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The College Bulletin

News for Members of the College of the State Bar of Texas *Spring 2014*

Be Proud *and Involved*

From the Chair

Morgan Broaddus

I'VE PRACTICED LAW 35 YEARS. Looking back over my career, I've concluded no one is born a natural or outstanding lawyer. The qualities that elevate a good lawyer to a great lawyer are simply hard work, dedication, and commitment to staying current in the law – i.e. the willingness to go the extra mile. It's never crowded along the extra mile.

My first job as an attorney was in 1979, when I served as a briefing attorney for the Eighth Court of Appeals in El Paso. Back then, the Court had only civil jurisdiction. Justice Max Osborne read and prepared his own digest of every reported Texas civil case. He had done so since his graduation from law school. When asked a legal question, Justice Osborne would often pull out one of his notebooks and quickly provide the answer and cite a current case.

Following my judicial clerkship I became an associate at an El Paso law firm. The senior partner was W.C. Peticolas, son of the first Chief Justice of the Eighth Court of Appeals and the 1934 editor of the Texas Law Review. Mr. Peticolas had practiced law twice as long as I was old! He too read every advance sheet, and he had the uncanny ability to recite case styles and holdings.

Another partner at my first law firm was Jack Luscombe. Jack was truly a legal "Jack of All Trades." He could try complex civil and criminal cases, and also handle business, real estate, corporate, tax and probate matters. Jack was an outstanding draftsman; he did extensive research and editing to ensure every document he prepared was flawless and deserving of his signature.

I was fortunate to have mentors like these, who also instilled in me their high ethical values and who taught lawyers—by example —to always take the high road. Attorneys such as these were no doubt an inspiration for the creation of the State Bar College.

Early in my legal career, I knew of older attorneys who, due to financial or family obligations, had been unable to attend law

school. These individuals had studied under an attorney and "read for the bar." I was impressed by the legal knowledge of a few of these individuals, who had become established and respected lawyers by their desire, work ethic, and dedication.

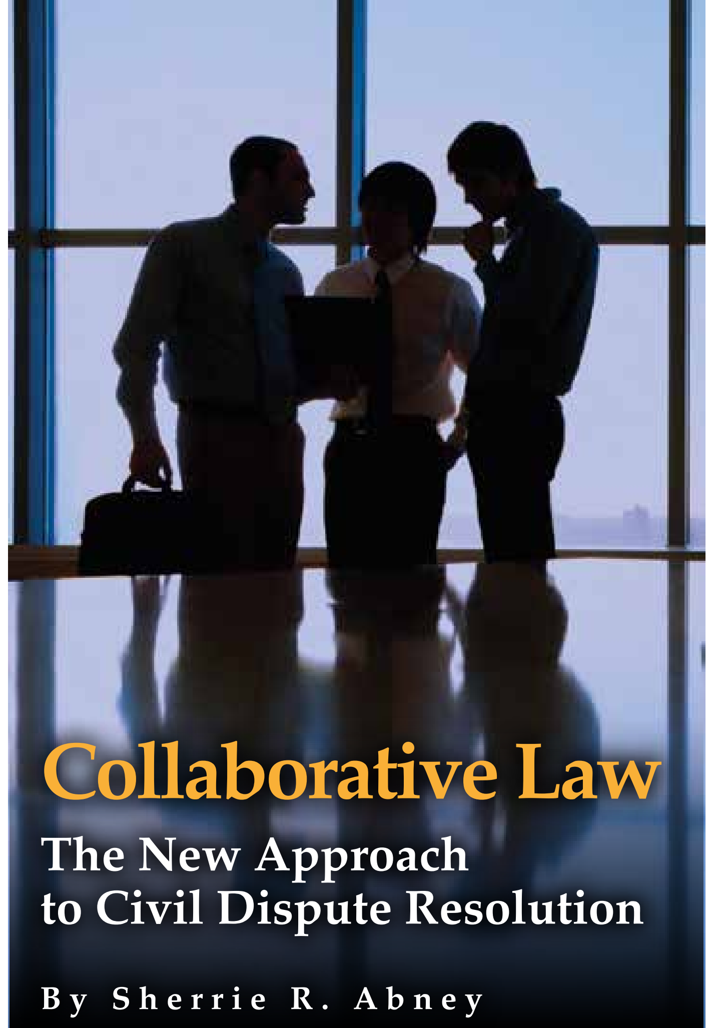
Later in my legal career I officed with a man who was a board certified physician in five specialties and board certified personal injury lawyer. One would think he had achieved enough education. However, he constantly attended continuing legal education courses, making it a point to go to seminars in areas new to his practice. He told me that at every legal seminar he learned something significant and beneficial to his cases, which easily paid for the seminar in case results.

