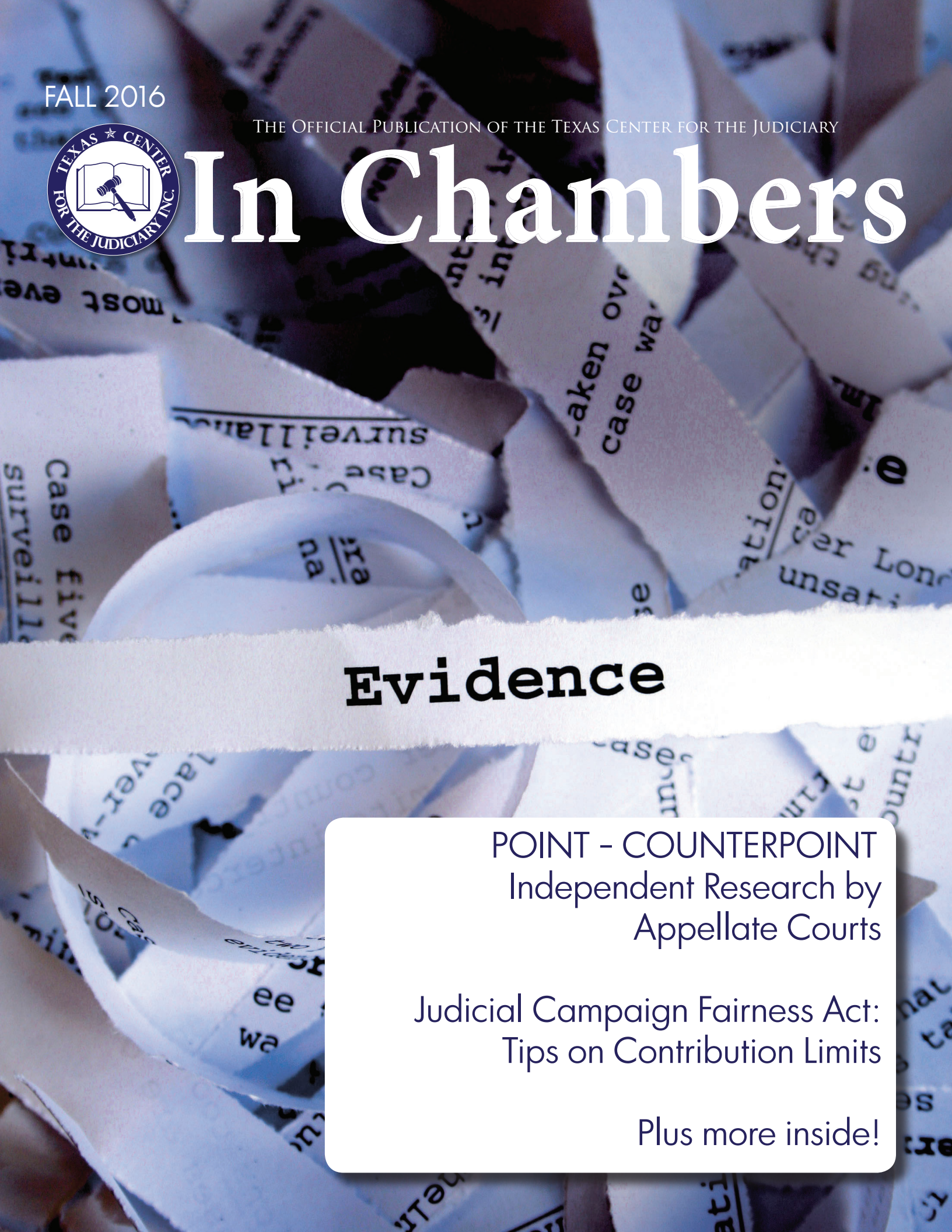
FALL 2016

The Official Publication of the Texas Center for the Judiciary

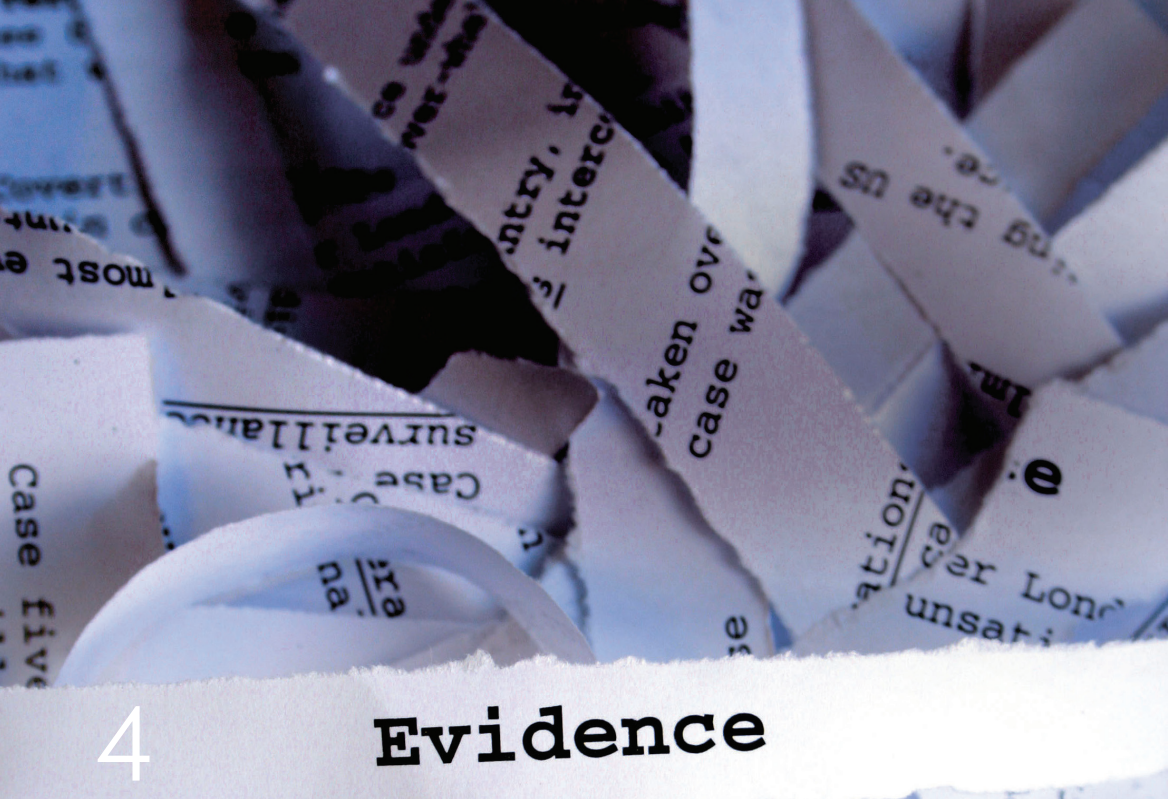
In Chambers



POINT – COUNTERPOINT
Independent Research by Appellate Courts

Judicial Campaign Fairness Act: Tips on Contribution Limits

Plus more inside!



