State Bar of Texas Intellectual Property Law Section

Vol. 14 No. 1

UPDATE FROM THE CHAIR



By Derrick Pizzaro

I think the script for newsletter chair comments around this time of year calls for a witty remark about summer. Unfortunately, "witty" seem to happen only after I hit "send," at least during summer when enjoying some great Texas 'cue from the backyard pit is about my peak level of productivity.

As we all return from vacation to professional life, I'd like to point out just how much our Intellectual Property Section has to offer. Given the growth of many "national" and "local" intellectual property organizations, you might wonder occasionally about the role of the State Bar's Intellectual Property Section. To be sure, membership in those organizations can offer interesting benefits. But our Section has a pretty special role – that of furthering the purposes and objectives of the State Bar of Texas within the field of intellectual property law. The real work of the State Bar is accomplished through its sections, and our Intellectual Property Section certainly plays a significant role in that work through the efforts of its members.

As you know, the mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.

In terms of active attorney members, the State Bar of Texas is the second largest state bar association. It should be no surprise, then, that our Intellectual Property section has over 2,100

members. That gives our Section significant "reach" into various Texas communities and organizations that other intellectual property associations simply do not have.

Over last year, our Section has worked to sharpen its focus on continuing to do what no other organization can do as well, namely, <u>educate</u>, <u>connect</u> and <u>serve</u> lawyers and our local citizens, and do so with a strong Texas focus.

Our Section offers three main educational courses throughout the year: our Advanced Intellectual Property course held in February, the IP track at the State Bar annual meeting held in June, and the Advanced Patent Litigation course held in July.

Our Section also offers many opportunities for you to connect with Texas IP lawyers.

And you can be very proud—as I am—of our Section's outreach to underserved communities in Texas through a pro bono outreach program.

In the next few newsletters, I'll turn my focus to each of those efforts to give you a better sense for what we as a section are doing to serve our members and how you can participate in our Section's accomplishments. So stay tuned!

STATE BAR OF TEXAS 2019 ANNUAL MEETING

The IP Law Section presented a full slate of CLE at the State Bar of Texas' Annual Meeting in Austin on June 13-14, 2019.

The Section also recognized recipients of the various Section awards, including Inventor of the Year, the Trademark Award, the Women and Minority Scholarship Awards, the Tom Arnold Lifetime Achievement Award, and the Chair Award.



Frank Bradley Stamps with Bell Helicopter Textron Inc., received the Section's Inventor of the Year award, which honors a recipient whose inventions have significantly impacted the Texas economy.



Leanne Stendall with TGI Fridays received the Section's Trademark Award, which recognizes lawyers and businesses for their accomplishments on brand-related projects.





Danielle Zapata with the UNT Dallas College of Law and **Vernetra Gavin** with the Thurgood Marshall School of Law received the Section's Women and Minority Scholarship Awards. These awards facilitate and encourage women and minorities to enter the practice of intellectual property law in Texas and to become active members of the Section by

assisting these students with their financial needs.



Tom Morris with the Underwood Law Firm received the Tom Arnold Lifetime Achievement Award, which honors a recipient who has practiced law, or otherwise been involved with intellectual property law, for at least 25 years.



Megan Hoyt with the Texas Regional Office, United States Patent and Trademark Office received the Chair Award. This is an award given by the outgoing IP Law Section chair each year to a worthy member of the Section for efforts supporting the ongoing work of the IP Section. As the Outreach Officer for the Texas Regional USPTO Ms. Hoyt was instrumental to the IP Section including being an original participant in the pro bono workshops and

helping to get the first trademark boot camp off the ground this year.

