



January 2017

Vol. 34, No. 1

THE DICTA

The Docket

- January 11 (Wednesday)
DAYL CLE: *How to Best Use Your Legal Team*
Noon, Belo Mansion
- January 12 (Thursday)
DAYL Pro Bono Partners Committee Meeting
Noon, Belo Mansion
- January 17 (Tuesday)
DAYL Elder Law Committee Meeting
Noon, Belo Mansion
- January 17 (Tuesday)
DAYL Charity Ball Committee Meeting
6:30 p.m., Duffee + Eitzen Law Firm
- January 17 (Tuesday)
DAYL Politically Aware Committee Meeting
6:30 p.m., KoonsFuller Law Firm
- January 18 (Wednesday)
Trial Skills Boot Camp Committee Meeting
Noon, George Allen Sr. Courthouse
- January 18 (Wednesday)
DAYL Book Club Special Interest Group Meeting
7:00 p.m.
- January 19 (Thursday)
DAYL Animal Welfare Committee Meeting
Noon, Belo Mansion
- January 20 (Friday)
DAYL Moms in Law Interest Group Meeting
Noon, Ziziki's (Preston Hollow)
- January 24 (Tuesday)
DAYL Lawyers Promoting Diversity Committee Meeting
Noon, Belo Mansion
- January 25 (Wednesday)
DAYL CLE Program: *A Call to Action: Responsible Citizen's School*
Noon, Belo Mansion
- January 25 (Wednesday)
DAYL Equal Access to Justice Committee Meeting
Noon, Belo Mansion
- January 26 (Thursday)
DAYL CLE Committee Meeting
Noon, Belo Mansion
- January 26 (Thursday)
DAYL Social
Stirr, 2803 Main Street
- January 27 (Friday)
DAYL Lawyers Against Domestic Violence Committee Meeting
Noon, Belo Mansion
- January 27 (Friday)
DAYL Solo & Small Firm Committee Meeting
Noon, Belo Mansion

Stirr Up Some Fun at the Social

The January Social will be held at **Stirr** on **Thursday, January 26, 2017** from 6:00 – 8:00 p.m. Stirr is located at 2803 Main Street in Dallas.

The DAYL Socials are a great way to network, reconnect with old friends, and connect with new ones. They are typically held on the last Thursday of each month and the cost is only \$3.00 for DAYL members and \$5.00 for non-members.

A special thank you goes to this month's Social sponsor, **HC Legal**

Search. HC Legal Search is a legal recruiting firm that helps customers find a solution to workflow demands while delivering personal attention to each customer and candidate. HCLS assists many of the top law firms to recruit top talent for their hiring needs whether it be for legal secretaries, lateral associates, or partners. Additionally, they work with candidates to help them strategize and secure a new position that fits their goals.

We hope you'll help us kick-off the new year at the DAYL Social on January 26th!

DAYL CLE: How to Best Use Your Legal Team: Managing Paralegals and Other Associates

By now you've probably realized most attorneys are responsible for managing paralegals or support staff in some way. And you've probably realized it's not always easy. Regardless of whether you are a transactional lawyer, a litigator, or an in-house lawyer, being able to effectively manage people is crucial to your success.

On **Wednesday, January 11th** at noon, join the DAYL for a CLE discussion on the ethical and practical considerations of managing paralegals and other attorneys.

The CLE will be presented by **Sarah**

Rogers of Thompson, Coe, Cousins & Irons, LLP, **Bill Richmond** of Platt Cheema Richmond PLLC, and **Timothy Newman** of Haynes and Boone, LLP, and will be moderated by **Alex More** of Carrington, Coleman, Sloman & Blumenthal.

This one-hour CLE, which will include .5 hours of ethics credit, will take place the Belo Mansion and is free for DAYL members. Non-members may attend for \$10. Parking is available at the Belo Mansion, and lunch is available for purchase.

RSVP to **Cherie Harris** (cherieh@dayl.com).

