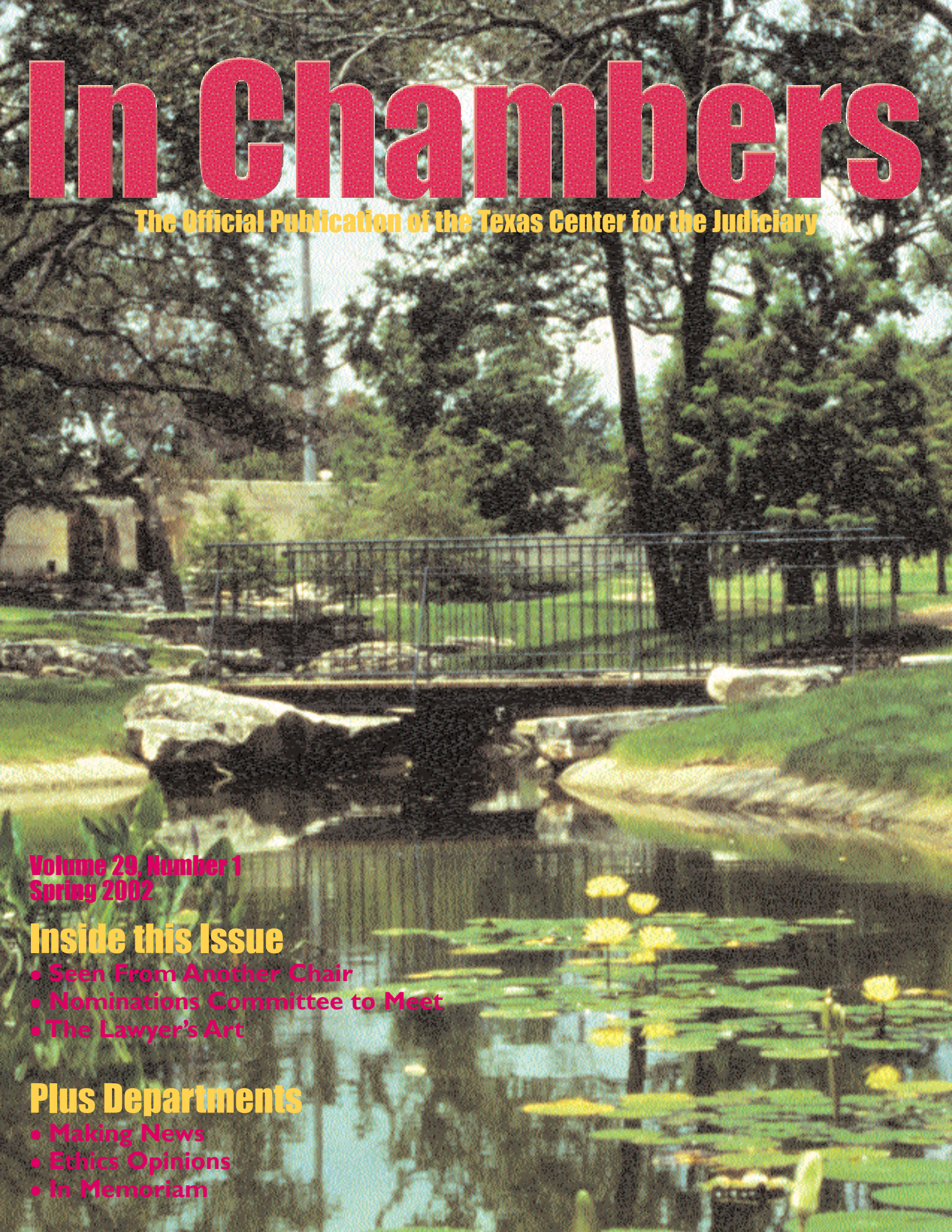
In Chambers

The Official Publication of the Texas Center for the Judiciary



Volume 29, Number 1
Spring 2002

Inside this Issue

Plus Departments

table of contents

features

departments

Cover photography courtesy of the Texas State Cemetery.

In Chambers is the official publication of the Texas Center for the Judiciary. The quarterly magazine 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 educational issues and course opportunities for Texas judges.

Readers are encouraged to write letters to the editor and submit questions, comments, or story ideas for *In Chambers*. Contact Morgan Morrison, Publications Coordinator, by calling 800-252-9232, faxing 512-469-7664, or e-mailing morganm@yourhonor.com.

The Texas Center for the Judiciary is located at the Texas Law Center, 1414 Colorado, Suite 502, Austin, TX 78701-1627.

In Chambers

Volume 29, Number 1
Spring 2002

Texas Center for the Judiciary Staff

Mari Kay Bickett
Executive Director
mkbickett@yourhonor.com

Tana J. Petrich
Associate Director
tpetrich@yourhonor.com

Betty Ann Hernandez
Administrative Assistant
bettyannh@yourhonor.com

Shirley Irvin
Assistant to the Director
shirleyi@yourhonor.com

Lacy Jemmott
Registrar
lacyj@yourhonor.com

Carolyn Cheu Mitchel
Program Attorney
carolynm@yourhonor.com

Morgan Morrison
Publications Coordinator
morganm@yourhonor.com

Denise Seal
Financial Officer
denises@yourhonor.com

Andrea Walker
Conference Coordinator
andreaw@yourhonor.com

Seen From Another Chair

By Judge Barbara B. Rollins
County Court at Law #2, Abilene & Taylor Counties

"I hope you understand that what you're doing here today is significant. Whether you serve on the jury or not, the fact that you are here, that you have made yourself available to serve, is important." Not just words I repeat to jury panels, these sentiments reflect my core beliefs. My opportunities to serve on juries have often been thwarted. As a law school student, the notice caused anguish. I chose to attend classes to learn what would be tested rather than a trial, where I might have mastered real lessons. As a lawyer on the front row of the panel, I recognized the defendant, as he did me. He'd poured out his history and version of the case, imploring me to fight the demons of injustice for him. Although the defense lawyer tried to keep me on the panel, he wouldn't have wanted me had he known just how *much* I knew. As a judge, I've normally had a jury panel of my own and felt it necessary to bow out of my own venire appearance.

