Dallas Bar Association
HEADNOTES

January 2024 | Volume 49 | Number 1 | Focus | Corporate Counsel/Securities

DBA's 115th President: Bill Mateja

BY GRIFFIN RUBIN

The Dallas Bar Association welcomes its 2024 President, **Bill Mateja**, who will serve as the 115th President of our storied Association. Mateja is an established white collar trial lawyer with a particular focus on healthcare fraud and securities enforcement. He is a former Department of Justice (DOJ) prosecutor, at one point responsible for all of the DOJ's white-collar operations, as well as the day-to-day workings of its corporate fraud task force. Mateja also served as Special Counsel for Health Care Fraud, overseeing all the DOJ's healthcare fraud enforcement. He is currently a partner at the Dallas office of Sheppard Mullin.

Mateja's accolades and honors barely begin to tell the story of his career as an attorney. In truth, Mateja has only ever wanted to do one thing—try cases. He realized as much early on as a "baby lawyer" working in Dallas. To chase that goal, he left Dallas and headed to Lubbock to serve as a federal prosecutor. There Mateja got exactly what he wanted, as he "rode circuit" across Texas trying cases. After some time as a federal prosecutor and serving in high-ranking positions with the DOJ in Washington D.C., Mateja returned to Dallas, where he has called home ever since.

Though Mateja has made his way across Texas and the country during his career, his service to the legal community is mostly deeply rooted in the Lone Star State. In 1997, he served as President of the Texas Young Lawyers Association (TYLA), an office previously held by many lauded attorneys, federal and state judges, and elected officials across this state. As TYLA President, Mateja forged and cultivated friendships that he cherishes to this day. That experience left an indelible mark on him, and it continues to energize Mateja's desire to serve the legal community, locally and at large.

Even with an incredibly active trial docket, Mateja assumes the role of DBA President with energetic plans for 2024. While he is less inclined to set stringent, formalistic goals in order to provide flexibility within the membership to shape the DBA's collective future, he nevertheless will seek to empower members to effect change.

One area he seeks to develop and emphasize is the role of criminal practitioners within the DBA. Though criminal practice can and does differ considerably from civil practice, Mateja believes that more can be done to afford criminal practitioners a more suitable environment within the DBA to collaborate, socialize, and come together more often with the criminal bar and civil practitioners in Dallas. Mateja believes this goal is critically important, and he is confident that he can help with this effort given his hybridized practice and specialty in white collar work, which frequently places him in the criminal, civil, administrative, and regulatory spheres (sometimes all at once).


Bill Mateja

Mateja additionally seeks to optimize the way law firms operate and co-exist by building upon the foundation of the DBA Managing Partners' Forum. The Managing Partners' Forum is a project originally spearheaded by immediate past DBA President **Cheryl Camin Murray** as an outlet for managing partners at firms around Dallas to come together to collaborate and communicate. Mateja seeks to ramp up this initiative with further partnerships and additional avenues for networking, communicating, and sharing ideas that will hopefully lead to positive changes to the practice of law in Dallas.

When all is said and done, Mateja hopes that his presidency will be impactful on all those involved in the legal industry in Dallas, from the partners at the top to support staff without whom practitioners would not be able to practice. Mateja is a "lawyer's lawyer." To him, nothing is more important than being an excellent lawyer in service to clients and the Bar. And he hopes that what he can bring to the DBA are efforts and initiatives that help others achieve that same goal in their careers. No matter where Mateja has been or what he has done—from Dallas to Lubbock to D.C. and back—he has enjoyed bar service and hopes that his past experiences will guide and motivate him during his year at the helm of the DBA.

Congratulations to Bill Mateja, as he embarks on his journey as the 115th President of the Dallas Bar Association. The future looks bright as ever for the DBA as it heads into its 151st year. **HN**

Griffin Rubin is an attorney at Sbaiti & Company and can be reached at gsr@sbaitilaw.com.

Sylvia Demarest and Edward Cloutman Win 2024 MLK Justice Award

BY J. COLLIN SPRING

The Reverend Doctor famously said "the moral arc of the universe is long, but it bends towards justice." But it does not bend on its own. It takes men and women of exceptional courage, honor, and integrity to look at the status quo and demand a better, more equitable world. Every year since 1992, the Dallas Bar Association has given out the Martin Luther King Jr. Justice Award to recognize members of our legal community who have dedicated their careers to helping bend that arc. It is with deep gratitude that the DBA announces **Sylvia Demarest** and **Edward Cloutman** as co-recipients of the 32nd MLK Justice Award.


Sylvia Demarest


Edward Cloutman

Demarest grew up in Lake Charles, Louisiana, in a Catholic family of trappers, farmers, and hunting guides. After graduating from the University of Texas School of Law, Sylvia Demarest immediately turned her attention to civil rights. At the early age of 27, she was named Executive Director of the Dallas Legal Services Foundation, where she was an integral part of the litigation that would lead the City of Dallas to shift from electing its City Councilors At-Large to electing them by geographic district—a historic milestone for people of color in Dallas politics. She entered private practice working with **Windle Turley**, moving up the ranks to become a member of the firm's leadership before opening her own firm some six years later. There, she would go on to represent victims of sexual abuse in lawsuits against the Catholic Church, one of which would result in a historic $119 million verdict in 1997. Throughout her career, she has been actively involved in the legal community, serving as President of the Dallas Trial Lawyers' Association in 1983 and on the Board of Directors for the Texas Trial Lawyers' Association from 1985 to 1990. She has been a dedicated mentor to the future generation of lawyers, serving as an adjunct faculty member at SMU Dedman School of Law teaching Trial Advocacy as well as being a member of the national faculty of the National Institute of Trial Advocacy.

Cloutman, the son of two school teachers and another native of Lake Charles, earned his J.D. at Louisiana State University. He came to Dallas in the second year of his practice as part of a fellowship program where he represented the indigent. When he came to Dallas, he began working at the Dallas Legal Services Foundation. Demarest was his direct supervisor. Together, they worked on a number of lawsuits aimed at improving the lives of Dallas' least fortunate—suing the county for food stamp program violations, suing the jails for overcrowding, and seeking to end disparate racial treatment of black prisoners in Dallas. Cloutman's dedication to civil rights would continue throughout his career working as one of Dallas' preeminent labor and employment attorneys. He has been recognized by publications ranging from *Texas Monthly* to *Best Lawyers in America* for his work in labor and employment, which he has been Board Certified in since 1975—the first year that the Labor and Employment certification was available.

Although their contributions to the field of civil rights are legion, Demarest and Cloutman are perhaps best known for their work on *Tasby v. Estes*, the seminal Dallas school desegregation case. As Cloutman recalled in an oral history interview given to the University of North Texas' *Portal to Texas History*, "everything about the district was separate, but not equal—from teacher recruitment, teacher assignment, administrator assignment, pay for teachers and administrators…Books and supplies were materially different, dependent on the race of the kids in the school." Although racial segregation of schools was struck down by the United States Supreme Court some 15 years prior, "good geographers that had malice in their hearts" had developed ways to keep white children separate from children of color. Despite *Brown v. Board of Education*, most schools throughout DISD were either 90 percent or more white students or 90 percent or more students of color. **Sam Tasby**, an African American father of six, went to

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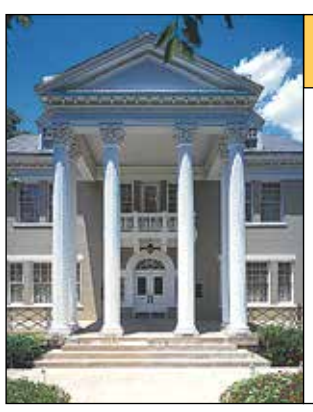


Inside

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

Calendar | January Events

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

WEDNESDAY WORKSHOPS

JANUARY 17
Noon *"The 'Jury Trial' is Changing: Upsides and Downsides that Increased Jury Participation Poses for Trial Lawyers," Mia Flazarano and Daniella Main.* (MCLE 1.00)* ***In person only***

MONDAY, JANUARY 1
DBA Offices closed in observance of New Year's holiday

TUESDAY, JANUARY 2
No DBA events scheduled

WEDNESDAY, JANUARY 3
No DBA events scheduled

THURSDAY, JANUARY 4
Noon **Construction Law Section**
"Understanding the Impact and Importance of Legal Technology on the Practice of Law," Steven Hill. (Ethics 1.00)* ***In person only***

Criminal Justice Committee. *Virtual only*

FRIDAY, JANUARY 5
No DBA Events Scheduled

MONDAY, JANUARY 8
Noon **Corporate Counsel Section**
"The Art of Effectively Serving the Board: Norms and Best Practices," Ferrell Keel. (MCLE 1.00)* *Virtual only*

Real Property Law Section
"*Corporate Transparency Act," Lauren White.* (MCLE 1.00)*

Tax Law Section
Topic Not Yet Available

Peer Assistance Committee. ***In person only***

Senior Lawyers Committee. ***In person only***

TUESDAY, JANUARY 9
Noon **Business Litigation Section**
"Alternative Litigation Strategies and Risk Transfer." (MCLE 1.00)*

Immigration Law Section
Topic Not Yet Available

Mergers & Acquisitions Section
"Developments in Delaware Law," Mark Hurd and Eric Klinger-Wilensky. (MCLE 1.00)* *Virtual only*

Tort & Insurance Practice Section
Topic Not Yet Available

Courthouse Committee. *Virtual only*

Home Project Committee. In person only

Legal Ethics Committee. *Virtual only*

6:00 p.m. DAYL Board of Directors

WEDNESDAY, JANUARY 10
Noon **Bankruptcy & Commercial Law Section**
"2024 Bankruptcy Recent Developments," Hon. Michelle Larson, Rakhee Patel, and Gerrit Pronske. (MCLE 1.00)* ***In person only***

Employee Benefits & Executive Compensation Law Section
"The Long Wait is Over for Long-Term, Part-Time Employee Guidance," Alexandra Green and Mary Niehaus. (MCLE 1.00)* *Virtual only*

Allied Bars Equality Committee. *Virtual only*

Public Forum Committee. *Virtual only*

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

THURSDAY, JANUARY 11
Noon **Alternative Dispute Resolution Section**
"Arbitration and Mediation in Construction Cases," Rod Toben. (MCLE 1.00, Ethics 0.25)* *Virtual only*

