Dallas Bar Association
HEADNOTES

November 2020 | Volume 45 | Number 11 | Focus | Corporate Counsel/Mergers & Acquisitions

Focus | *Corporate Counsel/M&A*

Earnouts in M&A Transactions

BY BYRON F. EGAN AND ZACHARY P. WARD

An "earnout" is a deal mechanism used in a merger and acquisition transaction (*M&A Transaction*) which structures the terms upon which a buyer agrees to pay additional consideration to the seller after the closing of the M&A Transaction if certain specified performance targets are achieved post-closing by the acquired business or upon the occurrence of specific events. An earnout is a particularly useful deal mechanism when: i) the buyer and seller have differing views on the value of a business, which often is based on the estimated future performance of the business or the likelihood that a specific event will occur in the future, related to the acquired business; ii) the seller will remain involved in the business post-closing, and the buyer wants to incentivize the seller to continue operating the business in a profitable capacity or grow the business after the closing of the M&A transaction; iii) the acquired company experienced a drop in earnings prior to the M&A Transaction; or iv) the acquired company is operating in a volatile economy or industry which can adversely affect the acquired company's profitability or cause its value to fluctuate widely.

While earnouts are used to bridge disagreements that arise during the negotiation of the purchase price, earnouts commonly result in post-closing disputes over the calculation of the earnout. One of these disputes is exemplified by *Fischer v. CTMI, L.L.C.*, where the Texas Supreme Court determined that an earnout provision that provided that a term relating to the amount of the final payment in a four-year earnout "will have to be mutually agreed upon" at a future date, was not an unenforceable agreement to agree. 479 S.W.3d 231 (Tex. 2016).

In *Fischer*, the seller sold his business to the buyer, the buyer acquired accounts receivable on projects that the seller had not yet completed, and the parties agreed that the seller would be entitled to an earnout made each year from 2007 to 2010. While the 2007 earnout was a flat amount, the later three payments contained an "adjustment payment" equal to 30 percent of that year's business revenue in excess of $2.5 million. The sole issue before the Supreme Court was an additional component in the 2010 earnout payment which, similar to the initial 2007 agreement, contained a "pending-projects clause" that obligated the buyer to pay the seller an amount based upon revenue from projects that were pending but not yet complete at the end of 2010. However, because the parties could not know in 2007 what projects would be pending completion in 2010, the pending-projects clause provided that the percentage of completion for each project "will have to be mutually agreed upon" by the parties. The trial court found the provision to be enforceable, but the court of appeals reversed.

In reaching its conclusion that the pending-projects clause was "sufficiently definite," the Supreme Court began its analysis by outlining several fundamental contract principles: (1) courts must evaluate the contract as a whole and may neither rewrite nor add to the parties' language; (2) Texas courts abhor forfeiture, and must construe a contract to avoid forfeiture if possible; (3) when interpreting an agreement to avoid forfeiture, courts may imply terms where they may reasonably be implied; (4) usage of trade and course of dealing may provide meaning to an otherwise imprecise term; and (5) the parties' performance may indicate they intended to be immediately bound by the agreement even when certain terms are indefinite.

The Court pointed out that where parties have done everything else necessary to make a binding agreement other than setting a price, "it will be presumed that a reasonable price was intended." Further, the parties here did not fail to "reach some understanding as to price" or "provide an adequate way in which it can be fixed." Rather, the parties provided a clear formula to calculate the payment by basing the amount on the percentage each project pending at

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DBA Dedicates 30th Habitat House

On September 19, the DBA virtually dedicated its 30th Habitat for Humanity home to the Ruiz family via Zoom, with DBA President Robert Tobey presenting the keys to the home. Thank you to all the DBA members and firms who donated during this difficult year, and a special thank you to DBA Home Project Co-Chairs David Fisk and Michael Bielby, Jr. (bottom photo). To participate in the project for next year, contact Mr. Fisk at dfisk@krcl.com.

Thank You to Our Major Donors

The Dallas Bar Association and Legal Aid of NorthWest Texas kicked off their annual Equal Access to Justice Campaign benefiting the Dallas Volunteer Attorney Program. A number of Dallas firms, corporations, and friends have committed major support. Join us in recognizing and thanking the following for their generous gifts*:

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**As of September 30, 2020*

Inside

DBA MEMBER REMINDER – RENEW ONLINE NOW

You may renew your **2021 DBA Dues** now!
Go to dallasbar.org and click on the My DBA button to log in and Renew online or print the 2021 Renewal Dues Invoice to mail in with payment.
Your 2021 DBA DUES must be paid by December 31, 2020
in order to continue receiving **ALL** your member benefits.
Thank you for your support of the Dallas Bar Association!

All programs are presented virtually. Check the DBA Online Calendar (www.dallasbar.org) for webinar links and the most up-to-date information.

Calendar | November Events

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

FRIDAY CLINICS

NOVEMBER 6
Noon *"The Shocking Truth: Hope and Treatment in the World of Mental Health for Lawyers," Michelle Staubach Grimes and Kelly Rentzel.* (Ethics 1.00)* *Co-sponsored by the Peer Assistance Committee.*

NOVEMBER 13
Noon "*The Witness Woodshed in the (New) Roaring 20's – Ethics, Tips, Tricks & Traps," David Kent.* (Ethics 1.00)*

NOVEMBER 20
Noon *"Fair Labor Standard Act," Brian Farrington.* (MCLE 1.00)*

MONDAY, NOVEMBER 2

No events yet scheduled

TUESDAY, NOVEMBER 3

Noon **Corporate Counsel Section**
"How to Handle an Internal Investigation," Angela Laughlin Brown. (MCLE 1.00)*

Tort & Insurance Practice Section
"The Other Epidemic: The Parties, The Claims, and The Insurance Policies Involved in the Opioid Litigation," Susan Briones, Melisa Thompson, Nicolas Sarokhanian, Monica Sullivan, and moderator Amy E. Stewart. (MCLE 1.00)*

WEDNESDAY, NOVEMBER 4

Noon **Alternative Dispute Resolutions**
"What Happens on Zoom Stays on…Oh, Wait! Ethical Issues in Online Mediation," Nicole LeBoeuf. (Ethics 1.00)*

Public Forum/Media Relations Committee

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

5:00 p.m. Catdaddies Virtual Concert

THURSDAY, NOVEMBER 5

Noon **Construction Law Section**
"Is There a Doctrine in the House?" Bill Quatman and Craig Williams. (MCLE 1.00)*

Admissions & Membership Committee

5:00 p.m. **Intellectual Property Law Section**
"Trademark Fights Over Alcoholic Beverages," Justin Cohen and James Gourley. (MCLE 1.00)*

FRIDAY, NOVEMBER 6

Noon **Employee Benefits & Executive Compensation Law Section**
"Fiduciary Duties: Risk Mitigation in the Security and Use of Plan Data," April Goff. (MCLE 1.00)*

Friday Clinic
"The Shocking Truth: Hope and Treatment in the World of Mental Health for Lawyers," Michelle Staubach Grimes and Kelly Rentzel. (Ethics 1.00)* *Co-sponsored by the Peer Assistance Committee.*

4:00 p.m. DBA Annual Meeting

MONDAY, NOVEMBER 9

No events yet scheduled

TUESDAY, NOVEMBER 10

Noon **International Law Section**
"Foreign Direct Investment in Latin America: 2020 and Beyond," Maria Luisa Canovas, Ricardo Leite, and Carlos Ronderos. (MCLE 1.00)*

Mergers & Acquisitions Section
"M&A Market Update," Dan O'Donnell. (MCLE 1.00)*

Legal Ethics Committee

6:00 p.m. **Juvenile Justice Committee**
"*Virtual Child Welfare Book Club Reading 'Etched in Sand', by author Regina Calcaterra, who will be in attendance. RSVP www.surveymonkey.com/r/226XJMQ.* (MCLE 1.00)*

WEDNESDAY, NOVEMBER 11

Noon **Public Forum/Media Relations Committee**
"Activism: Then and Now," David Henderson, Rhonda Hunter, Joli Robinson, and Prof. Cheryl Wattley. (MCLE 1.00, Ethics 0.50)* *Co-sponsored by J.L. Turner Legal Association.*