Once, while I practiced defense law, I struck gold and served on a DWI jury. I've cherished that experience knowing that now, with 14 years as a judge, the only way I would not be struck would be if both lawyers assumed the other would. Whether that's what happened or the assumption was simply unfounded, I was wrong.

Of course, it wasn't a convenient day. I'd told 42nd District Judge John Weeks at the grocery store on Sunday that I had overnight guests and didn't know how long they would stay on Monday. He said I didn't need to come, that he'd already excused a justice of the peace from the panel. I assured him I wanted to come if I could. He looked skeptical. "It's a criminal case." I was in my place the next morning, number 26 out of a panel of 42.

Judge Weeks' formal demeanor made me feel that, perhaps, I keep the banter too light. While he solemnly reads the requirements, I feel it's a cold panel if I can't get at least a chuckling murmur with, "You have to be of sound mind and good moral character, and if you're not, please come tell me about it." Judge Weeks read the requirement as, "You must not have been convicted of a

From Another Chair continued on page 10

Nominations Committee to Meet

The fiscal year 2002 Nominations Committee will meet on or before July 1 to slate officers and new members for the fiscal year 2003 Judicial Section Board of Directors and the Texas Center for the Judiciary Board of Directors.

If you are interested in serving on either of these boards or recommending a name for nomination, please notify Judge Lamar McCorkle, Chair of the Nominations Committee, in writing no later than June 1, 2002.

Judge McCorkle's address is: Honorable Lamar McCorkle, 133rd District Court, 301 Fannin, 5th Floor, Houston, TX 77002. His fax number is 713-755-5779. In addition, please provide the Texas Center with a copy of your interest letter (Attention: Mari Kay Bickett).

Three positions (one for an appellate judge and two for a district judge) are open on the Judicial Section Board of Directors. Terms are for three years. The chair-elect is nominated for a one-year term. The secretary/treasurer position on the Judicial Section Board is an appointed position.

Four positions (one for an appellate judge, two for a district judge, and one for a county court at law judge) are open on the Texas Center for the Judiciary Board of Directors. The chair-elect nominee for the Judicial Section will also serve as the chair-elect of the Texas Center. The secretary/treasurer position on the Texas Center Board of Directors is nominated for a one-year term. ◆

FY 2002 Nominations Committee

Lamar McCorkle, Chair	Raul Vasquez
John Boyd	Dean Rucker
Sherry Radack	B.B. Schraub
Frank Carmona	Rusty Ladd
Julie Kocurek	Brenda Chapman

Honors & Achievements for Texas Judges

During a ceremony held December 19, 2001, at South Texas College of Law's Garrett-Townes Hall, the First Court of Appeals unveiled the portrait of **JUSTICE D. CAMILLE HUTSON-DUNN**, the first female justice to serve on the Court. After the ceremony, the portrait was installed on the wall of the First Court's courtroom.

Justice Hutson-Dunn, the first woman to be elected to either of the two Houston courts of appeal, began her service on the Court in January 1985 and served 12 years before retiring in 1997.

In December, the First Court of Appeals held a ceremony to unveil Justice D. Camille Hutson-Dunn's portrait.

During the ceremony, former members of the Court of 1985, Chief Justice Frank Evans, Justices Jack Smith, Ben Levy, and Kenneth Hoyt shared remembrances of Justice Hutson-Dunn's entry onto the all-male court. Everyone agreed that Justice Hutson-Dunn was gracious and caring, but that she also knew how to stick to her views and convince others of her positions.

In October 2001, Texas CASA named **JUDGE OLEN UNDERWOOD** "Texas CASA Judge of the Year." Since 1991, the organization has honored various child advocates, including judges, for their leadership and contributions to the advancement of children's issues.

Colleagues supporting Judge Underwood's nomination call him the "driving force" behind the development of CASA in Montgomery County. More than 10 years ago, Judge Underwood recognized the need to improve services for abused and neglected children and organized the individuals who later established the county's CASA program.

Judge Underwood's commitment to children extends beyond his CASA involvement. For instance, Judge Underwood developed the East Texas Cluster Court in 1998 and the Southeast Texas Cluster Court in 2000 to hear Children's Protective Services cases exclusively. While serving as a juvenile judge, he also established an on-site courtroom at the local juvenile detention facility.

Since 1981, Judge Underwood has presided over the 284th District Court in Montgomery County. In 1996, then-Governor George W. Bush appointed him to serve as presiding judge of the 2nd Administrative Judicial Region. In January 2002, Governor Rick Perry appointed Judge Underwood to serve on the Task Force on Indigent Defense. Judge Underwood is a graduate of the University of Houston Bates College of Law and the University of Texas.

Texas CASA honored Judge Olen Underwood as its "Judge of the Year" in October 2001.

JUDGE BONNIE SUDDERTH was elected president of the American Judges Association (AJA) for the 2001–2002 term. Previously, she served as the association's governor, second vice president, first vice president, and president-elect. Judge Sudderth is only the third judge from Texas to serve as president of the AJA in its 42-year history as a national association.

