Dallas Bar Association
HEADNOTES

August 2019 | Volume 44 | Number 8 | Focus | Construction/Real Property Law

Naturalization Ceremony Held at Belo

On June 24, the Dallas Bar Association hosted the third U.S. Naturalization Ceremony held at the Belo Mansion. Presiding Judge Hon. Barbara M.G. Lynn welcomed 50 candidates from 24 different countries. After the ceremony, the new citizens and their families were treated to lunch at Belo, courtesy of the Dallas Bar Association.

Focus | *Construction/Real Property Law*

Navigating the World of Emotional Support Animals

BY MARC MARKEL AND ASHLEY KOIRTYOHANN

Many apartments, condominiums, and single-family neighborhoods promulgate pet-related restrictions. They might limit the number of animals allowed in a residence, set maximum allowable weights, or exclude certain breeds or species altogether. So, what happens when a resident comes to their landlord or community association requesting permission to keep their 100-pound emotional support Rottweiler on the premises? What about an emotional support python? People often have an easier time accepting "traditional" assistance animals, such as seeing-eye dogs, than emotional support animals (ESA's). However, ESAs are afforded the same protections under the Fair Housing Act as any other type of assistance animal.

What are landlords and community associations required to do under the FHA? It probably goes without saying that landlords and community associations cannot treat disabled residents worse than their non-disabled counterparts (for purposes of the FHA, "disability" means "a physical or mental impairment which substantially limits one or more of a person's major life activities"). But beyond equal treatment, landlords and community associations are required to give disabled homeowners preferential treatment in some cases. In the context of ESAs, this preferential treatment will most often take the form of a "reasonable accommodation," which is a deviation from applicable rules, policies, practices, or services necessary to afford a disabled individual equal opportunity to use and enjoy his or her dwelling. In some circumstances, this may mean allowing an otherwise restricted breed or species of animal, or an animal that exceeds prescribed weight-limits. ESAs should not be counted toward the number of pets a resident is allowed to have. HUD guidance publications have specifically stated that ESAs are not considered pets. For this same reason, any otherwise applicable pet fees should not be charged in relation to an ESA.

What are landlords and community associations *not* required to do under the FHA? Landlords and community associations are not required to make "unreasonable accommodations." Whether a requested accommodation is considered unreasonable is incredibly fact specific. Courts typically examine whether the accommodation would impose an undue financial or administrative burden on the association, or whether it would fundamentally alter the nature of the property's operations. When it comes to requests to allow assistance animals, however, the request may be denied on additional grounds.

If the specific animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, the landlord or community association is not required to allow

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Payment Bonds to Avoid Property Liens During Private Construction

BY M. CASSIE EVANS

Considering a home remodel but want to limit liability and protect title to your property? Many owners of construction projects are often surprised to learn that they are required to withhold a 10 percent retainage on private-construction projects in Texas for thirty days after the work is completed. The retained funds secure the payment of artisans and mechanics who perform labor or service and of other persons who furnish material, material and labor, or specially-fabricate material for any contractor, subcontractor, agent, or receiver in the performance of the work. Failure to withhold the 10 percent can result in liability up to that amount in the form of a lien against the property.

A construction project owner *may* file with the county clerk of the county in which the property is located an affidavit of completion once the work under the contract is completed. Such affidavit must contain a conspicuous statement that a claimant may not have a lien on retained funds unless the claimant files an affidavit claiming a lien not later than the fortieth day after the date the work under the original contract is completed. Thus, if the owner chooses to file an affidavit of completion, it seems that retainage should be held at least forty days after completion of the work set forth in the contract.

Owners must be wary of another trap. Owners who continue to pay the general contractor after receiving a lien notice with fund-trapping language creates "fund trapping" liability for the owner. If fund-trapping liability is established, the owner could end up paying for the same work twice—once to the general contractor and again to the subcontractor. One way an owner can avoid these dangers is by requiring that the contractor on a private-construction project provide a statutory-payment bond, which is defined with specificity under the Texas Property Code. To receive the protection contemplated by the statute, the bond must:

(1) be at least in the original contract amount;

(2) be in favor of the owner—as obligee;

(3) have the written approval of the owner endorsed on it;

(4) be executed by:

(a) the original contractor as principal; *and*

(b) a corporate surety authorized, admitted, and licensed to do business in Texas;

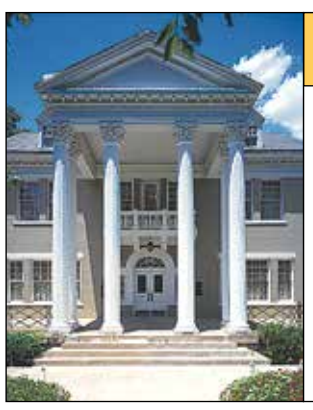
(5) be conditioned on prompt payment for all labor, subcontracts, materials, specially-fabricated materials, and normal and usual extras not exceeding 15 percent of the contract price; and

(6) clearly and prominently display the contact information for the surety.

If the owner obtains a bond that is consistent with these requirements and records it along with the contract between the original contractor and the owner in the applicable real-property records (or records a memorandum of the contract if the Owner does not want the specifics of the Construction Contract in the public records), the owner cannot be held liable for failing to trap funds. Subcontractor liens can no longer attach to the owner's real property, and as a result, the subcontractor will have no lien foreclosure action against the owner; rather, the subcontractor's remedy will be against the statutory-payment bond and not against the owner. Obtaining a statutory-payment bond results in a win-win for owners and subcontractors alike because the subcontractor's remedy is not limited to its proportionate share of retainage plus any trapped funds. Further, the owner is not subjected to an array of often conflicting subcontractor claims if abandonment, termination, or bankruptcy occurs at the prime-contractor level.

Note the original contractor must provide the bond. The construction-project owner should require a bond compliant with the Texas Property Code in the contract. (Many builders on the residential side oppose payment bonds, and many of those amenable to them pass the cost of the bond along to the Owner. Thus, it is a privilege that must be paid for.) The bond should be at least in the amount of the contract, not an amount less than the contract. Once the contractor obtains the bond, the construction project owner should review it for compliance with the Texas Property Code; the owner should not be persuaded by the surety or the general contractor that the surety can only use its non-compliant form. Finally, the construction-project owner should make sure that it is named as the "obligee" and not a contractor or some other party. **HN**

M. Cassie Evans is an associate with Coats Rose, PC, and can be reached at marycassevans@gmail.com.



Inside

Calendar | August Events

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

FRIDAY CLINICS

AUGUST 2-BELO
Noon *"UCC Article 9: A review of Article Nine of the Uniform Commercial Code in the Lender and Borrower Context," Ted Smith.* (MCLE 1.00)* *RSVP to yhinojos@dallasbar.org.*

AUGUST 9-NORTH DALLAS**
Noon *"Mind Your Steps: How Lawyers Use Mindfulness and Self Care to Overcome Depression," Dr. Ben Albritton and Jenny Womack.* (Ethics 1.00)* ***Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Ste. 240, Dallas, TX 75240. Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center.*** *Thank you to our sponsor Fox Rothschild LLP. RSVP to yhinojos@dallasbar.org. Co-sponsored by the Peer Assistance Committee.*

AUGUST 16-BELO
Noon *"Supreme Court Update," Brian Owsley.* (MCLE 1.00)* *RSVP to yhinojos@dallasbar.org.*

AUGUST 23-OAK CLIFF
Noon *"Disposition Perjury: Must You Disclose It?" Prof. Fred Moss.* (Ethics 1.00)* *RSVP to yhinojos@dallasbar.org.*

THURSDAY, AUGUST 1

Noon **Construction Law Section**
"The Skywalk Tragedy: Lessons Learned from the Collapse," Bill Quatman. (MCLE 1.00)*

Judiciary Committee

Lawyer Referral Service Committee

FRIDAY, AUGUST 2

Noon **Friday Clinic-Belo**
"UCC Article 9: A review of Article Nine of the Uniform Commercial Code in the Lender and Borrower Context," Ted Smith. (MCLE 1.00)* *RSVP to yhinojos@dallasbar.org.*

DAYL Assisting Lawyers in Transition Program

MONDAY, AUGUST 5

Noon **Tax Law Section**
"2019 Texas State Tax Practice and Procedure and Case Law Updates," Israel Miller. (MCLE 1.00)*

TUESDAY, AUGUST 6

Noon **Corporate Counsel Section**
"The Essential In-House Lawyer," Jane McBride and Sterling Miller. (Ethics 1.00)*

Tort & Insurance Practice Section
"ALI Proposed Restatement of Law on Liability Insurance," Ed Carlton, Christina Culver, and Beverly Godbey. (MCLE 1.00)*

DAYL Solo & Small Firm Meeting

6:00 p.m. DAYL Board of Directors

WEDNESDAY, AUGUST 7

Noon **Employee Benefits & Executive Compensation Law Section**
"Let's Talk About Ethics!" Lindsay Hedrick, Lindsay Murphy, and Adrien Pitchman. (Ethics 1.00)*

Solo & Small Firm Section
"Don't Walk the Solo Path Alone," Calvin Loung. (MCLE 1.00)*

Juvenile Justice Committee

Public Forum/Media Relations Committee

DAYL Judiciary Committee

THURSDAY, AUGUST 8

8:00 a.m. **Energy Law Section Seminar**
34th Annual Review of Oil & Gas Law. Two-day event. For more information, or to register, log on to www.reviewofoilandgaslaw.com.

