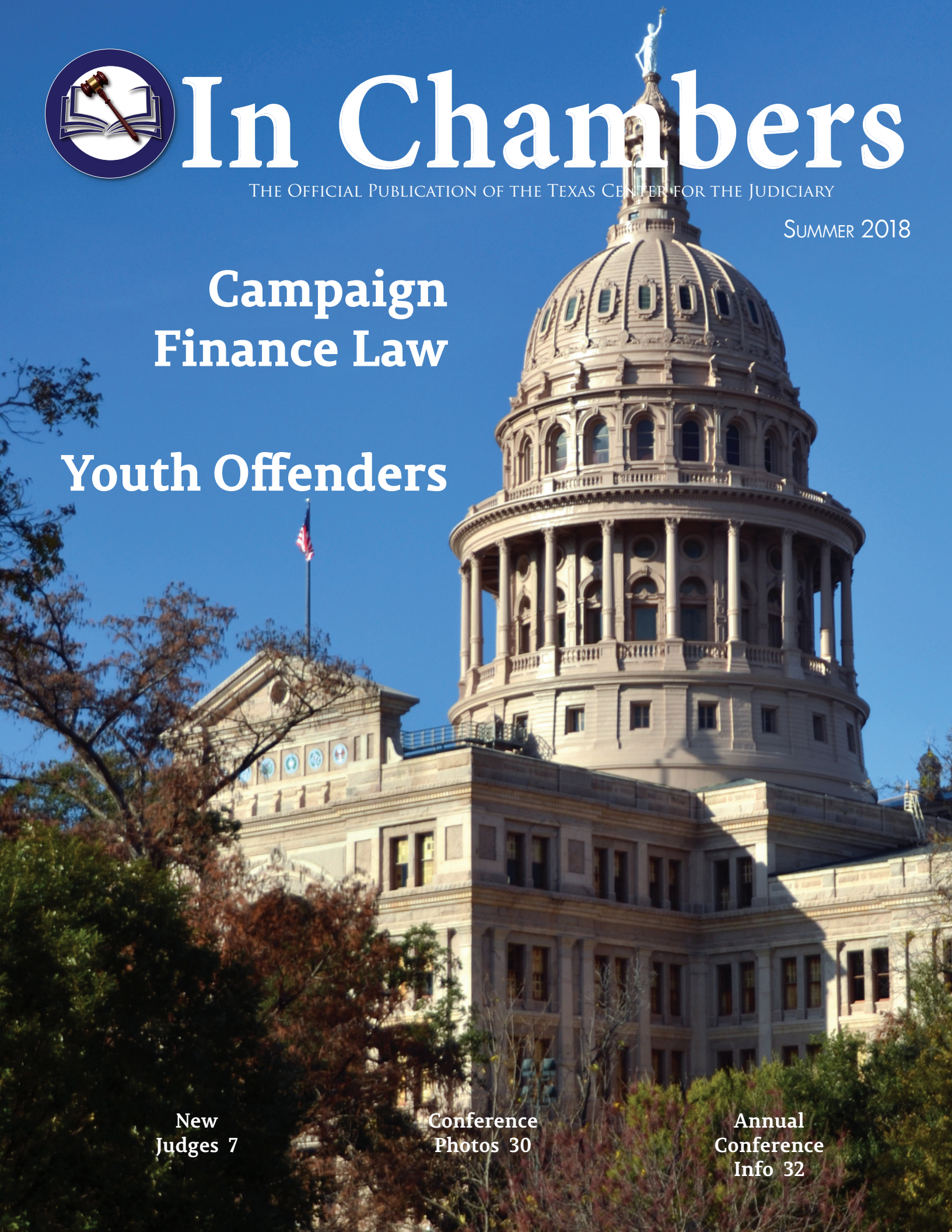

In Chambers

The Official Publication of the Texas Center for the Judiciary

Summer 2018

Campaign Finance Law

Youth Offenders

Features

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Cover photo by: Hon. Bert Richardson

In Chambers

The official publication of the Texas Center for the Judiciary

SUMMER 2018

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This is the the official publication of Texas Center for the Judiciary. The magazine is 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 Dotolo. The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.

LETTER FROM THE CHAIR

Dear Judges,

Time really does fly when you are working with great people who have the same drive and objective of providing amazing legal education that you do! This year, as your Chair, has flown by! What an amazing honor to serve the highly esteemed Judges of the State of Texas and to work with the outstanding staff of the Texas Center.

The Texas Center is diligently working to provide important training on courthouse and judicial security. Judge Julie Kocurek will be speaking to us at the Annual Conference in September, as well as Hector Gomez, Court Security Director of the OCA. Mr. Gomez met with the Texas Center Board of Directors at the last board meeting and provided valuable information regarding courthouse and judicial security. In addition, there will also be an active shooter training at the Annual Conference presented by Senior Inspector Marquis Fomby with the US Marshals.

Along with providing much needed education on judicial security, the Texas Center is taking steps to enhance judicial security at all Texas Center conferences. This will be a work in progress and we appreciate everyone's help in this endeavor so that we can be as safe as possible when we come together to obtain the best legal education available and to spend quality time with our judicial brethren.

At the mental health conference, the Texas Center provided training to magistrates for the first time. It was a very successful conference and having the magistrates present to discuss mental health allowed a much needed conversation to be held about how to address the mental health needs in the Texas criminal justice system.

Both Regional Conferences were a success and very well attended by our Judges. I am looking forward to seeing everyone at the Annual Conference in September in Houston. Our curriculum committee has worked diligently to prepare a remarkable program, with both relevant topics and astounding speakers. Additionally, there are tickets available for our group activity to attend the Astros game. Fun, food, and great company!!

I am honored and humbled to serve as your Chair of the Texas Center and thank each of you for your support of the Texas Center for the Judiciary and for making it one of the leaders in judicial education.

Best Regards,

Amanda D. Putman, Chair
Navarro County Court at Law

feature

The Zone of Reasonable Disagreement and Extraneous Offenses

By Judge Kerry L. Neves[1]

With the adoption of the Rules of Evidence, courts in Texas were confronted with the need for a balancing between probative value and unfair prejudice, the Rule 404(b) and Rule 403 analysis which trial courts deal with regularly, especially with respect to extraneous offenses. The Court of Criminal Appeals dealt with that issue in the unusual case of *Montgomery v. State* in 1991, mandating deference to a trial court as long as the decision was "...within the zone of reasonable disagreement."[2]

The case was unusual because of its procedural course. The defendant had been convicted of two counts of indecency with a child after the trial court allowed the State to introduce evidence that the father "… had paraded around in front of his minor daughters, the complainants, in the nude with an erection."[3] The Court of Appeals affirmed, rejecting defendant's argument the court abused its discretion by allowing evidence of an extraneous offense.[4]

The Court of Criminal Appeals initially affirmed, with a lengthy opinion in which the balancing test was discussed and explained.[5] The Court then granted rehearing and asked for further briefing and argument on two questions: (1) whether the opponent of the offered evidence has the burden of showing unfair prejudice outweighs the probative value, and (2) the proper role of the appellate court in reviewing the trial court's decision.[6]

The opinion on rehearing explained the opponent of evidence of "other crimes, wrongs or acts" under Rule 404(b) should object, and that "not relevant," or "extraneous offense," or "extraneous misconduct," would preserve error.[7] If the court determined the evidence had no relevance apart from character conformity, the evidence is "absolutely inadmissible."[8]

If the proponent can persuade the court that the evidence has relevance apart from "other crime, wrong, or act," it may be admissible under Rule 403. That rule favors the admissibility of relevant evidence; therefore, the presumption is that relevant evidence will be more probative than prejudicial.[9]

In the original opinion, the Court had stated that the opponent of the evidence had the burden to not only demonstrate the negative attributes but also to show those attributes substantially outweighed any probative value.[10] In the opinion on rehearing, the Court specifically disavowed that.[11] (However, it must be noted here that Montgomery was decided before the legislature added Article 38.37 to the Code of Criminal Procedure, which would have applied in this case and changed the analysis and possibly the outcome. [12] Still, Montgomery is the originating case for part of the balancing test and is being discussed for the purpose of the factors to be applied if a balancing test is required).