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

THURSDAY, NOVEMBER 12

Noon DBA Awards Luncheon

Publications Committee

2:00 p.m. CLE Committee

FRIDAY, NOVEMBER 13

10:00 a.m. **Criminal Law Bench Bar**
"Hon. Elsa Alcala, Hon. John Creuzot, Hon. Jorge A. Solis, and Jeff Tillotson. (MCLE 5.00, Ethics 1.00)*. *Register at www.dallasbar.org.*

Noon **Friday Clinic**
"The Witness Woodshed in the (New) Roaring 20's – Ethics, Tips, Tricks & Traps," David Kent. (Ethics 1.00)*

Intellectual Property Law Section
"Views from the Bench: Conducting Live Jury Trials in the COVID-19 Era," Hon. Rodney Gilstrap and Hon. Barbara M.G. Lynn. (MCLE 1.00, Ethics 0.50)*

MONDAY, NOVEMBER 16

Noon **Labor & Employment Law Section**
"A Modern Approach to Cross-Examination at Depositions," Shane Read. (MCLE 1.00)*

TUESDAY, NOVEMBER 17

Noon **Bankruptcy & Commercial Law Section**
"What Every Bankruptcy Lawyer Needs to Know About Trademarks," Chris Weimer and Travis Wimberly. (MCLE 1.00)*

Judiciary and Legal Ethics Committees
"Practical Lessons for Lawyers in Professionalism & Ethics," Hon. Ada Brown, Hon. Bonnie Lee Goldstein, Hon. Christine A. Nowak, and moderators Marina Amendola and Cameron Jean. (Ethics 1.00)*

DAYL General Counsel Webinar
"Pursuing Work with Government Entities? Know Before You Go," Gene Gamez, Elaine Rodriguez, Steve Roth, and Dena DeNooyer Stroh. (MCLE 1.00)* *Sponsored by the DBA, DAYL, and J.L. Turner Legal Association.*

Community Involvement Committee

Entertainment Committee

WEDNESDAY, NOVEMBER 18

Noon **Energy Law Section**
"Practical Litigation Tips and Strategies for an Oil and Gas Case," Jonathan Childers. (MCLE 1.00)*

Health Law Section
"Bill of Health: Coverage for COVID-19 Related Business Losses," Micah Skidmore. (MCLE 1.00)*

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

THURSDAY, NOVEMBER 19

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

Voting Rights Program
"General Election Roundup," Rafael Anchia, Gromer Jeffers, Jr., and Jonathan Neerman. (MCLE 1.00)*

Minority Participation Committee

3:30 p.m. DBA Board of Directors Meeting

FRIDAY, NOVEMBER 20

Noon **Friday Clinic**
"Fair Labor Standard Act," Brian Farrington. (MCLE 1.00)*

MONDAY, NOVEMBER 23

No events scheduled as of yet

TUESDAY, NOVEMBER 24

Noon **Probate, Trusts & Estates Law Section**
"Zoom Court - Legal & Technology Tips for a Successful Remote Trial," Hon. Emily A. Miskel. (MCLE 1.00)*

WEDNESDAY, NOVEMBER 25

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

THURSDAY, NOVEMBER 26

DBA Offices closed in observance of Thanksgiving

FRIDAY, NOVEMBER 27

DBA Offices closed in observance of Thanksgiving

MONDAY, NOVEMBER 30

No events yet scheduled

2021 DBA COMMITTEE PREFERENCES

It's time to add and/or update your 2021 DBA Committees!

We have streamlined the process, so please keep an eye out for your email invitation.

Thank you for your ongoing support and commitment to volunteer!

LegalLine Volunteers Needed

LegalLine is seeking volunteer attorneys for our LegalLine E-Clinics on Wednesdays.

Calls may be made between 4-8 p.m. from the comfort of their own homes.

Participating attorneys will be emailed contact information for those who have submitted a request for a call.

www.DallasBar.org/LegalLine

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

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

For confirmation of State Bar of Texas MCLE approval, please call Grecia Alfaro at the DBA office at (214) 220-7447.
****For information on the location of this month's North Dallas Friday Clinic, contact yhinojos@dallasbar.org.***

President's Column

It's Time to Vote!

BY ROBERT TOBEY

Since 2016, people have been talking about the 2020 general election as "the most important election of our lives." Well, it is almost here. Even at the start of this year, no one would have dreamed this election would occur against the backdrop of a global pandemic and resulting chaos. We have seen pitched battles over the merits of mail-in ballots, the sufficiency of allotted polling places, and even the number of poll workers and election observers—all with an eye toward the threats posed by COVID-19.

Voting participation in the United States is near the bottom of the world's democracies. In the 2016 general election, only 64 percent of eligible voters were registered and only 56 percent of eligible voters participated. Only one-third of eligible voters between the ages of 18 and 29 vote. Contrast this turnout rate with Belgium (87.2 percent), Sweden (82.6 percent), Denmark (80.3 percent), Australia (79 percent), South Korea (78 percent), Israel (76 percent), and Hungary (72 percent), and it is clear we have a problem—especially among younger generations.

Voter participation is even lower in state and local elections. In the 2018 midterm elections, 50 percent voted nationwide and 46.3 percent voted in Texas. The 46.3 percent voter participation rate in Texas was in the bottom half of the states. Interestingly, the 46.3 percent turnout rate represented an 18 percent increase from the 2014 midterm election, where our turnout was almost the lowest in the country. Local elections for mayor, city council, and school board seats often have voter-participation rates in the single digits.

These poor voter-participation statistics are startling as we reflect on two major anniversaries this year: the 150th anniversary of the ratification of the Fifteenth Amendment (guaranteeing that the right of United States citizens to vote shall not be denied on account of race, color, or previous condition of servitude) and the 100th Anniversary of the ratification of the Nineteenth Amendment (granting women the right to vote). Through our programs with Eric Foner on the Reconstruction Amendments and Nina Totenberg on the Nineteenth Amendment, we got an understanding about the struggles and bloodshed that went into getting these amendments ratified—and how those struggles continue even today.

So why is turnout so low? Many people say they are so disgusted with all of the candidates and the process that they stay home on election day. Others say their vote does not make a difference. In some instances, cultural issues play a role in the failure to vote. But people need to understand that voting is the pathway to having a true voice in the direction of our country, state, and city.

As lawyers, we must be leaders in the efforts to educate eligible voters and get them to the polls. This year, we joined with March to the Polls (www.marchtothepolls.org) and the League of Women Voters (https://my.lwv.org/texas/get-out-vote-0) to educate and register high school and community college students to vote. Unfortunately, those efforts were hampered by the pandemic. But I hope the DBA continues to pursue this effort in the future. If young people in this country get into the habit of not voting, that does not bode well for the future of our country.

We also must be leaders in ensuring that all eligible voters who are registered have the opportunity to exercise their right to vote. On November 3, the DBA and its sister bar associations will support voter protection efforts. Please let me know if you want more information about this effort or wish to volunteer.

The bottom line is that we as lawyers know and understand the privilege that we have to vote and the importance of participating in the process. We need to make sure that we lead not only by example but also by spreading the word to others about our fundamental right to vote. Regardless of the outcome on election day, we all need to do what we can to pull this country together!

Robert

DBA Annual Meeting

The Annual Meeting is
Friday, November 6, at 4:00 p.m. via Zoom.
Advance registration is required to participate in this program.
Register at www.dallasbar.org.

If you have prior DBA service and wish to run for a position, please contact Alicia Hernandez (ahernandez@dallasbar.org, (214) 220-7401), no later than Wednesday, November 4, at 5:00 p.m. to receive information about service on the Board. You are required to complete a biographical form prior to the meeting.

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.

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DBA Board Approves Delaying Membership Dues Increase to 2022

STAFF REPORT

At its October meeting, the DBA Board of Directors considered a long anticipated and necessary dues increase for calendar year 2021, but chose to defer the raise because of stresses felt by all of us during the pandemic. The Board voted to delay the increase of $35 until the 2022 membership year. Members will pay the same dues for their 2021 memberships that they have paid since 2009, the year the DBA last increased its dues.

DBA dues vary in cost based on length of practice and certain practice groups. Membership dues information is available at www.dallasbar.org. Though the DBA is one of few voluntary bar associations across the country to see annual growth in membership, demographic changes in the profession and the annualized rise in operational costs over the past decade (similar to "cost of living" increases over the same period) require a rare increase in membership dues.

