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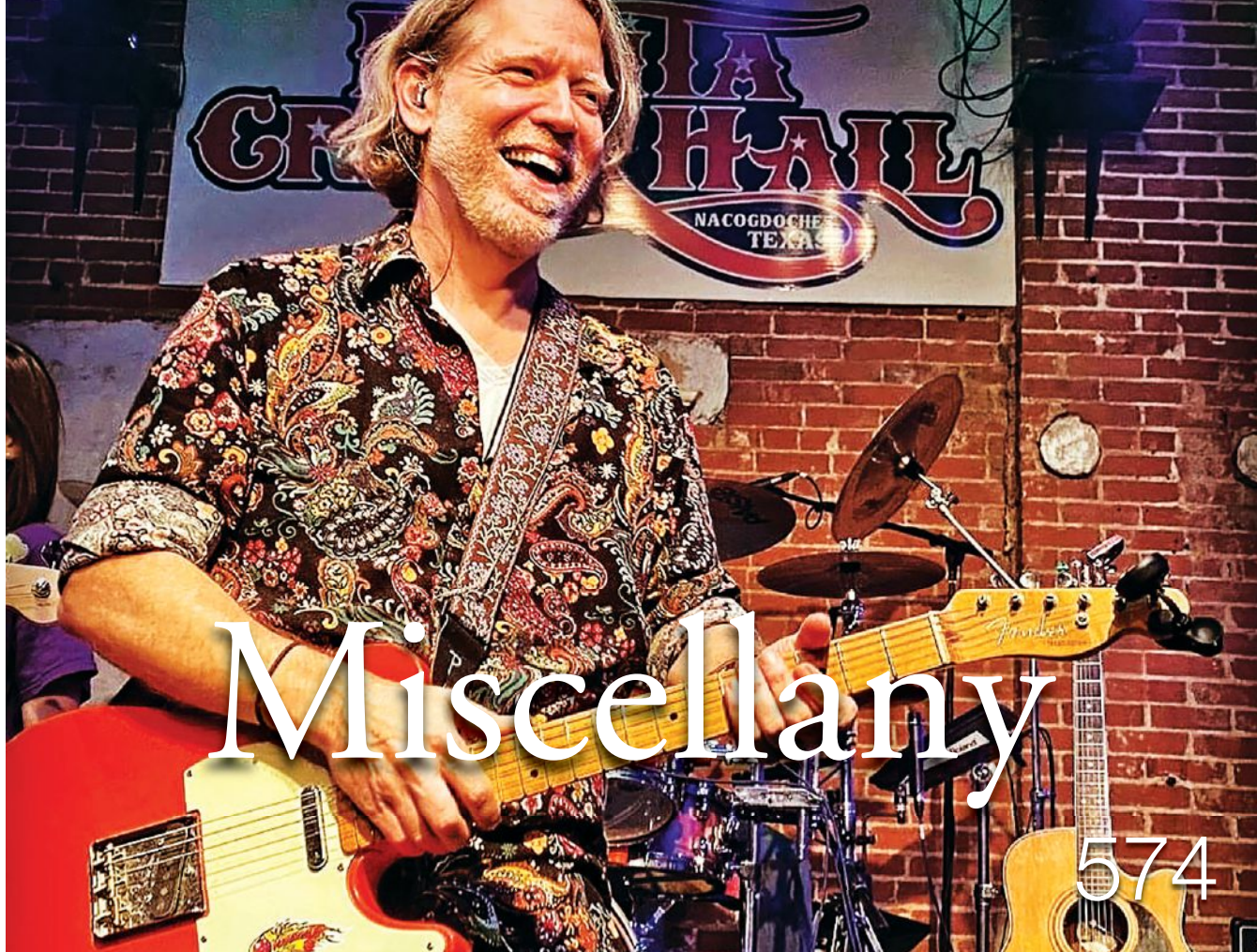
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Disciplinary Rule Updates Are **A WIN FOR SELF-GOVERNANCE**

ON MAY 25, THE TEXAS SUPREME COURT issued final approval of amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. Texas lawyers approved the proposals earlier this year as part of the first rules vote referendum in a decade. The court's order adopts each of those proposals, along with interpretive comments, effective July 1.

Among other changes to the Texas Disciplinary Rules of Professional Conduct, the court's order adopts amendments to Part VII (lawyer advertising and solicitation) and Rule 1.05 (confidentiality of information) and adopts new Rules 1.16 (clients with diminished capacity) and 6.05 (conflict of interest exceptions for nonprofit and limited pro bono legal services). I encourage you to read the court order and the adopted changes on page 630 of this issue.

The State Bar Board of Directors reviewed and approved each of the proposals, and I personally supported them because I believe they modernize our rules and help lawyers better serve their clients. Regardless of one's views on any individual proposal, however, this outcome is a win for our profession. By updating our disciplinary rules, Texas lawyers have shown once again we are reliable stewards of the power and responsibility entrusted to us in our unique system of self-governance.

The seeds of this rules vote were planted all the way back in 2017, when the Texas Legislature adopted a new rule-making process. Lawmakers empowered a new body—the Committee on Disciplinary Rules and Referenda, or CDRR—to oversee the initial process for proposing rule changes and ensured multiple opportunities for input from lawyers and all Texans.

From the start, everyone involved committed themselves to making the process successful. That meant carefully reviewing all proposed changes, gathering as much feedback as possible from Texas lawyers and the public, adjusting the proposals based on that feedback, and educating our members on the opportunity to vote through free CLE presentations, articles, videos, and other communications. Texas lawyers owe a special debt of gratitude to the members of the CDRR—volunteer lawyers and public members—who devoted countless hours to this effort.

In the end, nearly 20,000 lawyers cast a ballot, representing a turnout of about 18.5% of eligible voters. Each proposal passed overwhelmingly, with voter support of between 79% and 94%.¹ While I would always like to see higher turnout, I am encouraged that so many lawyers provided input throughout the process and ensured these proposals were well vetted.

To everyone who voted (yea or nay), submitted comments, attended CLE presentations, and otherwise had a role in the rule-making process—thank you for participating in this successful exercise of self-governance!

Sincerely,

TREY APFFEL

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

NOTES

1. https://www.texasbar.com/Content/NavigationMenu/RulesVote/Rules_Vote_Results/2021RulesVoteResults.pdf.

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‘Guitars are just wood and string and a bit of math’

How Waco-based attorney Chris Harris builds his own sound.

INTERVIEW BY ERIC QUITUGUA

FOR WACO ATTORNEY CHRIS HARRIS, custom building his own guitars gives him total control of his sound. Sand, grain fill, seal, prime, paint, and repeat. Add in a new neck, tweak or replace the pickups, and tool up on other components. The end result is a guitar that can pack the dirty crunchiness of a Gibson Les Paul and the bright twang of a Fender Telecaster. In the past five years alone, Harris has Frankensteined 20 and has two more necks, gun oil finish, and pawn shops at his disposal to add more.

ABOVE: Waco attorney Chris Harris has customized more than 20 guitars in the past five years, many of which are Fenders. PHOTO COURTESY OF CHRIS HARRIS

HOW MANY GUITARS HAVE YOU BUILT AT THIS POINT? ARE THEY ALL ELECTRIC?

Before I answer that, I have to be clear about one thing so that I'm not exoriated by any luthiers who may read this. I do not consider myself to be a luthier! A luthier is a maker of stringed instruments. In my mind, being a luthier generally involves more manufacturing than what I do. I do make stringed instruments, but I generally make them out of already existing guitar parts. I've created or restored about 20 electric guitars in the past five years. I can do minor work on my own acoustic guitars (re-setting the occasional bridge or tweaking a truss rod), but I never have built an acoustic instrument.

There are three main criteria that I consider whenever I'm deciding if I like a guitar or not. The order of importance has changed over the years: (1) sound; (2) playability; and (3) appearance. When most people start, they don't know anything about sound or playability, so they base their decision on looks alone. That's normal and fine. As you get better, the playability becomes more important. As your skill and your gear grow, the tone becomes more important. When you make your own instruments, you get to control all three parameters. That's why I build them.

DO YOU BUILD THEM FROM THE GROUND UP, INCLUDING THE BODY? OR IS IT MAINLY CUSTOMIZING OLDER ONES?

I don't go chop down a tree and use a CNC machine to make a guitar body or a neck. Rather, I like to make guitars in one of two ways: (1) transforming a cheap, poorly intonated, difficult-to-play instrument into something that can be used and enjoyed by a professional musician; or (2) making custom guitars out of custom parts.

I really love both methods. It turns out that knowing how and why an electric guitar works is incredibly helpful to my ability to sound good when I'm playing. Today, if you give me an instrument that is hard to play and sounds bad, there's a pretty good chance that I can make it sound and play a lot better without replacing a single component. Just knowing how to set the relief of the neck and how to intonate the instrument can make a tremendous difference. I can do all of that with a screwdriver and a hex wrench. If the frets are sharp and cutting my fingers, I can fix that (roll the edges) in about 30 minutes now rather than giving up on the instrument. If it won't stay in tune and bends are hard to make, I can file the nut and adjust string height. I can radically change the sound of a guitar just by adjusting the height of the pickups. Doing these things takes a very small amount of actual time, but it seems to take years to know what to do and how to do it.

WHAT SHAPES DO YOU LIKE WORKING WITH THE MOST? IS THERE AN ADVANTAGE TO THEM?

I'm largely a Fender guy, and my favorite body to work with *and* to play is an offset body. It has a perfect weight balance both when seated and when standing. Fender started using this shape on its Jazzmaster guitars in the late 1950s. This particular guitar of mine was a custom build by me from custom-ordered parts. I wanted to blend the shape of a Jazzmaster with the electronic simplicity of a Telecaster. Some have called it a "Jazzcaster," but I just call it an offset Telecaster, because every part of the guitar is inspired by a Telecaster except for the body shape. Besides the weight balance and look of this guitar, I am a little bit proud of its sonic range. Electric guitars

transmit sound from the strings through these things called "pickups," which are sort of like microphones. Where the pickup is placed on the guitar determines a lot of the sound. On this guitar, I used a really "hot" Telecaster bridge pickup and paired it with a P-90 pickup for the neck. A P-90 is an old, old type of single coil pickup, but it handles distortion really well. This particular (offset) guitar can handle everything from wandering country licks you might find on a Merle Haggard recording to the lead for "Sweet Child O' Mine" by Guns N' Roses. I loved the guitar so much I gave it to my daughter (Jaimee Harris) who is a singer/songwriter in Nashville; she's been using the pandemic as an opportunity to improve her own playing.

YOU MENTIONED IN YOUR EMAIL A TELECASTER THAT CAME TOGETHER BY ACCIDENT. WHAT CAN YOU TELL ME ABOUT THAT?

It's a very simple instrument in a classic "surf green," reminiscent of early Fender guitars of the 1960s. Guitars are just wood and string and a bit of math. If the span between the nut of the guitar and the saddles of the bridge are the correct distance from each other (25.5" on most Fender style guitars), and if the frets on the neck are correctly spaced, then any guitar should be able to reproduce notes of the frequency desired. But most real guitar players would agree that 100 guitars with the same dimensions that come off the same factory line will all play a bit differently *and* sound a bit different. Some of it is due to the fact that natural materials are used; wood is not fungible. It's all different, even when you're dealing with the same type of wood, like ash. Trees are different just like people are different.

While there is a great deal that you can control in terms of how a guitar plays and sounds if you know what you're doing, I still believe that some of it is frankly due to luck. I got a bit lucky with this particular guitar. It started off as a very cheap instrument that I got for \$120 because I needed a body that was already painted. Most of the time, when I buy a Telecaster style body, I have to pay \$200 for a raw body, and then

I have to sand it, grain-fill it, seal it, prime it and paint/stain/finish it. I enjoy doing all of that, but to do it right, it takes me a month because I use older paint that has to cure, and I was building this guitar for a friend who wanted it quickly. So I cheated a little by starting with a whole guitar. Then I replaced every single component on the guitar—I replaced the neck, the tuners, the pickups, the bridge, the control plate, the wiring ... I even replaced the strap buttons and the pickguard. When I got it all together and wired, I was pleasantly surprised at how resonant it was, and I was super happy with how great it played. I will oftentimes give my favorite guitars to my children, but I couldn't give this one away. I did not give it to my friend, either. He got a great guitar, but not this one.

DO YOU HAVE MORE LINED UP TO BE CUSTOMIZED?

Always! I have two spare necks laying around that need to be turned into guitars. Even when I'm not currently building one, I'm sort of building one. I've been applying gun oil finish to one of these necks for the past week, and I don't have a clue what kind of guitar the neck is going to be a part of. I frequently peruse pawn shops looking for terrible guitars that have great bodies. It's like musical recycling. Right now, there's a cheap Peavey guitar sitting in a pawn shop somewhere waiting to be transformed into somebody's favorite guitar ever. **TBJ**



Chris Harris' "accidental Telecaster." "I will oftentimes give my favorite guitars to my children, but I couldn't give this one away. I did not give it to my friend, either. He got a great guitar, but not this one." PHOTO COURTESY OF CHRIS HARRIS



Take a R.I.D.E. WITH ME

WHEN I RAN FOR PRESIDENT-ELECT, I talked with lawyers from all across this great state. I heard your opinions of what is right with our bar and what you feel is wrong. I took all of your comments to heart, and I think about some of you every day.

What I found is we have more in common as Texas lawyers than that which sets us apart. Of course, we cannot expect that 106,000 lawyers will agree on everything all the time, but what I do know is that there is room at the table for all viewpoints.

This is our bar. We are fortunate to be self-governing and led by dedicated volunteers with diverse opinions and ideas and who, like me, are indeed listening. Every day they and the State Bar staff are working to find the best ways to serve Texas lawyers.

I have high hopes for this year. We are emerging from the COVID-19 pandemic but still struggling with its hardships. This past year brought our country to some difficult truths and discussions about race and relationships, but I know together we can chart a path forward to greater understanding as we fulfill our purposes of regulating and improving the quality of legal services in Texas. I would like for you to come along for the R.I.D.E. as we focus on Respect, Inclusion, Diversity, and Equity within our bar.

These are big words with colloquial definitions that evoke different feelings in different people, but I want to think critically about what each one of these words means to us as members of the State Bar of Texas.

The Texas Lawyer's Creed: A Mandate for Professionalism holds that we as lawyers are committed to the highest ethical and moral standards for no other reason than it is right. Above all, we commit to be civil and courteous. We agree to respect the rule of law, our colleagues, our clients, the judiciary and its rulings—even if we sometimes vehemently disagree.

In our bar world when ideas clash, it can be easy to withdraw, to throw up our hands and claim “these are not my people.” But they are.

Advancing the mission of our bar will sometimes require uncomfortable conversations with people of opposing views, but these conversations can be had *respectfully*, with consideration given to the feelings of others and full attention to the diverse makeup of our bar. Who better than lawyers to work together on the common goals that unite us?

I know some lawyers may look at our bar and feel they have little in common with those they see in leadership roles. But that's an invitation to take part. If you don't hear a voice like yours in the volunteer bar leadership, on a board, on a committee, in a section, then be that voice.

I am the first Hispanic woman to be president of this bar and the seventh woman overall. This is the first time in our bar's 82-year history that the president and president-elect have both been women. There is a seat for everyone at the table.

SYLVIA BORUNDA FIRTH

President, 2021-2022
State Bar of Texas

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Hash Values and the FOURTH AMENDMENT

DO AUTHORITIES NEED A SEARCH WARRANT TO OPEN AND VIEW FILES?

WRITTEN BY PIERRE GROSDIDIER

IN *UNITED STATES V. MILLER*, the U.S. Court of Appeals for the 6th Circuit was the latest federal appellate court to reject the argument that opening a file that has been hash-matched to child pornography constitutes a warrantless search under the Fourth Amendment.¹ The contraband trapping technique at stake is conceptually simple: electronic communication service providers, or ESPs, filter files that pass through their servers by matching each file's hash value against a database of hash values of known illicit pictures. A hash value is a file's digital fingerprint; it is unique for each file and two files with the same hash value contain the same information.² ESPs forward trapped files and their originating IP addresses to authorities, who track down and prosecute the suspect. The technique can be fully automated and does not require ESP employees to review each trapped file because a hash value match guarantees that the file is illegal.³

This trapping technique nabbed two offensive files that led to William Miller's conviction. Google, the ESP, did not view Miller's files but had used its own hash algorithm and employees to stock its database. At some point, therefore, at least one Google employee had viewed Miller's files and decided they were contraband. Miller appealed his conviction on Fourth Amendment grounds, inter alia, arguing that authorities needed a search warrant to open and view his files.

The court easily rejected Miller's first argument that Google conducted an unreasonable search by filtering his email based on hash values.⁴ Google, the court held, is a private entity and not

subject to the Fourth Amendment's constraints regarding searches. The facts also showed that Google had not acted as the government's agent.⁵

Miller's second argument, that the detective assigned to his case invaded his reasonable expectation of privacy when he viewed the trapped files, fared no better.⁶ The court first applied the private search doctrine, which holds that the government does not conduct an illegal search when it is virtually certain that its search does not disclose anything beyond what a prior private search revealed.⁷ In Miller's case, the detective who opened the files might have stumbled upon images other than the expected contraband—as unlikely as it was. In that event, the police search would have proceeded beyond Google's and offended the Fourth Amendment. The question, therefore, was whether Google's hash value matching made it virtually certain that by opening the files, the detective would discover nothing more than what Google had learned when it first viewed the files.

Recall that at some point, trained Google employees had seen copies of the files and categorized them as child pornography. The issues, therefore, turned on “whether Google's hash value matching [wa]s sufficiently reliable” to ensure this constitutionally required virtual certainty, and on the legal test that applied to resolve this question.⁸ But, the court saw no need to answer these questions. Miller never challenged the reliability of Google's hashing algorithm, and the magistrate judge found that the hashing technology was “highly reliable—akin to the reliability of DNA.”⁹ Because of hashing's

generally accepted reliability and Miller's failure to object in the trial court, the court held that Google's file matching “satisfie[d] *Jacobsen's* virtual-certainty test and trigger[ed] its private-search doctrine.”¹⁰

The court also considered whether Miller's defense that the detective's viewing of the files amounted to a Fourth Amendment physical trespass.¹¹ The court analogized the detective's opening of digital files to colonial authorities' intrusion in a person's personal effects and papers, a practice that the Fourth Amendment clearly aimed to curtail. But here again, Google, not the detective, first matched the hash value and the private search doctrine applied.¹⁰ **TBJ**

NOTES

1. 982 F.3d 412 (6th Cir. 2020); see also, *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018); *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) (Gorsuch, J.).
2. See generally, Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 Harv. L. Rev. F. 38, 39 (2005). Hash algorithms are not perfect; two different files can have the same hash value, but the odds of a “collision” are “astronomically small.” *Id.* The hash value depends on the file's contents and not on its name. *Id.* n.5.
3. Unless there is a hash value collision with an innocuous picture (astronomically unlikely), or an error by an ESP employee who misjudged erotica (presumably, always a possibility).
4. *Miller*, 982 F.3d at 421–22.
5. *Id.* at 422–24.
6. *Id.* at 426 (citing *Katz v. United States*, 389 U.S. 347 (1967)).
7. *Id.* at 428 (citing *United States v. Jacobsen*, 466 U.S. 109, 119 (1984)).
8. *Id.* at 429–30.
9. *Id.* at 430.
10. *Id.*
11. *Id.* at 432 (citing *United States v. Jones*, 565 U.S. 400, 405, 406 n.3 (2012)).



PIERRE GROSDIDIER

is an attorney in Houston. He belongs to the first group of attorneys certified in construction law by the Texas Board of Legal Specialization in 2017.

Grosdidier's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, he worked in the process control industry. Grosdidier holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section treasurer for 2020-2021.

Take the Money AND RUN

AFTER LAWYER TRACY OBTAINS AN UNFAVORABLE RESULT at trial on behalf of client Chris, Tracy files post-judgment motions and a notice of appeal. But Tracy advises Chris to retain a separate appellate lawyer because Tracy does not handle appellate matters.

Chris is indecisive about whether to appeal and has Tracy file two motions for extension of time. Eventually Chris calls an appellate lawyer, Jamie, two weeks before the first brief is due. Jamie agrees to take the case but is concerned about the short turnaround. Chris requests a meeting to discuss the case and the terms of engagement, but Jamie says there is no time for that because the briefing deadline necessitates that work on the brief begin immediately. Jamie says, "I'll charge you my usual hourly rate and send you monthly invoices so the costs won't get out of hand. Now I need to get busy."

Jamie manages to get one more 30-day extension and files the brief approximately six weeks after being retained. Jamie spends 175 hours working on the brief. At \$500 per hour, the fees amount to \$87,500. After the adverse party files a response brief, Jamie spends another 110 hours analyzing and drafting a reply brief for a total of \$142,500 in unpaid fees.

Jamie has been sending monthly invoices to an office address listed on the internet for Chris, but none have been paid. Becoming concerned about the unpaid bills and loss of leverage, Jamie calls Chris, points out the unpaid balance, and says, "I have prepared a reply brief but will not file it until you pay the balance of your fees in full."

Chris had been working exclusively at home during the COVID-19 pandemic and had not seen any of the invoices. Moreover, Chris had mentally budgeted about \$40,000 for the appeal and cannot possibly pay the \$142,000 that Jamie is demanding. But Chris also has neither the money nor the time to hire a new lawyer who could get up to speed to file a reply brief that is due in one week.

If Jamie withdraws, which of the following is most accurate?

- A. Chris likely has a claim against Jamie for withdrawing the representation in violation of the Texas Disciplinary Rules of Professional Conduct, or TDRPC.
- B. Chris likely has a claim against Jamie for withdrawing the representation in violation of the Texas Standards for Appellate Conduct.
- C. Chris likely has a claim against Jamie for charging fees in violation of the TDRPC.
- D. Chris likely has a claim against Jamie for charging fees in violation of the Texas Standards for Appellate Conduct.
- E. A and B only.
- F. A and C only.
- G. A, B, and C only.
- H. A, B, C, and D.



ABOUT THE CENTER

The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed, and a variety of other online ethics resources by computer or smart device at legalethictexas.com.

DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.

ANSWER: Rule 1.15 provides that a lawyer cannot withdraw from representing a client when it will have a material adverse effect on the client's interests, which it clearly would here given the looming deadline to file the reply brief and inadequate time to locate new counsel. Rule 1.04 provides that new clients must be advised of the "basis or rate of the fee" within a "reasonable time after commencing the representation." Here, Jamie only indicated that Chris would be charged "my usual hourly rate," which is inadequate under these circumstances. While the Standards for Appellate Conduct do provide a similar duty to "explain the fee agreement and cost expectation" to clients, they also prohibit using the Standards as a basis for sanctions or civil liability. The correct answer is F. For further analysis of these issues, go legalethictexas.com/ethics-question-of-the-month.

Santos VARGAS

HOMETOWN: PORT ARTHUR **POSITION:** PARTNER IN DAVIS & SANTOS IN SAN ANTONIO **BOARD MEMBER:** DISTRICT 10, PLACE 2; CHAIR SINCE 2021

INTERVIEW BY **ERIC QUITUGUA**
PHOTO COURTESY OF **SANTOS VARGAS**



WHEN I WAS GROWING UP, MY FATHER INTRODUCED ME TO HIS LAWYER, MIKE CICHOWSKI, FROM PORT ARTHUR.

I was with my father on a few occasions when they met, and I was impressed even at a young age by how Mike handled himself. He was very intelligent, professional, and polished, while still managing to be extremely kind and down to earth. Before my introduction to Mike, my perception of lawyers had been shaped by what I had seen portrayed on television or movies. But the traits I saw in Mike really resonated with the type of person I wanted to be when I grew up. That is when I became interested in becoming a lawyer. Although he may not have realized it, the impression Mike made on me as a young man was profound.

MY "WELCOME TO LAW PRACTICE" MOMENT CAME A COUPLE OF YEARS INTO MY PRACTICE.

A lawyer I knew had a scheduling conflict for an upcoming jury trial on a car accident case. The lawyer asked me if I would agree to sit second chair for the trial if another more seasoned lawyer agreed to handle the trial as first chair.

This was going to be my first jury trial and I only knew the most basic facts of the case, but I agreed because I wanted to gain the experience. Halfway through voir dire, the lawyer handling the

trial as first chair "went to the bathroom" and never came back. After a couple of minutes of stalling, the judge ordered us to start back up since we had a panel waiting on us. I went on to try the case by myself and ended up winning on liability and damages.

Believe it or not, I never received an explanation as to why the first chair lawyer never came back. As horrified as I was at the time as a new lawyer, I've since come to appreciate how much that experience has helped me conquer my fears.

SEVERAL YEARS AGO, I WAS NOMINATED TO SERVE ON THE STATE BAR OF TEXAS LOCAL BAR SERVICES COMMITTEE AND EVENTUALLY BECAME CHAIR OF THAT COMMITTEE.

Through my service on the Local Bar Services Committee, I was able to get to know and work with several members of the amazing staff and leadership at the State Bar. I was impressed with their passion for the State Bar's mission and their tireless efforts to accomplish that mission. After my term as president of the San Antonio Bar Association, I decided to run for State Bar director because I wanted to continue being a part of this truly remarkable organization. It has been one of the most rewarding experiences of my career.

SOME OF THE BIGGEST CHALLENGES TO BEING A DIRECTOR INVOLVE DISSEMINATION OF INFORMATION.

We all have busy practices and volunteer our time to the State Bar, but we have a duty to make sure our members receive accurate information about the State Bar's initiatives and the important work the State Bar Board accomplishes. Sometimes our members receive inaccurate information about the State Bar from other sources. But more often than not, when we take the time to engage with our members and provide information about all of the great things the State Bar does for each and every one of its members, they come away with a different perspective. It often takes personal contact to help ensure the State Bar's message is communicated accurately to our members. Although it can be time consuming to make this personal contact, it is much easier for the State Bar to accomplish its work when our members are well informed.

THE STATE BAR BOARD HAS IMPROVED THE LEGAL PROFESSION IN MULTIPLE WAYS.

Some of the efforts that immediately come to mind include recently updating disciplinary and advertising rules, keeping our members informed about resources available to them during the global pandemic, and supporting efforts to reopen access to courts. In addition to these efforts, the State Bar Board spends significant time supporting and administering programs benefiting Texas lawyers that have been in place for many years.

ONE OF THE WAYS I WOULD LIKE TO SEE THE STATE BAR IMPROVE IS TO ENHANCE AND BUILD UPON THE RECENT EFFORTS TO INCREASE ACCESS TO BOARD MEETINGS THROUGH YOUTUBE AND SOCIAL MEDIA PLATFORMS.

Many of our members interact with social media on a regular basis. If the State Bar increases access to board meetings and business through social media, I believe our members will be much better informed about all of the State Bar Board's great work. **TBJ**



State Bar President-elect Nominee and Petition Information

The State Bar of Texas Board of Directors is soliciting candidates for the 2022 president-elect race. State Bar rules stipulate that all potential candidates for 2022 president-elect shall come from non-metropolitan counties of the state (all counties except Bexar, Dallas, Harris, Tarrant, and Travis).

Any member of the State Bar who meets the eligibility requirements for officers set forth in the State Bar Act and the State Bar rules is eligible for nomination for president-elect. The board of directors policy manual describes the criteria for selecting nominees. The board will consider potential nominees' involvement as a member of the board or in State Bar committee work, knowledge of State Bar operations, participation in local and specialty bar associations, and other activities demonstrating leadership ability and sincere interest and competence in dealing with issues concerning the State Bar of Texas. Potential nominees should submit a resume and a statement of their views on the key issues facing the bar, the role they would play in dealing with those issues, and what they would seek to accomplish during their tenure as president, all within the overall strategic plan of the State Bar.

Any other qualified member shall also be privileged to stand for election to that office as a candidate when a written petition, in a form prescribed by the board and signed by no less than five percent of the active members of the State Bar who are in good standing, is filed by or on behalf of such member with the executive director on or before March 1 preceding the election for the ensuing organizational year and such petition is certified by the executive director. State Bar rules state that a petition signature is invalid if it is not dated or the signer signed the petition before September 1 of the year before the election.

The board's Nominations and Elections Subcommittee is accepting names of and background information for potential candidates. Please write the subcommittee to recommend potential candidates.

**c/o John Charles "Charlie" Ginn and Larry P. McDougal,
Nominations and Elections Subcommittee Co-Chairs**

P. O. Box 12487
Austin, TX 78711-2487
ray.cantu@texasbar.com

Anyone submitting a name for consideration should first obtain that person's consent.

IN THE COURTROOM

New Texas law school advocacy competition to debut this fall.

WRITTEN BY EILEEN F. O'NEILL

Texas law students will have a new opportunity to hone their courtroom advocacy skills thanks to a partnership between the state's 10 law schools and the Texas chapters of the American Board of Trial Advocates—known regionally as TEX-ABOTA.

The “TEX-ABOTA Best in Texas Voir Dire Competition,” a first-of-its-kind advocacy simulation focused on the under-taught skills of jury selection, has been in the works since the early days of the COVID-19 pandemic. Its inaugural tournament is scheduled for September 30 through October 2, 2021, in San Antonio.

A trial advocacy competition among the Lone Star State's law schools was the brainchild of Austin attorney and 2020 TEX-ABOTA President Robby Alden, who while helping judge the regional rounds of the Texas Young Lawyers Association National Trial Competition in 2019, broached the idea with St. Mary's University School of Law Professor A.J. Bellido de Luna. Bellido de Luna, who enthusiastically endorsed the suggestion, remembers the conversation well. “I met so many ABOTA members there,” he said. “I think their positive experience helped us along the way to build the relationship.”

The idea garnered unanimous support from the TEX-ABOTA board, which includes representatives from all 15 Texas ABOTA chapters. Alden then appointed Justice Patricia O. Alvarez, of the 4th Court of Appeals in San Antonio, to chair the planning committee. Lawyers from all around the state volunteered to serve. Bellido de Luna suggested reaching out to each Texas law school to participate as well. All 10 agreed.

The first order of business was to decide on the competition's focus. Texas Tech University School of Law Professor Robert T. Sherwin felt strongly it should center on jury selection. “I thought that this was a really unique opportunity to do something nobody else in the country is doing,” Sherwin recalled. He said that back in 2013, the University of Missouri-Kansas City—then under the leadership of Texas attorney Rafe Foreman—launched a revolutionary competition emphasizing voir dire skills. “That tournament was the very best, and most practical, advocacy competition I had ever experienced,” Sherwin said.

Unfortunately, when Foreman retired from teaching and returned to Lubbock to practice law in 2019, the UMKC competition was retired as well. “I felt like that left a gaping hole in the advocacy world,” Sherwin said. “And I thought, the last thing we need is another regular old mock trial competition. There are already dozens of those. Let's do something different.”

The committee unanimously agreed, and the “Best in Texas Voir Dire Competition” was born. Instead of a traditional trial-advocacy tournament that follows the opening-statement/four-witness/closing-argument model, the voir dire competition will focus solely on jury selection and opening statement. To do this, real-world laypeople will be brought in to serve as mock jurors. The student advocates will question those jurors just as they would in a real case, and afterward, make both for-cause and peremptory strikes. A six-person jury will then be seated to hear the students' opening statements. Afterward, the jurors and the judge will fill out the ballots that will decide which team wins.

“What I really love about this format is how real world it is,” Sherwin said. “The juror ballots are going to be dead simple—which attorney do you think did a better job? The team that gets more ballots will win. And so it's just like the real world, where you're trying to make a connection with the venire panel and strike those people who you think don't think like you or your case.”

And because only the non-stricken jurors will vote on the winner, prudently exercising one's strikes is just as important as the oral arguments the attorneys make, Sherwin explained. “One of the things that I think sometimes gets lost in trial advocacy competitions is that they're judged by lawyers. Well, in the real world, lawyers aren't our audience. People are. And this is a competition where real people will get to decide who did a better job.”

Once the committee decided on the format, Alden submitted the idea to the TEX-ABOTA board. “They loved it,” Alvarez said of the board's unanimous approval. She then split everyone into subcommittees to begin the arduous task of building the tournament into a reality. Aside from a host subcommittee to plan the competition itinerary and details, subcommittee members have been

drafting the rules and the problem, designing trophies and awards, and perhaps most importantly, raising funds.

To help pay for the event, the Texas ABOTA chapters and many of their members have made contributions through the ABOTA Foundation, a 501(c)(3) educational organization. “Their contributions will help train the next generation of trial lawyers—and hopefully future ABOTA members—in Texas,” Alden said.

The committee also recommended that the competition rotate and be held in the cities with a law school. In 2022, the competition will take place in Dallas.

Alvarez is proud of the committee’s work so far. “To me, what is most important about this endeavor is that it’s a competition that has brought advocacy teachers and trial attorneys together for the first time—it’s a program grounded on civility, the right to jury trials, and the importance of voir dire in Texas advocacy practice,” she said.

Alden agreed. “One of ABOTA’s primary missions is the preservation of the Seventh Amendment’s right to a civil jury trial, and the focus on jury selection perfectly fits ABOTA’s mission,” he said. “The professors wholeheartedly supported this focus as well because law students do not receive much training in jury selection—perhaps the most important part of a jury trial.”

Law professors serving on the committee are Tim Adams, of Texas Southern University Thurgood Marshall School of Law; A.J. Bellido de Luna, of St. Mary’s University School of Law; Brandon Draper, of the University of Houston Law Center; Jennifer Ellis, of Texas A&M University School of Law; Elizabeth M. Fraley, Robert Little, and Kathy Serr, of Baylor Law School; Laura Frase, of UNT Dallas College of Law; Rob Galloway, of South Texas College of Law Houston; Jonni Walls, of SMU Dedman School of Law; Tracy McCormack, of the University of Texas School of Law; and Rob Sherwin, of Texas Tech University School of Law.

ABOTA members serving on the committee are Justice Patricia O. Alvarez, of San Antonio; Robby Alden, of Austin; Robert Aldrich, of Fort Worth; Quentin Brogdon, of Dallas; Judge Les Hatch, of Lubbock; retired Judge Caroline Baker Hurley, of Houston; Albert Gutierrez, of San Antonio; Donald Kidd, of Houston; Sandra Laurel, of San Antonio; Brian Lauten, of Dallas; Joe Lovell, of Amarillo; Ranelle Meroney, of Austin; Eileen O’Neill, of Houston; Dennis Peery, of San Antonio; R. Bruce Phillips, of San Antonio; Ellen Presby, of Dallas; Hella Scheuerman, of San Antonio; Terry Tottenham, of Austin;

and Allen Williamson, of Decatur.

Alden said other ABOTA groups across the country are watching the Texas event with an eye toward duplicating it. “I’ve mentioned the possibility of the other three regional chapters, CAL-ABOTA, FLABOTA, and SEABOTA, hosting a trial competition with the winners participating in a ‘Final Four’ event hosted by the national organization. No doubt the ‘Best in Texas’ would be the ‘Best in the U.S.,” he said.

But for now, TEX-ABOTA and the Texas law school advocacy professors are excited to see their work take flight. “An incredible relationship was born between ABOTA and all of the Texas law schools,” Bellido de Luna said. “I can’t wait for the first one.” **TBJ**



EILEEN F. O’NEILL

is a partner in Ware, Jackson, Lee, O’Neill, Smith & Barrow in Houston, where she is a trial and appellate lawyer focused on domestic and international arbitrations. She is certified in civil trial law by the Texas Board of Legal Specialization. A former judge, O’Neill is president of the American Board of Trial Advocates, a senior fellow of the Litigation Counsel of America, and a life fellow of the Texas Bar Foundation.