What do famous lawyers Patrick Henry, John Jay, John Marshall, Abraham Lincoln, Stephen Douglas, and Daniel Webster all have in common? None attended law school, but each distinguished themselves in the law by self-imposed and continuous legal education. We have all heard of Lincoln reading long into the night by fire light of the open hearth.

The practice of law has changed dramatically. In recent years the law has become more complex and specialized. It is difficult to practice and stay up to date in one area, much less several. The sheer number of reported cases makes it difficult to stay current. Over the past five years, an average of approximately 11,500 cases yearly were added to just the dockets of the Courts of Appeals. Technology has taken the practice of law to a new level. The green advance sheets are almost obsolete due to computers and electronic filings that display new opinions the moment they are released. The online library is a modern tool that can assist lawyers in staying current, allows instant access to thousands of legal articles on every aspect of Texas law, and helps "mentor" one into new and unfamiliar areas of law.

The spirit of great and conscientious lawyers continues with your commitment to the State Bar College. College members go the extra mile; they stay abreast of the law and constantly strive to better themselves. In turn, that betters our profession and our society. As a College member, be proud of your commitment to excellence and to our ever–evolving tradition of learning. ■

Morgan Broaddus *is the current Chair of the College of the State Bar of Texas, has been Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization since 1993, and is a shareholder in the Gordon Davis Johnson & Shane P.C. law firm.*



Collaborative Law

The New Approach to Civil Dispute Resolution

By Sherrie R. Abney

The legal community is aware that collaborative law may be used to settle family law disputes. However, most people have no idea the collaborative process is gaining acceptance in several other areas of the law, including probate, elder, construction, adverse medical events, labor, and commercial matters.

Collaboration is a very basic, simple approach to dispute resolution that employs interest-based negotiation. Simply stated, a dispute is considered a collaborative case if the parties and their lawyers have a written participation agreement (contract) containing a clause requiring the collaborative lawyers to withdraw if the dispute proceeds to an adversarial venue. If there is no written participation agreement that includes a withdrawal provision, the case is not a true collaborative case.

There are three basic reasons for having the collaborative lawyers withdraw if the parties fail to reach agreement. Such a requirement: (1) eliminates parties and lawyers who are not committed to seriously attempting resolution; (2) focuses one hundred per cent of the lawyers' skills

and clients' money on settling the case; and (3) creates a environment in which the parties can exchange their interests and concerns, safe in the knowledge that if they fail to settle no lawyer in the room will be able to cross-examine them in an adversarial hearing.

Aside from the lawyer withdrawal provision, the options in the collaborative process are limitless. Parties can agree to anything that is not illegal or against public policy. Thus parties concerned about time and cost containment can limit the number of meetings or number of months negotiations will continue. Moreover, should a party decide that he or she does not want to continue in the process, that person can withdraw at any time without giving any reason.

The parties can also agree that if they have not totally resolved their issues at the end of the time specified, any issues that remain undecided will go to another, predetermined form of dispute resolution. This allows the parties to know in advance what lies ahead if they do not settle.

If the parties elect arbitration as the default solution for impasse, they should agree in advance on how the arbitration will be conducted. Note that if the collaborative participants agree to submit to an arbitrator only the information gathered during the collaborative process, allow the arbitrator to ask questions, and that the collaborative lawyers will not make arguments, the collaborative lawyers need not withdraw. However, if there will be arguments by the lawyers on behalf of the parties, the arbitration will become adversarial in nature, and the collaborative lawyers must not participate.

Some lawyers experience difficulty with the process because most of their legal education is diametrically opposed to a non-adversarial method of resolving conflict.

One example of using collaborative law outside of the family law context involved a sexual harassment/retaliation dispute. During the parties' first face-to-face meeting, the plaintiff was able to share details regarding the harassment incidents that the employer did not know had occurred. In addition, the employer's representative was able to explain to the plaintiff why her dismissal had nothing to do with her reporting the harassment incidents. This candid exchange resulted in the parties coming to agreement in one meeting rather than having the case continue over a period of months or years. As part of a settlement the employer agreed to have a third party provider conduct companywide training regarding discrimination and sexual harassment—a result that would not have been included in a court order.