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Fall 2016

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This is the the official publication of Texas Center for the Judiciary. The magazine is published three times a year and funded in part by a grant from the Texas Court of Criminal Appeals. In Chambers strives to provide the most current information about national and local judicial educational issues and course opportunities available for Texas judges. We keep the Texas Center's mission of "Judicial Excellence Through Education" as our guiding premise. Readers are encouraged to write letters and submit questions, comments, or story ideas for In Chambers. To do so, please contact Courtney Gilason, Curriculum Director, at 512.482.8986 or toll free at 888.785.8986, or via email at courtneyg@yourhonor.com. Articles subject to editing for clarity or space availability. Layout and design by Christie Smith. The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.

LETTER FROM THE IMMEDIATE PAST CHAIR

How many times have we heard "They just don't make them like they used to"? Perhaps the topic was cars or homes or maybe literature or films. But the same has been said about people in certain professions such as doctors and even judges. Many of us attended law schools that used the casebook teaching method which implied that certain judges from years gone by displayed great writing skills together with an exceptional ability to analyze and apply the law that set them apart from and, frankly, ahead of judges who would follow. While we will all remember the eloquence and rhetorical skills of Judge Learned Hand and Justice Oliver Wendell Holmes, Jr., I think it is bleak and short-sighted to fail to recognize the extraordinary jurists of today and even tomorrow. Having had the privilege and experience of being a judge for over 27 years, I am proud to know and work with so many in our profession.

I am often asked who was my mentor or the person who most influenced my career. The answer is easy. Upon graduating from law school, I clerked for the Honorable Halbert O. Woodward, the Chief Federal District Judge for the Northern District of Texas. Judge Woodward demonstrated a strong sense of responsibility to perform his duties ethically and fairly, outstanding legal acumen, common sense, and last, but not least, a bold sense of humor. Looking back on that time, I was too inexperienced to appreciate the effect Judge Woodward would have on my career long-term, but today I know what a blessing it was to have worked for him at such an impressionable time in my career.

Over the last few years, I have had the honor to be a member of the Board of Directors of the Texas Center of the Judiciary and the Chair of the Board for the past year. In fulfilling those roles, I have come to know so many more judges across the State of Texas than I would have known otherwise. I have worked with other judges on the Board of TCJ, on committees such as the curriculum committee that plans all the TCJ educational conferences and on the Judicial Section Board of the State Bar of Texas. I have seen judges from all levels of courts across this state volunteer their time and work with dedication to advance the quality and integrity of our profession. The goal is the same for all those involved – to promote excellence in judicial officers and thereby enhance our judicial system. In my view, it's working.

My point is that I cannot agree that they don't make them like they used to. While, for me, there will never be another Judge Woodward, there are those inspirational role models for impressionable young lawyers who don't even yet know they might want to be a judge. I am encouraged about the future of our profession. We want new judges to learn from the best. The good news is they can learn from the legal scholars of the past but they also have the real-life influence of the bright minds who are today's jurists. I believe the best is yet to come.

Sincerely,

Justice Lee Gabriel

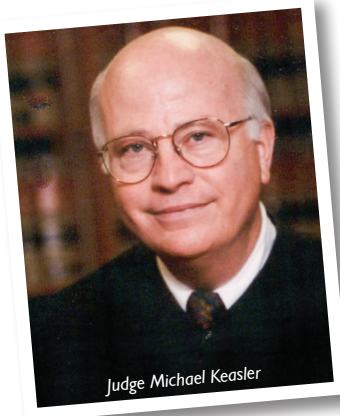
Independent Research at the Appellate Court Level: An Argument For and Against

Trial and appellate courts face many challenges when determining the propriety of independent research. The following articles present opposing views from two judges on Texas's highest criminal court, Judge Michael Keasler and Presiding Judge Sharon Keller, regarding independent research by appellate judges. While the articles were originally written in 2006 and appeared in Judicature[1], the issue gained national attention just last year when Seventh Circuit Court Judge Richard Posner issued the majority opinion in Rowe v. Gibson[2] discussing the independent medical research he conducted in the case. The law on this issue is still very much unsettled with no definitive resolution to the issue, making the arguments that follow just as relevant today as they were in 2006. ~ Editor

POINT

Appellate Courts Must Conduct Independent Research of *Daubert* Issues to Discover "Junk Science"

By Judge Michael Keasler,[3] Ms. Cathy Cramer[4]



Judge Michael Keasler

The scene is a courtroom in the State of Denial. The defendant, charged with murder, testifies to his innocence, claiming he was across town at the time of the crime. There being no eyewitnesses and no physical evidence linking the defendant to the victim, the State puts forth its scientific expert. Dr. Crackpot is an "auralist." Simply by being in the same room with someone, the doctor claims to read the person's "aura" and determine where he was on a specific date. The defense objects, arguing that this science is not valid, but the State has an article from Weird Science Magazine detailing the theories, and the defense has nothing to refute it. The trial judge admits the evidence, deciding that any doubts about it go to the weight of the evidence rather than its admissibility. Dr. Crackpot testifies that the defendant was at the crime scene at the time of the murder, and the jury convicts.

The defendant appeals, arguing that "auralism" is junk science. But the parties offer no additional authority, believing they are limited by what was presented at trial. The appellate court, reviewing for an abuse of discretion, finds no error, since there is nothing in the record to indicate that the science is invalid.

Yet the science is junk. There is no such thing as an "auralist." Nobody can credibly "read" a person's "aura" and determine where they were on any given day. The scientific journals are replete with articles condemning the science, and Dr. Crackpot himself has been proven to be a fraud. Nevertheless, the defendant goes to prison for a crime he did not commit, and the law in Denial is that auralism is valid.