2019-2020 SECTION OFFICERS & COUNCIL

New officers and council members for the Section were elected at the Annual Meeting. The current officers and council members are as follows:

	Name	Firm	City
Chair	Derrick Pizarro	Pizarro Allen PC	San Antonio
Chair-Elect	Leisa Peschel	Jackson Walker	Houston
Immediate Past Chair	Kirby Drake	Klemchuk	Houston
Vice Chair	Michael Locklar	Adolph Locklar	Houston
Secretary	Joe Cleveland	Brackett & Ellis	Fort Worth
Treasurer	Devika Kornbacher	Vinson & Elkins	Houston
Newsletter Officer	Michael Smith	Siebman, Forrest, Burg & Smith	Marshall
Website Officer	Austin Teng	Thompson & Knight	Dallas

Council			
Term ends 2020	Thomas Kelton	Haynes & Boone	Richardson
	Indranil Chowdhury	USPTO	Houston
	Cathryn Berryman	Winstead	Dallas
Term ends 2021	Craig Stone	Phillips 66	Houston
	Nick Guinn	Gunn Lee & Cave	San Antonio
	Elise Selinger	Patterson + Sheridan	Dallas
Term ends 2022	David Cho	AT&T Services	Dallas
	Michele Connors	Cirrus Logic	Austin
	Kat Li	McKool Smith	Austin

IP SECTION COMMITTEES

Much of the Section's work is performed by committees, which help carry out its mission of educating, connecting and serving the Section's members. This year's committees and chairs are as follows:

Activities	Committees	Committee Chairs/Officers
Educate:	Copyright Patent Trademark Trade Secret Newsletter Advanced IP CLE Advanced Pat. Lit.	Yocel Alonso Roshan Mansinghani Marylauren Ilagan Heath Coffman Michael Smith Mike Locklar Kirby Drake
Connect:	Women in IP Diversity New Members New Lawyers	Amy LaValle Chris Joe Melissa Silverstein Kimberly Thomas
Serve:	Pro Bono Public Relations Tex IP Law TALA IP Legends	Joe Cleveland Erin Choi J Mike Locklar Kirby Drake Herb Hammond

ADVANCED PATENT LITIGATION COURSE – SAN ANTONIO – TexasBarCLE

by Michael C. Smith



The IP Section cosponsored the annual Advanced Patent Litigation course held at the Hyatt Hill Country resort in San Antonio. Herbert J. Hammond from Thompson & Knight's Dallas office served as course director. The course covered both litigation and prosecution topics.

THE LEGISLATURE AMENDS THE TEXAS ANTI-SLAAP STATUTE TO EXEMPT TRADE SECRETS, OTHER CASES



by J. Heath Coffman

The Texas Citizens Participation Act (TCPA)—also known as the Texas anti-SLAPP statute—exists to "encourage and safeguard the constitutional rights of persons to petition, speak freely, and associate freely and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. CIV. PRAC. & REM. CODE § 27.002; see In re Lipsky, 460 S.W.3d 579, 584 (Tex. 2015) (recognizing that the TCPA is designed to thwart "retaliatory lawsuits that seek to intimidate or silence"). To prevent "Strategic Lawsuits Against Public Participation" from achieving their intended purpose of stifling free speech and free association rights, the TCPA permits early dismissal after little or no discovery. Tex. CIV. PRAC. & REM. CODE §§ 27.003(c), 27.006(b); In re Elliott, 504 S.W.3d 455, 467 (Tex. App.—Austin 2016, no pet.) ("[T]he TCPA stays all discovery until the trial court rules on a motion to dismiss filed under the Act.").

Originally, the TCPA was thought to apply only to cases involving *constitutional* rights of free speech, petition, and association. However, the TCPA's plain language contains no such limitation. *See Kawcak v. Antero Res. Corp.*, No. 02-18-00301-CV, 2019 WL 761480, at *6 (Tex. App.—Fort Worth Feb. 21, 2019, pet. denied) ("[T]he definitions of the rights set out in the TCPA are not drafted to mimic the boundaries of constitutional rights established by the First Amendment."). Consequently, the TCPA has been applied to all manner of commercial-litigation claims, including claims under the Texas Uniform Trade Secret (TUTSA). *See, e.g., Elite Auto*

Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. denied).

When reading the TCPA's plain language, it is not hard to see why the TCPA would apply to TUTSA. The TCPA applies to any "legal action" that is "based on, relates to, or is in response to" a movant's rights of free speech, to petition, or of association. TEX. CIV. PRAC. & REM. CODE § 27.005(b). Almost all TUTSA claims are going to be based on, relate to, or in response to a movant's rights of free speech and association under the TCPA's broad definitions for these terms.

