

IN CHAMBERS



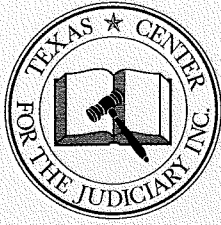
THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY, INC. VOLUME 27, No. 1 SPRING 2000

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JUDICIAL NEWS

In the Texas Center Library

Drug Courts: A Revolution in Criminal Justice

This book is an extensive history of the drug court movement over the past ten years. Published by the National Association of Drug Court Professionals.

Federal Confidentiality Laws and How They Affect Drug Court Practitioners

This monograph was produced as a result of several focus groups on the subject of confidentiality issues in drug court with the assistance of experienced drug court practitioners and several scholars. The monograph provides the drug court field with guidance on how to accommodate confidentiality requirements in drug court. Published by the National Drug Court Institute.

Genes and Justice: The Growing Impact of the New Genetics on the Courts Published by the American Judicature Society.

Judges Reference Guide: Managing Juvenile Cases

Published by the National Council of Juvenile and Family Court Judges. Developed under a grant from the State Justice Institute.

National Judicial College Scholarships Available

Several NJC courses are eligible for partial funding through a grant from the Bureau of Justice Assistance.

Contact

Nancy Copfer

Liaison Officer/Marketing Director at

1-800-255-8343

email at

copfer@judges.org

All NJC courses are eligible for scholarship funding on a first-come, first-service basis and by request due to financial need because of budget constraints.

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In Chambers is the official publication of the Texas Center for the Judiciary, Inc. The quarterly newsletter is funded by a grant from the Texas Court of Criminal Appeals. The staff of *In Chambers* strives to provide current information about national and local judicial education issues and course opportunities for Texas judges. Readers are encouraged to write letters to the editor and submit questions, comments, suggestions and story ideas for the newsletter. Contact, Marsha Kirk, by calling 512-463-1530, 800-252-9232 (in Texas), faxing 512-469-7664. The Texas Center's address is 1414 Colorado, Suite 502, Austin, TX 78701-1627.

Nominating Committee to Meet

The Fiscal year 2000 nominating committee will be meeting in June to slate officers and new members for the Fiscal year 2001 Texas Center for the Judiciary, Inc. Board of Directors and the Judicial Section Board of Directors. If you have an interest in serving on either of these boards or recommending a name for nomination, please notify Judge Tom Bacus, chair of the nominating committee, in writing no later than June 8, 2000. Also, please provide the Texas Center for the Judiciary, Inc. a copy of your interest letter (Attn: Mari Kay Bickett.) Judge Bacus' address is:

Honorable Tom Bacus
 Chief Justice
 County Court at Law #2
 900 7th Street, Room 353
 Wichita Falls, Texas 76301

or fax Judge Bacus at
 940/766-8181

Three positions are open on the Texas Center Board of Directors: all for a district judge. Terms are three years. In addition, the chair-elect and secretary/treasurer will be nominated for a one-year term. This term the chair-elect will be a county court at law judge.

Four positions are open on the Judicial Section Board of Directors: one for an appellate judge, one for a district judge; one for county court at law judge, and one for retired judge or justice. The chair-elect nominee for the Texas Center, if elected, will also serve as the chair-elect of the Judicial Section. The secretary/treasurer position on the Judicial Section Board of Directors is an appointed position.

New Program Provides Insurance for Children

by Howard Baldwin, Deputy Attorney General for Child Support, Office of the Attorney General of Texas and Jason Cooke, Texas State CHIP Director, Texas Health and Human Services Commission

The first year of the new millennium will usher in a significant “first” for thousands of Texas families—a chance to provide quality health insurance for their children through the TexCare Partnership.

TexCare Partnership is Texas’ public-private effort linking private insurance carriers, government, and Texas families to greatly increase the number of Texas children who have health insurance. The Health and Human Services Commission (HHSC) is leading the effort, but other partners and stakeholders, such as family law judges and attorneys, as well as child support professionals, will find TexCare Partnership a valuable ally in ensuring that children subject to child support and medical support orders get health insurance coverage.

