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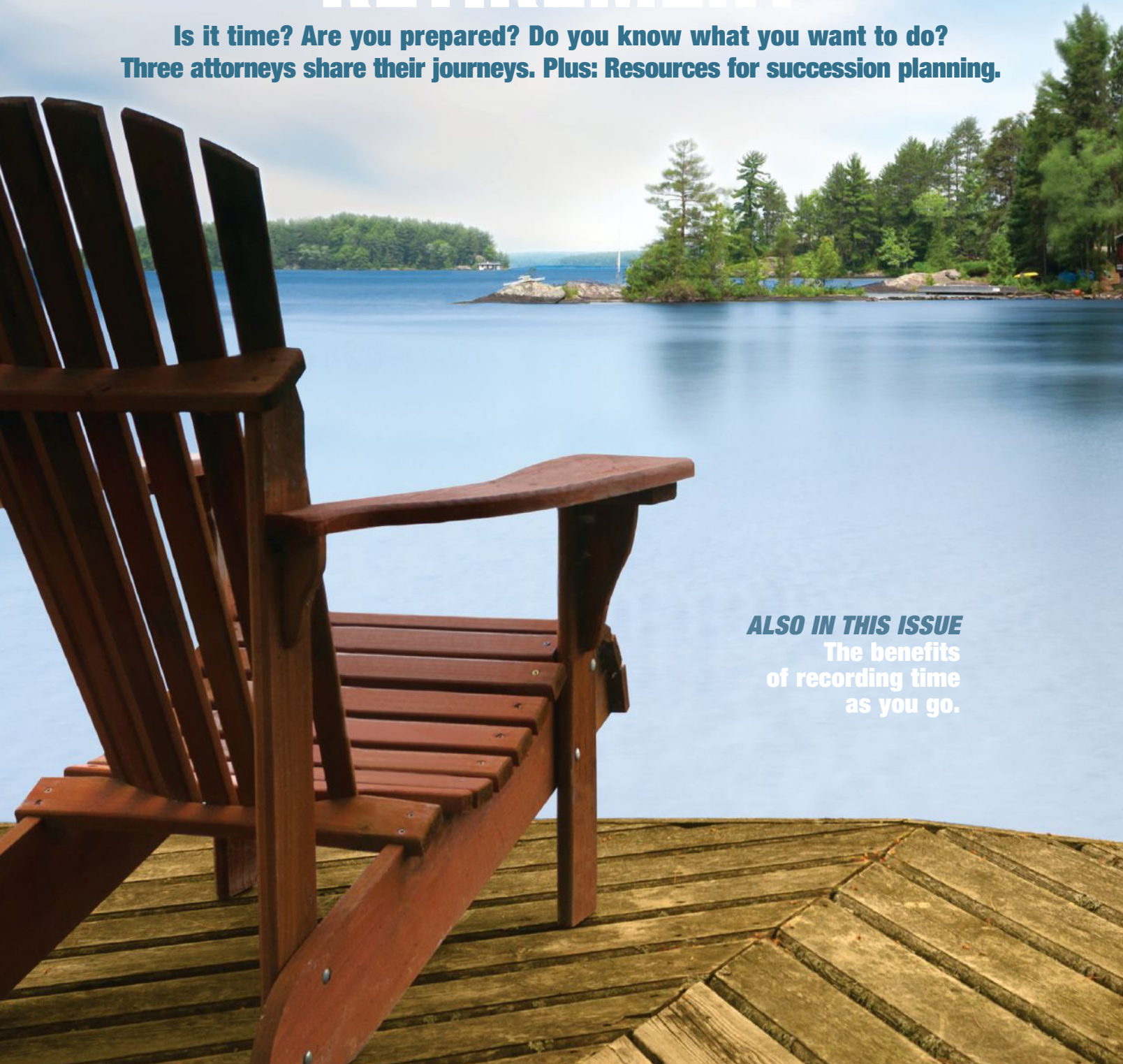

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"PRESIDENT'S PAGE: DIVERSITY WITHOUT INCLUSION IS A RECIPE FOR FAILURE," SEPTEMBER 2021, P. 688

OK on the respect, diversity, and inclusion. Though you added equity like it fits in the same category. Achieving equity is problematic, and there is not a consensus in the bar or elsewhere that equity is a worthy goal. Nice try to be "woke" and enlightened, but I see your sleight of hand. I am disappointed that partisan slogans have replaced real thinking and careful expression of ideas at the top of the bar association.

TOM BELANGER
Nacogdoches

I appreciate and agree 100% with the sentiments expressed in this letter! Having the all-too-familiar experience of being the "token" in far too many settings throughout my life and legal career, I wholeheartedly endorse President Firth's opinions. From my days as a summer law intern for a legal services office in Longview through my career as a government lawyer in Massachusetts, I have come to understand all too well why being "diverse" is not enough. Too often I have been the only Black or woman lawyer in the room or office or courthouse. And, from networking with colleagues, I know my anecdotes ring true with other attorneys who are Black and/or female or equally as subject to marginalization. Cheers for President Firth's candor and courage ... and for that of the rest of us "diverse" folks!

DORIS HELENE WHITE
Windcrest

The State Bar needs to do a lot of work on helping solo practitioners and small firms succeed. The focus on big-firm concerns has made the practice of law more difficult than it needs to be. Inclusion does not simply mean skin color. In fact, economics are driving solo practitioners and small firms out of business more than anything else. The State Bar of Texas could easily start improving things in this manner by vastly expanding the number and type of free online MCLE classes available (especially those offering ethics credits). Attorneys should be able to satisfy their MCLE compliance requirements for free, or for very little money.

STUART BAGGISH
Austin

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

A Tribute to AN INNOVATOR

SIRMAN

JOHN SIRMAN IS ONE OF THOSE PEOPLE WHO HAS BEEN AROUND FOR SO LONG, and his presence is so steady, that you can begin to take him for granted. Whenever you pause just a second to consider it, though, you realize how much he is part of the very fabric of our State Bar.

John has been an editorial assistant and an interim executive director—and a lot of things in between—during his more than 25 years on the staff of the State Bar of Texas.

Largely because of John, our State Bar was an early adopter and pioneer in incorporating digital communications such as blogging, online communities, and social media into bar activities. Always forward-thinking, John for many years has led our strategic planning efforts to ensure the State Bar continues to innovate in all that we do. And he has been a leader not only in Texas, but also at the national level with the National Association of Bar Executives.

John's history with the State Bar of Texas dates to 1991, when he worked as an editorial assistant before deciding to attend law school. He earned his J.D. from Texas Tech University School of Law in 1996 and came back to the State Bar as a part-time law clerk later that year. He has been with us ever since, sharing his many talents for the betterment of the legal profession and the benefit of the public we serve.

If you know John, you know he's not someone who seeks attention. He'd much rather serve, unnoticed, in the background. So, for me to publicly brag on him, there must be a good reason. There is: John recently let me know the time has come for him to retire from the State Bar and pursue other interests. He plans to stay on with us until the end of the calendar year to ensure a smooth transition.

Of course, we are sorry to see him go. His impact on the bar has been profound.

John has been associate editor and department manager of the *Texas Bar Journal,* website manager, legal counsel, and—most recently—both associate executive director/legal counsel and executive editor of this publication. When Michelle Hunter retired and the executive director's position opened in 2017, it was John to whom the State Bar Board of Directors looked to serve as interim executive director. He ably served in that role until I was hired as executive director in December 2017 and has been by my side every day since, providing encouragement, friendship, and solid counsel.

Thank you, John, for your tremendous service to the legal profession.

Staffing Changes

RITTER

GRIGG

John's pending departure created an opening for Chris Ritter to join Brad Johnson in the State Bar legal counsel's office as in-house counsel. Since November 2018, Chris has served as director of the Texas Lawyers' Assistance Program, where he has helped countless lawyers dealing with substance use or other mental health issues. Before he joined the TLAP staff in 2014, Chris spent almost 16 years as a civil trial lawyer with significant experience representing and advising governmental entities. We are fortunate to have Chris on our legal team.

I'm also pleased to report that TLAP's lead professional, Erica Grigg, has been promoted to fill the TLAP director role. Before joining the TLAP staff in 2018, Erica served as a volunteer for the program for nine years. She was a litigation attorney at Spivey & Grigg in Austin focusing on civil rights and personal injury law. Erica is well known and respected across the legal community, and I know she will do an excellent job in this new position.

Sincerely,

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

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A Band With an Identity Crisis

There's no "Loitering" for this Bexar County music group.

INTERVIEW BY **ADAM FADEREWSKI**

WHEN DIANNE "DEEDEE" GARCIA-MARQUEZ JOINED LOITERING at the PET as a vocalist in 2012, she was the first attorney to be part of the group that was formed of Bexar County employees. Garcia-Marquez, now general administrative counsel to Bexar County, would be joined by drummer Sam Adams, assistant city attorney for the San Antonio City Attorney's Office, and vocalist Judge Nicole Garza, of the 37th Civil District Court of Bexar County. PET is an abbreviation for Paul Elizondo Tower (the Bexar County Justice Center), where most of the band members work. However, when Garza joined the band, she raised a very good point: there was little loitering going on by the members as they constantly pursued the administration of justice in Bexar County. Even though the band is still searching for a new name, it continues to play happy, upbeat sounds that get the audience singing and out to the dance floor. The *Texas Bar Journal* recently had the opportunity to interview Adams, Garcia-Marquez, and Garza via Zoom.

LEFT: Loitering at the PET performs for Cinco de Mayo (top), front row, from left: Guest tambourinist Judge Antonia "Toni" Arteaga, Dianne Garcia-Marquez, and Judge Nicole Garza; second row, from left: Juan Martinez, Sam Adams, and Thomas Guevara. The band plays at the Mexican American Bar Association of San Antonio's annual golf tournament (remaining images). PHOTOS COURTESY OF DIANNE GARCIA-MARQUEZ

WHO ARE THE MEMBERS OF THE BAND AND WHAT INSTRUMENTS DO THEY PLAY?

Dianne Garcia-Marquez: We are the three lawyers in the band, but we do have other band members who are county officials. Mike Lozito is our lead guitarist and supports the county commissioners. John Diaz, assistant to the county manager, is our rhythm guitarist, and Tom Guevara, who is the chief of staff for the county manager, is our bass guitarist. Juan Martinez, with the pretrial services for the county, is our saxophone player, and Sam Adams, who is with the city attorney's office in San Antonio, is on drums. Melissa Lucio is on keyboards and works for the county mental health department, and Nicole Garza, who is now Judge Garza, is our singer vocalist. I'm also the singer in the band and I do play acoustic guitar. Nicole also plays keyboards, and we both play tambourine and other instruments such as cowbell and triangle.

WERE YOU INSTRUMENTAL IN INVITING SAM AND NICOLE INTO THE BAND?

Garcia-Marquez: Sam is a longtime member of the Beethoven Männerchor—they have the beer garden and the choir. I went there on a Tuesday night and Sam was hanging out. It just came up that Sam was looking for a band, and I casually mentioned that we were looking for a drummer. One day Nicole said, "We need to start a band." I said, "I'm actually in a band. Do you want to join us?" Nicole and I used to sing harmony in the law library back in 1990.

Judge Nicole Garza: Occasionally, I play piano, but we don't have piano. Really this keeps me sane. Our other jobs, our real jobs, are difficult, stressful. It's my outlet. This group of people has been a touchstone, and it just keeps me sane. They're good humans, and it's just nice to be able to have a little bit of time during the week to gather. I remember one day when I was still in private practice, one of my plaintiffs passed away—it was a difficult day and I didn't talk about it very much but was able to share it. It's a space that is very valuable for me.

WHAT ARE SOME OF YOUR PAST EXPERIENCES MUSIC WISE BEFORE BEING MEMBERS OF THE BAND?

Garcia-Marquez: I haven't played recently, but I do play guitar for St. Matthew Catholic Church, and I have done a lot of women's retreats. I do enjoy playing for the children's mass or playing at church, but I haven't been able to go as much because of COVID-19. I've been playing in my church since I was 14 years old at St. Leonard. I started as a singer, and then I wanted to play guitar, so I'm kind of self-taught. I'm not the greatest guitar player, but I know how to memorize a lot of the rhythms of things.

Sam Adams: I got introduced to various instruments. I think my first one was the kazoo in elementary school, which was just a comb and some tissue paper—we hummed along with some music. I ended up studying a whole bunch of different instruments—trombone, the French horn, the piano—and was master of absolutely none of them. In college, I got into snare drumming because we had a bagpipe band and that got me interested in drumming. I was on a long hiatus, and then about 17 or 18 years ago, a buddy of mine and I were at the Beethoven, and we made a bet with another friend that we would play during Fiesta. She said, "Well if you guys do that I'm going to buy all your drinks for that day at Fiesta." That was motivation enough. We formed our first band at that point, and I've been drumming ever since.

Garcia-Marquez: We've always wanted to play under the bridge at Fiesta—we hadn't been invited. There's usually a designated day hangout under the bridge and we take off for the day. There's always a band playing.

Adams: My point of pride is when we started our first under-the-bridge Fiesta performance, we opened for a Michael Jackson impersonator, but the next year, that Michael Jackson impersonator opened for us. That was our measure of success.

HOW OFTEN DO YOU PERFORM TOGETHER AND WHERE DO YOU USUALLY PLAY?

Garcia-Marquez: We have fun playing at the Beethoven with student parties and Mardi Gras. We also play the Mexican American Bar Association of San Antonio's golf tournament, which raises a lot of money for charity.

DO YOU PLAY ORIGINAL MUSIC, COVERS, OR A MIXTURE OF BOTH?

Garcia-Marquez: All covers, but it's everything from 1950s songs to contemporary music. Obviously, there's a great tendency to play a lot of '60s and '70s music because that's just the generation we come from. I know at one point, Thomas, our bass player, said, "We're going to nix all the slow sad songs and just play happy upbeat ones." We try to stick to that, and Nicole has brought a new variety of songs as well.

HOW DO YOU MANAGE YOUR JOBS AND YOUR SCHEDULES WITH THE TIME TO PERFORM AND PRACTICE?

Garcia-Marquez: Nicole has been offering her home lately, and it has a big area to practice.

Adams: We try to practice once a week, and it's a combination of community service and occupational therapy for all of us.

CAN YOU NAME A PARTICULAR PERFORMANCE THAT WOULD STAND OUT IN YOUR MIND AND WHY THAT WOULD BE MEMORABLE FOR YOU?

Garcia-Marquez: We all really like the ones at the Beethoven, with their Mardi Gras in February. Everyone had all their costumes—Nicole and I were Minnie Mouse.

WHAT WOULD YOU SAY IS YOUR FAVORITE PART ABOUT PERFORMING?

Adams: For me, a live performance because you're in the moment and you're reacting to your other players and other singers and you're also feeding off the audience. You're seeing how they're reacting, and it's a real high when you see folks enjoying the music that all of you are putting together and dancing to it. **TBJ**

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

This Veterans Day, Let's Turn GRATITUDE INTO ACTION

BECAUSE I GREW UP IN EL PASO, HOME TO FORT BLISS (the largest installation in U.S. Army Forces Command), I have always been surrounded by members of the military, their families, and the veterans who choose to remain after their active-duty days are completed. I have kept company with family members of soldiers deployed to dangerous duty stations while scenes of war in the Middle East unfolded in real time on cable television. I have personally witnessed the joy of families being reunited after an overseas deployment. I have even had the privilege of visiting wounded warriors at Walter Reed National Military Medical Center. That was a life-changing experience.

To say that I have a deep-seated sense of gratitude to those who serve our country and their families would be a gross understatement. I have chosen to use my term as president to refocus our attention on the need for additional legal services for veterans and to make certain lawyers across the state are aware of opportunities to serve.

Veterans who otherwise can't afford legal services need pro bono help with issues such as estate planning, government benefits, divorce, guardianship, landlord/tenant matters, and other basic legal questions.

As Veterans Day is upon us, and we take a moment to show our gratitude to those who have sacrificed so much for us, let us also examine how we can repay our debt for the freedoms we enjoy. This year, we must re-double our efforts.

The COVID-19 pandemic exacted a heavy toll on our veterans. The U.S. Department of Veterans Affairs has found the nature of the pandemic may trigger or worsen PTSD symptoms. At the same time, the pandemic caused a contraction in the number of pro bono veterans' legal services clinics available in Texas.

In 2010, the State Bar of Texas, under the direction of then-President Terry Tottenham, created the Texas Lawyers for Texas Veterans, or TLTV, program. TLTV is modeled after a program started by the Houston Bar Association in 2008. The program offers a simple, ready-made "Clinic in a Box" that organizations can use to host pro bono legal services clinics for veterans. The Clinic in a Box comes with everything an organization needs to host a veterans' legal clinic, including forms, signs, office supplies, and educational material.

At the last State Bar Board of Directors meeting, I challenged the directors to help our veterans by participating in or hosting a virtual or in-person veterans' legal clinic in each of their districts. I am issuing that same challenge to all of you.

In honor of Veterans Day, connect with your local bar association and inquire if it has a scheduled clinic that could use your volunteer help. You can find a calendar of scheduled veterans' legal clinics at texasbar.com/veterans.

If there are no clinics in your area, has your local bar association heard about the Clinic in a Box? To request a Clinic in a Box, contact the State Bar's Local Bar Services Department at localbars@texasbar.com or 800-204-2222, ext. 1514.

