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THE TEXAS BAR JOURNAL

The *Texas Bar Journal* fulfills its legal obligations by publishing the following: all rules of evidence, rules of post-trial, appellate, and review procedure for criminal cases as promulgated by the Court of Criminal Appeals and rules issued or amended by the Supreme Court of Texas; any public statements, sanctions, and orders of additional education issued by the State Commission on Judicial Conduct; a report of annual performance numbers included in the State Bar Strategic Plan; any auditor's report regarding the State Bar; statistics regarding participation in State Bar elections; final disposition of all attorney disciplinary proceedings and disciplinary actions; MCLE regulations, forms, modifications, or amendments; proposed disciplinary rules; abstracts of disciplinary appeals issued by the Board of Disciplinary Appeals; internal operating rules and procedures of the Commission for Lawyer Discipline; proposed State Bar Annual Meeting resolutions; and names of State Bar president-elect nominees. Statutory Citations: Tex. Govt. Code §§22.108(c); 22.109(c); 33.005; 81.0215(c); 81.023(a); 81.0242(2); 81.0876(b); 81.0878; Texas Rules of Disciplinary Procedure Rules 4.06; 6.04; 6.07; and Texas State Bar Rules Article IV, Section 11; Article VII, Section 3; Article XII, Section 3.

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Communications may be directed to the State Bar of Texas at texasbar.com or P.O. Box 12487, Austin, Texas 78711-2487, or by calling 800-204-2222, ext. 1463.

The Texas Bar Journal (ISSN 0040-4187) is published monthly, except a combined July/August issue, by the State Bar of Texas, 1414 Colorado, Austin, Texas 78701, as a service to the profession. One copy of each issue is provided to members as part of their State Bar dues. Subscription price to others, $12 (including sales tax); $15 to foreign countries. Single copies, $2.50 each (including sales tax). Periodicals Postage Paid at Austin, Texas, and at additional mailing offices. POSTMASTER: Send address changes to Texas Bar Journal, P.O. Box 12487, Austin, Texas 78711-2487.

Canadian Publication Agreement No. 40778512. Returns to: Station A, P.O. Box 54, Windsor, ON N9A 6J5.

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Trey Apffel can be reached at 512-427-1500, trey.apffel@texasbar.com, or @ApffelT on Twitter.

Keeping Up WITH THE NEWS

SUMMER WAS EVENTFUL FOR THE STATE BAR OF TEXAS, as our board of directors and CLE programs began to resume in-person meetings and we worked to keep Texas lawyers informed of the latest news on the effects of COVID-19 on the legal profession and a federal lawsuit against the bar.

I'm devoting my *TBJ* column this month to recapping these events, but the best way to receive timely updates from the State Bar of Texas is to receive our emails. The State Bar sends email newsletters on topics including COVID-19 court orders, State Bar governance, member benefits, monthly *TBJ* articles, and daily legal news headlines. If you're not receiving these updates, you may have opted out of optional emails from the State Bar.

If you have questions about your email subscriptions, please contact Communications Director Lowell Brown at 512-427-1713 or lowell.brown@texasbar.com and he will make sure you are receiving the updates you want to receive.

COVID-19 Orders and *McDonald v. Sorrels* Update

The State Bar updated Texas lawyers via email on July 21 regarding the Texas Supreme Court's 39th and 40th COVID-19 emergency orders and the U.S. Circuit Court of Appeals for the 5th Circuit's panel opinion in the *McDonald v. Sorrels* litigation involving the State Bar. The information is also printed in this issue. The court orders begin on page 750; the lawsuit update is on page 692.

Board of Directors Meetings

This issue of the *TBJ* also includes news from the State Bar Board of Directors meetings on June 16-17 in Austin. See page 690 for a summary of the board's actions.

The next scheduled board meeting is at 9 a.m. CDT on September 24 in San Antonio. The agenda and materials will be posted at texasbar.com/bodmaterials. You are welcome to join us in person, or to watch the meeting live on YouTube at youtube.com/statebaroftexas. To sign up to speak during the meeting, please email Amy Starnes at amy.starnes@texasbar.com by 5 p.m. CDT on September 23.

Casemaker Merges with Fastcase

Finally, for many years the State Bar has provided free access to legal research through both Fastcase and Casemaker as a benefit to all Texas lawyers. In January, Fastcase and Casemaker announced they were merging to offer a more comprehensive set of tools and products under one platform: Fastcase. Access to the Casemaker platform ends September 1.

To help ease your transition to Fastcase, please visit the Fastcase Resource Library (https://bit.ly/fastcase-resource-library) where you can access tutorial videos, register for training webinars, and find answers to your questions.

Sincerely,

TREY APFFEL
Executive Director, State Bar of Texas
Editor-in-Chief, *Texas Bar Journal*

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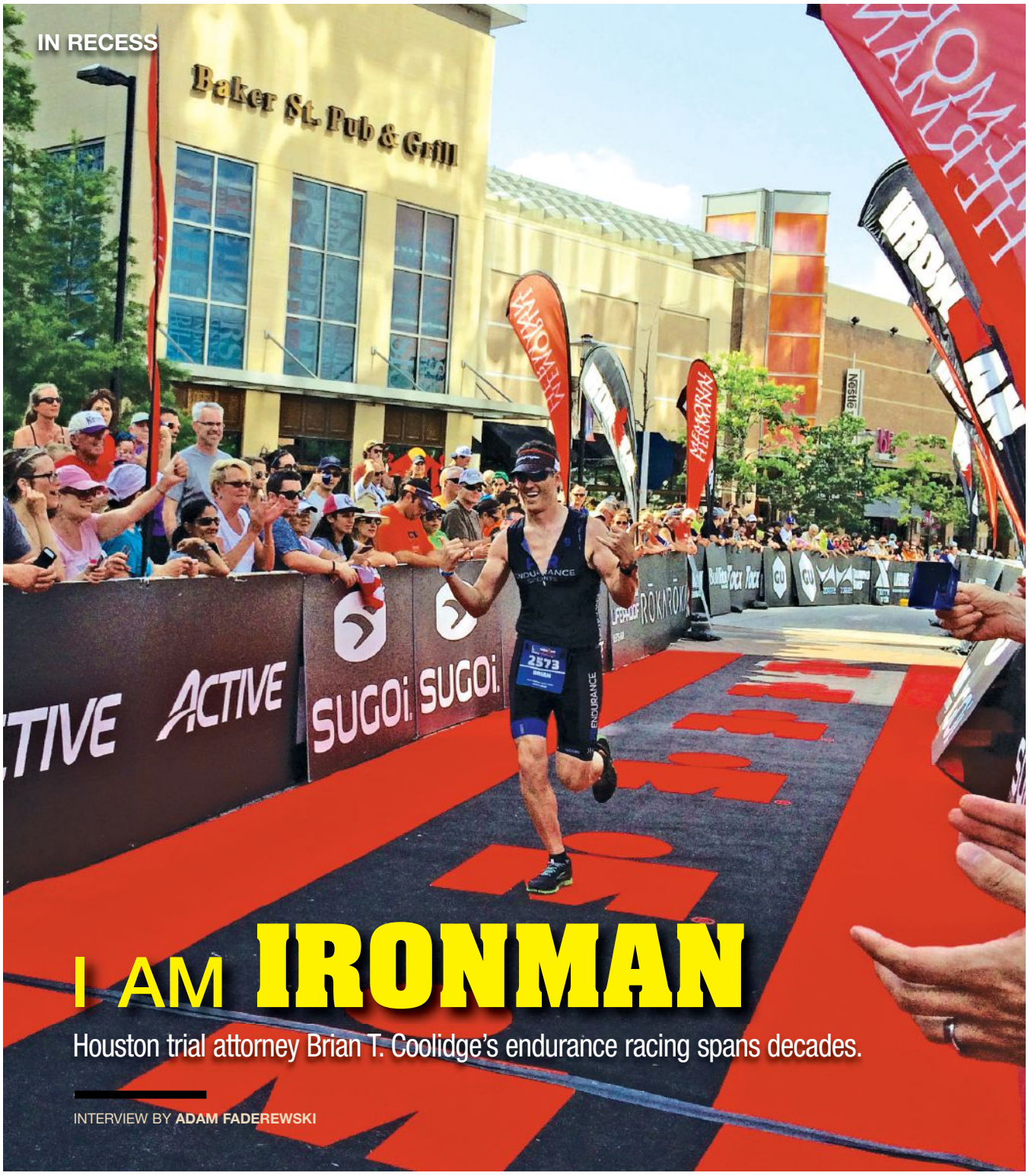

I AM IRONMAN

Houston trial attorney Brian T. Coolidge's endurance racing spans decades.

INTERVIEW BY **ADAM FADEREWSKI**

SWIMMING. CYCLING. RUNNING. The three legs of triathlons and IRONMAN competitions in that order. Brian T. Coolidge, a trial attorney in Houston, launched his foray into triathlons in the opposite order—starting with running in high school, cycling later in life, and picking up swimming when he became serious about competing. His interest in IRONMAN competitions began with a slow boil after seeing Dave Scott and Mark Allen on *Wide World of Sports* and reached its zenith many years later when IRONMAN Texas launched in The Woodlands in 2012. Coolidge has qualified for the IRONMAN 140.6 World Championship on multiple occasions, the IRONMAN 70.3 World Championship once, and the Boston Marathon many times. Recent meniscus surgery has sidelined him from training, but Coolidge is enjoying the pause from his hectic training regimen and preparing for his return to racing.

ABOVE: Brian T. Coolidge crosses the finish line at the IRONMAN Texas event in The Woodlands. PHOTO COURTESY OF BRIAN T. COOLIDGE

WHAT GOES INTO YOUR TRAINING BEFORE EACH RACE?

The thing is it depends on what you're getting ready for. If you're training for a full IRONMAN, it takes months to get ready. The amount of training is pretty substantial for somebody who has a job as a lawyer. Another factor is family. You've got a lot of things in life to balance, and you really have to take that into account. Training for an IRONMAN takes so much time—at my peak, I found myself training about 14 to 15 hours a week. What that really means is that you're training usually twice a day and then weekends because you get more time.

WHAT WOULD YOU SAY IS YOUR STRONG SUIT AS FAR AS SEGMENTS OF THE RACES?

It's running by far because that's my background. My next strongest is the bike. My limiter is my swimming. Triathlons always go swim, bike, run, so I start out with my weakest. I'm one of the people that as the race goes to the next stage, the race tends to be more like my style of racing—so it helps quite a lot.

WHAT DO YOU CONSIDER YOUR BIGGEST OBSTACLE DURING THESE ENDURANCE RACES? IS IT THE PHYSICAL ASPECT OR IS IT THE MENTAL ASPECT?

I think the physical and mental aspects come up in every race, and so no matter how much you train, you are going to find some challenge with each of them. I have found, though, as I've started to age, the physical has started to tax me in a different way than it did before. I find myself limited in terms of what I'm able to put out. It's frustrating because you're used to doing something at one point in your life and I'm not able to put out at the same level that I was maybe 10 to 15 years ago.

WHAT ARE SOME THINGS THAT COME UP DURING A CHALLENGE THAT A PERSON WHO HAS NEVER RACED WOULDN'T THINK OF?

Nutrition and hydration. I've had some issues in races where my blood pressure plummeted, and it turns out that I wasn't taking in the right kind of electrolytes. You have to think through it constantly—what do I need to take in. When swimming, you obviously can't swim and eat. We tend to talk about cycling like it's a rolling buffet. You should be eating the whole time—taking in energy gels, Gatorade, or electrolytes of some kind. At some point you're sick of it. You've been out on the bike for nearly five hours, thinking I don't want any more of this stuff. You have to think about applying that to the run, knowing that you're going to need fuel while you're running. Of course, you can eat while you're running, but if you don't load up on the bike, you could set yourself up to run into some problems. I've had those kinds of issues before.

YOU QUALIFIED FOR BOTH THE BOSTON MARATHON AND THE IRONMAN WORLD CHAMPIONSHIP IN HAWAII. WHAT WAS THE QUALIFYING PROCESS?

I've gotten into Boston many times. They have qualifying times based on your age, and if you run a marathon faster than that qualifying time, you can apply to get into Boston. It's getting a little more complicated now, and while that may qualify, it's probably not enough now to get you in because Boston is so popular and limited in terms of its size. People actually have to beat their qualifying time by some number of seconds or minutes to get in. IRONMAN is very different because the organization will make slots available at each race, so for example, I qualified by right in Los Cabos. I would have

ABOVE: Brian T. Coolidge runs in the 2016 Boston Marathon—one of many Boston Marathons he has qualified for. PHOTO COURTESY OF BRIAN T. COOLIDGE

qualified in Texas through the rolldown process, but I didn't really understand the process well at that point and I did not know how to claim. Basically, I missed my opportunity to claim so the guy who finished after me in my age group ended up going to Kona, Hawaii, that year. That was part of the reason why I started training differently—trying to really make this a goal. In terms of how much time you put in, another thing is your family. I'm really lucky that I have an incredibly supportive wife, Kim, who is OK with me doing this.

WHAT ARE SOME OF YOUR FAVORITE RACES?

It's always fun to race the big ones. Kona was certainly a memorable one, and another was the Chicago Marathon—because of how big it is. The ones that you have a personal best at are great. The Houston Marathon is the marathon where I ran my fastest ever, so I always think back about that one. Cozumel was one I really liked because I raced it really well. In Cozumel, the water is so clear—you can see everything. If you're in a triathlon, you're going to look up between strokes and pick out something on the horizon to try to swim to. In Cozumel, the water was so clear and there's coral and things on the bottom. You can look up to see where you need to go and put your head back down and see a rock formation ahead and swim for that. It was a wonderful swim, and it's a fun event. I think the ones that stick out are either the ones that are big or the ones that you nail. **TBJ**

Sylvia Borunda Firth can be reached by email at sylvia.firth@texasbar.com.

Diversity Without Inclusion IS A RECIPE FOR FAILURE

IN MY JULY COLUMN, I ASKED YOU TO TAKE A R.I.D.E. WITH ME THIS YEAR as we focus on Respect, Inclusion, Diversity, and Equity. I discussed my views on respect—for the rule of law, the judiciary, and each other. This month, I ask you to consider what it means to be inclusive and to embrace the many differences in points of view, culture, and life experiences that exist within our legal community. With respect for each other and the understanding and appreciation that comes from being truly inclusive, we will be better positioned to effectively represent the public we are called to serve.

Some might consider the discussion of inclusion before diversity out of sequence. However, inclusion is the path we walk to achieve diversity. Even the best intentions regarding the creation of a diverse organization will be derailed without careful consideration about how to support and sustain diversity. It is easy to find and recruit candidates for a job or a leadership position who are well qualified to serve in the role and who are diverse in gender, race, ethnicity, abilities, LGBTQIA, etc. Trust me, there are plenty of well-qualified, diverse individuals. However, finding and selecting the person is not the end of the mission.

Simply placing a person in a position just so you can check a box and call your organization diverse is not the answer. The organization must have a culture of inclusiveness for diversity to be sustained. What does that mean? It means there are mentors ready to help navigate through the system and advocate for the diverse individual if necessary. It means educating yourself about the person's culture, characteristics, or other features that make them unique in your organization. Making sure religious and other cultural holidays are respected when planning events. Dietary restrictions and other societal practices must be considered within the organization, and the diverse individual should be invited to participate in the creation of organization calendars and events. Lawyers raising families must be empowered to say when scheduling of events is not workable for them because of other commitments.

If the person is the "first of" their type in your organization they have the added pressure of wanting to be a success and fit in and may not tell you when they have been made to feel uncomfortable, less than, or even worse—a token. They may not tell you, but over time they will leave and your attempt at diversity will be a failure.

It is crucial for the future of our profession for all people to be able to see themselves in our bar. Young people of color must know that being a lawyer is a possible career choice. Not only that, but lawyers of color, LGBTQIA lawyers, and differently abled lawyers must see themselves represented in leadership positions because *they are* part of our bar. This should be a point of pride, not a scorecard.

Diverse perspectives in our bar help us improve not only the bar itself but also the quality of legal services and the administration of justice in this state.

So, we must walk the path of inclusion in every way. It's upon me, the other bar officers, board members, section members, and all Texas lawyers to reach out and extend that offer of inclusion to those with whom you share similar traits and to those with whom you don't. Our bar will only be better because of it. It is the path to our future.

SYLVIA BORUNDA FIRTH
President, 2021-2022
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Task Forces Present Reports on GRIEVANCES, DIVERSITY, AND COVID-19 ISSUES

WRITTEN BY **LOWELL BROWN**

THE STATE BAR OF TEXAS BOARD OF DIRECTORS received task force reports on major issues facing the legal profession, including grievances, diversity and inclusion, and lawyer needs arising from the COVID-19 pandemic.

Directors met June 16-17 in Austin for their first in-person meetings in 15 months, after the pandemic forced the board to conduct all business by videoconference. The meetings offered a chance to honor departing directors, welcome newly elected and appointed members, and hear final reports or status updates from task forces and workgroups formed throughout the bar year.

The report from 2020-2021 State Bar President Larry McDougal's Task Force on Public Protection, Grievance Review, and the Client Security Fund received the most discussion during the June 16 meeting. The task force report included recommendations on issues such as due process in investigative hearings and assistance to grieved attorneys, but much of the board's discussion centered on the recommendation not to require sworn complaints.

Currently, the attorney grievance form requires complainants to swear the information is true and correct. Some directors said the bar should do more to protect lawyers from frivolous complaints by requiring complainants to attest to their grievances under penalty of perjury.

El Paso District Director Steve Fischer urged those who supported sworn grievances while running for office to "hold true to what they campaigned on and … what the lawyers of this state want."

The task force found the current language on the grievance form sufficient to deter most false complaints. Houston lawyer Michael Fields, a former judge who chaired the task force, warned that requiring sworn grievances could have a chilling effect on the filing of legitimate complaints and could even jeopardize Texas lawyers' self-governance.

"Chilling the public's ability to make complaints about lawyers will be the death knell for this bar," Fields said. "It will send us to a place that we do not want to be—administrative hearings where nonlawyers are judging our conduct. That is just not something that is palatable to me personally and to the majority of the members of this task force."

Following the discussion, directors voted to refer the task force report to the board's Discipline & Client Attorney Assistance Program, or DCAAP, Committee for review and possible recommendations.

The board also received written reports from the Diversity, Equity, and Inclusion Task Force and the Justice in Leadership Workgroup, which were created in 2020 to recommend action items on various diversity and inclusion issues facing the bar. At the request of 2021-2022 State Bar President Sylvia Borunda Firth, the board voted to extend the diversity task force through December 31.

Directors also heard a report from Granbury attorney Cindy Tisdale, co-chair of the Workgroup on Texas Lawyer Needs Arising from the 2020 Pandemic and 2021 Winter Storm. The workgroup conducted a member needs survey, collected disaster resources for attorneys, and created a video to raise awareness of the resources, Tisdale said. The video and resources can be viewed at texasbar.com/attorneyresources.

Leadership Changes

Houston attorney Laura Gibson was sworn in as State Bar president-elect during the board's June 17 meeting. Santos Vargas, of San Antonio, succeeded John Charles "Charlie" Ginn, of McKinney, as chair of the board. Supreme Court Justice Debra Lehrmann administered the oath of office to new officers and directors.

Awards

McDougal presented presidential citations to State Bar directors August Watkins Harris III, of Austin; Wendy-Adele Humphrey, of Lubbock; and James Wester, of Amarillo; attorneys Betty Blackwell, of Austin, and Richard Elliott, of Dallas; Pastor Richie Butler and Charlene Edwards, of Project Unity in Dallas; and Committee on Disciplinary Rules and Referenda chair M. Lewis Kinard and members Claude Ducloux, Vincent Johnson, Timothy D. Belton, Amy Bresnen, Rick Hagen, Justice Dennise Garcia, W. Carl Jordan, and Karen J. Nicholson.

Ginn, the outgoing board chair, presented the Public Member Award to director Alan E. Sims, of Cedar Hill; the Outstanding Third-Year Director Award to Emily Miller, of Brownwood, and Stephen J. Naylor, of Fort Worth; and the Michael J. Crowley Award to Robert D. Crain, of Dallas.

In other action, the board:

- Heard an update from the Presidential Task Force on Criminal Court Proceedings and voted to extend the task force through December 31.
- Extended the Workgroup on the Texas Opportunity & Justice Incubator through December 31.
- Approved the Committee Review Task Force recommendation to change the name of the Disability Issues Committee to the Disability Rights and Issues Committee.
- Approved updates to the Board Policy Manual, including the addition of a State Bar Board of Directors' Code of Conduct and changes to policies related to the selection of president-elect candidates, the announcement of candidates, and the scheduling of candidate forums.
- Opposed a proposed annual meeting resolution presented by Joe K. Longley.
- Approved updated performance measures based on the Strategic Plan for 2021-2026.
- Passed resolutions commemorating the 175th anniversary of the federal courts in Texas; honoring the late State Bar past presidents Lloyd Lochridge and Broadus Spivey; and commending the work of the Texas Supreme Court's Remote Proceedings Task Force in addressing the issue of remote hearings.

Materials from the meetings—including task force reports—can be viewed at texasbar.com/bodmaterials. Watch the meetings at texasbar.com/board under "Board Meeting Videos." **TBJ**

ABOVE: Texas Supreme Court Justice Debra Lehrmann administers the oath of office to new directors, President-elect Laura Gibson, and Board Chair Santos Vargas. PHOTOS BY LOWELL BROWN

State Bar of Texas Will Not SEEK REHEARING OF 5TH CIRCUIT PANEL DECISION

THE STATE BAR OF TEXAS WILL NOT SEEK REHEARING of a U.S. Court of Appeals for the 5th Circuit panel opinion that upheld the constitutionality of most challenged State Bar activities and left intact the structure of the mandatory bar.

State Bar leaders announced the decision after the bar's board of directors met July 19 to consult outside counsel on the *McDonald v. Sorrels* litigation.

"We are pleased that the 5th Circuit panel upheld the constitutionality of nearly all of the State Bar of Texas programs and activities challenged by the plaintiffs," State Bar of Texas President Sylvia Borunda Firth said. "Today the State Bar will inform the 5th Circuit Court of Appeals it will not be filing a petition for panel rehearing or a petition for rehearing en banc. We look forward to getting back to the trial court to bring this litigation to a conclusion."

Three Texas lawyers sued the State Bar of Texas in March 2019 claiming that under the U.S. Supreme Court's 2018 *Janus v. AFSCME* decision, it is unconstitutional for an attorney to be required to join the State Bar of Texas to practice law. The plaintiffs also challenge bar programs they claim exceed the bar's "core regulatory functions."

In May 2020, U.S. District Judge Lee Yeakel granted the State Bar's cross-motion for summary judgment and denied the plaintiffs' motion for partial summary judgment. The plaintiffs appealed the decision to the 5th Circuit.

On July 2, 2021, a panel of the 5th Circuit issued its opinion, upholding the constitutionality of the vast majority of the challenged State Bar programs and activities, including the bar's CLE and annual meeting programming, diversity initiatives, the *Texas Bar Journal,* and the bulk of its access to justice initiatives.

The panel found parts of the State Bar's and Texas Access to Justice Commission's legislative efforts were not germane to the bar's purposes of regulating the legal profession or improving the quality of legal services available to Texans, and therefore use of mandatory dues for those efforts violates the constitutional rights of the plaintiffs. The panel also found the bar's procedures are not sufficient to allow members to challenge activities they believe to be nongermane.

The panel vacated the district court's summary judgment, rendered partial summary judgment in favor of the plaintiffs, and remanded the case for the district court to determine the full scope of relief to which the plaintiffs are entitled.

The court also granted a preliminary injunction preventing the State Bar from requiring the three plaintiffs to join or pay dues pending completion of the remedies phase before the district court on remand. The injunction does not prevent the State Bar of Texas from requiring membership of, or collecting dues from, other bar members.

The 5th Circuit panel opinion does not change the longstanding U.S. Supreme Court precedent that supports the mandatory bar. The opinion also does not undermine the fundamental structure and purposes of the State Bar of Texas, which was established by the Texas Legislature in aid of the Texas Supreme Court's inherent authority to regulate the practice of law.

The Texas case is one of many federal lawsuits filed across the country in recent years against mandatory bars. Read filings from these cases on the State Bar of Texas website at texasbar.com/mcdonaldvsorrels. **TBJ**

PRACTICAL TIPS FOR TEXAS LAWYERS ON STAYING ETHICAL ON SOCIAL MEDIA

Attorneys have increasingly embraced social media sites like LinkedIn, Twitter, Facebook and Avvo for professional purposes. According to the American Bar Association's 2020 Legal Technology Survey Report, 77% of all respondents reported using social media for professional purposes. While social media sites are a convenient and affordable way to gain exposure to a larger audience and promote one's brand, incorrect use of these platforms can place attorneys at risk of running afoul of the ethics rules. (For the full article, please visit tlie.org.)

1. YOUR POSTS MAY BE ADVERTISING

It's important to recognize that attorneys' posts on social media may be construed as advertising. Under the recently amended Rule 7.01(b)(1), an "advertisement" is a "communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters."

So, what are the implications?

Unless the communication falls under one of the exemptions under amended Rule 7.05, the communication will need to comply with the filing requirements for advertising and solicitation communications under Rule 7.04.

2. BEFORE POSTING, CHECK IT TWICE FOR POSSIBLE FALSE OR MISLEADING STATEMENTS

While this tip seems intuitively obvious as the prohibition against making false or misleading statements is not new, the ease of using social media lends itself to posting in haste and without adequate review. Additionally, Texas attorneys would be well advised to review the recent changes to the Rule 7.01.

3. AVOID DISCLOSING CONFIDENTIAL INFORMATION

Social media also creates a potential risk of disclosing (inadvertently or otherwise) confidential information, including the identities of current or former clients. While this seems like a no-brainer, there have been several ethics opinions, as well as court cases where attorneys have found themselves in violation of Duty of Confidentiality under ABA rule 1.6 (Texas Rule 1.05).

For example, can an attorney respond to a former client's negative comments published online? According to the Professional Ethics Committee for the State Bar of Texas, not if the response would reveal any confidential information. In Opinion 662, the Committee found that "[t]he lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct."

CONCLUSION

Social media can serve as a valuable tool in growing an attorney or firm's law practice, but do pose ethical risks. Attorneys should take time to review the amended Texas Rules on advertising and solicitation, the type of content they post, as well as their policies on social media to ensure it is used in accordance with the ethics rules.

Preventative MEASURES

DOES YOUR COMPANY KNOW HOW TO SECURE ITS IOT DEVICES?

WRITTEN BY **PEGGY KEENE**

AS THE INTERNET OF THINGS, or IoT, has made itself increasingly relevant across all industries, smart devices have become especially common in the workplace. As a result, privacy experts across the nation have noted a steep rise in cyberattacks on IoT devices as more and more smart devices are being used in industries that are relatively new to using IoT connectivity.

The Popularity of IoT Use Has Made It a Target for Hackers

Every day IoT is used in new and exciting ways. Whether it is a new industry finally "coming online" with IoT or an already established IoT industry finding a new channel to use the technology, it is clear that IoT is here to stay. IoT refers to the technology that allows for smart devices to stay "online" indefinitely while being able to receive, track, and send data wirelessly. These devices can be used to monitor everything from a patient's blood glucose levels to a satellite's uptime. While an industry's need for IoT devices may vary, the use of IoT devices is steadily increasing across the board. For example, IoT devices have become incredibly popular in health care. Just earlier this year, one health system in southwest Missouri disclosed that they extensively use more than 17,000 IoT-connected devices in the day-to-day management of their services.

But as IoT technology becomes more widely accepted, it has also become a more high-profile target for hackers. Such a problem is compounded by the fact that there are so many different manufacturers of IoT devices as so many companies want to cash in on IoT's popularity. This makes it harder to ensure that consumer devices have adequate protection in place against hackers and cyberattacks.

Tips for Securing IoT From Hackers

First, above all, secure your company's network. A company or system's network is the foundation to all its technology transactions. Securing a company's network can include multiple steps, such as installing a firewall, maintaining proper firmware, pushing regular updates to devices, having antivirus and anti-malware software on all devices, and limiting activity on company devices to pre-approved activities.

The second step is to have a strong understanding of what kind of communications the company's devices should be making. When experts speak of "communications," they are not referring to communication like email but to the dialogue between devices that occurs for IoT devices to function. Understanding this and training employees on what kind of use is permitted on their devices can help IT recognize when unauthorized access, i.e., hacking, is occurring.

Lastly, if budget permits, experts stress that company-issued devices should be from the same company, of the same model, and run the same software. This streamlines the process for IT when updates or patches must be pushed to the devices, and it can also make it easier for companies to train their employees.

Key Takeaways on Securing IoT Devices From Hackers

The hacking of IoT devices has become a real concern as more and more industries begin to use IoT technology. To deter hacking, experts suggest several preventative measures that include:

- Limiting the use of company-issued devices to approved activities only;
- Ensuring that all the devices used by the company are of the same model, manufacturer, and version; and
- Using safeguards such as antivirus software, anti-malware software, and firewalls. **TBJ**

This article was originally published on the Klemchuk Intellectual Property Trends blog and has been edited and reprinted with permission.

PEGGY KEENE
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Breaking Up Is HARD TO DO

WIFE AND HUSBAND HAVE BEEN MARRIED FOR MANY YEARS. Seven years ago, Wife was considering divorcing her Husband. At the time, unbeknownst to Husband, she consulted with Taylor, a family law attorney at the XYZ Law Firm. Wife wanted to know what her options were and how the property would be split if she were to go through with filing for divorce. She discussed her situation with Taylor, who offered advice and took notes during their conversation. At the conclusion of the meeting, Wife was still undecided, so Taylor prepared an engagement agreement and told Wife to sign and return it if she decided to retain the XYZ Law Firm. Ultimately, Wife decided not to go through with filing for divorce, and Taylor did not take any other steps to take her on as a client.

Seven years later, Husband decides to file for divorce. Unaware that Wife previously consulted with the XYZ Law Firm, he contacts and consults with another attorney at the XYZ Law Firm, Cory. When Cory does a conflict check, it turns up the single meeting with Taylor, who is still at the firm. Cory talks to Taylor, who has no recollection of the meeting or of Wife at all, including anything that might have been discussed. Taylor also says that if any notes were taken, they would have been discarded years ago in accordance with firm policy regarding consultations that don't result in the firm being retained. When learning that Husband has retained the XYZ Law Firm, Wife makes clear that she will not waive any conflict of the XYZ Law Firm or its attorneys.

As Cory considers whether to take on Husband as a client, which of the following is most accurate under a recent Ethics Opinion from the Professional Ethics Committee for the State Bar of Texas?

A. Cory cannot represent Husband.
B. Cory can represent Husband if Taylor is screened from the representation and does not participate in any way.
C. Cory can represent Husband if Taylor is screened *and* the firm has no files or notes related to Wife's consultation five years earlier.
D. Cory can represent Husband without screening Taylor because Wife never signed the engagement agreement and therefore never became a client of the firm.

ANSWER: Because Wife never became a client of the firm, duties owed to current and former clients do not apply here. But in Ethics Opinion 691, the Committee on Professional Ethics makes clear that law firms still have obligations with respect to non-clients. The committee noted that Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct prohibits a law firm from representing a person when doing so would be "adversely limited" by the firm's responsibilities to a "third person." Here, while Wife was never a client, she was a *prospective* client. The committee found that attorneys do have a duty of confidentiality to prospective clients under Rule 1.05 and Texas Rule of Evidence 503(a)(1)(B). Therefore, Taylor cannot represent Husband, and his conflict is imputed to every other lawyer at the XYZ Law Firm under Rule 1.06(f) of the Texas Disciplinary Rules of Professional Conduct. Cory cannot represent Wife. The correct answer is A.

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MCLE Credit: 13 hrs (includes 3.25 hrs ethics)

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Webcast Sep 30-Oct 1 from 8:55 am to 5:00 pm CT on first day
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The 2021 State Bar of Texas Virtual Annual Meeting

The State Bar of Texas held a two-day virtual Annual Meeting packed with CLE offerings, ethics programming, and more for its members.

The State Bar canceled its Annual Meeting in Fort Worth scheduled for June 17-18 due to COVID-19. Like last year, volunteers and staff members developed a virtual event to take its place, featuring 50 sessions of up to 10 hours of video-on-demand CLE and an awards presentation. State Bar sections and other entities provided programming on Thursday, which featured pre-recorded, practice-specific seminars. Executive Director Trey Apffel kicked off Friday's programming with a welcome message. Additional content included a short awards presentation, parting remarks from 2020-2021 President Larry McDougal and 2020-2021 Texas Young Lawyers Association President Britney Harrison, and the swearing-in ceremonies of 2021-2022 President Sylvia Borunda Firth and 2021-2022 TYLA President Jeanine Novosad Rispoli.

Texas Supreme Court Justice Rebeca Huddle swore in Borunda Firth as president of the State Bar of Texas, thanking her for "answer[ing] the call for service" and celebrating her El Paso roots. Borunda Firth is the first Hispanic woman and first El Pasoan to serve as president of the State Bar. Borunda Firth said she ran for president because she felt it was important that State Bar leaders reflect diversity in race, ethnicity, gender identity, orientation, practice area, and geography. "It's important because diverse perspectives bring about better outcomes and better outcomes help us continue achieving the State Bar's essential functions of improving the quality of legal services and continuing regulating the profession," she said. Borunda Firth drove home a message of unity, calling on the state's 106,000 bar members—which include government lawyers, big firm lawyers, solo practitioners, or "something in between" and of any political affiliation or religious belief (or lack of)—to work together to improve the State Bar. The 21st century State Bar of Texas, she said, is "a place where all are welcome and all are encouraged to get involved in our unique system of self-governance."

The 21st century State Bar of Texas is "a place where all are welcome and all are encouraged to get involved in our unique system of self-governance."

2019-2020 TYLA President Victor A. Flores, of Brownsville, swore in Rispoli as TYLA president at the Dallas Arboretum and Botanical Gardens. Rispoli is a Baylor Law graduate and family law practitioner at Rispoli & Altman in Waco. "I have the most heartfelt appreciation for the trust TYLA members have placed in me," she said after taking the oath. "I am deeply grateful for the opportunity to serve you." Rispoli thanked her many law "families," including the Houston law community where she started practicing, Baylor Law School, her peers in the Waco and McLennan County legal communities, and TYLA for her "first big brother," Flores. The State Bar of Texas and TYLA "wouldn't be the strong communities we are today without the strong women who have led us and the men who truly value and listen to those strong women," Rispoli said. "This year, we will create new projects and resources with a focus on civility, relationship wellness, and much more, so stay tuned," Rispoli said of TYLA's plans for her term. "It is my hope that each step of the way forward we will foster enduring change together."

This recap of the 2021 Annual Meeting is provided to help our members improve the quality of legal services they offer their clients. Views expressed are those of the individual speakers and not those of the State Bar of Texas.

Updates on Environmental Law Issues

State Bar of Texas Environmental & Natural Resources Law Section Chair David Klein shared updates on environmental law issues throughout Texas. The Texas Public Utility Commission suspended late fees, and deferred payment plans are still in place for Texans. In 1991, the U.S. Environmental Protection Agency published a regulation to control the lead and copper in drinking water. In 2020, updates to the Lead and Copper Rule included changing sampling protocols to 20% each year for testing copper and lead in drinking water to protect children in schools and day care centers. If the samples come back with high copper and lead in drinking water, Klein said, you must notify the public of the findings.

Reasonable Accommodations and Protocols to Follow When Returning to Work

Brian East, of Disability Rights Texas in Austin, addressed some concerns in returning to work during COVID-19 in the session titled "COVID-19 and the ADA." Employers can lawfully take employees' temperatures before they enter the work building, ask if employees are experiencing symptoms, ask why the employee was absent from work, ask about known exposure, and encourage employees to get the vaccine, he said. Employers can also enforce forced leave until an employee gets a doctor's approval when it is safe to return to work, East said. Of course, telework is possible if the employee's job can be done at home, he said. Employers should have a general statement pertaining to employees who have been exposed to COVID-19, East said. If an employee lives with someone who is high risk, the employer is not required to make accommodations for them, East said. He advised to be flexible with the employee. For more information, the U.S. Equal Employment Opportunity Commission addresses COVID-19 concerns for employers and employees at eeoc.gov/coronavirus.

2021 Discovery Update: Full Disclosure and Other Changes in a Post-2020 Texas

Monica W. Latin, of Carrington Coleman Sloman & Blumenthal in Dallas, discussed some of the major discovery changes over the past year. Highlights include amended Rule 194.1 of the Texas Rules of Civil Procedure, which states that a party must provide to other parties the information or material described. In other words, Latin said, disclosures are mandatory—there is no such thing as request for disclosure anymore. Amended Rule 192.2 states that unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery until after the initial disclosures are due. Latin also discussed amended Rule 194.2. "Now it is mandatory to disclose at the time of your disclosures a copy of all of the information, including electronically stored information, which the party may use to support its claims, or defenses," she said. "It is a really broad standard. It requires a lot more upfront knowledge of your case."

