Dallas Bar Association
HEADNOTES

March 2024 | Volume 49 | Number 3 | Focus | Entertainment, Art & Sports Law

Latham's Impact Through the EAJ Campaign

BY MICHELLE ALDEN


Trina Chandler


Frank Saviano


Sam Zabaneh

The Dallas Bar Association is pleased to announce that Latham is supporting this year's Equal Access to Justice Campaign with a generous contribution of $25,500, making an impressive total of $88,100 donated by the firm since 2017. The Equal Access to Justice Campaign is the annual fundraising campaign that supports the activities of the Dallas Volunteer Attorney Program (DVAP). The firm's gift makes it possible for DVAP to continue providing and enhancing legal aid to low-income people in Dallas, keeping the doors to the courthouse and our justice system open to many more people in our community. Since 1982, DVAP has provided, recruited, and trained pro bono lawyers to provide free legal aid to low-income people in Dallas.

"A group of lawyers from Latham's Austin, Houston, and New York offices collaborated to participate in DVAP's Equal Access to Justice Campaign, a testament to the firm's cross-office approach to public service and community engagement. We were delighted to join **Rachel Morgan**, EVP and General Counsel of Nexstar Media Group, Inc., and Vistra Corp. in participating in this Campaign. Supporting legal aid organizations, whether through the provision of free legal services or by taking part in fundraising campaigns, allows us to strengthen the rule of law and increase access to justice—two values that are fundamental to our firm's culture," said **Sam Zabaneh**, Managing Partner of Latham's Austin office and corporate partner.

Pro bono is ingrained in Latham's culture. The firm's lawyers feel privileged to engage in what they do best on behalf of those most in need. The firm believes that the practice of law includes the unique ability and responsibility to advocate for equal justice and provide needed representation to persons of limited means.

In Texas, the firm has longstanding relationships with Texas Appleseed and Lone Star Legal Aid. Latham's pro bono work includes advocating on issues of racial justice and human trafficking and partnering with local legal aid organizations to assist with asylum, immigration, estate, and end-of-life planning matters for low-income seniors. Latham's offices in Texas also participate in food drives, professional development events, and other community-focused activities with such organizations as Boys & Girls Club, Community First Bank, Central Texas Food Bank, and Junior Achievement.

"What I love about the Latham community is what I love about our clients and the Texas legal community: we work together and strive to help however we can, whenever we can. We were proud to be a part of DVAP's Equal Access to Justice Campaign, as our firm seeks to contribute to our communities and work in a sustained way that maximizes impact," explained **Trina Chandler**, corporate partner, Houston.

DVAP in the Dallas Community

DVAP continues to assist the most vulnerable among us with their civil legal needs. One recent client, "David" sought assistance from DVAP after he purchased a vehicle, and the dealership refused to provide the title. He wished to transfer the car to his son as a gift but could not do so. Attorney **Sharon Campbell** accepted the case for pro bono representation and sued for breach of warranty. At trial, the Court found that David paid in full and was the bona fide purchaser. The Judge ordered the car dealership to provide the title and pay $939 in damages and $3,600 in attorneys' fees. David received the title and was able to give the car to his son at last.

The justice gap in Dallas County is daunting. In a country based on justice for all and access to our court system, over 25 percent of Dallas County residents live near the poverty level, and 42 percent have a slim hope of being able to afford an attorney. With annual poverty incomes of $39,000 for a family of four, justice is a luxury for low and moderate-income families.

The commitment of Dallas attorneys and the DBA to the Equal Access to Justice Campaign is impressive. Under the leadership of Campaign Co-Chairs **Rachel Morgan** and **Sarah Rogers** and Honorary Chair **David McAtee**, this year's Campaign has raised a record $1.4 million.

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

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

Thank You to Our Major Donors

The Dallas Bar Association and Legal Aid of NorthWest Texas thank the Dallas firms, corporations, and friends who have committed major support to the Equal Access to Justice Campaign benefiting the Dallas Volunteer Attorney Program.*

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As of Februrary 5, 2024

Inside

DBA MEMBER REMINDER:

All members who have not yet renewed for 2024 will be dropped on March 1, 2024.

Renew TODAY in order to continue receiving all your member benefits.

Thank you for your support of the Dallas Bar Association!

Calendar | March Events

Programs in green are Virtual Only programs. All in person programs are at the Arts District Mansion unless otherwise noted. Visit www.dallasbar.org for updates.

WOMEN'S HISTORY MONTH

March is Women's History Month. For additional resources on Women's History Month, visit the ABA's website at https://bit.ly/2Yf9pbJ. To find out more about the Dallas Women Lawyers Association, go to dallaswomenlawyers.org. For more on the DBA's Diversity Initiatives, log on to www.dallasbar.org.

WEDNESDAY WORKSHOPS

MARCH 6
Noon *"The Law of Diminishing Returns…to the Office: 5 Keys to Hybrid Workplace Model Success," Jill Rorschach.* (MCLE 1.00)*

MARCH 20
Noon *Topic Not Yet Available*

FRIDAY, MARCH 1

Noon **Legal Ethics Committee**
"It's Referendum Time Again: A Preview of the Proposed Changes to the Rules of Ethics," M. Lewis Kinard. (Ethics 1.00)*

MONDAY, MARCH 4

Noon **Education Law Study Group**
"Disability Accommodation in The Schools: Education, Facilities, Technology & Beyond," Hans Graff and Cynthia Marcotte Stamer. (MCLE 1.00)* *Virtual only*

Tax Law Section
"Is Soroban Capital the End of the Limited Partner Exception to Self-Employment Taxes?" Lee Meyercord and Mary McNulty. (MCLE 1.00)* ***In person only***

TUESDAY, MARCH 5

Noon **Corporate Counsel/Solo & Small Firm Sections**
"Smart Tech, Strong Practice: AI Essentials for Lawyers," Alex Shahrestani. (MCLE 1.00)*

DWLA Board of Directors

5:00 p.m. **DBA Member Social Hour**
Join fellow DBA members for a social hour with drinks and hors d'oeuvres.

6:00 p.m. DAYL Board of Directors

WEDNESDAY, MARCH 6

Noon **Wednesday Workshop**
"The Law of Diminishing Returns…to the Office: 5 Keys to Hybrid Workplace Model Success," Jill Rorschach. (MCLE 1.00)*

Allied Bars Equality Committee. ***In person only***

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

THURSDAY, MARCH 7

Noon Criminal Justice Committee. *Virtual only*

Judiciary Committee. ***In person only***

Membership Committee. *Virtual only*

Publications Committee. *Virtual only*

5:00 p.m. **DEI Toolkit Launch Party**
At the Arts District Mansion. Sponsored by the Allied Bars Equality Committee.

FRIDAY, MARCH 8

Noon **Trial Skills Section**
"Criminal/Civil Crossover: Applying Lessons Learned Trying Criminal Cases to a Civil Practice," Ty Stimpson and Benson Varghese. (MCLE 1.00, Ethics 0.50)*

Public Forum Committee. *Virtual only*

MONDAY, MARCH 11

Noon **Real Property Law Section**
"Transactional Lessons Learned at the Courthouse," J. Edwin Martin. (MCLE 1.00)*

Peer Assistance Committee

TUESDAY, MARCH 12

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

Courthouse/Library Committee. *Virtual only*

Home Project Committee. ***In person only***

Legal Ethics Committee. *Virtual only*

Morris Harrell Professionalism Committee *Virtual only*

5:00 p.m. **DBA Member Social Hour**
Join fellow DBA members for a social hour with drinks and hors d'oeuvres.

6:00 p.m. Dallas LGBT Bar Association Board

JLTLA Board Meeting

WEDNESDAY, MARCH 13

Noon **Bankruptcy & Commercial Law Section**
Topic Not Yet Available

Family Law
"Disabilities & Family Law," Robert Epstein and Chris Meuse. (MCLE 1.00, Ethics 0.25)* ***In person only***

Legal History Committee
"The Case Against Clarence Darrow," Mike Farris. (Ethics 1.00)* ***In person only***

Bench Bar Conference Committee. *Virtual only*

Summer Law Intern Program Committee

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

THURSDAY, MARCH 14

Noon **Alternative Dispute Resolution Section**
Topic Not Yet Available

CLE Committee. *Virtual only*

5:00 p.m. **St. Patrick's Day Celebration**
At the Arts District Mansion. Sponsored by the Entertainment Committee.