Regarding free speech rights, the "exercise of the right of free speech" under the TCPA means a "communication" made in connection with a "matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). A "communication" means "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). Courts have interpreted communications to include disclosing trade secrets. *See Elite Auto Body*, 520 S.W.3d at 205 (holding that disclosure of a competitor's information was a communication under the TCPA). In fact, it is hard to imagine how one could disclose a trade secret without some sort of communication under the TCPA.

Because disclosure of trade secrets necessarily involves a communication, the next issue is whether the communication involves a "matter of public concern." As defined by the TCPA, a "matter of public concern" includes any issue related to:

- (a) health or safety;
- (b) environmental, economic, or community well-being;
- (c) the government;
- (d) a public official or public figure; or
- (e) a good, product, or service in the marketplace.

Id. § 27.001(7). This broad definition means that free-speech rights under the statute can be implicated in almost any private business situation, including trade secrets cases. See Adams v. Starside Custom Builders, LLC, 547 S.W.3d 890, 894 (Tex. 2018) (noting that the definition of a "matter of public concern" covers "[a]lmost every imaginable form of communication, in any medium"); Morgan v. Clements Fluids S. Texas, LTD., -- S.W.3d --, No. 12-18-00055-CV, 2018 WL 5796994, at *3 (Tex. App.—Tyler Nov. 5, 2018, no pet.) (holding that free speech rights were implicated by claims of misappropriation of trade secrets); but see Dyer v. Medoc Health Services, LLC, No. 05-18-00472-CV, --- S.W.3d---, 2019 WL 1090733, at *6 (Tex. App.—Dallas March 8, 2019, pet. denied) (holding that communications discussing "misappropriating, selling, and using appellees' proprietary software and other confidential information" were not "tangentially related to a matter of public concern simply because the proprietary and confidential information that was to be misappropriated belonged to a company in the healthcare industry or because the alleged tortfeasors hoped to profit from their conduct").

Many TCPA/TUTSA cases also invoke the TCPA's right of association. Under the TCPA, the "[e]xercise of the right of association" means "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2). The term "common interests" is understood by its plain meaning. See ExxonMobile Pipeline Co. v. Coleman, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam) (applying longstanding rules of statutory construction when interpreting provisions of the TCPA). Communications between and among members of an organization or business relate to a "common purpose" if they pertain to the purpose of the business or organization. Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03–13–00105–CV, 2014 WL 411672, at *12 (Tex. App.—Austin Jan. 31, 2014, pet. denied); see also Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 296 (Tex. App.—Austin 2018, pet. filed) (holding that conspirators' alleged "course of action to use . . . Confidential Information to steal [competitor's] business" met the definition of "common interests" under the TCPA); Elite Auto Body, 520 S.W.3d at 205 (holding that alleged disclosure of trade secrets between former employees and competitor was a communication about a "common interest"); but see Kawcak v. Antero Resources Corp., No. 02-18-00301-CV, 2019 WL 761480, at *8 (Tex. App.—Fort Worth Feb. 21, 2019, pet. denied) (holding that "common" interests under the TCPA must be interests "shared by the public or at least a group").

This expansive reading of the TCPA led to an explosion of cases where litigants invoked the statute as a defense in trade secrets and other cases. During the last legislative session, though, numerous bills were filed to amend the TCPA "to curtail abuses and ensure the law is used as intended to protect Texans in the exercise of their constitutionally protected speech, petition, and association rights." Senate Research Center, Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019). Supporters of these bills also noted that the TCPA's overly broad wording, combined with its right to interlocutory appeal, resulted in an increased workload for Texas appellate courts. *Id.* The bills were supported by a variety of groups, including Texans for Lawsuit Reform and the Texas Trial Lawyers Association. *Id.*

On June 2, 2019, Governor Abbott signed HB 2730, which amends the TCPA to realign it with its original purpose to protect *constitutional* rights of free speech and association. Tex. H.B. 2730, 86th Leg., R.S. (2019). Among other things, HB 2730 limited the TCPA's definition of "matter of public concern"—which is the key term in the definition of the exercise of the right of free speech—to a statement or activity regarding:

- (a) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
- (b) a matter of political, social, or other interest to the community; or
- (c) a subject of concern to the public.

