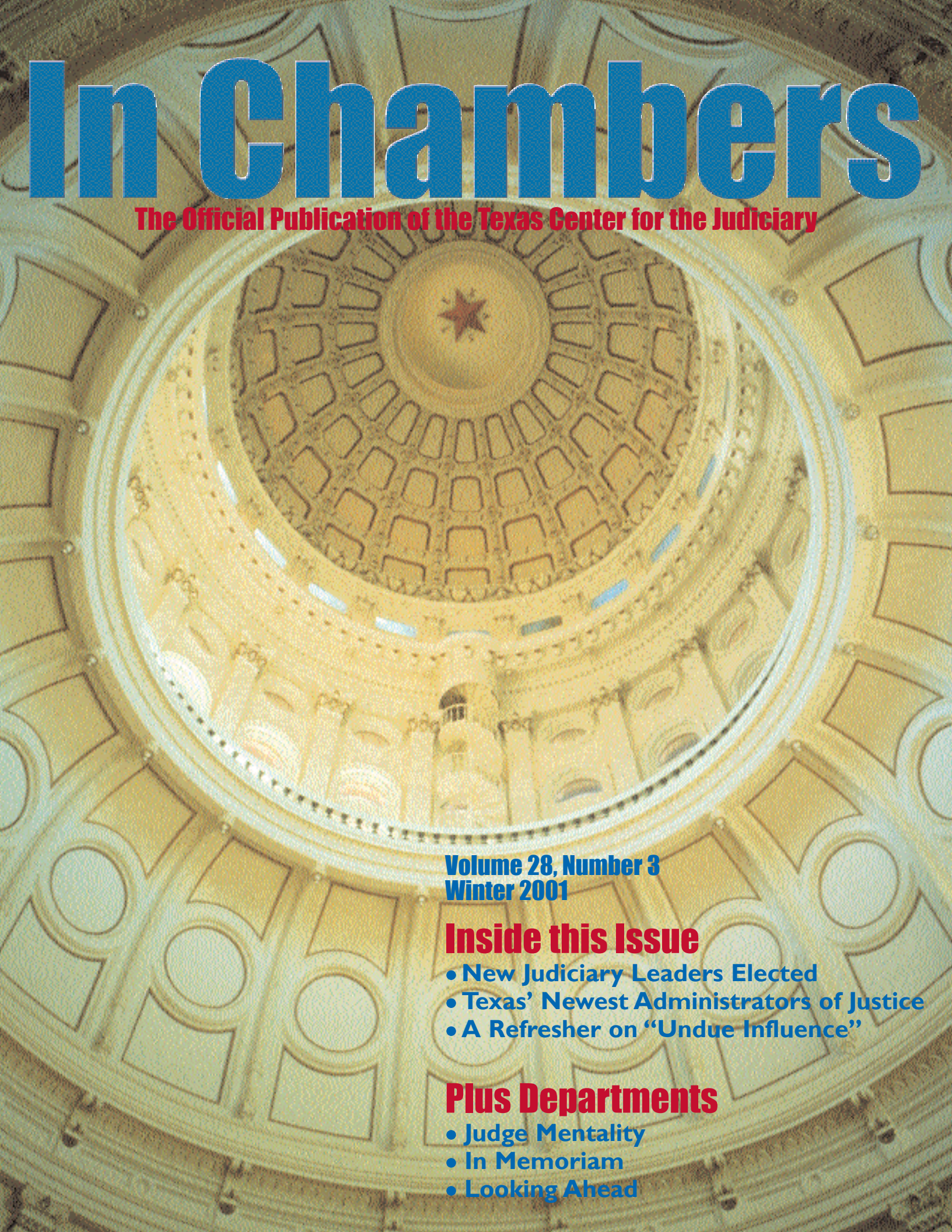
In Chambers

The Official Publication of the Texas Center for the Judiciary



Volume 28, Number 3
Winter 2001

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Cover photography courtesy of the Austin Convention & Visitors Bureau.

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 emailing morganm@yourhonor.com.

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

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Volume 28, Number 3
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ABA Recognizes Judge's *Pro Bono* Work

Judge Merrill Hartman

Judge Merrill Hartman, judge for the 192nd Judicial District of Dallas County, received the 2001 American Bar Association *Pro Bono Publico* Award in August during the ABA Annual Meeting. Established in 1984, the award honors those who have made "extraordinarily noteworthy contributions to extending free legal services to the poor and disadvantaged."

For close to 20 years, Hartman has volunteered, helping low-income Texans gain access to legal services. While in private practice, Hartman provided free legal services at neighborhood clinics and encouraged his colleagues to participate as well.

After becoming a district judge in 1984, Hartman began holding court at the legal clinics as a convenience to clients and their *pro bono* lawyers. He continues to hold court at the clinics monthly.

Hartman is also responsible for recruiting hundreds of volunteer attorneys to take *pro bono* cases. He has spoken at law firms, bar associations, and other organizations about the importance of assisting low-income people in need of legal help.

