

Lone Star Review

2015 Conference Agenda

The 102nd Annual Texas Circulation Management Association will convene on April 9, 2015, at the Omni Southpark Hotel in Austin, Texas. This hotel has become an Association favorite with the location in Austin, Texas, the capitol of Texas. This will be our tenth conference at the Omni Southpark Hotel.

In the November 2014, issue of the *Lone Star Review*, a drawing was offered to any member who submitted a name of a possible speaker at the 2015 TCMA Conference. Our winner in the drawing was **Richard Carlson**, from the Wichita Falls Times-Record. Richard will have his conference registration paid by the association.

Leading off our conference on Thursday, April 9, 2015, will be **Bill Huffhine**. His presentation will be **Five Bold Moves that Work**. Bill is the Corporate Audience Development Director for Journal, Inc., a Mississippi corporation that has several Mississippi newspapers. Following Bill will be **Aaron Kotarek**. Aaron will be presenting **Every Home, Every Day, Every Way**, a mix of digital strategies as well as time tested revenue increasing strategies. Aaron is the Vice President of the Lexington (KY) Herald-Leader.

Thursday evening, we will take a short bus ride to the **Oasis** on Lake Travis for a private dinner. This is a hill country favorite location to watch the sun set over Lake Travis. You can click on the link above to see the beautiful setting.

On Friday morning, **Mike Zinser**, our legal counsel, will provide updates to the independent contractor status and recent changes to the National Labor Relations Board. Mike is a regular presenter at the TCMA Conference because Texas law and national administration policy changes affect newspapers, contract law and Internal Revenue Service edicts. You do not want to miss this timely presentation. **Matthew Wolfe** will be sharing a presentation on single copy and utilizing digital with single copy sales. Matthew is the Single Copy Manager at the Raleigh (NC) News and Observer.

Our annual JW Smith Carrier of the Year Award Luncheon will conclude the 102nd Annual Conference. Sign up now to reserve your place at the TCMA Conference in April in Austin, TX.

Inside this issue

Board Member Nominations	2
2015 Conference Registration.....	2
New Members	3
Zinsergram	4
Lone Star Review Sponsors	7



TCMA Board Elections

Nominations for Second Vice President will be received at the 2015 Conference on Thursday afternoon. If you are interested in becoming a TCMA Board Member and have questions, contact **J W Smith** for more information about serving on the TCMA Board.

The TCMA Board of Directors is comprised of five members. Beginning with the Second Vice President which is elected at the annual conference, each board member advances to the next position following the close of the conference. The next position is First Vice President, President-Elect, President and then Chairman. The board typically meets three times annually including at the annual conference.

The President is responsible for the annual conference program. The President-Elect assists with the Buyer's Guide; the First Vice President is responsible for the Carrier of the Year Competition, and the Second Vice President is introduced to the board during the first year. The Chairman assists where needed after successfully completing the previous five positions.

If you would like to nominate someone for the Second Vice President be sure you have their permission and be ready to make a short nomination for them on Thursday afternoon at the conference. Again, if you have any questions please let me know.—J W Smith, tcma@texascma.org

2015 Conference Registration

Registration for the 2015 TCMA Conference is now open. The 2015 Conference will be held at the Omni Southpark Hotel in Austin, Texas, on April 9-10, 2015.

Hurry! Registration closes on **March 9, 2015**. Registration forms are attached to this issue of the *Lone Star Review* or you can register online. Go to the TCMA Conference web page and click on the link **Register for the 2015 Conference**. Complete the registration form and when you click submit you will be taken to the payment page where you can use your credit card. **Online registration is simple and secure.**

Your registration fee **INCLUDES** your hotel accommodation plus tax at the Omni Southpark Hotel. If you would like to come in early or stay an additional day you may add this to your registration.

Sharing a room? This is a great bargain as you can save over \$141 compared to two separate registrations.

Come be a part of the second conference in our second century. This year's conference is jam packed with exciting speakers and you will take away ideas that will help you at your newspaper.



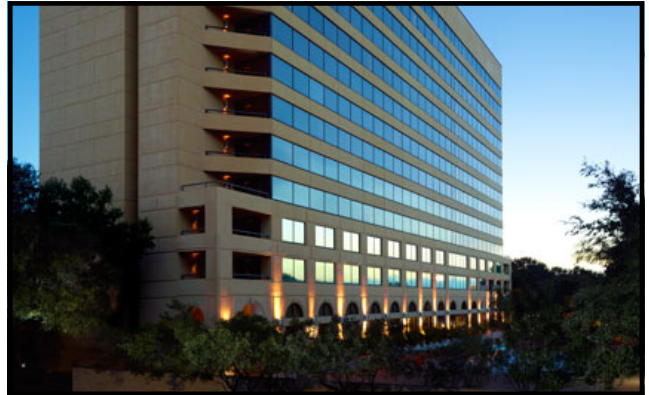
Texas Capitol Rotunda

2015 TCMA 10nd Conference

April 9-10, 2015

**Omni Austin Hotel at Southpark
4140 Governor's Row
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512 448 2222**

**Hotel Registration will be included
in your conference registration**



2015 Membership

Have you renewed your membership for 2015?