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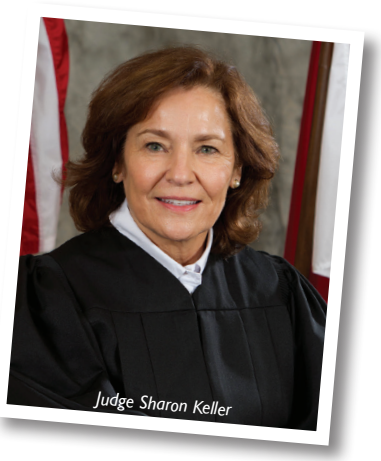
Appellate Courts Should Resist the Temptation to Conduct Their Own Independent Research on Scientific Issues

By Presiding Judge Sharon Keller,[16] Mr. Donald Cimics[17]


Judge Sharon Keller

When science has the potential to affect nearly every type of case in the judicial system, and where access to information is greater than ever before, courts increasingly confront the question of whether they should conduct independent research into the reliability of proffered scientific theories and techniques. In this article, I focus on the appellate perspective. My thesis is simple: regardless of what trial courts may do, appellate courts should resist the temptation to conduct their own independent research of the scientific literature.[18]

Three reasons for this are apparent. First, gathering scientific literature on a subject is essentially a fact-finding mission—a task alien to appellate decision making. Second, appellate courts lack critical tools available at the trial level for determining truth and for assessing the credibility and reliability of evidence. Finally, reasonable alternatives to independent research exist.

Appellate Court's Role

Traditionally, trial courts are assigned the role of finding facts.[19] Even when the evidence before a trial judge consists solely of documents, the trial judge is still generally entitled to deference as the factfinder because "with experience in fulfilling that role comes expertise."[20] Appellate courts are not generally in the business of making factual determinations; doing so brings them into unfamiliar territory.[21] Of course, appellate courts are in the business of evaluating the evidence presented in a trial record, but independent research goes beyond reviewing materials submitted.[22] No matter how careful the investigation, there is always a risk that the appellate court will mistakenly rely upon spurious materials, or that the research will fail to uncover sources that are crucial to determining the reliability of the scientific theory or technique.[23]

Critical Trial-Level Tools

Appellate courts lack some critical tools available at the trial level for arriving at an accurate determination: live testimony and cross-examination. Experts practicing in the field may have knowledge and experience beyond what is reflected in the available scientific literature. [24] And adverse parties can test the credibility and reliability of proffered literature by subjecting the expert witness to "the greatest legal engine ever invented for the discovery of truth"[25]—cross-examination. The trial judge himself may participate in the process by asking questions of the live witnesses.[26] However, these

(continued on page 8)

(Keasler, continued from page 4)

Change the name of the jurisdiction and the science, and this hypothetical case paints a realistic picture of the current state of the law in most jurisdictions. Appellate courts, limiting themselves to the information presented at trial, are forced to affirm trial courts' *Daubert*[5] rulings under an abuse-of-discretion standard of review. By confining themselves to the record and failing to conduct any independent research on scientific validity, courts of appeals fail to discover junk science. The solution is for appellate judges to conduct independent research of *Daubert* issues.

Daubert scientific issues represent a unique area of the law. More so than traditional evidentiary issues, *Daubert* issues transcend individual cases. A ruling on the validity of a science utilized in one case will affect every other case in that jurisdiction. As the hypothetical case demonstrates, this can be disastrous if the parties are unprepared and neglect to provide the trial judge with any useful information regarding a scientific theory's validity. Legal resolutions of this type harm not only the litigants of one case, but all future litigants in that court.

Standard of Review

In appellate law, the preliminary issue is the standard of review. If appellate judges may only review a trial court's *Daubert* ruling for an abuse of discretion, they must limit themselves to the record before them. So to permit an appellate judge to conduct independent research, appellate courts must adopt a hybrid standard of review that defers to the trial judge on matters concerning the application of the science to the facts of the particular case, but reviews *de novo* the validity of the science itself.

A hybrid standard is not unheard of and is, in fact, advocated both in appellate court opinions[6] and in scholarly literature. Kesan points out that "[t]he gatekeeping function assumes that trial judges possess sophistication and experience in scientific matters … [but] [t]here is little reason to believe that trial judges can readily equip themselves with such expertise."[7] Kesan contends that *de novo* appellate review of district court findings on the scientific knowledge prong of *Daubert* would create a body of appellate opinions that carefully review scientific theories and methodologies. As appellate courts repeatedly face the same sorts of scientific evidence, more uniform adjudication at the trial and appellate levels will result. In addition, careful appellate scrutiny would permit consideration and development of distinct validation criteria for expert testimony relating to different scientific or technical disciplines. Finally, appellate courts are also well situated to consider the broad public policy issues associated with admissibility determinations.[8]

Despite the advantages of a hybrid standard of review that would permit appellate judges to conduct independent research of *Daubert* issues, the Supreme Court of the United States has yet to establish one. Regrettably, in *General Elec. Co. v. Joiner,*[9] the Court stated, without elaboration, that federal district judges' *Daubert* rulings were to be reviewed for an abuse of discretion. But in that case, the issue before the Court was whether an appellate court could apply a different standard of review when the district court admits scientific evidence from that used when it excludes scientific evidence. The Supreme Court firmly rejected that notion, concluding that the same standard of review should apply in either instance. The Court then stated that abuse of discretion was the appropriate standard but did not address the inconsistencies that this standard would cause or the possibility of a hybrid standard.

Assessing Validity

The truth is, trial judges are in no better position than appellate judges to assess the validity of a scientific theory. Traditionally, appellate courts defer to trial court evidentiary rulings because the trial judge has the benefit of seeing witnesses in person and evaluating their credibility. But in *Daubert* cases, while the expert's credibility is a factor, the bigger issue is the underlying science's validity. So, it is neither necessary nor useful to give any particular weight to the trial judge's conclusion regarding this issue. Judges are judges, and whether trial or appellate, they are equally capable (or incapable) of determining a scientific theory's validity. That determination is reached by independent research. And if a trial judge is capable of independent research, an appellate judge is even more capable. Simply by virtue of their job descriptions, appellate judges are generally more accustomed to research than trial judges. And ap-

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> "Appellate courts lack some critical tools available at the trial level for arriving at an accurate determination: live testimony and cross-examination."

pellate judges have the time to conduct independent research—time that trial judges often lack.