FRIDAY, MARCH 15

No DBA Events Scheduled

MONDAY, MARCH 18

Noon **Government Law Section**
"Dallas Deselection: Examining Bias in Jury Selection for Criminal Trials in Dallas County," Hon. Brandon Birmingham. (Ethics 1.00)* ***In person only***

Labor & Employment Law Section
"Rising Antisemitism and Rising Hate; the Government's Perspective and Workplace Implications," Joel Clark and Lisa Hasday. (Ethics 1.00)*

Senior Lawyers Committee. ***In person only***

TUESDAY, MARCH 19

Noon **Antitrust & Trade Regulation Section**
Topic Not Yet Available

International Law Section
"Impact of the New Corporation Transparency Act – Compliance Requirements and Special Concerns for International Entities and Owners," Lauren White. (MCLE 1.00)*

Community Involvement Committee. *Virtual only*

Entertainment Committee. ***In person only***

WEDNESDAY, MARCH 20

Noon **Energy Law Section**
"Case Law Update," Charles Sartain. (MCLE 1.00)* ***In person only***

Health Law Section
"Legal & Ethical Issues Regarding AI, Cybersecurity, and Blockchain (Think Crypto)," Peter Vogel. (MCLE 1.00, Ethics 0.50)* ***In person only***

Wednesday Workshop
Topic Not Yet Available

Law in the Schools & Community Committee

Pro Bono Activities Committee. ***In person only***

4:00 p.m. DBA Board of Directors

LegalLine E-Clinic. *Volunteers needed. Contact mmejia@dallasbar.org.*

THURSDAY, MARCH 21

Noon **Allied Bars Equality Committee**
"DEI Toolkit CLE: Learning and Leading for the One," Manuel Berrelez, Erika Fadel, Alexis Robertson, and Jervonne Newsome, moderator. (DEI Ethics 1.00)* *Qualifies as 2024 DBA DEI challenge CLE. *Virtual only*

Appellate Law Section
"The Innerworkings of the Texas Judicial Conduct Commission-Its Jurisdiction, Process, and Rules," Valerie Ertz and Hon. Steve Seider. (MCLE 1.00) ***In person only***

6:00 p.m. **DBF Evening with Annette Gordon-Reed**
Benefiting the Sarah T. Hughes Diversity Scholarship. Tickets at dallasbarfoundation.org.

FRIDAY, MARCH 22

Noon **Living Legends Program**
Sandra Phillips Rogers, interviewed by Stephanie Gase. (Ethics 1.00)* *Virtual only*

MONDAY, MARCH 25

Noon **Securities Section**
Topic Not Yet Available

SBOT Rules Referendum
"Rules Vote Referendum 2024: Understanding the Changes to the Disciplinary Rules," Lewis Kinard and Robert Tobey. (Ethics 1.00)*

Golf Tournament Committee. ***In person only***

TUESDAY, MARCH 26

Noon **Probate, Trusts & Estates Law Section**
"Citations and Notices in Probate Court Proceedings: Who, How, and When to Serve Them, and Why They Matter," Nikki Wolff. (MCLE 1.00)* ***In person only***

5:00 p.m. **DBA New Member Reception.** *Honoring our New DBA Members and Newly Licensed Attorneys. For more information, contact Shawna Bush at sbush@dallasbar.org. or (214) 220-7414.* ***In person only***

WEDNESDAY, MARCH 27

Noon **Allied Bars Equality Committee**
"DEI Book Club: 'All Mixed Up: Discovering the Beauty in Racial Ambiguity," by Lexy Lutz—CLE and Book Discussion," Alexandria "Lexy" Lutz and Cali Franks, moderator. (DEI Ethics 1.00) *Qualifies as 2024 DBA DEI challenge CLE. Virtual only*

Business Litigation, Science & Technology and TIPS
"AI Considerations in Litigation," Hon. Brantley Starr, Meghan Ryan, and Peter Vogel, moderator. (MCLE 1.00)*

Collaborative Law Section
Topic Not Yet Available

Entertainment, Art & Sports Law Section
"An Introduction to the Professional Wrestling Business and Wrestling Contracts," Gwendolyn Seale. (MCLE 1.00)* ***In person only***

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

THURSDAY, MARCH 28

Noon **Criminal Law Section**
"Recent Amendments to the United States Sentencing Guidelines," Russell Turkel. (Ethics 1.00)*

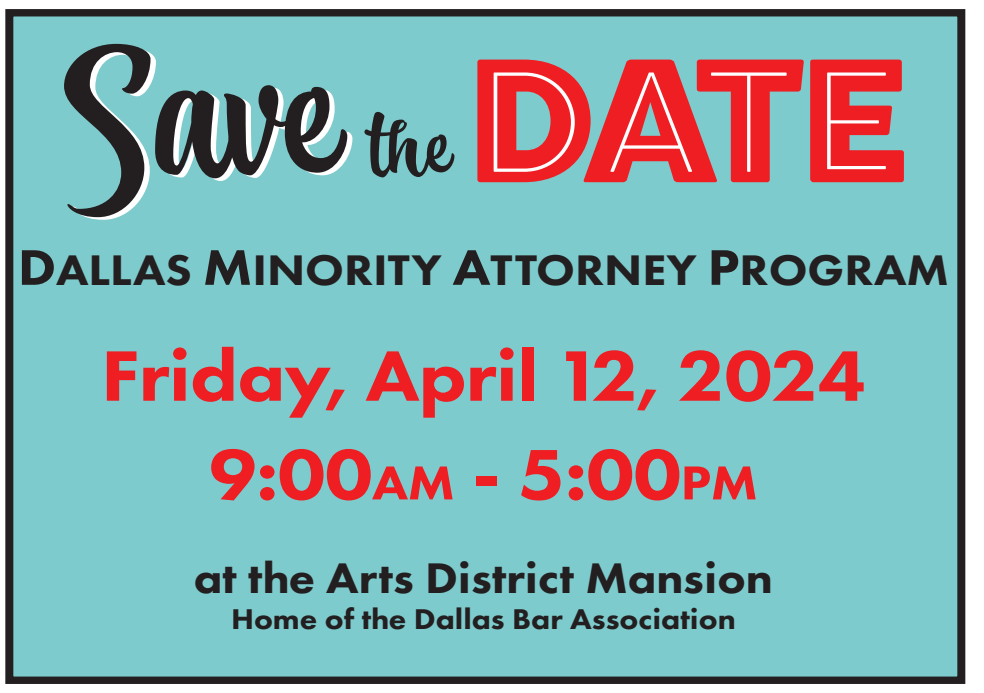
Environmental Law Section
Topic Not Yet Available

Intellectual Property Law Section
"The Trademark Trial and Appeal Board from January 2023 to Date," John Cone. (MCLE 1.00)* ***In person only***

Minority Participation Committee. *Virtual only*

FRIDAY, MARCH 29

DBA offices closed in observance of Good Friday



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

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

For confirmation of State Bar of Texas MCLE approval, please call the DBA office at (214) 220-7447.

President's Column

Our Terrific, But Not Equal, Women Lawyers

BY BILL MATEJA

March is Women's History Month which reminded me of a November 2023 article I recently read entitled "See Her, Hear Her: The Historical Evolution of Women in Law and Advocacy for the Path Ahead" which speaks to the encouraging, but still unsatisfying, news for women in the law. www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/see-her-hear-her-historical-evolution-women-in-law. I commend this article to everyone's review.

This article reported that women made up less than 5 percent of attorneys in the U.S. from 1950 to 1970, but that number has steadily risen since, to 38 percent in 2022. From 2000 to 2021, women made up close to or more than half of all law students, from 48.4 percent of law students in 2000 to 55.3 percent in 2021. That's right—we now have more females than males in our law school pipelines.

Notwithstanding this positive news, the article goes further to point out that:

> But what about the labyrinth of law firms? While women make up 47 percent of associates in law firms, the numbers drastically decrease further up the hierarchy. ***Only 22 percent of equity partners and 12 percent of managing partners are women***. And the gender pay gap? It further widens this divide.
>
> However, it is not just about representation in law firms' highest echelons; delving into firm policy perceptions offers more nuanced insights. For instance, ***88 percent of male attorneys believe that their law firm acknowledges gender diversity as a priority, while only 54 percent of their female peers shared this sentiment.***

Drilling down further on the gender pay gap, it reported that in 2020, women equity partners were paid 78 percent of male counterparts' compensation on average. What? Really? It also reported that women associates and non-equity received only 95percent of what their male counterparts received.

Come on, folks. Female lawyers need to make at least the same amount of money as male lawyers. This isn't even a close question. Equal pay for equal work. Likewise, there shouldn't be a disparity between the number of male and female lawyers in the equity and managing partner ranks. Period.

My challenge to my male brethren is this. First, we all need to wake up and recognize we still have a problem. Let's not be complacent in thinking that there isn't a problem simply because you see and hear great things about our female counterparts such as females outnumbering male law students or the fact that this year's presidents and chairs of the State Bar of Texas and Texas Young Lawyers Association are all female attorneys, or you witness the great work of a ***myriad*** of Dallas female attorneys to include our new Fifth Circuit judge and that Court's first Latina—the Hon. **Irma Carrillo Ramirez**—whose investiture will be hosted at our own Arts District Mansion this month on March 27.