HHSC is leading the effort in partnership with the Office of the Attorney General and other state and local stakeholders. In April, TexCare Partnership launched a multi-faceted effort to reach uninsured children and their families with the message that quality health insurance that meets their family’s budget is now available. HHSC has contracted with media professionals to craft the message in the media, and fifty community-based organizations have HHSC contracts to identify families who need children’s health insurance, and assist these families with the TexCare Partnership insurance application process. These community-based organizations will provide outreach in all 254 Texas counties. Several urban contractors have developed coalitions of dozens of partner groups to mobilize thousands of volunteers and outreach workers to assist in the effort.

Making sure that children subject to medical support orders actually receive the health insurance to which they are entitled is a high priority for members of the judiciary.

The TexCare Partnership application is so easy that parents take only eight minutes on average to complete it—start to finish. The TexCare Partnership application is the sole provider of entry into three children’s insurance programs. Based upon on the family’s income, TexCare Partnership will process the application and do one of three things:

- deem the child eligible for the Children’s Health Insurance Program (CHIP), a new federal/state insurance program targeted to children whose net family income is approximately 100 to 200 percent Federal Poverty Level—or a maximum of \$32,000 to 34,100 for a family of four. For children living in a single-parent family, only the net income of the parent living in the home is considered, but any child support received by that parent is included in figuring CHIP eligibility.
- refer the child to DHS for Medicaid eligibility screening; or

- refer the child to the Texas Healthy Kids Corporation (THKC) if his/her family’s income is too high to qualify for Medicaid or CHIP. THKC assists families in signing up for moderately priced private health insurance.

CHIP insurance coverage began May 1, in Texas, and provides comprehensive preventive and therapeutic care through CHIP health maintenance organization networks in urban areas, and through an “exclusive provider organization” network in predominantly rural areas. Limited dental coverage also is provided. Though some are exempt, most CHIP families will have modest cost-sharing requirements such as enrollment fees, monthly premiums, and co-payments for office visits, emergency room visits, and prescription drugs. Cost-sharing requirements are based upon the family’s income.

Family law judges and attorneys who work with low-income Texas families will receive additional information about the TexCare Partnership effort in the weeks leading up to rollout. In addition, OAG and HHSC are working to ensure that families can access this coverage at the time that judges are entering child support orders by informing families of this new insurance option. TexCare Partnership camera-ready brochures can be downloaded from the TexCare Partnership web page at www.texcarepartnership.com. Families also will be referred to community-based organizations contracted to provide insurance outreach services. A list of these organizations, listed by county, is on the CHIP section of the HHSC web page at www.hhsc.state.tx.

cont. on next page

Families can get applications by calling the TexCare Partnership toll-free hotline at 1-800-647-6558. Bi-lingual TexCare Partnership staff will answer the hotline Monday through Friday, 9 a.m. to 9 p.m., and Saturday, 9 a.m. to 3 p.m., except federal holidays. Families can apply for the insurance over the phone by calling the toll-free number.

A comprehensive overview of the yearlong development of the TexCare Partnership is available on the CHIP section of the HHSC web site.

Making sure that children subject to medical support orders actually receive the health insurance to which they are entitled is a high priority for members of the judiciary as well as for health and human services and other professionals concerned with children's issues. The TexCare Partnership will help Texas meet that goal by making parents aware of all their options for caring for their children.

Texas' Newest Administrators of Justice

...

Hon. Anne L. Gardner

Hon. Jim Locke

Hon. Chris Oldner

No new ethics
opinions have
been published
since the last
issue of
In Chambers

Code of Judicial Ethics Correction

Technical Correction to Canon 6F, Code of Judicial Ethics

IT IS ORDERED that:

1. Canon 6F, Texas Code of Judicial Conduct, is revised as follows:

Canon 6 Compliance with the Code of Judicial Conduct

* * *

- F. A Senior Judge, or a former district judge or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:
- (1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but
 - (2) should refrain from judicial service during the period of an extra-judicial appointment not permitted by Canon 4H.