Noon CLE Committee

Publications Committee

Christian Lawyers Fellowship

FRIDAY, AUGUST 9

8:00 a.m. **Energy Law Section Seminar**
34th Annual Review of Oil & Gas Law. Two-day event. For more information, or to register, log on to www.reviewofoilandgaslaw.com.

Noon **North Dallas Friday Clinic**
"Mind Your Steps: How Lawyers Use Mindfulness and Self Care to Overcome Depression," Dr. Ben Albritton and Jenny Womack. (Ethics 1.00)* ***Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Ste. 240, Dallas, TX 75240. Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center.*** *Thank you to our sponsor Fox Rothschild LLP. RSVP to yhinojos@dallasbar.org. Co-sponsored by the Peer Assistance Committee.*

Trial Skills Section
Topic Not Yet Available

MONDAY, AUGUST 12

Noon **Public Forum**
"School Shooter Safety: What You Need to Know to Keep Your Kids Safe," Chief John Lawton, Sherry West, and Nigel Wheeler. RSVP to jsmith@dallasbar.org.

Peer Assistance Committee

TUESDAY, AUGUST 13

Noon **Business Litigation Section**
"The Legislature SLAPPs Back: Anti-SLAPP Practice After the 2019 Amendments," Leslie Chaggaris, Hon. Martin Hoffman, Julie Pettit, and Chad Ruback. (MCLE 1.00)*

Legal Ethics Committee

DAYL GC Panel on Diversity. *Questions? Contact cherieh@dayl.com.*

DWLA Board of Directors

6:00 p.m. J.L. Turner Legal Association

WEDNESDAY, AUGUST 14

Noon Bench Bar Conference Committee

DAYL CLE on Cybersecurity. *Questions? Contact cherieh@dayl.com.*

5:15 p.m. LegalLine. Volunteers needed. Contact sbush@dallasbar.org.

THURSDAY, AUGUST 15

Noon **DVAP CLE**
"Expunction Law and the Expunction Expo," Karen Wise. (MCLE 1.00)*

Minority Participation Committee

FRIDAY, AUGUST 16

11:30 a.m. **Intellectual Property Law Section**
"Strategies to Address Issues in Intellectual Property Licensing and Technology Transfer," panel discussion. ***At Toyota Motor North America Headquarters.*** (MCLE 1.00)*

Noon **Friday Clinic-Belo**
"Supreme Court Update," Brian Owsley. (MCLE 1.00)* *RSVP to yhinojos@dallasbar.org.*

DAYL Boot Camp Committee

DBA/DAYL Moms in Law. Meddlesome Moth (in the Design District). *RSVP christine@connatserfamilylaw.com.*

MONDAY, AUGUST 19

Noon **Labor & Employment Law Section**
"Corroborating Evidence: He-Said, She-Said…[and X, Y, and Z Said]," Jim Sanford. (MCLE 1.00)*

TUESDAY, AUGUST 20

Noon **Franchise & Distribution Law Section**
Topic Not Yet Available

Community Involvement Committee

Entertainment Committee

DAYL Elder Law Committee

6:00 p.m. Dallas Hispanic Bar Association

WEDNESDAY, AUGUST 21

Noon **Health Law Section**
"Trends in Medical Group Transactions – Health Systems vs. Private Equity," Lisa Genecov and Jonathan Helm. (MCLE 1.00)*

Pro Bono Activities Committee

5:15 p.m. LegalLine. Volunteers needed. Contact sbush@dallasbar.org.

THURSDAY, AUGUST 22

Noon **Criminal Law Section**
"Ethical Considerations in Punishment from the Perspectives of a Prosecutor and a Defense Attorney," Kendall Castello and Jenn Falk. (Ethics 1.00)*

Environmental Law Section
Topic Not Yet Available

Intellectual Property Law Section
"The Ethical Traps of Joint Representations in IP Cases," Justin Cohen. (Ethics 1.00)*

FRIDAY, AUGUST 23

Noon **Oak Cliff Clinic**
"Disposition Perjury: Must You Disclose It?" Prof. Fred Moss. (Ethics 1.00)* ***Oak Cliff Chamber of Commerce, 1001 N Bishop Ave, Dallas.*** *RSVP to yhinojos@dallasbar.org.*

5th Annual L.A. Bedford Awards Luncheon. For more information, or to purchase tickets, contact lori.hayward@hotmail.com.

MONDAY, AUGUST 26

Noon **Science & Technology Law Section**
Topic Not Yet Available

Securities Section
"Securities and Exchange Commission v. Cuban -- A Trial of Insider Trading," Marc I. Steinberg. (MCLE 1.00)*

TUESDAY, AUGUST 27

Noon DAYL Lawyers Promoting Diversity Committee

American Immigration Lawyers Association

6:00 p.m. **Intellectual Property Law Section**
"What Would You Ask In-House IP Counsel?" Ebby Abraham, Evelyn Chen, and Marylauren Ilagan. (MCLE 1.00)* ***At Baker Botts offices.***

WEDNESDAY, AUGUST 28

Noon **Collaborative Law Section**
"The Child Specialist - Considering the Voice of the Child in Collaborative Matter," Jennifer Leister. (MCLE 1.00)*

Entertainment, Art & Sports Law Section
"Legal and Business Issues with Music Festivals," Alec Jhangiani, Ramtin Nikzad, and Gwen Seale. (MCLE 1.00)*

DAYL Foundation Board of Trustees

DAYL Equal Access to Justice Committee

DVAP New Lawyer Luncheon. For more information, contact martinm@lanwt.org.

THURSDAY, AUGUST 29

Noon DBA/DAYL Moms in Law. Nick & Sam's Grill (Park Cities/Preston Center). RSVP christine@connatserfamilylaw.com.

FRIDAY, AUGUST 30

No DBA Events Scheduled

DBA Recognized by State Bar

The DBA received several awards at the State Bar of Texas Annual Meeting in June. Accepting the awards were (left to right) DBA Executive Director Alicia Hernandez, SBOT President Joe Longley, DBA President Laura Benitez Geisler, and DBA Immediate Past President Michael K. Hurst.

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 Grecia Alfaro at 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

Time Flies . . . When You Are DBA President

BY LAURA BENITEZ GEISLER

As the saying goes time flies. It certainly has for me the past seven months as DBA President, but it wasn't until the other day when someone pointed out that I was more than half-way through did I realize I had not slowed down enough to really appreciate what a great experience it has been and how much we've accomplished. Because I am frequently asked about my experience as DBA President, I thought I would provide an overview and highlight some new projects for this year before I blink again, and the journey is over.

The work of a DBA President starts well before the term begins. I had no doubt about this when, in November 2017 as the incoming President-Elect, I was presented with a 27-page calendar filled with monthly tasks and deadlines for the next two years. Thankfully, I had our amazing executive director, **Alicia Hernandez**, to help keep me on task and plan for the upcoming year. I attended various bar leader training programs and conferences around the country where I found inspiration for new projects and programs. To help with the execution of these new ideas, I recruited volunteers I knew could take these ideas and make them better and we got to work. Throughout 2018, I also met with various lawyers, judges, and the presidents-elect of the sister bars to solicit feedback on ways the DBA could better serve their interests. By December 2018, all that was left to do was write my first Headnotes column and inaugural speech.

