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The Chair's Report

Doug Alexander, Alexander Dubose Jones & Townsend LLP, Austin

Dear Fellow Section members and colleagues,

The Appellate Section is making great strides on a number of different fronts, including working with the intermediate courts of appeals to post the courts' Internal Operating Procedures on their websites; sponsoring CLE events that bring together appellate justices and appellate practitioners to candidly discuss matters of mutual interest; reaching out to groups of appellate practitioners in other states to share ideas; and continuing to develop the Section's website with the goal of rolling out a dramatically upgraded site by the time of the Advanced Civil Appellate Course in September 2008.

Of all the recent advances by the Section, however, one merits particular attention: the Section's Pro Bono initiative. After considerable work by a core group of people working with the Pro Bono Committee—including Marcy Greer, Jeff Levinger, Pam Baron, James Ho, and David George—the Section recently launched pilot Pro Bono programs with both the Supreme Court of Texas and the Austin Court of Appeals. Under these programs, financially eligible pro se litigants are matched with appellate lawyers who have agreed to volunteer their time without compensation.

The program is unique in that it includes two types of Pro Bono volunteers—those who wish to obtain more appellate experience by serving as lead counsel and those who already have considerable appellate experience who are willing to assist as a mentor. This provides the pro se litigants with representation on appeal by appellate practitioners, and provides the Pro Bono volunteers with the valuable experience of representing clients who would otherwise not be able to afford appellate representation.

The Supreme Court formally adopted its pilot Pro Bono program in December and has already referred two cases to be handled by volunteers from the Section. The Austin Court of Appeals' pilot program is actively proceeding as well. And there are prospects for further appellate pro bono opportunities to come. For example, the Human Rights Initiative has contacted the Pro Bono Committee about helping with immigration appeals. And the two pilot programs already in place provide replicable templates for some or all of the other intermediate courts of appeals in Texas.

Approximately sixty of the Section's members have already volunteered to serve as lead counsel or mentors in the Pro Bono programs. With the prospect of other projects yet to come, the Pro Bono Committee is soliciting additional volunteers. Volunteering is easy—just fill out and make a copy of the form appearing in this edition of the Appellate Advocate, and either fax it or e-mail it to Jeff Levinger at (214) 758 3736 or jlevinger@ccsb.com. As Chair of the Appellate Section, it is particularly gratifying to me to see our Section take the lead in creative and productive pro bono activities. I hope that you will join me in signing up as a volunteer.

Doug Alexander
Chair, Appellate Section
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Hon. William G. ("Bud") Arnot III, Winstead PC, Houston

Questions by: **Chief Justice Arnot (CJA)**

Answers by: **Chief Justice Davis (CJD)**

CJA: Good morning, Your Honor.

CJD: Morning, Chief.

CJA: Will you tell us about your education?

CJD: I was a junior college kid and worked my way through school, attended the University of Texas in a combined program, moved to the law school in the middle of my senior year at Baylor, and am proud to say I graduated what they now call magna cum laude.

CJA: Tell us how you got to the Waco Court of Appeals as Chief Justice.

CJD: I had been licensed to practice law 32 years, so sometime in the early 90s, a good personal friend, Senator David Sibley, said I ought to think about the bench some day. A couple of things occurred. One, Chief Justice Bobby Thomas passed away in a very untimely fashion with pneumonia in 1996 and that created a vacancy. Second, I was not only a good friend with Senator Sibley, but I was also a Republican. When that opening occurred, David put me forth. The morning of my oldest son's state tournament out-of-town in golf, I got a call from Senator Sibley. He said, "Well, Chief, time to go." And the rest of that is history. I took the bench May 1, 1996.

CJA: Who was the Governor who appointed you?

CJD: It was our President.

CJA: Tell us about Bobby Thomas. We lost him at too early of an age.

CJD: Yes. Bobby contracted polio, I believe, at the age of 15 or 16. He was wheelchair-bound, had really only the partial use of one arm and not the other, but was brilliant—not just a scholar, but a common-sense guy. Bobby was also a master at judicial politics. A tremendous individual, wrote very strong opinions.

CJA: Tell me about your experience as the Chief Justice.

CJD: Well, Bobby Vance and Bill Cummings welcomed me an unfathomable way. We had different political philosophies and different backgrounds, so we were fortunate we meshed well. I had done some administration work with non-profits and some business, commercial work, even some criminal work. So I had a little bit of background in most everything we'd run into in the intermediate courts. Then, I found out, of course, as you found out, the appellate court situation is so much justice by committee. But we worked together pretty well. When it got down to making the decisions and meshing it and in pre-argument or pre-submission or post-submission cases, either one, that was some of our best times.

CJA: But the rule of law really comes through, and it's a shame that people can't be in those deliberations when people put aside their biases and their preferences and their leanings and they really try to apply the law.

CJD: Absolutely. Somewhere around 90 to 95 percent of all cases are final on appeal at the intermediate court of appeals. So the citizen's one shot to have a case reviewed and make sure it was done right is the intermediate courts of appeals in Texas.

CJA: Tell me about some of your cases. What about the Branch Davidians case that captured the American public interest?

CJD: That was John McAmore's case. McAmore was a reporter for Channel 10, which is the CBS affiliate in Waco. And John had the leading edge when the incident broke. When the violence started, John was out there on the front line, local reporter, and he was the first story out. Well, he did a fine job with his work as far as I could tell. WFAA—one of the large stations in the Dallas-Fort Worth area—and two or three other defendants published stories that were critical of what his sources were and how he got the front line and the notoriety of all of that. Well, John sued for defamation.

We struggled with two or three issues. The issue that ultimately carried the day was whether he was a limited public figure, which made his burden of proof extremely hard as opposed to the private individual. Justice Vance and I decided that he was simply practicing his craft and his burden should be limited to that of any other person practicing their trade as a news reporter. He shouldn't have to carry extra burden, moving from negligence to more of the intentional malice type approach to the case. Eventually the Supreme Court disagreed with us and threw Mr. McAmore out. Respectfully, there are some cases you feel like they have the last word, but they may not be right. And so, that is one of them.

CJA: Because you lived in Waco, we other judges all imposed greatly upon you to help us during the legislative sessions. Tell us about that aspect of the administration of being a Chief Justice.

CJD: It was helpful that some of the legislative giants and the Governor himself early on in the seven and a half years I was on the bench were somebody I knew and could deal with. We had two different issues. One, we had to be as close to unanimity as we could. And you have to convince the legislature that the judges need these kinds of funds to keep carrying forward with justice. The small courts and big courts sometimes were like family. The siblings don't always get along. And so we had to work through those things.

CJA: Tell me about your struggle with the legislature to redo the quarters at the Waco Court.

CJD: The Court was on the fourth floor of the McLennan County Courthouse. It was actually envisioned early on in the twenties that's where it was going to go. They built a new courthouse, and they had done some renovations. And so, the word got out they had the fifth floor available for the court of appeals. The court's quarters on the fourth floor really needed an overhaul. The problem was, and the reason we had to carry it three different sessions, is that we needed the funds to renovate. We ultimately were successful partially on that. But a good bit of what we wanted to do, we ran into the historical commission. So we bumped heads with the historical commission and others about not only securing the funds but then could you even use those funds.

CJA: One of the things that the state did do for the courts during our tenure together is to bring the computers at the courts of appeals in Texas up to a national standard. But that presented a problem with creating an electrical drain on buildings that were never designed for air conditioning or fans or even a radio.

CJD: Right.

CJA: You always, and still are, have been a man of great energy, Rex. And I know that at the time that you were on the court you taught at Baylor Law School and you are still teaching there today. Tell me a little bit about your law school teaching experience.

CJD: What a wonderful question because that's one of my favorite spots. In 1999, Dean Tobin and Associate Dean Jackson asked me to start teaching "Client Counseling." It's a course of ethics. It's a course of fee arrangements for lawyers and how to do it properly. It's a course of counseling of clients when you first meet a new one and the efforts that you have thereafter to do them the proper job. It is a wonderful opportunity because, as we both know, one of the things about law school is it is seriously academic, and so the practical application side sometimes inadvertently gets left at the side of the road. And it is my opportunity to bring young people along in the good, the bad, and the ugly about what happens after you get that bar license.

CJA: And tell me again the year you left the bench.

CJD: 2003. I still have the letter from the Governor accepting my resignation and the tears that were on that in making that decision.

CJA: And I'm sure that was a difficult decision.

CJD: Very much so. I dearly loved being on the bench.

CJA: Waco is a unique city. When cotton and oil were king, it was a seaport, actually, on the Brazos river, one of the older cities. What do you think is unique about the Waco Court of Appeals?

CJD: Well, even though it's very small and still relatively small—it's only a three-judge panel. It's become mixed rural/urban. It still has portions of the district that you really gotta know something about ag law. Certainly the district now is being impacted by oil and gas again because of the gas wells coming. On the other hand, other areas have become very metropolitan. So it's a court where you are going to get a tremendous mix of cases. That always fascinated me. I like the mix. I like the variety.

CJA: What do you think has been the biggest change while you were on the court in the law?

CJD: The biggest change in the law as far as the concerns I would have on the criminal law side is the judges elected to the high courts became more of a "conservative persuasion." The balance between law enforcement, which is very important, and individual liberty, which also is very important, tipped a little more on the law enforcement, and the concern about error and individual liberty is still there. But more things became harmless error in the criminal cases. That raised concerned for a lot of us, the balance of that, the struggle with that.

On the civil side, the civil cases are difficult, often technology involved. And I think I saw that change coming in the mid-90s until I left in '03.

CJA: You had a unique experience as an intermediate court of appeals justice in that you were able to sit on the Texas Supreme Court.

CJD: Yes, sir. I did in two different instances. In one situation, we actually wound up just determining whether the case was going to be granted petition. But the one that I most remember is a companion pair of cases out of the Dallas/Fort Worth area. In that mandamus situation, lawyers were disciplined in a sense that they were told that they could not pursue the case because of the conflict of interest involved. The Supreme Court had gotten to where they started applying the ethics rules in their opinions. That had not always been the case. And the struggle was, should there even be a mandamus to discharge these lawyers from the case? One firm had dissolved, and they had formed their own firm. The question was whether they had the available information that would then assist them in representing people in the later case. If they were kicked out of the case, they stood to lose many millions of dollars in compensation because of the complexity of the case. We struggled with that. We finally reached a decision where there was only one or two dissenters. It was a real eye-opener for me, and a privilege to sit in with those folks.

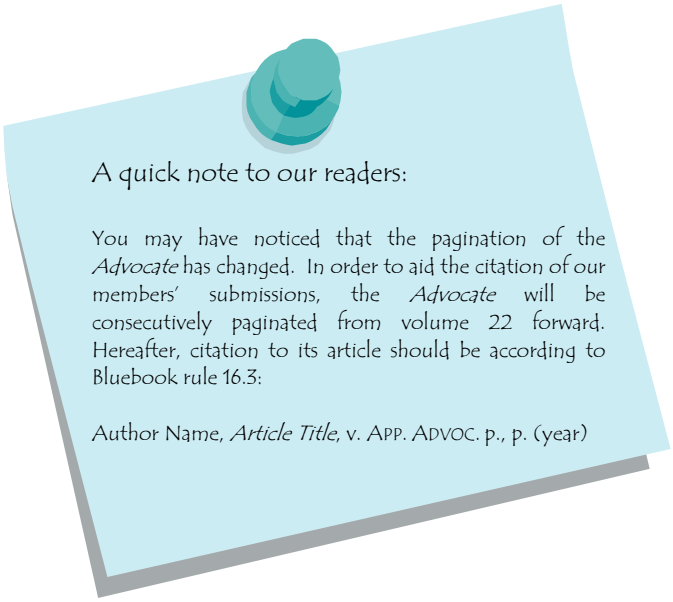
CJA: Is there anything you would like to discuss about the Waco Court of Appeals that we've not covered, in your experience there?

CJD: I will say that the court has experienced in recent years some difficulties in camaraderie. And all three of the guys that are there are just very bright individuals. I guess what I would say is, that I still have such a passion for the court, if I could, I would fix it. But my experience with it was a wonderful one. Bobby continued to be a friend after his retirement. Bill is still a good friend. Political people don't understand that. We've got a growing state, and we've got lots of problems. Every place that the intermediate appellate court particularly can serve, it needs to, because we're the mules.

CJA: I appreciate you taking out of your day to come and visit with me.

CJD: Thank you, Judge.

CJA: Thank you.



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INTRODUCTION

As frightfully corpulent as the subsequent history notation system currently is in Texas, the purpose of this article is to reveal that it is actually much worse than anyone imagined.

Citation to Texas civil case authority has long been a vexing problem for lawyers in this state. We attorneys are simultaneously governed by the Ivy League edicts of the "Bluebook,"[1] as well as by the bovine mandates of the "Greenbook."[2] We are bound by the varying jurisdictional frameworks buttressing our appellate courts[3] and by the unique sovereign history of our state.[4]

Because of the complexity inherent to our court system as it has developed, it has been the natural tendency of the bar to simplify our citational approach so that no lawyer need be conversant in decades of legal arcana in order to simply cite a case. Alas, this urge to streamline our approach to citation may have had the unintended effect of reducing our collective comprehension of what is truly precedential in Texas in the first place.

In order to resolve the many discrepancies and oversights that have arisen, it is the author's intent to collect the disparate and thoughtful writings of jurists and lawyers from years past and to present them in a concise and manageable framework from which the proper precedential weight that should be accorded Texas authority may be easily gleaned.

PURPOSE OF THE PROPOSED ORDER OF CITATION

This proposed precedential organization no doubt contains much more detail than the average practitioner would ever need, much less care, to know. Therefore, it is aimed more squarely at the civil appellate lawyer in Texas who wishes to distinguish the case authority in an opposing party's brief or winnow weaker cases from one's own arguments.

For example, under the framework outlined below, any type of case discussed in Part I—be it a petition-refused court of appeals opinion, an adopted opinion of the Texas Commission of Appeals, or a per curiam Texas Supreme Court opinion—has precisely the same precedential weight for any given point of law. However, the difference between these subsets lies in the shades of precedential persuasiveness inherent to each type of opinion. When reading the Order of Citation below at Appendix A, it is organized so that all cases under Part I control over those in Part II, which in turn, control over those in Part III. However, within each of these divisions, while the cases under Part A are generally more authoritative than those in Part B and so on, they do not necessarily control over the latter-listed opinions. For example, a signed Texas Supreme Court opinion is generally[5] a fraction more persuasive than is a per curiam Court[6] opinion

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[1] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005); *see* Marian O. Boner, Simplified Guide to Citation Forms 18 (1971) (unpublished manuscript on file with the author) (noting several defects regarding citation to Texas authority present in the Bluebook).

[2] TEXAS RULES OF FORM (Texas Law Review et al. eds., 11th ed. 2006) (commonly referred to as the "Greenbook" due to its green-hued cover) [hereinafter 11th ed. GREENBOOK].

[3] *See* Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 439-70 (2006).

[4] *See* James W. Paulsen, *If at First You Don't Secede: Ten Reasons Why the "Republic of Texas" Movement is Wrong*, 38 S. TEX. L. REV. 801, 804 & n.16 (May 1997) (explaining that Texas was different from any other state that claimed to have been sovereign because Texas was recognized by the leading nations of the world at the time—including the United States, Great Britain, and France—as an independent nation) [hereinafter *Ten Reasons*].

[5] *See* discussion *infra* Part I (noting the pertinent dates attendant to each of these types of opinions).

[6] Fully cognizant that an article opining on correct citation should not itself appear to be ignorant of citational

(see discussion under Parts I.A and B), and a per curiam Court opinion is slightly more persuasive than an either an adopted opinion of the Commission of Appeals (see discussion under Part I.C.1) or a petition- or writ-refused intermediate appellate opinion (see discussion under Part I.C.2).[7]

Similarly, another overarching caveat to this listing is that the precedential weight of any case is, of course, viewed from the perspective of the purpose for which it is cited. For example, in land title cases, modern courts may have a "duty to know and follow" the law of a sovereign which would not otherwise be as persuasive to a current-day determination.[8] Moreover, just because a decision is not technically precedential "does not mean that a later court will not find it persuasive anyway."[9]

Another purpose of this proposed Order of Citation is that, while the derivation of the various and numerous subsequent history notations affixed to the opinions of Texas's intermediate appellate courts has been exhaustively examined over the years by intellects more keen than the author's, the precedential impact of a particular notation as it relates to other Texas authority—with the sole exception of the "writ ref'd n.r.e." notation[10]—has not been examined at depth.[11] This article seeks to remedy that oversight.

It should be noted here as well that this is not the first attempt at cataloguing the proper order of citation of Texas authority. The Tenth Edition of the Greenbook included Rule 24.1,[12] which laid out a cogent and logical order of case citation with which—for the most part—the author does not quibble.[13] Accordingly, this revised Order of Citation expands upon the broadly-defined categories of that ordering with a few substantive changes as well.

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mandates, the author readily admits his provincial bias in insisting upon capitalizing references to the Texas Supreme Court (both of the Republic and of the State), even though such an upper-case honorarium is traditionally reserved only for references to the U.S. Supreme Court. *See, e.g.*, BLUEBOOK, *supra* note 1, at R. 8, p. 77; MANUAL ON USAGE AND STYLE, R. 3.9, at 29 (Texas Law Review et al. eds., 10th ed. 2005). Here, however, the improper usage will also hopefully serve to distinguish which of the many Texas courts to which the author is referring.

[7] Because there is no measurable precedential distinction between adopted opinions of the Commission of Appeals and petition- or writ-refused intermediate appellate opinions issued since June 14, 1927, they are both denoted in the Order of Citation at Part I.C.

[8] *See State v. Sais*, 47 Tex. 307, 318 (1877); *State v. Cuellar*, 47 Tex. 295, 305 (1877) (explaining that "it is the business of the courts of Texas to know and expound the laws pertaining to the rights to land situated in Texas, and here in suit, whether the laws, upon which the rights to the land depend, were laws made by the State of Texas, by the Republic of Texas, by the State of Tamaulipas as part of Mexico, or by Spain").

[9] *See* Jim Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value Of Decisions From the Civil War And Reconstruction Era*, 51 TEX. B.J. 916, 918-19 (Oct. 1988) [hereinafter *Confederates and Carpetbaggers*].

[10] *See generally, e.g.*, Hon. Ted Z. Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L. REV. 1 (1986) [hereinafter *Rethinking Writs*]; Hon. Ted. Z. Robertson & James W. Paulsen, *The Meaning (If Any) Of an "N.R.E.,"* 48 TEX. B.J. 1306 (Dec. 1985) [hereinafter *Meaning of N.R.E.*]; *see also* Hon. Zollie Steakley, *What the Heck in Two Respects*, 30 TEX. B.J. 697, 697-98 (Sept. 1967); Hon. Gordon Simpson, *Notations on Applications for Writ of Error*, 12 TEX. B.J. 547, 572-73 (Dec. 1949).

[11] *See, e.g.*, Hon. Frank M. Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037, 1090-91 (Nov. 1961); Hon. James P. Hart, *The Appellate Jurisdiction of the Supreme Court of Texas*, 29 TEX. L. REV. 285, 290-92 (1951); Simpson, *supra* note 10, at 570-75.

[12] Rule 24.1 and its contents were not included in the current, Eleventh Edition of the Greenbook.

[13] *But see* TEXAS RULES OF FORM R. 24.1, at 90 (Texas Law Review et al. eds., 10th ed. 2003) [hereinafter 10th ed. GREENBOOK] (see, *exempli gratia*, erroneously labeling opinions of the Texas Courts of Civil Appeals as "not precedential").

EXPLANATION OF THE PROPOSED ORDER OF CITATION

I. Texas Supreme Court equivalent

A. Authored majority Texas Supreme Court opinions (either on a cause or original proceeding) issued from January 1840 (Dallam 357) through 1867 (30 Tex. 374), and from 1871 (33 Tex. 585) to the present[14]

In the abstract, mandatory Texas Supreme Court authority encompasses opinions issued from January 1840, page 357 of Dallam's digest,[15] through volume 30, page 374 of the Texas Reports published in 1867, and from decisions published in 1871 in volume 33, page 585 of the Texas Reports to the present.[16]

The beginning date for this period is affixed by the approximate date upon which the inaugural term of the Supreme Court of the Republic of Texas (the "Republic Court") handed down it's first opinion in January 1840.[17] While, at first blush, it might seem logical for decisions of the sovereign Republic to be regarded as merely persuasive authority by subsequent State courts,[18]

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[14] *See* TEX. CONST. art. V, §§ 1, 3; TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 2004); *see also Confederates and Carpetbaggers*, *supra* note 9, at 920.

[15] *See* JAMES WILMER DALLAM, A DIGEST OF THE LAWS OF TEXAS: CONTAINING A FULL AND COMPLETE COMPILATION OF THE LAND LAWS; TOGETHER WITH THE OPINIONS OF THE SUPREME COURT (Baltimore, John D. Toy 1845). At the ripe, young age of twenty-six, James Wilmer Dallam undertook to compile and publish a digest of the opinions of the Supreme Court of the Republic of Texas. Bowen C. Tatum, Jr., *A Texas Portrait: James Wilmer Dallam*, 34 TEX. B.J. 257, 257 (March 1971) (noting Dallam's birth in 1818); James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 275 (1986) [hereinafter *Short History*] (describing how Dallam began to compile his digest of Republic Court opinions in 1844). All but one majority decision of the Republic Court issued between the Court's initial term in January 1840 to its June 1844 term are reported in Dallam's single-volume digest. *See Short History*, at 276 (identifying the missing decision as *Hall v. Aldridge*, (Tex. 1841), 65 TEX. L. REV. 429 (Paulsen rep. 1986)); Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 449 (1934) (noting the Republic Court's 1844 term convened in June). The decisions of the December 1845 term went largely unreported for 141 years until December 1986, when now-Professor Jim Paulsen was appointed by the Court to compile and publish the missing opinions. *See* James W. Paulsen, *The Missing Cases of the Republic: Reporter's Introduction*, 65 TEX. L. REV. 372 (1986) (the Court's order appointing Paulsen as Reporter for the 1845 term appears in the unnumbered preceding pages of issue). Sadly, Dallam died of yellow fever just two years after his digest was published in 1845. Tatum, *supra* at 258, 260.

[16] When citing to volumes 34 and 35 of the Texas Reports, note that two non-precedential Military Court cases are published in volume 34 (*Kottwitz v. Knox*, 34 Tex. 689 (1869) and *Bird v. Montgomery*, 34 Tex. 714 (1870)), and one non-precedential Military Court decision is published in volume 35 (*McArthur v. Henry*, 35 Tex. 801 (1869)). *See Confederates and Carpetbaggers*, *supra* note 9, at 920 n.3.

[17] The first recorded opinion of the Republic Court is *Texas v. McCulloch*, Dallam 357 (Tex. 1840) (cause number "I," ironically dismissing the first appeal ever brought before the Court for lack of jurisdiction). Although the Republic Congress formally established the Republic Court on December 15, 1836, the Republic Court did not convene its first session until 1840. *Short History*, *supra* note 15, at 248-52 (explaining, at length, the possible explanations for this delay).

[18] The formal transition from Republic to State transpired as follows: (1) U.S. President John Tyler signed a joint resolution of the U.S. Congress on March 1, 1845 authorizing the annexation of the Republic of Texas as a State of the Union; (2) the Texas Congress accepted the United States' joint resolution of annexation on June 18, 1845; (3) the voters of Texas accepted the United States' joint resolution of annexation as well and ratified the new State Constitution on October 13, 1845; and (4) U.S. President Polk signed a subsequent joint resolution of the U.S. Congress recognizing the admission of the State of Texas into the Union on December 29, 1845). *See* Ralph H. Brock, *"The Republic of Texas is No More:" An Answer to the Claim That Texas Was Unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 679, 691-693 (1997). The December 29, 1845 date is also recognized by the U.S. Supreme Court as the date upon which "Texas was admitted into the Union." *See E.P. Calkin & Co. v. Cocke*, 55 U.S. 227, 235-36 (1852) (clarifying that, on that date, "Texas was admitted into the Union," and from that day "the laws of the United States were declared to be extended over, and to have full force and effect within, the State," so that "the old system of [Republic] government, so far as it conflicted with the federal authority, became abrogated immediately on her admission as a State"), *overruling*, *Cocke v. E.P. Calkin & Co.*, 1 Tex. 542, 560 (1846) (holding that certain sections of article 13 of the newly-ratified state constitution postponed the operation of the

article 13, section 3 of the first State Constitution of 1845 contained a savings clause that expressly mandated "[a]ll laws and parts of laws now in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State."[19]

The intermediate and terminal dates for this mandatory period are defined by the four distinct periods of history that directly impact the precedential value of Court opinions. These periods include the Confederate Court (1861-65; volumes 26 and 27 of the Texas Reports),[20] the Presidential Reconstruction Court (1866-67; volumes 28 through 30, page 874 of the Texas Reports), the Military Court (1867-70; volume 30, page 375 through volume 33, page 584 of the Texas Reports), and the Semicolon Court (1870-73; page 585 of volume 33 through volume 39 of the Texas Reports).[21] The precedential weight of cases issued from each of these eras is derived from the degree of constitutional authority under which the Court in question operated. All of these periods are girded by constitutional authority save for the Military Court, which was installed at the whim of General P.H. Sheridan in mid-1867.[22] Accordingly, only Court opinions issued by the Military Court are without precedential value in Texas.[23]

However, while decisions issued by the Semicolon Court are fully precedential because that Court sat under the authority of the 1869 Constitution, the last opinion handed down by the Court cast a jurisprudential pall over the whole of its tenure.[24] The infamous decision of *Ex Parte Rodriguez* was prompted by an original habeas corpus proceeding brought by a jailed voter who was arrested for voting twice in the gubernatorial election.[25] The makeweight reputation of the *Rodriguez* Court springs from its invalidation of an entire statewide election on the basis of the

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laws of the Union until such time as a state government was organized on February 16, 1846).

[19] *See* Hon. Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 206 n. 76 (2000) (quoting TEX. CONST. of 1845, art. XIII, § 3); *see also* TEX. CONST. of 1845, art. XIII, § 2 (mandating that "[a]ll suits at law and equity which may be depending in any of the courts of the republic of Texas prior to the organization of the State government under this constitution shall be transferred to the proper court of the State which shall have jurisdiction of the subject-matter thereof"). The State of Texas has (thus far) operated under five constitutions (1845, 1861, 1866, 1869, and 1876). *See* 11th ed. GREENBOOK, *supra* note 2, at R. 9.1, p. 38, app. F.1, p. 105.

[20] Even though the Texas judiciary operated under a different constitution during the Civil War than it did during Reconstruction, the author does not recommend the relegation of decisions of the Confederate Court to persuasive status because, as the U.S. Supreme Court held just three years after the Civil War ended, Texas "did not cease to be a State, nor her citizens to be citizens of the Union" during the conflict. *See Texas v. White*, 74 U.S. 700, 726 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476, 496 (1885) (holding that "the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null"). It may be noted that George W. Paschal, who also served as the Court's official reporter from 1866-69 for volumes 28-31 of the Texas Reports, also represented Texas before the U.S. Supreme Court in *White*. *See White*, 74 U.S. at 717; Robert B. Gilbreath, *Slaves, Reconstruction, and The Supreme Court of Texas*, APP. ADVOC., Fall 2006, at 9; Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 953 n.16 (Nov. 2006).

[21] *See Confederates and Carpetbaggers*, *supra* note 9, at 920 (describing in fascinating detail the varying eras of Texas Supreme Court history); *see also* CRAWFORD C. MARTIN, OFFICE OF THE ATTORNEY GENERAL OF TEXAS, UNIFORM CITATIONS FOR OPINIONS, CORRESPONDENCE AND BRIEFS 11 (1967); Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error*, 27 TEX. B.J. 323, 385-86 (May 1964). While the Semicolon Court began its term in 1870, the first published decision from that Court did not issue until 1871. *See Johnston's Adm'r v. Shaw*, 33 Tex. 585 (1871).

[22] *Confederates and Carpetbaggers*, *supra* note 9, at 916-17.

[23] *See Peck v. San Antonio*, 51 Tex. 490, 492 (1879) (adopting Chief Justice Moore's majority opinion explaining that, because the Military Court was installed "by virtue of military appointment" instead of "by virtue of the [Texas] Constitution," the decisions of that Court are not authoritative).

[24] *Confederates and Carpetbaggers*, *supra* note 9, at 919.

[25] 39 Tex. 706, 773-76 (1873); Robert W. Higgason, *A History of Texas Appellate Courts: Preserving Rights of Appeal Through Adaptations to Growth, Part 1 of 2: Courts of Last Resort*, 39 HOUS. LAW. 20, 23 (Apr. 2002).

placement of a semicolon in article 3, section 6 of the Constitution of 1869,[26] and the resulting impression amongst the bar that the "whole case was a trumped-up affair to get the court to pass upon the legality of the election."[27] Accordingly, decisions from the Semicolon Court—while fully precedential—are frequently not respected.[28]

There is another subset of authored majority opinions that requires examination herein, even though the author is aware of only one instance in which such an opinion was actually issued. The 1992 decision in *American Centennial Insurance Co. v. Canal Insurance Co.* does not, on its face, appear to be comprised of anything more consequential than a typical majority opinion with an attached concurrence.[29] However, a closer examination of the votes cast in favor of each opinion reveals the "concurring" opinion by Justice Nathan Hecht was, in fact, a second majority opinion joined by four Justices, not including now-Congressman Lloyd Doggett, who was the putative majority's author.[30] Congressman Doggett's "majority" opinion was joined by all members of the concurrence save for Justice Eugene Cook.[31] Even though Justice Hecht's "majority concurrence" was handed down labeled only as a concurring opinion, because a majority of the Court joined in its issuance, its holdings and reasoning must be accorded the same precedential weight as any other majority opinion of the Court.[32]

B. Texas Supreme Court per curiam opinions[33]

Per curiam opinions issued by the Texas Supreme Court have precisely the same weight of authority as do signed Court opinions. That said, because per curiam opinions have traditionally been used to correct clear error,[34] among other objectives,[35] signed opinions are a comparatively—if only slightly—more authoritative source for a given proposition. The remedial nature of most per curiam opinions is evidenced by a summer 2001 draft of the Rules of Appellate Procedure (which was not ultimately adopted), where Rule 47.2 was proposed to refer to per curiam opinions as an alternative to a memorandum opinion.[36] Rule

[26] *See* TEX. CONST. OF 1869 art. III, § 6, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, 393, 399 (Austin, Gammel Book Co. 1898); *see also Confederates & Carpetbaggers*, *supra* note 9, at 919.

[27] Hon. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 285 (1959).

[28] *Confederates & Carpetbaggers*, *supra* note 9, at 919-20.

[29] 843 S.W.2d 480 (Tex. 1992).

[30] *Id*. at 485 (Hecht, J., majority concurrence) (listing the four concurring Justices as Chief Justice Thomas R. Phillips, Justices Raul A. Gonzalez and Eugene A. Cook, as well as now-Senator John Cornyn).

