



THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY

In Chambers

SUMMER 2020

**What We
Learned About
Criminal Law**

**“Fairness”
and
“Justice” in the
Courtroom**

**Top Ten
Family Law
Cases**

**2020-21 TCJ
Nominations**

**Pre-Order
Bench Books**

**Emergency
CJE Order**



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In Chambers

The official publication of the Texas Center for the Judiciary

Summer 2020

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This is the the official publication of Texas Center for the Judiciary. The magazine is funded in part by a grant from the Texas Court of Criminal Appeals. In Chambers strives to provide the most current information about national and local judicial educational issues and course opportunities available for Texas judges. We keep the Texas Center’s mission of “Judicial Excellence Through Education” as our guiding premise. Readers are encouraged to write letters and submit questions, comments, or story ideas for In Chambers. To do so, please contact Courtney Gilason, 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. Layout and design by Christie Dotolo. The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.



LETTER FROM THE CHAIR

Dear Colleagues,
What do you say about a year like 2020? As a result of the COVID-19 pandemic, since early March, the judiciary of this State has been faced with unprecedented challenges as we have struggled to ensure that the rule of law does not give way to the demands of a new paradigm of social interaction. No longer are we able to provide justice the “way we have always done it.” Instead, we have been called upon to be innovative and technologically-adapted to the less personal, but more demanding world of computer screens, Zoom hearings, and socially distanced interactions. Everything we do has become more demanding. First and foremost, I want to express to each of you how proud I am of the Texas judiciary. What a great job the judges of this State have done to adjust to needs of our system of justice in this environment.

I want you to know that the Texas Center for the Judiciary is doing a fantastic job to keep up with the demands of our current situation. Under the leadership of our Chief Executive Officer, Mark Atkinson, the Texas Center has been monitoring COVID-19 developments since early February—long before “social distancing” became a new phrase in our lexicon. Because the health and safety of our members and the staff of the Texas Center has always been a priority, we were able to make the tough decision to cancel a conference in a timely manner, thereby minimizing the inconvenience to everyone concerned.

In particular, we made the very difficult decision to cancel our annual conference in September. However, just because we are not going to be able to present a face-to-face conference this year, I still want to encourage everyone to sign-up for our *VIRTUAL 2020 Annual Judicial Education Conference*, to be held Tuesday and Wednesday, September 8-9. Under extraordinary circumstances, the Curriculum Committee and staff of the Texas Center have put together a tremendous

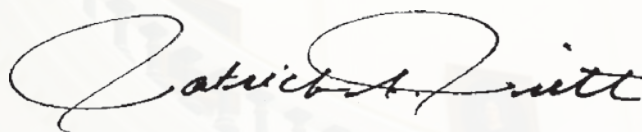
learning opportunity, highlighted by a presentation by one of most popular speakers, Dean Erwin Chemerinsky. There will also be very timely presentations on *The Mental Health Impact of COVID-19 within the Justice System*, by Dr. Brian Meyer, and *Implicit Judgments: How Intuition Affects Judicial Decision Making*, by Professor Jeffrey Rachlinski. Overall, I

feel certain that it will be a great learning experience.

For the foreseeable future, like you in your courtrooms, the Texas Center is going to have to “monitor and adjust” to our new normal. We remain committed to our mission of *judicial excellence through education*, and we remain committed to providing you, the Texas judiciary, the very best educational experience possible under these challenging circumstances.

God bless each of you, and God bless Texas!!!

Sincerely,



Patrick A. Pirtle



LETTER FROM THE CEO

Dear Colleagues,

Who would have ever thought that the Hurricane Harvey Annual Conference Cancellation episode would be eclipsed as an exercise in risk management for the Texas Center. We at TCJ wish our members the best in dealing with their court roles and duties in these extremely difficult times. It is truly remarkable what all has been done to adjust to these ever-changing realities. It is a great testament to the skill and determination of our Texas Judges and Justices to keep justice proceeding and advancing. Judicial excellence has never been more essential. That TCJ's members have changed practices and procedures as needed, with such deftness and flexibility, is truly awe-inspiring.

The Texas Center for the Judiciary staff, also, has excelled in adjusting to new roles and realities — beyond my wildest dreams. As did the rest of the world, TCJ staff began working remotely when required to. They never missed a beat, performing as well remotely as they did in the in-office environment. We met, and continue to meet, regularly, in video meetings. Some meetings include the entire staff, while some are attended by teams dealing with various needs and projects.

It became apparent to us, and our leadership, that in order to continue our mission of delivering quality education to our members, other than in mass gatherings, we were going to be required to gear up for alternate delivery methods. Probably as did many, we at first believed that the health crisis would be short-lived; but that has not turned out to be the case. While our ultimate goal is to return to in-person education as soon as is absolutely safe for attendees and staff alike, virtual presentations and conferences will likely be the norm for the near future.

TCJ staff is now in a never-ending process of learning about and experimenting with a wide variety and number of online delivery tools and platforms. Both on their own, as well as working with and exchanging information with other judicial education entities in Texas and nationwide, our staff is assembling exciting models for delivering education to our Judges and Justices. The upcoming, 2020 Annual Judicial Education Conference will be our first major virtual, but live, product. It looks to be excellent.

It has been disappointing to both our staff and leaders to be forced to make the calls to cancel already planned conferences. We always do so soberly and with due concern for the safety of our members and staff. But, out of this crisis has come the opportunity to learn new things. When the time comes that it is undeniably safe to gather together in meeting rooms again, we will proceed to resume, I hope, armed with new tools and ways of doing things. And, that's not all bad.

Never doubt that TCJ staff is dedicated to assembling and delivering educational products to our members with health and safety as paramount considerations. And, let us all be assured, that in the end, from our members conducting their courts, to our staff working at education delivery, we are all in this together. As it should be.

Yours,



Mark



feature

10 Things We Learned About Criminal Law This Term

By Hon. David Newell



As Garak on *Star Trek Deep Space Nine* observed, “We live in uncertain times.”¹ This is certainly as true now as it was when he said it. Or will say it. You get my point. Keeping up with the significant cases in criminal law from the Court of Criminal Appeals and the United States Supreme Court in 2020 has gotten a little more challenging what with all the limited or cancelled CLEs these days. So, hopefully this short article highlighting ten of the more significant opinions handed down this term by the United States Supreme Court and the Court of Criminal Appeals can be a relatively painless stop-gap measure. Of course, no article is a substitute for your own reading of the opinions, and no summary can fully capture the nuances of these cases. But hopefully this will make you aware of some significant decisions and encourage you to read those cases more fully in all that free time you don’t have.

10. A police officer has reasonable suspicion to stop a truck if he runs the license plate and finds the registered owner has a revoked driver’s license. That headline is so good, I almost don’t think I can embellish it. But that’s what the United States Supreme held in ***Kansas v. Glover*, 140 S. Ct. 1183 (Apr. 6, 2020)**. A Kansas deputy sheriff saw a pickup truck and ran the license plate on it. The deputy pulled the truck over after dispatch informed him that the owner of the vehicle had had his license revoked. That owner, Glover, turned out to also be the

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“The headline is so good, I almost don’t think I can embellish it.”



driver, but the deputy did not know that until after he had stopped the truck. Writing for the majority, Justice Thomas noted that “reasonable suspicion” does not require “scientific certainty” even if it has to be more than a “hunch.” The bottom line on this is that the Court looked at inferences from the facts at hand and whether it was reasonable for the officer to infer that the owner of the truck was the one driving it.²

9. Just because you can’t read the magistrate’s signature on a warrant doesn’t mean the officer can’t rely upon that warrant under the statutory “good faith” exception in Article 38.23(b). Here, a police officer arrested Cesar Arellano for driving while intoxicated. The officer got a search warrant for Arellano’s blood. The magistrate signed it, but his signature was so bad the trial court couldn’t tell who the magistrate was. Arellano argued that this failed to satisfy Article 18.04(5), which requires a “legible” signature. The Court of Criminal Appeals held in **State v. Arellano, 2020 WL 2182258 (Tex. Crim. App. May 6, 2020)**, that even if the warrant failed to comply with the requisites of Article 18.04, the officer may still be able to rely upon that warrant to search and seize the blood under the “good faith” exception found in Article 38.23(b) of the Code of Criminal Procedure. Of course, there was no dispute that the warrant had actually be issued by a magistrate based on probable cause, but that’s an issue for another day.

8. Seizure of 23 days of historical cell site location information without probable cause violates the Fourth Amendment and Article 1, section 9 of the Texas Constitution. Christopher Holder was believed by the police to have committed a murder, but he claimed to be elsewhere at the time. Prosecutors obtained a court order for 23 days of historical cell site location information from AT&T but did not set out facts establishing probable cause in the order. In **Holder v. State, 595 S.W.3d 691 (Tex. Crim. App. Mar. 11, 2020)**, the Court of Criminal Appeals held that seizure of this information would violate the Fourth Amendment in light of the recent decision from the United States Supreme Court, *Carpenter v. United States*, 138 S. Ct. 2206 (2018). [*Carpenter* held that a defendant has an expectation of privacy in more than 7 days of records documenting historical cell site location information.] The Court found the reasoning in *Carpenter* persuasive and held that the founders of Texas would not have intended to provide less protection to the citizens of Texas than that guaranteed by the federal constitution. Consequently, the Court held that the seizure of the evidence in this case would also violate the Texas Constitution. The Court remanded the case to consider whether the admission of the evidence harmed the defendant.

7. Reckless injury to a child and endangering a child by feeding adult doses of Benadryl to the child can be a predicate felony offense for felony murder despite the continued non-existence of the merger doctrine. This is a tragic case to be sure. Twelve children at an at-home day care became ill, and one died. Toxicology reports on the child who died revealed high levels of diphenhydramine, an

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“...you know you can't rely upon possession with intent to deliver as a predicate felony for engaging in organized criminal activity, right?”

antihistamine common to drugs such as Benadryl, in the child's body. The prolonged overuse of this drug can cause liver damage, and in extreme cases, death in young children (hence the existence of Children's Benadryl). The State charged Marian Fraser, the owner of the day care, with felony murder based upon injury to a child and endangering a child. Fraser argued that these were invalid predicate felonies for the offense of felony murder. The Court of Criminal Appeals disagreed. In *Fraser v. State*, 583 S.W.3d 564 (Tex. Crim. App. Sept. 11, 2019), the Court of Criminal Appeals held, again, that the statute prohibits only the use of manslaughter or a lesser-included offense of manslaughter as a predicate felony for felony murder. Here, injury to a child requires proof of an element that manslaughter does not—namely, that the victim be a child. And manslaughter requires proof of an element that injury to a child does not—namely, a death. Consequently, the felony offense of injury to a child could be a valid predicate and satisfy the requirement that the defendant committed an act clearly dangerous to human life.³

6. Speaking of predicate felonies, you know you can't rely upon possession with intent to deliver as a predicate felony for engaging in organized criminal activity, right? So, Shanna Hughitt was living with a meth-addict-slash-drug-dealer boyfriend and another guy. The police were aware of Hughitt's boyfriend's job. They got a search warrant and found not only meth on Hughitt, but also lots of cash, drug packaging, rolling papers, syringes, scales, a police scanner, and a large amount of MSN "cut." The State charged Hughitt with engaging in organized criminal activity based upon the predicate felony of possession of a controlled substance with the intent to deliver. The Court

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“For a tampering-with-evidence-by-concealment case, the evidence must be actually hidden or removed from sight rather than merely inconspicuous.”

of Criminal Appeals reversed in *Hughitt v. State*, 583 S.W.3d 623 (Tex. Crim. App. Sept. 25, 2019). According to the Court, the statute at issue (Penal Code § 71.02(a)(5)) designates either manufacture or delivery of a controlled substance as a viable predicate felony for the offense of engaging in criminal activity. The statute also lists “possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception” as a possible predicate felony as well. It does not list possession with intent to deliver. So, possession with intent to deliver without a showing of forgery, fraud, misrepresentation, or deception is not a valid predicate felony for the offense of engaging in organized criminal activity.⁴

5. To charge the mother with sexual assault as a party to the father’s prolonged sexual abuse, there must be a showing that it was the mother’s conscious objective or desire that the father commit the sexual assault. Here’s another terrible factual scenario leading to a very difficult case. Allen Metcalf started abusing his daughter when she was 13 and it carried on over several years. Allen went to his daughter’s room every night except when the daughter was menstruating. Lydia Metcalf admitted to waking up at 2:30 in the morning when Allen returned to bed, but she believed him when he said he was just checking on the kids. There was also testimony that sometimes her mother would come to the bedroom door after the daughter cried out, but Allen told Lydia that their daughter was only having a nightmare. Finally, the daughter told her mother that Allen was a monster who was doing bad things. Lydia kicked Allen out of the house, but she let him return later that day. Even though she did not believe Allen that there was nothing sexual going on, she claimed to have no proof. The Court of Criminal Appeals held that Metcalf could not be charged as a party to the sexual assault in *Metcalf v. State*, 597 S.W.3d 847 (Tex. Crim. App. Apr. 1, 2020). According to the Court, the State was required under the statute to prove that Lydia intended to promote or assist in the commission of the offense—i.e., that it was Metcalf’s conscious desire or objective that her husband commit the offense. Regardless of how truly awful the circumstances of the offense were, the evidence did not show that it was Metcalf’s conscious objective or desire that Allen commit the offense.