As veterans struggle with the emotional toll of the COVID-19 pandemic, the 20th anniversary of September 11, and the U.S. withdrawal from Afghanistan—finding pro bono civil legal assistance shouldn't be an additional burden.

Finally, if you are a veteran, an active duty servicemember, or a supporting family member, from the bottom of my heart, thank you for everything you have done and continue to do in service to our country. We *will* do more.

SYLVIA BORUNDA FIRTH
President, 2021-2022
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State Bar Board APPROVES CANDIDATES, RESPONDS TO FEDERAL COURT RULING

WRITTEN BY **LOWELL BROWN**

THE STATE BAR OF TEXAS BOARD OF DIRECTORS voted September 24 to nominate two candidates for 2022-2023 president-elect and approved rule and policy changes to comply with a federal circuit court decision, among other actions during its quarterly meeting in San Antonio.

Go to texasbar.com/board to read the agenda and meeting materials and to watch video of the meeting.

2022 Election Update

The board approved Joe Escobedo Jr., of Edinburg, and Cindy V. Tisdale, of Granbury, as candidates for 2022-2023 State Bar president-elect. Escobedo and Tisdale will appear on the ballot in April 2022 along with any certified petition candidates. Members interested in running for president-elect as petition candidates have until March 1 to submit nominating petitions to the State Bar for certification.

The board also approved policy changes to allow electronic signatures on candidate petition forms, to define candidates' principal place of practice for nomination and election purposes, and to require candidates to establish their principal places of practice no later than December 31. The bar previously allowed electronic signatures on petition forms as a pandemic-related safety measure but now will allow them in all future bar elections.

Federal Lawsuit Response

The board approved changes to State Bar rules and policies to comply with the recent U.S. Court of Appeals for the 5th Circuit panel opinion in *McDonald v. Longley*. The changes include updates to the bar's budgeting, legislative, and expenditure objection processes. On September 30, the State Bar filed a summary of the rule and policy changes approved by the board with the district court as part of the case's remedies phase. Go to texasbar.com/mcdonaldvlongley to read all filings in the case.

ABOVE: State Bar President Sylvia Borunda Firth (left) presents a resolution to Jane H. Macon for her exceptional service to the legal profession. PHOTO BY PATRICIA BUSA MCCONNICO

Resolutions

Directors approved forwarding a resolution regarding trial safety measures from the Presidential Task Force on Criminal Court Proceedings to the Office of Court Administration for consideration. The board postponed, until its January meeting, a resolution by director Steve Fischer supporting a post-pandemic remote hearings policy after some directors said they wanted to refine the resolution language.

TYLA Eligibility

At the request of the Texas Young Lawyers Association, the board approved changes to TYLA's membership structure. If the Texas Supreme Court amends bar rules to adopt the proposed structure, all Texas-licensed attorneys in their first 12 years of practice, regardless of age, would be TYLA members. Currently, Texas lawyers are TYLA members if they are 36 years old or younger or in their first five years of practice, regardless of age. The resolution states the revisions to TYLA's membership definition are needed "to better ensure that

all new attorneys are included, specifically, those practicing law as a second career." The changes would increase TYLA's membership from approximately 25,000 to 32,000 members. TYLA does not charge membership fees.

New Task Force and Special Committee

The board approved the creation of the Task Force on Redistricting to review apportionment of bar districts as required by the State Bar Act. The board also voted to create the Building Planning Special Committee to work with State Bar staff regarding decisions on remodeling, repairs, and uses of the property at 1415 Lavaca St. in Austin, which the bar recently purchased.

Proposed New Disciplinary Rules

The Committee on Disciplinary Rules and Referenda has recommended proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct, pertaining to duties to prospective clients, and proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure, pertaining to the termination of a custodianship for the cessation of practice. The board voted to approve the changes and to hold them for submission to the Supreme Court at a later date with other proposed rules as deemed appropriate by the board. Ultimately, the board will petition the Supreme Court to order a referendum on the proposed rules.

Recognitions

President Sylvia Borunda Firth and the board honored three individuals for exceptional service to the legal profession. Receiving board resolutions were James L. Branton (in memoriam), Jane H. Macon, and David Slayton. Executive Director Trey Apffel honored Royce LeMoine, deputy counsel for administration and regional counsel in the Office of the Chief Disciplinary Counsel in Austin, with the quarterly Staff Excellence Award. Apffel also recognized John Sirman, the bar's associate executive director and legal counsel, who is retiring from the bar in December after 25 years.

Looking Ahead

The next board meeting is scheduled for January 28 in McAllen. If you have comments for the board, please email them to boardofdirectors@texasbar.com. To find your district directors, go to texasbar.com/board and click on "Board Members." **TBJ**

A Narrow INTERPRETATION

A LOOK AT HOW THE U.S. SUPREME COURT CONSTRUES "EXCEEDS AUTHORIZED ACCESS" IN THE COMPUTER FRAUD AND ABUSE ACT.

WRITTEN BY **PIERRE GROSDIDIER**

IN *VAN BUREN V. UNITED STATES,* the U.S. Supreme Court resolved a circuit court split and narrowly construed the Computer Fraud and Abuse Act's definition of "exceeds authorized access."[1] The issue was that of the "rogue insider." Clearly, the CFAA criminalizes breaking into a computer, but does a properly credentialed person exceed his or her authorized access by obtaining information for illicit reasons? In its 6-3 decision, the court held "no."

Former police sergeant Nathan Van Buren traded information garnered from a law enforcement database for money.[2] Van Buren had database access credentials but not for this reason. He was convicted under CFAA § 1030(a)(2), which sanctions whoever "intentionally . . . exceeds authorized access." Under the CFAA § 1030(e)(6),

> the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not *entitled so to obtain* or alter.[3]

The U.S. Court of Appeals for the 11th Circuit, which has construed "exceeds authorized access" broadly, affirmed the conviction.[4] On appeal to the U.S. Supreme Court, Van Buren argued that the CFAA's "exceeds authorized access" should be construed narrowly. The court agreed.

Sticking closely to the statutory text, the court accepted Van Buren's argument regarding the importance of the word "so" in the expression "entitled so to obtain." Van Buren clearly "accessed a computer with authorization" and obtained information. The question was whether he was "entitled *so* to obtain" that information. The court agreed that "so" is a term of reference that relates to the preceding "identifiable proposition," namely the authorized access to a computer.[5] Under this reasoning, "[t]he phrase 'is not entitled so to obtain' is best read to refer to information that a person is not entitled to obtain by using a computer that he is authorized to access."[6] Thus, a credentialed computer user authorized to access Folder Y does not violate the CFAA by corruptly tapping into this folder, but does exceed authorized access by obtaining information from off-limit Folder X. Authorized access under the CFAA is ultimately a "gates-up-or-down inquiry—one either can or cannot access a computer system, and [likewise] certain areas within the system."[7]

The court rejected the government's argument that "so" referred more broadly to "the particular manner or circumstances" in which the user obtained the information.[8] These circumstances, the government argued, are defined by the terms of access of the information. Under the government's approach, the court reasoned, the circumstances that render a person's conduct illicit are not identified in the statute and are potentially overbroad.

The court also noted that this narrow interpretation of "exceeds authorized access" harmonized the CFAA's §§ (a)(2) and (e)(6), which proscribe accessing a computer without authorization and accessing a computer with authorization and securing information that the user is "not entitled so to obtain." The law, therefore, targets outside hackers and rogue employees who enter off-limit areas of a computer. The CFAA's civil liability provision, the court added, supports this interpretation. Civil liability depends on a finding of "damage" or "loss," i.e., technological harm such as file corruption, which are typically the consequences of computer hacking, not illicit information retrieval that does not damage a database, as was the case with Van Buren.[9]

The U.S. Supreme Court also observed that a broad construction of "exceeds authorized access" would criminalize the innocuous conduct of "millions of otherwise law-abiding citizens" who use their work-only computers for personal reasons, like checking personal emails, or who stretch the truth on their personal social media pages. This implication "underscore[d] the implausibility of the government's interpretation," and was the "extra icing on a cake already frosted."[10] **TBJ**

This article, which was originally published in Circuits, *has been edited and reprinted with permission.*

NOTES

1. 141 S. Ct. 1648 (2021); 18 U.S.C. 1030.
2. *Van Buren,* 141 S. Ct. at 1652.
3. 18 U.S.C. 1030(e)(6) (emphasis added).
4. *United States v. Van Buren,* 940 F.3d 1192, 1208 (11th Cir. 2019) (citing *United States v. Rodriguez,* 628 F.3d 1258 (11th Cir. 2010) (broad construction of "exceeds authorized access")); compare *United States v. John,* 597 F.3d 263 (5th Cir. 2010) (broad construction), with *United States v. Nosal,* 676 F.3d 854 (9th Cir. 2012) (en banc) (narrow construction).
5. *Van Buren,* 141 S. Ct. at 1655.
6. *Id.*
7. *Id.* at 1658-59; *but see id.* n.8 (leaving for another day the issue of whether the gates must be code-based or contractual).
8. *Id.* at 1654.
9. *Id.* at 1659-60. And as is also often the case with rogue employees who abscond with their employer's confidential information.
10. *Id.* at 1661. (quoting *Yates v. United States,* 574 U. S. 528, 557 (2015)).

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 chair-elect for 2021-2022.

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Benny AGOSTO JR.

HOMETOWN: HOUSTON (SAN JUAN, PUERTO RICO) **POSITION:** PARTNER IN ABRAHAM, WATKINS, NICHOLS, AGOSTO, AZIZ & STOGNER IN HOUSTON **BOARD MEMBER:** DISTRICT 4, PLACE 2 SINCE 2020

INTERVIEW BY **ERIC QUITUGUA**
PHOTO BY **KEVIN MCGOWAN**

I DECIDED TO ATTEND LAW SCHOOL IN 1991 AFTER I WAS TOLD I WAS NOT GOING TO BE REHIRED AS THE HEAD SOCCER COACH AT HOUSTON BAPTIST UNIVERSITY.

The university was undergoing some changes and the soccer program was being dropped. (Note, the university has currently brought back the soccer program and competes at the Division I level.) I knew I had to go back to school and continue my education. The law school gave me an opportunity to get a doctorate and possibly continue teaching. I never thought I would be a litigator. At least, not at that time.

As a Texas Board of Legal Specialization certified personal injury trial lawyer, I am looking to work for the underdog. My clients are catastrophically injured and need top-notch representation. I am always looking to serve and help those in need.

"PWCP."

I have given this talk many times through the years at different law schools across the country. Prepare, work hard, stay committed, and pray. This is my recipe for success, and I encourage others to follow it as well. There's no better way to achieve success than to follow simple rules.

THE STATE BAR OF TEXAS ALLOWS LAWYERS TO STAY INVOLVED WITH THEIR LEGAL COMMUNITY.

I have been blessed and honored to serve in different roles as a leader with the State Bar of Texas. I have followed other leaders who have encouraged me to get involved and make a difference. I see my involvement with the State Bar as an opportunity to make a positive impact.

DURING MY FIRST YEAR AS A BOARD MEMBER, THE BOARD HAD TO DEAL WITH DIVERSITY ISSUES, POLICY ISSUES, AND BEST PRACTICES.

Standing up for what is right and what I believe in is not a difficult thing but having a leadership role and making tough decisions can be an arduous task. Not everyone is going to agree with you. However, when one seeks justice and has the best interest of the State Bar of Texas in mind, decisions can be made with very little hesitation.

ON A PERSONAL LEVEL, I DO NOT LIKE CHANGE. I AM SLOW TO ADAPT TO NEW THINGS.

However, it is important that we change for the better. Improvements at the State Bar should be inevitable. We should strive to make our bar better and more inclusive. The issue of diversity is one that needs to be tackled from top to bottom at the State Bar of Texas. I am proud to be standing shoulder to shoulder with our leaders as we continue to work toward making our bar the best it can be.

FOR A MEMBER OF THE BAR TO ACHIEVE SUCCESS, ONE NEEDS TO REMAIN INVOLVED.

Having skin in the game always allows you to give it your best effort regardless of what you are doing. That is true with your involvement with the bar. There are many sections and committees that are available for members to participate in and serve, from local bars to the State Bar of Texas. There is also involvement with minority bars. Together we can make a difference—and have everyone involved, from large firms to small firms, including public service members, solos, and the judiciary. **TBJ**

STATE BAR of TEXAS

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Lawyer Discipline, BY THE NUMBERS

HOW MUCH DO YOU KNOW ABOUT THE ATTORNEY GRIEVANCE SYSTEM IN TEXAS? The State Bar recently posted on its website the *Annual Report of the Commission for Lawyer Discipline,*[1] which contains a wealth of information about the grievance process and statistics from the prior bar year, which ran from June 1, 2020, through May 31, 2021. The following questions and answers are all derived from that report.

1. How many grievances were filed against Texas attorneys during the 2020-2021 bar year?
   A. 5,217 C. 9,256
   B. 7,007 D. 12,755

2. When a grievance fails to allege, on its face, any professional misconduct, it is categorized as an "inquiry" and dismissed. The number of grievances last year is what percentage of the total number of grievances dismissed as inquiries?
   A. 28% C. 54%
   B. 37% D. 70%

3. The Office of Chief Disciplinary Counsel classifies every case in which sanctions are issued by practice area. Last year, what percentage of attorney sanctions were classified as criminal law?
   A. 8% C. 22%
   B. 15% D. 31%

4. What percentage of attorney sanctions were classified as family law?
   A. 19% C. 28%
   B. 23% D. 33%

5. What percentage of attorney sanctions were classified as personal injury law?
   A. 9% C. 21%
   B. 15% D. 29%

6. The CDC classifies every case in which sanctions are issued by the type of misconduct. What percentage of grievances involve safeguarding property?
   A. 8% C. 15%
   B. 11% D. 19%

7. What percentage of grievances involve neglect?
   A. 10% C. 23%
   B. 16% D. 28%

8. What percentage of grievances are classified as communication?
   A. 15% C. 25%
   B. 21% D. 28%

9. What percentage are classified as declining/terminating representation?
   A. 5% C. 14%
   B. 9% D. 18%

10. What percentage are classified as integrity?
    A. 18% C. 27%
    B. 24% D. 32%

11. Of the total disciplinary sanctions issued, what percentage were issued against male attorneys?
    A. 52% C. 73%
    B. 61% D. 79%

12. How many Texas lawyers were disbarred last year?
    A. 18 C. 51
    B. 35 D. 73

13. How many lawyers were suspended?
    A. 62 C. 123
    B. 98 D. 154

14. The State Bar's Client Security Fund provides compensation to victims of attorney theft or an attorney's failure to refund unearned funds who meet certain eligibility criteria. How much did the Client Security Fund distribute last year to victims of lawyer misconduct?
    A. $190,408 C. $390,717
    B. $278,560 D. $483,700

15. The CDC operates a toll-free Ethics Helpline (800-532-3947) that provides guidance to Texas attorneys on relevant ethics rules, opinions, and caselaw (though it cannot provide legal advice). Approximately how many calls did the Ethics Helpline answer last year?
    A. 2,000 C. 4,000
    B. 3,000 D. 5,000

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 legalethicstexas.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: Correct responses: 1(B), 2(D), 3(C), 4(B), 5(A), 6(B), 7(C), 8(D), 9(C), 10(B), 11(D), 12(A), 13(C), 14(D), and 15(D). To view the full 36-page *Annual Report of the Commission for Lawyer Discipline,* go to texasbar.com/annualreports. For further analysis, go to legalethicstexas.com/ethics-question-of-the-month.

NOTES

1. Commission for Lawyer Discipline Annual Report June 1, 2020 – May 31, 2021, State Bar of Texas, https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=54492.

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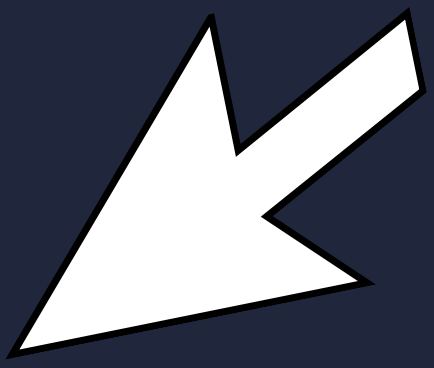

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In Re Allstate Indemnity Company and 18.001 Counteraffidavits

A procedural tool meant to streamline not steamroll.

WRITTEN BY **DOMINIQUE BOYKINS**

In May 2021, the Texas Supreme Court delivered two opinions clarifying procedural hurdles faced by personal injury litigants: *In Re Allstate Indemnity Company* and *Allstate Ins. Co. v. Irwin*. The effects of both decisions are sweeping and will, undoubtedly, have lasting effects for plaintiffs, defendants, and insurance companies across the state.

Background and Procedural History

Plaintiff Norma Alaniz brought contractual and extracontractual claims against her insurer, Allstate Indemnity Company, after the insurer denied underinsured motorist, or UIM, benefits following plaintiff's motor vehicle accident with a third-party tortfeasor. At the trial level, Alaniz served affidavits in accordance with Section 18.001 of the Texas Civil Practice and Remedies Code, or TCPRC, affirming the necessity and reasonableness of her $41,000 in medical treatment. Allstate timely served counteraffidavits contesting the reasonableness of approximately $37,000 of Alaniz's medical billing records. The counteraffidavit was executed by Christine Dickison, a registered nurse and certified professional coder with over 20 years of experience—12 of

which were in medical billing review. Alaniz moved to strike Dickison's counteraffidavit arguing that it (1) was made by someone who was unqualified to testify in contravention of all or part of the matters contained in the initial affidavit; (2) was unreliable; and (3) did not give plaintiff reasonable notice of the basis of its conclusions. After an evidentiary hearing on the matter, the trial court agreed with each of Alaniz's three points and struck the counteraffidavit in its entirety.