[31] *Id*. at 480 (listing the four Justices joining the majority opinion as Chief Justice Phillips and Justices Gonzalez, Hecht, and Cornyn).

[32] *See* TEX. CONST. art. V, § 2 (noting "the concurrence of five [Texas Supreme Court Justices] shall be necessary to a decision of a case").

[33] *See* TEX. R. APP. P. 59.1, 59.2.

[34] *See* Hon. Craig T. Enoch and Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L. J. 565, 568 (2000) (theorizing that, with the advent of the new Rules of Appellate Procedure, the Court would issue less "pure error-correct[ing]" per curiam opinions); Hon. Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course B, B-18 (1998) (associating per curiam opinions with "cases requiring relatively straightforward error correction"); *see also* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited as Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 117 (1992) (describing how, beginning in 1925, the Texas Supreme Court began to increase its issuance of per curiam opinions, "perhaps as a corrective device").

[35] Per curiam opinions have also been used to announce the judgment of the Court in situations where the Court is divided as to the reasoning for the judgment and has splintered into many concurring and dissenting camps. *See* Charles G. Orr, *Appellate Oddities*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. 19, p. 7-8 (2002) (describing the convoluted holdings of *In re Dallas Morning News*, 10 S.W.3d 298 (Tex. 1998) (per curiam), and *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001) (per curiam)).

[36] *See* Jennifer Adams, *Law Today; Gone Tomorrow*, 53 BAYLOR L. REV. 659, 664 (Summer 2001).

47.4 reserves memorandum opinions for cases in which "the issues are settled," and the "basic reasons" for the opinion do not establish any new rule of law, implicate any constitutional issue, criticize any existing law, or involve any apparent conflict of authority.[37]

An example of the somewhat lesser precedential weight accorded per curiam as opposed to authored Court opinions is exemplified by three recent decisions examining the "sue and be sued" language nonchalantly used by the Legislature in "[s]cores of Texas statutes."[38] Both per curiam opinions in *Lamesa Independent School District v. Booe* and *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District* refer to the "reasons explained in" the Court's seminal decision *Tooke v. City of Mexia* holding that "sue and be sued" language in a public entity's organic statute is not necessarily a clear and unambiguous waiver of sovereign immunity.[39] Therefore, it is somewhat less precedential to cite to a per curiam opinion that merely parrots the holding of an authored Court opinion, than to simply refer to the authored opinion itself.

Although six votes are required to issue a per curiam opinion as opposed to merely five to issue an authored opinion,[40] the precedential value of an authored opinion is not necessarily determined by the number of votes required to issue it. If it were otherwise, writ-[41] or petition-refused cases would be more precedential than an authored Court opinion merely because six votes are required to refuse an intermediate appellate opinion.[42]

C.1 Adopted opinions, or approved opinions[43] of the Texas Commission of Appeals issued from February 9, 1881[44] through August 31, 1892,[45] and from April 3, 1918[46] through August 24, 1945[47]

In order to reduce the backlog of cases pending at the Texas Supreme Court and the Court of Appeals,[48] the Texas Commission of Appeals (the "Commission") was created and sat at two different times during Texas's history:[49] first from 1879[50] to 1892, and again from 1918 to

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[37] TEX. R. APP. P. 47.4.

[38] *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex. 2006).

[39] *See Satterfield & Pontikes Const., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006) (per curiam) (citing *Tooke*, 197 S.W.3d at 325); *see also Lamesa Indep. School Dist. v. Booe*, 235 S.W.3d 710 (Tex. 2007) (per curiam) (citing *Tooke*, 197 S.W.3d at 325).

[40] *See* Andrew Weber, *Internal Procedures of the Texas Supreme Court*, *in* State Bar of Tex. Prof'l Dev. Program, Practice Before the Texas Supreme Court ch. 12, p. 3 (2004).

[41] Issued since June 14, 1927. TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[42] *See* Weber, *supra* note 40, at 3.

[43] *Compare Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935) (discussing "*adopted* or *approved*" Commission opinions) (emphasis added), *with* 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.1, p. 28 (discussing "[o]pinion [*a*]*dopted*" Commission opinions) (emphasis added).

[44] *See* Act of Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 96, 96-97 (Austin, Gammel Book Co. 1898) (effective upon passage on February 9, 1881).

[45] *See* Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892, and eliminating the Commission by providing for reorganization of the Texas Supreme Court, and defining its jurisdiction under amended article 5 of the Texas Constitution).

[46] *See generally* Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 81, 1918 Tex. Gen. Laws 171 (made effective April 3, 1918, and reestablishing the Commission).

[47] *See* Tex. S.J. Res. 8, 49th Leg., R.S., 1945 Tex. Gen. Laws 1043 (adopted at election held Aug. 25, 1945 eliminating the Commission).

[48] *See* discussion *infra* Part I.D.

[49] Michael S. Ariens, *The Storm Between the Quiet: Tumult in the Texas Supreme Court, 1911-21*, 38 ST. MARY'S L. J. 641, 697 (2007); F.A. Williams, *History of the Texas Judicial Machine and Its Growth*, 5 TEX. L. REV. 174, 178 (1927).

[50] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin,

1945.[51] Between 1879 and 1881, the cases referred to the Commission were done so only with the parties' consent, and therefore are not precedential.[52] However, after a legislative amendment in 1881 that stayed in effect until 1892, cases could be transferred to the Commission without the parties' consent.[53] The Court later adopted all Commission opinions issued between 1881 and 1892,[54] as well as on or after March 21, 1934.[55] However, several opinions issued by the Commission between 1918 and March 20, 1934 were neither adopted nor approved.[56] These remaining cases have been disposed of by the Court in several ways, including adopting, approving, or affirming the judgment,[57] approving the holding,[58] taking no express action at all,[59] or some combination of any of the above.[60]

The precedential value of a particular Commission case hinges upon how it was disposed of by the Court.[61] Commission opinions which the Court has expressly adopted or approved are "given the same force, weight, and effect as the opinions written by the members of the [Texas] Supreme Court itself."[62]

C.2 Petition-refused, or writ-refused intermediate appellate opinions issued from June 14, 1927 through the present[63]

A refusal of an application for writ of error or petition for review is the "strongest possible vote of confidence" the Texas Supreme Court can proxy to a lower court opinion.[64] This is because a "writ ref'd" or "pet. ref'd" notation "has the same precedential value as an opinion of the [Texas] Supreme Court."[65]

However, one caveat to the imprimatur of this notation is that the precedential weight it wields differs depending upon *when* the intermediate appellate opinion to which it is affixed was so designated.[66] Only after article 1728 of the Revised Civil Statutes was amended and made effective ninety days after the legislative session adjourned on March 16, 1927 (falling on June 14, 1927), was "a decision by a Court of Civil

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Gammel Book Co. 1898) (establishing the Commission of Appeals, and made effective October 7, 1879).

[51] *See supra* notes 45-47.

[52] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (effective October 7, 1879); *see State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 19 S.W.2d 297, 299 (1958); Williams, *supra* note 49, at 178; 11th ed. GREENBOOK, *supra* note 2, at 97, app. C.2.

[53] Williams, *supra* note 49, at 178.

[54] L.M., Note, *Courts—Opinions of the Texas Commission of Appeals*, 12 TEX. L. REV. 356, 356 (1934).

[55] *Id*. at 358 (quoting the order of the Court issued March 21, 1934); *see Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[56] Wilson, *supra* note 11, at 1091.

[57] *See id*.; *see also Humble Oil & Ref. Co. v. Davis*, 296 S.W. 285, 288 (Tex. Comm'n App. 1927, judgm't affirmed as recommended) ("In all other respects, judgements [sic] of the Court of Civil Appeals and district court affirmed, as recommended by the Commission of Appeals.").

[58] *See* 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.2, p. 29; *see, e.g., Gueringer v. St. Lous, B. & M. Ry.*, 23 S.W.2d 704, 704 (Tex. Comm'n App. 1930, holding approved).

[59] 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.4, p. 29; *see, e.g., Express Publ'g Co. v. Keeran*, 284 S.W. 913, 913 (Tex. Comm'n App. 1926).

[60] *See, e.g., Charles v. El Paso E. R. Co.*, 254 S.W. 1094, 1094 (Tex. Comm'n App. 1922, holding approved, judgm't adopted); *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n App. 1922, holding approved, judgm't adopted).

[61] *See Grave v. Diehl*, 958 S.W.2d 468, 471 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

[62] *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[63] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *Meyers v. Gulf Coast Minerals Mgmt. Corp*., 361 S.W.2d 193, 196 (Tex. 1962) ("by refusing the application for writ of error . . . this [C]ourt adopted the opinion in each case as its own").

[64] T.C. Sinclair, *The Supreme Court of Texas*, 7 HOUS. L. REV. 20, 52 (1969).

[65] Hon. Robert W. Calvert, *The Mechanics of Judgment Making in The Supreme Court of Texas*, 21 BAYLOR L. REV. 439, 447 (1969).

[66] *See* Simpson, *supra* note 10, at 574-75.

Appeals to which the Supreme Court refuses a writ of error . . . as binding as a decision of the Supreme Court itself."[67]

D. Texas Court of Appeals opinions issued from April 18, 1876[68] through August 31, 1892[69]

The adoption of the Constitution of 1876 established the State of Texas's second appellate court after the Texas Supreme Court, deceptively named the Texas Court of Appeals.[70] Its name was misleading in that it was not an intermediate appellate court as its name might lead one to believe, but instead possessed original appellate jurisdiction in all civil matters under one thousand dollars, as well as in all criminal appeals.[71] More important to this Order of Citation, however, is that the Court of Appeals was the court of last resort for these matters until it was abolished by the massive judicial restructuring undertaken in 1892.[72]

Because this court was the final arbiter over all civil matters regarding relatively costly disputes (for the late 1800s), it must be accorded precedential weight comparative with the other equivalent judicial forums of last resort in Texas.[73] However, because it had the most limited jurisdiction of any of the final appellate forums, it is precedentially the weakest of the grouping.

II. Texas Commission of Appeals equivalent opinions issued from February 9, 1881 through August 31, 1892 and from April 3, 1918 through August 24, 1945[74]

A. Holding-approved[75] opinions of the Texas Commission of Appeals

As explained above in Part I.C.1, the precedential value of a particular Commission case is determined by what manner in which the case was disposed of by the Texas Supreme Court.[76] In contrast to Commission opinions which the Court has adopted or approved as its own, a holding-approved Commission opinion indicates the Court "approved the judgment and adopted each specific holding of the Commission, but did not necessarily approve its reasoning."[77] Some

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[67] TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

[68] *See* TEX. CONST. OF 1876, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, 779, 779-834 (Austin, Gammel Book Co. 1898) (effective April 18, 1876); *see also Bass v. Albright*, 59 S.W.2d 891, 892 (Tex. Civ. App.—Texarkana 1933, writ ref'd).

[69] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892).

[70] Higgason, *supra* note 25, at 24; Williams, *supra* note 49, at 177.

[71] Hon. James T. "Jim" Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas, 1892-2003*, 46 S. TEX. L. REV. 33, 35 (Fall 2004).

[72] Higgason, *supra* note 25, at 24.

[73] This Order of Citation does not address courts of last resort in Texas whose subject matter jurisdiction is narrowly limited to only certain types of disputes. *See* TEX. GOV'T CODE ANN. § 33.034 (Vernon 2004) (governing the appeal of sanctions issued by the State Commission on Judicial Conduct (SCJC)); Jim Paulsen & James Hambleton, *Who Was That Masked Court? An Introduction to Texas' New Special Court of Review*, 56 TEX. B.J. 1133, 1133 (Dec. 1993); 11th ed. GREENBOOK, *supra* note 2, at R. 8.2, p. 36 (describing the Texas Review Tribunal, which reviews recommendations by the SCJC "for the removal or forced retirement of a judge"). Similarly, this Order of Citation does not address either the current or former types of disputes expressly excluded from the Texas Supreme Court's jurisdiction under Texas Government Code section 22.225 because the Court could (and still can) exert jurisdiction over any excluded type of case on dissent, conflict, or error of law grounds. *See* TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 2007); *Stafford v. Stafford*, 725 S.W.2d 14, 15 (Tex. 1987).

[74] *See supra* notes 44-47.

[75] *See* 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.2, p. 29; *see, e.g., Gueringer v. St. Lous, B. & M. Ry.*, 23 S.W.2d 704, 704 (Tex. Comm'n App. 1930, holding approved).

[76] *See Grave v. Diehl*, 958 S.W.2d 468, 471 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *see also* discussion, *supra* Part 1.C.1.

[77] 11th ed. GREENBOOK, *supra* note 2, at RR. 5.2.1-2.2, pp. 28-29.

Commission opinions contain the double notation, "holding approved, judgm't adopted," or the inverse thereof.[78] If a Commission opinion contains such a hybrid notation, it should be accorded the precedential weight attendant to the most authoritative notation in the opinion. Moreover, citations to all such hybrid Commission opinions should list the most authoritative notation first.[79]

B. Judgment-adopted, judgment-approved, or judgment-affirmed opinions of the Texas Commission of Appeals[80]

While holding-approved opinions of the Commission indicate the Texas Supreme Court approved of the holdings, but not necessarily the reasoning of Commission opinion, judgment-adopted opinions connote the Court approved neither the holdings nor the reasoning of the Commission opinion.[81] Therefore, judgment-adopted opinions are less precedential than are holding-approved opinions.

When defining judgment-*adopted* opinions, the Court actually quoted to an earlier definition it had provided for a judgment-*approved* opinion.[82] Therein, the Court explained that judgment-*approved* opinions are to "be understood as having no further effect than simply . . . adopt[ing] the view of the Commission as to the determination to be made of the cause."[83] Because the judgment itself is the repository of a court's determination of a cause, there is no meaningful jurisprudential difference between a judgment-adopted or -approved Commission opinion.[84] Accordingly, to the extent that judgment-adopted and -approved Commission opinions merely affirm the judgment recommended by the Commission, there is also no substantive difference between judgment-adopted, -approved, or -affirmed Commission opinions.[85]

For several editions now, the Greenbook has incorrectly conflated holding-approved and judgment-adopted Commission opinions as having the same precedential value.[86] However, it is clear that, because holding-approved opinions not only approve of the Commission's judgment, but also adopt the holdings of the Commission opinion, a holding-approved opinion is more authoritative than a judgment-adopted, -approved, or -affirmed Commission opinion.

The Eleventh Edition of the Greenbook contains a new section in chapter 5—section 5.2.4—which describes a category of Commission opinions upon which the Court took no action.[87] The one opinion referenced by the Greenbook authors in this section does indeed fail to include any typical notation regarding the Commission's opinion, holding, or judgment.[88] However, Chief Justice

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[78] *Compare City of Keller v. Wilson*, 168 S.W.3d 802, 823 n.118 (Tex. 2005) (citing *Charles v. El Paso E. R. Co.*, 254 S.W. 1094, 1094-95 (Tex. Comm'n App. 1922, holding approved, judgm't adopted)), *with Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (citing *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n. App. 1922, judgm't adopted, holding approved)).

[79] *But see Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (citing *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n. App. 1922, judgm't adopted, holding approved)).

[80] *See, e.g.*, *Humble Oil & Ref. Co. v. Davis*, 296 S.W. 285, 288 (Tex. Comm'n App. 1927, judgm't affirmed as recommended) ("In all other respects, judgements [sic] of the Court of Civil Appeals and district court *affirmed*, as recommended by the Commission of Appeals") (emphasis added); *McKenzie v. Withers*, 109 Tex. 255, 256, 206 S.W. 503, 503 (1918) (discussing judgment-*approved* opinions); 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.3, p. 29.

[81] 11th ed. GREENBOOK, *supra* note 2, at RR. 5.2.2-2.3, p. 29.

[82] *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 167, 254 S.W.2d 290, 291 (1923) (explaining that judgment-*adopted* opinions are "not authoritative[] because the [Texas] Supreme Court adopted only the judgment") (quoting *McKenzie*, 109 Tex. at 256, 206 S.W. at 503 (discussing judgment-*approved* opinions)).

[83] *McKenzie*, 109 Tex. at 256, 206 S.W. at 503.

[84] *See* TEX. R. APP. P. 43.2, 60.1.

[85] *See Humble Oil*, 296 S.W. at 288.

[86] 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.3, p. 29; 10th ed. GREENBOOK, *supra* note 13, at R. 6.2.3, at 29, R. 24.1, at 90.

[87] 11th ed. GREENBOOK, *supra* note 2, at R. 5.2.4, p. 29.

[88] *See Express Publ'g Co. v. Keeran*, 284 S.W. 913,

Calvin M. Cureton's comment at the top of the opinion decrees an identical judgment to that recommended by the Commission.[89] Therefore, the Commission's judgment was, in fact, adopted by the Court, even if Chief Cureton's notation did not expressly state the familiar refrain of adoption, approval, or affirmance.[90]

III. Intermediate appellate court equivalent[91]

A. Writ-refused or –denied[92] intermediate appellate opinions issued before February 20, 1917,[93]

writ-dismissed[94] intermediate appellate opinions issued from September 1, 1892[95] through June 30, 1917,[96] and from June 14, 1927[97] through February 28, 1939,[98]

writ dismissed for want of jurisdiction[99] intermediate appellate opinions issued from September 1, 1892 through June 30, 1917, and from June 14, 1927 through February 28, 1939,[100]

writ dismissed for want of jurisdiction—correct judgment[101] intermediate appellate opinions issued from March 1, 1939[102] to August 31, 1941,[103]

writ refused for want of merit[104] intermediate appellate opinions issued from September 1, 1941[105] to January 31, 1946,[106] and

913 (Tex. Comm'n App. 1926).

[89] *Id.*

[90] However, the author notes that were there a Commission opinion that did not include any notation whatsoever by the Court, it would indeed qualify as a distinct subset of Commission opinion. The author believes that such an opinion would be less precedential than a Commission opinion in which the Court had at least adopted the judgment but still more precedential than any intermediate court opinion save for those refused as equivalent Court authority. *See Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935); *see also* discussion *supra* Part I.C.2.

[91] TEX. CONST. art. V, § 1; TEX. GOV'T CODE ANN. § 22.220 (Vernon 2004).

[92] 11th ed. GREENBOOK, *supra* note 2, at 103, app. E; TEXAS RULES OF FORM at 84, app. A (Texas Law Review et al. eds., 9th ed. 2d prtg. 1998) [hereinafter 9th ed. GREENBOOK]; Simpson, *supra* note 10, at 574. The "writ ref'd," notation was sometimes termed "writ denied" in some early writ tables. *See Rethinking Writs*, *supra* note 10, at 10 & n.44; *see also, e.g.*, 29 S.W. xix (1895).

[93] *Compare Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error) (issued February 20, 1917), *with Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893).

[94] 11th ed. GREENBOOK, *supra* note 2, at 102, app. E; 9th ed. GREENBOOK, *supra* note 92, at 85-86, app. A; Simpson, *supra* note 10, at 575.

[95] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892).

[96] Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

[97] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[98] *See Court Makes Two New Rules*, 2 TEX. B.J. 101, 101 (Apr. 1939) [hereinafter *1939 SCOTX Rules*] (effective March 1, 1939, enacting Supreme Court Rule 5a).

[99] 11th ed. GREENBOOK, *supra* note 2, at 102, app. E; 9th ed. GREENBOOK, *supra* note 92, at 85-86, app. A; Simpson, *supra* note 10, at 575; *see also Bain Peanut Co. v. Pinson*, 282 U.S. 499, 500 (1931).

[100] *See supra* notes 95-98.

[101] *Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam).

[102] *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101.

[103] *See Rules of Civil Procedure*, 3 TEX. B.J. 522, 601 (Dec. 1940) [hereinafter *1941 TRCP*] (effective September 1, 1941, enacting Texas Rule of Civil Procedure 483).

[104] 11th ed. GREENBOOK, *supra* note 2, at 102, app. E; 9th ed. GREENBOOK, *supra* note 92, at 84, app. A.

[105] *See* TEX. R. CIV. P. 483, *reprinted in 1941 TRCP*, *supra* note 103, at 601.

[106] *See Official Amendments To Texas Rules of Practice and Procedure in Civil Cases*, 8 TEX. B.J. 532, 537 (Nov. 1945) [hereinafter *1946 TRCP*] (effective February 1, 1946, revising Texas Rule of Civil Procedure 483).

writ refused for no reversible error[107] **intermediate appellate opinions issued from February 1, 1946**[108] **through June 19, 1987**[109]

After the voters of Texas adopted Senate Joint Resolution 16, which drastically amended article V of the 1876 Constitution,[110] Texas's first intermediate appellate courts were established on September 1, 1892.[111]

From this date through February 28, 1939,[112] only three subsequent history notations existed, and among these, the first notation developed was the "writ ref'd" designation.[113] Before Associate Justice William E. Hawkins's February 20, 1917 concurring opinion in *Terrell v. Middleton*,[114] a "writ ref'd" notation was understood to mean the Texas Supreme Court approved the "result" but not necessarily the "reasoning through which the conclusion of the court is reached."[115]

Another of the three original subsequent history notations was the "writ dism'd w.o.j." designation,[116] which was apparently so haphazardly employed by the Court prior to 1939 that it could indicate a writ was dismissed on actual jurisdictional grounds as the name suggests or that—although the Court possessed jurisdiction—the writ was dismissed because the Court agreed with the judgment below, if not the opinion.[117] The "writ dism'd" notation was also occasionally used during this time as well in place of the "writ dism'd w.o.j." designation.[118]

Adding to the confusion was the State's brief experiment with discretionary review at the Court during the ten-year period from July 1, 1917[119] through June 13, 1927.[120] In 1917, the Legislature amended subdivision six of article 1521 of the Revised Civil Statutes, granting the Court jurisdiction in any case "in which it is made to appear that an error of law has been committed by the Court of Civil Appeals, of such importance to the jurisprudence of the state, as in the opinion of the [Texas] Supreme Court requires correction."[121] The 1917 revisions expressly specified the Court could grant an application for writ of error "in its discretion,"[122] and the primary

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[107] 11th ed. GREENBOOK, *supra* note 2, at 103, app. E; 9th ed. GREENBOOK, *supra* note 92, at 85, app. A.

[108] *See* TEX. R. CIV. P. 483, *reprinted in 1946 TRCP*, *supra* note 106, at 537.

[109] *See id.*; Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Elaine A. Carlson & Roland Garcia, Jr., *Discretionary Review Powers Of the Texas Supreme Court*, 50 TEX. B.J. 1201, 1202-03 (Dec. 1987).

[110] Tex. S.J. Res. 16, 22d Leg., 1st C.S., 1892 Tex. Gen. Laws 21 (adopted at election held Aug. 11, 1891); *see also* TEX. CONST. art V, §§ 1, 3; Hon. W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269 (Apr. 1962).

[111] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892, and eliminating the Court of Appeals in favor of establishing the intermediate Courts of Civil Appeals).

[112] *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101*; see also Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam) (announcing the adoption of the "writ dism'd—cor. judgm't" notation on March 1, 1939).

[113] The other two notations were: (1) "writ granted;" and (2) "writ dism'd w.o.j." Simpson, *supra* note 10, at 572. The "first notation developed to substitute for a full opinion was '[w]rit ref['d].'" *See Rethinking Writs*, *supra* note 10, at 10.

[114] This concurrence was technically concurring with a written order and not a majority opinion, as no majority opinion was issued. *Terrell v. Middleton*, 108 Tex. 14, 16, 191 S.W. 1138, 1139 (1917) (Hawkins, J., concurring in refusal of application for writ of error).

[115] *See Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893); *see also* Simpson, *supra* note 10, at 548, 574.

[116] Simpson, *supra* note 10, at 572.

[117] *See Rethinking Writs*, *supra* note 10, at 21.

[118] *Id*. at 11, 15; Simpson, *supra* note 10, at 575.

[119] Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

[120] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[121] *See id*.; *see also Holland v. Nimitz*, 111 Tex. 419, 429-30, 239 S.W. 185, 187 (1922) (emphasis added).

[122] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14,

notation used to denote a case that had been dismissed under subdivision six was the "writ dism'd w.o.j." designation.[123] The Court's short-lived discretionary jurisdiction ended in 1927, "when the discretionary review language was removed from subdivision [six] and replaced by language substantially equivalent to the pre-1917 statute."[124] However, just as denial of review since the Court was *permanently* granted discretionary jurisdiction in 1987 cannot affect the precedential value of an opinion below,[125] so too a dismissal of an application for writ of error for want of jurisdiction while the Court *temporarily* possessed discretionary jurisdiction cannot constitute a comment upon the merits of an intermediate appellate opinion.

The confusion regarding this notation reached its zenith when a 1929 "writ dism'd w.o.j." opinion was granted certiorari to the U.S. Supreme Court, whereupon Justice Oliver Wendell Holmes curtly remarked that the U.S. Supreme Court had been "misled by the form of the order dismissing the application for a writ of error 'for want of jurisdiction.'"[126]

The Court possessed obligatory jurisdiction over "all cases where the court of appeals committed an error of substantive law, which affected the judgment" from September 1, 1892 through June 30, 1917, and from June 14, 1927 through June 19, 1987.[127] Therefore, as the bar observed as early as 1934, the "writ dism'd w.o.j." designation "involve[d] the obvious contradiction to declare . . . that the Court must first consider the case to determine its jurisdiction over it, and, after having determined that [the appellate opinion below] *has been correctly decided*, shall then 'dismiss the case for want of jurisdiction.'"[128] Accordingly, a "writ dism'd w.o.j." notation affixed to an intermediate appellate opinion while the Court possessed obligatory jurisdiction and before the imposition of Texas Supreme Court Rule 5a[129] implicitly meant approval of the judgment below.

Taking heed of Justice Holmes's rebuke and the consternation of the appellate bar in general regarding the import of a "writ dism'd w.o.j." notation,[130] the Court promulgated Rule 5a on March 1, 1939, which introduced the notation, "writ dism'd w.o.j.—cor. judgm't," to the Texas citational lexicon.[131] This notation signified the "judgment of the Court of Civil Appeals is a correct one but the [Texas] Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law."[132] The introduction of the "writ dism'd w.o.j.—cor. judgm't" notation also clarified that, from March 1, 1939 forward, the "writ dism'd w.o.j." designation expressly indicated dismissal "because the case is adjudged beyond the jurisdiction of the Supreme Court."[133]

1927) (emphasis added).

[123] *See Simpson*, *supra* note 10 at 571; *see also Nat'l Compress Co. v. Hamlin*, 114 Tex. 375, 385-87, 269 S.W. 1024, 1029 (1925); *see also supra* text accompanying note 118.

[124] *Rethinking Writs*, *supra* note 10, at 16.

[125] *See infra* text accompanying note 187.

[126] *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 500 (1931); *see also Bain Peanut Co. v. Pinson*, 19 S.W.2d 203 (Tex. Civ. App.—Eastland 1929), *writ dism'd w.o.j.*, 119 Tex. 572, 34 S.W.2d 1090 (per curiam), *aff'd*, 282 U.S. 499.

[127] *See* Carlson & Garcia, *supra* note 109, at 1201 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)).

[128] *Rethinking Writs*, *supra* note 10, at 22 (quoting TEXAS LAW REVIEW, PROCEEDINGS OF THE FIFTY-THIRD ANNUAL MEETING OF THE TEXAS BAR ASSOCIATION 137, 139 (1934) (emphasis added)).

[129] *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101; *see also Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam).

[130] *See Rethinking Writs*, *supra* note 10, at 22; Wilson, *supra* note 11, at 1090-91.

[131] *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101; *see also Highland Park*, 133 Tex. at 546, 125 S.W.2d at 270. For the other, older, abbreviation variants of this notation, see Simpson, *supra* note 10, at 575.

[132] *Highland Park*, 133 Tex. at 546, 125 S.W.2d at 270.

[133] *Id.*; *see also* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101. Because it was used interchangeably with the "writ dism'd w.o.j." designation, the meaning of the "writ dism'd" notation was similarly changed by the Court's promulgation of Rule 5a.

After the Legislature surrendered the last vestiges of procedural rulemaking authority in May 1939,[134] the Court promulgated its first Rules of Civil Procedure, effective September 1, 1941.[135] Rule 483 eliminated the "writ dism'd w.o.j.—cor. judg't" notation and replaced it with the "ref'd w.o.m." designation without altering "the significance of the action" itself, only the terminology.[136] While in use from September 1, 1941 through January 31, 1946,[137] the "writ ref'd w.o.m." notation was used where the Court was convinced the judgment of the court of appeals was correct but the Court was not satisfied that the opinion correctly declared the law in all respects.[138]

When the Court amended the wording of former Rule 483 on February 1, 1946, it eliminated any reference to the notation "[r]efused for want of merit" and replaced it with the new notation, "'[r]efused, [n]o [r]eversible [e]rror."[139] Much has been written about the troublesome history of the "writ ref'd n.r.e." notation and just what, "[i]f [a]ny," precedential weight it carried.[140] In the most expansive examination of the topic, former Associate Justice Ted Z. Robertson and now-Professor James W. Paulsen concluded the "writ ref'd n.r.e." notation was, "in every sense[,] a decision on the merits of the appeal."[141] The explanation for this was eloquently articulated by former Chief Justice James W. McClendon of the Austin Court of Civil Appeals, when he reasoned that, because the "[Texas] Supreme Court had potential jurisdiction . . . of the case upon that appeal," the "effect of the dismissal order constituted an adjudication by that [C]ourt that the judgment of this court was 'a correct one.'"[142] In fact, the Court had more than mere *potential* jurisdiction during most of the period of time when the "writ ref'd n.r.e." notation was used, it had *obligatory* jurisdiction over "all cases where the court of appeals committed an error of substantive law that affected the judgment"[143] until June 19, 1987.[144] Therefore, just as Chief Justice McClendon cautioned, a refusal of the writ for no reversible error was a de facto approval of the judgment below.

The jurisprudential "result" of a case is contained in the court's judgment. Accordingly, whether the Court approved the "result" of a lower opinion (as in refused opinions before February 20, 1917), approved the judgment of the lower court (as in refused for want of jurisdiction, refused for want of jurisdiction—correct judgment, and refused for no reversible error opinions before June 20, 1987), or was convinced the judgment of the lower court was correct (as in refused for want of merit opinions), all of these notations bear the equal precedential weight of the Court's approval of the judgment below.

Even though a convincing argument may be made that the same action taken by the Court in adopting, approving, or affirming the judgment of a Commission opinion is precedentially indistinguishable from the action the Court

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[134] *See* Act of May 15, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201 (effective May 15, 1939) (codified as amended at TEX. GOV'T CODE ANN. § 22.004 (Vernon 2004)); *Rethinking Writs*, *supra* note 10, at 23.

[135] *See 1941 TRCP*, *supra* note 103, at 522; *Rethinking Writs*, *supra* note 10, at 23.

[136] *See* TEX. R. CIV. P. 483, *reprinted in 1941 TRCP*, *supra* note 103, at 601; *see also* Simpson, *supra* note 10, at 572.

[137] *See* TEX. R. CIV. P. 483, *reprinted in 1946 TRCP*, *supra* note 106, at 537; *see also* Simpson, *supra* note 10, at 572.