CLE Committee. *Virtual only*

Publications Committee. *Virtual only*

FRIDAY, JANUARY 12
Noon **Government Law Section**
Section planning meeting

Trial Skills Section
"Trial Skills Mentorship Panel," Michael Hurst and Shonn Brown. (MCLE 1.00)*

MONDAY, JANUARY 15
Noon **Martin Luther King, Jr. Justice Award Luncheon**
Recipients: Edward Cloutman and Sylvia Demarest. Register online at www.dallasbar.org. ***In person only***

TUESDAY, JANUARY 16
Noon **Antitrust & Trade Regulation Section**
Topic Not Yet Available

Community Involvement Committee. *Virtual only*

Entertainment Committee. ***In person only***

WEDNESDAY, JANUARY 17
Noon **Wednesday Workshop**
"The 'Jury Trial' is Changing: Upsides and Downsides that Increased Jury Participation Poses for Trial Lawyers," Mia Flazarano and Daniella Main. (MCLE 1.00)* ***In person only***

Energy Law Section
To Pool or Not to Pool: The Path to PSA and Allocation Wells," Lance Joiner. (MCLE 1.00)* ***In person only***

Health Law Section
"2023 in review," Eric Setterlund. (MCLE 1.00, Ethics 0.50)* *Virtual only*

International Law Section
Topic Not Yet Available. Virtual only

Law in the School & Community Committee. *Virtual only*

Pro Bono Activities Committee. ***In person only***

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

THURSDAY, JANUARY 18
Noon **Appellate Law Section**
Topic Not Yet Available

Solo & Small Firm Section
"LinkedIn 101: Ethical and Legal Issues Social Media," Peter Vogel. (Ethics 1.00)*

4:00 p.m. DBA Board of Directors Meeting

FRIDAY, JANUARY 19
No DBA Events Scheduled

SATURDAY, JANUARY 20
6:00 p.m. **Inaugural of DBA President Bill Mateja.**
Tickets available online at www.dallasbar.org.

MONDAY, JANUARY 22
Noon **Labor & Employment Law Section**
"2023 Annual L&E Year in Review," Joe Gilllespie and Christie Newkirk. (MCLE 1.00)*

Science & Technology Law Section
"Data Privacy Update and Enforcement Trends," Amanda Harvey. (MCLE 1.00)* *Virtual only*

Securities Section
Topic Not Yet Available

Golf Tournament Committee. ***In person only***

TUESDAY, JANUARY 23
Noon **Probate, Trusts & Estates Law Section**
"Offensive & Defensive Uses of Declaratory Relief in Probate Court," Cleve Clinton and Greg Sampson. (MCLE 1.00)* ***In person only***

WEDNESDAY, JANUARY 24
Noon **Collaborative Law Section**
Topic Not Yet Available

Entertainment, Art & Sports Law Section
Topic Not Yet Available

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

THURSDAY, JANUARY 25
Noon **Criminal Law Section**
"United States v. Bruin and It's Progeny," Camille Knight. (Ethics 1.00)*

Environmental Law Section
Topic Not Yet Available

Intellectual Property Law Section
"Implementation of AI Tools in the Practice of Law," David Ashton. (MCLE 1.00)* *Virtual only*

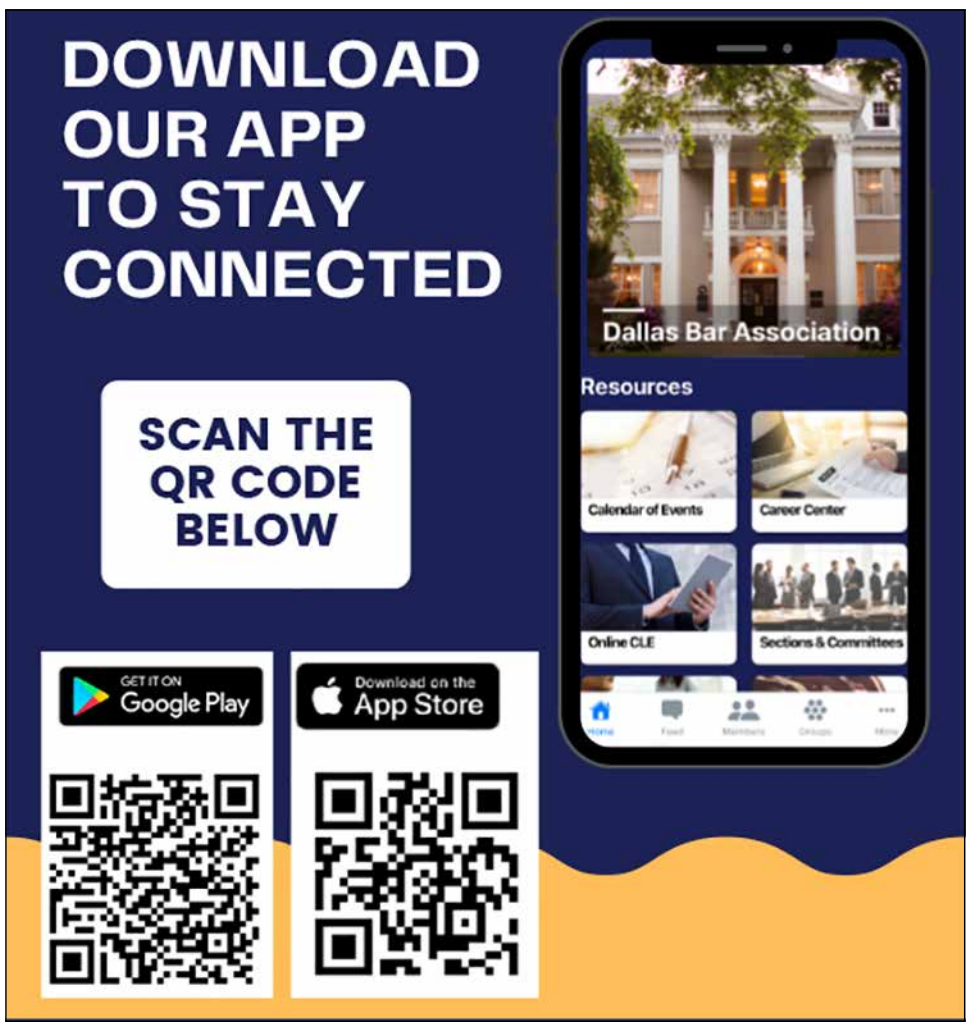
Minority Participation Committee. *Virtual only*

FRIDAY, JANUARY 26
9:00 a.m. **Family Law Section Bench Bar**
"It's All Fun & Games." (MCLE 7.25, Ethics 2.00)* *For registration and sponsorships, contact dbaflsbenchbar@gmail.com.*

MONDAY, JANUARY 29
No DBA Events Scheduled

TUESDAY, JANUARY 30
No DBA Events Scheduled

WEDNESDAY, JANUARY 31
4:00 p.m. LegalLine E-Clinic. *Volunteers needed.* Contact mmejia@dallasbar.org.



NEW MCLE SIGN-IN PROCEDURE

BEGINNING JANUARY 2024

Members will no longer need to use CLE bubble scantrons. Instead, for all in-person or Hybrid CLEs, members should fill out the sign-in sheet provided. The DBA will continue to report your CLE credit to the State Bar of Texas, or members can self-report at texasbar.com.

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.

President's Column

Get Back!

BY BILL MATEJA

Get back to the Dallas Bar Association
"Get back to where you once belonged"

My Story

It was 2005 and I was new to Dallas with no book of business. I'd wrapped up a terrific 13-year run with the Justice Department and had moved from Washington, D.C. where I headed up DOJ's corporate fraud, health care fraud, and white collar efforts. Talking business development with my new office managing partner at Fish & Richardson, **Tom Melsheimer**, he shared that I needed to focus on two things: professional competence and **people**. "You need to be pressing the flesh and meet as many people as you can, and lawyers in particular. I want you having breakfast, lunch, and drinks with someone new every chance you get," he said.

How best to do that? I recalled that when I was as a federal prosecutor in Lubbock and served on the board of the Texas Young Lawyers Association as its President in the late '90s, that Dallas board members (think **Brad Weber**, **Rudy Rodriguez**, and **Monica Latin**, just to name a few) sung the praises of the Dallas Bar. My takeaways were—great camaraderie, a deep connection amongst its lawyers, and esprit de corps. And, the place where Dallas' lawyers gathered was a diamond amongst bar headquarters, not just in the State, but in the country.

So, I made a beeline to the DBA and the Arts District Mansion. I started with lunches at Trial Skills, Business Litigation, Health Care, and Securities section meetings where I met a lot of lawyers I didn't know, handed out business cards, and picked up loads of CLE credit. I volunteered with DBA service programs such as Lawyers in the Classroom, the Golf Tournament, and Bench Bar. I became a Director and Chair of the Trial Skills Section and later chaired both Bench Bar and the Equal Access to Justice Campaign. Inertia took the reins from there and here I am now—not simply the President of the Dallas Bar Association, humbling for sure, but someone who has met literally **thousands** of people through the Bar, who has become lifelong friends with numerous Dallas lawyers, and who has a successful white collar defense practice because of the many Dallas lawyers I met through the Bar. The DBA has become part of the fabric of my professional life as it has with so many revered Dallas lawyers—everyone from **Morris Harrell** and **Jim Coleman** to **Harriet Miers** and **Kim Askew** to name just a few.

But, I Worry Dallas Lawyers Now Aren't as Connected

I was on a group call yesterday where a former Dallas Court of Appeals justice shared that Dallas lawyers don't appear to have as deep a connection to one another. Candidly, I feel the same way and I know others who pay attention to the Dallas Bar agree—it's "palpable" as another lawyer told me. Attendance at many in-person CLEs is down. While Bar membership continues to increase, recently topping 11,000 lawyers, and Section/Committee Zoom participation is solid, I feel that the camaraderie and interconnectedness that once personified the Dallas Bar is waning as many work remotely in the virtual world.

Why is This?

Obviously, the Pandemic impacted our ability to connect with one another and continues to do so vis-à-vis a sort of post-Pandemic malaise. It's more than that though. It's well-documented that Americans value community engagement far less than they did a quarter-century ago and that there has been a significant decline in participation in local civil society institutions from churches to school parent groups. Couple that with the demands on younger lawyers balancing careers, busy home lives, and ever-present technology. And, couple all of this with the fact that many lawyers aren't aware of the **incredible value proposition** in allowing the DBA to become a part of the fabric of their professional lives.

So, What is That Value Proposition?