Robert Weiner, chair of the ABA Standing Committee on *Pro Bono* and Public Service, says, "The individuals and firms receiving the 2001 ABA *Pro Bono Publico* Awards have advanced the cause of equal access to justice through their *pro bono* work. Their extraordinary dedication to serving those who cannot afford to pay for legal services has set an example for the entire legal profession. These award recipients truly make a difference in the lives of those they serve. They deserve our highest commendation." ◆

A Judge Down the Hall or Across the State

Or, What's a Friendly Byte Among Judges

By Judge Guilford L. "Gil" Jones
33rd District Court—Blanco, Burnet, Llano, and San Saba Counties

It seems to me that we "rural" judges have the best of all worlds. In addition to the privilege of serving on the bench, we get to do it in a slower-paced atmosphere and don't have to dodge near as much traffic. On the other hand, we're isolated—isolated from fellow judges with whom we can confer on such matters as a local rule idea, docket management techniques, a troublesome ruling, or drafting of a SB7-compliant indigent defense plan. There is no one down the hall with whom to have coffee.

There is a solution through technology, at least for the conversation—you'll still have to provide your own coffee. There now exists a secure Internet group through which rural district judges can communicate with and among each other on such matters. It is housed on the secure server of the Office of Court Administration (OCA).

Who May Use It?

Any district judge is welcome, but it is mainly oriented to us "rural" judges—meaning those with multiple counties or those presiding over the sole judicial district within a county. There are approximately 100 such districts in the state. In addition to geographic isolation, multi-county district judges have unique management issues.

What Is It and Why Use It?

"It" is a web-based email system with a place to post notes and reply to other notes on any topic of interest to the group. You can toss out that question that's been nagging you with no other judge with whom to discuss it. Files can be uploaded for others to see, critique, and use. As this article was being written, there were samples of SB7 reference materials and sample plans being written by various courts for reference by group members. "Discussions" can ensue by the posting of a note, a reply, replies to the reply, and so on. In a precursor to this system[1], there has already been discussion on a question of fees to

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From the 2001 Annual Conference

On program evaluations, attendees give the overall conference high marks—4.5 out of 5.0

Hon. Mark D. Atkinson thanks Hon. Lamar McCorkle for his outstanding service and leadership as 2000–2001 Chair of the Judicial Section and Texas Center for the Judiciary.

Great job by the Texas Center staff.

Juries on Trial—*one of the best. Very useful. Will change how I handle juries for the better.*

Well done. Another good job.

Electronic Evidence—*one of the most useful presentations I've seen.*

Joseph Lynn Nabers
Attorney at Law

October 4, 2001

Hon. Marilyn Aboussie
3rd Court of Appeals
P.O. Box 12547
Austin, TX 78711

Dear Chief Justice:

Words cannot express my surprise or the humble appreciation I feel as a result of the award that was so graciously presented to me at the Annual Judicial Conference last week. Thank you for honoring me. I shall not, in this lifetime, forget the occasion or the many fine individuals who initiated this effort.

I am reminded of numerous judicial issues, a few challenging legislative skirmishes, and the pleasure of representing this fine organization each time I look at the remarkable granite award. It is, by the way, prominently displayed in my office. I look forward to our continuing relationship and the opportunity to achieve the goals that we know are due the third branch of government.

Thanks again for your thoughtfulness...and even more, for your friendship.

Sincerely,

Lynn Nabers

Chief Justice Marilyn Aboussie presents Austin attorney Lynn Nabers with an award recognizing his 15 years of distinguished and dedicated service to the Texas judiciary.

New Legislation—*Clever, entertaining, informative. An excellent presentation.*

Great programs. Entertaining & educational.

The Honor Guard—7th R.O.T.C. Battalion, Houston ISD, Lamar High School, stands at attention during the memorial service honoring judges who passed away in 2000–2001.

New Judiciary Leaders Elected

Judges attending the Judicial Section—State Bar of Texas' 74th annual conference, held September 23–26 in Houston, elected new leaders for the 2001–2002 term. Harris County Criminal Court at Law Judge Mark D. Atkinson will serve as Judicial Section Chair, and Kerr County District Court Judge Stephen B. Ables will serve as Chair-Elect.

Formed in 1928, the Judicial Section promotes the objectives of the State Bar of Texas within the judiciary. Approximately 1,500 active and retired Texas judges compose the Judicial Section.

As Judicial Section Chair, Atkinson will preside at all Section and Board of Directors meetings; formulate and present a report of the Section's work at the State Bar of Texas' annual meeting; and perform other duties as pertain to the office.

Judge Atkinson has served as Judge of Harris County Criminal Court at Law #13 since 1987. Before his election to the bench, Atkinson practiced criminal, family, and civil trial law. Atkinson has received numerous community honors, including the Mexican-American Bar Association of Houston Amicus Award (1994), the Houston Council on Alcoholism and Drug Abuse Judicial Award (1993), the League of United Latin-American Citizens Certificate of Recognition (1993), and the Houston Police Officers' Association County Court Judge of the Year (1988).

Judge Ables, 216th District Court Judge, Kerr County, also serves as Presiding Judge of the 6th Administrative Judicial Region of Texas. Baylor University named Ables as Baylor Outstanding Young Alumnus (1989) and, together with his wife, Lynda, as Baylor Parents of the Year (1999–2000). The Judicial Section also honored Ables in 1999–2000 as Criminal Judge of the Year.

Currently, Judge Ables serves on the Supreme Court Task Force on Foster Care and coaches the back-to-back State Champion Kerrville Tivy mock trial team.

In addition to leading the Judicial Section, Atkinson and Ables were also elected to head the Texas Center for the Judiciary. Prior to their election, Atkinson and Ables were active on various Texas Center committees. Currently, both serve on the Curriculum Committee, which develops the specialized judicial education and training opportunities for Texas appellate, district, and county court at law judges.

