

AMA-LAW

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NO. 2

Meet Your President



Kelly Ussinger

The simple fact is: You have already met your President. You met him in the "Meet Your Director" article in AMA-LAW Vol. 13, No. 2 (October 1998) and then, again, in the "Meet Your Vice-President" article in AMA-LAW Vol. 21, No. 3 (November 2006). Quite frankly, I'm a little concerned about holding myself out using the intimate term "Your" because I don't know some of you very well. If you read those prior AMA-LAW articles, you'll know more about me than most members of the media know about Sarah Palin. These past articles contain awkward attempts at humor and were written in the third person. I think I moved up through the ranks because several years ago, I brought you Amarillo Bar Idol. I've kept the videotape of the "talent" and believe that those judges and lawyers on the tape voted for me to be President. Their votes were voluntary. Now that I have become the President of the Amarillo Area Bar Association, I plan to put such frivolity behind me and to take myself much more seriously. The cover picture confirms my new-found sense of sobriety.

I was born in Odessa, Texas. Like Pecos Bill, I was raised by coyotes until the age of four, and then domesticated, to the point of graduating from Odessa High School, Abilene Christian College and Texas Tech Law School. A little over 32 years ago, Kay and I married. She is a child nutrition specialist at Region XVI Education Service Center. We have two adult daughters, Amy and Emily, but no grandchildren. Instead, we have Great Dane grand dogs, Dottie (145 lbs) and Ivan (165 lbs). They are afraid of their grandfather when he wears his president's hat.

Now, about that hat. Before I was President, or even in line to become President, I visited Stanley Marsh 3's office on a President's Day. Everyone visiting Stanley that day was given a George Washington president's hat. I think Stanley was prescient, sensing that I was destined to reach a high office like AABA President. I kept the hat and believe it fitting for a president—particularly one that is follicularly challenged.

Having been with the Underwood Law Firm since 1980, my practice has focused on trial work. I plan to keep on doing that for the foreseeable future, with or without the president's hat.

Despite my self-deprecating humor, I do take the job of AABA President seriously, and consider it an honor to be "your" President. With your help and support, I think we'll have a good year.

"... just think of your donation as an advance deposit in the karma bank. . ."

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"some curled up in the fetal position with their thumb in their mouth, trying to figure out how to apply that crazy rule against perpetuities they learned in law school."

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"If you want to complain about being denied notice of a hearing, actually showing up makes that difficult."

- Page 5

"... treated clients, employees, judges, and opposing counsel with a level of respect that we should all aspire to."

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President's Page

Kelly Utsinger

“Ike” it or not. We need to respond.

It always happens to “those other people.” You know them--the ones in headlines. Those other people who live on some tropical coast devastated by the tsunami; those who risk the ravages of disease when the typhoon spoils their potable water; those surrounded by rubble as crews fight frantically to free them amidst the earthquake’s aftershocks ...those other people. So how does our perspective change when those others are some of us?

I suspect that many of our profession in Galveston, Beaumont, Port Arthur, Houston, and the twenty-nine Texas counties declared disaster areas in the wake of hurricane Ike never envisioned themselves as those other people-- until it happened to them. Forget access to Blackberry’s and e-filing; many of them would just like shelter for their families, a hot shower and some clean clothes. They will never again take elevators for granted.

The estimated \$20 billion in destruction throughout the 500 miles of Ike’s unwelcome visit is overwhelming, but the adjusters, underwriters and contractors may overlook an equally unfortunate circumstance that is not subject to quantitative measurement. Eliminate justice from the fabric of a community and you invite chaos. When the courthouses close and the lawyers cannot practice, the rule of law is put at risk and the wheels of commerce grind to a halt. The victims of the hurricane, who may desperately need legal assistance during this calamity, may be completely helpless because those who are sworn to uphold the rule of law are unavailable.

The State Bar of Texas (www.TexasBar.com) and the Texas Supreme Court (www.supreme.courts.state.tx.us) are acutely aware of the need for the judicial system and its primary players, the lawyers and judges, to work through this disaster. The Houston Bar Association (www.hba.org) is a clearinghouse for coordinating assistance. Visit these websites for details about how you can help. If nothing else, these sites will tell you how to contribute financially. You can even find a 79 page Disaster Legal Services Manual prepared by the State Bar of Texas Lawyers Disaster Response, updated in July 2007. It is a handy reference source.

So the question we have to answer is: “Ike” it or not--how will we respond to this legal crisis? If nothing else, consider making a contribution to those organizations recommended by the State Bar of Texas. But if you’re not moved to help the Gulf Coast lawyers/victims during this catastrophe, just think of your donation as an advance deposit in the karma bank because sometimes it doesn’t happen only to “those other people.”