[138] Simpson, *supra* note 10, at 572.

[139] *Id*.

[140] *See*, *e.g.*, *Rethinking Writs*, *supra* note 10, at 1; *Meaning of N.R.E.*, *supra* note 10, at 1306; Steakley, *supra* note 10, at 697; Simpson, *supra* note 10, at 547.

[141] *Rethinking Writs*, *supra* note 10, at 26; *see also* Wilson, *supra* note 11, at 1090.

[142] *Fisher v. City of Bartlett*, 88 S.W.2d 1068, 1069 (Tex. Civ. App.—Austin 1935, writ dism'd) (quoting former Revised Civil Statute article 1728).

[143] *See* Carlson & Garcia, *supra* note 109, at 1202 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)).

[144] After the Legislature granted discretionary jurisdiction to the Texas Supreme Court on June 20, 1987, the "writ ref'd n.r.e." notation became obsolete. *See* Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* discussion *infra* Part III.B.

employed in refusing or denying writs prior to February 20, 1917, refusing writs for want of jurisdiction, refusing writs for want of jurisdiction—correct judgment, refusing writs for want of merit, and refusing writs for no reversible error, the Court made clear in 1935 that "the Courts of Civil Appeals and all lower courts should feel constrained to follow" *all* Commission opinions regardless of whether they are adopted or approved.[145] Therefore, even less authoritative Commission opinions enjoy precedential superiority over all intermediate appellate opinions with the exception of "writ ref'd" or "pet. ref'd" intermediate appellate opinions issued from June 14, 1927 to the present, which carry the same force and effect of a Court opinion.[146]

B. Writ-refused[147] intermediate appellate opinions issued from February 20, 1917[148] through June 13, 1927,[149]

writ refused for no reversible error[150] intermediate appellate opinions issued from June 20, 1987[151] through December 31, 1987,[152]

writ-dismissed[153] intermediate appellate opinions issued from July 1, 1917[154] through June 13, 1927,[155] and from March 1, 1939,[156] through June 19, 1987,[157]

writ dismissed for want of jurisdiction[158] intermediate appellate opinions issued from July 1, 1917 through June 13, 1927, and from March 1, 1939, through June 19, 1987,[159]

writ dismissed by agreement intermediate appellate opinions,[160]

writ granted without reference to merits intermediate appellate opinions,[161]

writ-denied[162] intermediate appellate opinions issued from January 1, 1988[163] through August 31, 1997),[164]

petition-denied intermediate appellate opinions,[165]

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145 *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

146 *See* discussion *supra* Part I.C.2.

147 *See* Simpson, *supra* note 10, at 574.

148 *Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error) (issued February 20, 1917).

149 TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

150 11th ed. GREENBOOK, *supra* note 2, at 103, app. E; 9th ed. GREENBOOK, *supra* note 92, at 85, app. A.

151 *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Carlson & Garcia, *supra* note 109, at 1202-03.

152 *See* TEX. R. APP. P. 133(a), *reprinted in Court Order*, 50 TEX. B.J. 1044, 1049 (Oct. 1987) [hereinafter *1988 TRAP*].

153 11th ed. GREENBOOK, *supra* note 2, at 102, app. E; 9th ed. GREENBOOK, *supra* note 92, at 85-86, app. A; Simpson, *supra* note 10, at 575.

154 Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

155 Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

156 *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101.

157 *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Carlson & Garcia, *supra* note 109, at 1202-03.

158 10th ed. GREENBOOK, *supra* note 13, at 92, app. A; 9th ed. GREENBOOK, *supra* note 92, at 85-86, app. A; Simpson, *supra* note 10, at 575.

159 *See supra* notes 153-57.

160 10th ed. GREENBOOK, *supra* note 13, at 92, app. A; *see also* Greenhill, *supra* note 21, at 386.

161 TEX. R. CIV. P. 483; 11th ed. GREENBOOK, *supra* note 2, at 103, app. E; Simpson, *supra* note 10, at 574.

162 11th ed. GREENBOOK, *supra* note 2, at 103, app. E.

163 *See* TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 152, at 1049.

164 *See* TEX. R. APP. P. 56.1(b)(1), *reprinted in Texas Rules of Appellate Procedure*, 60 TEX. B.J. 878, 936 (Oct. 1997) [hereinafter *1997 TRAP*].

petition-struck intermediate appellate opinions,[166]

petition-dismissed intermediate appellate opinions,[167]

petition granted and judgment vacated without reference to the merits intermediate appellate opinions,[168]

petition dismissed by agreement of the parties intermediate appellate opinions,[169]

petition dismissed for want of jurisdiction intermediate appellate opinions,[170]

petition-withdrawn intermediate appellate opinions,[171]

petition-abated intermediate appellate opinions,[172] **and**

petition-filed intermediate appellate opinions[173]

The one precedential element common to all the remaining subsequent history notations addressed in this section is that none indicate the Texas Supreme Court has reviewed or commented upon the merits of the petition or application, either because of procedural reasons or because the Court lacked jurisdiction to consider the case.[174] That said, some of these notations warrant more examination in these pages than the others, and they are explored below.

After Justice Hawkins' *Terrell* opinion was issued on February 20, 1917, a "writ ref'd" notation no longer automatically meant the Court approved the result, if not the reasoning, of the court below.[175] Instead, Justice Hawkins's opinion revealed the notation now could mean no more than:

> that[,] in no instance[,] does a refusal by the [Texas] Supreme Court of a writ of error necessarily or conclusively carry an approval by that court of the opinion of the Court of Civil Appeals, or even of any one or more of the grounds or reasons given in its opinion in support of its decision and judgment.[176]

This distinction lasted until article 1728 of the Revised Civil Statutes was amended effective June 14, 1927, when the "writ ref'd" notation was made to indicate that "a decision by a Court of Civil Appeals to which the Supreme Court refuses

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[165] TEX. R. APP. P. 56.1(b)(1); 11th ed. GREENBOOK, *supra* note 2, at 98, app. D.

[166] TEX. R. APP. P. 53.9; 11th ed. GREENBOOK, *supra* note 2, at 99, app. D.

[167] TEX. R. APP. P. 60.6; 11th ed. GREENBOOK, *supra* note 2, at 99, app. D.

[168] TEX. R. APP. P. 56.2; 11th ed. GREENBOOK, *supra* note 2, at 99, app. D.

[169] 11th ed. GREENBOOK, *supra* note 2, at 100, app. D.

[170] TEX. R. APP. P. 56.1(b)(2); 11th ed. GREENBOOK, *supra* note 2, at 100, app. D.

[171] 11th ed. GREENBOOK, *supra* note 2, at 100, app. D.

[172] TEX. R. APP. P. 8.2; 11th ed. GREENBOOK, *supra* note 2, at 100, app. D.

[173] TEX. R. APP. P. 53.7; 11th ed. GREENBOOK, *supra* note 2, at 101, app. D. It should be noted that this designation only refers to petitions whose merits have not yet been reviewed by the Court. *See* 11th ed. GREENBOOK, *supra* note 2, at 101, app. D (citing TEX. R. APP. P. 53.7). However, there is currently no defined notation for a cause in which briefing on the merits has been ordered. *See* TEX. R. APP. P. 55.1-55.4. For this type of opinion, the author encourages the use of the notation, "pet. pending," which it appears the Texas Supreme Court may already favor. *See, e.g., Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236, 241 (Tex. 2007). Even though a "pet. pending" notation would differ from the other designations discussed in this section because a "pet. pending" notation would indicate the Court has reviewed the merits of the petition, because the Court now has discretionary review powers, the Court's examination of the merits of a cause—and even its subsequent decision to deny the petition—is not a comment upon the merits of the petition similar to that described in Part III.A.

[174] *See* 11th ed. GREENBOOK, *supra* note 2, at 98-101, app. D; 10th ed. GREENBOOK, *supra* note 13, at 92-93, app. A.

[175] *Compare Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893), *with, Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error); *see also* Simpson, *supra* note 10, at 548, 574.

[176] *Terrell*, 108 Tex. at 16-21, 191 S.W. at 1139-41 (Hawkins, J., concurring in refusal of application for writ of error); *see also* Simpson, *supra* note 10, at 570, 574.

a writ of error . . . is as binding as a decision of the [Texas] Supreme Court itself."[177]

As discussed in Part III.A, while the Court possessed discretionary jurisdiction from July 1, 1917[178] through June 13, 1927,[179] both the "writ dism'd w.o.j." and "writ dism'd" notations could not constitute a comment upon the merits of an intermediate appellate opinion. In addition, the Court's promulgation of Rule 5a made clear that, from March 1, 1939, forward, both the "writ dism'd w.o.j." and "writ dism'd" designations indicated dismissal for lack of jurisdiction only, and no longer carried an implicit comment upon the merits as previously implied."[180]

By its order of April 10, 1986, which became effective on September 1, 1986, the Court promulgated the state's first Appellate Rules of Procedure.[181] Therein, the Court adopted former Rule of Civil Procedure 483 as new Rule of Appellate Procedure 133(a) without any major substantive change.[182] However, after discretionary review powers were permanently granted to the Court in 1987 by the passage of Senate Bill 841,[183] the "writ ref'd n.r.e." notation became superfluous and was replaced by the designation "writ denied" by order of the Court made effective January 1, 1988.[184]

Although the Court was granted discretionary jurisdiction on June 20, 1987, the Court did not promulgate appellate rules commensurate with its new powers until some six months later on January 1, 1988.[185] As explained in Part III.A, because the "writ ref'd n.r.e." notation was based upon former subdivision six of Government Code section 22.001 giving the Court obligatory jurisdiction in all cases "in which it appears that an error of substantive law that effects the judgment has been committed by the court of appeals," the notation was a de facto approval of the intermediate appellate court judgment to which it was affixed.[186] However, this version of subdivision six was superseded by that enacted in 1987 giving the Court discretionary jurisdiction in cases "in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction."[187]

Therefore, while the statutory underpinnings of the "writ ref'd n.r.e." notation were removed as of June 20, 1987, there was nonetheless no other notation in existence to reflect the Court's newfound discretionary powers until Rule 133(a) was revised effective January 1, 1988.[188] However, because the Court's refusal for no reversible error during this time period could only

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[177] TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *see Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

[178] Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

[179] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[180] *See* TEX. SUP. CT. R. 5a, *reprinted in 1939 SCOTX Rules*, *supra* note 98, at 101; *Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam).

[181] *See Appellate Procedure*, 49 TEX. B.J. 558, 558 (June 1986) [hereinafter *1986 TRAP*].

[182] *Id*. at 554, 587.

[183] Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)).

[184] *See* TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 152, at 1049; Carlson & Garcia, *supra* note 109, at 1202.

[185] *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Carlson & Garcia, *supra* note 109, at 1202-03.

[186] *See* Carlson & Garcia, *supra* note 109, at 1202 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)).

[187] Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)).

[188] *See* Carlson & Garcia, *supra* note 109, at 1202-03.

be based upon the newly-enacted version of subdivision six regarding error "of such importance to the jurisprudence of the state" as to require correction, any comment upon the judgment of the court below that would have existed under the Court's former obligatory jurisdiction was removed.[189]

The eventual addition of discretionary language to Rule 133(a) allowing an application for writ of error to be denied (as opposed to refused or dismissed) based upon the discretionary powers granted the Court in the new section 22.001(a)(6), confirmed that a "writ denied" notation was not a comment upon the merits of the judgment below.[190]

With the massive overhaul of the Texas Rules of Civil Procedure by order of the Court effective September 1, 1997, by which the application for writ of error system was supplanted by the current petition for review process, former Rule 133(a) was re-adopted as Rule 56.1(b)(1).[191] Rule 133(a) was not substantively amended by its re-adoption, but—due to the elimination of writs of error—the notation, "writ denied," was replaced by the suffix, "pet. denied."[192]

C. Published memorandum intermediate appellate opinions issued from September 1, 1941[193] through August 31, 1986,[194] and from September 1, 1997[195] through the present

Just as per curiam opinions issued by the Texas Supreme Court are fractionally less authoritative than signed Court opinions,[196] so too are published memorandum intermediate appellate opinions slightly less precedential than non-memorandum opinions.

However, the distinction between memorandum opinions and non-memorandum opinions is even more stark than the difference between per curiam and signed Court opinions. Memorandum opinions came into existence on September 1, 1941, when the state's first Rules of Civil Procedure were promulgated.[197] Newly-enacted Rule 452 described a "brief, memorandum opinion" as one "where the issues involved have been clearly settled by authority or elementary principles of law."[198] The last sentence of Rule 452 mandated that "[o]pinions shall be ordered not published when they present no question or application of any rule of law of interest or importance to the jurisprudence of the State."[199] Because it is at least possible that opinions disposing of only "clearly-settled" issues could nevertheless be "important[t] to the jurisprudence of the State," the assumption cannot be made that all memorandum opinions issued in the forty-five year span from September 1, 1941 through August 31, 1986 were not published.

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189 *See id.*

190 TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 152, at 1049 ("In all cases where the Supreme Court . . . is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction.").

191 TEX. R. APP. P. 56.1(b)(1), *reprinted in 1997 TRAP*, *supra* note 164, at 878, 936.

192 *Compare* TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 152, at 1049, *with* TEX. R. APP. P. 56.1(b)(1), *reprinted in 1997 TRAP*, *supra* note 164, at 936.

193 *See* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 103, at 522, 596.

194 *See* TEX. R. APP. P. 90(a), *reprinted in 1986 TRAP*, *supra* note 181, at 558, 583.

195 *See* TEX. RR. APP. P. 47.1, 47.3, 47.4, *reprinted in 1997 TRAP*, *supra* note 164, at 878, 925.

196 *See* discussion *supra* Part I.B.

197 *See* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 103, at 522, 596.

198 *Id.* at 596.

199 *Id.*

When the Rules of Appellate Procedure were first enacted on September 1, 1986, the provisions of former Rule of Civil Procedure 452 were incorporated as amended in Rule of Appellate Procedure 90(a) and (c).[200] In subparagraph (a), the Rule provided that memorandum opinions "should not be published."[201] In addition, subparagraph (c) mandated that an opinion be published only if it:

> (1) establishes a new rule of law, alters or modifies an exiting rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.[202]

Upon the major revision to the Rules of Appellate Procedure in 1997, appellate Rule 90(a) was renumbered as Rule 47.1 requiring the issuance of a memorandum opinion in any instance "where the issues are settled," and the prohibition against publishing memorandum opinions was removed.[203] However, the standards for publication first adopted in Rule 90(c), were also renumbered at Rule 47.4.[204] Therefore, while memorandum opinions could again be published, few "settled-issue" opinions qualified for publication.

When the Rules of Appellate Procedure were amended to removed the "publish and "do not publish" notations from intermediate appellate opinions in 2003,[205] the standards for publication from former Rule 47.4 were amended to govern instead the issuance of memorandum opinions.[206] The only substantive change made to the standards between the two versions of subparagraph (c) was the elimination of the "public interest" prong, which was replaced by language requiring a memorandum opinion be issued unless the decision involves issues of constitutional law important "to the jurisprudence of Texas."[207] Because memorandum opinions were already—at least in essence—limited to the four publication standards in former Rule 47.4(c), and issues of importance to the jurisprudence of the state and issues of public interest are virtually indistinguishable for purposes of citation, there is no meaningful precedential difference between published memorandum opinions issued from September 1, 1997 through August 31, 2003, and memorandum opinions issued on or after September 1, 2003.

D. Texas Supreme Court per curiam opinions explaining and / or modifying designated notations[208]

Some consternation has been caused by the Texas Supreme Court's curious and—thankfully—rare use of the mechanism of a per curiam decision to opine on the merits, or lack thereof, of a case in which it did not either grant the application for writ of error or the petition for review.[209]

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[200] *Compare* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 103, at 596, *with* TEX. R. APP. P. 90(a), (c), *reprinted in 1986 TRAP*, *supra* note 181, at 583.

[201] TEX. R. APP. P. 90(a), *reprinted in 1986 TRAP*, *supra* note 181, at 583.

[202] TEX. R. APP. P. 90(c), *reprinted in 1986 TRAP*, *supra* note 181, at 583.

[203] *Compare* TEX. R. APP. P. 90(a), *reprinted in 1986 TRAP*, *supra* note 181, at 583, *with* TEX. R. APP. P. 47.1, *reprinted in 1997 TRAP*, *supra* note 164, at 925.

[204] *Compare* TEX. R. APP. P. 90(c), *reprinted in 1986 TRAP*, *supra* note 181, at 583, *with* TEX. R. APP. P. 47.4, *reprinted in 1997 TRAP*, *supra* note 164, at 925.

[205] *See* Order of Aug. 6, 2002, Misc. Docket No. 02-9119, *reprinted in* 65 TEX. B.J. 686, 692 (Sept. 2002) (effective September 1, 2003) [hereinafter *2003 TRAP*]; *see also* TEX. R. APP. P. 47.3, *reprinted in 2003 TRAP*, at 692 (noting strikeout changes and underlined additions to Rule 47.3).

[206] *See* TEX. R. APP. P. 47.4, *reprinted in 2003 TRAP*, *supra* note 205, at 692.

[207] *See id.*

[208] *See* TEX. R. APP. P. 59.1, *reprinted in 1997 TRAP*, *supra* note 164, at 878, 938.

[209] *See* Mark E. Steiner & Pamela E. George, *The Use of Authority: Lone Stare Decisis Revisited: Ethics and Authority in Texas Appellate Courts in Light of Recent Rule Changes*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. 15, p. 16 (2003); *see also* TEX. R. APP. P. 59.1, *reprinted in 1997*

In practice, these opinions have issued to comment upon or clarify precisely what level of approval or disapproval the Court felt compelled to bestow upon the lower court's opinion.[210] A precedential issue arises however when the notation the Court professes to attach to the opinion does not comport with the level of approval indicated in the opinion.

In the Court's 1964 per curiam opinion in *City of Dallas v. Holcomb*, the Court expressly refused for no reversible error the application for writ of error of the opinion below.[211] However, "[s]o that there may be no question as to the effect" of the its decision, the Court noted it also "approve[d] the holding" of the court below.[212] Of course, even though the "writ ref'd n.r.e." designation could only mean, at most, the Court approved the *judgment* of the court of appeals, the Court nevertheless approved the lower court's *holding*—which encompasses the judgment—as well. Just as a "holding approved" Commission opinion carries more precedential weight than does a mere "judgm't approved" Commission opinion, so too must a court of appeals opinion whose holding has been approved by the Court be more precedential than one in which only the judgment was deemed to be correct.[213] Accordingly, the inescapable effect of *Holcomb* is to elevate the Dallas Court of Civil Appeals' opinion[214] to a status lying somewhere in the precedential ether between the judgment-approving notations described in Part. III.A and the opinion-approving effect of a writ-refused opinion on or after June 14, 1927.[215]

During its short, officially-sanctioned history, the "writ denied" designation was not always used in the most scrupulous fashion. One such example is the June 15, 1988 case of *Louder v. DeLeon*, in which the Court technically denied the writ for application of error but did so by way of a per curiam opinion that expressly "disapprove[d of] the court of appeals' pronouncements . . . and criticize[d] its reasoning."[216] However, as discussed above in Part III.B, a "writ denied" notation affixed to a lower court's opinion issued from January 1, 1988 through August 31, 1997 was not a comment upon the merits of the opinion below.[217] But here, the Court expressly held it disapproved of both the lower court's meritorious "pronouncements regarding Tex[as] R[ule of] Civ[il] Evid[ence] 704 . . . and . . . reasoning."[218] As in *Holcomb*, the Court's exposition in *Louder* impacts the precedential weight of the opinion below. Here, it affixes a nebulous kiss of precedential death to the Amarillo Court of Appeals' opinion as being somewhat disapproved of by the Court.[219]

The Court has utilized this peculiar per curiam practice at least two other times as well. In its 1998 opinion in *Palo Pinto County v. Lee*, the Court "disapprove[d]" of language in the opinion below, while at the same time denying review.[220] Two years later in *Judwin Properties, Inc. v. Griggs & Harrison*, the Court again held that, "[i]n denying this petition for review," it "disapprove[d] of" language in the opinion

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TRAP, *supra* note 164, at 878, 938.

[210] *See* Steiner & George, *supra* note 209, at 16.

[211] 383 S.W.3d 585, 586 (Tex. 1964) (per curiam).

[212] *Id.*

[213] *Compare* discussion *supra* Part II.A., *with*, discussion *supra* Part II.B.

[214] *City of Dallas v. Holcomb*, 381 S.W.2d 347 (Tex. Civ. App.—Dallas 1964), *holding approved per curiam, writ ref'd n.r.e. by*, 383 S.W.2d 585, 586.

[215] *Compare* discussion *supra* Part III.A, *with*, TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *see Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

[216] 754 S.W.2d 148, 149 (Tex. 1988) (per curiam).

[217] 11th ed. GREENBOOK, *supra* note 2, at 103, app. E; *see* discussion *supra* Part III.B.

[218] *Louder*, 754 S.W.2d at 149.

[219] Because of the Court's disapproval of the opinion below, *Louder* arguably occupies a dubious precedential position that makes it less authoritative than a normal court of appeals opinion in which the Court has not examined the merits, but not quite as non-precedential as a court of appeals opinion the Court has forthrightly reversed. *See DeLeon v. Louder*, 743 S.W.2d 357, 361-62 (Tex. App.—Amarillo 1987), *pronouncements and reasoning disapproved per curiam, writ denied by*, 754 S.W.2d at 149.

[220] 988 S.W.2d 739, 739 (Tex. 1998) (per curiam).

below.[221] In both *Palo Pinto* and *Judwin*, the Court made clear the "language" it found objectionable was that contained in specific holdings of the First and Eleventh District Courts of Appeals.[222] Just as in *Louder*, the effect of the Court's per curiam commentary is to relegate the opinions of the courts of appeals below to an undefined precedential latitude somewhere south of intermediate appellate opinions in which the Court has not reviewed the merits.[223]

As with hybrid notations affixed to Commission opinions,[224] so too should citations to the types of lower court opinions examined here list the most (or least, as it were) authoritative notation first.[225] However, these intermediate appellate court opinions should be only be accorded the precedential weight attendant to the clearest indication of the Court's treatment of the opinion below.

Because these per curiam opinions issued by the Court contain minimal exposition beyond that which comments upon the opinion below, they possess little precedential weight as to their own merits,[226] but are instead primarily precedential as to the intermediate appellate opinions they critique.

IV. Non-precedential, but perhaps persuasive, authority

There are at least four categories of caselaw in Texas that are not precedential but that are often considered more authoritative than they truly are. If there is any distinction to be drawn between the shades of precedence inherent in each of these types of opinions (and that proposition is itself questionable), they are listed below in descending order of precedential weight.

A. Texas Commission of Appeals opinions issued from October 7, 1879[227] through February 8, 1881[228]

As is discussed in Part I.C.1, cases referred to the Commission between 1879 and 1881 were done so only with the parties' consent, and are therefore not precedential.[229] Even though a very defensible argument may be made that—prior to the establishment of the intermediate appellate court system in 1892—the Commission was the State's first attempt at creating an appellate buffer between the trial courts and the Texas Supreme Court and its opinions should therefore be accorded more precedential respect than an unpublished intermediate appellate opinion,[230] this argument fails in light of the Court's 1935 pronouncement that "the Courts of Civil Appeals and all lower courts should feel constrained to

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[221] 11 S.W.3d 188, 188-89 (Tex. 2000) (per curiam).

[222] *Judwin Props., Inc. v. Griggs & Harrison, P.C.*, 981 S.W.2d 868, 870 (Tex. App.—Houston [1st Dist.] 1998), *holding disapproved per curiam, pet. denied by*, 11 S.W.3d at 188-89; *Lee v. Palo Pinto County*, 966 S.W.2d 83, 85 (Tex. App.—Eastland 1998), *holding disapproved per curiam, pet. denied by*, 988 S.W.2d at 739.

[223] *See supra* note 219.

[224] *See* discussion *supra* Part II.A.

[225] For examples of both alternatives, see text accompanying notes 194, 199, and 202.

[226] There is no doubt, however, that these per curiam opinions carry just as much precedential weight as any other per curiam opinion issued by the Court. Their precedential value—if limited at all—is only reduced by the narrow scope of the holding in such opinions.

[227] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (establishing the Commission of Appeals, and made effective October 7, 1879).

[228] *See* Act of Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 96, 96-97 (Austin, Gammel Book Co. 1898) (effective upon passage on February 9, 1881).

[229] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (effective October 7, 1892); *State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 19 S.W.2d 297, 299 (1958); Williams, *supra* note 49, at 178; 11th ed. GREENBOOK, *supra* note 2, at 96, app. C.2; *see also* discussion, *supra* Part I.C.1.

[230] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898).

follow" *all* Commission opinions regardless of whether they are adopted or approved.[231]

B. Unpublished intermediate appellate opinions[232]

Although unpublished intermediate appellate opinions issued at any time have been expressly deemed as possessing "no precedential value" since the 2003 revisions to Rule of Appellate Procedure 47.7,[233] it was not always so. Originally, no comment was made until the 1986 enactment of the Rules of Appellate Procedure regarding either the citation of such unpublished opinions or the precedential weight of these decisions.[234] However, perhaps because of this ambiguity, the 2003 revisions to the Rules of Appellate Procedure inserted the phrase, "under these or any prior rules," into Rule 47.7's provisions deeming unpublished intermediate appellate court opinions issued at any time as lacking any "precedential value."[235]

Both the 1986 and 1997 incarnations of Rule 47.7 contained a prohibition against the citation "as authority" of unpublished intermediate appellate opinions "by counsel or by a court," even though the intermediate appellate courts were required to label such opinions with the notation, "do not publish."[236] However, the 2003 revisions to the appellate rules eliminated this prohibition against citation, as long as the writer affixed the notation, "not designated for publication."[237]

C. Texas trial courts

Because trial courts are the initial point of judicial review for disputes in Texas, decisions from these courts cannot constitute precedential authority in the civil appellate context.[238]

D. Dissenting opinions from denial of review or application for writ of error at the Texas Supreme Court[239]

There is one other type of opinion that bears precedential examination, and that is the practice by some of the Justices on the Texas Supreme Court to write dissenting opinions from the denial of review or application for writ of error.[240] However, unlike the per curiam opinions described in Part III.D, or the "majority concurrence" described in Part I.A, because these opinions are not issued per curiam or even by a majority of the Court, they cannot affect the precedential value of the intermediate appellate opinion to which they pertain.[241] Accordingly, they must be accorded the same precedential import assigned any other dissenting or concurring opinion issued by a Justice of the Court.

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[231] *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[232] TEX. R. APP. P. 47.7, *reprinted in 2003 TRAP*, *supra* note 205, at 692.

[233] *Id.*

[234] *Compare* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 103, at 596, *with* TEX. R. APP. P. 90(i), *reprinted in 1986 TRAP*, *supra* note 181, at 584.

[235] TEX. R. APP. R. 47.7, *reprinted in 2003 TRAP*, *supra* note 205, at 692.

[236] *Compare* TEX. R. APP. R. 47.3(b), 47.7, *reprinted in 1997 TRAP*, *supra* note 164, at 925, *with* TEX. R. APP. P. 90(e), (i), *reprinted in 1986 TRAP*, *supra* note 181, at 583-84.

[237] TEX. R. APP. R. 47.7, *reprinted in 2003 TRAP*, *supra* note 205, at 692.

[238] *See* 10th ed. GREENBOOK, *supra* note 13, at R. 24.1, at 91.

[239] *See* Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8 (cataloguing the practice from its inception in 1895 to the present).

[240] *Id.*

[241] One of these decisions, *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting from denial of review), stands out because, although it is clearly marked in the Southwestern reporter as being a dissent, it has nonetheless been cited as a majority Court opinion by the Texas Review Tribunal, Texas federal district courts, the Fifth Circuit Court of Appeals, and every Texas intermediate appellate court save for the Eastland Court of Appeals. *See, e.g.*, *Joslin v. Pers. Invs., Inc.*, No. 03-40200, 2004 WL 436001, at *5 (5th Cir. March 8, 2004); *Meecorp Cap. Mkts., LLC v. Tex-Wave Indus., LP*, No. C-06-148 2006 WL 3813779, at *5 (S.D. Tex. December 27, 2006); *In re Rose*, 144 S.W.3d 661, 676 (Tex. Rev. Trib. 2004, no appeal); *see also* Orr, *supra* note 35, at 9-13.

CONCLUSION

A precedential ranking this detailed is far from necessary for most practitioners and mildly interesting to even less.[242] However, in those instances where a writer seeks to distinguish, discredit, or otherwise cast doubt upon the validity of a particular opinion, or random, academic curiosity triumphs over a lawyer's better sense, this comprehensive Order of Citation will hopefully prove instructive.

[242] The author wishes to extend a note of thanks to Justice Nathan Hecht, Professors Jim Paulsen and Andrew Solomon at the South Texas College of Law, as well as Brandy Wingate at the Thirteenth Court of Appeals, who all graciously found this article interesting enough to ensure its accuracy transcended the limitations imposed upon it by the author.

APPENDIX A

Order of Citation

I. Texas Supreme Court equivalent

A. Authored majority opinions (Jan. 1840 (Dallam 357)-1867 (30 Tex. 374), 1871 (33 Tex. 585)-present)

B. (per curiam)

C.1 Adopted or approved opinions of the Tex. Comm'n App. (Feb. 9, 1881-Aug. 31, 1892, Apr. 3, 1918-Aug. 24, 1945)

C.2 (pet. ref'd) (writ ref'd) (June 14, 1927-present)

D. (Tex. Ct. App. 18__) (Apr. 18, 1876-Aug. 31, 1892)

II. Tex. Comm'n App. equivalent (Feb. 9, 1881-Aug. 31, 1892, Apr. 3, 1918-Aug. 24, 1945)

A. (Tex. Comm'n App. ____, holding approved)

B. (Tex. Comm'n App. ____, judgm't adopted)

(Tex. Comm'n App. ____, judgm't approved)

(Tex. Comm'n App. ____, judgm't aff'd)

III. Intermediate appellate court equivalent

A. (writ ref'd) (writ denied) (before Feb. 20, 1917)

(writ dism'd) (Sept. 1, 1892-June 30, 1917, June 14, 1927-June 19, 1987)

(writ dism'd) (Sept. 1, 1892-June 30, 1917, June 14, 1927-Feb. 28, 1939)

(writ dism'd w.o.j.) (Sept. 1, 1892-June 30, 1917, June 14, 1927-Feb. 28, 1939)

(writ dism'd judg't cor.) (Mar. 1, 1939-Aug. 31, 1941)

(writ ref'd w.o.m.) (Sept. 1, 1941-Jan. 31, 1946)

(writ ref'd n.r.e.) (Feb. 1, 1946-June 19, 1987)

B. (writ ref'd) (Feb. 20, 1917-June 13, 1927)

(writ ref'd n.r.e.) (June 20, 1987-Dec. 31, 1987)

(writ dism'd) (July 1, 1917-June 13, 1927, March 1, 1939-June 19, 1987)

(writ dism'd w.o.j.) (July 1, 1917-June 13, 1927, March 1, 1939-June 19, 1987)

(writ dism'd by agr.)

