

Published since 1995 by Greg B. Enos

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LAW FAX

June 24, 2001

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Editorial

Commissioners: Pick A Qualified Person For County Court 3!

The County Commissioners court, which includes four non-lawyers, will appoint the judge for the new County Court No. 3 on July 30. Not every attorney is qualified by experience, knowledge and temperament to be a judge just like not every physician is qualified to do heart surgery.

The commissioners have a much better opportunity than voters to interview and examine candidates for this post and they clearly have a duty to select the most qualified applicant. They should consider:

- Actual trial experience;
- Board certification;
- Experience in civil litigation and family law—the two most important areas of jurisdiction for this court;
- Past judicial experience (in courts where lawyers represent both sides and must follow the rules of evidence);
- Reputation among lawyers, including their Martindale-Hubbell ratings from their peers;
- Whether the lawyer is known to be a hard worker; and
- The applicant's intelligence and knowledge of law.

Many rumors swirl around this new court, such as the idea that commissioners really want to appoint a minority lawyer or they do not want another female judge. Obviously, commissioners will say they voted for the most qualified candidate regardless of their real motivations. This time, let's hope they really do select the best, most qualified candidate (which would be good, smart politics). ★

Big Changes in County Courts Approved by Legislature

Governor Perry signed a law which creates a new County Court No. 3 for Galveston County and will allow multi-million dollar civil suits to be filed in all three county courts.

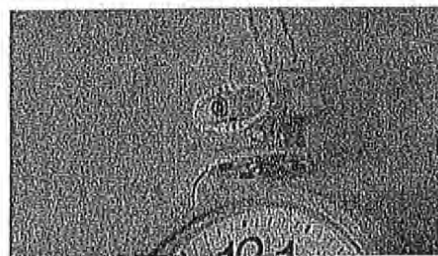
H.B. 3678 creates a third county court at law for Galveston County and gives all three county courts the same civil jurisdiction as district courts (except for election contests). This means that the three county court judges will hear:

- Civil cases of unlimited size;
- Family law cases;
- Juvenile and misdemeanor criminal cases; and
- Appeals from municipal and justice courts.

County Commissioners will appoint the judge of County Court No. 3 at their July 30 meeting. **Applicants may submit resumes to County Judge Jim Yarbrough through no later than July 13.** The new judge takes office on October 1.

Under H.B. 689, the Pro-

bate Court loses its civil and family jurisdiction on September 1 and all of its non-Probate Code cases will be transferred out to the county courts. ★



Hear no evil, see no evil, speak no evil. Do not shoot the finger or bad mouth the judge of the 306th when she is off the bench because the security camera is wired to her chambers to detect security threats and unruly behavior.

Courthouse News Big Changes in 306th

A lot is changing in the 306th Family District Court. Judge Susan Baker has announced that she will not seek reelection next year. Baker will be stepping down after serving 10 years on the bench that her father, Andrew Z. Baker, held for 12 years before her. Associate Judge Jan Yarbrough has already said that she intends to

(Continued on page 4)

CALENDAR

June 26	Noon	Galv. County Young Lawyers	Pelican Club - Galveston
June 28	Noon	Galv. County Bar Assoc.	Tremont House - Galveston
June 29	Noon	Mainland Bar Assoc.	Union Planter's Bank - League City
July 4		COURTHOUSE HOLIDAY!	

Please copy this LAW FAX and share with all the attorneys & staff in your office.

Only one copy of this newsletter is sent by fax to each office, so please SHARE!

Trial Reports

Greg Russell is one the county's busiest and most successful criminal defense attorneys. In June, he defended a 13 year old charged with indecency by contact with a three year old girl. The jury in Judge Mary Nell Crapitto's court returned a "not true" verdict. Taylor Schwab represented the State. There are three other indecency charges involving different girls still pending against the juvenile.

Greg Russell was a very busy lawyer in a April. Russell represented a 74 year old defendant charged with sexually assaulting a twelve year old boy over a two year period. Visiting Judge I. A. Lerner presided over the case in the 212th District Court. The jury found the defendant guilty and he received an automatic life sentence because of a prior conviction. Angela Taylor was the prosecutor.

Russell represented a defendant that was charged with resisting arrest in County Court No. 2 before visiting Judge Ron Wilson. The defendant was arrested at Mardi Gras and it took four police officers to subdue him. The defendant claimed that an officer grabbed and twisted his ear and he only resisted because they were using excessive force. Rick Bennett was prosecutor and could not have been to happy with the hung jury that deadlocked five to one for a "not guilty" verdict. The state dismissed the case after the judge declared a mistrial.

Russell also represented a woman charged with unlawfully

carrying a weapon (thirty eight caliber revolver). The defendant was arrested after being seen walking down the street with the pistol. The defendant argued the defense of necessity and the jury agreed after the jury heard the defendant say that she had been forced to wrestle the gun away from her boyfriend who had been threatening her with it. Calvin Parks was prosecutor. The jury found the defendant "not guilty." Visiting judge Ron Wilson presided over the case.

A jury in Judge David Garner's court in May found that UTMB was not negligent in causing a subcontractor's worker to fall from a ladder. Russ Burwell, III represented the plaintiff.

A woman sued by two men over a car wreck on Kappa weekend defeated their claims and convinced a jury in the 212th to

award \$3,000 on her counterclaim. Houston lawyers represented all parties.

Wade Williams' client prevailed in a motorcycle-auto claim in Judge Wayne Mallia's court in May. The defendant, represented by Williams, claimed he merely saw the accident and stopped to help. Ramzey Zein-Eldin represented the unsuccessful plaintiff.

In April visiting Judge Ron Wilson presided over a DWI case for County Court No. 1. The defendant allegedly accelerated quickly while two people were riding on the trunk of this car, causing them to fall off. The defendant failed a breath test and was found guilty by the jury and was assessed one year probation, a \$1,000.00 fine and other standard conditions of probation.★

Local Bar Associations

Galveston County Bar Association

Meets fourth Thursday of each month at the Tremont in Galveston (meets twice a year on the mainland). Dues are \$100 per year. President: Russ Burwell, III (elections are June 28)

Galveston County Young Lawyers Association

Meets last Tuesday of each month at the Pelican Club in Galveston. President: Lyle Courtney

Criminal Defense Attorneys

Meets third Friday of each month at DiBella's in Galveston. Dues: \$25 per year. President: Rebecca Murphy

Galveston County Family Bar Association

Meets second Wednesday of each month at the Pelican Club. Dues: \$40 per year. President: Rebecca Murphy

Mediator's Association of Galveston County

Meets quarterly. President: James R. Ansell

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The deadline for lawyers to apply for appointment to the new County Court No. 3 is July 13.

Mail resumes to County Judge Jim Yarbrough
At 722 Moody, 2nd Floor,
Galveston Texas 77550

Attorneys who have applied for the position so far are:

Patrick Reilly
Elisa Vasquez
Ted Mora
Harry Lawrence
Jennifer Smith
Leonard Cruse
John Ellisor
Phil Hosey

Rep. Patricia Gray Roasted

State Representative Patricia Gray was honored Tuesday night at a roast that raised over \$20,000 for the Galveston County Democratic Party.

Greg and Sharon Enos were event coordinators of the farce that pretended Gray had died and had to stand trial before being admitted to Heaven. Jan Yarbrough was the celestial judge, Greg Enos was prosecutor and Bob Monks was St. Peter. Anthony Griffin was a very funny and ribald devil. ★

Analysis of Reported Fees For Court Appointments

The Texas Supreme Court requires court clerks to file a monthly report detailing fees of \$500 or more earned by court appointed ad litem, mediators, masters, etc. This reporting requirement came about in the early-1990's after a scandal in Houston involving lawyers who made hundreds of thousands in court appointments from judges who had ties to those lawyers. The idea was that reporting fees of all court appointments and making them a public record would curb such abuses.

It is largely a waste of time to analyze the court appointment fee reports filed by the Galveston District Clerk, since the reports leave out so much. No fees in appointments in family cases are reported and no mediation fees are reported. Most fees in personal injury ad litem cases are not reported. The filed reports are filled mostly with fees in tax cases and occasionally list a few ad litem fees in injury or death cases. With that caveat, reports filed by the Galveston County District Clerk covering the period from January 1998 to April 2001 show the following:

The reports listed fees in a total of 434 cases, which included 306 tax cases (Shauna Berardinelli had 103 or one third of them) and 128 civil cases. Berardinelli had the third largest amount of total reported fees for the period but all of her fees were in tax cases and the fees were all \$500.

The top ten lawyers for total fees reported over the 40 month period were:

1. David Walker	\$104,170
2. Elisa Vasquez	\$81,650
3. Shauna Berardinelli	\$47,700
4. Wayne Johnson	\$25,000
5. Robert Monks	\$23,500
6. Margaret Hindman	\$18,500
7. Joel Correia	\$16,000
8. Traci Craft	\$16,000
9. Penny Pope	\$14,000
10. Mark Kelly	\$11,500

A total of 60 other attorneys were listed in the reports as receiving 30.6% of the total \$516,228 in fees reported for the period. This means that just 10 lawyers received 70% of the fees reported for the period.

The ten largest single fee awards reported were: Elisa Vasquez, \$50,000 by Judge Venso; David Walker, \$34,500 by Judge Whit-

(Continued on page 5)

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Page 3

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Courthouse News (continued)

run for the 306th, a prospect that is likely to dissuade most other potential candidates.

Yarbrough is widely respected as a judge in family cases and both her law firm and family are extremely politically active. Yarbrough's brother is Galveston County Judge Jim Yarbrough, State Representative Patricia Gray is one law partner and former County Democratic Party Chair David Jameson is her other partner. Yarbrough is so well thought of as a judge in a family cases, that she can expect the almost unanimous support of local divorce and custody attorneys. When Baker announced that she plans to retire at the Galveston County Family Bar meeting in June, Judge Yarbrough announced that she plans to replace her. Someone then asked the group of family attorneys, "Is anyone brave enough to run against Jan?" and no one indicated any interest in opposing her.

The 306th's court reporter, Jan Boening retired after 25 years of service. The new court reporter is Ron Vella.

Disciplinary News

A state district judge received a private reprimand. During an election in which the judge's father was a candidate, the judge talked to a

voter within the prohibited election area and disputed the time that the polls closed with the election judge. The judge also told the city manager that the judge would bring the manager before a grand jury if

the manager further threatened certain police officers with termination from their jobs.

This reprimand was issued in August 2000 but was not reported locally. ★

The Enos Law Firm, P.C.

Announces that

Kimberly D. Creel

and

Marybeth N. Nelson

have joined the firm as associates

Greg Enos is Board Certified in Family Law and Personal Injury Trial Law by the Texas Board of Legal Specialization. Other attorneys are not board certified.

"Helping Families Through Tough Times" in divorce, injury & death cases.

(409) 943-4300

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Attorneys, Kimberly Creel and Marybeth Nelson have joined The Enos Law Firm, P.C. Both lawyers will work primarily in the field of family law. Creel, formerly an associate with Sherri Y. Dean & Associates, joined the firm in February 2001. Nelson, a former solo practitioner, joined the firm in June 2001. Both are graduates of South Texas College of Law.



Greg Enos has been joined by Kim Creel (center) and Marybeth Nelson (right).

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Advertising "Mistakes" In League City

State Bar Rule 7.04(b)(3) requires any attorney advertising in public media to state, "Not Certified by the Texas Board of Legal Specialization" if he or she is not certified in a field the lawyer advertises in.

Robert Clements, who is NOT Board Certified in Family Law, has been listed under that heading for two years in a row in the GTE/Verizon League City phonebook. Hint: Your phonebook contract clearly specifies the headings you will be listed under and you usually receive proofs of the ads.

Leonard Cox's billboard in League City lists several fields of practice but does not include the required board certification disclaimer. His website, "www.LawyerCox.com" may be a crude play on words but it is apparently not really on the Internet.

**Attorneys Family Law
Board Certified Texas
Board Of Legal
Specialization**

CLEMENTS ROBERT D JR & ASSOCIATES
1606 Elway & Alvin • 281 331-1325
(See Advertisement On This Page)

**Attorneys Family Law
Board Certified Texas
Board Of Legal
Specialization**

DE LA GARZA BILL
17050 El Camino Real Houston • 281 486-7007
(See Advertisement On This Page)

FISHER EMILY A
1100 Rosenberg Galveston • 409 765-5705
Houston Number • 281 488-7929

SCHWAB & RADCLIFF LLP
17040 El Camino Real League City • 281 286-3300
(See Advertisement On This Page)

**BLANCHARD JUI
ATTORNEY AT
Law**
See our Ad under
711 W Bay Area Blvd Ste 620 West

**CLEMENTS ROBERT D JR &
ASSOCIATES**
1606 Elway & Alvin • 281 331-1325
(See Advertisement On This Page)

DE LA GARZA BILL
17050 El Camino Real Houston • 281 486-7007

Analysis of District Clerk Fee Reports (continued)

(Continued from page 3)

tington; Wayne Johnson, \$25,000 by Judge Venso; David Walker, \$34,500 by Judge Criss; David Walker, \$10,000 by Judge Garner; Elisa Vasquez, \$10,000 by Judge Venso; Elisa Vasquez, \$7,500 by Judge Venso; Patrick Quigley, \$7,500 by Judge Whittington; James Nebout, \$6,000 by Judge Criss; Lana Shadwick, \$5,500 by Judge Criss. There were almost certainly larger fee awards made during the period, but they were simply not reported.

The Galveston County District Clerk maintains the court files in all family cases, whether or not they are docketed in the 306th or one of the two county courts. There are absolutely no fees reported from any family cases, even though that is the field of law that almost certainly generates the most court appointments.

Clearly, fees in most civil cases are also missed. This author has been an ad litem and mediator in civil cases and filed fee reports with the District Clerk but my name is not listed at all as ever receiving a fee.

It is not always apparent from a court file or docket sheet what fees have been paid, so it will take a vigorous outreach program by the District Clerk to get attorneys to report their fees. ★

LEGAL SERVICES
LEONARD E. COX Attorney
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The Enos Law Firm, P.C., 1100 Nasa Road One, Suite 566, Houston, Texas 77058
(281) 333-3030 Fax: (281) 333-0300 e-mail: Lawfax@Enoslaw.com**Attorney Profile****Patrick
Reilly**

Pat Reilly at age 20 (above), planned on being a physician like his grandfather. Instead, he grew up to be a lawyer and judge. Reilly is married to Nina Moore Reilly (below). Nina Reilly is Chief Staff Attorney at the Fourteenth Court of Appeals in Houston.

**Associate Judge Patrick Reilly:
A True Courthouse Veteran**

Few attorneys in private practice spend as much time in the Galveston County courthouse as Patrick Reilly. On Wednesdays and Thursdays he hears cases as Associate Judge in family cases for the two county courts. On the other days, he is usually representing divorce and custody clients in the 306th or attending depositions or mediations.

In between hearings and trials, Reilly usually has a lot of time to visit and observe.

Pat Reilly prefers the term, "courthouse veteran" instead of "courthouse fixture" since he does not view himself as an inanimate object that has been around forever.

Reilly, who has practiced law in Galveston County for 33 years, notes that there are a lot more attorneys these days and a lot less collegiality.

Arkansas is Reilly's home state and after graduating from the University of Texas Law School, he went to work as a clerk for Justice George Rose Smith of the Arkansas Supreme Court. He worked as an associate for the Rose Law Firm in Little Rock for two years before forming his own partnership in Helena, Arkansas.

In 1968, Reilly moved to Galveston and went to work for Mills, Shirley, McMicken & Eckel, first as an associate and then as a partner.

Reilly has been in solo practice in Galveston since 1970. He was Board Certified in Residential & Commercial Real Estate Law in 1983. He has been certified in Family Law since 1984. His practice now primarily focuses on family law but over the years he has handled a fair amount of criminal cases, including one capital murder case in which his client avoided the death penalty.

Reilly has been an Associate Judge in family cases since 1996. "Serving as a judge gave me new perspective on the law," says Reilly. "I now evaluate my cases differently. In trial, I realize now how important it is to be succinct and get to the point."

Reilly is one of several lawyers who have applied for appointment to the new County Court No. 3. ★

Patrick Reilly

Practice Areas: Family, real estate, civil litigation

Board Certified: Family Law, Residential & Commercial Real Estate (formerly)

Years in Practice: 38 years

Law School: University of Texas 1962

College: Washington & Lee University, Virginia, 1959

Family: Married to Nina

Two daughters, one grandchild

Lives in: League City

Pet: Golden Retriever, Ridge

Idea of Fun: Gardening, reading, travel

Want to be profiled? If you want to be profiled, call for a bio sheet to fill out and return.

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Trial Reports

Rick Bennett won a "guilty" verdict for the State in a DWI case before Judge C. G. "Trey" Dibrell, III. The jury found against the defendant, who refused a breath test and video sobriety test but who performed poorly on sobriety tests in the field.

Attorney Jack Ewing does not shy away from confrontation. Ewing survived a verbal and near physical confrontation in the 212th only weeks later to lose a face off against his former employer and judicial election opponent, Leonard Cruse, in a jury trial involving a dispute over a \$100,000 fee.

A few weeks ago, deputies in the 212th had to intervene to stop a verbal argument between Ewing and a prosecutor from escalating into fisticuffs.

The Ewing—Cruse suit involves a \$250,000 verdict Ewing won when he was Cruse's associate and their fight over the fee. Visiting Judge Catherine Stone presided over the two days of testimony. Greg Enos (who handled most of the appeal) was called by Ewing's lawyer, Sam Finegan, to

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos is Board Certified in Family Law and Personal Injury Trial Law



Courthouse News

Judge Roy Engelke Moves Up To Higher Court

It is easy to picture Judge Roy Engelke carefully listening to lawyers' arguments, nodding his head and smiling. He was careful and deliberate in his decision-making and always friendly and courteous to those who appeared before him.

Judge Engelke's last decision was to terminate his dialysis and decide on his own when and how he would pass away. Engelke died last week at age 69. A moving memorial service was held in the courthouse that meant so much to him. Lawyers who wish to honor Judge Engelke's memory can send donations to the Roy C. Engelke Scholarship Fund, College of the Mainland, 1200 Amburn Road, Texas City, TX 77591.

New Justice Center Update

Bay Architects has been chosen to be the architects for the jail and justice center.



Judge Roy Engelke practiced law in Galveston County for 28 years and served as Judge of the 212th District Court for eleven years.

A company called Landmark is angling to win the contract to build the new facility and is actively courting local officials and political activists.

Courthouse Workers Still Fear Asbestos and Mold

Judge Norma Venso's courtroom was briefly evacuated after a strange white power came out of the air ducts.

(Continued on page 3)

CALENDAR

Feb. 22	Noon	Galv. County Bar Assoc.	Tremont House - Galveston
Feb. 27	Noon	Galv. County Young Lawyers	Pelican Club - Galveston
March 14	Noon	Family Bar Assoc.	Pelican Club - Galveston
March 16	Noon	Criminal Defense Lawyers	Di'Bella's - Galveston

This Week in Court

306th—Judge Baker out all week, visiting Judge Norman Lee will sit in the 306th

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Trial Reports (continued)

(Continued from page 1)

testify. The jury found that Ewing was entitled to a third of the fee, which must of come as a disappointment to him as he had been offered half by Cruse earlier. A later hearing on attorney fees may take Ewing's award away completely.

What the jury gives a jury can take away. A motorcyclist was found to have suffered \$37,000 in damages in a cycle-car wreck case in Judge Norma Venso's Court. However, the jury found that the Plaintiff had not exercised due diligence in serving the defendant after the statue of limitations had expired. Bill Bonerges represented the defendant.

No one was shocked when a woman was convicted by a jury of DWI in Judge C.G. Dibrell's Court after evidence of a 1.5 intoxilyzer test was introduced. Lonnie Cox was prosecutor and Charles Kingsberry represented the defendant.

A jury in Judge Frank Carmona's Court was transfixed by the injury and courage of the defense lawyer and not the

plaintiff in a premises liability suit against the Hobby Hilton. The plaintiff claimed a closet door fell on her arm. The defense lawyer, Toby Cole of Houston, is paralyzed below the neck and did his work from a wheel chair with the help of an assistant. Velda Faulkner of Houston represented the plaintiff (who lost the case).

The staff of County Court No. 1 swears a jury took less than 60 seconds to return a "Not True" verdict in Judge Mary Nell Crapitto's Court in a juvenile case involving alleged burglary. The Judge and Court Reporter had not even walked 20 feet back to their offices after final arguments before the jury sent work they had a verdict. Felicia Kearney represented the State and Greg Russell represented the juvenile.

Judge Susan Criss granted a directed verdict for a policeman charged with theft by disgruntled customers of a construction company he ran on the side. Larry Drosnes was prosecutor and Margaret Hind-

man represented the cop (with the help of Greg Cagle). Eight of the jurors said they would have voted "not guilty".

Police Officers testified they had to dig a five year old out of a pile of dirty clothes in a home littered with dog feces and uneaten clothes. A jury in Judge Baker's Court heard that sort of testimony before voting to award Sole Managing Conservatorship to the child's grandfather. The grandmother, who denied that her house was really that dirty, had to face the testimony of her own, grown children (who testified against her). Kathleen McCumber represented the victorious grandfather who had moved to Alabama with the child prior to trial in alleged violation of the court orders.

Greg Russell's client was found "not guilty" of an alleged assault at a family barbecue. Visiting Judge Ron Wilson presided over this County Court No. 1 Trial. Val Tizeno was prosecutor.

Judge Wayne Mallia conducted a three day civil jury trial in a dispute over a restaurant

(Continued on page 3)

The Enos Law Firm, P.C.

- Child Custody Disputes
- Complex Property Division Cases
(including those involving businesses or professional practices)
- Injury and Death Cases — including medical and pharmacy negligence

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"Helping families through tough times"



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Trial Reports (continued)

(Continued from page 2)

purchase. The jury found in favor of the plaintiff (represented by Steve Hunt and Jana Hartnett) awarded \$19,878.85 in actual damages, \$10,00 in mental anguish and \$11,157.87 in exemplary damages. Carlton Getty represented the defendant.

A plaintiff was awarded \$11,500 in an auto rear-end case in Judge Venso's Court.

IRS Delays 1099 Regulations for Lawyers

Attorneys in the personal injury field received a deluge of forms 1099 from insurance companies in the last few weeks, even though the Internal Revenue Service has again delayed implementation of regulations that will say exactly when a lawyer must be sent a form 1099.

In 1998, the tax code was amended to require that if a payment is made to a client and a lawyer, a 1099 must be sent to the lawyer for the entire amount unless the payer knows exactly how much the lawyer will receive. Proposed regulations would probably require attorneys to send 1099's on payments to other lawyers from trust accounts. The IRS has pushed back the effective date of its new regulations for the second time and currently it is not known when they will become effective.★

Courthouse News (continued)

(Continued from page 1)

County Judge Jim Yarbrough cannot say that the asbestos on the six and third floors will be removed anytime soon. A plan to abate a few inches of asbestos around the air vents so that the nasty, dirty vents can be finally cleaned is not proving popular with the workers on those floors. Yarbrough is meeting with O. C. Unbehagen, the County Construction Manager, and Morris Architects (who have been hired to oversee the courthouse remodeling) to determine a course of action.

Burwell Goes Prime Time

Probate Judge Gladys Burwell was thrust into the bright T.V. lights when she was assigned to hear a recusal motion in the Anna Nicole Smith case in Houston. Burwell denied the motion to recuse Judge Mike Wood from the high profile case.

Robledo Resigns From 306th

Gloria Robledo unexpectedly resigned as coordinator for the 306th Family District Court. Judge Susan Baker is using temporary workers until a permanent replacement is found. Judge Baker will be out this week and a visiting judge, Judge Norman Lee, will be sitting in her court.

Local Judges Reversed

A Galveston death penalty conviction was reversed by the Court of Criminal Appeals and a complicated parental

termination case kicked back in part by the Houston Court of Appeals.

The rare reversal of a death penalty case hinged on an alleged omission by Elisa Vasquez, who did not seek an instruction that the jury had to find beyond a reasonable doubt that the defendant had committed other alleged acts against his child victim. Vasquez' affidavit in her client's motion for new trial was used against her in her recent campaign for the 405th District Court.

An order to terminate a woman's parental rights in Judge Susan Baker's court was reversed because a temporary order was admitted that contained judicial findings against the mother and a mediator's confidential report. The mother will get a new trial eventually as to her parental rights but the termination of her husband's parental rights was upheld. This ruling by the Houston First Court of Appeals complicates another appeal of the termination of the mother's rights to a child she gave birth to weeks after the first trial. Her rights to the third child were terminated only because her rights had previously been terminated as to her other kids.

Judith Blanchard represented the mother in her successful appeal and was promptly rewarded for her efforts by being appointed to represent the mother at her retrial.★

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Count One: District Clerk Does Not Send Notices of Judgments as Required

CRT - 109 CASE - 199961257
VS.
BE ADVISED ON 01/29/2001 THE
FOLLOWING ACTIVITY OCCURRED.
MEDIATOR FEE AWARDED
GREG ENOS
1100 NASA RD 1 566
HOUSTON TX 77058
CHARLES BAGARESSE
DISTRICT CLERK, HARRIS COUNTY

Harris County sends postcards automatically using its case management computer program.

PATRICIA RITCHIE, COUNTY CLERK
P. O. BOX 2430
GALVESTON, TEXAS 77553
HARRIS COUNTY, TEXAS
JAN 31, 2001
GREG ENOS, ATTY
1100 NASA ROAD ONE, SUITE 566
HOUSTON, TEXAS 77058
THE ENOS LAW FIRM
GREG ENOS, ATTY
1100 NASA ROAD ONE, SUITE 566
HOUSTON, TEXAS 77058
PURSUANT TO THE PROVISIONS OF RULE 306a(3) OF THE TEXAS
RULES OF CIVIL PROCEDURE, YOU ARE HEREBY NOTICED THAT IMMEDIATELY
PRIOR TO THE MAILING OF THIS NOTICE OF JUDGMENT IN ESTATE
COUNTY COURT OF GALVESTON COUNTY, TEXAS, A AGREED FINAL JUDGMENT,
WAS SIGNED AND ENTERED ON JANUARY 31, 2001.
CAUSE NO. 45-716
STYLE
VS.
PATRICIA RITCHIE, COUNTY CLERK
GALVESTON, GALVESTON COUNTY, TEXAS
KAREN LEPTON, DEPUTY

The staff of the County Clerk of Galveston County types letters on WordPerfect when a clerk sees a judgment in a file.

The Galveston County District Clerk does not use either system and does not sent out any notices of civil judgments.

Rule 306a(3) requires the clerk of the court to send a notice of a judgment or appealable order to all parties. Such notices are critical to parties and lawyers who need to know when deadlines to appeal and file motions for new trial begin to run. Unfortunately, lawyers should not expect such a notice on any family case or district court case in Galveston County.

The Galveston County District Clerk does not send notices of judgments and Evelyn Robison is very aware her office is not following the law. Until the Galveston County Bar Association passed a resolution on the issue, no one in county government apparently cared about the issue or was doing anything about it.

Robison says her office's antiquated 1983 case management program cannot automatically generate notices. The company that sold the program is long out of business and the custom programming needed to create an automatic notice function is beyond the capabilities of the county's I.T. department according to Robison. She says she lacks the staff to type notices like the County Clerk does.

Until her office gets a new program or additional staff,

Robinson concedes her office will continue to violate the law and not send notices. She urges attorneys to write County Commissioners in support of more staff and new technology for her office.

Robison is apparently unaware of an effort to allow court coordinators to do the clerk's job for her. In response to the Bar Association's resolution on the issue, the county's office of Justice Administration is exploring whether a new computer program being developed for the court coordinators can generate notices of judgments. The CMS program will draw information on cases from the District Clerk's database but will not be accessible to the District Clerk. The new software for the court coordinators is supposed to be working by April.

A while back, a lawyer complaining of lack of notice of a judgment filed a mandamus against Ms. Robison but the action was dismissed after the parties in the underlying case settled. It would appear that an enterprising attorney could make some money and help improve the system by filing a mandamus or declaratory judgment to force the District Clerk (and the county) to the follow law.

District Clerk Evelyn Robison's post is up for reelection next year.★

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1100 Nasa Road One, Suite 566, Houston 77058

(409) 943-4300 (281) 333-3030 Fax: (281) 333-0300

e-mail: LAWFAX@ENOSLAW.COM

LAW FAX

January 22, 2001

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Trial Reports

Judge Norma Venso levied a two year prison sentence on a man found guilty of failing to register as a sex offender. Jeth Jones was prosecutor. The defendant was pro se but Bob Monks served as standby counsel.

Dominic Merino defended a man found "Not Guilty" of DWI before visiting Judge Ron Wilson. Val Trizeno and Rick Bennett represented the State.

Kathleen McCumber represented a widow who prevailed in a will contest case tried to Probate Judge Gladys Burwell.

A nursing home escaped liability in Judge Susan Criss' court. The deceased plaintiff allegedly fell and broke her hip.

In December, a jury in Judge Frank Carmona's court awarded \$10 million in a medical negligence case involving failure to diagnosis testicular cancer. Houston attorney Mike Mallia represented the plaintiff, who was found to be 5% at fault. Houston attorney Richard Law represented the Texas City physician and clinic.

Greg Enos lives in League City and primarily practices law in Galveston County. Enos is Board Certified in Family Law and Personal Injury Trial Law



Courthouse News

Judge Mallia Starts Work

Judge Wayne Mallia assumed office as Judge of the new 405th District Court. Mallia's Court Coordinator is Becky Hernandez (formerly of the D.A.'s office), his Court Reporter is Gail Jalufka and his Bailiff is Oscar Ekelund. Judge Garner has transferred 311 civil cases, 312 criminal cases and 560 tax cases to the 405th from other courts. Mallia will not preside over any criminal cases that he had involvement with in the District Attorney's office.

New Armed Bailiff in 56th

Deputy Sheriff Rick Percy is the new Bailiff in Judge Norma Venso's 56th District Court. Percy is the first certified peace officer assigned to a court on a full time basis.

Courthouse Work & Plans

The county will show it is really concerned about the health of its employees and the public by going ahead and performing asbestos removal on the 6th floor of the court-

house instead of putting the chore off as was discussed.

Commissioners are considering four tracts near the causeway for the new Justice Center.

Return Courthouse Surveys!

Attorneys and courthouse employees are reminded to return the survey on the design of the new courthouse to Greg Enos by February 6. The survey was mailed or delivered this week to all judges and over 600 attorneys and courthouse workers.

New Coordinator in 212th

Melissa Ewing has replaced Paula Boatright as Court Coordinator for the 212th District Court. Ewing's husband, attorney Jack Ewing, will continue to handle criminal matters in the 212th but his civil cases will be transferred to other courts according to Judge Susan Criss.

For Kids Sake Charge Up

The fee for the mandatory "For Kids' Sake" seminar will increase to \$40 on March 1.

CALENDAR

Jan. 19	Noon	Criminal Defense Lawyers	Di'Bella's - Galveston
Jan. 30	Noon	Galv. County Young Lawyers	Pelican Club - Galveston
Jan. 25	Noon	Galv. County Bar Assoc.	Tremont House - Galveston
Feb. 14	Noon	Family Bar Assoc.	Pelican Club - Galveston

Next Week in Court

10th and 212th: Criminal
122nd, 56th and 405th: Civil Jury Trials

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LAW FAX

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(281) 333-3030 Fax: (281) 333-0300 e-mail: Lawfax@Enoslaw.com

Attorney Profile

Greg Cagle

Greg Cagle

Firm: Cagle & McCumber

303 E. Main

PO Box 729

League City, TX 77573

(281) 332-7630

Fax: (281) 332-7877

e-mail: gcagle@ev1.net

Practice Areas: Criminal, DWI,
representing police officers

Years in Practice: 7

Law School: Thurgood Marshall
1994

College: Sam Houston 1989

Family: Married to Heather

Children: Curtis (4), Collin (2)

Lives in: Friendswood

Idea of Fun: Golfing, working on
the house

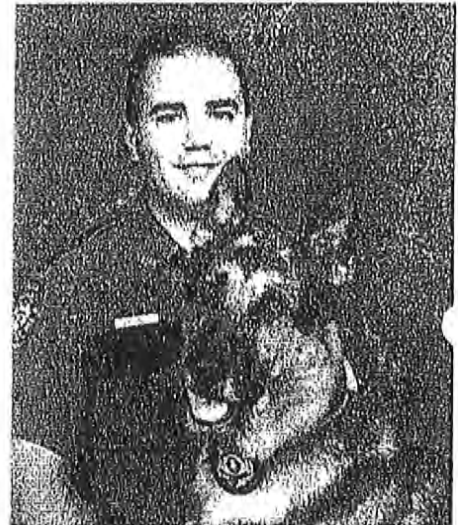
Most attorneys who know Greg Cagle as one of the sharpest criminal lawyers in Galveston County do not know where he learned so much about police procedure. Long before he ever questioned officers in court about why they arrested his clients, Cagle was doing some arresting of his own as a police officer.

Cagle worked for seven years as a policeman in Bellaire and Manvel. Cagle still represents many dozens of police officers a year in his capacity as attorney for the Texas Municipal Police Association.

Cagle practices law in League City with Kathleen McCumber in offices on Main Street in the League City Bank & Trust building.

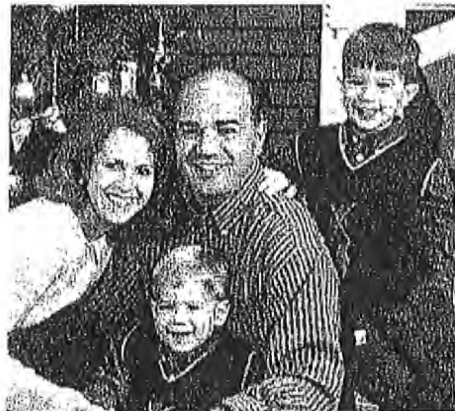
He lives in Friendswood with his wife, Heather (a registered nurse who has taken time off to be at home with the kids) and two young

boys; four year old Curtis and two year old Collin. The Cagle family also includes a Labrador Retriever, Sally.



Back when Greg Cagle wore a badge and had hair, his closest companion was his police dog, Barry (above).

Cagle represents police officers in administrative hearings and sometimes must leave his family (left) in the middle of the night to go to the scenes of police shootings. When not working, Cagle loves to golf and use his handyman skills on home remodeling.



Want to be profiled?

The Attorney Profile will now be a regular feature of every LAW FAX. If you want to be profiled, call for a bio sheet to fill out and return.

The Enos Law Firm, P.C.

"Helping families through tough times"

- Child Custody Disputes
- Divorces — Complex Property Division Cases
(including those involving businesses or professional practices)
- Injury and Death Cases — including medical and pharmacy negligence



Greg Enos is Board Certified in Family Law and Personal Injury Trial Law
by the Texas Board of Legal Specialization.

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LAW FAX

September 25, 2000

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

43 days until the Nov. 7 Election!

Courthouse Count Down What You Can Do To Help The New Justice Center Bond Issue

Most local lawyers do not know that part of the November 7 ballot will be a bond issue that will, if passed, allow Galveston County to build a new courthouse and jail. If attorneys largely do not know about this bond issue, then it is a fair bet that virtually none of the general public knows about this important vote.

It is vital that we educate the public about the need for a new jail and courthouse in the few weeks we have left before the election. County Judge Jim Yarbrough and some of his fellow commissioners are speaking about the bond issues to civic groups but nothing else is being done to help pass the justice center bonds.

This is what every lawyer can and should do to help:

1. Contribute \$300 (or as much as possible) to help us campaign

(Continued on page 8)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



A Once In a Generation Chance To Improve Justice

Galveston County voters on November 7 will be asked to approve Bond Issue #2 that will authorize \$93.6 million in bonds to build a new jail and county courthouse (collectively called, "the new Justice Center"). This is a once in a generation chance to improve the administration of justice in Galveston County.

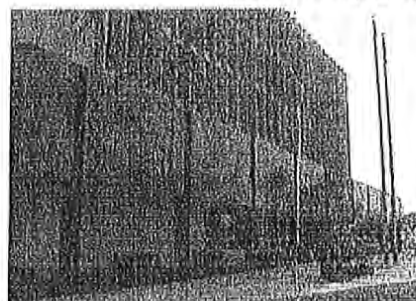
The arguments in favor of building a new Justice Center include:

-The current jail already houses 192 more prisoners than state regulations permit. By the year 2010, it is projected that Galveston County will have to house 1235 prisoners but our current jail can only hold 688. It now looks like State Jails will run out of room as early as 2004 and even more prisoners will have to be shifted to county jails. It would cost the county over \$4 million a year if it has to pay to house its excess prisoners

at other facilities and transport them.

-The plan is to design a jail

(Continued on page 3)



Galveston County's 30 year old courthouse is riddled with asbestos and does not have room for our current courts, much less room for more.

Courthouse News **Filing Fees Increase \$2**

Filing fees in all civil and family cases increased by \$2 effective September 11, 2000. County Commissioners on September 7 adopted an order increasing the "appellate judicial fee" from \$3 to \$5 effective September 11. This fee is used to

(Continued on page 4)

CALENDAR

Sept. 26	Noon	Galv. Co. Young Lawyers	Pelican Club - Galveston
Sept. 28	Noon	Galv. County Bar Assoc.	Tremont House - Galveston
County Judge Jim Yarbrough to speak about new Justice Center Bond Issue			
Sept. 29	Noon	Mainland Bar Assoc.	Union Planter's Bank - League City
Oct. 6	Noon	Mediation Assoc.	DiBellas - Galveston
Oct. 4	Noon	Family Bar Assoc.	Pelican Club - Galveston
Oct. 20	Noon	Criminal Defense Lawyers	DiBella's - Galveston
Nov. 7	Tuesday	ELECTION DAY—VOTE FOR THE JUSTICE CENTER BONDS!	

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Trial Reports

Note: I took a break from the LAW FAX this summer to spend time with my family and on making money as a lawyer. Many interesting trial reports were missed during May, June and July. I apologize to the winners of those trials for not being able to report them all. Greg Enos.

A jury in Judge Susan Baker's court voted unanimously to terminate the parental rights of a woman whose two day old baby was taken from her by CPS at UTMB because another jury a few months earlier had terminated her rights to two other children. In the earlier case, the parental rights of the mother and father were terminated as to two older kids because the father had badly broken one child's leg. The mother was far along in her pregnancy and could only testify by videotape in the first case. CPS waited until she went to UTMB to deliver the third child and took custody of her immediately. Judge Baker proceeded with the second termination trial even though the first termination judgment is still being appealed because of a one year deadline to resolve CPS cases or return the child. The father of all these children is serving a prison sentence in a Coast Guard brig and his rights were also terminated as to the third child. Marie Trefethern repre-

sented CPS, Diane Clark was the ad litem, Marybeth Nelson represented the mother and Dominic Merino represented the father. At this most recent trial, Judge Baker allowed the D.A. to call fact and expert witnesses even though the mother's requests for disclosure had never been answered. The DA had provided a bare bones "witness list" and claimed there was an agreement not to answer the disclosure requests (albeit, an unsigned agreement). One seemingly easy to answer question that will be faced in the appeal of this case is whether the plain wording of the discovery rules which say

you cannot call witnesses and especially experts if you did not properly disclose them applies even to C.P.S. and the D.A.'s attorneys.

Clear Lake attorneys Greg Enos and James Healey squared off in a custody case before Houston Judge Bonnie Hellums. The father, represented by Enos, was awarded primary custody of the four and five year olds. The mother accused the father of not even knowing how to cook, despite the fact he cooks all the time and his favorite television show is Emeril Live! Enos had his client cook a chicken spaghetti casserole and bring it to

(Continued on page 10)

Local Bar Associations

Galveston County Bar Association

Meets fourth Thursday of each month at Tremont in Galveston (meets twice a year on the mainland). Dues are \$100 per year.
President: Janet Rushing

Galveston County Young Lawyers Association

Meets last Tuesday of each month at Pelican Club in Galveston
President: Lyle Courtney

Criminal Defense Attorneys

Meets third Friday of each month at DiBella's in Galveston
Dues: \$25 per year. President: Rebecca Murphy

Galveston County Family Bar Association

Meets second Wednesday of each month at Pelican Club
Dues: \$40 per year. President: Rebecca Murphy

Mainland Bar Association

Meets last Friday of each month at Union Planters Bank in League City. Dues: \$60 per year or \$10 per meeting.
President: Elaine Michael

Mediation Assoc. of Galveston County

Meets 4 times a year
President: Jeff Kilgore

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A Once In a Generation Chance To Improve Justice (continued)

(Continued from page 1)

with 2500 beds but build 1250 beds at first. This will allow room for growth well into the mid-century.

—If the county builds itself a new jail, it will probably be able to lease the current jail to a private company and bring in almost \$2 million a year. There are now several for-profit private jail companies across the country. If we do

not build a new jail, we will have to be paying one of these companies to house our inmates for us.

—The current courthouse is too small even to properly house the current number of courts as shown by the loss of the snack bar and the shrinking of the law library to make room for a ridiculously small courtroom for the 405th. There is no room to add courts as population growth will require in the next few years.

—The current courthouse does not have room for probation hearings, family law hearings before associate judges or the Attorney General's child support hearings. There is no place for jurors and witnesses to eat or sit and there are not enough meeting rooms for attorneys and their clients.

—A new facility will allow the county to keep prisoners out of the halls of the courthouse and away from the public.

—A new courthouse could, for example, provide for remote video facilities so that abused children could testify without having to enter a big, scary courtroom.

—Space for additional courtrooms will allow criminal cases to be handled faster and generate more in fine revenue for the county. We already need another county court to handle

misdemeanor cases and there is simply no place to put any more courts.

—People who are civic minded enough to show up for jury duty, courthouse employees and even lawyers all deserve a parking garage with enough room for all cars, a covered walkway to the courthouse to protect them from the weather and a decent place in the courthouse to eat lunch or buy a magazine.

—A new facility would accommodate the disabled which the current courthouse does not.

—A new courthouse could provide for video conferencing so that residents and attorneys in the north end of the county and from other areas could "attend court" without having to drive to the courthouse.

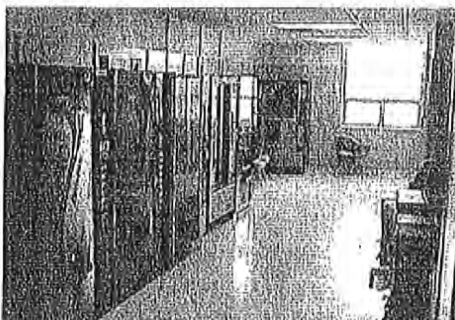
—A new courthouse could move people faster with escalators and more elevators than the two unreliable elevators our old courthouse has.

—The courthouse must remain in Galveston, the county seat, according to the Texas Constitution. Commissioners are currently looking at two sites: the old Galvez mall (as I have long suggested) and 60 acres on Broadway at 59th street behind the new post office and Race Trac gas station. Locating the new court-

(Continued on page 5)



Ramzey Zein-Eldin may be one of the last to have used the fourth floor snack bar. Vending machines have been put out into the hall to make room for the law library on the fourth floor.



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Courthouse News (continued)

(Continued from page 1)

run the courts of appeals in Houston. A schedule of District Clerk fees is attached to this newsletter. New County Clerk fees in civil cases will run in the next LAW FAX.

Courthouse Remodeling

The courthouse snack bar is being gobbled up this month by the law library, which had to be moved to make room for the new 405th District Court on the 6th floor. The vending machines from the snack bar have been moved to the hall outside the elevators on the fourth floor. There is now no place for witnesses or jurors to sit at a table and each lunch. Law librarian Jennifer Overbeck is overseeing the move to the fourth floor into a much smaller space. Most of the least used volumes will be placed in storage on the second floor.

Until recently, it appeared that County Court No. 2 would move to the new courtroom being built on the sixth floor, but county commissioners refused to change the current design and Judge Dibrell opted to stay where he is even though his courtroom does not have a jury room. The plan for the new courtroom places a single restroom in the middle of the judge's offices to be

shared by jurors, the judge and his staff. This means that a single juror with a stomach bug could make the entire chambers area an unpleasant place to work.

Legal Secretary Conference

The Legal Secretaries of Galveston County will be hosting the annual meeting of the Legal Secretaries International, Inc. at the Victorian Condo Hotel and Conference Center On October 13 - 15. Contact Teresa Williams at Greer, Herz & Adams (409-797-3206) for more information.

Courthouse Meeting Rooms

The courthouse is at least gaining two additional meeting rooms for lawyers to use on the fourth floor because the Justice Administration Department (Bonnie Quiroga and Brenda Beall) moved to new offices on the second floor.

County Court Battle Resolved

The dispute between presiding County Court Judge C.G. "Trey" Dibrell, III and the state's presiding probate judge over who gets to decide how many civil cases are assigned to the Galveston County Probate Court has effectively been decided in favor of Judge Guy Herman of Austin. The Texas Supreme Court

(Continued on page 9)

Extraordinarily Useful Internet Sites

An law office which does not regularly use the Internet in the year 2000 is about as backwards as a 1930's law office without a phone or phone directory. Here are a few more useful Internet sites lawyers and their staffs should know about:

- Get current schedules and buy tickets for Southwest Airlines:
<http://www.iflyswa.com/>
- Access Harris County civil docket information (hearings and trial settings):
www.harris.tx.us/civil/courts/docket_setting_inquiry.htm
- Check on your State Bar of Texas CLE credit status (you will need to call the State Bar membership department at 800-204-2222x1383 to get a PIN to access your CLE records over the Internet):
www.texasbar.com/attyinfo/mcle/login.asp
- The single best listing of law related sites anywhere thanks to Houston attorney Howard Nations
www.howardnations.com



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A Once In a Generation Chance To Improve Justice (continued)

(Continued from page 3)

house closer to the causeway would shorten the drive for jurors, witnesses and attorneys from the mainland.

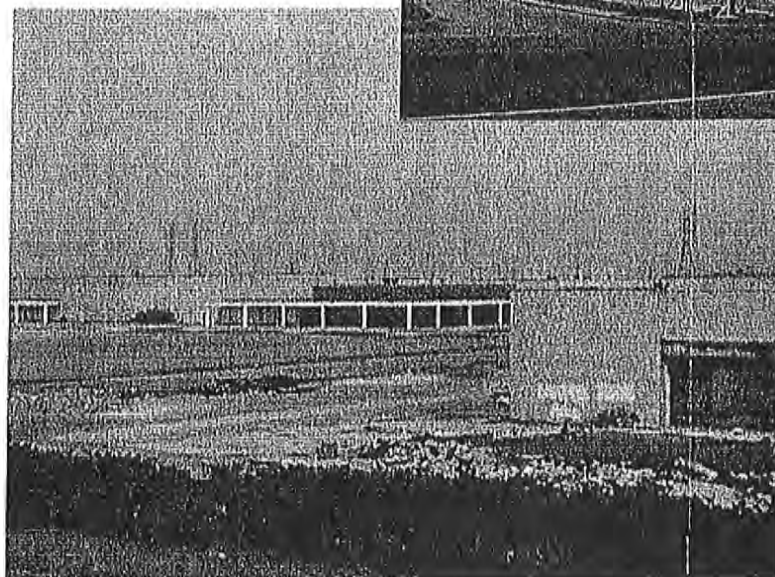
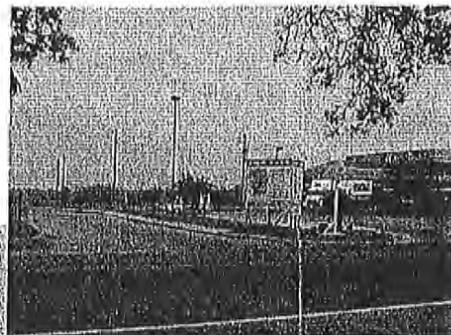
—Tax payers would actually save money by building the new Justice Center. The plan is to move all courts, the district and county clerks, the district attorney and the probation department to the new courthouse. The old courthouse would be remodeled (and all that deadly asbestos would be removed). All other county administrative offices on the island would be moved to the old courthouse. This would save at least \$800,000 a year in rent that is currently being paid on other office buildings. Leasing the old jail to a private company would bring in another \$2 million. The new county jail would include a shared jail facility for the City of Galveston, which would kick in \$270,000 a year. The county would thus save more than the projected \$1.5 million annual cost of operating the

new Justice Center.

—The bonds for the new Justice Center would at most raise county property taxes two cents per hundred dollar valuation and that sort of increase would only be felt during a few of the years that the bonds are being paid for. That would mean that the owner of a \$175,000 house might at most pay an extra \$35 per year in property taxes. If the

(Continued on page 6)

The sites being considered for the new Justice Center are at 59th street on Broadway behind the new post office and Race Trac gas station (top) and at the old Galvez Mall (below).



The Enos Law Firm, P.C. helps parents and families with cases involving:

- Child Custody Disputes
- Complex Property Division Cases
(including those involving businesses or professional practices)



(281) 333-3030 (409) 943-4300

Greg Enos is certified in personal injury trial law by the Texas Board of Legal Specialization. Not certified in family law. Other attorneys not board certified.

September 25, 2000

LAW FAX

Page 5

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A Once In a Generation Chance To Improve Justice (continued)

(Continued from page 5)

county waits a few years to build a new jail (as we absolutely must) and a new courthouse (as we inevitably will have to do), the annual cost to property owners and tax payers will be much greater.

—Attorneys and witnesses and jurors would all benefit from using modern courtrooms that have all of the modern electronic gizmos built. Just like the new criminal courts in Houston, TV monitors would already hang from the ceilings and have built-in wiring to video machines. Courtrooms would be wired for "real time" court reporting.

—The security at our current courthouse is simply not adequate and does not protect the jury assembly room or the annex which houses the DA's family and misdemeanor sections and the courtrooms where associate judges sit in family cases and the AG holds its child support hearings.

—The bond issue will also fund building a modern holding facility for prisoners on the mainland that all cities will use because a new emergency management building is to be built in League City. The National Weather Service, the Texas Department of Transportation, the regional 911 ser-

vice and Galveston County Emergency Management have all committed to sharing a new building on FM 646. The current county building on 646 will be remodeled into a holding facility and Sheriff's substation.

In short, passage of the new Justice Center bonds is absolutely necessary because of jail overcrowding. It will save tax dollars in the long run, it will greatly improve law and order work throughout the county and it will allow our justice system to handle the county's growth for the next 50 - 70 years. ☆

Law Firm and Attorney Announcements

Michael Miller, once a popular prosecutor in the Galveston County District Attorney's Office, has returned. Mike's new office is at 2127 Broadway, Galveston. His phone number is 409-763-2454.

Mabry, Herbeck & Chilton, L.L.P. and James C. Daniels have formed Lawyers Title of Galveston County to provide title insurance services.

Jonathan Harris, who formerly practiced family law with The Enos Law Firm, is now an associate at the Houston office of Orgain, Bell & Tucker

working primarily in the field of medical malpractice defense.

Marybeth Nelson has moved her offices to 1100 Nasa Road One, Ste 566, Houston, Texas 77058; Phone: 281-333-8360; Fax: 281-333-0300.

Kathleen McCumber gave birth to a 7 pound, 5 ounce girl, Hadley Reagan Lowery, on July 10 by c-section. McCumber is now back at work and can easily be forced to show a photo of her newest child.

Dane Johnson is leaving the District Attorney's misde-

meanor office to go to work with a criminal defense firm in Houston. Dane was tough but fair and was always very accessible and friendly. He will be missed.

The Legal Assistants Division of the State Bar of Texas (Districts 1 and 14) will hold its second annual general practice institute on Friday, October 27, 2000 at South Texas College of Law. Contact Carolyn Goff at Mills, Shirley, Eckel & Bassett (409-763-2341) for more information. ☆

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Attorney Profile

Lawrence Tylka



Galveston attorney Larry Tylka represents claimants in injury and death cases with special emphasis on claims of railroad workers and sailors.

An Attorney Who Puts Family First

Galveston attorney Lawrence M. Tylka has achieved some large injury settlements in his 16 years of practicing law, but his best quality as a lawyer is that his family always come first, no matter what. When each of us hits our 70's or 80's, we may still tell war stories of trial but it will be the time we spent with our families that we cherish the most (or the times we worked instead of coming home to our families that we will regret the most).

Larry Tylka's conscience will be clear when he hits the retirement home (where he will still probably be hustling injury cases) because Larry is truly one of those rarities in our profession who can excel at law and still have loads of time for his wife and children.

Larry's commitment to his family is shown by the fact that he works every day with his wife of 18 years, Deborah, at The Tylka Law Center, P.C. in Galveston. Then there is the fact that Larry and Debbie spend so

much time with their two children, Laura (15) and Tyler (13) at their home or church in League City or in the kids' many sports activities.

Tylka, who turned 42 last Saturday, grew up in a small town

outside of St. Louis and graduated from the University of Missouri with degrees in English and psychology. Larry married his high school sweetheart, Debbie, in 1982. Tylka then went to St. Mary's Law School in San Antonio and got his first law job at McLeod, Alexander, Powel & Appfel in Galveston. Larry worked as an insurance defense lawyer there for three years before switching to the plaintiff's side

and a job with Arthur Schechter. Larry worked in and/or managed Schechter's Galveston office until 1998 when he went solo and started The Tylka Law Center, P.C.

Tylka's office is in the historic Heidenheimer Marine Building

(Continued on page 8)

Lawrence "Larry" Tylka

Firm:

The Tylka Law Center, P.C.
305 21st Street, Suite 140
Galveston, Texas 77550
(409) 762-0066
Fax: (409) 762-7333
Toll free: 877-762-0066

Practice Areas: Injury and death cases, maritime & railroad claims

Years in Practice: 16 years

Law School: St. Mary's 1994.

College: Univ. of Missouri 1990.

Family: Married to Deborah

Kids: Laura 15, Tyler 13,

one dog, three cats

Lives in: League City

Idea of Fun: Coaching youth base ball, Teaching religion, Men's softball

Want to be profiled?

The Attorney Profile will now be a regular feature of every LAW FAX. If you want to be profiled, call for a bio sheet to fill out and return.

September 25, 2000

LAW FAX

Page 7

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Attorney Profile (continued)

Lawrence Tylka

(Continued from page 7)

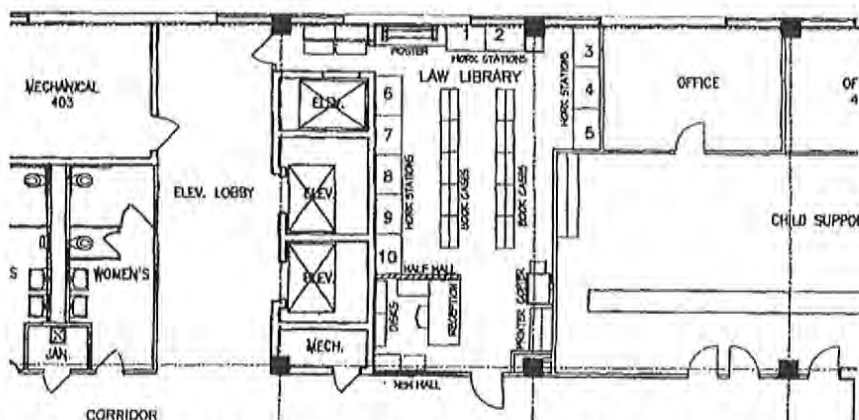
down the street from the courthouse. His practice is dedicated exclusively to injury and death claims, ranging from car wreck cases to maritime and railroad accidents. Tylka has a lot of experience representing injured seamen and his work had sometimes required him to travel to exotic locales. Once he was in Honduras for a deposition when shooting and an attempted coup broke out in the capital. Larry and 36 other Americans were hustled to what looked like a secret CIA base before they were flown out of the country.

Larry is well known as a successful personal injury attorney, but one of his most memorable trials involved Larry as court appointed counsel for a man charged with attempted capital murder for al-

legedly trying to burn his wife up in her mobile home. Larry's client turned down an offer of 49½ years in prison. Larry lost over 20 pounds during the two week trial but his client did not lose as he was acquitted.

Larry is very involved in his kids' many sports and church activities. He coaches his son's baseball team and is nervously preparing for his daughter to get her driver's license. Larry teaches religion classes at St. Mary's Catholic Church in League City and he plays in a men's softball league on Thursdays.

Larry's amazingly cheerful demeanor and his emphasis on family and community while still succeeding in the law should be a positive example for all of us. ☆



The new, compact law library on the fourth floor of the courthouse will look something like this.

Editorial

What You Can Do To Help...

(Continued from page 1)

for the bond issue in the little time we have left. Send your check payable to, "Citizens for A New Jail & Justice Center" and mail it to 2206 Fairwater Park Dr., League City, Texas 77573. This special purpose PAC is bipartisan and will not be involved in any other bond issue or political race.

Almost all of our judges support the bond issue and they can ethically help educate the voters and urge them to approve the bonds but they cannot directly solicit campaign funds. We need you to give money and urge others to follow your example. Starting next week, the LAW Fax will list contributors and amounts of their donations to show who is actively supporting this effort.

2. Agree to send a letter to at least 100 of your clients, friends and neighbors before election day urging them to support the bond issue. We will provide a two page letter for you to use.

3. Authorize us to use your name as part of newspaper advertisements we will run in the weeks before the election.

4. Volunteer to help our campaign, which is so far basically a five person operation. Call, fax or e-mail The Enos Law Firm and we will let you know when the next campaign meeting is.

All lawyers who receive this LAW FAX can expect a call from me in the next few days asking for your support and your contribution. ☆

LAW FAX

Published since 1995 by Greg Enos

The Enos Law Firm, P.C., 1100 Nasa Road One, Suite 566, Houston, Texas 77058
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Courthouse News (continued)

(Continued from page 4)

and the Houston Court of Appeals have both denied applications for writ of mandamus filed by the Galveston County Legal Department for Judge Dibrell. Dibrell had challenged Judge Herman's order earlier this year directing County Clerk Patricia Ritchie to assign fewer new civil cases to Judge Burwell's court.

Stevens v. World

A recent edition of the LAW FAX reported a battle between attorney Mark Stevens and federal judge Sam Kent over a suit against the Moody Foundation for allegedly firing a woman after tests supposedly showed cervical Dysplasia. Kent recused himself and the case was transferred to Judge Lynn Hughes in Houston. Stevens may well wish he had stayed to face Kent's wrath, as Judge Hughes dismissed the case and levied a judgment for attorneys fees and costs of \$37,730.49 against Stevens and his client and ordered an award of \$35,230.49 in Rule 11 sanctions against Stevens. Stevens has already filed an appeal of both awards. Stevens was not at the sanctions hearing before Judge Hughes because Stevens claims he did not receive notice of the hearing. At that hearing, the

following exchange occurred between Judge Hughes and Andrew Mytelka, the Moody Foundation lawyer:

The Court: Can you help me with the disciplinary complaint against Judge Kent?

Mr. Mytelka: I cannot, your Honor, because I was not aware of it until I read about it in a local fax, "Legal Rag," that goes around Galveston. I didn't even know he had filed it.

The Court: Is that the daily news?

Mr. Mytelka: No. That is a different one. In my opinion it would be, but it's something called "The Law Facts" put out by the law office of Greg Ginose [Enos?].

After further discussion, Mytelka told the judge that Stevens is not very fond of the Moodys and, "believes there's a lot of Mafia conspiracies are going on down there."

The following exchange then occurred:

The Court: They [the Moodys] could have engaged in Mafia conspiracies, all without touching [the plaintiff's] life. And my problem is not am I going to put the Moodys individually up to canonization, but whether there is a factual basis for a legally recognized claim in federal court involving [the plaintiff] and the Moody

Foundation itself.

Mr. Mytelka: And, your Honor, we've made our request [for sanctions] under three separate basis.

The Court: I've got one better. He [Stevens] sued them a couple of times, I've put a couple of them in jail.

After talking further about the past legal problems of the Moodys, Judge Hughes said he would decide based on the law and the facts and that his court was not "Geraldo" or "60 Minutes."

Judge Hughes stated: *It is impossible to characterize Steven's behavior as poor performance. Lawyers make mistakes. But in this case he willfully persisted after the objective facts contradicted his main theme, he also willfully persisted in injecting what I will call the character offense of simply attacking the Moodys...☆*

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Trial Reports (continued)

(Continued from page 2)

court to prove his abilities (the casserole was not marked or tendered as an exhibit).

Judge Frank Carmona presided over a long, complicated whistle blower suit against U.T.M.B. Deliberations took 25 hours and included only eleven jurors because one juror simply did not show up on the day of final arguments. Counsel agreed to proceed with one less juror, U.T.M.B. now probably wishes it had asked for a mistrial since U.T.M.B. and a former administrator were found liable for \$810,000 in damages to one of the nurse plaintiffs. Testimony revealed the dark underside of U.T.M.B. that is well known to its staff---frequent poor treatment of patients and vicious administrative efforts to cover-up and punish those truly concerned with patient care. In a separate hearing, Judge Carmona decided not to hold the missing juror in contempt. He said he had to go to Houston to help with an unnamed cousin's unspecified medical emergency. That sounds like a good excuse to try next time I forget a hearing or status conference.

Alton Todd is having a very busy but successful year. He is helping his wife recover from a broken leg, moving his

offices from Alvin to Friendswood and winning one huge verdict after another. In June, Todd convinced a Brazoria County jury to award \$1 million to a man badly electrocuted by a downed power line that had been reported to the utility company three hours before. The plaintiff, who suffered amputation of his left hand and three toes, was accused unsuccessfully by the defense of trying to steal the downed wire. Fred Bradford of McLeod, Alexander, Powell & Apffel represented the defendant.

James Nebout's client was rear-ended in heavy traffic on the causeway in 1996 and then was left for road kill by Allstate in 2000. A jury in Judge Frank Carmona's Court found no negligence by either party. The plaintiff claimed a herniated lumbar disc and \$10,500 in medical bills.

A jury found a DWI defendant not guilty despite a .13 breath test. Anthony Griffin was defense counsel and Kendrick Cesar was prosecutor. Visiting Judge Henry Dalehite presided in this County Court No. 1 case.

In August, a jury in Judge Mary Nell Crapittio's court found a defendant accused of DWI not guilty. There was no breath test and the video had

no sound. Defense counsel was John Ellisor and the prosecutor was Kendrick Cesar. In July, another jury in County Court No. 1 found a DWI defendant not guilty in another case with no breath test and a less than perfect video.

A drug possession trial in front of visiting Judge Henry Dalehite in August ended in a mistrial after it was learned that one of the jurors actually lived in Harris County. Prosecutor Mo Ibrahim and defense lawyer Greg Russell reached a plea agreement after the mistrial.

Rebecca Murphy's client was found not guilty of injury to a child in Judge David Garner's court in August. Joe Maida represented the state. ☆

Galveston County Bar Association

Monthly Meeting

Thursday
Sept. 28 — noon
Tremont Hotel
Galveston

*County Judge Jim
Yarbrough will explain
the new Justice Center
Bond issue*

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Appellate Cases

Criminal defense attorneys can only be sued for malpractice by innocent clients. A person convicted of a crime cannot pursue a malpractice claim against his attorney unless he has established his innocence by direct appeal, post-conviction relief, or other legal proceedings, even where the malpractice plaintiff plead "not guilty" and can show his attorney was negligent. Owens v. Harmon, ___ S.W.3d ___ (Tex. App. - Texarkana 9/6/2000).

A party who lacks standing to file a suit affecting the Parent Child Relationship can intervene in a pending SAPCR if they have had a substantial past contact with the child. In the interest of M.T. and K.T., ___ S.W. 3d ___ (Tex. App.-Beaumont 08-03-2000).

Trudy Davis, former CPS investigator and supervisor and now head of the Advocacy Center for Children is a great champion for abused and neglected children but she does not qualify as an expert on "Child Abuse Accommodation Syndrome". The First Court of Appeals reversed a life sentence for aggravated sexual assault of a child because visiting Judge I. Allen Lerner allowed Davis to describe the theories of a controversial pediatric psychiatrist. The opinion provides lengthy quotes from Robert Monk's cross-

examination of Davis and provides a great example of how to attack the reliability of proffered expert testimony. Perez v. State, ___ S.W. 3d ___ (Tex. App.-Houston [1st Dist] 07-27-00).

The Nevada Supreme Court in June 2000 ruled that a state law prohibiting custodial parents from moving to another state with their child is unconstitutional. The law prohibited the parent with primary custody from moving out of state with the child unless the other parent agreed or the court gave its permission. The Supreme Court said the law violates the parents' rights to equal protection since the non-custodial parent was free to move and violated the citizens' right to free travel from state to state.

An arbitration clause in an attorney-client contract was ruled invalid because the Texas Arbitration Act does not allow enforcement of arbitration clauses in "personal injury" cases. The Corpus Christi Court of Appeals ruled that a legal malpractice case arising from alleged mishandling of a medical malpractice case is a personal injury suit. The Court also noted that the contract was not signed by the attorney. In Re Pamela Godt, ___ S.W.3d ___ (Tex. App. - Corpus Christi 8/24/2000). Ironically, the same lawyer be-

(Continued on page 12)

Next Issue: Who has donated to the campaign to pass the New Justice Center Bonds?

Name

Amount

Send your check payable to, "Citizens for A New Jail & Justice Center" and mail it to 2206 Fairwater Park Dr., League City, Texas 77573.

This advertisement donated by Greg Enos.

Appellate Cases (continued)

(Continued from page 11)

ing sued did convince the San Antonio Court of Appeals earlier this year to enforce the very same arbitration clause in another malpractice case filed against him. Henry v. Gonzalez, __ S.W.3d __ (Tex. App. San Antonio 1/26/2000). You can expect the Texas Supreme Court to probably decide this important issue.

If you are involved in a dispute over an oral or written agreement between counsel that may or may not comply with Rule 11, you need to review Ebner v. First State Bank of Smithville, __ S.W.3d __ (Tex. App. - Austin 9/13/2000).

So many attorneys and even judges do not fully understand the hearsay rule and its many exceptions. Dorsey v. State, __ S.W.3d __ (Tex. App. - Beaumont 9/6/2000) provides many examples of what is and is not admissible hearsay. The court held that it was not error in a murder case to admit hearsay statements supposedly made by the victim that she was seeking divorce or was scared of the defendant but it was error to allow a witness to say the victim said to look to the defendant if anything strange happened to her. A statement of belief is not an exception to hearsay but a statement of then existing

mental state or a future plan relevant to the issues at trial are admissible. In this case, the hearsay statements erroneously admitted were held to be so prejudicial as to require reversal in a case that relied 100% on circumstantial evidence.

"Slip and fall" cases are notoriously hard to win because the plaintiff must prove that the cause of the fall was an unreasonably dangerous condition and that the defendant knew or should have known of the condition. When a customer falls in a puddle of clear liquid on aisle 4, the embar-

rassed customer has no way of knowing how long the liquid had been there. If it had been spilled just minutes before, logically the store could not be expected to have known of it. A recent case involved a lot of testimony about whether a single squished jalapeno on the floor of a Wal-Mart was old or fresh. In this case, the court of appeals ruled there was sufficient evidence to support a \$75,000 jury award for the plaintiff. Wal-Mart Stores, Inc. v. Garcia, __ S.W.3d __ (Tex. App. - San Antonio 8/16/2000).

Wal-Mart still wins more cases than it loses and it recently scored a huge victory for all Texas pharmacists. The Texas Supreme Court ruled in August that a pharmacist does not have a duty to warn a customer of common severe side effects or adverse effects or interactions of drugs except in special circumstances, such as when the pharmacist knows of some specific reason the patient should not take that specific medicine. The injured patient must apparently sue the doctor who prescribed the medicine and possibly the drug manufacturer. Morgan v. Wal-Mart Stores, Inc., __ S.W.3d __ (Tex. 8/10/2000). ☆

Injury & Death Claims

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Texas Board of Legal
Specialization*

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LAW FAX

May 8, 2000

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Editorial

Let's Disagree as Friends

Note: This editorial was written before the April 11 Democratic runoff election.

One good part of being a trial lawyer is our ability to fight it out in court but still be friends with opposing counsel. The public often does not understand how lawyers can be zealous advocates in court and then be best buddies with the opposition once the trial or hearing is over. We do not take it personally when the opposing attorney does not agree with us or when she goes all out arguing against our client. We also usually do not hold grudges against witnesses and supporters of the other side.

I can only wish politics was as genteel as the courtroom. The race for the 405th District Court has generated more anger, more bitterness and more hurt feelings than any recent election I can recall. The two runoff candidates, Wayne Mallia and Elisa Vasquez, have behaved civilly. It has been their supporters, friends and enemies who have created all of the heat.

Mallia and Vasquez did not

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

Spivey Elected Bar President

Broadus Spivey of Austin won the election to be President of the State Bar of Texas.

Plans Proceed For New Courthouse and Jail Vote

It appears almost certain that county voters will be asked to approve a \$70 - \$80 million bond issue to build a new justice center for the county. The November ballot will likely include three separate bond issues for construction of the new courthouse and jail, road improvements throughout the county, and the Grand Parkway project.

Meanwhile, planning continues on how to make room in the current courthouse for the new 405th District Court, which is supposed to open its doors in January of next year.

The county closed on its purchase of the old Texas Workforce Commission building a block from the current courthouse. It is pretty much agreed that the two Justice of

(Continued on page 3)



Mallia Is Outspent But Still Wins. Wayne Mallia proved would-be political pundits wrong and won the Democratic nomination for the 405th District Court despite being significantly outspent by his primary run-off opponent Elisa Vasquez. The final vote total in the April 11 runoff was:

Mallia	4,056	60.9%
Vasquez	2,604	39.1%

Mallia will face Republican John Ellisor in November to decide who will be the first judge of the 405th District Court.

Ed Wells Replaced by Bonnie Quiroga

Bonnie Quiroga was officially hired to replace Ed Wells as Director of Justice Administration.

CALENDAR

May 10	noon	Galveston County Family Bar, Pelican Club, Galveston
May 19	noon	Galveston County Criminal Defense Lawyers, Dibella's in Galveston
May 25	noon	Galveston County Bar Association, Tremont House, Galveston
May 29		Courthouse Holiday, Memorial Day
May 30	noon	Galveston County Young Lawyers, Pelican Club, Galveston
June 7	noon	Bay Area Legal Assistants, Red Lobster on Bay Area Blvd.
July 7	11:45	Mediation Association, La Marque Ramada Inn

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Editorial (continued)

(Continued from page 1)

publically attack each other and both actually declined chances to make truthful, legitimate comparisons with their opponents. Mallia's advertisements trumpeted his career as a prosecutor but did not point out that Vasquez has in contrast worked defending alleged murderers and rapists. Vasquez, on the other hand, emphasized her experience but did not starkly point out Mallia's near total lack of experience in civil cases which will be half of the 405th's docket. In other words, the candidates were not only not throwing mud at each other, they were passing up bona fide opportunities to argue why their opponents should not be elected.

The restraint and dignity shown by both candidates was not always shared by their supporters. Many of the campaign volunteers in this race seemed to spend more time bad-mouthing the other candidate's supporters than they did actually trying to get their person elected judge. Indeed, bitter feuds between activists in both camps were a dark undercurrent throughout the campaign. Some of the campaign workers took time from their own personal fights to also say really nasty things about the opposing candidates. It was so unpleasant, that it makes one wonder

why anyone would want to run for political office.

Lawyers should be free to run for office and attorneys should be able to support them without all of the nastiness. I, for example, have vigorously supported Vasquez, but that has been easy to do without bad-mouthing Mallia.

If Mallia wins, I cannot imagine him holding a grudge against me because I supported a long-time friend. Likewise, if Vasquez wins,

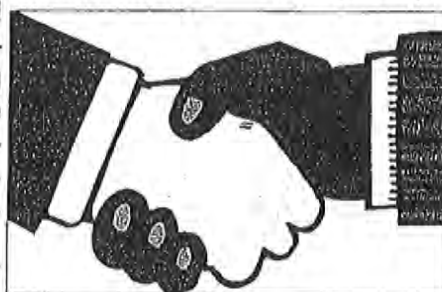
I sincerely doubt she will hold grudges against the many good folks who played fair and worked for Mallia. However, I fear both candidates will naturally remain bitter toward those who sunk to personal attacks and spread vicious lies. In fact, the loser in this race is more likely to bear ill will longer since it is far easier to be magnanimous in victory.

On the original primary day, I spent a very pleasant morning at a voting place in Texas

City talking to Anne Darring, who was out campaigning for Jack Ewing. We were able to support our respective candidates in a positive way and still get along. That night at the courthouse, I was there in a red Vasquez t-shirt watching the returns come in and a smiling Wayne Mallia shook

my hand and congratulated me on how, "my team" had done. That is the way it is supposed to be..