Even with the increase, DBA dues will remain some of the lowest for Metro bar associations in large part due to the Association's diversification of revenue sources and strong oversight. President Robert Tobey said, "there is a long history of focused economic planning and stewardship at the DBA which allowed us the discretion to delay this rare, but needed, increase." Tobey emphasized the continued economic health of the Association, "even after the increase, our members will continue to pay some of the lowest dues in the country yet receive benefits unlike any other Association. One benefit of the pandemic has been the necessary expansion of online services to our members," he continued, "we are already planning post-pandemic events to be available in-person and virtually to serve members far and near to our downtown headquarters."

If anyone has questions about the increase or concerns about affording to pay their dues in 2021 or beyond, please let DBA Executive Director **Alicia Hernandez** know. The DBA does not want to lose a single member due to economic hardship, and we will work with our members in this time of difficulty. We thank our members for all they do for the legal community and everyone in the greater Dallas area! **HN**

Focus | *Corporate Counsel/M&A*

How the Pandemic Impacted My Work with Outside Counsel

BY ROCÍO CRISTINA GARCÍA ESPINOZA

Is there an area of our lives that has not been impacted by the pandemic? As Senior Counsel of a real estate developer of multifamily, self-storage, industrial, and mixed-use properties in the United States, I can speak to many changes I have seen relating to in-house and outside counsel.

When the pandemic hit hard in March, like many in-house attorneys, my typical workday spanned 12–14 hours to address new issues created by the crisis. For example, many tenants sought revisions to their leases, which required a significant time commitment for negotiations and drafting of amendments.

In this time, I became focused on responding to urgent pandemic-induced real estate work instead of my typical responsibilities. Initially, no one knew when "the bottom would fall out" so we had no way to tell whether we needed to address a short-term or long-term issue or whether prior experiences could provide useful guidance. My fellow in-house colleagues at other companies recounted similar experiences. Normal workloads were hijacked by responding to urgent work created by the COVID-19 crisis.

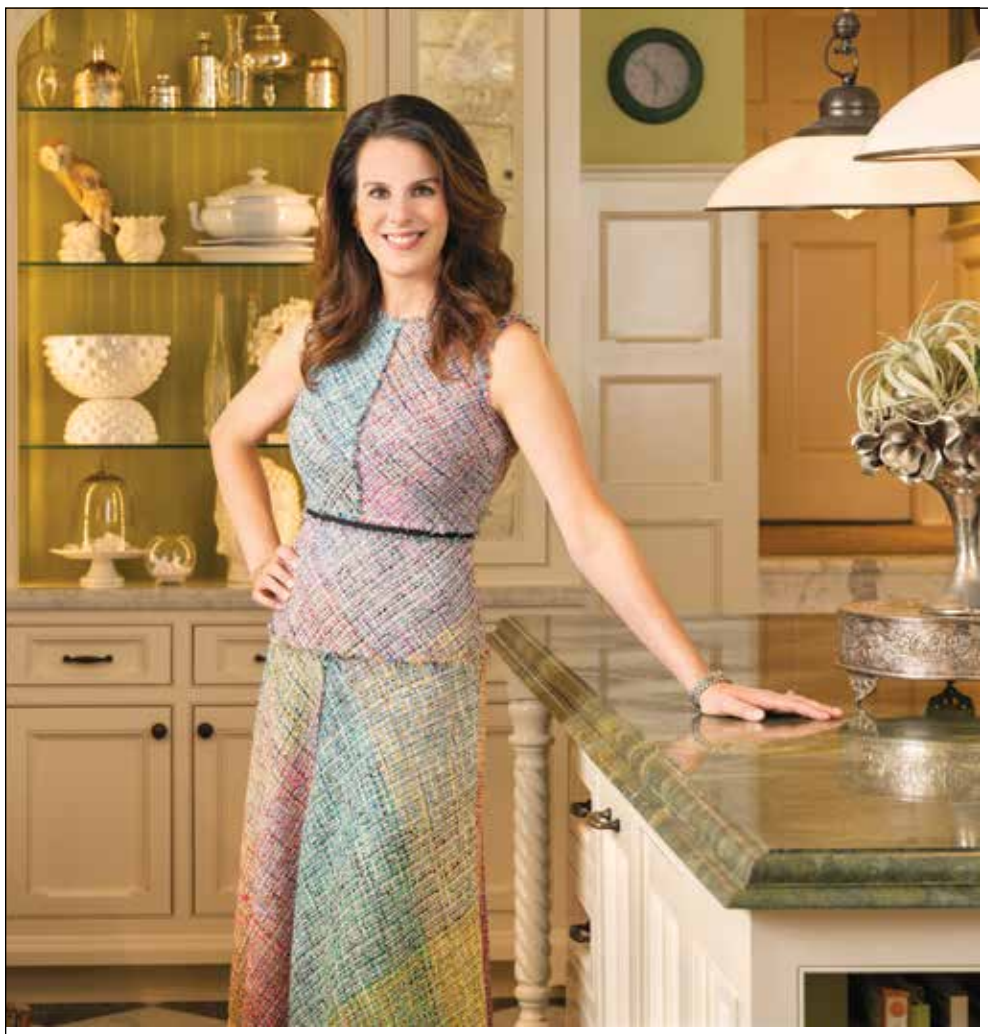
Fortunately, for most in-house counsel, we did not face budget cuts for help from outside counsel, so we were not forced to take on all the new and unexpected responsibilities alone. This is because many companies realized that a team approach was needed, with outside counsel helping clients understand the issues created by the pandemic. The knowledge of a group of attorneys assisting various clients helped us determine whether our own experiences were unique. We relied on law firms to assist us in understanding the climate across various jurisdictions. Because of the advantages of having outside assistance, most corporate counsel have no plans to reduce legal spending on outside counsel.

Understanding that there were companies seeking outside counsel, adding value to stand out became key. No one could claim he or she is an expert in CARES Act legislation because we were all reading it at the same time. No one could claim he or she knew what the market trends for leasing concessions were because everything was changing daily. In this crisis, adding value came from listening to client needs. For example, my firm was in the middle of construction in a couple of Texas markets. Instead of simply adding us to his firm's newsletter on COVID-19 articles their attorneys put together, our outside counsel honed in on sending us specific updates on whether any local court orders were affecting construction work in the markets where we had developments. This action showed us that our outside counsel understood our concerns and valued our time. We did not have time to read all the articles cited in a newsletter to figure out which ones were most relevant; rather, our outside counsel was able to narrow our focus in a meaningful way.

Anecdotally, it seems that this may be a good time to move in house if you are so inclined. Legal departments have realized more people power is needed to handle the increased work, and law firms have reorganized their staffing to handle changes in the workflow.

To stand out, outside counsel should reach out to their clients and have discussions on how to be most helpful. A simple "let me know how I can help" will not suffice because we are still figuring that out. **HN**

Rocío Cristina García Espinoza is Senior Counsel Real Estate at Rosewood Property Company and may be reached at rgarcia@rosewd.com.



RACHEL'S REAL ESTATE REPORT

I am grateful to live in our vibrant, diverse, booming city of Dallas. I am thankful for my clients whom I help each and every day with their real estate needs.

Based on the latest data from MetroTex Association of Realtors for Dallas County, the median sales price is up 13.1%, active listings are down 26.4% and closed sales are up 6.3% compared to last year. This data suggests it is a great time to sell.

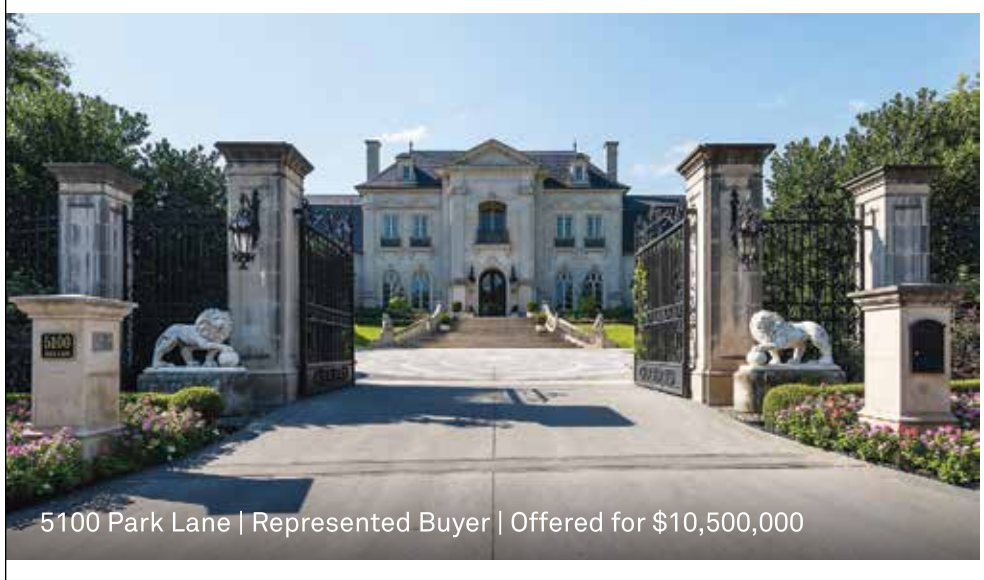
With historically low mortgage rates, and tax deductions for mortgage interest and property tax, it is also a great time to buy. Homeownership is the number one way to create and increase personal wealth, and a fixed mortgage rate is a great hedge against inflation.