Judge Mark D. Atkinson

Ables will succeed Atkinson as Chair of the Judicial Section and Texas Center during the 2002–2003 term. ◆

in|memoriam

For Those Who Served Our State Courts

As of November 28, 2001

Honorable James Amis, Jr.
Retired Judge
County Court at Law, Bryan

Honorable Robert E. Day
Senior Judge
County Court at Law #4, Dallas

Honorable William Cannon
Retired Justice
14th Court of Appeals, Houston

Honorable Thomas Stovall
Senior Judge
129th District Court, Webster

Honorable B.C. Chapman
Retired District Judge
39th District Court, Haskell

Don't Give Up! Help's on the Way!

Assigning senior and former judges in 11.07 habeas corpus matters

By John G. Jasuta
Staff Attorney, Court of Criminal Appeals

Judge P. K. Reiter
Senior Judge, 77th Judicial District

Judge Curt Steib
Senior Judge, 119th Judicial District

Judge Olen Underwood
Judge, 284th Judicial District
Presiding Judge, 2nd Administrative Region

The number of habeas corpus applications in Texas has increased exponentially in recent years. This is due in part to the ever-expanding prison population, and in part, as a response to deadlines for relief in federal court. This increase in writs has resulted in legislation curtailing repetitious habeas corpus applications in state court and mandating the exhaustion of administrative remedies regarding time-credit claims. Not considering death penalty writs, the number of post-conviction habeas corpus writ applications filed in Texas has been growing unchecked since the early 1990s, and now approaches 8,000 per year.

The lion's share of these applications originate in the most populous counties: Harris, Dallas, Bexar, and Tarrant. CCP Article 11.07 requires writ applications be filed in the county of conviction. Thus, those counties that send the most convicts to prison have the highest habeas corpus caseload. Since the district courts in these larger counties are busy dealing with criminal trial dockets, they have little spare time for writ responses. Judges of rural courts are also hard-pressed to spend the time necessary to deal fairly with post-conviction litigation.

Applicant's grounds for relief are often frivolous, yet our sense of Constitutional justice requires that each ground be reviewed, considered, and responded to. The Court of Criminal Appeals has specifically approved ODI's (Orders Designating Issues) if filed within 35 days of the writ application. In the absence of an ODI, the district clerk must transmit the writ application to the Court of Criminal Appeals or be subject to mandamus. Since the CCA has no fact gathering capability, it relies on the trial court to be its eyes and ears: investigating the grounds for relief, gathering evidence, and making a disposition recommendation. Therefore the initial burden of dealing with the 11.07 flood falls upon the convicting courts. Trial courts have responded to the rising waters in various ways, some juridical and some not.

In some districts, the prosecutor uses the "ostrich" approach by simply not answering the application. The convicting court also makes no response to the Court of Criminal Appeals. Such inaction may not cause problems, but there are reasons why a response is important. Firstly, the statute requires the state to answer, although there is no sanction for failing to do so. Secondly, the state will only have one opportunity to defend the conviction in the habeas corpus setting. While the conviction is unlikely to be reversed without the state having the opportunity to respond, it could happen, especially if the state habitually ignores its duty to answer. Thirdly, response at this point establishes the found facts for later federal litigation and can act as a limitation on claims. When contrasted to findings by a federal judge, findings of facts by the state court is usually to the state's advantage.

The ostrich method is also inappropriate for the regular judge of a convicting court, although there is no statutory mandate compelling a judicial response. Failure to make any findings is deemed a recommendation to deny the application. A "no response" is taken as a finding that there is no previously unresolved material fact regarding any ground for relief meriting consideration, whether true or not. Yet no response from the convicting court is just as inappropriate as the prosecutor failing to answer. When the CCA reviews the application, it might disagree and remand the writ back to the convicting court, creating needless and extra work for everybody.

Some courts have taken one of several "quasi-ostrich" approaches. In some districts, aggressive district attorneys handling writs are at the forefront of habeas litigation. The prosecutor prepares an answer, findings, conclusions, and recommendation, which, unfortunately for the applicant, the convicting court signs without review or revision. This approach intrudes little on the time of the judge, but gives short shrift to the applicant who is entitled to a fair review by an impartial magistrate. In other counties, the D.A.'s office decides

which applications to answer and lets the others go begging. This "triage" method simply does not comply with the statute.

One county assigns writ responses to "masters." These are practicing attorneys appointed to investigate, answer, and propose findings for the trial judge to sign. If the convicting court merely rubber stamps the master's proposed findings, conclusions, and recommendation, the applicant will not receive a judge's fair and impartial consideration of the merits. In another county with an office of court administration, staff lawyers, rather than a judge, perform the fact-finding function of the convicting court. This likewise suffers a potential short shrift.

Still another method of responding to writ applications is for a very active regular district judge to deal with them without help. Writ response pro-activity by the regular judge is more prevalent in rural counties, although some of the counties with a moderate urban population are also blessed.

Finally, another and better approach has been adopted in several counties. Senior and former judges are used to respond to the regular judges' habeas corpus caseload. This has resulted in timely and thorough findings, conclusions, and recommendations to the CCA, favoring neither the applicant nor the state. All of this is without effort on the part of the regular judge, and at little expense to the county. In Tom Green County and the surrounding counties, Judge Curt Steib handles writ applications for most of the district courts.