It is hard enough to get good, kind, qualified people to run for public office without all of the mean spirited campaigning. Those of us who are brave enough not to straddle the fence in judicial elections should do our best to promote a positive, truthful and friendly discussion of the candidates' qualifications and the issues. We can disagree in a friendly, polite way and once the election is over, we can forget and forgive our differences. ☆



LEGAL ASSISTANT JOB BANK

The Bay Area Legal Assistants offers a free job bank for qualified legal assistants. Call Lorraine Beaham at 281-334-9255 for a list of legal assistants seeking employment.

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Courthouse News (continued)

(Continued from page 1)

the Peace Courts and the Constable's office now on the second floor of the courthouse annex will be moved to the TWC building.

Originally, it was thought that the District Attorney's grand jury offices would be moved to the annex, the law library would go to the third floor and the 405th would go where the library is now. Mike Guarino has resisted relocating the grand jury operations because of space concerns. As a result, one option being discussed is to move the law library to where the third floor snack room is now so that a very compact courtroom could be built for the 405th on the sixth floor.

City Elections Are Finally Over.

The public imagines that almost all elected officials are attorneys, but in reality very few are in Galveston County. Carlos Garza was elected Mayor of Texas City and Tad Nelson won his race for City Council in League City. In other closely watched races, Bo Quiroga was reelected mayor in Galveston and Lloyd Criss was soundly

beaten for mayor of La Marque.

Door Closed On "Open Courts"

Citizens who came to watch the hearing on Constable Daniel Cooper's suit to reopen the Republican primary election were actually barred from

the proceedings, which had been moved from the 212th courtroom to the small County Judge's conference room on the second floor. People were told that visiting judge Shearn Smith was only allowing witnesses into the crowded room and were turned away in a clear violation of the Texas constitution, which

(Continued on page 4)

Local Bar Associations

Galveston County Bar Association

Meets fourth Thursday of each month at Tremont in Galveston (meets twice a year on the mainland). Dues are \$100 per year.

President: John Buckley President-Elect: Janet Rushing

Galveston County Young Lawyers Association

Meets last Tuesday of each month at Pelican Club in Galveston

President: James Nebout

Criminal Defense Attorneys

Meets third Friday of each month at DiBella's in Galveston

Dues: \$25 per year. President: Elisa Vasquez

President-elect: Rebecca Murphy

Galveston County Family Bar Association

Meets second Wednesday of each month at Pelican Club

Dues: \$40 per year. President: Laticia Bass

President-Elect: Rebecca Murphy

Mainland Bar Association

Meets last Friday of each month at Union Planters Bank in

League City. Dues: \$60 per year or \$10 per meeting.

President: Elaine Michael

Bay Area Legal Assistants

Meets first Wednesday of every month at Red Lobster on Bay Area Blvd. in Clear Lake.

The Enos Law Firm, P.C. helps parents and families with cases involving:

- Child Custody Disputes
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(including those involving businesses or professional practices)



(281) 333-3030 (409) 943-4300

Greg Enos is certified in personal injury trial law by the Texas Board of Legal Specialization. Not certified in family law. Other attorneys not board certified.

May 8, 2000

LAW FAX

Page 3

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Courthouse News (continued)

(Continued from page 3)

guarantees that courts shall remain open to the public. Mark Stevens on Monday filed an appeal of Judge Smith's ruling.

Judges Asked to Perform Marriages May Now Have to Check Under the Hood

Judge Susan Criss flatly denies the rumor going around the courthouse that she unwittingly married two men because one of them was dressed as a woman. "I married what I believed to be a man and a woman," Criss said.

Galveston County Gets a Part-Time Bankruptcy Court

Local bankruptcy lawyers will save on mileage thanks to the creation of a new part-time federal bankruptcy court for Galveston. The Bankruptcy Court, Galveston Division will open June 1 in the U.S. District Courthouse over the Galveston Post Office and will accept filings from Galveston, Brazoria, Chambers and Matagorda counties. Judge Leticia Clark will preside over the bankruptcy court on Mondays. Last year, about 1,000 bankruptcy actions were filed by residents of the four county area.

New Attorney in Clear Lake

Karen Eckerle has joined the firm of John A. Schmidt in Clear Lake as an associate. Eckerle grew up in Panama

and is bilingual. She graduated cum laude from Notre Dame and got her J.D. from the University of Houston Law Center.

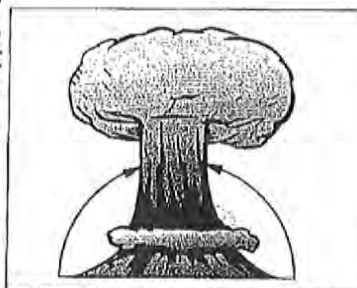
Mark Stevens Avoids Thermonuclear War

Galveston Attorney Mark

Stevens is willing to take on big, tough foes that most attorneys would be too scared to tackle. Not many lawyers have the guts to stand up to Federal Judge Sam

Kent, much less file a motion to recuse him. In January, Stevens was before Judge Kent on a suit involving an employee of the Moody Foundation who alleged she was fired because she possibly had cervical cancer. Andrew Mytelka represented the Moody Foundation.

Judge Kent called the attorneys to a special conference to discuss the widely disparate allegations of facts in the case and told counsel: "My perception is that given that, we have got to figure out a way to short circuit getting to the essence of what's really true in this case. And if, in fact, it is the case that there was this Machiavellian scheme pursuant to which communications took place between ANICO and the



Moody Foundation to deny this poor cancer ridden woman her benefits, that's terrible. It's awful. We need to deal with it. We need to barf up some money and take care of this poor lady and get her fixed. On the other hand, if, indeed, it turns out that she doesn't even

have cancer or the facts are utterly underdeveloped, then, for instance, my concerns about calling Bobby Moody, an agent for the foundation – I mean, you've live in Galveston long

enough to know that whatever Bobby Moody is, he ain't sitting around being an agent for some corporation, etc. We've got to get this narrowed down."

After Stevens told the court that his client was not diagnosed with cancer but had irregular pap smear results that indicated cancer, Judge Kent got angry. Kent said, "Well, I want to be frank about this. For obvious and personal reasons, the word 'cancer' has a telling and profound implication for this court and I am not going to take lightly the banding of that term with all of its subjective connotations if, indeed, there is not a definitive diagnosis, which had been handed down by a board certified oncologist. And this better get cleared up quickly or

(Continued on page 5)

May 8, 2000

LAW FAX

Page 4

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Courthouse News (continued)

(Continued from page 4)

there's going to be hellacious sanctions. That really makes me angry."

Kent appointed Ross Citti, who was already designated as mediator in the case, to be a special master to resolve all discovery disputes. Kent made it clear that Citti would be paid by

the hour in the \$250 to \$350 per hour range. Kent then gave deadlines to produce definitive proof of the plaintiff's diagnosis and said: "And I'm going to tell you flat out, if

there is not compelling evidence presented to this Court that this woman has cancer, as that term is defined in common medical usage at this hearing, I'm going to absolutely go nuts. I think this is the most personally insulting allegation to have ever been brought before this Court given the personal circumstances of this court and I am not going to take this lightly. If it turns out that you brought this lawsuit claiming this woman has cancer when, in fact, she has some irregular cellular structure that doesn't even give rise to that, you're going to be very, very sorry. Am I clear?" Mr. Stevens attempted to respond but was cut off by Judge Kent, who said, "Don't you say another word, by God or I'll hold you in

contempt today, am I clear?"

Stevens promptly filed a motion to recuse Judge Kent, in which he pointed out that comments by a judge may be grounds for recusal if, "they reveal such a high degree of antagonism as to make fair judgment impossible." Stevens' motion complained of the



abrupt end to the hearing without giving him a chance to respond and also addressed the appointment of Citti as special master, saying, "Both sides

now face the prospect of paying a frequently appointed court officer substantial sums for what, at the very most, was a routine discovery matter." (Citti is very often appointed by Judge Kent to mediate cases). Stevens pointed out that his suit never alleged his client had cancer and quoted numerous sources on the significance of Dysplasia or abnormal cervical cells. Steven's motion contained these brave statements:

—"That any judge would so cavalierly treat aberrant pap smear results is unfathomable to this counsel and can be explained only in terms of extrajudicial hostility for this counsel;"

—"This counsel undertook Mrs.

XXXXX's case in good faith and would have filed it in good conscience no matter who the judge of what his or her personal circumstances may have been."

—"All who practice before the court are deeply sympathetic of the court's personal situation. But no circumstances can excuse the court's overt conduct, which clearly bars any continued participation by the court in this case."

Within a week of receiving Steven's motion to recuse, Judge Kent signed a one sentence order recusing himself.

The Fifth Circuit recently sent out an order on this case in response to a filing of Stevens saying only that, "appropriate action," had been taken. ☆

LAWYER NEEDED FOR GALVESTON & SURROUNDING COUNTIES

3-5 years experience required. Must have knowledge of family law and some personal injury experience. Salary commensurate with experience. Bonuses and other benefits. Please fax resume to 713-871-1054.

Midani & Associates, P.C.

May 8, 2000

LAW FAX

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Trial Reports

Galveston County juries slap the wrists of two shootists with probation. Mark Kelly reduced a jury to tears in Judge Norma Venso's court in a case involving a man who shot another guy in the neck because it looked like he was trying to pick up the defendant's girlfriend outside the strip club where she worked. Kathleen Marx-Sharp prosecuted the defendant, who was found guilty and then given 10 years of probation.

Margaret Hindman represented a man found guilty of shooting a fellow he was arguing with. Bill Reed represented the State. Hindman's client was given five years of probation.

It became clear during deliberations that a jury in Judge Frank Carmona's court was considering the lesser included offense of assault in a murder case, so Mark Kelly and prosecutors reached a deal that netted the defendant ten years of probation. Four of the State's five witnesses had picked up felony convictions after the alleged murder. The defendant claimed the State's witnesses were the ones who beat the decedent to death. The State's witnesses denied that allegation but admitted cleaning up the murder scene and not reporting the death to the police.

Even Mark McGuire strikes

out. Alton Todd's amazing string of trial victories finally came to an end with a jury finding of no negligence in a dental malpractice case in Judge Susan Criss' court. Bill Griffey and Chris Bertini represented the successful defendant. Alton has been in back-to-back trials over the last five weeks. His first trial in this

courtroom marathon was a products liability case against Honda that resulted in a \$65 million award. His second trial will net a judgment over \$12 million.

Who says that an expensive ad in Martindale Hubble will never pay for itself? Mark Stevens is very happy that a Cana-

(Continued on page 7)

"Payment in Full" Checks

Lawyers should review Uniform Commercial Code Sec. 3-311 (Tex. Bus. & Commerce Code Sec. 3.311) to understand how a disputed debt can be satisfied by sending a check for an amount smaller than the sum allegedly due if the check is

marked conspicuously, "Payment in Full." Suppose a business claims its customer owes it \$600 and the customer sends in a check for \$200 marked, "Payment in Full." If the business goes ahead and cashes the check, the entire debt is probably paid off, even if the business owner crosses out the "payment in full" language on the check. The best defense for the business in this example is to return the check without cashing it or to refund the amount of the check if it is

cashed within 90 days. A business that fails to do either can still try to collect the full debt by arguing that: (1) the debt was liquidated or not subject to a bona fide dispute, (2) the check was tendered in bad faith or (3) the "payment in full" language

was inconspicuous. A business could also add a provision to its contract saying that "payment in full" checks are not allowed. A business can also designate a specific recipient for "payment in full"

checks. A lawyer advising a debtor or creditor in a case involving a "payment in full" check should look at the official UCC Comment on this section as well as case law on UCC 3-311 from around the country since 47 states have adopted the 1990 amendment that is written into Texas law. ☆



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Trial Reports (continued)

(Continued from page 6)

dian lawyer called him out the blue about an unusual death case. A 21 year old Canadian nurse working at UTMB drowned when her Honda rolled down a boat ramp after the nurse and a friend had been looking for the mysterious face on Ewing Hall. The decedent allegedly slipped into the water screaming that her seatbelt would not come undone. The dead nurse's family contacted a lawyer in Nova Scotia who found Mark Stevens in Galveston. Stevens referred the case to Alton Todd. Finally, after eight years and one mis-trial with a hung jury, a jury in Judge Norma Venso's court awarded what some think is the county's biggest actual damages verdict in a death case. The jury found that the Honda seatbelt was defective and awarded \$5 million to the estate of the nurse (a former Canadian Olympic figure skater) and \$30 million to each parent. The total \$65 million verdict will be reduced by the decedent's 25% negligence. Prejudgment interest should bring the total judgment to almost \$82 million. Honda is already planning an appeal, but the jury's award makes Todd's investment of almost \$200,000 in the case seem worthwhile. Todd retained and called seven

experts to testify in fields ranging from seatbelt design to aquatic engineering to human factors. Honda's lawyers may now regret failing to strike one juror who had lost a daughter at an early age and who had testified for Alton Todd as an expert witness. That gentleman ended up being the jury foreman. Honda can at least be thankful that Judge Venso refused to submit a gross negligence question to the jury. The parties have already unsuccessfully tried mediation since the verdict and now face



an appellate battle.

M.A.D.D. may not invite Mr. Todd to be a speaker at its next state convention after Todd convinced another jury to overlook the fact that a deceased accident victim had been drinking. A jury in Judge Frank Carmona's court found the City of Galveston and the

Flagship Hotel Ltd. liable for the death of two men whose car went through a guardrail and into the Gulf. The jury found the driver 10% at fault and put 50% of the responsibility on the city and 40% on the company that leases and operates the hotel. The jury awarded \$2.75 million to the estate of the driver, a carpenter, and \$3.75 million to the estate of his passenger, a waitress. The jury also awarded \$1 to each of the deceaseds' parents. The \$10.5 million total award will be reduced slightly because of the negligence attributed to the driver but prejudgment interest will bring the total judgment to well over \$12 million.

Ervin Appfel represented the hotel. The jury was so upset about the shoddy, 36 year old guardrail that it prepared a message for Judge Carmona asking him to make the city spend the almost \$30,000 it would take to put in a modern guard-

rail.

Another jury decided to send a message along with its verdict. A jury in Judge Gladys Burwell's court prepared a statement for the parties along with their verdict. The will contest case turned out to be a very

(Continued on page 8)

May 8, 2000

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Trial Reports (continued)

(Continued from page 7)

emotional one for the jury. Phil Roberts represented the opponent of the will and George Dana represented the proponent. The jury found that there had not been undue influence in their verdict but asked to present a statement to the parties. Judge Burwell allowed the presiding juror to read the statement aloud, which basically said that the decision reached by the jury was very difficult and that the jury had to follow the law even though it did not like the will proponent at all. Several jurors were crying as the tearful presiding juror read the statement.

A jury in the 10th District Court found a man guilty of Aggravated Assault with a Deadly Weapon. Judge David Garner sentenced the man to seven years in prison. Angela Taylor was prosecutor and Jones

Huskey was defense counsel.

Judge Susan Criss granted a directed verdict for a local law firm and its former associate in a legal malpractice case. The plaintiff had hired the attorney to defend a motion to terminate his parental rights. Allegedly, the termination trial went forward without the dad or his lawyer. The plaintiff alleged his attorney failed to appear at trial, failed to file a motion for new trial and did not file an appeal. In the legal malpractice trial, Judge Criss granted the defendants' motions for directed verdict because the plaintiff failed to prove that his parental rights would not have been terminated if he had attended the original trial.

Bill Reed prosecuted a man sentenced to 3.5 years by a jury which found him guilty of killing a 19 year old Galveston man. Roger Ezell represented the defendant who allegedly was robbed by the deceased during a marijuana deal. The defendant chased the decedent to a nearby field where the two fought. The defendant's hunting knife prevailed over the deceased's blackjack.

Gerson Bloom represented a defendant found guilty by Visiting Judge Ron Wilson of striking a woman in the face

several times. Dane Johnson prosecuted the defendant, who was sentenced to a year in jail, probated for a year, \$300 fine plus court costs, and 80 hours of community service.

Judge C. G. "Trey" Dibrell, III presided over a juvenile case in which a 12 year old student at a local Catholic school was accused of holding a knife to her victim's head while another girl threatened to kill her. The jury found "not true" to the charge of aggravated assault. Jyll and Kevin Rekoff represented the juvenile and Felicia Kerney was prosecutor in her first trial in the D.A.'s office.

That County Treasurer's office sure generates litigation! Federal Magistrate John Froeschner presided over a suit against Galveston County brought by a former employee of the Treasurer's office who claimed she was fired when she announced she was running against Gerald Burks. The jury found that the plaintiff's First Amendment rights were violated but the violation was not a proximate cause of her termination. Donald Glywasky represented the County and Stephen Schechter represented the plaintiff.

In January, Judge C. G. "Trey" Dibrell, III, granted a directed verdict for a DWI defendant alleged to have been sitting in the cab of his 18 wheeler barefoot

(Continued on page 9)



May 8, 2000

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Trial Reports (continued)

(Continued from page 8)

with the engine running. Without proof that the defendant was driving the vehicle, Judge Dibrell granted the directed verdict for Dominic Merino's client.

Another DWI defendant did not fare so well before visiting Judge Ron Wilson. The defendant was found guilty by the jury after less than 15 minutes of deliberations. The defendant was punished with 180 days in jail probated for a year and an \$800 fine. Dane Johnson was prosecutor and Joe Hunter was defense counsel.

A jury in County Court No.2 in February found Greg Cagle's client guilty of DWI after being presented with breath test results of .124 and .125. Prosecutor Jonathan Cox agreed on a punishment of 6 months in jail probated for a year and a \$500 fine. Cox and Jeth Jones lost another DWI case earlier in February but that case involved no breath test and only a video tape of the defendant. Kevin Rekoff represented the defendant who was found not guilty.

A jury found a woman represented by Greg Russell not guilty of telephone harassment. The defendant alleged she had been fired because she accused her ex-boss' husband of sexual harassment. The boss

turned around and accused her of phone harassment, claiming she was being called several times a day. Val Tisino was prosecutor and Ron Wilson was judge.

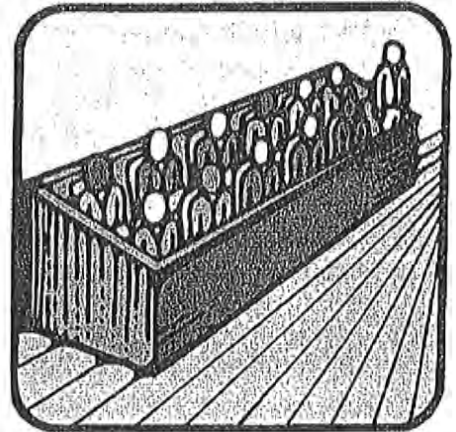
Greg Russell prevailed in another case before Judge Wilson in an unexpected way. Russell's client was charged with making a terroristic threat and was accused with pulling a knife during a supervised visit with her child. The defendant's ex-mother-in-law said the woman pulled a knife on her and caused her to faint during the visitation. The defendant had the habit of videotaping all of her visits and had given a tape to the D.A.'s office showing the incident did not occur. The D.A. proceeded with the prosecution because the tape did not have a date on it but prior to closing arguments (and after two defense witnesses had testified) the State announced it had "lost confidence" in its case and dismissed the charges.

A jury in February in Judge Susan Criss' court awarded Alvin Saenz' client \$4,000 for past medical expenses, \$1,000 for lost wages and \$2,000 for pain and mental anguish in a rear-end collision case. The award doubled what had been offered the

plaintiff, who had been ticketed for unsafe lane change.

Kenneth McConnico and Bill De La Garza represented a wife who was awarded \$1 million for assaults inflicted by her physician husband. The claim was made as part of the couple's divorce and was presented to a jury in Judge Doug Warne's family district court in Houston.

Informal marriages were the subject of two trials in February. Judge Susan Baker ruled that there had been an informal marriage between a couple who lived together for 18 years. The man who denied the common-



law marriage claimed the wedding rings he had bought for his woman were mere cocktail rings. Judge Baker ordered the "husband" to pay \$16,400 in interim attorney's fees and scheduled a later trial on the divorce. Marybeth Nelson represented the wife. A jury in Judge Gladys Burwell's court found that there had not been an infor-

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Trial Reports (continued)

(Continued from page 9)

mal marriage in a case where an elderly couple, now both deceased, had lived together since 1986. Phil Roberts and Doug Chilton represented the prevailing side.

Judge Frank Carmona continues to be one of our county's busiest trial judge. In February, Carmona presided over a six day jury trial in which one lumber company sued another lumber company and a former employee for stealing trade secrets. The employee, represented by Gordon Davenport, countersued for unpaid wages. The jury found no one liable. Grant Gealy represented the Plaintiff lumber company.

A jury in Judge Carmona's court in March poured out the plaintiff in a medical malpractice case. Mike Mallia of Houston represented a woman who claimed she lost an arm due to the negligence of her doctor and Mainland Medical Center. ☆

Greg B. Enos

*Certified in Personal Injury
Trial Law by the Texas Board
of Legal Specialization*

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Appellate Cases

Police officers were not justified in entering and placing its occupants under arrest simply because they detected the distinctive odor of marijuana when they knocked on the front door and spoke to the man who opened the door and stepped out on to the porch to talk to the officers. The officers entered the house and placed its occupants under arrest but saw no drugs and had to wait over two hours for a search warrant before looking for and finding the evil weed. The Eastland Court of Appeals ruled that the entry into the house and arrests lacked probable cause and the resulting search was illegal. *State v. Steelman*, __ S.W.3d __ (Tex. App. - Eastland 4/6/00).

An auto insurance company violated the terms of its Personal Injury Protection (P.I.P.) Policy by making the P.I.P. checks payable to the insured and her health care providers. The court of appeals upheld the trial court's ruling that the P.I.P. insurance company could not send its insured P.I.P. checks payable to the insured and her doctor unless the carrier had received a valid assignment to the doctor signed by the insured. Texas



Farmers Insurance Co. v. Fruge, __ S.W.3d __ (Tex. App. - Beaumont 1/27/00).

A police officer could not legally stop a driver simply because his car was failing to stay in a single marked lane. One officer testified that the defendant's car touched the solid white line on the right once and crossed over the white line on the left side of the lane. The

other officer only saw the car touch the white lane line on the right twice. Neither officer testified that the defendant's driving endangered other drivers. The State conceded that failure to maintain a single lane is

not illegal. The court rejected the arguments that the stop was justified under the "community caretaking" excuse for a temporary stop or that weaving gives rise to a reasonable suspicion the driver is intoxicated. *Ehrhart v. State*, __ S.W.3d __ (Tex. App. - Beaumont 1/24/00). This was a 2-1 decision with a strong dissent.

The San Antonio Court of Appeals has upheld the application of an arbitration clause in an attorney-client contract. In this case, the plaintiffs hired a lawyer to file a medical malpractice suit and he did not do so within the limitations period. The plaintiffs then sued the lawyer and the lawyer successfully argued that his attorney-client

(Continued on page 11)

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Appellate Cases (cont'd)

(Continued from page 10)

contract required arbitration. The client's argument that the arbitration clause violates public policy was rejected. *Henry v. Gonzalez*, __ S.W.3d __ (Tex. App. - San Antonio 1/26/00). This is an important case for lawyers, all of whom should consider putting an arbitration clause in their client contracts. The contract in this case provided:

11. Arbitration.

Any and all disputes, controversies, claims, or demands arising out of or relating to this Agreement and any provisions hereof, the providing of services by Attorneys to client, or in any way relating to the relationship between Attorneys and Clients whether in contract, tort or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act in accordance with the commercial Arbitration Rules then in effect with the American Arbitration Association.

Just above the signature line, the contract also said, "THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE." The top of the first page of the contract said, "THIS CONTRACT IS SUBJECT TO ARBITRATION." ☆

Extraordinarily Useful Internet Sites

The Internet can make life a lot easier for attorneys. The World Wide Web allows lawyers to do quick medical research, find witnesses, obtain maps or even aerial photographs. If you face an out-of-town deposition, the Internet can help you find a court reporter, hotel, make flight reservations and even check to see what bands are playing at bars in the part of town you will be staying at. As a regular feature of the LAW FAX, I will list Internet sites I find very useful. If you have favorite sites that help you in your law practice, send me an e-mail at greg@enoslaw.com.



- Find current information on Texas corporations from the Texas Comptroller. You can look up a corporation by name and find its full name, address, officers, state of incorporation, agent for service and tax payer i.d. no.:
<http://open.cpa.state.tx.us/>
- Suing an insurance company? Find the agent for service from the Texas Department of Insurance:
<http://www.tdi.state.tx.us/consumer/attorney.html>
- Look up the zip code for any address in the United States with the help of the U. S. Post Office:
http://www.framed.usps.com/ncsc/lookups/lookup_zip+4.html
- Calculate the exact postage for a letter or package sent overnight, by first class, to any location:
<http://postcalc.usps.gov/>
- Find an attorney by searching the State Bar of Texas' membership lists. You can search by first or last or maiden name or firm name and find the lawyer's full name, firm, address, phone number, bar no. and license status:
<http://texasbar.com/membership/meminq/qrymbr.asp>
- The absolutely most comprehensive source of information on Texas Probate law:
<http://www.texasprobate.com/>
- Convert roman numerals to arabic or vice versa (43 = XLIII):
<http://www.binary.net/dturley/js/roman.html>
- Order office supplies over the Internet from Office Depot and get free delivery the next day for orders over \$50:
<http://www.officedepot.com/>
- Get current schedules and buy tickets for Southwest Airlines:
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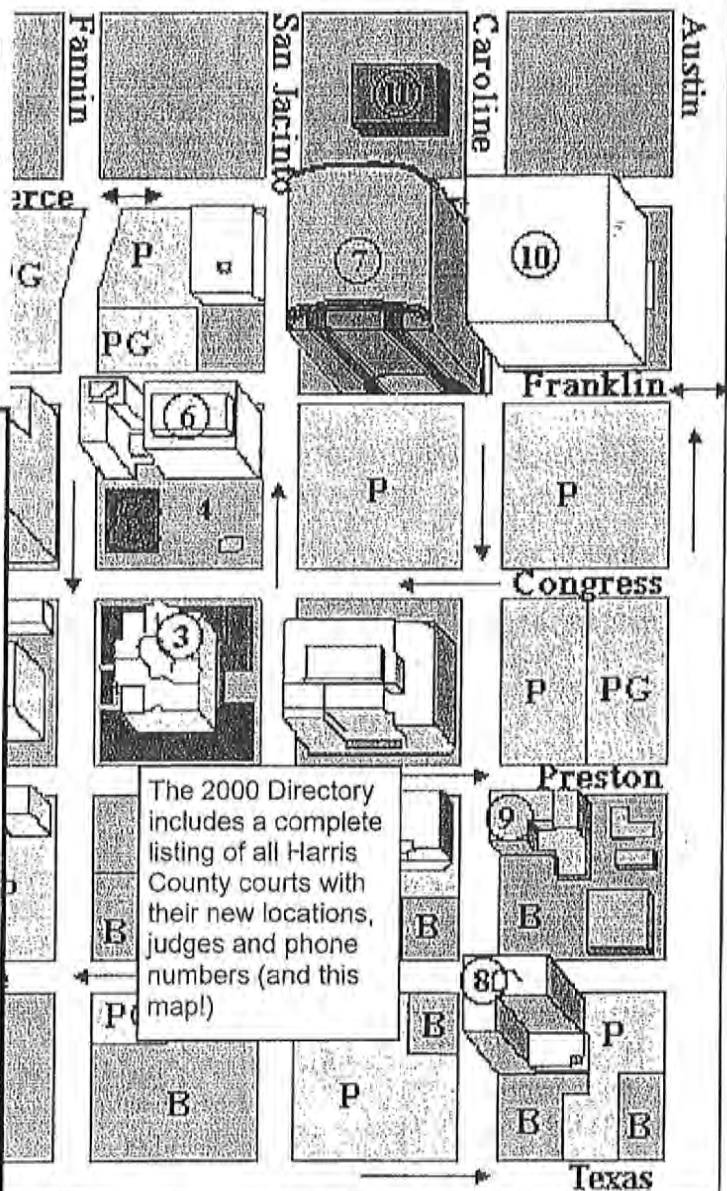
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LAW FAX

March 15, 2000

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Political Analysis

Election Day Misery and Surprises

The many folks who worked all day Tuesday on their friends' election campaigns were a wet, tired bunch by the time they gathered at the Courthouse yesterday evening to await the results.

The many politicians had plenty of time to gossip and comment on the night's vote tallies as they were posted. The consensus among the many experienced grass-root Democrats I talked to was that Elisa Vasquez is generally considered the front runner going into the April 11 runoff for the 405th with Wayne Mallia. Most assumed only hard-core Democrats will vote in the runoff and that Vasquez would have the edge because her long involvement in Democratic politics and her fundraising advantage.

It is heartbreaking to watch candidates realize they have lost. Good people who busted their butts, spent a lot of their own money and took tons of time away from their family somehow deserve a better consolation prize than a lame, "you ran a good race."

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Mallia vs. Vasquez in Runoff

Wayne Mallia and Elisa Vasquez are the survivors of the Democratic primary for the new 405th District Court and they will face each other in an April 11 runoff. The winner will face John Ellisor in November.

The final correct vote count was:

Mallia	3352	25.32%
Vasquez	3197	24.1%
Penrice	2374	17.9%
Ewing	2040	15.4%
Cruse	1407	10.6%
Kelly	891	6.7%

Local newspapers reported incorrect returns because of an error in the County Clerk's office late Tuesday night.

Rain and the lack of a contested presidential primary helped keep turnout low across the county. Voter disinterest seemed to be the rule except in the Afro-American community, which faced a spirited contest for county commissioner. Attorney Stephen Holmes handily defeated R.C. Williams by 2,710

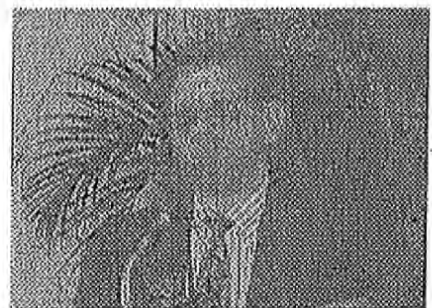
votes (63.1%) to 1,585 (36.9%).

The usual demographics of a local Democratic primary were skewed yesterday because practically every law officer in the county turned out to vote in the Sheriff's race.

(Continued on page 2)



April 11 will be the final show down between attorneys Elisa Vasquez, above, and Wayne Mallia, below, for the Democratic nomination for the new 405th District Court.



CALENDAR

The Galveston County Bar Association will meet on Thursday, March 23 at noon at the South Shore Harbour Hotel & Convention Center in League City. The meeting is not in Texas City as early flyers from the Bar Association indicated. Ethics CLE will be offered.

Trial Reports from the last several weeks will be included in a LAW FAX that will be sent out next Monday. I have been just too busy with my legal directory, politics and coaching basketball to be a responsible publisher.

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Election Results (continued)

(Continued from page 1)

Gean Leonard easily won with 9,257 votes (71.9%) over Lex Odom with 3,624 votes (28.1%). Leonard will face Republican Mike Herbst in November.

Two incumbent District Judges, Norma Venso and David Garner, did not have opponents in the primary and do not have G.O.P. opponents in November.

In the race for the 405th District Court, Elisa Vasquez had the edge in fund raising and

spent the most money. Leonard placed second in spending but came in fifth in the vote totals. Cruse apparently loaned his campaign \$30,000 but reported \$30,000 as individual contributions under \$50. Vasquez loaned her campaign \$15,000 and Ewing borrowed \$10,000 from a bank.

Based on reports that had been filed as of last Friday, the 405th candidates had spent and raised the following:

Vasquez

Contributions: \$32,953.32
Loans: \$15,000.00
Expenditures: \$60,547.88

Mallia

Contributions: \$24,220.16
Loans: \$ 0.00
Expenditures: \$24,846.03

Penrice

Contributions: \$ 3,485.00
Loans: \$ 0.00
Expenditures: \$10,953.00

Kelly

Contributions: \$ 6,480.00
Loans: \$ 5,000.00
Expenditures: \$14,244.99

Ewing (missing report)

Contributions: \$ 5,230.00
Loans: \$10,000.00
Expenditures: \$23,485.43

Cruse

Contributions: \$ 9,568.94
Loans: \$30,000.00
Expenditures: \$47,541.64

Political Analysis (continued)

(Continued from page 1)

Mark Kelly, Robert Penrice and Jack Ewing should be commended for running ethical, positive races (as did Mallia and Vasquez).

The real shame is that an error in the County Clerk's office caused everyone to leave the courthouse late Tuesday night with incorrect figures. Apparently, the early vote totals were mistakenly added back in and counted twice when the final tally was calculated.

That mistake did not change any of the Democratic races but it did alter the outcome of one G.O.P. race. One Republican constable candidate went to sleep Tuesday thinking she was in a runoff only to discover Wednesday she had lost.

Local Bar Associations

Galveston County Bar Association

Meets fourth Thursday of each month at Tremont in Galveston (meets twice a year on the mainland). Dues are \$100 per year.
President: John Buckley President-Elect: Janet Rushing

Galveston County Young Lawyers Association

Meets last Tuesday of each month at Pelican Club in Galveston
President: James Nebout

Criminal Defense Attorneys

Meets third Friday of each month at DiBella's in Galveston
Dues: \$25 per year. President: Elisa Vasquez
President-elect: Rebecca Murphy

Galveston County Family Bar Association

Meets second Wednesday of each month at Pelican Club
Dues: \$40 per year. President: Laticia Bass
President-Elect: Rebecca Murphy

Mainland Bar Association

Meets last Friday of each month at Union Planters Bank in League City. Dues: \$60 per year or \$10 per meeting.
President: Elaine Michael

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Dividing Community Property: Factors for the Court to Consider

Factor	Petitioner	Respondent
Fault in the break up of the marriage		
Earning Capacity and Ability		
Business Opportunities		
Benefits the spouse not at fault would have derived from the marriage		
Education		
Physical Condition		
Financial Condition and Obligations		
Disparity of Ages		
Size of Separate Estate		
Nature of Community Property		

Practical Trial Tips

- Not all of these factors apply in every case and what weight to give each factor it is totally up to the trial court. A divorce judge could, for example, ignore fault and focus on earning potential.
- Ask about these Murff factors in your discovery requests.
- Use a blow up of this chart and present evidence on each factor.

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- Child Custody Disputes
- Complex Property Division Cases
(including those involving businesses or professional practices)

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Greg Enos is certified in personal injury trial law by the Texas Board of Legal Specialization. Not certified in family law. Other attorneys not board certified.



Texas Family Law

Trial Guide

by Greg Enos

50-50 Property Division is Nifty (But Not Required)

The divorce court is required to make a "just and right" division of the community property. Tex. Fam. Code Sec. 7.001. In dividing assets and debts, the court may consider fault in the break up of the marriage, Young v. Young, 609 S.W.2d 758 (Tex. 1980), as well as the other factors set forth in the chart above. Murff v. Murff, 615 S.W.2d 696, 698—699 (Tex. 1981). A division of 72.9% vs. 27.1% has been upheld. Faram v. Faram, 895 S.W.2d 839 (Tex. App.—Ft. Worth 1995, no writ).

"Benefits the spouse not at fault would have derived from the marriage" can include insurance coverage, help with the kids, a house that was paid for, a secure retirement and even club memberships.

March 15, 2000

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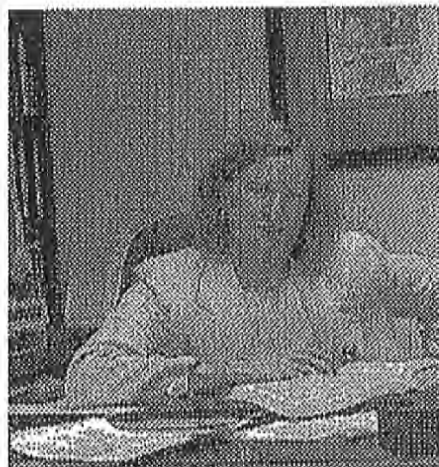
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Attorney Profile

Marybeth Nelson



Attorney Marybeth Nelson handles family law cases in Galveston and Harris Counties. Nelson tries hard to balance a personal life with work. One of her favorite activities is gardening in the backyard of her Seabrook home.



Attorney Raised by Wolves Enjoys Reading, Gardening and Cats

Nassau Bay attorney Marybeth Nelson doesn't look like Mowgli from the *Jungle Book*, but she does admit to an early family life that was, "similar to being raised by a pack of wolves" because she was the only girl in a family with six boys.

Nelson grew up in the northeast—in New York, Maryland and Pennsylvania. She received a history degree from York College of Pennsylvania in 1986 and graduated from South Texas Law School in 1992.

Nelson worked for Maas Nursery in Seabrook during law school and she still has her love of gardening. She spends a lot of time in the backyard of her Seabrook home working with plants or the rabbits she keeps there. Nelson also has four cats, Elmo, Nike, Jacque and Buster.

Marybeth is married to John Nelson, an engineer at Lock-

heed. The Nelsons co-own a beach house on Bolivar and go there frequently to relax, play cards with friends and fish. The

Nelsons are both serious, skilled Poker and Scrabble players.

Family law is the exclusive focus of Nelson's law practice that is located on Egret Bay in Clear Lake. Nelson shares offices with Mark Honsaker and she limits her practice to Galveston and Harris Counties.

A garden center/coffee shop would be the "dream job" other than being a lawyer for Nelson.

Her favorite activities outside of

the courtroom include, "anything related to the beach, gardening, shopping and playing with my cats."

Marybeth Nelson

Firm: Law Offices of
Marybeth M. Nelson
18333 Egret Bay Blvd.,
Suite 101
Houston, TX 77058
(281) 335-8360
Fax: (281) 335-8761
msample@aol.com

Practice Areas: Family
Years in Practice: 7
Law School: South Texas
1992

College: York College of
Pennsylvania 1986

Family: Married to John
(Lockheed engineer),
4 cats

Lives in: Seabrook

Idea of Fun: Anything related to
the beach, gardening,
shopping, playing with my
cats, poker, Scrabble

Want to be profiled?

The Attorney Profile will now be a regular feature of every LAW FAX. If you want to be profiled, call for a bio sheet to fill out and return.

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LAW FAX

January 31, 2000

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

And You Thought Enos Has a Poison Pen!

Note: Jack Ewing and Leonard Cruse are both running for the Democratic nomination for the 405th District Court. Ewing used to work for Cruse for several years. Ewing and Cruse are now suing each other over a fee dispute. At last week's Bar Association forum, Ewing told a humorous story of arguing a motion in limine in front of former District Judge Ed Harris, who fell asleep during the hearing. Cruse once worked with Ed Harris before Harris became a judge. The following is a fax that Cruse sent to Ewing and his attorney, Sam Finegan. The fax has been copied and widely distributed at the courthouse by now. The document probably tells us more about Cruse, who wrote it, than it does about Ewing. (Obvious spelling errors have been corrected).

TO: Jack D. Ewing, Jr.
From: Leonard A. Cruse

Ewing, you gnomish/trollish prick, it was absolutely heinous and despicable of you to trash the Honorable Ed J. Harris,

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

New Dress Code for the 306th

Judge Susan Baker has announced a new dress code for her 306th Family District Court. Previously, Judge Baker's rule was that women lawyers could not wear pants in her court. Baker will now allow female attorneys to wear pant suits as long as the pants and jacket match. Baker says that male attorneys can wear skirts so long as they shave their legs and wear pantyhose. Mini-skirts must cover the bottom when one bends over. Left unanswered are serious sartorial questions such as: must a woman's slacks be the same color as her jacket or can they be a color that goes with or complements the jacket hue? Male lawyers, for example, often wear navy jackets with tan or gray slacks.

Vasquez Leads 405th Pack in Fund-raising

Elisa Vasquez has raised about as much as all of her opponents combined in the

(Continued on page 2)



Wayne Mallia received the most "highly qualified" votes in the Bar poll, closely followed by Elisa Vasquez and Mark Kelly.

Galveston Bar Has Guts to Rate Judicial Candidates

The Galveston Bar voted overwhelmingly to rate judicial candidates at its meeting last Thursday. Russ Burwell, III and George Martin spoke against the proposal and Judge Norma Venso and Madison Wright spoke for it. Lawyers then voted 67 to 24 in favor of the judicial qualifications poll.

The seven candidates for the new 405th District Court then spoke. The lone Republican, John Ellisor, had not been scheduled to speak since his primary race was uncontested but President John Buckley put him on the program at the request of

(Continued on page 3)

CALENDAR

- | | | |
|---------|---------|--|
| Jan. 31 | 6:00 pm | Organizational meeting of local chapter of Family and Conciliation Courts, Harris Co. Pct. 8 JP Court, 16603 Buccaneer, Clear Lake |
| Feb. 7 | 5-7 pm | Commissioner Stephen Holmes Fund Raiser, Clary's Galveston |
| Feb. 15 | 5-8 pm | Wayne Mallia Fund Raiser, KC Hall, Galveston |
| Feb. 24 | noon | Galveston County Bar Association, Tremont House, Galveston |
| Feb. 24 | noon | Mainland Bar, Union Planter's Bank, League City |

Please copy this LAW FAX and share with all the attorneys & staff in your office.

Only one copy of this newsletter is sent by fax to each office, so please SHARE!

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Cruse vs. Ewing (continued)

(Continued from page 1)

deceased, in your speech before the Galveston County Bar Association yesterday for the sole purpose of deprecating my former partnership with him. If you have no respect for the living, you should show respect for the dead who are unable to defend themselves. We all know that Judge Harris had narcolepsy, a condition that effects many people. For you to give an anecdotal account of an experience with him in that regard in a vain effort to further your misguided political effort is an example of why the public does not trust many who seek public office these days. Further, while I have not mentioned it thus far, in my 32 years of practicing before the bar of justice and even before, I cannot recall either a former partner of another lawyer or a former associate of the another lawyer running in a judicial race against his/her former partner or the former lawyer with whom he/she was formerly associated with in this county, state and, perhaps, in this county, there apparently being an unwritten code of courtesy and respect in that respect following the corollary that one does not bite the hand that feeds or fed you. However, you are doing it in this race for the first time, and it amounts to no more than uncivilized cannibalism.

cc: Sam Finegan

Courthouse News(continued)

race for the 405th District Court, according to campaign reports filed in mid-January. Leonard Cruse filed a form stating that he had not and would not raise or spend more than \$500, even though he concedes that he has spent much more than \$500 already on full size newspaper advertisements. Cruse says he accidentally signed and mailed in the wrong form but, when contacted by the LAW FAX, Cruse had still not filed the legally required finance report.

Few lawyers have donated to candidates according to the reports filed so far. The reports compiled in this article cover the period up through December 31.

Candidate	Contributions
Vasquez	\$14,909.07
Wayne Mallia	\$ 5,260.44
Mark Kelly	\$ 4,555.00
Jack Ewing	\$ 2,940.00
John Ellisor	\$ 2,690.20
Robert Penrice	\$ 2,300.00

The next campaign finance reports are due to be filed 30 days before the March 14 primary elections.

Ortego Back in the Saddle Again

Ellis Ortego's brief vacation from his post as La Marque City Attorney ended last week when the City Council voted to rehire him. Ortego was abruptly canned last year by a council faction lead by Lloyd Criss, who then helped see that his family's life long friend, Jack Ewing was hired as City Attorney. Ewing served until early January of this year, when he resigned after Criss lost his post in a recall election. Ewing said he resigned to campaign fulltime for the 405th District Court.

Announcements

405th Candidate Wayne Mallia will host a fund raiser on Tuesday, February 15, from 5:00 - 8:00 p.m. at the Knights of Columbus Hall at 1912 Winnie in Galveston. Tickets are \$6.00. For more information call Maria Wagner at 409-925-4482 or Rachel Jones at 409-765-5773.

The Law Offices of Martin, Garza & Fisher, L.L.P., are pleased to announce that Kathryn Bradfield Lanam has become a partner of the firm.

The Galveston County Legal Department has an immediate opening for a full-time legal assistant. Fax resumes to (409) 770-5560.

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Candidates Rated (continued)

(Continued from page 1)

Kathryn Lanan. Each candidate spoke for six minutes and then the attorneys present at the meeting rated each as "Highly Qualified, Qualified, Not Qualified, or Qualifications Unknown."

Ten of the lawyers present apparently did not vote in the poll, so only 81 out of the almost 500 lawyers who actively practice in Galveston County participated. The results were as follows:

Wayne Mallia:	Highly Qualified 30 Qualified 39 Not Qualified 5 Qualifications Unknown 6
Mark Kelly	Highly Qualified 25 Qualified 43 Not Qualified 3 Qualifications Unknown 9
Elisa Vasquez	Highly Qualified 26 Qualified 26 Not Qualified 16 Qualifications Unknown 12
John Ellisor	Highly Qualified 22 Qualified 29 Not Qualified 5 Qualifications Unknown 11
Jack Ewing	Highly Qualified 23 Qualified 34 Not Qualified 15 Qualifications Unknown 9
Leonard Cruse	Highly Qualified 18 Qualified 27 Not Qualified 19 Qualifications Unknown 16
Robert Penrice	Highly Qualified 8 Qualified 32 Not Qualified 23 Qualifications Unknown 17

Only 67 lawyers rated Ellisor, which is probably because his name had to be written onto the ballot. Most of the candidates did not rate each other. One more ballot was turned in for Jack Ewing than the other five Democrats.

Appellate Cases

This case poses the probing question: was the crack in the crack or was it hidden where the sun does not shine and cops are not supposed to go without a warrant? Acting on a tip, Houston police approached three young men on a street corner. The officers smelled marijuana smoke and saw a "blue haze" of smoke around the suspects. The officers searched the men for weapons and found a cigar containing a small amount of marijuana. The officers then handcuffed the three and drove them to a nearby fire station. At the station, one officer put on latex gloves and launched a check of the suspects' buttock regions. The defendant was told to drop his pants, bend over a table and spread his cheeks. When he refused, the officers did it for him. The officer claimed he found a vial of crack cocaine lodged between the defendant's rear cheeks but not inside his body. The defendant claimed that the officer "probed inside [his] anal cavity for an extended period of time" in order to find the crack. The defendant pled guilty and appealed. The Court of Appeals concluded that the defendant was clearly under arrest when the search was conducted, therefore the State had the burden to prove one of the exceptions to the search warrant requirement. Strangely, the State relied on the "offender is about to escape" exception in art. 14.04 Tex. Code Of Crim. Proc. The Court of Appeals, in a 2 - 1 decision, ruled that there was not evidence the defendant was likely to escape and that the evidence should have been suppressed. *McGee v. State*, __ S.W.3d __ (Tex. App. - Houston [14th] - 1/20/00).

A governmental unit may be immune from liability for the negligent formulation of policy but the negligent implementation of policy will subject a governmental entity to liability. *City of San Augustine v. Parrish*, __ S.W.3d __ (Tex. App. - Tyler 12/30/99)

A law firm sued a former associate with the firm and his friend and current law partner, alleging breach of fiduciary duty, civil conspiracy,

(Continued on page 4)

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Appellate Cases (continued)

(Continued from page 3)

conversion, actual and constructive fraud, and negligence. The trial court granted defendants' motion for summary judgment on all causes of action and the Court of Appeals reversed in part, ruling that an associate does owe his firm a fiduciary duty. It was alleged that the associate signed up a huge personal injury case and referred it to his friend (and current partner) who referred it to Joe Jamail. Jamail settled the case and sent a \$3 million referral fee. Summary judgment evidence indicated that the associate had used his law firm's fax, phones and time to shop the case to at least six big time injury lawyers. The Court of Appeals ruled that during the course of his employer-employee relationship, the associate has "a duty to deal openly and to make full disclosure to the other members of the firm about matters affecting the firm's business." If, during the relationship, the associate uses his position to gain a business opportunity belonging to the firm, the conduct would constitute an actionable wrong."

Note: This author represents lawyers and law firms in partnership and employee disputes and we recommend a specific clause in an employment contract every lawyer signs with the firm that specifically prohibits referring any cases to other firms without the consent and participation of the employing firm.

County Commissioner Stephen Holmes

invites his fellow lawyers
to a fund raiser

on Monday, February 7
from 5:00 - 7:00 p.m.

at Clary's in Galveston
8509 Teichman Road

HORS d'oeuvres & CASH BAR

PLEASE RSVP: (281) 337-5975

Pd. Pol. Adv. By Stephen Holmes Campaign Committee P.O. Box 1009,
Dickinson, TX 77539

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LAW FAX

January 19, 2000

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Editorials

A Special Public Servant

Imagine my surprise to get a call at home on Christmas Eve morning from District Clerk Evelyn Robison. She wished me happy holidays but then asked for help contacting one of my clients who had a \$2,000 check for back child support in the District Clerk's office. Evelyn and five volunteers from her office went to work on December 24 to try to get every last child support check into the hands of parents in hopes all of them would be able to insure a good Christmas for their kids. Evelyn told me later that the look of excitement on my client's 12 year old son when they came in to get the check was ample reward for working on a holiday. The world would be a better place if every elected official had the enormous heart and dedication our District Clerk has.

History is No Reason Not to Rate Judicial Candidates

On Thursday, January 27, the County Bar's members will be asked to cast secret ballots to see if the Bar will evaluate judicial candidates as "Highly Qualified,

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

405th Candidate Forum Next Thursday!

All of the Democratic candidates running for the 405th District Court will answer questions at a candidate forum hosted by the Galveston County Bar Association on Thursday, January 27 at noon at the Tremont hotel in Galveston. The first order of business will be for members to vote whether or not the Bar should rate the candidates as, "Highly Qualified, Qualified, Not Qualified, or Qualifications Unknown." Only lawyers whose bar dues have been paid for the current year will be allowed to vote. Attorneys are urged to come early for the noon meeting as it is probably going to be "standing room only."

A new century dawns in the County Clerk's office. Finally, the Galveston County Clerk's office has granted the many requests of civil litigators and will provide what amounts to a file stamped copy of pleadings filed with that office. The stamp says, "Copy. True copy as

(Continued on page 3)

Trial Reports

Lawyers do not have to wear navy suits or be straight laced and serious to win. In a case tried before Judge Ron Wilson, the defense attorney, Robert Pendleton, had a pony tail and he reportedly cried during his closing argument, but the jury found his client "not guilty" of resisting arrest. Hitchcock police reportedly maced the 17 year old defendant as she sat handcuffed in the back seat of a squad car. Prosecutors were Dane Johnson and Jeth Jones.

A jury in the 10th District Court found a defendant "guilty" of burglary and the parties then agreed to a year in county jail for punishment.

Judge Ron Wilson presided over three jury trials last week, two of which ended in acquittals. Mario Madrid represented a defendant found "Not Guilty" of assault. Clyde Burleson was prosecutor. Kathleen Collins represented a DWI

(Continued on page 2)

CALENDAR

Jan. 25	5-8pm	Mark Kelly Fund Raiser, 1501 Amburn Road, Texas City
Jan. 26	5-7pm	Elisa Vasquez Fund Raiser, Gaido's, Galveston
Jan. 27	noon	Galveston County Bar Association, Tremont House, Galveston
Feb. 9	noon	Galveston County Family Bar, Pelican Club, Galveston
April 7,	noon	Mediation Assoc. of Galveston Co., Dibella's, Galveston

Political candidates: Send me announcements of your political functions so that I can include your events in the LAW FAX calendar!

Please copy this LAW FAX and share with all the attorneys & staff in your office.

Only one copy of this newsletter is sent by fax to each office, so please SHARE!

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Editorial (continued)

(Continued from page 1)

Qualified, Not Qualified or Qualifications Unknown." Every single attorney who cares about educating the public and helping to elect the most qualified judges should be at the Tremont House at or before noon to cast their vote.

Some attorneys who oppose evaluation of judicial candidates by the Bar recall past efforts to do so that were very different than what is being proposed now. Long ago, when Judge Piperi was up for election for the first time (he had been appointed to begin with), the Bar conducted a poll that looked just like an election ballot: choose Piperi or his opponent. Piperi lost the Bar poll but then used that result very effectively in his campaign. He told voters that he was unpopular with lawyers because he was tough on them and he won the primary. Later, the Bar did a similar poll when Roy Engelke and Joe Presnal ran for the 212th. Engelke got only 18 votes and Presnal received over 200 votes in the Bar poll. Again, it was a simple, "select one candidate or the other" sort of poll. When the general public got to vote in the election that counted, Engelke won.

Those two past examples of a Bar poll that the public ignored do not support opposition to the current proposal to rate each judicial candidate's qualifications. Unlike those two prior polls, the Bar poll this time could allow a lawyer to rate every single candidate as "Highly Qualified." The poll this time will not be and will not appear to be a simple popularity

(Continued on page 3)

Trial Reports (continued)

(Continued from page 1)

defendant who was involved in a very serious wreck. There was no breath test and no video test but officers did testify that the defendant failed the field sobriety tests and the HGN test. Collins called a TSO optometrist who examined the defendant prior to trial to say that his gaze was permanently deviated and that he would always fail the HGN test no matter how much he had been drinking. Dane Johnson was prosecutor.

Judge Frank Carmona is not our youngest judge but he almost certainly is our most hard working judge. Judge Carmona ended his last jury trial with final arguments on Saturday morning and the jury did not reach a verdict until 7:45 p.m. Saturday night. The case involved a homeowner suing his realtor and the seller of his home for fraud, negligence, and DTPA violations. Several defendants (like the termite company) had already settled. The jury found that the realtor was not at fault and found the Plaintiff's negligence was 70% the cause of his damages. However, the jury also found the sellers had knowingly violated the DTPA by failing to disclose but then did not award any additional damages. The plaintiff asked for \$70,000 in damages and the defense suggested zero. The jury sent out a note asking if they had to award one or amount or the other and Judge Carmona wrote back, telling them the amount of damages was up to them. The jury apparently split the difference and awarded

(Continued on page 3)

Attorney Survey

How much does your firm charge for faxes and copies? Fill out the form below and fax it to Greg Enos at 281-333-0300 and we will share the results in the next issue.

Size of our firm: _____ attorneys

Fax Charges:

Incoming faxes: _____ per page

Local faxes: _____ per page

Long distance faxes: _____ per page

Copy charges: _____ per page for copies

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Editorial (continued)

(Continued from page 2)

contest. Local Bar associations all across Texas follow a similar format as the one being proposed now for Galveston County and recent history suggests that voters do actually pay attention.

A local candidate for judge here who is rated "Not Qualified" is unlikely to try to pull a Piperi-like counterattack because it is much harder to say, "I am not popular because I am so tough therefore so many of my legal colleagues think I lack qualifications to be judge." Conversely, those candidates who receive mostly "Highly Qualified" marks, will almost certainly trumpet that fact in their advertisements.

The reason each lawyer should vote in favor of the new proposed Bar poll is simple: local lawyers will know the local judicial candidates and are much better able to evaluate their qualifications than the general public. We all want the best possible judges and we all owe a duty to the public to share our information about candidates to promote an informed electorate.

Everyone Libeled in Last Law Fax:

Please Do Not Leave
Phone Messages!

I gave my office staff a holiday present and closed the office between December 23 and January 3. I did check my answering machines daily to see if any clients needed help. Several folks called just to leave cheery holiday greetings. Judge Susan Criss called and left three messages threatening to sue me for libel because of my last

(Continued on page 4)

Trial Reports (continued)

(Continued from page 2)

\$30,000 in damages and \$37,500 in attorney's fees but nothing for mental anguish. There will be a big legal fight over the meaning of the jury's answers since the Legislature has extended comparative fault to the DTPA. Kerry Neves represented the couple who sold the house.

Talk about runaway juries! You know something is up when a jury starts showing up for court each day all wearing the same color of clothes. All twelve jurors in a malpractice case against UTMB in Judge Carmona's court wore bright red shirts or dresses on the day of final arguments. You know you are in trouble in a suit against UTMB when 15 of the first 24 members of the venire panel have direct connections to UTMB. Even after a shuffle and vigorous challenges for cause, three members of the jury worked for UTMB or had retired from UTMB. Greg Enos and Larry Tylka represented a doctor trained at UTMB who returned for back surgery and had a sponge left in his abdomen that was found the next day and retrieved the day after. The jury, which also included a legal assistant from Mills, Shirley, Eckel & Bassett, awarded the medical bills incurred for the surgery to remove the sponge and almost exactly three times the medical expenses for pain and mental anguish.

Robert Clements successfully represented a homeowner in a suit against a builder in the 56th District Court and won over \$50,000 (however, I lost his trial report and I will provide the details in my next issue—sorry Bob!).

A jury in the 212th found a 20 year old man guilty of murder and the defendant then agreed to a 25 year prison sentence. The defendant was represented by Greg Russell and Brett Podolsky, who just left the DA's office a few weeks ago. The

(Continued on page 5)

Courthouse News (continued)

(Continued from page 1)

being presented by party filing original. [Blank for date filed]. Patricia Ritchie, County Clerk, Galveston County, Texas."

Jeff Kilgore is again the President of the Mediation Association of Galveston County. Rick Ansell and Judy Meeh are Vice Presidents. The group's next quarterly meeting is on April 7, 2000 at noon at Dibella's in Galveston.

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Editorial (continued)

(Continued from page 3)

LAW FAX. Criss' message told me her family had hired a great lawyer with experience in representing elected officials who have been libeled (this was before her father lost his court case to stop his recall election). Criss even suggested that I keep the tapes of her messages because I would need them in court. Upon hearing the judge's messages, I hastily reread my last newsletter to see what I said that was maliciously false about her and I did not find Criss' name mentioned at all. I did see my editorial regarding the Bar poll that sarcastically suggested incompetent judges would oppose it and I saw the reference to judicial candidates who throw temper tantrums and make threats, but I did not see Criss' name attached to those references. Indeed, I would be the last to suggest Judge Criss is an incompetent judge because all of my information in that regard is to the contrary.

It is no secret that Judge Criss violently opposes the proposed Bar poll, but my tongue in cheek list of reasons to oppose the Bar poll was meant only to show there is no valid reason to vote against it.

I am prepared to apologize to anyone that I wrongly trash in my newsletter, as I did to a Houston orthopedic surgeon in my November issue. I invite Judge Criss or anyone else who feels I have printed false or damaging statements about them to fill out the following form and fax it to me so that my next issue can clarify the situation. I ask that folks who feel they have been libeled to use this form instead of calling my office and leaving messages, as the productivity of my staff drops when they spend all day giggling and teasing me about silly phone messages.

REPORT OF LIBEL IN LAW FAX. My name: _____

False Statement Made About Me (please summarize or quote exactly): _____

I demand: ☐ An apology ☐ A retraction ☐ The following sum of money: \$ _____

I plan to: ☐ Pout but do nothing ☐ Sue you using this famous lawyer: _____

☐ Recuse myself from any case you have in my court because I threatened you.

Announcements

Patrick Quigley has office space to rent in Galveston near the courthouse at 2020 Broadway. Call Pat at 409-762-1756 for more information.

The LAW FAX will run announcements for any local political candidate, so let us know about your fund raisers and events!

Mark Kelly, Democratic candidate for the 405th District Court will host a campaign kickoff party on Tuesday, January 25 from 5:30 p.m. - 8:00 p.m. at his offices at 1501 Amburn Road, Suite 9 in Texas City.

Elisa Vasquez invites everyone to a campaign kickoff and fund raiser on Wednesday, January 26 from 5 p.m. - 7 p.m. at Galdo's in Galveston. Cash bar. RSVP to Pat at 409-763-2131.

Opening a new office? Adding a lawyer? Do you have offices to rent or books to sell? Had a baby? Fax us your announcements and we will run them for free!

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Appellate Cases

A sanction of \$100,000 against a lawyer for filing frivolous pleadings was upheld. The Court of Appeals found that the conduct of this notorious attorney was so bad, that it found the sanction to be "disproportionately small" under the circumstances. The case is an excellent summary of current sanctions law under Rule 13. *Bradt v. Sebek*, __ S.W.3d __ (Tex. App. - Houston 1st 1/13/00).

Many P.I. lawyers file affidavits under Civ. Pract. & Rem. Code Sec. 18.01 to prove the necessity and reasonableness of medical bills without expert testimony. This case makes it clear that counter-affidavits filed by the defense must show: (1) the affiant is qualified to discuss the particular service and charge involved, (2) state specifically why the charge is unreasonable or the service was not medically necessary. This decision provides very specific criteria to judge counter-affidavits. *Turner v. Peril*, __ S.W.3d __ (Tex. App. - Dallas 1/13/00).

A certified copy of a police officer's auto accident report is admissible as an official record under 803(3) even if it contains the officer's conclusions as to the cause of the wreck and who was at fault. Here, the officer was not called to testify but his report putting all of the fault on the plaintiff was admitted over hearsay objections. P.I. lawyers: put a copy of this case in your trial notebook! *McRae v. Echols*, __ S.W.3d __ (Tex. App. - Waco 1/12/00).

What a shocker! An appellate case holding that the plaintiff's expert was qualified and his opinions were reliable in an occupational disease case! In this workers' compensation appeal, a board

Trial Reports (continued)

(Continued from page 3)

jury deliberated for several hours on Thursday and then returned the next day and promptly reached a verdict. Prosecutors were Michael Elliott and Mo Ibrahim.

Leonard "Lenny" Cruse was kind enough to supply some additional weird details concerning a slip and fall case he won for his client against Galveston County in December. The plaintiff's orthopedic surgeon was a friend of the claimant but refused to provide a narrative report and would not testify about the surgery he performed. That surgeon's wife called the defense lawyer just before trial (and over four years after the accident) to say that the claimant had told her before his fall that the condition of the county jail where he fell was going to be his "golden egg." She claimed that after his fall, the plaintiff called to say his "golden egg had been laid." The surgeon's wife was called to testify at trial. Cruse called a local constable to say the surgeon's wife had a bad reputation for untruthfulness. Obviously, the jury believed the plaintiff and not his doctor's wife since they found the county negligent and awarded a fair sum of money.

certified pulmonologist testified that the claimant's exposure to silica and other mineral dusts caused his chronic obstructive pulmonary disease.

The claimant submitted copies of medical journal articles supporting this position to the Court of Appeals, which relied on them in its opinion, even though the medical articles were not apparently used by the expert at trial (a trick to remember!). The Court of

Appeals also relied on lay testimony concerning the claimant's exposure to dust and the symptoms he exhibited after dust exposure. This "common sense causation" factor is not one of the six Robinson factors, but it is one that should be addressed in every Robinson challenge to an expert's opinions. Texas Workers' Comp. Fund v. Lopez, __ S.W.3d __ (Tex. App. - San Antonio 1/12/00).

CORRECTION FORM

If you want to add a listing or correct a listing in the Galveston County Legal Directory, please fax or mail a copy of this form to us. We constantly update our database of attorneys and reprint directories as orders come in, so your change or addition is needed. Please send us your correction form by February 10, 2000.

Attorney Name: _____

Firm: _____

Address: _____

Main Phone: (____) _____

Alternate Phone: (____) _____
Phone number in another area code or a toll free number.

Fax Phone: (____) _____

Bar No.: _____

E-mail Address: _____

Web Page URL: _____

Fax or mail to:
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Published since 1995 by Greg B. Enos

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LAW FAX

Dec. 21, 1999

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Editorials by Enos #1

Who Better to Judge Judicial Candidates?

Note: It has been so long since I put out this newsletter, I decided to run four editorials to satisfy the pent up demand for my opinions that mean so very little to so very many.

It is hard to imagine how at least one judge and several judicial candidates can feel so threatened by the notion that Galveston County lawyers might finally provide a public service that our Houston legal brethren now take for granted.

In November, the County Bar's board of directors voted to hold a forum for candidates for the new 405th court at the January 2000 Bar meeting. The directors also agreed to provide secret ballots for paid bar members who attended the forum to rate the candidates as "Highly Qualified, Qualified, Not Qualified or Qualifications Unknown." I was tapped to be moderator of this forum.

No one complained until I faxed a notice of this meeting to the declared candidates. That is when folks afraid of a Bar poll

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

Roy Brown Passes Away

Long time Alvin personal injury attorney Roy Brown passed away this weekend. Brown, age 60, was found dead in a deer blind on Saturday. The funeral is today, December 21 in Alvin.

County Bar Hosts Candidate Forum on January 27

The Galveston County Bar Association will host a 405th District Court candidate forum at its January meeting at the Tremont House in Galveston. The January 27 meeting will start at noon and commence with a vote of members to see if they want a bar poll to rate the candidates as, "Highly Qualified, Qualified, Not Qualified or Qualifications Unknown." If the resolution to conduct a bar poll passes, only attorneys whose bar memberships are paid and current will be allowed to vote. Regardless of whether the bar poll goes forward, each candidate will be given roughly seven minutes to answer these questions:

1. Why should you be elected

(Continued on page 2)



Mr. R^o Retires As 306th Bailiff

One smiling face lawyers could always count on at the courthouse will be missed as Mr. Doris Robertson retires effective December 30. "Mr. R" has been the bailiff for Judge Susan Baker for over eight years after retiring from Monsanto. Mr. Robertson looks forward to actually retiring finally and spending more time with his wife, his grandbaby, his dog and with the casino at Coshotta.

Mr. Robinson poses here with Judge Susan Baker and 306th Coordinator Gloria Robledo on one of his last days.

Trial Reports

A jury in Harris County found that a Galveston attorney had committed conversion and breach of fiduciary duty in her representation of a mother in a divorce action. The attorney deposited a check payable to

(Continued on page 3)

CALENDAR

Dec. 21 3:30 p.m. CPS meeting in County Court No. 1 to discuss the transition of CPS cases back to County Courts No. 1 and No. 2

Dec. 24 Courthouse closed

Dec. 31 Courthouse closed

Jan. 27 noon Galveston County Bar Association, Tremont House, Galveston
Candidate forum for 405th District Court

Preliminary vote on whether bar members should rate candidates as "Highly Qualified, Qualified, Not Qualified, or Qualifications Unknown"

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Editorial-Who Best to Judge? (cont'd)

(Continued from page 1)

started to raise hell. To placate those who feel local lawyers have no business rating local judicial candidates, a vote will be taken at the start of the January meeting to see if the bar poll should be taken. Here are the chief arguments against the bar survey as I understand them (although, I must admit they are very hard for me to understand):

1. We would rather have the public vote on judicial candidates based on near 100% ignorance of their intelligence, experience, qualifications and competence. Judicial elections should be decided on name recognition, fund-raising and political connections.
2. Why confuse the public with a judicial candidate's qualifications when it is so hard to predict how a lawyer will do as a judge? We all know that even the most incompetent and barely ethical of lawyers can be elected and grow to become judges of passable, even mediocre competence.
3. Even if local attorneys in a small county would know far more about a fellow lawyer seeking to be judge than the general public would, why should just a small gaggle of attorneys be allowed to sway an election (even if it is the same crowd who will provide almost all of the candidates' fund-raising)? For example, if a lawyer running for judge is known by his or her colleagues to have a foul temper, keep an enemies' list and be prone to threat filled tantrums, why share that information with a public that might very well be fooled by a sweet, public persona created by an expensive public relations advisor?

4. We must draw the line somewhere! If we allow lawyers to rate candidates for

(Continued on page 3)

Courthouse News (continued)

(Continued from page 1)

judge instead of these other candidates?

2. Summarize your civil and criminal law experience
3. How do you plan to organize and conduct your court?

No questions from the audience will be allowed. Bar President John Buckley and Greg Enos will be moderators. This is expected to be a very crowded meeting, so attorneys are asked to come early to get a seat.

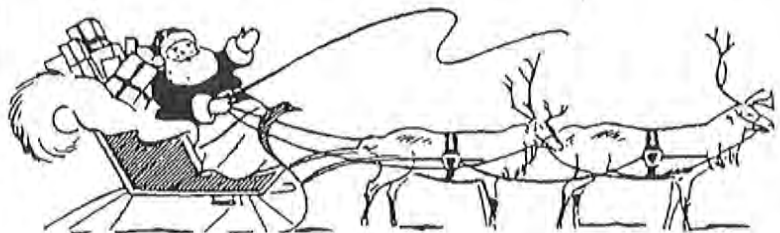
405th District Court Candidates Line Up

Six Democrats and one Republican have announced their intentions to run for the new 405th District Court, although not all have formally filed for the office. The deadline to file for the March primaries is January 3, 2000. John Ellisor is the lone G.O.P. candidate. The Democratic field includes Robert Penrice, Elisa Vasquez, Wayne Mallia, Mark Kelly, Leonard Cruse and Jack Ewing.

Bar Christmas Party A Success

Turn out was down but the Galveston County Bar Association Christmas party on December 9 at the Yacht Club was a lot of fun. This year, there was a band (Hamilton Loomis and Family Affair) people could dance to instead of the Lawrence Welk-type sound of past parties that people could only politely tap their toes to. Lawyers like Russ Burwell, III sat in with the band for a few numbers and plenty of folks boogied down on the dance floor, such as Judge Susan Baker and husband John Hunger as well as attorney Sherri Y. Dean and husband Lance.

A snafu with the invitation list may have effected the attendance as many Bar members did not receive invitations and some, such as this author, received invitations addressed to offices they had not been at in over a year.



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Editorial #1—Who Best to Judge (continued)

(Continued from page 2)

judicial office in 2000, the inevitable next step would be a bar poll rating judges up for reelection in 2002. One need only look to Harris County to see how much a damage a low bar poll rating can do to the reelection chances of incompetent judges.

5. Our county bar has few members and the "big" firms could stack a survey by bringing all of their members to a meeting and ordering them to rate certain candidates either very high or very low. This argument ignores the fact that there are no members of any big firm running for the 405th and it assumes that lawyers at Galveston's three law firms with over 10 members would: (a) all show up for a bar meeting, (b) vote on secret ballots exactly as their bosses direct, and (c) would ignore their ethical duties to rate judicial candidates solely on qualifications. This was the primary argument against a bar poll two years ago. I can only suggest that bar poll opponents get to know the lawyers at Greer, Herz & Adams; Mills, Shirley, Eckel & Bassett; and McLeod, Alexander, Powel & Apffel to learn just how independent and ethical they are. Most "big firm" lawyers I know are just as interested in good judges as are those of us who practice in small firms. In fact, the only lawyers I know who would even think of rating judicial qualifications based solely on political and partisan considerations are the political junkies who oppose the bar poll and would do it themselves in a New York minute.

6. Candidates with little egos and little self esteems might have their feelings hurt if they receive low ratings.

The only counter-point to be made against these overpowering arguments seems puny and weak in these cynical times: local attorneys know the qualifications of local judicial candidates far better than the general public ever could and it is our professional and ethical duty to educate the public and help elect the best possible judges.

All those in favor of incompetence and public ignorance should be sure to attend the January Bar meeting to let your opinions be heard. Of course, the majority of lawyers who care about honesty, qualifications and electing the best possible judges might also want to attend. If nothing else, it should be entertaining!

The Enos Law Firm, P.C. represents victims of

Pharmacy & Medication Errors

Greg Enos is Certified in Personal Injury Trial Law
Texas Board of Legal Specialization. Other attorneys not certified.

Trial Reports (cont'd)

(Continued from page 1)

the client without the client's knowledge or permission and without the client signing the check. The attorney claimed she was not sure if the check was a cashier's check and said she was afraid she might lose it. She testified that she consulted with another attorney who looked at the check and advised her to deposit it. That other attorney was later called to testify and he denied he ever saw the check or advised her to deposit it. Judge Don Ritter is to rule on how much of her fee the lawyer is to forfeit as a result of the breach of fiduciary duty finding. The conversion finding should result in a return of the client's \$3,000. Sheelah Wooten of Duff & Wooten represented the attorney and Greg Enos and Jonathan Harris represented the ex-client, who had settled her divorce after the attorney intervened to recover her fees. One obvious moral from this story is never sue your clients for fees because you invite a counterclaim from your client (which is exactly what happened in this case).

Visiting Judge Lupe Salinas granted a directed verdict in favor of a defendant charged with two counts of felony theft. Julia Hatcher represented the defendant, who was a general contractor who had been paid with two checks to put a new roof

(Continued on page 4)

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Appellate Cases

Divorcing lawyers should read this case. The wife of a lawyer was awarded 30% of any fees her ex-husband received on contingent fee cases pending prior to the divorce and 50% of any referral fees he received from cases he had referred out prior to the divorce. The division of fees on pending cases was attacked by the lawyer as an award of his separate property because he would necessarily have to work on those cases after divorce. The Houston 14th Court of Appeals conceded it would be improper for the divorce court to award the husband's pay for future work but pointed out the lawyer had failed to present evidence on that subject and so waived the point of error. The division of the referral fees was upheld because the lawyer ex-spouse had not obtained any findings of fact in the bench trial of the divorce. The moral to this story for lawyers being divorce is clear: (1) read Enos v. Baker, (2) hire competent counsel and do not represent yourself, (3) present testimony proving that contingent fee cases are worthless without work by the lawyer after divorce, and (4) request and obtain findings of fact and conclusions of law after a non-jury trial to preserve error. Licata v. Licata, ___ S.W.3d __ (Tex. App. - Houston [14th] - 10/7/99).

