

FALL 2015



THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY

# In Chambers



## INSIDE:

*Same-Sex Marriage and Gender Identity*

*New Grand Jury Procedures*

*Awards and Honors*

*Ethics*

*Upcoming Events*

*and more!*

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**On the cover:** State Capitol, photo by Debra Malkiewicz

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*Readers are encouraged to write letters and submit questions, comments, or story ideas for In Chambers. To do so, please contact Courtney Gabriele, Curriculum Director, at 512.482.8986 or toll free at 888.785.8986, or via email at courtneyg@yourhonor.com. Articles subject to editing for clarity or space availability.*

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# In Chambers

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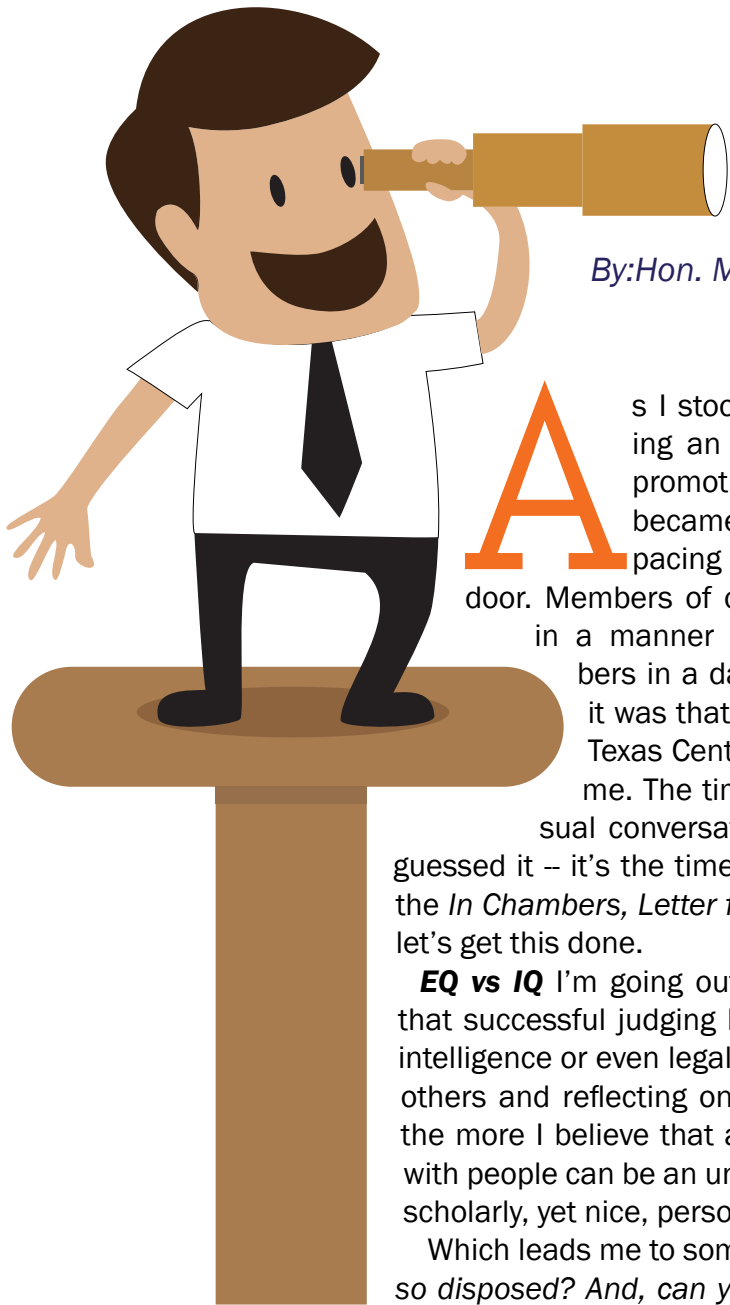
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# View from the Top

By: Hon. Mark Atkinson, CEO

**A**

s I stood at my stand-up desk, reading an on-line article about a study promoting the benefits of sitting, I became aware of shadowy figures pacing and lurking outside my office door. Members of our staff had gathered there in a manner that resembled gang members in a dark alley. I realized then that it was that time again – the time when Texas Center staff become cool toward me. The time when my attempts at casual conversation with them fall flat. You guessed it – it's the time when the deadline for submitting the *In Chambers, Letter from the CEO* has passed without my compliance. So, let's get this done.



**EQ vs IQ** I'm going out on a limb, here, but I'm coming to the conclusion that successful judging has more to do with people skills than either innate intelligence or even legal knowledge. The more I think about it, both observing others and reflecting on my own performance over my years on the Bench, the more I believe that a brilliant person without the ability to interact nicely with people can be an unproductive judge, while a basically competent but not scholarly, yet nice, person can be a success on the Bench.

Which leads me to some questions: *Can you teach niceness to someone not so disposed? And, can you teach either common sense or good judgment to folks seemingly equipped with neither?*

Actually, I think it can be done, if the individual sees the value in making changes. I certainly think I was better equipped to deal with folks the longer I served on the Bench, and perhaps, the more I matured. I also learned that I needed to be the same person both on and off of the Bench. For instance, it was not a good thing for me to be a docket tyrant on the Bench and a pleasant fellow when off. The point was made to me when, in my early years, a lawyer told me he sure enjoyed visiting with me – when I was off the Bench. I proceeded to address the issue, learning to be the same person wherever I was. It was good for everybody I think. I know it was for me.

Whether it involves prodding cases to resolution, ruling on trial objections or simply communicating with parties, lawyers or staff, I think it's more important to behave in an agreeable fashion than to simply know and apply the law and principles of caseload management. In my opinion, the successful judge should also have a basic fondness for people.

It also helps to have a sense of humor.

**Judges deal with very serious matters – even tragic ones**, but the successful judge, to enjoy the job to the fullest, should learn to recognize amusing things when they're encountered. In my top desk drawer is a

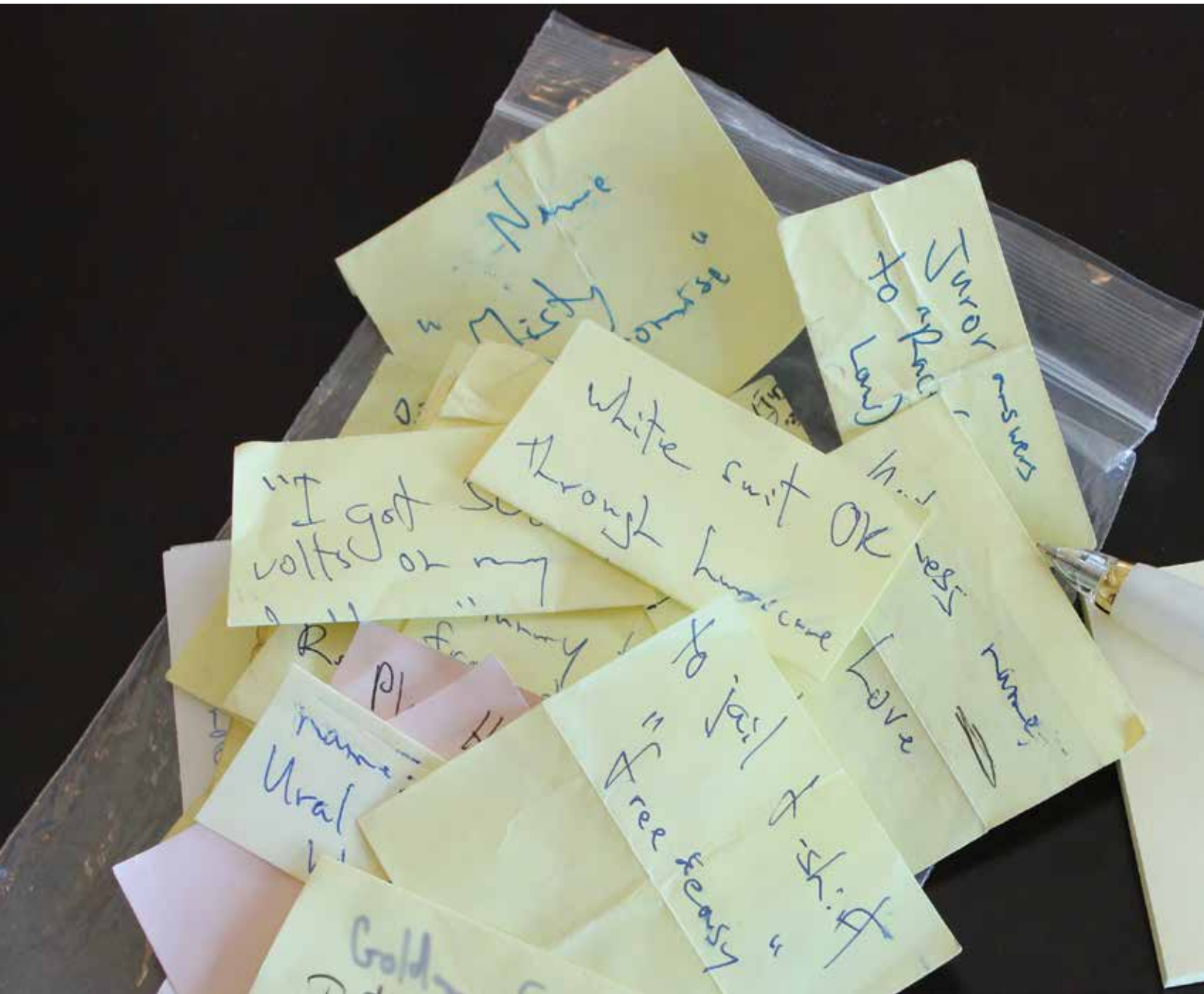
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zip-lock baggie stuffed with yellow stickies. Often, as notably amusing things occurred or were said in court, I jotted them down. When I retired, I kept those notes. So, now, as I reach into the baggie...

**Names I was called**, usually in the context of, and instead of, "Yes, Judge," or "Yes, Your Honor." I was referred to as "Captain," "Boss-man," "Your Greatness," and "Lord." That last one came from a young lawyer who had just left a Bible-study gathering. I whispered to my clerk that I'd like to keep the label, but she pretended not to hear me.

An elegantly dressed, middle-aged, and allegedly highly paid prostitute, after being advised by me that she could reset her case to hire a lawyer, leaned on the Bench and replied, "OK, hon." After she had departed, I did walk around to check, and sure enough, the sign on my Bench said "Hon. Mark Atkinson." Maybe that's where she got it.

A sheriff's deputy who worked in the jail informed me that he never let inmates call him "Boss," as it stood for "Sorry Son Of a B\_\_\_\_," backwards. I wasn't so sure I believed him, but I still kind of twitch when someone calls me that to this day.



**Best request for court-appointed counsel from a defendant on bond.** “How do you get one of them pro bono jokers?”

**Second best request for court-appointed counsel from a defendant on bond.** After doffing his beret, a jaunty young man said to me, “Please don’t be fooled by this air of bourgeois respectability – I’m dead broke.”

**Best pronouncement from a probationer asking to have his probation revoked.** “Probation is like a triple-decker stress sandwich.”

**Best plea from an obviously downbeat fellow.** “Guilty, as usual.”

**Best response from a defendant upon being ordered to have no communication with his former lover.** “I’m a desperate man with a raging love!” (Incidentally, he did not violate the order, but court staff referred to the statement for years thereafter, remembering it for both its form and substance.)

**Best juror questionnaire response to the box saying “Race (Required by Law.)”** “Pasty White.”

**Second best juror questionnaire response to the box saying “Race (Required by Law.)”** Apparently, in an overabundance of caution in complying with the law, “25% Hispanic, 50% American Indian, 25% Irish.” All of this was neatly handwritten in a box about an ½-inch square.

**Best juror questionnaire response to the box requesting religious preference.** “NOYB.” Sitting two folks over from him was a self-proclaimed Pagan. I still wonder if they discussed theology at breaks.

**Best response from a young prosecutor on a losing streak, upon hearing defense counsel state vehemently that he wanted a trial setting, because there was absolutely no evidence of guilt.** Sticking out his hand to shake with the defense attorney, and never missing a beat, responded, “Then, that will be my case.”

**Best misfiring testimony from a defendant in jury trial, looking up at me, after fumbling a response to a prosecutor’s question.** “I just \_\_\_\_\_ed myself, didn’t I.”

**Best example of a potential juror’s confusion at *voir dire* when responding to the prosecutor’s question, “... and, if I *don’t* prove the defendant is guilty by proof beyond a reasonable doubt, what do you do?”** “We put him on probation.”

I hope my submitting this article gets me off probation around this office, but you never know with these folks.

I could go on and on; that’s only a portion of the notes in the baggie. There are scribbles noting eye-opening language on t-shirts worn to court, jurors’ variety of occupations, unusual names of individuals, and a host of situations that I dare not include in a family column. There’s a lot more to judging than signing orders and making rulings, especially when you throw people into the mix. The job’s a lot more agreeable when you can enjoy them. ♦



## Senate Committee to Study Judicial Pay, Voting

By: Angela Morris, Texas Lawyer

**L**t. Gov. Dan Patrick recently announced that he has tasked a Senate committee with studying judicial pay raises and eliminating straight-party voting for judges, among other things.

Senate committees will study a slew of interim charges in 2016 and write reports or suggest bills for the Texas Legislature to consider in 2017. One of Patrick's charges for the Senate State Affairs Committee, which deals with civil justice and court-related bills, is to "examine the need to adjust Texas judicial salaries to attract, maintain and support a qualified judiciary."

No one from Patrick's press office returned a call seeking comment before deadline.

The legislature in 2007 created the Judicial Compensation Commission to study judge salaries and recommend raises. In 2013, the commission recommended a 21 percent raise. In the first judicial raise since 2005, lawmakers approved 12 percent. But an effort to increase judges' salaries again this year failed.

Pat Mizell, a member of the Judicial Compensation Commission, said it's positive to

see lawmakers preparing to discuss judicial pay. He said he hopes they realize that they need to bump the salaries to get Texas judges' pay in line with that of other states.

"It's a quality of the judiciary issue. Judges will never make what private lawyers make, but the salary can't be so low that people simply won't take the job because they can't make a basic living out of it. We think that if the salaries are fairly adjusted upward, it will attract high-quality people to the job," said Mizell, a partner in Vinson & Elkins in Houston and the 1995-2002 judge of Harris County's 129th District Court.

