Dallas Bar Association
HEADNOTES

December 2021 | Volume 46 | Number 12 | Focus | Probate, Trusts & Estates/Tax Law

Jones Day Leads the Way in the EAJ Campaign

BY MICHELLE ALDEN

Jones Day has delivered award-winning client service in litigation, enforcement matters, and a full range of global and local transactions for more than 40 years, opening the Dallas office in January 1981. The attorneys of Jones Day pride themselves on supporting the community in which they live and work. This desire to give back to the Dallas community led the firm to step up as the lead sponsor with an extraordinary gift of $30,500 to this year's Equal Access to Justice (EAJ) Campaign. The firm has a long and distinguished history of contributing to the Campaign. Including this gift, the firm has donated more than $280,500 to legal aid for low-income people since 1995. The EAJ Campaign is the annual fundraising campaign that supports the Dallas Volunteer Attorney Program (DVAP). The firm's gift makes it possible for DVAP to continue to provide legal aid in Dallas, keeping the doors to the courthouse and our overall justice system open to many more people in our community.

(Left to right): Samir Kaushik, Brian Jorgensen, Hilda Galvan, and Evan Singer

"Jones Day has a long history of, and commitment to, pro bono work, public service, and community involvement in North Texas. As our community closes another challenging year, Jones Day is honored to support DVAP's mission to provide access to justice to those in need," said **Samir Kaushik**, Hiring Partner. The most recent efforts of the Dallas office include:

Border Project. Jones Day represents migrants, primarily women, families, and unaccompanied children, who entered the United States at the southern border. Many are from Central America and are fleeing gender-based persecution in their home countries. Jones Day has set up two offices on the Border in Laredo and McAllen, Texas, to facilitate these direct services.

Constitutional Policing and Civil Justice Reform (CPR). Jones Day lawyers are working with cities, law enforcement, local, and national organizations across the country to drive systemic reform in policing practices, policies, procedures, and culture.

Anti-Human Trafficking. Jones Day is involved in efforts dedicated to detecting and preventing sex trade and forced labor trafficking crimes, in addition to assisting individual survivors.

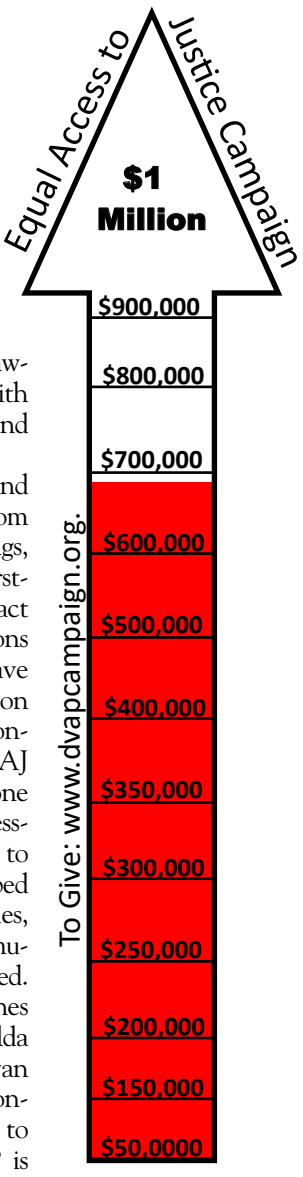
Jones Day attorneys also have a long history of involvement with DVAP, volunteering at various legal clinics and accepting cases for full representation. Without volunteer attorneys stepping up to assist, access to justice would be out of reach for DVAP clients, who do not have the resources to hire private attorneys.

"Jones Day stands behind the EAJ Campaign because equal access to justice is the backbone of our justice system and American society as a whole. If we do not ensure that those at or near the poverty line have access to the judicial system, they become marginalized or excluded from society altogether. It is absolutely essential that justice be the same for everyone, regardless of their income level," stated **Brian Jorgensen**, Administrative Partner.

Evan Singer, Pro Bono Partner, added, "My family has supported DVAP and the EAJ Campaign for many years. Beyond financial contributions, as the *pro bono* partner of the Dallas office, I am grateful for the partnership that our office has formed with DVAP and Legal Aid of NorthWest Texas to provide high-quality legal representation to low-income residents of Dallas. I look forward to that partnership flourishing for years to come."

Hilda Galvan, Partner-in-Charge of the Dallas office, is serving, along with **Lanesha Minnix** of Flowserve Corporation, as an Honorary Co-Chair of this year's EAJ Campaign. Hilda challenged local firms to encourage their attorneys and staff to participate in the Campaign this year by donating to DVAP in any amount. Jones Day is winning the race by a landslide so far, with over 40 attorneys and staff participating in this year's Campaign. The law firm challenge is bringing many new donors to the Campaign, who will hopefully remain donors for years to come.

According to Hilda, "It is a privilege for Jones Day to assist in our community's collective efforts to provide legal services to those without the means to pay for those services. We understand and accept that we have a duty to ensure that justice exists for all. Supporting the Equal Access for Justice Campaign is one way for law firms, corporate legal departments, and individual lawyers to assist with those efforts and honor that duty."



"My husband and I come from humble beginnings, and have seen firsthand the impact that organizations like DVAP can have on a family and on a community. Contributing to the EAJ Campaign is one small way of expressing our gratitude to those who helped us, our families, and our community," Hilda added. Apart from Jones Day's gift, Hilda and Mike Galvan are generously contributing $10,500 to the effort. DVAP is grateful for the leadership of Jones Day and the Galvans in this year's Campaign.

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

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

Thank You to Our Major Donors

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

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Simon Greenstone Panatier, PC
Stewart Law Group
Toyota

**As of November 9, 2021*

Inside

2022 DBA COMMITTEE SELECTIONS

You can now select your Committees with your 2022 dues renewal.

Make sure to pay your DBA dues by December 31, 2021 to continue receiving all Committee communications & benefits.

Thank you for your ongoing support and commitment to volunteer!

We look forward to seeing you in-person at the hybrid programs listed below. Programs in green are Virtual Only programs.

Check the DBA website (www.dallasbar.org) for the most up-to-date information.

Calendar | December Events

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

WEDNESDAY, DECEMBER 1

Noon **Employee Benefits & Executive Compensation Law Section**
"A Secret Behind High Drug Costs," Mary Powell. (MCLE 1.00)* *Virtual Only.*

Solo & Small Firm Section
"New Rules, One Year Later (TRCP)," Kirsten Castaneda, Andy Jones, and Hon. Monica Purdy. (MCLE 1.00)*. *Virtual Only.*

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

Public Forum/Media Relations Committee. *Virtual Only.*

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

4:30 p.m. Equality Committee. *Virtual Only.*

THURSDAY, DECEMBER 2

9:00 a.m. Santa Brings a Suit Drive Drop Off – Circle Drive at the DBA, 2101 Ross Avenue. Questions? Call (214) 220-7400.

Noon **Business Litigation Section**
"Properly Presenting Your Appeal," Justice Cory Carlyle, Anne Johnson, and Scott Stolley, moderator. (MCLE 1.00)*

Intellectual Property Law Section
"Design Patents – Latest from Federal Circuit on Claim Scope and its Effects," Alan Herda, Angela Oliver, and Vera Suarez. (MCLE 1.00)* *Virtual Only.*

FRIDAY, DECEMBER 3

No DBA Events Scheduled

MONDAY, DECEMBER 6

Noon **Tax Law Section**
"The Good, the Bad and the UGLY in Tax Court Trials," Hon. Elizabeth Copeland. (MCLE 1.00)* *Virtual Only.*

Senior Lawyers Committee
"Year-End Planning for Your Clients' IRA Funds including a Discussion of RMD Requirements, Impact of the Cares Act, and Seldom Used Opportunities," Pam Dennett. (MCLE 1.00)* *Virtual Only.*

TUESDAY, DECEMBER 7

Noon **Corporate Counsel Section**
"Recent Developments in Delaware M&A Law and Practice," Mark Morton. (MCLE 1.00)* *Virtual Only.*

Tort & Insurance Practice Section
"Developments Involving Coverage for Data Breach Claims," Micah Skidmore. (MCLE 1.00)* *Virtual Only.*

WEDNESDAY, DECEMBER 8

Noon **Blockchain Law Study Group**
"DeFi, Smart Contracts, and the Metaverse," Matthew Hine. Virtual Only.

Legal Ethics Committee
"End of Year Ethics Year Roundup," Prof. Fred Moss, Steve Kennedy, Anastasia Triantafillis. (Ethics 1.00)* *Virtual Only.*

3:30 p.m. **Judicial Investiture of Hon. Juan Renteria**
At the Arts District Mansion, 2101 Ross Avenue

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

5:30 p.m. **Bankruptcy & Commercial Law Section**
"Annual Judges' Roundtable," Hon. Harlin Hale, Hon. Stacey Jernigan, Hon. Michelle Larson, Hon. Mark Mullin, Hon. Edward Morris, and Hon. Brenda Rhoades. (MCLE 1.00)* *Virtual Only.*

THURSDAY, DECEMBER 9

9:00 a.m. **Juvenile Delinquency Conference**
Presented by the Child Welfare & Juvenile Justice Committee. (MCLE 6.00, Ethics 2.00)* *Virtual Only.*

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

CLE Committee. *Virtual Only.*

Publications Committee. *Virtual Only.*

DAYL Fellows Luncheon
Keynote speaker John Creuzot. For more information, cherieh@dayl.com. In-Person Only at the Arts District Mansion.

FRIDAY, DECEMBER 10

Noon **Outstanding Court Staff Awards**
Join us at the Arts District Mansion as we recognize this year's Outstanding Court Staff Awards recipients. RSVP at dallasbar.org. In-Person Only at the Arts District Mansion.