Please contact me to find out what your current home is worth, connect you with a mortgage broker to find out what you can afford, and help you find your new special place to call home.

PRESENTING THE EXTRAORDINARY

4125 Turtle Creek Boulevard | $6,850,000

SELLING THE EXTRAORDINARY



5100 Park Lane | Represented Buyer | Offered for $10,500,000

4545 San Gabriel Drive | Represented Buyer | Offered for $2,650,000

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RACHEL TROWBRIDGE
RESIDENTIAL REAL ESTATE

Allie Beth Allman™ & Associates
A BERKSHIRE HATHAWAY AFFILIATE

Focus | *Corporate Counsel/M&A*

How to Successfully Negotiate Cloud Agreements

BY PETER S. VOGEL

Cloud computing as described in this article is actually an old concept that has been in use since 1964 when Dartmouth University created time-sharing of remote computers over telephone lines. The term "Cloud" was coined by Google in 2006 and has been adopted by companies all over the world to describe remote computer access over the internet.

The term to describe a computer found at the offices of companies not using the Cloud is referred to as "On-Premises" or "On-Prem." However, fewer companies are relying on On-Prem computers in 2020. The trend expected by the Information Technology (IT) is for On-Prem to continue to decrease and for Cloud use to increase in the future.

Everyone reading this knows the big players in the Cloud business—Amazon, Google, Dell, and IBM—since they are also the biggest Internet Service Providers (ISPs), have computers located around the world, and sell services everywhere.

What Kind of Services are Offered on the Cloud?

At this time, Cloud companies offer a wide range of services including those which are referred to as Software as a Service (SaaS). Other names exist for similar services, such as Disaster Recovery as a Service–(DRaaS) and the like, because innovative companies continually create new names for the services they may offer as a service. Another is MLaaS, Machine Learning as a Service, using Artificial Intelligence (AI) like IBM's Watson.

The term SaaS may refer to online use of Microsoft Office 365 that includes Outlook, Word, Excel, PowerPoint, and all other Microsoft tools. Of course, Google offers a similar SaaS for Google Docs, Forms, Hangouts, and other Google tools. The whole deal with the SaaS is that the customer gets a license to use the software and to store data with the Cloud service provider.

Online Terms

Before all eCommerce online companies started using Online Terms, including Terms of Service (ToS), Privacy Policies, and Click Agreements, lawyers helped clients negotiate long, complicated contracts with Cloud providers. Now, all Cloud providers use Online Terms to legally create contracts with their customers. So today, the written contracts presented to lawyers and their clients are usually short documents that are only a few pages with many URL (Uniform Resource Locator) links to the Online Terms. For simplicity, here, I refer to these written contracts as Purchase Orders (PO).

By way of example, one of my clients started an online educational training website for doctors around the US. The client needed a SaaS so that it could collect sales taxes for sales in all states in the US. The SaaS provided my client with a two-page PO, but in order to agree to the PO, I had to review 28 separate Online Terms before amending the two-page PO.

What is a Service Level Agreement?

One of the most critical issues for every Cloud agreement is the availability of the Cloud services, because many clients operate 24/7/365. As a result, clients need to know what guarantees the Cloud service can make regarding when it will be up and running. The IT term for such availability is known as the Service Level Agreement (SLA), which is not actually an agreement but states availability and what kind of credits will be provided if the service fails to meet the parameters set forth in the SLA. When reviewing a SLA, you may want to negotiate a better availability, which may cost the client more:

Warranties to Negotiate

Protection of data from cyber criminals is high on the list of every business, so an important negotiation point is Cloud vendors' warranties about data security. Clients will often pay a higher fee for higher data security, so it is important to request the Cloud vendor to offer different options.

Also, an important issue for Cloud services is where the client's data is stored because the law of the country where the data is located controls how that data is managed. For instance, US banking laws require that all banking data reside in the US. Thus, banking clients are willing to pay a premium to make sure that all their data is stored on Cloud systems located in the US.

Availability %	Downtime per month	Downtime per year
99.999% ("5 nines")	26.30 seconds	5.26 minutes
99.99% (4 nines")	4.38 minutes	52.6 minutes
99.9% ("3 nines")	43.83 minutes	8.77 hours
99% ("2 nines")	7.31 hours	3.65 days
95% ("ninety-five")	36.53 hours	18.26 days

Working with these agreements may require you to better understand the IT technology in the future as the Cloud changes and evolves, so make sure you monitor technology as it evolves.

Peter Vogel is Of Counsel at Foley & Lardner LLP and can be reached at pvogel@foley.com.

Drafting Autonomous Vehicle Contracts

BY JAMES D. JORDAN

During the past two years, I have drafted dozens of contracts in the autonomous vehicle (AV) industry. Regional transportation authorities and municipalities view autonomous shuttles and driverless ride-sharing vehicles as critical components of future public transportation, but they do not yet have a clear vision of how these components will complement existing fixed route systems.

For the contract drafter, the field is so new that no tested legal forms exist. In fact, the parties often do not even know what they should ask for during negotiations. Here are some of the things I have learned while drafting AV master purchase agreements, ride-sharing agreements, pilot project, and fueling and maintenance agreements.

1. The parties often have little AV contracting experience. The industry is so new that no one has legally tested templates. Few have any templates at all. In one instance, an AV manufacturer tried to sell my client, a major transportation operator, a small fleet of cutting-edge autonomous shuttles based on a simple purchase order and invoice, as if it were merely selling a dozen garden hoses.

As I have built my own portfolio of forms, I have leaned toward simplicity. The industry includes many startup and early-stage companies that have little interest in studying or paying for 30-page templates. For now, most industry players remain focused on development of technology, not development of complex contract forms.

2. Data has value. Autonomous vehicles are capable of generating a tremendous amount of data about vehicle and route operations and passenger habits and preferences. Surprisingly, many contracting parties have not yet focused on the data as an independent value proposition. In fact, few companies currently have the data analytics firepower necessary to mine the data for anything other than quality control and operations refinement for the project at hand. Nevertheless, the data potentially has great independent value, just like the user data Facebook or Google generates. Therefore, I always seek access rights for my clients to as much of the AV data as possible and for as many uses as possible.

3. The operational environment is important. A vehicle that can operate on cruise control on an interstate highway without the driver's hands on the wheel is significantly different from a fully autonomous shuttle whose emergency operator is sitting behind a computer screen at a remote location. All parties must clearly understand what a specific project requires and what the project's vehicles are capable of providing. Current pilot projects typically involve the low end of Level 4 automation: vehicles that generally operate autonomously but on limited, well-defined routes and under favorable weather and road conditions. These AVs still have manual controls and a human in-vehicle operator who could take over in an emergency. Nevertheless, some requests for proposals for pilot AV projects include only loosely defined operational environments that suggest a higher level of autonomy than any AV is currently capable of delivering. The contract drafter must tightly define the operational environment expected of the AV.

4. Someone must be responsible for cybersecurity. The average consumer never gives a thought to how, when, and by whom the software in a new mobile phone will be updated and patched. In many ways, an autonomous vehicle is similar to a mobile phone on wheels. However, if someone hacks a cell phone, the consumer may end up hassled; if someone hacks an AV, the consumer may end up dead. Autonomous vehicles must promptly receive the same sorts of security patches and updates consumers take for granted in their phones. An AV contract must assign responsibility for the prompt issuance and installation of software updates and cybersecurity patches to prevent the remote hijacking of the vehicle.