Additionally, appellate research permits the law to change with the scientific times. Suppose a trial judge conducts independent research and determines that, at the time of the trial, the science at issue in the case is valid. Three months after trial, a new study is released demonstrating the obvious and fatal flaws in the science. On appeal, the appellate court should be permitted to conduct independent research, consider the new study, and reverse the trial court's ruling admitting evidence of the science. As the Arizona Supreme Court has recognized, "[i]t is somewhat incongruous to call the trial court's ruling 'error'" in this situation.[10] Nevertheless, as that court noted, neither logic nor authority supports confining ourselves to a snapshot, rather than viewing the motion picture, of technological advancement. If the result obtained is the product of invalid scientific theory, there is no good reason to accept it simply because we were fooled at the inception of the inquiry. [11]

Need for Uniformity

Finally, and perhaps most importantly, the need for uniformity of legal rulings is paramount in *Daubert* rulings. Courts have noted that, without a de novo review of scientific validity, "[c]ases built on similar facts and offering similar scientific techniques could have widely disparate results."[12] And "[u]nlike many other evidentiary issues, whether the scientific community generally accepts a methodology or test can transcend a particular dispute."[13] The result of an abuse-of-discretion review "will undoubtedly be rampant individualized decision-making."[14] This will "likely cause increased uncertainty among lawyers regarding the admissibility of expert testimony."[15]

There are those who would argue that it is unethical for appellate judges to conduct independent scientific research. But the American Bar Association's Model Code of Judicial Conduct does not prohibit it. Canon 3 of the Model Code states that a judge "shall not initiate, permit, or consider *ex parte* communications." The Commentary to that Canon provides that a judge "must not independently investigate facts in a case and must consider only the evidence presented." Of course, this does not in any way prevent a judge from conducting independent research into the law. Appellate judges, routinely and appropriately, research case law not provided to them by the parties and rely on that law in disposing of appeals. Researching scientific technology is analogous to researching case law. It is not an investigation into the facts; instead, it is research into the validity of the scientific theory at issue. The Code does not prevent it. And, as with legal issues, the court can give the parties the opportunity to respond before any opinion is issued.

Appellate courts hold all the cards. They can determine what the proper standard of review is in any case. By instituting a hybrid standard for *Daubert* claims, an appellate court can ensure that independent research is permissible to evaluate a scientific theory's validity. This will take the courts out of Denial and reverse judgments dependent upon Crackpot testimony. It is a step worth taking.

(Keller, continued from page 5)

events can occur only at the trial level.

As a general rule, appellate courts do not hear live testimony, so literature considered for the first time at the appellate level is not subject to live comment by practicing experts and cannot be tested in the crucible of the adversarial system. Internet sources have come under criticism for their potential unreliability,[27] and one of the core criticisms against the use of such sources by appellate courts is that doing so usurps the trial court's fact-finding function: "When an appellate court goes outside the record to determine case facts ... it ignores its function as a court of review, and it substitutes its own questionable research results for evidence that should have been tested in the trial court for credibility, reliability, accuracy, and trustworthiness."[28] This criticism applies with full force to the use of outside-the-record texts and treatises, regardless of the medium in which they are found.

Alternatives

Uniformity of application is desirable in the scientific evidence context. Trial courts should not have to reinvent the wheel regarding the validity or reliability of a well-established scientific theory or technique every time evidence invoking that theory or technique is proffered. [29] Appellate courts can promote the efficient use of judicial resources, provide guidance to trial courts, and help ensure uniformity of decision making by establishing the validity and reliability of various scientific theories and techniques as a matter of judicial precedent. [30] These goals can be accomplished in several ways without resorting to independent research.

First, some scientific theories and techniques are so well-established that their validity and reliability are matters of common knowledge within the legal community. An example would be the principles of thermodynamics. [31] When a theory or technique is well-established, an appellate court may take judicial notice on that basis without a fact finding hearing and without consulting any scientific literature. These types of theories or techniques will often (though not always) have the pedigree of a long history of recognition within the judicial system. [32]

Second, an appellate court can decide that the validity or reliability of a particular theory or technique has been soundly established through the comprehensive litigation at the trial level. The most obvious setting would be the trial proceedings from which the appeal arose, [33] but an appellate court could base its decision on trial proceedings that occurred in another case, where the appellate court has access to the trial record[34] or where the opinion in an appellate court of another jurisdiction sets forth a trial record substantial enough from which to draw the requisite conclusions.[35]

Finally, where the great weight of authority holds that a particular theory or technique is valid or reliable, an appellate court could hold the matter as established, inferring either that the proposition is wellestablished as a matter of common knowledge in legal circles or that comprehensive litigation must have occurred at some point for the proposition to be so widely cited.[36]

These three methods can also be used to determine whether a scientific theory is invalid or whether a technique is unreliable. In any event, where one of the three methods is satisfied, the appellate court can make a declaration that will govern future cases. This declaration would not be immune to future challenges but the burden would be on the challenging party to substantiate his or her position.

Where none of the three methods can be satisfied, an appellate court should decline to make a declaration that is applicable to future cases and simply decide whether, based on the evidence before it, the trial court abused its discretion in that particular case. This means that there may be instances in which a party simply has not offered enough evidence to support a conclusion that the theory or technique is valid or reliable. And there may also be cases in which a party has offered sufficient evidence to resolve the issue in his or her own case, but the issue has not been adequately litigated to enable the appellate court to establish a rule governing all cases. Following this course may sometimes delay the formulation of a uniform rule regarding the validity of a scientific theory or the reliability of a technique, but it will ensure that those decisions are made under circumstances most likely to yield an accurate result. ♦

(Endnotes)