Legal History Discussion Group
"T Lex, A Legal History of AT&T," David Huntt Baker. (MCLE 1.00)*. *Virtual Only.*

Trial Skills Section
Topic Not Yet Available

MONDAY, DECEMBER 13

Noon **Alternative Dispute Resolution Section**
"How to Succeed in a Construction Mediation," Barry Wernick and Adam Winegar. (MCLE 1.00)*

Real Property Law Section
Topic Not Yet Available

Peer Assistance Committee. *Virtual Only.*

TUESDAY, DECEMBER 14

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

Mergers & Acquisitions Section
Topic Not Yet Available. Virtual Only.

Home Project Committee

3:30 p.m. DBA Board of Directors

WEDNESDAY, DECEMBER 15

Noon **Living Legends Program**
Ophelia Camiña, interviewed by Sadaf Abdullah and Lacy Lawrence. (Ethics 1.00)* *Virtual Only.*

Collaborative Law Section
Topic Not Yet Available

Energy Law Section
"Force Majeure: A Desperate Measure for Desperate Times," Paul Westbrook. (MCLE 1.00)*

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

THURSDAY, DECEMBER 16

Noon **Appellate Law Section**
"The Texas Judiciary and the Rule of Law—Perspectives from a New Justice," Justice Evan Young. (MCLE 1.00)* *In-Person Only at the Arts District Mansion.*

Environmental Law Section
"Getting Ready for Take-off: Carbon Capture and Sequestration in the United States," Aileen Hooks. (MCLE 1.00)* *Virtual Only.*

FRIDAY, DECEMBER 17

No DBA Events Scheduled

MONDAY, DECEMBER 20

No DBA Events Scheduled

TUESDAY, DECEMBER 21

Noon **Franchise & Distribution Law Section**
"Hot Topics in Franchise Law – Year in Review," Sally Dahlstrom and Taylor Robertson. (MCLE 1.00)* *Virtual Only.*

WEDNESDAY, DECEMBER 22

No DBA Events Scheduled

THURSDAY, DECEMBER 23

No DBA Events Scheduled

FRIDAY, DECEMBER 24

DBA Offices closed in observance of the Christmas holiday

MONDAY, DECEMBER 27

DBA Offices closed in observance of the Christmas holiday

TUESDAY, DECEMBER 28

No DBA Events Scheduled

WEDNESDAY, DECEMBER 29

No DBA Events Scheduled

THURSDAY, DECEMBER 30

No DBA Events Scheduled

FRIDAY, DECEMBER 31

DBA Offices closed in observance of New Year's Eve

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

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

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

President's Column

Thank You DBA For a Tremendous Year of Staying Engaged!

BY AARON TOBIN

At the beginning of the year, we identified the 2021 theme, Staying Engaged. The goal was to sustain enthusiasm and participation in our traditional programming while uniting behind specific initiatives such as honoring women in the profession, mentoring our next generation of lawyers, and educating all lawyers on important topics such as diversity, equity, inclusion, and belonging. Thanks to the tremendous effort of our section and committee leaders, the DBA Board of Directors, the DBA support team, and hundreds of volunteers, mission accomplished!

Promoting the Rule of Law

Past leaders had braced me to expect the unexpected, and this lesson played out six days into the new year when right out of the gate, insurrection hit the grounds of our nation's capitol. I am proud of the Dallas Bar Association who, in less than a week, organized a statewide virtual program for all lawyers to come together and renew their oath and commitment to the rule of law. Many metro and local bar associations throughout the state co-sponsored a virtual program open to all Texas lawyers who stood united in a showing of solidarity to protect the constitution. A special thank you to our outstanding MLK Jr. award recipient, the Honorable **Tonya Parker** who administered the oath, as well as **Terah Moxley**, who helped organize the event.

To further the conversation on the rule of law, in May, the Dallas Bar Association was proud to lead a statewide Law Day program featuring Louie Freeh speaking on the highlights of his career and how it interplayed with the rule of law.

Education and Training

Education and training were a big part of the year. Our four-part series on bankruptcy issues for the non-bankruptcy practitioner was a huge hit with close to 1,000 people attending the virtual programming. **Jason Kathman, Annmarie Chiarello, Amber Carson**, and **Andrew Edson** planned the series, which featured presentations by all of the Dallas bankruptcy judges as well as our bar's most respected bankruptcy practitioners.

A special thank you to Judge Parker, **Courtney Barksdale Perez**, and **Jonathan Childers** who assembled three outstanding presentations on implicit bias during the voir dire process. The series featured top judges and trial lawyers from Dallas educating our trial bar on the importance of understanding that everyone in the system (lawyers, judges, clients, and especially jurors) have blind spots and the system works best when this is acknowledged and addressed, especially during voir dire.

Kate Morris, Tim Newman, and the entire technology committee did a tremendous job putting on a technology summit which focused on cyber security as well as basic technology tools for the practitioner.

All in all, our sections and committees put on a near record number of CLEs. Most of the programming was virtual, but starting in the last quarter, sections and committees began taking advantage of Arts District Mansion where we offered hybrid programming giving members the option to attend in person or virtually.

Diversity, Equity, Inclusion, and Belonging

The Dallas Bar's focus on DEIB only strengthened this year with the forming of the Allied Bar's Equality Committee. Co-chaired by **Paul Stafford** and **Koi Spurlock**, the committee performed a number of strategic initiatives to include the recently conducted privilege walk, as well as the Faith in Conversation series that highlighted the intersection between social justice and faith-based initiatives in different religions. The committee's initiatives on mentoring and educating on DEIB in our schools were also very successful.

A major step forward for the DBA's efforts with belonging is without question the re-branding of our headquarters with the forward-looking name, Arts District Mansion. Co-chairs of the naming committee, **Kim Askew** and **Cheryl Camin Murray**, did an outstanding job along with the assistance of the 23-member committee made up of a diverse cross-section of our bar. A special thank you to past DBA President, **Harriet Miers**, as well as Deborah McMurray, of Contact Pilot, who made significant contributions to the committee's efforts.

Honoring Women in the Profession

The Dallas Bar Association concentrated on honoring women lawyers and judges this year. The DBA's brand-new Living Legend series was spearheaded by alumni and current class members of our women's leadership class, DBA We Lead. We Lead members and alumni interviewed our Bar's most respected women lawyers and judges in a monthly series. If you missed any of these fabulous interviews, they are all archived and available on the DBA's YouTube channel. This project would not have been possible without Judi Smalling of the DBA who organized this successful series.

The DBA is proud to announce that for the first time in its history, women lawyers and judges swept all seven major Dallas Bar Association awards. The Honorable **Tonya Parker** received the Martin Luther King, Jr. award. The Honorable **Barbara M. G. Lynn** received the Dallas Bar Association's inaugural Jurist of the Year award, which going forward will be known as the Judge Barbara M. G. Lynn Jurist of the Year award. **Nina Cortell** was recently awarded the Morris Harrell Professionalism award. **Diane Sumoski** received the Kim Askew Distinguished Service award. And, **Koi Spurlock** received the Karen McCloud Outstanding Minority Attorney award. The Dallas Bar Association is proud to honor this slate of incredibly talented lawyers and judges.

Remembering the Past

In September, the Public Forum Committee put on a two-part series centered around the 20th anniversary of the September 11 attack. Co-chairs **Leslie Chaggaris** and **Nnamdi Anozie**, along with the assistance of **Rob Canas** and **David Kent** and the rest of the committee, put on an excellent series featuring Philip Zelikow, the Executive Director of the 9/11 commission in part 1, and a panel presentation in part 2 with past presidents of the Dallas Bar Association, **Harriet Miers** and **Bob Jordan**, who both played significant roles in the Bush administration post 9/11.

It has been an outstanding year for our membership who remained engaged on important initiatives that advanced the DBA's relationship with its members, the judiciary, and the community. Thank you to our Board, the leaders of our sections and committees, the committee members, our judges, our members, and the DBA support team for making this a successful year for the Dallas Bar Association. And a special thank you to the best Executive Director in the country, **Alicia Hernandez**. This bar association is truly blessed to have your leadership, my friend.

Now it is time to honor tradition and pass the baton to my good friend, **Krisi Kastl**. Krisi is a tremendous leader who will lead us into a post-pandemic world next year. Let's stay engaged and stay behind Krisi as she takes the reigns of the best bar association in the country.

I look forward to seeing you at Arts District Mansion soon, my friends.

Aaron

HEADNOTES
Published by:
DALLAS BAR ASSOCIATION

2101 Ross Avenue
Dallas, Texas 75201
Phone: (214) 220-7400
Fax: (214) 220-7465
Website: www.dallasbar.org
Established 1873

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.

Headnotes (ISSN 1057-0144) is published monthly by the Dallas Bar Association, 2101 Ross Ave., Dallas, TX 75201. Non-member subscription rate is $30 per year. Single copy price is $2.50, including handling. Periodicals postage paid at Dallas, Texas 75260.

POSTMASTER: Send address changes to Headnotes, 2101 Ross Ave., Dallas, TX 75201.

Diane Sumoski Receives Kim Askew Distinguished Service Award

BY ANDREW M. JONES

Diane M. Sumoski has been named this year's recipient of the Kim J. Askew Distinguished Service Award. The Award, named in honor of its inaugural recipient, was established in 2017 to recognize a Dallas Bar Association member who, through service to the Association and the Dallas community, has shown a lasting dedication to good work, while promoting good relations among lawyers, the judiciary, and the community. Sumoski, a Clinical Professor of Law at the SMU Dedman School of Law, certainly exemplifies these traits.

Supervising Attorney and Director of both the W. W. Caruth, Jr. Child Advocacy Clinic and the W.W. Caruth, Jr. Institute for Children's Rights, and a Clinical Professor, Sumoski is highly regarded for her years of outstanding, innovative work in the field of child advocacy. After graduating cum laude from Cornell Law School, Professor Sumoski enjoyed a successful 26-year career at Carrington Coleman before receiving a call from SMU in 2013. "I had always done pro bono work, so I was familiar with the environment, and the move was a very nice opportunity to follow my passion while training aspiring lawyers," she noted.

