The Appellate Advocate

State Bar of Texas Appellate Section Report

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ARTICLES

SPECIAL FEATURES

REGULAR FEATURES

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Chair's Report

David S. Coale, K&L GATES, LLP, Dallas

Best wishes to you for the New Year. Our Section moves forward on many fronts.

Thanks to the generosity of the many Section members who volunteered to help with Bar President Terry Tottenham's effort to assist veterans with legal needs. The Bar staff was very impressed with the number of volunteers and their ranges of experience, and I hope that some deserving veterans receive needed legal advice as a result of our volunteers.

Macey Stokes leads the planning for our Advanced Civil Appellate course this September. If you have an idea for a good presentation—either for the main course or the "Appellate Law 101" seminar the day before—please contact Macey sooner rather than later! We will receive more ideas than we have slots and want to be sure your idea gets full consideration.

The all-electronic *Appellate Advocate* is off and running under capable editors Brandy Wingate and Dylan Drummond. Aside from the obvious quality of the publication, their resourcefulness has recently proven itself in two other ways. In this issue, the article "Letters from Paradise" by Rebecca Copeland was entirely solicited and arranged via Twitter (we are still waiting for the first article actually written on Twitter, but I expect it soon). Also, contracts have been signed with Westlaw and Lexis for the content of the *Advocate*, which expands the audience for its good content and offers the Section a little income in the bargain. Brandy and Dylan always welcome article submissions—and don't hesitate to challenge them with creative ideas; they can handle it!

Each of our Bench-Bar, CLE, Corporate Counsel, Diversity, and Member Services Committees has planned a program or other outreach to a local bar association in the months ahead. I'm hopeful not only of increased membership in and enthusiasm for the Section, but of "templates" for good programs that we can build upon in years ahead. Scott Rothenberg and Thomas Allen continue work on the "Hall of Fame" initiative to honor deceased members of the appellate bar who practiced with great distinction.

Legislature Committee co-chairs Jerry Bullard and Justice Sherry Radack stand ready to monitor the Legislature as it begins its 2011 session. Among many important issues, significant budget matters lie ahead, and we look forward to receiving their updates about the legislative session.

And, this June, the Section returns to the State Bar annual meeting, led by CLE Committee chairs Chad Baruch, Brett Busby, and Rocky Dhir. We are co-sponsoring a "track" of programs on the morning of June 24 with the Individual Rights and

Responsibilities Section. I look forward to seeing you in San Antonio at our programs if you plan to attend the Bar's annual meeting.

The Section, as well as the entire bar, suffered a great loss late last year with the untimely passing of Greg Coleman. He was a great lawyer and person and will be missed by many. The Council of the Section is considering appropriate ways to show our respect for Greg, and I welcome your input.

As I said in my remarks at the annual meeting of our Section at last year's Advanced Civil Appellate course, our Section is a community of learners and teachers. It has been a joy to watch the energetic, enthusiastic leaders of our committees work with that community this year. I look forward to continuing to share their efforts with you in programs, seminars, and publications as 2011 continues.

Disclaimer

Contributions to the Appellate Advocate are welcome, but we reserve the right to select material to be published. We do not discriminate based upon the viewpoint expressed in any given article, but instead require only that the article be of interest to the Texas appellate bar and professionally prepared. To that end, all lead article authors who submit an article that materially addresses a controversy made the subject of a pending matter in which the author represents a party or amici must include a footnote at the outset of the article disclosing their involvement. Publication of any article is not to be deemed an endorsement of the views expressed therein, nor shall publication of any advertisement be considered an endorsement of the product or service advertised.

The Editorial Board of the

Appellate Advocate, as well as the officers

and council members of the

Appellate Section of the State Bar of Texas,

would like to thank LexisNexis

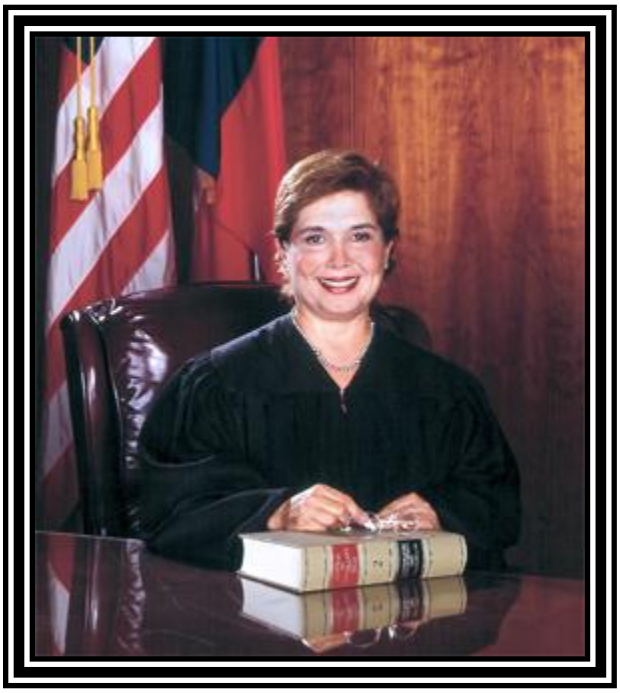
for its generous support of the

Appellate Advocate.

An Interview with Justice (Ret.) Linda Reyna Yañez

Brandy M. Wingate, SMITH LAW GROUP, PC, McAllen

On November 29, 2010, former Justice Linda Reyna Yañez was interviewed by Brandy Wingate. Justice Yañez was appointed as a Justice on the Thirteenth Court of Appeals by Governor Ann Richards, becoming the first female justice to serve on that court and the first Latina to serve on an appellate court in Texas. Justice Yañez served with distinction for seventeen years and now serves as a visiting judge.



Questions by: **Brandy M. Wingate (BW)**
Answers by: **Justice (Ret.) Linda Reyna Yañez (LRY)**

BW: First of all, thank you for giving us your time, and I'm honored to be interviewing my mentor and friend, who helped me get the job here at the Thirteenth Court of Appeals and who I owe a lot of my success to, so thank you.

LRY: And let me just say thank you for giving me an opportunity to engage in this exercise as I am getting ready to exit the appellate bench, and I'm retiring at the end of this year, so this is kind of nice to have this reflection at this point.

BW: Well, we're very excited, and I think that our readers are going to be excited to hear about your colorful background, so let's start there. You grew up here in the Valley or at least part of the time here in the Valley, right?

LRY: Yes. Born and reared in Rio Hondo, a little town in Cameron County, 1,500 people, and I think it's still the same size. And I went to school there from—I went to first grade at five years old. I think we had fifty-seven in my graduating class, so it was a small town.

BW: But you also did farm work while you were growing up?

LRY: Yes. In the '60s when I was a sophomore in high school, my parents had to leave the Valley because the unemployment rate was so high at the time. My parents didn't even finish high school, so they worked as unskilled laborers. My parents and my grandfather went to Illinois—my grandfather started working for a nursery up in the suburbs of Chicago, which is where a lot of Mexican-American laborers went up during the '60s. Fortunately, my parents, because they spoke English and had a little education, were able to get jobs in factories, but in order to live in the farmworker camps, you had to have family actually working there. So my grandfather and myself and my sister worked in the fields, and we hoed up and down the various rows of vegetable fields. They would pick us up at 5:30 in the morning and leave us out there all day long, and we worked all day from dawn until dusk and then would head back to the labor camps until my parents had enough money to get an apartment. But for that summer, we worked and saved our money so that we could come back to school.

BW: So then you came back down here to Rio Hondo?

LRY: Back to Rio Hondo. So we were full-time students. We came back in August so that we could start in September, and that would have been the summer after my sophomore year. By then my parents had been able to get an apartment because you can't live in the labor camps in the winter anyway. At that time the labor laws were such in the United States that the labor camps were subpar for human habitation. I'm talking dirt floors, no indoor plumbing for purposes of bathing or bathrooms. We used outhouses. We had to get the water in the tubs to bathe. It was unbelievable hardship, and the labor laws did not protect farmworkers. And as we get into my story later, people will understand why that was so important to me when I became a lawyer on those kinds of issues: wage-and-hour and living conditions for laborers in farmworker camps. I worked on those issues both as a student and as a lawyer later. I lived in those places, and so I knew what was needed and how we had reached the level of violating people's human rights, certainly their human dignity. But when you're a teenager, you don't think about those things. You just think, "I have a job. I can save some money so I can go back to school." And that's what we did. When I came home, I was a cheerleader. I was vice president of the Honor Society. I

started my senior year. I should have been the Valedictorian of my class. But I spent my summers working out in the field, and I didn't see any incongruities in that. That's just the way it was.

BW: And so you said your parents had some education but not all the way through high school. Obviously, they must have encouraged you to continue that and thought it was important enough to come all the way back here so that you could stay in the same school. But was one parent more of a role model in that regard or both equally?

LRY: I would say both. My mom was extraordinarily supportive. I had three siblings that went through the labor camps and then started school in Illinois. In fact, they went all the way through school in Illinois, because they were in elementary school at the time. And my mom, I remember her telling me that they had to go through different camps as they traveled north. And what my mother would do—my very assertive mom—she said the minute they arrived, the first thing she would ask is, "Where's the school?," to register the kids in school immediately, even if they were only going to be there for a few weeks. She said, "They're going to go to school," so that was her priority. She didn't get a chance to finish school, so she said, "My kids are going to get an education."

BW: And your dad was the same way?

LRY: Yeah. And he also was different in the sense that he was a Mexican-American dad who didn't put restrictions on us as girls. I would talk about things that I wanted to do, and he would say, "Yeah, go do it." There were no gender rules put on us, such as "You can't do this because you're female," and that was at a time when that was very dominant especially in Hispanic communities. He never told us, "You can't do that because you're a woman, because you're a girl."

BW: And so then you graduated high school, and where did you go to college?

LRY: I went to Pan Am. I got my degree in Inter-American Studies, which is really a double major in Spanish and Latin-American politics and history and geography. I wanted to work for the Organization of American States (OAS). That was sort of my dream at the time. I was always interested in international relations and—which I think had a lot to do with what I ended up doing as a lawyer.

BW: And did you go straight from college into law school?

LRY: No. When I was in my senior year in college, I really didn't know where I was going to work. I went to a bunch of interviews that were set up by the placement

office, and nothing was coming through. My roommate in college married another classmate of ours who got a job at NASA in Houston, so she went up to Houston, and I was trying to decide what I was going to do. And she wrote to me—remember this is before computers, before cell phones. Communication was literally snail mail. I mean, we had to write to each other, and it was long distance to call each other in Houston. We couldn't afford it. So she sent me a letter with a classified ad from a Houston paper and said, "Look, there are all kinds of jobs in Houston. Come up here. Stay with us until you get a job, and we'll help you, and then you can find an apartment of your own." I had been telling her, "Nothing is happening down here," and I told my grandma—I was with my grandma at the time, and I said, "I'm moving to Houston." Well, I literally was preparing to move. I had saved a little money. I was going to take the bus to Houston to go and see Sally McDonald. So I was cleaning and washing my clothes, and I had gone to the store. I came back and my grandmother said, "You got a call from Washington." She wrote down the number. I had done an interview with Mr. Hernandez who worked for the Cabinet Committee on Opportunity for the Spanish Speaking in the Nixon Administration, and he had been to Texas, New Mexico, Arizona, and California interviewing graduating college seniors that they were recruiting to take to Washington and to place them as interns in various federal agencies. And I had interviewed with him, but I hadn't heard back so I didn't give it any more thought. So I called the number, and it was him. It was Mr. Hernandez, and he said, "How would you like to come to Washington?" And I said, "Sure. Why not?" And I did, just blindly, and I asked him, "Where do I go? Where do I report, and where am I going to live?" He said, "Well, the YWCA has dorms." It was like a college dorm setup where women who worked with all the various agencies—most of them worked for the FBI—lived in transition to getting apartments, or whatever, so it was your classic sort of college dorm setup. And I remember—I think it cost like $90 a month or something to live there, and you got food. And so my dad drove me to D.C. So I ended up in Washington, D.C. right out of college.

BW: And how long were you there?

LRY: I was there for a year. They placed me with Health and Human Services, and it just didn't appeal to me. It just wasn't my thing. I wanted to work for the OAS, and one of the women who lived in that dorm where I lived worked for the representative at the OAS from Ecuador. And, I mean, it was just so hard to get in there if you didn't have a master's degree. A lot of women with master's degrees in—this was in 1970—were secretaries. That's all. They wouldn't give you any executive positions at all in any of those agencies. And I met Ben Fernandez from California, who ended up running for president later. He's the

one that told me, "You know what? If you really want to do something, you should go to law school. You should think about that." But that was so far-fetched to me at that moment that I thought, "Why?"

BW: Because not many women went to law school at that time?

LRY: Going back to school another three years—I was 21 years old. It just didn't seem like something that I could just do that easily at that point. I thought I needed to work. I needed to support myself. At that moment didn't seem like anything that was very realistic for me.

BW: And what did you do then, after you left Washington?

LRY: I got married, and I came back to Texas because I married my—the boyfriend that I had had down here. And at that age, those kinds of things end up sort of determining your future more than your own career path. I got pregnant. And I became an elementary school teacher.

BW: And what grade did you teach?

LRY: I figured I needed my students to be shorter than me, so I became a first-grade teacher in a bilingual program in Weslaco. [Laughs]. The bilingual programs were just starting to be part of the education system down here. That was all very new at the time.

BW: Well, having a first-grader myself, I'm sure that was a very challenging job.

LRY: It really was fun because I was in a bilingual class in which the kids were English dominant, so that meant that these parents wanted their children to learn Spanish. And then I taught the Spanish-dominant children English. We had what were called "team teachers." I had a class, and my team teacher had another class. Hers were Spanish dominant, mine were English, and then we would switch them for the language instruction. And so by definition, my parents were more progressive people because they had English-speaking children who they wanted to learn Spanish, and so I had really bright kids. So it was actually very easy because they were such curious, motivated children and parents.

BW: So then so how long did you teach?

LRY: I taught in that program for a year. Then I went to Mercedes, and I taught a fifth-grade class that had had five teachers before I got there. They were kids that had sort of been thrown in there because they had problems. And what's interesting is that in this last election campaign, now that everybody is on Facebook and all

of that, and I had to get on for purposes of the campaign, I heard from a couple of people, one, I guess, that we'll talk about later. But one of my former students wrote to me, and she said, "I remember you so clearly." She said, "You made us feel like we mattered. You were the best teacher I ever had. I remember that we were the class that nobody wanted to teach." She said she had seen me but she felt shy about approaching me. I said, "If you ever see me again, you must do that." She went ahead finished school and she, I want to say, is teaching and was telling me about her children. And I told her, "That's what keeps me going are these kinds of stories." So it was a challenging year, but it was very rewarding for me. I remember the kids didn't even want to go to recess because they wanted to come back into the classroom and hang out with me, and it was a very rewarding experience.

BW: Well, I'm sure that has happened to you in your legal career, too, where you have litigants who have come before you and who later remember you having been a part of their case. Do you have any particular stories about that?

LRY: Oh, yes, the best story. In 1980, I was one of the lawyers in the *Doe v. Plyler* litigation, and that was the case that challenged the Texas statute that required school districts to question children seeking admission into the schools about their immigration status. And that ended up being multidistrict litigation because lawsuits had been filed in various school districts, including Tyler. They were consolidated and were litigated at the trial level in Houston, and the style of the case became Doe versus Plyler. I had a client out of Brownsville named Jose Reyna, and he was denied admission to the Brownsville School District under that statute. And at that time I was with Texas Rural Legal Aid, and so that's how we ended up getting into that litigation. The Brownsville School District had been able to get an ex parte restraining order after there had been a ruling in the *Plyler* case by arguing that Brownsville, which was I think the largest school district that had the largest number of Hispanic children, should be exempted from an injunction preventing the schools from questioning children. And so Jose's mother was served with a restraining order when she went to go apply for admission, and she came to us. And we actually had a full-blown trial on the preliminary injunction hearing. I was the lead counsel in that case. We went through—with lawyers from MALDEF who had already been involved in *Plyler*—we actually went through Brownsville records, and we were able to show that they were counting U.S. citizen children. I mean, obviously, school admission officers are not Immigration officers, and they can't make those determinations, which was our point. And we were able to show it empirically by going through their own records and showing them and the court that that's the kind of determinations that they were making. And as it turned out, Jose was actually a

U.S. citizen himself through his dad but he didn't know it. The mother—they didn't know. They didn't understand the Immigration laws either.

BW: Who does? [Laughs]

LRY: Exactly. And that was the point we were trying to make. And so we litigated that case. It was an unbelievable drama because in the courtroom—in the federal courtroom before Judge Filemon Vela—the courtroom was packed when we had the hearing. We had every news outlet in the country there, including international news outlets. This was such a huge issue, and if they were going to be out from under the injunction, then every school district was going to make the same claim. We had so many lawyers at the table on both sides, on the side of the school districts and the TEA and the Attorney General and then on our side, MALDEF and the Justice Department, all of these people. We had all of these lawyers, and we had all met before we went into court and decided that each lawyer was going to be given a portion of the arguments that we were going to make, and we had sort of parsed it all out. Well, sure enough when we get in there, the judge—everybody wanted to talk—and the judge just got frustrated with everyone. He banged his gavel, and said, "Okay. Everybody, be quiet. On this side of the table, the only person I want to hear from is Mr. Tony Martinez, who represents the Brownsville Independent School District. On this side of the table, the only one I want to hear from is Linda Yañez. She's the only one who has a client before this court," and I thought I was going to pass out. And he gave us a little quick continuance, and I literally went and threw up. And I came back, and David Hall was with me at the table. I said, "David, obviously, we're going to the ask for a continuance here, right?" "No, no, no, no. You'll be fine." I asked, "Remember, we all had a different portion of the argument?" "You'll be fine." Oh, my God. My blood pressure must have been who knows where, so I had to do the direct and cross on every single witness, make every single argument on a 12(b) motion under the Federal Rules. And people were shoving notes in my face from every direction. We had a schoolteacher testify that they needed to exclude these kids because she knew who they were in her class, these illegal alien children. She said they were disrupting her classes because they were not as smart as the . . . . I mean, stuff like that was coming out from these teachers. It was heartbreaking, but our statistical data I think is what really impressed the judge. So at the end of the day, he said—first he said he was going to take it under advisement, and he started so stand up, and we were all standing up. Then he started to walk off the bench and turned around and got back on the bench. And then he said to Tony, "Mr. Martinez, how long will it take you to get the classrooms ready to admit these children?" And he said, "How about Monday?" "Yes, Judge," and he ruled right then and there. And we were all

looking at each other. Oh, my God. Oh, my God. And that was it. He dissolved the restraining order and said, "You guys get the schools ready for those kids on Monday." When he walked off the bench, it was like—I can't even describe the feeling at that moment. And then as we were all walking out, the media was just everywhere on that issue. Okay. So flash forward, the case went to the Fifth Circuit. It went to the U.S. Supreme Court. And so out of the blue, I got a phone call from Channel 5 news. Virginia Kise was the reporter at the time. And she called me and she said—again, before computers, before cell phones, before any of that, you had to get the news out of the newspaper or watch on television—and she said, "Are you ready to gloat on TV?" I asked, "Why?" She said, "Oh, you obviously haven't heard." I said, "No. What happened?" "The United States Supreme Court just ruled in your favor in *Plyler v. Doe.*" [451 U.S. 968 (1981).] I think I threw the phone up in the air, and I was in the reception area of the law firm that I was working with at the time. Euphoric moment. Euphoric moment. And so in my last campaign for reelection—again, now we're on Facebook, Internet, and all of that. I got a Facebook message from Jose. He said, "Hi, Linda. I'm in your commercial"—because in my campaign commercial, we talked about *Plyler*, and we had pictures and a montage on television. And he said, "I'm in your commercial. This is Joey Reyna. I just wanted to tell you that you changed my life." He said, "I went and I finished school and now I'm a registered nurse."

BW: Oh, wow.

LRY: My heart just—I mean, I was just teary-eyed thinking this is the child that the system wanted to prevent from getting educated even though we knew he wasn't going to go anywhere because his family lived and lives in Brownsville. They weren't going anywhere, which is very—that's classic for families who live along the border, and now he is in a profession—one of the most noble professions as a nurse helping society in ways that . . . A lot of people know we can't get enough American nurses. And so I think teaching and nursing are those professions that are the most noble and that don't get paid enough, and that's where my fifth-grader ended up, one, and my client. That's what he's doing now, and he would have been somebody that would have just been cast aside. So these are—how many times does a lawyer get such a real result from a case rather than just something sort of abstract?

BW: Or the exchange of money.

LRY: That's right.

BW: Most lawyers don't ever get to participate in that kind of law.

LRY: I've been very blessed.

BW: Well, who encouraged you to go take that step?

LRY: David Hall.

BW: David Hall? [Laughs} Who also said, by the way, that when you were younger, you were the most gorgeous woman that ever lived.

LRY: [Laughs] He said the Reyna sisters . . . my sisters and I worked the political campaigns. "They used to stop traffic," he says, so we could get people registered to vote. It was—during that time, we were working on the McGovern campaign. That was when I was a schoolteacher, and he said, "You need to go to law school. You really do." I had a daughter. I was divorced. I thought, "No, I can't." I mean, how can I possibly do that? And he literally brought the application to me, and it was already spring. I said, "Well, next year. Next year. It's too late. It's already spring." He said, "No, no, no. There's a law school in Texas that will still take an application." I kept trying to delay the decision. He literally came to my house with the application, and we filled it out and sent it in. Then I got a letter in the summer when I was up in Nebraska teaching migrant children. I went up to the migrant camps in the summer, and I taught children up there, farmworker children. And I got the letter on my way back to go to law school. I talked to my grandmother. She said she would help me out with my daughter, Regi, so that I could get moving. It all worked out.

BW: Then while you were in law school, you met your second husband; is that right?

LRY: Yes. We got married my third year in law school, but he was in Illinois and I was in Texas, so we didn't live together our first year of our marriage because I had to finish school in Texas. Then I went to Illinois after I graduated, and I took the Illinois bar in February because we weren't sure if we were going to stay up there or come back to Texas. I got pregnant with my second daughter, Amparo, and I took the Illinois bar at eight-and-a-half months pregnant. Of course, my favorite story is—you're talking about 1970s. I graduated in '76. This would have been February of '77, and I was taking the bar review courses. There were so few women. At that time I think the women law students were under 15 percent, and Latinas, we were under 1 percent of the students in the country. And so there I am in Illinois. It was at least 80-something percent males, and some of them went to the bar examiners and said they wouldn't take the bar in the same room with me because I was so pregnant. I was going to go into labor and disrupt the test and ruin their lives. And so they put me in a room. Rather than the big auditorium where you sit in the auditorium seat, I took the test in a—just

like a smaller classroom with tables and chairs, which was great for me because I was huge, so they accommodated me way better. Some women took the bar in the same room with me. And then, of course, I did pass the bar. My favorite story is when [my daughter] Amparo took the bar exam herself, I told her, "Amparo, you're going to do great. You already sat through the bar exam," and sure enough she and her sister both passed the bar at the same time. So, yeah. So those were the days, I mean, when women were such a minority. It was such a different climate than when my children and you have come into the profession, and now it's—I think it's becoming the opposite because now more than 50 percent of law students are women, and I think as your generation grows, the law profession is going to be dominated by women.

BW: Well, I know we have talked about this before personally, but what kind of advice do you have for young female lawyers who are just now entering the profession? I mean, you've obviously passed on your love of education and the law to both of your daughters who are now lawyers, but it seems like lately like a lot of glass ceilings have been shattered for women. And so what are the challenges that you see facing the new class of women that are entering the profession and what advice do you have for them?

LRY: Well, you're right, I mean, there have been many glass ceilings shattered from the time that I entered the profession back in the '70s. Just such a different world and environment. For example, on this—on the Thirteenth Court of Appeals, I was the first woman to serve on this Court, so, again, sort of breaking those barriers. And now since I've been sitting in this term, we have five women and one male, and I think that's reflective of the profession in general. There are so many issues that your generation is not going to face because of my generation having come before you, and I think that there's going to be a comfort level that we didn't have. On the other hand, the profession is very demanding, and so for those of us who are also mothers and wives, those demands can be very daunting because I think that the nurturing of our children still lies predominantly with the mom. And so I've had discussions with many young woman, including my own children, about whether "you can have it all." That was a phrase very dominant in my generation—about women having it all, being able to have it all. And I don't think you can because there are trade-offs. I've been quoted in the past as saying that usually the ones who sacrifice the most are the children, because we have to make choices, and I know that's true for myself. So when I received the Lifetime Achievement Award from the Hidalgo County Bar Association, I publicly told my children that I really owe them for their sacrifices for me to have done what I have done. That was time away from them, and I think Regi, my older daughter more so, because she was two years old

when I went to law school, and so we spent some time apart. That's time I'll never get back. At the time I thought it was the right thing, and it probably was, but it was at somebody's expense. And so for us to think that it isn't is just not true. It really is. And I don't think that's any different for this generation. Those are choices that women still have to make because of the demands of the profession.

BW: Well, now I want to go back to your appointment you just mentioned. You were appointed by Governor Ann Richards in 1993. Was being a judge something that was even on your radar at that point, or did it just come out of the blue, or how did that whole process get started?

LRY: The appointment definitely came out of the blue. I had been practicing law for seventeen years at that point. When I went to law school, I tell people, I had a purpose, and that was to come back and work on the issues that were very pressing to me, both as a person and as a teacher. I had the privilege of going back and being able to work on those issues. And that was my only ambition. I thought, when I received my law degree and my law licenses in Texas and Illinois, "These are my weapons. This is what I'm going to be able to use to be able to go out there and fight those fights." That was my only ambition. I said, "Dear Lord, please help me be a decent lawyer." No ambition beyond that. Sometimes I speak to law students, and they tell me, "I want to be a judge." I can't relate to that because that just was not what I was thinking at that point. So I started out for five years with Legal Aid, and then Reagan became president, and there were many restrictions on the work that we could do on the issues that I wanted to work on. I couldn't do it through Legal Aid, so I went into my own practice and was in private practice on my own. I ended up being the first woman partner at what is now Roerig, Oliveira & Fisher. Anyway, so I'm moving along thinking I'm going to practice law for the rest of my life. I worked on, as we have talked a little bit here, some very high profile cases, so my name was out there. I was in the media frequently on a lot of these issues, and so I was well-known, but all I was doing was working, working, working. And I tell young people go out there, do the best job you can on the issues that you care about, and your peers are going to notice and opportunities are going to come—not because you calculated it, but because people will notice you. And that's exactly what happened to me. As I was working, I went back to Illinois and went to work for MALDEF working on a variety of issues and then had an opportunity to teach. And so I went to Boston and became the instructor and the director of the Immigration clinic at Harvard Law School, which was also an amazing experience. I received phone calls from friends saying, "Oh, there's a judicial opportunity here or there," and that's when the seed sort of got planted in me. I was like, "Me?" I'm the one that's been sort

of leading the revolution on a lot of very controversial issues, and so I didn't think of myself as anyone who would be tagged for that kind of position. But my colleagues would say, "But what we see is someone who works hard, who's dedicated to their job, who works with integrity and honesty." And so I tell young people, it doesn't matter what area of the law you're working in. It doesn't matter. Whatever attracts you, whatever issues you want to work on, it doesn't matter what the substance of the area of law that you're working in. What matters is how you do it. If you do your work with integrity, with discipline, with the virtues that we want to see in lawyers, that's what matters, and that's what your peers are going to notice and that's how they're going come to you. I just never saw myself as someone who would be seen in that light. And then I was working in Brownsville on a project working with Haitian refugees who had been transferred around from the Northeast down to Texas, when I literally received a call out of the blue. Literally out of the blue. My phone rings. "Hello Linda, this is Gilberto Hinojosa," who, of course, was a justice on this Court, and he said, "How would you like to be appointed to the Thirteenth Court of Appeals? There's an opening on the Court, and Governor Ann Richards would like to appoint a woman. And not only will that be the first woman on this Court, but she's also interested in appointing a Latina." Because in 1993, and it's hard to believe, but in 1993 there had never been a Latina appellate judge on any court in Texas ever. So it was going to be this historic appointment. And my answer was just, "What does this mean? What do I do?" And he said, "Well, you have to run. You'll get appointed, but you'll have to run in the next election," which would have been in '94, "and you have to"—

BW: —So you have one year?

LRY: Uh-huh. So he said, "You have to convince a 20-county area." Obviously, I had never run for office before, and he said, "So you have to be prepared, and you have to convince them that you're willing and ready and able to go out there and campaign." And I sort of had to make a quick decision, and sure enough, within a couple of weeks I think after that phone call, I was confirmed for the position. So that's where it came from, and then as they say, the rest is history. I have now been here for seventeen years.

BW: And has Cindy Polinard, your staff attorney, been with you the entire time?

LRY: She's been here, I think, about eleven years. Cindy says she would have been a law student forever if she could.

BW: And that's what you are at the Court of Appeals, a student of the law.

LRY: Yes. So this was a perfect fit for her. And a perfect fit for me, and I just—I owe so much of the good work that comes out of these Chambers to her.

BW: What's your favorite part of this job?

LRY: My favorite part about it—well, first of all, I think it is a challenging position because we have general jurisdiction so we hear every imaginable case, as you know, criminal and civil. Whenever we have an issue about some esoteric rule that we're looking at, some procedural point that we're looking at that gets us all riled up here, those are some of the my favorite moments, when we're looking at those kinds of issues, which is probably pretty dorky. [Laughs] But since the people that are going to read this are appellate lawyers, they're going to know what we're talking about. But, yeah, I think those are the times that at the end of the day you feel like, wow, we did something sort of fun and significant. I think that's my favorite part, and the fact that we work with all of you brilliant lawyers, as opposed to the poor trial judges that have no clerks to work with. And I love the multi-member aspect of appellate work, that we get an opportunity to actually have a discussion of these issues with our colleagues. That to me is the best because then we hope we come up with a good result because we've had different points of view at the table on whatever the issue is.

BW: Having worked here for four years, I know how hard everyone here works to make the right decisions and to get the law right. Recently, Justice Brister made some comments to the *Texas Lawyer* about the Thirteenth Court of Appeals, and specifically he was responding to a question about whether he thought the Texas Supreme Court was defense-oriented. His response was that, well, that he's looked at a lot of the per curiam decisions that have been written by the Texas Supreme Court over the last ten years. He claims the great majority of those have been out of the Tenth Court in Waco and the Thirteenth Court here in South Texas, and way out of the proportion to the other courts. And he would say those per curiam decisions were all defense-oriented and necessary because this Court and the Tenth Court were not applying simple straightforward law. How does that make you feel when people say those things?

LRY: First let me say that I read the *Texas Lawyer* article, so I want to start my comments by saying that in another question they asked him whether or not the Supreme Court has changed jurisprudence in Texas and improved the jurisprudence. And he gets into some points in his response that, as I was reading it, I thought he could have taken those right out of a million speeches that I have made across the state about appellate courts. He says that it would be better if you had people across the political spectrum: "I just think the

broader range of views you have sitting at the table, the better decision you're going to have." I absolutely, totally agree with him, and when I ran for the Supreme Court, that was my argument—we need to have a broader perspective and spectrum of opinions at the table. He talks about the election of judges and how millions of people who are voting don't know who they're voting for. That is a problem with electing judges in a huge state like Texas, where you literally have millions of people voting for people they don't even know. And he talks about how some people say they don't want partisan judges but, really, they do because they want them to rule a certain way. And, again, I couldn't agree with him more. And then he talks about appointments as being as partisan as elections, and I agree with him both at the state level and at the federal level. Those are not non-political decisions. They're all political decisions. I am, like him, someone who has been appointed and somebody who has run, so I have been in both situations. And the advantage, I guess, of appointment is that there is a group of people that is at least looking at the merit of the judge's ability to be a judge, and so I think there is some merit to that argument. I just wanted to sort of state for the record that Justice Brister and I absolutely agree on all of those points. But on his response to the question that you're talking about, these were sort of my thoughts. First of all, I thought it was interesting that the reporter didn't ask him about Professor Anderson's article—he's a professor at the University of Texas Law School, and I believe the title of the article is "Judicial Tort Reform," where he did an empirical study of the Texas Supreme Court and the decisions from that court. And in Justice Brister's response talking about the Waco Court and the Thirteenth, he talks about us being the most reversed courts—he calls us the "outlier" courts. Well, Professor Anderson concluded that the Texas Supreme Court is the "outlier" court in the United States because their rulings were so much more defense-oriented than any other court in the United States. And so using the criteria that he uses to critique the courts in Texas, then the Texas Supreme Court is out of the mainstream of the United States courts, so that's one point that I would make, that he doesn't address that issue in his response. And then specifically I would say that both with respect to Justice Brister and those persons who are running as challengers against incumbents of our Court, for example, who use statements—these broad statements that the Thirteenth Court of Appeals is one of the most reversed court in Texas—that is so misleading and not useful to the public. Because if we go back and look at the raw numbers, the number of cases that get reversed is such a tiny minority of the total cases decided. I was looking at 2009, and the reversed and rendered I think was like 6 cases that whole year when we issue 600-plus cases a year. So you're talking, what, less than one percent of the cases, because appellate courts are not in the business of reversing lower courts, not the Texas Supreme Court, not

the intermediate appellate courts. We are not in the business of reversing trial judges and juries. I had an opponent who ran against me who called us the "court of affirms." Well, yes, because we do not just substitute our judgment for that of the trial court. We have to find a serious-enough error, right? We have to find harm—even if there's an error, we have to do a harm analysis to determine whether you're going to reverse a trial court. Well, the Supreme Court does the same thing when it's reviewing the Courts of Appeal. So it's a very, very low number of cases that get reversed. So when they use language like—and it's on its face superficially true, that "X" court is the most reversed court—they're not also saying "but it's a very, very small percentage of the cases the court actually decided that are being reversed." So the public gets, I guess, this notion that, oh, my goodness, half of the cases that that court is issuing are getting reversed, and nothing could be further from the truth. So that's not very helpful without sort of filling in what's left out of that statement. What's left out of that statement is more important than the statement itself. And then I think we were looking at those per curiam decisions, and a lot of those were mandamus cases where we just denied the petition, and so there wasn't a determination made of exactly what was the reason for the denial. And then the Supreme Court went ahead and took the case and issued whatever opinion they did. But it wasn't about us making a "serious misinterpretation of the law," a very straightforward law in those cases. Again, what's left out becomes more important than what is being addressed, and so I think that Justice Brister's statements on the surface appear accurate, but they're reduced too much, and, again, it's not a full and accurate picture of what's really going on. And so I would disagree that we're some out-of-the-mainstream court, which is what one would conclude from that. And, also, he talks about how we need different perspectives at the table. I think that is a factor in why we may see some issues differently. And he talks about how we bring life experiences to the table, and so I agree with him that we do. That's why I think it's important that we have some of these discussions about—the discussion we had earlier, what have been my life experiences, what have been my experiences as a lawyer, all of which I bring to the bench just like Justice Brister brings all of his to the table. And it's important to have all of those, but, again, I think we need to sort of fill in the gaps of his analysis.

BW: So what's next for you? What comes next?

LRY: What comes next is—we're sitting here and it's November of 2010, and in January of 2011 I will be designated as a retired appellate judge and an active visiting judge.

BW: So now you get to try your hand at the trial bench?

LRY: Yes. I'm looking forward to that. I'm in discussions now that hopefully will have been resolved by January in which I will be sitting as a trial judge. I'm looking forward to those challenges, and then I'll be the one sitting there saying, "Oh, my goodness. What are they going to do to me over there in that other building upstairs?" [Laughs] I'm looking forward to that challenge. I still teach in the trial advocacy program at Harvard, and I'll be there in January, and I sit as the trial judge in those cases that the students present. And every time that I'm sitting there, I admire the trial judges because of having to make those instantaneous rulings as they're trying to listen to the testimony and listen to the question and rule on an objection quickly, and so now I'm going to be put on the spot that way. So, again, I think it's going to be a challenge because one of the best things about being here is we have time to think and deliberate, and that's not the case at the trial level. And then I don't get to have discussions with people like you about those rulings.

BW: I will miss our discussions as well. Well, thank you so much for sitting with us, and good luck.

LRY: Thank you.

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Memorial Remarks for Gregory Scott Coleman

CHIEF JUDGE EDITH HOLLAN JONES, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, Houston

It was with great sadness and shock that we learned of Greg's passing shortly before Thanksgiving 2010. In order to honor his memory and recognize his monumental contributions to the Texas appellate bar, the *Appellate Advocate* is privileged to reprint the memorial remarks given on Greg's behalf by his former Judge, mentor, and friend: Chief Judge Edith Jones.—*Brandy and Dylan*

DECEMBER 2, 2010
AUSTIN STAKE CENTER
AUSTIN, TEXAS

It is an honor to be asked to talk today about Greg Coleman, and I thank Stephanie for having invited me to do so.

The relationship between judges and law clerks can be very special. Not only is it our privilege to receive assistance from the best and brightest young law students, but, through their success and achievements in their professional lives, we have an opportunity to influence the future. Good law clerks become our friends, our companions and our comrades in shared belief. They are part of our family. Greg was one of the best clerks I have worked with and one of the most distinguished lawyers following his clerkship. He was one of the best in every way.

On this type of sad occasion, the question always arises why God chose to take Greg home so soon? I have pondered this today and at other times. We, of course, will never know the full answer in this world, but a friend pointed me to a passage in the Book of Genesis that may provide a clue to God's design, especially for someone like Greg. In Genesis 5:24, it is said that Enoch, who lived in the generations following Adam, "was walking with God, and he was not, for God took him." The same language is used of the prophet Elijah, who the Bible says was translated directly to Heaven without first undergoing death. These men loved God and were favored by Him accordingly. And so one may conclude that God takes us when He is ready—and when He knows in His wisdom that we are ready to be in His company. Greg was ready to go home to the Lord, but he will remain vivid in our memories as long as we live.

While remembering an 18-year long friendship with Greg, I thought of life as a book in which the pages turn and, as events unfold, we create bookmarks in our memory for people, places and actions that are of great significance. To pay tribute to

Greg, I have turned to some of these bookmarks that reveal his extraordinary qualities of intellect, modesty, diligence and love of his family and his fellow man.

The bookmarks start with his clerkship in my chambers in 1992-93. He came to his clerkship with a record of high academic accomplishment as an honors graduate of the University of Texas School of Law and Texas A&M undergraduate and MBA programs. More than that, however, was represented on his resumé, which was quite long for a law school graduate. He listed numerous community-service activities, including a two-year mission for the LDS church in Japan, volunteering at a local food bank, and volunteering as a high school track coach. From his early years, Greg had sought to serve others. He linked personal accomplishment with community service. Greg was deeply involved in his church and youth and charitable activities for the rest of his life.

During the clerkship, he was an unusually hard worker. I remember his helping me out with extra, non-glamorous projects while I was on a family vacation. He did this although not asked by me just to assist in the disposition of our very heavy caseload. He arrived at the office early, a practice uncommon among the clerks who are often young, unmarried and less disciplined in their habits. Most clerks also find the demands of a clerkship fully consuming professionally, but not Greg. Greg exceeded the confines of the clerkship when he took a position as an adjunct professor at South Texas College of Law to better support Stephanie and their young family. His class was so popular that seventy students signed up for his teaching the following semester. Characteristically, during his clerkship he volunteered regularly with a teenage youth group and even subsidized their scuba diving trip with his own money.

Despite these commitments, Greg left work in time to be with his family. When Greg and Stephanie came to our house for a clerks' dinner, the boys were always invited. Chase and Austin were then toddlers, and they loved playing with guns and Star Wars toys that we had stored in a cabinet after our boys outgrew them.

A final anecdote from this period shows Greg's thoughtfulness. I had hired Brad Smith from Michigan to serve in chambers a year after Greg. Brad and his wife Diane, with three children and a fourth on the way,[1] visited Houston in search of a house for rent. Greg and Stephanie were well acquainted with the challenge of managing family finances during a clerkship, but they did not know the Smiths. Yet they drove Brad and Diane around Houston for hours to help them find a nice, affordable neighborhood. Later, the families often got together, and Greg and Stephanie babysat with Brad's children while Diane was giving birth to baby George.

FN 1: Brad and Diane now have seven children, but they are neither LDS nor Roman Catholic!

In memory of their friendship, and Greg's repeated kindnesses, Brad Smith has flown to Austin for this occasion.

Early in our acquaintance, I wrote two letters about Greg's unusual talents. To Bryan Garner, the well-known writer of legal dictionaries, who had generously corresponded with Greg, I wrote in 1993: "I predict Greg will have an enormously successful career. He is one of the most enthusiastic, dedicated and multifaceted young graduates I have had the privilege to know." And to Justice Thomas, I wrote recommending Greg for a clerkship at the U.S. Supreme Court in 1994 that he "is one of the hardest workers I have ever had," he is "far and away one of the most productive clerks," and the secrets of Greg's success are concentration, organizational ability, and a wonderful wife. I guess I was prescient.

Justice Thomas, who is here today, will have more to say about Greg's clerkship with him, but I have bookmarked a couple of memories from my occasional conversations with Greg during that exciting year. The wages at the Supreme Court are low, and the cost of living in the Washington, D.C., area is high. To save money, the Colemans had only one car while they were there, which Stephanie drove. Greg bicycled to work, even during rain and snow, for that entire year. He adhered to a disciplined schedule—again, uncommon among law clerks in general and especially those at the Supreme Court—of leaving the office in order to be home for the family dinner. After putting the boys to bed, however, Greg routinely worked at home for several hours. In fact, he only slept about four hours each night while he clerked for Justice Thomas. But he loved the work, and he loved this Justice. Later on, Justice Thomas told me, "Send me more Greg Colemans!"

Greg had returned to Texas and embarked on a lucrative career in appellate advocacy when then-Texas Attorney General John Cornyn, now a United States Senator and with us today, asked him again to make a personal financial sacrifice by becoming the state's first Solicitor General. Senator Cornyn had the vision to create this office. The Solicitor General's office represents the state in federal and state appellate courts utilizing talented young lawyers who will agree to serve the state for just a few years. It is fair to say, I think, that Greg Coleman implemented the vision and made the office tremendously successful in promoting the state's interests in court. Greg attracted a bevy of bright lawyers who learned from him, acquired valuable professional experience and then launched successful careers after serving with Greg. Many members of the Texas Solicitor General's office are at this service in tribute to Greg's influence on their lives. Jim Ho and Ted Cruz, who have followed Greg as Solicitor General, are both here, and both consider Greg a mentor and professional model.

Since Greg re-entered private practice nearly a decade ago, he and I have not seen each other often, because he has been so busy. But we talked by phone and sometimes, while on business trips to Houston, he would stop by my office for a visit. He loved practicing appellate law. He was eventually admitted to practice in all but two federal circuits in addition to the Supreme Court, and he filed briefs and argued cases all over the country. He appeared in the Fifth Circuit at least two dozen times, several times in the Texas Supreme Court, and nine times in the U.S. Supreme Court. He enjoyed discussing the nuances of practice before various courts, regaling me with his experiences, and informing me about hot topics in the law. He was especially happy when the opportunity arose to form his own appellate practice at Yetter Coleman. The firm enabled him to create his own environment for law practice, and it encouraged his pro bono publico representation of clients in causes he believed in.

The zenith of his pro bono work occurred in the spring of 2009 when he argued two important cases in successive weeks at the U.S. Supreme Court. I was so proud of his achievement. One of these cases sought to allow small municipalities and government bodies to "bail out" of onerous preclearance procedures required by the federal Voting Rights Act. The other suit was on behalf of firefighters in New Haven, Connecticut, who had been denied promotions for which they had otherwise fully qualified solely because of their race. It is virtually unheard of for a lawyer to argue two cases in two weeks at the Supreme Court. The required preparation for one argument includes becoming intimately familiar with the lower court records, participating in advance moot court arguments, and managing a team of lawyers. The stress of these responsibilities normally prevents a lawyer from attempting back-to-back arguments. Greg was no ordinary appellate lawyer.

Not long before the arguments were to take place, a news article reported on this unusual event. Greg was described by an admirer as understated and soft-spoken. The writer had also interviewed Greg about the impending challenge. With characteristic modesty, Greg said, "I'm not sure what to say about that. Both cases are very important to the clients, and we're going to do everything we can to give them adequate representation." Greg placed the focus on his clients rather than himself. By all accounts, his arguments in each case were brilliant, and he won both of them. His clients, two New Haven firefighters, and his co-counsel in that case have come here today, as have Greg's clients in the Voting Rights case.

In March of this year, I visited Baghdad, Iraq and met the top Iraqi judges under the auspices of our government's important rule of law program there. My visit was generated by Greg, who also went to Iraq in late May. It was our shared privilege to represent the United States and encourage the development of the legal system in a country where judges routinely risk their lives to establish the rule of law. Greg received

the initial invitation to visit because he had so impressed a U.S. Department of Justice lawyer who was his *opponent* in the Voting Rights Act case. After she transferred to Iraq for a tour with the rule of law program, this lawyer solicited Greg to participate and, at Greg's urging, then invited me.

Greg deeply impressed the Iraqis he met. The Chief Justice of Iraq, Justice Medhat, is sending a letter of condolence. As an aside, Greg generously gave Justice Medhat a pair of Tony Lama boots. Greg wrote in a report that at each of the several law schools he visited, the faculty, students and attorneys in attendance routinely kept him answering questions for several hours. One such extended meeting occurred on an Iraqi weekend day. He had evidently struck a responsive chord with the audiences in his remarks about our federal system and the division of duties between our national and state governments. Greg had prepared with his usual diligence to inform the Iraqis on a subject of vital importance to them. For a side trip, Greg was allowed to visit the excavations of the ancient city of Ur, where a guide showed him the reputed home of the patriarch Abraham. Abraham was a wealthy man in Ur, then one of the richest cities of the fertile crescent, the cradle of Western civilization, before he was called by God and took up his pilgrimage ultimately leading to the promised land. This must have been a spiritually significant occasion to Greg.

When I had to report the plane accident to my former law clerks, most of whom knew or knew of Greg, dozens of them immediately responded with expressions of shock and sympathy. They called him gracious, talented, wonderful, "one of the best advocates I've worked with." One of my clerks summed up his career well: "He proved it is possible to succeed in private practice while still continuing to fight for things you believe in."

The final bookmark I note is the gratitude my husband Woody and I both feel for Greg and Stephanie's generous support of the David R. Jones scholarship at Pepperdine University. The scholarship was established in honor of our son who tragically perished in a car accident. This was a tangible expression of the mutual affection we have shared.

To conclude, I would say that all the superlatives that have been said about Greg are true. He demonstrated that nice guys can finish first. He lived a full, noble life. He put his family first while also leaving an indelible imprint on his fellow church members, his law firms and clients, law students, young people, the state of Texas and the United States. He served tirelessly while walking humbly with God.

As we mourn Greg's passing from our presence, please recall Christ's promise in John 14:15-18: "If ye love me, keep my commandments, and I will pray the Father, and He will give you another Comforter . . . that he may abide with you forever." I know that as time goes on, the Spirit will offer comfort to Greg's family and friends in many and

unexpected ways, not least in these treasured memories of the life Greg lived and the excellent man he was.

In the name of Jesus Christ, Amen.