January started at a dizzying pace. I joined a new firm, Sommerman, McCaffity, Quesada & Geisler, LLP (although my partners may question that statement since they barely saw me in January) and was at the Belo daily attending committee and section orientations and meetings. After a joyous inaugural, I had the honor of presenting **Bill Holston** with the MLK Award and presided over three judicial investitures for newly elected judges. I met with the newly formed President's Millennial Advisory Council, where some of the best young lawyers in Dallas provided me with great insights into issues impacting young lawyers today. Thru the blur that was January, I could see clearly this membership has a demonstrated commitment to the profession and community.

In February, after a productive board retreat, I met more new judges while presiding over two additional investitures and enjoyed the company of our newest members at the New Member reception which was a great success thanks to the hard work of the Admissions & Membership Committee, led by co-chairs **Aaron Borden** and **Rebecca Nichols**, co-vice chairs, **Lynne Nash** and **Kate Morris**, along with board advisor, Hon. **Erin Nowell** and DBA staff liaison **Kim Watson**.

Planning efforts started in 2018 began to take life in February with the launch of two new program series. "Life Skills for Lawyers" kicked off with a communications workshop titled "Get Unstuck: Transforming a Difficult Conversation." The workshop focused on practical ways to approach a difficult conversation thanks to the efforts of committee members **Dawn Budner**, **Steve Bolden**, and **Amy M. Stewart** (**Saba Sayed** and **Talmage Boston** later joined this group of outstanding lawyers). The "Protecting the Independence of the Judiciary" series closed out the month of February with an informative program titled "History, Challenges and Threats to the Independent Judiciary." Led by Hon. **Martin Hoffman**, the committee for this special series includes: **Ben Dubose**, **Jim Grau**, Hon. **Tonya Parker**, Hon. **Irma Ramirez**, **Danny Tobey**, and **Marquette Wolf**.

My presidential duties in March began by serving as a judge for the final round of the High School Mock Trial State Championship competition. Then in between the steady stream of the regularly scheduled monthly meetings I witnessed another seed planted back in 2018 come to bloom. The newly created Presidential Breakfast Series "Community, Culture & Connection," designed for Managing Partners, General Counsel and C-Suite Members, began with *D Magazine* executive editor **Kathy Wise** interviewing **David McAtee II (**Sr. V.P. and General Counsel of AT&T) to a packed room. David spoke about his experience leading the trial team during the WarnerMedia merger trial and leading lawyers in the ever evolving legal landscape. Many thanks to planning committee members, **Vicki Blanton**, **Jonathan Childers**, and **Amy Stewart** for their work on this special series.

April and May came and went in a flash with a steady stream of routine meetings and annual events such as Law Day. Thrown into the mix were two new programs developed in collaboration with our sister bars. "Emerging Bar Leaders," a leadership training conference, was inspired by the Bar Leadership Institute I attended last year. Past DBA President **Mark Sales** worked with **Alicia Hernandez**, **Justin Gobert**, **Cherie Harris**, **Hanna Kim**, **Elsa Manzanares**, **Jasmine Robinson**, and **Paige Tackett** to put together a well-attended program that included a diverse group of local lawyers. "Re-Entry into the Legal Profession" (co-sponsored by DWLA) was the brainchild of **Dawn Budner**, who together with **Rocio Garcia Espinoza**, organized a half-day workshop for women seeking to re-enter the profession after taking a hiatus from the practice of law. The program helped bring to light an unmet need within the profession and inspired the creation of a new DBA committee which will focus on supporting women trying to negotiate their way back into the profession.

I must admit that I was somewhat relieved for summer to arrive because things slowed down a bit as we gear up for a very busy fall where more new projects and programs will see their debut. Among the new projects slated for this fall is the DBA legal incubator project, Entrepreneurs in Community Justice, which I wrote about in my June column. After interviewing a number of incredibly qualified candidates, **Saedra Pinkerton** was selected to oversee this pilot project as its program director. Thanks to the hard work of **Kate Morris** and committee members **Sorana Ban**, **Craig Carpenter**, and **Mina Saifi**, on September 13, the DBA will host a day long Technology Summit with a luncheon featuring keynote speaker, **Erin Nealy Cox**, U.S. Attorney for the Northern District of Texas. The dual track programming is designed for both experts and novices and will cover technology related topics all lawyers need be aware of regardless of practice area.

While this is just a tiny glimpse into the first seven months, I hope you have a better idea of what I have been working on this year as President. If the first seven months are any indication, the remainder of this year will be over in a flash and **Robert Tobey** will be taking the helm. And while I have five months left to enjoy in this role, I have no doubt that when I look back at this experience what I will cherish most about it are all the people who were put in my path along the way. So to all of you, my sincerest thanks for helping enhance what has already been an experience of a lifetime.

Laura

HEADNOTES
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DALLAS BAR ASSOCIATION

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

Headnotes serves the membership of the DBA and, as such, editorial submissions from members are welcome. The Executive Editor, Editor, and Publications Committee reserve the right to select editorial content to be published. Please submit article text via e-mail to jsmith@dallasbar.org (Communications Director) at least 45 days in advance of publication. Feature articles should be no longer than 750 words. DISCLAIMER: All legal content appearing in Headnotes is for informational and educational purposes and is not intended as legal advice. Opinions expressed in articles are not necessarily those of the Dallas Bar Association.

All advertising shall be placed in Dallas Bar Association Headnotes at the Dallas Bar Association's sole discretion.

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Equal Access to Justice Campaign Co-Chairs Named

STAFF REPORT

Lauren Leahy and **Sarah Teachout** have been named Co-Chairs of the 2019-2020 Equal Access to Justice Campaign benefiting the Dallas Volunteer Attorney Program (DVAP).

"Volunteer time and voluntary contributions are the foundational components of the Dallas Volunteer Attorney Program," said DBA President **Laura Benitez Geisler**. "Some people donate time and/or money to support equal access to justice for all. By donating their time to raise money and awareness of the Dallas Volunteer Attorney Program, Lauren and Sarah play an integral role in the campaign's success because their work inspires both types of contributions. The DBA is incredibly grateful to these two amazing women serving as co-chairs of this year's campaign."

Lauren Leahy is the Chief Legal Officer for Pizza Hut U.S. She joined Pizza Hut in 2013 as Counsel. Prior to joining Pizza Hut, Ms. Leahy completed a year-long clerkship for Judge **Jennifer Elrod** of the U.S. Court of Appeals, Fifth Circuit, worked in Vinson & Elkins's commercial litigation practice in Dallas, and clerked for Judge **David Godbey** of U.S. District Court for the Northern District of Texas.

She received her undergraduate degree from Southern Methodist University with a B.A. in Political Science and in Corporate Communications and Public Affairs and her law degree from Harvard School of Law. Throughout Ms. Leahy's legal career, she has made substantial contributions to important pro bono matters, including community and human rights initiatives at Harvard and in Dallas.

"Equal access to justice is a bedrock principle, and critical community priority, that binds us together as professionals and as people," said Ms. Leahy. "I look forward to the good, hard work that lies ahead as we embark on this year's campaign."

Sarah Teachout is the Sr. Vice President and Chief Legal Officer at Trinity Industries, Inc. In her role she leads the company's legal, compliance and ethics, government relations, and environmental health and safety functions. Prior to joining Trinity in 2015, Ms. Teachout was a partner in the law firms of Akin Gump Strauss Hauer & Feld LLP and Haynes and Boone, LLP.

Lauren Leahy

Sarah Teachout

Ms. Teachout earned her J.D. from Harvard Law School and her B.A. from the University of Iowa. She is active in serving the Dallas community and legal services, and has taken on several pro bono cases.

"There is an alarming disparity between the legal needs of our community and the resources available to meet those needs," said Ms. Teachout. "As lawyers, each of us is responsible for doing everything we can to help erase that gap. I look forward to being a part of this important campaign."

The Campaign will culminate at the Inaugural of 2020 DBA President **Robert Tobey** on January 11, 2020.

Technology Summit

Friday, September 13, at Belo
9:00 a.m.-3:30 p.m., reception to follow

Keynote speaker: Erin Nealy Cox, U.S. Attorney, Northern Dist.rict of Texas

DALLAS BAR ASSOCIATION
100 CLUB

2019 DBA 100 CLUB MEMBERS – THANK YOU!

We are proud to recognize the following firms, organizations, corporate legal departments, government agencies and law schools for their 100% support of the Dallas Bar Association as members of the 2019 **DBA 100 Club**!