In Montgomery County, Judge P. K. Reiter has been assigned to respond to writ applications filed in the 284th District. That district has a very competent D.A.'s habeas corpus section which is of great help to the assigned judge.

The 2nd Region Administrative Judge strongly supports this last approach. As Judge Olen Underwood notes, the merits of using senior and former judges to aid regular judges are clear. While pro-active regular judges are to be commended, senior and former judges are an experienced, inexpensive, low maintenance resource easily available. They can be assigned on a case-by-case basis or by a blanket order. They have extensive knowledge of the law and trial procedure as well as proven ability to review litigation in a fair and expeditious manner. Likewise, an assigned senior or former judge is unlikely to have any predilection except to the law.

With this in mind consider now:

Judge Curt Steib

The primary function of the trial court regarding an Article 11.07 writ application is to resolve any factual issues presented by the grounds for relief. There are two other functions that can either avoid or resolve problems down the line. The first is "exhaustion of state remedies" should the writ application find its way into federal court. The second is to reassure the inmate that his concerns are receiving serious attention by a fair, experienced, and impartial magistrate.

Federal and state courts alike, suffer great demands upon time and resources. As a consequence, federal courts are not anxious to be involved with state post conviction writs. Usually, if state court has duly considered and disposed of applicant's contentions, the writ will be dismissed at the federal level unless a serious, unresolved Constitutional question is involved. If some contentions have not been disposed of by the state court, the federal application will be dismissed without prejudice pending exhaustion of state remedies. The state habeas judge may avoid this by discussing all of applicant's contentions in writing,

Habeas Corpus continued on page 8

Texas' Newest Administrators of Justice

As of November 28, 2001

Hon. William Adams
County Court at Law, Rockport
New Court

Hon. Cathy Cochran
Court of Criminal Appeals, Austin
Succeeding Hon. Sue Holland

Hon. Vickers Cunningham, Sr.
283rd District Court, Dallas
Succeeding Hon. Molly M. Francis

Hon. Molly M. Francis
5th Court of Appeals, Dallas
Succeeding Hon. John Roach

Hon. Eva Guzman
14th Court of Appeals, Houston
Succeeding Hon. Don Wittig

Hon. Lee Hamilton
104th District Court, Abilene
Succeeding Hon. Billy John Edwards

Hon. Richard L. Hattox
County Court at Law, Granbury
New Court

Hon. Walter M. Holcombe
County Court at Law, Pecos
Succeeding Hon. Lee S. Green

Hon. Roy Quintanilla
County Court at Law #3, Galveston
New Court

Hon. Sherry Radack
1st Court of Appeals, Houston
Succeeding Hon. Scott Brister

Hon. Jane Roden
County Criminal Court at Law #8, Dallas
Succeeding Hon. Vickers Cunningham, Sr.

Hon. Xavier Rodriguez
Supreme Court of Texas, Austin
Succeeding Hon. Greg Abbott

Hon. Carter T. Schildknecht
106th District Court, Lamesa
Succeeding Hon. George Hansard

Questions & Answers

Ethics Opinion Number 275

May a district judge serve on the board of regents of a state university? The duties of the board are listed in Texas Education Code, Section 65.01 et. seq.?

No, a district judge may not serve on the board of regents of a state university. Canon 4H of the Code provides in part:

> "A judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

The Texas Education Code 65.16 and 65.31 lists the duties of the board to include the employment and supervision of the chief executive officer of the system and the establishment of policies for the general management of the university system. These activities are exactly those prohibited by Canon 4H.

The judge should also be mindful of the restrictions of Canon 4A. This section of the Code provides in part that, "A judge shall conduct all of the judge's extra-judicial activities so that they do not...interfere with the proper performance of judicial duties." If the judge's judicial district includes one of the universities that she would be supervising, she would be required to recuse herself in any case involving the university.

See also Opinion 246. ◆

Habeas Corpus continued from page 7

and making written recommendations whether or not the ground is cognizable for state habeas relief.

It is also important that inmates feel assured that all claims are being looked at thoroughly and fairly. If not, inmates turn to other convicts for help. The dramatic increase in prison "writ writers" is eloquent, though mute, testimony of the distrust of convicting court responses by writ applicants.

Some writ writers have the admirable motive of helping their fellow convicts. However, often they are merely vultures swooping down on road kill. It is amazing how quickly writ forms spread from one prison unit to another with the same spelling and grammatical errors. Fill-in-the-blank forms are available for a fee ranging from $100 up to several thousand dollars. Unfortunately, the advice and claims of writ writers are wrong more times than right.

If the convicting court's findings, conclusions, and recommendations are prepared with a degree of compassion and include applicable law citations, the applicant is frequently mollified. Even if the inmate is advised that there is no basis for release from prison, a thorough convicting court review often avoids further habeas applications. However, all of these "extras" consume time rarely available to a regular judge.

If the regular judge of the convicting court doesn't have time to make a response, an attorney may be appointed as a master to find facts and make recommendations. The drawbacks in most smaller counties include finding a qualified attorney to appoint as master and paying the appointee's fee and expenses from the county's General Fund. The regional administrative judge assigning a senior or former judge to act as habeas judge avoids these drawbacks. The assigned judge's salary is paid by the State with nominal expenses paid by the county. For the assigned judge willing to take on the task, responding to applications for post conviction writs only requires access to a law library, a place to work, and time.

