

HEADNOTES

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Focus Labor & Employment/Immigration Law

Virtual Law Day



Thank you to DBA Presidents (left to right) Mark Shank, Rhonda Hunter, Rob Crain, Robert Tobey, Robert Jordan, AI Ellis, Frank Stevenson, Harriet Miers, and Paul K. Stafford for presenting a fantastic virtual Law Day program May 8 on the topic of "Adaptability in the New Normal."

Focus Labor & Employment/Immigration Law

Artificial Intelligence at Work

BY LINDSAY HEDRICK

Artificial Intelligence (AI) is an umbrella term used to describe the simulation of human intelligence processes by machines. While the concept of AI is not new (the term dates back to at least 1956), its application has exploded in recent years for several reasons: a deluge of data that AI feeds on; virtually infinite computer storage capacity at reduced cost; and the proliferation of specialized computer hardware that make big data processing cheaper, quicker, and more powerful.

What is AI?

The concept of AI, as autonomous machine intelligence, encompasses multiple subgroups:

Machine Learning refers to empowering computing systems to "learn" from data and then make a determination or prediction. Machine Learning is dynamic, evolving without human intervention. The algorithms improve in accuracy as they receive more data and validation. Real-world examples include when websites like Zillow predict the value of a house that is not for sale, or Netflix or Amazon make suggestions based on previous selections.

Neural Networks are a subset of Machine Learning. Neural Networks are trained to recognize data patterns. Practical applications include language or facial recognition technology.

Deep Learning is a subset of Neural Networks. Deep Learning involves complex, multilayered Neural Networks. A Deep Learning model is able to learn from its own method of computing. Self-driving cars

use Deep Learning.

AI is already ubiquitous in our lives—whether we are asking our digital assistant to calendar a meeting, using facial identification to unlock our phones, or checking Google Maps for the quickest route home. But AI is poised to become even more transformative and pervasive. Google CEO Sundar Pichai said AI is one of the most important endeavors of humanity, more profound than electricity or fire.

AI in the Workplace

AI has significant potential to relieve employers of the burden of time-intensive human resource functions and eliminate decisions that may be challenged as subjective favoritism or even illegal bias. Many employers are already using AI in various aspects of employment:

Recruiting/Hiring: AI can screen resumes by using algorithms that identify traits of the most successful job candidates. Employers may also use AI in videotaped interviews where verbal communication is evaluated, and facial recognition technology analyzes micro facial expressions and eye contact.

Training/Development: Chatbots, which use natural language recognition to discern speaker intent in order to respond to questions, are being used to help employees identify skills gaps, recommend training based on career interests, and suggest new internal job opportunities.

Information Dissemination: Chatbots are also being used to answer questions in real time about

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Emotionally Intelligent Co-Parenting In a Pandemic

BY DAWN RYAN BUDNER

As with all things parenting and co-parenting, there is no manual to answer the toughest questions. And now we are truly breaking new ground with parenting while working remotely through the first global pandemic. So let me offer a few co-parenting tips as you try to wave off that new spouse, child or pet who is pulling at your pajama top, asking for a snack or otherwise demanding your attention.

To be clear, this is not an information piece on CV-19. You can find that all over the internet and news channels. This article is about our children—the ones with superpowers against the coronavirus, for which we are endlessly grateful. And yet. . . . No really! We are grateful. But there's no school. And they are home. And excited by the novelty of school closing indefinitely, but a little scared watching adults sputter around looking nervous and confused.

Because this is a legal article, let's begin with something legal. If you are a divorced parent of minor children, your parenting time is governed by a possession order. The order may award you Spring Break 2020, or it may not. Your kids may have Spring Break this week, or maybe it was last week. Regardless, odds are that your orders don't spell out how parenting time is impacted when school, and life as we know it, comes to a screeching halt.

Thankfully, the Texas Supreme Court provided the answer in an Emergency Order issued on St. Patrick's Day. To summarize: follow your possession orders as written, based on the original school calendar. In other words, school closures do not impact parenting time. Seems pretty straightforward, but let's consider a hypothetical.

Say YOU are the parent who has the kids for Spring Break 2020. Say the kids' school sends an email stating: "Spring Break is extended indefinitely, maybe forever." In this hypothetical, you may promptly forward the school email to your former spouse, with the following message: "Dear former spouse, I regret to inform you that I will be keeping the children

indefinitely, because the school announced that Spring Break shall last forever." If you did send this message, I regret to inform YOU that a mea culpa is in order.

With the legal question answered, now what to do with this unexpected, potentially fun (extra kid time), potentially exhausting (extra kid time), 24/7 parenting time? First stop: let's do an emotionally intelligent parenting check-in. We are intimately aware of our own fears around THE PANDEMIC and what it means in our adult lives. Have we considered how it is uniquely affecting our children? In addition to absorbing parental stress, kids will have their own emotional reactions to the sudden cessation of school, extracurricular activities, playdates, and fun events (especially child-centered events, like birthday parties). These may include: (i) delight and/or despair (school is canceled); (ii) disappointment (missing fun events/activities); (iii) sadness (not seeing friends); (iv) concern (generalized threat to public health); (v) worry/fear (a family member or friend may get sick or die); (vi) obsessive hand-washing (never happen); and (vii) all or none of the above.

Emotionally intelligent parenting means communicating with your children authentically about what's happening in their world. It requires consideration for your children's individual temperaments and processing styles. It means telling them the truth with the right amount of information for their age levels, and reassuring them that healthy kids and adults are not at high risk for serious illness. And while you're at it, show your children how humans across the globe are working together to fight this illness. Countries are donating supplies such as test kits and masks. States and cities, businesses and communities are shutting down to prevent the spread of illness to our elderly and immuno-compromised citizens. Tell them you and other adults are working from home, creating new ways of collaborating remotely. And that YOUR family, like other families, will do its best to contribute, even if it requires personal sacrifice—because that is

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Need Help? You're Not Alone.













- Texas Lawyers' Assistance Program.....(800) 343-8527
- Alcoholics Anonymous.....(214) 887-6699
- Narcotics Anonymous.....(972) 699-9306
- AI Anon.....(214) 363-0461
- Mental Health Assoc.....(214) 828-4192
- Crisis Hotline.....1-800-SUICIDE
- Suicide Crisis Ctr SMU.....(214) 828-1000
- Metrocare Services.....(214) 743-1200

More resources available online at www.dallasbar.org/mentalhealthresources

All meetings and events subject to change in connection with the ongoing coronavirus situation. Please check www.dallasbar.org and DBA Online newsletter for current notices.

DBA COVID-19 RESOURCE CENTER

The DBA has formed a Coronavirus Task Force, which will provide members with up-to-date information in one location about legal ramifications of COVID-19, including CLE, legal research, and Dallas courts' COVID-19-related orders and procedures. Go to www.dallasbar.org/COVID19Resources to see the DBA's webpage on COVID-19.

 Announcements	 American Bar Association Resources	 Community Outreach	 Court Closures, Announcements, and Orders
 Dallas Law Firm COVID-19 Websites	 Government Resources	 Legal and Community Resources	 State Bar of Texas Resources
 Texas Lawyer Assistance Program	 DBA Webinars/Zoom Conferences	 White Papers & Articles	 Additional Resources



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CHECK OUT THESE UPCOMING CLES

- June 2** - Dallas Court of Appeals Civil/Criminal Case Update
- June 5** - Ethical Law Practice During a Pandemic: 4 Positive (and Permanent) Changes You Want to Make Now
- June 10** - Recent Developments in Bankruptcy
- June 12** - New Expectations for Corporate Compliance Program & Ethical Implications for Attorneys
- June 15** - Parental leave
- June 18** - Small Estate Affidavits CLE
- June 19** - How Lawyers Can Use Social Media & Technology: The Legality & Ethical Ramifications

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President's Column

Respecting Our Independent Judiciary and the Role of Lawyers

BY ROBERT TOBEY

Judges form the third branch of government. The general public has a much poorer understanding of the judicial branch and what it does than the executive and legislative branches. Most people go their entire lives with only brief encounters with the judicial branch, mostly through municipal or family courts. Many of our fellow citizens are unable to explain the different roles of a justice of the peace and the Supreme Court of Texas. More concerning, many people have no concept about the importance of the rule of law (or even what that phrase really means) and the independence of the judiciary.

With deep divisions in our society, and the increasingly partisan nature of exchanges over issues, attacks on our judiciary grow more frequent and more intense. And because of the close relationship with lawyers to our judicial system, many of these attacks include the entire legal profession as well.

The rule of law separates this country from so many others around the world. Without it, our freedom and our way of life cannot endure. And the rule of law depends largely on respect for the judiciary. As lawyers, all of us must do what we can to foster respect for the rule of law and the role the judiciary plays in upholding it. And that begins by helping our fellow, non-lawyer citizens understand the importance of an independent judiciary and its role in our constitutional system.