Resolve to get involved in DAYL.
Find out how at
<http://www.dayl.com/get-involved/committees/>

THE DICTA

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Copy Deadline for February Issue:

January 15, 2017

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From the President

Why DAYL?

At the December monthly social, a new DAYL member asked me why I decided to become DAYL President. I told her that at that precise moment I did not remember why I made the decision to run for DAYL Secretary some five-plus years ago. In reality, I did not think she would believe the real reason I made that decision. The truth is, I owe DAYL. DAYL provided a career, a network, friends, and resources for this small-town Michigan kid.

Attending law school in Michigan during the mid-2000s did not provide new lawyers many opportunities. The economy was in the tank and jobs were scarce in the lead up to Detroit's bankruptcy filing. Since I proposed to my now wife in my 2L year and would have someone to support other than myself, I knew I needed a city that would allow me to develop as a lawyer.

Ultimately, we decided that Dallas provided a glimmer of hope. It was a big city in the great state of Texas and we were optimistic I could find a job. After graduating law school, my bride-to-be entrusted me with coming to Dallas to select an apartment sight unseen. I loaded my forest green Toyota Rav4 with all my earthly possessions (some clothes, a TV, a card table that would be my makeshift desk for bar prep, and an inflatable mattress that didn't hold air) and made the 16-hour drive.

I could fill every page of the DICTA writing about that summer, studying for the bar and all the stress that comes with waiting for results. Instead, I will fast forward to the time after I passed the bar and started my first job. Without any



Paul W. Simon

Dallas connections and with an extremely small alumni base in the area (i.e., two classmates at the time living and working in Dallas), I knew I had to get connected to the legal community and start building my network. Fortunately, the small law firm at which I started introduced me to DAYL and encouraged my involvement.

My very first co-chair assignment was the Ties That Bind committee, which I took over from my now law partner, **Dustin Paschal** of Simon | Paschal PLLC. While the committee was only a few lawyers, I loved the impact the committee had. We went to various high schools and spoke to students about professionalism and the importance of making a good first impression. We then demonstrated how to tie a necktie and provided each student with his or her own necktie. I was hooked on this "lawyers giving back to the community" idea!

In 2009, I was fortunate to be accepted into the DAYL Leadership Class. If you have not applied to the Leadership Class, it is an absolute must. I instantly was introduced to 40 lawyers from so many different backgrounds. We had lawyers from the big law firms to solo practitioners and everyone in between. I also immediately gained referral sources for almost every type of law imaginable. While everyone wants people to refer business their way, it is invaluable that prospective clients see you as a go-to resource because they know you know the right person for any job you cannot handle.

(continued to page 3)

Paul W. Simon is a Founding Partner at Simon Paschal PLLC practicing in Labor & Employment Law.

**DALLAS ASSOCIATION OF YOUNG LAWYERS
2017 SUMMER JUDICIAL INTERN PROGRAM
APPLICATION DEADLINE FEBRUARY 3, 2017**

The Dallas Association of Young Lawyers invites first- and second- year law students to apply for this summer's Judicial Intern Program. Judges from Dallas-area civil, criminal, probate, family, and appellate courts will be participating. Applicants must have completed first-year civil procedure and legal writing courses before June 2017. Courses in evidence and criminal or appellate procedure are helpful, but not required.

Internship selections will be made by the participating judges in February and March. Applicants must be willing to commit to a six-week, full-time voluntary internship during the summer months and are expected to honor any commitments made to the judges. The internship is unpaid, and individual schedules will be determined by the judges. A \$500 stipend may be available to law students to demonstrate a financial need.

For more information about the program or the stipend, visit <http://www.dayl.com/judicial-intern>.

A Call to Action: Responsible Citizen's School

Do you know basic police procedures for deescalating potentially violent situations? How about the community outreach programs the Dallas Police Department is currently offering, the goals of those programs, and how they work? Don't worry you're not the only one without answers to these basic questions and that is precisely why our Call to Action series continues on **Wednesday, January 25, 2017** at 12:00 p.m. with an educational-style meeting meant to arm responsible

citizens with basic knowledge about these topics and more.