Clueless over Clewis *or: How I Learned to Stop Worrying and Welcome* Brooks v. State

RICARDO PUMAREJO JR., KITTLEMAN, THOMAS & GONZALES, LLP, MCALLEN

INTRODUCTION

In 1996, a divided Texas Court of Criminal Appeals created a factual sufficiency standard of review for criminal appeals in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). From the beginning, *Clewis*'s life was fraught with peril. *Clewis* escaped an early death from the hands of a three-judge dissent in *Johnson v. State*, 23 S.W.3d 1, 12 (McCormick, J., dissenting) (advocating that *Clewis* be overruled). Six years later, *Clewis* escaped a closer brush with death from a four-judge dissent in *Watson v. State*, 204 S.W.3d 404, 421 (Cochran, J. dissenting) (advocating that *Clewis* be overruled). The court of criminal appeals opened the door for a third attack on *Clewis* when it granted the State's petition for discretionary review in *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010), to address whether a meaningful distinction between legal and factual sufficiency review exists.

In *Brooks*, a four-judge plurality—consisting of Judges Hervey, Keller, Keasler and Cochran—issued an opinion declaring that the legal and factual sufficiency standards had become "indistinguishable." *Id*. at 894-95. The opinion went on to state that "the *Jackson v. Virginia* [legal sufficiency] standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis*, are overruled." *Id*. at 912. In addition to joining the plurality opinion, Judge Cochran wrote a concurrence that further expressed the need to abandon *Clewis* and the factual sufficiency standard of review. *Id*. at 912-26 (Cochran, J., concurring). Judge Womack joined the concurrence, thus creating the five-judge majority needed to overrule *Clewis*. *See generally Haynes v. State*, 273 S.W.3d 183, 185-87 (Tex. Crim. App. 2008) (explaining how a four-judge plurality opinion and a concurring opinion issued in a case previously before the court worked together to create precedential authority).

The prosecution-declared war on *Clewis* and factual sufficiency review is over. Prosecutors won the war, this much is clear. What is not clear, however, is what exactly criminal defendants have lost. The answer, as this article suggests, is that there are benefits that criminal defendants can *gain* through *Brooks*'s arrival, and these benefits arguably overshadow the negligible losses from *Clewis*'s departure.

I. *Clewis*'s Interpretation of Legal and Factual Sufficiency Standards of Review

In *Jackson v. Virginia*, 443 U.S. 307, 318 (1979), the United States Supreme Court held that constitutional due process requires reviewing courts to "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." In assessing the sufficiency of the evidence under the *Jackson* standard, a court asks whether, after considering all the evidence in the light most favorable to the verdict, any rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Id*. at 319. Viewing the evidence in the light most favorable to the verdict simply means that the court defers to the factfinder's ability to weigh the evidence and resolve conflicts. *See id*. If the evidence is insufficient under the *Jackson* standard, it is "legally insufficient," meaning that the case should have never been submitted to the jury. *Clewis*, 922 S.W.2d at 132-33. A reviewing court that determines the evidence is legally insufficient must render a judgment of acquittal. *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

Clewis stated that though a court looks at all the evidence when applying the *Jackson* standard, the court only does this so it can fully assess what evidence supports the verdict. *Clewis*, 922 S.W.2d at 132 n.10. After this assessment, all evidence not supporting the verdict is disregarded and only the evidence supporting the verdict is considered when conducting a legal sufficiency review. *Id*. To demonstrate difficulties that could arise under the *Jackson* standard, *Clewis* proffered what is now known as "the forty-nuns hypothetical":

> The prosecution's sole witness, a paid informant, testifies that he saw the defendant commit a crime. Twenty nuns testify that the defendant was with them at the time, far from the scene of the crime. Twenty more nuns testify that they saw the informant commit the crime. If the defendant is convicted, he has no remedy under *Jackson* because the informant's testimony, however incredible, is legally sufficient evidence.

Id. at 133 n.12. With this understanding of how the *Jackson* standard was applied, *Clewis* made a persuasive case for why a second, less stringent evidentiary standard of review was necessary.

Although Texas courts had "adopted the *Jackson* standard as the legal sufficiency standard in direct appeals," the court of criminal appeals had "never held that its application precluded any other type of review." *Id*. at 132. The court thus adopted a factual sufficiency standard of review in *Clewis*. To determine whether the evidence is factually sufficient, a court considers all the evidence in a neutral light, and "sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be

clearly wrong and unjust."[1] *Id*. at 129. In contrast to the *Jackson* standard, the factual sufficiency standard required courts to consider not only the evidence supporting the verdict, but also the evidence against it. *Clewis* also explained that the factual sufficiency standard did not require the reviewing court to afford complete deference to the jury's weighing of the evidence. *See id*. at 133, 135. *Clewis* cautioned, however, that a court should never reverse a conviction simply because it disagrees with the verdict, but only when the conviction appears to be a "manifestly unjust result," though supported by legally sufficient evidence. *See id*. at 135. Any court that did find factually insufficient evidence was required to vacate the conviction and remand for a new trial. *See id*. at 133-34.

> **FN 1:** The court of criminal appeals would later clarify that "the appropriate scope of the *Clewis* criminal factual sufficiency review" permits a finding that the evidence is "factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the evidence." *Johnson*, 23 S.W.3d at 11.

Clewis claimed that the factual sufficiency standard would permit a court to reverse the defendant's conviction in the forty-nuns hypothetical. *See id*. at 133 n.12. The court would be able to consider the testimony of the forty nuns (which it purportedly could not do under the *Jackson* standard) and afford greater evidentiary weight to the testimony of the forty nuns than was obviously afforded by the jury, resulting in a factual insufficiency finding.

Clewis's dissenters argued that the majority had misinterpreted the *Jackson* standard. *See id.* at 155-56 & n.8 (McCormick, J., dissenting). The dissent asserted that the *Jackson* standard requires a court to consider all the evidence—not just the evidence supporting the verdict. *Id*. Therefore, the only difference between the *Jackson* legal sufficiency review and the *Clewis* factual sufficiency review is that the former requires the appellate court to defer to the jury's credibility and weight determinations while the latter permits the appellate court to disagree with those determinations. *See id*. at 152 (McCormick, J., dissenting). *Clewis*'s opponents argued, despite this difference, the *Jackson* standard could still be used to reverse a conviction like the one in the forty-nuns hypothetical. *See id*. at 156 n.7 (McCormick, J., dissenting); *see also Watson*, 204 S.W.3d at 418 (Hervey, J., dissenting). Judge Hervey best explained how the *Jackson* standard resolved the hypothetical in her dissenting opinion in *Watson*:

> The *Jackson v. Virginia* standard has two components. It requires the reviewing court to view the evidence in the light most favorable to the verdict, which means that the reviewing court defers to the jury's

> credibility and weight determinations . . . . The *Jackson v. Virginia* standard then requires the reviewing court to determine whether the jury's verdict is "rational" under the beyond a reasonable doubt standard. This "rationality" component prevents an "unjust" conviction and accomplishes essentially what *Clewis* seeks to accomplish. *Clewis*' 40-nun hypothetical illustrates this. Under the *Jackson v. Virginia* standard, the reviewing court would view the evidence in the light most favorable to the verdict and defer to the jury's determination to believe the impeached witness and to disregard the testimony of the 40 nuns. But, such a verdict cannot be considered rational under the beyond a reasonable doubt standard.

Watson, 204 S.W.3d at 418 n.174 (Hervey, J., dissenting). *Clewis*'s opponents further noted that the *Jackson* standard afforded the hypothetical defendant an acquittal, while the *Clewis* standard permitted reprosecution. *Johnson*, 23 S.W.3d at 15 n.17.

Though the distinguishing feature of the *Clewis* factual sufficiency standard was the purported freedom it gave a reviewing court to disagree with the jury on questions of credibility and weight of the evidence, *Clewis*'s opponents would later point out that even this difference was barely discernible. *See Johnson*, 23 S.W.3d at 13 (McCormick, J., dissenting). The difficulty stemmed from *Clewis*'s tenuous position that a reviewing court can "disagree with the factfinder's determination" so long as: (1) the court remains "appropriately deferential so as to avoid . . . substituting its judgment for that of the jury"; and (2) the court's disagreement seeks to "prevent a manifestly unjust result." *Clewis*, 922 S.W.2d at 133, 135. In the opinions that followed *Clewis*, the court of criminal appeals would continue to restrain a court's ability to disagree with the factfinder's determination. *See Watson*, 204 S.W.3d at 416-17; *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008) ("Appellate courts should afford *almost complete deference* to a jury's decision when that decision is based upon an evaluation of credibility." (emphasis added)).

II. *Clewis*'s Legacy

An evaluation of *Clewis*'s legacy in safeguarding individuals from "manifestly unjust" convictions raises a couple of questions:

- Were the courts of appeal confident in using the *Clewis* factual sufficiency standard to reverse a conviction?
- How many defendants had a conviction reversed as a result of a post-*Clewis* factual insufficiency finding?

- Are those reversals contributable solely to *Clewis*, or did other factors play a significant role?

- Was a vacated conviction and new trial what each defendant deserved, or was the defendant actually entitled to an acquittal?

In trying to answer these questions, the author attempted to locate every post-*Clewis* opinion where an appellate court: (1) found factually insufficient evidence to support an element of a crime; and (2) with respect to that same element, either found legally sufficient evidence or conducted no legal sufficiency review. The end result revealed a total of sixty-one opinions.[2]

> **FN 2:** The author's search was graciously aided by South Texas College of Law Professor Amanda Peters, who conducted a similar search two years earlier. *See generally* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 261-62 (2009) (discussing her search). With the assistance of Professor Peters, the author was able to double check his findings with her own and arrive at the sixty-one-opinion total. For the most part, the opinions gathered are ones that can be pulled from Lexis or Westlaw, but these research providers do not account for all unpublished opinions. It is thus possible, if not probable, that there are more than sixty-one cases that meet the criteria set out above. It is unlikely, however, that any unaccounted for cases are great in number.

A. The courts of appeal did not confidently utilize *Clewis*

There is only one opinion from the court of criminal appeals among the sixty-one examined by the author. *See Vodochodsky v. State*, 158 S.W.3d 502, 510-11 (Tex. Crim. App. 2005). The total also includes five opinions from the courts of appeal with factual insufficiency findings that were, or will be, abandoned because of *Brooks*.[3] After discounting these six opinions, we are left with fifty-five opinions from the courts of appeal that were free to survive under *Clewis*'s umbrella. This total, however, includes opinions that were subsequently withdrawn, vacated, or reversed—ultimately resulting in a new opinion that afforded no relief on factual insufficiency grounds. This was the story for seventeen of the fifty-five opinions. In other words, the courts of appeal collectively abandoned nearly one-third of all opinions containing a factual insufficiency finding.

> **FN 3:** *See Winningham v. State*, No. 02-07-389-CR, 2010 Tex. App. LEXIS 5016 (Tex. App.—Fort Worth July 1, 2010) (finding evidence factually insufficient), *withdrawn*, 2010 Tex. App. LEXIS 8498 (Tex. App.—Fort Worth

Oct. 21, 2010, pet. filed) (op. on pet. for discretionary review) (following *Brooks* and affirming conviction after only a legally sufficiency review); *Purdy v. State*, No. 07-09-00058-CR, 2010 Tex. App. LEXIS 4955 (Tex. App.—Amarillo June 29, 2010, pet. filed); *Griego v. State*, No. 07-09-00206-CR, 2010 Tex. App. LEXIS 4430 (Tex. App.—Amarillo June 10, 2010 (mtn. for reh'g granted); *Griego v. State*, No. 07-09-00206-CR, 2010 Tex. App. LEXIS 4430 (Tex. App.—Amarillo June 10, 2010 (finding evidence factually insufficient) *withdrawn*, 2011 Tex. App. LEXIS 204 (Tex. App.—Amarillo Jan. 11, 2011, no pet. h.) (abandoning factual insufficiency finding because of *Brooks* and finding evidence legally insufficient); *White v. State*, No. 05-08-00241-CR, 2010 Tex. App. LEXIS 3442 (Tex. App.—Dallas May 10, 2010, pet. filed); *Brooks v. State*, Nos. 10-07-00309-CR, 10-07-00310-CR, 2008 Tex. App. LEXIS 7364 (Tex. App.—Waco Oct. 1, 2008), *vacated and remanded*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

In six of those seventeen cases, the court of appeals reversed its factual insufficiency finding after the court of criminal appeals criticized its factual sufficiency review and remanded.[4] Typically, the court of criminal appeals criticized the lower court for its perceived lack of deference to the jury or for its failure to consider certain evidence. While such a critique should have undoubtedly prompted the court to revisit its factual insufficiency finding, the critique in no way compelled it to abandon that finding. *See Johnson*, 23 S.W.3d at 12 ("Regardless of whether we agree with the result, this Court is called upon to determine only whether the Court of Appeals correctly applied the factual sufficiency standard of review and properly considered all the relevant evidence."). Moreover, the court of criminal appeals did not critique the lower court's review of the evidence in each of these cases. In *Mireles v. State*, 994 S.W.2d 148, 150 (Tex. Crim. App. 1999), for example, the court of criminal appeals only directed the lower court to "state clearly why the jury's finding was factually insufficient so as to be manifestly unjust, shock the conscience, or clearly demonstrate bias." On remand, rather than add a few sentences to the opinion to satisfy the request of the court of criminal appeals, the lower court reversed course and found the evidence factually sufficient. *See Mireles v. State*, No. 13-96-321-CR, 2000 Tex. App. LEXIS 3647, at *17 (Tex. App.—Corpus Christi May 25, 2000, pet. ref'd) (not designated for publication) (op. on remand).

FN 4: *See Steadman v. State*, No. 10-07-00105-CR, 2009 Tex. App. LEXIS 9594 (Tex. App.—Waco Dec. 16, 2009, no pet.) (not designated for publication) (op. on remand); *Lancon v. State*, 276 S.W.3d 518 (Tex. App.—San Antonio 2008, pet. ref'd) (op. on remand); *Zuniga v. State*, No. 07-00-0461-CR, 2004 Tex. App. LEXIS 7084 (Tex. App.—Amarillo Aug. 2, 2004, pet. ref'd) (mem. op., not designated for publication) (op. on remand);

Goodman v. State, No. 14-97-01027-CR, 2002 Tex. App. LEXIS 4680 (Tex. App.—Houston [14th Dist.] June 27, 2002, no pet.) (not designated for publication) (op. on remand); *Mireles v. State*, No. 13-96-321-CR, 2000 Tex. App. LEXIS 3647 (Tex. App.—Corpus Christi May 25, 2000, pet. ref'd) (not designated for publication) (op. on remand); *Cain v. State*, No. 12-93-00155-CR (Tex. App.—Tyler Jan. 6, 1999, pet. ref'd) (not designated for publication) (op. on remand).

In six other cases, the court of appeals held that the evidence was factually insufficient but then reversed its finding upon issuing a second opinion that purportedly accounted for the holding of the court of criminal appeals in *Watson*, which was issued after the lower court had made its initial decision. *See Schiffert v. State*, 257 S.W.3d 6 (Tex. App.—Fort Worth 2008, pet. ref'd) (op. on remand); *Flowers v. State*, No. 13-05-004-CR, 2008 Tex. App. LEXIS 277 (Tex. App.—Corpus Christi Jan. 10, 2008, no pet.) (mem. op., not designated for publication) (op. on remand); *Stewart v. State*, No. 08-04-00272-CR, 2007 Tex. App. LEXIS 7051 (Tex. App.—El Paso Aug. 31, 2007, pet. ref'd) (op. on remand); *Watson v. State*, No. 10-03-00216-CR, 2007 Tex. App. LEXIS 4633 (Tex. App.—Waco June 13, 2007, pet. ref'd) (not designated for publication) (op. on remand); *Brown v. State*, 212 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (op. on reh'g); *Lillard v. State*, No. 09-04-395-CR, 2007 Tex. App. LEXIS 3548 (Tex. App.—Beaumont Feb. 7, 2006, no pet.) (mem. op., not designated for publication) (op. on remand). The court of criminal appeals used *Watson* to address concerns the Court had with its opinion in *Zuniga v. State*, 144 S.W.3d 477 (Tex. Crim. App. 2004), which the Court believed had the "clear potential to cause far more reversals for factual insufficiency than was ever contemplated by *Clewis*." *Watson*, 204 S.W.3d at 417. Though *Watson* may have clarified that the bar for finding factual insufficiency was actually higher than where some may have perceived it to be through *Zuniga*, it is doubtful that this clarification alone could justify reversing the factual insufficiency finding in all six cases. The likely reality is that some of these cases—if not all of them—involve instances in which the court of appeals could have rightfully maintained its factual insufficiency finding after *Watson*, *see*, *e.g.*, *Lillard*, 2007 Tex. App. LEXIS 3548, at *5-16, or it should have never made the finding from the beginning.

Finally, in four cases, the court of appeals abandoned its factual insufficiency finding after the State filed either a petition for discretionary review or a motion for rehearing. In three of those cases, the court issued a new opinion finding the evidence factually sufficient. *See Guyton v. State*, No. 10-07-00070-CR, 2009 Tex. App. LEXIS 839 (Tex. App.—Waco Feb. 6, 2009, pet. ref'd) (not designated for publication) (op. on pet. for discretionary review); *Chapa v. State*, No. 13-05-183-CR, 2006 Tex. App. LEXIS 10320 (Tex. App.—Corpus Christi Nov. 30, 2006, no pet.) (mem. op., not designated for publication) (op. on reh'g); *Perkins v. State*, 19 S.W.3d 854 (Tex. App.—Waco 2000,

pet. ref'd) (op. on remand; op. on reh'g). In the fourth case, the court issued a new opinion finding the evidence legally insufficient—an issue that had been overruled in its first opinion. *See Christensen v. State*, 240 S.W.3d 25 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (op. on reh'g). In *Guyton*, *Perkins*, and *Christensen*, the law controlling the courts' holdings did not change between the time the first and second opinions were issued. The court of criminal appeals did issue *Watson* between the *Chapa* court's first and second opinions, but the second *Chapa* opinion does not acknowledge *Watson*'s existence—indicating that *Watson* was likely irrelevant to the court's abandonment of its factual insufficiency finding. *See Chapa*, 2006 Tex. App. LEXIS 10320, at *5-6, 16.

To be clear, the courts of appeal cannot be faulted for reevaluating their findings when encountered with a noteworthy argument from the parties or a new, relevant opinion from the court of criminal appeals. But when these reevaluations inexplicably result in the abandonment of one-third of all factual insufficiency findings, it becomes a reflection of the courts of appeal's unassuredness, rather than their open mindedness.

B. Factual insufficiency findings were not all about the facts

Since *Clewis*, appellate courts have weighed the factual sufficiency of the evidence in over 8,000 cases. *See* Peters, 13 LEWIS & CLARK L. REV. at 261-62 (placing the number of these opinions at close to 8,000 as of June 1, 2008). Out of those opinions, the author's search uncovered thirty-eight opinions from the courts of appeal that actually resulted in a defendant obtaining relief through a factual insufficiency finding. Though the total is not sizeable, it manages to reveal a significant disparity among the courts of appeal with respect to their proven willingness to make a factual insufficiency finding.

Four of the fourteen courts of appeal—Texarkana, Fort Worth, Waco, and Amarillo—issued twenty-seven of the thirty-eight opinions, which is equivalent to seventy-one percent.[5] This percentage is all the more incredible when one considers the fact that Texarkana, Waco, and Amarillo have some of the smallest criminal case dockets among the fourteen courts of appeal. *See* OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2010, at 32 (2010), *available at* http://www.courts.state.tx.us/pubs/AR2010/AR10.pdf (last visited Jan. 24, 2011).

> **FN 5:** Texas empirical data, on file with author. The number of factual insufficiency reversals among each court, listed from greatest to least, is as follows: Texarkana—9; Fort Worth—7; Waco—6; Amarillo—5; Corpus Christi—3; Houston [14th] —2; Austin—2; Houston [1st]—1; El Paso—1; Dallas—1; San Antonio—1; Beaumont—0; Eastland—0; and Tyler—0.

Texarkana, for example, issued nine of the thirty-eight opinions while Dallas only issued one—even though Dallas's total yearly disposal of criminal cases is five-times greater than Texarkana's total. *See id*. In light of these realities, it is evident that a defendant's likelihood of being afforded relief on factual insufficiency grounds was affected by the panel of judges hearing his case and the representational location of the court. *See* Peters, 13 LEWIS & CLARK L. REV. at 264.

Another factor impacting a defendant's likelihood of obtaining relief on factual insufficiency grounds concerned whether the State petitioned for discretionary review. There were thirty-six cases in which a court of appeals made a factual insufficiency finding and the State responded with a petition for discretionary review.[6] In fourteen of the thirty-six cases (thirty-eight percent), the defendant subsequently lost the relief given to him. *See infra* note 6.

FN 6: Texas empirical date, on file with author.

Finally, for some defendants, a significant factor in obtaining relief on factual insufficiency grounds was their failure to challenge the legal sufficiency of the evidence on appeal. Seven of the thirty-eight defendants afforded a new trial did not challenge the legal sufficiency of the evidence supporting their conviction. *See supra* note 6. In some of those cases, there is strong reason to believe that an acquittal would have been issued if not for the defendant's failure to raise a legal sufficiency challenge. *See*, *e.g*., *Harmon v. State*, No. 07-03-0466-CR, 2005 Tex. App. LEXIS 5765, at *7-11 (Tex. App.—Amarillo July 25, 2005, no pet.) (mem. op., not designated for publication); *Logan v. State*, No. 02-02-191-CR, 2003 Tex. App. LEXIS 8503, *5-10 (Tex. App.—Fort Worth Oct. 2, 2003, no pet.) (mem. op., not designated for publication); *In re M.C.L.*, 110 S.W.3d 591, 598-600 (Tex. App.—Austin 2003, no pet.).

C. *Clewis* short-changed some defendants

In his concurring opinion in *Clewis*, Judge Meyers stated that the reversal of criminal convictions on the basis of factual insufficiency "will be most uncommon in practice and that, with few exceptions, there will be no good reason [for the public] to resent the ones that do occur." 922 S.W.2d at 151 (Meyers, J., concurring). What Judge Meyers neglected to address, however, was whether there would be good reason for the *defendants* to be resentful.

In *Johnson*, Judge McCormick argued that *Clewis* was resulting in defendants getting new trials when an acquittal was actually warranted through a legal insufficiency finding. *Johnson*, 23 S.W.3d at 16 & n.20 (McCormick, J., dissenting). He asserted in his dissent that he had "found two reported cases where the Courts of Appeals [sic] reversed a conviction on *Clewis* 'factual insufficiency' grounds and remanded for a new

trial when the appellants were actually entitled to appellate acquittals under a proper application of *Jackson v. Virginia*." *Id*. at 16 n.20. Only one of the two cases he referenced was post-*Clewis*. *Id*. In that case, the defendant argued that there was no evidence he was out on bond for a *felony*. *Burns v. State*, 958 S.W.2d 483, 488 (Tex. App.—Houston [14th Dist.] 1997, no pet.). The State's only evidence on this matter was: (1) the testimony of two bondsmen who stated that Defendant was on bond for attempted burglary of a building and that this crime was a felony; and (2) the Defendant's bond form, wherein one of the bondsmen had written "attempted burglary of a building" and circled the word "felony." *Id*. at 489. The court recognized that the bond form and the testimony did not accurately reflect the law—attempted burglary of a building was a misdemeanor under the penal code. *Id*. Nonetheless, the court—believing itself compelled to ignore the penal code because it could only consider the evidence supporting the verdict under the *Jackson* standard—found the evidence legally sufficient. *Id*. at 488-89. The court did consider the penal code in its factual sufficiency review, resulting in a factual insufficiency finding. *Id*. at 489.

Clewis's interpretation of the *Jackson* standard clearly produced the tortured result in *Burns*. As in *Burns*, there are other defendants who were denied an acquittal and forced to settle for a new trial because of *Clewis*'s interpretation of the *Jackson* standard. *See*, *e.g.*, *Drost v. State*, 47 S.W.3d 41, 44-45 (Tex. App.—El Paso 2001, pet. ref'd) (finding factual insufficiency, but rejecting legal sufficiency challenge upon refusing to consider complainant's clarification of his own testimony because the clarification was evidence that did not support the verdict and, if considered, would require an acquittal); *Moya v. State*, No. 05-98-00406-CR, 2000 Tex. App. LEXIS 1580, at *11-12 (Tex. App.—Dallas Mar. 9, 2000, no pet.) (not designated for publication) (same). In other troubling cases, the courts of appeal appeared to gloss over a thoughtful deliberation of a meritorious legal sufficiency challenge, so as to get to what was likely perceived as the more easily decided factual insufficiency finding. *See*, *e.g*., *Denny v. State*, No. 13-00-00510-CR, 2001 Tex. App. LEXIS 6826, at *8 (Tex. App.—Corpus Christi Oct. 11, 2001, no pet.) (not designated for publication) (finding the evidence factually insufficient but never actually deciding whether the evidence was legally sufficient, stating: "While this evidence . . . *may be sufficient* to withstand a challenge to its legal sufficiency, it does not survive the challenge to its factual sufficiency." (emphasis added)). *Compare id.* at *1-3, 6-9 (finding evidence legally sufficient but not factually sufficient), *with Saucedo v. State*, No. 11-06-00022-CR, 2007 Tex. App. LEXIS 6083, at *5-9 (Tex. App.—Eastland Aug. 2, 2007, no pet.) (not designated for publication) (finding evidence legally insufficient), *and Pena v. State*, No. 07-04-522-CR, 2005 Tex. App. LEXIS 6251, at *7-11 (Tex. App.—Amarillo Aug. 8, 2005, pet. ref'd) (mem. op., not designated for publication) (same).

III. What *Brooks* Brings to the Table

Where *Clewis* offered a new trial to a convicted defendant who had forty nuns testify in favor of his innocence, *Brooks* now offers that same defendant an acquittal. This is because *Brooks*, in disposing with the *Clewis* factual sufficiency standard, also tossed out *Clewis*'s problematic interpretation of the *Jackson* standard. The *Jackson* standard interpretation articulated by *Clewis*'s dissenters now controls. *See Brooks*, 323 S.W.3d at 906-07. *Brooks* expressed this interpretation through the following hypothetical:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Id. (emphasis in original). Within its first two months of existence, *Brooks*'s refined legal sufficiency interpretation made an indelible mark on at least one defendant's life. *See Cooper v. State*, No. 06-10-00083-CR, 2010 Tex. App. LEXIS 9069, at *10-16 (Tex. App.—Texarkana Nov. 16, 2010, no pet.).

In *Cooper v. State*, Cooper was convicted on two counts of improper video recording and sentenced to two years' imprisonment. *Id*. at *1. The court of appeals determined that the circumstantial evidence supporting the conviction would not permit a rational finding that Cooper was guilty. *Id*. at *14-16. The only evidence that could conceivably permit a finding of guilt was the testimony of Cooper's ex-girlfriend. She testified that, as she watched the video recordings in question, she saw a person handling the camera that she recognized as Cooper. *Id*. at *7-10. Her testimony was the only evidence that Cooper was the videographer. *Id*. The State did not identify where on the videotape Cooper could be seen. *Id*. at *13. The court of appeals examined the entirety of the video recordings and determined that, contrary to the ex-girlfriend's testimony, the video did not reveal who was operating the camera when the recordings were made. *Id*. at *13-14. The court found that, "under the explanations made in *Brooks* of sufficiency review and the [video] hypothetical provided, and applying the standard of *Jackson* as explained therein," it was "not rational for a jury to conclude that Cooper took the videos based upon the [ex-girlfriend's] testimony." *Id*. at *14.

Brooks's interpretation of the legal sufficiency standard resulted in Cooper successfully raising a legal sufficiency challenge on appeal. *Id*. at *16. *Clewis*'s interpretation of the same standard, however, would have directed the court of appeals to disregard the video and focus solely on the ex-girlfriend's testimony—i.e., the court

would have only considered the evidence supporting the verdict. Therefore, Cooper would have lost his legal sufficiency challenge and would have been forced to settle for a factual insufficiency finding—a dramatically different result. Receiving an acquittal that bars retrial is far more preferable than being afforded a second trial, which gives the State a second opportunity to produce additional evidence to fill the evidentiary gaps found by the court of appeals in the first trial.

Brooks's recognition that *all* evidence is considered in a legal sufficiency review may not be the only interpretational improvement it afforded the *Jackson* standard. At least one court, the Texarkana Court of Appeals, views *Brooks* as "attempting to refocus the application of the legal sufficiency standard from the quantity to the quality of the evidence presented." *Holz v. State*, No. 06-08-00225-CR, 2010 Tex. App. LEXIS 8800, at *4 (Tex. App.—Texarkana Nov. 4, 2010, no pet.). The court set out the basis for this view in a subsequent opinion, explaining:

> In a concurring opinion [in *Brooks*], Judge Cochran pointed out that the United States Supreme Court has rejected a legal sufficiency test that requires a finding that "no evidence" supports the verdict because it affords inadequate protection against potential misapplication of the "reasonable doubt" standard in criminal cases. Rather than meeting a mere "no evidence" test, legal sufficiency is judged not by the quantity of evidence, but by the quality of the evidence and the level of certainty it engenders in the fact-finder's mind.

Xayavong v. State, No. 06-10-00068-CR, 2010 Tex. App. LEXIS 8988, at *5 (Tex. App.—Texarkana Nov. 10, 2010, no pet.) (mem. op., not designated for publication) (internal citations omitted). In *Xayavong*, the court applied this view of *Brooks* in its legal sufficiency review and acquitted the defendant of marijuana possession because "the *quality* of the evidence . . . [was] too weak . . . for a rational trier of fact to find beyond a reasonable doubt that Xayavong knew of, or had control over, the contraband."[7] *Id*. at *10 (emphasis added).

> **FN 7:** The Amarillo Court of Appeals also views *Brooks* as moving the focus in a legal sufficiency review from the quantity to the quality of the evidence presented. *See Gomez v. State*, No. 07-10-00116-CR, 2011 Tex. App. LEXIS 378, at *5 n.3 (Tex. App.—Amarillo Jan. 19, 2011, no pet. h.) ("We note that this Court has at times quoted *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988), for the proposition that we had to uphold the verdict of the jury unless it was . . . unsupported by more than a mere modicum of evidence. We view such a statement, insofar as a modicum of

evidence being sufficient evidence, as contrary to a rigorous application of the Jackson standard of review urged by the court in *Brooks*.").

The *Brooks* plurality persuasively argued that the *Clewis* factual sufficiency standard was "indistinguishable" from a properly applied *Jackson* standard. *Brooks*, 323 S.W.3d 898-902. Whether or not the factual sufficiency standard was "indistinguishable" or "barely distinguishable" (as described in *Watson*, 204 S.W.3d at 415), its use assumed an unwarranted risk of violating double-jeopardy principles. *Brooks*, 323 S.W.3d 904-05. *Brooks* explained this point:

> With our prior decisions requiring a great amount of appellate deference to a jury's credibility and weight determinations and not permitting appellate courts to sit as "thirteenth jurors" except perhaps to "a very limited degree," it is questionable whether appellate reversals in Texas under such a factual-sufficiency standard are really reversals based on evidentiary weight (they may actually be reversals based on evidentiary sufficiency).

Id. By eliminating the factual sufficiency standard, *Brooks* also eliminated "any temptation appellate tribunals might have to direct a retrial merely by styling reversals as based on 'weight' when in fact there is a lack of competent substantial evidence to support the verdict or judgment and the double jeopardy clause should operate to bar retrial."[8] *Id.* at *905 (quoting *Tibbs v. Florida*, 397 So.2d 788, 1125-26 (Fla. 1976)).

> **FN 8:** If some judges are inclined to direct a retrial, rather than acquit, a question arises as to how they will respond when their only choices are to acquit or convict. At least two legal commentators believe that these judges will lean towards an acquittal, explaining:
>
> > [I]f the only options are affirming or acquitting in a case where the great weight of the evidence is for a defendant and the conviction is manifestly unjust, the judge is likely to vote for acquittal. After all, the conclusion regarding the great weight and the manifestly unjust character of the verdict does not show up waving flags. It is a conclusion to which a judge was individually moved based on the experience of reviewing all the evidence. Having taken the journey to this conclusion, he or she is more likely to want to act on it by acquitting.
>
> W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 593 n.310 (2008).

Though the factual sufficiency standard is gone, an element of factual sufficiency review remains through a proper application of the *Jackson* standard. *Brooks* explained that viewing the evidence in the light most favorable to the verdict only begins a legal sufficiency analysis. *Id*. 902 n.19. The *Jackson* standard still requires a court to determine whether any *rational* factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Id*. "This is the portion of the *Jackson v. Virginia* standard that essentially incorporates a factual-sufficiency review." *Id*.

Brooks emphasized that the rigorous and proper application of the *Jackson* standard is "as exacting as any factual-sufficiency standard," and "there are no jurisprudential systemic problems" the *Jackson* standard cannot address. *Id*. at 906. Unlike with *Clewis*'s factual sufficiency standard, a court's application of the *Jackson* standard is aided by a wealthy and coherent body of law that stretches across America. *See id.* at 914 n.9 (Cochran, J., concurring). Judges and attorneys may easily access and apply this law to any given conviction here in Texas. *See id*. Lastly, when the *Jackson* standard is properly applied, "[i]t is difficult to imagine how a 'rational' finding of guilt beyond a reasonable doubt could also be considered 'manifestly unjust.'" *Johnson*, 23 S.W.3d at 15 n.13 (McCormick, J., dissenting).

CONCLUSION

Brooks's dissenters may be correct in their insistence that the distinction between a legal sufficiency review and a factual sufficiency review "is a real one." *Brooks*, 323 S.W.3d at 927 (Price, J., dissenting). But even if they are correct, what value can this distinction have for our legal system when so many judges and attorneys cannot see the distinction, and those who can all see it differently? All that could ever result under such circumstances is a "luck of the draw" outcome for those defendants who successfully raise a factual sufficiency challenge on appeal.

A rigorous and proper application of the *Jackson* legal sufficiency standard—not luck of the draw factual insufficiency findings—is far more adept at safeguarding a defendant from a finding of guilt that is "manifestly unjust or shocks the conscience." As courts begin applying the *Jackson* legal sufficiency standard robustly, taking into account all of the evidence, *Brooks* will quickly prove itself to be a more reliable ally to a greater number of defendants than was *Clewis*. As previously discussed, *Brooks* has already done more for at least one defendant than *Clewis* could have ever offered. Many similar cases will inevitably follow.

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Lessons From Paradise: An Appellate Lawyer's Journey Across The Sea

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INTRODUCTION

The voyage started long before the journey. Nine years to be exact. The year the lawyer graduated from law school, she clerked for a judge in paradise. She traveled to Hawaii with husband and toddler in tow.

The judge's name was John S.W. Lim. He'd been born to high pedigree—his father an attorney, per diem judge, and former actor in television shows such as *Magnum P.I*. and *Hawaii Five-O*. Judge Lim taught the lawyer many things she hadn't learned in law school and helped her develop a thick skin when it came to redlines. The lawyer spent a year working for Judge Lim—a man she will always believe to be one of the greatest legal minds of all time. Exactly one year to the day after she arrived in paradise, she returned to the Lone Star State to start her appellate career.

Another clerkship, some teaching, and two law firm jobs later (all concentrating as much as she could in the area of appeals), she found herself back on the plane. This time she had husband, tween, and toddler in tow. She went back to paradise to work in the appellate division of the Hawaii Attorney General's office. Her stint as a Deputy Solicitor General gave the lawyer an in-depth view of Hawaii appeals before she found herself back in the arms of private practice.

Two journeys across the Pacific have taught the attorney very important lessons about life . . . and appeals. Here are a few of the lessons from paradise:

I. Never Judge A Book By Its Cover

An idiom well-known and often repeated. Every mother at some point tells her child never to judge a book by its cover. People are more than they appear. A person's true self is revealed more from who they are inside than out.

Legal systems can be judged by the same idiom.

In some ways, the appellate systems in Hawaii and Texas are very different. For example: size. They say everything is bigger in Texas, and that statement is certainly true of the network of appellate courts. Texas has fourteen courts of appeal, located in all corners of the vast state: Austin, San Antonio, Dallas, Texarkana, Amarillo, El Paso, Beaumont, Waco, Eastland, Tyler, Corpus Christi, and even two in Houston. Texas also has two courts of last resort—the Texas Supreme Court for civil cases and the Texas Court of Criminal Appeals for criminal cases, both located in the state's capital of Austin.

In contrast, Hawaii has one Intermediate Court of Appeals and one Supreme Court. Both courts are located in the state's capital—Honolulu. In fact, the two courts are located within a few hundred feet of each other.

On the cover, the two appellate systems are quite different.

Despite the differences in size, the appellate systems are fundamentally the same. The appellate courts in both states hear both civil and criminal appeals. Like the fourteen intermediate courts in Texas, the intermediate court in Hawaii hears appeals for both civil and criminal cases. Although Texas has a bifurcated court of last resort, the end is the same—both civil and criminal cases have an opportunity to be heard above the intermediate appellate level (by petition for review to the Texas Supreme Court or writ of certiorari to the Hawaii Supreme Court). The goal of both Hawaii and Texas, as with any system governing appeals, is to ensure that justice is done.

II. When Life Gives You Lemons, Make Lemonade

Another favorite idiom from any individual's childhood. When you were very young, the words sounded strange and confusing. I'm not thirsty, you may have thought, I'm hurt because of (insert the troubling thing that may have happened right before your mother verbalized these immortal words). Lemons are tart but can be made sweet with sugar. When something goes wrong, make the best of it. The legal

communities in Texas and Hawaii have implemented initiatives that make lemonade out of lemons.

Through its Access to Justice Foundation (TAJF) and other initiatives, the Texas Bar Association has made tremendous strides in helping those less fortunate. TEXAS ACCESS TO JUSTICE FOUNDATION, http://www.teajf.org/ (last visited Jan. 24, 2011). The Texas Bar is composed of tens of thousands of attorneys—in 2009 the number of active attorneys in Texas totaled over eighty thousand. Many of these attorneys volunteer their time to ensure that individuals who might not otherwise be able to afford legal counsel obtain necessary legal advice. In 2009, The TAJF celebrated its 25th anniversary and is still going strong. The [TAJF] is "committed to the vision that all Texans, regardless of income, will have equal access to the civil justice system. With TAJF funding, legal aid organizations provide assistance in civil matters to more than 100,000 low-income Texans each year." *Id.*

The Hawaii Bar has far fewer members than the Texas Bar. In total, there are approximately five thousand active attorneys. Despite the fact that the legal community is much smaller, many members of the Hawaii Bar also volunteer their time to assist those less fortunate. Hawaii Bar initiatives include the Hawaii Justice Foundation (the "Foundation") and a Delivery of Legal Services to the Public Committee (the "Committee").

The Foundation was established to increase access to justice in civil matters. HAWAII JUSTICE FOUNDATION, http://www.hawaiijustice.org/ (last visited Jan. 24, 2011). The purpose of the Committee is to develop legal services and access to justice programs in Hawaii, and the Hawaii Bar Association has given $10,000 in funding to start a pilot project for "self-help" centers at courthouses to service pro se litigants. These centers would be staffed by volunteer attorneys. And, like Texas, Hawaii has an Access to Justice Commission (the "Commission") established by the Hawaii Supreme Court that includes representatives from the Hawaii Bar.[1]

> **FN 1:** According to its website, "[t]he Commission's primary purpose is to substantially increase access to justice in civil legal matters for low- and moderate-income residents of Hawaii." HAWAII JUSTICE FOUNDATION, HAWAII ACCESS TO JUSTICE COMMISSION, http://www.hawaiijustice.org/hawaii-access-to-justice-commission (last visited Jan. 24, 2011).

Although their size may vary, the volunteer initiatives by both the Hawaii and Texas Bars serve an important purpose. These dedicated attorneys make lemonade out of lemons. The attorneys look at situations where people have been dealt a difficult deck of cards (am I mixing idioms now?), and help those individuals better their situations.

III. The First Step is Always the Hardest

Truer words have never been said. The first step is indeed always the hardest. From the first step taken by a toddler to a new attorney graduating from law school and passing the bar—venturing into the unknown can be a somewhat frightening event.

The Texas Bar assists new attorneys in a variety of ways including through membership in the Texas Young Lawyer's Association (TYLA).[2] Texas attorneys younger than thirty-six years or who have practices less than five years are automatically members of TYLA. TYLA's primary purposes include facilitating the administration of justice and assisting Texas lawyers in developing and maintaining their legal practices. Resources for new lawyers available through TYLA include the "Survival Guide"—a publication to assist attorneys navigating through their first years of practice. TEXAS YOUNG LAWYERS ASSOCIATION, TYLA SURVIVAL GUIDE, http://www.tyla.org/tasks/sites/tyla/assets/File/TYLASurvivalGuide.pdf (last visited Jan. 24, 2011).

> **FN 2:** More information about TYLA is available on its website. TEXAS YOUNG LAWYERS ASSOCIATION, http://www.tyla.org/ (last visited Jan. 24, 2011).

Likewise, the Hawaii Bar has a Young Lawyers Division.[3] A Hawaii attorney is automatically a member of YLD if he or she is under the age of thirty-six, or has been admitted to their first bar less than five years regardless of age. The purpose of the division is not only to provide camaraderie among Hawaii's young lawyers, but also to provide an arena in which attorneys new to their trade can help improve the administration of justice and promote public welfare. YLD provides new attorneys with a variety of activities including law week, professional development seminars, legal line hotline, disaster assistance manual, and a junior judge program. More seasoned attorneys and local judges often speak at YLD events providing a mentoring opportunity

for young lawyers. The Hawaii Bar also has plans to implement an attorney mentoring program for new attorneys and those re-entering the workforce.

> **FN 3:** More information about YLD is available on its website. HAWAII YOUNG LAWYER'S DIVISION, http://www.hsba.org/younglawyers.aspx (last visited Jan. 24, 2011).

With programs like the Texas and Hawaii young lawyer divisions, both states mentor their new attorneys (not necessarily "young" but perhaps all young at heart). These programs are akin to a parent holding a toddler's hand as she makes her first step in the world—so that the first step is not as hard as it might otherwise be.

IV. Dress to Kill

Perhaps not one of a mother's favorite idioms, but interesting when applied to the clothing styles of an attorney—especially in the varying locals of Texas and Hawaii.

When was the last time someone from Texas was asked if everyone in the state wears cowboy boots and Stetsons? Many people from outside Texas hold the perception that the land is still somewhat wild and populated by cowboys like those seen on television. It is assumed Texans ride their horses to work and wear belt buckles the size of a football. Texan lawyers are no exception of course.

And Hawaii? Aloha shirts and "slippas" (that is Hawaii slang for flip-flops, by the way). All day, every day. After all, with a year-round temperature hovering in the mid-eighties, why would anyone wear anything else?

There is no doubt that many in Texas subscribe to cowboy couture. Likewise, many residents of the Aloha State spend their time in hibiscus printed shirts and shorts. But in court, the dress is the same: Suits. Varying shades of black, brown, gray, and pinstriped. Dressing appropriately in court is a show of respect, and those who venture too far from what is expected immediately lose credibility with both judge and jury. You may choose to dress to kill—but if you are doing it in court in Texas and Hawaii you are doing it exactly the same way.

V. Don't Put Off Today What You Can Do Tomorrow

Scarlet O'Hara may have had the right idea—but, practically speaking, putting off important tasks offers little solace. Learning not to procrastinate is a lesson best

learned early—in life and in the law. Hawaii and Texas both have their own rules of civil and appellate procedure that govern when and how a case proceeds through the legal system.

In Texas, a notice of appeal is due within thirty days of final judgment. After the record on appeal is filed, and absent extension of time, the timeline is 30-30-20 (opening-response-reply). TEX. R. APP. P. 38.6(a), (b), (c). In Hawaii, the same time period applies to a notice of appeal, but the timeframe for filing the briefs is a bit longer: 40-40-14. HAW. R. APP. P. 28(b), (c), (d). While the deadlines may be different, the end goal is the same: present the most well-written and persuasive appellate brief on behalf of your client in order to prevail on appeal.

The courts of appeals themselves are similar in when and how they review cases—but they haven't always been so. In Texas, once final judgment is entered a case travels first to the intermediate appellate court and then may be heard by either the Texas Supreme Court (civil cases) or the Texas Court of Criminal Appeals (criminal cases). The two courts of last resort in Texas hear cases on a discretionary basis—petitions for review are filed with the Texas Supreme Court, and petitions for discretionary review are filed with the Texas Court of Criminal Appeals.

Since 2006, Hawaii follows a similar procedure. Appeals are heard first by the Intermediate Court of Appeals (ICA) and then on a discretionary basis by the Hawaii Supreme Court. A party seeking review by the State's highest court files a writ of certiorari. The "pass-through" appellate system replaced one in which all appeals where filed with the Hawaii Supreme Court, and then the Court—at its discretion—"passed-down" cases to the ICA. At the same time, the ICA was enlarged to include two more judges—growing from four to six.

The basic appellate procedure in Texas and Hawaii serves the same goal—the judicious administration of justice. In other words, obtaining the timeliest resolution to a case as possible. No procrastination; no Scarlet O'Hara syndrome.

CONCLUSION

From first being sworn in as a member of the Texas Bar to becoming a member of the Hawaii Bar across the Pacific Ocean, and through her years as a law clerk, private practitioner, and government attorney in both Texas and Hawaii, the lawyer learned to

navigate two seemingly different—but in reality quite similar—legal worlds. Her journey not yet done, the lawyer hopes that in these few common idioms, other attorneys in Texas and Hawaii recognize their common ground and continue to strive to make their profession and the law better because, (as your mother always said) in the end: what comes around goes around, and you do, in fact, reap what you sow.

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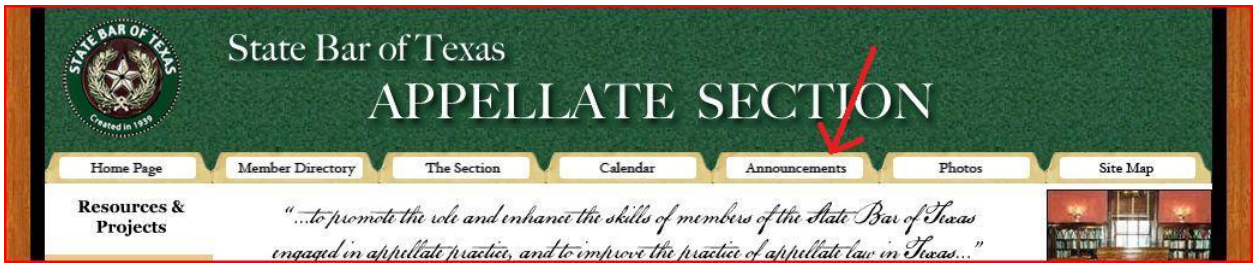

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Proposed Texas Disciplinary Rules of Professional Conduct: An Overview of the Amendment Process and a Comparison of the Proposed Rules with the ABA Model Rules of Professional Conduct

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FN *: Ms. Peterson is the Rules Attorney for the Supreme Court of Texas. The following article, however, does not represent the views or opinions of the Court or any of its members.

INTRODUCTION

The proposed Texas Disciplinary Rules of Professional Conduct have been in the works since 2003. Between January 18 and February 17, 2011, members of the State Bar of Texas will have an opportunity to vote on these rules. If the past is any indication of what is to come, many people will express many opinions regarding the rules in the days leading up to the referendum and during the referendum itself. Some of these opinions will be balanced and objective. Others will not. As Texas lawyers, we should all analyze the proposed rules as objectively as possible and make an independent decision about how to vote on them. This article is intended to assist with that decision-making process.