LAWYERS AT RISK: THE IMPACT OF HUMAN TRAFFICKING AND MODERN SLAVERY ON LAWYERS AND THEIR CLIENTS

"Human Rights Day honors the adoption of the Universal Declaration of Human Rights, which has inspired more than 60,000 human rights instruments," said moderator Wajiha Ahmed, of Buttar, Cadwell & Company in Sydney, Australia. "Article 4 states that no one shall be held in slavery or servitude. Slavery and the slave trade shall be prohibited in all their forms." Panelists Anne O'Donoghue, of Immigration Solutions Lawyers in Sydney; Judge Michael Kirby, of Institute of Arbitrators & Mediators in Sydney; Akiko Sato, of Business & Human Rights Resource Centre in Tokyo, Japan; and Nicole D'Souza, of Evatt Foundation in Sydney, discussed the impact of human trafficking and modern slavery on lawyers and their clients. O'Donoghue said Australia is leading the way in legislation against modern slavery. She said in-house counsel face ethical dilemmas and their first obligation is their duty to the court. "If you take away nothing else from this webinar as a corporate counsel, my ardent plea is for all corporate counsel to come to terms with what is human rights due diligence," O'Donoghue said. "It requires a reframing of the traditional approach to corporate risk, corporate due diligence, an assessment of risk from the perspective of protection of reputation of the corporate entity."

Social Justice and Policing

Since George Floyd's murder in May 2020, members of the African American Lawyers Section have spoken with law enforcement officials across Texas about issues including duty to intervene, policing, qualified immunity, use of force, and how lawyers can make a difference in their communities. "If there's anything you can say about this year, it's about talking about these issues, trying to identify these issues, trying to confront these issues, and [the need to] have hard conversations," Rudy Metayer, 2020-2021 section chair, said. "Because, guess what, if these issues were easy to us all, it would have already been done." The panel—which included attorneys and law enforcement representatives—discussed current issues in policing, including the "defund the police" movement, duty-to-intervene policies, and qualified immunity. Panelist Metayer called social justice and policing one of the most vital conversations to have right now. "I think that what we can all agree on is that we want to have good policing no matter where it's at," he said.

THE SITCH AT TWITCH, TRILLER, AND TIKTOK: THE RICH FAIL TO PROPERLY LICENSE MUSIC

Chris Castle and Gwen Seale, entertainment lawyers in Austin, discussed the ways social media platforms are relying on Section 512 (safe harbor) of the Digital Millennium Copyright Act, or DMCA, to avoid proper licensing of music. Platforms specifically site the creation of user-generated content, or UGC, by the posters of the work. Castle and Seale explained the licensing issues applicable to each platform. A possible solution to the current situation would be the creation of the Copyright Alternative in Small-Claims Enforcement Act, or CASE Act, that would establish a voluntary alternative dispute resolution system for both users and copyright claims. The CASE Act would create a Copyright Claims Board, a three-person panel of officers that would rule on infringements brought by copyright owners, counterclaims and defenses, declaration of noninfringement brought by users, and misrepresentation of DMCA takedown notice or counter-notification. Castle and Seale said safeguards for the proper licensing of music would be penalties for bad faith claims/actors, and the U.S. Copyright Office can limit the number of claims that can be brought.

Consumer & Commercial Law—Legislative Update

In Austin-based Karen Neeley's observations, COVID-19 reshaped the Pink Dome in some ways while keeping things the same in others. On the former, there was a split in handling bill testimonies—some committees accepted them electronically; others did not. Elsewhere, the session surprised Neeley, who anticipated a noticeable dip in the number of bills filed compared with the previous session—that number exceeded 7,000 with about 200 passing at the time of Neeley's Annual Meeting panel "Legislative Update" on May 21. But with Republican control of the Senate, House, and governor's mansion, there's a "totally different scenario with regard to how much influence the Democratic Party might have in amending different kinds of bills," she said. She also noted 2021 as a redistricting year. However, that will have to wait until census data becomes available—one modest estimate from the *Houston Chronicle* puts that in September at the earliest.

A Work in Progress With LGBT Law

Panelists Shelly Skeen, of Lambda Legal in Dallas; Geron Gadd, of AARP Foundation in Washington, D.C.; Venita Ray, of Positive Women's Network in Houston; Wesley Hartman, of Texas Health Action in Austin; and Cathy Sakimura, of National Center for Lesbian Rights in San Francisco, discussed ongoing concerns about LGBT law in the session titled "New Horizons for LGBT Rights." The panelists said Texas is still struggling with implementing marriage equality but the state now recognizes U.S. citizenship of children who were born abroad through surrogacy to same-sex parents. "Birth certificates are not the only way to show you are a parent in custody hearings," Skeen said. The *Bostock* decision, which was a landmark case in the U.S. Supreme Court, protects employees against discrimination regarding sexual orientation and gender identity. Hartman wrote the "Texas Name and Gender Marker Change Guide" to help with the process of changing a person's name and gender identity. Ray discussed the ongoing battle of HIV discrimination. She said the Positive Women's Network Texas Strike Force was successful in getting the Texas Department of State Health Services to reverse its decision to change income eligibility requirements—all people living with HIV will continue to receive medications.

Helpful Guidelines Concerning Taxes

"When money moves, there are usually tax issues," said Joshua Smeltzer, of Gray Reed & McGraw in Dallas. Smeltzer took a deep dive in explaining tax issues between client and attorney in a session titled "A Guide to Federal Tax Controversy and Litigation." When a tax issue occurs through inheritance, divorce, legal settlement, business assets/stock sales, change in corporate structure, change in ownership, change or expansion of business lines, and raising capital for expansion, it is helpful to ask a tax attorney what your options are before a potential audit notice, he said. Tax opinions that are made by a tax attorney can help show the IRS you took steps to rectify your taxes or help your case in court, Smeltzer said. Tax practitioner privilege does not cover communication made to prepare a tax return and does not apply to criminal tax proceedings or to state or local tax matters. It only applies to civil administrative proceedings. Make sure you have clear lines with your client on what is privileged information and what is not—if parties aren't careful, things might be disclosed that should not be, Smeltzer said. *United States v. Kovel* allows attorney-client privilege with an accountant that is hired by the attorney to assist with legal advice, he said. Get your client to sign the IRS Form 2848 so you can contact the IRS on his or her behalf and then order the IRS transcript online that will show all the taxpayer's activity to help with the audit, Smeltzer said. If your client receives a notice of deficiency, ensure you and your client make the 90-day deadline because this deadline will not be extended and you will lose your chance to go to tax court to try your case, he said. Verify all communication is in writing and keep a record of everything, Smeltzer said.

Texas Supreme Court

Steven J. Knight, of Chamberlain, Hrdlicka, White, Williams & Aughtry, provided an update on the Texas Supreme Court's term from September 2020 to August 2021, including statistics from the 2020 term and updates on the Texas Citizens Participation Act, or TCPA; premises liability; negligence; the Prompt Payment of Claims Act; underinsured motorists; and workers' compensation. In the 2020 term, the Supreme Court granted review for 11% of petitions and issued 136 opinions. Regarding the TCPA, the court ruled in *Montelongo v. Abrea* that because the submission of an amended petition added new causes of action, the 60-day deadline applied with respect to the amended petition. In *Catholic Diocese of El Paso v. Porter,* the court ruled that "a person on the property to perform volunteer work for a third party benefits the third party rather than the property owner and therefore is not the owner's invitee." In a negligence case, the court ruled in *JLB Builders, LLC v. Hernandez* that a "general contractor who, while observing a safety hazard firsthand, directly orders a subcontractor's employee to perform the injury-causing task incurs a duty with respect to the task's performance … However, there is no indication that JLB was aware that the wind posed a particular danger that day." The court reversed and remanded in *Hinojos v. State Farm Lloyds,* stating that petitioner Louis Hinojos had to establish the amount State Farm is contractually liable for, that State Farm failed to comply with statutory deadlines, and damages based on the amount contractually owed was less than the amounts paid within the statutory deadlines. In *In re State Farm Mutual Automobile Insurance Company,* the court rejected the claim that the plaintiff could avoid the ordinary sever and abate concept by only asserting extra-contractual claims. Finally, in *Berkel & Company Contractors, Inc. v. Lee,* the court reversed and rendered for Berkel because "no evidence supports an inference that Miller … believed the equipment would break and collapse, and that it was destined to collapse on Lee, who stood beyond the construction barricade at grade level."

Implicit Bias and Legal Ethics—What You Need to Know

Judge Audrey Moorehead, of Dallas County Criminal Court #3, and Jonathan Smaby, executive director of the Texas Center for Legal Ethics, discussed implicit bias and legal ethics. Smaby said implicit bias is an unconscious bias based on the attitudes and stereotypes that affect a person's understanding, actions, and decisions. Implicit bias works due to the way the brain is wired, Smaby said, as the brain makes quick decisions to save energy, which is highly efficient but often wrong. These snap decisions can lead to problems such as the "in-group/out-group phenomenon," Smaby said, which results in people who are similar not judging each other harshly and more harshly judging those in the out-group. Smaby cited the Thomas Meyer Study in which 60 law partners were asked to judge a millennial's legal writing skills. According to Smaby, partners reviewed legal memos with 22 errors baked in for a white Thomas Meyer and a Black Thomas Meyer. The scores showed the white Meyer receiving a score of 4.1 and the Black Meyer receiving a 3.2, with the comments about the Black millennial being decidedly negative. "A lot of people don't want to admit that they have an implicit bias," Moorehead said, "or believe that they have one." The impact of implicit bias affects how the public sees the legal system, Moorehead said. "We have to come to a certain realization that the public, the community, the society doesn't have the confidence in our system of justice that we thought they had," Moorehead said. Techniques for what can be done about implicit bias include understanding how your brain processes information, being aware of your biases, challenging yourself, creating in-house programs, initiating discussions at home and at work, and looking for it in your own life, Moorehead said. "There's no justification for throwing our hands up in resignation."

BUILDING AN EFFECTIVE DIVERSITY AND INCLUSION PROGRAM AT YOUR WORKPLACE

"Statistics have shown that companies with a diverse workforce are more successful and have higher revenues than companies that are not," said Toni Nguyen, of PowerSchool in Austin. "Diverse companies are more successful because they bring diverse point of views and solutions. Clients are demanding working with a lawyer that looks like them, therefore making law firms cater to their clients and hiring more diverse attorneys." In "Key Elements to Building an Effective Diversity & Inclusion Program", panelists John Treviño, of Perkins Coie in Dallas; Nguyen; Albert C. Tan, of Haynes and Boone in Dallas; and Natara Williams, of Trace Midstream in Houston, discussed diversity and inclusion in the workplace. The legal profession is behind other professions when it comes to diversity. "Over the past decade, there has been a slight increase in minority representation in the legal profession," Treviño said. According to U.S. Bureau of Labor statistics, the legal profession went from 11.6% in 2009 for minority representation to 17.4% in 2019. The percentage of women attorneys in the U.S. has continued to increase from 32.4% in 2009 to 36.4% in 2019 but still lags other professions, Treviño said. Minority attorneys make up 22% of the State Bar of Texas. Williams said you must be explicit and intentional to have conversations about growing diversity and inclusion in your workplace. Tan shared tips for helping a law firm be proactive in having diversity and inclusion—create a task force that focuses on how you recruit, how you assign and evaluate work, how you determine promotions, and how you get leadership involved, and have a budget and resources for the task force. Then develop and execute the plan. Panelists said companies need to create systemic changes to foster long-term inclusion and equity in the workplace.

THE PROMISE AND PERIL OF TECHNOLOGY

In February 2019, the Texas Supreme Court adopted Comment 8 to American Bar Association Model Rule 1.01, which deals with the ethical duty of technology competence. Moderator Elizabeth Rogers, of Michael Best & Friedrich in Austin, framed the discussion by reminding panelists Shawn E. Tuma, of Spencer Fane in Plano; Anne-Marie Rábago, of Modern Juris in Austin; and William Smith, of Business Talent Group in Austin, of that fact. "The comment is relatively very simple—it is less than 20 words," Rogers said. "But these words have somewhat become a game changer. It asks us to become familiar with not only the benefits of but the risks of technology during the course of representing our clients." Smith discussed the evolving nature of artificial intelligence and how it is being used in law enforcement and the judicial system. "We are starting to see the technology moving faster than the regulation does or even public awareness does," Smith said. Tuma said the focus needs to be not only on the impact of technology on lawyers but also the impact on humanity. "I'm going to bring the bad to the discussion," Tuma said. "I love technology. It is a source of livelihood for me. But what I've learned over the years is that every tool that is developed for good is also used for bad." He added that privacy goes to the essence of humanity, and when we lose it, it's gone. Rogers shifted the discussion to how to distribute technology with more equity. Rábago said the most recent U.S. Census data showed about one-third of all Texans, or 10 million people, don't have access to broadband. Smith brought the discussion full circle to practicing attorneys and stressed the importance of cybersecurity. "If you take nothing else away from this panel," he said, "a lot of these ransomware attacks happen not because they are sophisticated but because people are not using basic things." Smith recommended using a virtual private network, or VPN; using a complicated password; making sure you know where your data is stored; and enabling encryption on your devices.

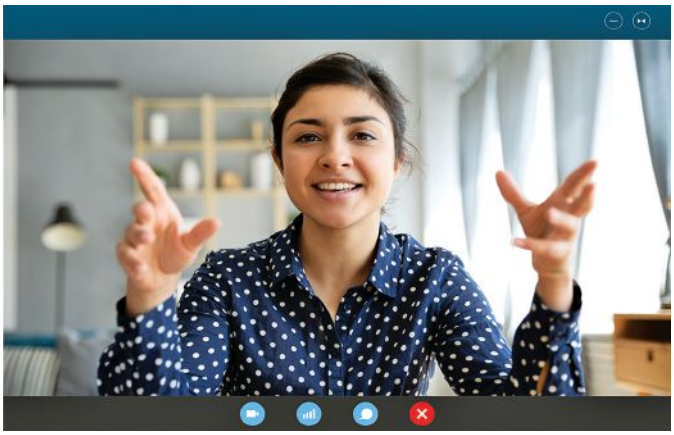
Temporary Orders: A View From the Bench

Moderator Deborah Mackoy, of Mackoy, Hernandez, Qualls, Jones, and Woods in Frisco, started the session by asking Judge Emily Miskel, of the 470th District Court, her take on temporary orders. Miskel said that at temporary orders, she's not looking to hear every bit of evidence she will hear again at trial. "I want to make sure that everyone is safe—that everyone hasn't starved. That we can basically Band-Aid a good enough D-minus solution to get everyone to their trial date," Miskel said. "And so also, I understand that after I hear more information at trial, I may very well totally change my mind. Some attorneys perceive that if a judge did something on temporary orders, that is a forgone conclusion that they're not going to change their mind at trial. I don't see it that way." Judge Brody Shanklin, of the 211th District Court, said his job during temporary orders is to maintain the status quo. Miskel said that for third-party witnesses, she thinks we will see much more use of Zoom. "A lot of my self-represented litigants do better on Zoom," Miskel said. "The upside is that people share more facts. As a judge, I believe I get better decisions if I have relevant, reliable evidence."

Texas Courts of Appeals

Former Texas Supreme Court Chief Justice Wallace B. Jefferson moderated a roundtable discussion with nine of the 14 chief justices from the Texas Courts of Appeals. Topics of discussion included most common cases, opinion and administration of the court, restructuring, diversity and inclusion on the courts, transferring cases, and Zoom trials. Chief Justice Darlene Byrne, of the 3rd Court of Appeals in Austin, said the most common cases in her court are the administrative laws of appeals for the Texas government. "We still get a lot of criminal appeals; about two-thirds of our cases are criminal appeals," said Chief Justice John M. Bailey, of the 11th Court of Appeals in Eastland. Chief Justice Tracy Christopher, of the 14th Court of Appeals in Houston, said her court sits in panels of three with the vast majority of the cases heard decided by the three-judge panels. Christopher said the 14th Court of Appeals has a high rate of concurring and dissenting opinions, with 9% of cases having them, whereas the 1st Court of Appeals in Houston has 0.02% dissenting or concurring opinions. The chief justices also addressed Senate Bill 11, the proposed restructuring of the courts of appeals from 14 to seven, which did not pass and was left pending in committee during the regular session of the Texas Legislature. "All the courts of appeals are effective, and I attribute that to them being spread out throughout the state and not centered in one, two, or three locations," said Chief Justice Bonnie Sudderth, of the 2nd Court of Appeals in Fort Worth. Bailey said the number of courts of appeals and locations are best left to the Legislature. "My bigger concern would be how far would someone from a small county have to travel if they chose to attend court in an urban area," Bailey said. Chief Justice Robert D. Burns III, of the 5th Court of Appeals in Dallas, said the proposed restructuring "would really make things challenging for us, for litigants, and appellate attorneys," and predicted it would be three or four years of difficulty before things got back to normal. Chief Justice Dori Contreras, of the 13th Court of Appeals in Corpus Christi, said she thinks consolidating the courts of appeals would reverse gains in diversity in the court system and result in chaos. Chief Justice Rebeca Martinez, of the 4th Court of Appeals in San Antonio, said the country has "a growing percentage of women and people of color on the bench," which shows the next generation there is a place for them in the judiciary.

PANDEMIC PLEA BARGAINS



With the COVID-19 pandemic in full swing, in-person hearings went by the wayside in favor of online proceedings, a move Philip Mack Furlow, district attorney for the 106th Judicial District in Dawson County, said puts a limit to an attorney's ability to negotiate a plea. "You cannot get much done doing what we're doing right here on Zoom," he said. "… [T]he likelihood of being able to reach resolution to get something done is when everyone is there in person." In person, attorneys can meet with each other, look each other in the eyes, shake hands, talk about the case, go back and forth, and have give-and-take, Furlow said. District attorney offices across Texas have continued to indict cases and conduct grand jury proceedings over the course of the last year. Without live dockets, cases haven't been getting resolved, he said. "No trials, no leverage." However, Furlow's district is returning to live trials soon and faces a backlog of cases that are opportunities to strike plea deals. He has 27 cases pending in the docket with only one trial team to handle them. "We'll see what we can get done." Furlow then mused over tricks he's learned in plea bargaining—such as reducing state jail felonies to Class C misdemeanors like possession of drug paraphernalia with intent to distribute—before praising the return to live court. "It's blue light special time. Be creative. Get stuff done."

BACK TO THE FUTURE: A JUDICIAL PERSPECTIVE ON COURTROOM TECHNOLOGY

In this session moderated by Rick Robertson, of KoonsFuller in Plano, panelists U.S. District Judge Xavier Rodriquez, 470th District Court Judge Emily Miskel, 394th District Judge Roy Ferguson, and Reginald Hirsch, of the Law Office of Reginald Hirsch in Houston, discussed technology in the courtroom and what it might look like going forward. Ferguson said that the 36th emergency order issued by the Texas Supreme Court restored some control to local jurisdictions to decide how to hold in-person hearings. Miskel said there have been variations since the start of the pandemic. "If anyone requested in person, I had to accommodate them on the fly," she said. "Based on experience, hybrid proceedings are terrible. They are the worst of both worlds. Doing everybody on Zoom works fine. Doing everybody in person works fine. Half the people on Zoom and half the people in person is a logistical and IT constant effort and toil." Rodriquez said the order would not affect federal courts. Ferguson said his court proceedings are still fully virtual unless parties can show good cause to be in person. They don't have the budget to install equipment for hybrid proceedings, he said. Rodriguez said most judges have been cautious. "By and large I would say mostly it is remote with pleas and sentences," Rodriguez said. "By and large, we have not had criminal jury trials being conducted. By and large, we have gone forward with bench trials in civil cases and bench trials in criminal cases where the defendant has waived his right to a jury trial with the concern about limiting the number of people in a courtroom and courthouse. Here is where architecture has worked against us. Our buildings were never meant to handle a pandemic." The panelists discussed the differences of availability of technology in courtrooms. Hirsch said some courtrooms in Houston are equipped with the latest technology, but Ferguson said some in West Texas are not. Miskel said she and Ferguson both serve on a task force appointed to look at barriers to remote proceedings. "In talking to different groups across the state, everybody is in agreement that we need to have remote proceedings as a tool in our toolbox," Miskel said. Legal aid groups are adamant that remote proceedings help access to justice, and attorney groups agree that for non-evidentiary hearings, they prefer not to have to drive and park and pay for parking to attend in person, she said. "My crystal ball gazing 10 years into the future is when jurors find out that we could have let them participate from their home or office virtually in jury duty but we chose and forced them to get in their car, take a day off from work, find child care, and come see us in person, they will be driving the shift to virtual jury selection," Miskel said. "And I think they won't be wrong." Ferguson said it depends on who ultimately makes the change. "If the change is made by the Legislature, then they will be listening to their voters. And if the voters en masse go to the legislators and say we want you to stop making us go to the courthouse for a full day for every jury trial, then the little percentage of lawyers who say I don't want to do that aren't going to carry a lot of weight with the legislators," Ferguson said. "If, however, it comes through rule making through the Supreme Court, well, there is a possibility that they will listen in larger part to the lawyers and the complaints that the lawyers have. It really depends on how that is presented."

TLAP OFFERS WAYS TO HELP REACH YOUR ZEN

Texas Lawyers' Assistance Program Director Chris Ritter discussed TLAP's free mental health services. He said attorneys face high levels of stress and anxiety, depression, burnout, secondary trauma, and substance use issues because they handle everyone else's stress and many times see clients at their lowest moments in life. Some attorneys use alcohol to relieve stress but oftentimes, usage gets worse over time. TLAP helps people manage stress and anxiety in a healthy way, Ritter said. Here are some suggestions: put limits on technology, don't check your email or social media when you first wake up but do breathing exercises instead, turn off notifications, don't charge your phone by your bed, go for a walk, write down what you are grateful for each day, volunteer at a local charity, and download the Calm app for meditation tips. Confidential help is available 24/7 by calling or texting TLAP at 800-343-TLAP (8527). Additional resources are available at tlaphelps.org.

Chapter 13 Trustees & CARES Act

The Bankruptcy Law Section hosted a panel moderated by Jessica Hanzlik, of Vahemelrijck Law Offices in San Antonio, with Chapter 13 trustees Pam Bassel, of North Richard Hills; Stuart Cox, of El Paso; Carey Ebert, of Plano; and David Peake, of Houston. The panelists discussed forbearances during the time of COVID-19 and the confusion that arose through a lack of good communication from the government. The confusion caused many people looking for more information on the forbearances to accidentally agree to one by clicking a button for "more information," Bassel said. When Bassel encountered people who had unwillingly committed to a forbearance she made sure that the forbearance was withdrawn and that the debtor's credit history was amended to reflect it wasn't requested. When debtors did request a loan modification, Ebert said the terms being offered weren't always as good as the current contract and might extend repayment of the loan. The panelists also discussed using Zoom for meetings during COVID-19. Peake said Zoom has offered "a clear and efficient way to do meetings." Cox agreed, saying he imagined that remote 341 hearings will be with us long into the future. The absenteeism rate and the need to reset has been down, Bassel said. Debtors can now have their 341 hearing over the phone during their lunch break rather than having to take a day off work and losing out on sorely needed income, she said.

Incorporating the New Disciplinary Rules Into Your Practice

Austin lawyer Claude Ducloux, a member of the Committee on Disciplinary Rules and Referenda, provided an update on the eight newly approved rules from the 2021 Rules Vote, which took effect July 1. Ballot Item A related to clients with limited capacity and included the key provision that a "lawyer may take reasonably necessary protection action … [that] may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client." Ducloux said the new measure was permissive for attorneys but not mandatory. Ballot Item B, Ducloux said, "removes all doubt" about what is permitted in securing legal ethics advice by making it clear that a lawyer may reveal confidential information to secure legal advice about the lawyer's compliance with the disciplinary rules. Ballot Item C relates to the confidentiality exception to permit disclosure to prevent client death by suicide. "When a lawyer has reason to believe it is necessary to reveal confidential information in order to prevent the client from dying by suicide, the lawyer shall have the option of making that disclosure," Ducloux said. He emphasized the "option" of making the disclosure as this is permissive action, and not mandatory. To promote pro bono services by narrowing the range of conflicts of interest, Ducloux said, Ballot Item D "exempts pro bono lawyers from compliance with the conflict-of-interest rules governing current and former clients, and lawyers serving as intermediaries, unless the lawyer actually knows that the representation presents a conflict of interest." Many new rules were added as part of Ballot Item E, Ducloux said, with the removal of Texas Rules of Disciplinary Procedure 7.01 to 7.07 and the replacement with new Rules 7.01 to 7.06. He said the new rules focus on false and misleading statements, advertisement versus solicitation, and trade names. The changes now allow trade names as long as they are not false or misleading. Ballot Item F extended existing self-reporting and reciprocal-discipline provisions to cover certain professional disciplinary actions by a federal court or agency, Ducloux said. New Rules of Disciplinary Procedure 3.01, 3.02, and 3.03 were added as part of Ballot Item G, which deals with the assignment of judges in disciplinary complaints and related provisions, he said. Finally, Ballot Item H "authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney's cessation of practice and provides limited liability protection for the custodian attorney," Ducloux said.

TRIAL TIPS FOR CHILD WELFARE ATTORNEYS REPRESENTING PARENTS AND CHILDREN

Travis County 261st Civil District Court Judge Lora Livingston opened the session with a quote from author Barbara Coloroso, who has worked in the juvenile justice consulting arena: "If kids come to us from strong, healthy, functioning families, it makes our job easier. If they do not come to us from strong, healthy, functioning families, it makes our job more important." Livingston said, "So I want to say to all of you—your job is extremely important." She then went over the basics, reminding the audience that Child Protective Services cases are family cases *and* civil cases, meaning the Texas Rules of Civil Procedure apply. "Use those rules to your advantage," Livingston said. She stressed the importance of prepping witnesses, being prepared, and telling the client's story. When starting a case, an attorney needs to really know his or her client, which means honing interviewing skills and asking open-ended questions, Livingston said. The lawyer should make sure the client's voice is heard and think about ACEs—adverse childhood experiences, she said. Then tie those ACEs into the theme and theory of the attorney's case and help others understand, Livingston said. "I like to say trauma rhymes with drama," she said. "So if there has been drama, there has been trauma." Livingston stressed the need to guard against any triggers that could potentially set off a client. She also stressed how important it is at the onset to set expectations and get resources to help the client succeed, such as housing, job placement and addiction recovery. During the middle of the case, Livingston said, an attorney needs to be proactive. "You need to not be on autopilot," she said. "You need to be out there advocating in front of problems to help your client." Livingston said an attorney should be mindful of what he or she knows and what he or she can prove and take advantage of data that can help. She said discovery is extremely important, especially pertaining to how an attorney can challenge opposing counsel's experts. Livingston said an attorney will want to tie expert testimony to the facts and might consider an expert in cultural expectations. "If you haven't done a good job in the middle, you can forget being successful at the end," she said. At trial, an attorney needs to show the client as sympathetic because others will try to show that client as pathetic—a very fine line, Livingston said. The notion of challenging removal continues through the trial stage, she said. "If the removal was wrong in the first place, it can't possibly justify the termination," Livingston said. "That is something I think we don't hear enough at trial. Don't forget who has the burden of proof," she said. "As an advocate, you have to object ... hold them to their burden of proof."

Implicit Bias: Views From the Bench

Judge Tonya Parker, of the 116th Civil District Court in Dallas, recalled the murder of George Floyd, saying people seeing incidents recorded on cellphones has made them curious about why certain people are disproportionately harmed in different arenas of our civil systems. "When we look at the data that comes back and tells us again and again and again that poor people are not getting access to health care and getting the same treatment in health care that other people are getting, that Black and brown people are disproportionately suffering from being victims of excessive force … it caused us to start the discussion about these issues in those settings but even in the bar society—certainly in the civil courts—it prompted us to want to look at … how they may manifest in the civil courts." The panelists gave examples of biases such as assuming a woman working on complex commercial litigation is a paralegal. Parker gave the example of a judge siding with a gray-haired, seasoned lawyer over a younger one by virtue of assumed experience. In that case, it could be a false assumption that the older attorney has more experience as a lawyer because of their age, she said. Bias training should teach people to be more cognizant of these biases and intentional in rooting them out in decision making, Parker said. The panel discussed mandatory implicit bias for judges, with Judge Ravi Sandill, of the 127th District Court in Harris County, recommending four hours every four years, something he's pitched to the state judiciary. "I feel it's important because we're dealing with all types of different people all the time." Among the most prevalent issues he sees in Houston: economic disparity. "We only hang out with people like us and that is primarily socioeconomic. We don't understand the trials and tribulations of those [who] are less than, for the most part. Having that awareness is critical," he said. Judge Maria Salas-Mendoza, of the 120th Judicial District Court in El Paso, offered ways she gets ahead of biases in her courtroom. She said people want a neutral arbitrator and to be treated fairly. In her courtroom, her staff, day-in and day-out, asks people how they want to be treated and then treats them that way, Salas-Mendoza said. If a name is new to her, she'll ask the person to pronounce it so she can say it as well as she can. If she isn't sure of a pronoun, she will ask. "We need to continue this talk, not just among judges and lawyers, but really with all the people that we run into to make sure that we're mindful of being better people," she said.

WE'RE CELEBRATING! 50-YEAR LAWYERS: 1971-2021

Every year at the State Bar of Texas Annual Meeting, the bar celebrates its 50-year lawyers with a reception, a time to catch up with colleagues and classmates and to meet new peers. Since the COVID-19 pandemic forced the cancellation of the in-person 2021 State Bar Annual Meeting in Fort Worth, these 50-year lawyers will be honored here by listing their names in the *Texas Bar Journal*.

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Samuel D. Adamo
Carleton C. Adams
Michael John Adams
Roy Thomas Ahrens
Roy Alanis
David Alexander
Daniel V. Alfaro
Martha Helen Allan
Roger John Allen, Jr.
Wanda Rose Allen
James P. Allison
William P. Allison
Moses D. Altman
William N. Ambler
Justice Eric Gordon Andell
Milton H. Anders
Paul F. Anderson
Richard M. Anderson
Edmund T. Anderson, IV
Michael A. Andrews
Paul David Angenend
Shirley T. Arend
Judge Ernie B. Armstrong
Charles T. Ashworth
Jefferson W. Autrey
John S. Avery
Rowe Jack Ayres, Jr.
Robert J. Bachman
John T. Bado
Joseph Thomas Bailey
William D. Bailey
David L. Baird, Jr.
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Gary Tim Banks
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James H. Barker
Judge Philip S. Barker
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Don M. Baucum
Barry Nathan Beck
Stephen Gary Beever
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Morris E. Belt, Jr.
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Robert Allen Berry
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David Richard Bires
Gerald Mark Birnberg
George Scott Bishop
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John Roy Black, III
Dwain William Blaschke
David Anthony Bloomer
Mary R. Bobbitt
Lovett T. Boggess
Woodrow M. Bonesio
Ruben Bonilla, Jr.
John William Booth
Ronnie Earl Bounds, Jr.
Richard L. Bourland
Albert D. Bowers
Dennis B. Boyd
Larry Ray Boyd
Paul Brauchle
Jim Garvin Bray, Jr.
Curtis Graham Briggs
David Kenneth Brinkerhoff
Judge David Briones
James William Brison
Barry Allan Brown
John Wat Brown
Timothy R. Brown
Wayne Douglas Brown
Paul H. Brumley
James Craig Brummett
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Richard A. Buckley
T. Paul Bulmahn
Charles Edwin Burge
Raymond Burgert, Jr.
Justice Don R. Burgess
Joe Wylie Burkett
Alphus E. Burt
Charles M. Butler, III
Gerald H. Buttrill
Michael John Butts
Lowell Thomas Cage
Craig Douglas Caldwell
Thomas Moore Callan
George C. Camp
James W. Carr
Frank Louis Carrabba
Robert A. Carter
David Robert Casey
Daniel T. Castillo
Michael J. Cenatiempo
James Henry Chandler
John Keith Chapin
Judge Charles Lewis Chapman
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James Stephen Cheslock
Philip D. Chiminello
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Douglas Frank Dupre
Diana C. Dutton
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Ronald Frank Ederer
Joseph Lyman Edgar
Tom Edwards
Michael W. Eheman
Ira David Einsohn
John Vincent Elick
Patricia Anne Elliott
Luther Willis Ellis
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Helen M. Eversberg
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Sue Z. M. Faulkner
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John B. Fisher, III
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George M. Fleming
Patricia H. Florence
Abelardo Flores
Judge Romeo M. Flores
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Col. Robert Floyd Gonzales
Judge Alexander R. Gonzalez
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Charles B. Gorham
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Gary Allmon Grimes
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Ted Allen Hodges
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Kirt Harold Kiester
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Andy Joe McMullen
Joseph B. McReynolds
Judge Dee Miller
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James Thomas Oitzinger
M. L. Oliver
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Judge Rey Perez
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Mario H. Rivera
David Roberts
Frank Eugene Robertson
Rob V. Robertson
Louis Rodriguez
Gilbert Rodriguez, Jr.
Regina J. Rogers
Lilyan Rogers
Stephen Lee Rohde
Robert M. Roller
David Alan Rose
David Bryce Rosen
Matthew A. Rosenstein
Michael Q. Rosenwasser
B. Schlessinger Ross
Justice Donald R. Ross
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Gordon K. Rouze
Joe A. Rudberg
Jimmy Dean Rudd
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George E. Ruff
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Cynthia Lindsey Salvato
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Alan G. Sampson
Rodger Marlin Sanders
Judge Charles F. Sandoval
Anna McLemore Sands
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Lawrence W. Sauer, Jr.
Michael Young Saunders
Terry Lane Scarborough
Judge Michael Schattman
David A. Schlueter
Judge Michael H. Schneider
Paul H. Schofield
William Edwin Schweinle, Jr.
Gerald Doyne Scucchi
Roy George Scudday
Stephen Jay Segal
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Gerald R. Severson
Cameron Dee Sewell
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James W. Shaddix
Joel Ingram Shannon
George Albert Shannon, Jr.
Harvey Melvin Shapan
Gary Stuart Shapiro
Steve Sharber
Robert Emery Shaw
Jody Gene Sheets
Marc A. Sheiness
Gray W. Shelton
Stuart Crow Shelton
Hamilton T. Shipp
William John Shirley
Robert Arley Shivers
Randall Clark Simmon
William B. Sing
Henry Thomas Skelton
Jack Lynn Slayton
William G. Small
Edgar Ashley Smith
Gavin H. Smith
Leland G. Smith
W. Read Smith
William J. Smith
Barry Snell
Charles J. Solcher
Robert Allan Solomon
Duane L. Spiess
Kenneth C. Squires
Thomas Lee Staley
Steven Wilson Stark
Robert Harold Steelhammer
Jan Thomas Steinberg
George J. Stengel, Jr.
Judge Gary R. Stephens
Stephen D. Stephens
Tommy D. Stephens
Robert D. Stiles
Art Stone
John R. Stooksberry
Anna E. Stool
John D. Stover
Hugh Aaron Stowe
Robert Paul Streiff
Jack Vernon Strickland, Jr.
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Macon D. Strother
H. Rey Stroube, III
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Herbert Sucherman
Leddie C. Taylor
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Nicholas C. Taylor
Robert Gordon Taylor, II
Robert P. Terzian
Donald Alan Thiel
Hedrick R. Thomas
Kent Thompson
Kim R. Thorne
Dale M. Tingleaf
Peter B. Tinkham
Alton C. Todd
Edward Bates Tomlinson, II
Alexander S. Tradd, II
William A. Tribble
Judge Martha Jane Trudo
Don Alan Tucker
David C. Tuggle
Charles Sydney Turet, Jr.
Jerry E. Turner
John Marion Tutt
Judge Candace G. Tyson
Roy K. Tyson
Hector R. Uribe
Albert E. Vacek, Jr.
Virginia K. Van Steenberg
Richard B. Vance
Judge Phillip Oran Vick
Timothy James Vineyard
Timothy D. Von Dohlen
Stanton Wagers, Jr.
Bobby J. Waggoner
Donald J. Walheim
William V. Walker
Albert M. Walker, Jr.
Robert Blake Wallis
Richard Edwin Ward
William F. Warnick
James D. Wasson
John A. Watson
Robert C. Watts
George C. Wayne
Laurence H. Wayne
Joseph R. Weaver, Jr.
David F. Webb
John Guss Webb, Jr.
Jack Nelson Webernick
Judge Marcia S. Weiner
Sanford A. Weiner
Sheldon Weisfeld
John Michael Weissert
Harvill E. Weller, Jr.
Rush Spencer Wells
Steven A. Wells
Norval J. Welsh, III
E. Jeffrey Wentworth
John Joseph Wheir
Wayne Martin Whitaker
Charles G. White
John Curtis White
Mary Ellen White
Kemble White, III
William O. Whitehurst, Jr.
David M. Whitney
Richard W. Whittaker
Marquis E. Whittington
William (Bill) K. Wilder
Glen Marcus Wilkerson
Prof. Riggs L. Wilks, Jr.
J. Hugh Willey, Jr.
Jerry Lynn Williams
Sidney B. Williams
Clark Suttles Willingham
Addison G. Wilson, III
Michael L. Wolfram
William Thomas Womble
Michael Wade Wood
Richard W. Wood
William R. Woods
Arthur James Wright
David L. Yarbrough
Joe Ronald Young
Robert J. Young
William S. Zanca
William E. Zimmerman, Jr.
Ronald D. Zipp
Arthur E. Zuehlke

2020-2021 BAR YEAR AWARDS

State Bar of Texas

President's Award
Robert Pelton, *Houston*

Outstanding Third-Year Director
Emily Miller, *Brownwood*
Stephen J. Naylor, *Fort Worth*