The court of appeals denied Allstate's writ of mandamus, and the insurer petitioned the Texas Supreme Court for mandamus. Ultimately, the Texas Supreme Court rejected the trial court's decision and held that not only was the counter affidavit proper under the TCPRC, even if it was defective, the insurer was permitted to contest the medical and billing records at trial through evidence and expert testimony.

In Re Allstate Indemnity Company Key Takeaways

(1) Non-doctors (including billing experts and nurses) can provide expert testimony regarding a specific medical issue, provided the party seeking to use such testimony establishes the expert's knowledge, skill, experience, training, or education regarding the medical issue; (2) TCPRC § 18.001's reasonable notice requirement is akin to the "fair notice" pleading standard found in Texas Rule of Civil Procedure 47; and (3) TCPRC § 18.001 does not require the expert's opinion to be admissible.

Expertise

Alaniz argued that Dickison was unqualified to opine on medical charges by a hospital or other medical provider because she was not in the same field of medicine.[1] However, the Texas Supreme Court rejected such a broad rule. Citing its own 2018 decision, the Supreme Court explained that even non-doctors may testify regarding medical treatment or medical billing, provided they demonstrate their qualification to do so through knowledge, skill, experience, training, or education regarding the particular medical issue.[2] Dickison had an associate's degree in nursing and a bachelor's degree in the science of nursing (education), was a registered nurse (training), and had 21 years of experience in the health care industry, including 12 years of billing review, coding, and auditor certification (knowledge and experience). Although she was not a licensed physician, the Supreme Court concluded that she was qualified to opine on the reasonableness of Alaniz's billing records.

Reasonable Notice

The trial court found that in addition to being unqualified, Dickison's counteraffidavit was *conclusory* in that it improperly used the median charge for a particular service as the standard for determining whether the expense was reasonable. Although TCPRC § 18.001 does not define "reasonable notice," the Supreme Court found that its meaning is similar to the "fair notice" standard for pleadings found in Texas Rule of Civil Procedure 47. That is, reasonable notice is met when the counteraffidavit "provided the opposing party sufficient information to enable that party to prepare a defense or a response."[3] Whether challengers agree with the opinions within the counteraffidavit or the information from which that opinion was derived, is irrelevant. The Supreme Court found that Dickison's counteraffidavit itemized each charge that was being controverted and compared those charges to the median charge for those same services, during the same time frame, and in the same zip code based on the figures provided by the Context4Healthcare database. Accordingly, the Supreme Court held that the counteraffidavit provided sufficient information to allow Alaniz to prepare a defense or a response to Dickison's challenge to the reasonableness of the medical fees.

Reliability

The Supreme Court unequivocally rejected the notion that opinions within the counteraffidavit must be admissible. Said differently, a counteraffidavit *does not* have to meet the evidentiary admissibility standard that requires it to be both offered by a qualified expert and based upon a reliable foundation. The Supreme Court admitted that reliability may be a proper admissibility challenge, but that it had no bearing on the TCPRC § 18.001 analysis. It found that imputing the higher admissibility standard—when TCPRC § 18.001 does not require such—is improper.

Ultimately, Allstate's counteraffidavit contained the opinion of an expert qualified to opine on billing reasonableness and provided reasonable notice to Alaniz of the basis of Dickison's opinion such that Alaniz has enough information to prepare a defense or response. The Supreme Court held that the trial court erred in striking the counteraffidavit.

But Wait … There's More

In addition to striking Dickison's counteraffidavit, the trial court went on to prohibit Dickison from testifying at trial regarding the reasonableness and/or necessity of the medical bills, and precluded Allstate from "questioning witnesses, offering evidence, or arguing to the jury the 'reasonableness of the medical bills.'" The Supreme Court clarified that (1) failure to serve an 18.001(f) compliant counteraffidavit does not preclude the offering party from challenging reasonableness and/or necessity at trial; and (2) in some instances, mandamus may be an appropriate remedy for improperly striking an 18.001 affidavit.

After *Beauchamp v. Hambrick,* a 1995 appellate decision, Texas courts have excluded trial testimony and evidence regarding the reasonableness and necessity of medical treatment/bills simply because the defendant failed to provide an 18.001 compliant counteraffidavit.[4] Here, the court determined that "[b]y creating an exclusionary sanction for the failure to satisfy section 18.001(f) that finds no basis in

the statutory text, *Beauchamp* and the courts following it have turned this 'purely procedural' statute into a death penalty on the issue of past medical expenses."[5] The court held that doing so, without any valid legal basis, was a clear abuse of discretion. The trial court's order was found to go beyond a routine evidentiary ruling; it severely limited Allstate's ability to engage in adversarial adjudication of the plaintiff's claims and compromised Allstate's damages defense. Accordingly, the court found that mandamus relief was appropriate.

So, What Does It All Mean?

In Re Allstate reduces the burden on defendants offering counteraffidavits contesting a plaintiff's billing reasonableness and medical necessity. The court has unequivocally stated that TCPRC § 18.001 does not impose an admissibility standard upon the offering party. Rather, the affiant need only be qualified to render the opinion (which we now know includes nurses and billing professionals) and the counteraffidavit must provide the plaintiff with enough information to prepare a response at trial. Whether the affiant's opinion and basis for that opinion are reliable is irrelevant. Defendants can retain a single (qualified) expert to review medical and billing records across specialties to determine reasonableness of costs—typically at a lower rate than those charged by specialized physicians.

Furthermore, should the expert's counteraffidavit be struck, defendants do not lose the ability to mount a defense; the offering party may still contest the submitted records at trial through evidence and expert testimony. Plaintiffs have previously leveraged an order striking counteraffidavits to force higher settlements by arguing that the defendant will have no recourse at trial to challenge the billing affidavits submitted. After *In re Allstate,* they no longer have such leverage. In fact, a defendant's live expert testimony regarding billing reasonableness may be more compelling than a plaintiff's affidavit. Finally, although the court has provided defendants with additional recourse should their counteraffidavits be improperly struck, mandamus may not be appropriate in all instances. However, courts will likely limit the scope of their orders striking affidavits to avoid potential overreach and subsequent mandamus.

UIM Carriers … Don't Celebrate Too Soon!

For insurance carriers, the court's May 7 opinion was a welcome clarification; complicated only by the court's *Allstate v. Irwin* opinion, delivered just 14 days later. There, the 5-4 majority rebuffed an insureds' breach of contract claims for UIM policy benefits when the underlying tort claim had not been previously adjudicated. In the opinion delivered by Justice John P. Devine (with a dissent by Chief Justice Nathan L. Hecht), the court instead authorized the use of declaratory judgments (pursuant to Chapter 37 of the TCPRC) to address the underlying tort claim. Based on its 2006 *Brainard v. Trinity* decision wherein the court explained that an insurance carrier was under no obligation to pay UM/UIM benefits until an insured obtained a judgment establishing the third-party tortfeasor's liability and underinsured status, the *Irwin* court reasoned that the insured's breach of contract claims for UIM benefits were not "mature."[6] Rather, a declaratory judgment was the proper cause of action to address the controversy between the parties, despite no "harm" having been committed.[7] While this decision may seem like splitting hairs, the *Irwin* decision allows insured plaintiffs the ability to recover attorneys' fees under Chapter 37 declaratory actions. Chapter 37.009 grants trial courts discretion to award not only costs but also reasonable and necessary attorneys' fees when equitable and just.[8] The trial court is not obligated to award attorneys' fees; however, carriers may see an increase in these awards in plaintiff-friendly courts. Challenges to those fees are reviewed under an abuse of discretion standard. Previously, following an adverse decision on liability and damages, a carrier could simply tender the UIM policy limits and face no additional liability to the insured. Now, under *Irwin,* insurers may be exposed to attorneys' fees well in excess of those UIM limits. The number of declaratory actions for UIM benefits will undoubtedly increase. However, after *In re Allstate,* insurance carriers are now affirmatively armed with the ability to present trial testimony controverting a plaintiff's medical and billing records—even in the absence of a proper controverting affidavit—but in doing so, risk being subject to plaintiff's attorneys' fees following an adverse trial verdict. The Texas Supreme Court giveth and taketh away. **TBJ**

NOTES

1. Plaintiff Alaniz argued that *Hong* (2006) and *Turner* (2001) required 18.001(f) counter affiants be experts in a particular field to challenge the reasonableness of medical expenses for that particular field. However, neither case espoused such a rule. Rather, both cases prohibit the affiant from opining on matters outside of their particular field *unless* there is other evidence that the affiant is qualified to opine on those matters. *See Hong v. Bennett,* 209 S.W.3d 795 (Tex. App.—Fort Worth 2006, no pet.). *See also Turner v. Peril,* 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied).
2. *See generally, Gunn v. McCoy,* 554 S.W.3d 645 (Tex. 2018).
3. *In re Allstate Indem. Co.,* 20-0071, 2021 WL 1822946, at *6 (Tex. May 7, 2021) (citing *First United Pentecostal Church of Beaumont v. Parker,* 514 S.W.3d 214, 225 (Tex. 2017)).
4. *Beauchamp v. Hambrick,* 901 S.W.2d 747 (Tex. App.—Eastland 1995, no writ).
5. *In re Allstate Indem. Co.,* 20-0071, 2021 WL 1822946, at *9 (Tex. May 7, 2021); *See also, Brainard v. Trinity Universal Ins. Co.,* 216 S.W.3d 809, 818 (Tex. 2006) (Insured plaintiff, Brainard, sought UIM benefits under his insurance policy after settling his negligence claims against a third-party tortfeasor for policy limits. The carrier denied the UIM claim and Brainard filed suit for breach of contract. Following a jury determination of liability and damages in the underlying tort case, the court rendered judgment for the insured and awarded UIM benefits and attorneys' fees under Chapter 38 of the TCPRC. The Texas Supreme Court reversed the award of attorneys' fees because the carrier was under no obligation to pay UIM benefits until the insured obtained a judgment establishing the liability and underinsured status of the third-party tortfeasor.)
6. *Allstate Ins. Co. v. Irwin,* 19-0885, 2021 WL 2021446, at *4 (Tex. May 21, 2021).
7. *Id.*
8. Tex. Civ. Prac. & Rem. Code Ch. 37.009.

DOMINIQUE BOYKINS
is a member with Smith Parker Elliott in Houston.

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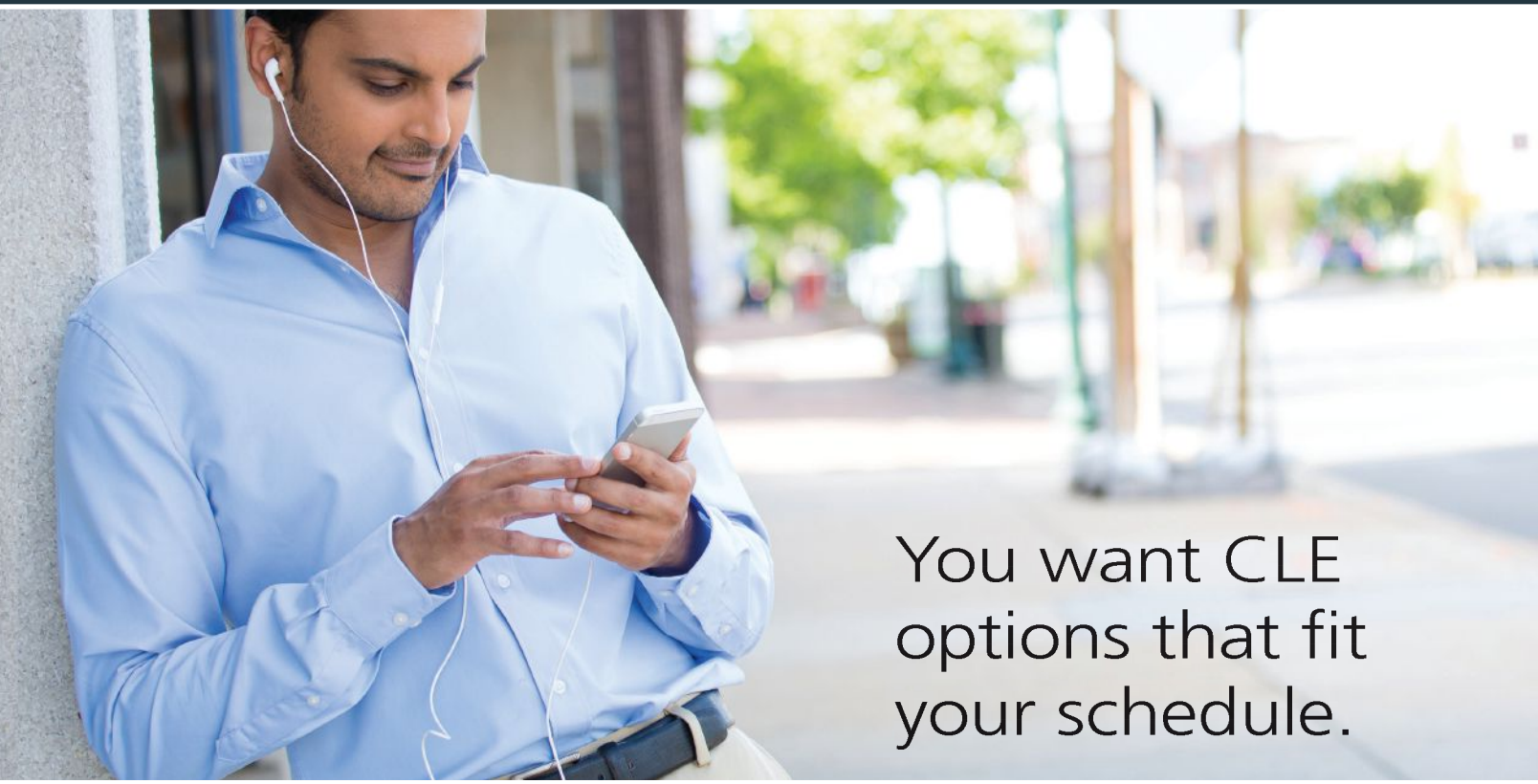

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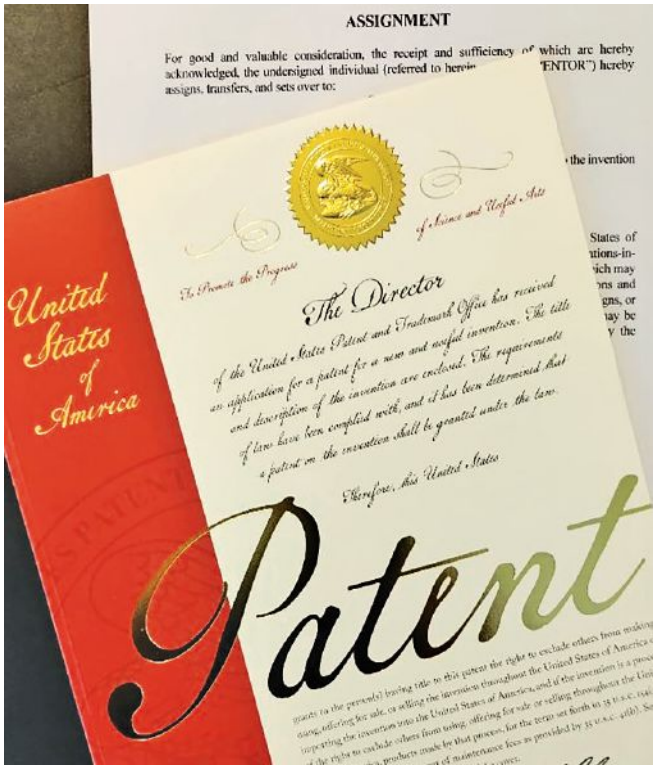

INVENTORS CHALLENGING THEIR OWN PATENTS

What patent owners should know.

WRITTEN BY AND PHOTO BY
VICTOR H. SEGURA

Your key inventor has gone to work for a competitor and is helping them produce the same product covered by a patent he previously assigned to your company. You sue the competitor for patent infringement. Your former inventor now claims the patent he assigned is invalid and unenforceable. Not fair, you say? A recent U.S. Supreme Court decision has set the standard to determine when an inventor can challenge the validity of his or her own assigned patent.

Assignor estoppel is a doctrine in U.S. patent law that prevents an inventor who assigns (assignor) a patent to another (assignee) from later contending that the patent is invalid. As an equitable doctrine, assignor estoppel is grounded in the principle of fairness. "If one lawfully conveys to another a patented right … fair dealing should prevent him from derogating from the title he has assigned."[1]

Assignor estoppel (hereinafter "AE") has effectively served as an enforceable noncompete canon. Not only does AE prevent the assignor from doing an about face regarding the validity of the assigned patent, but it also reaches those in privity with the assignor. What constitutes "privity" in an AE assessment? Privity depends on the nature and extent of the relationship between the assignor and the other party. The Federal Circuit considers privity as determined upon a balance of the equities. "If an inventor assigns his invention to his employer company A and leaves to join company B, whether company B is in privity and thus bound by the doctrine will depend on the equities dictated by the relationship between the inventor and company B in light of the act of infringement. The closer that relationship, the more the equities will favor applying the doctrine to company B."[2] Companies should take note of the broad encompassing scope of AE when considering new hires or performing acquisition studies, as its restrictions affect not only the inventor but also those in privity with the inventor and even affiliated companies.