PUBLIC NOTICE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGE IGNACIO TORTEYA, III

The current term of the office of United States Magistrate Judge Ignacio Torteya, III at Brownsville, Texas, is due to expire January 23, 2022. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of Magistrate Judge Torteya to a new 8 year term.

The duties of a Magistrate Judge position include the following:

1. Conducting most preliminary proceedings in criminal cases;
2. Trial and disposition of misdemeanor cases;
3. Conducting various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; and,
4. Trial and disposition of civil cases upon consent of the litigants.

The court invites comments from members of the bar and the public as to whether the panel should recommend the reappointment of Magistrate Judge Torteya to the court. Direct comments under confidential cover to:

Ignacio Torteya, III Reappointment Panel
Attention: Nathan Ochsner, U.S. District Clerk
P.O. Box 61010 • Houston, Texas 77208

Comments must be received no later than **July 23, 2021**, 5:00 p.m.

GASLIGHTING

Should it be recognized as a tort in Texas?

WRITTEN BY CARLOS R. SOLTERO AND KAYLA CARRICK KELLY

The common law tradition is based on experience, not logic.¹ Though we live in an era when busy legislatures keep enacting statutes for specific claims and causes of action in response to general cries that “there ought to be a law against this or that,” the common law has not yet been formally abolished in Texas.²

Although the Texas Supreme Court has been reluctant in the past two decades to expand tort common law claims,³ the common law has been the traditional method where courts recognize evolving legal norms over time.⁴ Over time, available common law tort claims and the names of various injurious acts visited upon people have been transformed, morphed, or abandoned.⁵ According to the Texas Supreme Court, “[w]hen recognizing a new cause of action and the accompanying expansion of duty, we must perform something akin to a cost-benefit analysis to assure that this expansion of liability is justified.”⁶

Is it time for the common law tort of gaslighting? Gaslighting refers to a particular species of manipulation or psychological abuse preying on the vulnerability of another to suggest to them that something that is not in fact true, is in fact true. Gaslighting has been described by a psychologist in a Texas case as:

manipulative behavior used to confuse people into questioning their reactions to events, so much so that the victims of gaslighting begin to question their own sanity. . . . [g]aslighting is often referred to as “crazy-making” as it makes otherwise ordinary functioning individuals act “crazy” in the face of such discrepant pieces of information.⁷

The term originates from a psychological thriller play and movie from the early 20th century called *Gaslight*,⁸ but the term and concept still permeates pop culture today.⁹

While somewhat akin to causes of action we are familiar with like fraud, invasion of privacy, and intentional infliction of emotional distress, gaslighting does not exactly match any of these and appears to be a concern in the internet era with its “deepfakes,” “ghosting,” and other forms of truth manipulation. It may be more difficult to uncover and detect than existing causes of action, even by a person using reasonable diligence.

Gaslighting is different from fraud because it often flows from a campaign of activity rather than specific statements, omissions, or representations. It may consist of a series of minor, seemingly harmless acts that combine to create an alternate reality leading to psychological abuse. Gaslighting is often—by design—equivocal or stated in the form of “opinions” or “questions,” which may not constitute actionable fraud and may not be material. While it does involve false representations made so that a person relies on the untruth, the harms that flow from relying on gaslighting are not completely captured by the fraud cause of action: It can cause

emotional and mental anguish rather than the pure financial or economic damages more commonly associated with fraud.

Gaslighting also is not covered by defamation because it is not a reputational tort. In other words, the core function of defamation is to protect or restore the reputation, honor, character, or good standing of a plaintiff who has been maligned publicly by false statements.¹⁰ By contrast, a gaslighting claim can stand without the defendant having “published” a false statement to any third party.¹¹ The harm inflicted on the plaintiff does not arise (primarily or perhaps at all) from what third-party members of the community may think about the plaintiff, but rather from the plaintiff’s own cognitive existential crisis or damage in processing the manipulative behavior.

Gaslighting is also not fully captured by the three Texas privacy torts (public disclosure of private facts, intrusion on seclusion, and appropriation of name or likeness)¹² because the conduct goes beyond merely invading a person’s privacy or right to be left alone, although it is closely related to these claims. Finally, intentional infliction of emotional distress¹³—a gap-filler tort that can only be used where other causes of action do not provide for recovery—by definition does not provide for redress when the harm suffered is not just emotional but financial as well.

Opinions in caselaw have generally mentioned gaslighting with increasing frequency in the past few years in various contexts.¹⁴ Additionally, murmurs of gaslighting as a potential cause of action have recently appeared in a range of contexts across the country, without much detailed discussion as to the elements of what an independent cause of action may require by way of pleading and proof.¹⁵

Texas could recognize the gaslighting tort in appropriate cases because it would provide for the recovery of both general types of damages or harms (economic and emotional). Arising injuries are often psychological,¹⁶ suggesting that this tort would allow for the recovery of damages for either mental anguish or emotional distress proximately caused.¹⁷ Apart from psychological harm, gaslighting may also result in financial or economic harms. Finally, equitable relief in the form of protective orders should also be available to stop harassment.

Apart from damages and causation, tort theories generally require a duty and standard of applicable culpability.¹⁸ If gaslighting were a recognized tort, what would be the required standard for culpability: intentional, negligent, or strict liability? For a gaslighting tort, requiring intentional conduct would be the most appropriate. Apart from wanting to discourage claims based solely on inadvertent or even negligent acts, the nature of gaslighting rests on intentional manipulation of the victim’s ability to perceive and react to the gaslighting conduct. Having an intentional-conduct requirement is also consistent with the three invasion of privacy torts that Texas currently recognizes,¹⁹ as well as the intentional-conduct standards that the Legislature adopted in recent statutory-based claims.²⁰ Additionally, the intentional standard is consistent with Texas’ general law limiting the recovery of mental anguish and emotional distress, which disfavors the recovery of these types of damages without a physical injury with rare exceptions.²¹

In sum, a gaslighting tort would likely require a plaintiff to show that the defendant intentionally gaslighted the plaintiff,

Opinions expressed on the Texas Bar Blog and in the *Texas Bar Journal* are solely those of the authors. Have an opinion to share? Email us your letters to the editor or articles for consideration at tbj@texasbar.com. View our submission guidelines at texasbar.com/submissions.

resulting in the plaintiff sustaining damages or injuries. Perhaps the time has come to recognize this tort to deter this type of destructive, manipulative behavior. **TBJ**

NOTES

1. Oliver Wendell Holmes, *The Common Law* 1 (1881).
2. Like other jurisdictions, Texas tort law has recently evolved less through court action in our traditional common law style, but more like the civil law traditions in Mexico or Europe: The Texas Legislature enacts statutes specifically addressing tort-like activity, creating new statutory civil causes of action and sometimes allowing the recovery of attorneys' fees, injunctive relief, or exemplary damages. See, e.g., Tex. Bus. & Com. Code § 109.005; Tex. Civ. Prac. & Rem. Code § 98B.003(a)(3); Tex. Civ. Prac. & Rem. Code § 123.004; Texas Gov't. Code § 423.006(b), (d); See also, Guido Calabresi, *A Common Law for the Age of Statutes* (1982).
3. *Archer v. Anderson*, 556 S.W.3d 228, 239 (Tex. 2018) (rejecting cause of action of intentional interference with inheritance); *Ritchie v. Rupe*, 443 S.W.3d 856, 878, 891 (Tex. 2014) (declining to recognize a common law cause of action for shareholder oppression); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (refusing to recognize a tort of spoliation).
4. *Billings v. Atkinson*, 489 S.W.2d 858, 859–60 (Tex. 1973) (recognizing tort cause of action for invasion of privacy and holding that “an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted”); *Dugger v. Arredondo*, 408 S.W.3d 825, 830–31 (Tex. 2013) (describing effect of Legislature adopting Chapter 33's comparative responsibility scheme as derogation of the common law).
5. For example, Texas abolished the tort of “alienation of affections” or “criminal conversations.” Tex. Fam. Code § 4.06.
6. *Kinsel v. Lindsey*, 526 S.W.3d 411, 423 n.6 (Tex. 2017), citing *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003); *Ritchie*, 443 S.W.3d at 878. The court describes the full analysis as “complex, requiring consideration of a number of non-dispositive factors including, but not limited to: the foreseeability, likelihood, and magnitude of the risk of injury; the existence and adequacy of other protections against the risk; the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question; and the consequences of imposing the new duty, including whether Texas's public policies are served or disserved; whether the new duty may upset legislative balancing-of-interests; and the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms.” *Id.*
7. *Coburn v. Moreland*, 433 S.W.3d 809, 818–19 (Tex. App.—Austin 2014, no pet.). In an employment context, another case quoted the plaintiff's allegations describing gaslighting behavior as an effort “to induce a severe sense of anxiety into the target and to cause others to regard him as mentally unstable” by completely annihilating the target's reputation and causing the target “personal disasters such as job loss, divorce, financial devastation—even jail.” *Williams v. Rosenblatt Securities Inc.*, 136 F.Supp.3d 593, 601 n.3 (S.D.N.Y. 2015). In a recent domestic abuse case, the court quoted a licensed clinical social worker's definition of gaslighting as “psychological form of abuse in which the perpetrator places seeds of doubt and insecurity in the victim and turning -- turning reality into -- into a falsehood, redirecting with lies and manipulation, intimidation through these methods and leaving the victim unsure, uncertain, insecure about what is -- what is real, what is true.” *Aguillard v. Aguillard*, 19-757, 2020 WL 3818159, *4 (La. App. 3 Cir. July 8, 2020). See generally Robin Stern, *The Gaslight Effect* (2010).
8. *Brown v. Bratton*, ELH-19-1450, 2020 WL 886142, *15 n.7 (D. Md. Feb. 21, 2020) (Title VII and employment discrimination case). The *Brown v. Bratton* court described the term as originating from the 1944 film *Gaslight*. See *Gaslight* (Metro-Goldwyn-Mayer 1944). The court continued to quote the National Domestic Violence Hotline, stating “[g]aslighting” describes a kind of psychological abuse in which a person denies another person's reality in order to cause that person to second-guess himself and his perceptions.” (quoting *What is Gaslighting?*, National Domestic Violence Hotline (May 29, 2014), <https://www.thehotline.org/2014/05/29/what-is-gaslighting/>).
9. For example, the country band The Chicks released an album called *Gaslighter* in July 2020, including the lead single and title track song “Gaslighter.” The Chicks, *Gaslighter* (Columbia Records 2020).
10. See *Innovative Block of South Texas, Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020) (distinguishing between defamation involving character and reputation and business disparagement that applies to economic interests and financial harm affecting the marketability of goods and services).
11. Publication to a third party is an essential element of defamation. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018); *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 528 (Tex. 2019) (stating defamation claims “generally accrue when the allegedly defamatory matter is published or circulated”).
12. Three privacy torts Texas recognizes are: (1) intrusion upon seclusion, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); Tex. PJC § 110.16 (2016 ed.); (2) appropriation of name or likeness, *K-mart Corp. v. Trotti*, 677 S.W.2d 632, 638 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e., 686 S.W.2d 593 (Tex. 1985); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); Tex. PJC § 110.18 (2016 ed.); and (3) public disclosure of private facts, *Indus. Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683–85 (Tex. 1976), cert denied, 430 U.S. 931 (1977); Tex. PJC § 110.17 (2016 ed.). Texas does not recognize a claim for “false light” invasion of privacy. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994).
13. A claim for intentional infliction of emotional distress, or IIED, requires a plaintiff to show that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that proximately caused severe emotional distress. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). Courts limit the applicability of IIED. See, e.g.,

Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 815 (Tex. 2005) (noting that “[f]or the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort”).

14. See, e.g., *Krauss v. Wal-Mart, Inc.*, 2:19-cv-00838-JAM-DB, 2020 WL 1874072, *8 (E.D. Cal. 2020) (calling a party's argument an attempt to “gaslight[] the Court”); *Garrett v. Cape Fox Facilities Servs.*, 1:19-cv-579, 2020 WL 265869, *2, 10 (E.D. Va. 2020) (dismissing pro se Title VII and ADA employment complaint including allegations of gaslighting); *Edwards v. Schwartz*, 378 F.Supp.3d 468, 484 (W.D. Va. 2019) (“gaslighting” claim part of defamation claim asserted in context of Flint, Michigan poisoned water crisis); see *supra*, note 6.
15. See, e.g., *Sissom v. Univ. of Texas H.S.*, 927 F.3d 343, 346, 349 n.4 (5th Cir. 2019) (affirming dismissal of gaslighting and RICO claims based on lack of jurisdiction and without reaching merits of whether claims survived as plead a 12(b)(6) challenge); *Shulman v. Facebook.com*, 17–764 (JMV) (LDW), 2018 WL 3344236, *8 (D.N.J. July 9, 2018) (dismissing gaslighting claim asserted under California statute CAN-SPAM for failing to establish allegation arising from email sent by defendant); *Tantavos v. Fox News Network, LLC*, 17 Civ. 2958 (GBD), 2018 WL 2731268, *4 n.9 (S.D.N.Y. May 18, 2018) (dismissing employment-related complaint including allegations of targeting plaintiff “for retaliation through online intimidation and smear campaigns. . . . Such campaigns allegedly involved the use of fake social media accounts to defame, discredit, gaslight, and otherwise influence the public perception of their intended victims.”); *White v. Green County Sheriff's Dept.*, 2:09–CV–211, 2014 WL 3058393, *10 (E.D. Tenn. July 7, 2014) (dismissing amended complaint including a claim of gaslighting by the sheriff's department together with “gang stalkers” because of failure to prove facts supporting claim).
16. Typically to recover for mental anguish damages, a plaintiff must show direct evidence of the nature, duration, and severity of their mental anguish thereby establishing a substantial disruption in his or her daily routine. *SCI Texas Funeral Services Inc. v. Nelson*, 540 S.W.3d 539, 544 (Tex. 2018), citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441–44 (Tex. 1995). This is more than mere worry, anxiety, vexation, embarrassment, or anger (although it may include all or some of these). *Woodruff*, 901 S.W.2d at 444. Similar testimony may support an award of future mental anguish damages. *Fifth Club v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006). In the area of non-physical, non-economic damages, it is unclear what the difference is between “mental anguish” and “emotional distress.” Some cases distinguish between “garden-variety” mental anguish and other types of emotional insult and injury. *In re Whipple*, 373 S.W.3d 119, 123 (Tex. App.—San Antonio 2012, orig. proceeding).
17. Virtually all tort claims under Texas law have a proximate cause requirement of both “cause in fact” or “substantial factor” and foreseeability. See, e.g., *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 221–23 (Tex. 2010); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).
18. “Whether a duty exists is a question of law for the court and turns on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.” *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010) (internal quotations omitted).
19. See *supra*, note 12.
20. See *supra*, note 2.
21. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993). In the state of Texas, for “many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish.” *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997). However, tortious negligent conduct may still give rise to claims for personal injury damages without physical invasion or touching of the body in some limited and specific circumstances: bystander claims, mishandling of a dead body, or specific instances where a “special relationship” exists. *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2013); *Likes*, 962 S.W.2d at 496 (Tex. 1997). As a 2018 Supreme Court of Texas case summarizes: “Historically, Texas law did not afford damages for mental anguish unless ‘(1) accompanied by a physical injury resulting from a physical impact, or (2) produced by a particularly upsetting or disturbing event.’” *Nelson*, 540 S.W.3d at 543.



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THE BUSINESS CASE FOR DIVERSITY, EQUITY, AND INCLUSION

Why it matters in the boardroom, the courtroom, and every room.

WRITTEN BY SOFIA ADROGUÉ



In 2020, the global humanitarian challenge of COVID-19 upended every aspect of life, threatening both lives and livelihoods. More than a year later, we are faced with the greatest leadership tests of our lifetimes—professionally and personally.

Cognizant that the newest normal will necessarily be different and “generations to come will likely discuss the pre-COVID-19 and post-COVID-19 eras,”¹ this crisis presents a key inflection point—a critical moment of choice. Undoubtedly, “[c]rises are like adrenaline for innovation, causing barriers that once took years to overcome to evaporate in a matter of days.”² As we emerge from 2020’s morass, “leaders in every industry are intently focused on understanding and improving performance drivers,”³ including “[r]acial equity and inclusive growth.”⁴ A strong

business case exists,⁵ innovation and momentum are palpable, and it is imperative that all sectors—in the boardroom, courtroom, and every room—reconfigure and transform.⁶

Diversity, equity, and inclusion are becoming paramount for the U.S. private sector⁷ and serve as a “powerful enabler of business performance.”⁸ “Companies whose leaders welcome diverse talents and include multiple perspectives are likely to emerge from the crisis stronger.”⁹

Given the negative impacts of COVID-19—particularly on women and minorities—corporate America finds itself at a pivotal crossroads, with the opportunity to accelerate progress that previously “proved painfully slow.”¹⁰ For survival, we must navigate, innovate, and reimagine with pragmatism and empathy.¹¹

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More diverse companies are more likely to outperform financially.¹² For instance, companies with at least one female director have proven to outperform significantly.¹³ “Having a greater proportion of women in senior positions is not just a diversity score to target or a box to be ticked, but is associated with a lower cost of equity, stronger share-price performance and lower volatility of shares, too. Good news for corporations, investors and society.”¹⁴

Our legal profession’s endeavors must parallel such boardroom initiatives.¹⁵ The American delivery of justice also has been indelibly affected and “2020 will be remembered as a galvanizing moment in the maturity of legal systems across America.”¹⁶ Albeit focused on the “gender gap in law,”¹⁷ Burford’s Equity Project exemplifies a pragmatic initiative to close the gap “by providing an economic incentive for change through a \$50 million capital pool earmarked for financing commercial litigation and arbitration matters led by women.” No doubt, the economics of law must change in order to spur any real change.¹⁸

“Parity is powerful. This is the time for policy makers and business leaders to step up and make it a reality”¹⁹ in the boardroom, the courtroom, and every room. We must act now to seize this moment of opportunity to create the new normal. As Sylvester Turner, the mayor of the prophetic²⁰ city of Houston advocates, “Diversity is descriptive. Inclusion is intentional.”²¹ **TBJ**

NOTES

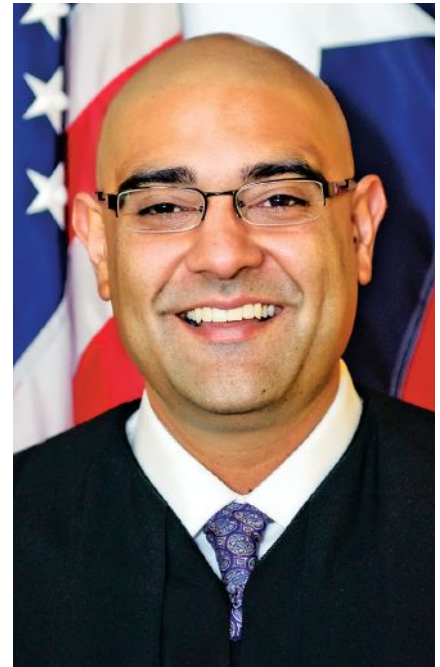
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PERSPECTIVES FROM ASIAN JUDGES

A look at judgeship, the pandemic, and diversity.

WRITTEN BY REHAN ALIMOHAMMAD AND JEFF LEUNG

One of the first Asian American males to serve as a justice in Texas, Justice David Chew, was sworn in to the 8th Court of Appeals in El Paso in January 1995. Since then, not that many Asians have chosen the path of judgeship. Studies suggest that Asians comprise 5% of the population of Texas. However, out of approximately 4,000 judges in the state, less than 1% are of Asian descent. Judge Linda Chew, of the Texas 327th District Court; Judge Tina Clinton, of the Dallas County Criminal District Court No. 1; and Judge R.K. Sandill, of the 127th Civil District Court, shared their experiences as judges and their perspectives on diversity and recent events.

Chew is part Asian and part Mexican. Her father was in Mexico due to the Chinese Exclusion Act, which was

supposed to ban Chinese immigration into the U.S. for 10 years but was continuously renewed until the mid-1940s (thereafter, a limited number of Chinese citizens were allowed to immigrate per year). There, he met Chew's mother, and they immigrated later to the U.S. as entrepreneurs.

Clinton was proud to say that "English is my second language." She was born in South Korea, and at the age of 4, her father received an offer to come to the United States for a job in Maryland. Her parents took the position thinking "that would be an opportunity to better their lives and to help their family." She still remembers the man who sent the employment offer fondly and appreciates the great impact it had on her life.

ABOVE FROM LEFT: Judge Linda Chew, Judge Tina Clinton, and Judge R.K. Sandill
PHOTOS COURTESY OF JUDGE LINDA CHEW, JUDGE TINA CLINTON, AND JUDGE R.K. SANDILL

Sandill was born to Indian parents in Toronto, Ontario, Canada. He spent his childhood in India, Canada, and England on a variety of military bases as his father served in the U.S. Armed Forces for 28 years. In 2009, he became the first district court judge in Texas of South Asian descent.

The judges agreed that the number of Asians in the legal community might not increase. “Being an attorney is not prized in our community ... becoming an engineer or a medical doctor is more appealing to Asians,” said Sandill, who also noted that he believes Asians shy away from controversy, which is inherent in litigation. Chew, however, credited her late father for her wanting to become a judge, when he taught her: “If you want to be a lawyer, that’s great ... prepare yourself to become a judge.” Her mother, who died in her 30s, also wanted her daughter to become a lawyer, and they would discuss topics such as the death penalty at the dinner table. For Clinton, she credited her decision to some really good mentors who invested time in her during her law school years.

They all agreed that diversity is vital in the legal profession. “Texas is a minority-majority state. We need the diversity in the legal profession to reflect our community ... diversity makes the judicial system very well in tune with the people who live within the jurisdiction,” Sandill said. “Diversity is important because the personalities of the judges influence the case, and having diversity on the bench could look at an issue from various angles,” Clinton said. “People that come to the court need to see someone who looks like them ... it gives you a comfort level to see people who look like you,” Chew said. “Being a minority gives you different values and experiences. It is important to my clients or people to feel comfortable with us ... people will feel that they are understood.”

To increase the awareness and mindfulness of diversity and disparity among legal professionals in Houston, effective September 1, 2021, Sandill will require anyone seeking appointments from his court to have completed 6 hours of CLE in mindfulness, bias, and decision accuracy training. All of Harris County’s county courts have now adopted the same rule. He will not stop there, as he has petitioned the past two years to require bias training for all Texas judges.

Clinton called the recent rise of hate crimes toward Asians concerning. “I know the opportunity is not only for us to make sure our community is safer for everyone but also for the next generation,” she said. “I don’t want our kids to live in that kind of hate.” The judges agreed that hatred and objectification toward Asians are deeply rooted in this country. From “yellow peril” in the 19th century, to the Chinese Exclusion Act, to the Japanese internment camps, Clinton said this cannot be tolerated. “Asians are the silent minority, and we are easy to pick on,” Sandill said. “Asians are known as the model minority. They work hard but also don’t raise a fuss.” As a solution, the judges encouraged Asians to participate in elections to have their voices heard. “We owe a

lot to the African American community for showing us how to evolve. Being a ghost is not an option,” Sandill said.

Although many view the COVID-19 pandemic negatively, Sandill said the pandemic has impacted the judicial system positively and has helped diversity. “Zoom hearings have made the courts open to many who couldn’t come to the court before ... it heightens the connectivity because everyone is comfortable, everyone is in their safe space, and because of that, hearings are much more conversational rather than adversarial,” Sandill said. “Lawyers are much nicer to each other on Zoom compared to in person ... all the technical difficulties and failures help build rapport and empathy during trials when all parties are trying to work it out together,” Sandill said. “Zoom lets you meet people where they are.”

For those who want to become judges, Sandill advised lawyers and law students to not take judgeship lightly. “Get lots of good experience first to prepare to be a judge,” Chew said. “Have a plan, find good mentors, follow the plan, go get it,” Clinton said. “Don’t sweat the small stuff; they call it the practice of law for a reason. You will never get it 100% right. You get paid to make decisions,” Sandill said. Chew concluded the interview by sharing a quote by Shirley Chisholm: “If they don’t give you a seat at the table, bring a folding chair.” **TBJ**



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JEFF LEUNG

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Optimistic About the Future

State Bar of Texas President Sylvia Borunda Firth on creating opportunities.

INTERVIEW BY PATRICIA BUSA McCONNICO

One morning when she was a small child, Sylvia Borunda Firth, carrying her lunchbox, walked toward the front door of the school where one of her relatives attended, pretending to be a student. A nun met her and asked what she was doing. Borunda Firth explained that she really wanted to go to school but her mother said she couldn't because she was too young, not even 5 years old yet. The sister had a few words with Borunda Firth's mom, and shortly afterward, Borunda Firth was enrolled in kindergarten. Somehow that determined little girl knew that education was the door to opportunity. She never looked back—and has continued to learn, be curious, and create educational opportunities for others.



Born and raised in El Paso, Borunda Firth—along with her two sisters—attended an all-female Catholic school from kindergarten through high school run by the Sisters of Loretto. The nuns became her mentors, instilling in her the importance of service to the community and social justice. Although she didn't really know any attorneys, Borunda Firth knew from an early age that she wanted to be a lawyer and help people like the ones she saw on television. Her teachers told her she needed to be able to read and write well, so that's what she focused on, reading voraciously and writing short stories and essays for fun.

By the time she graduated from high school, she had dreams of being in-house corporate counsel in a big city. She enrolled in St. Mary's University in San Antonio, majoring in business administration, and flourished, graduating with magna cum laude distinction and learning that if she could keep her eye on the prize, she could achieve any goal. "I was motivated to do well in college because I had my eye on law school," Borunda Firth said. "There were many other students who had set a similar goal but most of them were in the more 'traditional' pre-law degree plans like criminal justice or political science. I learned then, I was always going to be a little different."

Next Borunda Firth moved to Austin to attend the University of Texas School of Law, where she found the critical thinking and analysis necessary to succeed stimulating. She also met her future husband, Victor Firth, on the first day of class. After law school, the couple moved to El Paso, where Borunda Firth has worked in numerous practice areas and various settings, from a two-person group and in-house counsel for a large corporation to municipal law and her own solo practice.

Borunda Firth was sworn in as president of the State Bar of Texas at the Texas Supreme Court in a ceremony broadcast as part of the bar's virtual annual meeting on June 18, 2021. Borunda Firth recently talked with the *Texas Bar Journal* about her career, creating opportunities, and her plans as president of the State Bar.

WHAT LESSON OR EXPERIENCE HAS MOST IMPACTED THE WAY YOU PRACTICE?

Remember, I have always been a transactional lawyer so the lessons I have learned and use every day are likely very different from a litigator. My first mentor-boss, Merton Goldman, told me that clients came to us because they wanted us to help them accomplish something. While it is always our primary objective to protect the interests of the client and to negotiate to secure the best outcome possible, it is not our place to "get in the way of the deal." Merton told me that I wanted to have the reputation of being a lawyer who can get the deals done—not someone who blows things

up by over-lawyering. I always keep that in mind. In my 37 years of practicing law, I can honestly say that it has been a rare occasion when I was not able to negotiate a good outcome if the lawyer on the other side of the deal was like-minded.

YOU HAVE WORKED IN NUMEROUS PRACTICE AREAS AND VARIOUS SETTINGS. WHAT ARE YOUR KEY TAKEAWAYS FROM THOSE EXPERIENCES? HOW WILL THEY HELP YOU AS STATE BAR PRESIDENT?

Because my practice has been so varied, I have a broad perspective of the types of challenges lawyers face. Common sense tells us that the day-to-day issues faced by a lawyer in a large firm are not the same as those a solo practitioner in a rural part of the state deals with. I know what it is like to work in a firm chasing billable hours while trying to maintain work-life balance. Similarly, I now know what it is like to be a true solo lawyer hoping for good paying clients and interesting work. While I have never been a litigator, I have had substantial experience managing litigation, supervising trial attorneys, acting as a corporate representative at trial, and working through mediations. When I help form State Bar policy and make decisions, those decisions will be informed by those experiences.

YOU CAMPAIGNED ON THE POSITION THAT BAR LEADERSHIP SHOULD MORE ACCURATELY REFLECT THE DEMOGRAPHIC MAKEUP OF THE 21ST-CENTURY LEGAL COMMUNITY. AS PRESIDENT-ELECT YOU ESTABLISHED TWO INITIATIVES, AN SBOT FOCUS ON DIVERSITY LISTENING SESSION AND A TASK FORCE ON DIVERSITY, EQUITY, AND INCLUSION. TELL US MORE ABOUT THIS AND WHY IT IS IMPORTANT TO YOU.

Lawyers and the public should see State Bar leaders diverse in gender, race, ethnicity, gender identity and orientation, practice areas, and geography. The legal profession is lagging behind other businesses and industries in recognizing the value of diversity and inclusion, so we need to focus our attention on correcting that deficiency. I would like to continue the work that has been done by the bar to this point with a new emphasis.

I am not talking about going through the motions of recruiting people of diverse backgrounds just for appearances, or because it is politically correct to do so. I am looking for recognition that there is value in hearing divergent points of view from people whose life experiences are varied. The bar will become more relevant and effective as the seats around the table are filled with lawyers from different walks of life in positions of leadership. Lawyers will be more comfortable with the idea of volunteering to serve as a bar leader if they see people who look like them in leadership.

I am encouraged by the recent engagement of lawyers from across the state. We have seen unprecedented numbers participating and monitoring our meetings. We had a record number of people apply to be an at-large director.

OPPOSITE: PHOTO BY ADRIANNE RILEY PHOTOGRAPHY



LEFT: Sylvia Borunda Firth at the University of Texas School of Law Sunflower Ceremony in 1984.

MIDDLE: Borunda Firth with her nieces Aria Borunda (left) and Lauren Crusoe in 2002.

RIGHT: Borunda Firth with her husband, Victor Firth.

PHOTOS COURTESY OF SYLVIA BORUNDA FIRTH

LeadershipSBOT continued during the pandemic, and the program has produced a good group of potential future leaders. When making my committee appointments, I made sure to tap these folks to keep them engaged with the State Bar at some level. I spoke to people who have been serving on committees for a long time about stepping aside and creating leadership opportunities for others all while staying on board to mentor. Lawyers graciously agreed to work with me on these issues.

I am optimistic about the future. We only have to look at the leadership in the Texas Young Lawyers Association to see that recently licensed lawyers have figured it out. We are stronger as an organization when we embrace the differences.

WHAT OTHER AREAS WILL YOU BE FOCUSING ON THIS YEAR AS STATE BAR PRESIDENT?

We will need to focus on helping lawyers recover from the negative effects of the pandemic. Immediate Past President Larry McDougal formed a work group to study ways in which the bar can be of assistance. I look forward to those suggestions. We also need to preserve the efficiencies that were gained as we learned to work remotely.

While we examine the positive outcomes from the use of technology, I also want to focus on the areas of the state that are underserved by lawyers. While I was campaigning, lawyers told me of places away from the major metropolitan areas where there are just not enough lawyers to serve the needs of the people. In far West Texas, there is a dire need for criminal defense lawyers. In small rural communities, there are no “main street” lawyers.

I have been talking to faculty and staff at the SMU Dedman School of Law Deason Criminal Justice Reform Center regarding the STAR (Small, Tribal, and Rural) Criminal

Justice initiative to determine if that program can be a tool to assist with recruiting and keeping lawyers in areas in the state where they are sorely needed. The Texas Opportunity & Justice Incubator and the Dallas Bar Association incubator program “Entrepreneurs in Community Lawyering” may also be resources to replicate and expand in more rural areas. I am not ready to announce an initiative to address this problem, but I will work on it during my time as president.

Legal services for Texas veterans are another one of my priorities. I have spoken to past State Bar President Terry Tottenham regarding the work he did to establish Texas Lawyers for Texas Veterans and lawyers who are veterans themselves to look for ways we can expand on the programs and support the good work done by the Military and Veterans Law Section.

WHAT HAVE YOU FOUND MOST CHALLENGING ABOUT BEING A LAWYER? MOST REWARDING?

I think work-life balance is a challenge for most lawyers. It is difficult not to get totally consumed by your practice to the detriment of your family, personal relationships, and your health. The practice of law is intellectually stimulating and never boring. It is always rewarding when you complete a project and were able to be of assistance to someone else.

WHAT DO YOU THINK THE LEGAL PROFESSION WILL LOOK LIKE 50 YEARS FROM NOW?

Everything I have read indicates the future is bright for lawyers. There is projected steady growth in the need for legal services. The question becomes how will technology and developing artificial intelligence change the way the lawyers of tomorrow practice? During the pandemic, the legal profession has proven its ability to adapt and thrive during unprecedented circumstances. I have every confidence the profession will adjust to whatever the future holds. **TBJ**

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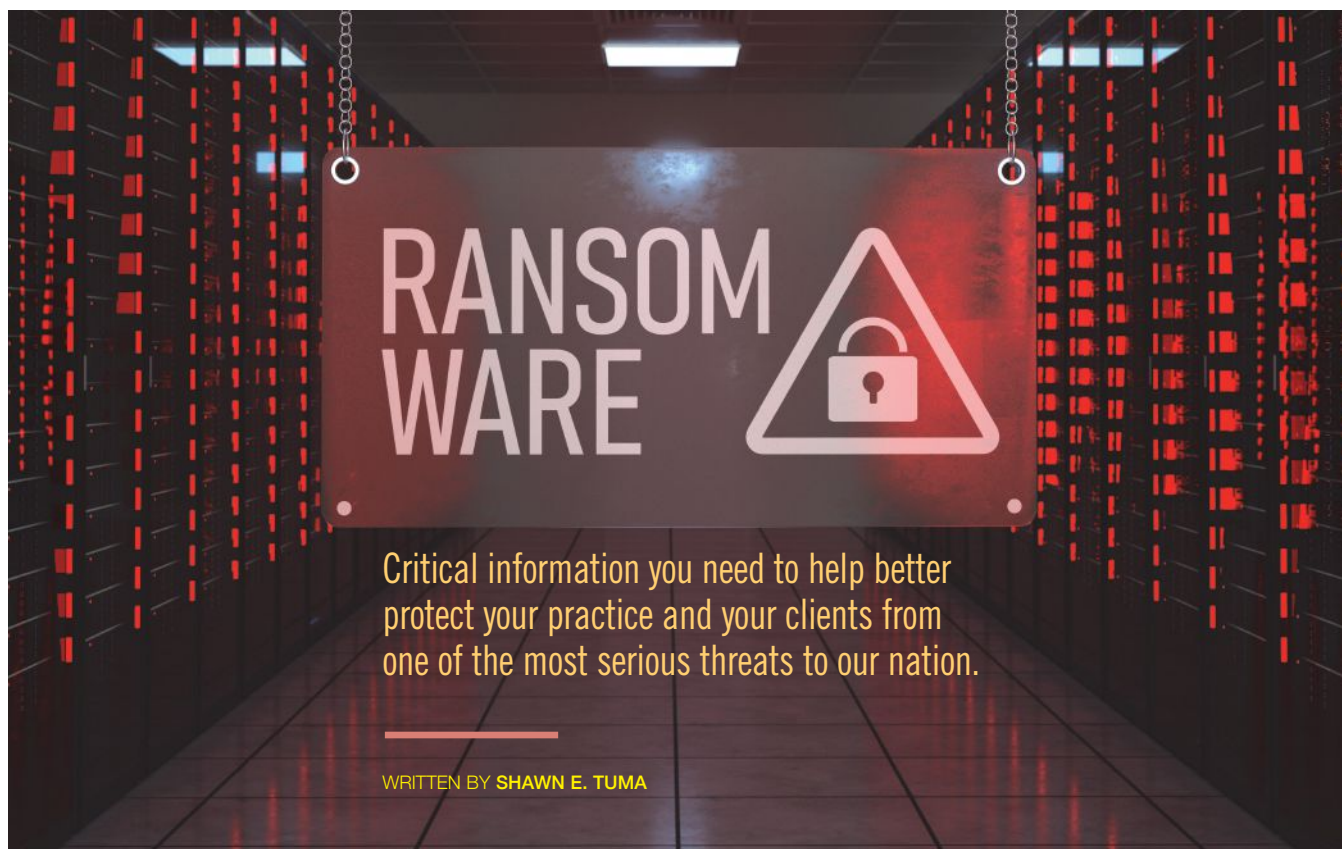
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Ransomware cyberattacks are the greatest existential threat that organizations in the United States face today. These organizations include your law practice as well as your clients—the two most important things to your own livelihood. This is serious. Ransomware literally shuts down operations within moments of the attack—often overnight.

