



# AMARILLO-LAW

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A PUBLICATION OF THE AMARILLO AREA BAR ASSOCIATION

## FEBRUARY SPEAKER: DIANE SUMOSKI



*Diane Sumoski*

A lawyer commits a misdemeanor by not doing what? Find out at our February bar luncheon, when Diane Sumoski will discuss “What Every Texas Lawyer Needs to Know about the Child Welfare System.”

The presentation will cover a broad overview of the legal framework of the Texas child welfare system and a lawyer’s ethical responsibilities to clients and others impacted by it. Among other things, we will learn

about the current definitions of abuse and neglect, duties to report, impact on the attorney-client and other privileges, dealing with CPS, and how being part of the system affects adult clients embroiled in it and the youth who emerge from it.

Ms. Sumoski is the Director of the W.W. Caruth, Jr. Institute for Children’s Rights at the Dedman School of Law at Southern Methodist University. She received her B.A. from Franklin and Marshall College, and her J.D., cum laude, from Cornell Law School. As the Director of the Law School’s Child Advocacy Clinic, Ms. Sumoski supervises law students in their representation of children in the child welfare system as the children’s guardian and attorney ad litem and in their representation of youth who have aged out of the system. She is currently a member of the Training Committee of the Texas Supreme Court’s Children’s Commission, as well as a member of several subgroups working on projects on behalf of the Commission. She has been listed in Best Lawyers in America since 2010. Before joining the SMU faculty, she was a partner for twenty years with the firm of Carrington, Coleman, Sloman & Blumenthal, L.L.P.

“That mental dry spell . . . ever hit it? ‘Inspiration lost in thoughts. I’ve got writer’s block and I’m against the clock.’ ” – Page 4

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# PRESIDENT'S PAGE

By: Matt Sherwood

## The Life and Times of an Attorney Official

If you have not yet figured it out, a lot of my non-work life revolves around sports. It has permeated many of my articles up to this point. Sports was a huge part of my developmental years, as I spent many an early morning and many a late night at a gym, in a weight room, at a football field, and in a batting cage. For a long time, it defined who I was.

But, as time wore on and joints wore out, I had to hang up the sneakers and cleats and was relegated to playing intramurals (although one of my proudest achievements was teaming up with Judge Curt Brancheau in law school and dominating some 19-year-old frat boys in intramural softball). Beyond the huffing and puffing up and down the court while being only quasi-in-shape, and barely that, the one way I found to continue to be involved was through officiating sports. Especially football. I began officiating in 2003 as an undergraduate right after I had given up my college football career.

I continued to call games through undergraduate, law school, and into my legal career. I have called everything from seven-year-old pee-wee football to high level collegiate football. I have called games that current NFL players played in. I have called games in all corners of the state of Texas and many outside our state. I have called an Arena League championship game. One of my favorite moments was officiating a high school all-star game in Cowboys Stadium.

Several friends and colleagues have asked what it is like. Now that is a loaded question. It is fun. It is hard. It requires attentiveness, quick thinking, patience, and, more than anything, an absolute love for the game. It is also an interesting dichotomy, as it is thankless but also rewarding. You know that on any given Friday or Saturday, you are likely to be cursed, booed, and have various cut downs made about your appearance and IQ by people who have no idea who you are (other than you had the audacity to call holding on precious Little Johnny).

I like to joke with people that officiating football was a great way to balance my life as an attorney. In our practices, we are in control. We control the witness on cross-examination, as they answer our questions when we ask, in the way we want, and if they try to wiggle out of it, we hammer at them and force them to give in. On the sidelines on a Friday night, you have no such control. I was told that I was blind, a moron, a homer, and "a tall, lanky oaf who would not know a hold if it jumped up and bit him in the a\*\*." All the while you stand there stoically and take it.

When I share some of the more colorful stories and colorful language with people, I am always asked why I would subject myself to such punishment. The truth is that I did not do it for the fans or the coaches or even the players. I did it for my fellow officials, and, most of all, I did it to give something to the sport I love so much.

But, now that I am retired from officiating, I can let you all in on a little secret. The truth is, we laugh at you fans. Not because you are actually funny but because you are dumb. You confuse college rules with NFL rules and with rules that you apparently made up on the spot. Spending time in the stands this last year just

reaffirmed a dirty little secret--the refs you yell at know the rules better than you (\*GASP!\*). I am only teasing (kind of).

Now that I am retired, I do miss the Friday nights with my crew and the Saturday afternoons watching the bands lead the college players onto the field. I hope that all of you can find a hobby that will mean as much to you.

Special shout out to my fellow attorney football officials: Cho Sherwood, Joe Marr Wilson, Brooks Barfield, Kerry Haney, and Todd Alvey.

