



AMA-LAW



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NOVEMBER SPEAKER: THOMAS BARKER



The November speaker is Thomas Barker. Tom is a partner at Foley Hoag, LLP, an international law firm with offices in Boston, Washington, D.C., New York, and Paris. Tom serves as the Co-Chair of the firm's health care practice group and serves on the firm's management committee. Tom regularly advises clients on health care matters, with a special expertise in Medicare and Medicaid reimbursement and coverage. His clients include providers, payers, and innovator pharmaceutical, biotechnology, and medical device manufacturers.

Prior to joining Foley Hoag, Tom served in a series of senior-level positions at the Centers for Medicare & Medicaid Services (CMS) and the U.S. Department of Health and Human Services (HHS)

during the Administration of President George W. Bush, including serving as general counsel of CMS and HHS and counselor to the Secretary of HHS.

In addition to his health care practice, Tom provides pro-bono legal services on immigration matters and has developed a specialization in representing individuals who have defected from North Korea.

Tom's presentation is entitled "2021 and Beyond: The Impact of the Election on Health Care and Immigration." His presentation will discuss the potential legal implications on the health care system and the immigration system from the contentious 2020 election.

Please join us via Zoom on Thursday, November 12th at noon to hear this interesting and helpful presentation.

“I'm writing this in the middle of October when #thankful is not yet trending. But maybe it should always be trending.”

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“Girls just wanna have fun”, says Cyndi Lauper. But I think trial judges do too. . . .”

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PRESIDENT'S PAGE

By: Jennie Knapp

Every time I sat down to work on this month's 300ish words, all that popped in my head was how much we sorely miss the normalcy of life and our regular Bar events. To encourage my extroverted heart, I decided to list blessings. It worked to cheer me up, and, as an added bonus, this column wrote itself. (Yes, it's a coincidence that the November column is about being grateful. I'm writing this in the middle of October when #thankful is not yet trending. But maybe it should always be trending.)

- The Potter County Courthouse lawn was put to a good use for Judge Titiana Frausto's swearing-in ceremony. We had perfect weather, and the courthouse was a beautiful backdrop for the historic event.

- One of the comments from our October Zoom meeting emphasized another big blessing. It was a message from an attorney in the northern Panhandle who cannot normally attend our lunch meetings due to the distance. We are now able

to reach out to the whole Amarillo Area Bar Association, something we have not ever done as efficiently as we can now.

- Outreach potential has increased in more ways than one. A big shout out to Kay Pechin and others at Legal Aid of Northwest Texas in setting up a Wills Clinic. LANWT reaches people in the top 20 counties of the Texas Panhandle. With the prevalence of (and increased comfort level with) Zoom and other platforms, they are able to set up remote meetings between essential workers and area lawyers.

- We are continuing with in-person CLE in the Eagle Center. Ask Janet Byars (director@amarillobar.org) for a schedule!

- You can also earn free CLE at our lunch meeting in November. You can even earn this CLE credit while cleaning out your garage or sitting on your back porch enjoying the weather.

Hope to see you all – or at least your names on a little black box – in November. Maybe (hopefully) soon we will be in person for lunches again.



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7TH COURT OF APPEALS UPDATE

By Chief Justice Brian Quinn

The court recently had a spate of constitutional issues brought to us. Some we heard, some we didn't. Before we can though, you have to let the trial court have a crack at them. For instance, the appellant in *Martin v. State*, No. 07-19-00082-CR, 2020 Tex. App. LEXIS 7879 (Tex. App.--Amarillo September 28, 2020) sought to attack the constitutionality of a penal statute criminalizing the possession of a firearm by a member of a "criminal street gang." The arguments were not raised at trial, however; so, we could not hear them. But, we did get the chance to see if Martin, a member of Cossacks MC, was a member of such a street gang, which according to statute, was a group having three or more persons with a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities. Though the police testified that the Cossacks met that test, it wasn't enough. The State failed to prove he was one of the three or more who regularly committed the crimes. In short, you have to be more than just a member; you have to be a regular law-breakers too.

We all know that the Covid has put a damper on jury trials. One of the groups most effected have been those who can't pay bail to get out of jail (now that sounds like a possible CW song lyric). Kevin Sheffield was one of them. So, he petitioned for writ of habeas corpus asking the trial judge to either lower his bond or try him. The judge denied the reduction and then told him that the court was "not allowed to conduct a jury trial" until the Office of Court Administration in Austin said otherwise. But what about his constitutional right to a speedy trial, he asked? Well, that complaint was preserved. In concluding that the virus did not infect it, we cited the Texas Supreme Court's own words about the edit to forego trials being subject to "constitutional limitations". Since the right to a speedy trial was one of them, administrative directives coming from Austin could not supersede it. In short, our Texas and U.S. Constitutions beat the bug. *Ex parte Sheffield*, No. 07-20-00216-CR, 2020 Tex. App. LEXIS 7598 (Tex. App.--Amarillo September 17, 2020).