In *Minerva Surgical, Inc. v. Hologic Inc.,* the U.S. Supreme Court recently affirmed the vitality of the AE doctrine.[3] The court clarified that AE is not a blanket rule, noting situations where the prohibition imposed on assignors and their privies does not apply. The court noted that AE should apply only when the principle of fair dealing is involved. The decision established a new standard for determining when AE applies: "The doctrine applies when, but only when, the assignor's claim of invalidity contradicts explicit or implicit representations he made in assigning the patent."[4] The court provided three examples where the majority concluded AE does not apply:

1. The assignment of patent rights occurs before invention (e.g., an employment agreement requiring assignment of future inventions not yet conceived);
2. A post-assignment change in the law that renders the patent invalid; or
3. A post-assignment change altering the scope of the patent claims.

The common element in the cited examples is that something changed subsequent to the assignor's "representations." In *Minerva,* the petitioner argued that the assignee (the company that acquired the inventor's patent) allegedly broadened the claims in the patent application after the inventor assigned the application. The court stated that "assuming that the new claims are materially broader than the old ones, the assignor did not warrant to the new claims' validity. And if he made no such representation, then he can challenge the new claims in litigation: Because there is no inconsistency in his positions, there is no estoppel."[5] The court remanded the case to the U.S. Court of Appeals for the Federal Circuit to determine whether the assignee's new patent claim is materially broader

than the claims that were assigned.

The *Minerva* decision should not be taken lightly by patent owners and companies with active patent portfolios if they seek to maintain full enforceability of their patents. Patent owners, particularly employers, must now remain cognizant that they may not be able to prevent a validity challenge to their patents under AE if they have materially broadened the claims of the patent applications or patents after receiving the assignment from the inventor. This situation is common as inventors often assign their patent rights to an invention at the initial stage when a patent application is prepared and filed by the assignee. If at a later point, the assignee (e.g., the employer) broadens the claims during prosecution of the patent application before the patent office and is subsequently issued a patent with the broadened claims, the inventor (assignor) could then challenge the validity of the patent claims that were changed after assignment. Under *Minerva,* the employer-assignee could no longer rely on AE to prevent the invalidity challenge from a competitor who hires the former employee-inventor.

What can companies do to protect themselves in the wake of the *Minerva* decision? As discussed above, the most likely situation to arise would be an inventor raising a validity challenge after an assignee broadens the patent claims. To help prevent this issue from arising, employers should consider keeping their inventors engaged during the entire prosecution of patent applications to preserve any AE defense. The intellectual property assignment document signed by the inventors should seek to cover all permutations of claims to any subject matter disclosed in the particular patent application and/or patent. Keeping in mind that the inventor's representations made in assigning the patent rights are key to an AE assessment, employers may also consider drafting employment contracts with employee cooperation clauses requiring cooperation with execution of supplemental assignments and oaths or declarations after any amendment (particularly if broadening claims) is made to the assigned patent application or patent. Employers may also want to have inventors execute confirmatory assignments when a patent issues. By having employees/inventors review and sign off on claim amendments and execute confirmatory assignments, it could mean the difference between being able to raise AE and expensive litigation to defend a patent's validity.

Another option for employers to consider is filing the initial patent application with broad claims, which can be narrowed during prosecution of the patent application if necessary. This could preserve an AE defense by blocking a subsequent assertion by the inventor that the claims were broadened by a later amendment. Such filings would serve to confirm that the inventor explicitly assigned narrower claims as well. In cases where an employer wishes to defer filing and prosecuting a regular patent application, yet desires to preserve its AE defenses, the employer can file a U.S. provisional patent application with a set of broad claims. Such a provisional application filing would establish a priority filing date while providing the employer additional time to decide whether or not to proceed with the patent application. Care would need to be taken to ensure that the broad claims are supported by the disclosure in the patent application to avoid other validity issues.[6]

The correct naming of inventors on patent applications is also not to be overlooked. Under U.S. patent law, a person should only be listed as an inventor on a patent application if he or she meets the legal standard as associated with at least one claim in the application. If amendments are made to the claims during prosecution of a patent application, it may be necessary to revise the named inventors depending on the respective inventive contribution to the claims. Recalling that under *Minerva,* AE should apply only when the principle of fair dealing is involved, employers may also consider educating their inventors regarding the various options available to a patent applicant at the U.S. Patent & Trade Office for prosecuting patent applications, including the option to broaden the claims of issued patents.[7] Such measures may help curtail an inventor's allegation of "unfairness" in an AE dispute.

Although the *Minerva* decision established limiting parameters, the doctrine of AE continues to provide a means by which patent owners and employers can defend the validity of their patents when an inventor-assignor breaches norms of equitable dealing. AE litigation will now entail determination whether an inventor truly gave up the ability to challenge the validity of the patent in question at the time of assignment. By taking measures to ensure that explicit representations are and have been made by inventors when assigning past, current, and future patent rights, patent holders can preserve their right to defend against validity challenges under the AE doctrine. Inventors, on the other hand, should be mindful of what is being assigned and when. Anyone acquiring a patent should also consider conducting a review of the file history for issues that could bar an AE defense against later validity challenges.

The lower courts are now tasked with refining the legal contours of the AE standard set by *Minerva*. Decisions will be addressing issues such as what constitutes a "material" patent claim amendment and when an assignor's claim of invalidity contradicts representations made in assigning patent rights. Nonetheless, patent owners and employers can take proactive measures to better preserve their ability to invoke the AE doctrine in defending their patents against validity challenges. **TBJ**

NOTES

1. *Westinghouse Elec. & Mfg. Co. v. Formica Ins. Co.,* 266 U.S. 342, 349 (1924).
2. *Shamrock Tech. v. Med. Sterilization, Inc.,* 903 F.2d 789, 793 (Fed. Cir. 1990).
3. *Minerva Surgical, Inc. v. Hologic Inc.,* No. 20-440, 2021 U.S. LEXIS 3563 (June 29, 2021).
4. *Id.*
5. *Id.*
6. 35 U.S.C. §112 (claims require written-description support in the patent application).
7. 35 U.S.C. § 251 (a reissue patent may be granted to enlarge the scope of the original patent claims under certain circumstances).

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HOW I PLANNED FOR RETIREMENT

A 50-year lawyer who retired eight years ago describes how he stepped away from his practice and how he spends his time now.

WRITTEN BY **IRA EINSOHN**

"Strive to do what you love for as long as you can do it."[1]
But prepare, prepare, prepare.

I started work in the summer of 1971 only one week after the Texas Bar Exam. I also worked part time during my third year of law school. I was chomping at the bit. I couldn't wait! I retired and chose inactive status in January 2013. I couldn't wait then either: I didn't love law practice nearly as much and that was affecting my desire to perform at my very best and to grow in the practice.

Retirement is a personal decision. If you love law practice and can do it, have at it. For most of us, though, the time will come, for whatever number of reasons, to "hang 'em up," "call the dogs and [put out] the fire," or decide that "the price of eggs ain't worth the wear and tear on the hen's [tail]."[2] Here is how I addressed the issues of retirement, and some of the matters you may wish to consider, depending on your personal circumstances.

Will you be able to afford retirement? Not only *financially,* but also *emotionally, mentally,* and *physically?* My advice is the same as you got on your first day of law school: "Prepare, prepare, prepare." If you haven't started, do it now.

PREPARE FINANCIALLY

This will not be a list of the many ways to cut expenses, no warnings about paying off your credit cards each month. I won't even refer you to the many publications where you will find such advice, or where to invest what you have left each month. You're on your own for all that. Here are two steps that worked for me.

Take advantage of ERISA.[3]

Participate, through your own and your firm's plans to the extent allowed and available. Let the U.S. help you build your retirement nest egg with its tax advantaged plans. If your firm does not have retirement plans under the Employment Retirement Income Security Act, urge them to see the light. The firm I retired from made no year-end distributions to owners until its retirement plans were fully funded. Consider what discretionary expenditures you could delay or do without until you and your firm have "maxed out" each year. I did that from 1974, the year ERISA became law, until I retired in 2013. I may not have had the choice to retire when I did if I had not. I could not have afforded it financially without using the provisions of ERISA.

Hire the best financial planners you can find.

As this is being written, Elton John is preparing for his farewell tour. I promise he will not be handling travel arrangements. He's not as good at that as the people he would hire, and he needs to focus on the performance. It's worth the money if he hires the right people and they provide him the right services.

Ask around. There are plenty of lawyers, friends, and others you trust who can recommend good financial planners. Although it is a plus, the planners don't necessarily have to have a lot of lawyers as clients, but you should inquire as to the general net worth, age, and other circumstances of their client base. Also, of course, it is important to talk to their clients whom you know and trust and to ask a lot of questions about the planning team.

The planners you interview should give you copies of the forms of reports of monthly portfolio positions and changes, and other forms of monthly reports they normally provide, and hold at least two formal meetings a year. One should cover all aspects of your financial condition and plans, including expenses you never thought about until they asked you, insurance, estate planning, proposed capital spending, and what your goals are over various time periods. The other meeting should focus primarily on your investment portfolio.

Not promptly returning your correspondence or calls, or the lack of a good referral network of other professionals, such as CPAs, life insurance agents and brokers, fire and casualty agents, etc., are red flags. Communications and a caring, responsive, and trustworthy financial team are essential to retirement success.

PREPARE EMOTIONALLY

Be ready to be a self-motivator. There are no partners or firm "executives" or "managers" to remind you of your budgetary commitments, no clients to send you papers to review at all hours after they go home to dinner, no opposing counsel to believe that harassing you is the way to win or just plain fun. You're independent! The motivation to get up and after whatever it is must come from within. Don't put that on your spouse or significant other. That is a death sentence. As one lawyer put it, "My spouse would kill me."

Also, although you may not appreciate it now, be prepared not to have the assistance of your staff or to share the common interests and daily discussions with your colleagues. Be prepared to leave behind the status, deference, and respect from your clients, those who work with you, and those who look up to you and seek your counsel. No one should define themselves

by what others think of them. However, all that reinforcement might disappear when you retire—some of it immediately, much of it over time. To the extent it does, don't worry. It is just as likely that it will be replaced with new and old friendships. You win. It's one of the best things about retirement.

Delegate. Your job is to make sure that your clients and those lawyers who have supported you get to know each other better or at least have that opportunity. Retire believing you did what you could to make that happen.

Finally, regarding being emotionally prepared, use preparation for retirement to begin spending more time with your friends and family, enjoy the privilege you have been given to live and practice law in this country, and appreciate the value you have added to society. Also, appreciate those who have mentored you and others on whose shoulders you have stood. Instead of competing with your colleagues and those opposing counsel who always seemed to get under your skin, empathize. Be glad they were there to challenge you. Enjoy their successes and the role you may have played.

Find something that will challenge you and that you love. Active service on a nonprofit using your experience and wisdom, not only your financial resources, can be very fulfilling. If it is a cause you care about and challenges you, the satisfaction, challenge, and even the tiniest steps of success can also replace from the inside what you thought you left behind.

PREPARE PHYSICALLY AND MENTALLY

Keep moving! What you do is yours to choose. Everyone's parts run out of warranty the older you become. Do what you can to fight back. Get up from your desk and walk around the office or block—whatever your doctor says is OK for you to do. Try to choose primarily those physical activities that you are passionate about, keep you moving, and involve your mind. Likewise, try to choose those mental activities that involve or at least give you time for staying in good enough shape to enjoy them. After 15 years on the Dallas Theater Center Board of Trustees, I chose acting for the former. I wanted to know how the actors do what they do. I am still learning. It is a challenge. For the latter, I chose golf after many years of a love-hate relationship. It remains a challenge and is played, as they say, "between the ears." I love both acting and golf.

And I love retirement. Good luck! **TBJ**

NOTES

1. Jane E. Brody, *A Birthday Milestone: Turning 80!,* The New York Times (May 21, 2021), https://www.nytimes.com/2021/05/17/well/family/jane-brody-birthday.html.
2. Only in Texas will you find these colorful phrases used in business or legal proceedings. Ain't it GREAT? The bracketed words are cleaned-up versions of the actual content.
3. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 18.

IRA EINSOHN
was born in New York City but got to Dallas as soon as he could, at age six months. He is known for having represented financial institutions with their syndicated credit facilities, both helping to structure and close them and, if required, restructuring them, outside or inside of Chapter 11 bankruptcy. In retirement Einsohn is enjoying film and television acting, golf, and time with his friends and family.

WHY I'M RETIRING

A 40-year lawyer explores passing on the reins to the next wave of leaders and visions of his next stage.

WRITTEN BY **STRATTON HORRES**

What Is Retirement Exactly?

Although this essay is about retirement, it may not be what you think, as retirement is not some monolithic concept—it involves many considerations including career, family, health, and finances; can take many forms; and there are no right or wrong answers. It is also a fairly recent concept that originated in 1889 when German Chancellor Otto von Bismarck invented the idea to address high youth unemployment by paying those 70 and older to leave the workforce. Other countries adopted the concept. In the U.S., the Social Security Act and rise of pensions allowed us the freedom to not have to work until death. In some ways, retirement for lawyers is a misnomer. It can perhaps better be understood as *what will the next stage of your life look like,* which is how I approached this dilemma.

The Law Is a Jealous Mistress

As U.S. Supreme Court Justice Joseph Story famously wrote in 1939, "[The law] is a jealous mistress, and requires a long and constant courtship…." As I approached my 65th birthday, I struggled mightily with how to end my 40-year romance (43 including law school) with the law and the law firm I have loved for over 29 years (Wilson Elser), having co-founded the Dallas office in May 1992 and been its managing partner for over 27 years. In the process, I grew the office from four to more than 50 lawyers, and served as the regional managing partner for the southern and southwestern regions at different times, an Executive Committee member for over 20 years, and the lateral hiring partner for a dozen years, opening many offices and bringing in talent across the firm.

I grant that to most of us, retirement is an intensely personal matter. In my decision process, I came to appreciate just how much the law has given me over the years. Her gifts to me were numerous, including financial independence, the most challenging cases in the country, and a rewarding career helping to build one of the largest firms in the country. Looking back, the years have flown by, and to my younger colleagues, I say take note of this because one day, sooner than you might expect, you will be in *my shoes and figuring out how to make your own exit.*

But as generous as my mistress has been, she has also extracted a high cost, for if anything, she has been incredibly demanding. The sacrifices include a first marriage; keeping track of my days in small increments; giving up precious family time and kid events; the postponement of many personal trips, some on short notice; and too many disrupted holidays to count. She generally controlled every aspect of my life. I did so without complaint, because after all, I knew it would be this way when I signed on to the relationship.

Why Consider Retirement Now?

As a result of my long relationship with this generous but demanding mistress, here I am, having had the best years in my career recently, writing an essay about retirement because just now on the other side of age 65, I am more conscious of

these time demands and wish to be more present in the moment for my family and myself. This requires a rebalancing and readjustment of my life. I've always wondered if I'd know when the time was ripe for this momentous decision. The answer came to me quite naturally and organically, not based on financial or health considerations, but a genuine desire to turn the duties and responsibilities of management over to lawyers in my office who have worked hard and deserve their own opportunity to succeed. In short, it's their time and turn to put their own stamp on the future. After all, I thought, *Isn't that the strength of a mature organization to evolve and transition other talent into key roles going forward and sooner than later?* My answer to this question was an unqualified yes.

When the opportunity for other deserving lawyers was greater than for myself going forward, I decided it was time to step aside and give them their chance. It is the organic evolution of an organization and the preservation of its future to do so. This leadership transition should be embraced and given freely, not hung onto. It is a strength to let the next generation lead—and it's also healthy. I realized that sometimes the best thing a leader can do is step out of the way and help develop the leaders of tomorrow. After all, my mistress had changed over four decades of practice and it was time to accept that fact and bring in new ideas, energy, creativity, and innovation.

Retirement From Law Doesn't Have to be Abrupt

I concluded that my mistress, though generous and demanding, is *also flexible* so that you do not have to end the relationship with her abruptly. We have options that do not exist in other professions. I realized that I could step down from my role as managing partner but continue to work for my clients on their cases without totally giving her up. In crystallizing my retirement plan, I decided I would retire in stages, beginning with transitioning out of my leadership role. This would also allow me to assist in my own transition and be a mentor to my successors. In other words, I would be a resource that they could turn to for advice and counsel. At the same time, it would also allow the rebalancing of my own life and allow greater flexibility to do those things that I had long postponed, such as spending more time with my family and doing things like traveling, speaking, and writing. My attorney friend Ron Taylor had once advised me "not to retire from something unless you have something to retire to." That struck me as a truth, and I am fortunate to have other passions to pursue, for you see my mistress has given me the freedom to do these as well without totally giving her up.

What Does my Next Stage Look Like?