The **DBA 100 Club** is a distinguished membership recognition category that reflects a commitment to the advancement of the legal profession and involvement in the community. The **DBA 100 Club** consists of firms with two or more attorneys as well as corporate legal departments, organizations, law schools and government agencies that have 100% membership in the DBA. Recognition is free and given to the 2019 **DBA 100 Club** members in our *Headnotes* publication, at our Annual meeting in November and in the 2020 DBA Membership Directory.

Please note that the DBA 100 Club is FREE recognition and open for renewal annually. We do not automatically renew an organization's membership due to changes in attorney rosters each year.

It is not too late to become a member of the 2019 **DBA 100 Club**! Please submit your request via email including a list of all lawyers in your Dallas office to Kim Watson, kwatson@dallasbar.org. We will verify your list with our membership records and once approved, your organization will be added to the 2019 **DBA 100 Club** for recognition at our Annual Meeting and the 2020 DBA Directory!

THANK YOU FOR YOUR SUPPORT OF THE DALLAS BAR ASSOCIATION!

DBA 100 Club Members as of July 16, 2019

2 to 5 Attorneys
A. William Arnold III & Associates, P.C.
Adair, Morris & Osborn, P.C.
Adam L. Seidel, P.C.
Addison Law Firm P.C.
Aldous \ Walker
Alexander Dubose Jefferson & Townsend LLP
Alexandra Geczi PLLC
Altaffer & Chen PLLC
Anderson & Brocious P.C.
Anderson Grossman PLLC
Ashcraft Law Firm
Atkins, O'Toole & Briner, L.L.C.
Atwood Gameros LLP
Avant Law Firm
Barbee & Gehrt, L.L.P.
Billings, Tubb & Wright, PLLC
Bisignano Harrison Neuhoff LLP
Blackwell & Duncan, PLLC
Blankenship, Wiland & O'Connor, P.C.
Bocell Ridley, P.C.
Broden & Mickelsen
Brusniak Turner Fine LLP
Campbell & Associates Law Firm, P.C.
Capshaw & Associates
Carlock & Gormley
Chavez & Nguyen P.C.
Chen Dotson, PLLC
Christiansen Davis LLC
Clark Law Firm
Clark, Malouf & White, LLC
Davenport & Epstein, P.C.
Davis Stephenson, PLLC
Duke Seth, PLLC
Fisher & Welch, P.C.
Francis & Totusek, L.L.P.
Fuller Mediations
FurgesonMalouf Law PLLC
Ganci, L.L.P.
Gauntt Koen Binney & Kidd, LLP
Gillespie Sanford LLP
Goldfarb PLLC
Grau Law Group, PLLC
Griffith Barbee PLLC
Grogan & Brawner P.C.
Hahn Law Firm, P.C.
Hamada Smith, PLLC
Hamilton & Squibb, LLP
Hance Law Group
Hayward & Associates PLLC
Henley & Henley, P.C.
Herrera & Herrera
Hitchcock Evert LLP
Hoge & Gameros, L.L.P.
Hollingsworth Walker
Holmes Firm PC
Horton & Archibald, P.C.
Hosch & Morris, PLLC
Howell & Willingham, PLLC
Hunt Huey PLLC
Hunter & Kalinke
Iola Galerston, LLP
Jameson & Powers, P.C.
Jenkins & Watkins, P.C.
Johnston Tobey Baruch, P.C.
Jones Carr McGoldrick L.L.P.
Jordan Monk Reber, PC
Kabani & Kabani, PLLC
Kastl Law, P.C.
Kellett & Bartholow PLLC
Kinser & Bates, L.L.P.
Koning Rubarts LLP
Koons Real Estate Law
Langley LLP
Law Office of Andrew & Mark Cohn
Law Office of Jodi McShan, PLLC
Law Offices of Maduforo & Osimiri
Law Offices of Otstott & Jamison
Law Offices of Richard A. Gump, Jr., P.C.
Law Offices of Terrence G. Turzinski, P.C.
Lawrence Law PLLC
Lemons & Hallbauer, LLC
Letteer & Mock, P.C.
Leu & Peirce, PLLC
Lidji Dorey & Hooper
Lillard Wise Szygenda PLLC
Lira Bravo Law, PLLC
Lisa E. McKnight, P.C.
Little Pedersen Fankhauser LLP
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Focus | Construction Law/Real Property Law

Immigration Compliance Liability and Staffing Companies

BY RICHARD A. GUMP, JR. AND KELLI GAVIN

The use of staffing companies to supplement or replace direct hires is becoming more commonplace in the construction business and related industries. There are many benefits associated with utilizing a staffing company to provide workers for projects, but the lack of direct employment does not mean that the potential for immigration compliance liability disappears.

Project volatility makes staffing companies an attractive alternative for many companies involved with construction and real property work. Staffing companies can be helpful tools that provide authorized workers without the overhead costs associated with direct employment. Outsourcing hiring can cut down on HR and payroll needs and make workers akin to ordering a product from a vendor. However, serious consequences can result from using the wrong staffing company or using one for the wrong (fraudulent) reasons.

A staffing company differs from a Professional Employment Organization (PEO) in that a PEO creates a co-employment relationship while a staffing company agreement attempts to contract away employment liability. PEOs must be licensed in Texas, while there are no licensing requirements for staffing companies. Most staffing companies provide employees while covering hiring, payment, and HR needs. A solid agreement can avoid a co-employment relationship and therefore deter immigration liability from being passed on to client companies.

Drafting, negotiating, and monitoring staffing company agreements is key to ensuring that any immigration issues associated with staffing agency employees are not attributable to client companies. Staffing companies should be vetted and evaluated before signing any agreement. Questions asked should include: "Has your agency undergone an ICE audit before?"; "What are your hiring policies and procedures?"; "Do you use E-Verify?"; "Do you retain copies of the supporting documents?"; and "Do you conduct internal audits?". Contracting with staffing companies that use E-Verify for all hires or those that allow independent audits will help protect against verification issues. Agreements should include a material breach clause allowing for automatic contract termination for supplying unauthorized workers or refusing to make Forms I-9 available for review. Lastly, full indemnification against liability for knowingly hiring or continuing to employ unauthorized workers can serve as a good faith defense during an ICE investigation. The goal of the agreement is to avoid a co-employment relationship, as that minimizes the potential for immigration liability in the future.

In an effort to combat fraud, ICE and other immigration agencies have recently taken an interest in investigating the use of staffing companies. Form I-9 ICE audits are performed in accordance with a civil liability system. This system is based on statutes fining employers for knowingly hiring or continuing to employ unauthorized workers, or failure to properly complete a Form I-9. Monetary penalties based on a percentage of total violations can result. Knowingly or fraudulently using a contract or subcontract to circumvent immigration laws (e.g. staffing company agreements) is specifically prohibited by the statutes. If the staffing company becomes embroiled in an investigation, client companies could not only lose workers, but also become the target of their own investigations as ICE tries to determine who had knowledge of employees' lack of status. Audits have been rapidly increasing and the construction industry is a heavily favored target due to high turnover, the type of work involved, and high numbers of unauthorized workers typically employed.

Outside of the realm of civil liability, companies and individuals must be careful not to cross the line into criminal liability. Sending potential, current, or former employees over to a staffing company to escape liability for employing unauthorized workers is fraud. Anyone with knowledge of this type of arrangement could be federally prosecuted. ICE and DOJ will investigate and talk to employees to determine who at the client company had knowledge of unauthorized workers or a fraudulent arrangement. Supervisors and those involved with employees day-to-day should be trained to report former employees who return under new names, anyone discussing fraudulent documents, or anything else suspicious involving staffing company employees. Criminal liability can include charges for fraud, a pattern or practice of knowingly hiring or continuing to employ unauthorized workers, and harboring illegal aliens, which also includes aiding and abetting an individual to remain in the United States.

The lack of a Form I-9 is not enough to protect a client company from immigration liability. The consequences could end up being worse for a company if ICE finds that individuals were funneled through a staffing agency knowing they could not be legally employed than if the company directly employed them. Staffing companies can help alleviate the costs and issues surrounding direct employment for those in the construction and real property industries; but, counsel should craft carefully-worded contracts to eliminate the possibility of immigration liability being passed on to client companies and to avoid any indicia of fraud surrounding the arrangement. **HN**

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Focus | Construction Law/Real Property Law

Wine Not? – Bringing Customers Back to Retail Stores

BY DELANEY NAUMANN

Accounting for 13.7 percent of 2019 retail sales worldwide, e-commerce is a rapidly growing industry that shows no signs of slowing. When a person can sit at home with a glass of wine and shop online, why would anyone visit a physical store location again? Decision-makers at a DFW area mall must have asked themselves this question when developing their newest concept: serving alcohol in the mall.