The first part of this article contains an overview of the amendment process that began in 2003. An entire article could be dedicated to this process, but the narrow focus here is on the catalyst and main components of the process.

The second part of this article is intended for all prospective voters but is directed specifically at the people who are concerned, or simply curious, about differences between the proposed rules and the American Bar Association Model Rules of Professional Conduct (the "ABA rules"). This part of the article compares ABA rules with the proposed Texas rules and focuses on the five new Texas rules—proposed Rules 1.00, 1.13, 1.14, 1.17, and 6.03—as well as the proposed amendments to four conflict-of-interest rules that have prompted the most extensive debates during the amendment process—Rules 1.06–1.09.

OVERVIEW OF AMENDMENT PROCESS[1]

I. Why the Process Began

The Supreme Court of Texas (the "Court") repealed the Texas Code of Professional Responsibility and adopted the Texas Disciplinary Rules of Professional

Conduct in 1990 (the "Texas rules"). Since then, there have been four referendums, two of which resulted in some amendments to the rules.[2] But, despite many changes that have occurred in the ethical and legal landscapes that govern the conduct of lawyers in Texas and beyond, comprehensive amendments have not been proposed until now.

> **FN 1**: The following overview stems largely from applicable administrative orders and an article that was published in the December issue of the *Texas Bar Journal*. *See* Sup. Ct. of Tex., *Order Creating Task Force on the Texas Disciplinary Rules of Professional Conduct*, Misc. Docket No. 03-9147 (Aug. 29, 2003); Sup. Ct. of Tex., *Approval of Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, Misc. Docket No. 09-9175 (Oct. 20, 2009); Kennon L. Peterson, *Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct: Brief Background and Explanation*, 73 TEX. B.J. 894 (2010).

> **FN 2**: The referendums occurred in 1993, 1994, 1998, and 2004. Research suggests the 1993 and 1998 referendums failed due to a prior statutory requirement that fifty-one percent of the bar participate in a referendum in order for it to succeed. That requirement has been repealed and replaced by a simple-majority requirement. *See* TEX. GOV'T CODE ANN. § 81.024(e) (Vernon 2005) ("The supreme court shall promulgate each rule and amendment that receives a majority of the votes cast in an election."). Collectively, the 1994 and 2004 referendums resulted in the adoption of Rule 9.01; amendments to Rules 1.04, 3.07, 3.08(a), 5.05, 5.08, 6.01; and amendments to various rules in Sections VII and VIII of the Texas Disciplinary Rules of Professional Conduct.

As in many other states, the amendment process in Texas was prompted by the extensive amendments to the ABA rules in 2002, in response to recommendations from the Ethics 2000 Commission.[3] But it is important to understand that the goal of the process here was not to make the Texas rules mirror the ABA rules. Rather, the goal was to make the Texas rules more consistent with the ABA rules to the extent greater consistency would improve the rules in our state.[4]

> **FN 3**: *See* ABA CTR. FOR PROF'L RESPONSIBILITY, ETHICS 2000 COMM'N REPORT ON THE MODEL RULES OF PROF'L CONDUCT, http://www.abanet.org/cpr/e2k/e2k-report_home.html (last visited Jan. 3, 2011) (containing extensive analysis of Commission's recommendations and ABA's changes).

> **FN 4**: Several additional goals were in place. One of the primary goals was to enhance protection of the public. Another goal was to provide

better guidance for lawyers dealing with distinct types of clients—such as prospective clients and clients with diminished capacity; and lawyers engaging in certain professional activities—such as law-reform activities and transactions with or relating to clients. Other goals were to make the Texas rules more consistent not only with the ABA rules but also with other states' rules, to reflect current practices, and to clarify disciplinary standards overall in an effort to improve lawyers' compliance with these standards and thereby protect the integrity of the legal profession.

II. The Roles of the Court Task Force and State Bar of Texas TDRPC Committee in the Amendment Process

On August 29, 2003, in Misc. Docket No. 03-9147, the Court appointed the Task Force on the Texas Disciplinary Rules of Professional Conduct (the "Task Force"). *See* Sup. Ct. of Tex., *Order Creating Task Force on the Texas Disciplinary Rules of Professional Conduct*, Misc. Docket No. 03-9147 (Aug. 29, 2003). The Task Force included a public member and lawyers intended to represent the interests of federal prosecutors, corporate practitioners, civil trial practitioners, criminal trial practitioners, the State Bar Office of the Chief Disciplinary Counsel, the Texas Commission for Lawyer Discipline, the Board of Disciplinary Appeals, the Grievance Oversight Committee, the Texas Center for Legal Ethics and Professionalism, and the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct (the "State Bar TDRPC Committee").[5] The Court asked the Task Force to study the amended ABA rules, compare them with the current Texas rules and other states' rules, and make recommendations for improvements to the Texas rules. The Task Force complied and submitted its recommendations to the Court in 2005.

FN 5: The following people were members of the Task Force: Thomas H. Watkins (Chair), Judge Robert Pitman, Dawn Miller, Mark White, Christine McKeeman, Susan Saab Fortney, Robert Paul Schuwerk, Ken Raines, Luke Soules, Eduardo Rodriguez, Vincent Perini, Rob Kepple, Beryl Crowley, Sarilee Ferguson, Steve Moyik, and Kenneth Raney.

Meanwhile, in 2004, the State Bar TDRPC Committee got involved extensively with the amendment process.[6] The State Bar TDRPC Committee analyzed the Task Force's recommendations in conjunction with, among other things, the existing Texas rules, the ABA rules, other states' rules, and the Restatement (Third) of the Law Governing Lawyers. Based on this analysis, the State Bar TDRPC Committee submitted its own recommendations to the Court, State Bar President, and Task Force between 2005 and 2006.

> **FN 6**: Between 2004 and 2010, the following State Bar TDRPC Committee members participated (to varying degrees) in the process of amending the rules and/or associated interpretive comments: Patricia Chamblin (current Chair), Lillian B. Hardwick (former Chair), Linda Eads (former Chair), Constance K. Acosta, George Joseph Altgelt, Susan Louise Bickley, James E. Brill, Ralph H. Brock, W. Amon Burton Jr., Edward A. Carr, Cynthia Bodendieck Chapman, Gary D. Douglas, Scott Anthony Durfee, Byron F. Egan, Sally Emerson, Susan Saab Fortney (also a Task Force member), Valorie C. Glass, Cullen M. Godfrey, Rebecca Ann Gregory, Gary R. Gurwitz, Gregory Max Hasley, Joseph C. Hawthorn, Robert J. Hearon Jr., Leila Safi Hobson, Michelle Burke Jordan, M. Lewis Kinard, Rebecca Clark Lucas, Cynthia Elaine Masters, William B. Mateja, Paul McGreal, Gregg Smolenski McHugh, Frederick C. Moss, Louis Murat Newman IV, Carol Collins Payne, Mark L. Perlmutter, Edna Isabella Ramon, Hugh Massey Ray III, Robert Paul Schuwerk (also a Task Force member), Marcus F. Schwartz, Harlow L. Sprouse, Walter W. Steele Jr., John F. Sutton Jr., G. Allan Van Fleet, James H. Wallenstein, Larry Logan Warner Sr., James C. Winton, and George Parker Young. Over the years, this committee has included, among others, lawyers from small, mid-sized, and large firms practicing in diverse areas of the law; solo practitioners; academics; government lawyers; and in-house counsel.

In 2007, the Court asked the Task Force and State Bar TDRPC Committee to examine and comment on each other's recommendations. They complied. Due to the extent of differences between their recommendations, however, the Court also requested the formation of a Conference Committee, consisting of Task Force and State Bar TDRPC Committee members designated by their respective Chairs. The Conference Committee identified all rules for which the Task Force and State Bar TDRPC Committee made substantially similar recommendations; attempted to resolve, or at least explain, divergent recommendations; and made final recommendations to the Court in 2008.

III. The Court's Initial Analysis, Initial Proposals, Request for Public Feedback, and Revised Proposals

Between 2008 and 2009, the Court analyzed the recommendations of the Task Force, State Bar TDRPC Committee, and Conference Committee, in conjunction with—among other things—the existing Texas rules, ABA rules, and applicable law. On October 20, 2009, in Misc. Docket No. 09-9175, the Court issued the initial version of the proposed amendments to the Texas rules (the "proposed rules"). *See* Sup. Ct. of Tex., *Approval of Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, Misc. Docket No. 09-9175 (Oct. 20, 2009).

Through the end of 2009, the Court invited public comments regarding the proposed rules and received numerous comments in response. The comments resulted in revisions to the proposed rules. Additional revisions stemmed from additional feedback the Court received from individuals and entities such as the State Bar TDRPC Committee, the State Bar Office of the Chief Disciplinary Counsel, and the State Bar Board of Directors' Discipline and Client Attorney Assistance Program Committee (the "DCAAP Committee"), which was tasked with analyzing the proposed rules and recommending how the State Bar Board of Directors (the "Board") should proceed in relation to the amendments.

On April 14, 2010, the Court completed a revised version of the proposed rules. The Court sent these proposed rules and a copy of the October 2009 Order to then-State Bar President Roland Johnson and State Bar President-Elect Terry Tottenham for distribution to and consideration by the Board. On the Court's behalf, Chief Justice Jefferson requested the Board consider the proposed rules and provide the Court with any recommendations or comments by October 6, 2010.

On July 7, 2010, the Court—with assistance from the State Bar TDRPC Committee—completed proposed interpretive comments for the proposed rules. The Court sent the proposed rules and interpretive comments to State Bar President Terry Tottenham and Immediate Past President Roland Johnson, once again for distribution to and consideration by the Board. Chief Justice Jefferson also reiterated the Court's request that the Board provide the Court with any recommendations or comments by October 6, 2010.

IV. The Role of State Bar Leadership

As indicated above, the Board asked its DCAAP Committee to analyze the proposed rules and interpretive comments and recommend how the Board should proceed with them. The Board also discussed the proposed rules and interpretive comments in multiple meetings throughout 2010. The Board's understanding of the

proposed rules and interpretive comments was aided by, among other things, presentations given by DCAAP Committee members, State Bar TDRPC Committee members, Tom Watkins, and the author of this article.

On a broader scale, between August 30 and September 10, 2010, the State Bar held nine public-education hearings in cities throughout Texas to educate and obtain feedback from Texas lawyers and members of the general public regarding the proposed rules and interpretive comments. Also around the same time period, the State Bar invited feedback on its website, through email, and in public Board meetings.

On October 1, 2010 the Board—with assistance from its DCAAP Committee—finalized its recommendations for every proposed rule and interpretive comment except proposed Rules 1.06 through 1.09, relating to conflicts of interest, and associated interpretive comments. Shortly before October 1, concerns arose regarding these proposed rules. Because the concerns were not understood completely by October 1, the Board voted to recommend to the Court that a thirty-day period be set aside to allow interested parties to address the concerns and offer suggestions for improvement. The Board also recommended the DCAAP Committee prepare a recommendation for the Board to consider and vote on during its next scheduled meeting on January 28, 2011. Terry Tottenham sent a letter to Chief Justice Jefferson to convey the Board's recommendations. Chief Justice Jefferson responded with a letter requesting the Board meet and make final decisions by November 5 and share its decisions with the Court by November 8. The Board complied.

On November 8, the Board provided the Court with its final recommendations for the proposed rules and interpretive comments. The Board also submitted a petition for the referendum, a proposed referendum ballot, and a proposed timeline for the referendum. The Court analyzed the Board's recommendations in conjunction with public comments and other related correspondence.

V. The Final Proposed Rules

On November 16, the Court approved a referendum on the proposed rules. *See* Sup. Ct. of Tex., *Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, Misc. Docket No. 10-9190 (Nov. 16, 2010). The approval Order, which is posted on the websites of the Court and State Bar, contains the timeline for the referendum, the referendum ballot, a "clean" version of the proposed rules and interpretive comments (in Exhibit A), and a "redlined" version of the proposed rules compared with the existing Texas rules (in Exhibit B). Everything except Exhibit B is published in the December issue of the *Texas Bar Journal*. *See* 73 TEX. B.J. at 898–975.

COMPARISON OF PROPOSED TEXAS RULES WITH ABA RULES

According to the ABA, as of November 3, 2010, approximately forty-six states and the District of Columbia had modified their rules in response to the ABA's revision of its rules in 2002. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES, http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf (last visited Dec. 28, 2010). But research with the ABA Center for Professional Responsibility indicates that none of these jurisdictions has adopted the ABA rules verbatim.[7] Instead, they have preserved or crafted different rules to the extent they believed it was appropriate to do so.[8]

> **FN 7**: The U.S. Virgin Islands did, however, adopt the ABA rules verbatim. A December 30, 2010 call to the Virgin Islands Bar Association confirmed that ABA rules are still in place there.

> **FN 8**: To assist with understanding the scope of differences, the ABA Center for Professional Responsibility has prepared charts that compare revised state rules with the ABA rules, *see* ABA CTR. FOR PROF'L RESPONSIBILITY, CHARTS COMPARING PROFESSIONAL CONDUCT RULES AS ADOPTED BY STATES TO ABA MODEL RULES, http://www.abanet.org/cpr/pic/charts.html (last visited Jan. 12, 2011), and charts that show variations between individual rules in each state and the comparable ABA rules. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, CHARTS COMPARING INDIVIDUAL PROFESSIONAL CONDUCT MODEL RULES AS ADOPTED OR PROPOSED BY STATES TO ABA MODEL RULES, http://www.abanet.org/cpr/pic/rule_charts.html (last visited Jan. 12, 2011).

If the proposed rules take effect here, the Texas rules will be more consistent with the ABA rules than they are now. But Texas, like other states, will still have rules that differ from ABA rules. Because the Fifth Circuit considers ABA rules in conjunction with Texas rules in disqualification cases and because several jurisdictions have modified their rules to be more consistent with the ABA rules, it is important to understand the similarities and differences between the ABA rules and the proposed rules. *See, e.g.*, *In re ProEducation Int'l, Inc.*, 587 F.3d 296, 299 (5th Cir. 2009) (relying on *Fed. Deposit Ins. Corp. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995), and *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992), to consider both ABA rules and Texas rules in reviewing motion to disqualify lawyer).

An exhaustive analysis of similarities and differences between the proposed rules and ABA rules is beyond the scope of this article. This article focuses on the five new rules (*i.e.*, proposed Rules 1.00, 1.13, 1.14, 1.17, and 6.03) because lawyers need to be

aware of them, and the proposed amendments to the four conflict-of-interest rules that have prompted the most extensive debates during the amendment process: Rules 1.06 through 1.09. Appendix A contains charts that compare the ABA rules with the existing Texas rules, as well as with the proposed rules as they were published initially (in October 2009) and as they will appear in the upcoming referendum.

I. The Five New Rules

A. Proposed Rule 1.00

Proposed Rule 1.00 contains defined terms that appear throughout the rules. While proposed Rule 1.00 is technically new, several of the terms it contains are in the "Terminology" section of the existing rules. Some, but not all, of the definitions of these terms have changed in a substantive way.

The definitions of the following terms have not changed in a substantive way: "adjudicatory official"; "adjudicatory proceeding"; "belief" or "believes"; "competent"; "consult" or "consultation"; "knowingly," "known," or "knows"; "person"; "reasonable" or "reasonably"; and "reasonable belief" or "reasonably believes." In contrast, the definitions of the following terms have changed in a substantive way: "firm" or "law firm"; "fitness"; "fraud"; "partner"; "substantial" or "substantially"; and "tribunal." Finally, the following seven terms are new: "affiliated," "confirmed in writing," "informed consent," "personally prohibited," "reasonably should know" (which replaces the existing term, "should know"), "represents," and "writing" or "written."

1. Amended terms

The substantive amendments to terms in the existing rules are often consistent with language in terms in ABA Rule 1.0. For example, the bulk of the new language in the definition of "firm" or "law firm" in proposed Rule 1.00(h) comes directly from the definition of "firm" or "law firm" in ABA Rule 1.0(c). In addition, the amended definition of "partner" in proposed Rule 1.00(m) is substantively identical to the definition of "partner" in ABA Rule 1.0(g). The definitions of "substantial" are also quite similar. Proposed Rule 1.00(t) provides that, "'[s]ubstantial' or 'substantially,' when used in reference to degree or extent, denotes a material matter of *clear significance*." (Emphasis added). ABA Rule 1.0(l), in turn, provides that, "'substantial[,]' when used in reference to degree or extent denotes a material matter of *clear and weighty importance*." (Emphasis added). The differences between these definitions are not intended to be clearly significant or of clear and weighty importance; the modifications to the Texas definition are intended simply to improve clarity.

There are, however, a few significant differences between the proposed definitions and the ABA definitions of "fraud" or "fraudulent" and "tribunal." ABA Rule 1.0(d) defines "fraud" or "fraudulent" as "denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Proposed Rule 1.00(j) refers similarly to "an intent to deceive" but also provides state-specific guidance about "a knowing misrepresentation of a material fact . . . or a knowing concealment of a material fact if there is a duty to disclose the material fact."[9]

> **FN 9**: Research indicates other states' rules also contain state-specific guidance. For example, see the "fraud" definitions in the rules in Alabama, Alaska, Florida, Georgia, Hawaii, Michigan, New York, North Dakota, Ohio, Tennessee, and Washington. *See* ABA CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, http://www.abanet.org/cpr/pic/1_0.pdf (last visited Jan. 12, 2011).

The amended definition of "tribunal" in proposed Rule 1.00(u) is quite similar to the definition of "tribunal" in ABA Rule 1.0(m), but there is one significant difference. The ABA definition refers to a body that will render *a binding legal judgment* directly affecting a party's interest in a matter." (Emphasis added). By comparison, the proposed Texas definition refers to a body that "*will render a proposal for decision or a binding legal order or decision* directly affecting a party's or parties' interests in a particular matter." (Emphasis added). The modified Texas definition is intended to encompass Texas entities that function as tribunals even when they do not render a binding legal judgment in a matter—e.g., the State Office of Administrative Hearings. Under this definition, as well as under the definition in the existing Texas rules, a lawyer has a duty of candor toward these entities in accordance with Rule 3.03, which addresses candor toward a "tribunal."

Finally, the term "fitness," which is in the existing rules and is amended in proposed Rule 1.00(i), is unique to Texas. ABA Rule 1.0 contains no counterpart.

2. New terms

Four of the seven new terms are based on terms in ABA Rule 1.0—"informed consent," "confirmed in writing," "reasonably should know," and "writing" or "written." But three of the new terms—"affiliated," "personally prohibited," and "represents"—do not have counterparts in ABA Rule 1.0.

a. Terms based on ABA terms

Proposed Rule 1.00(k) provides that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has *explained, in a manner that a reasonable lawyer would believe sufficient for the person to understand,* the material risks of and reasonably available alternatives to the proposed course of conduct." (Emphasis added). By comparison, ABA Rule 1.0(e) provides that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has *communicated adequate information and explanation about* the material risks of and reasonably available alternatives to the proposed course of conduct." (Emphasis added).

Feedback suggests there are concerns about the fact that proposed Rule 1.00(k) contains a reasonable-lawyer standard that is not in ABA Rule 1.0(e). But, while the ABA rule does not contain this standard on its face, the standard comes into play when the rule is read in context with relevant commentary and a related definition. Comment 6 to ABA Rule 1.0(e) provides: "The *lawyer must make reasonable efforts* to ensure that the client or other person possesses information reasonably adequate to make an informed decision." (Emphasis added). The term "must" is emphasized because it indicates an obligation, even though ABA comments are not generally intended to be authoritative.[10] The term "reasonable" is emphasized because it is defined in the ABA rules. Specifically, ABA Rule 1.0(h) defines the term, "when used in relation to conduct by a lawyer[,] [to] denote[] the conduct of a reasonably prudent and competent lawyer." Reading comment 6 to ABA Rule 1.0(e) in conjunction with the text of ABA Rules 1.0(e) and (h) suggests the ABA definition of "informed consent" incorporates the perspective of a reasonable lawyer, at least to an extent. In other words, the difference of concern between the proposed definition and ABA definition appears less stark when the ABA definition is read in context rather than in an isolated manner.

> **FN 10**: *See* MODEL RULES OF PROF'L CONDUCT: SCOPE ¶ 21 (2010) ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."). One of the drafting goals for the proposed rules was to remove mandates in comments that could be construed as adding obligations beyond the obligations in the rules.

The term "confirmed in writing" is defined with reference to informed consent in both the proposed rules and the ABA rules. Proposed Rule 1.00(f) contains the following definition:

> "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not reasonable for the lawyer to obtain or transmit the writing at the time the person provides informed consent, then the lawyer shall obtain or transmit it within a reasonable time after the person provides informed consent.

A few nonsubstantive differences exist between this definition and the comparable definition in ABA Rule 1.0(b). For example, this definition refers to informed consent that is "provided," while the ABA definition refers to informed consent that is "given." But the only difference that appears to have potential significance is that the ABA definition refers to what the lawyer must do if it is not "feasible"—as opposed not "reasonable"—for the lawyer to obtain or transmit the writing when informed consent is given. The Court modified the Texas definition in response to a public comment indicating that, in this context, reasonability is a more appropriate gauge than feasibility.

No substantive differences exist between the definitions of "reasonably should know" in proposed Rule 1.00(r) and ABA Rule 1.0(i). Likewise, there are no substantive differences between the definitions of "writing" or "written" in proposed Rule 1.00(v) and ABA Rule 1.0(n).

b. Terms without ABA counterparts

As mentioned above, the following three new terms are not in the ABA rules: "affiliated," "personally prohibited," and "represents." Proposed Rule 1.00(c) defines "affiliated" as follows:

> (1) A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity:
>
> (i) is a shareholder, partner, member, associate, or employee of that firm;
>
> (ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the

confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or

(iii) is held out as being in category (i) or (ii).

(2) A lawyer is "affiliated" with another lawyer if either the lawyers or their professional entities have any of the relationships described in categories (i)–(iii) above.

This definition of "affiliated" stems in part from Professional Ethics Committee Opinion No. 577. *See* Tex. Comm. on Prof'l Ethics, Op. 577, 70 TEX. B.J. 706 (2007). In that opinion, the committee identified factors to consider when determining whether a lawyer is or is not "in" a law firm.[11] *See id.* at 706–07. Factors that the committee considered relevant included, among other things, "receipt of firm communications, . . . whether the firm and the lawyer identify or hold the lawyer out as being in the firm to clients and to the public, and the lawyer's access to firm resources including computer data and applications, client files[,] and confidential information."[12] *Id.* at 706.

FN 11: The Professional Ethics Committee provided the following explanation for the need to identify these factors:

> The [existing] Texas Disciplinary Rules do not provide guidance on when a lawyer is in a law firm for purposes of the Rules. That may be in part because traditionally law firms consisted basically of partners or shareholders and "associates," who were any lawyers employed by the firm who were not partners or shareholders. Today the legal services landscape is more varied.

Tex. Comm. on Prof'l Ethics, Op. 577, 70 TEX. B.J. 706, 706 (2007).

FN 12: *Id*. The Professional Ethics Committee also identified "inclusion in firm events, work location, [and] length and history of association with the firm" as relevant in determining whether a lawyer is or is not "in" a firm. *Id*. In addition, the committee provided examples of lawyers who may fall into these categories. *Id*. at 706-07. Several of these examples are in comments 1 and 2 to proposed Rule 1.00(c).

Comments to proposed Rule 1.00(c) provide additional guidance that is not in Opinion 577. As one example, comment 1 provides that a lawyer is not "affiliated" with another lawyer or firm "solely because the lawyer assists the other lawyer or firm with a

matter and thereby gains access to some of the other lawyer's or firm's client confidences."

In contrast to proposed Rule 1.00(c), the ABA rules use the term "associated," and variations thereof, to describe a lawyer's relationship with a firm or other lawyers. The ABA has provided some helpful guidance about the meaning of "associated" in comments to the term "firm" in ABA Rule 1.0(c)[13] and in ethics opinions;[14] however, "associated" is not actually defined in the ABA rules.

FN 13: For example, comment 2 to ABA Rule 1.0(c) provides in part:

> Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.

FN 14: *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990) (describing "of counsel" designation and indicating that lawyer with designation at firm is likely to be considered "associated" with firm); Formal Op. 88-356 (1988) (explaining that "a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be 'associated with' the firm generally under Rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients").

The final two new terms—"personally prohibited" and "represents"—are related. Proposed Rule 1.00(o) provides that "[p]ersonally prohibited' means a lawyer is prohibited based on the lawyer's direct knowledge or involvement rather than being

prohibited based on the lawyer merely being affiliated with another lawyer." Proposed Rule 1.00(s) provides, in turn, that "[a] lawyer 'represents' a client when the lawyer personally exercises legal skill or judgment on behalf of the client in connection with a matter." The State Bar TDRPC Committee crafted both of these definitions in an effort to make it easier to understand a direct conflict of interest that arises as a result of a lawyer being involved with a case, as opposed to a conflict of interest that extends beyond that lawyer to affiliated lawyers (i.e., an imputed conflict). The definition of "represents" is also meant to clarify which lawyers fall within the breadth of rules that describe the duties of a lawyer who "represents" a client.

B. Proposed Rule 1.13

Proposed Rule 1.13 addresses prohibited sexual relations between a lawyer and, among other persons, a client. This new rule consists of three paragraphs. Paragraph (c) is modeled after ABA Rule 1.8(j).

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.13 provides: "A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer." This provision applies both before and during representation and is intended to protect not only the client but also any other person whom a lawyer may pursue for sexual relations. The ABA rules do not contain a comparable provision.[15]

> **FN 15**: Some states, however, include similar provisions in their rules. For example, North Carolina provides in Rule 1.19(c) that "[a] lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation." California provides in Rule 3-120(B)(1) that a lawyer "shall not . . . [r]equire or demand sexual relations with a client incident to or as a condition of any professional representation[.]" Similarly, in Rule 1.8(j)(1)(i), New York provides that "[a] lawyer shall not . . . as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person[.]" This list is not exhaustive.

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.13 provides: "A lawyer shall not solicit or accept sexual relations as payment of fees or expenses." This provision is intended to protect the client both during and after representation. Once again, the ABA rules do not contain a comparable provision.[16]

> **FN 16**: But the conduct is also prohibited, at least in part, by Texas criminal law. *See, e.g.*, TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon Supp. 2010) ("A person commits an offense [of prostitution] if he knowingly . . .offers to engage, agrees to engage, or engages in sexual conduct for a fee[.]"); *see also id.* § 43.02(b) ("An offense is established under Subsection (a)(1) whether the actor is to receive or pay a fee. . . .").

3. Paragraph (c)

Paragraph (c) of proposed Rule 1.13, which generated extensive discussion during the amendment process, provides: "A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation." This paragraph is based on comparable ABA Model Rule 1.8(j), which provides: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

Several people have construed the prohibition in paragraph (c) of proposed Rule 1.13 as being much less protective than the prohibition in paragraph (j) of ABA Rule 1.8 because the former refers specifically to "a client that the lawyer is personally representing," while the latter refers more generally to "a client." The argument is essentially that proposed Rule 1.13 is limited to the lawyer who is on the case, while ABA Rule 1.8(j) applies not only to that lawyer but also to any lawyer with whom that lawyer works.

This argument appears reasonable at first glance, but it does not consider ABA Rule 1.8(k), which reads: "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them." By excluding paragraph (j) from the imputation provision in 1.08(k), the ABA expressed intent for the prohibition in paragraph (j) *not* to extend beyond the lawyer who is on the case to all lawyers with whom that lawyer works. That intent is crystallized in comment 20 to ABA Rule 1.8, which provides that "[t]he prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers." Thus, what

has been construed and characterized as a significant difference between proposed Rule 1.13(c) and ABA Rule 1.8(j) is not, in fact, a substantive difference.

There are, however, two substantive differences between proposed Rule 1.13(c) and ABA Rule 1.8(j). Both of them relate to the exceptions in the rules. In paragraph (c) of proposed Rule 1.13, the prohibition against sexual relations does not apply when the lawyer and client are either: (1) married to each other; or (2) engaged in an ongoing consensual sexual relationship that predated the representation. The first exception is not in ABA Rule 1.8(j). With its inclusion in Rule 1.13, Texas lawyers will be able to represent their spouses without concern about having to demonstrate to disciplinary authorities the existence and nature of the married couple's sexual relationship. The second exception is similar to the exception in ABA Rule 1.8(j) but varies to the extent it requires "an *ongoing* consensual relationship" rather than just "a consensual sexual relationship." The requirement of an "ongoing" relationship should help to deter a lawyer from dating a person just before representing that person in order to circumvent the intended scope of the prohibition against sexual relations between a lawyer and client.

C. Proposed Rule 1.14

Proposed Rule 1.14 addresses a lawyer's obligations and options in relation to a client who has diminished capacity. This new rule is modeled after ABA Rule 1.14 and replaces existing Texas Rule 1.02(g), which reads: "A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.14 provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Paragraph (a) of ABA Rule 1.14 is substantively identical to paragraph (a) of proposed Rule 1.14.

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.14 provides:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

Notice that this provision, unlike existing Texas Rule 1.02(g), *allows* protective action but does not *require* such action.

Paragraph (b) of ABA Rule 1.14 contains the same conditions that trigger a lawyer's ability to take reasonably necessary protective action on a client's behalf. But the examples of such action are not identical in the rules. The ABA rule provides that the action may include "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." The Court expanded the list of options in paragraph (b) of proposed Rule 1.14 to include the appointment of an attorney ad litem and amicus attorney—two additional types of court-appointed attorneys in Texas. In addition, to be consistent with guardianship procedures in Texas, the Court did not incorporate the ABA's language allowing a lawyer to seek the appointment of a guardian; instead, the Court included language allowing a lawyer to submit an information letter to a court with jurisdiction to initiate guardianship proceedings for a client. *See* TEX. PROBATE CODE ANN. § 683 (Vernon Supp. 2010) (describing procedure for court appointment of guardians in Texas).

3. Paragraph (c)

Paragraph (c) of proposed Rule 1.14 provides: "When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law." Paragraph (c) of ABA Rule 1.14 provides similarly: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

There are two main differences between paragraph (c) in proposed Rule 1.14 and in ABA Rule 1.14. First, paragraph (c) in proposed Rule 1.14, unlike paragraph (c) in ABA Rule 1.14, does not state that information relating to the representation of a client with

diminished capacity is protected by the rule governing the confidentiality of client information—ABA Rule 1.6 and Texas Rule 1.05—and does not refer specifically to applicable language in that rule. But this difference should not have a substantive impact, as comment 8 to proposed Rule 1.14 contains guidance similar to the guidance that the ABA included in its rule, providing: "As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05."

The second difference relates to the standard governing the disclosure of confidential information. Paragraph (c) of ABA Rule 1.14 allows a lawyer to disclose information "to the extent *reasonably necessary* to protect the client's interests[,]" while paragraph (c) of proposed Rule 1.14 allows a lawyer to disclose information "to the extent *the lawyer reasonably believes is necessary* to protect the client's interests, *unless otherwise prohibited by law.*" (Emphasis added). The scienter standards are slightly different in these rules, and proposed Rule 1.14(c), unlike ABA Rule 1.14(c), provides essentially that the rule cannot be used to expand the scope of disclosure permitted by law.

D. Proposed Rule 1.17

Proposed Rule 1.17 addresses a lawyer's duties in relation to a prospective client. Consisting of four paragraphs, this new rule is based in part on ABA Rule 1.18. Both proposed Rule 1.17 and ABA Rule 1.18 recognize that, while it is important to protect a prospective client's interests, the protections afforded to a prospective client generally should not be as extensive as the protections afforded to an actual client to whom a lawyer owes the full range of fiduciary duties. But these rules, as well as other related rules, approach this balancing act in fairly divergent ways. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, CHARTS COMPARING INDIVIDUAL PROFESSIONAL CONDUCT MODEL RULES AS ADOPTED OR PROPOSED BY STATES TO ABA MODEL RULES, http://www.abanet.org/cpr/pic/rule_charts.html (last visited Jan. 12, 2011) (indicating that rules in several other states also diverge from ABA Rule 1.18 in several respects).

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.17 contains the following definition of a "prospective client": "A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The definition in paragraph (a) of ABA Rule 1.18 is almost identical but excludes the phrase "in good faith" that appears in paragraph (a) of proposed Rule 1.17. As explained in comment 3 to the proposed rule, "[t]he requirement in paragraph (a) that a lawyer's services be sought 'in good faith' is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party."

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.17 describes limitations on a lawyer's use and disclosure of a prospective client's confidential information, as follows: "A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2)." Proposed Rule 1.05 is the main rule on confidentiality and addresses the use and disclosure of confidential information. Important to the analysis of proposed Rule 1.17, proposed Rule 1.05 also contains this definition of "confidential information":

> (a) Confidential information:
>
> (1) in the case of a client or former client, is *all information relating to representation of the client from whatever source*, whether acquired by the lawyer personally or through an agent, other than information that is or becomes generally known or is readily obtainable from sources generally available to the public; and
>
> (2) in the case of a prospective client, as described in Rule 1.17, is *information furnished to the lawyer by that prospective client*, either personally or through an agent or other representative authorized to act on the prospective client's behalf, *in the course of seeking legal representation*, other than information that:
>
> (i) is or becomes generally known or is readily obtainable from sources generally available to the public; or
>
> (ii) is furnished under the circumstances described in Rule 1.17(d)(2).

(Emphasis added). The italicized text reveals that the scope of information considered "confidential" is narrower for a prospective client than it is for a current or former client. Proposed Rule 1.17(d)(2), which is referenced in proposed Rule 1.05(a)(2)(ii) above, allows a lawyer to narrow the scope of protection even further, with the prospective client's informed consent. Specifically, subparagraph (d)(2) of proposed Rule 1.17 provides:

> When a lawyer has received confidential information from a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is

> permissible if . . . the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

Comment 5 to ABA Rule 1.18 provides the following, similar guidance:

> A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. . . . If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Paragraph (b) of ABA Rule 1.18, similar to paragraph (b) of proposed Rule 1.17, addresses the use and disclosure of a prospective client's information and provides: "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client." Of relevance, ABA Rule 1.9(c) provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.

3. Paragraphs (c) and (d)

In proposed Rule 1.17 and ABA Rule 1.18, paragraph (c) addresses the extent to which a lawyer's interactions with a prospective client create conflicts that impede future representations. Both rules generally prohibit a lawyer who has received confidential information from a prospective client from representing "a client with interests materially adverse to those of the prospective client in the same or substantially related matter[.]" But under the ABA rule, this prohibition is triggered only "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter[.]" Furthermore, the rules contain different exceptions to the general prohibition against conflicted representations.

Paragraph (c) of ABA Rule 1.18 allows a lawyer to proceed with a conflicted representation "as provided in paragraph (d)[,]" which reads:

> When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice is promptly given to the prospective client.

By comparison, paragraph (c) of proposed Rule 1.17 allows a lawyer to proceed with a conflicted representation "as provided in (d)(1) or (d)(2)." The exception in subparagraph (d)(1) provides that a lawyer may proceed with the representation if "the prospective client has provided informed consent, confirmed in writing, to the representation." This exception is similar to the exception in ABA Rule 1.18(d)(1) but varies to the extent it does not require a lawyer to obtain informed consent from the "affected client." The exception in proposed Rule 1.17(d)(2) and comparable language in an ABA comment is described, *supra*, on pages 286-87.

Proposed Rule 1.17 does not include screening provisions comparable to subparagraphs (d)(2)(i)-(ii) of ABA Rule 1.18, because the Court decided not to allow screening to avoid the imputation of a conflict relating to a lawyer's interactions with a prospective client without obtaining that prospective client's informed consent. But, somewhat similar to the first part of subparagraph (d)(2) of ABA Rule 1.18, comment 2 to proposed Rule 1.17 provides:

> To attempt to avoid acquiring information from a prospective client that could prohibit the lawyer from undertaking another representation, the lawyer considering whether to represent the prospective client in a new matter may choose to limit the receipt of information from that prospective client to information that will assist the lawyer in determining

whether a conflict of interest or other reason for declining the representation exists.

The final variation between proposed Rule 1.17 and ABA Rule 1.18 relates to their imputation provisions. Paragraph (c) of proposed Rule 1.17 provides: "When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter." By comparison, paragraph (c) of ABA Rule 1.18 provides: "If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)."

The terminology in these imputation provisions is fairly different. ABA Rule 1.18(c), for example, does not contain the new terms (addressed on pages 278-81) that do not have ABA counterparts—e.g., "personally prohibited" and "affiliated." In addition, proposed Rule 1.17(c), like other proposed rules, does not follow the ABA in referring to a "disqualified" lawyer. The concepts of discipline and disqualification, while related, are not the same. In that regard, paragraph 13 of the preamble to the proposed rules provides that "these Rules are not designed to be standards for procedural decisions, such as disqualification." And paragraph 20 of the preamble to the ABA rules provides similarly that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." To avoid any unintended blurring of the standards of disqualification and discipline, the proposed rules simply do not refer to disqualified lawyers or disqualification.

Another difference between the imputation provisions in proposed Rules 1.17(c) and ABA Rule 1.18(c) relates to their scienter standards. Proposed Rule 1.17(c) contains the standard "knows or reasonably should know," while ABA Rule 1.18(c) contains the standard "knowingly." The "reasonably should know" standard, when used in reference to a lawyer, is defined in proposed Rule 1.00(r) and ABA Rule 1.0(j) to "denote[] that a lawyer of reasonable prudence and competence would ascertain the matter in question." As used in proposed Rule 1.17, this standard is intended to be objective and, as comment 7 to that rule provides, is not intended to "diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation." Proposed Rule 1.00(l) and ABA Rule 1.0(f) provide that the scienter standard "knows" or "knowingly" "denotes actual knowledge of the fact in question . . . [and that a] person's knowledge may be inferred from circumstances." This standard places less of an affirmative duty on a lawyer to discover a conflict than the standard "reasonably should

know." Thus, the scienter standards in proposed Rule 1.17(c) are arguably more stringent than the scienter standard in ABA Rule 1.18(c). But neither rule subjects a lawyer to discipline for engaging in a conflicted representation without consideration of that lawyer's awareness of the conflict.

E. Proposed Rule 6.03

Proposed Rule 6.03 addresses a lawyer's obligations when the lawyer is participating in law-reform activities that may affect the interests of a client of the lawyer. This rule is substantively identical to ABA Rule 6.4 and provides: "A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client." In light of this new rule, references to law-reform activities in existing Rule 6.02 have been deleted.

II. Proposed Amendments to Conflict-of-Interest Rules 1.06 Through 1.09

As indicated above, proposed Rules 1.06, 1.07, 1.08, and 1.09 have sparked much discussion during the amendment process. Like proposed Rule 1.17, all of these rules address conflicts of interest.

An extensive analysis of the amendments to existing Rules 1.06 through 1.09 is beyond the scope of this article. But, as a reminder, the tables in Appendix A compare text in the existing rules, proposed rules, and ABA rules.

A. Proposed Rule 1.06

Proposed Rule 1.06 is the general rule relating to conflicts that result from a lawyer's representation of one or more current clients. The amendments to existing Rule 1.06 make the rule more consistent with ABA Rule 1.7, but differences remain between these rules.[17]

FN 17: Other states' rules also vary to an extent from ABA Rule 1.7. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, CHARTS COMPARING INDIVIDUAL PROFESSIONAL CONDUCT MODEL RULES AS ADOPTED OR PROPOSED BY STATES TO ABA MODEL RULES, http://www.abanet.org/cpr/pic/rule_charts.html (last visited Jan. 12, 2011).

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.06 describes when a conflict of interest exists, as follows:

> A conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

This standard replaces the standard in paragraph (b) of existing Rule 1.06.

Paragraph (a) of ABA Rule 1.7 contains the exact same standard as paragraph (a) of proposed Rule 1.06 for determining whether a "concurrent conflict of interest" exists. The difference between the terms "concurrent conflict of interest" in the ABA rule and "conflict of interest" in the proposed rule is not intended to be substantive.

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.06 provides that "[a] lawyer shall not, even with informed consent, represent opposing parties in the same matter before a tribunal." This is similar to existing Rule 1.06(a), which reads: "A lawyer shall not represent opposing parties to the same litigation." But the proposed rule makes clear that a lawyer cannot overcome the prohibition at issue by obtaining a client's informed consent.

Subparagraph (b)(3) of ABA Rule 1.7 contains a prohibition that is similar to the prohibition in paragraph (b) of proposed Rule 1.06, despite being worded in a fairly different way. ABA Rule 1.7(b) provides in full:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment 17 to ABA Rule 1.7 explains that the conflict of interest described in subparagraph (b)(3) of the rule is a "nonconsentable" conflict, just like the conflict described in paragraph (b) of proposed Rule 1.06. Thus, in this instance, the difference between the ABA rule and proposed rule is more about form than substance. ABA Rule 1.7 addresses both consentable and nonconsentable conflicts in one paragraph—(b)—while proposed Rule 1.06 addresses nonconsentable conflicts and consentable conflicts in two separate paragraphs—(b) and (c) respectively.

3. Paragraph (c)

Paragraph (c) of proposed Rule 1.06 is structured similarly to paragraph (b) of ABA Rule 1.7 and provides:

> In situations other than the situation described in (b), when representation of a client will involve a conflict of interest, the lawyer shall not represent the client unless:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client;
>
> (2) the client provides informed consent, confirmed in writing; and
>
> (3) the representation complies with Rule 1.07 if the lawyer is considering representing more than one client in the same matter.

The standards in subparagraphs (c)(1) and (c)(2) are generally consistent with the standards in subparagraphs (b)(1) and (b)(4) of ABA Rule 1.7. Subparagraph (b)(2) of ABA Rule 1.7, however, has no counterpart in proposed Rule 1.06(c). Lest there be any confusion, this does not mean lawyers in Texas can engage in representations that are prohibited by law. Rule 8.04(a)(12) (in both its existing and proposed form) provides, for example, that "[a] lawyer shall not . . . violate any laws of this state relating to the professional conduct of lawyers and to the practice of law."

Subparagraph (c)(3) of proposed Rule 1.06 references proposed Rule 1.07 to make clear that a lawyer who is considering representing more than one client in the same matter must comply with Rule 1.07 in addition to Rule 1.06. ABA Rule 1.7 does not contain a comparable provision because there is no ABA rule like proposed Rule

1.07. Instead, as explained in Section B below, the ABA addresses specific issues relating to such joint representation in comments to ABA Rule 1.7.

4. Paragraph (d)

Paragraph (d) of proposed Rule 1.06 provides that "[i]f a lawyer has accepted representation in violation of this Rule, or if a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules." This requirement stems from paragraph (e) of existing Rule 1.06.

ABA Rule 1.7 does not contain a comparable requirement, but ABA Rule 1.16 does. In fact, comment 4 to ABA Rule 1.7 refers to ABA Rule 1.16 for the proposition that "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)." ABA Rule 1.16(a) provides: "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law[.]" Paragraph (c), in turn, provides the following, narrow exception: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[18]

> **FN 18**: Proposed Rule 1.16(a) and (c) contain language that is substantively the same as the quoted language from ABA Rule 1.16(a) and (c).

5. Paragraph (e)

Finally, paragraph (e) of proposed Rule 1.06 contains this imputation provision:

> When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter, unless the prohibition is based only on a personal interest of the personally prohibited lawyer and the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation.

The language preceding the word "unless" is very similar to the imputation provisions in proposed Rules 1.07(c); 1.08(i); 1.09(a)(2), (c)(2), and (e); 1.10(b) and (d); 1.11(c); and

1.17(c). This repetition is designed to give lawyers a standard, easy-to-locate test for assessing the imputation of the various types of conflicts. The ABA's approach to imputation is different. ABA Rule 1.10 addresses the imputation of conflicts arising under ABA Rules 1.7 and 1.9. There are, however, separate imputation provisions in ABA Rules 1.8, 1.11, 1.12, and, as discussed above, 1.18.

Relevant to the imputation of conflicts arising under ABA Rule 1.7, subparagraph (a)(1) of ABA Rule 1.10 provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . . the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm[.]

The prior analysis of the imputation provisions in proposed Rule 1.17(c) and ABA Rule 1.18(c) is applicable to the general imputation provisions in proposed Rule 1.06(e) and ABA Rule 1.10(a)(1). Thus, that analysis will not be repeated here.

But the exceptions to imputation in proposed Rule 1.06(e) and ABA Rule 1.10(a)(1) are not in proposed Rule 1.17(c) or ABA Rule 1.18(c) and, therefore, should be considered here. Both exceptions are triggered initially when an imputed conflict is based on a personal interest of the lawyer with whom the conflict originated. But the exception in proposed Rule 1.06(e) applies only when "the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation[,]" while the exception in ABA Rule 1.10(a)(1) applies only when the prohibition imposed on the disqualified lawyer "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm[.]" The standard in proposed Rule 1.06(e) is similar to the standard in ABA Rule 1.7(b)(1) and proposed Rule 1.06(c)(1), while the standard in ABA Rule 1.10(a)(1) is similar to the standard in ABA Rule 1.7(a)(2).

B. Proposed Rule 1.07

Proposed Rule 1.07 replaces existing Rule 1.07, which addresses a lawyer's obligations as an "intermediary." As mentioned above, proposed Rule 1.07 addresses conflicts relating to a lawyer's representation of more than one client in the same matter. The ABA does not have a separate rule for these conflicts; instead, the ABA addresses these conflicts generally as a component of ABA Rule 1.7 and deals with specific issues relating to these conflicts in various comments to ABA Rule 1.7. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 18, 29-33 (2010).

1. Paragraph (a)

Subparagraph (a)(1) of proposed Rule 1.07 provides that "[a] lawyer shall not represent two or more clients in a matter unless . . . the representation complies with Rule 1.06[.]" As explained in comment 6 to proposed Rule 1.07, this subparagraph "reminds lawyers that [proposed] Rule 1.06, which provides general conflict-of-interest principles, is the starting point for assessing conflicts of interest." Comment 6 also provides: "Only after the lawyer has determined that a representation complies with [proposed] Rule 1.06 should the lawyer consider the implications of a joint representation involving multiple clients in the same matter, which requires analysis under [proposed] Rule [1.07]."

Subparagraph (a)(2) of proposed Rule 1.07 lists three disclosures a lawyer must make to clients "prior to undertaking the representation or as soon as reasonably practicable thereafter[.]" Specifically, this subparagraph requires the lawyer to tell the clients that during the representation the lawyer:

(i) must act impartially as to all clients;

(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and

(iii) may be required to withdraw from representing some or all of the clients before the matter is completed due to events that occur during the representation;

Subparagraph (a)(3) provides that "as soon as reasonably practicable after making the disclosures required by [subparagraph] (a)(2)," a lawyer must "obtain each client's informed consent, confirmed in writing, to the representation."

2. Paragraph (b)

Paragraph (b) contains the following exception to the requirements in paragraph (a): "When a lawyer represents multiple clients in a matter pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in this Rule, the lawyer may comply with those different standards notwithstanding this Rule."

3. Paragraph (c)

Finally, as previously discussed, paragraph (c) contains the same general imputation provision that appears in the other proposed conflict-of-interest rules: "When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter."

