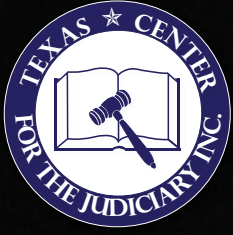


SUMMER 2016

THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY



# In Chambers





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# In Chambers

The official publication of the Texas Center for the Judiciary

Summer 2016

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**On the cover:** State Capitol, photo by Hon. Bert Richardson

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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 CEO

## A Remarkable Institution

**T**he Texas Center for the Judiciary is a remarkable association. With approximately 1200 members, hundreds of additional non-member constituents served, and annual revenue just short of \$5 million, it is a power-house of judicial education resources. Of the 50 states in the US, approximately 30 provide judicial education separate from legal education. And, approximately 15 states mandate judicial education. Texas has both provided and mandated judicial education for decades.

TCJ is funded primarily by large grants, three federal and one state. The three federal grants target education regarding three distinct areas: child abuse, foster care, and impaired driving. Our state grant, appropriated by the legislature and channeled through the Court of Criminal Appeals, provides the majority of our funding and is used to provide judicial education on all relevant topics.

The TCJ is set up as a 501(c)(3) non-profit corporation. This is, as far as I've been able to learn, unique in the US. Being close to, but not actually part of, state government, allows TCJ to operate in a nimble, flexible, constantly relevant, and overall effective manner.

In addition to its grant-funded programs and other educational operations, TCJ conducts the Annual Judicial Conference, which is funded by the Administrative Judicial Regions. And, when other institutions have asked TCJ to develop and conduct educational events outside of grant funds, the Court of Criminal Appeals has generously provided additional funds.

The generosity of our judges, both with voluntary registration fees and individual contributions, allow TCJ to fund needs that fall outside of our grant limits. Funds so collected are maintained as cash reserves and ensure the ability of the TCJ to continue operations during any period of short term absence of other funds. Use of these funds is overseen by the TCJ Board of Directors.

Effective practices of non-profit associations include, as a top priority, continually researching, updating and maintaining technologies needed to deliver services to members. Our new database, purchased with a combination of an award from the CCA and a TCJ Board of Director-approved expenditure of cash reserves, has kept TCJ at the forefront of this area. The database, which should serve TCJ needs for decades, is essential to most everything TCJ does, from operation of the website, generally, and judges' conference registration and hours-tracking, specifically, to the delivery of *In Chambers*, conducting of surveys, storing of TCJ records, and more.

As I've had the opportunity to become acquainted with judicial education scenarios in other states, I have developed an even greater appreciation for how good we judges in Texas have it. The generosity of our funders, state, federal and individual, allows TCJ to bring judges together for frequent, relevant, face-to-face educational opportunities. The TCJ Board, Curriculum Committee, staff and membership all

make this possible.

A director of judicial education from a large and populous state phoned to ask about how Texas judges were educated. When I mentioned that our judges enjoy attending conferences where they can meet face-to-face, the person responded, "You are very lucky; we would never have the funds to bring our judges together face-to-face." Texas provides, in my opinion, the best judicial education in the United States.



Judge Mark D. Atkinson, CEO



# feature

## Characters

By Judge Larry Gist, Senior Judge



**N**obody who has been in any type of business or profession for any length of time hasn't run into some "characters". I am certainly no exception, and after working in the criminal justice system for 50 years, there were some unforgettable people to cross my path.

So I thought I might take a moment and reminisce about some of the offenders I've dealt with over the years. Unfortunately, in so many cases, their lights were on but nobody was home.

Let's start with Little Joe. When I first became an Assistant District Attorney, I was assigned like most new prosecutors to work in Justice of the Peace Courts. That's where I first met Little Joe.

I was a young prosecutor and he was a young thief. I prosecuted him several times for Class C misdemeanors. Then I got promoted to County Court at Law cases and sure enough, here came Little Joe, now stealing in Class A & B amounts.

As my career advanced, I was assigned to felony court. Who do I see there but Little Joe, now committing Third Degree crimes. I later became the Chief of the Trial Division and Little Joe moved up to Second Degree offenses. And as a newly elected judge, I got to sentence Little Joe to life in prison under the then mandatory habitual offender statute.

Our careers paralleled each other. As I went up a notch, so did Little Joe.