The speakers include **Dr. Roy Alston**, formerly a LT. with Dallas Police Department ("DPD") and currently an instructor the DPD Academy and addresses de-escalation issues and methods and **Brian Nolf**, a Senior Corporal with DPD who works as part of the Neighborhood Policing Team of the Community Engagement Unit in the Northwest Patrol Division. A Dallas City Attorney who advises the DPD

and Dallas Citizen's Review Board is also expected to participate. Join us to gain the knowledge responsible citizens need to engage in the crucial work of ensuring our system works fairly for everyone.

This program is pending 1.00 hour CLE approval by the State Bar of Texas. There is no charge for DAYL members to attend; the non-member fee is \$10. Lunch is available for purchase at the Belo Mansion. RSVP to **Cherie Harris** (cherieh@dayl.com).

Why DAYL?

During this time, I also had the pleasure of playing on two DAYL basketball teams. My Monday night team was "retired" DAYL members, including **Jim and Jay Hartnett** of The Hartnett Firm and **Peter Krause** of Waters Krause Paul. I later came to learn how incredibly "big time" these guys are as lawyers – not only in Dallas, but nationally as well. On Wednesday nights, I had the opportunity to be the dumbest player on my team when the guys at **Vinson & Elkins** asked me to join them. While I don't want to brag too much, V&E won a lot of hardware in that league for several years. I firmly believe my involvement with V&E and the DAYL Leadership Class pro-

vided me the necessary connections and networks to garner enough votes to be elected to the DAYL Board of Directors.

Throughout my 8-plus years in DAYL, I have had the opportunity to learn from some incredible leaders. As I assume the role of President, I specifically want to acknowledge those that led this organization so admirably during my time and those who I hope to make proud: **Karen McCloud, Dena DeNooyer Stroh, Jennifer Edgeworth, Penny Blackwell, Chip Brooker, Sarah Rogers, Mey Ly, Jonathan Childers, and Stephanie Gause**. I am honored to call these Past-Presidents my friends and mentors.

(continued from page 2)

My goal as DAYL president is to leave this organization in a little better place than it was when I was entrusted to lead it. I owe that to DAYL. In reality, DAYL is all of you – the more than 3,000 members. I am here to serve you and help you build your network, gain lifelong friends, and provide you the resources to make an impact on our community and the bar. Here's to DAYL and 2017!

DAYL ONE TO WATCH

Jordan Wynn has been selected as the January 2017 DAYL One to Watch! To find out why, visit www.dayl.com.

In Case You Missed It... How to Pick a Jury, Part 1

On December 9, 2016, the DAYL presented *How to Pick a Jury, Part 1: Building a Rapport with the Jury* with phenomenal panelists **Lisa Blue, Victor Vital, and Michael K. Hurst**. Unsurprisingly, the panel spoke to a packed room. For those of you who were unable to attend, below are some golden nuggets of wisdom the panel gifted us with:

1. Any case can be focus grouped. Don't let cost be a prohibitive factor. Sure, not every case warrants a full-blown case study, and not every client will allow it, but anyone can conduct a focus group on any budget. Don't have a budget at all? Gather up support staff in your office, family members, and friends, explain your case to them and get their feedback.

2. Use questionnaires to get the boring questions out of the way. The best way to lose a jury is to bore them with background questions. So, if you're being allowed a questionnaire, use it to ask those standard foundational questions.

Pro tip: ask the potential jurors how many

bumper stickers the individual has on their car. Opinionated people tend to have more bumper stickers and knowing which people are inclined to be opinionated can be helpful during voir dire.

3. People like people like themselves. It's that simple. The trick is helping each potential juror find themselves in yourself or your client. For example, people tend to inherently trust or like people with the same name as themselves because people like people like themselves. Use your questionnaires to find ways to connect with your potential jurors.