Your membership fee enables the Association to provide you with a quarterly newsletter as well as supporting the Carrier of the Year Competition.

PayPal has a new feature allowing TCMA to send you a customized invoice with a link to the TCMA PayPal site to pay your invoice. If you are interested and would like a special invoice please let our Secretary know at tcma@texascma.org

Don't forget! You can **renew online** and use your credit card to pay for your membership and other services provided by TCMA.



Welcome New Members

Dan Johnson

CirTec

Kevin Woelfel

Lubbock Avalanche-Journal

Jeff Gibson

San Antonio Express-News



The Yapp is back! Download our conference app now and keep up with enhancements as we get closer to the conference. Scan the QR code above with your iPhone or Android or enter this address in your phone browser:

<http://my.yapp.us/TCMA102>



Zinsergram a/k/a Legal Update

By L. Michael Zinser

The Zinser Law Firm, P.C.

This column will review some practices that I have discovered at various newspapers while conducting independent contractor audits or preparing for litigation. These are practices that I recommend you *avoid*.



Contracting Before Delivery – In several situations, Circulation Management allowed a newspaper contractor to start delivery of a home delivery route *before* the contractor actually signed a written Independent Contractor Agreement. This is a major problem. You could be the victim of “Murphy’s Law.” Just imagine the confusion and finger pointing if the independent contractor newspaper carrier has a serious automobile accident while delivering without a contract.

Separate Contracts for Separate Routes – It is considered evidence of independent contractor status if a newspaper carrier has the right to contract for more than one delivery area. The best practice is for the independent contractor to sign a separate Independent Contractor Agreement for each individual route or delivery area. In my preparation, I discovered that Circulation Management was missing this opportunity by merely penciling in the number of the new route when the contractor agreed to deliver to a second area. The right of the contractor to contract for more than one delivery area is considered evidence of entrepreneurship and thus evidence of independent contractor status. A separate written contract better evidences this entrepreneurship.

Contract Compliments Course of Dealing – Judges and Hearing Officers will give the written agreement great respect if the day-to-day course of dealings and practices of the parties are consistent with the written agreement. One of things discovered in my preparation of one case is that the written agreement contained contract language that simply did not apply to the particular contractor. While I was able to explain this away and obtain an independent contractor ruling, it would have been more independent contractor-friendly if the written agreement reflected the reality of the relationship.

Contractor Receives Copy of Contract – From an independent contractor point of view, it is absolutely the best practice to give the independent contractor newspaper carrier a copy of the written agreement after it is negotiated and signed. While preparing one of my cases, we discovered a questionnaire completed by the independent contractor, claiming to be an employee. In that questionnaire, the contractor checked a box that said he did not sign a written agreement. In preparation, when I asked my witness why the independent contractor would make such a statement, I learned that this particular Manager did not routinely give contractors copies of the agreement. That looks really bad when you are trying a case. Always give the contractor a copy of the final signed Agreement.

Substitutes – In my opinion, the greatest single distinguishing factor of independent contractor status is the contract right and obligation of the contracted carrier to utilize a substitute if the contracted carrier does not want to personally perform the services. Employees may not engage substitutes. Typically, the independent contractor may use substitutes without restriction. The sub can use whomever he/she wants to use; the contracted carrier directly pays the substitute. If, for any reason, the contracted carrier is unable or unwilling to deliver on a particular day, the contract obligates the contractor to find a substitute. What I discovered while preparing for one case is that the particular manager was not following the contract that obligated the contracted carrier to find a substitute. Rather, the

(Continued on page 5)

Manager was maintaining “on-call” substitutes that were provided a 1099 from the Publishing Company at the end of the tax year. This was not an independent contractor-friendly practice and the newspaper has ceased it.

Contract Termination Provision – I recommend that a contract termination provision be bilateral, meaning that the provision applies with equal force to both the Publishing Company and the contractor. What I learned in preparation is that when a contractor terminated the agreement, the Publishing Company was not requiring the contractor to do so in writing with 30 days notice, as required by the Independent Contractor Agreement. Management was religious in writing letters when it terminated a contract. However, contractors were given a pass. The newspaper has cleaned up that bad practice.

Recruitment Ads – It is very common for a newspaper to run ads in its own publication, trying to recruit individuals to be independent contractor newspaper carriers. The text of this ad can be very helpful or hurtful. What I discovered in preparation is that a particular newspaper was discovering an extremely poorly drafted ad. It was also attempting to recruit substitutes. The newspaper has now changed its advertising practices. The ad refers to the contract as a “business opportunity” and has the “independent contractor” phraseology that will support the Company in future litigation. Do not use language stating that your Company is an “equal opportunity employer.” This is **not** employment. It is an advertisement to establish an independent contractor relationship.