Second, let's do something about this inequity. Beyond simply recognizing that things aren't right, it's critical that we be allies. Allyship, allyship, allyship. To borrow again from the "See Her, Hear Her" article, here are things that we men can do:

1. **Celebrate Achievements**: Actively acknowledge and appreciate the accomplishments of our female peers.
2. **Promote Equitable Distribution**: Move beyond gendered expectations and ensure fair delegation of responsibilities.
3. **Champion Safe Spaces**: Advocate for settings where open and unbiased dialogues can thrive.
4. **Facilitate Networking**: Guarantee that our female colleagues have equivalent access to pivotal career opportunities.
5. **Encourage Feedback**: Understand that being an ally is an evolving commitment; remain receptive to change.
6. **Invest in Mentorship and Sponsorship**: Harness your influence to propel the careers of our female colleagues.

Third, follow my lead here and spread the word—that our female lawyers, as a whole, still aren't being treated equally and there is work to be done. To that end, consider supporting the significant work of the DBA's Equality Committee started by former DBA President **Paul Stafford** and former J.L. Turner Legal Association President, **KoiEles Lomas**, nurtured by DBA Director, **Katie Anderson**, and now led by Chair, **Cortney Parker**, and Vice-Chair, **Ashley Jones Wright**. DBA We Lead is another avenue in which to show your support by encouraging the women in your firm to apply for the program, supporting those invested in the program, or as I have recently, becoming a mentor. Program Co-Directors **Ophelia Camiña** and **Mary Scott** have put together a terrific agenda for the DBA We Lead's 7th year.

You could also consider supporting the Dallas Women Lawyers Association (DWLA) and the Dallas Women Lawyers Association Foundation. DWLA opens its arms to both men and woman. And, a gift to the DWLA Foundation ensures the continuity of its programs and the growth of its initiatives which include:

Bar Study Scholarships for law students who have demonstrated a commitment to scholastic achievement while supporting the mission to elevate the standing of women in the legal profession.

Karen D. McCloud Memorial Grant providing resources to assist a solo or small firm woman lawyer with the development of her legal practice

Outreach Grants to organizations that support women and children in the Dallas metropolitan area and surrounding suburbs.

Men, we all know by now that Dallas' female lawyers are at least our equals in the courtroom, boardroom, and beyond, but let's strive to make them truly our equals ***in all respects.***

Bill

HEADNOTES
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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 800 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.

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Focus | Entertainment, Art & Sports Law

Navigating the NCAA Rules to Maximize NIL Money

BY RYAN K. MCCOMBER AND SOPHIA REYNOLDS

Two recent developments have profoundly impacted college athletics and college athletes' ability to maximize their earnings under the NCAA rules. As an initial matter, it is well known that NCAA student-athletes can now receive financial compensation, including through endorsements and other business opportunities, due to recent changes in NIL (Name, Image, Likeness). This change, combined with the creation of the transfer portal in 2018, which did away with many of the archaic restrictions on college athletes transferring to other schools, has created a system whereby student-athletes can now transfer to new schools to pursue athletics and chase additional opportunities for financial compensation under NIL.

The recent rule changes are controversial. Critics complain that the transfer portal combined with NIL has created free agency in college sports. Colleges are now forced to not only compete with other schools for high school recruits, but also for athletes available in the transfer portal. It has been reported that over 20 percent of college athletes entered the transfer portal in 2023, and the numbers continue to increase. This has put additional pressure on colleges and newly created NIL college collectives, typically made up of wealthy fans and alums of schools, to raise incredible amounts of NIL money to recruit and keep elite talent.

Under the current system, it has been widely reported that elite college athletes are earning millions of dollars in NIL money after entering the transfer portal. This process can be fraught with challenges, and there are several things a student-athlete should be aware of before trying to utilize the transfer portal for potential NIL gain.

The Transfer Portal and Scholarships

First, while the NCAA transfer rules have changed, there is still risk. Once student-athletes put their names in the transfer portal, their current schools can terminate their scholarships. If student-athletes do not receive a scholarship offer through the transfer portal, they will have to pay for their college education unless their current school agrees to let them return to the team and restore their scholarship.

Restrictions and Risks of NIL Opportunities

Second, while multimillion-dollar NIL opportunities make headlines, the NCAA prohibits schools and NIL collectives from negotiating deals with recruits or transfers before enrolling at the new school. NIL deals cannot be contingent upon going to any particular school, and student-athletes may not accept compensation tied to performance. In one instance, the NCAA penalized Florida State University for facilitating contact between a transfer prospect and a team booster who offered the student-athlete an NIL contract to play football. NIL money is simply not guaranteed to a student-athlete who chooses to transfer. Because NIL collectives are not required to disclose what they are paying, student-athletes could end up with far less than they anticipated if they overestimate their value. While the NCAA is currently working to create standardized NIL contracts and data resources to address these issues, there remain considerable risks faced by student-athletes who choose to transfer.

While some risks can be mitigated through the use of an agent, that option is also not risk-free. There are limited restrictions on agents, their qualifications, or their compensation. There have been many instances in which NIL collectives or their agents have falsely promised significant NIL money to induce a student-athlete to transfer to a new school. A student-athlete without a written contract has limited recourse if such promises are not fulfilled.

International Students and NIL

Despite the explosion of NIL opportunities for student-athletes, a vital group remains left out of the equation: the international student-athlete. Twelve percent of Division I athletes are not American citizens. These international athletes enter the United States on an F-1 visa, and to maintain their status, they are not allowed to engage in endorsement deals or participate in NIL. NIL deals are considered off-campus employment, which conflicts with the terms of international students' visas. Violating these terms can result in a termination of visa status, a withholding of future benefits and citizenship opportunities, and even deportation.

While the NCAA rules and NIL continue to change to support student-athletes, chasing additional NIL money through the transfer portal comes with significant risk to those who do not take the time to consider the potential ramifications before entering the portal. **HN**

Ryan K. McComber is a Partner at Figari + Davenport, LLP. He can be reached at ryan.mccomber@figdav.com. Sophia Reynolds is a student at Southern Methodist University majoring in Applied Physiology and Sport Management. She can be reached at sereynolds@smu.edu.

Deducting Legal Fees: Learning from Big Pharma

BY CHRISTINE ROBINSON

The Internal Revenue Service, taxpayers, and federal courts devote a significant amount of time and attention to the tax treatment of taxpayers' legal fees. The deductibility of substantial legal fees can impact the financial outcome of a transaction or case. And the unwanted extra tax cost of non-deductible legal fees can negatively affect deal negotiations and litigation settlement potential.

Business taxpayers can usually deduct their legal fees as ordinary and necessary business expenses. An important caveat to this rule is that certain legal expenses may need to be capitalized and written off over time by way of depreciation or amortization expense deductions (or recovered as reduced gain or increased loss when the taxpayer later disposes of the property to which the capitalized legal fees relate). For example, legal fees incurred to acquire another company, to defend title to property, or to purchase tangible or intangible business assets are not currently deductible but must be capitalized over the life of the related asset. Whether legal fees are deductible or capitalizable turns on the particular facts of each case. Courts use the "origin of the claim" test focusing on the underlying transaction to determine the tax treatment of legal fees.

Pharmaceutical companies have dominated recent legal fees deductibility tax litigation in generic drug approval matters governed by the Hatch-Waxman Act. A generics pharmaceutical company in *Mylan, Inc. & Subsidiaries v. Commissioner* incurred legal expenses to prepare notice letters necessary to obtain FDA approval of its generic drugs and to defend related patent infringement suits triggered by its generic drug applications, all pursuant to Hatch-Waxman Act procedures. Mylan deducted all of these legal expenses—approximately $123 million over a 3-year period—as ordinary and necessary business expenses in its corporate tax returns. The IRS disallowed the deductions on audit, claiming that the bulk of the legal fees should be capitalized, and handed the taxpayer tax bills of over $50 million.

The Tax Court in its 2021 opinion focused on how Mylan's legal expenses originated and bifurcated them into two tranches. Because the notice letters were a prerequisite to FDA approval, the court concluded the legal fees related to that process facilitated the creation of a business intangible asset and should be capitalized and amortized over the statutory 15-year tax amortization period for business intangibles. And because the patent infringement litigation originated in the ordinary and necessary activities of the taxpayer's generic drug business and was not a facilitating step in the FDA approval process for generic drugs, the court further concluded those litigation defense legal fees could be deducted currently.

In another Hatch-Waxman Act case in 2022, the Federal Claims Court followed the Tax Court's *Mylan* rationale in its *Actavis Laboratories, FL, Inc. v. United States* opinion. The *Actavis* court found that the taxpayer's $12 million of patent litigation expenses originated from "the branded drug companies' patent enforcement efforts—a claim sounding in tort," not from the generic drug company's process of acquiring an intangible capital asset, and the legal fees were deductible. The Third Circuit in July 2023, in affirming the Tax Court's decision in the *Mylan* case, made the similar observation that the patent litigation does not facilitate the acquisition of FDA approval because "the two processes are distinct and ultimately separate." Despite losing its *Mylan* case appeal in the Third Circuit, the government has not given up on this legal fee issue, and its appeal in *Actavis* is currently pending in the Federal Circuit.