And then there was Frank. I was prosecuting misdemeanor offenses when I first ran into him. Way back then our jail was on the top of the courthouse building. The sheriff didn't have funds to hire professional cooks for the jail kitchen, so inmates had to handle all of the food preparation. And an inmate who knew how to cook was very valuable.

Frank was a seaman and cooked on ships when he wasn't in jail. And he had been in almost every jail and prison in the country at one time or



another. He was at the time in our jail charged with felony forgery. Frank was so valuable to the sheriff that he asked to have the charges handled as misdemeanors so Frank could serve all of his time in our jail – and do the cooking. The judge agreed, a deal was struck, and Frank got sentences totaling several years in our jail.

About two years later and during the Vietnam war, Frank wrote the judge. He indicated that he had a chance to become a seaman on a ship under contract to the government of Vietnam. If he could get on that ship, he would be in Vietnam waters for over three years. He promised that if he wasn't killed, he would never enter our jurisdiction again for the rest of his life.

All of the county criminal justice officials finally agreed to give Frank some trustee credit and cut him loose early. The ship was to leave the Port of Beaumont at 3 p.m. on Saturday. The Port is exactly one block from the jail, and the judge ordered the sheriff to release Frank at 2:50 p.m., drive him to the ship, watch him board and see the ship sail away.

At precisely 2:50 p.m. Frank got in the sheriff's car for the one block ride. Next to the only red light at that time was a small building known as "Smokey the Bar." Frank asked the deputy sheriff if he could go in and get some cigarettes as the ship wouldn't get to Vietnam for three months. In a few moments, Frank was back in the car, rode to the ship and the deputy watched it sail away.

The next week I received a forgery complaint from Smokey the Bar. Seems Frank went in there and forged a check for the cigarettes. Now that's a criminal. Not only did he commit a new crime, but he

used a deputy sheriff as the get-away driver! They don't make many like Frank anymore. By now Frank is certainly deceased and probably residing in an exceptionally hot environment. I'll bet anything that he's figured out a way to steal gasoline from the devil!

And finally, there was the Old Gray Fox. He was called that because he had a full head of thick gray hair, and he could break into almost anything. His specialty was safe jobs, and he was a recognized expert. Unfortunately for him, he got caught fairly often and spent a considerable portion of his life in prison.

But his reputation as a safe burglar remained strong. Let me tell you just how strong. Our police once caught two burglars and were interrogating them about other crimes they had committed. The police told them they would only file one charge against them but wanted to clear the books regarding their other offenses.

And this is the story they told. They had entered a local business one night by cutting a hole in the roof. Once inside, they attempted unsuccessfully to open the safe. Nothing they tried worked. So in desperation they picked up the phone and called the Old Gray Fox who was at home asleep.

They described their problem and he told them to put their punch in a particular location. But that didn't work. So he told them to place their drill in another spot on the safe. Again, their attempts failed.

So the Old Gray Fox got dressed, drove down to the building, climbed on the roof, dropped down to the office and opened the safe for them. Seems there was almost \$40,000 in the vault and the grateful burglars asked him what part he wanted as his share.

The Old Gray Fox told them that this was their job and he didn't want anything but in the future if they couldn't handle the job, don't call him at home when he was sleeping! Now that's a professional.

Way back then, so many criminals were professionals in the sense that when they were caught they knew it. And all they tried to do was lower their business expense and get as little pen time as they could. None of them would ever think of physically hurting an officer or anybody else for that matter.

In their minds, they were crooks – but besides being thieves, not really bad people.

Things have gotten so much more dangerous throughout the years. Violence has become the overwhelming focus of our modern day criminal justice system. So in a strange way it's refreshing to remember a time when most of the crooks were characters. Not killers. ♦

of note... 