Contractor Compensation – The written agreement should reflect all of the compensation being paid to the contractor. That prevents misunderstandings and is independent contractor-friendly. In preparing one case, I discovered that the independent contractor was paid an additional contract fee if the contractor bagged the newspapers with poly-bags, with an advertiser’s imprint on them. However, the written agreement did not reflect that additional contract fee. While the fee was paid, the contract was silent. That has been fixed. It is very important that the contract compensation evidence that it is based upon sales or output – and not hours worked. Avoid provisions labeled “subsidy” or “transportation allowance.” Such provisions imply to a judge that your Company is subsidizing the expenses of the independent contractor. Independent contractors are responsible for all of their own expenses. If you can, build everything into the rate. Keep it simple!

Start With a Blank Slate – One of the key factors of independent contractor status is the right of the contractor to negotiate the agreement and the fees/rates contained therein. Often, a contractor will give testimony that he did not have the right to negotiate, stating that when he sat down with a Manager, all of the blank spaces were already typed in. The witness testifies that it looks like “take it or leave it.” It looks like a “done deal.” On all items that are negotiable, start the contract in process with those spaces blank. Then, in the negotiating process, you will put those numbers in your handwriting in ink on the agreement. That will more likely support Management’s argument that the contract was negotiated.

Drafting Tip: In the written Agreement, where the contract compensation is reflected, make sure that the rates are identified as “negotiated rates.” On the last page of the contract, where the contractor signs the Agreement, I recommend that you include, in bold type, language stating, “Contractor also acknowledges that this Agreement is negotiable, including the contract fees herein.” Such a provision takes away from the contractor the argument that he/she had no idea that he/she had the right to negotiate.

Party to Deception – In preparing one case, the contractor was the party that terminated the Independent

(Continued on page 6)

Contractor Agreement. I was inquiring of the Management witness the reason for the termination. The Manager then sheepishly said that the contracted carrier, who had a full-time job with a manufacturing company, had lost the full-time job. The contractor was planning to file for unemployment compensation. The contracted carrier wanted to be able to complete unemployment papers saying that he had no work of any kind. The contractor asked the Manager to have his spouse sign a new contract. The same individual is going to be delivering the route. This is a problem. The newspaper was complicit in deceiving the State Department of Unemployment. I recommended against this.

Literacy of the Contractor – It is important in litigation that we are able to prove that both parties entered into the Agreement with the intention of creating an independent contractor relationship. The intention of the parties is important. In one case I was preparing, we learned that the contractor could not read! Management was knowingly contracting with an individual who could not read. The contractor had signed a document he could not read. That contractor is a position to later argue that he had no idea he was creating an independent contractor relationship. During the contracting meeting, ask the prospective contractor to read back to you paragraph one of the written Agreement. You will quickly learn whether he/she can read. If he/she cannot read, do not contract with that individual.

Language Barrier – A language barrier can also destroy the argument that the contractor entered into the Agreement with the intention to create an independent contractor relationship. If the prospective contractor cannot understand spoken English and cannot read an English language contract, then you will have a problem proving the contractor's intention to create an independent contractor relationship. If you are going to contract with individuals who do not understand the English language, then you should consider having your contract translated into that language. For example, the *Seattle Times* has translated their Independent Contractor Agreements into the Spanish, Vietnamese, and Russian languages. Find a professor at a local community college to do the translation so that a neutral party does it competently.

Conclusion

This writer recommends that you do a complete annual audit of your independent contractor practices. You may be surprised as to what you find out there lurking to jump up and bite you if you end up in litigation. Preventive legal medicine is the best legal medicine. I hope you will take this advice to heart.

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To renew or add your business card ad on the back page or within the *Lone Star Review* with a link to your company web site for 2015, send your request for an invoice to:

J W Smith —

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TCMA Conference/Hotel Registration

2015 Texas Circulation Management Association Conference
Omni Southpark Hotel

April 9-10, 2015
Austin, Texas

.01 >>REGISTRATION INFO

Please be sure to fill in all blanks which apply to your registration form as needed. Use names as you want them to appear on name tags. The prices for the conference are per person.

Pay online at www.texascma.org or

Make checks payable to TCMA.

Send to **New Address**

J W Smith, Secretary/Treasurer

PO Box 9577

The Woodlands TX 77387

Cancellation/Refund Policy

Reservation deadline is March 11, 2015

No refunds will be issued for no-shows. No cancellations after March 11, 2015.

Questions?

Call 713 822 0989

conference@texascma.org

.02 >>Conference Plans *(Includes conference fee AND Omni Hotel Room + tax)*

<u>Registration Fees</u>	<u>Number</u>	<u>Before March 11</u>	<u>Line Total</u>
Single Occupancy	_____ X	\$362.95	\$_____
Double Occupancy	_____ X	\$584.45 (includes 2 people)	\$_____

TCMA WILL RESERVE YOUR HOTEL ROOM

Includes one hotel night (April 9, 2015) including hotel tax

Other charges to hotel room will be guest's responsibility

Check in April 9, 2015, 3:00 pm; Check out April 10, 2015, 12 noon

Additional night(s) available; Single \$153; Double \$165 \$_____

_____ April 8; _____ April 10

Select Guest® Number (if applicable) _____ \$_____ Total

.03 >>ATTENDEE INFORMATION (for **double occupancy**, submit information forms together)

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Is this your first TCMA Conference? _____ Yes _____ No