## AMA-LAW

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#### Amarillo Area Bar Association

Eagle Center  
112 West 8th Avenue, Suite 615  
Amarillo, Texas 79101  
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# 7TH COURT OF APPEALS UPDATE

By Chief Justice Brian Quinn

That mental dry spell . . . ever hit it? “Inspiration lost in thoughts. I’ve got writer’s block and I’m against the clock.” Like Lower than Atlantis, I’m feeling my “War with Words.” But, I’ll fight back with a spin on an old theme.

You’ve heard us say it before: unsworn statements by counsel in open court are not evidence. Like most everything, the rule has its exceptions. One was in play in *State v. Tooley*, No. 07-21-00103-CR, 2021 Tex. App. LEXIS 7758 (Tex. App.—7th Dist. Sept. 21, 2021). There Tooley told the trial court that the State destroyed a police video depicting her demeanor after being stopped and questioned about her sobriety. Losing or destroying the video allegedly required dismissal of the prosecution against her. We did not reach what the appropriate remedy should be since Tooley failed to prove that the video was lost or destroyed. She merely argued as much through counsel. That led us to reiterate that save for one exception, unsworn argument of counsel is not evidence. The exception concerned assertions by trial counsel about events occurring in the courtroom which people had to notice and opposing counsel does not deny their occurrence. The record before us did not satisfy those conditions viz the missing video.

Tooley also dealt with another topic . . .

spoliation. The spoliation of evidence seems to be a contention most often heard in civil cases. But, it implicates due process and has a place in criminal proceedings, too. Depending on whether the missing evidence is exculpatory or merely useful also affects what the complainant must prove to establish a due process violation. For instance, if the evidence is merely useful, then the defendant would have to show the State acted in bad faith.

On a different but nonetheless common subject, I mention *Clark v. State*, No. 07-21-00116-CR, 2021 Tex. App. LEXIS 9638 (Tex. App.—7th Dist. Dec. 2, 2021). There, the court both described the applicable standard of review when determining if the evidence was sufficient to support a conviction and illustrated how to apply it. Our analysis led us to conclude that appellant’s fingerprint on a Hawaiian Punch bottle smelling of gasoline, a missing television from the home, and appellant’s recorded statement to his wife (on a jail phone) to put the new T.V. in their son’s room was enough to support the arson conviction. If nothing else, the case may serve as a reminder to those sitting in jail that their calls are being recorded.

There you have my page of scribbled line. Maybe the block’s gone this time, but I know it lurks around the corner.



## **AAYLA UPDATE**

By Brittany K. Hinton

The American Bar Association's Profile of the Legal Professional from July of 2021 included an entire section on COVID-19's impact on lawyers. In preparation for this publishing, the American Bar Association ("ABA") surveyed more than 4,200 ABA members regarding certain subjects.

Most of the surveyed lawyers (54%) said they were working from home close to 100% of the time. Unsurprisingly based on the previous statistic, nearly half of the attorneys (49%) answering the survey said they felt disengaged from their firm or employer during the

pandemic. In addition, one-third of "older lawyers" (33%) said the pandemic changed their retirement plans.

With so much disruption to attorneys' typical methods of practicing law, it is no wonder that those in the legal profession are anxious for a return to normalcy. While AAYLA cannot change the pandemic and its resulting isolation, AAYLA hopes to safely bring the local bar together in future months for socialization and enjoyment that harkens back to the "pre-pandemic" days.

## **YOUNG LAWYER OF THE MONTH: JARED BARTON**



**Jared Barton**

Jared Barton is an attorney at Brown & Fortunato, P.C, where he joined the firm's litigation team to handle commercial disputes and health care matters. Jared grew up in Dallas, watching both of his parents practice law. His mom was an Assistant District Attorney in Dallas County for 27 years, and his dad practiced bankruptcy law, before joining Fannie Mae as in-house counsel.

Jared's parents are proud University of Oklahoma College of Law alumni. When making the decision on where to pursue higher education, Jared was faced with a heart versus head decision. The heart won, and he attended OU to obtain both his undergraduate and law degrees. Jared's head finally won a bout, and he came back to Texas where he enjoyed the pleasure of taking the last Texas Bar Exam, online, and from his childhood bedroom during the COVID-19 Pandemic.

Throughout his first year of practice, Jared has learned to deal with the paradox of practicing during the Pandemic. From second chairing an in-person federal bench trial in May 2021, and then returning to the courtroom in December 2021, to first chair an in-person jury trial to successful verdict, while in the meantime conducting mediations and arbitrations entirely by zoom, without any parties or attorneys ever meeting in person; practicing during the Pandemic has proven to be forum specific and based on the risk tolerance of the clients and venue.

In his free time, Jared enjoys watching sports, whether it is catching a Sod Poodles game after work or traveling to Norman to root on the Sooners with old classmates, friends, and his family. Boomer!

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# YOUR BAR EVENTS - FEBRUARY 2022

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