Article 11.07 gives the habeas judge the option of gathering evidence by hearing or by affidavits. While there may be occasions where a hearing is necessary, most applications can be fairly and efficiently handled by the much less costly use of affidavits. If a hearing is held, the inmate must be bench-warranted back to the county and a defense attorney appointed at county expense. Appointed counsel feel compelled to litigate all points that the

client desires, whether germane or not. The hearing must be transcribed and the court reporter paid.

On the other hand, the inmate can raise in the application all of the issues desired, evidentially supported by affidavits. This includes evidence not admissible at a hearing. Since most of the pertinent evidence is already in the file or in the record, the best procedure is to permit the prosecuting attorney to present any evidence desired by way of affidavit. The inmate is copied on all correspondence emanating from the habeas judge, as is the district attorney's office. The inmate is free to amend and supplement any claims as desired, so long as the matter remains pending.

The vast majority of writ applications are without merit.

The decision whether or not to sign an ODI requires the habeas judge to read the application and decide if additional information is needed for complete resolution. At this point, it is rarely necessary to refer to the file itself, because the issues are determined by the applicant's allegations irrespective of the facts. However, the habeas judge may request that the trial attorney prepare an affidavit if there are allegations of ineffective assistance of counsel. The habeas judge may ask the custodian of the penitentiary records for an affidavit regarding forfeiture of good time, request the Parole Division for copies of documents or an affidavit regarding revocation hearings, or ask the prosecuting attorney for an affidavit regarding Brady matters. Irrespective of what the issues are, the chronology of events is invariably important. Access to the clerk's record and any appellate record is therefore mandatory.

When all of the requested information has been received, work can start on the preparation of the finding of facts, conclusions of law, and recommendation to the CCA. There are certain requirements as well as preferences by the Court of Criminal Appeals and the Attorney General, who may be called upon to answer the writ application in federal court. When met, it makes their job a great deal easier.

The vast majority of writ applications are without merit. Yet it would be unforgivable in our justice system if relief were denied in a meritorious case because the convicting court relied on biased advice or failed to invest the effort deserved. The use of senior and former judges can help the judicial system achieve justice and ensure that meritorious cases do not fall through the cracks.

Judge P. K. Reiter

In the 2nd Administrative Region, senior and former judges are assigned as habeas judges under Chapter 74 of the Government Code by Judge Olen Underwood. The judge assigned is one requested by the convicting court and approved by Judge Underwood. In the 284th District Court, I have been assigned as habeas judge for the past year and a half.

Because the typical 11.07 applicant is at best a sophomore in the law, it takes some considerable effort to fathom all of the grounds raised and make a fair evaluation of the facts and law that apply to the inmate's application. The new 11.07 format adopted by the CCA, effective January 1, 2001, will help applicants be more focused and make it easier to recognize an applicant's grounds for relief.

The use of assigned habeas judges has resulted in several savings to Montgomery County. Firstly, the county General Fund is charged only with occasional travel expenses. Secondly, the assigned judge personally accesses the clerk's file, copying only those documents needed without imposing on the deputy clerk. Thirdly, the regular judge can rely on the assigned judge to respond timely and fairly to the 11.07 application.

All reviewing courts, state appellate and federal, rely on findings by the convicting trial court. Therefore it is either of no importance or crucial to make a thorough response to the convict's

Habeas Corpus continued on page 12

in the library

THESE publications are now available from the Texas Center library. If you would like to check out these or other materials, please contact Morgan Morrison, Publications Coordinator, at 512-463-1530 or morganm@yourhonor.com.

- **American Bar Association Office of Justice Initiatives**
  Unified Family Courts: Justice Delivered
- **National Council of Juvenile and Family Court Judges**
  U.S. Supreme Court Case Law Digest, Volume II
- **State Justice Institute**
  Timing is Everything: The Appropriate Timing of Case Referrals to Mediation—A Comparative Study of Two Courts
- **Supreme Court of New Mexico Administrative Office of the Courts**
  NM Court Volunteer Program: Recruiting, Retaining, and Recognizing Court Volunteers

A Refresher on "Undue Influence"

By Judge Randy Michel
County Court at Law #1, Brazos County

Are you about to try a Will contest involving "undue influence"? Just what is this thing called "undue influence"? This article will help those judges in the probate court trenches who are confronted with this issue during will contests. This paper covers, among other things, the elements the contestant must prove to establish that a will is the product of undue influence, the factors the trier of fact should consider in determining whether an undue influence was exerted, and the quality of evidence needed to uphold a finding of "undue influence" on appeal.

Elements of Undue Influence

The burden of proving undue influence rests on the individual contesting the will.[1] The contestant must prove the following elements: (1) the existence and exertion of an influence; (2) the effect of the influence was to subvert or overpower the mind of the testator at the time the will was executed; and (3) the execution of a will that the testator would not have executed but for such influence.[2]

"It is important to note that not every influence exerted by one person on the will of another is *undue*."[3] An influence is not undue unless the free agency of the testator is destroyed and a testament is produced that expresses the will of the one exerting the influence rather than the will of the testator.[4] Thus, the will's contestant must not only provide competent evidence (1) that *such influence in fact existed*, but also offer (2) evidence of the testator's state of mind at the time the will was executed that would tend to show his free agency was overcome by such influence.[5]

The Burden of Proof

As with most civil cases, the burden of proof is advertised as being "by a preponderance of the evidence." Nevertheless, *Horton v. Horton*[6] directs that "the circumstances relied on to establish undue influence must be a *reasonably satisfactory and convincing* character, and must not be equally consistent with the *absence* of such influence."[7] This language sounds like more than "by a preponderance," but no case has ever acknowledged that it is. One recent case will illustrate the quality or quantity of evidence that fails to meet this standard.