2. The Clerk is directed promptly to file a certified copy of this Order with the Secretary of State and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

Public Information Officer Supports Supreme Court

The Texas Supreme Court's staff attorney for public information, Osler McCarthy, began communicating with Texas judges through email in March, 2000. Judges across the state receive full text and synopses of the court's opinions as well as summaries of the cases set for oral argument and new rules. The distribution list was developed from email addresses maintained by the Texas Center for the Judiciary, Inc.

McCarthy began his new position with the court in September 1999. He is responsible for answering public inquiries, including from the press and bar, and is available to work with judges facing extraordinary circumstances who need help or advice with media relations. He spent 20 years as a reporter and editor for newspapers in Sherman, Temple, Kansas City, Spo-

kane, Southern California and Austin and practiced appellate criminal defense for three years in Spokane after clerking in 1991 for the chief justice of the Washington state supreme court.

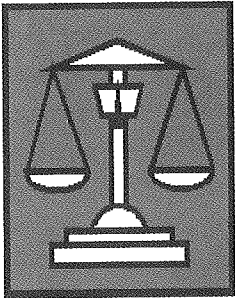
A native of Plainview, he is a graduate of Austin College, did graduate work in journalism at the University of Missouri and earned his law degree from Gonzaga University. He has taught media law in the journalism program at Southwest Texas State University and wrote the chapter on defamation in the torts volume of Washington Practice, West's guide for Washington state lawyers.

In addition to communicating with judges, the press and bar in Texas, McCarthy will help design education programs about Texas courts. He can be reached at 512.463.1441 and osler.mccarthy@courts.state.tx.us.

Judge-Mentality

“...Free From Any Bias or Prejudice...” *Voir Dire*

Judge John McClellan Marshall, Presiding Judge, 14th District Court, Dallas



In both the Sixth Amendment of the Constitution of the United States and Rule 226a of the Texas Rules of Civil Procedure, we read that the parties are entitled to a “fair and impartial jury.” Such language is expressive of a belief on the part of the Founding Fathers that “the People” really could act in a governmental context in a manner that was meaningful and positive and, more importantly, direct. How we as judges and attorneys go about bringing this ideal into reality is at the very heart of the trial process, and the best mechanism that we have devised to meet this need is *voir dire*.

The phrase *voir dire* is often translated as “to tell the truth.” Such a translation is not only literally incorrect; it misses the point of the process. The phrase actually translates from French as “to see, to speak.” In that context, it faithfully conveys the import of the process, namely, that it is the opportunity for the attorney to see the potential juror face to face and to speak directly in a dialogue with the potential juror in an effort to uncover whatever bias or prejudice might lurk out there on the panel. The problem that has arisen in recent years is not that jury selection has become more straightforward; rather, it is that the skill to question potential jurors effectively so as to elicit meaningful responses may have gotten lost.

Judge-Mentality is an In Chambers guest column written by a judge. Opinions presented in the column are not necessarily those of the Texas Center for the Judiciary, Inc.

There are numerous commentators on the jury system who advocate various “reforms” that range from the creation of “expert” juries for complex cases to outright abolition of the right to a jury trial. Such views, I would submit, fail to perceive accurately what the true function of the jury is in the judicial process. The jury as empaneled should represent the viewpoints of the community at large, capable of expressing the will of “the People” as to the direction toward which the government

The jury as empaneled should represent the viewpoints of the community at large, capable of expressing the will of “the People” ...

and law should evolve at this moment in this context. It is this ideal that is expressed in the Constitution, because it is only in the jury system that the Founding Fathers incorporated “We, the People” into the government. In short, the jury system is the unique expression of “direct democracy” in our Constitution in our system of government

Within the context of a trial, the enabling of this direct democracy requires that we as judges and lawyers perceive accurately the jury’s role, which is not to be experts in the law or even in the facts of the case. It is for the judge to know the law and for the lawyers to explain the facts of the case to the jurors. To that extent, our task in relation to the jury is to be teachers of the law and the facts. That means that we must explain complex concepts such as “promissory estoppel” without using terms such as “detrimental reliance” in such a way that they understand. If we

do not do that, then the verdict, if one should be forthcoming, is impaired before it is ever rendered. The explanation, therefore, must be pitched to the jurors at their level, not ours. So how do we know what that level is? *Voir dire*.