The Child Advocacy Clinic represents abused and neglected children who have been removed from their homes by Child Protective Services. The program is staffed by Sumoski, a staff attorney, and by SMU law students acting under their supervision as guardians and attorneys ad litem. The program collaborates with volunteer attorneys, numerous community groups, and strategic partners, including Dallas CASA.

Diane Sumoski

"The law student advocates do thorough client-centered work and are very enthusiastic," Professor Sumoski said, noting that the time commitments involved in this practice area make this level of work impossible for many practicing attorneys.

The Clinic affords practical experience for participating law students. **Nicole Miller**, now a practicing lawyer, noted that "the old adage that law school teaches one to think like a lawyer, but not how to be a lawyer, is certainly true. The Clinic provided me hands-on experience, such as learning how to file pleadings and interact with the courthouse."

Students and lawyer volunteers gain knowledge and experience in a broad range of topics, according to **Kim Murphy**, an experienced attorney who supports Professor Sumoski's programs fulltime as its staff attorney. "The legal topics are numerous, from family law to evidence to procedural matters," she noted. "But knowledge of assorted non-legal topics is also necessary for effective advocacy, including gaining an understanding of cultural and psychological issues facing foster children."

In addition to the hands-on teaching Professor Sumoski does in the Clinic, she also teaches child advocacy law and trial advocacy law in her clinical course.

"Under Diane's leadership, the Clinic has expanded its outreach in the community and Dallas CASA has been a grateful partner and beneficiary," said **Kathleen LaValle**, President and CEO of Dallas CASA. "The Clinic has included Dallas CASA in workshop and event planning, and they have provided expert instruction on legal matters in programs we have sponsored. We have been particularly grateful for Diane's willingness to have the Clinic accept limited scope appointment to youth in longer-term foster care who need an attorney for a specific purpose such as obtaining an order sealing juvenile records. In an environment where so much seems more difficult than it should be, Diane is always there with solutions."

Professor Sumoski also serves as director for the Institute for Children's Rights. The Institute focuses on exploring, promoting, and teaching education advocacy to improve foster children's educational and overall life outcomes. As noted on its website, the Institute focuses on "providing leadership service to organizations and professionals in the fields of child welfare, child protection, and child welfare law by exploring cutting edge policies and issues to improve service to and outcomes for abused and neglected children." To this end, the Institute works with other organizations to share information and ideas, and to promote best practices. "Diane engages with numerous child welfare community partners to create cross-agency/cross-professional advocacy," said Ms. LaValle. "She invites multiple agencies, including Dallas CASA, to speak to clinic students during their orientation."

Nearly half of foster children end up being homeless within a few years of aging out of the foster care system. In addition, while foster children are afforded free college educations, only about 3 percent end up completing college. These statistics troubled Professor Sumoski, so she has looked for ways to address them. Through her efforts, clinic and related assistance is now available to foster children through age 26, part of the "aged-out" project she created. "She takes a holistic view of foster kids' interests, both currently and in the long term," said Ms. Miller. "Diane could do a lot of other things, but she cares about these children, and she taught us the value of caring for these kids."

An innovative aspect of the aged-out project is a podcast that Professor Sumoski helped launch, according to Ms. Murphy. The podcasts are done by students who have aged out of foster care, and they can be found on iTunes or Spotify at "aged out: the stories that built us."

"Diane's work with the SMU aged-out project is an innovative way to allow youth to use their voices to highlight their experience and the change needed in the system," said Ms. LaValle. "Dallas CASA has been fortunate to have one of our own supervisors, Jackie Davis, a former foster care youth, highlighted in this project."

Astonishingly, some 300,000 Texas children are raised by grandparents or other relatives, Professor Sumoski said. "Many times, these relatives do not have defined legal rights to act on behalf of the children in their care. This of course creates issues regarding medical care and school, among others," she said. To address this concern, Professor Sumoski worked to launch the "Kinship Custody Program." She offered multiple CLE courses and established a partnership with DVAP to assist grandparents and others in formalizing their relationships with children in their care. About 100 attorneys have been trained to handle these matters.

Professor Sumoski emphasized her appreciation of the donors that have assisted her programs' undertakings. "I am grateful to the W.W. Caruth, Jr. Foundation for its generous support of our efforts," she noted, "as well as to more recent supporters, the Rees-Jones Foundation and the Texas Bar Foundation.

"Diane has been a tremendous friend and servant to the DBA for decades," said DBA President **Aaron Z. Tobin**. "Her longstanding commitment to the Dallas Volunteer Attorney Program and to Equal Access to Justice has made a difference in the lives of many here in our local community. Diane is incredibly deserving of this important award, and it gives me great joy that she is this year's recipient."

Andrew M. Jones is Senior Director, Legal Counsel for Epsilon Data Management, LLC (Publicis Groupe) and Immediate Past Co-Chair of the DBA Publications Committee. He can be reached at andrew.jones@lionresources.com.

Dallas Bar Elects 2022 Officers

Cheryl Camin Murray Elected President-Elect

STAFF REPORT

Members of the Dallas Bar Association proudly elected its 2022 officers during the Annual Meeting on October 29. **Cheryl Camin Murray** was elected president-elect and will serve as the Association's 114th president in 2023.

Ms. Camin Murray is an experienced healthcare attorney who currently serves as General Counsel at GI Alliance. A graduate of the University of Houston Law Center, she is a long-time supporter of pro bono and was a Co-Chair of the 2017-2018 Equal Access to Justice Campaign, which raised over $1 million for pro bono legal services. Ms. Camin Murray has been active in the Dallas Bar Association for many years and currently serves as the Board Advisor to the Health Law Section and the Public Forum/Media Relations Committee. Among her many accolades, she has been recognized in *D Magazine's* Best Lawyers in Dallas, Healthcare, since 2012.

Other officers elected at the Annual Meeting were: **Bill Mateja**, of Sheppard Mullin, elected first vice-president; **Vicki Blanton**, of AT&T, elected second vice-president; **Elizabeth (Liz) Cedillo-Pereira**, City of Dallas, Office of WCIA, elected Secretary/Treasurer. **Aaron Tobin**, of Condon Tobin Sladek Thornton will serve as immediate past president, and **Krisi Kastl**, of Kastl Law, P.C. will serve as president in 2022.

Additionally, on November 4, ballots for director positions were sent to members and six of the following nominees will assume director positions in 2022: **Lauren Black, Rob Cañas, Jonathan Childers, Rocío Cristina García Espinoza, Jennifer King, Derek Mergele-Rust, Javier Perez, Lindsey Rames, Ebony Rivon,** and **Andrew "Drew" Spaniol**. Ballots were due back November 15, and results were not available at press time. The 2022 presidents of the minority bar associations will also serve on the board as Directors, and the president-elects of these associations will serve on the board as Advisory Directors.

Krisi Kastl

Cheryl Camin Murray

Bill Mateja

Vicki Blanton

Liz Cedillo-Pereira

On November 12, the DBA hosted its annual Awards program where several award recipients were recognized. Each year, the Texas Center for Legal Ethics & Professionalism co-sponsors the presentation of the Morris Harrell Professionalism Award with the DBA. The award was created in 1999 in honor of DBA Past President **Morris Harrell** to recognize an attorney who best exemplifies, by conduct and character, truly professional traits who others in the bar seek to emulate. This year's Morris Harrell Professionalism Award recipient is **Nina Cortell**, of Haynes and Boone, LLP.

In 2017, the DBA created the Kim Askew Distinguished Service Award. The award recognizes DBA members who have demonstrated a lasting dedication to the DBA and Dallas community, consistently given back, and who gone above and beyond traditional service of DBA members. This year's award went to **Diane Sumoski**, of SMU Dedman School of Law, for her many years of dedicated service to the DBA.

The DBA created the Al Ellis Community Service Award in 2019 to honor and recognize those DBA members who exemplify the spirit of community involvement and service. This year's recipient is **Shonn Brown**, of Kimberly-Clark Corporation.

The Karen McCloud Outstanding Minority Attorney Award was presented to **Koi Spurlock**, of McKesson Corporation. And **Lisa Blue**, of Baron & Blue, and **Lewis Sifford**, of Sifford, Anderson & Co., P.C., received the Judge Merrill Hartman Support Award, for their continued support of the DBA Home Project.

This year three Committees received the Jo Anna Moreland Outstanding Committee Chair Award: the Equality Committee, Co-Chairs Ms. Spurlock and **Paul Stafford**, of the Stafford Law Firm, P.C.; the Mock Trial Committee, Chair **Steve Gwinn**, of Suzanne I. Calvert & Associates; and the Morris Harrell Professionalism Committee, Co-Chairs **Kelli Hinson**, of Carrington, Coleman; and **Tim Newman**, of Haynes and Boone, LLP. The Intellectual Property Law Section, chaired by **Robert H. Johnston, III**, of Hubbard Johnston, PLLC, received the Cathy Maher Special Section Award.