The *Mylan* and *Actavis* courts disagreed with the government's expansive interpretation of "facilitative" legal costs that require capitalization, and both decisions are consistent with a long history of precedent finding that infringement litigation costs are currently deductible ordinary and necessary business expenses. The Tax Court, Federal Claims Court, and Third Circuit all make clear that such tax treatment applies even when patent litigation is tangential to the Hatch-Waxman Act generic drug approval process. The law firm invoices provide key proof of the capitalizable versus deductible legal fees breakdown in these cases.

Lawyers can help business clients deduct or capitalize their legal fees by understanding the tax issues surrounding legal fees and by appropriately documenting in client bills the nature of the legal services provided, especially in situations where legal representation covers both regulatory agency processes and related litigation. Business clients that incur legal fees in connection with creating intangible intellectual property like patents, copyrights, and trademarks will want to consider whether these recent federal tax cases might impact them. **HN**

Christine Robinson teaches federal income tax courses at Baylor Law School. She can be reached at christine_robinson@baylor.edu.

Column | *Ethics*

Advertising, Solicitation, and Barratry

BY FRED MOSS

Assume that one week ago a Texas industrial disaster caused many personal injuries. The names and addresses of the injured and their relatives can be easily found. You are a personal injury lawyer practicing in Texas. *Question*: May you offer your legal services to the victims of the disaster? It may depend on how the offer is communicated.

A correct answer requires study of the Texas Disciplinary Rules of Professional Conduct's (TDRPC) advertising and solicitation rules (Rules 7.01-7.06), which were substantially revised in 2021. It also may require a review of the Texas Barratry Law, Section 38.12 of the Texas Penal Code (TPC). A short summary of answers is set forth below.

Can you solicit a prospective client in person or by telephone? No. In-person and telephone solicitations in this context are prohibited. TDRPC 7.03(b). Moreover, in-person and telephone solicitations are a third-degree felony under the Barratry Law. TPC § 38.12(a)(2), (f). However, this section of the law oddly (and thankfully) defers to the TDRPC. In-person and telephonic solicitations permitted by the ethics rules are not a crime. That means an attorney may reach out to a member of the lawyer's family, a close personal friend, another lawyer, a person with whom the lawyer had a prior business or professional relationship, an experienced user of legal services for business matters, to secure pro bono employment, or as otherwise authorized by law. Tex. R. Disc. Prof'l Cond. 7.03(b), (g). A lawyer who solicits a person in violation of either the TDRPC or the Barratry Law may be sued by the solicited person for disgorgement of all fees, actual damages, and punitive damages up to $10,000. Tex. Govt. Code § 82.0651.

Can you send a text, email, or other direct message? These are "solicitations" as defined in Rule 7.01(b)(2). But only solicitations that "involve . . . a live or electronically interactive manner" are prohibited. While texts or direct messages are "interactive," they are not considered as dangerous to vulnerable persons as an in-person or telephone contact. Comment 6 to Rule 7.03 makes clear that "regular mail and e-mail" solicitations are allowed because they "can easily be ignored, set aside, or reconsidered." The same is true of text and direct messages. As long as the messages are truthful and not deceptive or misleading, and do not involve coercion, duress, overreaching, intimidation, or undue influence, they are likely to be permitted.

Are letters permitted? Targeted letters are generally permitted but must be clearly marked "Advertisement" and filed with the Advertising Review Committee. The same limitations governing texts and emails also apply to letters. But wait! If the letter is sent within thirty days of an accident or disaster, the lawyer may be committing Barratry, a misdemeanor. *See* TPC § 38.12(d)(2), (g). The Barratry Law prohibits sending "a written communication or a solicitation" to anyone involved in "an accident or disaster," or who has been named a defendant in "any kind of" lawsuit within 30 days of the occurrence or of the suit being filed. Here, there is no deference to the TDRPC.

Are blog posts improper solicitations? Not necessarily. If made generally and not live and directed to specific individuals known to need legal representation, blogging is permitted.

Television commercials and newspaper advertisements? Attorneys may use television commercials and newspaper advertisements to explicitly solicit persons known to need legal services because ads are not "interactive" communications. However, both forms of advertisement first must be filed with the Review Committee.

Can a legal assistant solicit clients if the Rules do not allow the attorney to do so? No!

May an attorney contact a victim's relatives? The solicitation prohibitions are confined to contacting "a specific person . . . the lawyer knows or reasonably should know . . . needs [legal assistance] in a particular matter," and a "prospective client." *See* Rules 7.01(b)(2), 7.03(b). This seems to make relatives fair game. However, a lawyer may not offer "anything of value" to a non-lawyer for referring a prospective client to the lawyer.

Note that offering one's legal services, in-person or otherwise, is not prohibited if the person initiated the contact with the lawyer seeking legal assistance. But, to end on a final word of caution: the anti-solicitation rules and the Barratry Law are not limited to prohibitions on contacting prospective parties who may be plaintiffs in a future suit. The prohibitions apply equally to prospective clients who may be defendants. **HN**

Fred Moss is an Emeritus Professor of Law who has retired from teaching at the SMU Dedman School of law where he taught Legal Ethics for 30 years. He has long been a member of the DBA's Legal Ethics Committee. He can be reached at fmoss@mail.smu.edu.

Big Property Tax Relief – What You Should Know

BY JOHN BRUSNIAK

The property tax is the most hated tax in America. Efforts to suppress and control the growth of property taxes began in California in 1978 and spread from there. Early efforts in Texas were slow and ineffective as the tax reductions were devoured by skyrocketing property valuations. However, the effect of recent reforms will dramatically change this. The new reforms impact maintenance and operations (M&O) school district tax rates and the rates of municipalities and counties. However, the changes did not affect the ability to issue property tax-backed bonds for new projects.

Rate Compression

Most dramatically, school district tax rates have been reduced. The M&O rate has been cut from 1.48% to .73%. That is more than a 50% reduction! That benefits both businesses and individual taxpayers.

School District Homestead Tax Exemptions

The mandatory minimum homestead school tax value exemption was first raised from $5,000 to $15,000 in 1997. (The mandatory minimum county exemption remains stuck at $3,000.) The school district M&O exemption has been raised to $100,000. Given the median taxable value of homes in Texas is $125,800, many homeowners will pay no M&O taxes. This exemption is in addition to the $10,000 exemption granted to homesteads owned by disabled individuals or those 65 and older. Taxing units (e.g., school districts, cities, counties, or special districts) can additionally exempt up to 20% of the value of homesteads.

Tax Caps and Circuit Breakers

Appraisal districts are barred from raising the "appraised value" of homesteads by more than 10% a year. This does not relieve appraisal districts from calculating homesteads' actual "market value" each year. Both "market value" and "appraised value" appear on tax notices and bills. "Appraised value" is the "cap" or limited value. "Market value" sets forth the actual "market value" of a homestead. The "appraised value" is the more important number, as it is used to calculate tax payments and that value cannot be higher than 10% of the prior year's appraised value. Appraisal districts often do not raise values by 10%, and the market and appraised values are the same.

In 2024, a three-year pilot 20% "circuit breaker" for business real property, including oil, gas, and other mineral properties, will commence. This program is almost identical to homestead tax caps. The program is limited to properties listed on the 2023 appraisal roll at $5 million or less. (This threshold is to be recalculated annually and adjusted for changes in the consumer price index.) Commercial and mineral properties are often separated into individual account numbers. The $5 million threshold applies on an account number basis. For example, all or some parts of a $20 million shopping center could be subject to the 20% value increase based on the individual values placed on each account. This limitation is significant because, unlike homesteads, which rarely decrease in value, commercial and mineral properties fluctuate dramatically based on market changes. A significant market drop could benefit taxpayers dramatically upon a market rebound.

Tax Freezes

When individuals turn 65 or become disabled, barring new improvements to their homestead, their actual taxes cannot increase from the amount they paid in the year they turned 65 or became disabled, regardless of increases to their home's market value. This provision applies to all school districts and to cities and counties that agree to grant it.

Tax Deferrals

Disabled taxpayers and those over the age of 65 have the option of no longer paying their homestead property taxes by filing an affidavit with the appraisal district stating that is their desire. Deferred taxes incur interest at the rate of 5% per annum and are not subject to statutory penalties or interest. The deferral expires 180 days after the property ceases to be the person's homestead.

Limit on Total Tax Collections

Excluding new property, without an affirmative vote of the citizens, total tax collections of school districts may not increase more than 2.5% from the prior year. Municipalities and counties may not increase their tax collections by more than 3.5%.

What Should a Taxpayer Do?

The future of tax relief is uncertain. The legislature guaranteed funding for tax relief for this year and next. Funding for this massive relief was available due to a huge, unexpected revenue windfall. The tax relief burden could easily shift back to local governments, causing substantially lowered services or increased taxes.