Instead, it put the burden on the trial court, saying it should ask the opponent what the prejudice was, and ask the proponent why it needed the evidence.[13] The trial court, however, has no discretion and must perform the balancing test once Rule 403 is invoked, and must approach that from the position of favoring admissibility in close cases.[14]

A four-factor approach was created by the Court for the balancing test:

1. Does the evidence serve to make more or less probable a fact of consequence?
2. The potential to impress the jury in some irrational but indelible way;
3. The amount of trial time needed to develop the evidence of the misconduct, diverting the attention from the indicted offense;
4. How great is the need for the evidence?[15]

That final factor was broken down into three subparts:

> "Does the proponent have other available evidence to establish the fact of consequence…? If so, how strong is that other evidence? And is the fact of consequence related to an issue that is in dispute?"[16]

In performing that analysis, the trial court can only be reversed for an abuse of discretion, which means an appellate court will not intercede as long as the ruling is "within the zone of reasonable disagreement."[17]

Having laid out those factors, the Court then applied them to the facts in *Montgomery* and concluded the trial court had abused discretion in allowing the evidence, re-

(continued on next page)

"The factors were also applied in overturning a suppression order..."

versing both the original opinion and the court of appeals.[18]

The Court reiterated those factors a few years later in *Mozon v. State*.[19] The Court remanded a case to the Tenth Court of Appeals in Waco to consider them where the trial court excluded evidence of extraneous offenses, and the 10th Court of Appeals affirmed. The Court concluded that the appellate court had not considered "unfair prejudice," a discussion necessary given the presumption in Rule 403 for admissibility.[20]

Those factors were referred to as the "*Montgomery-Mozon* factors" by the Court of Criminal Appeals in an appeal of a manslaughter conviction, in which the charge included an allegation that the defendant caused the death while driving under the influence of a controlled substance.[21] The trial court allowed evidence of a cocaine metabolite in the blood of the driver to be admitted, over his "extraneous offense" and "prejudicial" objections. The Sixth Court of Appeals in Texarkana reversed, citing *Mozon*.[22]

The Court of Criminal Appeals reversed, finding the cocaine metabolite was not evidence of an extraneous offense, but part of the charged offense.[23] It then applied the "*Montgomery-Mozon* factors." It found the cocaine metabolite served to make the question of whether the defendant had consumed a controlled substance more probable.[24]

With respect to impressing the jury in some irrational but indelible way, the Court concluded Rule 403 deals only with "unfair prejudice," and stated:

> "Evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence."[25]

In considering the amount of time used to develop the evidence, the Court said it could not have distracted the jury from the offense because it was proof of the offense.[26] Finally, it held the evidence was very needed by the proponent, as the State had no other evidence with which to prove the use of the controlled substance as charged.[27]

The "*Montgomery-Mozon* factors" have continued to be used. In a death penalty case, the trial court was affirmed in admitting "…extraneous offense evidence pertaining to the theft of Brinlee's gun, the aggravated assault of Wilson in Llano, the killing of Allred in Marble Falls, and the robbery of DeHart in Pennsylvania" to prove same-transaction contextual evidence.[28] The Court said the trial court's finding the extraneous offenses to be contextual was within the zone of reasonable disagreement.[29]

The factors were also applied in overturning a suppression order dealing with breath test results.[30] Using the "*Montgomery* factors," the Court found the trial court abused its discretion in suppressing the results, and criticized the court of appeals for using a *de novo* standard.[31]

Judge Cochran wrote an extensive concurrence, stating all Rule 403 rulings are subject to three general considerations:

1. The trial judge should exercise his power to exclude evidence sparingly;
2. The trial judge's discretion is not an invitation to rule reflexively or without careful reasoning;
3. The trial judge may not exclude evidence merely because he disbelieves the testimony.[32]

In that case, Judge Cochran criticized the trial court for not doing a discretionary, individualized, context-driven analysis, as opposed to an implicit blanket prohibition of admissibility without retrograde extrapolation testimony.[33]

Summary

For trial courts, the judge must listen to the objection to the evidence to determine if Rule 403 is invoked. If that is the case, the balancing analysis must be done. The judge should consider the proponent's articulation of why the evidence should be admitted, as well as the opponent's response.

For appellate courts, the review of the trial judge's ruling should not be whether the court would reach the same decision as the trial judge. Rather, the review must show deference to the decision, as long as it is within the zone of reasonable disagreement. The trial court is in a superior position to view the ebb and flow of the trial, the credibility of the witnesses, and to evaluate the impact of the testimony. Only when there is a clear abuse of discretion should the ruling of the trial court be overturned.

NOTE: Patrick Montgomery (*State v. Montgomery*) received two ten-year sentences, to be served consecutively, for the offense of indecency with a child. In 2009, he filed writs of habeas corpus, and his two daughters testified they were encouraged by their mother and others to testify falsely about sexual abuse which never occurred. The relief was granted.

Endnotes

1. *Judge Kerry L. Neves is presiding judge of the 10th District Court in Galveston County, Texas.*
2. *Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1991)(op. on reh'g).*
3. *Id. at 375.*
4. *Montgomery v. State, 760 S.W.2d 323, 324 (Tex. App.— Dallas 1988).*
5. *Montgomery v. State, supra note 2 at 372-383.*
6. *Id. at 386.*
7. *Id. at 387.*
8. *Id. at 387.*
9. *Id. at 389.*
10. *Id. at 377.*
11. *Id. at 389.*
12. *Tex. Crim. Proc. Code Ann. art. 38.37 (Vernon 2005).*
13. *Id. at 389.*
14. *Id. at 389.*
15. *Id. at 389-390.*
16. *Id. at 390.*
17. *Id. at 391.*
18. *Id. at 397.*
19. *Mozon v. State, 991 S.W.2d 841 (Tex. Crim. App. 1999).*
20. *Id. at 847-848.*
21. *Manning v. State, 114 S.W.3d 922, 927 (Tex. Crim. App. 2003).*
22. *Manning v. State, 84 S.W.3d 15, 21 (Tex. App.—Texarkana 2002).*
23. *Manning v. State, supra note 20 at 927.*
24. *Id. at 927.*
25. *Id. at 927-928.*
26. *Id. at 928.*
27. *Id.*
28. *Devoe v. State, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011).*
29. *Id. at 470.*
30. *State v. Mechler, 153 S.W.3d 435 (Tex. Crim. App. 2005).*
31. *Id. at 441-442.*
32. *Id. at 443-444.*
33. *Id. at 444.*

NEW Judges

as of 7/1/18

Hon. Melissa Bellan
Dallas County Court at Law No. 2
Judge

Hon. Carol Chaney
Waller County Court at Law
Judge

Hon. Lori DeAngelis
325th District Court
Associate Judge

Hon. Kimberly L. Fitzpatrick
342nd District Court
Judge

Hon. Ellen Griffith
Child Protection Court of the Permian Basin
Associate Judge

Hon. Brandy Hallford
Williamson County Court at Law No. 1
Judge

Hon. Paul LePak
264th District Court
Judge

Hon. Lawrence Phillips
59th District Court
Judge

Hon. Elizabeth Rainey
Midland County Drug Court
Magistrate

Hon. Pedro P. Ruiz
Fort Bend County Court at Law No. 5
Judge

Hon. William Wallace
378th District Court
Judge

SIDE BAR

UPCOMING CONFERENCES

(log in for exact dates and places)

Impaired Driving Symposium
August 2018

Annual Judicial Education Conference
September 2018

Child Welfare Conference
November 2018

College for New Judges
December 2018

Family Justice Conference
January 2019

DWI Court Team Basic Training and Advanced Conference
January 2019

Criminal Justice Conference
February 2019

Regional A Conference
(Regions 1, 2, 8, 10, 11)
April 2019

Regional B Conference
(Regions 3, 4, 5, 6, 7, 9)
May 2019

Professional Development Program
June 2019

Annual Judicial Education Conference
September 2019

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:

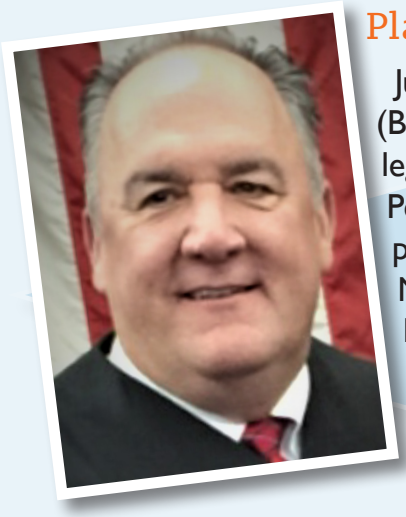
- View the conference schedule
- See who else is attending
- Download conference materials
- Fill out session evaluations
- Fill out the overall evaluation
- Ask a question of the presenter during sessions!