In another example, the collaborative law process resulted in the speedy repair of a defective foundation. The homeowner's attorney was about to file suit when he was contacted by the general contractor's lawyer, who also contacted the subcontractor that poured the foundation and the subcontractor's insurance adjuster. Everyone agreed try the collaborative process. Rather than each party hiring an expert, they shared the cost of hiring a single engineer, who delivered a report to the parties prior to their face-to-face meeting. At the meeting, the subcontractor's insurance adjuster offered to pay $25,000 above policy coverage to a foundation company to level the foundation—work that the contractor and subcontractor lacked the men or equipment to do—*provided* the parties promised to not go to court. Her reasoning was that it would cost $25,000 to retain litigation counsel and that defense costs in similar cases had run into hundreds of thousands of dollars. Repairs began the following week.

Some lawyers experience difficulty with the process because most of their legal education is diametrically opposed to a non-adversarial method of resolving conflict. In the collaborative process, cooperation must replace the win/lose scenario of litigation with win/win results that are not necessarily products of the law or third party decision makers. In the collaborative process, winning consists of satisfying each of the parties to the greatest possible degree. This aspect of the process makes it especially useful in resolving disputes among parties who desire to continue business or personal relationships, or that involve solutions requiring one of the parties to perform over an extended period of time (as parties are more likely to follow through when they have had a voice in the final decision).

Prospective participants must understand there is much more to participating in the collaborative process than attempting to appear non-adversarial. Candidates for the process must be able to compromise when necessary, and rather than concentrating on who is to blame, they must focus conversations on the responsibilities participants must assume to resolve the dispute.

The first step in the collaborative process is to discover the interests, concerns, and goals of each party. This requires face-to-face meetings with the other parties and lawyers. These meetings follow predetermined agendas. Topics not on the agenda may not be introduced for discussion without the agreement of all of the participants, so parties are protected from being confronted with situations they are not prepared to address. In addition, lawyers must coach their clients to refrain from speaking about their opinions as though their opinions are facts instead of simply their point of view. Lawyers must also encourage their clients to carefully listen to the other parties and take into consideration the other parties' interests.

The first step is to discover the interests, concerns, and goals of each party in face-to-face meetings.

As the parties' interests and goals are listed, the lawyers usually identify additional information necessary for the parties to be informed well enough to reach an agreement; consequently, gathering that information is the second step in the process. All collaborative participants agree to voluntarily deliver information to the other parties. Unfortunately there is no dispute resolution procedure that can guarantee honest disclosure of information; however, in the collaborative process, participants are sitting face-to-face and able to ask questions if anyone believes that there is missing data that has not been produced. These candid conversations are not always possible in adversarial forms of dispute resolution.

There are times when the parties are unable to interpret the information they have gathered, or they find they need an expert appraisal, evaluation, or another opinion. Instead of each party hiring an expert to bolster a particular position, the parties usually agree to jointly hire a single expert to give an objective opinion. If one of the parties is unconvinced the jointly retained expert's opinion is valid, that party is free to get a second opinion.

Once necessary information is collected, participants will proceed to step three—developing options. An efficient way to discover possibilities for resolution is by brainstorming each one of the parties' concerns in order to list as many options as possible for addressing each individual issue. After all options are listed, the parties can proceed to step four: evaluating options.

Prior to evaluating options, parties may wish to determine the criteria that options must meet to be acceptable. For example, in an adverse medical event, all parties may agree that putting a patient safety procedure in place is necessary to avoid recurrence of the problem, so any final resolution must include appropriate measures to accomplish this. Evaluation of options should begin with eliminating any options that are impossible or unnecessarily burdensome for one of the parties. After all remaining options are evaluated, the parties begin negotiations and move forward to step five—resolution.

Collaborative law is not for every lawyer, client, or dispute. However, when lawyers are properly trained and clients desire to have control of scheduling, the prospect of substantially reduced costs, and opportunity to reach final resolutions privately, quickly, and without destroying their business and/or personal relationships, collaborative law may provide the relief they are seeking.