Patrick also asked the State Affairs Committee to study

and recommend whether Texas should "delink legislators' standard service retirement annuities from district judge salaries."

Mizell explained that having lawmakers' retirement linked to judges' salaries creates a political problem. A lawmaker might be accused of voting to raise his own retirement benefits whenever he votes to increase judicial pay, explained Mizell.

Under Patrick's charge, the State Affairs Committee will also look at the impact of eliminating straight-party voting for judicial candidates.

“Under Patrick’s charge, the State Affairs Committee will also look at the impact of eliminating straight-party voting for judicial candidates.”

Two failed bills in the 2015 legislative session, House Bill 25 and Senate Bill 1702, would have eliminated straight-party voting for judges. Both bills received public hearings, but they died without getting affirmative committee votes to send them to the House or Senate.

SB 1702 was authored by Sen. Joan Huffman, R-Houston, the chairwoman of the Senate State Affairs Committee. She didn't return a call seeking comment before deadline.

## Fair Housing

Patrick tasked the Senate Inter-Governmental Relations Committee with studying whether the state needs to change laws and rules to comply with a recent U.S. Supreme Court case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.

In that civil rights case, the nation's highest court on June 25 decided 5-4 that statistical evidence of discrimination, paired with practices or policies of housing providers that cause the disparate impact, may suffice to trigger a violation under the nation's fair housing laws. The violation doesn't require the housing provider, developer or lender to have intended to discriminate. ♦

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## Upcoming Conferences

### College for New Judges

December 6-9, 2015  
Hyatt Regency, Lost Pines

### Family Justice Conference

January 25-26, 2016  
Hyatt Regency, Lost Pines

### DWI Court Team Training

February 8-10, 2016  
Sheraton Austin Capitol, Austin

### DWI Court Team Conference

February 11-12, 2016  
Sheraton Austin Capitol, Austin

### Criminal Justice

February 22-23, 2016  
Sheraton Austin Capitol, Austin

### Civil Justice Conference

March 31-April 1, 2016  
Hotel Galvez, Galveston

### Spring Regional A (2, 6, 7 & 9)

April 18-19, 2016  
Westin Galleria, Houston

### Spring Regional B (1, 3, 4, 5 & 8)

May 9-10, 2016  
Westin Galleria, Houston

### Professional Development Program

June 20-24, 2016  
Embassy Suites, San Marcos

### Impaired Driving Symposium

August 4-5, 2016  
Sheraton Austin Capitol, Austin

### Annual Judicial Education Conference

September 6-9, 2016  
J.W. Marriott, San Antonio

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## New ABA Resource Outlines All Authority in Each State for Appointing Counsel in Civil Cases

By: John Pollock<sup>1</sup>

**I**n its most recent edition of the Rule of Law Index, the World Justice Project ranked the United States 65th out of 102 countries on access to and affordability of civil justice, lower than every European country except Kazakhstan. This ranking follows in the wake of repeated “Justice Gap” reports by the Legal Services Corporation estimating that four out of every five legal needs of low-income people go unmet.

The judiciary is no stranger to this crisis: it is on the front lines facing the waves of pro se civil litigants engulfing the courts. Many state court judges have expressed frustration at their inability to provide assistance to such litigants, due to the need to remain impartial. And it is true that while the right to counsel for criminal defendants at risk of incarceration is well established due to *Gideon* and its progeny, the U.S. Supreme Court has not yet recognized a right to counsel in civil cases other than in the juvenile delinquency context. But all of the states require or permit the appointment of counsel in various types of civil cases based on a mixture of statutes, federal and state constitutional decisions, and court rules. There are also some federal appointment statutes that apply to state courts.

State court judges, however, may not be aware of all of these sources of authority. Some derive from state statutes that are either ancient or located in obscure portions of state code. Other authority comes from unpublished cases that still carry precedential value in the jurisdiction, or from a lower court. Other cases or statutes may establish a general authority to appoint that is little known or underutilized. In order to increase awareness, the American Bar Association (ABA), with the help of the National Coalition for a Civil Right to Counsel (NCCRC), created the *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*. This new resource (available at <http://www.ambar.org/civilrighttocounsel>) has an entry for each state explaining which types of civil cases (such as child welfare, termination of parental rights, civil commitment, paternity, housing discrimination, and so on) either require, permit, or do not permit appointment of counsel in that state, and the legal authority (statute, court decision, court rule) behind it. The *Directory* is a companion resource to the NCCRC’s interactive map, <http://www.civilrighttocounsel.org/map>, which allows visitors to select a subject area and see a quick snapshot of which states do and don’t provide authorization for appointing counsel.

Besides ensuring that a judge is aware of all existing appointment authority, the *Directory* confers several additional benefits. First, where state law does not address appointment of counsel one way or another for a certain subject area, a judge can examine how courts in other states have addressed that subject area from a constitutional perspective to see if a similar conclusion is merited for the judge’s state. This is consistent with the ABA’s position that expanding the right to counsel in civil cases can help close the justice gap. In 2006, the ABA House of Delegates approved Resolution 112A, which “urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.” This resolution was





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co-sponsored or later supported by nineteen state and local bar associations as well as five state access to justice commissions. Then, in 2010, the ABA approved the Model Access Act and the Basic Principles of a Right to Counsel in Civil Legal Proceedings, which suggest how states can best implement newly announced or recognized rights to counsel in civil cases while avoiding some of the problems that have plagued the implementation of *Gideon* for criminal cases. All of these documents are available at <http://www.ambar.org/civilrighttocounsel>.

Second, there are situations where the exact nature of a right to counsel affects other parts of the legal analysis, such as where a constitutional right to counsel is evaluated differently from a statutory right to counsel in

terms of waiver or preservation. In some instances, judges have relied on the statutory right to counsel for purposes of waiver/preservation analysis without realizing that the right had an established constitutional basis as well. The *Directory* ensures that judges have all the information when conducting these evaluations.

An examination of the *Directory* entry for Texas reveals that the state, in many ways, is in line with other states. Like most others, Texas has law providing a right to counsel in many types of family law and physical liberty cases. This includes proceedings such as child abuse/neglect, state-initiated termination of parental rights, confinement of sexually violent persons, contempt for failure to pay child support (according to some but not all of the Texas courts of appeals), guardianship of adults, and proceedings for minors to dispense with the parental notification/consent requirements for an abortion. The Texas *Directory* entry provides all of these sources, as well as statutory cites and case law discussing subsidiary issues such as timing of appointment, appellate reversal standards, ineffective assistance of counsel standards, and compensation of appointed attorneys. The *Directory* also illustrates the ways in which Texas is similar to other states in not providing counsel for certain civil cases, such as housing, public benefits, employment, and health benefits.

The *Directory* also reveals the ways in which Texas is ahead of or behind other states. For instance, Texas has a relatively unique court rule permitting a court to appoint counsel for a person whose right to child support or custody/visitation has been violated. It also has a statute permitting the court to appoint counsel in any district or county court civil case, and some case law authorizing discretionary appointment in domestic violence cases. Conversely, while more than half the states require the appointment of counsel in adoption (private termination) cases, appointment in Texas is discretionary, and there is no provision for appointing counsel in paternity cases. Texas also does not guarantee counsel in private child guardianship, custody, or domestic violence cases, as some other states do.

While the *Directory* entries are only consistently current through 2012 (some states have partial updates for 2013 and 2014), the ABA and NCCRC hope to update the *Directory* in coming years. In the meantime, the NCCRC reports on recent right to counsel advancements on its website, <http://www.civilrighttocounsel.org>. ♦

(Endnotes)

<sup>1</sup> John Pollock is a staff attorney for the Public Justice Center and the coordinator for the National Coalition for a Civil Right to Counsel in Baltimore, Maryland.

*feature*



# A New Day: Same-Sex Marriages; Emerging Gender Identity Issues

By: Richard R. Orsinger



## Obergefell v. Hodges

On June 26, 2015, the United States Supreme Court determined that, in the eyes of the law, marriage in America includes marriages between two persons of the same gender. This was the decision in *Obergefell v. Hodges*.<sup>1</sup> According to a 5-to-4 majority of the Justices, this “marriage equality” is required by the Fourteenth Amendment to the U.S.

Constitution, both because substantive due process protects the fundamental right to marry the person of your choice, and because the equal protection clause requires that same sex marriages be treated as equal to heterosexual marriages. The decision requires states both to grant same-sex marriages and to recognize same-sex marriages validly granted elsewhere.

## Applies to Texas

Texas was not a party to the *Obergefell* appeal, but Federal District Judge Orlando Garcia had previously ruled, back on February 26, 2014, that Texas’ constitutional<sup>2</sup> and statutory<sup>3</sup> bans on same-sex marriage violate the Fourteenth Amendment. Judge Garcia stayed the effect of his decision pending appeal to the Fifth Circuit Court of Appeals, but he lifted the stay hours after the *Obergefell* decision was released, and six days later his decision was affirmed by the Fifth Circuit Court of Appeals.<sup>4</sup> Initially, Texas Governor Greg Abbott announced that Texas officials were not bound to apply the *Obergefell* decision if it violated their religious beliefs. On June 28, 2015, Texas Attorney General Ken Paxton released a defiant letter, addressed to Texas’ Lieutenant Governor, calling the Supreme Court’s *Obergefell* ruling “lawless” and “flawed,” and saying that county clerks and employees might be able to refuse to issue same-sex marriage licenses based on personal religious objections, and that state judges were not required to conduct same-sex weddings if that conflicted with their personal religious views.<sup>5</sup> However, the Attorney General reconsidered his position, at least in so far as issuing an amended death certificate, when ordered to appear in Judge Orlando Garcia’s Federal District Court to show cause why he should not be held in contempt of court. Several county clerks in Texas initially refused to issue same-sex marriage licenses, but after suits were filed they all backed down. In Kentucky, a county clerk did not back down, and she

was held in contempt by a federal district judge and spent five days in jail, until she agreed for her office to issue marriage certificates for same-sex marriages.<sup>6</sup> Pending appeals of cases involving the validity of same-sex marriage have been returned to the trial court by Texas courts of appeals.<sup>7</sup> A temporary injunction prohibiting the City of Houston from providing spousal benefits to same-sex spouses of city employees was reversed based on *Obergefell*.<sup>8</sup>

While the validity of same-sex marriages is now established, there are questions still to be answered about how newly-recognized same-sex marriages will mesh with other family law issues.

Precedents. While the U.S. Supreme Court's 2015 decision in *Obergefell* was startling to some, it was actually the culmination of a long process that in America began with the Hawaii Supreme Court's 1993 decision that Hawaii's ban against same-sex marriage violated the equal protection clause of the Hawaii constitution.<sup>9</sup> In 2003, the U.S. Supreme Court struck down Texas' criminal law prohibiting sodomy, based on a substantive due process protection of the right to privacy in consensual sexual matters.<sup>10</sup> Another milestone occurred in 2003 when the Massachusetts Supreme Court ruled that the Massachusetts Constitution required equal treatment of heterosexual and same-sex marriage.<sup>11</sup> In 2010, eight federal district courts ruled that the part of the 1996 Defense of Marriage Act (DOMA), that limited Federal recognition of marriage to heterosexual marriages, was unconstitutional. On February 23, 2011, U.S. Attorney General Eric Holder said in a letter addressed to the Speaker of the House of Representatives that the Justice Department would no longer defend the DOMA in litigation. On May 9, 2012, President Obama stated in a television interview that he had arrived at the personal decision to accept same-sex marriage. In 2013, in *U.S. v. Windsor*,<sup>12</sup> the Supreme Court struck down the part of the DOMA that required Federal agencies to ignore same-sex marriage even where they were legally recognized under the law of marital residence, relying on the due process clause of the Fifth Amendment and the fact that the U.S. Constitution did not give the Federal government the power over marriage.

That same day, in *Hollingsworth v. Perry*,<sup>13</sup> the Supreme Court dismissed the appeal from a ruling invalidating California's constitutional ban against same-sex marriages, saying that the California Attorney General's refusal to defend the law on appeal meant that there was no case or controversy for Federal appellate courts to rule on. That ruling resulted in the recognition of same-sex marriages in California by virtue of an unreviewed decision of a single federal judge. During 2014, the U.S. Supreme Court denied review in three cases where U.S. courts of appeals had invalidated state constitutions and statutes that denied the validity of same-sex marriages. The result was to leave in place circuit court decisions invalidating such laws in West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming. Thus, the decision in *Obergefell* had many precedents.