4. For a tampering-with-evidence-by-concealment case, the evidence must be actually hidden or removed from sight rather than merely inconspicuous. Karl Stahmann turned across traffic and struck an oncoming car. Two bystanders saw the accident and got out to help. They saw Stahmann get out of his car, walk over to a wire game fence nearby, and throw a prescription medicine bottle over the fence. He missed the bushes, and the pill bottle landed a few feet from the fence in plain view. The bystanders never lost sight of the bottle. When the first officer arrived, the bystanders told the officer about the bottle and pointed it out. The officer could see the bottle very clearly from the accident scene. In *Stahmann v. State*, 2020 WL 1934894 (Tex. Crim. App. Apr. 22, 2020), the Court

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of Criminal Appeals held that the evidence was insufficient to establish tampering with evidence because the prescription bottle was in plain view. Even assuming that the statute required that the evidence be concealed from law enforcement, the evidence only established an attempted tampering because the record was clear that the prescription bottle was not actually hidden or removed from the sight of the police.

3. Admission of Article 38.41 certificate of blood-analysis did not violate the Confrontation Clause even though the report was signed by an assistant lab director rather than an analyst because the defendant failed to object 10 days prior to trial. Andrew Williams hit and killed a jogger with his car, and the State charged him with manslaughter and failure to stop and render aid. Fifty days before trial, the State indicated to Williams and the trial court that it was going to rely upon an Article 38.41 certificate of analysis without calling the analyst. It was signed by an assistant lab director rather than the analyst. Williams waited until trial to object that the failure to call the analyst violated the Confrontation Clause. In **Williams v. State, 585 S.W.3d 478 (Tex. Crim. App. Oct. 9, 2019)**, the Court of Criminal Appeals held that Williams had waived his Confrontation Clause complaint by failing to object at least 10 days prior to trial as the statute required. The Court acknowledged that the certificate did not designate that the person swearing to the lab report was the analyst who conducted the tests. Even though this was required under the statute, that was not the argument Williams made at trial or on appeal. Most importantly, as the Court observed, Williams was never bound by the certificate and could have insisted that the State call the analyst to testify by objecting ten days prior to trial. Consequently, there was no Confrontation Clause violation.

2. Multiple-assailants instruction on use of deadly force in self-defense is warranted even when not every member of a group is using deadly force. There's a lot of backstory to this case but sufficed to say that Patrick Jordan ended up in a fight with five guys. A guy named Royal got him down on the ground, and Jordan heard at least one other approaching. Jordan pulled out

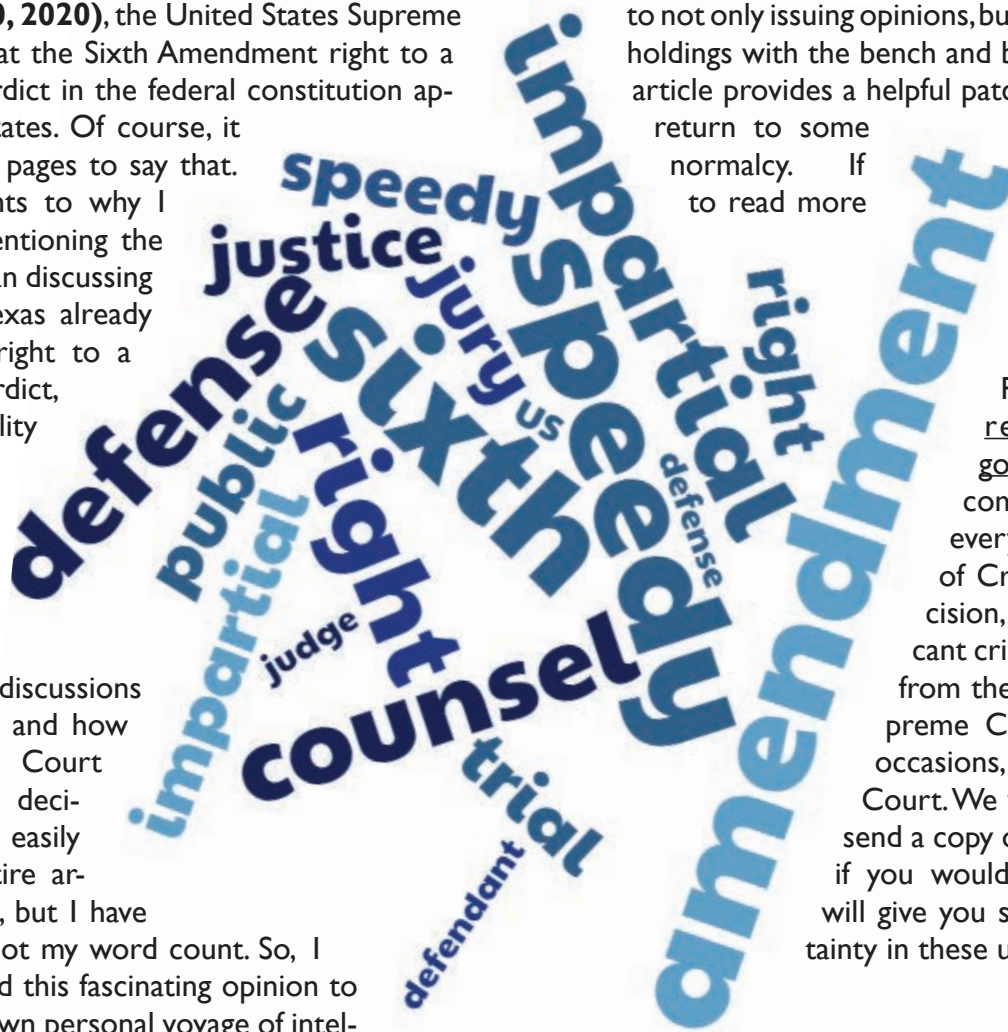
a gun and shot Royal. The State charged him with aggravated assault with a deadly weapon and deadly conduct related to the shooting of Royal. The trial court instructed the jury on self-defense as to Royal but did not include the language "or others with him." In **Jordan v. State, 593 S.W.3d 340 (Tex. Crim. App. Feb. 5, 2020)**, the Court of Criminal Appeals held that the lack of a multiple-assailants instruction was not only error, but also harmful because the existing instruction foreclosed Jordan's self-defense argument. According to the Court, from Jordan's standpoint, he was being attacked by more than one person so he was entitled to a deadly-force instruction regarding multiple attackers even if he could only definitively say that Royal was the one who was using deadly force against him.⁵

1. The implied-consent statute does not justify taking blood from an unconscious driver without a warrant in a DWI case. Jose Ruiz fled the scene of a car wreck under circumstances indicating he was driving while intoxicated. Police found him unconscious in a nearby field and carried him to a patrol car. Despite efforts to revive him, he did not wake up. At the hospital, the officer arrested the unconscious Ruiz and read him his statutory warnings. The unconscious Ruiz did not protest. The hospital drew his blood without a warrant pursuant to the Transportation Code's implied-consent statute. The Court of Criminal Appeals held in **State v. Ruiz, 581 S.W.3d 782 (Tex. Crim. App. Sept. 11, 2019)** that section 724.011(a) of the Transportation Code authorizes officers to present an affidavit to a magistrate for civil penalties in a DWI case. But it doesn't authorize officers to forcibly obtain blood samples without a warrant. In this way, the Court answered a question that the United States Supreme Court ostensibly left open in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).⁶ And, in the end, the Court of Criminal Appeals remanded the case to the court of appeals to determine whether the warrantless blood draw was authorized based upon exigent circumstances.

But what about that big jury unanimity case from the United States Supreme Court? Okay, I acknowledge that there is one more case from the United States Supreme Court that came out with



broad applicability. In **Ramos v. Louisiana, 140 S. Ct. 1390 (Apr. 20, 2020)**, the United States Supreme Court held that the Sixth Amendment right to a unanimous verdict in the federal constitution applies to the states. Of course, it took them 87 pages to say that. And that points to why I am merely mentioning the case rather than discussing it at length. Texas already recognizes a right to a unanimous verdict, so its applicability to Texas is not immediately apparent. And, most of the opinion is concerned with discussions of *stare decisis* and how the Supreme Court reached its decision. I could easily devote an entire article to *Ramos*, but I have already overshot my word count. So, I must commend this fascinating opinion to you for your own personal voyage of intellectual discovery.



This year has been a challenging one with regard to not only issuing opinions, but also sharing those holdings with the bench and bar. I hope that this article provides a helpful patch as courts slowly return to some semblance of normalcy. If you would like to read more about these cases, please feel free to email my executive assistant, Nichole Reedy, at nichole.reedy@txcourts.gov. Every year we compile summaries of every published Court of Criminal Appeals decision, as well as significant criminal law decisions from the United States Supreme Court and, on rare occasions, the Texas Supreme Court. We would be happy to send a copy of the paper to you if you would like. Hopefully it will give you some sense of certainty in these uncertain times.

(Endnotes)

1. "What You Leave Behind," *Star Trek Deep Space Nine* (Paramount 1999)
2. This is consistent with the approach taken by the Court of Criminal Appeals in cases like *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997) and *Derischweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011). I could explain these cases to you at length, but where's the fun in that?
3. Yeah, but dude, what did you mean about "the continued non-existence of the merger doctrine"? Two judges would have held that the reckless injury to a child could not be a valid predicate felony because it was also the act clearly dangerous to human life. However, the Court rejected the invitation to reconsider its precedent limiting "the merger doctrine" to the text of the statute. In other words, the felony murder statute does not require a separate act from the underlying felony, as the Court has previously held, it only prohibits the use of manslaughter or lesser-included offenses of manslaughter as predicate felonies. See e.g., *Lawson v. State*, 64 S.W.3d 396 (Tex. Crim. App. 2001). And as a concluding note, the court of appeals reversed the case on remand due to jury charge error. *Fraser v. State*, 593 S.W.3d 883 (Tex. App.---Amarillo Dec. 19, 2019, pet. ref'd.). Hope that provides some sense of closure.
4. So, what happens to the conviction on the greater offense? In **Walker v. State, 594 S.W.3d 330 (Tex. Crim. App. Feb. 27, 2020)**, the Court of Criminal Appeals held that a defendant charged with engaging based upon a predicate felony of possession with intent to deliver is entitled to an acquittal for engaging due to legally insufficient evidence. However, a court of appeals can reform the judgment to mere possession with intent to deliver if a conviction for that offense is authorized by the indictment. As Walter White from *Breaking Bad* might say, "So, there's that."
5. And speaking of jury instructions, you also might want to check out **De La Torre v. State, 583 S.W.3d 613 (Tex. Crim. App. Sept. 18, 2019)**. There, the trial court included an instruction on "joint possession" in a possession-of-a-controlled-substance case. Appellant claimed that he was entitled to an instruction on "mere presence." The Court of Criminal Appeals held that both instructions are comments on the evidence.
6. If you followed *Mitchell*, it sure looked at oral argument like Justice Alito had the votes to affirm the use of implied consent to justify warrantless seizure of blood. But the best laid plans gang aft a-gley, as Scottish poet Robert Burns might say. Sufficed to say, it looks as if Justice Alito needed Justices Thomas and Gorsuch to agree with him in order to secure a majority, and he was apparently unable to completely persuade either justice.