What's my next stage? Well, there are at least two more. After the transition is complete from management, I will relinquish my equity partnership at some point. This will allow me to continue to work on my cases and do other tasks assigned to me by senior management during this phase. So, I plan to continue servicing my clients, developing business, doing tasks assigned by the firm, and working on my cases. In a sense I'm ending my career as it began 40 years ago, as a working lawyer.

At this point in my career, it is also about giving back—and not just by allowing other deserving talent to move up in their own careers. It is also about giving back to the community, which I have served for so long. I am excited to begin chapter two for the Dallas office and for myself.

What Are Some of the Lessons I've Learned?

Which brings me to some thoughts about the lessons I've learned along the way since lawyers ask me this question frequently. For purposes of this essay, I will narrow them to three. The first is to lead from the front, or in other words, don't ask others to do anything that you yourself are not willing to do. This is the lesson I learned from Alexander the Great, who was the first to lead his vaunted companion cavalry into battle. As a result, his troops followed him to the corners of the known world as he created the greatest empire ever known. The second I learned from the great Roman Emperor Marcus Aurelius whose *Meditations* is a blueprint for leadership for all ages. His guiding principles were self-reliance and self-mastery—"It's up to you!" He assumed personal responsibility for whatever situation he found himself. A good leader does. Finally, and apropos to this essay, never give up but know when to quit. Alexander, Hannibal, and Caesar, as great leaders as they were, didn't know when to stop and they paid the price. Alexander died at just 33 years old from either disease or poison, and after he died, his great empire was divided into fragments among his generals. Hannibal stayed too long fighting Rome in Italy, and by the time he was called back to defend his homeland of Carthage in North Africa, his army was too exhausted and worn out to fight the Roman General Scipio Africanus. Carthage was razed to the ground. As for Caesar, we know what happened to him on the Ides of March in 44 BC.

A jealous mistress yes, but I wouldn't choose another to spend my life with. **TBJ**

STRATTON HORRES, originally from Charleston, South Carolina, began his legal career in 1981 with Dallas firm Gardere & Wynne. In 1992, he co-founded the Wilson Elser Dallas office, where he was the managing partner for over 27 years as well as the regional managing partner of the firm's southwest region. Horres is a member of the firm's Executive Committee and represents clients in catastrophic and high-exposure cases across the U.S. For more information, go to wilsonelser.com/attorneys/e_stratton_horres_jr.

WHY I DON'T WANT TO RETIRE YET

A Houston attorney who has been practicing for more than 40 years explains why she has no intention of giving up her job anytime soon.

WRITTEN BY **LINDA BROOCKS**

"Aren't you retired yet?" That's a question people of a certain age hear with more frequency than we might like. I, for one, answer it without fail with a resounding "NO!" Why would I retire from a job that allows me intellectual stimulation, provides daily interaction with like-minded colleagues, affords me a sense of purpose, and gives me the flexibility to work as much or as little as I like?

Intellectual stimulation is perhaps the primary driver in my decision to continue practicing law past the time some might consider retirement age. I am one of the many among us who have witnessed a family member's tragic descent into the grips of Alzheimer's disease, and I have convinced myself that continued brain exercise is the best prevention for a similar fate. Mountains of studies have found increased cognitive decline in retirees, even taking into account normal, age-related changes. One study of particular interest to me found that declines in *verbal memory* in its subjects were 38% faster after retirement.[1] To a lawyer, whose tools are words, this presents a frightening picture. Other studies have shown that post-retirement decline occurs at a much greater rate among persons who had particularly mentally challenging occupations—including, of course, lawyers.

This is not to say that a lawyer must continue practicing law in order to remain intellectually engaged, especially if law has become enervating rather than exciting. But I am convinced that regular, disciplined, stimulating work is a must to maintaining a vibrant intellect. You rest, you rust!

Equally important to maintaining cognitive health is human interaction and engagement. And what better way to get that engagement than to work with people you like and respect and who challenge you. My colleagues at Kean Miller fit the bill in all respects. It's pure joy to bounce a particularly thorny issue around with smart, creative, friendly people. As long as they let me continue, and as long as I feel that I am a contributing member of the team, I intend to stay.

Next on my list is a sense of purpose, which psychologists uniformly acknowledge to be a key factor in creating optimism, resiliency, and hope. I am particularly passionate about achieving true diversity and inclusion in the legal profession and have been an active participant in the Center for Women in Law. The center, housed at the University of Texas School of Law, is the premier institution dedicated to supporting women lawyers in every stage of their careers, from the first-year law student to the most senior attorney. My position as a partner at my firm provides me with the platform to further the center's work and to act as an effective mentor to younger attorneys, especially women and people of color. Not only does this sort of work provide immense satisfaction and fulfillment, but it also sharpens interpersonal skills, broadens perspectives, and educates the mentor as well as the mentee.

Finally, I love the fact that at this stage in my legal career I have much greater flexibility in setting my schedule. While being ever mindful that I am part of a team and that I must remain willing to jump in occasionally on short notice if necessary, I generally have the freedom to pick and choose the work I do, to travel, and to pursue my avocations (i.e., my non-money making jobs). At this point, my favorite avocation is filmmaking. I have made one recent documentary, *Mother's Day: The Forgotten Victims of Death Row,* which was featured and won awards in several film festivals in the U.S., Canada, England, Spain, Belgium, and Poland. I am in the editing phase of a second documentary focusing on survivors of sex trafficking, and I have many other, similar projects in various stages of planning. My "day job" not only funds these ventures, but it also generates ideas for future films.

How long will I continue to practice law? I often jokingly say that I will be removed from my office feet first, and I really don't foresee wanting to retire. But my vision of my future does feature my assuming ever-increasing roles in training and mentoring at my firm—while always working on the side on a film that inspires me.

All of this assumes that I maintain my enthusiasm and, more importantly, my competence. While fervently hoping that I can do so for many years, I also hope that I will have the courage and wisdom to acknowledge it when I cannot. I want to end on a high note! **TBJ**

NOTES

1. Baowen Xue, Dorina Cadar, Maria Fleischmann, Stephen Stansfeld, Ewan Carr, Mika Kivimäki, Anne McMunn & Jenny Head, *Effect of retirement on cognitive function: the Whitehall II cohort study,* 33 Eur. J. Epidemiol., 989-1001.

LINDA BROOCKS
is a partner in the Houston office of Kean Miller, where she handles trials and appeals of complex commercial, securities, real estate, personal injury, and employment cases. In addition to being certified in civil trial law and civil appellate law by the Texas Board of Legal Specialization and a member of the American Board of Trial Advocates, she is a certified mediator, an arbitrator, and a documentary filmmaker.

AIDING LAWYERS IN SUCCESSION PLANNING

A look at State Bar of Texas resources.

WRITTEN BY **GREGORY W. SAMPSON**

Many lawyers in the "baby boom" generation—and the most thoughtful of the next generation of lawyers—are asking this pinnacle question, *What should I be doing to prepare for my inevitable transition out of the full-time practice of law?*

This question is essential on at least three levels. First, it embraces the obvious but uncomfortable reality that none of us will practice law forever. Second, it recognizes that our clients deserve an intentional succession to a worthy lawyer when we exit the practice, whether sudden or planned. Third, it concentrates efforts to achieve a respectable value for our decades of extremely hard work when we exit. For solo practitioners, the answer can often be the difference between a comfortable retirement or continued unplanned servitude to the practice.

Recognizing lawyers' needs for resources for sound exit planning to maximize the benefits of their practice for themselves and their families, the State Bar of Texas Board of Directors approved several initiatives in recent years. One was the Succession Planning Work Group, which developed an online custodian appointment portal on the State Bar website and new Texas Disciplinary Rule of Procedure 13.04, enabling lawyers to name a custodian to wind up and close their practice in the event of a sudden cessation.

You can designate a custodian online and volunteer to serve as a custodian at texasbar.com/custodiandesignation.

You can find other resources, forms, and checklists for designated custodians engaged in closing a practice at texasbar.com/succession.

This same work group and the State Bar of Texas Law Practice Management Committee that is continuing its work has helped compile articles, CLE presentations, suggested forms, checklists, and best practices outlines for those interested in sudden cessation custodianships and succession planning on the law practice management portal created for Texas lawyers at texasbarpractice.com.

Articles and checklists for planning and executing the closure of your practice and best practices for selling your practice in compliance with the Texas Disciplinary Rules of Professional Conduct can be found at texasbarpractice.com/law-practice-management/plan.

Ethical guidance on client file management and destruction, firm management issues, and selling your practice can be found in searches of ethics opinions on the Professional Ethics Committee for the State Bar of Texas webpage at texasbar.com/pec. More direct answers to ethical questions can be obtained by posing them on the State Bar of Texas' toll-free Ethics Helpline at 800-532-3947.

Lawyers seeking to upgrade their practices with technology to better prepare for a practice transition with digitized files and business management tools that can enhance the value of a practice upon sale can find these tools at discount prices on the Member Benefits and Services webpage at texasbar.com/memberbenefits.

Even funding for the costs incurred when a sudden cessation of practice occurs due to a disability or death might be found on the Texas Bar Private Insurance Exchange portal on the Member Benefits webpage. There you will find special rates for Texas lawyers on disability insurance, accidental death and dismemberment, and life insurance. For more information, go to texasbar.memberbenefits.com.

The Law Practice Management Committee continues to work on a broader use succession planning manual providing guidance through the texasbarpractice.com portal. Plans for the manual include articles on best practices, checklists, sample forms, and referrals to helpful resources to make succession planning easier and more accessible for busy lawyers. In addition to the great resources already provided to lawyers as outlined in this article, the committee hopes the manual will encourage more lawyers to take these important planning steps for the long-term health of their practice and their family. **TBJ**

GREGORY W. SAMPSON
is a trusts and estates attorney in Gray Reed's Dallas office. He brings more than 30 years of experience to counseling clients on all aspects of wealth preservation and transfer, including estate and gift tax planning, charitable planning, retirement planning, estate and trust management, trust and estate controversy, trust modification and termination, family asset management, and business succession planning. Sampson is certified in estate planning and probate law by the Texas Board of Legal Specialization.

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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9110

FINAL APPROVAL OF AMENDMENTS TO TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. On May 25, 2021, the Supreme Court of Texas (in Misc. Dkt. No. 21-9059) and the Court of Criminal Appeals (in Misc. Dkt. No. 21-001) preliminarily approved amendments to the Texas Rules of Appellate Procedure and invited public comment.

2. Following public comment, the Supreme Court and the Court of Criminal Appeals revised those amendments. This Order incorporates the revisions and contains the final version of the rules, effective October 1, 2021.

3. The Clerk is directed to:

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

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

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

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

Dated: September 13, 2021

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

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 21-003

FINAL APPROVAL OF AMENDMENTS TO TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. On May 25, 2021, the Supreme Court of Texas (in Misc. Dkt. No. 21-9059) and the Court of Criminal Appeals (in Misc. Dkt. No. 21-001) preliminarily approved amendments to the Texas Rules of Appellate Procedure and invited public comment.

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

Dated: September 13, 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 F. McClure III, Judge

[REDLINE VERSION AS AMENDED]

Rule 10. Motions in Appellate Courts

* * *

10.4 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

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 ~~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~~consideration 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~~issues 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.~~

49.5~~4~~. 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.~~7~~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, 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 time prescribed by Rule 49.1 for filing a motion for rehearing. 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.~~8~~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.~~9~~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.

~~49.10. *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. A motion for en banc reconsideration must be filed by the deadline for filing an initial motion for rehearing under subdivision 49.1. 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.

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Rule 47. Opinions, Publication, and Citation

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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.

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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 issues 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 the time prescribed by Rule 49.1 for filing a motion for rehearing. 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. A motion for en banc reconsideration must be filed by the deadline for filing an initial motion for rehearing under subdivision 49.1. 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.

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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9118

FORTY-SECOND EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

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

2. The Thirty-Ninth Emergency Order (Misc. Dkt. No. 21-9078) is renewed as amended.

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

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

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

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

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

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

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

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

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

i. allow, if available, representatives from legal aid organizations or volunteer legal services to be present—in person or remotely—to provide information, advice, intake, referral, or other assistance for eligible litigants;

ii. confirm whether or not the plaintiff has any pending applications for rental assistance or has provided any information or documentation directly to a rental assistance provider for the purpose of receiving rental assistance;

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

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

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

(A) immediately abate the eviction action for 60 days;

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

(C) inform the parties of the extension, reinstatement, and dismissal procedures outlined in Paragraphs 6, 7, and 8 of this Order; and

d. at the trial required by Texas Rule of Civil Procedure 510.10(c), if the plaintiff has a pending application for rental assistance, the plaintiff has provided any information or documentation directly to a rental assistance provider for the purpose of receiving rental assistance, or the plaintiff and defendant both express an interest in participating in the Texas Eviction Diversion Program, the judge must also immediately instruct the justice court to make all court records, files, and information—including information stored by electronic means—relating to the eviction action confidential to prohibit disclosure to the public.

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

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

a. reinstates the eviction action;

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

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

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

8. If the plaintiff does not file and serve a motion to reinstate an action abated under Paragraph 5(c)(v) within the abatement period, the judge must dismiss the action, including any claims that do not involve the nonpayment of rent, with prejudice. The judge must dismiss the action the day after the abatement period expires, without requiring either party to file a motion or make a request. All court records, files, and information—including information stored by electronic means—relating to the dismissed eviction action must remain confidential.

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

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

a. set aside any judgment;

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

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

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

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

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

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

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

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

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

Dated: September 21, 2021.

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

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9119

FORTY-THIRD EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

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

2. The Fortieth Emergency Order (Misc. Dkt. No. 21-9079) is renewed as amended.

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

a. except as 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;

b. 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;

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

d. 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;

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

4. Subject only to constitutional limitations, justice courts and municipal courts may in any case, civil or criminal, without a participant's consent, modify or suspend the following deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than April 1, 2022:

a. trial-related deadlines and procedures; and

b. deadlines and procedures for pretrial hearings.

5. In any proceeding under Subtitle E, Title 5 of the Family Code, the dismissal date may be extended, without a participant's consent, as follows:

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

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

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

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

6. Courts may continue to use reasonable efforts to conduct proceedings remotely. In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor. In all other cases, remote jury proceedings must not be conducted unless the court has considered on the record or in a written order any objection or motion related to proceeding with the jury proceeding at least seven days before the jury proceeding or as soon as practicable if the objection or motion is made or filed

within seven days of the jury proceeding. Except in a non-binding jury proceeding, a court may not permit or require a petit juror to appear remotely unless the court ensures that all potential and selected petit jurors have access to technology to participate remotely.

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

8. 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.

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

10. 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.

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

Dated: September 21, 2021.

JUSTICE DEVINE and JUSTICE BLACKLOCK dissent.

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

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9120

PRELIMINARY APPROVAL OF AMENDMENTS TO CANON 6(B) OF THE CODE OF JUDICIAL CONDUCT

ORDERED that:

1. The Court preliminarily approves the amendments to Canon 6(B) of the Code of Judicial Conduct set out in this order.

2. The amendments authorize a constitutional County Judge who performs judicial functions to act as an arbitrator or mediator for compensation under the circumstances stated in Canon 6(B)(3). The Code has long authorized Justices of the Peace and Municipal Court Judges to engage in arbitration and mediation. The language added to Canon 6(B)(3) is imported directly from Canon 6(C)(1)(c), which applies to Justices of the Peace and Municipal Court Judges.

3. The Court will issue a final approval order at least 60 days after publication of the amendments in the November edition of the *Texas Bar Journal*. The amendments may change in response to public comments.

4. Comments should be sent to rulescomments@txcourts.gov. The Court requests that comments be sent by December 31, 2021.

5. The Clerk is directed to:

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

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

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

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

Dated: September 23, 2021

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

Canon 6: Compliance with the Code of Judicial Conduct

* * *

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation;

(~~3~~4) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(~~4~~5) with Canon 5(3).

* * *

STATE BAR OF TEXAS
AT-LARGE DIRECTOR SOUGHT

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

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

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

CRITERIA FOR SELECTION

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

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

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

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

Submit the information to:

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

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

Email questions to jennifer.reames@texasbar.com.

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

Contact TYLA at tyla@texasbar.com or go to tyla.org.

A Season of Coming Together, Inspiring Others

TO BE CIVIL AND GIVE THANKS

GRATITUDE IN NOVEMBER? As Miranda Priestly quips in *The Devil Wears Prada,* "Florals? For spring? Groundbreaking." Gratitude and gathering together with family may not be groundbreaking for this time of year, but their importance only grows each year, especially since the pandemic began.

In September, we had our first in-person Texas Young Lawyers Association meeting since March 2020, and I was reminded just how much I have to be thankful for. Our directors have taken challenges in stride and created opportunities to come together and support others. This year we are working on big projects to promote and celebrate civility in our profession. As I learn more about civility with our board—by listening to each other, appreciating our unique voices, and recognizing, as the late U.S. Supreme Court Justice Ruth Bader Ginsburg said, "You can disagree without being disagreeable"—I become more and more grateful for our differences. We are stronger and more united when we prioritize listening and understanding above arguing and trying to "win" a conversation. Justice Sandra Day O'Connor knew what it was like to be different and the importance of coming together. As Evan Thomas writes in his book *First, Sandra Day O'Connor: An Intimate Portrait of the First Woman Supreme Court Justice,* O'Connor convinced a newly confirmed Justice Clarence Thomas that he had to come to lunch with all the justices. Thomas ultimately said of this interaction, "You know it made all the difference for me. I went from being lonely and alone to coming to lunch." He would also credit O'Connor as "the glue … that made this place civil."