Meet Your 2018-2019 Texas Center for the Judiciary Board Nominees

Chair-Elect: Hon. Ada Brown, 5th Court of Appeals, Dallas

Justice Ada Brown was appointed to the Fifth District Court of Appeals on Sept. 3, 2013. She brings both civil and criminal law experience to the appellate bench. Justice Brown previously served as the judge of Dallas County Criminal Court No. 1, the oldest criminal court in Dallas County. Before her appointment to the appellate bench, Justice Brown was a civil litigator at the McKool Smith law firm where she focused on patent infringement and commercial litigation cases. During the course of her career, Justice Brown was selected to be a Texas Monthly Magazine's Super Lawyers Rising Star in 2005, 2012, and 2013. In 2014, Governor Perry awarded her the Yellow Rose of Texas Award, which recognizes outstanding Texas women for significant contributions to their communities. Justice Brown served as Commissioner for the Texas Commission on Law Enforcement Officer Standards and Education and then as Commissioner for the Texas Department of Public Safety. She frequently teaches trial advocacy at continuing legal education seminars for attorneys and judges. Justice Brown speaks French and Spanish and enjoys reading and writing about legal issues. She was awarded a best volunteer editorial columnist award by the Dallas Morning News Editorial Board in 2012 and her article "Batson and Peremptory Strikes in Criminal and Civil Cases" earned a best feature story award from the State Bar of Texas in 2008. Justice Brown is a graduate of Spelman College and Emory University School of Law. She is one of two African-American appellate jurists in the State of Texas.

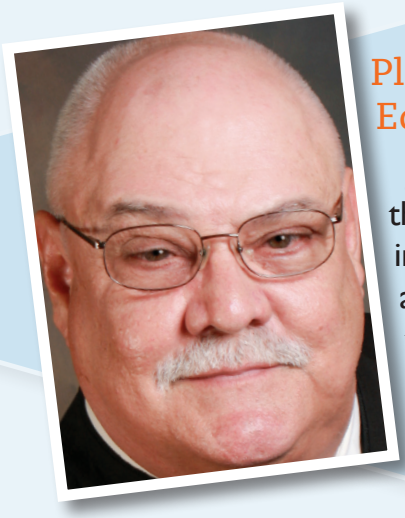
Place 4: Hon. Jeff Fletcher, 402nd District Court, Quitman



Judge Fletcher is a native East Texan, born and raised in the Golden Triangle (Beaumont) and attended Baylor University on a football scholarship under legendary Coach Grant Teaff from 1979 to 1982. He played on the 1979 Peach Bowl Championship team, the 1980 Southwest Conference Champion team, and the 1981 Cotton Bowl. After a short stint trying to make an NFL roster and operating a family business, Judge Fletcher earned his Juris Doctor from Texas Wesleyan School of Law in 1993 and began practicing law in May of 1994. After serving as a briefing attorney for Judge Ben Z. Grant of the 6th District Court of Appeals, he went into private practice in Texarkana and Quitman until he was sworn as the 402nd District Judge of Wood County on January 1, 2017. He recently received local recognition for tackling a defendant that was fleeing the courtroom during a hearing (read about it here). Judge Fletcher's favorite activities are spending as much time with his children and grandchildren as possible, fishing, hunting, and team roping.

Place 5: Hon. Hazel Jones, 174th District Court, Houston

Judge Hazel B. Jones is a native Houstonian. She received her undergraduate degree from the University of Texas at Austin and her law degree from Howard University Law School in Washington, D.C. After law school, Judge Jones worked as an assistant district attorney for Harris County, Texas from 1996-2003. From 2003-2005, Judge Jones worked as a special assistant United States attorney for the Southern District of Texas – Houston Division where she pursued the federal government initiate of "Project Safe Neighborhoods" prosecuting dangerous felons with firearms. Judge Jones has also worked as a criminal defense attorney and a visiting justice of the peace judge in the Houston area. She served a 4-year term as state district judge for the 338th Criminal District Court and is currently the presiding judge of the 174th Criminal District Court of Harris County, Texas.



Place 7: Hon. Mario Ramirez, 332nd District Court, Edinburg

Judge Mario E. Ramirez, Jr. is a South Texas native. He earned his BA from the University of Notre Dame and received his JD from St. Mary's University in 1974. He has been a judge at all levels. He started his judicial career as an assistant Municipal Court Judge in McAllen, Texas, then was appointed by the County Commissioners as Judge of County Court at Law #2. He was then appointed by Gov. Bill Clements to the 93rd District Court. In 1983, Gov. Mark White appointed him as the judge of the 332nd District Court where he has presided ever since. He has served under six Governors and has over 38 years of judicial experience. He is currently on the Death Penalty Qualified Attorneys Selection Committee of the 5th Administrative Judicial Region and has served in that capacity for over 10 years. He is also on the Texas Juvenile Justice Department Advisory Council. Since 2016, he has served as the local Administrative Presiding Judge of Hidalgo County and also served in this capacity from 2005-2007. He's been both a past Director and past President of the Hidalgo County Bar Association amongst other committees and boards. The Hidalgo County Commissioner's Court named the juvenile probation department after him in 2007 and the building is now called the Judge Mario E. Ramirez, Jr. Juvenile Justice Center. Judge Ramirez is married and has three children and six grandchildren.

feature

You Asked, She Answered: Executive Director of the Texas Ethics Commission Addresses Campaign Finance Questions

Editor's Note: At the 2018 Spring Regional Conference, the Texas Center offered a session called "Judicial Campaign Finance Laws Made Easy." During this session, many judges took the opportunity to submit questions to Seana Willing, Executive Director of the Texas Ethics Commission, using the conference app. While she did not have time to address the questions during her session, she provided written answers the following week. They have been compiled below.
If you have any additional questions, please feel free to email her at Seana.Willing@ethics.state.tx.us.

******The information provided in this document is the opinion of the author. It is not binding on the Texas Ethics Commission.The information does not constitute legal advice or ad hoc rulemaking.******

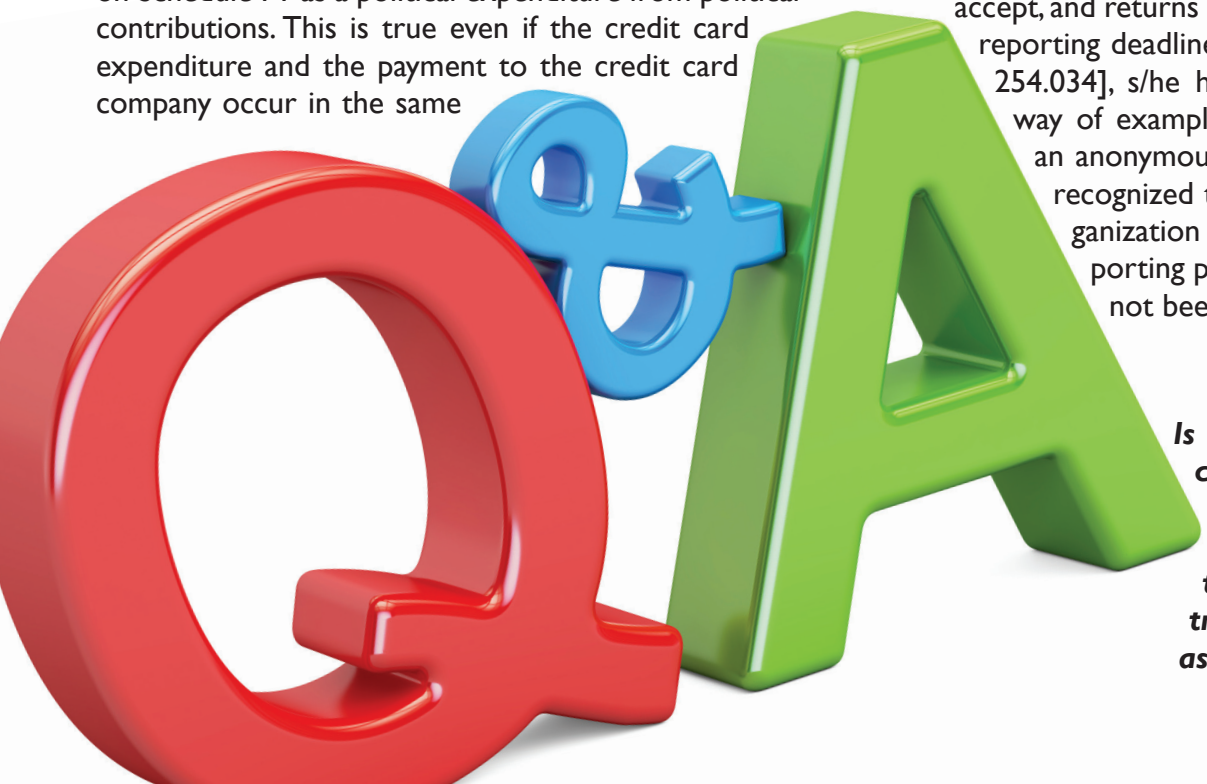
Are you saying unopposed candidates can raise 25% more than opposed candidates? Yes, the primary and general elections are treated as one election for unopposed candidates (whether unopposed in primary or unopposed in the general) so the contribution limits for them are increased by 25%. But remember, the additional 25% can only be spent on officeholder expenses, not on campaign expenses. Officeholder expenses are defined as "a payment or agreement to pay certain expenses in connection with an officeholder's duties or activities as an officeholder if the expenses are not reimbursable with public money." An unopposed candidate who is not an incumbent officeholder will not reap the benefit from having the 25% increase in contributions unless and until s/he is elected and sworn into the office.