4. General discussion

Proposed Rule 1.07 stands alone in a question in the referendum ballot because several concerns arose regarding this rule during the amendment process. The Court modified the proposed rule in several ways to alleviate these concerns, but issues linger. For example, some people do not like that proposed Rule 1.07 is unique to Texas and cross-references proposed Rule 1.06. In addition, some lawyers believe they should not be required to make the disclosures described in paragraph (a) of proposed Rule 1.07 every time they represent multiple clients in the same matter, even when there is no conflict of interest relating to the representation. And some lawyers have been critical of the content of the proposed disclosures.

Because the disclosures required under proposed Rule 1.07(a)(2) are the subject of some lingering concern, it is important to understand their purpose and how they relate to the ABA rules. As comment 2 to proposed Rule 1.07 indicates, the disclosures are required because "a joint representation [of multiple clients] is frequently laden with conflict-of-interest risks." Comment 2 explains these risks, as follows: "The lawyer has fiduciary obligations to each client, which include loyalty, candor, and confidentiality. But the representation may develop so that protecting one joint client harms another joint client or concealing information helps one joint client but adversely affects another joint client."

Proponents of proposed Rule 1.07 have asserted that the disclosures required under subparagraph (a)(2) are consistent with a lawyer's fiduciary duties and that, if a lawyer makes the disclosures, the lawyer is less likely to be sued by jointly represented clients and, if sued, is more likely to have a good defense to the suit.

Although the ABA rules do not explicitly require any of the disclosures required under proposed Rule 1.07(a)(2), comments to ABA Rule 1.7 address the concepts in the proposed rule and encourage similar disclosures. Comment 29 to ABA Rule 1.7, for example, recognizes the obligation of impartiality addressed in subparagraph (a)(2)(i) of proposed Rule 1.07 and provides: "[B]ecause the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper

when it is unlikely that impartiality can be maintained." In addition, comment 32 to ABA Rule 1.7 encourages a similar disclosure to the disclosure required under subparagraph (a)(2)(ii) of proposed Rule 1.07, providing: "When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented."

Finally, several comments to ABA Rule 1.7 address the withdrawal possibility that a lawyer is required to consider under proposed Rule 1.07(a)(2)(iii). Comment 29 to ABA Rule 1.7, for example, provides: "In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination." The comment also provides that a lawyer "[o]rdinarily . . . will be forced to withdraw from representing all of the clients if the common representation fails." Comment 31 provides further that "[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." Comment 18 also addresses the process of obtaining informed consent and provides that, "[w]hen representation of multiple clients in a single matter is undertaken, the information *must* include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." (Emphasis added). The intended interplay between this comment and the other quoted ABA comments is unclear.

This analysis of ABA comments reveals that the policies underlying the disclosures required by proposed Rule 1.07(a)(2) are echoed to an extent in the ABA comments. But the fact remains that proposed Rule 1.07 is unique to Texas and requires disclosures that are not required explicitly by ABA Rule 1.7.

C. Proposed Rule 1.08

Proposed Rule 1.08 addresses certain transactions that are generally prohibited because they generally involve conflicts. Some of the changes to existing Rule 1.08 make the rule more consistent with ABA Rule 1.8 and a related ABA ethics opinion; but differences remain between proposed Rule 1.08 and ABA Rule 1.8.

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.08 contains a general rule that "[a] lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others[.]" By comparison, paragraph (a) of ABA Rule 1.8 provides that "[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client[.]" There are two main differences between these rules. First, proposed Rule 1.08(a) does not impose the ABA restrictions on a lawyer acquiring a pecuniary interest adverse to a client. Second, proposed Rule 1.08(a) (like existing Rule 1.08(j)) excludes standard commercial transactions that are not excluded on the face of ABA Rule 1.8(a). But comment 1 to the ABA rule resolves this difference by providing that the rule "does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others[.]"

Both proposed Rule 1.08(a) and ABA Rule 1.8(a) contain exceptions to the general prohibition against entering into a business transaction with a client. The proposed rule allows the transaction if:

> (1) the lawyer reasonably believes that the terms of the transaction between the lawyer and the client:
>
> (i) are fair and reasonable to the client; and
>
> (ii) if known to the lawyer and not known to the client, are fully disclosed in a manner that can be reasonably understood by the client;
>
> (2) the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Similar to proposed Rule 1.08(a), ABA Rule 1.8(a) contains a three-pronged exception to the general rule against business transactions with a client:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and

transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There are two main differences between proposed Rule 1.08(a)(1) and ABA Rule 1.8(a)(1). First, while the proposed rule refers to "the terms of the transaction[,]" the ABA rule refers to "the transactions and the terms on which the lawyer acquires the interest[.]" Existing Rule 1.08(a)(1) contains the same phrase that appears in the ABA rule. The phrase is shortened in the proposed rule to improve clarity, not to change substance. There is, however, a substantive change to existing Rule 1.08(a). Specifically, two scienter standards have been added to paragraph (a)—"reasonably believes" and "known." With the addition of the first scienter standard, a lawyer who reasonably (even if mistakenly) believed the terms of a transaction were fair and reasonable to a client will not be subject to discipline. The second scienter standard recognizes that clients sometimes initiate business transactions with lawyers and, as a result, know just as much, if not more, than the lawyers know about the terms of the transactions. As comment 4 to proposed Rule 1.08 provides, under those circumstances, the same disclosures are not required to prevent overreaching by the lawyer.

The only substantive difference between proposed Rule 1.08(a)(2) and ABA Rule 1.8(a)(2) relates to the writing requirement. Proposed Rule 1.08(a)(2), like existing Rule 1.08(a)(2) but unlike ABA Rule 1.8(a)(2), does not require a client to be advised in writing of the desirability of seeking independent legal counsel on the transaction.

Proposed Rule 1.08(a)(3) and ABA Rule 1.8(a)(3) are fairly similar but contain slightly different phrasing. The proposed rule requires the informed consent to be "confirmed in a writing signed by the client, to the material terms of the transaction[,]" while the ABA rule requires the informed consent "in a writing signed by the client, to the essential terms of the transaction[.]"

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.08 addresses restrictions on gifts and reads:

> A lawyer shall neither prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, nor solicit any substantial gift from a client for the lawyer or for a person related to the lawyer, unless the lawyer or other person is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ABA Rule 1.8(c) is similar substantively but lists "a testamentary gift" as a specific example of a substantial gift. This example is also listed in existing Rule 1.08(b) but has been moved to comment 10 for proposed Rule 1.08(b).

3. Paragraph (c)

Paragraph (c) in proposed Rule 1.08 addresses restrictions on literary and media rights and provides:

> Before the conclusion of all aspects of the matter giving rise to a lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client, or anyone acting on that person's behalf, that gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

The only substantive change to existing Rule 1.08(c) is the reference to "anyone acting on [the client's, prospective client's, or former client's] behalf[.]"

ABA Rule 1.8(d) contains the same basic prohibition contained in proposed and existing Rule 1.08(c) but is worded more generally, as follows: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

4. Paragraph (d)

Paragraph (d) of proposed Rule 1.08 restricts a lawyer's ability to provide financial assistance to a client, reading:

> A lawyer shall not provide financial assistance to a client in connection with contemplated or pending proceedings before a tribunal, except that:
>
> (1) a lawyer may advance or guarantee the costs and expenses of such proceedings, and reasonably necessary medical and living expenses,

the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay costs and expenses of such proceedings on behalf of the client.

The only substantive change to existing Rule 1.08(d) relates to the description of proceedings that fall within the rule's confines. For example, the reference in the existing rule to "litigation or administrative proceedings" has been changed in the proposed rule to "proceedings before a tribunal[.]"

Comparable ABA Rule 1.8(e) refers more specifically to "litigation" and to "court costs" rather than "costs." In addition, unlike proposed and existing Rule 1.08(d)(1), ABA Rule 1.8(e)(1) does not permit a lawyer to guarantee costs or expenses or to advance or guarantee "reasonably necessary medical and living expenses[.]"

5. Paragraph (e)

Paragraph (e) of proposed Rule 1.08 prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the following, three conditions are met:

(1) the client, if not represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code, provides informed consent;

(2) the lawyer reasonably believes that the lawyer's exercise of independent professional judgment on behalf of the client will not be affected; and

(3) information relating to representation of the client is protected as required by Rule 1.05.

Paragraph (f) of ABA Rule 1.8 contains the same general prohibition in paragraph (e) of proposed Rule 1.08 and the following, related conditions for overcoming the prohibition:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

There are two substantive differences between the proposed rule and ABA rule. First, unlike the ABA rule, the proposed rule contains an exception to the informed-consent requirement. Specifically, under proposed Rule 1.08(e)(1), a lawyer does not have to obtain informed consent from a client in order for someone else to pay for that client's representation when the client is "represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code[.]" These representations are excepted primarily because they entail relatively low risk of improper third-party-payer influence.[19]

> **FN 19**: The exception is also intended to address concerns over the amount of staff time that nonprofit legal provides would potentially have to dedicate to obtain the informed consent at issue. David G. Hall, the Executive Director of Texas RioGrande Legal Aid (TRLA), asserted during a public-education hearing on September 8, 2010 that TRLA receives funds from approximately sixty different sources other than the client and that TRLA represents around fifty thousand clients each year. Hearing on 2010 Proposed Rules Before the Board. (Sept. 8, 2010), *available at* http://www.texasbar.com/audio/publichearings/mcallen.mp3 (last visited Jan. 11, 2011). He predicted it would require approximately 4,000 hours of staff time each year to obtain the clients' informed consent for other persons to pay for their representation. *Id.*

The second difference between the proposed rule and ABA rule relates to scienter—proposed Rule 1.08(e)(2) contains a reasonable-belief standard that is not in comparable ABA Rule 1.8(f)(2). The scienter standard in the proposed rule is intended to avoid the imposition of discipline on a lawyer who accepts compensation from a third-party payer and reasonably believes the acceptance will not affect the lawyer's exercise of independent professional judgment on the client's behalf. Existing Rule 1.08(e)(2), like ABA Rule 1.8(f)(2), does not contain this standard.

6. Paragraph (f)

Paragraph (f) of proposed Rule 1.08 addresses aggregated settlements and aggregated agreements and provides:

> Except as otherwise authorized by law, a lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against that lawyer's clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless the lawyer obtains

the informed consent of each client, confirmed in writing, after advising each client of:

(1) the total amount of the settlement or result of the agreement;

(2) the existence and nature of material claims, defenses, or pleas involved;

(3) the nature and extent of each client's participation in the settlement or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges;

(4) the total fees, costs, and expenses to be paid to the lawyer from the proceeds, or by an opposing party or parties; and

(5) the method by which the costs and expenses are to be apportioned to each client.

Comparable ABA Rule 1.8(g) provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The first difference of significance is that the proposed rule, unlike the ABA rule, expressly allows lawyers to proceed "as otherwise authorized by law[.]" This exception applies, for example, in class actions. In that regard, comment 17 to proposed Rule 1.08 provides that "[l]awyers representing a class of plaintiffs or defendants should consult applicable law, rules of procedure, and other rules for guidance regarding communications about settlements."

The second difference of significance relates to the disclosures required under the proposed rule versus the ABA rule. The more extensive disclosures under the proposed rule are based largely on a formal ethics opinion in which the ABA Standing Committee on Ethics and Professional Responsibility concluded that, "[i]n order to ensure a valid and informed consent to an aggregate settlement or aggregated agreement, Rule 1.8(g) requires a lawyer to disclose, at a minimum," several things that are not explicitly listed in Rule 1.8(g). ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438 (2006). The additional disclosures in proposed Rule 1.08(f) are based

on the additional disclosures the committee required. *See id*. (requiring disclosure of (1) "[t]he total amount of the aggregate settlement or the result of the aggregate agreement"; (2) "[t]he existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement"; (3) "[t]he details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contribution, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution . . ."; (4) "[t]he total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties"; and (5) "[t]he method by which costs . . . are to be apportioned among them.").

7. Paragraph (g)

Subparagraphs (g)(1) and (g)(3) of proposed Rule 1.08 address agreements relating to a lawyer's malpractice and professional misconduct, as follows:

> A lawyer shall not:
>
> (1) make an agreement with a client prospectively limiting the lawyer's liability to a client for malpractice or professional misconduct unless the client is represented by independent legal counsel in making the agreement; [or]
>
> * * *
>
> (3) settle a claim or potential claim for malpractice or professional misconduct with a client or former client of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises that person in writing of the desirability of seeking, and gives a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

Comparable subparagraphs (h)(1) and (h)(2) of ABA Rule 1.8 are similar to subparagraphs (g)(1) and (g)(3) of proposed Rule 1.08. But, like existing Rule 1.08(g), ABA Rule 1.8(h) does not address professional misconduct. The reference to "professional misconduct" in the proposed rule is intended to extend the protections in that rule to cover professional-misconduct claims that do not fall within the confines of malpractice. As provided in comment 21 to the proposed rule, "Neither subparagraph (g)(1) nor subparagraph (g)(3) authorizes a lawyer to make an agreement with a client

that limits the lawyer's obligations under these Rules or the enforcement of these Rules."

Subparagraph (g)(2) of proposed Rule 1.08 provides that "[a] lawyer shall not:

> [M]ake an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either:
>
> (i) the client is represented by independent legal counsel in making the agreement; or
>
> (ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated, that the client will waive a trial before a judge or jury on these issues, and that the rights of appeal may be limited[.]

This subparagraph recognizes that a lawyer will likely have a better understanding than a client of the potential advantages and disadvantages associated with binding arbitration and, accordingly, requires the lawyer to make certain disclosures to the client if the client is not independently represented when entering into a binding arbitration agreement with the lawyer.[20] There is no comparable ABA provision.

> **FN 20**: In Opinion 586, the State Bar Professional Ethics Committee analyzed issues relating to binding arbitration agreements between lawyers and clients and encouraged several additional disclosures beyond the disclosures that are required under proposed Rule 1.08(g)(2). *See* Tex. Comm. on Prof'l Ethics, Op. 586, 77 TEX. B.J. 128 (2009). Comment 19 to the proposed rule also encourages some additional disclosures.

8. Paragraph (h)

Paragraph (h) of proposed Rule 1.08 addresses proprietary interests in a cause of action or subject matter of litigation and provides:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation in which the lawyer is representing a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

There are no substantive differences between the proposed rule and existing rule, but there are differences between the proposed rule and comparable ABA Rule 1.8(i). First, while the proposed rule refers to a lien "granted" by law, the ABA rule refers to a lien "authorized" by law.[21] Second, while the proposed rule allows contingent fees that are "permissible under Rule 1.04[,]" the ABA rule simply allows a lawyer to "contract with a client for a reasonable contingent fee in a civil case."

FN 21: Comment 16 to ABA Rule 1.8(i) provides, in relevant part, that "[t]he law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client."

9. Paragraph (i)

Paragraph (i) contains the following imputation provision for proposed Rule 1.08: "When a lawyer is personally prohibited by this Rule from engaging in particular conduct, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall engage in that conduct." This language has been analyzed above. Also analyzed above, the comparable imputation provision in ABA Rule 1.8(k) reads: "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them."

D. Proposed Rule 1.09

Proposed Rule 1.09 addresses conflicts of interest relating to a lawyer's or firm's representation of a former client. The amendments to existing Rule 1.09 make the rule more consistent with ABA Rules 1.9 and 1.10, but differences remain between these rules.[22]

FN 22: Other states' rules also vary to an extent from ABA Rules 1.9 and 1.10. *See* ABA CTR. FOR PROF'L RESPONSIBILITY, CHARTS COMPARING INDIVIDUAL PROFESSIONAL CONDUCT MODEL RULES AS ADOPTED OR PROPOSED BY STATES TO ABA MODEL RULES, http://www.abanet.org/cpr/pic/rule_charts.html (last visited Jan. 12, 2011).

1. Paragraph (a)

Paragraph (a) of proposed Rule 1.09 addresses conflicts that arise from a lawyer's representation of a former client. Subparagraph (a)(1) provides that, "unless the former client provides informed consent, confirmed in writing[,] . . . a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client[.]" Similarly, paragraph (a) of ABA Rule 1.9 provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

In addition to the structural differences between the proposed rule and ABA rule, there are two subtle word differences. First, as in all other proposed rules, the term "provides" rather than "gives" precedes the term "informed consent" in proposed Rule 1.09(a)(1). This difference should not have a substantive impact. The second difference is that proposed Rule 1.09(a)(1) refers to "a lawyer who *personally* has formerly represented a client" while ABA Rule 1.9(a) refers more generally to "[a] lawyer who has formerly represented a client[.]" (Emphasis added). Existing Rule 1.09(a) also refers to a lawyer who has "personally" represented a client. Comment 4 to proposed Rule 1.09 makes clear that the term, which appears in a few provisions in the proposed rule, is intended simply "to emphasize and to clarify that those provisions apply to lawyers who have themselves actually been involved in rendering legal services, rather than to affiliated lawyers who have not been actually involved."

Subparagraph (a)(2) of proposed Rule 1.09 imputes the conflicts addressed in subparagraph (a)(1) to affiliated lawyers. It provides that, without a former client's informed consent, confirmed in writing,

> if a lawyer personally prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent another person in the same or a substantially related matter in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.

The comparable imputation in ABA Rule 1.10(b) provides:

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

There are a few differences of note. First, terminology differences that have been analyzed for other imputation provisions exist here—e.g., "affiliated" versus "associated." Second, while the ABA rule does not contain any scienter standards, the proposed rule's imputation provision applies only to an affiliated lawyer who "knows or reasonably should know" of the prohibition. Third, the rules contain different mechanisms for overcoming the prohibition against representation. Subparagraph (a)(2) of proposed Rule 1.09 provides that an affiliated lawyer may overcome the prohibition with the former client's informed consent, confirmed in writing. Paragraph (c) of ABA Rule 1.10 addresses this option by providing: "A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7." Comment 6 to ABA Rule 1.10 explains that paragraph (c) "removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7[,] . . . which require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing."[23]

FN 23: Refer to pages 290-94, *supra*, for an analysis of ABA Rule 1.7.

2. Paragraph (b)

Paragraph (b) of proposed Rule 1.09 addresses conflicts that arise from a firm's representation of a former client. The rule provides:

> Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was affiliated previously represented a client:
>
> (1) whose interests are materially adverse to the interests of that person; and

(2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.

Paragraph (b) of ABA Rule 1.9 is structured somewhat differently, cross-references ABA rules, and uses the term "associated" rather than "affiliated." Otherwise, the ABA rule and proposed rule are substantively the same.

3. Paragraph (c)

Paragraph (c) of proposed Rule 1.09 addresses challenges to the validity of a lawyer's services or work product for a former client. The paragraph is based on existing Rule 1.09(a)(1) and has no counterpart in ABA Rule 1.9. Subparagraph (c)(1) addresses direct conflicts and provides: "Unless the former client provides informed consent, confirmed in writing . . . a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which such other person questions the validity of the lawyer's services or work product for the former client[.]" Subparagraph (c)(2) addresses imputed conflicts and provides that, without the former client's informed consent, confirmed in writing, "if a lawyer personally prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client." Existing Rule 1.09(c) contains a comparable provision.

4. Paragraph (d)

Paragraph (d) of proposed Rule 1.09 addresses the use and disclosure of information relating to the representation of a former client. The paragraph reads:

> A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or
>
> (2) disclose information relating to the representation except as these Rules provide.

ABA Rule 1.9(c) is fairly similar to proposed Rule 1.09(d). In fact, the rules impose the same general restrictions, though there are slight variations in the wording of these restrictions. There is, however, a substantive difference between the rules' exceptions to the prohibited use of information. While subparagraph (c)(1) of ABA Rule 1.9 provides that use is permitted "when the information has become generally known[,]" subparagraph (d)(1) of proposed Rule 1.09 provides that use is permitted "when the information is or becomes generally known or is readily obtainable from sources generally available to the public[.]" The exception in proposed Rule 1.09 tracks the exception in the definition of "confidential information" in proposed Rule 1.05(a), which is quoted on page 286. Comment 3 to proposed Rule 1.05 provides guidance about this exception, which stems from Section 59 in the Restatement (Third) of the Law Governing Lawyers.[24]

> **FN 24**: *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. d (2000) ("Confidential client information does not include information that is generally known. . . . Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense . . . .").

5. Paragraph (e)

Finally, paragraph (e) of proposed Rule 1.09 contains an imputation provision that applies to lawyers with whom a personally prohibited lawyer is currently affiliated. The paragraph provides: "When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter."

Paragraph (a) of ABA Rule 1.10 contains a comparable imputation provision, but it differs in several regards from paragraph (e) of proposed Rule 1.09. ABA Rule 1.10(a) provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Beyond the standard variations among imputation provisions that have been addressed already, the first significant difference between ABA Rule 1.10(a) and proposed Rule 1.09(e) is that the ABA rule contains a personal-interest exception that is not in the proposed rule. The second significant difference is that the ABA rule, unlike the proposed rule, allows screening as a means to avoid the imputation of a conflict relating to the representation of a former client. The Court decided, after extensive debate, not to incorporate a comparable screening provision into proposed Rule 1.09. This decision, however, should not preclude the continuation of the current practice of employing screening as a condition of obtaining a former client's informed consent for lawyers to engage in otherwise prohibited representations.

CONCLUSION

This article is intended to be a useful resource for lawyers who are preparing to vote on the proposed Texas Disciplinary Rules of Professional Conduct and want to know more about how the proposed rules were drafted and how they relate to the ABA Model Rules of Professional Conduct. Information regarding proposed rules that are not addressed in this article is available from the author on request. Additional information is also on the websites of the State Bar of Texas, at http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources, and the Supreme Court of Texas, at http://www.supreme.courts.state.tx.us/rules/rules.asp.

Appendix A

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
		The following definitions apply to all Texas Disciplinary Rules of Professional Conduct unless the context in which the word or phrase is used requires a different definition.	The following definitions apply to all Texas Disciplinary Rules of Professional Conduct unless the context in which the word or phrase is used requires a different definition.
	"Adjudicatory Official" denotes a person who serves on a Tribunal.	(a) "Adjudicatory official" denotes a person who serves on a Tribunal.	(a) "Adjudicatory official" denotes a person who serves on a Tribunal.
	"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.	(b) "Adjudicatory proceeding" denotes the consideration of a matter by a Tribunal.	(b) "Adjudicatory proceeding" denotes the consideration of a matter by a Tribunal.
		(c) "Affiliated": (1) A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity: (i) is a shareholder, partner, member, associate, or employee of that firm; (ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or (iii) is held out as being in category (i) or (ii). (2) A lawyer is "affiliated" with another lawyer if either the lawyers or their professional entities have any of the relationships described in categories (i) - (iii) above.	(c) "Affiliated": (1) A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity: (i) is a shareholder, partner, member, associate, or employee of that firm; (ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or (iii) is held out as being in category (i) or (ii). (2) A lawyer is "affiliated" with another lawyer if either the lawyers or their professional entities have any of the relationships described in categories (i)–(iii) above.

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	(d) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	(d) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
	"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.	(e) "Consult" or "consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.	(e) "Competent" or "competence" denotes possession of or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.
		(f) "Competent" or "competence" denotes possession of or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.	
(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.		(g) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible for the lawyer to obtain or transmit the writing at the time the person provides informed consent, then the lawyer must obtain or transmit it within a reasonable time after the person provides informed consent.	(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not reasonable for the lawyer to obtain or transmit the writing at the time the person provides informed consent, then the lawyer shall obtain or transmit it within a reasonable time after the person provides informed consent.

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
	"Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.		(g) "Consult" or "consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.
(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.	"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.	(h) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.	(h) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a government entity.
	"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.	(i) "Fitness" denotes those qualities of physical and mental health that enable a lawyer to discharge the lawyer's responsibilities to a client in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or an unreliability in carrying out, significant obligations.	(i) "Fitness" denotes those qualities of physical and mental health that enable a lawyer to discharge the lawyer's responsibilities to a client in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or an unreliability in carrying out, significant obligations.
(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.	"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.	(j) "Fraud" or "fraudulent," when used in relation to conduct by a lawyer, denotes an intent to deceive and either: (1) a knowing misrepresentation of a material fact; or (2) a knowing concealment of a material fact if there is a duty to	(j) "Fraud" or "fraudulent," when used in relation to conduct by a lawyer, denotes an intent to deceive and either: (1) a knowing misrepresentation of a material fact; or (2) a knowing concealment of a material fact if there is a duty to

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
		disclose the material fact.	disclose the material fact.
(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.		(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of and reasonably available alternatives to the proposed course of conduct.	(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has explained, in a manner that a reasonable lawyer would believe sufficient for the person to understand, the material risks of and reasonably available alternatives to the proposed course of conduct.
(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	(l) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	(l) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
	"Law firm": see Firm.		
(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	"Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.	(m) "Partner" denotes a member of a partnership, shareholder in a law firm organized as a professional corporation, or member of an association authorized to practice law.	(m) "Partner" denotes a member of a partnership, shareholder in a law firm organized as a professional corporation, or member of an association authorized to practice law.
	"Person" includes a legal entity as well as an individual.	(n) "Person" includes a legal entity, as well as an individual.	(n) "Person" includes a legal entity, as well as an individual.
		(o) "Personally represents" and "represents": A lawyer "personally represents" a client in a matter if the lawyer personally exercises legal skill or judgment on behalf of the client in connection with that matter. A lawyer "represents" a client in a matter if the client is personally represented in that matter by that	

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
		lawyer or by an affiliated lawyer.	
			(o) "Personally prohibited" means a lawyer is prohibited based on the lawyer's direct knowledge or involvement rather than being prohibited based on the lawyer merely being affiliated with another lawyer.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.	"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.	(p) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.	(p) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.
(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	(q) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	(q) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.		(r) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.	(r) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
	"Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.		
			(s) "Represents": A lawyer "represents" a client when the lawyer personally exercises legal skill or judgment on behalf of the client in

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
			connection with a matter.
(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.			
(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.	"Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.	(s) "Substantial" or "substantially," when used in reference to degree or extent, denotes a material matter of clear significance.	(t) "Substantial" or "substantially," when used in reference to degree or extent, denotes a material matter of clear significance.
(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.	"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.	(t) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative agency, or another body acting in an adjudicative capacity. A legislative body, an administrative agency, or another body acts in an adjudicative capacity when, after the presentation of evidence or legal argument by a party or parties, one or more neutral officials will render a binding legal judgment directly affecting a party's or parties' interests in a particular matter.	(u) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative agency, or another body acting in an adjudicative capacity. A legislative body, an administrative agency, or another body acts in an adjudicative capacity when, after the presentation of evidence or legal argument by a party or parties, one or more neutral officials will render a proposal for decision or a binding legal order or decision directly affecting a party's or parties' interests in a particular matter.

ABA Rule 1.0: Terminology	Terminology Section in Existing Rules	Original Proposed Rule 1.00. Terminology	Final Proposed Rule 1.00. Terminology
(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.		(u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.	(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and email. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Original Proposed Rule 1.13. Prohibited Sexual Relations	Final Proposed Rule 1.13. Prohibited Sexual Relations
. . . . (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	(a) A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer. (b) A lawyer shall not solicit or accept sexual relations as payment of fees. (c) A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation.	(a) A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer. (b) A lawyer shall not solicit or accept sexual relations as payment of fees or expenses. (c) A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation.

ABA Rule 1.14: Client With Diminished Capacity	Existing Rule 1.02. Scope and Objectives of Representation	Original Proposed Rule 1.14. Diminished Capacity	Final Proposed Rule 1.14. Diminished Capacity
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.	. . . .	(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.	(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.	(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.	(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.	(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information		(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.	(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.

ABA Rule 1.14: Client With Diminished Capacity	Existing Rule 1.02. Scope and Objectives of Representation	Original Proposed Rule 1.14. Diminished Capacity	Final Proposed Rule 1.14. Diminished Capacity
about the client, but only to the extent reasonably necessary to protect the client's interests.			

ABA Rule 1.18: Duties to Prospective Client	Original Proposed Rule 1.17. Prospective Clients	Final Proposed Rule 1.17. Prospective Clients
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.	(a) A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.	(a) A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.	(b) A lawyer who has had a discussion with a prospective client shall not use or disclose confidential information learned in the discussion, except as provided in Rule 1.05 or (d)(2).	(b) A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2).
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).	(c) A lawyer who has received confidential information during a discussion with a prospective client shall not represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(1) or (d)(2). No lawyer in a firm with which that lawyer is affiliated may knowingly represent a client in such a matter.	(c) A lawyer who has received confidential information from a prospective client shall not represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(1) or (d)(2). When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:	(d) When a lawyer has received confidential information during a discussion with a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:	(d) When a lawyer has received confidential information from a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or: (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the	(1) the prospective client has provided informed consent, confirmed in writing, to the representation; or	(1) the prospective client has provided informed consent, confirmed in writing, to the representation; or

ABA Rule 1.18: Duties to Prospective Client	Original Proposed Rule 1.17. Prospective Clients	Final Proposed Rule 1.17. Prospective Clients
prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.		
	(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter. (e) For purposes of this Rule, matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the discussion with the prospective client would materially advance a client's position in a subsequent matter.	(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

ABA Rule 1.7: Conflict of Interest: Current Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing Rule 1.06. Conflict of Interest: General Rule	Original Proposed Rule 1.06. Conflicts of Interest	Final Proposed Rule 1.06. Conflicts of Interest
Rule 1.7: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.	[Refer to paragraph (b) below for comparison.]		(a) A conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.
	(a) A lawyer shall not represent opposing parties to the same litigation.	(a) A lawyer shall not, even with informed consent: (1) represent opposing parties in the same matter before a tribunal; (2) represent a client in a matter when the lawyer's representation of the client in that matter is or will be both materially and adversely limited by a personal interest of the lawyer or by that lawyer's responsibilities to another client, a former client, or a third person; or (3) represent two or more clients in the same matter if the proposed representation would violate Rule 1.07.	(b) A lawyer shall not, even with informed consent, represent opposing parties in the same matter before a tribunal.

ABA Rule 1.7: Conflict of Interest: Current Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing Rule 1.06. Conflict of Interest: General Rule	Original Proposed Rule 1.06. Conflicts of Interest	Final Proposed Rule 1.06. Conflicts of Interest
	(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.		
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.	(c) A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.	(b) In all other situations in which it reasonably appears that representation may involve a conflict of interest, a lawyer may represent a client in a matter if the lawyer reasonably believes that the lawyer's representation of the client neither is nor will be materially limited by a personal interest of the lawyer or by the lawyer's responsibilities to another client, a former client, or a third person, but only if: (1) the representation does not violate Rule 1.07; and (2) the client provides informed consent, confirmed in writing.	(c) In situations other than the situation described in (b), when representation of a client will involve a conflict of interest, the lawyer shall not represent the client unless: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client; (2) the client provides informed consent, confirmed in writing; and (3) the representation complies with Rule 1.07 if the lawyer is considering representing more than one client in the same matter.

ABA Rule 1.7: Conflict of Interest: Current Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing Rule 1.06. Conflict of Interest: General Rule	Original Proposed Rule 1.06. Conflicts of Interest	Final Proposed Rule 1.06. Conflicts of Interest
	(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.		
	(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.	(c) If a lawyer has accepted representation in violation of this Rule, or if a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.	(d) If a lawyer has accepted representation in violation of this Rule, or if a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
Rule 1.10: (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm	(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.	(d) When a lawyer is prohibited by this Rule from representing a client, no affiliated lawyer who knows or reasonably should know of the prohibition shall represent that client, unless the prohibition is based on a personal interest of the prohibited lawyer, and the affiliated lawyer reasonably believes that the representation of the client will not be materially and adversely limited by the personal interest of the prohibited lawyer.	(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter, unless the prohibition is based only on a personal interest of the personally prohibited lawyer and the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation.

Existing TDRPC 1.07. Conflict of Interest: Intermediary	Original Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter	Final Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter
	(a) A lawyer shall not represent two or more clients in a matter if the representation would violate any of these Rules.	
(a) A lawyer shall not act as intermediary between clients unless:	(b) A lawyer shall not represent two or more clients in a matter unless:	(a) A lawyer shall not represent two or more clients in a matter unless:
(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;	[Refer to subparagraph (b)(2) for comparison.]	[Refer to subparagraph (a)(2) for comparison.]
(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.	(1) the lawyer reasonably believes that: (i) the representation does not violate Rule 1.06; (ii) the clients can agree among themselves to a resolution of any material issue concerning the matter; (iii) each client is capable of understanding what is in that client's best interest and making informed decisions; (iv) the lawyer can deal impartially with each of the clients; and (v) the representation is unlikely to result in material prejudice to the interests of any of the clients;	(1) the representation complies with Rule 1.06;
(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.	(2) prior to undertaking the representation, or as soon as practicable thereafter, the lawyer discloses to the clients in writing the following aspects of joint representation in the matter: (i) that the client might gain or lose some advantages if represented by separate counsel;	(2) prior to undertaking the representation or as soon as reasonably practicable thereafter, the lawyer discloses to the clients that during the representation the lawyer: (i) must act impartially as to all clients;

Existing TDRPC 1.07. Conflict of Interest: Intermediary	Original Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter	Final Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter
	(ii) that the lawyer cannot serve as an advocate for one client in the matter against any of the other clients, but instead must assist all of them in pursuing their common purposes, as a consequence of which each must be willing to make independent decisions without the lawyer's advice concerning whether to agree to any proposed resolution of any issues concerning the matter; (iii) that the lawyer must deal impartially with each of the clients; (iv) that information received by the lawyer or by any affiliated lawyer or firm from or on behalf of any jointly represented client concerning the matter may not be confidential or privileged as between the clients; (v) that the lawyer will be required to disclose information concerning the matter to any jointly represented client if the lawyer knows that information would likely materially affect the position of that client, even if requested by another jointly represented client not to do so; (vi) that the lawyer will be required to correct any false or misleading statement or omission concerning the matter made by or on behalf of any jointly represented client, if the lawyer knows failure to do so would likely materially affect the position of any client, even if requested by another jointly represented client not to do so; (vii) that the lawyer may not be able to continue representing any of the clients if discharged by any one of them or if the lawyer is required to withdraw from representation under these Rules; and (viii) that the representation of all clients by a single lawyer or firm will not necessarily expedite handling of the matter or reduce associated	(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and (iii) may be required to withdraw from representing some or all of the clients before the matter is completed due to events that occur during the representation; and

Existing TDRPC 1.07. Conflict of Interest: Intermediary	Original Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter	Final Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter
	attorneys' fees and expenses; and (3) the lawyer obtains each client's informed consent, confirmed in writing, to the representation after making the determinations required by (b)(1), and as soon as reasonably practicable after making the disclosures required by (b)(2). (c) A lawyer representing two or more clients in a matter shall, with respect to that matter, conduct the representation in accordance with the determinations and disclosures set forth in this Rule, except that: (1) the requirement that the lawyer disclose information described in (b)(2)(v) may be waived by all clients' informed consent that the lawyer will keep mutually agreed upon specified information confidential; and (2) the lawyer may rely on this informed consent only if a disinterested lawyer would reasonably conclude that all clients could make adequately informed decisions about the matter without having the information otherwise required to be disclosed under (b)(2)(v). (d) A lawyer representing multiple clients in a matter must withdraw from representing each client in the matter if the lawyer, for whatever reason, will not make disclosures required in: (1) subparagraph (b)(2)(v), unless the failure to make such disclosures is permitted by (c); and (2) subparagraph (b)(2)(vi).	(3) as soon as reasonably practicable after making the disclosures required by (a)(2), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation. (d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.		

Existing TDRPC 1.07. Conflict of Interest: Intermediary	Original Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter	Final Proposed Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter
(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.	(e) If a lawyer is prohibited from representing two or more persons in a matter, no lawyer or firm affiliated with the lawyer may do so if the representation by that other lawyer or firm would violate Rule 1.06.	
	(f) When a lawyer represents multiple clients pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in (a)-(e), the lawyer may comply with those different standards notwithstanding this Rule.	(b) When a lawyer represents multiple clients in a matter pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in this Rule, the lawyer may comply with those different standards notwithstanding this Rule.
[Refer to paragraph (e) above for comparison.]	[Refer to paragraph (e) above for comparison.]	(c) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:	(a) A lawyer shall not enter into a business transaction with a client unless:	(a) A lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others, unless:	(a) A lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others, unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;	(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;	(1) the lawyer reasonably believes that the terms of the transaction between the lawyer and the client: (i) are fair and reasonable to the client; and (ii) if known to the lawyer and not known to the client, are fully disclosed in a manner that can be reasonably understood by the client;	(1) the lawyer reasonably believes that the terms of the transaction between the lawyer and the client: (i) are fair and reasonable to the client; and (ii) if known to the lawyer and not known to the client, are fully disclosed in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and	(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and	(2) the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and	(2) the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.	(3) the client consents in writing thereto.	(3) the client provides informed consent, in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including: (i) whether the lawyer is representing the client in the transaction; (ii) if applicable, the possible material adverse consequences to the lawyer-client relationship if the lawyer represents the client in connection with the transaction; and (iii) anything of value the lawyer anticipates receiving as a result of the transaction other than those benefits explicitly set out in the terms of the	(3) the client provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
		transaction.	
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.			
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.	(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.	(b) A lawyer shall neither prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, nor solicit any substantial gift from a client for the lawyer or for a person related to the lawyer, unless the lawyer or other person is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship.	(b) A lawyer shall neither prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, nor solicit any substantial gift from a client for the lawyer or for a person related to the lawyer, unless the lawyer or other person is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.	(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.	(c) Prior to the conclusion of all aspects of the matter giving rise to a lawyer's representation, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client, or anyone acting on that person's behalf, that gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.	(c) Before the conclusion of all aspects of the matter giving rise to a lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client, or anyone acting on that person's behalf, that gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:	(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:	(d) A lawyer shall not provide financial assistance to a client in connection with contemplated or pending proceedings before a tribunal, except that:	(d) A lawyer shall not provide financial assistance to a client in connection with contemplated or pending proceedings before a tribunal, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and	(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and	(1) a lawyer may advance or guarantee the costs and expenses of such proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and	(1) a lawyer may advance or guarantee the costs and expenses of such proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.	(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.	(2) a lawyer representing an indigent client may pay costs and expenses of such proceedings on behalf of the client.	(2) a lawyer representing an indigent client may pay costs and expenses of such proceedings on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent;	(e) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents;	(e) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client provides informed consent;	(e) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client, if not represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code, provides informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	(2) there is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and	(2) the lawyer reasonably believes that the lawyer's exercise of independent professional judgment on behalf of the client will not be affected; and	(2) the lawyer reasonably believes that the lawyer's exercise of independent professional judgment on behalf of the client will not be affected; and
(3) information relating to representation of a client is protected as required by Rule 1.6.	(3) information relating to representation of a client is protected as required by Rule 1.05.	(3) information relating to representation of the client is protected as required by Rule 1.05.	(3) information relating to representation of the client is protected as required by Rule 1.05.

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.	(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.	(f) Except as otherwise authorized by law, a lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against that lawyer's clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless the lawyer obtains the informed consent of each client, confirmed in writing, after advising each client of: (1) the total amount of the settlement or result of the agreement; (2) the existence and nature of all claims, defenses, or pleas involved; (3) the nature and extent of each client's participation in the settlement or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges; (4) the total fees and costs to be paid to the lawyer from the proceeds, or by an opposing party or parties; and (5) the method by which the costs are to be apportioned to each client.	(f) Except as otherwise authorized by law, a lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against that lawyer's clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless the lawyer obtains the informed consent of each client, confirmed in writing, after advising each client of: (1) the total amount of the settlement or result of the agreement; (2) the existence and nature of material claims, defenses, or pleas involved; (3) the nature and extent of each client's participation in the settlement or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges; (4) the total fees, costs, and expenses to be paid to the lawyer from the proceeds, or by an opposing party or parties; and (5) the method by which the costs and expenses are to be apportioned to each client.
(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or	(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former	(g) A lawyer shall not: (1) make an agreement with a client prospectively limiting the lawyer's liability to a client for malpractice or other professional misconduct unless the client is represented by independent legal counsel in making the agreement;	(g) A lawyer shall not: (1) make an agreement with a client prospectively limiting the lawyer's liability to a client for malpractice or professional misconduct unless the client is represented by independent legal counsel in making the agreement;

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
	client without first advising that person in writing that independent representation is appropriate in connection therewith.	(2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either: (i) the client is represented by independent legal counsel in making the agreement; or (ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated and the fact that the client will waive a trial before a judge or jury on these issues and that the rights of appeal may be limited; or	(2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either: (i) the client is represented by independent legal counsel in making the agreement; or (ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated, that the client will waive a trial before a judge or jury on these issues, and that the rights of appeal may be limited; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.		(3) settle a claim or potential claim for malpractice or other professional misconduct with a client or former client of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises that person in writing of the desirability of seeking and gives a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.	(3) settle a claim or potential claim for malpractice or professional misconduct with a client or former client of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises that person in writing of the desirability of seeking, and gives a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil	(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract in a civil case with a client for a contingent fee that is	(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation in which the lawyer is representing a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract in a civil case with a client for a contingent fee that is	(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation in which the lawyer is representing a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract in a civil case with a client for a contingent fee that is

ABA Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	Existing TDRPC 1.08. Conflict of Interest: Prohibited Transactions	Original Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions	Final Proposed Rule 1.08. Conflict of Interest: Prohibited Transactions
case. (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	permissible under Rule 1.04.	permissible under Rule 1.04.	permissible under Rule 1.04.
(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.	(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct. (j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.	(i) When one lawyer is prohibited by this Rule from engaging in particular conduct, no affiliated lawyer who knows or reasonably should know of the prohibition shall engage in that conduct.	(i) When a lawyer is personally prohibited by this Rule from engaging in particular conduct, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall engage in that conduct.

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
Rule 1.9: (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person	(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client: (1) in which such other person questions the validity of the lawyer's services or work product for the former client; (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or	(a) Unless the former client provides informed consent, confirmed in writing: (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter knowingly represent another person	(a) Unless the former client provides informed consent, confirmed in writing: (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person
in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.	(3) if it is the same or a substantially related matter.	in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; and	in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; and
	(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).		

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
Rule 1.10: (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.		(2) if a lawyer prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer presently affiliated with that firm, and who knows of the prohibition, shall knowingly represent another person in the same or a substantially related matter to that in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.	(2) if a lawyer personally prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent another person in the same or a substantially related matter in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.
Rule 1.9: (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and		(b) Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was affiliated previously represented a client: (1) whose interests are materially adverse to the interests of that person; and	(b) Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was affiliated previously represented a client: (1) whose interests are materially adverse to the interests of that person; and

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.		(2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.	(2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.
		(c) Unless the former client provides informed consent, confirmed in writing: (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter knowingly represent another person in a matter adverse to the former client in which such other person questions the validity of the lawyer's services or work product for the former client; and	(c) Unless the former client provides informed consent, confirmed in writing: (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which such other person questions the validity of the lawyer's services or work product for the former client; and
	(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(l) or if the representation in reasonable probability will involve a violation of Rule 1.05.	(2) if a lawyer prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer presently affiliated with that firm, and who knows of the prohibition, shall knowingly represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client.	(2) if a lawyer personally prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a		(d) A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client	(d) A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.		in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or (2) disclose information relating to the representation except as these Rules provide. (e) For purposes of this Rule, matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.	in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or (2) disclose information relating to the representation except as these Rules provide.

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
Rule 1.10: (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond			(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

ABA Rule 1.9: Duties to Former Clients & ABA Rule 1.10: Imputation Of Conflict Of Interest: General Rule	Existing TDRPC 1.09. Conflict of Interest: Former Client	Published, Proposed Rule 1.09. Conflicts of Interest: Former Client	New, Revised Rule 1.09. Conflicts of Interest: Former Client
promptly to any written inquiries or objections by the former client about the screening procedures; and (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.			

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CRIMINAL LAW

***Abbott v. United States*, 131 S. Ct. 18 (2010)**

The Supreme Court held a clause in 18 U.S.C. section 924(c) providing an exception to the imposition of a mandatory five-year minimum consecutive sentence did not prevent a court from imposing the sentence when the defendant is sentenced to more than five years for related but independent crimes.

In separate prosecutions, the defendants, Abbott and Gould, were convicted of drug-trafficking offenses. In addition, both defendants were convicted under section 924(c) of possession of a firearm in furtherance of a drug-trafficking crime. The defendants were each sentenced to more than ten years for the drug-trafficking offenses and an additional five years for the section 924(c) offense. The defendants argued that language in section 924(c) providing that the additional five-year sentence must be imposed "[e]xcept to the extent that a greater minimum sentence is otherwise provided by [section 924(c) itself] or by any other provision of law," prevented the judge from imposing the five-year sentence. The appellate court held that the exception language contained in section 924(c) referred only to sentences imposed under that provision of the statute, and not to minimum sentences imposed for other offenses.

In an opinion by Justice Ginsberg, the Court affirmed. The Court noted the defendants' interpretation of section 924(c) imposed no penalty at all for conviction of an independent criminal statute whenever a defendant was convicted of another criminal offense with a minimum sentence of more than five years. Thus, the Court reasoned the defendants' reading of the statute would thwart the legislative purpose of enacting the provision. Therefore the Court concluded the exception clause only applies when there is a greater minimum sentence already imposed by a violation of section 924(c).

Justice Kagan took no part in the decision.

HABEAS CORPUS

***Wilson v. Corcoran*, 131 S. Ct. 13 (2010) (per curiam)**

Addressing Corcoran's murder conviction for the second time, the Supreme Court held the Seventh Circuit erred in granting habeas relief without first concluding a federal right had been infringed.

Corcoran killed four men including his brother and his sister's fiancé. After he was convicted of murder, the court imposed the death penalty. On appeal, the Indiana Supreme Court remanded for resentencing because the trial court's sentencing remarks suggested it relied on nonstatutory aggravating factors in violation of Indiana law. The trial court issued a revised sentencing order clarifying that it relied only on statutory factors. The Indiana Supreme Court affirmed.

Corcoran then filed a habeas petition in the Northern District of Indiana asserting multiple grounds, including improper reliance on nonstatutory aggravating factors. The district court granted habeas relief on an alternate ground and did not reach Corcoran's aggravating factors argument. On appeal, the Seventh Circuit reversed and—apparently overlooking the remaining claims—instructed the trial court to deny the writ of habeas corpus. The Supreme Court granted certiorari, vacated the Seventh Circuit's judgment, and remanded for consideration of the remaining claims.

On remand, the Seventh Circuit granted habeas relief. It held the Indiana Supreme Court made an "unreasonable determination of the facts" in accepting the trial court's statement that is relied only on statutory aggravating factors. The Circuit ordered the district court to "grant the writ unless within 120 days the state court holds a new sentencing hearing in accordance with [the Circuit's] opinion."

In a per curiam opinion, the Supreme Court again reversed the Seventh Circuit. Because the habeas statute, 28 U.S.C. section 2254(a), only authorizes habeas relief for "violation[s] of the Constitution or the law or treaties of the United States[,]" and not for errors of state law, the Circuit had exceeded its statutory authority by granting relief for state court error regarding state law sentencing factors. Though Corcoran asserted that state law noncompliance also infringed his Constitutional rights, the Supreme Court noted the Circuit did not indicate agreement or "even articulate what federal right was allegedly infringed."

SECTION 1983

***Los Angeles County v. Humphries*, 131 S. Ct. 447 (2010)**

The Supreme Court unanimously confirmed a municipality may only be held liable under 42 U.S.C. section 1983 ("Section 1983") based on a policy or custom of the municipality, even when the only relief sought is prospective.