In early 2019, a Dallas coffee shop debuted its new location within the mall, complete with a wine bar. Mallgoers can purchase wine or beer from the coffee shop and take it with them while they shop. To get shoppers back into brick and mortar stores, this "Sip and Shop" concept is a buzzworthy idea that could attract many consumers. However, this idea presents legal ramifications worth considering.

Initially, the sale of alcohol in Texas is governed by the Texas Alcoholic Beverage Commission (TABC). To legally sell beer and wine in the mall, the coffee shop obtained a Wine and Beer Retailer's Permit from the TABC. This permit authorizes the permit holder to sell beer, ale, malt liquor, and wine containing up to 17 percent alcohol on or off the premises, but not for resale. This permit further allows customers to avoid violating the public consumption ordinances established by the city where the mall is located. In addition to regulating the types of alcohol sold, the TABC restricts the times when alcoholic beverages may be served. An on-premise permit holder like the coffee shop may serve from 7 a.m. to midnight Monday through Friday, 7 a.m. to 1 a.m. on Saturdays, and noon to midnight on Sunday. The coffee shop must also provide adequate seating and may not sell alcohol within 300 feet of a church, school, or public hospital.

In addition to the requirements set by the TABC, the mall established rules shoppers must follow when purchasing their alcoholic beverages. First, all beer and wine is served in plastic cups and purchasers must wear a wristband at all times. Next, no beer or wine is allowed near a children's attraction located within the mall or in any of the mall's restaurants that also serve alcohol. Finally, customers are prohibited from taking beer or wine off the mall premises.

While the mall's guidelines contemplate some of the major areas of risk associated with alcohol service, there are other implications that may still need to be evaluated. The most obvious of such risks is liability. Personal injury, service to minors and overserving patrons are all potential dangers relating to alcohol consumption. So, who is liable when these situations occur: the mall or the coffee shop?

Such liability will likely depend on statutes and codes related to serving and selling alcohol, but also on the contractual relationship of the property owner and the establishment, which for purposes of this article, is landlord and tenant. When drafting a lease for an alcohol-serving tenant, there are ways to protect the landlord. One form of protection is including an indemnity provision that obligates the tenant to hold landlord harmless from all liability associated with tenant's activities, fault, and failure to abide by applicable laws and governmental regulations, as well as fault by tenant's invitees. While tenants may object to this broad indemnification, the tenant is in the best position to control the actions of tenant's invitees.

Another protection device is requiring the tenant to carry the proper insurance coverage in sufficient amounts. Tenants serving alcoholic beverages need liquor law legal liability insurance and Dram Shop liability insurance. The coverages may differ from state to state but are intended to provide protection against such things as alcohol induced battery and assault. Thoughtful lease drafting will provide the mall with added protections and a clear method for assigning liability in the event the mall's rules leave it exposed.

An additional implication to consider is how alcohol sales may impact the atmosphere and reputation of the mall. The availability of beer and wine on the premises could attract unpleasant clientele. If shoppers are visibly intoxicated, potential customers could be deterred from going to the mall, which would be contrary to the motivation behind allowing alcohol in the mall in the first place. Therefore, the mall and coffee shop should ensure coffee shop employees are properly trained to not overserve wine bar patrons.

Sip-and-Shop is an innovative strategy to bring life back to DFW brick and mortar stores. Although rivaling the appeal of online shopping, this tactic raises new legal questions for owners of commercial retail property. With possible threats of premises liability, the mall may need to look beyond the Texas Property Code to ensure this concept is successful. If executed correctly, mall-wide alcohol service has the potential to increase mall attendance, boost physical store sales, and have a lasting effect on the commercial retail industry. **HN**

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Column | Ethics

Ethical Considerations in Real Property Transactions

BY ANDREW COX

Real property transactions can present ethical challenges for the practitioner, particularly where the lawyer prepares documents for the use and benefit of multiple parties. This article discusses two real property transaction conflict of interest examples in light of the requirements of Texas Disciplinary Rule of Professional Conduct 1.06. Rule 1.06 provides, in part, as follows:

> "(a)A lawyer shall not represent opposing parties to the same litigation.
>
> (b)In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

Tex. Disciplinary Rules Prof'l Conduct R. 1.06(c).

One real property conflict example arises when a lawyer represents a lender in the preparation of loan documents to be executed by the purchaser. Often, the lender will also require a retained vendor's lien in the deed conveyed from seller to purchaser. In those cases, the lender may request its attorney to prepare the deed with vendor's lien and submit it, along with the loan documents, to the title company for closing. But what is the lawyer's ethical duty if the seller has not requested the lawyer to prepare the deed that the seller is asked to execute and pay for and the lawyer has no existing attorney-client relationship with the seller?

In Ethics Opinion 525 (May 1998), the Texas Commission on Professional Ethics (the "Commission") concluded, in part, that "[a] lender's attorney may not prepare a deed for use in a real estate transaction without having been requested or authorized to do so by the seller unless the attorney provides written notice to the seller that he has prepared the deed at the request of the lender, that he represents the lender and only the lender in the transaction, and that the seller is advised to consult his own legal counsel before signing the deed."

If, however, the seller requests or authorizes the lender's attorney to prepare the deed for the seller's execution, the lender's attorney may do so, provided the attorney first reasonably believes that the representation of both seller and lender will not be materially affected, provides a full dual representation disclosure to both seller and lender as required by Tex. Disciplinary Rules Prof'l Conduct R. 1.06(c), and obtains their mutual consent to the dual representation. (*Id.*)

Another potential conflict example arises where a lawyer represents the property owner who has received a mechanic's lien notice from an unpaid contractor. The lawyer's firm may also represent the lender who holds a deed of trust on the property in unrelated matters. The lender requests the lawyer to represent its interests by seeking to negotiate a compromise of the contractor's claim and to draft and obtain a signed waiver and release of lien from the contractor in exchange for payment. The property owner and the lender may have interests that are generally aligned in that both wish to remove the mechanic's lien against the property. However, the property owner may have a legitimate basis to contest the lien claim, and, in the absence of a payment bond, may have to pay from its own pocket to obtain a release of the lien. The interests of the two clients, therefore, may in fact be at least partially adverse.

Before undertaking to represent the interests of both lender and property owner in negotiating the lien claim and drafting the waiver and release of lien instrument, the lawyer may be required to provide the dual representation disclosure and obtain informed consent of both the property owner and lender before undertaking the work.

The particular facts of a given matter will shape the required ethical response. Nevertheless, Tex. Disciplinary Rules Prof'l Conduct R. 1.06 and Ethics Opinion 525 are good resources for the practitioner to have handy before undertaking to draft a real property instrument on behalf of multiple parties. **HN**

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Navigating the World of Emotional Support Animals

CONTINUED FROM PAGE 1

the animal. Also, if the specific animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation, then the landlord or community association may deny the resident's request to keep the animal. These exceptions are very narrow and should be carefully analyzed on a case-by-case basis.

Another thing landlords and community associations are not required to do is take a resident's word that their animal is an ESA. Best case scenario, a resident will approach the landlord or community association about allowing an ESA on the property in advance. The more common scenario is when a landlord or community association notifies a resident that he or she is in violation of the terms of the lease or the neighborhood's governing documents, and the resident responds by claiming that the animal is an ESA. In either case, the landlord or community association has the right to assess whether the individual making the request is truly disabled for FHA purposes, if the disability is not readily apparent or already known to the landlord or community association.

Information from a treating physician should be considered sufficient proof of disability. The most common method to obtain such information is to give the resident a *Reasonable Accommodation Request Verification* form that their physician can fill out. The form should ask whether the resident is disabled, whether the accommodation is needed, and whether the condition can be treated. The form should **not** ask about the severity or type of the disability. Sample forms can be found on the Texas Department of Housing and Community Affairs website. The landlord or community association should **not** ask for documentation that the animal has been certified, trained, or licensed as a service animal.

Many times, the difference between resolving an accommodation issue and having an FHA complaint filed is whether the landlord or community association takes the time to discuss with the resident what his or her needs are and make an effort to jointly work out a plan to accommodate the resident. While the landlords and community associations have the right to request the information necessary to make an informed decision, these situations should be handled delicately and with the awareness that the decision to deny a request to keep an ESA may very likely be challenged through an FHA complaint or lawsuit. **HN**

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Sign up to Volunteer at the DBA Community Day of Service
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A day of community service hosted by the DBA's Community Involvement Committee.