Meet Your 2020-2021 Texas Center Leadership Nominations

Chair-Elect: Hon. Robert Ramirez, Denton County Court at Law, Denton

Judge Robert Ramirez took the bench in August 2010 and serves as a County Court at Law Judge in Denton County. He has served on the Texas Center's Board for one term as well as the Curriculum Committee. Judge Ramirez also served two terms as the president of the Texas County Court Judges Association. He was recognized as the Public Elected Official of the Year in 2012 by the Texas Chapter of the National Association of Social Workers. Judge Ramirez has served on the board of multiple nonprofits including the Denton County Children's Advocacy Center, Health Services of North Texas, PediPlace, and the Denton Area Teacher's Credit Union as well as serving as a Trustee for the Denton County Baptist Association. He obtained his JD from SMU's School of Law and his MBA from Texas A&M University at College Station. He worked as an associate at Jones, Day Reavis and Pogue in Dallas as well as forming a law firm in Denton County with his wife Laura Coopender Ramirez. Judge Ramirez and Laura met in law school and have two children.



Place 3: Hon. Ernest White, 194th District Court, Dallas

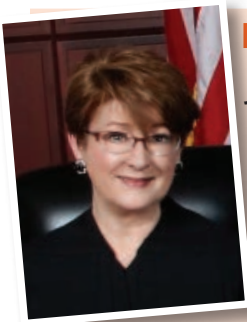
Elected to the bench in November 2006, Judge Ernest White presides over the 194th District Court. Prior to taking the bench in January 2007, Judge White was in private practice where the majority of his practice was devoted to the area of criminal law. He is a former Director of the Criminal Justice Clinic and Associate Professor of Law at Dedman School of Law, Southern Methodist University. In this position he taught law students how to handle criminal cases and supervised them in handling actual cases in county and district courts. He is a former Assistant Public Defender with the Dallas County Public Defenders' Office and served as the Interim Chief Public Defender for this office. He started his legal career as an Assistant District Attorney with the Denton County District Attorney's Office. Judge White also served in the United States Navy as both a JAGC Officer and Enlisted man. Judge White received his JD from the Thurgood Marshall School of Law, Texas Southern University and his bachelor's degree in psychology from San Diego State University.



Place 1: Hon. Elizabeth Kerr, 2nd Court of Appeals, Ft. Worth

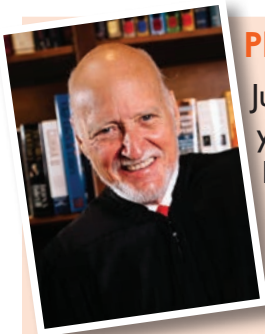
Justice Kerr grew up in Memphis, Tennessee, graduating from White Station High School in 1974. She became a Texan when she matriculated at Rice University in Houston, obtaining a BA in English and Art History in 1978, followed by a JD from the University of Texas in 1982. Immediately following, she spent two years as a briefing attorney for the late Hon. Lucius D. Bunton, III, Judge of the United States District Court for the Western District of Texas, Midland Division. From there, Justice Kerr began her private practice in Ft. Worth in 1984, first with the firm of Law, Snakard & Gambill. During the 1990s, in addition to maintaining her legal practice,

Justice Kerr worked on numerous projects with lexicographer and author Bryan A. Garner, including as a contributing editor of the seventh edition of Black's Law Dictionary. Starting in 1995, she taught legal writing and research off and on for a number of years at what began as the DFW School of Law and then became Texas Wesleyan (now Texas A&M) School of Law. Before being elected to the appellate bench in 2016, she was of counsel at Friedman, Suder & Cooke beginning in 2006. While at FS&C, Justice Kerr was a member of the planning committee of the Tarrant County Bar Association's appellate section, serving as its chair for the 2010-2011 bar year. She is a Fellow of the Tarrant County Bar Foundation and a Life Fellow of the Texas Bar Foundation. Justice Kerr currently serves on the advisory board of the Federalist Society's Ft. Worth Lawyers Chapter and on the executive committee of the Eldon B. Mahon Inn of Court. Outside her professional activities, she is president of the board of trustees for St. Peter's Classical School in Ft. Worth.



Place 8: Hon. Raúl Rodríguez, Harris County Criminal Court at Law No. 13, Houston

On January 1, 2019, Judge Raúl Rodríguez was sworn in as Judge of Harris County Criminal Court at Law No. 13. Prior to taking the bench, Judge Rodríguez had a private law practice in Houston, Texas for over 26 years. He primarily focused on criminal law having tried cases ranging from speeding tickets to theft to assault up to capital murder. In addition to criminal defense, he also represented clients in family law and personal injury law cases. On November 5, 2005, he was appointed to the position of Associate Judge for the City of Houston Municipal Courts by Mayor Bill White. For 13 years, he served in this position, presiding over Class C misdemeanors while still maintaining a full-time law practice. Judge Rodríguez received a BBA in Marketing from the University of Houston and a JD from South Texas College of Law. He currently presides over Harris County's only Spanish-speaking S.O.B.E.R. Court for DWI repeat offenders, serves on the Criminal Justice Legislative Sub-Committee of the Judicial Section of the State Bar of Texas and is the Co-Chair of the Harris County Standing Committee that oversees the probation and pre-trial services departments. Judge Rodríguez serves on the Board of the Mexican American Bar Association of Houston and is a member of the Association of Women Attorneys-Houston, Hispanic Bar Association of Houston, Houston Bar Association, Houston GLBT Political Caucus, LULAC, NAACP, National Hispanic Professional Organization, St. Frances Cabrini Catholic Church, Texas Organizing Project, University of Houston Alumni Association (including the Hispanic and Life Member Chapters) and various other organizations. He currently resides in Houston, Texas with his wife, Patricia Limón de Rodríguez.



Place 10: Hon. Jim Parsons, Senior Judge, Palestine

Judge Jim Parsons began serving as judge of the 3rd District Court in 1996, serving for 10 years before returning to practice. In 2018, the Supreme Court of Texas appointed Judge Parsons as Senior Judge of the 3rd District Court. In 2019, Judge Parsons was named an Outstanding 50 Year Lawyer by the State Bar of Texas. Previously, he received Alumnus of the Year, Bates College of Law, University of Houston; Alumnus of the Year, Lon Morris College, Lawyer of the Year, Texas Mexican-American Bar Association; and Citizen of the Year, Palestine (2018). Judge Parsons served as President of the State Bar of Texas (1990-1991) and dedicated his presidency to The Year of Inclusion. As President, Judge Parsons was recognized by minority bars for advancing minority participation in the Bar, including his resignation as an ABA delegate and appointing as his replacement the first woman and first person of color to be a Texas ABA delegate. As the Soviet Union was dissolving, he traveled to the Soviet Union and brought Soviet judges, lawyers, and professors to the 1991 SBOT Annual Convention, under the title of Rule of Law or Rule of Man. As Bar President, he oversaw legislative sunset and upon an affirmative referendum secured the passage of a new grievance system and a dues increase to finance the new system. He served as President of East Texas ABOTA, and President of TEX-ABOTA. The Texas Supreme Court appointed Judge Parsons to the Texas Judicial Council (1997-2001) and to the Supreme Court Task Force on Jury Assembly and Administration (2006). Judge Parsons has spoken and written extensively on trial procedure, trial technique, jury trial improvement and evidence. Prior to taking the bench, Judge Parsons was Board Certified in Civil Trial, Personal Injury and Family Law. As a lawyer and a judge combined, Judge Parsons has tried over 300 jury trials.

feature

Top 10 Recent Family Law Cases

By Judge Angela Tucker



“Issue: Whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order that names a parent as the child’s managing conservator.”

1. In re C.J.C., 2020 WL 3477006, (Tex. June 26, 2020)

Abigail’s parents lived together from 2011 – 2016, but never married. Abigail was born in 2014. In 2016, Abigail’s father filed a SAPCR. The trial court named the parties JMCs with Abigail’s mother having the exclusive right to designate the primary residence of the child. In 2017, Abigail and her mother moved in with the mother’s boyfriend, Jason. In January 2018, the mother filed a modification of child support and the possession schedule. In July 2018, the mother died while the modification suit was still pending. The father’s Motion to Dismiss was denied by the trial court and the grandparents and Jason were permitted to intervene. The appellate court granted the mandamus as it related to the grandparents, but found Jason did have standing. The trial court named Jason a possessory conservator and granted visitation along with other rights. Father filed a second petition for writ of mandamus.

Issue: Whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order

(continued on next page)

Under the Texas Family Code, a parent may seek to set aside a termination order secured by a voluntary relinquishment affidavit only on the grounds that the affidavit was procured by fraud, duress, or coercion.

that names a parent as the child's managing conservator.

Holding: The presumption that a fit parent acts in the best interest of the child applies to the modification of an original suit. The trial court abused its discretion in naming the ex-wife's fiancé a possessory conservator with rights to possession of the child. The writ of mandamus was conditionally granted and the trial court directed to vacate its temporary orders.

2. *In the Interest of D.S., a child.* 2020 WL 2363408 (Tex. May 25, 2020)

D.S. was born in Massachusetts. The parents were married in Texas and lived in Texas most of the marriage. Father took a job in Massachusetts shortly before the birth of D.S. Mother remained in Massachusetts until the conclusion of her maternity leave and then returned to her job in Texas. D.S. spent time in Texas and Massachusetts. Mother filed for divorce when D.S. was 8 months old in Texas. Father did not challenge jurisdiction. Father's parental rights were terminated solely on the grounds of execution of a voluntary relinquishment. Mother was named SMC of the child. Six months later, Father filed a Bill of Review challenging the voluntary relinquishment on the ground that

the home state of D.S. was Massachusetts, not Texas at the time of divorce. The trial court denied the Bill of Review. The Court of Appeals reversed the trial court.

Issue: Whether a parent can challenge a termination order based solely on execution of a voluntary relinquishment on the ground of erroneous "home state" jurisdiction under the UCCJEA.

Holding: NO. REVERSED. Section 161.211(c) prohibits a collateral attack premised on an erroneous home-state determination even if that determination implicates a trial court's subject-matter jurisdiction. Under the Texas Family Code, a parent may seek to set aside a termination order secured by a voluntary relinquishment affidavit only on the grounds that the affidavit was procured by fraud, duress, or coercion.

3. *Treto v. Treto*, 2020 WL 373063 (Tex. App.—Corpus Christi; Jan. 23, 2020)

Jennifer and Sandra married as a same-sex couple. A male friend donated sperm to Sandra, and a child was born during the marriage. The parties divorced and Jennifer argued that since she is not the biological parent of the child, Texas law prevented the Judge from naming her as a parent possessory and or-

dering child support.

Issue: Whether a non-biological parent in a same-sex marriage can be named as a parent conservator and ordered to support the child after the divorce.

Holding: YES. The trial court gave effect to the Texas Family Code presumption that a child born of the marriage is the child of the mother's spouse pursuant to §160.106. The trial court treated the same-sex married couple like any other married couple who separated after having a child-- it divided the community estate and entered an order regarding the rights and duties and support of the child. In doing so, the trial court did not abuse its discretion.

4. *In the Interest of B.C.*, 592 S.W.3d 133 (Tex. 2020)

At every permanency hearing, Mother appeared without counsel but was not further admonished about her statutory right to legal representation after the adversary hearing. The trial court subsequently terminated Mother's parental rights. Mother then filed an affidavit of indigence and a notice of appeal. After a hearing, the trial court found Mother indigent and appointed counsel to represent her on appeal. The Court

(continued on next page)

of Appeals reversed and remanded the case for a new trial, holding that Mother was entitled to appointed counsel because there was sufficient indication in the record that she was indigent, such that the trial court should have conducted further inquiry into her status.

Issue: Whether failure to properly admonish a parent about his/her rights to appointed counsel at each hearing as required by Tex. Fam. Code 263.0061 is reversible error.

Holding: YES. The Supreme Court affirmed the Court of Appeals, holding a new termination trial was required because the trial court failed to give mandatory statutory admonishments regarding the right to appointed counsel.

5. In the Interest of R.R.K., 590 S.W.3d 535 (Tex. 2019)

Child's parents obtained a court order establishing possession and support obligations for the child. One year later, Father filed a motion to modify. After the hearing, the trial court issued a "memorandum" modifying the possession schedule and child support obligations. Father subsequently moved for entry of a final order. The trial court entered an "Order in Suit to Modify Parent-Child Relationship." Mother appealed the Order. The court of appeals dismissed the appeal as untimely, holding that the trial court's memorandum constituted a final order.