Presidential Citations were also presented to behind-the-scenes members who have faithfully performed often time-consuming tasks for the association. This year's recipients were **Jonathan Childers**, of Lynn Pinker Hurst & Schwegmann, and **Courtney Barksdale Perez**, of Carter Arnett PLLC, and Hon. **Tonya** Parker, of the 116th District Court, for their work on the Implicit Bias Program Series; **Terah Moxley**, of The Simpson Tuegel Law Firm, for her efforts on the Renew Your Oath Program; **Kim Askew**, of DLA Piper LLP, Mrs. Camin Murray, **Sean Hamada** and **Sam Smith**, of Hamada Smith, PLLC, for their efforts related to the DBA Name Change Committee; **Jason Kathman**, of Spencer Fane LLP, **Amber Carson**, of Gray Reed & McGraw LLP, **Annmarie Chiarello**, of Winstead PC, and **Andrew Edson**, of Clark Hill, for their efforts on the Bankruptcy Series; and **Maria Garrett**, of DLA Piper LLP, **Jessica Riley**, of Akerman LLP, **Sarah-Michelle Stearns**, of Greenberg Traurig, LLP, and **Alexis Swanzy**, of Kessler Collins PC, for their work on the DBA/DAYL STEER Program. **HN**

~ *In Memoriam* ~

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

Robert Fredericke Ashley
(1926-2021), a 1951 graduate of George Washington University Law School

Royal Henry Brin, Jr.
(1919-2020), a 1941 graduate of The University of Texas School of Law

Clarence B. Brown, III
(1968-2021), a 1994 graduate of Emory University School of Law

Bruce Jackson Caldwell, Jr.
(1939-2020), a 1966 graduate of South Texas College of Law

Robert William "R.W." Calloway
(1934-2021), a 1958 graduate of Southern Methodist University School of Law

Winifred Elaine "Wini" Cannon
(1954-2021), a 1983 graduate of Antioch School of Law

Dennis Ray Cassell
(1940-2021), a 1965 graduate of University of Houston Law Center

William Ramsey Clark
(1927-2021), a 1951 graduate of University of Chicago School of Law

Joe Don Denton
(1924-2020), a 1953 graduate of Baylor University School of Law

Stefani Ilana Eisenstat
(1967-2020), a 1993 graduate of Southern Methodist University Dedman School of Law

Frank Wallace Elliott
(1930-2021), a 1957 graduate of The University of Texas School of Law

Ronald Leroy Frazee
(1946-2020), a 1977 graduate of Alexander Blewett III School of Law, University of Montana

Dennis Aubrey Fuller
(1955-2020), a 1980 graduate of Baylor University School of Law

Norman Dean Hawkins
(1957-2021), a 1983 graduate of The University of Oklahoma College of Law

Jimmy Dwain Ivy
(1937-2021), a 1962 graduate of The University of Texas School of Law

Glenn Edward Janik
(1977-2020), a 2002 graduate of The University of Texas School of Law

Grier Patterson Jones
(1942-2021), a 1967 graduate of The University of Texas School of Law

Richard Marvin "Rick" Lannen
(1947-2021), a 1973 graduate of The University of Texas School of Law

Paul Eugene Lokey
(1939-2020), a 1964 graduate of Baylor University School of Law

Andrew James Marshall, Jr.
(1948-2020), a 1994 graduate of Texas Wesleyan University School of Law

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(1947-2021), a 1971 graduate of Southern Methodist University School of Law

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(1928-2020), 1954 graduate of The University of Texas School of Law

Focus | Probate, Trusts & Estates Law and Tax Law

When is a Gift Tax Return Required?

BY KRISTIN L. BROWN

With the potential for a reduction of the estate and gift tax exclusion amount looming on the horizon, high net worth individuals are increasingly motivated to reduce the value of their taxable estates by making gifts that utilize the record-high exclusion amount of $11,700,000 per person. Unrelated to this phenomenon, many taxpayers regularly make gifts to family members or friends for reasons that go beyond tax planning. All these donors have one thing in common: they must determine whether their gifts give rise to a requirement to file a Form 709, otherwise known as a gift tax return.

When a Return is Required

A donor who in any calendar year makes a total amount of gifts to a donee (except the donor's spouse) that exceeds the annual exclusion amount of $15,000 per person is generally required to file a gift tax return. The annual exclusion amount typically only applies to gifts of present interests that grant the donee an immediate, unrestricted right to use or possess the gifted property. As a result, the annual exclusion amount is available to offset outright gifts and certain gifts made in trust that grant the beneficiary a withdrawal right over all or a portion of the gifted assets. This right is commonly referred to as a *Crummey* power, in honor of the case that first recognized that a gift in trust subject to a beneficiary's withdrawal right qualified as a gift of a present interest. The annual exclusion amount also applies to certain gifts made for the benefit of an individual who is under age 21, including those made to an account established under the Texas Uniform Transfers to Minors Act.

It is important to note that a transfer that is not considered a gift in the conventional sense of the word may nevertheless be a gift for federal tax purposes. Any transfer made for less than adequate and full consideration is a taxable gift, even if the transferor lacked donative intent. As a result, making rent or mortgage payments for an adult child, granting an interest-free loan, and other similar transfers made to a third party may constitute a taxable gift that must be reported.

Any gift of a future interest, regardless of the amount, must be reported on a gift tax return. Future interests include reversions, remainders, and other interests that limit or delay the donee's right to use or possess the gifted property. Consequently, any gift made to a trust that does not include a *Crummey* power is a gift of a future interest and gives rise to a filing requirement.

Certain gifts involving the donor's spouse are also required to be reported on a gift tax return. Spouses may treat a gift made by one spouse to a third party as if it were made one-half by each of them, by making a gift-splitting election. If a married couple desires to split gifts, then at a minimum, the donor-spouse will be required to file a gift tax return. Note that gifts of community property are already considered as having been made one-half by each spouse and should not be reported as split gifts.

A donor is generally not required to report a gift of a present interest to his or her spouse thanks to the unlimited marital deduction. However, the unlimited marital deduction does not apply to gifts to a non-citizen spouse that exceed $159,000 (for 2021). It also does not apply to a gift of a terminable interest, unless that gift meets one of a number of exceptions, such as a gift to a lifetime QTIP trust or a charitable remainder trust of which the donee-spouse is the only non-charitable beneficiary. A gift to a lifetime QTIP trust will only qualify for the unlimited marital deduction if the donor-spouse makes the QTIP election on a timely-filed gift tax return.

When a Return is Not Required

There is no requirement to file a gift tax return if a donor only made gifts to charity, so long as those gifts were of the donor's entire interest in the gifted property. However, if a donor is required to file a gift tax return for any reason, the donor must disclose all of his or her charitable gifts from the relevant calendar year on the return. Most political contributions are never required to be reported on a gift tax return, regardless of whether the donor has a filing requirement.

The gift tax does not apply to certain payments made directly to an educational organization or health care provider on behalf of a third party. Thus, payments for tuition or medical expenses made directly to the provider on behalf of a family member or friend, regardless of the amount, are never required to be reported on a gift tax return. **HN**

Kristin L. Brown is a member at Davis Stephenson, PLLC. She can be reached at kristin@davisstephenson.com.

Kevin Spencer and Zachary Johnson are pleased to announce the promotion of Brendan P. Harvell to name partner in the firm on June 1, 2021.
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How the Rise of Commercial DNA Tests Can Affect Estate Planning

BY LARRY A. FLOURNOY, JR.

On its homepage, Ancestry.com proclaims: "Every family has a story." However, often chapters of a family's "story" are lost to history, either through neglect or conscious concealment. Illegitimate children are usually the most common omissions in a family's "story," and until the last decade, it has been easier to keep them concealed. Recently, commercial DNA testing sites (i.e., 23andMe, Ancestry.com) have played an evolving role in civil and criminal law. As these commercial sites become prevalent, claims of illegitimate heirs will likely see a corresponding increase. Trust and estate lawyers should be ready to confront the increasing reality of a "long-lost" heir claiming an interest in a trust or estate and understand how courts address such claims.

A common distributive provision in a will or trust reads as follows: "Upon [Grantor/Testator's] death, all remaining assets shall be distributed outright to my descendants, per stirpes." Without a strong and robust definition of "descendants," this provision is open to claims of illegitimate descendants. To resolve claims of inheritance, the Texas Legislature has developed a statute to determine a child's inheritance rights from a purported father. For purposes of paternal inheritance, a child can establish their rights either through the Texas Family Code or seeking an adjudication of inheritance rights from probate court if the purported father has passed. The Estates Code does not establish a limitations period for actions to determine inheritance rights.

In proceedings involving an illegitimate heir claiming an interest in a closed and distributed estate, the Texas Supreme Court has imposed the following limitation: Where there has been an administration of a decedent's estate, whether testate or intestate, there is a residual four-year statute of limitations to challenge any order of the court or establish inheritance rights through the estate. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508-510 (Tex. 2010). The court held that limitations began to run when an estate closed, and claims are not subject to tolling by the discovery rule. While recognizing the harsh application of this law, especially in cases of adoption, the court reasoned that the state's interest in the "finality of probate proceedings" and avoiding "endless litigation" in probate proceedings outweighed those concerns.

While it appears the Texas Supreme Court has brought some finality regarding an illegitimate heir's claim to a decedent's estate, such limitations have not been applied when an illegitimate heir attempts to establish rights as a beneficiary of an ongoing trust. Neither *Fernandez* nor its progeny dealt with the interpretation of ongoing trusts, and the public-policy rationale in those cases are not applicable to trusts that are still open and being administered. Under the Uniform Declaratory Judgment Act (UDJA), any person interested in a writing, including a trust, may ask the court to resolve any question of construction or validity of the document, including ascertaining the class of heirs, devisees, or beneficiaries. While the residual four-year limitations period applies to the UDJA, claims seeking the interpretation or construction of terms in a trust do not begin to accrue until there is an actual controversy between the parties related to the terms or interpretation of the trust. Thus, in situations involving an ongoing trust, illegitimate heirs can still have their rights and status as "beneficiaries" established by the court, even years or decades after the instrument was created, if the claim is brought within four years of a controversy (i.e., parentage) arising. Unless the Supreme Court extends the *Fernandez* holding to ongoing trusts, ongoing trusts are subject to claims of illegitimate heirs without temporal limitations.