Give an example of how the $12,500 limit on loaning yourself money in an election cycle would play out? You will save a marriage. *(I won't charge extra for the information even though a marriage is riding on the answer).* There are quite a few ways that this could

(continued on next page)

play out, but basically a complying candidate (one who indicated an intent to comply with the voluntary expenditure limits under the Judicial Campaign Fairness Act) in a district with a population of 250,000 to 1 million, may loan him/herself up to $12,500 (depositing the funds into his/her campaign account) or, if paying expenses with personal funds, reimburse him/herself up to $12,500 per election (the primary and general elections are treated as two separate elections for this purpose if the candidate is opposed; if unopposed, they are treated as one election and the limits are increased by 25%; however, this doesn't really benefit a non-incumbent candidate who is not an officeholder and the only "benefit" to a candidate who is an officeholder is that the additional 25% may be spent on officeholder expenses, not campaign expenses). Depending on which way you go, the loan will be reported on Schedule E(J) or the expenditures from personal funds will be reported on Schedule G. In both schedules, the candidate will check a box indicating an intent to use political contributions to reimburse him/herself or repay the loan. When that reimbursement/repayment occurs, it is reported on Schedule F1, and is limited to a total of $12,500 for each election.

Explain how to report expenditures made on a personal credit card. Expenditures made by credit card are reported on Schedule F4, with the vendor/payee name, address, amount of expenditure, date, and description/category of expense. When the credit card bill is paid by the candidate, that payment is reported on Schedule F1 as a political expenditure from political contributions. This is true even if the credit card expenditure and the payment to the credit card company occur in the same reporting period. Don't worry about conventional accounting practices when it comes to campaign finance reports – it doesn't matter if things don't balance; what matters is that everything is reported on the appropriate schedules.



If I return an unsolicited contribution, do I report it? If so, how? If you receive a contribution that exceeds the limits, you must return it (and may do so without reporting it) not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the 5th day after the contribution is received. Election Code, Section 253.155(e). Otherwise, if you receive an unsolicited contribution that you do not wish to accept, you must make that decision before the end of the reporting period and you must return the contribution not later than 30 days after the reporting deadline. Election Code, Section 254.034. You would not report it if you return it in accordance with these provisions.

Can you discuss when a contribution is "accepted" for rule purposes? "Acceptance" requires intent. If a candidate receives a contribution that exceeds the limits but returns it not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the 5th day after the contribution is received [Election Code, Section 253.155(e)], or if the candidate receives a contribution that s/he determines before the end of the reporting period not to accept, and returns it within 30 days from the reporting deadline [Election Code, Section 254.034], s/he has not "accepted" it. By way of example, the TEC has said that an anonymous contribution given to a recognized tax-exempt charitable organization before the end of the reporting period (EAO No. 207), has not been "accepted."

Is the law firm restricted class rule limited to attorneys only? What if a paralegal or receptionist at the firm contributed? Same analysis as if a lawyer from the

> "Are there any limits or reporting requirements for judges making political contributions with personal funds?"

firm contributed? What if the receptionist just quit the law firm prior to donating? An employee of a law firm is treated the same as the attorneys for purposes of the restricted class. A "member" of a law firm includes partner, associate, shareholder, **employee**, or person designated as "of counsel" or "of the firm." Election Code, Section 253.157(e)(2). If the receptionist was not an employee of the law firm at the time of the contribution, his/her contribution would not be included in the limit. Since the contribution must come from the actual contributor, the recipient has the duty to determine the contributor's occupation and place of employment before acceptance. Contributions from members of the law firm should not be "bundled" together as part of one large contribution from the law firm.

What if a lawyer changes firms? Will past contributions count against new firm? No, with the exception of the scenario set forth in Election Code, Section 253.155(d), the past contributions should not count against the new firm, but they will still count against the lawyer who is limited in the amount s/he may contribute to a judicial candidate in connection with each election. Election Code, Section 253.155.

Does the $100 limit on contribution to another candidate per election cycle apply equally to a contribution from the judicial campaign account and a judge's personal contribution? No, unless the judge intends to seek reimbursement from political contributions. A judge may not use political contributions to contribute to another candidate that in the aggregate exceed $100 in a calendar year. Election Code, Section 253.1611. A judge may use personal funds to contribute to a candidate without this restriction but would still report the expenditure as campaign activity under Schedule G. The judge would not check the box to indicate s/he intends to reimburse those personal funds with political contributions as the restriction would apply in that situation. The amount of reimbursement of personal funds is also limited under Election Code, Section 253.162.

Are there any limits or reporting requirements for judges making political contributions with personal funds? A judge or judicial candidate must report political expenditures, including political contributions, made with personal funds on Schedule G of the campaign finance report. If s/he checks the box indicating an intent to reimburse him/herself with political contributions, any limits for political expenditures, including political contributions, from political contributions imposed by the Election Code would apply. The amount of reimbursement of personal funds may also be limited under Election Code, Section 253.162.

The requirement to file PFS on the earlier date in an election year than in a non-election year even if uncontested. I found this out just in time. This information is on our website (https://www.ethics.state.tx.us/schedule/s18state.pdf), but not easily found if you don't know where to look. Also, if you didn't know there was an earlier deadline in an election year, you wouldn't necessarily know to look at the website or call the TEC to find out. After hearing from a few frantic judges, I sent a letter with the information to the Texas Center for the Judiciary, which disseminated it to all of the judges about five days before the deadline. Next time, we will try to send it out 30 days ahead of the deadline. I would recommend regularly checking your spam folder or the email address you have provided TEC for notices, because Notices to File go out to everyone on the ballot several times leading up to a filing deadline.

(continued on next page)

Once a final report is filed, who can the candidate/officeholder give the remaining funds to? Texas Center? Yes, as long as the Texas Center is a 501(c)(3) tax exempt organization. Once a final report is filed, any unexpended campaign or officeholder funds must be disposed of in accordance with the law and cannot be converted to personal use. There are many advisory opinions relating to personal use questions: https://www.ethics.state.tx.us/whatsnew/Personal_Use_Of_Contributions.html. The unexpended funds cannot be held more than six years after the person ceases to be an officeholder or candidate or files a final report. In Election Code, Section 254.203, the legislature provided six ways in which the unexpended funds could be used that would not be considered a conversion to personal use. By law, they must be remitted to: (1) the political party with which the person was affiliated when the person's name last appeared on a ballot; (2) a candidate or political committee; (3) the comptroller for deposit in the state treasury; (4) one or more persons from whom political contributions were received, in accordance with Subsection (d); (5) a recognized charitable organization formed for educational, religious, or scientific purposes that is exempt from taxation under Section 501(c)(3), Internal Revenue Code of 1986, and its subsequent amendments; or (6) a public or private postsecondary educational institution or an institution of higher education as defined by Section 61.003(8), Education Code, solely for the purpose of assisting or creating a scholarship program. Additional restrictions for some of these donations can be found in Election Code, Section 254.204.

May an officeholder use remaining funds to pay for a judicial portrait? Ethics Advisory Opinion 199 (1994) addressed this question and opined that this would not be a "personal use" of political contributions provided the portrait hangs in the courthouse or courtroom. There are numerous TEC advisory opinions relating to personal use questions located at the following link: https://www.ethics.state.tx.us/whatsnew/Personal_Use_Of_Contributions.html.