The DBA offers a terrific opportunity for connection. Not only does it have a wonderful facility—the ADM—that gives us a chance to mix and mingle with one another and to network, but it also offers leadership opportunities, career development, speaking and authorship opportunities, and maybe most importantly, friendship. Being with others makes us be present, makes us focus, and allows us to be humans rather than just a screen on a Zoom call. If we only participate in the Bar remotely, what stops one from working his/her Inbox instead of listening to a speaker? How are you going to introduce yourself to that next referral source? Zoom meetings don't allow us to bump into a friend, former colleague or opposing counsel and have that conversation where you start the net step with "we need to talk" or "we need to get together for lunch" or "here's my business card."

A Lot at Stake ....

If lawyers aren't regularly meeting face-to-face, how does the DBA continue the great collaboration that makes it a leader and gives rise to signature accomplishments like the Dallas Lawyers Creed, which paved the way for the Texas Lawyers Creed? How do lawyers develop the humanity that underpins professionalism and that typifies those Dallas lawyers considered legal giants? And, while the Dallas Bar and ADM are doing fine financially right now, what happens if membership starts to decline because lawyers don't feel connected and members simply stop going to the ADM—resulting in revenue reductions whether it be parking fees, royalties from the ADM's manager or otherwise?

My Challenge to You

Support the Bar with your feet—**Get Back!...to the Mansion**. If you are a Committee or Section leader think in-person first and drive meetings and events back to the ADM. Of course, all of us need to consider the networking opportunities and camaraderie that you might be missing by not gathering with fellow Dallas lawyers—so add more in person events to your calendar this year. And, if you are a member and haven't really taken advantage of all that the Dallas Bar has to offer, well, what's stopping you now? Not sure where to start? Just call me or contact any DBA director.

I Invite You

Please join us for our annual Inaugural on Saturday, January 20 as we **Get Back! ... to the Mansion**, as we **Get Back!...to the Dallas Bar**, and, as we **Get Back!**, in the immortal words of the Beatles **"to where we once belonged."** And, on a final note, thank you for allowing me the privilege and honor of being your 2024 DBA President. I will not only zealously guard the large reservoir of trust handed me that was built on the backs of my predecessors, but I will return that reservoir of trust to your 2025 president, **Vicki Blanton**, as full, if not fuller, than that which I received.

Bill

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

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Focus | *Corporate Counsel/Securities*

Decrypting the Definition of "Securities" for Digital Assets

BY ALEX MORE

The question of what qualifies as a "security" continues to vex litigants and courts after decades of developing law. Recent litigation and Securities and Exchange Commission (SEC) enforcement actions have tested the limits of this concept in the context of digital assets. These developments offer insight into both the future of the digital assets industry and the continued evolution of the legal definition of "security."

The Securities Act of 1933 defines "security" broadly with the intent to cover the myriad instruments that may fall within the common understanding of what constitutes a security, i.e., an investment. The definition of "security" includes any "investment contract," which courts have treated as a kind of catchall. Courts today use the *Howey* test to determine what qualifies as an "investment contract," referring to the Supreme Court's landmark 1946 decision in *SEC v. W.J. Howey Co*. Under that test, an "investment contract" includes any investment of money in a common enterprise with a reasonable expectation of profits derived from the efforts of others.

The current concept of digital assets originated in 2008 with the creation of Bitcoin by the pseudonymous Satoshi Nakamoto. Since then, developers have created tens of thousands of digital assets with a variety of characteristics. Proponents describe the innovation of this asset class as the use of a decentralized transaction ledger that obviates the need to rely on intermediaries such as payment processors, banks, and other financial institutions.

Opinions of the value of digital assets range widely from a revolutionary technology to a worthless scam. In the early 2010s, the SEC undertook a number of enforcement actions against persons alleged to have used digital assets as part of a fraudulent scheme. Often in these early cases, the "security" at issue was not the digital asset but rather the broader scheme, such as a fund representing it would buy and sell digital assets for "guaranteed returns" to investors. By the end of the 2010s, however, the SEC had focused its attention on digital assets themselves, pursuing issuers for fraudulently selling unregistered securities in the form of digital assets.

The SEC said it would apply the *Howey* test to digital assets on a case-by-case basis. But the SEC's public comments created uncertainty regarding which digital assets the SEC would consider securities. In a November 2017 interview, SEC Chair Jay Clayton suggested he did not view Bitcoin or Ether as securities.

In a June 2018 speech, SEC Director of Corporate Finance William Hinman further muddied the waters announcing the SEC would not treat Bitcoin or Ether as securities, adding "there may be other sufficiently decentralized networks and systems where regulating the tokens or coins that function on them as securities may not be required."

This comment speaks to the "efforts of others" prong of the *Howey* test—where a digital asset network is sufficiently decentralized such that owners do not rely on the efforts of central managers the digital asset may not qualify as a security.

Further complicating things, SEC Chair Clayton wrote in March 2019 that "a digital asset may be offered and sold initially as a security because it meets the definition of an investment contract, but that designation may change over time…if, for example, purchasers no longer reasonably expect a person or group to carry out the essential managerial or entrepreneurial efforts."

Gary Gensler replaced Clayton as SEC Chair in April 2021, and under Gensler's leadership, the SEC has taken a decidedly more hawkish approach to digital assets. In a congressional hearing earlier this year, when asked whether Ether was a security, Gensler refused to answer. SEC Commissioners Hester Pierce and Mark Uyeda have become increasingly vocal dissenters regarding the SEC's treatment of digital assets, and pending federal legislation seeks to clarify when digital assets are exempt from the definition of "security."

Last July, a court in the Southern District of New York held that Ripple's sales of its digital asset XRP on public markets did not satisfy the *Howey* test because purchasers had no expectation that they were investing in Ripple when they bought XRP. The court also held Ripple's payment of XRP to vendors for services rendered did not satisfy the *Howey* test because those services did not meet the *Howey* prong requiring an "investment of money" (or other "tangible and definable consideration").

Undeterred, the SEC intends to appeal the Ripple decision, and continues to investigate and prosecute digital asset sellers, particularly when such sellers tout potential profits. Absent a change in SEC leadership or congressional legislation, regulatory uncertainty will likely persist, chilling the growth of the digital asset industry and leading to more litigation of this issue. **HN**

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Focus | *Corporate Counsel/Securities*

2023 Developments in the Securities Regulation

BY JOSLYN R. SMITH

Kabosu, the Shiba Inu dog, known as "Doge," was an internet meme sensation. This adorable dog whose likeness as an avatar on a gold coin represented the digital asset, Dogecoin. But the expression of the dog had absolutely nothing to do with the satirical cryptocurrency. As a way to mock Bitcoin, the founders of Dogecoin created this "meme coin" and were able to capitalize on the adorable pup's expression and well-established internet notoriety. Over the last few years, Dogecoin has been riding a rollercoaster of popularity, which periodically peaks due to Tik-Tok or Reddit campaigns.

Almost as quickly as this "dog coin" rises to fame, the value of the digital asset's seem to crash, harming the investors who fail to heed warnings that they should no invest based merely on the "name" of a fund or digital asset. This is just one example of the public policy behind 2023 regulatory amendments promulgated by the Securities Exchange Commission (SEC). In the 2023 amendments, SEC attempts to protect investors from poor investment decisions made based on an asset's name or what that name might represent the asset to be.

On October 13, 2023, the SEC adopted amendments to 17 CFR 270.35d–1 (rule 35d–1) under the Investment Company Act, which goes into effect on December 11, 2023. These new rules have been designed to protect investors. They expand the scope of the existing rules and will have a significant impact on cryptocurrencies as well as traditional funds. Digital currencies and traditional funds must fall in line with the new provisions, and there appears to be no room for mistakes or oversight on the compliance requirements.

The SEC's "name rule" amendments expand the rule's 80 percent investment policy requirement beyond its current scope. As of December 11, 2023, any newly registered asset or fund name with terms suggesting that it focuses on investments with particular characteristics will be subject to these expanded rules. Assets within funds with fund names that include terms such as "growth," "value," or the overused "greenwashed" ESG terms within the assets name (or which indicate the fund's investment decisions to incorporate one or more ESG factors) must actually comports to the fund's moniker. If a fund's name suggests a focus on a particular type of investment, investments in a particular industry, a geographic focus, or that the fund's distributions are tax-exempt, the new rules mandate that those funds must show 80 percent of the assets comport with the nature of the investments that the fund's or assets' names suggest.

Future cryptocurrency issues must be mindful of these amendments when picking their names. Any names that are misleading to the public or investors are subject to scrutiny and consequences from the SEC. If a digital asset calls itself "Green Growth Coin," it should be investing 80 percent of its assets into growing green initiatives or something that matches the definitions found in its prospectus.

Under the 2023 rules, misleading prospectus definitions should also be avoided. For example, the prospectus may define "Green Growth" as a cannabis cultivation initiative and "Coin" as a physical coin rather than a digital asset, but those definitions would not comply with the new "plain English" rules of definitions found in a prospectus. The new rules require that any terms used in the fund's name that suggest an investment focus or tax-exempt distribution must be consistent with those terms' plain English meanings or established industry uses.

Funds must report the value of the fund's 80 percent basket and if said funds in the basket match the definition(s) of terms used in the fund's name. The new rules include recordkeeping provisions related to a fund's compliance with the new rules.

The new compliance component requires funds to perform a quarterly review of portfolio assets included in its "80 percent basket." Digital assets and cryptocurrencies must ensure that investments of these assets are made "under normal circumstances" at the time a fund invests its assets. A fund only has 90 days to get back into compliance once it departs from the 80 percent requirement per the new rules. There are some exceptions to this rule, but none of those apply to digital assets. **HN**

Joslyn R. Smith is a Solo Practitioner at the Law Office of J.R. Smith and can be reached at js@lojrs.com.

Education Law Study Group

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

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

Celebrating Our Members!

On November 29, the DBA honored members who have given outstanding service to the Dallas Bar Association this year. Thank you to all of our members for being part of our DBA Community.

Focus | *Corporate Counsel/Securities*

Implications of the Corporate Transparency Act

BY CALEB SEGREST AND TED TOOLEY

On January 1, 2024, the Corporate Transparency Act's beneficial ownership information (BOI) reporting rule will become effective and subject to enforcement by the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). The Act's purpose is to make it more difficult for bad actors to use business entities in schemes involving money laundering, tax fraud, terrorism financing, and other misconduct. The Act aims to achieve this purpose by imposing beneficial ownership disclosure obligations to increase corporate transparency.