Homeowners need to ensure they have applied for and received their homestead, over 65, and disabled exemptions. Failing to do so will cost them a lot of money. Businesses and homeowners need to aggressively pursue value reductions each year or risk the overall tax burden shifting to them. Approximately 70% of taxpayers who protest their taxes receive some reduction. **HN**

John Brusniak is the Founding Principal of Brusniak Turner and can be reached at john@texaspropertytaxattorneys.com.

MLK Day Celebrated at the Arts District Mansion

On February 5, DBA President **Bill Mateja** presented the MLK, Jr. Justice Award to this year's recipients **Edward Cloutman** and **Sylvia Demarest**. Also at the luncheon, DISD student Aiden Body gave his award-winning MLK Jr. Oratory Competition speech, which is hosted annually by Foley & Lardner.

The Texas Towing and Booting Act

BY FRANK L. BROYLES

The Texas Towing and Booting Act, Chapter 2308, Subtitle A, Title 14 of the Texas Occupations Code (the Act), is a surprisingly complex 40-plus page criminal and civil statute that impacts the daily lives of Texas residents, visitors, and businesses.

The Act categorizes tows as "consent tows, incident management tows, nonconsent tows and private property tows." Consent tows are tows initiated by the towed vehicle owner or operator or by a person with possession, custody, or control of the vehicle. Incident management tows are tows from an event such as a traffic accident. A nonconsent tow is any tow that is not a *consent* tow and includes private property tows. A tow may fit into more than one category; e.g., a nonconsent tow might also be an incident management tow. A towing company, booting company, or parking facility owner who violates the Act, knowingly or unknowingly, is liable for actual and statutory damages and possible criminal prosecution.

A private property tow—a common subject of towing litigation—is a nonconsent tow initiated by a parking facility owner or agent. Nonconsent tows from apartment complexes are common, and Section 2308.253 of the Act addresses nonconsent tows from apartment complex parking lots in detail.

Subchapter G of the Act addresses a common issue in towing litigation titled "Signs Prohibiting Unauthorized Vehicles and Designating Restrictive Areas." A parking facility owner's towing-related signage must contain approved coloring and lettering with the tow company's phone number and be placed in specific areas proscribed by the Act. Failure to have compliant signage can result in liability to both the parking facility and the towing company.

Under the Act, the owner or operator of a wrongfully towed or booted vehicle has two remedies. One option is to file an expedited process to determine if there was probable cause to tow or boot under Subchapter J. A vehicle owner or operator impacted by a tow or boot may request that a justice court hold an expedited hearing to determine whether there was probable cause for the towing or booting. That request generally must be filed within fourteen days following the towing or booting, and it must be filed in a justice court located in the county where the towing or booting occurred. The prevailing party in a probable cause hearing may be awarded attorney's fees.

Another option is a traditional law-suit under Section 2308.404. Section 404, titled "Civil Liability of Towing Company, Booting Company, or Parking Facility Owner for Violation of Chapter," is a strict liability section, and the plaintiff must only prove a violation to recover statutory damages and actual damages. If the violation was intentional, knowing, or reckless, the plaintiff is also entitled to recover $1,000 plus three times the fees charged.

One significant distinction between the two procedures is that the "probable cause" hearing provides for an award of attorney's fees to the prevailing party, while Section 404 does not mention attorney's fees. A litigant seeking attorney's fees in a Section 404 proceeding must rely on some basis for such an award other than the Act. **HN**

Frank Broyles is an attorney and professional engineer. He can be reached at frank.broyles@utexas.edu.

DBA Home Project: Volunteers & Sponsors Needed

The DBA Home Project is in need of volunteers and sponsors, both individual and firms/organizations.

Sponsorship Levels:
$750 donation = send 2 volunteers (Bronze Level Sponsor)
$1,500 donation = send 5 volunteers (Silver Level Sponsor)
$3,500 donation = send 12 volunteers (Gold Level Sponsor)
$7,000 donation = send 20-25 volunteers (Platinum Level Sponsor)

For more information email vmartinez@dallasbar.org or go to www.facebook.com/DBAHomeProject

SAVE THE DATE!

Online Annual Evening Ethics Fest
Thursday, May 9, 2024
5:30 – 8:30 p.m.
Registration will be open soon!

For more information contact Marcela Mejia at (214) 220-7410 or mmejia@dallasbar.org.

Sponsored by the DBA Legal Ethics Committee

DVAP's Finest

EUGENE TEMCHENKO

Eugene Temchenko is a Senior Associate in the Complex Commercial Litigation group at Vinson & Elkins LLP.

1. How did you first get involved in pro bono?
Having arrived to the United States on a humanitarian parole, my family and I were no strangers to dealing with poverty and a litany of legal twists and turns. And while I quickly gravitated to large commercial disputes (and firmly believe that defending businesses against non-meritorious suits protects jobs for everyone), I always wanted a part of my practice to be devoted to helping the indigent through the issues my family had faced. My first pro bono project was in law school—assisting an Afghani family that supported our troops with applying for refugee status.

2. Which clinics have you assisted with?
I have had the pleasure of working together with DVAP on its eviction clinic for nearly three years. This clinic, which was started in the midst of COVID, ensured that Dallas residents facing eviction did not face the Court unrepresented.

3. Describe your most compelling pro bono case.
A senior and indigent resident was being evicted during the summer heat wave from senior housing. The defendant had no friends or family. The defendant was current on rent; indeed, housing assistance programs compensated the landlord for the unit. The defendant was being evicted over a series of disagreements with the landlord, which the landlord's representative admitted on the stand were non-threatening and non-violent. Thanks to DVAP, we were able to step in and obtain an agreed dismissal of this action, allowing the defendant to stay in her unit well past the heatwave and enabling her to move out in peace.

4. Why do you do pro bono?
DVAP's Director signs her emails with this line - "Pro bono: it's like billable hours for your soul." That is a very true statement. For me, pro bono is how I give back to the community that has given so much to me, mentor junior associates about the real difference we can make as lawyers, and display the compassion and mercy that my God has displayed to me.

5. What is the most unexpected benefit you have received from doing pro bono?
Learning to be quick on my feet in oral advocacy. There are not many opportunities where lawyers are retained ten minutes before a hearing, because the client did not realize a lawyer could be willing to help them. But when all you have is ten minutes for intake and strategizing, the best arguments are often developed on the stand. And while my day-to-day practice is meticulously planned out and rehearsed, the importance of the skill of ad-libbing a compelling argument cannot be understated. I am grateful to DVAP for giving me the opportunity to develop this skill, and to my firm for enabling lawyers like me to pursue pro bono.

DVAP
Dallas Volunteer Attorney Program

Focus | Entertainment, Art & Sports Law

Cinematic Obsolescence in a Post-Pandemic World

BY ALEXANDER MAZERO

While the COVID-19 pandemic hit many industries hard—some near the point of collapse—the cinema industry was among the industries hit the hardest. Venues where the big screen once captured eager moviegoers fell lifeless and dark. Cinemas closed and film releases were deferred to future dates or delayed indefinitely. Ticket sales sank to their lowest levels in the last two decades as the pandemic wreaked havoc on the cinema industry, with some theaters going out of business permanently. The post-pandemic cinema space is only now recovering, albeit slowly, and many cinemas are still taking drastic measures to attract consumers to boost ticket sales and admissions.

Despite the mayhem that the pandemic caused, the properties where cinemas are located are generally trending upward in value. This in turn results in higher property taxes, which can be a problem for those cinemas still trying to make ends meet. It is important for these cinema owners to understand how tax assessors will value their properties in the coming year.

Generally, tax assessors utilize the cost approach to determine market values for properties in the entertainment sector due to their unique nature, lack of transactional sales data, and lack of comparable properties. The cost approach values property as equal to the cost of land, plus total cost of construction, less total depreciation. Assessors frequently use cost-estimating services and depreciation tables to determine total depreciation. But relying solely on depreciation estimates may lead to faulty assessments, which may result in inflated market values. It is important that tax assessors also consider whether economic obsolescence—i.e., external forces that cause a property's value to decline—or other forms of obsolescence should be considered and incorporated into the market valuation.

Market forces have a profound effect on property values, especially properties in the entertainment sector. Economic obsolescence is typically caused by elements external to the property itself such as market trends and economic shifts, particularly as it relates to cinemas. Property owners generally do not have control or influence over this form of obsolescence. Before the pandemic, theaters were battling streaming services for consumer loyalty. When the pandemic struck, streaming services gained even more momentum and now command a greater following than in-person cinema. The consequential decline in ticket admissions resulted in a sharp decline in revenue, threatening the very existence of many cinemas. While cinemas begin to recover, the lingering effects of the pandemic's influence on the cinema industry still negatively impacts ticket sales and admissions. Studies show that consumers still prefer streaming movies at home without the theatrical element. Although the cinema industry is making a comeback to some degree, pandemic-related obsolescence should be given great weight when formulating depreciation and ultimately reducing assessments of cinema market values.