What judges do is both important and difficult. Many of the most divisive issues in our society—capital punishment and abortion, to name just two examples—end up in our courts. Every day, judges across the country make difficult decisions in cases affecting child custody, incarceration, and other matters that have very real consequences for the lives of millions of Americans. Nothing about this is easy. But all of it is important. And the ability of citizens to get decisions from neutral arbiters in a forum governed by legal rules and principles is integral to our system of government and our way of life.

Every one of these decisions results in a winner and a loser. And in cases involving “hot-button issues,” the decisions may implicate deeply and passionately held ethical, religious, social, or political opinions held by many thousands of citizens. Unfortunately, with ever greater frequency, judges’ decisions are being met not with criticism of judicial philosophy, legal reasoning, or application of precedent (all of which are fair game for criticism) but with accusations of political bias or, even worse, outright political corruption.

To be sure, not all of these attacks are borne of ignorance concerning the role of the judiciary. Sadly, some personal attacks come from lawyers. But most do not. And most result from fundamental misconceptions about the judicial function.

For example, most people have no conception of the administrative side of being a judge—for example, the “simple” (and it definitely isn’t) task of just making sure citizens can get access to the judiciary during this public health crisis. Here in Dallas, our judges have done a magnificent job dealing with the COVID-19 crisis.

Historically, courts and the legal profession have been perceived to be behind the times when it comes to the use of technology. Not anymore! Within days of the entry of shelter in place orders in

March, our local judges were holding virtual hearings using Zoom and Microsoft Teams. At the time of this article, judges are working to figure out how jury trials can be held when the concern about the health and safety of the public is of paramount importance. The judges have made it clear that the pandemic will not stop the wheels of justice from turning.

Their success is something that all of us—liberal and conservative, democrat and republican—should applaud. And, more important, we should be explaining it to our non-lawyer clients and friends to help them appreciate the extraordinary efforts of Dallas judges to ensure that the halls of justice remain open to those who need them.

Additionally, we can and should do more to defend our judges when they come under attack for deciding difficult cases. After all, the ethical rules governing judges generally prevent them from defending themselves. We must step into the void and respond to unfair attacks on judicial integrity. Lawyers and judges are in this together. If lawyers do not defend the role of the independent judiciary, then who will?

At the Dallas Bar Association, part of our mission in part is to serve, support, and promote good relations with the judiciary and to improve the administration of justice. We need to take this mission statement seriously and do what we can to support and defend our judiciary from unfair attacks.

So, what can we do?

First, in responding to judicial decisions, act like a lawyer. If you believe the decision is wrong *legally*, then explain why you believe it is wrong *legally*. Don’t chalk it up to personalities, politics, or corruption. Attacks spread like wildfire in this age of social media—particularly in a time of high stress, such as with the current pandemic crisis. If our fellow citizens believe that we as lawyers no longer have faith in the integrity of the judiciary, they cannot help but lose faith as well.

Second, respond when people attack a judge unfairly. For me, this comes up most often in the family law context when someone talking to me about their case is convinced the proceeding and the system are rigged and the judge is in on it. All of us as lawyers hear stories from people who have lost their case and blame it on the judge being “in the other side’s pocket.” We need to rebut these perceptions at every turn. I love seeing lawyers defend the judicial process in op-ed articles in the newspaper following an attack on a member of the judiciary. There was no better defense of the independence of the judiciary than the one given by Justice Roberts in late 2018.

Finally, if you are active in social media, be a source of good, reliable, and accurate information—not disinformation. Our fellow citizens look to us, as lawyers, as reliable sources of information about the law. Nothing discourages me more than when I see a member of the legal profession spreading inaccurate information about the legal system on social media for political purposes.

Together, we can make a difference. I wouldn’t have wanted this position if I didn’t love lawyers, judges, and the judicial system. Together, let’s work to ensure the continuing viability and independence of our judiciary.

Robert

HEADNOTES

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Focus | Labor & Employment/Immigration Law

BigLaw and Human Rights? Meeting the Surge of Asylum-Seekers

BY LUIS R. CAMPOS

In 2018 BigLaw discovered the practice of human rights law. The country witnessed unprecedented numbers of Central Americans arriving at our southern border. The majority sought the protection of our asylum laws, both for themselves and for their children, who came in tow. As a group, these arriving aliens were quite different from others. They purposely sought out border enforcement officers, rather than evading them, so that a formal request for asylum could be made. What ensued was alarming. Children were separated from parents and sent to distant shelters, while parents were criminally prosecuted [under a zero-tolerance policy] and subjected to questionable and lengthy detention.

It is in this context that BigLaw took on the pro bono representation of this vulnerable population, ensuring it would have proper access to justice. My firm was one of many law firms that answered the call to volunteerism by taking on more than 20

clients. Our goals were threefold: pursue the reunification of families; challenge the conditions and duration of detention—in federal court, if necessary, to secure the release of clients; and provide legal representation in removal and asylum proceedings. Firms also recognized the need to protect the rule of law (*that is*, its fair and consistent application), as well the constitutional and legal rights to which asylum-seekers are entitled. There were many accounts in the press and by immigration/human rights advocates not only of the harsh conditions to which asylum-seekers were subjected, but also of the deprivation of due process in the administration of our immigration laws. BigLaw was compelled to join the fight.

Asylum-seekers were not the only beneficiaries of BigLaw's commitment, however. The firms also derived significant benefits. At my firm, cadres of enthusiastic and highly talented young lawyers formed asylum teams. They were given significant responsibilities such as conducting research; drafting pleadings; interview-

ing clients; and occasionally appearing in immigration court. From an attorney development perspective, the young lawyers (and the firm) clearly also gained much. Initially, the learning curve could be steep, as lawyers came from diverse practice groups such as corporate, real estate, business litigation, and white collar. Fortunately, we were able to tap the expertise of our non-profit partners, excellent organizations that have traditionally occupied the asylum and immigrant rights space. These strategic partnerships were essential to securing effective and successful representation. Since these organizations can often be resource-deprived, BigLaw also helped fulfill a critical need, particularly as the surge of asylum-seekers overwhelmed the non-profits. Interestingly, many of our institutional clients also expressed enthusiasm for our asylum work. Some joined our asylum teams by offering legal and translation support, as well as direct assistance to asylum-seekers, who faced a precarious existence while

their asylum proceedings continued.

In June 2018, the managing partners of more than 30 large law firms signed on to an important op-ed in the *New York Times*. The authors, the managing partners at two of the largest law firms in the United States, titled the piece, *The Law did not Create this Crisis, but Lawyers Will Help End it*. My firm and I have had the privilege of being one of many who have answered this call. And the work continues. My central purpose in this essay is to invite more lawyers to join our network, a newly formed bulwark. Our work is urgent and necessary to protect the law: both for humans in need and for the integrity of our legal institutions.

For other opportunities to get involved, take a look at the Community Legal Resources on the DBA website at www.dallasbar.org/index.cfm?pg=community-legal-resources. **HN**

Luis R Campos, Counsel (Immigration and Nationality Law), Haynes and Boone, LLP. The opinions expressed here are solely the authors. He can be reached at luis.campos@haynesboone.com.



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Best Practices for Employers and Departing Employees

BY ALYSON BROWN

Employers and employees alike face legal challenges when an employee leaves a business, whether through termination or voluntary resignation. While a variety of legal issues can arise during the course of employment, departure comes with its own specific risks.

For employers, primary challenges revolve around protecting proprietary information and preserving the goodwill of the business, including customer relationships. Employees, on the other hand, want to protect their personal information, continue to earn a living, and ensure they “leave the right way” without burning bridges or undermining their professional futures.

Protecting Trade Secrets & Proprietary Information

Employers need to secure proprietary information and trade secrets. Recommended practices include:

Require nondisclosure agreements to protect confidentiality of trade secrets and confidential information with post-employment restrictive covenants regarding competition and solicitation of customers and employees.

Implement clear device and IT policies and track any company equipment or account access that is provided to each employee.

Ensure employees understand that their work product is property of the company and cannot be removed upon termination of employment.

When employees depart, an exit

interview should be conducted, with verbal and written reminders of any continuing obligations to the company. Exit interviews should also be used to document device inventory, ensure all company property is returned, and terminate access to company email accounts and servers. Employees who work remotely or travel often have company data on thumb drives or forwarded to personal email accounts. The exit interview should include questions about these practices, and involve an IT employee when necessary to ensure any downloaded or forwarded data is deleted from personal devices in a forensically sound manner.

Employees should avoid storing personal data on company devices. When examination of devices upon departure reveals deletion, downloading, or forwarding activity, it is easy for a company to assume the employee is attempting to take proprietary company data. Even if the employee is only taking medical records, tax returns, and vacation pictures, the simple act of unsupervised deletion or downloading can lead to costly computer forensics and possible litigation. Avoiding this issue in the first instance is recommended. If the employee does have personal data on company devices, the data should be identified for a collaborative remediation with company IT staff or an outside resource.