For more information on collaborative law go to www.collaborativelaw.us. ■

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The *Day* After Tomorrow: Texas Groundwater Law in the 21st Century

By Dylan O. Drummond

FEW, IF ANY, STATES HAVE AS ROBUSTLY DEVELOPED AND HOTLY DEBATED an area of law so central to its citizens as does Texas in groundwater law. Debate over groundwater law has raged in the literature, the courts, and the legislature for over 100 years – from the Texas Supreme Court's first groundwater decision in *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), to the legislature's passage of Senate Bill 332 in 2011, the Court's opinion the following year in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), and the public's amendment to the Texas Constitution providing dedicated water-project funding in 2013. But it has only been in the past three years that the dispute over just what interest, if any, an overlying landowner possesses in the groundwater beneath his or her land has finally been clarified, and the means to finance needed water projects statewide has been secured.

Senate Bill 332 (2011)

In 2011, the 82d Legislature made substantive changes to the groundwater-ownership provision in the Texas Water Code for the first time since groundwater conservation districts were first created in 1949. Prior to 2011, section 36.002 governing the "Ownership of Groundwater" contained the noncommittal bromide that:

> The ownership and rights of the owner of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district ….

Substantively, this passage meant next to nothing because it left undefined precisely *what are* the "ownership and rights of the owner of the land . . .." This was this question that formed the crux of the dispute—whether a property right in groundwater vests only upon capture (i.e., when it is "actually reduced to possession") or vests while in place beneath a surface-owner's real property.

Into this fray rode Senate Bill 332, which made a substantial change to the law regarding the ownership of groundwater. Specifically, it modified the ownership pronouncement in section 36.002(a) to provide:

> The Legislature recognizes that a landowner owns the groundwater beneath the surface of the landowner's land as real property.

As described above, previously the Water Code referenced that a Texas landowner owned some vague interest in groundwater, but provided no guidance as to what that interest actually was. After the passage of Senate Bill 332, however, the Water Code expressly and unequivocally recognized that a landowner owned "as real property" the groundwater beneath his or her tract. To be sure, this newly-confirmed property right was not inviolate, as other provisions of section 36.002 plainly cautioned that groundwater districts would still be authorized and

required to carry out their regulatory duties to manage groundwater. In doing so, however, they now had to expressly consider the "groundwater ownership and rights described by [s]ection 36.002."

Edwards Aquifer Auth. v. Day (2012)

In 1994, Robert Burrell Day and Joel McDaniel purchased some 380 acres overlying the Edwards Aquifer on which they raised oats and peanuts, and grazed cattle. In order to either continue using an existing well on the property or drill a replacement well, Burrell and Day were required to obtain a permit from the Edwards Aquifer Authority (which was created the year before they bought the property). They pursued the permit, and the Authority's general manager told Day and McDaniel that the Authority's staff had "preliminarily found" that their application "provide[d] sufficient convincing evidence to substantiate" the irrigation sought. Based on this news, Day and McDaniel spent $95,000 to drill a replacement well.

But soon thereafter, the Authority denied their application because the documented withdrawals from the well during the historical period were not put to a beneficial use. After exhausting their administrative remedies against the Authority, Day and McDaniel appealed the Authority's decision to the district court, suing the Authority for taking their property without compensation under the Texas Constitution's Takings Clause. While the district court subsequently granted summary judgment for the Authority on Day and McDaniel's takings claims, the San Antonio Court of Appeals reversed. The Supreme Court granted the petition for review.

The anticipation and anxiety leading up the Court's issuance of *Day* was at a fever pitch. Since the Court's last major groundwater decision (some thirteen years earlier), issues surrounding Texas groundwater production and supply had only grown more acute, and cases that appeared poised to carry the mantle of the "next big groundwater case" all either failed to reach review by the Court or were decided on other grounds. So when *Day* finally reached the Court, some 24 amici filed briefs in the case both before and after review was granted—at the time the most of any case then-pending.

The Texas Supreme Court issued its decision in *Day* some four years later. It framed the precise question before it as "whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution." After over a century of debate and discord on this issue amongst the bar since *East* was decided, the Court held that it did.

The Court was careful to clarify the distinction between the rule of capture and ownership in place. It reflected that, "while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership." Therefore, the Court disagreed with the Authority that the rule of capture, "because it prohibits an action for drainage, is antithetical to such ownership." To the contrary, the Court explained that the rule of capture determines title to groundwater that drains from property owned by one person onto property owned by another, but says nothing about the ownership of gas that has remained in place.

It is not often that a court distinguishes seminal portions of a decision it handed down more than a century before, but the Texas Supreme Court did just that in *Day* regarding its opinion in *East*. The Court clarified that—despite quoting and relying on language from the New York High Court explicitly declaring that groundwater was indistinguishable from soil and that the owner of one was the owner of both—it "could have meant only that a landowner is the absolute owner of groundwater flowing at the surface from its well"—but not in place.