Horton v. Horton[8] provides an example of evidence that failed to support the jury's finding of "undue influence." The testator signed the Will at the Horton's home, not in a lawyer's office. The testator read his last Will only five minutes before he signed it. The testator signed the will while on pain medication and suffering from cancer. The alleged exerter of the undue influence was the testator's primary caregiver and together they lived alone in the country. Added together, these facts were deemed "no evidence" to support the jury's fining of "undue influence."[9]

One case that presents a mountain of evidence from which the jury found "undue influence," but the Texas Supreme Court reversed, is *Rothermel v. Duncan*.[10] *Cobb v. Justice*[11] illustrates a body of evidence that upholds the jury's finding of "undue influence." *Longaker v. Evans*[12] provides an example of a substantial quality of evidence that failed to overturn a jury's finding of no "undue influence." Space does not permit a fuller examination of these cases.

Proof of Whether an Influence Was Exerted

Generally, to establish that an undue influence was actually exerted, the relevant inquiry includes an examination of numerous factors, including (a) whether the accused party had an opportunity to exercise the type of influence or deception that is alleged; (b) the circumstances surrounding the drafting and execution of the will; (c) the existence of a fraudulent motive; (d) whether the will makes an unnatural disposition of property, considering the nature and type of relationship existing between the testator, contestants, and the party accused of exerting such influence; (e) whether the testator has been habitually subjected to the control of the accused party; (f) whether the testator was mentally or physically capable of resisting the accused party; (g) the words and acts of the testator; and (h) the weakness of the testator's mind and body.[13]

Opportunity to Exert Versus Actually Exerted

Establishing the *opportunity* to exert and influence is different—vastly different—from establishing that the influence was indeed *exerted*. The seminal case in "undue influence" law is

Rothermel v. Duncan;[14] it explains the difference in these words:

> It is the law in Texas that a will cannot be set aside on proof of facts which at the most do no more than show an *opportunity* to exercise influence. The establishment of the circumstances of having an *opportunity* to exert such influence due to being in a position of caring for the person upon whom the influence is supposed to be exerted is equally consistent with the theory of innocence as it is with the theory of wrongdoing. The exertion of influence that was undue cannot be inferred along from *opportunity*, but there must be some testimony, direct or circumstantial, to show that influence was not only present but that *it was in fact exerted* with respect to the making of the testament itself.[15]

Proof of When the Testator's State of Mind Was Subverted

The testimony offered by the contestants must establish that the decedent's "mind was in fact subverted or overpowered at the time of the execution of the instrument in question."[16]

Proof of a Causal Relationship Between the Will's Execution and the Influence

The third element of *Rothermel* asks if there was "execution of a document which the [testator] would not have made but for the alleged influence."[17]

In *Estate of Davis v. Cook*[18], the contestants argued there was impropriety surrounding the Will because the testator gave family stock to non-family members. Furthermore, the testator favored one son and his wife over two other sons and did not give gifts to long-time friends but rather to charities. In spite of this evidence and the contestants' assertions, the appellate court explained that:

> Excluding collateral heirs in favor of charities is *not unnatural*. [Citation omitted.][19] Further, there is a direct connection between [the decedent] and each of the beneficiaries [in this case], thus providing a reasonable explanation for the devises. [Citations omitted.][20]

Estate of Davis v. Cook[21], (emphasis added).

Nearly 40 years ago, our Texas Supreme Court stated the rule respecting supposed "unnatural dispositions of property." "[I]t is *only where all reasonable explanation* in affection for the devise is lacking that the trier of facts may take this circumstance as a badge of disorder or lapsed mentality or of its subjugation."[22]

Conclusion

Not every influence exerted upon a testator will be considered "undue." Furthermore, it is not enough to establish the *opportunity* to exert a subverting influence on the testator; the influence must actually be exerted. Moreover, while the proof must be by a preponderance of the evidence, the reported cases show that the proof must also be of a reasonably satisfactory and convincing character, and not equally consistent with the *absence* of an undue influence. Finally, all reasonable explanations must be lacking when viewing allegedly unnatural dispositions of the testator's property. Now, go preside over that Will contest with confidence. ◆

Endnotes

1 *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963)

2 *Id.*

3 *Long v. Long*, 133 Tex. 96, 125 S.W.2d 1034, 1035 (1939); *Horton v. Horton*, 965 S.W.2d 78, 87 (Tex. Civ. App. - Ft Worth 1998, no pet.)

4 *Id.*, 1035-36.

5 *Rothermel v. Duncan*, 369 S.W.2d, at 922; see also *Horton*, 965 S.W.2d, at 87.

6 965 S.W.2d 78 (Tex. Civ. App. - Ft Worth 1998, no pet.)

7 *Id.*, at 87 (emphasis added).

8 965 S.W. 2d 78 (Tex. Civ. App. - Ft Worth 1998, no pet.)

9 *Id.*, at 87-88.

10 369 S.W.2d 917 (Tex. 1963)

11 954 S.W.2d 162 (Tex. Civ. App. - Waco 1997, writ denied)

12 32 S.W.3d 725 (Tex. Civ. App. - San Antonio 2000, no pet.)