Lawyer Sanctioned \$30,000 for false affidavit. A lawyer who filed an affidavit supporting a special appearance challenging personal jurisdiction over his client was properly sanctioned \$30,000 for filing an affidavit he knew was false. After depositions proved the

Trial Reports (continued)

(Continued from page 3)

on a house. The homeowner terminated the contract before work was done and hired another contractor to do the work. The defendant offered a partial refund but was then indicted. Judge Salinas ruled that there was no evidence of deception by the defendant.

Judge C. G. "Trey" Dibrell, III granted the father primary custody in a divorce case where the parties had stipulated to be joint managing conservators. An IRA that was community property was divided evenly. Most other issues had been stipulated to. Emily Fisher and Mike Fieglien represented the parties.

Could Bob Monks be Galveston County's next Perry Mason? Local juries seem to like his Yankee accent as he is truly on a roll in recent criminal cases. In December, Monk's client was found not guilty of delivery of cocaine in the 56th District Court. The witnesses called by prosecutor Lonnie Cox had difficulty in identifying the delivery man. They described a bald black man while the defendant presented evidence he had never been bald. Monks sat second chair with Travis Williams who won a directed verdict of acquittal in a burglary of a vehicle case before visiting Judge Ron Wilson in County Court No. 2. Prosecutors were Jonathan Cox and Val Tisino. Monks in September won an acquittal in a drug possession case and in November he helped his wife, Elisa Vasquez win a not guilty verdict in an aggravated sexual assault case prosecuted by Bill Reed.

A plaintiff represented by Gene Hagood won a \$25,000 verdict in a medical malpractice case against a Clear Lake area neurologist in the 10th District Court. Ervin Appfel represented the doctor. Judge Garner also presided over a suit against an electrical contractor which was alleged to have caused a fire that destroyed a very large home on Tiki Island. Chris Pappas represented the defendant, which won a finding of no liability.

Leonard Cruse won something of a victory over Galveston County. Cruse represented an employee of the food caterer in the county jail who fell on a freshly mopped floor. The jury found the plaintiff 50% at fault and awarded \$56,000 in past medical bills. Barry Willey and Don Glywasky represented Galveston County.

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Appellate Cases (continued)

(Continued from page 4)

defendant had indeed done business in Texas, the lawyer again filed the same affidavit signed by his client's president which said the company had never done business in Texas. The sanctions were upheld even though the lawyer only filed the false affidavit but did not sign it. *Skepnek v. Mynatt*, ___ S.W.3d ___ (Tex. App. - El Paso - 11/24/99).

Is Juror Misconduct Possible?
There was no juror misconduct when the Presiding Juror asked another juror to bring to deliberations a textbook formula for discounting cash flows into jury deliberations does not constitute juror misconduct. *Crowson v. Kansas City Southern Railway Co.*, ___ S.W.3d ___ (Tex. App. - Eastland-12/8/99)

Now we know why our family courts must give CPS cases precedence! The trial court abused its discretion by not entering a final concerning the child or dismissing no later than a year after the department becomes the temporary managing conservator of a child. Texas Family Code section 263.402(a). *In Re Neal*, ___ S.W.3d ___ (Tex. App. - Houston [1st]-10/21/99)

Home builders beware! The implied warranty of habitability and good and workmanlike construction cannot be disclaimed and its protection eliminated merely by a pre-printed standard form disclaimer or an unintelligible merger clause. *Buelcher v. Centex Home*, ___ S.W.3d ___ (Tex. App. - San Antonio-11/17/99).

Yes, those Docket Control Orders
(Continued on page 6)

Trial Reports (continued)

(Continued from page 4)

A jury in County Court No. 1 found a defendant Guilty of Possession of Marijuana on December 1. Elizabeth Gunn represented the State and Herb Coleman and Ted Silverman represented the defendant.

Toyota won a defense verdict in the big crashworthiness case tried in the 212th.

Judge "Trey" Dibrell presided over a jury trial in a child custody modification case in which the parents had been JMC with the mother having primary possession. J. Eric Humphrey represented the mother and Marcia Zimmerman represented the father. The jury decided that the father should have primary possession of the three year old child.

In late November, Federal Magistrate John Froeschner presided over the civil rights suit arising from Constable Daniel Cooper's shooting of a distraught League City man. Don Glywasky of the Galveston County Legal Department had the tough assignment of representing Constable Cooper. The judge granted a directed verdict for the City of League City, represented by Bill Helfand. The jury deadlocked after two days on Cooper's liability and the case is expected to be retried next year.

In November, a jury handed CPS a rare defeat in a termination case. The jury found that the parental rights of the father, who lived in Washington state, should not be terminated even though he did poorly on a social study that noted his arrest history and the fact he lived in a one bedroom apartment. Julia Hatcher was appointed to represent the father and Ella Anderson represented CPS. Trial was in the 306th.

Terry Holmes won a Not Guilty verdict for his client in a DWI case in County Court No. 2. Jonathan Cox was prosecutor.

In November, Enid Williams' client received probation after being found guilty of aggravated robbery. Phil Chupik was prosecutor.

Greg Cagle's client was a Kemah volunteer fireman who received five years of probation with a boot camp requirement after being found guilty of setting a church on fire. Visiting Judge I. Allen Lerner assessed punishment. Joe Maida was prosecutor.

Send us your trial reports. We especially want to hear from the District Attorney's office!!!

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Appellate Cases (continued)

(Continued from page 5)

mean something. A trial court has the power to control its own docket, may impose deadlines to exchange expert opinions and has the discretion to impose sanctions for failing to meet the court's deadlines. Mack, et al. v. Suzuki Motor Corp., et al., __ S.W.3d __ (Tex. App. - Houston [1st]- 11/18/99).

Unborn, viable fetuses have rights! The Fort Worth Court of Appeals has ruled the Texas wrongful-death and survival-action statutes are in part unconstitutional because they deny redress and equal protection to a mother and father of a viable fetus capable of living outside the womb.

Parvin v. Dean, __ S.W.3d __ (Tex. App. - Ft. Worth - 11/18/99).

Go ahead and park that R.V. right by the corner. A property owner does not owe a duty to passing motorists not to create a visual obstruction caused by a vehicle parked on his property. Gonzales v. Trinity Industries, __ S.W.3d __ (Tex. App. - Houston [1st] - 12/9/99).

Supreme Court slams Mireles lid shut on toes of DWI defendants. The sliver of hope created by the Mireles v. DPS case by the San Antonio Court of Appeals was erased by the Texas Supreme Court, which ruled that the jury could have, without other evidence, have inferred from the intoxilyzer results given over an hour after the arrest that the defendant was over 0.10 at the time of the accident. It is now still virtually impossible to stop license suspensions in DWI cases with intoxilyzer results. Mireles v. DPS, __ S.W.3d __ (Tex. 12/9/99).

Detectives, read my lips! The detectives should have stopped questioning the suspect once she said, "I'm going to stop talking." Continuing to question the witness tainted her later verbal and written confessions. Mayes v. State, __ S.W.3d __ (Tex. App. - Amarillo -

11/16/99).

No Assault with a Deadly Weapon in the lumber yard. Pieces of wood are not "deadly weapons" for the purposes of an aggravated assault. Bailey v. State, __ S.W.3d __ (Tex. App. - Corpus Christi - 11/10/99).

Finally! An example of poor driving that does not give officers probable cause to pull the driver over and smell the scent of alcohol on and about the suspect's person. The fact that a vehicle is drifting within its own lane does not constitute probable cause to pull over the defendant and charge him with DWI. State v. Arriaga, __ S.W.3d __ (Tex. App. - San Antonio - 9/28/99).

UTMB, please read this case! The allegation that a hospital is liable for a patient's death because the hospital failed to activate a bed's safety equipment states a cause of action under the Texas Tort Claims Act. Hampton v. Univ. of Texas, __ S.W.3d __ (Tex. App. - Houston - 9/23/99).

UTMB, everyone but the family of the patient who died thanks you for this case. UTMB's decision to put a cardiac monitor into service for the purpose of monitoring the decedent's heart, and the hospital employee's subsequent failure to pay proper attention to the monitor, constitute a use or misuse, of tangible personal property and so waived sovereign immunity. U.T.M.B. v. Hardy, __ S.W.3d

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Courthouse Holidays for Y2K

The Galveston County courthouse will be closed on the following weekdays in 2000:

Marlin Luther King day	Jan. 17	Monday
Presidents day	Feb. 21	Monday
Good Friday	April 21	Friday
Memorial Day	May 29	Monday
Independence Day	July 3, 4	Monday, Tuesday
Labor Day	Sept. 4	Monday
Thanksgiving	Nov. 23,	Thursday, Friday
Christmas	Dec. 25, 26	Monday, Tuesday

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Appellate Cases (continued)

(Continued from page 6)

— (Tex. App. - Houston 8/31/99).

When does the limitations period for legal malpractice start running? For local attorney, Kenneth Kaye, the answer is not early enough. Kaye represented an office of a Savings and Loan who was found liable for actual and punitive damages. Kaye filed an appeal but allegedly told the client a supersedeas bond was not needed. Kaye represented the man up through a decision by the Court of Appeals but at the same time was demanding his fees be paid and threatening to sue his client. After the Court of Appeals ruled against the client, Kaye withdrew as counsel on August 20, 1992. Another lawyer took over the appeal up to the Supreme Court, which reversed and remanded back to the Court of Appeals, which then ruled against the client. The client filed suit against Kaye on July 31, 1997, within two years of the end of the underlying appeal. Kaye obtained a summary judgment on the grounds that he had not been sued within two years of the time his representation ended. The Houston 14th Court of Appeals reversed and ruled that the limitations was tolled until the client's appeal was finally exhausted, even if he had changed attorneys. *Edwards v. Kaye*, __ S.W.3d __ (Tex. App. - Houston [14th] 11/18/99).

Moral#1: Unless you are poor Kenneth Kaye, if you commit legal malpractice, quit the case and start the limitations period running. Moral#2: Commit your legal malpractice in Beaumont and not the Houston area. In stark contrast to the case summarized above, the Beaumont Court of Appeals recently held that the rule which tolls limitations until all appeals of the underlying claim are exhausted when an attorney commits malpractice applies only to situations where the client uses the same lawyer in the pending case. *Apex Towing*

Company v. Tolin, __ S.W.3d __ (Tex. App. - Beaumont - 08/26/99).

Guaranteed Malpractice for Family Lawyers. Wife's lawyer failed to get a QDRO entered prior to the ex-husband's retirement. Under the Retirement Equity Act, failure to obtain a qualified domestic relations order prior to a spouse's retirement date forever bars one from acquiring an interest in that spouse's pension plan. *Rivers v. Central and Southwest Corp.*, __ F.3d __ (5th Cir. 9/7/99).

The plaintiffs' third case will be a legal malpractice case for failing to timely file a legal malpractice case for failing to file a plane crash death case. In this twisted case full of attorney error, the plaintiffs consulted law firm A about their child's death in a plane crash. Firm A advised against bringing suit. Later, after they learned other families had sued and recovered money from the crash, the plaintiffs hired Firm B to sue Firm A. A legal malpractice suit was filed before the two year deadline but Firm A was not served until several weeks after limitations ran.

The Court of Appeals affirmed the summary judgment in favor of Firm A on limitations and held: "Bringing suit" within a limitations period involves both filing a petition within the applicable time period and exercising due diligence in serving the defendant with citation. When, the plaintiff files her petition within the limitations period, but does not serve the defendant until after the statutory period has run, her suit is time barred unless it is shown that

she exercised diligence in effecting service. That is, the date of service will relate back to the date of the petition's filing if the plaintiff exercised diligence in effecting service. The existence of due diligence is usually a fact question

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Editorials by Enos #2

My Friend Jim's Growing Family & How Best to House the Brood

Assume my friend Jim's house is even now too small for his family and he just found out another child is on the way. Jim knows his house is old and run down. The cost of remodeling and changing the garage into a bedroom is about what the down payment on a new house would be. Jim knows in his heart that further population growth is inevitable and eventually he will have to borrow the money to build a new home big enough for any foreseeable expansion. Jim can easily borrow the money now but he is by nature fiscally conservative and he is leaning toward spending a lot of money to just repair and remodel his current house. I think my friend Jim is making a well intentioned mistake.

In fact, I urge County Judge Jim Yarbrough to put a bond issue before the voters next Spring and get approval to build a new courthouse and jail just as the leaders of Harris County have done. It makes little sense to spend millions of dollars to repair and remodel the current courthouse primarily to make room for the new 405th District Court when everyone knows more courts are inevitable. Our current courthouse is already too crowded and contaminated with asbestos. Our jail is too small and few believe the number of prisoners will decrease any time soon.

It absolutely makes no sense to go forward with a major remodeling of the courthouse that we will have to live

(Continued on page 9)

Appellate Cases (continued)

(Continued from page 7)

determined by a two-prong test: (1) whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances; and (2) whether the plaintiff acted diligently up until the time the defendant was served. A lack of diligence will be found as a matter of law, however, if no valid excuse for lack of service is offered, or if the lapse of time and the plaintiff's acts, or inaction, conclusively negate diligence. In this case, an alleged miscommunication between two attorneys at Firm B about whether Firm A had

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- Divorce Litigation involving complex property issues
- Contested Custody Cases
- Interstate and International Custody Disputes
- Adoptions and Name Changes

*Greg Enos is Certified in Personal Injury Trial Law
Texas Board of Legal Specialization.*

Other attorneys are not certified.

Mr. Enos is not certified in Family Law.

Announcements

Merino & Anderson

Dominic J. Merino and David N. Anderson are pleased to announce their newly formed partnership: Merino & Anderson, Attorneys at Law. 6302 Broadway, Suite 245, Pearland, Texas 77581. Phone: (281) 997-8266; Fax: (281) 997-8495.

Clear Lake Office Space

A Clear Lake is offering Class A professional office space in the Clear Lake Professional Park in Webster in an executive suite format under the name of Clear Lake Professional Group. The tenant mix will be mostly mental health providers and one to two attorneys. Call Linda Tap at 281-332-3558 for more information.

Opening a new office? Adding a lawyer? Do you have offices to rent or books to sell? Had a baby? Fax us your announcements and we will run them for free!

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Editorial #2 - Jim's Growing Family (continued)

(Continued from page 8)

with for years. One plan floated in November envisioned four district courts each on the fifth and sixth floors and all county courts in what is now the annex with courtrooms on the second floor and judges' chambers on the ground floor. One obvious problem with this idea is where the judges will hold court for months while construction is going on. All of the county court at law judges oppose a move to the annex and certainly do not want courtrooms on a different floor from their courtrooms.

Harris County voters in November overwhelmingly approved bonds for a new civil courthouse even as they voted down bonds for a port expansion. Galveston County voters will vote to spend tax dollars wisely for law and order. I cannot imagine they would approve of spending millions now to move courtrooms around when an entirely new courthouse is needed and is affordable for our county.

I again urge County Commissioners to look at the old eye sore that once was the Galvez Mall and consider a spectacular center that would house a public courthouse and jail as well as privately run office building and mall. Imagine how much business a beauty shop, book store or restaurant would do in a mall attached to the courthouse! Just think how many law firms would rent office space in a professional building attached to the courthouse. Visitors to Galveston Island could see a beautiful new complex to their left as they drive in before looking to the right to see the pyramids of Moody Gardens.

If Commissioners are worried about where to temporarily house the 405th while a new courthouse is being built, I offer this suggestion: convert one of the J.P. courtrooms in the annex into the law library, and turn the current library into chambers for the 405th as well as a large hearing room (a mini-courtroom without a jury box). A

hearing room would allow the new judge to handle many matters next door to her chambers. Temporarily putting the 405th on the sixth floor would solve a vexing security problem since the annex is outside the security system currently in place. So where would the 405th conduct trials until the new courthouse is built? Most bench trials could be handled in the hearing room. Criminal jury trials would have to be in the courthouse for security reasons, so the 405th

could use the jury assembly room or another district courtroom (that judge could use the 405th's hearing room and in effect trade places for a week). Civil trials could be held in the same places or even at a facility away from the courthouse. The recent case of *Cruz v. Hinojosa*, __ S.W.3d __ (Tex. App. - San Antonio 12/1/99) held that a district court can conduct a civil trial in a KC Hall in the county seat. Tex. Local Government Code Sec. 292.001 allows county commissioners

to provide a building or room other than the courthouse for housing district courts if it is needed, as long as the facilities are in the county seat. It would be a lot cheaper for the county to rent space for a civil courtroom for a year or two than pay for all of the major remodeling that is currently planned.

My proposal is not a completely satisfactory solution, but is far less of an inconvenience for the majority than the plans currently under consideration.

It is a year before the 405th every hears its first case. A bond issue could be presented to county voters this Spring and a new courthouse built before the 405th has existed for two years. Vision and realistic planning for the future are qualities the public appreciates in its elected leaders as much as penny pinching and fiscal conservatism. The time to think big and prepare for future growth is now!



LAW FAX

Published since 1995 by Greg Enos

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Editorial #3

What We Really Want in Judges

In a perfect world, the smartest, most scholarly lawyers would be promoted to judge based solely on legal experience and qualifications. In our imperfect world, we still manage to elect smart, good lawyers to be judges. All too often, however, the best lawyers never run for judge because they do not want to take a pay cut or do not want to endure the hassle of a political race.

Some of our best judges came to the bench with little actual experience in the sort of cases they had to decide. Some had been primarily civil lawyers with little or no criminal experience yet they were able to hear even the most complicated capital murder cases with fairness and competence. Others had been mostly politicians or criminal defense lawyers before taking the bench, yet they ruled on million dollar civil cases with unquestioned skill and even-handedness.

So far, six Democrats and one Republican have stepped forward to say they are qualified to be a judge that will hear our larger civil cases and felony criminal cases on the newly created 405th District Court bench. How can we predict what sort of judge these lawyers we have known most of our professional lives would make?

I suggest four primary criteria that cut across political lines and which ignore legal experience in specific sorts of cases:

1. Intelligence. We know pretty quickly if a lawyer we are dealing with is smart, stupid or something in between. An intelligent lawyer with the proper attitude and training can hear civil or criminal cases as a judge and do just fine even without a lot of experience in those kinds of cases.
2. Trial experience. Book learning just isn't the same as education by combat. A trial judge's primary duty is to be a trial judge and there is

nothing more miserable than trying a case in front of a judge who never voir dired a jury panel or made an offer of proof or laid the predicate for an unusual piece of evidence.

3. Normal, pleasant personality. Lawyers who lie, who hold grudges, who throw temper tantrums, who verbally assault people in public places, or who love to make threats will become judges who are just as bad or worse. We need judges who can be tough when needed but we also need judges who can be understanding and forgiving. Do not vote for someone who is already working on an enemies list.

4. Hard working. A lazy lawyer will most likely be a lazy judge. Judges who arrive early and stay late had the same work habits as lawyers in most cases.

Editorial #4

Filthy Courthouse Vent System Sickens Staff

No article or editorial ever presented in the LAW FAX created the kind of overwhelming response that my editorial on asbestos in the courthouse created. Judges, clerks, janitors and Sheriff's deputies all told me about their health problems they feel are caused by the courthouse itself. Many feel the courthouse suffers from "sick building" syndrome, a condition in which the occupants are made sick by working in a contaminated office environment.

A November 1997 test of air samples taken in County Court No. 1 showed "abundant fungus spores resembling Cladosporious" according to a Texas Department of Health report. result of working in the courthouse.

Fungus and molds in air conditioning and heating ducts are a known cause of "sick building" syndrome.

At least some, if not all, employees in virtually every department and court in the courthouse report increased respiratory illness as a

The health of county employees and of the public who visits the courthouse would seem to be a pretty good reason to: (1) take remedial action NOW, and (2) build a new courthouse!



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LAW FAX

Nov. 10, 1999

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Letters to the Law Fax

Judge Yarbrough Replies: Asbestos Concerns And Court Appointments

Dear Greg:

Thanks for providing me a copy of the Law Fax. I definitely enjoy reading it.

Regarding the recent editorial on Courthouse asbestos, I would like to take this opportunity to share some data. Galveston County leaders have been and are currently dealing with the asbestos situation at the Courthouse. During the past several years approximately one-third (1/3) of the abatement has been completed. The current estimate to abate the balance of the asbestos and meet all regulations are estimated at \$1.4 Million. Obviously financing has been an obstacle.

On Thursday, October 14, 1999, the Commissioners voted to obtain financing through Certificates of Obligation for this project at the Courthouse and others. Financing the cost of asbestos abatement is only the tip of the iceberg. The Architects have been employed and they are in the process of meeting with the tenants regarding scheduling and temporary locations and they will also meet with facility uses, such as the Bar Association, to get their input.

Phase 3 of our long range plan contemplates a new jail and justice center off site and will

(Continued on page 2)

Courthouse News

Bar Association News

The Bar's January meeting in Galveston will feature a judicial candidate forum. Greg Enos will be the moderator. Paid Bar members will be able to rate the candidates for the new 405th District Court as "Very Qualified, Qualified, Not Qualified or Qualifications Unknown."

The annual Lake Tahoe Seminar will be February 3-7, 2000. Cost is \$750 per person double occupancy. A \$50 deposit is due today! Contact Jack Ewing or Russ Burwell for more info!

The Bar is considering an October 2000 seminar cruise on the Carnival cruise ship going from Galveston to Cancun. Double occupancy for an outside cabin would be \$633.75 per person. Contact Pete Urbani at 409-763-2454 if you are interested.

Probate Court News

Stacey Jones is the new part time special prosecutor for mental health cases.

Judge Burwell has submitted new local rules for her Probate Court. The rules are available

Trial Reports

A jury in Judge Frank Carmona's court decided the City of Galveston did not fire an employee because she had filed a workers' compensation claim. Mark Stevens represented the unsuccessful claimant and Bill Helfand of Houston represented the City.

A jury in Judge C. G. "Trey" Dibrell, III's court awarded \$14,000 in damages in an auto rear-end case (the collision occurred in a UTMB parking garage).

Judge Mary Nell Crapitto assessed the maximum punishment allowed in an Assault Causing Bodily Injury case. The defendant was found guilty by the jury of hitting his common-law wife even though she refused to testify against him. Elizabeth Gunn was the prosecutor and Frederick Kelly represented the defendant, who was sentenced to a year in jail and a \$4,000 fine.

Another alleged family violence case resulted in a

(Continued on page 2)

CALENDAR

Nov. 11		Veteran's Day - Courthouse Holiday
Nov. 17	4 - 7 pm	Judge David Garner fund raiser, Yacht Club, Galveston
Nov. 23	noon	Galveston County Bar Assoc., Tremont House, Galveston
Dec. 1	6 pm	Bay Area Legal Assistants Christmas Party at Texas Ice Stadium on Gulf Freeway
Dec. 9	7 pm	Galveston County Bar Association Holiday Party Yacht Club, Galveston

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Letter to Editor (continued)

(Continued from page 1)

necessitate a bond issue. We are looking forward to carrying Galveston County facilities for the coming twenty-five years.

Obviously, asbestos abatement has been and is a very expensive process. We have not ignored the problem, but it has taken time to get a game plan in place and obtain funding. I am confident that we are currently putting together a fairly accurate calendar.

Re: Court Appointed Attorneys

Yes, expense of Court appointed Attorneys is a hot topic and a major expenditure on the County budget. Although the Judges asked for \$900,000 for 1999 and the Court elected to appropriate \$800,000, neither figure proved to be accurate. Obviously, the expense far exceeded both projections, as we actually spent in excess of \$1.6 million—nearly double the projection. For FY 2000 we have appropriated \$1,175,000, as requested by the Judges. It certainly would be nice if we're on target. The figures varies widely and is a management tool for accountability. We want the public to know and understand that we are fostering government in the sunshine. The Commissioners look at options and reviews all assumptions during the budget process in an attempt to approve a realistic budget. I assure you that we are not intentionally trying to under budget any expense category.

Again, thanks for holding us accountable.

Sincerely,
Galveston County Judge
Jim Yarbrough

Trial Reports (continued)

(Continued from page 1)

"not guilty" verdict in Judge Dibrell's court in October. The defendant was alleged to have grabbed his wife and squeezed her. Johnathan Cox was prosecutor and Terry Holmes represented the defendant.

A jury in Judge Susan Baker's court voted to terminate the parent rights of a father and a pregnant mother to their two children. CPS plans to take the woman's new baby when it is born as well. Marie Trefethern and Ella Anderson represented CPS, Susan Edmonson represented the mother, Sheelah Wooten represented the dad and Diane Clark was the ad litem.

Correction

There was an error of judgment and the article of September 23, 1999 regarding Dr. J. Martin Barrash contained some incorrect statements. I apologize to Dr. Barrash for those mistakes. Greg Enos

Announcements

Administrative Assistant Position

The Galveston County Legal Department has a position available as an Administrative Assistant. The duties are support of non-litigation activities conducted by the department. Answering phones and clerical duties are daily functions, and the position also entails proofreading of contract and real estate documents, maintaining the law library, preparation and typing of declarations, proclamations and other non-complex documents, purchasing items and submission of claim and payroll to other County officials. Please fax a resume to Don Glywasky and Barry Willey at 409-770-5560.

Competition for the For Kids Sake Program

Parents involved in family litigation required to attend a "Parent Education and Family Stabilization Course" per Texas Family Code Sec. 105.009 now have a local alternative to For Kids Sake in Texas City or Galveston. A "Parents Apart" seminar is now offered in League City. Call 281-333-5866 for more information.

Galveston Office Space Available

2127 Broadway. Receptionist, fax, copier, conference room, law library, street parking. Online research available. No lease

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LAW FAX

Sept. 23, 1999

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Enos on the Law, Life & Courts

Lessons Learned From A Harris County DWI

A young family friend was recently arrested for DWI in Harris County and I spent most of Labor Day getting him out of jail. His experience in Harris County certainly contrasts with what most DWI defendants go through in Galveston County.

My friend's first court date was the very same week of his arrest. In contrast, a person charged with a misdemeanor DWI in Galveston County would probably not have to appear for the first time in court until four to six months after the arrest. I have represented one lady whose first court appearance was eight months after her arrest! Another man who consulted me on a DWI case apparently fell through the cracks and never got a court date. Amazingly, over fifty percent of all misdemeanor cases in Harris County are resolved within a month of the arrest! Virtually all Harris County misdemeanor cases are resolved within three months of the arrest, well before

(Continued on page 4)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



**Join the Campaign to force
the County to properly
deal with the Asbestos in
the courthouse!**

**Call Greg Enos
(281) 333-3030**

Courthouse News

Battle Brews Over Probate Court Civil Filings

A simmering dispute between Galveston County and the State's presiding probate judge appears like it will soon come to a head. Judge Guy Herman of Austin on September 20 ordered County Clerk Patricia Ritchie to stop transferring seventy five percent of all county court at law civil filings to the Probate Court. Herman's does permit Ritchie to send one-third of all such cases to the Probate Court as of October 1 as long as the probate court receives credit for all filing fees on those cases.

This dispute is technically between Judge Herman and Judge C. G. "Trey" Dibrell, III, who is Galveston County's ad-

(Continued on page 2)

Editorial by Greg Enos

Courthouse Asbestos

Galveston County leaders have taken far too long in dealing with the major asbestos problem in the courthouse.

The ceilings on all floors and in all courts except for the fourth floor and the 306th are covered with asbestos. Several years ago, the asbestos was covered with a sealant that is like a thick layer of latex paint. That encapsulation was intended to keep the asbestos sealed up so that it could not flake and send its deadly little fibers floating around in the air. Asbestos causes deadly diseases such as Asbestosis, Mesothelioma and cancer of the lungs and gastrointestinal tract when asbestos fibers are inhaled and lodge in the lungs.

Our courthouse's asbestos is again exposed to the air in many places because the sealant is cracking, falling off

(Continued on page 5)

CALENDAR

Sept. 23 noon	Galv. Co. Bar, Tremont House, Galveston
Set. 27 - 29	Judicial Conference (good luck finding a judge!)
Sept. 28 noon	Young Lawyers, Pelican Club, Galveston
Oct. 7 9am - 5:30pm	Satellite CLE: Business Law Survival Course at COM Technical Voc. Building, Texas City, \$175
Oct. 8 noon	Galv. Co. Mediation Assoc., DiBella's, Galveston
Oct. 15 10am - 4	Family Ad Litem Seminar, Landry's Kemah Waterfront

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Appellate Cases

The San Antonio Court of Appeals reversed itself in an important DWI case and ruled this time that a trial court did not abuse its discretion in allowing an expert to relate the results of a blood-alcohol test back to the time of driving even though the expert did not know the defendant's weight or his drinking or eating history on the night of the arrest. *Hartman v. State*, __ S.W.2d __ (Tex. App. - San Antonio 8/4/99).

A trial court did not err when it refused to allow a defendant's brother to testify that the defendant accused of aggravated sexual assault of a child enjoyed a good reputation in the community as a "non-pedophile." The 14th Court of Appeals ruled that the status of being a pedophile (or a murderer) is not a character trait and it would not be proper to elicit such testimony. *Valdez v. State*, __ S.W.2d __ (Tex. App. - 14th 8/12/99).

For Sale

Six foot race track
mahogany conference
table

Call Jana Hartnett
(409) 943-5184

Courthouse News (continued)

(Continued from page 1)

ministrative (presiding) county court judge. Herman's letter of September 20 to Ms. Ritchie states, "...I do not believe that the statute grants any authority to the administrative judge in any matter affecting Galveston County's statutory probate court." The letter further states that Judge Dibrell's order, "...ordering you to transfer a certain number of "county civil" cases filed in the statutory county courts of Galveston County to the Probate Court is void as it exceeds the authority of the administrative judge to issue such an order."

For the last few years, 75% of all civil cases filed with the County Clerk were transferred to the Probate Court and 25% went to County Court No. 2. County Court No. 1 does not hear civil cases. Probate Judge Gladys Burwell is staying out of the ruckus her presiding probate judge has created and says she will come to work each day to handle whatever cases are assigned to her court but she will give preference to probate and guardianship cases as ordered by Judge Herman.

The implications of Judge Herman's order, if it stands, for Judges Dibrell and Crapitto are enormous given their mind boggling misdemeanor caseloads. Judge Dibrell can point to specific statutes which give the Probate Court concurrent jurisdiction in a wide range of non-probate cases, including civil, family, misdemeanor and juvenile matters. However, Herman argues that there is no statute authorizing the transfer of such cases to the Probate Court, which is no longer a county court at law.

The next issue of the Law Fax will include a lengthy article on the statutory jurisdictions of our county courts at law, including the Probate Court, and how that jurisdiction is being exercised.

A Judge Returns and a Judge Leaves

Judge Frank Carmona is already back to work after his recent gallbladder surgery.

Lawyers who have worked in Galveston County a while will remember John Jay Thorpe, who worked

(Continued on page 3)

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Courthouse News (continued)

(Continued from page 2)

briefly in the District Attorney's office in the late 1980's. Thorpe moved back to Amarillo and was elected to a County Court at Law bench in Randall County last year. Sadly, Thorpe died in a mountain climbing accident in New Mexico on August 30 in Colorado. He was 39.

Courthouse Babies

Monica Gracia returned to her Coordinator's desk in County Court No. 1 after giving birth to Jonathan Andrew Gracia on July 3. The proud daddy is Victor Gracia and his new son weighed in at 8 pounds, 1 ounce at birth.

Just what the county needs: another Burwell! Russ Burwell, III is the proud father of Blair Elizabeth Burwell, who was born on the easy to remember date of 9/9/99 at 1:30 a.m. Grandmother and Probate Judge Gladys Burwell will gladly show off photo's of her first grandchild, who weighed 7.06 pounds at birth.

Much Ado About Fees For Court Appointed Attorneys

Fees for court appointed lawyers are a hot topic in Galveston County. Each year, County Commissioners appropriate far less for appointed attorneys than the figure everyone knows will have to be spent. For fiscal year 1999, for example, the judges asked for \$900,000 and commissioners appropriated \$800,000. The county ended up spending around \$1.6 million this year on appointed counsel. Commissioners just voted to appropriate just \$1.175 million for the next fiscal year, even though it is clear that amount will not be enough. Lest anyone imagine for a moment that appointed defense counsel are being overpaid, consider the new uniform fee policy adopted by all of our judges hearing criminal matters. Rates of pay are as follows:

Jury trial	\$300 per day
Non-jury trial	\$300 per day
Pleas	\$160 total unless counsel can show he or she spent over 3 hours, then it is \$160 plus \$60 per hour over 3 hours
Court appearances	\$60 per hour
Hearings	\$175 per day
Appeals	\$60 per hour

The policy states that lawyers are not paid for travel time between their office and the courthouse. Also, vouchers for investigation and expert witnesses will be paid only if the court approved those services in advance. Counsel must use new forms for submitting claims for fees and expenses.

The new fee policy specifically authorizes judges to reduce fee requests. Recently Judge Susan Criss cut a fee request from Sharon Meier from \$1,200 to \$200 in a cocaine possession case in which Meier was the second lawyer to have represented the defendant. Meier then attempted to withdraw from two other cases she had been appointed on in the 212th. When those requests were denied, she filed a motion to recuse Judge Criss in one of the cases, alleging that there was a conflict between the two and arguing that Criss had lost confidence in her work. A visiting judge denied the recusal motion.

(Continued on page 6)

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Harris County DWI (cont'd)

(Continued from page 1)

most defendants even make their first appearances in Galveston County.

Harris County probably leads the nation in the efficiency with which it processes criminal defendants through its use of 24 hour a day case intake system and computers. Officer's reports are filed electronically so there is no wait for the paperwork. Prosecutors working through the night weed out non-meritorious cases and around the clock clerks handle the paperwork.

In Galveston County, virtually all misdemeanor charges result in prosecutions with no one really doing anything to screen them.

Last year, Harris County's county-courts-at-law handled over 50,000 misdemeanor cases yet the biggest pending case docket was 462 and the lowest was 273. In contrast, our two county courts each had close to 5,000 pending misdemeanor cases per court in 1998. Harris County misdemeanor courts also lead the state in fine revenue per court. It was \$1.5 million per court last year—twice the state-wide average.

Our judges cannot really be blamed for the huge misdemeanor dockets as they depend on the District Attorney's

office to screen, file and move cases. The assistant DA's do their best with a crushing caseload and Mike Guarino can hardly be faulted for our county's refusal to spend decent dollars on our justice system. In fact, commissioners just cut one district attorney staff position for the next fiscal year.

An up front expenditure would be required to establish a 24 hour, computerized intake system in Galveston County but it would quickly more than pay for itself with increased fine revenue. Our county leaders who refuse to give all but two county employees raises are unlikely to make such a wise investment without strong encouragement.

Criminal defendants and defense lawyers are unlikely to clamor for such a sensible change because they benefit from the long delays in getting the accused into the system and in front of a judge. The delay gives defendants more time to raise cash to pay attorneys and also means it will be much longer before there is even a chance they have to pay any sort of price for their alleged crimes. It would appear that there are "law and order" reasons for our overly fiscally conservative county leaders to spend the money to set up a 24 hour intake system. Work should begin now on including that cost in next year's budget.

Trial Reports

Memo to all lawyers, especially those in the District Attorney's Office: Fax me your trial reports so I can boast on your victories! Include information on the type of case, the judge, whether it was a jury or bench trial and the lawyers involved.

A new law designed to punish Republic of Texas nuts for filing false liens could result in huge damages in run of the mill construction disputes. In a trial last week before Judge Norma Venso, a father sued his son who had filed a mechanic's and material man's lien on dad's house. The son had helped the dad build the house and alleged he had spent over \$17,000 on materials even though he had not a single receipt. Shortly after the suit was filed, the parties reached a tentative agreement at an injunction hearing which resulted in the lien being dropped and the disputed funds being placed into the registry of the court. The suit continued and at trial a jury question was submitted based on Civ. Pract. & Rem. Code Sec. 11.001 et seq, which creates very harsh civil penalties for filing fraudulent liens (including awards of mental anguish, punitive damages and investigation costs). The jury found the lien was fraudulent but awarded no money for mental anguish, only \$500 for out of pocket expenses, and \$15,00 in

(Continued on page 5)

September 23, 1999

LAW FAX

Page 4

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Trial Reports (continued)

(Continued from page 4)
attorney's fees.

A jury returned a rare "not guilty" verdict in a possession of cocaine case in the 56th District Court (this author's "law and order" wife was struck from the jury panel by the DA's office and probably would have turned the panel around). Lonnie Cox was prosecutor and Robert Monks represented the defendant, who was in a car with two other people when the dope was found.

Tad Nelson's client was found not guilty of solicitation of prostitution before Judge Ron Wilson. The case involved an undercover sting operation and a video of the alleged solicitation that unfortunately for prosecutor Brett Podolsky did not have any audio.

Tad Nelson won another "not guilty" verdict for a man charged with evading arrest. The defendant was in his big diesel pickup truck on the way to pick up his son from elementary school and he claimed he never heard the police sirens or saw their lights. By the time he pulled up to his son's school, the entire Dickinson police force was trailing him and he was confronted by officers with guns drawn. The jury was taken outside to listen to how loud the diesel truck was. Clyde Burleson represented the State.

Kenneth Kaye took on a case most lawyers would have turned down and then won a surprising jury verdict. A jury in Judge Garner's court found that a funeral home and its director violated the DTPA by not providing the casket the deceased had paid for and failing to clean her up or change her clothing. The

(Continued on page 8)

Courthouse Asbestos (continued)

(Continued from page 1)

or cracking away from an adjoining wall.

If you doubt my concern, go look at the hallway ceiling on the sixth floor where a leaking roof is making chunks of asbestos fall or go look at Stephenie Matte's ceiling in the Probate Court. The ceiling is pulling away from the wall in Connie Chan's office in County Court No. 1, so the asbestos is not sealed on the sides.

A problem related to the asbestos is the filthy air ducts and vents throughout the courthouse. Prior air testing has shown them to be laden with disease causing molds and contaminants. Sadly for the many courthouse workers suffering from continuous respiratory and allergy problems, the air ducts cannot be cleaned until the asbestos is removed.

Many county employees and judges have complained about the asbestos and filthy air ducts but have gotten the impression that county commissioners do not really care. I am sure county leaders do care, but their lack of responsiveness has disappointed many of their employees.

Supposedly, part of the \$12 million in certificates of obligation that the county will issue this year will go for asbestos removal or abatement. Nervous county employees deserve to know the details of exactly how and when the asbestos will be treated. Those with exposed asbestos in their offices should get immediate help NOW!

I suspect that our county leaders would act like they are much more attentive to this possibly deadly problem if the general public knew they were potentially being exposed to deadly asbestos when they come to the courthouse for jury duty or other business.

The morale of courthouse employees is already low after being told there would be no pay raises or bonuses except for a very few special employees. These hardworking, dedicated people at least deserve to know someone cares about their health and safety. County leaders should hire an objective outsider to test mold and asbestos levels in the air and should tell all employees what the specific plan is to deal with the asbestos and filthy air ducts.

by Greg Enos.

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Courthouse News (continued)

(Continued from page 3)

Burwell Presides Over Complex Recusal Hearing

Few brand new judges are selected to preside over hearings in cases generating national interest, but that is exactly what happened to Probate Judge Gladys Burwell this month. She was chosen from all of the active and retired probate judges in Texas to preside over a recusal motion in the complex battle over the estate of millionaire J. Howard Marshall, who married former Playboy model Anna Nicole Smith at age 89. Marshall's estate is valued at between \$300 - \$700 million. Much of Marshall's estate was invested in stock of Koch Industries and one of Marshall's sons had sued Charles Koch for defrauding him out of his rightful inheritance. Harris County Probate Judge Mike Wood and his District Judge Wife, Sharolyn Wood, went on an all expenses paid trip to a free market oriented, pro-business judicial seminar that was funded in part by a Koch family charity that included a family trip to the Utah mountains. The seminar, which is affiliated with the University of Kansas, has received national publicity for what some call a blatant attempt to sway judges toward pro-business positions. Judge Wood was assigned the Marshall probate proceeding after he attended the seminar. The son suing Koch's chairman filed a motion to recuse Judge Wood and Judge Burwell was assigned to hear the motion.

At the recusal hearing, Judge Burwell had to contend with over 20 high power attorneys and testimony from three former Texas Supreme Court justices. She did not allow two of the ex-justices to testify as experts on recusal. Judge Burwell denied the recusal motion in part because the actual party involved, Charles Koch, did not fund the judge's seminar trip and because of Texas' very strict and narrow rules on judicial recusal. As one lawyer summarized a recent recusal case, "If recusal is not required when Joe Jamaica donated \$10,000 to a judge's campaign during a trial before that very judge, then how can a family trust paying for seminar require recusal?"

New Filing Fees

The District and County Clerks are now charging increased filing fees thanks to our legislature and county commissioners. Attorneys should get copies of the complete, new fee schedules. The most common fees lawyers pay are now:

District Clerk

New civil suit	\$183.00	Jury Fee	\$ 30.00
Divorce suit	\$184.00	Citations/Precepts	\$ 8.00
Divorce with waiver	\$186.00		
SPACR, Name change	\$178.00		
Adoption	\$350.00 (includes investigator's fee)		
Third Party Action - Civil	\$ 30.00 (\$25 in family cases)		
Cross/Counter claim - Civil	\$ 30.00 (\$25 in family cases)		
Intervention	\$ 30.00 (\$25 in family cases)		
Mot. For New Trial	\$ 30.00 (\$25 in family cases)		
Mot. To Transfer Venue	\$ 30.00 (\$25 in family cases)		
Motion to Modify	\$ 25.00		

(Continued on page 8)

LAW FAX

Published since 1995 by Greg Enos

The Enos Law Firm, P.C., 1100 Nasa Road One, Suite 566, Houston, Texas 77058
(281) 333-3030 Fax: (281) 333-0300 e-mail: Lawfax@Enoslaw.com

The Practical Lawyer: News You Can Use

NADA Guides

Need to prove the value of a car, truck, motorcycle, RV, boat, commercial truck, limousine, snowmobile or mobile home? The yellow NADA Guides most folks have long used for cars are also published to cover all of the above, including older cars (1980-1991) and classic and collectible cars. Contact NADA at 1-800-966-6232 for price information and to place orders.

Low Impact, Low Ball Offers

Insurers such as Allstate are using a new computer based "low ball offer" system in soft tissue, low impact auto accident cases. Adjustors input data into a program called "Colossus" and it provides a settle offer amount, usually \$750 or \$1,000, that once made is never increased no matter whether liability is clear or new medical bills are incurred. Insurers using systems such as "DOLF" ("Defense of Litigated Files") or "MIST" ("Minor Impact Soft Tissue") will typically object to mediation because their initial offer will never be increased. Many plaintiffs' lawyers are much more careful about signing up car wreck cases that involve little or no property damage and usually hope their

clients have PIP (Personal Injury Protection) coverage to help pay most of their bills.

"Black Boxes" in Cars

Most new cars now contain "black box" data collection units similar to those in commercial airplanes which will show the V-force involved in an impact and data on airbag deployment. Higher cost 1999 GM cars will have data storage devices that will show data on the last five seconds before impact, including time of braking, vehicle speed, engine RPM, gas pedal position and seat belt status. Many new Ford cars have a similar device. Attorneys involved in auto accidents resulting in serious injury or death should consult an expert trained in downloading the data from the vehicles' "black box." One such consultant is Automotive

Systems Analysis in Reston, Virginia.

New Info To Include In Every New Civil Suit

All new civil suits must contain the current residence or business address for all parties, including plaintiffs! Civ. Pract. & Rem. Code Sec. 30.015(a). Also, remember, the first numbered paragraph in all civil suits must allege the discovery level the plaintiff plans to proceed under.

Special Rules Apply To Obtaining Bank, S&L Records

Want to subpoena records from a bank or credit union? Financial institutions are given extra time to produce records on their customers in Texas. Civil & Practice Code Sec. 30.007 requires 24 days notice of the record request and requires payment in advance for the costs of complying with the record request.

New law firm?
New partner or associate?
Change of Address?

Run a professional announcement
for free in the Law Fax!

Fax your announcement to Greg Enos
(281) 333-0300

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Courthouse News (continued)

(Continued from page 6)

New Filing Fees (continued)

County Clerk	
New civil suit	\$173.00
Intervention	\$ 85.00
Cross/Counter claim	\$ 85.00
Third Party Action	\$ 85.00
Jury Fee	\$ 22.00
Citations	\$ 4.00

Probate fees changed on September 1 and will change again on October 1. Attorneys should obtain the new fee schedules and still probably bring blank checks with them when they go to probate Wills and file for guardianships.

Trial Reports (continued)

(Continued from page 5)

family alleged she still had on the grass stained dress she was wearing when she collapsed doing yard work. The jury awarded each of the three grown children \$35,000 in mental anguish from the funeral home, about \$1,500 in actual damages from the director, \$1 each in additional damages from the home and \$25,000 from the director. The jury also awarded \$100,000 in attorney's fees. It is unclear exactly how much the final judgment will be for. Finis Cowan represented the defendants.

In August, a former volunteer fireman was sentenced to two years in prison and five years of probation for setting fire to a church storage facility and a seafood company. Joe Maida was prosecutor and Shauna Berardinelli represented the defendant.

Most plaintiff's lawyers have run into a defense orthopedic "expert" named Martin Barrash. I handled a case once where the claimant, who had a diagnosed herniated disk per MRI, committed suicide after Dr. Barrash examined him and said there was nothing

wrong with him. Insurance companies and defense counsel who do not worry about the appearance of buying prostituted testimony often send hurt plaintiffs to Dr. Barrash for "Independent" Medical Exams. Judge Susan Criss recently ruled that Dr. Barrash could not testify in a case unless documents were produced on all of Barrash's IME's and reports he had done in the last 2.5 years and the amount of money he had earned from IME's in the last 18 months. The defense tried to mandamus Judge Criss and the 14th Court of Appeals rejected the application in an unpublished opinion. Otto Hewitt of Alvin was one of the plaintiff's lawyers and can share the motions and briefs with interested counsel.

Greg Russell "won" two criminal trials in July that were not reported earlier in this journal. In one case, his client was accused of aggravated kidnapping and five counts of aggravated sexual assault of a child. The jury apparently decided the defendant did not molest a five year old girl in his trailer in San Leon as alleged. In the other case, the defendant was accused of hitting a bicyclist with his vehicle and then getting out and robbing the prone biker of \$50. The jury ended up hung 11 to 1 in favor of acquittal.

Greg B. Enos

The Enos Law Firm, P.C.

*Board Certified in Personal Injury
Trial Law*

Texas Board of Legal Specialization

- Medical negligence cases
- Nursing Home abuse and neglect
- Pharmacist malpractice

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August 6, 1999

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Enos on the Law, Life & Lawyers **When Is It Okay To Be Disagreeable?**

One of the most important lessons I learned from Russell Burwell as a young lawyer was that you usually get ahead by getting along with your fellow attorneys. Generally, I try to accommodate opposing counsel when asked and I have found they will usually do the same for me. Of course, there are times when I know my opponent cannot help me out because to do so would prejudice his client.

I recently found myself in a tough spot, caught between my overwhelming desire to accommodate a lawyer whose father had died 10 days before trial and my duties to my clients. Trial had been set for six months and my clients had already left for Galveston from their home in Europe when my opponent asked for a continuance. I had other witnesses coming from England, West Virginia and Georgia. It was a child custody case that both parents desperately wanted resolved and our visiting judge told us that we could not be reset for perhaps a year. I agreed to cancel five depositions set for the week before trial to help my opponent but I simply could not agree to the continuance.

My opponent's board certified co-counsel argued the motion for continuance and I pointed out that the six

(Continued on page 2)

*Greg Enos lives in
League City and
primarily practices
law in Galveston
County. Enos
also operates the
Clear Lake
Mediation Center.*



Courthouse News

Rheta Cox, Coordinator for the Probate Court, continues to recover from the serious heart attack she suffered two weeks ago. Rheta is expected to be out a month. Bridget Hargrove is filling in for Rheta.

Judge C. G. "Trey" Dibrell, III will not be running for the new District Court since he determined that he would have to give up his current judgeship as soon as he filed for the new post. The list of lawyers seriously considering a run for the 405th continues to swell. Leonard Cruse, former mayor of League City, is now on the "likely" list of candidates.

Appellate Cases

Lawyers who cheat their clients may lose their entire fees! An attorney who breaches her fiduciary duty to her client may be required to forfeit all or part of the fee, regardless of whether the breach caused the client actual damages. The amount of the fee to be forfeited is a question for the court, not a jury. Burrow v. Arce, __ S.W.2d __ (Tex. 7/1/99)

Consumers lose to insurance companies again. The Texas Supreme Court decided a conflict between appellate courts and ruled that auto carriers do get credit for PIP payments against an uninsured/underinsured motorist policy. The standard non-duplication language in auto policies is valid. Mid-Century Ins. Co. v. Kidd, __ S.W.2d __ (Tex. 7/1/99).

Trial Reports

A jury in County Court No. 1 found a defendant "Not Guilty" of cruelty to an animal. Tad Nelson represented the man who shot a dog in his yard which he alleged was aggressive. Kerri Foley was the prosecutor.

A seven day jury trial involving a modification/custody dispute quickly ended in a verdict that the mother should retain primary custody. Visiting Judge Henry Dalehite presided over the case, which had originally been in the 306th before Judge Baker recused herself. The mother and child were living in Georgia when the parents of the six year old girl divorced in 1997. In 1998, the mother married an English businessman living in Monaco and she moved there with the child. The father, who works as an airline pilot, spent over \$70,000 on attorneys in New York and England trying to use The Hague Convention to force the mother to return with the child. Texas retained jurisdiction (at least when the modification suit was filed in September) because the child had not lived in Monaco for six months then. The jury took only about ten minutes to vote 10 -2 not to change primary custody but then spent almost two hours arguing over the question on attorney's fees. Bill De La Garza represented the father and Greg Enos represented the mother.

**Galveston County Bar Association
Fall 1999 Seminar - Aug. 20, 1999**

(see next page for details)

Please copy this LAW FAX and share with all the attorneys & staff in your office.

Only one copy of this newsletter is sent by fax to each office, so please SHARE!

Galveston County Bar Association

Fall 1999 Seminar "Ad Litem, New Laws & Rules"

When: Friday, August 20, 1999
Where: Hotel Galvez, Galveston
Cost: \$75 for Bar members if they pre-register (\$100 for members who register at the door)
Non-Bar members: \$100 for pre-registration (\$125 at the door)
Price includes lunch!

Registration Form

Name: _____
Firm: _____
Address: _____
City: _____ Zip: _____
Phone: (____) _____
Fax: (____) _____
E-mail: _____
Bar No.: _____

Make checks payable to, "Galveston County Bar Association" and mail this form and your check for registration to:

John Buckley

Greer, Herz & Adams
One Moody Plaza—18th Floor
Galveston, TX 77550

For more information, call **Greg Enos**
(409) 943-4300 (281) 333-3030

**Most Galveston County Judges
require attendance at this seminar in
order to be appointed an ad litem in a
personal injury or death case.**

Editorial (continued)

(Continued from page 1)

year old's school started in six weeks and noted that a delay would probably cost our clients \$20,000 or more each in additional attorney's fees. The judge denied the continuance and my opponent was extremely unhappy with me. I added insult to injury by having to go ahead with one of the canceled depositions because a psychologist from France was going on vacation and would not be available during trial.

I felt bad when my opponent wouldn't even speak to me before the pretrial conference, where a second motion for continuance was denied. However, he was back to being his smiling, jaunty self by the end of the first day of trial and we got on as well after that as lawyers can in the heat of battle.

Lawyers should give and expect reasonable accommodation but, as always, the real interests of our clients must come first (even when it makes us feel uncomfortable).

Seminar Topics Include:

Morning Session (9:00 am - noon)

- Duties of Ad Litem in P.I. Cases
- Demonstration of a Minor's Settlement Hearing
- Evaluating Personal Injury Cases
- Insurance Coverage Basics
- Hospital Liens, Subrogation Claims & LOP's
- Judge's Perspective
- The Ad Litem in Probate Court

Lunch: Panel Discussion of "Winners and Losers" in the 1999 Legislature

Afternoon Session (1:15 pm - 5:00 pm)

- New Discovery Rules
- Changes in Probate Law
- Legislative Overview
- Changes in Criminal Laws
- Changes in Family Law
- Expert Witnesses
- Legal Ethics: Grievance Procedure
- Legal Malpractice
- Attorneys Fees

CLE Credit: Application is being made to the State Bar of Texas for 6.0 credit hours, including one (1) hour of ethics.

Please copy this newsletter and share it with your entire firm!

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June 14, 1999

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Enos on the Law, Life & New Courts

County Needs to Plan for New Courthouse

Harris County Commissioners are clearly foresighted and understand the importance of our courts to the entire community. Harris County is finishing its new Criminal Courts Building and is buying three blocks of prime land around the current court buildings to hold a new civil courts building, a parking garage and a park-like plaza that would allow room for future expansion. Commissioners are confident enough in the public's support of law and order to put a bond issue on this November's ballot to pay for the new civil courthouse.

Galveston County needs a similar long range plan for our courthouse. There has been talk about a possible new courthouse and an architect has been consulted. However, talk and vague plans will not provide a courtroom for our new district court. Our county hasn't even been able to remodel the law library using plans that were approved two years ago!

There is some talk of moving the County Tax Assessor to another building (good luck doing that!) and building two courtrooms on the first floor. There is no way that can be

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

Attorney Survey Results

Eighty two attorneys responded to the Law Fax survey mailed out two weeks ago. A majority of the attorneys responding, 62.3%, think our county needs a new courthouse. Moving the courthouse to the mainland is supported by only 42% of attorneys (but is favored by a majority of lawyers who office on the mainland). Lawyers by a two to one margin agree our county needs a new district court. Attorneys are evenly divided on whether we need another statutory county court.

A whopping 86% of attorneys think the Galveston County Bar Association should meet every other month on the mainland. This proposal is even supported six to one by lawyers who office on the island. Ninety percent of lawyers agree that the County Bar should conduct elections by secret ballots which are mailed to dues paying members. Attorneys are evenly divided about a proposal to amend the County Bar bylaws to alternate each year be-

Calendar

June 18, noon

Galveston County Criminal Defense Lawyers, Dibella's in Galveston

June 24, noon

Galveston County Bar Association, Tremont House, Galveston

June 29, noon

Galveston County Young Lawyers, Pelican Club, Galveston

July 7, noon

Bay Area Legal Assistants, Red Lobster, Webster

tween electing the President-Elect from big firms and small firms or solo's.

In retrospect, it was foolish to ask lawyers to name three local attorneys they thought would be qualified to be a district or county judge. Most lawyers did not fill in that blank (which either means they know of no lawyers qualified to be judges or they feared I would use their an-

(Continued on page 4)

Are You Charging Enough For Criminal Cases?

A suit in federal court in New York City gives some hint of the huge fees top notch criminal defense lawyers charge. A former client of Dick DeGuerin of Houston, who had been charged with conspiracy to distribute cocaine, is suing DeGuerin's firm in the Big Apple, seeking a return of part of his \$250,000 retainer.

**The Law Fax
will return to a
regular weekly
format next
week.**

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and story ideas!
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Editorial (continued)

County Needs to Plan for a New Courthouse

(Continued from page 1)

done in time for the new district court to use in January 2001. The only real temporary alternative is to take over one of the Justice of the Peace courtrooms in the annex but there would be no place for offices for the new district judge and the courtroom would be outside the existing security system of metal detectors and x-ray machines. A temporary building (like those used in schools) stuck in the middle of the parking lot would hardly be appropriate for a district court.

The commissioner's court, judges and lawyers need to work together to make a 50 year projection of how many courts we are likely to need and figure out how many total folks would do business with that many courts in a day. We

should then design a courthouse big enough to house that many courts, would-be jurors, attorneys, district attorneys, clerks, and files (and don't forget parking!). Once the size and requirements of the new courthouse are known, we should find suitable land that is closer to the center of the county (or at least the causeway).

The new courthouse could be built to house our current nine courts, including the new district court (with an extra courtroom for visiting judges), as long as there were plans and room for expansion over the next decades.

The current courthouse could be used to house all county administrative divisions, which would save over \$400,000 a year in rent the

county is currently paying.

Commissioners need to put a bond issue to the public and every single attorney needs to go all out to support it. This November would be the best time for a new bond issue because there will be a lot of publicity about the similar Harris County bond issue.

All of this is going to take time so the process needs to start now. This long range plan needs to be developed now at the same time we are figuring out a temporary place to house the new district court. A new courthouse and jail are not going to be cheap and attorneys must help educate the public and support our commissioners in selling the program to the public.

Legal News

Keep Saying, "Not Board Certified"

The State Bar got caught cheating on counting votes in the recent referendum election. This means that even though Texas lawyers overwhelmingly voted to change the rule requiring lawyers to do themselves in when advertising and boldly proclaim they are not board certified, the hated rule is still in effect. It is considered unlikely

the Supreme Court will adopt the rule change on its own.

Court Insiders Think Poorly of System

It doesn't look like judges and lawyers view our legal system any better than the general public. A survey of 3,000 judges, court personnel and attorneys sponsored by the State Bar and the Texas Office of Judicial Administration turned up some disheartening results. About half of

judges believe campaign contributions have a "fairly" or "very" significant influence of judicial decisions, while 79% of attorneys and 69% of court personnel thought so as well.

Only one third of attorneys thought courts follow the law in performing their duties and only 28% of attorneys thought judges had a hard working profession. Only 17% of Judges thought more than half of the lawyers they dealt with are "highly skilled."

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Trial Reports

The trial result I have most wanted to report happened in April and involves a DWI case heard by Judge Ron Wilson before a jury. Paul Coscelli of Houston represented the woman accused of driving while tipsy. As big shot Houston lawyers will do, Coscelli brought his female legal assistant with him and she sat next to him at the counsel table during the trial. The prosecutor called the first officer to testify and he promptly identified the legal assistant as the woman he had seen driving so erratically on the occasion in question. A cool professional, the prosecutor did not blink or flinch and quickly called the other officer involved in the arrest to testify. Surely this officer would have no problem pointing out the defendant since he had just that morning watched the jail house video of the accused drunk driver! Unfortunately, the goddess of justice must have had a few stiff martini's that day, because the second officer also pointed to the legal assistant as the woman he helped arrest that night. An amused Judge Wilson granted a directed verdict for the defendant.

Jim Healy's client was found not guilty last week of assault charges in jury trial before Judge Ron Wilson. Ben Mas-sar was prosecutor. The alleged victim of the assault was

a rather large chief of a school district police department who was off duty and out of uniform attending his daughter's ball game. Some young men had been acting up and the chief went to one guy's car and tapped on the window. The man asked for police I.D. and the chief had none. At that point, either the youth assaulted the cop or the cop punched the boy through his open car window. The State sought enhanced penalties, alleging that the kid's alleged assault was motivated by race since the officer was black.

A jury in Judge Susan Criss' Court found that a Texas A&M-Galveston professor had been fired because of ethnic and religious discrimination. The plaintiff, represented by Larry Watts of Houston, will get his job back and attorney's fees will be assessed by the judge later. Assistant Attorney General David Morales represented A&M.

Jim Ducote won a surprising victory for his client in a murder case in Judge David Garner's court in May. The man was found guilty of killing a male friend of his estranged wife. Everyone was surprised when the jury assessed a sentence of only five years in prison, including Judge Garner, who polled the jury. Lonnie Cox was prosecutor.

In May, a jury found a defendant not guilty in a DWI case in Judge Mary Nell Crapitto's

court. The defendant, who allegedly drove his car into a ditch, refused the intoxilyzer, but there was a video. Kerri Foley was the prosecutor.

Wayne Mallia and Tim Weatherly have faced each other in major jury trials in at least two cases that were not reported before in this newsletter. In January, Mallia convinced a jury to return a guilty verdict in a murder cases (after only ten minutes of deliberations). The jury then sentenced the man to life in prison. Tim Weatherly was defense counsel and the trial was in Judge Criss' court. In a second case, tried at the end of April before Judge Henry Dalehite, a man was found guilty of capital murder and received an automatic life sentence. Tim Weatherly also represented that defendant, who allegedly went to an apartment to rob a fellow of cocaine and end up shooting a woman lying in bed next to her three year old daughter (who was not hurt).

A jury in Judge Norma Venso's court in April found a man not guilty of aggravated sexual assault of a child. Michael Villalba represented the defendant and Bill Reed was prosecutor. Reed prosecuted another similar case and the man was found guilty of sodomizing a nine year old girl. Four

(Continued on page 4)

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Courthouse News

(Continued from page 1)

swers against them). Over forty different names were suggested and many lawyers clearly suggested themselves or their law partners. There were no clear favorites among attorneys answering the survey. The names of five lawyers were mentioned twice (Elisa Vasquez, David Walker, John Ellisor, Greg Enos and Charles Jordan). Only two attorneys were suggested by three lawyers each and both were associate family judges: Pat Reilly and Jan Yarbrough. Every other lawyer suggested for a possible judgeship only got one mention in the survey returns.

Answers about fees were more informative. The average hourly fee charged by attorneys was \$162 and ranged from \$70 to \$250 per hour. The average charged for preparing a simple will, durable power of attorney, power of attorney for health care and a living will was \$327 and ranged from \$150 to \$600. The average charge for handling a misdemeanor DWI was \$1,100. The average retainer in a contested divorce involving child custody in Galveston County was \$3,700.

Here Comes A New District Judge!

Lawyers across the county are nervously trying to figure out how they will break the

news to their spouses and law partners that they want to run for the new district court the legislature created for Galveston County. The bill creating the 405th District Court for Galveston County provides in part:

"(a) The 404th, 405th, and 406th judicial districts are created January 1, 2001.

(b) The initial vacancy in the offices of judge of the 404th, 405th, and 406th judicial districts shall be filled by election. The offices exist for purposes of the primary and general elections in 2000. A vacancy after the initial vacancy is filled as provided by Section 28, Article V, Texas Constitution.

Attorneys considering a run for this new judgeship in next year's primaries include: Elisa Vasquez, Pam Hoerster, Mark Kelly, and John Ellisor. Governor Bush has not yet signed H.B. 400 creating our new court but his office has indicated that he will.

Bill Could Allow Creation of a Public Defender's Office

A bill that Governor Bush has not yet signed would allow County Commissioners to take away from judges the right to appoint criminal defense counsel for indigents. Senate Bill 247 would authorize counties to establish public defender's offices or to contract with outside agencies for indigent defenders.

Several counties could pool and form joint P.D. departments. Judges from across the state have been urging the Governor to veto the bill. Even the Houston Chronicle had editorialized against it. Lawyers can contact the Governor and urge him to veto (or sign) S.B. 247 by calling 1-800-252-9600 or sending a fax to 512-463-1849. If the Governor does not sign or veto the bill by June 30, it automatically becomes law.

Family Bar Elects Officers

The Galveston County Family Bar Association elected Rebecca Murphy to be President-Elect, Enid Williams to be Secretary and Christina Tillinger to be Treasurer. Laticia Bass takes over from Steve Windsor as President for this year.

Trial Reports (cont'd)

(Continued from page 3)

other girls, all under 10, testified the man had molested them as well. The jury sentenced the man to life in prison.

In May, Jeff Kemp's client was found not guilty of assault and criminal trespass before Judge C. G. "Trey" Dibrell. Cylde Burleson was prosecutor.

In May, a truck driver lost his injury claim in Judge Susan Criss' court. He alleged he slipped on product being loaded on his truck.

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Appellate Decisions

Expert Witnesses. The use of radar is based on a scientific theory and is therefore subject to proof of reliability and relevance under Kelly. Ochoa v. State, __ S.W.2d __ (Tex. App. - San Antonio, 5/20/99)

The trial court doesn't abuse its discretion in allowing an expert witness to testify to the cause of a fire where the expert witness did not simply guess at the fire's cause, but deduced it by eliminating other possible causes, such as gnawing rodents or a surge from an electrical storm. Doyle Wilson Homebuilder Inc. v. Pickens, __ S.W.2d __ (Tex. App., Austin 5/27/99)

The Fifth Circuit used tough new rules on experts to throw out another plaintiff's verdict, ruling that a doctor should have not been allowed to testify that medical malpractice caused a baby's cerebral palsy. The court relied on medical articles (generated by doctors afraid of being sued) that say the problem is usually congenital and not due to birth asphyxia. The plaintiff's two doctors at the Daubert hearing said they eliminated congenital defects because there was no evidence of congenital damage to non-vital organs. The Fifth Circuit pointed out that no medical articles were submitted proving that logical conclusion. One of the plaintiff's doctors said a good physical exam would be

needed to rule out congenital defects and no such exam had been done. Moral: in a case with complex scientific or medical issues relating to causation, the plaintiff will always lose unless every possible Daubert line of attack is covered. Tanner v. Westbrook, __ F.3d __ (5th Cir. 4/27/99).

Oh, surprise, another plaintiff's verdict stripped by the 5th Circuit using Daubert as the excuse. In this case, the woman fell at a Food Lion and her board certified treating physician testified she suffered fibromyalgia syndrome as a result. A magistrate awarded almost \$300,000. Citing medical articles not admitted into evidence at trial, the 5th Circuit ruled that the doctor's opinions should not have been admitted because medical research has not proven the link between trauma and this extremely painful condition. Imagine a case where a woman is hit in the mouth with a frozen eel and gets a cut, swollen fat lip. There are no peer reviewed medical articles on the link between blows from frozen eels and fat lips and indeed there are no published articles at all on the causes of cut, swollen fat lips. This would apparently mean a doctor could not testify that the swat with the frozen eel caused the mouth damage. Black v. Food Lion, __ F.3d __ (5th

Cir. 3/30/99).

Attorney's Fees. A man sued a former Dallas School District trustee demanding that he file campaign finance reports. The defendant won on summary judgment and the trial court refused to award the defendant attorney's fees, even though there was attorney testimony that \$75,000 in fees were reasonable. It turns out that the lawyer was paid by the school district and not by the defendant himself. The Open Records Act allows for the recovery of "reasonable attorney fees incurred by the prevailing party (wording similar to that used in most statutes allowing recovery of lawyer fees). The court of appeals decided that "incurred" means liable to pay and the defendant was not liable to pay the fees. This logic would apply

(Continued on page 6)

Clear Lake Office Space For Rent

Looking a office space in Clear Lake? Mary Beth Nelson and Mark Honsaker have an office to rent at 18333 Egret Bay Boulevard in Webster, just south of NASA Road One. Call 281-333-8360 for information.

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Appellate Decisions

(Continued from page 5)

to pro bono cases in which the attorney agrees in advance the client is not liable to pay him or her. Interestingly, the plaintiff in this case lost the summary judgment but was awarded \$18,000 in sanctions against the defendant's attorney for filing a false affidavit stating the fees were billed to the defendant when they were billed to the district. The sanction was upheld. *Keever v. Finlan*, ___ S.W.2D ___ (Tex. App. Dallas 2/18/99).

Family Law. As long as there is a credible showing of the need for attorney's fees and the ability of the opposing spouse to meet that need, the trial court has authority by temporary orders to require the payment of such fees; however, the trial court may not make the opposing party destitute in order to pay the support and fees. *Herschberg v. Herschberg*, ___ S.W.2D ___ (Tex. App. Austin 5/20/99).

To invalidate an antenuptial agreement, a party must show that he did not sign voluntarily or that the agreement is unconscionable and then that conditions regarding disclosure of the other party's estate were not met. *Fazakerly v. Fazakerly*, ___ S.W.2D ___ (Tex. App. Eastland, 5/27/99).

Reimbursement, not constructive trust, is the only available remedy to a person whose

spouse used community funds to purchase or improve his separate property. *Wilkerson v. Wilkerson*, ___ S.W.2D ___ (Tex. App. Austin, 5/20/99).

Sexual Harassment in School. In cases of peer harassment, where the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit, a private damages action may lie against the school board, but only when the district acts with deliberate indifference to known acts of harassment in its programs or activities. *Davis v. Monroe Co. Bd. of Edu.*, ___ U.S. ___ (5/24/99).

Discovery. The trial court's finding that a letter prepared in anticipation of litigation is a witness statement and discoverable was not error. Among the documents identified, was a letter dated October 26, 1998, sent by an employee and a company officer to defendant's insurance carrier. The first paragraph of the letter contained a description of the accident by the defendant's allegedly negligent employee and a witness to the accident. The second paragraph of the letter contained comments by the defendant's Vice-President on procedures used at the warehouse where the accident occurred. In *Re Team Transport Inc.* 5/21/99

Premises Liability. The trial court erred in granting JNOV in a slip-and-fall case where there was more than a scintilla of evidence that the owner of the premises had constructive knowledge of a puddle of water on the floor. The claimant testified she entered the bingo hall at about 6:45 p.m. on the evening she fell. It was not raining at the time, but had rained that day and the day before. Upon coming through the door, she walked across a door mat that was placed inside of and adjacent to the door. When stepping off the mat, she slipped and fell in a puddle of water. Another witness testified she observed the water on the floor that evening when she arrived at about 6:15 p.m. A man testified he noticed the puddle of water in front of the mat at about 6:20 p.m., and that the puddle was wider than his shoulders. He testified he had seen the floor wet at that same location on several occasions prior to the plaintiff's fall. The record reveals the bingo hall had at least three employees known as "floor walkers" whose job responsibilities include selling bingo tear sheets and checking the premises for spills. *Stewart v. Beaumont Aerie Number 116, Fraternal Order Of Eagles, Inc.*, ___ S.W.2D ___ (Tex. App. - Beaumont, 5/27/99).

LAW FAX

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May 29, 1999

Distributed by fax, mail, e-mail and now at WWW.ENOSLAW.COM

Enos on the Law, Life & Attorneys The Evils of Family Law

I have written before about why I enjoy family law. As many of you know, I started handling divorce and custody cases after representing myself in a four week doozy of a trial I was fortunate enough to win. My goal is to try to be the kind of lawyer I wanted and needed during that terrible period of my life.

My current family practice involves very simple cases, some taken pro bono, and also high dollar, complex cases. This means I go up against lawyers ranging from the poor and inexperienced to the big bucks, big name divorce hounds.

The three species of divorce lawyers I do not like are:

1. **Do Nothing Lawyers** who cannot ever be reached by phone and who simply will not work on their cases, thus delaying settlement.
2. **@#%\$ Stirring Lawyers** who create a fight when there is no need for one. Some do so out of ignorance and some seem to intentionally goad their clients into fights they don't need or can't win.
3. **Nasty Lawyers** (often found in the "upper echelons" of matrimonial lawyers) who sneer and snarl and demean during questioning. I find you can treat opposing parties with respect and still be an effective advocate (and possibly avoid making enemies out of two parents).

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



The LAW FAX Returns!

The LAW FAX has been on a six week hiatus while I supervised the final work on my firm's website and spent far too much time on my other hobby, being a lawyer. Nothing can interfere with a personal life like three trials and two major briefs.

I also spent an unusual amount of time (for me) just goofing off with family and friends on week-

ends and not working.

As soon as my vacation this week is over, I promise to get back to turning out my newsletter every two weeks.

In the meantime, take the time to fill out the attorney survey so I have results to share with everyone in my next issue (which will also include pages and pages of trial reports that have accumulated).