It is certainly true that there are many variations on the style of juror examination. They seem to range from a sort of “first opening statement followed by a couple of questions” to “how many dogs and cats do you have” to “has anyone on the jury ever been exposed to a toxic substance.” Based upon the results of the trials that have incorporated these styles, it appears to me that none them is very effective in the modern trial context

at eliciting the true feelings of the jurors. That is, after all, a part of what we are trying to learn...feelings. How does the jury “feel” about your case? In order to answer that question, to be sure, it is important to provide them with some factual data. That part of the examination should be relatively brief at first, a sort of “broad brush,” and it should consist primarily of those facts that will be uncontroverted. The scene is now set for the attorney to ask, “Mr. Smith, how do you feel about that?” Based upon the response, the attorney can either continue with Smith or go on to Ms. Jones, possibly adding a few facts. The point here is to engage the jurors in a dialogue in which the attorney and the juror participate one on one without making the others feel excluded. This is what could be called the “principle of inclusion,” and it works regardless of which side of the docket one is on. Indeed, it is the hallmark of an effective *voir dire*.

Inclusion works because, not only does it acquaint the prospective jurors with some of the salient facts of the case, but because, by eliciting their "feelings," the attorney is learning how to pitch the presentation of the case itself. In effect, it is the mechanism by which the jurors educate the lawyer as to just how the lawyer should talk to them. For this mechanism to work, however, there is an important ingredient that should not be ignored...time.

It is well-known that in certain courts the trial judge will allow little, if any, time for the lawyers to conduct the examination of the jurors. Depending upon the case, this may or may not be constitutional. Once the right to a fair and impartial jury is recognized, I would submit, the court must allow a

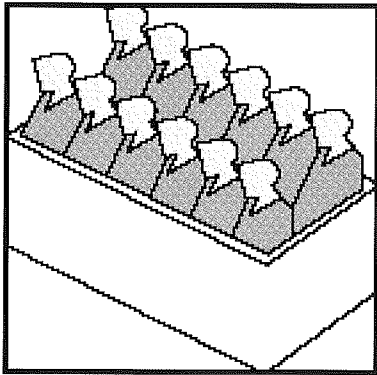
reasonable time for the attorneys to examine the prospective jurors. An arbitrary time limit is simply inappropriate. While it is good court administration to set a standard, the trial judge should be open to expansion of that standard to meet the

genuine needs of the case at bar. This, of course, puts the burden on the attorney to present the court with a substantive reason why more time is needed. The "my voice is so beautiful that they will love hearing me talk" motion is bound to fail. Again, this is part of the education process, because the true need for additional time may not be apparent from the file that the judge has reviewed. When the attorney presents a cogent reason to the court, the judge learns more about the case and can then justify more time for *voir dire* and, therefore, a more effective *voir dire*. The end result of this interaction between the attorneys and the judge in the pretrial environment will undoubtedly yield very positive results during the trial itself. The attorneys will know at the start of the trial how to budget their time, and the judge will not be blind-

sided with a request for more time in the middle of the examination.

Of course, there is an exception to this in that there often is an unexpected response to a question. After all, if we accept the idea that the jurors are educating us, and assuming that we are listening to what they say, they may open up an entirely new line of inquiry that we had not anticipated. That may call for an "approach the bench" moment and, undoubtedly, some flexibility on the part of the trial judge that results in a further expansion of the time for *voir dire*.