The respondents were accused of child abuse in California but were later exonerated. Based on the accusation, however, state law required their names to be placed on an index of child abusers. The statute has no procedure for challenging inclusion on the index, and neither the state nor Los Angeles County had created any such procedures. The respondents sued public officials and Los Angeles County under section 1983, arguing that the failure to create a mechanism to challenge the inclusion of their names on the index violated their constitutional rights. The district court granted summary judgment to all the defendants on the ground that the plaintiffs had not been deprived of a constitutionally protected liberty interest. The Ninth Circuit reversed, concluding that the plaintiffs had a liberty interest, that it had been violated, and that the plaintiffs were entitled to declaratory relief as well as attorney fees, as a prevailing party under the civil rights statutes.

The Ninth Circuit's ruling included $60,000 fees assessed against Los Angeles County, despite the county's argument that it could not be held liable based on the rule of *Monell v. Dept. of Social Servs. of N.Y. City*, 436 U.S. 658, 694 (1978). Monell held that a municipality can be held liable under Section 1983 only if a municipal policy or custom caused the plaintiff to be deprived of a federal right. The Ninth Circuit, based on its prior precedent, concluded that the Monell limitation does not apply to claims for prospective relief. The County sought review of that narrow holding, which was out of step with four other circuits that had reached the contrary conclusion.

Granting certiorari, the Court issued a unanimous summary reversal (with Justice Kagan not participating). The Court began by reviewing Monell and its reading of Section 1983, noting that the fundamental principle it embraced was that municipalities should only be held liable for its own violations of federal law, and not the acts of others. The Court also noted that Monell itself, in stating the policy-or-custom rule, had expressly stated it applied to suits "under [Section] 1983 for monetary, declaratory, or injunctive relief." *Id*. at 690. The Court further noted the statutory text did not state or suggest that the causation requirement should change based on the type of relief

sought. The Court therefore confirmed Monell's policy-or-custom restriction applies equally whether the relief sought is prospective, or not.

Texas Supreme Court Update

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APPELLATE PROCEDURE

Sweed v. Nye, 323 S.W.3d 87 (Tex. 2010) (per curiam)

> A timely filed notice of appeal may be amended to correct deficiencies if filed before appellant's brief.

James Sweed filed a notice of appeal five and a half months after the trial court dismissed his case. Sweed's notice of appeal was timely for a restricted appeal, but failed to include all of the required information. In response to the court of appeals' notice of the deficiencies, Sweed filed an amended notice of appeal more than six months after the trial court judgment. The Eighth Court of Appeals dismissed Sweed's appeal for want of jurisdiction.

In a per curiam opinion, the Texas Supreme Court reversed. The Court noted the court of appeals' jurisdiction is invoked with a timely filed, albeit defective, notice of appeal. Texas Appellate Procedure Rule 25.1(f) authorizes an amended notice of appeal to correct deficiencies if filed before an appellant's brief is filed. The court of appeals erred in treating Sweed's notices of appeal as separate documents. Sweed's timely notice of appeal invoked the court of appeals' jurisdiction. The amended notice filed before his appellant's brief properly corrected the deficiencies. The Court reversed the court of appeals' judgment and remanded to the court of appeals.

ARBITRATION

In re 24R, Inc., 324 S.W.3d 564 (Tex. 2010) (per curiam)

> A non-contractual employee policy manual does not diminish the validity of an arbitration agreement as a stand-alone contract.

Frances Cabrera worked for 24R, Inc. as an at-will employee for approximately fifteen years, during which time she signed three separate arbitration agreements. In 2008, she sued her employer for age and disability discrimination. Her employer filed a

motion to compel arbitration. The trial court denied the motion, and the Corpus Christi Court of Appeals denied the employer's petition for mandamus relief.

In a per curiam opinion, the Texas Supreme Court held the trial court abused its discretion in refusing to compel arbitration pursuant to the parties' agreement. Cabrera argued that the arbitration agreement was illusory because an employee policy manual stated that the employer reserved the right to revoke, change or supplement employee guidelines at any time without notice. The manual explicitly referred to the employer's arbitration policy. The Court rejected this argument, concluding that the policy manual was, by its own terms, non-contractual and did not diminish the validity of the arbitration agreement as a stand-alone contract.

***In re Olshan Found., Repair Co*., Nos. 09-0432, 09-0433, 09-0474 & 09-0703, 2010 WL 4910050 (Tex. Dec. 3, 2010)**

The Federal Arbitration Act (FAA) applies to contracts containing the phrase disputes are resolved pursuant to the "arbitration laws in your state."

At issue are four different original proceedings in which Olshan Foundation Repair sought to compel arbitration. Four homeowners sued Olshan for damages based on defective repairs to their homes' foundations—Kilpatrick, Tisdale, Tingdale, and Waggoner. The contracts at issue contained two different arbitration clauses. In the Waggoners' contract, the arbitration clause provided that disputes "shall be resolved by mandatory and binding arbitration . . . pursuant to the Texas General Arbitration Act . . . ." In Olshan's contracts with Kilpatrick, Tisdale and Tingdale, the arbitration clauses provided that disputes "shall be resolved by mandatory and binding arbitration . . . pursuant to the arbitration laws in your state . . . ." In each of the four cases, the trial courts refused to compel arbitration. The Second, Fifth, and Tenth Courts of Appeals denied mandamus relief.

In an opinion by Justice Wainwright, the Texas Supreme Court denied mandamus relief in the Waggoner case, but granted mandamus relief in the other three cases. In the Waggoner case, the Court concluded the contract selected the Texas Arbitration Act (TAA) to govern. The Waggoner contract expressed a preference between state and federal law. The Court explained the FAA is not a part of the TAA, at least where the two are inconsistent. Under the TAA, the Waggoners' arbitration agreement is unenforceable. Under section 171.002(a)(2) of the Texas Civil Practice and Remedies Code, an arbitration agreement is unenforceable if the agreement is for services of less than $50,000 and the agreement is not in writing and signed by each party and each

party's attorney. The Waggoners' attorney did not sign the agreement. Accordingly, the Waggoner arbitration clause was unenforceable, and the trial court correctly denied Olshan's request to compel arbitration.

The Kilpatrick, Tisdale and Tingdale contracts, providing that it is controlled by the "laws in your state" produced a different result. According to the Court, "laws in your state" does not exclude federal law. The FAA preempts state law that renders arbitration agreements unenforceable in a contract involving interstate commerce. Thus, the FAA preempts section 171.002(a)(2) of the TAA. Accordingly, the Court held the trial court abused its discretion in denying Olshan's requests to compel arbitration in the Kilpatrick, Tisdale and Tingdale cases.

The Court next addressed whether the Kilpatrick, Tisdale and Tingdale contracts were unconscionable and thus unenforceable. Plaintiffs argued that arbitration under the American Arbitration Association rules would be prohibitively expensive, depriving them of their ability to pursue their claims. To show unconscionability, plaintiffs must present some evidence that they will likely incur arbitration costs in such an amount that would deter enforcement of statutory rights. Plaintiffs, however, failed to show the amount of their claims, the costs of litigation, or their ability to pay the costs of arbitration. Accordingly, the Court concluded there was no legally sufficient evidence that the arbitration fees would prevent the plaintiffs from pursuing their claims.

Finally, the plaintiffs argued that arbitration is unconscionable because they will be forced to expend time and money in a needless arbitration when the arbitration clause is void under the Texas Home Solicitation Act (the "Act"). The Act requires a contract entered through personal solicitation outside a defendant's place of business contain language about cancelling the contract in boldfaced 10-point type. Plaintiffs contend the contracts violate the Act and are void. The Court concluded when parties have agreed to arbitrate disputes, a trial court may consider only those issues relating to the making and performance of the agreement. Neither the trial court nor an appellate court can determine issues relating to the contract in general. The validity of the contract is first considered by the arbitrator.

Justice Hecht, joined by Justice Medina, concurred. The concurrence observed that, if—as plaintiffs contend—the contracts are void based on the Texas Home Solicitation Act, Olshan and its counsel could be subject to sanctions for filing groundless motions to compel arbitration.

CAPACITY TO SUE

***Christi Bay Temple v. GuideOne Specialty Mut. Ins. Co*., No. 09-0683, 2010 WL 4913711 (Tex. Dec. 3, 2010) (per curiam)**

> Evidence only that a plaintiff has the same name as a corporation that forfeited its charter is no evidence that the plaintiff lacked capacity to sue.

Christi Bay Temple (the "church"), a member church of the Pentecostal Church of God, sustained water damage to its property and sought coverage from its insurer, GuideOne Specialty Mutual Insurance Company ("GuideOne"). Unhappy with the adjustment of its claims, the church sued for additional damages. Shortly before trial, GuideOne averred that the church was a nonprofit corporation that had forfeited its charter years earlier and thus lacked capacity to sue. Christi Bay Temple maintained that it was an unincorporated religious association. The trial court granted GuideOne's plea in abatement and several months later dismissed the lawsuit for want of prosecution. The Corpus Christi Court of Appeals affirmed, finding no abuse of discretion.

In a per curiam opinion, the Texas Supreme Court reversed, holding there was no evidence that the church lacked capacity to sue. GuideOne presented evidence that a similarly-named, non-profit corporation associated with the Pentecostal Church had forfeited its charter in the early 1980s. Noting that GuideOne bore the burden of proof, the Court concluded there was no evidence, other than the similarity of the names, that connected the former non-profit to the Christi Bay Temple.

CONSTITUTIONAL LAW

***Robinson v. Crown Cork & Seal Co.*, No. 06-0714, 2010 WL 4144587 (Tex. Oct. 22, 2010)**

In determining whether a statute violates the prohibition against retroactive laws in the Texas Constitution, courts should consider: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment.

Barbara Robinson and her husband John filed suit against Crown Cork & Seal Co., alleging that John had contracted mesothelioma from workplace exposure to asbestos products. Crown manufactures metal bottle caps known as "crowns" and has never engaged in the manufacture and sale of asbestos products. Rather, Crown's predecessor purchased a majority of the stock in Mundet, a corporation engaged in two businesses: the sale of insulation products and the manufacture of crowns. Within ninety days, Mundet sold its insulation business, and two years later the companies merged. Crown, however, did not contest its successor liability to the Robinsons.

After the Robinsons filed suit, the Texas Legislature passed chapter 149 of the Texas Civil Practice and Remedies Code, which limits the liability of "innocent successors," who never engaged in selling asbestos products and succeeded to another's liability at a time when the dangers of asbestos were not commonly known. The statute took effect in 2003 and applied to future or pending actions where trial had not commenced. There is only one recognized beneficiary of the statute: Crown Cork & Seal Co.

The Robinsons argued Chapter 149 violates the prohibition against retroactive laws in the Texas Constitution. The trial court granted summary judgment in Crown Cork's favor. A divided panel of the Fourteenth Court of Appeals upheld the law, reasoning that it is a "valid exercise of the police power by the Legislature to safeguard the public safety and welfare."

The Texas Supreme Court reversed, holding Chapter 149 is unconstitutionally retroactive. A five justice majority attempted to reconcile over a century of inconsistent case law by fashioning a new three-factor test. The Court recognized the presumption against retroactivity serves two fundamental objectives. First, it protects reasonable, settled expectations. Second, it prevents abuses of legislative power, particularly

retribution against unpopular groups or individuals. The majority instructed the courts to consider three factors in light of these dual objectives: "[1] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [2] the nature of the prior right impaired by the statute; and [3] the extent of the impairment." Turning to the facts, the Court noted the statute was not accompanied by relevant Legislative findings, applied only to Crown Cork, significantly impacted the plaintiffs' substantial interest in a well-recognized common-law cause of action, and upset the settled expectation that an applicable rule of law will not change after suit is filed.

In a concurring opinion, Justice Medina, joined by Justice Willett, wrote separately to endorse the Court's prior "vested rights" analysis, which was rejected by the majority as impossible to predictably apply. He concluded that an accrued cause of action is a "vested right" and, thus, cannot be retroactively abrogated unless a compelling public interest justifies its impairment.

Justice Willet, joined by Justice Lehrmann, also wrote a separate concurrence that stressed broader concerns about unlimited police power. His concurrence also examined the role of the judiciary generally, positing that "[i]f judicial review means anything, it is that judicial restraint does not allow everything." *See also* George Will, *The Case for Engaged Justices*, WASH. POST, Dec. 5, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/03/AR2010120304467.html (last visited Jan. 12, 2011) (expounding upon the concurrence). Justice Willett's concurrence was also noted for its novel citation to one of the *Star Trek* films. David Lat, *Legal Citation of the Day: Pointy Ears Under a Ten-Gallon Hat?*, ABOVE THE LAW (Oct. 27, 2010, 3:02 PM), http://abovethelaw.com/2010/10/legal-citation-of-the-day-pointy-ears-under-a-ten-gallon-hat/.

In a dissenting opinion, Justice Wainwright, joined by Justice Johnson, agreed the Court should continue to apply its "vested rights" analysis. However, the dissent concluded that a cause of action is a "mere expectation subject to numerous contingencies" and becomes a "vested right" only when reduced to an enforceable judgment. The dissent then concluded Chapter 149 was a legitimate exercise of the police power, noting, among other things, that the plaintiffs had a limited expectancy in their cause of action, could still recover against other defendants, and that the statute rationally addressed what the Legislature perceived to be an important problem.

Finally, turning to an issue that the majority did not need to reach, the dissent concluded that Chapter 149 was not an unconstitutional "special law." Stating that a statute is not unconstitutional merely because it identifies a "class of one," Justice Wainwright concluded that the plaintiffs failed to establish that the classification was

not rationally related to the law's objective or that the legislation treated similarly situated successor companies differently.

CONSTRUCTION LAW

***Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104 (Tex. 2010)**

Absent expressly conditional language, a lien-release provision in a standard construction contract is a covenant rather than a condition precedent to suit.

Solar Applications Engineering, Inc. ("Solar Applications"), as general contractor, entered into a contract with T.A. Operating Corp. ("T.A.") to build a truck stop in San Antonio. After Solar substantially completed the project, a dispute arose over several remaining work items. T.A. terminated the contract and asserted a claim for damages. Solar counterclaimed to recover the unpaid contract balance. Following a jury trial, the trial court entered judgment on the verdict for Solar.

The San Antonio Court of Appeals reversed and rendered a take-nothing judgment, concluding Solar failed to perform a condition precedent to receipt of final payment. Specifically, the court reasoned Solar failed to comply with a contractual provision requiring that a final application for payment be accompanied by complete and legally effective releases or waivers of all lien rights (the "lien-release affidavit").

The Texas Supreme Court reversed, concluding the lien-release provision was a covenant and not a condition precedent. The Court drew three relevant conclusions. First, the lien-release provision lacked expressly conditional language. Second, a reasonable interpretation of the contract existed that prevented forfeiture. Finally, the Court noted the parties' contract followed a process for final payment common to construction contracts and consistent with a statutory scheme designed to provide owners and contractors with self-help remedies. Construing the provision as a condition precedent defeated the statute's objective.

Under the Texas Property Code, a contractor may foreclose on liens on the property if an owner wrongfully withholds payment. Conversely, an owner may retain ten percent of the contract price to secure the payment of any contractor (or subcontractor) who asserts a lien on the property. To resolve the standoff, a general contractor often provides a lien-release affidavit stating that when the contractor receives full payment it will release all liens on the property. The Court reasoned that, if the lien-release was a condition precedent to payment the owner could simply accept

the release and then refuse payment, defeating the self-help protections provided by the statutory scheme.

FAMILY LAW

***In re Scheller*, 325 S.W.3d 640 (Tex. 2010) (per curiam)**

Temporary orders allowing grandparent access violated father's fundamental liberty interest to have control and autonomy in father's child-rearing decisions.

Both before and after his daughter's death, William Pemberton had regular and frequent visits with his two granddaughters. After conflicts arose between the children's father, Richard Scheller, and Pemberton over access to the children, Pemberton filed suit seeking grandparent access. The trial court granted temporary orders, awarding Pemberton possession and access. The Third Court of Appeals denied Scheller's petition for writ of mandamus.

In a per curiam opinion, the Texas Supreme Court granted mandamus relief. Scheller argued that the temporary orders granting his children's grandfather access violated his fundamental liberty interest as a parent to have control and autonomy in making child-rearing decisions. The Court observed a trial court has broad discretion in setting temporary orders in suits affecting parent-child relationships, but its orders cannot infringe on the fundamental rights of parents in making child-rearing decisions. According to the Court, Pemberton failed to satisfy the "high threshold" to prove that his granddaughters' mental and physical health would suffer if he were denied access. The evidence was nothing more than an indication of "sadness resulting from losing a family member." The Court held the trial court abused its discretion in granting temporary orders for grandparent access and possession.

The Court also addressed the trial court's order appointing one expert to serve as both the guardian ad litem to the children and the expert psychologist to examine the parties and make recommendations to the trial court. The Court noted nothing prevents a trial court's appointment of the same person to serve as the ad litem and as an expert to report back findings about the best interest of the children. The Court conditionally granted mandamus relief and directed the trial court to lift the temporary order permitting grandparent access.

HEALTH CARE LIABILITY ACT

***Jelinek v. Casas*, No. 08-1066, 2010 WL 4910172 (Tex. Dec. 3, 2010)**

When circumstantial evidence indicates several possible conclusions, only one of which establishes a defendant's negligence, expert testimony on causation must explain with reasonable degree of medical probability how and why the negligence caused an injury.

Eloisa Casas had terminal colon cancer and underwent surgery, radiation, and chemotherapy. A year after her treatment, she experienced abdominal pains. Surgery revealed an intra-abdominal abscess and an infection. Her doctor prescribed two antibiotics to treat the infection. Hospital staff, however, failed to administer the prescribed medications for several days. Casas died a few months later. Casas's family sued the hospital and her treating doctors. According to plaintiffs, the lapse in administering the antibiotics caused Casas pain and mental anguish above and beyond that caused by cancer, surgery, and other infections. The jury found for the plaintiffs. The Thirteenth Court of Appeals affirmed.

In an opinion by Justice Guzman, the Texas Supreme Court reversed. The primary issue on appeal is whether plaintiffs produced legally sufficient evidence of causation. While the hospital admitted it should have continued Casas's antibiotics, plaintiffs still had the burden to prove the hospital's negligence caused Casas an injury. The Court first addressed whether lay testimony can provide evidence of causation. There was no direct evidence that Casas suffered from an infection that was treatable by the omitted antibiotics, and there was evidence she had other infections that accounted for symptoms. Under these facts, expert testimony was crucial to connect the lapse in medication to an infection causing pain above what she would have otherwise experienced. The lay testimony presented was legally insufficient to establish the hospital's negligence.

On the sufficiency of plaintiffs' expert evidence on causation, the Court noted an expert must do more than opine that a defendant's conduct caused plaintiff an injury. The expert must, to a reasonable degree of medical probability, explain how and why the negligence caused the injury. The evidence indicated that Casas's symptoms were consistent with infections that were not treatable by the omitted antibiotics. In reviewing the evidence, the Court concluded competing causation explanations amounted to no more than circumstantial evidence. There was no direct evidence identifying the source of Casas's infection. The Court concluded the evidence failed to

provide a reasoned basis from which to infer the presence of a negligence-induced infection, and that no evidence supported the verdict.

The Court also addressed the sufficiency of an expert report. Dr. Jelinek contended that the trial court abused its discretion in denying his motion to dismiss and for sanctions based on the plaintiffs' deficient expert report under section 13.01(l) of Texas Revised Civil Statute article 4590i. Jelinek challenged plaintiffs' expert report as failing to state the applicable standard of care and containing only conclusory statements about causation. According to the Court, a report is inadequate if it simply opines that a breach caused an injury. The report must explain how and why the breach caused the injury. The report only stated that Jelinek's breach increased Casas's pain and suffering. It offered no explanation of how the breach caused her injury. The Court held the trial court abused its discretion in denying Jelinek's motion to dismiss.

The Court reversed the court of appeals' judgment, rendered judgment that the plaintiffs take nothing, and remanded for an award of Jelinek's attorney's fees and costs in challenging the plaintiffs' expert report.

Chief Justice Jefferson, joined by Justices Green and Lehrmann, dissented on the adequacy of plaintiffs' expert report. According to the dissent, the adequacy of an expert's report cannot be judged by what later discovery or evidence at trial reveals. The purpose of the report is to determine if plaintiffs' claims have merit and to give a defendant notice of the challenged conduct before the case is tested in a full adversary process. The report does not have to satisfy the requirements as a report offered in a summary-judgment proceeding or trial. The dissent acknowledged that plaintiffs' expert report could have been more detailed, but concluded that it: (1) stated the standard of care (to maintain vigilance over a patient's care); (2) described how the doctor's care fell below the standard (failing to ensure the ordered treatment was administered); and (3) explained the causal link (the lack of antibiotics increased Casas's pain and suffering).

Justice Lehrmann wrote separately on the Court's remand to the trial court for an award of attorney's fees and costs to Jelinek. Justice Lehrmann would allow plaintiffs an opportunity to show that their failure to present an adequate report was not intentional or the result of conscious indifference.

INSURANCE

***Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151 (Tex. 2010) (per curiam)**

A construction accident resulting from hoisting workers up a cell tower through a pulley system attached to a pickup truck fell within an insurance policy's "auto use" exclusion. However, the accident did not trigger a "subsequent-to-execution" exclusion, despite the fact that the relevant subcontract was signed after the accident occurred.

Global Enercom Management, Inc. ("Global") subcontracted with All States Construction Company ("All States") to perform repairs on a cell tower in Arkansas. A provision in the subcontract required All States to indemnify Global for all acts and omissions of its employees. All States's employees began work, but Global did not immediately sign the contract. During construction, three All States employees fell to their death while being hoisted up the tower on a rope through a pulley system attached to a pickup truck. Heirs of the deceased workers sued Global, who in turn sought indemnification from All States's insurer. The insurer refused, claiming two policy exclusions: "auto use" and "subsequent-to-execution." On competing motions, the trial court granted summary judgment in favor of the insured, concluding that neither exclusion applied. The Houston Fourteenth Court of Appeals affirmed.

In a per curiam opinion, the Texas Supreme Court reversed in part and affirmed in part, holding that the accident fell within the "auto use" exclusion, but did not trigger the "subsequent-to-execution" exclusion. Addressing the "auto use" exclusion first, the Court used a well-established three-part test as a "conceptual framework" for analysis. The Court reasoned: (1) it was within the "inherent nature" of a pickup truck to haul and tow materials; (2) the accident occurred within the "natural territorial limits" of the truck because the workers were attached to the truck's pulley system and the term "auto" in the insurance policy was defined to include attached machinery and equipment; and (3) the accident arose out of use of the truck because the workers could not have accomplished the same result without the truck's lifting activities. Accordingly, the accident fell within the "auto use" exclusion.

Turning to the "subsequent-to-execution" exception, which prohibits coverage of a claim that accrues before the execution of the subcontract, the Court noted the term "execute" does not mean only "to sign." Thus, despite undisputed evidence that the subcontract was signed the day *after* the accident, the Court held the parties "executed"

the contract before the accident—the parties to the subcontract agreed that the contract was in effect prior to the accident, and, in fact, had commenced performance.

JUDGMENTS

***Vaughn v. Drennon*, 324 S.W.3d 560 (Tex. 2010) (per curiam)**

The Texas Supreme Court reinforced the well-established presumption of finality for judgments that follow a conventional trial on the merits.

The Vaughns sued the Drennons over a dispute related to water drainage on their property. The Vaughns joined the Drennons' grandchildren as defendants, but did not pursue any claims against them at trial. The court's final judgment made no mention of the grandchildren. Despite the fact that all parties treated the judgment as final, the Tyler Court of Appeals dismissed the appeal for want of jurisdiction. In a per curiam opinion, the Texas Supreme Court reversed, noting this was precisely the type of delay the Court sought to avoid in continually enforcing the presumption of finality following a conventional trial on the merits.

JUVENILE LAW

***In re B.T.*, 323 S.W.3d 158 (Tex. 2010) (per curiam)**

A juvenile court abused its discretion in failing to obtain a complete diagnostic evaluation of a juvenile prior to a hearing to transfer the juvenile to adult criminal court.

B.T. was a seventeen-year-old charged with murdering his teacher. The State urged the juvenile court to order B.T. tried as an adult. Section 54.02 of the Texas Family Code requires that prior to a hearing to transfer a juvenile to adult criminal court the juvenile court "shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." A preliminary report concluded that B.T. suffered from a mental disease or defect that prevented the formation of an opinion on his capacity to be adjudicated as an adult until he was deemed fit to proceed. After B.T. underwent treatment and counseling, the juvenile court set the transfer hearing without awaiting

completion of the report. The Tyler Court of Appeals denied B.T.'s petition for mandamus relief.

In a per curiam opinion, the Texas Supreme Court held the juvenile court abused its discretion when it failed to obtain a complete diagnostic evaluation prior to the transfer hearing. Although the Court recognized a trial court has discretion to determine whether a diagnostic study is complete, the Court noted the report itself professed to be incomplete. Moreover, both parties jointly urged the juvenile court to delay the transfer hearing to await completion of the report. The Court also concluded the juvenile had no plausible appellate remedy because by the time his conviction was final and appealable he would likely be eighteen years old and potentially ineligible for juvenile adjudication.

PUBLIC UTILITY REGULATORY ACT

Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC, 324 S.W.3d 95 (Tex. 2010)

An electric utility company may recover interest on its non-stranded costs and recover its rate-case expenses, including a valuation-panel fee, from its ratepayers.

CenterPoint Energy Houston Electric, LLC ("CenterPoint") sought a "competition transition charge" (CTC) to recover costs that it was not allowed to securitize. The Public Utility Commission (PUC) issued an order allowing CenterPoint to recover about $570 million in non-stranded costs and allowed CenterPoint to receive interest on the unrecovered CTC balance. The PUC further ordered that CenterPoint could receive certain rate-case expenses, including $5.2 million in valuation-panel fees from its ratepayers. Two consumer groups intervened in the CTC proceeding, challenging the recovery of interest and the valuation-panel fee. The trial court agreed with the intervenors and invalidated the PUC's order. The Third Court of Appeals reversed and rendered judgment affirming the PUC order.

In an opinion by Justice Willett, the Texas Supreme Court affirmed. The PUC awarded CenterPoint interest based on PUC Rule 25.262(l)(3). The Court acknowledged it has previously invalidated a portion of PUC Rule 25.262(l)(3) relating to the date that interest begins to accrue. The Court rejected the consumer groups' arguments that the remaining portions of the rule were similarly invalidated. One consumer group challenged the interest rate—11.075 percent—as arbitrary, capricious, and not

supported by the evidence. According to the Court, a reasonable basis exists to support the interest rate. The rate was based on the weighted-average costs of capital established in an early proceeding, adjusted for federal income taxes. The consumer group offered no argument that the earlier proceeding was flawed. The Court further noted the interest rate was later reduced to 8.06 percent to reflect changed economic conditions.

On the recovery of the valuation-panel fee, the Court observed the PUC convened the valuation panel under Texas Utility Code section 39.262(h)(3) to assist in determining the market value of the transferred generation assets under the partial stock valuation method. The PUC retained J.P. Morgan as the valuation panel and approved its $5.2 million fee.

The consumer group challenged the PUC order in that it allowed the parent company, CenterPoint, to recover the valuation fee as opposed to Texas Genco, the subsidiary company that received the transferred generation assets. The Court construed section 39.262(h)(3) as obligating the transferee as initially responsible for paying the valuation fee. The statute, however, does not limit how the transferee ultimately satisfies the obligation. The statute does not prohibit the PUC from allowing CenterPoint to recover the fee through its rates under section 36.061(b)(2). The Court affirmed the court of appeals' judgment.

REAL PROPERTY

Severance v. Patterson, No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010) (Jefferson, C.J., not participating)

In answering a certified question from the Fifth Circuit, the Court concluded Texas law does not recognize a "rolling easement" on Galveston Island's West Beach.

Carol Severance owned a beach house on Galveston Island's West Beach. There was no easement on her property. A public use easement existed on a privately owned parcel seaward of Severance's property. Hurricane Rita devastated Severance's property and moved the vegetation line landward. Severance's house is now seaward of the vegetation line and entirely on the public beach. The State claimed a portion of her property was located on a public beachfront easement and that her house interfered with the public's use of the dry beach. The State contended that the

easement on the property seaward of Severance's property "rolled" onto her property, subjecting her house to removal.

In response to the State's efforts to enforce the easement, Severance sued the State and various state officials in federal court for violations of her constitutional rights. The district court held that under Texas property law, an easement on a parcel landward of Severance's property pre-existed her ownership and that after an easement to private beachfront property had been established between the mean high tide and vegetation lines, it "rolls" onto new parcels of realty according to natural changes. The Fifth Circuit certified the unsettled questions of state law to the Texas Supreme Court.

In an opinion by Justice Wainwright, the Texas Supreme Court concluded on this issue of first impression that Texas law does not recognize a "rolling" easement on Galveston Island's West Beach.

The Court noted "public beaches" are any beach area, publicly or privately owned, extending inland from the mean low tide to the line of vegetation. The "wet beach" is the area from the mean low tide line to the mean high tide line. The "dry beach" extends from the mean high tide line to the vegetation line. Wet beaches are all owned by the State. The dry beach is commonly privately owned but may be burdened with a public easement based on continuous public use or by the government establishing an easement. Thus, a public beach includes the wet beach, state-owned dry beach and privately owned dry breach if a public easement has been established.

A "rolling" public beachfront access easement is an easement in favor of public use the boundary of which migrates with changes in the vegetation line without proof of prescription, dedication or customary rights in the property. The Court recognized property ownership along a beach necessarily involves a moving property line based on the tidal and weather-altering conditions of the coast. The Court contrasted when a sudden event moves the high tide and vegetation line causing the former dry beach to become state-owned wet beach. In that case, the Court concluded the private property owner is not automatically deprived of her right to exclude the public from the new dry beach. Accordingly, the Court concluded with sudden changes in littoral boundaries, the State must seek to establish an easement as permitted by law on the newly created dry beach to enforce an asserted public right to use private land and compensate the land owner. The Court expressly disapproved earlier decisions of the courts of appeals that recognized rolling easements.

Justice Medina, joined by Justice Lehrmann, dissented. According to the dissent, the risks of owning coastal property are well-known and assumed. If an easement were established over dry beach before a sudden change, it must remain over the "new" dry

beach without the burden on the State of having to re-establish a previously existing easement whose boundaries have shifted.

RECORDING STATUTES

***Wind Mountain Ranch, LLC v. City of Temple*, No. 09-0026, 2010 WL 4923144 (Tex. Dec. 3, 2010) (per curiam)**

A bankruptcy court order is not an "agreement" and thus need not be recorded to effectively extend the maturity date of a promissory note secured by a real property lien.

Centex Investments ("Centex") owned a tract of land encumbered by a deed of trust securing a promissory note. The note was set to mature in 1993. In 1992, Centex entered voluntary Chapter 11 bankruptcy proceedings. The bankruptcy court confirmed a reorganization plan that extended the note's maturity date to 1999. In 2003, the owner of the note and deed acquired the land through a foreclosure sale.

The City of Temple (the "City"), one of Centex's creditors, sought to recover the land. Under the Texas Civil Practice and Remedies Code, a party who intends to foreclose on a lien encumbering real property must do so within four years of the date the cause of action accrues. However, the party primarily liable for the debt may suspend the statute of limitations by executing a written extension agreement. Under the Code, such agreements must be recorded. The City argued that the extension of the note's maturity date was never recorded and thus was void. The trial court rendered judgment for the City, and the Amarillo Court of Appeals affirmed.

The Texas Supreme Court reversed, holding that—by its plain language—the recording statute applied only to an extension *agreement*. The bankruptcy court's order was not an agreement between the parties and, as a result, did not need be recorded to be effective.

SOVEREIGN IMMUNITY

***Colquitt v. Brazoria Cnty.*, 324 S.W.3d 539 (Tex. 2010) (per curiam)**

The Texas Tort Claims Act's notice provision is satisfied by serving a lawsuit within six months of an incident if it contains information required by Texas Civil Practices and Remedies Code section 101.101(a).

Glenn Colquitt sustained injuries while working for a private contractor at the Brazoria County jail. Colquitt filed suit against the county within two months of the incident. Colquitt's notice to the county of the lawsuit was the lawsuit itself; he did not provide separate notice. Two years later, the county challenged the trial court's jurisdiction based on Colquitt's failure to provide a separate written notice. The trial court denied the plea to the jurisdiction. The Fourteenth Court of Appeals concluded that the Tort Claims Act required a separate notice of suit preceding the lawsuit's filing and dismissed the suit.

In a per curiam opinion, the Texas Supreme Court reversed. Section 101.101 of the Texas Civil Practices and Remedies Code requires a claimant to provide a governmental entity notice of a claim within six months of the date of the incident giving rise to the claim. This notice provision is jurisdictional and a condition for the government's waiver of immunity from suit. The Court concluded the Tort Claims Act notice provision does not require pre-suit notice when a lawsuit is filed within six months of an incident. Colquitt's lawsuit contained the statutory requisites under section 101.101(a) and was filed within six months of the incident. Accordingly, the lawsuit itself satisfied the notice provision. The Court reversed the court of appeals' judgment and remanded to the trial court.

***Univ. of Tex. Sw. Med. Ctr. v. Est. of Arancibia*, 324 S.W.3d 544 (Tex. 2010)**

Formal written notice under the Tort Claims Act is not required if a governmental entity is subjectively aware of its fault in contributing to a death, injury, or property damage. An interlocutory appeal is available to challenge the prerequisites to filing a Torts Claims Act lawsuit.

In 2003, Irene Arancibia underwent laparoscopic hernia surgery performed by two residents in the University of Texas Southwestern Medical Center ("Southwestern")'s surgical department. Two days after surgery, Arancibia returned to the hospital's emergency room with severe abdominal pain. Emergency surgery revealed that the hernia surgery had perforated her bowel. She died the following day. Her family sued. Southwestern moved to dismiss for lack of jurisdiction, contending that the Arancibias failed to timely notify them of the claim. The trial court denied the plea, and the Fifth Court of Appeals affirmed.

In an opinion by Chief Justice Jefferson, the Texas Supreme Court affirmed. To invoke the Tort Claims Act waiver of immunity, plaintiffs must give notice to the governmental entity within six months of the incident. The notice must reasonably describe the injury, time, and place of incident and the incident itself. Under Texas Civil Practices and Remedies Code (CPRC) section 101.101(c), formal notice is not required if the governmental entity has "actual notice that death has occurred [or] that the claimant has received some injury." In 2005, the legislature amended Texas Government Code section 311.034 to provide that statutory prerequisites to suit, including notice provisions, are jurisdictional.

The Court first addressed whether the 2005 amendment to section 311.034 applies to allow an interlocutory appeal. The Court observed the prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes because such statutes do not affect a vested right. Section 311.034 does not deprive a litigant of a substantive right. Instead, it speaks to a court's power to hear the case. Accordingly, the Court concluded the 2005 amendment applied, and Southwestern had a right to an interlocutory appeal.

The Court next addressed Southwestern's argument that it lacked actual notice. As the Court has previously held, the governmental entity has to know of its "alleged fault producing or contributing to the death, injury, or property damage." If the governmental entity has subjective awareness of fault, as well as the information required under CPRC section 101.101(a), formal notice is not required.

The Court concluded Southwestern had subjective awareness of its fault in producing Arancibia's death. According to the evidence, shortly after her death, the supervising surgeon contacted the chief of the surgery division and hospital's risk management. The supervising surgeon concluded the torn bowel was the result of the hernia surgery, that a "technical error" was made, and that "clinical management contributed to" Arancibia's death. The Court could not conclude that Southwestern was unaware of its fault in producing the alleged injury. The purpose of the notice provision was satisfied; further notice would have provided precisely what Southwestern already knew. The Court held Southwestern had actual notice and affirmed the court of appeals's judgment.

Justice Johnson, joined by Justice Wainwright, dissented. According to the dissent, immunity from suit is waived if Southwestern had subjective awareness that its doctors breached the standard of care in causing Arancibia's death. Under the dissent's analysis, that the supervising surgeon contacted Southwestern's risk management was not evidence of a subject believe of fault. The dissent concluded Southwestern did not have actual notice.

***Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113 (Tex. 2010) (per curiam)**

A metal chain across a driveway located behind a barricade is not a premises or special defect for which governmental immunity is waived.

In preparation for Saturday game-day parking, the University of Texas at Austin (the "University") closed a service driveway by placing a barricade in front of a metal chain that stretched across the entrance. That night, Robert Hayes rode his bicycle through campus and rode around the barricade and was injured when he rode into the chain. Hayes sued the University for failure to warn of the defect. The trial court denied the University's plea to the jurisdiction and granted partial summary judgment for Hayes, concluding that immunity had been waived. The University filed an interlocutory appeal, and in a divided opinion, the Third Court of Appeals affirmed.

In a per curiam opinion, the Texas Supreme Court reversed. The State's immunity from suit is waived for tort claims arising out of either premises defects or special defects. The Court first considered whether the chain constituted a special defect. While a special defect is not defined, it is generally one that poses a threat to the ordinary users of a particular roadway, such as excavations or obstructions on roads. The Court observed characteristics such as the size of the condition, whether the condition unexpectedly or physically impairs a vehicle's ability to travel a road, whether the condition presents some unusual quality, and whether the condition presents an

unexpected and unusual danger. The focus is on the expectations of the "ordinary user" who follows the "normal course of travel." According to the Court, Hayes did not take the normal course of travel when he went behind the barricade. A chain across a barricaded and closed roadway would not pose a threat to an ordinary user in the normal course of travel. The Court concluded the chain was not a special defect.

The Court next considered whether the chain constituted a premises defect. To establish a premise defect claim, a plaintiff must show that the landowner failed to either use ordinary care to warn a licensee of a condition that presented an unreasonable risk of harm about which the landowner is actually aware and a licensee is not, or make the condition reasonably safe. Hayes failed to show the University had actual knowledge of a dangerous condition. Having erected the barricade and closed the road, the University had no reason to know the chain was dangerous. The Court concluded the chain was not a premise defect. The Court reversed the court of appeals' judgment and dismissed the case for lack of jurisdiction.

***Reyes v. City of Laredo*, No. 09-1007, 2010 WL 4909963 (Tex. Dec. 3, 2010) (per curiam)**

A storm-flooded street is not a "special defect" and thus does not give rise to a government duty to warn motorists unless the government has actual knowledge of flooding. Awareness of a potential problem is not actual knowledge of an existing danger.

Maria Reyes sued the City of Laredo (the "City") for wrongful death after her fourteen-year-old daughter drowned when the family van was swept into Chacon Creek in a flash flood. The City asserted governmental immunity and moved to dismiss for lack of jurisdiction. The trial court denied the motion and the San Antonio Court of Appeals affirmed.

In a per curiam opinion, the Texas Supreme Court reversed. Section 101.022(a) of the Texas Tort Claims Act states that the government only has a duty to prevent injury from premise defects of which it has actual knowledge. Reyes relied on an exception for "special defects," defined to include "excavations or obstructions on highways, roads, or streets." The Court rejected the application of the "special defects" exception and concluded that there was no evidence that the City had actual knowledge that the creek had flooded at the time of the accident.

Relying on prior precedent, the Court noted "special defects" must be of the same kind or class as excavations and obstructions and must pose "an unexpected and

unusual danger to ordinary users of roadways." It then concluded that the dangers posed by a storm-flooded street are neither unexpected nor unusual. Next, the Court turned to the issue of actual knowledge. It examined an affidavit filed by a homeowner with a clear view of the accident site. The affidavit stated that the homeowner called 911 four or five times on the night at issue to advise the police that the water in the creek was rising and that there would be a problem with cars getting swept away. The Court concluded the affidavit was no evidence of the City's actual knowledge that the creek had flooded at the time of the accident. The Court reasoned, "Awareness of a potential problem is not actual knowledge of an existing danger."

TEXAS PUBLIC INFORMATION ACT

***Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010)**

Birth dates contained in State employees' personnel files are exempted from disclosure under the Texas Public Information Act because disclosure would constitute a clearly unwarranted invasion of personal privacy.

The *Dallas Morning News* sought a copy of the Texas Comptroller of Public Accounts (the "Comptroller")'s payroll database for State employees under the Texas Public Information Act. The Comptroller provided the requested information, but withheld dates of birth and sought the Attorney General's opinion on whether those dates must be disclosed. Although the Attorney General recognized the growing problem of identity theft and noted that the majority of states protect date of birth information, he concluded that birth dates should be released because there was no proof of harmful financial consequences. The trial court and the Austin Court of Appeals agreed.

The Texas Supreme Court reversed, holding that the disclosure of State employee birth dates would constitute a clearly unwarranted invasion of personal privacy. The opinion discussed two potentially applicable statutory provisions. Section 552.101 of the Texas Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 of the Texas Government Code exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Although the Comptroller sought an exemption only under Section 552.101, the Court held the third-party privacy interests at stake justified

the liberal interpretation of the petition for review to include the personnel file exemption.

Unlike the general exemption for confidential information, the Court concluded the personnel file exemption requires a balancing of third party privacy interests against the public's right to government information. The Court noted the personnel file exemption is modeled after a similar provision in the federal Freedom of Information Act, which the United States Supreme Court has held requires a balancing of interests. Turning to the facts of the case, the Court held the State employees' privacy interest substantially outweighed the negligible public interest in disclosure. First, the Court concluded State employees have a "non-trivial privacy interest" in their dates of birth, noting that such information can be readily used to recover sensitive information. Second, the Court rejected the suggestion that the public had a substantial interest, in the absence of any evidence of wrongdoing, in verifying whether State employees who work near children are convicted felons. It reasoned that, if applied in the absence of any evidentiary support, an interest in determining whether government agents are telling the truth would logically justify the disclosure of all private information.

In a dissenting opinion, Justice Wainwright pointed to several perceived flaws in the majority's balancing analysis. First, he noted that the Legislature has not expressly exempted birth dates from disclosure and that any potential harm from disclosure is merely derivative. Second, he argued that the majority failed to cite positive data demonstrating that release of birth date information makes identity theft more likely. Third, he reasoned that Texas already sells birth date information associated with driver's license data. Finally, Justice Wainwright noted that past investigations have revealed State employees who are convicted felons and work near children.

In any event, Justice Wainwright concluded that the Comptroller waived its argument under the personnel file exception and concluded that birth dates are not confidential information under Section 552.101. He reasoned that, under the Court's prior test for "confidential information," birth dates do not constitute highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.

UNIFORM COMMERCIAL CODE

***Tex. Lottery Comm'n v. First St. Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010)**

The UCC permits assignments of lottery prize payments and renders the Lottery Act's anti-assignment provision ineffective.

Cletius Irvan won a lottery prize in 1995. After the Legislature amended the Lottery Act permitting assignments, Irvan assigned his rights to all but the last two payments in exchange for a lump sum. To resolve the debt with the First State Bank of DeQueen (the "bank"), Irvan paid the debt through a common law Composition of Creditors proceeding in Arkansas court. The arrangement provided that Irvan would assign his final two prize payments in exchange for a lump sum. The bank registered the Arkansas judgment in Travis County and notified the Texas Lottery Commission (the "Commission") of the assignment. The Lottery Commission refused to recognize the Arkansas judgment and notified the parties of its intent to make the final payments to Irvan. The bank and Irvan filed a declaratory judgment action. The trial court granted summary judgment in favor of the bank and declared the UCC rendered the Lottery Act sections 466.406 and 466.410 ineffective to the extent those sections prohibited assignments. The Third Court of Appeals affirmed.

In an opinion by Justice Johnson, the Texas Supreme Court affirmed. The Court first rejected the Commission's argument that sovereign immunity protected it from suit. The Commission argued that, because it was an *ultra vires* lawsuit, it must be brought against a State official. The lawsuit did not challenge a governmental action; the lawsuit challenged a statute. Accordingly, the Court concluded it was not an *ultra vires* claim that must be brought against a government officer.

In addressing the merits, the Court noted when first enacted, the Lottery Act prohibited assignments except by judicial order. Later, the Act was amended to allow assignments for all but the last two installment prize payments which were not assignable. Before amending the Lottery Act to permit assignments, the Legislature amended section 9.102(a)(2)(viii) of the Texas Business and Commerce Code to include winnings in a lottery or other game of chance operated by the State in the definition of "account." Under section 9.406(a), accounts are assignable. The UCC further enforced the assignability of accounts in section 9.406(f), which renders ineffective any law that prohibits or restricts assignments.

The Court rejected the Commission's argument that any conflict with the UCC and a consumer protection law must be resolved against the UCC. The Lottery Act does not provide a different rule for "consumers." The UCC defines "consumer" as an individual who enters a transaction for personal, family, or household purposes. The Lottery Act is not limited to individuals. The Act's restrictions on assignment do not apply only to individuals but applies to persons who are not individuals or consumers. The Court concluded the Lottery Act's anti-assignment provisions are ineffective to the extent they conflict with the UCC and affirmed the court of appeals' judgment.

WHISTLEBLOWER ACT

***City of Elsa v. Gonzalez*, 325 S.W.3d 622 (Tex. 2010) (per curiam)**

An allegation of reporting "illegal acts" without specifying the nature of the acts is not a good-faith reporting of a violation of the law to waive immunity under the Whistleblower Act.

Joel Homer Gonzalez served as the city manager for the City of Elsa (the "City"). After Elsa's mayor was appointed assistant director of the Hidalgo County Urban County Program, the city attorney opined that the mayor could not simultaneously serve as city mayor and as a director of the urban county program. The attorney further opined that the mayor's acceptance of the director position constituted an implied resignation as mayor. On advice of the city attorney, the city council voted to accept the mayor's implied resignation. The council then instructed Gonzalez to notify the Hidalgo County judge, the director of urban county program, and the district attorney of the council's actions.

A few months later, the city council met and terminated Gonzalez's employment. Gonzalez filed a Whistleblower Act claim against the City. The trial court denied the City's plea to the jurisdiction and granted Gonzalez's motion for summary judgment and awarded back pay and attorney fees. The Thirteenth Court of Appeals affirmed.

In a per curiam opinion, the Texas Supreme Court reversed. The Whistleblower Act protects a government employee from termination or other adverse action for good faith reports of a violation of law to an appropriate law enforcement authority. The Whistleblower Act further waives immunity from suit if the plaintiff alleges sufficient facts to establish a good-faith report of a violation of law to an appropriate law enforcement authority. Gonzalez alleged he "reported illegal acts of the mayor," but

failed to specify the nature of the illegal acts. The Court concluded such allegation failed to provide facts to determine the trial court's jurisdiction.

Despite the pleading deficiency, the Court reviewed the evidence to determine if it raised a fact issue on the jurisdictional question. Gonzalez argued that he reported in good faith a violation of law by the mayor. The evidence, however, indicated that Gonzalez reported alleged illegal acts of the city council, not acts of the mayor. That Gonzalez circulated the city attorney's opinion letter and reported the city council's acceptance of the mayor's resignation did not amount to a good faith report a violation of law by the mayor.

The Court next addressed Gonzalez's claim that the city council violated the Open Meetings Act during the council's meeting at which he was terminated. The Whistleblower Act requires a claimant to report the alleged violation of law to an appropriate law enforcement authority. An "appropriate law enforcement authority" is a part of a governmental entity that the employee in good-faith believes is authorized to regulate or enforce the law alleged to be violated or to investigate or prosecute a violation. The Court concluded the city council was not an appropriate law enforcement authority. That the council could postpone a meeting or otherwise prevent a violation of the Open Meetings Act does not make it a law enforcement authority.