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Contact Us

For more information about your local area bar association or for address changes, contact Jo Ann Holt, Executive Director, at:

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Also visit our website at www.amarillobar.org for information and links to both local and state-wide legal resources.



AAYLA Update

Its October and fall has arrived. The leaves are changing, the dove are flying, football season is in full swing, the Longhorns look great, and yes, there are many new lawyers meandering around town with blank looks on their faces, some curled up in the fetal position with their thumb in their mouth, trying to figure out how to apply that crazy rule against perpetuities they learned in law school. All is well as AAYLA is hosting its annual New Lawyer Orientation on October 2, 2008. All new lawyers who want to participate should have already received an invitation, but if not, just show up at the Potter County jury pool room at 1:30 pm on October 2. The orientation will involve a tour of the state and federal courthouses, an opportunity to meet the judges and courtroom personnel, and an introduction to Amarillo. There will be a reception at the Amarillo Club following the orientation starting at 5:00 pm. The

Big Bar a/k/a the Amarillo Area Bar Association is partnering with AAYLA and the reception will double as their Kick-Off Party. They are learning from the best on how to throw a party. Therefore, everyone is invited, young and old, short and tall. We even invited our Old friend Dusty Stockard. Maybe we can get him to sing a few songs.

After the new lawyers get oriented, they will then curl back into their fetal position to await bar results. In summary, they will be useless for the next month. For the few lucky ones, AAYLA will be hosting its annual

swearing in ceremony on November 13, 2008 at the Court of Appeals. Please mark your calendars.

Also, remember VEGAS BABY, VEGAS. Coming April 4, 2009. Get ready to double down on some great CLE.



By John Massoub

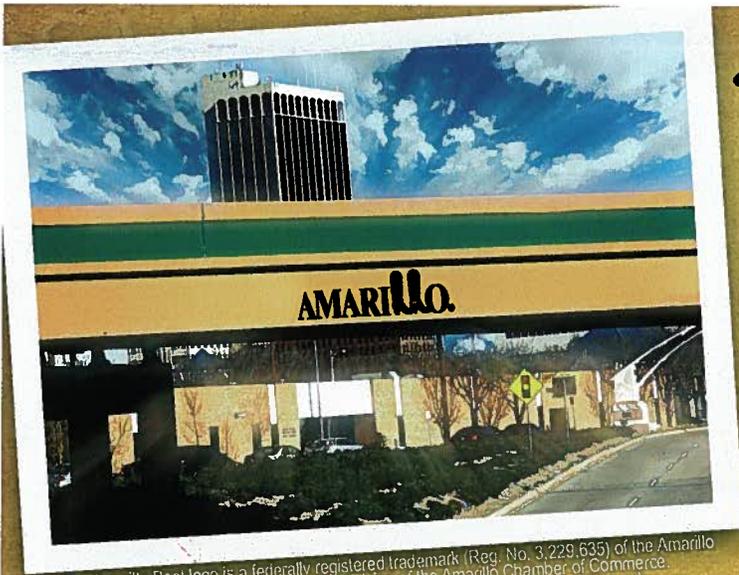


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Young Lawyer of the Month



John Atkins

Born and raised in Amarillo, John Atkins suffered through Tascosa High losing to Amarillo High in football just about every year – though he was lucky to not be athletically gifted enough to play. Deciding that he'd had enough football heartbreak for a lifetime, he went to The University of Texas where he suffered through losing to OU just about every year – though the 2005 Texas season seemed to make up for it all.

He obtained a B.B.A. in finance

from The University of Texas in 2002 and went straight to the beautiful hub city to begin law school. Eager to come home to Amarillo after law school, he has practiced with SandersBaker since graduating from Texas Tech School of Law in 2005. At SandersBaker, his practice is focused mainly on transactions, civil or commercial litigation, estate planning, and obtaining judgments against judgment-proof defendants. He was named a Rising Star by the Texas Super Lawyer publication for 2008, and he is excited to be joined at the firm by two future rising stars:

Matt Sherwood and Kelln Zimmer.

He has no wife, no kids, no pets, no oven, and the plants in his office are artificial so he doesn't have to water them. He enjoys frequent trips to Las Vegas to visit family (and by visit family, I read I play golf and gamble) and enjoys losing to his grandmother in the yearly college football pool. He also enjoys golf, racquetball, college football, music, and drag-racing his old Camaro. On a good day, he can touch his toes without bending his knees. He once read a book for pleasure.

October Luncheon



At our October meeting, we will hear Lubbock lawyer Jack Stoffregen, who heads the newly-organized West Texas Regional Public Defender's Office for Capital Murder Cases. The regional office is headquartered in Lubbock, and has offices in

Amarillo and Midland. Whether or not your practice involves criminal matters, you will want to hear about this very significant development for the handling of capital murder cases in our area of the State.