Visit our new Internet web site:
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ATTORNEY SURVEY

Please complete and mail back or fax to (281) 333-0300

Opinions

1. Galveston County should build a new courthouse. ☐ Agree ☐ Disagree
2. Galveston County, assuming legislative permission is granted, should build a new court house and jail on the mainland on or near I.H. 45 so it is centrally located in the county. ☐ Agree ☐ Disagree
3. Galveston County needs another district court. ☐ Agree ☐ Disagree
4. Galveston County needs another county court at law. ☐ Agree ☐ Disagree
5. The Galveston County Bar Association should meet every other month on the mainland. ☐ Agree ☐ Disagree My office is: ☐ in Galveston ☐ on the mainland
6. The Galveston County Bar Association should elect officers using secret ballots mailed to members to insure only paid members vote and to make sure "block voting" does not occur at election meetings. ☐ Agree ☐ Disagree
7. The Galveston County Bar Association should amend its bylaws to provide that in odd years, candidates for president-elect would come from large firms and in even years the candidates would come from small firms or be solo practitioners. ☐ Agree ☐ Disagree Size of my firm: ☐ Solo Firm has ☐ lawyers
8. Name three local lawyers who you feel would be qualified to be a district or county judge in the next ten years: _____

Fees

9. What hourly rate do you usually charge? \$ _____ Don't do hourly work
10. What is your usual fee for preparing the following for a single person: simple will, durable power of attorney, power of attorney for health care, declaration of guardian and directive to physicians? \$ _____ Don't do Wills
11. What do you charge for handling a misdemeanor DWI (1st offense, no accident)? _____
12. What retainer do you ask for in contested custody cases in Galveston County prior to temporary orders (no protective order)? _____

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April 1, 1999

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Courthouse Gossip

Warning: This is fiction. It was written last week when the courthouse was abuzz with rumor about why Judge Engelke's framed picture had been removed from the wall of the 212th. Judge Engelke's picture is now back up where it belongs.

Late at night, in the darkened, silent courtrooms, the framed paintings of the deceased and retired judges hung on the wall begin to give off an eerie green glow. The courtrooms fill with the pungent smell of sulfur released from some judicial Hades. The eyes of the ancient jurists begin to burn red and before long the ghostly judges begin to talk to each other across the courtrooms. The old judges comment on what happened in court that day and often argue over the rulings made by the current judge who now sits on the very bench where once the old ghouls rested their creaking behinds. In the 212th, it is said the ghostly painting of Judge Don Morgan has grown bored with his fellow old judges hung on the wall and that he yearns for newly framed jurists

(Continued on page 2)

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

Judge Jones' Framed!

Retired Probate Judge Jerome Jones was honored by the Galveston County Bar Association with a ceremonial unveiling of his framed portrait, that will be hung in the courtroom he served in for so many years. On hand to honor one of the true legends of the Galveston Bar were Judge Jones' brother, son, his former staff and his successor on bench, Gladys Burwell.

Law Library Aide Julie Blackwell Needs Your Help

Part-time law library aide Julie Blackwell recently underwent triple by-pass heart surgery at UTMB and has no medical benefits. Julie works in the library through the Senior Aides program. Law Librarian Jennifer Overbeck is accepting donations to help Julie and a bake sale will be held on April 7 in the Law Library to help raise funds for her.

For more information, call Jennifer Overbeck at (409) 765-2601.

Trial Reports

Judge Susan Criss' first capital murder case ended in a conviction but not a death sentence. A 40 year old League City woman was found guilty of conspiring with her boyfriend and another man to murder her husband for almost \$700,000 in life insurance benefits. Prosecutors Mike Guarino and Kurt Sistrunk did not seek the death penalty so the defendant received an automatic life sentence. Brian Abbington and Elisa Vasquez were defense counsel.

Lois McCarnes' client was found guilty only of class B criminal mischief in County Court No. 1. It was alleged the woman confronted her boyfriend's daughter who had snuck into her house then drug the girl out of the house by her hair, threw eggs on her car, beat her car with a cordless phone, and then, while everyone was waiting for the cops, burned the daughter's clothes in the backyard. The defendant denied a cordless phone could possibly cause so much dam-

CALENDAR

April 9	Noon	Mediation Assoc.	Pelican Club - Galveston
April 14	Noon	Family Bar Assoc.	Pelican Club - Galveston
		Special Meeting on Family Violence	
April 16	Noon	Criminal Defense Lawyers	Di'Bella's - Galveston
April 29	Noon	Galv. County Young Lawyers*	Pelican Club - Galveston
April 29	Noon	Galv. County Bar Assoc.*	Pelican Club - Galveston
		Special Law Day Luncheon - Joint Meeting With Young Lawyers	
April 30	Noon	Mainland Bar Assoc.	Union Planter's Bank - League City
* Note change in meeting date, time or place			

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Trial Reports (continued)

age to the car. New prosecutor Dane Johnson was unable to convince the jury to find the woman guilty of Class A criminal mischief.

A defendant in Judge Dibrell's court faced two consecutive jury trials in one week. First the man, represented by Charles Kingsberry, was found not guilty of unlawfully carrying a weapon. Then, a second jury found him guilty of DWI. The parties reached agreement on punishment. Jonathan Cox was prosecutor.

A woman was found guilty in Judge David Garner's court of tampering with government records by covering up her embezzlement from a school district with a phony check. She was also found guilty of using forged prescriptions. Before the completion of the sentencing trial, the woman fled with her young son. The jury finished its work without her and sentenced her to six years in prison and assessed a \$20,000 fine. The woman was found in Florida with her six year old son. Joe Maida was prosecutor. Tom Lambright was defense counsel.

(Continued from page 1)

to listen to his rantings. They say that each night Morgan's framed spirit wails in torment and asks why the portrait of Judge Engelke was removed from the wall. For their part, the other framed judges who remain on the wall mutter under their breaths that they wish they had been taken down. The mystery remains—where is Judge Engelke's portrait and why was it taken down?

Judge Susan Criss assures all brave enough to ask that the mix-up that sent her official Judge's license plates to Engelke by mistake had nothing to

do with why Judge Engelke's picture was taken down. Criss says the picture came down because new wallpaper was hung behind the 212th's jury box. In fact, courthouse maintenance on Wednesday replaced Engelke's picture on the back wall of the courtroom (where the other judges are hung and where space has been left for Miles Whittington's photo). The fact that Engelke's photo went back up the day after he returned the license plates and after this intrepid reporter started asking questions for a story is purely coincidental.

Personal Injury & Death Cases

The U.S. Supreme Court last week ruled that all expert witnesses testifying on any subject must pass the reliability test of Daubert. The factors set forth in Daubert,

however, may not apply to every type of expert. The trial court has discretion in determining reliability. The court clearly holds that some expert testimony based solely on experience could be admissible. Kumho Tire Co. v. Carmichael, ___ U.S. ___ (1999).

Greg Enos is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization.

DWI

The New Mexico Supreme Court has joined a growing number of courts that have held the horizontal gaze nystagmus test is not admissible

in a DWI case without expert testimony that proves its validity. State v. Torres, (N.M. 2/15/99). Ten other states have issued similar rulings. In Texas, the HGN test can be used to prove intoxication but not the level of intoxication.

The Enos Law Firm, P.C. handles misdemeanor DWI and license revocation cases in Galveston County.

Order your 1999 Galveston County Legal Directory for just \$12.
Send your check to Greg Enos 1100 Nasa Road 1, #566, Houston 77058

April 1, 1999

LAW FAX

Page 2

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March 22, 1999

Distributed by fax, mail, e-mail and soon at ENOSLAW.COM

Enos on the Law, Life & Attorneys

Keep Appointing and Paying Independent Attorneys

When county commissioners start asking for lists showing how much attorneys were paid for court appointments, one first smells politics and then hears rumblings of creating a public defenders office to save tax payer's money. No one familiar with how our justice system works thinks for a second a P.D.'s office would work here or is justified by the numbers paid in 1998 to court appointed attorneys. Before anyone starts blasting court appointed attorneys, they should consider:

1. Each court appointed lawyer covered their own office, staff, insurance, tax and equipment expenses and not the tax payers.
2. Many of the court appointed attorneys advanced expenses on their cases in hopes they would be reimbursed later. Tad Nelson spent over \$15,000 of his own money on court appointed cases.
3. In criminal cases, there are often conflicts of interest that would preclude a single P.D. office from representing every defendant in a case.
4. Many of the lawyers listed on the county's list of court appointed

(Continued on page 3)

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Courthouse News

Rep. Eiland Files Bill to Create New District Court

After vigorous lobbying from our local judges, Rep. Craig Eiland on March 17, filed H.B. 3360, which would create the 420th District Court for Galveston County. The new court would be a court of general civil and criminal jurisdiction and would come into existence on January 1, 2001. Presumably, this would mean the new judge would be selected by election rather than gubernatorial appointment. The bill was referred to the House Jurisprudence Committee.

Bruce Fort's Ex-Secretary Sentenced for Embezzlement

Texas City criminal law specialist Bruce Fort should eventually be repaid the \$126,000 a secretary embezzled over a four year period under a sentence imposed

by Judge David Garner. Fort's secretary allegedly forged his names on firm checks and pocketed cash paid by clients. The 33 year old defendant was placed on probation by Judge Garner only after her 58 year old mother sacrificed her \$50,000 pension as the first installment of the court ordered restitution. Judge Garner met with the mother in chambers to make sure she understood what she was doing. Garner ordered 10 years probation, monthly restitution payments, 60 days in jail and ordered the woman to write Fort a detailed apology letter.

Statistics Argue For Another District Court

A comparison of Galveston County with seven other counties of similar size show the need for another district court

(Continued on page 2)

Calendar

March 23	Galv. Co. Young Lawyers	Noon
	Pelican Club - Galveston	
March 25	Galveston County Bar	Noon
	Southshore Harbour Resort	
	Note: Meeting is in League City!	
	Speaker: Justice Eugene Cook	
March 26	Mainland Bar Association	Noon
	Merchant's Bank, League City	
	Speaker: Greg Enos: New Discovery Tactics	
April 9	Mediation Assoc.	Noon
	Pelican Club - Galveston	
	Judicial round table on mediation	
April 14	Family Bar Association	Noon
	Pelican Club - Galveston	
	Special Meeting on Family Violence	
April 16	Criminal Defense Lawyers	Noon
	Di'Bella's - Galveston	

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(Continued from page 1)

for our county. Consider these numbers for fiscal year 1998:

County	Population	# of Dist. Courts	Pending Cases	Total New Cases Added	Cases Disposed
Denton	273,525	5	7,634	8,624	8,414
Collin	264,036	5	5,814	9,582	9,503
Cameron	260,120	5	6,873	10,605	12,429
Jefferson	239,397	8	9,444	15,643	16,982
Ft. Bend	225,421	3	5,565	7,020	6,444
Lubbock	222,636	6	11,811	7,015	6,957
Galveston	217,399	5	12,227	10,051	10,879
Brazoria	191,707	4	8,491	6,519	5,999

Put another way, the number of pending cases per district court are:

County	Pending Cases Per Court
Galveston	2,445
Brazoria	2,123
Lubbock	1,969
Ft. Bend	1,855
Denton	1,526
Cameron	1,375
Jefferson	1,181
Collin	1,163

By comparison, in 1998, in misdemeanor criminal cases alone, our two statutory county courts at law had a total of 9,868 cases pending or 4,934 per court.

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Directories will be available at future Bar meetings and will be delivered or mailed to those who have already ordered books by April 1.

The directory lists over 450 local attorneys and all courts in Galveston and Harris counties.

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Editorial (continued)

(Continued from page 1)

attorneys were mediators or ad litem that would not be part of a P.D. office. Most of the mediators were paid from the mediation fund that is generated by a portion of each civil filing fee and so does not come from tax dollars.

5. There is no way a Public Defender's office could give as high quality representation as the outstanding lawyers appointed by our local judges.

A note: I worried about publishing a list of lawyers showing how much each was paid by the county. I was concerned I was invading their privacy since I wouldn't like anyone printing my income for 1998. However, the report is a public record and many folks I talked to had already seen or heard of the list.

I talked to the guy who topped the list, Tad Nelson, and he assured me he wouldn't care if I printed the list. Five minutes with Mr. Nelson will convince anyone he earned every cent the county paid him last year and that the county and his clients got a great bargain in the process.

I would prefer to print a list showing how much court appointed lawyers got from each district court, with a break down of criminal, juvenile, family and CPS cases. I would also like to be able to show how much mediators and ad litem in civil cases earned from private sources on appointments from each court. Unfortunately, our District Clerk's office is not vigorously compiling that information and it is often impossible to get without the cooperation of lawyers appointed in civil cases.

Tad Nelson Tops List of Court Appointed Attorneys

Newly elected Republican County Commissioner Ken Clark had the County Budget Office compile a list showing the total amounts paid to attorneys by the county in 1998 for criminal defense of indigents and service as mediator and ad litem. A total of \$1.258 million was paid by the county to court appointed lawyers in 1998. Attorneys who were paid more than \$10,000 in 1998 were:

Rank	Attorney	Total Paid
1	Tad Nelson	76,385.16
2	Thomas J Wooten	53,167.50
3	Greg Russell	42,062.50
4	Jeff Kemp	41,195.00
5	Elisa Vasquez	41,028.97
6	Dominic Merino	34,995.19
7	Maria Mercado	30,530.00
8	Leonard Cox	30,009.34
9	Shauna Berardinelli	29,394.64
10	Robert Monks	27,830.00
11	Joel Correia	27,617.50
12	Jennifer Smith	26,948.56
13	Johnette Duff	26,765.00
14	Judy Meeh	26,301.82
15	Sharon Meier	26,204.21
16	Christine Mangle	26,146.77
17	Brian Abbington	24,756.00
18	Carmen Graham	24,160.37
19	Tim Weatherly	23,925.00
20	Roger Ezell	23,905.57
21	Lois McCarnes	23,454.57
22	Stephen Taylor	22,367.95
23	Joel Bennett	22,246.78
24	John Ellisor	22,128.71
25	Roberto Torres	21,590.00
26	Michael Villalba	19,248.00
27	Marybeth Nelson	19,043.13
28	Kevin Rekoff	18,835.00
29	Laticia Bass	17,814.00
30	Rebecca Murphy	16,690.83
31	Robert Fredericksen	13,987.50

(Continued on page 4)

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(Continued from page 3)

32	Gerise Kemp	13,938.00
33	Dinah Lewis	13,405.00
34	Oktavia Carstarphen	13,388.00
35	Joyce Darling	12,283.00
36	Roy Warren	12,280.00
37	Kathryn Lanan	12,170.31
38	Robert Coltzer	11,954.96
39	Susan Criss	11,937.50
40	Robert Hoskins	11,507.50
41	James Graves	10,890.00
42	Carla Anderson	10,444.93
43	Gene Parrish	10,173.00

The report did not break down the numbers for each district court but did so for the County Courts. Jeff Kemp received the most as an appointed lawyer in Judge Crapitto's Court (\$7,765.00). Tad Nelson topped the list in Judge Dibrell's Court (\$14,280.00).

Greg B. Enos

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Trial Reports

In February, two DWI defendants were found "not guilty" by juries in Judge Mary Nell Crapitto's court. In both cases, there was no intoxilyzer but there was a video. Elizabeth Gunn was the prosecutor in both cases. Norwood Ruiz was defense counsel in one case and R.A. Apffel in the other. In Ruiz' case, the officer had to say the defendant reeked of apple juice, instead of alcohol as usual, since for some reason it was spilled everywhere in the man's car.

Two more "not guilty" verdicts in DWI cases were returned by juries before "IMPACT" Judge Ron Wilson, who has been helping relieve the misdemeanor criminal docket. There was no intoxilyzer test results in either case but both had videotapes of the defendants. In one video, the defendant fell down several times but he explained his tumbles by saying he was sleepy.

A plaintiff finally won an auto rear-ender case in Probate Judge Gladys Burwell's court. Kathleen McCumber and Mark Mayfield represented the plaintiff, who suffered soft tissue injuries and had about \$3,000 in medical bills. The defendant was alleged to have been intoxicated. The jury awarded \$6,750 in damages. With pre-judgment interest, the judgment will be slightly more than the \$8,000 the carrier had offered.

Tad Nelson's client was acquitted by a jury in Judge David Garner's court of indecency with a child and sexual contact with a child. The jury was hung on the charge of Aggravated Sexual Assault of a Child and a mistrial was declared. Bill Reed was prosecutor.

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February 17, 1999

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Enos on the Law, Life & Lost Friends

Galveston County Loses Two Political Giants

Our county recently lost two very special people, Judge Ed Harris and County Commissioner Wayne Johnson; two men who were so very different yet who both exemplified some of the very best attributes of our profession.

Judge Harris spoke slowly and usually softly. He was courteous to a fault and could make the newest, most inexperienced lawyer feel comfortable in his court. Even criminal defendants being sentenced to prison appreciated his grandfatherly kindness. Judge Harris was not a legal scholar reveling in statutory minutiae but rather a student of people who made sure that common sense and practicality reigned in his court.

In contrast, Wayne Johnson never talked slowly and seldom stopped talking. He was consumed by a passion for politics and he usually ended up consuming those who crossed him in the arena of policy or vote counting or getting out the vote. Some attorneys like what they do and find it interesting. Wayne loved his political life with a zeal and passion few ever match.

(Continued on page 3)

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in League City
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Courthouse News

Legal Secretaries of Galveston County to Hear About New Discovery Rules

The group known as the Legal Secretaries of Galveston County has been meeting for 37 years and now convenes on the first Tuesday of every month at Clary's Restaurant in Galveston. The group will hold a special seminar meeting on Wednesday, February 24 at the Victorian Condo Hotel at 6300 Seawall to hear Greg Enos speak on the New Discovery Rules. Cost is \$35 per person and includes a deli buffet. Register with Wendy Barron at Greer, Herz and Adams--409-797-3202.

Bar Plans August Seminar

John Buckley and Greg Enos are planning an all day seminar for August 20, 1999 at the Galvez Hotel. The morning will be a seminar for those wishing to be appointed ad litem in injury cases and the afternoon will feature top notch speakers from around the state addressing new laws enacted by the Legislature in the fields of family law, criminal

Calendar

Criminal Defense Lawyers

Feb. 19 noon - Di'Bella's, Galveston

Galv. Co. Young Lawyers

Feb. 23 noon - Pelican Club
Galveston

Galv. County Bar Association

Feb. 25 noon - Tremont Hotel,
Galveston

Mainland Bar Association

Feb. 26 noon - Merchant's Bank,
League City

Galv. Co. Family Bar Association

March 10 noon - Pelican Club,
Galveston

law, probate, injury & death
cases and civil procedure.

Justice Cook to Address

Bar Association at

South Shore Harbor

The Galveston County Bar Association will meet on March 25 at the South Shore Harbor Resort in League City. Former Texas Supreme Court Justice Eugene Cook will be the speaker. The buffet line will

(Continued on page 2)

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(Continued from page 1)

open at 11:45 a.m. for this second "off the island" meeting of the County Bar. The meeting is March 25 at noon. The County Bar meets in February on Thursday, February 25 at the Tremont House in Galveston.

306th Really Expects Parties to Mediate

Judge Baker is now issuing docket control orders that contain a deadline to mediate the case and which state that the case will be dismissed if the parties have not completed mediation by that date. The new docket control orders will also appoint a specific mediator. Judge Baker has announced that she will only appoint mediators who are members of the Galveston County Mediation Association.

State Bar Election Under Investigation

The State Bar's recent referendum is under investigation because voting was extended an extra day to barely squeak past the requirement that 50% of lawyers vote before the results are binding. John Onion, a retired Justice of the Court of Criminal Appeals, has been appointed to conduct a factual inquiry in to how and why 856 ballots were counted even though they arrived in the mail a day after the December 16 end of the announced voting period. The Bar must assume the referendum results will be upheld because it has quietly stopped enforcing the rule that

requires attorneys who are not board certified to so state in their advertising.

Announcements

Greer, Herz & Adams, LLP is pleased to announce two new partners: Gregory S. Garrison and Scott D. Daniel.

Miles M. Whittington, Sr., former judge of the 212th District Court, is returning to the practice of law at 1919 Sealy Avenue, Galveston, Texas 77550; (409) 762-8960; Fax: (409) 762-1755. Whittington is not out of politics because he has announced he is a candidate

for City Council in League City.

Alton Todd has opened a second office in Friendswood at 316 E. Edgewood (FM 2351). Todd's main office will still be in Alvin.

There will be a reception for lawyer—turned politician, County Commissioner Stephen Holmes, who will be honored on Tuesday, February 23 at 5:30 p.m. - 7:00 p.m. in the Community Room at La Marque City Hall at 1111 Bayou Road, La Marque.

Work Wanted.

Legal Secretary/Legal Assistant

Legal Assistant/Legal Secretary with over 15 years experience in litigation, plaintiff and defense; probate/estate planning; and family law seeks employment. Proficient in MS Word, Word Perfect and many other programs. Typing speed 90+ w.p.m. Available for temporary assignments while seeking permanent position. Please call Nancy Spangler Sykes at (281) 334-2279. Resume and references available.

Miles M. Whittington, Sr.,

former judge of the 212th District Court,
proudly announces his
return to the practice of law at
1919 Sealy Avenue
Galveston, Texas 77550
(409) 762-8960
Fax: (409) 762-1755

LAW FAX

Published since 1995 by Greg B. Enos

The Enos Law Firm, P.C., 1100 Nasa Road One, Suite 566, Houston, Texas 77058
(281) 333-3030 Fax: (281) 333-0300 e-mail: EnosLaw@phoenix.net

TRIAL REPORTS

Judge Baker in the 306th has been very busy. She presided over a CPS/parental termination jury trial that lasted two weeks. Alvin Saenz represented the absent father and Maria Mercado the mother. Christine Mangle was the ad litem and Ella Anderson represented CPS. Over 23 witnesses were called to testify. The father allegedly molested one of the four children. The jury voted unanimously to terminate the father's parental rights and finally voted 10-2 to terminate the mother's rights as well. While the jury was still deliberating, Judge Baker conducted a short bench trial and then immediately started a two day divorce trial where Howard Hill and Johnette Duff represented the father and Greg Enos and Jonathan Harris represented the mother. The mom won sole managing conservatorship and received significantly more than she had been offered on the property division.

Probate Judge Gladys Burwell presided over her first jury trial where the defendant won a finding of no negligence in a rear end auto collision case. There was a dispute over whether the plaintiff was actually injured but there was no doubt the deputy county clerk was hurt when her chair collapsed during the trial, causing her to strike her head on the floor. EMS took the clerk to UTMB and the trial continued. Happily, the clerk is okay. Judge Burwell's second civil jury trial was an uninsured motorist case against Allstate. Judge Burwell granted a defense motion in limine and would not let the jury know it was a

(Continued on page 4)

Two Giants Lost (continued)

(Continued from page 1)

Wayne was a master of very small, esoteric details and he was always more than willing to take a position on anything. Wayne would fight and talk his opponents in to submission by either the force of his arguments or his willingness to out talk and out last them.

Ed Harris and Wayne Johnson were in so many ways as different as could be. They were separated by age and generation, race and personality. Yet both men dedicated their entire lives to political service. Ed Harris served 33 years as an elected official and fought through 17 elections. He served on the Galveston City Council for two years then was a State Representative for 14 years. He then spent 16 years as a District Judge.

Wayne Johnson's political influence extended far beyond the boundaries of his County Commissioner's district. His ability to mobilize the black vote is one primary reason we still have Democratic officeholders in Galveston County. Wayne didn't just call local folks in the wee hours of the morning to share political insights. He called people in Austin and Washington and more often than not they listened.

Our county and our legal community are better off for having enjoyed the lives of Ed Harris and Wayne Johnson. Their work as lawyers and primarily as public servants touched thousands of lives. They were two men who made a difference and they will both be missed terribly.

Greg B. Enos

Accepting referrals of:

**Board Certified in
Personal Injury Trial
Law by the Texas
Board of Legal
Specialization**

- Car wreck cases
- Medical malpractice
- UTMB claims
- Nursing Home cases
- Refinery Accidents

**(409) 943-4300
(281) 333-3030**

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Trial Reports (cont'd)

(Continued from page 3)

suit directly against the carrier. The jury found no negligence on the uninsured driver but told lawyers later they thought the plaintiff's uninsured motorist carrier should have paid (which it now, of course, won't have to do). Steve Ongert and Jack Nolan represented the plaintiff.

Judge Norma Venso in the 56th spent two weeks in the second trial of a murder case and then had to declare another mistrial because the jury was deadlocked. Lonnie Cox was lead prosecutor and Brian Abington was defense counsel.

Judge Venso let the murder jury take a break during the trial so two members could go on long planned vacations. She used that break to try a disputed red light auto collision case where Larry Tylka represented the plaintiff claiming soft tissue injuries. Baker & Botts represented the defendant. Defense counsel had clearly never had to deal with a Batson attack on their peremptory strikes. Twice Tylka made successful Batson challenges to the defendants' strikes and twice black jurors were put back on the panel. Tylka also managed to get six would-be jurors struck for cause and he got the defense expert struck because he had not been designated properly. Tylka managed to easily best the \$1,500 he had been offered as the jury

awarded \$25,000 in damages. Even after a 50% reduction for comparative fault, six years of prejudgment interest brings the total recovery to well over \$20,000.

Judge C. G. "Trey" Dibrell, III presided over an auto collision case. The jury found negligence but no damages. Wade Williams represented

(Continued on page 5)

Editorial

We do Need Another District Court!

County Judge Jim Yarbrough and three of our four county commissioners voted for a resolution calling on the Legislature not to create a new district court for Galveston County. The only lawyer on the Commissioner's Court, Stephen Holmes, voted against the resolution.

It is true that a new court would cost the county a lot of money and it is very true that we currently do not have an empty courtroom to assign a new district court.

However, it is just as true that the dockets of all four general district courts are far too congested, despite the best efforts of judges to handle the ever-increasing number of cases.

It is great that the three commissioners and our county judge are fiscal conservatives. But I am sure they all say they are for law and order when they meet with voters. They would not want to meet with a group of violent crime victims and say they find it acceptable that criminal cases take so long to get to trial. They would probably not tell business owners or labor union leaders they don't care if judges in civil cases have the time to move cases along. Yet, that is the message their vote against a new court sends.

If the four against a new court think we do not need one because our current judges should just work harder, they should say so. But again, I don't really expect to hear them say that.

The argument that we do not have an empty courtroom rings hollow since most of the commissioners who voted against a new court were the same ones who last year decided not to put a bond issue on the ballot to fund a new courthouse and jail.

Our usually forward thinking county leaders must be willing to spend a little money now to deal with our county's rapid growth and show they understand the needs and importance of our justice system.

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Trial Reports (cont'd)

(Continued from page 4)

the defendant and Gordon Davenport represented the plaintiff.

Judge Susan Criss in the 212th presided over a jury trial that ended in an acquittal of a defendant charged with sexual assault. Stephen Holmes, in his last case before being appointed County Commissioner, represented the State along with Mo Ibrahim. Two Houston lawyers represented the successful defendant, who worked at a mental hospital where he met the alleged victim, a young female patient.

In another trial in the 212th a week earlier, Tim Weatherly's client was found guilty of murder after about 20 minutes of jury deliberations and then was sentenced by the jury to life in prison. Prosecutors were Wayne Mallia and Mo Ibrahim.

The bell may have tolled on the end of an era. It is possible that Russell Burwell, Jr. (the father) has tried his last "old law" workers' compensation case. Once, in a happier, golden era, lawyers like Burwell (and this humble author) represented hundreds of compensation claimants at a time and each week several comp cases would be set for jury trial. Burwell was a true master of the strange language and often illogical law involved in workers' compensation in those halcyon days. Once, Burwell won a man life-time weekly benefits

based on a jury finding of total loss of use of both legs (both of which were still attached and working). It was common for him to win verdicts of "total and permanent incapacity" for men with operated backs who had returned to work at higher wages. Alas, courtroom warriors like Burwell no longer touch compensation cases. Like doctors under Medicaid, attorneys cannot make money representing compensation claimants whose cases are now decided by grumpy bureaucrats instead of juries.

Burwell's last compensation case was against Rick Ansell in the 122nd and involved a man who had been injured in 1986 but did not receive weekly benefits for a good while. Once 401 weeks had passed after his injury, his benefits were terminated even though he had not received 401 weeks of comp. The jury accepted Burwell's argument that the man was totally and permanently disabled from the original date of injury. This means he will receive over \$40,000 more in compensation.

Judge Carmona presided over another auto rear end collision case. This time the defendant stipulated to negligence and offered \$20,000 to settle. The plaintiff, represented by John Powell, turned down the offer and ended up with a \$6,000 verdict.

Former State Representative Mike Martin recently spent some time in Galveston, trying

to convince a jury in Judge Carmona's court to award damages to a property owner whose building was eaten up by termites. David Lynch represented the defendant pest control company that had been paid to treat the plaintiff's building for termites and then one time voluntarily treated his adjoined building for free. Later, termites were discovered to have chewed up the adjoining building. Included in the termites' menu were 1500 lithographs. Expert witnesses were called to testify about the value or worthlessness of those old artworks. The jury ended up finding for the defendant bug man on all counts.

The Enos Law Firm, PC
represents parents in

DIVORCE, CUSTODY AND ADOPTION CASES

in Harris and
Galveston Counties

Greg B. Enos
Jonathan T. Harris
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Family Law Attorneys: Read Harris County's New Local Rules

The Harris County family courts have adopted new local rules effective 1/1/99 that every family law attorney needs to be familiar with. The new rules:

- Specify when and how a child will be allowed to testify;
- Require Financial Information Statements at hearings on temporary orders that include the last two year's tax returns and two most recent pay stubs;
- Require inventories at final divorce hearings that attach the most recent statements of retirement and savings plans as well as a summary, in columnar format, of property values and liabilities;
- Proposed property divisions and suggested findings of fact on child support calculations must be exchanged 10 days before a final hearing;
- All parties to a divorce or annulment suit must disclose to the other side, without a written discovery request, the following information and documents:
 1. All documents pertaining to real estate;
 2. All documents relating to employee benefit plans together with the most recent statements for all such plans;

3. All documents relating to any sort of insurance;
4. The most recent statements for all bank and financial accounts.

- All parties to any suit involving child or spousal support must also disclose:
 1. All policies, statements and benefits descriptions of medical or health insurance available to the child or spouse; and
 2. The required Financial Information Statement.
- These required disclosures must be made without request:
 1. By a petitioner or movant within 30 days after the Respondent files its first pleading;
 2. By a respondent 30 days after he/she files a pleading.
- Parties making these disclosures must file a statement with the court showing the disclosures have been made and are under a duty to supplement.
- Sanctions under Rule 215 may be imposed for failure to make these disclosures.
- Most motions must be captioned "Unopposed" or must contain a very detailed certificate of conference.

The new rules state that all cases filed on or after 1/1/99 are automatically referred to the associate judge of each court and that the Rules constitute an order of referral. Does this mean parties must file an objec-

tion to the associate judge hearing their case within 10 days of filing their first pleading?

Appellate Cases

Wal-Mart can get trial judges to make goofy rulings, which may explain why it wins most of the time. The Dallas Court of Appeals reversed a directed verdict in favor of Sam's in a case where a shopper was checking out and got wacked in the head by the cashier in the next check out line who was removing a case of sodas from the bottom of a cart. At trial, Wal-Mart moved for directed verdict and argued that the plaintiff could only sue Wal-Mart for a premises defect and had failed to prove one. Plaintiff's counsel only responded to that dumb argument and failed to point out that he was also suing Wal-Mart for the negligent act of its employee (he had also erroneously plead his client was a licensee instead of an invitee). The Court of Appeals reversed and pointed out the obvious: a customer hurt on a business' property can sue under a premises liability theory or can allege the business' employee was negligent. If the negligent activity caused the plaintiff's injuries, it is a valid cause of action and is often easier to prove. Sibai v. Wal-Mart (2/7/99).

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January 21, 1999

Distributed by fax, mail, e-mail and soon at WWW.LAWFAX.COM

*Enos on the Law, Life & Appellate
Cases of Interest*

Attorney and Client

A two timing legal assistant caused a plaintiff's firm to be disqualified from Norplant litigation. The assistant had worked for the defense firm as a "consultant" interviewing witnesses and meeting with lawyers. Later she went to work for a plaintiff's firm involved in Norplant litigation. The Supreme Court held the plaintiff's firm was disqualified but its co-counsel firm was not because there was not clear evidence it had received information from the legal assistant. In re American Home Prod. Corp. (12/31/98).

In another disqualification case, the Supreme Court explained the "substantially related" test in Disciplinary Rule 1.09 as meaning, "when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." Actual disclosure of confidential information need not be proven; only the threat of disclosure is enough to require disqualification of counsel. The court also repeated the rule that if one attorney is disqualified, then her entire firm is as well. In re Epic Holdings. (12/31/98).

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

A CPS Mediation Conference will take place April 19 - 23 in Houston at the Doubletree Hotel at Post Oak (Jan. 25 - 29 in Ft. Worth). It includes three days of mediation training. Call Kathryn Lanan at 409-948-2425 or the sponsor at 512-328-2202 for more details.

Family Bar monthly meetings are the second Wednesday of each month at the Pelican Club. The cost of meals has gone up to \$12.

The Galveston County Bar Association meets at the Tremont House in January and February. The March meeting will be at the Southshore Harbor Resort in League City.

Greg Enos will speak on the new discovery rules to the Legal Secretaries of Galveston County on February 24 from 7 pm - 9 pm at the Victorian Condo Hotel. Cost will be \$10 per attendee.

Pat W. Phillips, Attorney at Law, has opened offices at 3345 Gulf Freeway, Dickinson, Texas 77539. Phone 281-337-5626.

Calendar

Criminal Defense Lawyers

Jan. 22 noon - DiBella's, Galveston

Galv. Co. Young Lawyers

Jan. 26 noon - Pelican Club
Galveston

Galv. County Bar Association

Jan. 28 noon - Tremont Hotel,
Galveston

Mainland Bar Association

Jan. 29 noon - Merchant's Bank,
League City

Galv. Co. Family Bar Association

Feb. 10 noon - Pelican Club,
Galveston

Fax: 281-337-1180.

Another Burwell partner leaves the roost in Texas City. Neil Baron is now a proud solo practitioner with an office in Galveston at 409-762-1200 and soon an office in League City as well. Burwell, Baron & Burwell (once Burwell, Enos & Baron) is now Burwell, Burwell & Nebout, LLP. James

Nebout is now a partner and Russ Burwell, III has become board certified in personal injury

(Continued on page 2)

1999 Galveston County Legal Directory

Make sure you are in it,
Make sure you order it (\$12)!

All local attorneys will receive a form in the mail in the next few days to verify their address, phone, fax, bar no., e-mail, etc.

A form for corrections and ordering a directory will be included.

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(Continued from page 1)

trial law. Congratulations!

Trial Reports

In the 56th District Court two weeks ago, Judge Venso declared a mistrial in a murder case when an officer on the stand mentioned something that had been suppressed and excluded in motions in limine. Brian Abbington represents the defendant and Lonnie Cox is prosecuting. The retrial started the next week and has carried over to this week. It may not be over until next week.

Judge Susan Criss wasted no time in diving into the civil trial business by presiding over a slip and fall case against HEB. The jury found no negligence. Kip Patterson from Houston represented the almost always victorious HEB and John McEl-downey represented the plaintiff.

Judge Carmona in the 122nd presided over a two day criminal nonsupport trial involving a man who owed over \$46,000 in child support and was extradited from Utah. The jury sentenced him to two years of state jail time probated for five years. The defendant must pay \$700 a month and must live in Galveston or Harris counties for a year. Larry Drosnes was the prosecutor and Enid Williams was defense counsel.

Judge Crapitto will assess punishment for a DWI defendant found guilty by a jury in County Court No. 1 this week. Cesar Galli represented the defendant who refused a intoxilyzer and performed well on video. Apparently, the jury was impressed by the fact he was driving 100 mph in downtown Friendswood and told the officer he could not have been doing over 96 or 97 mph because his car wouldn't go faster than that.

Leonard Cox achieved what must be considered a victory for his young client in

an aggravated sexual assault of a child case in the 122nd. The jury gave only five years to the defendant who was 17 when he allegedly molested a five year old boy. Testimony indicated the defendant had been thrown out of his house by his parents after charging \$2,000 for phone sex and a family friend allowed him to stay with her. The defendant allegedly admitted to police that he had molested the child left briefly in his care. Prosecutor Kurt Sistrunk asked for 16 years and Cox asked for probation. The defendant had been in jail for over a year and the jury heard about rats, lice, beatings and forced tattooing by fellow inmates.

Probate Court News

Judge Burwell has hired Stephenie Mattes away from the Family Division of the District Clerk's office to be the Probate Court's full-time auditor. The job of Investigator is still open. Rheta Cox is the Probate Court Coordinator. Judge Burwell has decided she will continue to do uncontested wills on Fridays and she will hear probate motions that require a court reporter on Thursdays. Most motions in probate matters (such as requests for attorney's fees) should be filed by submission and the Judge will decide if an oral hearing is necessary. Judge Burwell is studying how to reduce her civil case load of over 870 cases. She has decided that lawyers filing motions in civil cases should request a hearing in writing and state how long they expect the hearing to last and say whether a court reporter is required.

Clear Lake Office Space

Approx. 1280 sq. ft.

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Family Law Filing Fees

The following chart is a handy reminder of filing fees in family cases in Galveston County:

Divorce - uncontested - no citation	\$166
Divorce - citation but no TRO or precept	\$172
Divorce - citation and TRO (no precept)	\$180
Divorce - citation and precept (no TRO)	\$180
Modification with citation	\$33
Modification - citation and precept	\$41
Modification - citation and TRO	\$41
Motion to Enforce and precept	\$33

These fees assume private service. A precept is an official notice of a hearing. A precept and a TRO are not needed for the same hearing since the TRO form itself gives notice of the hearing. When temporary orders are sought but no TRO is asked for, a precept is necessary. Except in motions for enforcement, a precept is not needed once the opposition has answered and is represented because a notice of hearing can be served on counsel. Strangely, the District Clerk's office charges a \$25 fee for a motion to modify temporary orders as if it was a new suit. This fee can be avoided by calling it a motion for additional tempo-

rary orders. **The Enos Law firm accepts referrals in divorce and custody modification cases in Galveston and Harris Counties.** Attorneys are not board certified in family law.

New Discovery Rules Seminars

for legal secretaries & assistants

Presented by Greg Enos
at The Enos Law Firm, P.C.
1100 Nasa Road One, Ste 566

January 28 at 2:30 p.m.
February 5 at 2:30 p.m.
February 12 at 2:30 p.m.
February 19 at 2:30 p.m.

Cost is \$45 per person.
Space is limited.

Call (281) 333-3030 to register.

Participants will get the new rules,
and many new forms.



Law Library Gets Poster Enlarger Machine

County Law Librarian Jennifer Overbeck shows off the law library's new poster enlarger that will blow up a letter-size document to two feet by three feet. Members of the Galveston Bar Association and the Family Bar Association will be charged \$2.50 per enlargement. Others will pay \$5. This enlarger was first proposed by Greg Enos three years ago as part of the Bar's Courthouse Improvement Committee's work and was paid for by the two bar associations. Hint: for best results, enlarge your document on the copier to make the type as big as possible on a letter size page before enlarging to poster size.

MOTIONS, HEARINGS AND SUBMISSION DATES IN CIVIL CASES IN GALVESTON COUNTY

Each court in Galveston County handles motions in civil cases differently. It is therefore vital for lawyers and their staff to understand how a particular court will deal with a motion in a civil case before filing it. These details are not addressed in the local rules.

10th District Court. Judge Garner decides all motions by submission except for motions to transfer venue. Call the court coordinator to get a submission date then prepare a notice of submission and file it along with the motion and proposed order. If you cannot get through to the coordinator, file your motion and proposed order and in your cover letter to the District Clerk, request in bold or underlined type that the court notify the parties of the submission date. If a party strongly feels an oral hearing is needed, file a request for an oral hearing and set forth succinctly the reasons why the motion should not be decided by submission only.

56th District Court. Judge Venso does not hear motions by submission. All motions, except agreed motions, are decided by oral hearings. All motions for continuance must be set for oral hearing, even agreed motions. File your motion and proposed order and in the cover letter to the clerk state in bold or underlined type: Please forward this motion to the court so that an oral hearing can be set. The court coordinator will call the attorney who requested the hearing to schedule the hearing. The requesting attorney will then send out notices of hearing and send a copy to the District Clerk.

122nd District Court. Judge Carmona decides all summary judgment motions by submission. Motions for continuance should be set for an oral hearing, even if all parties agree to the continuance. On all other motions, the movant can ask for a submission date or for an oral hearing. If a lawyer wants a submission date, he or she can call the court coordinator to get a

submission date then prepare a notice of submission and file it along with the motion and proposed order. Otherwise, file the motion and proposed order and in your cover letter to the District Clerk, request in bold or underlined type that the court notify the parties of a submission date or request that an oral hearing be scheduled. The Court Coordinator will usually call the lawyer requesting the submission date or hearing to work out a date and that lawyer will be responsible for sending notices of hearing or notices of submission to all other parties with a copy to the District Clerk. Judge Carmona strongly prefers that all motions be filed and served before the pretrial conference so that he can consider them at that time.

212th District Court. Judge Criss does not hear motions by submission. All motions, except agreed motions, are decided by oral hearings. All motions for continuance must be set for oral hearing, even agreed motions. File your motion and proposed order and in the cover letter to the clerk state in bold or underlined type: Please forward this motion to the court so that an oral hearing can be set. The court coordinator will call the attorney who requested the hearing to schedule the hearing. The requesting attorney will then send out notices of hearing and send a copy to the District Clerk.

306th Family District Court. Most motions will be heard by the associate judge. If a motion is heard by Judge Baker, the motion will be heard by submission unless an oral hearing is requested and granted or if it is the sort of hearing that requires oral testimony. The following motions generally

(Continued on page 5)

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(Continued from page 4)

require an oral hearing in this court: motion for continuance, motion to transfer venue, motion to withdraw, motion to reinstate, motion for new trial or summary judgment, motion to secure costs, motion for appointment of ad litem or psychologist, and a motion for a social study. On a motion to be heard by submission, pick your own date and prepare a notice of submission and file it with your motion and proposed order. If you want an oral hearing, file your motion and proposed order and state in bold or underlined type: Please forward this motion to the court so that an oral hearing can be set. The court coordinator will fax to the attorney who requested the hearing a note stating when the hearing will be and that attorney has the responsibility of sending notices to the other parties. All communications with the court are by fax, so the lawyer will usually not be called by the coordinator to determine a convenient hearing date. The 306th now generally does not allow attorneys to come by in person to get a hearing set. Instead, the clerks bring all files requesting hearings up each day at 4:00 p.m. It is advisable to include in a request for hearing the dates the requesting attorney is available.

County Court No. 1. Judge Crapitto decides motions by oral hearing, although most motions in family law cases will be heard by the associate judge. A lawyer can file a motion and a proposed order and in the cover letter state in bold or underlined type: Please forward this motion to the court so that an oral hearing can be set. The court coordinator will call the attorney who requested the hearing to schedule the hearing. Alternatively, you can file a motion, have the clerk walk the file down to the court and then the attorney can talk with the coordinator in person about a hearing date. The requesting attorney will then send out hearing notices to all parties.

County Court No. 2. Judge Dibrell decides motions by oral hearing. Most motions in family law cases will be heard by the associate judge.

A lawyer can file a motion and a proposed order and in the cover letter state in bold or underlined type: Please forward this motion to the court so that an oral hearing can be set. The court coordinator will call the attorney who requested the hearing to schedule the hearing. Alternatively, you can file a motion, have the clerk walk the file down to the court and then the attorney can talk with the coordinator in person about a hearing date. The requesting attorney will then send out hearing notices to all parties.

Probate Court. Judge Burwell is still deciding how to deal with motions in civil cases. She is hearing probate motions by submission. In all cases, lawyers seeking oral hearings should request the hearing in writing and state how long the hearing should take and say if a court reporter is needed.

Selecting a Submission Date

The Rules of Judicial Administration allow submission of motions based on the pleadings instead of oral hearings. Rule 21 requires notice of a hearing be served on all parties or counsel of record at least three days before the hearing. Rule 4 says that Saturday and Sunday count when computing a three day deadline, so notice can be given on Friday for a Monday hearing. Rules 21 and 21a require counsel to add three days to any period if service was by fax, registered or certified mail.

Conclusion: Pick a submission date at least six days from the date you give notice of the submission date. Courts in Harris County have their own rules for selecting a submission date (e.g.—the next Monday after 10 days from the notice), so check with the court you are in. A party receiving a late submission notice should object and ask for more time.

[Form for a Rule 176 Subpoena. A second page with a Proof of Service is required. If a nonparty is to be subpoenaed to produce documents without a deposition under Rule 205.3, a notice must be sent to the nonparty 10 days before the subpoena is served.]

CAUSE NO. _____

VS. _____

§ IN THE _____ COURT OF
§
§ _____ COUNTY, TEXAS
§
§ COURT NO.: _____

ISSUED IN THE NAME OF THE STATE OF TEXAS

SUBPOENA

To: This subpoena is directed to:

Name: _____
Address: _____
Phone: (____) _____

Date on which this subpoena was issued: _____.

You are commanded to do the following at:

Date: _____

Time: _____

Location: _____

_____ attend and give testimony at the following proceeding in the above styled and captioned case pending in the court set forth above: ☐ deposition ☐ hearing ☐ trial

_____ produce and permit inspection and copying of the documents or tangible things in your possession, custody, or control described in Exhibit A attached to this subpoena in the above styled and captioned case pending in the court set forth above.

This subpoena was issued at the instance of (party's name): _____
who is represented by the following attorney of record:

Attorney: _____
Firm: _____
Address: _____
Phone: (____) _____
Fax: (____) _____

Enforcement of Subpoena. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

Signed by the person issuing this subpoena.

Printed Name: _____
Title: _____

ATTACH \$10 WITNESS FEE TO SUBPOENA

In Texas, a subpoena may be issued by the clerk of the appropriate District, County or Justice of the Peace Court, an attorney authorized to practice law in the State of Texas as an officer of the court or by an officer authorized to take depositions in this State.

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January 7, 1999

Distributed by fax, mail, e-mail and soon at WWW.LAWFAX.COM

Enos on the Law, Life & Discovery

The New Discovery Rules: Changed Again

The Supreme Court on December 31, 1998 adopted even more changes to its radical new discovery rules in civil cases. Although they were called "technical corrections," some of the changes were in fact substantive.

For example, a ten day notice requirement was added for discovery from non-parties via subpoena without deposition. Rule 205.2

Changes were also made in the effective date of the new rules. For example, the old "two sets of 30 interrogatories" limit still applies in all cases pending on 1/1/99.

A completely updated, indexed copy of the new discovery rules, including the 12/31/98 changes, is available from The Enos Law Firm for \$2.00 to cover copying and mailing.

Legal Secretary/Assistant Seminar on New Discovery Rules

All local legal assistants and secretaries will soon receive invitations to a two hour seminar on the new discovery rules at The Enos Law Firm's new Clear Lake offices. The class will be repeated on each Friday in late January and February. Cost will be \$45 per person. Call if you are interested.

Greg Enos lives in League City and primarily practices law in Galveston County. Enos also operates the Clear Lake Mediation Center.



Courthouse News

New Judges Sworn In

The jury assembly room was packed on Saturday, January 2, as Galveston County's newly elected judges and officials were sworn in. Susan Criss took office as judge of the 212th District Court. Gladys Burwell was sworn in by her predecessor and mentor, Jerome Jones, who had served as Probate Judge since 1968.

Discovery Seminar Approved

The State Bar of Texas approved the November Discovery seminar for 4 hours of CLE. The course number is 006998324.

Galveston Co. Family Bar Assoc.

MEETING Jan. 13 noon

Pelican Club. Cost \$12

Speaker: John Buckley on Internet



Gladys Burwell got a little emotional when she was sworn in as Probate Judge by Judge Jerome Jones.



Who says there are too many women judges? Gladys Burwell, Susan Baker, Susan Criss and Bolivar J.P. Pat Lowery wait to take their oaths of office.

Law Fax goes weekly

Starting this week, the Law Fax will be published every Thursday. Every issue will feature a short legal profile of a local lawyer, judge or courthouse employee, courthouse news, trial reports and a calendar.

Call (281) 333-3030 to subscribe.

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LAW FAX

Distributed by fax, mail and e-mail

October 26, 1998

Coming soon to WWW.LAWFAX.COM

Cave Man Lawyer Balances Family & Work

I try to explain why I traded my big, successful P.I. firm for a solo practice that involves as much family law as injury and death cases by telling folks I wanted more time with my family and more control over my own schedule.

I try to explain my life as a solo lawyer to my big firm friends by likening myself to a caveman. I eat what I alone kill and I must feed a whole tribe, that includes my wife, kids and five employees. I may lay by the fire at night with a full belly but I must worry about what I will kill tomorrow, where I will hunt, and what will happen if I return empty handed. Actually, being a solo lawyer is much harder than being a caveman since most Neanderthals did not have to worry about payroll tax deposits, copier leases, employee vacation conflicts, multiple court appearances in different counties or clients calling at 11:30 p.m. asking where they can park free at the courthouse.

This past Friday involved the usual juggling act between work and family. Unlike most days, I got the kids off for school in the morning since my wife Sharon has started Tai Chi two mornings a week at her gym at 6:30 a.m. That Friday was a kid's birthday, a big one, since Jami was turning 18. I went shopping in the morning instead of heading straight for the office. I had too much fun and spent too much time shopping for things for Jami's new apartment and even had to solve a mini-office crisis on the cell phone in

(Continued on page 2)

Where's My Law Fax?

Everyone is calling to say they did not get the last LAW FAX. It was distributed at the courthouse as usual. Major water leaks in my office, a change of my office computer network to Windows 95 and a seminar/vacation to Santa Fe, New Mexico with my wife kept me from doing the usual mass fax. I am therefore mailing the last full issue and this issue to everyone on my list. A new computer and fax program will go into service next month, so if you want to be on the fax list, please fill out the enclosed form and fax or mail it to me.

Calendar

October

- | | | |
|----|-------|--|
| 27 | 12:00 | Galv. Co. Young Lawyers: Pelican Club |
| 29 | 12:00 | Galveston Co. Bar Assoc.: Tremont House |
| 30 | 12:00 | Mainland Bar: Merchant's Bank, League City. Speaker: Warren Cole: Special Evidentiary Problems in Family Law Cases |

November

- | | | |
|----|-------|---|
| 11 | 12:00 | Galv. Co. Family Bar: Pelican Club |
| 11 | | Courthouse Closed for Veteran's Day |
| 20 | 12:00 | Galveston County Bar Assoc. meeting |
| | | Different Day: Friday instead of Thursday |
| | | Different Location: La Marque Inn
(Formerly Holiday Inn on I.H. 45) |

Trial Reports

Last month, Kerry Neves represented an expert on pesticide use who was being stiffed by the apartment complex that hired him to be an expert witness. The lawyer who hired the expert tried to get his client to pay, partly because the expert helped the apartment owner win a big settlement against a pest control company for misapplying chemicals. The jury ruled that there was an agreement to hire the expert which the apartment complex breached. Neves' client was awarded \$21,800 in damages and \$17,400 for attorney's

fees at the trial court level. Moral: If you hire an expert, pay him or her no matter how the case turns out. Trial was in Judge Dibrell's court.

Salvador Faus represented the State in Judge Crapitto's court where a juvenile was charged with burglary of a building. Jennifer Smith represented the young man, who the jury decided committed the lesser offense of criminal trespass.

Nov. 20 Seminar

Lawyers who are not familiar with the totally new discovery rules that go into effect on January 1 are going to be embarrassed and possibly harm their clients' cases. An afternoon seminar sponsored by the Galveston County Bar Association on Friday, November 20, 1998 at the La Marque Inn (formerly the Holiday Inn) will cover these important new rules in detail, as well as also cover DWI, family and evidence topics. To register, contact Greg Enos at (281) 286-5500 or (409) 943-4300. Cost will be \$75 for those who preregister and \$90 for those who do not. Space is limited, so please register in advance.

Liability of Social Hosts Serving Booze

Generally, social hosts cannot be successfully sued for failing to stop serving alcohol to obviously intoxicated people. However, Liability might be imposed for serving alcohol to children under age 18.

In Graff v. Beard, 858 S.W.2d 918 (Tex. 1993) the Supreme Court ruled a motorcyclist injured by a crash could not sue the social host who served liquor to the other driver. The Court found it unreasonable to expect social hosts to assess a guest's state of intoxication. In Smith v. Merritt, 940 S.W.2d 602 (Tex. 1997), the Court refused to establish a common law duty to not provide alcohol to a 19 year old driver even though the legal drinking age is 21. However, a social host can be sued for serving alcohol to a 17 year old who then was killed in a wreck right after the party. Ryan v. Friesenhahn, 911 S.W.2d 113 (Tex. App. - San Antonio 1995), *aff'd* on other grounds, 960 S.W.2d 656 (Tex. 1998). The Supreme Court's affirmation was based solely on procedural summary judgment matters and did not address the substance of the Court of Appeals ruling. The key factor in Ryan was the child's minor status whereas the 19 year old in Smith was an adult for all practical and legal purposes.

(Continued from page 1)

the checkout line at Super K-Mart. I was at the office struggling with a summary judgment response due Monday when Jami came by the house to get her presents but she did call me and say, "thanks." The girl, I mean woman, is hard for me to understand and she clearly intends to head down different life paths than I would ever choose but she is happy and I am crazy about her. My only regret is that her 18th birthday came too late to register her to vote in time for November 3!

There would be no traditional family birthday dinner at a restaurant of the celebrant's choice since Jami, like any new legal adult would, preferred to go out celebrating with her boyfriend.

Sharon, the two little kids and I ended up having a raucous, hilarious dinner at home since we took turns listing and acting out each other's bad habits (most of which I was falsely accused of having and virtually none of which can be mentioned in this family oriented paper). Our 21 year old, Jason, was off bowling—something he does almost every waking moment when he is not working for me as my car wreck legal assistant. Later that evening, we had our traditional "family video night" in which we all pile together to watch a movie and eat popcorn. Lost in Space lost the attention of both females, who were asleep before the robot first intoned, "Warning Will Robinson."

That Friday was a workday and I am sure I did a lot of important things for my clients. But now, just a week later, all I really remember about that day is the family related stuff. It makes me think that for at least one day in October I had things in the right balance.

Sadly, I went in to the office the next Sunday afternoon when I should have stayed home with my family. It was raining like crazy, which is not a good thing if the roof of your office building is in the middle of being replaced. We sprang water leaks in our back rooms and soggy ceiling tiles and bales of insulation began to fall to the ground. Everyone ran back to rescue our new \$15,000 copier. One ceiling tile that fell had a big black rat on it. My client and the computer technicians who were in the office squealed in terror, but like the cave man I am, I picked up a broom and foam poster board shield and charged into battle. Talk about a rat race!

October 1, 1998

Coming soon to WWW.LAWFAX.COM

More Lawyer Bashing

Insurance Agent Dave Norman is bringing new meaning to the term "demagoguery" in his race for State Representative against Patricia Gray, who coincidentally is a lawyer. His last mailing says:

Lawyers. The fact that we have too many is an understatement. The fact that so many dominate the Texas Legislature is a nightmare. Take a simple idea, let a lawyer work on it, and you will need five more to figure out what the first one did. The most definitive resource for lawyers is a book called Black's Law Dictionary. It should come as no surprise this book has no listing for "common sense."

We don't need more lawyers; we need fewer. The vast majority of the trouble they stir up starts in the Texas Legislature. Currently, we have 46 lawyers in the Texas House of Representatives; that's out of 150 members. Now its good to have a lawyer around when you need one, but do we need 46? I wouldn't want so many doctors, plumbers, or any other occupation in the legislature.

I promise one thing: I will never become a lawyer.

Norman's campaign literature still refers to him as a small businessman and does not reveal he is an insurance agent whose income is directly tied to the size of insurance premiums.

Kemp Seeks to Disqualify Olsen

Family District Judge Susan Olsen has refused to grant a motion to disqualify her from hearing a paternity case filed in her court by her Republican challenger, Jeff Kemp. The motion was filed after Judge Olsen refused to grant a TRO against the underage mother of the child in favor of the alleged 18 year old father. Kemp's motion alleges a general prejudice against the subject matter of the suit. Kemp's affidavit, however, cites alleged misrepresentations Olsen has made about Kemp's length of residence in Galveston County and the number of family law cases he has handled as grounds for recusal. Kemp's affidavit even quotes comments Judge Olsen made during a candidate forum sponsored by the Family Bar Association. An assigned judge will now hear the disqualification motion.

Judicial Candidates Debate Before Family Bar

Jeff Kemp had it right when he said he wished all of Galveston County's voters could have attended the candidate forum sponsored by the Galveston County Family Bar Association. The personalities, qualifications and opinions of Judges Olsen and Dibrell and their challengers, John Ellisor and Jeff Kemp, were on open display during the sometimes heated debate. After brief opening remarks, the candidates were posed written questions submitted anonymously from the audience.

Ellisor was certainly forthright when he frequently answered, "I don't know" or agreed with his opponent's answers to several questions on family law subjects. Ellisor spoke a little on his interesting background as a TDC guard and probation officer and left little doubt that he knows criminal law but has done little family law. Ellisor stated his main goal as judge would be to help cases get to trial quicker.

Judge Dibrell explained the huge backlog of misdemeanor cases he inherited upon taking office and stated that his court has more new filings than all of the district courts combined. Dibrell noted that civil cases in his court frequently get bumped for trial by criminal, juvenile and some family law cases that must be given preference by law. Dibrell said his court has disposed of over 25,000 cases since he took office.

Judge Olsen surprised no one when she said, "I am the most qualified candidate in this county for this office, you know it and I know it." She then recited her many qualifications and contributions to the well-being of children in Galveston County.

Jeff Kemp emphasized lawyers should be treated with respect instead of pushing his qualifications as a family lawyer.

Dibrell, Ellisor and Kemp agreed that female lawyers should be able to wear slacks in court and said they approve of "informal Fridays" in court. Judge Olsen adamantly refused to allow women attorneys to wear slacks and said changes in dress codes were part of a general breakdown of society.

The debate got heated at the end during closing remarks when Kemp said, "A judge should have a judicial temperament and be moral and compassionate." Olsen apparently took offense and said, "I don't know what Jeff's beef is. He never had the courtesy to come visit me and tell me why he was running against me." Olsen said she does not do as much chewing out of lawyers as some judges and she tries to help attorneys and be courteous. Olsen said being a family law judge is, "a very sad, hard job" and stated she does think knowing family law is very important for the job—a statement virtually all of the family lawyers in attendance agreed with.

Calendar

October

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|----|-------|---|
| 8 | 5:00P | Evelyn Wells Robison Fund Raiser
Walter Hall Park, League City |
| 14 | 12:00 | Galveston Co. Family Bar: Pelican Club
Speaker: Rep. Craig Eiland—Legislative Update |
| 16 | 12:00 | Galv. Co. Criminal Defense Lawyers:
DiBella's-1903 31st Street, Galveston |
| 27 | 12:00 | Galv. Co. Young Lawyers: Pelican Club |
| 29 | 12:00 | Galveston Co. Bar Assoc.: Tremont House |
| 30 | 12:00 | Mainland Bar: Merchant's Bank, League City.
Speaker: Warren Cole: Special Evidentiary Problems in Family Law Cases |

November

- | | | |
|----|-------|--|
| 22 | 12:00 | Galveston County Bar Assoc. meeting
Different Day: Friday instead of Thursday
Different Location: La Marque Inn
(Formerly Holiday Inn on I.H. 45) |
|----|-------|--|

EDITORIAL: Judging What Is Right or Wrong

1. Fundamental Fairness

I recently came across some cases that should remind us all what we must (or must not) get from a judge.

"Public policy demands that a judge who tries a case act with absolute impartiality. It further demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust and thwart the principles on which the judicial system is based." *CNA Ins. v. Scheffey*, 828 S.W.2d 785, 792 (Tex. App. - Texarkana 1992, writ denied).

"Where a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate, this system cannot function and fairness is lost. Under these circumstances, the injury is suffered not only by the accused, but by society as a whole."

Bethany v. State, 814 S.W.2d 455, 462 (Tex. App. - Houston [14th Dist.] 1991).

"A judge should be fair and impartial and not act as an advocate for any party. A judge should not be any party's adversary. The judge should, however, refrain from verbally confronting or displaying displeasure toward counsel, particularly in the presence of the jury the judge should not make unnecessary comments or remarks that may result in prejudice to a litigant." *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App. - Houston [1st Dist.] 1994).

2. Judge Kent

This month, Galveston Federal Judge Sam Kent apparently got very mad at the City of Houston in a suit filed for three people who died in fires, allegedly

(Continued on page 3)

Editorial (continued)

(Continued from page 2)

because of defective fire fighting equipment placed in minority neighborhoods. Kent threatened to jail the mayor and city council if they did not watch a video settlement proposal prepared by the plaintiffs. According to the Houston Chronicle, Kent also supposedly said the following in a case that has not yet been tried, where the city hotly denies liability, "I'm also appalled that the government of the city of Houston apparently has no concern for the minority community whatsoever." Kent also indicated the city had, "a willful intent to disregard the rights of the African-American community by putting garbage in the fire trucks they put out there to serve these people's interests."

I assume the Chronicle must have misquoted Judge Kent. A potential juror who made such statements before hearing evidence from both sides would be struck for cause.

Judge Kent, like Harry Truman, always speaks plainly and his powerful words can inspire fear—which is fine as long as they also engender respect for his office and do not cause people to suspect his fairness.

2. Whittington v. Criss

Susan Criss, the Democratic candidate for 212th District Judge, is being accused by some of violating the Code of Judicial Conduct by commenting on an on-going case. Exactly what has happened is unclear and more information is needed.

Canon 5(1) of the Code of Judicial Conduct says a judge and a judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to interpretation by the court but is otherwise free to discuss one's judicial philosophy as long as it is not done in a manner that would suggest to a reasonable person a probable

(Continued on page 4)

Nov. 20 Seminar

New discovery rules that go into effect on January 1 will revolutionize how all civil cases are handled in Texas. An afternoon seminar sponsored by the Galveston county Bar Association on Friday, November 20, 1998 at the La Marque Inn (formerly the Holiday Inn) will cover these important new rules in detail, as well as also cover DWI, family and evidence topics. Expect an announcement next week from CLE chair Greg Enos.

District Court Races Briefly Uncontested

A few days of excitement were generated last month when it was discovered that the three GOP candidates for District Court in Galveston County had been left off the November ballot. The error was spotted on a preliminary, sample ballot and Judge Whittington, Jeff Kemp and Kevin Corcoran's names were quickly restored to the ballot after the snafu was fixed in the Secretary of State's office.

Courthouse News

The County is supposedly going to put in three working computer terminals in the county law library in the next few months but plans to remodel the library according to my suggestions made two years ago are still on hold pending the overall court building plan under development.

This year's Lake Tahoe Seminar will be February 17 - 21 at Harrah's Hotel and Casino. Cost is \$660.00 per person for double occupancy and \$945.00 per person for single. This price includes 8 hours of CLE, flight tickets and lodging. A non-refundable deposit of \$50 is due by December 5. Contact Russ Burwell for more details (409) 945-0660 or (281) 488-0691.

The Galveston County Bar Association is now meeting at the Tremont Hotel. The food is better and it is closer to the courthouse than the San Luis but the meeting room is smaller, street noise is distracting and parking is much tougher. Two meetings this year will be on the mainland.

The Galveston County Family Bar elected new officers: Laticia Bass is President-Elect, Kathryn Lanam is Treasurer, and Greg Enos is Secretary. Steve Windsor assumed the office of President from Doug Foster, who did a great job this past year.

The Galveston County Criminal Defense Lawyers Association meets on the third Friday of every month at DiBella's Restaurant at 1903 31st Street, Galveston. New officers are: President-Maria Luisa Mercado; President Elect - Elisa Vasquez; Secretary Treasurer-Dominic

Merino.

Steve Windsor, who has worked as Judge Hugh Gibson's briefing attorney in the federal courthouse is going to work for Greer, Herz & Adams.

Trial Reports

A special issue next week will include all of the trial reports for September.

Interesting Texas Developments

Federal Judge Sanctioned For Mistreating Lawyers. Federal District Judges can be forced from office only by impeachment or age, but they can be punished for bad behavior. U.S. District Judge John McBryd of Fort Worth received the harshest possible penalty short of an impeachment recommendation from the Judicial Conference of the United States, which stopped the assignment of all new cases to McBryd for a year. Last year, the Judicial Council had voted to sanction McBryd, saying, "Judge McBryd's intemperate, abusive and intimidating treatment of lawyers, fellow judges and others has detrimentally affected the effective administration of justice..." McBryd appealed that ruling but clearly lost before the Judicial Conference.

Awesome Award Against Attorney Who Talked To Reporters. Ambassador Arthur Schechter's former partner, Diana Marshall, was hit with an \$8.5 million jury verdict in Dallas for alleged defamatory remarks she made to news media about the opposing party in a will contest involving Anna Nicole Smith. Marshall allegedly told a newspaper reporter outside the courthouse that signatures on 90 year old oil tycoon Howard Marshall's trust documents had been forged by his son. The parties reportedly settled for the \$800,000 balance of Marshall's liability policy.

Appellate Cases

Death Case Trap. The Houston 14th Court of Appeals has created a terribly dangerous trap for plaintiffs in death cases. Under the Survival Act, TCCP 71.021, a claim for the decedent's injuries can be brought by the personal representative of the decedent's estate or by heirs at law if the heirs allege and prove that there is no estate

Editorial (continued)

(Continued from page 3)

decision in any particular case.

Criss says in her latest campaign flyer, "*Susan Criss shares your values. Her opponent, appointed by Austin politicians, mishandled a case and as a result the confessed gang rapist of a 12 year old girl received a probated sentence. In contrast, Susan Criss, as a former Assistant Galveston County District Attorney, has prosecuted hundreds of criminals who have harmed Galveston County residents. She was the lead prosecutor in a capital case that landed a man on death row, who had sexually molested and then murdered a two year old baby girl.*"

The case Criss is accusing Judge Whittington of "mishandling" is still before the 212th because of alleged probation violations and could well be one she would have to rule on if elected.

Someone got a member of the National Organization of Women to write a bitter attack on Judge Whittington and the defense attorney, Steve Taylor, about this same case. A copy of the rough draft of that article was faxed from The Tramonte Building (where Criss offices) to the Galveston Daily News. Criss told the reporter for the News that her First Amendment right to free expression overrode the Code of Judicial Conduct.

This whole situation really involves two issues: (1) Is it permissible or fair for Criss to criticize Whittington for how he conducted this particular trial? and (2) Did Whittington really mishandle the case?

I am inclined to agree with Criss that even if she has technically violated the Code of Judicial Conduct, comment on how a judge handles an important case should be fair game in an election. There should be no need to make the point through surrogates such as NOW.

Criss is also absolutely right that sexual assault victims should be treated with dignity and should not be put on trial. Whether that happened in this case is not clear. It may be that attorney Taylor's remarks out of the courtroom to a reporter have been confused for

(Continued on page 3)

Editorial (continued)

(Continued from page 4)

what he said in the courtroom to the jury. Although a judge should control his or her courtroom, the judge can usually only rule if a lawyer objects. And of course, a lot can be introduced in the punishment phase in such a case, including probably the victim's willingness or lack thereof, that would not be admissible in the guilt or innocent phase in a rape case of a 14 year old child.

Before my next issue, I will interview jurors and review the trial record to see what really happened (something the News reporter and the NOW writer should have done).

Criss, who no longer touts her Presidency of the Galveston County Criminal Defense Lawyers Association in her campaign literature, will be presiding over civil and criminal cases if she is elected, just as Judge Whittington is now. Most of the criminal defendants will probably be guilty, some will be innocent of the specific charges filed against them and a few will be totally innocent. All will be presumed innocent and will deserve a fair trial. All will deserve an impartial, competent judge who also still protects crime victims.

FUND RAISER TO RE-ELECT
EVELYN WELLS ROBISON
DISTRICT CLERK

THURSDAY, OCTOBER 8
5:00 PM UNTIL 10:00 PM

WALTER HALL PAVILION, LEAGUE CITY
\$10.00 DONATION

LIVE MUSIC AND BAR-B-QUE DINNERS

administration pending or necessary. In this case, the parents sued Ford and won a \$25 million verdict. Even though the defendant never complained about the parents' standing in the trial court, it may do so for the first time on appeal because "standing can't be waived." Even though the father testified that there had been no administration of the estate, the parents did not offer proof that they were the deceased's rightful heirs or that there were no estate debts (which would show no estate administration was necessary). Therefore, the parent's survival claim (\$1 million of the jury award) was thrown out and so was the \$22.5 million punitive award. Ford Motor Co. v. Cammack, __ S.W.2d __ (Tex. App. - 14th Dist. [Houston] 1998). Hint: In almost every death case, get an executor or administrator appointed to be safe.

Parental Tape Recording Legal. A parent may vicariously consent to tape recording a minor child's conversations with the other parent according to the U.S. sixth Circuit. To avoid violating the federal wiretapping statute, the parent must have a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child." Pollock v. Pollock, __ F.3d __ (6th Cir. 1998).

Family Law: Reimbursement Claim for Child Support for Paramour's Kid. Child support paid for an illegitimate child conceived during an affair is not obligation of the marital estate, therefore the wife at divorce may pursue a reimbursement claim for the community estate. Butler v. Butler, __ S.W.2d __ (Tex. App. - Corpus Christi 1998). On the other hand, a spouse who comes in to a marriage paying child support or alimony from a prior marriage does not give to rise to a reimbursement claim. Pelzig v. Berkebille, 931 S.W.2d 398 (Tex. App.-Corpus Christi 1996, no writ).

Daubert Prevents Medical Doctor's Testimony on Causation. A treating physician's testimony about the cause of a patient's respiratory disease is "scientific evidence" that must meet the standard of Daubert v. Merrell Dow Pharmaceuticals. This 12-3 en banc ruling of the U.S. Fifth Circuit reversed an earlier panel decision which said clinical medical

Legal Secretary Wanted

Darrell Apffel with the Galveston law firm of Baker, Doyle, Apffel & Bettison has an immediate opening for an experienced legal secretary with personal injury litigation and family law experience. Good salary and benefits package. Please fax resume to (409) 744-9786.

LEARN THE NEW DISCOVERY RULES BEFORE YOUR OPPONENT DOES

Afternoon Seminar
(right after Bar Meeting)
Friday, November 20

La Marque Inn on IH 45
(formerly Holiday Inn)

Also covered:
Family law topics
Liquor & The Law
(DWI, etc.)

testimony did not fall under Daubert's scientific reliability standards. Moore v. Ashland Chemical, __ F.3d __ (5th Cir. 1998)(en banc).

Prejudgment Interest on a P.I. Recovery is Taxable. The IRS won a ruling that the prejudgment interest of a medical malpractice settlement made after a judgment for damages and prejudgment interest was taxable income. This ruling is doubly dangerous because it says that the IRS can go behind almost any settlement after a judgment to determine what portion is taxable. This would be important in cases involving punitive damages as well as prejudgment and postjudgment interest. Rozpad v. Commissioner, __ F.3d __ (1st Cir. 1998).

Juror Testimony Ban Unconstitutional. The Beaumont Court of Appeals has held that Rule of Civil Procedure 327(b), which prohibits juror testimony as to any matter occurring during the course of deliberations, violates Article I section 15 of the Texas Constitution. This could be a useful case for any lawyer wanting a new trial because of juror misconduct. Jackson v. Golden Eagle Archery, Inc., __ S.W.2d __ (Tex. App.-Beaumont 1998).

Health Insurance Available For Low Income Children

The Texas Healthy Kids Corporation is offering very low cost health insurance to low income families in Galveston County. Coverage is available in Galveston County through UTMB at a cost of \$41.53 per child. In Harris and Brazoria counties, coverage costs \$68.21 per child through Texas Children's Hospital.

The Texas Family Code Sec. 154.182 says family courts may order medical obligors to purchase coverage through the THKC if comparable coverage is not available.

Call 1-877-WELL-KID to get a THKC enrollment application for your clients.

August 6, 1998

Coming soon to WWW.LAWFAX.COM

Experts in Criminal Cases

This article is a summary of a paper presented to the Galveston County Criminal Defense Attorneys in July.

Kelly v. State, 824 S.W.2d 568 (Tex.Crim.App.1992) applies to all scientific testimony offered by the State or defense. Kelly probably applies to all expert testimony. See Gammill v. Jack Williams Chevrolet, Inc., ___ S.W.2d ___ (Tex. 1998).

Kelly requires the trial court to determine if the expert testimony: (1) will help the jury understand the evidence or determine a fact issue; (2) is relevant; and (3) is reliable.

The proponent of the expert testimony has the burden of proving outside the presence of the jury each of these elements.

Kelly requires a showing that:

- (1) the underlying scientific theory must be valid;
- (2) the technique applying the theory must be valid; and
- (3) the technique must have been properly applied on the occasion in question.

The trial court may consider the following nonexclusive factors in assessing the reliability of scientific testimony:

- (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a

(Continued on page 3)

Young Lawyers Elect Officers, Play Golf

The Galveston County Young Lawyers Association elected the following new officers: President: Russ Burwell, III; President-Elect: James Nebout; Secretary: Lyle Courtney; Treasurer: Bobby Gervais.