This threat is so serious that in June 2021, the U.S. Department of Justice, or DOJ, announced that it will be treating ransomware with the same level of priority that it treats terrorism¹ and the White House issued a memo to all corporate executives and business leaders with the subject “What We Urge You To Do To Protect Against The Threat of Ransomware.”² This is the first time such a memo has ever been issued. That is how serious the threat of ransomware attacks is to our nation.

In this article I summarize information from the DOJ;³ U.S. Cybersecurity & Infrastructure Security Agency, or CISA;⁴ Coveware;⁵ SpearTip;⁶ Tetra Defense;⁷ and my own experience leading numerous organizations through the ransomware recovery and response process. Coveware, SpearTip, and Tetra Defense are three of the trusted cybersecurity vendors our firm’s cyber incident response team uses for gathering intelligence about and negotiating with ransomware threat actors, recovering from ransomware attacks, and protecting against future attacks. Due to space limitations, I only hit the high points and do so without direct citation to the sources, but I strongly encourage you to analyze each of the sources referenced.

What is ransomware?

Ransomware is malicious software, or malware, that threat actors use to encrypt your data and deny you access to it until a ransom is paid. With ransomware, the threat actors do not care how intrinsically valuable your data may be—they know that it is valuable to you and if they can keep you from having the ability to use it, you will pay to get it back. The best way to circumvent a successful ransomware attack is to have viable backups of your data that can be restored quickly. Threat actors know this so, when they gain access to your environment, one of the first things they will do is search for your backups and either encrypt them or forensically delete them so they cannot be recovered.

While threat actors initially used encryption for leverage, they have evolved in their tactics. In many cases today, the threat actors will not only encrypt your data, but also steal your data and use a second level of extortion by threatening to publish the data if the ransom is not paid.

Who is at risk from an attack?

Every type of organization with a computer connected to the internet is at risk. This ranges from global enterprises down to small “mom and pop” shops, in every type of industry and of every level of sophistication. Coveware’s latest study notes that *the most notable change observed in Q1 of 2021 was an increase in attacks on the professional services industry, specifically law firms.*

What is the impact on your organization if you get hit?

The consequences of a successful ransomware attack on

important systems in your organization are that you immediately lose access to those systems and whatever operations they control are shut down. This often means a complete shutdown of your organization. In some cases, these interruptions are overcome quickly, such as when an organization has viable backups of its data that can be restored. When your organization does not have viable backups, you face being shut down for days, weeks, or maybe forever. The encryption used in ransomware attacks cannot be broken and, when your organization does not have viable backups of your data, you are faced with a Hobson's choice of only two options of negotiating with and paying the threat actor for the decryption keys or not recovering your data and not restoring your operations.

How much are organizations having to pay in ransom payments?

In Q1 of 2021, the average ransom payment alone was \$220,298 and the median payment was \$78,398. In addition to the payment, your organization will face other losses such as the lost profits from a business interruption, reputational harm, costs associated with negotiating, remediating, and investigating the attack. Then come the costs of complying with legal and regulatory obligations that may be triggered by such attacks, which include notifying individuals and reporting to regulators. If you find yourself in this situation you had better have cyber insurance that will cover these losses.

What are the most common methods the threat actors use to carry out these attacks?

The most common attack vectors that threat actors are consistently using are remote desktop protocol, or RDP, compromise, email phishing, and unpatched software vulnerabilities. Having vulnerable services and systems that face the public internet are among the most common ways threat actors can gain a foothold in your network. In most cases they are not looking for your organization in particular—they use scanning tools that can find any computer in a certain area that has a vulnerability that they know how to exploit. Once they find these computers, they begin exploiting the vulnerabilities and gaining access to the networks. Only then will they discover whose network they have compromised.

How can your organization better protect itself?

In order to better protect your organization, you should focus on addressing at least the following issues, which are by no means exhaustive, but are a good place to begin:

- Perform a risk analysis to better understand your organization's greatest risks—you cannot mitigate what you do not know exists.
- Backup your data, system images, and configurations,

regularly test them, and keep at least one copy of the backups offline. Consider the “3-2-1 backup rule.”

- Encrypt all sensitive data to ensure that if it is stolen, its confidentiality is not compromised.
- Update and patch your systems promptly, especially external-facing systems. Configure automatic updates on workstations and laptops where feasible.
- Require multi-factor authentication, or MFA, for every login for something important, especially external-facing systems and services. MFA is using two steps to log in instead of just one.
- Require cybersecurity and phishing training and exercises for all members of your organization, especially senior leadership.
- De-escalate privilege to the minimum necessary on user accounts, especially for high-value target users such as executives, accounting, and human resources and for vendor access.
- Use a reputable firewall that is configured to block access to known malicious IP addresses.
- Use a reputable endpoint detection and response, or EDR, solution.
- Identify external-facing systems by looking up IP addresses and DNS subdomains for your organization.
- Block public access to the services RDP, Secure Shell, Telnet, and file transfer protocol, or FTP.
- Perform vulnerability scans against external-facing systems.
- Have a security team and check their work.
- Have an incident response plan and business continuity plan and regularly exercise both.
- Segment your networks.
- Choose third-party service providers that are dependable and secure. **TBJ**

NOTES

1. See Christopher Bing, *U.S. to give ransomware hacks similar priority as terrorism*, Reuters (June 3, 2021 6:50 PM), <https://www.reuters.com/technology/exclusive-us-give-ransomware-hacks-similar-priority-terrorism-official-says-2021-06-03/>.
2. See Shawn E. Tuma, *Five Best Practices the White House Urges all Businesses to Take to Mitigate Risk of Ransomware Attacks*, Spencer Fane (June 3, 2021), <https://www.spencerfane.com/publication/five-best-practices-the-white-house-urges-all-businesses-to-take-to-mitigate-risk-of-ransomware-attacks/>.
3. RANSOMWARE: What It Is and What To Do About It, U.S. Dept. of Justice, <https://www.justice.gov/criminal-ccips/file/872766/download>.
4. Ransomware Guidance and Resources, Cybersecurity & Infrastructure Security Agency, <https://www.cisa.gov/ransomware>.
5. Ransomware Attack Vectors Shift as New Software Vulnerability Exploits Abound, Coveware, <https://www.coveware.com/blog/ransomware-attack-vectors-shift-as-new-software-vulnerability-exploits-abound>.
6. Caleb Boma, *Ransomware You Probably Didn't Know About*, SpearTip (June 12, 2020), <https://www.speartip.com/resources/a-ransomware-you-probably-didnt-know-about/>.
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USING INTENSIFIERS

Is it literally a crime?

WRITTEN BY WAYNE SCHIESS

As a legal writer, as a paid persuader, you might be tempted to use intensifiers to bolster your points—to persuade. What’s an intensifier? It’s a “linguistic element used to give emphasis or additional strength to another word or statement.”¹

Examples of intensifiers?

Intensifiers can be various parts of speech: adverbs (*clearly*), adjectives (*blatant*), participles (*raving*), and more. For legal writers generally and for brief writers particularly, the most commonly used intensifiers tend to be adverbs ending in *-ly*:

blatantly
certainly
clearly
completely
extremely
highly
obviously
undoubtedly
wholly

But if you consult writing experts, you’ll see that intensifiers get a lot of bad press, and *clearly* is king:

- [*Clearly*] is so overused in legal writing that one has to wonder if it has any meaning left.²
- Doctrinaire adverbs such as *clearly* and *obviously* are perceived as signaling overcompensation for a weak argument.³
- [*C*]learly lulls legal writers into a false sense that they’ve given substantive, persuasive reasons for a legal conclusion.⁴

An entire article could be written on *clearly*—and has been.⁵

Other intensifiers get fair criticism, too:

- When most readers read a sentence that begins with something like *obviously*, *undoubtedly*, ... and so on, they reflexively think the opposite.⁶
- When you cut the intensifier, your phrasing usually gains intensity.⁷
- Perhaps it’s counterintuitive, but intensifiers ... tend to weaken prose, not intensify it.⁸

In fact, a recent law review article suggests that overusing intensifiers is bad—*very bad*. In a study of U.S. Supreme Court briefs, the authors found that increased intensifier use was correlated with losing, especially for appellants.⁹ The authors allege no causal connection—they couldn’t prove that the intensifiers had lost the cases—but the correlation is interesting.

What to do about intensifiers

Let’s explore the downsides of intensifiers as we consider what we should do instead. Here are six suggestions.

1. Cut intensifiers.

It may be counterintuitive, but intensifiers often weaken prose. A sentence usually gets stronger without the intensifier. Which of these is more forceful?

- 1a. Clearly, an attorney is not an expert on what a “Doberman” is, and there is no showing in the affidavit that Squires is an expert on Dobermans. It clearly is a fact issue for the trier of fact.
- 1b. An attorney is not an expert on what a “Doberman” is, and there is no showing in the affidavit that Squires is an expert on Dobermans. It is a fact issue for the trier of fact.

For me, the second example is stronger.

Dropping intensifiers doesn’t always work, and you can’t completely banish them. Some legal standards require them:

clearly erroneous
highly offensive
egregious harm
substantially outweigh

Legal writing entails some qualifying, but good legal writers develop a sense for when they're appropriately qualifying and when they're blatantly bolstering.

2. Replace intensifiers.

With some thought, you can delete an intensifier-plus-verb or an intensifier-plus-noun and replace the phrase with a single forceful word. So—

very small → *tiny*
very sure → *certain*
extremely smart → *brilliant*
very large → *massive, sizable*
quickly went → *hurled, sped, rushed*
highly capable → *accomplished, proficient*
completely wrong → *inaccurate, incorrect, mistaken, unsound*

Again, develop an editorial sense. Replacements don't always work; sometimes a single-word option is loaded. If instead of *very bad* you write *terrible* or *dreadful*, you might interject undesired subjectivity or emotion.

3. Specify instead of intensifying.

Intensifiers are often vague. Rather than rely on a vague intensifier, you might use details to emphasize. Here's a classic example:

- 3a. It was very hot.
- 3b. It was 103 degrees in the shade.

Here's another example. The original uses an intensifier, but the revised version specifies. It also uses two other persuasion techniques: a dash and a sentence that ends with key words:

- 3c. The transaction at issue obviously did not take place at Eason's residence.
- 3d. Lubbock detectives set up a controlled purchase with a cooperating defendant at Jay's Auto Body. It was there that Eason handed over a bag of methamphetamine— not at Eason's residence.

As you can see, specifying takes more words, and so, as with all writing, you must exercise editorial judgment. Weigh the longer, specific description against the shorter, vaguer, intensified one.

4. Use a dash instead.

As we saw in the last example, the dash can be an effective persuasive-writing aid. In *The Redbook*, Bryan Garner calls the dash "a forceful and conspicuous punctuation mark."¹⁰ The dash is flexible—it can replace a comma, a colon, or a semicolon, and a pair of dashes can replace a pair of commas or a pair of parentheses, like this:

- 4a. Calhoun's statement (which was false) sought to incriminate Scoville.
- 4b. Calhoun's statement, which was false, sought to incriminate Scoville.

- 4c. Calhoun's statement—which was false—sought to incriminate Scoville.

In these examples, the inserted text is downplayed with parentheses, is neutral with commas, and is emphasized with dashes. But the dash can emphasize text even when it doesn't replace other punctuation.

- 4d. Obviously, no living witness other than Gregory knows exactly what occurred on the occasion in question.
- 4e. No living witness—other than Gregory—knows exactly what occurred on the occasion in question.

You can also use a single dash to point, and that pointing is emphatic.

- 4e. No living witness knows exactly what occurred on the occasion in question—no one other than Gregory.

The intensifier *literally* in particular

I've got some bad news about *literally*, but I've got some good news, too. First, let's be clear: *literally* means *actually*, or *verbatim*. Yet linguists and others who study language agree: In speech, *literally* has become an all-purpose intensifier like *truly* or *completely*. No doubt you've heard expressions like these:

- The firm is literally printing money.
- We literally bombed them for 52 points.
- I was so scared, I literally died.

These statements flout the literal meaning of *literally*, and to some ears they sound comical—or absurd.

In writing, the trend is the same: *literally* can't be taken ... literally. According to Garner, the figurative use of *literally* is "commonplace even among many well-educated people but is still avoided in careful usage."¹¹ But this commonplace usage, even in writing, isn't recent.

Charles Dickens used *literally* nonliterally in *Nicholas Nickleby* in 1839, and F. Scott Fitzgerald used it in *The Great Gatsby* in 1925. Neither use was in dialogue:

- Dickens: "Lift him out," said Squeers, after he had literally feasted his eyes, in silence, upon the culprit.¹²
- Fitzgerald: He literally glowed.¹³

So it isn't new. Or rare. *Merriam-Webster's Dictionary of English Usage* cites many examples from the 1800s and 1900s.¹⁴ In fact, *Merriam-Webster* suggests that using *literally* in this way is no longer a mistake; rather, it's mere hyperbole—but careful writers should avoid it for that reason. Lawyers, as careful writers, should heed that advice. That's the bad news, and there's not much we can do about it. Words change, language changes, and sometimes they change for the worse.

Now the good news. I wanted to see how lawyers actually use *literally*, and I decided that my best route was to search in appellate briefs. What I found is that lawyers are holding the line on *literally*.

I did a search for the word *literally* in appellate briefs filed in cases before the 3rd Court of Appeals in Austin, the Texas Court of Criminal Appeals, and the Texas Supreme Court. My search returned more than 1,000 hits, and I skimmed dozens of them, ignoring quotations from witnesses or evidence.

I'm happy to report that I couldn't find any genuinely erroneous uses of *literally*. Brief writers are using *literally* when they mean . . . *literally*. So hurray for these:

- "In rejecting a plural use of the term 'employer,' the Court of Appeals interpreted the term literally, giving it a singular construction."
- "The Appellants freely admit that if the terms of the contract are interpreted literally, there is no coverage of any kind provided in this contract."
- "An individual need not literally possess an item at all times in order to be legally in possession of it."

Congratulations, and let's keep it that way. **TBJ**

NOTES

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7. John R. Trimble, *Writing with Style: Conversations on the Art of Writing* 70 (3rd ed., Pearson Education 2011).
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10. Bryan Garner, *The Redbook: A Manual on Legal Style* § 1.51 (3rd ed., West Academic Publishing 2013).
11. Bryan Garner, *Garner's Modern English Usage* 568 (4th ed., Oxford University Press 2016).
12. Charles Dickens, *Nicholas Nickleby* 114 (1839).
13. F. Scott Fitzgerald, *The Great Gatsby* 95 (Charles Scribner's Sons, 1925).
14. *Merriam-Webster's Dictionary of English Usage* 607 (1994).

This article originally appeared in the August 2017 Plain Language column in the Michigan Bar Journal. It has been edited and reprinted with permission.



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PRIORITIES

Choosing venue in the face of conflicting mandatory venue provisions.

WRITTEN BY TRACY C. TEMPLE

Defining venue is relatively simple: venue refers to “the geographic location within the forum where the case may be tried.”¹ Though simple to define, Texas law contains myriad venue statutes that govern where parties must file their claims. Many of these venue provisions are found in Chapter 15 of the Texas Civil Practice and Remedies Code, but other statutes also contain venue provisions.² The Texas Supreme Court recently described conflicting mandatory venue provisions as “a recurrent and perplexing procedural issue.”³

The venue analysis begins with the principle that “[v]enue may be proper under general, mandatory, or permissive venue rules.”⁴ Under mandatory venue rules, there may be multiple counties of proper venue.⁵ The plaintiff establishes the first

choice on venue by filing the lawsuit.⁶ If the plaintiff’s choice is proper, that choice should be honored unless a mandatory venue statute requires venue elsewhere.⁷ If both a permissive and a mandatory venue provision apply to claims brought in a suit, the permissive statute must yield to the mandatory provision.⁸

If two competing mandatory venue provisions apply, courts look for any statutory language or rules indicating a legislative intent to place priority on one provision over the other.⁹ For example, in *In re Fox River*, the court faced the mandatory venue provision found in Section 15.020 of the Texas Civil Practice and Remedies Code applicable to venue-selection agreements in major transactions and the mandatory venue provision found in Section 65.023(a) applicable to injunction suits.¹⁰ The court rejected an argument that Section 15.020 acts as a “super mandatory” venue provision that would control beyond Title 2 of the Texas Civil Practice and Remedies Code, because it was contrary to the statute’s text.¹¹ The text of Section 15.020 expressly provides that the “section does not apply to an action if: ... venue is established under a statute of the state other than this title.”¹² The court clarified language from its decision in *In re Fisher* and emphasized that “section 15.020 means what it says and indicates that the Legislature intended for it to control over other venue provisions within Title 2.”¹³ The court ultimately held that Section 15.020 controlled, but only because it found Section 65.023(a), a venue provision from outside of Title 2, inapplicable to the case.¹⁴ The court in *In re Fox River* noted that venue is a “creature of legislative grace” and that review of venue rulings focuses on whether the venue ruling is “faithful to the venue statute.”¹⁵

Courts will typically apply a mandatory venue provision from outside of Chapter 15 of the Texas Civil Practice and Remedies Code over a mandatory provision arising under Chapter 15 because of the legislative mandate found in Section 15.016. That provision states: “[a]n action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute.”¹⁶ An exception to this rule exists for suits brought against a county. Under Section 15.015 of the Texas Civil Practice and Remedies Code, a suit against a county must be brought in that county, notwithstanding Section 15.016.¹⁷ Absent statutory language or other rule indicating one provision should apply over the other, the plaintiff’s choice of venue will likely be honored.¹⁸

Keep in mind that venue can be a very case-specific question. A few representative examples of courts applying these principles to address conflicting mandatory venue provisions include:

- *In re Fisher*, 433 S.W.3d at 533-34 (concluding that Section 15.020 of Texas Civil Practices and Remedies Code for major transactions applied over Section 15.017 of the Texas Civil Practice and Remedies Code for defamation claims because of language in Section

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15.020 stating it applies “[n]otwithstanding any other provision of this title.”).

- *In re J.P. Morgan Chase Bank, N.A.*, 373 S.W.3d 615, 617-18 (Tex. App.—San Antonio 2012, orig. proceeding) (holding Section 115.002 of the Property Code applied over Section 15.011 of the Texas Civil Practice and Remedies Code because it originated outside of Chapter 15).
- *In re Sosa*, 370 S.W.3d at 81, 82 (basing decision on statutory construction, rather than plaintiff’s choice of venue, in a case involving two provisions originating outside of Chapter 15 and concluding that more-specific and later-enacted statute of mandatory venue for arbitration agreements found in Section 171.096(b) prevailed over mandatory venue for injunction suits found in Section 65.023(a)).

Another related issue involves whether a mandatory venue provision should apply based on the nature of the claims asserted, rather than solely on the way the claims are pleaded. Plaintiffs generally “are free to tailor their pleadings to eschew those claims which would mandate one forum instead of another forum for litigation of those well-pleaded claims.”¹⁹ Nevertheless, parties may argue that a mandatory venue provision should still apply.²⁰ Parties have successfully used this argument under the mandatory venue provision found in Section 15.011 for interests in real property.²¹ “It is the ultimate nature or purpose of the suit that determines whether a particular case falls under the mandatory venue statute, and not how the cause of action is described by the parties.”²²

In sum, when facing more than one mandatory venue provision, courts will look for any legislative guidance or rules on which provision should apply. Because venue is a matter of legislative grace, the inquiry on appeal will focus on whether the venue ruling held true to the language of the venue statute. Absent any applicable statutory language or rule indicating priority between competing mandatory venue provisions, the plaintiff’s choice should establish proper venue. **TBJ**

NOTES

1. *In re Hannah*, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam) (internal quotations omitted).
2. See generally Michol O’Connor, *O’Connor’s Texas Rules Civil Trials* Ch. 2-H, 4 (2020) (listing mandatory venue provisions found in Chapter 15 and a number of mandatory venue provisions found elsewhere).
3. *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d 759, 761 (Tex. 2020) (orig. proceeding).
4. *Perryman v. Spartan Tex. Six Cap. Partners, Ltd.*, 546 S.W.3d 110, 130 (Tex. 2018).
5. *Id.*
6. *Id.*
7. *Id.*; see also Tex. Civ. Prac. & Rem. Code § 15.001(a), (b) (defining proper venue as the venue required by mandatory provisions or, if no mandatory provisions apply, the venue provided by permissive venue provision).
8. *Perryman*, 546 S.W.3d at 130.
9. See *Perryman*, 546 S.W.3d at 132-33 (looking to statutory language and rules of civil procedure for intent of Legislature); see also *In re Fisher*, 433 S.W.3d 523, 533-34 (Tex. 2014) (orig. proceeding); *In re Sosa*, 370 S.W.3d 79, 81 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding) (holding that if two mandatory provisions apply, both

from outside of Chapter 15, then the court should resolve conflict by statutory construction rather than plaintiff’s choice).

10. 596 S.W.3d at 762.
11. *Id.* at 764.
12. Tex. Civ. Prac. & Rem. Code § 15.020 (d)(3).
13. 596 S.W.3d at 764 (emphasis added).
14. *Id.* at 768.
15. *Id.* at 763.
16. Tex. Civ. Prac. & Rem. Code § 15.016; *In re San Jacinto Cty.*, 416 S.W.3d 639, 641 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding).
17. See *In re Fort Bend Cty.*, 278 S.W.3d 842, 844-45 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).
18. See *Perryman*, 546 S.W.3d at 133 (“Similarly, holding here that the third-party-venue provision controls over other mandatory venue provisions gives effect to both provisions while honoring the general rule that the plaintiff makes the first choice of appropriate venue.”).
19. *Prosperity Energy Corp. v. Terfam Family Ltd.*, No. 13-15-00184-CV, No. 13-15-00234-CV, 2015 WL 3946553 at *7 (Tex. App.—Corpus Christi-Edinburg, orig. proceeding) (mand. denied) (mem. op.).
20. See *id.* at *6.
21. See, e.g., *In re Applied Chem. Magnesias Corp.*, 206 S.W.3d 114, 119 (Tex. 2006) (dispute involved indirect means of quieting title to the mineral estate in the Marble Canyon land.”); *Renwar Oil Corp. v. Lancaster*, 276 S.W.2d 774, 776 (Tex. 1955).
22. *In re Harding*, 563 S.W.3d 366, 371 (Tex. App.—Texarkana, orig. proceeding).



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2020-2021 STATE BAR OF TEXAS

COMMITTEE REPORTS

Committee reports are included in the July/August issue of the *Texas Bar Journal* to update Texas lawyers on State Bar activities. The reports do not necessarily reflect the position or official policy of the State Bar of Texas, which is formulated by the State Bar Board of Directors or by the membership through referendum. For more information or to complete a Committee Volunteer Interest Form, go to texasbar.com/committees or call 800-204-2222, ext. 1516.

ADMINISTRATION OF RULES OF EVIDENCE

Johnathan Stone, Chair

The Administration of Rules of Evidence Committee evaluates the Texas Rules of Evidence to ensure they are internally consistent, match the actual practice of law, and track the Federal Rules of Evidence. This bar year, the committee recommended revising the language in Rule 404 to make disclosure of the evidence prosecutors intend to rely on at trial mandatory and no longer only available upon request by a defendant. It also recommended expanding the allied litigants' privilege in Rule 503 to include communications concerning matters of common interest in related pending and anticipated actions. The committee is considering recommendations revising the physician-patient and mental health information privileges in Rules 509 and 510, the dead man's rule in Rule 601, and the ancient documents exception in Rule 803(16). The committee created a subcommittee to liaise with the Court Rules Committee on matters of mutual interest. It also formed new subcommittees investigating Rules 503(a)(5) (exceptions to confidential communication), 614 (exclusion of witnesses), and a Texas Lawyers' Assistance Program privilege.

ADVERTISING REVIEW

Al Harrison, Chair

The Advertising Review Committee had been working on preparing for two landmark events. With the passage of the new rules as of the 2021 Rules Vote, it will be the first time since the advertising rules were enacted that they have been completely revised. One of the main changes is that the absolute prohibition on trade names is rescinded. Trade names are allowed as long as they are not false and misleading. The ARC will be coming out with an interpretive comment on trade names next bar year. One of the other major departures from the current rules is that the disclosure language for past successes and results is no longer a requirement. There is also language in the new rules that addresses the use of social media and solicitation communications. The other landmark

event is the new Advertising Review Department database, which allows attorneys to file their advertisement or solicitation communication electronically from their My Bar Page. Additionally, staff will be able to denote the violation and any other recommendation or explanation on the submission. The submitter will be able to receive an email back from the Advertising Review Department and be able to view the violation electronically and submit any changes.

ANNUAL MEETING

Due to the ongoing pandemic, the 2021 Annual Meeting scheduled for June 17-18 in Fort Worth was canceled. Instead, a virtual Annual Meeting took place. With more than 25 informative learning sessions of up to 10 hours of video on demand CLE, this year's meeting featured programs for everyone, from the first-year associate to the seasoned professional. State Bar sections provided practice-specific programs, including Computer & Technology: Being an Adaptable Lawyer; Legislative updates and programs on diversity and inclusion; General Practice, Solo & Small Firm; and Family Law. Friday's programming included parting remarks from 2020-2021 President Larry McDougal and 2020-2021 Texas Young Lawyers Association President Britney Harrison, the swearing in of 2021-2022 President Sylvia Borunda Firth and 2021-2022 TYLA President Jeanine Novosad Rispoli, and a brief presentation of awards. Be sure to mark your calendars for the 2022 Annual Meeting on June 9-10 in Houston.

CONTINUING LEGAL EDUCATION

Scott Rothenberg, Chair

The Continuing Legal Education Committee met with the State Bar Board of Directors' Professional Development Subcommittee and bar staff to propose topics for CLE programs and to discuss issues facing TexasBarCLE and Texas Bar Books. TexasBarCLE is proud to have been able to transition live courses, programs, and institutes to webcasts over the past year. As a result, TexasBarCLE continues to

be the go-to source for CLE for Texas attorneys. TexasBarCLE continues to offer free programming to help Texas attorneys advise and represent their clients in the areas needed most—force majeure due to COVID-19, claims arising out of freezes and power outages, implicit bias, lawyer well-being during COVID-19, evictions, the Paycheck Protection Program, and dealing with depression and suicide. Texas Bar Books launched a new website called texasbarpractice.com, which serves as the new platform for Texas Bar Books and the Law Practice Management Program. The new website offers lawyers a single place to explore free practice management content; shop for practice manuals, jury charges, deskbooks, and reference guides; and subscribe to online practice manuals with downloadable forms. Scholarships are available for all CLE programs and Texas Bar Books publications.

COURTS RULES

Robert Burns, Chair

Since the last report, the committee has worked on several proposals that are being submitted to the Texas Supreme Court for consideration, including additions to the Texas Rule of Civil Procedure 226a, relating to implicit bias jury instructions; an addition to TRCP 199.2(b)(1), requiring before or shortly after a notice is served for the deposition of an organization that the server and the organization confer in good faith about the matters for examination and any documents requested to be produced; an addition to the new TRCP 192.2(a), prohibiting a party from serving discovery until after initial disclosures are due; and a revision to Texas Rule of Appellate Procedure 49.7, clarifying the timing for filing and content of a motion for en banc reconsideration, along with a suggested explanatory comment. The committee is also considering new rules to address proper procedures for remote discovery, hearings, and trials.

DISABILITY ISSUES

Sean Pevsner, Chair

Over the past year, the Disability Issues Committee educated members of the bar and the public on legal issues

facing Texans with disabilities. The committee invited guest speakers to discuss issues in disability rights law. The committee collaborated with these speakers to plan CLE activities on supported decision-making and FHA and *Olmstead* rights cases. Additionally, the committee is developing programs for disabled veterans' benefits and law school education. The mental health subcommittee invited the Texas Lawyers' Assistance Program to speak at a quarterly meeting and provide insight on the TLAP's capacities in relation to mental health conditions and substance use issues. The subcommittee seeks to use this information in future projects. The committee continues to correspond with Texas courthouses regarding compliance with Title II of the Americans with Disabilities Act. Collaborating with state courts, the committee aims to ensure court personnel are providing reasonable accommodations, such as sign language interpreters and accessible documentation, to people with disabilities who attend court hearings.

DIVERSITY IN THE PROFESSION

Tracy C. Almanzan, Chair

The Diversity in the Profession Committee continues to enhance opportunities for attorneys from diverse backgrounds and to increase their participation in State Bar of Texas activities. A committee goal for 2020-2021 was to increase funding for the bar prep scholarship program and to award more recipients with these scholarships. The committee received a \$15,000 grant from the Texas Bar Foundation and obtained several vouchers from BARBRI, Themis, and Kaplan. In 2018-2019, the committee awarded five scholarship recipients with vouchers from bar prep companies; in 2019-2020, the committee awarded over \$20,000 to more than 20 Texas law students; and this year, the committee awarded over \$26,750 to 15 law students taking the Texas Bar Exam. In October 2020, the committee supported the annual Texas Minority Counsel Program that provided continuing education, client development training, and networking opportunities. The

committee also hosted the Texas Minority Law Student Program at Texas Tech University School of Law. Additionally, the committee conducted an outreach program for K-12 students in San Antonio. Finally, the committee also submitted articles related to diversity to be included in issues of the *Texas Bar Journal*. For more information about the Diversity in the Profession Committee, go to texasbar.com/dipcommittee.

JURY SERVICE

Steven Michael Denny, Chair

The Jury Service Committee has been hard at work (remotely) this year ensuring that now, more than ever, the importance of jury service is clearly communicated to the public and that the safety and respectful treatment of jurors once we get them to the courthouse is ensured. The committee sought partnerships with other committees to ensure integration of bar objectives—specifically, the Law Focused Education Committee and a project titled “Overview of the Texas Jury System.” The committee continues work on the “Juror’s Bill of Rights” (working title), which is a list of best practices for the handling of jurors throughout the jury system. It includes considerations for parking, breaks, access to communication devices, and other things jurors have indicated from online surveys that affected their prior service. The committee is especially excited about its public service announcements featuring notable Texans encouraging jurors to respond when called for jury duty. The committee plans to start production on those PSAs soon. To protect potential jurors, the committee is working on producing materials to assist law enforcement in identifying and preventing jury scams through public education. Additionally, the committee discusses safety issues specific to COVID-19 from around the state at every meeting.

LAW FOCUSED EDUCATION

Adam C. Falco, Chair

The Law Focused Education Committee members have stayed busy

and active by continuing to meet with local school districts, private school networks, and community groups providing the latest Texas Law-Related Education Department materials (texaslre.org). Committee members used the Law-Related Education web-based materials to give presentations to classrooms, community groups, and local bar associations. The committee continued helping and supporting the annual Texas Citizen Bee, the statewide civic education program and two-part competition, which was held virtually this year (citizenbee.org). In the upcoming year, committee members will continue speaking with participants at local Law Focused Education events, promoting the use of the Law Focused Education, Inc., website, and working on a U.S. Constitution amendment video project.

LAW PRACTICE MANAGEMENT

E. Steve Bolden II, Chair

The committee continued its focus to fulfill its purposes: (1) the implementation of programs conducive to the effective, ethical delivery of legal services; (2) the delivery of legal services at reasonable prices, with sufficient return to ensure viability; and (3) an increase in the management skills of State Bar members. The Succession Planning Initiative was the focus of the committee. First, the committee is pleased that the rules referendum providing for agreed custodian designations passed—this helps with the committee’s initiative. The new rule allows for a simplified voluntary procedure to appoint a custodian to help wind up the practice of a lawyer who has ceased practicing and gives the custodian liability protection for undertaking custodian tasks. In furtherance of the rule change and our initiative, committee members have given and will give CLE presentations concerning succession planning and are also drafting template succession planning documents. The revamped Law Practice Management website went public. Go to texasbarpractice.com/law-practice-management/ to see content regarding starting a practice, maintaining a practice, growing a practice, and closing

a practice. Finally, the committee is starting a project to assist with linking lawyers considering transitioning out of practice with lawyers ready to upgrade their law practice.

LAWS RELATING TO IMMIGRATION AND NATIONALITY

Roberto Rivera, Chair

The committee for laws related to immigration and nationality is tasked with providing updates, changes, and information on the effects of immigration law across the State Bar. The committee is composed of mostly immigration attorneys who practice in a variety of different areas of specialization, from corporate immigration to humanitarian immigration and family based immigration. Historically, a large part of the committee's activities has been centered on meeting with the U.S. Department of Homeland Security and U.S. Department of State officials on tours and site visits to gain a boots-on-the-ground assessment of current immigration policies. Unfortunately, for much of this past year, DHS facilities have been closed or were operating with restrictions on who could enter their buildings. Nevertheless, several upcoming meetings are in the works now that DHS has reopened its offices and has resumed operations. The committee is eager to gain insight on any changes to immigration policy so that it may provide this valuable information to the State Bar.

LAWYERS' ASSISTANCE PROGRAM

Tracy Squires, Chair

This committee assists the Texas Lawyers' Assistance Program, or TLAP, by creating initiatives and programming for lawyers, law students, and judges related to substance use and other mental health disorders as well as providing overall well-being support. *Law Schools and Suicide Prevention Subcommittee.* This subcommittee expanded outreach to law students with significant focus on suicide prevention. Through this subcommittee, TLAP initiated Student Support Sessions

offered via Zoom. It also assisted TLAP in the creation of a groundbreaking suicide prevention video and printed promotional materials. *Special Populations and Anti-Stigma Subcommittee.* This subcommittee improved TLAP's outreach to African American, Latinx, LGBTQIA, and other minority lawyer and law student populations. It expanded diversity programming by creating programs featuring special populations, including first-generation lawyer wellness, minority-women lawyer wellness, impostor syndrome, and more. It also planned a new video incorporating diverse speakers supporting law students of special populations. *Improving Help to Solos and Law Firms Subcommittee.* This subcommittee focused on improving TLAP's outreach to both solo attorneys and law firms. Its work resulted in a major plan to utilize more judges, distribute local mental health resources in communities across Texas, and create free practice area-specific local well-being CLE. Additionally, this subcommittee added programming for paralegals.

LEGAL SERVICES TO THE POOR IN CIVIL MATTERS

Eric Garza, Chair

The Legal Services to the Poor in Civil Matters Committee concerns itself with the creation and means of implementation of programs, such as legal aid or pro bono efforts, to assure delivery of legal services in civil matters to all Texans. The committee comprises attorneys and advocates from law firms, legal aid providers, law schools, and corporations all committed to enhancing access to justice. As done each year, the committee recognized deserving individuals, groups, and entities that perform exceptional work in the field of legal services to the poor through the Pro Bono Excellence Awards. Seven awards are given, and honorees are recognized during the State Bar of Texas Annual Meeting. Throughout the year, the committee monitored issues and challenges met by attorneys working hard to ensure access to justice for all Texans, including those affected by the pandemic. In addition,

the committee received regular reports from the Texas Access to Justice Foundation, the Texas Access to Justice Commission, and the Legal Access Division of the State Bar of Texas.

LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS

Jani Maselli Wood, Chair

The Legal Services to the Poor in Criminal Matters Committee serves one of the State Bar of Texas' purposes by providing legal services to and combatting current legal issues of the indigent. The committee comprises members of the judiciary, prosecution, and public defense, as well as representatives of court administration, state agencies, and nonprofit organizations with a focus on indigent defense. Projects this year included: (1) updating the State Bar performance guidelines for non-capital criminal defense representation to reflect changes in the law; (2) discussing the mandated ability-to-pay inquiries regarding court costs and how to encourage compliance in the courts and with practitioners; (3) developing guidelines for the state when prosecuting indigent and pro se defendants; and (4) the continued promotion of guidelines for the representation of juvenile defendants. The committee also received excellent recommendations for its Michael K. Moore and Warren Burnett awards. The awards recognize individuals or groups who provide exceptional research or writing representing significant contributions to the knowledge and practice of law as well as providing quality legal representation to indigent defendants in Texas.

LOCAL BAR SERVICES

C. Michael Davis, Chair

The Local Bar Services Committee enhances communication between State Bar leadership and local bar associations to assist local bar leaders in the development of their associations. Resources available from the State Bar's Local Bar Services Department include speaker coordination, membership assistance, program coordination, and guidance on creating a new association.

Yearly, the committee plans the annual Law Day contest, Stars of Texas Bars Awards, and the Local Bar Leaders Conference. The Stars of Texas Bar Awards recognize local bar associations for outstanding involvement and commitment to the legal profession. Unfortunately, these events were canceled this past year due to COVID-19. To continue providing services to the bar during the pandemic, the committee coordinated a quarterly virtual speaker series on a variety of topics for bar members. The committee will resume the annual Law Day awards this year for local bars that are holding a contest, and the winners will be recognized on the State Bar website and in the *Texas Bar Journal*. The Local Bar Leaders Conference is tentatively scheduled to resume in January 2022.

MINIMUM CONTINUING LEGAL EDUCATION

John Boyce, Chair

The Minimum Continuing Legal Education Committee administers the minimum continuing education program established by Article XII of the State Bar Rules and the regulations and accreditation standards promulgated therefrom. Most of the committee's work consists of reviewing proposals for accreditation of an activity such as a conference, presentation, or video. The staff presents the committee the few proposals for which there is any question. The issue is usually whether the program consists of legal education or ethics within the definition of accreditation standards. Though not always clear, this task is intellectually challenging. Proposal fees generate revenue for the bar, and the committee's approval can mean commercial success for some applicants. It is a far larger task than most attorneys realize. The staff receives over 48,000 applications a year from non-accredited sponsors, out-of-state attorneys seeking credit, and existing accredited sponsors. It would not have been possible to review such an amount without the dedication of the committee's fabulous staff, particularly Erica Rodriguez. The State Bar of Texas Board of Directors charged the committee with making

recommendations on changes to the MCLE standards to allow courses on implicit or explicit bias and wellness to count toward ethics credit. It recommended offering such courses on a voluntary basis.

PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT

William J. Chriss, Chair

The PJC Business, Consumer, Insurance & Employment Committee spent this year completing work on its 2020 volume and has begun work on materials for its next edition in 2022. The committee finalized new questions on fraud and employment, as well as an updated discussion on justifiable reliance. These are included in the 2020 edition along with a comprehensive update to the questions and instructions covering piercing the corporate veil, defamation, and attorneys' fees. The committee continues work with the Oversight Committee and the other civil law drafting committees on updates and revisions that affect multiple volumes. For example, in collaboration with the PJC Oil and Gas Committee, the committee is reviewing proposed revisions to the contracts section appearing in both volumes, as well as participating in other cross-volume subcommittees that are considering updates to sections on exemplary damages and proximate cause. The committee continues to study several new questions and instructions for the 2022 edition. The committee welcomes suggestions for new material as well as questions and comments from the bench and bar, which can be sent to books@texasbar.com.

PATTERN JURY CHARGES—CRIMINAL

Wendell Odum, Chair

The Pattern Jury Charges Criminal Committee is responsible for maintaining four published volumes of model jury instructions for use in criminal cases. The committee recently released the 2020 edition of the *Texas Criminal Pattern Jury Charges Crimes Against Persons & Property*. New in this

edition are instructions and commentary on sexual assault of a child, assault by occlusion or impeding breath, and injury to a child with lesser-included offenses, as well as all-new chapters for offenses against the family and transportation code offenses. The committee has focused efforts on facilitating the online transition of the Texas Criminal Pattern Jury Charges volumes, which will be offered in a subscription model with accessible pricing. Amid this work, the committee is also creating new charges and revising existing charges and commentary to reflect current statutory and caselaw.

PATTERN JURY CHARGES—FAMILY AND PROBATE

Chris Nickelson, Chair

Since the publication of the 2020 Edition of the Texas Pattern Jury Charges—Family and Probate, the committee published a supplemental slip insert for all purchasers containing completely rewritten charges and commentary for termination of the parent-child relationship. This was in response to the 2020 amendments to Texas Rules of Civil Procedure 277, which required separate jury findings rather than broad-form questions for each individual statutory ground for termination, as well as a finding on whether termination is in the best interest of the child. The supplemental insert also contained new commentary addressing last year's Texas Supreme Court opinion *In re C.J.C.*, a case addressing fit-parent presumptions in modifications of conservatorships. Finally, the insert provided practitioners with updated jury questions for will contents by interested parties who are neither designated beneficiaries nor named executors or administrators. The committee is monitoring legislative developments and is studying possible new charges for outpatient mental health commitments, for actions based on breaches of privacy in divorces, and for actions for contempt in failing to comply divorce decrees. Comments, questions, and suggestions for new topics for inclusion in future editions may be sent to books@texasbar.com.

PATTERN JURY CHARGES— GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS & WORKERS’ COMPENSATION

Paula Knippa, Chair

Our committee reviews and revises the *Texas Pattern Jury Charges General Negligence, Intentional Personal Torts & Workers’ Compensation* volume to ensure that it reflects Texas law and its developments. The 2020 edition incorporates a new instruction that addresses the “eggshell plaintiff” and advises how to address this issue. Also included is a significant update to the attorneys’ fees section of the Texas Theft Liability Act to conform to the Texas Supreme Court’s holding in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), as well as clarifying comments on who may recover attorneys’ fees in *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136 (Tex. 2019). For purposes of the 2022 publication, the committee is currently working on: (1) “cap-busting” provisions; (2) updating inferential rebuttals; (3) updating the definition of “proximate cause”; (4) a new negligent undertaking instruction; (5) alternative damages questions based on use of “injury” or “occurrence”; (6) revisions to the damages section of Trespass and Nuisance; (7) updating “Property Damages” to include “lost profits” as well as to clarify that this section refers solely to personal property; (8) revisions to statutory dram shop liability; and (9) a revised definition of “physical impairment.”

PATTERN JURY CHARGES— MALPRACTICE, PREMISES & PRODUCTS

Laura M. Trenaman, Chair

The Pattern Jury Charges—Malpractice, Premises & Products Committee submitted its 2020 edition to the bench and State Bar, capping off more than 18 months of revisions, additions, and improvements to the 2018 edition. The 2020 volume contains new material distinguishing between pre-existing conditions and the “eggshell” plaintiff. Additionally, questions about liability in emergency-

care cases received a comprehensive update; jury instructions for the Emergency Medical Treatment and Active Labor Act were revised; and questions for joint-and-several liability, as well as for exceeding normal limits on exemplary damages, were amended to reflect recent legislative changes. The committee expects to revise guidance to practitioners about proximate causation as well as how best to question juries about personal injury damages—both necessitated by recent Texas Supreme Court opinions. The committee also anticipates future revisions to various issues covered in premises and products liability commentary, such as proper pleading practices in premises actions and presumptions raised by governmental approval in products cases. The committee is committed to keeping a close eye on new developments in Texas law and welcomes comments and suggestions, which may be sent to books@texasbar.com. The mission remains the same—to “get it right.”

PATTERN JURY CHARGES— OIL AND GAS

Ricardo E. Morales, Chair

The PJC Oil and Gas Committee has published its 2020 edition and is now beginning work on its next volume. The 2020 edition includes new material on statutory waste, an updated discussion on attorneys’ fees, and has been updated throughout to reflect current caselaw. The committee has worked closely with the other civil drafting committees and the PJC Oversight Committee on overlapping issues and will continue to do so for its next edition. In preparation for the 2022 volume, the committee will begin to review current material to consider where updates are needed and what new issues should be addressed. The committee has been reviewing charges on trespass and drafting new materials on nuisance and is collaborating with the General Negligence volume to complete materials for inclusion in the 2022 edition. Additionally, the committee is working with the PJC Business committee to review and update contracts charges appearing in both

volumes. The committee is also working closely with a cross-volume subcommittee to update the discussion of proximate cause appearing in all volumes. The PJC Oil and Gas Committee welcomes suggestions for new material and questions or comments from the bench and bar. Feedback can be sent to books@texasbar.com.

PATTERN JURY CHARGES— OVERSIGHT

Daniel Hinde, Chair

The PJC Oversight Committee supports the drafting volumes in their work in order to ensure accuracy and clarity of their jury charges and consistency among the volumes. The committee met virtually throughout the year to finalize material for the 2020 volumes and to begin preparing for the 2022 editions. The committee reviewed and provided guidance on final updates to the discussion of pre-existing conditions included in the General Negligence and Malpractice volumes and reviewed new material on statutory waste for the Oil and Gas volume. The committee also worked with the PJC Business, Consumer, Insurance & Employment Committee on its new questions on employment and fraud and an updated discussion on justifiable reliance. Additionally, the committee provided support for the PJC Criminal Committee in its work as it begins the process of comprehensively updating and reformatting its charges. Following the completion of materials for the 2020 volumes, the committee has begun work with each volume on new projects and materials for 2022. This includes working with several cross-volume subcommittees on updates to issues affecting multiple volumes, including exemplary damages, proximate cause, contracts, and nuisance. The committee welcomes input from the bench and practitioners. Please send comments and questions to books@texasbar.com.

PROFESSIONALISM

Sarah P. Springer, Chair

The Supreme Court and the Court

of Criminal Appeals have declared September 17—Constitution Day—as the statewide Day of Civility. The committee has been working with the bars of Dallas, Houston, San Antonio, Austin, and Nueces County on the program for the Day of Civility, themed “Culture of Respect” and making it available statewide. The keynote speaker will be Judge Carl E. Stewart, of the U.S. Court of Appeals for the 5th Circuit. Other statewide noteworthy speakers are on the roster; all bar associations are invited to enjoy the program. The committee’s ethics directory is being revamped to be more accessible, user-friendly, and informative. Mentorship is focusing on social media, TYLA, and law schools to promote mentor/mentee relationships. Texas Lawyers Professionalism is the committee’s Facebook outreach. This year marks the beginning of the fourth decade of the Texas Lawyer’s Creed. COVID-19 has made getting out the word in person difficult, but the committee is full of ideas and exciting plans and looks forward to the new world once everyone has been freed from the grip of the pandemic. For more information on professionalism resources, go to texasbar.com/professionalism.

PUBLIC AFFAIRS

Julie Doss, Chair

The mission of the Public Affairs Committee is to expand public understanding of the legal system and to foster relations with the news media to advance that goal. During the 2020-2021 bar year, the committee hosted the 2020 Texas Gavel Awards and accepted submissions for the 2021 awards. Through the Texas Gavel Awards, the committee honored outstanding Texas journalism that enhanced public understanding of our legal system. Learn more about the awards and read the winning pieces at texasbar.com/gavelawards.

REAL ESTATE FORMS

Sara E. Dysart, Chair

The State Bar of Texas published the 2021 edition of the *Texas Real Estate*

Forms Manual in May. The Real Estate Forms Committee reviewed the existing manual and drafted updates to the practice commentary and forms. Revisions reflect recent caselaw, as well as guidance on navigating challenges related to the evolving circumstances of the COVID-19 pandemic. The real estate sales contract has been completely revised and reimaged, with a new checklist form created to help attorneys complete the contract. The 2021 edition also provides new forms and includes references to recent State Bar CLE articles. The manual is now available as two sleek softbound volumes, as well as in both online and downloadable versions that offer enhanced word-processing forms. The online and downloadable versions provide links to primary research, including cases, statutes, and CLE articles. The manual serves as a starting point for recognizing issues and drafting documents for real estate transactions. Since 1970, committee members have identified and responded to changes in the law and enhanced the value of this manual. A recurring goal of the committee is to provide relevant information and resources for understanding how to handle a real estate transaction.

TEXAS BAR JOURNAL BOARD OF EDITORS

Brent Benoit, Chair

The *Texas Bar Journal* is the official publication of the State Bar of Texas. In print since 1938, the magazine serves as a publication of record for the Texas Supreme Court, a scholarly legal journal, and the association magazine for the State Bar of Texas. Each month (except a combined July/August issue), the *Texas Bar Journal* is mailed to approximately 123,000 subscribers, is available in digital format, and is the only publication reaching every lawyer in Texas. The Texas Bar Journal Board of Editors reviews legal article submissions, develops issue topics, and helps set the general editorial direction for the magazine. In 2020-2021, the *Bar Journal* examined a number of subjects of interest to Texas lawyers,

including legal history; civil rights and individual liberties; education law; disabilities; white-collar crime; cybersecurity for lawyers; Black History Month from a legal perspective; Women’s History Month from a legal perspective; how the Texas law schools, Texas Young Lawyers Association, and Texas Lawyers’ Assistance Program adapted to the pandemic; and how the pandemic affected the legal profession. The *Bar Journal* also offered an informative “Year in Review” issue and conducted a 2021 Texas Bar Journal Readership Survey.

WOMEN IN THE PROFESSION

Courtney T. Carlson, Chair

In fall 2020, the Women in the Profession Committee continued identifying barriers facing women in the profession and looked to the past, present, and future of women attorneys to develop new programs and make recommendations to the State Bar Board of Directors. With the changed circumstances and challenges presented by the pandemic, identifying barriers and solutions became even more relevant. The committee’s 2020 objectives were to evaluate “Where We Came From, Where We Are Now, and Where We Are Going.” The committee developed and issued a COVID-19 impact survey focused on changes and challenges Texas women attorneys faced due to the pandemic and possible solutions to address these issues. The committee also continued to promote author Betty Trapp Chapman’s *Rough Road to Justice: The Journey of Women Lawyers in Texas*, which details the many “firsts” of women lawyers in Texas. Additionally, the committee continued monitoring parental leave rules in other states as well as the rule pending before the Texas Supreme Court Rules Committee. A committee member also authored an article for the *Texas Bar Journal* detailing the committee’s formation and history while another committee member served this year on the Task Force on Diversity, Equity, and Inclusion. **TBJ**



2020-2021 STATE BAR OF TEXAS

SECTION REPORTS

Section reports are included in the July/August issue of the *Texas Bar Journal* to update Texas lawyers on State Bar section activities. Section membership and dues are voluntary. These reports do not necessarily reflect the position or official policy of the State Bar of Texas, which is formulated by the State Bar Board of Directors or by the membership through referendum. For more information or to join a section, go to texasbar.com/sections or call 800-204-2222, ext. 1420.

ADMINISTRATIVE AND PUBLIC LAW

Bill Dugat, Chair

The section dealt with the COVID-19 pandemic by conducting its flagship programs in a virtual fashion. First, an all-virtual 2020 Advanced Texas Administrative Law Seminar, co-sponsored by the University of Texas School of Law Continuing Legal Education, was held September 3-4, 2020, via live webcast. The 2021 Annual Seminar will be September 9-10, 2021. The seminar will be a live webcast. The preliminary agenda includes 12.75 hours of CLE credit with two hours of ethics. Please check the UTCLE website for any changes in plans. Like the seminar, the section conducted its annual Mack Kidd Administrative Law Moot Court Competition in a virtual manner. The moot court competition introduces students from Texas law schools to administrative law and provides experience in brief writing and oral argument before higher court justices and experienced administrative law practitioners. In 2020, nine teams participated with Baylor Law School providing the winning team in a championship round argued before Justices Thomas Baker, Chari Kelly, and Edward Smith of the 3rd Court of Appeals in Austin. The 2021 competition is scheduled October 22-23.

AFRICAN-AMERICAN LAWYERS

Rudolph "Rudy" Metayer, Chair

COVID-19. A recession that wiped away 40% of Black-owned businesses. George Floyd's murder. All three framed the bar year for the African-American Lawyers Section. Consequently, the council members hit the ground running to address issues that didn't just disproportionately impact Black Texas lawyers, but Black Texans as a whole. AALS engaged and formed a relationship with the Texas Municipal Police Association, Dallas and Houston police associations, and Texas State Troopers. A weekly Facebook Live event was forged about the issues affecting law enforcement and the communities they serve. AALS responded to the

comments of State Bar of Texas President Larry McDougal concerning the Black Lives Matter movement. This response caused a ripple effect across the bar, which led to honest dialogue regarding the bar's role in addressing biases that many were unconscious of. AALS then held a town hall for lawyers to speak about the issues. Finally, AALS held an event with Austin Black Physicians Association about the facts and myths regarding COVID-19 vaccines. In extraordinary times, AALS went through extraordinary means to serve the citizens of our great state.

ALTERNATIVE DISPUTE RESOLUTION

Gene Roberts Jr., Chair

The ADR Section continued its active mission of educating the public about alternative forms of dispute resolution. For 2020-2021, the ADR Section:

- Revised its website;
- Hosted its annual Advanced ADR CLE with topics including an arbitration law update, civility, family law mediation, personality-driven approaches to mediation, the Conciliation and Arbitration Board, consumer arbitrations, and practice tips for remote mediations and arbitrations;
- Named Elaine Roberts, the executive director of the Dispute Resolution Center of Montgomery County, as the recipient of the Justice Frank G. Evans Award, the section's highest award;
- Participated in the State Bar of Texas' financial audit with success;
- Elected a talented and diverse group of ADR professionals for leadership positions;
- Developed several videos as a public service on ADR-related matters in an era of remote delivery, with topics including child protective services mediations, family law mediations, the soft underbelly of mediating online, and online summary jury trials;
- Published two newsletters with

substantive issues devoted to arbitration and mediation; and

- Implemented a legislative monitoring program.

ANIMAL LAW

Eric Torberson, Chair

The purpose of the Animal Law Section is twofold. First, to promote and assist members of the profession in the study and understanding of the laws, regulations, and court decisions dealing with legal issues involving animals. Secondly, the section provides a forum for members of the profession to consider and discuss the legal issues involved in human relationships with animals and improving how we coexist. The 2020-2021 officers and council come from a broad range of legal backgrounds. Their interest and dedication to animal law continues to keep the Animal Law Section aware of key issues. As of the writing of this summary, the section has a successful online CLE about service animals. Another CLE is scheduled and will cover animal law bills filed during the 2021 legislative session. Free online video CLEs will be available to section members on animallawsection.org. Most importantly, the Listserv is a tremendous asset to Animal Law Section members. Animal law issue deadlines can approach quickly and many times need a rapid response. The listserv helps lawyers handle local animal matters across the vast state of Texas. Being a voice for the voiceless is a privilege and an obligation to the section.

ANTITRUST AND BUSINESS LITIGATION

Thomas York, Chair

The Antitrust and Business Litigation Section is an organization of Texas lawyers who focus on antitrust law compliance, enforcement, and complex litigation affecting Texas. This year, the section continued its tradition of supporting initiatives promoting pro bono legal services, lawyer assistance, and antitrust-focused legal education. The section carried out this tradition by making donations for a scholarship at Baylor Law School, charitable gifts to the Texas Access to Justice Foundation and

the Sheeran-Crowley Trust, and a paid internship for a law student to work at the Antitrust Division of the Office of the Texas Attorney General. The section also awards its annual Distinguished Counselor Award to recognize service to the section, excellence in antitrust and business litigation, and high professionalism and ethical standards, to be given at the Annual Meeting.

APPELLATE

Jerry D. Bullard, Chair

The section happily reports that, even in the midst of a pandemic, it used remote technology in new and creative ways to serve members and reach practitioners in diverse practice groups and geographical areas. For example, the section co-sponsored webcasts with the Texas Supreme Court and the Texas Court of Criminal Appeals that generated the most views of any single event on their respective YouTube channels. The Diversity Committee hosted outstanding virtual CLE events that attracted participants from across the state. The section also continued to provide benefits to section members free of charge, such as more than 17 hours of online CLE videos, hundreds of online appellate CLE articles, the *Appellate Advocate*, and dozens of video interviews with former appellate justices. Members also take part in the section's pro bono initiative and the multitude of section committees. The section's success is due to the hard work of many volunteers participating in a range of projects. If you are not already involved in the section, visit the website to see all that the section does and to join: tex-app.org.

ASIAN PACIFIC INTEREST

Jim Thomas, Chair

The Asian Pacific Interest Section, or APIS, continued to advocate and promote the professional interests of the Asian-Pacific American community in the midst of the pandemic. Though hosting virtual events have been challenging, APIS has used the virtual environment as an opportunity to include panelists from across the country. APIS panels have included APA Women Charting Successful Career Paths, Law Firm and In-House Interview

Tips, Review of Attempts to Disenfranchise Mail-In Votes in Texas, Conducting Hearings and Trials During a Pandemic, and Supporting Your Clients in the Age of COVID-19. APIS has also formed a partnership with Asia Society Texas Center to cohost cultural events in 2021. The section appreciates the continued support of its sponsors and encourages its members to monitor the section's website that features published newsletters highlighting accomplishments of its members and other notable events in the community. Additionally, APIS has cosigned statements with other affiliate groups in recognizing the increased verbal assaults, physical attacks, and threats to the Asian American community. APIS will continue to stand in solidarity with these organizations to stop the spread of anti-Asian violence and stand together against racism toward Asians and any other race or community of individuals. #StopAsianHate

AVIATION LAW

Peter Busher, Chair

The Aviation Law Section began the year with the Annual Meeting, held virtually via Zoom on June 25, 2020. This year the scholarship award went to Megan Greer, a student at Texas Tech University School of Law, for her brief on *Siegel v. Administrator of the Federal Aviation Administration and the National Transportation Safety Board*. Wayne Fagan was recognized for his pro bono work. Christa Hinckley's videotaped CLE presentation was made available at the State Bar of Texas Annual Meeting On Demand website. The following officers and at-large members for 2020-2021 were elected: Peter Busher, chair; Hinckley, vice chair; Greg Reigel, treasurer; Bryan David, secretary; Kerry Adams, newsletter/membership; and at-large members Derrick Hahn, Kristin Newman, Stella Dulanya, Tressie McKeon, Don Windle, and Caitlyn Goodwin. The Aviation Law Section held monthly CLE's via Zoom presented by Dulanya, Reigel, Hinckley, Glenn Vallach, Andrea Palmer, and McKeon. These are available on the section's website (AviationLawTX.com/CLE-Video-Library). On February 5, 2021, at

a meeting with the Texas Board of Legal Specialization, it was decided that the application for specialization will be redrafted and bifurcated into "aviation litigation" and "aviation regulatory and transactional."

BANKRUPTCY LAW

Judge Joshua P. Searcy, Chair

The past year was one of great changes for bankruptcy practitioners. In February 2020, the Small Business Reorganization Act became effective. SBRA created new Subchapter V of Chapter 11 of the Bankruptcy Code, streamlining Chapter 11 reorganizations for certain small business debtors. Shortly thereafter, the Coronavirus Aid, Relief, and Economic Security, or CARES, Act expanded these new provisions by temporarily increasing the debt limit in Subchapter V cases. Unprecedented economic conditions due to the COVID-19 pandemic caused a surge in business filings and a lull in consumer filings. The section continued providing value to its members, including pro bono clinics and the Elliott Cup moot court competition for law students. The section replaced its beloved Listserv, established a diversity and inclusion subcommittee, and created educational opportunities for bankruptcy lawyers and the public, such as the Bankruptcy Bench Bar conference that was held virtually on April 8-9, 2021. Another is a series of webinars offered free to members, addressing business and consumer bankruptcy topics. Bankruptcy law is an important practice area likely to become even more critical in the future. The section remains committed to bringing members the best possible benefits to support and advance the practice of bankruptcy law in Texas.

BUSINESS LAW

Frank Zane Ruttenberg, Chair

The State Bar of Texas Business Law Section has a broad reach into all aspects of commercial law in Texas. Through the involvement of its members and the leadership of its council and committee members, the section engages in robust discussion of the laws that affect business activity within our state. Through the active engagement of many members

over the past year, the section provided invaluable resources in the fields of corporate, securities, commercial, banking, and bankruptcy law for attorneys in Texas. Current committees include those that address general aspects of commercial law but also include dynamic new areas that discuss the laws on, and relating to, blockchain, virtual currencies, and social media. The section is also actively engaged in the review of the laws of other states which, like Texas, may have a significant impact on commerce in an effort to ensure our state's leadership maintains prominence as a leading jurisdiction for commerce. Members also organized and presented numerous continuing legal education programs on relevant topics that were, once again, considered among the highest quality in the country.

CHILD PROTECTION LAW

Tiffany Elizabeth Crouch Bartlett, Chair

The Child Protection Law Section keeps growing and is fast becoming one of the State Bar's most active sections. The Advanced Child Protection Law Seminar, broadcast online April 1-2, was a tremendous success. The legendary Dr. Bruce Perry kicked off the event as the keynote speaker, focusing on trauma informed care with a critical examination of the overuse of prescription medications for our state's most vulnerable children. The section and its members have worked diligently over the past year to provide more education and to open the dialogue in child welfare practice, examining the pandemic and ongoing racial disparity as well as how trauma affects children. Some of the CLE webinars included Handling Your CPS Cases During a Pandemic; Advocacy Tips: Dealing with Racial Disparities in Child Welfare Cases; Recent Supreme Court Cases Child Protection Attorneys Should Know; My Life in Foster Care: Was Race a Factor? with Zoe Jones-Walton; Prevention and Intervention Before Removal: The Role of Lawyers; and Making History with the First Termination Jury Trial by Zoom. The Child Protection Law Section hopes to build an architecture of education and critical thinking for child welfare attorneys and judges for both the

immediate and distant future.

CIVIL LIBERTIES & CIVIL RIGHTS

Jennifer Mathis Michalewicz, Chair

Despite the complications caused by COVID-19, the Civil Liberties & Civil Rights Section had another fantastic year thanks to the hard work of the section's members. The section continued its efforts to promote discussion regarding constitutional issues and civil liberties and civil rights, which are of ever-increasing importance in the nation. To that end, the section co-hosted the 15th annual Bill of Rights Course on May 14, 2021, virtually as it was last year. The section is pleased to announce that the 2021 recipient of the Patrick Wiseman Award for Civil Rights is Thomas Leatherbury, of Vinson & Elkins in Dallas. The section has two new council members, and there is an abundance of opportunities for section members to get involved. If you are not a section member yet, please join.

COLLABORATIVE LAW

Laura R. Schlenker, Chair

The Collaborative Law Section had an outstanding year thanks to the hard work and passion of its council and members. The pandemic created opportunity for innovation in online collaborative law process models. It did not stop Texas lawyers and professionals from attending the 21st Annual Collaborative Law Course in March 2021, presented virtually. The section increased member benefits by resuming publication of member newsletters and producing its first webinar CLE program in April 2021, free to members. The section began sponsoring a groundbreaking study group, the "CL/ADR Innovations Workgroup," whose mission is to design enhancements to dispute resolution processes to make them more accessible, financially feasible, and attractive to a broader range of clients, both family and civil. The new website, CollaborativeLawSection.com, debuts in the summer of 2021. Last year's highly anticipated program by The Likeable Lawyer team has been rescheduled to an interactive, virtual format in July 2021.

It will spotlight techniques from improvisational acting and expansive negotiation to equip collaborative attorneys to "further enlarge the pie," so that every stakeholder gets more of what they want. Sadly, the section mourned the loss of its beloved vice chair, colleague, and friend, Ruth L. Rickard, in December 2020.

COMPUTER & TECHNOLOGY

Shawn Tuma, Chair

The Computer & Technology Section had another outstanding year thanks to the dedication and hard work of the section's membership. The section's mission is to educate and involve the legal profession in and about the use and law of computer and information technology. With the COVID-19 pandemic, the section has been perfectly poised to help lawyers adjust to the transformation of how we live and work by leveraging technology to practice law from remote environments. For the fourth consecutive year, the section sponsored "With Technology and Justice for All CLE." The conference theme was "Vaccinating Your Technology Tools for Practice in a Pandemic" and, though it was held virtually for the first time, the presentations were excellent. The section publishes *Circuits*, a quarterly eJournal; provides speakers for live webcasts on tech-related topics; and has videos on its series titled Tech Bytes, which is available to all Texas lawyers at texasbar.com/tech-resources. Section members continue to enjoy the Texas Legal App, which provides access to Texas rules and codes with links to caselaw. The section also sponsors the Adaptable Lawyer Track and a section general membership meeting at the Annual Meeting. For more information, contact the administrator at admin@sbot.org.

CONSTRUCTION LAW

Laird Lawrence, Chair

The Construction Law Section focuses on continuing education for its 2,600 members through its CLE programs and scholarly publications. In addition to serving as a joint sponsor of two significant CLE programs, the section publishes the *Construction Law Journal* semi-annually, publishes a highly

regarded monthly caselaw update known as the “Change Order,” and provides webinars on timely topics for its members. The section proudly supports the Texas Access to Justice Foundation and will donate \$40,000 this year to provide much-needed funds for legal services to low-income Texans. The annual Basics Course in Construction Law was held virtually on December 10-11, 2020. The 138 attendees learned about a variety of introductory topics and received updated materials. Another 750 attendees at the 34rd annual Construction Law Conference, held virtually on March 4-5, 2021, heard presentations on cutting-edge legal and industry topics. The section selected the Construction Education Foundation, or CEF, as the designated charity this year and will be donating \$12,500. CEF is a nonprofit organization that has trained thousands of skilled laborers and supervisors for the construction industry.

CONSUMER & COMMERCIAL LAW

Paula Pierce, Chair

The Consumer & Commercial Law Section completed extensive upgrades to txconsumerlawyers.org this year including adding COVID-19 resources for consumers and attorneys. The section passed its financial audit thanks to the efforts of Rhonda Bridges and the 2019-2020 treasurers Gregg Stevens and Karen Neeley. The 16th annual Advanced Consumer & Commercial Law course was webcast in August 2020 and was well attended and well received. Jon Michael Smith gave the second annual Mark Kincaid Memorial Lecture on Insurance Law, and Austin attorney Carlos Soltero won the Richard Alderman Award for CLE Excellence. The 17th annual Advanced Consumer & Commercial Law course will be held September 23-24, 2021. Although the section was unable to meet in person, it presented a short virtual annual meeting CLE. Congratulations to this year's Craig Jordan Writing Competition winner Cole F. Watson, of Texas A&M University School of Law, for his article “Protecting Children in the Frontier of Surveillance Capitalism.” Finally, section members continue to receive the

acclaimed *Journal of Consumer & Commercial Law*, edited by Richard Alderman and published by the University of Houston Law Center; the Lexology news feed; and discounted attendance at section CLE programs.

CORPORATE COUNSEL

T. Jason Smith, Chair

While this year has been unlike any other in the history of this section, membership remains one of the largest in the bar and the section continues to deliver on its mission and objectives. Since 1997, the section has awarded more than \$800,000 in pro bono grants, and the section encourages law firms to consider being a champion of pro bono to provide more opportunities for in-house counsel to support pro bono organizations throughout Texas. The section is working to increase corporate counsel pro bono efforts through the bar's Pro Bono Working Group. Diversity, equity, and inclusion are more than just words for the Corporate Counsel Section. The section has also committed to improving diversity, equity, and inclusion by forming a new DEI Committee that will create CLEs, scholarships, and other opportunities to advance not only awareness but also actual activities that will result in tangible improvements. The first step was to become a signatory to EQUAL in LEGAL, a global community of organizations committed to learning from each other, connecting people, and making the world better for everyone. Go to the newly redesigned website at texascorporatcounsel.com for more information and consider joining the section today.

CRIMINAL JUSTICE

Dwight McDonald, Chair

The Criminal Justice Section's mission is to promote collaboration between judges, prosecutors, and defense lawyers to benefit the criminal justice system. This past year has been difficult for everyone, including members. The section has tried to balance the needs of those incarcerated and awaiting trial while acknowledging the health risks posed by COVID-19. To support members, the Criminal Justice Section

Council provided masks to all its nearly 4,000 members last year. The section also hosted a panel discussion on Zoom regarding how the pandemic was affecting the criminal justice system in Texas as part of the State Bar of Texas Annual Meeting. To maintain the section's commitment to providing low-cost CLE opportunities to lawyers in underserved regions, CJS had scheduled a CLE in Waco before it was canceled due to COVID-19. CJS continues to provide scholarships to its members who attend the Advanced Criminal Law Seminar, Advanced Criminal Law Boot Camp, the Texas Criminal Defense Lawyers Association Rusty Duncan Criminal Law Seminar, and the Texas District and County Attorneys Association Criminal & Civil Law Conference as well as allowing free CJS membership for lawyers in their first two years of practice.

ENTERTAINMENT AND SPORTS LAW

Melissa G. Thrailkill, Chair

TESLAW had a busy year, despite all the changes. The website committee worked to launch a new website for membership. TESLAW's Legislative Committee successfully proposed legislation as part of the State Bar of Texas' legislative package. The section's proposed bill passed the Texas Legislature and was sent to the governor on June 1. The section continued to provide members a benefit with the quarterly newsletter and *Texas Entertainment and Sports Law Journal*, which highlights members and their work and provides timely content and practice documents for members' use. The section is always looking for those who wish to publish or get involved in the section's education and CLE efforts. Additionally, the Entertainment Law Institute continued to provide stellar education despite changing to an online format, and it also worked with the bar to provide members content during the online annual meeting last year. The section is planning more CLE content for members and is prepared to go live when the time is right. Finally, with the surplus in budget due to lack of expenses during COVID-19, TESLAW is looking

to find ways to fund grants for organizations and advocates helping artists and others affected by the pandemic.

ENVIRONMENTAL & NATURAL RESOURCES LAW

David Klein, Chair

Throughout this past year, the ENRLS has been hard at work carrying on the important work of the section. The section has not let COVID-19 or Winter Storm Uri get in the way. In August 2020, ENRLS managed to host its 32nd annual Environmental Superconference, virtually, which was once again a success, bringing in high-quality speakers and obtaining sponsorships to fund the section's Buck J. Wynne Memorial Scholarship program. The ENRLS is also proud to report that not only has the section continued to publish the *Texas Environmental Law Journal* on its regular schedule, but it also is celebrating its 50th year of issuing this important publication. Interestingly, COVID-19 has been the impetus for the ENRLS to improve upon its annual law school event, as there have been two virtual meetings that were made available to multiple law schools. These events were a success, as environmental attorneys interacted with law students who have an interest in environmental law. Last, the ENRLS has established two new committees: the Diversity, Engagement, and Inclusion Committee and the Social Media Committee. These two new committees aim to improve upon all of the excellent work that the ENRLS is already producing.