Accordingly, the Court concluded Gonzalez failed to satisfy the jurisdictional requirements of the Whistleblower Act as a matter of law. The Court reversed the court of appeals' judgment and dismissed the case.

WORKERS' COMPENSATION

Leordeanu v. American Prot. Ins. Co., No. 09-0330, 2010 WL 4910133 (Tex. Dec. 3, 2010)

In this workers' compensation case, the Court concluded an injury sustained traveling from one workplace to another while on the way home is in the "course and scope of employment."

Liana Leordeanu worked as a pharmaceutical sales representative who officed out of her home. After leaving a client dinner, Leordeanu intended to drive to her company-provided storage unit located next to her apartment complex to unload business supplies and then to her home. On her way to the storage unit, she was injured in a car accident. The American Protection Insurance Company denied her claim, concluding she was not in the course and scope of employment when injured.

The Texas Department of Insurance, Division of Workers' Compensation upheld the carrier's decision. On appeal to district court, a jury found Leordeanu was in the course and scope of employment, and the trial court rendered judgment in her favor. A divided Third Court of Appeals reversed and rendered judgment for the carrier, holding there was no evidence to support the verdict.

In an opinion by Justice Hecht, the Texas Supreme Court reversed. Texas Labor Code section 401.011(12) defines course and scope of employment. The statute excludes from "course and scope," with some exceptions, transportation to and from work (the "coming and going rule") and transportation made both in the furtherance of work and personal matters (the "dual purpose rule"). Section 401.011(12)(A) defines the "coming and going rule" as travel to and from work is in the course and scope if: the transportation is furnished as part of the employment contract or paid for by the employer; the employer controls the means of transportation or the employee is directed in the employee's employment to proceed from one place to another place. Section 401.011(12)(B) provides that "dual purpose" travel is not excluded from course and scope merely because the travel also furthers the employee's personal interests that would not, alone, have caused her to make the trip.

The Court held only section 401.011(12)(A) applies to travel to and from a place of employment, and that subsection B applies to other dual-purpose travel. Under these facts, Leordeanu was driving a company car at the time of her accident, thus coming within an exception of the "coming and going" rule under section 401.011(12)(A). The Court concluded there was evidence supporting the jury's verdict that Leordeanu's injury was in the course and scope of employment. The Court reversed the court of appeals and affirmed the trial court's judgment.

Justice Johnson dissented. According to the dissent, the dual purpose rule applies to Leordeanu's claim and applying that rule, her injury was not in the course and scope of employment.

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BREACH OF CONTRACT—AFFIRMATIVE DEFENSE—QUASI-ESTOPPEL

***Clark v. Cotten Schmidt, L.L.P.*, No. 02-09-00400-CV, 2010 Tex. App. LEXIS 8159 (Tex. App.—Fort Worth Oct. 7, 2010, no pet.)**

The Second Court of Appeals held the trial court erroneously granted summary judgment in favor of a law firm on the basis of a quasi-estoppel affirmative defense to a former law partner's breach of contract action when genuine issues of material fact existed regarding the defense.

This appeal arose out of a breach of contract action in which a former law partner, Kevin Clark, disputed the amount of money he was entitled to receive as a repayment of his capital investment under a law firm's partnership agreement. Clark joined the firm in the fall of 2001 as a non-equity partner. In 2003, Clark became an equity partner, and he contributed $25,000 to the firm as capital. Clark voluntarily left the firm in May 2005. After consulting with accountants, the firm paid $4,640.36 to Clark as his capital investment repayment under the partnership agreement. Clark claimed that the firm incorrectly valued his capital investment repayment based on an opinion from an accountant who reviewed the partnership agreement and concluded that the firm wrongly excluded the following items from the definition of "partnership assets": "notes, accounts receivable, work in process, and contingent fee interests."

Clark filed suit alleging that the firm breached a fiduciary duty and breached the partnership agreement by incorrectly calculating and paying him the $4,640.36. The firm filed an answer and a motion for summary judgment in which it argued that Clark's claim was barred by the doctrine of quasi-estoppel. The firm's quasi-estoppel defense was based on the contention that Clark took a legal position inconsistent with an interpretation of the agreement to which he previously acquiesced on behalf of the law firm when Clark, as an equity partner of the firm, addressed a similar claim asserted by a prior partner in the firm. The law firm further moved for summary judgment on the basis that the firm did not owe a fiduciary duty to Clark.

Clark filed a competing motion for summary judgment on his breach of contract claim and alleged that "notes, accounts receivable, work in process, and contingent fee

interests" are unambiguously included under section 12.03(c)'s capital-investment-repayment calculation. In response, the firm contended that, given the language of section 12.03(c) and Clark's current interpretation, when considered in proper context, "it becomes apparent that the firm's interpretation . . . is correct, and that [Clark's] current interpretation is wrong."

The trial court denied Clark's summary judgment motion and granted the firm's motion against Clark's contractual claim based on its quasi-estoppel defense, concluding that the law firm had established all elements of the defense as a matter of law.

On appeal, the court held that summary judgment in favor of the firm was erroneously granted because there were genuine issues of material fact as to whether Clark's breach of contract claims were barred by the doctrine of quasi-estoppel. Specifically, the court held that the firm failed to conclusively establish that it would be "unconscionable to allow [Clark] to maintain a position inconsistent with one to which he previously acquiesced on behalf of [the firm] even if Clark, as an equity partner, received a benefit in 2003 by [the firm] retaining money that it might have otherwise paid to a partner who had challenged the firm's capital investment repayment calculation when that partner left." Further, there were also genuine issues of fact with respect to the proper interpretation to be afforded to the disputed provision.

CONTRACT

***Tex. All Risk Gen. Agency v. Apex Lloyd's Ins. Co.*, No. 10 10 00017 CV, 2010 Tex. App. LEXIS 9035 (Tex. App.—Waco Nov. 10, 2010, no pet.)**

The Waco Court of Appeals held a contract was not ambiguous and was enforceable as written and denied a claim that such an interpretation would make the agreement oppressive, inequitable, and unreasonable.

Texas All Risk General Agency ("TAR") entered into a managing general agency agreement with Apex Lloyd's Insurance Company ("Apex") whereby TAR would sell insurance policies as a managing general agent of Apex. The agreement contained a provision that restricted the percentage of policies that could be issued in certain counties. The original period of the restrictions stated that TAR could write no more than ten percent of its policies with wind exposure in Harris County from May through November 2007. The agreement also required TAR to submit monthly reports regarding this information. After several reports indicated that TAR was selling in excess of ten

percent of its wind exposure policies in Harris County, Apex notified TAR that it was suspending TAR's right to sell policies and notice of intent to terminate the agreement. Apex sued TAR for damages, and after a bench trial, the court found that TAR had breached the territorial limitations in the agreement and ordered damages and attorney's fees to Apex. TAR appealed.

TAR first complained that the trial court erred in interpreting the agreement, and argued that the language of the agreement required that there could be no breach of the ten percent territorial limitation prior to November 30, 2007. The court of appeals reviewed the agreement and found that it was not ambiguous. Rather, the court found that the intent of the parties was that TAR was not to write more than ten percent of its policies in Harris County and that the monthly reports would determine compliance on a monthly basis. The court agreed with the interpretation of the trial court.

TAR further complained that the trial court's interpretation of the agreement was oppressive, inequitable, unreasonable and frustrated the spirit and purpose of the agreement. TAR contented that it was impossible for it to not have breached the territorial limitations in the agreement from the time it sold the first policy if it were in Harris County. It argued that the ten percent rule should have been applied only after all of the policies were issued for the six month period. In response, Apex contended that the purpose of the territorial limitations was to limit its exposure to large claims in and around Harris County, and that the provision was made with the intent to satisfy the Texas Department of Insurance's and Apex's reinsurers' concerns about a geographically centered catastrophic loss. The court of appeals found that it was to construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and to avoid when possible a construction that was unreasonable, inequitable, and oppressive. However, the court did not find the agreement was unreasonable, inequitable, or oppressive. Rather, the court found that the trial court's interpretation of the agreement was reasonable in light of the other provisions of the agreement and the reinsurance agreement, and that Apex's interpretation was not reasonable. The court stated if TAR was to have the entire six month period to which to determine compliance, the purpose of the monthly and quarterly reports would be meaningless. Accordingly, the court overruled that issue as well.

In the next issue, TAR complained that the provision in the contract that required it to pay Apex no less than $60,000 in the event of breach made the agreement illusory and void because it would potentially have allowed Apex to terminate the agreement on the first day and obligate TAR to pay $60,000 without a breach of the agreement by TAR. The court held that the agreement was a bilateral contract, or one in which there are mutual promises between two parties to the contract, each being a promissor and a

promisee. A bilateral contract must be based on valid consideration. A contract that lacks mutuality of obligation, or consideration, is illusory and void. The court noted the test for mutuality is applied and determined when enforcement is sought, not when the promises are made. The court found that regardless of whether the clause was illusory at the time the agreement was signed as alleged by TAR, the subsequent performance by both TAR and Apex pursuant to the agreement constituted an adequate consideration, and therefore the agreement was not illusory. Finally, the court rejected TAR's liquidated damages provision argument because TAR had waived that contention by failing to put it as an affirmative defense. The court of appeals affirmed the trial court's judgment.

EMINENT DOMAIN—CONDEMNATION

***Enbridge Pipeline LP v. Avinger Timber, LLC*, No. 06-09-00046-CV, 2010 Tex. App. LEXIS 8629 (Tex. App.—Texarkana Oct. 27, 2010, no pet. h.)**

The Texarkana Court of Appeals affirmed a judgment that rural real estate had a fair market value of $21 million where the landowner had leased it to several gas companies for over thirty years as a gas processing plant, had more than fifteen pipelines entering the property, and had all of the proper permits for use as a gas processing plant.

The Simpson family and their company Avinger ("AV") owned the condemned land since the mid 1950's. In 1973, the family leased twenty four acres out of its 418-acre property to Tonkawa Gas Processing Company ("Tonkawa") for the purpose of building and operating a gas processing facility. Tonkawa built a large natural gas processing plant on the land in 1973. Tonkawa renewed the lease in the mid 80's and subsequently sold the plant to Koch Midstream Processing ("Koch"). Koch renewed the lease in 2001, and later Enbridge became the operator and successor to Koch's interest. The term of the lease expired in 2004, and Enbridge sent AV an offer to purchase the property for a little over $35,000. After an agreement could not be reached, Enbridge filed a petition for condemnation in March of 2004, and the commissioners awarded AV $47,000. AV objected to the commissioners' award and went to trial on one issue—the fair market value of the condemned acreage. Both parties filed challenges to each others' experts with the main question being whether the expert was entitled to consider the gas processing plant in valuing the land. The trial court answered that the expert could consider the gas processing plant, allowed AV's expert to testify, and excluded Enbridge's expert. After solely hearing AV's expert testimony, the jury found the surface interest of the condemned land was worth approximately $21 million.

After discussing the requirements for expert testimony generally, the court of appeals stated a certified or licensed real estate appraiser is required to apply with the Uniform Standard of Professional Appraisal Practice adopted by the Appraisal Standard Board of the Appraisal Foundation, or other similar strict standards must be used. Additionally, the appraisers should use an appraisal method that meets the requirements of *Robinson*. The court noted other Texas courts have recognized that the comparable sales, income capitalization, and replace costs methods meet these standards.

The question in a condemnation case is what is the fair market value of the interest being taken. Fair market value is the price the property would bring when offered for sale by one who desires to sale but is not obliged to do so and is bought by one who desires to buy but is under no necessity to do so. The Court held the condemnee is entitled to compensation for the property's highest and best use. In that regard, the jury could consider "all uses for which the property is reasonably adaptable and for which is it (or in all reasonable probability will become) available within the foreseeable future." But a party cannot give uses that are purely speculative and unavailable. The court held a fact finder should review the following factors: legal permissibility, physical possibility, financial feasibility, and maximum productivity. Furthermore, the existing use of the land is presumed its highest and best use, but the landowner can rebut this presumption by showing: (1) that the property is adaptable to another use; (2) that the other use is reasonably probable within the immediate future, or within a reasonable time; and (3) that the market value of the land has been enhanced thereby. Moreover, the court noted a landowner can introduce evidence that the condemned land is a self-sufficient, separate economic unit, independent from the remainder of the parent tract with a different highest and best use and different value from the remaining land. When this occurs, the fair market value of separate land can be independently assessed without consideration of the remainder.

The court noted that, because the value is determined at the time of the taking, the fact that previous improvements had been made by the condemnor or others is a factor which is properly considered. This ensures that the condemnee receives the current value of the property. However, with respect only to the condemned land, the project enhancement rule generally provides that the fact finder may not consider any enhancement to the value of the property that results in the taking itself, to avoid placing the landowner in a better position than it would have enjoyed had there been no condemnation. This rule derives from the principle that the benefit to the condemnor is not the proper guide, and it avoids a windfall to the condemnee. The court noted this rule was intended to deal with a new, previously unannounced project, and did not apply to previously existing, ongoing projects. Thus, because the rule prohibits project enhancement, only consideration of a new project is prohibited.

AV had two experts to testify, Nieniec and Bolton. Nieniec emphasized that the property was unique due to the gas processing plant, the characteristics of the land, and the type of lease that existed prior to the taking. Nieniec testified that the property was unique because it had access to pipelines to distribute the gas, it had proper permits to authorize the operation, it had nearby gas production that was anticipated to continue for a lengthy duration, and had the proper amount of electrical supply. Nieniec testified that other companies would be interested in this real estate and that for approximately $74 million ($22 million for the land and $52 million for the plant) such a company would own a property and improvements that were valued at between $165 and $231 million and would generate income of $16.5 million per year. Thus, he concluded that many buyers would be interested in this site. Nieniec testified that a willing investor would pay from $18 to $22 million for the land, knowing that the lease had expired and what would have to be done to remove the existing plant.

Bolton stated that he measured the fair market value of the land as of the date of the taking, which both parties stipulated was April 7, 2004. At that time, the lease had expired, the property was already improved by the gas processing plant, had a permit to operate and was benefitted by fifteen or sixteen pipelines, each with its own easement. Bolton shared Nieniec's opinion that this location was unique because it was already permitted, had power, was in the middle of gas field, had fifteen to sixteen pipelines attached, and the market was not declining. Bolton determined that the land's highest and best use was for the industrial gas processing plant. Bolton first used the comparable sales approach, and appraised the property at $21 million. Bolton also used the income approach to "analyze what a prudent and knowledgeable investor would pay for the leased land, which includes the terms of the lease agreement, considering the gas processing facility must be removed and the land restored within a six-month period." Using the analysis Bolton found that the market value of the subject tract was $19 million. Bolton used a third method, the direct capitalization approach, that was based on one-year's estimate of net operating income derived from a market land leased rate. Capitalizing the annual net operating income using a capitalization rate of eight percent resulted in a value of approximately $22 million.

The court then analyzed Enbridge's complaints about Bolton's testimony. The court first looked to the fact that Bolton used the value of the improvements currently existing on the property in considering the fair market value. The court disagreed with Enbridge that the experts improperly took into consideration how Enbridge valued the site. The court held the experts merely used the knowledge of the value of the unique nature of the property into account in determining the fair market value. The court held that, to properly appraise this real estate, one could not ignore the fact that a gas processing plant had been established on it for more than thirty years and that it would be proper to consider any effect the improvements had on the value of the underlying

real estate. The court held the value of the real estate was not exclusive to Enbridge, and therefore Bolton's assessment was at the fair market value, not the value to the condemnor. Based on the record and precedent before it, the court concluded that the trial court did not abuse its discretion in admitting Bolton's testimony.

In contrast, Enbridge's expert valued the property for rural residential purposes and stated that that was its highest and best use. He did not take into consideration the pipelines, easements, permits, and testified that the fair market value of the property was approximately $48,000. Enbridge's expert did not explain why the existing use of the property would not be its highest and best use and did not consider the affects of the easements or how use of property as residential units was financially feasible. The trial court found that he attempted to "create a total fiction, appraisal in a vacuum." The court of appeals held that, while use as a residential property could theoretically be physically possible, it would not be financially feasible. The court held Enbridge's expert's opinion was not reliable, and affirmed the exclusion of that evidence, and affirmed the trial's court's judgment.

MALPRACTICE—BREACH OF FIDUCIARY DUTY

***Total Clean, LLC v. Cox Smith Matthews, Inc.*, No. 04-09-00392-CV, 2010 Tex. App. LEXIS 8369 (Tex. App.—San Antonio Oct. 20, 2010, no pet. h.)**

The San Antonio Court of Appeals reversed a summary judgment rendered on behalf of a law firm, holding there was a fact issue as to whether the law firm breached its fiduciary duty and whether the client was entitled to the remedy of fee forfeiture.

In 2000, the Nami family formed Total Clean, LLC ("Total Clean") for the purpose of constructing and operating an automated commercial truck wash in San Antonio. Total Clean entered into a contract to purchase a truck wash system from ONDEO Nalco ("Nalco"). Unsatisfied with that system, Total Clean sued Nalco and sought to recover its lost profits from the venture. Total Clean hired Renee McElhaney and Cox Smith to serve as co-counsel. A jury trial was set to commence on September 29, 2003 in federal court before United States District Judge Royal Ferguson. In pretrial filings, Total Clean's attorneys estimated that the trial would take from two to four weeks. Shortly before trial, McElhaney attended an Inns of Court meeting, which was also attended by Judge Ferguson. According to McElhaney, she had a brief conversation with the Judge, during which he told her that the parties would have only five days to try the case. After she

left the meeting, she reported that to co-counsel and relayed it to the client. The litigants eventually settled the case for $4.5 million. The Nami family later came to believe that Judge Ferguson had not told McElhaney that he would limit trial to only five days, and that McElhaney had lied in order to induce the family to settle the case. Total Clean sued McElhaney and Cox Smith for breach of fiduciary duty, fraud, negligence, and negligent misrepresentation. McElhaney and Cox Smith filed a motion for summary judgment, which was granted. Total Clean appealed.

All of Total Clean's causes of action were premised on the contention that Judge Ferguson did not tell McElhaney that the trial would be limited to five days. The law firm contended that the trial court correctly applied the equal inference rule to grant summary judgment because it was equally consistent to infer from the evidence that the conversation occurred as McElhaney reported it as that it did not. Total Clean acknowledged that there was no direct evidence supporting its contention that McElhaney did not truthfully relate the conversation with Judge Ferguson. Instead, Total Clean relied on Judge Ferguson's deposition testimony, including the testimony of his habits and general practices. Total Clean argued that the equal inference rule did not apply and that the trial court erred in granting summary judgment because the record as a whole contained sufficient circumstantial evidence to enable a reasonable juror to infer the alleged conversation in which Judge Ferguson told McElhaney he would limit the time of trial did not occur. Judge Ferguson in his deposition testified that he could not recall telling any of the lawyers in the case that he was going to limit it to five days of trial. He stated that he did not have any recollection one way or the other, but stated that it was possible that he had a discussion with McElhaney. The record also contained the hearing from the June 2003 pre trial in the Nalco case where the attorneys told Judge Ferguson the case would take three weeks to try and that Judge Ferguson did not give counsel any indication that the anticipated trial length presented any difficulties or that he intended to limit the trial. Furthermore, Judge Ferguson also testified as to his habits and practices, which included normally not setting any limitations and normally not discussing cases with lawyers outside the presence of opposing counsel. The court of appeals stated:

> A fair reading of Judge Ferguson's testimony is that it is his practice or habit not to talk with lawyers about pending cases in social settings and not to have a substantive conversation about a pending case with only one side. It is also his practice or habit not to limit the time allotted for the trial of a case, and in the one instance the judge had imposed a time limit before trial, he spoke with both sides before doing so. The Texas Rules of Evidence provide that "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the

person or organization on a particular occasion was in conformity with the habit or routine practice."

The court held Judge Ferguson's testimony, taken as a whole and viewed in the light most favorable to Total Clean, was sufficient to raise a fact issue on whether he had made the alleged comments to McElhaney.

The court next addressed whether Total Clean had sufficient evidence of lost profits. After a lengthy discussion of the expert offered by Total Clean, the court concluded his estimates of the number of trucks that would be washed by Total Clean were not based on objective facts, figures, or data. Moreover, his later calculations were based on assumptions the expert knew to be untrue. The court concluded that his lost profits testimony was without any evidentiary foundation and therefore, was purely speculative and conclusory. Because Total Clean failed to produce any competent evidence that profits were reasonably certain, there was no evidence to support a claim for future lost profits, and summary judgment was proper on that ground. However, the court held a finding of actual damages was not necessary to obtain a forfeiture of attorney fees where a "clear and serious" breach of fiduciary duty was shown. Accordingly, the court held Total Clean's failure to produce evidence of lost profits did not dispose of Total Clean's breach of fiduciary cause of action. The court affirmed the trial court's summary judgment on Total Clean's negligence, negligent misrepresentation, and fraud causes of action, but reversed the trial court's summary judgment on Total Clean's breach of fiduciary duty claim and remanded the cause of action for further proceedings.

MOTION FOR NEW TRIAL

***In Re: Toyota Motor Sales, U.S.A., Inc*., No. 08-09-00293-CV, 2010 Tex. App. LEXIS 7919 (Tex. App.—El Paso Sept. 29, 2010, orig. proceeding)**

The El Paso Court of Appeals denied a defendant's request for mandamus relief because the trial court's order granting a new trial satisfied the specificity requirements of *In re Columbia Medical Center*.

Toyota Motor Sales, Inc., U.S.A. and Viscount Properties II (collectively, "Toyota") filed a petition for writ of mandamus seeking an order to compel a trial court judge to withdraw her order granting a new trial and enter a take-nothing judgment in Toyota's favor. The underlying lawsuit, which was filed on behalf of the estate of Richard King (King) and his family members, arose out of a rollover accident in which King was fatally

injured. The Kings sued Toyota alleging that his Toyota 4 Runner caused King's death because of a defective restraint system that allowed King to be ejected from the vehicle when it rolled. A jury found that there was no design defect in the 4 Runner's restraint system and issued a verdict in favor of Toyota. The trial court subsequently entered judgment on the jury's verdict.

The Kings moved for a new trial "in the interest of justice" on the basis that Toyota's counsel had violated the trial court's limine and evidentiary rulings by referring to a police investigator's lay opinion that King was not wearing a seatbelt at the time of the accident during the presentation of evidence and closing argument. The trial court entered an order granting a new trial. The order stated:

> [T]he Court now hereby grants a new trial in the above-styled cause in the interest of justice because Defendant willfully disregarded, brazenly and intentionally violated the Court's orders in limine, evidentiary rulings, instructions and orders concerning a crucial evidentiary issue relating to seat belt use by Mr. Richard King, the decedent, during Defendant's closing argument, it purported to present evidence outside the record, and commented on matters in violation of the Court's order in limine.
>
> Additionally, this Court pursuant to its inherent authority to issue sanctions, irrespective of and or in additional to its authority under Rule 320, grants a new trial as a sanction to Defendant's conduct during closing argument . . . [m]oreover, the court finds, in this regard, that this sanction of granting a new trial is narrowly tailored to prevent this sort of behavior in the future by Defendant.

In the mandamus proceeding, Toyota alleged that the trial court abused its discretion by granting a new trial because the reasons stated in the new trial order were legally and factually insupportable. However, the court rejected Toyota's argument and held the trial court satisfied the specificity requirements of *In re Columbia Medical Center of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009) when it granted the new trial. Accordingly, Toyota failed to demonstrate a clear abuse of discretion so as to entitle Toyota to mandamus relief.

SPECIAL APPEARANCE

***Moncrief Oil Int'l v. OAO Gazprom*, No. 02-09-00336-CV, 2010 Tex. App. LEXIS 9382 (Tex. App.—Fort Worth, Nov. 24, 2010, no pet. h.)**

The Second Court of Appeals affirmed the trial court's order granting defendants' special appearances when the appellate record contained legally and factually sufficient statements of fact to support the trial court's implied findings that two meetings attended in Texas, even when combined with the phone conversations and emails between the Defendants and the Plaintiff, did not constitute purposeful availment so as to establish personal jurisdiction over the Defendants. The court also held allegedly tortious acts occurring in one state but "directed at Texas" did not create personal jurisdiction.

Moncrief Oil International, Inc. ("Moncrief Oil") filed an interlocutory appeal challenging the trial court's order granting the special appearances filed by OAO Gazprom ("Gazprom"), Gazprom Export, LLC, and Gazprom Marketing & Trading, Ltd. (collectively, "Gazprom Defendants").

Moncrief Oil, an independent Texas oil and gas company, claimed to have reached an agreement with Occidental Petroleum Corporation ("Occidental") for a Texas-based joint venture to import liquefied natural gas (LNG) and to develop a re-gasification facility in Ingleside, Texas. Moncrief Oil, which had allegedly developed confidential trade secret information relating to the marketing of Russian natural gas and LNG in the United States, offered Gazprom the opportunity to participate in the joint venture with Occidental. Moncrief alleged that, during negotiations concerning the joint venture, Gazprom and Gazprom Export learned certain trade secrets belonging to Moncrief Oil concerning the marketing, sales, and distribution of LNG in the United States.

Moncrief Oil filed suit against the Gazprom Defendants alleging that Gazprom and Gazprom Export misappropriated these trade secrets and used them to set up their own LNG re-gasification facility in Houston, Texas. Moncrief Oil also alleged that the Gazprom Defendants tortiously interfered with the Occidental joint venture and conspired to tortiously interfere with the Occidental joint venture and to misappropriate trade secrets. The Gazprom Defendants filed special appearances alleging that the court did not have personal jurisdiction over them. The trial court agreed and sustained the special appearances.

On appeal, Moncrief Oil alleged that the court had personal jurisdiction over the Gazprom Defendants on the basis that the alleged tortious interference claim arose out of a California meeting but involved acts that were "directed at Texas" and that the misappropriation of trade secrets claim arose out of Gazprom's emails and phone calls to Moncrief Oil's Fort Worth, Texas, office and two trips by Gazprom to Texas for meetings with Moncrief Oil.

The court held the appellate record conclusively established that any tortious interference with the Moncrief Oil/Occidental joint venture that may have occurred happened in California. The meeting between Gazprom and Occidental at which Gazprom allegedly interfered with the business relationship existing between Occidental and Moncrief Oil occurred in California. Moncrief Oil claimed that Gazprom's tortious interference with its Occidental joint venture was "directed toward" Texas to the extent that Moncrief Oil is a Texas resident and that Moncrief Oil allegedly suffered damages in Texas. However, the court held that, because the elements of the alleged tort purportedly occurred in California, specific jurisdiction over the claim did not exist in Texas.

With respect to Moncrief Oil's misappropriation of trade secrets claim, the court examined whether the contacts relied upon by Moncrief Oil were attributable to Gazprom, whether the contacts were purposeful, and whether Moncrief Oil's claim for misappropriation of trade secrets arose from or related to those contacts. The contacts to support Moncrief Oil's misappropriation of trade secrets claim consisted of Gazprom's emails and phone calls to Moncrief Oil's Texas office and two trips by Gazprom to Texas for meetings with Moncrief Oil. Moncrief Oil alleged that confidential trade secrets were provided to Gazprom during the emails, phone calls, and at the Texas meetings.

Gazprom claimed that its trips to Texas were for the purpose of discussing settlement of Moncrief Oil's federal lawsuit and therefore were merely fortuitous and could not, as a matter of law, be considered purposeful contacts with Texas. The court could not locate any Texas authority holding that business meetings conducted by a nonresident defendant while in Texas for a settlement conference or a mediation could not constitute contact with Texas. Therefore, the court declined to find that, as a matter of law, conduct of a nonresident defendant while in Texas for a settlement conference could not be considered a contact with Texas for purposes of a jurisdictional analysis.

Gazprom also alleged that the trade secret information disclosed by Moncrief Oil in Texas had been previously disclosed to Gazprom in Moscow and in Washington, D.C., and was only "re-disclosed unilaterally" by Moncrief Oil during the settlement

conferences. Consequently, Gazprom argued that, even if a tort claim for misappropriation of trade secrets existed, no element of it initially occurred in Texas. The court declined to hold that, in analyzing specific jurisdiction of a forum over a nonresident defendant for misappropriation of trade secrets, only the forum of the initial disclosure of trade secrets counted as a contact.

Although the court rejected Gazprom's claim that its trips to Texas were fortuitous as a matter of law simply because settlement negotiations occurred in Texas and that its phone calls and emails to Texas were fortuitous as a matter of law simply because alleged trade secret information was repeated in Texas rather than initially disclosed in Texas, the court's "rejection of these arguments that would render Gazprom's contacts fortuitous does not mean that there is no evidence or insufficient evidence that Gazprom's contacts were purposeful." Consequently, the court proceeded to analyze whether Gazprom's contacts were purposeful so as to subject them to jurisdiction in Texas.

Gazprom argued that its contacts with Moncrief Oil were not purposeful because its communications with a single Texas resident that did not result in a venture, a contract, or any kind of business deal could not constitute a purposeful contact with Texas. In other words, Gazprom claimed that negotiating to possibly do business with a single Texas resident and deciding not to do business with that resident cannot constitute doing business. Deferring to the trial court's implied findings, the court agreed. Specifically, the court held that, based on the trial court's implied findings of fact, the affidavits, exhibits, and deposition excerpts contained in the appellate record, there were legally and factually sufficient statements of fact to support the trial court's implied findings that the two meetings Gazprom attended in Texas, even when combined with the phone conversations and emails between Gazprom and Moncrief Oil, did not constitute purposeful availment so as to establish personal jurisdiction over the Gazprom and the other Gazprom Defendants.

***In Re: Guetersloh*, No. 07-10-0375-CV, 2010 Tex. App. LEXIS 8730 (Tex. App.—Amarillo Nov. 1, 2010, orig. proceeding)**

The Seventh Court of Appeals held a trustee of a trust does not have the same right to represent himself in his representative capacity as he does in his individual capacity. Therefore, a non-attorney trustee who represents the trust in court pro se is engaged in the unauthorized practice of law.

In this case, Michael Guetersloh, Jr., Denise Foster, and Michael Guetersloh, III (collectively, the "Real Parties in Interest"), each acting pro se, filed suit seeking: (1) termination of the 1984 Guetersloh Trust (Trust); (2) distribution of Trust property; and (3) an accounting of all income and distributions from the Trust. The Trust was a family trust created for the benefit of four named individuals, the Real Parties in Interest and James Guetersloh. Guetersloh was named as the trustee of the Trust. In addition to naming Guetersloh in his individual capacity as a party to the lawsuit, the petition named Guetersloh, as trustee of the Trust, as a party (collectively "Relators").

Relators, each acting pro se, subsequently filed an original answer, comprised of a general denial and affirmative defenses, coupled with a Motion to Transfer Venue based on provisions of the Texas Property Code. That same day, acting sua sponte, the trial court found that the trustee of a trust cannot appear in court pro se because to do so would amount to the unauthorized practice of law.

On appeal, the court noted the general rule in Texas has long been that the term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to trust property. Accordingly, suits against a trust must be brought against the trustee. The court could not locate any Texas case directly dealing with the issue of whether a non-lawyer can appear in court pro se, in his capacity as a trustee of a trust. However, the court believed the same logic expressed in court opinions addressing whether a non-lawyer could appear pro se on behalf of a corporation and whether a non-attorney may appear pro se in his capacity as independent executor of an estate should apply to this situation.

The court noted Texas Rule of Civil Procedure 7 did not suggest that a non-lawyer could appear pro se, in the capacity of trustee of a trust, because in that role "he is appearing in a representative capacity rather than *in propria persona*." The actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries.

Because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation.

Consistent with the legislative mandate, the court recognized that Guetersloh's appearance in the trial court in his capacity as trustee falls within the definition of the "practice of law." Accordingly, if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law. Therefore, the appellate court concluded the trial court did not abuse its discretion in prohibiting Guetersloh, in his capacity as trustee of the Trust, from appearing without legal representation.

Derek Montgomery, KELLY HART & HALLMAN LLP, Fort Worth
Adrienne N. Wall, KELLY HART & HALLMAN LLP, Fort Worth

BOND ON APPOINTMENT OF RECEIVER

***Genssler v. Harris County*, No. 01-10-00593-CV, 2010 WL 3928550 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.)**

The First Court of Appeals affirmed the trial court's appointment of a receiver and the setting of a $100 bond where the Defendants presented no evidence that their damages would be greater than $100 if it were later proven that the receiver was wrongfully appointed.

Harris County and the Texas Commission on Environmental Quality brought suit against Klaus Genssler, U.S. Oil Recovery, L.P., MCC Recycling, LLP and other entities (collectively referred to as "Defendants") for environmental violations on real property located in Harris County, Texas. The trial court issued a temporary injunction requiring the Defendants to begin removing hazardous material and prevent the discharge of more hazardous materials, wastewater, or sewage from the property. Harris County contended that Defendants failed to do so, and subsequently sought and obtained the appointment of a receiver to remediate the hazardous conditions. In granting the application to appoint a receiver, the trial court ordered that both Harris County and the receiver post a $100 bond.

The Defendants appealed, arguing that the trial court's order appointing a receiver should be reversed because the bond requirements had not been met. Specifically, the Defendants argued that a $90,000 bond should have been posted instead of the $100 bond posted by the Plaintiffs. Rule 695a provides that no receiver may be appointed until the party applying for a receiver posts a:

> [G]ood and sufficient bond . . . in the amount fixed by the court, conditioned for the payment of all damages and cost in such suit, in case it should be decided that such receiver was wrongfully appointed to take charge of such property. The amount of such bond shall be fixed at a sum sufficient to cover all such probable damages and costs.

TEX. R. CIV. P. 695a. If an applicant fails to post bond in compliance with Rule 695a, the order appointing a receiver must be reversed. *See Rubin v. Gilmore*, 561 S.W.2d 231,

234 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). Determining the amount of a bond is within the trial court's discretion. *See Childre v. Great Sw. Life Ins. Co.*, 700 S.W.2d 284, 289 (Tex. App.—Dallas 1985, no writ). Unless there is evidence in the record that supports a higher bond amount, a trial court does not abuse its discretion by setting a lower bond. *See IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App.—Fort Worth 2005, no pet.).

The First Court of Appeals affirmed the setting of a $100 bond for two reasons. First, it noted that the Defendants would not be truly damaged by the receiver selling assets and applying the proceeds to remediate the property. Because the Defendants were required to remediate the property anyway, the receiver's sale of assets and use of those proceeds to remediate would put the Defendants in the same position they should be in now. Second, the court noted that the Defendants failed to identify any evidence showing what their damages would be if the receiver had been wrongfully appointed. Without such evidence, the First Court of Appeals could not conclude that the trial court abused its discretion in setting a $100 bond.

DERIVED JUDICIAL IMMUNITY FOR RECEIVER

***Conner v. Guemez*, No. 02-10-00211-CV, 2010 WL 4812991 (Tex. App.—Nov. 24, 2010, no pet. h.) (mem. op.)**

The Second Court of Appeals reversed the trial court's denial of summary judgment and rendered judgment in favor of judicially-appointed receiver because derived judicial immunity barred any suit against him.

Jose Miguel Guemez filed for divorce from his former wife Maria Guemez in November 2004. That divorce proceeding involved the division of the marital estate, including a chain of grocery stores. On August 22, 2006, the trial judge, in the presence of attorneys for both of the Guemezes, telephoned Coye Conner and asked him to serve as receiver. Conner said he was "tentaviely interested" and requested to speak with counsel for each side to obtain more information. Conner later conferred with counsel and agreed to the appointment. The trial court entered an order on September 22, 2006, appointing Conner to take possession of and maintain the chain of grocery stores and other receivership property. Conner received official notification of his appointment on the same day. But the order appointing him as receiver noted an effective date of August 23, 2006.

Between late August and mid-September 2006, the stores fell into disrepair—employees left after not being paid, meat was left rotting on shelves, and the City of Arlington issued citations for various code violations. After receiving the Order of appointment on September 22, 2006, Conner stepped in and determined that the state of the stores precluded him from selling them as going business concerns. He later moved for, and was granted, authority to sell the stores as real estate. The sale ultimately consummated for $4,200,000.

Mr. Guemez filed suit against Conner, alleging he breached his fiduciary duty by failing to protect the assets of the estate and failing to maximize their value. Specifically, Mr. Guemez claimed that Conner abused his position by waiting to take control of the stores until after the order was signed on September 22, 2006 instead of on his effective appointment on August 23, 2006. Conner filed a motion for summary judgment, arguing that as the court-appointed receiver, he was protected by derived judicial immunity. The trial court denied the motion, and Conner filed an interlocutory appeal pursuant to section 51.014(a)(5) of the Texas Civil Practice and Remedies Code.

Derived judicial immunity operates to confer absolute immunity from liability to a person appointed to perform services for the court. *See Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). Thus, a judge's immunity attaches to a person to whom a judge has delegated her authority to, appointed to perform services for the court, or otherwise serves as an officer of the court. *Id.* Determining whether a person has derived judicial immunity requires pursuit of a "functional approach"—looking "to whether the person seeking immunity is intimately associated with the judicial process" and whether "that person exercises discretionary judgment comparable to that of the judge." *Id.* Here, the Second Court of Appeals noted the complained-of actions and omissions all fell within the authority delegated to Conner by the trial court's order. Because those actions and omissions were done in his capacity as a receiver, the Second Court of Appeals held Conner was functioning as an arm of the court and was therefore protected by derived judicial immunity.

DISCOVERY DURING ADMINISTRATIVE PHASE OF EMINENT DOMAIN PROCEEDING

***In re Texas*, No. 03-10-00260-CV, 2010 WL 4595712 (Tex. App.—Austin Nov. 12, 2010, orig. proceeding)**

The Third Court of Appeals held a trial court may not order the State to produce documents requested by property owners pursuant to section 21.024 of the Texas Property Code pending the commissioner's hearing in the administrative phase of an eminent domain proceeding because compelling such discovery would undermine legislative intent, and section 21.024 does not apply to governmental entities.

In November 2009, the State initiated an eminent domain proceeding in order to acquire property from James and Rosemary LeGuin, after which the trial court appointed three special commissioners to assess the damages to the owner of the property being condemned. A commissioner's hearing was set for June 2010. Prior to the hearing, the LeGuins filed a request for production pursuant to section 21.024 of the Texas Property Code, seeking various documents related to the eminent domain suit to be produced prior to the hearing. In response, the State objected to the request, arguing that the property code provision does not apply to the State or the governmental entities on behalf of which the eminent domain proceeding was filed (i.e., the Texas Transportation Commission and the Texas Department of Transportation). Shortly thereafter, the LeGuins filed a motion to compel, which was granted by the trial court. The petition for writ of mandamus followed.

The Third Court of Appeals first noted eminent domain proceedings are comprised of two phases. In the first, or administrative, phase, the trial court appoints three special commissioners who assess the damages of the owner of the property being condemned. The administrative phase is designed to provide a means to quickly award damages without the delays of a court proceeding. During this phase, the trial court only has jurisdiction to appoint the commissioners, receive their opinion as to value, and render judgment based upon the commissioners' award. If either the property owner of the State is dissatisfied with the commissioners' award, they may file objections to such in the trial court. Once such objections are filed, the second phase begins. In the second phase, the award is vacated and the administrative proceeding converts into a normal trial. Only after either party files an objection does the trial court obtain full jurisdiction over the case.

After holding that the State had no adequate remedy on appeal, the Third Court of Appeals found the trial court had abused its discretion in ordering the production of documents pending the commissioner's hearing. The court of appeals found that construing section 21.024 of the Texas Property Code as applying to the administrative phase would undermine the intent of the legislature by adding expense to the administrative phase.

Additionally, construing section 21.024 as applying to the State is inconsistent with the language of the provision. Section 21.024(a) provides that "an entity which is considered critical infrastructure and which is authorized by law to take private property through the use of eminent domain" is required to produce certain documents set forth in section 21.024. First, the Third Court of Appeals held the State is not an entity of "critical infrastructure." Second, section 21.024(i) provides that the entities described in section 21.024(a) are not subject to section 552.0037 of the Texas Government code, which specifies that non-governmental entities with the power to use eminent domain are subject to the Public Information Act. Because section 553.0037 of the Texas Government Code only applies to non-governmental entities, and section 21.024(i) exempts all of the entities described in section 21.024(a) from the requires imposed by the government code provision, the court of appeals concluded that section 21.024 applies only to non-governmental entities, which would necessarily not include the State. Last, the State is not "authorized by law" to take private property; rather, the State has an inherent sovereign power of eminent domain. As such, the court of appeals concluded that the State is simply not governed by section 21.024. Therefore, the Third Court of Appeals held the trial court abused its discretion in compelling the State to produce documents prior to the commissioner's hearing, and conditionally granted the writ of mandamus.

FAILURE TO RELEASE BOND SECURING TEMPORARY RESTRAINING ORDER AFTER FINAL JUDGMENT

***Energy Transfer Fuel, L.P. v. Head*, No. 12-09-00061-CV, 2010 WL 4523776 (Tex. App.—Tyler Nov. 10, 2010, no pet.) (mem. op.)**

The Twelfth Court of Appeals held the trial court abused its discretion in denying Plaintiff's motion to release a bond securing a temporary restraining order after final disposition of the case.

Energy Transfer Fuel, L.P. ("Plaintiff"), a public gas utility, petitioned the trial court for a temporary restraining order (TRO), and temporary and permanent injunctions, against Fred and Marsh Head (collectively, "Defendants") as a result of

Defendants' refusal to permit Plaintiff's entry on Defendants' property to conduct surveying activities in connection with a proposed pipeline route. (Plaintiff, as a public utility, has the right to enter upon property to make preliminary surveys of proposed routes along which its gas pipelines may be constructed.) On July 23, 2008, the trial court issued a TRO prohibiting Defendants from interfering or attempting to interfere with Plaintiff's right to enter and survey the route of its pipeline across Defendants' property, and ordered Plaintiff to post a $25,000 bond. The trial court also set a hearing on Plaintiff's application for a temporary injunction for July 31, 2008. After obtaining the TRO, Plaintiff began its surveying activities on Defendants' property and completed its work by July 29, 2008. Plaintiff subsequently filed a notice of nonsuit on July 29, 2008, and filed a motion requesting the return of its $25,000 bond on July 31, 2008. The trial court denied Plaintiff's request for the return of its bond, as well as Plaintiff's motion for reconsideration, and an appeal followed.

A trial court's denial of Plaintiff's motion requesting the return of its bond is reviewed for an abuse of discretion. A nonsuit may be taken after a TRO has been obtained but before the hearing on the temporary injunction, but the nonsuit does not defeat the right of a restrained party who is damaged by the TRO to sue for wrongful injunction. Nonetheless, the Twelfth Court of Appeals held that, by refusing to release the bond, the trial court abused its discretion. The court of appeals noted the trial court rested his decision denying Plaintiff's request to release the bond on the possibility that Defendants would sue Plaintiff for wrongful injunction. Specifically, the trial court stated, "until there is either some disposition or loss of [the restrained parties'] right to sue on the TRO" the trial court would not release the bond. The court of appeals found, however, that not only is there no authority supporting the retention of a bond posted as a condition to the issuance of a TRO after final judgment, but no "special circumstances" exist supporting such retention. Defendants did not: (1) move for dissolution or modification of the TRO; (2) plead a claim for affirmative relief prior to Plaintiff's nonsuit; (3) file a response to Plaintiff's motion for release of the bond; (4) object to the release of the bond; (5) inform the trial court that they intended to assert a wrongful injunction claim against Plaintiff; or (6) otherwise provide the trial court with any argument or authority in opposition to Plaintiff's motion for reconsideration. Consequently, the Twelfth Court of Appeals held that, in light of Defendants' inaction, the trial court abused its discretion.

PLENARY JURISDICTION AND PETITIONS IN INTERVENTION

***Josephine Douglas-Peters v. Choe, Holen, Yoo & Burchfiel, P.C.*, No. 05-10-00208-CV, 2010 WL 4946612 (Tex. App.—Dallas Dec. 7, 2010, no pet. h.) (mem. op.)**

The Fifth Court of Appeals vacated the court's summary judgment in favor of Intervenor where the Original Petition in Intervention was filed after the trial court's plenary jurisdiction had expired.

Josephine Douglas-Peters filed suit *pro se* against C.F. & H. Corporation d/b/a South Dallas Nursing Home, Dr. Leona Hawkins, Juliette Wesley, and Charles W. Smith (collectively, "Defendants") for wrongful termination and violations of the health and safety code (the "Lawsuit"). The following month, Douglas-Peters retained the firm of Choe, Holen, Yoo & Burchfiel, P.C. (the "Firm") to represent her in the Lawsuit. Douglas-Peters filed a Motion for Summary Judgment in June 2009, which was granted in full by the trial court. The trial court entered final judgment on October 27, 2009, awarding Douglas-Peters more than $322,000 in damages and $80,000 in attorney fees. Neither Douglas-Peters nor the Defendants filed a motion for new trial or to correct, modify, or reform the judgment, or any other post-judgment motion that would extend the trial court's plenary jurisdiction. On January 29, 2010, the trial court granted the Firm's Motion to Withdraw as Douglas-Peters' attorney-of-record. Four days later, on February 2, 2010, the Firm filed an Original Petition in Intervention, seeking to enforce its retainer agreement with Douglas-Peters and recover attorney fees of $164,400 and expenses in the amount of $6,000. That same day, Defendants' real property sold for $412,000 at a public auction held in connection with Douglas-Peters' attempt to collect on her judgment. The trial court granted the Firm's request for a temporary restraining order and ordered the proceeds from the sale of Defendants' real property deposited into the registry of the court. The firm subsequently filed a Motion for Summary Judgment, which the trial court granted on May 5, 2010.

A non-party can successfully intervene in a case post-judgment provided that both the petition is filed and the judgment is set aside within thirty days from the judgment. The Fifth Court of Appeals found that the Final Judgment was filed on October 27, 2009 and the trial court's plenary jurisdiction expired on November 30, 2009. Yet, the Firm did not file its Petition in Intervention until sixty-four days after the trial court's plenary jurisdiction expired. Because judicial action taken after the expiration of the trial court's jurisdiction is a nullity, and any orders signed outside the trial court's plenary jurisdiction are void, the court of appeals held the Firm's

intervention was untimely and all orders signed in connection with the intervention, including the May 5, 2010 summary judgment, are void.

The Fifth Court of Appeals held that the holdings in *Lerma v. Forbes*, 166 S.W.3d 889 (Tex. App.—El Paso, 2005, pet. denied) (holding that the issue of the trial court's plenary jurisdiction is irrelevant to the proprietary of a post-judgment petition in intervention where the intervenor "has no complaint with the merits of the judgment obtained in the underlying lawsuit, but only seeks to protect his or her own interest in the post-judgment proceedings"), and *Breazeale v. Casteel*, 4 S.W.3d 434 (Tex. App.—Austin 1999, pet. denied) (same), are inapplicable when, as here, an attorney or law firm seeks fees incurred in representing one of the parties in the underlying case as such act seeks to alter the underlying judgment.

PLEA TO THE JURISDICTION—GOVERNMENTAL IMMUNITY

***City of Dallas v. Gatlin*, No. 05-09-01425-CV, 2010 WL 4924935 (Tex. App.—Dallas Dec. 6, 2010, no pet. h.)**

The Fifth Court of Appeals held the government has not waived governmental immunity under Texas Labor Code section 408.001(b) or article XVI, section 26, of the Texas Constitution.