1. *Michael Keasler & Cathy Cramer, Appellate Courts Must Conduct Independent Research of Daubert Issues to Discovery "Junk Science," 90 Judicature 62, 62-64 (2006); Sharon Keller & Donald Cimics, Appellate Courts Should Resist the Temptation to Conduct Their Own Independent Research on Scientific Issues," 90 Judicature 64, 64-65 (2006).*
2. *Rowe v. Gibson, 798 F. 3d 622 (7th Cir. 2015).*
3. *Michael E. Keasler is a judge on the Texas Court of Criminal Appeals.*
4. *Cathy Cramer is a staff attorney at the Texas Court of Criminal Appeals.*
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).*
6. *See State v. Beard, 194 W.Va. 740, 461 S.E.2d 486 (1995); Taylor v. State, 889 P.2d 319, 332 (Okla. Crim. App. 1995); Commonwealth v. Vao Sok, 425 Mass. 787, 683 N.E.2d 671 (1997); State v. Harvey, 151 N.J. 117, 699 A.2d 596 (N.J. 1997).*
7. *Jay P. Kesan, Note, An Autopsy of Scientific Evidence in a Post-Daubert World, 84 Geo. L.J. 1985, 2037-38 (1996).*
8. *Id.*
9. *522 U.S. 136 (1997).*
10. *State v. Bible, 175 Ariz. 549, 858 P.2d 1152, 1189 n.33 (Ariz. 1993).*
11. *Id.*
12. *Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000).*
13. *Harvey, 699 A.2d at 619.*
14. *K. Issac deVyver, Comment, Opening the Door But Keeping the Lights Off: Kumho Tire Co. v. Carmichael and the Applicability of the Daubert Test to Nonscientific Evidence, 50 Case Wes. Res. L. Rev. 177, 199 (1999).*
15. *Douglas B. Maddock, Jr., Note, Federal Rules of Evidence: Raising the Bar on Admissibility of Expert Testimony: Can Your Expert Make the Grade After Kumho Tire Co. v. Carmichael?, 53 Okla. L. Rev. 507, 513 (2000).*
16. *Sharon Keller is the Presiding Judge on the Texas Court of Criminal Appeals.*
17. *Donald Cimics is a research attorney for the Texas Court of Criminal Appeals.*
18. *This thesis was advanced in my concurring opinion in Hernandez v. State, 116 S.W.3d 26, 32-42 (Tex. Crim. App. 2003) (Keller, P.J. concurring). Because many of the thoughts expressed in this article are also in that opinion, I will dispense with any further citation to it.*
19. *Anderson v. Bessemer City, 470 U.S. 564, 574-575 (1985).*
20. *Id.*
21. *Ex parte R.T.S., 771 So.2d 475, 477 (Ala. 2000); State v. City of Dover, 891 A.2d 524, 531 (N.H. 2006).*
22. *Despite occasional confusion, de novo review and independent research are not comparable issues. The former concerns how evidence is reviewed - the amount of deference given the factfinder. The latter concerns what evidence is reviewed - whether evidence outside the record should be considered at all. See Jones v. United States, 548 A.2d 35, 41 (D.C. App. 1988).*
23. *Id. at 44.*
24. *Id. at 42 ("expert testimony can be helpful to update and critique some of the information available through published articles and judicial decisions"); United States v. Bonds, 12 F.3d 540, 553 (6th Cir. 1993) (refusing to take judicial notice on appeal of a report because the government would not have a chance to rebut it with expert testimony).*
25. *California v. Green, 399 U.S. 149, 158 (1970).*
26. *E.I. du Pont Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995) (the trial judge can "freely ask questions" of the expert witness).*
27. *Coleen M. Barger, On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials, 4J. APP. PRAC. & PROCESS 417, 431 (2002).*
28. *Id. at 436.*
29. *Perry Lumber Co. v. Durable Servs., 271 Neb. 303, 311,710 N.W.2d 854,861 (2006).*
30. *See Martinez, 3 F.3d 1191, 1194, 1197 (8th Cir. 1993), cert. denied, 510 U.S. 1062 (1994).*
31. *Daubert, 509 U.S. 579,592 n. 11 (1993).*
32. *See United States v. Crisp, 324 F.3d 261, 265-267, 271 (4th Cir. 2003) (fingerprint and handwriting comparison).*
33. *See United States v. Jakobetz, 955 F.2d 786, 799 (2d Cir.), cert. denied, 506 U.S. 834 (1992).*
34. *Jones, 548 A.2d at 46.*
35. *Martinez, 3 F.3d at 1194, 1197; see also the discussion in Jones, 548 A.2d at 44.*
36. *United States v. Youngberg, 43 MJ. 379, 385-386 (CAAF 1995) (acceptance of DNA testing evidence by large number of jurisdictions).*

# of note...

NCSC Honors Judge with William H Rehnquist Award for Judicial Excellence

District Judge Marc C. Carter has been named recipient of the 2016 William H. Rehnquist Award for Judicial Excellence, presented annually by the National Center for State Courts (NCSC). The Rehnquist Award recognizes a state court judge that demonstrates the outstanding qualities of judicial excellence, including integrity, fairness, open-mindedness, knowledge of the law, professional ethics, creativity, sound judgment, intellectual courage, and decisiveness, as well as judges who are taking bold steps to address a variety of issues affecting their communities. Judge Carter presides over the 228th Criminal District Court in Harris County, Texas. He is only the second judge from Texas to receive this honor since the award's inception in 1996. Justice Jane Bland, also from Houston, received the award in 2010.

TCJ Chair's Award Presented to Judge Paul Davis

The Texas Center's Immediate Past Chair, Justice Lee Gabriel, presented Senior Judge Paul Davis with the Chair's Award for his unwavering and enduring dedication to the Texas Center and educating judges. During her presentation, Justice Gabriel commended Judge Davis on his steadfast, calm demeanor and constant wisdom. Judge Davis was judge of the 200th District Court from 1983 until his retirement December 31, 2004. He serves on the Ethics Committee of the Judicial Section of the State Bar of Texas and is its past chair. Judge Davis was the first recipient of the Texas Center's Mari Kay Bickett Judicial Excellence Through Education Award.

Judge Paula Goodhart Named Outstanding Judicial Faculty by Texas Center

The Curriculum Committee for the Texas Center for the Judiciary chose Judge Paula Goodhart as its recipient for the 2015-2016 Exemplary Judicial Faculty Award. She was presented the award during the Bar Foundation Luncheon at the 2016 Annual Judicial Education Conference. Judge Goodhart is a new faculty member, but demonstrated her ability to teach with humor and grace. Her presentation was very well-received by the judiciary. Judge Goodhart was appointed by the Harris County Commissioner's Court to fill the judicial vacancy in County Criminal Court at Law #1 in March of 2010 and has been elected to that position since.