Cases; Weddings. The decision in *Obergefell*, and the few follow-up enforcement proceedings to date, make it clear that Texas judges, in ruling on cases, must recognize same-sex marriages as being valid on the same terms as opposite-sex marriages. Whether the failure to do so would subject a judge to contempt of a Federal court, or a sanction from The Judicial Conduct Commission, as opposed to reversal on appeal, are unanswered questions. Also unclear is whether Texas judges, who by law have the authority to marry couples,<sup>14</sup> are required to perform same-sex marriages. The indications coming from other states suggest that no judge is required to perform marriages, but if s/he does, s/he must perform both opposite-sex and same-sex marriages.<sup>15</sup> However, Texas has no gay anti-discrimination law, so the question of whether Texas



judges are obligated to conduct same-sex marriages is more a matter of judicial ethics than law. Texas' Pastor Protection Act allows religious organizations and the clergy to refuse to perform weddings that violate "a sincerely held religious belief."<sup>16</sup> But the foundation for that exemption is the First Amendment freedom of religion, which will not extend to actions by judges acting in their official capacity. As noted above, Texas Attorney General Ken Paxton wrote, on June 28, 2015:

Justices of the peace and judges similarly retain religious freedoms, and may claim that the government cannot force them to conduct same-sex wedding ceremonies over their religious objections, when other authorized individuals have no objection, because it is not the least restrictive means of the government ensuring the ceremonies occur. The strength of any such claim depends on the particular facts of each case.<sup>17</sup>

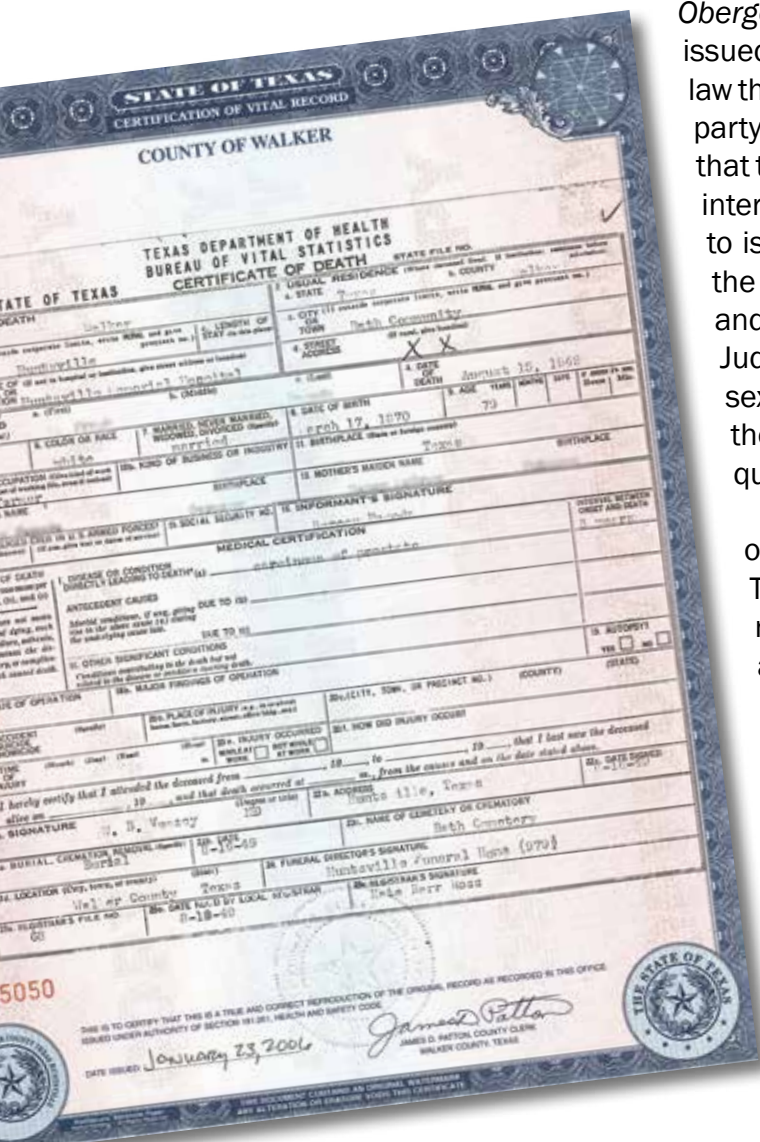
More detail of his reasoning is set out later in the Opinion. On July 1, 2015, the Office of Harris County, Texas Attorney Vince Ryan issued a letter to all Harris County justices of the peace and county judges advising them that "[a] judge or justice of the peace is authorized to perform a marriage but is under no obligation to do so. However, once the judge elects to undertake the performance of marriages, the service must be offered to all (including same-sex couples) in a non-discriminatory manner."<sup>18</sup>

### Retroactivity

Texas Attorney General Ken Paxton and others have questioned whether *Obergefell* is retroactive in effect. The start date of marriage can affect community property rights, among other things. It seems clear that a same-sex marriage, occurring in a jurisdiction where it was lawful from its inception, is valid in Texas from the inception of the marriage. Not so clear is whether a same-sex purported marriage, that occurred in a jurisdiction where it was then prohibited, is now retroactively validated back to the date of the ceremony. The State of Texas is now (thanks to Federal Judge Garcia) issuing amended death certificates for persons who died before *Obergefell* was decided, which as a practical matter is giving that decision retroactive effect. But the legal question of retroactivity is still unresolved. The IRS applied *U.S. v. Windsor* prospectively from the date it issued the Revenue Ruling implementing that decision.<sup>19</sup> However, the IRS also permits – but does not require – administrators of qualified retirement plans to recognize same-sex marriage retroactive to a date prior to *U.S. v. Windsor*.<sup>20</sup> And the IRS allows persons to amend tax returns to take advantage of *U.S. v. Windsor* all the way back to when the limitations period has expired.<sup>21</sup>

Informal Marriage. Another question is whether an informal same-sex marriage, which in Texas requires the parties to agree to be married, followed by cohabitation and "holding out," all within the State, can exist retroactive to a time when an informal same-sex marriage was not allowed. The Internal Revenue Service has long recognized an informal marriage that was valid under the law of the state where it was entered into, without regard to the law of subsequent domiciles.<sup>22</sup> The IRS is taking the same approach to same-sex marriage: a same-sex marriage is recognized only if it was valid in the state where it was entered into.<sup>23</sup> A party claiming an informal same-sex marriage under Texas law prior to *Obergefell* cannot show that the marriage was valid under Texas law at the time it was entered into. Thus, the validity of an alleged same-sex informal marriage predating *Obergefell* turns on whether that decision has retroactive effect—a question that is yet to be answered.





Death Certificates; Birth Certificates. When the decision in *Obergefell* was announced, Federal District Judge Orlando Garcia issued an order enjoining the State of Texas from enforcing any law that prohibits or fails to recognize same-sex marriages. A new party<sup>24</sup> intervened in the case in Judge Garcia's court, alleging that the Bexar County Clerk, the Texas Attorney General, and the interim State Commissioner of Health Services, were refusing to issue an amended death certificate. Judge Garcia ordered the Attorney General and Commissioner to appear in his court and show cause why they should not be held in contempt of Judge Garcia's earlier order invalidating Texas' ban on same-sex marriage. The Attorney General filed a brief saying that the amended death certificate would issue but that a legal question existed as to the retroactivity of *Obergefell*.

Civil Unions. *Obergefell v. Hodges* requires recognition of same-sex marriages, but not of civil unions. The Texas Constitution and Texas Family Code still prohibit recognition of a civil union, which the Family Code defines as "any relationship status other than marriage that: (i) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage." So far, this prohibition has not been touched by cases interpreting *Obergefell* and it remains the law of Texas. The IRS does not treat registered domestic partnerships or civil unions as a marriage, and that position was not altered after *U.S. v. Windsor*,<sup>25</sup> which in part was based on the due process clause in the Fifth Amendment.

Polygamous Marriages. The states of the United States permit only marriages between two persons, not more. The history was plainly stated in *Reynolds v. U.S.*:<sup>26</sup>

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England, polygamy has been treated as an offence against society.

In *Potter v. Murray City*,<sup>27</sup> a Federal district judge ruled that the state of Utah, who fired an employee for polygamy, had a compelling interest in protecting and advancing traditional marriage that supported the ban on polygamous marriage.

In Africa polygamy is widely accepted where it is not widely practiced. Islamic law (Shari'a law) permits "plural marriages" in some situations. It is estimated that 1 to 3% of marriages in the Islamic world are polygamous. Under Shari'a law, a man can take up to four wives, provided he can afford to support them all and the children he has with them. Polygamy is legal, subject to varying conditions, in Iraq, Syria, Morocco, Algeria, Jordan, Yemen, Egypt, Indonesia, Muslims in India, Bangladesh, Pakistan, Muslims in Sri Lanka, Singapore, Cameroon, Burkina Faso, Gabon (where polygamy is the default), Bhutan, and nations in Africa that apply "African customary law." Polygamous marriage validly entered into in another country are recognized in England, Australia and New Zealand. The courts of France, Belgium, Spain, and Canada do not recognize plural marriage but will afford some marital-rights to persons in such relationships.<sup>28</sup> One National Public Radio report related that academics researching the issue estimate that 50,000 to 100,000 people in the United States live in polygamous families.<sup>29</sup> At some point, American courts will have to address persons

in the United States in polygamous marriages that were valid in the country where the marriages were celebrated. The argument in *Obergefell*, that the freedom to choose whom to marry is protected by the Fourteenth Amendment, will have to be weighed against the argument that you are free to marry more than one other person. Some American polygamists have one legal marriage to one woman and “spiritual” marriages to one or more other women. The state of Utah criminalized such relationships. In 2013, a Federal District Judge invalidated the Utah law purporting to criminalize cohabitation with more than one woman, but left intact the ban on marriage to multiple partners.<sup>30</sup> Texas Penal Code Section 25.01 criminalizes bigamy, which it defines as a married persons purporting to marry or marrying someone other than his spouse “in this state, or any other state or foreign country . . . .” The statute also criminalizes a married person living with a person not his or her spouse “under the appearance of being married.”<sup>31</sup> Thus, Texas law criminalizes polygamous marriages around the world. The Texas statute also makes it a crime to be married and to live “with a person other than his spouse in this state under the appearance of being married.”<sup>32</sup> The statute defines “under the appearance of being married” as “holding out that the parties are married with cohabitation and the intent to be married by either party.”<sup>33</sup> These are the same elements required to prove an informal marriage in Texas.<sup>34</sup>

### Temporary Marriages

The Islamic law recognized by Shi'i Muslims makes a distinction between permanent marriage (nikah) and temporary marriage (nikah mut'ah). Permanent marriage, like marriage in “the West,” lasts until divorce or death. Nikah mut'ah, in contrast, lasts for a period of time agreed upon in advance, and when the end is reached the marriage automatically annuls itself. The BBC News reports that the practice is followed by many Muslims in England. Nikah mut'ah is not recognized as valid in the Suni branch of Islam.

When a Texas court encounters persons who have a nikah mut'ah, will it respect the temporary nature of the marriage? Will it enforce provisions in the marriage agreement for the payment of a dowry (mahr) to the woman, or her parents, to the exclusion of a property division or spousal maintenance?



## Marriages to Relatives

In Texas, a person is not supposed to marry a brother or sister, an ancestor or descendant, an aunt or uncle, a niece or nephew, a first cousin, or a present or former step-child. This is accomplished by requiring an application form for marriage license in which the applicants must swear that they are not related within the prohibited degree of consanguinity or affinity.<sup>35</sup> False swearing to this part of the application is a Class A misdemeanor.<sup>36</sup> However, falsity in this part of the application does not render the marriage void.<sup>37</sup> Marriage between first cousins is omitted from the list of void marriages contained in Family Code Section 6.201. Thus, a marriage between first cousins is not supposed to occur in Texas, but such a marriage is not void. However, the Texas Penal Code makes sexual relations between first cousins a third degree felony.<sup>38</sup> The constitutionality of these strictures is in doubt. Marriage between first cousins is permitted in Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. Some states allow first cousins to marry only under certain circumstances: Arizona, if both are 65 or older, or one is unable to reproduce; in Illinois, if both are 50 or older, or one is unable to reproduce; in Indiana, if both are at least 65; in Maine, if the couple obtains a physician's certificate of genetic counseling; in Utah, if both persons are 65 or older, or if both are 55 or older and one is unable to reproduce; Wisconsin, if the woman is 55 or older, or one is unable to reproduce.<sup>39</sup> Texas law does not prohibit recognition of marriages between first cousins that were valid where contracted.

Texas law does not prohibit recognition of marriages between first cousins that were valid where contracted.

## Under Age Marriage

In Texas, ordinarily a person must be 18 years of age or older, in order to marry.<sup>40</sup> However, a person as young as 16 years can marry with parental consent.<sup>41</sup> And a court can authorize a minor to enter into a marriage.<sup>42</sup> If persons divorcing in Texas were married in a place that permitted marriage at a younger age, will a Texas court recognize the validity of that marriage?

## Gender Identity Issues

Gender identity issues are making their way into the cultural and legal consciousness in America. The American Psychiatric Association<sup>43</sup> notes: "The area of sex and gender is highly controversial and has led to a proliferation of terms whose meanings vary over time and within and between disciplines."<sup>44</sup> An example is the phrase "sexual preference" versus the phrase "sexual orientation." The former

connotes a subjective choice while the latter connotes a genetic or biological condition.<sup>45</sup> The American Psychological Association has distinct definitions for sex,<sup>46</sup> gender,<sup>47</sup> gender identity,<sup>48</sup> gender expression,<sup>49</sup> transgender,<sup>50</sup> and sexual orientation.<sup>51</sup>

The American Psychiatric Association defines *gender assignment* as "the initial assignment as male or female. This occurs usually at birth, and, thereby, yields the 'natal gender.'" "*Gender reassignment* denotes an official (and usually legal) change of gender."<sup>52</sup> The DSM-5 uses the term "posttransition" when "[t]he individual has transitioned to full-time living in the desired gender (with or without legalization of gender



# Gender identity disorder

change) and has undergone (or is preparing to have) at least one cross-sex medical procedure or treatment regimen—namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender (e.g., penectomy, vaginoplasty in a natal male; mastectomy or phalloplasty in a natal female).”<sup>53</sup>

Gender Dysphoria Disorder. Between 1994 and 2013 the American Psychiatric Association defined “Gender Identity Disorder” as a condition where the person has a “strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex.” The diagnosis also requires “evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.” In order for the condition to be considered a “disorder,” “there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>54</sup>

In 2013, the American Psychiatric Association published the Diagnostic and Statistical Manual (5th edition) (DSM-5). The Manual dropped the “Gender Identity Disorder” reflected in the Fourth Edition of its Manual and in its stead has the new Gender Dysphoria Disorder. The Association said: “[P]eople whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria.” The Association states:

For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>55</sup>

DSM-5 does not consider cross-gender identity in and of itself a disorder. Rather the disorder exists only if the cross-gender identity causes distress or impairment. The focus of treatment thus is not attempting to reduce or eliminate the cross-gender identity, but rather to reduce or eliminate the distress associated with the condition. This view is supported by assigning Gender Dysphoria Disorder to its own chapter, in contrast to Gender Identity Disorder which was lumped together in the same chapter with Sexual Disorders in DSM-4. The subgroup that developed the new Disorder indicated that separating the Gender Dysphoria Disorder from Sexual Disorders was intended to reduce the stigma associated with the diagnosis.<sup>56</sup>

Gender Identity Under Texas Law. In *Littleton v. Prang*,<sup>57</sup> the appellate court held that a person's gender was not changed by a sex change operation, and that the designation of gender on the birth certificate controlled over a sex-change operation. That view of the law was confirmed in *Mireles v. Mireles*.<sup>58</sup> However, in 2009, the Legislature amended Section 2.005(8) of the Family Code to provide that proof of identity for purposes of obtaining a marriage license could consist of "an original or certified copy of a court order relating to the applicant's name change or sex change . . ." This impliedly says that a court can judicially recognize a change in gender for purposes of marrying.