Since 1996, Judge Sudderth has presided over the 352nd District Court in Tarrant County. From 1990–1996, she served as Chief Judge of the City of Fort Worth Municipal Court. Judge Sudderth is a graduate of the University of Texas School of Law and the University of Southern California. ◆

For publication in Making News, *send your announcements to Morgan Morrison, Publications Coordinator (fax: 512-469-7664 or e-mail: morganm@yourhonor.com).*

Does CASA Have a Role in Private Custody Litigation?

By Judge F. Scott McCown
345th District Court, Travis County

When I was in my first year of judging many years ago, I had a difficult private custody case and thought it would be useful to appoint a Court Appointed Special Advocate (CASA) as a volunteer guardian ad litem (GAL) for the child. I asked the executive director of our local CASA to accept the appointment, but she told me that CASA served only in child abuse and neglect cases brought by Child Protective Services (CPS).

At the time, I was frustrated because it seemed to me that a child is a child, and if a child needs help, it should not matter whether the case is a CPS case about child maltreatment or a private case about child custody. With many more years of experience, however, I have concluded that a judge should not—indeed cannot—appoint CASA as GAL in a private case about child custody. In this short article, I hope to lead you to the same conclusion, and I will suggest some other options for private custody cases.

Purpose of CASA

A judge founded CASA in 1976 to recruit, train, and supervise volunteer advocates for abused and neglected children. Communities across the country have replicated CASA, and there are now almost 1,000 local programs. CASA's primary mission is advocating for abused and neglected children in dependency or delinquency cases. CASA's mission has never been to serve as the GAL for a child in the multitude of contexts in which a child might need a GAL. Generally speaking, the men and women who volunteer to serve as CASAs do so to work with abused and neglected children; they do not volunteer to serve as GALs in private custody cases.

Funding of CASA

CASA operates through a combination of public and private funds. The U.S. Congress in the Victims of Child Abuse Act of 1990 provided federal funds to expand CASA so that a "court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate." You can review the congressional findings and provisions at 42 U.S.C. Chapter 132, Subchapter I and II. Congress funds CASA only to serve in abuse and neglect cases brought by the state.

The Texas Legislature also funds CASA only to serve abused and neglected children in cases brought by the state. Chapter 264 of the Family Code, Child Welfare Services, Subchapter G, Court-Appointed Volunteer Advocate Programs, expressly provides that state financial support is for

CASA continued on page 6

Texas' Newest Administrators of Justice

As of March 20, 2002

Hon. Robert S. Anchondo
County Crim. Ct. at Law #2, El Paso
New Court

Hon. Ken Anderson
277th District Court, Georgetown
Succeeding Hon. John Carter

Hon. Jeffrey V. Brown
55th District Court, Houston
Succeeding Hon. Sherry Radack

Hon. Jennifer Elrod
190th District Court, Houston
Succeeding Hon. John Devine

Hon. Belvin R. Harris
County Court at Law, Gainesville
New Court

Hon. Sandee Marion
4th Court of Appeals, San Antonio
Succeeding Hon. Tom Rickhoff

Hon. Tom Rickhoff
Probate Court #2, San Antonio
Succeeding Hon. Sandee Marion

Hon. Frank B. Rynd
309th District Court, Houston
Succeeding Hon. Eva Guzman

CASA continued from page 5

abused or neglected children who are the subject of a suit affecting the parent-child relationship filed by a governmental entity.

Some cities and counties also provide money, invariably for assistance to abused and neglected children in CPS cases. Likewise, private parties donate to CASA, again invariably to help abused and neglected children in CPS cases.

Even with this support, however, CASA is still short on funds. CASA constantly seeks funds to meet its goal of recruiting, training, and supervising a volunteer advocate for every abused and neglected child. Therefore, if a judge appoints a CASA in a private custody case, the judge is diverting resources intended for an abused and neglected child in a CPS case.

Of course, it may be that the child in the private custody case is in a dysfunctional family that needs help, but it is unlikely that the child's situation is worse than that of all other children who do not yet have a CASA on the CPS docket. While a small number of counties may from time to time have extra CASAs, most do not. So, in most counties, when a judge appoints a CASA in a private custody case, there will be some child in a CPS case who needs the CASA more and must go without.

Moreover, when a judge appoints a CASA in a private custody case, the judge is using money for something for which it was not intended. While a CASA is a volunteer, considerable money is spent in recruiting, training, and supporting the CASA, all of which is diverted to an unintended use if the CASA works in a private custody case. To make this vivid, consider whether you would appoint a juvenile probation officer (JPO) to serve as a GAL in a private custody case. The answer is no, and one reason is that the juvenile board has not authorized its money to be spent on JPOs serving as GALs in private custody litigation. Likewise, the Congress, the Legislature, and other public and private contributors to CASA have not authorized their money to be spent in private custody litigation.

Authority to Appoint

Furthermore, a judge has no authority to appoint a CASA to serve as GAL in private custody litigation. With regard to court appointments, Chapter 107 of the Family Code provides for whom, when, and why. Under Family Code §107.031(a), the court may appoint a volunteer advocate on behalf of the child only in "a suit filed by a governmental entity," which means only in a case prosecuted by the state pursuant to the Family Code such as a CPS case or a juvenile case. Thus, the Family Code does not authorize the appointment of a CASA in a case prosecuted by private parties such as a custody case.

Family Code §107.031(d) can be misread as authorizing the appointment of a CASA as a guardian ad litem in a private custody case, but a careful reading establishes just the opposite: Subdivision (d) provides that when the court can appoint a CASA as a volunteer advocate for a child pursuant to subdivision (a), then the court can make the CASA the guardian ad litem for the child under §107.001. Put another way, under §107.031(d), the only time the court can appoint a CASA as a guardian ad litem under §107.001 is when the court can likewise appoint the CASA as a volunteer advocate under §107.031(a), which is only in "a suit filed by a governmental entity."