Public Member Award
Alan E. Sims, *Cedar Hill*

Michael J. Crowley Award
Robert D. Crain, *Dallas*

Presidential Citation
Chielsey Barber, *Austin*
Lona Chastain, *Austin*
Timothy D. Belton, *Bellaire*
Betty Blackwell, *Austin*
Amy Bresnen, *Austin*
Paul Burks, *Austin*
Pastor Richie Butler, *Dallas*
Claude Ducloux, *Austin*
Jennifer Dunham, *Austin*
Charlene Edwards, *Dallas*
Richard Elliott, *Dallas*
Hon. Dennise Garcia, *Dallas*
Rick Hagen, *Denton*
August W. Harris III, *Austin*
Wendy-Adele Humphrey, *Lubbock*
Brad Johnson, *Austin*
Vincent R. Johnson, *San Antonio*
W. Carl Jordan, *Houston*
M. Lewis Kinard, *Dallas*
Karen J. Nicholson, *Austin*
Ellen Pitluk, *San Antonio*
Jennifer Reames, *Austin*
James Wester, *Amarillo*

Certificate of Merit
Roy Dayton Brantley, *College Station*
James D. Granberry, *Corpus Christi*
Joe K. Longley, *Austin*
W. Troy McKinney, *Houston*
Michael Mowla, *Dallas*
Florentino A. Ramirez, *Dallas*
J. Gary Trichter, *Houston*
Connie Brown Williams, *Houston*

Texas Center for Legal Ethics

Chief Justice Jack Pope Professionalism Award
Retired Chief Justice Ann Crawford McClure, *El Paso*

Legal Services to the Poor in Criminal Matters Committee Indigent Defense Awards

Warren Burnett Award
Mark Stevens, *San Antonio*

Michael K. Moore Award for Excellence in Research or Writing in the Area of Indigent Criminal Defense
Claire Buetow, *Austin*

Pro Bono Excellence

Frank J. Scurlock Award
Lynn Rodriguez, *Fort Worth*

J. Chrys Dougherty Legal Services Award
Dana Karni, *Houston*

Judge Merrill Hartman Pro Bono Judge Award
Hon. Gina Benavides, *Corpus Christi*

W. Frank Newton Award
SMU Dedman School of Law's COVID-19 Legal Helpline, *Dallas*

Pro Bono Award
Lone Star Legal Aid, *Houston*

Pro Bono Coordinator Award
Lena Engelage, *Conroe*

Pro Bono Support Staff Award
Shanna Mello, *Weatherford*

Texas Access to Justice Commission

ATJ Corporate Counsel Pro Bono Award
Alyssa Schindler, *Houston*
Doug B. Neagli, *Irving*

James B. Sales Boots on the Ground Award
Beth Mitchell, *Austin*
Allison Eichenfeld Neal, *Austin*

Harry M. Reasoner Justice for All Award
R. Paul Yetter, *Houston*

Emily C. Jones Lifetime Achievement Award
Fred J. Fuchs, *Austin*

Texas Bar Foundation

Samuel Pessarra Outstanding Jurist Award
Hon. Xavier Rodriguez, *San Antonio*

Dan Rugeley Price Memorial Award
Billie J. Ellis Jr., *Dallas*

Gregory S. Coleman Outstanding Appellate Lawyer Award
Marcy Hogan Greer, *Austin*

Outstanding Law Review Article Award
Kem Thompson Frost, *Houston*

Terry Lee Grantham Memorial Award
Terry Bentley Hill, *Dallas*

Lola Wright Foundation Award
Robert A. Black, *Houston*

Ronald D. Secrest Outstanding Trial Lawyer Award
Frank Branson, *Dallas*

Outstanding 50 Year Lawyer Award
Allan K. DuBois, *San Antonio*
Kelly Frels, *Houston*
Harriet Miers, *Dallas*
Terry O. Tottenham, *Austin*

TexasBarCLE

Gene Cavin Award
Scott Rothenberg, *Bellaire*

PAT NESTER
INNOVATION IN PROFESSIONAL
DEVELOPMENT AWARD
Hon. Xavier Rodriguez, *San Antonio*

STANDING OVATION AWARD
Kirby B. Drake, *Dallas*
Rhonda Hunter, *Dallas*
Marc Markel, *Houston*
Chris Ritter, *Austin*
Mike Tolleson, *Austin*
Mark C. Walker, *El Paso*
Zach Wolfe, *The Woodlands*

Texas Young Lawyers Association

OUTSTANDING DIRECTOR AWARD
Hisham A. Masri, *Dallas*

OUTSTANDING YOUNG LAWYER OF TEXAS
Armin Salek, *Austin*

LIBERTY BELL AWARD
Ellen Alexander, *Houston*

OUTSTANDING MENTOR AWARD
Gerald R. Powell, *Waco*

OUTSTANDING FIRST YEAR
DIRECTOR AWARD
Chelsea Mikulencak, *San Antonio*

KEITH L. KRUEGER LEADERSHIP AWARD
Julia Rubio, *Laredo*

TYLA PRESIDENT'S AWARD
Cali M. Franks, *Dallas*

EXCELLENCE IN TRIAL
ADVOCACY AWARD
Tim Williams, *Amarillo*

TRIAL AND APPELLATE ADVOCATE AWARD
Ashley Hymel, *Houston*
Sara Anne Giddings, *Shiner*
Kirk Cooper, *El Paso*

TYLA PRESIDENT'S AWARD OF MERIT
Atina Stavropoulos, *Shalimar, Florida*
A.J. Bellido de Luna, *San Antonio*
Justin Bernstein, *Los Angeles, California*
Elizabeth Duggan, *San Antonio*
Johnathan Stone, *Austin*
Jefferson Fisher, *Beaumont*
Josué J. Galván, *San Antonio*
Tiffany Sheppard, *San Angelo*
David R. "Dave" Hagan, *Longview*
Meagan T. Harding, *Humble*
Eduardo Marquez Certucha, *Houston*
Matthew Dorf, *Dallas*
Ashley Pileika, *Dallas*

Section Awards

Antitrust and Business Litigation
DISTINGUISHED COUNSELOR AWARD
Barry McNeil, *Dallas*

African-American Law
DISTINGUISHED JURIST AWARD
Judge R. K. Sandill, *Houston*

OUTSTANDING ACHIEVEMENT AWARD
Genora K. Boykins, *Houston*

TRAILBLAZER AWARD
Leon Reed, *Fort Worth*

Alternative Dispute Resolution
FRANK EVANS AWARD
Elaine Roberts, *The Woodlands*

Asian Pacific Interest
JUSTICE
DAVID WELLINGTON CHEW AWARD
Judge Ravi K. Sandill, *Houston*

AFFILIATE OF THE YEAR
Dallas Asian American Bar Association,
Dallas

OUTSTANDING MENTOR
Stacey Cho Hernandez, *Dallas*

CHAMPION OF DIVERSITY
Punam Kaji, *Fort Worth*

BEST LAWYERS UNDER 40
Cheuck Ang Yee, II, *Austin*
Joshua D. Lee, *Houston*
Jason Shyung, *Carrollton*

Bankruptcy Law
ROBERT B. WILSON
DISTINGUISHED SERVICE AWARD
Judge Joshua P. Searcy, *Tyler*

MICHELLE A. MENDEZ
AWARD OF EXCELLENCE
Elizabeth Smith, *San Antonio*

BANCO ROTTO AWARD
Judge Ronald B. King, *San Antonio*

JOHN C. AKARD
COMMUNITY SERVICE AWARD
Debbie Langehennig, *Austin*

ROMINA L. MULLOY-BOSSIO
ACHIEVEMENT AWARD
Amber Carson, *Dallas*

PRO BONO SERVICE AWARD
Sean Flynn, *Austin*

Civil Liberties & Civil Rights
PATRICK WISEMAN AWARD
Thomas S. Leatherbury, *Dallas*

Collaborative Law
DISTINGUISHED LAWYER AWARD
Ruth L. Rickard (posthumously),
The Colony

Computer & Technology
CHAIR'S AWARD FOR EXCELLENCE
Ronald Chichester, *Cushing*
Lisa Angelo, *Houston*

Consumer and Commercial
RICHARD ALDERMAN AWARD
FOR CLE EXCELLENCE
Carlos Soltero, *Austin*

Criminal Justice Section
PROSECUTOR OF THE YEAR AWARD
Kenda Culpepper, *Rockwall*

DEFENSE LAWYER OF THE YEAR
Clay Steadman, *Kerrville*
Allen Place, Jr., *Gatesville*

Family Law
KEN FULLER PRO BONO AWARD
Judge Delia Gonzales, *Farmers Branch*

HALL OF LEGENDS AWARD
Richard Orsinger, *San Antonio*

JOSEPH W. KNIGHT
BEST FAMILY LAW CLE ARTICLE
Karl E. Hays/Chris K. Wrampelmeier,
San Marcos/Amarillo

GAY G. COX
COLLABORATIVE LAW AWARD
Honey A. Sheff, *Dallas*

SPECIALIST'S SAM EMISON AWARD
Kathryn Murphy, *Allen*

DAN PRICE AWARD
Judge Dean Rucker, *Midland*

Government Law
OUTSTANDING GOVERNMENT LAWYER
Scott Durfee, *Pearland*

Hispanic Issues
BAR ASSOCIATION OF THE YEAR
Hispanic Bar Association of Houston, *Houston*

CHAIR'S AWARD FOR EXCELLENCE
Carlos Soltero, *Austin*
Christopher Pineda, *Brownsville*

JAMES W. WRAY JR. AWARD
Judge Leslie Briones, *Houston*

JUDGE OF THE YEAR AWARD
Chief Justice Rebeca Martinez, *San Antonio*
Judge Ron Rangel, *San Antonio*

LEGISLATOR OF THE YEAR AWARD
Rep. Rafael Anchia, *Dallas*

PETE TORRES JR.
COMMUNITY SERVICE AWARD
LULAC Council #650, *Austin*

REYNALDO G. GARZA
LIFETIME ACHIEVEMENT AWARD
Judge Leticia Hinojosa, *Edinburg*

Insurance Law
LEGENDS OF TEXAS INSURANCE LAW
Michael W. Huddleston, *Dallas*

Intellectual Property Law
TOM ARNOLD
LIFETIME ACHIEVEMENT AWARD
Meg Boulware, *Houston*

CHAIR'S AWARD
Mike Locklar, *Houston*

TRADEMARK AWARD
Craig Stone, *Houston*

Litigation
LUTHER H. SOULES AWARD
FOR EXCELLENCE IN LITIGATION
Justice Eva Guzman, *Cypress*

TEXAS LEGAL LEGEND INDUCTION(S)
Chief Justice Ann McClure, *El Paso*

Poverty Law
NOBLE AWARD
Denise Moy, *Austin*

IMPACT AWARD
Gabriel Sanchez, *Rio Grande Valley*
Stephanie Champion, *Dallas*
Ann Maldonado Heaps, *Austin*
John Hasley, *Fort Worth*
Wayne Krause Yang, *Austin*

Real Estate, Probate and Trust Law
DISTINGUISHED
REAL ESTATE ATTORNEY
LIFETIME ACHIEVEMENT AWARD
Sara Dysart, *San Antonio*

DISTINGUISHED
TEXAS PROBATE ATTORNEY
LIFETIME ACHIEVEMENT AWARD
Michael Bourland, *Fort Worth*

Tax Law
OUTSTANDING SERVICE
AS COUNCIL MEMBER
Laurel Stephenson, *?*
James V. Roberts, *Dallas*
Ira A. Lipstet, *Austin*
Renesha Fountain, *Houston*

EXTRAORDINARY SERVICE AWARD
Robert D. Probasco, *Forth Worth*
Rachel E. Rubenstein, *San Antonio*

Women and the Law
SARAH T. HUGHES AWARD
Hilda C. Galvan, *Dallas*

LOUISE B. RAGGIO AWARD
Kathryn Snapka, *Corpus Christi*

HARRIET E. MIERS
WRITING COMPETITION AWARD
Taylor Feldt, *Dallas*

STATE BAR OF TEXAS
AT-LARGE DIRECTOR SOUGHT

The State Bar of Texas is accepting nominations for at-large director positions on the Board of Directors. Four at-large positions on the board are required to be appointed by the president of the State Bar subject to confirmation by the board of directors. Two positions will become vacant in 2022. At-large directors serve three-year terms, and this year the term begins June 9, 2022.

In making the appointments, the president is required to appoint directors who demonstrate knowledge gained from experience in the legal profession and community necessary to ensure the board represents the interests of attorneys from the varied backgrounds that compose the membership of the State Bar of Texas.

An Ad Hoc Committee to Nominate At-large Directors will recommend four candidates to the State Bar president, who will select two candidates for appointment subject to ratification of the State Bar board. Nominees will be responsible for their own expenses related to the interview process.

CRITERIA FOR SELECTION

Any active, licensed lawyer in good standing with the State Bar is eligible to be nominated, provided such lawyer is not currently serving as an elected director or appointed director. The Ad Hoc Committee shall nominate only persons who demonstrate knowledge gained from experience in the legal profession and community necessary to ensure the board represents the interests of attorneys from the varied backgrounds that compose the membership of the State Bar of Texas.

The Ad Hoc Committee shall be guided by, but not limited by, the following criteria in selecting its nominees for at-large director:

- The degree of representation already on the State Bar Board of Directors from a particular geographic area, substantive area of practice, and size of practice.
- The population of the area in which the nominee resides and practices.
- The content of a nominee's recommendation letters.
- The size of a nominee's practice.
- A nominee's:
  - substantive areas of practice;
  - demonstration of leadership ability;
  - involvement in civic activities within the community;
  - participation in local and specialty bar associations;
  - participation in local bar, State Bar, and American Bar Association committees, sections, and activities; and
  - years of licensure.

The deadline for nominations is December 1, 2021. Persons interested in being nominated for the position should submit the following: an application (found at texasbar.com/atlarge), a nomination letter from a third party (*self-nominations will not be accepted*), a resume, three to five letters of recommendation, and a brief personal statement of no more than 500 words explaining why they have "knowledge gained from experience in the legal profession and community necessary to ensure the board represents the interests of attorneys from the varied backgrounds that compose the membership of the State Bar." For more information, go to texasbar.com/atlarge.

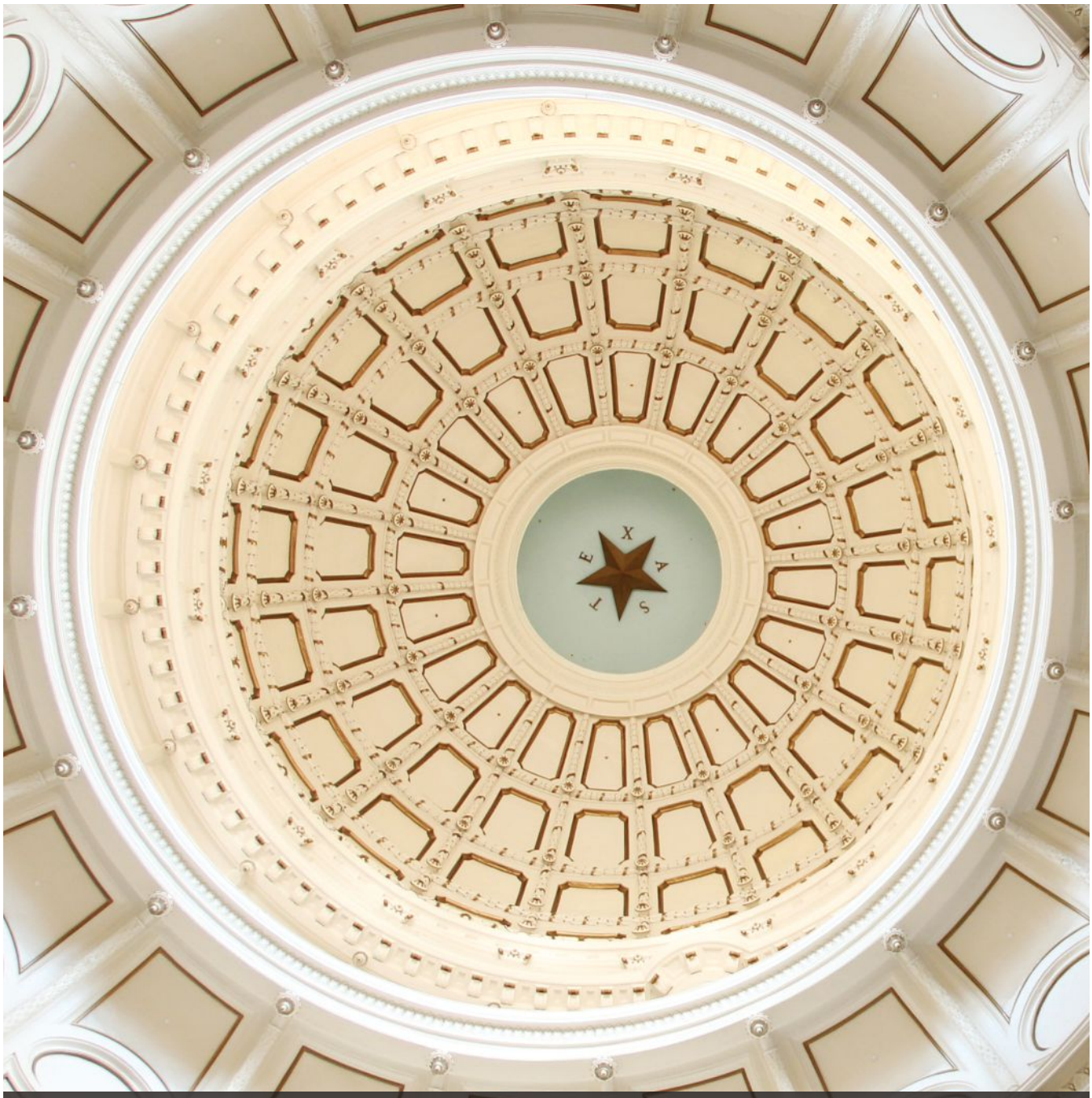
Submit the information to:

AD HOC COMMITTEE TO NOMINATE AT-LARGE DIRECTORS
jennifer.reames@texasbar.com

Or by regular mail, c/o State Bar of Texas
P.O. Box 12487
Austin, TX 78711-2487

Email questions to jennifer.reames@texasbar.com.

Please note that an application for at-large director does not preclude an applicant from seeking election to a geographic area board position. Petitions for the elected board member positions must be received at the State Bar headquarters by March 1, 2022.



THE 87TH SESSION

OVERVIEW

By Royce Poinsett

The 2021 Texas Legislature furnished enough compelling storylines for several sessions. Among other endeavors, legislators convened warily during a pandemic, responded to a historic winter storm that overwhelmed the state's electrical grid, and balanced a strained state budget with the help of billions of dollars in just-in-time federal relief.

PHOTOS BY PATRICIA BUSA McCONNICO

A primary—and somewhat unexpected—narrative emerged: The 2021 Legislature was the most socially conservative session in a generation.

Republican legislators pursued a wide-ranging agenda that included election law reforms, permitless handgun carry measures, abortion restrictions, "critical race theory" curriculum bans, transgender youth constraints, national anthem requirements at sports events, and more.

Texas Democrats resisted but were largely overwhelmed, as socially conservative measures passed each chamber on largely party-line votes. Democrats (both in Texas and nationwide) were most affronted by the now-famous **SB 7,** a proposed sweeping change of Texas election laws promoted by Republicans as election integrity reform but denounced by Democrats as voter suppression. In the final days of the session, frustrated House Democrats deployed their "nuclear option" to kill that bill and several others, dramatically walking out of the chamber and breaking quorum for the first time since 2003.

The Democrats' victory over SB 7 may be short-lived. Gov. Greg Abbott quickly called for a 30-day special session beginning July 8 to force continued work on the election law changes and a slew of other unfinished items including border security enhancements, transgender youth sports restrictions, "critical race theory" curriculum bans, bail system reforms, abortion-inducing drug limitations, and social media platform "bias prohibitions." The governor also line item vetoed the entire 2021-2022 budget appropriation for the legislative branch to incentivize Democrats to return to (and stay in) the state capitol to restore that funding. However, Democrats promptly broke quorum yet again with a sojourn to Washington, D.C. The governor responded by calling yet another 30-day session beginning August 7 and by pledging to call additional special sessions if necessary. The Legislature is also expected to return for at least one additional special session in the fall to conduct once-a-decade legislative and congressional redistricting and to appropriate further federal relief funds. Look for coverage of these special sessions in future issues of the *Texas Bar Journal.*

Major Legislation of the 2021 Regular Session

Texas legislators filed more than 6,900 bills and enacted over 1,000 into law. Some of the most significant legislative action is summarized here.

State budget. Legislators initially faced a multibillion-dollar budget shortfall for the upcoming biennium inflicted by the COVID-19 recession. But that shortfall vanished thanks to the mid-session influx of over $16 billion in federal COVID-19 relief funding, a surprisingly resilient Texas economy, and rebounding oil and gas revenues. **SB 1** enacts a two-year balanced state budget with $248.6 billion in overall spending, a 5% decrease from the prior biennium due to the federal largesse. Later tranches of the federal aid package remain to be appropriated in a future special session.

Electrical grid. Responding to February's Winter Storm Uri, the Legislature enacted the largest reform of the Texas electricity system since the landmark deregulation legislation of 2005. **SB 2** and **SB 3** overhaul governance of the beleaguered Electric Reliability Council of Texas and require market participants to "weatherize" certain facilities to handle extreme temperatures under rules to be promulgated by the Public Utility Commission of Texas and Railroad Commission of Texas. Under another package of bills (**HB 1520, HB 4492,** and **SB 1580**) the state will securitize approximately $7 billion in private losses caused by the storm, spreading out these losses (and the resulting customer rate increases) over the next two decades.

Pandemic response. Proposals to limit the governor's emergency powers during pandemics and other disasters had bipartisan support but fell victim to infighting between the House and Senate. Instead, the Legislature passed narrow measures banning public officials from closing places of worship (**HB 1239**) and gun stores (**HB 1500**) and requiring that patients in health care facilities be allowed visits by clergy (**SB 572**) and visits by friends, caregivers, and other individuals (**SB 25**) during future governor-declared disasters. **SB 6** extends broad pandemic liability protections (both retroactive and prospective) against lawsuits arising from the current and future pandemics.

State vs. local control. **SB 23** requires local governments to hold an election before reducing law enforcement budgets and **HB 1900** provides that large cities that do make substantial cuts to police budgets could face financial penalties and disannexation elections. **HB 1925** imposes a statewide ban on camping by homeless individuals in most public spaces.

Policing. Many bills were filed in response to the killing of George Floyd, and to the unrest that followed, but only a few passed. **SB 69** bans the use of chokeholds by peace officers in most circumstances and requires officers to intervene to stop excessive force by other officers. **HB 2366** raises penalties for interfering with or harming law enforcement.

Broadband access. **HB 5** is bipartisan legislation that will finally establish a long-discussed state broadband plan and incentive program to help provide residential high-speed internet access to the estimated 5 million Texans who lack it.

Abortion. **SB 8** is one of the most restrictive abortion laws in the country, prohibiting the procedure as early as six weeks into a pregnancy and creating a novel private cause of action allowing citizens to enforce the new law through lawsuits. The constitutionality of a similar Mississippi law will be considered by the U.S. Supreme Court this fall. **HB 1280** will

completely outlaw abortions in Texas if the U.S. Supreme Court ever overturns *Roe v. Wade*.

Guns. **HB 1927** allows Texans to carry holstered handguns without a permit or training (termed "constitutional carry" by supporters), following the lead of 20 other states. Existing restrictions against certain people carrying handguns, and against the carrying of handguns in certain places, will remain in place, and most private property owners will still be able to ban handguns on their property.

School curriculum. **HB 3979** seeks to limit how public school teachers handle classroom discussions of certain concepts related to race and racism. The governor stated his desire to further "abolish critical race theory in Texas" in the July special session.

Transgender children. Democrats successfully fought legislation to mandate that transgender student athletes play on sports teams based on their sex at birth rather than on their gender identity. They also killed bills that would have banned gender transitioning hormone therapy, puberty suppression treatment, and surgery for children younger than 18.

Marijuana. **HB 1535** is a modest expansion of the medical marijuana program to include research patients suffering from cancer, post-traumatic stress disorder, epilepsy, seizure disorders, multiple sclerosis, autism, and other issues. But the Legislature again declined calls to legalize (and tax) recreational marijuana.

Gaming. The Legislature rejected well-funded advocacy efforts to allow (and tax) casinos and sports betting in Texas.

New Laws That Affect Everyday Life

Readers might be pleased to know that the Legislature took action on some legislation that was less ideologically charged.

Cheers. **HB 1024** allows restaurants to continue selling "alcohol to go" even after the current pandemic ends. **HB 1518** allows Sunday sales of beer and wine from stores beginning at 10 a.m. (as opposed to noon) and allows hotels to sell alcohol to hotel guests 24/7.

Tax-free Fido. **SB 197** creates a sales tax exemption for the adoption of pets from nonprofit animal shelters and similar organizations.

Law students rejoice. **HB 654** significantly weakens the "rule against perpetuities" in Texas, so much so that future Texas law students might not even be forced to memorize it. The new law requires that an interest in a trust, other than a charitable trust, must vest, if at all, not later than 300 years after the effective date of a trust. This former law student can't quite remember what the prior rule required.

ACCESS TO JUSTICE

By Bruce P. Bower

Access to justice relies on funds appropriated by the Texas Legislature. The 87th Legislature convened on January 12, 2021, and held its final session on May 31, 2021. The Legislature passed the biennial state budget as **SB 1**. The Texas Senate voted in favor of SB 1, 31-0, on May 26. The Texas House of Representatives voted in favor of SB 1, 142-6, on May 27. The governor signed SB 1 (with an exception not germane here) on June 18. SB 1 can be viewed at https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=87R&Bill=SB1.

For fiscal years 2022 and 2023, appropriations for basic civil legal services are part of the SB 1 appropriations for the Texas Supreme Court. In other words, it is the Texas Supreme Court which, through its legislative appropriations request, sets the amount of state funds that the Legislature is requested to appropriate for basic civil legal services. Article IV of SB 1 is the article in which appropriations to the judiciary are found.

For the biennium, which starts September 1, 2021, the Legislature appropriated $43,284,392 for FY 2022 for basic civil legal services and $33,284,392 for FY 2023 (which starts September 1, 2022).[1] The goal that the Legislature set for this strategy—the output—is that, each year, 30 grantees will receive state funding for basic civil legal services.[2] The Legislature stated, "It is the intent of the Legislature that appropriations made by this Act [SB 1] be utilized in the most efficient and effective manner possible to achieve the intended mission of the Supreme Court of Texas."[3]

The Texas Supreme Court is required to report semi-annually each year to the Legislative Budget Board and the governor "disbursements from all funding sources for Basic Civil Legal Services, the purpose for each disbursement, and compliance with grant conditions."[4]

The $10 million difference between the FY 2022 appropriation and the smaller FY 2023 appropriation results from that $10 million being included in FY 2022 "for basic civil legal services to victims of sexual assault that may only be used for purposes established for the Supreme Court of Texas in Government Code, §420.008."[5] Texas Government Code § 420.008 (c)(11) specifies this appropriation is to "[T]he supreme court, to be transferred to the Texas Access to Justice Foundation, or a similar entity, to provide victim-related legal services to sexual assault victims, including legal assistance with protective orders, relocation-related matters, victim compensation, and actions to secure privacy protections available to victims under law[.]"

Of the amount appropriated for basic civil legal services for FY 2022 and FY 2023, "3,500,000 each fiscal year in General Revenue [is] for the purpose of providing basic civil legal services to veterans and their families."[6]

It is never known for certain at the beginning of a biennium what the receipts for basic civil legal services will be through the Chief Justice Jack Pope Act.[7] Nor is it known what the receipts will be through settlement of opioid litigation. It *is* known that on September 25, 2020, Gov. Greg Abbott allocated $4.2 million of Coronavirus Aid, Relief, and Economic Security (CARES) Act funds to the Texas Supreme Court for basic civil legal services to avoid evictions.[8] Another $167 million will be used for "targeted rental assistance." The Texas Supreme Court had established the Texas Eviction Diversion Program through its Twenty-Seventh Emergency Order Regarding the COVID-19 State of Disaster.[9]

Readers who are interested in the grant conditions for basic civil legal services appropriations in SB 1 can visit the website of the Texas Access to Justice Foundation at tajf.org. One can also see there the income and resource criteria that limit eligibility for basic civil legal services funded by the Texas Legislature.

The roles that the governor, the chief justice and the entire Texas Supreme Court, the lieutenant governor, the speaker of the House, and the attorney general carry out in support of basic civil legal services can be seen in the fact that state funds for basic civil legal services are appropriated to the Supreme Court in a bill the governor signed, and in the fact that receipts under the Chief Justice Jack Pope Act contribute to funding for basic civil legal services.

Notes

1. SB 1, Section 1, Item of Appropriation B.1.1. Strategy, SB 1, page IV-1.
2. SB 1, page IV-2.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Tex. Gov't Code § 402.007.
8. *See* https://gov.texas.gov/news/post/governor-abbott-announces-over-171-million-in-cares-act-funding-for-rental-assistance-texas-eviction-diversion-program.
9. *See* TJB | Eviction Diversion Program (txcourts.gov).

ANIMAL LAW

By Shelby Bobosky and Eric Torberson

Despite starting the session with strict COVID-19 protocols, surviving Winter Storm Uri, and safety concerns at the Texas Capitol following rioting at the federal Capitol, the 87th Texas Legislature was a busy session for those who practice animal law.

HB 1071 was passed during the session. HB 1071 amends the Texas Government Code to allow specially trained facility dogs to escort vulnerable witnesses during court proceedings in Texas courts. These witnesses are typically victims of violence or abuse, are usually minor children, and must recount and testify on traumatic experiences crucial for the record. The specially trained dogs provide comfort and support to those witnesses.

Gov. Greg Abbott also signed into law **HB 1480,** which will make it a misdemeanor if a person "intentionally releases, steals, destroys, or otherwise causes the loss of an animal or crop from an animal or crop facility without the consent of the owner;" "damages, vandalizes, or steals any property on or from an animal or crop facility;" "breaks and enters into an animal or crop facility with the intent to destroy or alter records, data, materials, equipment, animals, or crops;" or "enters or remains on an animal or crop facility with the intent to commit" any of the above listed acts.

HB 1071 amends the Texas Government Code to allow specially trained facility dogs to escort vulnerable witnesses during court proceedings in Texas courts.

HB 604, a mandatory microchip scanning law, was signed by the governor on May 26, 2021. Despite a pet owner's investment in a microchip, an owner of a stolen or lost pet must still rely on a responsible third party to scan animals at their intake and quickly identify the animal. Unaccompanied pets in the custody of those entities must be scanned for microchips as soon as is practicable. This new law affects shelters, animal control agencies, law enforcement agencies that double as animal control, and rescue groups that care for stray and homeless pets. Based on those jurisdictions that have already implemented this policy, microchip scanning will save costs associated with shelter intake and boost reunification numbers, especially if they are able to "return in the field." The dog or cat doesn't even enter the shelter. HB 604 is effective September 1, 2021. There are many organizations that provide agencies with free microchip scanners via grant programs.

Another bill that passed this session is **SB 197,** an adoption

fee sales tax exemption. Effective October 1, 2021, this exempts nonprofit rescue groups from paying sales tax on adoption fees. This frees up funds previously paid in taxes to serve more animals and eliminates the time spent preparing tax documents. In other words, SB 197 allows nonprofit animal welfare organizations that rely on foster homes rather than facilities to be exempt from collecting sales tax to align with those nonprofits that operate a shelter facility. Whether through facilities or foster homes, the spirit of this law was to exempt rescue organizations from the sales tax, as nonprofits and rescuers are not in the business of "selling dogs."

SB 48, an animal possession ban bill, amends current law relating to conditions of community supervision for defendants convicted of certain animal cruelty crimes. The law will give judges the discretion to prevent persons from possessing an animal if they are sentenced to community supervision for attacking an assistance animal, cruelty to non-livestock animals, dog fighting, or cockfighting. The law also permits judges to require psychological counseling as a condition of such sentences. This might prevent persons from harming more animals and could ensure they are provided treatment before violent tendencies escalate, which might cause them to injure or kill humans. It fixes the problem wherein judges who grant community supervision to persons convicted for most crimes related to animal abuse cannot prohibit an offender from possessing an animal as a condition of their release and mandatory psychological counseling could not be allowed as a term of community supervision for persons found guilty of these offenses. This is important because committing crimes against animals often serves as an indicator that a person could perpetrate acts of violence against humans in the future.

Despite the Texas Licensed Breeders Law falling under the Texas Department of Licensing & Regulation and TDLR being under Sunset review this legislative session, the Breeders Program was not a part of the Sunset bill. So, a breeder must get inspected and purchase a license if the breeder has 11 or more adult breeding female cats and/or dogs and sells, exchanges, or offers to sell or exchange at least 20 cats and/or dogs in one calendar year.

Abbott vetoed one dog bill that garnered nationwide attention. **SB 474,** also known as the Safe Outdoor Dogs Act, clarified requirements for the restraint of unattended dogs outdoors. The bill would have defined "adequate shelter" and removed the use of a chain as a legal restraint. The bipartisan bill, which was co-sponsored by more than 80 legislators, passed the House 83-32, the Senate 28-3, and went to the governor for signature May 29, 2021. On June 18, 2021, Abbott vetoed SB 474.

BUSINESS LAW

By Daryl B. Robertson

This article summarizes several bills passed by the Texas Legislature in its 2021 regular session that affect business law and does not purport to describe all passed bills in this area. This article contains summaries only and should not be relied on as a complete description of any bill. All bills are effective September 1, 2021, unless otherwise noted.

Initial Mailing Address in Certificate of Formation of New Filing Entity

HB 3131 amends the Texas Business Organizations Code, or TBOC, to require, effective January 1, 2022, that the certificate of formation of a new filing entity must contain an initial mailing address for the entity. This change was requested by the Texas Comptroller's office to enhance its ability to communicate with new filing entities to assure their franchise tax reporting compliance.

Virtual Currency

HB 4474 amends the Texas Business & Commerce Code, or TBCC, to add a new Chapter 12 to the Uniform Commercial Code, or UCC, provisions based on a recent working draft of UCC amendments at the national level. The new provisions establish rules for ownership, transfer, and control of virtual currency and defenses against adverse claims to the virtual currency. Definitions of "virtual currency" and "control" are added. Various amendments are made to Chapter 9 (secured transactions) of the TBCC to provide that a security interest in virtual currency can be perfected by obtaining control or by filing of a financing statement.

SB 1203 Contains Omnibus Package of TBOC Amendments

SB 1203 makes an array of amendments to the TBOC covering various topics. These amendments are summarized below.

Choice of Forum Provisions in Governing Documents. The governing documents of Texas entities may require all internal entity claims to be brought only in courts (federal and state) located in Texas, if consistent with applicable state and federal jurisdictional requirements. The phrase "internal entity claims" includes direct and derivative claims based upon, arising from, or related to the "internal affairs" of the entity, which is already defined in the TBOC to include the rights, powers, and duties of governing persons, officers, owners, and members and matters relating to the membership or ownership interests of an entity.

Registration of Foreign Entities to Transact Business in Texas. No registration for a foreign entity to transact business in

Texas is required if the foreign entity is acting solely as a governing person of a domestic Texas entity or a foreign entity that is registered to transact business in Texas. This change is intended to cure any contrary implication created by a 1983 Texas attorney general opinion that has been referenced for many years on the website of the Texas secretary of state.

Emergency Provisions. The TBOC's emergency provisions are amended to expand the definition of "emergency" to include an epidemic, pandemic, hurricane, tornado, riot or civil disturbance, governmental emergency declaration, and other emergency situations. Provisions in governing documents of Texas entities applying only during an emergency period can be adopted to limit or prohibit various specified procedural requirements for meetings of governing persons. In addition, the governing persons can take "emergency action" during an emergency period without satisfying specified procedural requirements for meetings of governing persons. Emergency actions are protected if taken in good faith and based on a reasonable belief that they were in the entity's best interests.

Virtual Shareholder Meetings. The requirements for meetings of shareholders held by means of remote communications are relaxed. Participating shareholders or proxyholders must have a reasonable opportunity to vote at the meeting and to read or hear the meeting proceedings substantially concurrently with these proceedings.

Reliance on Financial Information by Governing Persons of Limited Partnerships or LLCs. For a limited partnership or limited liability company, its governing persons may rely on financial statements, financial information, projections, and fair valuations in making determinations of the entity's assets, liabilities, and solvency for purposes of authorizing distributions to its owners. A new two-year statute of limitations, similar to that applicable to corporations, is added for claims against owners of a limited partnership or LLC who receives impermissible distributions.

Management of Texas LLCs. Flexibility in management of a Texas limited liability company is improved by authorizing its company agreement to control over its certificate of formation as to whether the LLC is manager-managed or member-managed. The certificate of formation must state whether the LLC initially will be member-managed or manager-managed and the names and addresses of its initial members or managers.

Future Effective Time for Actions by Written Consent. A unanimous written consent of governing persons, owners, and members or non-unanimous consent of owners and members of a Texas filing entity can expressly have a future effective time. A consent of any person can also have a future effective time. The future effective time can be determined based on the happening of an event. There is, however, a time limit of 60 days for the future effective time after the signing of the last consent. Consents may be revoked before they become effective.

Restated Certificates of Formation. For LLCs and corporations, any restated certificate of formation may omit the names and addresses of the initial directors, managers, or members, which are typically outdated. The LLC or corporation can elect, but is not obligated, to list the names and addresses of its current directors, managers, or members.