Many companies have Bring Your Own Device (BYOD) policies that allow employees to work on their personal laptops, tablets, and smartphones in addition to (or in lieu of) company-issued devices. These policies are

increasing in popularity as remote and telework have become more commonplace. When implementing BYOD programs, several legal risks must be taken into consideration, including confidentiality and employee privacy. Personal information and data should be separated from business information. One way to accomplish this is with mobile device management (MDM) technology. Consistent protocols should be implemented for identification and removal of company data from personal devices.

Use of Restrictive Covenants to Protect Business Interests

Non-solicitation agreements can protect a company’s human assets: personnel and clients. They are designed to prevent employees from soliciting the company’s clients or employees prior to (or for a certain period after) their departure. Non-competition agreements are viewed under the same framework as non-solicitation agreements, so reasonableness is key.

To be enforced by Texas courts, non-solicitation and non-competition agreements must be reasonable in duration, geography, and the scope of activity restrained. These agreements must be carefully drafted to avoid unreasonable or overly broad restrictions, and must demonstrate the legitimate interest of the employer in protecting its business and goodwill. “One size fits all” agreements should be avoided, and restrictions should be tailored to the

employee’s specific role and geographic responsibility. These agreements should be drafted in conjunction with nondisclosure and confidential information provisions to ensure the restrictive covenants are ancillary to an otherwise enforceable agreement.

Mitigating Risk with Collaboration and Transparency

For employers, protecting the proprietary information should be a concern from an employee’s start date. The onboarding process provides a perfect opportunity to set expectations and review and sign policies designed to protect the company from common sources of litigation. Communication and consistent enforcement regarding confidentiality policies throughout employment is crucial. Finally, reinforce and remind departing employees of their legal obligations to the company during exit interviews.

Employees should carefully review all the agreements signed and clarify any continuing obligations that will continue post-departure. Bulk downloading and deletion of data is a recipe for litigation that should be avoided. Transparency regarding identification of personal data and removal in collaboration with company IT resources can minimize a departing employee’s risk. **HN**

Alyson Brown is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. She practices at Clouse Brown PLLC and can be reached at abrown@clousebrown.com.

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Column | Ethics

A Failure to Communicate (Properly)

BY PATRICK MAHER

Proper communication is crucial to all aspects of law. There, however, are some unique considerations within the Labor and Employment Law (L&E) context. To paraphrase *Cool Hand Luke*—the best guy movie of all time (sorry *Great Escape* fans)—too often “What we got here is a failure to communicate [properly].”

One frequent situation involves clients asking outside counsel to conduct an internal investigation or even deliver the results of that investigation. These requests are loaded with ethical implications.

When outside counsel personally conducts the investigation, counsel may become a fact witness. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court created an affirmative defense to a hostile environment. In *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110 (Cal. Appl. 1997), however, a court held that the assertion of such an affirmative defense constituted a

waiver of the attorney work product privilege for the attorney’s investigative notes. Such waiver may not be absolute. See, e.g., *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988) (upholding limited work product protection of attorney’s mental impressions to the extent severable from underlying notes of investigative facts.) It remains the better practice to have someone other than outside counsel conduct the investigation if possible.

Sometimes the employer wants the attorney to deliver a disciplinary letter to an employee on the employer’s behalf. If the attorney actually signs the termination letter, the attorney exposes him or herself to privilege waiver. The termination is an operative document and the attorney may be asked, through deposition, to explain the basis for that termination. Worse yet, the attorney may expose him or herself to a disqualification motion.

In *Ayus v. Total Renal Care, Inc.*, 48 F. Supp.2d 714 (S.D. Tex. 1999), for example, outside counsel drafted warning and termination letters to a physician-employee

(and former co-owner of the clinics in question). Although the opinion is not entirely clear, it appears that the letters were sent out over the attorney’s signature. After the physician-employee was fired, he sued his former employer. He also moved, at the express direction of the court, to disqualify the attorney who had authored the critical letters on the grounds that the letter made the attorney a potential witness. When the underlying physician-clients could not adequately explain the grounds for termination set forth in the termination letter, former federal Judge Kent held the attorney could be deposed and disqualified under the attorney-witness rule set forth in Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct (TDRPC). *Ayus* may be an outlier opinion because it was written by Judge Kent, but it illustrates the necessity of making sure client/witnesses fully understand and can explain any letter drafted by counsel.

TDRPC Rule 4.02’s prohibition on *ex parte* contacts with opposing parties represented by counsel is also of special concern in the L&E context. Rule 4.02(c) specifies that this Rule encompasses (a) persons *presently* having managerial authority for an organization or governmental entity, and (b) other persons *presently* employed by an organization or entity whose conduct or omission could result in vicarious liability. Comment 4 to the Rule makes it clear that the prohibition does not extend to *former* employees or employees. This opens up an employer’s former managers and employees

to contact by a plaintiff’s counsel. *In re Users System Services, Inc.*, 22 S.W.3d 331 (Tex. 1999), illustrates that the client alone determines whether he or she is still protected from *ex parte* contacts. In that case, multiple defendants were initially represented by the same counsel. One of those defendants decided to defect, secretly wrote opposing counsel a letter stating he had fired his attorney, and ultimately met with opposing counsel and agreed to provide testimony against the co-defendants in exchange for his own nonsuit. The Court of Appeals held that this was an improper *ex parte* contact. The Supreme Court of Texas, however, reversed finding that a client is free to discharge an attorney at any time and that opposing counsel may rely on the former client’s statement of nonrepresentation.

Finally, TDRPC Rule 4.03 imposes a special obligation when dealing with unrepresented parties, including present or former employees who may fall outside of Rule 4.02. In such a case, the lawyer may not create the impression that he or she is a disinterested party and must dispel any misimpression in this regard. Simply put, the attorney should clearly identify that he or she is conducting an investigation on behalf of the client. The State Bar has specifically applied this rule to present and former employees of a corporation. Ethics Opinion No. 461, 52 Tex. B.J. 52 (Jan. 1989). **HN**

Patrick Maher is Senior Counsel at Ogletree, Deakins, Nash, Smoak & Stewart, P.C. He can be reached at patrick.maher@ogletree.com