The rule will require BOI reports to be submitted in connection with eligible domestic and foreign reporting companies. If an entity was created or registered before January 1, 2024, the entity will have until January 1, 2025, to submit a BOI report. However, if an entity is created or registered on or after January 1, 2024, the entity will have only 30 days to submit its BOI report (FinCEN has submitted a separate proposal that, if made effective, would require entities created or registered during the 2024 calendar year to report within 90 days).

Who Has to Submit a BOI Report?

In short, both the beneficial owner(s) and company applicant of a "reporting company," along with the entity itself, will have reporting obligations. A reporting company is any corporation, limited liability company, partnership, or other entity that does not fall within any of 23 enumerated exemptions. The reporting obligations will apply regardless of whether the entity was formed within the U.S. or under the laws of a foreign country and subsequently registered to do business within the U.S. The exemptions focus primarily on highly-regulated businesses (e.g., financial institutions, public accounting firms, insurance companies, and federal/state governmental entities), publicly traded companies, tax-exempt entities, nonprofits, and companies with a large operating presence and employee headcount.

A "beneficial owner" is any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise either (1) exercises substantial control over the reporting company, or (2) owns or controls at least 25 percent of the ownership interests of the reporting company. A reporting company can have more than one beneficial owner and there is no maximum number that can be reported.

A "company applicant" is the *individual* who files the document that creates the reporting company or registers the company to do business in the U.S., or the individual who is primarily responsible for directing or controlling such filing. The rules impose a maximum of two company applicants. Notably, a reporting company is only required to report its company applicants to FinCEN if it is created or registered on or after January 1, 2024.

What Do Entities Have to Report?

Each reporting company must collect and report four pieces of information:

1. Full legal name and any trade name or "doing business as" (DBA) name;
2. Complete current U.S. address of principal place of business;
3. State, tribal, or foreign jurisdiction of formation or registration; and
4. IRS Taxpayer Identification Number (TIN), including an Employer Identification Number (EIN).

What Do Owners/Companies Have to Report?

Each beneficial owner and company applicant of a reporting company must collect and report four pieces of information:

1. The individual's full legal name;
2. Date of birth;
3. Complete current *residential* address for beneficial owners and a residential or business address for company applicants; and
4. Unique identifying number from an acceptable identification document, along with a copy of that document.

Examples of acceptable identification documents include a U.S. passport, identification document issued by a state, local government, or tribe, and a state driver's license. If none of the above are available, FinCEN will accept a non-expired foreign passport.

How Can a "FinCEN Identifier" Help?

A FinCEN identifier is a unique identifying number issued to an individual or entity upon request that can be used to streamline reporting. Individuals may submit an electronic application for a FinCEN identifier containing all the BOI that otherwise would have been in that individual's initial report. Entities may request their own FinCEN identifiers during the BOI reporting process by checking a box on the reporting form. The FinCEN identifier will be particularly useful for lawyers and other individuals who will be involved in entity formation on an ongoing basis.

What Happens Upon Failure to Report?

Failure to file an initial or updated BOI report with FinCEN, if willful, can result in a $500 per day fine (up to $10,000) and up to two years' imprisonment. Senior officers of an entity that fail to file a report may also be held accountable for such failure.

Looking forward, FinCEN's secure filing system will not be available until January 1, 2024, and it will not accept BOI reports before that date. Ongoing organization of the information required to be reported by the Corporate Transparency Act and coordination with third-party filing vendors will be integral to navigating BOI reporting and ensuring timely client compliance. **HN**

Caleb Segrest is a Senior Associate and Ted Tooley is an Associate at Norton Rose Fulbright US LLP. They can be reached at caleb.segrest@nortonrosefulbright.com and ted.tooley@nortonrosefulbright.com, respectively.

Focus | Corporate Counsel/Securities

SEC v. Ripple: A Pivotal Case for Digital Asset Transactions

BY LILYA TESSLER AND ROBERT UHL

A landmark case in the U.S. District Court for the Southern District of New York provides a significant decision that directly impacts the legal environment of digital assets, cryptocurrency, and blockchain technology. The district court in *SEC v. Ripple Labs, Inc.* evaluated whether Ripple Labs' distribution of the digital asset XRP constituted a sale of securities in violation of U.S. securities laws. In July 2023, the court notably reached different conclusions for three different types of distributions of the digital token when it separately analyzed each distribution under the multipart "investment contract" test established by the U.S. Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The court also stated that the subject of an investment contract that is a standalone commodity, such as the citrus grove in *Howey*, is not inherently a security, and any later resales of such commodity may not necessarily be investment contracts. Though the decision may still be appealed to the Second Circuit, these substantive findings have impacted other pending actions by the Securities and Exchange Commission (SEC).

The SEC has, in recent years, sought to regulate blockchain technology by bringing enforcement actions against market participants. Primarily, the SEC alleges that digital assets are sold in unregistered securities offerings and that intermediaries supporting digital asset trading are engaging in unregistered broker-dealer and exchange activities. The court in *Ripple* reviewed such allegations, applying the *Howey* test to three categories of transactions alleged to be investment contracts. The court found that: (1) direct XRP sales from Ripple Labs to institutional buyers pursuant to written contracts satisfied the *Howey* test and were securities transactions, (2) XRP sales from Ripple Labs to buyers who used trading algorithms on digital asset exchanges failed the "expectation of profits from the efforts of others" prong of the *Howey* test and were not securities transactions because the buyers did not knowingly purchase XRP directly from Ripple Labs but instead entered into blind bid/ask transactions, so they could not reasonably expect profit from Ripple Labs' efforts, and (3) other distributions of XRP from Ripple Labs to its employees as compensation failed the "investment of money" prong of the *Howey* test and were not securities transactions because the recipients did not pay money or some tangible and definable consideration to Ripple Labs.

By distinguishing among these digital asset transactions, the court found that each of their distinct characteristics determined whether an investment contract (and thus security) existed. In addition, the court cited to another Southern District of New York opinion that noted "the security in this case is not simply the [digital token, the] Gram, which is little more than alphanumeric cryptographic sequence." *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020). This same principle was embraced by the SEC in its request for interlocutory appeal. No. 20-cv-10832, Doc. 893 at *22, filed Aug. 18, 2023.

The court in *Ripple* expressly declined to opine on whether secondary market transactions (i.e., transactions subsequent to the initial sale) in XRP constituted investment contracts, as that question was not properly before the court. However, it noted that purchasers who bought XRP from digital asset exchanges "stood in the same shoes as a secondary market purchaser" and were not offered or sold investment contracts. Nevertheless, this line of reasoning is informative for future or ongoing SEC litigation.

The SEC disagreed with the court's decision in *Ripple* and immediately sought an interlocutory appeal (the substantive ruling came from cross motions for summary judgment), which the court denied. The SEC disputed the court's finding that algorithmic trading sales and other distributions to employees were not securities, but the court rejected the appeal because it determined the SEC did not present a "pure question of law"—which is the basis for interlocutory appeal—but rather questioned the court's application of the facts to the law (in fact, the SEC's proposed legal standard)—which is an inappropriate basis for interlocutory appeal.

A trial was set for April 2024 related to allegations against Ripple Labs executives, but in October 2023 the SEC dropped all charges against the executives to expedite its ability to appeal the lower court's decision to the Second Circuit. The only outstanding issue in the case at this stage relates to remedies. The parties are expected to complete discovery related to remedies in February 2024, followed by briefing on the topic in March through April 2024.

The blockchain industry has long engaged with the SEC to discuss paths to compliance and registration as an alternative to navigating significant enforcement actions and litigation. In the meantime, *Ripple* represents a strong step forward by providing caselaw that serves as both an example to market participants of how the judiciary views these categories of transactions and a foundation for securities law guidance for blockchain technology and digital assets. **HN**

Lilya Tessler is a Partner at Sidley Austin LLP and can be reached at ltessler@sidley.com. Robert C. Uhl is a Managing Associate at the firm and can be reached at ruhl@sidley.com.

THANK YOU DALLAS COMMUNITY FOR GIVING BACK

Dear Citizens of Dallas:

The Equal Access to Justice Campaign is an annual fundraising drive benefiting the Dallas Volunteer Attorney Program. The Dallas Volunteer Attorney Program, or DVAP, is a free, civil legal aid program of the Dallas Bar Association and Legal Aid of NorthWest Texas. Through DVAP, over 1,200 volunteers donate their time and legal skills to help low-income people in Dallas resolve their legal problems. Those who have bravely served our country, innocent children, the elderly, and the disabled are some of the many people DVAP helps every day. The support of our donors is more important now than ever. Over 800,000 people in Dallas County already qualify for DVAP's help, while the number of people living in poverty continues to grow. Please join us in thanking our generous donors for their support of access to justice for all.

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For more information contact Michelle Alden at aldenm@lanwt.org or (214) 243-2234.

Dallas Bar Foundation – Dedicated to the Future

STAFF REPORT

The Dallas Bar Foundation (DBF) had a very memorable year in 2023. At the October DBF Fellows Luncheon **Frank E. Stevenson II**—Of Counsel at Locke Lord LLP, 2016 President of the State Bar of Texas (SBOT) and 2008 President of the Dallas Bar Association (DBA)—was honored as the 2023 Fellows Justinian Award recipient. **Harriet Miers**, also of Locke Lord LLP, and past recipient of this award, introduced Frank. Among the guests honoring Frank and attending the event were six SBOT presidents, 16 DBA presidents, and 20 members of the Class of 2023 DBF Fellows. Frank's acceptance speech was thoughtful, reflective, inclusive, and appreciative of those who accompanied him on his journey. His inspirational and uplifting remarks were acknowledged with a standing ovation. Frank was gracious in sharing his speech with the many guests who asked for a transcript. It is posted on the DBF website.

Our major fund-raising event of 2023, *An Evening with Arthur Brooks*, was held in April, with Toyota as the Presenting Sponsor. It was one of the most enjoyed evenings since the event's inception in 2011. Brooks provided a thought-provoking presentation on the science of happiness and the aspects of meaningful work. The proceeds from the event benefit the Sarah T. Hughes Diversity Scholarship program, which has been in existence since 1981. Please make plans to attend *An Evening with Annette Gordon-Reed* on March 21, 2024. Ms. Gordon-Reed graduated from Dartmouth College and earned her law degree at Harvard, where she is currently the Carl M. Loeb University Professor. She is a MacArthur Genius and the first Black author to win the Pulitzer Prize for History. She has won 16 book awards.