Express Negligence Doctrine. Provisions in governing documents of Texas enterprises relating to indemnification and exculpation for negligence are not subject to the so-called Texas "express negligence" doctrine, including specifically general partnerships and limited liability companies. These provisions do not have to be express and conspicuous.

Clarifications Relating to Terminated Entities. The effects of a court-ordered revocation of an entity's fraudulent termination and a reinstatement of a forfeited certificate of formation of a filing entity under the Tax Code are clarified. A prior extinguishment of claims under TBOC Chapter 11 is nullified when a terminated entity is reinstated, its termination revoked, or its tax forfeiture reinstated, in each case with retroactive effective. The definition of the phrase

"existing claim" is also clarified to include claims arising during the entity's three-year limited survival period.

Series LLC Amendments

SB 1523 amends the TBOC and the TBCC, effective June 1, 2022, to introduce the concept of "registered series" of Texas limited liability companies, while renaming the existing series concept as a "protected series." In 2009, the TBOC was amended to authorize series of LLCs that allow the assets and liabilities of each series to be segregated. The registered series concept improves the transparency of series to third parties and their ability to obtain financing, to contract with third parties, and to open bank accounts. Third parties transacting with registered series can confirm the existence of the registered series through the public records of the Texas secretary of state and obtain certificates of existence.

A "registered series" has characteristics identical to a "protected series" except that an LLC must file a certificate of registered series with the Texas secretary of state containing specified information to form a registered series. Naming rules are included for registered series. A registered series is a "registered organization" for purposes of filing of financing statements to perfect security interests under TBCC Chapter 9. A registered series can also file an assumed name certificate with the Texas secretary of state under the TBCC. To terminate a registered series, a certificate of termination must be filed with the secretary of state. The filing of a certificate of amendment with the secretary of state is required to amend a certificate of registered series. Conversions of registered series into protected series and vice versa are authorized. Merger transactions among registered series and/or protected series of a single LLC are also authorized, including a divisive merger of a single registered series or protected series. Various other clarifying amendments were made to the existing protected series provisions in the TBOC.

Exemptions for Filing Fees and Taxes for New Veteran-Owned Businesses

SB 938 amends the TBOC and Tax Code, effective January 1, 2022, to exempt new veteran-owned businesses from filing fees imposed by the Texas secretary of state and from Texas franchise taxes. Similar provisions had expired on January 1, 2020. To qualify, each owner of the business entity has to be a verified veteran with honorable discharge. The entity's exemption expires on the earlier of (a) five years after beginning its business or (b) when it ceases to qualify as a new veteran-owned business. The new provisions are automatically repealed as of January 1, 2026.

New Oil and Gas Lien Statute

HB 3794 adds new Chapter 67 to the Texas Property Code and establishes liens in favor of oil and gas interest owners in their produced oil and gas and the proceeds from the sale thereof, including rules for automatic perfection and priority of those liens. The provisions replace repealed Section 9.343 of the TBCC.

CIVIL LITIGATION AND APPELLATE LAW

By Jerry D. Bullard

The following briefly describes some of the bills passed by the 87th Legislature that will directly affect Texas civil trial and appellate practitioners. Unless otherwise indicated, all bills are effective September 1, 2021.

For more detailed and additional background information on the following bills, please visit Texas Legislature Online at capitol.state.tx.us.

Attorneys' Fees

HB 1578[1] amends Section 38.001 of the Civil Practice & Remedies Code, or CPRC, to include any type of "organization" as defined under the Business Organizations Code as entities from whom attorneys' fees can be recovered (the amendment excludes quasi-governmental entities, religious organizations, charitable organizations, and charitable trusts).

HB 2416[2] adds Section 38.0015 to the CPRC and allows a person to recover reasonable attorneys' fees from an individual, corporation, or other entity from which Section 38.001 permits the recovery of compensatory damages in breach of construction contract cases.

Commercial Motor Vehicle Litigation

HB 19[3] amends the CPRC to provide new guidelines for cases arising out of commercial motor vehicle accidents, including the following:

- *Bifurcated trials*: Bifurcated trials are required when a claimant seeks to recover exemplary damages. Requests to bifurcate must be brought on or before the later of: (1) the 120th day after the defendant bringing the motion files its original answer; or (2) the 30th day after a claimant files a pleading adding a claim against the defendant bringing the motion. Liability for and the amount of compensatory damages will be determined in the first phase of a bifurcated trial; liability for and the amount of exemplary damages will be determined in the second phase.

- *Violation of regulatory standards*: A defendant's failure to comply with a regulation or standard will be admissible into evidence in the first phase of a bifurcated trial only if: (1) the evidence tends to prove that the failure to comply was a proximate cause of the injury or death for which damages are sought; and (2) the regulation or standard specifically governs, or is an element of a duty of care applicable to, the defendant, the defendant's employee, or the defendant's property

or equipment when any of those is at issue. However, if an employer-defendant is regulated by the Motor Carrier Safety Improvement Act, such evidence may be admissible in the first phase to prove ordinary negligent entrustment.

- *Direct actions against an employer*: An employer-defendant's liability for damages caused by the ordinary negligence of a person operating the defendant's vehicle shall be based only on respondeat superior if the defendant stipulates that, at the time of the accident, the person operating the vehicle was: (1) the defendant's employee; and (2) acting within the scope of employment. If an employer-defendant so stipulates and the trial is bifurcated, a claimant may not, in the first phase of the trial, present evidence on an ordinary negligence claim against the employer-defendant that requires a finding that the employee was negligent as a prerequisite to the employer-defendant being found negligent in relation to the employee's operation of the vehicle.

- *Admissibility of visual depictions of all motor vehicle accidents*: A court may not require expert testimony to admit evidence of a photograph or video of a vehicle or object involved in an accident. If properly authenticated under the Texas Rules of Evidence, a photograph or video of a vehicle or object involved in an accident is presumed admissible, even if it tends to support or refute an assertion regarding the severity of damages or injury to an object or person.

Pandemic Liability

SB 6,[4] effective June 14, 2021, amends the Texas Medical Liability Act, or TMLA, and the CPRC to provide liability protection for health care providers; businesses that manufactured and distributed products related to a pandemic emergency; and individuals and businesses that continue to operate during a pandemic emergency. More specifically, SB 6 provides for the following:

- *Liability of Health Care Providers During a Pandemic*: Except in a case of reckless conduct or intentional, willful, or wanton misconduct, a health care provider is not liable for an injury or death arising from care or treatment (or a failure to provide care or treatment) relating to a pandemic disease or a disaster declaration related to a pandemic disease, if the health care provider proves by a preponderance of the evidence that: (1) a pandemic disease or a related disaster declaration was a producing cause of the care or treatment (or failure to provide care or treatment) that allegedly caused the injury or death; or (2) the individual who suffered injury or death was diagnosed or reasonably suspected to be infected with a pandemic disease at the time of the care or treatment (or failure to provide care or treatment). A health care provider who intends to raise this defense must provide facts supporting such a defense no later than the later of: (1) the 60th day after the claimant serves an expert report on the health care provider; or (2) the 120th day after the health care provider files an original answer.

- *Pandemic Emergency Related Products.* A person who designs, manufacturers, sells, or donates a product described in SB 6, such as personal protection equipment and medications and vaccines used to treat or prevent the spread of the disease, is not liable for an injury, death, or damage caused by the product unless: (1) the person either had knowledge of a product defect when the product left the person's control, or acted with malice in designing, manufacturing, selling, or donating the product; and (2) the product presented an unreasonable risk of substantial harm.

- *Liability for Causing Exposure to a Pandemic Disease*: A person is not liable for injury or death caused by exposure to a pandemic disease during a pandemic emergency unless: (1) said person knowingly failed to warn the individual of or remediate a condition that said person knew was likely to result in exposure, or knowingly failed to implement or comply with government-promulgated standards or guidance intended to lower the likelihood of exposure; and (2) scientific evidence shows that the failure to warn about the condition, remediate the condition, or implement or comply with government-promulgated standards or guidance caused an individual to contract the disease.

- *Expert Reports*: Claims for exposure to a pandemic disease must be supported by an expert report. Absent written agreement otherwise, no later than the 120th day after a defendant files an answer to an exposure claim, a claimant must serve on the defendant: (1) an expert report that provides a basis for the claim that the defendant's failure to act caused an individual to contract a pandemic disease; and (2) a curriculum vitae for each expert whose opinion is included in the report. A defendant must object to the sufficiency of the report no later than 21 days after the later of: (1) the date the report is served; or (2) the date the defendant's answer is filed.

- *Interlocutory Appeal*. A person may appeal from an interlocutory order that overrules an objection filed to an expert report or denies all or part of the relief sought in a motion to dismiss.

Contractor Liability

SB 219[5] amends the Business & Commerce Code to establish that, except for a "critical infrastructure facility," a contractor

is not responsible for the consequences of defects in plans, specifications, or other design/bid documents to construct or repair an improvement to real property when provided to the contractor by a person with whom the contractor entered into the contract.

Under SB 219, a contractor must disclose, in writing, any known defect in the plans, specifications, or other design/bid documents discovered by the contractor before or during construction, as well as any other inaccuracies, inadequacies, and insufficiencies. A contractor who fails to disclose conditions may be liable for defects resulting from the failure to disclose. SB 219 prohibits these protections from being waived by contract.

HB 2086,[6] effective June 16, 2021, amends CPRC § 51.014 to authorize the interlocutory appeal of an order either granting or denying a motion for summary judgment filed by a contractor in cases arising out of the conduct of a contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation if, at the time of the injury, damage, or death, the contractor was in compliance with contract documents material to the damage-causing condition or defect.

Health Care Liability

SB 232[7] adds to the TMLA a "preliminary determination for expert report" section that permits a court to issue a preliminary determination as to whether a claim is a health care liability claim. A claimant must request such a determination no later than 30 days after a defendant's original answer is filed. If a court determines that a claim is a health care liability claim, the claimant must serve an expert report no later than the later of: (1) 120 days after each defendant's original answer is filed; (2) 60 days after the court issues the determination; or (3) a date agreed to in writing by the affected parties.

If a preliminary determination is not issued before the 91st day after a claimant files a motion, the court shall issue a determination that the claim is a health care liability claim. A preliminary determination is subject to interlocutory appeal by either the claimant or defendant.

Notes

1. Act of May 31, 2021, 87th Leg., R.S., H.B. 1578 (to be codified as an amendment to Tex. Civ. Prac. & Rem. Code § 38.001).
2. Act of May 27, 2021, 87th Leg., R.S., H.B. 2416 (to be codified at Tex. Civ. Prac. & Rem. Code § 38.0015).
3. Act of May 31, 2021, 87th Leg., R.S., H.B. 19 (to be codified as amendments to Tex. Civ. Prac. & Rem. Code §§ 72.002-.003 and adding §§ 72.015-.055, and by adding Tex. Ins. Code § 38.005).
4. Act of May 31, 2021, 87th Leg., R.S., S.B. 6 (to be codified as amendments to Tex. Civ. Prac. & Rem. Code §§ 51.014; 74.155; and §§ 148.001-.005).
5. Act of May 31, 2021, 87th Leg., R.S., S.B. 219 (to be codified at Tex. Bus. & Com. Code §§ 59.001.003, 59.051-.052; Tex. Civ. Prac. & Rem. Code § 130.0021; and as an amendment to Tex. Civ. Prac. & Rem. Code § 130.004).
6. Act of May 31, 2021, 87th Leg., R.S., H.B. 2086 (to be codified as an amendment to Tex. Civ. Prac. & Rem. Code § 51.014).

COMPUTER AND TECHNOLOGY

By Shawn Tuma, Natalie Soas Washington, and Shelby Wilson

New Data Breach Notification Requirements

Texas law requires a person who conducts business in Texas and collects or stores computerized data that includes sensitive personal information, or SPI, to notify any individual whose electronic SPI was or is reasonably believed to have been acquired by an unauthorized person without unreasonable delay and not later than the 60th day after the date on which the person determines that the breach occurred.[1] The law also requires notifying the Texas attorney general during that 60-day time period if the breach involves at least 250 Texas residents, which notice must include multiple specific categories of information identified in the statute.[2]

Effective September 1, 2021, **HB 3746** amends this law to require that notices to the AG include the number of affected residents notified.[3] It further requires the AG to post on its website in a publicly accessible location a listing of the notifications it received, excluding any reported sensitive personal information, information that may compromise a data system's security, and other information that is confidential by law. The AG must post the listings within 30 days of receipt, remove them within one year of their posting (if the entity has not notified of additional breaches), and, if the entity has had additional breaches, maintain only the most recently updated listing on its website.[4]

Identity Theft Enforcement and Protection Act Use of Personal Information Consent

An individual's personal identifying information may not be obtained, possessed, transferred, or used without the individual's consent—or, beginning September 1, 2021, effective consent as amended by **HB 3529**.[5]

Effective consent includes consent given by a person legally authorized to act on behalf of the person from whom consent is required.[6] Consent is not effective if induced by force, threat, fraud, or coercion.[7] Neither is consent effective if given by a person who by reason of youth, mental illness, or intellectual disability is known by the actor to be unable to make reasonable decisions.[8]

Electronic Tracking of Mail-In Early Voting Applications and Ballots

Certain qualified voters are eligible for early voting by mail in the state of Texas.[9] Eligibility criteria for early voting by mail include being 65 years of age or older on Election Day, certain jail confinement, disability, and absence from the county on Election Day.

Effective September 1, 2021, **HB 1382** requires the secretary of state to develop or otherwise provide an online tool for individuals who submit their early voting application or ballot by mail to track the location and status of their submission online.[10] The online tool must require the individual to verify his or her identity by providing certain personal identifying information such as name, registration address, and the last four digits of their Social Security number.[11]

Disclosure of Data Collected by Public Transportation Systems

The Texas Transportation Code protects certain personal identifying information as confidential and not subject to disclosure such as a traveler's name, address, phone number, account number, and payment information. Effective May 28, 2021, **SB 858** amended the code to include additional trip data subject to non-disclosure such as time, date, place of departure and destination, and demographics that are routinely collected at the time of ticket purchase.

The newly protected information may only be disclosed to a governmental agency or institution of higher education, as defined by Section 61.003 of the Texas Education Code, by an authority if the requestor confirms in writing that the use of the information will be strictly limited to research and statistical data not subject to publish, re-disclosure, or sale.

Bullying and Cyberbullying in Public Schools

Texas law requires schools to adopt bullying and cyberbullying policies for the protection of their students.[12] **SB 2050** amended Texas Education Code § 37.0832 to add additional policies that the board of trustees of each school district must adopt for their district. As of June 18, 2021, each school district's board of trustees is required to adopt a policy preventing and mediating bullying incidents between students that (a) interfere with a student's educational opportunities; or (b) substantially disrupt the orderly operation of a classroom, school, or school-sponsored/related activity.[13] SB 2050 also added a minimum standard for the policies the school districts must adopt. The standards adopted must: include an emphasis on bullying prevention by focusing on school climate and building healthy relationships between students and staff;[14] each district campus must establish a committee to address bullying by focusing on prevention efforts and health and wellness initiatives;[15] students at each grade level must meet periodically for instruction on building relationships and preventing bullying or cyberbullying;[16] the standard should emphasize increasing student reporting of bullying to the school by increasing awareness about reporting procedures and providing the ability to anonymously report;[17] the standard must collect information annually through student surveys on bullying/cyberbullying and use the survey results to develop action plans to address student concerns regarding bullying or cyberbullying;[18] and the districts must develop a rubric or checklist to asses an incident of bullying and determine the response to the incident.[19]

SB 2050 also amended Texas Education Code § 48.009 to require school districts and open-enrollment charter schools to annually report via the Public Education Information Management System the number of reported incidents of bullying at each campus, and they must specify the incidents that included cyberbullying.[20]

Coercion in Relation to the Trafficking of Persons

Effective September 1, 2021, **HB 3521** amends Texas Penal Code § 20A.01 to include a definition concerning coercion in relation to the trafficking of persons that focuses on the misuse of their personal information.[21] This amendment adds the definition of coercion as follows: destroying, concealing, confiscating, or withholding from a trafficked person (or threatening to do so) their government records[22] or identifying information or documents;[23] causing a trafficked person to become intoxicated without their consent to a degree that impairs the person's ability to appraise the nature of the conduct or resist in engaging in any conduct;[24] or withholding alcohol or a controlled substance to a degree that impairs the ability of a trafficked person with a chemical dependency to appraise the nature of the conduct or resist in engaging in any conduct.[25]

Cybersecurity Training Compliance for Grant Eligibility

HB 1118, effective May 18, 2021, requires local governments applying for grant funds to submit a written certification of the local government's compliance with the cybersecurity training required by Section 2054.5191.[26] If the criminal justice division determines that an awarded local government has not complied with the cybersecurity training requirement, such government shall pay back the state an amount equal to the grant award and be deemed ineligible for

another grant until the second anniversary of the determined date of ineligibility.[27]

Texas Schools' Ability to Share Information Relating to Cybersecurity Incidents

SB 1696 amends Texas Education Code § 11.175, which details the schools' systems for reporting cyber-attacks or other cybersecurity incidents they experience. Effective September 1, 2021, SB 1696 requires a school district or open-enrollment charter school to report any cyber-attack or cybersecurity incident against the school district/open-enrollment charter school's cyber infrastructure that constitutes a breach of system security as soon as practicable after discovery of the incident.[28] The school must report this type of incident to the agency in cybersecurity matters or, if applicable, the entity that administers the system designed to coordinate the anonymous sharing of information concerning cyber-attacks or other cybersecurity incidents between participating schools and the state.[29] The system established must include each report the school district reports to the agency or entity described above,[30] provide for those reports to be shared between participating schools in as close to real time as possible,[31] and preserve a reporting school's anonymity by ensuring the name of the school that experienced the attack or incident is not released.[32] When establishing the system to anonymously share information concerning attacks or incidents, the agency may contract with a qualified third party to administer the system.[33]

Notes

1. Tex. Bus. & Comm. Code § 521.053(b).
2. Tex. Bus. & Comm. Code § 521.053(i).
3. Tex. Bus. & Comm. Code § 521.053(i)(3).
4. Tex. Bus. & Comm. Code § 521.053(j).
5. Tex. Bus. & Comm. Code § 521.051(a).
6. Tex. Bus. & Comm. Code § 521.051(a-1).
7. Tex. Bus. & Comm. Code § 521.051(a-1)(1).
8. Tex. Bus. & Comm. Code § 521.051(a-1)(2).
9. Tex. Elec. Code § 82.001.
10. Tex. Elec. Code § 86.015.
11. Tex. Elec. Code § 86.015(b).
12. Tex. Educ. Code § 37.0832.
13. Tex. Educ. Code § 37.0832(c)(2).
14. Tex. Educ. Code § 37.0832(c-1)(1).
15. Tex. Educ. Code § 37.0832(c-1)(2).
16. Tex. Educ. Code § 37.0832(c-1)(3).
17. Tex. Educ. Code § 37.0832(c-1)(4).
18. Tex. Educ. Code § 37.0832(c-1)(5).
19. Tex. Educ. Code § 37.0832(c-1)(6).
20. Tex. Educ. Code § 48.009(b-4).
21. Tex. Penal Code § 20A.01(1-a).
22. Tex. Penal Code § 20A.01(1-a)(A)(i).
23. Tex. Penal Code § 20A.01(1-a)(A)(ii).
24. Tex. Penal Code § 20A.01(1-a)(B).
25. Tex. Penal Code § 20A.01(1-a)(C).
26. Tex. Gov't Code § 772.012.
27. *Id.*
28. Tex. Educ. Code § 11.175(e).
29. Tex. Educ. Code §§ 11.175(e) and (g).
30. Tex. Educ. Code § 11.175(g)(1).
31. Tex. Educ. Code § 11.175(g)(2).
32. Tex. Educ. Code § 11.175(g)(3).
33. Tex. Educ. Code § 11.175(h).

CONSTRUCTION LAW

By Ben Aderholt

Design Defect Liability

The 87th Legislature shifted liability from the general contractor for design defects in plans prepared by others and limits the contractor's responsibility to timely disclose discovered plan defects in writing, and the new protection may not be waived by contract. Furthermore, indemnification by a contractor of design professionals for liability caused by defective plans is now void.[1]

Since the 1907 Texas Supreme Court opinion in *Lonergan v. San Antonio,* a contractor bore the risk and liability of a building failure resulting from defective design. The court rejected the defense that the owner impliedly warranted the sufficiency of the plans. Several appellate courts in the face of *Lonergan* recognized a cause of action for contractors when the owner furnished defective plans. The new law effective September 1, 2021, may resolve this conflict among Texas courts as well as the conflict with *U.S. v. Spearin,* a 1918 opinion by the U.S. Supreme Court.

Attorneys' Fees

Attorneys' fees may be recovered after September 1, 2021, as part of compensatory damages for breach of a construction contract.[2] This will increase the face amount of appeal bonds.

Public Works (McGregor Act)

The maximum retainage will be limited to 5% on contracts exceeding $5 million, retainage held by the government on large projects may bear interest, and retainage must be payable upon completion. New contracts must provide when the work is substantially complete. The amount of retainage withheld may not exceed amounts withheld upstream. An owner must now specify why retainage is withheld and allow the contractor time to cure.[3]

Procurement scoring methodologies and bid evaluations must be disclosed within 30 days after a contractor's request. Evaluations must be made public within seven days.[4] Texas Local Government Code § 302 was amended to provide that energy savings performance contracts in certain cases are prohibited for public works. School districts may adopt uniform general conditions to be drafted and reviewed by the Texas Facilities Commission.[5]

The 10-year statute of repose in Texas Civil Practice & Remedies Code § 16.008 was shortened to eight years for a public building owner to sue for defects, but Texas Department of Transportation, highways, and civil works are excluded.[6]

Texas Government Code § 2254 was amended to restrict amending contracts for attorneys' fees.[7]

The Prompt Pay statute was amended to require an owner to provide detailed written notice of disputed amounts, and the withheld amount may not exceed 110% of the disputed amount.[8]

Lien Law (Hardeman Act)

Many revisions were made to construction law. Here are the main ones.

Texas Property Code § 53 was amended effective September 1, 2022, to eliminate the requirement for the subcontractor's second month notice to the general contractor. Form notices are promulgated in sections 53.056 and 53.057. To avoid the *Myrex* case result, lien deadlines are extended to the next business day and limitations to foreclose a lien is shortened to one year from when the lien could be recorded. The requirement for notices to be sent by certified mail (one of the methods for notice currently provided) was made optional. Design services and equipment rental are now lienable. Materials are now defined as those incorporated or used, rather than consumed in the project.[9]

Sincere gratitude is once again extended to Ben Wescott.

Notes

1. Tex. Civ. Prac. & Rem. Code § 130. SB 219.
2. Tex. Civ. Prac. & Rem. Code § 38. HB 2416.
3. Tex. Gov't Code § 2252. HB 692.
4. Tex. Gov't Code § 2269. HB 2581.
5. Tex. Educ. Code § 44. HB 3583.
6. HB 3069.
7. SB 1821.
8. Tex. Gov't Code § 2251. HB 1476.
9. HB 2237.

CRIMINAL LAW

By Allen D. Place Jr. and Shea Place

The first two months of the 87th legislative session featured mostly empty House and Senate chambers and ended with an empty House chamber on the eve of sine die. Talk of simply passing a budget and perhaps a statewide broadband access bill and then adjourning was soon forgotten, as the Legislature passed well over 100 bills affecting the Texas Penal Code and Texas Code of Criminal Procedure out of approximately 900 criminal law bills filed.

Firearm legislation attracted significant attention this year and the following are the new laws regarding firearms, including handguns.

- **HB 957** amends current law regarding firearm suppressors by removing such from the list of prohibited weapons in the Penal Code and makes a firearm suppressor that is manufactured and remains in Texas not subject to federal law or regulation.
- **HB 1069** seeks to ensure first responders employed or supervised by counties or municipalities with smaller populations are able to defend themselves. It establishes the right of certain first responders who are handgun

license holders to carry a handgun while performing their duties, contingent on the first responder obtaining liability insurance and completing applicable training.
- **HB 1407** amends Penal Code § 46.035 by stating a license holder can have a handgun visible in their vehicle, regardless of whether it is on their person, as long as the handgun is in a holster.
- **HB 1920** expands the "secured area" for airports to include airport operations in order to protect against potential insider threats.
- **HB 1927** garnered the most attention in this area by allowing unlicensed or permitless carrying of a firearm for individuals over 21 who are not otherwise prohibited in doing so. There are limited changes to the places where firearms are prohibited and retroactive expunctions of unlawfully carrying a weapon charges are allowed. The bill reduces penalties for noncompliance with trespass and creates a new offense of carrying a firearm while intoxicated. Finally, the Legislature left intact current law regarding licensing procedures for carrying a handgun, primarily for individuals traveling to other states.
- **HB 2622** seeks to be proactive in protecting Texans' Second Amendment rights through enacting the Second Amendment Sanctuary State Act. This act prohibits the enforcement of certain federal regulations on firearms, firearm accessories, or ammunition that are not in state law.
- **HB 2675** creates an at-risk designation for a handgun license and provides for the expedited processing of an application for a license with that designation.
- **SB 20** denies a hotel the right to adopt a policy prohibiting guests from storing a handgun or ammunition in a hotel room, but hotels may adopt a policy requiring guests to conceal the weapons en route to their rooms.
- **SB 162** creates an offense if a person knowingly makes a materially false or misleading statement when providing information for the purposes of complying with the National Instant Criminal Background Check System.
- **SB 550** and **HB 2112** both address the holster issue by striking a belt or shoulder from existing law, allowing one to use any type of holster for properly carrying a gun in Texas.

Human trafficking once again took center stage, as numerous bills seeking to address this issue were signed into law.

- **HB 465** eliminates the eligibility for release on parole of certain inmates serving sentences for trafficking involving one or more child victims.
- **HB 1540** codifies unanimous recommendations from the Texas Human Trafficking Prevention Task Force by increasing investigatory tools against traffickers and amends current law relating to regulation of certain facilities and establishments. In Penal Code § 43.021, Solicitation of Prostitution, this bill provides an enhanced penalty from a Class A misdemeanor to a state jail felony if a person knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another.
- **HB 3521** redefines coercion with respect to trafficking offenses to include the performance of labor or services.
- **SB 1831** addresses the vulnerability of students to trafficking by enhancing penalties near schools and within school hours.

Following the summer of 2020, many states saw increased legislation regarding police interactions with citizens. The Texas version of the George Floyd bill did not advance out of either a House or Senate committee, but the following bills passed in response to this issue.

- **HB 9** provides enhanced penalties for those who prevent passage of an emergency vehicle or obstruct access to a medical facility.
- **HB 1900** affects the ability of a local jurisdiction of over 250,000 people to make certain changes to their police budget.
- **SB 69** bans chokeholds and imposes a duty on peace officers to intervene in certain circumstances.
- **SB 2212** creates a duty on a peace officer to request and render aid for an individual.

In response to the federal government's imposition of a requirement to suspend an individual's driver's license upon conviction of certain controlled substance violations, two bills passed:

- **SB 181** reforms mandatory 180-day license suspensions. Suspensions are reduced to a minimum of 90 days and a judge is permitted to waive suspension for defendants with misdemeanor drug convictions who do not have prior drug convictions within the past 36 months.
- **Senate Concurrent Resolution 1** voices formal objection from Texas to the federal government regarding 23 U.S.C. § 159 requiring Texas to suspend drivers' licenses of individuals convicted of certain controlled substance violations.

Following concerns that some prosecuting attorneys do not always receive all relevant evidence pertaining to a particular case from law enforcement agencies, **SB 111** establishes certain duties for law enforcement agencies regarding the release of information subject to disclosure to the state's attorney. It specifically requires a law enforcement agency that files a case with the attorney representing the state to submit to the prosecutor a written statement from an officer employed by the agency that attests that all exculpatory, impeaching, or mitigating evidence in possession of the investigating agency has been released to the state's attorney at

the time the case is filed. Section (c) places a continuing duty to disclose on law enforcement.

HB 1694 establishes a limited "good Samaritan" defense in drug overdose cases. This bill provides a defense to prosecution for certain offenses involving possession of a small amount of a controlled substance or marijuana for individuals seeking assistance for a suspected overdose. This bill is narrower in focus than similar efforts in previous sessions.

Relating to the effect of a successfully completed period of deferred adjudication, **HB 757** prohibits denial of professional or occupational licenses and certificates for individuals who have successfully completed deferred adjudication community supervision and who would otherwise qualify for the professional or occupational license or certificate, except in limited circumstances.

The Legislature made yet another modification to the improper relationship between educator and student statute. **HB 246** broadens and clarifies the definition of sexual contact between an educator and a student.

SB 1164 amends the sexual assault statute by addressing some recent headline situations. The bill adds private coaches and tutors who use their power and influence to exploit the other person's dependency on them to the same section of the sexual assault code that applies to clergymen, public servants, and medical professionals.

A notable change regarding community supervision and also addressing the ability to pay a community supervision fee was spelled out by **HB 385**. The change to the probation system in Texas strengthens judicial review, aligns conditions of community supervision with individual risk assessments, and provides guidance to judges on the ability to pay determinations so people can satisfactorily complete probation. It creates a time credit for participation in faith-based programs.

The Legislature's answer to the homeless situation was the creation of a new offense of prohibited camping. **HB 1925** creates a Class C offense if a person intentionally or knowingly camps in a public place without the consent of the legal authority that manages the public place.

Finally, for the last several sessions, differing bills regarding marijuana have been filed. 2021 was no different, as a record number of bills were filed on this topic. However, the only bill that made it to the governor's desk was a modification of the Compassionate Use Program. **HB 1535** made moderate changes to this program so eligibility is now expanded to people with cancer and post-traumatic stress disorder. Although the House version increased the scope to include chronic pain, the Senate removed this section and it did not make it into law. Finally, THC content was raised from 0.5% to 1%.

ENVIRONMENTAL AND WATER LAW

By Claudia Russell and Susan M. Maxwell

Although the 87th regular legislative session was not particularly focused on environmental law issues, various bills passed that affect aspects of environmental, water, and utility law practice. Highlights of key bills are summarized in this article. Unless noted otherwise, these bills are effective September 1, 2021.

Response to Winter Storm Uri

SB 3—While most of this bill addresses problems with the state's electrical grid exposed by February's freezing weather event, several provisions pertain to water utilities, including:

- As soon as it is safe and practicable, water utilities must provide service during an extended power outage following a natural disaster.
- Utilities must adopt and submit a plan to the Texas Commission on Environmental Quality, or TCEQ, showing the ability of the utility to conduct emergency operations. The new law requires TCEQ to develop a template plan for systems to use and to offer the agency's financial, managerial, and technical staff for assistance.
- Utilities are prohibited from disconnecting customers for nonpayment and from imposing late fees during an "extreme weather emergency," which is defined in terms of high temperatures not exceeding 28 degrees for more than 24 hours.
- Although most utilities already do, utilities are now

required to assist customers who request a payment schedule.
- Fines can be imposed for violations of utilities' billing provisions.
- Utilities have until November 1, 2021, to submit critical infrastructure and emergency contact information to the Public Utility Commission of Texas, or PUCT; electrical providers; local offices of emergency management, and the governor's division of emergency management. Utilities have until March 1, 2022, to submit their emergency preparedness plan to TCEQ and until July 1, 2022, to implement the plan.
- SB 3 became effective June 8, 2021.

Wholesale Water Rates

SB 997—Wholesale rate appeals are processed in bifurcated proceedings before the PUCT. First, the commission determines whether a wholesale rate is adverse to the public interest, and only if so, the second phase addresses what the proper rate should be. Currently, a party challenging rates can only appeal the PUCT's decision after both phases are complete. In an effort to reduce litigation time, SB 997 now allows the losing party in the first phase to appeal that decision immediately before moving on to the rate-setting phase. SB 997 also promotes settlement of rate disputes by permitting parties to a dispute to amend their contract before PUCT begins rate proceedings.

Retail Water Rates

SB 387—This bill authorizes rate appeals for customers within a city's extraterritorial jurisdiction, or ETJ, when their service is taken over by another municipal utility. Districts and water supply corporations are not affected by SB 387.

HB 3689—Because they cannot vote in city elections, Water Code Chapter 13 grants municipal utility customers outside a city's limits the right to appeal their rates to the PUCT. This bill was filed in response to a recent appeal on the reasonableness of a city's rates outside its limits, where the PUCT assumed jurisdiction to review not only those rates but also those charged to customers within the city limits. HB 3689 clarifies that the commission's jurisdiction extends only to rates charged to out-of-city customers.

HB 1484—This bill addresses rates charged by a utility once it purchases or acquires another utility. HB 1484 provides that without going through a new rate proceeding at the PUCT, an acquiring utility can charge its new customers the rates in effect for its existing customers.

Certificate of Convenience and Necessity, or CCN, Issues

HB 3476—Current law provides that as a condition of giving consent when a new CCN is requested within a city's boundaries and its ETJ, cities with a population of 500,000 or more may require that water and sewer facilities be designed and constructed in accordance with city standards. That provision is now deleted, and thus these larger cities may no longer require facilities within their ETJ to comply with the city's standards. Instead, those facilities are subject to standards set by the TCEQ.

Direct Potable Reuse Guidance

SB 905—This bill requires the TCEQ to develop and make available to the public a regulatory guidance manual explaining its rules pertaining to direct potable water reuse, which is defined as the "introduction of treated reclaimed municipal wastewater either directly into a public water system or into a raw water supply immediately before the water enters a drinking water treatment plant."

Produced Water

SB 601—This bill creates the Texas Produced Water Consortium, to be hosted by Texas Tech University. Its purpose is to study the economic, environmental, and public health considerations of beneficial uses of oil and gas waste and the needed technology. September 1, 2022, is the deadline by which the consortium must produce its report suggesting policy changes, a state participation pilot project for a produced water facility, and an economic model for using the produced water. The consortium must also create a fee structure for private entities to participate in investigation and research. SB 601 became effective June 18, 2021.

River Authorities

SB 600—This bill requires each river authority to provide information to TCEQ regarding the operations and maintenance of each dam under its control. Specified information is required each year and also any significant changes. With this information, TCEQ must create and maintain a website that contains information on these dams, subject to confidentiality laws.

Texas Emissions Reduction Program, or TERP

HB 4472—This bill amends various aspects of the TERP program to give TCEQ more flexibility in its administration. Notably, the scope of grants or other funding is expanded to include remittances to the state highway fund for use by the Texas Department of Transportation for congestion mitigation and air quality improvement projects in nonattainment areas and affected counties. Also, award preferences for TCEQ's grant program for new technology implementation for facilities and stationary sources will now include projects that reduce flaring emissions and other site emissions.

Geologic Storage of Carbon Dioxide

HB 1284—Effective June 9, 2021, this bill amends current law regarding the injection and geologic storage of carbon dioxide in the state, consolidating jurisdiction over both onshore and offshore Class VI underground injection control wells solely under the Railroad Commission of Texas. This consolidated jurisdiction is designed to facilitate Texas' seeking primacy from the U.S. Environmental Protection

Agency over the Class VI underground injection control well program. Other provisions of HB 1284 address deposit of collected fees and penalties to the anthropogenic carbon dioxide storage trust fund.

Dry Cleaner Environmental Response Program

SB 872—Effective May 15, 2021, the expiration of this TCEQ program, governed by Chapter 374 of the Health and Safety Code, is extended to September 1, 2041.

Eminent Domain

SB 721—This bill requires that an entity using its eminent domain authority disclose to the landowner, prior to the special commissioners' hearing on the property's value, all current and existing appraisal reports produced or acquired by the entity relating to the subject property.

SB 726—Current law provides that landowners whose property is taken by eminent domain may repurchase the property if the condemnor fails to show actual progress toward the public use by the 10th anniversary of the date the land was taken. SB 726 raises the standard for demonstrating actual progress by requiring condemning entities now to demonstrate that they have completed three (not just two) of the five enumerated steps toward development.

HB 2730—This bill makes comprehensive reforms to the eminent domain process, including requirements for an initial offer, terms of conveyance, the landowner's bill of rights, and the appointment of special commissioners. HB 2730 also establishes education requirements for easement or right-of-way agents. HB 2730 is effective January 1, 2022.

Groundwater

This was the first session in recent years with no groundwater-specific bills passing the Legislature. **SB 152** was the comprehensive bill that would have provided a process to petition a groundwater conservation district, or GCD, for rulemaking and would have clarified which desired future condition, or DFC, should be included in a GCD's management plan when a DFC is challenged. It failed to pass due to disputes relating to other provisions regarding attorneys' fees. Other groundwater bills, including to expand considerations for GCDs' decisions on permit applications, were also unsuccessful.

Sunset Review

It was somewhat quiet on the environmental front in the 87th regular session but that will most likely change in the 88th regular session. That is at least partly because most of the primary environmentally related state agencies (TCEQ, the Texas Water Development Board, PUCT, and the State Soil and Water Conservation Board) are up for review by the Texas Sunset Advisory Commission during this interim. That process of comprehensive review of agency functions and processes often serves as the catalyst for other substantive legislation addressing agency jurisdiction and programs.

ESTATE, GUARDIANSHIP, AND TRUST LAW

By William D. Pargaman

This article contains a summary of 2021 statutory changes affecting decedents' estates, guardianships, trusts, powers of attorney, and other areas of interest to estate and probate practitioners. This article contains summaries only and should not be relied on as a complete list of bills affecting these areas or a full description of any bill.