On February 13, 2008, Donny Gatlin was employed by the City of Dallas when he sustained serious injuries, which ultimately resulted in his death, as a result of falling fifty feet while performing repair or maintenance work at the Dallas Convention Center. The City of Dallas paid workers' compensation benefits to Debra Gatlin, Gatlin's wife, but not to Gatlin's adult children, Lacey and Amber Gatlin. Lacey, Amber, and Debra Gatlin (collectively, "Plaintiffs") subsequently sued the City alleging gross negligence and seeking an award of punitive damages only. Plaintiffs alleged that the City had waived its governmental immunity under section 408.001(b) of the Texas Labor Code and article XVI, section 26 of the Texas Constitution. The City filed a plea to the jurisdiction, which the trial court denied. An interlocutory appeal ensued.

In Texas, governmental immunity deprives a trial court of subject matter jurisdiction for suits against governmental units unless the government consents to suit. A municipality has governmental immunity to the extent it engages in the exercise of governmental functions, except when that immunity has been waived. A municipality's governmental functions include convention centers. Texas Labor Code section 408.001

provides that recovery of workers' compensation benefits is the exclusive remedy of an injured employee or legal beneficiary of such employee. Paragraph (b) of that section, however, provides that a surviving spouse or heirs of a deceased employee whose death was caused by the employer's gross negligence may nonetheless recover exemplary damages. The Fifth Court of Appeals held, however, that the City's governmental immunity is not waived. Although chapter 504 of the Texas Labor Code makes many provisions of the workers' compensation system applicable to political subdivisions of the state, such law provides that it does not authorize a cause of action or damages beyond those authorized by the Tort Claims Act. The Tort Claims Act does not authorize exemplary damages. Further, the Legislature in Chapter 504 specifically did not extend to employees of political subdivisions section 408.001(b)'s provisions permitting a deceased employee's spouse and heirs the right to sue for exemplary damages for the employer's gross negligence. Therefore, the City's governmental immunity is not waived with respect to section 408.001(b) of the Texas Labor Code.

Plaintiffs also asserted that article XVI, section 26 of the Texas Constitution waives the City's immunity from suit for gross negligence and exemplary damages. Section 26 provides that "[e]very person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide." The court of appeals ruled that article XVI, section 26 of the Texas Constitution did not waive the City's immunity because: (1) when the section was adopted the common law included absolute sovereign immunity for governmental entities performing governmental functions, and convention centers is a statutorily designated governmental function; and (2) section 26 does not permit the recovery of punitive damages when the plaintiff lacks a cause of action for compensatory relief, as here. As a result, the Fifth Court of Appeals reversed the trial court's order denying the City's plea to the jurisdiction and ordered the cause dismissed for want of jurisdiction.

RESIDENT PHYSICIAN'S OFFICIAL IMMUNITY FROM SUIT

***Zimmerman v. Anaya*, No. 01-07-00570-CV, 2010 WL 4484010 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet.) (mem. op.)**

The First Court of Appeals reversed the trial court's denial of summary judgment and rendered judgment in favor of resident physician where Plaintiff made irrevocable election to first sue the Baylor College of Medicine—a state agency.

Wendy Gonzalez Anaya was a labor and delivery patient at Ben Taub General Hospital ("Ben Taub"). Anaya's son suffered personal injuries and ultimately passed during the delivery. Geoffrey Zimmerman, M.D., a resident physician of Baylor College of Medicine ("Baylor"), rendered service to Anaya during the delivery of her son. Baylor provided medical care at Ben Taub by and through contracts with the Texas Higher Education Coordinating Board and state funding.

In the original petition, Anaya, individually and as next friend of Christopher Gabriel Hernandez ("Plaintiff"), asserted health care liability claims against Baylor as the sole defendant. Plaintiff first named Zimmerman as a defendant in the second amended petition. Zimmerman asserted the affirmative defense of official immunity, arguing that as a resident of Baylor, he was entitled to immunity under section 101.106 of the Texas Civil Practice and Remedies Code (CPRC) because Plaintiff made an irrevocable election to sue Baylor first. The trial court denied Zimmerman's motion.

On interlocutory appeal, Zimmerman challenged the trial court's order denying his motion for summary judgment. Zimmerman argued that Baylor qualified as a governmental unit under section 312.007 of the Texas Health and Safety Code, thereby making him an employee of a state agency for purposes of immunity under the Tort Claims Act. The First Court of Appeals dismissed the appeal, holding Zimmerman was not entitled to interlocutory appeal because he was not an officer or employee of the state. *Zimmerman v. Anaya*, 315 S.W.3d 549, 551-52 (Tex. App.—Houston [1st Dist.] 2008) ("*Zimmerman I*"), *rev'd* 315 S.W.3d 523 (Tex. 2010) ("*Zimmerman II*"). On petition for review, the Texas Supreme Court held that:

> [A] resident physician at a private medical school is to be treated like a state employee for purposes of [CPRC] section 51.014(5) when the

> underlying litigation arises from a residency program coordinated through a supported medical school, like Baylor, at a public hospital, like Ben Taub.

Zimmerman II, 315 S.W.3d 523, 524 (Tex. 2010). The Texas Supreme Court reversed and remanded.

On remand, Zimmerman argued that in light of the Texas Supreme Court's holding, he was entitled to official immunity pursuant to section 101.106 of the CPRC. That section provides that "[t]he filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (Vernon Supp. 2010). Because Plaintiff sued Baylor as the sole defendant in the original petition, and because the claims against Zimmerman "do not involve conduct that strays outside the scope of Baylor's coordinated or cooperative activities at Ben Taub through Baylor's residency program," the First Court of Appeals held section 101.106 bars the suit against him. *Zimmerman*, 2010 WL 4484010, at *2. The First Court of Appeals therefore reversed the trial court's denial of summary judgment, and rendered judgment dismissing Plaintiff's claims, with prejudice, against Zimmerman. *Id.*

SPECIAL APPEARANCE

***Moncrief Oil Int'l, Inc. v. OAO Gazprom*, No. 02-09-00336-CV, 2010 WL 4813273 (Tex. App.—Fort Worth Nov. 24, 2010, no pet.)**

The Second Court of Appeals affirmed the trial court's order granting special appearances in favor of Russian oil companies because the exercise of jurisdiction would be inconsistent with federal constitutional due-process guarantees.

Moncrief Oil International, Inc. ("Moncrief Oil") filed a lawsuit against OAO Gazprom ("Gazprom"), Gazprom Export, LLC ("Gazprom Export"), Gazprom Marketing & Trading, Ltd. ("Gazprom M&T") (collectively, the "Gazprom Defendants"), and other entities, claiming they misappropriated trade secrets, conspired to tortiously interfere with a joint venture with Occidental Petroleum Corporation, and conspired to misappropriate trade secrets. Gazprom is a Russian company. Gazprom Export is a subsidiary of Gazprom, with the exclusive right to export Russian natural gas outside the Russian Federation. Gazprom M&T is a United Kingdom corporation that markets

natural gas for Gazprom and Gazprom Export. The Gazprom Defendants filed special appearances, which the trial court granted.

On appeal, Moncrief Oil argued that the Gazprom Defendants failed to negate all bases of personal jurisdiction. Moncrief Oil bore the initial burden of pleading sufficient allegations to confer jurisdiction, and the Gazprom Defendants then bore the burden of negating all bases of jurisdiction alleged in the petition. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). The petition and evidence introduced to the trial court demonstrated that the Gazprom Defendants:

- exchanged over fifty communications (emails and phone calls) with Moncrief Oil in its Fort Worth, Texas office;
- attended a meeting in Houston, Texas between Richard Moncrief and representatives of the Gazprom Defendants; and
- attended a meeting in Fort Worth, Texas between Moncrief and representatives of the Gazprom Defendants.

On those allegations and facts, the Second Court of Appeals held Moncrief Oil sufficiently alleged jurisdiction and that the Gazprom Defendants failed to negate that Moncrief Oil disclosed trade secret information to the Gazprom Defendants in Texas or that the Gazprom Defendants used Moncrief Oil's trade secret information in Texas. *Moncrief Oil*, 2010 WL 4813273, at *10.

The Second Court of Appeals then addressed whether the exercise of jurisdiction over the Gazprom Defendants would be consistent with federal constitutional due-process guarantees. That determination required analysis of whether (1) the Gazprom Defendants' contacts with Texas were relevant and not the unilateral activity of another party, (2) the contacts with Texas were purposeful rather than random, fortuitous, or attenuated, and (3) the Gazprom Defendants sought some benefit, advantage, or profit by availing itself of the jurisdiction. *See Moki Mac*, 221 S.W.3d at 575. There was no dispute on the first factor. On the second, the court opined:

> [W]e have rejected Gazprom's claims that its trips to Texas were fortuitous . . . simply because settlement negotiations occurred in Texas and that its phone calls and emails to Texas were fortuitous . . . simply because alleged trade secret information was repeated in Texas rather than initially disclosed in Texas, [but] our rejection of these arguments that would render Gazprom's contacts fortuitous does not mean that there is no evidence or insufficient evidence that Gazprom's contacts were purposeful.

Id. at *11. The Second Court of Appeals then noted the affidavits, exhibits, and deposition excerpts attached to the special appearances and responses filed with the trial court contained conflicting statements on the purposes of the Gazprom Defendants' trips to Texas and communications with Moncrief Oil. *Id.* at *13. Because the trial court entered no findings of fact, the Second Court of Appeals deferred to the trial court's implied findings of fact. *Id.* In doing so, the court ultimately held the evidence contained "legally and factually sufficient statements of fact to support the trial court's implied findings that the two meetings . . . in Texas—even when combined with the phone conversations and emails between Gazprom and Moncrief Oil—did not constitute purposeful availment." *Id.*

TEMPORARY INJUNCTIONS—STANDING UNDER THE DANGEROUS WILD ANIMALS ACT

***Tuma v. Kerr Cnty.*, No. 04-10-00478-CV, 2010 WL 4815881 (Tex. App.—San Antonio Nov. 29, 2010, no pet.)**

The Fourth Court of Appeals held the trial court's temporary injunction was void because it failed to set forth reasons why injury will result in the absence of a temporary injunction pursuant to Texas Rule of Civil Procedure 683. Further the court of appeals held that Plaintiffs did not have standing to obtain injunctive relief under the Dangerous Wild Animals Act.

Kerr County, Texas and Janie Whitt (collectively, "Plaintiffs") brought suit against Clint and Amy Tuma (collectively, "Defendants") under the Dangerous Wild Animals Act (the "Act") seeking to enjoin Defendants from violating the Act. Texas Rule of Civil Procedure ("Rule") 683 requires that an order granting an injunction "set forth the reasons for its issuance." The procedural requirements of Rule 683 are mandatory, and any order granting a temporary injunction that fails to strictly comply with the Rule, as here, is subject to being declared void and dissolved. Therefore, the Fourth Court of Appeals held that, because the trial court's temporary injunction failed to set forth the reasons why injury will result in the absence of a temporary injunction, it is void and dissolved.

The Fourth Court of Appeals further found neither Plaintiff had standing to obtain an injunction under the Act. The Act provides that "[a]ny person who is directly harmed or threatened with harm by a violation of this subchapter or a failure to enforce this subchapter may sue an owner of a dangerous wild animal to enjoin a violation of this subchapter or to enforce this subchapter." The court of appeals found Whitt's testimony that she lived ten miles from where Defendants caged the animals, and that

she felt threatened because the animals are dangerous and one could escape and cause her injury if she was in the area "visiting friends," was insufficient to confer standing under the Act.

Finally, the court of appeals found Kerr County had no standing to obtain injunction relief as such relief is only available to a "person," which is specifically defined under the Act as "an individual, partnership, corporation, trust, estate, joint stock company, foundation, or association of individuals"—not a county. Alternatively, the court of appeals found the county does not have standing under the doctrine or *parens patriae* (i.e., maintenance of a suit on behalf of citizens for protection of their rights) because: (1) such doctrine does not apply to counties, whose power is derivative and not sovereign; and (2) even if such doctrine did apply, the doctrine is typically only invoked with respect to persons unable to protect themselves, such as child or the mentally ill.

Stanford Purser, HERMES SARGENT BATES, LLP, Dallas

ADMINISTRATIVE PROCEDURE ACT—STANDARD OF REVIEW

***Cedar Lake Nursing Home v. U.S. Dep't of Health & Human Servs.*, 619 F.3d 453 (5th Cir. 2010)**

An appeal from an administrative law judge's grant of summary judgment should be reviewed under the deferential standard of the Administrative Procedures Act.

The Centers for Medicare and Medicaid Division (CMS) of the Department of Health and Human Services (DHS) imposed a civil monetary penalty on Cedar Lake Nursing Home for violating certain Medicare-related regulations. Cedar Lake appealed the fine to an administrative law judge (ALJ) and requested a hearing. CMS moved for summary judgment. Without holding an evidentiary hearing, the ALJ granted summary judgment to CMS. The Departmental Appeals Board affirmed the decision, and Cedar Lake sought further review by the Fifth Circuit.

The APA permits a court to set aside agency rulings that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "unsupported by substantial evidence." But, based on a case from the Sixth Circuit, Cedar Lake argued that the Fifth Circuit should use a de novo standard of review in this appeal in accord with Federal Rule of Civil Procedure 56 because the ALJ granted summary judgment without an evidentiary hearing. Addressing this issue of apparent first impression in the Fifth Circuit, the court instead followed a recent decision by Judge Posner in the Seventh Circuit, holding the deferential APA standard of review applies to summary judgments. Judge Posner reasoned that the APA standard still applies because agencies have particular subject-matter experience and expertise and are given more decisional latitude by legislatures than trial courts are.

APPELLATE JURISDICTION—COLLATERAL ORDER DOCTRINE

***Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010)**

Amending a prior decision, the court held the denial of a federal contractor's claims of official immunity, derivative sovereign immunity, Defense Production Act immunity, and preemption were not appealable under the collateral order doctrine.

A civilian employee of United States government contractors was killed while working in Iraq. The employee's daughter brought suit against the contractors, alleging various state law claims. The contractors moved to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) based on: (1) official immunity; (2) derivative sovereign immunity; (3) immunity under the Defense Production Act (DPA); and (4) preemption of state law under the combatant activities exception to the Federal Tort Claims Act. The district court denied the motion without explanation, and the plaintiff appealed under the collateral order doctrine. The Fifth Circuit held that it lacked jurisdiction because none of the trial court's rulings qualified as collateral orders.

In holding it lacked jurisdiction, the Fifth Circuit emphasized the relatively limited "universe of orders from which collateral order review may be taken." Simply asserting the denial of a claim of immunity does not suffice. Rather, the court reiterated "the forms of immunity that may be vindicated on appeal at an early stage through collateral order review are those that involve 'not simply a right to prevail, but a right not to be tried.'" The relevant inquiry for purposes of collateral order appeal is whether the asserted immunity is from suit or merely from liability. The court noted the right not to be tried "rests upon an explicit statutory or constitutional guarantee that trial will not occur."

Claims of official immunity may qualify for collateral order review if the immunity claim is "substantial," which means more than colorable. But the Fifth Circuit denied review in this case because the limited record did not adequately suggest that the Defendants were entitled to official immunity. The court denied review of the derivative sovereign immunity claim based on prior precedent holding that such claims did not qualify under the collateral order doctrine. The court also denied jurisdiction over the Defendants' asserted immunity under the Defense Production Act because the United States Supreme Court had previously described such immunity as a defense to liability, not immunity from suit. Finally, the Fifth Circuit relied on prior precedent to hold that the denial of a preemption claim does not constitute a reviewable collateral order.

ARBITRATION—DIRECT BENEFIT ESTOPPEL

***Noble Drilling Servs., Inc. v. Certex USA, Inc*., 620 F.3d 469 (5th Cir. 2010)**

The doctrine of direct benefit estoppel could not be used to compel a plaintiff to arbitrate his claims when he never signed the arbitration agreement, never knowingly sought or obtained any benefit from the contract containing the arbitration clause, and never sought to enforce the terms of the contract or asserted claims that were necessarily based on the contract.

Bridon, a manufacturer of wire mooring rope, used Certex USA, Inc. ("Certex") to distribute its goods under a distribution agreement that contained an arbitration clause. Noble Drilling Services, Inc. (Noble") entered into a sales contract with Certex to buy Bridon mooring rope. The sales contract did not contain an arbitration clause. To fill Noble's order, Certex entered into purchase order agreements with Bridon. These agreements also incorporated an arbitration clause. Noble never saw or agreed to the distribution agreement or purchase order agreements between Bridon and Certex.

When the wire mooring rope failed to perform as Noble expected, Noble sued Bridon and Certex, alleging various state law claims. The defendants moved to compel arbitration under the purchase order and distribution agreements. They argued that Noble was bound under the theory of direct benefits estoppel even though it had never signed those agreements. The district court agreed and dismissed the case. Noble appealed.

The Fifth Circuit held direct benefit estoppel did not apply to Noble, and Noble did not have to arbitrate its claims. Direct benefit estoppel involves non-signatories who "embrace" a contract but then, during litigation, attempt to repudiate the arbitration agreement within the contract. A non-signatory can "embrace" a contract in two ways: (1) by knowingly seeking or obtaining direct benefits from the contract; or (2) by trying to enforce the contract or asserting claims that must be determined by reference to that contract. Noble did not embrace the contract in either way. The Fifth Circuit noted Noble could not have "knowingly" sought benefits under the contract because there is no evidence that Noble ever knew about the terms of the distribution agreement or the purchase order containing the arbitration clauses. The court also noted none of Noble's claims relied on the contracts containing the arbitration agreements. Rather, Noble's claims arose from the defendants' representations about the mooring rope and whatever duties a manufacturer and distributor have by law.

BANKRUPTCY—JUDICIAL ESTOPPEL

***Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010)**

Judicial estoppel barred a bankruptcy debtor and the trustee from enforcing a $1 million judgment that the debtor deliberately failed to disclose as an asset of the estate while at the same time defending that judgment on appeal.

Kim Lubke obtained a judgment for more than a million dollars against the City of Arlington (the "City"). During the City's appeal, Lubke filed for bankruptcy but did not disclose the pending judgment in the schedule of assets or any other bankruptcy filings. The bankruptcy court deemed the bankruptcy a "no asset" case, and Lubke was discharged when the Trustee closed the case. Without any knowledge of the bankruptcy, the Fifth Circuit heard oral argument in the City's appeal and largely affirmed the award. When Lubke informed his counsel in the case against the City about the bankruptcy, the bankruptcy was reopened, and the Trustee was substituted for Lubke in the case against the City. The bankruptcy court revoked Lubke's discharge and allowed creditors to refile any claims, but relatively few creditors availed themselves of this opportunity. Meanwhile, on remand in the district court, the City sought to prevent the bankruptcy Trustee from enforcing the judgment based on judicial estoppel.

The district court held Lubke was judicially estopped from enforcing the judgment but the Trustee was not. Accordingly, the court ordered the City to pay the judgment to the Trustee and ordered the Trustee to return any remaining funds (not disbursed to creditors) to the City. The City appealed.

The Fifth Circuit held Lubke's conduct judicially estopped him and the Trustee from collecting the judgment. No one disputed the factual basis for applying judicial estoppel. The issue was whether it should bar the Trustee in addition to Lubke. The Fifth Circuit reasoned judicial estoppel applied to the Trustee because: (1) the Trustee succeeded to Lubke's claim with all of its attributes, including the effects of judicial estoppel; and (2) the balance of harms disfavored permitting the litigation to continue. Specifically, the court found that the creditors were not materially advantaged by continuing the litigation because so few had refiled their claims, and they were still second-priority to substantial administrative expenses, including the Trustee's and trial counsel's fees. The court also found the City had been victimized by the non-disclosure and became liable for increased attorney fees caused by the unusual litigation. Finally, the court observed Lubke had been benefited by effectively ridding himself of all of his creditors.

DISCOVERY—28 U.S.C. § 1782(a)

***Ecuadorian Plaintiffs v. Chevron Corp*., 619 F.3d 373 (5th Cir. 2010)**

The Fifth Circuit held Chevron could obtain discovery from the Plaintiffs' consultant to investigate alleged collusion between the consultant and a court-appointed expert in a foreign proceeding.

This appeal stems from the Plaintiffs' suit in Ecuador alleging that Texaco (later acquired by Chevron) polluted the Ecuadorian amazon rainforest during several decades of oil extraction. The Ecuadorian court appointed a neutral expert who opined that Texaco caused $27.3 billion in damages. Claiming that the Plaintiffs and their U.S. consultants colluded with the expert in crafting the report, Chevron started several discovery proceedings in the United States under 28 U.S.C. section 1782(a), seeking evidence of collusion. In particular, Chevron subpoened 3TM, an environmental consulting firm retained by the Plaintiffs' consultant, Stratus. Plaintiffs intervened to quash the subpoena, but the district court ordered 3TM to submit to limited discovery based on the factors outlined in *Intel Corporation v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004).

On appeal Plaintiffs argued: (1) Chevron should just ask the expert to turn over the documents upon which he relied; (2) Chevron was improperly trying to avoid Ecuadorian discovery restrictions; and (3) the documents were privileged under the work product doctrine. The Fifth Circuit rejected these arguments and affirmed the district court's ruling. First, the Fifth Circuit noted it made no sense to require Chevron to request 3TM documents from the expert. The expert had not produced any 3TM documents in response to the Ecuadorian court's order, making it extremely unlikely the expert would produce such documents in response to Chevron's request. Second, the Fifth Circuit noted the record did not reflect that Chevron was trying to evade Ecuadorian discovery limitations. The parties had apparently informed the Ecuadorian court of Chevron's section 1782(a) proceeding, but the court had neither approved nor condemned the request or otherwise indicated that such evidence would not be considered. Finally, the court ruled any work-product privilege would have been waived for documents that 3TM gave to the court-appointed expert. Even though Chevron had no direct proof of such a waiver, the Fifth Circuit ruled foundational discovery could proceed to discover, in part, whether any waiver took place. As to any privileges under Ecuadorian law, the Fifth Circuit ruled the Plaintiffs had not provided any authority showing the section 1782(a) discovery would offend Ecuadorian judicial norms.

EMPLOYMENT DISCRIMINATION—BURDEN OF PROOF

***Jackson v. Watkins*, 619 F.3d 463 (5th Cir. 2010) (per curiam)**

> General statistical evidence is not sufficient to meet a plaintiff's burden to rebut each of the nondiscriminatory reasons offered by the employer for terminating the plaintiff.

After Craig Watkins became Dallas County District Attorney, he terminated Rick Jackson, who is Caucasian, and replaced Jackson with an African-American. Jackson sued alleging racial discrimination in violation of Title VII. Watkins responded with four nondiscriminatory reasons for firing Jackson, including a history of negative personal interactions. Jackson did not address each specific justification but offered statistical evidence of Watkins's alleged replacement of Caucasian prosecutors with African-American prosecutors. Watkins moved for summary judgment, which the district court granted.

Jackson argued on appeal he was not required to rebut every non-discriminatory reason offered by Watkins. He also argued that even if he was so required, the statistical evidence was sufficient. The Fifth Circuit rejected both arguments. First, the court reiterated settled precedent holding "a plaintiff asserting a Title VII claim must rebut each of the defendant's nondiscriminatory reasons in order to survive summary judgment." Second, the court held Jackson's statistical evidence by itself could not raise an issue of material fact about Watkins's proffered reasons for terminating Jackson, particularly that Watkins and Jackson had a history of negative personal interactions.

FAIR LABOR STANDARDS ACT—GUEST WORKER REIMBURSEMENT

***Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc)**

> Neither the Fair Labor Standards Act (FLSA) nor other federal law requires an employer of guest workers to reimburse the workers for inbound travel and visa expenses or fees paid to recruitment companies.

Workers from various Latin American countries obtained H-2B visas to work at Decatur's hotels in the United States. The workers paid placement fees charged by recruitment companies, the application fees for their H-2B visas, and all transportation expenses to relocate to the United States. The workers argued federal law required

Decatur to reimburse them for these expenses during the first week of employment, otherwise the expenses would have to be deducted from the first week's wage before calculating whether Decatur was paying minimum wage under the Fair Labor Standards Act. Decatur refused to pay the reimbursements, so the workers sued claiming that Decatur was in violation of the minimum wage requirements of the FLSA

The district court granted the workers' motion for summary judgment in part and denied Decatur's motion for summary judgment. The district court then certified that order for interlocutory appeal, and a panel of the Fifth Circuit reversed and rendered judgment for Decatur. The Fifth Circuit granted en banc review and reversed the grant of summary judgment for the workers and remanded for entry of judgment in favor of Decatur.

The Fifth Circuit relied heavily on the fact that no federal law or regulation expressly requires an employer to reimburse an H-2B worker for inbound travel or visa expenses. The workers argued that such expenses were "tools of the trade" under federal regulations and de facto deductions from their wages. But the court noted neither its precedent nor federal regulations supported such a broad interpretation of "tools of the trade." The court also rejected the Department of Labor's argument that the Department's own recent interpretations of the controlling statutes and regulations supported the workers' claim for reimbursement. The court held that, regardless of how much deference might be due, the Department's bulletin was issued after the relevant facts occurred and would not be applied retroactively.

The court engaged in a similar analysis in rejecting the workers' claim for reimbursement of recruitment fees but noted that the Department of Labor's newly enacted regulations supported the court's conclusions.

FAIR LABOR STANDARDS ACT—MOTOR CARRIERS ACT EXEMPTION

***Songer v. Dillon Res., Inc.*, 618 F.3d 467 (5th Cir. 2010)**

A staff leasing company that jointly employed the plaintiff-employees qualified as a "motor carrier" for purposes of the Motor Carrier Act exemption from the overtime provisions of the Fair Labor Standards Act (FLSA).

Dillon Resources, Inc. is a staffing company that hired the plaintiffs and employed them jointly with two trucking companies. The employees sued Dillon and the trucking companies for failure to pay overtime under the Fair Labor Standards Act. The defendants answered that the FLSA claim was barred because the employees' work fell within the Motor Carrier Act (MCA) exemption to the FLSA. The MCA exemption states that the FLSA overtime rules do not apply to employees over whom the Secretary of Transportation has power to "establish qualifications and maximum hours of service." The Secretary has such power over persons employed by carriers and engaged in activities directly affecting the safety of motor vehicle transportation in interstate commerce.

The Fifth Circuit held the MCA exemption applied in this case. First, though circuit precedent was limited, the court noted authority from other jurisdictions holding that a staff leasing company qualifies as a carrier under the MCA when it employs drivers jointly with a carrier. Second, the court noted no one disputed that the plaintiffs, as truck drivers, were employed in positions affecting the operational safety of motor vehicles. In applying the MCA exemption, the court also rejected the plaintiffs' argument that the defendants had to prove that each individual plaintiff personally transported property across state lines. Based on Supreme Court precedent and federal regulations, the court held the Secretary had the authority to regulate employees who might reasonably be expected to perform interstate transport. Therefore, it was not necessary to prove whether each plaintiff actually did so as long as the reasonable possibility existed under the terms of their employment.

FREE SPEECH—CAMPAIGN CONTRIBUTIONS

***Cao v. Fed. Election Comm'n*, 619 F.3d 410 (5th Cir. 2010) (en banc)**

The Fifth Circuit held that the Federal Election Campaign Act's limitations on a political party's contributions and coordinated expenditures did not violate the First Amendment.

The Federal Election Campaign Act (FECA) limits contributions to and expenditures in coordination with a candidate's campaign. In support of Congressman Anh "Joseph" Cao's 2008 campaign, the Republican National Committee (RNC) spent the $42,100 it was allowed to spend on coordinated expenditures and reached its $5,000 contribution limit under FECA. The RNC wanted to and would have spent more but for FECA's limits. In particular, the RNC created a radio advertisement in support of Cao that the RNC wanted to (but never did) air after coordinating with Cao's campaign as to the optimal timing for the ad.

The RNC and Cao argued that the FECA violated their free speech rights. The district court made findings of fact and certified certain non-frivolous questions to the en banc court of appeals. A majority of the en banc court rejected each of the Plaintiffs' non-frivolous arguments.

First, Plaintiffs argued that FECA unconstitutionally imposes the same contribution limits on political parties as it does on political action committees. According to Plaintiffs, political parties' speech deserves more First Amendment protection than speech of political action committees. The Fifth Circuit held no Supreme Court precedent requires treating the speech of political parties differently than the speech of political action committees.

Second, Plaintiffs argued that the $5,000 limit was unconstitutional because it had not been adjusted for inflation. The court noted that, while one Supreme Court case had criticized a "suspiciously low" state law campaign limit for its failure to index, there is no requirement that all limits must be indexed. Moreover, the Supreme Court has expressly held Congress's failure to fine tune campaign limits does not invalidate the statute.

Finally, Plaintiffs asserted that FECA was unconstitutional as applied to the Cao radio advertisement, which the majority characterized as indisputably a "coordinated expenditure" for FECA and First Amendment purposes. In essence, Plaintiffs argued that the Cao advertisement was the RNC's "own speech" and could not be regulated

regardless of any coordination with Cao's campaign. The majority rejected this argument based on settled Supreme Court precedent holding Congress can regulate coordinated expenditures, which were the functional equivalent of direct contributions, but not independent expenditures.

Chief Judge Jones and Judge Clement authored vigorous dissents about the Cao radio ad issue, specifically disagreeing with the majority's characterization of the Plaintiffs' arguments.

FREE SPEECH—PROCESSIONS/MARCHES

***Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346 (5th Cir. 2010)**

The Fifth Circuit held certain San Antonio ordinances that imposed fees on some marches, while waiving fees for other processions, were not unconstitutional. Moreover, the court upheld the process for determining the amount of fees to be imposed.

The City of San Antonio (the "City") regulates processions on its streets. An applicant must pay an initial application fee to obtain a permit and reimburse the City for the cost of cleaning up the route and the cost of any police personnel needed to control traffic during the march. The San Antonio police department determines the number of personnel needed during the procession based on various factors outlined in the ordinance. The ordinances also explicitly exempt three annual events from having to pay any traffic control costs and mandate that the City will pay the first $3,000 in traffic control costs for "First Amendment processions." The ordinance does not expressly grant the City Council authority to waive fees for any other processions, although the evidence suggested that such waivers were in fact granted to other annual events. Thus far, however, the Council had not attempted to waive any fees on an ad hoc, case-by-case basis.

Plaintiffs alleged that these ordinances violated the First Amendment's free speech guarantees. Specifically, plaintiffs argued: (1) San Antonio's payment/waiver of fees for certain processions constituted impermissible content or view-point based discrimination; (2) the City Council and police have too much discretion in assessing fees, allowing them to discriminate against disfavored speech/processions; (3) the fee waivers prove that the fees are not narrowly tailored to achieve the City's alleged goal of

recouping traffic control costs; and (4) imposing fees on applicants is impermissible because there are no other alternate venues for unburdened speech.

The Fifth Circuit rejected the City's argument that its support of certain processions was "government speech" not subject to First Amendment strictures. The court found there was no evidence the City had any of the organizational or planning involvement that would be required to convert private speech to government speech. Accordingly, the ordinances had to comply with the First Amendment.

Turning to the First Amendment analysis, the court upheld the City's ordinances. First, the court noted Supreme Court precedent would allow the City to subsidize some speech, while not subsidizing other speech, as long as the City did not engage in viewpoint discrimination. Finding no material difference between providing a subsidy and waiving a fee, the Fifth Circuit held the City's waiver of certain fees for a limited number of reoccurring events did not exhibit any viewpoint discrimination or animus towards any particular message expressed by the plaintiffs or anyone else.

Second, the court held neither the City Council nor the police exercised an unconstitutional amount of discretion over the permit/fee process. The ordinances did not authorize the City Council to waive fees on a permit-by-permit basis, and there was no evidence it had done so. The Council might exercise its legislative-type authority to create additional reoccurring exemptions in the future, but that was permissible so long as no viewpoint discrimination occurred. The court found the police department's discretion was adequately constrained by existing guidelines outlined in the ordinances. The court emphasized standards are not impermissible because they leave officials some discretion. Moreover, "when police make decisions concerning the resources necessary to maintain order on city streets, they necessarily must exercise some discretion."

Third, the court held the City's fee schedule (complete waivers for some processions and $3,000 discounts for others) was narrowly tailored to achieve a significant government interest. There was no dispute that the City had a significant interest in recouping the expenses it incurs from the processions held on its streets. The issue was whether the City's fee schedule collected enough fees to justify the burden on free speech. The court held the City did not need to recoup all of its traffic control expenses for its fees to be narrowly tailored. Rather, it was sufficient that, based on a very limited record, the City's fees appeared to make a "realistic dent" in its budget.

Fourth, the court held the City's ordinances still left plaintiffs and others with adequate alternatives for free speech expression unburdened by any fees. And while the ordinances might limit the plaintiffs' ability to march along certain paths, the ordinances do not limit other methods of free speech along the routes.

INSIDER TRADING—STATING A CLAIM UNDER THE MISAPPROPRIATION THEORY

***SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010)**

The Fifth Circuit held the SEC had adequately pleaded a claim of insider trading under the misappropriation theory against Mark Cuban because the allegations, taken in their entirety, provide a plausible basis to conclude that Cuban had agreed not to trade a company's securities until the confidential facts were publicly disclosed.

The SEC sued Mark Cuban for insider trading under the misappropriation theory, which holds that a person commits insider trading when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. According to the SEC's complaint, Cuban owned shares of Mamma.com. The company's CEO informed Cuban that the CEO had confidential information, which Cuban allegedly agreed to keep confidential. The CEO then shared the confidential information about a PIPE offering that the company was going to make. Cuban allegedly acknowledged to the CEO that he couldn't sell his shares until news of the PIPE offering became public. Cuban then contacted the company's investment bank for additional information about the PIPE, including the off-market prices for the PIPE participants. One minute after speaking with the investment bank, Cuban ordered his shares of the company be sold, thereby avoiding $750,000 in losses.

Cuban moved to dismiss the action under Rules 9(b) and 12(b)(6). The district court granted dismissal and held: (1) at most, the SEC's complaint alleged an agreement to keep the information confidential but not an agreement not to trade; and (2) a simple confidentiality agreement did not create a duty not to trade under the securities laws.

The Fifth Circuit reversed, holding that, based on the preliminary stage of the proceedings and viewing the "factually sparse record in the light most favorable to the SEC," the SEC's "allegations, taken in their entirety, provide more than a plausible basis to find that the understanding between the CEO and Cuban was that he was not to trade, that it was more than a simple confidentiality agreement." The court continued that it was "at least plausible [under the alleged facts] that each of the parties understood, if only implicitly, that [the Company] would only provide the terms and conditions of the offering to Cuban for the purpose of evaluating whether he would participate in the offering, and that Cuban could not use the information for his own personal benefit."

SANCTIONS—INHERENT AUTHORITY

***Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458 (5th Cir. 2010)**

Federal district courts do not have the inherent authority to sanction attorneys for conduct that occurred only during arbitration proceedings.

Positive Software Solutions, Inc. ("Positive Software") sued New Century Mortgage Corp. ("New Century") in federal district court. The court ordered the parties to arbitrate pursuant to their contract. During arbitration, a New Century attorney advised it on various discovery matters. The resulting arbitration award was ultimately vacated on appeal, the parties then settled on remand, and the federal suit was administratively closed. Based in part on information discovered after settlement, Positive Software moved for sanctions against New Century's counsel. Relying on its inherent authority, the federal district court sanctioned counsel for discovery issues that occurred "in connection with the arbitration."

The Fifth Circuit reversed the sanctions award for three reasons. First, a district court's inherent authority enables it to sanction conduct that is in direct defiance of the court, or that manifests disobedience to court orders, or if necessary to control the litigation before the court. But the Fifth Circuit held the district court's inherent authority does not extend to attorney conduct during arbitration. Second, the district court's sanctions order ran counter to the Federal Arbitration Act, which strictly limits federal court authority over arbitration. Third, the sanctions order "threaten[ed] unduly to inflate the judiciary's role in arbitration" by allowing courts to become "roving commission[s]" that supervise a private dispute resolution process. The fact that Positive Solutions did not learn of all the relevant conduct until after settlement did not alter the analysis. Positive Solutions had other options to pursue its claim, including asking the American Arbitration Association to re-open the proceedings or filing a grievance with the State Bar.

SOCIAL SECURITY ACT—ATTORNEY FEES

***Jeter v. Astrue*, 622 F.3d 371 (5th Cir. 2010)**

Supreme Court precedent does not preclude courts from considering the lodestar method as one of several factors in determining whether attorney fees constitute a "windfall" for purposes of the Social Security Act provision limiting attorney fees to twenty-five percent of past-due benefits.

42 U.S.C. section 406(b) permits an attorney who successfully represents a social security benefits claimant in judicial proceedings to receive a reasonable fee not exceeding twenty-five percent of the past-due benefits awarded. In *Gisbrecht v Barnhart,* 535 U.S. 789 (2002), the United States Supreme Court expressly rejected the lodestar method to calculate "reasonable" fees under section 406(b). However, the Court also concluded that, if the attorney fee award was "large in comparison to the amount of time counsel spent on the case, a downward adjustment" is appropriate to avoid "windfalls" for lawyers. These seemingly contradictory guidelines have created some confusion in the lower courts.

In this case, an attorney agreed to represent Mr. Jeter in his appeal from an administrative order denying social security benefits. They agreed that the attorney would receive twenty-five percent of any benefits awarded to Jeter. Jeter was ultimately awarded benefits, and the attorney sought to collect his contingency fee, which totaled more than $22,000. The Social Security Administration objected to the attorney fee request as an unreasonable "windfall" under *Gisbrecht.* The magistrate judge assigned to the matter agreed that the attorney's requested fee was too high and awarded a lower amount after considering several factors, including the hours the attorney spent on the case compared to the fees being sought (i.e., the lodestar method). The district court adopted the magistrate's recommendation, and the attorney appealed arguing that the district court had improperly relied on the lodestar method.

The Fifth Circuit stated the issue on appeal was whether a court could "give the lodestar method *any* consideration in its determination of whether a contingency fee constitutes a 'windfall'[,]" The court held "our district courts may consider the lodestar method in determining the reasonableness of a [section] 406(b) fee, but the lodestar calculation alone cannot constitute *the* basis for any 'unreasonable' finding." The court reasoned that this approach best harmonized *Gisbrecht's* rejection of exclusive reliance on the lodestar method with *Gisbrecht's* simultaneous admonition to avoid awarding "windfalls" in fees for relatively little actual work. Any other approach—allowing

exclusive reliance on the lodestar method or never allowing a court to consider it at all—would disregard a material aspect of *Gisbrecht.* Because the district court in this case only used the lodestar method as one of several factors in determining the attorney's reasonable fee, the Fifth Circuit affirmed.

SUPPLEMENTAL JURISDICTION

***Griffin v. Lee*, 621 F.3d 380 (5th Cir. 2010) (per curiam)**

> Pursuant to 28 U.S.C. section 1367, a federal district court may not exercise supplemental jurisdiction over the claim of a plaintiff-intervenor that does not satisfy the diversity requirements of 28 U.S.C. section 1332.

An attorney withdrew from representing the plaintiff in a diversity suit in federal court. The district court later allowed the attorney to intervene to assert a state-law claim for attorney fees against the plaintiff's recovery. The court determined it had supplemental jurisdiction over the attorney's claim and ultimately awarded him some fees. The plaintiff appealed from this award of attorney fees.

The Fifth Circuit sua sponte examined whether the district court had jurisdiction over the attorney-intervenor's claim. The court noted section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy. But section 1367(b) expressly denies supplemental jurisdiction over plaintiffs seeking to intervene in a suit "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." Because adding the attorney to the action as a plaintiff would have destroyed complete diversity, the Fifth Circuit held section 1367(b) barred supplemental jurisdiction over his attorney fee claim.

Alan Curry, HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, Houston

ACQUITTAL—CONVICTION OF LESSER NON-INCLUDED OFFENSE

***Benavidez v. State*, 323 S.W.3d 179 (Tex. Crim. App. 2010)**

The remedy for being convicted of an offense that is not a lesser-included offense of crime charged in the indictment is not an acquittal.

The defendant was indicted for the felony offense of aggravated sexual assault. At the close of evidence, the State submitted a proposed jury charge authorizing the jury, should it acquit the defendant of aggravated sexual assault, to convict him of the lesser offense of aggravated assault. Although the defendant vigorously opposed the inclusion of this charge, the trial court submitted it, and the jury convicted the defendant of aggravated assault, thereby implicitly acquitting him of aggravated sexual assault. The defendant appealed his aggravated assault conviction, arguing among other things, that the trial court erred to authorize a conviction for that offense because it was not a lesser-included offense of aggravated sexual assault, as the latter offense had been alleged in the indictment. The court of appeals agreed with the defendant that, as alleged in the indictment, aggravated assault was not a lesser-included offense of aggravated sexual assault. The court of appeals declared that a trial court has no jurisdiction to convict a defendant of an offense not charged in the indictment, unless that offense is a lesser-included offense of the crime charged. Without further explanation, the court of appeals then simply vacated the trial court's judgment and "remanded for entry of a judgment of acquittal as to the charge of aggravated assault."

The Court of Criminal Appeals held the remedy afforded to the defendant by the court of appeals was—at best—premature. For purposes of double jeopardy, an acquittal occurs in the trial court only when the ruling of the trial court, whatever its label, actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged. The jury verdict in this case actually amounted to a finding of fact that he was guilty of all of the elements of aggravated assault, and the trial court's judgment reflected accordingly. Therefore, nothing occurred at the trial court level that amounted to an acquittal for the lesser-but-not-included offense. An appellate court does not properly order the entry of a judgment of acquittal unless either the trial court's ruling amounts to a *de facto* but unacknowledged acquittal, or the appellate court itself finds that the evidence was legally insufficient to support the conviction. The court of appeals did not hold the

evidence was legally insufficient to justify the jury's verdict that the defendant was guilty of the lesser-but-not-included offense of aggravated assault.

One of the defendant's points of error on direct appeal was the evidence was not legally sufficient to support the jury's verdict finding him guilty of the lesser-but-not-included offense of aggravated assault. But the court of appeals did not address this point of error. Had the court of appeals actually reached the defendant's legally sufficiency challenge, it might have been justified in ordering the entry of a judgment of acquittal for aggravated assault. The greatest injury the defendant inflicted in this case was that he cracked one of his victim's ribs when he pushed her to the floor trying to gain access to her apartment. The defendant argued such an injury did not satisfy the statutory definition of "serious bodily injury," one of the elements of aggravated assault. The Court of Criminal Appeals held the court of appeals could address the legal sufficiency ground on remand, hold the evidence to be legally sufficient, and proceed to determine whether the trial error that occurred in the jury charge authorizing conviction for aggravated assault caused the defendant "some" harm. In the event the court of appeals should conclude, however, that the evidence is not legally sufficient to support conviction for the lesser offense, then it may reinstate its judgment remanding the cause to the trial court for entry of a judgment of acquittal.

ESTOPPEL–CONVICTION FOR LESSER NON-INCLUDED OFFENSE

***Woodard v. State*, 322 S.W.3d 648 (Tex. Crim. App. 2010)**

If a defendant requests a charge on an unindicted lesser offense, he is estopped from complaining of its inclusion in the charge.

The defendant was charged with murder either by intentionally or knowingly causing the victim's death or by committing an act clearly dangerous to human life with the intent to seriously injure the victim. During voir dire, the prosecutor questioned the prospective jurors on party liability under section 7.02(b) of the Penal Code, which provides that conspirators to a felony are criminally responsible for felonies committed by other conspirators in furtherance of the conspiracy if the other felonies should have been anticipated. Defense counsel also questioned the prospective jurors concerning party liability under section 7.02(b).

The evidence at trial showed that the victim was murdered on a shrimp boat that was docked in Freeport, Texas. Someone placed a loaded pistol against the victim's head and pulled the trigger. The victim's wallet was located in a field about two miles

away. After initially denying any involvement in the offense, the defendant eventually told the police that he and several individuals went to the docks in a borrowed car to sell the victim fake cocaine. The defendant said two of the men boarded the shrimp boat, while the defendant remained at the car. The defendant heard a gunshot just before the two men returned to the car. The defendant said one of the men threw the victim's wallet out of the car soon after they left the docks. The State's theory, however, was there never was any plan to sell the victim fake cocaine. The State presented evidence that the defendant and at least two other individuals conspired to rob the victim by using a gun and that either the defendant or one of the other men shot the victim. The State presented the testimony of another witness, who testified that she saw the defendant at her home with a gun while the defendant and the two men conspired to rob the victim on the night he was murdered.

When the parties discussed the jury charge, the prosecutor objected to a requested instruction by the defense that the jury should find the defendant guilty of the conspiracy to commit aggravated robbery offense if it found beyond a reasonable doubt "that the Defendant is either guilty of Murder or Conspiracy to Commit Aggravated Robbery," but it had "a reasonable doubt as to which of said offenses he is guilty." The trial court overruled the State's objection. The trial court's charge included a section 7.02(b) jury instruction. During closing jury arguments, the defense argued there was no credible evidence to show that the defendant conspired to rob the victim. Conversely, the prosecutor argued the evidence showed that the defendant conspired to rob the victim, which, under the court's charge, made the defendant guilty of murder.

The Court of Criminal Appeals first reviewed any harm the defendant suffered as a result of the jury charge on the unindicted offense. The court held the defendant was not inadequately prepared to defend against the unindicted conspiracy to commit aggravated robbery offense and that the submission of this unindicted offense did not deprive the defendant of his due-process right to appropriate pretrial notice of the charges against him. The record reflects the defendant knew, no later than during voir dire, that he was required to defend against the State's factual theory that he conspired with others to rob the victim. If the defendant had simply failed to object to the submission in the jury charge of the unindicted conspiracy to commit aggravated robbery offense, he would be entitled to a reversal of his conviction for this offense.

Nevertheless, if the record shows the defendant requested the charge on the unindicted lesser offense, he would be estopped from complaining of its inclusion in the charge. The record in this case showed the defendant had some responsibility for the jury instruction on the unindicted conspiracy to commit aggravated robbery offense. The defendant helped prepare the charge, including the instruction related to the unindicted charge of conspiracy to commit aggravated robbery, to which the State

unsuccessfully objected. This is a great deal more than just simply not objecting to the charge or just stating "no objection" to the charge. Under these circumstances, the defendant may not be heard to complain for the first time on appeal that the trial court erred to instruct the jury on the unindicted conspiracy to commit aggravated robbery offense.

HARM ANALYSIS–DEFECT OF SUBSTANCE IN A CHARGING INSTRUMENT

***Mercier v. State*, 322 S.W.3d 258 (Tex. Crim. App. 2010)**

A harm analysis under Texas Rule of Appellate Procedure (Rule) 44.2(b) is necessary when an indictment is defective due to the lack of a tolling provision.