A summer highlight for the DBF is the Summer Clerks Luncheon. All the law students awarded a clerkship and/or fellowship by the Dallas Bar Foundation and their mentors attend the event. It is an opportunity for the DBF trustees to personally thank the mentors and for the law clerks to make some brief remarks about their six-week summer clerkship experiences.

The Bar None XXV show, titled *Where the Law Dads Sing*, had a very successful 4-night performance run in June after a 3-year hiatus from having a "live" show. Many thanks goes to **Rey Rodriguez**, a past Hughes Scholar, and to Vistra Energy, both of whom were Investor Sponsors. **Martha Hofmeister,** Shackelford, Bowen, McKinley & Norton LLP, and Bar None Director, and **Tom Mighell**, Contoural, Inc and Bar None Producer, presented a "check" of the proceeds from the show to **Trisha DeLeon**, Holland & Knight LLP and DBF Chair, at the Bar None – Hughes Scholar Luncheon. Ms. DeLeon gratefully acknowledged the contributions of the many sponsors and friends of Bar None and thanked the cast and crew of Bar None without whom the Hughes Scholarships would never have been able to continue since 1981. **Karen Askew,** Askew Law PC, and **Mike Kornecke**, Michael A. Koenecke, Attorney & Counselor, were recognized and presented with a framed photo collage for their many years of service with Bar None. The introduction of the three new Hughes Scholars, **Frank Brown**, 2L UNT Dallas, **Jennifer Monel**, 2L UNT Dallas, and **Hernan Valles**, 1L SMU, is always a special part of the luncheon.

A sample of the grants awarded by the DBF throughout the year include: the DBA Mock Trial Program; Genesis Women's Shelter Legal Services for their attorneys to attend the DBA Family Law Bench Bar Conference; Lone Star Justice Alliance for the recruitment of pro-bono attorneys to handle cases referred by New Friends/New Life to assist victims and survivors of abuse; Advocates for Community Transformation (ACT) to upgrade their on-line research capabilities; and Housing Crisis Center to integrate their online application process with Legal Aid of NorthWest Texas.

The Dallas Bar Foundation gratefully appreciates the many sponsors, donors, and volunteers for making 2023 a memorable year. **HN**

Focus | Corporate Counsel/Securities

Unlocking the SEC's New Private Fund Adviser Rules

BY GRAHAM MCCALL

The SEC recently adopted sweeping and controversial new rules applicable to investment advisers to the $26.6 trillion private fund industry. While most of the substantive provisions of the Investment Advisers Act of 1940 apply only to registered investment advisers, several new rules also apply to certain managers and independent sponsors that file with the SEC as exempt reporting advisers.

The new rules are currently being challenged before the Fifth Circuit Court of Appeals. In the interim, private fund advisers should start preparing for thorny interpretive issues under the new rules—namely, those involving preferential treatment among investors.

It is common practice for private fund advisers to enter into "side letters" or other similar agreements with certain investors. These side letters and agreements may provide those investors with favorable rights under the private fund's governing agreement. Side letters are particularly common for "seed" deals, in which an investor provides initial capital to a private fund and, in exchange, receives reduced fees, better liquidity, or enhanced transparency (among other things) from the fund. Under the SEC's new rules, certain prohibitions and notice requirements will apply to these arrangements, regardless of a private fund adviser's registration status.

Preferential Redemption Rights

Subject to certain limited exceptions, the new rules prohibit investors from receiving preferential rights (i) to redeem their interests prior to or on better terms than other investors in the same fund or a similar pool of assets, or (ii) to receive information regarding the portfolio holdings or exposures of the private fund or a similar pool of assets that other investors do not receive.

Notice of Preferential Treatment

Prospective investors must receive notice if another investor in the same fund has been granted preferential treatment on any material economic terms of the investment (e.g., fee breaks and co-investment rights). Current investors must receive written disclosures of all preferential treatment granted to other investors in the same fund. For an illiquid private fund (e.g., a private equity fund), these disclosures must be provided upon completion of the fundraising period. For a liquid private fund (e.g., a hedge fund), the disclosures must be provided as soon as reasonably practicable after the investor makes his or her investment. All investors in a private fund must receive annual written notice regarding any preferential treatment provided during the preceding year.

Treatment of Existing Funds

Private fund advisers should determine what existing private funds and side letters fall within the scope of the new rules' preferential treatment prohibitions and notice requirements. Preferential liquidity and transparency rights for side letters dated prior to the applicable compliance deadline (likely third quarter of 2024, at the earliest) will generally be granted legacy status. Even then, fund advisers will still need to disclose the preferential terms to all investors by the new rules' compliance deadline.

For liquid funds, investors may continue to be given different liquidity options through different classes of interests. But investment size can no longer be a gating criteria. Rather, the trade-off may be that a fund provides investors with greater liquidity rights in exchange for higher fees.

Similar Pools of Assets

While private fund advisers need not disclose to a particular fund's investors whether preferential treatment is provided to investors in a similar pool of assets, they still must consider those similar pools of assets for purposes of the prohibition against preferential liquidity and transparency rights.

The rules define a "similar pool of assets" to generally mean a pooled investment vehicle (other than a registered fund or securitized asset fund) with substantially similar investment policies, objectives, or strategies to those of the private fund managed by the adviser or its related persons. This definition is vague and raises a number of questions: Does this definition require that a co-investment vehicle not give investors greater transparency into the underlying asset than is given to investors in the main fund? When can a fund-of-one for a larger institutional investor be considered within the definition's scope? Would any of the adviser's proprietary vehicles meet the definition such that insiders would no longer be able to redeem sooner or have greater insight into certain holdings?

Outside counsel will need to grapple with these questions to ensure private fund adviser clients do not inadvertently violate the new rules. **HN**

Graham McCall is a Partner at Jackson Walker. He can be reached at gmccall@jw.com.

Sylvia Demarest and Edward Cloutman Win 2024 MLK Justice Award

CONTINUED FROM PAGE 1

Cloutman when he was only a second-year attorney seeking help—he wanted his children, who lived just down the road from a white school near Love Field, not to have to take the bus to a black school in West Dallas. Demarest and Cloutman would spend the next several years of their lives fighting to end the segregation of Dallas public schools not only on paper but in practice. Collectively, they put almost 1,700 hours into that single case, resulting in the resounding vindication of the educational rights of children of color.

Demarest and Cloutman, as lawyers, as citizens, and as leaders, embody the ideals that Dr. King called each of us to aspire to. They did their part to bend the moral arc of the universe towards justice, and it is only fitting that they be recognized as the recipients of this year's DBA MLK Justice Awards. **HN**

J. Collin Spring is an Associate at Ryan Law Firm, PLLC, and a Co-Vice Chair of the DBA's Publications Committee. He may be reached at jay.spring@ryanlawyers.com.

Focus | Corporate Counsel/Securities

Workplace In-Civility: The NLRB Changes Course

BY HUNTER TAYLOR

Employers have a vested interest in establishing and maintaining a professional environment for their customers and employees. It seems odd to even consider an alternative approach. After all, some amount of mental gymnastics is required to imagine a scenario in which the alternative would benefit the employer. But the concept is not free of its issues in execution. Some efforts to maintain "civility" in the workplace through employee and similar handbooks can create unintended consequences. The National Labor Relations Board (NLRB) has not hesitated to respond to these unintended consequences, as evidenced by its recent shifts in interpretation and enforcement of restrictions set forth in the National Labor Relations Act.

As an example, Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It gives employers the right "to refrain from any or all such activities." Section 8(a)(1) of the Act also makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

What constitutes an interference, restraint, or coercion made by an employer is less clear. This issue has been the focus of varying (and at times conflicting) NLRB rulings in which the NLRB has attempted to determine where the Act lands on the pendulum between the: (a) employer's interests in enforcing so-called "civility" policies, and (b) an employee's freedom to engage in activities protected by the Act.

Confusingly, the NLRB has held that even when an employer's facially neutral employment policy does not expressly restrict Section 7 activity, was not adopted in response to a protected activity, and has not applied to restrict a protected activity, the policy may still violate Section 8(a)(1) of the Act. Such a violation would occur if the employee "would *reasonably* construe the language to prohibit Section 7 activity." Without sufficient regulatory guidance and clarity, an employer cannot adequately protect itself from an employee who may cleverly or unfairly "reasonably construe" language that violates the Act.

Until 2017, this "reasonableness" qualifier was enforced without substantial deference to objective circumstances, such as an employer's legitimate interests in maintaining civility policies. This changed in the NLRB's *Boeing* decision, in which the NLRB acknowledged the existence of special circumstances relative to the employer's industry, work settings, and events specific to or resulting in the policy in question. Under *Boeing*, employers found some degree of stability in understanding the types or categories of policies that do not violate the Act.

However, following its invitation for public input (which was notably absent in *Boeing*), the NLRB changed course in its *Stericycle* decision. In *Stericycle*, the NLRB reemphasized a perception-based qualifier as to an employee's "reasonable" interpretation of a workplace policy and paid particular attention to whether or not an "economically dependent" employee could interpret a policy to restrict Section 7 rights. The decision was a drastic shift in the NLRB's position on the pendulum because it replaced the NLRB's use of "categories" of acceptable rules in favor of a case-by-case approach that is contingent on disparate interpretations.

Poised to abandon the precedent it set in *Boeing*, the NLRB quickly applied the new elements and standards it laid out in *Stericycle* to Starbucks' "How we communicate" policy.

Although Starbucks' policy was facially neutral and included common requirements that its employees practice "professional and respectful" behavior, contained a uniform dress code, and required attendance at HR meetings related to employee benefits, the NLRB determined that Starbucks' application of these policies created opposing interpretations as to the policy's true meaning. According to the ruling, Starbucks' selective implementation of its policies and certain language within its policy suggested there could be negative consequences for union activity. This resulted in the NLRB finding that Starbucks' policy was "overly broad, vague, and can [be] reasonably construed to intrude on Section 7." Of note, the NLRB imposed a significant burden of proof on Starbucks, requiring it to demonstrate that it would be "unable" to advance its legitimate interests with a "more narrowly tailored rule." The impact of a burden of this sort cannot be understated as applied to workplace policies because each employer policy may now be rendered unenforceable if a less "restrictive" alternative is available.