Decedents' Estates

The bills that passed substantively affecting decedents' estates are relatively few. **HB 1514** tinkers with procedures for estates to follow when retrieving unclaimed property from the comptroller. Under **HB 1011,** a commissioners court in a county with a medical examiner may authorize the medical examiner to expedite the completion of a death certificate if needed for religious purposes; the remains will be interred, entombed, buried, or cremated in a foreign country; and the individual requesting the expedited process is a person authorized to receive a copy of the certificate. Finally, Property Code § 240.151(g) already bars a disclaimer by a child support obligor if the obligor has been determined to be in arrears in those obligations. **SB 286** contains a number of changes regarding the payment of child support, but one in particular requires all disclaimers to contain a sworn statement regarding whether the disclaimant is a child support obligor whose disclaimer is barred that section. A sentence was added clarifying that a failure to include the required statement would not invalidate a disclaimer if the disclaimant wasn't a child support obligor.

Guardianships and Persons With Disabilities

SB 626 contains a number of "miscellaneous" changes. Estates Code § 1021.001 defines matters related to a guardianship proceeding. Prior to its amendment, there were two different definitions depending on whether you were in a county with or without a statutory probate court. The change divides the latter category further into separate definitions for counties with or without a county court at law. County courts at law now have jurisdiction over the interpretation and administration of a trust in which a ward is a beneficiary. The pandemic introduced difficulties getting documents notarized when people were advised to stay at home. Unsworn declarations under Civil Practice and Remedies Code § 132.001 are available as substitutes in a number of cases, but some county clerks took the position that they were unavailable for the oaths of guardians since they were "oaths of office" for which unsworn declarations aren't available. This change allows a guardian to submit an unsworn declaration under the Estates Code in lieu of an oath in order to qualify to serve. (Note that the Estates Code declaration *is not* the same as an unsworn declaration under Civil Practice and Remedies Code § 132.001.) The general notice to creditors may be published in a newspaper

of general circulation in the county, rather than one *printed* in the county. If there is no newspaper of general circulation in the county, the notice need only be posted. (This is similar to a 2017 change relating to publication of the notice to creditors in decedents' estates.) Procedures for the sale of property are updated to conform to 2019 changes applicable to sales in dependent administrations of decedents' estates. Changes affecting management trusts under Estates Code Chapter 1301 included conforming the notice provisions for an application to create a management trust to the provisions applicable to the creation of a guardianship. A management trust created for a minor who is also incapacitated for some reason must terminate on the beneficiary's death or when the beneficiary regains capacity (not when the beneficiary turns 18). Copies of the annual account must be provided to both the guardian of the estate and the guardian of the person (not either).

SB 615 is a statutory probate judges' bill and contains a number of changes affecting several areas. Some related specifically to guardianships include requiring an attorney representing any person in a guardianship proceeding to obtain guardianship education certification, not just the applicant's attorney and court-appointed attorneys. A guardianship application must include the applicant's former name, if any, and the approximate value of the proposed ward's liquid and non-liquid assets (instead of just describing the proposed ward's "property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled."). A court waiving a guardian's training requirement must contain a finding in the appointment order that the waiver is in accordance with Supreme Court rules. No guardian may be excluded from attending a legal proceeding in which the ward is a party or participating as a witness. Citations in a temporary guardianship must include a statement that a person interested in the estate or welfare of a ward may file a request to be notified of filings. Temporary guardians must file a final report at the termination of the temporary guardianship. Proposed non-resident guardians must provide a *fingerprint-based* criminal history record, while proposed Texas resident guardians must provide a *name-based* criminal history record. And a court may transfer a guardianship to a foreign jurisdiction to which the ward has permanently moved on its own motion.

Selected other guardianship-related bills include **HB 3394** (allowing a court to appoint an ad litem and a court investigator to investigate whether a guardian should be removed due to incapacity); **HB 549** (relieving certain professionals from civil, criminal, or administrative liability for making a permitted disclosure of mental health information); **HB 1156** (creating a criminal offense if a person knowingly engages in financial abuse of an elderly individual, including financial exploitation committed by a person who has a relationship of confidence or trust with the elderly individual); and **HB 4477** (allowing a financial institution to place a hold on any transaction in a vulnerable adult's account if there is reason to believe the transaction involves financial exploitation and the institution has submitted a report of the suspected exploitation to DFPS). **SB 25** and its companion constitutional amendment, **SJR 19,** grant residents of long-term care facilities (or their guardian or other legally authorized representative) the right to designate an essential caregiver for visitation, subject to the temporary suspension of a caregiver's designation if that caregiver violates the facility's safety protocols.

HB 375 creates the offense of continuous sexual abuse of a disabled individual, while **SB 109** makes it a criminal offense to fraudulently secure document execution if a person with fraudulent intent causes another person to execute a document affecting property, a service, or pecuniary interest without that person's effective consent.

Trusts

HB 654, which attempts to statutorily modify our constitutional rule against perpetuities as it relates to trusts, changes the statutory perpetuities period applicable to trusts to a fixed 300-year time limit measured from the "effective date" of the trust, i.e., the date the trust becomes irrevocable. It applies to trusts with an effective date on or after September 1, 2021, and to trusts with an earlier date if the trust provides that interests vest under the statutory provision applicable to trusts on the date the interest vests (which seems a bit circular). At the last minute, an amendment was added prohibiting the settlor from "direct[ing] that a real property asset be retained or refus[ing] that a real property asset may be sold for a period longer than 100 years." Some commentators (including this author) question whether our constitutional perpetuities period (21 years plus lives in being) can by lengthened by statute.

Jurisdiction, Venue, Court Administration, and Other Stuff

HB 1296 modifies the method of serving notice to a guardian on a court's motion to transfer the guardianship to another county from personal service to certified mail. Furthermore, the method of notice given to a private professional guardian or a guardianship program for removal for failure to maintain required certification is clarified to be by certified mail. **SB 1129** modifies rules relating to (i) transfers of guardianships, (ii) mediation of contested guardianships, and (iii) guardianship mediation training. The Office of Court Administration is directed to establish a guardianship mediation course with at least 24 hours of training (if the Legislature appropriates money for that purpose). **HB 1297** requires a party (rather than the court) to provide service on an institution of higher education or charitable organization that is a necessary party in a will contest or construction suit. **HB 79** expands the use of associate judges to hear guardianship and protective services proceedings in courts other than just statutory probate courts.

The author would like to acknowledge the contributions of Lauren Davis Hunt and Craig Hopper, legislative co-chairs in 2021, and of Meredith McIver, his co-author of the full 2021 Estate & Trust Legislative Update.

FAMILY LAW

By Kristal C. Thomson

Despite the unpredictability of the session, several bills passed that affected the Texas Family Code. What follows are highlights from this legislative session that directly affect Texas family lawyers. It is not an exhaustive list or discussion. For a thorough and complete analysis, the TexasBarCLE Family Law 2021 legislative update is highly recommended. A legislative update also was presented at the 2021 Advanced Family Law CLE.

HB 3774 requires the date of marriage to be included in all final decrees of divorce. This amendment was important for the purposes of retirement, specifically Social Security. Divorced spouses will often retain a copy of their final decree of divorce, but rarely will they retain copy of their marriage license. Proof of the length of the marriage is required to apply for Social Security retirement benefits. Now the marriage date will be included in an official court document. The bill is effective September 1, 2021.

HB 867 and **HB 851**—These two bills combined made several changes to the spousal maintenance statutes in Chapter 8 of the Texas Family Code. Prior to this session, spousal maintenance could only be modified down. Now, in a situation where spousal maintenance has been previously modified down, it may be modified back up. However, the modification may not be increased to an amount or duration that would exceed the original maintenance order. This amendment is appropriate in situations where the spousal maintenance obligation was modified down due to a decrease in income, usually due to a loss of a job, and that income is somehow restored or even increased during the time period when the obligation would still be payable.

The changes enacted by these bills also allow the court that rendered the support order to maintain jurisdiction to enforce the order, including by means of a qualified domestic relations order. The court's power to enforce spousal maintenance via a qualified domestic relations order includes temporary orders for spousal maintenance. This procedure was not prohibited prior to HB 867, but now there is no question that it is specifically and statutorily permitted. Furthermore, if a party objects or appeals a court order under this chapter, the court may enter temporary restraining orders that protect the pension/retirement account in question until a final order is issued. The court also retains jurisdiction for the purpose of amending the qualified domestic relations order previously entered.

Chapter 8 is additionally amended so that if a petition to modify spousal maintenance is filed based on a material and substantial change, that filing may not be considered on that basis alone to be an admission of a material and substantial change as to any other matter. Last, HB 867 amends the chapter to clarify that a court may use a writ of withholding or a qualified domestic relations order to enforce spousal maintenance. The court may order attorneys' fees in a suit/motion filed to enforce the provisions enacted herein.

Note: The portions of HB 867 related to child support enforcement also amend Texas Family Code Chapter 157 in relation to the use of qualified domestic relations orders.

The changes to the modification portions only apply to a motion to modify filed on or after September 1, 2021. The changes to the enforcement portions apply to any order subject to enforcement regardless of when the order was entered.

HB 868 amended Texas Family Code § 105.002(c) relating to jury trials. It was enacted due to confusion among the trial courts as to whether the jury could decide a geographic restriction when a sole managing conservator was appointed. The previously worded statute discussed only geographic restrictions in relation to joint managing conservators. The statute left the courts and practitioners either assuming the wording also applied to a sole managing conservator, or a very narrow reading that if a sole managing conservator was appointed, the court would decide on the geographic restriction. This bill clears up that confusion. A jury may decide the issue of geographic restriction regardless of whether the parties are appointed joint managing conservators or one party is appointed a sole managing conservator. This change will apply only to those lawsuits filed on or after September 1, 2021.

SB 904 requires attorneys ad litem to receive trauma informed care education in order to be appointed or maintained on a court's list of qualified appointees.

SB 1936 clarifies the standard possession order by expressly stating that the alternative ending time for Monday student holidays and teacher in-service days is 8 a.m. on the following Tuesday *and* that if a conservator lives less than 50 miles from the other conservator, then the court shall also award that conservator the alternative beginning and ending times to the standard possession order. This award does not apply if the possessory conservator declines one or more of the alternative times or possession is limited by the court because of the best interest of the child. This change applies to pending suits as well as those filed on or after September 1, 2021.

SB 904 requires attorneys ad litem to receive trauma informed care education in order to be appointed or maintained on a court's list of qualified appointees. The training must be completed by September 1, 2022.

HB 3009 requires child custody evaluators to be able to communicate with a parent in their primary language or have someone who can assist the parent in their primary language. This requirement applies to child custody evaluations conducted on or after September 1, 2021.

SB 286 requires that *if* an obligee is required to pay spousal maintenance *and* child support, then the court *shall* order both to be paid through the state disbursement unit. This bill further establishes child support guidelines for low-income obligors whose monthly net resources are $1,000 or less. The court shall presumptively apply different guidelines to obligor's who qualify as low-income. These changes apply to maintenance orders or suits filed on or after September 1, 2021.

SB 1458 calls for the creation and mandatory use of standardized forms for applications of protective orders and ex parte temporary protective orders. The Office of Court Administration is responsible for promulgating the forms. SB 1458 was vetoed on June 18, 2021.

HB 2926 added subchapter D to chapter 161 of the Texas Family Code, which is titled Reinstatement of Parental Rights After Involuntary Termination. This is a new and significant procedure that allows certain persons, including the Department of Family and Protective Services and a previously terminated parent, to move for reinstatement of parental rights. The new statutes set out the basic requirements for filing such a motion and details for the new hearing procedures. The bill is effective September 1, 2021.

HB 1012 amends Texas Property Code § 24A.002. Family lawyers are not typically interested in Property Code changes. However, there were procedures in the property code that allowed for "persons" to enter a "former residence" to obtain "personal belongings." This procedure may be initiated in a court other than a family trial court. To prevent this statute from being abused by family court litigants, it was amended so that an applicant is required to notify the court if they are a party to a pending suit under Title I of the Texas Family Code. This amendment only applies to those applications filed on or after September 1, 2021.

HB 1372 allows the court to order a third-party phone carrier to transfer a phone number to the named petitioner in a protective order under Chapter 85 of the Texas Family Code. While the bill prevents the phone company from charging a "transferring fee," it does not set limitations on other "customary" administrative fees. These are court orders specifically related to Chapter 85 of the Texas Family Code (protective orders), and at first blush appear to be helpful in protecting spouses and their dependents from abusive family members. It may be a useful tool, so long as the phone company does not make it cost prohibitive. This is an amendment in the Texas Business and Commerce Code, Chapter 608, and applies to petitions filed on or after September 1, 2021.

INSURANCE LAW

By W. Ryan Brannan

Affordability and accessibility continue to be central motifs for insurance-related legislation at the Texas Legislature. This session, significant pieces of legislation were also passed involving modernization and price transparency, particularly as they relate to pharmaceutical costs. Given the number of insurance bills that passed this session, the article below is to be viewed as a summary of the more significant legislation. All bills are effective September 1, 2021, unless otherwise indicated.

Transparency and Affordability

In the 2019 session, legislators passed **HB 2536,** requiring drug manufacturers to report wholesale acquisition costs and significant price increases and to provide justification for those increases on the Texas Health and Human Services Commission, or HHSC, website. This session, **HB 1033** expanded on price transparency measures by requiring manufacturers to disclose research and development costs annually, limiting the scope of the word "drug" to "pharmaceutical drug," and allowing the Texas Department of State Health Services to administer a fee for implementation and fines for failures to disclose price increases.

HB 1763 curtails the ability of pharmacy benefit managers, or PBMs, to assess retroactive fees and payment reductions. The bill prohibits these actions by PBMs, with few exceptions, unless those fees or reductions are made as a result of an audit outcome or the pharmacy agrees. This legislation follows the U.S. Supreme Court decision in *Rutledge v. Pharmaceutical Care Management Association,* holding that an Arkansas PBM reform law is not preempted by the Employment Retirement Income Security Act of 1974.

HB 1919 seeks to prevent pharmacies' concern of PBMs referring patients to their own specialty pharmacies by protecting the right of pharmacy patients to use their pharmacy of choice.

HB 2090 codifies the federal price transparency rules for health plans into Texas statute. It also requires insurers and third-party administrators to disclose information related to health care costs at the request of the enrollee.

HB 18 requires HHSC to develop a prescription drug savings program that partners with a PBM to offer prescription drugs at a discounted rate to uninsured individuals.

HB 1935 gives pharmacists the authority to dispense a 30-day emergency supply of insulin and insulin-related equipment and supplies if specific criteria are met. Previously, they could only fill a three-day emergency refill. **SB 827** caps the out-of-pocket costs in a health plan's cost-sharing requirements for insulin at $25 for a 30-day supply.

SB 1296 gives the Texas Department of Insurance, or TDI, commissioner authority to review and disapprove rates of health benefit plans and to draft rules on a process for doing so. It also includes rules establishing geographic rating areas. This role was ceded to the federal government in 2013 as a result of the Affordable Care Act, or ACA. Now that the feds have ended reimbursements, having TDI review rates ensures Texans are getting allowed subsidies and that rates remain affordable.

Transparency and Modernization

The changing landscape of how we do business due to COVID-19 affected all lines of insurance, creating a push for more electronic means of health care delivery as well as flexibility in how insurers do business.

Effective June 15, 2021, **HB 4** made permanent most of the Medicaid/Children's Health Insurance Program waivers put in place as part of the state's COVID-19 response while still upholding the standard of care. It also addressed gaps related to the use of technology in delivering services and information to clients identified by stakeholders during the COVID-19 pandemic. Dentists also are included in telehealth expansion as a result of **HB 2056**.

SB 2124 seeks to give employers the authority to "opt in" all employees to electronic delivery by default, while providing employees the ability to "opt out" of this paperless option should they so choose.

SB 1367 exempts a list of insurance products for large commercial risks and 17 specialty commercial insurance lines—from rate filing and review requirements—consistent with the existing exemption from form filing requirements for those same risks. A TDI recommendation, these changes will help employers gain specialty products in an evolving market.

SB 918 provides flexibility for when meetings can be held, allowing smaller insurance companies to operate with smaller boards and eliminating unnecessary regulations on boards, similar to other companies governed by the Texas Business Organizations Code.

Health Insurance Substitutes

In attempts to address accessibility to health products, several bills were offered this session allowing for certain insurers to offer products outside of the requirements of traditional health plans. Opponents argued these products are not pervasive coverage and could hinder the market. Time will tell as two of these bills passed. **HB 3924** allows the Texas Farm Bureau to offer health products to its members. The bill exempts these plans from the definition of insurance.

HB 3752 allows Texas Mutual Insurance Company, or TMIC, to offer health products to its members, individuals, and employers with fewer than 250 employees, beginning September 1, 2023. By September 1, 2022, TMIC must submit a report to the Legislature on the feasibility in the market for this new product, taking into account a laundry list of requirements, including preexisting conditions.

Health Mandates and Rising Costs

HB 317 prohibits insurers from discriminating against living organ donors by denying coverage, increasing premiums, or taking other adverse actions against them. **HB 428** expands the mandate for ovarian cancer testing and screening by including any test or screening approved by the U.S. Food and Drug Administration for the detection of ovarian cancer during annual well woman examinations. **SB 1065** requires that a health benefit plan that covers a screening mammogram must provide coverage that is no less favorable for diagnostic imaging. **SB 1028** lowers the mandate for colorectal cancer detection from age 50 to age 45 and requires a colonoscopy if the screening comes back with positive cancer indicators.

SB 2016—effective immediately with the governor's signature on June 16, 2021—exempts health plans from compliance with any state-mandated benefits determined to exceed the federally mandated essential health benefits and for which the state must defray the cost.

Additional Health Insurance Related Bills of Significance

As a result of concerns raised by health providers, **HB 3459** requires physicians involved in utilization review to be in the same field as those they are reviewing. It also exempts certain physicians and providers from preauthorization requirements if they had at least 90% of their preauthorization requests approved by the insurer in the preceding calendar year.

Effective June 7, 2021, **SB 874** allows for TDI to access federal funds for high-risk individuals should funds become available during the interim. Texas dissolved its high-risk pool after the ACA was passed because insurers could no longer prohibit offering coverage to individuals with serious and/or preexisting health conditions.

HB 2595, the result of recommendations from the Mental Health Condition and Substance Use Disorder Parity Workgroup created by legislation last session, creates a parity complaint portal, provides training related to parity, creates

educational materials to raise public awareness, and designates October as Mental Health Condition and Substance Use Disorder Parity Awareness Month.

Motor Vehicle Coverage

HB 19 gives commercial vehicles added tort protections. Specifically, HB 19 requires evidence directly relevant to causation and injuries arising from a commercial vehicle accident to be presented to jurors without prejudice. HB 19 also sets forth specific procedures by which the facts of a case are presented by both the plaintiff and defendant to determine negligence of a defendant and compensation.

SB 1602 requires nonrenewal of private passenger automobile policies if an insured fails to cooperate in the investigation, settlement, or defense of a claim, or if an insurer is unable to contact the insured after making reasonable efforts.

SB 965, in order to add a consumer safeguard against potential excessive or discriminatory rates, repeals the exemption for low market share auto insurers and subjects otherwise exempt residential property insurers to rate filing and approval if they increase their rates above 8% on average for three consecutive years.

Windstorm Insurance

SB 1448 requires the Texas Windstorm Insurance Association Board of Directors to have a super-majority vote to increase rates on its policyholders, going from a 5-4 vote to requiring a 6-3 vote. SB 1448 also extends interim committee studies passed in the previous legislative session that studies the funding structure of TWIA and looks at combining TWIA and the Texas Fair Access to Insurance Requirements Plan.

HB 769 prevents TWIA from using the same vendor that does its hurricane modeling to determine how much reinsurance to purchase to also be the vendor that sells TWIA its reinsurance. HB 769 prevents the TWIA Board of Directors from voting on a rate increase if there has been a coastal board member vacancy that has been unfilled for 60 days.

Additional Property and Casualty Bills of Significance

SB 1809 allows the TDI commissioner to issue an emergency cease and desist order if TDI finds that someone is unlawfully selling insurance in Texas.

HB 3769 clarifies which non-workers' compensation policies that provide coverage to employees must disclose that a policy is not a workers' compensation policy. HB 3769 does not create any changes to occupational injury benefit plan law and regulation.

Effective June 16, 2021, **SB 713** updates the Texas Sunset Commission agency review calendar. SB 713 postponed the Sunset review of all insurance-related agencies from the current interim to after the 2023 session. These agencies include the TDI, the Division of Workers' Compensation, the Office of Public Insurance Counsel, and the Office of Injured Employee Counsel.

LEGISLATIVE AND CAMPAIGN LAW

By Ross Peavey

During the 87th session, the Texas Legislature filed and passed a multitude of new regulations on legislative and campaign law. This session saw updates to the law regarding operation of legislative institutions and government agencies, public integrity, state appropriations and procurement, campaign finance, and election administration. Each chamber of the Texas Legislature adopted rules to limit the spread of COVID-19 while they were in Austin for their deliberations. These new rules affected legislators, lobbyists, and those who visited the state capitol from around the world. Additionally, the 87th session saw an uptick in elections bills when compared with prior sessions. A survey of some significant changes in Texas legislative and campaign law in 2021 include the following legislation. All bills are effective September 1, 2021, unless otherwise indicated.

HB 3920

- Requires new certification for disabled voters to vote by mail.
- Expressly limits pregnant and expectant mothers' qualification to vote by mail to those "expecting to give birth within three weeks before or after election day."
- Under the new law, a voter's lack of transportation, a voter's sickness that does not prevent the voter from appearing without assistance or injuring themselves, or a voter's requirement to be at a place of employment, may not be used to request mail-in ballots.

HB 2283

- Prohibits elections officials and commissioner's courts from accepting donations of $1,000 or more to perform any function of administering elections.
- The secretary of state may make an exception with unanimous consent of the governor, the lieutenant governor, and the speaker of the House with written consent from the relevant political subdivision.

HB 1382

- Requires the secretary of state to provide an online tool to each early voting clerk that enables a voter who applies for a ballot by mail to track the location and status of the person's application and ballot on the Texas secretary of state and county websites.

SB 1113

- Authorizes the secretary of state to deny public federal funds from voter registrars who failed to timely perform a duty requiring the approval, change, or cancellation of a voter's registration.

SB 1387

- Provides that for a voting system or voting system equipment to be approved for use in Texas elections, the

system in which the equipment was designed to be used must be manufactured, stored, and held in the United States and sold by a company whose headquarters and parent company's headquarters are in the United States. SB 1387 became effective June 16, 2021.

SB 282

- Forbids the Legislature from appropriating money, and state agencies from using appropriated money, to settle sexual harassment claims made against a person who is an elected member of state government, is appointed by the governor to serve in public office within state government, or serves as staff for an elected or appointed person.
- Similarly prohibits political subdivisions, including open-enrollment charter schools, from using public money to settle sexual harassment claims made against an elected or appointed member of the governing body of the political subdivision or an officer or employee of the political subdivision.

OIL AND GAS LAW

By Cory Pomeroy and Tom Zabel

The oil and gas industry's priority legislation in the session included eminent domain reform, royalty suspense during ownership disputes, creation of the storage vessels safety program, updates to offset well statutes on state land, primacy of Class VI injection wells, and reestablishment of the TexNet Technical Advisory Committee. Below is a snapshot of significant legislation impacting the industry and summaries of some key bills. All bills are effective September 1, 2021, unless otherwise indicated.

Taxes/Budget

SB 1 is the state budget bill, which includes funding for the Railroad Commission of Texas, or RRC, and the Texas Commission on Environmental Quality, or TCEQ.

RRC (in millions):

2020-2021: $281.9
2022-2023: $247.8

TCEQ (in millions):

2020-2021: $770.7
2022-2023: $640.7

Industrial Project Property Tax Discounts

HB 4242, relating to the extension of the expiration of certain parts of the Texas Economic Development Act, did not pass. HB 4242 would have extended Chapter 313 of the Texas Tax Code to attract major investment by offering limited property tax discounts.

Eminent Domain

Eminent Domain Reform

HB 2730, relating to the acquisition of real property by an entity with eminent domain authority and the regulation of easement or right-of-way agents, is the result of a three-session effort to draft a balanced eminent domain bill. In part, it:

- Amends Section 402.031, Texas Government Code, to add to the Landowners' Bill of Rights, or LOBOR: (i) notice to landowners of the right to file a complaint about a right of way agent; and (ii) an addendum of required terms for an easement under Texas Property Code § 21.0114(c), and terms the landowner can negotiate. The attorney general will conduct a biennial review of the LOBOR with public input;
- Amends Chapter 1101, Texas Occupations Code, to add continuing education requirements for registered right-of-way agents and prohibit an agent from receiving financial incentive to make an inadequate compensation offer;
- Amends Section 21.0113, Texas Property Code, as to the initial offer letter requirements to the landowner;
- Adds Section 21.0114, Texas Property Code, to set required easement terms for certain pipeline and electric transmission entities;
- Creates Section 21.0114 to permit the parties to: (i) agree to different terms than those in the condemnation petition once the owner has been provided with a conveyance that contains certain easement terms; and (ii) negotiate subsequent changes and revisions to the terms; and
- Amends Section 21.014, Texas Property Code, regarding appointment of special commissioners, alternates, and related issues. HB 2730 is effective January 1, 2022.

Notice of Entry

HB 4107, relating to the notice of entry for the purpose of exercising the power of eminent domain by a common carrier pipeline, amends Section 111.019, Natural Resources Code, to require that common carrier pipelines provide two days' prior written notice to the landowner of the intent to enter the property to conduct a survey to be used in the exercise of eminent domain.

Disclosure of Appraisals

SB 721, relating to the disclosure of appraisal reports in connection with the use of eminent domain authority, provides that the condemning entity shall disclose to the landowner all appraisal reports the entity produced or acquired relating to the property and used in the opinion of value, if an appraisal report is to be used at the hearing.

Environment

Storage Vessel Safety

SB 900, relating to the safety of storage vessels, creates a new safety program at TCEQ to establish the Performance Standards for Safety at Storage Vessels Program.

SB 900 creates a new safety program at TCEQ to establish the Performance Standards for Safety at Storage Vessels Program.

Texas Emissions Reduction Program

HB 4472, relating to the Texas emissions reduction plan, adds authority for Texas emissions reduction plan funding to include remittance of funds to the state highway fund for Texas Department of Transportation's congestion mitigation and air quality improvement projects in nonattainment areas and affected counties.

Utilities

Regulation Based on Energy Source

HB 17, relating to a restriction on the regulation of utility services and infrastructure based on the energy source to be used or delivered, prohibits cities and other governmental entities from banning natural gas infrastructure. HB 17 became effective May 18, 2021.

Ban on Natural Gas Restrictions

HB 1501, relating to certain regulations adopted by a governmental entity restricting the use of a natural gas or propane appliance or other system or component, did not pass. HB 1501 would have prohibited a governmental entity from adopting or enforcing a rule, charter provision, order, or regulation that directly or indirectly restricts or prohibits the use of natural gas or propane, or imposed an additional charge or pricing difference on a development or building permit if natural gas or propane is used.

Water

Produced Water Consortium

SB 601, relating to the creation and activities of the Texas Produced Water Consortium, creates the Texas Produced Water Consortium to study the economics and technology related to, and the environmental and public health considerations for, beneficial uses of produced water. The consortium is to be housed at Texas Tech University and is required to seek input from an agency advisory council, a stakeholder advisory council, and a technical and economic steering committee. SB 601 became effective June 18, 2021.

Recycled Waste

HB 3516, relating to the regulation of the recycling of fluid oil and gas waste, requires that the RRC promulgate rules to establish standards for issuance of permits for commercial recycling and to encourage fluid oil and gas waste recycling.

Exploration and Production

TexNet Seismic Monitoring

HB 632, relating to the establishment of an advisory committee for the TexNet seismic monitoring program, recreates in statute the TexNet Technical Advisory Committee, within the University of Texas Bureau of Economic Geology, to advise the TexNet Seismic Monitoring Program in its collection of seismic activity information. The committee is composed of nine members, appointed by the governor, and includes an RRC representative and at least three oil and gas industry representatives.

Carbon Capture, Utilization, and Storage

HB 1284, relating to the regulation of the injection and geologic storage of carbon dioxide in this state, moves the regulatory authority from TCEQ to the RRC for adopting standards for location, construction, maintenance, monitoring, and operation of a carbon dioxide injection and repository and for ensuring compliance with U.S. Environmental Protection Agency requirements. HB 1284 became effective June 9, 2021.

Offset Wells on GLO Lands

SB 1258, relating to the duty of a lessee or other agent in control of certain state land to drill an offset well, pay compensatory royalty, or otherwise protect the land from drainage of oil or gas by a horizontal drainhole well located on certain land, changes the statutory 1,000-foot offset oil and gas well requirement that exists in the two statutes applicable to state lands managed by the Texas General Land Office: public lands owned by Texas and Relinquishment Act Lands but does not apply to university lands. The statutes eliminate offset well requirements if the adjacent well has been drilled in an unconventional field and is no closer than the greater of 330 feet or the applicable distance in spacing rules. The bill leaves in place the offset well

requirement for conventional oil and gas development.

Suspending Lease Payments

SB 1259 relates to causes of action for withholding payments of the proceeds from the sale of oil and gas production. Section 91.402(b), Texas Natural Resources Code, allows for payments on proceeds from the sale of oil or gas production to be withheld, without interest, if there is a dispute concerning title. In 2018, the Texas Supreme Court held in *ConocoPhillips v. Koopman* that, despite this provision, an oil and gas payor was subject to claims for breach of contract and other common law causes of action for suspending royalty payments because of ownership claims. SB 1259 amends Section 91.402 to add Subsection (b-1), which bars common law causes of action for breach of contract against a payor who withholds payments due to a title dispute unless the contract that requires payment specifies otherwise. This bill applies to actions filed on or after May 24, 2021, the effective date of the bill.

Abandoned Wells

HB 3973, relating to a study on abandoned oil and gas wells in this state and the use of the oil and gas regulation and cleanup fund, creates a joint interim committee to study abandoned oil and gas wells and the use of the ORGC and cleanup fund. The committee will look at costs associated with plugging abandoned wells, current bonding requirements, and identify solutions to reduce the need for general revenue and conduct a review of the oil and gas regulation and cleanup fund. A report is due to the Legislature by December 1, 2022.

Winter Storm Uri

Emergency Preparation and Outage Prevention

SB 3, relating to preparing for, preventing, and responding to weather emergencies and power outages; increasing the amount of administrative and civil penalties, is the omnibus electricity bill that enacted several changes to electricity law following Winter Storm Uri. They include alert systems; winter preparation education; weatherization for natural gas infrastructure and generators; changes to critical load designation for industrial customers; changes to load-shedding procedures; electricity mapping; weather reports from the Public Utility Commission of Texas, or PUCT, and RRC; water infrastructure weatherization; and the formation of the Texas Energy Disaster Reliability Council. SB 3 became effective June 8, 2021.

Critical Gas Entities and Facilities

HB 3648, relating to the provision of natural gas and electric services in this state, requires the PUCT to work with the RRC to adopt rules that would designate certain gas entities and facilities as critical to receive electricity during an energy emergency. HB 3648 became effective June 18, 2021.

PUBLIC UTILITY LAW

By Dane McKaughan

In February, Texas experienced the worst winter storm in living memory. Winter Storm Uri plunged temperatures across the state to the teens for almost five days and blanketed the state in ice and snow. The governor declared a state of emergency in all 254 counties. More than 200 Texans died.

Exacerbating the impact of the winter storm, operations of the wholesale electricity and gas markets in the Electric Reliability Council of Texas, or ERCOT, failed, causing blackouts for almost five days and creating huge financial impacts for stakeholders in these markets. Because the storm and the extended outage occurred during the 2021 legislative session, the Legislature addressed in real time the root causes contributing to the outage and the financial burdens Winter Storm Uri left behind.

Before describing these bills, it is worthwhile to discuss the problems these bills are designed to address. One omnibus bill, **SB 3,** addresses the root causes leading to the failure of the ERCOT market. Two other bills, **HB 4492** and **SB 1580,** address the financial impact caused by that failure on market participants.

Numerous bills were filed in the Legislature attempting to identify and address the causes of the market failure. After taking testimony from market stakeholders and individuals impacted by the storm, three general categories encompass the causes identified by the Legislature.

First, it was just too cold for too long. Neither the electricity generation sector nor the natural gas production and transportation sectors were designed to operate in the sustained cold and icy conditions presented by Uri. And while legislative and regulatory efforts to incentivize weatherizing critical facilities had occurred following the last significant winter storm in 2011, Uri was colder and lasted longer. Furthermore, prior efforts relied on voluntary action taken by industry, resulting in infrastructure that was not equipped to handle this storm.

Second, there were communication breakdowns across the relevant sectors of the energy industry. ERCOT gave conflicting market signals to participants. Additionally, in an effort to divert resources to human needs customers, electric generators curtailed natural gas production while the natural gas pipelines curtailed electric generation. Because these two segments of the industry are regulated by different agencies, the curtailment priorities were not aligned. And there was no single agency dedicated to accumulating emergency information related to the winter storm on a real-time basis that could speak with a single voice.

Third, there was not sufficient "dispatchable" generation available, meaning generation sources where the turbine can be turned off and on rather than relying on external environmental factors. In ERCOT, natural gas provides a little more than half of all electricity generation, while wind provides about a quarter, with solar, coal, and nuclear rounding out the remainder. The cold affected all types of generation technology, reducing supply as demand for power reached all-time highs for the winter months. This revealed a need to have more dispatchable generation to both increase supply and to insulate that supply

from external environmental factors. Until there is adequate storage capability for renewable sources, ERCOT needs to be able to control the generation of electricity by having sufficient dispatchable resources. But because Texas is an energy only market, the construction of new dispatchable generation is left to the market to decide, and the market obtains a premium during times of scarcity, creating a disincentive to invest.

SB 3

SB 3 attempted to accumulate all of the lessons learned through all of the committee hearings on all of the bills filed to address the causes of the ERCOT failure. While the details of SB 3 exceed the scope of this article, in light of the causes identified above, SB 3 addresses the first two but delegates to the Public Utility Commission of Texas, or PUCT, to resolve the thorny issue of creating new gas-fired generation in an "energy only" market.

Specifically, SB 3 creates the Texas Energy Reliability Council, or TERC, to "ensure that the energy and electric industries…meet high priority human needs and address critical infrastructure concerns" and "enhance coordination and communication in the energy and electric industries in this state." In practice and in consultation with the PUCT and Railroad Commission of Texas, or RRC, the TERC will identify critical natural gas infrastructure necessary for the generation of electricity. These critical supply chain entities will be required to "weatherize" their facilities as directed by rule. Importantly, the TERC has enforcement authority such that if it identifies failures to comply with weatherization requirements, it can refer the matter to the Office of the Texas Attorney General to file suit and recover a fine up to $1 million for each occurrence. Similarly, any entity that produces or sells wholesale electricity or transmits electricity must weatherize its facilities as required by rule and is subject to administrative penalties for failure to comply.

Additionally, SB 3 directs the Texas Division of Emergency Management to work with the Texas Department of Transportation and other agencies to implement an alert system when it looks like the power supply may not be sufficient to meet demand and creates the Texas Electricity Supply Chain Security and Mapping Committee to annually map the electricity supply chain and establish priorities for involuntary load shedding that harmonizes the current systems at various agencies.

With respect to the need for more dispatchable generation, SB 3 does not itself require the construction of new gas-fired generation. Instead, the bill directs the PUCT to establish requirements to meet the reliability needs of the ERCOT region and to, at least annually, determine the quantity and characteristics of reliability or ancillary services necessary to meet extreme heat and extreme cold weather conditions. Exactly how the PUCT should go about this SB 3 does not say. SB 3 became effective June 8, 2021.

HB 4492 and SB 1580

The failure of the ERCOT market during Winter Storm Uri caused huge financial consequences. In a normal wholesale market in February, the expected price for a megawatt hour, or MWh, of electricity would be about $20. But during the winter storm, because of the scarcity of electricity coupled with the huge demand, the wholesale price of electricity skyrocketed to reach the legal cap, which was $9,000 per MWh, and stayed there for several days. So everyone—including municipal utilities, cooperative utilities, and retail electric providers, or REPs—that was not locked into a contract rate had to pay about 450 times as much for electricity than the previous February. And because almost half of natural gas production was lost at times due to the storm, in addition to the high demand for natural gas generation plus the increased demand for home gas appliances during the winter storm, the wholesale market for natural gas skyrocketed as well. The typical cost of gas in February would be $3 per Metric Million British Thermal Unit, or MMBtu, so a price of $1,000 MMBtu during the winter storm was an increase of more than 300%. Of course, there were winners and losers on both sides of these transactions, but because of the outsized impact of the losses for public utilities and REPs in the ERCOT market, the Legislature sought to create legislative mechanisms to mitigate the impact of these losses and prop up the market.

SB 1580, effective June 18, 2021, specifically addresses the financial impact on cooperative utilities. By way of example, Brazos Electric Power Cooperative serves about 1.5 million customers and owes about $1.9 billion to ERCOT for electricity it took off the grid without paying. SB 1580 enables co-ops that suffered extraordinary costs due to the winter storm to securitize that amount and requires repayment of amounts owed to ERCOT as part of ongoing participation in the market.