4. Don't have the funds for a jury consultant? Go to the psychology department of a local college and get some psychology students. At the very least, have another person with you during voir dire. When you are conducting voir dire, you need to be paying attention to the jurors, listening to their answers, and formulating your next questions. Have someone there with you that can take notes for you on which jurors would be good for your case and which you need to strike.

5. Public speaking is the most widely-

held fear – more people are afraid of public speaking than are afraid of snakes or spiders. To get more information out of your undoubtedly nervous venire panel, use scaled questions – “on a scale of 1 to 10, how likely are you to _____?”

6. It is important that your client is likeable and relatable to the jury. If you're representing a corporation, this can get tricky. Find a person within the company that you can use to personify that company. Putting a face on the company will go a long way in humanizing your client to the jury.

7. People will give you more information if they feel comfortable talking to you. Expressing vulnerability is perhaps the most important thing you can do to be relatable in the jury's eyes. Start your voir dire by telling them about yourself – tell them something real and sincere and vulnerable.

The DAYL CLE Committee will be presenting the second and third installments of this series in 2017: How to Pick a Jury, Part 2: Educating the Potential Jurors and How to Pick a Jury, Part 3: Deselecting the Jury.

DAYL Elder Law Committee Hosts Another Amazing CLE

by Matthew Rittmayer

On November 10, 2016, the DAYL Elder Law Committee put on another terrific CLE for attorneys who practice in the Probate Courts. The CLE focused on guardianship proceedings with an emphasis on the role of the attorney ad litem. Special thanks to **The Honorable Brenda Hull-Thompson** for allowing the use of her courtroom and for presiding over the event, sharing her wisdom and insight, and for being an incredible supporter of the DAYL and the Committee. Additional thanks to the presenters: **Barkley Miller, David Mead, LaNasha Houze, and Ellen Williamson** for preparing and presenting such a thoughtful CLE to a packed courtroom of attendees. The attendees found the CLE very helpful and infor-

mative, and are appreciative of everyone's efforts in putting on the CLE. Finally, the DAYL Elder Law Committee would like to thank the event's sponsor, Amegy Bank, for providing food and refreshments.

If you are interested in learning more

about elder law or joining the Elder Law Committee, please email **Cherie Harris** (cherieh@dayl.com) to join the distribution list, like the Facebook page, or come to a meeting! The committee meets the third Tuesday of each month at noon at the Belo Mansion.



DAYL Calls for Nominations for Prestigious Awards

DAYL is accepting nominations for its Outstanding Young Lawyer Award, the Liberty Bell Award, and the Outstanding Mentor Award. The recipients will be presented with their awards at the DBA Annual Law Day Luncheon. Each winner will then be submitted to the Texas Young Lawyers Association for statewide consideration.

Outstanding Young Lawyer Award

To be eligible for selection as the DAYL's Outstanding Young Lawyer, nominees must have been 36 years of age or younger as of June 1, 2016. In addition, nominees must be licensed to practice law in Texas and be members in good standing of the State Bar. The Awards Committee will consider all outstanding qualities of a nominee, including (1) exemplified professional proficiency; (2) service to the profession; and (3) service to the community.

Liberty Bell Award

The Liberty Bell Award recognizes a non-lawyer of any age who has made a selfless contribution to the community by strengthening the effectiveness of the American system of justice. The categories of community service to be considered include activities that (1) promote a better understanding of our form of government, especially the Bill of Rights; (2) encourage greater respect for the law and the courts; (3) stimulate a deeper sense of individual responsibility; (4) contribute to the effective functioning of our institutes of government; and (5) instill a better understanding and appreciation of the rule of law. Non-lawyers of any age are eligible to receive this award.

Outstanding Mentor Award

The DAYL Outstanding Mentor Award is awarded to a lawyer in Dallas who has consistently demonstrated a commitment to mentoring young lawyers in his

or her legal community. Nominees must be licensed to practice law in Texas, have paid membership dues prescribed by the Supreme Court of Texas, and be members in good standing of the State Bar. The DAYL Awards Committee will consider all outstanding qualities of a nominee, including (1) service as a role model to young lawyers in the legal community; (2) fostering the development of young lawyers; and (3) significant contributions to the profession and/or the community.