(writ granted w.r.m.)

(writ denied) (Jan. 1, 1988-Aug. 31, 1997)

(pet. denied)

(pet. struck)

(pet. dism'd)

(pet. granted, judgm't vacated w.r.m.)

(pet. dism'd by agr.)

(pet. dism'd w.o.j.)

(pet. withdrawn)

(pet. abated)

(pet. filed)

C. Published (mem. op.) (Sept. 1, 1941-Aug. 31, 1986, Sept. 1, 1997-present)

D. *holding / reasoning approved / disapproved per curiam*

IV. Non-precedential authority

A. (Tex. Comm'n App. 18__) (not precedential) (Oct. 7, 1879-Feb. 8, 1881)

B. (do not publish) (not designated for publication)

C. (___ Dist. Ct., ____ County, Tex. ____ __, ____)

D. (____, J., dissenting from denial of review) (____, J., dissenting from denial of application for writ of error)

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Plurality decisions are those in which a majority of the Court's members agree with the judgment or result, but no single rationale carries the support of at least five of the concurring justices. As a result, a minimum of three opinions, none with the support of more than four justices, come together to form a plurality decision. The lead opinion announces the outcome decided by at least five justices and proffers one of several competing rationales. *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (explaining that a plurality opinion is one that "attract[s] more concurrences than d[oes] any other opinion leading to the result"). Concurring opinions articulate different legal rules that justify the outcome announced in the lead opinion. Often, a dissenting opinion rejects the outcome of the lead and concurring opinions and articulates yet another legal standard.

Because there are so many moving parts in a plurality opinion, it is often difficult for litigants and construing courts to identify any controlling rule of law announced by the plurality. In an attempt to end this confusion, the United States Supreme Court adopted the "narrowest grounds" doctrine in *Marks v. United States*, 430 U.S. 188 (1968). In *Marks*, the Supreme Court held:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

430 U.S. at 193 (internal quotation omitted). Although the "narrowest grounds" test is the only model of interpretation recognized by the Supreme Court, the Court has never fully explained what it entails. One court has opined that the "narrowest grounds" are simply understood as the "less far-reaching common ground." *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001). And commentators have opined that "[o]ne way to determine the 'narrowest grounds' is to look for the opinion 'most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules.'" Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420-21 (1992) (quoting Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980)).

PSS v. NEW CENTURY: ACCORDING PRECEDENTIAL VALUE TO JUSTICE WHITE'S NARROWEST-GROUND CONCURRENCE IN *COMMONWEALTH COATINGS*

The Fifth Circuit has applied *Marks*' narrowest grounds doctrine in a number of cases with little discussion.[243] However, in its en banc decision in

[243] *E.g. U.S. v. Hernandez*, 200 Fed. Appx. 283, 286 (5th Cir. 2006) (applying Justice Kennedy's concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004)); *Staley v. Harris County*, 461 F.3d 504, 512 (5th Cir. 2006) (finding that Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005), is controlling); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 182 (5th Cir. 2003) (concluding that Justice Kennedy's concurrence in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), was a vote necessary to the Court's judgment); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 (5th Cir. 2003) (concluding that Justice O'Connor's opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is binding precedent); *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 370 (5th Cir. 1998) (finding that Justice Souter's concurrence is the narrowest opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)); *Stegmaier v. Trammell*, 597 F.2d 1027, 1033 (5th Cir. 1979)

Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007), cert. denied, 127 S. Ct. 2943 (2007) ("*PSS*"), the Fifth Circuit shed some light on how it determines the precedential value of plurality opinions using the narrowest grounds analysis. *PSS* was an arbitration case in which the losing party sought to have the award vacated because the arbitrator failed to disclose that he and an attorney for one of the prevailing parties had been two of 34 attorneys that had represented the same client in unrelated litigation seven years earlier. The legal basis for vacating the award was the arbitrator's alleged "evident partiality," one of the very few statutory grounds for vacating an arbitration award. The district court vacated the award, a three-member panel affirmed the vacatur, and the en banc panel reversed. *Id.* at 280. The Fifth Circuit held that vacatur was not warranted because the prior co-counsel relationship was so trivial that it did not amount to evident partiality. *See id.* at 283.

The en banc Court relied heavily on the Supreme Court's 1968 plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co*., 393 U.S. 145 (1968), the only Supreme Court case that addresses the standard for determining arbitrator bias as a ground for vacating an arbitration award. Acknowledging its difficult task of determining the precedential value of the splintered opinions in the case, the Fifth Circuit commented that "*Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid." *See PSS*, 476 F.3d at 281.[244]

While six of the Supreme Court's members agreed that the arbitration award should have been set aside because of the arbitrator's evident partiality, no single legal rule carried the support of at least five of the Justices. Justice Black, who authored the opinion of the Court with the support of three other justices, applied the same legal standards that apply to Article III judges and imposed a requirement that "arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings*, 393 U.S. at 149. Thus, according to Justice Black, arbitrators "not only must be unbiased but also must avoid even the appearance of bias" (the "appearance of bias standard"). *Id*. at 150.

Justice White, who was joined by Justice Marshall in his concurring opinion that supplied the fifth vote in the case, rejected Justice Black's rationale, but did so very subtly. Justice White opened his opinion by stating that he was "glad to join [his] Brother Black's opinion in this case," but that he desired "to make these additional remarks." Justice White rejected the idea that the same standard that applies to Article III judges applies to arbitrators by *redefining* what the lead opinion said. Justice White wrote: "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Id*. at 150 (White, J. concurring).

Moreover, under Justice White's test, arbitrators will not be automatically disqualified for failing to disclose a business relationship with the parties where the relationship is trivial or insubstantial. *Id*. at 152. Justice White practically concluded that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id*. at 151. This also differed from Justice Black's lead opinion, which found it irrelevant that the arbitrator received only trivial amounts of money from his business relationship. *See id.* at 148 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

(concluding that Justice Stewart's narrow position in *Elrod v. Burns*, 427 U.S. 347 (1976), is the Court's holding).

[244] As a general rule, a simple majority decision is announced as "the Opinion of the Court" and a lead plurality opinion is introduced: "Justice X, joined by Justice Y, announced the judgment and an opinion of the Court." *Commonwealth Coatings*, a 4-2-(3) decision, has commonly been described as a plurality opinion despite the fact that the lead opinion was announced with the terminology customarily reserved for a simple majority. *See id*. at 282 (collecting cases and noting that "[a] majority of circuit courts have concluded that Justice White's opinion did not lend majority status to the plurality opinion").

In *PSS*, the Fifth Circuit joined a majority of circuits and rejected Justice Black's "appearance-of-bias standard." *PSS*, 476 F.3d at 282. Citing *Marks*, the Fifth Circuit concluded that "Justice White's concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black's opinion, and it becomes the Court's effective *ratio decidendi*." *Id.* (citing *Marks*, 430 U.S. at 193-94).

In its effort to determine which of the two opinions articulated the less far-reaching common ground, the Court acknowledged that there were two possible readings of *Commonwealth Coatings*. First, if the Court focused primarily on Justice White's statement that he was "glad to join" the plurality, his opinion could be deemed reconcilable with that of Justice Black. Only under that view would the plurality opinion have binding effect.

However, noting that Justice White's joinder was significantly qualified, the Court found a second reading more persuasive. Under that view, the Court focused on Justice Black's employment of an egregious set of facts as the vehicle to require broad disclosure of "any dealings that might create an impression of possible bias," whereas Justice White hewed closely to the facts and found it "enough for present purposes to hold" that an arbitrator must disclose his relationship when he has "a substantial interest in a firm which has done more than trivial business with a party." *Id*. (citing *Commonwealth Coatings*, 393 U.S. at 149, 151-52). Read that way, the Court was able to accord scope to the full White opinion as opposed to his introductory "glad to join" sentence.

Thus, because Justice White's concurrence was based on a narrower ground than Justice Black's opinion, the Fifth Circuit found that the concurrence controlled and concluded that "in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceedings." *Id*. at 283. The Court reversed the district court's vacatur of the arbitration award and remanded the case to the district court for consideration of additional grounds that had not been decided.

Five judges strongly dissented from the en banc opinion, taking the position that the Court had effectively "overruled" the Supreme Court's decision in *Commonwealth Coatings*. Characterizing Justice Black's opinion as the majority and arguing that it was reconcilable with Justice White's concurrence, the dissent concluded that Justice Black's appearance-of-bias standard was controlling precedent. *Id*. at 286-87 (Reavley, J., dissenting).

Like the dissent in *PSS*, the Texas Supreme Court has followed the broader reading of *Commonwealth Coatings* as articulated by Justice Black. *See Burlington N. R.R. Co. v. TUCO, Inc*., 960 S.W.2d 629, 633 (Tex. 1997) (rejecting narrow standards adopted by federal courts that treat Justice Black's opinion as a mere plurality).

WHEN THE SWING VOTE CONTROLS

Often a concurring opinion will be given precedential effect when a four-member coalition seeks to obtain a fifth, or "swing" vote. When the concurring Justice is necessary to effect a majority, a simple concurrence often represents a concession, in the absence of which the case would be decided differently. *See* Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2097 (Dec. 1995).

The Fifth Circuit has embraced this view, explaining: "While there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *J&B Entm't, Inc. v. City of Jackson, Miss*., 152 F.3d 362, 370 (5th Cir. 1998); *see also ANR Coal Co., Inc. v. Cogentrix*, 173 F.3d 493, 498 (4th Cir. 1999); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) (applying the narrowest grounds analysis to *City of Los Angeles v. Alameda Books, Inc*., 535 U.S. 425 (2002) and concluding that the rationale contained in Justice Kennedy's concurrence was

critical because he supplied the deciding vote necessary to the Court's judgment); *Muir*, 688 F.2d at 1045 (finding that Justice White's concurring opinion supplied the fifth vote and constituted the narrowest grounds for the judgment in *Board of Educ. v. Pico*, 457 U.S. 853 (1982)). Indeed, this precise scenario was present in *Commonwealth Coatings.* *See ANR*, 173 F.3d at 498 (listing cases and noting that "[b]ecause the vote of either Justice White or Justice Marshall was necessary to create a majority, courts have given this concurrence particular weight).

WHEN NO COMMON DENOMINATOR EXISTS

There are some instances in which the narrowest grounds analysis will not apply. According to the Fifth Circuit, "[t]he *Marks* 'narrowest grounds' interpretation of plurality decisions comprehends a least common denominator upon which all of the justices of the majority can agree." *See United States v. Eckford*, 910 F.2d 216, 219 (5th Cir. 1990); *see also United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) ("*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions."); *Martinez v. State*, 204 S.W.3d 914, 918-20 (Tex. App.—Corpus Christi 2006, pet. granted) (holding that "[w]hen the plurality and concurring opinions take distinct approaches, and there is no narrowest opinion representing the common denominator of the Court's reasoning, *Marks* becomes problematic," and that "*Marks* does not apply when the various opinions supporting the Court's decision are mutually exclusive").[245]

[245] In *Martinez v. State*, the Corpus Christi Court of Appeals disagreed with the Fifth Circuit's determination that Justice Kennedy's concurrence was the holding in *Seibert*, surmising that the Fifth Circuit could find an internal rule coursing through the plurality and Justice Kennedy's concurrence that it could not. *See* 204 S.W.3d 914, 918-20 (Tex. App.—Corpus Christi 2006, pet. granted) (citing *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Hernandez*, 200 Fed. Appx. 283, 286 n.1 (5th Cir. 2006) (per curiam)).

Indeed, the Supreme Court itself has observed that "[t]his test is more easily stated than applied," adding, "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *See Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

For example, *United States v. Eckford* involved the collateral use of uncounseled misdemeanor convictions at sentencing, which had been addressed by the plurality in *Baldasar v. Illinois*, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring). The Court held that, in the absence of an underlying platform of common agreement among the majority justices in *Baldasar*, it was precluded from engaging in a fresh examination of the official position of the Supreme Court. *Eckford*, 910 F.2d at 219. Concluding that *Baldasar* did not provide persuasive influence, the Fifth Circuit relied on its own precedent in holding that uncounseled misdemeanor convictions could be considered in imposing the sentence under the facts involved. *Id*. at 220.

The Fifth Circuit similarly refused to consider the rationale adopted by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 363 (1987), when he wrote in his concurrence that student-body diversity is a legitimate justification for a race-based admission criterion at the University of Texas law school. *See Hopwood v. State of Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (citing *Bakke).* The Court explained that although *Bakke* stands for the proposition that the government can use racial preferences under some circumstances, no controlling rationale emerged from that decision to delineate precisely what those justifying circumstances are. *Id*. at 275. Therefore, in deciding whether the system of racial preferences employed by the University of Texas was constitutional, the court was free to determine which among the competing rationales offered by the Justices in *Bakke* was constitutionally valid. *Id*.

In so holding, the Court expressly disagreed with the Ninth Circuit's holding that Justice Powell's

diversity rationale was binding Supreme Court precedent because it provided "the narrowest footing upon which a race-conscious decision-making process could stand." *Id*. at 275 n.66 (citing *Smith v. Univ. of Washington*, 233 F.3d 1188, 1199-1200 (9th Cir. 2000)). The Fifth Circuit took issue with the Ninth Circuit's decision to adopt Justice Powell's rationale as binding because (1) no justice other than Justice Powell even discussed diversity; and (2) despite the fact that no other Justice joined that part of Justice Powell's concurrence, the Ninth Circuit hypothesized that Justice Brennan and three other justices "would have embraced [the diversity rationale] if need be." *Id*. (citing *Smith*, 233 F.3d at 1199-1200). As the Fifth Circuit explained, "we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held." *Id.*

Federal district courts in Texas have also struggled with the practical limitations of *Marks*. In a recent decision involving the interpretation of "navigable waters" under the Clean Water Act, the Northern District of Texas refused to follow any of the Justices' legal reasoning from the Supreme Court's plurality decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). *See United States v. Chevron*, 437 F. Supp. 2d 605, (N.D. Tex. 2006) (citing *Rapanos*). Because *Rapanos* did not provide a clear legal standard and because Justice Kennedy failed to elaborate on the meaning behind the standard he employed, the Northern District concluded that it would look to prior reasoning within the Fifth Circuit and accept Chief Justice Roberts' invitation to "'feel [its] way on a case-by-case basis.'" *Id*. at 613 (citing *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

The Supreme Court recently passed on an opportunity to clarify how plurality opinions should be interpreted when *Marks* does not easily apply, as was the case with the *Rapanos* plurality. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (combining a dissent with a concurrence to find the ground of decision embraced by the majority of the Justices in *Rapanos*). Considering the Supreme Court's denial of review in *Johnson*, litigants and courts will likely continue to have to feel their way on a case-by-case basis when *Marks* proves unworkable.

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HABEAS CORPUS/DEATH PENALTY

***Allen v. Siebert*, No. 06-1680, 128 S. Ct. 2 (2007)**

The Supreme Court ruled that an untimely application for state collateral review of a criminal conviction does not toll the federal habeas limitations period because that application is not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) provides that the federal limitations period shall not run while a "properly filed" application for state collateral review is pending. Siebert filed for state collateral relief three months after the applicable state limitations period had lapsed, and he was denied state relief on that basis. Siebert then filed a federal habeas petition, which the district court dismissed as untimely. The Eleventh Circuit reversed, reasoning that a state collateral review application that was untimely under state law could, under certain conditions, be "properly filed" for purposes of tolling the federal habeas statute.

In a per curiam opinion, the Supreme Court reversed. It rejected as immaterial the Eleventh Circuit's distinction between state statutes of limitations that are jurisdictional and those that are affirmative defenses. No matter the formal status of the state limitations period, the Court ruled, an untimely state application is not "properly filed" and does not toll the federal limitations provision under § 2244(d)(2).

CRIMINAL LAW

***Watson v. United States.*, No. 06-571, 128 S. Ct. 579 (2007)**

The Supreme Court determined that, under 18 U.S.C. § 924(c)(1)(A), a person does not "use a firearm" in a drug trafficking crime when he receives it in exchange for narcotics. After receiving a pistol in such a transaction, Watson was indicted for violating § 924(c)(1)(A). Watson pleaded guilty, but reserved the right to challenge the factual basis for his conviction and the incremental consecutive sentence of 60 months for "using" the gun. The Fifth Circuit affirmed.

With Justice Souter writing, the Supreme Court reversed the Fifth Circuit. The Court began by distinguishing two potentially dispositive Supreme Court cases interpreting § 924(c)(1)(A): *Smith v. United States* (1993) and *Bailey v. United States* (1995). It determined that *Smith* did not control because that defendant had *given*, rather than *received*, the firearm in the narcotics transaction. And it declared that its holding in *Bailey*—that a gun must be actively employed in the offense—was largely immaterial because the question before it was whether Watson employed the gun at all. The Court instead relied on plain meaning: the term "use," it reasoned, does not include accepting a gun as payment for narcotics.

Justice Ginsburg concurred, arguing that the distinction between giving and receiving a gun was not relevant, under § 924(c)(1)(A), to whether it was "used" in the transaction. She would overrule *Smith*, however, and hold that neither giving nor receiving a firearm may constitute "use" under § 924(c)(1)(A).

***Logan v. United States*, No. 06-6911, 128 S. Ct. 475 (2007)**

The Supreme Court held that a prior state conviction counts as a "violent felony" under the federal Armed Career Criminal Act (ACCA), even if it did not cause revocation of the offender's civil rights. Logan pled guilty to possessing a firearm after a prior felony. The district court applied the 15-year mandatory minimum sentence under the ACCA for having three prior "violent felony" convictions, 18 U.S.C. § 924(e), based on Logan's three Wisconsin misdemeanor convictions. Each Wisconsin

conviction was punishable for up to three years but did not cause revocation of his civil rights. A state misdemeanor may qualify as a "violent felony" if it is punishable by more than two years in jail, § 921(a)(20)(B), but Congress excluded "any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored," § 921(a)(20). Logan argued that he qualified for the "civil rights restored" exemption because the retention of rights should be treated the same as the restoration of revoked rights. The district court and Seventh Circuit rejected that view.

The Court unanimously affirmed in an opinion by Justice Ginsburg, holding that the § 921(a)(20) exemption covers only those offenders whose civil rights were both lost and restored. The Court interpreted the word "restored" according to its ordinary meaning, and its context within § 921(a)(20), as not including retention of rights that were never lost. Logan argued that interpreting § 921(a)(20) in this way is absurd because it treats less serious offenders more severely than serious counterparts who have lost their civil rights and had them restored. The Court rejected that argument, observing that other parts of § 921(a)(20) would disqualify many of those offenders from exemption, and that Wisconsin no longer punishes misdemeanors by more than two years' imprisonment. The Court also explained that Logan's view would create its own anomalies: in states where the offender's civil rights are never revoked, it would exempt *all* crimes from the ACCA; and, because misdemeanors generally do not cause revocation of rights, it would make the § 921(a)(20) exception swallow the basic provision for counting some misdemeanors as a "violent felony."

SENTENCING

***Gall v. United States.*, No. 06-7949, 128 S. Ct. 586 (2007)**

The Supreme Court ruled that a federal court of appeals reviews a district court's sentence only for an abuse of discretion without respect to whether the sentence was within the range prescribed by the Federal Sentencing Guidelines. Gall distributed ecstasy in college, but he withdrew from the associated drug distribution conspiracy after seven months, sold or used no illegal drugs since then, and held a job steadily after graduation. Three and a half years after his withdrawal, he pled guilty to conspiracy. The properly computed Guidelines range called for 30 to 37 months in jail, but the district court sentenced him to only 36 months' probation. The trial court did not sentence Gall to jail time because, it reasoned, probation reflected the seriousness of the offense, he voluntarily withdrew from the conspiracy, and his post-conspiracy conduct demonstrated that he was unlikely to return to criminal behavior. The Eighth Circuit reversed, reasoning that any sentence outside the Guidelines range had to be justified by "extraordinary circumstances."

Justice Stevens wrote for the Court in reversing the Eighth Circuit and reinstating the original sentence of probation. The Court began by explaining that its decision in *United States v. Booker* (2005) rendered the Guidelines advisory and required a court of appeals to review a district court sentence only for an abuse of discretion. It then emphasized that, while a sentencing judge must explain and justify any deviation from the Guidelines range, such a deviation does not require "extraordinary circumstances." It also rejected any mathematical rule requiring that the justification for the deviation be proportionate to its magnitude. Applying its holding to Gall's case, the Court ruled that the district judge committed no procedural error and that the Eighth Circuit was wrong to determine that the district court abused its discretion.

Justice Scalia concurred, reiterating his position that reasonableness review for anything other than a sentencing court's procedure is inherently flawed. Justice Souter also concurred, stating that the best solution to the doctrinal problems caused by *Booker* was a new set of Guidelines that provided for jury findings of all facts necessary to set the upper range of sentencing discretion.

Justice Alito wrote the principal dissent, stating that he would require judges to give some weight to the policy choices embodied by the Guidelines. Justice Thomas also dissented, incorporating by reference his dissenting opinion in *Kimbrough v. United States* (2007), *infra*.

***Kimbrough v. United States*, No. 06-6330, 128 S. Ct. 538 (2007)**

The Court held that the Guidelines applicable to crack and powder cocaine offenses were not mandatory and that a sentencing judge may consider the distortions that the crack cocaine guidelines have on sentencing. Kimbrough pleaded guilty to four offenses, including multiple offenses involving crack cocaine, and the proper Guidelines range was 19 to 22.5 years. The district court sentenced Kimbrough to 15 years, in part due to the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." The Fourth Circuit vacated the sentence, finding that a sentence outside of the proper Guidelines range is per se unreasonable when based on a disagreement with the sentencing disparity for crack and powder offenses.

In an opinion by Justice Ginsburg, the Court reversed the Fourth Circuit and upheld the sentence. It affirmed that the Guidelines for crack and powder cocaine offenses are merely advisory. The Court noted that although crack and powder cocaine have the same physiological and psychotropic effects, the Guidelines yield sentences for crack cocaine that are identical to those for 100 times the amount of powder. The Court dismissed the Government's argument that, because it represented a specific Congressional policy determination, the 100:1 ratio was an exception to *Booker's* holding that the Guidelines were not mandatory. The Court also rejected the Government's contention that unwarranted disparities would result from the ability of sentencing judges to deviate from the Guidelines based on disagreement with the 100:1 ratio. Indicating that its legal holding preserved a sufficient role for the Sentencing Commission, the Court determined that the fifteen-year sentence was not an abuse of discretion in Kimbrough's case.

Justice Scalia concurred, emphasizing that nothing in the Court's ruling should be taken to inhibit a district court from imposing a reasonable sentence after considering the factors identified in the Guidelines.

Justice Thomas dissented, repeating his disagreement with *Booker's* remedial holding that the Guidelines are advisory. He would require that all facts enhancing a sentence go to a jury. Justice Alito also dissented, incorporating his dissent from *Gall v. United States* (2007), *supra*, in which he argued that a properly computed Guidelines range should receive considerable deference. He nonetheless agreed with the majority that the level of deference afforded within-Guidelines sentences should not differ for crimes involving crack and powder cocaine.

TRANSPORTATION LAW

***CSX Transp., Inc. v. Ga. State Bd. of Equalization*, No. 06-1287, 128 S. Ct. 467 (2007)**

The Railroad Revitalization and Regulatory Reform Act (the "4-R Act") bars States from discriminating against railroads by taxing their property more heavily than they tax other commercial and industrial property in the State. The Supreme Court previously held that railroads could challenge a State's application of its method for valuing property under the 4-R Act. In this case, the Court ruled that railroads can also challenge the State's valuation methods themselves.

In 2002, Georgia's state board found that the market value of petitioner CSX Transportation's in-state railway property increased by 47 percent, which resulted in a substantial hike in CSX's property taxes. The State used a different combination of valuation methods in 2002 than it had in 2001. CSX filed suit under the 4-R Act, which authorizes district courts to enjoin a tax where the State assessed railroad property such that the ratio between the assessed and "true market value" of the property is five percent (or

more) greater than the same ratio for other commercial property in the State. CSX contended that Georgia overestimated the market value of its property, such that the railroad ratio exceeded the non-railroad ratio by far more than five percent. The district court found that Georgia did not discriminate against CSX because it used accepted valuation methods, and that the 4-R Act does not allow railroads to contest the chosen valuation method. The Eleventh Circuit affirmed.

The Court reversed in a unanimous opinion by the Chief Justice. The Court stated that courts cannot apply the 4-R Act's clear language—requiring a comparison between that the ratio of assessed-to-*market*-value for railroad and non-railroad property—without calculating the true market value of railroad property, which in turn requires scrutiny of the State's valuation methods. The Court observed that the 4-R Act draws no distinction between valuation methodologies and their application. It also makes no sense to create such a distinction: valuation is not a mathematical exercise so much as an applied science, and determinations of market value can vary widely depending on the method chosen. As a result, the Court said, disallowing courts from reviewing valuation methods would render the 4-R Act an empty command because courts would be powerless to stop States from using methods that are discriminatory. It noted that courts regularly address issues of fact such as market price, and it rejected the State's federalism pleas because Congress chose to allow courts to determine true market value.

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ADMINISTRATIVE LAW

***Houston Mun. Emp. Pension Sys. v. Ferrell*, No. 05-0587, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 154, 2007 WL 4216604 (Tex. Nov. 30, 2007) (Willett, J., not sitting)**

The issue in this case was whether employees may seek declaratory relief to declare their rights under a statute when the statute does not provide for judicial review.

Twenty-nine plaintiffs sought credits to their respective retirement accounts for time in training with the police academy. The Houston Municipal Employees Pension System (HMEPS) alleged immunity and that the plaintiffs' claims were not ripe. The trial court denied HMEPS's plea to the jurisdiction, and the First District Court of Appeals affirmed.

In an opinion by Justice Green, the supreme court reversed and rendered. HMEPS argued that Article 6243h denies pension members judicial review from pension board determinations. Plaintiffs argued they exhausted their administrative remedies and were entitled to judicial review.

According to the Court, there is no right to judicial review of an administrative order unless a statute expressly provides that right or the administrative order violates a constitutional right. That is, when a statute denies judicial review or is silent on judicial review, a party may appeal only if the administrative action violates the constitution.

Article 6243h provides that factual decisions by the pension board and the board's interpretation of the Act are "final and binding on any interested party." The Court explained that "final and binding" in the context of administrative decisions precludes judicial review. Accordingly, the Court did not address plaintiffs' claim of exhaustion of administrative remedies.

The Court also rejected the argument that plaintiffs solely sought a declaration of whether a trial court can review HMEPS's determinations. While trial courts have jurisdiction to determine their own jurisdiction, plaintiffs sought more than a determination of the trial court's jurisdiction. Plaintiffs sought a declaration of entitlement to benefits. The Court concluded the statute did not give the trial court jurisdiction to grant the relief requested.

The Court also addressed filing a non-suit in the supreme court. One plaintiff, Ferrell, filed a voluntary non-suit without prejudice on the day his response to HMEPS's petition for review was due. According to the Court, a plaintiff has an absolute right to non-suit in the supreme court if filed before all of his evidence, other than rebuttal evidence, is introduced. The Court accepted Ferrell's non-suit that mooted his appeal and his case.

Accordingly, the Court concluded that the trial court erred in denying the plea to the jurisdiction. The Court reversed and rendered, dismissing Plaintiffs' lawsuit.

Justice Brister, joined by Justice O'Neill, concurred. The concurrence noted the number of times the Act had been amended demonstrated clear legislative intent for pension boards to have complete discretion. The concurrence recognized that it would be a different scenario if a plaintiff alleged that a pension board violated the Act. Here, plaintiffs only alleged that the board misinterpreted the Act.

ALTERNATIVE DISPUTE RESOLUTION

***In re U.S. Home Corp.*, 236 S.W.3d 761 (Tex. 2007) (per curiam) (orig. proceeding)**

In a per curiam opinion, the Texas Supreme Court held that no evidence supported any of the asserted defenses to enforcement of an arbitration clause and conditionally granted mandamus relief from a trial court order refusing to compel arbitration.

The Court rejected the homeowners' argument that arbitration clauses in home sale contracts and warranties were made procedurally unconscionable by the builder's refusal to deal with purchasers unless they agreed to the arbitration clauses.

The Court noted that adhesion contracts were not automatically unconscionable and held that proving the builder refused to contract with the plaintiffs unless they agreed to arbitration was not enough to prove unconscionability. The Court also held that a party cannot avoid an arbitration clause merely because it was printed on the back of a single-sheet contract, and that the contracts were supported by mutual consideration because both sides consented to arbitration.

Finally, the Court held the plaintiffs had to arbitrate with the defendants who were not a party to the contracts with the builder because the nonsignatories' liability arose from and must be determined by reference to the parties' contract.

APPELLATE JURISDICTION—AFFIDAVIT OF INDIGENCE

***Springer v. Springer*, No. 06-0382, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 103, 2007 WL 3230314 (Tex. Nov. 2, 2007) (per curiam)**

The issue in this case was whether failure to timely file an affidavit of indigence is jurisdictional. While incarcerated, the husband timely filed a notice of appeal, but failed to pay the filing fee or to file an affidavit of indigence. One month after filing the notice of appeal, the husband filed an affidavit of indigence, as required by Texas Rule of Appellate Procedure (TRAP) 20.1(c)(1).

Two months later, the Waco Court of Appeals notified the husband he had ten days to pay the filing fee or his appeal would be dismissed. After the husband failed to pay the filing fee the court of appeals dismissed the appeal.

The Texas Supreme Court reversed and remanded. The Court noted that under TRAP 25.1(b), an affidavit of indigence is no longer jurisdictional. In addition, TRAP 44.3 prohibits dismissal for formal procedural defects without giving an appellant time to cure. Accordingly, the failure to file an affidavit of indigence does not support dismissal unless an appellant fails to cure after reasonable notice.

The husband corrected the defect without requiring additional time from the court of appeals. Accordingly, the Texas Supreme Court granted the petition and reversed and remanded to the court of appeals.

***Sprowl v. Payne*, 236 S.W.3d 786 (Tex. 2007) (per curiam)**

The issue in this case was whether failure to timely file an affidavit of indigence is jurisdictional. A week after timely filing a notice of appeal, Sprowl filed an affidavit of indigence. The trial court sustained the clerk's contest to the timeliness of Sprowl's affidavit. The Dallas Court of Appeals dismissed the appeal when Sprowl failed to file proof that she had paid or made arrangements to pay for the record.

The Texas Supreme Court reversed and remanded. The Court noted that under TRAP 25.1(b), an affidavit of indigence is no longer jurisdictional. In addition, TRAP 44.3 prohibits dismissal for formal procedural defects without giving an appellant time to cure. Accordingly, the failure to file an affidavit of indigence did not support dismissal unless an appellant fails to cure after reasonable notice.

Sprowl corrected the defect in her notice of appeal by filing an affidavit of indigence. Accordingly,

the Court granted the petition and reversed and remanded to the court of appeals.