13 *Rothermel v. Duncan*, 369 S.W.2d, at 922; see also *Horton*, 965 S.W.2d, at 87.

14 *See* Endnote 1, *supra*.

15 *Rothermel*, at 923 (emphasis added); cited in *Horton*, at 87 (emphasis added)

16 *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex 1963)

17 *Cobb v. Justice*, supra, at 294.

18 9 S.W.3d 288 (Tex. Civ. App. - San Antonio 1999, no pet.)

19 See *Nailhaus v. Feigon*, 244 S.W.2d 325 (Tex. Civ. App. - Galveston 1951, writ ref'd n.r.e.) (upholding testatrix's will disposition which left the bulk of the estate to two synagogues and a rabbi to the exclusion of surviving nieces and nephews); and *In re Caruther's Estate*, 151 S.W.2d 946, 948 (Tex. Civ. App. - Beaumont 1941, writ dism'd) (recognizing that Texas public policy favors charitable gifts)

20 See *In re Estate of Davis*, 920 S.W.2d 463, 467 (Tex. Civ. App. - Amarillo 1996, writ denied)

21 9 S.W.3d, at 294-295 (upholding the alleged "unnatural disposition" and finding no "undue influence")

22 *Rothermel v. Duncan*, 369 S.W.2d 917, 924 (Tex. 1963) (emphasis added)

Habeas Corpus continued from page 9

application. It is of no importance if the application is pro forma alleging no proper ground for relief or failing to provide evidence. However, if there are genuine unresolved issues raised, the entire character of applicant's relief, or lack thereof, is governed by the habeas judge. It is the convicting court's investigation and review of evidence that results in findings, conclusions, and recommendation for specific action by the Court of Criminal Appeals. A fair-minded habeas judge is the citizen's last, best hope against unlawful restraint.

The ever-increasing prison population and consequent burgeoning applications for post-conviction writs, like gasoline and natural gas prices, are not likely to decrease absent a fundamental change in our society. Therefore the writ workload for convicting courts will continue to increase, unabated.

Judge Olen Underwood

In the 2nd Administrative Region, all senior and former district judges have been asked to provide the Presiding Judge with information concerning their respective areas of interest. This includes responses to 11.07 writ applications. With this information, the Regional Presiding Judge has the ability to assist the regular trial judges in moving their caseloads by assigning a habeas judge to deal with 11.07 writs.

When the regular judge does not have adequate time to evaluate the merits of a writ application, an assigned judge can provide a great benefit to the regular judge in effectively managing the trial court's caseload. Where used, assigned judges have proven to be a Godsend to regular judges with congested dockets.

If an application appears to have merit and requires more than a computation of credit for time served, it may be referred to an assigned judge for preparation of the convicting court's response. If the case is one about which the regular judge has a clear memory, the regular judge may request an assigned judge to hear the convicting court's trial docket while the regular judge gives the application the time and effort it deserves.

Usually in the 284th, my memory is of little use in crafting the convicting court's response. Therefore, I generally have a judge assigned to review the writ application, the file, gather evidence, make findings of fact and conclusions of law, and recommend a final disposition to the Court of Criminal Appeals. The assigned judge submits the convicting court's response to me for my review prior to filing with the District Clerk. Usually, the assigned judge signs the response. Occasionally, I make modifications to the draft and sign the response myself.

As district judges, we all look to our county officials for financial support in equipment, supplies, and staff. Without exception, there is less money available than needed. We are constantly seeking additional funds from county, state, and federal sources. Therefore, regular judges are fortunate to have assigned judges available to help with 11.07 writ responses.

There are more than 320 judicial officers with various amounts of experience on the bench either as trial or appellate judges. These senior and former judges work on a per diem basis at the will of the regular judge and the Regional Presiding Judge. They are self-starters, require no supervision, and receive their compensation from the state.

All that is required to obtain this assistance is for the regular judge to request that the Presiding Judge of the Administrative Region assign a senior or former judge to the convicting court. The assigned judge works exclusively for the regular judge, who provides appropriate instructions and requests the Presiding Judge approve the state and county expense claims.

The use of experienced assigned habeas judges to help regular judges is a solution whose time has come. It is an efficient, cost-effective, and painless way for regular judges to meet their statutory duty regarding post-conviction writs. It provides fair, judicious, and timely disposition of habeas corpus applications independent of prosecutorial bias. It adds to the efficiency of the trial court. Expense to the county is minimal while the benefits are maximal. It is certainly rare when justice may be so economically achieved by utilizing resources available for the asking. ◆

Outstanding Efforts Honored

Former State Bar of Texas President Lynne Liberato presented Chief Justice Marilyn Aboussie, 3rd Court of Appeals, with a Presidential Citation at the Bar Leaders' Luncheon in June 2001. The citation recognized Chief Justice Aboussie "for coordinating the efforts of the Texas Center for the Judiciary with the State Bar of Texas, especially for her leadership in improving access to justice in criminal matters."

Internet Groups continued from page 3

appointed counsel on an appeal, legality of a traffic stop, the problem of insufficient prospective grand jurors appearing, courtroom design, who owns the furniture and equipment in a multi-county district, appointment of counsel for an 11.07 post-judgment writ application, use of juror questionnaires, interview of children in chambers, and other topics.

Ethical Considerations Exist

All judges with whom I've spoken affirmed the long-held assumption that a judge could talk to another judge about judicial concerns—including pending case matters—but only with another judge.