Issue: Whether a memorandum order modifying possession and child support is final and appealable, rendering the trial court's later order void, and the mother's appeal untimely.

Holding: NO. The Supreme Court reversed and remanded the case, holding (1) the memorandum lacked "clear and unequivocal" indicia of finality, requiring an examination of the record to determine the trial court's intent; and (2) the record demonstrated that the trial court's later order was the final order. Further, holding that Mother's notice of appeal was timely filed.

6. Mosley v. Texas Health & Human Services Commission, 593 S.W.3d 250 (Tex. 2019)

HHSC, a state agency, investigated a nurse, Patricia Mosley, for allegedly neglecting a disabled patient. After the investigation, HHSC recommended she be added to the "Employee Misconduct Registry." Inclusion on the Registry, would have severely impacted her nursing career. Mosely followed the procedure outlined in a letter from the agency to request an appeal of their decision. The agency's letter gave her the wrong procedure to follow, and she did not file the required motion for rehearing. Thus, her appeal of their decision was dismissed.

Issue: Whether an agency's affirmative misrepresentation of the proper procedure for judicial review violates a party's right to due process.

Holding: YES. The Supreme Court held that the agency misrepresented the proper procedure for judicial review in a letter to Mosley, thus denying her due process.

“The Supreme Court affirmed the Court of Appeals, holding a new termination trial was required because the trial court failed to give mandatory statutory admonishments regarding the right to appointed counsel.”

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7. *Highsmith v. Highsmith*, 587 S.W.3d 771 (Tex. 2019)

Husband and Wife executed an MSA dividing the marital estate and settling child custody issues. Husband then filed the petition for divorce. Husband appeared in court for a hearing wherein the trial court orally rendered judgment on the MSA. Wife failed to appear at the hearing because she did not receive notice. Wife later moved to set aside the judgment and to revoke the MSA. The trial court denied the motions and entered a final decree of divorce incorporating the terms of the MSA. The court of appeals reversed the trial court.

Issue: Whether an MSA that resolves the parties' property-division and conservatorship issues can satisfy all statutory requirements if it is executed before a petition for divorce is filed.

Holding: YES, if the party has notice. The Supreme Court reversed in part, holding (1) an MSA that resolves the parties' property division and conservatorship issues can satisfy all statutory requirements if it is executed before a petition for divorce is filed; but (2) because Wife did not receive the notice to which she was constitutionally entitled the trial court erred in rendering judgment on the MSA in her absence.

8. *In the Interest of W.J.M.*, 2020 WL 813365 (Tex. App.—Dallas, Feb. 19, 2020)

The Office of the Attorney General filed a SAPCR to establish paternity, conservatorship, and child support. The OAG sent father notice, on June 26th for a July 7th final hearing date. Father was an inmate, but filed responsive pleadings and requested to appear by phone. The trial court took no action on the father's motion to appear by phone or other pleadings. The OAG obtained a default order that established father's paternity and conservatorship rights; set a visitation schedule; and fixed the child support amount at zero. Father appealed the default order.

Issue: Whether the trial court violated father's due process rights by (1) failing to provide a minimum of 45 days' notice of the final hearing and; (2) failing to rule on his motion to appear by telephone before the final hearing.

Holding: YES. Trial court's judgment was REVERSED. The trial court violated father's due process rights by failing to provide him 45-days' notice of the final hearing pursuant to TRCP 245, and by not allowing him to appear at the final hearing by telephone in lieu of a physical appearance.

9. *In the Interest of S.J.H.*, 594 S.W.3d 682 (Tex.App.—El Paso 2019)

Father claimed Native American heritage through three different tribes. Mother claimed no Indian heritage. The State's pleadings alleged S.J.H. was a child of Indian ancestry. Father voluntarily relinquished his parental rights. The State failed to notify one of the tribes Father alleged to be a member of. Mother's rights were terminated involuntarily. Mother appealed alleging the trial court erred by (1) failing to determine if S.J.H. qualified for membership in an Indian tribe; (2) failing to follow the statutory guidelines for ICWA.

Issue: Whether the Indian Child Welfare Act (ICWA) applies to a termination case wherein the parent claiming Indian ancestry has relinquished his parental rights.

Holding: YES. Trial court's judgment REVERSED as to the Mother. Failure to contact all tribes identified by the Father and failure to use the "beyond a reasonable doubt standard" as to the Mother's termination of parental rights were reversible error.

10. *Caddell v. Caddell*, 597 S.W.3d 10 (Tex.App.—Houston [14th Dist.] 2020)

Appellant's trial attorney filed a motion to withdraw six days before trial alleging that his communication with Appellant had "deteriorated to the point that her interest would be served if she found alternate counsel." The attorney set his motion to withdraw for hearing on the date of trial.

During the hearing, Appellant did not raise any objections to the motion to withdraw, however, she clearly indicated that she did not wish to proceed to trial without an attorney. The trial court granted the motion to withdraw and denied Appellant's request for a continuance to hire new counsel. The divorce was granted and Appellant was not awarded her requested relief.

Issue: Whether the trial court abused its discretion by (1) permitting an attorney to withdraw on the day of trial without a showing of good cause; and (2) denying Appellant's motion for continuance to obtain new counsel.

Holding: YES. The trial court's judgment was REVERSED. The trial court abused its discretion in permitting Appellant's attorney to withdraw without complying with the rules: (1) giving proper notice to the client; (2) allowing the client time to employ new counsel; and (3) delivering all papers and property to the client to which she is entitled. The trial court's error left Appellant unprepared and unrepresented at trial. Further, the trial court should have given Appellant a reasonable amount of time to secure new counsel prior to proceeding to trial.

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Speaker Highlights



Professor Erwin Chemerinsky

Dean of Berkeley School of Law the University of California

U.S. Supreme Court Update and Trends

October 2019 Term was another incredible year in the Supreme Court involving issues concerning discrimination based on sexual orientation, immigration, abortion, and much more. Dean Chemerinsky will join us once again to summarize, analyze, and relate implications for Texas from the Supreme Court's most important cases, in the way that only Dean Chemerinsky can.

Dr. Brian Meyer

Clinical Psychologist & Substance Abuse / Post-Traumatic Stress Disorder Specialist, Hunter Holmes McGuire VA Medical Center

The Mental Health Impact of COVID-19 on the Justice System: What Can Judges Do?

What can judges do to address the trauma and fatigue that many have experienced due to the pandemic? Dr. Meyer will discuss the impact of COVID-19 on all participants in the judicial system, including litigants, attorneys, victims, judges, juries, and the public at large. He will then offer recommendations for courtroom-related responses that judges and others can use to deal with the impact when performing in their respective roles.



Professor Jeffrey Rachlinski

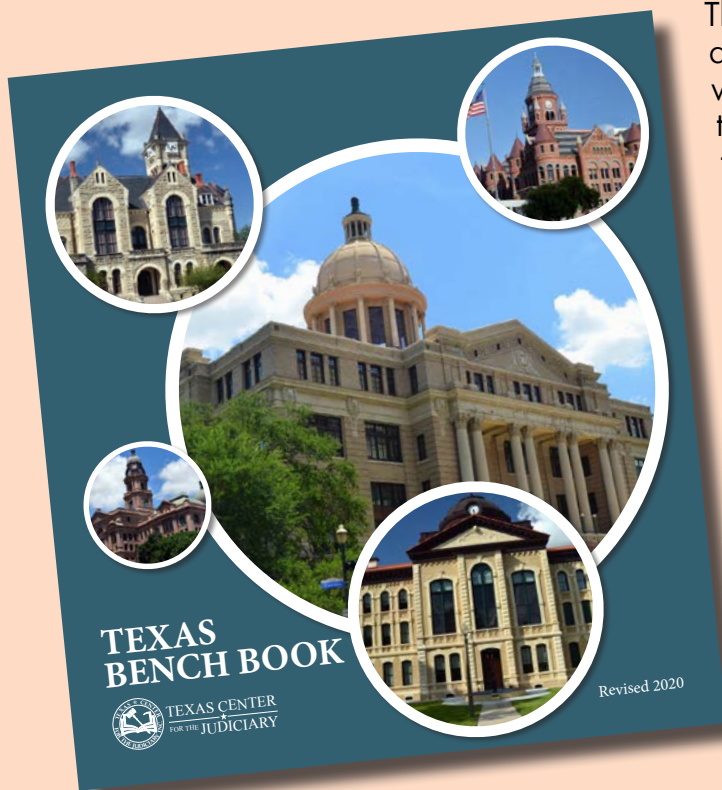
Cornell Law School

Implicit Judgments: How Intuition Affects Judicial Decision-Making

Do judges make decisions by intuition or by careful deliberation? This session will probe how implicit bias based on gender, race/ethnicity, and a whole host of other individual traits can affect judgments in both civil and criminal cases, in the courtroom and beyond. Professor Rachlinski will also offer an "intuitive-override" model to produce more just and accurate outcomes in (and out of) court.



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As always, the updated Texas Bench Book will be available for free on our website and the LawBox app, upon completion. We'll send out an email announcement when it's ready for you to view.

A big THANK YOU to all the Bench Book Committee members who worked tirelessly to get this put together. The Texas Center could not have done it without their tremendous efforts.

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Online Impaired Driving Symposium

August 2020

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April 2021

Regional B Conference - Regions 1,3,4,8 & 10

May 2021

DWI Summit

June 2021

Annual Judicial Education Conference

September 2021

feature

Ten Recent Texas Supreme Court Civil Cases You Should Know

By Courtney Barksdale Perez



1. Atrium Medical Center, LP v. Houston Red C LLC, 595 S.W.3d 188 (Tex. 2020)

ImageFIRST Healthcare Laundry sued Atrium Medical Center for breach of contract seeking liquidated damages under the agreement. Atrium argued that the liquidated damages provision operated as an unenforceable penalty. The trial court found that ImageFIRST was entitled to liquidated damages equal to 40% of the invoice multiplied by the 222-weeks remaining on the agreement. The court of appeals affirmed reasoning that the cancellation charge was not a penalty because the evidence illustrated that 40% was a reasonable forecast of ImageFIRST's losses.

Issue: Whether the enforcement of a liquidated damages clause in a contract should be viewed as an unenforceable penalty?

Holding: Enforcement of liquidated damages is not a penalty if the court finds that the clause was formed to reasonably adhere to the principle of just compensation. The party seeking to avoid liability for liquidated damages must show that an “unbridgeable discrepancy” exists between the enforcing party’s actual and

liquidated damages. Here, the harm that would result from a breach was difficult to estimate, and the liquidated damages provision reasonably forecast just compensation.

2. Bethel v. Quilling, 595 S.W.3d 651 (Tex. 2020)

The Petitioner sued a trailer manufacturer alleging that faulty brakes caused the accident that resulted in her husband’s death. During the litigation, Petitioner alleged that the manufacturer’s counsel, Quilling Sanders, intentionally destroyed evidence by disassembling and testing the trailer’s brakes before she could examine them or document their original condition. Quilling sought dismissal of the Petitioner’s fraud and conversion claims arguing that it was entitled to attorney immunity. The trial court granted the motion, and the court of appeals affirmed.

Issues: (1) Whether an affirmative defense is a proper basis for a Rule 91a motion to dismiss? (2) Whether the alleged destruction of evidence is an action “taken in

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“As a general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation.”

connection with representing a client in litigation,” thus entitling Quilling to attorney immunity?

Holding: Rule 91a permits dismissals based on an affirmative defense. As a general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation. The immunity inquiry focuses on the kind of conduct at issue rather than the alleged wrongfulness of the conduct. Reasoning that Quilling’s actions involved the provision of legal services in examining and testing relevant evidence, the Court affirmed the lower courts’ decisions.

3. Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020)

Energy Transfer Partners (ETP) and Enterprise Products Partners formed an agreement to build a pipeline, provided that each company’s board of directors approved the execution of a formal contract. The agreement was memorialized by a signed confidentiality agreement, a “Non-Binding Term Sheet,” Letter Agreements and a Reimbursement agreement. Enterprise orally ended the relationship with ETP and joined in a similar venture with a different company. ETP sued for breach of fiduciary duty. Enterprise argued that it had not formed a partnership with ETP, and thus owed it no duty of loyalty. A jury disagreed and judgment was rendered on a \$535 million verdict in favor of ETP. The Court of Appeals reversed.