Functional obsolescence is another form of obsolescence. It is typically caused by factors internal to the property, specifically affecting the property's desirability and utility. Before the pandemic, many cinemas provided only the basic amenities including cloth or non-reclinable leather seats and basic concessions. Many cinemas, especially the more traditional venues constructed in the 1990s, lacked true dining services, commercial kitchens, or digital cinema. While the cinema industry slowly recovers in a post-pandemic world, the onslaught of streaming services continues. Large cinemas took note and began adding features to their cinemas such as fully stocked bars, dining options, commercial kitchens, premium luxury chairs, larger screens, and digital cinema. Cinemas that did not innovate were left behind and the value of those properties declined.

The issue of whether a cinema is the highest and best use of the land should also be considered during an assessment of property value. The entertainment sector's current market conditions make cinema properties potential candidates for adaptive reuse, which is defined as the practice of taking an existing property and repurposing it for a new commercial use. The viability of adaptive reuse typically stems from the existence of functional and economic obsolescence. Shifts in other industries such as the retail industry further incentivize adaptive reuse. As online shopping becomes a norm, failing and vacant cinema properties provide a lucrative opportunity for real estate investors who wish to convert them into other commercial uses such as e-commerce warehouses, distribution hubs, or fulfillment centers.

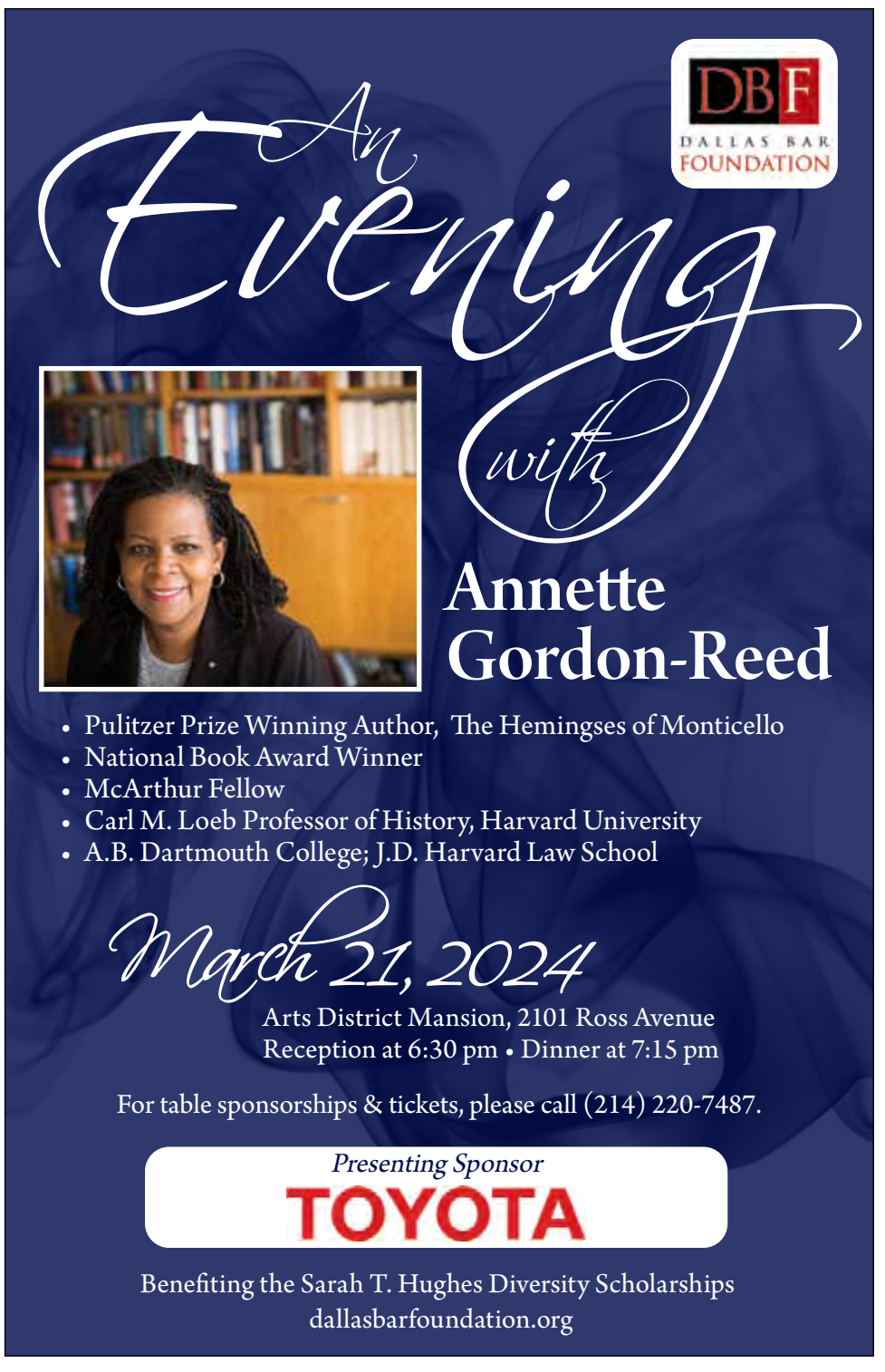
While the U.S. domestic box office in 2023 was the highest since before the pandemic, the outlook for 2024 is bleaker with a predicted box office of 5 to 10 percent less than the preceding year. The uncertain economic climate of the cinema industry highlights the need to evaluate obsolescence during market value assessments. Even in times of cinematic growth, a cinema owner should always take note of economic and functional obsolescence as obsolescence provides ammunition for reduced tax liability. **HN**

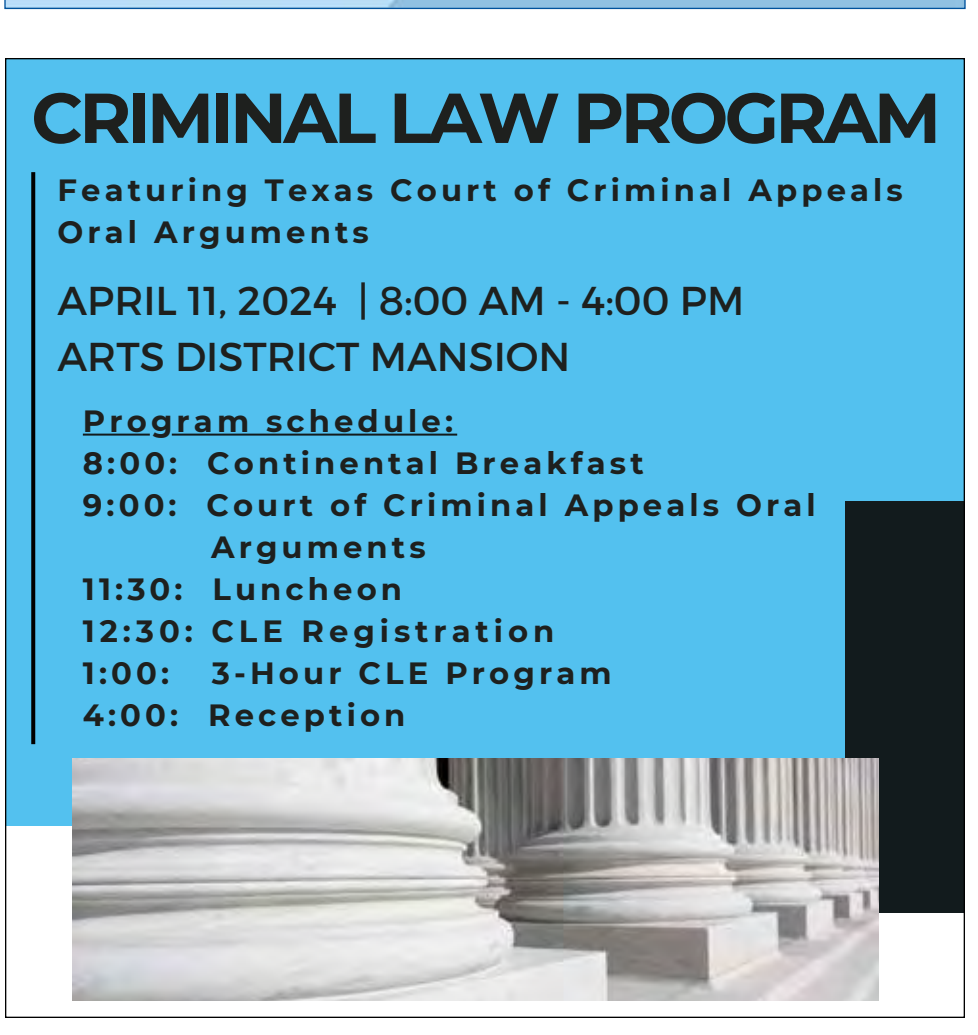
Alexander Mazero is a Tax Litigation Attorney at Ryan Law Firm, PLLC. He can be contacted at alex.mazero@ryanlawyers.com.