HB 4492, effective June 16, 2021, establishes a process for two types of securitization that include elements of the market other than cooperatives. The first bucket is funded by a loan from the Texas Comptroller up to $800 million from the economic stabilization fund, with loans to be repaid at an interest rate based on ERCOT's credit rating, plus 2.5%. This $800 million component is designed to address the approximately $3 billion in short pays owed by ERCOT because it has not been paid amounts owed by market participants.

The second component, referred to as the "uplift balance" in HB 4492, securitizes as much as $2.1 billion to address reliability deployment price adder charges and ancillary services costs in excess of the PUCT's system-wide offer cap during the winter storm. These exceptionally high costs strained the financial health of numerous load-serving entities throughout ERCOT. The proceeds of the securitization would be delivered to retailers who participate in the securitization. Notably, retail providers, including cooperatives and municipally owned utilities, have the option not to participate in this component of HB 4492 and to avoid the related repayment obligations.

As noted above, there is still work to do to protect against a similar collapse of the ERCOT market, and ERCOT has already issued at least one plea to conserve electricity usage in what will be a long, hot summer. In addition to the ongoing rulemakings at the PUCT and the RCC, these issues may be revisited by the Legislature during either the fall special session or in Interim Committee meetings before the 2023 regular session.

REAL ESTATE LAW

By Richard L. Spencer and Richard A. Crow

This article contains a summary of bills enacted this session relating to real estate law and should not be relied on as a complete list of bills affecting these areas or a full description of any bill.

SB 219 adds Sections 59.001-59.052 to the Texas Business and Commerce Code regarding civil liability for the consequences of defects in the plans, specifications, or related documents for the construction or repair of an improvement to real property or of a road or highway. SB 219 provides that contractors are not liable for design defects in (and may not warranty the accuracy or suitability of) plans, specifications, or other design documents provided to the contractor by a person other than the contractor's agents. SB 219 applies to the construction of improvements to real property, including additions to improvements and repair, alteration, or remodeling of improvements (exempts contracts for construction or repair of "critical infrastructure" facilities, certain design-build contracts, and certain engineering, procurement, and construction contracts). The statute imposes an affirmative duty for contractors to disclose, in writing, any defect, inaccuracy, or insufficiency a contractor discovers (or reasonably should have discovered) during construction. The statute imposes the same standard of care on design services found in Section 130.0021 of the Texas Civil Practice and Remedies Code and amends that section to provide that any attempt to contractually establish a different standard of care is void. SB 219 applies to contracts entered on or after September 1, 2021.

HB 390 adds Business and Commerce Code §§ 114.0001-114.0104. Effective January 1, 2022, hotels (and other commercial lodging establishments with more than 10 rooms) must put all employees through an approved training program designed to identify and prevent human trafficking and post pre-approved signs regarding human trafficking. HB 390 authorizes civil penalties for non-compliance.

HB 3415 amends Texas Local Government Code § 191.010 effective September 1, 2021, so that county clerks in a county with a population of 800,000 or more may require "a person presenting a document in person for filing in the real property records" to present photo identification.

HB 1475 amends Local Government Code § 211.009 allowing municipal board of adjustment zoning variances based on unnecessary hardship. Zoning boards of adjustment, in variance cases, can now consider "as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship," whether: (1) "financial cost of compliance" would be greater than 50% of the structure's tax-roll value; (2) compliance would cause a loss of at least 25% of the lot area "on which development may physically occur;" (3) compliance would result in non-compliance with a "municipal ordinance, building code, or other requirement;" (4) compliance would result in "unreasonable encroachment on an adjacent property or easement;" or (5) the municipality considers the structure "nonconforming." (Texas courts held financial cost, alone, insufficient to establish the "hardship" for issuance of a variance.) HB 1475 is effective September 1, 2021.

SB 30 adds Texas Property Code § 5.0261, effective September 1, 2021, allowing removal of certain discriminatory provisions from a recorded conveyance instrument. An owner of property subject to an instrument containing a discriminatory provision (as defined under Section 5.026(a)) may request removal of the provision by filing a motion verified by affidavit. A court may rule on the motion "solely on a review of the conveyance instrument, without hearing any testimonial evidence." If the court does not rule by the 15th day after the motion is filed, it is deemed granted. The court must enter a finding of fact and conclusion of law, and that finding must be transferred to the county clerk and recorded. A county clerk cannot charge a fee for recording the finding.

SB 885 adds Property Code § 13.006 and amends Civil Practice and Remedies Code § 16.025(b) concerning quitclaim deeds. Beginning September 1, 2021, SB 885 protects a lender's or buyer's ability to be a good faith purchaser for value and to be shielded by Property Code § 13.001 by establishing that a quitclaim deed recorded more than four years prior does not affect a buyer's or creditor's "good faith" or constitute notice of an unrecorded deed or lien.

HB 900 adds Property Code § 24.0061(i) relating to the liability of a landlord for damages resulting from the execution of a writ of possession. HB 900 protects a landlord from liability to the tenant resulting from an officer's (sheriff or constable pursuant to Property Code § 24.0054(a-1)) execution of a writ of possession pursuant following an eviction suit filed on or after September 1, 2021.

HB 2237 amends Insurance Code § 3503.051(3) and Property Code Chapter 53, and various sections, relating to mechanic's, contractor's, or materialman's liens. HB 2237, effective January 1, 2022, clarifies various provisions pertaining to mechanic's liens by replacing text with defined terms. HB 2237 adds real property and clarifies that the definition of "residence" includes multi-unit condominium projects. HB 2237 changes method of notices required by Chapter 53 and revises the deadlines for filing a lien affidavit and retainage, dependent on whether the party filing is an original contractor or a subcontractor and on whether the project is residential or commercial. HB 2237 requires subcontractors to give a funds trapping notice (with form) one month prior to the applicable deadline. Creates a similar notice for a claim of unpaid retainage. Shortens the limitations to bring suit to foreclose a lien to one year from the last day a claimant may file a lien affidavit, unless the claimant enters a written agreement to extend the limitations period and the agreement is filed (in which case the limitations period may be up to two years).

SB 1783 adds Property Code § 92.111 and codifies the practice of accepting small monthly "deposit waiver fees" instead of large down payments at move-in. Starting September 1, 2021, this bill

allows a residential landlord to give a prospective tenant the option to pay a fee in lieu of a security deposit and creates restrictions and notice requirements for a landlord that chooses this option, such as:

a. The landlord cannot use the choice to pay such a fee in lieu of a deposit as a criterion for lease application approval.
b. The tenant has the option to terminate the fee agreement and pay a security deposit instead.
c. Notice to the tenant and the fee agreement must both be in writing.
d. This is a recurring fee of equal amount, payable when rent is due.

SB 1783 also:

(a) delineates specific language in the fee agreement;
(b) caps the fee at the reasonable cost of insurance for tenant damages and charges;
(c) sets up restrictions and notice requirements for an insurance claim for unpaid rent or damages; and
(d) provides that fees collected under this section are still security deposits for purposes of Chapter 92 of the Property Code unless the parties enter into an agreement providing otherwise (which agreement must comply with this section) and the fees are used to purchase insurance coverage for damages and unpaid rent arising from the tenant's default.

SB 1588, effective September 1, 2021, amends various sections of and adds sections to Property Code §§ 202, 207, and 209 to, among other things, address fees, notices, and disclosures of a property owners' association, or POA. SB 1588 limits the cost for delivering a resale certificate and the cost of an update, requires a POA to deliver subdivision information to an owner or their agent within five business days after a second request is made, and allows for increased recovery of actual damages for a POA's failure. SB 1588 requires a POA to make current dedicatory instruments available on its website and requires that an association's certificate of management include any amendments to the declaration, contact information for the person managing the association, and the website with its dedicatory instruments. SB 1588 requires a POA to electronically file any certificate or amended certificate with the Texas Real Estate Commission, or TREC, within seven days and requires that TREC establish a system for electronic filing of management certificates no later than December 1, 2021. Any denial of the construction of improvements by a POA's architectural review authority must be in writing and may be appealed to the POA's board with a hearing relating to the denial. At least 144 hours' notice must be given to the members before a regular POA board meeting and 72 hours' notice prior to a special board meeting. A POA must give written notice to an owner before reporting any delinquency to a credit reporting service. An owner's cure period for a delinquency is extended to 45 days before any collection action. A POA may not report delinquencies that are the subject of a pending dispute. Advance disclosures to owners prior to a hearing by a POA are required, and a member of the POA must present the case against the owner. SB 1588 clarifies that an association is not prohibited from adopting or enforcing provisions restricting occupancy or leasing.

TEXAS JUDICIARY

By David Slayton and Megan LaVoie

In February 2021, as socially distanced budget hearings for the 87th Legislature were unfolding at the Texas Capitol, the Texas judiciary was simultaneously celebrating an unprecedented milestone—one million court hearings held online via Zoom during the first 11 months of the COVID-19 pandemic. Zoom hearings for court proceedings continued throughout the spring and summer and also became a mainstay in legislative hearings with many judges, court staff, and attorneys testifying remotely before legislative committees. Testifying virtually was a new process for the 87th Legislature. The use of Zoom was authorized by the Texas House of Representatives for certain legislative hearings to mitigate the risk of contracting COVID-19.[1] The Senate allowed remote testimony in the Special Committee on Redistricting only.

SB 690 and **HB 3611**—two bills filed to expand the use of remote court proceedings outside of a pandemic or disaster—didn't pass, but many other bills made it across the legislative finish line and to the governor's desk. The following is a brief overview of some of the new laws passed by the 87th Legislature that will directly impact the judiciary and attorneys who practice in Texas courts. All bills are effective September 1, 2021, unless otherwise indicated.

Judiciary Budget

The Legislature appropriated more than $796 million to fund the Judicial Branch for the 2022-2023 biennium.[2] The funding supports the Texas Supreme Court, Court of Criminal Appeals, appellate courts and judicial branch agencies, boards, and commissions. The appropriations in **SB 1** include more than $94 million over the biennium for indigent defense funding and $76 million for basic civil legal services.

New Courts

The 87th Legislature created 10 new district courts, one new statutory probate court, and six statutory county courts at law with various creation dates.[3]

New district courts: 478th Judicial District in Bell County, 482nd Judicial District in Harris County, 485th Judicial District in Tarrant County, 480th Judicial District in Williamson County, 481st Judicial District in Denton County, 483rd Judicial District in Hays County, 484th Judicial District in Cameron County, 474th Judicial District in McLennan County, 475th Judicial District in Smith County, and the 476th Judicial District in Hidalgo County.

New statutory county courts at law: Kendall County Court at Law, County Court at Law No. 3 of McLennan County, County Court at Law No. 6 of Montgomery County, County Court at Law No. 2 of San Patricio County, County Criminal Court No. 6 of Tarrant County, and County Court at Law No. 5 of Williamson County.

New statutory probate court: Statutory Probate Court No. 2 of Denton County.

HB 79 Guardianship Courts

HB 79 establishes a framework to allow associate judges to hear guardianship cases, similar to the way child protection courts work

across the state. The bill outlines associate judge appointment procedures, powers, qualifications, and compensation, as well as host county designation and responsibilities of the regional presiding judges in implementing the process. The bill also requires the Office of Court Administration to assist in the supervision, training, and evaluation of the associate judges.

HB 1071 Therapy Dogs in Court

HB 1071 allows for a qualified facility dog or qualified therapy dog to accompany a witness testifying in court. The bill defines what constitutes a facility or therapy dog and permits courts to impose restrictions on their presence in court.

HB 1256 Specialty Court Funding

Funding for specialty courts like drug and DWI courts across the state has historically been limited. HB 1256 aims to develop a new funding source by requiring that 1% of the mixed beverage gross receipts and sales taxes received by the state (estimated to be around $10 million per year) be credited to GR Specialty Court Account 5184. Funds generated in this account may only be used by the criminal justice division within the governor's office for distribution to specialty court programs that apply for the funding.

HB 2950 MDL Court Modifications

HB 2950 makes changes to the makeup of a multidistrict litigation panel. It provides that the judicial panel on MDL consists of five members designated by the Texas Supreme Court. The bill requires that panel members be active, former, or retired court of appeals justices or active administrative judges. HB 2950 became effective June 16, 2021.

HB 3774 Judicial Omnibus Bill

It's been the tradition for the chairs of the House and Senate committees with jurisdiction over the judiciary to sponsor a judicial omnibus bill every legislative session with new courts, jurisdiction changes, and modifications to judicial operations. HB 3774 was the 87th Legislature's judicial omnibus bill and it includes the following provisions: establishes a dual status case transfer structure for juvenile and family courts; requires the Office of Court Administration to adopt rules related to the transfer of documents and cases between courts; allows applicants for writs of habeas corpus the option of using secure electronic mail to serve a copy of the application on the state's attorney; revises statutes governing the Forensic Science Commission; expands the entities where jurors may donate their daily reimbursement and removes caps on meal reimbursement given to jurors; provides a statutory framework for regional specialty court programs, and expands the protective order registry maintained by the Office of Court Administration.

HB 4293 Court Reminder Program

It's common practice to receive text notifications reminding you of an upcoming appointment or package delivery, but what about an upcoming court date? HB 4293 requires the Office of Court Administration to develop and make available to each county a court reminder program that would send a text message to notify criminal defendants of scheduled court appearances. Similar programs across the country have reported great success in reducing failure to appear rates.[4]

SB 41 Civil Court Costs Restructuring

Following the restructuring of criminal court costs during the 86th legislative session, the 87th Legislature focused on modernizing civil court fees. SB 41 consolidates civil filing fees into one state consolidated civil filing fee and one local consolidated civil filing fee. Additionally, the bill repeals various outdated court fees and costs. The bill's framework was recommended by the Texas Judicial Council to remedy potential constitutional issues and make it easier for clerks to administer filing fees. Beginning January 1, 2022, civil filing fees across the state and in most case types will be the same. Filing fees for civil cases in all district courts, statutory county courts, and constitutional county courts will be $350 for the filing of new cases and $80 on the filing of other actions, such as an appeal counterclaim, cross-action, intervention, contempt action, interpleader, motion for new trial, or third-party action. Those amounts will be $360 and $120 for probate, guardianship, and mental health cases filed in all courts. Justice court filing fees will be $54 for all civil filings.

SB 907 Remote Marriage Licenses

SB 907 requires the Texas Judicial Council to promulgate rules, in consultation with the Department of State Health Services, to develop and implement a voluntary certification process where a county clerk may be certified to issue a marriage license to applicants through remote technology. The bill requires procedures to authenticate each applicant's age and identity to prevent fraud.

SJR 47 Judicial Selection Constitutional Amendment

The proposed constitutional amendment would amend Article V of the Texas Constitution to change the eligibility requirements to serve as a judge.

The amendment would require at the time of election or appointment that a justice on the Supreme Court, Court of Criminal Appeals, or court of appeals be a resident of Texas, licensed to practice law in the state, and have been a practicing lawyer in Texas or a combination of a practicing lawyer in the state or judge of a state court or county court for at least 10 years. The amendment would require at the time of election or appointment that a district judge be a resident of the state and a practicing lawyer or combination of practicing lawyer and judge of a court in the state for eight years.

The amendment would prohibit a judge or justice from running for election or being eligible for appointment if their license to practice law was revoked, suspended, or subject to probation.

If passed by voters during the November 2, 2021, election, the amendment is effective January 1, 2022, and would apply to judges and justices elected or appointed after January 1, 2025.

Notes

1. HR 4, https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HR00004I.pdf#navpanes=0, Jan. 15, 2021.
2. SB 1 Conference Committee Report, 3rd Printing, https://www.lbb.state.tx.us/Documents/Appropriations_Bills/87/Conference_Bills/87R-SB1.pdf, May 25, 2021.
3. HB 3774.
4. *How "nudges" can help reduce failure to appear rates,* National Center for State Courts (Oct. 19, 2020), https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/how-nudges-can-help-reduce-failure-to-appear-rates.

THE 87TH SESSION CONTRIBUTORS

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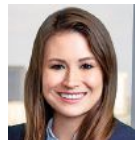

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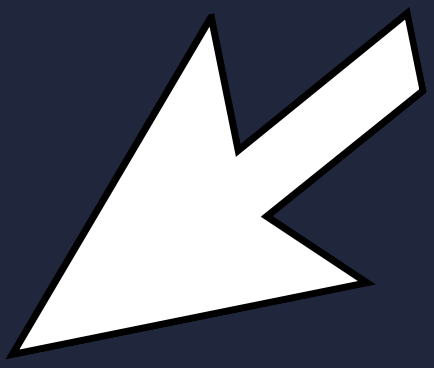

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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9069

ORDER AMENDING RULE 26 OF THE RULES GOVERNING THE OPERATION OF THE TEXAS ACCESS TO JUSTICE FOUNDATION

ORDERED that:

1. The Court approves the following amendments to Rule 26 of the Rules Governing the Operation of the Texas Access to Justice Foundation.

2. The amendments take effect immediately.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: June 15, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

Rules Governing the Operation of the Texas Access to Justice Foundation

* * *

26. Confidentiality.

The files, records, proceedings, as they relate to the compliance or noncompliance of any attorney with the requirements of these Rules, shall be confidential and shall not be disclosed except upon consent of the attorney affected, ~~or~~ as directed in the course of judicial proceeding by a court of competent jurisdiction, or to the State Bar's Office of Chief Disciplinary Counsel. **TBJ**

Misc. Docket No. 21-9070

ORDER ADOPTING COMMENT TO PART II OF THE TEXAS RULES OF DISCIPLINARY PROCEDURE

ORDERED that:

1. The Court approves the following comment to Part II of the Texas Rules of Disciplinary Procedure.

2. The comment takes effect immediately.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: June 15, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

TEXAS RULES OF DISCIPLINARY PROCEDURE

PART II. THE DISTRICT GRIEVANCE COMMITTEES

* * *

Comment: Consistent with section 81.086 of the Texas Government Code, these rules permit the Office of Chief Disciplinary Counsel to allow or require anyone involved in an investigatory hearing, a summary disposition setting, or an evidentiary hearing—including but not limited to a party, attorney, witness, court reporter, or grievance panel member—to participate remotely, such as by teleconferencing, videoconferencing, or other means. A panel may consider as evidence sworn statements or sworn testimony given remotely. The term "teleconference" in these rules includes videoconference or other remote means. **TBJ**

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9077

FINAL APPROVAL OF AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE RULE 145, 502.3, AND 506.4

ORDERED that:

1. On December 23, 2020, in Misc. Dkt. No. 20-9154, the Court preliminarily aproved amendments to Texas Rules of Civil Procedure 145, 502.3, and 506.4 and to the form Statement of Inability to Afford Payment of Court Costs. The Court invited public comments on the proposed amendments.

2. This order contains the final version of the amendments to Rules 145, 502.3, and 506.4. Included are a clean copy of the final amended rules and a redline demonstrating changes made to the preliminary amendments published in Misc. Dkt. No. 20-9154.

3. These amendments take effect September 1, 2021.

4. The Court will issue a separate order approving amendments to the Statement at a later date.

5. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: July 9, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

RULE 145. PAYMENT OF COSTS NOT REQUIRED
Final Amended Version

(a) *Costs Defined*. "Costs" mean any fee charged by the court or an officer of the court, including, but not limited to, filing fees, fees for issuance and service of process, fees for copies, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record.

(b) *Sworn Statement Required.* A party who cannot afford payment of court costs must file the Statement of Inability to Afford Payment of Court Costs approved by the Supreme Court or another sworn document containing the same information. A "sworn" Statement is one that is signed before a notary or made under penalty of perjury. In this rule, "declarant" means the party filing the Statement.

(c) *Duties of the Clerk*. The clerk:

   (1) must make the Statement available to any person for free without request;

   (2) may return a Statement for correction only if it is not sworn—not for failure to attach evidence or any other reason; and

   (3) must, on the filing of a sworn Statement, docket the case, issue citation, and provide any other service that is ordinarily provided to a party.

(d) *Prima Facie Evidence of Inability to Afford Payment of Costs*. The declarant should submit with the Statement any available evidence of the declarant's inability to afford payment of costs. An attachment demonstrating any of the following is prima facie evidence:

   (1) the declarant or the declarant's dependent receives benefits from a means-tested government entitlement program;

   (2) the declarant is being represented in the case by an attorney who is providing legal services to the declarant through:

      (A) a provider funded by the Texas Access to Justice Foundation;

(B) a provider funded by the Legal Services Corporation; or

(C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services; or

(3) the declarant has applied for free legal services for the case through a provider listed in (2) and was determined to be financially eligible but was declined representation.

(e) *Motion to Require Payment of Costs.* A motion to require the declarant to pay costs must comply with this paragraph.

(1) *By the Clerk, the Reporter, or a Party.* A motion filed by the clerk, the court reporter, or a party must contain sworn evidence—not merely allegations—either that the Statement was materially false when made or that because of changed circumstances, it is no longer true.

(2) *By the Court.* The court on its own may require the declarant to prove the inability to afford costs when evidence comes before the court that the declarant may be able to afford costs or when an officer or professional must be appointed in the case.

(f) *Notice; Hearing; Requirements of Order.* When a Statement has been filed, the declarant must not be ordered to pay costs unless these procedural requirements have been satisfied:

(1) *Notice and Hearing.* The declarant must not be required to pay costs without an oral evidentiary hearing. The declarant must be given 10 days' notice of the hearing. Notice must either be in writing and served in accordance with Rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs.

(2) *Findings Required.* An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs.

(3) *Partial and Delayed Payment.* The court may order that the declarant pay the part of the costs the declarant can afford or that payment be made in installments. But the court must not delay the case if payment is made in installments.

(4) *Order Must State Notice of Right to Appeal.* An order requiring the declarant to pay costs must state in conspicuous type: "You may challenge this order by filing a motion in the court of appeals within 10 days after the date this order is signed. See Texas Rule of Civil Procedure 145."

(g) *Review of Trial Court Order.*

(1) *Only Declarant May Challenge; Motion.* Only the declarant may challenge an order issued by the trial court under this rule. The declarant may challenge the order by motion filed in the court of appeals with jurisdiction over an appeal from the judgment in the case. The declarant is not required to pay any filing fees related to the motion in the court of appeals.

(2) *Time for Filing; Extension.* The motion must be filed within 10 days after the trial court's order is signed. The court of appeals may extend the deadline by 15 days if the declarant demonstrates good cause for the extension in writing.

(3) *Record.* After a motion is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the declarant's claim of indigence. The court may set a deadline for filing the record. The record must be provided without charge.

(4) *Court of Appeals to Rule Promptly.* The court of appeals must rule on the motion at the earliest practicable time.

(h) *Judgment.* The judgment must not require the declarant to pay costs, and a provision in the judgment purporting to do so is void, unless the court has issued an order that complies with (f), or the declarant has obtained a monetary recovery, and the court orders the recovery to be applied toward payment of costs.

(i) *Court to Designate Record.* When the declarant requests preparation of the reporter's record, the court must designate the portions to be transcribed.

Notes and Comments

Comment to 2016 Change: The rule has been rewritten. Access to the civil justice system cannot be denied because a person cannot afford to pay court costs. Whether a particular fee is a court cost is governed by this rule, Civil Practice and Remedies Code Section 31.007, and case law.

The issue is not merely whether a person can pay costs, but whether the person can afford to pay costs. A person may have sufficient cash on hand to pay filing fees, but

the person cannot afford the fees if paying them would preclude the person from paying for basic essentials, like housing or food. Experience indicates that almost all filers described in (e)(1)-(3), and most filers described in (e)(4), cannot in fact afford to pay costs.

Because costs to access the system—filing fees, fees for issuance of process and notices, and fees for service and return—are kept relatively small, the expense involved in challenging a claim of inability to afford costs often exceeds the costs themselves. Thus, the rule does not allow the clerk or a party to challenge a litigant's claim of inability to afford costs without sworn evidence that the claim is false. The filing of a Statement of Inability to Afford Payment of Court Costs—which may either be sworn to before a notary or made under penalty of perjury, as permitted by Civil Practice and Remedies Code Section 132.001—is all that is needed to require the clerk to provide ordinary services without payment of fees and costs. But evidence may come to light that the claim was false when made. And the declarant's circumstances may change, so that the claim is no longer true. Importantly, costs may increase with the appointment of officers or professionals in the case, or when a reporter's record must be prepared. The reporter is always allowed to challenge a claim of inability to afford costs before incurring the substantial expense of record preparation. The trial court always retains discretion to require evidence of an inability to afford costs.

Comment to 2021 Change: A number of changes have been made to reduce frivolous challenges to a Statement, which cost time and money, and to streamline proceedings. Former paragraph (c)(4) has been deleted. Paragraph (d) has been amended to clarify that proof of any listed criterion is prima facie evidence of the declarant's inability to afford payment of costs. Paragraph (e) has been amended to require that a contest by the court reporter satisfy the same conditions as a contest by the clerk or a party. New paragraph (i) requires that the trial court designate the portions of the reporter's record to be transcribed for appeal.

The rule has also been amended to require in paragraph (f)(4) that an order requiring payment of costs include conspicuous notice of the declarant's right to appeal.

To accommodate these substantive changes, some paragraphs have been rearranged and relettered or renumbered. Other clarifying and stylistic changes have been made.

* * * * *

RULE 502.3. FEES; INABILITY TO AFFORD FEES

(a) *Fees and Statement of Inability to Afford Payment of Court Costs.* On filing the petition, the plaintiff must pay the appropriate filing fee and service fees, if any, with the court. A plaintiff who is unable to afford the fees must file a Statement of Inability to Afford Payment of Court Costs. The Statement must either be sworn to before a notary or made under penalty of perjury. Upon filing the Statement, the clerk must docket the action, issue citation, and provide any other customary services.

(b) *Supreme Court Form; Contents of Statement.* The plaintiff must use the form Statement approved by the Supreme Court, or the Statement must include the information required by the Court-approved form. The clerk must make the form available to any person for free without request.

(c) *Certificate of Legal-Aid Provider.* If the party is represented by an attorney who is providing legal services either directly or by referral from a legal-aid provider described in Rule 145(d), the attorney may file a certificate confirming that the provider screened the party for eligibility under the income and asset guidelines established by the provider. A Statement that is accompanied by the certificate of a legal-aid provider may not be contested under (d).

(d) *Contest.*

(1) Unless a certificate is filed under (c), the defendant may file a contest of the Statement at any time within 7 days after the day the defendant's answer is due. If the Statement attests to receipt of government entitlement based on indigence, the Statement may only be contested with regard to the veracity of the attestation.

(2) If contested, the judge must hold a hearing to determine the plaintiff's ability to afford the fees. At the hearing, the burden is on the plaintiff to prove the inability to afford fees.

(3) The judge may, regardless of whether the defendant contests the Statement, examine the Statement and conduct a hearing to determine the plaintiff's ability to afford fees.

(4) If the judge determines that the plaintiff is able to afford the fees, the judge must enter a written order listing the reasons for the determination, and the plaintiff must pay the fees in the time specified in the order or the case will be dismissed without prejudice.

* * * * *

RULE 506.4. WRIT OF CERTIORARI

* * *

(c) *Bond, Cash Deposit, or Sworn Statement of Inability to Pay Required....*

* * *

RULE 145. PAYMENT OF COSTS NOT REQUIRED

Redline demonstrating changes to the version released for public comment in Misc. Dkt. No. 20-9154

(a) *Costs Defined.* "Costs" mean any fee charged by the court or an officer of the court ~~that could be taxed in a bill of costs~~, including, but not limited to, filing fees, fees for issuance and service of process, fees for copies, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record.

(b) *Sworn Statement Required.* A party who cannot afford payment of court costs must file the Statement of Inability to Afford Payment of Court Costs approved by the Supreme Court or another sworn document containing the same information. A "sworn" Statement is one that is signed before a notary or made under penalty of perjury. In this rule, "declarant" means the party filing the Statement.

(c) *Duties of the Clerk.* The clerk:

(1) must make the Statement available to any person for free without request;

(2) may return a Statement for correction only if it is not sworn—not for failure to attach evidence or any other reason; and

(3) must, on the filing of a sworn Statement, docket the case, issue citation, and provide any other service that is ordinarily provided to a party~~; and~~ .

~~(4) may, without delaying compliance with (3), ask the court to direct the declarant to correct or clarify a sworn Statement that contains a material defect.~~

(d) *Prima Facie Evidence of Inability to Afford Payment of Costs.* The declarant should submit with the Statement any available evidence of the declarant's inability to afford payment of costs. An attachment demonstrating any of the following is prima facie evidence:

(1) the declarant or the declarant's dependent receives benefits from a means-tested government entitlement program;

(2) the declarant is being represented in the case by an attorney who is providing ~~free~~ legal services to the declarant through:

(A) a provider funded by the Texas Access to Justice Foundation;

(B) a provider funded by the Legal Services Corporation; or

(C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services; or

(3) the declarant has applied for free legal services for the case through a provider listed in (2) and was determined to be financially eligible but was declined representation.

(e) *Motion to Require Payment of Costs.* A motion to require the declarant to pay costs must comply with this paragraph.

(1) *By the Clerk, the Reporter, or a Party.* A motion filed by the clerk, the court reporter, or a party must contain sworn evidence—not merely allegations—either that the Statement was materially false when made or that because of changed circumstances, it is no longer true.

(2) *By the Court.* The court on its own may require the declarant to prove the inability to afford costs when evidence comes before the court that the declarant may be able to afford costs or when an officer or professional must be appointed in the case.

(f) *Notice; Hearing; Requirements of Order.* When a Statement has been filed, the declarant must not be ordered to pay costs unless these procedural requirements have been satisfied:

(1) *Notice and Hearing.* The declarant must not be required to pay costs without an oral evidentiary hearing. The declarant must be given 10 days' notice of the hearing. Notice must either be in writing and served in accordance with Rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs.

(2) *Findings Required.* An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs.

(3) *Partial and Delayed Payment.* The court may order that the declarant pay the part of the costs the declarant can afford or that payment be made in installments. But the court must not delay the case if payment is made in installments.

(4) *Order Must State Notice of Right to Appeal.* An order requiring the declarant to pay costs must state in conspicuous type: "You may challenge this order by filing a motion in the court of appeals within 10 days after the date this order is signed. See Texas Rule of Civil Procedure 145."

(g) *Review of Trial Court Order.*

(1) *Only Declarant May Challenge; Motion.* Only the declarant may challenge an order issued by the trial court under this rule. The declarant may challenge the order by motion filed in the court of appeals with jurisdiction over an appeal from the judgment in the case. The declarant is not required to pay any filing fees related to the motion in the court of appeals.

(2) *Time for Filing; Extension.* The motion must be filed within 10 days after the trial court's order is signed. The court of appeals may extend the deadline by 15 days if the declarant demonstrates good cause for the extension in writing.

(3) *Record.* After a motion is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the declarant's claim of indigence. The court may set a deadline for filing the record. The record must be provided without charge.

(4) *Court of Appeals to Rule Promptly.* The court of appeals must rule on the motion at the earliest practicable time.

(h) *Judgment.* The judgment must not require the declarant to pay costs, and a provision in the judgment purporting to do so is void, unless the court has issued an order that complies with (f), or the declarant has obtained a monetary recovery, and the court orders the recovery to be applied toward payment of costs.

(i) *Court to Designate Record.* When the declarant requests preparation of the reporter's record, the court must designate the portions to be transcribed.

Notes and Comments

Comment to 2016 Change: The rule has been rewritten. Access to the civil justice system cannot be denied because a person cannot afford to pay court costs. Whether a particular fee is a court cost is governed by this rule, Civil Practice and Remedies Code Section 31.007, and case law.

The issue is not merely whether a person can pay costs, but whether the person can afford to pay costs. A person may have sufficient cash on hand to pay filing fees, but the person cannot afford the fees if paying them would preclude the person from paying for basic essentials, like housing or food. Experience indicates that almost all filers described in (e)(1)-(3), and most filers described in (e)(4), cannot in fact afford to pay costs.

Because costs to access the system—filing fees, fees for issuance of process and notices, and fees for service and return—are kept relatively small, the expense involved in challenging a claim of inability to afford costs often exceeds the costs themselves. Thus, the rule does not allow the clerk or a party to challenge a litigant's claim of inability to afford costs without sworn evidence that the claim is false. The filing of a Statement of Inability to Afford Payment of Court Costs—which may either be sworn to before a notary or made under penalty of perjury, as permitted by Civil Practice and Remedies Code Section 132.001—is all that is needed to require the clerk to provide ordinary services without payment of fees and costs. But evidence may come to light that the claim was false when made. And the declarant's circumstances may change, so that the claim is no longer true. Importantly, costs may increase with the appointment of officers or professionals in the case, or when a reporter's record must be prepared. The reporter is always allowed to challenge a claim of inability to afford costs before incurring the substantial expense of record preparation. The trial court always retains discretion to require evidence of an inability to afford costs.

Comment to 2021 Change: A number of changes have been made to reduce frivolous challenges to a Statement, which cost time and money, and to streamline proceedings. Former paragraph (c)(4) has been deleted. ~~The rule has been amended to clarify that proof of any criterion in p~~Paragraph (d) has been amended to clarify that proof of any listed criterion is prima facie evidence of the declarant's inability to afford payment of costs. Paragraph (e) has been amended to require that a contest by the court reporter satisfy the same conditions as a contest by the clerk or a party. New paragraph (i) requires that the trial court designate the portions of the reporter's record to be transcribed for appeal. ~~These amendments are intended to reduce frivolous challenges to a Statement, which cost time and resources.~~

The rule has also been amended to require in paragraph (f)(4) that an order requiring payment of costs include conspicuous notice of the declarant's right to appeal.

To accommodate these substantive changes, some paragraphs have been rearranged and relettered or renumbered. Other clarifying and stylistic changes have been made.

* * * * *

RULE 502.3. FEES; INABILITY TO AFFORD FEES

(a) *Fees and Statement of Inability to Afford Payment of Court Costs.* On filing the petition, the plaintiff must pay the appropriate filing fee and service fees, if any, with the court. A plaintiff who is unable to afford ~~to pay~~ the fees must file a Statement of Inability to Afford Payment of Court Costs. The Statement must either be sworn to before a notary or made under penalty of perjury. Upon filing the Statement, the clerk must docket the action, issue citation, and provide any other customary services.

(b) *Supreme Court Form; Contents of Statement.* The plaintiff must use the form Statement approved by the Supreme Court, or the Statement must include the information required by the Court-approved form. The clerk must make the form available to any person for free <u>without request</u>.

(c) *Certificate of Legal-Aid Provider.* If the party is represented by an attorney who is providing ~~free~~ legal services either directly or by referral from a legal-aid provider described in Rule 145(d), the attorney may file a certificate confirming that the provider screened the party for eligibility under the income and asset guidelines established by the provider. A Statement that is accompanied by the certificate of a legal-aid provider may not be contested under (d).

(d) *Contest.*

(1) Unless a certificate is filed under (c), the defendant may file a contest of the Statement at any time within 7 days after the day the defendant's answer is due. If the Statement attests to receipt of government entitlement based on indigence, the Statement may only be contested with regard to the veracity of the attestation.

(2) If contested, the judge must hold a hearing to determine the plaintiff's ability to afford the fees. At the hearing, the burden is on the plaintiff to prove the inability to afford fees.

(3) The judge may, regardless of whether the defendant contests the Statement, examine the Statement and conduct a hearing to determine the plaintiff's ability to afford fees.

(4) If the judge determines that the plaintiff is able to afford the fees, the judge must enter a written order listing the reasons for the determination, and the plaintiff must pay the fees in the time specified in the order or the case will be dismissed without prejudice.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9078

THIRTY-NINTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Thirty-Seventh Emergency Order (Misc. Dkt. No. 21-9050) is renewed as amended.

3. In consultation with Governor Abbott, who has directed federal funding from the CARES Act, Community Development Block Grant, and Emergency Solutions Grant to rental assistance and eviction diversion, and the Texas Department of Housing and Community Affairs, and in an effort to curb the possible surge of evictions due to the COVID-19 pandemic, assist Texas's most vulnerable tenants, and provide landlords with an alternative to eviction, the Court establishes the Texas Eviction Diversion Program and adopts the procedures set forth in this Order.

4. Eligibility for rental assistance under the Texas Eviction Diversion Program will be determined by the Texas Department of Housing and Community Affairs and its providers.