Issue: Does Texas law permit parties to agree that no partnership will exist unless certain conditions are satisfied?

Holding: Yes. When parties sign an agreement in which they disclaim any “binding or enforceable obligations” unless conditions precedent occur, they are bound by that agreement. The Court reversed the jury’s award in favor of ETP, holding that the two parties had not formed a partnership because the conditions precedent to formation of the partnership did not occur.

4. Janvey v. GMAG – Certified Question from the Fifth Circuit, 592 S.W.3d 125 (Tex. 2019)

Stanford International Bank ran a Ponzi scheme for two decades, attracting billions by selling fraudulent certificates of deposits and issuing returns to its old investors with the new investors’ money. Magness (a collective of investors) purchased \$79 million in the fraudulent certificates, later withdrawing once the news of the SEC investigation became public. Janvey, the Receiver, sought to recover the Bank’s assets arguing that Magness’s (1) withdrawal should be avoided because it constituted a fraudulent transfer under Texas Uniform Fraudulent Transfer Act (TUFTA) and (2) Magness was unjustly enriched. The Fifth Circuit sought guidance on what constitutes good faith under TUFTA.

Issue: Must a transferee on inquiry notice conduct a diligent investigation to shield itself from the TUFTA’s “clawback provision?”

Holding: No. If the transferee has either actual or constructive knowledge of fraud that would lead a reasonable person to investigate, then the transferee must conduct a diligent investigation to demonstrate its good faith. Requiring proof of an investigation negates the incentive transferees may have to remain willfully ignorant of fraud.

5. Richards v. State Farm Lloyds – Certified Question from 5th Circuit Court, 597 S.W.3d 492 (Tex. 2020)

Ten-year-old Jayden Meals died during an ATV accident while under the supervision of his grandparents. Meals’s mother filed suit against the grandparents who maintained a home-owner’s insurance policy with State Farm Lloyds. State Farm subsequently filed suit in federal court seeking a declaration that it had no duty to defend or indemnify the grandparents against the mother’s claims because its policy excluded coverage for bodily injury arising out of a recreational vehicle owned or op-

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erated by any insured “while off an insured location.” State Farm submitted extrinsic evidence with its motion for summary judgment to support its position that the accident occurred off of the Richards’ property, and that the deceased child should be deemed an insured resident of the Richards’ household. The federal district judge found that the eight-corners rule was triggered by and/or conditioned upon the policy language requiring an insurer to defend any suit “even if the allegations of the suit are groundless, false, or fraudulent.” Because the Richards’ policy did not have such language, and instead provided that “the duty to defend arises only if suit is brought to which coverage applies,” the eight-corners rule did not apply.

Issue: Whether the policy-language exception to the eight-corners rule is a permissible exception under Texas law?

Holding: No. The eight-corners rule generally provides that the insurer’s duty to defend is determined based solely on the allegations in the underlying petition and the terms of the insurance policy, without considering any other “extrinsic” evidence. The mere absence of a groundless clause in a contract does not satisfy the “policy-language exception,” and therefore does not preclude the application of the eight-corners rule under Texas law.

6. *In re Mobile Mini*, 596 S.W.3d 781 (Tex. 2020)

Mobile Mini, the owner of a construction trailer, was sued for injuries Luis Covarrubias received when a wind gust blew the door of the trailer closed on his hand. Mobile Mini filed a motion to designate Nolana Self Storage, LLC, the owner of the construction site, as a responsible third party, but did so after the statute of limitations expired on Covarrubias’s potential tort claims against Nolana. The trial court denied Mobile Mini’s request. The Court of Appeals denied Mobile Mini’s mandamus petition.

Issue: Are third party designations valid if they are served after the statute of limitations of the tort claim has expired?

Holding: The Supreme Court vacated the trial court’s order denying Mobile Mini’s motion to designate Nolana as a responsible third party, holding that Mobile Mini’s discovery response disclosing Nolana as a potentially responsible third party was timely even though it was served after the statute of limitations had expired on Covarrubias’s tort claims. Disclosure of potentially responsible third parties is not required until discovery responses are due, unless the court finds that the delay is a result of moving party’s gamesmanship.



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“Because Flores was not an authorized driver under the insurance policy, Flores, his wife and the plaintiffs agreed to tell the officers on the scene and the insurance company that Guevara was driving during the accident.”

7. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544 (Tex. 2019)

Swanson, a secretary for the Town of Shady Shores, was terminated by the Town’s council during a “closed meeting.” Swanson sued alleging she was terminated in violation of the Texas Whistleblower Act and sought a declaration that her removal was void under the Open Meetings Act. Shady Shores filed a plea to the jurisdiction and a traditional and no-evidence motion for summary judgment arguing that it was entitled to sovereign immunity on all of Swanson’s claims. The trial court granted the plea and dismissed the Whistleblower Act claims, but denied the summary judgment motion. The court of appeals affirmed in part and reversed in part.

Issues: (1) Whether a no-evidence motion for summary judgment is a proper procedural vehicle to defeat jurisdiction? (2) Whether the Texas Open Meetings Act waives governmental immunity with respect to declaratory judgment claims?

Holdings: (1) When a challenge to jurisdiction implicates the merits, whether by a plea to the jurisdiction or by a traditional or no-evidence motion for summary judgment, the plaintiff is required to present sufficient evidence on the merits of her claims to create a genuine issue of material fact; and (2) The Open Meetings Act waives immunity from a suit “by mandamus or injunction to stop, prevent, or reverse violation or threatened violation” of the Open Meetings Act. However, the Open Meetings Act does not waive immunity from suit for Uniform Declaratory Judgment Act claims as a matter of law.

8. *In re Fox River Real Estate*, 596 S.W.3d 759 (Tex. 2020)

Fox River sued to remove its general partner, Carlson, and sought a permanent injunction against Carlson’s distribution of partnership assets. Fox River filed the lawsuit in Washington County, Carlson’s domicile. Carlson moved to transfer venue to Harris County, which the partnership agreement established as venue for partnership disputes. Fox River contested the motion. The trial court granted Carlson’s motion and transferred venue to Harris County. The court of appeals denied Fox River’s petition for mandamus relief.

Issues: (1) Whether Section 15.020 of the Tex. Civ. Prac. & Rem. Code overrides all other mandatory venue provisions? (2) Whether Fox River’s request for injunctive relief was the central focus or dominant purpose of the lawsuit?

Holding: Tex. Civ. Prac. & Rem. Code § 15.020, requiring enforcement of a pre-litigation agreement fixing venue in major transactions, does not override all other mandatory venue provisions found outside of the statutory title in which major transactions venue provision is found. It only did so in this case because the limited partners’ request for injunctive relief was not the dominant purpose or central focus of lawsuit, and therefore the mandatory venue provision for injunction suits in Tex. Civ. Prac. & Rem. Code § 65.023(a) did not apply.

9. *Loya Insurance Company v. Avalos*, 18-0837, 2020 WL 2089752 (Tex. May 1, 2020)

Flores was driving an insured vehicle when he collided with plaintiffs. Because Flores was not an authorized driver under the insurance policy, Flores, his wife and the plaintiffs agreed to tell the officers on the scene and the insurance company that Guevara was driving

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during the accident. Subsequently, Guevara disclosed that Flores was driving when the accident occurred. Loya thereafter refused to defend Guevara against the plaintiffs' suit. The trial court granted summary judgment for the plaintiff's, awarding them \$450,343.34. Guevara assigned her rights against the insurer to the plaintiffs who filed a suit against Loya, alleging that its denial of defense and coverage was negligent, breached the insurance contract, and breached duty of good faith. Loya filed a motion for summary judgment, which the trial court granted. The court of appeals reversed.

Issues: (1) Does the eight-corners rule bar a court from considering extrinsic evidence of fraud by the insured? (2) Does the liability insurer have a duty to defend when there is conclusive evidence that groundless, fraud, or fraudulent claims against the insured have been manipulated by insured's own hands?

Holding: The eight-corners rule does not bar a court from considering extrinsic evidence of fraud by

insured in determining liability insurer's duty to defend. A court may consider extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they would not otherwise.

10. *In re Turner*, 591 S.W.3d 121 (Tex. 2019)

Dr. Jeffrey Turner delivered the relator's child at Methodist Dallas Center. Turner sued the hospital alleging that its negligence resulted in injuries to her infant during birth. Turner timely served the hospital with an expert report prepared by a board certified obstetrician and gynecologist. Turner subsequently served a subpoena duces tecum for an oral deposition on a different provider, Dr. Sandate. Dr. Sandate moved to quash the subpoena, arguing that the Texas Medical Liability Act prohibits the deposition and accompanying document production unless and until a plaintiff serves an expert

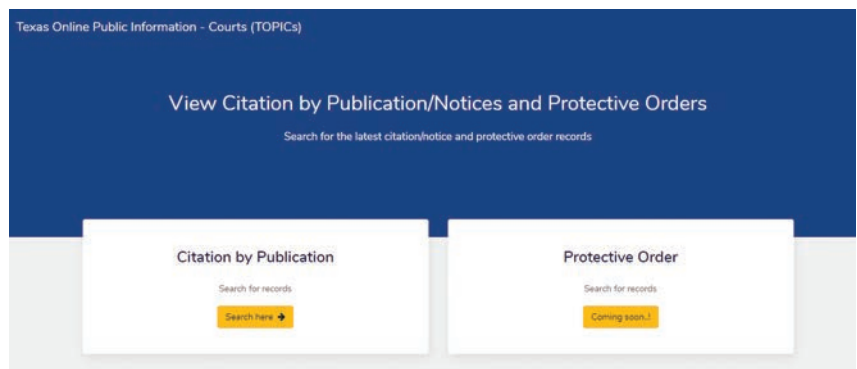
report on the provider whose deposition is sought. The trial court sustained Dr. Sandate's objection to the subpoena duces tecum, but denied the motion to quash. The court of appeals reversed, holding that Turner could not depose Dr. Sandate until he is served with an expert report.

Issue: Whether the Texas Medical Liability Act prohibits a deposition and accompanying document production unless and until the claimant serves an expert report on the provider whose deposition is sought?

Holding: The Texas Medical Liability Act does not deprive a claimant of legitimate discovery of third-party information from a fact witness in aid of a health care liability claim for which a statutorily compliant expert report has been served. But the information sought must be limited exploration of facts relating to claims against the party, rather than potential claims against the fact witness from whom discovery is sought.

OCA Launches Citation by Publication Website

The Office of Court Administration announces the launch of its citation by publication public internet website. OCA developed the website pursuant to Senate Bill 891 (86th Legislature, RS). Citations and other related public or legal notices required by law to be posted on the website can only be entered into the system by a district or county clerk or court staff. Uploaded documents are fully searchable by the public. For more information, please visit <https://www.txcourts.gov/judicial-data/citation-by-publication/> or contact OCA-Legal@txcourts.gov.



feature

Ten Cases Related to DWI Between March 2019 and May 2020 That May or May Not Interest You

By Hon. David Newell



As I write this, I kind of feel like Steve Martin in the movie *The Jerk* explaining what a patron might win at the guess-your-weight booth.¹ Normally, I cover terms of the Court of Criminal Appeals when doing case law updates, but here, I am really pulling highlights from a paper I wrote in anticipation of presenting the DWI Case Law Update at the Center for the Judiciary's Regional Conferences. So, I have this unique span of time that I am covering for you. Courtney at the Center assures me that this is totally fine, as this is really intended as an amuse bouche for your own personal legal research. I make no guarantees that any of these cases will be the ones you want me to highlight or even that they might amuse you. I can only promise that I will try to make the summaries bite-sized. If you have ever eaten any of my cooking, you know to ingest at your own peril.