Client Development—Speak at a DBA Program

Interested in sharing your legal knowledge and expertise with your colleagues?

The CLE Committee is looking for speakers and hot topics for the Wednesday Workshop programs it holds throughout the year. Please submit a short bio, title, and 2-3 sentence description of your presentation to Araceli Rodriguez at arodriguez@dallasbar.org. Submissions will be discussed at monthly CLE Committee meetings.





Focus | Entertainment, Art & Sports Law

High-Stakes Media Inquiries and Protecting a Client's Reputation

BY DAVID SILLERS

The significant financial pressure on American media companies is fueling a new era of journalism, often rushed articles to post online and incomplete fact checks. Sometimes such articles cross the line into including defamatory falsehoods.

Clients and their counsel have a strong incentive to hold the media accountable *before* any potentially defamatory story is published, for both legal and practical reasons.

Legally, because of the Supreme Court's ruling in *New York Times v. Sullivan*, to prevail on a defamation claim, nearly all clients must show the reporter acted with "actual malice." Actual malice is a subjective inquiry asking whether the reporter knew what he or she was about to publish was false (or acted in reckless disregard for such a possibility).

Practically, this means that if a client refuses to comment on a story before it is published, it is extremely difficult to hold a reporter (or publisher) accountable for publishing otherwise actionable falsehoods.

In today's media climate, what can an unfairly targeted client do? There are actually a number of possible strategies:

Engage. Nearly all news stories are preceded by a contact from the journalist, albeit often with an unreasonable deadline for comment. Vigorous engagement—typically through inside or outside media relations specialists—is the first step toward telling your side of the story. Most of the time, ignoring an outreach or stating "no comment" is the wrong path, not least because it makes a defamation suit extremely difficult to pursue later on. Publishers could take a failure to comment as a license to print whatever they want.

Demand transparency. Most journalists are obligated to share the basics of what they plan to write because of their publishers' rules or journalistic ethics. This is called a "fact check." Responsible clients should demand a written fact check and should not be afraid of vigorously refuting any false statements or implications contained therein. Clients should not be afraid to raise issues with a reporter's editors.

Tell your story. When engaging with a journalist, the best path is to demonstrate with evidence both what is wrong with their proposed story and the true facts. Hard evidence is best. Sometimes, facts can be shared "off the record" if there are compelling reasons to do so. Consider pointing the journalists toward sources that refute the negative narrative, such as satisfied customers, friendly former employees, or supportive experts in the relevant field, typically after obtaining an agreement to keep such accounts "on background" (not naming them specifically).

Develop a mitigation plan and "reactive" statements. Clients, media relations, and outside counsel can help lessen the sting of bad publicity through reach-outs to customers, friendly outlets, and others. Sometimes, a statement (or even a webpage) telling the client's side of the story can help dispel falsehoods published about it. These materials can (and should) be developed before a story is published.

When all else fails, make clear the legal risks associated with false publications. When diplomacy has failed, defamation counsel can make clear the legal risks that come with publishing false and defamatory statements. If the client has educated the reporter about what is false or the true facts, it is often possible to demonstrate a real risk of "actual malice" by showing reporters how and why what they intend to publish is false. A publisher's counsel has different incentives than its journalists and the publisher's counsel should recognize legitimate legal risks presented by this approach. Sometimes, these efforts can reign in or even "kill" a flawed story.

Demand a correction. In many jurisdictions, a refusal to correct falsehoods in a news story can be circumstantial evidence of actual malice. After all, journalists acting in good faith should be willing to correct their mistakes, right? The faster and more clearly you can articulate what is factually wrong with a story, the more seriously a publisher will consider your request.

Take legal action. Defamation actions are increasingly accustomed to setting the record straight and obtaining redress. The $787.5 million Dominion settlement, the Georgia election workers' victory against Rudy Giuliani, and Johnny Depp's victory against Amber Heard are just a few examples. Dozens of other disputes never reach the public because of retractions, corrections, or settlements. **HN**

David Sillers is a Partner at Clare Locke LLP and can be reached at david@clarelocke.com.

Professionalism Tip

"I will always be conscious of my duty to the judicial system."
- Excerpt from the Texas Lawyers Creed

Find the complete Creed online at https://shorturl.at/FQX26

Introducing the 2024 Class of DBA WE LEAD

STAFF REPORT

Beginning its seventh year, the DBA WE LEAD: Women Empowered to Lead in the Legal Profession, is welcoming a new talented class of participants. DBA WE LEAD, which began in 2017, is a leadership program designed to address the challenges of high-performing women who have practiced law for 8 to 15 years. The purpose of DBA WE LEAD is to address the unique challenges facing women in the legal profession; to empower, educate and uplift women lawyers to take an already successful law practice to new heights; and to prepare lawyers for active professional leadership within their law firms, the business community, and the community at large.

Program leadership includes Co-Directors **Ophelia Camiña** and **Mary Scott** and three Assistant Directors—all DBA We Lead alum—**Amanda Cottrell**, Assistant Director of Mentoring; **Lisa George**, Assistant Director of Programing; and **Liset Lefebvre**, Assistant Director of Alumni Activities.

Since its inception, DBA WE LEAD has been supported by Mary Kay, Toyota, Vistra Energy, and AT&T. Corporate sponsors host a half-day session on their campuses and their executives often participate in panel discussions and otherwise interact with DBA WE LEAD class members. To find out more about DBA WE LEAD, contact Judi Smalling at jsmalling@dallasbar.org. **HN**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Marion Armstrong


Diana Bandoh


Kaitlyn Blanchard


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Kenitra Brown


Ashton Butcher


Jasmit Dhaliwal


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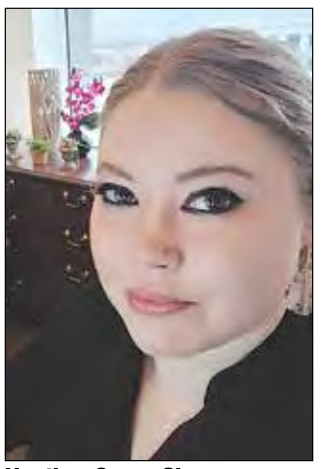
Rocio Garcia Espinosa


Heather Gram-Chavez


Ryan Hargrave


Darlene Hodges


Jade Jackson


Jayshree Jewett


Theresa Melia


Chrissy Metcalf


Victoria Nwankwo


Letetia Patin, DHA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Whitney Warren


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Focus | *Entertainment, Art & Sports Law*

Choreographer Scores Epic Win in Battle over Fortnite Dances

BY JAMES GOURLEY

In the realm of video games, few have reached the staggering popularity of Fortnite developed by Epic Games. This battle-royale-focused shooter has not only captivated millions of gamers worldwide but also become a cultural phenomenon, thanks in part to its in-game dance emotes. However, the game's use of these dance moves has put Epic in the legal spotlight.

Over the last few years, Epic has been sued a handful of times by parties who claim that a Fortnite emote infringes their intellectual property rights. For example, *The Fresh Prince of Bel-Air* star Alfonso Ribeiro's "Carlton dance" routine was the subject of a short-lived lawsuit against Epic that was voluntarily dismissed by Ribeiro in 2019.

The main obstacle potential plaintiffs face in these cases is that United States copyright law protects choreographic works but does not protect individual elements such as individual dance steps or short routines, which the Copyright Office has called "the building blocks of choreographic expression" available to all. Until the recent Ninth Circuit decision in *Hanagami v. Epic Games*, courts and the Copyright Office have found that the Fortnite emotes fall into the category of unprotectable steps or routines, rather than protectable choreography.

Other litigants have tried to avoid this thorny copyright question by framing their claims as alleged trademark violations, unfair competition, unjust enrichment, or similar causes of action. These lawsuits almost uniformly are dismissed as preempted under Section 301 of the Copyright Act. Former University of Maryland basketball players Jaylen Brantley and Jared Nickens suffered this fate after suing Epic under several non-copyright theories. Brantley and Nickens claimed they had created, named, and popularized the "Running Man" dance in 2016 and that Epic used it as an emote in Fortnite. The district court dismissed the case with prejudice as preempted and further found that the Running Man dance was not protectable as a copyrighted choreographic work.

Celebrity choreographer Kyle Hanagami's case against Epic has reinvigorated interest in the copyright implications of Fortnite's dance emotes. Hanagami successfully registered a five-minute choreographic work with the Copyright Office. His lawsuit claimed that Epic created an emote using a distinct four-count portion that was repeated several times within this registered work. His suit was dismissed by the Central District of California trial court on grounds that the emote was closer to an uncopyrightable "short" routine and comprised a "small component" of Hanagami's overall choreographic work. On appeal, the Ninth Circuit reversed.