Additionally, HB 2730 limited the definition of the "exercise of the right of association," defining it as "to join together to collectively express, promote, pursue, or defend common

interests relating to a governmental proceeding or a matter of public concern." (emphasis added)

Both changes ensure that the TCPA does not apply in trade secrets and other commercial litigation cases. Nevertheless, the Legislature also added several cause of action-specific exemptions to the TCPA. For instance, HB 2730 specifically exempts from the TCPA a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

- (A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or
- (B) seeks to enforce a non-disparagement agreement or a covenant not to compete.

HB 2730 also contains numerous other exemptions for the Texas Deceptive Trade Practices Act, eviction suits, lawyer disciplinary proceedings, and common law fraud, among others.

HB 2730's changes should put an end to the explosion of TCPA motions to dismiss filed in response to trade secrets and other commercial litigation claims. The Intellectual Property Section's Trade Secrets Committee, along with the Business Law Section, formed a working group to monitor these changes and make recommendations while these bills progressed through the Legislature. Members of the working group included Irene Kosturakis, Kelly Hine, Decker Cammack, Joe Cleveland, John Sokatch, Brent Benoit, Leiza Dolghih, Brent Shellhourse, James Beebe, Bob Garrey, and Alicia Castro.

PRO BONO IP WORKSHOP - NACOGDOCHES

by Joe Cleveland



On Thursday, September 12, 2019, the United States Patent and Trademark Office and the Intellectual Property Section of the State Bar of Texas will be hosting a pro bono intellectual property workshop for East Texas inventors and entrepreneurs at the Cole STEM Building located on the campus of Stephen F. Austin State University in Nacogdoches, Texas.

The pro bono program is designed to provide the public with basic information on securing patent and trademark rights, and includes small group meetings to focus on specific topics and short one-on-one consultations with intellectual property lawyers.

The IP Section and the USPTO have successfully presented this program to underserved communities across Texas in Corpus Christi, the Rio Grande Valley, Fort Worth, El Paso and Waco. Nacogdoches will continue the pro bono tour into East Texas. A pro bono tour to Lubbock is scheduled for spring 2020. Without exception, every lawyer who has participated in the program has greatly enjoyed the opportunity to give back to our community in such a unique and significant way.

Here are a sampling of the comments the IP Section received from the last tour:

"We are excited to see our innovation economy grow and your work this past week will contribute significantly!" Dr. Jeremy Vickers, Associate Vice President, Baylor University

"Your service to the bar and to the public is greatly appreciated!" Leah Jackson Teague, Associate Dean, Baylor Law

"Thank you for bringing so much value to our community." Greg W. Leman, Executive Director, Start Up Waco

Attendance at this program is estimated to be around 50-60 people. Joe Cleveland, chair of the pro bono tour, is looking for 12-15 good IP lawyers who would be willing to participate in the Nacogdoches program on Thursday, September 12, 2019 from 8AM to 4PM.

If you (other lawyers) may be interested, please contact Joe Cleveland as soon as possible, and he will provide further details. He can be reached at 817-339-2454 or jcleveland@belaw.com.

IP LEGENDS UPDATE



By Herb Hammond

Last year, the Section initiated the "Texas IP Legends" project, an initiative designed to capture the stories of lawyers who have distinguished themselves as "legends" in our field. We plan to interview these legends about their backgrounds, careers, their contributions to the law and the

profession, and their advice on the practice of law. These interviews will be available to members of the bar through the Section website.