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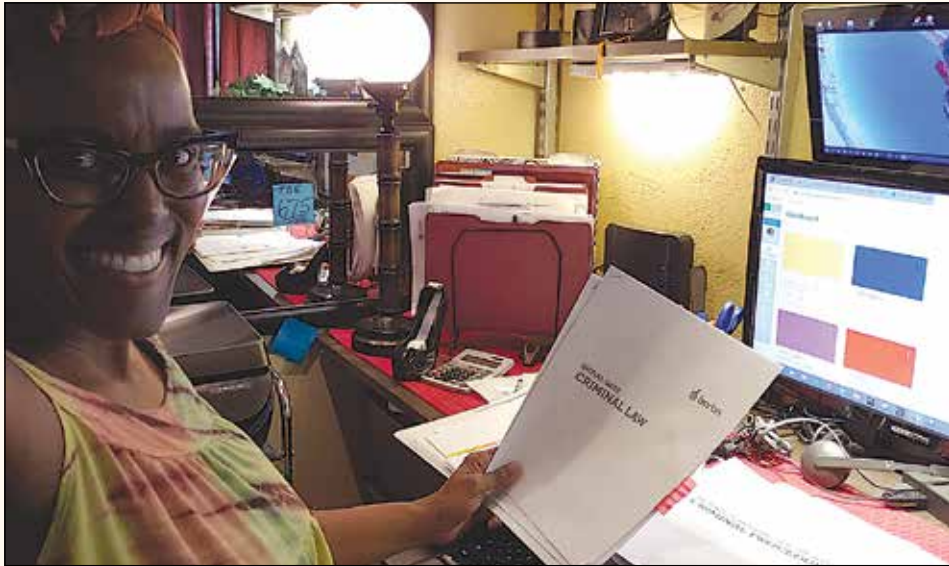
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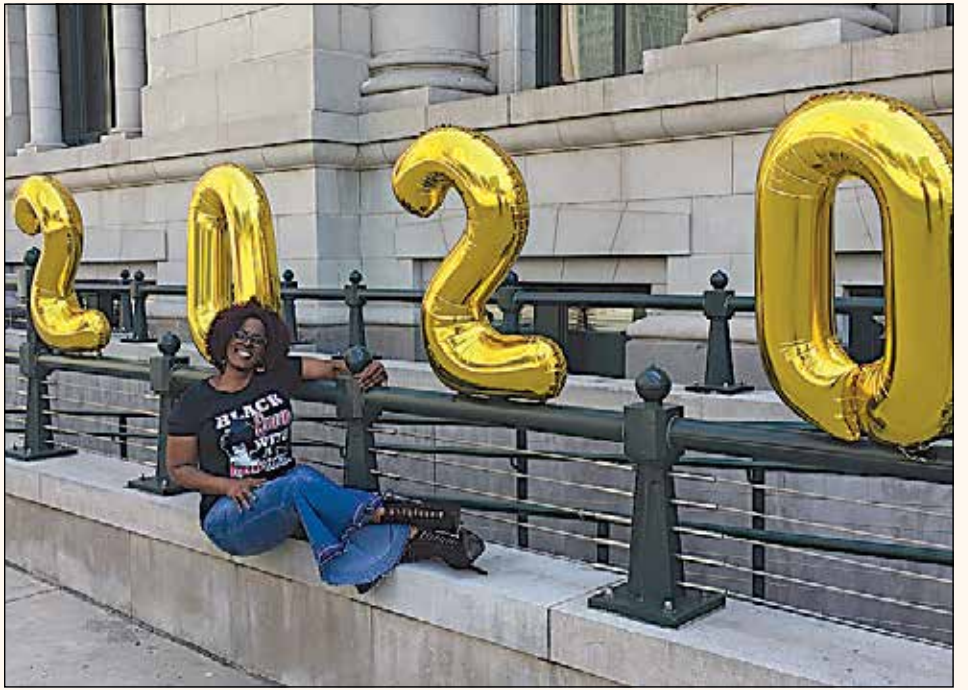
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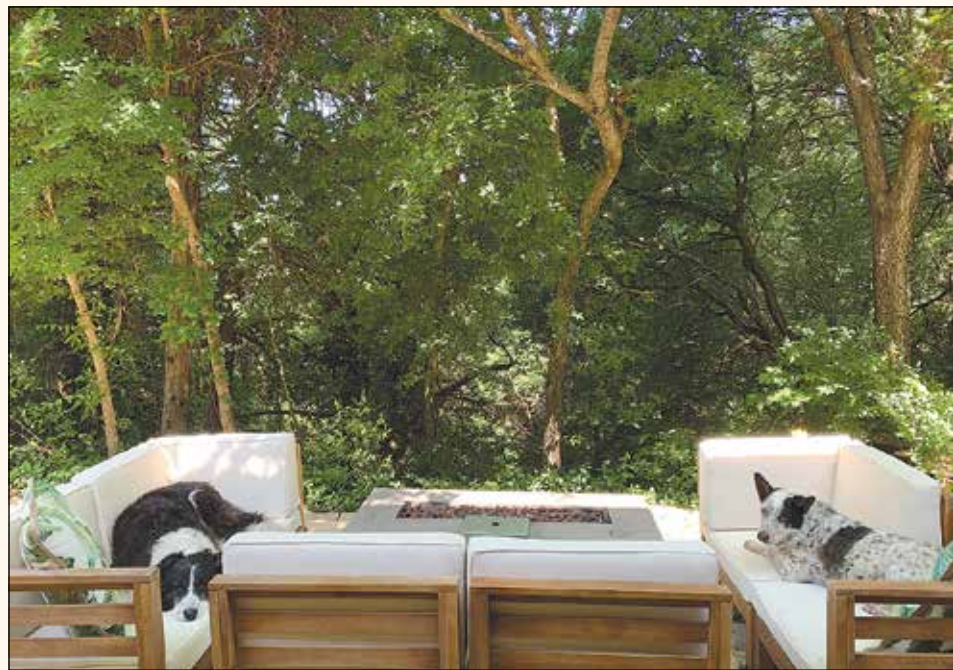
Rebekah Brooker's social distance meeting with a client to execute his estate planning documents.



Gary Lawson, as part of his non-profit Independence Corps, donates Hand Sanitizer to Irving Fire 2.



Gwen Bennet, recent UNT Dallas College of Law graduate



Lindsey Rames' Covid "office" and "coworkers" Mavi and Chloe



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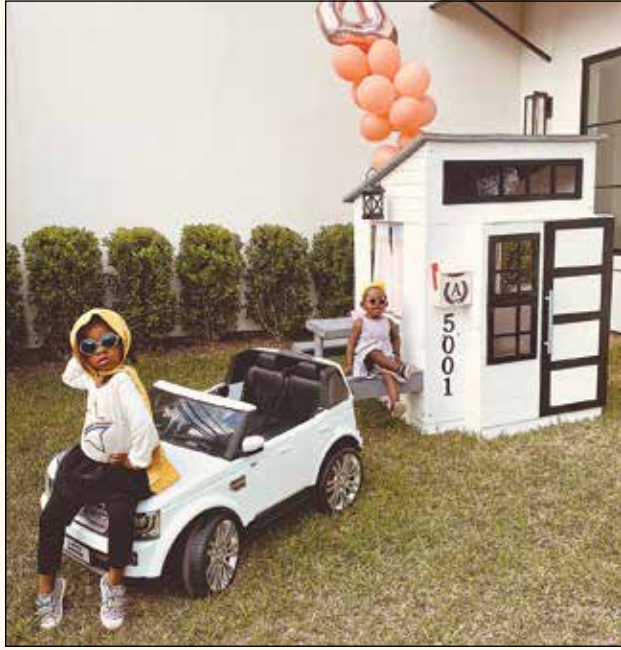
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Aria Thomas, celebrating her 4th birthday with her sister Alana, 22 months



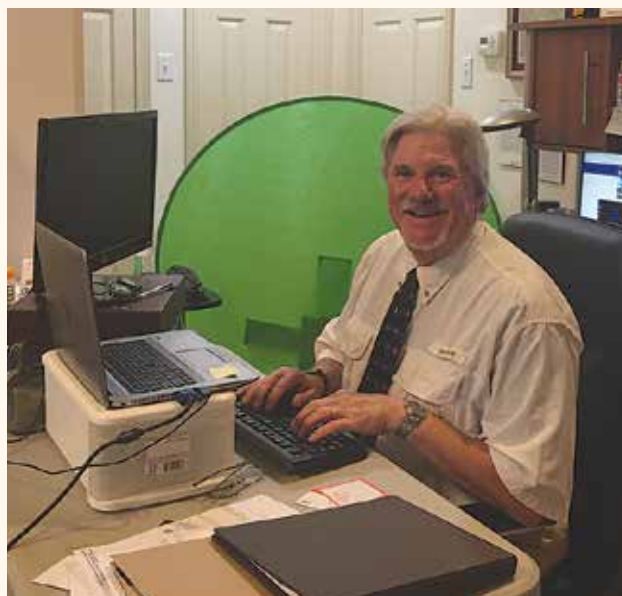
DBA Executive Director Alicia Hernandez and Cookie working from home



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Cheryl Camin Murray and 4-year-old triplets Piper, Tess, and Connor



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Focus | Labor & Employment/Immigration Law

Just Say “No” to Collusion During COVID-19 Crisis

BY SCOTT MCDONALD AND JACQUELINE JOHNSON

On October 20, 2016, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) Antitrust Division issued Antitrust Guidance for Human Resources Professionals addressing concerns about information sharing and hiring agreements between companies. The FTC and DOJ included the following among “red flags” for antitrust scrutiny: agreements between companies not to solicit or hire each other’s employees (no-poach agreements) and the sharing of compensation information between companies.

The FTC and DOJ recently adjusted the antitrust guidelines to facilitate collaboration between competing companies where the information sharing and collaboration activity has a legitimate purpose like making the workplace safer for employees or helping to provide a resource for public health purposes (like joint efforts to produce COVID-19 related protective gear). However, such adjustments should not be seen as a reversal on their stance on mutual no-hiring provisions, or a relaxation on the prohibition against information sharing

on things like wages, benefits, or terms of conditions of employment that could improve a company’s competitive position compared to others.

In this regard, on April 13, 2020, the FTC and DOJ issued a joint statement warning employers that they are not relaxing previously issued guidelines prohibiting anticompetitive behavior by employers. Among other things, the joint statement says:

The Agencies are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked. For years, the Agencies have challenged unlawful wage-fixing and no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data. Moreover, the Division may criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements. Even absent a collusive agreement, the Bureau may pursue a civil enforcement action against com-

panies and individuals that invite others to collude.

The Statement’s reference to employers who “invite” others to collude can be construed as a warning to employers not to engage in efforts to collect and share competitive information regarding things like compensation plan adjustments during the COVID-19 pandemic.

Reacting to COVID-19 response planning by companies, the FTC and DOJ issued a Joint Antitrust Statement Regarding COVID-19 providing guidance and an expedited review process for approval of collaboration projects that have a legitimate purpose. www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 Much of the original COVID-19 related guidance focused on collaboration between health care providers, and an expedited process for approvals that is projected to be much faster than normal (a goal of seven days). However, in this guidance the agencies also emphasized that they would still prosecute for illegal “agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct.” The most recently issued guidance echoes and emphasizes that message.