Without a robust and limiting definition of terms like "descendants" and "beneficiaries," estate plans are wide open to unknown claims of illegitimate heirs. To avoid the uncertainty of such claims, practitioners should counsel their clients regarding these potential issues, encourage their clients to be forthcoming regarding potential illegitimate heirs, and include a robust definition of these key terms, which excludes illegitimate children or limits the class of devisees to specific children or children born from a specified marriage. With the rising use of commercial DNA tests, the likelihood of challenges to estate plans will see a corresponding rise. Rather than subjecting the estate plans to the uncertainty imposed by the current law, drafting lawyers can anticipate these changes, counsel their clients, and draft the relevant documents in a manner that limits or eliminates the unknown portions of a "family's story" from disrupting a client's estate plan. **HN**

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Administration After Muniment of Title

BY BRETTON C. GERARD

Muniment of title probate is a simpler way to establish the validity of a will and pass title to the beneficiaries named in the will. When a will is probated as a muniment of title, no representative is appointed to administer the estate. Since no representative is appointed, no person has legal authority to act on behalf of the estate. Historically, muniment of title probate was used when there were no debts owed by the estate (other than mortgages on real estate), and no actions otherwise requiring the appointment of a personal representative of the estate.

In the past, when the need for administration arose after the admission of the will to probate as a muniment of title, Texas courts would (if filed within four years from the date of the decedent's death) permit a subsequent application for the issuance of letters testamentary and appoint an administrator for the estate. In those situations, Texas courts temporally viewed the prior allegation of "no necessity for administration" as of the date of the initial filing of the will as a muniment of title and justified granting a subsequent application for letters testamentary based upon changed circumstances.

The limited window of obtaining an administration after the admission of a will to probate as a muniment of title was firmly closed by the 2016 Houston [1st Dist.] Court of Appeals opinion in *In Re Jacky*. In that case, the decedent's will was admitted to probate as a muniment of title at the request of one of his daughters. Three years after the admission of the decedent's will to probate as a muniment of title, the daughter filed an application for administration and sought appointment as the estate's independent executrix. Decedent's other children objected to the daughter's application and appointment by arguing that the original order admitting the will to probate as a muniment of title was a *final order*. They contended that their sister should have filed an application seeking administration earlier and that she no longer had that option because the order admitting the will to probate as a muniment of title was a final and non-appealable order that had been signed by the court two years earlier. In other words, the court lacked jurisdiction (due to the passage of time) to re-open the matter for the appointment of the daughter/applicant as the estate's independent executrix. *In Re Jacky* had the (possibly unintended) effect of precluding the allowance of a later administration when a will had earlier been admitted to probate as a muniment of title.

In response to the opinion in *In Re Jacky*, the Texas legislature passed Section 257.151 of the Texas Estates Code which states that a court order admitting a will to probate as a muniment of title does not preclude the subsequent appointment of a personal representative and opening of an administration for the testator's estate. The application must still be filed no later than the fourth anniversary of the testator's death.

Section 257.152 of the Texas Estates Code was also added to provide additional time for the appointed representative to receive letters testamentary and to give notice of the administration to the beneficiaries. Instead of beginning the accrual of that time period from the date of the decedent's death, the newly created time period instead runs from the date of the representative's qualification.

Both new sections in the Texas Estates Code were added by Acts 2019, 86th Leg., R.S., Ch. 1141 (H.B. 2782), Sec. 16, effective September 1, 2019. This addition to the Texas Estates Code expressly allows the muniment of title probate procedure to be coupled with an administration.

Although muniment of title is only an option when the decedent leaves a valid will, there are no unpaid debts (other than mortgages), and no need for administration of an estate, it is possible to envision the benefit of coupling this less-expensive option with a later-filed administration. **HN**

Bretton C. Gerard is a solo practitioner. He can be reached at bret@brettongerardlaw.com

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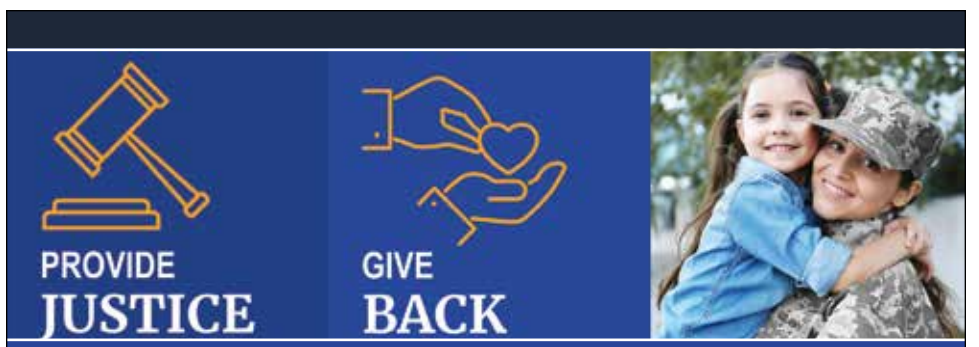

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Safeguards in the Texas Guardianship Process

BY JESSICA DUNNE, SPENCER TURNER, AND DEBORAH SCHMIDT

The #FreeBritney movement thrust guardianship law to the forefront of public discussion. Media exposure created concern for Britney Spears while giving short shrift to the merits of guardianship proceedings for mentally unstable wards. The fictitious film *I Care a Lot* demonstrated how susceptible our aging population can be to exploitation, while omitting the stringent legal requirements to establish a guardianship. Rest assured; Texas law maintains extensive safeguards to protect any vulnerable individual who is subjected to a guardianship proceeding.

Alternatives to Guardianship

Texas law requires an applicant for guardianship to plead and prove the infeasibility of alternatives to guardianship. The following options may preserve the ward's independence and possibly avoid guardianship:

- Medical Power of Attorney;
- Declaration for mental health treatment;
- Appointment of an attorney in fact, or agent, under a Durable Power of Attorney;
- Appointment of a Representative Payee to manage public benefits and /or establishment of a joint bank account;
- Management Trust (for minors);
- Special Needs Trust (for disabled adults); and
- Designation of a guardian (must be done before the need arises).

Standard of Proof

Before appointment, an applicant for guardianship in Texas must prove by clear and convincing evidence that: (i) the ward is incapacitated, (ii) it is in the ward's best interest to have a guardian appointed, (iii) the appointment of a guardian will protect the ward's rights and property, and (iv) alternatives to guardianship were not feasible. An applicant must produce, in the mind of a jury or the judge, a firm belief or conviction that the ward is substantially unable to care for his or her financial and/or daily physical needs. Extensive testimony from a variety of lay and expert witnesses must establish that the ward is incapacitated. In every guardianship proceeding, the court must appoint an attorney *ad litem* to defend the ward's interests. In a contested guardianship, the ward will present contravening evidence that highlights the ward's ability to independently care for his or her interests.

Court Approval of Fees

Payment of fiduciary and attorney fees are subject to court approval. Compensation for guardians of the person and estate are statutorily regulated and cannot exceed a certain percentage of the ward's estate, absent a determination that such fee is unreasonably low for the services provided. Additionally, to authorize compensation for a guardian, the court must consider the ward's monthly income from all sources and whether the ward receives medical assistance under the state Medicaid program. The court has authority to deny compensation to a guardian if the court finds that the guardian has not adequately performed the duties required or has been removed for cause. Attorneys serving as guardian who provide related legal services must file a detailed description that distinguishes between services performed as guardian and as the ward's legal counsel. Attorneys who serve as guardians are not entitled to payment of attorney fees for guardianship services that are not legal services. Courts may authorize payment of attorney fees from the ward's estate to applicants for appointment of a guardian or for the creation of a management trust only upon a finding that the applicant acted in good faith and for just cause in the filing and prosecution of the application.

The Probate Courts of Dallas County have guidelines for court approval of attorney fee petitions for a fiduciary's attorney, attorneys *ad litem* and guardians *ad litem*, and attorneys simultaneously serving as the fiduciary.

Requirements for Fiduciaries and Attorneys

To annually renew letters of guardianship, Texas law requires each guardian to explain the "Ward's Bill of Rights" in the ward's preferred language/mode of communication and in a manner accessible to the ward. Additionally, the Judicial Branch Certification Commission (JBCC) requires applicants for guardianship to complete a training course that explains a guardian's duties and services prior to the applicant's appointment. The JBCC also performs criminal background checks on all parties to a guardianship proceeding.

Furthermore, any attorney for an applicant for guardianship and all court-appointed attorneys in guardianship proceedings, including *ad litems*, must be certified by the State Bar of Texas as having successfully completed a state bar-sponsored course of study in guardianship law and procedure. The certification requires four hours of coursework, including one hour on alternatives to guardianship and support and services available to proposed wards.

While rigorous, the standards for guardianship fiduciaries are a worthwhile effort to protect individuals susceptible to abuse of power. **HN**

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Focus | Probate, Trusts & Estates Law and Tax Law

Maintaining Privilege with Non-Lawyer Experts Under *Kovel*

BY ABBEY GARBER
AND DENISE MUDIGERE

The backbone of most tax litigation is the preservation of attorney-client privilege and other protections. The dynamics of a dispute with the IRS can drastically change if communications intended to be protected are disclosed to the IRS. Tax attorneys commonly engage the help of accountants, investment bankers, financial advisers, and other experts in responding to information discovery requests, developing legal positions, evaluating settlement alternatives, and preparing for litigation. Judge Friendly recognized in *United States v. Kovel*, that the "complexities of modern existence prevent attorneys from effectively handling client's affairs without the help of others." The Second Circuit consequently extended attorney-client privilege to a third-party professional acting as an agent of an attorney in providing legal advice. If proper steps are taken, a third-party's assistance could be protected from disclosure through the *Kovel* extension of attorney-client privilege.

In this article, we explain requirements for the *Kovel* extension of attorney-client privilege and provide best practices for maintaining privilege with third-party professionals.