In sum, recent NLRB cases reflect a substantial shift in the legality of workplace "civility" policies that "could" be interpreted to limit union activity and involvement. Further, the NLRB cases serve as a great reminder that employers need to periodically review their handbooks and update the handbooks accordingly. Any such updates should narrowly tailor policies to promote enforceability and hedge against potential contests that a policy violates the Act. **HN**

Hunter Taylor is an Attorney at Griffith Davison. He can be reached at htaylor@griffithdavison.com.

2023 DBA President Recognized

On behalf of the Board, Sarah Rogers (right), Second Vice President, presented Cheryl Camin Murray, DBA's 2023 President, with an oil painting by Texas artist Jerral Derryberry. Mr. Derryberry's work is currently represented and sold in fine art galleries and national exhibitions. More of his work can be seen at www.jerralderryberry.com.

Focus | Corporate Counsel/Securities

Why Arbitration and How to Improve Your Chances of Winning

BY MARK SHANK

Why Arbitrate?

Arbitration provides distinct advantages to parties that are not available in court. These advantages include more autonomy and self-determination in the adjudicatory process. For example, while judge shopping is difficult or prohibited at the courthouse, parties in arbitration can vet several potential arbitrators and select the one (or a panel of three) that they like the most or who has appropriate expertise in the relevant subject matter.

Prior to selection, parties can review extensive CVs or, in some cases, watch short video presentations in which the arbitrator addresses his or her style and procedural preferences. The parties may also research the arbitrator's background (including any websites, publications, or speaking engagements); confer with colleagues who are familiar with the candidate; and receive written disclosures about the arbitrator's previous contacts with parties, their counsel, and potential witnesses to preclude disqualifying conflicts of interest.

Once an arbitrator is selected, the parties can avail themselves of additional advantages of arbitration. First, the parties can set a hearing on a date certain. Unlike a judge, the arbitrator will have no competing settings. Discovery is also generally more limited in arbitration. Witnesses can be taken out of sequence and when available. Experts can be examined remotely through Zoom, saving travel and waiting costs. Arbitrators are typically open to any other approaches that improve efficiency, increase flexibility, and lower costs. The selection of an arbitrator who will actively participate in these processes is crucial.

Improve Your Chances of Winning

Counsel in arbitration sometimes fail to consider that their ultimate audience in arbitration is much different than at the courthouse. Instead of jurors who might be susceptible to emotional pleas and might need repetition to fully understand the case, neither approach typically appeals to arbitrators. In fact, a frequent complaint by arbitrators is that attorneys are repetitive.

Instead, parties have the benefit of a highly experienced decisionmaker who will understand the importance of proof provided by counsel and who will analyze the facts dispassionately. Much like trial counsel who should always be mindful of the jury charge, arbitration counsel should always be mindful of the arbitration award that may be entered. And trial counsel should always endeavor to cater proof to make it easier for the arbitrator to write an award in their client's favor. Here are some thoughts on how to do that:

Focus on the elements. Each cause of action has elements of proof. At the outset confidently lay out the elements of each claim, and briefly explain how your evidence will prove each one. At the close of the hearing, lay out how you have proved the elements. This is the precise information the arbitrator will be focused on when writing the award.

Clarity and simplicity. All arbitrators appreciate advocates who can present their cases clearly and simply. Take great care to ferret out what is important and stay focused on that. Do not take the bait if opposing counsel tries to send you down rabbit trails that are not germane to proof of your claims and defenses. Stay focused.

The flexibility of arbitration. Counsel sometimes miss opportunities to take advantage of the flexibility of arbitration. For example, once a document is in evidence in an arbitration, you can read from it, without the need for a sponsoring witness. Most arbitrators will also let you comment on why a particular passage in the document is important.

Use cast of characters. Providing the arbitrator with a list of key persons and witnesses involved in the case often helps the arbitrator understand the case and is a useful tool when writing the award. This is particularly true during a lengthy hearing. The list could include pictures of each person and a short summary of that person's role in the case.

Use of timelines. Timelines are particularly useful. When you provide the arbitrator with a timeline of key events, you help the arbitrator understand the context of testimony, which is not often presented chronologically. Timelines need to be accurate but can emphasize important favorable facts without being argumentative.

Use of summaries. Summaries are very useful to arbitrators and tend to be important tools arbitrators use in writing awards. Summaries are often used to simplify complicated numerical information but can also be used to summarize the evidentiary showings made by parties on particular case elements or damages theories.

Proof of damage. Counsel often put so much effort into proving the fact of damages that they neglect proving up their damages model. So, make it easy for the arbitrator to understand your damages models. As stated above, summaries can be very effective.

Do not forget interest. Counsel often fail to provide the arbitrator with a guide to determine what is the proper basis for awarding prejudgment and post-judgment interest. You should be prepared to present this information.

Hopefully, these suggestions will encourage you to choose arbitration when appropriate to meet your clients' goals, and once you get there, to make a presentation more likely to result in a favorable award. **HN**

Mark Shank is Senior Counsel at Diamond McCarthy. He can be reached at mark.shank@diamondmccarthy.com.

DBA/DAYL Moms in Law

Being a working mom can be challenging. Being a working lawyer mom can be a different ballgame with its own unique challenges. Moms in Law is a no pressure, no commitment, informal, fun, support group for lawyer moms.

Join Moms in Law for lunch
Thursday, January 25, Noon, at PaneVino Osteria
(5000 Belt Line Rd, Ste. 300, Dallas)
To RSVP, email Rebecca Nichols at rfitzgib@gmail.com
Email cpleatherberry@gmail.com to join the Moms in Law email listserv.

Dallas Bar Association

Inspiring Women 13 took place at the Arts District Mansion on December 1, 2023. Our all-star panelists, led by Hon. Karen Gren Scholer and Dawn Estes, included: Hon. Bonnie Goldstein, Karen Hartsfield, Hannah Kim, Karen Mitchell, Yvette Ostolaza, Leigha Simonton, and moderator Terry Bentley Hill. The program offered an hour of Ethics CLE, along with humor and war stories to help you reach the top of your game.

Inspiring Women 13










Nuances of Texas Bank Litigation

BY ERIC HAIL AND TED HUFFMAN

Like most businesses, banks sue and get sued. But if you have ever been involved in litigation with a Texas bank, you may know that the rules and procedures differ in some ways from other cases. That is because lawmakers have enacted special laws governing banks. The purpose of those laws is often aimed to strengthen standards governing the banking system or to protect the privacy of bank customers, but the impact of those laws also plays out in litigation. For the general practitioner, this article provides a primer on some things you should know.

Serving Process on Banks

The first step in litigation after filing a lawsuit is to serve the citation. Texas law is particular about how banks must be served. Specifically, Section 17.028 of the Texas Civil Practice and Remedies Code requires that banks be served by one of two means: (1) serving the registered agent, or (2) if there is no registered agent, serving the president or any branch manager in the state. Parties often attempt to serve a bank through the Texas Secretary of State, but the Secretary of State is not a valid method for serving a Texas bank.

Unique Discovery Protocol

Parties seeking written discovery from banks relating to customers are often surprised to learn about Section 59.006 of the Texas Finance Code. For many civil matters, Section 59.006 "provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers."

To request discovery under Section 59.006, a party must serve its record request and give the bank at least 24 days to respond. The requesting party also must pay the bank's reasonable costs of production, including costs of reproduction, postage, research, delivery, and attorney's fees. If the requesting party does not fulfill these initial requirements, the bank has certain immunity from the discovery, and the court cannot order the bank to produce any documents or hold the bank in contempt for withholding.

If the bank records relate to a customer that is not a party to the lawsuit, the requesting party is also required to notify the customer and obtain the customer's written consent authorizing the production. If the customer does not consent, then the requesting party has one option left: it must move for in camera inspection and ask the court to order a production. The court then must decide whether the bank records can be produced in a partial or redacted form and, if so, order a limited production subject to the terms of a protective order. An order by the court to quash or protect the production is not subject to interlocutory appeal.

Liability Protections for Bank Officials

While bank directors, officers, agents, and employees are subject to many of the same general standards for liability, defenses, and indemnification under the Texas Business Organizations Code as other corporate parties, they also receive enhanced liability protections in some circumstances.

One of these limited liability protections applies to bank representatives that do not have a personal interest in the bank's decision-making or the transactions giving rise to a lawsuit. Unless the disinterested bank representative acts with gross negligence or engages in willful or intentional misconduct causing damage to an opposing party, the statute generally provides that he or she cannot be sued for damages arising out of the conduct of the depository institution's affairs.

Bank directors and officers are also not required to endorse and be held responsible for all decisions of their employing banks. A bank director or officer, acting in good faith, is entitled to reasonably rely on opinions, reports, financial statements, and other data prepared or presented to them by other bank representatives who are reasonably deemed to merit confidence, including (1) certain directors, officers, or employees of the depository institution, (2) legal counsel, (3) a public accountant, or (4) a committee of the board of which the bank director is not a member. *See* Tex. Fin. Code § 31.006(c).

False Statements About Banks' Financial Condition

As a last word of caution, parties and their counsel should be careful in making out-of-court representations about any bank that is adverse to them. Bank defamation is not just a matter of commercial concern in Texas. It is a state jail felony to knowingly slander or assist another person to make derogatory statements about the financial condition of a bank in this state. Tex. Fin. Code § 59.002. **HN**

Eric Hail and Ted Huffman are attorneys at Katten Muchin Rosenman LLP. They may be reached at eric.hail@katten.com and ted.huffman@katten.com, respectively.

Focus | *Corporate Counsel/Securities*

Energy AI Initiatives and New Texas Privacy Law

BY THAÍS DOURADO

Texas is the leading U.S. state in electricity production, generating nearly twice as much as the second-ranked Florida. According to the U.S. Energy Information Administration, Texas is also the nation's largest electricity consumer. In 2022, the residential sector accounted for approximately two-fifths of electricity sales in Texas, the commercial sector consumed about one-third, and the industrial sector used around three-tenths.

Texas' power grid avoids regulation by the Federal Energy Regulatory Commission, allowing Texas to have its own energy policy and foster a competitive market for electricity providers in the state. There are various state laws and regulations that govern the industry.

One such law is the Texas Data and Privacy Security Act (TDPSA), which Governor Greg Abbott enacted by signing House Bill 4 on June 18, 2023. The Lone Star State is currently one of the 14 U.S. states with a comprehensive data privacy statute. Many aspects of the TDPSA take effect on July 1, 2024, with additional specific rules regarding universal opt-out technology to take effect on January 1, 2025.