Some have argued, however, that Family Code §107.001 by itself authorizes the appointment of a CASA as a GAL in a private custody case. Their argument takes two different forms. First: Some argue that §107.001(c) authorizes the judge to appoint a GAL in any suit,

and then §107.001(d) authorizes the judge to appoint a GAL under §107.001 who is a "volunteer advocate appointed under §107.031." This first argument fails, however, because it takes us back full circle. Yes, you can appoint a CASA as GAL under §107.001, but only when the CASA could also be appointed a volunteer advocate under §107.031, which is only in a "suit filed by a governmental entity."

Second: Some argue that a CASA can be appointed under the "another adult" provision of §107.001(d). When making such an appointment, however, you are not appointing a CASA. You are merely appointing an adult coincidently affiliated with CASA just as the adult is perhaps affiliated with Rotary. The local CASA organization itself, however, should have no more to do with the case than the local Rotary. If it does, then the local CASA exposes itself to potential civil liability.

Liability of CASA

If a volunteer advocate accepts an appointment as a CASA to serve as a GAL in a case in which a CASA has no authority to serve under §107.031, the advocate's supervisor, the program director, the executive director, and the board of the local CASA are all at risk of civil liability for the recommendations and opinions of the CASA. Under §107.031, the CASA program has qualified immunity from civil damages for a recommendation made or opinion rendered by a volunteer but only when acting under §107.031. When a volunteer is not acting under §107.031, but is instead acting only under the "another adult" provision of §107.001, then the CASA program has no qualified immunity. True, the volunteer would have immunity under §107.003 for service as a GAL, but only the individual adult appointed as GAL, not the supervisor, program director, executive director, and board of the local CASA, who if they supervise and support the GAL, might then become liable for the GAL recommendations and opinions.

Wisdom of Appointment

Even considering everything said so far, a judge might still well ask whether it would be a good idea to be able to appoint a CASA volunteer as a GAL in a private custody case. A judge might well ask why the Family Code provides a guardian ad litem—whether a CASA volunteer or someone else—as a general rule in every CPS case, but does not provide a GAL as a general rule in private custody litigation, and why CASA should not fulfill that role at least in the exceptional case. The answer is because of the difference in

CASA continued on page 13

The Lawyers' Art

By Judge James W. Mehaffy
58th District Court, Beaumont

The term "voir dire" is not *Latin—it is Norman French. When the Norman William ("The Conqueror") defeated the Saxon Harold at Hastings in 1066, he took the French language to England. Henry II (r. 1154–1189), a Plantegenet, is considered the principal patron of the developing English Common Law. Henry and his royal court only spoke French. As the Common Law developed, at first in French, the words "voir" (to see) and "dire" (to say) came to describe the jury selection process. The two words retain the same spelling and meaning in contemporary French.*

When Ignorant armies clashed on Hastings' Plain
The darkling scene of Saxon sovereign slain;
The Norman *lengua franca* then was heard,
And the royal court eschewed the Saxon word.

A century more—Plantegenet arrived;
The dulcet Latinate French yet thrived.
Sovereign-sponsored English Common Law took root
In French! And 'tho' ensuing years dilute,

Still lingered on the Norman form of speech
In words and manner, thus to teach
The lawyers, as they learned to speak
Ornate prolixity oblique.

Magnificent bombast! Elegant twaddle!
Better to obfuscate, confuse, and muddle.
'Tho' in that ancient medieval process
The French gave way to English, nonetheless,

Some Norman words and terms yet do endure
To this good day; still, to be sure,
Not many U.S. lawyers are aware
Of this linguistic quirk *hereditaire*.

They think it's Latin when they say *voir dire*;
The law schools do not otherwise inspire.
Oblivious of verbiage with Norman heritage,
In mundane matters like abatement and coverage.

More obvious in words like garage and camouflage,
But the noblest Norman noun of all is: "**persiflage**"!!
Loquacious vacuity, meaningless chatter,
Designed to entertain, mislead, and flatter.

Thus now is heard in English-speaking courts
Throughout the world, ubiquitous retorts;
Specious banter, erratic badinage,
The ancient legal art of persiflage. ◆

Questions & Answers

Ethics Opinion Number 276

Judge Presenting CLE at Private Law Firm

May a judge speak at an in-house CLE event sponsored by a law firm? The audience will consist solely of employees of the law firm.

No. It is the belief of the committee that the presentation by the judge of a CLE program for a private law firm violates 2B of the Code of Judicial Conduct. Section 2B prohibits a judge from lending the prestige of judicial office to advance the private interests of others. It also prohibits the judge from allowing anyone to convey an impression that they are in a special position to influence the judge.

If the law firm allows any lawyer not affiliated with the firm who wishes to attend the CLE event to do so without charge, but does not publicize the event, change the answer?

No. The same reasoning as above applies. With no invitations the CLE remains private.

A judge is invited by a local bar association to speak at a CLE event sponsored by the bar association. Members can attend at a reduced price from non-members. The judge is not receiving any money from the entry fee. By speaking at an event whose entry fee schedule encourages membership in a bar association, is the judge promoting the private interests of that group?

A judge may speak at such an event. The event is open to all lawyers and therefore no one group of lawyers is benefitting from the event.

A judge is invited to speak at a CLE event sponsored by a law school. The law school hopes to make money for their scholarship fund by virtue of the quality speakers they have recruited for the event. The judge knows this. By speaking at such an event is the judge lending the prestige of office to the private interests of the law school?

The judge may speak at the law school event. Canon 4B allows a judge to speak and participate in activities concerning the law. Canon 4C(2) allows a judge to be a speaker at an educational organization's fund raising event.

Ethics Opinion Number 277

May a Judge Sign an Affidavit Certifying an Attorney's Legal Proficiency?