Kovel and Attorney-Client Privilege

Fundamentally, attorney-client privilege protects communications where legal advice is sought from a professional adviser in his or her capacity as an attorney. The communications made in confidence with the client are permanently protected from disclosure unless the client waives that privilege.

In *Kovel*, the Second Circuit extended the attorney-client privilege to include "all persons who act as the attorney's agents." That ruling opened the door to an extension of privilege to communications between a client or attorney and third-party professionals and experts. For the privilege to apply, communications between the expert, the attorney, and the client must meet the requirements of traditional attorney-client privilege. In determining whether *Kovel* protection applies, courts consider several factors, including:

- Whether the third party assisted the attorney in providing legal advice;
- Whether the third party served as a "translator" on complex subject matter or merely supplied facts; and
- Whether the attorney directed the actions of the third party.

Best Practices

When establishing a *Kovel* relationship, parties should make clear that the expert is working for the attorney and furthering the attorney's provision of legal services. Best practices for delineating the relationship between the expert and attorney include:

- ***Kovel* Engagement Letter**. Parties should execute an engagement letter that memorializes the relationship between the attorney, the expert, and the client. While an engagement letter is not required to extend privilege, it is an effective way of communicating the expectations of the relationship. The letter also serves to support the privilege if challenged. Engagement letters should include language that indicate that the engagement of the expert by the attorney is to assist the attorney in rendering legal advice to its client and that the expert reports to the attorney. The language included by many accounting firms in standard engagement letters and terms of service can be problematic for supporting a *Kovel* arrangement. Often, negotiating the terms of an engagement is necessary.
- **File Segregation**. To ensure an expert's work is privileged, any work product prepared by the expert should be segregated from other documents or files. Where the expert has a pre-existing relationship with the client, it is imperative that the expert maintain separate files for all documents, correspondence, notes, memoranda, and other materials relied upon, used by, or created in connection with the *Kovel* engagement. For example, return preparation files and other tax advice that an accountant previously provided to the client should be segregated.
- **Privilege Labels**. All work product prepared by the expert at the direction of the attorney should be appropriately labeled. Documents, correspondence, advice, and opinions may be subject to the attorney-client and attorney work product protections. Accordingly, legends stating "Privileged and Confidential", "Attorney Work Product", and "Attorney-Client Communication" should be appropriately placed on all written materials. Remember, labels ultimately do not control whether a document is privileged. Thus, blindly labeling all communications as privileged is not a best practice and can be detrimental in a privilege fight. Communications that are solely ministerial in nature do not need to bear such labels. If it is determined by the attorney that a report or study will be used to serve as documentation or otherwise be disclosed to the IRS to advance a taxpayer position, then the final document is not privileged and should not be labeled as such. Along these lines, the expert and the attorney should be in close coordination as the analysis progresses towards a final document.
- **Correspondence**. The expert should address all correspondence and work product to the attorney rather than to the client, if possible. If the expert needs to communicate with the client, it should copy the attorney on all communications.
- **Billing**. If the expert works with the client on other matters, the expert should conduct the *Kovel* project under a separate client-matter number and should issue separate billing statements. Because the *Kovel* doctrine requires the expert to work as the lawyer's agent, the expert should bill the attorney directly for work, even if the client is ultimately responsible for paying the invoices. **HN**

Abbey Garber and Denise Mudigere are Partners at Holland & Knight. They can be reached at abbey.garber@hklaw.com and denise.mudigere@hklaw.com, respectively.

Focus | Probate, Trusts & Estates Law and Tax Law

Best Practices for Cryptocurrency in Estate Planning

BY SOL S. REIFER

A recent online survey showed that 10 percent of the population owns cryptocurrency, but only 23 percent of crypto owners have a documented succession plan in case of disability or death. Without proper documentation, your client's fiduciaries may lack access to crypto holdings, increasing the risk that crypto assets will not pass on to your client's intended beneficiaries. Best practices suggest you consider the following:

- **Inform your estate planning attorney about your crypto holdings**. When you are either incapacitated or deceased, your estate planning attorney, if informed, will be able to help your successor fiduciary and beneficiaries to secure the crypto holdings. The estate planning attorney needs to also incorporate special provisions in the documents, including the Durable General Power of Attorney and the Will/Living Trust so that crypto holdings can be accessed properly and legally by the successor fiduciaries.
- **Document your crypto holdings**. Assets that are not specifically listed in a Will/Living Trust regrettably will pass under the residuary clause; which is not advisable since those holdings do not leave a paper trail. Similar to the proverbial needle in the haystack, they are almost impossible to discover due to their private nature. As you acquire more or different kinds of cryptocurrency, or use different wallets or storage devices, you will need to make sure your estate planning documents and instructions to successors contain full information.
- **Provide access instructions**. It is imperative that you provide specific information about how and where your cryptocurrency is stored inclusive of access to the password or 'private key.' To ensure security, you might write a memorandum and keep it with your estate planning documents; leave the information on a cold storage drive in a location your successor fiduciaries will be able to find; or use a password manager and leave instructions about how to access that manager. The memorandum can include: (i) the type of digital wallet(s) you have; (ii) any computer, smartphone, or device on which the crypto holdings are stored; (iii) website links for any needed online exchanges, or password managers; and (iv) any login or password information needed for each wallet, account, and website. Best practice might also incorporate sharing only a portion of the key as a security precaution with multiple trusted individuals (i.e., X holds the first and third portion of the key, Y holds the second and third portion of the key and Z holds the first and second portion of the key); so that no one person has the complete key!
- **Choice of Fiduciary**. Some institutional fiduciaries, such as banks, may have policies against serving as trustee of trusts that hold cryptocurrency. If you designate an institutional fiduciary, interview them regarding their policy, and always name an alternative trustee in case their policy changes and they decline the appointment.
- **Authority**. In most states, including Texas, a trustee has a fiduciary duty to invest trust assets as a reasonably prudent investor would. Because cryptocurrency may be considered "speculative," there is a possibility that it may fall outside the boundaries of what would be considered a reasonably prudent investment for a trust. The solution to this is to include language that gives your trustee the specific authority to hold cryptocurrency as a trust asset.

Cryptocurrency is considered personal property, rather than currency, for purposes of estate planning and administration. If the private key for your cryptocurrency is held in an online wallet, then it is considered 'intangible' personal property, much like accounts receivable, copyrights, or patents. However, if the private key is held in some type of offline storage device, such as a USB drive, then it may be considered 'tangible' personal property, like your clothing or furniture. Why does it matter whether your cryptocurrency is considered personal property? Standard language in Wills/Living Trusts might designate certain personal property for specific persons—leaving your car to your son, for example. It is also common to have catchall language that gives all of your personal property to a specific person. That catchall language will automatically include your cryptocurrency (because it is considered personal property), even if you only meant to include your household furnishings.

At this time, the major cryptocurrency exchanges, do not support any sort of beneficiary designation such as "Payable on Death," "In Trust for," "Transfer on Death," "Totten Trust," etc.; but hopefully, this will change in the future! Currently, the aforementioned exchanges also only allow individual account owners—no Trusts or LLCs. Therefore, careful planning in consultation with your estate planning attorney is critical. **HN**

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Focus | Probate, Trusts & Estates Law and Tax Law

Changes to Texas' Rule Against Perpetuities Are Here… For Now

BY CHRISTINE S. WAKEMAN, ESQ. AND SEAN DOYLE

Background

Many attorneys recall the rule against perpetuities (RAP) (not altogether fondly, perhaps) from their law school days. Historically, Texas followed what is known as the common-law RAP. This rule has been enshrined in the Texas Constitution, statutes, and case law. In the context of trusts, Texas Trust Code (TTC) Section 112.036 codifies the maximum duration of trusts. Since its inception, Section 112.036 required interests in trust to "vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation."

The reasoning for this nettlesome rule is a two-fold public policy argument. First, there is a desire to curtail the control a deceased individual can exert from beyond the grave and the period over which such control can be exerted. Second, the RAP has acted as a limit on the accumulation of dynastic wealth.

There was a heavy cost to this policy choice, however. Other states, such as Alaska, Delaware, and South Dakota (all of which also have other state laws favorable for trusts), significantly extended or altogether abolished the RAP. Naturally, many Texans chose to create trusts in those other jurisdictions to avail themselves of more favorable state laws. In 2021, proponents of Texas RAP reform said that Texas banks and trust companies lose over $600 million of trust assets annually to corporate fiduciaries in states that had extended or eliminated the RAP. Perhaps it was inevitable that Texas would respond to market forces and follow other state leaders in extending the Texas RAP.

2021 Legislation

Earlier this year, after many failed attempts to extend the RAP in prior legislative sessions, the State of Texas passed new RAP legislation. The new RAP continues to apply to all non-charitable trusts. The key difference is that it now has two different maximum perpetuities periods: one for most trusts that become irrevocable before September 1, 2021, and another primarily for trusts that become irrevocable on or after that date. For the former group of trusts, the old perpetuities period still applies. For the latter group, the perpetuities period is extended to, at most, 300 years after the date the trust becomes irrevocable.

Two exceptions apply. First, there is a transitional rule that applies to trusts that specifically invoked the new law, after it was passed, but before the effective date of September 1, 2021. The second exception restricts a trust's terms from mandating that real property be held in trust for more than 100 years.

Constitutionality

Despite this recent legislation, the story of the Texas RAP might not be finished yet. Although Texas first implemented its statutory RAP in 1984, the RAP predates that statute by over a century. Section 26 of Article 1 of Texas Constitution provides that: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." At first glance, this language from the Texas Constitution does not seem to conflict with the recent legislation, as it did not purport to abolish the RAP; it merely extends the period to 300 years.