The first of these interviews, filmed by professional videographers, took place last March. Former chair Pete Peterson interviewed Tom Morris, the lawyer who tried the *Graham v. John Deer Co.* cases in the Fifth and Eighth Circuits and who argued and won those cases in the Supreme Court in 1966. (*Graham* is the seminal case on the issue of patent obviousness). In that interview, Morris talks about his upbringing and career, *Graham* and other patent cases he tried, and he reflects on the history of the IP bar in Texas and the changes he's seen in the profession over the years. Morris, who was born in Texas, spent his whole career here and still practices, will celebrate his 100th birthday on November 12th.

Following the interview, Section Chair Kirby Drake, Vice Chair Derrick Pizarro, and USPTO PTAB Judge Georgianna Braden presented Morris with the Tom Arnold Lifetime Achievement Award before a gathering of Morris's partners and associates at the Underwood law firm in Amarillo. You can see excerpts from the video interview and the award presentation at https://texasbariplaw.org/committees/member-services/texas-ip-legends/. We expect to have a link to the full interview, which exceeds an hour in length, on the Section website in the next few weeks.

The IP Legends Committee plans to interview another Legend this year. If you have an interest in participating in the project, contact Herb Hammond at https://exammond@tklaw.com.

TEXAS IP CALENDAR

One-day "IP & Licensing Basics" course – September 13 – Houston



On Friday, September 13, at the University of Houston Law Center, the Houston chapter of the Licensing Executives Society USA/Canada will again present a one-day, highly-interactive CLE program, "IP & LIcensing Basics," which has been developed over a number of years by LES in the U.S. and other countries. The program is again co-sponsored by the Intellectual Property and Information Law Institute at UH Law Center; this year the Houston Bar Association is a new co-sponsor. CLE credit of 6.5 hours is expected, as in past years. The program always gets very-high marks from attenders, in no small part because of its interactive nature (including a license-negotiation game). It's especially well-suited for non-specialists, including for example admins,

paralegals, and other non-lawyers, who would like to get a basic overview of intellectual property law and how IP licensing works. It's a bargain, too: The maximum late-registration cost is \$295, including breakfast, lunch, and "afterparty." <u>REGISTER HERE</u>.

USPTO Trending Issues in Trade Secrets: 2019 – September 19 – Alexandria, VA

The USPTO is presenting a free seminar on trending issues in trade secrets. If you have previously registered for the original date, June 19, 2019, you will need to re-register for the new date, September 19, 2019. There is no charge to attend the program, but registration is on a first-come, first-served basis. Please <u>register in advance</u> as there will be a limited ability to accommodate walk-in registrations. This program will be available for viewing remotely via LiveStream.

23rd Annual Eastern District of Texas Bench Bar Conference – September 23-25 – Plano



The 23rd Annual Eastern District of Texas Bench Bar Conference is being held at the Dallas/Plano Marriott at Legacy Town Center -7121 Bishop Road, Plano, TX. The Bench Bar includes the Second Annual Texas Dinner in Honor of the Judiciary & 7th Amendment, which will be held on September 24, 2019 at AT&T Cowboy Stadium. As you can tell, we had a great time last year!

Contact Andrea@siebman.com with any questions.

35th Annual Fall Institute on Intellectual Property – September 26–28, 2019 — Galveston



HIPLA invites members, non-members, and law students to register for the 35th Annual Fall Institute on Intellectual Property, to be held September 26–28 at Moody Gardens Hotel in Galveston, Texas. At the largest intellectual property conference in the Houston area, attendees will receive 14.25 hours of Texas MCLE credit, including 2.5 ethics hours, across three days of programming. This year's Fall Institute will feature Federal Circuit Judge Jimmie Reyna, Fifth Circuit Judge James Graves, U.S. District Judge Lee Yeakel, U.S. Magistrate Judge Keith Giblin, and many more outstanding speakers and panels, as well as fantastic networking opportunities. Click here for more details and registration.

Federal Circuit Bar Association - Mock Inter Partes Review Argument - September 30



The Federal Circuit Bar Association will be presenting a mock inter partes review argument on September 30 from 1-5 p.m. at the Fairmont Hotel, 1717 N. Akard Street, Dallas.