The TDPSA applies to entities that conduct business in Texas or that produce products or services consumed by Texas residents. Unlike all other U.S. states, Texas created a limited exemption in TDPSA for "small businesses" as defined by the U.S. Small Business Administration (SBA). Nevertheless, whether a small business meets the SBA definition is a complicated issue, and the lack of other thresholds may indicate that the TDPSA will apply broadly.

While the TDPSA is similar to the well-known California Privacy Rights Act (CPRA) and prioritizes consumers, the TDPSA is considered more "business-friendly" than other states' privacy laws. Like many other U.S. states' data protection laws (but different from the CPRA), the TDPSA does not provide for a private right of action. The Attorney General will have the exclusive authority to enforce TDPSA violations, although no rulemaking power is provided to the Attorney General to interpret the Act.

The TDPSA affects the Texas energy sector directly. Many companies in the industry are undergoing a global digital revolution and have increasingly utilized information and communication technologies (ICTs) that require the implementation of privacy security measures. These energy companies must be well-positioned to comply with the TDPSA.

An example of technological development in the electricity sector triggering the application of data protection laws is the use of smart meters. Smart meters allow consumers to track their electricity consumption and costs while collecting such information and transferring it to system operators. Data gathered from the most modern smart meters can serve to identify energy usage patterns associated with specific appliances, including electric kettles, televisions, and charging electric vehicles. Data collected by smart meters can also be combined with other information, such as usage metadata and postcode information, to generate sensitive identifying information about specific consumers. For example, power consumption records from a residential hemodialysis machine could reveal an individual's health diagnosis.

Artificial Intelligence and machine-learning systems also analyze smart meter-generated consumer information and can reveal lifestyle habits and other personal data. And consumer data has many applications and may be used, for example, to influence behavior. Therefore, data privacy rules and regulations applied to the energy sector are essential to safeguard consumer rights.

Under the TDPSA, covered businesses must obtain clear affirmative consent from consumers before processing sensitive data. Even an otherwise exempt small business is prohibited from selling sensitive personal data that could identify an individual unless the business first obtains that individual's consent.

The TDPSA requires clear privacy notices to consumers regarding the category of data being processed, the data processing purpose, and the means available for consumers to exercise their data privacy rights. Except for exempt "small businesses," if a business engages in the sale of sensitive data, the following notice must be provided: "NOTICE: We may sell your sensitive personal data." If a business engages in the sale of biometric personal data, the following notice also must be included: "NOTICE: We may sell your biometric personal data."

The TDPSA requires covered businesses to expand their opt-out compliance programs and recognize universal opt-out mechanisms for the sale of personal data and targeted advertising. Under the TDPSA, such mechanisms must be consumer-friendly and easy to use and allow the data controller to determine if the consumer is a Texas resident and has made a legitimate opt-out request.

Texas energy companies with preexisting compliance policies for the General Data Protection Regulation (GDPR), CPRA, Florida Digital Bill of Rights, Virginia Consumer Data Protection Act, and other states' data protection laws may already comply with most aspects of TDPSA. Nonetheless, these companies must carefully analyze Texas' novel statute and review their compliance programs to ensure adherence to the TDPSA, especially businesses using Artificial Intelligence, machine learning, and ICTs. **HN**

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Join the Texas UPL Committee

The **Unauthorized Practice of Law Committee (UPLC)** is comprised of nine volunteers who are appointed for three-year terms. The UPLC is authorized to investigate and eliminate the unauthorized practice of law. Members of the UPLC volunteer to help with cease-and-desist letters and injunction lawsuits. Serving on this committee is an excellent opportunity to get involved, network, meet people, and develop business.

Sign up at https://buff.ly/3E8qadk

Meet Your Allied Bar Presidents for 2024

STAFF REPORT

With a new year also comes the time to welcome the incoming presidents of our sister bar associations. The DBA looks forward to working with these leaders as they seek to advance the goals of their organizations and promote the interests of their members in 2023.

Serving as this year's President of the Dallas Women Lawyers Association (DWLA) is **Stephanie Almeter**. She is a Partner at McCathern, Shokouhi, Evans, PLLC and is a results-driven advocate for clients in the areas of Business & Commercial Litigation, Directors & Officers Liability, and Employment Law. Almeter was recognized as Super Lawyers Texas Rising Star from 2014-2021. She has also been voted by her peers as one of Dallas's Best Lawyers Under 40 by *D Magazine* from 2018 through 2023. In addition, she was named a 2020 «12 Under 12» by the Texas A&M Association of Former Students. She received her undergraduate degree, *Cum Laude*, from Texas A&M University, and received her J.D. from Baylor University School of Law.

Kristine Cruz will serve as President of the Dallas Asian American Bar Association (DAABA). An Associate at Berry Appleman & Leiden LLP, she works on all aspects of employment-based immigration, including non-immigrant and immigrant visa matters. Prior to joining the firm, Cruz served as the Legal Program Director at Mosaic Family Services, a nonprofit dedicated to serving survivors of human rights abuses in North Texas, including domestic violence and human trafficking. She earned her undergraduate degree in International Affairs from the George Washington University and her law degree from SMU Dedman School of Law, graduating with honors.

Trerod Hall will serve as President of the J.L. Turner Legal Association (JLTLA). As an Assistant City Attorney for the City of Dallas, he helps to oversee all legal matters of the city relating to Real Estate and Construction matters, including negotiating contracts and providing legal advice regarding Dallas' strategic and progressive policies, laws, agreements, programs, projects, procurements, and services. Prior to the City of Dallas, Hall worked as a Staff Attorney at Legal Aid of NorthWest Texas. A graduate of the University of North Texas and UNT Dallas College of Law, Hall has been a member of JLTLA since 2019.

Haleigh Jones, a Partner at Crawford, Wishnew & Lang PLLC, will serve as President of the Dallas Association of Young Lawyers (DAYL). She practices commercial litigation in trial and appellate courts, representing both plaintiffs and defendants in matters involving real estate, breach of contract, breach of fiduciary duty, fraud, business divorce, personal injury, and aviation. She was recognized as the DWLA 2021 "Rising Raggio," and has been recognized on D Magazine's lists of Best Lawyers and Best Lawyers under 40since 2021, and on Thomson Reuters' list of "Rising Stars" in the area of business litigation since 2019. She received her undergraduate degree from the University of Cincinnati, and her J.D. from SMU Dedman School of Law, magna cum laude, where she graduated as the Fred C. Moss Outstanding Graduating Advocate.

Serving as President of the Dallas Hispanic Bar Association (DHBA) is **Edward J. Loya, Jr.**, a partner at Epstein Becker & Green, P.C. and a former federal prosecutor, who focuses his practice on white-collar defense and investigation and civil litigation matters. A graduate of the University of California, San Diego, and Stanford Law School, Loya is a Sustaining Life Fellow of the Texas Bar Foundation and Co-Chair of the Hispanic National Bar Association's Standing Committee on Endorsements.

Elissa Wev will serve as President of the Dallas LGBT Bar Association. Currently assigned to the Juvenile Justice Division of the Dallas County District Attorney's Office, Wev previously prosecuted felony offenses involving intimate partner violence and served in the Public Integrity Division. She began her career as a public defender helping indigent clients overcome poverty-biased procedures and punishments. Earning both her undergraduate and J.D. at The University of Texas School of Law, Wev also studied at Federal University of Rio Grande do Sul in Porto Alegre, Brazil. In addition to her work with the Dallas LGBT Bar Association, she has also volunteered on committees for the Texas Lawyers Assistance Program, DWF Hispanic100, and Annie's List. **HN**


Stephanie Almeter


Kristine Cruz


Trerod Hall


Haleigh Jones


Edward J. Loya, Jr.


Elissa Wev

ECL Attorney Spotlight

JOEL B. WINFUL

With over 20 years of service to the local legal community and to the African-American community through J.L. Turner Legal Association, Legal Aid of NorthWest Texas, the Dallas Bar Association, and others, Joel Winful is establishing an Estate Planning, Wills & Trusts and Probate law practice with the help of Entrepreneurs in Community Lawyering.

"Over the last 3 years, I have helped my own family deal with 3 completely unexpected deaths. So, end of life planning has become a focus point for me," he said. "I am aware that the African-American community is particularly underserved in this area of the law. I believe that I can be of assistance in trying to help more people within this community to obtain wills and estate planning services at reasonable prices."

Mr. Winful graduated from the University of North Carolina at Chapel Hill, with a degree in Political Science and then got his Juris Doctorate degree at Southern Methodist University Dedman School of Law. He has practiced law for over 25 years in the DFW area primarily in the areas of civil litigation, contracts, and governmental law.

Entrepreneurs in COMMUNITY LAWYERING — A program of the Dallas Bar Association

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Thank you to all of our Equal Access to Justice Campaign sponsors who attended the Bachendorf's Reception. And thank you to Bachendorf's for their continued support of the EAJ Campaign.

Focus | *Corporate Counsel/Securities*

New Cybersecurity Rules and Tips for Companies

BY BRUCE NEWSOME AND KIERRA JONES

On July 26, 2023, the Securities and Exchange Commission (SEC) adopted final rules addressing cybersecurity incidents, risk management, strategy, and governance. The rules are designed to enhance and standardize cybersecurity-related disclosures required by public companies and reflect the increased significance of cybersecurity to both investors and regulatory bodies.

The rules include amendments to annual reports on Forms 10-K and 20-F and current reports on Forms 8-K and 6-K. Public companies will be required to include the periodic report disclosures beginning with annual reports for fiscal years ending on or after December 15, 2023. Current report disclosures will be required beginning on December 18, 2023. Smaller reporting companies will be allowed an additional 180 days for current report disclosures.

Public companies will be required to describe in a current report, to the extent known at the time of filing, the material aspects of a cybersecurity incident including the nature, scope, timing, and material impact (or reasonably likely material impact) on the company. The disclosure should identify any material impact on the company's financial condition and results of operations. As part of a continuation of the trend in SEC rulemaking in recent years, public companies are cautioned against boilerplate disclosure and analysis lacking meaning for the investing public. The materiality determination should consider the unique characteristics of the company and reflect an informed and deliberative process.