5. In any action for eviction to recover possession of residential property under Chapter 24 of the Texas Property Code and Rule 510 of the Texas Rules of Civil Procedure based, in whole or part, on the nonpayment of rent:

a. in addition to the contents required by Texas Rules of Civil Procedure 502.2 and 510.3, a sworn original, amended, or supplemental petition must state that the plaintiff has reviewed the information about the Texas Eviction Diversion Program available at www.txcourts.gov/eviction-diversion/;

b. in addition to the contents required by Texas Rule of Civil Procedure 510.4(a), the citation must include:

i. the following statement: "If you and your landlord agree to participate in the Texas Eviction Diversion Program, you may be able to have up to 15 months of the rent you owe paid and stop your eviction. At your trial, the court will tell you about the Program and ask if you are interested in participating. Find out more about the Program in the attached brochure, titled State of Texas Eviction Diversion Program, at www.txcourts.gov/eviction-diversion/; and at https://texaslawhelp.org/article/texas-eviction-diversion-program. You may also call Texas Legal Services Center for assistance at 855-270-7655."; and

ii. the following Spanish translation of the statement in (i): "Si usted y el propietario están de acuerdo en participar en el Programa de Desvío de Desalojo del Estado de Texas, podrá ser elegible para recibir asistencia de hasta quince meses de pagos vencidos de su alquiler y detener su desalojo. En su audiencia de desalojo, el juez le dará información sobre este programa y le preguntará si desea participar en él. Encontrará más información sobre el programa en el folleto adjunto titulado Programa de Desvío de Desalojo del Estado de Texas. Puede visitar los siguientes enlaces para más información www.txcourts.gov/eviction-diversion o https://texaslawhelp.org/article/texas-eviction-diversion-program, o llamar al Centro de Servicios Legales de Texas *(en inglés, Texas Legal Services Center)* por teléfono al 855-270-7655."; and

iii. a copy of the informational brochure, titled State of Texas Eviction Diversion Program, prepared by the Texas Department of Housing and Community Affairs;

c. at the trial required by Texas Rules of Civil Procedure 510.6 and 510.7 or 510.10(c), the judge must:

i. confirm whether or not the plaintiff has any pending applications for rental assistance;

ii. discuss the Texas Eviction Diversion Program with the plaintiff and defendant;

iii. ask the plaintiff and defendant whether they are interested in participating in the Texas Eviction Diversion Program; and

iv. if the plaintiff has a pending application for rental assistance or the plaintiff and defendant both express an interest in participating in the Texas Eviction Diversion Program:

(A) abate the eviction action for 60 days;

(B) make all court records, files, and information—including information stored by electronic means—relating to the eviction action confidential to prohibit disclosure to the public; and

(C) inform the parties of the extension,

reinstatement, and dismissal procedures outlined in Paragraphs 6, 7, and 8 of this Order; and

d. at the trial required by Texas Rule of Civil Procedure 510.10(c), if the plaintiff and defendant both express an interest in participating in the Texas Eviction Diversion Program, the judge must also instruct the justice court to make all court records, files, and information—including information stored by electronic means—relating to the eviction action confidential to prohibit disclosure to the public.

6. The judge may extend the 60-day abatement period under Paragraph 5(c)(iv) upon the plaintiff's request. Each extension must not exceed 60 days.

7. To reinstate an eviction action abated under Paragraph 5(c)(iv), the plaintiff must file a motion to reinstate with the court within the abatement period and serve a copy of the motion on the defendant. The motion must show that the application for rental assistance or to participate in the Texas Eviction Diversion Program, whichever is applicable, has been denied, canceled, or withdrawn. Upon the filing and service of the motion, the judge must sign and serve—in a method provided by Texas Rule of Civil Procedure 510.4—a written order that:

a. reinstates the eviction action;

b. sets the eviction action for trial as soon as practicable, but no later than 21 days after the date the order is signed;

c. states the procedures for the action to proceed; and

d. makes all court records, files, and information—including information stored by electronic means—relating to the eviction action non-confidential to allow disclosure to the public.

8. If the plaintiff does not file and serve a motion to reinstate an action abated under Paragraph 5(c)(iv) within the abatement period, the judge must dismiss the action, including any claims that do not involve the nonpayment of rent, with prejudice. All court records, files, and information—including information stored by electronic means—relating to the dismissed eviction action must remain confidential.

9. Paragraph 8 does not prohibit the plaintiff from filing an action for eviction based on future events or acts that are an independent basis for eviction.

10. Even if the plaintiff and defendant do not express an interest in participating in the Texas Eviction Diversion Program at trial under Paragraph 5(c), they may later inform the judge of their interest in participating and, so long as a writ of possession has not issued, the judge must:

a. set aside any judgment;

b. make all court records, files, and information—including information stored by electronic means—relating to the eviction action confidential to prohibit disclosure to the public; and

c. sign a written order stating the procedures that apply for reinstating the judgment or dismissing the eviction action.

11. The procedures for reinstating the judgment under Paragraph 10(c) must include making all court records, files, and information—including information stored by electronic means—relating to the eviction action non-confidential to allow disclosure to the public.

12. This Order is effective immediately and expires October 1, 2021, unless extended by the Chief Justice of the Supreme Court.

13. The Clerk of the Supreme Court is directed to:

a. post a copy of this Order on www.txcourts.gov;

b. file a copy of this Order with the Secretary of State; and

c. send a copy of this Order to the Governor, the Attorney General, and each member of the Legislature.

14. The State Bar of Texas is directed to take all reasonable steps to notify members of the Texas bar of this Order.

Dated: July 19, 2021.

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9079

FORTIETH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Thirty-Eighth Emergency Order (Misc. Dkt. No. 21-9060) is renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal, without a participant's consent:

a. except as provided in paragraph 4, modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than October 1, 2021;

b. except as this Order provides otherwise, allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means;

c. consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means;

d. conduct proceedings away from the court's usual location with reasonable notice and access to the participants and the public;

e. require every participant in a proceeding to alert the court if the participant has, or knows of another participant who has: (i) COVID-19 or a fever, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, sore throat, loss of taste or smell, congestion or runny nose, nausea or vomiting, or diarrhea; or (ii) recently been in close contact with a person who is confirmed to have COVID-19 or exhibiting the symptoms described above;

f. take any other reasonable action to avoid exposing court proceedings and participants to the threat of COVID-19.

4. In any proceeding under Subtitle E, Title 5 of the Family Code, all deadlines and procedures must not be modified or suspended, unless permitted by statute, except the dismissal date may be extended as follows:

a. for any such proceeding that, on May 26, 2021, had a dismissal date that was previously modified under a prior Emergency Order Regarding the COVID-19 State of Disaster, the court may extend the dismissal date for a stated period ending no later than December 1, 2021;

b. for any such proceeding that, on May 26, 2021, had been previously retained on the court's docket pursuant only to Section 263.401(b) or (b-1), the court may extend the dismissal date for a stated period ending no later than February 1, 2022;

c. for any such proceeding that, on May 26, 2021, had not been previously retained on the court's docket pursuant to Section 263.401(b) or (b-1), the court may extend the initial dismissal date as calculated under Section 263.401(a) for a stated period ending no later than April 1, 2022; or

d. for any such proceeding that is filed on or after May 26, 2021, the court may extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1).

5. Courts may continue to use reasonable efforts to conduct proceedings remotely. In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor. In all other cases, remote jury proceedings must not be conducted unless the court has considered on the record or in a written order any objection or motion related to proceeding with the jury proceeding at least seven days before the jury proceeding or as soon as practicable if the objection or motion is made or filed within seven days of the jury proceeding. Except in a non-binding jury proceeding, a court may not permit or require a petit juror to appear remotely unless the court ensures that all potential and selected petit jurors have access to technology to participate remotely.

6. The chief justice of a court of appeals, the local administrative district judge, and the presiding judge of a municipal court are encouraged to adopt minimum standard health protocols for court participants and the public attending court proceedings that will be employed in the courtroom and in public areas of the court building.

7. The Office of Court Administration should issue, and

update from time to time, best practices to assist courts with safely and effectively conducting in-person and remote court proceedings under this Order.

8. This Order is effective August 1, 2021, and expires October 1, 2021, except as otherwise stated herein, unless extended by the Chief Justice of the Supreme Court.

9. This Order is intended to be the final renewal of Paragraph 3(a), except the authority to modify or suspend the following deadlines and procedures in justice and municipal court proceedings will continue after October 1, 2021, until January 1, 2022:

a. jury-related deadlines and procedures; and

b. deadlines and procedures for pretrial hearings.

10. All previously adopted local plans and minimum standard health protocols will expire on September 1, 2021, unless readopted by the local administrative district judge or presiding judge of a municipal court before September 1, 2021.

11. The Clerk of the Supreme Court is directed to:

a. post a copy of this Order on www.txcourts.gov;

b. file a copy of this Order with the Secretary of State; and

c. send a copy of this Order to the Governor, the Attorney General, and each member of the Legislature.

12. The State Bar of Texas is directed to take all reasonable steps to notify members of the Texas bar of this Order.

Dated: July 19, 2021

JUSTICE DEVINE and JUSTICE BLACKLOCK dissent.

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9082

ORDER ADDING COMMENT TO TEXAS RULE OF CIVIL PROCEDURE 107

ORDERED that:

1. In accordance with Act of May 31, 2021, 87th Leg., R.S., ch. 787 (HB 39, codified at TEX. FAM. CODE § 85.006), the Court approves the following comment to Rule 107 of the Texas Rules of Civil Procedure.

2. The comment takes effect September 1, 2021.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: August 2, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

Rule 107. Return of Service

***

(h) No default judgment shall be granted in any cause until proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

Notes and Comments

***

2021 Comment: Certain default orders, like those in suits for protection from family violence, may be exempt by statute from the ten-day requirement in paragraph (h). *See, e.g.*, TEX. FAM. CODE § 85.006.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9083

ORDER AMENDING TEXAS RULE OF CIVIL PROCEDURE 199.1(b)

ORDERED that:

1. The Court approves the following amendments to Rule 199.1(b) of the Texas Rules of Civil Procedure.

2. To effectuate the Act of May 31, 2021, 87th Leg., R.S., ch. 934 (HB 3774, codified at TEX. GOV'T CODE § 154.105), the amendments are effective September 1, 2021. But the amendments may later be changed in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court requests comments be sent by November 1, 2021.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: August 2, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

***

(b) **Depositions by telephone or other remote electronic means.** A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. ~~The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.~~

***

Comment to 2021 change: Rule 199.1(b) is amended in response to changes to section 154.105 of the Texas Government Code governing the administration of oaths by court reporters.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9084

ORDER AMENDING RULE 13.1 OF THE TEXAS RULES OF JUDICIAL ADMINISTRATION

ORDERED that:

1. The Court approves the following amendments to Rule 13.1 of the Texas Rules of Judicial Administration.

2. To effectuate the Act of May 31, 2021, 87th Leg., R.S., ch. 832 (HB 2950, amending TEX. GOV'T CODE § 74.1625(a)), the amendments are effective June 16, 2021. But the amendments may be changed in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court requests that comments be sent by December 31, 2021.

3. The amendments apply to actions commenced on or after June 16, 2021. An action commenced before June 16, 2021, is governed by the law in effect immediately before June 16, 2021.

4. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of the Order for publication in the *Texas Register*.

Dated: August 6, 2021

Nathan L. Hecht, Chief Justice
Debra H. Lehrmann, Justice
Jeffrey S. Boyd, Justice
John P. Devine, Justice
James D. Blacklock, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice

Rule 13. Multidistrict Litigation

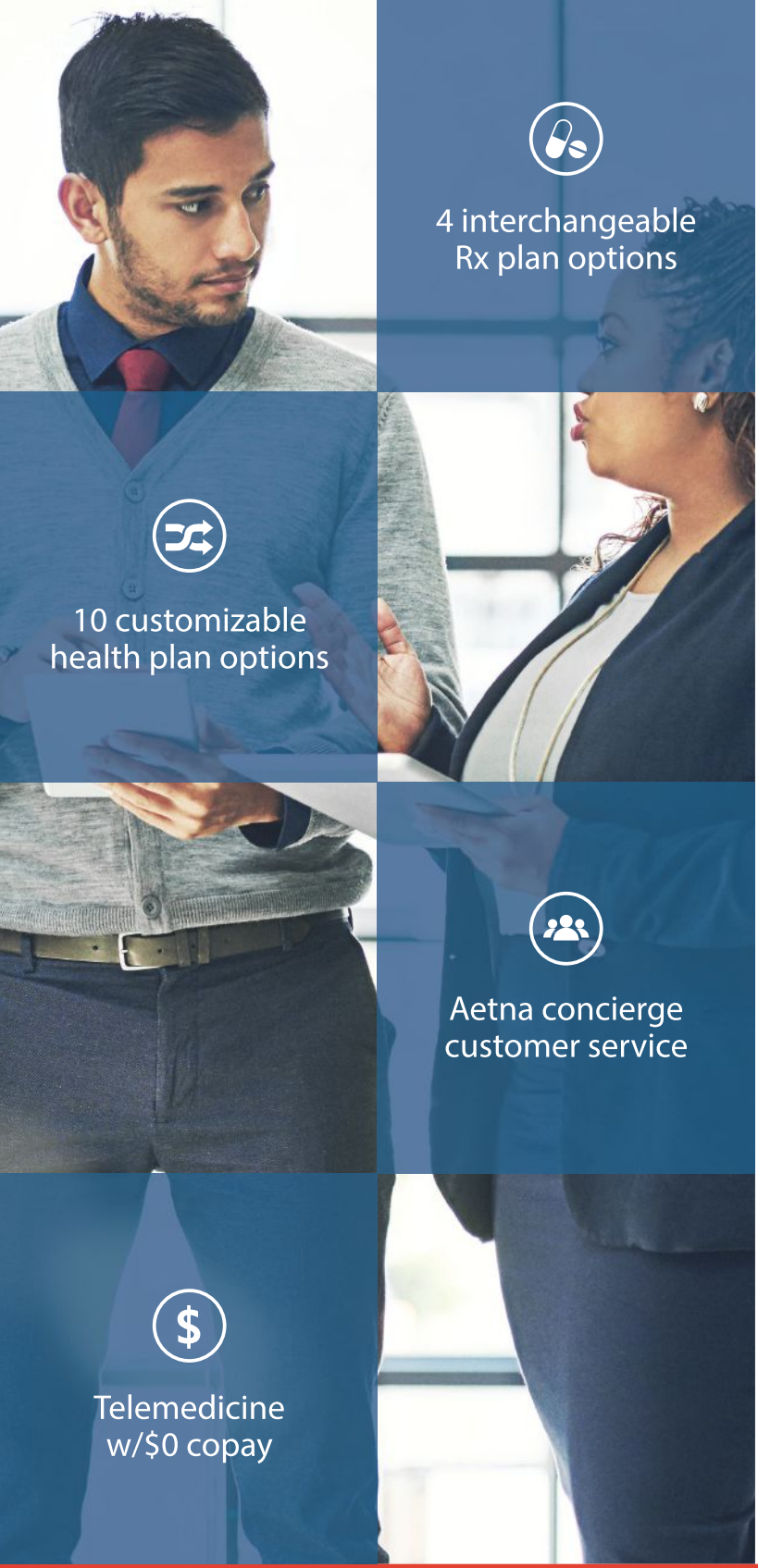
13.1 Authority and Applicability.

* * *

~~(d) *Prohibited Transfers*. The judicial panel on multidistrict litigation may not transfer:~~

~~(1) an action brought by the consumer protection division of the attorney general's office under Subchapter E, Chapter 17, Business & Commerce Code, except an action specifically authorized by Section 17.50 of that code; or~~

~~(2) an action brought under Chapter 36, Human Resources Code.~~



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The Lessons We've Learned About ADAPTABILITY AND UNCERTAINTY

ON FRIDAY, MARCH 13, 2020, I began the day laughing with colleagues about how odd it was to not shake hands anymore. By the end of the day, I could see panic in people's eyes and I already had a few emails from friends sharing recipes for homemade hand sanitizer. I'm reminded that adaptability and positivity are just as important now, 18 months into the pandemic, as they were back at the beginning.

A month into the pandemic, I had the privilege to interview one of my favorite nonprofit and leadership experts, Vicki Clark. Vicki shared many enlightening insights, as she always does, including this accurate perspective: "Somebody said that we have to start thinking out of the box. I'm saying the box is gone." If you know Vicki, you know that she has a fabulous way with words and people. She also shared this approach to the pandemic: "There's an old song that says 'trouble don't last always,' and it doesn't. We will come through this individually, collectively, association-wise, but everything is going to be different and different isn't always bad. We have to look for the light in it, and we also have to stay connected."

Some of the things that haven't aged well in 20/20 hindsight are thoughts that *the whole pandemic will be over in a few weeks* and *virtual happy hours are fun*. One surprisingly poignant quote that has endured, though, came from an animated snowman. In *Frozen 2,* Olaf is playing a game with children, and he says, "We're calling this 'controlling what you can when things feel out of control.'" Haven't we all done this in the past year? Whether we learned a new hobby, took on a home improvement project, or made plans despite overwhelming uncertainty, we were really focusing on adapting and staying positive instead of wallowing over what we could not control.

In the past year and a half, we have faced more loss, disappointment, and change than any other time. Change and uncertainty are by no means new to our profession, yet many of us are still struggling to adapt because we don't know what the "new normal" is or when the pandemic will be "over." What do we do now if uncertainty is the only thing that is certain? One of the best answers I've found so far comes from Peloton instructor Selena Samuela: "Fear is negative imagination, and you're using it against yourself. Anxiety is just negative imagination about the future. So, let's try to do the opposite of that. Let's try to use our imagination for positive uplifting thoughts." Regardless of the adversity we face in the future, I'm comforted by the knowledge that the Texas Young Lawyers Association and the State Bar of Texas will continue to focus on positive uplifting projects and new ways to connect our members.

JEANINE NOVOSAD RISPOLI
2021-2022 President, Texas Young Lawyers Association

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WRITTEN BY **MARTHA M. NEWMAN**

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Practicing law is a profession, but it is also a business. You risk crippling your success from the beginning if you ignore sound business practices. The more you plan with time-tabled benchmarks, the faster your firm will grow. Here are resources that will help you.

- The Lawyer's Guide to Creating a Business Plan, Sixth Edition americanbar.org/products/inv/cdr/137050908/
- Law Office Business Plan Worksheet https://www.osbplf.org/assets/forms/pdfs/Law%20Office%20Business%20Plan%20Worksheet.pdf
- The Lawyer's Guide to Strategic Planning https://catalog.sll.texas.gov/cgi-bin/koha/opac-detail.pl?biblionumber=8480

Put aside your fears and delegate.
When you have lawyers and paralegals you can trust, insisting on handling a case in its entirety stems from perfectionism (*nobody can do this work as well as I can*), fear of loss of control, and often laziness about figuring out what to delegate. When you fail to delegate, it can cripple your productivity and prevent you from focusing on the high dollar work only you can do.

Leverage your people! On each new matter establish criteria for what work can be delegated to associates and paralegals and have the courage to hand over the work to them while maintaining a supervisory role. Your revenues will surge!

Hire new employees sooner than later.
Add new employees before you absolutely need them. As you gain new clients and your book grows, be proactive about staffing up to handle the heavier workloads before the work gets out of hand. Move with reasonable caution but have the courage to take growth-oriented risks. Using personality assessments to gauge the business development skills of new hires and identify their rainmaking potential will help ensure continued growth. Outsource if advisable.

Strong cultures fuel firm growth.
Define your core values. Live them. Recruit lawyers who fit those values. Top people and quality clients will gravitate to your firm if it is known as a place where lawyers have strong relationships and trust each other.

A firm with no core values is siloed, disjointed, and cliquish. Partners selfishly guard clients from associates and project a "me-first" attitude.

According to Altman Weil author Eric Seeger, a healthy culture that fosters growth is interdependent, collaborative, coordinated, and trusting. Partners put the firm first and practice law with a shared agenda. Lawyers in those firms cross-sell, refer business to each other, share associates, and become more profitable because clients notice the difference between values-based firms and dysfunctional ones.

Use technology to automate repetitive tasks and reduce staff.
Lighten your load and save money by using technology-assisted support such as LegalTypist, virtual receptionists such as Ruby Receptionist or Abby Connect, virtual assistance like VAnetworking, and legal software such as Clio, MyCase, or Rocket Matter.

Drive growth these additional ways.
- Capture your billable time as you go. Don't lose money by trying to recreate it later.
- Work in focused work periods and reduce inter office interruptions to increase your billables.
- Create a marketing plan, back it up with a generous marketing budget, and devote 30% of your work week to business development.
- Get out of the office. Write. Speak. Network.
- Make your website client friendly and invest in strong search engine optimization.
- Keep in touch with former and current clients and cultivate referral sources.

What will make your success easier and faster to achieve? Discarding self-doubt and believing in yourself. **TBJ**

MARTHA M. NEWMAN
is a former oil and gas litigator and owner of Top Lawyer Coach. She specializes in lawyer coaching and consulting in the areas of law firm management, business development, leadership, time management, presentation skills, career advancement, and job interviewing. Newman has been awarded the Professional Certified Coach, or PCC, credential by the International Coach Federation in recognition of her coaching excellence. For more information, go to toplawyercoach.com.

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JUDICIAL ACTIONS

To read the entire public sanctions, go to scjc.texas.gov.

On June 17, 2021, the Special Court of Review of the State Commission on Judicial Conduct issued an opinion on *In Re Inquiry Concerning Honorable Thomas G. Jones, SCR 21-000, CJC No. 19-1083*.

On July 12, 2021, the State Commission on Judicial Conduct issued the voluntary agreement to resign from judicial office in lieu of disciplinary action signed by the chair of the State Commission on Judicial Conduct regarding *In Re: Honorable George Barnstone Harris County Civil Court at Law No. 1 Houston, Harris County, Texas CJC Nos. 19-0336, 19-0910, 19-1289, 19-1821, 20-0221 & 20-0924*.

On July 14, 2021, the State Commission on Judicial Conduct issued a public admonition and order of additional education (nunc pro tunc) to Paul Lilly, county judge, Brownwood, Brown County. Lilly is appealing his sanction.

DISBARMENTS

On May 27, 2021, **THOMAS F. FLEISCHER** [#00784056], of North Richland Hills, was disbarred, effective May 24, 2021. The District 7 Grievance Committee found that on January 31, 2017, the complainant hired Fleischer to represent her in the probate of the estate of her deceased father. The complainant was appointed the estate's administer and Fleischer was entrusted with the estate's funds but failed to deposit the funds in an IOLTA or a designated trust account. Over the course of the representation, the complainant made multiple requests for information that went unanswered by Fleischer. The complainant also requested reimbursement for estate-related expenses and to reimburse the Teacher Retirement System of Texas, or TRS, for overpayments made to the decedent. Fleischer failed to reimburse the complainant or TRS. In April 2019, the complainant requested an accounting of the estate funds, and Fleischer represented that he would provide an accounting and proof that the estate funds were safeguarded but failed to provide the accounting or proof that the estate funds were in trust. On May 20, 2019, the complainant sent Fleischer a certified letter requesting that the estate funds be returned to her or sent to her new attorney. Fleischer did not respond to this request. Fleischer failed to respond to the grievance.

Fleischer violated Rules 1.01(b)(1), 1.03(a), 1.14(a), 1.14(b), 8.04(a)(3), and 8.04(a)(8). He was ordered to pay $14,575.33 in restitution and $3,534 in attorneys' fees and direct expenses.

On July 14, 2021, **CHRISTINA E. PAGANO** [#07154500], of Austin, received a judgment of disbarment effective July 8, 2021. An evidentiary panel of the District 9 Grievance Committee found that on or about January 16, 2018, Pagano was hired to represent the complainant in a Child Protective Services matter. Thereafter, Pagano failed to keep the complainant reasonably informed about the status of the complainant's case and failed to promptly respond to the complainant's requests for information. Upon termination, Pagano failed to timely withdraw from the case. Pagano further failed to provide a written response to the complainant's disciplinary complaint.

Pagano violated Rules 1.03(a), 1.15(a)(3), and 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, State Bar Rules. Pagano was ordered to pay $1,500 in restitution and $2,318.87 in attorneys' fees and expenses.

RESIGNATIONS

On June 15, 2021, the Supreme Court of Texas accepted the resignation, in lieu of discipline, of **WILLIAM P. DAVIS** [#05564000], of Dallas. At the time of Davis' resignation, there were two pending matters against him alleging professional misconduct. Davis created a life insurance trust agreement for the complainant's husband, with Davis listed as trustee. In October 2018, the complainant's husband died, and Davis collected the life insurance benefits. From November 2019 to March 2020, Davis made several distributions to himself and depleted the account. Davis did not disclose to the complainant that the funds had been spent. The complainant demanded an accounting, but Davis did not provide one. After the complainant filed the grievance, Davis wired $200,000 to the complainant on July 27, 2020. In the second pending matter, the complainant hired Davis in 2000 for advice on tax, real estate, investment, and asset protection. Davis misappropriated $2.116 million in investment principal and withheld $1,281,162.50 in interest payments. Davis falsified or attempted to falsify government documents to justify his inability to return funds to the complainant or explain the status of her investments. Davis purported to obtain a mortgage loan for her from a bank,

but Davis made that loan from his IOLTA at a higher than market rate. Davis was actively suspended from law practice and required to notify clients of his suspension by March 15, 2018. Davis did not notify the complainant of that suspension. Davis' statements regarding his compliance with the agreed judgment of partially probated suspension as set forth in his letter to the Office of Chief Disciplinary Counsel's compliance monitor and its attached affidavit were false.

Davis violated Rules 1.04(a), 1.06(b)(2), 1.08(a), 1.14(a), 1.14(b), 1.14(c), 8.04(a)(3), 8.04(a)(7), and 8.04(a)(11).

On June 15, 2021, the Supreme Court of Texas accepted the resignation, in lieu of discipline, of **VINEY K. GUPTA** [#00790085], of Orange, California. At the time of Gupta's resignation, the following disciplinary cases were pending against him. In the first case, Gupta filed numerous frivolous, untimely, and/or misleading petitions for review of removal orders and asylum determinations in the U.S. Court of Appeals for the 9th Circuit between January 2019 and July 2019. In each of the petitions for review, Gupta sought review of a negative credible fear finding and the resulting expedited removal order, despite the fact that the 9th Circuit lacked jurisdiction to review such matters. As such, these pleadings were frivolous because there was no plausible basis for the 9th Circuit to assert jurisdiction and they did not contain a good faith argument for reconsidering the jurisdictional question. Additionally, Gupta frequently filed groundless motions in addition to the initial petition for review. Gupta also filed frivolous motions for reconsideration that were denied. These pleadings wasted valuable court resources and delayed a final resolution in his clients' cases. On or about October 10, 2019, the 9th Circuit issued an order suspending Gupta from the practice of law in its court for six months. Gupta was ordered to: 1) file notices of withdrawal in 18 pending cases in which he remained counsel of record; 2) serve the order on his clients in the pending cases; 3) turn over all client files and materials to the clients; 4) notify the clients that he could no longer provide any legal assistance for them or collect fees for future services in the 9th Circuit; 5) provide the court with the addresses and telephone numbers of his clients; and 6) file proof with the court that he made the required notifications. Gupta failed to comply with the terms of the order and, on December 11, 2019, he filed motions to withdraw in 10 of his pending cases. On November 4, 2019, the court gave Gupta additional time to comply with the order. In response, he filed five additional motions to withdraw but failed to comply with any other provisions in the order. On November 19, 2019, the court gave Gupta a final opportunity to fully comply with the order, but he failed to do so. On December 11, 2019, the court imposed a monetary sanction of $1,000 on Gupta. In the second case, the complainant hired Gupta in January 2019 to represent him on an appeal of the complainant's immigration case before the 9th Circuit. Following Gupta's directions, the complainant paid an advanced fee equivalent of $6,000 to Gupta's brother in India, who is not a licensed attorney in the United States. On December 16, 2019, without the complainant's consent, Gupta filed a pro se habeas corpus petition on the complainant's behalf in the U.S. District Court for the Central District of California. The purported signature on said petition was not that of the complainant and the complainant did not file the petition. As set forth above, Gupta was suspended from practicing law before the 9th Circuit on October 10, 2019. On November 18, 2019, Gupta was suspended from the practice of law before the Board of Immigration Appeals, the Immigration Courts, and the U.S. Department of Homeland Security. Nonetheless, he continued to practice law when he prepared and filed the alleged pro se habeas corpus petition for the complainant on December 16, 2019. Gupta also failed to file a response to the complaint as directed.

Gupta violated Rules 1.02(a)(1), 1.14(a), 3.01, 3.02, 3.04(d), 5.04(a), 8.04(a)(3), 8.04(a)(8), and 8.04(a)(11).

On June 15, 2021, the Supreme Court of Texas accepted the resignation, in lieu of discipline, of **BRECCIA M. McDERMED** [#24052206], of Fort Worth. At the time of McDermed's resignation, eight disciplinary cases were pending against her. McDermed neglected her clients' legal matters, failed to keep clients reasonably informed about the status of their matters, failed to promptly comply with reasonable requests for information, and failed to explain matters to the extent reasonably necessary to permit clients to make informed decisions. McDermed failed

to promptly deliver property to which a client was entitled, failed to withdraw when discharged by a client, and further failed to surrender papers and property to which clients were entitled. McDermed knowingly made a false statement of fact in connection with a disciplinary matter and further engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. McDermed repeatedly failed to timely furnish a written response to the Office of Chief Disciplinary Counsel.

McDermed violated Rules 1.01(b)(1), 1.03(a), 1.03(b), 1.14(b), 1.15(a)(3), 1.15(d), 8.01(a), 8.04(a)(3), and 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct. She was ordered to pay $8,235 in restitution and $5,657.20 in attorneys' fees and costs.

SUSPENSIONS

On June 11, 2021, **CARLTON CONLEY** [#04663030], of San Antonio, agreed to an 18-month partially probated suspension effective June 15, 2021, with the first six months actively served and the remainder probated. An evidentiary panel of the District 10 Grievance Committee found that Conley failed to withdraw when the representation would result in a violation of a Rule of Professional Conduct.

Conley violated Rule 1.15(a). He agreed to pay $1,000 in attorneys' fees and direct expenses.

On June 4, 2021, **ARTHUR R. EURESTE** [#06702250], of Houston, accepted a three-year active suspension, effective August 1, 2021. The 215th District Court of Harris County found that Eureste neglected his client's legal matter and frequently failed to carry out completely the obligations he owed to his client. Eureste also failed to keep his client reasonably informed about the status of his case and failed to promptly comply with his client's reasonable requests for information. During the course of the representation, Eureste committed a serious crime or any other criminal act that reflected on his honesty, trustworthiness, or fitness as a lawyer. Furthermore, Eureste engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Eureste violated Rules 1.01(b)(1), 1.01(b)(2), 1.03(a), 8.04(a)(2), and 8.04(a)(3). He was ordered to pay $1,500 in attorneys' fees.

On June 8, 2021, **LOREN CRAIG GREEN** [#24029179], of Arlington, agreed to a 36-month fully probated suspension effective June 15, 2021. The District 7 Grievance Committee found that in August 2017, Green was hired by the complainant for representation relative to a motor vehicle accident. During the representation, Green's employee, a non-lawyer, handled the complainant's case and rendered legal services to the complainant even though the non-lawyer employee is not a licensed attorney. Green allowed the non-lawyer employee to perform activities that constitute the unauthorized practice of law. Green had direct supervisory authority over the non-lawyer employee and failed to make reasonable efforts to ensure that his conduct was compatible with the professional obligations of Green. The non-lawyer employee failed to exercise due diligence in serving the defendant, he drafted a fraudulent pleading purportedly signed by a fictitious attorney, and failed to notify the complainant that funds had been received by Green's office for the complainant's personal property loss.

Green violated Rules 1.01(b)(1), 1.03(b), 1.14(b), 3.03(a)(1), 3.03(a)(5), 5.03(b)(2), 5.05(b), and 8.04(a)(3). He was ordered to pay $500 in attorneys' fees and direct expenses.

On June 25, 2021, **JAMES BRUCE HARRIS** [#24026926], of Wichita Falls, agreed to a six-month fully probated suspension effective June 15, 2021. The District 14 Grievance Committee found that in June of 2018, Harris was hired by the complainant for representation in a divorce matter. During the course of the representation, Harris failed to explain the divorce matter to the extent reasonably necessary to permit the complainant to make informed decisions regarding the representation.

Harris violated Rule 1.03(b). He was ordered to pay $500 in attorneys' fees and direct expenses.

On May 14, 2021, **AMELIA CHRISTINA JONES** [#24086652], of Lake Dallas, received a default judgment to a 24-month partially probated suspension effective June 15, 2021, with the first six months actively served and the remainder probated. An evidentiary panel of the District 14 Grievance Committee found that on May 28, 2019, the complainant hired Jones for representation in a civil matter. Thereafter, Jones neglected the legal matter entrusted to her by failing to perform any legal services on behalf of the complainant. Jones failed to keep the complainant reasonably informed about the status of his legal matter, failed to promptly comply with reasonable requests for information, and failed to explain the matter to the extent

reasonably necessary to permit the complainant to make informed decisions regarding the representation. Upon termination of representation, Jones failed to return unearned fees and failed to return the complainant's file as requested. Jones failed to respond to the grievance.

Jones violated Rules 1.01(b)(1), 1.03(a), 1.03(b), 1.15(d), and 8.04(a)(8). She was ordered to pay $2,902 in restitution and $2,567.50 in attorneys' fees and direct expenses.

On May 17, 2021, **DIANNA LEE MCCOY** [#24026865], of Austin, received a five-year partially probated suspension related to two disciplinary cases effective May 7, 2021, with the first six months actively served and the remainder probated. An evidentiary panel of the District 13 Grievance Committee found in the first case that on or about November 8, 2019, McCoy was court-appointed to represent the complainant in a criminal matter. In representing the complainant, McCoy neglected the legal matter entrusted to her, failed to keep the complainant reasonably informed about the status of his criminal matter, and failed to promptly comply with reasonable requests for information from the complainant. In a second case, on or about March 27, 2019, McCoy was court-appointed to represent the complainant in a criminal matter. McCoy failed to keep the complainant informed about the status of his case and failed to reply to his requests for information related to his case. In both cases, McCoy failed to respond to the allegations in the grievances filed by the complainants.

McCoy violated Rules 1.01(b)(1), 1.03(a), and 8.04(a)(8). She was ordered to pay $1,858.21 in attorneys' fees and direct expenses.

On July 18, 2021, **EDGARDO RAFAEL BÁEZ** [#24048334], of San Antonio, agreed to a four-year fully probated suspension effective August 21, 2021. An investigatory panel of the District 10 Grievance Committee found that Báez entered into an arrangement for an unconscionable fee and failed to promptly render full accounting.

Báez violated Rules 1.04(a) and 1.14(b). He was ordered to pay $7,500 in restitution and $1,200 in attorneys' fees.

On June 30, 2021, **JOHN JOSEPH KLEVENHAGEN III** [#90001652], of Houston, accepted a 35-month fully probated suspension effective June 30, 2021. An investigatory panel of the District 4 Grievance Committee found that Klevenhagen failed to keep his client reasonably informed about the status of her matter, neglected the legal matter entrusted to him, failed to refund advance payments of fees that had not been earned, and failed to timely furnish to the Office of Chief Disciplinary Counsel a response or other information as required by the Texas Rules of Disciplinary Procedure.

Klevenhagen violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay $3,500 in restitution and $1,000 in attorneys' fees and expenses.

On June 11, 2021, **JEFFREY ROBERTS ALLEN** [#24006751], of Southlake, received a one-year partially probated suspension effective June 15, 2021, with the first month actively suspended and the remainder probated. An evidentiary panel of the District 7 Grievance Committee found that Allen on or about August 31, 2016, was hired by the client for representation in a legal matter involving the purchase of a home and was paid $2,500 for the representation. Allen neglected the legal matter entrusted to him and frequently failed to carry out completely the obligations he owed to the client. Allen failed to keep the client reasonably informed about the status of the legal matter, failed to promptly comply with reasonable requests for information from the client, and failed to file a response to the grievance.

Allen violated Rules 1.01(b)(1), 1.01(b)(2), 1.03(a), and 8.04(a)(8). He was ordered to pay $2,500 in restitution and $2,249 in attorneys' fees and direct expenses.

On July 13, 2021, **DEREK ALFONSO QUINATA** [#24072292], of El Paso, accepted a one-year partially probated suspension, with the first month actively served effective August 31, 2021. County Court at Law No. 7 of El Paso found that Quinata violated Rules 1.01(b)(1) [a lawyer shall not neglect a legal matter entrusted to the lawyer], 1.03(a) [failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information], 1.14(a) [failing to hold funds and other property belonging in whole or part to clients or third persons in a lawyer's possession separate from the lawyer's own property], 1.15(d) [failing to return any advance payments of fees that have not been earned], and 8.04(a)(8) [failure to respond to a grievance in a timely manner].

Quinata was ordered to pay $750 in restitution and $2,700 in attorneys' fees.

On July 14, 2021, **HEATHER CATHERINE SUTHERLAND PANICK** [#24062935], of Elkhorn, Omaha, Nebraska, accepted a two-year active suspension effective September 1, 2021. An investigatory panel of the District 4 Grievance Committee found that Panick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Panick violated Rule 8.04(a)(3). She was ordered to pay $1,000 in attorneys' fees and direct expenses.

PUBLIC REPRIMANDS

On June 2, 2021, **J. PAXTON ADAMS** [#24042459], of Huntsville, accepted a public reprimand. An investigatory panel of the District 3 Grievance Committee found that Adams neglected his client's case, failed to keep his client reasonably informed about the status of her case, and failed to promptly comply with his client's reasonable requests for information. Adams further failed to return unearned fees. Additionally, Adams failed to timely respond to the grievance.

Adams violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay $500 in attorneys' fees and direct expenses.

On June 2, 2021, **J. PAXTON ADAMS** [#24042459], of Huntsville, accepted a public reprimand. An investigatory panel of the District 3 Grievance Committee found that Adams failed to hold funds belonging to his client separate from his own property and failed to promptly deliver funds that his client was entitled to receive. Adams further failed to return unearned fees. Additionally, Adams failed to timely respond to the grievance.

Adams violated Rules 1.14(a), 1.14(b), 1.15(d), and 8.04(a)(8). He was ordered to pay $5,000 in restitution and $500 in attorneys' fees and direct expenses.

