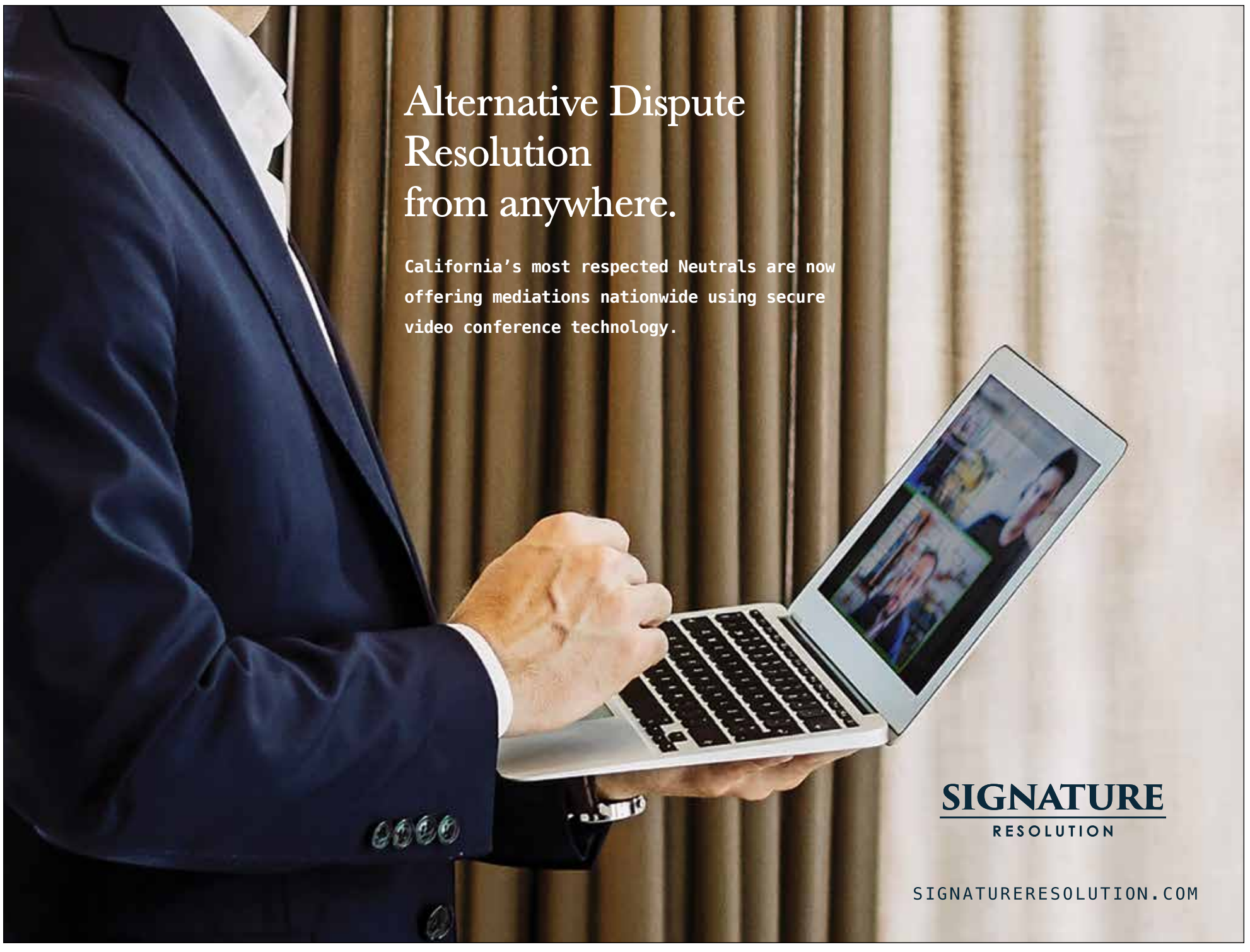
Consider a married 401(k) plan participant who wants to name his children as beneficiaries of his 401(k) account but, pursuant to plan terms that implicate ERISA, needs his incapacitated spouse's written, notarized consent to this designation. The participant presents a durable power of attorney to the plan administrator as authority to sign the consent on behalf of the spouse. Arguably, the power of attorney would be ineffective even under state law, as the plan's spousal consent requirement requires personal performance by the spouse. But more likely, the plan administrator would refuse to honor the power of attorney based on ERISA. Federal regulations, which apply not only for tax qualification purposes but also to ERISA's civil enforcement scheme, provide that the plan participant may sign on behalf of his incompetent spouse only if he is the legal guardian of the spouse. A durable power of attorney falls short of guardianship. In fact, under Texas law, permanent guardianship would terminate the power of attorney. The plan administrator would be well advised to decline honoring the power of attorney in this case, as it would conflict directly with ERISA's requirements and could jeopardize the plan's tax-qualified status and risk fiduciary liability under ERISA.

As another example, consider an employee who has become disabled and has a dispute over his eligibility for disability benefits under his employer's plan. A family member holds a durable power of attorney and seeks to assist the employee in prosecuting the administrative appeal of the denial of his benefits. ERISA regulations require that the plan maintain appeal procedures that allow an "authorized representative" to act on behalf of the employee. However, rather than specifically defining "authorized representative," the regulations allow the plan to establish "reasonable procedures" to determine whether the representative is properly authorized. The plan might face less risk in accepting the power of attorney here as compared to the prior example, but the plan here might adopt its own requirements to verify authorization, such as completion of a plan-specific form by the participant, with specific authorization to share protected health information typically needed to support a disability claim.

While ERISA plans generally cannot be compelled to honor powers of attorney, a plan administrator may choose to recognize a power of attorney in particular circumstances if it determines that it is appropriate. In a 2015 Northern District case affirmed by the 5th Circuit, a plan administrator did not abuse its discretion in allowing the holder of the power to withdraw plan funds to pay the plan participant's nursing home expenses, in part because the plan administrator thoroughly investigated the circumstances of a power of attorney, including talking to a police detective who vouched for the lucidity of the plan participant who executed the power of attorney.

Plan administrators must carefully consider whether honoring a power of attorney is consistent with ERISA in a particular case, and if a plan decides to honor a power of attorney in a particular case, it should document a prudent and reasonable basis for doing so. **HN**

Karen K. Suhre is a solo practitioner who limits her practice to employee benefits and executive compensation matters. She may be reached at ksuhre@erisatexas.com.



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INJURY LAW

More than a year into the pandemic, the legal profession perseveres and continues to serve clients and the rule of law. Thank you to our colleagues and the judiciary in keeping courthouses working across the country.

Our catastrophic personal injury and wrongful death cases get the benefit of the team - each case receives a personal approach. We love what we do.

Thank you for being part of our journey. We look forward to continuing to help others together.

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