In February of 2014, the Corpus Christi Court of Appeals decided *In the Estate of Thomas Trevino Araguz III, Deceased*,<sup>59</sup> a case involving a marriage between a man (Thomas) and another man (Nikki) who was born with male genitalia but claimed to have a female brain, and who said she was miss-typed on her birth certificate. The facts showed that Thomas married Nikki at a time when both Thomas and Nikki had male sex organs. After the marriage ceremony, Nikki underwent surgery which removed her male sex organs and created female sex organs. The trial court dismissed Nikki's surviving spouse claims in probate on the grounds that Thomas and Nikki had a same-sex marriage that was prohibited under Texas law. The Corpus Christi Court of Appeals reversed, saying a fact issue was presented as to whether Nikki was male or female at the time of the marriage ceremony and thereafter. The appellate court held that genitalia at birth or at the time of marriage is not determinative of gender, and that Nikki's expert testimony that she was "medically and psychologically" a female created a fact issue that precluded summary judgment.<sup>60</sup> In doing so, the appellate court credited Nikki's medical expert's opinion that "sexuality per se is a complex phenomenon which involves a number of underlying factors . . . includ[ing] chromosomes, hormones, sexual anatomy, gender identity, sexual orientation, and sexual expression."<sup>61</sup> The import of the Corpus Christi Court of Appeals' decision is that a person's self-perceived gender identity can prevail over physical attributes in determining whether a person is male or female. The court specifically said that a sex-change operation is not determinative. On September 4, 2015, the Texas Supreme Court denied appellate review of the decision.

At this point in time, there is no definitive indication of how and when a sex change, mentioned in Family Code Section 2.005(8), becomes legally effective. The fact that Section 2.005(8) mentions a "court order relating to sex change" suggests that the law does not recognize the sex change until a court issues an order to that effect. A bright line such as that would have the advantage of eliminating guesswork over when a person's gender changes from the initial gender assignment reflected in the birth certificate.

## Family Violence

The Texas Family Code's family violence provisions protect individuals in same-sex relationships just as in traditional marital relationships. Texas Family Code Section 71.004 defines "family violence" as an act by a member of a family or household. Texas Family Code Section 71.003 defines "family" as including "individuals related by consanguinity or affinity," individuals who are former spouses, individuals who are parents of the same child, and a foster child and foster parent. Texas Family Code Section 71.005 defines "household" as "a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other." Texas Family Code Section 71.0021 defines "dating violence" as an act against someone with whom the actor has or had a dating relationship. Texas Family Code Section 71.0021(b) defines "dating relationship" as "a continuing relationship of a romantic or intimate nature." The court in *Ochoa v. State*,<sup>62</sup> held that "dating relationship" applies to both same-sex and opposite-sex relationships.

## Parent-Child Issues

Marriage equality should not affect the standing to litigate parent-child claims. The claim that a child cannot be adopted by two persons of the same sex was rejected in a 2007 case.<sup>63</sup> Parents automatically have standing to litigate parental rights of their children and the definition of a parent in the Texas Family Code is independent of marital status.<sup>64</sup> If only one adult in a same-sex relationship is the natural or adoptive parent of a child, the adult who is not a parent will have to meet the standing requirements of non-parents in

order to litigate parental rights. That typically will be “actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.”<sup>65</sup>

The parental presumption may be an issue in the break-up of a same-sex couple. If a child is born to a female couple by assisted reproduction followed by childbirth to one of the women, that birth mother will be a parent and the other female spouse will not be a parent unless she adopts the child. The Family Code creates a presumption that a parent should be appointed as sole managing conservator in a custody fight with a non-parent, and to prevail the non-parent must prove that the appointment would significantly impair the child’s physical health or emotional development.<sup>66</sup> So the spouse who is not a biological or adoptive parent may face this elevated burden of proof. Family Code Section 160.203 provides a presumption of paternity for children born into marriage, but the presumption is stated in terms that a man is presumed to be the father of a child born to the wife during marriage.<sup>67</sup> A similar issue could arise between two married men, where one is the biological father and the other spouse has not adopted. The constitutionality of that wording will no doubt be challenged.

## Conclusion

The legal acceptance of same-sex marriage in America has developed in just over two decades, with state court decisions, statutory enactments, amendments to state constitutions, lower federal court decisions, and finally a decision of the U.S. Supreme Court. Two decades is a long time measured by the lives of individuals, but a remarkably short period of time considering that marriage equality had no legal recognition 20 years ago and now is considered to be a fundamental right protected by the U.S. Constitution. ♦



(Endnotes)

- 1 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
  - 2 Tex. Const. Art. I, § 32 of the Texas Constitution states:
    - (a) Marriage in this state shall consist only of the union of one man and one woman.
    - (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.
  - 3 Tex. Fam. Code § 6.204, states: § 6.204. Recognition of Same-Sex Marriage or Civil Union.
    - (a) In this section, "civil union" means any relationship status other than marriage that:
      - (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
      - (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
    - (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
    - (c) The state or an agency or political subdivision of the state may not give effect to a:
      - (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
      - (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.
- Added by Acts 2003, 78th Leg., ch. 124, § 1, eff. Sept. 1, 2003.
- 4 DeLeon v. Abbott, 791 F.3d 619 (5<sup>th</sup> Cir. July 1, 2015).
  - 5 Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges <<https://www.texasattorneygeneral.gov/oagnews/release.php?id=5144>>, describing Opinion No. KP-0025 (June 28, 2015).
  - 6 After the Obergefell decision was announced, Kim Davis, County Clerk of Rowan County, Kentucky, refused to issue marriage licenses, first to same-sex applicants and then to all applicants, citing her religious beliefs. Four couples filed suit in the U.S. District Court for the Eastern District of Kentucky to require that marriage licenses be issued, and Federal District Judge David Bunning ordered Davis to issue the licenses. Davis sought review from the Sixth Circuit, which refused, writing that "[i]t cannot be defensibly argued that the holder of the Rowan County Clerk's office ... may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Davis sought review in the U.S. Supreme Court, which refused to hear her appeal. Davis persisted in refusing to issue marriage licenses, and after a hearing she was incarcerated for a period of five days, when she was released with the understanding that she would not interfere with her deputy clerks issuing marriage licenses.
  - 7 Powell v. Long, No. 02-14-00397-CV, 2015 WL 4776109 (Tex. App.–Fort Worth August 13, 2015) (memo. opinion) (case remanded for reconsideration); In re Marriage of A.L.F.L and K.L.L. and in the Interest of K.A.F.L, No. 04-14-00364-CV, 2015 WL 4561231 (Tex. App.–San Antonio July 29, 2015) (memo. opinion) (appeal from denial of plea to the jurisdiction dismissed as moot).
  - 8 Parker & City of Houston v. Pidgeon, No. 14-14-00899-CV, 2015 WL 5438670 (Tex. App.–Houston [14<sup>th</sup> Dist.] July 28, 2015).
  - 9 Baehr v. Miiike, 910 P.2d 112 (Hawaii 1993).
  - 10 Lawrence v. Texas, 539 U.S. 558 (2003).
  - 11 Goodridge v. Dept. of Public Health, 798 N.E. 2d 941 (Mass. 2003).
  - 12 U.S. v. Windsor, 133 S. Ct. 2675 (2013).
  - 13 Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
  - 14 Tex. Fam. Code § 2.202(4) & (5).
  - 15 In 2013, the State of Washington's Commission on Judicial Conduct admonished a judge who refused to solemnize same-sex marriages in contravention of state legislation recognizing same-sex marriage. The Commission said the judge was not required to solemnize marriage, but if he chose to do so he could not perform only opposite-sex marriages. The Commission cited Washington's Code of Judicial Conduct, Rules 1.1 & 1.2, and 3.1(C), about avoiding the appearance of impropriety and promoting public confidence in the judiciary's impartiality. In re Tabor, CJC No. 7251-F-158 (October 4, 2013). In May of 2014, the Deputy Counsel for the Pennsylvania Judicial Conduct Board published a newsletter article advising judges that to refuse to perform all marriages would be ethical, but performing opposite-sex marriages while refusing to perform same-sex marriages would violate the Code of Judicial Conduct. Elizabeth Flaherty, Impartiality in Solemnizing Marriages, Newsletter of the Judicial Conduct Board of Pennsylvania (No. 3 Summer 2014). In March of 2015, the Arizona Supreme Court's Judicial Ethics Advisory Board issued an Advisory Opinion stating that judges are not required to perform marriage ceremonies, but if they do perform them for any members of the public they cannot refuse to perform same-sex weddings. The Opinion says a judge can perform marriages for friends and family without triggering the duty to members of the public. Az. Jud. Ethics Advisory Op. 15-01 (March 9, 2015). In May, 2015, North Carolina enacted a statute permitting judges to recuse themselves from performing marriage ceremonies due to "sincerely held religious objection." The recusal applies to all marriages, not just same-sex marriages, and the state has to provide a substitute magistrate to perform the ceremony. N.C. Gen. Stat. 51-5.5. The recusal form is at <<http://www.nccourts.org/Forms/Documents/1662.pdf>>. In June of 2015, the Nebraska Judicial Ethics Committee issued an Opinion saying that judges are not required to perform marriage ceremonies, but if they do they must not refuse to perform same-sex marriage, regardless of the judge's personal religious views. Neb. Jud. Ethics Com. Op. 15-1 (June 29, 2015). In August of 2015, the Board of Professional Conduct of the Supreme Court of Ohio issued an Opinion saying that a judge who performs opposite-sex marriages cannot refuse to perform same-sex marriages, and further saying that the refusal to perform any marriages in order to avoid performing same-sex marriages reflects a lack of impartiality that may lead to disqualification in cases involving homosexuals. However, the Board acknowledged that it had no authority to opine on a judge's refusal to perform any marriages at all.
  - 16 The Texas Pastor Protection Act established Texas Family Code Section 2.601, Rights of Certain Religious Organizations.
  - 17 Opinion No. KP-2005, p. 2 (June 28, 2015) <<https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>>.
  - 18 Letter from Robert Soard, First Assistant County Attorney for Harris County, Texas, addressed to all Harris County Judges and Justices of the Peace (July 1, 2015), available at [http://www.harriscountytexas.gov/cmpdocuments/caoimages/County\\_Attorney\\_Vince\\_Ryan\\_Opinion\\_Marriage\\_Ceremonies.pdf](http://www.harriscountytexas.gov/cmpdocuments/caoimages/County_Attorney_Vince_Ryan_Opinion_Marriage_Ceremonies.pdf).
  - 19 Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013); IRS Notice 2013-61, ¶ 3.
  - 20 IRS Notice 2014-19.
  - 21 Rev. Rul. 2013-17 (Aug. 29, 2013); IRS Notice 2014-19, pp. 4-5.
  - 22 Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013).
  - 23 Rev. Rul. 2013-17, p. 9 (Aug. 29, 2013).
  - 24 According to The Texas Tribune, the intervening plaintiff needed the amended death certificate in order to obtain surviving spouse benefits to help pay for the cost of cancer treatments. <<http://www.texastribune.org/2015/08/05/federal-judge-rules-gay-spouse-named-death-certifi/>>.
  - 25 Rev. Rul. 2013-17 p. 12 (Aug. 19, 2014).

- 26 Reynolds v. U.S., 98 U.S. 145, 165 (1878).
- 27 Potter v. Murray City, 585 F. Supp. 1126 (1984), aff'd, 760 F.2d 1-065 (10<sup>th</sup> Cir. 1985).
- 28 See Angela Campbell, et al., Polygamy in Canada: Legal and Social Implications for Women and Children (A Collection of Policy Research Reports) (Nov. 2005) <[www.vancouver.sun.com/pdf/polygamy\\_021209.pdf](http://www.vancouver.sun.com/pdf/polygamy_021209.pdf)>.
- 29 "Some Muslims in U.S. Quietly Engage in Polygamy," National Public Radio (May 27, 2008).
- 30 Brown v. Buhman, 947 F. Supp.2d 1170 (U.S. Dist. Ct. Utah 2013). The court issued a 91-page opinion that delved deeply into the history of polygamy and efforts to ban it in the United States, and found no fundamental right to enter into a second legal marital union when already legally married.
- 31 Texas Penal Code § 25.01. This part of the Texas statute is much like the Utah law that was invalidated.
- 32 Tex. Penal Code § 25.01(a)(1)(B).
- 33 Tex. Penal Code § 25.01(b).
- 34 Tex. Fam. Code § 2.401.
- 35 Tex. Fam. Code § 2.004(b)(6).
- 36 Tex. Fam. Code § 2.004(c).
- 37 Tex. Fam. Code § 2.301.
- 38 Tex. Penal Code § 25.02(a)(6) & (c).
- 39 <<http://www.ncsl.org/research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx>> [1-14-2015].
- 40 Tex. Fam. Code § 2.101.
- 41 Tex. Fam. Code § 2.102.
- 42 Tex. Fam. Code § 2.103.
- 43 The American Psychiatric Association publishes the leading authority on naming and diagnosing mental disorders in the United States, the Diagnostic and Statistical Manual of Mental Disorders (DSM). The Manual is updated every few decades. The Fourth Edition, the DSM-4, was published in 1994. The Fifth Edition, DSM-5, was published in 2013.
- 44 Diagnostic and Statistical Manual 5, p. 451 (2013).
- 45 Bedi, Sonu, Sexual Preference vs. Sexual Orientation: Identity and Same Sex Marriage, paper presented at the annual meeting of the Northeastern Political Science Association, Crowne Plaza, Philadelphia, PA, Nov. 17, 2011 <[http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/5/2/6/2/0/p526209\\_index.html](http://citation.allacademic.com/meta/p_mla_apa_research_citation/5/2/6/2/0/p526209_index.html)> [1-20-2015].
- 46 "Sex refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 47 "Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 48 "Gender identity refers to 'one's sense of oneself as male, female, or transgender' (American Psychological Association, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000)." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 49 "Gender expression refers to the '...way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity' (American Psychological Association, 2008, p. 28)." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 50 "Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 51 "Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shiveley & DeCecco, 1977). In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000)." Practice Guidelines for Lesbian, Gay, and Bisexual Clients (American Psychological Association, Feb. 18-20, 2011).
- 52 DSM-5, p. 451 (2013).
- 53 DSM-V p. 453 (2013).
- 54 DSM-4, pp. 532-33 (1994).
- 55 <<http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>> [1-18-2015].
- 56 Mark Moran, New Gender Dysphoria Criteria Replace GID <<http://psychnews.psychiatryonline.org/doi/full/10.1176%2Fappi.pn.2013.4a19>> [1-18-2015].
- 57 Littleton v. Prang, 9 S.W.3d 223 (Tex. App.–San Antonio 1999, pet. denied).
- 58 Mireles v. Mireles, No. 01–08–00499–CV, 2009 WL 884815, at \*1 (Tex. App.–Houston [1st Dist.] April 2, 2009, pet. denied) (mem. opinion).
- 59 In the Estate of Thomas Trevino Araguz III, Deceased, 443 SW3d 233 (Tex. App.–Corpus Christi 2014), pet. Denied.
- 60 Id. at 248-49.
- 61 Id. at 246.
- 62 Ochoa v. State, 355 S.W.3d 48 (Tex. App.–Houston [1st Dist.] 2010, pet. ref'd).
- 63 Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.–Austin 2007, pet. denied).
- 64 Texas Family Code § 101.024. Parent, provides:  
(a) "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. . . .
- 65 Tex. Fam. Code § 102.003(9).
- 66 Family Code Section 153.131.
- 67 Tex. Fam. Code § 160.204.