10. Don't ask the United States Supreme Court if implied-consent laws authorize the warrantless seizure of blood from an intoxicated and unconscious driver. Stop me if you've heard this one before. In case

you haven't, the United States Supreme Court granted review on that very question but ended up not answering it. In ***Mitchell v. Wisconsin*, 139 S.Ct. 2525 (June 27, 2019)**, the Court recognized, albeit in a plurality, that while there is no *per se* exigency in the metabolization of alcohol into the bloodstream justifying the warrantless seizure of an intoxicated driver's blood, an unconscious and intoxicated driver could present a medical emergency. That medical emergency, in addition to the dissipation of the alcohol in the unconscious driver's blood stream and the inability to obtain a breath sample, combine to create exigent circumstances to seize and analyze the blood. One of the swing votes in this case was Justice Thomas, who has always believed that probable cause to believe a driver is intoxicated along with the dissipation of alcohol amounts to exigent circumstances justifying a warrantless search and seizure.² So, he agreed with the plurality on the issue of exigency. Three dissenters noted that the State had actually conceded that the seizure was not justified under a theory of exigent circumstances. And Justice Gorsuch dissented simply to observe that

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the Court was supposed to address the issue of implied consent, not exigency. But, if you are looking for closure, the Texas Court of Criminal Appeals later held in ***State v. Ruiz*, 581 S.W.3d 782 (Tex. Crim. App. Sept. 11, 2019)** that the implied-consent statute did not authorize the warrantless search and seizure of blood from an unconscious and intoxicated driver. There is obviously a lot more to these cases than this summary, so I commend them both to your reading.

9. A police officer has reasonable suspicion to stop a truck if he runs the license plate and finds the registered owner has a revoked driver's license. If you read my other article “10 Things We Learned About Criminal Law This Term” then this case may already be familiar to you. In case you haven't, I will reproduce what I wrote about this case in that article for you here. In ***Kansas v. Glover*, 140 S. Ct. 1183 (Apr. 6, 2020)**, the United States Supreme Court considered a stop like the one described above. A Kansas deputy sheriff ran the license plate on a pick-up truck and found out that the registered owner had had his license revoked. The deputy pulled the truck over. The owner of the truck, Glover, turned out to also be the driver, but the deputy did not know that until after he had stopped the truck. Writing for the majority, Justice Thomas noted that “reasonable suspicion” does not require “scientific certainty” even if it requires more than a “hunch.” The bottom line on this is that the Court looked at inferences from the facts at hand and whether it was reasonable for the officer to infer that the owner of the truck was the one driving it.³

8. If you're driving drunk, do not throw a lit cigarette out of the window because that's reasonable suspicion to stop even if you don't start a fire.⁴ Michael Wood was driving while intoxicated and flicked a lit cigarette out of the driver's side window. In front of a police officer. The officer stopped Wood and later arrested Wood for DWI. Wood argued that Section 365.012 of the Health and Safety Code, which deals

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...so we'll see whose cuisine reigns supreme... Bon appétite.”

with littering, makes disposing of lighted liter, including a cigarette, an offense only if a fire is ignited as a result of the conduct. The trial court suppressed the evidence, but the Third Court of Appeals reversed. In **State v. Wood, 575 S.W.3d 929 (Tex. App.—Austin May 23, 2019, pet. ref'd.)**, the court of appeals held that the officer's observation of an object being discarded was enough to provide reasonable suspicion. The court of appeals also noted that subsection 365.012(a) of the Health and Safety Code still allowed for punishment for littering even if the lighted trash doesn't start a fire, albeit for an offense with a lower punishment range.

7. Does weaving within one's lane of traffic, even if done safely, amount to reasonable suspicion to stop for failure to maintain a single lane? I would love to answer this question for you, but the issue is currently pending. I will note two, count 'em two, cases you might want to be aware of from intermediate courts of appeals that have tackled the issue. In the first one, police pulled over a U-Haul that was suspected of being involved in multiple burglaries. The officer had observed the rear tire of the vehicle straddling the lane divider shortly after rounding a curve. The trial court granted the motion to suppress because even though the driver's tires crossed the striped lines without signaling a lane change, there were no other vehicles in the vicinity. The Thirteenth Court of Appeals affirmed in **State v. Hardin, 2019 WL 3484428 (Tex. App.—Corpus Christi Aug. 1, 2019, pet. granted) (not designated for publication)**. The court of appeals acknowledged the plurality opinion of the Court of Criminal Appeals in *Leming v. State*, 493 S.W.3d 552 (Tex. Crim.App. 2016) (plurality op.), had observed that it is an offense for someone to leave the marked lane without signaling regardless of whether the action was safe, but did not follow it because it was not binding authority. Conversely, in **State v. Meras, 2020 WL 103805 (Tex.App.—Waco Jan. 8, 2020, pet. filed)**,

the Tenth Court of Appeals held that a stop for failing to maintain a single marked lane was a traffic offense justifying a traffic stop regardless of whether there was any evidence of unsafe driving. The court of appeals chose to follow the reasoning of the plurality in *Leming*. As you case see from the case cite, *Hardin* has already been granted for review, so we'll see whose cuisine reigns supreme.⁵

6. If getting a search warrant for blood is doable, a warrantless blood draw might not be justified under exigent circumstances. Trooper David Kral was called out to car accident. Eyewitnesses on the scene identified Phillip Couch as having driven his Corvette recklessly into the wrong lane and hit a pick-up truck head on. Couch had refused treatment at the scene. It took Trooper Kral⁶ about an hour and thirty minutes from the time he was called out to the completing of field sobriety tests. Kral then transported Couch to a hospital in New Braunfels, a drive that took about 45 minutes. (So we're at about 2 hours and 15 minutes now.) At the hospital, Kral began drafting a blood search warrant to draw Couch's blood. That took about 30 minutes. (Up to 2:45 now.) When he could not reach a judge, Kral decided to take Couch's blood without a warrant based upon the Texas Transportation Code.⁷ Kral got Couch's blood about three hours after he had been dispatched to the collision. The trial court suppressed the evidence because there was no showing of exigency. The Third Court of Appeals affirmed in **State v. Couch, 595 S.W.3d 748 (Tex. App.—Austin Aug. 29, 2019, pet. ref'd.)**. According to the court of appeals, the facts did not support a conclusion that the search would be "significantly undermined" by the time it would have taken to get a warrant. In particular, the court noted the availability of other officers to assist, procedures for obtaining a blood warrant via fax or in person, and no evidence indicating what time period would amount to a "significant delay."⁸

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5. And speaking of exigency, does the State need to show exigent circumstances in order to justify a “suspicious place” arrest under Article 14.03(a)(1)? Sean Michael McGuire drove while intoxicated and ran into a motorcycle, killing the cyclist. McGuire pulled into a nearby gas station and waited for the police after he called his mother and two other people he knew in law enforcement. McGuire was arrested without a warrant, and his blood was later drawn without a warrant. The trial court suppressed the evidence on the basis that Article 14.03(a)(1) did not authorize the “suspicious place” arrest in this case without a showing of exigency. The First Court of Appeals agreed in **State v. McGuire, 586 S.W.3d 451 (Tex. App.—Houston [1st Dist.] August 29, 2019, pet. granted)**. The court of appeals explained that Article 14.03(a)(1) requires a showing of (1) probable cause; (2) a suspicious place;

and (3) exigent circumstances that call for immediate action or detention by police. Here, the State did not argue that the dissipation of alcohol established an exigency justifying the arrest. Further, there were no facts supporting exigent circumstances.⁹

4. A magistrate’s terrible handwriting doesn’t prevent good-faith reliance upon a blood search warrant even if the signature is illegible (but everyone please try to write legibly). Police arrested Cesar Arellano for driving while intoxicated. The arresting officer submitted a sworn affidavit to the on-duty magistrate for a search and seizure warrant for blood. The magistrate signed the blank signature line form of the search warrant in cursive. Aside from the cursive signature, the magistrate’s name was not typed or handwritten anywhere on the warrant. Arellano argued that the warrant was invalid because it failed to

comply with Article 18.04(5) of the Texas Code of Criminal Procedure which provides among other things, that the magistrate’s name is in clearly legible handwriting or in typewritten form. The trial court granted the motion to suppress after repeatedly asking the State which magistrate had signed the warrant to no avail. The court of appeals affirmed. The Court of Criminal Appeals reversed in **State v. Arellano, ___ S.W.3d ___, 2020 WL 2182258 (Tex. Crim. App. May 6, 2020)**. The Court recognized the deficiency in the warrant but held that the deficiency did not automatically preclude an application of the “good-faith” exception to the state exclusionary rule found in Article 38.23(b). The Court remanded the case to the court of appeals to consider whether the blood evidence should be suppressed.

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Bene Taylor's Volkswagen stalled out on the Southwest Freeway demonstrating that driving a hooptie is not an adequate deterrent for driving while intoxicated.”

3. Make sure the State “wheeled” the defendant with something other than the defendant’s own extra-judicial statements. Bene Taylor’s Volkswagen stalled out on the Southwest Freeway demonstrating that driving a hooptie is not an adequate deterrent for driving while intoxicated. Tragically, this led to a car accident on the freeway. Taylor appeared intoxicated and later admitted to drinking “three beers” and driving. Taylor argued there was no evidence to establish the *corpus delicti* of the offense of driving because no evidence showed he was driving. The Fourteenth Court of Appeals disagreed in **Taylor v. State, 572 S.W.3d 816 (Tex. App.—Houston [14th Dist.] April 9, 2019, pet. ref’d)**. The court noted that Taylor’s car was stopped in the main lane of the Southwest Freeway, with Taylor observed standing alone outside the car near the front door. Conversely, Van Alstyne Police got a call from a motorist that a gray mini-van they were following was driving dangerously and going all over the median. The police found the van parked in a McDonald’s parking lot moments after the caller indicated that the van had pulled into a McDonald’s parking lot. Police found Robert Harrell seated in the driver’s seat with his seatbelt on. Two other people were sitting in the back of the van. Spoiler alert: Harrell was intoxicated. He admitted to driving the van. On appeal from his conviction, Harrell argued there was insufficient evidence establishing that he had operated a motor vehicle in a public place. The Fifth Court of Appeals agreed and reversed. In **Harrell v. State, 2019 WL 3955774 (Tex. App.—Dallas Aug. 22, 2019, pet. granted)**, the court of appeals explained that the jury would have had to infer that Harrell was the person driving the van when the caller saw it on the highway based on the fact that he was sitting in the driver’s seat with his seat belt on. This was not sufficient based on facts to support a finding beyond a reason-

able doubt. The Court of Criminal Appeals has granted review in *Harrell*, but not in *Taylor*. But more importantly, look at the added value here! Two cases for the price of one free summary.

2. Cars are not deadly weapons per se even though in their use or intended use they are capable of causing death or serious bodily injury, so the State must present evidence regarding the way the car was used to justify a deadly weapon finding. Donald Couthren was driving on a frontage road when Frank Elbrich stepped in front of the vehicle. Couthren stopped and helped the bloodied Elbrich into the car. Ordinarily a trip to the hospital would be in order. Instead, Couthren drove to his girlfriend’s house to exchange vehicles.¹⁰ At his girlfriend’s house, an argument ensued.¹¹ And the police were called. At this point, police observed Elbrich bloody and incoherent still in the passenger seat of Couthren’s vehicle. Couthren admitted he struck the pedestrian but related that Elbrich was the one who stepped in front of the vehicle. Couthren later admitted to having consumed two “Four Loko” alcoholic beverages (thereby raising his loko level to eight). The State charged Couthren with felony driving while intoxicated and sought a deadly weapon finding based upon the use of the car. The court of appeals affirmed, but the Court of Criminal Appeals reversed in part. In **Couthren v. State, 571 S.W.3d 786 (Tex. Crim. App. April 17, 2019)**, the Court held that only evidence establishing the accident was Couthren’s testimony that Elbrich stepped out in front of him; without more, the evidence did not establish how the car was used to cause serious bodily injury. Holding otherwise would effectively designate a motor vehicle a deadly weapon *per se* despite not being listed as such by the Legislature.¹²

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1. Article 38.41 certificate of blood-analysis signed by an assistant lab director rather than the analyst authorized admission of blood analysis report over a Confrontation Clause objection the defendant failed to object 10 days prior to trial. This case may also look familiar to you if you read my “10 Things We Learned About Criminal Law This Term” article. I’ve tried to use all different words this time.