The Young Lawyers are putting on a golf tournament on August 27 at 1:15 pm at the Bayou Golf Course in Texas City. The tournament, which raises money for youth scholarships, will be a four person scramble (bring your own team or join one at the tournament) and will cost \$50 per person. For more information, contact Russ Burwell or James Nebout at (409) 945-0660/(281) 488-0691.

CNA Discourages Hiring a Lawyer

Folks who get in car wrecks with CNA insureds are receiving a slick brochure that actively discourages them from hiring lawyers. The brochure says:

DO YOU NEED TO HIRE A LAWYER? NO. In fact, many accident victims settle their claims directly with CNA every year without lawyers' involvement.

WHO PAYS LAWYERS AND HOW MUCH DO LAWYERS CHARGE? You pay them. Lawyers often take up to one third of the settlement you receive after deducting expenses incurred. If you settle directly with CNA, however, the total amount of the settlement is yours.

WILL THE CLAIM SETTLEMENT PROCESS BE FASTER IF I HIRE A LAWYER? Probably not. According to the Insurance Research Council, people who settle their insurance claims without a lawyer generally settle their claims more quickly than those who have hired a lawyer.

CAN I HIRE A LAWYER LATER? Yes. In each state there is a time limit, (generally no less than one year after your accident) to take legal action against our policy holder. Whether you should retain a lawyer is your decision. A lawyer may be able to provide valuable advice to you, may be able to help you advance your interest, and such counseling may be important in complex or serious cases. Before you hire a lawyer, you may first wish to seek an offer from CNA. If you still want to retain a lawyer, make it a condition that their contingency fee will apply ONLY to the

settlement amount in *EXCESS* of what CNA offered to you without the lawyer's assistance.

Editorial: It hardly seems fair for these brochures to be mailed very soon after auto accidents to injury victims when State Bar advertising rules prohibit lawyers from writing accident victims to explain why they really need attorneys. It is also cruelly ironic since most lawyers I know encourage people to buy insurance and here an insurance company tells people not to hire us.

Calendar

August

- 17-21 State Bar Advanced Family Law Seminar-San Antonio
27 1:15p Young Lawyers Golf Tournament
Bayou Golf Course, Texas City—\$50 per person
28 Noon Mainland Bar: Merchant's Bank. League City
Speaker: Lawrence Pirtle on "Wills 7 Probate-Recent Developments"

** No Galveston County Bar Assoc. Meeting in August. The next meeting will be September 24 at the Tremont House in Galveston (the meeting site will no longer be the San Luis).

Legal Tax Deadbeats Prompt IRS Scrutiny

It is hard to imagine a lawyer simply not filing a federal income tax return, but that has happened with such frequency that now the IRS is more actively scrutinizing lawyers and law firms for tax irregularities. Special care is given to analyzing solo and small firm lawyers and those practicing in areas where cash receipts are common (criminal and immigration).

Tax year 1998 is going to give the IRS something new to look for in lawyers' tax returns. Beginning 1/1/98, any person or business engaged in business who makes any payment to a lawyer or law firm in the course of the taxpayer's business having to do with legal services must file a 1099 with the IRS reporting the total amount paid. It doesn't matter whether the lawyer or law firm is organized as a PC, partnership or LLP, the gross amount paid must be reported. The new law, Sec. 1021 of the Taxpayer Relief (and Screw Lawyers) Act of 1997 requires attorneys to promptly provide the tax payer i.d. numbers when requested and appears to require attorneys to tell the folks paying them how much is going to the lawyer and how to be reported as "other." This raises interesting issues, since it could be a breach of client confidentiality to tell State Farm exactly how much the client is getting from a \$20,000 settlement. On the other hand, if State Farm sends in a 1099 for \$20,000 and the lawyer only received \$6,666.66 in actual income, the discrepancy will have to be

Interesting Federal Cases

The Federal D.C. Circuit has struck down the EPA's "Wetlands" rules that required developers and builders to get an EPA or Corps of Engineers permit before building in a wetlands. This ruling could have a big effect in our coastal area. National Mining Assoc. v. U.S. Army Corps of Engineers, __ F.3d __ (D. C. Cir. 6/19/98).

A "witness tampering" law was violated when a prosecutor offered leniency to a man to testify against a co-defendant. The ruling of a three judge panel of the Tenth Circuit could apply in State cases as well and may prompt defense attorneys to at least begin making detailed objections for later appeals. The key issue seems to be that the deal was struck before the guy testified rather than afterwards. En banc review has been granted, so the ruling may not stand long. U.S. v. Singleton, __ F.3d __ (10th Cir. 7/1/98).

Flashing a turn signal without turning or changing lanes is not a violation of Texas Transportation Code section 547.305 — which prohibits operating a vehicle with the turn signal left on — and does not create probable cause for a police stop; a subsequent consent to search does not cure the taint of the unconstitutional stop. U.S. v. Miller, __ F.3d __ (5th Cir. 7/13/98).

A debt to a former spouse incurred in the course of a divorce is not dischargeable in bankruptcy unless the debtor can show that he lacks an ability to pay the debt or that the benefits to the debtor from the discharge outweighs the detriment to the former spouse. In the Matter of Gamble, __ F.3d __ (5th Cir. 1998).

Experts (continued)

(Continued from page 1)

community can be ascertained;

(2) the qualifications of the expert(s) testifying;

(3) the existence of literature supporting or rejecting the underlying scientific theory and technique;

(4) the potential rate of error of the technique;

(5) the availability of other experts to test and evaluate the technique;

(6) the clarity with which the underlying scientific theory and technique can be explained to the court; and

(7) the experience and skill of the person(s) who applied the technique on the occasion in question.

Two additional objections to expert testimony: (1) the so-called expert is not qualified; and (2) the prejudicial effect of the expert's testimony outweighs its probative value.

Part of an expert's testimony may be admitted while other parts may be properly excluded under Kelly.

Expert testimony may be challenged prior to trial at a separate hearing because of a motion to strike expert testimony and/or can be challenged at trial in a motion in limine and in a request to voir dire each expert. The trial court must allow the defense to voir dire experts if a timely request is made.

Admission of expert testimony is reviewed on abuse of discretion and on a harmless error standards of review.

A key concept: a qualified expert may be allowed to testify but just one of his key opinions may be excluded if he cannot show a reliable, scientific basis for that opinion.

somehow explained by the lawyer at tax time.

Supposedly, the IRS will soon issue regulations that will explain how lawyers are supposed to cope with this new rule. All personal injury law firms are advised to keep copies of all settlement disbursement sheets in case the details are needed next April. We may have to adjust our accounting programs to report gross income and net income or treat payments to clients from settlements as expenses. My question involves the increasing commercial litigation I do by the hour. If a business pays a \$10,000 retainer, which I place in trust and use to pay my hourly fees and expenses, will that business have to file a 1099 on the retainer? If some of the money is still in trust on December 31, will I also have to divulge details of my clients' trust accounts to the IRS? ALL LAWYERS NEED TO DISCUSS THIS ISSUE WITH THEIR ACCOUNTANTS NOW RATHER THAN WAIT UNTIL TAX RETURN TIME NEXT YEAR.

More IRS Fun: New Innocent Spouse Election

Divorce and bankruptcy lawyers need to understand the new Innocent Spouse Election law to protect their clients. Under the new law, spouses who divorce or live apart for a year can file an election for separate tax liability. Under this election, spouses will only be liable for their own income as if they had filed separately. Business and investment income is allocated in proportion to the ownership of the business or investment. This election is much more liberal than the old "innocent spouse" rule (which has been loosened a little for spouses who do not divorce or separate in the new IRS law). The new election can be filed up to two years after the IRS starts collection activity.

For example, a wife earning \$18,000 a year files for divorce and discovers her husband failed to report \$60,000 of income in their joint return the prior year. The soon to be ex-wife can file the new election and only be liable for taxes on her income (which was covered by payroll deductions). The new election covers liabilities for deficiencies but not failure to pay taxes at all. In many divorces, spouses will feel more comfortable enjoying the benefits of filing a joint return knowing they have protection of the new election. The new law was signed by President Clinton in July and is Sec. 3201 of H.R. 2676 and will be Sec. 6015 of the IRS Code. The IRS obviously has not had time to issue regulations or forms for this new election.

Dallas Divorce Attorney Hit With \$108.8 Million Malpractice Verdict

The former wife of a multimillionaire businessman lost the custody and property fight in divorce court but a year later received a record legal malpractice verdict against her divorce attorney.

The ex-wife lost custody of her children in an agreed settlement and received "only" \$52 million of a community estate valued at over \$200 million. The court approved a \$300,000 fee for her attorney but he then got the wife to pay him a \$5 million "bonus." At trial, the defendant lawyer was unable to produce time records for most of his work and insisted the extra \$5 million was a gift rather than a contingent fee. The jury assessed \$33.5 million in actual damages and the judge added on another \$72 million in punitive damages. The judgment is apparently not covered by insurance and the defendant lawyer is now in bankruptcy court.

Now, if the ex-wife has to hire a bankruptcy attorney and he screws up the collection effort, could she then sue him to recover at least part of the award from the malpractice suit against her divorce attorney? Legal malpractice cases within malpractice cases within injury or divorce cases are going to be much more common in the future.

Appellate Cases

Plaintiffs actually win appeals in the Texas Supreme Court!

The statute of limitations in latent-occupational disease cases starts to run whenever a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he suffers some injury and he knows or in the exercise of reasonable diligence should have known that the injury is likely work related. Childs v. Haussecker, __ S.W.2d __ (Tex. 1998).

A product can still be defective, even if it has an adequate warning, if a safer alternative design exists. A plaintiff must prove that the safety benefits from its proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety. Uniroyal Goodrich Tire Co. v. Martinez, __ S.W.2d __ (Tex. 1998).

Trial judges take note! The Supreme Court rules that it is proper and probably smart to condition jury questions on damages on a finding of negligence on the defendant and 50% or less fault on the plaintiff. Defense lawyers often argue that those predicates for damages questions in the PJC book improperly inform juries of the effects of their answers. The Supreme Court soundly rejected that argument and so should our good trial judges. HEB v. Bilotto, __ S.W.2d __ (Tex. 1998).

FOR KIDS SAKE

The For Kids Sake schedule through the end of the year is:

Nessler Center, Texas City

5:30 pm: Aug. 24, Sept. 21, Oct. 19, Nov. 2, Dec. 7

10:00 am: Aug. 10, Oct. 5, Nov. 16

Rosenberg Library, Galveston

5:30 pm: Aug. 6, Sept. 3, Oct. 1, Oct. 29, Nov. 30, Dec. 17

10:00 am: July 23, Aug. 20, Sept. 17, Oct. 15, Nov. 12

Upon the nomination of Arthur Schechter as Ambassador to the Bahamas,

Lawrence M. Tylka

announces his relocation
and formation of a new law firm
as of August 17, 1998

The Tylka Law Center, P.C.

Heidenheimer Marine Building
305 21st (Moody)
Suite 140
Galveston, Texas

(409) 762-0066
Houston: (877) 762-0066
Toll Free: (877) 228-9552
Fax: (409) 762-7333

Word Perfect About to Croak?

I have been using Word Perfect as my word processor since it came on a single floppy disk. When I had questions, I could call toll-free to the smart Word Perfect folks in Orem, Utah for answers. Now, Corel, the company that bought Word Perfect has announced the complete closing of the Orem Word Perfect facility and says it is moving those operations to Ottawa, Canada headquarters and firing over 500 Utah employees.

My populist nature has made me resist Microsoft and my fingers are programmed to use the Word Perfect 5.1 keystrokes, but even I may be forced to switch to Microsoft Word. New versions of Word Perfect will simply not give you the option of using the ver. 5.1 function keys, so I might as well learn Word as the new Word Perfect. Word Perfect ver. 7 worked horribly under Windows 95 and I can be sure that Ms Word will always work well with the latest Microsoft operating system.

Word Perfect's last real toe hold in American business is the legal community and that is really because so many law offices are still using DOS! If they lose even me, I fear Word Perfect is doomed to go the way of Word Star and other ancient dinosaurs.

July 17, 1998

Coming soon to WWW.LAWFAX.COM

County Bar Elects Buckley

John Buckley was voted in as President-Elect of the Galveston County Bar at its last meeting. Janet Rushing was elected Treasurer and Russ Burwell, III was elected Secretary. David Salyer now takes over as President.

Legal Babies: Sean Patrick Quigley

Pat Quigley's wife, Janet, gave birth to their second child on June 22 at UTMB. Sean Patrick Quigley weighed 8 pounds, two ounces and joins his two year old sister Caitlin in the Quigley home. Congratulations!

New Cases on Experts

Texas' two highest appellate courts have ruled that all expert testimony will be evaluated for reliability under DuPont v. Robinson, 923 S.W.2d 549 (Tex. 1995)(civil cases) or Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992)(criminal cases).

The Court of Criminal Appeals in Hartman v. State, ___ S.W.2d ___ (Tex. Crim App. 4/23/97) ruled that all scientific evidence, not just "novel science," must be scrutinized under the Kelly standard. Hartman involved testimony by Bexar County's Breath Test Technical Supervisor that a defendant who blew 0.138 on the Intoxilyzer was probably over the legal limit 45 minutes before when he was stopped by the police. The Court of Criminal Appeals reversed the Court of Appeals which had held that Kelly did not apply to the case because it did not involve "novel" or "junk"

(Continued on page 3)

Editorial: Move Jail and Courts to Galvez Mall

Our county leaders are pondering the need for a new jail and a new courts building. Why not meet our local justice system's growth needs cheaply and fix up one of Galveston's worst eyesores at the same time?

The Galvez Mall is long empty and it is an ugly blight to anyone driving on to the island. The mall has a lot of wide open building space and tons of parking. There is no law that says courtrooms have to be stacked on top of each other in multi-story buildings. There certainly is no requirement that courthouses be ugly and tough on the public to access and use.

I propose that the county buy the Galvez at what surely would be a bargain price and build it into the courts building and jail. The jail would probably require a totally new building build on the site but the courts and clerks' offices could certainly be built in existing mall spaces. Even with projected new courts and extra space for files, our county could still not fill up the mall entirely. The county would lease spaces to stores and restaurants who would want to go back into the Galvez if it was filled every day with patrons. Imagine a mall-style food court serving the courthouse! Office space could be rented to lawyers, process servers, bail bondsmen and court reporters who would love to have an office in the courthouse. The current courthouse would be used for the county's administrative departments and perhaps the existing jail could be a woman's jail and the new, larger jail at the old Galvez would house only men

prisoners.

This could be a one-of-a-kind public/private endeavor that would garner national attention and help the City of Galveston, our justice system, the public and even us poor old lawyers. Turning the decrepit Galvez into a courthouse would generate tax dollars from the businesses that would flock there, make the ride to jury duty and court appearances much shorter for mainland residents and hopefully create the dynamic that made the courthouse square the business hub of every small Texas town. In fact, that should be the new place's name: Courthouse Square Mall.

While we are talking about new courtrooms, whether in a new courts building next to the existing courthouse or in the Courthouse Square Mall, it is vital that the courtrooms be designed with the needs of judges, lawyers and the public in mind. The last page of this newsletter contains my design idea for a model courtroom. The basic design requirements for a courtroom should include:

- Storage for court files and office space for clerks. Unlike the current central files system, the new courthouse should store each court's files with that court. This would eliminate the single biggest headaches for court personnel and lawyers: finding files and getting them to the courtroom.
- Attorney conference rooms for lawyers to meet with clients and witnesses;
- A large suite of offices for the judge and his staff that would include a kitchenette, a room for a receptionist and a waiting area for lawyers waiting for hearings, and offices for a bailiff and law clerk;
- The courtroom should already have TV monitors, projector screens and computer projectors built in and be pre-wired for computers at everyone's tables;
- Each courtroom should have a back entrance for the judge and court personnel that leads to a secure back hall and private elevator.

Trial Reports

The jury gave the most lenient sentence possible, probation, to a 19 year old man found guilty of participating in the gang rape of a 12 year old girl. However, Judge Miles Whittington handed down the harshest form of probation the law allows. Terms of the man's 10 year probation include 180 days in the county jail, 800 hours of community service, a 7 p.m. curfew, a required electronic monitoring device, sex offenders counseling and the requirement that he stay at least 100 yards from any area children gather. The defendant must also write a letter of apology to the victim. Bill Reed prosecuted the case and Steve Taylor masterminded the

Experts (continued)

(Continued from page 1)

science.

The Texas Supreme Court reached the same conclusion in Gammill v. Jack Williams Chevrolet, Inc., ___ S.W.2d ___ (Tex. 7/3/98), ruling that the Robinson standard applies to all scientific evidence. The court upheld striking testimony from two engineers in an Isuzu crashworthiness case. Noting that not every engineer is qualified to testify in every products liability case, the court pointed out that one of the experts was experienced in designing and testing missiles and planes but not cars. The other expert's opinions were deemed to be little more than subjective belief or unsupported speculation.

The Supreme Court emphasized that the six factors set forth in Robinson for evaluating the reliability of expert testimony are not exclusive. The court said, "The factors a trial court will find helpful in determining whether the underlying theories or techniques of the proffered evidence are scientifically reliable will differ with each particular case."

It also held that experience alone may provide a sufficient basis for an expert's opinions in some cases and not in others. It concluded, "We recognize that the trial court's task is sometimes a difficult one. The trial court is not to determine whether an expert's conclusions are correct, but only whether the analysis used to reach them is reliable."

amazingly successful defense. Taylor has received a lot of criticism for blaming the young victim for encouraging, or even enjoying, the group sex session with a total of eight boys or men. It was a defense that was not really used by the three juveniles who have already been found guilty for the assault and were sentenced to TYC. Four other juveniles await trial.

Mike DeGuerin represented a man found guilty of intoxication manslaughter for an I.H. 45 wreck that killed two people. The jury sentenced the man to two four year terms and Visiting Judge Henry Dalehite ruled they would be served concurrently. Larry Drosnes represented the State in the case.

Joe Maida prosecuted a defendant found guilty of delivery of 200-400 grams of cocaine in Judge Frank Carmona's court. Joel Bennett represented the defendant, who was sentenced to 45 years in prison.

Carlos Garza's client was awarded no damages by a jury in Judge C. G. "Trey" Dibrell, III's court in a car wreck case.

Appellate Cases

The Court of Criminal Appeals has ruled that in the penalty phase, the parties may not just say the defendant received deferred adjudication for another offense but may also introduce the details of the underlying offense. Davis v. State, ___ S.W.2d ___ (Tex. Crim. App. 6/10/98).

A trial court's refusal to conduct a jury shuffle is an error that effects the defendant's substantial rights and is deemed harmful. Ford v. State, ___ S.W.2d ___ (Tex. App. - Ft. Worth 6/11/98).

Practical Lawyer: Computer Bargains

The choices in personal computers and accessories are staggering and sometimes what seems like a good deal is not. Recently, several stores advertised Packard Bell computers with 300MHz Intel Celeron processors, 32MB memory, a 5.7GB hard drive, 56k modem, a 15" monitor and a Lexmark color printer for a total price of \$1,149.99 (Best Buy). A Hewlett Packard system with a 300MHz Intel Pentium II processor, 48MB ram, 8.0GB hard drive, 56k modem, 15" monitor and Hewlett Packard color printer was advertised at \$1,499.99 (ComputerCity). Both are good prices for speedy, powerful systems. However, Packard Bell consistently is rated among the worst computer makers for reliability, service and technical support whereas Hewlett Packard (long famous for great printers) is rated much higher. The best bet is probably the

Hewlett Packard. The Intel Celeron chip used in the Packard Bell PC is a cheaper, slower version of the Pentium II and was intended to compete with a speedy, low cost chip made by AMD.

Most PC techies will advise you not to buy a Compaq because it will usually cost more and because most of its insides are proprietary systems, making them much harder and more expensive to fix or upgrade.

One problem with PC's is the fact that today's hottest system is out of date in a year. Gateway 2000, which is one of the top mail order PC sellers, is offering a \$49.95 a month deal to buy a customized PC system that matches hardware and programs to your needs. The price includes monthly Internet access (which will usually cost around \$19 a month by itself), around the clock technical support, a service plan and the right to turn in the PC in two years as a trade for a new system. This sounds like a very good deal.

Family Law Focus

Contacting the Paternity Registry

Fathers of babies born out of wedlock are supposed to sign up with the State's Paternity Registry. Lawyers can check to see who has registered by contacting:

Texas Health Department Bureau of Vital Statistics
P. O. Box 12040
Austin, Texas 78711-2040
(512) 458-7111 Fax: (512) 458-7783.

There is no charge to register but there is a \$9.00 fee to check the registry and get a certificate of the search results.

24 Hour Notice Required to Register With For Kids' Sake

Family lawyers need to let their client know that they must register at least 24 hours in advance to get in the For Kids' Sake seminar. Late registrations have caused a lot of problems so the new deadline was imposed.

The For Kids Sake schedule through the end of the year is:

Nessler Center, Texas City

5:30 pm: July 27, Aug. 24, Sept. 21, Oct. 19, Nov. 2, Dec. 7
10:00 am: Aug. 10, Oct. 5, Nov. 16

Rosenberg Library, Galveston

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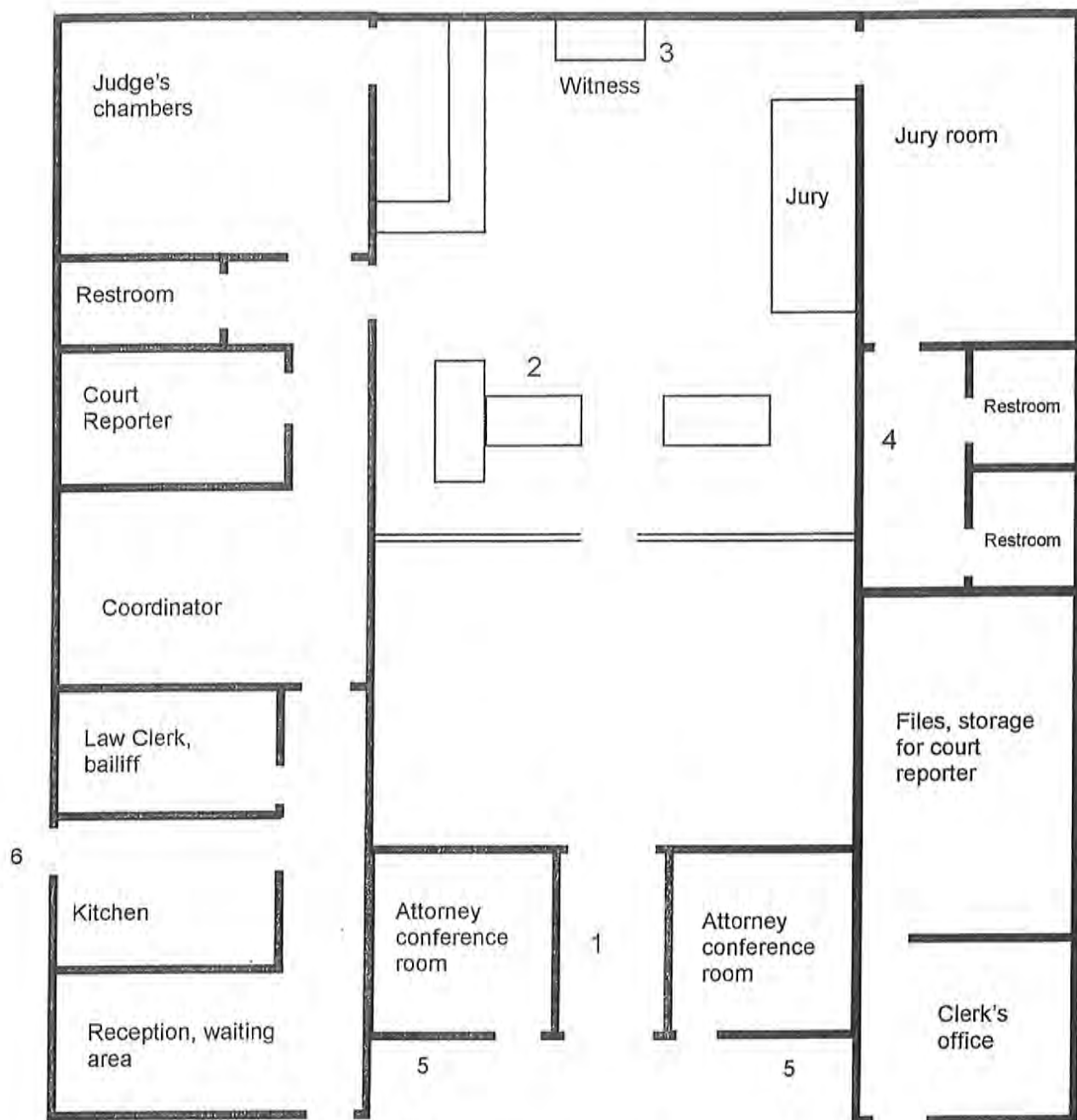
Pediatricians Study Spanking, Normal Sexual Behavior in Kids

The American Academy of Pediatrics publishes peer reviewed, scientific articles in its journal Pediatrics and on the Internet in its Pediatrics electronic pages (www.pediatrics.org).

Two articles published in April 1998 may be of interest to family lawyers.

A study of mothers of 1,000 children ages 2 to 12 years old who had not been sexually abused revealed that a lot of behavior some claim is evidence of sexual abuse is really normal childhood behavior. The study found that many children frequently engage in self-stimulation, exhibitionism and violation of personal boundaries (standing too close or rubbing up against people). The authors concluded, "simply because a 5-year-old boy touches his genitals occasionally, even after a weekend visit with his noncustodial parent, it does not mean he has been sexually abused. Rather, it is a behavior seen in almost two thirds of boys that age."

The AAP also in April issued a policy statement recommending that parents should not spank their kids, even though studies show about 90 percent of parents have spanked their children.



- 1 Double door entrance for silence.
- 2 Counsel tables large enough to accommodate large trials. Build-in connections for computers.
- 3 Handicap accessible witness stand in the middle of the courtroom with marker board behind.
- 4 Kitchenette and restrooms for jurors.
- 5 Lobby area with commercial couches and tables with magazines, newspapers for those waiting for court.
- 6 Back entrance to secure hallway for court personnel leading to private elevator, secure parking.

Prototype Courtroom

Published by Greg Enos
17400 El Camino Real, Suite 300
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LAW FAX

Distributed by fax, mail and e-mail

June 22, 1998

Coming soon to WWW.LAWFAX.COM

Good Bye to Judge Gibson

Lawyers and the public will say, "good bye" to Judge Hugh Gibson today at a memorial service in the Jury Assembly Room in the Galveston County Courthouse at 1:30 p.m. Judge Gibson served most of his adult life as a state or federal judge and he will be remembered for his fairness and quiet integrity. A simple man who usually rode his bicycle to work, Judge Gibson earned respect by treating lawyers, parties and witnesses with old fashioned courtesy. He did not bully or embarrass counsel. Judge Gibson showed bravery in his early civil rights rulings and never showed partiality to any clique of lawyers. Conservative by nature and tough on crime, Gibson always treated his courtroom like a hall of justice with dignity and only occasional humor. Judge Gibson will be missed but his judicial legacy will not soon be forgotten.

Living Up to Dad

We never truly appreciate our parents until we have kids of our own. Ultimately, our jobs as role models are our most important contributions to the men and women our children will become. Few of us now remember any specific words our parents said to us as kids but we will always have that more general memory of what kind of people Mom and Dad were. We will spend our entire lives either trying to be like our parents or, in some sad cases, being as different as we can be from them.

This past Sunday was an opportunity to honor our fathers and I made my obligatory call to Dad in Austin. True to form, our talk was brief, unemotional and ended up focusing on the mundane. After we hung up, I

(Continued on page 3)

County Bar Election Meeting This Thursday At A Different Location: Hilton Resort

The June meeting of the Galveston County Bar will feature officer elections and will NOT be held at the usual San Luis location. The meeting will be in Salon C of the Galveston Island Hilton Resort, two blocks down from the San Luis. Nominees for Bar offices are:

President-Elect	John Buckley	Greg Enos
Secretary	Darrell Apffel	Russ Burwell
Treasurer	Maureen Kusik	Janet Rushing
Board of Directors (choose 5)	Brian Abbington Robert Clements Doug Foster Kathryn Lanan Keith McFatridge Genevieve Bacak McGarvey Maria Louisa Mercado Brent Richbrook	Chris Bertini Jack Ewing Doryn Glenn Wayne Mallia

Second Draft of New Discovery Rules Unveiled

The Texas Supreme Court issued its second draft of new discovery rules that will radically change how pre-trial discovery is conducted in Texas. For example, in cases involving \$50,000 or less (including divorces without children), each party would be limited to a total of six hours for deposition questions of all witnesses and a total of 25 interrogatory questions. Disclosures like those now used in federal courts would be required. Expect to see a "final" set of proposed rules in the September Bar Journal. The current draft can be viewed on the Internet at www.tfla.com.

Lecherous Lawyers Relieved: Bar Refuses Again to Ban Sex Between Attorney and Client

The State Bar refused for the second time in four years to ban sex between attorneys and clients. This time, a committee of the State Bar Board of Directors voted 12 to 2 to table a proposed rule that would have said, "A lawyer shall not condition or threaten to condition the delivery of legal services on the lawyer having sexual relations with any person." A broader proposed rule was rejected in 1994 which would have banned any sex between lawyer and client, "if the sexual relationship is reasonably likely to prejudice or damage the client or the client's interest."

Editorial: County Bar Elections Important

This Thursday, members of the County Bar Association will elect officers for the next year (and in some instances, for the year after as well). At the top of the ticket is the contest for President Elect between John Buckley of Greer, Herz & Adams and yours truly, a solo practitioner.

Is this a contest between our county's biggest firm and its smallest? The attorneys who killed the proposed bar poll of judicial candidates out of fear of "big firm block voting" might think it is but I don't see it that way. Buckley and I both strongly pushed for the Bar poll. I personally think if you met us at the park and had to guess which goofy guy in the Bermuda shorts was a "small firm" lawyer that Mr. Buckley, with his unruly hair and outrageous sense of humor, would be tagged as the rebel solo attorney, not me.

Is this a conservative vs. liberal contest? People who know me and Buckley won't think so since we are both non-traditional in the extreme. This is certainly not the "ultimate contest between good and evil" as one jokester called it.

In reality, Buckley and I are kindred spirits with the same vision for our County Bar and we have agreed to continue to work closely together no matter how the election turns out. We both want to:

- increase bar membership to at least 70% of our almost 500 county lawyers by creating a bar that attorneys want to join;

1998

Galveston County Legal Directory

listing 440+ lawyers'
addresses, phone numbers,
fax, e-mail, bar numbers

Court Listings for Galveston &
Harris Counties

\$10 per directory

Order by sending check to:
Greg Enos
17400 El Camino Real, #300
Houston, TX 77058

Dad (continued)

(Continued from page 1)

spent much of my very enjoyable Sunday with my own family thinking about what my father has done for me as a role model.

I know I can never be as successful in my profession as Robert Enos was in his. He was named National High School Principal of the Year. When his district would transfer him to another troubled school hoping he would turn it around too, the kids and parents at his old school staged protests demanding that he not be taken from them.

On occasion, I fancy myself a hard worker but I doubt I have ever taken on any task with the same perfectionist, "its got to be done now and done right" attitude my Dad applied to everything. Even now in "retirement" he works over 40 hours a week for Habitat for Humanity and his church and on many other worthy projects.

"How Dad would do it" is a consideration for me in everything I do. When Sharon and I recently painted the inside of our garage, that little part above the rolling door no one would ever see still got two coats of paint because I knew Dad would have done it that way.

My real hope is to be as successful a parent as my father. I am not sure I want all of my kids to grow up to be lawyers like my brothers and I, but I'll count myself lucky if I shape my kids' lives as positively as my father has molded mine. **Happy Father's Day Dad!**

- accept our professional responsibility to inform the public about judicial elections and conduct a bar poll of judicial candidates;
- conduct every other monthly bar meeting on the mainland in recognition that well over half of the county's attorneys practice north of the causeway;
- conduct bi-annual seminars that will provide high quality but low cost CLE for bar members; and
- continue the drive to improve the County Law Library.

On Thursday, I am voting for John Buckley! You owe it to the Bar to attend this important meeting to vote and to thank the many good lawyers willing to donate their time as officers.

A New Reason to Strike Pleadings

Lawyers using good, modern word processing techniques should be wary when submitting orders in federal court. Lawyers are receiving orders signed by Judge Kent striking their pleadings with an explanation, "Word Processor File Information on Order." All of the other reasons in the form order for striking pleadings refer to a local rule but apparently there is no local rule forbidding the very common practice of automatically including the word processing file name on pleadings.

Editorial: <c:\wp\forms\fed-ct\nitpicking\nonsense.ord>

Calendar

June		
25	12:00	Galv. Co. Bar Assoc.—Hilton Resort
July		
3	12:00	Galv. Co. Mediation Assoc.—Olive Garden, Texas City Speaker: Hon. Judge Frank Evans
8	12:00	Galveston Co. Family Bar: Pelican Club
17	12:00	Galv. CRIMINAL Defense Lawyers Assoc. - DiBella's Speaker: Greg Enos on expert witnesses

Trial Reports

John Thoma's client was found guilty of DWI by a jury in County Court No. 2 before Judge C. G. "Trey" Dibrell, III. Brett Podolsky represented the State. The parties reached agreement on punishment: six months in jail probated for a year, \$1,000 fine. There was video but no breath test. The week before, Mr. Thoma represented another DWI defendant against Mr. Podolsky in a bench trial with Judge Wilson. The female defendant was found guilty and assessed a year of probation and a \$500 fine.

Judge Miles Whittington presided over his first civil trial in which

Larry Tylka's client alleged he hurt his neck and back while working on a railroad. Tylka had previously settled with another defendant for \$150,000 and everyone (Tylka, the Judge, and even the defense lawyer) tried desperately to get the plaintiff to accept a \$250,000 offer. The stubborn plaintiff refused to settle and he ended up with zero from the jury which found no negligence. The next week Judge Whittington presided over another civil trial involving Arnold Palmeri (the pipefitter, not the golfer). Rick Ansell represented the carrier in this new law workers' compensation case. The jury found for the worker and assessed a 16% impairment rating.

Judge Whittington's first jury trial was a felony DWI. The defendant, who had several prior DWI's, was found guilty.

A juvenile case involving alleged aggravated sexual assault of a child ended on the third day in County Court No. 1 with an agreed plea. Sal Faus represented the State and Tad Nelson represented the juvenile.

A defendant in Judge Norma Venso's court was found guilty of delivery of cocaine and sentenced to 10 years in prison. Ted Mora represented the State and Kevin Rekoff represented the defendant.

A defendant in Judge Frank Carmona's court escaped a burglary charge and was found guilty of criminal trespass instead. Larry Drosnes was prosecutor. Judge Carmona assessed the maximum sentence of a year in jail plus a \$4,000 fine.

An Aggravated Sexual Abuse of a Child case tried before Visiting Judge Henry Dalehite ended in a mistrial after five days because of a hung jury. James Moore was counsel for the defendant and Kurt Sistrunk and Mike Elliott represented the State.

A defendant in County Court No. 1 was found guilty of his second DWI. There was video but no breathalyzer. Punishment was to the court and Judge Crapitto assessed a year in jail probated for a year and a \$1,000 fine. Elizabeth Gunn represented the State in her first jury trial. Robert Hoskins represented the defendant.

Alton Todd wins and loses. Todd lost a car-train wreck case in Houston but two weeks later won a wrongful termination case for a hospital employee fired for refusing to commit Medicare fraud. Todd's client was awarded \$600,000 in damages.

EMPLOYMENT

The Galveston County Legal Department has an immediate opening for a paralegal/legal assistant to work in a litigation environment. Duties will include claims handling, file maintenance, case tracking, scheduling and other litigation related matters. Salary is \$23,000 with full benefits. A full job description is available upon request. Please fax your resume to Don Glywasky at (409) 770-5560. Equal Opportunity Employer.

Need a Legal Assistant? Part-time, full-time, temporary or permanent. Law student with experience in personal injury and family law, Word Perfect, Word and Pro Doc. Call Ellen Griffith at (281) 337-2187.

Thanks for the Party Help!

Thanks to everyone who helped make our "fun raiser" party for Judge Dibrell a success. Over 120 people attended the party, which was a lot of fun and helped raise significant funds for a judge we all want to see reelected. We particularly want to thank our many event and band sponsors and our kids for their help. Our youngest children, Christopher and Catherine worked hard on the invitations and our 21 year old, Jason, supervised the bar tenders. Thanks again.

Greg & Sharon Enos

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LAW FAX

Distributed by fax, mail and e-mail

May 26, 1998

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Judge Olsen: The Name is Unchanged

Judge Susan Baker Olsen wants attorneys to know she has not changed her name after her recent marriage. She has begun to receive faxes and letters addressed to "Judge Hunger" and other variations. "Susan Baker Olsen" is still the proper name to use.

District Courts Get New Carpet

Let's hope no glue sniffers go to trial in the 10th District Court real soon, since the smell of carpet glue is still detectable in Judge Garner's court. Last week, beautiful new carpet was laid down in the entire courtroom (except in the audience section) and in the court offices. Eventually, all the courtrooms will get new carpet.

Editorial: Reform Bar Association

A musty notebook we found in a file cabinet in the County Law Library contains neatly typed, very detailed minutes from the meetings of the Galveston County Bar Association in the late 1950's. Read those minutes and you will see that our Bar is struggling with the same issues it faced four decades ago: pro bono services for the poor, organization of the law library, encouraging lawyers to be dues paying members, etc.

One major problem our County Bar faces is the lack of continuity. Each year we have a complete turn over in officers. Every single officer serves a one year term and is required by the by-laws not to succeed him or herself. Only the President-elect stays on after June while all the other officers and the Board of Directors are usually a completely new set of folks who have little idea what happened in the prior year. At a recent meeting of the Bar Board, we realized that no one knows who owns the copier in the Law Library. The County denies ownership, the Family Bar says it only owns the fax machine and not one of seven County Bar officers had the faintest idea where the copier came from.

At next week's Bar meeting, lawyers will have a chance to vote on two proposals to help cure this problem. First, the Bar Board proposes that we fund a part-time Executive Director who will also be the new law librarian. This person will be a full-time county employee with county benefits but will also be paid an additional \$300 a month by the Bar to keep records, organize events and

You are invited to a

"Fun Raiser"
party



for Judge C. G. "Trey" Dibrell, III

Saturday, June 13
6:00 p.m. - sunrise?

at the home of Greg & Sharon Enos
2206 Fairwater Park Drive, League City

Dress casual, please RSVP
(281) 286-5500 or (409) 943-4300

Political contributions appreciated
Party attitude required

provide and institutional memory. Other County Bar associations have been very successful with this arrangement. The Smith County Bar in Tyler contributes to its law librarian's salary and uses her as an executive director. They report that the position more than pays for itself because the executive director organizes bi-annual seminars that are very profitable and keeps track of membership dues, which has greatly increased their paid membership base. Our Bar can certainly afford to help fund this position and it badly needs someone who will be in a position for years to help each incoming set of officers know what happened the prior year.

The second proposal is to amend the Bar by-laws to give Directors staggered two year terms so that there is not a complete turnover of officers every year. This is a good idea suggested by John Buckley and it should be approved.

Calendar

May

26 noon Galv. Co. Young Lawyers: Pelican Club
 28 noon Galveston Co. Bar Assoc.: San Luis, Galveston
 28 5:00p Miles Whittington Campaign kickoff—Yacht Club

June

13 6:00p Judge "Trey" Dibrell "FUN RAISER" at the home of Greg & Sharon Enos, 2206 Fairwater Park Dr., League City
 25 noon Galveston Co. Bar Assoc.: San Luis, Galveston
 29 noon Galv. Co. Young Lawyers: Pelican Club

Trial Reports

Ever felt like you were left in the 306th without a paddle? Perhaps you should have invited the judge out to the water! Judge Susan Baker Olsen, her court reporter, the parties and lawyers all went outside the courthouse to view some kayaks that were the center of the child possession issues tried in a modification case. The mother of the 14 year old mentally handicapped girl was a champion kayaker and wanted her daughter to enjoy the sport whereas the father, represented by John Gay, felt it was too dangerous given the girl's disabilities. After examining the kayaks and watching the girl climb in and out of one, Judge Olsen ruled that the child had to go through special swimming lessons, wear a modified lifejacket and could only go out in open kayaks or canoes. Marcia Zimmerman represented the mother.

A jury in County Court No. 2 before Judge C. G. "Trey" Dibrell, III found a defendant guilty in a DWI case. Mario Madrid represented the State and Lois McCarnes represented the defendant. In the last few weeks, Judge Dibrell has conducted two lengthy jury trials in juvenile cases.

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Craig Eiland kicks butt all over Texas! Eiland convinced a Texarkana jury to award his 15 year old client \$1.1 million in actual damages and \$1.075 million in punitive damages. Eiland's client, was raped in a Charter psychiatric hospital by two teenage boys who were fellow patients, one of whom was in the hospital for sexually abusing his six year old cousin. The girl was put in an unlocked room next door to the boys' room in a wing supervised by just one nurse.

A local orthopedic surgeon was exonerated of negligence in a malpractice case tried in Judge Frank Carmona's court. Marc Mayfield and Michael Fuerst represented the elderly plaintiff who felt his knee surgery had been botched. John Scott of Houston represented the defendant.

A jury in Judge Carmona's court found for the plaintiff who claimed he was a partner with the defendant in a lounge in Dickinson. The defendant, represented by Ramzey Zein-Eldin contended his foe had only lent him money but was not a partner. Michael Fieglein represented the plaintiff, who recovered over \$86,000 for breach of the partnership agreement, breach of an agreement on vending machines, violation of a sub-lease and attorney's fees.

Appellate Cases

Imagine the unanimous Texas Supreme Court actually upholding a punitive damages award against a big corporation in a toxic tort case! Aided by local appellate guru, **Otto Hewitt**, the plaintiffs held on to a \$6.6 million verdict in a case where the plaintiff, a millwright, was exposed to benzene at Mobil Oil's Beaumont refinery and developed leukemia and died. The Supreme Court opinion provides a short and obviously authoritative summary of what constitutes gross negligence, when a corporation can be held liable for punitive damages and the standard of review in punitive damages cases. This case should serve as a road map for plaintiffs seeking to recover punitive damages since it is a rare example of when this Supreme Court considers exemplary damages justified. This case also breaks new ground in the arcane area of settlement credits in multi-party cases. If the plaintiff sues defendants A and B and then settles with defendant B, A need only informally prove the amount of the settlement to get a dollar for dollar credit (in this case, attorneys just said how much the settlement amount was and never offered any proof of the amount). Since settlement credits can only be made against settlements for actual damages, the Supreme Court says plaintiffs should specify in such partial settlements how much is for actual damages and how much is for punitive damages. A clever plaintiff could thus say 95% of a settlement was for punitive damages and

Reno Won't Enforce Medicaid Law

U.S. Attorney General Janet Reno announced that her department will not enforce a new federal statute that made it a crime for lawyer to advise a client to give away assets to get Medicaid coverage for nursing home care. This law had worried many attorneys working in elder law.

therefore greatly reduce the credit a remaining defendant could claim. _ Of course, punitive damages are taxable, so it might not be that clever after all. Mobil Oil Corp. v. Ellender, __ S.W.2d __ (Tex. 5/8/98).

The Texas Supreme Court really went out on a limb to help consumers by ruling that insurance agents are "persons" and can be sued under Ins. Code. art. 21.21. Liberty Mutual Ins. Co. v. Garrison Contractors, __ S.W.2d __ Tex. 4/14/98). Two Justices, Baker and Gonzales, must have a dim view of insurance agents because they dissented and would hold that agents are not persons and should not be sued if the companies they work are defendants.

The Texas Tort Claims Act does not waive sovereign immunity unless the injury or death is proximately caused by a condition or use of tangible personal property or real property. A state hospital's failure to close and lock a door was not the proximate cause of a patient's escape and suicide but was rather just a condition that made the escape possible. The family's real complaint is a failure to restrain the patient, which does not fall within the waiver of immunity. Since the State escapes with a take nothing judgment, the hospital doctors and employees also must be dismissed because of Tex. Civ. Pract. & Rem. Code 101.106. Dallas Co. Mental Health & Retardation v. Bossley, __ S.W.2d __ (Tex.4/14/98).

Judges in criminal cases when giving an Allen charge should not give juries deadlines to conclude their deliberations, although in this case, telling a jury to let the judge know in an hour what progress had been made in deliberations was not harmful error. Hollie v. State, __ S.W.2d __ (Tex. App. - Ft. Worth 4/16/98).

Bad facts (especially when children are victimized) often lead to bad evidentiary rulings. In a recent case, a high school student told a drama therapist that her father had molested her years before. In the trial of the aggravated sexual assault charge, the therapist was allowed to testify over defense objections to what the child had told her. The trial court and the Beaumont Court of Appeals relied on T.R.Crim.Evid. 803(4) that excludes statements made for the purpose of medical treatment and diagnosis from the hearsay rule. It is not clear why the drama therapist, who was working with the child at the request of CPS, would be considered to be providing medical treatment. The court of appeals also ruled that it was error to allow a CPS social worker to repeat the child's abuse allegations because it would not be reasonable for the child to assume the statements were being made for the purposes of medical treatment. Gohring v. State, __ S.W.2d

How to Keep Children From Leaving the U.S.A.

Parents in divorces often fear the other parent will take the child out of the country. A parent may file a Denial of Passport by notifying The Office of Passport and Advisory Services, 111 19th St., NW, Suite 260, Washington, D.C. 20524-1705. Phone: (202) 736-7000. The written request should include copies of any court orders.

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LAW FAX

May 4, 1998

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Miles Whittington takes the oath of office to become District Judge.



Over 150 packed the 212th courtroom to watch Whittington take office.

Whittington is County's Newest Judge

Miles Whittington, Sr. became Judge of the 212th District Court last Friday before a packed courtroom audience of over 150 friends and well-wishers. Almost all of the county's elected officials and judges (nearly all of whom are Democrats) were part of the crowd who watched Republican Whittington be sworn in by First Court of Appeals Chief Justice Michael Schneider. Susan Criss, who is the current County Bar Association President and Whittington's Democratic opponent in November, was not present. Criss did issue a brief statement which said, "The voters will get a chance to chose their judge in November based on qualifications and not political cronyism."

Judge Whittington's long time friend and law partner David Walker gave a brief introductory speech and admonished Whittington to take his job seriously but not take himself too seriously.

Whittington characteristically gave a very brief speech in which he first introduced his cute little son Miles Jr. and his wife Patricia, who just recently discovered she is expecting another child. Whittington thanked Governor Bush for appointing him, Senator Jerry Patterson for helping obtain the appointment, and Judge Roy Engelke for serving the county as judge for 12 years. Whittington introduced the 212th Court staff and said they would all stay on. Judge Whittington then thanked everyone for attending the ceremony and promised to do his best as judge.

Family Bar Hosts Forum on Child Abuse

The Galveston County Family Bar Association and the Gulf Coast Coalition for the Prevention of Child Abuse will sponsor a panel discussion that will explore the various professional perspectives regarding what constitutes child physical abuse. Judge Susan Olsen will moderate a panel that will include a pediatrician, a juvenile police officer, a CPS case worker and a counselor from the Family Service Center. The meeting will be May 13 at noon at the Pelican Club. Attendees must RSVP to Patricia Eitel at (409) 763-6502. There is a charge for attendance.

Mark Your Calendars!

Judge C. G. "Trey" Dibrell, III will be honored at a "fun raiser" on Saturday, June 13 at 6:00 p.m. at the home of Greg and Sharon Enos in League City. *Expect an invitation soon.*

State Bar Approves Gay Practice Section

The State Bar of Texas approved creation of a new practice section called the Sexual Orientation and Gender Identification Issues Section which will focus on matters relating to homosexuality and transexuality. What a modern world we live in!

In other action, the State Bar approved a new pro bono reporting form that will allow lawyers to list community service as pro bono service. The State Bar Board of Directors was also expanded to include six non-voting members representing the various sections of the Bar. The Bar approved a new communications plan that will include a newsletter faxed to lawyers six times a year (I wonder where they got that great idea). The Bar budgeted \$98,000 for its on-going discipline fight with John O'Quinn, proving that the Bar will be grossly out spent as well as probably outlawyered in that battle. Preparations are underway for the Bar referendum this fall on changes in the lawyer disciplinary system.

Editorial: Lessons Learned From Primaries

Lawyers dreaming of running for judge in Galveston County may want to start hanging out with a new crowd over the next two years.

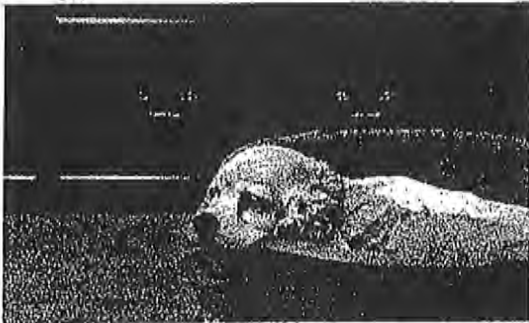
County Now Charging Interest on Minors' Funds. District Clerk Evelyn Robison reluctantly has begun to enforce a new law requiring her to charge a fee of 10% on all interest earned on funds held in the Registry of the Court. The fee is assessed when the funds are withdrawn. Tex. Prop. Code 117.054.

Galveston County is slowly becoming a two party county. That process means fewer people vote in the primaries, as shown by this year's record low turnout in the Democratic primaries. In the old days, everyone knew they had to vote in the Democratic primary to really have a say. Now, more think they can wait until November to pick their officeholders. This means that the Democratic primaries are increasingly resembling the GOP primaries in that loyal party activists comprise the majority of voters. Extremely qualified lawyers who would make great judges will remain just lawyers unless they become active in local party functions. Would-be Democratic judges will need to know their way around union halls and black churches. Republican primaries will sooner or later become contested as more folks figure the GOP is the route to holding elected office. But few will succeed in GOP primaries if they do not know the movers in the Pachyderm Club and are familiar with the Byzantine world of League City and Friendswood city politics.

EXHIBITS PLUS

Trial Exhibits enlarged and mounted. Photo enlargements. Next day service on most orders. (713) 702-5569 or (409) 986-5989. Janie Gray.

Another lesson gleaned from the recent primaries is that big bucks and power political friends do not always guarantee victory. Dennis Bettison was extremely qualified to be probate judge and he outspent his opponents, yet he still lost. Bettison's billboards and slickly produced, newspaper inserts would have been perfect for a general



Frisky "the law firm dog" returns to work at The Enos Law Firm. He may be old (13) and in poor health, but he missed the challenge of sleeping and eating in a busy law office and didn't like being left at home when both of his owners were at work. Clients actually seem to like having Frisky around while only UPS men fear his return.

election in which 70,000 people voted. If Bettison had known that just barely 10,000 die-hard Democrats would bother to vote, I am sure he would have spent his money in different ways. Common sense would say that the active support of Texas City Mayor Chuck Doyle should have really meant a lot for Bettison. Yet, despite Doyle's letters to voters and newspaper ads touting his endorsement in the primary run off, Bettison lost in all three Texas City voting places, with Burwell receiving 69% of the Texas City vote. Burwell's long ties to the community and Democratic groups was simply too much to overcome.

If a new District Court is created in 1999, a lot of lawyers will be taking crash courses in partisan, primary politics.

Calendar

May

- 11 For Kids' Sake: Nessler Center 5:30 pm
- 13 "Discipline or Abuse?" Panel Discussion, co-sponsored by Family Bar. Noon; Pelican Club
- 15 Free CLE at Gulf Coast Legal Foundation: "The Science of Cross Examination" and "What clients Need to Know About Public Accommodations" (video-3.5 hours of CLE)
- 21 For Kids' Sake: Rosenberg Library: 10:00 am
- 25 Galv. Co. Bar Assoc.: noon at San Luis

June

- 1 Kids' Sake: Rosenberg Library: 5:30 pm
- 11 For Kids' Sake: Nessler Center 5:30 pm
- 13 Judge C. G. "Trey" Dibrell, III "Fun Raiser"
- 18 Kids' Sake: Rosenberg Library: 10:00 am
- 22 For Kids' Sake: Nessler Center 10:00 am

Trial Reports

A juvenile case in County Court No. 1 ended in a mistrial when a juror discussed the case with the victim's grandmother, who the juror recognized as a clerk at a convenience store the juror frequents. Tad Nelson represented the juvenile and Phil Chupik represented the State.

Anthony Griffin lost a sexual discrimination case against the City of Kemah in Galveston Federal Court in a jury trial before Judge Kenneth Hoyt of Houston. Griffin's client was a police officer who took maternity leave during field training and was told she would have to continue the training when she returned to work.

Jeff Kemp's client was found "Not Guilty" by a jury in County Court No. 2 in a DWI case involving video but no breath test. Brett Podowsky represented the State.

Appellate Cases

The Texas Supreme Court has ruled that a trial court has the power to disqualify a lawyer even if she has not violated a specific disciplinary rule. A lawyer who obtains privileged information improperly obtained from an opponent potentially subverts the litigation process and may be disqualified but does not have to be thrown off a case. The trial court should consider: (1) whether the attorney knew or should have known the material was privileged; (2) the promptness with which the attorney notifies the opposition that he has received the privileged information; (3) the extent to which the attorney actually reviews the privileged materials; (4) the significance of the privileged material to the case; (5) the extent to which the movant seeking disqualification is at fault for the unauthorized disclosure; and (6) the extent to which the non-movant will suffer prejudice from having his attorney disqualified. The trial court ordered the lawyer to return all copies of a clearly privileged letter a client had swiped from her employer but refused to disqualify the lawyer. The Supreme Court on mandamus ruled that the trial court had not abused its discretion.

The El Paso Court of Appeals again rules that supplemental interrogatory answers must be verified. In this case, the workers' compensation claimant listed a doctor in unverified supplemental interrogatory answers as an expert and fact witness and enclosed his medical records. The Court of Appeals found that it was harmful error to have allowed the doctor to testify despite a specific objection that he was listed in unverified interrogatory answers. American Home Assurance Co. v. Lara, __ S.W.2d __ (Tex. App. - El Paso 1998).

Practical Lawyer: Buying a New Computer

You can buy a great computer for the home or office for under \$1,200 with the following features:

- Processor: minimum 233MHz--it does not have to be Intel or a Pentium. The AMD K6 chip is fine.
- Memory: at least 32 megabytes--this is the most important factor in PC performance.
- L2 Cache--a least 256 kilobytes--512k is better.
- Hard Disk: at least three gigabytes
- Modem: get a 56k modem that is upgradable.
- Monitor: your eyes will thank you for getting a 17 inch monitor
- CD ROM: any speed over 8X will be fine.
- USB: it is nice to have at least one of these new type of connectors on the back of your PC which will eventually replace the serial and parallel connectors we are used to.
- Built in back up device (like a Zip drive) is smart.

PRACTICE LAW ON BEAUTIFUL GALVESTON ISLAND - Go to work by boat! Established AV lawyer is retiring to a limited practice. Lease or purchase modern office building fully furnished on I-45 with 75 foot frontage on Offats Bayou with pier, boat lift and deep water access to the Gulf. Excellent accommodations for up to three lawyers with room to expand the building and build a shoreline home. \$350,000 for the real estate only. Office furnishings, equipment and library sold separately. Owner financing available for qualified purchasers. Contact Robert M. Moore, 7511 Broadway, Galveston, Texas 77554 (409) 740-0224.

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LAW FAX

April 15, 1998

Distributed by fax, mail and e-mail
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Burwell wins Demo Probate Race

Gladys Burwell defeated Dennis Bettison in the Democratic primary runoff election for the Probate Court bench being vacated by Judge Jerome Jones. The "final" unofficial tally showed Burwell with 2,107 votes or 58.4% and Bettison with 1,498 votes or 41.5%. Burwell will face Republican Robert Perman in November.

New Unified Rules of Evidence

Stop citing the Texas Rules of Civil Evidence or its criminal step-sister. Instead, start using the new Texas Rules of Evidence that apply in both civil and criminal cases as of March 1, 1998. The April 1998 Texas Bar Journal has a complete copy of the new rules, which contain almost no new substantive rules.

Editorial: A "Sad" Choice of Words

One gauge of how many people read this little newsletter is the number of complaints I receive. If no one called to say I had misreported a trial or had falsely slurred them, I would assume I had no readers. Actually, I receive a lot more compliments than complaints but it is the complaints I pay the most attention to. No less than the legendary Ervin Apffel of the McLeod, Alexander firm called me after my last issue to point out errors in a trial report concerning a will contest his firm had been involved in. The hundreds of young lawyers under age 30 running around this county may not know the senior Mr. Apffel, but they should. He is without doubt one of the most talented trial lawyers this county has ever produced. I learned most of what I know about trial work from Mr. Apffel one year when he beat me in three jury trials in a row. In his phone call, Mr. Apffel kindly said he enjoyed reading my newsletter but he pointed out some errors in the following story:

**PLEASE COPY AND SHARE
THIS NEWSLETTER WITH
YOUR FIRM'S ATTORNEYS
AND STAFF.**

A big will contest settled during trial in Judge Jerome Jones' court. The deceased had no wife or kids and left his entire \$7.5 million estate to a charitable foundation. Sadly, his will was lost and 18 distant heirs appeared seeking their slice of the pie.....Faced with conflicting evidence and the legal principle that assumes a decedent revokes a will if it was last with him and cannot be found,

both sides settled for \$1.1 million being paid to the heirs.

I should have noted that it was a hotly disputed fact issue whether the will had been lost or destroyed. If the will had been revoked, then the heirs had every right to their shares of the estate. Many of the heirs were themselves quite elderly and some wanted to settle because they felt they would not be alive to see how a lengthy appeal would turn out. My main mistake was to inject the editorialish word "sadly" when it was unclear the will had been lost and it was only a sad event for the charitable trust and not the heirs.

Lawsuits to be Ashamed Of

I am defending a case involving the wrongful death of a pine tree which I had imagined was the poster child for frivolous lawsuits. However, my son Jason found a report of a Philadelphia lawsuit that takes the cake. A woman there is suing a store that sold her a tube of spermicidal jelly because she got pregnant using it in a peanut butter and "jelly" sandwich. Her suit alleges that since the "jelly" was sold just one aisle over from the bread and jam it was only natural that she would not read the label and assume it was meant to be eaten.

My trial reports are based mainly on reports I receive from judges or court reporters. I cannot always verify every detail with both sides of a case. I will continue to strive for accuracy and I will always let you know when I make a mistake.

On the bright side, County Judge Jim Yarbrough is working to implement most of the suggestions I made in a recent issue concerning hospitality for the few citizens who bother to show up for jury duty.

Keep letting me know what you think about this publication and if you have news or a legal development your fellow lawyers need to know about, please share it with me.

Calendar

April

- 15 Deadline to register for April 23 Bar Seminar and pay just \$60 (price will be \$75 after April 15)
- 16 5:30p For Kids' Sake: Nessler Center, Texas City
- 17 10:00a Free CLE at Gulf Coast Legal Foundation: Jumpstarting Your Family Law Practice (Video-6.0 hours)
- 23 10:00a For Kids' Sake: Rosenberg Library, Galveston
- 23 8:30 -4:30 **GALVESTON COUNTY BAR ASSOCIATION SEMINAR**
- 27 10:00a For Kids' Sake: Nessler Center, Texas City
- 30 12:00 **Law Day Banquet-Pelican Club**

Trial Reports

Whataverdict! A jury in Judge Frank Carmona's court did not believe a woman who said she went into a Whataburger restroom on crutches (she'd had foot surgery a week before). The woman alleged that while she was in the stall, a Whataburger employee mopped the restroom floor despite the customer's request not to. The jury found the plaintiff 100% at fault.

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LAW FAX

April 6, 1998

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Garner Elected Administrative Judge

Judge David Garner was elected by his fellow judges to be Local Administrative Judge for Galveston County. Garner replaces Judge Roy Engelke, who is stepping down because of ill health. The Local Administrative Judge presides over the monthly meeting of District Judges and can order transfer of cases between courts.

Judge Olsen Just Got Married

Judge Susan Olsen of the 306th Family District Court was wed to John Hunger on Saturday in a private, family ceremony. The newlyweds will honeymoon in June or July for several weeks in Europe.

Shelly Darnell Is a New Mom!

Shelly Darnell now has a title much more important than Court Coordinator for County Court No. 2; she is now the proud mother of Joe Dale Rogers Darnell. The eight pound, one ounce boy was born on March 26 and is Shelly and Gary's first baby. Shelly will be out for six weeks. Jennifer Newberry will substitute for her.

Editorial: Give the Devil His Due

A video rental of The Devil's Advocate starring Al Pacino and Keanu Reeves will provide some real entertainment and should give lawyers some real-life lessons to ponder. Keanu Reeves plays an unbeaten Florida criminal defense lawyer recruited by a big New York firm run by Pacino, who turns out to be Satan himself. The movie is at times funny, moving and scary (there is also bad language and nudity so only older, mature attorneys should see it). One important moral the movie provides is the harm done by lawyers who work 24 hours a day and ignore their spouses. Ironically, I saw this video on a Monday I had taken off work to stay home with my wife. Of course, few of us should realistically worry about our spouses clothes shopping with demons or having an affair with Beelzebub, but we each stand to lose if our jobs become more important than our families.

Another troubling issue raised by the movie is the demonization of the legal profession. It shows just what

Family Bar Meets Wednesday April 8

Ellen Lancaster will speak on
mediation in family cases.
12:00 noon
Pelican Club, Galveston

Galveston County Bar Association Seminar

April 23 San Luis Hotel

- 6.5 hours of CLE for just \$60 (if you register before April 16; \$75 after April 15)
- Morning session will qualify participants to be guardian/attorney ad litem in Guardianship cases.
- Afternoon session is on, "Law You Need to Know" and will include talks from D.A. Mike Guarino on working with his office, a Supreme Court Uptake, Suing UTMB, DWI Basics, Basic Estate Planning, Bankruptcy, Using the Internet for Legal Research, the New Rules of Expert Witnesses, and more.

Fax your registration to E.A. "Trey" Apffel, III at (409) 945-5443.

our society thinks of us when a successful, big budget movie suggests that the Prince of Darkness would carry a Bar card and bill clients \$450 per hour. I would rather see a movie in which Jesus comes to Galveston only to be arrested for vagrancy; forcing him to rely on Anthony Griffin (played by Denzel Washington) and the ACLU to free him by challenging the politically popular but unconstitutionally vague ordinance. Such a movie would depict attorneys for what we usually are: the good guys.

Calendar

April

- 6 - 9 Early voting for primary runoff election.
- 8 12:00 Galveston Co. Family Bar: Pelican Club
- 14 7:00 - 7:00 Runoff Election!!!
- 15 Deadline to register for April 23 Bar Seminar and pay just \$60 (price will be \$75 after April 15)
- 16 5:30p For Kids' Sake: Nessler Center, Texas City
- 17 10:00a Free CLE at Gulf Coast Legal Foundation: Jumpstarting Your Family Law Practice (Video-6.0 hours)
- 23 10:00a For Kids' Sake: Rosenberg Library, Galveston
- 23 8:30 -4:30 **GALVESTON COUNTY BAR ASSOCIATION SEMINAR**
- 27 10:00a For Kids' Sake: Nessler Center, Texas City
- 30 12:00 **Law Day Banquet-Pelican Club**

Trial Reports

Gordon Davenport had a good March. Davenport and Roy Brown settled a dog bite case for \$135,000 with S. R. "Stretch" Lewis after both sides rested in Judge Robert May's court. Also in March, a jury in Judge May's court awarded Davenport's client \$563,500 in a car wreck case in which the plaintiff suffered two ruptured cervical disks and had \$6,200 in medical bills and claimed \$35,000 in future medical and \$240,000 to \$480,000 in future lost wages. State Farm may now wish it had bothered to at least answer Davenport's Stowers letter in which he offered to settle for \$25,000.

A big will contest settled during trial in Judge Jerome Jones' court. The deceased had no wife or kids and left his entire \$7.5 million estate to a charitable foundation. Sadly, his will was lost and 18 distant heirs appeared seeking their slice of the pie. Doug Poole and Mike Hughes at McLeod, Alexander, Powel & Apffel represented the heirs and Grant Gealy at Mills, Shirley, Eckel & Bassett represented U.S. National Bank and the Foundation. Faced with conflicting evidence and the legal principle that assumes a decedent revokes a will if it was last with him and cannot be found, both sides settled for \$1.1 million being paid to the heirs.

The D.A.'s office is on a roll in DWI cases. A woman was found guilty of DWI by a jury in Judge Mary Nell Crapitto's court (video, no breathalyzer). Brett Podowsky represented the State and R. V. Hebisen represented the defendant. Kerri Foley Garcia successfully represented the State in a DWI case in County Court No. 2 before Judge C. G. "Trey" Dibrell, III (no breath test, video). After the jury found the defendant guilty, a deal was struck on punishment: two years of probation, a minimal fine and attendance at AA as part of probation. Ben Massar prevailed in a DWI case before Judge Mary Nell Crapitto where John Thoma's client was found guilty and received a year of probation and a \$500 fine (no breath test, video).

Lois Carnes won a forgery case in the 56th District Court before Judge Norma Venso. The defendant cashed a \$40 check that turned out to have come from the victim's lost checkbook. The jury apparently believed the defendant's story that he was given the check in exchange for work he had performed. Ted Mora represented the State.

In February, a jury in Judge Frank Carmona's Court ended up hung 10 to 2 in favor of acquittal in an aggravated sexual assault case. This writer was struck from that jury panel and thought both Joel Bennett for the State and Greg Russell for the defendant did great voir dieres.

Visiting Judge I. Allen Lerner sentenced a man to 45 years in T.D.C. for aggravated sexual assault after a two day bench trial. Joel Bennett represented the State and Tim Weatherly represented the defendant.

Appellate Cases

The Supreme Court last week ruled that a ban on use of polygraph test results in military courts does not violate a criminal defendant's constitutional rights. This decision should not effect the recent trend, which has been embraced by the Fifth Circuit, of loosening the out-right ban on lie detector results if sufficient evidence of their reliability is presented. U.S. v. Scheffer, __ U.S. __ (1998).

The Supreme Court ruled unanimously last Tuesday that people involved in lawsuits over alleged copyright infringement always are entitled to have a jury, not just a judge, decide how much money is awarded. Feltner vs. Columbia Pictures Television, __ U.S. __ (1998).

The widening door closes tighter. The U.S. Supreme Court decision that seemed to expand Title VII to include "same sex" sexual harassment actually will make it harder for either gender to win such suits. A Title VII plaintiff must prove that harassment was "severely abusive" and not just

U.S. Senate Votes to Force States to Lower DWI Blood Alcohol Limit

The U.S. Senate voted 96 to 4 to pass a law that will require states to lower their legal limit for intoxication to .08% by 2002 or risk losing federal highway funding. The House version of this bill is H.R. 981. President Clinton (who never lets the Secret Service drive him after drinking) supports the measure.

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teasing, flirtation or horseplay. The plaintiff must prove the offensive behavior was directed at him or her because of his or her gender and judges are directed to consider the behavior in its larger social context and apply, "common sense." The court gave the example of a butt slap by a coach, which might not offend a football player but might freak out his secretary. Oncale v. Sundowner Offshore Services, Inc., ___ U. S. ___ (1998).

Police can break down a door or smash a window in the course of a search and the fruit of their search cannot be suppressed even if the property damage is excessive. The Supreme Court also ruled that whether the police must, "knock and announce" before searching does not depend on whether they must destroy property to get in. U.S. v. Ramirez, ___ U.S. ___ (1998).

Help! Someone call an ambulance! A poor man thought his scrape with disaster was over when he survived a car crash and EMS personnel arrived and strapped him on to a backboard. Suddenly, another car came careening their way on the slick pavement. The EMS team took one look at the spinning car and nimbly dove for cover, leaving their patient strapped to the backboard in the street where he was run over all over again. The unlucky patient sued the city which employed the EMS team. The city prevailed on summary judgement on the basis of sovereign immunity. The El Paso Court of Appeals reversed, ruling that the backboard was tangible personal property and therefore the Texas Tort Claims Act provided an exception to sovereign immunity. Notably, the failure to move the immobilized patient was deemed to be a "use" of tangible personal property. Borrego v. El Paso, ___ S.W.2d ___ (Tex. App. - El Paso, 1998).

New Tax Hassles For P.I. Lawyers

In August 1997 Congress dreamed up a new way to make life even tougher for personal injury attorneys. Starting in tax year 1998, business and insurance defendants must report the gross amount of settlements paid in whole or part to attorneys. Attorneys must provide their Taxpayer Identification Numbers to defendants who will use a special 1099 Form to report settlements. Lawyers will treat settlements as gross income and will have to show how much was paid to their clients and others to calculate their net incomes. Lawyers are advised to keep copies of settlement disbursement sheets in a special tax file. The new law is part of H.R. 2014, The Budget Reconciliation Act, Sec. 1021.

LAW FAX

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March 25, 1998 Distributed by facsimile, e-mail and U.S. mail. Coming soon at WWW.LAWFAX.COM

212th Judge Roy Engelke Retiring on May 1

Roy Engelke, Judge of the 212th District Court, has decided to retire for health reasons as May 1, 1998. Presumably, Governor George W. Bush will appoint a replacement to finish out Engelke's term through December of this year. Miles Whittington, who is the Republican nominee for the 212th, is said to be the front runner for the appointment. If he was appointed Judge, Whittington would be able to run as the incumbent (albeit, an unelected incumbent) against Democrat Susan Criss. Whittington said, "I regret that Judge Engelke has had to resign for health reasons. I will seek the appointment from Governor Bush to complete his term. I believe it would be a great opportunity to serve all of the citizens of Galveston County and a chance to earn their vote in November." Criss said she wishes Judge Engelke well and said, "The voters of this county want and deserve the right to choose their own judge." The last time a Republican was appointed judge in Galveston County, Charles Smith was defeated in the general election by I. Allen Lerner.

Editorial: Improve Treatment of Would-Be Jurors

A few weeks ago, I answered a jury summons and reported to the Jury Assembly room with a herd of other folks. I was assigned to a panel in Judge Carmona's court in a criminal case but I was struck (probably by both sides). Not sure that I really earned \$7.00 for a day away from the office, I have decided to share my suggestions for improving the jury experience:

1. The county should provide coffee, orange juice and donuts like Southwest Airlines does at the airport. The only place to get a drink now is the snack bar on the fourth floor which requires a trip through the metal detector, a wait for the elevator and a search for the vending machines. On jury days, tables should be set up in the lobby and these goodies handed out for free.
2. Most would-be jurors do not bring anything to read. The Galveston Daily News should provide free papers on Monday mornings with big stickers on them saying, "A free gift of thanks from the News." This would really help cut the boredom and would be great P.R. for the paper.
3. There is no place near the courthouse for jurors to eat lunch or grab a snack. At least on jury Mondays, the county should contract with a catering business to bring a lunch truck like the kind that serve construction sites to sell food for breakfast and lunch. This would cost the county nothing.
4. The county should do something to punish those who ignore jury summons as a way to encourage greater participation from all segments of the community. The District Clerk sends out an average of 1,200 jury summons each week but usually less than 300 people bother to show up. This could be in part due to the fact that the county is using data from driver license and voter registration rolls that are almost three years old (new data is to be received in December). However, most working folks, who can scarcely afford to give up a day's salary for just \$7.00, have figured out that there is no penalty to be paid for ignoring a jury summons. The group that showed up with me for jury duty totaled 132, of which only nine were Afro-American and twelve appeared to be of Hispanic origin. The group seemed to be largely middle class and disproportionately drawn from the north end of the county. Enforcement of jury summons may not be politically popular but it would help provide jury panels that are more representative of our county.

An airline would quickly be out of business if it treated its passengers like our county treats those with enough citizenship to respond to a jury summons. It is a rare opportunity for our county government to make a good impression on several hundred voters a week that is being squandered.

Early Voting for the April 14 primary run off elections is April 6, 7, 8 and 9. Early voting sites include the County Clerk's Office in the Courthouse, the Nessler Center in Texas City and the League City Civic Center.

