

Texas – Law Firms

Texas Courts: A Seasoned Appellate Advocate's Perspective

The Editor interviews Kevin J. Keith, Of Counsel and Head of the Appellate Section for Dallas-based Hiersche Hayward Drakeley & Urbach, P.C.

Editor: How has tort reform in Texas benefited insurance companies and companies generally?

Keith: Tort reform has placed caps on punitive damages and imposed a higher burden of proof on any award of punitive damages. Any award of punitive damages now requires a unanimous verdict as opposed to the previously required 10-to-2 verdict. This is just one example of the probusiness reforms that have proven beneficial to the insurance industry and to business generally in Texas.

Editor: You frequently practice before the Dallas 5th District Court of Appeals. How would you characterize that 5th District judiciary?

Keith: It's predominately Republican and conservative. I feel that business concerns are given proper weight. It's a court with a very good reputation for following the law – both Texas Supreme Court precedents and state statutes.

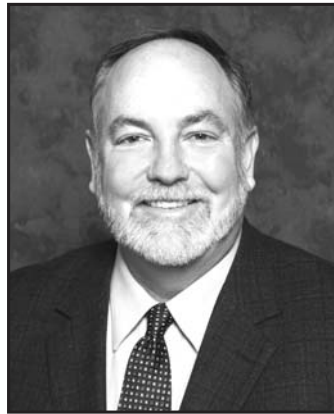
Editor: How do you feel about the Supreme Court of Texas? I was very impressed when I interviewed Chief Justice Wallace B. Jefferson a few years ago.

Keith: Chief Justice Jefferson is up for reelection this year and has an opponent. The Texas Supreme Court is very conservative, Republican. We're seeing more heated disagreements and perhaps a decline in collegiality – disagreements expressed in the form of dissenting opinions in a number of recent decisions by the court. The language in the opinions in some instances, both the majority and dissent, seems to reflect a decline in collegiality. This is sometimes reflected in opinions that contain harsh criticisms of the judges taking different positions.

Editor: Does that affect the ability of the Court to reach decisions?

Keith: It has probably delayed a lot of the decisions. Time is consumed trying to find a common ground or to modify each other's position or the tone of the position before the opinions are handed down. This delays the consideration of other cases on the court's docket such as the two significant insurance law cases I discussed in my May 2008 interview (*Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, (No. 07-0639) and *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, (No. 06-0867)). Those cases have been before the court for almost two years now. I wouldn't even want to guess as to when they are going to hand down those decisions. Both cases were argued in February, so adequate time has passed for the court to issue an opinion. The petitions for review in those cases were granted last August, so it has been a full year.

Editor: Is this the kind of conservative-liberal split that you sometimes see in U.S. Supreme Court cases?



Kevin J. Keith

Keith: No. Business interests are on both sides. In the cases I mentioned, they reflect differences between insurance companies and businesses that are policyholders. The Texas Supreme Court has issued some opinions that favored policy holders, and these are two cases where that could very well occur again. The best way to say it is that they are cases where the business community and the insurance industry are on opposite sides. On one side, there are construction companies that have taken out policies to spread the risk so that they can build projects. On the other side are insurance companies that deny responsibility to provide coverage for a loss. And our conservative Supreme Court could go either way. You don't really have a political ideological basis to speculate about which way the court will decide.

Editor: Does your appellate group in your firm practice before other appellate courts in Texas?

Keith: Yes, we have a statewide practice and work in all 14 districts of the Texas Courts of Appeals and the Texas Supreme Court.

Editor: What kind of a record does your appellate group have? I guess the measure of that would be the extent to which your firm is favored above others in terms of selection by major business clients.

Keith: I was just hired by a major retailer in two cases in which they suffered million dollar judgments in each case. If we were boxers, the win-loss ratio would be meaningful. For lawyers, the win-loss record is subject to a lot of things, including the nature of the case and its history. If the client insists that you take a case that has very little chance of being overturned on appeal, your lack of victory says very little about your ability. On the other hand, if your efforts cause the other side to become concerned that the case is going to be overturned on appeal and then you settle it, obtaining a large discount off the existing judgment, some corporate clients would consider that a success. It depends on how you define winning and success. At the end of the day, we try to provide the client with quality services at each stage of the trial and appellate process so that they can make the best informed decision with respect to their business interests.

Editor: Have the Texas courts instituted e-filing?