## UPCOMING CONFERENCES

### **Impaired Driving Symposium**

August 4-5, 2016  
Sheraton Capitol, Austin

### **Annual Judicial Education Conference**

September 6-9, 2016  
J.W. Marriott, San Antonio

### **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**

February 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

Hon. Ismael Flores, Court #25, Edinburg, Associate Judge  
Hon. Linda Garcia, Harris County Criminal Court at Law No. 16, Houston, Judge  
Hon. Jose M. Gonzalez, 65th District Court, El Paso, Associate Judge  
Hon. Ryan D. Larson, 395th District Court, Georgetown, Judge  
Hon. Patricia Maginnis, 35th District Court, Conroe, Judge  
Hon. Amy Parsons, Harris County Probate Court No. 3, Houston, Associate Judge  
Hon. Ronald Wesley Tidwell, 6th District Court, Paris, Judge  
Hon. Toni M. Wallace, Fort Bend County Court at Law No. 5, Richmond, Judge  
Hon. Kimberly Williams, Travis County Court at Law No. 9, Austin, Judge

**NEW  
Judges**  
as of 5/31/16

Hon. Henry Dalehite  
122nd District Court  
Galveston

Hon. John Forbis  
100th District Court  
Childress

Hon. Joe Bob Golden  
1st District Judge  
Jasper

Hon. Phyllis Lister Brown  
162nd District Court  
Dallas

Hon. Howard Tygrett  
86th District Court  
Terrell

*In  
Memory...*



# of note...



## Justice Marilyn Aboussie Named a 2016 Woman of Distinction by the Girl Scouts of Central Texas

Retired Chief Justice Marilyn Aboussie was selected as one of the 2016 recipients of the Girl Scouts of Central Texas Women of Distinction award. Girl Scouts of Central Texas celebrates women who have distinguished themselves as outstanding members of their community through individual excellence and high levels of achievement. Past recipients have included women honored for excellence in the areas of business, education, government, communications, health care, sports, volunteer services, multicultural activities, and Girl Scouting. They look for women who are role models for all of our members, girls and adults alike, showing them that with hard work and perseverance, anything can be accomplished.



## Justice Jeff Brown Presented with Outstanding Eagle Scout Award

On May 15, Justice Jeff Brown received the Outstanding Eagle Scout Award from the National Eagle Scout Association (NESA). The award was presented by United States District Judge David Hittner (who is a past recipient of the even more prestigious designation of “Distinguished Eagle Scout”). The NESA Outstanding Eagle Scout Award is a prestigious recognition granted by the local council’s NESA committee to Eagle Scouts who have demonstrated outstanding achievement at the local, state, or regional level.



## Mexican-American Bar Association of El Paso Honors Judge Linda Chew

On January 22, 2016, the Mexican-American Bar Association of El Paso honored Judge Linda Chew with the “Albert Armendariz, Jr. Lifetime Achievement Award” at its Annual Banquet ceremony. Judge Chew was elected as judge of the 327th Judicial District Court in March 2002, and took her oath of office in January 2003. Much of Judge Chew’s legal career has been devoted to the service of children, families, and immigrants. Other El Paso judges honored during the banquet were Judge Laura Strathmann of the 388<sup>th</sup> Judicial District Court and Judge Carlos Carrasco of the County Criminal Court at Law No. 3.



“The new reporting requirements are more comprehensive than what is currently required under the Supreme Court’s order.”

# feature

## New Court Appointment Reporting Requirements For All Case Types Effective September 1, 2016

By Mena Ramon, General Counsel  
and Angela Garcia, Judicial Information Manager  
Texas Office of Court Administration

**N**ew case reporting requirements go into effect September 1, 2016. The new requirements were enacted by the 84<sup>th</sup> Texas Legislature in Senate Bill 1369<sup>1</sup> and are codified in Chapter 36 of the Texas Government Code. The new law requires courts to report the appointment of and payments to attorneys ad litem, guardians ad litem, guardians, mediators and competency evaluators.

Courts are already required to report fees paid during a month in the amount of \$500 or more to persons appointed by a judge of any district, county or probate court, court master, or court referee to a position for which any type of fee may be paid in a civil, probate, or family law case under Titles 1, 2 and 4 of the Family Code. This is required by Supreme Court of Texas order (Misc. Docket No. 07-9188).<sup>2</sup> The reports are prepared by the district and county clerks for the courts they serve and are submitted to the Office of Court Administration monthly.<sup>3</sup>



## New Reporting Requirements

The new reporting requirements are more comprehensive than what is currently required under the Supreme Court's order. The new law requires<sup>4</sup>:

1. reporting from appellate, justice and municipal courts in addition to those courts already covered under the Supreme Court's order;
2. reporting of fees paid for each court appointment during the month and all appointments made during the month regardless of whether a fee is paid - the Supreme Court's order only requires reporting of fees paid;
3. if the amount paid to a person in a month in one case exceeds \$1,000, any information related to the case that is available to the court on the number of hours billed and billed expenses – this is not currently required under the Supreme Court's order;
4. reporting on appointments to all family law cases, including child protection cases and it also expands the reporting requirement to any relevant activity in criminal and juvenile cases – the Supreme Court's order only applies to family law cases under Titles 1, 2 and 4 of the Family Code.