On June 28, 2021, **SEAN ROLFE JOSEPHSON** [#24041215], of Sugar Land, accepted a public reprimand. An investigatory panel of the District 4 Grievance Committee found that Josephson neglected his client's case, failed to keep his client reasonably informed about the status of the case, engaged in conduct involving dishonesty in that he said a matter was filed when it had not yet been filed, and failed to withdraw from representation when his physical, mental, or psychological condition materially impaired his ability to represent the client.

Josephson violated Rules 1.01(b)(1), 1.03(a), 1.15(a)(2), and 8.04(a)(3). He was ordered to pay $500 in attorneys' fees and direct expenses.

On June 25, 2021, **CLYDE R. PARKS** [#15518500], of Dallas, agreed to a public reprimand. An investigatory panel of the District 6 Grievance Committee found that Parks employed Law Street Marketing a/k/a Exclusive Legal Marketing and agents of Law Street Marketing a/k/a Exclusive Legal Marketing improperly solicited the complainants on behalf of Parks' law firm. Parks paid something of value to a person not licensed to practice law for soliciting prospective clients or referring prospective clients to Parks' law firm. Parks' agent engaged in conduct that constitutes barratry.

Parks violated Rules 7.03(b) and 8.04(a)(9). He was ordered to pay $750 in attorneys' fees and direct expenses.

On June 3, 2021, **THOMAS J. TURNER** [#20331500], of Richardson, agreed to a public reprimand. An investigatory panel of the District 6 Grievance Committee found that in representing the complainant, Turner neglected the legal matter entrusted to him, failed to carry out completely the obligations that he owed to the complainant, and failed to keep the complainant reasonably informed about the status of his legal matter and failed to promptly comply with reasonable requests for information from him.

Turner violated Rules 1.01(b)(1), 1.01(b)(2), and 1.03(a). He was ordered to pay $10,000 in restitution and $600 in attorneys' fees and direct expenses.

On July 28, 2021, **JOHN BLAKE ETHERIDGE** [#24063290], of San Antonio, accepted a public reprimand. An evidentiary panel of the District 10 Grievance Committee found that Etheridge failed to respond to the grievance.

Etheridge violated Rule 8.04(a)(8). He was ordered to pay $400 in attorneys' fees and direct expenses.

On May 27, 2021, **THOMAS F. FLEISCHER** [#00784056], of North Richland Hills, received a public reprimand. The District 7 Grievance Committee found that Fleischer mailed a cease and desist letter to the complainant dated September 3, 2019, regarding the complainant's public comments about the complainant's former employer. The letterhead identifies the "Law Office of Tom Fleischer" and Fleischer indicates that he has been retained by the complainant's former employer. Fleischer's law license was actively suspended on September 1, 2019, for non-payment of dues and was not reinstated until September 25, 2019. Fleischer's license to practice was suspended when he mailed this letter on September 3, 2019, and when the complainant received the letter on September 6, 2019. Fleischer failed to respond to the grievance.

Fleischer violated Rules 8.04(a)(8) and 8.04(a)(11). He was ordered to pay $2,377.50 in attorneys' fees and direct expenses.

On July 15, 2021, **KENNETH CHUKS ONYENAH** [#24007779], of Dallas, agreed to a public reprimand. An investigatory panel of the District 6 Grievance Committee found that on or about August 14, 2019, the complainant retained Onyenah to represent her in a DWI case. In representing the complainant, Onyenah neglected the legal matter entrusted to him. Onyenah failed to keep the complainant reasonably informed about the status of her case and failed to promptly comply with reasonable requests for information from the complainant. Additionally, Onyenah had direct supervisory authority over a non-lawyer employee and failed to make reasonable efforts to ensure that employee's conduct was compatible with the professional obligations of Onyenah.

Onyenah violated Rules 1.01(b)(1), 1.03(a), and 5.03(a). He was ordered to pay $250 in attorneys' fees and direct expenses.

PRIVATE REPRIMANDS

Listed here is a breakdown of Texas Disciplinary Rules of Professional Conduct violations for 13 attorneys, with the number in parentheses indicating the frequency of the violation. Please note that an attorney may be reprimanded for more than one rule violation.

1.01(b)(1)—for neglecting a legal matter entrusted to the lawyer (4).

1.01(b)(2)—In representing a client, a lawyer shall not frequently fail to carry out completely the obligations that the lawyer owes to a client or clients (1).

1.03(a)—for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information (7).

1.03(b)—A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (3).

1.05 (b)(1)(ii)—A lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm (1).

1.14(a)—A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation (1).

1.14(b)—Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property (1).

1.15(a)(3)—A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if the lawyer is discharged, with or without good cause (2).

1.15(d)—Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fees that have not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation (4).

3.04(d)—A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience (1).

8.04(a)(8)—A lawyer shall not fail to timely furnish to the Office of Chief Disciplinary Counsel or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so (2). **TBJ**

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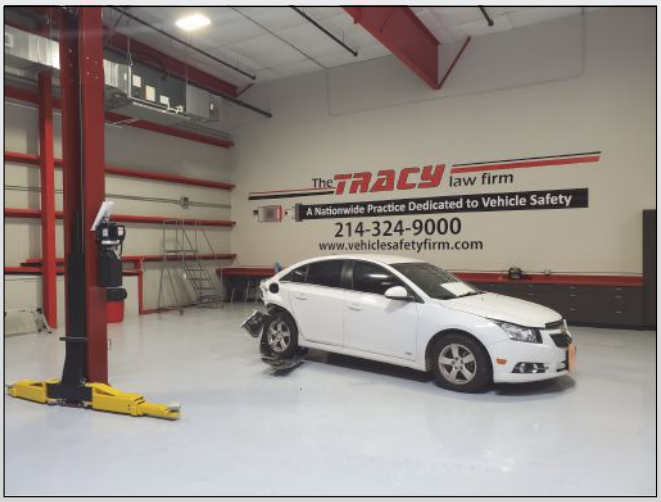
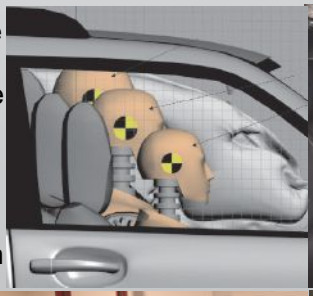
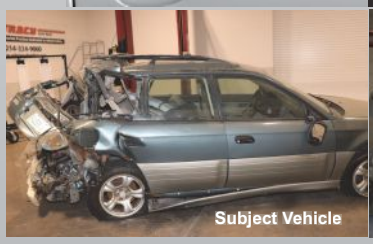
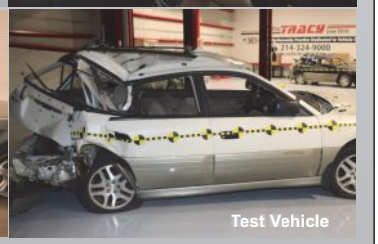


Every vehicle accident case you handle has the potential to be on one of the 235 racks or in one of our six inspection bays at the firm's Forensic Research Facility. We continually study vehicle safety through the use of engineering, biomechanics, physics and innovation.







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CENTRAL

O'MELVENY & MYERS has opened an office in Austin, 500 W. Second St., Ste. 1900, 78701.

SONIA ANSARI, JACKLYN MANN, and **KRYSTAL GOMEZ** are now attorneys with Lincoln-Goldfinch Law in Austin.

MICHAEL J. SCHAFF, previously with Vida Capital, is now compliance counsel to the Teacher Retirement System of Texas in Austin.

ARTHUR GOLLWITZER is now a partner in Jackson Walker in Austin.

CHRISTOPHER HANBA is now a member in and **JOSHUA JONES** is now of counsel to Dickinson Wright in Austin.

PATRICK KEEL, a mediator-arbitrator in Austin, was elected fellows secretary of the Texas Bar Foundation Board of Trustees.

EMILY E. LANDEROS is now an attorney with Bollier Ciccone in Austin.

KURT D. METSCHER is now an attorney with Walters Gilbreath in Austin.

GREGORY S. KAZEN is now a partner in Fritz, Byrne, Head & Gilstrap in Austin.

EAST

MICHAEL SMITH is now a partner in Scheef & Stone's newly opened Marshall office, 113 E. Austin St., 75670.

GULF

JENNIFER DAVIDOW is now senior counsel to Fogler, Brar, O'Neil & Gray in Houston.

JENNIFER JOB, of ExxonMobil in Beaumont, is now a member of the International Association of Defense Counsel.

ANIETIE AKPAN, of the Metropolitan Transit Authority of Harris County in Houston, received the Outstanding Young Lawyer Award from the Houston Young Lawyers Association.

DAVID J. BECK, of Beck Redden in Houston, received the Award for Lifetime Achievement from the Texas Law Alumni Association.

JEFF SPIERS is now chief executive officer of Patterson + Sheridan in Houston.

MOLLY MAIER and **GABE RINCÓN** are now associates of Bradley Arant Boult Cummings in Houston. **SAIRA S. SIDDIQUI,** also with the firm, is now the vice president of community outreach with the South Asian Bar Association of Houston. **STEPHANIE C. GASTON,** also with the firm, was elected a fellow of the Texas Bar Foundation.

HICHAM CHIALI, KEVIN GIESEKE, and **STEPHEN MCCALLISTER** are now attorneys with Coats Rose in Houston.

ISAAC JOHNSON is now president and chief executive officer of TDECU in Lake Jackson.

JOHN B. STRASBURGER is now a partner in Bissinger, Oshman, Williams & Strasburger in Houston.

JUDE DES BORDES II is now an associate of Abraham, Watkins, Nichols, Agosto, Aziz & Stogner in Houston.

JOHN MAUEL is now a global sector lead at Norton Rose Fulbright in Houston.

JAMES SCHUELKE, previously with Reynolds Frizzell, is now a partner in Hogan Thompson in Houston. **ALLIE HALE,** previously with JE Dunn Construction, is now an associate of the firm.

AMY DUNN TAYLOR, previously with Kane Russell Coleman & Logan, is now with the Caroline Mediation Center in Houston.

NORTH

ARLENE SWITZER STEINFIELD, previously with Dykema Gossett, is now a principal in Steinfield Employment Law in Dallas.

ASHLEY W. ANDERSON and **ERIN MARINO** are now partners in Stinson in Dallas.

JASON MARLIN, previously with Locke Lord, is now a partner in Bailey Brauer in Dallas.

BRITTA STANTON is now a partner in the Castañeda Firm in Dallas.

CYNTHIA DOOLEY is now an attorney with Brousseau Naftis & Massingill in Dallas.

ROBB L. VOYLES is now an arbitrator and mediator with JAMS in Dallas and Houston.

VICTOR CRISTALES is now an attorney with Coats Rose in Dallas.

JONATHAN CHARLES STRAIN is an associate of Scheef & Stone in Frisco.

JIM KENNERLY is now general manager and chief executive officer of Mount Olivet Cemetery Association in Fort Worth.

LACHIQUITA MCCRAY is now a health care attorney with Holland & Knight in Dallas. **ZOE PHELPS** is now an associate of the firm.

KARA KARCHER, previously with Vinson & Elkins, is now a real estate transactional attorney with Bourland, Wall & Wenzel in Fort Worth.

ALI HINCKLEY and **SAM KESSLER** are now associates of Kessler Collins in Dallas.

MICHAEL K. HURST, of Lynn Pinker Hurst & Schwegmann in Dallas, received the Lead By Example Award from the National Association of Women Lawyers.

JONATHAN CONE and **MICHAEL FARMER** are now associates of Eggleston King in Dallas. **LEW STEVENS,** previously with the Law Offices of Lewis T. Stevens, and **NIKKI GROTE,** previously with O'Neil Wysocki, are now senior attorneys with Eggleston King in Weatherford.

AW

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MOHR LAW GROUP has merged with Albin Oldner Law in Frisco.

NEIL J. ORLEANS, of Ross & Smith in Dallas, was reelected director of the Richardson Symphony Orchestra and elected member-at-large of the executive committee.

MISTY LEON, previously with Wilkins Finston Friedman Law Group, is now legal counsel of employee benefits at Texas Instruments in Dallas.

ALEX J. BELL is now a member in the newly established Macdonald Devin Ziegler Madden Kenefick & Harris, 901 Main St., Ste. 4960, Dallas 75202.

MICHAEL A. LIVENS, previously with Livens & Reed, is now an associate of Bourland, Wall & Wenzel in Fort Worth.

PATRICK NORWOOD is now an associate of Matthew S. Beard, P.C. in Dallas.

MICHAEL FECHNER is now an associate of Lyons & Simmons in Dallas.

PHILLIP L. KIM, previously with Haynes and Boone, is now a partner in Sheppard Mullin in Dallas.

CHAD RUBACK, of Dallas, was elected president of the William "Mac" Taylor American Inn of Court. **JUDGE MARTIN HOFFMAN,** of the 68th Civil District Court in Dallas, was elected counselor.

CHRISTOPHER BOECK is now a partner in Locke Lord in Dallas.

SOUTH

JAIME GARCIA is now a partner in J. Cruz & Associates in Laredo.

CLAYTON N. MATHESON, previously with Akin Gump Strauss Hauer & Feld, is now a shareholder in Hornberger Fuller Garza & Cohen in San Antonio.

VICTOR FLORES, of the Brownsville City Attorney's Office, received the Rising Advocate in Government Law Award from the State Bar of Texas Government Law Section.

OUT OF STATE

MITCH REID, previously with Hunton Andrews Kurth, is now a partner in Spencer Fane in Denver, Colorado.

WADE H. SCOFIELD II, previously with Orgain Bell & Tucker, is now an associate of Leitner, Williams, Dooley & Napolitan in Memphis, Tennessee. **TBJ**

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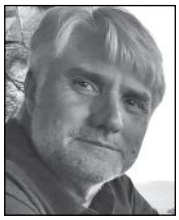
G. ALAN WALDROP



Waldrop, 59, of Austin, died May 5, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1987. Waldrop was a briefing attorney for the U.S. District Court for the Western District of Texas in Waco from 1987 to 1988, an attorney and partner in Locke Liddell & Sapp in Austin from 1988 to 2005, justice on the 3rd Court of Appeals in Austin from 2005 to 2010, a partner in Locke Lord Bissell & Liddell in Austin from 2010 to 2015, and a partner in Terrill & Waldrop in Austin from 2015 to 2021. He was a lecturer and adjunct professor of trial advocacy at the University of Texas School of Law from 1993 to 2000. Waldrop was a Texas Bar Foundation sustaining life fellow. He was a member and music director of the Bar & Grill Singers for 25 years. Waldrop enjoyed sailing, music, and woodworking. He is survived by his wife of 30 years, Debra Waldrop; sons, Duncan Waldrop and Pierce Waldrop; and brothers, Gordon Waldrop II and Stan Waldrop.

CHARLES N. CURRY

Curry, 79, of Fort Worth, died January 21, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1966. Curry was an attorney with Shannon, Gracey, Ratliff & Miller in Fort Worth, where he became partner and practiced for 50 years, and was of counsel to Bonds Ellis Eppich Schafer Jones. He was chair and vice chair of the State Bar of Texas Real Estate, Probate, and Trust Law Section's Fiduciary Litigation Committee. Curry was a member of the State Bar of Texas Real Estate Forms Committee, the State Bar of Texas Business Law Section, and a Texas Bar Foundation life fellow. Curry was a founding member of the Texas Association of Bank Counsel, serving two terms as director, and was a member of the Texas College of Real Estate Lawyers. He loved his career and there was never a person prouder of being an attorney than him. Curry is survived by his wife of 48 years, Mary; daughters, Claire Curry McInnis and Anne Curry Phillippe; and five grandchildren.

ROY STEWART DALE

Dale, 87, of McAllen, died February 18, 2020. He received his law degree from Indiana University School of Law and was admitted to the Texas Bar in 1978. Dale was admitted to practice in Indiana in 1961. He practiced in Brownsville from 1978 to 1992, including service with Cameron County, and was a partner in Dale & Klein in McAllen from 1992 until 2020. Dale served on the South Texas ISD School Board from 1982 to 1986 and was voluntary counsel to the State Bar of Texas. He loved litigation and tried 32 jury trials one year. Dale had a passion for history and was quick witted, brilliant, scholarly, and charitable. He was a proud member of Temple Emanuel in McAllen and fulfilled his lifelong dream of visiting Israel three months before his death. Dale is survived by his wife of nearly 30 years, Katie Klein; sons, Jonathan Dale, Harrison Dale, and Joshua Dale; stepson, Pearson Klein; and stepdaughter, Cassidy Klein.

ROBERT L. ESTEP

Estep, 80, of Rural Retreat, Virginia, died March 28, 2020. He served in the U.S. Army from 1966 to 1970. Estep received his law degree from the University of Virginia School of Law and was admitted to the Texas Bar in 1984. He was admitted to practice in Illinois in 1973. Estep was an associate of and partner in Isham Lincoln & Beale in Chicago, Illinois, from 1973 to 1983; a partner in Jones Day in Dallas from 1983 to 2006; and of counsel to Jones Day in Dallas from 2007 to 2009. He was smart, hardworking, and had an insight into people and situations. Estep is survived by his wife of 49 years, Elizabeth W. Estep; daughter, Laura Liseno; sister, Carol Thomas; and four grandchildren.

LAUREN J. BENSI

Bensi, 63, of Spring, died October 19, 2020. She received her law degree from Texas Southern University Thurgood Marshall School of Law and was admitted to the Texas Bar in 1996. She was a solo practitioner focusing on family law, wills, probate, and trust administration in Spring from 1996 to 2020. Bensi loved to cook and was always planning the next party or informal get-together of friends and neighbors at her house. She also cherished her down time at home with her best friend and long-time housemate, Chris Bozman, as well as their dogs through the years. Bensi was a strong believer in God and her Jewish faith. She is survived by her brother, Andrew Bensi.

MELTON DAVID CUDE

Cude, 65, of Decatur, died November 29, 2020. He received his law degree from Baylor Law School and was admitted to the Texas Bar in 1980. Cude served in the U.S. Army National Guard Judge Advocate General's Corps from 1988 to 1996. He was an attorney at Woodruff, Fostel, Wren & Simpson in Decatur from 1980 to 1986 and judge of Wise County Court at Law 1 in Decatur from 1987 to 2020. Cude was known for his loyalty. He loved reading, especially history, and camping with friends. Cude is survived by his wife of 38 years, Arlena Cude; son, David Cude; daughter, Amy Casares; brother, Murray Cude; and four grandchildren.

STEPHEN E. MUSIL

Musil, 71, of Haskell, died May 1, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1974. Musil was in private practice specializing in family law, an assistant district attorney in the Travis County Attorney's Office, and an attorney in the Travis County Domestic Relations Office. He enjoyed listening to music, working on old cars, and raising chickens. Musil is survived by his wife of four years, Nicolasa Musil; sons, Jeff Musil, John M. Musil, and Ben Musil; daughters, Katie Hanley and Jennifer Rowsey; mother, Mary Musil; brothers, David Musil and Tim Musil; sisters, Pat Smith and Paula Gilbert; and 11 grandchildren.

LOU PORTER BAILEY

Bailey, 66, of Austin, died February 11, 2021. She received her law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1979. Bailey was a partner in Dyche & Wright in Houston. She enjoyed quilting, reading British murder mysteries, watching *Jeopardy!*, working with local nonprofits, and solving the *New York Times* Sunday crossword puzzle. Bailey is survived by her husband of 39 years, Scott Bailey; daughter, Katherine Brown; and one grandchild.

DANIEL DIAZ JR.

Diaz, 73, of San Antonio, died May 31, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1973. Diaz was an associate of Wiley, Plunkett, Gibson & Allen in San Antonio from 1973 to 1979, a partner in Plunkett, Gibson & Allen in San Antonio from 1979 to 1989 and a shareholder in the firm from 1989 to 1996, of counsel to Plunkett & Gibson in San Antonio from 1996 to 2000, and staff legal counsel to Zurich North America in San Antonio from 2000 to 2001. He was a member of the Order of Barristers. Diaz was an avid fisherman, fishing every chance he got anywhere he could. He was utterly devoted to caring for and encouraging the aspirations of his wife and children. In retirement, Diaz took pride assisting his wife in legal work helping and representing children. He is survived by his wife of 41 years, attorney Dorothy Flagg Diaz; son, David Daniel Diaz; daughter, Teresa Diaz Alecozay; and one granddaughter.

MINOR L. HELM JR.

Helm, 83, of Waco, died May 18, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1961. Helm was a partner in Sleeper, Johnston & Helm from 1961 to 1995 and an associate of Pakis, Giotes, Beard & Page from 1995 to 2013. He was a member of the American Bar Association and Waco-McLennan County Bar Association. Helm enjoyed collecting coins and stamps. He is survived by his wife of 33 years, Vivian Helm; son, attorney Charles M. Helm; daughter, attorney Sandra Helm Waelder; sister, Kay Preddy; and five grandchildren.

ROBERT JAY REINING

Reining, 74, of Corpus Christi, died November 23, 2020. He served in the U.S. Coast Guard Judge Advocate General's Corps from 1969 to 1994. Reining received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1970. He was admitted to the Hawaii Bar in 1973 and the District of Columbia Bar in 1990. Reining was a JAG officer in Houston; Washington, D.C.; Honolulu, Hawaii; Portland, Oregon; Norfolk, Virginia; New York, New York; and Corpus Christi from 1969 to 1994; and was an attorney for the city of Corpus Christi from 1994 to 2014. He enjoyed traveling and hunting. Reining is survived by his wife of 51 years, Drew Matlock Reining; daughter, Elizabeth Reining Buehler; sister, Marilyn McCabe; and one grandchild.

DULCIE D. BRAND

Brand, 65, of Sugar Land, died March 7, 2021. She received her law degree from George Washington University Law School and was admitted to the Texas Bar in 1986. Brand was admitted to the District of Columbia Bar in 1981 and the California Bar in 1995. She was a partner in Jones Day in Dallas and Los Angeles, California, from 1984 to 2005 and a partner in Pillsbury Winthrop Shaw Pittman in Los Angeles from 2005 to 2016. Brand was a member of the National Association of Public Pension Attorneys. She enjoyed traveling, cooking, and spending time with friends and family.

RICHARD NORMAN NELSON

Nelson, 79, of Keller, died September 27, 2020. He served in the U.S. Navy from 1962 to 1998, receiving two Meritorious Service Medals, Navy & Marine Corps Commendation Medal, and Recruiting Gold Wreath. Nelson received his law degree from George Washington University Law School and was admitted to the Texas Bar in 1996. He was admitted to the Michigan Bar in 1980 and was admitted to practice in Maryland in 1994. Nelson was general counsel to EFW, Inc. in Fort Worth from 1996 to 2006. He was a member of U.S. Submarine Veterans Fort Worth and Dallas bases, the National Society of the Sons of the American Revolution, and was a violinist and member of the Northeast Orchestra. Nelson is survived by his wife of 57 years, Bonnie Nelson; daughters, Kimberly Nelson and Amy Mylius; brother, Allan Nelson; and five grandchildren. **TBJ**

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THINK YOU'RE FUNNY TOO? PROVE IT! Send deposition and trial excerpts to pambuchmeyer@gmail.com.

The Judge's Daughter: UNDER THE BENCH!

WRITTEN BY **PAMELA BUCHMEYER**

THE COURTS ARE BACK IN SESSION after a long shutdown for COVID-19. Fingers crossed for their future operations and for everyone's health. May we all stay healthy and strong. Still, this might be a good time for a public service warning—bizarre things can and will happen when hapless witnesses testify and when lawyers try to shake off the cobwebs and get back to work.

Examples of this problem abound as this month's column fully demonstrates. The following bloopers and blunders could make any judge want to crawl under the bench, or any lawyer crawl out the courtroom door. What would you do as the questioning lawyer in the following cases? Let me know and send along your own collection of guffaws and gaffes to me at pambuchmeyer@gmail.com.

As always, it's my pleasure to follow in the footsteps of my late father, U.S. District Judge Jerry L. Buchmeyer, who for 28 years wrote a humor column for the *Texas Bar Journal*.

JUDGE JERRY L. BUCHMEYER (1933-2009) grew up in Overton and served as a federal judge in the Northern District of Texas after being nominated in 1979 by President Jimmy Carter. His monthly legal humor column ran in the *Texas Bar Journal* from 1980 to 2008.

Is John Roberts Aware?

From a district court in Edinburg, a civil case brought by a prisoner and an excerpt from cross-examination of an officer in the Mission Police Department.

> Atty: …Now correct me if I'm wrong, but doesn't an inmate have a *constitutional right,* under the laws of the state of Texas and under the laws of the United States, *to make a phone call?*
> A: No, sir. Constitutional right? *There were no phones when the Constitution was written.*
> Atty: …No, no, no. I'm sorry. I'm going to have to think about that one.

From an attorney's letter that offered a stirring and vigorous argument against pending legislation in the oil and gas industry, we find this amusing typo:

> "When our democracy was formed in our great living document, the United States constitution, there were specific safeguards of property rights. These rights are to be held *in violet.*"

When Date Night Ends in Divorce Court

From a court in Beaumont, "incriminating" testimony from an eyewitness in a personal injury case where the defendant was an establishment offering alcohol and dancing to customers.

> Atty: Was there anyone else sitting at your table?
> A: Yes, sir. There was about eight couples there that night.
> Atty: Did you have a date that night?
> A: No, sir. With me, I had my wife.

Also, from a writ of habeas corpus alleging ineffective assistance of counsel due to the lawyer's failure to interview possible witnesses: *"Petitioner had alibi witnesses to testify on his behalf that he was alone at the time of the offense."*

Not My Son-In-Law!

From a case where the judge was considering home confinement in lieu of jail time and not submitted by my own son-in-law who was forced to isolate for three long months during COVID-19 with his *two* mothers-in-law, my wife and me.

> Judge: …the only telephone you had access to was at your ex-mother-in-law's house…You have to be near a telephone at all times when you're on electronic monitoring. You, therefore, have a choice of staying with your ex-mother-in-law for 15 days or to stay in jail. Which one do you want to do?
> A: I'd rather be in jail for 15 days than with my ex-mother-in-law for 15 days, sir.

Autocorrect Cannot Save You!

It can't even save itself. To wit, there's a clever joke going around about what happens when autocorrect walks into a bar.

> Bartender: What can I get you?

Autocorrect: I'll have a bear. A bare. Bier. Briar. Oh, never mind!

And so, we ponder the following marvelous typos sent in from Dallas, Houston, Lake Jackson, Austin, and San Antonio.

From answers to interrogatories: "Plaintiffs reserve the right *to illicit testimony* from adverse witnesses designated by Defendants."
From a letter to opposing counsel: "This letter will also confirm…that you will not oppose a *Notion* for Continuance."
From a newspaper column dedicated to citation by publication, where the defendant being *sued* in a divorce case could not be found, this most amusing and perhaps entirely accurate typo: "Attention Defendant, YOU HAVE BEEN *USED.* If you or your attorney do not file a written answer…"

I'll Take a Beer and the Fifth

Yes, dear readers, this laudable line is actually in print. From a criminal case involving the admission of a confession (490 S.W.2d 573).

Q.: …have you ever heard about taking the Fifth?
A.: A fifth of wine?
Q.: No, the Fifth Amendment.

A Selfless Image

Autocorrect's companion must be Photoshop, a program that this poor attorney from El Paso must have wished to use to edit himself out of the frame after posing a regrettable inquiry.

Atty: Ms. Doe, would you look at this picture, and tell me if you recognize the person in that picture?
A: Yes, that's me.
Atty: OK. Now you did not take that picture, did you?
A: No, I did not.
Atty: But you were present for that picture?
A: Yes indeed. **TBJ**

PAMELA BUCHMEYER
is an attorney and award-winning writer who lives in Dallas and Jupiter, Florida. Her work-in-progress is a humorous murder mystery, *The Judge's Daughter.* She can be contacted at pambuchmeyer@gmail.com.

State Bar of Texas Government Law Section Names Victor A. Flores 2021 Rising Advocate in Government Law

The State Bar of Texas Government Law Section named Victor A. Flores, of Brownsville, as its 2021 Rising Advocate in Government Law Award recipient during the 33rd annual Advanced Government Law Seminar. The award recognizes a Texas lawyer who is employed by a government entity and has made outstanding contributions to the practice of government law and serving the public. Flores is an attorney with the Brownsville City Attorney's Office. He was also recognized for his contributions as a speaker and author at various statewide seminars for attorneys practicing government law. He has served as legal counsel to several communities in South and North Texas. He is also a past president of the Texas Young Lawyers Association. For the past four years, Flores has authored an article on government law for the *Texas Bar Journal*'s annual Year in Review feature.

DALLAS BAR ASSOCIATION NAMES CHERYL WATTLEY AS TRIAL LAWYER OF THE YEAR

The Dallas Bar Association named Cheryl Wattley as the recipient of the 2021 Outstanding Trial Lawyer of the Year Award, to be presented at the DBA's Bench Bar Conference in Horseshoe Bay on November 4. The award is given annually to the DBA member who best exemplifies the noble principles of the legal profession. Wattley, a professor at UNT Dallas College of Law, worked with non-governmental organizations through the International Human Rights Clinic to provide shadow reports in relation to countries' mandatory human rights reports to the United Nations. The work of her students contributed to an amendment to a Central American country's education statutes to remove corporal punishment for indigenous students as allowable discipline. Wattley also does pro bono work with Centurion Ministries, a nonprofit dedicated to the vindication of the wrongly convicted, which led to the recent release of Benjamine Spencer after 34 years in a Texas penitentiary. For more information about the Dallas Bar Association, go to dallasbar.org.

APPELLATE SECTION PRESENTS AWARDS TO LAW STUDENTS

The State Bar of Texas Appellate Section gave Excellence in Appellate Advocacy Awards to nine graduating Texas law school students. The awards recognize students who showed excellence in appellate advocacy, based on the recommendations from their law schools. Award recipients are Andrew Swallows, of Baylor Law School; Blake Glatstein, of SMU Dedman School of Law; Javier Gonzalez, of South Texas College of Law Houston; Melissa Sharon Fullmer, of St. Mary's University School of Law; Rolando Reyna Jr., of Texas A&M University School of Law; Sara Baumgardner, of Texas Tech University School of Law; Mariah Zenrene Noyola, of Texas Southern University Thurgood Marshall School of Law; Kade Beyer, of the University of Houston Law Center; and Elizabeth Hamilton, of the University of Texas School of Law.

STATE BAR PARALEGAL DIVISION ELECTS NEW OFFICERS, BOARD OF DIRECTORS

The State Bar of Texas Paralegal Division has elected the following members to its officer positions and board of directors for the 2021-2022 bar year: officers include Susi Boss (president), Lisa Pittman (president-elect), Alice Lineberry (secretary), Eugene Alcala (treasurer), and Shannon Shaw (parliamentarian). The board of directors includes Kim Goldberg (District 1), Eugene Alcala (District 2), Wayne Baker (District 3), Alice Lineberry (District 4), Pearl Garza (District 5), Erica Anderson (District 7), Shannon Shaw (District 10), Stacey Marquez (District 11), Pamela Snavely (District 12), Shannon Happney (District 14), Georgina Guzman (District 15), and Rhonda Brashears (PD coordinator).

HOUSTON BAR ASSOCIATION CELEBRATES ACHIEVEMENTS AT ANNUAL DINNER

The Houston Bar Association welcomed 2021-2022 President Jennifer A. Hasley and recognized outstanding service by members at its annual dinner on July 15. David J. Beck, founding partner in Beck Redden, received the Justice Eugene A. Cook Professionalism Award, and Susan L. Bickley, a partner in Blank Rome, received the Justice Ruby Kless Sondock Award. 2020-2021 President Bill Kroger presented Special Recognition Awards for exemplary service to the legal profession and community to Dean Michael F. Barry, of South Texas College of Law Houston; Dean Joan R.M. Bullock, of Texas Southern University Thurgood Marshall School of Law; and Dean Leonard M. Baynes, of the University of Houston Law Center, for leadership in legal education and community engagement. Committees honored for their achievements in 2020-2021 were the Bench Bar Conference Committee, County Law Library Committee, Diversity & Inclusion Committee, Fun Run Committee, Gender Fairness Committee, The Houston Lawyer Editorial Board, Implicit Bias Task Force, Law Week Committee, and LegalLine Committee. For more information about the Houston Bar Association, go to hba.org.

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW NAMES ROOM AFTER AUSTIN ATTORNEY

American University Washington College of Law named the Thomas W. George Courtroom in the Capital Building in honor of Austin attorney Thomas W. George. George's daughter, Caroline George Schaefer, and her husband, David, made the gift in celebration of George's 80th birthday, his esteemed legal and academic career, and his passion for commitment to American University Washington College of Law. **TBJ**

SORRELS LAW

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In their first month of practice together, the husband-and-wife team of Randy Sorrels and Alex Farias-Sorrels were called to an in-person jury trial (during COVID-19), representing two minor league baseball players—the sons of former Major League Baseball players Roger Clemens and Mike Capel. After a week of testimony, the jury returned a $3.24 million verdict against the defendant bar and bar owner for the assault on the two ball players. The offer before trial was $125,000.

Following the verdict, Randy and Alex turned their attention to assembling the best group of multitalented, broadly diverse, hardworking, creative-thinking, and innovative-minded lawyers they could find. In just a few short months, Sorrels Law has an engineer, a medical doctor, a nurse, a former hospital CEO, a pharmacist, an 18-wheeler expert, and several bilingual lawyers to serve Texas clients in personal injury, medical malpractice, product liability, wrongful death, and commercial cases.

L-R: Mike Capel, Randy Sorrels, Alex Farias-Sorrels, Roger Clemens

Today, Sorrels Law is looking to joint venture cases of all sizes across Texas. Even with over $600 million in settlements, verdicts, and awards under their belts, the lawyers at Sorrels Law still answer their own phones, return phone calls, and are looking to build new relationships for decades to come. Referral fees are gladly and generously paid. Call this energetic boutique law firm to talk about working together.

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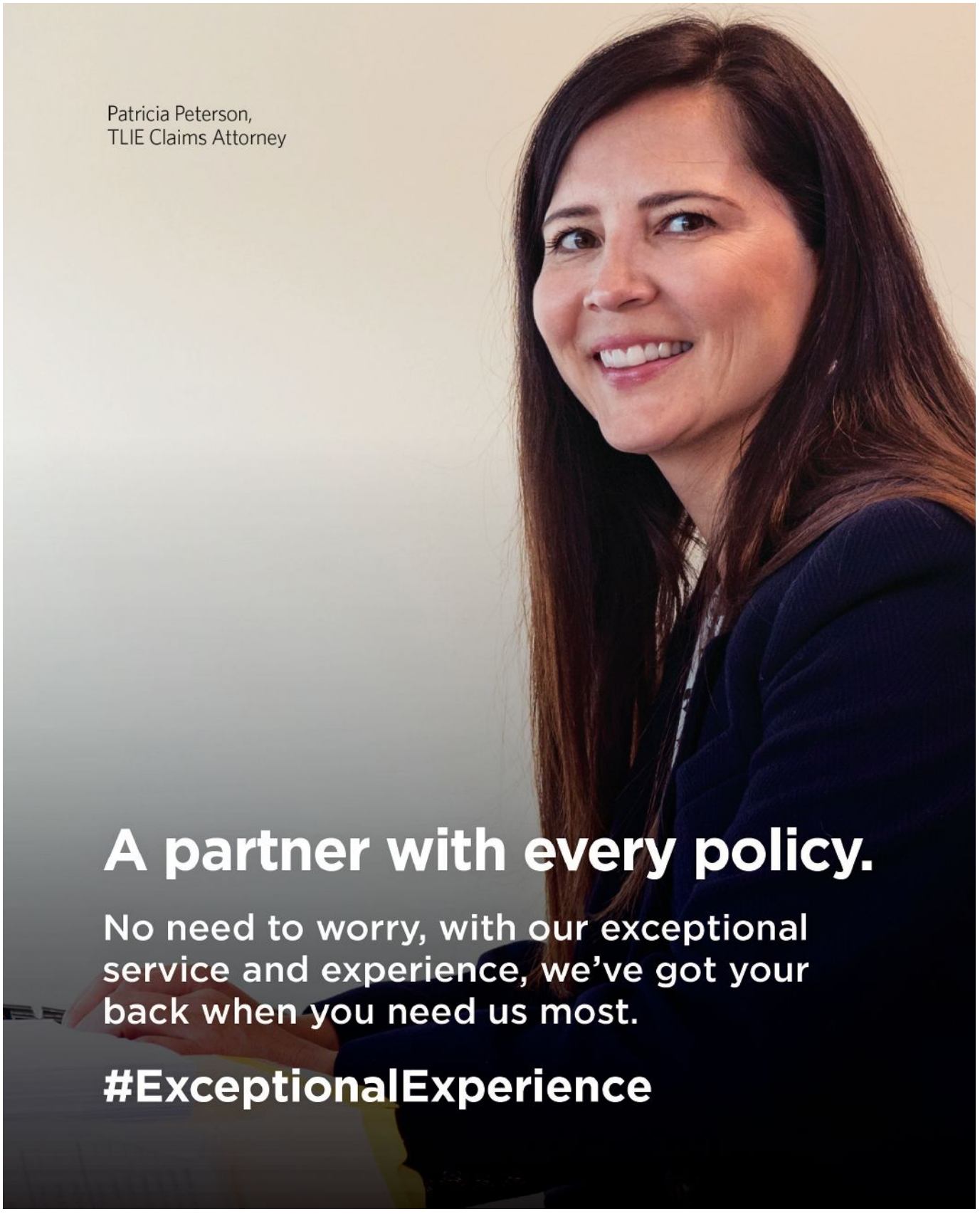

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