FAMILY LAW

Kristal C. Thomson, Chair

The mission of the Family Law Section is "to promote the highest degree of professionalism, education, fellowship, and excellence in the practice of family law." The section has a long history of fulfilling this mission, primarily in three areas: top-quality CLE, robust committee work, and producing practical family law publications. Despite the roadblocks presented during the past year, the section proudly continued its service to

the mission with great success. The section continued the tradition of excellent committee work, and many goals were met and exceeded by our volunteer committee members. The section also continued its invaluable partnership with TexasBarCLE to produce some of the nation's best family law CLE. All of the course directors and their committees did outstanding work transforming to the virtual CLE format. Additionally, the section continued to publish practical practice tools for family lawyers, including the *Predicates Manual*, the *Family Lawyer's Essential Toolkit*, and the original "formbook," the *Texas Family Law Practice Manual*. These are invaluable resources for family lawyers, considering the formbook was quickly updated as various needs arose during the pandemic. All of this information is available at sbotfam.org. If you are already a member, thank you. If not, please join!

GENERAL PRACTICE, SOLO AND SMALL FIRM

Ron Bunch, Chair

It has been a crazy year, but the section is still strong. Lawyers across the state are surviving and adapting to some new ways to practice law. Well over one-third of Texas lawyers in private practice are solos or in small firms (five or less). The section encompasses many areas of law, tries to stay up-to-date on State Bar activities, and works to promote policies that are helpful to solos and small firms. Among other things, the section regularly publishes a *General Practice Digest*, sponsors the Annual General Practice Institute at Baylor Law School, and hosts a popular CLE event at the State Bar Annual Meeting. The section has some other projects in the works but let the section know how it can help you.

GOVERNMENT LAW

Kuruvilla Oommen, Chair

The Government Law Section provides resources and services for its members who represent governmental entities across the state. The section continues to provide a monthly e-blast to its members with caselaw updates, a timely article, and a list of CLEs for

government lawyers. The section is continuing to work on an initiative to explore establishing legal specialization in local government law to recognize the distinct practice area and the breadth of knowledge required for practitioners. This year, the section's other initiative is to produce webinar CLEs for its members and other government lawyers. The section is cohosting the well-received Annual Advanced Government Law and Government Law 101 courses virtually on July 28-30, 2021. Speakers plan to present foundational topics for new government lawyers as well as materials for seasoned practitioners, including a legislative update and other hot topics in government law.

HEALTH LAW

Fletcher H. Brown, Chair

The Health Law Section continues to focus on creating a better understanding and cooperation among attorneys and other professions involved in the health care industry, including attorneys who represent hospitals, doctors, and life sciences industries. On January 14, 2021, the section provided a webinar titled "End of Life Update and Considerations." The section is planning the 34th annual Texas Health Law Conference. For more information, go to texhealthlaw.org. The conference, which offers an estimated 13 hours of quality health law CLE, is co-sponsored by the Texas Hospital Association and is scheduled for October 10-12, 2021, at the AT&T Hotel and Conference Center in Austin. The section is hopeful that an in-person conference will be possible but is also planning to offer a virtual option for this event. The section will be monitoring the circumstances surrounding the COVID-19 pandemic. Major initiatives of the section include recruiting and attracting future talent by offering opportunities for law school students to learn more about the practice of health law. The section also provides a weekly e-newsletter for all members that tracks proposed and adopted health law-related rules and regulations published in the *Texas Register*. Finally, the section is planning an upgrade of its website.

HISPANIC ISSUES

Judge Victor Villarreal, Chair

“Raising the Bar” was the aspirational goal for the Hispanic Issues Section, or HIS, last year. Knowing that challenges create opportunities, HIS undertook innovative programs and strategies for the benefit of section members and Hispanic communities in Texas. The results: The first statewide HIS fundraiser, “LAWteria,” that raised funds for access to justice organizations. Over \$40,000 was raised, and more importantly, access to justice was provided to people negatively impacted by COVID-19 who could not afford legal services. HIS initiated monthly CLEs via Zoom for its members. Over 1,200 people have attended, and HIS has provided just as many CLE hours. HIS has engaged with other minority State Bar of Texas sections—the “affinity groups”—including the LGBT Law Section, the Asian Pacific Interest Section, Diversity in the Profession Committee, Native American Law Section, Texas Minority Counsel Program, and Women and the Law Section. The joint collaboration resulted in focus by the State Bar of Texas Board of Directors on diversity and inclusion issues. All HIS initiatives this year are possible because of engaged, united members and strong efforts by HIS council members who are dedicated to service and innovation. Count on HIS to continue “Raising the Bar.”

IMMIGRATION & NATIONALITY LAW

Matthew Myers, Chair

The Immigration & Nationality Law Section was greatly impacted by the constant changes in immigration laws and practice associated with the government’s response to the pandemic, the restrictions on international travel, and the U.S. presidential election. The section met challenges and greatly exceeded expectations, creating new benefits for members, which may become staple benefits of section membership. Over the past year, the section has successfully implemented quarterly update bulletins, fourth Tuesday monthly lunch CLEs, and website updates to provide a CLE bank

and pro bono resources. The section partnered for the second straight year with the Family Law Section to present a joint CLE, free to members of both sections, titled “The Intersection of Immigration and Family Law.” The section welcomes the opportunity to partner with other sections and local bar associations on CLE events, and it continues to solicit opinions and guidance from members on how it can provide more value, in addition to existing writing, speaking, volunteer, and free CLE opportunities.

INSURANCE LAW

Pamella A. Hopper, Chair

The Insurance Law Section continues to improve the services it provides to members, even in the midst of the pandemic. The virtual format has allowed the council to hold more frequent meetings, along with mentoring and networking happy hours for lawyers across the state. The section continues to publish the *Journal of Texas Insurance Law*, the preeminent law journal dedicated to Texas insurance law, and the weekly “Right Off The Press” emails that provide summaries and links to the most recent Texas state and federal insurance law decisions and current listings of insurance-related employment opportunities. The section’s website, insurancelawsection.org, also continues to offer new content. The section remains dedicated to providing quality CLE through webinars on cutting-edge issues and looks forward to presenting its annual Advanced Insurance Law Course and Casino Night live at the Hyatt Regency Hill Country Resort and Spa in San Antonio September 29-October 1. The section held its inaugural Texas Insurance Law Student Writing Competition, in which students from all 10 accredited Texas law schools were asked to submit articles on insurance-related topics. The section awarded scholarships to the winners of the competition, whom it will recognize at the Advanced Insurance Law Course this fall.

INTELLECTUAL PROPERTY LAW

Leisa Talbert Peschel, Chair

This year the IP Law Section has continued to educate, connect, and serve

its members and the IP community in Texas through virtual meetings. The Advanced IP Litigation course was held October 15-16, 2020, and the Advanced IP course was held February 3-5, 2021. To celebrate the upcoming 75th anniversary of the Lanham Act, the IP Law Section planned a number of events and commissioned a documentary and traveling exhibit in collaboration with the U.S. Patent and Trademark Office and Texas Intellectual Property Law Foundation. On June 17, 2021, the IP Law Section in collaboration with the USPTO presented a virtual version of its annual Trademark Bootcamp, *Nuts and Bolts of Trademark Law and TTAB Practice*. The two-part session was held virtually and featured live oral hearings and arguments before the Trademark Trial and Appeal Board. On June 18, the IP Law Section presented a blockbuster CLE program. Over lunch, the IP Law Section held its virtual Annual Meeting, where David Gooder, U.S. commissioner for trademarks, was the IP Law Section’s keynote speaker.

INTERNATIONAL LAW

Karla Pascarella, Chair

The International Law Section more than met the challenges brought by the pandemic, sudden economic downturn, and a rapidly changing political landscape. Thanks to the engagement of a strong council and a team approach, the section completed the audit process, adopted updated standards for its recordkeeping, and quickly and successfully transitioned its benefits to the membership to a range of virtual education programs. Additionally, the International Human Rights Committee continues to provide guidance to lawyers regarding international human rights through a variety of CLE opportunities, taking advantage of virtual platforms. International Human Rights Day activities continue to draw participants from around the country and the world. This year, the section achieved a long-term goal of submitting suggestions for human rights considerations to be included in the Texas Disciplinary Rules of Professional Conduct. The section continues to be a resource for

pro bono opportunities focusing on human rights and articles on the topic through its annual writing competition (in partnership with the ILS newsletter). The section quickly made changes to allow members to continue learning, meeting, and connecting. As a result, the section kept its budget balanced, maintained membership, and evolved into an even more nimble, responsive, and relevant section.

JUDICIAL

Judge Les Hatch, Chair

My predecessor, Justice Gina Benavides, penned this update last year discussing the unknown, if not scary, world that awaited us. As she predicted, the courts rose to the occasion. The Texas Supreme Court and Court of Criminal Appeals immediately issued orders authorizing courts to change deadlines and provide for remote proceedings. David Slayton and the Office of Court Administration ramped up the acquisition of Zoom licenses for all the courts. To date, over one million Zoom hearings have transpired in Texas. As Chief Justice Nathan L. Hecht recently noted, participation rates in high-volume dockets like child custody and traffic cases flipped from approximately 80% no-shows to 80% appearances through online access. Unfortunately, the jury trial did not fare as well. The risk of infection and fear of the disease were incompatible with the mandatory component of jury service. Although some judges bravely ventured into online jury trials, most encountered parties and attorneys who preferred to wait. The result was approximately 240 jury trials from March 2020 to March 2021 compared to 9,000 in 2019. The judiciary is committed to clear this backlog, and like its reaction to COVID, I predict success.

JUSTICE OF THE PEACE COURTS

Howard M. Bookstaf, Chair

The Justice of the Peace Courts Section is continuing to work hard. Several board members have been instrumental in providing educational opportunities for section members. During the past year, the section had the

following CLE presentations Justice Court Jurisdiction Increase to \$20,000; Negligence: Auto Accident Cases; Coronavirus Conversation; COVID-19, CDC Order, Supreme Court Orders, and CARES Act; and Premises Liability. The purpose of the section is to further the administration of justice in the justice courts, provide a forum for the exchange of information on matters of practice and procedure in justice courts, provide information and educational opportunities for the membership, and cooperate closely with the State Bar of Texas and other professional organizations in developing, supporting, and promoting legal and professional activities affecting justice of the peace courts. In addition to licensed attorneys in good standing with the State Bar of Texas, membership in the Justice of the Peace Courts Section is open to all current and former Texas justices of the peace. Justices of the peace who are not licensed attorneys can become associate members of the section.

JUVENILE LAW

Patrick Gendron, Chair

The Juvenile Law Section held its 34th annual conference virtually in February 2021. The conference was a great success with over 50% more attendees than previous years. The virtual format provided challenges but opportunities as well. With the use of a special app, conference participants were able to share ideas, exchange information, and interact in ways that are not possible in a simple live session. For the coming year, the section is returning to a live format in San Antonio—February 27-March 2, 2022—but will be incorporating the best aspects of the virtual format into the normal live sessions. The pandemic presented challenges to juvenile practitioners (defense lawyers, prosecutors, probation and state agency officials, judges, and law enforcement) and to the clientele that we all serve. The section has learned some of the benefits of working remotely in a virtual setting and some of the disadvantages. As we get back to the new normal, the section hopes to take the best of the virtual practices and utilize those for the benefit

of all involved and many jurisdictions are already doing just that.

LABOR AND EMPLOYMENT LAW

Shannon B. Schmoyer, Chair

The section includes attorneys who represent employees and employers in workplace issues and is one of the largest sections. In the 2020-2021 bar year, the section provided members with quarterly updates via newsletters concerning the latest court opinions, prepared and edited by law professors who teach labor and employment law. Due to the COVID-19 pandemic, the section changed its CLE to online and provided a series of complimentary webinars on a variety of labor and employment topics. The section is looking forward to returning to a live presentation of its Labor and Employment Law Institute CLE in August 2021. All section members have access to an expanding database of jury charges and verdicts in labor and employment cases in Texas. Additionally, CLE and database materials are available to members via the website. The section hosted virtual meetings with law students around Texas to answer their questions and discuss the choice of labor and employment law as a practice area. The section also funded grants and internships for nonprofit organizations involved in labor and employment law. If you have an interest in labor and employment law, please join.

LAW STUDENT DIVISION

Michelle King, Chair

The Law Student Division met its goal of increasing access to resources for law students. The division partnered with student leaders from across the state to raise awareness about the many events and initiatives available to division members. For a \$15 annual membership fee, law students receive numerous benefits including a student bar card, exclusive scholarship opportunities, free memberships in selected State Bar of Texas sections, a monthly subscription to the *Texas Bar Journal*, and much more. Throughout the past year of trying and uncertain times, members have continued to rely on these resources to help cope with

external stressors and adapt to a unique law school experience.

LEGISLATIVE AND CAMPAIGN LAW

Royce Poinsett, Chair

In its seventh year, the Legislative and Campaign Law Section continues to be one of the fastest growing sections of the State Bar, now with about 450 members. Lawyers in this section practice at the intersection of law, policymaking, and politics. They guide their clients in navigating legal issues involving the operation of legislative institutions and governmental agencies, the regulation of professional lobbying, public integrity and government transparency, state agency appropriations and procurement, and elections and campaign finance. This year the section significantly updated its website, social media presence, newsletters, and publications. The section's LinkedIn page now has close to 200 followers. The section also celebrated the inaugural issue of *Legislative Lawyer*, the new journal of the section. The section's online CLE webinars covered topics such as "Texas Election Law 101," "the Texas Disaster Act," "Legislating During a Pandemic," "COVID and the Courts," and "Introduction to the Texas Legislative Process." The section continues to work with the Texas Board of Legal Specialization to further develop the new certification in legislative and campaign law.

LGBT LAW

Michael Debnam, Chair

The LGBT Law Section began the year at the virtual Annual Meeting in June 2020. Like other organizations, the section had to alter its goals for the year due to COVID-19. The section has a council member sitting on the State Bar's Task Force on Diversity, Equity, and Inclusion, which works to improve diversity through the bar and practice. The section has a section member and council member sitting on the 2021 Civil Rights Course Committee. The section worked with other affinity groups and has met multiple times throughout the year. Along with its sister affinity sections, the section

submitted three letters of recommendation for the open at-large board of director position. The affinity sections also formally responded and condemned State Bar of Texas President Larry McDougal's comments and asked for specific changes. The section co-hosted a free CLE titled "The Truth About Systemic Racism in Society and Understanding Our Personal and Professional Responsibility." The section worked to get its proposed legislation introduced, including House Bill 1037 and Senate Bill 129. The State Bar went through a financial audit this year, and the section's policies all passed. The section adopted the new bar-wide recommended changes to increase oversight and transparency.

LITIGATION

Xavier Rodriguez, Chair

Despite COVID-19, the section continued to excel in its mission of empowering advocates, promoting justice, and preserving the rule of law. The section sponsored two CLE presentations on implicit bias and how it affects decision-making inside and outside the courtroom. The section co-sponsored the Litigation Update Institute, which featured nationally renowned Dean Erwin Chemerinsky, of the University of California, Berkeley School of Law, and the section provided hours of free CLE to members in July, in lieu of the usual Annual Meeting program. The award-winning publication *The Advocate* covered myriad ways the pandemic has changed how we practice and offered perspectives on how practice will evolve in the future. *News for the Bar* provided bimonthly news and short legal takeaways that could be immediately used by practitioners. The legislative committee kept members informed of bills filed that could potentially affect litigators. The section added a new member benefit—a substantial discount to WriteLaw, an education tool designed for lawyers on every aspect of litigation writing and technology. The section's grant and scholarships continued to assist pro bono providers with much needed funds to hire law student interns and staff to continue their good work.

MILITARY AND VETERANS LAW

Jon Shelburne, Chair

The Military and Veterans Law Section, or MVLS, hosted virtual CLEs and meetings. The response to the pandemic created challenges for all of us not only in how we practice law or try our cases but in how we meet as a section. While the virtual CLEs and meetings have allowed section members to stay connected, the section looks forward to holding its 2021 fall meeting in person—time and place still TBD. MVLS hosted CLEs on updates to the Uniform Code of Military Justice, challenges the Department of Defense faces with cybersecurity, the international legal response to combating terrorism, and the challenges to prosecuting or defending war crimes. At the Annual Meeting, the section's program covered the challenges with using National Guard troops in support of border security, providing VA representation during COVID-19, updates on anticipated or proposed changes in legislation affecting servicemembers and veterans, and an overview of how the U.S. Coast Guard responds to legal challenges in current operations. MVLS welcomes its new officers, Patrick McLain as chair-elect and Julie Glover as vice chair. The section extends special thanks to Bob Goss, its longtime secretary and treasurer, who was recently selected to serve as a section representative to the State Bar Board of Directors.

MUNICIPAL JUDGES

Alan Wayland, Chair

COVID-19 continues to dominate the municipal judges landscape. Emergency orders from the president, governor, Texas Supreme Court and Court of Criminal Appeals, county judges, and mayors have emphasized masking, social distancing, and personal hygiene. With guidance from the Office of Court Administration, all but essential proceedings have become virtual instead of in person. The section also looks to the Texas Municipal Courts Education Center, which has provided excellent guidance. With traditional seminars on hold, both agencies went into overdrive by setting up opportunities not only to

learn remotely but also conduct hearings remotely. The Office of Court Administration equipped every Texas court with Zoom to conduct hearings remotely. Mandatory judicial education was received remotely. McKinney's was the first municipal court to conduct a virtual jury trial. Hopefully, in-person proceedings will resume as Gov. Greg Abbott has removed the mask mandate. Whether the annual section meeting will be conducted remotely, or in person, or some hybrid form of both, the content should be answered soon.

NATIVE AMERICAN LAW

Lisa Tatum, Chair

The Native American Law Section continues in its advocacy of the common professional interest of all those who share an interest in Native American law in Texas. The section held its Annual Business Meeting virtually on August 28, 2020. The 2020-2021 elected officers are Lisa Tatum, chair; Stephen Jon Moss, vice chair; Ruth H. Soucy, secretary; and Sandy McCorquodale, treasurer. The Native American Law Section celebrated the life of one of its founding members, Paul Shunatona, who died September 6, 2020. The section accepted a representative member appointment and is participating in President Sylvia Borunda Firth's Diversity Task Force, helping to assess where the State Bar is and where it might go in the realm of diversity, equity, and inclusion. Section members continue to monitor significant cases impacting Native Americans in Texas. As part of its efforts, the section invites its members and others who have written and are writing substantive articles on Native American law to consider sharing their work with the section through the NALS Newsletter. The Newsletter Committee is co-chaired by Daniel Gomez and Ruth Soucy. The section website is another source of information for events and resources, and it will also feature the NALS Newsletter.

OIL, GAS AND ENERGY RESOURCES LAW

Jeff Weems, Chair

OGERL demonstrated its resilience and drive by expanding its outreach and building its membership during one of the toughest years Texans have faced in a

while. OGERL planned and coordinated another year of some of the most remarkable CLE events in Texas for both the State Bar and UT Law CLE. The Advanced Oil, Gas and Energy Resources Law Course; the Oil and Gas Disputes course; and the Ernest E. Smith Oil, Gas, and Mineral Law Institute were outstanding once again. Of special note was the success of the 16th annual Renewable Energy Law conference, which was "virtually" sold out. OGERL also advances legal scholarship in the energy field by publishing three section reports that contain some of the most detailed, in-depth articles about breaking topics you can find. You can find these articles, along with many other energy-related articles, at the OGERL website, oilgas.org. One of OGERL's best activities is providing scholarships to the top performers in introductory oil and gas courses in Texas law schools and funding internships at numerous Texas agencies that regulate and address our state's energy and power issues. This year OGERL is providing a record level of such scholarships and internships.

PARALEGAL DIVISION

Edna W. Garza-Guerra, President

The June 18-19, 2020, incoming/outgoing board meeting was held via Zoom. This was the first time that officers/directors were virtually sworn in. When the Texas Advanced Paralegal Seminar Planning Committee learned that the State Bar had canceled all live events due to COVID-19, it quickly came up with "E-TAPS 2020—The Home Edition," which was held online on September 16-17, 2020. Attendees were able to enjoy two days of CLEs from home. The 2020 Virtual Annual Meeting was held on September 18 in conjunction with E-TAPS. The ethics speaker was Ellen Lockwood. Attendees received one hour for attending the free CLE. The fall board of directors meeting followed on September 18-19. The 2020 Salary Compensation Survey was completed on October 30. In January 2021, Lisa Pittman (District 12) was elected as the 2021-2022 president-elect. On February 26-27, the Paralegal Division had a winter board meeting in Dallas. The 2021 TAPS will be held at

the Wyndham San Antonio River Walk on September 22-24. The Paralegal Division will be celebrating its 40th anniversary so plans are in the works to commemorate this milestone occasion at TAPS.

POVERTY LAW

Melissa Thrailkill, Chair

The Poverty Law Section continued to work hard to serve members and the public during the pandemic. Our First Friday CLEs provided members with a wide range of education every month, from voting rights to immigration to criminal record expunctions to tenant rights. The section also issued statements condemning the words of State Bar President Larry McDougal and announcing its commitment to educating and working against systemic racism in the profession, the courts, and culture. Additionally, the section held its annual meeting virtually and honored several outstanding lawyers and advocates in the areas of LGBTQIA+ rights, family violence, and housing and economic justice. The legislative committee also actively participated in reviewing other sections' legislative proposals, providing comments and insight into how certain proposals would affect Texans living in poverty and our members' advocacy. Finally, the section announced the launch of the Bruce Bower Justice Grant, which the section will use to help provide grant(s) to nonprofits and other organizations that seek to increase access to justice.

PUBLIC UTILITY LAW

Dane McKaughan, Chair

The Public Utility Law Section provides opportunities for practitioners from all segments of the utility law bar to interact, learn from each other, and keep abreast of developments in relevant laws, government regulations, and court decisions. Despite having to move the section's 2020 Annual Conference online, members turned out in force to hear recorded and live presentations from key individuals involved in public utility law, including the past chair of the Public Utility Commission of Texas and the current chair of the Railroad Commission of Texas, in addition to

presentations regarding the security and reliability of the Texas grid, water rights, and issues affecting the telecommunications industry. Calendar year 2020 also saw members vote to expand the number of council members and to amend bylaws to allow section leadership to provide more services and increased value to members. This year, the section will be sponsoring an intern at the Public Utility Commission for the first time and has plans for more social gatherings with members once health considerations allow. The section is also working on publishing additional newsletters and potentially expanding its internship program. The section looks forward to the Annual Conference, hopefully in person, in the fall to bring together for members key leaders in the Public Utility space to speak to important topics such as the 2021 Texas winter storm and its consequences and updates from the 2021 legislative session.

REAL ESTATE, PROBATE & TRUST LAW

Reid Wilson, Chair

The Real Estate, Probate & Trust Law Section, or REPTL, one of the largest sections with over 9,200 members, is focused on its most ambitious legislative program in years with 10 bills filed on a variety of subjects: real estate, probate, and trust. Roland Love, Lauren Hunt, and Chair-elect Craig Hopper led this effort. Section volunteers have researched, drafted, and debated these proposed bills. Every bill proposed by REPTL was approved for inclusion in the State Bar legislative program. After this year's session, a summary of bills will be published. REPTL has worked with the state government on COVID-19 issues and Supreme Court committees. REPTL honored two lawyers—Bill Locke (real estate), of Austin, and Rhonda Brink (probate), of Austin—as its 2020 Distinguished Lifetime Achievement Award recipients. REPTL published the *REPTL Reporter* edited by Gerry Beyer, and sent multiple e-blasts on legal developments, section news, practice tips, and CLE. REPTL members enjoyed \$50 discounts from select TexasBarCLE events. REPTL funded and supported the Texas Title Standards Joint Editorial Board,

approving an update to its materials. REPTL is proud of its commitment to diversity in its leadership. REPTL has solid finances with adequate reserves.

SCHOOL LAW

Marianna McGowan, Chair

The School Law Section is dedicated to providing information related to legal issues arising in Texas public schools, junior colleges, and universities to a range of legal practitioners and education law-related associations. Section membership includes individuals representing the interests of parents, students, employees and employee organizations, educational institutions and their governing bodies, and state and national education-related agencies and associations. Despite an unusual year, the section did an excellent job of “rolling with the punches” as our practice changed from day-to-day with changes in legislation, federal and state orders, and administrative guidance. This year, the section is offering a new and improved website. It is the section's goal to provide members with updates, general information about the section, contacts within the section, CLE programs, and other resources. The section expects to hold the 35th annual School Law Section Retreat July 23-24, 2021. This retreat is a family-friendly event members attend to receive high-quality CLE in a setting that encourages members to meet one another and their families. We encourage all attorneys interested to join this outstanding group.

TAX

Lora G. Davis, Chair

The Tax Section remained involved in programs this fiscal year. The section's pro bono volunteers represented taxpayers across the country in virtual U.S. Tax Court hearings and trained over 60 service members at three bases on Volunteer Income Tax Assistance. Section leaders participated in online panel presentations, describing a variety of career paths and encouraging Texas law school students to become tax practitioners. The section provided comments to the IRS and U.S. Department of the Treasury on the centralized audit regime and proposed regulations relating to carried interests.

The section provided comments to the Texas comptroller on proposed draft rules relating to qualified research and margin tax research and development activities credit. The section hosted a free seminar titled “Zooming Into the Tax Court: Practice Tips for Remote Proceedings” and continued to provide free monthly tax law updates for members. Tax Law in a Day and the SALT seminar were “virtual” successes! This spring, an advanced seminar on the carried interest regulations will be held, scholarships will be awarded to law students, and an Outstanding Texas Tax Lawyer will be selected. Section benefits include a free 24/7 CLE library, *Texas Tax Lawyer*, and 22 active committees.

WOMEN AND THE LAW

Teresa Schiller, Chair

The year's accomplishments include the following: (1) redesign of monthly newsletters; (2) monthly CLE programs; (3) creation of members-only CLE video library; (4) extensive website update; (5) incentivizing Texas law school students to tackle legal and societal challenges through annual writing competition in honor of Harriet E. Miers; (6) hands-on business development workshops; (7) “Giving the Gift of Membership” drive; (8) co-hosting statewide tribute to Justice Ruth Bader Ginsburg; (9) co-sponsorship of a National Association of Women Judges program featuring four female Texas Supreme Court justices; (10) nomination of section leader to the State Bar of Texas Board of Directors and plan for supporting future diverse candidates; (11) signatory to the affinity sections and committees' July 2020 statement advocating for diversity and inclusion; (12) outreach to section, committee, and Texas women's bar association leaders for cross-promotional purposes; (13) hosting annual competitions to recognize lifetime achievement and ongoing contributions to women in memory of Sarah T. Hughes, Louise B. Raggio, and Barbara Culver Clack; (14) election of emeritus (permanent) council members with institutional knowledge; (15) adoption of internal financial controls policy; (16) favorable section audit results; and (17) development of manuals and templates for future section leaders. **TBJ**

The Workers' Compensation Section did not submit a report.

A photograph of Jeanine Novosad Rispoli, a woman with blonde hair and glasses, smiling. She is standing next to her husband, Stephen, who has a beard and is wearing sunglasses. They are both smiling at the camera. In the background, there is a black dog, Khaleesi, sitting in a grassy field. The setting appears to be a rural area with trees and a clear sky.

Practicing Civility

Texas Young Lawyers Association
President Jeanine Novosad Rispoli
on treating people with respect.

INTERVIEW BY ADAM FADEREWSKI

From the day Jeanine Novosad Rispoli learned that she had been adopted with the help of attorneys, she aspired to be a lawyer to help people achieve the same level of happiness she found with her parents. Being an attorney wasn't her only aspiration though, as she had dreams of glitz and glamour in New York as a Radio City Rockette, but those dreams were dashed by circumstances outside of her control—her height and a dance injury in high school.

It was in high school that Rispoli got her first experience working in the legal profession at a law office—Bates stamping discovery documents, answering phones, and filing motions—and it planted the seed for her love of family law. Rispoli graduated from Baylor University and carried over time there to Baylor Law School. She returned to home to Houston, but it wasn't long before she and her husband, Stephen—who also graduated from Baylor and is now assistant dean of student affairs and pro bono programs at Baylor Law School—were together again in Waco.

Rispoli hung her shingle as a family law practitioner in Waco in 2018, and this year, she started a new firm with her friend Mark Altman. While trials are contentious environments, Rispoli learned from her mentor, Judge Vikram Deivanayagam, and one of her favorite bosses, Lauren Waddell, that the competitive nature need not carry into interactions with opposing counsel before and after

the trial. She hopes to promote civility as her platform as Texas Young Lawyers Association president, noting that the profession is already a trying one and that attorneys can practice civility to alleviate that tension for one another.

Rispoli, who was sworn in June 18, 2021, spoke with the *Texas Bar Journal* about the biggest influence in her career, being a young attorney, and why civility is so important.

DO YOU HAVE ANY OTHER LAWYERS IN YOUR FAMILY?

No one in my family was a lawyer, but I was determined to start working for lawyers as soon as possible. Working for family lawyers in high school and college gave me some insight into how the career could look, what the expectations would be, and some of the ups and downs I might experience. No one tried to glamorize family law or tell me it would be easy. Many of the lawyers I worked for are still my mentors today, and they continue to remind me that you can make such a difference in the lives of your clients.

WHO IS THE BIGGEST INFLUENCE IN YOUR CAREER?

My mom is my biggest influence. I was born around Mother's Day so I always say she is the best birthday gift I could ever receive. She taught me to be strong but compassionate, independent but empathetic, and brave. She's an amazing math

ABOVE: Jeanine Novosad Rispoli with her husband, Stephen, and their dog, Khaleesi, in Valley Mills. PHOTO COURTESY OF JEANINE NOVOSAD RISPOLI

teacher, not a lawyer, and yet I've learned so much about being a good lawyer from her because she's always prioritized helping others and being kind.

WHAT MADE YOU CHOOSE BAYLOR LAW SCHOOL?

I was fortunate enough to attend several trials and hearings while I was working in college, and I quickly realized that family lawyers went to court a lot. I heard that Baylor Law School was the litigation school, so it felt like a natural fit. I also don't like to back down from a challenge and the 3L Practice Court training was worth every sleepless night and more. As my 10-year law school reunion approaches, I've reconnected with so many classmates who are genuinely wonderful people and I'm so thankful for the classmates and professors who have become family to Stephen and me.

WHAT LED TO YOUR MOVE FROM HOUSTON BACK TO WACO?

I spent seven years in Waco as a Baylor student, and I thought my time in the Heart of Texas was over. After practicing in Houston for four wonderful years, it was time for Stephen, my husband, and me to finally live in the same city—and the career opportunities in Waco were too good for us to ignore. As a city girl, I knew I could be happy here because, while Waco may be considered a small city, it still has that magical “anything is possible” feel to me. Do you want to feel and hear a SpaceX rocket engine test? You can probably feel it from your own house and may even need to readjust the pictures on your walls afterward. Do you want to see a local couple grow a business from a startup to a multimillion dollar and internationally recognized brand? Follow the signs downtown to the Magnolia Silos. Do you want to open your own firm and build a law practice that actually makes you happy and proud? I started my own practice in 2018 and recently opened a new firm with a friend, Mark Altman, who I'm proud to call my law partner.

WHAT'S THE TOUGHEST PART ABOUT BEING A YOUNG ATTORNEY?

When I was dancing in high school, I was continually reminded that an athlete's career won't last very long before he or she is considered too old. It's been interesting to me to experience the opposite treatment as a young lawyer. So many lawyers have told me in the past 10 years that I'm too young to really be successful or respected. People have even gone so far as to say that I won't be credible until I have gray hair or children of my own. Say what you want about millennials, but I've seen colleagues my age and younger who put in the hard work and do it with incredible integrity and compassion. I've realized that you'll never be enough to some people, so you have to build your own self-worth and confidence. Some of the best antidotes to self-doubt are working hard and surrounding yourself with people who support and inspire you. It helps me to remember that Sheryl Sandberg, Maya Angelou, Tina Fey, and Justice Sonia Sotomayor have all experienced impostor syndrome and self-doubt. I've often been told I need to wear higher heels because I'm too short

to be intimidating. That used to bother me until I won a hearing against an opposing counsel well over a foot taller than me and I wore tasteful flats the whole time. Now we have the first woman vice president and she made pearls and Converse Chuck Taylors a fashion trend.

WHAT'S THE KEY TO BALANCING AN AMICABLE APPROACH WITH AGGRESSIVE-WHEN-NECESSARY LITIGATION?

To me, civility is an integral part of lawyer wellness. This profession is stressful enough, and I've felt just how powerful and necessary it is to treat people with basic respect. My husband and I have read dozens of books on resilience and perseverance, and we know that those skillsets and mindsets are important. I also know that I've never lost sleep over being too respectful. My

advice to young lawyers and law students is to think about who you want to be as a lawyer. When you are listing words that you want people to associate you with, make sure that respectful and civil are at the top of the list. It is possible to be a zealous advocate for your client and to be civil to the other side. In fact, I believe that you are more likely to be effective for your client when you do so. As the old saying goes, you catch more flies with honey than vinegar.

WHAT WILL BE YOUR FOCUS GOING INTO YOUR YEAR AS PRESIDENT?

I'm sure no one is surprised at this point that civility, civil discourse, and relationship wellness are going to be major focuses for TYLA this year. The TYLA board

and local affiliates are families because the members come together to support each other and serve the public. As Texas lawyers, we have diverse needs and interests, but I think we all have more in common than we think. I may not agree with my opposing counsel, but I can still ask them how they're doing or congratulate them for a recent accolade. It sounds trite and yet so many lawyers are shocked when I say something kind to them right before walking into a hearing.

WHAT ELSE DO YOU WANT PEOPLE TO KNOW ABOUT YOU OR THE WORK YOU DO WITH TYLA?

I was two weeks into the travel phase of the TYLA campaign on March 13, 2020. I went from traveling all over Texas and shaking hands with so many young lawyers to waking up on Friday the 13th to a different reality. Not surprisingly, Texas lawyers adapted quickly, and we rescheduled office visits to virtual meetings. Britney and the TYLA board rolled with all the punches and created amazing projects this year. As Britney says, this year wasn't canceled. Stephen and I spent more time outdoors this past year. We've enjoyed more sunsets and beautiful days outside, and we know we don't want that to change. When everyone is talking about returning to normal, remember that you don't have to return to how things were before March 2020. Take that walk, FaceTime that friend or family member, keep baking bread or whatever hobby you started, stay involved with the virtual book club you joined, keep going to therapy virtually or in person, and remember to be kind to yourself and others. **TBJ**



ABOVE: Jeanine Novosad Rispoli with her mom and grandparents on the day her parents adopted her.
PHOTO COURTESY OF JEANINE NOVOSAD RISPOLI



IN THE SUPREME COURT OF TEXAS

■ Misc. Docket No. 21-9059

ORDER AMENDING TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Court approves the following amendments to the Texas Rules of Appellate Procedure.
2. The amendments take effect October 1, 2021.
3. The amendments may be changed before October 1, 2021, in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court requests that comments be sent by August 31, 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: May 25, 2021

Nathan L. Hecht, Chief Justice
Eva M. Guzman, 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 COURT OF CRIMINAL APPEALS OF TEXAS

■ Misc. Docket No. 21-001

ORDER AMENDING TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Court approves the following amendments to the Texas Rules of Appellate Procedure.
2. The amendments take effect October 1, 2021.
3. The amendments may be changed before October 1, 2021, in response to public comments. Written comments should be sent to txccarulescomments@txcourts.gov. The Court requests that comments be sent by August 31, 2021.
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 - 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: May 25, 2021

Sharon Keller, Presiding Judge
Barbara Hervey, Judge
Bert Richardson, Judge
Kevin P. Yeary, Judge
David Newell, Judge
Mary Lou Keel, Judge
Scott Walker, Judge
Michelle M. Slaughter, Judge
Jesse McClure, Judge

Rule 10. Motions in Appellate Courts

104 Power of Panel or Single Justice or Judge to Entertain Motions.

(a) *Single Justice.* In addition to the authority expressly conferred by these rules or by law, a single justice or judge of an appellate court may grant or deny a request for relief that these rules allow to be sought by motion. But in a civil case, a single justice should not do the following:

- (1) act on a petition for an extraordinary writ; or
- (2) dismiss or otherwise determine an appeal or a motion for rehearing or en banc reconsideration.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

191. Plenary Power of Courts of Appeals

A court of appeals' plenary power over its judgment expires:

- (a) 60 days after judgment if no timely filed motion for rehearing or en banc reconsideration, or timely filed motion to extend time to file such a motion, is then pending; or
- (b) 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such a motion.