Is the use of a government owned computer to prepare a Personal Financial Statement (whether for an active judge or a retired judge) prohibited as with a campaign report? Ethics Advisory Opinion 386 (1997) states that a government owned computer cannot be used for campaign finance reports. TEC has not formally addressed the question of using a government computer to prepare and file a PFS, including whether a distinction would exist for active judges versus retired judges, or elected judges versus appointed judges. TEC does not enforce Chapter 39 of the Penal Code, but it does have the authority to issue advisory opinions interpreting those provisions, including Section 39.02. An advisory opinion, relied upon in good faith, may provide a defense to prosecution so there may be some value in obtaining an opinion rather than relying upon non-binding advice from TEC staff.

Can you walk through the burdens of proof at different stages of the complaint process? If a complainant is not cooperative, does the process continue? Is there any obligation by the complainant to cooperate? If not, why not? The burden of proof in TEC proceedings is on the TEC. In the preliminary review stage, the TEC uses a credible evidence standard and in the formal hearing stage the standard is preponderance of the evidence. The process may continue in the absence of an uncooperative complainant, but at the request of a complainant, the TEC may dismiss a complaint. There is no requirement that the complainant cooperate in the process once the TEC accepts jurisdiction. There are numerous technical and legal form requirements that a complainant must comply with in order for the TEC to accept jurisdiction. If those requirements are met, TEC would have sufficient information with which to go forward with a preliminary review and obtain a response from the respondent. The complainant is not a "party" to the process; the respondent is a party and is required to cooperate.

Can you prosecute a reporting violation without a complaint having been filed? Sua sponte? Yes. TEC can initiate its own preliminary review/sworn complaint for reporting violations, but rarely does so for a variety of reasons, including inadequate funding/staff resources. Outside of the administrative penalty process for late or missing reports, enforcement of reporting violations is mainly driven by sworn complaints from concerned citizens and political opponents.

What do you do with a renegade candidate? If they sign the pledge to follow the limits ($100K) - then don't report any expenditures, how are they held accountable?
In most cases, it's up to an opponent, concerned citizens, the media, or a watchdog group to hold violators accountable. Without a sworn complaint, it's almost impossible for the TEC to know if a candidate has violated the Election Code or is otherwise non-compliant. In judicial races, that information needs to be reported to the TEC as early as possible so that the Executive Director can issue an order suspending the limits for the complying candidates in that particular race. TEC is not staffed, nor has it been appropriated funds, to check the accuracy and completeness of campaign finance reports that are filed with the agency throughout the year, especially during an election year. We have no way to monitor elections across the state or the conduct of candidates during any election. Enforcement and accountability are "complaint driven." The exception is when a TEC filer doesn't file required reports. The TEC electronic filing system is set up to automatically assess civil penalties for late or missing reports. Although local filers do not file with the TEC, they are required to comply with the Election Code. Violations by local filers, including late or missing reports, can be enforced by the TEC through the sworn complaint process or by local prosecutors.

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Gilbert Tuhabonye is an accomplished runner, genocide survivor and philanthropist. He is the author of *This Voice in My Heart: A Genocide Survivor's Story of Escape, Faith, and Forgiveness* (HarperCollins Publishing, 2006), the harrowing tale of his courageous escape from one of the massacres in the long Tutsi-Hutu war of Burundi. In October of 1993, members of the Hutu tribe invaded Tuhabonye's high school and captured hundreds of Tutsi children and teachers. Most of the captives were killed with machetes; the rest were burned alive. After spending nearly nine hours hidden beneath the burning corpses of his classmates and suffering burns over much of his body, Tuhabonye managed to be the only one to escape. Hospitalized for months with 3rd degrees burns, he was told he would never run again. Tuhabonye proved them all wrong. He persevered and, by 1996, his running skills took him to the United States as part of an Olympic training program. He obtained a track scholarship at Abilene Christian University and was a national champion runner. Now a U.S. Citizen, Tuhabonye is the award-winning coach of Gilbert's Gazelles Training Group in Austin, Texas. In 2006, he cofounded the Gazelle Foundation, a non-profit organization whose mission is to improve life for people in Burundi without regard to tribal affiliations. While Tuhabonye's story is one that includes great tragedy, it is also one of faith, hope, and resilience. He is living proof that one person can make the world a better, more compassionate place, and that love really does conquer all evil.

PHOTO COURTESY HOLLY REED PHOTOGRAPHY

feature

If You Build It, They Will Come: Filling the Gap for Youth Offenders

By Judge Brandy Mueller

It's been nearly eight years since I became a judge. I preside over a busy criminal county court that handles misdemeanor cases in Travis county. The observations and experiences that have affected me most about our criminal justice system have surrounded the teenage adult defendant. I have grown to believe that the misdemeanor defendant often falls within a gap that exists within our adult criminal justice system. Teenage defendants are too old to have their cases handled as juvenile offenders, yet often too young to be treated as an adult criminal.

Observations

One of my most memorable first impressions as a criminal court judge, was in observing just how young, the young adult defendants that came before me really were. I preside over an adult, rather than a juvenile criminal court, so the sheer appearance of some of the youngest members of our adult criminal justice system peering back at me during guilty pleas on assaults, thefts, and burglary of a vehicle cases, for example, came somewhat as a surprise. This was particularly the case, you can imagine, when the teenage defendant was sandwiched between the older repeat offenders on my crowded misdemeanor court docket. But even more apparent than the young faces of these 17, 18, and 19 year old defendants, was the way in which they seemed to fail to appreciate how a permanent conviction would affect their future. Even when given a choice by the prosecution in a plea bargain that provided for an alternative between deferred adjudication and a jail sentence conviction…the young defendants more often seemed to lack *forward thinking* and unwisely chose the "easier" jail sentence alternative, despite the conviction that came along with it. This was done despite a conversation with his or her lawyer on the collateral consequences of a permanent conviction. Being advised that it would undoubtedly affect his or her ability to obtain employment, schooling, educational certifications, housing, loans, etc. didn't seem to make a difference.

I also observed that the teenage adult defendant was being revoked from probation at a higher rate. And in the time between the teen defendant's first probation violation and when he or she was before me in court on a motion to revoke, the teen was more likely to have re-offended…. oftentimes, escalating to a more serious allegation and/or a new charge. The lag-time between the alleged violation itself and when the defendant was confronted in court with the consequences of a motion to revoke, seemed to contribute to more allegations and ultimately, revocations. The teenage defendants, in particular, it seemed, required a rapid response to violations.

"I also observed that the teenage adult defendent was being revoked from probation at a higher rate."

As I continued to look more closely at the young adults on my criminal court docket, I also came to question whether the standard probation conditions employed with adult defendants fit the mind-set and circumstances of the youth offender as best they could. Many teen defendants had idle time, were not working or in school, and waited to start the counseling, classes, community service required by their probations, until the end of the term … often when there wasn't enough time to complete the required conditions by the discharge date. They often seemed overwhelmed with the standard probation conditions. A good number did not have stable housing or a healthy, pro-social support network. The teen defendants on my docket included former foster kids, those who had family members who were incarcerated, those in dysfunctional homes, with parents who oftentimes were not supportive of making their court orders a priority or were simply using them as babysitters for their much younger children. Many were indigent, some were borderline homeless, most lacked transportation and a high school diploma or GED equivalent and employable vocational skills.

Putting a Plan Together

With the help of my court staff and our county's probation department, I began to order teen defendants into a specialized form of probation. Along the way, I learned that my colleague, felony court Judge Brenda Kennedy, had created a diversion program for young adults on her felony probation for offenders from age 17 to 26 with the result being dismissal if all of the requirements are met. I observed her court's program and its regular court appearances and began to attempt to craft a misdemeanor version of my own. What we aimed to do, was to fill the gap that seemed to exist, between the adult criminal justice system and the juvenile one, for the young adult defendant.

Ultimately, we established a new and more intensive form of probation for young adult defendants; ages 17, 18, and 19 years old. The mission and purpose of the program came to be to reduce the number of revocations and convictions for these defendants. We hoped to do this by providing a more structured probation with regular judicial oversight and a rapid response to violations. We also sought to provide support, as well as, referrals for educational and work training programs, housing and mental health. The probation itself would have an emphasis on school and/or work. In fact, every defendant would be required to be working or in school to remain in the program. Community service would also be an important part of the probation. There would be a hefty amount of "giving back" required in the form of community service, but it would be doled out in manageable amounts at the monthly court settings and would seek to be more engaging on the youth offender's level, when possible. Instead of sorting donations at charitable resale shops or picking up trash, for example, we would require our defendants to work as a group, in projects that might involve cleaning up a school, washing Red Cross transport vehicles that had returned from a disaster site, helping the Optimist Club raise money for youth scholarships and helping put on a Halloween party and collect candy donations for our local children's shelter.