# New Court Appointment Procedures and Reporting Requirements Enacted by the 84<sup>th</sup> Legislature – Senate Bill 1876 and Senate Bill 1369

By: Mena Ramon

The 84<sup>th</sup> Texas Legislature passed two bills providing new procedures and reporting requirements for court appointments. Senate Bill 1876<sup>1</sup> enacted new procedures for courts to follow when appointing attorneys ad litem, guardians ad litem, guardians and mediators. Senate Bill 1369<sup>2</sup> added new reporting requirements regarding the appointment and payment of persons covered under Senate Bill 1876 and competency evaluators.

On September 21, 2015, Representative Harold V. Dutton, Jr., filed a request for an attorney general opinion (RQ-0060-KP)<sup>3</sup> regarding the constitutionality of SB 1876. Chairman Dutton asks whether the requirements of the Act violate the doctrine of separation of powers because it deprives judges of their discretion in making court appointments and “improperly interferes with how a court manages its docket” and whether it is unconstitutionally vague because it requires judges to add persons to their appointment lists who are “qualified” but does not provide the standards a judge should use to determine whether a person is qualified. This article is intended to provide general information about the law and suggestions for how to comply. It does not address the merits of the arguments posed in Chairman Dutton’s attorney general opinion request.



feature

“The new law provides no guidance on how to determine if a person is “qualified to serve.”

## Senate Bill 1876 - Court Appointment Procedures

SB 1876 added Chapter 37 to the Government Code effective September 1, 2015. Chapter 37 provides new procedures for the appointment of attorneys ad litem, guardians ad litem, mediators and guardians in counties with a population of 25,000 or more. It applies to any court created by the Texas Constitution or by statute or that is authorized by statute.<sup>4</sup>

The most significant change to practices in effect before September 1, 2015, is the requirement that a court, when required to appoint an attorney ad litem, guardian ad litem or guardian, appoint the person

whose name appears first on a list to be maintained by the court pursuant to Government Code Sec. 37.003.<sup>5</sup> Courts are also required to follow this appointment process when appointing mediators in cases when the parties cannot agree on one.<sup>6</sup> Once a person from one of the lists is appointed,

their name is moved to the end of the applicable list.<sup>7</sup>

New Government Code Sec. 37.003 requires courts to establish and maintain lists of: 1) “all attorneys who are qualified to serve as an attorney ad litem and are registered with the court,” 2) “all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court,” 3) “all persons who are registered with the court to serve as a mediator,” and 4) “all attorneys and private professional guardians who are qualified to serve as a guardian as defined by Sec. 1002.012, Estates Code, and are registered with the court.” A court may establish and maintain more than one list that is categorized by the type of case and a person’s qualifications.<sup>8</sup>

## “Qualified to Serve”

To be placed on the list to serve as an attorney ad litem, guardian ad litem and guardian, Sec. 37.003 requires that the person be “qualified to serve” in that capacity and register with the court.<sup>9</sup> The new law provides no guidance on how to determine if a person is “qualified to serve.” At a minimum, persons placed on lists for positions that have statutory requirements to serve in that capacity should meet those minimum requirements before being “registered” with the court and placed on the list. The following is a list of court appointed positions that have specific statutory requirements and a description of the requirements.

*Attorney ad litem for child or parent in a child protection case* - must complete three hours of continuing legal education relating to representing children or parents in child protection cases, depending on the type of appointment, as soon as practicable after the appointment. However, the attorney is not required to comply with this requirement if the court finds that the attorney ad litem has experience equivalent to the education. If a person is required to complete the CLE, the attorney must receive an additional three hours of CLE annually by the anniversary of the day the person was added to the court’s list in order to remain on the list of attorneys who are eligible to represent children and parents in child protection cases.<sup>10</sup>

*Attorneys who serve as guardians or attorneys ad litem in guardianship proceedings* - to be appointed in a guardianship established before September 1, 2015, must be certified by the State Bar as having successfully completed a three-hour course of study in guardianship law and procedure sponsored by the State Bar or its designee.<sup>11</sup> This provision was amended by the 84<sup>th</sup> Legislature in House Bill 39.<sup>12</sup> For guardianships established after September 1, 2015, the attorney must have completed a four-hour course of study that includes an hour on alternatives to guardianships and the support and services available to proposed wards. The certification issued by the State Bar expires two years from the date it is issued.

*Professional guardians* - persons who are in the business of providing guardianship services are required to be certified by the Judicial Branch Certification Commission and would need this certification in order to be “qualified to serve” as a private professional guardian and be registered with the court and placed on the list.<sup>13</sup>

Other than the few court appointed positions that have specific statutory requirements, there is no guidance for a judge to determine whether a person is qualified for purposes of being placed on the list. Arguably, the judge or judges in a county could adopt additional objective standards, but this exercise could be subject to challenge if the standards are not truly objective. If judges are interested in setting up additional standards, they may find it helpful to review the standards established by local selection committees for the qualification of attorneys who can represent indigent defendants in capital cases in which the death penalty is sought.<sup>14</sup>

## Establishing and Maintaining the Lists

A court may request that the court’s local administrative judge (LAJ) establish and maintain the required lists for the court. An LAJ is required to maintain these lists for any court that requests the LAJ to do so, even if it is just one court. The LAJ may establish and maintain one list for all of the requesting courts and may maintain separate lists categorized by the type of case and the person’s qualifications.<sup>15, 16</sup>

A court is not required to make an appointment from the required list for: 1) “a mediation conducted by an alternative dispute resolution system established under Ch. 152, Civil Practices and Remedies Code,”

2) the appointment of “a guardian ad litem or other person appointed under a program authorized by Sec. 107.031 of the Family Code (CASA appointment), 3) the appointment of an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code, or 4) “a person other than an attorney or a private professional guardian appointed to serve as a guardian as defined by Sec. 1002.012, Estates Code.<sup>17</sup>

Courts are permitted to appoint persons who are not next on the list or who are not on the list but meet the statutory or other requirements necessary for the appointment in two instances. The first is when the parties have agreed on the person and the court approves of the appointment.<sup>18</sup> The other is on a finding of good cause, if the appointment is required on a complex matter, because the person has “relevant specialized education, training, certification, skill, language proficiency or knowledge of the subject matter,” “has relevant prior involvement with the parties,” or “is in a relevant geographic location.”<sup>19</sup>

Senate Bill 1876 also requires an LAJ to ensure that appointments made by the courts in the county are made from the lists as required by Sec. 37.003.<sup>20</sup> It also requires the presiding judge of the probate courts to require that the LAJs for statutory probate courts in a county ensure that the statutory probate courts in the county comply with Chapter 37.<sup>21</sup>

## Posting the Lists

The lists maintained by the courts are required to be posted annually “at the courthouse of the county in which the court is located and on any Internet website of the court.”<sup>22</sup> Under the plain reading of the statute,

a court does not appear to have a duty to update its lists as names are added; however, it is probably a best practice to do so. If a court is known to post general information for the attorneys who practice regularly before them, the lists should be posted there. Another possible location is the place where the district clerk posts the lists of attorneys who are qualified for appointment to represent indigent defendants in capital cases in which the death penalty is sought.

SB 1876 also requires that the lists be posted on “any Internet website of the court.” If courts do not maintain their own websites, they should coordinate with the person in the county who maintains the sites for the courts and request that the lists be posted there. If there is no Internet website for the courts in the county, SB 1876 does not require that one be created solely for the purpose of posting the required lists.

## Reconciling HB 3003 (new offices of child and parent representation and managed assigned counsel programs for certain children and parents) and SB 1876

The 84<sup>th</sup> Legislature also passed House Bill 3003<sup>23</sup> that provides a process for local governments to establish offices for the representation of children and indigent parents involved in suits seeking conservatorship of the child or the termination of



“...it is not surprising that the appointment provisions... are in conflict. So how does one comply with both laws?”

parental rights by the Department of Family and Protective Services.<sup>24</sup> The bill permits several counties to establish an office that serves more than one county. Attorneys employed by the office are not permitted to engage in the private practice of child welfare law.<sup>25</sup> If the county in which the court sits has such a program, the court is required to appoint an attorney from the office unless there is a conflict of interest or other reason to appoint a different attorney.<sup>26</sup>

HB 3003 also authorizes counties to create a managed assigned counsel program to provide legal representation for parents and children in cases in which an appointment is required under Sec. 107.012 and 107.013 of the Family

Code.<sup>27</sup> A judge in a county served by a managed assigned counsel program must make appointments required under Sec. 107.012 and 107.013 of the Family Code from the program’s public appointment list unless there is a conflict of interest or other reason to appoint a different attorney from the list maintained by the court of attorneys qualified for appointment under Sec. 107.012 or 107.013.<sup>28</sup> In order to be placed on the program’s list, attorneys must apply with the program, meet all education and training requirements under Sec. 107.004 and 107.031, and be approved by the program director or review committee, as applicable.<sup>29</sup>

Having been passed during the same legislative session and covering the same subject matter, it is not surprising that the appointment provisions of SB 1876 and HB 3003 are in conflict. So how does one comply with both laws? The answer lies in the conflict provision of SB 1876.<sup>30</sup> It provides that Chapter 37 controls when there is a conflict between the provisions of Chapter 37 “and a specific provision relating to a court.” It is unlikely that the programs established under HB 3003 would be considered “specific provisions relating to a court” because the attorneys would not be selected for the programs by a court. They would either be hired by the office of parent/child representation or be on a list prepared by the managed assigned counsel program. Therefore, SB 1876 should not trump the appointment procedures provided by HB 3003 and a judge in a county with one of these programs should follow the appointment procedures required under HB 3003 and not be required to resort to the lists maintained under Chapter 37 unless there is a conflict of interest or other reason required to appoint a different attorney from the list maintained by the court.<sup>31</sup>

## Senate Bill 1369 – New Reporting Requirements Effective September 1, 2016

Most judges are familiar with the Supreme Court of Texas order (Misc. Docket No. 07-9188)<sup>32</sup> that mandates reporting of fees paid during a month in the amount \$500 or more for each appointment made by a judge of any district, county or probate court, court master, or court referee of a position for which any type of fee may be paid in a civil, probate, or family law case under Titles 1, 2 and 4 of the Family Code. All reports required under the order are prepared by the district and county clerks for the courts they serve.<sup>33</sup>

## Differences Between Supreme Court Order and SB 1369 Reporting Requirements

Effective September 1, 2016, Senate Bill 1369 requires more comprehensive reporting than what is currently required under the Supreme Court’s order. SB 1369 requires reporting from appellate, justice and

municipal courts as well as those courts already covered under the Supreme Court's order. The bill also requires that the monthly reports include all appointments made during a month in addition to payments made during the month. If the amount paid to a person in a month on one case exceeds \$1,000, the report must also include any information related to the case that is available to the court on the number of hours billed and billed expenses.<sup>34</sup>

Additionally, the Supreme Court's order only applies to family law cases under Titles 1, 2 and 4 of the Family Code. SB 1369 requires reporting on appointments to all family law cases, including child protection cases. SB 1369 also expands the reporting requirement to any relevant activity in criminal and juvenile cases.

Unlike the Supreme Court's order which requires that any fee payment over \$500 be reported, SB 1369 only requires reporting of payments made to attorneys ad litem, guardians ad litem, guardians, mediators and competency evaluators.<sup>35</sup> The new reporting requirements do not apply to: "1) a mediation conducted by an alternative dispute resolution system established under Chapter 152, Civil Practices and Remedies Code, 2) information made confidential under state or federal law, including applicable rules, 3) a guardian ad litem or other person appointed under a program authorized by Sec. 107.031, Family Code, or 4) an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code."<sup>36</sup>

SB 1369 requires that the monthly reports be submitted no later than the 15<sup>th</sup> day of each month to the Office of Court Administration; this is a shorter time period than the Supreme Court's requirement that the reports be submitted no later than the 20<sup>th</sup> day following the end of the month.<sup>37</sup> SB 1369 also makes a court ineligible for state grant funds in the following biennium if it fails to provide the clerk of the court the information required to be submitted in the reports.<sup>38</sup>

## Report Content

The report must include:<sup>39</sup>

- The name of each person appointed by the court in the month;
- The name of the judge and the date of the order approving compensation to be paid to a person appointed
- The number and style of the case
- The number of cases each person was appointed to in the month
- The total amount of compensation paid to each person and the source of compensation
- If the total amount paid to a person in one case in the month exceeds \$1,000, the number of hours billed for the work performed and the billed expenses.
- If no appointment was made during the reporting period, the clerk must submit a report indicating so.