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Legal Yarns

Distracted or Convinced

From James Wester

Submitted by in part by both Ron Nickum and Joel Hogue

Ron Nickum provided this story from a trial over a decade ago.

Joel's witness was a beautiful young woman. Joel passed the witness and Ron stood to approach and display a document to the witness. When Ron reached the side of the witness box where the young woman had entered, he was stunned to find that when she sat down her "short" dress had slid up displaying quite a bit of shapely leg for the jury (which was mostly men). Ron stared at her legs for a long moment and being quite speechless; Ron turned to the juror at the end of the first row of chairs and said "I lost my train of thought." The juror grinned and replied, "So did we."

Joel remembers less about Ron's recollection, but does recall his cross examination of Ron's client. In particular, Ron's client walked into a trap that led to this exchange:

A. No, I never did use diesel in my

wells, sir.

Q. Well, let me hand you what's been marked Plaintiff's Exhibit 169. That deals with the [XYZ] lease, right?

A. Mercy.

Mr. Nickum: Your honor, can I request a brief recess.

After Ron's client recanted his testimony, the following exchange occurred (which exchange has previously appeared in Judge Buchmeyer's column):

Q. Well, I mean why should we be-



James Wester

lieve anything that's coming out of your mouth as you sit here right now?

A. Well, I don't suppose you have to believe any of it. All I'm trying to do is convince the jury.

Legal Briefs

Our congratulations to Adrian Castillo of the Seventh Court of Appeals and Pete Serrano, Sprouse Shrader Smith, for being selected for the first class of Leadership SBOT. This is a statewide initiative of Harper Estes, State Bar President, the State Bar of Texas and the Texas Young Lawyers Association. It is designed to expand the leadership rolls

of the participants in their communities. The first session is slated for October 16, 2008.

If you have news, we want to hear from you. Send your information to the AABA: email director@amarillobar.org, fax 379-9259, or call 371-7226.

7th Court of Appeals Update

by Justice Brian Quinn



The sovereign has its immunity. But, the shield can be pierced when, among other things, injury is caused by the use of personal property it owns.

In *Texas Tech University Health Sciences Center & University Medical Center v. Wards*, No. 07-07-0451-CV (Tex. App.—Amarillo, August 6, 2008), the personal property in question was an external fetal heart monitor. The monitor apparently recorded an unusual heart rate to which information the attending medical personnel did not adequately respond. This resulted in the infant being stillborn.

Though the Wards contended that the child's death was linked to the use of the monitor, their effort to pierce the sovereigns' immunity failed. This was so because the failure to address the information being imparted from the monitor caused the death, not the monitor or the information it was imparting.

If your client says he didn't sell drugs, maybe it was his neighbor with the same name. At least that is what the defendant in *Johnson v. State*, No. 07-06-0190 (Tex. App.—Amarillo May 30, 2008) contended. However, the State had evi-

dence of him selling crack to an informant and undercover officer four months earlier, and that evidence was admitted over the accused's objection. We concluded that the trial court did not abuse its discretion given the similarity between the two criminal acts and the defendant's effort to place his identity as the culprit into issue.

If you want to complain about being denied notice of a hearing, actually showing up makes that difficult. In *In re Meiwes*, 07-08-0239-CV (Tex. App.—Amarillo, September 5, 2008), we held that by appearing at and participating in the contempt hearing, Meiwes waived his complaint about the irregularity of the notice. In addressing a different dispute, we also concluded that a protective order does not necessarily merge into or go away upon entry of a final judgment in a family matter. You have to look at the wording of the judgment to be sure.

IN MEMORIAM

Tom J. Fotheringham

If you have practiced law in Amarillo in the last half-century, you may have had a case with him and you most certainly recognize his name. He was a rare lawyer who spent an incredible amount of time helping those who could not help themselves and caring for those who no one else cared for.

The consummate family man, he raised two beautiful daughters, Tammy and Teri, and had four grandchildren and three great-grandchildren. His devotion to his talented and beautiful wife, Carolyn Furr, was matched only by his devotion to the rest of his family. Together, he and Carolyn were never at a loss for entertainment. He had a green thumb, dedicating a good part of each day to tending to his garden, the greenhouse in his home, and the greenhouse that doubled as an entrance to his firm.

He was the late A.J. Robinson's law partner for three decades and practiced with and mentored many other fine lawyers who went on to prosperous legal careers. Even at the end of his career, he worked longer hours than most first year associates (believe me, I was his roommate at the time) and treated clients, employees, judges, and opposing counsel with a level of respect that we should all aspire to.

He was active in his church and in the community, serving on the Board of Amarillo College. Having received his law degree from The University of Texas, he was a huge Longhorn fan. To say he had many friends would be as much of an understatement as saying that he was a great man who touched many lives. He passed away after a brief and pain-free battle with cancer, surrounded by the ones he loved.