For more information, visit www.dallasbar.org/dbacommunitydayofservice.

If your firm or group has an idea for a project that you would like to organize, please contact beth@bethmjohnson.com, cspencer@ritterspencer.com, or galfaro@dallasbar.org.

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Thursday, September 5, 2019
at the Frank Crowley Courts Building Central Jury Room

MCLE: 6:00 hours, Ethics 1.00 Hour (pending) | Free to attend

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Focus | Construction Law/Real Property Law

A Drone Law Primer for Construction Attorneys

BY FRANK L. BROYLES

Drones, more appropriately called Unmanned Aircraft Systems (UAS) or Unmanned Aerial Vehicles (UAVs), are revolutionizing almost all segments of industry, including the construction industry. UAS operations are reducing time and costs, enhancing data analytics, and enabling new business opportunities. Illustrative is a PwC study that concluded:

- Real-time UAS inspection of construction sites has reduced threatening accidents by up to 91 percent; and
- FAA data showing current registration of non-military UAVs exceeds registration of manned aircraft by roughly 400 percent.

Local impact of UAS includes:

- Mineral Wells's recent commitment to repurpose a portion of land and air space on or near Fort Wolters airbase to a military and commercial UAS training facility; and
- The Dallas County Community College System's addition of an extensive variety of UAS courses.

Primary Sources of UAS Law

The foundational statutes are:

- Subtitle B of the FAA Reauthorization Act of 2018, a 50-page statute titled "Unmanned Aircraft Systems," and
- Texas Government Code Chapter 423, a 2017 20-page updated statute titled "Use of Unmanned Aircraft."

FAA regulations implementing the FAA Act most relevant to the construction industry are found in 14 CFR Part 107, which defines "Small Unmanned Aircraft Systems" as a UAV weighing less than 55 pounds, including everything that is on board or otherwise attached to the UAV.

Absent an appropriate FAA waiver, a general Part 107 guideline is:

(i) The UAV must be: (a) FAA registered unless it weighs less than 250 grams, (b) checked for safe operation before each flight as part of a detailed preflight inspection, and (c) flown only by a licensed, unimpaired UAV pilot (minimum age is 16 and the license currently requires passing only the FAA's written test every two years).

(ii) The UAV *cannot* be flown: (a) close to manned aircraft, (b) over "restricted areas" or over an individual unless that individual is either participating in the flight or protected from a falling UAV, (c) at night, (d) more than 400 feet above the surface unless the UAV is being flown within 400 feet of a structure, (e) beyond the visual line of sight ("BVLOS") of the pilot or a licensed observer; or (f) over 100 mph. The visual line of sight restriction is not waivable if the UAV will carry property of others for compensation.

More complex UAV operations generally require compliance with other portions of the Code of Federal Regulations and are beyond the scope of this article.

Accidents in which a UAV is involved must be reported to the FAA if there is serious personal injury or property damage of more than $500, exclusive of the damage to the UAV.

UAVs are "Aircraft," and it is as illegal to down a UAV or shoot at a UAV as it is to down or shoot at a manned airplane. See, *e.g.*, *Boggs v. Merideth*, 16-cv-00006 (W.D. Ky. 2017).

Arming a civilian UAV is prohibited, which has caused some Second Amendment concerns. An infamous Facebook posting on the topic is the entertaining subject of *Huerta v. Haughwout*, 16-cv-358 (D. Conn. 2016).

"Use of Unmanned Aircraft"

While, the FAA's focus is safety of our air space, the focus of Texas UAV law is privacy. For example, Chapter 423 of the Texas Government Code titled, "Use of Unmanned Aircraft," prohibits using a UAV to capture an image of individuals or their real property with an intent to conduct surveillance.

There are, however, 21 exceptions to this prohibition, several of which apply to construction activities. The construction-industry exceptions include business use of UAVs by licensed land surveyors and licensed professional engineers. The surveyor and engineer exceptions still preclude the capture of images of "identifiable individuals."

Additionally, Chapter 423 prohibits the operation of a UAV less than 400 feet above a correctional facility, "critical infrastructure," or certain types of sports venues. The Code defines twelve different "critical infrastructures." It also prohibits local governments from regulating UAV use—also subject to several exceptions. Violators are subject to both criminal and civil penalties, including statutory damages and attorney's fees.

Summary

A working knowledge of UAS law, as well as communication laws impacting UAV communications with its pilot, other aircraft, and air-safety personnel, will become a significant benefit, possibly a necessity, to many construction attorneys. The FAA remains the primary regulator of UAS and provides timely and useful UAS information at www.faa.gov/uas and www.faadronezone.faa.gov. **HN**

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Focus | Construction Law/Real Property Law

Pitfalls Involving Owner Financing of Residential Property in Texas

BY MARTIN CAMP

Owner financing can benefit both parties. Sellers can realize a higher rate of return and buyers gain access to financing not available conventionally. Because of the home mortgage crisis and housing collapse, access to conventional mortgage financing has become more restricted and more highly regulated. Unaware sellers may find themselves subject to unintended liability for failure to correctly navigate these more dangerous waters.

Federal and state legislation designed to protect borrowers from predatory lending has made the seller financing more complicated and difficult. Three laws in particular affect owner financing: (i) Chapter 5 of the Texas Property Code governing installment sales; (ii) the S.A.F.E. federal act and the T.S.A.F.E. Texas version, requiring sellers to have a mortgage loan origination license if they are selling non-homestead property to other than family members; and (iii) the Dodd-Frank Act which overlaps the S.A.F.E. Act imposing obligations on seller/lenders to ascertain that the buyer/borrower has the ability to repay the loan prior to lending.

Traditional seller financing, like third party financing, involves a note and deed of trust. Sellers transfer title to the buyer secured by this lien. Sellers also have an implied vendor's lien which can become an express lien, if it is included in the deed. Vendor's liens must be judicially foreclosed. Prudent sellers will insist on both a deed and trust and reserved express vendor's lien.

In installment sales contracts (contracts for deed), the seller retains title until the buyer has completed payment of the sales price, sometimes after many years. Rather than foreclosing on a lien, traditionally the seller was able to terminate the contract for buyer default and terminate the buyer's right to possession. Chapter 5 of the Texas Property Code imposes significant burdens upon sellers desiring to use installment sales contracts. Sellers have multiple disclosure obligations. After payment by the buyer of a certain percentage of the sales price, or making the requisite number of payments, the contract is essentially treated like a mortgage. It must be foreclosed upon in the event of a default. This preserves the buyer's right to his equity. Failure to strictly comply with this section can result in significant penalties for the seller. A close review of this complicated Chapter together with properly drafted contract forms and compliance regimens is mandatory to avoid costly violations.

Leasing with an option to purchase, including partial credit for lease payments, is another seller financing method. Sellers need to understand that courts will look at the substance over form. When treated as a financing, these might be subject to aggregation with other financings to meet the annual transactions figures requiring mortgage broker licensing discussed below. Use of wraparound mortgages and land trusts are other financings that could trigger compliance issues.

A seller involved in more than five qualifying financings in a year may be subject to the licensing requirements of S.A.F.E and T.S.A.F.E. Persons involved in more than five transactions can engage an intermediary (RMLO) to act as their agent to satisfy this requirement. There are many companies now offering these services for a reasonable fee.

Regulations promulgated by the Consumer Finance Protection Board (CFPB) under Dodd/Frank require creditors not to make covered loans unless the creditor has made a good faith determination that the consumer can pay in accordance with its terms. The list of factors that must be considered includes income, credit history, other debt, etc. There is a de minimus exception for persons who are not in the building business and engage in three or less transactions in a year. Non-conventional loan terms can create problems under Dodd/Frank when applying these factors. Balloon payments, for example, must be scrutinized closely. The bottom line is that to comply, the lender must be able, based upon verified documented information, to determine that the borrower has the ability to repay (ATR). Once again, use of a RMLO can assist with this determination.

Sellers intending to use owner financing on a regular basis should carefully review the various regulatory schemes to avoid inadvertent violations that can result in severe consequences. **HN**

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Moms in Law Events August

Being a working mom can be challenging. Being a working lawyer mom can be a different ballgame with its own unique challenges. Moms in Law is going on its third year of being a no pressure, no commitment, informal, fun, support group for lawyer moms. The August events are:

Friday, August 16: Noon, Meddlesome Moth in the Design District

Thursday, August 29: Noon, Nick & Sam's Grill – Park Cities/Preston Center

Email christine@connatserfamilylaw.com to RSVP or to join the Moms in Law email listserv.