5. AV accidents will rewrite automobile tort and insurance law. Where a vehicle has no human operator, no one, not even the insurance industry—knows precisely how future vehicle liability and insurance issues will evolve. For example, who will be responsible if an AV operates perfectly as designed, but its algorithms prioritize passenger safety over pedestrian safety, causing it to veer onto a crowded sidewalk to avoid a head-on collision? Conversely, what if its passenger dies because the algorithm prioritizes pedestrian over passenger safety? The law has not yet determined the answers to these questions, and insurance policies have not yet adapted to the prospect of AV-dominated roads. From a drafting standpoint, the best current solution is to require as many project parties as possible to carry as much insurance as possible, under the assumption that it will be years before the courts sort out the liability and insurance issues raised by this new technology. **HN**

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Final Binding Resolution Outside the Courthouse

BY CHARLES QUAID

While the COVID-19 Pandemic has further emphasized the point, backlogs in Texas courts were often problematic even before "coronavirus" became a household term. Getting to trial is most often a very long, winding, and expensive road, and the situation will only be worse when the courts finally fully re-open. Far more efficient, economical, and faster options are available to participants and lawyers to reach a final, binding resolution of legal disputes without being hindered by the court's schedule or availability.

Collaborative Law (Texas Family Code Ch. 15). In Texas, the only existing collaborative law statute applies only to family law matters. The collaborative process offers participants a confidential, client-focused, and client-paced process, where the court is needed solely to initiate and finalize the dispute. The focus is on transparency and achieving as much as is possible of all the parties' goals and interests. The result is often much more creative than can be produced in a trial court, where the limitations of remedies allowed restrict the judge's options. Collaborative cases can be resolved more quickly, and the cost usually is far less than litigation. Once a collaborative settlement is reached, reduced to writing and signed, it is binding. Thereafter, the agreement is memorialized in an agreed judgment and submitted to the court for ministerial entry. More detailed information about the collaborative law process can be found at www.collaborativedivorcetexas.com.

Arbitration (Texas Civil Practice and Remedies Code § 154.027). Mutually agreed upon binding arbitration affords a faster, private, streamlined, more flexible, and less formal process. Once agreed upon, any litigation is stayed until an arbitration award is entered. All parties have the right under Tex. Civ. Prac. & Rem. Code § 171.087 and § 171.092 to obtain the entry of a judgment that confirms the award and renders judgment pursuant to the terms of the arbitration award.

Special Judges (Texas Civil Practice and Remedies Code Ch. 151). Parties may hire and pay a "private judge," or special judge, to hear their pending case and make a binding decision. The parties must agree and file a motion requesting the referral to the special judge. In this motion, the parties waive their right to a jury trial and state which issues will be referred to the special judge. The court may refer "any or all of the issues" in a civil case, "whether an issue of fact or law," to a qualified special judge selected by the parties. The motion should identify the trial's time and place, the identity of the special judge who has agreed to hear the case, and the fee that the parties have agreed to pay the special judge. After the court signs an order of referral, the court proceeding is stayed until the special judge has filed a verdict with the court. To prevent delay, the special judge must return a verdict to the referring court within sixty days of the trial's conclusion, unless the referring order provides otherwise. Importantly, the statute preserves the right to appeal under the Texas Rules of Civil and Appellate Procedure.

Comparison of Arbitration and Special Judges. In arbitration, the parties can select one or more agreed-upon individuals to serve as arbitrators. In the case of a special judge, the choices are limited to a former appellate, district, statutory county, or probate judge with four years of judicial experience who meets specific ethical and experiential requirements.

Except as limited to some contempt issues, special judges conduct trials "in the same manner as a court trying an issue without a jury," using Texas procedural and evidentiary rules and applying Texas law principles, including the provision of a qualified court reporter. Arbitration is conducted under the rules and criteria established under the Federal Arbitration Act, 9 U.S.C. Sects. 1–16 (2013) or the Texas General Arbitration Act, TCPRC Ch. 171, or those promulgated by organizations such as the AAA or JAMS. As a participant-driven process, the parties can agree to the implementation of the Texas Rules of Civil Procedure, including for prehearing discovery, as well as strict or modified use of the Texas Rules of Evidence. While a special judge can be required to make findings of fact and conclusions of law, the parties to an arbitration can additionally dictate the form (and cost) of the arbitration award choosing between:

1. a "standard" award that states the decision in a conclusory manner without insight into or details about how arbitrator viewed the evidence and arguments and applied the law;

2. a "reasoned" award in which the tribunal sets out the bases or reasoning for its decision; or

3. an award that includes detailed findings of fact and conclusions of law.

Judicial or appellate review is usually extremely limited in arbitration awards, and they are very challenging to set aside, unless the parties agree that the arbitration award will be subject to the standards of an appeal in the State of Texas as in any action tried before a court. Conversely, chapter 151 allows dissatisfied litigants to appeal the verdict of a special judge through the Texas appellate system, and thus avail themselves of the same review as would be available to parties in any other civil case.

Finally, in arbitration, the parties can agree to set a range of the dollar amount of a potential award. They can agree that there will be no award for any intentional torts or punitive damages and only general damages. They can agree that the arbitration award remains confidential unless the award is not paid within an agreed time. It would then be subject to standard collection procedures available in state courts such as abstract of judgment, writs of execution, levies, or others. **HN**

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Recent Changes to Texas Rules of Civil Procedure

BY TRENT W. REXING AND ANDREW J. UPTON

The Texas Supreme Court adopted amendments to the Texas Rules of Civil Procedure that apply to all cases filed on or after January 1, 2021. The amended Rules broaden the scope and applicability of the expedited action procedures and expand initial disclosure requirements and the timing of discovery to more closely align with the Federal Rules of Civil Procedure. Several of the key amendments are discussed below.

Expedited Actions

In its comments, the Supreme Court notes that the amended expedited actions procedures are intended to carry out the "prompt, efficient, and cost-effective resolution of civil actions" by balancing the need for lowering discovery costs against the complexity (or lack thereof) of lawsuits to which the procedures apply. The expedited actions procedures under Rules 169 and 190.2 currently apply to cases under $100,000. The newly amended expedited action procedures have increased that threshold and will now automatically apply to lawsuits seeking relief of $250,000 or less, excluding interest, statutory or punitive damages and penalties, attorney's fees, and costs. The expedited actions discovery period now begins when initial disclosures are due and ends 180 days afterward. Each party is allowed 20 hours of total oral deposition time (increased from 6) but the trial court can modify this limit to avoid unfairness. The limit of 15 Interrogatories, Requests for Production, and Requests for Admission per litigant remain unchanged.

Expedited actions must be set for a trial date within 90 days after the discovery period and can be continued twice up to a total of 60 days. It remains to be seen if courts will have capacity to set and call to trial the increased case volume—especially in light of the backlog of cases due to COVID-19.

Updated Disclosure Requirements

In a clear attempt to more closely align the Texas Rules of Civil Procedure with the Federal Rules of Civil Procedure, the Supreme Court also adopted amendments to the disclosure requirements for all civil lawsuits.

Rule 194 Requests for Disclosure will now be known as Required Disclosures. Based on Federal Rule 26(a), this amendment requires automatic disclosure of basic discovery. Barring an agreement or court order, all parties must make their Initial Disclosures within 30 days after the first answer is filed or, for those served or joined later, within 30 days of service or joinder. A party is not excused from its disclosure obligations despite its inability to have previously investigated the matter. Similarly, the failure of one party to make its disclosures does not excuse the other of its obligation to provide same.

The content of the Required Disclosures is similar to the current Requests for Disclosure material, except that testifying expert discovery is now addressed separately. While parties currently must disclose a computation of each category of damages, they must now identify documents that support their computation of each category of damages. Litigants are now further required to disclose any documents that may be used to support their claims or defenses. Unless the trial court orders otherwise, at least 30 days before trial, parties must also file identifying information about all witnesses, documents, and exhibits that they *may* present at trial, and must separately identify the witnesses and exhibits that they *expect* to be present or offered.

Unless otherwise agreed to or ordered, a party cannot serve discovery until after initial disclosures are due. While litigants may now benefit from additional frame-of-reference when drafting their discovery requests, this new amendment may be viewed as an unnecessary delay to those who are accustomed to state court litigation and want to get a quick handle on issues that fall outside of the scope of initial disclosures.