May a judge sign an affidavit attesting to the competency of an attorney who practices before the judge to be used in a grievance proceeding against the lawyer?

No. Canon 2B prohibits the lending of the prestige of judicial office to advance the private interests of another and convey to others the impression that the attorney is in a special position to influence the judge. In addition, a judge is specifically prohibited from voluntarily testifying as a character witness. The judge could testify at the grievance hearing if subpoenaed.

Ethics Opinion Number 278

May a Judge Accept an Honorarium from the Justice Department for Reviewing Grant Applications?

A judge has been asked by the Justice Department to review grant applications (VAWA, violence against women). The Justice Department indicated they use judges for this all the time and want to pay the judge an honorarium. May the judge take the honorarium?

No. Canon 4(B)(2) allows a judge to "make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice." Canon 4(D)(4) prohibits a judge from accepting a gift, bequest, favor, or loan unless it is from relative or friend on a special occasion, it is not excessive and the donor has no interest that might come before the Court and there is no reasonable perception of an intention to influence the judge. Penal Code Section 36.07 Acceptance of Honorarium states that a public servant

commits an offense if he/she agrees to accept an honorarium in consideration for service that the public official would not have been requested to provide but for the public servant's official duties or position.

See Opinions 20, 86, & 215.

Ethics Opinion Number 279

Judge Serving on Community Associations

May a judge serve as an officer of a non-profit neighborhood association? The purpose of the organization is to promote the well-being of the neighborhood by representing the interest of its residents in matters of civic involvement, community interaction, security, and physical improvements of its environment. Service would not involve fund-raising. The organization has never been involved in litigation.

Yes. A judge is permitted to serve as an officer of a civic organization not conducted for profit provided the judge may not use the prestige of judicial office to advance the private interest of the organization.

See Opinions 108, 144, & 152.

May a judge serve on a homeowner's condominium board to help manage the building where the judge owns a condominium?

Yes. For the same reasons as above.

Ethics Opinion Number 280

May a Judge Serve in the DARE Organization?

1. May a judge serve as president of DARE (drug educational awareness orgs.)?

2. May the judge's name be used on the letterhead used in fund raising solicitation so long as the judge is not actively involved in the fund raising?

3. May a judge handling criminal cases serve as DARE president when some funds are used to help the local police department or make civic speeches describing how DARE helps local DARE officers?

No, to all the questions above. Service as a DARE official would reflect adversely on the judge's impartiality since part of the organizations purpose is to support the police and provide DARE officers with funds.

Ethics Opinion Number 281

May a Judge Serve of the Board of the Houston Volunteer Lawyers Program?

May a judge serve on the Board of the Houston Volunteer Lawyers Program, an organization whose staff and volunteer attorneys appear as advocates in the judge's court? May a judge serve on the Advisory Board in an ex officio advisory capacity, not involved in decision or policy-making?

No, as to both questions. See Opinion 270. Service in any capacity in an organization whose staff appears in the judges court violates Canon 2. Canon 2 requires a judge to act at all times in a way that promotes the public confidence in the judge's impartiality. Canon 2 further prohibits lending the prestige of office to advance the private interest of others or to convey that others are in a special position to influence the judge.

Ethics Opinion Number 282

May a Judge Participate in a Conference Hosted by the Texas Association of Domestic Relations Officers?

May a family court judge speak and/or participate in an annual conference hosted by the Texas Association of Domestic Relations Officers?

Yes. Canon 4 allows a judge to speak or participate in activities concerning the law, the legal system, and the administration of justice so long as such participation does not cast doubt on the judge's capacity to decide any issue that may come before the court or interfere with the proper performance of judicial duties.

Ethics Opinion Number 283

May an Appellate Court Staff Attorney Perform Pro Bono Appellate Work?

May an attorney employed at a state intermediate appellate court perform pro bono work on a federal appeal when the issue appealed involves only a federal issue and no state, Texas or otherwise, has concurrent jurisdiction? May the same attorney perform pro bono work on an appeal in another state?

No, to both questions. Canon 3 B (6), (8), (10) and 3C (2) require that appellant court staff attorneys are subject to the

Ethics Opinions continued on page 12

From Another Chair continued from page 3

felony or of theft." I chided him in my mind—until the recess when I ran upstairs to my chambers and pulled up Westlaw to find that there really is precedent for that instruction, even if it's not statutory. I thought my lesson from the experience had been achieved and went back downstairs for the seating of the panel. When the bailiff called my name, I jerked.

For the next three and a half days, I sat in the jury box and played musical chairs with another juror since after we had settled into "our" seats, she took mine. At breaks,I'd run upstairs, sign orders, and put out fires. Once, on the first day, I was late returning to the jury room. After the 42nd bailiff called mine who sent me packing, the chuckles in the jury room finally broke the ice, and we began to talk other than in whispers. For the most part, the trial moved at an easy, efficient pace. Two problems arose, one over a tape recording the defense introduced. The attorney set his handheld micro-cassette recorder on the rail and punched "play." Besides an inadequate speaker for that room, the condition of the tape made hearing it totally impossible. It seemed to have been stored near a magnet; on every trip around the reel, an instant had been erased. With renewed objections from the prosecution, Judge Weeks sent us out. The ten minutes became thirty, then grew longer, eventually resulting in our being sent home for the evening. The next day, a court reporter read maybe 40 lines from the whole 30 minute tape into the record and we moved on.

The other lengthy break came when Judge Weeks broke from his formal manner at a cue from the D.A. and said, "I'm going to send you out. I need to argue with these guys for a while." Again, the break stretched into hours by segments, terminating in the testimony of the hairdresser who met the complaining witness for the first time two days before trial, eighteen months after the offense. She identified the defendant and recounted his conversational confession almost a year earlier.