Unlike the Supreme Court's order which requires that *any* fee payment over \$500 be reported, the new law only requires reporting of payments made to attorneys ad litem, guardians ad litem, guardians, mediators and competency evaluators<sup>5</sup>. The new reporting requirements do not apply to: "1) a mediation conducted by an alternative dispute resolution system established under Chapter 152, Civil Practices and Remedies Code, 2) information made confidential under state or federal law, including applicable rules, 3) a guardian ad litem or other person appointed under a program authorized by Sec. 107.031, Family Code, or 4) an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code."<sup>6</sup>

The monthly reports must be submitted no later than the 15<sup>th</sup> day of each month to the Office of Court Administration; this is a shorter time period than the Supreme Court's current requirement that the reports be submitted no later than the 20<sup>th</sup> day following the end of the month<sup>7</sup> If a court fails to provide the clerk of the court the information required to be submitted in the required reports the court becomes ineligible for state grant funds in the following biennium.<sup>8</sup>

## Report Content

The report must include:<sup>9</sup>

1. the name of each person appointed by the court in the month;
2. the name of the judge and the date of the order approving compensation to be paid to a person appointed;
3. the number and style of the case;
4. the number of cases each person was appointed to in the month;
5. the total amount of compensation paid to each person and the source of compensation;
6. if the total amount paid to a person in one case in the month exceeds \$1,000, the number of hours billed for the work performed and the billed expenses; and
7. if no appointment was made during the reporting period, the clerk must submit a report indicating so.

Clerks are already reporting most of this information in most types of cases. The exceptions are that they must submit a report even if there are no appointments made in the month and they must provide more detailed information that is available to the court in cases where a person is paid more than \$1,000 in a case in one month.

Judges should be especially aware of the report content requirements so that all court appointment orders and orders approving payment include the information the clerk requires to prepare and submit the monthly reports. Ensuring that orders making appointments and approving payment contain this information is not only a best practice, it is currently required by the Supreme Court's order for the cases that must be reported under the Court's order. Additionally, as mentioned above, failure to do so may make the court ineligible for state grant funding in the following state biennium.

## Posting the Report

The new law also requires the clerk to post the report at the courthouse of the county in which the court is located and on any Internet website of the court.<sup>10</sup>

## Supreme Court Order Will Remain in Effect

The Supreme Court order will remain in place for appointments in civil cases, but the \$500 minimum threshold for the fees is being removed by changes to Judicial Council reporting rules. The reporting rule

changes also change the due date of the report to the 15<sup>th</sup> of the month to be consistent with SB 1369.<sup>11</sup>

## Submitting the Report, Report Instructions and Other Resources

Clerks will continue to submit the reports into the appointments and fees reporting system, which is currently being updated by the Office of Court Administration to reflect the changes made by SB 1369. OCA has also posted reporting instructions, frequently asked questions, and other resources on its website<sup>12</sup> to assist clerks and others in determining how the changes mandated by SB 1369 will change the way they currently report to OCA. ♦

(Endnotes)

1. Act of June 1, 2015, 84th Leg., R.S., ch. 1199, 2015 Tex. Sess. Law Serv. 4024 (Vernon).
2. <http://www.txcourts.gov/media/7527/SC-Order-07-9188.pdf>
3. Information regarding reporting requirements under the Supreme Court's order is available at: <http://www.txcourts.gov/statistics/appointments-fees-in-civil-cases.aspx>
4. Tex. Gov't Code §36.004(a)
5. *Id.*
6. Tex. Gov't Code §36.003
7. Tex. Gov't Code §36.004(b)
8. Tex. Gov't Code §36.005
9. Tex. Gov't Code §36.004(a)
10. Tex. Gov't Code §36.004(b)
11. Proposed amendments to the rules were published in the April 1, 2016 edition of the Texas Register and are available on the Secretary of State's website at: <http://www.sos.state.tx.us/texreg/archive/April12016/Proposed%20Rules/1.ADMINISTRATION.html#4>
12. <http://www.txcourts.gov/reporting-to-oca/news/sb-1369-appointments-fees-reporting.aspx>