Calendar

March	26	noon	Galveston County Bar Association: San Luis
	31	noon	Galveston County Young Lawyers: Pelican Club
April	2	10:00am	For Kids' Sake: Nessler Center, Texas City
	3	10:00am	Free CLE at Gulf Coast Legal Foundation: Administering the Estate: A Practical Guide to Probate (Video-5.50 hours)
	3	noon	Mainland Bar Association: Merchant's Bank League City
	3	noon	Mediation Association - Christie's Beachcomber
	6	5:30pm	For Kids' Sake: Rosenberg Library, Galveston
	6		Campaign Report due for Candidates in April 14 runoff
	8	noon	Galveston County Family Bar Association: Pelican Club
	14	7:00 - 7:00	Runoff Election!!!
	15		Deadline to register for April 23 Bar Seminar and pay just \$60 (price will be \$75 after April 15)
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	30	noon	Law Day Banquet--Pelican Club

Trial Reports

Only an ex-marine pilot like Tim Beeton would have the guts to leave an insurance defense lawyer on a jury panel in a big wrongful death case. A jury in Judge Norma Venso's Court awarded \$3.3 million to the family of a 35 year old man with AIDS induced dementia who wandered away from a nursing home and was found dead a week later two blocks from the home. Finis Cowan, III of Mills, Shirley, Eckel & Bassett was left on the jury and was elected the presiding juror. According to Cowan, the jury liked the defense expert better and really was impressed with the corporate representative of Texas Health Enterprises yet still found the home negligent based on the evidence of prior patients walking away from the home without much response from the home. Only one juror seemed effected by the fact that the patient had AIDS. On the first vote regarding damages, the jurors' numbers ranged from \$600,000 to over \$20 million. One lesson Cowan left the trial with is to be sensitive to jurors: don't keep them after five, if you are not scoring big points do not drag things out. Small things bothered the jury. The under head projector used by the lawyers often could not be seen clearly by the jurors and its light blinded them when the lawyers changed sheets. The Defense used the deceased's mother's thank you note to the nursing home staff, blew it up on a five foot poster and unwittingly offended many jurors. Cowan also noted that the typical stereotypes lawyers use in selecting jurors seldom work. A nurse who the lawyers thought was pro-defense actually wanted to award \$20 million in punitive damages whereas a black truck driver initially voted that there had been no negligence.

A jury in Judge C. G. "Trey" Dibrell, III's court returned a "not guilty" verdict in an Assault Causing Bodily Injury case. Mario Madrid represented the State and Terry Holmes represented the defendant.

Primary Campaign Contributions and Expenditures (totals through last reports)

212th District Court Democratic Primary

<u>candidate</u>	<u>total contributions</u>	<u>total expenditures</u>	
Susan Criss	\$25,430	\$38,925	\$40,000 loan from candidate
Elisa Vasquez	\$26,961	\$34,584	\$10,000 loan from candidate
Bob Moore	\$5,056	\$16,141	

Probate Court Democratic Primary

<u>candidate</u>	<u>total contributions</u>	<u>total expenditures</u>	
Gladys Burwell	\$27,121	\$30,072	
Dennis Bettison	\$21,598	\$46,485	\$30,000 loan from candidate
Brian Abbingon	\$ 5,794	\$10,417	

Appellate Cases

CRACK ABOUT "BUTT BROTHERS" DOES NOT REQUIRE NEW TRIAL. A trial court refused to grant a new trial when a juror, during the trial talked to a co-worker on the phone, said the case involved the rape of a five year old and said, "...if in fact the guy is guilty, then you can send a bastard like that to the pen to play drop the soap with the Butt Brothers?" The juror also said, "you can't kill them and the most you can give them is life or 99 years and that means that they are out in 10." (The call was automatically recorded by the fire department which employed the juror). The state can rebut the presumption of harm arising when a juror talks to an unauthorized person about the trial. Quinn v. State, 958 S.W.2d 395 (Tex. Crim. App. 1997).

An important debate is raging on whether the new cases limiting the use of expert testimony apply just to scientific testimony or to all expert testimony. In Fowler v. State, 958 S.W.2d 853 (Tex. App. - Waco 1997, writ?), the Court ruled that Kelly v. State applies to non-scientific testimony, including that of a family violence counselor explaining the common long-term effects of family violence. This case is important for all practitioners because the same analysis would apply in civil cases under Robinson and in federal cases under Daubert. I am sure this decision will be appealed.

An elevator owner does not owe duty to exercise high degree of care but rather owes duty to exercise reasonable care. If the claims relate to the condition of the elevator, standard premises liability questions should be submitted to the jury, Dallas, Market Center Development Co. v. Liedeker, 958 S.W.2d 382 (Tex. 1997)

The Texas Supreme Court has provided guidance on when a corporation can be held liable for punitive damages: (1) The principal authorized the doing and manner of the act; or (2) the agent was unfit and the principal was reckless in employing him; or (3) the agent was employed in a managerial capacity and was acting in scope of employment, or (4) the employer or a manager of the employer ratified or approved the act. A corporation is liable for punitive damages if a "vice-president" acted for the corporation. A "vice-principal" can be: (a) a corporate officer, (b) those who have authority to employ, direct and discharge employees, those engaged in the performance of non-delegable duties of the corporation or (d) those to whom the corporation has confided the management of the whole business or a department or division thereof. Non-delegable duties of a corporation include the duty to exercise ordinary care to select careful and competent employees. Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387 (Tex. 1997)

A conviction of manslaughter was reversed because the trial court allowed the State's chief witness, a DPS officer, to stay in the courtroom while other witnesses were testifying because there was no evidence the DPS officer's presence was essential to presentation of State's case. White v State, 958 S.W.2d 460 (Tex. App. - Waco 1997).

Library Expansion

Limited Law Library? Need a case quick? Tip: West Publishing will fax opinions to your office. Call 1-800-562-2FAX

Galveston Bar Seminar April 23: Mark Your Calendars!

Lawyers can get 7.5 hours of CLE for just \$60 on Thursday, April 23 at a seminar sponsored by the Galveston County Bar Association. The charge will be \$60 for those who register on or before April 15 and \$75 for those who pay after April 15 or at the door.

The morning session will qualify lawyers to be appointed guardian ad litem in Guardianship cases and will include speakers on guardianships, trusts, the duties of ad litem, Medicare and Medicaid, the medical process of aging and a mock guardianship hearing. The afternoon session will include speakers on DWI, trial of a divorce property case, suing UTMB, Supreme Court Update, dealing with our D.A.'s office, using the Internet for legal research and more. Seminar directors are E. A. "Trey" Apffel, III and Greg Enos. Fill out the registration form on the next page and mail or fax it in to reserve a spot.

Thursday, April 23, 1998
San Luis Hotel, Galveston, Texas

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March 20, 1998 Distributed by facsimile, e-mail and U.S. mail. Coming soon at WWW.LAWFAX.COM

Law Librarian Manny Espitia Dies

Manuel Espitia, who worked for many years in the County Law Library, died suddenly last week of a heart attack. Manny was buried Tuesday in Houston. Manny was a warm, friendly man who helped many of us find a book, unjam the copier, or schedule our client for the For Kids' Sake Seminar. Manny also worked for the Mediation Association. He is going to be missed.

Editorial: Finish the Law Library Now!

The best tribute we can pay to Manny would be to finish the remodeling of the Law Library that meant so much to him. Regardless of what the county plans to do about a bond issue and a new courts annex that won't be built for 5 years, the plan for removing the out-of-state reporters and building a hearing room for the Family Associate Judges and Tax Master should be finished now. Any notion that some of the current library space should be used for offices for county staff should be shot down. Converting the seldom used lounge room to another conference room is a good idea but only if there is some other comfortable place for witnesses to sit while waiting to testify down the hall. Manny can never really be replaced, but his position should be filled with a college educated librarian paid primarily by the county but who is also paid partially by the County Bar Association to serve as its executive director. Several other bar associations in counties of similar size in Texas have permanent executive directors and so should we!

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	30	noon	Law Day Banquet

WHEN AND WHERE DOES THE CRIMINAL DEFENSE LAWYERS ASSOCIATION MEET?
SOMEONE PLEASE CALL ME WITH THAT INFORMATION!

Galveston Bar Seminar April 23: Mark Your Calendars!

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The morning session will qualify lawyers to be appointed guardian ad litem in Guardianship cases and will include speakers on guardianships, trusts, the duties of ad litem, Medicare and Medicaid, the medical process of aging and a mock guardianship hearing. The afternoon session will include speakers on DWI, trial of a divorce property case, suing UTMB, Supreme Court Update and more. Seminar directors are E. A. "Trey" Appfel, III and Greg Enos. Fill out the registration form on the next page and mail or fax it in to reserve a spot.

1998 Galveston County Bar Association Seminar

Thursday, April 23, 1998

San Luis Hotel, Galveston, Texas

8:30 a.m. - 12:30 pm	Guardianships
12:30 pm - 1:30 pm	Lunch on your own
1:30 pm - 4:30 pm	Law You Need to Know

Registration Form

Name: _____ Bar
No.: _____
Firm: _____ Phone: _____
() _____
Address: _____ Fax: _____
() _____

Price: \$60 if you register on or before April 15. \$75 after April or at the door.

Registration fee: \$ _____ enclosed
_____ I will bring to the seminar

Mail or fax this form to: E. A. "Trey" Appfel, III
1201 N. Logan
Fax: (409) 945-5443 Texas City, TX 77590

Trial Reports

- A jury in County Court No. 2 before visiting Judge Ron Wilson found against Jack Ewing's client who said she fell in water leaking from a freezer unit at Kroger.
- Steve Ongert represented a man whose motion for emergency relief was granted by Judge Susan Olsen. The mother, who was pro se, had sent her naughty son to a juvenile rehabilitation camp in a remote part of Western Samoa where 250 boys were forced to wear native skirts, live in grass huts and were subjected to

discipline with stun guns, handcuffs and pepper mace. The boy was ordered returned to the U.S. and the mother was enjoined from removing the child from the jurisdiction of the court.

- A jury in Judge David Garner's court found Sharon Meier's client not guilty of two counts of intoxication assault but guilty of two other counts and Judge Garner sentenced the man to 40 years in TDC.
- A jury in Judge Frank Carmona's court ended up hung 10 to 2 in favor of acquittal after a four day trial involving a step-father charged with indecency with his 13 year old step-daughter. (The author of this newsletter was on that jury panel and was struck, probably by both sides). Joel Bennet represented the State and Greg Russell represented the defendant.
- David Salyer represented a plaintiff suing the Texas City Housing Authority for slip and fall injuries. The jury in Judge Garner's court found no negligence on either party, which was a victory for defense lawyer Carla Cotropia.
- Chris Bertini of Mills, Shirley, Eckel & Bassett successfully defended a dentist sued for malpractice in Judge David Garner's Court.

PLEASE FAX ME YOUR JURY OR BENCH TRIAL RESULTS (CIVIL, CRIMINAL OR FAMILY).

Talk About Runaway Juries!

Where were these folks the last time I went to trial? A jury in Brazoria County in February awarded \$115.6 million to 21 plaintiffs who claimed their asbestos exposure came from working with diamond-tipped cutting wheels in an Alabama steel plant from 1970 to 1983. The \$115.6 million verdict is impressive enough but the plaintiffs' lawyer, Mark Lanier of Houston, is still disappointed. In closing argument he asked for \$15.31 BILLION, just a little more than the tobacco settlement. Three of the jurors held out for over an hour for the full \$15.31 billion.

Election Results

212th Dist. Court—Democratic

Susan Criss	5,348	56.5%
Elisa Vasquez	2,452	25.9%
Bob Moore	1,671	17.6%

Probate Court—Democratic

Gladys Burwell*	4,238	46%
Dennis Bettison*	2,639	28.7%
Brian Abbington	2,323	25.3%

*runoff on April 14

Election Analysis

Galveston County voters followed the state-wide trend and stayed away from primary voting places in droves, resulting in the lowest primary turnout in recent memory. Only 10,266 of Galveston County's 162,741 registered voters voted in the Democratic primary while 6,484 participated in the Republican primary. Susan Criss won the Democratic primary for the 212th District Court being vacated by Judge Roy Engelke

with 56.5% of the vote. Criss will face Republican Miles Whittington in November.

Voters in an April 14 Democratic primary runoff will have to choose between Gladys Burwell and Dennis Bettison for the Probate Court bench now held by Judge Jerome Jones, who is retiring. Brian Abbington was barely edged by Bettison. The winner of the Democratic Probate runoff will face a Republican opponent in November, as will incumbent Judges Carmona, Olsen and Dibrell. There were no contested local judicial races in the Republican primary. Several state-wide judicial posts and the local Congressional race will be contested in the April 14 Republican primary runoffs. Early voting for the April 12 runoff starts April 6. People who did not vote in this primary can vote in the runoff. However, people who did vote in the March primaries cannot switch parties. If a person voted GOP on March 10, he or she cannot vote in the Democratic runoff and vice versa.

In the 212th race, Susan Criss aimed her campaign at a broader range of Democratic voters than Vasquez, greatly out spent her opponents (helped by a \$40,000 loan from Criss to her own campaign) and benefited from the full-time attention of her father, Lloyd Criss, an experienced campaigner. Criss used a professional phone bank and likely voters received multiple mailers which were slickly produced and emphasized her anti-crime efforts on behalf of children and the elderly. Vasquez, who has been primarily a criminal defense lawyer during her time in Galveston County, appealed mainly to the Democratic activists who actually make up a small portion of the voting pool. Bob Moore did little more than run bland newspaper ads and did one mailing early in the Spring.

The surprise in the Probate Court race was that Brian Abbington, who spent almost no money, came so close to edging heavy spending Dennis Bettison out of the runoff. Gladys Burwell garnered support in all areas of the county and won virtually every precinct except for 15 predominantly Afro-American precincts which went to Brian Abbington. Dennis Bettison won 5 out of 72 precincts but in those boxes he beat Burwell by just a total of 15 votes. The key to the runoff will be getting out the vote since the Probate Court is the only spot on the April 14 Democratic runoff ballot. It is possible that less than 2,000 people could vote in the runoff.

In Harris County, 86,000 voted in the GOP primary and just 32,000 voted in the Democratic primary. State-wide, about 660,000 voted in the Democratic primaries compared to about 600,000 in the Republican primaries.

Looking to November, turnout should also be down and Republicans will probably edge closer to competitiveness in Galveston County. Figures for past years show the following:

VOTES CAST

<i>Year</i>	<i><u>Democratic Primary</u></i>	<i><u>Republican Primary</u></i>	<i><u>General Election</u></i>
1998	10,266	6,484	???
1996	14,794	11,358	80,619
1994	22,022	5,324	64,444
1992	20,311	6,961	90,858

STRAIGHT TICKET VOTING

<u>Year</u>	<u>Democrat</u>	<u>% of total vote</u>	<u>Republican</u>	<u>% of total vote</u>
1996	22,125	27.4%	15,482	19.2%
1994	15,738	24.4%	10,979	17.0%
1992	22,783	25.1%	11,015	12.1%

Appellate Cases

Robinson only applies to the admission of scientific testimony and does not apply to the admission of an expert's testimony about safety procedures. Also, an engineer's testimony about the degree of force involved when a display sign at Walmart fell on a customer's head was properly admissible under Robinson because it involved conclusions based on the well recognized laws of physics. Walmart Stores, Inc. V. Garcia, __ S.W.2d __ (Tex. App. - San Antonio 1998).

An expert does not have to be designated to be used in summary judgment proceedings. An expert's affidavit can be used even though he was not listed as an expert in answer to interrogatories. Stucki v. Noble, __ S.W.2d __ (Tex. App. - San Antonio 1998)

The doctrines of misnomer and misidentification (which can extend the statute of limitations) do not apply in medical malpractice cases because art. 4590i Sec. 10.01 is the exclusive limitations rule for medical malpractice cases. Hyson v. Chilkewitz, __ S.W.2D __ (Tex. App. Dallas 1998).

A person claiming to be a common law spouse must institute a proceeding to prove the informal marriage within one year of the spouse's death in order to bring a wrongful death suit. In other words, the statute of limitations for a wrongful death claim may be two years, but a would-be common law spouse is out of luck if he or she doesn't institute some proceedings (probably either a probate action or the wrongful death suit itself) within a year of the death to establish the informal marriage. Sheperd v. Ledford, __ S.W.2D __ (Tex. 1998).

In an aggravated sexual assault case, two experts testified that the six year old child did not exhibit characteristics of a child who was being manipulated or who was fantasizing. This testimony was inadmissible and the conviction is reversed. Under Yount v. State, 872 S.W.2d 706 (Tex. Crim. App. 1993), an expert cannot give a direct opinion on whether a child is being truthful. Schutz v. State, __ S.W.2D __ (Tex. Crim. App. 1998). THIS CASE CAN BE USED IN CPS AND FAMILY CASES AS WELL TO PREVENT THE CASE WORKER OR A PSYCHOLOGIST FROM GIVING AN OPINION THAT THE CHILD IS TELLING THE TRUTH.

306th News: Gloria Robledo is Back

Gloria Robledo, Coordinator for the 306th Family District Court, is back working half days as she recovers from double carpal tunnel surgery. Jennifer Newberry, who did an excellent job filling in for Gloria, will soon be substituting in County Court No. 2 while Shelly Darnell is on maternity leave.

Report of Judicial Statistics Error Plagued

The 1997 Annual Report of the Texas Judicial System issued by the Texas Judicial System is 436 pages of densely packed statistics on the caseloads of Texas courts. If the numbers for Galveston County are any measure, then the entire report is filled with errors and simply unreliable. This is important because judicial candidates may latch on to the report's numbers to attack incumbent judges. Any such use of the Report in Galveston County at least would be intellectually dishonest and really be a fraud on the voters. The real question is why are the numbers not right and how can they be corrected to allow a realistic appraisal of the local caseload?

Juvenile Cases

In Galveston County, the 306th District Court and County Courts No. 1 and No. 2 handle juvenile cases (the Probate court has juvenile jurisdiction but Judge Jones has traded Judge Crapitto's civil caseload for his juvenile docket). Somehow, the numbers on juvenile cases must not have been reported correctly to Austin because the report shows juvenile cases pending only in Galveston County's District Courts and none in the County Courts at Law.

	<i>Pending 9/1/96</i>	<i>Added</i>	<i>Disposed</i>	<i>Pending 8/31/97</i>
Juvenile	12,355	9,429	9,074	12,727

Family Cases

Family Cases in Galveston County are assigned 50% to the 306th Family District Court and 25% each to County Court No. 1 and No. 2. The report shows no family cases handled at all in the County Courts and shows the following for family cases at the District Court level:

	<i>Pending 9/1/96</i>	<i>Added</i>	<i>Disposed</i>	<i>Pending 8/31/97</i>
Divorce	339	1,605	1,721	223
Other Family	1,237	1,504	1,733	1,008

Capital Cases

The Report shows that seven capital murder cases were disposed of in Galveston County: one by acquittal and six by conviction. Somehow, the Report on another page shows that of the 34 death sentences meted out during the period state-wide, none were assessed in Galveston county and two of the 498 life sentences handed down in the state were assessed in Galveston County. What happened to the other four capital murder convictions in Galveston County?

Workers Compensation Cases

The County Courts have jurisdiction to hear appeals of workers' compensation cases in Galveston County yet the Report only shows compensation cases being handled in the District Courts. Amazingly, the report shows 516 compensation cases pending when the period started, only one compensation case disposed of, one new case added and 516 compensation cases still pending a year later. There is no way that number is correct.

District Courts

The Report, to the extent it can be believed, shows the District Courts of Galveston County gaining ground on civil cases but falling slightly behind in criminal matters.

District Courts	<i>Pending 9/1/96</i>	<i>Added</i>	<i>Disposed</i>	<i>Pending 8/31/97</i>
Civil Cases	10,719	5,161	5,512	10,368
Criminal	929	3,031	2,770	1,210

New Local Rules Submitted

New local rules for the District Courts in Galveston County have been submitted to the Texas Supreme Court for approval. Copies of the new rules can be obtained from Ed Wells on the 4th floor. The most dramatic change will be a new rule 3.50 that will say most written discovery will not be filed with the District Clerk. Interrogatories, Production Requests, Requests for Admissions and business records with affidavits will not be filed with the District Clerk. Responses to production requests will also not be filed. Interrogatory answers and responses to admission requests will be filed. Parties will file a "Certificate of Written Discovery" instead and retain the originals. Discovery documents can be filed if needed for summary judgment or other motions.

Changes in local rules relating to family law cases will be reviewed in a future issue.

THE NEW LAW FAX FORMAT is not as pretty or graphically pleasing as it was but the new design is part of my effort to get ready for my website WWW.LAWFAX.COM. We can also now send the newsletter by e-mail. Hopefully this layout, which does not require so much of my time, will allow me to get the newsletter out on a more frequent, reliable basis.

CIVIL Division					Coordinator	Tel.	Coord. Location	Court Reporter
Civil Court Building 301 Fannin • 77002	Court	Judge	Tel.	Building	Harrison, Rhonda	8261	Civil 304	Anderson, Terry
	11	Davidson, Mark	6250	Civil 3	Bennett, Ann	5463	Congress Plaza 16	Rusk, Jimmie Lee
	55	Stone, Kathleen	6255	C Pl 16	Winter, Dana	5580	Civil 606-D	Zapata, Arturo
	61	Donovan, John	6258	Civ 309	Fauntleroy, Lara	7232	Civil 6	Berezoski, Carol
	80	Link, Scott	6774	Civil 6	Boyd, Jeff	5969	Civil 5	House, Mike
	113	Hancock, Patricia	6294	Civil 5	Tauriac, Roman	5240	Civil 103	Mills, Mary
	125	Wittig, Don	5577	Civ 209	Ranier, Bonnie	5590	Civil 606-B	Baldwin, Scott
	127	Wood, Sharolyn	6274	Civ 205	Thomas Delores	5919	Congress Plaza 16	Black, Mary
	129	Mizell, Patrick W.	6279	C Pl 16	Dejean, Cynthis	5645	Civil 511	Eberling, Bob
	133	McCorkle, Lamar	6266	Civil 5	Wall, Betsy	5230	Civil 6	Reynolds, Kimberly
Congress Plaza Building 1019 Congress • 16th Fl 77002	151	Baker, Caroline E.	6289	Civ 604	Williams, Dollie	7588	C Pl 16	Stomberg, Marijane
	152	Brown, Harvey, Jr.	6282	C Pl 16	Coons, Darla	5967	Anderson Clayton	Martin, Joellyn
	157	Medina, David	6270	Civil 6	Martinez, Gloria	4497	Civil 518	Chumley, Barbara
	164	Kennedy, Katie	6316	Civ 519	Grun, Deb	7590	Civil 307	Van Slyke, Keva
	165	Ray, Elizabeth/HC Admin	6320	Civil 3	Norton, Cathy	6020	Civil 2	Baldwin, Martha
Anderson/Clayton Bldg 1310 Prairie • 11th Fl 77002	189	Johnson, Carolyn	6366	Civil 2	Valdez, Maria	5466	Civil 6	Nguyen, Mythuy
	190	Devine, John	6370	Civ 610	Jones, Karen	5258	Anderson Clayton	Ivey, LaVearn
	215	Jefferson, Dwight	6382	Civil 6	Sitgreaves, Jim	8246	Civil 103	Bruce, Andrea
	234	Brister, Scott - Admin	6263	Civil 2	Bruner, Dodie	7594	Civil 2	Korzeb, Loretta
	269	Wooldridge, John T.	5516	AC 11	Sanchez, Andy	6117	Congress Plaza 16	Miller, Carmen
	270	Hall, Richard	5509	C Pl 16	Parrish, Leveda	6292	Civil 6	Tofolla, Letecia
	280	Lindsay, Tony	5518	Civil 6	Torres, Rick	8268	Civil 6	Struss, Delicia
	281	Bland, Jane	5506	AC 11	Struss, Jacqueline	6018	Congress Plaza 16	Kidd, Kimberly
	295	Christopher, Tracy E.	5541	C Pl 16	Moritz, Pam	5205	Civil 503	Lacy, Jodi
	333	Halbach, Jr., Joseph	7760	Civ 500	Bucko, Walter	5483	Civil 607	
	334	Lloyd, Russell	7793	Civil 2				
CRIMINAL Division					Coordinator	Tel.		Court Reporter
Criminal Court Building 301 San Jacinto 77002	Court	Judge	Tel.	Building	Jefferson, Sandy	6324		Orsack, B.J.
	174	Godwin, George - Admin	6324	Cr 628	Cummings, Carol	6328		Fox, Judy
	176	Rains, Brian	6328	Cr 532	Heacock, Carolyn	6332		Parks, Tamra
	177	Davies, Carol G.	6332	Cr 631	Hanson, Linda	6336		Garcia, Ida
	178	Harmon, William	6336	Cr 719	Witt, Peggy	6340		Knobloch, Pam
	179	Wilkinson, J. Michael	6340	Cr 812	Manuel, Annette	6344		Powers, Kathleen
	180	Stricklin, Debbie	6344	Cr 800	Hasler, Diane	6350		Traylor, Debbie
	182	Barr, Jeannine	6350	Fire 5	Porter, Melanee	6354		Lee, Wong C.
	183	Burnett, Jay W.	6354	Cr 306	McClinton, Mary	6358		Lee, Cynthia
	184	Krocker, Jan	6358	Cr 424	Hughes, Ron	6362		Hargis, Myrna
Fire Station Building 1302 Preston 77002	185	Harper, H. Lon	6362	Cr 600	Cormier, Mona	6374		Skinner, Marilyn
	208	Collins, Denise	6374	Cr 806	Joachim, Kathy	6378		Sanders, Janet
	209	McSpadden, Michael	6378	Cr 708	Stolte, Elaine	6650		Johnson, Julie
	228	Poe, Ted	6650	Cr 506	Alsworth, David	6782		Slessinger, Jennifer
	230	Hill, Belinda	6782	Fire 2	Armand, Stephanie	6778		Webb, Arlene
	232	Keel, Mary Lou	6778	Cr 514	Spinks, Chuck	7094		Thibodeaux, Phyllis
	248	Voigt, W. R.	7094	Fire 3	Roberts, Lanelle	6961		Steckler, Louise
	262	Shaver, Doug	6961	Cr 500	Oliver, Les	6944		Cook, Sharon
	263	Wallace, Jim	6944	Cr 608	Teaff, Kerry	7746		Johnson, Walter
	337	Barr, Jim	7746	Cr 520	Garrett, Karen	7774		Pruett, Edna
	338	Bacon, Mary	7774	Cr 700	Covington, Mary	7784		Hilty, Dana
	339	Cosper, Caprice	7784	Fire 5	Woolf, Karen	5620		
	351	Ellis, Mark Kent	5620	Fire 3				
JUVENILE Division					Coordinator	Tel.	Associate Judge	Court Reporter
Family Law Center 1115 Congress	Court	Judge	Tel.	Building	McGee, Kevin	6470	Molder, Bob	Bartek, Jill
	313	Shelton, Pat	6470	Fam 4	Garcia, Ann	6475	Longoria, David	Escamilla, Letecia
	314	Craft, Mary	6475	Fam 4	Lawrence, Pamela	6480	Van Pelt, Sherry	Bankston, Cynthia
Family Law Center 1115 Congress 77002	315	Ellis, Kent - Admin	6480	Fam 4				
	245	Galik, Annette	6935	Fam 3	Catani, Marilou	4677		Janice Le Sueur
	246	Ritter, Don	6938	Fam 7	Harris, Yolanda	6938	York, James	Kelley, Debbie
	247	Hellums, Bonnie Crane	6246	Fam 2	Brown, Esther	4348	Parks, Leta	Pitts, Nicole
	257	Motheral, Linda	6950	Fam 6	Parker, Melissa	5346	Rica, Elizabeth M.	Ellis, Beverly
	308	Dempster, Georgia	6230	Fam 3	Phelan, Debbie	4346	Pardue, Janice	Stein, Darlene
	309	Montgomery, John D.	6234	Fam 7	Plotkin, Pat	5635	Hay, Michael	Moody, Lisa
	310	Millard, Lisa	6238	Fam 3	Garza, Marie	6238	Burke, Lynda	White, Tina
	311	Henderson, Bill	6242	Fam 7		4356	Morris, Bradford	Edwards, Frances
	312	Squier, James - Admin	6941	Fam 2	Bennett, Patricia	6941	Warne, Doug	Majors, Barbara

Law Fax

By Greg Enos

February 26, 1998

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos . 17400 El Camino Real, Suite 300,
Houston, TX 77058; (281) 286-5500; (409) 943-4300;
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Choice testimony...

Q: Now, doctor, isn't it true that when a person dies in his sleep, in most cases he passes quietly away and doesn't know anything about it until the next morning?

Q: Is that the same nose you broke as a child?

Campaign Reports Yield Surprises

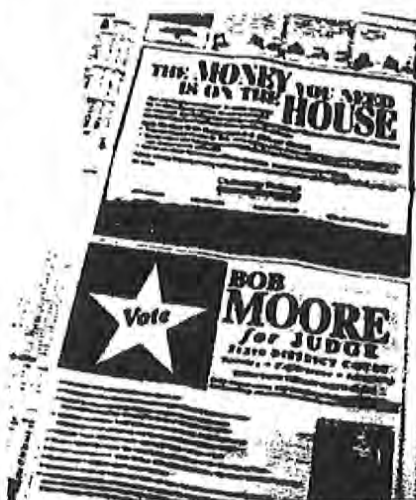
Most assume that lawyers running for Judge will know the law and follow it. Robert Moore, Democratic candidate for the 212th District Court has not filed with the County Clerk as of February 24 either of the two required finance reports which would show his contributions and expenditures. Unless Moore's campaign has neither raised or spent more than \$500, he was required to file the reports on January 15 and February 9.

A candidate who files late or fails to file a campaign report could face a civil penalty of \$100 for each day the report is late or a penalty of up to \$10,000 for a report over 40 days late. In addition, a person who knowingly fails to file a report on time or fails to include required information in a report commits either a class C or class A misdemeanor.

Publication of this newsletter was delayed a week until I could talk to Moore, who earlier failed to return repeated phone calls. Moore stated that he only filed one campaign report on January 15 and that he filed it with the Texas Ethics Commission. He said he did not know he was supposed to have filed another campaign finance report on February 9

and he did not know that the reports should have been filed in Galveston and not Austin. Moore said he did file the required personal finance report on February 9, which actually was supposed to be filed in Austin. An employee of the Texas Ethics Commission said their computers indicated that they written a Robert M. Moore telling him he

(Continued on page 3)



Bob Moore is spending money on his campaign but no one knows how much or where it came from because he has not filed required campaign finance reports with the County Clerk's office.

Editorial

Doyle vs. Olsen: Fur Flies at Bar Meeting

I picked the wrong Bar meeting to skip and I missed the confrontation at the January Galveston County Bar Association meeting between Texas City Mayor Chuck Doyle and Judge Susan Olsen.

I was not there, so this account is based on second hand renditions. After the Mayor had spoken, Bar President Susan Criss asked if there were any questions and she called on Judge Olsen. Judge Olsen said she had heard that Mayor Doyle had said there were too many female judges and she asked if he had indeed made those comments. Mayor Doyle did not take kindly to the question and he was clearly irritated. Many lawyers told me they sat watching and were very embarrassed. Mayor Doyle eventually denied making the remark. At the end, Justice of the Peace Pat Doyle thanked his father for attending and apologized for the "asinine question."

This episode raises many interesting questions, among

(Continued on page 2)



Calendar

March

6	noon	Mainland Bar Assoc.—Merchant's Bank, League City
10		PRIMARY ELECTION DAY!
11	noon	Galveston County Family Bar Assoc.—Pelican Club
26	noon	Galveston County Bar Assoc.—San Luis
31	noon	Galveston Co. Young Lawyer's Assoc.—Pelican Club

Please copy and share with your firm's attorneys and staff.

Rhonda S. Hernandez

has moved to
910-9th Street North
Texas City, Texas
(409) 941-0100

Campaign Reports (continued)

(Continued from page 1)

was filing reports in the wrong place.

Political observers have noted that Moore's failure to file may not matter since neither local newspapers or Moore's opponents have told voters about the situation.

The other Democratic candidates for the 212th have filed their reports, which show the following:

212th	Total reported to date	
	<u>Contributions</u>	<u>Expenditures</u>
E. Vasquez	\$18,131	\$18,232
Susan Criss	\$22,730	\$23,731
Bob Moore	No Reports filed	

Susan Criss tops all local judicial candidates with the biggest loan and biggest single contribution. Criss loaned her own campaign \$40,000 and she received a \$6,000 contribution from Foster & Sears, an Arlington, Texas law firm that has used local union activists to recruit asbestos claimants. Other major contributors to Criss' campaign in the latest reporting period are Steve Ongert, \$500, Jerry Gunn, \$250, and Fred Raschke, \$200.

In the Democratic Race for Probate Court Judge, Dennis Bettison leads by far in expenditures but Gladys Burwell leads in contributions. Bettison loaned his campaign \$30,000.

Probate Court	Total reported to date	
	<u>Contributions</u>	<u>Expenditures</u>
Gladys Burwell	\$21,303	\$16,795
Dennis Bettison	\$9,520	\$40,095
Brian Abbingtion	\$3,729	\$7,634

Brian Abbingtion's figures include money reported when he initially was running for County Court No. 2. Bettison's contributors in the latest reporting period are mostly non-lawyers and the largest include Gaddis Wittjen of Hitchcock, \$750, N.I. Shapiro of Galveston, \$500, and Lawrence Del Papa, \$500. The three attorneys who contributed to Bettison in the last reporting period were Stephen Baker, \$500, Michael Sanders, \$500, and Kenneth Kaye, \$100.

In the last reporting period, Gladys Burwell's largest contributors were Sam Tramonte, \$1,000, Russ Burwell, III, \$1,200, Russell Burwell \$600 and the Williams, Bailey Law Firm, \$1,000.★

Campaign Errors & Omissions

DEMOCRAT SUSAN CRISS IS QUALIFIED FOR JUDGE OF DISTRICT COURT 212

- ★ 10 Year Galveston County Assistant District Attorney specializing in protecting children and senior citizens
- ★ Founding Member, Galveston County Child Abuse Neglect Task Force
- ★ Board Certified in Criminal Law
- ★ President, Galveston County Bar Association
- ★ Recipient of Young Lawyer Award, 1994
- ★ President, Galveston County Defense Attorneys Association
- ★ President, Galveston County

Susan Criss, who is running on a "law and order" platform, risks misleading the public by continuing to omit "Criminal" when she says she is, "President of the Galveston County Defense Attorney's Association." Criss says this omission is a mistake she had not caught even though the same "mistake" has been made in all of her campaign literature since December. Some criminal defense lawyers wonder if Criss is as proud of her current work on behalf of criminal defendants as she of her ten years of service in the District Attorney's office.

Dennis Bettison

★ **for Probate Judge**

Democratic Primary
Early Voting - February 21 through March 6, 1998
Primary Election Day - March 10, 1998

Signature of Justice of the Peace Pat Doyle
Pat Doyle, Justice of the Peace, District 1, Precinct 1, Galveston County, Texas

Justice of the Peace Pat Doyle openly endorses his law partner Dennis Bettison even though the Code of Judicial Conduct, Canon 5(3), prohibits judges from using their names to endorse other candidates.

Law Fax

By Greg Enos

January 20, 1998

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos . 17400 El Camino Real, Suite 300,
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Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net



Choice testimony...

Q: Have you lived in Texas City all of your life?

A: Not yet.

....

Q: You don't know what it was and you don't know what it looked like, but can you describe it?

Judicial Candidates Report Contributions

Candidates for local judicial posts filed financial reports detailing contributions and expenditures on January 15. Most candidates are relying primarily on their own funds and finding it tough to raise the \$50,000 or so most feel is needed for a contested primary in Galveston County.

The most successful fund raiser among candidates in a contested primary race so far is Gladys Burwell, who is seeking the Democratic nomination for Probate Judge. Burwell reported \$19,128 in contributions and \$14,985 in expenditures. Burwell's largest contributors were Arlene Swenson of Sugarland (\$1,000), Mary Lou Daniel of California (\$1,000), Russ Burwell III (\$1,000), Pete Urbani (\$1,000), Sam Tramonte (\$1,000) and Jeff Kilgore (\$500).

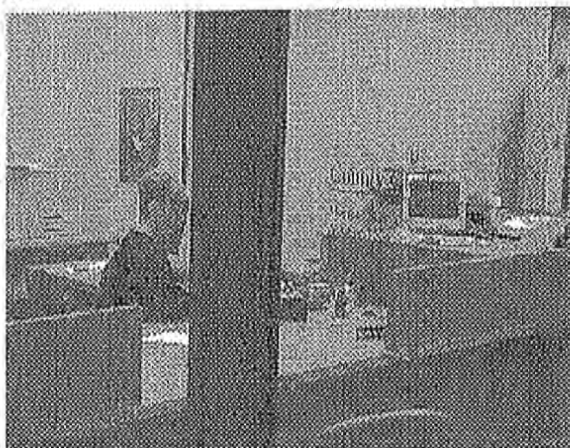
Burwell's primary opponent, Dennis Bettison, reported contributions of \$8,029 and expenditures of \$30,163. Bettison, who loaned his campaign \$30,000, reported as his largest contributors Charles Doyle (\$500), Patrick Doyle (\$500), Dr. Virginia Blocker (\$1,000) and Charles Scott (\$400).

Brian Abbington, who is also run-

ning as a Democrat for the Probate Court, reported a total of \$2,465 in contributions and \$3,124 in expenses. Abbington, who originally was running for County Court No. 2, filed two reports and these numbers are totals from both.

Robert Perman of League City is running for the Probate Bench as a

(Continued on page 4)



The County Clerk's branch office in the new League City County Annex at 174 Calder Road is open for recording of real property records, real property searches for 1965 to the present, filing of assumed name certificates and issuance of marriage licenses.

Editorial

Lawyers and Greed

At a Christmas party of all places, I was asked if we become lawyers because we are greedy or does being a lawyer make us greedy.

Lately, I have been pondering the darker side of our "greedy" profession and asking the question, "Why am I a lawyer?" In that question, at least, I am not alone. Most of the attorneys I talk to in depth eventually admit they would rather be doing something else. I personally have a long list of activities that now interest me more and give me more fulfillment than lawyering: writing, teaching, working on computers, coaching... The problem is that I cannot earn nearly as much doing those things as I can earn as a lawyer—which brings us back to greed.

Greed among lawyers is one reason why many of my colleagues (and me, for that matter) are unhappy with our profession.

Greed is something different than the desire to succeed in a profession where success is typically measured in dollars. Greed is grabbing for more than you

(Continued on page 4)



Calendar

January	23	noon	Mainland Bar Assoc.—Merchant's Bank, League City
	29	noon	Galveston County Bar Assoc.—San Luis
	27	noon	Galveston Co. Young Lawyer's Assoc.—Pelican Club
February	11	noon	Galveston County Family Bar Assoc.—Pelican Club

Please copy and share with your firm's attorneys and staff.

Courthouse News

Courthouse Renovation Under Study

Elected county officials will meet this Wednesday at 8:30 a.m. in the Holbrook Building's first floor conference room to help formulate a 90 day study of all of the county's building needs in Galveston, including the courthouse. County Commissioners have contracted with Bay Architects to do the study, which will look at needed renovations to the cooling and heating for the jail and courthouse, the need to remove asbestos and the need for more courtrooms.

The remodeling of the County Law Library is on hold until the results of the study are announced in July. Terry Holmes, who bought the out-of-state reports has removed all of his books, except for the Northeast Reporter, which he sold to Barry Radcliffe.

Correction on J.P. Races

County Clerk Patricia Ritchie was kind enough to point out an error in the list of judicial candidates in the last Law Fax. Precinct 8 Justice of the Peace Jim Woltz of Friendswood is not opposed. The following candidates have filed for the Precinct 9 J.P. post on the Bolivar Peninsula: Mary Ann Rogers (R), Gregory Rodriguez (D), Tony Reed (D), and Pat Lowry (D).

Ellisor Board Certified

John Ellisor has become Board Certified in Criminal Law by the Texas Board of Legal Specialization. Congratulations!

Emily Fisher is M&G Partner

Emily Estrada Fisher has become an equity partner in Martin & Garza, L.L.P., which has offices in Galveston and Texas City.

District Clerk Making Refunds

Evelyn Wells Robison's office is in the process of issuing refund checks on a dormant account which consists of state and county fees paid between September 3, 1985 and September 3, 1996. Those fees were ruled unconstitutional and have been held pending refund requests.★

Jan 20, 1998 Page 2

Trial Reports

Pat Reilly represented a disinherited son contesting a will in Judge Jerome Jones' Probate Court. The jury ruled that there was no undue influence. Tim Beeton represented the will proponent in the one day jury trial.

A criminal jury in Judge Norma Venso's court in January found a defendant not guilty of cocaine possession. Lois McCarnes represented the defendant and Ted Mora represented the State.

A defendant in Judge Mary Nell Cripitto's court was found guilty of Unlawfully Carrying a Weapon. The jury assessed a \$100 fine. Phillip Chupik represented the State and the defendant was pro se.

Mike Elliott successfully prosecuted a defendant charged with DWI in Judge Mary Nell Cripitto's court. Frank Hale represented the defendant who received punishment of six months in jail probated for a year, a \$1,000 fine, 60 days of community service. There was a video of the defendant.★



**The Enos
Law Firm,
P.C.**

Greg B. Enos

**(409) 943-4300
(281) 286-5500**

Injury and Death Claims

Board Certified. Greg Enos is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization.

Experience. Greg Enos has represented hundreds of injury victims during the last 12 years. Enos has written articles and taught at seminars for lawyers on personal injury topics.

A Courtroom of Their Own. The firm's Texas City office has its own courtroom which is used for trial preparation and seminars for other lawyers.

- Auto accidents
- Refinery injuries
- Maritime cases
- Medical negligence
- Nursing home claims
- Suits against UTMB

**Baker & Lain, P.C.
and
Darrell A. Apffel**

are pleased to announce the formation of a new partnership for the practice of law as

**Baker, Doyle,
Apffel & Bettison**
Attorneys and Counselors at Law

Stephen W. Baker
Darrell A. Apffel

Patrick F. Doyle
Dennis R. Bettison

Galveston: 409-744-9783
Texas City: 409-945-9551
Fax: 409-744-9786

Discovery Sanctions: Pay Up!

Attorneys and parties who abuse the discovery process, withhold evidence, resist proper discovery requests and violate court orders on discovery should beware! A trial court may not be easily able to strike pleadings or issue a "death penalty" sanction except in the most severe of cases. However, a trial court has great latitude in imposing monetary sanctions against parties who abuse the discovery process. As long as the award of attorney's fees and/or expenses is supported by the evidence and is "just" in light of the wrong done, an appellate court is very unlikely to disturb the sanction on appeal.

Generally, the winning party on a motion for sanctions is entitled to recover expenses, including attorney's fees. Hanley v. Hanley, 813 S.W.2d 511 (Tex.App.-Dallas 1991, no writ).

Rule 215(2)(b)(8) permits a court to order a party or attorney to pay the reasonable expenses, including attorney fees, caused by failing to comply with proper discovery requests or failing to obey a court order to provide or permit discovery. Rule 215(2)(b)(8) allows for the recovery of more than merely the cost of obtaining the sanction order. Any reasonable expense resulting from the delay caused by the other party's obstinance or from the fact that the discovering party was deprived of the needed information would be recoverable under this section. Hanley v. Hanley, 813 S.W.2d 511 (Tex.App.-Dallas 1991, no writ).

Thus, for example, a party who withholds discoverable documents and then fails to fully comply with an order compelling discovery could be sanctioned in an amount that might include attorney's fees incurred in bringing the original motion to compel and the subsequent motion for sanctions as well as for the time spent trying to obtain the withheld documents informally. If depositions were required to locate the missing doc-

uments, attorney's fees for noticing and attending the depositions as well as the court reporter's bills could be included in the sanction award.

A trial court imposing sanctions should consider several factors. The purposes of discovery sanctions are to 1) secure the parties' compliance with the rules of discovery, 2) deter other litigants from violating the discovery rules, and 3) punish parties that violate the discovery rules. Westfall, 852 S.W.2d 587, 590 (Tex. App.-Dallas 1995, writ denied).

A sanction should be no more severe than required to satisfy a legitimate purpose. Thus, a court must consider and impose relatively less stringent sanctions first to determine whether lesser sanctions will fully promote compliance and deterrence, and discourage further abuse. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex.1992). In addition, the trial court must attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. Jones v. Andrews, 873 S.W.2d 102, 105-106 (Tex.App.-Dallas 1994, no writ).

In deciding discovery sanctions, a trial court may consider the entire record and all the offending parties' conduct during the litigation. Larsen v. H.E. Butt Grocery Co., 769 S.W.2d 694, 696 (Tex.App.-Corpus Christi 1989, writ denied).

If true prejudice has resulted to a party by another party's failure to cooperate during discovery, that factor should be given substantial weight in evaluation of ultimate discovery sanctions. Pelt v. Johnson, 818 S.W.2d 212, 217 (Tex. App.-Waco 1991, orig. proceeding). A

party's prejudice can result from such conditions as the destruction of evidence, irretrievable loss of evidence, the inevitable dimming of witnesses' memories, incurring excessive burdens and costs, and other situations in which the party cannot be restored to the same status by an appropriate sanction. City of Dallas v. Cox, 793 S.W.2d 701, 724-25 (Tex.App.-Dallas 1990, no writ).

Appellate review of discovery sanctions is very deferential to the trial court's ruling. The court in Arit Intern. Corp. v. Allen, 910 S.W.2d 166, 170-171 (Tex.App.-Fort Worth 1995, no writ) stated the standard of review in discovery sanction cases:

The standard of review of a trial court's discovery sanctions is whether the court abused its discretion. The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles. In other words, the reviewing court must determine whether the trial court's action was arbitrary or unreasonable. The scope of review in determining whether the trial court abused its discretion is assayed in light of all the circumstances of the case.The trial court is given broad discretion in imposing discovery sanctions and in choosing the appropriate sanctions. In determining whether to impose discovery sanctions, the trial court is not limited to considering only the specific violation for which sanctions are finally imposed, but may consider everything that has occurred during the history of the litigation. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. (Citations omit-

(Continued on page 4)

For Kids' Sake Schedule

Register with Manny at the County Law Library (409-765-2601)

	Texas City Nessler Center	Galveston Rosenberg Library
January	29th at 10:00 a.m.	22nd at 10:00 a.m.
February	12th at 5:30 p.m. 23rd at 10:00 a.m.	2nd at 5:30 p.m. 19th at 10:00 a.m.
March	12th at 5:30 p.m.	2nd at 5:30 p.m.

(Continued from page 1)

Republican. Perman reported zero in contributions and \$1,466 in expenses.

In the hotly contested race for the 212th District Court, Elisa Vasquez is leading the pack in fund raising. Vasquez reported \$16,386 in contributions and \$17,364 in expenditures. Vasquez' largest contributors were Bob Monks (\$1,000), Helen Monks (\$1,000), William Monks (\$1,000) and Tim Beeton (\$1,000). Vasquez has given \$8,500 to her campaign.

Susan Criss reported contributions of \$12,925, of which Criss has donated \$10,700 of her own money. Pipefitters Local 211 donated \$1,000. Criss reported expenses of \$12,033.

Robert Moore's report was not filed as of January 16, although it could have been mailed on January 15 and still be deemed timely.

Miles Whittington, who will be the GOP nominee for the 212th, reported contributions of \$2,400 and expenses of \$1,482. His major contributors were E. A. Apfel (\$250), "Trey" Apfel (\$250), Kerry Neves (\$250) and Fred Raschke (\$250).

Incumbent Susan Olsen of the 306th Family District Court reported \$18,888 in contributions and expenses of \$5,582. Olsen's largest contributors were Dean &

Ongert, P.C. (\$5,000 in-kind contribution), Neves & Crowther (\$1,000), Carl Halla of Houston (\$1,000), Stephen and Vicki Lewis (\$500), Janis Yarbrough (\$500) Robert Moore (\$500) and Visnoski & Visnoski (\$500).

Jeff Kemp, who will oppose Olsen as a Republican, reported \$115 in contributions and \$1,215 in expenses.

Judge Frank Carmona reported contributions of \$13,300 and expenditures of \$1,702 in the 122nd District Court race. Judge Carmona's largest contributors were William King (\$1,000), Greer, Herz & Adams (\$2,000), Gregg, Mieszkuc, Lewis & Daughtry (\$1,000), Hagood & Neuman (\$500), John McEldowney (\$500) and McLeod, Alexander, Powell & Apfel (\$500). Judge Carmona's GOP opponent, Kevin Corcoran, reported contributions of \$3,000 and expenditures of \$1,702.

County Court No. 2 Judge Trey Dibrell reported contributions of \$1,150 and expenses of \$2,248.

John Ellisor, who filed against Judge Dibrell as a Republican, reported no contributions and expenses of \$1,200.

County Court No. 1 Judge Mary Nell Crapitto achieved a campaign efficiency her fellow candidates can only dream of: she is unopposed and she reported no contributions and no expenditures. ★

Editorial (continued)

(Continued from page 1)

fairly deserve. Lately, I have seen plenty of greed.

Greed is a fired employee falsely claiming to be a partner and demanding money he does not deserve. Greed is a former partner demanding all of a referral fee when he knows in his heart half is fair enough. Greed is a lawyer who talks ignorant, elderly folks in to hiring him on an hourly basis and running up a bill of over \$15,000 to pursue a groundless claim that involves at most a few hundred dollars even if successful. Greed is a lawyer who settles a car wreck case for policy limits and then files suit for no reason other than collecting 40% instead of 33.33% because his contract provides for a higher fee if suit is filed.

In my younger, idealist days, I would have said greed is the reason to be a lawyer—to protect the weak and ignorant against greed. Yet I told myself such things even as I relentlessly spent every waking hour building what was then one of the most financially successful practices in our area.

I left my former firm to be a solo practitioner and spend more time with my family, knowing I would probably earn less money. But, even working alone I still worry constantly about fees and billing and kick myself in the pants when I am told I didn't charge enough.

Yet, just when I am sick of the greed I see around me (and sometimes in me), I run in to attorneys like Kathryn Lanan or Emily Fisher, who give more of their time free to their profession and community than some lawyers actually work.

The answer to lawyers and greed is to expect it, fight it and resist the temptation to give in to it. We are no different than anyone else in our human frailties. People just like to complain about us more. ★

Discovery Sanctions (continued)

(Continued from page 3)

ted).

Several principles apply in determining if an abuse of discretion occurred:

1. An abuse of discretion does not exist where the trial court bases its decision on conflicting evidence. Davis v. Huey, 571 S.W.2d 859, 862 (Tex.1978).

2. The appellate court reviews the evidence in the light most favorable to the trial court's action and indulges every legal presumption in favor of the judgment. Vaughn v. Texas Employment Comm'n, 792 S.W.2d 139, 143 (Tex. App.-

-Houston [1st Dist.] 1990, no writ).

3. The appellate court may not substitute its judgment for that of the trial court. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917-18 (Tex.1985) (orig. proceeding).

Virtually all of the appellate cases striking down discovery sanctions involved the inappropriate use of the "death penalty" sanctions or imposition of a type of sanction that was not allowed. The only case this author could find striking down an award of attorney's fees and expenses as a discovery sanction is Hanley v. Hanley, 813 S.W.2d 511

(Tex.App.-Dallas 1991). There, the only testimony concerning the cost of bringing the sanction motion involved mention of \$3,500 in attorneys fees and the court of appeals struck down an award of \$39,000 in attorneys fees because there was no evidence justifying that amount. ★

Law Fax

By Greg Enos

January 5, 1998

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 300,
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Editorial

License Mediators?

A recent article in the *Wall Street Journal* claimed there are too many mediators in Texas. The article quoted a nurse who paid \$600 for mediator training but could not find work as a mediator and then said, "...nonlawyer mediators like her are a dime a dozen these days, because the state's lax regulation of mediators and mediator-training programs has opened the doors for just about anyone—even ex-cons—with a little spare time and money to qualify for court appointments."

What bull! Judges in our area are appointing experienced, lawyer mediators. The notion that a janitor or ex-felon could pay for a mediation class and then get court appointments is ludicrous.

It is true that almost every lawyer I know, particularly in the family law area, has gone through mediation training and only a few in our county are working full-time as mediators. However, strict regulation and even licensing mediators is not needed.

The free market largely controls which mediators succeed. In the vast majority of cases, the lawyers agree on a mediator rather than letting the judge pick someone. Most lawyers want a mediator who is good and will get the case settled. A poor mediator will not get repeat business. We all do need to try new mediators periodically to let the fresh faces get a start but we do not need to be checking for some state license. ★

Election Contests Set

It is going to be a very busy and interesting election year in Galveston County. Almost every incumbent local officeholder will face Republican opposition in November. District Attorney Mike Guarino and County Court No. 1 Judge Mary Nell Crapitto were the only two incumbents elected county-wide to escape without opposition.

1998 is expected to be a strong Republican year in Galveston County because of on-going demographic changes and because of the perceived strength of Governor George W. Bush at the top of the ticket.

Candidates who filled in time to meet the January 2 deadline are:

122nd District Court—Frank Carmona (D), Kevin Corcoran (R).

212th District Court—Susan Criss (D), Bob Moore (D), Elisa Vasquez (D), Miles Whittington (R).

306th Family District Court—

Susan Olsen (D), Jeff Kemp (R).

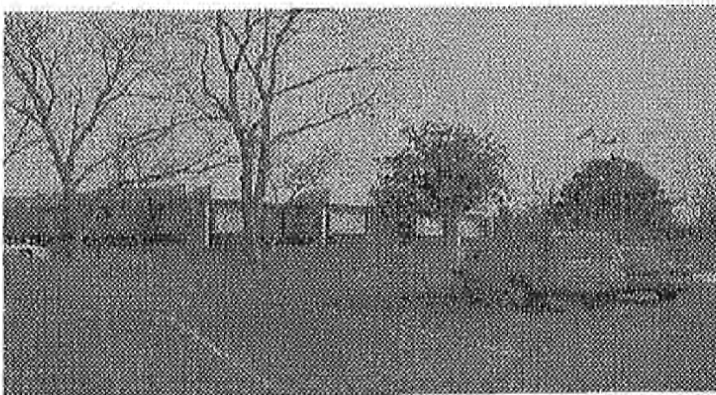
County Court No. 1—Mary Nell Crapitto (D).

County Court No. 2—C. G. "Trey" Dibrell, III (D), John Ellisor, Jr. (R).

Probate Court—Gladys Burwell (D), Brian Abbington (D), Dennis Bettison (D), Robert Perman (R).

County Judge—Jim Yarbrough (D), Bonnie Jean Hart (R).

(Continued on page 2)



The new North County Building at 174 Calder Road in League City contains satellite offices for many county offices. The District Clerk's satellite office there is able to:

- take filings in civil, family and tax suits;
- handle all child support transactions;
- issue citations and subpoenas;
- handle juror excuses and reschedule jury service; and
- search records and certify copies.

Office hours will be 8:00 - 12:30 and 1:30 - 5:00, Monday through Friday.



Calendar

January	14	noon	Galveston County Family Bar Assoc.—Pelican Club
	27	noon	Galveston Co. Young Lawyer's Assoc.—Pelican Club
	29	noon	Galveston County Bar Assoc.—San Luis
February	6	noon	Mainland Bar Assoc.—Merchant's Bank, League City

Please copy and share with your firm's attorneys and staff.

(Continued from page 1)

District Attorney—Mike Guarino (D).

District Clerk—Evelyn Wells Robinson (D), Geraldine Sam (R).

County Clerk—Patricia Ritchie (D), Kathy Wright (R).

State Senator Dist. 11—Ed Wesley (D), Mike Jackson (R).

State Representative Dist. 23—Patricia Gray (D), Dave Norman (R).

State Representative Dist. 24—Craig Eiland (D), Robert Hart (R), Larry Taylor (R).

Justice of the Peace Pct. 6—Joseph Malloy (R), Curtis Norman (R).

Justice of the Peace Pct. 7—Mark Foster (R), Stephanie Barnett (R).

Justice of the Peace Pct. 9—Jim Woltz (R), Maryanne Rogers (R), Patricia Lowry (D), Tony Reed (D), Gregory Rodriguez (D).

County Treasurer—Gerald Burks (D), Annie Burton (D), Keith Dill (R).

Justices of the Peace Phil Hosey, Penny Pope, Sonny James, Mike Nelson, and Pat Doyle are unopposed. ★

Trial Reports

Neil Baron's client was awarded just over \$3,500 by a jury in Judge Jerome Jones' court. The case involved a minor collision, soft tissue auto accident defended by Allstate.

Gordon Davenport lost a medical malpractice trial in Houston against St. Luke's Hospital in which his 75 year old client alleged he developed a bed sore from being left on a bed pan too long while recovering from heart surgery.

Judge Susan Olsen granted the State's petition for waiver of jurisdiction and discretionary transfer to district court in a capital murder case. The teenager was represented by Leonard Cox and the State was represented by Salvador Faus.

In November, William King of Kemah won a \$355,000 verdict for his client in Judge Roy Engelke's court in a suit involving an alleged breach of contract to develop a property in Galveston.

A jury found a defendant not guilty of assault causing bodily injury in a family violence case tried in Judge C.G. "Trey" Dibrell, III's court. Mario Madrid was the prosecutor and Lois McCarnes was defense counsel.

In November, a jury in Judge David Garner's court found that a day care was not negligent in a case where a five year old was hurt on a slide. Jack Nolan represented the plaintiffs. ★



Car Wreck

Property Damages

The Austin Court of Appeals in Mondragon v. Austin, 954 S.W.2d 191 (Tex.App.-Austin 1997, writ pending) restated and then expanded Texas law concerning what property damages are recoverable in a car wreck suit.

The Court noted that in Texas, a person whose car has been totally destroyed is only able to recover the value of the car while a person whose car is repairable may recover both the cost of repairs and for loss of use of the car. Hanna v. Lott, 888 S.W.2d 132 (Tex.App.Tyler-1994, no writ). One way to prove loss of use damages is to show the reasonable rental value of a substitute car. Luna v. Lonestar Dodge Sales, 667 S.W.2d 115 (Tex. 1984).

In Mondragon, the jury awarded \$10,772.70 for property damages, of which \$2,752.70 was arguably for the stipulated cost of repairs. The court held that it was proper for the jury to have calculated the other \$8,020 as damages for loss of use of the vehicle, because \$20 a day was a fair rental value and it took over a year for the other (drunk) driver's carrier to finally stop denying the claim. The Court rejected the carrier's argument that it should have taken only two weeks to repair the vehicle if the plaintiff had been able to pay for it himself. ★



The Enos Law Firm, P.C.

Greg B. Enos

(409) 943-4300

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Injury and Death Claims

Board Certified. Greg Enos is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization.

Experience. Greg Enos has represented hundreds of injury victims during the last 12 years. Enos has written articles and taught at seminars for lawyers on personal injury topics.

A Courtroom of Their Own. The firm's Texas City office has its own courtroom which is used for trial preparation and seminars for other lawyers.

- Auto accidents
- Refinery injuries
- Maritime cases
- Medical negligence
- Nursing home claims
- Suits against UTMB



Family Law Focus

Gloria Robledo & Judge Olsen Return

January 5 marks the return of 306th Family District Court Coordinator Gloria Robledo from a prolonged absence caused by severe carpal tunnel syndrome which required surgery. Judge Susan Olsen is also returning from a vacation in England.

Family Bar Elects Officers

The Galveston County Family Bar Association's new officers are: President-Elect: Steve Windsor; Treasurer: Judy Meeh; and Secretary: Greg Enos. Doug Foster is now President.

Barry Radcliffe Board Certified

Congratulations to Barry Radcliffe, who is now Board Certified in Family Law.

Thanks to Kathryn Lanan

Every lawyer who practices family law in Galveston County owes Kathryn Lanan a huge, "Thanks," and pat on the back for spending the last two and a half years publishing the voluminous and extremely helpful newsletter for the Galveston County Family Bar Association. Kathryn's efforts cannot and will not be duplicated. The group is working on plans to use this newsletter to serve as the association's primary communication outlet.

Overcoming the JMC Presumption

Tex. Fam. Code 153.131(b) creates a rebuttable presumption in favor of joint managing conservatorship. Doyle v. Doyle, __ S.W.2d __ (Tex.App.-Austin 1997, writ?) is an example of how the JMC presumption can be overcome. When the couple separated, they agreed their four year old son would live for four months in Texas with mom and for four months in Florida with Dad. The child turned five, started school and the deal broke down. The court-appointed psychologist testified that the couple's ability to cooperate deteriorated during the proceedings. The husband's mother began interfering with decisions regarding the kids, and the distance between the parents made joint decision-making impractical. SMC for mom was upheld. ★

Form of the Week

Many lawyers are not handling discovery in Harris County civil cases correctly. Local Rule 3.7(1)(a) says that the following discovery is not filed with the District Clerk: Requests for Production, Interrogatories, Requests for Admissions, Business Records with affidavit per Tex.R.Evid. 902(10) and discovery requests in enforcement of a judgment. These documents should be served on opposing counsel and only a Certificate of Written Discovery is filed with the Clerk. Rule 3.7(3). The following is supposed to be filed: answers and objections to interrogatories, admission responses and responses to discovery in enforcement of a judgment. Responses to requests for production are not filed with the District Clerk.

[style of case]

CERTIFICATE OF WRITTEN DISCOVERY

TO THE HONORABLE COURT:

Plaintiff, xxx, certifies pursuant to Local Rule 3.7(3) that the following has been served upon all parties and/or counsel of record but has not been filed with the District Clerk as required by Rule 3.7(1)(a):

- Interrogatories to Defendant, yyy;
- Requests for Production to Defendant, yyy; and
- Business Record Affidavit of Acme Hospital.

Respectfully Submitted,

Greg B. Enos
SBOT No.: 06630450
17400 El Camino Real,
Suite 300
Houston, TX 77058
(281) 286-5500;
(409) 943-4300
Fax: (281) 286-9939

Certificate of Service

I certify that the above instrument and all attachments described therein were served on all parties and/or counsel of record by facsimile on January 6, 1998.

Attorney for Plaintiff

For Kids' Sake Schedule

Register with Manny at the County Law Library (409-765-2601)

	Texas City Nessler Center	Galveston Rosenberg Library
January	15th at 5:30 p.m. 29th at 10:00 a.m.	5th at 5:30 p.m. 22nd at 10:00 a.m.
February	12th at 5:30 p.m. 23rd at 10:00 a.m.	2nd at 5:30 p.m. 19th at 10:00 a.m.

Courthouse News



Law Fax Jan. 5, 1998 Page 4

Noteworthy Cases

U.S. Supreme Court Applies Abuse of Discretion Test to Expert Rulings

The U.S. Supreme Court has ruled that the "abuse of discretion" standard should be used to review a trial court's decision to admit or exclude expert testimony. Applying that standard, the court said the trial court properly excluded testimony that an electrician's exposure to PCP's caused his lung cancer where the only studies linking PCP's to cancer were animal tests involving infant mice which were injected with massive doses of PCP's and developed a different kind of cancer. The court said that Daubert does not require a court to admit opinion evidence that is connected to current data only by the opinion of the witness. "A court may conclude that there is simply too great an analytical gap between the data and the opinion offered." General Electric v. Joiner, ___ U.S. ___ (1997).

Insured Can Sue Carrier Under art.

21.21 For Failure to Settle Claims

A business can sue its excess liability carrier which took over settlement negotiations and failed to settle soon enough for policy limits. The suit can be brought under Insurance Code art. 21.21 and for negligence for failing to settle. Rocor Int'l vs. National Union Fire, ___ S.W.2d ___ (Tex. App. - San Antonio 1997, writ ?). This case is important because it recognizes a private cause of action for the insured (not the third party claimant) under the art. 21.21.

Summary Judgment Response Mailed 7 days Before Hearing Is Timely

The mailbox rule of TRCP 21a allows a summary judgment response mailed on the 7th day before the hearing to be timely even if it is received and file stamped less than 7 days before the hearing. Holmes v. Ottawa Truck, ___ S.W.2d ___ (Tex.App.-El Paso 1997, writ?),

Child Support Arrearages Report Admissible as Public Record

A report summarizing child support arrearages prepared by a child support office for the hearing is hearsay but is still admissible as a public record in a criminal nonsupport trial. Tex.Crim.Evid. 803(8). Perry v. State, ___ S.W.2d ___ (Tex.App.-Texarkana 1997, writ?). This ruling should be persuasive in civil cases as well under Tex.R.Civ. Evid. 803(8). ★

Houston Lawyers Like Lerner

The Houston Bar Association's 1997 Judicial Evaluation poll shows that Houston's attorneys have discovered what Galveston County lawyers have long known—Judge I. Allen Lerner is a great judge! Judge Lerner received an overall rating of "Outstanding" from 77% of attorneys who rated him. Only Mary O'Reilly and Maryellen Hicks received higher overall ratings among visiting judges. In contrast, only 15.6% of attorneys responding rated Judge Louis Moore as "Outstanding" and 55% rated him "Poor." Among sitting civil District Judges, Patrick Mizell received the highest overall "outstanding" rating (66%) and John Devine received the highest overall "Poor" rating (55.6%). Justice Murry Cohen had the highest overall rating among Houston Courts of Appeals Justices (71.2% Outstanding) and Sam Nuchia the lowest (19.7%).

At Least It Didn't Happen In Our Courthouse

A Maverick County judge dismissed a bunch of misdemeanor cases because the judge said a box containing the files was lost. A search of the judge's chambers uncovered the box of files in the judge's bathroom. The judge was convicted of two counts of tampering with government documents. The Court of Appeals ruled that the judge's secretary properly consented to the search since she could use the judge's bathroom whenever she wanted. The secretary's consent was ruled voluntary even though the Sheriff, four deputies and a TV camera crew showed up at the judge's office and a deputy said they would just go get a search warrant if the secretary refused permission for the search. Carpenter v. State, 952 S.W.2d 1 (Tex.App.-San Antonio 1997). ★

How To

How To Get a Car Title

If your client has lost a car title, have them call (713) 681-6637, press "O" for the operator and make sure there is not a lien on the vehicle. To check, they will need the name on the title, the VIN, and the year, make and model of the car. If there is a lien shown and it has been paid off, they need to go to their bank and request a Form 34—Release of Lien.

Your client can go in person to get a replacement car title in Houston at 10000 Northwest Freeway, Suite 105. They will need \$5.45, a current driver's license, and the Form 34 Release of Lien (if needed). If someone other than the person whose name is on the title is picking it up, they will need a signed authorization and a phone number where

they can call to confirm the authorization. A duplicate car title can also be ordered by mail.

To transfer a car title, the client should preferably go in person to the Tax Assessor-collector's office for the county in which the car is registered and take the title (and, if applicable, the power of attorney and the divorce decree showing the vehicle's VIN). Both parties (old title holder and new title holder) must sign the back of the title and a Form 13U—Application for Texas title. If there is a power of attorney to transfer title, then the new title holder signs both forms for both parties. In a divorce case, the new title holder does not have to pay license fees. ★

Law Fax

By Greg Enos

November 12, 1997

Serving the Galveston County and Clear Lake Legal Community.
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Trial Reports

Some tigers just can't change their stripes. The parental rights of a woman alleged to be a prostitute were terminated following a jury trial in **Judge Susan Olsen's** court. The trial went on without the mother after she supposedly met a man in the hall and left the courthouse with him. Her son was 7 when he was taken by CPS suffering from impacted bowels. **Ella Anderson** represented the State, **Greg Russell** was the guardian ad litem and **Maria Mercado** represented the mother, who had allegedly had never enrolled her son in school.

A League City police officer was acquitted of DWI charges by a jury in **Judge Mary Nell Crapitto's** court. Apparently the officer did not give himself a breath test and did not allow anyone else to do so. **Susan Criss** defended the officer during the six day trial and **Mike Elliott** was the prosecutor.

Wade Williams' client backed up in her driveway and hit a school bus that had stopped on on the street behind her. The 8 year old plaintiff on the bus allegedly suffered a serious back injury as a result of the collision. The jury in **Judge David Garner's** court found that the defendant was not negligent. **Bill Neuman** represented the plaintiff.

(Continued on page 2)

Judge Jones Will Not Seek Reelection

Probate Judge Jerome Jones, who has been on the bench for 29 years, has quietly let it be known that he will not run for reelection in 1998.

Gladys Burwell, Dennis Bettison and Brian Abbing-ton are running as Democrats for the County Probate Court.

Burwell has been the Probate Court's Investigator and Administrator for over three years and previously served

as a Justice of the Peace in Kemah. Burwell plans a fund raiser in December.

Bettison practices in Galveston with Barker & Lain and serves as the Municipal Judge in La Marque.

Abbing-ton opted to run for the Probate bench instead of challenging County Court No. 2 incumbent C.G. "Trey" Dibrell, III. ★

How to Order Autopsy Reports

To order a copy of an autopsy report in Harris County, call the medical examiner's office at (713) 796-6775, tell them the deceased's name and date of death and they will tell you if an autopsy was done and if the report is ready.

It costs ten cents per page to order the report, which is a public record. If the report is not available, the ME's office will take your name and number and call you when the report is ready.

Send your check and a written request for the report to Medical Examiner's Office, 1885 Old Spanish Trail, Houston, Texas 77054.

To order an autopsy report in Galveston County, send \$15 and a written request to Galveston County Medical Examiner, 6607 F.M. 1764, Texas City, TX 77591. Dr. Korndorffer's phone number is (409) 935-9274. ★

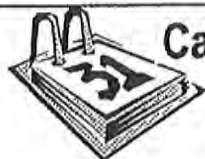
Editorial

Adjusting to Two Party Politics

At the age of four, I avidly rooted for Barry Goldwater, an act of shocking sacrilege in 1964 in LBJ's stomping grounds of Austin, Texas. With that one exception, I have been involved in Democratic politics ever since. As a lawyer in Galveston County for the past decade, I have seen that local judicial politics has been an exclusive Democratic franchise.

However, I feel that sooner or later Galveston County is going to elect judges from both parties. This fact was hit home to me recently when a friend who is a lifelong Democrat and union member told me he was probably going to support Republican Miles Whittington, whom he has never even met!

Of course, 1998 may not be Miles' year, if his friends Vasquez, Criss and Moore have their way. But change will eventually come, like it or not. The challenge will be to put judicial qualifications over partisan, party politics. ★



Calendar

November	12	noon	Galveston County Family Bar Assoc.—Pelican Club
	25	noon	Galveston Co. Young Lawyer's Assoc.—Pelican Club
	20	noon	Galveston County Bar Assoc.—San Luis
December	5	noon	Mainland Bar Assoc.—Merchant's Bank, League City
	10		Galveston Co. Bar Holiday Party—Yacht Club

Injuries In Low Speed Collisions

The arguments commonly used by auto insurance companies to deny that soft tissue injuries really occur in slow speed collisions ignore the laws of physics and widely accepted medical research. The following article is an excerpt from an excellent paper submitted to me by Dr. C. Wayne Brown,

D.C., the owner of The Chiropractic Health Center in Dickinson. You can contact Dr. Brown at (281) 534-4987.

By C. Wayne Brown, D.C., C.C.S.P.

Magnification of Acceleration is explained by McKenzie and Williams, two well respected researchers. The back of the head strikes the seat back (hyperextension) and then it rebounds off the seat back and is whipped forward (hyperflexion) like a wrestler bouncing off the rope. Then, just like the speed of the wrestler off the ropes, so is the speed of the head greater as it rebounds off the seat back. (*Journal of Biomechanics* 1975; 8: 257-259.)

Yale University School of Medicine conducted auto crash research to show the effects of low speed rear-end collisions. When a stopped vehicle is struck from the rear by another vehicle of equal weight travelling at an average speed of 8.2 mph, the struck car accelerates to 2 gravitational units of force at about 100 milliseconds. The shoulders of the passengers after being struck by the seat back

Law Fax Nov. 12, 1997

are accelerated to 4 gravitational units of force at about 250 milliseconds. The head of the passenger reaches its peak at 5 gravitational units at about 250 milliseconds. The entire cycle lasts less than 300 milliseconds which is the time that it takes the human nervous system to react. Consequently this is the time when the damage is incurred to the human body because the nervous system can not react sooner than 300 milliseconds.

In only an 8 mph collision, the struck car receives 2 G's of force; the shoulder receives 4 G's of force; and the head and neck receive 5 G's of force. Therefore, even in a low impact collision the transfer of energy to the head and neck has been measured as 2 1/2 times more than the energy impacting the car. At 5 G's of acceleration there is a 50% probability of cerebral contusion for the occupants. It is estimated that up to 80% of these post traumatic brain injuries are overlooked in the Emergency Rooms. (*Canadian Services Medical Journal* 1955; November: 727-759. The results of the older Yale study were duplicated by McKenzie recently using modern cars for the Society of Automotive Engineers, 39th Stapp Car Crash Conference, 1995. SAE 952724.)