Testifying Expert Discovery

The Supreme Court now has concrete deadlines for testifying expert designations: 90 days before discovery ends for parties seeking affirmative relief and 60 days before discovery ends for all other experts. In addition to the present disclosure requirements for testifying experts, Rule 195.5 now includes the disclosure of: (i) the expert's qualifications, including a list of all publications authored in the previous 10 years, (ii) a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition, and (iii) a statement of the compensation to be paid for the expert's study and testimony. The additional testifying expert information will permit counsel to more thoroughly prepare for rebutting expert testimony and depositions. **HN**

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Focus | *Corporate Counsel/M&A*

China, TikTok, and Foreign Investment: CFIUS Review

BY ELSA MANZANARES

Recent news coverage of U.S.-China tensions, including President Trump's order to unwind a Chinese entity's acquisition of TikTok's U.S. operations over threats to the personal data of U.S. citizens, has placed a spotlight on the activities of an obscure US inter-agency group known as the Committee on Foreign Investment in the United States (CFIUS). Chaired by the Treasury Department, CFIUS has authority to review foreign investments in the United States for national security risks. U.S. companies facing an uncertain economic future may increasingly look to capital from sources located abroad. Parties to international acquisitions, especially those involving businesses who collect personal information of U.S. persons, should be aware of recently expanded CFIUS jurisdiction rules. While CFIUS review has historically been a voluntary process, under the most recent rules, certain transactions are subject to mandatory review.

Below are answers to the most common questions about the foreign investment review process conducted by CFIUS.

Who is CFIUS?

CFIUS is an inter-agency committee that includes representatives from the Departments of State, Commerce, Defense, Homeland Security, Energy, and the intelligence community. Due to national security considerations, very little information is revealed to the public about their deliberations.

What Does CFIUS Do?

CFIUS has authority to review the national security implications of foreign investments in US businesses. CFIUS conducts this review based on a detailed written notice filed by the parties. All terms of the proposed transaction must be included. The review process usually takes six to nine months.

CFIUS can impose conditions on parties to a transaction to mitigate threats to national security. For example, it may require the parties to impose restrictions on access to sensitive technology by the foreign buyer. If CFIUS believes there are no conditions that can sufficiently mitigate the risk to national security, CFIUS can recommend to the President that a transaction be blocked or unwound.

At the end of the process, CFIUS will notify the parties that it has concluded all action with respect to the transaction and that there are no unresolved national security considerations. Once the parties receive this safe harbor, CFIUS cannot unwind the transaction at a later date. Parties to transactions who do not submit a voluntary notice can be compelled to appear before CFIUS (before or after closing) and risk having their transaction unwound or blocked anytime in the future.

Which Transactions are Subject to CFIUS Review?

CFIUS has authority to review transactions by or with a foreign person which could result in "control" of any U.S. business. There is no numerical threshold for control. The standard is whether a foreign buyer has the power to determine "important matters" affecting the U.S. business, which is subject to CFIUS discretion. Following increasing concerns about Chinese investment in sensitive sectors of the U.S. economy, in 2018 Congress passed legislation to expand CFIUS jurisdiction to include review of "non-controlling investments" by foreign persons that afford the foreign person certain access, rights or involvement in certain U.S. businesses, such as those that maintain sensitive personal data of U.S. citizens or develop critical technologies. The legislation also codified existing CFIUS practices relating to reviews of sensitive real estate transactions.

What is CFIUS Looking For?

CFIUS must determine whether a proposed transaction poses a national security risk. What are the national security threats posed by the foreign buyer? What are the vulnerabilities posed by the target? In what ways can the target be exploited that might raise national security considerations? Traditionally, U.S. export controls have played a significant role in this assessment.

When is a Mandatory Declaration Required?

A mandatory filing is required in two instances: (1) transactions in which a foreign government has a "substantial interest" in the foreign acquirer and (2) transactions in which an export license would be required to transfer U.S. goods or technology from the U.S. target to the foreign acquirer. These provisions are broadly interpreted so they must be reviewed carefully.

The mandatory filing, known as a declaration, must be filed 30 days prior to the completion date of the transaction. Penalties for failure to file are $250,000, or the value of the transaction, whichever is greater.

What are the CFIUS Implications in the COVID Environment?

Foreign persons seeking investments in sensitive U.S. sectors (development of a COVID-19 vaccine, ventilators, or tracking apps) should expect a thorough CFIUS national security review. Some members of Congress have expressed concerns that China is using the pandemic to target investment in small- and medium-sized US companies in key sectors. Legislation has been introduced to further expand CFIUS jurisdiction.

Does CFIUS Apply to Transactions in Bankruptcy?

Yes. If a foreign investor takes control of a U.S. business or acquires covered real estate in the US through bankruptcy, the transaction may be subject to CFIUS review and a mandatory filing requirement. **HN**

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Focus | *Corporate Counsel/M&A*

Considerations for Drafting Board Minutes

BY MATTHEW FRY
AND CHRISTINE DRYDEN

Memorializing the actions and deliberations of the board of directors through minutes is a vital aspect of corporate governance. Minutes constitute the official record of board meetings, eliminating discrepancies that might exist in each attendee's memory. Importantly, minutes often document that directors fulfilled their fiduciary duties. Minutes may be needed in future years, including in litigation, and are subject to shareholder statutory books and records requests.

Considerable care and attention should be given to preparing minutes of meetings of the board of the directors.

All minutes should include the date, the starting and concluding times, the name of the secretary, a list of directors and others in attendance as well as absent directors, whether the meeting was telephonic or in person and regular or special, a list of the materials provided to the directors, and the matters discussed and voted on. Beyond these basic points, there is considerable flexibility in drafting minutes; below are a few best practices.

Draft minutes promptly. Timely drafting ensures that the meeting is fresh in the minds of the drafter and the directors reviewing the minutes.

Carefully note the facts. Minutes should record what was done, not what was said by each attendee. They should state the facts of what happened only and distinguish between discussions about possible actions and approval of an action. In the case of a voting dissent or abstention, the minutes should identify the count of the vote or identify the dissenters. The minutes should indicate the documents that were presented to the board and note whether they were sent to the directors for advance consideration. If something is unclear, the secretary should ask for clarification during the meeting itself.

Show the board's process. Minutes should reflect a careful deliberative process by describing the scope and length of the discussion, demonstrating the directors' exercise of business judgment and fulfillment of fiduciary duties. The minutes should indicate advisers' input.

Preserve attorney-client privilege. Attorney-client privileged discussions should be noted as having occurred but not described further. Shareholders can request access to meeting minutes, and once privileged information is disclosed to a third party, it is no longer privileged.

Weigh length of minutes. The level of detail given to a particular topic in the minutes will depend on the length and topic of discussion. Descriptions of routine matters can be succinct, and those of more sensitive matters—such as M&A and financings—should be more detailed. Beyond that guiding principle, there are several drafting styles that the secretary should consider. Board minutes can be written in short form, long form, or a combination. Short-form minutes identify the item discussed and say whether it was approved. Short-form minutes are quicker and easier to draft and read; however, they do not give much insight into what occurred. Long-form minutes describe in greater detail the information offered to the board, the recommendations of management and board advisers, and the rationale for directors' decisions. Long-form minutes give more detail and should prove that the directors were well-informed, but they take longer to draft and require the secretary to be more sensitive as to what information to include. In addition, if long-form minutes describe one subject in greater detail than others, it might lead to the inference that the other subjects were ignored. Minutes can also be drafted using a combination of these two methods, using short-form minutes for routine matters and using long-form minutes for other matters.

Describe executive sessions. Detailed minutes may be unnecessary, but the secretary should note that an executive session was held, who participated, the date it occurred, the location, and the duration.

Finalize the minutes. Once finalized, the minutes should be the only record of the board meeting. Accordingly, board meetings should not be recorded. Directors sometimes take notes during board meetings, but these notes are often informal and incomplete and may create unnecessary ambiguity in the event of future litigation. A company should discourage note taking to reduce the potential for inconsistencies, and if directors are allowed to take notes, the secretary should collect the notes and other meeting materials at the end of each meeting. The secretary may then use the notes in preparing the minutes to ensure a complete record of the meeting. The minutes should be formally approved by the directors, typically at the next board meeting. When the minutes are finalized, the secretary should destroy earlier drafts and notes, along with correspondence related to the earlier drafts, in accordance with the company's document retention policy. **HN**

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Column | *Ethics*

Social Media Posts by Former Clients – and Your Response

BY MARY SCOTT

Sometimes clients say bad things about their lawyer. What do you do when they post the bad things on social media? Some lawyers launch an immediate, in-kind counter-attack. DON'T! A knee-jerk reaction can haunt you for a long time. I suggest you take a deep breath and hit the pause button.