"Girls just wanna have fun", says Cyndi Lauper. But I think trial judges do too, like when Justice Pat Pirtle was trying a drug case while still on the trial bench. He tells about man being tried for possessing less than a ton pot.

"It was packaged in a 55-gallon barrel (like a oil barrel) crammed-full. During the State's case-in-chief, the DPS chemist admitted on cross-examination that he only tested the substance found on the top of the barrel, and he could not say for certain what was on the bottom After the defense finished presentation of its case ... Assistant District Attorney ... commenced to cover the entire courtroom floor with black plastic. After accomplishing that task, he rolled the 55-gallon barrel to the center of the courtroom and emptied the entire contents onto the floor. ... the smell. Everyone's allergies were acting up, but no one seemed to mind" I wonder if he invited everyone to the local convenience store for chips and fried burritos afterwards?

Stay mellow, dudes, and peace out!

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AAYLA UPDATE

By Richard Biggs

As this article is being written, the City has announced a “code red” Covid alert, and non-essential social functions are again being discouraged. This creates some difficulty for me, the person tasked with writing about the activities of an organization which is now intentionally reducing its activities. So today I’m not going to be writing about any legal or current affairs.

Being that this is the November issue, I decided to take a moment to discuss what we have to be thankful for. Thankfulness is clearly important in our society, evidenced by one of our main public holidays. The value of being thankful, however, is timeless. The Roman politician and philosopher Cicero wrote that “gratitude is not only the greatest of the virtues but the parent of all others.” This seems likely, as gratitude is the keystone of most modern religions. Christians are called to worship to express their gratitude (e.g. Psalm 118:24), while the Qur’an says “whoever gives thanks benefits his own soul.” (The Qur’an, 31:12).

In addition to spiritual benefits, psychological studies from Harvard Medical School researchers have found that expressions of gratitude not only improves a person’s spirit, it makes people physically healthier. Those studies concluded that people who expressed gratitude about their lives “exercised more and had fewer visits to physicians than those who focused on sources of aggravation.” Another study found that when test participants were “assigned to deliver a letter of gratitude to someone who had never been properly thanked for his or her kindness, participants immediately exhibited a huge increase in happiness scores. This impact was greater than that from any other [tested] intervention, with benefits lasting for a month.”

As you may have heard on TV: listen to the scientists. I encourage everyone reading this article to take a brief pause, and contemplate what you are thankful for in your life. If you are able, write a note or send a text of gratitude. There is no time better than the present to boost your “happiness score.”

Personally, I am grateful for the local leadership by the Bar. Our local courts have published comprehensive plans for how cases are to be tried in these “code red” times. In our current moment of national discord, the members of the Amarillo Bar have worked together commendably in order to keep the wheels of justice spinning. I am grateful for the Amarillo legal community, and look forward to a time when I can return to writing of the upcoming events hosted by AAYLA.

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AABA History Quiz

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MORE ON THE CUSTODIAN ATTORNEY PROGRAM

By James Wester, State Bar of Texas District 13 Director



James Wester

is Greg's updated article titled Rescuing Your Practice From Sudden Cessation:

"You get a call late in the evening from a close friend's spouse, "Bob was in an accident and is unconscious in the ER." You swallow hard and ask, "Will he be alright?" She replies haltingly, "They think he had a stroke, and it will be weeks or months in a coma... and then rehab, if he survives."

Just days before, Bob excitedly shared over coffee about the biggest trial of his career as a sole practitioner starting in two weeks. You ask yourself, "How can I help my friend, his family and his clients so suddenly left without the one person who knows what needs to be done and where to begin?" "And how can I protect my own family and practice from such a calamity?"

Sadly, this has become a common occurrence in recent years. Echoing findings of the National Task Force on Lawyer Wellness, regional offices of the Chief Disciplinary Counsel saw a significant rise in occurrences of lawyers dying or otherwise becoming "absent" from their law practice. In 2018, a "Cessations Docket" pilot program was created to field all such calls. It soon encountered scores of situations in which lawyers died, resigned, were disbarred or suspended, became disabled, or disappeared. Some lawyers intended to cease practice, others didn't. Some survived personal crises, others didn't. Lawyer suicides alone left hundreds of active matters pending with no lawyer at the helm.