Tacking its analysis towards whether groundwater is indeed owned in place, the Court held that the following passage—originally applied to oil and gas more than sixty years before—"correctly states the common law regarding the ownership of groundwater in place":

> In our state the landowner is regarded as having absolute title in severalty to the [groundwater] in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The [groundwater] beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the [groundwater] under his land and is accorded the usual remedies against trespassers who appropriate the [groundwater] or destroy [its] market value.

While the Court found no reason to treat differently the ownership in place of groundwater as compared to oil & gas, it did distinguish the regulatory rationale applicable to groundwater from that applicable to hydrocarbons. Specifically, because oil & gas cannot be replenished, the Court reasoned that"land[-]surface area is an important metric in determining an owner's fair share." In contrast, because the amount of groundwater beneath the surface is "constantly changing" due to recharge via rainfall, drainage, surface-water underflow, or depletion due to drought, "regulation that affords an owner a fair share of subsurface water must take into account factors other than surface area." The Court also questioned basing the issuance of groundwater permits on historical use because of the differences between riparian and subterranean water rights. The key difference between the two regimes, the Court explained, was that riparian rights governing surface water are usufructory—giving their owner only a right of use—while groundwater is owned in place completely. Therefore, "non[-]use of groundwater conserves the resource," but non-use of appropriated surface water is "'equivalent to waste.'" Therefore, a landowner "cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited."

Ultimately, and for the first time, the Court expressly recognized that "landowners … have a constitutionally compensable interest in groundwater." The resulting "requirement of compensation" for such a taking "may make the regulatory scheme more expensive," the Court reasoned, "but it does not affect the regulations themselves or their goals for groundwater production." It concluded that the "Takings Clause ensures that the problems of a limited public resource—the water supply—are shared by the public, not foisted onto a few. We cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the Takings Clause on government is no reason to excuse its applicability."

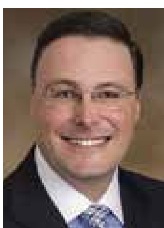
Proposition 6 (2013)

In 2013, the 83d Legislature enacted Subchapters G an H to Chapter 15 of the Water Code, which became effective last November upon ratification of Proposition 6 that added section 49-d-12 to Article 3 of the Texas Constitution. Both the constitutional amendment and Subchapters G and H govern the implementation and operation of the new State Water Implementation Fund for Texas, which appropriates some $2 billion from the state's "rainy day fund" to offer low-interest loans to cities and nonprofit water supply corporations to fund water projects throughout the state. This new fund provides resources dedicated to water projects that will help rural communities (10% is earmarked for rural projects), mid-size towns, and large metropolitan areas to meet the coming water needs of their respective constituents.

The *Day* After Tomorrow

So where does Texas groundwater law stand after the passage of Senate Bill 332 and the *Day* decision? It now seems clear that Texas landowners "own[] the groundwater below the surface of the[ir] … land as real property," and that such groundwater is owned in place. And dedicated financing now exists for communities to draw upon in order to help meet their water needs.

As the population of Texas swells and its groundwater resources become more burdened, a new balance will have to be struck between Texas landowners' recognized property interests in groundwater and the duties of groundwater districts to manage that groundwater for the public. The extent to which any shift in that balance might give rise to takings claims under the Texas Constitution will likely be the ground on which this age-old debate will be continued.



Dylan O. Drummond *is an accomplished civil appellate and commercial litigator practicing in Austin with the law firm of K&L Gates, LLP. Prior to entering private practice, Dylan clerked for now-Chief Justice Nathan L. Hecht during the Texas Supreme Court's 2003–04 term. Dylan is AV™ rated by Martindale-Hubbell®, and has been selected as a "Rising Star" in appellate practice the past six years by* Thomson Reuters *as published in* Texas Monthly. *He currently serves on the Board of Directors of the Texas Bar College, as a subcommittee chair on the Texas Bar Pattern Jury Charge Committee, and as a councilmember of the Texas Bar Appellate Section.*

New College Members

We are pleased to publish the names of those who joined in 2013 and welcome them to enjoy the many benefits of College membership, including *free* access to TexasBarCLE's Online Library, a database of over 18,000 CLE articles.

If you know of anyone interested in becoming a member, please feel free to have them contact Managing Director Merianne Gaston at merianne.gaston@texasbar.com or 512-427-1819.

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