Notes and Comments

Comment to 2008 change: Subdivision 19.1 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as having the effect of a motion for rehearing.

Rule 41. Panel and En Banc Decision

41.2. Decision by En Banc Court

(c) *En Banc Consideration Disfavored.* En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration. A vote to determine whether a case will be ~~heard~~considered or ~~reheard~~reconsidered en banc need not be taken unless a justice of the court requests a vote. If a vote is requested and a majority of the court's members vote to ~~hear~~consider or ~~rehear~~reconsider the case en banc, the en banc court will ~~hear~~consider or ~~rehear~~reconsider the case. Otherwise, a panel of the court will consider the case.

Rule 47. Opinions, Publication, and Citation

47.5. Concurring and Dissenting Opinions

Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a ~~hearing~~hearing or ~~rehearing~~reconsideration en banc.

Rule 49. Motion for Rehearing and En Banc Reconsideration

49.1. Motion for Rehearing

A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing.

49.2. Response to Motion for Rehearing

No response to a motion for rehearing need be filed unless the court so requests. ~~A~~The motion will not be granted unless a response has been filed or requested by the court.

49.3. Decision on Motion for Rehearing

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Unless two justices who participated in the decision of the case agree on the disposition of the motion for

rehearing, the chief justice of the court of appeals must assign a justice to replace any justice who participated in the panel decision but cannot participate in deciding the motion for rehearing. If rehearing is granted, the court ~~or panel~~ may dispose of the case with or without rebriefing and oral argument.

49.4. Accelerated Appeals

~~In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.~~

49.54. Further Motion for Rehearing

After a court decides a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment; or
- (c) issues a different opinion.

49.6. Amendments

~~A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.~~

49.75. En Banc Reconsideration

A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order is rendered, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration. The motion should address the standard for en banc consideration in Rule 41.2(c). No response to a motion for en banc reconsideration need be filed unless the court so requests. While the court has plenary power, a majority of the en banc court may, with or without a motion on its own initiative, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition. The court may dispose of the case with or without rebriefing and oral argument.

49.6. Further Motion for En Banc Reconsideration

After a court decides a motion for en banc reconsideration,

a further motion for en banc reconsideration may be filed within 15 days of the court's action if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment; or
- (c) issues a different opinion.

49.7. Accelerated Appeals

In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or en banc reconsideration or shorten the time to file such a motion.

49.8. Amendments

A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.89. Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.910. Not Required for Review

A motion for rehearing or for en banc reconsideration is not a prerequisite to filing a petition for review in the Supreme Court or a petition for discretionary review in the Court of Criminal Appeals nor is it required to preserve error.

49.10. Deleted

49.11. Relationship to Petition for Review

A party may not file a motion for rehearing or en banc reconsideration in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.12. Certificate of Conference Not Required

A certificate of conference is not required for a motion for rehearing or en banc reconsideration of a panel's decision.

Notes and Comments

Comment to 1997 change: This is former Rule 100. Subdivision 49.4 is moved here from former Rule 43(h). Subdivisions 49.9 and 49.10 are added.

Comment to 2008 change: Rule 49 is revised to treat a motion for en banc reconsideration as having the effect of a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Comment to 2021 change: Rule 49 is revised to clarify when a motion for en banc reconsideration may be filed. Some subdivisions have been rearranged. Amended subdivision 49.5 adds a cross-reference to the standard for en banc consideration in Rule 41.2(c).

Rule 53. Petition for Review

53.7. Time and Place of Filing

(c) *Petitions Filed by Other Parties.* If a party files a petition for review within the time specified in 53.7(a) — or within the time specified by the Supreme Court in an order granting an extension of time to file a petition — any other party required to file a petition may do so within 45 days after the last timely motion for rehearing or en banc reconsideration is overruled or within 30 days after any preceding petition is filed, whichever date is later.

[CLEAN VERSION AS AMENDED]

Rule 10. Motions in Appellate Courts

10.4 Power of Panel or Single Justice or Judge to Entertain Motions.

(b) *Single Justice.* In addition to the authority expressly conferred by these rules or by law, a single justice or judge of an appellate court may grant or deny a request for relief that these rules allow to be sought by motion. But in a civil case, a single justice should not do the following:

- (1) act on a petition for an extraordinary writ; or
- (2) dismiss or otherwise determine an appeal or a motion for rehearing or en banc reconsideration.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1. Plenary Power of Courts of Appeals

A court of appeals' plenary power over its judgment expires:

- (a) 60 days after judgment if no timely filed motion for rehearing or en banc reconsideration, or timely filed motion to extend time to file such a motion, is then pending; or
- (b) 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such a motion.

Notes and Comments

Comment to 2008 change: Subdivision 19.1 is changed, consistent with other changes in the rules, to specifically address a motion for en banc reconsideration and treat it as having the effect of a motion for rehearing.

Rule 41. Panel and En Banc Decision

41.2. Decision by En Banc Court

(c) *En Banc Consideration Disfavored.* En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration. A vote to determine whether a case will be considered or reconsidered en banc need not be taken unless a justice of the court requests a vote. If a vote is requested and a majority of the court's members vote to consider or reconsider the case en banc, the en banc court will consider or reconsider the case. Otherwise, a panel of the court will consider the case.

Rule 47. Opinions, Publication, and Citation

47.5. Concurring and Dissenting Opinions

Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of consideration or reconsideration en banc.

Rule 49. Motion for Rehearing and En Banc Reconsideration

49.1. Motion for Rehearing

A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing.

49.2. Response to Motion for Rehearing

No response to a motion for rehearing need be filed unless the court so requests. The motion will not be granted unless a response has been filed or requested by the court.

49.3. Decision on Motion for Rehearing

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Unless two justices who participated in the decision of the case agree on the disposition of the motion for rehearing, the chief justice of the court of appeals must assign a justice to replace any justice who participated in the panel decision but cannot participate in deciding the motion for rehearing. If rehearing is granted, the court may dispose of the case with or without rebriefing and oral argument.

49.4. Further Motion for Rehearing

After a court decides a motion for rehearing, a further motion for rehearing may be filed within 15 days of the court's action if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment;
or
- (c) issues a different opinion.

49.5. En Banc Reconsideration

A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order is rendered. The motion should address the standard for en banc consideration in Rule 41.2(c). No response to a motion for en banc reconsideration need be filed unless the court so requests. While the court has plenary power, a majority of the en banc court may, on its own initiative, order en banc reconsideration of a decision. If a majority orders reconsideration, the judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition. The court may dispose of the case with or without rebriefing and oral argument.

49.6. Further Motion for En Banc Reconsideration

After a court decides a motion for en banc reconsideration, a further motion for en banc reconsideration may be filed within 15 days of the court's action if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment;
or
- (c) issues a different opinion.

49.7. Accelerated Appeals

In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or en banc reconsideration or shorten the time to file such a motion.

49.8. Amendments

A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.9. Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.10. Not Required for Review

A motion for rehearing or for en banc reconsideration is not a prerequisite to filing a petition for review in the Supreme Court or a petition for discretionary review in the Court of Criminal Appeals nor is it required to preserve error.

49.11. Relationship to Petition for Review

A party may not file a motion for rehearing or en banc reconsideration in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or en banc reconsideration or preclude the court of appeals from ruling on the motion. If a motion for rehearing or en banc reconsideration is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.12. Certificate of Conference Not Required

A certificate of conference is not required for a motion for rehearing or en banc reconsideration.

Notes and Comments

Comment to 1997 change: This is former Rule 100. Subdivision 49.4 is moved here from former Rule 43(h). Subdivisions 49.9 and 49.10 are added.

Comment to 2008 change: Rule 49 is revised to treat

a motion for en banc reconsideration as having the effect of a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration. Subdivision 49.5(c) is amended to clarify that a further motion for rehearing may be filed if the court issues a different opinion, irrespective of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. Issuance of a new opinion that is not substantially different should not occasion a further motion for rehearing, but a motion's lack of merit does not affect appellate deadlines. The provisions of former Rule 53.7(b) that address motions for rehearing are moved to new subdivision 49.11 without change, leaving the provisions of Rule 53.7(b) that address petitions for review undisturbed. Subdivision 49.12 mirrors Rule 10.1(a)(5) in excepting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Comment to 2021 change: Rule 49 is revised to clarify when a motion for en banc reconsideration may be filed. Some subdivisions have been rearranged. Amended subdivision 49.5 adds a cross-reference to the standard for en banc consideration in Rule 41.2(c).

Rule 53. Petition for Review

* * *

53.7. Time and Place of Filing

* * *

(c) *Petitions Filed by Other Parties.* If a party files a petition for review within the time specified in 53.7(a) — or within the time specified by the Supreme Court in an order granting an extension of time to file a petition — any other party required to file a petition may do so within 45 days after the last timely motion for rehearing or en banc reconsideration is overruled or within 30 days after any preceding petition is filed, whichever date is later.

* * *



IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9060

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

ORDERED that:

August 1, 2021, except the dismissal date may be extended as follows:

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-Sixth Emergency Order (Misc. Dkt. No. 21-9026) is renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—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 August 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, after

a. for any such proceeding that, on the date of this Order, has 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 the date of this Order, has 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 the date of this Order, has 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 the date of this Order, 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 should continue to use reasonable efforts to conduct proceedings remotely.

6. Upon request and good cause shown by a court participant other than a juror—including but not limited to a party, an attorney, a witness, or a court reporter—a court must permit the participant to participate remotely in any proceeding, subject to constitutional limitations.

7. A court of appeals may conduct in-person proceedings if the chief justice of the court of appeals adopts 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.

8. A district court, statutory or constitutional county court, statutory probate court, justice court, or municipal court may conduct in-person proceedings, including both jury and non-jury proceedings, if the local administrative district judge or presiding judge of a municipal court, as applicable, adopts, in consultation with the judges in the county or municipal court buildings:

a. minimum standard health protocols for court proceedings and the public attending court proceedings

that will be employed in all courtrooms and throughout all public areas of the court buildings, including masking, social distancing, or both; and

b. an in-person proceeding schedule for all judges in the county or municipal court buildings, as applicable.

9. A court may conduct an in-person jury proceeding if:

a. to assist with coordination of local resources and to manage capacity issues, the court has obtained prior approval, including a prior approved schedule, for the jury proceeding from the local administrative district judge or presiding judge of the municipal courts, as applicable;

b. the court has considered on the record 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;

c. the court has established communication protocols to ensure that no court participants have tested positive for COVID-19 within the previous 10 days, have had symptoms of COVID-19 within the previous 10 days, or have had recent known exposure to COVID-19 within the previous 14 days;

d. the court has included with the jury summons information on the precautions that have been taken to protect the health and safety of prospective jurors and a COVID-19 questionnaire to be submitted in advance of the jury selection that elicits from prospective jurors information about their exposure or particular vulnerability to COVID-19; and

e. the court has excused or rescheduled prospective jurors who provide information confirming their COVID-19 infection or exposure, or their particular vulnerability to COVID-19 and request to be excused or rescheduled.

10. 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 complied with paragraph 9(b).

11. Except for non-binding proceedings, 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.

12. 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.

13. In determining a person's right to possession of and access to a child under a court-ordered possession schedule in a Suit Affecting the Parent-Child Relationship, the existing trial court order shall control in all instances. Possession of and access to a child shall not be affected by any shelter-in-place order or other order restricting movement issued by a governmental entity that arises from the pandemic. The original published school schedule shall also control, and possession and access shall not be affected by the school's closure that arises from the pandemic. Nothing herein prevents parties from altering a possession schedule by agreement if allowed by their court order(s), or courts from modifying their orders on an emergency basis or otherwise.

14. An evidentiary panel in an attorney professional disciplinary or disability proceeding may—and must to avoid risk to panel members, parties, attorneys, and the public—without a participant's consent:

a. conduct the proceeding remotely, such as by teleconferencing, videoconferencing, or other means;

b. allow or require anyone involved in the proceeding—including but not limited to a party, attorney, witness, court reporter—to participate remotely, such as by teleconferencing, videoconferencing, or other means; and

c. consider as evidence sworn statements or sworn testimony given remotely, such as by teleconferencing, videoconferencing, or other means.

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

16. 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.

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

Dated: May 26, 2021

JUSTICE BOYD, JUSTICE DEVINE, AND JUSTICE BLACKLOCK dissent.

Nathan L. Hecht, Chief Justice
Eva M. Guzman, Justice
Debra H. Lehrmann, Justice
J. Brett Busby, Justice
Jane N. Bland, Justice
Rebeca A. Huddle, Justice



IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9061

FINAL APPROVAL AND ADOPTION OF AMENDMENTS TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT AND THE TEXAS RULES OF DISCIPLINARY PROCEDURE

ORDERED that:

1. On September 29, 2020, in Misc. Dkt. No. 20-9114, the Court submitted proposed amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure ("Proposed Rules") to the State Bar of Texas members for a referendum. The referendum occurred between February 2, 2021, and March 4, 2021.
2. On March 5, 2021, the State Bar of Texas Executive Director certified that the Proposed Rules were approved by a majority of the votes cast, and, on March 11, 2021, submitted a Petition for Order of Promulgation ("Petition") requesting the Court's adoption of the Proposed Rules effective July 1, 2021.
3. On March 15, 2021, in Misc. Dkt. No. 21-9029 the Court provided notice of public deliberations on the Proposed Rules and invited public comment until April 15, 2021. No comments were received.
4. On May 4, 2021, pursuant to Texas Government Code Section 81.08791, the Court deliberated on the Proposed Rules by Zoom videoconferencing and broadcast those deliberations to YouTube for public viewing.
5. Having considered the votes of the State Bar of Texas members, the Petition, and the presentations and materials submitted at the Court's public deliberations on May 4, 2021, and pursuant to Texas Government Code Sections 81.0879 and 81.08792, the Court approves and adopts the Proposed Rules, as well as interpretive comments, as set forth in this Order, effective July 1, 2021.
6. New Texas Disciplinary Rules of Professional Conduct 1.16 and 6.05, amendments to Part VII of the Texas Disciplinary Rules of Professional Conduct, and new Texas Rule of Disciplinary Procedure 13.04 are set forth in clean form. Amendments to Texas Disciplinary Rules of Professional Conduct 1.02, 1.05, and 8.03, to the comments to Texas Disciplinary Rules of Professional Conduct 1.03, 1.15, and 4.02, and to Rule 1.06, Part III, and Rule 9.01 of the Texas Rules of Disciplinary Procedure are demonstrated in redline.

7. 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: May 25, 2021

Nathan L. Hecht, Chief Justice
Eva M. Guzman, 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 Disciplinary Rule of Professional Conduct 102—Redline

Rule 102. Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), ~~and~~ (e), and (f), ~~and~~ (g), a lawyer shall abide by a client's decisions:

- (1) concerning the objectives and general methods of representation;
- (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
- (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

~~(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.~~

Comment:

Client Under a Disability

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph

~~(g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.~~

Comment to Texas Disciplinary Rule of Professional Conduct 1.03—Redline

Rule 1.03. Communication

Comment:

3. Ordinarily, the a lawyer should provide to the client information to be provided is that would be appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard communicating such information may be impractical; as for example, where if the client is a child or suffers from mental disability diminished capacity; see paragraph 5 and Rule 1.16. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.132. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Client Under a Disability with Diminished Capacity

5. In addition to communicating If a client appears to suffer from diminished capacity, a lawyer should communicate with any legal representative, a lawyer should and seek to maintain reasonable communication with a the client under a disability, insofar as possible. When a lawyer reasonably believes a Even if the client suffers a mental disability or is not legally competent from diminished capacity, it may not be possible to maintain the usual some aspects of a normal attorney-client relationship. Nevertheless, tThe client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, cChildren's opinions

regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client. Regardless of whether a client suffers from diminished capacity, a client should always be treated with attention and respect. See also Rule 1.02(e) 16 and Rule 1.05, Comment 17.

Texas Disciplinary Rule of Professional Conduct 105—Redline

Rule 1.05. Confidentiality of Information

(a) “Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(9) To secure legal advice about the lawyer’s compliance with these Rules.

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

Comment:

Client Under a Disability with Diminished Capacity

17. In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer’s revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03: When representing a client who may have diminished capacity, a lawyer should review Rule 1.16, which, under limited circumstances, permits a lawyer to disclose confidential information to protect the client’s interests.

Other Rules

22. Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 1.16, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

Permitted Disclosure or Use When the Lawyer Seeks Legal Advice

23. A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s responsibility to comply with these Rules. In most situations, disclosing or using confidential information

to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(9) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules. A lawyer who receives confidential information for the purpose of rendering legal advice to another lawyer or law firm under this Rule is subject to the same rules of conduct regarding disclosure or use of confidential information received in a confidential relationship.

Comment to Texas Disciplinary Rule of Professional Conduct 115—Redline

Rule 1.15. Declining or Terminating Representation

Comment:

Mentally Incompetent Client with Diminished Capacity

~~6. If the client is mentally incompetent, the a client may lacks the legal capacity to discharge the lawyer, (see paragraphs 11 and 12 of Comment to Rule 1.02), and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the incompetent client consider the consequences (see paragraph 5 of Comment to Rule 1.03) and the lawyer may in some situations may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.02(e)16.~~

Texas Disciplinary Rule of Professional Conduct 1.16—Clean

Rule 1.16. Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action.

Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

Comment:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. As part of the client intake process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise. Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person. Standardized forms may be available from bar associations and practice groups. Information about trusted person designations should be appropriately safeguarded and periodically updated, as necessary. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect an existing client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections. If it appears to be necessary to disclose confidential information to a third person to protect the client's best interests, a lawyer should consider whether it would be prudent to ask for the client's consent to the disclosure. Only in compelling cases should the lawyer disclose confidential client information if the client has expressly refused to consent. The authority of a lawyer to disclose confidential client information to protect the interests of the client is limited and extends no further than is reasonably necessary to facilitate protective action.

Duties Under Other Law

6. Nothing in this Rule modifies or reduces a lawyer's obligations under other law.

7. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

8. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

9. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational.

Emergency Legal Assistance

10. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer

may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

11. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Comment to Texas Disciplinary Rule of Professional Conduct 4.02—Redline

Rule 4.02. Communication with One Represented by Counsel

Comment:

2. Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government. Furthermore, it

does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a "second opinion" in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rules 7.021 and 8.04(a)(3).

Texas Disciplinary Rule of Professional Conduct 6.05—Clean

Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.

(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not:

(1) disclose confidential information of the pro bono client to the lawyers in the firm; or

(2) maintain such information in a manner that would render it accessible to the lawyers in the firm.

(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if:

(1) the eligibility information is not material to the legal matter; or

(2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.

(d) As used in this Rule, "limited pro bono legal services" means legal services that are:

(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program;

(2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and

(3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.

(e) As used in this Rule, a lawyer is not “in a firm” with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.

Comment:

1. Nonprofit legal services organizations, courts, law schools, and bar associations have programs through which lawyers provide short-term limited legal services typically to help low-income persons address their legal problems without further representation by the lawyers. In these programs, such as legal-advice hotlines, advice-only clinics, disaster legal services, or programs providing guidance to self-represented litigants, a client-lawyer relationship is established, but there is no expectation that the relationship will continue beyond the limited consultation and there is no expectation that the lawyer will receive any compensation from the client for the services. These programs are normally operated under circumstances in which it is not feasible for a lawyer to check for conflicts of interest as is normally required before undertaking a representation.

2. Application of the conflict of interest rules has deterred lawyers from participating in these programs, preventing persons of limited means from obtaining much needed legal services. To facilitate the provision of free legal services to the public, this Rule creates narrow exceptions to the conflict of interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts of interest will arise between clients represented through the program and other clients of the lawyer or the lawyer’s firm. Other than the limited exceptions set forth in this Rule, a lawyer remains subject to all applicable conflict of interest rules.

Scope of Representation

3. A lawyer who provides services pursuant to this Rule should secure the client’s consent to the limited scope of the representation after explaining to the client what that means in the particular circumstance. See Rule 1.02(b). If a short-term limited representation would not be fully sufficient under the circumstances, the lawyer may offer

advice to the client but should also advise the client of the need for further assistance of counsel. See Rule 1.03(b).

Conflicts and the Lawyer Providing Limited Pro Bono Legal Services

4. Paragraph (a) exempts compliance with Rules 1.06, 1.07, and 1.09 for a lawyer providing limited pro bono legal services unless the lawyer actually knows that the representation presents a conflict of interest for the lawyer or for another lawyer in the lawyer’s firm. A lawyer providing limited pro bono legal services is not obligated to perform a conflicts check before undertaking the limited representation. If, after commencing a representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis or the lawyer charges a fee for the legal assistance, the exceptions provided by this Rule no longer apply.

Imputation of Conflicts

5. Paragraph (b) provides that a conflict of interest arising from a lawyer’s representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer’s firm if the pro bono lawyer complies with subparagraphs (b)(1) and (2).

6. To prevent a conflict of interest arising from limited pro bono legal services from being imputed to the other lawyers in the firm, subparagraph (b)(1) requires that the pro bono lawyer not disclose to any lawyer in the firm any confidential information related to the pro bono representation.

7. Subparagraph (b)(2) covers the retention of documents or other memorialization of confidential information, such as the pro bono lawyer’s notes, whether in paper or electronic form. To prevent imputation, a pro bono lawyer who retains confidential information is required by subparagraph (b)(2) to segregate and store it in such a way that no other lawyer in the pro bono lawyer’s firm can access it, either physically or electronically.

Eligibility Information

8. Paragraph (c) recognizes the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide. Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential

information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive.

9. The first situation where the paragraph (c) exception is available is where none of the eligibility information is material to an issue in the legal matter. Alternatively, under subparagraph (c)(2), if the applicant provided confidential information after giving informed consent that the eligibility information would not prohibit the persons or entities identified in the consent from representing any other present or future client, then the eligibility information alone will not prohibit the representation. The lawyer should document the receipt of such informed consent, though a formal writing is not required. What constitutes informed consent is discussed in the comments to Rule 1.06.

10. Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview. Similarly, Rule 1.09 continues to apply to the representation of a person in a matter adverse to the applicant. Notably, Rule 1.05(c)(2) permits a lawyer to use or disclose information provided during an intake interview if the applicant consents after consultation to such use or disclosure, and Rule 1.09(a) excludes from its restrictions the representation of a person adverse to the applicant in the same or a substantially related matter if the applicant consents to such a representation.

Limited Pro Bono Legal Service Programs

11. This Rule applies only to services offered through a program that meets one of the descriptions in subparagraph (d)(1), regardless of the nature and amount of support provided. Some programs may be jointly sponsored by more than one of the listed sponsor types.

12. The second element of "limited pro bono legal services," set forth in subparagraph (d)(2), is designed to ensure that the services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm.

13. The third element of the definition, set forth in subparagraph (d)(3), is that the services are offered and provided without any expectation of either extended representation or the collection of legal fees in the matter. Before agreeing to proceed in the representation beyond "limited pro bono legal services," the lawyer should

evaluate the potential conflicts of interest that may arise from the representation as with any other representation. Likewise, the exceptions in paragraphs (a) and (b) do not apply if the lawyer expects to collect any legal fees in the limited assistance matter.

Firm

14. Lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program. Nor will the personal prohibition of a lawyer participating in a pro bono program be imputed to other lawyers participating in the program solely by reason of that volunteer connection.

Texas Disciplinary Rules of Professional Conduct, Part VII—Clean

VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of a lawyer or law firm. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve.

(b) This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. For purposes of Rules 7.01 to 7.06:

(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.

(2) A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which reasonably can be understood as offering to provide

legal services that the lawyer knows or reasonably should know the person needs in a particular matter.

(c) Lawyers may practice law under a trade name that is not false or misleading. A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) A statement or disclaimer required by these Rules shall be sufficiently clear that it can reasonably be understood by an ordinary person and made in each language used in the communication. A statement that a language is spoken or understood does not require a statement or disclaimer in that language.

(e) A lawyer shall not state or imply that the lawyer can achieve results in the representation by unlawful use of violence or means that violate these Rules or other law.

(f) A lawyer may state or imply that the lawyer practices in a partnership or other business entity only when that is accurate.

(g) If a lawyer who advertises the amount of a verdict secured on behalf of a client knows that the verdict was later reduced or reversed, or that the case was settled for a lesser amount, the lawyer must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that was ultimately received by the client.

Comment:

1. This Rule governs all communications about a lawyer's services, including firm names, letterhead, and professional designations. Whatever means are used to make known a lawyer's services, statements about them must be truthful and not misleading. As subsequent provisions make clear, some rules apply only to "advertisements" or "solicitation communications." A statement about a lawyer's services falls within those categories only if it was "substantially motivated by pecuniary gain," which means that pecuniary gain was a substantial factor in the making of the statement.

Misleading Truthful Statements

2. Misleading truthful statements are prohibited by this Rule. For example, a truthful statement is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

Use of Actors

3. The use of an actor to portray a lawyer in a commercial is misleading if there is a substantial likelihood that a reasonable person will conclude that the actor is the lawyer who is offering to provide legal services. Whether a disclaimer—such as a statement that the depiction is a "dramatization" or shows an "actor portraying a lawyer"—is sufficient to make the use of an actor not misleading depends on a careful assessment of the relevant facts and circumstances, including whether the disclaimer is conspicuous and clear. Similar issues arise with respect to actors portraying clients in commercials. Such a communication is misleading if there is a substantial likelihood that a reasonable person will reach erroneous conclusions based on the dramatization.

Intent to Refer Prospective Clients to Another Firm

4. A communication offering legal services is misleading if, at the time a lawyer makes the communication, the lawyer knows or reasonably should know, but fails to disclose, that a prospective client responding to the communication is likely to be referred to a lawyer in another firm.

Unjustified Expectations

5. A communication is misleading if there is a substantial likelihood that it will create unjustified expectations on the part of prospective clients about the results that can be achieved. A communication that truthfully reports results obtained by a lawyer on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Depending on the facts and circumstances, the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to mislead the public.

Required Statements and Disclaimers

6. A statement or disclaimer required by these Rules must be presented clearly and conspicuously such that

it is likely to be noticed and reasonably understood by an ordinary person. In radio, television, and Internet advertisements, verbal statements must be spoken in a manner that their content is easily intelligible, and written statements must appear in a size and font, and for a sufficient length of time, that a viewer can easily see and read the statements.

Unsubstantiated Claims and Comparisons

7. An unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as to lead a reasonable person to conclude that the comparison or claim can be substantiated.

Public Education Activities

8. As used in these Rules, the terms "advertisement" and "solicitation communication" do not include statements made by a lawyer that are not substantially motivated by pecuniary gain. Thus, communications which merely inform members of the public about their legal rights and about legal services that are available from public or charitable legal-service organizations, or similar non-profit entities, are permissible, provided they are not misleading. These types of statements may be made in a variety of ways, including community legal education sessions, know-your-rights brochures, public service announcements on television and radio, billboards, information posted on organizational social media sites, and outreach to low-income groups in the community, such as in migrant labor housing camps, domestic violence shelters, disaster resource centers, and dilapidated apartment complexes.

Web Presence

9. A lawyer or law firm may be designated by a distinctive website address, e-mail address, social media username or comparable professional designation that is not misleading and does not otherwise violate these Rules.

Past Success and Results

10. A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced or reversed, or that the case was settled for a lesser amount, must disclose those facts with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgement or settlement only if the lawyer played a substantial role in

obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer's experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Related Rules

11. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.04(a)(3); *see also* Rule 8.04(a)(5) (prohibiting communications stating or implying an ability to improperly influence a government agency or official).

Rule 7.02. Advertisements

(a) An advertisement of legal services shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location.

(b) A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization – Texas Board of Legal Specialization"; and

(2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

(c) If an advertisement by a lawyer discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation.

(d) A lawyer who advertises a specific fee or range of fees for an identified service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so.

Comment:

1. These Rules permit the dissemination of information that is not false or misleading about a lawyer's or law firm's name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language abilities; names of references and, with their consent, names of clients regularly represented; and other similar information that might invite the attention of those seeking legal assistance.

Communications about Fields of Practice

2. Lawyers often benefit from associating with other lawyers for the development of practice areas. Thus, practitioners have established associations, organizations, institutes, councils, and practice groups to promote, discuss, and develop areas of the law, and to advance continuing education and skills development. While such activities are generally encouraged, participating lawyers must refrain from creating or using designations, titles, or certifications which are false or misleading. A lawyer shall not advertise that the lawyer is a member of an organization whose name implies that members possess special competence, unless the organization meets the standards of Rule 7.02(b). Merely stating a designated class of membership, such as Associate, Master, Barrister, Diplomate, or Advocate, does not, in itself, imply special competence violative of these Rules.

3. Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer practices, focuses, or concentrates in particular areas of law. Such communications are subject to the "false and misleading" standard applied by Rule 7.01 to communications concerning a lawyer's services

and must be objectively based on the lawyer's experience, specialized training, or education in the area of practice.

4. The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

Certified Specialist

5. This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the Texas Board of Legal Specialization or by an organization that applies standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable, if the organization is accredited by the Texas Board of Legal Specialization. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.03. Solicitation and Other Prohibited Communications

(a) The following definitions apply to this Rule:

(1) "Regulated telephone, social media, or other electronic contact" means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) A lawyer "solicits" employment by making a "solicitation communication," as that term is defined in Rule 7.01(b)(2).

(b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(c) A lawyer shall not send, deliver, or transmit, or knowingly

permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence.

(d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if:

(1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or

(2) the communication is not plainly marked or clearly designated an "ADVERTISEMENT" unless the target of the communication is:

(i) another lawyer;

(ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(e) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(1) This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Texas law.

(2) A lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive;

(ii) clients are informed of the existence and nature of the agreement; and

(iii) the lawyer exercises independent professional judgment in making referrals.

(f) A lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or

advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value.

(g) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Comment:

Solicitation by Public and Charitable Legal Services Organizations

1. Rule 7.01 provides that a "'solicitation communication' is a communication substantially motivated by pecuniary gain." Therefore, the ban on solicitation imposed by paragraph (b) of this Rule does not apply to the activities of lawyers working for public or charitable legal services organizations.

Communications Directed to the Public or Requested

2. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is made in response to a request for information, including an electronic search for information. The terms "advertisement" and "solicitation communication" are defined in Rule 7.01(b).

The Risk of Overreaching

3. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services via in-person or regulated telephone, social media, or other electronic contact. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

4. The potential for overreaching that is inherent in in-person or regulated telephone, social media, or other electronic contact justifies their prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be sent by regular mail or e-mail, or by other means that do not involve communication in a live or electronically interactive manner. These forms of communications make it possible for the

public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, with minimal risk of overwhelming a person's judgment.

5. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

Targeted Mail Solicitation

6. Regular mail or e-mail targeted to a person that offers to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter is a solicitation communication within the meaning of Rule 7.01(b)(2), but is not prohibited by subsection (b) of this Rule. Unlike in-person and electronically interactive communication by "regulated telephone, social media, or other electronic contact," regular mail and e-mail can easily be ignored, set aside, or reconsidered. There is a diminished likelihood of overreaching because no lawyer is physically present and there is evidence in tangible or electronic form of what was communicated. See *Shapero v. Kentucky B. Ass'n*, 486 U.S. 466 (1988).

Personal, Family, Business, and Professional Relationships

7. There is a substantially reduced likelihood that a lawyer would engage in overreaching against a former client, a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent an entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Constitutionally Protected Activities

8. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries. See *In re Primus*, 436 U.S. 412 (1978).

Group and Prepaid Legal Services Plans

9. This Rule does not prohibit a lawyer from contacting representatives of organizations or entities that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties. Such communications may provide information about the availability and terms of a plan which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to persons who are seeking legal services for themselves. Rather, it is usually addressed to a fiduciary seeking a supplier of legal services for others, who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the information transmitted is functionally similar to the types of advertisements permitted by these Rules.

Designation as an Advertisement

10. For purposes of paragraph (d)(2) of this Rule, a communication is rebuttably presumed to be "plainly marked or clearly designated an 'ADVERTISEMENT'" if: (a) in the case of a letter transmitted in an envelope, both the outside of the envelope and the first page of the letter state the word "ADVERTISEMENT" in bold face all-capital letters that are 3/8" high on a uncluttered background; (b) in the case of an e-mail message, the first word in the subject line is "ADVERTISEMENT" in all capital letters; and (c) in the case of a text message or message on social media, the first word in the message is "ADVERTISEMENT" in all capital letters.

Paying Others to Recommend a Lawyer

11. This Rule allows a lawyer to pay for advertising and communications, including the usual costs of printed or online directory listings or advertisements, television and radio airtime, domain-name registrations, sponsorship fees, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers.

12. This Rule permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

13. A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.04(a) (division of fees with nonlawyers) and Rule 5.04(c) (nonlawyer interference with the professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services). To comply with Rule 7.01, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

Charges of and Referrals by a Legal Services Plan or Lawyer Referral Service

14. A lawyer may pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

15. A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

Reciprocal Referral Arrangements

16. A lawyer does not violate paragraph (e) of this Rule by agreeing to refer clients to another lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive, the client is informed of the referral agreement, and the lawyer exercises independent

professional judgment in making the referral. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. A lawyer should not enter into a reciprocal referral agreement with another lawyer that includes a division of fees without determining that the agreement complies with Rule 1.04(f).

Meals or Entertainment for Prospective Clients

17. This Rule does not prohibit a lawyer from paying for a meal or entertainment for a prospective client that has a nominal value or amounts to ordinary social hospitality.

Rule 7.04. Filing Requirements for Advertisements and Solicitation Communications

(a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services, or ten (10) days after the date of a solicitation communication sent by any means:

- (1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination;
- (2) a completed lawyer advertising and solicitation communication application; and
- (3) payment to the State Bar of Texas of a fee authorized by the Board of Directors.

(b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication.

(c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described

the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party.

Comment:

1. The Advertising Review Committee shall report to the appropriate disciplinary authority any lawyer whom, based on filings with the Committee, it reasonably believes disseminated a communication that violates Rules 7.01, 7.02, or 7.03, or otherwise engaged in conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

Multiple Solicitation Communications

2. Paragraph (a) does not require that a lawyer submit a copy of each written solicitation letter a lawyer sends. If the same form letter is sent to several persons, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

Requests for Additional Information

3. Paragraph (b) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in communications about legal services that were not substantially motivated by pecuniary gain.