We aimed to have a guest speaker at the monthly court settings when we could. We were often able to get people from our community to volunteer their

Actor Matthew McCoughney was one of the prominent community citizens who has given of his time to help youthful offenders.

time to help in this way. It became clear that although there is a general feeling of disdain towards the criminal defendant, the juvenile delinquent in particular… most people can identify with the teenage defendant, having "messed up" when they were young and believe in giving these defendants a second chance. It turned out that when we invited inspirational ESPN sports announcers, professional and college athletes, CEOs, a musician, and even a famous actor to come to court and speak to our youth offenders…they came. It turned out, many of our speakers had had run-ins with the law and relatable problems in their past. In most cases, our speakers' personal stories resonated with the teens. Almost anyone we asked to speak to our youth offenders said "yes" and was often very generous with his or her time.

The prosecutors in our county appreciated the extra effort that the teen defendant would be required to put into our youth offender probation and were more likely to offer deferred adjudication as a plea bargain. A dismissal track was also created for the defendants the prosecution believed warranted special consideration. Members of the Bar seemed to be more considerate of the adult youth offender's age in their handling of the case and defense counsel more apt to advise their client to take advantage of deferred adjudication or a dismissal by completing our youth offender program. All in all, the program is by no means perfect, but it has had its fair share of success, particularly with medium- and high-risk defendants. The defendants in our program, that we call *Project Engage*, are considered high-risk for re-offending in that they have criminal history at a young age, often don't have a stable residence, and have not graduated from high school. Many believe that the fact that we are having success with defendants with this particular background is a good thing.

If you are interested in learning more about the misdemeanor program called "Project Engage" check out http://www.traviscountytx.gov/courts/criminal/specialty/project-engage or contact Judge Brandy Mueller of County Court #6, in Austin, Travis County, Texas at (512) 854-9677 brandy.mueller@traviscountytx.gov

If you are interested in learning more about the Felony Youthful Offender Program contact, Judge Brenda Kennedy of the 403rd District Court, also in Austin, at 512.854-9808 brenda.kennedy@traviscountytx.gov

Do you have a dilemma or question concerning judicial ethics?

The Judicial Section of the State Bar of Texas offers a resource by which judges can submit confidential ethics questions. Either in a written opinion or informal response, the Ethics Committee of the Judicial Section will provide a judge with their collective opinion. These opinions may provide protection to judges if there is ever an inquiry into questioned conduct.

Judges can contact the Ethics Committee by email at judicialsectionethics@hotmail.com or by phone to the committee chair: Justice Lee Gabriel (940) 367-0629.

We hope judges will take advantage of this valuable resource.

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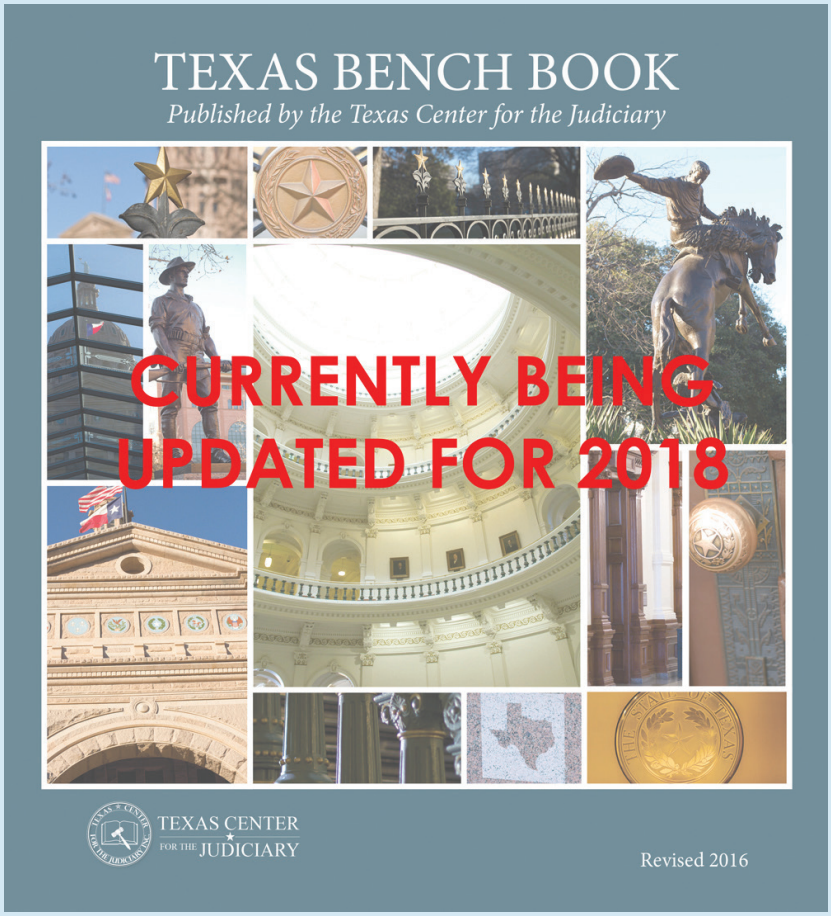
The Bench Book Committee has been hard at work updating the Texas Bench Book with changes made during the 85th Legislative Session. Judges may place their order for a printed version here. Hard copies are $55 and will be mailed in December.

As always, the updated Texas Bench Book will be available for free on our website and the Law-Box app.



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Speaker Highlights

Professor Erwin Chemerinsky

Dean of Berkeley School of Law at the University of California

U.S. Supreme Court Update and Trends

October Term 2017 was an amazing year in the Supreme Court involving issues concerning discrimination based on religion, partisan gerrymandering, immigration, free speech and much more. Dean Chemerinsky will join us once again to summarize, analyze, and relate implications for Texas from the Supreme Court's most important cases, in the way that only Dean Chemerinsky can.

Mr. Reid Ryan

President of the Houston Astros

Never Settle

Strong leadership requires an ability to guide as well as a willingness to follow. For judges, it requires innovation as well as consistency in the rule of law. Reid Ryan, President of the Houston Astros, will provide an inspiring account of how leadership, innovation, and effective decision-making allowed the Houston Astros to overcome adversity, rebuild, and eventually succeed in taking home the franchise's first ever World Series title. Judges will leave with a renewed sense of the importance of their leadership role in their jobs, as well as within their communities.

Professor Joanna Grossman

Preventing Sexual Harassment and Setting the Right Tone for Your Courtroom Culture

Professor Grossman has dedicated her career to combating sexual harassment and gender discrimination in the court system. Based upon her first-hand experience while clerking at the US Court of Appeals for the Ninth Circuit through her twenty-plus years of extensive research and writing on these issues, Professor Grossman will examine how a hostile work environment that includes sexual harassment and discrimination affects the administration of justice. She will then offer ways in which judges can create comfortable and safe cultures for court staffs and litigants.

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EQUAL JUSTICE UNDER LAW

feature

The Number *Nine:* Why the Texas Supreme Court Has the Same Number of Justices as the United States Supreme Court

by Josiah M. Daniel, III[1]

As law students learn in constitutional law class, early in 1937 President Franklin D. Roosevelt proposed increasing the United States Supreme Court (the "SCOTUS") from *nine* to *fifteen* justices in an attempt to overcome the Court's hostile reception to significant portions of his New Deal legislative program as evidenced by a crescendo of adverse decisions from 1935 through 1936. After 168 days of bitter politics, Congress defeated the President's proposal due not only to Justice Owen Roberts' "switch in time that saved nine" but also in significant measure to the legislative efforts of the Dallas congressman Hatton W. Sumners.[2] One consequence of the 1937 episode is that, ever since, virtually all

"The Texas justices thus serve at the pleasure of any majority of voters in an ongoing series of elections."

commentators, lawyers, and judges reflexively regard *nine* as the proper and immutable number of justices of the SCOTUS.

At first glance, the saga of that 1937 crisis surrounding the SCOTUS might seem irrelevant for a *state* supreme court, namely, our Texas Supreme Court (the "SCOTX"). But a comparison of the two courts shows that the number of *nine* seats[3] is one of the fundamental ways in which the two courts are alike. The other two similarities are that each is created in organic law—the constitution—of the respective government—federal or state—of which each is a component[4] and that each is the court of last resort, or apex, of the judicial branch of its respective government and accompanying legal system.