2016 Annual Judicial Education Conference

September 6-9, 2016  
J.W. Marriott, San Antonio

Register Now! [www.yourhonor.com](http://www.yourhonor.com)

# of note...



## Judge Mike Engelhart Earns Two Prestigious Awards

Judge Mike Engelhart of the 151<sup>st</sup> Civil Judicial District Court was named “Trial Judge of the Year” by the Texas Association of Civil Trial and Appellate Specialists (TACTAS). Each year, TACTAS members vote for a Trial Judge of the Year out of dozens of sitting state civil and federal district court judges in Harris County. TACTAS members include only attorneys and judges who have obtained board certification in Civil Appellate Law, Civil Trial Law, or Personal Injury Trial Law. Judge Engelhart himself is board certified in Personal Injury Trial Law and has been Judge of the 151<sup>st</sup> since he was elected in 2008. In addition, Judge Engelhart also received the University of Houston Law Center’s “2016 Public Sector Achievement Award” in recognition of exceptional achievement in public service.



## Judge Carl Ginsberg Earns LLM from the University of London

Judge Carl Ginsberg of the 193<sup>rd</sup> Judicial District Court in Dallas County, Texas recently graduated with an LLM from the University of London. Pursuing the distance learning curriculum, jointly developed by University College London and Queen Mary College (both constituent colleges of the University of London), Judge Ginsberg earned an LLM in International Dispute Resolution with a supplementary Diploma in Public International Law (with Distinction).



## Judge Kathleen Hamilton Honored by the State Bar of Texas and Veterans of Foreign Wars

On January 22, 2016, at a meeting of the State Bar of Texas Board of Directors in The Woodlands, Texas, State Bar President Allan DuBois and the State Bar of Texas Board of Directors presented a “Resolution Honoring Judge Kathleen A. Hamilton” for her “commitment to raising the awareness of the importance of adoptions, for loyalty to preserve and restore the dignity of Texas veterans, and for support for the State Bar and its programs.” Also, in April, Judge Kathleen Hamilton received a “Certificate of Merit” from the Veterans of Foreign Wars of the United States Post #4079 Auxiliary, at their annual Awards Banquet in Conroe, Texas, in recognition of her commitment to Veterans in need in and around the Conroe Texas Community. Judge Hamilton has been Judge of the 359<sup>th</sup> Judicial District Court in Montgomery County since 2003.

## Contributions in Honor

**Hon. Joe Carroll**

*In Honor of Judge Julie Kocurek and Judge Gerald M. Brown*

**Hon. Carolyn Marks Johnson**

*In Honor of Judge Neil Caldwell and Judge Lee Duggan Jr.*

**Hon. Mary Murphy**

*In Honor of Judge Mark Atkinson and the Center Staff*

**Hon. Lori Rickert**

*In Honor of Judge Ogden Bass for being such a good role model for me!*

**Hon. Laura Weiser**

*In Honor of Judge Lori Rickert of her receipt of the Spotlight on Success Award presented at the 2016 DWI Court Team Training*

**Hon. Laura Weiser**

*In Honor of Judge Linda Chew: Recognizing her excellent work for the TCJ College for New Judges*

**Hon. John Wooldridge**

*In Honor of Judge Sharolyn Wood: Tribute to a life dedicated to professional and honorable judicial service.*