Another component of the modern *voir dire* is the use of questionnaires. This practice is questionable from several points of view. Almost invariably the prospective jurors are told that their



responses are confidential and will be destroyed after the trial. First of all, it must be kept in mind that they are court records, subject to Rule 76a, Texas Rules of Civil Procedure, and their sealing or destruction may not be permissible. Even

more to the point, if the trial judge should undertake to shred the questionnaires in an effort to maintain the confidentiality, there may well be the deprivation of a substantive right of one or both of the parties; namely, the right to assert an Edmonson/Batson challenge. In the absence of the evidence contained in the juror questionnaire, an aggrieved party might well have a problem establishing the record in the trial court for appellate purposes. Such a situation is potentially detrimental to the selection process however well intentioned it might be. If questionnaires are employed, then they should be preserved, and this would entail telling the jurors that their answers will not be held in confidence or at the very least not representing to them that they will be confidential. If there should be some relatively inflammatory issues about

which the parties wish to inquire, it might be worthwhile to ask the judge to ask the questions of the panel with the understanding that there might be a need for the attorneys to follow up individually as part of their respective examinations. With the requirement that the *voir dire* be on the record under the present rules, it is difficult to imagine a scenario in which the responses of the jurors can be kept confidential.

The end result of the selection process, revolving around the principle of inclusion, is of course to obtain a jury that is not biased at the outset for either side. This is the ideal toward which the system strives, and when reached results in a fair trial and a solid verdict. How did it get there? The answer lies in the recognition that the jury is not there to be experts, but to learn from the judge and the lawyers about the case. This learning process then sets them free to perform their true function of finding the facts of the case. Put another way, the jury becomes a multi-headed lie detector in relation to the witnesses and the attorneys. When properly selected and informed, they have an uncanny ability to discern who is telling the truth and to render their verdict accordingly. That is the genius of the American jury system and the explanation as to why *voir dire* is so important in the trial of cases in the United States

As lawyers and judges, it is incumbent upon us not to waste the jurors' time with the "how many dogs and cats" type of *voir dire*. Instead we should engage them, learn from them what they need to know and at what level, and then present the case to them at *their* level. Indeed, it is essential to the expression of *our* educational function as reflected in the principle of inclusion. To do otherwise is to defeat the principle of a "fair and impartial jury that is free from any bias or prejudice," and we do so at our peril.

Bar Foundation

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Texas Judges Attend NAWJ Conference in Miami

Four Texas judges attended NAWJ's National Conference in Miami. Justice Bea Ann Smith, Third Court of Appeals, was elected NAWJ Treasurer and Justice Deborah Hankinson of the Texas Supreme Court was elected to the Board of Directors. District Judges Suzanne Covington and Lora Livingston from Travis County also attended.

The next NAWJ national conference, highlighting "The Future is Now," will be in Los Angeles, October 18-22, 2000. The California judges promise to deliver lots of Hollywood glitter and glamour at the Beverly Hilton Hotel, with optional trips to the Getty Museum, Universal Studios, and the Wine Country. There will also be exceptional educational programs. Make plans now to attend!

The Texas Chapter of NAWJ will host its second annual dinner at the Annual Judicial Conference in



From left to right: District Judge Lora Livingston, 261st District; former Intern on 3rd Court of Appeals Brita Strandberg; District Judge Suzanne Covington, 201st District; Justice Bea Ann Smith, 3rd Court of Appeals; Justice Deborah Hankinson, Texas Supreme Court.

Dallas. Make plans now to join us for dinner on Monday, September 25, 2000 at the Hyatt Reunion Hotel at 6:30 p.m. The Honorable Barbara Lynn will speak on "Reflections of a New Federal Judge." The Texas Center for the Judiciary will handle registration for the dinner. Men are welcome as members or guests!

⊕ IN MEMORIAM ⊕

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LOOKING AHEAD: JUDICIAL CONFERENCE CALENDAR

2000

Professional Development Program

June 12-16, 2000
Criminal Justice Center
Huntsville

Judicial Section Annual Conference

September 24-27, 2000
Hyatt at Reunion
Dallas

College for New Judges

December 3-8, 2000
Dallas

2001

Juvenile Justice Conference

January 7-9, 2001
San Luis Hotel
Galveston

College of Advanced Judicial Studies

March 18-21, 2001
Austin Marriott &
Omni Austin Hotels
Austin

Criminal Justice Conference

May 9-11, 2001
Hyatt on Town Lake
Austin

Judicial Section Annual Conference

September 23-25,
2001
Adam's Mark
Houston

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