ATTORNEY'S FEES

***Bossier Chrysler-Dodge II, Inc. v. Rauschenberg*, 238 S.W.3d 376 (Tex. 2007) (per curiam)**

The Waco Court of Appeals reduced the trial court's damage award by more than eighty percent but affirmed the attorney's fees award. Relying on *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006), the Texas Supreme Court reversed. In Barker, the Court noted that when a damage award is reduced on appeal, an attorney's fees award should be retried unless there is reasonable certainty that the jury was not significantly influenced by the erroneous damages. Accordingly, the Court reversed and remanded to the court of appeals to consider the attorney's fees award.

CLASS CERTIFICATION

***In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759 (Tex. 2007) (per curiam) (orig. proceeding)**

In a per curiam opinion, the Texas Supreme Court granted mandamus relief from discovery and sanctions orders in a putative class action because the El Paso Court of Appeals' reversal of class certification rendered the class-wide discovery superfluous and the class-wide sanctions incongruous.

Relying on *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 185 (Tex. 1999), the Court held trial courts should limit pre-certification discovery to the particular issues governing certification in each case, considering factors such as importance, benefit, burden, expense, and time needed to produce the proposed discovery. In this case, the Court noted the trial court abused its discretion by compelling discovery that was not narrowly tailored to the relevant dispute. The Court also held the sanctions order was unjust because the plaintiffs were neither prejudiced nor entirely innocent.

***Best Buy Co. v. Barrera*, No. 07-0028, ___ S.W.3d ___, 51 Tex. Sup. J. 170, 2007 WL 4216615 (Tex. Nov. 30, 2007) (per curiam)**

In a per curiam opinion, the Texas Supreme Court held that individual issues would predominate in a suit for the equitable claim of "money had and received," making the claim inappropriate for class certification.

Barrera sued Best Buy, Inc. ("Best Buy") for the equitable claim of "money had and received" over its policy of charging a fifteen percent restocking fee and argued that common issues would predominate because the is a uniform, automatic, mandatory fee that was charged in the exact same way for each member of the class, regardless of his or her individual circumstances.

Best Buy claimed that class certification was not appropriate because it was entitled to make an individualized inquiry into each class member's actual knowledge regarding the restocking fee. Specifically, Best Buy wanted to show that some customers purchased merchandise with the intention of returning it and that at least some customers were aware of the restocking policy and voluntarily agreed to it.

The Texas Supreme Court reversed and remanded, holding that, in order to recover on a claim for "money had and received," the class members must demonstrate that the restocking fee "in equity, justice and law" belongs to them and that Best Buy was entitled to show that in equity and good conscience that individual claimants should not recover. It thus concluded that Barrera failed to satisfy TRAP 42(b)(3)'s predominance requirement because she failed to prove that individual issues governed the class claim for "money had and received."

FAMILY LAW—PARENTAL RIGHTS

***In re J.A.J.*, No. 07-0511, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 107, 2007 WL 3230169 (Tex. Nov. 2, 2007)**

The issue in this case was whether the reversal of a parental termination order affects an unappealed conservatorship appointment.

The trial court terminated the mother's parental rights to J.A.J. and appointed the Department of Family and Protective Services as J.A.J.'s conservator. The mother only appealed the termination portion of the order. The Fourteenth District Court of Appeals reversed both the termination and conservatorship appointment.

In an opinion by Justice O'Neill, the supreme court reversed. Mother argued that challenging termination also included a challenge of the conservatorship appointment.

The Court disagreed and concluded that several factors indicated the two issues were separate. First, the requirements for parental termination are different than the considerations in appointing a managing conservator. Termination requires a trial court to find one or more of the listed acts and omissions in Family Code Section 161.001(a) as a basis for termination. In contrast, conservatorship is not based on parental acts or omissions. Conservatorship appointments are instead based upon whether appointing a parent as conservator would significantly impair the child's physical or emotional well-being. According to the Court, the evidence could support appointing a non-parent as a conservator, but still not support termination.

Second, termination and conservatorship appointments are based on different levels of proof. Terminations must be based on clear and convincing evidence, while conservatorship appointments are based on a preponderance of the evidence.

Finally, the Court rejected the argument that de facto terminations would occur where a parent successfully appealed termination but failed to appeal conservatorship. According to the Court, trial courts retain jurisdiction to modify conservatorship and may modify conservatorship if in the child's best interest and if the parent's or child's circumstances materially and substantially change. Accordingly, the Court granted the Department's petition and reversed.

HEALTH CARE LIABILITY ACT

***Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778 (Tex. 2007)**

The issue in this summary judgment proceeding was whether the two-year statute of limitations in Section 10.01 of former Article 4590i of the Revised Civil Statutes violates the open courts provision when a guardian files a lawsuit on behalf of an incapacitated plaintiff against some but not all defendants.

During a routine surgery, Yancy went into cardiac arrest due to an alleged failure to monitor her oxygen, rendering her comatose. Yancy's guardian timely sued several defendants, and after the two-year statute of limitations had run, the guardian sued United Surgical Partners International, Inc. ("United Surgical") and others.

United Surgical moved for summary judgment contending limitations barred the guardian's claims. In response, the guardian presented summary judgment evidence that Yancy had been comatose since the surgery and that Yancy's incapacity tolled the statute of limitations. The guardian further argued that not tolling the statute of limitations in this case violated the Open Courts provision. The trial court granted United Surgical and the other defendants' motions for summary judgment. The Dallas Court of Appeals affirmed.

In a unanimous opinion by Chief Justice Jefferson, the Texas Supreme Court affirmed. The Court first analyzed the burden of proof to negate an open courts violation. The guardian argued that, like the discovery rule, a defendant must negate an open courts violation allegation. The Court disagreed and concluded that a plaintiff

who raises the open courts provision to defeat limitations bears the burden to raise a fact issue.

The Court next addressed Yancy's incapacity. The guardian presented evidence that plaintiff's condition occurred as a result of the surgery and that she remained in a coma since the surgery. In reviewing the summary judgment evidence, the Court concluded that the evidence supported the inference, and raised a fact issue regarding Yancy's mental incapacity after the surgery.

On the open courts issue, the Court first noted that Section 10.01 expressly prohibited tolling based on Yancy's minority or incapacity. A statute violates the open courts provision if: (1) there is a cognizable, common-law claim that the statute restricts; and (2) the restriction is unreasonable or arbitrary when weighed against the statute's purpose.

The Court distinguished the open courts provision from the discovery rule. The discovery rule defers accrual of a cause of action until the plaintiff knew, or with reasonable diligence should have known, the facts giving rise to a claim. The open courts provision gives plaintiffs a reasonable time to discover their injuries and file a lawsuit; it does not toll limitations. Under the open courts provision, courts then must determine what constitutes a reasonable time to discover injuries and file suit.

According to the Court, a plaintiff cannot obtain relief under the open courts provision if he fails to use diligence and sue within a reasonable time after learning of the alleged wrong. The guardian failed to show that there was no reasonable opportunity to discover the alleged wrong and sue all defendants within the limitations period. Yancy's injury occurred on one day and her guardian timely sued some of the defendants. Due process was not implicated when the guardian timely hired a lawyer and timely sued some of the defendants.

In affirming the court of appeals' judgment, the Court concluded that Section 10.01 was constitutional as applied and that the open courts provision did not save Yancy's claims barred by limitations

***Ogletree v. Matthew*s, No. 06-0502, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 165, 2007 WL 4216606 (Tex. Nov. 30, 2007)**

The issue in this interlocutory appeal was whether a defendant can appeal when a trial court denies a motion to dismiss and grants a plaintiff time to cure a timely, but deficient, expert report.

In a health care liability claim against their doctor and hospital, plaintiffs timely filed a radiologist's expert report directed to doctor's conduct and reports from two nurses directed to hospital's conduct.

The doctor timely objected to the sufficiency of the radiologist's report and sought dismissal. The hospital failed to timely object but nevertheless sought dismissal. The hospital argued that because nurses could not offer opinions on medical causation, their reports were not reports at all. Thus, the hospital did not have to object.

The trial court agreed that the radiologist's report was deficient and granted plaintiffs 30 days to cure. The trial court denied the doctor's motion to dismiss. The trial court also denied the hospital's motion, concluding that the nurse's reports sufficiently implicated the hospital's conduct and that hospital waived its right to seek dismissal by failing to timely object. Both the doctor and hospital filed a joint interlocutory appeal, which the Austin Court of Appeals affirmed.

In an opinion by Chief Justice Jefferson, the Texas Supreme Court affirmed. The Court noted the relevant provisions of Section 74.351 of the Civil Practices & Remedies Code. If a plaintiff in a health care liability claim fails to serve an expert report within one hundred and twenty days of filing suit, a trial court shall grant a defendant's motion to dismiss. An order denying all or part of a motion to dismiss is appealable. A defendant whose conduct is implicated by a plaintiff's expert report must object to the report's sufficiency within twenty-one days or any objections are waived. If a trial court concludes

that a report is deficient, it may grant one thirty-day extension to cure. An order granting a thirty-day extension cannot be appealed.

The doctor argued that a radiologist could not offer an expert opinion regarding a urologist's standard of care. Accordingly, the plaintiff's report constituted no report and the trial court had no discretion to grant a thirty-day extension to cure. The Court disagreed. According to the majority, an absent report is different from a deficient report. When no report is served, trial courts have no discretion but to dismiss. A deficient report, however, gives a trial court discretion to grant a thirty-day extension to cure. To allow the granting of an extension to cure to be appealed violates Section 51.014(a)(9) and forces a court of appeals to review a report that will be cured.

The Court concluded that if an extension to cure is granted and a motion to dismiss is denied, the trial court's order is not reviewable. Accordingly, the Court concluded that the court of appeals lacked jurisdiction over doctor's appeal. The Court also agreed that the trial court correctly denied hospital's motion to dismiss based on waiver.

The Court affirmed the court of appeals' judgment.

Justice Willett concurred, and explained that another category of reports exists beyond the two identified by the majority. The majority categorized reports as absent reports or deficient reports. The concurrence pointed out that some reports may exist but be so "utterly lacking that, no matter how charitably viewed, it simply cannot be deemed an 'expert report' at all, even a deficient one." Such reports warrant dismissal just as an absent report. As an example, Justice Willett opined that a report that omits the required statutory elements and that makes no attempt to demonstrate liability would constitute no report at all.

INSURANCE

***Nat'l Plan Adm'rs, Inc., v. Nat'l Health Ins. Co.*, 235 S.W.3d 695 (Tex. 2007)**

The Texas Supreme Court held that a third-party administrator of an insurance company's policies did not owe a general fiduciary duty to an insurer that would prohibit the administrator from rolling the insurer's policies to another insurer.

In 1995, CRS Marketing Agency, Inc. (CRS) began marketing cancer policies underwritten by National Health Insurance Company ("National Health"). National Plan Administrators, Inc. (NPA), a corporation wholly owned by CRS, administered the policies.

In 1999, National Health informed NPA that National Health would no longer underwrite CRS-marketed cancer policies and that it had found a buyer to purchase the existing policies. The potential buyer would administer CRS's policies itself instead of using NPA. National Health gave NPA ninety days to find another buyer.

NPA also administered cancer policies for Hartford Life Insurance Company ("Hartford"). NPA approached Hartford about purchasing National Health's policies. In order for Hartford to evaluate the offer, NPA sent Hartford what National Health contends was confidential information as to National Health's policyholders and premiums. Hartford declined to purchase all of National Health's cancer policies, but agreed to offer replacement policies to National Health's insureds without requiring evidence of insurability so long as the insureds were "actively at work."

Ultimately, most of National Health policies were replaced by Hartford policies. The policies that remained with National Health were primarily those of insureds who were not "actively at work."

National Health sued NPA, CRS, and Hartford. NPA contended that it did not owe National Health a general fiduciary duty and objected to the breach of fiduciary duty question and

instructions submitted to the jury on the basis that the question and instructions inquired about a general fiduciary duty. The trial court overruled NPA's objection and the jury found that NPA had breached its fiduciary duty.

NPA (and CRS, pursuant to the jury's finding that NPA and CRS were a single business entity) appealed and the Austin Court of Appeals affirmed, concluding that NPA owed a general fiduciary duty to National Health.

The Texas Supreme Court reversed and rendered judgment that National Health take nothing from NPA or CRS. The Court held that neither the Insurance Code nor the parties' agreement imposed a general fiduciary duty on NPA and that the jury's answer to the breach of fiduciary duty question was thus immaterial and could not support a judgment.

***Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007)**

This certified question from the Fifth Circuit asked whether one insurer owed a duty to another insurer, where the two insurers—providing the same insured primary insurance liability coverage—cooperatively assumed the defense of the suit against their common insured and the case settled for an amount one of the insurers contended was excessive.

Two insurers, Liberty Mutual Insurance Co. ("Liberty Mutual") and Mid-Continent Insurance Co. ("Mid-Continent"), provided the same insured primary insurance liability under policies with $1 million limits and standard provisions. Liberty Mutual also provided the insured coverage under a $10 million excess policy. The two insurers admitted coverage and cooperatively assumed the defense of the suit against their common insured.

Liberty Mutual procured an offer to settle for $1.5 million (which the Fifth Circuit deemed reasonable) and demanded that Mid-Continent contribute $750,000. But Mid-Continent valued the case at no more than $300,000 (which the Fifth Circuit deemed unreasonable) and contributed only $150,000. The case ultimately settled for $1.5 million, with Liberty Mutual funding $1.35 million of the settlement.

The Texas Supreme Court held that there is no duty of reimbursement between co-primary insurers. The Court also held that the insured did not have any rights to which Liberty Mutual could be subrogated because the insured had no common law cause of action against Mid-Continent and, since the insured was fully indemnified, it had no rights to recover an additional pro rata portion of the settlement from Mid-Continent.

Justice Willett concurred to enumerate additional reasons why Texas law should not recognize a claim by one primary insurer against another in these circumstances.

***Mid-Century Ins. Co. of Tex. v. Ademaj*, No. 05-0016, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 146, 2007 WL 4216599 (Tex. Nov. 30, 2007) (Hecht, J., not sitting)**

In this declaratory judgment action, the Texas Supreme Court held that insurers may lawfully collect Texas Automobile Theft Prevention Authority (the "Authority") fees from auto insurance policyholders without including the fees in its Article 5.101 rate-filings.

Ademaj brought a class action suit against Mid-Century Insurance Co. ("Mid-Century") and Texas Farmers Insurance Company seeking a declaratory judgment on the manner in which Mid-Century could lawfully recoup the legislatively imposed Authority fee.

Ademaj alleged the Authority fee must be included in the Article 5.101 rate filed with the insurance commissioner. Article 5.101 authorizes the commissioner to set a benchmark rate for each line of personal automobile insurance in Texas. Under Article 5.101, once the commissioner establishes acceptable rate ranges for each line of insurance, insurers must file detailed information on proposed rates, which are presumed valid if falling within the commissioner's set rate ranges.

Ademaj filed a motion for summary judgment that Mid-Century illegally collected the Authority fee because it was not included in Mid-Century's Article 5.101 rate-filing. The insurers countered with their own motion for summary judgment, alleging that Article 21.35B of the Insurance Code, which outlines the payments insurers may collect from insureds, authorized them to charge the Authority fee as an expense and that they were therefore not required to include the fee in their Article 5.101 rate-filing.

The trial court agreed with Ademaj and granted his motion for summary judgment. The Tyler Court of Appeals affirmed, holding that insurers are required to include the Authority fee in their Article 5.101 rate-filings with the commissioner.

The Texas Supreme Court reversed and rendered, holding that insurers were not required to include the Authority fee in their Article 5.101 filings because the fee did not fit within Article 5.101's flexible rating program. The Court held that Article 21.35B authorized the collection of certain fees and that the Authority fee could thus fall under either Articles 5.101 or 21.35B. The Court also noted that the commissioner had decided, in Article 5.205(b), that the Authority fee should not be governed by Article 5.101 (Article 5.205(b) directs insurers to collect the Authority fee from policyholders and simply notify them that the fee was being collected "in addition to the premium due" under the policy.).

Justice O'Neill, joined by Justice Medina, concurred. O'Neill disagreed with the majority holding that Article 21.35B authorized the collection of certain fees. O'Neill argued that insurers may charge their policyholders for the items listed in Article 21.35B only if the charge was either included in the insurer's rates under Article 5.101 or otherwise authorized by the Legislature or commissioner. Nevertheless, O'Neill agreed that, in Article 5.205, the commissioner empowered insurers to pass the Authority fee directly to insureds.

PROBATE CODE

***A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704 (Tex. 2007)**

The Texas Supreme Court rejected the argument that Section 439(a) of the Texas Probate Code barred the plaintiff's negligence and breach of contract claims against a financial institution.

A father and his daughter attempted to transfer funds from the father's existing account to a joint tenancy with right of survivorship account, delivering all of the required documentation to A.G. Edwards. However, the joint account agreement was lost and the funds were not transferred. When the father died, the daughter attempted to access the account, but when A.G. Edwards was unable to locate the joint account agreement, it froze the account.

The daughter sued A.G. Edwards for conversion, negligence, fraud, negligent misrepresentation, breach of contract, and breach of fiduciary duty. A jury found for the daughter on all six claims and the court awarded attorney's fees for all the claims.

A.G. Edwards appealed, claiming that Section 439(a) of the Texas Probate Code barred the daughter from seeking ownership of the joint account funds. Section 439(a) governs controversies over the beneficial ownership of the sums in an account between parties. Pursuant to Section 439(a), for a party to have a right of survivorship in a joint account upon the death of the other joint owner, the right must be included in a written agreement signed by the decedent.

The Texas Supreme Court affirmed with respect to A.G. Edwards' liability, holding that Section 439(a) did not apply in this case because the dispute was not over whether A.G. Edwards incorrectly paid the funds, but rather whether A.G. Edwards breached a contract and negligently failed to set up the account.

The Court also held that attorneys' fees should have been segregated because the plaintiff brought some claims for which attorneys' fees

were not recoverable and reversed and remanded for a new trial on attorney's fees.

SOVEREIGN IMMUNITY

***Lamesa Indep. School Dist. v. Booe*, 235 S.W.3d 710 (Tex. 2007) (per curiam)**

The issue in this case was whether Section 11.151(a) of the Texas Education Code, which provides that "[t]he trustees of an independent school district constitute a body corporate and in the name of the district may . . . sue and be sued" waives a school district's sovereign immunity. The trial court held that it did, giving four different reasons. The Eastland Court of Appeals affirmed, holding that immunity was waived under 11.151(a), but did not reach the other three bases for lack of jurisdiction.

In a per curiam opinion, the Texas Supreme Court noted that, since the court of appeals issued its opinion, it had issued two opinions, *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist*., 197 S.W.3d 390 (Tex. 2006) holding that Section 11.151(a) is not a clear waiver of immunity.

Relying on *Tooke* and *Satterfield*, the Court reversed and remanded the case to the court of appeals to consider the remaining issues. The Court did not address whether new Sections 271.151-160 of the Local Government Code retroactively waived sovereign immunity for certain claims against local government entities, including school districts, because that issue was not raised. *Tex. Parks and Wildlife Dep't v. E.E. Lowery Realty, Ltd*., 235 S.W.3d 692 (Tex. 2007) (per curiam)

In a per curiam opinion, the Texas Supreme Court applied its recent decision in *Texas A&M University Sys. v. Koseoglu*, 233 S.W.3d. 835 (Tex. 2007), and held that Section 51.014(a)(8) of the Civil Practices and Remedies Code provided the Waco Court of Appeals with jurisdiction to consider the appeal of government employees named as codefendants in the suit.

Lowery sued the Texas Parks and Wildlife Department (TPWD) and two of its employees, Wills and Hammitt, after a fire damaged Lowrey's storage facility. Lowery alleged negligence claims relating to Wills's and Hammitt's installation of a radio, siren, and lights on a TPWD patrol boat stored in Lowery's facility, and alleged that TPWD breached its storage contract by refusing to pay for damages caused by the fire.

TPWD, Wills, and Hammitt filed a joint plea to the jurisdiction, contending that Lowery's claims were barred by sovereign immunity. The trial court denied the plea and TPWD, Wills, and Hammitt filed interlocutory appeals.

The Waco Court of Appeals held that Wills and Hammitt, as employees of a government unit, did not have the right to an interlocutory appeal and that, although Lowery's claims against TPWD fell outside of any waiver of sovereign immunity, the case should be remanded to the trial court to allow Lowery an opportunity to amend its pleadings.

The Texas Supreme Court reversed and rendered judgment dismissing all of Lowery's claims because it held the court of appeals had jurisdiction pursuant to Section 51.014(a)(8) to consider the appeal of the government employees and that Lowery's claims against TPWD, Wills, and Hammitt were incurably defective.

TEXAS WHISTLEBLOWER ACT

***Montgomery County, Tex. v. Park*, No. 05-1023, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 160, 2007 WL 4216605 (Tex. Nov. 30, 2007)**

The Texas Supreme Court held that a personnel action is "adverse" under the Texas Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act.

Park was a patrol lieutenant with the Montgomery County Sheriff's Department who also coordinated, for no additional pay, the hiring of off-duty deputies for private events at Montgomery County's convention center. Park

reported sexual remarks made by County Commissioner Ed Rinehart about female employees. When the County undertook an investigation, Rinehart relieved Park of his security coordination duties.

Park sued Montgomery County, alleging it had violated the Whistleblower Act by reassigning the security coordinator duties in retaliation for Park's report of Rinehart's comments.

The trial court granted the County's motion for summary judgment that Park's claim failed as a matter of law. The Waco Court of Appeals reversed and remanded, holding that Montgomery County was not entitled to summary judgment.

The Texas Supreme Court noted that the United States Supreme Court had recently confronted a similar issue when determining how serious the harm from an allegedly retaliatory action must be to sustain a claim under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).

The Texas Supreme Court observed that the anti-retaliation provision of Title VII and the Whistleblower Act serve similar purposes and adopted a modified version of the Burlington standard, holding that a personnel action is adverse within the meaning of the Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act. The Court rejected Park's argument that he was harmed because he lost the ability to assign himself extra jobs at private events because it found that there was no evidence that losing the first choice of extra jobs actually reduced Park's earnings.

Accordingly, the Court held that the actions taken against Park would not be likely to dissuade a reasonable, similarly situated worker form making a report under the Act and reversed and rendered judgment for Montgomery County.

TRIAL PROCEDURE—FORUM NON CONVENIENS

***In re Pirelli Tire, L.L.C.*, No. 04-1129, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 90, 2007 WL 3230166 (Nov. 2, 2007) (orig. proceeding) (Green, J., not sitting)**

The issue in this original proceeding concerns the limits upon a trial court's discretion to dismiss on forum non conveniens grounds.

Valentin Hernandez Aran, a Mexican citizen, was killed when a truck in which he was riding overturned. The truck had been purchased by a Texas dealer from out of state. The truck remained in Texas for eleven days before being purchased by a Mexican citizen and imported into Mexico. Surviving family members, all Mexican citizens, sued Perelli Tire, L.L.C. ("Perelli") in Cameron County alleging negligence and strict liability. Perelli moved to dismiss on grounds of forum non conveniens. The trial court denied the motion and the court of appeals denied mandamus relief.

In an opinion by Justice O'Neill, the supreme court granted Perelli's petition for writ of mandamus and ordered the trial court to dismiss the case. The Court first addressed the plaintiffs' contention that Perelli's motion to dismiss was untimely. Section 71.051(d) of the Civil Practices and Remedies Code requires that a motion to dismiss based on forum non conveniens be filed within one hundred eighty days of filing a motion to transfer venue. While Perelli filed its motion to dismiss with its answer, it filed a supplemental motion to dismiss after the one hundred eighty-day deadline. According to the Court, Perelli timely filed its original motion to dismiss and the second motion expanded on the first motion. The Court noted that the statute allows the parties time for discovery before a hearing on the motion and thus contemplates amending a motion to dismiss after discovery.

Perelli argued that a trial court's discretion under Section 71.1051(a) is not unlimited and that dismissal is warranted when an action has no significant connection to Texas. The plaintiffs

contended that the trial court had unlimited discretion and could be reversed only if the lawsuit had no connection to Texas.

According to the Court, forum non conveniens applies where there are sufficient contacts between a defendant and the state but when the case has no connection to the state. Section 71.051(a) provides that, for lawsuits brought by non-U.S. residents, if a trial court finds that "in the interest of justice" the claim would be more properly heard outside Texas, the court may decline to exercise jurisdiction under forum non conveniens.

In deciding if the trial court abused its discretion, the Court applied factors articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), including the private interests of the parties, the public's interest in adjudicating a particular dispute, and the adequacy of alternative forums.

First, the Court rejected plaintiffs' claim that they lacked an adequate alternate forum. The plaintiffs argued that, because Mexican law does not recognize strict liability, they were without an adequate forum. That the alternative forum affords different remedies is not determinative. The question is instead whether a remedy is available. Accordingly, the Court concluded plaintiffs had an adequate alternative forum.

Next, in addressing the private interests of the parties, the Court noted the accident occurred in Mexico and the witnesses, including medical personnel and investigators, were located in Mexico. The Mexican witnesses cannot be compelled to testify in Texas. Several key witnesses, including one of the plaintiffs, had refused to be deposed in Texas. Accordingly, the Court concluded that the private interests favored a Mexican forum.

Finally, in considering the public interest in litigating in Cameron County, the Court observed that Mexico has an interest in protecting its citizens and in monitoring and compensating for safety issues on Mexican roads. Cameron County, on the other hand, had virtually no connection to the lawsuit. Citizens of Cameron County should not be burdened with the costs of litigating a dispute that had no connection to the county.

Having determined that the Gulf Oil factors favored a Mexican forum, the Court concluded that the trial court abused its discretion in denying the motion to dismiss.

On the adequacy of an appellate remedy, the Court analogized an erroneous ruling on a forum non conveniens to an erroneous ruling on a motion to enforce a forum selection clause. Accordingly, the Court concluded that defendant had no adequate remedy by appeal and granted mandamus relief.

Justice Willett, joined by Justice Wainwright, concurred. The concurrence concluded that the dismissal was warranted under the language of Section 71.051(a) alone. Having only a trivial connection to Texas was sufficient alone to mandate dismissal.

Justice Johnson, joined by Chief Justice Jefferson, dissented. The dissent focused on the 2003 amendment to Section 71.051 that changed the language in the statute from permissive to mandatory. As applicable, when a defendant filed its motion to dismiss, Section 71.051(a) permits the trial court to refuse to exercise jurisdiction. The dissent pointed out that Section 71.051(a) required the trial court to affirmatively find that in the interest of justice a forum outside Texas would be more proper before dismissing a case. Even such finding, however, did not mandate dismissal.

Because the Court cannot resolve factual disputes or weigh evidence, defendant can prevail only if the evidence was conclusive that a Mexican forum was an adequate alternative. The dissent concluded that the evidence was conflicting. Without findings of fact, the Court presumes that the trial court resolved all factual disputes in favor of the trial court's determination. The dissent concluded that the record supported the trial court's decision to exercise its discretion to refuse

to dismiss. Accordingly, the dissent concluded that the trial court did not abuse its discretion in denying the motion to dismiss.

TRIAL PROCEDURE—RECUSAL

***In re McKee*, No. 06-0055, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 164, 2007 WL 4216661 (Tex. Nov. 30, 2007) (per curiam) (orig. proceeding)**

The issue in this original proceeding is the validity of an administrative order signed by the presiding administrative judge after he voluntarily recused himself.

Both Judge Grisham, the trial court judge, and Judge Ovard, the presiding administrative judge, voluntarily recused themselves in a legal malpractice case. Chief Justice Jefferson then appointed Judge Delaney to preside.

Subsequently, Judge Grisham retired. The new trial judge, Judge Blake, did not recuse herself. Judge Delaney then asked Chief Justice Jefferson to withdraw his assignment.

Defendants moved to recuse Judge Blake, who refused to recuse voluntarily and referred the matter to Judge Ovard to assign a judge to hear the motion to recuse himself. Judge Ovard assigned Judge Kupper to hear the motion. Judge Kupper granted the motion to recuse.

McKee filed an original proceeding contending that after Judge Ovard initially recused himself, he had no authority to take any action. Thus, Judge Ovard's order appointing Judge Kupper was void and Judge Kupper's subsequent order recusing Judge Blake was invalid.

The Texas Supreme Court denied mandamus relief. In its per curiam opinion, the Court noted that, absent extraordinary circumstances, a presiding judge's appointment of a judge to hear a motion to recuse is administrative. Texas Rule of Civil Procedure 18(c) allows a presiding judge who has recused himself to assign a judge to hear recusals if the order states "good cause" for taking action.

The record did not contain any reason requiring Judge Ovard's initial recusal nor did the record contain a ground precluding his assignment of a judge to hear the recusal motion. Good cause is inherent in the administrative nature of the assignment. The Court concluded that the presiding judge should revise his order to state his assignment was purely an administrative act.

The Court concluded relator had an adequate remedy by appeal and that there was no significant benefit to mandamus relief.

TRIAL PROCEDURE—RULE 11 AGREEMENTS

***Knapp Med. Ctr. v. Garza*, 238 S.W.3d 767 (Tex. 2007) (per curiam)**

The issue in this case is whether a disputed oral settlement agreement is enforceable when the parties failed to comply with Texas Rule of Civil Procedure 11.

Garza sued Knapp Medical Center ("Knapp") for defamation, business disparagement, interference with business relations and conspiracy. Garza and Knapp's carrier settled. Garza and Knapp disagreed over whether the Knapp would also contribute money to the settlement. The trial court accepted the oral agreement between Garza and Knapp's carrier.

Garza then sued Knapp for breach of the alleged oral agreement, contending that Knapp had agreed to contribute to the settlement of the original lawsuit. The trial court rendered judgment for Garza and Knapp appealed.

On appeal, Knapp contended that Rule 11 barred any claims relating to an alleged oral agreement. The Corpus Christi Court of Appeals concluded the parol testimony of one attorney supported the existence and breach of the oral settlement agreement and affirmed, without addressing the Rule 11 argument.

In a per curiam opinion, the Texas Supreme Court reversed. The Court noted that Rule 11 requires agreements to be in writing and filed with the court or made in open court and entered of record

to be enforceable. According to the Court, Rule 11 provides a means for finalizing agreements without allowing the agreement itself to become a controversy.

Here, the parties' agreement was neither in writing nor on the record regarding Knapp's contribution to the settlement and therefore failed to comply with Rule 11. Accordingly, the Court granted the petition for review and reversed and the court of appeals' judgment and rendered that Garza take nothing.

As recently read in

John Grisham's newest legal thriller, *The Appeal*:

> In Atlanta, Jared Kurtin passed the file to the firm's appellate unit, the "*eggheads*," as they were known, brilliant legal scholars who *functioned poorly in normal circles and were best kept in the library*. Two partners, four associates, and four paralegals were already hard at work on the appeal when the massive transcript arrived and they had their first look at every word that was recorded at trial. They would dissect it and find dozens of reasons for a reversal.

JOHN GRISHAM, THE APPEAL 103 (2008) (emphasis added) (any resemblance this description may have to the readership of the *Appellate Advocate* is purely anecdotal and coincidental).