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Counseling Real Estate Clients Looking to Invest in QOZs

BY JULIE PETTIT

Qualified Opportunity Zones (QOZs) have recently been thrust into the spotlight by the Tax Cuts and Jobs Act, which incentivizes private investment in underserved and otherwise blighted communities across the U.S. through a hefty tax break.

As a result of this tax break, real estate investors across the nation are seeking to deploy billions of dollars in capital gains into QOZs. Further, clients are seeking counsel about the program and are on the hunt for resources to utilize the tax savings.

Seemingly, Opportunity Zone investing is straightforward: purchase property within an Opportunity Zone and reap the tax rewards. But, it is not that simple. Two statutes govern investment in Opportunity Zones—26 U.S.C. §§ 1400Z–1 and 1400Z–2. In advising your clients, it is first important to know *why* your client might benefit from the investment. Even more, it is critical to understand that Opportunity Zone investments have strict requirements for *how* an investment must be made, *who* can invest in an Opportunity Zone, and *what* property qualifies for the investment.

Why Might Your Client Benefit?

The QOZ program is attractive for the potentially substantial tax savings it promises. Investors generally have 180 days to invest the realized gains, usually capital gains, from the sale or exchange of any appreciated asset in an Opportunity Fund. Capital gains resulting from the sale or exchange of any appreciated asset to an unrelated person will be deferred until the earlier of (1) the date the investment in the Opportunity fund is sold or exchanged, or (2) December 31, 2026.

If an investment is held for at least five years, the gains are discounted by 10 percent. If the investment is held for at least seven years, the gains are discounted by an additional 5 percent. Gains can be deferred until December 31, 2026 at the latest—which is why 2019 is being called the Year of the Opportunity Zone—as investors who invest in Opportunity Funds before December 31, 2019 will have the benefit of a 15 percent discount on gains plus a seven-year deferral. Because there is no statutory limit on the amount one can invest in a QOF, the potential tax savings here are grand.

How Must a QOZ Investment be Made?

Investors cannot benefit from Opportunity Zones by simply buying real estate within a particular zone. To qualify for the tax benefits, an investment must be made in Opportunity Zone property *and* it must be made by the appropriate vehicle—a Qualified Opportunity Fund (QOF).

To make the deferral election, the investor will file a form with their U.S. federal income tax return for the year in which the deferred gain would have been recognized.

Who Can Invest in a QOZ?

Qualified opportunity funds (QOFs) are the instruments by which investors may reap the tax benefits of this program. QOFs are defined by the act as "any investment vehicle which is organized as a corporation or a partnership for the purpose of investing in qualified opportunity zone property . . . that holds at least 90 percent of its assets in qualified opportunity zone property."

A typical candidate would be someone who just sold a business or piece of property and would like to defer the gain. But the gains may come from the sale of any asset that has appreciated—including stock, art, or baseball cards. Note, however, that the candidate will also be someone who can afford to have the funds illiquid during the term of the investment.

What Property Qualifies?

To qualify as an Opportunity Zone, the property must be situated in particular population census tracts that are low-income communities *and* which were nominated by each State's governor and approved by the Secretary of the Treasury. States are limited to nominating no more than 25 percent of their qualifying census tracts as Opportunity Zones. Once property is designated, that property is held by the census tract for 10 years.

Fortunately, there is a lot of property available. Within four months of the passing of Section 1400–Z, the first set of opportunity zones were designated by 18 states. Now, over 8,000 opportunity zones exist across the U.S.

What are the Risks?

While QOZs are all the hype right now, they may not be the best investment choice for everyone. One primary risk is that an Opportunity Fund may fail to meet the 90 percent requirement of 26 U.S.C. § 1400Z–2(c)(1). If the requirement is not met, the fund faces monetary penalty.

It is also important to know the key deadlines related to QOZs. Two deadlines to keep in mind are:

12/31/19 – Last day to invest in QOF to exclude 15 percent of gain invested from capital gains tax

12/31/26 – Last day that gains reinvested into a QOF can be deferred

Ultimately, you and your client should be familiar with not only the QOZ rules and regulations, but also state laws and the rest of the Internal Revenue Code, to determine if a QOZ is an effective investment vehicle for your client and to elect the best QOF structure for your client. **HN**

Julie Pettit is the founder of The Pettit Law Firm. She can be reached at jpettit@pettitfirm.com.

In The News

FROM THE DAIS

Joel Crouch with Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P. spoke in San Antonio at the Intermediate Estate Planning and Probate Course sponsored by the TexasBarCLE. **Mary Wood** spoke in New York at the 11th Annual NYU Tax Controversy Forum; **Aaron Borden** spoke in Fort Worth at the Fort Worth Chapter/TXCPA Members CPE Day; **Joel Crouch** and **Anthony Daddino** spoke in Fort Worth at the Fort Worth Chapter/TSCPA Tax Institute and **Joel Crouch** spoke in San Antonio at the TXCPA Advanced Estate Planning Conference.

KUDOS

Lewis R. Sifford of Sifford, Anderson & CO., P.C. was named 2019 Baylor Lawyer of the Year.

Cecilia H. Morgan with JAMS Local Solutions received the Steve Brutsché award from the Association of Attorney Mediators.

Andy Jones, of Sawicki Law, was awarded a President's Award of Merit by the Texas Young Lawyers Association for his outstanding service on the 2018-2019 TYLA Board of Directors.

The 2019 State Bar of Texas Pro Bono Excellence Awards were given to **William Holston, Jr.** with the Human Rights Initiative of North Texas, Inc., who received the J. Chrys Dougherty Legal Services Award, and the W. Frank Newton Award was given to the Dallas Office of Hunton Andrews Kurth, LLP.

Bob Allen, of The Allen Law Group, has been elected to a 3-year term on the Board of Regents for the American College of Coverage Counsel.

Robert "Bob" Hinton has been inducted into the Texas Criminal Defense Lawyer's Association's Hall Of Fame.

William "Willie" H. Hornberger with Jackson Walker LLP received a Distinguished Public Service Award from the Texas Society of CPAs for his work with AVANCE-North Texas

Brad Weber with Locke Lord LLP has been elected Chair of the Antitrust and Business Litigation Section of the State Bar of Texas for a one-year term.

Bryan Shores, of Hamilton & Squibb, LLP, has been promoted to Partner.

Michael A. Villa, Jr., with Meadows Collier, has been appointed Chair of the Tax Controversy Committee of the State Bar of Texas Tax Section for the 2019-2020 year.

Bobby Albaral with Baker McKenzie is now Managing Partner of the Firm's Texas offices (Dallas and Houston).

Dwight Francis with Sheppard Mullin has been named to Lawyers of Color's Nation's Best List.

ON THE MOVE

Cari LaSala joined Meadows Collier as an Associate.

Alison Cross and **Elaine Flores** joined Phillips Murrah P.C. as Directors.

Monica Narvaez joined Estes Thorne & Carr PLLC as a Partner.

Amanda Cottrell joined Sheppard, Mullin, Richter & Hampton LLP as a Partner.

Jackson Mabry and **Stewart Shurtleff** joined Peckar & Abramson, P.C. as Associate & Partner respectively.

Brad D'Amico joined Spencer Fane LLP as Partner.

D. Wade Cloud Jr. joined Munck Wilson Mandala as a Partner.

Jason Myers joined Barnes & Thornburg LLP as a Partner.

Heather Bocell and **Barton Ridley** opened the firm of Bocell Ridley, P.C. located at 8350 North Central Expressway, Suite 2000, Dallas, TX 75206. (469) 209-8888. **Cali Franks** has joined the firm as an Associate.

Gregg Gallian opened the firm Gallian Defense Firm LLC located at 2001 Bryan Street, Suite 1905, Dallas, Texas 75201. (214) 433-6303.

Andrew Howard and **Andrew Spaniol** have formed Howard & Spaniol, PLLC, located at 5220 Spring Valley Road, Suite 530, Dallas, Texas 75254. (214) 974-0585.

Kelly Davis joined The Bassett Firm as an Associate.

Candice Carson joined Butler Snow as Senior Counsel.

Murad Salim joined McGlinchey Stafford PLLC as an Associate.