Nominations for each award may be made by individuals, groups of individuals, or organizations. If you would like to nominate someone for an award or if you have any questions, please contact **Jennifer Ryback** (jryback@mcslaw.com). A nomination form for each award is located on the DAYL website at <http://dayl.com/awards/>. The deadline for submitting nominations is **March 13, 2017**.

Sign Up Your Basketball Team in January

DAYL Basketball season is nearly underway with games set to begin in late January / early February. The games are set to be held on Mondays and Tuesday nights at the downtown YMCA, located at 601 N. Akard Street with the registration fee being \$625. The location and cost per team details are subject to change. For information about DAYL basketball, please email Sean Brown (sean.brown@nortonrosefulbright.com).

The DAYL Law Student Assistance Committee is seeking volunteers to conduct mock interviews with law students at SMU Dedman School of Law. By serving as a mock interviewer, you will be helping law students prepare for their upcoming interviews for summer internships and clerkships. The interviews will be held as follows:

- Wednesday, February 8, 2017 - 5:30 p.m. – 8:00 p.m.
- Thursday, February 9, 2017 - 5:30 p.m. – 8:00 p.m.

To sign up to be an interviewer, please email Cherie Harris (cherieh@dayl.com).

Should you have any questions or need additional information regarding the mock interview program, please contact Ashley Withers (awithers@jw.com) or Joseph Hummel (joseph.hummel@solidcounsel.com).

DAYL Foundation Hosts Annual Luncheon

The DAYL Foundation held its annual luncheon at the Belo Mansion on December 15, 2016. It was an opportunity to celebrate the great work of the Foundation over the past year and also to recognize a current Fellow who has made outstanding contributions to the community and three law students who have excelled in community service.

The DAYL Foundation is a 501c3 organization that provides grants to non-

profit organizations, many of which have a legal tie. The Foundation is funded primarily through its Fellows, through voluntary contributions of lawyers in the community, and for the first time in recent history, through a fund raiser that solely benefited the DAYL Foundation.

At the Luncheon, **Chief Judge Barbara M.G. Lynn** gave an inspirational keynote speech and the **Honorable Royal Furgeson**, founding Dean of UNT Dallas College of Law, was presented with the Foundation's annual

Award of Excellence. In addition, law students **Ashley Yen** (SMU Dedman School of Law), **Terrod Hall** (UNT Dallas College of Law), and **Elizabeth Anderson** (Texas A&M University School of Law) were each recognized for their outstanding community service and were given a \$2,000 scholarship to be awarded to their spring law school tuition.

For more information about the DAYL Foundation, please email **Cherie Harris** (cherieh@dayl.com) or visit <http://www.daylfoundation.org>.



Classifying Workers in an Age of Internet Platform Companies—Is the Gig Up on Outdated Labor Laws?

by Janet Landry Smith



While technological advancements have not *changed* the way we buy goods and services—customers have contracted directly with workers for specific jobs for centuries - the proliferation of internet-based market platforms has drawn a great deal of attention to the classification of these “gig economy” workers. Various IT innovations in mobile network efficiency, cloud computing, and smartphone application design have changed the growth trajectory of this segment of the workforce. Yet labor laws have remained largely untouched, leaving individuals and companies with the uncertainty of how courts may classify these workers. Companies like Uber and TaskRabbit may have helped bridge the gap between workers and consumers, but some fear they have further blurred the line between employee and independent contractor.

Many workers in today’s gig economy are driven by a desire for increased flexibility and control of their own schedules, yet others are driven by a decline in full-time employment positions. And although these gig-workers still constitute a relatively small percentage of the American workforce, a new Pew Research Center survey on the sharing economy shows that 8% of American adults earned money from a “gig” platform in 2016. And whether it is due to the growth of this sector, or what many consider a long-overdue review of state and federal labor laws, many are calling for policymakers to aid workers and businesses alike in projecting how these workers will be classified in the future.