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4th Court of Appeals
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Hon. Sharolyn Wood
Hon. Jerry Woodlock
Hon. John Wooldridge
Hon. Jim Worthen
Hon. Carolyn Wright
Hon. Jim Wright
Hon. Tim Yeats
Hon. John Youngblood

Contributions in Honor

Hon. Robert Brotherton
In Honor of Mark and the Staff: Thanks to all of you for what you do

Hon. Carolyn Marks Johnson
In Honor of Carl A. Parker

Hon. Mickey Pennington
In Honor of Texas Center Staff

Hon. Dean Rucker
In Honor of Judge Kelly G. Moore on the occasion of his retirement as District Judge, 121st District Court

Hon. Jim Wright
In Honor of Hon. Austin McCloud Retired Chief 11th COA

Contributions

as of 9/30/16

Contributions in Memory

Hon. Robert Barton
In Memory of Justice Shirley W. Butts

Hon. Denise Bradley
In Memory of Judge Mike Anderson

Hon. Buddie Hahn
In Memory of Judge James Farris and Judge Tom Mulvaney

Hon. Lee Hamilton
In Memory of Judge John Hyde

Hon. Gladys Oakley
In Memory of Judge William Elliott

Hon. Mary Ann Turner
In Memory of Judge Fred Edwards

Hon. Carolyn Wright
In Memory of Judge Cleophaus Steele

Hon. Loyd Wright
In Memory of Judge Russell Austin

UPCOMING CONFERENCES

Child Welfare Conference
November 14-16, 2016
Sheraton Capitol, Austin

College for New Judges
December 11-15, 2016
Sheraton Capitol, Austin

Family Justice Conference
January 23-24, 2017
Sheraton Capitol, Austin

Criminal Justice Conference
Feburary 12-14, 2017
Embassy Suites, San Marcos

DWI Court Team Basic & Advanced Training
February 27-March 3, 2017
San Luis, Galveston

College for New Judges II
March 23-24, 2017
Hyatt Lost Pines, Lost Pines

Civil Justice Conference
April 3-4, 2017
Sheraton Capitol, Austin

Spring Regional A (Regions 1, 6, 7, 8 & 9)
April 24-25, 2017
Omni, Forth Worth

Spring Regional B (Regions 2, 3, 4 & 5)
May 11-12, 2017
Omni, Forth Worth

PDP Conference
June 18-23, 2017
Embassy Suites, San Marcos

Annual Judicial Education Conference
September 5-8, 2017
Marriott Marquis, Houston

College for New Judges
December 10-13, 2017
Sheraton Capitol, Austin

Family Justice Conference
January 22-23, 2018
Hyatt Lost Pines, Lost Pines

Criminal Justice Conference
February 26-27, 2018
Sheraton Capitol, Austin

NEW Judges

as of 9/30/16

Hon. Laura Barker, Williamson County Court at Law No. 2, Georgetown, Judge
Hon. Robert E. Bell, 267th District Court, Victoria, Judge
Hon. Eric Berg, Washington County Court at Law, Brenham, Judge
Hon. John Didway, 121st District Court, Brownfield, Judge
Hon. Philip Anthony Grant, 9th District Court, Conroe, Judge

Tips from the Texas Ethics Commission to Comply with Judicial Campaign Fairness Act Contribution Limits

feature

By Ms. Jessica Hurtado

In Texas, candidates and elected officeholders are subject to regulation by Title 15 of the Election Code, the state's campaign finance law, and the administrative rules adopted by the Texas Ethics Commission.[1] In addition, judicial candidates and officeholders must comply with the Judicial Campaign Fairness Act (JCFA), which imposes restrictions and requirements on certain judicial candidates and officeholders, including contribution and expenditure limits.[2] The following six tips are intended to assist judicial candidates and officeholders in complying with the contribution limits in the JCFA. For complete information regarding the campaign finance law, including other restrictions and requirements in the JCFA,[3] please consult the Texas Ethics Commission's *Campaign Finance Guide for Judicial Candidates and Officeholders*.[4]

Know your contribution limit

A judicial candidate may not accept political contributions from a person that exceed certain limits in connection with an election.[5] The contribution limits are:

- $5,000 for candidates for statewide judicial offices;
- $5,000 for judicial districts with a population of more than one million;
- $2,500 for judicial districts with a population of 250,000 to one million; and
- $1,000 for judicial districts with a population of less than 250,000.[6]

These limits apply to total contributions, both monetary and non-monetary (in-kind), from an individual or entity in connection with an election. A political contribution is "in connection with" the next election for the office occurring after the contribution is made, *unless* the contribution is designated in writing for a specific election.[7] A judicial candidate or officeholder should check the applicable population figures for the office they are seeking in order to determine the contribution limit for their particular race.[8]

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Do not accept more than the applicable limit from a law firm

The contribution limits in section 253.155 of the Election Code restrict how much a judicial candidate may accept from a person in connection with an election. A law firm is a person for purposes of the JCFA.[9] Therefore, a judicial candidate may not accept political contributions from a law firm that exceed the applicable contribution limit in section 253.155 of the Election Code (listed above at #1). These limits apply to total contributions, both monetary and non-monetary (in-kind), in connection with an election.

EXAMPLE: Brenda Brown is a judicial candidate for a statewide judicial office. The law firm Smith & Associates would like to contribute to Brenda Brown's campaign. The maximum amount that Brenda may accept from Smith & Associates in connection with a single election is $5,000.

In addition to the limitation on how much a judicial candidate or officeholder may accept from a law firm, there are additional restrictions that apply to political contributions from persons associated with a law firm. See #5 below for more information.

Do not accept more than the applicable limit from family members of contributors

The JCFA treats a political contribution from a spouse or unmarried minor child of an individual as a contribution from that individual.[10] Thus, section 253.155 of the Election Code acts as a limit on how much a judicial candidate may accept from certain related contributors. These limits apply to total contributions, both monetary and non-monetary (in-kind), in connection with an election.

EXAMPLE: Stan and Sue Smith are married. Judge Jones is a judicial candidate for a district court in a judicial district with a population of 250,000 to one million. Stan contributes $2,500 to Judge Jones for a single election. Because Stan has already contributed the maximum amount for this election, Judge Jones is prohibited from accepting a political contribution of any amount from Sue for the same election.