Plastic Deformation and Elastic Deformation explain how serious injuries can occur even when there is little damage to the car body itself.

Plastic deformation is a term used to describe external property damage, (when a car body deforms). Observers of race car crashes have witnessed crash scenes where the car literally shatters and breaks up into hundreds of pieces. All that remains is a roll bar. These cars are designed that way. What happens next is astonishing. The driver steps out of the wreckage and walks away. This is possible only due to the fact that each shattered piece disperses a portion of the forces of impact. The more flying pieces, the more energy dissipates. The flying pieces dissipate the force of impact and transmit the forces outward and away from the driver. This is the effect of Plastic Deformation.

In Elastic Deformation, there is no

(Continued on page 3)

Trial Reports (cont'd)

(Continued from page 1)

A plaintiff injured in a car wreck, represented by **David Slaughter**, was poured out by a jury in county Court No. 2 before Visiting Judge **Ron Wilson**.

A man was found guilty of DWI by a jury in County Court No. 1 before Visiting Judge **I. Allen Lerner**. There was a video but no intoxilyzer. **Randy Bond** represented the State and **Dan Hennigan** represented the defendant, who was sentenced to 2 years of probation and a \$800 fine.★



Injury and Death Claims

Board Certified. Greg Enos is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization.

Experience. Greg Enos has represented hundreds of injury victims during the last 12 years. Enos has written articles and taught at seminars for lawyers on personal injury topics.

A Courtroom of Their Own. The firm's Texas City office has its own courtroom which is used for trial preparation and seminars for other lawyers.

The Enos Law Firm, P.C.

Greg B. Enos

**(409) 943-4300
(281) 286-5500**

- Auto accidents
- Refinery injuries
- Maritime cases
- Medical negligence
- Nursing home claims
- Suits against UTMB



Family Law Focus

306th Family Court News

Judge Susan Olsen, who is sporting a big engagement ring, will be out of the office this Wednesday through Friday. Visiting Judge Ron Wilson will be substituting for her. Judge Olsen will be out town from Dec 18 through the end of the year. Visiting Judge Andrew Z. Baker will be sitting in her absence. Gloria Robledo is expected to be out at least until January. Judge Olsen reminds attorneys handling CPS cases that they are paid on an hourly basis and that detailed, itemized vouchers are required.

Changes in Family Code

The last Legislature made many changes in the Texas Family Code, including:

- Wednesday visitation under the Standard Possession Order may end at the time the child's school resumes. This gives overnight Wednesday visitation to parents who elect this option. Sec. 153.312(a)(2).
- Jury verdicts on the determination of a child's primary residence are binding on the court. Sec. 105.002(c)(1)(D).
- Regarding child support, the definitions of "earnings" and "employer" were expanded to include virtually anyone who owes the parent anything. Sec. 101.011 and 101.012.★

Family Law Forms

Shift workers at area refineries often cannot easily exercise visitation under the Standard Possession Order. This form accommodates such workers and is placed in the divorce decree after the Standard Possession Order and terms of possession.

The Court finds that it is necessary to modify the Standard Possession Order to accommodate the work schedule of Respondent and to encourage frequent contact between Respondent and the Child. The Court finds that Respondent currently (and for the foreseeable future) works shift work for Acme Oil Company, which makes the standard possession order unworkable.

10. Designation of Substituted Weekday Periods of Possession by Respondent. It is ORDERED that Respondent, FATHER, may designate in writing no later than thirty days prior to any Wednesday on which Respondent has the exclusive right of possession of the child during the regular school term, as provided above, an alternative period of possession which must be on a Monday, Tuesday or Thursday of the same calendar week as the Wednesday period of possession for which it is being substituted for. Any such substituted period of possession on a week day shall begin at the time the child's school is regularly dismissed and end at 8:00 p.m. If Respondent designates a substituted week day in lieu of a regularly scheduled Wednesday period of possession, it is ORDERED that Respondent shall not have the right to possess the child on the regularly scheduled Wednesday but instead shall have the exclusive right of possession of the Child on the substituted weekday period of possession so designated. If Respondent, FATHER, does not timely designate a substituted weekday period of possession, as provided above, then it is ORDERED that Respondent shall have possession of the Child on the usual Wednesday as provided in the Standard Possession Order.

11. Designation of Substituted Weekend Periods of Possession by Respondent. It is ORDERED that Respondent, FATHER, may designate in writing no later than sixty (60) days prior to any Friday on which Respondent has the exclusive right of possession of the child, as provided above, an alternative weekend period of possession which must commence on a Friday in the same calendar month as the weekend period of possession for which it is being substituted for. Any such substituted period of possession on a weekend shall begin on the designated Friday at the time the child's school is regularly dismissed and shall end at 6:00 p.m. on the following Sunday. If Respondent designates a substituted weekend in lieu of a regularly scheduled weekend period of possession, it is ORDERED that Respondent shall not have the right to possess the child on the regularly scheduled weekend but instead shall have the exclusive right of possession of the Child on the substituted weekend period so designated. If Respondent, FATHER, does not timely designate a substituted weekend period of possession, as provided above, then it is ORDERED that Respondent shall have possession of the Child on the usual weekend as provided in the Standard Possession Order.★

Injuries in Low Speed Collisions (cont'd)

(Continued from page 2)

external property damage, thus the energy during the collision is transferred to the occupants inside the car. The energy is never lost, it is always transferred. Without property damage, whatever occupies the car will receive the energy forces. Think of it as two milk jugs that are smashed together. The elastic nature of the containers allows them to return to their normal shape without any apparent damage done to them. However, the energy was not lost but transferred to the milk which is suddenly and violently shaken. ★

Law Fax Nov. 12, 1997

ATTORNEY OFFICE SPACE AVAILABLE

- Downtown Texas City
 - 200 to 1,600 sq. ft. available
 - Totally remodeled in September 1996
 - 6 month, 1 year and 2 year leases
 - Common areas: kitchen, work room, conference room and lobby
- Please call Jennifer Smith at (409) 943-4400 for further information.

Law Fax

By Greg Enos

November 12, 1997

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 300,
Houston, TX 77058; (281) 286-5500; (409) 943-4300;
Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net



Trial Reports

Late trial report:

Somewhere there is a homebuilder who wishes he had never told his customers, "If you wanted a house with straight walls, you should have bought a \$400,000 house." That statement and evidence that a couple's \$131,000 house suffered from all sorts of defects lead a jury to award \$494,500 in damages against Royce Homes. David Harberg of Houston (713-651-0593) represented the plaintiffs in Judge Norma Venso's court. The plaintiffs' expert was Ray Jackson of Houston (713-960-8567). The defense apparently made several major blunders which may have contributed to the verdict. First, the defense never took the case seriously and did not offer any serious money to settle. Second, the defense designated expert witnesses but never provided their qualifications or opinions and all eight defense experts were struck. Third, the defense apparently anticipated a small damage award so they stipulated to attorney's fees of 40% of any award. Now Royce Homes may owe an additional \$197,800 in attorney's fees. ★

1998 Legal Directory

Work is starting on the 1998 Legal Directory which will list over 500 area attorneys. Please fill out this form if you want to be listed in the new directory and then mail or fax this form to **GREG ENOS, 17400 El Camino Real, Suite 300, Houston, TX 77058; Fax: (281) 286-9939.**

Name: _____

Firm: _____

Address: _____

Main phone: (____) _____ **ext.** _____

Fax number: (____) _____

Alternate phone: (____) _____

Bar No.: _____

E-Mail address: _____

Areas of practice: _____

Board certified in: _____

MEDIATION AT SHORT NOTICE

Doug Chilton had blocked out six weeks to be away from the office but his plans changed, so now he is available for mediations on short notice.

(409) 948-4466

WANT TO RECEIVE THE **LAW FAX** BY FACSIMILE?

Fill out the form above, check "Yes" and fax this page back to us to get on our fax list.

☐ **YES, PUT ME ON YOUR FAX LIST**

☐ **NO**

Law Fax

By Greg Enos

November 20, 1997

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 300,
Houston, TX 77058; (281) 286-5500; (409) 943-4300;
Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net



Mini-Editorial

We as local lawyers know what judges do and we will know the candidates. We owe it to the public and the justice system we serve to help the public know which judicial candidates are qualified and which are not.

County Bar To Debate Judicial Qualifications Poll Today at Noon

Today's meeting of the Galveston County Bar Association will feature a debate, floor discussion and vote on a judicial qualifications poll. Bar Director John Buckley will propose that the Galveston Bar Association do what the Harris County Bar has done for years—mail surveys to member lawyers and ask them to rate all judicial candidates as Well Qualified, Qualified, Not Qualified or un-

rated due to insufficient information.

The results of the would be shared with the public before the March 1998 primaries.

The survey would be conducted by mail and would be absolutely anonymous. A separate signature card would also be mailed in by each lawyer to verify that only genuine ballots are used and that each lawyer only gets one vote.

The total cost to the Bar would be less than \$500, a

small amount to an organization with over \$30,000 in the bank.

Candidates for the Supreme Court, Court of Criminal Appeals, 1st and 14th Court of Appeals and all Galveston County judicial posts, including Justices of the Peace, would be rated. Candidates would be listed solely by name without reference to party or whether they are an incumbent.★



**Calendar Galveston County Bar Association Meeting
TODAY at noon—San Luis Hotel**

**PLEASE COPY AND DISTRIBUTE TO YOUR FIRM'S LAWYERS
THIS MORNING.**

Cause No. _____

New Associate Judge's Report

In Galveston County, Associate Judges in family cases are using a new, two page form on carbon-less, triplicate paper to record the results of hearings. Lawyers can use these forms as outlines to prepare for hearings and to discuss settlement with the other side.

Petitioner _____

Respondent _____

VS. _____

Attorney for Petitioner _____

Attorney for Respondent _____

☐ 306TH JUDICIAL DISTRICT

☐ COUNTY COURT No. 1

☐ COUNTY COURT No. 2

ASSOCIATE JUDGE'S REPORT

HEARING DATE: _____

TYPE OF CASE: _____

☐ NO RECORD MADE

☐ RECORD MADE BY _____

☐ TEMPORARY HEARING

☐ FINAL HEARING

☐ APPEAL to the Referring Court Waived

Conservatorship: _____

☐ TMC

Primary Parent: _____

TMC _____

TPC _____

Child Support: \$ _____ weekly / bi-weekly / semi-monthly / monthly

beginning _____, 199____, payable to _____

☐ Payable through the Galveston County District Clerk's Office, 4th floor, 722 Moody Avenue, Galveston, TX

Healthcare: _____

\$ _____ weekly / bi-weekly / semi-monthly / monthly payable to _____

additional child support for payment of insurance premiums.

_____ to continue current healthcare coverage.

☐ Parties ordered to attend For Kids Sake Seminar by _____

☐ Counseling ordered for _____ with _____

☐ Parties to register with counselor by: _____

☐ Cost of Counseling to be paid by: _____

Possession/Access: _____

☐ Standard Possession Order

☐ Modified Possession Order: _____

Use of Property: _____

Use of Residence, located at _____

Other: _____

of Vehicle to Petitioner: _____

Year / Make / Model

Use of Vehicle to Respondent: _____

Year / Make / Model

Temporary Responsibility for Debts: _____

To be paid by Petitioner: _____

To be paid by Respondent: _____

Specific Authorizations: _____

Additional Orders: _____

Temporary Injunction / Protective Order: _____

☐ Standard Injunction (TFC §3.58) as to _____

☐ Standard Injunction (TFC §3.58) - Mutual (as to property only in 306th)

☐ No Injunction

☐ Other (Specific Terms): _____

☐ Protective Order against _____

☐ No Protective Order

Spousal Support: _____

\$ _____ weekly / bi-weekly / semi-monthly / monthly

beginning _____, 199____, payable to _____

Interim Attorney's Fees: _____

\$ _____ due and payable to _____ on or before the _____ day of _____, 199____

\$ _____ due and payable to _____ on or before the _____ day of _____, 199____

ALL ORDERS shall be prepared by PETITIONER'S / RESPONDENT'S attorney and filed by _____, 199____.
(Local Rule 4.7 for the 306th Family District Court requires this date to be no later than 7 days following the hearing before the Associate Judge. County Court Orders to be filed no later than 14 days following the hearing before the Associate Judge. FAILURE TO FILE IN A TIMELY MANNER MAY RESULT IN DISMISSAL.)

SIGNED ON the _____ day of _____, 199____.

ASSOCIATE JUDGE

NOTICE IS HEREBY GIVEN THAT EACH PARTY HAS THE RIGHT TO APPEAL THIS DECISION TO THE JUDGE OF THE REFERRING COURT, UNLESS WAIVED, HEREIN. NOTICE OF APPEAL SHALL BE GIVEN IN ACCORDANCE WITH SECTION 201.012 OF THE TEXAS FAMILY CODE.

Petitioner _____

Respondent _____

Attorney for Petitioner _____

Attorney for Respondent _____

ADOPTED, CONFIRMED & ORDERED ON the _____ day of _____, 199____.

JUDGE PRESIDING

Law Fax

17400 El Camino Real, Suite 300
Houston, Texas 77058

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*Serving the Galveston County and
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17400 El Camino Real, Suite 300, Houston, Texas 77058
(281) 286-5500; (409) 943-4300; Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net*

Medical Malpractice Deadlines & Time Traps

The Legislature has planted many dangerous land mines in the field of medical malpractice that attorneys should be wary of.

The Medical Liability and Insurance Improvement Act of Texas, art. 4590i, sets forth most of the time limits applicable to medical negligence cases. However, 4590i does not always mean what it says since parts have been ruled unconstitutional and other sections have been interpreted in surprising ways.

The statute of limitations in medical negligence cases can be very difficult to calculate with certainty and it is best to err on the side of caution. It would take a very lengthy article to cover all of the confusing cases on the

statute of limitations in this field. The best advice is to assume the deadline is always two years from the date the wrongful act was committed (not from the date of death or discovery) unless you find a specific, current case that says otherwise. Consult lawyers specializing in this area to be sure you are using the correct limitations date.

The statute of limitations in medical malpractice cases can be extended 75 days as to all defendants by sending a notice letter to any one defendant. Sec. 4.01(c); DeCheca v. Diagnostic Center Hospital, 852 S.W.2d 935 (Tex. 1993).

A notice letter must be sent to a defendant 60 days before he is

sued. Sec. 4.01(b). Failure to give notice requires abatement of the suit for 60 days but not dismissal. Schepps v. Presbyterian Hospital, 652 S.W.2d 934 (Tex. 1983).

A claimant must file an expert's report within 90 days of filing suit or post a \$5,000 bond or cash deposit to avoid dismissal of the suit. Sec. 13.01(a). The report, which may not be used otherwise in the lawsuit, must come from a qualified expert and address liability and causation of damages. Within 180 days of filing a claim, the claimant must provide an expert's report and the expert's curriculum vitae. Sec. 13.01(d).

The deadlines to file expert reports may be extended by 30 days for good cause. Sec. 13.01(f-g). Failure to file the required reports will result in dismissal of the suit, forfeiture of any cost bond filed and an award of attorney's fees and court costs incurred by the defendant. Sec. 13.01(e).★

Do you favor a County Bar poll to rate judges and judicial candidates? The Galveston County Bar Association will soon vote on this issue, probably at its November 20, 1997 meeting. Plan to attend this meeting and voice your opinions.

Law Fax

By Greg Enos

October 23, 1997

Serving the Galveston County and Clear Lake Legal Community.
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Houston, TX 77058; (281) 286-5500; (409) 943-4300;
Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net



Trial Reports

Galveston County civil juries run amok! Imagine being rear-ended in an auto collision and the first person at your window is the county coroner! Dr. Korndorffer was found negligent by a jury in Judge Frank Carmona's court. John Powell and Christine Mangle of Pearland represented the plaintiff, a decorated Vietnam veteran, who claimed aggravation of a pre-existing neck condition and depression. Total past medical bills were \$29,039, which were mostly chiropractic and psychiatric bills. The jury awarded \$125,000 but found the plaintiff 40% at fault. Prejudgment interest will bring the total recovery to almost \$100,000 (which is a lot better than the \$25,000 U.S.A.A. had offered).

Craig Eiland can apparently charm jurors as well as he can persuade voters. A jury in Judge David Garner's court awarded a total of \$3.15 million in damages to a refinery worker who claimed toxic emissions from a nearby petro-chemical plant aggravated his asthma (the man is a heavy smoker). The jury said after the trial that it would have awarded exemplary damages if it had been given the chance

(Continued on page 2)

Attorney Tax Costs Some a Lot

The State Occupational Tax on attorneys costs each lawyer \$200 per year. Failure to pay the tax can cost a lawyer her license, as several local attorneys discovered when their names appeared on a State Bar list of suspended attorneys. The list of suspended attorneys included one judicial candidate and its arrival stopped one DWI trial in its tracks because the defense counsel was suspended.

Fortunately for those embarrassed attorneys who found themselves suspended for failure to pay the

tax, the State Bar reinstates licenses immediately upon receipt of the \$200 plus penalty and interest (thanks FedEx!).

The tax raises over \$10 million a year for the State, 25% of which goes to the Permanent School Fund and 75% to the State's General Revenue Fund.

The State Bar of Texas mails the first tax notice on May 1 and the tax is due June 1. Two additional late notices are mailed before licenses are suspended. ★

November Ballot Effects Supreme Court

The Texas Supreme Court will face deadlines just like lawyers and trial judges do if voters approve Proposition No. 12 on the November 4 ballot. The measure would amend the Texas Constitution and give the Supreme Court six months to decide on motions for rehearing, which would be automatically denied if no action is taken in 180 days.

Last week, the Supreme Court heard arguments in

an insurance bad faith case that has been pending before the high court since August 1993. The court initially voted not to grant writ of error but sat on the motion for rehearing for three years before deciding to hear the case.

Proposition No. 5 would allow the Supreme Court to hear cases in cities other than Austin.

Early voting has already started for the November election. ★

Editorial

Pro Bono is a Fact of Life

My last two years as a solo attorney have taught me many things I never learned during a decade as a pampered partner in a "big" firm with almost unlimited resources. Some things I've learned, such as how to reconcile a trust account or assemble furniture from Office Depot, have little to do with the more noble aspects of our profession.

I have learned one fact of life that every solo or small firm attorney knows: "free" or pro bono cases are an unavoidable part of the practice. Strangely, it seems that the "little lawyers" who seemingly can least afford to give their precious time away are the lawyers most likely to do so.

Our State Bar can pontificate about the need for pro bono programs but most small firm lawyers are already doing their share of free work. It is only fair to recognize the pro bono

(Continued on page 2)



Calendar

October 31

noon-5:00 p.m. (no Bar meeting on Oct. 30)

Family Law Ad Litem Seminar sponsored by the Galveston County Bar Assoc. and the Galveston Family Law Bar—San Luis Hotel, Galveston. 4.75 CLE hours applied for. Cost: \$25 before Oct. 15, \$35 after Oct. 15. Contact Kathryn Lanam for details.

Trial Reports(continued)

(Continued from page 1)

to. An election of remedies may reduce the eventual recovery.

In September, a jury in Judge Frank Carmona's court found a man guilty of burglary of a building and assessed a nine year prison term. Joe Maida was the prosecutor and Thomas "Jay" Wooten was the defense counsel.

A 14 year old was found to have engaged in delinquent conduct by a jury that heard painful evidence of kidnapping and aggravated sexual assault of a young child in Judge C. G. "Trey" Dibrell, III's court. Bill Reed represented the State and Tad Nelson represented the juvenile. Punishment of 20 years confinement was assessed by the court.★

Office Space

Houston-Clear Lake

Established law firm looking for TAX-REAL ESTATE-CRIMINAL attorney to share attractive office space.

includes receptionist, lobby, 2 conference rooms, copier, kitchen and phone system, plus referrals.

Call 281-486-5066.

Pro Bono (continued)

(Continued from page 1)

work already being done by so many without any official Bar sanction. Still, all of Galveston County's lawyers and law firms, big and small, should pitch in and participate in the Galveston County Bar Association's voluntary Pro Bono program. All of us should be able to take on one pro bono case a year (even if for some, it means one more "free" case).

There are over 480 lawyers in our county. If we all take on one pro bono case, our community and our profession's reputation will benefit. Call 409-763-0381 to sign up now!★

Law Fax October 23, 1997

Supreme Court Jury Task Force Suggests Many Changes to Texas' Jury System

The Texas Supreme Court's Jury Task Force has issued a lengthy list of recommendations which, if adopted by the Legislature and the state's high courts, would radically change how juries operate in Texas.

Two local attorneys, State Rep. Craig Eiland and Greg Enos, were part of the 105 person group appointed by the Supreme Court last year to study ways of improving the jury system. The group's suggestions will be studied by an Interim Senate committee headed by Sen. Rodney Ellis of Houston.

The key recommendations made by the group include:

- Allow less than unanimous verdicts in the penalty phases of criminal trials;
- Allow jurors to take notes under carefully controlled conditions;
- Allow judges in lengthy civil trials to permit interim summations by attorneys;
- Adopt a rule to recognize the inherent power of trial judges to limit the length of trials;
- Allow limited judicial control of voir dire by requiring a brief initial voir dire by the judge and requiring part of the attorney voir dire be done by written questionnaire. Questions that rehabilitate potential jurors would be allowed.
- Eliminate the shuffle of jurors

in most situations;

- Adopt a state-wide juror summons form;
- Study the effect of the recent law including driver's license lists in the juror pool;
- Increase the number of counties using the "one day, one trial" system of excusing jurors;
- Encourage all counties to pay attention to the comfort and convenience of jurors and address such matters as reducing waiting times and providing comfortable waiting areas;
- Increase the pay for jurors to \$40 per day starting on the second day of jury service;
- Tax jurors' pay as court costs;
- Increase jury fees to \$200 for county court and \$400 for district court trials; and
- Allow counties to offer incentives for jurors appearing at the first day call for venirepersons such as free movie passes, reduced airline fare, coupons or even possibly lottery tickets.

Many other ideas regarding juries were discussed but not accepted, including allowing questions to be posed by jurors during the trial, interim jury deliberations, changing the size of juries, or changing the number of peremptory strikes. Not all of the Task Force's recommendations were unanimous and some generated vigorous dissents.★

Albert G. Redmond and Peter J. Sapio, Jr.

formerly doing business as Houston Title - Galveston
have commenced doing business as

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CORRECTION: The fax version of last week's newsletter contained an article on a new law making it easier to enroll children of divorce in a school district where either parent lives. The cite should have been to Tex. Educ. Code Sec. 25.001(b)(2) not to the Family Code. Thanks Bill

Law Fax

By Greg Enos

October 13, 1997

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 300,
Houston, TX 77058; (281) 286-5500; (409) 943-4300;
Fax: (281) 286-9939; e-mail: enoslaw@phoenix.net



Trial Reports

Larry Tylka's client was awarded \$17,800 in a soft tissue car wreck case. Prejudgment interest and court costs will boost the total recovery to over \$25,000. Defense counsel was J. D. Bashline. Trial was in Judge Frank Carmona's court.

Jeff Kemp's client led police on a three mile chase in Bacliff before his tires were shot out. A jury in Judge Trey Dibrell's court found the defendant not guilty of DWI and Resisting Arrest but found him Guilty of Evading Arrest. The Court assessed six months of jail time, which the defendant had already served. Mario Madrid was the prosecutor.

A jury in Judge Frank Carmona's court returned a defense verdict in a suit brought for a child injured in a swimming pool by Pete Duntun and Deborah January-Bevers. Trey Taylor was the ad litem.

Kids of Divorce Easier to Enroll in School

A new law requires school districts to enroll children if either parent is a managing or possessory conservator and lives in the district, even if the child does not. Tex. Educ. Code Sec. 25.001(b)(2). ★

Courthouse News

District Clerk Lowers Cost of Non-Certified Copies

District Clerk Evelyn Wells Robison announced that her office will charge \$1.00 for the first page and \$.25 for each additional page for non-certified copies. Ms. Robison would love to hear from someone who could show her how she can avoid the \$1.00 per page charge for certified copies listed in the Government Code.

No Profanity Ordered

Judge Frank Carmona recently issued an order requiring a defendant to answer questions her counsel objected to and taxed the cost of the deposition against the defendant. The order also said, "It is further ORDERED that Defendant's counsel shall conduct themselves professionally and shall not use profanity toward anyone present in these proceedings. It is further ORDERED that Defense counsel shall issue a letter of apology to Plaintiff for use of profanity." The defense lawyer, a female

associate with a Galveston firm, wrote a brief letter of apology as ordered.

Trey Appfel Appointed to Commission on Lawyer Discipline

E. A. "Trey" Appfel, III, our former State Bar Director and past-Bar President, was appointed to a three year term on the Commission for Lawyer Discipline by immediate past President of the State Bar, Colleen McHugh. The Commission on Lawyer Discipline is a standing committee of the State Bar composed of six attorneys and six non-lawyer public members.

Incumbent Judges Face Opponents

Brian Abbington has announced he is running against County Court Judge C. G. "Trey" Dibrell, III in the Democratic primary. Family District Judge Susan Baker Olsen will face Jeff Kemp in November. Kemp filed as a Republican candidate. ★

Editorial

Join The Pro Bono Effort Now

Almost any disgruntled, fired employee willing to lie about his employer will find some law firm willing to take the case. Kids accused of murder have no problems getting legal representation. Corporate polluters and plane crash victims will always have attorneys.

But poor folks who need a divorce, a name change or an adoption in our society have a terrible time finding a lawyer to help them. If a family can barely afford the rent, it usually cannot afford an attorney to fight the landlord.

The Galveston County Bar Association has established a Pro Bono program to help our neighbors who cannot afford legal representation. Cases are screened and assigned by the Gulf Coast Legal Foundation (409-763-0381). Every lawyer reading this newsletter should call to join this worthwhile effort and agree to take just one case a year. ★



Calendar

October 31

noon-5:00 p.m. (no Bar meeting on Oct. 30)

Family Law Ad Litem Seminar sponsored by the Galveston County Bar Assoc. and the Galveston Family Law Bar—San Luis Hotel, Galveston. 4.75 CLE hours applied for. Cost: \$25 before Oct. 15, \$35 after Oct. 15. Contact Kathryn Lanan for details.

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relating to public school admission and attendance.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (b), Section 25.001, Education Code, is amended to read as follows:

(b) The board of trustees of a school district or its designee shall admit into the public schools of the district free of tuition a person who is over five and younger than 21 years of age on the first day of September of the school year in which admission is sought if:

(1) the person and either parent of the person reside in the school district;

(2) the person does not reside in the school district but a parent of the person resides in the school district and that parent is a joint managing conservator or the sole managing conservator or possessory conservator of the person;

(3) the person and the person's guardian or other person having lawful control of the person under a court order reside within the school district;

(4) ~~the person~~ the person has established a separate residence under Subsection (d);

(5) ~~the person~~ the person is homeless, as defined by 42 U.S.C. Section 11302, regardless of the residence of the person, of either parent of the person, or of the person's guardian or other person having lawful control of the person;

(6) ~~the person~~ the person is a foreign exchange student placed with a host family that resides in the school district by a nationally recognized foreign exchange program, unless the school district has applied for and been granted a waiver by the commissioner under Subsection (e); or

(7) ~~the person~~ the person resides in the school district and is 18 years of age or older or the person's disabilities or minority have been removed.

Law Fax

By Greg Enos

Sept. 2, 1997

Proving Fair Market Value With Lay Witness Testimony

Lawyers in the trials of divorce, car wreck or DTPA cases may want to prove the fair market value of a car, business or other property without using expert witnesses.

The general rule is that a lay witness may give opinions which are rationally based on the perception of the witness and relevant to a fact in issue. Tex. R. Civ. Evid. 701. Under this principle, a lay witness can testify about the fair market value of his or her own property upon a showing that the witness is familiar with the property and with similar market values. Guaranty County Mutual Ins. Co. v. Williams, 732 S.W.2d 57, 60 (Tex. App. - Amarillo 1987, no writ).

In Porras v. Craig, 675 S.W.2d 503, 504-5 (Tex.1984), the Court held that an owner of property can testify to its market value as long as the testimony shows that it refers to market value and not intrinsic value. Market value is the high-

est price a willing buyer would pay and a willing seller would accept to do business, whereas intrinsic value is personal or sentimental value not established by market forces. The Supreme Court said, "We should not be understood as retreating from the general rule that an owner is qualified to testify about the market value of his property...." *Id.* at 505.

In Mercedes-Benz v. Dickenson, 720 S.W.2d 844 (Tex.App.--Fort Worth 1986, no writ), the court followed Porras and held that a car owner is competent to testify to the sales market value of his car.

In Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Development, Inc., 915 S.W.2d 61, 71 (Tex.App.-Corpus Christi 1996, writ denied) the court held that the owner of a shrimping company could establish the value of the pumps if his opinion

(Continued on page 4)

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No-Evidence Summary Judgments

The new RULE 166a(i) on no-evidence summary judgments went into effect on September 1. In mid-August, the Supreme Court issued the final rule and a comment which is intended to guide trial courts in applying the new rule. The new rule and comment, as well as portions of two dissents are set forth below.

166a. SUMMARY JUDGMENT (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Comment to 1997 change: This comment is intended to inform the construction and applica-

(Continued on page 2)

Editorial

For Whom the Bar Polls

I just received the Harris County Bar Association's 1997 Judicial Evaluation Questionnaire. The survey's instructions tell me how to bubble in my choices on the anonymous computer sheets and warn me: "Your evaluation should be based on personal, firsthand knowledge only, not on hearsay or reputation." I am also advised that this is not a popularity contest and I am not to consult with other attorneys when completing the survey.

The questionnaire rates federal and state judges as Outstanding, Acceptable or Poor in these categories:

- Follows the law?
- Rules decisively and timely?
- Is courteous and attentive toward attorneys and witnesses?
- Demonstrates impartiality?
- Uses attorneys' time efficiently?

(Continued on page 2)



Calendar

September	4	noon	Mainland Bar Assoc.—Merchant's Bank, League City
	10	noon	Galveston County Family Bar Assoc.—Pelican Club
	25	noon	Galveston County Bar Assoc.—San Luis
	30	noon	Speaker: Justice Leslie Yates, 14th Court of Appeals Galveston Co. Young Lawyer's Assoc.—Pelican Club

New Rule (continued)

(Continued from page 1)

tion of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (Tex. Civ. Prac. & Rem. Code §§ 9.001-10.006) and rules (Tex. R. Civ. P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

JUSTICE BAKER, dissenting. [excerpt] I agree with the basic concept of a no evidence motion for summary judgment. However, I cannot agree with the rule that the Court adopts today. I am concerned that the Court ignores its

own Supreme Court Advisory Committee's recommendations and promulgates a rule of its own choosing. In doing so, the Court eliminates the balance, fairness and safeguards the Committee's recommendations provide. Consequently, I respectfully dissent....

JUSTICE SPECTOR, dissenting. [excerpt] I agree with most of Justice Baker's dissent to the rule the Court adopts today. Although the Court has made some helpful modifications to the comment, it declines to incorporate the recommendations of its own advisory committee in the rule itself. I write separately, however, because, unlike Justice Baker, I do not agree with the basic concept underlying Rule 166a(i).

As this Court has previously noted, our existing summary judgment "procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions." The Court's adoption of Rule 166a(i) effectively discards a well-developed body of summary judgment law that has been available to guide the bench and bar. Trial judges, who lack the resources available to their federal counterparts, will now be required to resolve many more pre-trial disputes without the benefit of that valuable precedent. [citations omitted]....Finally, the new rule creates a serious risk that meritorious lawsuits will be summarily dismissed. My eighteen years on the trial bench, as well as my experience on this Court, have left me convinced that truly frivolous cases are relatively rare and are readily disposed of under the existing rule. I do not believe that any marginal benefit of the new rule in these exceptional cases outweighs the constitutional rights of aggrieved citizens to seek redress. See TEX. CONST. art. I, § 15; art. V, § 10. Accordingly, I dissent. ★

Trial Reports

A defendant named "Justice" decided to plead guilty during the second day of his trial on burglary charges before visiting Judge Henry Dalehite, who assessed 20 years in TDC. Joe Maida was the prosecutor and Jim Ducote defended.

A 21 year old woman's parental rights were terminated as to her "special needs" twins in a non-jury trial before Judge Susan Baker Olsen. Ella Anderson represented the State, Terry Holmes was ad litem, and Mary Burnikell represented the mother, who still has custody of three older children.

The string of victories enjoyed by DWI defendants came to a stop recently. In the span of two weeks, three juries in County Court No. 1 found defendants guilty in DWI cases. Punishments ranged from 60 days to 6 months in jail (probated) and fines up to \$1,500. Phillip Chupik represented the State in two cases and Randy Bond was the prosecutor in the other case. Defense counsel were Gerson Bloom, John Thoma and Roger Bridgwater. There were no breath tests in all three cases, although two of the cases did have videos of the defendants. ★

Share your trial results with us by phone, fax or mail

Most trial reports in this newsletter are based on weekly fax reports from Galveston court reporters and judges.

Bar Poll (cont'd)

(Continued from page 1)

- Works hard?
- Overall rating?

The results of this survey are tabulated and shared with the public, who have no other way of knowing how a judge would score on these criteria. In Harris County, the Bar survey has become very influential in judicial fundraising and in elections, a fact that is surely not lost on the judiciary. ★

Expert Alley

Offering and Excluding Expert Witnesses

Robinson & Kelly in Court: Part 4

by Greg Enos

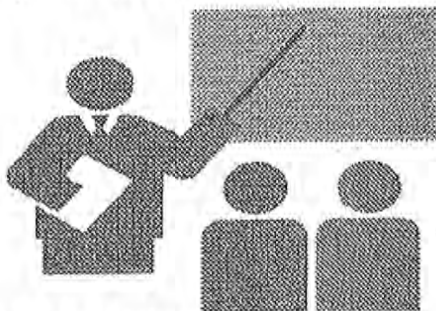
The rules for admitting expert testimony set forth in DuPont v. Robinson, 923 S.W.2d 549 (Tex. 1996) and Kelly v. State, 824 S.W.2d 568 (Tex. Crim App. 1992) seem to apply best to cases involving true science—such as chemistry—and cases where actual tests or experiments are performed. The federal grandfather of all expert admissibility cases, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) has been limited by some courts only to scientific testimony and yet applied by other courts to non-scientific expert opinions.

This article (the fourth in a series) focuses on whether Robinson and Kelly apply to the social sciences, such as psychology, or to doctor's opinions based primarily on experience and diagnostic logic, or to an accountant's opinions of a business' market value.

Robinson would appear to apply to all expert testimony, since it analyzes Tex. R. Evid. 702 that relates to, "scientific, technical or other specialized knowledge..." However, the standards for determining whether expert testimony is reliable are all phrased as a test of "scientific...knowledge" or "scientific technique" or "scientific evidence." The majority opinion in Robinson defends itself against a dissent that says judges should not be forced to play amateur scientist and assess scientific reliability. Robinson clearly dealt with areas of classic science, chemistry and biology. In short, Robinson would appear to apply only to scientific expert testimony.

In S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996), the Supreme Court ruled that "repressed memories" of

childhood sexual abuse do not toll the statute of limitations. The admission of expert testimony was not at issue but the reliability of psychological testimony on repressed memories was. In a concurring opinion, Justice Cornyn argued that the behavioral sciences cannot be readily evaluated using the factors applied in Robinson. He quoted a law review article that pointed out that Rule 702 also cov-



ers the technical testimony of experts such as attorneys, historians and musicians, who clearly do not offer scientific testimony. Cornyn stated that Robinson simply cannot be read to exclude testimony from any expert discipline that is incapable of being empirically tested. In response, Justice Gonzalez, who authored the Robinson opinion, wrote a concurring opinion on the motion for rehearing in R.V. v. S.V. and stated the court's intent in Robinson was to provide, "a standard for the reliability of expert testimony about anything characterized as science." *Id.* at 42. Justice Gonzalez would include psychology's study of repressed memories in his definition of science. Gonzalez recognized the need to develop a standard or filter apart from Robinson to judge the validity of expert testimony based on the social sciences and recommended the Supreme Court Advisory committee study the issue and recommend a rule change.

The Texas Court of Criminal Appeals ruled in Hartman v. State, 946 S.W.2d 60 (Tex. Crim. App.

Law Fax Sept. 2, 1997

1997) that its Kelly test for the admissibility of expert testimony applies to all scientific evidence offered by an expert, not just novel theories of science (a point made by Justice Gonzalez in his concurring opinion in the recent Havner opinion).

The federal courts of appeals have split on whether Daubert (upon which Robinson is based) applies to non-scientific testimony. see e.g., Thomas v. Newton Int'l Enters., 42 F.3d 1266, 1270 (9th Cir. 1994) (Daubert does not apply to longshoreman testifying about boat's unsafe condition); Cummings v. Lyle Industries, 93 F.3d 362 (7th Cir. 1996) (Daubert applied to industrial engineer's opinions about product design). The Fifth Circuit seems somewhat confused on the subject. In U.S. v. 14.38 Acres, 80 F.3d 1074 (5th Cir. 1996), the court held Daubert did not apply to an expert real estate appraiser. Yet, in Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994), the court said Daubert applied to the admissibility of an economist's testimony.

Until further clarification is received from on high in the form of a rule change or more specific opinions, it appears that the Robinson standard for evaluating the reliability of expert testimony applies only to testimony based on science. Two weeks ago, the Corpus Christi Court of Appeals in Dico Tire, Inc. v. Cisneros, ruled that Robinson does not apply to the testimony of an engineer explaining why the design of a front-end-loader's tire was defective. The court stated that Robinson applies to scientific evidence, not testimony derived from specialized knowledge or technical expertise.

Psychologist

It is fair to assume that Robinson would apply to the testimony of a psychologist. In America West Airlines, Inc. v. Tope, 935 S.W.2d 908 (Tex. App. - El Paso 1996, no writ), the exclusion of a clinical social worker's testimony about the plaintiff's post-traumatic stress disorder was upheld. The Court of Appeals unequivocally applied Robinson and found the psychological testimony unreliable (no MMPI was performed, etc.). Jordan v. State, 928 S.W.2d 550 (Tex. Crim.

(Continued on page 4)

Lay Opinions (cont'd)

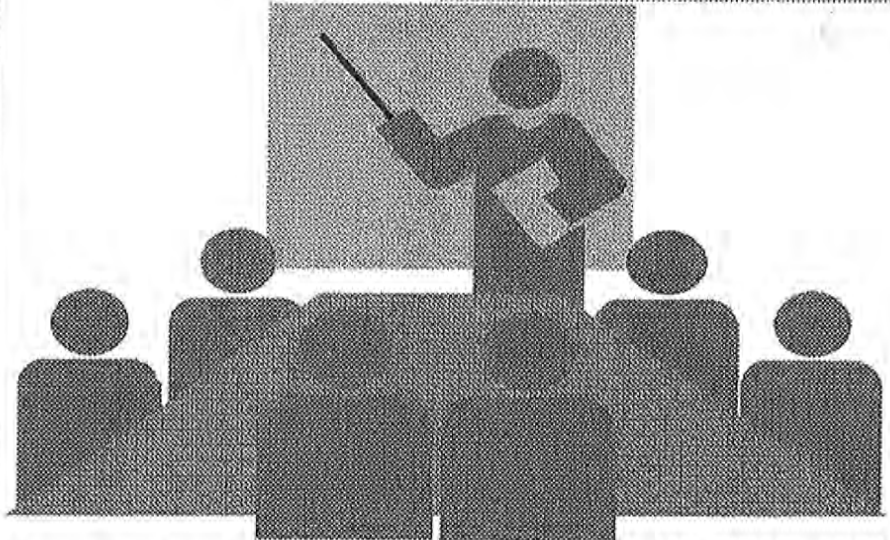
(Continued from page 1)

was based on fair market value. In LaPrade v. LaPrade, 784 S.W.2d 490, 492-93 (Tex. App. --Fort Worth 1990, writ denied), a lay witness was allowed to testify about the value of a business.

The court in Hochheim Prairie Farm Mut. Ins. Ass'n v. Burnett, 698 S.W.2d 271 (Tex. App. --Fort Worth 1985, no writ) held the trial court did not abuse its discretion by admitting lay testimony about the market value of a rent house. The court concluded the testimony was helpful in determining a fact in issue. The witness in Burnett based his opinion on his familiarity with rent houses.

Rent Cars & Repair Costs

A lay witness was allowed to testify what it would cost to lease a car in Star Houston, Inc. v. Kundak, 843 S.W.2d 294, 298-9 (Tex. App. --Houston, (14 Dist.) 1992). A witness who familiarizes himself with the reasonable car repair costs in a given county can give his opinion about what those costs might be. International Serv. Ins. Co. v. Hanna, 515 S.W.2d 175, 176 (Tex. Civ. App. --Eastland 1974, no writ). The issue is whether the party testifying about the cost of car repairs knew what a reasonable charge was. McMahan v. Musgrave, 229 S.W.2d 894, 898 (Tex. Civ. App. --Eastland 1950, writ dismissed). Coker v. Burghardt, 833 S.W.2d 306 (Tex. App. --Dallas 1992, writ denied) involved a car owner suing a towing company for damages to his car. The car owner testified to the reasonable cost to repair his car based on visits to various repair shops. The testimony was admitted over the towing company's hearsay and lack of expert qualification objections. The court of appeals ruled that the evidence was admissible because Rule 701 of the Rules of Civil Evidence permits a lay witness opinion if the witness bases his opinion on his perception and if his opinion helps in determining a fact in issue. The Coker court held that lay witness opinion testimony on the cost to repair a car could be based on hearsay, the key issue being whether the witness knew what a reasonable charge was. ★



Experts (cont'd)

(Continued from page 3)

App. 1996) applied the Kelly analysis to a psychologist's testimony about eyewitness identification. In the future, the Robinson test may be changed or limited somewhat to better fit the social sciences. Under the current Robinson test, however, few opinions of psychologists would seem to pass the reliability test.

Physician

Clearly, the scientific part of a doctor's opinions would be governed by the Robinson test. Thus, testimony that a low speed, rear end collision can cause injury to the human neck would be covered by Robinson. On the other hand, a physician's opinion that a patient seemed sincere and genuinely in pain would probably not be subject to Robinson because it is based on personal observation and opinion, not science.

The expert testimony of most medical doctors is based in part of medical science and part on experience and logic. Some courts have held that Daubert does not apply to expert opinions based on training and experience. see e.g., Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996), cert. denied, 117 S.Ct. 611 (1996).

Even if part of a physician's testimony might be excluded under Robinson, other parts may be admissible as reliable or because it is not scientific testimony or because it is based on personal opinions,

which even a lay witness could give.

Accountant

One could certainly argue that business valuation is not a scientific endeavor and Robinson would not apply. However, it is likely that some future court will rule that the trial court must still make a preliminary determination that the accountant used generally accepted methods and applied them correctly to the business at issue. One federal circuit court has held that Daubert does not apply to accountants. Tamarin v. Adam Caterers, Inc., 13 F.3d 51 (2nd Cir. 1993).

Conclusion

The specific tests for the admissibility of expert opinions laid down in Robinson and Kelly probably only apply to scientific testimony. However, it is fair to assume that the current high courts are likely to eventually fashion some other generalized tests for reliability that will be applied to all experts before they are allowed to testify. Remember, even if Robinson or Kelly does apply, the question then becomes whether the testimony is reliable.

For the time being, lawyers should make detailed objections to the reliability of all experts and the proponents of expert testimony should meet such objections with all available evidence and arguments that the opinions are reliable and trustworthy. ★

Next Issue: Specific Practical Tips on Offering and Excluding Experts. in DWI and Divorce Trials.

Law Fax

By Greg Enos

August 15, 1997

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Trial Reports

Joe Jamail settled his helicopter case for a confidential amount after two weeks of trial in the 56th District Court.

John Thoma's client was found Not Guilty of DWI charges in Judge Mary Nell Crapitto's court. There was a video of the defendant but no breath test. Michael Elliott was the prosecutor.

A local plastic surgeon won a medical malpractice case in Judge Frank Carmona's court. Mike Mallia of Houston represented the unsuccessful plaintiff, who complained that her abdominoplasty left too much loose skin on her stomach. She also felt slighted because the surgeon did not build her a new belly button.

A hung jury could not agree on the guilt of Rhonda Hernandez' client who was accused of theft in County Court No. 2 before Visiting Judge Ron Wilson. Mario Madrid represented the State.

Bob Clements and Sondra Kaighen did battle in an unusual divorce trial in July in Brazoria County. The wife said her husband beat her and hid money. The husband said she fell attacking him and broke her arm. He also

(Continued on page 2)

New Federal Tax Law Effects Lawyers

Estate Planning Changed

The new tax law signed by President Clinton changes the current \$600,000 estate tax credit to \$625,000 next year and eventually to \$1 million by 2006. Wills that use general language taking advantage of the "available estate tax credit" probably do not have to be changed.

Congress also enacted a temporary \$1.3 million estate tax credit for family owned businesses.

P.I. Lawyers Face Tax Hassles

Personal injury lawyers will face additional tax reporting requirements beginning in 1998. Currently, if State Farm pays \$15,000 to settle a car wreck, the lawyer only reports her \$5,000 fee as income. Under the new law, the attorney would report the entire \$15,000 and then provide proof of what was paid to the client. Insurance com-

panies will start issuing 1099's on settlements, so have your tax i.d. number handy when a case settles. The IRS will issue new forms this Fall for reporting settlement payments.

Home Office Deduction Easier

Congress overruled the U.S. Supreme Court and made it easier to obtain a deduction for a home office.

A deduction would be allowed when a taxpayer uses a home office for "the administrative or management activities of any trade or business" as long as there is no other fixed place where substantial administrative or management activities are regularly conducted.

The home office deduction can include a pro rata share of the home's mortgage payment, utility bills and other expenses.

The new deduction will become available after December 31, 1998.★

Editorial

How Would You Rate?

Rate Your Lawyer:
OUTSTANDING

- Goes the extra mile for the client
- Takes pride in work
- Shows a sense of caring for justice in the matter
- Advises against unethical practice even though it may be legal
- Shows sincere regard for the fact that lives are involved
- Is willing to report judge or other lawyers who engage in serious misconduct

SUBSTANDARD

- Seems more concerned in obtaining client's money or property than in defending client's rights
- Keeps client in the dark about significant developments in the case
- Fails to adequately explain client's rights
- Fails to prepare client for hearing or trial

Excerpt from *Divorced From Justice: The Abuse of Women and Children by Divorce Lawyers and Judges*.★



Calendar

August
September

18-21
1
25

State Bar Advanced Family Law Seminar in San Antonio

Labor Day—Courthouse closed

noon County Bar Association—San Luis

Justice Leslie Brock Yates of the 14th Court of Appeals will speak on the new appellate and summary judgment rules.

Expert Alley

Offering and Excluding Expert Witnesses

Supreme Court Ups Scrutiny of Experts

by Greg Enos

Some liked the Texas Supreme Court's recent decision in *Merrell Dow Pharmaceuticals v. Havner* and some did not. The lawyer who represented the plaintiffs said in his motion for rehearing, "Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine and this Texas Supreme Court." Of course, he was entitled to be a little sore since the 8-0 decision erased an \$3.75 million judgment (that had been reduced from the \$33.75 million awarded by the jury).

Havner is an extremely detailed application of the new rules for admitting expert testimony in Texas civil cases set forth in *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1996).

The jury in *Havner*, which ended up awarding \$3.75 million in actual damages and \$30 million in punitive damages, heard five of the plaintiff's expert witnesses testify that the mother's use of Bendectin during her pregnancy caused her daughter to be born with incompletely formed limbs. The trial

judge allowed the experts to testify and apparently found them credible because he entered judgment for the plaintiffs. The Court of Appeals affirmed the award of actual damages but the Supreme Court concluded that the expert's opinions were not based on reliable scientific evidence.

Following the eternal principle that bad facts make bad law, the Supreme Court noted that the



same experts had testified many times before in Bendectin cases and that no plaintiff had ever ultimately prevailed in federal court in Bendectin cases.

In ruling that there was not sufficient evidence to support the jury's award, the Supreme Court had to deal with the fact that five admittedly well qualified experts testified that Bendectin can cause limb defects and one said it probably did cause Kelly Havner's birth defect. The Court held that a reviewing court must not simply accept an expert's opinion as evidence and on appeal should independently evaluate the underlying data to determine if the opinion is scientifically valid. The Court said, "If the expert's scientific testimony is not reliable, it is not evidence."

The *Robinson* analysis used to determine the admissibility of expert testimony was then applied in a "no evidence" review of the scientific evidence.

The court went on for pages discussing the use of epidemiological studies and concluded that scientifically valid studies which

Law Fax August 15, 1997

demonstrate at least a doubling of the risk of developing a disease as a result of the chemical exposure can be some evidence of causation. However, the Court ruled that it would take more than just one such study and the plaintiff would have to be similar to those in the study who developed the disease. Reviewing courts are directed to evaluate how each study was done to see if it was scientifically sound.

All of the plaintiff's experts were assailed because none of their findings had been published in a peer reviewed journal and had never been offered outside the confines of a courthouse.

The reasoning of each expert was then minutely scrutinized and eventually held to be unreliable. For example, one expert relied on animal studies but the Supreme Court ruled that there was no showing how a study involving high dosages given to rabbits applied to humans. Another expert pointed to in-vitro studies of how Bendectin effects animal limb bud cells in a dish but the Supreme Court found no explanation for extrapolating those findings to human beings.

In summary, the Supreme Court ruled that a qualified expert's opinion is no evidence unless the data underlying the opinion are sound and the conclusions are logically drawn from the data. *Robinson* now provides the test for admissibility of scientific evidence as well as the test for "no evidence" attacks on appeal.

Justice Spector concurred in the result but complained that the ruling's "ambitious scientific analysis" was not appropriate for judges who are not scientists and provided no practical guidance outside the context of what is now clearly suicidal Bendectin litigation.

The opinion did not explain how a busy trial judge with no scientific training is supposed to evaluate scientists' reliance on complicated studies or somehow find time for pre-trial *Robinson* hearings that could take days to complete. Most importantly, the Supreme Court has yet to say how to evaluate the sort of expert testimony commonly heard in courtrooms as given by treating medical doctors, accountants or design engineers. ★

Trial Reports (cont'd)

alleged she locked him in the bedroom at night, insisted on going with him to the restroom, made him conduct all phone calls on a speaker phone and asserted he had a radio in their trash cans that was used to signal his girlfriends. The wife, represented by Clements, made a claim for damages and maintenance, which was denied. Her request for a disproportionate property division was also thwarted as Judge Bass rendered a roughly even property division. ★

Law Fax

By Greg Enos

July 31, 1997

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Trial Reports

A jury in Judge Susan Olsen's court voted 10-2 to make a 9 year old girl's father sole managing conservator instead of the child's 21 year old uncle (her mother is deceased). Sheelah Wooten represented the father and Bill De La Garza represented the uncle.

Now that is deviant sex! A press release from the D.A.'s office summarizing a conviction of a Texas City police officer for soliciting prostitution from a undercover Galveston policewoman stated, "...an audio tape indicated that XXX discussed having sexual intercourse and deviate sexual intercourse with her, as well as a nearby hotel." Anyone who would even suggest sex with a hotel is a true deviant!

Never trust an eyewitness! An ex-school teacher charged with solicitation of prostitution in Judge Mary Nell Crapitto's court argued that the male undercover cop exposed himself to the defendant. The defendant's claim that the cop's private parts had more skin than normal was refuted by a female physician, who examined the officer and testified he was neatly circumcised. The doctor was the wife of an assistant D.A. not involved in the case. ★

Courthouse News

Judge Carmona Will Seek Reelection

Judge Frank Carmona has confirmed that he is definitely going to seek reelection next year. Other incumbent judges planning to run again are Family District Judge Susan Olsen (who has a fund raiser in League City on August 1) as well as County Court Judges Mary Nell Crapitto and Trey Dibrell.

District Judge Roy Engelke plans to finish out his term but will not seek reelection. The field to replace Judge Engelke now includes Elisa Vasquez, Susan Criss and Bob Moore.

Probate Judge Jerome Jones has not announced his election plans.

Judge Lerner Receives Award

Retired Judge I. Allan Lerner received the 1997 Samuel Pessarra Outstanding Jurist Award in recognition of his contributions to the legal field.

Courts Building Bond Issue Off

There will not apparently be a bond election this November to fund construction of a new courts building next to the current court house. County Commissioners are convinced voters would reject a bond issue. Other means of financing the building as well as badly needed improvements to the court house are under study.

Library Remodeling to Start Soon

As soon as Terry Holmes removes the hundreds of out-of-state law reporters he bought, the remodeling of the County Law Library will begin. Plans call for a large meeting room and work carrels for lawyers.

Neumann Joins Hagood

Gene Hagood has joined forces with William "Bill" Neumann to form Hagood & Neumann. Neumann used to work with what is now The Krist Law Firm. ★

Editorial

Lawyers As Consumers

Lawyers should be smart consumers for themselves and their clients. For example, there is a wide range in prices charged by court reporting firms for depositions. I use Sullivan Litigation Services, which charges about 20% less than most of its competition and always provides great service. I could pay some Houston reporting firms up to 25 cents more per page for basically the same product.

Apparently some court reporters do not like the thought of attorneys choosing among them based on price competition. Some time ago, I had requested detailed rate information from a dozen court reporting firms for an upcoming article comparing prices. Several reporting firms sent me their rate information, but some refused to cooperate.

I learned last week that my request for rate information was discussed at a meeting of Houston reporters and the

(Continued on page 2)



Calendar

August	1	4:30 p.m. Judge Olsen Fundraiser & Birthday Fiesta—League City
	18-21	State Bar Advanced Family Law Seminar in San Antonio
September	1	Labor Day—Courthouse closed
	25	noon County Bar Association—San Luis

Expert Alley

Offering and Excluding Expert Witnesses

Daubert, Robinson & Kelly in Court

by Greg Enos

The new tests for determining the admissibility of expert witnesses are designed to insure scientific testimony is relevant to the facts of the case and has a reliable basis even before it is presented to the jury. This article focuses on civil cases under *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1996) but it is also generally applicable to criminal proceedings following *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

So, how do lawyers successfully offer or exclude expert testimony now?

First, a challenge must be made, usually in the form of a written motion and then a hearing is held outside the presence of the jury. The Daubert/Robinson hearing probably should be done before trial starts. The Robinson opinion at page 558 says, "the judge can freely ask questions at a preliminary hearing." Clearly, an evidentiary hearing with live witnesses on the record is envisaged.

Once a challenge has been made to expert testimony, the proponent of that testimony has the burden of

demonstrating its admissibility, Robinson at 557.

A lawyer seeking to admit expert testimony should go first at a preliminary hearing because she has the burden of proof. In most cases, the expert witness would be called as a live witness but presumably deposition testimony could be offered.

A Daubert/Robinson hearing is supposed to be, "a flexible inquiry



focusing solely on the underlying principles and methodology, not on the conclusions they generate." Id. The relevance of the proposed expert testimony should also be explored if it is attacked on those grounds. An expert's qualifications might also be attacked at the preliminary hearing. see e.g., *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996) (ER physician not qualified to testify about neurosurgery).

The Robinson opinion quoted with approval an earlier 5th Circuit case that held that if the expert's methodology is well founded, the expert's conclusion is irrelevant to the preliminary inquiry, even if the conclusion is controversial or unique. Id. (citing *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1111 (5th Cir. 1991).

Thus, the real purpose and focus of a Daubert/Robinson hearing is the methodology and not the conclusion.

The proponent of the expert testimony should establish the expert's qualifications and prove the methods used by the expert were reli-

able.

Failure to use the scientific method may support exclusion of an expert's opinions. In Robinson, the trial court's decision to exclude the expert was upheld because:

- he did not consider and rule out other possible causes of the damage;
- he reasoned from an end result (Benlate killed the plaintiff's plants) instead of reasoning from known facts to reach a conclusion;
- his research and opinions were conducted and formed for the purposes of litigation; and
- his method had not been subjected to peer review or publication.

Not all of the six factors listed in Robinson will apply in every case. Indeed, the Supreme Court in Robinson specifically said that the six factors it listed are nonexclusive and, "the factors a trial court will find helpful...will differ in each particular case." Id. at 557.

Robinson seems to apply best to cases involving true science—such as chemistry—and cases where actual tests or experiments are performed. The next article in this series will address whether Robinson applies to the social sciences, such as psychology, or to doctor's opinions based primarily on experience and diagnostic logic.★

Office Share Space

This Clear Lake Law Firm has an office that offers an outstanding view, receptionist, two conference rooms, phones and office equipment usage. Attorneys will need their own computers and be prepared to do their own work, including the generation of all legal documents. Phone and filing support will be provided. Contact: Sheri Y. Dean (281) 333-8456.

Associate Position

Associate position open in Clear Lake Law Firm, preferably for and attorney with portable business already in place. Attorneys interested in areas of the law other than Family Law and Social Security are welcome! For additional terms and details, contact: Sheri Y. Dean (281) 333-8456.

Lawyers as Consumers

(Continued from page 1)

group agreed not to disclose their rates for publication.

Law firms should have access to the rates charged by different reporting firms so that price, as well as service, can be a factor in intelligently choosing court reporters and record services. It is ridiculous for record services to charge 50 cents per page on top of a \$50 service fee for copies of records another lawyer has already paid top dollar for. Attorneys should demand and get reasonable prices for their clients.★

Law Fax

By Greg Enos

July 1, 1997

People Who Deliver Justice: A Series

Evelyn Wells Robison: A Courthouse Career

Many people make sure our justice system works. However, no one would accomplish anything in the courthouse if there wasn't a professional, dedicated manager of the mountains of paper which legal work generates.

Galveston County District Clerk Evelyn Wells Robison oversees a staff of 43 which handles hundreds of hundreds of thousands of documents relating to an average of 1352 civil, 656 tax, 2601 family, 414 juvenile and 1861 criminal cases filed every year in this county.

Each month, the District Clerk's office processes over 20,000 child support checks and mails out 3,200 jury summons. Robison's office receives hundreds of pieces of mail every day and is custodian of over \$2 million in funds held in court registries. In 1996, over \$800,000 was paid to the District Clerk's office for fil-

ing fees, which helped reduce the tax dollars needed to finance the court system.

District Clerk Evelyn Wells Robison is proud of a 33 year career in the Clerk's office and very conscious of the office's vital role in the justice system's efficient operation.

"Our goal is to provide the best, most efficient ser-

(Continued on page 2)



Galveston County District Clerk Evelyn Robison

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 300,
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Editorial

What Makes A Good Judge?

Lawyers are starting to line up to run for several judicial openings, real and imagined. Incumbent judges are planning their reelection efforts. The voting public will know almost nothing about the candidates or the jobs they seek. We, as local attorneys, will know most of the candidates quite well and we all think we know what a judge is supposed to do. We therefore have a duty and an opportunity to educate the public about what judges do and which candidates are (or are not) qualified to hold judicial office.

My idea of a good judge includes:

- Knowledge of rules of evidence and procedure;
- Knowledge of substantive law;
- Gives all sides a full and fair hearing;
- Efficiently manages his/her docket;
- A hard worker who puts

(Continued on page 3)

Bar News

Bush Veto Sinks New District Court

Gov. Bush vetoed a bill that would have created 15 new district courts, including a new court slated for Galveston County. Bush objected to the bill because the new judgeships would have been filled by election rather than by gubernatorial appointment.

New Legal Secretary Group Formed

The newly formed Legal Secretaries of Galveston County held its first organization meeting June 3. Lori Wilson from Neves & Crowther was elected President. The group will meet on the first Tuesday of every month at Clary's.

Bill De La Garza Wins Award

Bill De La Garza is the 1997 recipient of the Gulf Coast Family Law Specialists Association *David A. Gibson Award* for professionalism and excellence in the practice of Family Law.

Marcus Truscott Foundation

The Marcus Truscott Foundation honors the memory of a special young man and funds youth scholarships. Send donations to 371 Hwy 3, Suite D, Dickinson, Texas 77539.

★

County Bar Elects Officers

At its July 2 meeting, the Galveston County Bar Association elected: David Salyer, President-elect; Greg Enos, Secretary; Dennis Bettison, Treasurer; Directors: Darrell Apffel,

Janet Rushing, Russ Burwell III, John Buckley and Doryn Glen. Susan Criss assumed the office of President. The next bar meeting is in September.

Robison (continued)

(Continued from page 1)

vice possible," Robison says. "When you are a public servant, that's what you are—a person serving the public." Robison expects her employees to be knowledgeable and friendly and not act like the usual government bureaucrat.

Robison acknowledges that attorneys are her office's primary consumers and she is keenly aware they are sometimes hard to please. "If you have a complaint, complaining to other attorneys won't solve the problem," Robison stated. She encourages lawyers with problems or suggestions to come directly to her and take advantage of her "open door" policy.

A Galveston native, Robison first went to work in the courthouse in 1958 in the records department of the Public Welfare Office. In 1964, she went to work for then District Clerk H. H. Treacchar. In 1973, Robison became V. J. Beninati's Chief Deputy, replacing Roy Engelke, who went into private practice as a lawyer. When Beninati died in 1992, the District Judges appointed Robison his temporary successor. She immediately had to run for election in 1992 to fill out his term and then seek reelection in 1994. Robison intends to run again in 1998.

Robison hopes to soon implement an optical imaging system to allow remote, computer access to court documents. She is proudest of her staff's efforts to streamline processing of child support checks and improvements in how citizens are called for jury duty. ★

Trial Reports

Larry Tylka turned down a \$6,000 offer and convinced a jury in Judge David Garner's court to award his client \$45,385 even though the plaintiff testified he was a licensed attorney but then admitted he was not after the defense lawyer called the State Bar.

James Healey danced around a blood test showing his client had a .117 blood/alcohol level and persuaded a jury in Judge Mary Nell Crapitto's court to return a "Not Guilty" verdict. Kerri Foley Garcia was the prosecutor. There was no breath test.

A defendant who hired State Rep. Craig Eiland as local counsel still lost a big verdict in Judge Norma Venso's court. A jury awarded \$341,000 to the parents of a man shot and killed during a carjacking at a Dickinson apartment complex. E. A. "Trey" Apffel, III and Tal Hammock represented the plaintiffs.

Case Reports

Sleep easy Mr. Kaye! A lawyer cannot be sued by her client's opponent for conduct in litigation. *Renfro v. Jones & Assoc.*, __ S.W.2d __ (Tex. App. - Ft. Worth 1997, writ __).

Bad news for naughty billers. The statute of limitations for suing lawyers for fraudulent billing is four years. *Sullivan v. Brewer*, 943 S.W.2d 477 (Tex. App. - Dallas 1995, writ __) (just published!)

A divorce judgment rendered orally has res judicata effect where the husband died before a written judgment could be signed. Sorry

lady, you're divorced and not his widow! *Dearing v. Johnson*, __ S.W.2d __ (Tex. App. - 6th 1997, writ __).

Drug dealers: buy auto insurance! Confiscation by police of an innocent buyer's car is covered as an "accidental loss" under the standard auto policy. *State Farm v. Kelly*, __ S.W.2d __ (Tex. App. - Austin 1997, writ __).

The Fifth Circuit recently approved a very sneaky way to avoid removal to federal court. 28 USC 1446(b) requires removal within 30 days of the defendant receiving the lawsuit "through service or otherwise." In this case, the plaintiff's attorney mailed the defendant's CEO a file stamped copy of the suit and waited 2 months before obtaining service. The court ruled the removal clock started ticking when the president got his copy. *Reece v. Wal-Mart*, 98 F.3d 839 (5th Cir. 1996).

A lawyer lost her appeal and got referred by the San Antonio Court of Appeals to the Grievance Committee when she wrote in her motion for rehearing, "politics should not win the day over incapacitated rape victims" and "it must be embarrassing to take such a pro-rapist, pro-big-business-insurance-defense firm position with so appallingly non-existent legal or logical basis." *In re Maloney*, __ S.W.2d __ (Tex. App. - S.A. 1997).

A death sentence was reversed because the State struck male veniremembers under age 30 for fear they would empathize with the defendant. The *Batson* challenge should have been granted. *Fritz v. State*, __ S.W.2d __ (Tex. Crim. App. 1997). ★

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Expert Alley

Offering and Excluding Expert Witnesses

The Basics: *Daubert* *Robinson & Kelly*

by Greg Enos

The rules on admitting expert testimony have changed for civil and criminal cases. Judges now serve important, pre-trial "gate keeper" roles for determining the admissibility of expert testimony. What was once inadmissible may now be presented and what was formerly routinely admitted may now be excluded. For example, it is arguable that polygraph test results can be admitted whereas "touchy, feely" testimony from child psychologists in custody cases may have to be excluded.

The U.S. Supreme Court got the current trend started in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and actually liberalized the use of expert testimony. The Court rejected the 70 year old *Frye* requirement that expert testimony be founded on generally accepted scientific principles. Ruling that the Federal Rules of Evidence supplanted *Frye*, the Court imposed on trial courts the duty to determine whether offered expert testimony is: (1) based on scientific knowledge—i.e.—RELIABLE and (2) will assist the trier of fact to understand or decide a fact in issue. Reliability is to be determined by looking to see if the testimony is based on known scientific facts or is derived using the scientific method. The Court provided the famous *Daubert* factors for determining reliability: (1) whether a technique or theory has been or can be tested, (2) whether it has been subject to peer review or publication, (3) the known or potential error rate, and (4) whether the theory or technique has gained general acceptance in the field. The Court emphasized that many other factors may also bear on the inquiry. It made it clear

that publication in peer reviewed journals is not a prerequisite for admissibility but merely a factor to consider.

The Texas Supreme Court adopted *Daubert*, but went even further in toughening the standards for expert testimony in *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Trial courts must determine if proposed expert testimony meets Tex. R. Evid. 702's requirement



that it be relevant and reliable and should consider the following non-exclusive list of factors:

- The extent to which the theory has been tested;
- The extent to which the technique relies on the subjective interpretation of the expert;
- whether the theory has been subject to peer review or publication;
- The technique's potential error rate;
- Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- The non-judicial uses which have been made of the theory or technique.

If the trial judge decides the offered expert testimony is relevant and reliable, the Supreme Court also noted that he or she could still exclude the testimony if its probative value was outweighed by danger of unfair prejudice, confusion of the issues, misleading the jury or because of undue delay or need-

less presentation of cumulative evidence. A trial court's ruling on admitting expert testimony is evaluated on appeal under the "abuse of discretion" standard.

The expert whose testimony was excluded in *Robinson* was criticized for not evaluating other potential causes and not following the scientific method in reaching his opinions.

The Texas Court of Criminal Appeals in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) had earlier set forth its own set of non-exclusive criteria for expert testimony in criminal cases: (1) the extent to which the theory or technique has been accepted as valid by the relevant scientific community, if such a community can be ascertained, (2) the qualifications of the expert, (3) the existence of literature supporting or refuting the theory or technique, (4) the potential error rate, (5) the availability of other experts to test and evaluate the technique, (6) the clarity to which the theory or technique can be explained to the court, and (7) the experience and skill of the person who applied the technique.

NEXT ISSUE: *Applying Robinson and Kelly in the courtroom.*★

(Continued from page 1)

Good Judges (continued)

- the needed hours,
- Embodies ethics and integrity,
- Treats jurors, witnesses, parties and lawyers professionally,
- Remembers what it was like to be a busy, practicing lawyer and is reasonable with deadlines and merciful with those who occasionally run late for hearings, and
- Is "middle of the road" and isn't viewed as pro-defense or pro-State or pro-anything, and almost always lets litigants leave their courtroom feeling they at least got a fair hearing.

The Galveston County Bar Association should conduct a survey of its members next January rating all candidates for judicial office along these lines to inform the public and hopefully insure that we can continue to have good judges.★

Law Fax

By Greg Enos July 1, 1997



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Tired of all of the questions and complaining from lawyers who no longer receive my newsletter by mail like they used to, I want to make it clear:

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Calendar

July 9
11

noon Galveston County Family Bar Assoc.—Pelican Club
noon Criminal Defense Lawyers—Dibella's, Galveston

No meetings in July: County Bar Assoc., Young Lawyers

If space permits, we will run your firm's professional announcements free of charge.

Law Fax

By Greg Enos

June 10, 1997

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Bar News

New Court Created

A bill awaiting Governor Bush's signature will create the new 398th District Court for Galveston County. The new court will have general jurisdiction after it was amended at the request of Galveston Representative Patricia Gray.

Originally, the amendment adding the 398th to the bill provided that it would give preference to family law cases. However, after six of Galveston County's Judges wrote legislators saying the new court should have general

jurisdiction, Gray had the bill amended. The new court will be filled by election next year.

Another bill that passed, HB 3541, changes the name of Judge Jerome Jones' court to "The Probate Court of Galveston County."

The Legislature's new budget provides for a \$7,000 a year pay raise for District Judges, who will be paid \$99,685 annually in Galveston County.★

Editorial

Appreciate Our District Clerk

A recent trip to Houston to get a divorce petition filed and a TRO issued made me appreciate the work of the Galveston County District Clerk's office even more than usual. Unlike Houston, our clerks are almost always friendly and helpful and seldom lose court filings. Given the staggering amount of suits and motions, our District Clerk's office does a great job. Thanks Evelyn!

Stealth Court Needs Explaining

Someone needs to answer questions about the family district court that was almost created before any judges or lawyers knew about it. It is hard to imagine how our legislators could consider creating a new court without consulting our current judges, the local bar or even county commissioners. Once news spread about the proposed family court, the furor caused the bill to be amended. So really, what gives?

County Bar to Elect Officers July 2

The Galveston County Bar Association will not meet on the last Thursday of June because of the State Bar convention. Instead, our local Bar will meet on Wednesday, July 2 at the San Luis to elect officers. Nominees are:

President: David Salyer, Larry Tylka

Secretary: Greg Enos, Jeff Kilgore

Treasurer: Dennis Bettison, Jeff Kemp

Directors (5 are elected): Darrell Apffel, Chris Bertini, John Buckley, Russ Burwell III, Pat Doyle, Doug Foster, Carlos Garza, Doryn Glen, William King and Janet Rushing.

The Bar resolution on pro bono service will also be discussed and voted on.

Local Attorneys Get Board Certified

Three local lawyers were awarded Board Certification by the Texas Board of Legal Specialization. Tad Nelson and Stephen Tay-

(Continued on page 3)

NEWSLETTER NEWS

I apologize for being late in getting out my usually-twice-a-month newsletter. I was just too swamped moving my law offices, writing a brief and enjoying the end of school with my children. I'll try to be more regular in the future.

Want on the Fax/Mailing Lists?

I fax this newsletter to about 300 attorneys at fifty firms with 2 or more lawyers. I also put about 150 copies at the courthouse. I also mail copies to retired judges and Justices on the Houston Courts of Appeals. Lawyers who want to receive the *Law Fax* by mail should send me \$8 to cover a year's postage. Contact me if you want to get on the fax or mail list. Greg Enos.



Calendar

June	11	noon
	13	noon
	24	noon
	25-28	
July	2	noon

Galveston County Family Bar Assoc.—Pelican Club
Criminal Defense Lawyers—DiBella's
Galveston Co. Young Lawyer's Assoc.—Pelican Club
State Bar Convention in Houston
Galveston County Bar Assoc.—San Luis

Case Notes

In Texas criminal cases, the *Kelly v. State* standard for determining if scientific evidence is admissible applies to all scientific evidence, including the results of an intoxilyzer test. The Court of Criminal Appeals rejected the argument that the *Kelly* test only applied to novel scientific evidence. *Hartman v. State*, ___ S.W.2d ___ (Tex. Crim. App. 1997).

What's a trial judge to do? In the middle of a custody case, a lady juror tells the judge she has developed an extreme dislike of the husband (who reminds her of her daughter's sorry ex-husband). The juror says she can't be fair or impartial to the husband and has in fact developed a skin rash because of her extreme bias against the husband. The judge excuses the juror and then denies the husband's motion for mistrial because there are only 11 jurors left. The Court of Appeals reversed, ruling that without agreement of the parties the only way to proceed with less than 12 jurors is if one becomes "disabled from sitting"—which includes illness but not prejudice. *Fiore v. Fiore*, ___ S.W.2d ___ (Tex. App. - Ft. Worth 1997).