Our U.S. Supreme Court justices can break bread together and be civil, which means it should be easy for your family members to come together without an argument, right? It may be harder to appreciate our differences in these settings, but to absolutely oversimplify the situation, wouldn't it be a boring Thanksgiving dinner if everyone brought the same thing? I am grateful that I will celebrate this season with family, regardless of whether we agree on politics or not or whether we gather in person or virtually. Attorney wellness continues to be a TYLA priority, and this year, we will add relationship wellness resources to help you navigate the family dinner table and the boardroom table.

I will always be most grateful for my adoption and the family I have been blessed with through our legal system. I am excited that TYLA will add resources for attorneys and their clients to navigate the legal system in adoptions and foster care families. I've gained family through adoption, college, law school, marriage, friendship, TYLA, and other ways that I'm sure I've left out. I don't know a single person related to me by blood, but my family is full of people I love. We don't agree on everything, but I'm thankful for that too.

I am thankful for each of you. Your unique perspectives and talents make our bar stronger. I hope your gratitude lists are long, that you invite someone to lunch with you, and that your actions inspire others to be civil and give thanks.

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

A Member Benefit of:

STATE BAR of TEXAS

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The Texas Bar Private Insurance Exchange offers members of the State Bar of Texas access to the most competitive group insurance plans on the market. Enjoy unique cost-saving opportunities, enrollment technology, HR tools, and ancillary benefits typically only offered to Fortune 500 companies. You also have year-round access to a team of licensed benefits counselors who can answer questions, help members navigate the enrollment process, and find the best group health solution for your firm's unique needs.

To speak with a benefits counselor or request a free quote, visit:

memberbenefits.com/texasbar

Stop Losing Your HARD-EARNED MONEY

RECORD TIME AS YOU GO.

WRITTEN BY **MARTHA M. NEWMAN**

YOU ARE LOSING MONEY or over-billing your clients if you try to reconstruct the time you spend on cases instead of tracking your time as you go.

Why do lawyers delay time keeping?

I need to get other work done. (But do you not want to get paid for all the work you just did?)

I will remember everything I did and write it down at the end of the day. (Not unless you have a flawless memory!)

Prevent revenue losses.

Record your time as you start working on a matter and when you finish rather than waiting to record it later. According to management consultant Ann Guinn for her ABA blog, a 24-hour delay in recording time equals a 25% loss in revenue. Even waiting a few hours or until the end of the day to recall what tasks you performed on a case earlier will likely result in inaccurate recall.

If you add up losses resulting from memory-based time keeping, you could be giving away 20% to 30% of the revenues you rightfully earned or you could be inadvertently violating your ethical responsibilities by over-billing your clients.

Remember the small things.

Round up time spent on tasks to minimum time increments such as one-quarter or one-tenth of an hour. Ensure you are compensated for the time you spend on a case—even if it is for a three-minute call, assuming the call was substantive. See American Bar Association Formal Opinion 93-379, which approves that practice.

Two caveats: First, sustaining relationships with clients and engendering their loyalty may take priority over charging for minor tasks. That is a judgment call to make each month before sending out your invoices. Clients do love seeing "NC" on their invoices. Second, when you review the month's billing or when you send the last invoice pertaining to a matter, ask yourself if the work you did was worth the time you spent on it.

Let clients know exactly what they are paying for.

Prepare clearly written, detailed invoices that will provide a rationale for your fees. Give complete descriptions of each piece of work as you go or write down what are called *placeholders* that you or your legal assistant can *polish* later if you do not have time for lengthy descriptions in the moment. Here is how that would look on a summary judgment according to Annie J. Dike, the author of "Three Ways to Better Billing" at attorneyatwork.com.

Placeholder text: R/R of Ct notice for Def's MSJ.

Polished invoice: Receipt and review of electronic notification from the court enclosing defendant's Motion for Summary Judgment.

Beware of billables slipping through the cracks.

Reading an email related to a case. Thinking about strategy. Consulting with your partners about a case. Pausing to do quick research before a meeting. Each of those tasks should be recorded. If they are not, you are not getting paid for small but legitimate tasks that are necessary for the successful development of the case.

Prevent clients from resenting your bills.

Set clear expectations at the outset about what constitutes billable time. If you delineate the kinds of tasks for which you will charge in the representation agreement, you can avoid giving free advice and working without getting paid. Emphasize that telephone calls are billable to avoid surprising your clients.

Take the guesswork out of billing.

Resolve now to stop billing based on reconstructive time keeping. Capture all your billable hours and drive higher profitability for yourself and your law firm. **TBJ**

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

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39th Annual Advanced Oil, Gas & Energy Resources Law Course
Webcast Replay Nov 2-3 from 8:55 am to 5:30 pm CT on first day
MCLE Credit: 13.75 hrs (includes 2.5 hrs ethics)

22nd Annual Advanced Elder Law Course
Live Dallas Nov 4 Westin Hotel Galleria Dallas
MCLE Credit: 6 hrs (includes 1 hr ethics)

19th Annual Advanced Business Law Course
Live Houston Nov 4-5 Hilton Houston Westchase
MCLE Credit: 12.5 hrs (includes 3.25 hrs ethics)

22nd Annual Advanced Guardianship Law Course
Live Dallas Nov 5 Westin Hotel Galleria Dallas
MCLE Credit: 6.25 hrs (includes .75 hr ethics)

Handling Your First (or Next) Removal or Remand
Webcast Nov 5 from 8:55 am to 4:15 pm CT
MCLE Credit: 6.25 hrs (includes 1 hr ethics)

10th Annual Firearms Law Course: What Every Texas Lawyer Needs to Know
Webcast Replay Nov 9-10 from 8:55 am to 5:00 pm CT on first day
MCLE Credit: 11.75 hrs (includes 2.5 hrs ethics)

Law Practice Management Course
Webcast Nov 10 from 8:55 am to 3:15 pm CT
MCLE Credit: 5.25 hrs (includes 2.5 hrs ethics)

Handling Your First (or Next) School Law Case
Webcast Replay Nov 15 from 8:55 am to 4:30 pm CT
MCLE Credit: 6.5 hrs (includes 1.25 hrs ethics)

Handling Your First (or Next) DWI Case
Webcast Replay Nov 16 from 8:55 am to 4:15 pm CT
MCLE Credit: 6.25 hrs (includes .5 hr ethics)

Entertainment Law 101: The Film Edition
Webcast Nov 17 from 12:55 pm to 4:45 pm CT
MCLE Credit: 3.5 hrs (includes .5 hr ethics)

31st Annual Entertainment Law Institute
Webcast Nov 18-19 from 8:40 am to 5:15 pm CT on first day
MCLE Credit: 13.75 hrs (includes 1.75 hrs ethics)

Prosecuting & Defending Truck and Auto Collision Cases
Live Houston Nov 18-19 Hilton Houston Westchase
MCLE Credit: 13 hrs (includes 4 hrs ethics)

Listings may change without notice.
To verify information or to register, call 800-204-2222, x1574, M-F 8a-5p CST or visit TexasBarCLE.com.

Connect with **TexasBar**CLE

Contact the Office of Chief Disciplinary Counsel at 877-953-5535, the Board of Disciplinary Appeals at 512-427-1578 or txboda.org, or the State Commission on Judicial Conduct at 512-463-5533.

JUDICIAL ACTIONS

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

On August 12, 2021, the State Commission on Judicial Conduct issued a public admonition and order of additional education to **JAMES ZANDER,** justice of the peace, Precinct 2, Clifton, Bosque County.

On August 16, 2021, the State Commission on Judicial Conduct issued a public warning and order of additional education to **PATRICIA BACA BENNETT,** judge, 360th District Court, Fort Worth, Tarrant County.

On August 19, 2021, the State Commission on Judicial Conduct issued a public warning to **GEORGE GALLAGHER,** judge, 396th District Court, Fort Worth, Tarrant County.

On August 19, 2021, the State Commission on Judicial Conduct issued a public admonishment to **ROBERT D. BURNS III,** chief justice, 5th Court of Appeals, Dallas, Dallas County. Burns has filed a notice of appeal to the Texas Supreme Court.

On September 20, 2021, the State Commission on Judicial Conduct issued an order of suspension to **ROEL "ROLE" VALADEZ,** justice of the peace, Precinct 4, Rio Grande City, Starr County.

DISBARMENTS

On July 14, 2021, **CHRISTINA E. PAGANO** [#07154500], of Austin, received a judgment of disbarment effective July 8, 2021. An evidentiary panel of the District 9 Grievance Committee found that Pagano contacted law enforcement on May 3, 2018, and filed charges against her roommate, alleging he had taken her vehicle without her consent. On or about May 7, 2018, the complainant, who is a licensed Texas attorney, was appointed to represent Pagano's roommate on a charge of unauthorized use of a motor vehicle. The following day, Pagano visited her roommate in the Travis County Correctional Complex and represented she was his attorney, without the consent of the complainant. The roommate was granted a personal bond on May 10, 2018, which listed Pagano as the attorney of record. Pagano took these actions even though she was the victim in the criminal proceedings against her roommate and he was represented by the complainant at the time.

Pagano violated Rules 1.03(a), 1.15(a)(3), and 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, State Bar Rules. Pagano was ordered to pay $1,638.25 in attorneys' fees and expenses.

On October 30, 2020, **BRANDI K. STOKES** [#24044940], of Austin, received a judgment of disbarment. The 419th District Court of Travis County found that Stokes violated Rule 3.01 [a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous]; Rule 3.02 [a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter]; Rule 4.04(a) [in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person]; and Rule 4.04(a)(1) [a lawyer shall not present, participate in presenting, or threaten to present: criminal or disciplinary charges solely to gain an advantage in a civil matter].

Stokes was ordered to pay $47,331.49 in attorneys' fees and costs.

RESIGNATIONS

On August 27, 2021, the Supreme Court of Texas accepted the resignation, in lieu of discipline, of **ROEL ALANIS**

[#24097287], of Weslaco. At the time of his resignation, Alanis had three grievances pending alleging that Alanis had neglected a client's matter, failed to communicate with a client, made a misrepresentation, failed to properly safeguard funds belonging to a third party, and failed to properly deliver funds that belonged to a third party. Alanis had also committed the crimes of bribing immigration officials and conspiracy to bribe as alleged in *USA v. Alanis,* 1:19 - CR-00673, in the U.S. District Court for the Southern District of Texas.

Alanis violated Rules 1.01(b)(1), 1.03(a), 1.03(b), 1.14(a), 1.14(b), 8.04(a)(2), and 8.04(a)(3).

On August 27, 2021, the Supreme Court of Texas accepted the resignation, in lieu of discipline, of **AMELIA CHRISTINA JONES** [#24086652], of Lake Dallas. At the time of Jones' resignation, there were 15 pending matters against her alleging professional misconduct. The 15 pending matters alleged misconduct including, but not limited to: neglecting legal matters, failing to communicate with clients, failing to refund unearned fees, failing to respond to the grievance, and making misrepresentations to the investigatory hearing panel.

Alleged Rules Violated: 1.01(b)(1), 1.03(a), 1.14(b), 1.15(d), 8.04(a)(3), and 8.04(a)(8).

SUSPENSIONS

On August 27, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective August 26, 2021, with the first 12 months actively suspended. An evidentiary panel of the District 4 Grievance Committee found that Mastriani neglected a legal matter, failed to keep his client reasonably informed about the status of the case, and further failed to refund advance payments of fees that had not been earned. Additionally, Mastriani 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 $1,500 in restitution and $766 in attorneys' fees and direct expenses.

On August 29, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective August 26, 2021, with the first 12 months 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 further failed to refund advance payments of fees that had not been earned. Additionally, Mastriani 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 $2,000 in restitution and $600 in attorneys' fees and direct expenses.

On August 29, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective August 26, 2021, with the first 12 months 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 further failed to refund advance payments of fees that had not been earned. Additionally, Mastriani 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 $1,000 in restitution and $966 in attorneys' fees and direct expenses.

On August 30, 2021, **MAX FRANKLIN STOVALL** [#00789657], of Houston, received a two-year partially probated suspension effective September 1, 2021. The evidentiary panel of the District 4 Grievance Committee found that Stovall neglected the legal matter entrusted to him. Stovall further failed to keep his clients reasonably informed about the status of their case and failed to promptly comply with his clients' reasonable requests for information. Stovall also

failed to provide closing statements and failed to distribute all funds from the settlement amounts received. Stovall also failed to direct and supervise a nonlawyer in the distribution of the funds.

Stovall violated Rules 1.01(b)(1), 1.03(a), 1.04(d), 1.14(b), 5.03(a), 5.03(b)(1), 5.03(b)(2), and 8.04(a)(3). He was ordered to pay $11,193 in restitution and $2,000 in attorneys' fees.

On September 27, 2021, **GLEN MICHAEL CROCKER** [#24001445], of Beaumont, agreed to a 15-month fully probated suspension effective October 4, 2021. The 58th District Court of Jefferson County found that Crocker neglected a legal matter entrusted to him and upon termination of representation, Crocker failed to refund any advance payments of fees that had not been earned. Furthermore, Crocker engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation. Lastly, Crocker failed to timely respond to the grievance without asserting a privilege or other legal ground for his failure to do so.

Crocker violated Rules 1.01(b)(1), 1.15(d), 8.04(a)(3), and 8.04(a)(8). He was ordered to pay $2,616.50 in restitution and $1,500 in attorneys' fees and direct expenses.

On September 21, 2021, **CHRISTIAN KEIDRIC JOHNSON** [#24078742], of Dallas, received a one-year fully probated suspension effective September 15, 2021. An evidentiary panel of the District 6 Grievance Committee found that on or about June 2016, the client hired Johnson to represent her in a civil matter. Johnson was paid $2,000 for the legal representation. In representing the client, Johnson neglected the legal matter entrusted to him. Johnson also failed to keep the client reasonably informed about the status of the civil matter and failed to comply with the client's reasonable requests for case information.

Johnson violated Rules 1.01(b)(1) and 1.03(a). He was ordered to pay $2,000 in restitution and $900 in attorneys' fees.

On September 1, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective August 26, 2021, with the first 12 months 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. Additionally, Mastriani 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 $1,300 in attorneys' fees and direct expenses.

On September 1, 2021, **JOHN VICTOR MASTRIANI** [#13184375], of Houston, accepted a 36-month partially probated suspension effective August 26, 2021, with the first 12 months 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 refund advance payments of fees that had not been earned. Additionally, Mastriani failed to timely respond to the grievance.

Mastriani violated Rules 1.01(b)(2), 1.15(d), and 8.04(a)(8). He was ordered to pay $11,750 in restitution and $1,050 in attorneys' fees and direct expenses.

On September 7, 2021, **JOE STEVEN SHARP** [#24028929], of Amarillo, received a six-month active suspension effective October 1, 2021. The District 13 Grievance Committee found that on or about May 17, 2019, Sharp was retained by a client for representation in a criminal matter regarding the client's alleged assault of the client's wife. Thereafter, Sharp communicated with the wife, offered her legal advice, and consulted with the wife about joint representation between the client and his wife, forming an attorney-client relationship with the client's wife. Sharp's representation of the client's wife reasonably appeared to be adversely limited by Sharp's responsibilities to his client. Sharp acted as an intermediary between the client and his wife but failed to explain the implications and effects of this relationship to the wife, and Sharp failed to obtain the wife's written consent to the relationship. Sharp represented the client at a

hearing on the wife's application for a civil protective order.

Sharp violated Rules 1.06(b)(2), 1.07(a)(1), 1.07(a)(2), 1.07(a)(3), 1.09(a)(2), 1.09(a)(3), and 3.04(d). He was ordered to pay $1,000 in attorneys' fees and direct expenses.

On September 14, 2021, **DAVID SIBLEY** [#18337600], of Gregory, accepted a six-month fully probated suspension effective November 1, 2021. An investigatory panel of the District 11 Grievance Committee found that Sibley's statements made about a judge were made with reckless disregard as to their truth or falsity.

Sibley violated Rule 8.02(a). He agreed to pay $800 in attorneys' fees and direct expenses.

PUBLIC REPRIMANDS

On August 31, 2021, **SHARION L. FISHER** [#07061100], of Dallas, agreed to a public reprimand. An investigatory panel of the District 6 Grievance Committee found that on or about October 15, 2019, the complainant retained Fisher for a guardianship and probate matter related to the complainant's elderly mother. In representing the complainant, Fisher neglected the legal matter entrusted to her and failed to communicate with the complainant. Fisher failed to identify the complainant's other property and appropriately safeguard the property. Upon termination of representation, Fisher failed to surrender papers and property to which the complaint was entitled and failed to refund an unearned fee. Fisher failed to respond to the grievance.

Fisher violated Rules 1.01 (b)(1), 1.03(a), 1.14(a), 1.15(d), and 8.04(a)(8). She was ordered to pay $250 in attorneys' fees and direct expenses.