Clerks are already reporting most of this information in most types of cases. The exceptions are that they must submit a report even if there are no appointments made in the month and they must provide more detailed information that is available to the court in cases where a person is paid more than \$1,000 in a case in one month.

Judges should be especially aware of the report content requirements so that all court appointment orders and orders approving payment include the information the clerk requires to prepare and submit the monthly reports. Ensuring that orders making appointments and approving payment contain this information is not only a best practice, it is currently required by the Supreme Court's order for the cases that must be reported under the Court's order. Additionally, as mentioned above, failure to do so may make the court ineligible for state grant funding in the following state biennium.

## Posting the Report

SB 1369 also requires the clerk to post the report at the courthouse of the county in which the court is located and on any Internet website of the court.<sup>40</sup> Under the Supreme Court's order, a clerk is only required to make a copy available for public inspection in the clerk's office.

The provisions regarding the places that the report must be posted are identical to those specifying where the Government Code Sec. 37.003 lists of attorneys ad litem, guardians ad litem, guardians, and mediators must be posted. If possible, court clerks should coordinate with the courts in the county to identify a common place where this information can be posted in order to avoid confusion regarding the location of the various lists and reports required to be posted under SB 1876 and SB 1369.

The Office of Court Administration is updating the reporting forms and system to reflect the changes made by SB 1369 and to ensure that any reporting requirements mandated by the Supreme Court but not included in SB 1369 continue to be addressed. OCA anticipates the Supreme Court's order will be amended to reflect the changes required by SB 1369 and that the reporting of court appointees other than those listed in SB 1369 will continue in effect under the Supreme Court's order. A "Frequently Asked Questions"<sup>41</sup> page has been added to OCA's website to assist clerks in determining how the changes mandated by SB 1369 will change the way they currently report to OCA. ♦

(Endnotes)

- 1 Act of May 31, 2015, 84<sup>th</sup> Leg., R.S., ch. 1223, 2015 Tex. Sess. Law Serv. 4071 (Vernon).
- 2 Act of June 1, 2015, 84<sup>th</sup> Leg., R.S., ch. 1199, 2015 Tex. Sess. Law Serv. 4024 (Vernon).
- 3 <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2015/pdf/RQ0060KP.pdf>
- 4 To be codified at Tex. Gov't Code Ann. §37.001(a) (Vernon Supp. 2015).
- 5 *Id.* §37.004(a) (Vernon Supp. 2015).
- 6 *Id.* §37.004(b) (Vernon Supp. 2015).
- 7 *Id.* §37.004(f) (Vernon Supp. 2015).
- 8 *Id.* §37.003(b) (Vernon Supp. 2015).
- 9 New Tex. Gov't Code §37.003(a)(3) regarding establishing lists of mediators who can be appointed does not include the "qualified to serve language" found in the provisions for the other lists.
- 10 Texas Family Code Ann. §§107.004 and 107.0131 (Vernon 2014).
- 11 Tex. Estates Code Ann. §1054.201 (Vernon 2014).
- 12 Act of May 20, 2015, 84<sup>th</sup> Leg., R.S., ch. 214, 2015 Tex. Sess. Law Serv. 1290 (Vernon).
- 13 Tex. Gov't Code §155.102 (Vernon Supp. 2014).
- 14 See Code Crim. Proc. Ann. art. 26.005(d)(1) (Vernon Supp. 2014).
- 15 Senate Bill 1876 repealed the provisions of Tex. Gov't Code §§74.092(a)(11) and (b) that required the LAJ to maintain a list of all attorneys who were qualified to serve as an attorney ad litem.
- 16 To be codified at Tex. Gov't Code Ann. §37.003(c) (Vernon Supp. 2015).
- 17 *Id.* §37.002 (Vernon Supp. 2015).
- 18 *Id.* §37.004(c) (Vernon Supp. 2015).
- 19 *Id.* §37.004(d) (Vernon Supp. 2015).
- 20 *Id.* §74.092(11) (Vernon Supp. 2015).
- 21 *Id.* §25.0022(d)(10) (Vernon Supp. 2015).
- 22 *Id.* §37.005 (Vernon Supp. 2015).
- 23 Act of May 25, 2015, 84<sup>th</sup> Leg., R.S., ch. 571, 2015 Tex. Sess. Law Serv. 1969 (Vernon).
- 24 To be codified at Tex. Family Code Ann. §107.064 (Vernon Supp. 2015).
- 25 *Id.* §107.069(d) (Vernon Supp. 2015).
- 26 *Id.* §107.070 (Vernon Supp. 2015).
- 27 *Id.* §§107.102, 107.103 (Vernon Supp. 2015).
- 28 *Id.* §107.107(a) (Vernon Supp. 2015).
- 29 *Id.* §107.107(b) (Vernon Supp. 2015).
- 30 To be codified at Tex. Gov't Code Ann. §37.001(b) (Vernon Supp. 2015).
- 31 To be codified at Tex. Family Code Ann. §§107.070(a) and 107.107(a) (Vernon Supp. 2015).
- 32 <http://www.txcourts.gov/media/7527/SC-Order-07-9188.pdf>
- 33 Information regarding reporting requirements under the Supreme Court's order is available at: <http://www.txcourts.gov/statistics/appointments-fees-in-civil-cases.aspx>
- 34 To be codified at Tex. Gov't Code Ann. §36.004(a) (Vernon Supp. 2015).
- 35 *Id.*
- 36 *Id.* §36.003 (Vernon Supp. 2015).
- 37 *Id.* §36.004(b)(1) (Vernon Supp. 2015).
- 38 *Id.* §36.005 (Vernon Supp. 2015).
- 39 *Id.* §36.004(a) (Vernon Supp. 2015).
- 40 *Id.* §36.004(b)(2) (Vernon Supp. 2015).
- 41 <http://www.txcourts.gov/reporting-to-oca/news/sb-1369-appointments-fees-reporting.aspx>

# How to Pick a Grand Jury Pursuant to HB 2150

By: Judge Alfonso Charles

**G**rand juries were a hot button issue during the 84<sup>th</sup> Legislative session this past spring. Numerous bills were introduced concerning grand juries. These bills included provisions from professional grand jurors, to what cases the grand jury could hear, to the formation of the grand jury.

One of the most important and controversial bills that passed during the session was HB 2150 by Representative Alvarado. This high profile bill amends Chapter 19 of the Code of Criminal Procedure concerning the formation and composition of the grand jury. This act establishes new requirements for a grand jury and abolishes the use of the grand jury commissioner or “key man” system. The new law requires that all grand juries be summoned and empaneled using the same system as petit juries. While some of the proposed amendments to these bills provided for some leeway, there are no exceptions to this new statute.

Under the new law, the court must summon between 20 and 125 prospective jurors for the panel. Further, the grand jury panel must be “fair cross section of the population area served by the court.” Since the court must empanel the jurors in the same manner as a petit jury, the court would be justified in selecting a panel from a central jury pool or summoning a separate panel for a grand jury.

Article 19.23<sup>1</sup> establishes the questions to be asked of each prospective grand juror. It now adds a question concerning a conviction for misdemeanor theft, to bring this section in accord with the qualifications under section 19.08.<sup>2</sup>

In addition, the bill amends Article 19.31<sup>3</sup> and expands the grounds for challenging a potential grand juror. Such new grounds include, but are not limited to:

1. The grand juror is insane;
2. Medical conditions;
3. The grand juror is a witness or a target in the investigation (must be made *ex parte* and reviewed in camera by the court);
4. The grand juror served on the petit jury of the offense or conduct this grand jury is investigating;
5. The grand juror has a bias or prejudice against or for the defendant or the person the grand jury is investigating; or
6. The grand juror has a bias or prejudice against any phase of law upon which the state is entitled to rely for an indictment.

Article 19.26<sup>4</sup> sets out how the grand jury is to be impaneled. Once the court has at least 16 qualified panel members and there is not a challenge to the array or a panel member, the court “shall select twelve fair and impartial persons to serve as grand jurors and four additional persons to serve as alternate grand jurors. The grand jurors and the alternate grand jurors shall be **randomly selected** from a **fair cross section of the population of the area served by the court.**”

There have been numerous disputes and suggestions by judges and stakeholders on how the court should select and impanel the grand jurors. Some judges are concerned about “hand picking” a grand jury. Others are concerned about how to insure fair cross sections of the community. Senator John Whitmire, the main Senate proponent for these changes, wrote a letter in response to some



feature

questions concerning the application the new statute. An excerpt from that September 15, 2015, letter provides some legislative intent and guidance on selection of the grand jury.

*So long as the panel is randomly selected, the court can pick the first sixteen or not, it can question the entire panel or not, it can select the most qualified or not. It is within the court's discretion to determine if those selected are 'fair and impartial' through direct questioning of the potential jurors by the court.*

Based on the wording of the statute and the legislative intent, there are basically four ways to pick a grand jury. The four methods are:

1. The court could pick the first 16 jurors from the qualified panel.
2. The court could “randomly select” 16 jurors from the qualified panel.
3. The court could select the 16 most “qualified” or most representative jurors by using the entire panel.
4. The court could select a grand jury that represents a fair cross section of the county, starting with the first juror and working up from that juror until the court chooses 16 jurors.

There are potential concerns with some of these methods. If the court just selects the first 16 jurors or “randomly selects” 16 jurors, it runs the risk of having a grand jury that is not a fair cross section of the community. The 16 selected could end up being all of one race, or all male or all female. While that would be permissible under the statute, it would not be consistent with the legislative intent of the new law.

If a court uses the other two methods, it is taking steps to ensure that the grand jury is a fair cross section of the population area served by the court. The court can select a qualified grand jury that takes into consideration the county's demographics related to race, ethnicity, sex, and age. This fits with the legislative intent of the bill and is probably a better way to select a grand jury.

While not required, it is recommended that the courts consider placing on the record the method they choose to apply in selecting the grand jurors. Further, courts may want to consider keeping statistics on demographics of the grand juries they select. ♦

(Endnotes)

- 1 Code Crim. Proc. Ann. art. 19.23 (Vernon 2015).
- 2 Art. 19.08.
- 3 Art. 19.31.
- 4 Art. 19.26.





as of 10/31/15

**NEW JUDGES**

Hon. Maurice Aguilar	Court #2	Dallas
Hon. Carry Baker	High Plains Child Protection Court	Amarillo
Hon. Gary Banks	Child Protection Court of the Concho Valley	San Angelo
Hon. Richard T. Bell	387th District Court	Richmond
Hon. Sara Kate Billingsley	446th District Court	Odessa
Hon. Chad Bridges	240th District Court	Richmond
Hon. Don J. Clemmer	450th District Court	Austin
Hon. Rene E. De Coss	445th District Court	Brownsville
Hon. Shelly Dukes	Court #5	Tyler
Hon. Melissa Joy Garcia	49th District Court	Laredo
Hon. Alexandra Maria Gauthier	Magistrate Office	Georgetown
Hon. Clyde R. Leuchtag	Harris County Civil Court at Law No. 1	Houston
Hon. Karen B. Lewis	Court #31	Midland
Hon. Erin E. Lunceford	61st District Court	Houston
Hon. Piper McCraw	469th District Court	McKinney
Hon. Selina L. Mireles	4th & 5th Administrative Judicial Regions	
	Cluster Court	Laredo
Hon. Emily Ann Miskel	470th District Court	McKinney
Hon. Lincoln J. Monroe	Dallas County Probate Court	Dallas
Hon. Nikki Mundkowsky	Centex Child Protection Court North	Waco
Hon. Stuti Trehan Patel	240th District Court	Richmond
Hon. David Scott Perwin	505th District Court	Richmond
Hon. Susan Rankin	254th District Court	Dallas
Hon. Thomas Stuckey	Centex Child Protection Court South	Seguin
Hon. John M. Swanson	143rd District Court	Monahans

**IN MEMORIAM**

Hon. Samuel Carroll	Taylor County Court at Law No. 2	Abilene
Hon. Thomas R. Culver, III	240th District Court	Richmond
Hon. Dixon Holman	2nd Court of Appeals	Arlington

# Advisory Opinion Summaries

July 1, 2015 – October 31, 2015

## *Texas Ethics Commission*

These summaries have been taken directly from the TEC's website. To see summaries from previous years, please visit: <http://www.ethics.state.tx.us/legal/AT-eaosquery.html>.

[EAO No. 529 \(2015\)](#) – Section 305.027 of the Government Code requires legislative advertising to indicate the name of an individual who personally enters into a contract on behalf of a nonprofit corporation to broadcast the advertising, in addition to the name of the corporation. An individual or corporation who knowingly enters into such a contract commits a violation if the advertising does not include the required disclosure.

[EAO No. 530 \(2015\)](#) – A member appointed to the Cancer Prevention and Research Institute of Texas Oversight Committee is not “appointed for a term of office” and is not an “appointed officer” for purposes of chapter 572 of the Government Code. Accordingly, a member appointed to the agency is not a “state officer” and is not required to file a personal financial statement with the commission or subject to the standards of conduct provided by section 572.051 or certain provisions under the “revolving door” law applicable to state officers under section 572.054(b).

[EAO No. 531 \(2015\)](#) – For purposes of section 255.003 of the Election Code, a brochure that includes facts about the proposed county assistance district, such as the maximum amount of a sales tax assessed for the district, the overall maximum amount of a sales tax that would be imposed, the district functions for which the sales tax revenue must be used, as well as the question as it would appear on the ballot and the dates and times of early voting, is not political advertising. In our opinion, the brochure provides information and discussion of a measure without promoting the outcome of the measure. Therefore, public funds may be used to distribute the brochure unless an officer or employee of the county authorizing such use of public funds knows that the brochure contains false information.

[EAO No. 532 \(2015\)](#) – An officer or employee of a political subdivision may not use letterhead that is created by city staff or with city resources, and that contains the city's logo and slogan that were designed with city funds, to write and distribute political advertising.

## *Judicial Section of the State Bar of Texas Committee on Judicial Ethics*

None for this time period.

## *State Commission on Judicial Conduct – Public Statements*

None for this time period.

## *American Bar Association's Ethics Opinion*

None relating to judges for this time period.