Consequently, nothing in the guidance issued by FTC and DOJ during the COVID-19 pandemic withdraws or suggests any suspension of FTC and DOJ prohibitions to information sharing among employers with respect to wages, benefits, or other terms and conditions of employment or to no-poach

agreements. See the DOJ/FTC’s Antitrust Guidance at www.justice.gov/atr/file/903511/download and Antitrust Red Flags for Employment Practices at www.justice.gov/atr/file/903506/download. Accordingly, efforts to collect and share information on what competitors are doing in areas like wage reduction programs, benefit programs, paid leaves of absence, furloughs, and the like, is likely to remain a problem. Likewise, agreements between companies in contexts such as settlement of unfair competition litigation may continue to receive scrutiny from FTC and DOJ.

It is possible to engage in some market analysis and benchmarking through data collection shared within industries, but in order to pass muster under FTC and DOJ guidelines, this would normally need to be data acquired, compiled, aggregated, and anonymized by a third party. However, the nature and type of permitted collaboration based on FTC and DOJ guidance has been a source of confusion and a subject of continued discussion in the business and legal communities. Consequently, before participating in data collection and sharing activities that concern any of the subject areas that are competitive in nature, employers are encouraged to seek qualified legal advice. Further, attorneys are well-advised to remind their clients of the antitrust issues surrounding discussions among business which might not be at the forefront of their minds amidst the myriad of COVID-19 complications and issues. **HN**

Scott McDonald and Jacqueline Johnson are Shareholders at Littler Mendelson, P.C. and can be reached at smcdonald@littler.com and jjohnson@littler.com, respectively.



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Focus | Labor & Employment/Immigration Law

Social Media Contacts—Who Owns Them, Employer or Employee?

BY JASON WEBER

In today's digital age, employers have become increasingly reliant upon technology and the myriad of third-party platforms that are available for building new clientele and maintaining existing relationships. The era of tangible information, such as hard copy rolodexes, has been superseded by the intangible—virtual business cards and social media contacts. While the practical benefits of electronically stored information are undeniable, the ownership and confidentiality of such information can become blurred—particularly when employers allow (or encourage) employees to utilize personal devices and social media accounts (e.g., LinkedIn, Facebook, Twitter) to develop and maintain customer contacts.

Often, the disconnect between an

employer's and employees' competing perspectives does not become apparent until the employment relationship is severed and assumptions are challenged. On the one hand, employers often assume that their unique definitions of "confidential," "proprietary," or "goodwill" automatically capture all connections an employee makes or enhances while employed (regardless of the medium used). Conversely, employees often equate ownership of their personal social media accounts with inherent ownership of all contacts maintained on their accounts (regardless of when or how the connection was made). Inevitably, one or both parties will realize that their assumptions may not be as defensible as they once assumed.

While Texas courts have not expressly addressed the ownership of social media contacts, other jurisdic-

tions have confronted this issue by examining whether such information (1) is indeed "confidential;" (2) qualifies as a "trade secret;" or (3) was developed utilizing the employer's resources/goodwill. Each of these issues have been developed by Texas jurisprudence in other contexts.

In Texas, information is generally "confidential" only if it is actually *kept* confidential—meaning the employer must demonstrate efforts to actively safeguard information it deems confidential. The Texas Uniform Trade Secrets Act (TUTSA) governs the existence of trade secrets under Texas law and dovetails with this concept. Under TUTSA, all forms of tangible and intangible information (including compilations) can potentially qualify as a trade secret if: "(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6).

While employers would generally be hard-pressed to demonstrate that the mere identities of social media contacts are confidential or amount to trade secrets (if publicly accessible), the analysis can potentially change if employees are required to keep their connections private. Similarly, other aspects of social media accounts (e.g., private messages, employer-provided methodologies for targeting connections) could potentially qualify as confidential/trade secrets—again, turning on whether the information is indeed confidential and derives independent economic value.

Even if the confidentiality of such material is subject to a legitimate dispute, the actual ownership and control of social media accounts (and the underlying contacts) remains a separate fact-specific issue. By default, social media platforms typically regard the user (i.e., employee) as the owner of the account. For example, LinkedIn's User Agreement (Section 2.2) states: "As between you and others (including your employer), your account belongs to you. However, if the Services were purchased by another party for you to use (e.g., Recruiter seat bought by your employer), the party paying for such Services has the right to control access to and get reports on your use of such paid Service. However, they do not have rights to your personal account."

In theory, an employer and employee could potentially modify ownership or control by private agreement (assuming other general contract principals are satisfied)—particularly in instances where the employer has sponsored or paid for the account. Similarly, an obligation to purge employer-generated connections upon separation of employment could also be created by private agreement.

Finally, when analyzing the aforementioned issues, practitioners should also consider the implications of applicable non-solicitation and/or non-compete covenants, which may also impact a departing employee's ability to interact with various social media connections. Documenting pre-existing social media connections (which can often be retroactively generated by the social media platform) is also an important consideration for both the employer and employee—either to demonstrate or disprove a pre-existing relationship. **HN**

Jason Weber is a Partner at Crawford, Wishnew & Lang PLLC. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and can be reached at jweber@cwl.law.

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Texas Litigators' Guide to Departing Employee Cases

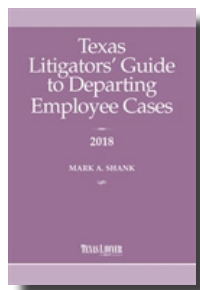
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Emotionally Intelligent Co-Parenting In A Pandemic

CONTINUED FROM PAGE 1

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your children, share something like the template below to create consistency between the two homes.

Why go to all this trouble? Because your kids are facing this new, weird world right beside you, and kids feel safer in a structured environment. As it happens, they also feel safer when their parents interact without emitting contempt into the air around them. Remember, that stuff is contagious **HN**

Dawn Ryan Budner is Co-Managing Partner at Calabrese Budner and may be reached at dawn@calabresebudner.com

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Focus | Labor & Employment/Immigration Law

Puff, Puff, Passed: Marijuana Laws & Employment Law Implications

BY JENNIFER JONES
AND OLESJA CORMNEY

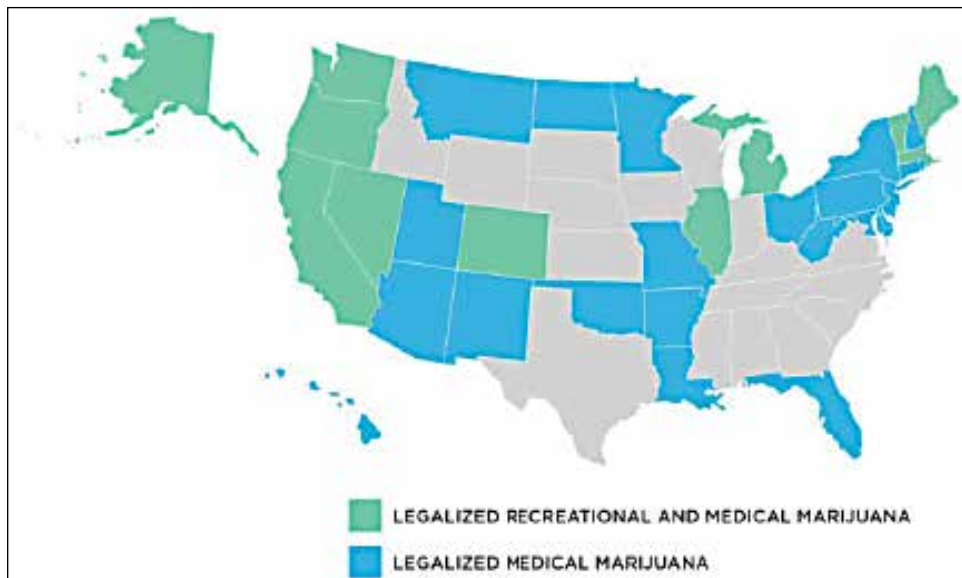
Overview of Varying Marijuana Laws

Although marijuana use is still illegal under federal law, as the below chart indicates, over half of states in the U.S. permit marijuana use, either medically or recreationally. Employers need to be mindful of these laws because they could impact business operations.

While Texas is currently in the “gray”, it is one step closer to joining the 34 states where medicinal marijuana is legal after state legislators passed a new law to expand the conditions that can be treated with medicinal cannabis. Although the law narrowly defines which conditions can be treated with medicinal marijuana, it is a significant expansion.

There is also a trend that involves limitations on pre-employment marijuana testing. For example, on January 1, 2020, a Nevada law took effect barring employers from considering a pre-employment marijuana test result, and beginning May 10, 2020, a New York City law will prohibit employers from conducting pre-employment marijuana tests. However, both laws have exceptions for safety-sensitive positions and jobs regulated by federal programs that require drug testing.

In addition, employers should be aware that more states are passing laws that



prohibit discrimination against employees who are authorized medical-marijuana patients or caregivers of patients. In those states, employers may be required to engage in the interactive process to accommodate the use of medicinal marijuana off duty. Although employers do not have to accommodate on-the-job marijuana use or intoxication, they may have to grant time off or alter shifts while the employee is medicated.