After Andrew Williams killed a jogger with his car (by using it in a manner capable of causing death), the State charged him with failure-to-stop-and-render-aid, and manslaughter. The State indicated to Williams and the trial court 50 days before trial that it was going to rely upon an Article 38.41 certificate of analysis rather than live testimony from the analyst. But the assistant lab director signed the report rather than the analyst. When the State sought to introduce the report at trial, Williams objected that the failure to call the analyst to testify violated the Confrontation Clause. In ***Williams v. State, 585 S.W.3d 478 (Tex. Crim.App. Oct. 9, 2019)***, the Court of Criminal Appeals rejected this argument. The Court held that Williams had waived his Confrontation Clause complaint by failing to object at least 10 days prior to trial as the statute required. Even though the report failed to provide the information regarding the analyst required under the statute, the statute itself did not require the affidavit be sworn to by the analyst. So, Williams’s argument at trial was that the report had to be sworn to by the analyst rather than the assistant director. So even though it did not comply with the statute, having included the information regarding the assistant lab director substantially complied with the statute. Of course, Williams was never bound by the certificate and could have insisted that the State call the analyst to testify by objecting 10 days prior to trial. Consequently, there was no Confrontation Clause violation.

“...the State charged him with failure-to-stop-and-render-aid, and manslaughter.”

And thus concludes our sometimes careening adventure through some of the more significant cases and/or issues in DWI law over the last year, give or take a month or three. I hope you have found something in here that was helpful going forward and that the summaries were in the appropriate serving size. Most importantly, I hope this article whet your appetite to read these cases yourself so you can get the full dining experience. Bon appétite.

(Endnotes)

1. *The Jerk* (Universal 1979) (Anything between the ashtrays and the thimbles, including the chicklets but not the erasers.).
2. See, e.g., *Missouri v. McNeely*, 569 U.S. 141, 178 (2013) (noting that exigent circumstances exist in every driving while intoxicated case because the body is metabolizing the alcohol).
3. This is consistent with the approach taken by the Court of Criminal Appeals in cases like *Woods v. State*, 956 S.W.2d 33 (Tex. Crim.App. 1997) and *Derischweiler v. State*, 348 S.W.3d 906 (Tex. Crim.App. 2011). I could explain these cases to you at length, but where’s the fun in that?
4. At the outset, it is important to note that this case does not involve Billy Joel. See, e.g. Joel, William “We Didn’t Start the Fire” *Storm Front* (Columbia 1989).
5. *Iron Chef* (Fuji Television 1993--1999).
6. I’m going to stop calling him “Trooper Kral” because it makes him sound like a Klingon.
7. This occurred in 2012. The apocalypse did not, despite early Mayan predictions.
8. There was also some indication from the Trooper that the blood draw was necessary to prevent the destruction of evidence due to possible medical procedures, but the court of appeals held that the record did not support the officer’s concern.
9. The State Prosecuting Attorney filed a petition for discretionary review, asking the Court to address whether the statute requires a showing of exigency. The Court of Criminal Appeals has granted it so the issue is currently pending.
10. Is this a sign of intoxicated thinking or non-intoxicated thinking?
11. See footnote 7, supra.
12. This was a very close case, and I commend the dissenting opinion in the case to your consideration as well.

Court of Criminal Appeals Issues Emergency Order Allowing Online CJE Hours

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 20-009

EMERGENCY ORDER REGARDING THE RULES OF JUDICIAL EDUCATION

ORDERED that:

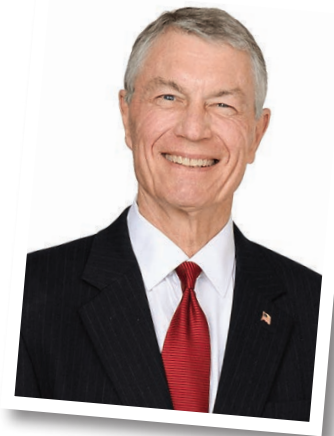
1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic.
2. This Order supplements and does not replace or amend prior Emergency Orders regarding the COVID-19 State of Disaster.
3. This Order is issued pursuant to Section 56.006 of the Texas Government Code and applies to the Rules of Judicial Education adopted by the Court of Criminal Appeals.
4. This Order suspends all sections of the Rules of Judicial Education that require live, continuous hours of judicial education, including instruction regarding substantive, procedural, and evidentiary law in civil matters, that would in any way prevent a judge from completing the number of hours required by said Rules while coping with this disaster. The number and type of hours required by the Rules of Judicial Education may be obtained by electronic means and may include on-demand/online webinars and audio or video recorded from live seminars.
5. In the event you cannot obtain your required hours within the reporting deadline set by your respective organization, you may fulfill your hours by electronic means. This may include on-demand webinars and audio or video recorded from live seminars.
6. This Order is effective as of March 30, 2020 and is in effect until thirty days after the Governor lifts the Declaration of State of Disaster.
7. The Clerk of the Court of Criminal Appeals is directed to:
 - a. post a copy of this Order on www.txcourts.gov;
 - b. file a copy of this Order with the Secretary of State; and
 - c. send a copy of this Order to the Governor, the Attorney General, and each member of the Legislature.
8. The State Bar of Texas is directed to take all reasonable steps to notify members of the Texas bar of this Order.

Dated: March 30, 2020.

To read the Order in full, please visit <https://www.yourhonor.com/web/images/pdfs/EmergencyOrderCJE.pdf>.

feature

“Fairness” and “Justice” in the Courtroom – Community and Public Perception



By Justice Douglas S. Lang (Fmr.), Of Counsel, Dorsey & Whitney LLP, Dallas¹

I. Introduction-What is “Fairness?”

“Fairness.”² “Justice.” What do those words mean as to the judicial system-the court room? In order to glean the meaning of words, we often consult dictionaries and appellate court opinions. For instance, a helpful dictionary definition tells us the word “fairness” means, among other things, “lack of favoritism toward one side or another.”³ Fairness has also been defined by dictionaries as “justice.”⁴ The importance of “justice” and the demonstration of it by the courts was stated eloquently by one court and repeated by others over time: “[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁵

It is obvious that judges must assure fairness and justice is *done* and *seen* in our courts, every day. In order to do so, a judge’s conduct must proceed from this baseline tenant of fairness set out in Canon 3 B, (6), (7) of the Code of Judicial Conduct:

Judges “shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, includ-

ing but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge’s direction and control to do so.”⁶

Judges, experienced ones for sure, intuitively know that they must put aside any bias and prejudice in court proceedings or anywhere else for that matter. However, to better understand how to avoid any appearance of exercising bias or prejudice, judges must step back and consider the law, their own perceptions, how those who come to our courts and the community at large perceive the “fairness” atmosphere in our judicial system. That is not simple to do, but the effort must be made to understand those views.⁷

Judges must look inward to evaluate what is fair. However, determining the point of view of members of the public is a bit more difficult. The perception held by a member of the public at large as to whether something,

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“However, the machinery of discontent starts moving when members of the public air their complaints to non-judicial elected officials.”

like a court, or someone, like a judge, is “fair” or not depends largely upon a person’s background. That, of course, includes each person’s varied life experiences. Each person may have a bit different slant on what is fair. Some people in particular, such as philosophers, may have a “Utopian” view that defines fairness in hypothetical or theoretical terms.⁸ Still others are likely to go about their business every day and simply do not consider, or even seek, “fairness.” Those people may just want everything to be done “their way.”⁹

So, how do we evaluate the concept of fairness in light of an assortment of viewpoints? Is it plausible to try to meld all of those viewpoints into one, reasonably clear, universally acceptable, definition of “fairness” or “justice?” Attempting to do that could lead us to what would effectively be no standard at all. That is, something like, “*I know it when I see it.*”¹⁰ So, we cannot rely on the “eye of the beholder” to define fairness. A vague standard will not do. Since we are a society “of laws, not men,”¹¹ the standard must be found in our law.

We have well tested laws and standards that will guide us. Under our system that standard is based upon what we, as judges, promise to do. The Oath of Office¹² is our personal affirmation that we will perform our duties in accordance with the Constitution and the law. That clearly includes all that our system promises and requires under the law. Further, we are guided by the Code of Judicial Conduct.¹³ Those rules are reasonable and fairly clear. However, beware. Even those standards are basic and do not address absolutely every situation.¹⁴ Never the less, should a judge fail to conform to the Code, complaints can be filed against such a judge with the State Commission on Judicial Conduct.¹⁵ When the Commission does render a public sanction against a judge, we know there will be significant public criticism.

II. Why Should Judges Care What the Public Thinks?

The fact is judges absolutely must care about what the public thinks. A distressing historical observation by French author, Honoree Balzac, is eye catching. Balzac warned that distrust is the beginning of the ruin of the judiciary. He said, “To distrust the judiciary marks the beginning of the end of society. Smash the present patterns of the institution, rebuild it on a different basis ... but don’t stop believing in it.”¹⁶

It is crystal clear that the level of public confidence in the courts is low. Is this the “beginning of the end” for the judiciary and society? Hopefully not. However, that low confidence level is confirmed by the results of a recent survey conducted by the National Center for State Courts (NCSC). The NCSC’s survey analysis advises that the survey “reveals decreased confidence in all levels of the court system – the U.S. Supreme Court, federal courts, and state courts – and lower scores on a range of attributes related to court performance, customer service, and equal justice.”¹⁷ One could discount the survey results that may have taken months to compile by describing them as “old news.” Yet, these complaints are real and not new in our society.¹⁸ Complaints persist today as they are fueled by the current well-publicized political antipathy and race relation issues.

Certainly, if public confidence is low, then it follows the perception of

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fairness in the courts is likewise low.¹⁹ The results of that low level of confidence is not reflected only by surveys. That low level of confidence is broadly disseminated by the media and in public speeches. However, the machinery of discontent starts moving when members of the public air their complaints to non-judicial elected officials. It is likely those officials will be urged to pursue and pass “remedial” legislation. Such legislation could include restrictions on the courts’ budgets, judges’ salaries, court facilities, or even restrictions on how the judges make decisions.²⁰

Another factor that affects public perception is the conduct of individual judges. When one judge is found to have acted improperly, the situation is widely and quickly publicized. The news travels quickly and many consider the single judge’s conduct as support for an indictment of the legal system. Unfortunately, the public at large is not informed about how few judges actually run afoul of the law. An understanding of the system must be developed so that when a judge is sanctioned by the State Commission on Judicial Conduct, such a declaration should not automatically reflect negatively on all of 3219 Texas judges.²¹

Information must be disseminated to show that in any given year, sanctions are levied against relatively few judges. The fact is, anyone can file a complaint with the Commission against any judge. According to the Commission’s 2019 annual report, out of 1694 complaints against judges that were disposed of in 2019, approximately 52% of those were dismissed and closed because they did not allege any judicial misconduct. Of those that were reviewed beyond the early evaluation stage, the Commission took action by imposing public sanctions of various degrees in only 80 cases which is 4.7% of the cases disposed of in 2019.²² Never the less, any violation of the Code will be disseminated far and wide by the media.

So, what can be done about these factors that appear to affect the public’s perception? The commentators tell us the public perception of fairness of the judicial system has never been favorable.²³ Do we give up and chalk it all up to “that is just the way it is?” Of course not.

Since the vast majority of Texas judges are doing their duty well, that fact should not be shrouded in ignominy. The State Bar of Texas should speak out. When a judge is chastised by the media for a decision the media does not favor, that judge should not speak out. The Bar should do the explaining. Also, it does not hurt for all of us to be careful to avoid conduct that could lead to discipline by the commission.

III. How Can Public Perception Be Improved?

There are many possibilities for action. Just a few are listed below.

First, the judiciary must consider what has already been strongly suggested by others. For instance, excellent suggestions have been made in the 2018 report of the Texas Judicial Council Committee and Recommendations on Public Trust and Confidence.²⁴ Importantly, the Committee recognized the need to build credibility with the public through community outreach. Several specific recommendations were made in that regard:

1. Continue presentations of a program for school age children previously produced in Laredo titled, *Access to Justice: Class in the Courtroom*.
2. Host a summit similar to that produced in Dallas in 2016 titled *Beyond the Bench: Law, Justice, and Communities Summit*.
3. Consider producing an updated version of *The Beyond the Bench Toolkit*.

These programs are but a few that can be implemented. Perhaps, another program that can be created is a *Judicial Road Show*. A *Roadshow* can create a dialogue with, not lecture to, all segments of the community about the judicial system, what judges do, and how they do it. The judiciary should not be alone in this effort. Rather, the judiciary must join with the State Bar of Texas, metropolitan, county, and specialty bar associations to create and produce the program.

The second obvious step is judicial education. Of course, continuing education must include the usual updates of the many substantive areas of the law critical to judicial skills. As always, ethics and professionalism must be part of the package.