At current rates, an unusually large appellate detail such as that described above would likely ring up about $3,000 an hour. Might Mr. Grisham's next legal tome be entitled, *The Bill*?

Joseph W. Spence, Shannon, Gracey, Ratliff & Miller, L.L.P., Fort Worth

CHALLENGE TO TAX APPRAISAL—"APPRAISED VALUE" INCLUDES LAND AND IMPROVEMENTS

***Covert v. Williamson Cent. Appraisal Dist.*, No. 03-06-00218-CV, 2007 WL 4207925 (Tex. App.—Austin Nov. 30, 2007, pet. filed)**

The Coverts sued Williamson Central Appraisal District (WCAD) challenging WCAD's appraisal of five separate tracts of land owned by the Coverts. Three of the five tracts had substantial improvements to the property in the form of car dealerships. The Coverts' second amended petition modified their challenge by appealing the valuation of the "land portion only" of each of the properties. The Coverts argued that, when compared to other vacant unimproved parcels of land along the same highway, the land underlying their car dealerships had been appraised unequally. WCAD responded by filing a special exception, alleging that the Tax Code does not provide a remedy for a taxpayer who claims "unequal appraisal" only as to the land portion of an improved property.

The trial court granted WCAD's special exception and ordered the Coverts to re-plead their cause of action to state that the subject property (i.e., the entire property) has been appraised unequally under Section 42.26 of the Tax Code. Upon the Coverts' refusal to re-plead, the trial court dismissed the case.

The Austin Court of Appeals noted that the issue of whether Section 42.26 of the Tax Code authorizes a taxpayer to challenge a single component of the assessor's appraisal of improved land is one of first impression. The court of appeals concluded that in the case of an improved property, such as the tracts including the Covert car dealerships, a single appraised value is to be given to the entire property, which represents the total value of the land, the buildings, and the various site improvements (including all parking lots, curbing, and landscaping). The court concluded that so long as the valuation is an equal and uniform assessment, the court cannot support overturning it merely because the land component is valued too high or the improvement component too low. The court noted that while evidence that only the land or only the improvements were assessed unequally is certainly relevant to a taxpayer's challenge, the taxpayer cannot prevail unless the taxpayer shows that the appraised value of the improved property is not equal or uniform. Thus, the term "appraised value" encompasses both the land and the improvement value for the purpose of challenges brought under Section 42.26 of the Tax Code.

HEALTHCARE LIABILITY CLAIM—SEPARATION OF POWERS

***Wilson-Everett v. Christus St. Joseph*, No. 14-05-00999-CV, 2007 WL 4198993 (Tex. App.—Houston [14th Dist.] Nov. 29, 2007, pet. filed)**

This case raises the question of whether Section 74.351 of the Texas Civil Practice and Remedies Code violates the separation of powers provision of the Texas Constitution. Section 74.351 of the Texas Civil Practice and Remedies Code requires a plaintiff, pursuing a healthcare liability claim, to file expert reports by a date certain. The provision also provides that if the plaintiff fails to file a timely report, the trial court shall enter an order dismissing the claim with prejudice.

In the instant case, the appellant argued that Section 74.351 violates the separation of powers provision because the statute dictates to courts exactly when and how to render a judgment (i.e., requiring a court to dismiss with prejudice if a plaintiff does not provide an adequate expert medical report within the prescribed time period). The appellant argued that the statute interferes with the judiciary's constitutional power to decide when and how to render judgments.

The Houston Fourteenth Court of Appeals acknowledged that it has found no Texas appellate court decision on whether Section 74.351 violates the separation of powers provision of the Texas Constitution. The Houston Court of Appeals opined that no constitutional violation had been shown, concluding that courts retain the judicial power to determine whether a timely filed report is adequate and to render a decision accordingly. Justice Frost, in a concurring opinion, agreed with the majority's holding, but criticized the majority for its reliance, in dicta, on methodology of the Texas Court of Criminal Appeals as opposed to that of the Texas Supreme Court.

HOMEOWNER'S POLICY—RECREATIONAL VEHICLE EXCEPTION

***Gomez v. Allstate Texas Lloyds Ins. Co.*, No. 02-06-00233-CV, 2007 WL 3203112 (Tex. App.—Fort Worth Nov. 1, 2007, no pet.)**

In this case, the Fort Worth Court of Appeals addressed the scope of the "recreational vehicle exception" to the motor vehicle exclusion found in a typical homeowner's policy. The homeowners (the Johnsons) allegedly placed the Gomezes' six-year-old son on a four-wheeler with no protective equipment and thereafter allowed the six-year-old to operate the four-wheeler. The six-year-old lost control of the four-wheeler, went over an embankment, and was injured. The question presented was whether, under the recreational vehicle exception (an exception to the motor vehicle exclusion), coverage is only afforded when the bodily injury arises out of use of the recreational vehicle while on the premises of the insured's residence. The Fort Worth Court of Appeals first concluded that the homeowner's policy is not ambiguous. The court then held that "coverage is afforded for recreational vehicles owned by the insured only for bodily injury or property damage arising out of the use of such vehicles while they are on the residence premises." However, the court of appeals reversed and remanded because of the existence of a fact issue regarding where the accident occurred (i.e., whether the accident occurred on the residence premises).

HOMEOWNER'S POLICY—TRIGGER OF COVERAGE

***Allstate Ins. Co. v. Hunter*, No. 02-07-027-CV, 2007 WL 4126055 (Tex. App.—Fort Worth Nov. 21, 2007, no pet.)**

This case addresses which "trigger of coverage" theory should apply to a first-party claim under a standard homeowner's insurance policy based on continuing or progressively deteriorating damage to the insured's dwelling. The court noted that the word "trigger" is used in the insurance context as a term of art, meaning the event that activates coverage under one or more insurance policies. The trigger of coverage problem arises when determining exactly what must take place within the policy's effective dates to trigger coverage.

The court noted that there exists numerous "trigger of coverage" theories, including: (1) the manifestation trigger, (2) the exposure trigger, (3) the continuous trigger, and (4) the injury-in-fact trigger. The Fort Worth Court of Appeals acknowledged that while no Texas state appellate court has specifically discussed the distinctions among the various trigger of coverage theories in the context of coverage under a standard, first-party homeowner's insurance policy for a first-party claim based on continuing or progressively deteriorating damage to the insured's dwelling, two courts have applied the manifestation trigger to such claims (the San Antonio Court of Appeals and the District Court for the Southern District of Texas). The Fort Worth Court of Appeals concluded, based on the language of the homeowner's policy in question, that the manifestation trigger of coverage theory applies with regard to the progressive property damage claimed by the insureds. The Fort Worth Court of Appeals ultimately concluded that the charge should have defined the manifestation trigger of coverage as being "when the damage is capable of being easily perceived, recognized and understood."

LIABILITY OF CHARITABLE ORGANIZATIONS AND VOLUNTEERS

***Chrismon v. Brown*, No. 14-05-00822-CV, 2007 WL 2790352 (Tex. App.—Houston [14th Dist.] Sept. 27, 2007, no pet. h.)**

In this case, a volunteer assistant coach on a girls' softball team sustained injuries when she was struck in the face by a bat that slipped from the hand of the volunteer head coach during a softball drill. The court of appeals first addressed the scope of the exception to the general rule that volunteers of charitable organizations are immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of the volunteer's duties or functions of the organization. The exception to this general rule is that immunity does not apply to an act or omission that is intentional, willfully negligent, or done with conscience indifference or reckless disregard for the safety of others. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(a) (Vernon 2005).

The Houston Fourteenth Court of Appeals noted that no Texas court has interpreted the statutory language of the exception. However, the court noted that in interpreting language from other statutes, the Texas Supreme Court and various courts of appeals have equated the terms in Section 84.007(a) with the definition of "gross negligence" as found in Chapter 41 of the Texas Civil Practice and Remedies Code (the exemplary damage statute). As such, the court held that to fall within the exception to the general rule that volunteers are immune, the volunteer's act must constitute gross negligence.

The second question addressed by the Fourteenth Court of Appeals was whether the softball association, a charitable organization, for which the coaches volunteered, was vicariously liable for the head coach's acts or omissions. The court noted that although the head coach was individually immune under Chapter 84 of the Civil Practice and Remedies Code, such immunity did not apply to the potential vicarious liability of the softball association for the common law torts of the head coach, its alleged agent. As such, the Fourteenth Court of Appeals analyzed, under the common law, the head coach's potential tort liability for the assistant coach's injuries.

The court of appeals recognized that the Texas Supreme Court has yet to speak as to what standard of tort liability should be applied vis-à-vis a personal injury claim by one sports participant against another sports participant. The court of appeals identified four possible approaches under the law. The court ultimately concluded that the fourth approach is the best approach and is governed by the following legal standard (a/k/a, the "inherent risk" standard):

> Considering from an objective standpoint the nature of the sport in question, the conduct that is generally accepted in that sport, and the risk resulting from that conduct, if the risk that resulted in the plaintiff's injury is inherent in the nature of the sport in which the plaintiff chose to participate, then a participant-defendant owes the plaintiff no negligence duty. Under this same inquiry, if the risk that resulted in the plaintiff's injury is not inherent in the nature of the sport in which the plaintiff chose to participate, then a participant-defendant owes the plaintiff an ordinary negligence duty. Regardless of whether the risk that resulted in the plaintiff's injury is inherent in the nature of the sport in question, a participant-defendant owes a duty not to engage in gross negligence or intentional conduct causing injury to the plaintiff.

Notably, Senior Justice Richard H. Edleman authored a dissenting opinion, concluding, among other things, that while the issue may be an issue of first impression in the Fourteenth Court of Appeals, at least seven opinions from five other Texas appeals courts have addressed the duty standard applicable to sports injuries and have all applied or recognized the "reckless or intentional

conduct" standard as opposed to the "inherent risk" standard adopted by the majority.

MATERIALMAN'S LIEN AFFIDAVIT—TIMING OF FILING WITH COUNTY CLERK

***Arias v. Brookstone, L.P.*, No. 01-05-00746-CV, 2007 WL 4465517 (Tex. App.—Houston [1st Dist.] Dec. 20, 2007, no pet. h.)**

This case addresses Property Code Section 53.055 and the issue of when the materialman's lien affidavit must be filed with the county clerk. In this case, the plaintiff, Gustavo Arias, served mechanic's, contractor's, and materialman's lien affidavits on the property owner and various contractors. Approximately three weeks later, Arias filed the affidavits with the county clerk. The trial court granted the contractor's motion for summary judgment, finding that Arias failed to comply with the notice provisions of Property Code Section 53.055 because he served copies of the affidavits (on the owner and contractors) before he filed them with the county clerk. Property Code Section 53.055(a) states:

> A person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk.

The Houston First Court of Appeals, relying on a split decision from the Corpus Christi Court of Appeals, concluded that Section 53.055 does not require that a mechanic's, contractor's, and materialman's lien affidavit be filed with the county clerk before the required notice is given.

PRE-MARITAL AGREEMENT—CHARACTERIZING SALARY DURING MARRIAGE

***Williams v. Williams*, No. 14-05-00975-CV, 2007 WL 4195666 (Tex. App.—Houston [14th Dist.] Nov. 29, 2007, no pet. h.)**

This case re-visits the issue of what type of language is required in a pre-marital agreement to ensure that each spouse's wages and salary remain separate property during the marriage. The parties' pre-marital agreement provided, in part, that "all revenues, increases, and income from such separate property and from their respective personal efforts will be separate property." Despite this language, the court of appeals concluded: (1) the pre-marital agreement was not ambiguous, and (2) the clause in question applied only to separate property which existed at the time of the marriage and did not encompass the spouses' wages and salary during marriage. The court of appeals re-affirmed Texas law that a pre-marital agreement which does not expressly address the parties' salaries earned during marriage will not alter the character of salaries or income earned during marriage. The dissent would hold that the respondent (the wife) failed to show the existence or amount of the parties' salaries during marriage, and thus failed to show whether the division of the community estate was manifestly unjust.

Susan Dillon Ayers, Baker Botts L.L.P., Austin
Scott Powers, Baker Botts L.L.P., Austin

AMENDMENT OF PLEADINGS & SUMMARY JUDGMENT

***Torres v. GSC Enters., Inc.*, No. 08-05-00321-CV, 2007 WL 2965779 (Tex. App.—El Paso Oct. 11, 2007, no pet.)**

In *Torres*, the court of appeals construed a scheduling order requiring that amended pleadings be filed "45 days before trial" as requiring that amended pleadings be filed 45 days before a summary judgment hearing, in spite of the fact that the same scheduling order included a date certain for trial. The court also issued evidentiary rulings that, taken together, stress the importance of presenting proper and authentic summary judgment evidence and of requesting the opportunity to cure any defects found in such evidence.

The plaintiff had asserted causes of action for malicious prosecution and intentional infliction of emotional distress. The defendants filed summary judgment motions, and a hearing was set on the motions. Eight days before the motions were heard, the plaintiff filed an amended pleading, which added a negligence claim. The trial court struck the amended petition, struck the plaintiff's summary judgment evidence, and granted the summary judgment motions. The plaintiff appealed, asserting that the trial court erred in striking his amended petition, striking his summary judgment evidence, and granting summary judgment to the defendants.

The court of appeals first considered the decision to strike the amended petition and found no abuse of discretion. Although the court of appeals acknowledged that the amended petition was filed timely under Rule 63 of the Texas Rules of Civil Procedure, it held that the amended pleading was late under the trial court's scheduling order, which provided that amended pleadings were due "45 days before trial." Because a summary judgment hearing is considered a "trial" when determining whether amended pleadings are timely filed, the court held that the trial court did not abuse its discretion by striking the amended petition. In so ruling, the court rejected the plaintiff's argument that the scheduling order should be interpreted to set the pleading amendment deadline at August 16, 2005, which was 45 days before the trial date of September 30, 2005 set out in the scheduling order.

The court also overruled the plaintiff's complaints about the trial court's exclusion of his summary judgment evidence. In support of his summary judgment response, the plaintiff had attached an affidavit and other documentary evidence. The defendants had objected to the affidavit on the grounds that it did not establish that the affiant was competent to testify, contradicted the affiant's sworn testimony, contained conclusory statements, and contained hearsay. The defendants had objected to the other documentary evidence on the ground that it was not authenticated. The trial court sustained the defendants' objections.

As to the affidavit, the court of appeals concluded that the plaintiff had not provided any argument or authority supporting his contention that the trial court had erred. Therefore, the court of appeals held that the plaintiff had waived his complaint. As to the other documentary evidence, the court rejected the plaintiff's argument that the documents were admissible as "discovery products." The court noted that some of the exhibits were not in fact discovery products, and in any event, the plaintiff had not complied with Rule 166a(d) of the Texas Rules of Civil Procedure, which requires that a party intending to use discovery products to oppose summary judgment must serve all parties, at least seven days before the hearing, with a statement of intent to use specified discovery products.

The court of appeals also dispensed with the plaintiff's argument that the trial court erred in

failing to allow him to cure the defects in his summary judgment evidence, finding that the plaintiff had not requested an opportunity to cure in the trial court.

Finally, the court dispensed with the plaintiff's objections to the defendants' summary judgment evidence, finding that the plaintiff's objections had not been preserved, because the plaintiff had not obtained a ruling on his objections from the trial court.

After reviewing the plaintiff's issues concerning his amended complaint and the trial court's evidentiary rulings, the court reviewed the trial court's summary judgment ruling and concluded that it was correct.

CLASS CERTIFICATION

***Gov't Employees Ins. Co. v. Patterson*, Nos. 13-06-00258-CV & 13-06-00259-CV, 2007 WL 4225504 (Tex. App.—Corpus Christi Nov. 29, 2007, no pet.)**

In *Government Employees Insurance Co.*, the court of appeals reversed a trial court's orders certifying two classes, finding that the plaintiff lacked standing to assert claims on behalf of one class and that the certification order as to the other class failed to adequately address how individual issues would be considered, as required by *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000).

The plaintiff was a chiropractor who had asserted claims of libel *per se*, tortious interference with contract, and breach of the duty of confidentiality. The plaintiff's claims arose out of letters sent to two of the plaintiff's patients by adjusters for one of the defendant insurance companies. The plaintiff's libel claim was based on his contention that the letters falsely claimed the plaintiff had given his patients unnecessary treatment and overcharged them for the treatment. The tortious interference claim was based on the plaintiff's contention that the letters instructed his patients not to pay for medical treatment provided to them. Finally, the plaintiff contended that the defendants' practice of disclosing patient identities and confidential communications breached the defendants' duty to maintain the patients' confidentiality. The plaintiff sought to assert the libel and tortious interference claims on behalf of similarly- situated physicians, and he sought to assert the confidentiality claim on behalf of a class of patients. After hearing, the trial court entered orders certifying both classes. The defendants then appealed.

The court first considered the order certifying the patient class. The court concluded that the plaintiff did not have standing to assert a claim for a breach of the duty of confidentiality. The plaintiff was not a patient whose confidential records had been divulged, and thus he had not been personally injured by any breach of the duty of confidentiality. Although the plaintiff argued that the standing defect was cured by the certification order having named one of his patient's as the class representative, the court held that the named plaintiff had to have standing at the time suit was filed, without regard to the class claims. Because the plaintiff was the only named plaintiff when the suit was filed (and, in fact, he remained the only named plaintiff), his lack of standing necessitated that the breach of confidentiality claim be dismissed.

The court next considered the order certifying the physician class, concluding that the trial court had abused its discretion in entering the order. First, although the trial court had certified a multi-state class, the trial court erred by failing to analyze how choice-of-law issues would affect the case. The court held that when "ruling on motions for class certification, the trial court must conduct an extensive analysis before it can determine predominance, superiority, cohesiveness, and even manageability." Second, the defendants had identified a number of individual issues that they argued would predominate over common issues. For example, with respect to the defamation claim, the defendants argued that the trial court would have to determine on an individual basis the truth of the alleged defamatory statements as to each member of the class. With respect to the tortious interference claims, the defendants argued that the trial court would have to determine on an

individual basis whether the defendants' letters to patients in fact caused a loss to each of the class members. The court concluded that the trial plan contained in the class certification order did not adequately address how these and other individual issues would be considered at trial, as required by *Bernal*.

Accordingly, the court reversed both certification orders, dismissed the plaintiff's breach of confidentiality claim, and remanded the remaining claims to the trial court for further proceedings.

CRIMINAL PROCEDURE

***Ex parte McBride*, No. 12-07-00241-CR, 2007 WL 4216370 (Tex. App.—Tyler Nov. 30, 2007, no pet.) (mem. op.)**

In *Ex parte McBride*, the court of appeals held that the trial court did not violate the Texas Code of Criminal Procedure when it reduced the appellant's bond from $500,000 to $250,000, instead of to $50,000, as the defendant had requested.

The appellant was charged with murder, and his bond was originally set at $500,000. The appellant petitioned the trial court to reduce the bond, stating that his family could post a $50,000 bond. After hearing, the court reduced the bond to $250,000. The appellant then filed this appeal.

On appeal, the court analyzed the bond in the context of the statutory factors laid out in Article 17.15 of the Texas Code of Criminal Procedure. The court first concluded that there was some risk the appellant would not appear at trial, because it was uncertain where he would reside if released and because he was facing a life sentence. As to the plaintiff's ability to pay, although the plaintiff complained that the bond was more than he could afford, the court held that the appellant had not submitted sufficient evidence to carry his burden of proof that the bond was more than he could afford or higher than necessary to assure his appearance in court. Thus, the factors concerning the appellant's ability to pay and the use of bond as an instrument of oppression favored maintaining the $250,000 bond. The court also noted that in other cases involving a murder charge, $250,000 had been found to be an appropriate bond amount, and upon consideration of the nature of the particular conduct of which the appellant stood accused, the court concluded it was sufficiently serious to favor a high bond. Finally, the court held that the unproven allegations in the indictment did not provide a sufficient basis to form a belief that the appellant posed a danger to the community, and thus, the factor concerning the appellant's potential danger to the community tended to favor a lower bond amount. Viewing all of the Article 17.15 factors together, the court of appeals held that the $250,000 bond was supported by the evidence, and it affirmed the trial court's judgment.

***Ivey v. State*, No. 03-06-00683-CR, 2007 WL 4245892 (Tex. App.—Austin Oct. 19, 2007, no pet.) (mem. op.)**

Appellant elected to have a jury assess punishment in the event he was found guilty of driving while intoxicated. The jury found Appellant guilty and returned a verdict for 35 days in jail and a $2,000 fine. The trial court suspended imposition of the sentence and placed Appellant on probation for two years with the following conditions: Appellant had to serve 30 days jail time, complete 60 hours of community service, and attend regular meetings with a probation officer, counseling and educational classes.

Appellant argued that the trial court erred by suspending his sentence and placing him on probation because he did not apply for jury-recommended probation under Article 42.12, Section 4 of the Code of Criminal Procedure. The court noted that, while Appellant was not eligible for probation under Section 4, Article 42.12, Section 3 permits the trial court to suspend the imposition of a sentence if the defendant has been convicted and it appears in the best interest of justice, the public and the defendant to place the defendant on probation. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4 (Vernon 2006).

Appellant also complained that the trial court erroneously admitted testimony from witnesses concerning the conditions of probation and Appellant's eligibility for probation. The court of appeals overruled this issue noting that Article 37.07 of the Code of Criminal Procedure permits evidence on "any matter the court deems relevant to sentencing." The probative value of the testimony from a probation officer, counselor, and county attorney was not substantially outweighed by the danger of unfair prejudice or misleading the jury.

Finally, the conditions of probation did not impose a longer period of confinement than did the jury's verdict. The trial court's order required Appellant to spend thirty days in jail, which was five less than the period of confinement assessed by the jury.

DISMISSAL FOR WANT OF PROSECUTION

***Wallingford v. Trinity Universal Ins. Co.*, No. 07-06-00142-CV, 2007 WL 3087227 (Tex. App.—Amarillo Oct. 23, 2007, no pet. h.)**

Wallingford's fifteen-year-old workers' compensation case was dismissed for want of prosecution. She moved for reinstatement and participated in a hearing on the motion, at which the trial court orally pronounced reinstatement and made a docket entry to that effect. However, the court never reduced this decision to a written order as required by Rule 165a(3). After the trial court lost plenary power, defendant successfully moved to dismiss for lack of subject matter jurisdiction. The Amarillo court of appeals affirmed the dismissal.

First, the court rejected Wallingford's argument that the original DWOP was void because she had not received service of the motion or notice of the hearing. Without resolving the factual dispute on the question of service, the court stated that Wallingford received the exact same opportunity to argue the merits at the hearing on her own motion for reinstatement.

Second, the court relied on Texas Supreme Court precedent which states unequivocally that a trial court's oral pronouncement and docket entry are "not an acceptable substitute" for the written order required by Rule 165a(3).

Finally, the court rejected Wallingford's argument that Rule 165a violated the open courts guarantee of the Texas Constitution because it required the "impossible"—that she diligently pursue the trial judge to timely obtain a signed written order. This constitutional challenge failed because Wallingford's claim was not a cognizable common law cause of action. Moreover, the court stated in dicta that the requirement of securing a written order within 105 days of dismissal was not an unreasonable or arbitrary burden.

MANDAMUS PROCEEDING—HABEAS CORPUS

***In re Altschul*, 236 S.W.3d 453 (Tex. App.—Waco 2007, orig. proceeding)**

In *In re Altschul*, the court of appeals conditionally granted the relator's petition for writ of mandamus, directing the trial court to rule on a petition for writ of habeas corpus filed by the relator.

The relator is a prisoner in the Texas state prison system who is seeking relief from a prior juvenile adjudication. After unsuccessful attempts to have his habeas corpus petition heard in the Waco court of appeals, the Texas Supreme Court, and the Texas Court of Criminal Appeals, the relator filed an application for writ of habeas corpus in the trial court, which was the court that issued his original juvenile adjudication. After the trial court failed to act on his application, the relator filed a petition for writ of mandamus in the court of appeals.

After reviewing the relator's habeas corpus petition, the court concluded that the trial court had a duty to issue the writ of habeas corpus and consider the relator's allegations. Noting the general rule that an appellate court may not issue a writ of mandamus based on a trial court's refusal to consider a habeas corpus application because of the availability of other district courts to consider the application, the court concluded that the relator had no alternative remedy because

he could only file the application related to his juvenile adjudication in the court of that adjudication. Therefore, the court conditionally granted the writ of mandamus and ordered the trial court to rule on the relator's application for writ of habeas corpus within thirty days of the opinion.

MANDAMUS PROCEEDING—REQUEST FOR CONTINUANCE

***In re Walter*, 234 S.W.3d 836 (Tex. App.—Waco Sept. 26, 2007, orig. proceeding)**

In re Walter dealt with a trial court's refusal to stay or continue a temporary orders hearing in a divorce action regarding the custody of the relator's children. The relator is a member of the United States Army deployed in "Kuwait and/or Iraq." On the day of the temporary orders hearing, the relator's counsel moved the court for a continuance or stay pursuant to 50 U.S.C.S. Appx. § 522, which deals with applications for stay by service members. The trial court denied the motion, and the relator filed a petition for writ of mandamus.

The court of appeals denied the petition, holding that the statute did not require that a stay be entered in the absence of the relator presenting a letter from his commanding officer stating that his military duty prevented him from attending the hearing and that military leave was not authorized. Because no such letter was included with the motion, whether to grant the stay was in the trial court's discretion, and the court of appeals concluded it could not find that the trial court had abused that discretion.

MANDAMUS PROCEEDING—WORKERS' COMPENSATION

***In re American Cas. Co.*, 233 S.W.3d 925 (Tex. App.—Waco 2007, orig. proceeding)**

In *In re American Casualty Co.*, the court of appeals considered the propriety of a trial court's decision to allow discovery to go forward in a suit that had been abated pending resolution of workers' compensation administrative proceedings.

The plaintiffs had filed a lawsuit against the defendant, alleging that the defendant had improperly delayed or denied payment of workers' compensation benefits. At the plaintiffs' request, the lawsuit was abated pending the resolution of workers' compensation administrative proceedings relating to certain of the underlying claims for workers' compensation benefits. Three years later, the plaintiffs filed a motion to lift the stay, claiming that all administrative remedies had been exhausted. The defendant disputed the plaintiffs' claim, however, identifying two pending proceedings involving the plaintiffs' underlying claims. Although the plaintiffs did not refute the defendants' claim, the trial court granted the plaintiffs' motion in part, allowing the parties to move forward with discovery. The defendant then filed a petition for writ of mandamus, challenging the trial court's ruling.

The court of appeals held that because the plaintiffs' claims related to claims lying within the Division of Workers' Compensation's exclusive jurisdiction, the trial court lacked subject matter jurisdiction over the plaintiffs' claims until the plaintiffs' administrative remedies were exhausted. Finding that the plaintiffs had not yet exhausted their administrative remedies, the court of appeals concluded that the trial court lacked subject matter jurisdiction over the plaintiffs' claims, and thus, that the trial court had abused its discretion in permitting discovery to proceed. The court also found that, as a workers' compensation carrier, the defendant had a "statutory expectation" that claims against it would be resolved administratively. The court held that absent mandamus relief, the defendant would be deprived of this benefit, and as a result, the defendant had no adequate remedy by appeal. In support of its conclusion that the defendant had no adequate remedy, the court analogized to cases in which a party has been held to have no adequate remedy by appeal when denied the benefits of an agreement to arbitrate.

Because the trial court had abused its discretion and the defendant had no adequate remedy by appeal, the court conditionally granted the writ and ordered the trial court to vacate its order permitting discovery to go forward.

A dissent was filed in the case, which argued that only a portion of the case dealt with currently-pending administrative actions for workers' compensation benefits. The dissent wrote that permitting discovery to proceed as to the remainder of the case would be appropriate. Further, the dissent argued that it was unclear that the plaintiffs intended to seek discovery as to the portion of the case related to the pending administrative proceedings. The dissent would have denied the petition for writ of mandamus, permitting the trial court an opportunity to rule on any objection by the defendant to any discovery request that was not confined to the portion of the case unrelated to pending administrative proceedings.

***In re Ward*, No. 01-07-00558-CV, 2007 WL 3227681 (Tex. App.—Houston [1st Dist.] Nov. 1, 2007, orig. proceeding)**

Relator sought mandamus relief from the medical examination ordered by the trial court and argued that the Labor Code granted the Workers' Compensation Division of the Texas Department of Insurance exclusive jurisdiction over medical exams for injured workers. *See* TEX. LABOR CODE ANN. § 408.003 (Vernon 2006).

The First Court of Appeals denied Relator's petition because the underlying suit was one by the workers' compensation insurance carrier for judicial review of the Division's award of benefits to Relator. Under Chapter 410 of the Labor Code, trial courts review such decisions under a modified de novo standard and new evidence is admissible at trial. Because the trial court possessed jurisdiction over the issue of compensability, it had the authority to issue an order for a physical examination under Rule 204 of the Texas Rules of Civil Procedure.

NO-EVIDENCE SUMMARY JUDGMENT

***Bayou City Fish Co. v. S. Tex. Shrimp Processors, Inc.*, No. 13-06-438-CV, 2007 WL 4112003 (Tex. App.—Corpus Christi Nov. 20, 2007, no pet.) (mem. op.)**

In *Bayou City Fish Co.*, the court of appeals affirmed the trial court's grant of a no-evidence summary judgment motion where virtually all of the evidence presented by the non-movant was unverified.

Bayou City Fish Co. was a breach of contract action in which the plaintiff asserted that the defendant had breached a contract to process shrimp for the plaintiff. The defendant filed a no-evidence summary judgment motion, asserting that there was no evidence of breach, no evidence that the plaintiff had suffered damages, and no evidence that the defendant had been the cause of any damage to the plaintiff. The plaintiff filed a response, to which it attached numerous unverified documents, an unverified expert report, and a conclusory affidavit from its vice president stating that the plaintiff had sustained damages as a result of the defendant's conduct.

On the day of the summary judgment hearing, the plaintiff sought to file an affidavit from its damages expert, which stated that the expert would swear to the contents of his expert report. The defendant argued that leave of court was required to file the affidavit because it was filed within seven days of the summary judgment hearing. TEX. R. CIV. P. 166a(c).

On appeal, the defendant argued that the unverified documents and unverified expert report were not authenticated, and thus that they were not competent summary judgment evidence. The plaintiff responded that the defendant had waived the authentication deficiency by failing to raise it in writing in the trial court. The court of appeals held, however, that an authentication deficiency is a substantive defect that can be raised for the first time on appeal. As to the expert's affidavit, the plaintiff had not obtained a ruling from the trial court permitting its late filing, and accordingly,

the court presumed that the trial court had not considered the affidavit. As to the affidavit from the defendant's vice president, the court determined that it was conclusory and thus not sufficient to raise a genuine issue of material fact on damages. The court of appeals therefore concluded that the plaintiff had not presented any competent summary judgment evidence on the issue of damages, and as a result, the court affirmed the trial court's no-evidence summary judgment.