The takeaway here is that before employers make any employment decisions related to marijuana use, they should review any relevant state laws on the subject. Let's look at some marijuana-related employment lawsuits to help illustrate

the importance of the foregoing point.

Marijuana-Related Employment Lawsuits

Marijuana-related employment lawsuits are on the rise as more workers who have been fired, disciplined, or denied a job opportunity over their marijuana use are availing themselves to the judicial system to challenge the decisions. This, in turn, results in employers balancing the risk of litigation against the possibility of impaired employees hurting someone on the job, damaging the business, or even something worse.

In the past, employers operating in states where marijuana use was legal had the discretion to not hire employees who used marijuana, because marijuana was—and still is—illegal under federal law. However, this discretion is not that clear anymore.

Some courts have started to rule in favor of employees who use medicinal marijuana in employment cases. For

example, a court in Rhode Island ruled in favor of a job candidate who sued her potential employer because she was not hired after disclosing her medicinal marijuana use. A court in Massachusetts found in favor of a medicinal marijuana user who lost her job for failing a drug test and held that employees can seek reasonable accommodations for medical marijuana use under the state's disability discrimination law. Moreover, a Delaware state court held that a medical marijuana user may proceed with a lawsuit against his former employer after his employment was terminated due to a positive post-accident drug test result for marijuana.

Notably, California's highest court held that an employer can terminate employees or not hire potential employees who use marijuana for medicinal or recreational purposes, and an employer does not have to provide accommodations for an employee's medicinal marijuana use.

While the employer-employee landscape in this area is being shaped by the courts through litigation, employers walk a fine line between new laws and existing obligations.

Conclusion

Given the recent trends, employers should expect another wave of marijuana legislation this year (unless COVID-19 slows that down). As shown above, states are split on employer requirements regarding marijuana laws, and employers should seek legal guidance before deciding not to hire potential employees or terminate current employees for their marijuana use.

HN

Jennifer Jones and Olesja Cormney are Managing Counsel at Toyota Motor North America, Inc. They can be reached at jennifer.n.jones@toyota.com and olesja.cormney@toyota.com, respectively.

DVAP's Finest



PATRICK QUINE

Patrick Quine is an associate with Hunton Andrews Kurth LLP.

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

Hunton Andrews Kurth has a robust pro bono program and encourages attorneys to get involved. I attended a few DVAP intake clinics as a first-year associate and eventually found the courage to start taking cases on my own. DVAP also provides mentors for attorneys, who have been a great resource. They help enable me to handle cases that are outside of my regular practice areas.

2. Describe your most compelling pro bono case.

One of my most compelling cases involved a client with a leaking roof which if left unrepaired, could have caused a number of problems. My client was unable to make repairs because the title of the house was in the name of his deceased mother. I helped him probate his mother's will to transfer the title to his name.

3. Why do you do pro bono?

I think it is so important to engage with, and serve, the communities in which we live, and to help those who may not have the means or access to the resources necessary to help themselves. I am thankful to have the opportunity to be there for those who have nowhere else to turn, and that my firm supports me in those efforts. Providing pro bono legal services to the community is so important and not only helps my clients, but also enriches me personally.

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

I think pro bono work helps build character. When you do something for others without expecting anything in return, it is not only a gift to them but also turns out to be a gift for you. I may have a long way to go, but pro bono work is at least helping me head in the right direction, while helping others at the same time.

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

I mostly assist the elderly, so I hear some really incredible life stories and learn so much from our work together. It is history from the source and I value the relationships I have developed with each and every client.

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LAW DAY 2020

Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100

Each year, the American Bar Association sponsors Law Day, and regional bar associations, including the Dallas Bar Association, host various events, programs and contests to commemorate the chosen theme. Law Day not only educates students and citizens about our government, but also the legal system itself. One of its main goals is to focus students' attention on important constitutional principles.

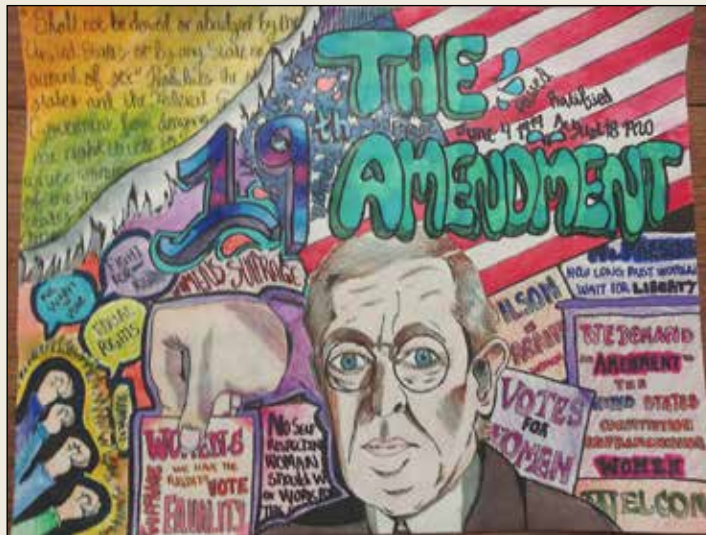
As part of the DBA's Law Day celebration, the association sponsors essay, art and photography competitions for Dallas ISD students in grades K-12. This year's awards were presented virtually, as was the DBA's Law Day Luncheon. Here are some of this year's winning entries, which depicted the Law Day theme of "Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100." Congratulations to all the winners. Not pictured: Olivia Darnall, William B. Travis Academy, First-Place: (6th-8th Essay Contest).



Seyry Moreno, Carter High School
First-Place (9th-12th Photography)



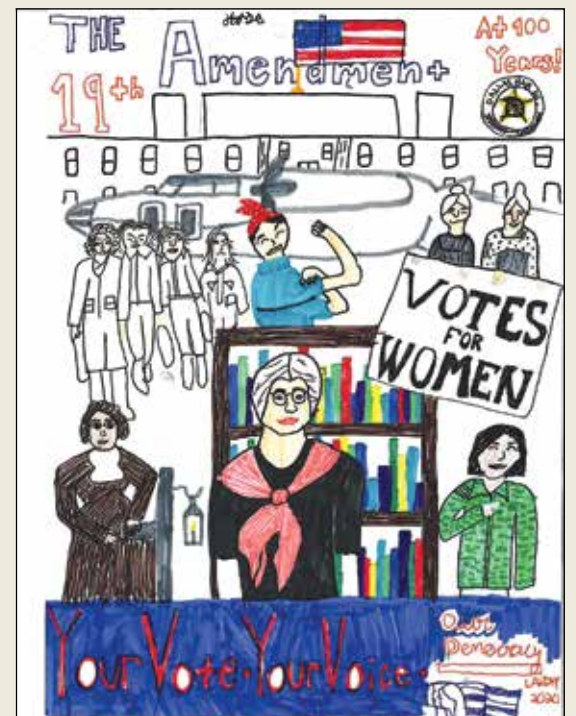
Alana Arteaga, H.W. Longfellow CEA
First-Place (6th-8th Photography)



Nivia Perez, Sam Tasby Middle School
First-Place: (6th-8th Poster Contest)