What is the downside of doing without thinking? The writing invariably comes off as a stream of consciousness rant. Confidential information often pours out in the lawyer's attempt to mount a defense. Many lawyers believe that, if client information is available in the public domain, it is not confidential. That reasoning might hold true with an NDA in a commercial context, but it is not always true in a lawyer-client relationship.

While the lawyer may feel a momentary elation and sense of power after posting a biting response, one danger of forging ahead is that the client may decide to file a grievance. Sadly, these kinds of grievances are on the rise. Depending on how far the lawyer has gone, there may be little support in the Disciplinary Rules for the lawyer's defense. The lawyer's post could result in a reprimand or worse—all for a momentary lapse.

The general rule, subject to some exceptions, is that a lawyer "shall not knowingly" use a client's confidential information against the client or for the lawyer's advantage without client consent or, under Rule 1.5(b)(3) only, unless the information has become *generally* known. Disciplinary Rule of Professional Conduct 105(b). Importantly, under Rule 1.05(a), "Confidential information" includes both privileged and *unprivileged* client information. Unprivileged client information includes all unprivileged information relating to a client or furnished by the client that is acquired by the lawyer during the course of, or because of, the client representation. Rule 1.05(a). In other words, every piece of information that comes to hand during the client representation should be treated as confidential and not disclosed unless an exception under Rule 1.5 applies.

The State Bar of Texas Professional Ethics Committee has concluded, "*No exception* in Rule 1.05 allows a lawyer to reveal information in a public forum in response to a former client's negative review." *See* Professional Ethics Committee Opinion (Ethics Opinion) 662 at 2 (Aug. 2016). The Ethics Committee also opined that (i) every Rule 1.05 exception applies only when formal actions, proceedings, and charges are involved and (ii) Rule 1.05 cannot reasonably be interpreted to allow a lawyer to publicly disclose a former client's confidential information in an internet post. *Id.*; Rule 1.05(c) and (d).

A counter-attack may actually work against the lawyer. I do not believe a caustic response will have the desired effect—to undermine the client's comments about the lawyer. The internet is replete with anti-lawyer articles. Prospective clients likely will sympathize with the client, not the lawyer. I also find it doubtful that a client—at least a reasonable client—will hire a lawyer who has shown the world that he/she is unable to apply the brakes on a verbal assault or the disclosure of embarrassing or unpleasant information about a client. Engaging in a harsh exchange with a client is likely to further provoke the client into continued tirades, keeping the negative post in the forefront of reviews instead of allowing it to slide into the background in the regular course.

Consider whether the client has a legitimate complaint with you or your services. A phone call to the client may make a difference—perhaps to clear up a misunderstanding or to give the client a chance to vent directly to you so you can deal with the complaint constructively. Perhaps you can convince the client to take down or revise the negative post.

A lawyer may respond to a negative client post without fear of a grievance, but only with a response that is proportional and restrained and free of false, misleading, or unfounded comments. *See* Ethics Opinion 662 at 3; Ethics Opinion 685 at 3 (Jan. 2020). A lawyer may ask other clients to write positive reviews, but the lawyer may not encourage false, misleading or unfounded statements. Ethics Opinion 682 at 3.

If you feel you must respond to a client post, ask a lawyer friend to review your response before posting it—to help ensure a dispassionate and professional response. Be sure you do not disclose confidential information to your friend.

The point is, there are ways to deal with negative client posts without placing yourself at risk. Push pause and consider the alternatives. **HN**

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Focus | Corporate Counsel/M&A

EBITDA, Adjusted EBITDA, and EBITDAC in the Age of COVID-19

BY AMY E. LOTT AND AUSTIN C. CARLSON

The definitions of earnings before interest, taxes, depreciation, and amortization (EBITDA) and adjusted EBITDA have always been important and highly-negotiated terms of credit agreements and M&A transactions. However, with the unprecedented economic impact of the COVID-19 pandemic, these financial measurements take on even greater importance. Now, borrowers seek to maintain financial covenants in their credit agreements, and prospective buyers and sellers struggle to determine whether EBITDA, if determined without an adjustment for the financial impact of COVID-19, will provide an accurate representation of a company's value. One example of this is in M&A transactions, where a multiple of EBITDA is a common valuation technique for determining the purchase price. During COVID-19, certain businesses are flourishing due to increased revenues (e.g., telehealth providers, delivery services, and residential waste haulers). In this situation, buyers may ask to adjust EBITDA downward to remove the impact associated with the COVID-19-related revenue increase, thus driving down the purchase price.

Calculation of EBITDA and Adjusted EBITDA

EBITDA and adjusted EBITDA are calculated as follows:

Gross Operating Revenue
– Operating Costs and Expenses
= **Consolidated Net Income**
+ Interest Expense
+ Income Taxes
+ Depreciation and Amortization
= **EBITDA**
+/- Permitted Adjustments and Addbacks
= **Adjusted EBITDA**

EBITDA and Adjusted EBITDA in Lending Transactions

EBITDA is an important measure in lending transactions, as it is often used by lenders to evaluate whether a borrower has sufficient cash flow to service the loan. The definition of adjusted EBITDA is a highly negotiated term in a loan agreement. Most loan agreements typically allow for addbacks to EBITDA for "extraordinary, non-recurring and unusual costs, expenses, and losses." These terms are usually not defined in credit agreements but instead are interpreted based on GAAP principals and commonly-accepted definitions of these terms. In the era of COVID-19, there are a number of different items that are likely permissible addbacks to EBITDA.

However, there are limitations. Many businesses may find that their biggest COVID-19 loss is related to lost revenue. Unfortunately, lost revenue is very unlikely to be a permissible addback as it does not exist in GAAP, and several GAAP authorities explicitly state that lost revenue is not a permissible addback. Additionally, the SEC recently published guidance, reaffirming that lost revenue should be not presented in financial disclosures and that expenses that are not incremental to and separable from normal business activities are not permissible addbacks in financial disclosures (such as paying for idle employees or facilities).

EBITDAC in Private M&A Transactions

If you have not heard of EBITDAC (EBITDA plus a "c" for coronavirus), you might soon. The emerging acronym was allegedly first used by Schenck Process LLC, a German applied measuring technology company owned by US-based private equity firm Blackstone. Schenk Process reportedly added back 5.4 million euros to its earnings (the amount it claims it would have earned but for the pandemic).

So, what does a coronavirus adjustment include? Unlike EBITDA addbacks, which are based on GAAP and other commonly-accepted guidance, EBITDAC can mean whatever a company wants it to mean or, in the case of M&A transactions, whatever the parties negotiate. For example, while lost revenue is unlikely to be a permitted addback in a credit agreement and is explicitly prohibited for SEC reporting purposes, it may be useful and appropriate when calculating EBITDAC for purposes of determining the purchase price of an M&A target.

The following are a few examples where a coronavirus adjustment to EBITDA might be appropriate in private M&A transactions:

1. **Purchase Price**: A multiple of EBITDA is a common valuation technique for determining the purchase price in M&A transactions. Many businesses have seen dramatic changes to their EBITDA (some positive, some negative) as a result of the pandemic. Using a trailing 12- or 24-month EBITDA without a coronavirus adjustment (such as a lost revenue adjustment as discussed above, or an adjustment to account for temporarily increased revenues) could dramatically overstate or understate the value of a company.
2. **Earnouts**: Earnouts are often based on hitting pre-defined EBITDA targets. A coronavirus adjusted EBITDAC may be more appropriate for targets that are based on a percentage increase over a pre-closing period that includes a period where the business had a significant economic impact from COVID-19.
3. **Executive Compensation Agreements**: Similar to earnouts, executive compensation arrangements often use EBITDA targets as triggering events for compensation. Agreements with targets based on increases from COVID-19 impacted periods may need an adjustment to baseline EBITDA figures to appropriately account for coronavirus economic impacts. **HN**

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Focus | *Corporate Counsel/M&A*

Tips for Running an Effective In-House Legal Department

BY ALYSSA Y. KRAHMER

The General Counsel (GC) of a corporate legal department has an intricate job. Not only is the GC required to maintain command over several areas of law, but the GC also must answer to the CEO and to other C-Suite executives and department heads, and, in some instances, to the shareholders of a large corporate enterprise. The GC manages a budget, oversees numerous legal matters, and directs an internal staff along with outside counsel, sometimes coordinating operations in numerous countries, all in an ever-changing legal and regulatory environment.