He is Tom J. Fotheringham, but to me, he will always be "Pa".

TPPA's Attorney/Paralegal Luncheon

When and where?

11:30 a.m.-1:00 p.m., October 16, Amarillo Club

Who's invited?

TPPA members and their attorneys/supervisors. Any paralegal, attorney or other member of the legal community

What's going on?

Networking, lunch and CLE presentation by Dr. Christian Meissner on *Impartial Memory and Eyewitness Recollection* **

**CLE credit approval from the State Bar of Texas is pending.

What's it going to cost me?

\$20 for TPPA members and their guests.

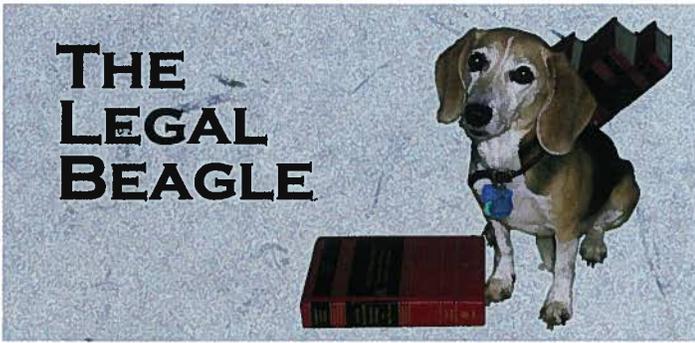
\$25 for other non-members

How do I RSVP?

Erica Anderson - 433-0726 (cell) or eanderson@mhba.com



C'MON! There is a chance to win a Weekend Getaway to Santa Fe! Enjoy a 2 night stay at Inn of the Governors



Abby is a miniature Beagle who is a hound for obscure, interesting, and/or outrageous legal treats. Her briefs are meant to educate and entertain. If you have any Legal Beagle-worthy tidbits, please e-mail Abby at legalbeagle.aaba@sbcglobal.net. Submissions will be published in this column and attributed to the sender. Abby is a stickler for Shepardizing, so please cite your source.

That's Refreshing

Key Notes that you knew but may have forgotten:

Alter Ego Theory

"The Alter Ego theory applies where there is such a unity between corporation and individual that the corporation has ceased to be a separate entity, and allowing the individual to avoid liability through the use of the corporate form would work an injustice." *Country Vill. Homes, Inc. v. Patterson* 236 S.W.3rd 413, 428 (Tex. App.—Houston [14th Dist.] 2007, pet. filed) (citations omitted).

Dram Shop Act

"As already explained, the Dram Shot Act does not make a provider vicariously liable for the conduct of an intoxicated patron. F.F.P.'s liability arises from the actions of its employees and agents—not through the actions of Ruiz." *F.F.P. Operating Partners, L.P. v. Duenez*, 137 S.W. 3rd 680, 693 (Tex. 2005).

The Discovery Rule

"For purposes of the discovery rule, 'discovery' occurs when a plaintiff has knowledge of such facts as would cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action" *Haidar v. Nortex Foundation Designs, Inc.*, 239 S.W.3rd 924, 926 (Tex. App.—Dallas 2007).

Lis Pendens

"A lis pendens is a 'notice, recorded in the chain of title to real property. . . to warn all persons that certain property is the subject mater of litigation. . . If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, the interest is merely collateral and will not support a lis pendens." *Countrywide Home Loans, Inc. v. Howard*, 240 S.W.3d 1, 4 (Tex. App.—Austin 2007).

Quote of the Month:

Thinking is the hardest work there is, which is probably the reason why so few engage in it."

--Henry Ford

A Picture is Worth. . .

Correctly identify this young person to legalbeagle.aaba@sbcglobal.net and win a travel brief case generously provided by Thomson West Publishers. Modeling this prize is last month's winner, **Karl Baumgardner**:



You have to get up pretty early in the morning (or at least read your AMALAW as soon as it comes in the mail) to beat **Karl Baumgardner**.

Karl correctly guessed that last month's picture was the Legal Beagle's new master, Kage Hawkins. Kage was born on July 30, 2008 to Hollye and Brent Hawkins.

None of the following, whose name was drawn from the fishbowl at last month's bar luncheon, was present to collect.

- \$25 **Brad Howard**
- \$50 **Randy M. Phillips**
- \$75 **Kerry David McLain**

Your Bar Events - October 2008

S	M	T	W	T	F	S
			1 AAYLA Board Meeting, 12:00 p.m. Sprouse Law Firm	2 AABA Board Meeting, 11:45 a.m. Amarillo Club	3	4
5	6	7	8	9 Bar Luncheon, 11:45 a.m., Amarillo Club, 30th Floor	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

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