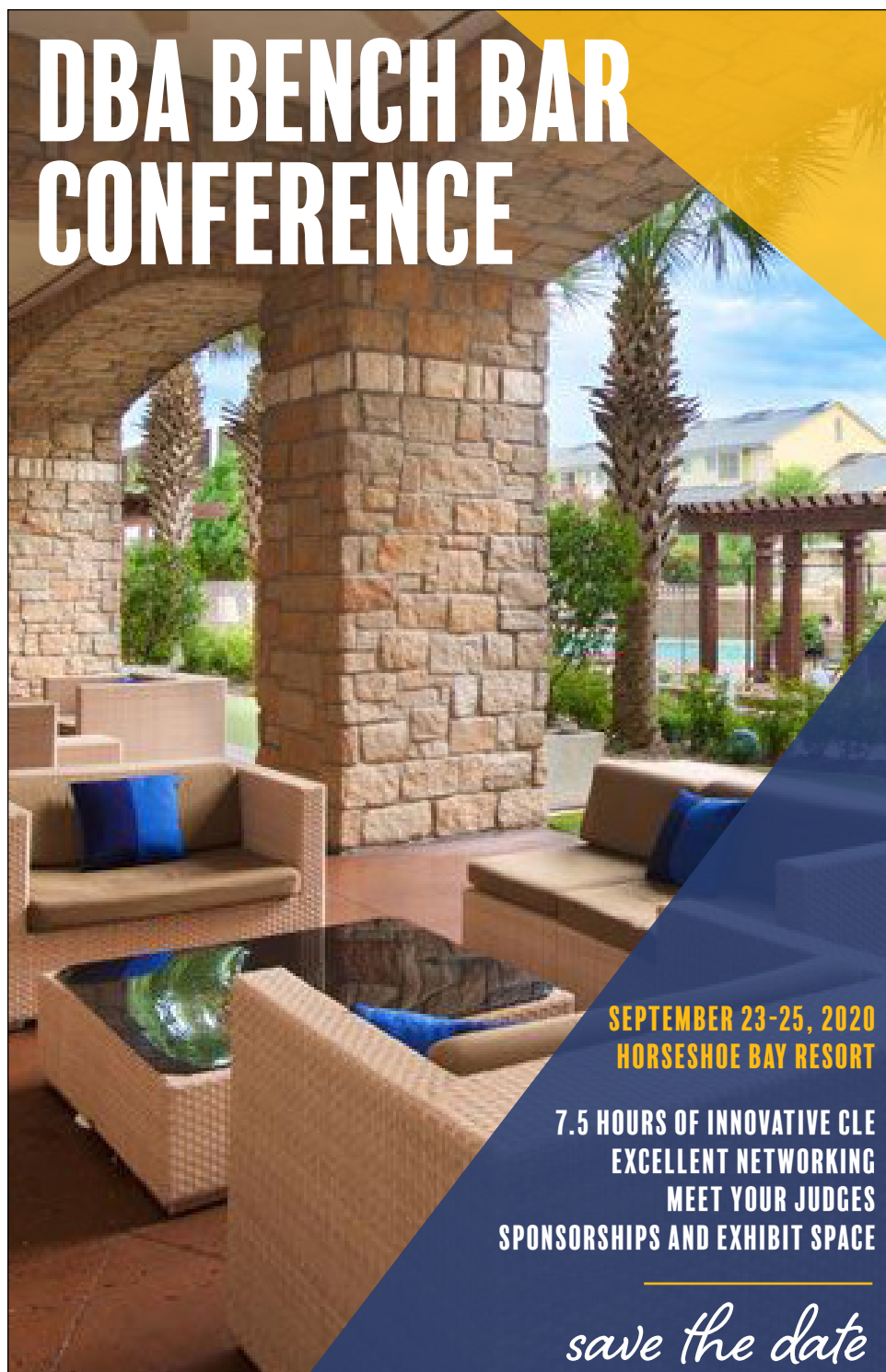


Alexa Kwong, Sewell Elementary School
First-Place (K-2nd Poster Contest)



Kate Olszewski, Solar Prep Elementary School
First-Place (3rd-5th Poster Contest)

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Artificial Intelligence at Work

CONTINUED FROM PAGE 1

company policies, benefits, and compensation.

Predicting Employee Behavior: AI is being used to forecast employee attrition so that managers can take proactive steps to retain top talent.

Performance Evaluations: AI is being used to assess employee performance in real time based on historical performance data and achievement of current performance metrics.

The Technology has Outpaced the Law

A challenge for users of AI in the workplace is the lack of a legal framework to guide decision-making and risk assessment. Neither the Equal Employment Opportunity Commission nor the Department of Labor has issued guidance on AI use. Much has been written about the theoretical risk of disparate impact discrimination claims where an unaudited AI algorithm, fed with allegedly biased data, perpetuates that bias to disproportionate detriment of individuals in a protected class. But there is a dearth of case law on this issue.

No federal law specifically regulates AI in the workplace, although the Algorithmic Accountability Act was introduced in April 2019. The proposed legislation would

require companies to assess algorithmic bias and correct issues discovered during impact assessments, and require the Federal Trade Commission to create algorithm guidelines. Illinois recently became the first state to regulate employers' use of AI when it passed the Illinois Artificial Intelligence Video Interview Act, which addresses notice and consent when an employer records an applicant interview and then uses AI to analyze the video.

AI in the workplace also raises issues about data privacy, storage, and ownership. The internet may provide abundant stores of data that can be mined to learn about applicants, employees, and consumers, but doing so may run afoul of state laws. A federal class action lawsuit filed in February 2020 in California alleges that Clearview AI, Inc. "scraped" photos from websites like Facebook, Twitter, and Google to build a facial recognition database matching a biometric "faceprint" with identifiable information, and then sold access to the database, all in purported violation of various state privacy and consumer protection laws.

So, the takeaway for users of AI in the workplace (and the lawyers that advise them): Diligently monitor this developing area of law. Or perhaps ask Siri or Alexa to do it for you. **HN**

Lindsay Hedrick is a labor and employment partner at Jones Day. She can be reached at lhedrick@jonesday.com.

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The Dallas Bar Association would like to recognize the following firms, government agencies, organizations/schools and corporate legal departments for their support of the DBA along with their commitment to the advancement of the legal profession and the betterment of the community. The **DBA 100 Club** is a distinguished membership recognition category that consists of Firms, Law Schools, Organizations and Government agencies with two or more attorneys as well as corporate legal departments that have 100% membership in the DBA. Recognition is given to the 2020 **DBA 100 Club** members in our June, July and August *Headnotes* and at our Annual meeting in November.

Not a **DBA 100 Club** member yet? This is the perfect time to encourage your newly hired attorneys to join the DBA and take advantage of our many member benefits—such as 400 FREE CLE programs including 6 hours of online CLE access each year, networking opportunities, community projects and many other member benefits as well as the opportunity to qualify for the **DBA 100 Club**.

Please note that the **DBA 100 Club** is open for renewal annually to every firm. We do not automatically renew a firm's membership due to changes in firm rosters from year to year.

How do you get on the list? To become a 2020 **DBA 100 Club** member, please submit your request via email and include a list of all lawyers in your Dallas office to Kim Watson, kwatson@dallasbar.org. We will verify the list with our member records and, if eligible, we will add your firm to the 2020 **DBA 100 Club**!

If we receive your qualifying list by **June 4**, your firm will be included on the July and August **DBA 100 Club** recognition list in *Headnotes*.

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Avoiding Political Landmines in the Workplace

BY TERAH MOXLEY
AND MONICA NARVAEZ

A lockdown-inducing pandemic in a presidential election year presents the perfect breeding grounds for political dustups between employees. While the COVID-19 pandemic amplifies the divisiveness that pervades our political discourse, this acrimony is not new. In November 2019, the Society for Human Resource Management released the results of its “Politics at Work” survey, which found that 42 percent of employees have personally experienced political disagreements in the workplace. As the November election draws near and as COVID-19 continues to wreak havoc on the political calendar and business-as-usual, employers should make sure their policies and practices comply with employment laws that address political activity.

Time Off

In Texas, employers must offer employees paid leave to vote on election day unless the employee has two consecutive hours to vote outside the employee’s working hours. It is unclear whether state officials will change the voting process in light of COVID-19 in ways that might reduce the need for voting leave, like making vote-by-mail an option for all voters.

In addition to voting leave, Texas law requires employers to grant employees time off to attend some political conventions. For non-exempt employees (i.e.,

overtime-eligible employees), the leave is unpaid. But, for an exempt employee, leave to attend such a political convention would be unpaid only if the employee takes the entire day off. However, if the overtime-exempt employee does any work during that day, even responding to an email, the employer must pay that employee’s full salary.

Governor Abbott postponed May’s run-off elections until July. The schedules for various political conventions are also in flux. So, employers should keep an eye on the calendar to stay up to date on when employees might need this time off. An employer that fails to provide mandated leave or that penalizes an employee for using such leave (or even threatens such a penalty) commits a Class C misdemeanor. Further, employers cannot retaliate against employees for voting a certain way or for refusing to reveal how they voted—doing so is a third-degree felony.

Political Expression

The National Labor Relations Act (NLRA) protects employees’ rights to engage in “concerted activity” regarding their working conditions. A 2018 opinion from the Fifth Circuit provides a good example of how political expression can rise to the level of concerted activity. In that case, employees at a fast-food restaurant filed charges with the National Labor Relations Board (NLRB) complaining of unfair labor practices after their employer forced them to remove “Fight for \$15” but-

tons from their uniforms. These buttons referenced a national movement that advocates for raising the minimum wage to \$15 per hour. The Fifth Circuit upheld the NLRB’s determination that the employer’s “no pins and stickers” rule violated the NLRA. Employers should be cautious when enforcing (or even maintaining) seemingly innocuous policies that could infringe on employees’ ability to engage in concerted activity.

While most public-sector employers are not subject to the NLRA, they do have to contend with the First Amendment. The First Amendment protects public-sector employees when they speak on a matter of public concern as private citizens and the employees’ interest in speaking outweighs the employer’s interest in promoting efficiency in the workplace.

Best Practices

Like most employment law issues, good policies and thorough training go a long way toward keeping employers out of trouble. Laws on voting and political activity are state-specific, so employers operating in multiple states should consult the law in each jurisdiction in which they have employees to determine which policies are required.

All employers should be careful to avoid the appearance that decisions affecting employees are not based a protected class. Political activity or affiliation is not a “protected class” in Texas (although it is in some states.)