Effective in-house legal departments deliver useful, proactive legal counsel in a timely, practical, and cost-friendly manner. The following are some best practices for in-house legal departments, several of which I have seen excellent GCs follow to maximize the performance of their in-house legal departments:

Tip #1-Hire right. Engage attorneys and staff whose qualifications and personalities suit the culture and the needs of the corporate client. Thoughtfully-drafted job descriptions tailored to the precise needs of the company are fundamental. In addition to the Human Resources Department, the GC and all lead attorneys should be involved in the hiring process for each Legal Department candidate using the job description as the basis for conducting the interview.

Tip #2-Thoughtfully train all legal department employees. Train all in-house legal staff on company operations, and on common legal and business issues that arise in the company's industry. Documented training materials that are updated regularly are helpful. Useful training program components may include: 1) educational orientation meetings with corporate department heads on departmental legal concerns and collaboration protocols; 2) comprehensive corporate-structure charts reflecting all corporate entities involved, with their identification numbers, their officers and reporting lines, their jurisdictions of organization, and any subsidiaries; and 3) required reading of critical corporate documents that best summarize key company developments, such as any significant securities filings, material contracts entered by the company, the corporate books, and a legal department playbook, if any.

Tip #3-Teach everyone on staff how to roll out the red carpet. The Legal Department members should be trained to ensure that every interaction with the Legal Department is positive, marked by the hallmarks of respect, good communication skills, a welcoming attitude, and a prompt, well-reasoned response. Dale Carnegie's book, *How to Win Friends and Influence People*, should be required reading for the whole department.

Tip #4-Use a master playbook. Legal departments should consider having a master playbook containing core information on practice methods, including all corporate legal and regulatory policies for dealing with the most common matters, such as responding to subpoenas and discovery, engaging and managing outside counsel, handling whistleblower hotlines, conducting investigations, training agendas, prescreening processes for trademarks, and dealing with corporate governance issues. Also, methods for managing customers and vendors, a data security/privacy primer, compliance-portal protocols, state-by-state surveys, contracts review guidelines, matter-intake procedures, and any research memos on key legal topics should be included. The Legal Department and outside counsel should collaborate in maintaining this playbook and in dealing with privilege issues for best results.

Tip #5-Require memberships in relevant organizations. Each attorney should be required to actively participate in one industry-related organization and in one law-related organization, other than a state bar association, and be required to report to the legal team information learned from attending meetings with these groups. These memberships should be strategic, helpful to the corporate client, and coordinated with the C-suite when appropriate.

Tip #6-Demonstrate tangible, measurable value. Tangible, measurable value can be shown by: 1) tracking case value and win rates; 2) tracking dollars spent on attorneys' fees and comparing these figures to potential savings in what could have been spent by hiring other firms, or by employing costlier legal avenues in resolving legal matters; 3) tracking savings from working on matters in-house versus using outside counsel; and 4) aligning the legal department's goals with the company's goals and updating management on a regular basis with specifics on how the Legal Department is helping to achieve both sets of goals.

Operating a corporate legal department is both an art and a science. The above tips may vary in their usefulness. Overall, it takes a smart legal generalist who has an awareness of the needs of the corporate client coupled with an appreciation for the unique skillsets of the talent in the legal department, and a knack for equipping people with the tools to perform at their best. **HN**

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Earnouts in M&A Transactions

CONTINUED FROM PAGE 1

the end of 2010 had been completed.

Perhaps most important in the Supreme Court's conclusion, though, was the parties' prior dealings and performance. When the parties entered into the purchase agreement in 2007, they allocated accounts receivable between them based on the percent each pending project had been completed at that time. Because of the parties' prior dealings, the Court had no trouble concluding that when they agreed to the 2010 pending-projects clause, the parties "knew exactly how the process would work because they had just done it with then-existing accounts." The Court read the 2010 pending-projects clause to require the parties to replicate the same "simple calculations" they had in 2007.

Fischer suggests that drafters may avoid inadvertently creating an unenforceable agreement to agree in their earnout provision by providing a formula for calculating inexact terms and substituting any promise to "negotiate" with a matter-of-fact statement that the parties *will* agree. **HN**

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Cybersecurity for Law Firms: What Every Practice Needs to Know

BY CALLISTA HINMAN

Cybersecurity incidents are on the rise. And unfortunately, law firms are attractive targets for cybercriminals.

Here's a breakdown of why larger law firms need to invest even more in cybersecurity and what they can do to keep their offices safe.

The primary reason law firms are often the victims of cyberattacks is because they have sensitive (and valuable) information about multiple companies or entities housed in a single database. In essence, this makes firms "one-stop shops" for cybercriminals since they can obtain the desired data on multiple companies via a single source.

Further, were a cybercriminal to attempt to access an individual company's database directly, she would likely encounter more sophisticated security measures than those employed by the law firm. More data + easier access = prime targets.

In the ABA's 2018 Legal Technology Survey Report, the percentage of firms that reported a security breach generally increased as firm size grew. For example, whereas only 14 percent of solo firms claimed to have had an incident, 42 percent of firms with 50-99 employees reported experiencing a breach.

It's no surprise, then, that a third of the participants in the 2018 Aderant Business of Law and Legal Technology Survey (which featured respondents mostly from larger firms) cited cybersecurity as one of their top challenges. In the U.S. in particular, cybersecurity rose from sixth place the previous year to the number one most-cited concern.

Protecting Your Firm in 3 Steps

There are plenty of actions you can take to reduce the likelihood of experiencing a cybersecurity incident. To help get you started, here are three things you can do.

1) Draft an Acceptable Use Policy. An acceptable use policy (AUP) explicitly outlines the rules employees must follow in regards to the firm's network, software, computers, laptops, and mobile devices. It clearly states how employees should and shouldn't use both employer-provided technology and personal mobile devices like smartphones and tablets.

One of the main reasons to implement an AUP is the ability of employees to either deliberately or inadvertently compromise the security of your company. Ipswitch, a provider of IT management software, reported that nearly ¾ of security breaches are due to employee actions (either intentional or accidental).

An AUP ensures employees understand their responsibilities in regards to technology use and helps educate them on identifying possible cybersecurity threats. A comprehensive yet easy-to-read AUP can substantially decrease your firm's risk of cyberattacks and data breaches.

2) Adopt Cloud-Based Technology. Many (if not the majority of) law firms that favor on-premise or hosted solutions to cloud-based platforms will cite security as the reason they refuse to move their data to the cloud. But the truth is, cloud-based solutions are considerably more secure than on-premise or hosted software (and nearly 30 percent of the respondents in Aderant's survey agree.)

An on-site IT team may do periodic network vulnerability checks, but they have dozens of other responsibilities to worry about, too. Providers of cloud legal solutions have employees dedicated exclusively to ensuring their IT infrastructure is as strong and secure as possible.

Additionally, because updates to cloud solutions are deployed automatically, you'll know the platform always has the latest patches and the provider has addressed known vulnerabilities. As an added bonus, cloud-based solutions are also generally less expensive and easier to maintain than hosted or on-premise options.

3) Develop an Incident Response Plan. Ideally, your firm will never experience a data breach or cyberattack. Realistically, you need to be prepared for the day when it happens. That's why an incident response plan is an essential part of any large law firm's cybersecurity program.

The steps your firm takes immediately upon discovery of the issue will determine just how extensive (and expensive) the damage will be. An effective incident response plan includes the following steps:

- Designate an incident response planning team
- Classify the type/extent of the incident
- Complete initial reporting
- Escalate the incident, as appropriate
- Inform affected individuals and organizations
- Investigate and collect evidence
- Mitigate further risks
- Execute recovery measures

Your incident response plan (in addition to any other security policies and procedures) should be regularly evaluated and updated. With existing threats continuously evolving and new threats appearing almost daily, your firm must take a proactive approach to maintaining strong cybersecurity protections.

Don't let your law practice become a cautionary tale for other firms. Take the necessary steps today to ensure your office is safe from external and internal threats. **HN**

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