Contributors

as of 5/31/16

## Contributions in Memory

**Hon. Robert Blackmon**

*In Memory of Judge Jack Blackmon*

**Hon. Chad Bridges**

*In Memory of Judge Thomas Culver III*

**Hon. Kelly Moore**

*In Memory of Judge John T. Forbis*

**Hon. Donna Rayes**

*In Memory of Judge Bob Parks*

**Hon. Cara Wood**

*In Memory of Judge John T. Forbis*

## Lifetime Jurist

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Hon. Linda Chew  
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Hon. Randy Clapp  
Hon. Tom Culver  
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Hon. David Evans  
Hon. Bobby Flores  
Hon. Ana Lisa Garza  
Hon. Tiffany Haertling  
Hon. Robert Kern  
Hon. Lamar McCorkle  
Hon. Margaret Mirabal  
Hon. Cynthia Muniz  
Hon. Kerry Neves  
Hon. Gladys Oakley  
Hon. Bob Pfeuffer  
Hon. Sherry Radack  
Hon. Israel Ramon  
Hon. Bonnie Robison  
Hon. Doug Robison  
Hon. Peter Sakai  
Hon. David Sanchez  
Hon. Steve Smith  
Hon. Ralph Strother  
Hon. Stephani Walsh  
Hon. Mike Willson  
Hon. Bob Wortham

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Hon. Bob Brotherton  
Hon. Claude Davis  
Hon. Larry Gist  
Hon. Carolyn Johnson  
Hon. Jerome Owens

## Platinum

Hon. Bill Boyce  
Hon. John Ellisor  
Hon. Phil Vanderpool  
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## Gold

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Hon. Chad Bridges  
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Hon. David Chew  
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Hon. Lynn Bradshaw-Hull  
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Hon. Ada Brown  
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Hon. Jim Wright  
Hon. Leslie Yates  
Hon. Tim Yeats  
Hon. Phil Zeigler

“The recent history of this latter exception is something about which judges need to be aware.”

# feature

## Forfeiture by Wrongdoing

By Kerry L. Neves  
Judge, 10<sup>th</sup> District Court  
Galveston County, Texas



### Background

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront the witnesses against him, generally referred to as the Confrontation Clause. But what if the witness does not appear? Clearly, any effort to introduce statements by that person would be subject to hearsay objections.

Two common law exceptions were recognized at the time the Constitution was adopted. The dying declaration was one, made by someone “...on the brink of death and aware that he was dying.” This is recognized in Texas by Rule 804(b)(2) of the Texas Rules of Evidence.

The second exception was forfeiture by wrongdoing, in which the defendant engaged in conduct intended to keep the witness from testifying, either personally or by someone acting on his behalf. This is recognized in Texas by Article 38.49 of the Texas Code of Criminal Procedure.

### Recent History

The recent history of this latter exception is something about which judges need to be aware. In 2004, in *Crawford v. Washington*, the US Supreme Court held that a testimonial statement is admissible only if the person making it is available for cross-examination.<sup>1</sup> Justice Scalia wrote at length about the history of the Confrontation Clause, but also recognized the right of confrontation could be waived by a defendant, under the doctrine of forfeiture by wrongdoing, after examining the defendant’s actions.<sup>2</sup> That forfeiture was based on equitable grounds, citing *Reynolds v. U.S.*, in which the Supreme Court held:

“The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong... It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.”<sup>3</sup>



After *Crawford*, the Texas Court of Criminal Appeals adopted forfeiture by wrongdoing in a murder case, *Gonzales v. State*.<sup>4</sup> A victim told police the person who shot her was the defendant, then she died a few hours later. At trial, her statement was objected to as hearsay, but was admitted as an excited utterance.<sup>5</sup> The Court of Appeals upheld defendant's conviction, stating he had forfeited his right of confrontation under the doctrine of forfeiture by wrongdoing by killing her.<sup>6</sup>

The Court of Criminal Appeals discussed how courts after *Crawford* had taken an expansive view of the forfeiture by wrongdoing doctrine.<sup>7</sup> Some held the wrongdoing could be the same crime for which the defendant was being tried, and without reference to whether the intent was to prevent the person from testifying.<sup>8</sup> Others held the doctrine could not apply in those circumstances, as the wrongdoing only indirectly caused the witness to be absent.<sup>9</sup> The Texas Court accepted the former position, applying the doctrine even though the act with which *Crawford* was charged was the same act which caused the witness to be unavailable.<sup>10</sup>

After *Gonzales*, several Courts of Appeal followed the forfeiture by wrongdoing doctrine. One court found that intimidation could be used to apply the doctrine. In *Sohail v. State*, after reports the defendant had struck his wife, she refused to testify, even after being held in contempt by the trial court.<sup>11</sup>