# Disciplinary Actions

(July 1, 2015 – October 31, 2015)

## State Commission on Judicial Conduct

### Public Sanctions

**Public Reprimand:** District Court Judge had several complaints filed against him for inappropriate conduct. Below are brief summaries:

*Allegation 1:* District Court Judge served on the Board of Directors for a bank for which his family had a substantial interest in its stock (more than \$10,000,000) and the bank's website included his judicial title. District Court Judge admitted to the Commission that he knew it was a violation to serve as a board member, but that he continued to serve so that he could look after his family's financial interests.

*Allegation 2:* District Court Judge openly discussed the "Indecency with a Child" charges against a father that had just appeared in his courtroom for a placement review hearing of his children. The father and his attorney had already left the courtroom. The judge made several disparaging statements, including that the father was "going away for a long time." District Court Judge was later recused from the father's criminal case.

*Allegation 3:* District Court Judge publicly discussed a killing that happened in his community in which a wife killed her husband. He stated that some people "needed to be killed" in reference to the husband and that the state would not get an indictment. When the case landed in his court, the State reduced the wife's charge to manslaughter. The District Court Judge also discussed possible plea deals in an *ex parte* communication with the wife's attorney, which caused the prosecutor to file a recusal motion.

*Allegation 4:* District Court Judge found out that a probationer was using drugs in violation of his terms, and called the defendant's probation officer to inquire why defendant's bond was not revoked. After refusing the plea deal offered in this case, District Court Judge then further refused to dismiss the case. When the prosecutor responded by not offering arguments or presenting witnesses, District Court Judge called the probation officer as a witness and questioned him. He then found defendant violated probation and gave him jail time. In response to the Commission, District Court Judge admitted to being too involved in the case, but said he believed that in a small town like his, it reflected poorly on the judiciary to not take action when it was publicly known that defendant was violating his probation.

*Allegation 5:* District Court Judge was recused after making a statement that a defendant in his courtroom would serve 180 days in jail because "he deserved it." He made these statements to the prosecutor without defense counsel present.

*Allegation 6:* District Court Judge ordered that a defense attorney be removed from the indigent defense wheel without obtaining a majority vote of the judges in violation of the county's indigent defense plan. District Court Judge also appointed and approved payment to one attorney in a disproportionately high percentage of cases in violation of the county's plan. District Court Judge told the Commission this was due to the fact that he believed the attorney was the most qualified to handle murder cases and that the cases would be less likely to come back to him on appeal.

*Allegation 7:* District Court Judge improperly intervened in the appointment of counsel to an indigent defendant. He refused to allow the counsel who was representing defendant in a misdemeanor case to represent the defendant in his felony case.

*Allegation 8:* District Court Judge improperly presided over a case in which the defendant was a friend of his.

*Allegation 9:* District Court Judge was accused of having improper *ex parte* communication with a

woman indicted on felony drug charges whose case was in his court. The woman advised others that District Court Judge gave her advice on how to handle her case and told her that he would not send her back to prison if she requested that he sentence her. She also alleged that District Court Judge told her he would help her get her children back. District Court Judge voluntarily recused from the case. He told the Commission that he only advised the defendant to speak with her attorney and that he could not discuss her case with her.

*Allegation 10:* District Court Judge's daughter's dog was injured by a neighbor's dog. He sent the neighbor two letters on his judicial letterhead, one demanding reimbursement for vet bills and a later one threatening legal action. District Court Judge told the Commission that his assistant wrote the letters on his behalf.

*Allegation 11:* District Court Judge's court reporter accused a police officer's children of harassing some of her relatives. District Court Judge demanded a meeting with the police officer at the courthouse and threatened the police officer that if he didn't "take care of it," he would contact the Juvenile Probation Department about the harassment. He then admitted to the Commission that he did "likely" contact a probation officer at the juvenile department about the harassment.

The Commission concluded that the evidence in regards to the above allegations demonstrated that District Court Judge allowed his name and judicial title to promote private interests, that legitimate concerns about his impartiality were raised in several of the complaints, that he failed to comply with the Fair Defense Act and his county's indigent defense plan, that he misused his position and prestige of office, and finally, that his conduct was willful and/or persistent. They further held that his "initial lack of candor" during the Commission's investigation into the allegations was an aggravating factor.

**Public Warning and Order of Additional Education:** After an in-chambers review of medical records in a second degree felony assault case, District Court Judge erroneously came to the conclusion that the victim in the case had lied to the court about being a virgin. District Court Judge erroneously read an entry in the medical records to say that the victim had previously given birth. She then gave the defendant deferred adjudication and five years community supervision. She also sentenced the defendant to 250 hours at the Rape Crisis Center, to which its Executive Director objected to publicly. District Court Judge received widespread media attention for her decisions in the case. District Court Judge felt that the media reports contained false information about the case and that the public should know the truth, so she agreed to speak to a reporter. Although the exact statements are disputed by District Court Judge, the reporter quoted her as stating "the victim was not the victim she claimed to be" and that the victim was not a virgin. The headline of the article the following day was "Judge says sexually assaulted 14-year-old 'wasn't the victim she claimed to be.'" During her testimony to the Commission, District Court Judge stated that after further review of the medical records she was not sure if the victim had previously been pregnant. There were additional news stories critical of the judge's comments to the reporter. The attorney for the victim's mother stated that the article caused them to question whether they should have come forward and re-victimized the victim. District Court Judge conceded that talking to the reporter was in "poor judgment" and that she would not do it again, but that she acted in good faith and that the information was public record.

The Commission found that District Court Judge's actions were willful and in violation of Canon 3B(10) and Article v, §1-a(6)A of the Texas Constitution. It noted that her actions undermined public confidence in the judiciary and cast discredit upon the judiciary. "An independent judge accepts that she may face criticism for her decisions, and does not succumb to the temptation to publicly defend an unpopular decision to the press." District Court Judge was also ordered to obtain four additional hours of education in being patient, dignified, and courteous towards victims of sexual assault and in refraining from making public comment about pending cases.

**Public Warning and Order of Additional Education:** Justice of the Peace filed suit against her local party Chair after the Chair removed JP's name from the ballot for re-election. JP's opponent had challenged

JP's ballot petitions. Prior to filing the suit, JP sent an email to the Chair with the subject line "solution," which noted that while she needed one more year in office to qualify for full retirement, her election would not mean that "[she] must fulfill the next term of office." JP goes on to suggest, among other things, that: (1) her opponent withdraw her challenge; (2) they proceed with election; (3) the opponent builds name recognition while JP "will make sure [opponent's] brushes with the law are not an issue, ever"; (4) JP will endorse her opponent to fill the unfulfilled term; and (5) that JP will support her opponent in any future elections. The Chair, instead of forwarding the email to the opponent, forwarded it to the Office of the Secretary of State. A member of the public obtained a copy of the email and published it to her Facebook page and included a statement "I have never seen or heard of such a blatant attempt at bribery and coercion aimed at circumventing the will of the voters..." After JP received favorable early polling results, she posted a comment to her Facebook page saying "...and to my opponent...here's an Italian wish... 'bafongoo' and that's accompanied by a flick of the wrist under the chin." JP told the Commission that the word was meaningless and the accompanying gesture meant "to go jump back in the mud" and was "a tongue in cheek reference to the massive amount of mudslinging" her opponent did.

The Commission held that JP's email cast doubt on her impartiality because it purported to confer benefits in return for her opponent's withdraw from the election. Furthermore, the later publication of the email undermined public confidence and cast discredit upon the judiciary in violation of Canon 2A and 4A(1), and Article V §1-a(6)A of the Texas Constitution. Her Facebook post to her opponent also cast reasonable doubt on her impartiality and cast public discredit upon the judiciary. The Commission ordered that JP obtain three additional hours of education regarding a judge's duty to conduct extra-judicial activities in a manner that promotes, and does not compromise, public confidence and judicial integrity.

### **Private Sanctions**

No private sanctions have been issued since the date of the last publication.

### **Suspensions**

No suspensions since the last issue.

### **Resignations**

No resignations since the last issue.

### **Special Court of Review Opinions**

[Docket No. 15-0001 Full Opinion Here](#)

In April 2015, the Commission issued a public admonition and order of education to a District Court Judge for comments she posted to her public Facebook page. District Court Judge appealed the Commission's disciplinary action, and a Special Court of Review (hereafter "SCR") was convened to conduct a trial de novo. For the proceedings, the Commission was required to file a charging document with the allegations of misconduct. The charging document contained three allegations, which are discussed in detail below. The District Court Judge asserted that she utilized her Facebook page as a means to fulfill her campaign promise of transparency. The SCR found that District Court Judge was very active in posting comments to her Facebook page once she took the bench and used it as a means to educate the public about her court.

In Charge I, the Commission criticized several postings by District Court Judge and argued that they called into question District Court Judge's impartiality:

*"We have a big criminal trial starting on Monday!"* (The Commission criticized the use of an exclamation point and the word "big.")

*“Opening statements this morning at 9:30 a.m. in the trial called by the press ‘the boy in a box’ case” and “After we finished Day 2 of the case called the ‘Boy in the Box’ case, trustees from the jail came in and assembled the actual 6’ x 8’ ‘box’ inside the courtroom!” (The Commission objected to the comments referring to the case as “the boy in a box case,” which was the term given by the media.)*

*“We have a jury deliberating on punishment for two counts of possession of child pornography. It is probably one of the most difficult types of cases for jurors (and the judge and anyone else) to sit through because of the evidence they have to see. Bless the jury for their service and especially bless the poor child victims.”*

*“We finished up sentencing with a very challenging defendant.”*

In her defense, District Court Judge offered four experts who testified that she did not violate the Canons of the Code of Judicial Conduct or the Texas Constitution. Referring to the last two statements above, District Court Judge stated that the comments were meant to show her appreciation to the jurors and to describe her day with a particularly difficult defendant who spit and used profanity. She also stated that the comments were aimed at keeping her campaign promise of transparency. The SCR agreed. While it found it “troublesome that these comments go beyond mere factual statements of events” and add “subjective interpretation,” the comments, at most, demonstrated a lack in judgment and were not an intentional or gross misuse of office. It further held that the Commission failed to present evidence that the statements suggested a probable decision or casted a doubt on District Court Judge’s impartiality. In fact, the defense attorney in the underlying criminal matter testified that he did not observe any bias in District Court Judge’s actions or rulings during the trial.

Charge II alleged that District Court Judge’s Facebook activities led to her recusal from a criminal proceeding. The SCR found that there was no evidence of the factors that the administrative judge relied upon for the recusal, and that the recusal alone did not meet the burden of proof that District Court Judge violated Canon 4(A).

Finally, in Charge III, the Commission criticized District Court Judge for failing to promote and maintain public confidence when she disregarded her own admonition to the jury about using social media to comment on the pending criminal trial. After admonishing the jurors, District Court Judge later posted a link to a news article about a pending trial to her Facebook page. The SCR held that there was no evidence suggesting that information from the news article contained extraneous information that District Court Judge did not already know, or that was used in any improper manner to prejudice the parties in the case. It also found that District Court Judge had taken an extra step of caution by polling the jurors during the trial to determine whether he or she had seen anyone’s social media post about the trial. All the jurors responded that they had not.

District Court Judge was found not guilty on all charges and the public admonition was dismissed.

# Texas Ethics Commission

## Sworn Complaints

*(July 1, 2015 – October 31, 2015)*

**Editor's Note:** Only sworn complaint orders involving judicial campaigns are summarized here. None have been issued since the date of the last publication. For a full list of orders issued by TEC, visit: [http://www.ethics.state.tx.us/sworncomp/orderlst\\_issued.html](http://www.ethics.state.tx.us/sworncomp/orderlst_issued.html)



# Contributors

as of 7/1/15

## Contributions in Memory

Hon. Nancy Berger, In Memory of William "Bill" Brigham  
Hon. Charles Lewis Chapman, In Memory of Bob Parks  
Hon. James F. Clawson, In Memory of Judge Thomas R. Culver III  
Hon. James F. Clawson, In Memory of Judge William C. Black  
Hon. June Jackson, In Memory of Judge Dan Beck, Ret from 155th Judicial Dist  
Hon. Carolyn Marks Johnson, In Memory of J.E. (Jake) Johnson  
Hon. Charles Mitchell, In Memory of Judge John W. Mitchell  
Hon. Robert H. Moore, III, In Memory of the Honorable Bob Parks  
Hon. James Morgan, In Memory of Bob Parks  
Hon. Robert Tug Pfeuffer, In Memory of Judge Carroll Wilborn  
Hon. Dean Rucker, In Memory of Bob Parks  
Hon. Dean Rucker, In Memory of Hon. Sam Carroll  
Hon. Kathleen Susan Stone, In Memory of Velma "Bonnie" Stone  
Hon. Al Walvoord, In Memory Of Jim FitzGerald, Pat M. Baskin, James Clack, Ray L. McKim, Stacey Dawn Walvoord, In Memory of Good Judges, Good Friends and My Trial Lawyer Daughter in Law  
Hon. Leslie Brock Yates, In Memory of Judge Norman Lee

## Contributions in Honor

Hon. Perry Oswin Chrisman, In Honor of Judge Lori Hockett  
Hon. Larry Gist, In Honor of Judge Carroll Wilborn  
Hon. Robert R. Hofmann, To Honor Retired 388th District Court Judge Patricia A. Macias for her continued work for the benefit of the children of the State of Texas  
Hon. Lloyd Perkins, In Honor of Judge Temple Driver of Wichita Falls and Judge Henry Braswell of Paris  
Hon. Neel Richardson, In Honor of Judge Jean Hughes; Thanks for your dedication  
Hon. Steve Smith, In Honor of Chief Justice Jack Pope (Ret.). In tribute to a lifetime of service to God, his family, his State and the judiciary  
Hon. John T. Wooldridge, In Honor of Judge Elizabeth Ray. For dedicated service upon her retirement, as Judge, 165th District Court, Harris, County, Texas  
Hon. Jim R. Wright, In Honor of Justice Terry McCall

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Hon. Thomas R. Culver, III  
Hon. Vickers Cunningham  
Hon. Rodolfo Delgado  
Hon. Travis Hugo Ernst  
Hon. David W. Evans  
Hon. Jose Roberto Flores  
Hon. Ana Lisa Garza  
Hon. Robert J. Kern  
Hon. Lamar McCorkle  
Hon. Margaret Garner Mirabal  
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Hon. Douglas Robison  
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 Hon. Jim R. Wright  
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 Hon. Leslie Brock Yates  
 Hon. John Youngblood  
 Hon. Phillip Zeigler



*Judge Mark Atkinson presents Texas Center for the Judiciary supporter awards at the Judicial Section Annual Conference. Top left to right, Judge Linda Chew receives the Lifetime Jurist award. Judge Nancy Bergen receives the Diamond Gavel award, and at left, Judge Jerome Owens receives the Diamond Gavel award.*

{photo lineup}

# 2015 ANNUAL JUDICIAL EDUCATION CONFERENCE



{photo lineup}



# The Texas Center Honors Outstanding Faculty and Jurists

## 2014-2015 Exemplary Judicial Faculty Award: Hon. Judy Warne

Judge Judy Warne was appointed to the 257th District Court in 2005 and elected in 2006, 2010 and 2014. Prior to taking the bench, she was in private practice as a board certified family law attorney. She has been teaching for the Texas Center for almost 10 years on family law issues. She has served on the Texas Center's Curriculum Committee for two years and has been extremely involved in not only planning the curriculum, but identifying and inviting speakers. She often agrees to teach some of the harder topics herself. She has been, and continues to be, a great resource for the Texas Center and judiciary at large. In addition to this award, Judge Warne was named Jurist of the Year by the American Academy of Matrimonial Lawyers, Texas Chapter in 2012 and received the David A. Gibson Award for Professionalism and Excellence in Family Law by Gulf Coast Family Law Specialists in 2013. She also received the Standing Ovation Award from State Bar of Texas CLE Department for 2012 for outstanding volunteer service.