On September 15, 2021, **CATHERINE MARY IVERS NIELSEN** [#24032791], of Carthage, received an agreed judgment of public reprimand. An investigatory panel of the District 1 Grievance Committee found that in September 2019, Nielsen, while serving as first assistant district attorney in the Panola County District Attorney's Office, was lead prosecutor in the *State of Texas v. Dean Paul Asbury,* Cause No. 2018-C-094, wherein Asbury was charged with an enhanced first-degree aggravated sexual assault. In connection with the above case, Nielsen made a false statement of material fact or law to a tribunal when Nielsen stated to the court that she had discussed witnesses' criminal histories with said witnesses. Nielsen subsequently corrected her false statement and stated that the witnesses' recollection of their prior conversations would be more accurate than her own. Nielsen also disobeyed an obligation under the standing rules of, or a ruling by, a tribunal by failing to disclose two witnesses' criminal histories to defense counsel. The criminal histories did not contain information that could be used to impeach the witnesses at trial.

Nielsen violated Rules 3.03(a)(1) and 3.04(d). She was ordered to pay $675 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 (2).

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).

1.02(a)(1)—A lawyer shall abide by a client's decisions concerning the objectives and general methods of representation (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 (5).

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 (1).

1.04(a)—A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable (1).

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

1.15(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).

5.03(a)—A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer (1).

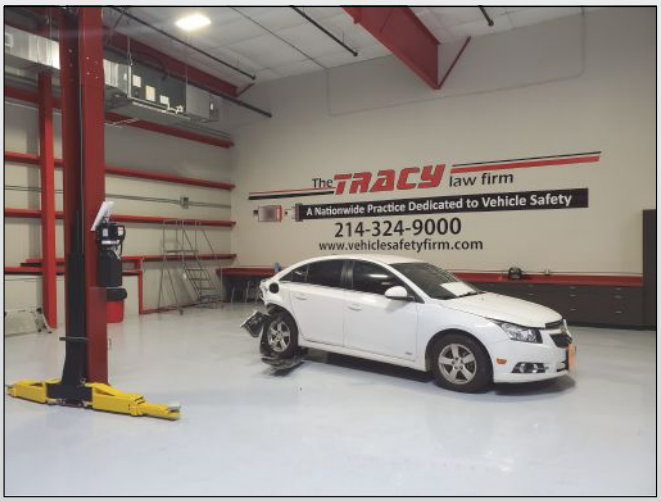
8.04(a)(3)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (1).

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 (3).

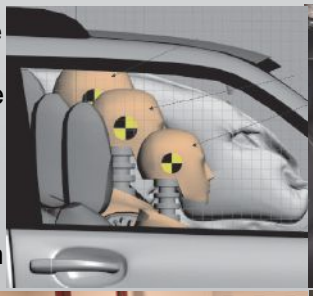
8.04(a)(10)—A lawyer shall not fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice (1). **TBJ**

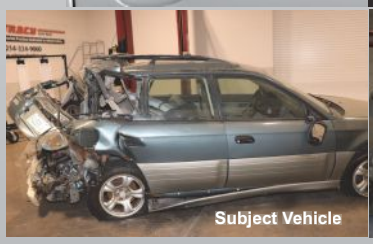
CRASHWORTHINESS:

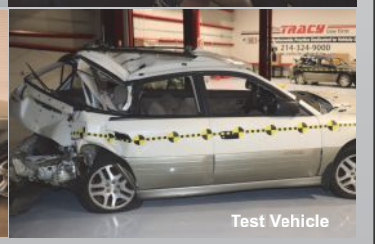
We Didn't Invent the Word; We DEFINED it.



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







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CENTRAL

JEFF WURZBURG is now senior counsel to Locke Lord in Austin and Washington, D.C.

WILLIAM D. "BILL" PARGAMAN and **SARA H. ATKINS,** both previously with Saunders, Norval, Pargaman & Atkins, are now partners in Brink Bennett Pargaman Atkins in Austin.

JESSICA ESCOBAR, of the Texas Department of Agriculture in Austin; **COLT HOFFMANN,** of Hoffmann Cattle Company in Reagan; and **SARA LEMOINE KNOX,** of Sara LeMoine Knox Attorney at Law in Coleman, are now graduates of the Gov. Dolph Briscoe Jr. Texas Agricultural Lifetime Leadership Program.

STEVEN FLECKMAN, JESSICA MCGLYNN, MELISSA LABAUVE, ANDREW MCKEON, JASON BLAIR, and **BILL RAMAN,** all previously with Fleckman & McGlynn, are now attorneys with Munck Wilson Mandala in Austin.

EAST

BALEKIAN HAYES opened an office in Seven Points, 720 S. Hwy. 274, 75143.

GULF

MERRITT CHASTAIN is now a partner in Spencer Fane in Houston. **JA'QUEENETT S. "JACKIE" WILHITE** is now an associate of the firm.

STEPHEN QUEZADA is now counsel to Gray Reed & McGraw in Houston. **ASHLEY DEHART** is now an associate of the firm.

THOMAS J. FORESTIER, of Winstead in Houston, is now a member of the International Association of Defense Counsel.

CHRIS BENNETT is now a partner in Simpson Thacher & Bartlett in Houston.

WITHERS opened an office in Houston, 700 Milam, Ste. 1300, 77002. **KEVIN T. KEEN** is a partner in the firm and will lead the office.

SHANNON DAVIS, of Coats Rose in Houston, was selected to Leadership Houston Class XL.

J. RUSSEL "RUSTY" UMBLE is now an attorney with West Mermis in Houston.

JOHN WESLEY WAUSON and **ANABEL KING** formed Wauson | King in Sugar Land, 52 Sugar Creek Center Blvd., Ste. 325, 77478.

BRIAN KILMER, previously with Kilmer Crosby & Quadros, is now a partner in K&L Gates in Houston.

RANDI S. ELLIS is now an arbitrator, mediator, special master/referee, and settlement master at JAMS in Houston.

CASSANDRA G. MOTT and **SARAH H. FRAZIER** are now partners in Blank Rome in Houston.

VINCENT BRYAN, MIKE FARRELL, UMAIR KAROWADIA, and **CHRISTOPHER LANGSTON** are now associates of Chamberlain, Hrdlicka, White, Williams & Aughtry in Houston. **MATTHEW STIRNEMAN** is now senior counsel to the firm.

JOHN CAIN, previously with Fleckman & McGlynn, is now an attorney with Munck Wilson Mandala in Houston.

The **ST. FRANCES CABRINI CENTER FOR IMMIGRANT LEGAL ASSISTANCE AT CATHOLIC CHARITIES OF THE ARCHDIOCESE OF GALVESTON-HOUSTON** relocated to 5599 San Felipe St., Ste. 300, Houston 77056. **JEDRICK BURGOS, IVY CUELLAR, ALICE LIMA LOVCHICK,** and **DANIELLE TOMLINSON** are now staff attorneys at the center's Unaccompanied Children's Program. **TANYA FERNANDEZ-ALANIZ** and **DIANA ORTIZ** are now senior attorneys.

TOM GANUCHEAU, of Beck Redden in Houston, received the Founders Award from the Texas Association of Defense Counsel.

PULUNSKY BEITEL GREEN opened an office in Houston, 5555 San Felipe St., Ste. 1100, 77027.

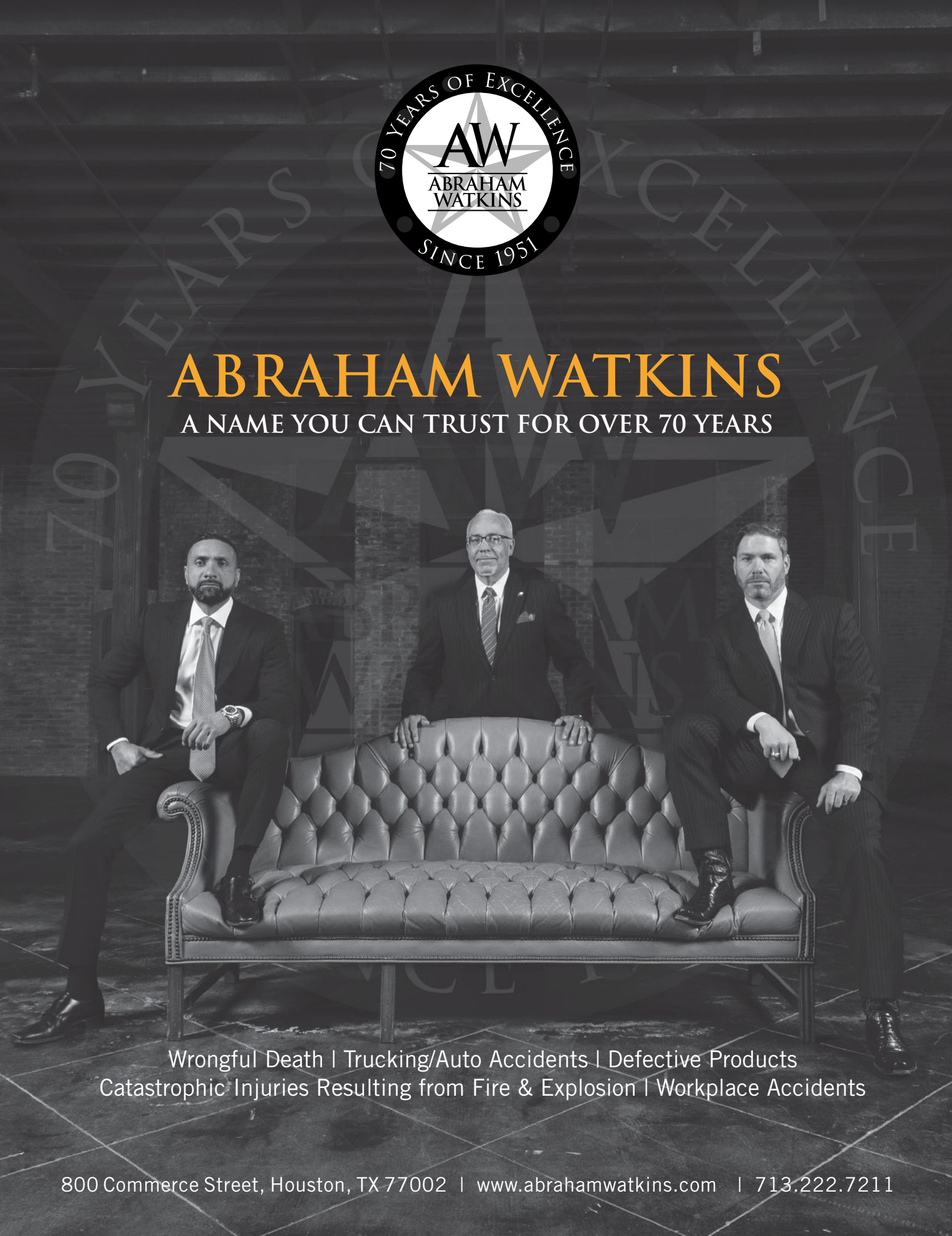
MATTHEW B. PROBUS and **MICHAEL PROBUS** formed the Probus Law Firm, 10497 Town & Country Way, Ste. 930, Houston 77024.

NORTH

LAUREN GORSCHE rejoined Weil, Gotshal & Manges as an associate of the firm's Dallas office.

CURTIS LYNDON LAIRD is now a senior trial attorney with Loncar Lyon Jenkins in Dallas.

JACKIE JOHNSON is now a partner in Constangy, Brooks, Smith & Prophete in Dallas and will serve as co-chair of the firm's Trade Secrets & Unfair Competition Practice Group.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ASHLEY M. SAENZ, of the Whalen Law Office in Frisco, was selected to Leadership Frisco Class XXV.

PATRICK MCMANEMIN is now an arbitrator and mediator at JAMS in Dallas.

SARA BARFIELD and **NIKKI BRITTEN** are now associates of Jackson Spencer Law in Dallas. **RON WOESSNER** is now senior counsel to the firm.

BRAD FOSTER and **CLAY PULLIAM** are now members in Frost Brown Todd in Dallas.

GECHI TESIC is now a shareholder in Polsinelli in Dallas.

JOHN SALLAWAY is now a counsel attorney with Spencer Fane in Plano.

STEPHANIE KAY BRADLEY-FRYER, of Stamford, is now a graduate of the Gov. Dolph Briscoe Jr. Texas Agricultural Lifetime Leadership Program.

JUDGE HARLIN D. HALE, of the U.S. Bankruptcy Court for the Northern District of Texas in Dallas, received the Bankruptcy Inn Alliance Distinguished Service Award from the American Inns of Court.

COURTNEY S. MARCUS, of Weil, Gotshal & Manges in Dallas, was named a Top Women Lawyer Award winner by the Texas Diversity Council.

ANNE ELIZABETH BURNS, CHRISTOPHER J. VOLKMER, and **EMILY S. WALL** are now shareholders in Cavazos Hendricks Poirot in Dallas.

RAJKUMAR VINNAKOTA and **SEAN N. HSU,** both previously with Janik Vinnakota, are now members in Cole Schotz in Dallas.

ROBERT EPSTEIN founded Epstein Family Law, 5949 Sherry Ln., Ste. 1070, Dallas 75225.

SOUTH

DANIELA GONZALES ALDAPE is now a member in Dykema Gossett in San Antonio.

DAVID LOUIS is now an associate of Langley & Banack in San Antonio.

OUT OF STATE

DANIEL L. GEYSER is now chair of Haynes and Boone's Appellate Group in Denver, Colorado. **TBJ**

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For information on closing a deceased attorney's practice, go to texasbarpractice.com/law-practice-management/close/.

RANDY LEE CRISPIN

Crispin, 68, of Leakey, died February 24, 2021. He received his law degree from South Texas College of Law and was admitted to the Texas Bar in 1980. Crispin was in private practice in Cherokee, Real, and Uvalde counties and Houston for 30 years. He was president of the Cherokee County Bar Association in the late 1980s. Crispin was an avid lifelong golfer and was active in business and community organizations. He is survived by his wife of 20 years, Vickie Crispin; sons, Josh Crispin, Scot Crispin, and Joel Crispin; daughter, Lauren Kerrigan; stepsons, Clint McClead and Tyson McClead; sisters, Ronna Crispin and Denise Lazenby; 13 grandchildren; and one great-grandchild.

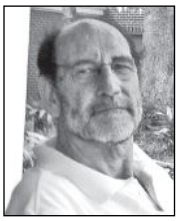
PAUL LOUIS SALZBERGER

Salzberger, 87, of Dallas, died May 1, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1959. Salzberger served in the Texas National Guard 36th Infantry Division from 1960 to 1965. He was an attorney with Passman Jones in Dallas from 1960 to 1971; of counsel to Daniel Investment Group, Inc., in Dallas from 1971 to 1976; a partner in Stewart & Salzberger in Dallas from 1976 to 2021; and a mediator with Burdin Mediations in Dallas from 1995 to 2021. Salzberger served as an officer, director, trustee, and pro bono lawyer for Camp Fire Boys and Girls, Dallas Symphony Orchestra Guild, National Multiple Sclerosis Society North TX Chapter, Lions Club, Selective Service System, North Texas Reading Services for the Blind, and Temple Emanu-El Dallas. He enjoyed hiking and gardening. Salzberger is survived by his wife of 63 years, Joan Salzberger; daughters, Lynn Salzberger and Laura Greenberg; brother, Lee Salzberger, and four grandchildren.

BENTON "BEN" SULLIVANT

Sullivant, 52, of Galveston, died September 6, 2021. He received his law degree from St. Mary's University School of Law and was admitted to the Texas Bar in 1997. Sullivant was a felony chief prosecutor in the Galveston County District Attorney's Office from 2001 to 2010, a criminal defense attorney in Sullivant Law Office from 2010 to 2021, and a defense attorney for Galveston County Hope Drug Court from 2013 to 2021. He was president of the Galveston County Criminal Defense Lawyers Association from 2018 to 2019. Sullivant enjoyed fishing in the Gulf of Mexico and hunting and participating in chili, BBQ, and wild game cookoffs in Galveston. He was a loyal Dallas Cowboys fan and loved traveling to New Orleans. Sullivant is survived by his wife, Gayle Peters Sullivant; father, William Sullivant; mother, Elizabeth Harrison Sullivant; stepmother, Deborah Shasteen Sullivant; brother, Brent Sullivant; and sisters, Katherine Sullivant, Page Sullivant Griffith, and Amy Sullivant.

BILL EDWIN DAVIS



Davis, 74, of League City, died August 26, 2021. He received his law degree from South Texas College of Law and was admitted to the Texas Bar in 1974. Davis was admitted to the Kentucky Bar in 1975. He was a solo practitioner focusing on international and business law in Houston and Brownsville. Davis possessed a keen insight into people and an extraordinary grasp of what was going on behind the scenes throughout the world. He loved music and playing golf, often opening his home on the golf course to family and friends. In his home, Davis was surrounded by his considerable and impressive personal library—the creased spines of each book demonstrated that it was extensively and repetitively read. He is survived by his wife of 36 years, Nancy Davis; daughter, Tomi Joyce Ackerman; and twin granddaughters.

ROBERT A. WHITTINGTON

Whittington, 66, of South Padre Island, died May 11, 2018. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1976. Whittington was an associate of Sanchez, O'Leary & Benton and a partner in Sanchez, Whittington & Hoffman, and Sanchez, Whittington & Wood. He was an avid golfer and enjoyed scuba diving and surfing. Whittington was a Hobie Cat sailor and competed at a world-class level. He is survived by his son, Michael Whittington; daughter, Jennifer Whittington; father, Frank Whittington; brothers, Scott Whittington and Kent Whittington; and two grandchildren.