During a hearing outside the presence of the jury, evidence was presented which supported the court's conclusion that the wife was refusing to testify out of fear because of threats defendant had made to her. The court found that "physical unavailability" was not the only way for the doctrine to be applied.<sup>12</sup>

In 2008, however, the doctrine was again reviewed by the Supreme Court, which narrowed and limited its application. In *Giles v. California*, the defendant had been convicted of the murder



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of his girlfriend, after testimony from a police officer about the girlfriend's statements to him three weeks before her death.<sup>13</sup> Her statements included descriptions of physical violence and threats to kill her.<sup>14</sup> During the pendency of his appeal, the Supreme Court decided the *Crawford* case. The California appellate courts upheld the conviction, stating the defendant forfeited his right of confrontation by committing the murder and that caused the witness to be unavailable.<sup>15</sup>

Justice Scalia, again writing for the Court, held there were only two exceptions to the right of confrontation at the time of the Founding. The first was the dying declaration, which required the statement to be made by a person "...on the brink of death and aware he was dying."<sup>16</sup> The second was forfeiture by wrongdoing, which required the witness to be "detained" or "kept away" by the defendant's actions, either personally or by someone acting in his behalf.<sup>17</sup> The test now is that the defendant must have committed the wrongdoing with the intent to cause or prevent a witness to not be available to testify.<sup>18</sup>

Since *Giles* was decided, there have been few reported cases on forfeiture by wrongdoing in Texas. The Austin Court of Appeals dealt with the issue in *Garcia v. State*, a family violence case in which Garcia assaulted his girlfriend/common-law wife, Christina Cooper.<sup>19</sup> Although she was subpoenaed, she did not appear at trial, and the evidence was introduced through her mother, doctor, and investigating officers. The trial court held a hearing outside the presence of the jury, and subsequently made detailed findings of fact and conclusions of law, which showed Garcia intimidated Cooper with jailhouse phone calls and letters, attempted to re-establish their relationship and told her she could hurt him by talking about the case.<sup>20</sup> A few days before trial

he scolded her for getting served with a subpoena, and for not being harder to find.<sup>21</sup> Cooper was crying and apologizing during the jailhouse call.

Based on all those findings, the trial court concluded "...the acts of the Defendant show that he intended to keep the witness from testifying. As a result, Defendant forfeited his confrontation claims."<sup>22</sup> On appeal, the Court held the record supported the trial court's findings, and upheld Garcia's forfeiture of his Confrontation Clause rights.<sup>23</sup>

In another family violence case, *Pena v. State*, a paramedic testified to what the victim told him about Pena's assault of her and his threat to kill her and leave her in a ditch where she would never be found.<sup>24</sup> A jailhouse phone call showed a comment from him indicating he might call Child Protective Services about her children.<sup>25</sup> She subsequently did not respond to a subpoena and did not testify.

The Austin Court of Appeals held the threat to kill the victim did not show the specific intent to prevent her from testifying.<sup>26</sup> But it also held the comment about calling CPS was a threat intended to prevent her from testifying.<sup>27</sup> In light of that, the trial court did not abuse discretion in admitting the statements.<sup>28</sup>

The current Article 38.49 of the Code of Criminal Procedure attempts to codify the Court decisions on the doctrine. It provides that a party to a criminal case may not benefit by wrongfully procuring the unavailability of a witness, and forfeits the right to object to evidence about that through forfeiture by wrongdoing.<sup>29</sup> The trial court is to hold a hearing outside the presence of the jury, and consider evidence supporting forfeiture by wrongdoing, using preponderance of the evidence as the burden of proof.<sup>30</sup>

## Trial Court Actions

The prosecution in a case should be proactive early in the process, especially in family violence cases, if there is any suggestion a witness may be reluctant or afraid to testify. Evidence of the relationship between the parties should be gathered, including jailhouse phone calls or letters, where an intent to threaten or coerce a witness to not testify could be found.

When confronted with the suggestion of forfeiture, the trial court must conduct a hearing outside the presence of the jury. Art. 38.49 states this should be done, if practicable, before trial.<sup>31</sup> The issue could, however, arise during trial, which would require the court to conduct such a hearing with the jury excused.