Rule 7.05. Communications Exempt from Filing Requirements

The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03:

- (a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services;
- (b) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing;
- (c) a listing or entry in a regularly published law list;
- (d) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, or a business card;
- (e) a professional newsletter in any media that it is sent, delivered, or transmitted only to:

- (1) existing or former clients;
- (2) other lawyers or professionals;
- (3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;
- (4) members of a nonprofit organization which has requested that members receive the newsletter; or
- (5) persons who have asked to receive the newsletter;

(f) a solicitation communication directed by a lawyer to:

- (1) another lawyer;
- (2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or
- (3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;

(g) a communication in social media or other media, which does not expressly offer legal services, and that:

- (1) is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or
- (2) consists primarily of the type of information commonly found on the professional resumes of lawyers;

(h) an advertisement that:

- (1) identifies a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and
- (2) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, contact information, and the fact of the contribution or sponsorship;

(i) communications that contain only the following types of information:

- (1) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession, such as "attorney," "lawyer," "law office," or "firm;"

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- (2) the areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice;
 - (3) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction;
 - (4) the educational background of the lawyer;
 - (5) technical and professional licenses granted by this state and other recognized licensing authorities;
 - (6) foreign language abilities;
 - (7) areas of law in which a lawyer is certified by the Texas Board of Legal Specialization or by an organization that is accredited by the Texas Board of Legal Specialization;
 - (8) identification of prepaid or group legal service plans in which the lawyer participates;
 - (9) the acceptance or nonacceptance of credit cards;
 - (10) fees charged for an initial consultation or routine legal services;
 - (11) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event;
 - (12) any disclosure or statement required by these Rules; and
 - (13) any other information specified in orders promulgated by the Supreme Court of Texas.

Comment:

1. This Rule exempts certain types of communications from the filing requirements of Rule 7.04. Communications that were not substantially motivated by pecuniary gain do not need to be filed.

Website-Related Filings

2. While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer's website.

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by another person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by another person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Comment:

1. This Rule deals with three different situations: personal disqualification, imputed disqualification, and referral-related payments.

Personal Disqualification

2. Paragraph (a) addresses situations where the lawyer in question has violated the specified advertising rules or other provisions dealing with serious crimes and barratry. The Rule makes clear that the offending lawyer cannot accept or continue to provide representation. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

Imputed Disqualification

3. Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have

known that the employment was procured by conduct prohibited by the stated Rules. This effectively means that, in such cases, the disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

Restriction on Referral-Related Payments

4. Paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, even if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation only if the lawyer does not pay anything of value, such as a referral fee, to the person making the referral.

Texas Disciplinary Rule of Professional Conduct 8.03—Redline

Rule 8.03. Reporting Professional Misconduct

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

Texas Rule of Disciplinary Procedure 106—Redline

106. Definitions:

CC. "Professional Misconduct" includes:

2. Attorney conduct that occurs in another state or in the District of Columbia jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

Texas Rules of Disciplinary Procedure, Part III—Redline

PART III. TRIAL IN DISTRICT COURT

3.01. **Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the ~~Supreme Court of Texas~~ Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the ~~Clerk of the Supreme Court of Texas~~ Presiding Judge. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- C. A request for assignment of an active district judge to preside in the case.
- ~~CD.~~ Allegations necessary to establish proper venue.
- ~~DE.~~ A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
- ~~EF.~~ A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.
- ~~FG.~~ A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.
- ~~GH.~~ Any other matter that is required or may be permitted by law or by these rules.

3.02. Assignment of Judge:

- A. Assignment Generally: Upon receipt of a Disciplinary Petition, the ~~Clerk of the Supreme Court of Texas~~ shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court Presiding Judge shall promptly appoint

~~assign an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so appointed assigned be unable to fulfill the appointment assignment, he or she shall immediately notify the Clerk of the Supreme Court Presiding Judge, and the Supreme Court Presiding Judge shall appoint assign a replacement judge whose district does not include the county of appropriate venue. The A judge appointed assigned under this Rule shall be subject to objection, recusal or disqualification as provided by law the Texas Rules of Civil Procedure and the laws of this state. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of objection, recusal or disqualification, the Supreme Court Presiding Judge shall appoint assign a replacement judge within thirty days whose district does not include the county of appropriate venue. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.~~

- B. Transfer of Case: If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial

region shall assign a replacement judge whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue.

3.03. Filing, Service and Venue: After the trial judge has been ~~appointed assigned~~, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order Presiding Judge's assignment order~~ with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order Presiding Judge's assignment order~~. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

Texas Rule of Disciplinary Procedure 9.01—Redline

9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of

this Part, “discipline” by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of “warning” or “admonishment” or a similar advisory by a federal court or federal agency.

Texas Rule of Disciplinary Procedure 13.04—Clean

13.04. Voluntary Appointment of Custodian Attorney for Cessation of Practice:

In lieu of the procedures set forth in Rules 13.02 and 13.03, an attorney ceasing practice or planning for the cessation of practice (“appointing attorney” for purposes of this Rule) may voluntarily designate a Texas attorney licensed and in good standing to act as custodian (“custodian attorney” for purposes of this Rule) to assist in the final resolution and closure of the attorney’s practice. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed:

- A. Examine the client matters, including files and records of the appointing attorney’s practice, and obtain information about any matters that may require attention.
- B. Notify persons and entities that appear to be clients of the appointing attorney of the cessation of the law practice, and suggest that they obtain other legal counsel.

- C. Apply for extension of time before any court or any administrative body pending the client’s employment of other legal counsel.
- D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client’s rights.
- E. Give appropriate notice to persons or entities that may be affected other than the client.
- F. Arrange for surrender or delivery to the client of the client’s papers, files, or other property.

The custodian attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.

Comment: Performing the duties of a custodian under this Rule does not create a client-lawyer relationship. If a lawyer serving as custodian assumes representation of a client, the lawyer’s role as custodian terminates, and the lawyer’s actions are subject to the Texas Disciplinary Rules of Professional Conduct regarding the client-lawyer relationship.



IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9064

ORDER ADOPTING COMMENT TO TEXAS CODE OF JUDICIAL CONDUCT CANON 3

ORDERED that:

1. Canon 3 of the Texas Code of Judicial Conduct is amended to add the comment published in this Order, effective immediately.
2. 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 this Order for publication in the *Texas Register*.

Dated: May 28, 2021.

Nathan L. Hecht, Chief Justice
Eva M. Guzman, 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

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

COMMENT

It is not a violation of Canon 3B(8) for a judge presiding in a statutory specialty court, as defined in Texas Government Code section 121.001, to initiate, permit, or consider any ex parte communications in a matter pending in that court.

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from the bar and the judiciary and designates one of the members as chair. According to section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the Supreme Court." The committee posts drafts of its proposed opinions online at texasbar.com/pec for public comment before the opinions are finalized and printed in the *Texas Bar Journal*.

Opinion No. 691, June 2021

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, when may a lawyer represent a client adverse to a former prospective client of the lawyer or another lawyer in the lawyer's firm?

STATEMENT OF FACTS

Husband and Wife are married. Five years ago, Wife approached Lawyer A to discuss the possibility of retaining Lawyer A to bring a divorce action against Husband. Wife met with Lawyer A for approximately 45 minutes. Lawyer A presented Wife with an engagement letter, but Wife declined to retain Lawyer A. Wife took no further action to divorce Husband.

Lawyer B has been Lawyer A's partner for many years. Recently, Husband asked Lawyer B to represent him in divorcing Wife. Before entering into a client-lawyer relationship with Husband, Lawyer B learned that Wife had previously met with Lawyer A to discuss potential divorce representation.

Lawyer A retained no notes or other documents from his meeting with Wife and claims to have no recollection of any information shared by Wife during the meeting. Wife is unwilling to consent to Lawyer B's representation of Husband in the divorce or otherwise waive any conflict of interest arising from her prior consultation with Lawyer A.

Lawyer B asks whether the Texas Disciplinary Rules of Professional Conduct prohibit him from accepting representation of Husband in the divorce.

DISCUSSION

Lawyers owe a duty of confidentiality to prospective clients. In the following discussion, a "prospective client" is a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter but who does not enter into a client-lawyer relationship with the lawyer. For purposes of this discussion:

- (1) A person who sends information to a lawyer unilaterally and without the lawyer's express or implied

invitation is not necessarily a "prospective client." *Cf.* Professional Ethics Committee Opinion 651 (November 2015) (discussing duties owed to persons who submit information to a lawyer via links on the lawyer's website); and

- (2) A person who consults with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." *See generally* ABA Model Rule 1.18, comment 2.

There is no Texas Rule devoted to defining a lawyer's duties with regard to prospective clients. Nevertheless, the Preamble to the Rules indicates that such duties exist and may include the duty of confidentiality. Paragraph 12 of the Preamble ("Scope") provides:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.

Rule 1.05 addresses a lawyer's duties with respect to confidential client information. Rule 1.05(a) provides, in relevant part:

"Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by

the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates.

The Committee concludes that Rule 1.05's internal reference to Texas Rule of Evidence 503 means that a lawyer's duty of confidentiality under Rule 1.05 extends to information provided by prospective clients. Texas Rule of Evidence 503(a)(1)(B) provides that a "client" includes a person who "consults a lawyer with a view to obtaining professional legal services from the lawyer." This is consistent with comment 1 to Rule 1.05, which states that "[t]he ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance." *See also* Opinion 651 (November 2015) (absent an effective warning to the contrary, the duty of confidentiality may apply to information submitted by a prospective client in response to an invitation to submit such information via links on the lawyer's website).

Subject to the exceptions in Rule 1.05, therefore, a lawyer's unauthorized use or disclosure of confidential information provided by a prospective client violates Rule 1.05 and subjects the lawyer to possible disciplinary sanction. Accordingly, Lawyer A has a duty to maintain the confidentiality of any information disclosed by Wife in their meeting to discuss possible divorce representation.

The next question is whether Lawyer A's duty of confidentiality creates a conflict of interest that prevents Lawyer

A from representing Husband in divorcing Wife and, if so, whether Lawyer A's conflict is imputed to his partner, Lawyer B. The potentially applicable Rules relating to conflicts of interest are Rules 1.09 and 1.06.

Consultation with a prospective client does not create a "former client" conflict under Rule 1.09. Rule 1.09(a) addresses whether a lawyer may represent a person in a matter adverse to a former client:

- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
 - (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
 - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
 - (3) if it is the same or a substantially related matter.

Because Rule 1.09 only applies when a lawyer has formerly "represented" a client, a conflict in violation of Rule 1.09 does not arise when a lawyer represents a person adverse to a former prospective client.

Consultation with a prospective client does not create an opposing party representation conflict under Rule 1.06(a). Rule 1.06(a) prohibits a lawyer from representing opposing parties in the same litigation. Because Rule 1.06(a) applies only if the lawyer represents both opposing parties, it does not apply to a representation adverse to a prospective client.

Consultation with a prospective client may create an adverse limitation conflict under Rule 1.06(b)(2). Rule 1.06(b) provides:

- (b) In other situations and except to the extent permitted by paragraph

(c), a lawyer shall not represent a person if the representation of that person:

- (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
- (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Rule 1.06(b)(1) is expressly limited to representations adverse to the interests of "another client." Unlike Rule 1.05, Rule 1.06 does not refer to clients as defined in Texas Rule of Evidence 503. In the opinion of the Committee, (a) the word "client" in Rule 1.06 means a person in a duly formed client-lawyer relationship with the lawyer or the lawyer's firm, and (b) Rule 1.06(b)(1) does not apply to representations adverse to the interests of a prospective client.

Rule 1.06(b)(2), on the other hand, is not limited to conflicts relating to "another client." Among other things, Rule 1.06(b)(2) prohibits representations that reasonably appear to be "adversely limited by the lawyer's or law firm's responsibilities to . . . a third person." A lawyer's duty of confidentiality to a prospective client is the type of responsibility to a third person that may result in an adverse limitation under Rule 1.06(b)(2).

Whether a lawyer's duty of confidentiality to a prospective client reasonably appears to adversely limit the lawyer's representation of a client is ordinarily a question of fact. As a general rule, a lawyer should not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. In evaluating whether a conflict is caused by

consultation with a prospective client, the lawyer should consider circumstances including: (a) the nature of the representation sought by the prospective client; (b) the nature of the matter adverse to the prospective client; (c) the length of discussion with the prospective client; (d) the matters actually discussed; and (e) the contents of any documents given or shown to the lawyer.

The fact that the lawyer claims to be unable to remember all or some of the information disclosed by the prospective client is not determinative of whether a conflict exists under Rule 1.06(b)(2).

In the opinion of the Committee, based on the limited facts presented, Lawyer A's previous consultation with Wife creates a conflict of interest that would prevent Lawyer A from representing Husband in divorcing Wife. Given that Lawyer A's consultation with Wife lasted 45 minutes and related to the same matter as the proposed representation of

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Husband, the Committee believes a reasonable lawyer would conclude that Wife likely shared confidential information during the consultation that could be significantly harmful if revealed or used against her in a divorce from Husband. Accordingly, the Committee concludes that Lawyer A's duty of confidentiality to Wife reasonably appears to adversely limit his ability to represent Husband in divorcing Wife and that Rule 1.06(b)(2) therefore prohibits that representation.

Vicarious disqualification. Rule 1.06(f) provides: "If a lawyer would be prohibited by this Rule [1.06] from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."

As noted, Rule 1.06(b)(2) prohibits Lawyer A from representing Husband in divorcing Wife. Rule 1.06(f) automatically extends that prohibition to Lawyer B and any other lawyer presently in Lawyer A's firm. The firm-wide imputation of conflicts arising from relatively brief prospective client interviews may in some cases lead to harsh results, but the language of Rule 1.06(f) currently allows for no exception. *Compare* Rule 1.06(f) with ABA Model Rule 1.18 (limiting imputation of prohibition arising from consultation with prospective client, subject to certain conditions). The Committee notes that as of the date of this opinion the Committee on Disciplinary Rules and Referenda has proposed the addition of a new Texas Rule modeled on ABA Model Rule 1.18, but the proposed Texas Rule has not yet been adopted. *See* 83 Texas Bar Journal 618 (September 2020).

Effective consent. In the fact scenario assumed in this opinion, Wife is unwilling to consent to Lawyer A's or Lawyer B's representation of Husband. The Committee notes, however, that a lawyer may be able to proceed with a representation prohibited under Rule 1.06(b)(2) if the lawyer can obtain effective consent of both the former prospective client and the proposed client whose representation would otherwise be prohibited. Effective consent

under Rule 1.06(c) requires two elements:

- (c) A lawyer may represent a client in the circumstances described in (b) if:
 - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Rule 1.06(c) does not expressly address the need to obtain consent from non-clients when the potential conflict is based on the adverse limitation due to the interests of a third party. Nevertheless, the Committee believes that when representation is prohibited based on a consultation with a former prospective client, effective consent requires the informed consent of both the former prospective client and the currently proposed client, as well as the lawyer's reasonable belief that the representation can proceed without violation of the duty of confidentiality owed to the former prospective client.

A former prospective client may place limitations on its consent under Rule 1.06(c). For example, the former prospective client might condition consent on the adoption of an agreed screening arrangement whereby the individual lawyer(s) who consulted with that prospective client would be prohibited from participating in the proposed adverse representation or disclosing the prospective client's confidences to any other person. Assuming the former prospective client, the lawyer, the law firm, and the law firm's proposed client all agree, such a screening arrangement would allow other lawyers in the law firm to undertake the representation adverse to the interests of the former prospective client, notwithstanding imputation of the conflict under Rule 1.06(f). The Committee notes that screening will not avoid a Rule 1.06(b)(2) conflict based on a consultation

with a former prospective client unless all parties consent to the arrangement in accordance with Rule 1.06(c).


CONCLUSION

A lawyer who consults with a person about the possibility of forming a client-lawyer relationship with respect to a matter owes that person a duty of confidentiality under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and may not use or reveal information communicated by the prospective client except in accordance with that Rule.

A lawyer's consultation with a prospective client may result in a disqualifying adverse limitation under Rule 1.06(b)(2). Whether a lawyer's representation of a client reasonably appears to be adversely limited by the lawyer's duty of confidentiality to a former prospective client is ordinarily a factual inquiry. As a general rule, a lawyer should not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

If Rule 1.06(b)(2) prohibits a lawyer from undertaking a representation adverse to a former prospective client, then no other lawyer while a member or associated with that lawyer's firm may accept the representation. Screening will not avoid the imputation of a Rule 1.06(b)(2) conflict based on a consultation with a former prospective client unless all parties consent to the screening arrangement in accordance with Rule 1.06(c).

Under the fact scenario presented in this Opinion, Lawyer A owes a duty of confidentiality to Wife and may not use or reveal information communicated by Wife except in accordance with Rule 1.05. Rule 1.06(b)(2) prohibits Lawyer A from representing Husband in his divorce because Lawyer A previously had a substantive consultation with Wife about possible divorce representation. Lawyer A's disqualifying conflict is imputed to Lawyer B and all other lawyers in the Lawyer A's law firm. **TBJ**



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I AM DEEPLY GRATEFUL FOR THE EXTRAORDINARY OPPORTUNITY to serve you as the 2021-2022 Texas Young Lawyers Association president. For the past few years, I've had the privilege of learning more about servant leadership from past presidents Victor A. Flores and Britney Harrison and all of the TYLA board members. TYLA is a perfect example of one of my favorite quotes from retired U.S. Supreme Court Justice Sandra Day O'Connor: "We don't accomplish anything in this world alone and whatever happens is the result of the whole tapestry of one's life and all the weavings of individual threads from one to another that creates something." The State Bar of Texas has been part of my tapestry from the beginning: It started at my birth with my adoption by my parents. I remember hearing about my adoption as a child—about the judge and lawyers involved—and I decided all those years ago that this was the profession I wanted to join one day.

Since law school, I have been welcomed into the Baylor Law family, my local affiliates, the family law bar, the State Bar, and TYLA. Through these experiences and relationships, I've seen how the unique perspectives, talents, and passions of Texas lawyers come together to make us stronger. During his year as TYLA president, Victor Flores reminded us that we are "Better Together." This past year our president, Britney Harrison, encouraged us to work together to become the change we need. I have been inspired by the way Texas lawyers have adapted and supported each other and their communities throughout the pandemic and the various other challenges that 2020 and 2021 have posed. As we move forward and life returns to "normal," I hope that this culture of camaraderie and civility remains.

I'm not entirely sure what to call this stage of the pandemic. I do know that this is the part when I can visit and hug my grandmother, Meme. This has been the phase where we have started celebrating the missed milestones and achievements all at once across a dinner table instead of a screen. I have found this relatively undefined but optimistic phase inspiring. We spent more than a year outside of our comfort zones, rethinking our priorities and habits, and now (or soon, hopefully) we can start defining a new normal. The priorities I choose to move forward with include family, friends, being kind and brave, and finding joy and pride in what I do.

For our next chapter, I hope for a better future for all in our profession. As so many people have done during this pandemic, we binge watched Star Wars. Last year I left our "May the 4th Be With You" Star Wars banner up well into the summer because, as Gen. Leia reminded us, "Hope is like the sun. If you only believe it when you see it, you'll never make it through the night." But hope alone is not enough. The late U.S. Supreme Court Justice Ruth Bader Ginsburg taught us that "Real change, enduring change, happens one step at a time." As we move forward, this is the part of the pandemic where we need to have hope, we can remind others around us to have hope, and we will foster enduring change and a brighter future together.

JEANINE NOVOSAD RISPOLI

2021-2022 President, Texas Young Lawyers Association



How to Take Advantage of Client Calls to MARKET YOUR PRACTICE

TIPS TO HELP YOU BE ORGANIZED AND EFFICIENT.

WRITTEN BY MEGAN LADRIERE

WHETHER YOU'RE A SOLO PRACTITIONER OR A LAWYER AT A SMALL FIRM, client calls provide an excellent opportunity to market your practice and build your brand. Not only do they give you an opportunity to show clients your commitment and dedication, but they will also help position you as an organized and efficient legal counselor. Here are some tips on preparing for and excelling at these calls regardless of the size of your firm.

1. Lay out a plan for the call.

Prepare an agenda with a list of the important topics you need to cover in the limited time you have with the client. Share it with your colleagues and the client before the call begins. By sharing it with the client and your team beforehand, you allow everyone to be prepared

for the call, ensuring you have a productive conversation.

2. Start the call off on the right foot.

Set yourself up to have a successful call by joining early. Doing so will give you time to take a deep breath, center yourself for a moment, go over your talking points, and show up mindfully to the call. You will also be in a good mood, rather than appearing to be the distracted outside counsel, too busy to truly focus on the client or their concerns.

3. Focus on the substantive issues.

On your client calls, limit the substantive discussion to just two or three topics that can realistically be covered and resolved within the time allotted. If more time is

needed to discuss any of these items, or if you need more information before deciding on an issue, suggest scheduling a separate call dedicated to that topic.

You could also let the client decide, noting that this may take longer than the time allotted, indicating that you are happy to stay on longer to discuss this more in detail, and asking the client's preference. Clients always appreciate it when you're mindful of their busy schedule.

4. **Schedule some post-call time for yourself.** Block off your calendar for 30 minutes after the end of the client call to draft a document that focuses on the issue, decisions made, and upcoming action items. You may also take this time to draft up any notes to send around to the client or the internal team, start working on some of the quicker next steps from the call, and get ready for your next call of the day.

Doing this right after the call, and while your memory is still fresh, will help you be better organized. If your calendar is blocked off, you have free space to stay ahead on your action items, allowing yourself to stay on top of your client's needs.

These tips are simple to implement but they will provide myriad positive effects. Not only will they help you become known as an organized and efficient lawyer, but they will also make meetings more productive and helpful for all parties involved. Without a doubt, your clients and colleagues will notice and appreciate your efforts. **TBJ**



MEGAN LADRIERE

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DISBARMENTS

On April 15, 2021, **DIANNA LEE MCCOY** [#24026865], of Austin, was disbarred. An evidentiary panel of the District 13 Grievance Committee found that on or about October 9, 2019, McCoy was court-appointed to represent the complainant in two criminal matters. In representing the complainant, McCoy neglected the legal matter entrusted to her, failed to meet with the complainant after her appointment, 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. McCoy also failed to timely respond to the grievance.

McCoy violated Rules 1.01(b)(1), 1.03(a), and 8.04(a)(8). She was ordered to pay \$1,796.21 in attorneys' fees and direct expenses.

On April 28, 2021, **CHRISTINA E. PAGANO** [#07154500], of Austin, received a judgment of disbarment effective April 22, 2021. An evidentiary panel of the District 9 Grievance Committee found that a client hired Pagano in June 2018 to secure his release from custody. After the complainant gave Pagano the pin numbers to his debit card and food stamp card, Pagano withdrew \$1,450 from the client's debit card and used \$170 from the client's food stamp card as an advanced fee for her services. Pagano failed to place the funds in an escrow or trust account. With the client's permission, Pagano also took possession of the client's watch and wallet containing the client's debit card, food stamp card, identification card, and Social Security card. Pagano failed to appropriately safeguard the client's property and return them at the end of her representation. Pagano made no appearance in the case and failed to provide the legal service for which she was hired. During the disciplinary case, Pagano provided a copy of a handwritten contract and a motion to substitute counsel, both purportedly signed by the client. The panel found that Pagano's client did not sign either document and that Pagano fabricated both documents. Pagano further failed to timely provide a written response to the disciplinary case.

Pagano violated Rules 1.01(b)(1), 1.14(a), 8.04(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 \$4,850 in attorneys' fees and expenses.

SUSPENSIONS

On April 14, 2021, **BLAKE DANIEL ALLRED** [#24069292], of Bayou Vista, accepted a 24-month fully probated suspension effective April 14, 2021. An evidentiary panel of the District 4 Grievance Committee found that, while representing clients, Allred neglected the legal matters entrusted to him, failed to keep his clients

reasonably informed about the status of their matters and promptly comply with reasonable requests for information, 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.

Allred violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$6,300 in restitution and \$2,870.51 in attorneys' fees and expenses.

On May 27, 2021, **PAUL CEDILLO JR.** [#04043500], of Rosenberg, received a two-year fully probated suspension effective June 1, 2021. The 400th District Court of Fort Bend County found that Cedillo violated Rule 1.01(b)(1) [neglected a legal matter], Rule 1.01(b)(2) [frequently failed to carry out completely the obligations owed to the client], Rule 1.03(a) [failed to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information], and Rule 1.04(c) [failed to communicate the basis or rate of the fee to the client].

Cedillo was ordered to pay \$300 in restitution and \$500 in attorneys' fees.

On April 28, 2021, **SHAMIM EBRAHIMI** [#24072907], of Dallas, received a 12-month fully probated suspension effective May 15, 2021. The 116th Civil District Court of Dallas County found that Ebrahimi committed professional misconduct by violating Rule 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].

Ebrahimi was ordered to pay \$3,500

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in restitution and \$2,054.53 in attorneys' fees.

On May 5, 2021, **KEITH MATTHEW GOULD** [#00795885], of Corpus Christi, accepted a six-month fully probated suspension effective June 1, 2021. The 28th District Court of Nueces County found that Gould failed to return unearned fees.

Gould violated Rule 1.15(d). He was ordered to pay \$2,500 in restitution and \$2,336.63 in attorneys' fees and direct expenses.

On May 5, 2021, **RONALD G. GREENING** [#08402600], of Austin, accepted a 15-month fully probated suspension effective May 15, 2021. An evidentiary panel of the District 9 Grievance Committee found that in January 2019, Greening consulted with a client regarding the probating of her mother's estate and the client's stepfather paid Greening a \$5,000 advanced fee, on or about February 6, 2019, which Greening failed to place in a trust or escrow account. Subsequently, Greening sent the client a proposed fee agreement, which she did not sign because she wanted to discuss the agreement with Greening. After receiving the proposed fee agreement, the client made numerous calls to Greening, after February 11, 2019, which he did not return. On April 2, 2019, having received no information from Greening, the client terminated the representation and requested a refund. Rather than comply with the client's request, Greening sent her a letter containing his analysis of potential issues that may arise in the probating of her mother's estate. On April 16, 2019, the client hired new counsel who unsuccessfully attempted to obtain an accounting and the refund of any unearned fees from Greening. Greening failed to respond promptly to new counsel's request. On the morning of June 18, 2019, the client spoke to an employee at Greening's law firm and again requested a refund. That evening, the client received an email from Greening with an attached statement

purporting to show that the firm had earned the advanced fee.

Greening violated Rules 1.14(a), 1.15(d), and 8.04(a)(3). He was ordered to pay \$3,500 in restitution to the client and \$1,463 in attorneys' fees and direct expenses.

On May 17, 2021, **ISRAEL PANDO GUARDIOLA** [#00784184], of Odessa, agreed to a one-year fully probated suspension effective May 23, 2021. An investigatory panel of the District 17 Grievance Committee found that Guardiola failed to properly supervise his non-lawyer employee.

Guardiola violated Rules 1.03(b), 5.03(b)(1), and 5.05(a). He was ordered to pay \$800 in attorneys' fees and direct expenses.

On April 23, 2021, **GEORGE ANGELO OGGERO** [#24060360], of Houston, received a two-year fully probated suspension effective May 12, 2021. An investigatory panel of the District 4 Grievance Committee found that in representing the complainant in a probate matter, Oggero accepted and continued employment in a legal matter, which Oggero knew or should have known, was beyond his competence. Oggero neglected the legal matter entrusted to him.

Oggero violated Rules 1.01(a) and 1.01(b)(1). He was ordered to pay \$1,000 in attorneys' fees.

On April 9, 2021, **THOMAS ANTHONY ZAKES** [#22243420], of Houston, received a two-year fully probated suspension effective June 8, 2021. An evidentiary panel of the District 4 Grievance Committee found that in representing the complainant in a child custody matter, Zakes neglected the legal matter entrusted to him and frequently failed to carry out completely the obligations that he owed to the client. Zakes failed to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. Zakes failed to explain the matter to the extent reasonably necessary to permit

the client to make informed decisions regarding the representation.

Zakes violated Rules 1.01(b)(1), 1.01(b)(2), 1.03(a), and 1.03(b).

On May 26, 2021, **RODNEY WILLIAM HAIRE** [#00795402], of Denton, agreed to a 12-month partially probated suspension effective July 15, 2021, with the first three months actively served and the remainder probated. An evidentiary panel of the District 14 Grievance Committee found that, in May 2014, the complainant hired Haire for representation in a personal injury. In November 2014, Haire settled the complainant's case without consulting the complainant and, over the course of the representation, repeatedly misrepresented to the complainant that the case was not yet settled. Haire frequently failed to carry out obligations owed to the complainant, failed to abide by the

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complainant's decisions whether to accept an offer of settlement, and failed to explain the settlement offer to the extent reasonably necessary to permit the complainant to make informed decisions regarding the representation. After settling the matter, Haire failed to provide the complainant with a written statement describing the outcome and showing the remittance and the method of its determination. Upon receiving funds in which the complainant and the medical providers had an interest, Haire failed to safeguard those funds, failed to promptly notify the complainant, and failed to promptly deliver to the complainant or the medical providers any funds they were entitled to receive, failed to promptly render a full accounting, and failed to surrender the complainant's file to her. Haire engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Haire violated Rules 1.01(b)(2), 1.02(a)(2), 1.03(b), 1.04(d), 1.14(a), 1.14(b), 1.15(d), and 8.04(a)(3). He was ordered to pay \$2,500.93 in attorneys' fees and direct expenses.

On May 18, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$750 in restitution and \$1,250 in attorneys' fees and direct expenses.

On May 25, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further engaged in the practice of law while administratively suspended for failure to timely pay dues and failure to comply with State Bar Rules relating to mandatory continuing legal education.

Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(11). He was ordered to pay \$750 in restitution and \$1,200 in attorneys' fees and direct expenses.

On May 18, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$1,000 in restitution and \$716 in attorneys' fees and direct expenses.

On May 18, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

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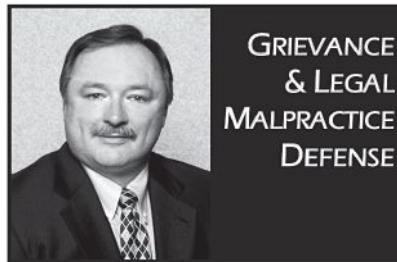
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Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$750 in restitution and \$716 in attorneys' fees and direct expenses.

On May 18, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$2,500 in restitution and \$666 in attorneys' fees and direct expenses.

On May 19, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected his client's case, failed to keep his client reasonably informed about the status of the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(1), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$500 in restitution and \$600 in attorneys' fees and direct expenses.

On May 19, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani failed to carry out completely the obligations owed to his client, failed to keep his client reasonably informed about the status of

the case, and failed to return unearned fees. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(2), 1.03(a), 1.15(d), and 8.04(a)(8). He was ordered to pay \$600 in restitution and \$616 in attorneys' fees and direct expenses.

On May 18, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective May 17, 2021, with the first seven months, 18 days actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani failed to carry out completely the obligations owed to his client and failed to keep his client reasonably informed about the status of the case. Mastriani further failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(2), 1.03(a), and 8.04(a)(8). He was ordered

to pay \$98 in restitution and \$750 in attorneys' fees and direct expenses.

On April 15, 2021, **CHRISTINA E. PAGANO** [#07154500], of Austin, received a three-year partially probated suspension effective April 13, 2021, (18 months active and 18 months probated) related to two corresponding disciplinary cases. An evidentiary panel of the District 9 Grievance Committee found that, on or about September 1, 2019, a friend of the client paid Pagano an advanced fee of \$2,000 to represent the client in a criminal matter. Pagano failed to place the advanced fee into a trust or escrow account and failed to make an appearance in the case. Additionally, Pagano had the client, who does not read English, sign a contract that was in English. Pagano failed to explain the terms of the contract to the client. After the client hired new counsel, Pagano failed to

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Member, 1992-1996, 1997-2003

State Bar of Texas
Disciplinary Rules of Professional
Conduct Committee
Member, 1993-1996

Disciplinary
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Member, 1991-1992

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return any unearned fee, a copy of the contract, or any documents in the client's file.

Pagano violated Rules 1.03(b), 1.14(a), 1.14(b), and 1.15(d) of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, State Bar Rules. Pagano was ordered to pay \$2,000 in restitution and \$3,902.80 in attorneys' fees and expenses.

On May 20, 2021, **MICHAEL KERRY RUSSELL** [#17420700], of Dallas, agreed to a 12-month partially probated suspension effective June 1, 2021, with the first six months actively served and the remainder probated. An investigatory panel of the District 6 Grievance Committee found that Russell neglected the legal matter entrusted to him, failed to communicate with the complainant, and upon termination of representation, failed to surrender papers and property to which

the complainant was entitled.

Russell violated Rules 1.01(b)(1), 1.03(a), and 1.15(d). He was ordered to pay \$250 in attorneys' fees and direct expenses.

On May 21, 2021, **ARTHUR R. EURESTE** [#06702250], of Houston, accepted a three-year active suspension effective August 1, 2021. The 270th Civil Court of Harris County found that Eureste neglected his client's legal matter, 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. Eureste further failed to timely respond to the grievance.

Eureste violated Rules 1.01(b)(1), 1.03(a), and 8.04(a)(8). He was ordered to pay \$1,000 in attorneys' fees.

On April 15, 2021, **DIANNA LEE MCCOY** [#24026865], of Austin,

received a 12-month active suspension effective May 1, 2021. An evidentiary panel of the District 13 Grievance Committee found that on or about January 11, 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. McCoy also failed to timely respond to the grievance.


McCoy violated Rules 1.01(b)(1), 1.03(a), and 8.04(a)(8). She was ordered to pay \$1,696.21 in attorneys' fees and direct expenses.

PUBLIC REPRIMANDS

On April 29, 2021, **JANA LEWIS-PEREZ** [#24077463], of Pearland, accepted a public reprimand. An investigatory panel of the District 5 Grievance Committee found that Lewis-Perez neglected a legal matter entrusted to her and failed to keep her client reasonably informed about the status of his legal matter and promptly comply with reasonable requests for information about the case. Upon termination of representation, Lewis-Perez failed to refund any advance payments of fees that had not been earned. Lastly, Lewis-Perez knowingly made a false statement of material fact or law to a tribunal.

Lewis-Perez violated Rules 1.01(b)(1), 1.03(a), 1.15(d), 3.03(a)(1), and 8.04(a)(8). She was ordered to pay \$1,500 in restitution and \$1,000 in attorneys' fees and direct expenses.

On April 15, 2021, **DIANNA LEE MCCOY** [#24026865], of Austin, received a public reprimand. An evidentiary panel of the District 13 Grievance Committee found that on or about January 12, 2016, McCoy was court-appointed to represent the complainant in a criminal matter. In representing the complainant, McCoy failed to keep the complainant reasonably informed about the status of




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his case and failed to promptly comply with reasonable requests for information from the complainant. McCoy also failed to timely respond to the grievance.

McCoy violated Rules 1.03(a) and 8.04(a)(8). She was ordered to pay \$2,802.21 in attorneys' fees and direct expenses.

On April 15, 2021, **DIANNA LEE MCCOY** [#24026865], of Austin, received a public reprimand. An evidentiary panel of the District 13 Grievance Committee found that on or about January 14, 2019, the complainant filed a complaint against McCoy. Thereafter, McCoy failed to timely respond to the grievance.

McCoy violated Rule 8.04(a)(8). She was ordered to pay \$2,431.21 in attorneys' fees and direct expenses.

PRIVATE REPRIMANDS

Listed here is a breakdown of Texas Disciplinary Rules of Professional Conduct violations for 11 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 (3).

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 (8).

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).

1.14(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 (1).


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 (2).

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).

8.02(b)—A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct (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 (1). **TBJ**



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CENTRAL

JULIE SEARLE is now a partner in Norton Rose Fulbright in Austin.

GEORGETTE ODEN is now a senior associate of Fletcher, Farley, Shipman & Salinas in Austin.