With nearly 30% of our state bar brothers and sisters over the age of 60, and increasing reports of the stress of being responsible for yourself, your family and your clients causing serious physical and mental health problems and substance abuse, our profession is primed for contingency planning.

Part XIII of the Disciplinary Rules of Procedure provides a judicially supervised practice cessation procedure using a court-appointed custodian to take charge of abandoned practice files, notify clients of the need for new counsel and transfer files, notify the court, opposing counsel, file for continuances, etc., and dispose of closed files. While this procedure works, it can be slow, costly and absolutely depends on other lawyers stepping up to serve as custodians away from their own practices, who can be hard to find.

Recognizing the need for an easier way to engage custodians to assist in cessation without a court proceeding, the State Bar initiated a special work group

with key expertise, first, to implement a simple way for you to choose your own custodians and to encourage custodians to serve. Next, the work group is to design a comprehensive guidebook for succession planning for Texas lawyers, which is in the works.

Launched in April, the first phase of this effort is now a reality and available online. You can now visit https://www.texasbar.com/AM/Template.cfm?Section=Succession_Planning&Template=/Succession/home.cfm where in a few simple steps you can appoint a custodian and an alternate to serve under Part XIII if ever needed. Your appointment request then goes to the appointee's email where they can accept or decline and upon acceptance, the private profile page of both of you reflects the appointment. Of course, the appointee could later resign, and you can change your appointment at any time using the same portal. You can also volunteer for possible appointment as a custodian for local cessations that may occur in your own area of practice, so please consider volunteering as the need is great.

The introduction of proposed Rule 13.04 under Part XIII also encourages custodians to serve. Published earlier this Spring for comment in the Texas Bar Journal, Rule 13.04 is on the ballot for the 2021 referendum. Under this proposed rule your custodian may access otherwise confidential files with client consent in the process of closing your practice and without the need for court appointment and supervision. Perhaps most importantly, the proposed rule would limit liability of voluntary custodians to gross negligence or willful misconduct, the same as court-appointed custodians under Part XIII. Bar members will vote on the proposal and seven other proposed rules from February 2 to March 4, 2021. For more information on the proposed rule changes, go to [texasbar.com/rulesvote](https://www.texasbar.com/rulesvote).

The next phase currently being finalized by the work group is the promulgation of template forms you can use to (1) obtain client consent in engagement letters, (2) enter an agreement with your designated custodian, and (3) notify clients upon serving as custodian. These forms will be added to other forms and practice guides on initiating cessation, what to do when serving as a custodian and succession planning that can be found on the new Succession Planning webpage initiated by the State Bar. In the meantime this material can be found at <https://www.texasbar.com/Content/NavigationMenu/Succession-Planning/default.htm> and on the Law Practice Management webpage at <http://texaslawpracticemanagement.com/free-resources/succession-planning/>

Rescuing one's practice from the perils of an unplanned cessation can now be accomplished more easily than ever by simply visiting the succession planning portal link cited above."

My thanks to Greg for allowing me to share his article and to the Work Group for their continuing working to draft the guidebook and forms. If I can be of assistance, please feel free to contact me at James.Wester@uwlw.com or 806-379-0354.



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John Smithee, Jr.

YOUNG LAWYER OF THE MONTH: JOHN SMITHEE, JR.

John Smithee, Jr. was born and raised in Amarillo, Texas. After graduating from Tascosa High School, John attended Texas A&M University. While at Texas A&M, John worked as an intern for Congressman Mac Thornberry in Washington, D.C.

John then went on to attend Southern Methodist University Dedman School of Law to pursue his dream of becoming an attorney like his father. During law school, John served as a law clerk for United States Senator John Cornyn on the Senate Judiciary Committee. He also served as a judicial extern for United States District Judge Richard Schell. John graduated from SMU Law cum laude in 2015.

After laws school, John joined the Underwood Law Firm as a litigation associate in Fort Worth and worked there

until 2017. John then got married and lived in Nashville, Tennessee for three years while his wife completed her internal medicine residency at Vanderbilt University. During those three years, John continued to work with the Underwood Law Firm and became licensed to practice law in Tennessee. John's wife is also from Amarillo, and they moved back home as soon as her residency ended in June 2020.

While not in the office, John enjoys spending time with his wife, Ryan, and their dog, Juno. John and Ryan enjoy hiking, running, and traveling. They are also very excited to be adding a new baby girl to their family in February 2021. John and his family attend First Baptist Church Amarillo.