JOE BECK HAIRSTON

Hairston, 82, of Rice's Crossing, died August 30, 2020. He served in the U.S. Navy from 1961 to 1964. Hairston received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1976. He was staff attorney and associate executive director of the Texas Association of School Boards in Austin from 1976 to 1979, a partner in Doyal, Henslee & Hairston in Austin from 1980 to 1983, managing partner in Doyal, Hairston & Walsh in Austin from 1983 to 1985 and in Hairston Walsh from 1985 to 2018. Hairston was a charter member of the Texas Association of School Boards in 1977. He was a member of the faculty at Baylor Law School and the University of Texas School of Law. Hairston liked to travel and visited more than 100 countries on six continents. He held five college degrees, beginning with a bachelor's degree from Harvard University. Hairston is survived by his partner, Mary Willis; son, attorney Charles Hairston; and two granddaughters.

RAUL MORA

Mora, 82, of McAllen, died August 14, 2021. He served in the U.S. Army from 1964 to 1969 and in the U.S. Army Judge Advocate General's Corps from 1970 to 1980. Mora received his law degree from Texas Southern University Thurgood Marshall School of Law and was admitted to the Texas Bar in 1970. He served in the U.S. Army JAG Corps in Berlin, Germany; Taipei, Taiwan; and Southport, North Carolina, from 1970 to 1980; and was an attorney in the Law Office of Hinojosa, Ortiz, Mora & Carmona from 1980 to 1982 and at the Law Office of Raul E. Mora from 1982 to 2021, providing bankruptcy, family, immigration, and real estate counsel to generations of Rio Grande Valley families. Mora will be remembered for his warm smile, infectious laugh, and as being a mentor to many. He is survived by his sons, Oscar Mora, David Moreno, and Zadhay Mora; daughter, attorney Sabine Romero; and six grandchildren.

STANLEY FRANCIS LEWIECKI II

Lewiecki, 54, of Arlington, died December 5, 2020. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 1994. Lewiecki was staff counsel to Allstate Insurance Company from 1997 to 2001, claims counsel to Professional Claims Managers from 2001 to 2014, claims counsel to the Texas Association of Counties from 2014 to 2018, and senior claims counsel to TransEleven Claims Managers from 2018 to 2020. He executed everything he did with incredible care and compassion, from managing softball concession stands to serving on the building committee at Ash Lane United Methodist Church. Lewiecki will be remembered as deeply funny, profoundly kind, and as the best dad anyone could hope to have. He is survived by his wife of 25 years, attorney Paige Anders Lewiecki; daughter, Maggie Eliza Lewiecki; and father, Stanley Francis Lewiecki Sr.

PATRICIA HOWERY DAVIS

Davis, 67, of Dallas, died January 11, 2021. She received her law degree from Southern Methodist University School of Law and was admitted to the Texas Bar in 2002. Davis was a law clerk to Judge Barefoot Sanders, of the U.S. District Court for the Northern District of Texas in Dallas from 2002 to 2004, an associate of Jackson Walker in Dallas from 2004 to 2006, and of counsel to Farrow-Gillespie Heath Witter in Dallas from 2015 to 2021. She earned a Ph.D. in practical theology and counseling from Princeton Theological Seminary in 1991 and was an associate professor of pastoral care and counseling at SMU Perkins School of Theology from 1991 to 2004. Davis was an ex officio member of the SMU Board of Trustees from 2000 to 2001 and served as president of the SMU Faculty Senate from 2000 to 2001. She was vice president of research and training for the Frederick Douglass Family Foundation from 2012 to 2015. Davis was a lifelong Chicago Cubs fan. She is survived by her son, attorney Thomas Steven Howery; daughter, Sarah Megan Howery; brother, Thomas Andrew Davis; sisters, Susan Marie Davis and Barbara Jean Davis; and two grandchildren.

JAMES D. HORNFISCHER

Hornfischer, 55, of Austin, died June 1, 2021. He received his law degree from the University of Texas School of Law and was admitted to the Texas Bar in 2001. Hornfischer was president and founding partner in Hornfischer Literary Management, which handled 19 *New York Times* bestsellers, from 2003 to 2021 and was one of the few literary agents in the country who was both a licensed attorney and a former New York trade book editor. He received the U.S. Department of the Navy Distinguished Public Service Award in 2021 for his work presenting pivotal naval history, increasing the professionalism and knowledge of Navy personnel, and his extraordinary success at telling the Navy's story; the Naval Order of the United States Samuel Eliot Morison Award for Naval Literature in 2004; and the U.S.S. Constitution Museum Samuel Eliot Morison Award for Distinguished Service in 2018. Hornfischer was the bestselling author of *Neptune's Inferno: The U.S. Navy at Guadalcanal, The Last Stand of the Tin Can Sailors: The Extraordinary World War II Story of the U.S. Navy's Finest Hour; Ship of Ghosts: The Story of the USS Houston, FDR's Legendary Lost Cruiser, and the Epic Saga of Her Survivors; Service: A Navy SEAL at War* with Marcus Luttrell; and *The Fleet at Flood Tide: America at Total War in the Pacific, 1944-45*. Works to be published posthumously include, *The Last Stand of the Tin Can Sailors* (graphic novel adaptation); *Who Can Hold the Sea: The U.S. Navy in the Cold War 1945-1960;* and *Destroyer Captain: The Last Stand of Ernest Evans,* which he co-authored with his son David J. Hornfischer. He was a member of the Authors Guild and the Texas Institute of Letters and served on the advisory board of the Mayborn Literary Nonfiction Conference and on the board of the Naval Historical Foundation. Hornfischer is survived by his wife of 28 years, Sharon G. Hornfischer; sons, David J. Hornfischer and Henry Hutchins Hornfischer; daughter, Grace Ann Hornfischer; father, David Raymond Hornfischer; mother, Elsa D. Bozenhard Hornfischer; and sister, Amy Signorino.

RONALD J. JOHNSON

Johnson, 72, of San Antonio, died August 30, 2021. He served in the military reserves. Johnson received his law degree from St. Mary's University School of Law and was admitted to the Texas Bar in 1978. He was clerk for Judge John H. Wood Jr. in San Antonio, a partner in Soules & Wallace in San Antonio, and a partner in the Law Office of Ronald J. Johnson in San Antonio. Johnson enjoyed hunting, fishing, and cooking. He is survived by his wife of nine years, Susan Johnson; and daughters, attorney Allyson S. Johnson and Ashley A. Johnson. **TBJ**

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i. Percent Paid *(15c divided by 15f times 100)* ▶			99.8%	99.9%

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16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies ▶	2,758	2,954
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a) ▶	126,392	127,550
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a) ▶	126,593	127,742
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100) ▶	99.8%	99.9%

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THINK YOU'RE FUNNY TOO? PROVE IT! Send deposition and trial excerpts to pambuchmeyer@gmail.com.

The Judge's Daughter: SCARECROW OF LAW

WRITTEN BY **PAMELA BUCHMEYER**

A NEW PUPPY LIVES AT OUR HOUSE! The popular COVID-19 trend of adopting a pet came to us late, and apparently all the law-abiding animals had already found good homes. Because our 6-pound poodle is a bona fide canine tortfeasor who delights in terrorizing our sleep and vandalizing our home.

We named her Ladybird in honor of the Texas First Lady Claudia Alta "Lady Bird" Johnson, a woman of many accomplishments whom I had the honor to meet. I keep a framed photo in my office of us together on the University of Texas at Austin campus.

JUDGE JERRY L. BUCHMEYER (1933-2009) grew up in Overton and served as a federal judge in the Northern District of Texas after being nominated in 1979 by President Jimmy Carter. His monthly legal humor column ran in the *Texas Bar Journal* from 1980 to 2008.

My late father, Judge Jerry L. Buchmeyer, who wrote a humor column for the *Texas Bar Journal* for 28 years, had a special talent for naming pets. He named my first kitten Whereas, a term he used endlessly each day while drafting documents as a young associate for a large downtown law firm.

He named another pet Pfeffa, which means "cat" in the fictional rabbit language written by Richard Adams in his beloved novel *Watership Down*. And another kitten was called Small, the name of a tiny spider in A.A. Milne's books. That animal grew, of course, to an absolutely enormous size as did our love for our animal companions.

Hope all of you have marvelous holidays, and please don't forget to send your humorous war stories, memories, and pet names to me at pambuchmeyer@gmail.com.

Out Standing in a Field

A seasonal legal quotation from a Dallas lawyer who is also a bard enthusiast. Shakespeare, *Measure for Measure,* Act II, Scene i.

> "We must not make *a scarecrow of the law,*
> Setting it up to fear the birds of prey,
> And let it keep one shape, till custom make it
> Their perch and not their terror."

Watering the Law

This man's lawyer tried to advise him about taking the Fifth, he really tried.

> "I decided not to answer the question on the grounds that anything that I might say would tend to *irrigate* me."

From an unpublished opinion in a legal malpractice case where the administratrix of an estate alleged fraud in that she did not understand certain documents presented for her signature.

> "Finding by the Court: The evidence indicated that the administratrix had some understanding of English and *she was not as ignorant as she appeared.*"

Unfortunately, no photograph was entered into evidence.

Credentials in Question

In Texas, some things simply do not require an explanation. So concluded one Galveston attorney when his client was questioned about prior use of tobacco.

> Q: Are you still using any tobacco products…?
> A: Skoal.
> Q: Skoal. What is that?

Opposing Counsel: Worm dirt.
Q: Is that basically … tobacco? So … you were … using Skoal products?
Opposing Counsel: It's called dipping.
Q: Dipping. OK. All right.
Opposing Counsel: *Are you sure you're from Texas?*

A Tentatively Clean Record

From Wharton, this deponent describes himself as a felon-elect or a pre-felon.

Q: …how much child support, if any, have you paid since the divorce?
A: I have not paid no child support at all.
Q. All right. *Do you have any criminal convictions?*
A: *Not right now.*
Q: Are you planning on having some?
A: I've been charged with a couple of crimes … aggravated assault, possession of prohibited weapon.
Q [wisely]: So then all tentative.

The Case Belongs to Kellogg

From Houston, the deposition of a chiropractor.

Q: Can you treat heart problems with chiropractic care?
A: No.
Q: Can you treat cancer with chiropractic care?
A: No.
Q: When you perform an adjustment or manipulation, is there an audible "snap," "crackle," or "pop"?
A: Only if someone in the room is eating Rice Krispies, which has never happened to me.

Why Folks Hate Depositions

This is a true transcript of a deposition that is either extremely silly or extremely significant in that it mentions the U.S. president. You be the judge.

Question to the witness: So, to this very day has anybody advised you that … before October 11 … your firm was no longer representing Acme Inc. in San Antonio?
Mr. C: Let the record reflect that … the witness is conferring with his counsel….
Mr. P: Let the record show he can confer with counsel any doggone time he wants to without any remarks about it.
Mr. C: You're going to get the remarks.
Mr. P: Well, we're not going to listen to remarks.
Mr. C: I don't care.
Mr. P: I don't care whether you care….
Mr. C: OK. If you care, I care. That's getting silly.
Mr. P: It is getting silly. And you know any client has a right to confide with their lawyers, and you can make any remarks about it. [To the witness]: Just don't pay any attention to them.
Mr. C: We'll let the jury pay attention to them.
Mr. P: The jury isn't here, and he isn't letting the jury do anything.
Mr. C: We'll let the court.
Mr. P: … He can let the court, the president of the United States or anybody else he wants to … you have a right to talk to your lawyer….
A [wisely]: Right. Remind me, what was the question? **TBJ**

PAMELA BUCHMEYER
is an attorney and award-winning writer who lives in Dallas and Jupiter, Florida. Her work-in-progress is a humorous murder mystery, *The Judge's Daughter.* She can be contacted at pambuchmeyer@gmail.com.

South Texas College of Law Houston honors graduates at Alumni Association Annual Luncheon

LOVETT

CARTER

PERSHING

South Texas College of Law Houston recognized alumni Mary-Olga Lovett, Judge Kyle Carter, and Derek Pershing on September 28 at its 2021 Alumni Association Annual Luncheon at Hotel ZaZa-Houston Museum District. Lovett received the Distinguished Alumni Award, Carter the Public Service Award, and Pershing was recognized with the Young Alumni Award. "STCL Houston has a reputation for graduating exceptional lawyers," said Michael F. Barry, law school president and dean, in a press release. "We are proud to select Mo Lovett, Judge Kyle Carter, and Derek Pershing as remarkable graduates who truly embody our mission of service to the community and to the legal profession. Known equally for their notable professional accomplishment and their civic contributions, they set a standard of excellence for our students and for their fellow alumni. I am proud to call them graduates of STCL Houston." Lovett is senior vice president of Greenberg Traurig's Texas offices and serves as a member of the firm's Executive Committee and is a member of STCL Houston's Board of Directors. The Distinguished Alumni Award is the highest award presented by the law school's alumni association and acknowledges outstanding civic contribution to the community where the recipient lives. Carter is judge of the 125th District Court in Harris County and has served as general counsel to the state's legislative committees on General Investigations and Ethics and the committee on Urban Affairs. He is being honored with the Public Service Award for his significant and sustained accomplishments in public service positions. Pershing is an adjunct professor at STCL Houston and a shareholder in Wilson Cribbs + Goren. He is certified in commercial real estate law, residential real estate law, and farm and ranch real estate law by the Texas Board of Legal Specialization. Pershing is being recognized for his significant leadership and service contributions to STCL Houston and the legal profession in the eight years since his graduation from law school. For more information about South Texas College of Law Houston, go to stcl.edu.

SHANNON DAVIS HUNTER SELECTED AS LEADERSHIP HOUSTON CLASS XL FELLOW

HUNTER

Shannon Davis Hunter, of Coats Rose, has been selected as a fellow in Leadership Houston Class XL. Leadership Houston XL is a 10-month signature program for community leaders that will culminate with a civic class project to effect positive change and the development of individual, personal plans for future civic engagement. Hunter is a director in Coats Rose's Affordable Housing and Community Development section in Houston. She represents public housing authorities, housing developers, syndicators, and investors with leveraging various products, including HOPE VI funds, low-income housing tax credits, private activity tax-exempt bonds, investment syndications, and conventional loans. For more information about Leadership Houston, go to leadershiphouston.org.

ONLINE PORTAL TO STREAMLINE ADVERTISING REVIEW PROCESS FOR TEXAS LAWYERS AND LAW FIRMS

A new online portal is designed to make it easier for lawyers and law firms to submit advertisements for review by the State Bar of Texas. Attorneys can launch the Advertising Review Portal from their My Bar Page at texasbar.com to easily complete an advertising review application, upload media files, pay fees, check the status of recent submissions, and receive status notifications from the bar. The portal's homepage provides a "how to" video and detailed instructions on using the portal. "This is very innovative for advertising review and will make it easier to send information and media and receive notifications and approvals quicker," said Gene Major, the bar's attorney compliance division director. The State Bar is responsible for reviewing attorney and law firm advertisements and solicitation communications as required by Part VII of the Texas Disciplinary Rules of Professional Conduct.

ST. MARY'S UNIVERSITY SCHOOL OF LAW TO LAUNCH FIRST FULLY ONLINE J.D. PROGRAM APPROVED BY ABA IN FALL 2022

St. Mary's University School of Law will launch the first fully online juris doctor program approved by the American Bar Association in fall 2022. St. Mary's University plans to enroll 25 students in the first cohort of the five-year pilot program. The program is the first to offer all credit-bearing courses online by design. "As the only law school serving San Antonio and the southernmost school serving South Texas, St. Mary's Law has a tradition of excellence in legal education stretching back to its founding in 1927," said Patricia Roberts, St. Mary's law dean and Charles E. Cantú Distinguished Professor of Law, in a press release. "This new fully online J.D. program—the one and only of its kind—exemplifies how St. Mary's Law continues to lead with tradition and innovation." The online law degree will take about four years to complete and tuition will be comparable to the school's existing in-person, part-time program. Students will be able to complete half of the first-year courses on their own schedule and the other in real time online. For more information about St. Mary's University School of Law, go to law.stmarytx.edu. **TBJ**

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Growth With a Purpose
10 Lawyers in 10 Months

In 10 months, Sorrels Law has worked with lawyers across Texas and has now grown to 10 lawyers. The law firm recruited a couple of lawyers and a couple of lawyers recruited the law firm. This group of energetic lawyers has more capacity and is ready to work with lawyers on personal injury cases, medical malpractice cases, wrongful death cases and commercial litigation – on both a contingency fee basis and hourly basis.

Sorrels Law also is proud to announce co-founding partner, Randy Sorrels has been named Best Lawyers “Lawyer of the Year” Personal Injury Litigation – Plaintiffs in Houston for 2022, and a Top 100 Texas Super Lawyer by Texas Super Lawyers. Randy is a Past President of the State Bar of Texas and is Board Certified in Personal Injury Trial Law and Civil Trial Law by the Texas Board of Legal Specialization.

Best Lawyers LAWYER OF THE YEAR RANDALL O. SORRELS PERSONAL INJURY LITIGATION - PLAINTIFFS HOUSTON 2022

Best Lawyers LAWYER OF THE YEAR RANDALL O. SORRELS MEDICAL MALPRACTICE HOUSTON 2019

TEXAS TOP 100 HOUSTON TOP 100 RATED BY Super Lawyers Randall O. Sorrels

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