After noting that few courts have considered the scope of copyright protection in choreographic works, the Ninth Circuit discussed the "substantial similarity" prong of the copyright infringement analysis in the context of choreography. The district court was primarily faulted for breaking the dance routine down into individual poses or steps, which themselves are unprotectable. Instead, the Ninth Circuit said that the arrangement of poses or steps could be protectable, given its previous holding that "substantial similarity can be found in a combination of elements, even if those elements are individually unprotected." The Ninth Circuit also agreed with Hanagami that choreography includes expressive elements other than merely individual poses or steps, such as "body position, body shape, body actions, transitions, use of space, timing, pauses, energy, canon, motif, contrast, [and] repetition."

The Ninth Circuit chided the district court for relying on the notion that the allegedly copied moves were "short" or a "small component" of the overall work. Analogizing to several music-related copyright cases, the appellate panel noted that even when the copied portion is relatively small, if that portion is qualitatively important to the overall work, a finder of fact can find substantial similarity.

The Hanagami case will set a precedent that other choreographers can use to craft a copyright claim with a chance at surviving a motion to dismiss.

Cases like Hanagami's lawsuit against Epic Games are pivotal to the ever-changing legal landscape for digital media. They highlight the evolving dialogue between copyright law and the creative expressions manifesting in the digital age. As games like Fortnite remain at the forefront of popular culture, developers must watch their steps and ensure that the intellectual property behind game features is respected. And the dance between creativity and legal compliance continues (i.e., the beat goes on). **HN**

James Gourley is a Partner at Carstens, Allen & Gourley, LLP, and can be reached at james@caglaw.com.

In The News

KUDOS

Andy Jones, of Sawicki Law Firm, has been promoted to Partner.

Veronica Bonhamgregory, of Weil, Gotshal & Manges LLP, has been promoted to Counsel.

Jonathan James and **Chandler Rice Winslow**, of Goranson Bain Ausley, have been promoted to Partner.

John Sullivan, of Winston & Strawn LLP, has been promoted to Partner.

Courtney Gilberg, **Jeremy Pettit**, and **David Silva**, of Sidley Austin LLP, have been promoted to Partner. **Jocelyne Kelly**, of the firm, has been promoted to Counsel.

Donald E. Godwin, of Godwin Bowman, **Brittany K. Barnett**, of Brittany K. Barnett, Attorney at Law, **The Hon. Dennise Garcia**, of the Fifth District Court of Appeals, and **Mark A. Melton**, of Holland & Knight, all received Distinguished Achievement Award honors from SMU's Dedman School of Law for 2024.

Neil Orleans, of Ross, Smith & Binford, P.C., was appointed to the City of Richardson Sign Control Board.

Aaron Dilbeck and **Patrick Whitaker**, of Munck Wilson Mandala, LLP, have been promoted to Partner.

Spencer Turner, of Farrow-Gillespie-Heath Wilmoth LLP has been promoted to Partner.

Brian Gillett, of Bradley Arant Boult Cummings LLP, has been promoted to partner. **Gabriella Alonso**, also of the firm, has been named vice chair of the Regional and Community Banks Subcommittee of the American Bar Association's (ABA) Banking Law Committee.

Clark Kimball, of McCall, Parkhurst & Horton L.L.P., has been promoted to Partner.

Michael Slack and **Ladd Sanger**, of Slack Davis Sanger, LLP, received Board Certification in Aviation Law from the Texas Board of Legal Specialization.

Charles Siegel, of Waters Kraus Paul & Siegel, has been elevated to Named Partner.

Daniel Boysen and **Shelly Maurer**, of Hallett & Perrin, P.C., have been promoted to Shareholders.

ON THE MOVE

Clayton Mahaffey joined Burns Charest LLP as Of Counsel.

Barrett Howell and **Rebecca Kuritzkes** joined Blank Rome LLP as Partner and Associate, respectively.

Jackson Long joined Massumi + Consoli LLP as Associate.

Robert Royse joined Downs & Stanford, P.C. as Shareholder.

Allison Elko re-joined Bell Nunnally & Martin LLP as Partner.

Arianna Smith joined Knox Ricksen LLP as Associate.

Paul Patton joined Bradley Arant Boult Cummings LLP as Associate.

Jennifer Ryback joined Carrington, Coleman, Sloman & Blumenthal, L.L.P. as Partner.

Samuel Fubara joined Brown Fox PLLC as Corporate Senior Associate.

Donald Parker and **Dallas Flick** joined Crawford, Wishnew & Lang PLLC as Associates.

Kevin Davidson joined Goranson Bain Ausley PLLC as Partner.

Sheryl Kao joined Chartwell Law as Partner.

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

Focus | *Entertainment, Art & Sports Law*

Estate and Tax Planning for Athletes, Entertainers, & Artists

BY KATHY ROUX

Athletes, entertainers, and artists can benefit from thinking early in their careers about their estate planning needs. At a minimum, these individuals should start putting together a plan for a will, a trust, or both.

A will is the quintessential estate planning vehicle. But it is not used simply to pass on money and assets at the time of death. A will can be used to choose guardians for minor children, designate a guardian for an adult if they become incapacitated or unable to manage financial matters alone, or appoint a personal representative to manage an estate's affairs.

Regarding trusts, there are many different kinds, each with unique benefits. For example, a testamentary trust can hold property for a minor until that minor reaches a certain age of maturity. A supplemental needs trust can be set up for a legally incapacitated adult as the beneficiary, allowing that person to enjoy the benefits of the trust estate without becoming ineligible for government aid programs. A revocable trust can provide privacy benefits.

Trusts that meet certain requirements under Section 2056(b) of the Internal Revenue Code qualify for the unlimited marital deduction, thus allowing couples to defer all estate tax until the death of both spouses. A bypass trust will not be included in the surviving spouse's estate, thus allowing the most efficient use of both spouses' lifetime gift and estate tax exemptions. Irrevocable life insurance trusts can effectively remove life insurance proceeds from an insured's estate. Other irrevocable trusts can transfer wealth out of a trustor's estate without giving the beneficiary immediate control over certain assets.

Managing Your Tax Liabilities

Often, professional athletes and entertainers are very young and come into wealth quickly, resulting in sudden increased tax liabilities that must be managed. To begin managing these matters, these individuals will need to quickly become financially literate and determine whether they are receiving sound financial advice from current advisors surrounding them.

These young stars must create a reliable system that regularly monitors, manages, and puts systems in place to satisfy their tax responsibilities. There will be taxes on what they earn, taxes on what they buy, and taxes on what they own. It takes time to develop a basic understanding of how these taxes fit together and how to plan for tax issues as they arise.

Income for athletes, entertainers, and artists often comes from different sources, and there can be different rules that govern tax rates and deductible expenses for each of these sources of income. These individuals earn a base salary while also enjoying signing and performance bonuses, appearance fees, sponsorship deals, prize money, royalties, and other back-end compensation. The potential tax consequences abound.

Tax issues also arise when athletes, entertainers, and artists sell property. The sale proceeds on property may be taxed as capital gains. Capital gains are owed when an asset is sold for more money than the owner paid for the asset. Short-term capital gains can push a person into a higher tax bracket. For example, if somebody is in the 22 percent tax bracket and a $10,000 capital gain inflates their income to qualify for the 24 percent tax bracket, that person will end up paying a higher tax rate on the portion of income in the 24 percent bracket.

One strategy for lowering capital gains tax is to consider holding onto assets for over a year to qualify for lower tax rates in the form of long-term capital gains. Another strategy for lowering capital gains tax is to offset capital gains with capital losses, i.e., when an asset is sold for less than the owner paid. Capital losses can often be subtracted from capital gains to lower an annual tax bill. Investing in tax-advantaged accounts like individual retirement accounts (IRAs) or 401(k) plans can also prove beneficial, depending on the person's financial situation.

In prior years, athletes and entertainers could make significant deductions for certain professional expenses such as agent fees, union dues, and payments made to trainers in the offseason. However, the passage of the Tax Cuts and Jobs Act in 2017 eliminated these deductions until at least 2026.

One of the best tax benefits for athletes and performers in this state remains that Texas does not require athletes and entertainers who perform in Texas to file a state income tax return and pay a portion of their earnings. In other words, there is no "jock tax" in this state if the athlete or entertainer does not live here. Texas also does not require payment of a personal income tax.

Name, Image, Likeness, & Artwork

The brand, image rights, artwork, and related intellectual property of athletes and artists are assets that can continue to generate income long after their playing and performance days are over. It is essential for these individuals to include provisions in their estate plans that address how these assets are managed and protected.

The Best Plan

Any estate plan, whether for athletes, entertainers, artists, or otherwise, will be well served by taking the "Texas two-step." The first step is to create an estate plan that achieves one's goals. The second step is to regularly monitor the estate plan to make sure it serves its intended purpose and, if it does not, to start planning better for next year. If things get complicated, competent advisors and legal counsel are around.

Kathy Roux, of the Law Offices of Kathy Roux, can be reached at kathy@kathyrouxlaw.com.