After considering the evidentiary issues, the court addressed two other complaints raised by the plaintiff on appeal. First, the court of appeals rejected the argument that the trial court should have given the plaintiff more time for discovery before ruling on summary judgment. Second, the court of appeals rejected the argument that the plaintiff did not have proper notice that the trial court was considering the summary judgment motion. The trial court had held a summary judgment hearing, over which a visiting judge presided. The visiting judge declined to rule on the summary judgment motion at the hearing. Three months later, the sitting judge entered summary judgment. The court held that the defendant was not entitled to a renewed notice following the hearing that the trial court was considering the motion.

***Humphrey v. Pelican Isle Owners Ass'n*, 238 S.W.3d 811 (Tex. App.—Waco 2007, no pet.)**

In *Humphrey*, the court of appeals reversed a summary judgment granted by the trial court on the grounds that the defendants' no-evidence summary judgment motions lacked adequate specificity.

The plaintiff filed suit against the defendants after the defendant property association rescinded its approval of the plaintiff's plan to build a structure on certain property owned by the plaintiff. The defendants then filed a no-evidence summary judgment motion on the plaintiff's claims of promissory estoppel, breach of fiduciary duty, negligence, negligent misrepresentation, and fraud. The defendants argued that there was no evidence that the plaintiff could have obtained a permit from the water district to build his proposed structure, and thus the plaintiff could not have built his structure, irrespective of the defendants' actions.

The trial court granted the defendants' summary judgment motions, and the court of appeals reversed. In reversing the summary judgment, the court of appeals pointed out that the defendants' summary judgment motions did not specify the elements of the plaintiff's various causes of action for which there was no evidence, and it held that the requirement to do so is strictly construed. The court noted that although the question of whether the plaintiff could have obtained a permit might have been an evidentiary fact, it was not an element of any of the plaintiff's claims. The court therefore reversed the summary judgment and remanded the case to the trial court for further proceedings.

TERMINATION OF PARENTAL RIGHTS

***In re S.K.A.*, 236 S.W.3d 875 (Tex. App.—Texarkana 2007, pet. filed)**

Section 263.405 of the Family Code governs the appeal of final orders for children in the care of the Department of Family & Protective Services. Once a final order is signed, a party has 15 days to file, in the trial court, a request for a new trial or a statement of points on which they intend to appeal. TEX. FAM. CODE. ANN. § 263.405(b)(2) (Vernon Supp. 2007). The court of appeals is prohibited from considering any issue that was not specifically presented to the trial court in a timely-filed statement of points or in a statement combined with a motion for new trial. *Id.* § 263.405(i).

The court of appeals held that the statute prohibiting consideration of issues not presented in a timely-filed statement of points was unconstitutional as applied to Appellant, whose parental rights were terminated by a default judgment while he was incarcerated in Mississippi. Within hours of entering the default judgment, the trial court received Appellant's

letter requesting a court-appointed attorney. However, the order appointing counsel was not signed or filed until the deadline for filing a statement of points had already expired. Although court-appointed appellate counsel immediately filed a motion for new trial and statement of points, which were heard and denied by the trial court, the application of Section 263.405(i) would have barred the court of appeals from considering any of Appellant's issues on appeal.

The court of appeals recognized that the parent-child relationship is a constitutionally protected interest, and that a parent is entitled to fundamentally fair procedure, meaningful appeal, and effective assistance of counsel before his parental rights are terminated. A due process analysis in this context requires the court to weigh three factors, the private interests at stake, the government's interest, and the risk of erroneous deprivation of parental rights, and balance them against the presumption that the statute comports with constitutional due process requirements. The court concluded that the application of Section 263.405(i) would render Appellant's right to effective counsel a "useless gesture." Therefore, Appellant's statement of points was considered timely.

On the merits, the court of appeals affirmed the order terminating parental rights because the default was proper when Appellant failed to file a timely answer; the motion for new trial was properly denied because the evidence showed that Appellant's failure to appear was intentional or the result conscious indifference; and, legally and factually sufficient evidence supported the order.

***In re A.S.*, 239 S.W.3d 390 (Tex. App.—Beaumont 2007, pet. dism'd)**

In a challenge to the trial court's finding that an indigent parent did not have substantial grounds to appeal a judgment terminating his parental rights, the court of appeals held that due process did not entitle the parent to obtain a free transcript of the trial.

The Department of Family and Protective Services petitioned to terminate the parental rights of A.S.'s parents. The trial court granted the petition following a jury trial.

Pursuant to Family Code Section 263.405, A.S.'s parents each identified to the trial court their grounds for appeal. The father, who had filed an affidavit of indigence, asked the trial court that the reporter's record be prepared without charge. The trial court denied the request, concluding he was not entitled to a free record and that he had not presented a substantial issue for appellate review.

On appeal, the father argued that due process required that the reporter's record be prepared before the court of appeals reviewed the trial court's determination that the father's appeal would be frivolous. The court of appeals held that due process did not require preparation of a reporter's record before the court's review of the trial court's judgment. The father's appellate counsel had the opportunity to discuss the case with his trial counsel, and thus, his appellate counsel could determine the potential issues for appeal and describe the evidence germane to those issues as required by Section 263.405. The court of appeals concluded that, based on the evidence as described by the parties, the Department had evidence sufficient to support its grounds for termination, and the father had not identified evidence that would support a factual sufficiency challenge. The court thus concluded that no substantial issue was presented for appellate review and affirmed the trial court's judgment.

The dissent questioned whether competent appellate counsel could adequately challenge a finding that an appeal would be frivolous without access to the reporter's record. The dissent thus argued for an interpretation of Section 263.405 that would allow review of the evidentiary record in parental termination cases where there was a finding that a factual sufficiency challenge would be frivolous.

TEXAS MEDICAL LIABILITY ACT

***In re Temple*, 239 S.W.3d 885 (Tex. App.—Texarkana 2007, orig. proceeding)**

This opinion demonstrates that a claimant may be able to conduct a pre-suit deposition in a case arising from botched surgery, even in those districts that view the Texas Medical Liability Act as prohibiting such discovery.

During knee replacement surgery on Robert Christophersen's right knee, a device designed for a left knee was implanted. Christophersen successfully petitioned the trial court to conduct the pre-suit deposition of his orthopedic surgeon under Rule 202 of the Texas Rules of Civil Procedure. The record on mandamus indicated that Christophersen had two possible theories of recovery. He could not explore a medical malpractice claim against his surgeon in a pre-suit deposition because such discovery is barred by Section 74.351(s) of the Texas Civil Practice & Remedies Code. However, Christophersen could depose his surgeon to investigate the viability of a products liability or negligent manufacture case against the supplier of the knee replacement apparatus. Even though the device was a medical device, it was not covered by the Texas Medical Liability Act.

Because the trial court's order permitted the deposition of the surgeon without any limitation on subject matter, mandamus was conditionally granted and the trial court was instructed to rescind or modify the order to exclude questions prohibited by Section 74.351.

***In re Kiberu*, 237 S.W.3d 445 (Tex. App.—Fort Worth 2007, orig. proceeding [mand. pending])**

Contrary to *In re Temple*, the Fort Worth court of appeals has decided that pre-suit depositions under Rule 202 are permissible, even if the potential claim may be one of "health care liability" under the Texas Medical Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon 2005).

The real party in interest alleged sexual assault during treatment at Harris Methodist H-E-B Hospital and secured an order to take pre-suit depositions of Troy Easley, the employee alleged to have committed the assault, and Simon Kiberu, a possible witness, and to obtain copies of their personnel files. Relief was granted as to Easley because he was not served with the petition or provided notice of the hearing that resulted in the order, as required by Rule 202. *See* TEX. R. CIV. P. 202.3(a). Relief was denied as to Kiberu and his employment records.

First, the court held that the allegation of sexual assault constitutes a "health care liability claim" under the Texas Medical Liability Act. Citing Texas Supreme Court precedent, the court noted that such a claim implicates the actions of the hospital and its employees in hiring, supervising, and training, as well as policies relating to the transport of patients and the administration of diagnostic tests.

Second, the court noted the split in authority on the question of whether the Act's expert report requirement trumps the Rule 202 presuit deposition procedure. The court reasoned that the definition of "health care liability claim," which includes the phrase "cause of action," does not include a potential cause of action. A cause of action implies that "the essential facts are known." To the contrary, the essential facts are not known about a potential cause of action, so a petitioner should be permitted to investigate whether she does, or does not, even have a viable claim. Moreover, without Rule 202 depositions, potential claimants might never be able to bring a health care liability claim because they would lack access to the very information needed by an expert to formulate an opinion and provide the report required by Section 74.351(a).

***Eric Vanderwerff, D.C. v. Beathard*, 239 S.W.3d 406 (Tex. App.—Dallas 2007, no pet. h.)**

Because Kristina Beathard failed to serve an expert report on the chiropractor alleged to have rubbed her genitals during an examination, her tort claim for assault was dismissed with

prejudice and the case remanded for a determination of the reasonable attorney's fees and costs Beathard owed the chiropractor.

Under the Medical Liability Act, every health care liability claim must be supported by an expert report, served on each party no later than the 120th day after suit is filed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007). Citing Texas Supreme Court precedent, the unanimous opinion stated that "[i]f the act or omission that forms the basis of the complaint is an inseparable part of the rendition of health care services, or if it is based on a breach of the standard of care applicable to health care providers, then the claim is a health care liability claim." Because the conduct about which Beathard complained occurred during a chiropractic exam, the court concluded that it was "inseparable" from the rendition of health care services. Therefore, the assault claim was a health care liability claim subject to the expert report requirements of Section 74.351(b). Dismissal of Beathard's claim and an award of attorney's fees were therefore mandatory under the Act.

***Maxwell v. Seifert,* 237 S.W.3d 423 (Tex. App.—Houston [14th Dist.] 2007, pet. struck)**

In *Maxwell*, the court of appeals considered whether the plaintiff's production of her bulk medical records, in response to requests for production, satisfied the statutory requirement to produce an expert report in medical malpractice cases within 120 days of filing the original petition. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007).

The plaintiff filed suit against a physician who had treated her for neck pain, originally asserting a claim of negligence. Three weeks after the passage of the 120-day deadline for serving expert reports, the defendant moved to dismiss the plaintiff's claim. The plaintiff filed a response, and then, the day before the motion to dismiss hearing, the plaintiff filed an amended petition, asserting two new claims: (1) failure to disclose risks of a procedure; and (2) *res ipsa loquitur*. After hearing, the trial court granted the motion to dismiss.

The plaintiff asserted three grounds for reversal: (1) the trial court erred when it dismissed the failure-to-disclose risks claim, which constituted a "distinct health care liability claim"; (2) the plaintiff's production of bulk medical records in response to requests for production was sufficient to satisfy the requirements of Section 74.351(a); and (3) the trial court erred by failing to rule on the plaintiff's motion for a thirty-day extension to cure the deficiency in the purported expert report, pursuant to Section 74.351(c).

The court of appeals rejected all three grounds and affirmed. As to the dismissal of the failure-to-disclose risks claim, the court held that Section 74.351(a) required the expert report be served within 120 days of the filing of the "original petition." The plaintiff did not gain another 120 days to serve her expert report by filing an amended petition.

The court also rejected the argument that the production of her medical records satisfied the requirement to serve an expert report. The court noted that the records reflected the treating physicians' contemporaneous observations and diagnoses, rather than an expert's responses to specific questions concerning standard of care and medical causation. The court also noted that production of the records was not sufficient to inform the defendant of the specific conduct the plaintiff had called into question. Finally, the court pointed out that the medical records did not contain the statutorily-required opinions regarding the standard of care or how the standard of care was breached. The court rejected the plaintiff's suggestion that such opinions were not necessary to support a *res ipsa loquitur* claim.

As to the plaintiff's request for a thirty-day extension, the court held that Section 74.351(c) only applies when a plaintiff has timely filed an initial expert report. Because the plaintiff's production of her bulk medical records did not satisfy Section 74.351(a), the trial court did not

err in failing to rule on the request for an extension.

***In re Locke*, No. 11-07-00250-CV, 2007 WL 3106656 (Tex. App.—Eastland Oct. 25, 2007, orig. proceeding) (mem. op.)**

In *In re Locke*, the court of appeals held that a defendant does not waive the right to challenge an expert report pursuant to TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon 1997), through mere delay or by participating in discovery.

The petitioner in this mandamus proceeding was a defendant in a multi-defendant medical malpractice case. One of the petitioner's co-defendants filed a motion to dismiss based on deficiencies in the report of the plaintiffs' expert. The trial court granted the motion to dismiss, and the court of appeals affirmed the dismissal in *Kuykendall v. Dragun*, No. 11-05-00230-CV, 2006 WL 728068 (Tex. App.–Eastland March 26, 2006, pet. denied) (mem. op.). Then, 864 days after the plaintiffs originally filed their expert report, the petitioner filed a motion to dismiss based on deficiencies in the report. The trial court denied the motion to dismiss, and the petitioner sought mandamus relief.

On review, the court of appeals rejected the plaintiffs' argument that the petitioner had waived his right to seek dismissal merely through the passage of time or through his participation in discovery. The court held that these actions were not inconsistent with an intent to seek dismissal under Article 4590i, Section 13.01. The court then concluded that the same things that made the expert report deficient as to the claims against the petitioner's co-defendant also made the expert report deficient as to the claims against the petitioner. The court conditionally granted the petition for writ of mandamus, directing the trial court to vacate its finding that the expert report was adequate under Article 4590i, Section 13.01. Concluding that the plaintiffs had asserted grounds for a continuance that applied uniquely to the petitioner, however, the court also directed the trial court to consider the plaintiffs' request for a thirty-day extension to cure the deficiencies in the expert report.

***Bohannon v. Winston*, 238 S.W.3d 535 (Tex. App.—Beaumont 2007, no pet.)**

In *Bohannon*, the court of appeals held that a delay in serving a defendant with the citation and petition in a lawsuit does not excuse the requirement to serve the defendant with a copy of the plaintiff's expert report within 120 days of the filing of the lawsuit.

The plaintiffs filed their lawsuit on April 24, 2006, and directed that service be effected on the defendant at a business address in Houston. In June 2006, within 120 days of filing the lawsuit, the plaintiffs filed their expert reports, but the defendant, who had not yet been served with process in the lawsuit, did not receive the reports at that time. Two months later, more than 120 days after the plaintiffs filed the petition, the defendant was served with the lawsuit. The defendant moved to dismiss, pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007), based on the plaintiffs' delay in serving him with the expert reports. The plaintiffs argued that the defendant could not invoke the 120-deadline, because he caused the delay in the service of the original petition. The plaintiffs also argued that Rule 21a allows the court to establish a date of service based on a date other than the date of constructive delivery. Finally, the plaintiffs argued that the 120-day requirement under Section 74.351(a) should not apply until after a plaintiff obtains service of process on the defendant.

The court rejected the plaintiffs' first argument, finding reasonable the trial court's conclusion that the defendant was not avoiding service. The trial court also rejected the plaintiffs' second argument, concluding that Rule 21a does not allow a court to extend a deadline for providing service. Finally, the court held that, in the absence of the parties' agreement, Section 74.351(a) does not provide a court with the ability to extend the deadline for service of expert reports beyond 120 days after the filing of the original

petition. The court wrote: "The potential for gamesmanship does not vest the courts with the power to legislate; instead, we must apply the statute as written and address a party's misconduct when it occurs. The record of this appeal reveals no gamesmanship."

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

***Ware v. Everest Group L.L.C.*, 238 S.W.3d 855 (Tex. App.—Dallas 2007, pet. filed)**

A judgment creditor's assignee sought to enforce a 14-year-old New Mexico judgment by filing an original petition in Dallas County and won summary judgment. The Dallas court of appeals analyzed and applied the Uniform Enforcement of Foreign Judgments Act (UEFJA) found at Chapter 35 of the Texas Civil Practice and Remedies Code, and the legal concepts of dormancy, revival and limitations to reverse and remand.

In August 1990, Rutledge won a default judgment against Ware in New Mexico. In November 1992, under Section 35.003 of the UEFJA, Rutledge filed the foreign judgment in Dallas County. This filing immediately and simultaneously initiated an enforcement proceeding and rendered a Texas final judgment. Ten years later, in November 2002, this Dallas County judgment became dormant and unenforceable. TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a) (Vernon 1997). However, the dormant judgment could have been revived by an Action of Debt brought within two years, or no later than November 2004. *Id*. § 31.006.

In November 2000, Rutledge assigned the New Mexico judgment to Everest. In July 2004, Everest filed an original petition for enforcement of the New Mexico judgment in Dallas County, without reference to Rutledge's 1992 UEFJA action. Everest's new action was barred by a 10 year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN § 16.066(b) (Vernon 1997). In December 2004, Everest filed an amended petition, which added an Action for Debt, seeking to revive the 1992 enforcement action. The court analyzed and rejected Everest's arguments that tolling under Section 16.063 or the relation-back doctrine made its amended petition timely in December 2004. Because Everest sought to revive the dormant judgment one month too late, its claim was barred by limitations.

Robert Fugate, Fanning, Harper & Martinson, P.C., Dallas
Chris Brisack, Immigration Judge, Department of Justice, Houston

APPELLATE JURISDICTION / QUALIFIED IMMUNITY / FRIVOLOUS APPEALS

***Charles v. Grief*, 507 F.3d 342 (5th Cir. 2007)**

The Fifth Circuit reiterated that not all denials of qualified immunity to state actors are appealable as interlocutory appeals. Rather, only denials of qualified immunity that turn on legal issues are immediately appealable.

An upper-level official (Grief) with the Texas Lottery Commission terminated an employee (Charles) who sent emails to members of the legislative committee with oversight over the Commission. The emails alleged violations of the Texas Open Records Act, misuse of state funds, and misconduct by management. Charles sent a copy of his last email to Commission officials. Two days later, Charles was fired.

Charles filed suit for violation of his constitutional right of free speech. Grief sought a dismissal on the grounds of qualified immunity.

The district court denied Grief's motion to dismiss because Charles established genuine issues of *fact*, including "(1) whether Charles was fired for insubordination or for sending the emails to members of the state legislature, and (2) whether he was speaking as a citizen on matters of public concern and interest of the State and was thus entitled to protection of the First Amendment (as asserted by Charles) or merely making the statements as a public employee, possibly even pursuant to his official duties as contended by Grief."

Although denial of qualified immunity is one of the "few narrow exceptions" that can be reviewed via an interlocutory appeal, "[i]t is well settled . . . that not every interlocutory denial of such a defendant's claim of qualified immunity is immediately appealable: Only those denials that turn on legal issues, such as the materiality of a disputed fact—and not those that turn on factual issues, such as the trial court's finding of the presence of a genuinely disputed issue of fact—are immediately appealable." Since the motion to dismiss was denied because fact issues existed, the Fifth Circuit dismissed the appeal.

The Fifth Circuit also expressed frustration with the frequency that interlocutory appeals are improperly filed. The Court said the "lack of appellate jurisdiction is pellucid" given "the clear, unequivocal, and emphatic pronouncement of the district court that it was denying qualified immunity because Charles had borne his burden of demonstrating the presence of issues of fact." The Fifth Circuit gave the Office of the Attorney General of Texas a strong warning, saying:

> The cost in time and money incurred by a public employee who has sued in the belief that he has suffered an adverse employment action as the result of unconstitutional retaliation is significantly increased when, as here, the defendant takes a clearly unwarranted appeal of an interlocutory denial of qualified immunity. Taking such an appeal is now unconscionable in light of this court's burgeoning precedent uniformly rejecting such appeals of fact-based denials of qualified immunity for lack of appellate jurisdiction . . . . Considering the usual disparity in the financial conditions of the parties to such actions, cavalierly taking such an appeal smacks of economic duress. Indeed, this is at least the second such case this year in which the office of the Attorney General of Texas has improvidently brought and doggedly prosecuted such an appeal . . . . We trust that counsel for Grief, as well as all other counsel who represent public employers and state

> actors in such roles, will henceforth carefully heed the case law of this court on point and be chary to take appeals of interlocutory orders denying qualified immunity on grounds of the existence of genuine factual disputes, lest they incur penalties, sanctions, damages for, *e.g.*, frivolous appeals, or worse.

BANKRUPTCY / TEXAS HOMESTEAD LAW

***In re Norris*, 499 F.3d 443 (5th Cir. 2007) (per curiam)**

Two boat owners, who lived on their boat, challenged a bankruptcy court's ruling that their boat did not qualify has a homestead under Texas law. Except for the question of whether a homestead must be attached to land, the boat fulfilled all the requirements of a homestead. On appeal, the Fifth Circuit certified the question to the Texas Supreme Court, which ruled (in a 5-4 decision) that the boat did not qualify as a homestead because it was not "realty-based." *See Norris v. Thomas*, 215 S.W.3d 851 (Tex. 2007). The dissent in the Texas Supreme Court opinion reasoned the boat was no less attached to the land than are mobile homes, which the Texas Supreme Court had previously given homestead status ("It is difficult to distinguish between a mobile home hooked up to land-based electricity and water, and a boat hooked up to land-based electricity and water, when it is the attachment itself that makes the dwelling habitable as a residence."). In light of the Texas Supreme Court's decision, the Fifth Circuit affirmed the bankruptcy court's judgment that the boat did not qualify as a homestead under Texas law.

CITIZENSHIP / JURISDICTION

***Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393 (5th Cir. 2007)**

In this case, the Fifth Circuit examined a statutory scheme, which it adjudged did not provide "an easy avenue by which [Appellant Rios] might bring his citizenship claim before the courts . . . ." Nevertheless, the Court felt that some avenues might exist and that it should not disturb a statutory scheme established by Congress.

Rios was born in Mexico in 1956. Rios claimed his mother was unmarried to his father, the latter being an American citizen at the time, which meant that she needed only to have been present in the U.S. for one continuous year for him to be a citizen under 8 U.S.C. § 1409(c). The Government contended Rios's parents were married Mexican citizens when he was born. In 1975, Rios was granted a green card and he moved to the United States, but he was deported in 1989 based on a drug crime conviction. In October 2003, Rios reentered, claiming to be a U.S. citizen. Rios was placed in removal proceedings pursuant to a notice to appear (NTA) dated January 20, 2004. Rios filed a Form N-600 Application for Citizenship on May 12, 2004, while the removal proceeding was pending. The application was denied on August 13, 2004. Rios appealed but also filed another application with the same District Director. The immigration judge presiding over the removal proceedings held a hearing in mid-March 2004 wherein Rios submitted evidence of his citizenship, and the immigration judge terminated the removal proceeding without prejudice. On April 1, 2005, the Administrative Appeals Unit rejected Rios's appeal. A United States Citizenship and Immigration Services (USCIS) officer processing the second application gave Rios twelve weeks to provide evidence of his mother's presence in the U.S. On October 21, 2005, Rios filed an action in district court seeking a declaratory judgment that he was an United States citizen. The second application was denied in November 2005 when Rios failed to produce evidence to USCIS. In federal court, the Government moved to dismiss the case for lack of jurisdiction. The district court agreed and Rios appealed. Subsequent to oral argument on appeal, the Government issued a new NTA, which reinstituted removal proceedings against Rios. Rios asserted his citizenship as a defense to removal and sought to have the administrative proceedings terminated. The final merits hearing had not been held as of the time of the Fifth Circuit's decision.

The first issue addressed by the Fifth Circuit was whether the court was deprived of jurisdiction under 8 U.S.C. § 1503(a)(2), which holds that "no [declaratory judgment] action may be instituted in any case if the issue of such person's status as a national of the United States . . . is in issue in any removal proceeding." Rios argued, and the Court found, that there is a prohibition against instituting a citizenship declaratory judgment action when there is a pending removal action but that in this case Rios had already filed the declaratory judgment action when the Government began the current (*i.e.* second) removal proceeding, so that jurisdiction existed.

The second issue was whether the court was deprived of jurisdiction under 8 U.S.C. § 1503(a)(1), which provides that "no [declaratory judgment] action may be instituted in any case if the issue of such person's status . . . arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act . . . ." The District Court held that, because Rios filed his N-600 application after the commencement of removal proceedings, his claim must be dismissed because the issue of his citizenship arose by reason of or in connection with his removal proceedings. Both the Government and Rios agreed that the claim was not invalid simply because it was made after the initiation of removal proceedings, but the Government did argue that the claim was invalid because "the issue of citizenship arose in connection with Rios's removal proceeding." The Fifth Circuit agreed, explaining that it is "the context of how the particular issue of citizenship arose rather than the mere timing of events that determines the applicability of § 1503(a)(1)." Acknowledging the validity of Rios's argument that the N-600 application process is separate from the removal proceedings, the Court nevertheless felt his claim to be invalid because the focus is on "the proceeding in which the particular claim to citizenship originates, not the proceeding in which it is being pursued." The Court also found the fact that the removal proceedings had ended to not be determinative.

The Fifth Circuit acknowledged that "[t]his straightforward reading of the statute appears to leave Rios in limbo, victorious in the removal action against him, yet unable to obtain judicial review of his claim of citizenship through review of the executive's denial of his N-600 application." Nevertheless, the Court rejected arguments that it should therefore find a due process violation and look beyond the straight-forward reading. The Court found the cases cited by Rios to be "not squarely on point," and held "we do not perceive Rios's plight as being as dire as he suggests—though it is admittedly less than ideal." Finally, the Court noted that "we do perceive avenues by which he might [present his citizenship claim]." The Court therefore affirmed the judgment of the district court.

CLASS ACTION / APPEAL COSTS / BOND

***Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007) (per curiam)**

Consumers brought a purported class action lawsuit against Honda alleging that certain odometers overstated actual mileage. The parties moved to certify a settlement class and to settle the case. Some class members objected that the proposed settlement provided no compensation for "diminution in value" or value lost on a sale or trade-in due to an inflated odometer, so that class members who had already sold or traded their vehicles would receive no compensation.

This objection was overruled and the district court judge entered an order requiring each objector who appealed to post a $150,000 bond for costs on appeal. The trial court noted, in support of its decision, that "the detrimental impact of an appeal as to the entire class renders it appropriate for the court to require any objector to post an appeal bond," that Honda stood ready to deliver approximately $10 million in lease funds to class members, and that "there is a significant possibility that any appeal of the court's decision to overrule these objections would be summarily denied pursuant to [Federal Rule of Appellate Procedure (FRAP)] 38 and an award of attorneys' fees and costs assessed against the appealing

objector(s)." The objectors moved for a stay of the bond requirement and requested that the amount of the bond be reduced to $1,000.

The Fifth Circuit characterized the trial court's "detrimental impact of an appeal as to the entire class" point as "using a bond for costs on appeal as a surrogate for a supersedeas bond," holding that same was inappropriate because "[b]onds to supersede a judgment must be set under Rule 8, not Rule 7." The Court found that the amount Honda stood ready to deliver was "adequately captured by the settlement," also noting that the settlement agreement did not award to the plaintiffs any time-value of the benefits to be paid and contemplated that payment would not occur until all appeals are exhausted, and that the amount secured should not have included interest accrued pending appeal as part of a bond for costs on appeal.

With regard to the possibility of a summary denial, the Court noted the Federal Rules of Appellate Procedure contain no provision allowing a district court to predict that an appellate court will find an appeal frivolous or to set a bond for costs on appeal based on an estimate of what "just damages" and costs the appellate court might award. Further, the Fifth Circuit found that the amount of potential damages assessed was not supported by the evidence. Finally, the Court noted there is a split among the circuit courts as to whether a district court has the power to award attorneys' fees as costs pursuant to FRAPs 7 and 39(e), when the underlying statute provides that attorneys' fees may be included as costs, but held that this particular issue was not before it in this case.

The Fifth Circuit granted the motion to stay the appeal bond and reduced the amount of the bond to $1,000, indicating that none of the appellees had asserted that this amount was inadequate.

ERISA—BREACH OF FIDUCIARY DUTY

***Amschwand v. Spherion Corp.*, 505 F.3d 342 (5th Cir. 2007)**

Thomas Amschwand was employed by Spherion Corp. Amschwand developed cancer and sought medical leave, during which Spherion switched insurance providers, replacing Prudential with Aetna Life Insurance Co. A special provision called the "Active Work Rule" provided that an ill employee away from work on the date the new coverage would become effective would not receive coverage until the employee came back to work for one full day. Aetna and Spherion agreed the Active Work Rule would not apply to employees like Amschwand, who were not currently working full-time due to a medical condition that predated the switch from Prudential to Aetna.

Amschwand enrolled in the Aetna plan, paid premiums, and was repeatedly reassured that he had coverage under the Aetna plan. He was not told about the requirement that he return to work for at least one full day. Nevertheless, "[f]or reasons Spherion has failed to explain, however, Mr. Armschwand was not among those who received coverage," despite the agreement, because he never received a waiver and remained subject to the Active Work Rule. Shortly after Amschwand died, his wife filed a claim with Aetna, but was informed Amschwand was ineligible because of not satisfying the Active Work Rule. She filed suit under Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) for "monetary damages caused by Spherion's breach of fiduciary duty," i.e. the amount of money she would have received if her husband had complied with the Active Work Rule. Spherion refunded Amschwand's premium payments but maintained that any additional damages did not constitute "appropriate equitable relief" within the meaning of subsection (a)(3). The district court agreed and granted summary judgment for Spherion.

Section 502(a)(3) of ERISA allows a plan participant to obtain "appropriate equitable relief"

to enforce the terms of an employee-benefit plan. The Fifth Circuit discussed the long line of U.S. Supreme Court cases which have "circumscribed" the "scope and nature of relief available to aggrieved parties under this statutory provision." The Court recognized Amschwand's proposed distinction, which was that Spherion had a fiduciary duty and that "make whole relief was routinely available as a remedy for breach of fiduciary duty in cases brought against fiduciaries." Nevertheless, the Fifth Circuit rejected that argument, noting the "proposed distinction among defendants has been rejected by many of our sister circuits" and that "[t]here is no textual argument for drawing this distinction . . . ." Accordingly, the Judgment of the trial court was affirmed.

Judge Benavides filed a concurring opinion noting the "facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available."

EXHAUSTION OF ADMINISTRATIVE REMEDIES—JURISDICTIONAL OR JURISPRUDENTIAL?

***Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592 (5th Cir. 2007)**

In this case, the Fifth Circuit addressed what standards apply to determine whether a farmer's failure to exhaust administrative remedies in a case brought against the Farm Service Agency is jurisdictional or merely jurisprudential.

After a prior warning that the farmer could lose U.S. Department of Agriculture benefits if he filled in wetlands again, the farmer nonetheless filled in additional wetlands. Consequently, the Farm Service Agency denied future benefits under the "swampbuster" provisions and demanded the return of $107,000 in prior payments. The farmer did not meet the administrative appeal deadlines, but later filed suit in federal court.

The Fifth Circuit addressed a split in the circuits about whether the administrative exhaustion provision in 7 U.S.C. § 6912(e) was jurisdictional. If the provision codifies a jurisprudential requirement, it merely continues the self-imposed doctrine of judicial restraint, leaving the federal courts with jurisdiction to consider excusing a failure to exhaust administrative remedies.