Perhaps it is also troubling that there is an extended history of Texas case law defining a perpetuity as "a period of time greater than a life or lives in being, and 21 years thereafter, plus the ordinary period of gestation." However, the Texas Supreme Court opened the door to interpretive license regarding a perpetuity in 2018, in *ConocoPhillips Co. v. Koopmann*. While *ConocoPhillips* involved oil and gas and did not involve trusts, its holding could be indicative of how the Texas Supreme Court might approach its analysis of a constitutional challenge to the new RAP under TTC § 112.036.

Solution

So, how should practicing attorneys approach a more permissive RAP that could later be invalidated by courts? If attorneys draft trust agreements in reliance on the terms of TTC Section 112.036's new 300-year perpetuities period and the new RAP later is invalidated in court, surely there will be some legal grace afforded, right? It would seem like a draconian result for a trust drafted in reliance on a statute to be deemed invalid based on subsequent constitutional challenge to that statute. But given the constitutionality concerns, it may be prudent to draft trust instruments to allow for the maximum RAP period permitted under Texas law. If there is no constitutional challenge or if the constitutionality of the new statute is upheld, the client and his or her trust beneficiaries will benefit from the 300-year period, while the client will also be protected in the event of a less favorable court holding. With this approach, clients can achieve a zero-downside, high-upside outcome for trust RAP provisions. **HN**

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DVAP's Finest

BRAD SMYER

Brad Smyer is a senior associate with Alston & Bird LLP.

Which clinics have you assisted with?
Clinics are one of my favorite ways to give back to the community when I don't have time to take on another pro bono case. In addition to DVAP's general in-person and virtual clinics, I have participated in clinics to help veterans, reinstate driver's licenses, help with housing disputes, draft simple wills, and set up basic corporate entities.

Describe your most compelling pro bono case.
A few years ago, I was able to help a client who had suffered horrific domestic abuse to find safety and start a new life. She later called me in tears to again thank me after moving into a new place of her own. You never forget those moments.

Why do you do pro bono?
A good pro bono case can stretch you as a lawyer and as a person.

What impact has pro bono service had on your career?
Pro bono has allowed me to gain incredible experience that makes me a better advocate in my daily practice. I had already deposed an expert witness, argued hearings, and negotiated settlement agreements before I graduated from law school. Every year since then, I have continued to seek pro bono matters that challenge or stretch me, and I have gained invaluable experiences and friendships along the way.

What is the most unexpected benefit you have received from doing pro bono?
A pro bono client once hugged me as we left the courtroom after completing her relatively simple matter. As a lawyer who typically helps clients navigate their most challenging legal disputes and government enforcement actions, it felt good to know that I could help do something so simple that made such a profound impact in her life.

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Focus | Probate, Trusts & Estates Law and Tax Law

The Case of the Disappearing Legal Fees Deduction

BY CHRISTINE ROBINSON

The Internal Revenue Code and tax regulations, and even the courts, have devoted an unusual amount of coverage to the deductibility of taxpayers' legal fees. The appropriate tax treatment of legal fees can be a surprising mystery that we lawyers can help our clients solve by understanding the tax issues surrounding our legal fees and by appropriately documenting the nature of our legal services in our client invoices.

Businesses currently can usually deduct their legal fees as ordinary and necessary business expenses. The main caveat to this rule is that certain legal expenses may need to be capitalized and written off over time by way of depreciation or amortization expense or recovered as reduced gain (or increased loss) when the property to which they relate is later sold. Whether legal fees are deductible or capitalizable turns on the particular facts of each case.

The courts use the "origin of the claim" test focusing on the underlying transaction to determine the tax treatment of legal fees. The pharmaceutical company in *Mylan, Inc. v. Commissioner* (April 2021) incurred legal expenses to prepare notice letters necessary to obtain FDA approval of its generic drugs and to defend related patent infringement suits. Mylan deducted all the legal expenses—approximately $123 million over a 3-year period—on its tax returns. The IRS disallowed the deductions on audit, claiming that the bulk should be capitalized, and handed the taxpayer tax bills totaling over $50 million. The Tax Court focused on how the legal expenses originated and bifurcated them into two tranches. Because the notices were a prerequisite to the FDA approval process and therefore part of the creation of an intangible asset, the court held the legal fees related to that process should be capitalized and amortized over 15 years. Because the patent infringement litigation arose out of the ordinary and necessary activities of the taxpayer's generic drug business, the court held those legal-defense fees could be currently deducted. No doubt the law firm invoices were key proof supporting this breakdown of fees.

The business deduction for legal fees completely disappears in the case of a sexual harassment or sexual abuse settlement subject to a nondisclosure agreement. This disallowance added by the Tax Cuts and Jobs Act of 2017 is an outgrowth of the #MeToo movement. The presence of a nondisclosure agreement in such a case prevents not only the defendant business from deducting its legal fees, but also nullifies its deduction for the entire settlement payment to the plaintiff.

Individual non-business taxpayers are much more limited in their ability to deduct legal fees. If the fees originate in a purely personal, as opposed to a business or income-producing transaction, they are non-deductible. The tax regulations list legal fees in the following contexts as examples of non-deductible personal expenses: divorce, will preparation, will contest, and criminal matters unrelated to business or employment.

An individual's legal expenses originating in income-producing activities like investments or damage claims or for non-business tax advice are only deductible as miscellaneous itemized deductions, an entire category of individual expenses that the TCJA suspended for tax years 2018–2025. These legal expenses have fallen into a black hole that sucks them out of the taxpayer's return to vanish into the void of non-deductibility.

The Code provides statutory exceptions to this unfortunate tax treatment for employment and civil rights plaintiffs and certain whistleblowers by pulling their attorney fees out of the presently useless miscellaneous itemized deduction category and placing them safely "above-the-line" in the tax return so that those plaintiffs' legal fees are deductible directly against their related taxable damages income. Not so for personal injury plaintiffs who are taxed on their punitive-damages award yet who cannot deduct their punitive-damage-related attorney fees paid over to their plaintiff lawyers. Those legal fees still fall into the miscellaneous itemized deduction black hole, putting those individuals in a tax-disadvantaged position. Legislation introduced in 2019 to fix this problem by allowing an above-the-line deduction for legal fees in all civil actions was shelved by the Ways and Means Committee. Another version of that legislative fix now being floated would add consumer protection actions—but not all civil actions like the prior version of the bill—to the tax-favored group of deductible legal fees.

Lawyers can help their clients support the proper tax treatment of legal fees by providing the correct detailed breakdown of the fees in the law firm's invoices. It is also important to understand and communicate which legal fees are not deductible at all, so that clients are not unpleasantly surprised to learn later at tax-return time that their expected tax deduction for legal expenses has mysteriously disappeared. **HN**

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Column | Ethics

Responding to Negative Online Reviews

BY CARRON E. NICKS

Lawyers often suffer frustrations in their practices, but few are worse than a client's negative review on a site like Google My Business, Yelp, or Avvo. In days past, a dissatisfied client might bad mouth the lawyer to friends and family, but the negative review rarely traveled beyond his immediate circle. The internet and the dreaded "one star" rating have changed that.

Unfortunately, negative online reviews are almost bound to happen, and when they do, a negative review puts a lawyer into a precarious position. Unlike a plumber, who owes no duty to a customer who rates him as substandard, an attorney must operate within the bounds of the Texas Disciplinary Rules of Professional Conduct. Thus, before responding, consider these steps:

Take a Deep Breath

Give it a day or two before you act. Responding in anger or frustration will likely quash any chance of resolving the author's issues and will leave most readers with a bad taste in their mouths.

Who is Posting?

How and whether you respond may depend on the author's relationship to you and your office. Determine if the author is a client, former client, potential client, adversary, opposing counsel, ex-employee, or someone who has misidentified you.

Invoke the Terms of Service

Become familiar with the terms of service for the platform hosting the review. Generally, sites will not remove a negative review just because you claim it contains false facts. However, they will remove a review if it violates their terms of service.

Go Offline

If you have contact information for the reviewer, reach out to the author offline. Some people will never be satisfied no matter how they are treated or how successfully you manage their matter. Some, however, will agree to change or delete the review.

Decide Whether to Respond or Not to Respond

Ignoring a bad review will keep you out of the doghouse with the State Bar. But studies show that potential customers do not trust companies that fail to respond or take too long to respond to negative reviews. Offering a measured and thoughtful response can lessen the impact of a bad review and show that the firm cares about its clients.

In responding to reviews, the disciplinary rule most often implicated is Rule 1.05, which prohibits a lawyer from knowingly revealing confidential information of a client or a former client. Lawyers often feel hamstrung by the duty of confidentiality and unable to respond in a meaningful way to a review heavily embellished with false information.

ABA Formal Opinion 496 (2021), which recently considered this issue, suggests this response: "Professional obligations do not allow me to respond as I wish." Some would say that statement exhibits an undertone of anger and sarcasm.

Texas State Bar Ethics Opinion 662 (2016) advocates a "proportionate and restrained" response, and endorses this statement offered by Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014): "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

If you cannot identify the reviewer as a client or former client, this response might be useful: "We wish to provide only the best service to our clients and others. Please contact me by telephone so that we can discuss your concerns."

Besides confidentiality, keep in mind these two caveats. First, any response could awaken a sleeping giant and encourage further unpleasant discourse. Second, depending on the platform, your response may push the negative review to the top of the column when otherwise it might have sunk so low most readers would never see it. For this reason, some attorneys prefer to bury the bad review under a flood of positive reviews. According to Texas State Bar Ethics Opinion 685 (2020), the Disciplinary Rules allow an attorney to solicit comments from clients as long as the attorney does not encourage statements that are false, misleading, or unfounded.

A Teachable Moment

Regardless of how you respond online, a negative review is a learning opportunity. Because the reviewer felt strongly enough to air a grievance in a public forum, you may discover that some process in your practice is not serving your clients. Do you return phone calls in a timely manner? Are you managing your clients' expectations? Are you properly preparing yourself and your clients for contentious hearings? Does your staff need retraining? Or, do you need better screening of potential clients? **HN**

Carron E. Nicks is an attorney and writer. You can reach her at carron@thelegalwriter.com.