The required disclosure must focus primarily on the material aspects and impact of the particular cybersecurity incident. Public companies should make sure systems are in place to monitor the initial occurrence of cybersecurity incidents in addition to any ongoing impact on the company. Moreover, the SEC noted that public companies may have a duty to correct a prior disclosure that the company determines was untrue at the time it was made, or a duty to update a disclosure that becomes materially inaccurate after it was made. Public companies are generally not required to disclose remediation status, whether the incident is ongoing, or whether data was compromised. One exception is that companies still must disclose the circumstances of a particular cybersecurity incident if a determination is made that these circumstances are material to understanding the cybersecurity incident or its impact.

Public companies will also be required to provide in their annual reports a description of their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes. In preparation for compliance with the rules, public companies should begin gathering the necessary information to provide adequate disclosure on how cybersecurity risks are identified through, and integrated into, their management system or processes including whether the company engages third parties in connection with such processes.

The rules will require descriptions of the roles of the board of directors and management in overseeing and implementing cybersecurity processes and assessing and managing cybersecurity-related risks. A company must identify any board committee or subcommittee responsible for oversight and describe the processes by which the board or such committee is informed of such risks.

When disclosing management's role in assessing and managing the company's material risks from cybersecurity threats, public companies should consider the non-exhaustive list of elements provided in the rules. The list includes the following:

- Whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise;
- The processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
- Whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.

In addition to the updates to the forms listed above, public companies should be cognizant of the possibility that the rules may impact disclosure considerations beyond these requirements. For example, a disclosure of cybersecurity risk factors should adequately reflect any material developments or updates to a prior disclosure. Generally, the new rules reflect the importance of cybersecurity to investors, company stakeholders, regulatory bodies, and the market. While compliance with the rules will require public companies to ensure appropriate processes are in place to identify and assess the materiality of cybersecurity incidents, public companies should also be mindful of how inadequacies in cybersecurity disclosures, particularly when compared to industry peers, could negatively impact investor perception. **HN**

Bruce Newsome is a Partner at Haynes and Boone, LLP, and Kierra Jones is an Associate at the firm. They can be reached at bruce.newsome@haynesboone.com and kierra.jones@haynesboone.com, respectively.

Professionalism Tip

"I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system... My word is my bond."
- Excerpt from the Texas Lawyers Creed

Find the complete Creed online at tinyurl.com/jve7h93h

DBA Publishes DEI Toolkit

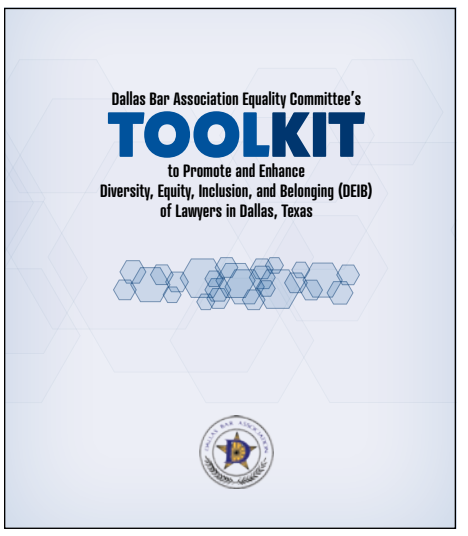
STAFF REPORT

The DBA Allied Dallas Bars Equality Committee's Toolkit to Promote and Enhance Diversity, Equity, Inclusion and Belonging of Lawyers in Dallas, Texas is will be available online in January 2024.

The Toolkit includes checklists, templates, and suggestions for an organization to carefully consider as it works to tailor initiatives to its own organizational needs to attract and retain diverse legal talent while fully complying with all laws and avoiding discrimination.

To articulate current "best practices" for achieving diversity in the legal profession, the DBA Equality Committee's Practice Sub-Committee worked in 2021 and 2022 to craft this Toolkit. The primary goal was to help firms and corporations of all sizes identify diversity, equity, inclusion, and belonging (DEIB) efforts and results, and to explore resources, ideas, and programs supporting progress in the following focus areas:

1. recruiting and retaining diverse talent;
2. promoting equitable resources and opportunities in the legal profession for lawyers belonging to historically underrepresented and underserved groups; and
3. ensuring inclusion and equitable participation of diverse talent through client development and provision of legal services.



The Toolkit is searchable and the Table of Contents is linked to help navigate the document with ease.

"The Committee appreciates the work of its members and others in the industry who shared ideas and gave significant time, attention, and heart to this project," stated Committee Chairs. "We invite you to work through topics offered in the table of contents and keep checking as the document is a living one that will be changed and updated as laws, trends, and data evolve. Stay tuned for a rollout event and CLE session in 2024." **HN**

Irma Ramirez First Latina to Serve on Fifth Circuit

STAFF REPORT

On December 4, 2023, Judge **Irma Ramirez** was confirmed by the Senate on an 80-12 vote to serve on the U.S. Court of Appeals for the Fifth Circuit. She is the first Hispanic female to serve on that court. The Fifth Circuit is based in New Orleans and spans Texas, Louisiana, and Mississippi.

Judge Ramirez was nominated by President Biden in April 2023 to replace Judge Gregg Costa, who retired. Texas Senators John Cornyn and Ted Cruz both supported the nomination.

She has been serving as a U.S. magistrate judge for the Northern District of Texas for more than two decades. Prior to that she served as an assistant U.S. attorney and as an attorney at the firm of Lock Purnell Rain Harrell, LLP. She is a member of the Texas Bar Foundation, Dallas Bar Association, and Federal Magistrate Judges Association. She is also a Fellow of the Dallas Bar Foundation.

Born and raised in Brownfield, a small town south of Lubbock, Judge Ramirez attended West Texas A&M University for her undergraduate degree and earned her law degree from Southern Methodist University in 1991.

Judge Ramirez was an early recipient of the Dallas Bar Foundation's Diversity Scholarship, now known as the Sarah T. Hughes Diversity Scholarship. Established in 1981 by the Dallas Bar Foundation, the Judge Sarah T. Hughes Diversity Scholarship was established to increase the diversity of the legal community in Dallas.


Hon. Irma Ramirez

Judge Sarah T. Hughes often remarked upon a formula she used to live her life—"Pick out your goal, and then use determination and courage to reach it." Judge Irma Ramirez has done just that. Congratulations! **HN**

Focus | Corporate Counsel/Securities

SEC Enforcement Continues Despite Administrative Challenges

BY DAVID L. PEAVLER, EVAN P. SINGER, AND LUKE A. EKSTROM

Recent Supreme Court decisions have chipped away at the SEC's ability to bring actions through administrative proceedings, but have they meaningfully inhibited the SEC's overall enforcement efforts? The evidence says no. Despite growing limitations on its use of administrative proceedings, the SEC's enforcement program has returned to case numbers and financial sanctions that rival those it generated before the challenges appeared, in large part by shifting nearly all contested cases to federal district court.

Constitutional Challenges to the Administrative Proceedings. The SEC is authorized to bring enforcement cases in two forums: federal district court and the agency's own administrative courts. For most of the SEC's existence, its authorizing statutes largely restricted the administrative forum to actions against registered securities industry participants, delinquent reporting companies, and allegedly wayward professionals who practiced before it. The Dodd-Frank Act of 2010, however, empowered the SEC to bring virtually any enforcement case administratively, and the SEC promptly signaled its intent to use this authority.

Constitutional challenges to SEC administrative proceedings appeared almost immediately, culminating in the Supreme Court's 2017 decision in *Lucia v. SEC,* which held that the SEC's administrative law judges (ALJs) had been improperly appointed under the Constitution's Appointments Clause. The SEC tried to rectify this issue following *Lucia*, but nonetheless sharply curtailed its use of administrative proceedings for contested cases as other challenges arose.

One of those challenges was decided earlier this year, when the Supreme Court ruled in *Axon v. FTC* that a respondent in an SEC administrative proceeding could immediately contest the constitutionality of the proceeding in federal district court rather than being required to wait for a final decision from the SEC. The Court reasoned that respondents did not have to endure years of potentially unconstitutional proceedings without access to federal court to litigate their rights.

A potentially more serious challenge to the SEC's administrative powers is looming in *Jarkesy v. SEC*, in which the Supreme Court will hear the agency's appeal of a Fifth Circuit decision holding SEC administrative proceedings to be unconstitutional on multiple grounds. If decided against the SEC, *Jarkesy* could end the agency's ability to proceed administratively. And because it has implications for administrative proceedings across the federal government, *Jarkesy* promises to be one of the most closely-watched cases this term.

Challenges to Administrative Process Have Not Visibly Slowed SEC Enforcement. These recent challenges have created stark differences in the SEC's use of administrative proceedings. Between 2016 and 2018, the SEC initiated between 185 and 299 actions before ALJs each year, whereas from 2019 to 2022 the agency has brought between five and eight each year. Between April 1 and September 30, 2023, the SEC did not bring any actions before ALJs.

That said, the SEC's overall enforcement filings and sanctions have returned to—or even exceeded—their pre-*Lucia* levels. For example, in fiscal 2022, the SEC reported total financial sanctions of nearly $6.5 billion, including record civil penalties of $4.2 billion. For fiscal year 2023, the SEC has reported that it obtained $5 billion in total financial sanctions. These figures dwarf the SEC's pre-*Lucia* financial sanctions, which totaled between $3.7 billion and $4.2 billion each year from 2014 to 2017.

The SEC Is Pursuing New Approaches to Cases It Can Only Bring Administratively. The SEC has returned to pre-*Lucia* numbers by funneling its enforcement filings into federal court, but there are certain cases the SEC must bring administratively. Most significant are actions brought under SEC Rule 102(e), which allows the SEC to limit or bar lawyers, accountants, and other professionals from practicing before it. Rule 102(e) is among the SEC's most powerful weapons given the often severe reputational and business consequences that face professionals charged under the rule. But because the actions must be brought administratively, the SEC is exposed to collateral challenges authorized by *Axon*.

The SEC may be trying a different approach to this problem. It recently sued an accounting firm in federal court, alleging auditor independence violations and that the firm aided and abetted its clients' SEC reporting failures. This is precisely the kind of case the SEC historically pursued administratively under Rule 102(e).

While the SEC ultimately may achieve the same outcome in federal court as it would have administratively, it will likely be more challenging to do so. In federal court, the SEC faces more robust discovery, tighter evidentiary rules and burdens, and longer proceedings. It may also have to try its case to a jury rather than an SEC employee. These challenges increase the SEC's risk and costs of pursuing these actions and thus may temper its aggressiveness. But whatever the fate of administrative proceedings, it is clear that the SEC will remain active in its enforcement efforts. **HN**

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