The Fifth Circuit looked to the Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), which established the standard for determining whether a statutory exhaustion requirement is jurisdictional rather than merely the preservation of a jurisprudential doctrine. An exhaustion provision that is "sweeping and direct" and "plain from its own language" is indicative of a jurisdictional bar. The Fifth Circuit agreed with other circuits that one important factor in deciding whether exhaustion is "textually required" or "statutorily mandated" is whether the statute explicitly mentions and deprives federal courts of jurisdiction if administrative remedies are not exhausted. The Fifth Circuit joined the Eighth and Ninth Circuits in concluding that Section 6912(e) focuses on the individual litigant and does not expressly deprive the courts of jurisdiction.

The Fifth Circuit held the district court correctly found the farmer failed to exhaust his administrative remedies. However, the district court incorrectly ruled that the failure was jurisdictional.

Rather than dismissing the case outright, the district court should have proceeded to determine whether the exhaustion of administrative remedies should be excused. However, exceptions to the jurisprudential exhaustion requirement apply "only in extraordinary circumstances," such as: (1) a plainly inadequate administrative remedy; (2) a constitutional challenge that would remain standing after exhaustion; (3) a claim that the administrative remedy is inadequate; (4) futility; and (5) irreparable injury absent immediate judicial review. None of these exceptions applied to the farmer's case.

Because the farmer failed to exhaust his administrative remedies and no excuse applied, the summary judgment in favor of the government

was affirmed. The Fifth Circuit also rejected the farmer's estoppel argument because there was no showing of government misconduct. Noting that a court may dismiss with prejudice when exhaustion is no longer possible, the Fifth Circuit modified the district court's judgment to dismiss the case with prejudice because the exhaustion of administrative remedies was too late for the farmer's claims.

FAIR DEBT COLLECTION PRACTICES ACT—DEFENSES

***Sobranes Recovery Pool I v. Todd & Hughes Constr. Corp*, 509 F.3d 216 (5th Cir. 2007)**

Sobranes, as private-party assignee of the Federal Deposit Insurance Corporation (FDIC), sought to execute on a judgment entered against Todd & Hughes Construction Co. (THCC) and other individual guarantors (collectively, "Defendants") and in favor of the FDIC. THCC had executed an "All Inclusive Deed of Trust Note" in favor of Western Savings Association (WSA) for $10.3 million. Extensions were granted after guarantees were signed by certain Defendants. Subsequently WSA was placed into receivership and its assets, including the note and guarantees, transferred by the Federal Savings and Loan Insurance Corporation (FSLIC) to Western Federal Savings and Loan Association (WFSLA). WFSLA subsequently was placed in receivership and the assets were transferred again, this time to Sunbelt Savings, which in turn transferred them to the FSLIC. THCC and the guarantors defaulted. The FSLIC was abolished and the FDIC thereby came into possession of the notes and guarantees.

Judgment on the notes and guarantees was entered in favor of the FDIC in October 1992. The judgment was abstracted in January 1993. The judgment was assigned and re-assigned by the FDIC and other entities until it finally was owned by Sobranes. However, a writ of execution was not issued until April 2003. Defendants argued the writ of execution was dormant since a writ must issue within ten years from the judgment date and Sobranes can not invoke the FDCPA to evade this time bar. Sobranes argued that, as the FDIC's assignee, it was entitled to avoid this bar. The district court held that Sobranes had failed to demonstrate that it was a proper party to invoke the FDCPA and that Sobranes could not therefore rely on the FDCPA to establish that the judgment was not dormant.

The Fifth Circuit court agreed that the central question was whether Sobranes was entitled to invoke the FDCPA. Defendants argued the judgment was not a FDCPA debt, reasoning the underlying notes were agreements between private parties that the FDIC acquired only through the failure of a private savings and loan. Sobranes argued that, because WSA was a federally insured institution, the note fell within the ambit of loans insured or guaranteed by the U.S.

The Circuit Court held Sobranes could not invoke the FDCPA. A "debt" subject to the FDCPA provision invoking "amounts owing to the United States" results either from a direct loan by the U.S. (not applicable to the facts of this case) or a loan insured or guaranteed by the U.S., which in turn means loans where the federal government has agreed to cover a lender's losses in the event the debtor defaults. No such arrangement existed with regard to this private loan by a private institution, and "of course, the judgment entered against Defendants is not a loan at all—insured or otherwise." The Court held Sobranes's argument focused on whether the lending institution itself was federally insured, and not as it should on whether the U.S. has insured or guaranteed the loan. The Fifth Circuit, therefore, affirmed the judgment of the district court.

FAIR DEBT COLLECTION PRACTICES ACT / STUDENT LOANS

***Wagstaff v. U.S. Dep't of Education*, 509 F.3d 661 (5th Cir. 2007) (per curiam)**

The principal issue in this case was whether Congress waived sovereign immunity of the United States by enacting the Fair Debt Collection Practices Act (FDCPA). The Fifth Circuit held Congress did not waive immunity and affirmed

the district court's dismissal for want of subject matter jurisdiction.

The borrower took out student loans between 1991 and 1993 and "never made a single voluntary payment" although she was gainfully employed. The Texas Guaranteed Student Loan Corporation (TGSLC) paid the claims of the lenders following the plaintiff's default. The Department of Education (DOE), in its role as reinsurer, paid the TGSLC. TGSLC assigned its rights and title to DOE for collection purposes.

DOE filed suit against borrower, but dismissed when the borrower raised questions about the validity of the notes. DOE determined that the notes were valid and offset the debt with borrower's tax refunds. DOE proposed to garnish borrower's wages, and borrower filed suit against DOE under the FDCPA. The district court held that it lacked subject matter jurisdiction and also held the borrower failed to exhaust her administrative remedies.

On appeal, borrower argued that DOE waived its sovereign immunity by acting through a third party to collect her student loan debt, filing suit against her, and informing her that she could bring a federal suit to review the decision to garnish her wages. The Fifth Circuit rejected the contention that these matters waived the government's sovereign immunity to suit under the FDCPA. The Fifth Circuit further held the FDCPA does not contain an unequivocal and express waiver of statutory immunity, and thus, sovereign immunity was retained.

FEDERAL INCOME TAX / TAXABLE SETTLEMENTS

***Green v. Comm'r of Internal Revenue*, 507 F.3d 85 (5th Cir. 2007)**

This case addresses what types of settlement payments are taxable and whether costs expended in attempts to recover a judgment can be excluded from gross income as business expenses. The case also considers liability for a twenty percent accuracy-related penalty.

In 1991, former State of Texas employee and whistle-blower George Green was awarded $3,459,832 in compensatory damages and $10,000,000 in punitive damages by a Texas jury in a wrongful termination case. However, Texas initially failed to pay Green any portion of the judgment. After three years, Green sold a $1,000,000 interest in his recovery, if any, for $500,000 to fund his attempt to collect the judgment. Green formed Green Capital Corp. and TS Capital Asset, L.L.C. to hire consultants, advisors, publicists, and other professionals. Green's mental and physical health deteriorated. He was hospitalized for bleeding ulcers.

Eventually Green and Texas entered into a settlement agreement for $13,775,000, although the judgment's value exceeded $20 million by that time due to accrued interest. The settlement apportioned the payment into three categories. The first category was a $3.4 million payment for loss of earning capacity, mental anguish, and suffering. The second category was for "additional damages," and consisted of monthly annuity payments and a final lump sum payment. The third category was for "all other damages, including punitive, prejudgment and post-judgment interest," and was also paid with a monthly annuity followed by a lump sum payment. The total payment for the second and third categories was $10,347,000.13.

On his 1995 tax return, Green excluded the payment of $3.4 million (first category payment) under Section 104(a)(2) of the Internal Revenue Code, which provides an exclusion for "damages received . . . on account of personal injury or sickness." For 1996, 1997, and 1998, Green reported payments made under the second annuity, but not the first. In 1997 and 1998, Green attached a statement to his return asserting the payments under the first annuity represented additional damages—other than punitive damages and interest—that were excludable under Section 104(a)(2). For 1999, Green reported neither of the final lump sum payments ($3,000,000 and $1,761,000), but attached statements contending

these payments were excludable from gross income.

For 1995 and 1996, Green also claimed losses for Green Capital and/or TS Capital. These claimed losses arose from expenses Green incurred in collecting his judgment and defending a suit by a third party who rendered services attempting to collect the judgment. Green deducted these expenses as trade or business expenses. Because of the claimed loss of $1.47 million, Green paid no taxes for the years at issue, except 1997—when he paid $8,066 in taxes.

In 2001, Green amended his tax returns for 1996, 1997, and 1998. In the amended returns, Green claimed that $95,088 should not have been reported as taxable income. Green sought a refund of $7,654 for 1997.

The Commissioner of the Internal Revenue Service initially contended that all of Green's settlement was taxable. However, at the tax court level, the Commissioner agreed that the $3.4 million payment under the first category was properly excluded from gross income.

The tax court agreed with the Commissioner that the remaining payments were taxable and that the twenty percent accuracy related penalty was proper. The tax court also found that Green's losses and expenses from Green Capital and TS Capital were not deductible under Section 162 of the Code as trade or business expenses, but instead were only deductible under Section 212 of the code as expenses related to the production of income.

Applying the standard of review that findings of fact are reviewed for clear error and issues of law are reviewed de novo, the Fifth Circuit affirmed the tax court's judgment.

FIRST AMENDMENT / STUDENT SPEECH

***Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007)**

In this case, the Fifth Circuit held a student journal threatening a Columbine-style attack and hate crimes was not protected student speech.

A high school student kept an "extended notebook diary, written in the first-person" detailing the creation of a pseudo-Nazi group on the school campus. The diary included entries where the author orders his group to commit brutal, hate-based assaults. After a report by a fellow student, the school's Assistant Principal acquired and read the diary. The Assistant Principal determined that the diary posed a "terroristic threat" to students on the campus. The author was suspended for three days and a recommendation was made that the author be placed in the school's alternative education program. The student and his mother contended the diary was merely creative writing, and a work of fiction.

After the student's parents filed suit, the district court granted a preliminary injunction barring the school from imposing punishment on the student. The school appealed.

In analyzing the First Amendment issue, the Court applied the Supreme Court's recent decision regarding a student who unfurled a banner reading "BONG HiTS 4 JESUS." *See Morse v. Frederick*, 127 S.Ct. 2618 (2007). Under *Morse*, student speech advocating illegal drug use is "per se unprotected because of the scope of the harm it potentially foments." Thus, school administrators are not required to evaluate such speech for substantial disruption or material interference with school activities, which is the hallmark for analysis established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The *Morse* analysis applies—rather than the *Tinker* analysis—in cases where the "speech poses a direct threat to the physical safety of the school population." Further, the *Morse* analysis focuses on how the audience would interpret the message, rather than the speaker's motive.

The Fifth Circuit carefully noted that students could not be expelled "just because they are 'loners,' wear black and play video games." *Ponce*, 2007 WL 4111241 at *7 (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001)). However, "when a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling 'fire' in [a] crowded theater." *Id*. (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). Because the student's speech was not protected, the Fifth Circuit vacated the preliminary injunction.

INSURANCE LAW—DUTY TO DEFEND

***Lincoln Gen. Ins. Co. v. Garcia*, 501 F.3d 436 (5th Cir. 2007)**

An insurer, Lincoln General Insurance Co. ("Lincoln General"), filed a declaratory judgment action against an insured, seeking a declaration that its policy did not provide coverage for any damages arising out of a bus accident in Mexico. The district Court held the endorsement "only applies to transportation that occurs within the United States, and does not apply to transportation occurring outside of the United States." The Fifth Circuit held the insurance policy form endorsement was prescribed by the Bus Regulatory Reform Act (the "Act") and did not cover a bus accident occurring in Mexico. In reaching its decision, the Court rejected the insured's argument that the endorsement was simply a private insurance contract with negotiated terms; rather, the form and substance of the endorsement are mandated by federal law.

This action arose out of an accident in Monterrey, Mexico between a vehicle and a bus operated by Garcia's Tours ("Garcia"). The vehicle was carrying eight members of the Morquecho family, two of which were killed, and six of which were injured in the collision. Garcia's insurance was provided by Lincoln General but covered accidents and losses occurring only within the U.S. and certain other locations, not including Mexico. The policy contained a federally mandated "Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Section 18 of the Regulatory Reform Act of 1982."

The Morquechos filed suit against Garcia in Texas state court for negligence and other causes of action. Lincoln General denied coverage and refused to defend or indemnify Garcia. Lincoln General then filed a declaratory judgment action in federal district court seeking a declaration that the policy did not provide coverage for any damages arising out of the accident. The Morquechos intervened, requesting a declaration that the policy applied to any judgment rendered against Garcia in the state court suit. Lincoln General and the Morquechos filed cross-motions for summary judgment. Lincoln General argued there was no duty to defend because the accident occurred in Mexico. The Morquechos contended that the endorsement trumped the territorial limitation in the policy and mandated coverage.

The district court ruled in favor of Lincoln General, holding the endorsement only applied to transportation between the U.S. and a foreign country *to the extent the transportation is in the U.S.* This was based, at least in part, on the fact that the Act only required minimum levels of financial responsibility *while in the U.S.* The Fifth Circuit affirmed the judgment of the district court.

MANDAMUS / CHANGE OF VENUE

***In re Volkswagen of Am., Inc.*, 506 F.3d 376 (5th Cir. 2007)**

In this case, the Fifth Circuit acknowledged "several conflicting panel opinions addressing the proper degree of deference to be given to a plaintiff's choice of forum," and held that on a motion to transfer the movant must only show good cause. A defendant is not required to show that the balance of convenience and justice substantially weighs in favor of transfer, as would be required under the forum non conveniens dismissal standard. The Court explicitly indicated that "[a]bsent exceptional circumstances, the

district courts of the Fifth Circuit must consider motions to transfer under the rubric we have provided" in this case.

This case originated when Plaintiffs filed suit against Volkswagen in the Marshall Division for the Eastern District of Texas, alleging that design defects in a Volkswagen vehicle caused injuries to Richard Singleton and death to Mariana Singleton when the vehicle was struck from behind and propelled rear-first into a flat-bed trailer parked on the shoulder of a Dallas, Texas freeway. Volkswagen sought to transfer venue to the Dallas Division of the Northern District of Texas. The district court denied the motion because "Volkswagen had not satisfied its burden of showing that the balance of convenience and justice weighs substantially in favor of transfer."

In reaching its decision, the Court noted that it was "bound by the *Humble Oil* decision. And as *Humble Oil* preceded *Bayside Warehouse*, to the extent these two opinions conflict, we again find ourselves bound by *Humble Oil*." The Court also noted other possible standards of deference, such as "highly esteemed" and "strongly favored," but found them problematic and irreconcilable with prior decisions. Instead, a party seeking a transfer "must show good cause," which means "that a moving party must demonstrate that a transfer is '[f]or the convenience of parties and witnesses, in the interest of justice.'" When the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed. When the transferee forum is clearly more convenient, a transfer should be ordered."

The Court went on to analyze the various private and public interest factors to be considered. The first private interest factor is the relative ease of access to sources of proof. The second private interest factor is the availability of compulsory process to secure the attendance of witnesses. The third private interest factor is the cost of attendance for willing witnesses. The Court noted that the only contested public interest factor "is the local interest in having localized interests decided at home."

Although sympathizing with the district court "because our precedents have not been the model of clarity," the Fifth Circuit held that the district court abused its discretion by failing to order transfer of the case, and therefore granted the petition for mandamus and remanded the case with instructions that it be transferred to the Northern District of Texas, Dallas Division.

Alan Curry, Harris County District Attorney's Office, Houston

ABATEMENT OF APPEAL—OUT-OF-TIME MOTION FOR NEW TRIAL

***Cooks v. State,* PD-0010-06, 2007 WL 4146374 (Tex. Crim. App. Nov. 21, 2007)**

The defendant entered a guilty plea without a plea bargain to the offense of aggravated assault with a deadly weapon. After sentence was pronounced, the defendant's retained trial attorney asked the trial judge to appoint an attorney for the defendant for appeal if the defendant wished to bring an appeal. The trial court responded that it would appoint an attorney for the defendant if the defendant wished to bring an appeal. With ten days remaining before a notice of appeal or a motion for new trial could be filed, the defendant's trial attorney filed a notice of appeal, and he also requested the appointment of an appellate attorney for the defendant. The trial court appointed an appellate attorney for the defendant on that same day, and no motion for new trial was filed. Several months later, the defendant's appellate attorney filed a motion to abate the appeal so that an out-of-time motion for new trial could be filed. In that motion, the defendant claimed that he was not represented by any attorney during the time in which he could have filed a motion for new trial, and that his appellate attorney did not have enough time to help the defendant determine whether a motion for new trial should have been filed. The defendant also claimed that his trial attorney rendered ineffective assistance of counsel at the punishment hearing because he failed to call a material witness. The court of appeals denied the motion to abate.

The Court of Criminal Appeals held that, as a matter of federal constitutional law, the time for filing a motion for new trial is a critical stage of the proceedings, and that a defendant has a constitutional right to counsel during that period. But the court reaffirmed its prior holdings that, in cases in which a defendant is represented by counsel during trial, there is a presumption that the defendant's trial attorney continued to adequately represent the defendant during that critical stage. The court held that this presumption was rebutted in the defendant's case because (1) the defendant was unrepresented by counsel during the initial twenty days of the thirty-day period for the filing of a motion for new trial, and (2) the defendant asserted in his motion to abate that ten days was not enough time for the defendant's appellate attorney to help the defendant decide whether to file a motion for new trial.

The court held, however, that the deprivation of counsel during the thirty-day period for filing a motion for new trial was harmless because the defendant's motion to abate presented no facially plausible claims that could have been presented in a motion for new trial, even though the defendant's appellate attorney had more than four months to discover such claims. The court found the defendant did not present a facially plausible claim when he presented the conclusory claim in his motion to abate that his trial attorney rendered ineffective assistance of counsel by failing to call a material witness at the punishment stage of the trial. The court observed the defendant did not explain what evidence or information the material witness would have revealed that reasonably could have changed the result of this case.

PRESERVATION OF ERROR—TRIAL COURT ADMONISHMENT REQUIREMENTS

***Bessey v. State,* 239 S.W.3d 809 (Tex. Crim. App. 2007)**

The defendant was charged with three counts of aggravated sexual assault of a child and one count of injury to a child. The trial court admonished the defendant as to the range of punishment and the effects that a guilty plea might have upon a non-citizen. The defendant remained silent during these proceedings, so the trial court entered

a "not guilty" plea on the defendant's behalf. The defendant later changed his pleas to "guilty," and the jury assessed the defendant's punishment at the maximum possible, with all of the sentences to be served consecutively. On appeal, the defendant claimed that the trial court failed to properly admonish him concerning the sex-offender registration requirements. The court of appeals did not address the merits of the defendant's claim, instead holding that no error had been preserved for the purposes of appeal because the defendant had failed to object to the trial court's incomplete admonishments.

The Court of Criminal Appeals noted that errors may be raised for the first time on appeal if the complaint is (1) that the trial court disregarded an absolute or systemic requirement or (2) that the defendant was denied a right that must be affirmatively waived before it can be waived. And the court also noted that a defendant's right to be properly admonished is a right that must be affirmatively or expressly waived. This is because the trial court has a statutory duty to properly admonish a defendant pursuant to Article 26.13 of the Texas Code of Criminal Procedure. Therefore, the Court of Criminal Appeals held that a defendant could raise a trial court's failure to properly admonish him for the first time on appeal. *But cf. Rhea v. State,* 181 S.W.3d 478, 484 (Tex. App.—Texarkana 2005, pet. ref'd). The Court of Criminal Appeals went on to hold that the defendant was not harmed by the trial court's failure to admonish the defendant concerning the sex offender registration requirements.

RIGHT TO APPEAL—PETITION FOR NON-DISCLOSURE

***Huth v. State,* No. 7-07-274-CV, 2007 WL 3240303 (Tex. App.—Amarillo Nov. 2, 2007, no pet.)**

The defendant appealed from a trial judge's order on the defendant's petition for non-disclosure under Section 411.018 of the Texas Government Code. The court of appeals held it did not have jurisdiction over the defendant's appeal. In contrast to the statutory provision for the expunction of criminal records, Section 411.081 contains no express grant of an appellate right. Since no amount in controversy exceeding $100 was involved in the defendant's petition for non-disclosure, general jurisdiction in the court of appeals was not established.

STANDARD OF REVIEW—COLLATERAL ESTOPPEL

***State v. Stevens,* 235 S.W.3d 736 (Tex. Crim. App. 2007)**

While serving deferred adjudication probation for involuntary manslaughter, the defendant was arrested for committing the offense of driving while intoxicated. In the driving-while-intoxicated prosecution, evidence was presented that the defendant committed several traffic violations in the presence of an investigating police officer. Nevertheless, the trial court granted a motion to suppress all of the evidence collected during the defendant's arrest, and the driving-while-intoxicated prosecution was dismissed. The State filed a motion to adjudicate the defendant's guilt in the involuntary manslaughter case, and the trial court also granted a motion to suppress based upon the doctrine of collateral estoppel.

The State appealed from the trial court's order in the involuntary manslaughter case. The court of appeals found that the suppression motion in the driving-while-intoxicated case had been granted due to a lack of reasonable suspicion to stop the defendant, and the court of appeals presumed that decision to have been based upon a credibility determination. The court of appeals deferred to the trial judge in granting the motion to suppress in the driving-while-intoxicated case, and the court of appeals also granted deference to the subsequent ruling by the trial judge in the involuntary manslaughter case.

The Court of Criminal Appeals held that the only decision under review was the decision of the trial judge in the involuntary manslaughter case, and that decision was based solely upon the doctrine of collateral estoppel. Although a reviewing court

may affirm a trial court's decision if it is correct on any theory of law applicable to the case and supported by the record, the Court of Criminal Appeals held that no other theory of law applied to the case. Therefore, the court held, the court of appeals erred in applying a deferential standard of review to the ruling of the trial judge in the involuntary manslaughter case. Rather, the court should have applied a *de novo* standard of review because application of the doctrine of collateral estoppel is solely a question of law.

STATE'S APPEAL—JUDGMENT NUNC PRO TUNC

***Collins v. State*, No. PD-1203-06, 2007 WL 4146547 (Tex. Crim. App. Nov. 21, 2007)**

In exchange for a guilty plea to committing the offense of possession of a controlled substance, the defendant agreed to a sentence of five years in prison, a fine of $4,000, restitution in the amount of $140, and thirty-four days of credit for jail time that had already been served. The defendant did not file a motion for new trial and did not appeal the conviction. After the trial court's plenary power had expired, the defendant filed an application for a writ of habeas corpus or a motion for a judgment nunc pro tunc. After a hearing, the trial judge entered judgment nunc pro tunc, granting the defendant 271 additional days of jail-time credit based upon time that the defendant had served in custody in Louisiana while being held on a detainer from Texas.

The State appealed, claiming that the trial judge did not have the authority to enter a judgment nunc pro tunc. Credit for jail time served is an element of a trial court's judgment pursuant to Article 42.01, Section 1(18) of the Code of Criminal Procedure. Therefore, the Court of Criminal Appeals held that the State was entitled to appeal because the trial court's judgment nunc pro tunc "modified" the prior judgment, for the purposes of Article 44.01(a)(2) of the Code of Criminal Procedure. The court went on to hold that the trial court did not have the authority to render a judgment nunc pro tunc because the award of credit for jail time did not constitute a clerical error. Rather, it was based upon a plea bargain that the trial judge had approved.

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Rachel L. Grier, Berg & Androphy, Houston, Texas
Dustin Sullivan, Berg & Androphy, Houston, Texas

OBSTRUCTION OF JUSTICE

***United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007)**

The Seventh Circuit in *Matthews* held that a jury instruction on obstruction of justice under 18 U.S.C. § 1512(c)(1) that defined "corruptly" as acting "with the purpose of wrongfully impeding the due administration of justice" did not understate the mens rea necessary for conviction. In *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Supreme Court reversed a conviction for obstruction of justice under Section 1512(b), where "corruptly" had been defined as acting with intent to "subvert, undermine, or impede" governmental fact-finding. The Court reasoned that the definition of "corruptly" was so broad that it covered not only criminal acts of obstruction, but innocent acts, such as an attorney persuading a client to withhold documents under valid privilege, as well.

Matthews contended that, similar to the definition in *Arthur Andersen*, the definition of "corruptly" given in his trial did not serve its intended function of distinguishing innocent obstructive acts from corrupt obstructive acts. Matthews argued that the instruction should have defined "corruptly" to mean acting "with an improper motive or with an evil or wicked purpose."

After analyzing the Supreme Court's rationale in *Arthur Andersen*, the court determined that the word "corruptly" need not be read so narrowly. First, the court found that defining "corruptly" as acting "with the purpose of wrongfully impeding the due administration of justice" was consistent with a definition propounded in *Arthur Andersen*. Second, the court found that the word "wrongfully" as used in the definition performed the limiting function of directing the jury to convict only those who have no legal right to impede justice; thus distinguishing innocent obstructive acts from corrupt obstructive acts

SENTENCING

***United States v. Gammicchia*, 498 F.3d 467 (7th Cir. 2007)**

The Seventh Circuit in *Gammicchia* held that the defendant's appeal from a sentence at the bottom of the guidelines range presented no colorable argument, and that when, in a case such as this, an appeal is frivolous, the defendant's attorney should file an *Anders* motion rather than waste the court's time. The defendant pleaded guilty to obstruction of justice and his guidelines range, enhanced to reflect a threat made to a co-defendant, was 30 to 37 months. The trial judge sentenced him to 30 months. The defendant contended that this sentence was unreasonably long in view of the sentences received by co-defendants and the poor health of himself and his wife. Rather, he argued, a sentence of a year and a day would be appropriate.

The court, "in the hope of heading off what is assuming the proportions of an avalanche of utterly groundless sentencing appeals," stated that it presumed that a sentence within the guidelines range is reasonable. There are two reasons for maintaining a very limited review of sentences within the properly computed guideline range, the court stated. First, such a sentence reflects the confluence of the judgments of the Sentencing Commission and the sentencing judge. Second, the character of the factors in 18 U.S.C. § 3553(a), the only guidance that the law offers a federal sentencing judge, is vague and non-directional, weighable in only a metaphorical sense, and best left in the hands of the sentencing judge. The court recognized that the sentencing judge said he had balanced these factors and found no reason to doubt this was true.

***In re United States*, 503 F.3d 638 (7th Cir. 2007)**

The Seventh Circuit in *In re United States* held that a district judge's demand for information on the government's ongoing investigations before ruling on acceptance of a plea bargain impermissibly intruded on the activities of the Executive Branch. The defendant had agreed to plead guilty on the condition that the prosecutor promise to file a motion allowing the judge to sentence below guidelines range under Section 5K1.1, if, in the Government's sole discretion, the defendant provided enough cooperation. The judge postponed accepting or rejecting the plea until after the defendant provided whatever information and assistance she could and the prosecutor decided whether or not to file a Section 5K1.1 motion. The prosecution moved for reconsideration, expressing concern that the defendant might wait until the time provided for a speedy trial, withdraw her plea, and move for dismissal of the charge. In response, the judge requested that the prosecution provide information such as the names of case agents that were interviewing the defendant regarding her cooperation, the status of other ongoing investigations for which the defendant might provide information, and the prosecution's conclusions as to whether the defendant had breached her plea agreement thus far and assessing her cooperation.

Judge Easterbrook, writing for a three-judge panel, held that the judge's actions raised separation of powers concerns. Judge Easterbrook noted that the information the district court requested from the prosecution was the kind of information a United States Attorney might well ask of an Assistant United States Attorney, but it was not information appropriate for the Judicial Branch to ask of the Executive Branch. Furthermore, although judges may reject plea agreements in situations involving the protection of the Judicial Branch's interests, such as if the sentence agreed to in the plea bargain would be inappropriate or when the existing record does not permit the judge to make an intelligent decision to accept or reject, none of these situations permits the court to reject a plea or postpone a decision as a way to supervise the internal operations of another branch of the government. The court stated that the decision not to file a motion under Section 5K1.1 should be treated just like the selection of a charge or a decision not to engage in plea negotiations and be overseen only to ensure the prosecutor does not violate the Constitution or some other rule of positive law. Here, the defendant had not shown that the prosecutor violated the Constitution or any statute or that there was any other basis for access to the Executive Branch's ongoing decision-making; indeed, the judge had acted sua sponte despite the defendant's apparent contentment with the plea bargain.

***Carrington v. United States*, 503 F.3d 888 (9th Cir. 2007)**

The Ninth Circuit in *Carrington* held that two petitioners whose convictions and sentences were final prior to *United States v. Booker*, 543 U.S. 220 (2005) did not present the exceptional circumstances necessary to require the court to recall the mandates of their direct appeals years after their cases became final. The first petitioner had been sentenced to 324 months in prison for conspiracy to distribute 500 grams of mixture and substance containing cocaine. The second petitioner had been sentenced to 320 months in prison for conspiracy to import and distribute hashish as well as other drug related crimes. In both cases, the sentencing judge expressed his frustration with the mandatory nature of the sentencing guidelines and ordered sentences at the bottom end of the guidelines. The Ninth Circuit upheld both convictions.

Following the Supreme Court's ruling in *United States v. Booker*, the petitioners sought relief from "unconstitutional sentences" and asked for modification of their sentences. The sentencing judge denied relief on these grounds, but noted sua sponte that in *United States v. Crawford*, 422 F.3d 1145 (9th Cir. 2005), the Ninth Circuit had recalled its prior mandate in a sentencing case that involved "extraordinary circumstances" and that the availability of such relief was "for the Ninth Circuit to apply." On appeal of that denial, the

Ninth Circuit stated that petitioners' cases did not warrant a recall of its prior mandates, because the cases did not present the same type of extraordinary circumstances present in *Crawford*. In *Crawford*, the Ninth Circuit found "extraordinary circumstances" requiring recall of the mandate because: (1) the sentencing judge had expressed explicit reservations on the record about the sentence required under the mandatory guidelines, and (2) the Supreme Court's decision in *Blakeley v. Washington*, 542 U.S. 296 (2004) foreshadowed its holding in *Booker*, was rendered before its mandate issued.

The Ninth Circuit held that neither of these two factors were present in *Carrington*. First, the Ninth Circuit stated that although the sentencing judge expressed concern about the mandatory nature of the sentencing guidelines, he did not suggest that "there were any exceptional circumstances distinguishing either petitioner from other persons sentenced under the Guidelines prior to *Booker*." Second, the Ninth Circuit noted that unlike in Crawford, the petitioners' sentences were final before *Booker* was published. The Ninth Circuit has previously held that *Booker* "does not apply retroactively to convictions that became final prior to its publication." The Ninth Circuit noted that the petitioners were not seeking the recall of the mandate of cases that are still subject to the filing of a petition for writ of certiorari to the Supreme Court, but rather asking the court to recall its mandates in their direct appeals. The court stated that in essence the petitioners were arguing for the retroactive application of *Booker*, which the court has already refused to do. The court further pointed out that although there is an element of unfairness in this result, it is the same element found in any Supreme Court decision that announces a new rule that is not retroactive to criminal defendants whose cases are final.

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