ABA IP WEST 2019 – Oct. 1-3, 2019 – Hyatt Regency Hill Country Resort – San Antonio



The ABA Section of Intellectual Property law will host the third annual IP WEST, a CLE Institute focusing on new developments, emerging issues and best practices in IP Law. IP WEST brings together prominent IP industry leaders including in-house counsel, USPTO officials, district court Judges, academic professors, and private practitioners from the US and around the world to gain knowledge on the latest

industry information through dynamic CLE programming and interactive networking events.

The Federal Circuit Comes to Dallas – October 1-2 – Dallas



The Court of Appeals for the Federal Circuit, located in Washington, D.C., will hear cases in Dallas this fall. On October 1st, the Court will hear cases in the Earle Cabell Federal Building and at SMU Law School in Dallas. The next day, the Federal Circuit will hear cases at Texas A&M University School of Law in Fort Worth.

Dallas Bar Association IP Section 25th Anniversary Celebration – October 1 – Dallas



The Dallas Bar Association's IP Section turns 25 this year and is hosting a celebration on the evening of October 1st at the Belo Mansion for all of those involved in IP in and around North Texas. They expect many prominent members of our IP community to attend, including judges, USPTO officials, entrepreneurs, business leaders, university and law school deans, and legal professionals. In addition, the IP Section will be hosting the visiting Federal Circuit judges at the 25th Anniversary celebration.

The celebration is also an opportunity to highlight the IP Section's new scholarship. Starting this year, the IP Section will be awarding scholarships to students from each of the three North Texas law schools: Southern Methodist University Dedman School of Law, Texas A&M University School of Law, and University of North Texas Dallas College of Law. The goal is to support students with a desire to practice IP law in North Texas.

A number of firms and companies are underwriting the events. All proceeds exceeding the cost of the anniversary event will go toward the scholarship fund, and all underwriters will receive recognition for funding scholarships. Individual tickets will be available for sale at \$125. Discounted tickets will be available to those that wish to attend but may have trouble with the ticket price, such as law students.

For information about the event or to become a sponsor/underwriter, please contact Shannon Bates (<u>shannon.bates@harperbates.com</u>) or Justin Cohen (<u>Justin.Cohen@tklaw.com</u>).

Nevada IP Law Section Annual Intellectual Property Law Conference – October 18 – Las Vegas, NV



The Nevada State Bar's IP law section will be holding its annual IP law conference in the Thomas & Mack Moot Courtroom of the Boyd School of Law in Las Vegas, Nevada on October 28. Register at: members.NVBar.org

National Asian Pacific American Bar Association Annual Convention – November 7-10 – Austin



The National Asian Pacific American Bar Association (NAPABA) will be holding its annual convention on **November 7-10, 2019, at the JW Marriott in Austin, TX**. For registration and more information, please visit the <u>NAPABA</u> website.

57th Annual Conference on Intellectual Property Law – November 11-12, 2019 – Plano



The Center for American and International Law will be holding its 57th Annual Conference on Intellectual Property Law on November 11-12 at its headquarters located at 5201 Democracy Drive, Plano, TX.

CALL FOR SUBMISSIONS

The TIPSHEET welcomes the submission of articles for potential publication in upcoming issues, as well as any information regarding IP-related meetings and CLE events. If you are interested in submitting an article to be considered for publication or adding an event to the calendar, please email **michaelsmith@siebman.com**.

Article Submission Guidelines

STYLE: Journalistic, such as a magazine article, in contrast to scholarly, such as a law review article. We want articles that are current, interesting, enjoyable to read, and based on your opinion or analysis.

LENGTH: We accept a wide range of articles, with most falling into the 500-2500 word range.

FOOTNOTES AND ENDNOTES: Please use internal citations.

PERSONAL INFO: Please provide a one-paragraph bio and a photograph, or approval to use a photo from your company or firm website.

If you have any questions, please email michaelsmith@siebman.com.

NOTE FROM NEWSLETTER OFFICER



By Michael C. Smith

I hope you have enjoyed this, my first issue of the IP Section's quarterly newsletter. If you're interested in contributing an article, news or otherwise working with me on the newsletter, please email at michaelsmith@siebman.com. I'd enjoy working with you!

Michael Smith