Do not accept more than the applicable limit from persons associated with a law firm

A judicial candidate may not accept a political contribution of more than $50 from a member of a law firm's *restricted contributor class* if the total of all political contributions already accepted from members of the class exceeds the following limits:

- $30,000 for candidates for statewide judicial offices;
- $30,000 for judicial districts with a population of more than one million;
- $15,000 for judicial districts with a population from 250,000 to one million; and
- $6,000 for judicial districts with a population of less than 250,000.[11]

The *restricted contributor class* includes: (1) the law firm itself; (2) any partner, associate, shareholder, or employee of the law firm; (3) anyone designated "of counsel" or "of the firm"; (4) any general-purpose political committee established or controlled by the law firm or members of the firm; and (5) any spouse or minor child of a member of the restricted class.[12] These limits apply to total contributions, both monetary and non-monetary (in-kind), in connection with an election.

EXAMPLE: Lisa Lawyer, an associate at the law firm Smith & Associates, has not contributed to Judge Anderson, a judicial candidate for a statewide judicial office. Judge Anderson has accepted $30,000 from the members of Smith & Associates's *restricted contributor class*. Judge Anderson may not accept more than $50 from Lisa Lawyer in connection with the same election despite the higher $5,000 limit in section 253.155 of the Election Code (listed above at #1).[13]

Do not accept more than the applicable limit from general-purpose committees (GPACs)

A judicial candidate may not accept political contributions from GPACs that exceed certain limits in connection with an election. The contribution limits are:

- $300,000 for statewide judicial offices;
- $75,000 for courts of appeals if the judicial district has a population of more than one million;
- $52,500 for courts of appeals if the judicial district has a population of one million or less;
- $52,500 for district or county courts if the judicial district has a population of more than one million;
- $30,000 for district or county courts if the judicial district has a population of 250,000 to one million; and
- $15,000 for district or county courts if the judicial district has a population of less than 250,000.[14]

These limits apply to total contributions, both monetary and non-monetary (in-kind), from all GPACs in connection with an election.

EXAMPLE: Walter Williams is a judicial candidate for a district court in a judicial district with a population of less than 250,000. GPACs A, B, and C each contribute $5,000 to Walter for a single election. Because Walter has already accepted a total of $15,000 in the aggregate from all GPACs, he is prohibited from accepting any further contributions from any GPAC for the same election.

The contribution limits in section 253.155 of the Election Code do not apply to contributions from GPACs.[15] However, GPAC expenditures that exceed the third-party expenditure limits to support or oppose a judicial candidate must comply with certain notice requirements and may affect other JCFA limits in the election.[16] For more information on third-party expenditure limits, please consult the Texas Ethics Commission's *Campaign Finance Guide for Judicial Candidates and Officeholders*.[17]

Primary and general elections are a single election for certain candidates

For purposes of the contribution limits, the primary election and the general election are considered together to be a single election if the candidate (1) is unopposed in the primary, *or* (2) does not have an opponent on the ballot in the general election.[18] Under these circumstances, the various contribution limits are increased by 25 percent for that "single election."[19] However, the amount of the increase may only be used for *officeholder expenditures*.[20]

In conclusion, we hope that you find the above tips helpful in understanding how the contribution limits in the JCFA apply to judicial candidates and officeholders. For more information regarding the campaign finance law, including other restrictions and requirements of the JCFA, please consult the *Campaign Finance Guide for Judicial Candidates and Officeholders*[21] or visit our website at www.ethics.state.tx.us. ♦

(Endnotes)

1. *Tex. Elec. Code §§ 251.001-258.009; 1 T.A.C. §§ 6.1-50.1.*
2. *Tex. Elec. Code §§ 253.151-253.176. The Judicial Campaign Fairness Act (JCFA) applies to candidates and officeholders in the following offices: (1) chief justice or justice of the Supreme Court; (2) presiding judge or judge of the Court of Criminal Appeals; (3) chief justice or justice of a court of appeals; (4) district judge; (5) judge of a statutory county court; and (6) judge of a statutory probate court. Id. § 253.151. Additionally, a specific-purpose political committee for supporting or opposing a judicial candidate or assisting a judicial officeholder is subject to the JCFA. Id. § 253.1601.*
3. *See id. §§ 253.153 (moratorium period on accepting political contributions applicable to judicial candidates and officeholders); 253.161 (prohibition on using political contributions raised as a judicial candidate for a nonjudicial office and vice versa); 253.1611 (restrictions on certain contributions made by judicial candidates); 253.162 (restrictions on reimbursement of personal funds and payments on certain loans); 253.168 (expenditure limits).*
4. *Available at https://www.ethics.state.tx.us/guides/jcoh_guide.pdf.*
5. *Tex. Elec. Code § 253.155.*
6. *Id.*
7. *Id. § 253.152(2).*
8. *Most recent federal decennial census figures are available at https://www.ethics.state.tx.us/filinginfo/JudicialDistrictPopulations.pdf.*
9. *Ethics Advisory Opinion No. 342 (1996) available at https://www.ethics.state.tx.us/opinions/342.html.*
10. *Tex. Elec. Code § 253.158.*
11. *Id. § 253.157.*
12. *Id.*
13. *Id. See also Ethics Advisory Opinion No. 274 (1995) available at https://www.ethics.state.tx.us/opinions/274.html.*
14. *Tex. Elec. Code § 253.160.*
15. *Id. § 253.155(c).*
16. *Id. §§ 253.163, 253.170.*
17. *Available at https://www.ethics.state.tx.us/guides/jcoh_guide.pdf.*
18. *Tex. Elec. Code § 253.1621.*
19. *Id.*
20. *Id.*
21. *Available at https://www.ethics.state.tx.us/guides/jcoh_guide.pdf.*

# of note...

Judge Michael Keasler Receives Judicial Excellence in Education Award for His Longstanding Dedication to Judicial Education

Judge Mike Keasler has been deeply involved in judicial education both in Texas and nationwide. He has been teaching for the Texas Center for over 20 years and has served on the Curriculum Committee on and off since 1995. He has worked tirelessly to develop curriculum and bring in leading experts from around the country to Texas to teach. Over the years, Judge Keasler has devoted countless hours and energy to ensure Texas judges are among the best and most knowledgeable in the nation. For these reasons, the Texas Center chose Judge Keasler as its 2015-2016 recipient of the Judicial Excellence Through Education Award.