The defendant was charged with barratry and conspiracy to commit barratry. The first indictment was returned by the grand jury on March 21, 2000, and alleged that the two counts of conspiracy to commit barratry occurred on or about September 30, 1997. The defendant was re-indicted for the same offenses on December 19, 2001, and the first indictment was dismissed two days later. In the second indictment, the offenses were outside the three-year limitations period, and no tolling factors were included. The defendant filed a pretrial application for a writ of habeas corpus seeking his release based on the expiration of the limitations period. The trial judge denied the motion. After the jury was sworn, the defendant filed a motion to dismiss, asking the judge to reconsider the issue of limitations. The trial judge again denied the motion. After the State rested, the defendant asked the judge to enter, or to order the jury to enter, a judgment of acquittal or not guilty on the ground the indictment was time barred. The request was denied by the trial judge. The jury subsequently found the defendant guilty of conspiracy to commit barratry. The defendant filed a motion for a new trial raising multiple claims, including that the evidence was legally and factually insufficient to support his conviction and that the prosecution was barred by limitations. The trial court granted the motion and entered an order of acquittal, finding the defendant not guilty of the crime charged. The State appealed, and the court of appeals found the evidence to be sufficient to support the defendant's conviction and reversed the trial court's order of acquittal. On remand, the trial court reduced the defendant's sentence, and the defendant then filed an appeal seeking dismissal.

The Court of Criminal Appeals noted article 21.02(6) of the Code of Criminal Procedure requires an indictment to indicate on its face that the prosecution is not barred by the applicable statute of limitations. Therefore, the indictment in this case was defective, and, as such, the trial court erred in refusing to grant the defendant's

motion to quash the indictment. The court also held the defect was a defect of substance. The court further held the harm analysis for Rule 44.2(b) applied to this case. The court reaffirmed that only errors labeled as structural by the United States Supreme Court are immune from a harm analysis, while Rule 44.2(b) was promulgated to deal with non-constitutional errors. The Court of Criminal Appeals also disagreed with the suggestion that analyzing harm from a defect of substance under Rule 44.2(b) would render the analysis of defects of form in article 21.19 of the Code of Criminal Procedure to be meaningless. While there may be some overlap between the two provisions, article 21.19 is specific to defects of form and applies before, during, or after the trial, while Rule 44.2(b) deals with other error in general, including defects of substance, but only at the appellate level.

HARM ANALYSIS–STATUTORY GRAND JURY VIOLATION

***Mason v. State*, 322 S.W.3d 251 (Tex. Crim. App. 2010)**

> When addressing a statutory grand jury violation, the proper subject of a harm analysis is the product of those proceedings: the charging decision. The reviewing court should consider whether the defendant's substantial rights were affected by the violation and whether the violation had a substantial and injurious effect or influence on the grand jury's decision to indict.

Officers responded to a call that a baby was not breathing. The eight-month-old child had been left with the defendant and his cousin when her mother went to work that day. Upon arriving at the apartment, the officers found the victim without a pulse. The defendant's cousin explained to the officers that he checked on the baby after hearing her scream and found she had rolled off the bed and hit her head. He said he then called the defendant, who arrived at the apartment with a woman. The defendant's cousin repeated this story in subsequent statements, but eventually identified the defendant as the child's killer. The defendant's cousin said that the defendant hit the victim with his fist two or three times while she was on the living room couch. At that point, the cousin took the baby from the couch to her mother's bed. In the bedroom, the defendant kicked the victim and struck her with a mop or broom. The defendant left the apartment to pick up the woman, and the cousin brought the baby back to the couch in the living room. Before the defendant left, he and his cousin discussed that, if authorities questioned the state of the child, they would report that she fell off the bed. When the defendant and the woman returned to the apartment five minutes later, the victim was cold and not breathing, and the woman

called 9-1-1. The autopsy determined the cause of death to be multiple blunt force injuries. At a hearing more than a year before the trial began, the defendant's counsel requested a copy of the grand jury testimony to learn which of the cousin's various explanations he had presented to the grand jury. Defense counsel finally received the testimony just prior to the commencement of voir dire. The videotape of the cousin's testimony revealed that two investigating officers asked several questions of the witness. Upon learning of the officers' grand jury participation, defense counsel filed a motion to quash the indictment, asserting that the State had violated article 20.011 and article 20.04 of the Code of Criminal Procedure. The trial court overruled the defendant's motion, but acknowledged the statutes had been violated during the grand jury proceedings. The jury found the defendant guilty of capital murder, and the court sentenced the defendant to life in prison. The State conceded that Article 20.011 may have been violated, and conceded that article 20.04 was violated.

The Court of Criminal Appeals noted a statutory violation at the grand jury stage is not constitutional error, and therefore Texas Rule of Appellate Procedure 44.2(b) applied to this case. The court held that, when addressing a grand jury statutory violation, the proper subject of a harm analysis is the product of those proceedings: the charging decision. Therefore, the court would consider whether the defendant's substantial rights were affected by the violation and whether the unauthorized questioning had a substantial and injurious effect or influence on the grand jury's decision to indict. If the record does not show that the violation influenced the grand jury, or if there was just a "slight effect," then the trial court was correct to deny the defendant's motion to quash.

During the cousin's grand jury testimony, the State's attorney conducted most of the questioning. The prosecutor's questions covered the details of the defendant's physical assault on the victim. The questions posed by the officers addressed further details of the assault ("At any time did you see any blood on the baby?"), the cousin's conflicting statements ("So everything you told me, pretty much, is a lie?"), his actions on the day of the victim's death ("You did change her diaper?"), and his inaction during the events that led to her death ("Do you feel like you should have done more to help that baby?"). One of the officers closed his participation by stating: "All I can say is I do appreciate the fact you did come and talk to us, and I appreciate the fact you stepped forward and talked to us. Hopefully you are telling us the truth. And all I can say is good luck to you."

After reviewing the grand jury transcript, the Court of Criminal Appeals did not detect a substantial and injurious effect on the grand jury's decision to indict the defendant. The details regarding the defendant's conduct on the date of the victim's death were well established by the prosecutor's questioning, which was authorized, and

the members of the grand jury could indict the defendant without the additional information solicited by the officers. The unauthorized questioning served to paint a picture of the cousin's role, not the defendant's. Therefore, the court could not say the violation substantially influenced the grand jury's decision to indict the defendant, nor was there grave doubt as to whether it had such effect.

PERFECTION OF APPEAL BY PRO SE INMATE–MAILBOX RULE

***Campbell v. State*, 320 S.W.3d 338 (Tex. Crim. App. 2010)**

The pleadings of pro se inmates shall be deemed filed at the time they are delivered to prison authorities for forwarding to the court clerk.

A jury convicted the defendant of possession of a controlled substance, and they found two enhancement paragraphs to be true and assessed the defendant's punishment at ninety-nine years in prison. The defendant's sentence was imposed on November 18, 2008. The defendant filed a pro se motion for new trial that was filed-stamped on December 31, 2008. In the certificate of service of that motion for new trial, the defendant declared, "under penalty of perjury," that the motion was placed in the prison mailbox on December 18, 2008. On February 20, 2009, a notice of appeal was filed by an attorney representing the defendant, and the defendant, pro se, filed a notice of appeal on March 3, 2009. In the certificate of service of the pro se notice, the defendant certified that it "was served within ninety days by mail postage prepaid" to the clerk of the specified Potter County district court on February 12, 2009. That certificate also stated, "[M]ail box rule deemed filed at time delivered to prison authorities." The court of appeals informed the defendant by letter that his notice of appeal appeared to be untimely and he had ten days to provide information necessary to determine its jurisdiction. The defendant responded by informing the court of appeals that the mailbox rule would be sufficient to establish jurisdiction. The court of appeals concluded, however, the mailbox rule was unavailing to the defendant because he and the record failed to provide anything indicating that his new trial motion was timely received as required. The court of appeals accordingly dismissed the defendant's appeal for want of jurisdiction.

The "prisoner mailbox rule" provides that a pro se prisoner is deemed to have filed his properly addressed notice of appeal at the time it is delivered to the appropriate prison authorities for forwarding to the clerk of the convicting court. In Texas, the mailbox rule is encompassed by Texas Rule of Appellate Procedure 9.2(b), which provides that, if filed by mail, a document received within ten days after the filing

deadline is considered timely filed if: (1) it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail; (2) it was placed in an envelope or wrapper properly addressed and stamped; and (3) it was deposited in the mail on or before the last day for filing. Rule 5 also provides that additional time to file is permitted, including specific provisions that if any properly addressed and stamped document in an envelope or wrapper sent to the proper clerk by first-class United States mail and deposited in the mail on or before the last day for filing, and received by the clerk not more than ten days after the last day for filing, shall be filed by the clerk and be deemed filed in time. The Court of Criminal Appeals declined to penalize a pro se inmate who timely delivers a document to the prison mailbox. The pleadings of pro se inmates shall be deemed filed at the time they are delivered to prison authorities for forwarding to the court clerk.

POST-CONVICTION WRIT OF HABEAS CORPUS–RECUSAL

***Ex parte Sinegar*, 324 S.W.3d 578 (Tex. Crim. App. 2010)**

The requirements of Texas Rule of Civil Procedure ("Rule") 18a, regarding the recusal of judges, apply in habeas corpus proceedings conducted at the trial level.

The defendant pleaded no contest to aggravated kidnapping and was placed on ten years' deferred adjudication probation. His guilt was later adjudicated, and he was sentenced to seventy-five years in prison. Acting pro se, the defendant subsequently filed an application for a post-conviction writ of habeas corpus. The defendant alleged that he received ineffective assistance of counsel at the adjudication hearing because counsel failed to seek the recusal of the trial judge. The defendant claimed the judge was subject to recusal because one of the allegations in the motion to adjudicate was that the defendant made verbal threats against the same judge. The judge in the habeas corpus proceedings was also the trial judge at the adjudication hearing. The defendant filed another pleading, in which he alleged the habeas corpus proceeding could not be resolved by the trial judge because of the defendant's allegations of bias against him. The defendant requested that a recusal hearing occur with an administrative judge before the trial court issued findings of fact and conclusions of law. Nevertheless, the trial judge held a hearing by affidavit on the defendant's habeas corpus application, and the trial judge filed findings of fact and conclusions of law recommending that relief be denied. The defendant filed a motion for a recusal hearing, seeking an administrative hearing to determine whether the trial judge should be recused from further involvement in the habeas corpus proceedings, but the trial judge refused to rule on the

motion for recusal hearing because the defendant's application for a writ of habeas corpus was pending before the Court of Criminal Appeals.

The Court of Criminal Appeals has previously held Rule 18a applies to criminal cases. By its terms, the rule does not apply to a hearing before the Court of Criminal Appeals. But the court held Rule 18a does apply in habeas corpus proceedings that occur before the trial court. Because the defendant had complied with Rule 18a, the trial judge had no option but to either recuse himself or forward the matter to the presiding judge of the administrative judicial district for a recusal hearing before another judge.

POST-CONVICTION WRIT OF HABEAS CORPUS–VERIFICATION

***Ex parte Rendon*, No. AP-76352, 2010 WL 4628527 (Tex. Crim. App., Nov. 17, 2010)**

A defendant need not personally verify an application for a post-conviction writ of habeas corpus. Rather, a petitioner who is not the defendant may verify the application, and may do so "according to his belief."

The defendant pleaded guilty to the offense of possession of cocaine with intent to deliver in a drug-free zone, and was sentenced to five years in prison. The defendant filed a post-conviction application for a writ of habeas corpus, alleging ineffective assistance of counsel predicated upon erroneous advice about parole eligibility. The defendant alleged he pleaded guilty based on his trial counsel's advice that he would be eligible for parole in twelve to eighteen months. But because the defendant committed his offense in a drug-free zone, he was not eligible for parole for the duration of his five-year sentence. In support of his application, the defendant attached four affidavits from family members stating that he pleaded guilty based on trial counsel's advice that he would be eligible for parole sometime within the first two years of his sentence. The defendant submitted his application on the form for post-conviction writ applications that is specifically prescribed by the Texas Court of Criminal Appeals. Although the defendant did not sign the application, his counsel did. After the State filed its response, the convicting court ordered the defendant's two trial attorneys to file affidavits addressing the defendant's ineffective assistance of counsel claim. In their affidavits, the attorneys denied that they had ever advised the defendant that he would be eligible for parole. After receiving the attorneys' affidavits, the State filed a second response arguing that the relief requested should be denied. The convicting court recommended relief be denied, finding that the defendant's trial lawyers never advised him that he would be eligible for parole during his sentence and concluding that, in any

event, any erroneous advice about parole eligibility, assuming arguendo that there was any, would not have rendered the guilty plea involuntary.

The person who presents an application for a post-conviction writ of habeas corpus may be called the "petitioner," while the word "applicant," as it is used in chapter 11 of the Code of Criminal Procedure, refers exclusively to the person for whose relief the writ is sought. The application may be signed and presented by either the defendant or any other person on his behalf. One of the requirements of a writ application is that an oath must be made that the allegations of the petition are true, "according to the belief of the petitioner." This provision applies equally whether the petitioner is the defendant himself or some other person filing the application on his behalf, such as his attorney. The Court of Criminal Appeals held either the defendant, or a petitioner who is not necessarily also the defendant, may verify a post-conviction application for writ of habeas corpus, and either one may do so "according to his belief." Accordingly, it would have been permissible for the defendant's attorney to verify his writ application by swearing that the allegations contained therein were true and correct according to his belief, regardless of whether personal knowledge of those allegations resided exclusively with the defendant himself.

The court noted the Texas Rules of Appellate Procedure (the "Rules") require that an application for a post-conviction writ of habeas corpus be made in the form prescribed by the Court of Criminal Appeals. That form appears as Appendix F to the Rules. The verification portion of the court's form directs the petitioner to complete either the "Oath Before a Notary Public" or the "Inmate's Declaration" in order to verify the writ application. In both of these verification sections of the form, however, the signature line calls only for the signature of the "Applicant" in order to properly verify the form. In drafting the form, the court did not contemplate that a "petitioner," who is not also the inmate/defendant, may verify the writ application by way of the "Oath Before a Notary Public." There is a signature line for an attorney to sign the verification, presumably as a petitioner who is not the defendant, but that signature line is located under the section designed for the "Inmate's Declaration." Because an attorney is not an inmate, he cannot verify the writ application by signing this particular line on the verification form, as the defendant's attorney in the present case did. Because the defendant's writ application was signed only by his attorney on this particular signature line on the verification form, it was not properly verified.

The fault was not with the defendant, or his attorney, but with the court's prescribed form. The court, therefore, dismissed the writ application without prejudice to re-file at a later date with a proper verification. The inmate/defendant can sign the "Oath Before a Notary Public" (and actually do so before a notary public) to verify the writ application according to his belief. Alternatively, he may sign the "Inmate's

Declaration" attesting to the truth of the allegations without a notary public—again, according to his belief. Or, finally, the defendant's attorney (or any other person, for that matter), as petitioner, may sign the "Oath Before a Notary Public" in the presence of a notary public, attesting to the truth of the allegations according to his belief. But the petitioner who is not the defendant should strike the word "Applicant" from beneath the prescribed signature line under "Oath Before a Notary Public" and interlineate the word "Petitioner" there. Any of these three methods should serve to properly verify the writ application.

PRESERVATION OF ERROR–CHALLENGE FOR CAUSE

***Cardenas v. State*, 325 S.W.3d 179 (Tex. Crim. App., 2010)**

When prospective jurors have repeatedly been told of their obligation under the law to consider the full range of punishment and there is no indication of their confusion, the complaining party need not ask any follow-up questions regarding their full and complete understanding of the law to preserve error.

The defendant was indicted for three counts of aggravated sexual assault of a child and a single count of indecency with a child. At the defendant's trial, after the venire panel was sworn in and before the attorneys began their voir-dire examination, the trial judge explained the general law, including the pertinent law concerning the range of punishment. During the State's voir dire, the prosecutor asked the panel for a show of hands of those venire members who could not consider the full range of punishment for indecency with a child. Several prospective jurors who raised their hands were then examined in more detail. The defense later challenged two of those venire members because they were unable to consider the full range of punishment, and the prosecutor agreed with those challenges. The prosecutor then explained the law concerning the punishment for aggravated sexual assault of a child and repeatedly told the prospective jurors they must consider the full range of punishment. During his voir dire, defense counsel again explained the range of punishment for the crimes charged and the requirement that all jurors must be able to consider the full range of punishment. The defense attorney posed the following question during voir dire and asked each venire member:

> I want you to assume that you have found somebody guilty of sexual assault, aggravated sexual assault of a child. They intentionally or knowingly caused the penetration of the sexual organ of the complaining witness, of the victim, by the means of the sexual organ or any other [sic]

> or with a finger or with touching genital to genital. . . . Could you honestly ever fairly consider on an aggravated sexual assault of a child as little as five years in prison and give probation as an appropriate punishment[?]"

Defense counsel asked each individual venire member to answer either "Yes" or "No" to the question. In response, fifty-two venire members stated that they could not consider the minimum sentence. Counsel did not seek any elaboration on their reasoning and made no attempt to rehabilitate them with further examination. Defense counsel made forty-six challenges for cause based on the prospective jurors' inability to consider the full range of punishment. Of those 46 challenges, 11 were granted with the prosecutor's consent or without objection, six were granted over the prosecutor's objection, and 30 challenges were denied. Ultimately, the jury convicted the defendant of two counts of aggravated sexual assault of a child and a single count of indecency with a child and assessed a sentence of twenty years in prison on each count.

The Court of Criminal Appeals reaffirmed both the State and defense are entitled to jurors who can consider the entire range of punishment for the particular statutory offense. Therefore, both sides may question the panel on the range of punishment and may commit prospective jurors to consider the entire range of punishment for the statutory offense. Once a prospective juror expressly admits his bias against a phase of law upon which both the State and defense are entitled to rely, a sufficient foundation has been laid to support a challenge for cause. A prospective juror who states he cannot consider the minimum punishment for a particular statutory offense is subject to a challenge for cause. The opposing party or trial judge may then examine the prospective juror further to ensure he fully understands and appreciates the position that he is taking, but unless there is further clarification or vacillation by the prospective juror, the trial judge must grant a challenge for cause if the prospective juror states he cannot consider the full range of punishment. When the venire members have repeatedly been told of their obligation under the law to consider the full range of punishment for the statutory offense and there is no indication of their confusion, the complaining party need not ask any follow-up questions regarding their full and complete understanding of the law to preserve error.

STANDARD OF REVIEW–SUFFICIENCY OF THE EVIDENCE

***Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)**

The *Jackson v. Virginia* legal sufficiency standard of review is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. Previous cases permitting a factual sufficiency standard of review, including *Clewis v. State*, are overruled.

Two police officers went into a bar to investigate a report that someone matching the defendant's description was there with a gun. When the officers asked the defendant to step outside, the defendant ran and threw two baggies towards a pool table just before one of the officers tased him. One of the baggies contained a small amount (about three grams) of marijuana. The other baggie contained one baggie holding 4.72 grams of crack cocaine and another baggie holding six ecstasy tablets weighing 1.29 grams. The defendant did not appear to be under the influence of narcotics, and he was not in possession of any drug paraphernalia that could have been used for smoking crack cocaine. The police did not find a gun. A drug-enforcement investigator testified that 4.72 grams of crack cocaine was a "dealer amount," which could have been cut up into 23 or 24 rocks, and was worth about $470.00. The investigator acknowledged a person could possess 4.72 grams of crack cocaine for personal use, but that was not typical. The defendant testified that he possessed only the baggie containing the small amount of marijuana. He denied possessing the baggies containing the crack cocaine and the ecstasy pills. The defendant also admitted he had two prior convictions for possession of cocaine and another prior conviction for possession with intent to deliver cocaine. On appeal, the defendant claimed the evidence was factually insufficient to support a finding that he possessed the illegal narcotics with the intent to deliver.

In a plurality opinion and a concurring opinion, a majority of the Texas Court of Criminal Appeals held there has become no meaningful distinction between the standard of review for legal sufficiency evidence, established in *Jackson v. Virginia,* 443 U.S. 307 (1979), and the standard of review for factual sufficiency of the evidence, as set forth in *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996). Therefore, the court overruled *Clewis v. State* and held the *Jackson v. Virginia* legal sufficiency standard of review is the only standard that a reviewing court should apply in determining whether

the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt.

The Court of Criminal Appeals noted a factual-sufficiency standard is "barely distinguishable" from a legal-sufficiency standard. The only apparent difference between these two standards is that the appellate court views the evidence in a "neutral light" under a factual-sufficiency standard and "in the light most favorable to the verdict" under a legal-sufficiency standard. Viewing the evidence "in the light most favorable to the verdict" under a legal-sufficiency standard means the reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. Viewing the evidence in a "neutral light" under a factual-sufficiency standard is supposed to mean the reviewing court is not required to defer to the jury's credibility and weight determinations, and that the reviewing court may sit as a "thirteenth juror" and disagree with a jury's resolution of conflicting evidence and with a jury's weighing of the evidence. But it is very clear that the court's factual-sufficiency decisions have always required a reviewing court in a factual-sufficiency review to afford a great amount of deference to a jury's credibility and weight determinations.

The Court of Criminal Appeals also noted some troubling double-jeopardy questions are raised as a result of the *Clewis* factual-sufficiency standard being "barely distinguishable" from a legal-sufficiency standard. The court stated the *Clewis* factual-sufficiency standard, with its remedy of a new trial, could very well violate double-jeopardy principles. It is questionable whether appellate reversals in Texas under such a factual-sufficiency standard are really reversals based on evidentiary weight; they may actually be reversals based on evidentiary sufficiency. Having decided the current *Clewis v. State* factual-sufficiency standard is indistinguishable from a *Jackson v. Virginia* legal-sufficiency standard, the remedy of a new trial under this factual-sufficiency standard would violate double-jeopardy principles.

The Court of Criminal Appeals held that, if it was to decide that reviewing courts must continue to apply a factual-sufficiency standard with its remedy of a new trial in criminal cases, then the court would also have to hold that those reviewing courts should apply this standard as "thirteenth jurors" with no deference at all to a jury's credibility and weight determinations in order to avoid these potential federal constitutional double-jeopardy issues. A non-deferential standard, however, could violate the right to trial by jury under the Texas Constitution. The Court of Criminal Appeals additionally held there are no jurisprudential systemic problems for which the *Jackson v. Virginia* legal-sufficiency standard is inadequate or that can be resolved more satisfactorily in other ways besides retaining *Clewis'* internally inconsistent factual-

sufficiency standard. A rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard is as exacting a standard as any factual-sufficiency standard.

Case law makes it fairly clear that, from the time that Texas was a republic in the 1830s and 1840s until the United States Supreme Court decided *Jackson v. Virginia* in 1979, the Texas Court of Criminal Appeals and its predecessors, under what are essentially the same constitutional and statutory provisions that currently exist, applied a single and deferential evidentiary-sufficiency standard in criminal cases that essentially was the same standard as the *Jackson v. Virginia* standard. The Court of Criminal Appeals acknowledged the Texas Constitution gives direct-appeal courts constitutional jurisdiction to review "questions of fact," and article 44.25 of the Code of Criminal Procedure authorizes direct-appeal courts to reverse a judgment "upon the facts." The Court declined, however, to construe these constitutional and statutory mandates to review "questions of fact" to also require direct-appeal courts to sit as "thirteenth jurors" in criminal cases. The *Jackson v. Virginia* standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis v. State,* are overruled by the plurality opinion.

Judge Cochran concurred and stated the *Clewis v. State* factual-sufficiency review was a well-intentioned, but ultimately, unworkable effort to incorporate civil standards of review on elements of a crime that must be proven beyond a reasonable doubt. She noted that the Texas Court of Criminal Appeals has never been successful in its attempts to superimpose the civil standards for sufficiency review on top of the constitutionally mandated legal-sufficiency review of a criminal conviction. These two standards of review depend upon their distinctly different burdens of proof. "Like oil and water, they do not mix. They are not logically consistent, and they promote only confusion and conflation of two distinct concepts. I agree that it is time to consign the civil-law concept of factual sufficiency review in criminal cases to the dustbin of history."

***Baines v. State*, No. 6-10-69-CR, 2010 WL 4321599 (Tex. App.—Texarkana, Nov. 3, 2010, no pet.)**

In order to pursue a cross-appeal in a defendant's appeal, the State must timely file its own separate notice of appeal.

The defendant was charged with committing the offense of evading detention by leading a police officer on a low-speed chase at speeds of approximately 15 to 20 miles per hour around a single city block. The State sought to enhance the punishment, alleging the defendant had previously been convicted of two prior felonies. After a bench trial, the trial court found the defendant guilty of the charged offense. At the punishment hearing, the trial court accepted the defendant's plea of true to the enhancement paragraphs, but announced he was making no finding on the enhancements. The trial court then sentenced the defendant to 180 days in the county jail under section 12.44(a) of the Penal Code; the defendant subsequently appealed. In its brief, the State raised a cross-issue complaining that the defendant's sentence was an "illegal sentence." The State did not file a separate notice of appeal to perfect its cross-appeal.

The court of appeals noted the issue of whether a State is required to file a separate notice of appeal in order to bring a cross-appeal has not yet been decided by the Texas Court of Criminal Appeals. The Austin, Dallas, Beaumont, and Fort Worth Courts of Appeals have each held the State must file a notice of appeal in order to perfect a cross-appeal. *See, e.g., Davis v. State,* 144 S.W.3d 192, 202 (Tex. App.—Fort Worth 2004, pet. ref'd); *Strong v. State,* 87 S.W.3d 206, 212 (Tex. App.—Dallas 2002, pet. ref'd); *Ganesan v. State,* 45 S.W.3d 197, 203-04 (Tex. App.—Austin 2001, pet. ref'd); *Malley v. State,* 9 S.W.3d 925, 927 (Tex. App.—Beaumont 2000, pet. ref'd); *Rodriguez v. State,* 939 S.W.2d 211, 219 (Tex. App.—Austin 1997, no pet.). The Fourteenth District Court of Appeals has held a notice of appeal is not a predicate for the State to file a cross-appeal, irrespective of from which subsection the appeal is pursued. *McClinton v. State,* 38 S.W.3d 747, 750-51 (Tex. App.—Houston [14th Dist.] 2001); *pet. dism'd, improvidently granted,* 121 S.W.3d 768 (Tex. Crim. App. 2003).

In this case, the court of appeals disagreed with the Fourteenth Court of Appeals in that the differences in language between Texas Rules of Appellate Procedure 25.1 and 25.2 suggest that a separate notice of appeal is not required for a cross-appeal in a criminal case. Rather, both rules state in absolute terms that an appeal is perfected

upon the filing of a notice of appeal. The fact that the civil rules describe this basic principle in more detail does not suggest that the criminal rules contain an exception for cross-appeals. There is nothing in the Texas Rules of Appellate Procedure or in article 44.01 of the Code of Criminal Procedure that specifically provides the State is exempt from filing a notice of appeal when bringing an appeal under article 44.01(b). Even though the court of appeals held it did not have jurisdiction to entertain the State's cross-appeal, the court went on to hold that the defendant's sentence was not an illegal sentence.

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HABEAS CORPUS

***Riva v. Ficco*, 615 F.3d 35 (1st Cir. 2010)**

The First Circuit held as a matter of first impression that mental illness qualifies as a ground for equitably tolling the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year statute of limitations for the filing of a state habeas petition.

James Riva II, a diagnosed paranoid schizophrenic, was charged with murder after he allegedly killed his grandmother during a paranoid delusion in which he believed that he would fall victim to a society of vampires unless he killed her. After being found competent to stand trial, Riva was convicted of second-degree murder on October 30, 1981 and was sentenced to life imprisonment. Riva was committed to a state hospital four days after his sentencing, where he remained for more than seven years. On January 24, 1989, Riva was transferred to the general prison population but returned to the state hospital less than two years later, after he assaulted a correctional officer while under a paranoid delusion that the officer had been draining fluid from Riva's spine. After returning to the hospital, Riva began challenging his murder conviction through numerous motions both in federal and state court. Several of Riva's motions were dismissed at Riva's request or for failure to prosecute.

Riva filed his fourth habeas petition on October 15, 2001—nearly twenty years after his conviction. The district court dismissed the petition as untimely, reasoning that Riva's mental illness did not toll the one-year statute of limitations for filing state habeas petitions because Riva's "prolific" filings in both state and federal courts demonstrated his capacity to comply with filing deadlines. In further support of its determination, the trial court also noted that Riva's mental illness did not prevent him from complying with filing deadlines because testing revealed he was highly intelligent.

On appeal, the First Circuit acknowledged the AEDPA's statute of limitations may be extended for equitable reasons if the habeas petitioner can establish that: (1) he diligently pursued his rights; and (2) some extraordinary circumstances stood in his way and prevented timely filing. As a matter of first impression, the First Circuit held that

mental illness will equitably toll the statute of limitations if the habeas petitioner can establish a causal link between his mental illness and his inability to timely file for habeas relief or otherwise effectively assist and communicate with counsel.

The First Circuit vacated the district court's judgment dismissing Riva's habeas petition and remanded the case for further development of the record. Although the First Circuit did not determine whether Riva's mental illness tolled the statute of limitations, the court specifically rejected the district court's determination that Riva's "prolific" state and federal court filings demonstrated his capacity to comply with filing deadlines, reasoning that the district court erred in ignoring Riva's "obvious insanity" throughout the tolling period. The First Circuit supported its position by emphasizing that it was medically established that Riva suffered from a debilitating mental illness—paranoid schizophrenia—that caused him to experience intense auditory and visual hallucinations and powerful urges to consume the blood and flesh of others. The First Circuit also rejected the district court's consideration of Riva's intelligence, reasoning that there is no necessary correlation between intelligence and sanity. The court then noted that the district court's reliance on the number of motions Riva filed was misplaced because the court should have focused on their content or their quality. According to the First Circuit, the district court's misplaced reliance on the quantity of motions alone was exacerbated by the court's complete failure to consider whether the fact that most of Riva's motions were dismissed at his requests or for failure to prosecute evidenced Riva's inability to effectively pursue legal redress once the motions were filed. In light of this failure, the First Circuit remanded the case for further development of the record with respect to whether Riva was able to effectively pursue his legal remedies throughout the tolling period.

JURISDICTION

United States v. Vela, 624 F.3d 1148 (9th Cir. 2010)

The Ninth Circuit held as a matter of first impression that when a defendant is found not guilty by reason of insanity, the lack of a sentence does not preclude appellate jurisdiction.

Rogelio Vela was charged with assault on a federal officer after allegedly stabbing a Customs and Border Protection agent. Vela moved to dismiss the indictment on the ground that it failed to properly allege the offense of assault, but the court disagreed and denied his motion. At trial, Vela argued for an acquittal and also presented an insanity defense, which was supported by expert testimony and several notes Vela had

exchanged with the agent prior to the stabbing, in which Vela described his fears that both the Mafia and his family wanted him dead. The court prohibited Vela from presenting a diminished capacity defense. The jury found Vela not guilty by reason of insanity, and the district court ordered Vela committed to the custody of the Attorney General for placement in a suitable mental facility.

Vela appealed the jury's verdict, arguing that the court erred in refusing to dismiss the indictment and for refusing to allow evidence of Vela's diminished capacity. The government argued that, because the jury's verdict did not result in a final judgment—i.e., a conviction and a sentence—from which Vela could appeal, the Ninth Circuit lacked jurisdiction. The government also argued that Vela was not entitled to appeal the verdict because the jury accepted Vela's affirmative defense of insanity.

The Ninth Circuit acknowledged only final judgments can be appealed. The court rejected the suggestion, however, that a judgment is only final for purposes of appellate review if the judgment involves a conviction and a sentence. Instead, the court held as a matter of first impression that a judgment is final if it coincides with the termination of the criminal proceeding, regardless of whether the judgment constitutes a conviction or imposes a sentence. Therefore, if a criminal case culminates in a verdict of not guilty by reason of insanity, the judgment is final and is subject to appellate review.

The Ninth Circuit also rejected the government's argument that it is improper to permit an appeal by a defendant who prevailed in his insanity defense, reasoning that the cases relied upon by the government involved defendants who did not seek an acquittal at trial, but only asserted an insanity defense. *See, e.g., Curry v. Overholser*, 287 F.2d 137, 138–40 (D.C. Cir. 1960) (holding that a convicted defendant who successfully appealed his conviction to obtain the verdict he sought at trial—not guilty by reason of insanity—could not challenge the verdict in subsequent civil commitment proceedings because the defendant could "not now be heard to complain of the consequences" of his decision to seek the insanity verdict). The court determined Vela, on the other hand, was not directly attacking the verdict of not guilty by reason of insanity, but was instead arguing that the verdict should be overturned because he was entitled to an acquittal. Therefore, although the Ninth Circuit affirmed the jury's verdict on the merits, the court held that there were no jurisdictional bars preventing the court from considering Vela's appeal.

RESTITUTION

***In re Silverman*, 616 F.3d 1001 (9th Cir. 2010)**

The Ninth Circuit held criminal restitution payments that otherwise qualify as preferential transfers are recoverable by bankruptcy trustees, abrogating *In re Nelson*, 91 B.R. 904 (N.D. Cal. 1988).

Jeffrey Silverman and Faye Silverman were convicted of participating in a fraudulent scheme to underreport payroll, underpay premiums, and prevent injured workers from obtaining workers' compensation benefits. Pursuant to their plea agreement, the Silvermans paid $101,531 in restitution to their insurance carrier, State Compensation Insurance Fund (State Fund), in March 2005. On April 29, 2005, the Silvermans filed a petition for Chapter 7 bankruptcy. The court-appointed bankruptcy trustee instituted proceedings against State Fund to recover the criminal restitution payment as a preferential transfer under 11 U.S.C. section 547(b), which provides that a trustee may recover the transfer of an interest of the debtor that is: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; and (4) made on or within ninety days before the date of the filing of the bankruptcy petition. 11 U.S.C. § 547(b) (2006).

State Fund moved for summary judgment, relying on United States Supreme Court precedent to argue that Section 547(b) does not apply to criminal restitution payments. *See Kelly v. Robinson*, 479 U.S. 36 (1986) (holding that criminal restitution payments are not dischargeable in bankruptcy). State Fund also relied on *Nelson*, in which the Northern District of California held that because criminal restitution payments are non-dischargeable in bankruptcy under Kelly, they are not preferences under section 547(b). *Nelson*, 91 B.R. at 907. The court, however, found *Kelly* to be factually distinguishable because it did not consider whether criminal restitution payments can qualify as preferences. The court also found *Nelson* to be unpersuasive because it was decided by a district court in a different district. The bankruptcy court therefore concluded that the trustee could recover the restitution payment as a preferential transfer. The district court affirmed the bankruptcy court's order on appeal.

On appeal from the district court's ruling, the Ninth Circuit first held that *Nelson* was non-binding precedent because *Nelson* was decided by the Northern District of California, which could not bind a bankruptcy court in the Central District of California. The Ninth Circuit then considered whether Section 547(b) applies to criminal restitution

payments, noting that the plain language of the statute supports its application to criminal restitution payments because such payments are not specifically excepted from section 547(b). The court then rejected State Fund's argument that criminal restitution payments are judicially excepted from section 547(b), reasoning that the Supreme Court in *Kelly* only held that criminal restitution payments cannot be discharged in bankruptcy—the Court did not consider the issue of whether criminal restitution payments can qualify as preferential transfers. Finding that judicially excepting criminal restitution payments from section 547(b) would encourage debtors to pay off non-dischargeable debts during the preference period, leaving all other debts to be extinguished in bankruptcy, the Ninth Circuit held that criminal restitution payments that otherwise meet the requirements of section 547(b) can be recovered by bankruptcy trustees as preferential transfers.

SEARCH AND SEIZURE

***Jimenez v. Wood Cnty.*, 621 F.3d 372 (5th Cir. 2010)**

The Fifth Circuit held an officer must have reasonable suspicion that an individual arrested for a minor offense has a weapon or contraband before an officer is permitted to perform a strip search. The court declined the appellants' invitation to overrule the line of cases imposing the reasonable suspicion requirement, despite the United States Supreme Court's holding in *Bell v. Wolfish* that strip searches in a prison setting can be performed based on less than probable cause.

Oscar Jimenez and Chandra Jimenez operated a bar in Wood County, Texas. Agents of the Texas Alcoholic Beverage Commission (TABC), in coordination with the Wood County Sheriff's Department, raided the bar to investigate allegations of drug activity. During the raid, TABC agents confronted Oscar Jimenez in the bar, who fled but was eventually discovered locked in the trunk of his car. After initially refusing to cooperate, Chandra Jimenez eventually agreed to unlock the trunk but was then arrested for hindering apprehension, a Class A misdemeanor, and taken to Wood County jail where an employee of the Wood County Sheriff's Department performed a strip search. The Jimenezes later sued Wood County and Wood County's sheriff, Dwaine Daugherty (collectively, the "County"), alleging the strip search violated Chandra Jimenez's constitutional rights because it was performed without reasonable suspicion. *See* 42 U.S.C. § 1983. A jury found in favor of the Jimenezes and awarded actual and punitive damages and attorney fees.

On appeal, the County argued it was not required to base the strip search on reasonable suspicion because: (1) under *Wolfish*, the Fourth Amendment permits visual strip searches of all jail detainees, regardless of reasonable suspicion, 441 U.S. 520, 560 (1979); and (2) even if reasonable suspicion is required under controlling Fifth Circuit precedent, the district court erred in classifying the offense of hindering apprehension as a minor offense.

With respect to the County's first argument, the Fifth Circuit noted it has long held, even under *Wolfish*, that an officer must have reasonable suspicion that an individual arrested for a minor offense has a weapon or contraband before an officer is permitted to perform a strip search. Although the court acknowledged a growing trend among circuit courts in favor of abolishing any reasonable suspicion requirement in a prison setting, the court determined the trend did not justify the panel in reversing prior decisions of the court. Because the County did not identify a Supreme Court case that unequivocally directed the panel to overturn existing precedents, the court held that it must consider the case under existing Fifth Circuit law.

With respect to the County's second argument, the court considered whether the offense of hindering apprehension should be classified as a minor offense. Acknowledging that the issue was a matter of first impression, the court noted that misdemeanor offenses have historically been considered minor offenses. The offense of hindering apprehension is generally a Class A misdemeanor but can be charged as a felony if the person who is harbored or concealed is under arrest for, charged with, or convicted of a felony, and the individual charged with hindering apprehension had knowledge of that fact. TEX. PENAL CODE ANN. § 38.05(d). Chandra Jimenez was charged with only a misdemeanor. As such, the court held that hindering apprehension—other than felony hindering apprehension—is a minor offense and reasonable suspicion was therefore required before the County was permitted to strip search Chandra Jimenez. Because the fact that Chandra Jimenez concealed her husband did not give rise to reasonable suspicion that she was carrying weapons or contraband, and because the County otherwise failed to establish that it based its strip search on reasonable suspicion, the court affirmed the district court's judgment in favor of the Jimenezes.

SENTENCING

***United States v. Graham*, 622 F.3d 445 (6th Cir. 2010)**

The Sixth Circuit held the appellant's prior felonies justified the imposition of a mandatory life sentence, despite the fact that one of the predicate felonies was charged when the appellant was a juvenile. The court also held the mandatory life sentence was not excessive or disproportionate, and therefore did not violate the Eighth Amendment, even though the two predicate felonies only required the appellant to serve a total of two years in prison and both sentences were imposed more than ten years earlier.

Donald Graham was convicted of three counts of conspiring to distribute cocaine, distributing cocaine, and aiding and abetting others in the distribution of cocaine. The district court sentenced Graham to concurrent terms of life imprisonment, the mandatory minimum for two of the counts, and 168 months imprisonment for the third count. *See* 21 U.S.C. § 841(b)(1)(A) (2006) (providing that a third qualifying felony is subject to a mandatory life sentence).

On appeal, Graham argued his criminal history did not justify the imposition of a mandatory life sentence because one of his two prior felonies was committed and charged when he was a juvenile. The Sixth Circuit quickly rejected this argument because Graham was indicted, prosecuted, and sentenced as an adult for two counts of aggravated drug trafficking, despite the fact that he was only seventeen at the time. The court acknowledged that the Sixth Circuit had not addressed whether a prior felony drug offense conviction stemming from a juvenile action that was prosecuted as an adult qualifies as a prior conviction for purposes of imposing sentencing enhancements. The court, however, noted it was limited to a plain error review because Graham failed to preserve the issue for appeal. In expressly declining to resolve the issue, the court held that, because Graham failed to present any evidence suggesting that the trial court's consideration of the prior felony as a predicate offense was improper under the Sentencing Guidelines, Graham's sentence did not constitute plain error. The court also rejected Graham's argument that the district court erred in failing to consider mitigating factors before imposing the mandatory life sentence, such as the facts that the underlying felonies only required Graham to serve two years in prison and were imposed more than ten years earlier, reasoning that the Eighth Amendment does not require sentencing courts to consider mitigating factors relating to predicate felony convictions before imposing a mandatory sentence.

***United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010)**

As a matter of first impression, the Seventh Circuit held prior crimes involving phony versions of illegal drugs are properly characterized as "controlled substance offenses" under the Sentencing Guidelines.

Irvin Hudson pleaded guilty to possession of a firearm as a felon and possession of a stolen firearm. The district court concluded that Hudson was previously convicted of a controlled substance offense and therefore calculated his sentence on that basis. Hudson appealed his sentence of seventy-two months' imprisonment, arguing that because his prior conviction involved the distribution of faux marijuana that he represented to be marijuana—a so-called "look alike" drug offense under Indiana law—the district court erred in concluding that his conviction qualified as a controlled-substance conviction for purposes of enhancing his sentence.

On appeal, the Seventh Circuit noted the Sentencing Guidelines specifically define controlled substance offenses to include crimes related to controlled substances or "counterfeit" substances. U.S.S.G. § 4B1.2(b) (2007). Hudson argued his conviction involving faux marijuana did not qualify as a controlled substance offense or a counterfeit substance offense under the Sentencing Guidelines because: (1) faux marijuana is not a controlled substance; (2) he was not charged with a counterfeit substance offense under Indiana law, but was instead charged with the different offense of selling a non-controlled substance that was falsely represented to be a controlled substance; and (3) faux marijuana does not qualify as a counterfeit substance, which is defined by the Controlled Substances Act as "a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser."

Because Hudson's first two arguments were not in dispute, the court focused on whether faux marijuana can be properly characterized as a counterfeit substance under the Sentencing Guidelines. Although the court acknowledged that both the Controlled Substances Act and other provision of the Sentencing Guidelines define "counterfeit substance" in a manner that unquestionably excludes faux marijuana, the court pointed out that the provision of the Sentencing Guidelines concerning controlled-substance offenses does not itself define "counterfeit substance" and does not incorporate any other definition of the term. The court found the lack of any incorporated definition to

be particularly important because of the Sentencing Commission's frequent use of explicit cross-references to incorporate one provision or definition into another. Reasoning that courts are required to give meaning to the Sentencing Commission's silence as well as its words, the court rejected Hudson's narrow interpretation of the term "counterfeit substance" as applied to section 2K2.1(b) of the Sentencing Guidelines, and held that offenses involving phony versions of illegal drugs qualify as controlled substance offenses.

***United States v. Zaldivar*, 615 F.3d 1346 (11th Cir. 2010)**

As a matter of first impression, the Eleventh Circuit held a human smuggler's sentence may be enhanced based on the reasonably foreseeable death of a smuggled immigrant.

Elieten Mendoza Zaldivar participated in a scheme to smuggle dozens of Cuban immigrants into the United States by boat. The boat in which Zaldivar was riding became involved in a high-speed chase with the Coast Guard, during which one of the immigrants—Radilberto Quevedo Garcia—struck his head and was seriously injured. After the operator of the boat eventually surrendered, the Coast Guard airlifted Garcia to a hospital for medical treatment, where he later died. Following his arrest, Zaldivar pleaded guilty to conspiring to encourage or induce immigrants to illegally enter the United States, resulting in Garcia's death. Because Zaldivar's offense resulting in the death of an individual, the district court applied a ten-level enhancement to his sentence pursuant to section 2L1.1(b)(7)(D) of the Sentencing Guidelines. Zaldivar appealed his sentence, arguing that the court erred in applying the enhancement because, as merely a passenger on the boat, his conduct did not proximately cause Garcia's death.

As a matter of first impression, the Eleventh Circuit considered the extent to which a defendant must be causally responsible for the death or serious bodily injury of another for purposes of applying the section 2L1.1(b)(7)(D) enhancement. The government argued that, because the Sentencing Guidelines calculate the guideline range based, in part, on the applicable offense level and "all relevant conduct," which includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," a sentence can be enhanced as long as the death was reasonably foreseeable. *See* U.S.S.G. § 1B1.3(a)(1)(B) (2007). The court agreed and rejected Zaldivar's argument that a defendant's individual actions must be the proximate cause of the death or serious injury. The court then affirmed Zaldivar's sentence, reasoning that Garcia's death was reasonably foreseeable because:

(1) Zaldivar knowingly participated in a dangerous scheme to smuggle dozens of individuals in a small boat designed to travel at a high rate of speed; (2) Zaldivar knew the boat would be traveling at night with no lights running in order to avoid detection; and (3) it was reasonably foreseeable that the boat's operator would attempt to evade the Coast Guard if the boat was detected.

SEX-OFFENDER REGISTRY

***United States v. George*, 625 F.3d 1124 (9th Cir. 2010)**

As a matter of first impression, the Ninth Circuit held the State of Washington's failure to implement the Sex Offender Registration and Notification Act (SORNA) did not prevent the federal government from prosecuting a defendant for failing to register as a sex offender in Washington.

Phillip George was convicted of sexually abusing a minor on an Indian reservation. After serving his sentence, George failed to register as a sex offender. In 2008, George was convicted of violating SORNA's registration requirement pursuant to a conditional guilty plea. George appealed his conviction, arguing that he was not required to register as a sex offender under SORNA because the state where he was required to register, Washington, had not implemented SORNA.

The Ninth Circuit held, as a matter of first impression, that Washington's failure to implement SORNA did not preclude the federal government from prosecuting George for failing to register as a sex offender because all sex offenders have a federal duty to register, regardless of whether the state in which they reside has implemented SORNA. The court reasoned that, although SORNA provides for a three-year grace period for states to implement sex offender registries that comply with SORNA requirements, SORNA's registration requirement became immediately effective when enacted on July 27, 2006. Because George admittedly failed to register as a sex offender in violation of SORNA, the Ninth Circuit affirmed his conviction..

SIXTH AMENDMENT RIGHT TO COUNSEL

***United States v. Brown*, 623 F.3d 104 (2d Cir. 2010)**

As a matter of first impression, the Second Circuit held a district court is not prohibited from considering a claim of ineffective assistance of counsel before sentencing a defendant.

A jury convicted Chad Marks of seven counts of various drug-trafficking and firearm charges. Following the conviction, but before sentencing, Marks discovered that his attorney failed to convey a twenty-year plea agreement offered by the Assistant United States Attorney before trial. Based on this failure, Marks filed a pro se petition for habeas relief alleging ineffective assistance of counsel. The court determined that Marks's motion should not be considered until after he was sentenced, and then sentenced Marks to forty years' imprisonment.

On appeal, the Second Circuit considered whether sentencing is a prerequisite to considering a claim of ineffective assistance of counsel. The court rejected the government's assertion that a defendant must wait until post-judgment to assert a claim of ineffective assistance of counsel, reasoning that a trial court is in the best position to take evidence, if necessary, and to decide the issue pre-judgment. As a matter of first impression, the court held that, when a claim of ineffective assistance of counsel is raised in the district court prior to judgment, the district court may, and at times should, consider the claim at the point. Considering the claim pre-judgment is especially proper when the facts and circumstances of the case indicate that the claim is facially plausible. Because Marks's claim of ineffective assistance of counsel was facially plausible based on the record, the court remanded the case with instructions for the trial court to consider whether Marks was prejudiced by the ineffective assistance of his attorney, and, if so, to resentence Marks in conformance with the twenty-year plea offer at issue.