Profound differences also obtain, of course. The SCOTUS is staffed by justices appointed by the President, and those justices enjoy lifetime tenure and protection against salary reduction during "good Behaviour."[5] SCOTUS justices exit the bench only by death, resignation, or—since 1937—retirement.[6] In contrast, the SCOTX is composed of justices who have won statewide election[7] to serve fixed terms of only six years, on a staggered basis.[8] The Texas justices thus serve at the pleasure of any majority of voters in an ongoing series of elections.[9] Moreover, SCOTX justices have an age limitation of, more or less, 75 years; and they are not protected against salary reductions by the Legislature.[10]

Moreover, while the number of *nine* justices is legislatively determined for the SCOTUS, it is constitutionally established for the SCOTX. To change the number of justices, an appropriate vote is required—by very different voters: by Members of Congress and Senators voting to revise the federal Judicial Code for the SCOTUS and by a statewide vote of Texas citizens in a constitutional-amendment election for the SCOTX. And while no SCOTUS justice has ever left the bench to run subsequently for office in the executive or legislative branches, the SCOTX is a springboard for election to such other offices.[11]

With that comparison as background, consider now that first one of the three basic similarities of the two supreme courts—that is, both courts have the same number of justices, *nine*. The number of nine justices composing the SCOTUS has been fixed for a century and a half, since Congress enacted the Judiciary Act of 1869 in the aftermath of the Civil War[12]; as noted, that number is "carved in stone" as a result of the 1937 crisis. But the number of *nine* justices staffing the SCOTX is of much more recent vintage, dating from the adoption of a state constitutional amendment only 73 years ago, in 1945.

So, a pertinent question for Texas legal history is why and how did *nine* become the number of justices for Texas's highest civil court,[13] the SCOTX, mirroring that of the SCOTUS? No easy or clear answer is found in the existing literature. Upon my research, I submit that the reason for the number of seats on the SCOTX becoming established at *nine* at mid-20th century was not only the needs of the "byzantine"[14] structure of the courts of a geographically very large state,[15] but also the inspiration of significant Texas law professors, lawyers, and judges of the first four decades of the twentieth century, expressed in articles addressed to the bar[16] and acting through the professional organizations,[17] by and with the federal court system and the associated federal judicial reforms that were occurring after World War I and into and through the New Deal and that culminated soon after the court-packing crisis. The SCOTUS was for these Texans the model of what the SCOTX could and should be.

The starting point is the State's Constitution of 1876 which had established the membership of the SCOTX at three justices. But consistent with the trend of all American states after the Civil War[18] Texas thereafter created intermediate appellate courts, as well as new trial courts, on an ad hoc, uncoordinated basis. Beginning in 1879 and until 1891, the Legislature not only created a steadily growing number of Courts of Civil Appeals and also provided by statute a three-member Commission of Appeals tasked to assist the SCOTX.

Attempts to reform and rationalize the system began in the new century. In 1913, the Texas Senate passed a resolution favoring an in-

crease of the SCOTX justices to fifteen with abolition of all other appellate courts; and in 1919 the House voted a resolution that the Legislature should create and vacate any courts beneath the SCOTX to rationalize the system, just like Congress does with the federal courts.[19] While nothing came of those efforts, it was obvious that the SCOTX had fallen far behind in its work, and in 1918, a progressive governor, William P. Hobby (1917-1921), persuaded the Legislature to enact a second Commission of Appeals, of six members this time, for the same purpose as before. The new Commission was an imperfect solution,[20] but "the sentiment for more fundamental judicial reform received a shot of energy" from the Legislature's action.[21]

Then during the 1920s, the two business-progressive[22] governors, both lawyers, Pat Neff (1921-1925) and Dan Moody (1927-1931),[23] advocated for significant reform of the judicial department of state government. Moody took the matter the farthest, making constitutional enlargement of the SCOTX to *nine* full members a priority. Moody and his allies in the Texas Bar Association (the "TBA")[24] wished to revise the judicial article of the Texas Constitution along the lines of Article III of the US Constitution including increasing the SCOTX to the same number of justices as the SCOTUS, *nine*. "With a Supreme Court of *nine* members in Texas," as Moody himself argued, "Texas ought to have as great a Supreme Court as exists on the North American continent."[25]

At Moody's request, the Legislature twice submitted to Texas voters such an amendment to the state Constitution[26]; but in tiny turnouts, both in in 1927 and again in 1929, the electorate rejected each amendment.[27] So Moody and his allies in the Legislature turned to the alternative of reform through legislation; and, as I have written elsewhere, by simple measures they managed to improve judicial administration while maintaining the six-member Commission of Appeal to assist the three-member Supreme Court.[28] In fact, in the 1930 Legislature, Moody and his allies obtained an enactment to enlarge the terms of the Commissioners to six years and to make them appointable, not by the Governor but by the SCOTX itself.

It was an iterative process over the 1930s and early 1940s to increase the SCOTX to nine justices. While initially the Commission of Appeals "wrote an opinion and the Court approved or disapproved," the operating procedures gradually changed over two decades, with individual Commissioners called in for conference with the Justices, and later sections of the Commission constituted. By the time of the federal court-packing crisis, the Clerk of the Texas Supreme Court wrote in the Texas Bar Journal that its three justices and the six Commissioners were always acting "en banc,"[29] that is, functioning as "a court of *nine* Judges."[30]

Another step along that pathway was to return civil procedural rulemaking to the SCOTX, from which it had been taken by legislation back in 1891. After Moody left office, the work for such reform centered in the TBA and in an innovative agency that Moody had persuaded the Legislature to create in 1927, the Texas Civil Judicial Council. It sought the modernization of Texas civil practice rules, which in fact occurred soon after the analogous work in Washington had borne fruit.[31] The federal Rules Enabling Act of 1934 and the SCOTUS's adoption of the initial Federal Rules of Civil Procedure in 1938 strongly influenced Professor Roy W. McDonald of SMU Law School, and to varying and lesser degrees the other members appointed to a civil rules advisory committee, in the project of preparing new civil rules after the Texas Legislature in 1939 passed—along with enacting the State Bar Act—the Texas Rules of Practice Act.[32]

In 1943, presaging a new push to increase the SCOTX membership to nine, Charles T. McCormick, the Dean of the University of Texas School of Law, published an influential article reviewing the efforts of the prior three decades and finding all of those steps as part of a modernization process that was informed by the federal court system and its reforms during these decades.[33] Two years later, in 1945, the Legislature submitted and Texas voters adopted the constitutional amendment to increase the number of justices to *nine*,[34] where it has remained.

Although movements and efforts within the bar have periodically arisen, since World War II, urging that the selection of SCOTX justices be on the basis of merit or at least nonpartisan,[35] those advocates have assumed that the court's membership will continue to be *nine*. My research found no effort since 1945 to reduce the number of Texas justices from nine. Accordingly, the *number* of justices of the SCOTX will likely remain mirrored with that of the SCOTUS—at *nine*—for the indeterminate future.

Texas legal history is the story of its law, lawyers, and courts. I hope this short essay may illustrate not only that the *history* of Texas *courts* is an interesting and worthy component of Texas legal history generally but also that it offers many opportunities for further research and publication. And who better to research and write such history than Texas judges?