Judge Emily Miskel Receives Exemplary Article Award

The Curriculum Committee for the Texas Center for the Judiciary awarded Judge Emily Miskel of the 470th District Court in Collin County the 2015-2016 Exemplary Article Award for *Admissibility of Electronic Evidence: Present and Future Considerations*. Judge Miskel presented this paper at numerous Texas Center conferences since 2013, but most recently at the 2015 Annual Judicial Conference for over 600 judges. Her article consistently received excellent reviews and is often requested by judges. In 2014, Judge Miskel expanded on the topic and published a book called "Interception: A Practical Guide to Wiretapping and Interception Laws for Civil and Family Attorneys."

Exemplary Non-Judicial Faculty Award Goes to Seana Willing

In recognition of her long-standing service to the Texas judiciary, Seana Willing was honored by the Texas Center for the Judiciary's Curriculum Committee with the Exemplary Non-Judicial Faculty Award. Ms. Willing is the Executive Director of the State Commission on Judicial Conduct. She has been teaching for TCJ for over 10 years, including every year at the College for New Judges. She has dedicated herself to maintaining a high ethical standard for the Texas judiciary and provides training on current ethical challenges and boundaries. Throughout her years of teaching, she has always encouraged judges to have open communication with her and her office and has demonstrated a true desire to help judges understand the canons that govern their conduct. Ms. Willing is a 1993 graduate of St. Mary's University School of Law and has served as Executive Director since 2003.

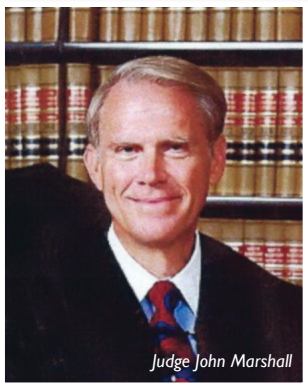
“A number of factors came together in Dallas County at a particular moment forming a perfect storm of progress.”

feature

How One County Made a Bit of Judicial History

By Judges Don Metcalfe and John Marshall


Judge Don Metcalfe


Judge John Marshall

Today Texas judges have computers, software, court coordinators, and possibly, briefing attorneys, magistrates, or associate judges. In 1970 a judge had a clerk and a court reporter. What happened?

A number of factors came together in Dallas County at a particular moment forming a perfect storm of progress. The County Commissioners Court came to realize that it was cheaper to infuse courts with collateral aids than to pay for the creation of new courts. The federal government was willing to put money into improvement of state criminal justice systems. There was a Dallas County auditor who knew how to deal with Commissioners Court. And then a judge came along who had the foresight and stamina to put all the pieces together.

In 1968, James B. Zimmermann was appointed to serve as Judge of Criminal District Court 3, Dallas County. He attended courses at the National Judicial College in Reno where he learned about the Law Enforcement Assistance Administration (LEAA). This federal agency made grants available to states to improve the criminal justice system, via police, prosecutors and courts.

Dallas County Commissioners were beginning to feel the financial pinch of an increased jail population, both in terms of operational costs, and potential construction of new jail facilities. The Commissioners to a great extent relied on the counsel of county auditor George Smith, an extremely knowledgeable and perceptive individual.

With the auditor’s effort at securing the support of the Commissioners, and with LEAA willing to put grant money into criminal justice improvements, Judge Zimmermann set about to effect changes in the county’s criminal justice system.

With a grant from LEAA in place, Judge Zimmermann, Assistant District Attorney Jim Barklow and a software programmer, developed a computer program for track-

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ing county cases. It was one of the first such efforts in Texas, and was so effective that it is still used today with only minor changes. Its success probably stemmed from the fact that it was designed by its users.

At the same time, Judge Zimmerman drafted a bill providing for court coordinators and staff attorneys for the Dallas County criminal courts. He secured the support of the Commissioners Court, who hoped it would help alleviate the burgeoning jail population. He then went to Austin, lobbied it through the Legislature, and witnessed it become law in 1971 – the first such law in Texas.

On the heels of these successes, Judge Zimmermann drafted and lobbied into law a bill providing for the appointment of magistrates for the criminal district courts in the county. Skeptical colleagues told him it would never pass constitutional muster with the Court of Criminal Appeals. Some years later the constitutionality was upheld by that court without dissent. In the early 1980s the civil district judges in Dallas County enlisted his aid in obtaining legislation providing the civil courts with court coordinators. Due to the efforts of county officials and Judge Zimmermann, court coordinators and staff attorneys are now commonplace through most of the state.

Many of today's judicial aids in Texas trace back to Judge Zimmermann. After serving for over 16 years as Judge of Criminal District Court 3, he served as Judge of the 191st Civil District Court. He is, so far as is known, the only person in Dallas County history to have served as judge of both a criminal and a civil district court. He then served as a Justice on the Texas Court of Appeals for the Fifth District, and as presiding judge of the First Administrative Region. Throughout the last 15 years of his time on the bench, he served as a regular lecturer on court administration at the National Judicial College in Reno. Few judges have had such a positive impact on judicial administration in Texas. ♦

Judge Metcalfe is Senior Judge of Criminal District Court Two, Dallas County
Judge Marshall is Senior Judge of the 14th District Court, Dallas County

CONFERENCE APP

Download the conference app from the Apple App or Google Play stores by searching "Texas Center for the Judiciary." Use your e-mail address as your username and the password "tcj1210" to log in to the app. Using the app you can:

- View the conference schedule
- See who else is attending
- Download conference materials
- Fill out session evaluations
- Fill out the overall evaluation *
- Ask a question of the presenter during sessions! *

***new features!**

# of note...

Judge Amanda Putman

Judge Kerry Russell

Judge Jennifer Rymell

The Texas Center and Judicial Section Confirm Incoming Leadership Positions

At the 2016 Annual Judicial Education Conference, the Texas Center and Judicial Section both confirmed, by unanimous vote of the membership, their Chair-Elects for the Board of Directors. Judge Amanda Putman, Navarro County Court at Law, became Chair-Elect for the Texas Center and Judge Jennifer Rymell, Tarrant County Court at Law No. 2, became Chair-Elect for the Judicial Section. Judge Kerry Russell, 7th Judicial District Court, was also elected and took his place as Chair of the Judicial Section for the 2016-2017 term. Congratulations to the new leadership!

Have you gotten an award lately? How about an idea for an article for the next In Chambers issue? Email courtneyg@yourhonor.com with your award details or for feature article guidelines.

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