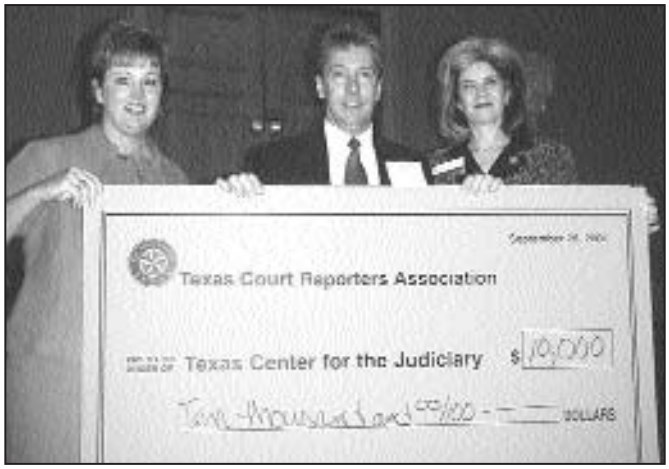
I heard no complaints about the delays as they occurred, but the bitterness obviously mounted in some jurors. Soon before the trial ended, one juror complained of the lawyers' making $200 an hour while she couldn't get her work done waiting for them to get busy.

I recommend to you the experience of jury service should it become available to you. Until then, three nuggets gained will improve my handling of juries. I'll pass them on for your consideration:

- Jurors do understand what you find it necessary to reiterate, but don't catch what you assume they'll retain from running through the instructions. Repetition by the judge, by lawyers, or through witnesses, grows old quickly. Once something is said emphatically, it has been received. The proscribed instructions and explanations at the first of the trial overwhelm, and those should be restated once when appropriate. The instruction on Monday morning not to read coverage and the televised reference to the conviction before punishment began were not connected by the jurors.

- Some people really have difficulty

Thank You, Texas Court Reporters Association



Sponsored by the Texas Court Reporters Association, the 2001 Judicial Section Annual Conference's Silent Auction raised $10,000 for the Texas Center for the Judiciary. Representing the Texas Court Reporters Association, Ms. Judy Miller (*far left*) presents the auction proceeds check to Hon. Mark D. Atkinson, 2001–2002 Judicial Section and Texas Center Chair, and Ms. Mari Kay Bickett, Executive Director of the Texas Center for the Judiciary. Thank you, Texas Court Reporters Association. ◆

Texas State Cemetery

Since it's creation in 1851 to it's renovation in 1997, the Texas State Cemetery has established itself as one of the premier historical sites in the state. Among those buried at the Cemetery are Stephen F. Austin, Ralph Yarborough, Albert Sidney Johnston, Allan Shivers, John Connally, and Barbara Jordan.

Those wishing for internment need to meet one of four requirements: (1) Be an elected official in the State of Texas; (2) Spend at least 12 years serving in a Governor-appointed position; (3) Receive a Governor or Legislative proclamation; or (4) "Make a significant contribution to the history of Texas."

The Cemetery was founded in 1851 when Andrew Jackson Hamilton, a Representative for the Republic of Texas, donated land in East Austin so that his friend, Edward Burleson, could have an appropriate final resting-place. The Cemetery slowly increased in popularity in the coming years as heroes of the War of Texas Independence and the Civil War passed on, including Abner Lipscomb, former Justice of the Texas Supreme Court, Ben McCulloch, and William Hardeman. Hundreds of Confederate veterans—most of them former residents at the Confederate Men's Home—are also buried here.

However, through the years, the Cemetery fell into disrepair, and by the 1990s, it was in need of extensive work. So, under the leadership of former Lieutenant Governor Bob Bullock, the Cemetery underwent a major renovation from 1994–1997. Virtually every headstone on the grounds was cleaned, offices were built, and the Cemetery was transformed into one of the finest historical sites in the state.

Many judges, including Abner Lipscomb and Royal Wheeler, members of the first Supreme Court of Texas, are buried at the Texas State Cemetery.

Now, the Cemetery is striving to become even greater. It recently celebrated its 150th anniversary and a new building will be finished in March that will serve as a reception area for families during funerals. The Cemetery is the only site of its kind in the United States and will continue to make sure that it is among the most popular historical places of any kind. ◆

---

making decisions. We, whose career is deciding, forget the agony of making such drastic choices for some. The same jurors who had difficulty with guilt, agonized on punishment, wanting to rethink the first decision in making the second. These people need whatever support we can give them in light of our placing them in such a situation. Instructing them not to discuss it with their support system, while necessary, substantially increases that burden.

● It's tough to have "special knowledge or information" and not pass it along. When we have a nurse on a panel dealing with medical issues, a carpenter on one addressing negligent construction, or an electrical engineer dealing with wiring, we should not only stress the instruction to that person, but also point out to the other jurors it's not appropriate to ask for the assistance. I found a great many issues dangling, inviting an education on the judicial system. For these jurors, I could not provide answers. For those in my courtroom Monday, I intend to.

I'd often wondered about the reaction to formalistic questions such as, "Do you know her reputation in the community for truth and veracity?" Nobody mentioned it, even after hearing it repeated several times with the curt answer and without follow-up. They did, though, pick up nuances such as those that I'd often assumed to be lost on the jurors.

Once upon a time, each of us was naive, unaware of the evil around us, especially in our own communities. Many, like me, remained ignorant of the depravities possible among our neighbors until we began practicing law. By the time we reach the bench, we may still be offended by crime, but we're no longer surprised by it. I'm aware in those trials, where the behavior nudges the edges of my own horror, to be aware the jurors may just be confronting their own naivete. Henceforth, I will be more completely aware of that possibility in trials that feel more mundane to me.