Current Methods of Classifying Workers

Limited to the binary of either employee or independent contractor, the laws meant to protect the needs of workers and the innovators of commerce have instead left a wide gap where many of these gig economy workers fall. This is because most protections afforded workers derive from labor laws that depend on the existence of an employer-employee relationship. But there is no one test for classifying workers. While the IRS uses a “right to control test,” focusing on the employer’s right, or lack thereof, to control how work is performed, the Department of Labor in a 2015 advisory opinion announced it would abandon that test in favor of

its own “economic realities test.” This analysis determines whether an individual as a matter of economic reality is economically dependent upon the business to which he or she renders his or her services. Yet another test, used by the National Labor Relations Board, is the “Eleven Factor Test”—an overall evaluation asking as a matter of fact whether the individual is rendering services as part of an independent business.

The most common factors considered in determining whether a worker is an employee include: 1) the degree of control the employer exercises over the details of the work; (2) the relative investment in facility, tools and equipment used to perform the work; (3) the worker’s opportunity for profit and loss; (4) the level of judgment, skill and initiative required to perform the work; (5) the length of the relationship; (6) whether the work is part of the regular business of the firm; and (7) the subjective belief of the parties. Notably, the fact that a worker has signed an agreement stating that he or she is an independent contractor is not a common factor considered by the courts. Likewise, the fact that a worker has incorporated a business typically has no bearing on the analysis.

Uber Litigation as an Example of Uncertainties Faced by Workers and Companies Alike

But applying any one of these tests to the growing number of misclassification cases involving internet platform companies does not result in a clear answer. Taking Uber for example, many believed on-going litigation in five class-action suits pending in California would offer some guidance on classifying these workers. But after three years of litigation, and a recent Ninth Circuit ruling on Uber’s arbitration clauses, which could reverse certification for many of the suits, workers and businesses are still left in the dark.

One such case, *O’Connor v. Uber Technologies, Inc.*, No. 13-cv-3826 EMC, a certified class action, was brought on behalf of plaintiffs who allege Uber violated the California Gratuities Law, and those who allege they have been misclassified as independent contractors. The workers argue that because of their misclassification, they have been wrongly required to pay business expenses (such as vehicles, gas, and maintenance costs) in violation of the Cali-

fornia Labor Code. These plaintiffs allege that Uber requires drivers to follow a “litany of detailed requirements imposed on them by Uber and they are graded, and are subject to termination, based on their failure to adhere to these requirements.” *Id.* These requirements govern conduct with customers, cleanliness of vehicles, timeliness in picking up customers, and what the drivers are allowed to say to customers. The plaintiffs further argue that the drivers are “fully integrated into Uber’s business, and without the drivers, Uber’s business would not exist.” *Id.*

And while it seemed the parties had side-stepped the issue of classification, when they submitted a proposed \$100 million settlement agreement to the Court, the district court created further uncertainty in August of this year when it rejected that settlement, on the grounds that the deal was too favorable to Uber. But a win for Uber in a related suit, in which the Ninth Circuit held Uber’s 2013 and 2014 arbitration agreements blocked many of the drivers from suing as a class, may mean trouble for the drivers in *O’Connor*. For now, Judge Chen has paused five class action suits alleging Uber violated various state and federal laws until the case management conference slated for next February, and pending the Ninth Circuit’s review of the certification of about 240,000 drivers in California and Massachusetts.

What this Means for Businesses and Workers

Without clarification on how these internet platform workers should be classified, workers are left without the protections afforded those who are classified as employees. Businesses too are faced with great potential for liability if their workers are found to be misclassified. Without guidance from courts or reform of labor laws, uncertainty over worker classification could stifle growth. For owners operating a “gig economy” model business, the best course of action is to consult with an attorney to understand how the worker relationships are viewed under state and federal law.

Janet Landry Smith practices labor and employment and commercial litigation at Carter Scholer Arnett Hamada Mockler. She can be reached at jsmith@carterscholer.com.