(Endnotes)

1. *Retired Partner in Residence, Vinson & Elkins LLP, Dallas office; Chair, Legal History Group, Dallas Bar Ass'n; B.A., Sewanee, and J.D. & M.A., Univ. of Texas at Austin. The views and ideas expressed in this essay do not necessarily represent those of the law firm or its clients.*

2. *This oft-quoted aphorism is the conventional wisdom—that Justice Roberts' sudden change in the middle of the crisis from voting with the opponents of the New Deal to instead sustaining it was the primary cause for defeat of FDR's plan—but Sumners' solution to the crisis, which was to sponsor and enact the Retirement Act of 1937, under which SCOTUS justices could retire at full pay and continue to sit, if they wish, in the lower federal courts, was at least as important. See Josiah M. Daniel, III, Hatton Sumners and the Retirement of Supreme Court Justices, Not Even Past, available at https://notevenpast.org/hatton-sumners-and-the-retirement-of-supreme-court-justices/ (2017) (hereinafter, "Daniel, Sumners and the Retirement of Supreme Court Justices").*

3. *28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices"); Tex. Const. art. V, § 2(a) ("The [Texas] Supreme Court shall consist of the Chief Justice and eight Justices").*

4. *See U.S. Const. art. III, § 1; Tex. Const. art. 5, § 1.*

5. *U.S. Const. art. III, § 1.*

6. *Daniel, Sumners and the Retirement of Supreme Court Justices, supra n. 2.*

7. *For complete accuracy, it should be noted that the Governor is authorized to appoint a SCOTX justice when one exits by death or resignation. Tex. Const. art. IV, § 12.*

8. *"Said [SCOTX] Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years." Tex. Const. art. 5, § 1a(1).*

9. *SCOTX justices also may be removed pursuant to state constitutional provisions establishing the State Commission on Judicial Conduct. Tex. Const. art. V, § 1-a(2)-(14).*

10. *Tex. Const. art. 5, § 1a(1) provides that "the Legislature shall provide for the retirement and compensation of [SCOTX] Justices," and § 2(c) provides that the Justices shall each 'receive such compensation as shall be provided by law."*

11. *SCOTX alumni in elective offices today are the Governor, Greg Abbott, and both United State Senators, John Cornyn and Ted Cruz.*

12. *Bernard Schwartz, A History of the Supreme Court 157 (1993).*

13. *The Texas Court of Criminal Appeals is also a nine-member court of last resort, but for simplicity I ignore that criminal appellate court and focus here on the two supreme courts.*

14. *Legal historian Mike Ariens has described the Texas judicial system as a "byzantine structure" with a "plethora of courts with varied, overlapping, and confusing jurisdictional boundaries" along with the SCOTX and the Court of Criminal Appeals. This predicament has resulted, he argues, from a history of legislative "penury" and has caused "a persistent backlog of cases, difficulty keeping judges on the bench, and occasional claims of corruption in the Texas courts." Michael S. Ariens, Lone Star Law: A Legal History of Texas at 200 (2011)*

15. *Only five states have nine justices; the vast majority have five or seven. State Supreme Courts, Ballotopedia, https://ballotpedia.org/State_supreme_courts.*

16. *In every volume from its inception in 1922 through the late 1920s, the Texas Law Review carried articles by academics and practitioners under the broad heading "Suggestions for Improving Court Procedure in Texas." For instance, Professor Leon Green of the University of Texas Law School wrote: "Our court organization is organically diseased, and, therefore, radical treatment will be required. . . . [c]ourt organization, therefore, must be seriously remodeled." Leon Green, Simplification of Civil Procedure, 2 Tex. L. Rev. 464-66 (1922).*

17. *Josiah M. Daniel, III, Governor Dan Moody and Judicial Reform in Texas During the Late 1920s, 2 J. Tex. Sup. Ct. Hist. Soc., No. 2 at 2-4 (Winter 2012) (hereinafter, "Daniel, Moody and Judicial Reform") (as of 1927, "the [Texas Bar] Association had been pointing up deficiencies of the state's legal system and proposing reforms for most of its 45 years"). And as explained later, the Texas Civil Judicial Council, from its inception in 1929, proved to be a strong proponent of a nine-justice SCOTX.*

18. *See Lawrence M. Friedman, A History of American Law at 336-37 (1973).*

19. *Charles T. McCormick, Modernizing the Texas Judicial System, 21 Tex. L. Rev. 622-23 (1943) (McCormick, Modernizing").*

20. *One shortcoming was the variable precedential value of its decisions, depending on whether the SCOTX justices (i) took no action on a Commission decision (in which event, its value was uncertain or low and it was published in the unofficial South Western Reporter only as a decision of the Commission); (ii) adopted the judgment or approved the holding of a Commission decision (which meant that the case was published only in the South Western Reporter but with a higher level of precedence; or (iii) adopted the entire opinion of the Commission (in which event the case was published as if it were a decision of the SCOTX in the official Reporter, Texas Reports, with full precedential authority). Tex. L. Rev., The Greenbook: Texas Rules of Form §§ 5.2-5.2.4 (12th ed. 2010). See also Spurgeon E. Bell, A History of the Texas Courts, in State Bar of Texas, Centennial History of the Texas Bar at 201-02, 205-06 (1982); Marian Boner, A Reference Guide to Texas Law & Legal History: Sources and Documentation at 30-33, 37 (1976).*

21. *James L. Haley, The Texas Supreme Court: A Narrative History, 1836-1986 at 139, 161-62 (2013).*

22. *Historian George Brown Tindall coined this phrase to describe those New South politicians of the 1920s who sought reforms, among other things, to improve efficiency of state government including specifically the judiciary. George Brown Tindall, The Emergence of the New South, 1913-1945 at 224-233 (1967).*

23. *Daniel, Moody and Judicial Reform, supra n. 17, at 2-4 ("In Moody, the TBA had a member who shared the professional organization's . . . zeal to reform the [Texas] judicial system").*

24. *For example, one Houston attorney active in the effort spoke at the DBA's annual meeting, decrying "the divided, medieval and reactionary system" of Texas courts and pleading for reform along federal Article III lines. Sam'l B. Dabney, Judicial Reconstruction, 6 Tex. L. Rev. 302, 303 (1928) (hereinafter, Dabney, Judicial Reconstruction"). A former judge, A.H. McKnight, was adamant about the need judicial reform over the entire 1920s. See, e.g., A. H. McKnight, Fortieth Legislature and Judicial Reform, 5 Tex. L. Rev. 360, 362 (1927).*

25. *Address of Gov. Dan Moody, Proceedings of the Annual Meeting of the Texas Bar Ass'n, 5 Tex. L. Rev. 68, 70 (1927) (emphasis added).*

26. *Dabney, Judicial Reconstruction, supra n. 24, at 309 (1928)*

27. *See Bar Section, 7 Tex. L. Rev. 413, 414 (1929).*

28. *Daniel, Moody and Judicial Reform, supra n. 17.*

29. *S. A. Philquist, The Supreme Court of Texas, 1 Tex. B.J. 7, 8 (1938). See also Walter C. Woodward, The President's Address, Proceedings of the Texas Bar Ass'n, 15 Tex. L. Rev. 6, 9 (1937) ("Our Supreme Court as now constituted, is in reality a court of nine Judges.") (emphasis added).*

30. *After the success of the constitutional amendment in 1945, the Texas Bar Journal reflected back that:*
the Commission and the Court sat en banc and the Commission's opinions were adopted by the Court, until the system worked as near a nine-judge operation as possible under the Constitution, with the result that only the three Justices could vote although all nine of the judges heard the oral argument and participated in the consultation.
Texas Voters Adopt 9 Judge Supreme Court Amendment, 8 Tex. B.J. 448, 449 (1945) (emphasis added) (hereinafter, "Texas Voters Adopt 9 Judge Supreme Court").

31. *See Stephen N. Subrin, How Equity Conquered Common Law: the Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 910 (1987) (The 1938 Federal Rules were heralded as a phenomenal success. Approximately half of the states adopted almost identical rules, and procedural rules in the remainder of the states bear their influence.").*

32. *William V. Dorsaneo III, The History of Texas Civil Procedure, 65 Baylor L. Rev. 713, 734-37 (2013) (as adopted by the SCOTX in 1941, "[m]ost of the [822] rules were based on the procedural provisions of the Revised Civil Statutes of 1925 and . . . [o]thers were based on a slightly modified version of the 1938 federal rules.").*

33. *McCormick, Modernizing, supra n. 19, at 622-23, 684-85.*

34. *The Texas Bar Journal reported:*
[The amendment i]ncreas[ed] membership of the Supreme Court of Texas from three to nine and made the six judges now serving on the Commission of Appeals Associate Justices. The six who were changed from Commissioners to Justices by passage of the amendment are Few Brewster, A. J. Folley, J. E. Hickman, C. S. Slatton, G. B. Smedley, and W. M. Taylor. They were sworn into the Supreme Court of Texas, highest tribunal for civil litigation in Texas, on September 21 in an impressive ceremony. In an informing prologue Chief Justice James P. Alexander of the Court, paid tribute to past and present members of the Court and the Commission. He reminded the audience that the six judges have been three times approved, twice in their appointment by the Court, once by the people, August 25.
Texas Voters Adopt 9 Judge Supreme Court, supra n. 30, at 449.

35. *Kyle Cheek & Anthony Champagne, Judicial Politics in Texas: Partisanship, Money, and Politics in State Courts 83-84 (2005).*

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