When a citizen sits in the jury box in our courtrooms, that person is performing a significant service. We should stand in awe, not only of the system, but also of the individual jurors that make the system work. Their significant role demands our respect. ◆

Ethics Opinions continued from page 9

same ethical standards as the judge for whom they work. Cannon 4G prohibits a judge from practicing law except as permitted by statute or this Code. Pro bono appellate work in a federal or sister-state requires the practice of law. No Code sections provide an exception to the prohibition against practicing law under the circumstances presented here.

Ethics Opinion Number 284

May a Judge's Spouse Host a Fund-Raiser for a Judicial Candidate in the Judge's Home?

May a judge's spouse host a fund-raiser for a judicial candidate in the judge's home?

No. A judge may not host, sponsor or give a fund-raiser in the judge's home for a judicial candidate. Canon 5 (3) states that a judge shall not authorize the public use of his or her name endorsing another candidate for any public office. Canon 2 (B) prohibits lending the prestige of judicial office to others or to convey the impression that someone is in the special position to influence the judge. A fund raiser for a judicial candidate held in a judge's home violates all of these provisions.

While the Committee has long been cognizant of the independent nature of spouses of judicial members, the hosting of the event at the Judge's residence crosses the line of permissible conduct. The public perception would be that the event is being sponsored by the judge.

It would be permissible for the spouse of the judge to sponsor the event at another location provided no reference to the judge is made or implied.

May a person who believes s/he may later be appointed to a judicial position sponsor a fund-raiser for a judicial candidate?

Yes, such a person could sponsor a fund-raiser for a judicial candidate. The Code of Judicial Conduct only applies to sitting judges or official judicial candidates.

See Opinions 73, 130, & 259.

Ethics Opinion Number 285

May a Judge Contact the District Attorney to Discuss the Conduct of an Assistant District Attorney Appearing in the Judge's Court?

A judge is hearing a case in which an assistant district attorney is representing the state interests in a case involving Child Protective Services. Individual attorneys are representing the parents. May the judge hearing the case, after or during temporary hearings or after the final hearing contact the district attorney to advise him of the failure of the assistant district attorney to properly prepare or handle the court proceedings?

Yes, but only under limited circumstances. Canon 3B(8) provides that a judge shall not initiate or permit ex parte communications concerning the merits of a pending or impending judicial proceeding. Conversation between the Judge and the District Attorney is permitted if it is confined to conduct of the assistant district attorney. If the conversation involves specifics of a case, it may only be done after the case is final. ◆

To ask an ethics question, contact Judge Suzanne Stovall, Past Chair of the Judicial Section Committee on Judicial Ethics, by telephone: 936-539-7808 or fax: 936-788-8364.

CASA continued from page 7

CPS abuse cases and private custody cases in both kind and degree.

The cases are different in kind because of the different issues at stake. If a child's parents are married, the law vests the parents with full authority to speak and plan for their child. If a child's parents are divorcing, and cannot agree with regard to their child, by necessity, a judge must decide between their respective positions, but generally speaking, the law still vests in the parents the authority to speak and plan for their child. Thus, it is not appropriate to appoint a guardian ad litem merely because parents are divorcing.

In contrast, in a CPS case, the state is accusing parents of abusing and neglecting a child, thereby losing their presumed right to speak and plan for the child. Moreover, the child may well come into the care of the state, and in reality, the child may need protection from the state as much as from the parents. Thus, the law provides a guardian ad litem to every child in a CPS case.

Private custody cases and CPS cases are also different in degree. Generally, regardless how contentious and difficult custody litigation becomes, the issues are not as serious for the child in a CPS case. Sometimes, however, custody litigation will be very serious and look much like a CPS case. In those exceptional cases, a judge may appropriately appoint a guardian ad litem for the child. In such a case, however, a CASA volunteer is not the right choice.

When a private child custody case is so difficult and complex that it justifies the appointment of a GAL, then it is far too difficult and complex to expect a community volunteer to effectively function as the GAL. Consistent with its mission, CASA trains its volunteers to serve as child advocates in abuse and neglect cases brought by CPS, but does not train them to serve as GAL's in private custody litigation. Indeed, CASA supervisors and program directors have no training for such a role either.

Training and experience are important because the differences between serving as a child advocate in a CPS case and serving as a GAL in a private custody case are considerable. The actors are different with different roles. The available community resources to help the family are often different in terms of whom, when, and how. Moreover, in a CPS case, the CPS caseworker and the district attorney are generally helpful and honest with the CASA, even if the CASA is not fully in agreement with the state. In contrast, in a private custody case, the CASA volunteer has to function alone in a complex role for which the volunteer is untrained and inexperienced.

Again, to make this vivid, consider whether you would appoint a juvenile probation officer to serve as a GAL in a private custody case. A JPO knows a great deal about children, families, and courts, but you have not trained your JPOs to function as GALs in a private custody cases. CASAs are even less prepared than JPOs. CASAs are not the right choice.

Options to CASA

If appointing CASA is not appropriate in private custody litigation, what is a judge to do? First, for the philosophical reasons explained above, a judge needs to think long and hard about whether the child should really have a GAL. Certainly, a judge should not appoint a GAL merely because the custody decision is going to be difficult and the judge wants some other neutral person to decide. In some cases, though, the judge may need a neutral person to investigate and evaluate which parent should have custody; in such a case, the judge can appoint an expert to make a custody evaluation and testify without appointing the expert as a GAL.