However, in a recent issue of *In Chambers*, Ethics Opinion No. 263 was discussed regarding ex parte communications. There was troublesome language appearing in dicta that read "[t]he consultation between judges that is permitted in Canon 3 are conversations between judges regarding the law and its application where neither judge has an interest in the out come [sic] of the litigation being discussed." That would seem to prohibit discussion about a pending case.

To the contrary, I believe that portion of the opinion to be limited to the facts posed in seeking the opinion (which regarded a conversation between a trial judge and the appellate court about a case then pending before the appellate court).

The opinion is thusly limited in that latter phrase, I submit, because the entirety of Canon 3 has to do with impartiality and diligence, while 3 B deals with the Adjudicative Responsibilities; and 3 B (8) deals specifically with the right of interested persons to be heard. The proscription is against an ex-parte communication, i.e. one where some, but not all, of the litigants are present. That proscription is clearly in the context of a matter pending before the court. Therefore, war stories at the annual conference are clearly permitted on cases no longer pending. Thank goodness! On second thought... but, I digress.

Section 3 B (8)(d)[2] then EXCEPTS "consulting with other judges..." from the proscription. That exception (i.e. permission to consult), without question, applies to a pending suit and not just for later war stories. Therefore, if the phrase from Opinion 263 regarding a judge's "interest in the out come [sic] of the litigation being discussed" is to have any meaning it can only refer to a direct interest (such as the trial judge lobbying the appellate judge) and not a purely judicial interest in seeking a colleague's advice about a pending matter. Lastly, even if the "interest in the out come [sic] of the litigation" phrase is not limited to the context of litigation pending in the court of one of the judges, it is still mere dicta.

A clarification of this opinion has been requested by Judge Bob Parks, judge of the 143rd District Court, and that request is still pending. In any event, the discussion group is still highly useful, and if you are uncomfortable discussing a pending case, then limit your discussion to other matters.

How to Use It?

First, you must have the capability of accessing the Internet. Second, you must have an OCA email account. Everyone received a flyer last May soliciting your obtaining one. For example, my address there is gil.jones@33rd.courts.state.tx.us. Judge Parks, who has assisted in this endeavor, has an address of bob.parks@143rd.courts.state.tx.us. If you don't have one, contact Mike Griffith who is the Judicial Committee on Information Technology (JCIT) director for OCA. His email address is mike.griffith@courts.state.tx.us, and his telephone number is 512-463-1641.

Once you have the OCA mail address, just email me (at the address shown above) and ask to be on the list. I will then relay that to Mike who will add you to the list.

When you have been set up, I will send you some introductory tips and suggestions for getting into the secure site and about posting a note or replying to postings there.

Summary

I believe that we can be better judges by learning the "best practices" of judges whose opinions we respect. That's harder for us "rural" judges, but this secure communication medium should bridge the gap. Try it; you have nothing to lose and everything to gain. ◆

Endnotes

1 A group has existed in Yahoo!®Groups among eight rural district judges.

2 The relevant part of the canon reads as follows:
"(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit: ...
(d) Consulting with other judges or with court personnel; ..."

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January 13–15, 2002
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Regional Program (Regions 1, 3, 4, 5, & 8)
February 24–26, 2002
Galveston

Advanced Computers
March 18–19, 2002
Midland

Family Violence Program
April 14–16, 2002
Dallas

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

Advanced Computers
June 3–4, 2002
Midland

Professional Develop. Program
June 9–14, 2002
Huntsville

Joint Ethics Program
July 14–17, 2002
San Antonio

Judicial Sect. Annual Conference
August 25–28, 2002
San Antonio

College for New Judges
December 8–13, 2002
Austin

2003

Judicial Sect. Annual Conference
September 14–17, 2003
Corpus Christi

Justices Take Top Prize

By Osler McCarthy, Staff Attorney for Public Information
The Supreme Court of Texas

Justice Harriet O'Neill and Justice Wallace B. Jefferson accomplished what no other two judges on one court have in the past: They won first and second places in the American Bar Association's Judge Edward R. Finch Law Day Speech Awards for the same year.

Both O'Neill, who won the top prize, and Jefferson addressed protecting the best interests of children, the Law Day theme this year. O'Neill delivered her address to the Houston Young Lawyers Association Law Day celebration. Jefferson spoke to the San Antonio Bar Association.

"Both were outstanding speeches," said Leslie Andersen, program manager in the ABA's Division of Public Education. "No one could say we were being heavy-handed with Texas this year."

The Law Day speech contest drew 12 entries this year, Anderson said.

O'Neill's award carries a $1,000 prize, which she has offered to contribute to a program of Travis County District Judge Scott McCown's choice. O'Neill credited McCown, whose child advocacy is known statewide, for significant help with her speech.

Both O'Neill and Jefferson were invited in early February to the ABA's midyear meeting in Philadelphia for an awards ceremony.

Anderson said this year was the first that the top two awards were presented to recipients on the same court. Competition for the Judge Edward R. Finch Law Day Speech Award, named for a late New York jurist, includes entries from lawyers and judges throughout the United States.

Texas Supreme Court Justice Craig Enoch was awarded a second place in the competition two years ago.

O'Neill and Jefferson's speeches will be posted at www.abanet.org/publiced/lawday.

Julie Baumgarten of the Houston Young Lawyers Association entered O'Neill's speech. Michael J. Black of the San Antonio Bar Association entered Jefferson's. ◆

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