However, the most critical focus of judicial education at this time is for each Texas judge to refresh their individual awareness of what it takes to actually be fair and for that fairness to be “seen” in our courts. Not only must the focus be on general considerations of bias respecting Canon 3. We must place a laser focus on what is referred to as “implicit bias.”²⁵ This introspective analysis must not be a “one shot” effort. Rather, it must be continuing and effective.

Where does that leave the judiciary? It presents a challenge to do more. The status quo is not satisfactory. Action is required.

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(Endnotes)

1. *Former Justice*, 5th District Court of Appeals, State Commission on Judicial Conduct (Chair 2018, member 2013-2018).
2. A personal note to the reader: Forgive me, I know what I say in this article is like “preaching to the choir.” However, we know we must promote fairness in the courts and impress upon our colleagues and our staff members the importance of “fairness.” For instance, as you know, Canon 3, D. (1) of the Code of Judicial Conduct requires us to consider our own conduct as well as that of our fellow judges. Canon 3 provides, in part, “A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge’s fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.” By the way, according to the *Cambridge Dictionary*, “Preaching to the choir” means “to try to persuade people who already agree with you.” Available at <https://dictionary.cambridge.org/us/dictionary/english/preach-to-the-choir> (Last accessed June 9, 2020).
3. The Merriam-Webster.com definition includes “fair or impartial treatment: lack of favoritism toward one side or another;” Available at <https://www.merriam-webster.com/dictionary/fairness>, (Last accessed June 8, 2020); Synonyms found in Merriam-Webster.com include detachment, disinterest, disinterestedness, equity, evenhandedness, fair-mindedness, impartiality, justice, neutralism, neutrality, nonpartisanship, objectiveness, objectivity Available at <https://www.merriam-webster.com/thesaurus/fairness>; (Last accessed June 8, 2020).
4. *Id.*
5. *Rex v Sussex Justices* [1924] 1 KB 256, 259 ([Lord HEWART, C.J.], cited in *La Rocca v Lane*, 366 N.Y.S.2d 456 (N.Y.App. Div. 1975), *aff’d*, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968, 96 S. Ct. 1464, 47 L. Ed. 2d 734 (1976); *In re De Leon*, 2003 Tex. App. LEXIS 6896 *21 (Tex. App.-El Paso 2003); *In re Chavez*, 130 S.W.3d 107, 115 (Tex. App.-El Paso 2003); *State v. Love*, 218 Wis. 2d 1, 11, 579 N.W.2d 277, 281 (Wis. App. 1998, citing, “The underlying principle is, of course, one of basic political theory: the legitimacy of any system for resolving disputes ultimately depends on the willingness of the parties to abide by the results—a willingness that will be undermined by procedures and results that are perceived as unfair. See, e.g., David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 Ariz. L. Rev. 785, 790 (1993); Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 Marq. L. Rev. 295, 298 (1995).” See also, *Levine v. United States*, 362 U.S. 610, 616, 4 L. Ed. 2d 989, 80 S. Ct. 1038 (1960) (trials themselves are “a reflection of the notion, deeply rooted in the common law, that ‘justice must satisfy the appearance of justice.’”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (Brennan, J., concurring).”
6. See *Code of Judicial Conduct, Canon 3, B., (6), (7)*, (As amended by the Supreme Court of Texas through July 10, 2019) Available at <http://www.scjc.texas.gov/media/46779/code-of-judicial-conduct.pdf> (Last accessed June 9, 2020). (Code). Perhaps, it would be wise to include this concept: judges “. . . shall not . . . manifest bias or prejudice toward any person respecting political views or affiliation.”
7. National Center for State Courts, “*Bias in the Court! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions*,” “Eliminating bias from the courts and other aspects of the justice system is critical. This country and the rights and obligations of all who live here are defined by law—the Constitution and laws passed by Congress, states, and localities. If bias exists in the operation of this system for the enforcement and protection of rights, then a corruption exists that goes to the foundation of the nation. Therefore, this elimination of bias is not an exercise in political correctness; it is of fundamental and structural importance to the viability of our system of government.” Available at <https://www.ncjrs.gov/pdffiles1/Digitization/173729NCJRS.pdf> (Last accessed June 10, 2020). See also, Allison P. Harris, *Maya Sen, Bias and Judging 22 Annual Review of Political Science 241-259 (May 2019)* Available at <https://doi.org/10.1146/annurev-polisci-051617-090650> (Last accessed June 10, 2020).
8. Rawls, John, *Justice As Fairness: a Restatement*. 13, Cambridge, Mass.: Harvard University Press, 2001. “We ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable under the circumstances of justice (Theory, §22), and so under realistic, though reasonably favorable, conditions. In this way, justice as fairness is realistically Utopian: it probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values—democratic perfection, if you like.”
9. *Id.* at 30, “Many of our most serious conflicts are conflicts within ourselves. Those who suppose their judgments are always consistent are unreflective or dogmatic; not uncommonly they are ideologues and zealots. The question arises: how can we make our own considered judgments of political justice more consistent both within themselves and with the considered judgments of others without imposing on ourselves an external political authority?”
10. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (When addressing whether “hard-core pornography” can be defined, Justice Potter Stewart wrote in his concurrence, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).
11. “In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial power, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men.” Massachusetts Constitution of 1780, I, XXX, Declaration of Rights. (Emphasis added); *Building a Government of Laws: Adams and Jefferson 1776–1779*, in *Legal Doctrines of the Rule of Law and of the Legal State* (James Silkenat, et al., eds.), (38 *lus Gentium: Comparative Perspectives on Law and Justice* 267, 2014) at 7-8; Available at https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1417&context=all_fac (Last accessed June 8, 2020).
12. “IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.” Available at <https://www.sos.state.tx.us/statdoc/forms/2204.pdf> (Last accessed June 9, 2020).
13. “Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.” Preamble, Code
14. *Id.* “The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They [Judges] should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.”

15. State Commission on Judicial Conduct, Available at <http://www.sjc.texas.gov/> (Last accessed June 9, 2020).
16. See Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 *Law and Contemporary Problems* 69 (Winter 1970) Available at: <https://scholarship.law.duke.edu/lcp/vol35/iss1/6> (Last accessed June 9, 2020); See also, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. Rev. 729 (1906).
17. National Center for State Courts, 2019 Survey Analysis, p. 1, (January 3, 2020) Available at https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf (Last accessed June 9, 2020), “This year’s State of the State Courts survey shows that Americans still feel broad confidence in our court system However, the current political environment in the country poses risks that seem to be influencing public attitudes toward the court system. Even as they give strong marks to the economy, Americans are increasingly distrustful of many pillars of our society, including government, large corporations, organized religion, colleges and universities, and other institutions. This survey reveals decreased confidence in all levels of the court system – the U.S. Supreme Court, federal courts, and state courts – and lower scores on a range of attributes related to court performance, customer service, and equal justice. The courts remain more popular than other parts of our government at all levels, but they are not immune from this period of deep public cynicism.”
18. Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 *Law and Contemporary Problems* 69-93 (Winter 1970) Available at: <https://scholarship.law.duke.edu/lcp/vol35/iss1/6> (Last accessed June 9, 2020); See also, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. Rev. 729 (1906). Professor Miller also points out in his 1970 article that, at that time, judges were beset by some of the very same issue judge face today. Miller said, “Two other factors merit mention: the judiciary today is required to act at a time when polarization is occurring over a number of fundamental goals of the American people, and second, it must operate during a period of the most rapid social change in history.” Miller at 77.
19. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 *The Journal of Politics*, 697, 699 (August 2006). “Some argue that procedural justice considerations necessarily rest on knowledge of institutional procedures, however, and so, given the general lack of information citizens have about courts, perceptions of fair procedures can hardly be expected to influence legitimacy (Gibson 1991).” Benesh continues, “Nonetheless . . . information at the state court level is possibly driven by experience and by contact with the courts or even by television and movie portrayals” See also, National Center for State Courts, 2019 Survey Analysis, p. 1, (January 3, 2020) Available at https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf (Last accessed June 9, 2020), “This year’s State of the State Courts survey shows that Americans still feel broad confidence in our court system However, the current political environment in the country poses risks that seem to be influencing public attitudes toward the court system. Even as they give strong marks to the economy, Americans are increasingly distrustful of many pillars of our society, including government, large corporations, organized religion, colleges and universities, and other institutions. This survey reveals decreased confidence in all levels of the court system – the U.S. Supreme Court, federal courts, and state courts – and lower scores on a range of attributes related to court performance, customer service, and equal justice. The courts remain more popular than other parts of our government at all levels, but they are not immune from this period of deep public cynicism.”
20. See Neal Devins, “Congressional Responses to Judicial Decisions” (2008). *Faculty Publications*. 1633. Available at <https://scholarship.law.wm.edu/facpubs/1633> (Last accessed June 9, 2020).
21. *Texas Court Structure*, Available at <https://www.txcourts.gov/media/1444966/court-structure-chart-october-2019.pdf> (Last accessed June 10, 2020).
22. *The 2019 Annual Report shows: 1. 31 cases were dismissed with language advising the judge about technical or de minimus violations, or violations were of aspirational canons and the judge was cautioned. 2. 5 cases were dismissed after the judge demonstrated appropriate measures were taken to correct the conduct. 3. Of 80 cases where sanctions were announced to the public, 69 resulted in sanctions, 4 resignations, 4 suspensions and 3 formal proceedings.* Available at <http://www.sjc.texas.gov/media/46782/tx-sjc-fy-19-annual-report.pdf> (Last accessed June 10, 2020).
23. Miller at 69.
24. *Texas Judicial Council Committee Report and Recommendations on Public Trust and Confidence (2018)*. Available at June 2018 <https://www.txcourts.gov/media/1441910/public-trust-and-confidence-committee-report.pdf> (Last accessed June 10, 2020). (Judicial Council Report or Report). (Recommendations include improving the judiciary’s response to disaster emergencies, sexual harassment training, and public reporting by the State Commission on Judicial Conduct, court security, recusal standards, and community engagement.)
25. Consider this fair and candid description of “implicit bias.” “When is the last time a stereotype popped into your mind? If you are like most people, the authors included, it happens all the time. That doesn’t make you a racist, sexist, or whatever-ist. It just means your brain is working properly, noticing patterns, and making generalizations. But the same thought processes that make people smart can also make them biased. This tendency for stereotype-confirming thoughts to pass spontaneously through our minds is what psychologists call implicit bias. It sets people up to overgeneralize, sometimes leading to discrimination even when people feel they are being fair.” Keith Payne, Laura Niemi, John M. Doris, “How to Think about ‘Implicit Bias’” *Scientific American*, March 27, 2018, Available at <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/> (Last Accessed June 16, 2020).

NEW

Judges

as of 6/30/20

Hon. David Barkley

Child Protection Court Eighth Region South
Associate Judge

Hon. Larry Doss

7th Court of Appeals
Justice

Hon. Keith Downs

Northeast Texas Child Protection Court No. 3
Associate Judge

Hon. Jennifer Habert

50th District Court
Judge

Hon. Meredith Kennedy

78th District Court
Judge

Hon. Ken Leggett

Court #32
Associate Judge

Hon. Jesse McClure

339th District Court
Judge

Hon. Benjamin Moore

Hays County
Associate Judge

Hon. Albert Pattillo

216th District Court
Judge

Hon. William Porter

323rd District Court
Associate Judge

Hon. Geoffrey Puryear

460th District Court
Judge

Hon. Victor Salas

65th District Protective Order Court
Associate Judge

Hon. Reedy Spigner

Court #3
Associate Judge

Hon. Cheryl Vaughan

Child Protection Court Eighth Region North
Associate Judge

Hon. Lewis White

Fort Bend Associate County Court at Law
Associate Judge

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Hon. Bobby D. Burnett
50th District Court
Seymour

Hon. Jake Collier
158th District Court
Lewisville

Hon. Joseph Connally
244th District Court
Odessa

Hon. Carlton Dodson
7th Court of Appeals
Lubbock

Hon. Joe B. Evins
206th District Court
Edinburg

Hon. Charles Holcomb
Court of Criminal Appeals
Wimberley

Hon. Ray Olivarri, Jr.
144th District Court
San Antonio

Hon. Joe Spurlock
2nd Court of Appeals
Colleyville

Hon. Gus J. Strauss
2nd 25th District Court
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247th District Court
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