If after careful reflection, though, the judge concludes that the child does need a GAL, then pursuant to §107.001(d), the judge can appoint an attorney/guardian ad litem trained and experienced in family law. Pursuant to §107.015, the judge can require the parties to pay the attorney, or if the case is one for termination of parental rights, and the parents are indigent, the court can require the county to pay the attorney, or the judge can ask the attorney to serve pro bono (which is after all what a CASA would be doing).

Another option is the professional GAL. Chapter 203 of the Family Code allows a county to establish a Domestic Relations Office to provide services to families. Family Code §203.004(a)(6) expressly allows a DRO to serve as a GAL for a child in a custody case. A county can fund a DRO from fees and charges as set out in the Family Code or from general revenue. A county does not have to provide the full array of service, but can provide those services it chooses.

Some small counties may have a special resource problem. There may be few, if any, family mental health experts to appoint for custody evaluations, and few, if any, lawyers to appoint as A/GAL. There may be little or no money for a professional GAL. So, if CASA is meeting the needs of all the CPS children in that small county, then why should CASA not branch out into serving as

CASA continued on page 14

For Those Who Served Our State Courts

As of March 15, 2002

Honorable Gene Ater
Senior District Judge
70th District Court, Troup

Honorable Eva Barnes
Senior District Judge
322nd District Court, Fort Worth

Honorable Peter Michael Curry
Senior District Judge & Former Presiding Judge
166th District Court & 4th Region, San Antonio

Honorable H.F. "Hippo" Garcia
Senior District Judge
Western District of Texas, San Antonio
144th District Court, San Antonio

Honorable John Ray Harrison, Sr.
Senior District Judge
113th District Court, Pasadena

Honorable Vernon Harville
Senior District Judge
105th District Court, Corpus Christi

Honorable Frank G. McDonald
Chief Justice (Retired)
10th Court of Appeals, Waco

Honorable Neil McKay
Retired Judge
County Criminal Court at Law #5, Houston

Honorable Robert Murray
Justice (Retired)
4th Court of Appeals, Fredericksburg

CASA continued from page 13

GAL in private custody cases? As noted above, the problems with CASA in private custody cases is not just a resource issue. Regardless of resources, appointing a CASA in a private custody case may be inappropriate as a philosophical matter. Moreover, there are the training, supervision, experience, and liability issues discussed. Fortunately, even small counties have other options.

For example, even a very small county might establish a DRO that consists of nothing more than one person with a masters in social work or counseling (even someone from out of town) who serves as GAL in troublesome custody cases under a contract with the county. The county could pay the cost of such a limited DRO with the fees set out in §203.005(a). If one county does not have enough cases for its own DRO, it might join with several small counties to establish a regional DRO. With innovative thinking, in those exceptional cases where a GAL is needed, a county can provide a professional GAL.

Conclusion

While you may think that your local CASA program is happy to serve as GAL in private custody cases, some local programs report that they want to say "no" but are afraid to decline appointment for fear of disappointing their local judge who they very much want to support. While I know that judges want to do their best for all the children before the court, and while I appreciate those local CASAs who want to support their judge, I hope this article has explained the problems with CASAs serving as GALs in private custody litigation and suggested better options. We need to keep CASA on task advocating for abused and neglected children in CPS cases. ◆

Thank You for Your Contributions

Includes contributions received as of March 12, 2002

Contributions to the Texas Center

Bill Bender
R.H. Bielstein
B.F. Coker
Chuck Demos
Dixon Holman
Allan Lerner
Janet Littlejohn
Juan Partida
Jay Patterson
W.F. Roberts
J.C. Zbranek

Memorial Contributions

Judge Gene Ater Memorial
Marilyn Aboussie
John Bradshaw
George Cowart
Diane DeVasto
Weldon Kirk
John Ovard

Mrs. Bonnie Lou Calabria Memorial
Mari Kay Bickett

Judge B.C. Chapman Memorial
Weldon Kirk

Judge Peter M. Curry Memorial
Harold Entz

Chief Justice Martin Dies Memorial
Patrice Barron

Judge Joe H. Eidson Memorial
Sam Day

Justice Vic Hall Memorial
Derwood Johnson

Judge Vernon Harville Memorial
Martin Chiuminatto

Chief Justice Frank McDonald Memorial
Marilyn Aboussie
Solomon Casseb
James Morgan

Chief Justice Charles Reynolds Memorial
Philip W. Johnson

Judge Thomas Ryan Memorial
Joe B. Brown
Joe Leonard

Judge Thomas Stovall Memorial
James F. Clawson
Neil Daniel
Harold Entz
Ray McKim
George M. Thurmond

Contribution Card

Your generous support is sincerely appreciated and vital to the success of mission of the Texas Center for the Judiciary: **Judicial Excellence Through Education**.

Enclosed is a check for $_____* in support of the Texas Center for the Judiciary.

*If this is a memorial contribution, please indicate in whose memory it is made:

_____

Date: _____

Name: _____

Court: _____

Address: _____

City, State, & Zip: _____

The Texas Center is a non-profit organization to which contributions are fully deductible.

Mail your contribution to: Texas Center for the Judiciary, 1414 Colorado, Suite 502, Austin, TX 78701-1627

looking|ahead

Judicial Conference Calendar

2002

Family Violence Conference
April 14–16, 2002
Dallas

Texas College for Judicial Studies
May 19–24, 2002
Austin

Advanced Computers
June 3–4, 2002
Midland

Professional Development Program
June 10–14, 2002
Huntsville

Joint Ethics Program
July 15–17, 2002
San Antonio

Judicial Section Annual Conference
August 25–28, 2002
San Antonio

College for New Judges
December 8–13, 2002
Austin

2003

Judicial Section Annual Conference
September 14–17, 2003
Corpus Christi

Texas Center for the Judiciary
1414 Colorado, Suite 502
Austin, TX 78701-1627

Judicial Excellence Through Education