Raymond J. Urbanik joined Lathrop Gage LLP as Of Counsel.

Amanda Hale joined Hamilton & Squibb, LLP as an associate at the firm's new Fort Worth office located at 3301 Hamilton Ave., Suite 123, Fort Worth, Texas 76107.

Hunter Barker and **Eunice Yi** joined Polsinelli PC as Associates.

Bailey Brauer PLLC has moved a new floor at Campbell Centre I, 8350 N. Central Expressway, 6th Floor, Dallas, TX 75206-1607.

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

DVAP's Finest

VINITA TANDON SINGH

Vinita Tandon Singh is Legal Counsel at Accudyne Industries, LLC.

1. How did you first get involved in pro bono?
My first time doing pro bono work was during my first semester of law school at the University of North Carolina School of Law, when I spent my fall break traveling to the North Carolina coast to assist Legal Aid with an expunction clinic. My law school's robust Pro Bono Program allowed me to spend multiple winter and spring breaks attending legal clinics in various areas of North Carolina, such as Cherokee, where individuals desperately needed free legal services. I am grateful that the importance of pro bono was instilled in me as a law student and that I can incorporate those values of service into my life as a practicing attorney.

2. What impact has pro bono service had on your career?
Pro bono service has deepened my knowledge of areas of law that I do not encounter in my regular practice. Furthermore, as a transactional attorney, the Prove-up Clinics have provided me with valuable insight into the courtroom and given me the confidence to appear before a judge. And, most importantly, pro bono service has reminded me how blessed I am to be part of a profession, and a legal community here in Dallas, that encourages us to use our education and expertise to better the lives of those around us through service.

3. What is the most unexpected benefit you have received from doing pro bono?
The opportunity to allow people to share their stories with me in the hope that I can help them normalize parts of their life is extremely humbling. The gratitude of these clients is a constant reminder that I, and every other attorney in this state, is so uniquely empowered to do good, and even a few hours of service each month can have a tremendous impact within our community.

Pro Bono: *It's Like Billable Hours for Your Soul.*

To volunteer or make a donation, call 214/748-1234, x2243.

DVAP
Dallas Volunteer Attorney Program

Classifieds | August

EXPERT WITNESS

Economic Damages Experts - Thomas Roney has more than thirty years' experience providing economic consulting services, expert reports and expert testimony in court, deposition and arbitration. His firm specializes in the calculation of economic damages in personal injury, wrongful death, employment, commercial litigation, IP, and business valuation matters. Mr. Roney and his experienced team of economic, accounting and finance experts can help you with a variety of litigation services. Thomas Roney LLC serves attorneys across Texas with offices in Dallas, Fort Worth and Houston. Contact Thomas Roney in Dallas/Fort Worth (214) 665-9458 or Houston (713) 513-7113. troney@thomasroneyllc.com. "We Count."

Economic Damages Experts-GMCO Litigation Damages Firm. Economic Damages Valuation Experts. GMCO a CPA firm with significant testifying experience. George Mendez CPA CVA has more than twenty years' experience providing economic damages, lost profits, damage calculation testimony in court, deposition and arbitration. The firm provides services regarding commercial damages, lost profits, intellectual properties, employment, personal injury/lost earnings wrongful death, and insurance litigation. George Mendez has experience in most industries including energy/oil & gas, manufacturing, transportation, hospitality, service, distribution, and construction. GMCO serves attorneys in Dallas/Ft. Worth, Houston, Austin/San Antonio. Contact George Mendez CPA CVA. Dallas/Ft Worth (469) 248-4477 or Houston (713) 8925037 experts@georgemendez.com

OFFICE SPACE

Private offices designed for attorneys available at 75 & NW Hwy - Class A High Rise. ENGAGE is an innovative attorney-only workspace. Plug in to a secure & professional environment with mail/parcel handling, guest reception, conference rooms, free garage parking, office/kitchen amenities, and networking opportunities. Contact Chelsea at (214) 865-7770 or chelsea@engagelawspace.com.

Office space available at 4054 McKinney Avenue. Second floor corner suite with three offices, reception and file room. This space is 1275 sq/ft and rents for $1,950.00 per month fixed rate. Full service with weekend and evening HVAC. Call (214) 520-0600.

North Dallas – Two professional offices available in suite with four attorney's with access to two conference rooms, kitchen, fax machine, free Wi-Fi, and free parking. Contact Ron at (972) 231-8855 or rmiller@legalcpa.com.

Office Space Available in Uptown. Office space available at 4303 N. Central Expressway for lease in a professional legal environment, in uptown. Share office space with experienced and established lawyers. Case referrals and other case arrangements are possible. Amenities include: Bi-lingual receptionist, fax copy machines, notary, internet, two conference rooms, two kitchen areas and plenty of free parking. Location is convenient to all Dallas Courts and traffic arteries. Please call Rosa at (214) 696-9253.

Professional office suites for lease in Uptown State Thomas area. Restored Victorian home circa 1890 w/ hardwood floors throughout. Shared conference room. 2619 Hibernia Street and 2608 Hibernia Street, 1 block from McKinney Avenue Whole Foods. Lawyers preferred. $750-$850/month. Includes phone & internet. Phone (214) 987-8240.

POSITIONS AVAILABLE

Experienced Attorney. Palmer & Manuel, PLLC provides a platform in iconic Campbell Centre where you get to do what you love – practice law while we handle the administration and logistics. Run your practice and be an entrepreneur as part of our well-established group of respected and collegial attorneys with varied practice areas. Keep 95% of your fees plus earn on your internal referrals. Reasonable fixed overhead covers rent, legal assistant (or bring your own), office administrator, PCLaw/ProDoc, Lexis, phone, internet, website, parking, malpractice insurance, etc.). See www.pamlaw.com or contact Larry, Marty, or Jeff at (214) 242-6444.

Dallas Family Firm that helps people through divorce with empathy and unyielding representation seeks associate with 5+ years' experience. Email resume to christina@katielewisfamilylaw.com; subject line should be your last name in all caps plus one word that describes you.

SERVICES

Quality Network Support/Services. Bluefinger is bringing quality back to Information Technologies by providing all-inclusive, high-touch IT services. Your clients depend on your firm… you can depend on Bluefinger. Our experienced engineers are dedicated, responsive, and committed to delivering zero downtime and optimized network solutions that are on-budget. We support software and solutions typically used within the legal industry. A few include Amicus, Sage, LexisNexis Time Matters, PCLaw, document and storage management, compliance software, on-premise Exchange Mail Servers and cloud-based Office365 mailboxes, both with the options of email archiving, litigation hold and eDiscovery. When you need safe, secure access to your client data from anywhere, anytime, from any device, you can rely on Bluefinger Technologies. Serving DFW since 1997. www.bluefinger.net/legal (972) 905-9035

The Attorney's Therapist: Kate Casey, LPC, JD. As a former practicing attorney, Kate understands the overwhelming feelings of stress, burnout, and isolation that often accompany the art of balancing life with the practice of law. Kate will help you evaluate your choices, identify areas for change, and implement an achievable plan which will allow you to become the best version of yourself both at work and home. Autumn Ridge Counseling and Wellness is conveniently located at 270 Miron Drive, Suite 112 in Southlake. Kate can be reached at (817) 881-1914 or kate@autumnridgelpc.com or AutumnRidgeLPC.com.

To place an affordable classified ad here, contact Judi Smalling at (214) 220-7452 or email jsmalling@dallasbar.org.

TEXAS LAWYERS' ASSISTANCE PROGRAM

Need Help? You're Not Alone.

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

Dallas Bar Association Peer Assistance Committee

DAY OF CIVILITY & PROFESSIONALISM

SAVE THE DATE!

A Special Program Promoting Civility

Friday, October 4, 2019 at Belo
Noon–4:30 p.m., Reception to Follow

Ethics 4.50, pending

Sponsored by the Morris Harrell Professionalism Committee

Civility is the hallmark of a professional

Dallas Bar Association Public Forum
School Shooter Safety:
What You Need to Know to Keep Your Kids Safe

Speakers:
Sherry West Christian, DISD Assistant Superintendent of Student Services
Chief John Lawton, DISD Acting Chief of Police
Nigel Wheeler, Bracewell LLP, *Moderator*

Monday, August 12, 2019
Noon – 1:00 p.m.
Belo Mansion

RSVP to jsmith@dallasbar.org

Sponsored by: DBA Public Forum/Media Relations Committee