KATHERINE L. OBANDO is now an attorney with Bollier Ciccone in Austin.

GULF

WILKA V. TOPPINS is now of counsel to Baker, Donelson, Bearman, Caldwell, & Berkowitz in Houston. **BRANDY N. WILLIAMS** is now an associate of the firm.

BENNY AGOSTO JR., of Abraham, Watkins, Nichols, Agosto, Aziz & Stogner in Houston, is now a member of the editorial board of the *ABA/Bloomberg Law Lawyers' Manual on Professional Conduct*.

JULIE GREMILLION is now general counsel to GoExpedi in Houston.

DARREN SKYLES is now a member in and **LINDSAY CONTRERAS**, **AVERY ADDISON**, and **HANNAH JOHANNES** are now associates of Frost Brown Todd in Houston.

STEPHEN JAMES HYLAND is now an associate of the Werner Law Group in Victoria.

AARON BURDETTE is now deputy general counsel to U.S. LawShield in Houston.

CLAY ALLEN is now general counsel to the Houston Rockets.

RONALD C. GREEN, previously with Greenberg Traurig, is now a partner in Jones Walker in Houston.

NORTH

CHRIS SCHWEGMANN, of Lynn Pinker Hurst & Schwegmann in Dallas, is now a member of the International Association of Defense Counsel. **MARY GOODRICH NIX** is now a partner in the firm.

BEN STEWART is now a partner in Bailey Brauer in Dallas.

YVETTE OSTOLAZA, of Sidley Austin in Dallas, was elected chair-elect of the firm's Management Committee.

SHAWNA YOUNG and **DANIEL COOK** are now attorneys with Grover Loudermilk in Fort Worth.

SMU COX SCHOOL OF BUSINESS named the Rogge, Cathy, and Ross Dunn Classroom in the James M. Collins Executive Education Center in honor of Dallas attorney **ROGGE DUNN** and his family.

VICKIE L. DRIVER and **CHRISTINA W. STEPHENSON** are now directors in Crowe & Dunlevy in Dallas. **A. RAYLEE STARNES** is now an associate of the firm.

STEVE LAIRD, of the Law Offices of Steven C. Laird in Fort Worth, received the Blackstone Award from the Tarrant County Bar Association.

LANDON YOUNG and **REED LOFTIS** are now associates of Brackett & Ellis in Fort Worth.

FOSTER acquired Dallas-based Elise Healy + Associates.

JESSE E. BETTS is now a partner in Akin Gump Strauss Hauer & Feld in Dallas.

COLE BREDTHAUER is now a partner in the firm's Fort Worth office.

DAENA GOLDSMITH RAMSEY is now a partner in and **MATTHEW ALAGHA** is now an associate of Cantey Hanger in Dallas. **CONSTANCE M. "MISTY" BROOME** is now a partner in the firm's Fort Worth office. **LAURA HILTON HALLMON**, also with the firm's Fort Worth office, was elected to the Meritas Board of Directors.

STEPHEN IYA is now a corporate associate of Weil, Gotshal & Manges in Dallas.

WENDI ROGALINER, of Bradley Arant Boult Cummings in Dallas, will continue to serve on the American Health Law Association's *Journal of Health and Life Sciences Law* editorial board.

MICHAEL P. HEISKELL, of Fort Worth, was appointed to the Baylor University Board of Regents.

JENNIFER RYBACK, of McGuire, Craddock & Strother in Dallas, received the Outstanding Young Lawyer Award from the Dallas Association of Young Lawyers. **JONATHAN PETREE** is now an associate of the firm.

GIBBS HENDERSON is now a partner in the Fears Nachawati Law Firm in Dallas.

LEONCIO AGUSTIN "LEON" GIL III, **DIANA KAY BROOKS**, **JOSHUA D. WAHL**, **TAYLOR LEE HARRIS**, and **JONATHAN CHARLES STRAIN** are now associates of Scheef & Stone in Frisco.

SOUTH

JAY DEWALD is now a partner in Norton Rose Fulbright in San Antonio and Dallas.

BRIAN A. METCALF is now of counsel to Langley & Banack in San Antonio.

JOEL H. GARCIA JR. is now the chief assistant criminal district attorney with the Hidalgo County District Attorney's Office Juvenile/Civil Division in Edinburg.

HEATHER LOCKHART, previously with the City of Austin Law Department, is now a staff attorney with the New Braunfels Utilities.

S. TAYLOR FRANKLIN is now an associate of Drought, Drought & Bobbitt in San Antonio.

OUT OF STATE

GILES STANLEY is now U.S. general counsel to Praesidiad Group in London, England.

JANUS PAN, of Bradley Arant Boult Cummings in Nashville, Tennessee, was appointed vice chair of the American Health Law Association Regulation, Accreditation, and Payment Practice Group. **TBJ**

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From Left to Right: Taylor Pace, Wady S. Rahbani-Chavez, Alicia Roberson, Barney Dill, William Farmer, Jared Blanton

Abraham, Watkins, Nichols, Agosto, Aziz & Stogner is celebrating its 70th anniversary in 2021. We would like to congratulate Taylor Pace, Wady S. Rahbani-Chavez, Alicia Roberson, Barney Dill, William Farmer and Jared Blanton who were all recently promoted to Junior Associates at the firm. These young leaders are the future of the firm and will learn from some of the best catastrophic personal injury trial lawyers in the nation! This includes commercial auto accidents, maritime, aviation, products liability, workplace accidents, premises liability, medical malpractice, wrongful death, chemical plant, refinery, and residential explosions. Congratulations to these rising stars as they begin their journey!

Nick C. Nichols, P.C.[†]
Benny Agosto, Jr., P.C.^{*}
Muhammad S. Aziz, P.C.^{*}
Brant J. Stogner, P.C.^{*}
Imrana Manzanares, R.N., J.D.
Michelle A. Rice
Jonathan D. Sneed
Ciro J. Samperi
Jennifer O'Brien Stogner^{††}



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Christopher D. Mahfouz
Edward Festeryga
G. Braxton Smith
Ben Agosto III
Nancy Flores
David Baluk

^{*}Board Certified - Personal Injury Trial Law

[†]Retired Partner

^{††}Of Counsel

MICHAEL ELLIOTT McCLENDON

McClendon, 70, of Austin, died February 27, 2021. He served in the U.S. Army Infantry in Vietnam and was stationed in West Germany.

McClendon received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1984. He was a civil attorney for Vinson & Elkins in Houston, an attorney in the Office of the Texas Attorney General in Austin, and worked for the Judge Judy Show. McClendon graduated in the top 10 of his class. He was a contrarian. McClendon trekked the Appalachian Trail and cleaned hiking trails in Austin. He is survived by his sister, Cynthia Nicolini.

CHARLES B. "BUCKY" TENNISON

Tennison, 79, of San Antonio, died January 18, 2021. He received his law degree from Southern Methodist University School of Law and was admitted

to the Texas Bar in 1968. Tennison worked as a stockbroker on Wall Street for 18 months, was appointed to the U.S. Attorney's Office in San Antonio, worked in criminal trial law in the Bexar County District Attorney's Office, and was later in private practice. He is survived by his wife of 40 years, Eileen W. Tennison; son, Charles Tennison Jr.; and two grandchildren.

GARY J. HOLLOWAY

Holloway, 54, of Plano, died May 4, 2021. He received his law degree from South Texas College of Law and was admitted to the Texas

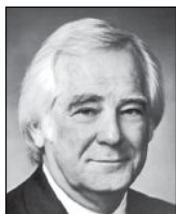
Bar in 2001. Holloway was admitted to the Kentucky Bar in 2012. He was a clerk and litigation assistant at Kilburn, Jones, Gill & Campbell from 1999 to 2001, an associate of Kilburn, Jones, Gill & Campbell from 2001 to 2003, in

private practice from 2003 to 2017, and general counsel to Diversity Petroleum from 2008 to 2009. Holloway is survived by his wife of 14 years, Michelle Holloway; son, Christian Holloway; mother, Shirley Reuland; brother, Roger Holloway; and sister, Tammy Lambert.

R. LEON TROTTER

Trotter, 68, of Charlotte, North Carolina, died April 24, 2021. He received his law degree from Southern Methodist University School of

Law and was admitted to the Texas Bar in 1982. Trotter was an associate of Brice & Barron from 1980 to 1985, a partner in Speer, Giles & Trotter from 1985 to 1988, general counsel to R.L. Trotter Woodworking LLC from 1988 to 2001, and a contract attorney at Kilpatrick Townsend from 2016 to 2020. He was involved in his church's ministry from 2001 to 2011. Trotter was an actor. He is survived by his wife of seven years, attorney Gloria Topping Trotter; son, Kyle Trotter; daughters, Erin Trotter and Cara Trotter; mother, Shirley Trotter; brothers, Ricky Trotter and Randy Trotter; and one grandchild.

REX H. WHITE JR.

White, 88, of Austin, died April 4, 2021. He received his law degree from the University of Texas School of Law and was admitted to the

Texas Bar in 1967. White was admitted to practice before the U.S. Supreme Court, U.S. Courts of Appeal for the 5th and 11th Circuits, the D.C. Circuit Court of Appeals, and the U.S. District Court for the Western District of Texas. He was an assistant attorney general in the Office of the Texas Attorney General in Austin from 1967 to 1976, special counsel to the Railroad Commission of Texas in Austin from 1976 to 1979, a partner in O'Neill, Haase & White in Austin from 1979 to 1986, a founding

partner in White & Grove in Austin from 1986 to 1991, a partner in Hutcheson & Grundy in Austin from 1991 to 1998, and a solo practitioner in Austin from 1998 to 2020. White was a three-term president, chair, and chair emeritus of the Texas Independent Producers & Royalty Owners Association, or TIPRO. He was awarded the Mr. TIPRO Award. White was a member of the Interstate Oil and Gas Compact Commission. He was known for his integrity. White enjoyed sailing and traveling. He is survived by his wife of 40 years, Brenda White; sons, Rex H. White III and Eric Polnau; and eight grandchildren.

WILLIAM COPPERSMITH

Coppersmith, 68, of Olathe, Kansas, died May 11, 2020. He received his law degree from Washburn University School of Law and

was admitted to the Texas Bar in 1979. Coppersmith was admitted to practice in Kansas in 1978. He was an attorney with Shell Oil Company. Coppersmith enjoyed reading, spending time with his granddaughters, and studying genealogy. He is survived by his wife, Gail; son, Matt; daughter, Catie; and three grandchildren.

ELLEN MYERS WILSON

Wilson, 35, of Longview, died April 30, 2021. She received her law degree from Texas Tech University School of Law and

was admitted to the Texas Bar in 2010. Wilson was a solo practitioner. She loved flying with her dad; her passion and skill as a pilot carried into adulthood as one of her favorite hobbies. Wilson had an exceptional academic career and a lifelong love of learning—she started medical school at the University of North Texas and received her doctorate of osteopathic medicine in 2014. She had a heart to

love on people and was constantly scheming to find ways to bless people she knew needed help. Wilson is survived by her husband of 12 years, Matthew Wayne Wilson; sons, Benjamin and John; father, Buddy Myers; mother, Julia Myers; and sister, Beth Myers.

JOHN O. KAIN



Kain, 89, of Sugar Land, died November 25, 2020. He served in the U.S. Army. Kain received his law degree from the University of Texas

School of Law and was admitted to the Texas Bar in 1958. He was a partner in Powell, Tucker, Kain & Reedy in Houston from 1958 to 1970 and senior partner in Kain & Reedy in Houston. Kain was a critical thinker and gifted storyteller. He had a prodigious memory and was extremely witty and charming. Kain enjoyed playing golf, racquetball, and tennis. He is survived by his wife of 32 years, Sharmen Winterfeld-Kain; son, Jordan Winterfeld; daughters, Susan Grainge, Karen Kain, Colleen Kain, and Lauren Little; sisters, Colleen T. Kain and Caroline Galloway; and seven grandchildren.

CARL LYNN RAY



Ray, 86, of New Braunfels, died March 9, 2021. He served in the U.S. Army in 1954. Ray received his law degree from the University of

Houston Law Center and was admitted to the Texas Bar in 1963. He was an associate of Fulbright & Jaworski in Houston from 1963 to 1964 and owner of the Law Offices of Carl L. Ray in Houston from 1964 to 1999 and in Port O'Connor from 1999 to 2016. Ray was recognized as a 50-Year Lawyer in 2013. He was a member of the Texas Trial Lawyers Association and Houston Bar Association. Ray formed the Port O'Connor Chapter of the Coastal Conservation Association and served on the CCA Texas Executive

Board and Texas Power & Water Committee. He enjoyed fishing and quail hunting. Ray is survived by his wife of 44 years, Pamela A. Ray; son, Carl Randall Ray; daughters, Leslie Ray Griffith and Trenton Ray DeSpain; five grandchildren; and five great-grandchildren.

TRAVIS FONTAINE ERSKINE



Erskine, 43, of Houston, died April 16, 2021. He received his law degree from South Texas College of Law and was admitted to the Texas

Bar in 2004. Erskine was an associate attorney at Brown Sims in Houston from 2005 to 2007, at Donato, Minx, Brown & Pool in Houston from 2007 to 2016, and at Walker Wilcox Matousek in Houston from 2016 to 2021. He was admitted to practice before the U.S. District Court for the Southern District of Texas. Erskine had an ability to get along with people of all walks of life and to be a friendly arbitrator. He coached soccer and basketball for his three daughters. Erskine enjoyed hunting and watching and attending Texas A&M University sports events with his girls and family. He is survived by his daughters, Gracie, Mackenzie, and Brinlee; father, Mark N. Erskine; mother, Kathy Crews Erskine; and brothers, Newton Erskine, Todd Erskine, and Cary Erskine.

ARCH B. GILBERT



Gilbert, 87, of Fort Worth, died January 18, 2021. He received his law degree from the University of Oklahoma College of Law, his LL.M. in

taxation from Southern Methodist University School of Law, and was admitted to the Texas Bar in 1960. Gilbert was admitted to the Oklahoma Bar in 1957. He served in the U.S. Air Force Judge Advocate General's Corps from 1957 to 1960. Gilbert was an attorney with Thompson, Walker, Smith Shannon from 1960 to 1962 and with

Brooks, Tarlton, Gilbert from 1962 to 1979 and was a solo practitioner in trust and estate, oil and gas, and securities law. He was known for his entrepreneurial nature, which led him to form and operate multiple companies in areas ranging from oil and gas to medical care. Gilbert was a devoted fan of Oklahoma University football and women's basketball. He is survived by his wife of 63 years, Jo; daughters, Shannon Moten and Devon Vrana; and four grandchildren.

HARRY LEE HALL



Hall, 89, of San Antonio, died February 24, 2021. He received his law degree from the University of Texas School of Law and

was admitted to the Texas Bar in 1956. Hall was admitted to the California Bar in 1973. He served in the U.S. Navy Judge Advocate's Generals Corps and U.S. Coast Guard from 1957 to 1977, receiving the National Defense Medal, Vietnam Service Medal, and Naval Achievement Medal. Hall was a JAG officer in NAS Rota, Spain; the Pentagon in Washington, D.C.; the U.S. Department of Justice in New York; 5th Naval District Headquarters in Norfolk, Virginia; Sangley Point in the Philippines; 12th Naval District Headquarters in San Francisco, California; and Commander Fighter Wing in San Diego, California; a federal public defender in El Paso from 1977 to 1980; and assistant U.S. attorney in Brownsville from 1981 to 1988. Hall was a member of Sigma Chi Fraternity and Phi Alpha Delta Legal Fraternity. He was admitted to practice before the U.S. Supreme Court, U.S. Courts of Appeals for the 2nd, 5th, and 9th Circuits, U.S. Court of Claims, U.S. Court of Military Appeals, and the Texas Supreme Court. Hall was editor of the *Texas Law Review* and was honor graduate at Naval OCS. He was an avid golfer and fisherman. Hall is survived by his son, Harry Lee Hall III; daughters, Winn Hall Jaimes and Margaret Hall McDaniel; and five grandchildren. **TBJ**

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WRITTEN BY JOHN G. BROWNING

WE ALL KNOW THAT TRIAL LAWYERS IN TEXAS have fairly wide latitude during closing argument. As you're summarizing the evidence in the case and how it should lead the jury to find in favor of your client, you can say almost anything. You can wax poetic, tug at jurors' heartstrings, and even summon the righteousness of an Old Testament prophet. But while younger lawyers sometimes ask me what they should do

during closing argument, I rarely get any questions about what *not* to do in closing argument. So here are a few helpful, if tongue-in-cheek, pointers:

Don't Threaten to Kill the Jury

This rarely works, as Richard Glawson, of Boston, can attest. In 2007, Glawson was on trial for a number of serious charges stemming from a 2001 crime spree, including carjacking and assault with a deadly weapon. Representing himself at trial, Glawson began his closing argument by stating, "Ladies and gentlemen of the jury, I'll kill all of you if you find me guilty of any one charge, and that goes for your family, too." Apparently, this novel "threaten the jury" approach wasn't a new one for Glawson. His previous trial had ended in a mistrial after Glawson actually punched an elderly juror (afterward, new charges of battery and juror intimidation were added to what Glawson was already facing). Glawson also was accused of kicking a Suffolk County Superior Court officer in the head during what was described as a "courtroom outburst." Not surprisingly, Glawson was convicted on nearly all charges and was sentenced to 45 years behind bars (or "bahs," as they say in Boston).

Don't Fake a Heart Attack—Especially if You're Really Bad at It

Keison Wilkins was on trial in Montgomery County, Ohio, in June 2008 on a variety of charges, including felonious assault. The Dayton man was representing himself, and as he began

his closing argument, he must have sensed that he needed a "Hail Mary" to even get a mistrial. So, he faked a heart attack, grabbing at his chest and then collapsing to the floor. In a rather entertaining courtroom video that went viral (and is still viewable on YouTube), skeptical deputies react, but it's clear that neither the judge nor anyone else in the courtroom is buying Wilkins' performance. A nurse is summoned, who quickly finds nothing wrong with Wilkins. Wilkins continues the act even after he's returned to the defense table, but everyone just looks bored. In a development that shocked no one, Wilkins was found guilty and sentenced to 42 years in prison. I guess that leaves him a ton of time to brush up on acting.

Don't Use a Hand Grenade

While I'm normally a big fan of the value of demonstrative aids during closing argument, I'm afraid I have to draw the line at explosive devices. But apparently Hutchinson, Kansas, criminal defense attorney Sam Kepfield disagrees. In November 2009, Kepfield was representing a defendant, Anastasia Daily, on charges of forgery and theft. Daily's defense was that a co-defendant had threatened to hurt her daughter and kill her dog if she didn't go along with the scheme that resulted in the charges. To help illustrate for the jury the concept of acting under the compulsion of an imminent threat of bodily harm, Kepfield used an unconventional method, to say the least, during his closing. He set a grenade down, first on the ledge of the jury box and then on the prosecutor's table before suddenly pulling the pin and asking the jurors, "Are you afraid now?"

Assistant District Attorney Amanda Voth later said she was too surprised to say anything, but Judge Richard Rome ordered Kepfield to get the grenade off the table. The stunt apparently didn't

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sway the jury, since they found Daily guilty after deliberating for only 15 minutes. But Kepfield did make an impression on the local sheriff's office and the Kansas Attorney General's office, which opened an investigation after the incident was reported by the judge. And although Kepfield would not face criminal charges, the question remains: Which was the bigger dud, the dummy grenade or his closing argument?

Don't Spontaneously Combust

Finally, we've all probably had the experience of listening to an opposing attorney in court and secretly wishing that "liar, liar, pants on fire" wasn't just a phrase. But then again, we never got to witness the bizarre turn of events in March 2017 in a Miami courtroom, when then-28-year-old lawyer Stephen Gutierrez was making his closing

argument—only to have his pants catch on fire. Gutierrez was defending a client, Claudy Charles, who was accused of intentionally torching his car. Gutierrez had earlier tried to argue spontaneous combustion as a defense. According to Gutierrez, during his closing he noticed that his pants pocket felt hot (he had several small e-cigarette batteries at the time). With the heat intensifying into flame and smoke, Gutierrez ran from the courtroom straight to the men's room. After dousing the batteries in water, he returned to the courtroom, pants singed but unharmed.

Gutierrez insisted that he didn't stage the fire as a courtroom stunt but that didn't prevent prosecutors from launching an investigation that concluded the young lawyer had likely ignited the battery. In 2019, Gutierrez

pleaded guilty to Florida Bar violations, including filing a bogus insurance claim related to the arson case. In November 2020, Gutierrez's license was suspended for 91 days. And in February 2021, the lawyer was arrested on a felony cocaine charge.

So, the next time you're preparing for a closing argument that will "kill," when you're "on fire" and ready to drop some bombshells, don't take it literally. **TBJ**



JOHN G. BROWNING

is a former justice of the 5th Court of Appeals in Dallas. He is the immediate past chair of the State Bar of Texas Computer & Technology Section. The author of five books and numerous articles on social media and the law, Browning is a nationally recognized thought leader in technology and the law.

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Jennifer A. Hasley elected 2021-2022 Houston Bar Association president

Jennifer A. Hasley, managing partner in Hasley Scarano, was elected 2021-2022 president of the Houston Bar Association. Hasley succeeds Bill Kroger, a partner in Baker Botts. Hasley is only the fifth woman president of the HBA in its 150-year history. This is her 12th year of leadership on the HBA Board of Directors, including serving as first vice president and treasurer. Hasley has spent more than 25 years volunteering through HBA community projects, events, and partnerships. She is a past chair of the Houston Volunteer Lawyers Board of Directors and supports HVL's mission by providing pro bono legal service to low-income Houstonians. Other new officers are President-elect Chris Popov, of Vinson & Elkins; First Vice President Daniella Landers, of Reed Smith; Second Vice President David Harrell, of Locke Lord; Treasurer Diana Gomez, of Chamberlain, Hrdlicka, White, Williams & Aughtry; and Secretary Greg Moore, of Norton Rose Fulbright. Kroger will serve on the board as immediate past president. Directors for 2021-2023 are Collin Cox, of Yetter Coleman; Pamela A. Medina, of Medina Law Texas; Colin Pogge, of Gibbs & Bruns; and Yvonne Ho, of Bracewell. Completing terms as directors in 2022 are Robert Painter, of Painter Law Firm; Greg Ulmer, of BakerHostetler; and Chanler Langham, of Susman Godfrey. For more information about the Houston Bar Association, go to hba.org.



KAREN C. BURGESS ELECTED DEAN OF THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS

Karen C. Burgess, of Burgess Law in Austin, was elected dean of the International Academy of Trial Lawyers at the academy's annual meeting, held virtually in March. "It is an honor to work with the people and for the purposes of the academy and to join with leading lawyers around the globe to promote the rule of law," Burgess said in a press release. Burgess is a trial lawyer with a practice ranging from trade secret disputes to securities, contract, insurance, real estate, oil and gas, partnership, and fiduciary litigation. She is certified in civil trial law by the Texas Board of Legal Specialization. Burgess was inducted into IATL in 2015 and has served on various IATL committees, the board of directors, and held the office of secretary-treasurer. She served as co-chair of the 2019 State Bar of Texas Annual Meeting.



SCOTT ROTHENBERG NAMED 2021 GENE CAVIN AWARD FOR EXCELLENCE IN CLE RECIPIENT

Scott Rothenberg, of Bellaire, has been named the 2021 Gene Cavin Award for Excellence in CLE recipient. Nominations for the Gene Cavin Award are solicited from the State Bar of Texas Board of Directors, Continuing Legal Education Committee members, and past award recipients. The award was established by the CLE Committee in 1989 and recognizes long-term participation in State Bar CLE activities. The award is named in honor of Gene Cavin, the founder of the Professional Development Program, who during his service from 1964 to 1987, lifted the level of practice in Texas while bringing the program to international prominence.

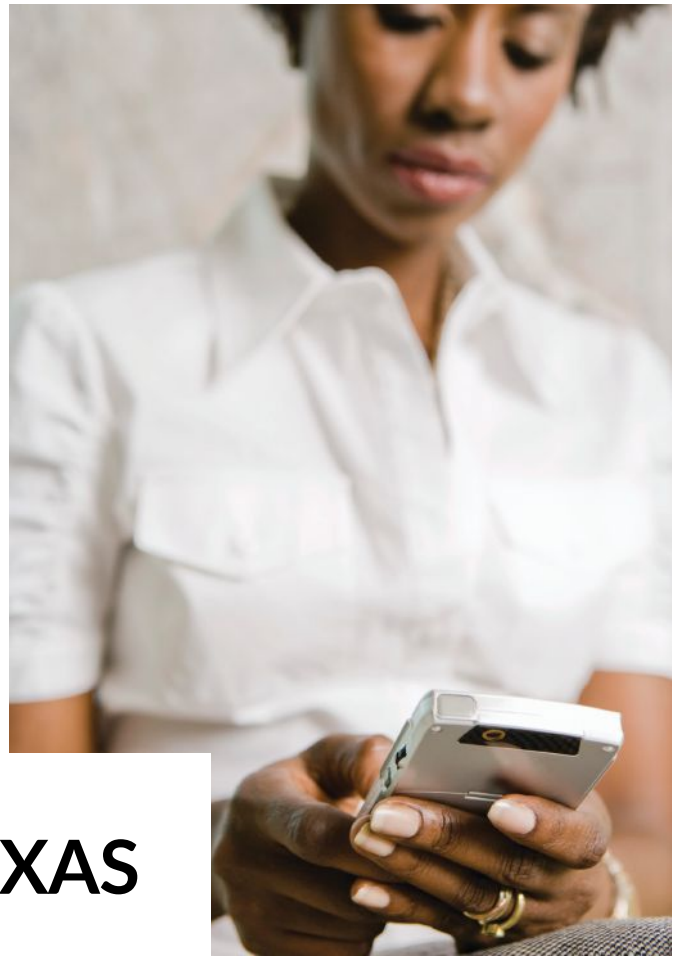


STATE BAR OF TEXAS APPELLATE SECTION SEEKS NOMINATIONS FOR TEXAS APPELLATE HALL OF FAME

The State Bar of Texas Appellate Section is accepting nominations for the Texas Appellate Hall of Fame. The hall of fame posthumously honors advocates and judges who made a lasting mark on appellate practice in Texas. Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nominations (including unique contributions to the practice of appellate law in Texas). The more comprehensive the nomination materials, the better. All material will be sent to the voting trustees for consideration. Nominations will be considered based upon some or all of the following criteria: written and oral advocacy; professionalism; faithful service to the citizens of Texas; mentorship of newer appellate attorneys; pro bono service; and participation in appellate CLE. An individual's nomination in a prior year will not necessarily carry over to this year. If someone was nominated in a prior year, the nomination and nomination materials should be submitted again. Nominations should be submitted in writing to halloffametxt@outlook.com no later than July 15. The tentative plan is to honor the inductees as part of a luncheon presentation and ceremony held by the Appellate Section on September 2.

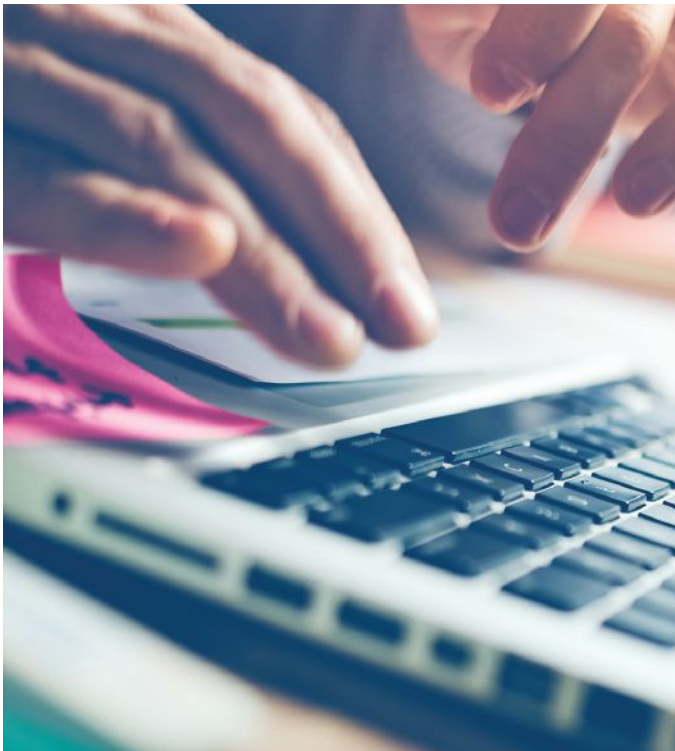
LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS COMMITTEE ANNOUNCES INDIGENT DEFENSE AWARDS WINNERS

The State Bar of Texas Legal Services to the Poor in Criminal Matters Committee announced Claire Buetow as the winner of the Michael K. Moore Award and Mark Stevens as the Warren Burnett Award winner. Buetow is a senior policy analyst for the Texas Indigent Defense Commission. The Michael K. Moore Award recognizes an individual or organization for exceptional research or writing that deals with indigent criminal defense and that represents a significant contribution to the knowledge and practices of the bench, bar, and scholarly committees. The award is named after Michael K. Moore for his pivotal role in research and writing efforts that had a major effect on indigent defense in Texas. Stevens practices at the Law Office of Mark Stevens in San Antonio. The Warren Burnett Award recognizes extraordinary contributions to improving the quality of criminal legal representation to indigent Texans. The award honors either an individual or organizations for their work in the courtroom, Legislature, or in the public sphere. **TBJ**



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Dori Goldman Chris Ward

HOUSTON-BASED ATTORNEYS DORI GOLDMAN AND CHRIS WARD DEVOTE THEIR PRO BONO EFFORTS TO WORKING WITH THOUSANDS OF TEXAS' FOSTER CARE CHILDREN AND REFORMING THE STATE'S FOSTER CARE SYSTEM.

INTERVIEW BY **ERIC QUITUGUA**
PHOTOS COURTESY OF **DORI GOLDMAN** AND **CHRIS WARD**



WHAT MADE YOU FOCUS YOUR PRO BONO EFFORTS ON FOSTER CARE CHILDREN?

In 2004, we came across a report by the then-comptroller of Texas titled "Forgotten Children," which identified glaring systemic deficiencies. From inadequate numbers of caseworkers to serious shortcomings in licensing and investigations, the report chronicled stories of abuse and neglect in care that were shocking. We did more digging through stakeholder interviews and information act requests. We believed then, and believe even more strongly now, that foster care wouldn't be fixed and couldn't be fixed, maybe for political reasons, until the state was told that it had to fix the constitutional defects.

YEARS AGO, YOUR FIRM, YETTER COLEMAN, JOINED A CLASS ACTION FOR 12,000 FOSTER CARE CHILDREN FOR VIOLATION OF THEIR 14TH AMENDMENT RIGHTS. WHAT CAN YOU TELL ME ABOUT THAT?

We are representing the most vulnerable Texans, the "forgotten children" who, as Judge Janis Jack, of the U.S. District Court for the Southern District of Texas, found, "have been shuttled throughout a system where rape, abuse, psychotropic medication, and instability are the norm." The case seeks systemic reform of the Texas foster care system to ensure the safety of these long-forgotten children in the custody of our state government. Under the 14th Amendment, children who are under the state's care have a constitutional right to be safe from an unreasonable risk of physical or severe psychological harm. For decades, the Texas system has failed to live up to that constitutional duty, and the state has been fully aware of the dysfunction—from reports dating back for decades. Time and again, the Legislature and Texas Department of Family Protective Services have promised to make key reforms to the system only to see those promises broken or unfulfilled. Children who enter this system all have suffered difficulty and trauma in their short lives, but for many, the horror is just beginning. Thousands age out of the system far more damaged than

when they entered, and other children tragically do not live to escape the system because of untimely, preventable deaths.

WHAT ARE THE ISSUES IN TEXAS' FOSTER CARE SYSTEM AT THE CORE OF THE CASE?

Systemic dysfunction and numerous specific failings subject Texas foster children to an unreasonable risk of harm. Indifferent to the perils, the state did not set caseload parameters or even conduct workload assessments to determine appropriate caseloads. It conducted shoddy abuse and neglect investigations, while substantiating only a sliver of claims and penalizing fewer still. It housed many unrelated boys and girls of all ages together in large-group facilities lacking basic safeguards like supervision by adult caregivers overnight. Physical and sexual abuse are rampant throughout the foster care system and are especially prevalent in the large-group facilities.

I READ THERE WERE ABOUT 20,000 CHILDREN IN THE FOSTER CARE SYSTEM AT THE TIME—HOW WERE THE 12,000 CHOSEN AND WHY WERE ONLY 12,000 CHOSEN? WHAT HAPPENS WITH THE REST?

The approximately 12,000 children in the *M.D. v. Abbott* class are the foster children in the permanent managing conservatorship of the state. Texas has a label for its kids who've been in foster care for at least 12 or 18 months—"permanent managing conservatorship," or PMC. Often a PMC child loses his or her attorney ad litem and guardian ad litem and is monitored only by DFPS caseworkers, if at all. The "PMC" label becomes a painful reality as many PMC children become permanent wards of the state. In bringing a class action, the plaintiff class must be a definable, coherent group who share relevant commonalities. And the remedies sought must be capable of benefiting the class as a whole, like the systemic reforms we sought in this case. We were able to show that the PMC children met the class certification standard and were all subjected to a similar risk of harm from the systemic dysfunction. The remaining foster children have not yet been in the system as long and thus, under the state's terminology, are in the state's temporary managing conservatorship, or TMC. Many TMC children eventually become part of the PMC class. While the injunctive remedies that have been ordered are specific to the PMC children, the systemic nature of many of those remedies should benefit all foster children.

WHAT CAN YOU TELL ME ABOUT SOME OF THE FOSTER CARE REFORM EFFORTS YOU'VE BEEN INVOLVED IN? HOW SUCCESSFUL HAVE THEY BEEN? HAVE THERE BEEN ROADBLOCKS?

The *M.D. v. Abbott* litigation has led to remedial orders mandating numerous crucial systemic reforms. These include reducing caseworker caseloads, full-time supervision in group placements, timely and effective investigations of reports of abuse and neglect, improvements in licensing and monitoring licensed placement facilities, and improvements in tracking and preventing sexual abuse. The state has continually resisted making such reforms, including via numerous appellate proceedings. Having succeeded in getting the federal courts to order these reforms, we are continuing to work on enforcing compliance with the permanent injunction such as by working closely with the court-appointed monitors and pursuing contempt orders for non-compliance.

HAVING READ STATISTICS ON WHAT HAS HAPPENED TO CHILDREN IN FOSTER CARE SINCE 2017, IT'S NOT HYPERBOLE TO SAY IT'S A MATTER OF LIFE OR DEATH FOR THESE KIDS. WHEN WORKING WITH SUCH A REALITY, HOW DO YOU MAINTAIN YOUR FOCUS ON YOUR EFFORTS AS WELL AS ON YOUR SELF-CARE?

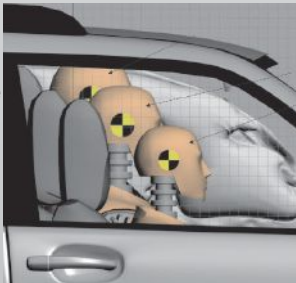
Reading the statistics and learning the horror stories is heartbreaking. We are so gratified to know that the justice system is able to provide systemic relief and to ensure that the most vulnerable residents of our state—the "forgotten children"—will never again be "forgotten." **TBJ**

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A close-up photograph of two hands, palms up, holding a large, realistic red heart. The heart is positioned in the center of the hands, and the skin tones are warm and natural. The background is a soft, out-of-focus grey.

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