However, even in Texas, political association bias may be construed as discrimination or harassment. For example, if a supervisor picks a politically likeminded individual for promotion over someone of a different gender, race, or religion, some employees may feel they were passed over because of their membership in a protected class. By providing training on anti-discrimination policies, employers can avoid such issues.

Employers should also review, or create, policies on workplace behaviors. These policies should require employees to be respectful when dealing with co-workers, vendors, customers, and others that enter the workplace. Employers should also review—and likely update—their social media policies. The NLRB has “blessed” certain policies that encompass the basic parameters for polite and respectful discourse so that, to the extent possible, discussions do not turn into arguments, attacks, or create feelings of an unsafe work environment. Employers should train supervisors on these policies frequently. Ultimately, the ability to discuss differences of thought in a civil manner will be what allows diversity and inclusion to flourish in the workplace. **HN**

Terah Moxley and Monica Narvaez are partners at Estes Thorne & Carr PLLC, and Terah is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. They can be reached at tmoxley@estesthorneccarr.com and mnarvaez@estesthorneccarr.com, respectively.

Working Remotely: 3 Tips for Law Firm Success

BY JORDAN TURK

Thanks to advances in technology and a seemingly limitless number of real-time communication channels, the options for and success of remote working have exploded over the past five years. While some fields and professions have embraced these changes more than others (think engineering), professional service providers, including lawyers, have not been as quick to adopt remote working practices.

It should come as no surprise that the legal industry has been historically resistant to technological change—the field is highly personal and involves significant social interaction. However, just because working remotely doesn’t happen frequently does not mean it cannot be done effectively. In this post, we are sharing five tips for lawyers and law firms who engage in remote work, whether for the first time or as part of your regular routine.

Keep a Structured Schedule

Some people incorrectly believe that working from home opens the door to a work free-for-all, where schedules are long forgotten (as is the dress code). This is an easy assumption to make—you do not have a commute to contend with, your work attire can likely be a bit more casual than usual, and you have the ability to work late into the night because your office is in your dining room. Why bother with keeping a schedule?

However, keeping a regular schedule is not just good for your productivity, it is good for your mental health and well-being, too. Keeping a structured work schedule will allow you to devote more *focused* time to executing necessary tasks. As much as possible, try to have your remote working habits and schedule mirror your in-office practices—your body and your brain are already trained to work this way, so do not force them to make new habits.

Additionally, maintaining a proper

work-life balance is incredibly important for those working from home. You need to carve out time to physically and mentally unwind—if you keep working off and on well into the night, you never get a chance to recharge. So, as much as possible, set regular working hours for yourself, and when you are able to wrap up work, close your laptop, leave the room, and truly relax.

Stay Connected with Essential Tools and Software

As mentioned above, the ability to work remotely is easier than ever before, thanks to the ever-increasing number of personal and collaborative productivity and practice management tools available to lawyers. In fact, many of these were created specifically to help law firms share documentation with colleagues and clients across great distances.

Before you start working from home or another remote location, make sure you have access to all the tools you need to conduct business away from the office and stay connected to colleagues and clients. This could include, but is certainly not limited to:

- Secure document sharing services
- Practice management tools
- Timekeeping and billing software
- Internal and external email accounts
- Internal communication channels (intranet, Slack, Skype, etc.)
- Company shared drives or file servers
- Secure document signing services
- Online notarization

Let Your Clients Pay Online

Of course, one part of your job that you cannot forget about when working remotely is accepting client payments. Whether you need to replenish an ever-green retainer or get paid at the end of a case, you need a reliable, secure, and easy way to get paid, and nothing fits the bill (literally!) better than an online payment solution.

Online payment solutions have the benefit of letting you not only get paid from practically anywhere, but get paid significantly faster than traditional means. Before online payments, attorneys would generally send their invoices by mail. Factor in the time it takes for the mail to arrive, the client to write the check, send the check to the attorney, and then depositing the check after it arrives—you’re looking at well over a week to get paid (if the check arrives at all). With an online payments solution, studies have shown that 85 percent of electronic invoices are paid the same week they are sent out, and as much as 57 percent of them are paid the same day they are sent to the client!

Not only that, but your clients will likely prefer being able to pay online. They do not have to track down their checkbook, they do not have to drive to your office, and they do not even have to walk to the mailbox to pay their invoice. They can pay you from any internet-connected device, at any time. You will find that putting that power in their hands will not only breed good will from your clients, but also result in you getting paid faster and more reliably. **HN**

Jordan Turk is a practicing attorney and LawPay’s Legal Content and Compliance Manager. She can be reached at jturk@lawpay.com

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Putting Your Employees to the Personality Test

BY CHANTEL LEE CHEATHAM,
HILLARY KRAMER LYNCH,
AND FARSHED FOZOUNI

Most of us have taken a personality test at one point—whether online for fun, for a class, or even when applying for a new job. When it is for fun or a class, we may not think much of the result, but it may be a little more stressful if the chance of getting an interview or job offer is on the line. “Do I want to be strong and independent, or do I want to look like a team player? Or something in between?” Employment lawyers must be mindful of whether their clients’ use of these personality tests will run afoul of state and federal discrimination laws.

Personality and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism). Personality testing today is a roughly \$500 million industry, with an annual growth rate estimated at 10 to 15 percent. Eben Harrell, *A History of Personality Testing*, HARVARD BUSINESS REVIEW, (Mar.-Apr. 2017) available at hbr.org/2017/03/the-new-science-of-team-chemistry#a-brief-history-of-personality-tests.

A study conducted by the Society for Human Resource Management found that many organizations use personality testing for career development, and approximately 22 percent use it to evaluate job candidates. Approximately 76 percent of all companies with more than 100 employees are using these tests, and this number is expected to grow. Tomas Chamorro-Premuzic, *Ace the Assessment*, HAR-

VAR BUSINESS REVIEW (Jul. 2015) available at <https://hbr.org/2015/07/ace-the-assessment>. Despite their many benefits, these personality tests *might* violate Title I of the Americans with Disabilities Act (ADA) and cause an impermissible disparate impact under Title VII.

Employers have many reasons for wanting to learn more about their employees’ personalities, including maximizing productivity and minimizing risk. However, some of these tests have been challenged in court by individuals who took them at an employer’s insistence, and some courts have expressed uneasiness with their use.

For example, the Seventh Circuit in *Karraker v. Rent-A-Ctr., Inc.* held that an employer’s administration of a Minnesota Multiphasic Personality Inventory (MMPI) as part of a management test was a medical examination and violated the ADA. 411 F.3d 831, 837 (7th Cir. 2005). The *Karraker* case largely turned on whether the MMPI test was designed to reveal a mental impairment. The Court reasoned that psychological tests “designed to identify a mental disorder or impairment” qualify as medical examinations, but psychological tests “that measure personality traits such as honesty, preferences, and habits” do not. *Id.* Determining whether a specific personality test lands on either side of this dichotomy is inherently difficult without diving deeper into the test, its purported use, the results, and perhaps consulting with a psychologist.

In the *Karraker* case, the plaintiff argued the MMPI discriminated against potential employees with paranoid personality disorder (PPD), a disability protected by the ADA. While the plaintiff’s

expert psychologist concluded that a high score on a certain scale of the MMPI did not necessarily mean that the person had PPD, he also testified it would be likely that a person who does, in fact, have PPD would tend to register a high score on that scale of the test. Based on the way the test was evaluated, a higher score on that particular scale could potentially cost an applicant the chance at a promotion. Therefore, the Court concluded that because the MMPI was designed, at least in part, to reveal mental illness and had the potential effect of hurting the employment prospects of people with a mental disability, it was best categorized as a medical examination. *Id.* at 837. And even though the MMPI was only a part (albeit a significant part) of a battery of tests administered to employees looking to advance, its use, the Court ultimately concluded, violated the ADA. *Id.* at 837.

The United States Equal Employment Opportunity Commission (EEOC) Fact Sheet on Employment Tests and Selection Procedures offers additional guidance for employers considering the proposed uses of specific tests. The EEOC specifically cautions against casual use of these tests without understanding their effectiveness and limitations for the organization and their appropriateness for a specific job. Thus, given the wide range of available tests and possible applications, it is important for employers to consider the underlying purpose of the tests *before* implementing them in order to ensure compliance with applicable employment laws. **HN**

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MEET PARTNER SARAH ROGERS

Sarah Rogers relates to juries and clients because she is authentic, because her life of serving others has developed empathy, and because she faces all challenges with a determined yet positive spirit. Sarah brings clarity, comfort and confidence to complex issues. She gives back to the profession having served as President of the Dallas Women Lawyers Association and the Dallas Association of Young Lawyers. She helps women reentering the workforce gain confidence and life-skills through her volunteer work with Attitudes & Attire. She, along with her husband Chris, are devoted to their children, Andrew and Caroline. Though we congratulate her on becoming partner, it is truly our honor.

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