A trial court needs to be aware that in considering evidence offered to prove that a party has engaged or acquiesced in causing a witness to be unavailable, it is not required for it to be shown that:

1. the sole intent was to wrongfully cause the unavailability, or
2. the actions constituted a criminal offense, or
3. any statements offered are reliable.<sup>32</sup>

The issue of forfeiture by wrongdoing will be something trial courts will be confronting on an increased basis. The judge should be aware of the doctrine, and be prepared to handle it when it is raised, preferable before trial, but in the midst of a trial if necessary. Under the current Supreme Court precedent, the court will need to ensure there is evidence of intent on the part of the party in causing the unavailability of a witness.

### (Endnotes)

1. *Crawford v. Washington*, 541 US 36, 124 S.Ct. 1354 (2004).
2. *Id.* at 62.
3. *Reynolds v. U.S.*, 98 US 145, 159 (1878).
4. *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim.App., 2006).
5. *Id.* at 116.
6. *Gonzales v. State*, 155 S.W.3d 603, 610 (Tex.App. – San Antonio 2004).
7. *Gonzales*, *supra* at 120.
8. *Id.* at 121.
9. *Id.* at 121.
10. *Id.* at 125.
11. *Sohail v. State*, 264 S.W.3d 251, 256 (Tex. App. – Houston [1st Dist.] 2008, *pet. ref'd*).
12. *Id.* at 259.
13. *Giles v. California*, 554 US 353, 128 S. Ct. 2678 (2008).
14. *Id.* at 356-357.
15. *People v. Giles*, 19 Cal.Rptr.3d 843, 847 (2004), *People v. Giles*, 55 Cal. Rptr.3d 133, 152 P.3d 433, 435 (2007).
16. *Giles v. California*, *supra* at 358.
17. *Id.* at 359.
18. *Id.* at 359-364.
19. *Garcia v. State*, 2012 WL 3795447 (Tex. App. – Austin 2012, *pet. ref'd*) (*memo. op.* – not designated for publication).
20. *Id.* at 8 – 9.
21. *Id.* at 8.
22. *Id.* at 8.
23. *Id.* at 9.
24. *Pena v. State*, No. 03-08-00546-CR, 2009 WL 2900742 at 4-5 (Tex.App. – Austin 2009, *no writ*)(*mem. op.*, not designated for publication).
25. *Id.* at 5-6.
26. *Id.* at 6-7.
27. *Id.* at 6-7.
28. *Id.* at 6-7.
29. *Tex.Crim.Proc.Code Ann. art. 38.49(a)(1) & (2)*.
30. *Tex.Crim.Proc.Code Ann. art. 38.49(c)*.
31. *Tex.Crim.Proc.Code Ann. art. 38.49(c)*.
32. *Tex.Crim.Proc.Code Ann. art. 38.49(d)*.

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# of note...



Justice Greg Perkes Receives Outstanding Service Award and National Education Certificate

Justice Greg Perkes of the 13<sup>th</sup> Court of Appeals received the Cameron County Bar Association's (CCBA) 2016 Outstanding Service Award at their annual gala in Brownsville on April 30. The CCBA Outstanding Service Award is given each year to a person who exemplifies service to others, service to their communities, service to the legal profession, and advancing the administration of justice. In addition, Justice Perkes recently received a Certificate of Completion from the National Judicial College (NJC) for its Advanced Skills for Appellate Judges course. He was one of 23 judges to attend the week-long continuing education course.



Tarrant County Bar Association Selected Judge Judith Wells as Silver Gavel Recipient

Each year, the Tarrant County Bar Association honors a local jurist with The Silver Gavel Award. The award is given to a judge who has served as a Judge or Jurist for at least 10 years; has made substantial contributions to the judiciary by exemplifying the ability, integrity and courage desirable in a Judge; who respects the law and expects others to do the same; and who is as knowledgeable as possible in every area of the law. Judge Judith Wells of the 325th Judicial District Court was selected as the 2016 recipient. She served as Associate Judge to the 325th before being elected in 1995.



Judge Robert J. Vargas Honored for Commitment in Mental Health Field

The Behavioral Health Center of Nueces County (formerly MHMR of Nueces County) awarded its Leadership Award at its May 7, 2016, banquet to Judge Robert J. Vargas of Nueces County Court at Law No. One. Judge Vargas was selected for the award based on his 30 years of service and participation in the mental health field and his support of the organization.

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