Focus | *Probate, Trusts & Estates Law and Tax Law*

The Snowball Effect of Adverse Interests

BY HEATHER R. BELL

A guardianship is a court-sanctioned infringement of an incapacitated person's right to control her own property, liberty, and life, to promote and protect the individual's well-being. It is a double-edged sword—the guardian has the potential to protect the incapacitated person (ward) who lacks that power, yet also has the potential to neglect, abuse, and exploit the ward. Thus, it is imperative that those who are appointed as guardians will promote and protect the well-being of the incapacitated elderly and the disabled.

Any person has the right to commence or contest a guardianship proceeding or contest the appointment of a person as guardian. A guardian owes fiduciary duties to the ward, requiring the fiduciary to place the ward's interests above those of the guardian. As a result, a person with an interest adverse to a proposed ward (PW) lacks standing to participate in the guardianship proceeding.

An interest is adverse to a PW when that interest adversely affects the PW's welfare or well-being. Texas courts have found that a person suing a PW or owing the PW an outstanding debt has an interest adverse to the PW. A person also has an adverse interest if that person would benefit or inherit from another's claim(s) brought against the PW; asserts claims against the PW on behalf of that person's minor children; or has comingled opposing interests (e.g., hires counsel who represent other parties suing the PW).

Courts have also found adverse interests when a potential guardian adopts a hostile position to the PW. For example, a person adopts a hostile position to the PW by pleading that the PW breached fiduciary duties or that the PW committed a crime or fraud resulting in a loss to that person.

An adverse interest exists when a person wears multiple fiduciary hats (e.g., trustee of a trust, partner of a partnership, power of attorney for another individual, etc.) and owes fiduciary duties to other entities and their beneficiaries. If that person became the PW's guardian, that person would be obligated to place the ward's interest above other fiduciary roles.

Not only are certain individuals prevented from participating in a guardianship proceeding, but attorneys may also be prevented from participating in the proceeding and subjected to even harsher consequences.

Guardianship proceedings generate grave ethical issues for attorneys. For example, the Texas Disciplinary Rules of Professional Conduct forbid a lawyer from taking on a representation that is adverse to a current or former client in a substantially related matter.

A lawyer's representation of one client is adverse to another client if the lawyer's ability to faithfully and loyally represent his other client is compromised. An appearance of impropriety exists when an attorney violates the conflict-of-interest rules, requiring the trial court to disqualify counsel.

To establish the need for disqualification, a movant must show that representation of the former or current client is substantially related to the matters in the guardianship proceeding and that the guardianship proceeding is adverse to the former or current client. The similarity must create a genuine threat that the attorney will reveal the PW's confidences to the new client.

To show that a guardianship proceeding is adverse, one must prove the applicant's interests are adverse to the PW's objectives or interests as the PW would have defined them when the PW had capacity. Absent evidence of how the PW would have defined her interests, adversity exists when the applicant's interests would not promote and protect the PW's well-being.

This analysis is often made when an estate planner represents a client applying for guardianship of a former client. Although estate planning and guardianship proceedings are similar in that they are both end-of-life matters, a guardianship proceeding is not always adverse to the former client.

When an attorney previously prepared the PW's estate planning documents, and an applicant was appointed to serve in fiduciary roles for the PW, any confidences shared with the attorney relating to the estate plan and possible future incapacity would necessarily be reflected in the documents, evidencing how the PW defined her interests when able to do so. If the former client appointed someone other than the applicant named in the estate planning documents, the attorney would be disqualified.

If the attorney continues representation of an adverse party, depending on the severity of the facts and circumstances, the attorney may be denied compensation and ordered to return some or all of the compensation already paid. The attorney may also be subject to disciplinary action, disgorgement of improper gains and profits, or sued for breach of fiduciary duty by his client, including for exemplary damages.

Investigating the circumstances prior to representing a party in a guardianship proceeding is critical. The effects of failing to preemptively consider these issues can snowball quickly. **HN**

Heather R. Bell is the Founder and Managing Member of Bell Probate Law, PLLC. She can be reached at heather@dfwprobatelaw.com.

Four Ways Lawyers Can Minimize Outstanding Receivables

BY JORDAN TURK

Every pragmatic legal professional expects that some percentage of their billed services won't be paid. But even small fluctuations in a law firm's collection rate can have a huge impact on its bottom line. So how can you improve your collection rate and minimize outstanding receivables?

Below are tips to help your firm develop a strategy to tackle your aged accounts receivable.

Interview Carefully and Thoroughly

Conducting a potential new client consultation is an art, but there are some easy concepts you can implement to help you avoid pitfalls down the road. The goal of the consultation (other than your retainment) should be to assess the client's situation and give reasonable legal advice.

You should utilize the following steps:

- Determine whether the client's needs and expectations can even be realistically satisfied.
- If so, give the client a roadmap of what the most important next steps will be and the issues that may arise therefrom.
- Ensure the client understands the cost and the law firm's expectation of payment, discussing frankly how the client plans to pay and whether the client can afford the firm's services. This should also be explicitly addressed in your fee agreement.
- Exercise your own judgment as to whether this client is credible and a good risk. This is easier said than done and will mostly come with experience, but if the client's story doesn't make sense, or if you would be the client's fifth attorney, alarm bells should be ringing. Trust your gut.

Bottom line: When the consultation ends and the client decides to retain you, both attorney and client should be comfortable and confident in the integrity of the other party.

Be Timely with Your Billing

First, try to bill clients around the same day every month. Even better, aim to have your clients receive their monthly statement about three to four days after the first of the month. Sending invoices around this time increases the chances that the client has recently received a paycheck and therefore has funds available.

Clients typically appreciate what you just did for them—not what you did months ago. What's more, you want to catch them at a time where they appreciate you and the work you are doing on their case.

Clients routinely complain that all too often they receive bills 90 days or more after the work is done. By then, the client doesn't remember what you did three months ago and will be less willing to pay you. If the work is fresh on their mind, you'll find a client more willing to pay their invoice.

Send Descriptive, Easy-to-Understand Invoices

Provide a clearly written, detailed invoice. You don't have to outline your time to the minute, but use separate line items for the larger tasks and include a brief summary of the work you did.

As much as possible, avoid legal jargon. Your objective is to give the client visibility into what you're doing for them. If you use too much technical language, your client may end up with even more questions. Also, don't nickel and dime your client by billing for things like office supplies. This kind of billing only makes clients angry, offended, and more likely not to provide timely payment.

Utilize Scheduled Payments

For clients who might have trouble paying your bill or for those who are habitually late and/or forgetful, one option is to offer them a recurring monthly payment plan. This is a great way to help them out financially and save you time and effort, all while ensuring you maintain a consistent, predictable cash flow in your practice.

To make things even easier on you and your firm, have clients sign payment authorization forms during their intake paperwork and set them up on a payment plan as part of your initial meetings and onboarding. That way, your clients' payments can run automatically without any action needed from you or them.

Remember: the longer a bill sits unpaid, the less likely it is that it will ever get paid. Therefore, it is imperative that you have a strategy to keep aged accounts receivable at a minimum, lest they remain outstanding indefinitely. **HN**

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Focus | *Probate, Trusts & Estates Law and Tax Law*

The "Alphabet Accounts": Who Owns What?

BY KELLY C. WALKER

Multiple-party financial accounts are described in the Texas Estates Code. The POD (payable on death), TOD (transfer on death), and ROS (right of survivor) accounts all have beneficiary designations, and the named beneficiary can claim the account proceeds merely by producing valid proof of a decedent's death. Therefore, just like life-insurance policies which have a named beneficiary, these accounts are not part of a decedent's estate and are not subject to probate. Instead, such accounts belong immediately to the designated beneficiary upon decedent's death and are not part of an estate administration.

These multiple-party accounts are governed by the financial institution's written "signature card," which is completed when the account is established. Regardless of how an account is "styled," just titling it "John Doe and David Smith" does not create a valid payable upon death account. Instead, a POD, TOD, or ROS account must have a signature card executed by the account holder specifically selecting the type of account and designating a beneficiary. The Texas Estates Code requires these accounts to have provisions which are substantially similar and comply with the statutorily proposed form for financial institutions. Before the 1993 statutory enactment, there was no uniform signature card or account agreement governing such financial accounts.

The signature card is an essential document, and the Texas Supreme Court held in 1990 in *Stauffer v. Henderson* that extrinsic evidence that would contradict the executed signature card was inadmissible. The account holder's "intent" does not control, and even the monthly account statements are secondary to the executed signature card. Every account signature card should be carefully reviewed to ensure funds are transferred to the chosen beneficiary at death.

If the account does not fully comply with the statute, then the funds are payable to the account holder's estate at death, to be distributed under a written will or under the rules of intestacy. The obvious corollary is that if your client wants his or her assets distributed according to an estate plan in a written will, then these beneficiary-type accounts should not be used.

If there is litigation over an estate, it is imperative to obtain the executed account agreements and signature cards from each financial institution because such documents may change the economic makeup of an estate. In some cases, the account designations can be challenged as technically insufficient or noncompliant with the statute, and if successful, then the account belongs to the decedent's heirs and not the purported named beneficiary.

A notable twist with multiple-party accounts is that the funds received by the named beneficiary are still subject to creditor claims. Such accounts, if needed, can be used to discharge debts, taxes, and estate expenses, including the statutory allowances to a surviving spouse and minor children and liens on the account by secured creditors. Locating any multiple-party accounts and their values is key in administering an estate or seeking relief for creditors.

Multiple-party accounts can be a great tool for estate planning. They are efficient methods to transfer a decedent's funds after death to a named beneficiary. Just be sure to check your clients' accounts to ensure the accounts are set up as the clients wish! **HN**

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