## 2014-2014 Exemplary Non-Judicial Faculty Award: Mr. Ed Wells

Ed Wells began serving as Court Manager for the County Criminal Courts at Law of Harris County in 2011, having served as Assistant Court Manager for the three previous years. Prior to this position, Mr. Wells was Clerk of the Court at the Texas Fourteenth Court of Appeals from 2000-2008. He began his career in the courts employed by Galveston County as Court MIS Director and then as Director of the Office of Justice Administration. Mr. Wells started teaching for the Texas Center over 20 years ago. He develops, manages, and even teaches at the Texas Center's Professional Development Program for court coordinators. He was instrumental in

bringing the Institute for Court Management's certification program to Texas. Coordinators are now earning the same education through the Texas Center that would normally cost them thousands of dollars to get at the national level. He has also started teaching judges at other Texas Center programs on the topics of docket management. Mr. Wells serves on the Texas Center's Curriculum Committee, the Texas Supreme Court's Judicial Committee on Information Technology, and currently serves as Treasurer of the Texas Association for Court Administration.

# AWARDS &

## 2014-2015 Exemplary Article Award: Hon. Elsa Alcalá

Judge Elsa Alcalá has served on the Court of Criminal Appeals since her appointment in May 2011. While on the CCA, Judge Alcalá has authored over 50 majority opinions, 20 concurring opinions, 15 dissenting opinions, and participated in the resolution of over 30,000 cases. Judge Alcalá received the honor for exemplary article for her paper titled “Recent Developments in the Law Related to Search and Seizure in Driving-While-Intoxicated Cases,” which she presented at the 2015 Regional Conferences. Her article has become a go-to resource on DWI law. She has spoken for the Texas Center on many occasions in the past few years, and her materials are always thorough, accurate, and understandable. Prior to becoming a judge on the Court of Criminal Appeals, she served for nine years as a justice on the First Court of Appeals, an intermediate court of appeals in Texas with jurisdiction over criminal and civil matters. There, Judge Alcalá authored over 650 majority opinions and presided in approximately 3,000 cases. Prior to serving on the appellate courts, Judge Alcalá presided over trials as a state district court judge for over three years.



## 2014-2015 Judicial Excellence in Education Award: Hon. Dean Rucker



Judge Dean Rucker serves as the Presiding Judge of the Seventh Administrative Judicial Region of Texas. He is also a Senior Judge of the 318th Family District Court and sitting by assignment. He is consistently a “yes-man” for the Texas Center when it comes to supporting programs, whether it be offering input for developing curriculum, serving on committees, contacting speakers, or speaking himself. Some examples of Judge Rucker’s commitment to judicial excellence in education include his work with the Children’s Commission. He serves as one of two Children’s Commission Jurists in Residence. He also serves as the Legal Representation Committee Chair. Recently, Judge Rucker

volunteered to serve on the Texas Board of Legal Specialization Advisory Committee which is working to establish board certification in child welfare law. Judge Rucker is the 2014 recipient of the Samuel Pessarra Outstanding Jurist Award given by the Texas Bar Foundation and the 2014 recipient of the Harriett Herd Founders Award from Centers for Children and Families of Midland. In 2006, he was awarded the Chair’s Award of Excellence by the Texas Center for the Judiciary. Judge Rucker was also honored as the 2005 Jurist of the Year by the Texas Chapter of the American Academy of Matrimonial Lawyers. In 1997, Texas CASA recognized Judge Rucker as the Clayton E. Evans Judge of the Year.

## W.C. “Bud” Kirkendall Receives the Texas Center’s Chair’s Award

The Texas Center’s Past-Chair, Judge Randy Clapp, presented Judge Kirkendall with the Chair’s Award for his unwavering and enduring dedication to the Texas Center and educating the judiciary. Judge Kirkendall is also a 2012 recipient of the Texas Center’s Exemplary Judicial Faculty Award. His list of accolades does not end there, however. In 1996, Judge Kirkendall was named Prosecutor of the Year by the State Bar of Texas. He won the John Ben Sheppard Political Courage Award in 1993. Judge Kirkendall is not only a dedicated servant to judicial education, but an excellent and engaging teacher. Judge Kirkendall currently serves on the 2nd 25th District Court and has over 30 years of experience in law. Prior to taking the bench, he had a private practice in Seguin, served as district attorney for the 25th Judicial District from 1984 to 2004, and as a briefing attorney for the Court of Criminal Appeals. Congratulations on adding another award to the mantel, Judge Kirkendall.



## Judicial Section Awards Judge Bill McCoy with Lifetime Achievement Award



During the Texas Bar Foundation Luncheon at the 2015 Annual Judicial Education Conference, the Judicial Section of the State Bar of Texas named Judge Bill McCoy as their recipient of the Judicial Lifetime Achievement Award. Judge Dean Rucker was on hand to present the award to Judge McCoy on behalf of the Judicial Section. He noted that “[t]his year’s recipient is most deserving of this recognition and has met its qualifications through a lifetime of public service through which our recipient has ensured that the judicial system is the guardian of the Constitution and the law, and has, through the use of wisdom, humor and legal persuasion given life to this creed each and every day on the job.”

The Judicial Lifetime Achievement Award is presented annually to a current or former Texas judge or justice who is recognized by his or her peers as having a reputation for and commitment to judicial excellence, has achieved a significant length of service as a judge in Texas and has demonstrated a long term, consistent and significant contribution to the betterment of the judiciary, access to justice and the system of justice in Texas. Judge Bill McCoy is Senior District Judge of the 358<sup>th</sup> District Court in Odessa, Texas. He served on the bench for 30 years before retiring in December 2014. During his tenure, he earned the respect and admiration of those in his community. He previously served Ector County as an assistant district attorney and county attorney, before practicing law for almost 10 years.

As Judge Rucker further noted, “[Judge McCoy] has lived his life as he presided over his court. Everything about this man is noble, humble and without pretension...I submit to you that our recipient is the genuine article, the real McCoy.”

# AWARDS &

# Justice Anne Gardner Named as Recipient of Texas Bar Foundation's Samuel Pessarra Award

Each year, the Texas Bar Foundation honors those who exemplify the highest standards of the legal profession. This year, the Texas Bar Foundation selected Justice Anne Gardner from the 2<sup>nd</sup> Court of Appeals as the 2015 Samuel Pessarra Outstanding Jurist Award. Justice Gardner is the 34th recipient of the award and the third jurist from Fort Worth to receive the award, which was previously presented to United States District Judge Eldon B. Mahon in 1998 and to State District Judge Charles J. Murray in 1988.<sup>1</sup>

Justice Gardner was in private practice for 30 years before being appointed to the appellate bench. She served as Law Clerk for Honorable Leo Brewster, U.S. District Judge, Northern District of Texas from 1967-1971, was a partner with the firm of Simon, Peebles, Haskell, Gardner & Betty for 13 years, and was a partner with McLean & Sanders for 4 years. From 1988 until her appointment to the Court of Appeals by Governor George W. Bush effective January 1, 2000, she was a partner with Shannon, Gracey, Ratliff & Miller, where she was Chair of that firm's Appellate Section. Justice Gardner was elected the first woman President of the Tarrant County Bar Association in 1994. She received her B.A. in history from the University of Texas in 1964 and her J.D. from the University of Texas School of Law in 1966, where she was Associate Editor of the Texas Law Review. Justice Gardner has been board certified in Civil Appellate Law since 1987 by the Texas Board of Legal Specialization, and she served on that Board's first Advisory Commission on Appellate Civil Law, which established the standards for certification, for 12 years (chairman 1993) and on the Civil Appellate Law Examination Commission. She was appointed to and served on the Texas Supreme Court Advisory Committee (1993-1998). Justice Gardner was elected first woman President of the Tarrant County Bar Association in 1994 (Vice President 1984-85; Director 1977-79, 1982-84). She served as a Director on the board of the Texas Association of Defense Counsel (1988-91, 91-94) and as Director at Large (97-99).

In 1987, the Texas Bar Foundation created the Outstanding Jurist Award to honor an active Federal or State Judge. Retired judges or judges of senior status are eligible if they continue to be active on the bench. In 1995, the Foundation received a bequest to the endowment from the estate of Mrs. Samuel Pessarra in honor of her late husband for the purpose of funding the Outstanding Jurist Award. The recipient must have served on the bench for a minimum of 10 years and exhibit an exceptionally outstanding reputation for competency, efficiency, and integrity.

(Endnotes)

<sup>1</sup> <https://www.tarrantbar.org/UserFiles/files/FINAL%20MAY-JUNE%20BULLETIN%20for%20website%20-%20Copy.pdf>



# Judge Dean Rucker Receives Highest Honor from Texas Academy of Family Law Specialists

**A**t its annual dinner in San Antonio on August 5, 2015, the Texas Academy of Family Law Specialists honored Judge Dean Rucker, Presiding Judge of the Seventh Administrative Judicial Region of Texas, as the 2015 recipient of the Judge Sam Emison Award. Each year, the Emison Award is bestowed upon one exceptionally distinguished family law practitioner or judge who has demonstrated a significant commitment and made significant contributions to the practice of family law in the State of Texas. “I am deeply honored to receive this distinguished award from this outstanding organization of family law attorneys and judges,” said Judge Rucker.<sup>1</sup>

The same week, Judge Rucker learned that the authors of *Sampson & Tindall’s Texas Family Code Annotated* dedicated the 2015 edition to him. The dedication was in honor of Judge Rucker’s tireless and extensive work drafting legislative changes to the Texas Family Code for the 84th Legislative Session. This volume is a trusted resource for family lawyers and judges throughout Texas. “I am humbled by this dedication,” said Rucker. “I have loved every minute of my career.”

Judge Dean Rucker served as the presiding judge of the 318th Family District Court, Midland County, Texas for more than 25 years, retiring in 2014 as the longest serving judge in the history of Midland County. He is also the presiding judge of the Seventh Administrative Judicial Region, having been appointed in 1998.



Photo left to right: Judge Rucker’s son, Dustin; Judge Rucker’s wife, Karen; Judge Rucker; and Judge Rucker’s son, Clark

## (Endnotes)

<sup>1</sup> Press Release, Seventh Administrative Judicial Region of Texas, Judge Dean Rucker Receives Honors (Aug. 22, 2015) (on file with author).

# AWARDS &



## Judicial Section Recognizes Representative Bryan Hughes as “Friend of the Judiciary”

**T**he Judicial Section of the State Bar of Texas honored Representative Bryan Hughes from Mineola with the “Friend of The Judiciary Award” during the Bar Foundation Luncheon at the Annual Conference. Representative Hughes was honored for his long standing commitment and support of the judiciary during his 12 years in the House of Representatives. He has been a staunch supporter of increasing judicial compensation. This past session, he filed all the major pieces of legislation the Judicial Section attempted to pursue. His support and efforts this session were invaluable.

# & HONORS

# NEW RESOURCES FOR JUDGES:

## USCIS Resources on the Special Immigrant Juvenile Program

Juvenile court judges, child welfare workers, health care professionals, and educators are important participants in the SIJ process. Judges play a critical role because they see these children in their court rooms, and the juvenile court order helps determine a child's eligibility for SIJ status. The U.S. Customs and Immigration Services (USCIS) is trying to provide outreach to state court judges on SIJ matters. Texas is at the top of the list given the high number of unaccompanied minors and other youth immigrants here. Below are some resources that they would like to share.

### Outreach Requests

State juvenile courts may contact USCIS to ask general questions or request outreach on the SIJ program by submitting a request to: [USCIS-IGAOutreach@uscis.dhs.gov](mailto:USCIS-IGAOutreach@uscis.dhs.gov).

[USCIS Brochure on Immigration Relief for Abused Children](#)

[SIJ Status: Information for Juvenile Courts](#)

### 2015 Legislative Update Summary

At the 2015 Annual Judicial Education Conference, Judge Alfonso Charles provided a thorough summary of the recently passed legislation. To make sure you are up to date on the recent changes, you can access the summary of bills here (you need to log in to your judicial profile to access):

[Legislative Update Paper](#)

### Texas Attorney General Opinion No. KP-0038

Last month, the Office of the Attorney General issued an opinion concluding that the Open Meetings Act (OMA) does not apply to meetings in which district and statutory-county court judges meet to appoint county auditors and community supervision and corrections department directors.

[Read Full Opinion Here](#)

### DWI Form Bank

Over the past several years, Judge Laura Weiser and Holly Doran have been compiling useful DWI forms. It is their hope that these forms will assist judges in improving efficiency and consistency in DWI cases across the state. These forms include, but are not limited to, a blood search warrant, bond conditions, an occupational license checklist, instructions to juries, an ignition interlock removal order, and many more.

[Access the Form Bank Here](#)