Keith: They are getting there. It is kind of like everyone – the judges, the clerk's offices and the practicing bar – are all on a learning curve and not everyone is at the same point along that learning curve in terms of instituting and effectively utilizing e-filing. Frequent seminars and other learning opportunities are being offered. Have we gone completely to e-filings? No. There is still a lot of work to be done there.

At the appellate level, filing hard copy is customary. Sometimes e-filings are made in order to comply with a deadline with an understanding that you will send in the bound hard copy later. Where you also see some e-filing are things like mandamus, pleadings and responses and motions and responses for temporary relief. Those can go very quickly. In some instances, the court can rule as soon as they are received without your response. So if the court is in Austin, you don't have the luxury of even sending something overnight, you try to e-file it the same day.

Editor: One of the things that Chief Justice Jefferson mentioned when I interviewed him in 2005 was the effort to get better compensation for judges in order to attract better quality judges. Is that still a concern?

Keith: It has always been a concern for as long as I've practiced, which has been almost 30 years now. I do not think there has been much, if any, progress made since you talked to Chief Justice Jefferson about it. I think that every Chief Justice of the Supreme Court in the last 30 years has made that an item to discuss with the Texas Legislature. That is just kind of the way it is and being a judge has to be seen as a public service to justify the lack of adequate compensation.

Editor: There seems to be a trend toward appellate courts deciding cases on the record and the briefs and eliminating the opportunity for oral argument. As an experienced practitioner, do you feel that an opportunity for oral argument is desirable from the standpoint of getting a proper result?

Keith: Not in all cases, it really depends on the case. Some cases can be decided on the briefs without the need for oral argument. For example, summary judgment appeals where the other side did not come forward with adequate evidence to raise a fact issue. However, I would say the vast majority of cases can benefit from an oral argument.

Editor: Is there adequate opportunity for interlocutory appeals in Texas?

Keith: That is established by statute. We are seeing a great deal of use of the interlocutory appeal for purposes of appealing the denial of motions to dismiss based upon a challenge to the adequacy of an expert report in medical negligence cases. In fact, I would suspect that is becoming a docketing problem for the Courts of Appeal because they are just

being inundated with interlocutory appeals dealing with the adequacy of plaintiff's expert reports. We are seeing a lot of case law in that area both from the Courts of Appeals and to some extent the Texas Supreme Court.

This flood of appeals is attributable in part to the tort reform statute applicable to medical negligence cases. It requires the plaintiff at the outset of the case to come forward with an expert report that establishes a prima facie case on each element: the standard of care, the breach of the standard of care and causation between the breach and the alleged damages. The statute says that you can take an interlocutory appeal upon denial of your motion to dismiss based on the inadequacy of a report. So that immediately allows the defendant to get in front of an appellate court while the case is still at its outset in the district court.

The right to an interlocutory appeal can be very beneficial to the defendant physician or hospital and to the insurance industry. The litigation expenses that would be incurred while waiting to appeal after judgment are eliminated.

Editor: Are there reforms that have taken place that you feel have led to significant improvements?

Keith: I guess the major advantage or benefit of tort reform is that it has eased the pressure on the insurance industry and made it easier for health care providers to be insured. This is attracting more doctors and other health care specialists back to the Texas to practice their professions. We were getting to a point where doctors were finding it uneconomical to continue practicing, and some communities were being threatened with the loss of health care. At the same time, we are seeing that not all the results of tort reform are beneficial. There have been some instances where the pendulum has probably swung too far the other way and people who have sustained verifiable, significant loss as a result of negligent health care have not been able to obtain an adequate remedy.

Editor: I would assume that people from outside Texas interested in locating a business in Texas would be interested in the legal climate.

Keith: Sure that's part of it. They want to be able to assess what their risks are. They look at it from a business climate perspective. A significant part of that is the legislative and judicial climate. Those things and the ability to get affordable insurance are all positives in Texas right now.

Even though you are in a conservative pro-business environment, business doesn't always win. A lot of times you get two businesses on opposite sides of a case, and one of those interests is going to be disappointed with the outcome.

However, what is important is that the business client is provided a fair determination on the merits in a relatively stable legal environment. Moreover, at each stage of the legal process, we endeavor to provide the business client with the best legal advice available so that it can make its own assessments and control the outcome of the matter.

Please email the interviewee at kkeith@hhdulaw.com with questions about this interview.