The Beaumont court of Appeals has ruled that workers exposed to asbestos may seek damages for their fear of developing asbestosis, even if it is not medically probable that they will ever develop it. *Carter v. Temple-Inland Forest Products*, ___ S.W.2d ___ (Tex. App. - Beaumont 1997, writ ?).

Another court has held that expert testimony assailing the reliability of eyewitness identifications is admissible, even where the "expert" never interviewed the eye witness. *Nations v. State*, ___ S.W.2d ___ (Tex. App. - Austin 1997, writ ___). This case contains a good discussion of whether the *Robison* test for the admissibility of expert testimony applies to the social sciences such as psychology (it apparently does).

The Texas Supreme Court has provided detailed instructions for trial courts on how to handle *Batson* challenges in civil cases. For ex-

Trial Reports

The good news is that a jury awarded **Gordon Davenport's** client \$137,500 in damages (that will be reduced because of 15% comparative negligence but then slightly increased by pre-judgment interest). The bad news is that the defendant had offered \$350,000 before the verdict. The plaintiff injured her foot stepping into an uncovered vent grille in her office floor that required her to undergo two surgeries. Her medical bills were about \$48,000.

Larry Drosnes and **Mike Elliott** won a murder conviction and a 25 year sentence for a man accused of beating a 17 year old Texas City student to death. The defendant was defended by **Susan Criss**. **Judge Henry Dalehite** presided over the trial in the 56th District Court.

ample, trial courts are told to afford the parties the time to conduct a *Batson* hearing that can include unsworn statements from counsel about why they struck particular venire members, admission of the jurors' information cards and, if relied on by counsel, admission of attorney's notes made during voir dire. *Goode v. Shoukfeh*, ___ S.W.2d ___ (Tex. 1997).

The 14th Court of Appeals in Houston has held that the uninsured motorist coverage in a standard auto policy does **not** cover exemplary damages. The case involved an uninsured drunk driver. *Milligan v. State Farm Mutual Automobile Ins. Co.*, ___ S.W.2d ___ (Tex. App. - Houston [14th Dist.] 1997, writ ___).

COMMON TRUST ACCOUNT ERRORS

The most frequent mistakes with trust accounts include failing to reconcile the account every month, paying out funds before a deposited check clears, failing to put retainers in the trust account, and promptly removing fees from the trust account once earned.

Law Fax June 10, 1997

Judge I. Allan Lerner is now getting a taste of family law. Sitting as a visiting judge in County Court No. 1, Lerner heard an emergency motion to modify temporary orders in a divorce. **Sheelah Wooten** represented the movant and **Diane Clark** represented the respondent. The motion was denied.

Greg Enos represented a father in a divorce trial before **Judge Mary Nell Crapitto**. Enos' client was awarded custody of the couple's four year old daughter. The mother, who was pro se, was granted only supervised visitation, primarily as a result of her attempt to flee the state last December with a boyfriend who was out on bail for murder. The wife was caught in a beauty shop in Bonham, Texas having the child's hair cut and colored.

Judge Susan Baker Olsen granted a grandmother's motion to terminate parental rights, allowed grandma to adopt the child and changed her name. **Joseph Hunter** represented the grandmother. The mother was pro se.

A man who fell on a freshly waxed floor of the Nessler Center won against the City of Texas City. The jury in **Judge Norma Venso's** court awarded \$34,000 in damages but found the plaintiff 50% at fault. The jury awarded \$26,000 for medical expenses but found the plaintiff, who snapped his patellar tendon, suffered zero damages for pain and suffering.

Joe Maida successfully prosecuted a Galveston man charged with aggravated assault with a deadly weapon. A jury in **Judge Frank Carmona's** court found the man guilty and Judge Carmona sentenced him to forty years in prison. The victim was stabbed with a knife, which punctured her pancreas.

A hand can be a deadly weapon—just ask **Chuck Norris** or the defendant found guilty of assault with a deadly weapon for throwing a retarded, blind woman from a porch and fracturing her ankle. The defendant received a 30 year sentence from a jury in the 122nd District Court, Visiting **Judge Henry Dalehite** presiding. **Joe Maida** represented the State.

Larry Tylka did a little better than an

(Continued on page 3)

(Continued from page 1)

lor are now board certified in Criminal Law. Carlos Garza became board certified in Personal Injury Law.

State Bar Election Results

Richard Pena of Austin edged Mike Crowley to become President-elect of the State Bar. Kerry Neves of Galveston was elected to be our region's representative on the State

Bar Board of Directors.

Legal Secretaries Bestow Awards

The Galveston Legal Secretaries Association at its annual Boss' Appreciation Banquet in April named Charles Brown of Greer, Herz & Adams as "Boss of the Year." Cheri Garcia was awarded, "Legal Secretary of the Year."★

NEW RULE ON SUMMARY JUDGMENTS WILL REVOLUTIONIZE CIVIL PRACTICE

Effective September 1, 1997, Rule 166a on Summary Judgments is amended to include a new section (i) that will allow one paragraph motions that essentially force the other side to prove their case (or at least raise a fact issue)—a complete reversal of the current burden on summary judgments. The new rule says:

(i) No-Evidence Motion. *After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.*

"Adequate time for discovery" is not defined and will surely be the subject of many appellate decisions. Respondents to summary judgment motions under Rule 166a(i) will be forced to file motions for continuance and present arguments that not enough discovery has been done.

In the typical medical malpractice case for example, a defendant doctor moving for summary judgment under the current rule would have to present affidavits and other evidence that she was not negligent and did not proximately cause the plaintiff's damages. The burden to show there was no fact issue would be on the doctor. Under the new rule, the doctor could file a short motion without any evidence and allege the plaintiff could not prove negligence or proximate cause. The burden would then be on the plaintiff to come forward with evidence that at least raises a fact issue on each element.★

Law Fax June 10, 1997

Trial Reports (cont'd)

(Continued from page 2)

\$8,000 offer when he convinced a jury in **Judge David Garner's** court to award his client \$45,385 in a damages for a back injury suffered in a car wreck.

District Attorney **Mike Guarino** tangled with his former employee, **Sharon Meier**, who defended a man charged with aggravated robbery and retaliation. The defendant was given 25 years for the robbery and 10 years on the retaliation charge.

Mark Steven's client lost a claim under the Federal Polygraph Act in **Judge David Garner's** court. Her employer suspected her of theft.★

MOCK TRIALS

The Texas City office of The Enos Law Firm features a private courtroom that is available for trial preparation and mock trials. A Houston law firm recently retained Greg Enos to conduct a mock trial in an auto accident involving a badly injured plaintiff. A six person jury watched four hours of evidence and attorney argument and returned a verdict that surprised everyone. The case was settled within weeks. The price, \$3,000. The lawyers credited the mock trial for convincing their client to settle. If you are interested in a mock trial of your next big case, contact:

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I	55	Stone, Kathleen	755-6255	Cong. Plaza-16th	Ann Bennett	755-5463
V	61	Donovan, John	755-6258	Civil-3rd	Dana Winter	755-5580
I	80	Link, Scott	755-6774	Civil-6th	Lara Burgess	755-7232
L	113	Hancock, Patricia	755-6294	Civil-5th	Jeff Boyd	755-5969
	125	Wittig, Don	755-5577	Civil-2nd	Roman Tauriac	755-5240
	127	Wood, Sharolyn	755-6274	Civil-2nd	Dottie McDonald	755-5590
	129	Mizell, Patrick	755-6279	Cong. Plaza-16th	Delores Thomas	755-5919
	133	McCorkle, Lamar	755-6266	Civil-5th	Cynthia Dejean	755-5645
	151	Baker, Caroline E.	755-6289	Civil-6th	Betsy Wall	755-5230
C	152	Brown, Harvey	755-6282	Cong. Plaza-16th	Dollie Williams	755-7588
I	157	Medina, David	755-6270	Anderson Clayton-11th	Darla Coons	755-5967
V	164	Kennedy, Katie	755-6316	Civil-5th	Gloria Martinez	755-4497
I	165	Ray, Elizabeth	755-6320	Civil-3rd	Deb Grun	755-7590
L	189	Johnson, Carolyn Marks	755-6366	Civil-2nd	Cathy Norton	755-6020
	190	Devine, John	755-6370	Civil-6th	Maria Valdez	755-5466
	215	Jefferson, Dwight	755-6382	Anderson Clayton-11th	Karen Jones	755-5258
	234	Brister, Scott	755-6263	Civil-2nd	Jim Sitgreaves	755-8246
C	269	West, David	755-5516	Civil-2nd	Dodie Bruner	755-7594
I	270	Hall, Richard	755-5509	Cong. Plaza-16th	Andy Sanchez	755-6117
V	280	Lindsay, Toni	755-5518	Civil-6th	Leveda Parrish	755-6292
I	281	Bell, Bill	755-5506	Civil-6th	Rick Torres	755-8268
L	295	Christopher, Tracy	755-5541	Cong. Plaza-16th	Jacqueline Struss	755-6018
	333	Joseph, James Halbach	755-7760	Civil-5th	Pam Moritz	755-5205
	334	Lloyd, Russell	755-7793	Civil-6th	Walter Bucko	755-5483

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Law Fax

By Greg Enos

May 1, 1997

Serving the Galveston County and Clear Lake Legal Community.
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Bar Mulls Pro Bono Proposal

The Pro Bono Committee of the Galveston County Bar Association will ask the Bar to approve a resolution creating a voluntary pro bono program. If approved, each attorney practicing in Galveston County will be asked to volunteer to handle one free case a year.

Lawyers would be asked to state what sort of cases they would want to handle, which could range from Social Security claims, Landlord-Tenant disputes, guardianships and administrative hearings for government benefits to divorces.

The lengthy and fact-filled resolution that will be submitted to the Bar membership points out that 33,165 Galveston County residents live in poverty. Congress has cut the budget for the Legal Services Corporation and Texas' IOLTA program (which sent \$386,000 to our local Gulf Coast Legal Foundation) has been ruled unconstitutional. The staff of the local GCLF offices has been cut from seven lawyers to two in the last two years.

(Continued on page 2)

New Court Likely

A bill nearing approval in the Texas Legislature would create a new District Court of general jurisdiction for Galveston County. The new court would be filled by election rather than appointment, so it would not come into official existence until January of 1999. Hopefully, the new courts building would be built by then since there is currently no courtroom for the new court.

The Legislature appears likely to pass a \$7,000 a

year raise for District Judges, which would raise their salaries in Galveston County to \$99,000 a year.

Susan Criss officially announced her candidacy for the 212th District Court before the County Democrat Club. Elisa Vasquez is the other announced candidate to fill the spot currently held by Judge Roy Engelke, who has said he will not seek reelection.★

Courthouse News

New JP Appeal Process

Beginning April 23, the J.P. and Municipal Court appeal docket will be held on the fourth Wednesday of every month at 2:15 p.m. Defendants and counsel must be present. The D.A.'s office threatens to forfeit bonds and issue capias warrants for defendants who do not appear in person.

Free Local CLE

The Pro Bono Committee of the Galveston County

Bar Association has arranged for free video CLE at the Gulf Coast Legal Foundation offices in Galveston. Topics include: May 2: Trial of a Sexual Harassment Case; May 16: Ethics in Litigation; May 16: ADA; June 6: How to Thrive...Not Just Survive in A Solo/Small Firm.

Attorneys are asked to RSVP but walk-ins are welcome. Space is limited to 12 attorneys.★

Editorial

Scouting Report: Judge Venso

Local attorneys are curious to see how Judge Norma Venso will be as a trial judge. This scouting report is based on my experience in a week-long medical malpractice trial.

No time limits were placed on voir dire and challenges for cause were made as they came up. Judge Venso is not adverse to innovation since she let us submit a one page jury questionnaire prior to voir dire and we used jury notebooks with highlighted portions of the voluminous medical records.

Lawyers on both sides appreciated Judge Venso's flexibility. She paused the trial for two hours to wait for a defense witness and she allowed the defense to briefly reopen its case.

Judge Venso could be faulted by some for working too hard. We stayed until 10:30 p.m. on Friday waiting for a jury verdict. At least the Judge was good enough to order and buy pizza.★



Calendar

May	9	noon	Criminal Defense Lawyers—DiBella's
	14	noon	Galveston County Family Bar Assoc.—Pelican Club
	29	noon	Galveston County Bar Assoc.—San Luis
June	6	noon	Mainland Bar Assoc.—Merchant's Bank, League City

Pro Bono (continued)

(Continued from page 1)

Local Bar Associations in Brazoria and 100 other counties have adopted similar voluntary pro bono programs.

The proposed resolution concludes, "...the members of the Galveston Bar Association have determined that it is now necessary and essential to develop and adopt an organized volunteer program to provide legal representation to poor residents of Galveston County in order to ensure that equal access to justice is available to all residents of Galveston County." ★

Case Notes

The San Antonio Court of Appeals has bravely imposed nondelegatable liability on hospitals for the negligence of its emergency room physicians, even those who are clearly independent contractors. *Sampson v. Baptist Memorial Hospital System*, 940 S.W.2d 128 (Tex. App. - San Antonio 1996, writ pretty darn certain).

If some nutty judge imposes an unreasonably short time limit on voir dire, turn to *Clemments v. State*, 940 S.W.2d 207 (Tex. App. - San Antonio 1996) for guidance on how to preserve the point for appeal. This case should be persuasive in civil cases as well. ★

Trial Reports

The D.A.'s office ended up three for three in the 1993 murder of an 18 year old Houston man. Allegedly, the victim was shot execution style at Indian Beach because his compatriots feared he was going to blab about their check forgery scheme. The most recent conviction came in **Judge David Garner's** court. **Wayne Mallia** was the prosecutor and **Tim Weatherly** was defense counsel. Judge Garner sentenced the 24 year old defendant to 35 years in prison.

A condominium association represented by **Damon Capps** lost a fraud suit against The Galvestonian, represented by **Anthony Brown** and **James Ansell** in Judge David Garner's court.

Larry Drosnes obtained a Guilty verdict and a 20 year sentence in a murder case in the 122nd district Court. **James Moore** and **John Thoma** represented the man who said he killed his wife in self defense.

A DWI defendant won a "Not Guilty" verdict in County Court No. 1. **Michael Elliott** prosecuted the case which involved video but no intoxilyzer. **Heidi Teiken** defended.

Judge **Susan Baker Olsen** ruled that the parental rights of both the mom and dad should be terminated in a recent CPS case. **Johnette Duff** was the ad litem, **Kathryn Lanan** represented the mother and

Law Fax May 1, 1997

Jay Wooten represented the father. The case involved four children under age 5 found in an abandoned car eating peanut butter with a belt buckle.

Leonard Cruse's client lost a car wreck case to State Farm and Lueders and Boanerges in Judge **Jerome Jones'** court. The plaintiff and defendant each accused the other of failing to yield right of way.

Judge **Norma Venso's** first jury trial resulted in an acquittal of a man charged with murder. The jury apparently accepted the self defense argument of **Jim Ducote's** client, despite the two deep knife slashes to the victim's neck. **Kathleen Marx-Sharp** represented the State.

Judge Venso's second jury trial was a medical malpractice case against UTMB that resulted in a 6-6 deadlocked jury at 10:30 p.m. on Friday in the middle of a monsoon. **Greg Enos** and **Jack Ewing** represented the woman who alleged that her baby was delivered by an unlicensed medical student who was alone because the nurse had gone to look for the woman's medical chart that had been thrown down a laundry chute. The cause of the baby's brain damage and ultimate death was hotly contested.

Judge **Frank Carmona** is on a roll and tried three cases in one week! In one case, in which a bank sued Seagull Properties, Judge Carmona granted a directed verdict. **David Marion** represented the bank and **Eric Lipper** was attorney for the defendant. In a car wreck case, the jury found both parties equally negligent and awarded no damages. **Max Stovall** represented the plaintiff and **Wade Williams** handled the defense. In the third case, the plaintiff, represented by **Kay Noblock**, won in a suit on a promissory note against Cesare Galli, represented by **Randy Wooten**.

Anthony Griffin was unable to dissuade a jury in Judge David Garner's court from finding his client guilty of two counts of attempted capital murder, but he did persuade the jury to give his client only 10 years of probation and a \$10,000 fine. **Joel Bennett** and **Mario Madrid** prosecuted the case. ★

Sheri Y. Dean & Associates

Attorneys at Law

Are pleased to invite you to an

Open House

May 8, 1997

From 4:30 p.m. to 8:30 p.m.

to celebrate their newly expanded offices at

18333 Egret Bay Blvd., Suite 580

Clear Lake, Houston, Texas

and to acknowledge:

*Daniel Habenicht, Kelly Kersh Hambrick and Mark Honsaker
as associates of the firm.*

Law Fax

By Greg Enos

March 31, 1997

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos . 17400 El Camino Real, Suite 4,
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How To Count Short Deadlines

Engelke Will Not Resign, Will Not Seek Reelection

Judge Roy Engelke announced to the Galveston County Bar Association that he will not seek reelection next year. However, Engelke vowed that he would not resign early. Galveston attorney Elisa Vasquez promptly became the first candidate to announce for the 212th.

Engelke made a special

appearance before the sparsely attended March 27 Bar meeting. Engelke said that he wanted to lay rumors to rest about his health and future plans. Engelke repeated a statement made the night before to the North County Democrats that he would not run again

(Continued on page 2)

Courthouse and Bar News

New Bailiff in CC#2

County Court No. 2 has a new bailiff, Michael Daniel. Mr. Daniel formerly worked as a supervisor at Marathon Oil in Texas City.

Program on Kidnapping

On April 9, the Galveston County Family Bar Association and the Gulf Coast Coalition for the Prevention of Child Abuse will jointly sponsor a panel discussion on, "Legal and Emotional Aspects of Children Being Kidnapped by Parents" at the Pelican Club. RSVP to Doug Foster at (409) 765-7774.

Law Library Fax

The County Law Library is getting a fax machine thanks to the Family Bar Association. The fax number will be (409) 762-1098.

No April Bar Meeting

The County Bar will not meet April 24 as usual but will convene May 1 with the Young Lawyers for the annual Law Day Banquet.

Neves Wins

Kerry Neves will apparently be elected our State Bar Director without opposition. ★

Profile

Elisa Vasquez

Galveston attorney Elisa Vasquez may be short in stature (she is 4'11") but she is long on ambition. Vasquez wasted no time in announcing that she would be running for the 212th District Court as soon as Judge Roy Engelke said he would not seek reelection.

Vasquez's practice focuses mainly on criminal and personal injury law and on mediation. She is a partner with her husband Robert Monks and with Brian Abbingdon.

Mindful that Galveston County's District Courts handle both criminal and civil dockets, Vasquez points out she is board certified in personal injury trial law and she has handled several death penalty cases. She also speaks fluent Spanish.

Vasquez graduated from U.T. El Paso and U.T. Law School. She practiced with Warren Burnett in Odessa for eight years before coming to Galveston in 1988.

A lifelong Democrat, Vasquez has been a national convention delegate twice. She is President of the Galveston County Democratic Club. ★

When computing deadlines involving periods of five days or less, Tex. R. Civ. Proc. 4 says you do not count Saturdays, Sundays or legal holidays.

Rule 4's special method of calculating deadlines of less than 5 days may not always apply, however. A recent case held that the Code Construction Act's provisions on calculating deadlines prevails over Rule 4. That case involved the three day deadline to appeal an associate judge's ruling in family cases. The associate judge's ruling was filed on a Thursday and the wife did not appeal until the next Tuesday. The wife relied on Rule 4, which would not have counted the intervening Saturday and Sunday. The Austin Court of Appeals held that Tex. Gov. Code Sec. 311.014 prevails over a rule of civil procedure when they conflict and noted that the Code Construction Act does not contain any special rule for deadlines of five days or less. *Peacock v. Humble*, __ S.W.2d__ (Tex. App. - Austin 1997, writ ____). ★



April	4	noon
	9	noon
	11	noon
May	1	noon

Mainland Bar Assoc.—Merchant's Bank, League City
Galveston County Family Bar Assoc.—Pelican Club
Criminal Defense Lawyers—Pasta & Clam Bar
Law Day Banquet—Galveston Co. Young Lawyer's Assoc. & Galveston County Bar Assoc.—San Luis

Engelke (continued)

(Continued from page 1)

but would fill out his term, so there would be no appointment by the governor.

Engelke said he would return to the bench on April 6. The judge has been out for several weeks for health reasons and retired visiting judges Lerner and Dalehite have been filling in for him.

Egelke said that he would not support any particular candidate running to succeed him and repeated several times that he knew he could not choose his successor.

Galveston attorney Elisa Vasquez announced that she would run in the democratic primary to succeed Engelke. Other potential candidates mentioned around the courthouse include Democrats Susan Criss and Billy Jack Pegues and Republicans Miles Whittington and Kevin Corcoran. ★

City Attorney

League City is taking applications for the post of City Attorney. Salary: mid 50's.

Send resumes to:

Dir. of Administration
300 W. Walker
League City, TX 77573

Trial Reports

Tim Beeton successfully represented Ernst & Young against a multi-million dollar suit filed by the Moody Foundation, represented by Greer, Herz & Adams. Visiting Judge Henry Dalehite presided over the nine day jury trial in the 212th.

Gordon Davenport may not be welcomed into any more Walmarts after he popped the usual invincible retailer for a \$606,987 verdict in Brazoria County. The plaintiff suffered a brain injury when four one gallon cans of paint fell on her head from a top shelf. She suffered memory loss and anxiety attacks and incurred over \$12,000 in medical bills. The jury awarded \$674,430 in actual damages but found the plaintiff 10% at fault. Judge Robert May did not allow submission of gross negligence questions but the jury indicated after the trial that it would have awarded punitive damages. Walmart, represented as usual by **Alan Magenheimer**, vowed to appeal.

A jury in County Court No. 2 found **Susan Criss'** client "Not Guilty" of DWI even though he admitted drinking 5-6 beers (there was a video but no intoxilyzer). **Mario Madrid** and **Ben Massar** were the prosecutors.

A DWI defendant was found "Guilty" in County Court No. 1 in an accident case (again, video but no

Law Fax March 31, 1997

intoxilyzer test). **Kerri Foley-Garcia** represented the State and **Robert Shattuck** was defense counsel.

A jury in **Judge Susan Olsen's** court returned a "True" verdict where a juvenile was charged with burglary of a habitation. **Salvadore Faus** represented the State and **Richard Bell** was counsel for the youngster was sentenced to six months of boot camp and a year probation.

Case Notes

Supplemental Interrogatory Answers Must Be Signed and Verified. The El Paso Court of Appeals ruled that an expert listed in supplemental interrogatory answers that were not signed by the party and verified should have been excluded. *Morua v. State Farm Fire & Cas. Co.*, ___ S.W.2d ___ (Tex. App. - El Paso 1997).

The Texas Supreme Court ruled that a bystander may not recover for mental anguish in a medical malpractice case. However, a woman can sue for her injuries when she suffers a stillbirth due to the hospital's negligence. *Edinburg Hospital Authority v. Trevino*, ___ S.W.2d ___ (Tex. 1997).

It still is not always easy to escape from requests for admissions. In a recent case from the Beaumont Court of Appeals, the defendant admitted he owned the premises where the plaintiff said he fell and then got the trial court to allow him to change the response just before prevailing on a summary judgment motion on the issue of who owned the land. The Court of Appeals reversed, ruling that the trial court abused its discretion since the defendant failed to show the plaintiff would not be unduly prejudiced by withdrawing the admissions. *Papania v. Stelly*, ___ S.W.2d ___ (Tex. App. - Beaumont 1997, writ ___). *City of Houston v. Riner*, 896 S.W.2d 317 (Tex. App. - Houston [1st Dist.] 1995, writ denied) is a good example of how, "even a slight excuse," for failing to answer admission requests will be good cause for striking deemed admissions under Rule 169(2). Lack of prejudice to the other side must also be proved to overcome deemed admissions. ★

Jeff Kilgore

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Law Fax

By Greg Enos

February 17, 1997

Serving the Galveston County and Clear Lake Legal Community.
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Calculating Deadlines & Due Dates

Lawyers and legal assistants need to understand the tricky rules for calculating deadlines and due dates.

Service by Mail Adds Three Days

If a pleading is sent by U.S. Mail, Rule 21a adds three additional days to the deadline. Thus, if a motion for summary judgment is sent by mail, Rule 21a requires a minimum of 24 days notice of the hearing (21 days required by Rule 166a(c) plus three days). *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994).

No Extra Time With Next Day Delivery

If you send a motion by Federal Express or another overnight delivery service, Rule 21a does not add an additional three days to the due date.

Fax by 5 pm and You Get Additional Time

If a pleading is served by fax and is received before 5:00 pm on a business day, Rule 21a adds three extra days to the deadline to respond. If the fax is received after 5:00 pm, it is deemed received the next day, so really four days are added.★

Next issue: Counting Days and the Mailbox Rule.

Judge Dalehite Sues UTMB

Retired District Judge Henry G. Dalehite has sued the University of Texas Medical Branch and a UTMB doctor for the death of Dalehite's wife, Virginia.

Judge Dalehite filed suit on January 22 in his individual capacity and as Executor of his wife's estate. He was joined by his four children as plaintiffs.

Alton Todd, who represents the Dalehites, alleged in the suit that Mrs. Dalehite suffered a cerebral aneurysm in August 1994 and then underwent brain

surgery in December 1994.

The lawsuit alleges that Dr. Harling Nauta performed a type of brain surgery that had never been done at UTMB and failed to advise his patient of the risks of such a surgery. Mrs. Dalehite died three days after the surgery.

The suit is pending in the 10th District Court. A firm from Houston will reportedly defend Dr. Nauta, while the AG's office represents UTMB.★

Courthouse News

New Courtroom Building May Be Built Next Door

Galveston County Judge Jim Yarbrough has proposed that a Courts Building be built, possibly above the parking lot between the current courthouse and the parking garage. The new building would free up much needed space in the old courthouse.

County Court No. One Gets New Coordinator

Monica Lozano Garcia will be the new coordinator for

Judge Mary Nell Crapitto in County Court at Law No. One. Garcia formerly worked in the District Attorney's misdemeanor section and is currently the secretary for David Walker and Miles Whittington.

Judge Crapitto urges attorneys to make Ms. Garcia welcome. "If you don't know Monica, please come by and meet her," said Crapitto. "I know that she will be a true asset to this Court."★

Rebuttal

Tauss Wishes Engelke Well

Cynthia Tauss, Galveston County Republican Party Chair, sent out the following memo in response to an article in the last edition of the *Law Fax*:

Mr. Greg Enos' article, "Engelke Plans to Stay," incorrectly stated that I, reportedly, have a "short list" of lawyers who would be recommended to the Governor in the event of Judge Engelke's resignation and that this "short list" does not include Miles Whittington. HOG WASH!

I am often amazed at how rumors get started, added to and twisted a few times, and then travel around this county.

While I would love for the GOP to claim the 212th, I'd prefer to win in November and not by default due to a medical retirement by Judge Engelke. I have the greatest respect for the Judge and I wish him the best of health.★



Calendar

February	27	noon
March	6	noon
	12	noon
	14	noon

Galveston County Bar Assoc.—San Luis
Mainland Bar Assoc.—Merchant's Bank, League City
Galveston County Family Bar Assoc.—Pelican Club
Galveston Co. Criminal Defense Lawyers—DiBella's

Are Lie Detector Results Admissible?

The former rule that polygraph test results are *per se* inadmissible is being changed by more courts. The U.S. Fifth Circuit Court of Appeals ruled in *U.S. v. Posado*, 57 F.3d 428 (5th Cir. 1995) that polygraph test results may sometimes be admissible. The U.S. Ninth Circuit recently joined the Fifth and reversed a criminal conviction where the trial court refused to admit lie detector results. *U.S. v. Cordoba*, __ F.3d __ (9th Cir. 1997).

The Federal Courts are applying the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuti-*

cals that sets forth the requirements for expert testimony, the most essential of which is reliability.

Texas criminal courts are supposed to follow an almost identical procedure to determine if proffered expert testimony, "is sufficiently reliable and relevant to help the jury in reaching accurate results." *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). In civil cases, trial judges must scrutinize "proffered evidence for its scientific reliability when it is based upon novel scientific theories..." *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Both Texas cases essentially followed the U.S. Supreme Court's reasoning in *Daubert*.

Thus, civil and criminal litigants in Texas state courts should be able to cite the recent federal cases in favor of admitting lie detector tests if there is testimony that the polygraph test is reliable and accurate. ★

Law Fax Feb. 17, 1997

Trial Reports

Alton Todd lost a car wreck case in Judge Frank Carmona's court when the jury found that the plaintiff was 51% at fault. David Salyer represented the defendant, who was alleged to have been driving while intoxicated and speeding when struck by the plaintiff's car.

Robert Penrice's client lost his suit to recover stolen jewelry in Judge Jerome Jone's court. The jury apparently believed the defendant's story that another guy had purchased the stolen jewelry.

A plaintiff with \$8,000 in medical bills (mostly chiropractic) was awarded only \$500 in damages but will recover less than that since the jury in Judge Jone's court found the plaintiff 50% at fault.

Judge Mary Nell Crapitto presided over a two day bench trial in which grandparents were seeking a protective order from their son. The grandparents were represented by Jennifer Smith and the respondent by Bob Clements. The request for the protective order was denied.

New Tort of Spoliation of Evidence

The Corpus Christi Court of Appeals has recognized the tort of spoliation (destruction or loss) of evidence in a suit where a hospital lost medical records and thwarted a malpractice case. *Ortega vs. Trevino* (1/30/97). ★

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Book Reviews



The Run Away Jury by John Grisham (hard back fiction, Doubleday). If you thought your last jury was bad, wait until you see how the jury behaves in this fictional "trial of the century" against a big tobacco company. (Grade: B+).

A Civil Action by Johnathan Harr (paperback; non-fiction, Vintage Press). A mass toxic tort case paid for my house, but it was nothing like this spell-binding true account of a lawyer's quest for damages for a Massachusetts town poisoned by toxic waste. The book starts with the lawyer's Porsche being repossessed in the middle of trial and then goes back to explain how the case got started. It is a must read for aspiring p.i. lawyers. (Grade: A+).

Law Fax

By Greg Enos

February 3, 1997

Serving the Galveston County and Clear Lake Legal Community.
Published by Greg Enos. 17400 El Camino Real, Suite 4,
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New Cases and Laws

No Contingent Fee Awards in DTPA Cases

The Texas Supreme Court recently ruled that when attorney's fees are awarded in DTPA cases, the fees cannot be based on a percentage of the damage award but must be based on actual work performed. *Arthur Anderson & Co. v. Perry Equip. Co.* (1/10/97).

IRA Exempted from Chapter 7 Estate

The Fifth Circuit ruled that the debtor's \$16,000 IRA was exempted from his Chapter 7 estate under 11U.S.C. 522(d)(10)(E). *In re: Carmichael* (5th Cir. 11/13/96).

Landlords Have Duty To Mitigate Damages When Tenant Breaches Lease

The Texas Supreme Court imposed a common law duty on landlords to mitigate damages when a tenant breaches a lease by moving out early. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.* (1/10/97).

Federal Diversity Minimum Now \$75,000

Effective January 17, 1997, federal diversity cases must involve an amount in controversy of

(Continued on page 2)

Engelke Plans to Stay

Rumors of the imminent medical retirement of Judge Roy Engelke of the 212th District Court are greatly exaggerated and apparently not true. Judge Engelke's doctors did cancel his planned knee surgery two weeks ago while they double-checked test results on his kidney. The judge continues to be treated for his long time diabetes condition, but he plans to maintain a full court schedule.

"I have absolutely no intention of resigning early and I plan to run for re-election next year," he said.

Engelke, who took office in 1987, is 63 years old. If Engelke, a Democrat, did resign, Governor George Bush, a Republican, would appoint a replacement to fill out the term. Reportedly, Galveston County G.O.P.

(Continued on page 2)

Editorial

Case Running II

In the last issue, I told the story of a client who was contacted by several attorneys after her husband was killed. That same client was involved in a car wreck a few weeks later. Within four days of the wreck, my client was called at home by an outfit in Brownsville called, "Accident Care." The caller, who said he got her name from "public records," wanted to know how she was doing. The caller strongly suggested that my client go see a doctor since the lady, although sore, had not yet been to one.

The caller was kind enough to set up an appointment with a Galveston chiropractor. At her first visit, the chiropractor's receptionist asked my client if she had a lawyer, stating that they could recommend one if needed.

The point of this sad story is that folks other than lawyers are illegally and unethically chasing cases—a fact the media often misses. ★

Say it Ain't So! Nancy Otero Leaving County Court No. 1 for Seattle

County Court at Law No. One's Coordinator, Nancy Otero, has announced her resignation, effective January 31.

Nancy is catching a plane March 12 to move to Seattle, where her daughter works as a lawyer. Nancy plans to work again as a legal secretary.

Otero has worked for Judge Mary Nell Crapitto for

seven years—when Crapitto was a lawyer and then when she became a judge.

Nancy will be sorely missed because she was what every lawyer wants in a court coordinator: friendly and understanding, professional and helpful. She was always calm in the midst of chaos. ★



February	14	noon	Galveston Co. Criminal Defense Lawyers—DiBella's
	12	noon	Galveston Family Bar—Pelican Club
	25	noon	Galveston Co. Young Lawyer's Assoc.—Galvez
	27	noon	Galveston County Bar Assoc.—San Luis
	28	noon	Mainland Bar Assoc.—Merchant's Bank, League City

New Cases and Laws (continued)

(Continued from page 1)

at least \$75,000 (up from the former \$50,000 minimum).

IRS Releases Model QDRO and Instructions

The IRS on December 30 released a model Qualified Domestic Relations Order with instructions that cover basic QDRO issues. Call to request a free copy from The Enos Law Firm, P.C. (281-286-5500).

(Continued from page 1)

Chairwoman, Cynthia Tauss' "short list" of lawyers she would recommend to the Governor includes Kevin Corcoran (a Friendswood resident who does insurance defense work for Phillips & Akers in Houston) but does not include Miles Whittington, who ran against Norma Venso last year. State Senator Jerry Patterson, a Republican who represents this county, would have a major say in the appointment.

Susan Criss, a lawyer in general practice in Galveston, has openly announced her intent to run for some judicial post next year and she has often been rumored to be seeking Engelke's post. Criss would presumably run as a Democrat.

Other local judicial posts that will be up for election in 1998 include the Probate & County Court, both County Courts at Law, the 122nd District Court and the 306th Family District Court. ★

It is Now Easier To Sue Small Firms for Discrimination

The U.S. Supreme Court ruled that part-time workers and those on leave can be counted to determine if the business has 15 employees. Only companies with 15 or more employees can be subject to Title VII claims for discrimination based on race, sex, religion and national origin.

One Hour Limit on Voir Dire is Abuse of Discretion

In a criminal case, the San Antonio Court of Appeals ruled that a one hour limit on voir dire was an abuse of discretion. *Clemments v. State* (12/21/96).

Defendants Can't "Blame The Empty Chair" in Montana

The Montana Supreme Court struck down as unconstitutional a law (similar to one in Texas) that allows juries to apportion negligence to non-parties. The cases involved a slip and fall claim where the defendant argued the plaintiff's doctor had been negligent and caused or contributed to the injuries. *Plumb v. Fourth Judicial District* (11/22/96). ★

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Trial Reports

Visiting Judge Henry Dalehite presided over an Aggravated Sexual Assault of a Child trial in the 56th District Court that ended in a mistrial. During jury deliberations, the one juror who was holding out against a "guilty" verdict was informed that her mother had died and was excused. Kurt Sistrunk represented the State and Peter Lavalie was the defense lawyer.

Traci Edwards successfully defended a cook at Skipper's Restaurant in Clear Lake Shores who was accused of burning a waitress' hand after she turned down his offer for a date. The jury in County Court No. 1 returned a "not guilty" verdict at the conclusion of the three day trial. Randy Bond represented the State.

Judge Mary Nell Crapitto found a man "non guilty" in a bench trial in County Court No. 1. The defendant, who represented himself, was accused of unlawfully carrying a weapon. Michael Elliott was the prosecutor.

Settlements

Greg Enos settled a lawsuit against a Texas City nursing home for \$300,000. The claim involved failure to follow doctor's orders for treating fecal impactions. ★

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Law Fax

By Greg Enos

January 10, 1997

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Galveston Courthouse Phone Numbers

10th District Court The Hon. David E. Garner 766-2230
Coordinator: Cindy Mora
Fax: 770-5266
Reporter: Vickie Brocker (766-2231)
Bailiff: Joseph Sanders

56th District Court The Hon. Norma Venso 766-2226
Coordinator: Lucia Smith
Fax: 770-5264
Reporter: Doug Faulin (766-2227)
Bailiff: Joseph Banks

122nd District Court The Hon. Frank T. Carmona 766-2275
Coordinator: Connie Nolan
Fax: 770-5265
Reporter: Judy Hansen (770-5169)
Bailiff: Carl Kelly

212th District Court The Hon. Roy Engelke 766-2266
Coordinator: Bridget Hargrove
Fax: 765-2610
Reporter: Dale Lee (766-2264)
Bailiff: Charles Delgado

306th Family Dist. Court Hon. Susan Baker Olsen 766-2255
Coordinator: Gloria Robledo
Fax: 765-2674
Reporter: Jan Boening (766-2254)
Bailiff: Doris Paul Robertson

Houston Line: (713) 996-1710 (ask for court or give last four digits of the phone number)

County Court No. 1

The Hon. Mary Nell Crapitto
766-2233 Fax: 765-2641
Coordinator: Nancy Otero
Reporter: Connie Chan
766-2235

County Court No. 2

The Hon. C. G. Dibrell, III
766-2405 Fax: 795-3034
Coordinator: Shelly Darnell
Reporter: Marlene Casey
766-2407

Probate & County Court

The Hon. Jerome Jones
766-2251 Fax: 762-5365
Coordinator: Kathy Allen
Reporter: Donna McGuire
Investigator: Gladys Burwell
770-5188

District Clerk

The Hon. Evelyn Wells Robison
766-2424 Fax: 766-2292
Family Div. 770-5118, 5119
-5120, 5121
Criminal Div. 770-5287
Civil Div. 766-2460
Child Support 766-2259

County Clerk

The Hon. Patricia Richie
766-2200 (no fax)

District Attorney 766-2355

Hon. Michael J. Guarino, II
Felony Section 766-2355
Grand Jury 766-2379
Family Law 766-2364
Misdemeanor 766-2373
Juvenile 766-2364

Law Library 765-2601



Calendar

January	20	Courthouse Closed—Martin Luther King Jr. Birthday
	28	noon Galveston Co. Young Lawyer's Assoc.—Galvez
	30	noon Galveston County Bar Assoc.—San Luis
	31	noon Mainland Bar Assoc.—Merchant's Bank, League City

Galveston County Lawyer

October 1, 1996

Serving the Galveston County Legal Community

Texas IOLTA Law Loses Fifth Circuit Challenge

The U.S. Fifth Circuit Court of Appeals may have dealt a fatal blow to Texas' IOLTA law which takes interest on lawyers' trust accounts to fund legal programs for the poor.

A three judge federal panel ruled that the plaintiffs challenging the IOLTA law have a recognizable property interest that is subject to unconstitutional taking by the state. The case was remanded to the district court to determine, as most observers expect it to do, that the interest on the trust funds was taken without the individual clients' consent.

The suit was originally filed in U.S. District Judge James Nowlin's court in Austin by clients who claimed that the IOLTA law was an unconstitutional taking of their property (i.e. the interest on their trust accounts) and violated their first amendment rights because they were funding legal aid groups they did not believe in. Judge Nowlin dismissed their suit and held that the plaintiffs did not protectable property interests in the small amounts of interest generated on their IOLTA accounts.

The Fifth Circuit panel reversed and remanded the case to Judge Nowlin to decide on the narrow question of whether the interest was taken

against the plaintiffs' will. The State of Texas plans to ask for an en banc review of the opinion by the Fifth Circuit and, if needed, appeal to the Supreme Court. Supreme Court review might be likely since two other federal courts of appeals have reached opposite conclusions. The First and Eleventh Circuits had upheld IOLTA plans, ruling the interest taken belonged to no one.★

President's Column

Bar & County Discuss Issues

By E. A. "Trey" Apffel, III

Discussions recently took place between the Bar, County Judge Jim Yarbrough, and Ed Wells, Director of Justice Administration, in connection with the County's plans for overall improvement of the County Courthouse and its operations. Topics of discussion included courtroom renovations, expansion of the snack bar, continuation of efforts with regard

(Continued on page 3)

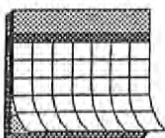
Big Judicial Pay Raises Proposed by Commission

A special task force on judicial efficiency has proposed raises for all Texas judges that would make them some of the highest paid in the nation.

State District Judges, who are now paid \$92,685 a year in Galveston County, would be paid \$110,621 under the proposal. Currently, District Judges receive a base salary of \$85,217 from the state and a supplement from Galveston County of \$7,468. In contrast, the three County Court at Law Judges in Galveston County are now paid \$93,519 a year, according to Curtis Brown, former county budget director. Justices of the Peace in Galveston County are paid different amount depending on how long they have served. J.P. pay ranges from \$38,000 to \$41,084 a year.

A pay raise for District Judges would boost the District Attorney's salary since state law requires the D.A. to be paid the same as a district judge. Increased salaries for District Judges would also result in higher retirement benefits for judges and for members of the Legislature, whose retirement benefits are linked to district court salaries.★

Mark your Calendar....



- | | | |
|------|----|--|
| Oct. | 9 | Family Bar Association—Pelican Club: noon |
| | 9 | Court of Appeals Reception—Yacht Club: noon (RSVP!) |
| | 11 | Criminal Bar Assoc.—DiBella's in Galveston: noon |
| | 25 | Mainland Bar Assoc.—Merchant's Bank in League City: noon |
| | 31 | Galveston Bar Assoc.—Galveston Hilton (San Luis): noon |
| Dec. | 12 | Bar Assoc. Holiday Party—Galveston Yacht Club: 7:00 pm |

Judge Lerner Retirement Party Set

The retirement party for 56th District Court Judge I. Allan Lerner is scheduled for December 5 from 4:00 p.m. until 7:00 p.m. Contributions are requested and can be sent to Kathy Allen in the 56th (make checks payable to her). Also, photographs with captions are requested for a scrap book.

Two Locals Named to Jury Task Force

State Rep. Craig Eiland and Texas Clear Lake attorney Greg Enos were recently named to the Texas Supreme Court's Task Force that will study possible changes in our jury system. Possible reforms under consideration include allowing jurors to take notes and/or pose questions to witnesses. The group's first meeting is October 14 in Austin.

Family Court Associate Judges Change Procedures

Cases heard by the 306th's Associate Judge Jan Yarbrough will be assigned by Gloria Robledo to 9:00 a.m. or 1:30 p.m. dockets on Mondays and Tuesdays. Judge Yarbrough will call a docket at 9:10 and 1:40 and assign cases specific starting times during that three hour period. If the movant misses the docket call, the hearing will not be held. If the respondent does not appear, the hearing will go forward without him or her.

Associate Judge Pat Reilly, who hears cases for the County Courts, will continue to hear cases on Wednesdays and Thursdays assigned to specific times 30 minutes apart. If the lawyer or party is more than five minutes late for hearing, a penalty will be assessed. Wednesday hearings are in the County Commissioner's courtroom. Thursday hearings are in JP No. 1.★



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(Continued from page 1)

to the library renovation, sale of existing library subscriptions, and a further delineation of the library's highest and best use as it pertains to

both the Bar and the public. The County Bar Association will be working closely with County Judge Yarbrough's office and Ed Wells in connection with all of these issues,

which will be studied over the next year. We hope most of these improvements will be implemented as soon as funding is available.

An additional subject which was discussed was the possibility of creating the position of an Executive Director for the Galveston County Bar Association. This idea was initially discussed at the Bar Leaders Conference held over the summer at Del Lago. At that conference, I had the opportunity to meet and speak with several Executive Directors of local Bars from around the state. After investigating some of the details involved, my feeling is that an Executive Director could act in a dual role in serving not only the Bar Association, but the County as well.

First, with regard to the Bar Association, the Executive Director would serve as the point person on a daily basis and also as the liaison between the County Bar and the county courthouse operations. The Executive Director would also assist the President and other officers in the operation of the association, carry out policies of the Board of Directors, prepare, edit and mail the association's newsletter and maintain the financial books. Secondly, the Executive Director would serve the county as head of the law library operations and work with both the county bar and Commissioner's Court in determining what the needs of the Bar are with regard to subscriptions, computers, and other resource materials.

Personally, I feel having an individual serve as Executive Director of our organization would be a very positive step in the right direction. The position of Executive Director would add a certain degree of continuity to the operation of our association while allowing the individual to serve as the point person for common issues between the bar and the county. ★

E. A. "Trey" Apffel, III is the President of the Galveston Bar Association. Contact Mr. Apffel at (409) 948-0003 or (713) 488-2281.



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Legal Developments

Mandamus Against Judge Baker-Olsen Granted then Denied

The Fourteenth Court of Appeals initially granted writ of mandamus against 306th Family District Judge Susan Baker-Olsen in a challenge of temporary orders issued in a modification action. However, on rehearing, the writ of mandamus was denied.

The mother, represented by Linda Nickerson, gave notice as required by the divorce decree that she planned to relocate with the child to Georgia. The father, represented by Pat Reilly, filed a modification action and sought, and obtained, temporary orders enjoining the mother from changing the child's residence from Galveston County. The Court of Appeals ruled that Tex. Fam. Code Sec. 156.006

allows entry of temporary orders in modification actions and Sec. 105.001 permits orders limiting the areas where a child may reside.★

Supreme Court Considers Appellate Rule Changes

The Texas Supreme Court is expected to soon formally adopt sweeping changes in how civil litigants appeal to the state's highest court. Under the proposed rule changes, the motion for rehearing with the court of appeals would be eliminated. The application writ of error, which now can be up to 50 pages long, would be replaced with a "petition for review" which could not exceed 15 pages. A 15 page response to a petition for review would be allowed as would a reply by the petitioner that could be up to eight pages in length. The Supreme Court would receive only an appendix of record excerpts instead of the entire case record.

The new appellate rules are expected to be approved this winter and take effect in April 1997.★

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New, Simplified Retirement Plans Should Help Small Firms and Solo Lawyers

A new, simplified retirement plan established by a law President Clinton signed in August will allow participants to save up to \$10,500 a year tax-free. The "Savings Incentive Match Plan for Employees" (SIMPLE) is like a miniature 401K plan without most of the hassle and paperwork.

Many small employers were discouraged from establishing 401K plans because of complicated federal rules that banned "top heavy" plans

which forbid too much money from going to "key" employees (i.e.-the lawyers). Discrimination testing of plans was complex and expensive.

SIMPLE plans can be established by firms with less than 100 employees and can be set up as either IRA's or 401K plans. Employee contributions are limited to \$6,000 per year. The company cannot maintain any other retirement plan and can either match employees' contributions up to 3% of

the workers' salaries or contribute 2% of each employee's salary (up to a maximum salary of \$150,000).

The total employee and company contribution per worker per year is \$10,500. Employees can invest their SIMPLE plan funds like they would their own IRA, with no income taxes due until funds are withdrawn. All employees vest immediately in a SIMPLE plan. Most accountants will now have information on setting up SIMPLE plans.★

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Trial Reports

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Occasionally, something more than invective gets hurled in the courtroom. **Judge Frank Carmona** threw the book at a criminal defendant, who promptly spewed his breakfast back. A Galveston man had just been sentenced by Judge Carmona to eight years in prison for aggravated sexual assault of a child when the upset gentleman desperately asked to be allowed to go to the restroom because he felt sick. The bailiff was in another courtroom, so the now TDC-bound man could not go unescorted. Suddenly, the man vomited all over the courtroom, causing a mass exodus from the courtroom. Among those who had to deal with the mess were lawyers waiting to resume a civil trial whose video gear got an unexpected washing.

Anthony Griffin's client was found not guilty of a resisting arrest charge in a jury trial before County Court No. 2's **Judge Mary Nell**

Crapitto. Ben Massar was the prosecutor.

You win some and you lose some. **Anthony Griffin** lost an age discrimination case against the City of Galveston Parks Board in Federal **Judge Sam Kent's** court. **Doug Poole** and **David Cowen** of McLeod, Alexander, Powell & Apffel represented the defendants.

Grant Gealy of Mills, Shirley, Eckel & Bassett's Houston office won a case for Tyson Foods in **Judge David Garner's** 10th District Court. A Kentucky Fried Chicken manager was shot during an early morning robbery and blamed the Tyson delivery man for leaving the back door unlocked. The jury found that Tyson was not negligent.

Wade Williams obtained a directed verdict from **Judge David Garner** in a suit against a physician accused of prescribing sleeping pills to a man who allegedly fell asleep while

driving and causing a car wreck. The plaintiff's expert was unable to say use of Halcion was a proximate cause of the plaintiff's badly broken leg.

Ron Gipson's client sued the City of Galveston for leasing space at the city airport to a competitor which drove it out of business. The city, represented by **John Eckel**, countersued for past-due rent. **Judge Frank Carmona** granted a directed verdict for the City and the jury awarded the City \$136,000 in damages.

Bob Clements prevailed in an appeal for homeowners in the Polly Ranch subdivision who wanted to subdivide their lot and build a second home. **Marilyn Meiszkuc** represented the homeowner's association which won an injunction in the trial court. However, the First Court of Appeals reversed and rendered, holding that the lots could be subdivided. The homeowners' counterclaims for harassment by the association is still pending.★

Galveston County Lawyer

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Serving the Galveston County Legal Community

Welfare Texas Style: A Primer on Public Benefits

Congress has passed a welfare reform law that awaits President Clinton's signature. This new law will eventually result in drastic changes in public benefits for low income families. For example, most recipients will be required to seek or obtain work and the duration of benefits will be limited. It is also likely that the already low amounts of public assistance paid in Texas will be reduced by our legislature. Such changes in public benefits will not go into effect for over a year and it is worthwhile for lawyers to understand Texas' current system of public benefits.

AFDC

Households with one or more minor children, few resources and very little income can qualify for Aid to Families With Dependent Children. Children must have been deprived of a parent's support or care because the parent died, is disabled, has left the family home or is unemployed. With just a few exceptions, including the first \$50 in monthly child support, AFDC benefits are reduced dollar-for-dollar by any income earned by the family. Monthly AFDC benefits for single family households are currently:

- 1 child \$163 per month
- 2 children \$188 per month
- A single parent with five children

would receive \$288 per month. However, even a full time, minimum wage job for that parent would eliminate all AFDC benefits.

To qualify for AFDC benefits, a family may not have more than \$2,000 in resources (or \$3,000 if the household

(Continued on page 3)

Gulf Coast Legal Foundation Still In The Divorce Business

Contrary to a recent report in the Galveston Daily News, the Gulf Coast Legal Foundation is still accepting new divorce cases, although the Foundation is much more stringent about which divorce cases it will work on. Max Sukiennik confirmed that the Foundation has been forced to perform a sort of "legal triage" on new divorce cases because of budget cuts and staff reductions. He said they are accepting only cases in which they can clearly make a difference, such as matters involving recent abuse.

Three lawyers (Sukiennik, Steve McIntyre and recently Sue Lung) work in the Galveston office, which had as many as seven lawyers last year. Their phone number is (409) 763-0381.★

President's Column

Legal Services for the Indigent

By E. A. "Trey" Appfel, III

There is a tendency for Texas lawyers to look the other way when they hear the phrase, "Pro Bono" or when a discussion centers around legal services to the poor. However, we as lawyers are responsible to assure that all persons have access to competent representation regardless of wealth or position in life (see Texas Lawyers' Creed).

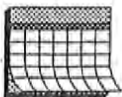
The Legal Services Corporation has been a mainstay of the federal government as far as providing monies to the state for legal services programs for the indigent. The LSC's budget has recently been cut 33% for the year 1996, costing the State of Texas \$10 million in federal funding for this purpose.

A comprehensive plan was recently adopted by the State Bar Board of Directors which will continue efforts to minimize federal funding cuts, seek new sources of funding for legal services, and encourage a grass roots effort to increase voluntary participation by lawyers in Pro Bono programs.

The State Bar of Texas has endorsed, in concept, a proposal to

(Continued on page 2)

Mark your Calendar....



- Aug. 19 - 22 State Bar Advanced Family Law Seminar—San Antonio
- 29 Galveston Bar Assoc.—Galveston Hilton (San Luis) : noon
- 30 Mainland Bar Assoc.—Merchant's Bank in League City: noon
- Sept. 11 Family Bar Assoc.—Pelican Club: noon
- 19 Ad Litem Seminar—Galveston Hilton (San Luis) : 1:30-4:30 p.m.

(Continued from page 1)

create a new court filing fee add-on to provide state revenues for the provision of legal services to the poor. The proposal is currently going through the State Bar's official legislative process. Under the proposal, there would be an additional \$4.2 million in projected annual revenues raised for legal services for the poor. The Bar has determined that this concept is the only legal services funding proposal with any chance of succeeding in the Texas legislature this next session.

Originally included in the plan was the concept of creating a new non-profit corporation to administer the program. However, this idea was not considered to be the ideal solution, and it was felt that the answer to providing legal services to the poor had to come more from the local level.

That brings us to the Galveston County Bar Association. Emily Fisher is presently chairing our Pro Bono committee. Emily has been almost single handedly attempting to establish this "grass roots" effort. However, her efforts are being thwarted by the fact that the Gulf Coast Legal Foundation has had its staff of seven lawyers reduced to three because of spending cuts. I would like to challenge the lawyers of Galveston County to participate in finding ways to help solve this problem.

I propose that we attempt to develop a program whereby our members' expertise can be used most effectively to benefit the poor in Galveston County. In attempting to adopt and develop such a plan, it would be a great opportunity for the Galveston Bar Association to do good for all of our lawyers in the county and for all of the people in the county. You would think that between our membership of 225 and the total lawyer population in Galveston County of almost 500, we could come up with something.

If you have any ideas or suggestions, please contact Emily Fisher at 765-5705.★

E. A. "Trey" Apffel, III is President of the Galveston Bar Association. Contact Mr. Apffel at (409) 948-0003 or (713)488-2281.



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"I'd like the reporter to read that back"

The following are excerpts from two books by Mary Louise Gilman, *Humor in the Court* (1977) and *More Humor in the Court* (1996).

Q: Officer, what led you to believe the defendant was under the influence?

A: Because he was argumentary and he couldn't pronounce his words.

Q: What can you tell us about the truthfulness and veracity of the defendant?

A: Oh, she will tell the truth. She said she'd kill that sonofabitch and she did!

Q: Mrs. Jones, is your appearance

this morning pursuant to a deposition notice I sent to your attorney?

A: No. This is how I dress when I go to work.

Q: Are you also sexually active?

A: No. I just lie there.

Q: The truth of the matter is that you are not an unbiased, objective witness, isn't it? You too were shot in the fracas?

A: No sir. I was shot midway between the fracas and the navel.

Q: Do you drink when you are on duty?

A: I don't drink when I'm on duty, unless I come to work drunk.★

(continued from page 1)

includes a disabled or elderly person). Resources that do not count toward the limit include the family's home, personal possessions, exempt trust funds and co-owned property that cannot be sold without the other owner's okay. The fair market values of vehicles which exceed \$4,600 count against the limit, although vehicles used primarily for income producing activities or which are the family's home do not count at all.

Food stamps

A family with \$2,000 of nonexempt resources and minimal income can qualify for food stamps, that can be used to buy food, but not household goods, tobacco, or liquor.

Supplementary Security Income (SSI)

SSI is a federal program that helps those over 65, the blind and disabled, including disabled children. SSI benefits are reduced by any other income the SSI recipient earns and may be reduced by income received by other members of the household. The most an unemployed SSI recipient can earn from her sources is \$490 a month.

Medicaid

Medicaid pays limited benefits for medical care for the poor. Medicare, on the other hand, is not needs-based and is available to the elderly and to disabled persons receiving social security disability benefits. Those receiving AFDC benefits qualify for Medicaid as do pregnant women and children whose families meet certain income requirements.

WIC

The Women, Infants and Children program provides nutritional education and assistance to low income children and pregnant women.

County Assistance

The Galveston County Department of Social Services administers a variety of program to help low income citizens. Financial assistance is available to low income families who face eviction, utility cutoff or other extreme need. The agency also manages indigent burials. The department counsels people and helps put them in contact with public and private agencies that can provide help.

Energy Assistance

Houston, Light & Power, Entex and

Southern Union Gas cooperate in this program which helps the elderly, disabled and the poor with utility bills.

Lawyers can refer clients with ques-

tions about public benefits to the Galveston County Department of Social Services at (409) 766-2270 or (713) 534-2531★



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Preparing Your Medical Expert for Deposition

By Greg B. Enos

Personal injury cases can be won or lost as a result of the deposition of the plaintiff's expert witnesses on injuries and causation. In medical malpractice cases especially, how well the plaintiff's expert does in deposition can greatly effect a case's settlement value.

When scheduling the deposition of your medical expert you should take into account the need to spend at least two uninterrupted hours with your expert just before the deposition, preferably on the same day as the deposition. Notify your expert in writing as soon as the deposition is scheduled, including the time and place of your pre-deposition meeting. If the deposition is to be videotaped, remind your expert to dress like a doctor, preferably with white hospital coat on.

Most defense counsel will include a list of documents to be produced by your expert with the formal deposition notice. Send the entire notice to the expert as soon as it is received with a cover letter explaining the need to produce readily available documents that have been requested. The expert is not required to create documents (e.g. lists of prior cases he/she has testified in).

Try to meet your expert in a private office or conference room with enough table space to spread the file out on. Avoid public places such as restaurants where your conversation might be overheard.

The attorney must prepare for the deposition by being thoroughly familiar with the facts of the case, particularly the testimony of the plaintiff(s), the defendants and other fact and expert witnesses. The attorney should outline in advance areas of cross-examination specific to the case.

Never assume your expert is familiar with the facts of the case or is a particularly good testifier, no matter how much you are paying the expert

and regardless of how many times the witness has testified before.

Your pre-deposition meeting with the expert should include discussion of the following items:

1. As soon as you see the expert, shake hands and say, "first and foremost, I want you to give fair, honest opinions no matter which side of the case it helps or hurts." Then relax, say, "hi", and explain that if the defense attorney asks the expert if she met with you and asks what was said, the doctor can say with a smile, "The first thing he told me was to give fair, honest opinions no matter who it helps or hurts." That

"Never assume your expert is familiar with the facts of the case . . ."

frequently will end that line of inquiry.

2. Emphasize several times during the meeting the three basic rules for an expert to follow in deposition:

- A. Only answer the question asked, no more. Give examples and analogize to the card game of "Go Fish." (If the other player asks for queens, either produce them or say, "go fish." Don't reveal whether you have any fours or aces which were not asked about). Emphasize this will get the deposition over much quicker.

- B. Be sure of the facts and sequence of events. A deposition is not a memory game. The doctor should insist on looking at the records or his notes to verify a fact.

- C. The doctor should be prepared to differentiate those opinions he is sure of, those that are based on reasonable medical probability, and those that are mere possibilities. An exasperated physician will often agree with the defense attorney that his/her opinion is mere speculation and so sink the

plaintiffs' case.

3. Briefly review with your expert her prior testimony in other cases. Attorneys will usually ask if the doctor has testified before, how many times, what sort of cases they were, who the lawyers were, how many times she has testified for the patient and how many for the defendant. Your expert must of course testify truthfully but she should be reminded, "I don't remember," is an acceptable answer. Caution her that the defense may have copies of her prior testimony.

4. Your expert should have his entire file on your case. Review each and every document, record, x-ray, etc. your doctor has reviewed, including articles and text books. Have him make a handwritten list to refer to in the deposition.

5. Look through any notes your expert has made and prepare her for questions about them.

6. Review your expert's billing records and tell her to anticipate questions about her charges. I am always amused when a doctor tells a defense lawyer, "I charge by the hour, just like you do."

7. If your expert was located or retained through a service or bureau, let her know that questions about that relationship may be coming. Cross your fingers that your expert does not advertise individually.

The next steps are the most important in preparing your expert for deposition.

8. Review the facts of the case by reciting them for your expert, looking through records together, and asking questions. Doctors new to testifying tend to be more scrupulous. Do not assume the doctor knows the facts of a case he or she may have last thought of over a year before. "Hot

(Continued on page 5)

shot" doctors and experienced testifiers tend to be more cavalier on studying the case and can be made to look very foolish if they screw up the facts. I find it useful to prepare a typed chronology of the medical care in the case for my experts. As long as it contains no events you want to keep secret from the defense, it is fine for your doctor to review it and produce it for the defense.

9. Review each of your expert's opinions that are key to your case. Ask him to explain the foundation for each opinion and explore the logical underpinnings of each one (e.g. "so, there are only three possible causes for 'his problem and tests ruled out two of them, are you sure there are no other possible causes? Did the test really negate those other two possibilities?") Again, emphasize that these core, important opinion upon which your case hinges must be based on reasonable medical probability.

Prepare the doctor for questions like:

- You don't really know, do you?
- In fairness, that is simply speculation isn't it?
- Would you agree that is a subject upon which reasonable doctors would differ?
- You would defer to a neuro - radiologist in interpreting this film since you are an internal medicine specialist?
- So, if an expert in maternal fetal medicine testified otherwise, he would be just flat wrong?

10. Review your legal theories and the causes of action you are asserting. If your expert will testify about the standard of care, read the definition of negligence in a malpractice case from

the Pattern Jury Charge and remind him that is all the standard of care amounts to.

11. Finally, just before the deposition, remind your expert again of the three cardinal rules of expert depositions (No. 2 above). Ask her to take frequent breaks so you can converse with her and emphasize that her demeanor should be like a resident facing an oral board exam: project competence, be serious, do not come across as a smart ass and do not lose your cool.

If you are facing an experienced defense lawyer, you will usually feel some damage has been done to your case at the end of your expert's deposition. Hopefully, preparing your expert in the manner set forth above will minimize the harm done to your case. Your expert might even "kick butt" for you. Remember, it is always easier if you only sign up good cases in the first place.★

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Trial Reports

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Kyle Pinkerton represented a father who received primary custody of his two year old son in a modification action before Judge Susan Baker Olsen. **Mary Beth Nelson** represented the mother.

A jury in Judge Mary Nell Crappito's court returned the fastest "guilty" verdict she has ever seen in a DWI case. Judge Crappito swears the jury was out for less than three minutes. **John Thoma** represented the defendant, who had turned down an offer of one year probation and \$400 in fines. Judge Crappito assessed two years of probation, 150 hours of community services, and four days in jail over two weekends. **Ben Massar** represented the State.

A jury in Judge Roy Engelke's court found a local gynecologist performed a hysterectomy without informed consent and awarded \$34,911 in damages (which will be doubled by prejudgment interest).

Elisa Vasquez represented the

claimant in an Underinsured Motorist action in Judge Jerome Jones' court. The plaintiff had settled with the driver of the other vehicle for his \$25,000 policy limits. The jury found \$17,500 in damages, meaning there will be no recovery against the UIM carrier.

A jury in Judge I. Allan Lerner's court found the plaintiff 100% negligent in a medical malpractice case. **S. R. "Stretch" Lewis** represented the defendant doctor (another physician received an instructed verdict).

Go figure. A huge dump truck rear ends the plaintiff's Honda Accord. The plaintiff is seen on the day of the accident in a local E.R. and by an orthopedic surgeon and is hospitalized for almost two weeks. Medical bills exceed \$18,000 and a claim for \$3,500 in lost wages is made. The jury in Judge David Garner's court found the dump truck driver negligent but awarded \$1,350 in damages. **Neil Baron** represented the plaintiff.

Kenneth Kaye represented the

owner of a townhome who sued the homeowners' association for failing to repair a bulkhead which caused foundation damage. The jury in Judge Frank Carmona's court found DTPA violations and awarded \$22,500 in actual damages and \$60,000 in attorney's fees. The association, represented by **Marilyn Mieszkuc** and **Charles Daughtry**, won almost \$21,000 in a counterclaim for unpaid assessments and \$2,500 in attorney's fees.

What a jury awards, the trial judge may take away (and the Court of Appeals may make worse). **Kenneth Kaye's** clients sued a Galveston bank which had foreclosed on a house it had financed. The jury awarded Kaye's clients DTPA damages and attorney's fees but Judge Henry Dalehite granted judgment n.o.v. for the bank. On appeal, the 14th Court of Appeals added insult to injury by ruling that the bank should have recovered \$11,700 on its deficiency action and should have also won attorney's fees from the plaintiff.★

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July 15, 1996

Serving the Galveston County Legal Community

Evelyn Wells Robison vs. 212th's Bridget Hargrove?

Bridget Hargrove, Coordinator for the 212th District Court, confirmed that she is seriously considering seeking the Democratic nomination for District Clerk in 1998, even if that means challenging incumbent Evelyn Wells Robison.

Robison says she has every intention of running for reelection. "I intend to be District Clerk at the turn of the century and beyond," said Robison. "There is no substitute in the

clerk's office for experience and knowledge."

Robison, 56, has worked in the courthouse for 37 years, 32 of which was in the District Clerk's office. She was V. J. Beninati's Chief Deputy for 19 years.

Hargrove started work in the D.A.'s office in 1977 and has worked in the 212th since 1983. She said, "I worked for Ron Wilson and Don Morgan and lived to tell about it."★

Bar Associations Elect Officers

The Galveston County Young Lawyers' Association and the Galveston County Criminal Bar Association elected officers for the new bar year.

The new President of the Young Lawyers is Karen Madden. The President-elect is Shauna Berardinelli. Lloyd Earley is the new Secretary and Leslie Walker (formerly Leslie Dillon) will be the Treasurer.

The Young Lawyers will not meet in July or August. Starting in September, the group's meeting site will move to the Pelican Club. Lloyd Earley and Leslie Dillon Walker will represent the group at the State Bar Association Bar Leader's Conference in El Lago.

The Galveston County Criminal Bar Association's President for the 1996-97 year will be Oktavia Carstarphen of Galveston. Leonard Cox was elected Secretary/Treasurer. Susan Criss was elected as President-Elect.

The Criminal Bar Association will continue to meet at Dibella's restaurant in Galveston.★

County Bar Spring Seminar To Las Vegas?

County Bar leaders are considering moving the site of the annual Spring seminar from Lake Tahoe to Las Vegas to lower the price and entice more members to attend.★

President's Column

County Bar Association Has Big Plans

By E. A. "Trey" Appfel, III

The Galveston County Bar Association has elected new officers and has many plans for the next 12 months.

At the June Bar meeting, Susan Criss was selected to be President-Elect, David Salyer was elected Secretary and Janet Rushing won the post of Treasurer. The Bar Directors for the next year will be Pat Doyle, Wayne Mallia, Barry Radcliffe, Russ Burwell and Bruce Fort.

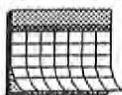
The Bar will present its annual Ad Litem seminar on Thursday, September 19 at the San Luis. The First Court of Appeals will be in town the next week and has promised to attend the Bar's monthly meeting on September 26.

Five special committees have been established which hopefully will have a positive impact on our entire legal community.

The Courthouse Improvement Committee will explore ways to make our venerable courthouse a better place to work. Ideas we have already heard range from

(Continued on page 2)

Mark your Calendar....



July	25	Galveston Bar Assoc.—Galveston Hilton (San Luis) : noon
	26	Mainland Bar Assoc.—Merchant's Bank in League City: noon
Aug.	29	Galveston Bar Assoc.—Galveston Hilton (San Luis) : noon
Sept.	19	Ad Litem Seminar—Galveston Hilton (San Luis) : 1:30-4:30 p.m.
	26	Galveston Bar Assoc.—Galveston Hilton (San Luis) : noon

(Continued from page 1)

benches in the hall to a poster-blow-up machine. Greg Enos will chair this committee.

The Membership Services committee will survey all bar members to determine how the Bar can improve its services to local lawyers. If you have ideas about how your bar association can help you or your practice, contact this committee.

The Library Committee will continue the great work of John Ellisor (who is stepping down as chairman) and proceed with plans to remodel and modernize the County Law Library. If you would like to serve on this committee, please contact Wayne Mallia at (979) 766-2355.

Emily Fisher will head up the Pro Bono Committee which is working on promoting the delivery of legal services to low income families. Please call Emily at (409) 765-5705 if you would like to help with this vital effort.

The State Bar's quarterly meeting in September 1997 will be held in Galveston. The State Bar Reception Committee will plan a reception for bar leaders from around the state. Russell Burwell will lead this committee.★

E. A. "Trey" Apffel, III is President of the Galveston Bar Association. Contact Mr. Apffel at (409) 948-0003 or (713) 488-2281.



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Abusers Face Federal Civil Rights Law

by Greg Enos

The Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C. 13981, is a new, powerful weapon in the fight against family or work-place violence.

The Act provides a remedy against any person, including someone acting under color of state law, who commits a crime of violence motivated by gender.

The Act features: (a) unlimited compensatory and punitive damages; (b) liability against governmental and private actors; (c) attorney's fees and costs; (d) explicit prohibition against removal to federal court; and (e) no minimum number of employees or administrative prerequisites to filing suit like most civil rights laws.

The underlying crime need not result in an arrest or conviction, but must constitute a felony crime of violence, as defined by state law.

A doctor who rapes a patient or a husband who attempts to run his wife over with a car are examples of potential defendants under this law. Texas now allows tort causes of action to be joined in divorce suits. There are many marital situations which might give rise to a cause of action under the Act.★

Trial Re-Setting Erases Docket Control Order

In a mandamus proceeding, the Corpus Christi Court of Appeals ruled that scheduling orders do not survive the re-setting of the trial date. The docket control order required expert designation by April 12, 1995. Trial was reset for November 27 and the defendant designated an expert 31



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days before trial. The trial court struck the expert and the Court of Appeals held that was an abuse of discretion, stating, "A trial resetting has the effect of nullifying a discovery deadline set by a docket control order." J.G. v. Murray, 915 S.W.2d 548 (Tex. App. - Corpus Christi 1995)(orig. proc.).★

Trial Reports

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A jury in Judge I. Allan Lerner's court awarded \$65,000 to a man whose vehicle was hit from behind by a car driven by a 16 year old who had two beers (but was not legally intoxicated). The young defendant contended the plaintiff stopped suddenly and did not have his turn signal on (which an eye witness confirmed). The plaintiff suffered two bulging discs and a herniated disc at L5-S1. The defense called Dr. J. Martin Barrash, a Houston neurosurgeon, to testify the plaintiff merely had a soft tissue injury and should have recovered in six months.

Ervin Appfel, Jr. and **Genevieve McGarvey** won a medical malpractice case in Judge I. Allan Lerner's court. The patient and her husband sued two UTMB rheumatoidologists and a drug company, alleging that the woman was given a placebo as part of a clinical trial without her informed consent. The jury found that none of the de-

fendants were negligent.

The plaintiff lost a swearing match about who ran the red light in a brief jury trial before Judge Jerome Jones. **Roy Brown** and **Sean Tracey** represented the plaintiff who was found to be 80% at fault.

A rear-ender, soft tissue auto case resulted in a finding of 50/50 negligence and zero damages in a trial before Judge I. Allan Lerner. The three plaintiffs all had soft tissue injuries and had been treated by the same chiropractor. The defendants argued that the plaintiff driver stopped suddenly and that the property damage was minimal (about \$800). There was some testimony that one plaintiff told the others to "hold their necks" right after the accident.

Jack Ewing lost a medical malpractice case against St. Mary's Hospital, which was represented by Fulbright & Jaworski. The plaintiff alleged that a respiratory therapist injured her median nerve while perform-

ing an arterial blood gas test, thereby causing sympathetic reflex dystrophy. Judge David Garner presided over the four day trial.

Russ Burwell, III lost a slip and fall case against H.E.B. in Judge I. Allan Lerner's court. The plaintiff slipped and fell in chicken blood some ten yards from the meat section. HEB called one of the plaintiff's nieces to testify that she was offered a vehicle to help the plaintiff at trial. HEB also contended it had no notice of the blood on the floor.

Liberty Doc Becomes "Freeman"

A Liberty doctor, acting pro se, has attacked a \$300,000 sexual harassment judgment against him because the judge, attorneys and court reporter allegedly conspired to expunge his true, Christian name from the record. The doctor, who has declared himself a "freeman," contends his real name doesn't include the title, "Dr." and has a comma in it. ★

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June 13, 1996

Serving the Galveston County Legal Community

Bar Approves Changes for County Law Library

The Galveston County Bar Association at its May meeting approved proposals that will result in major changes in the County Law Library located on the sixth floor of the courthouse.

The Bar Law Library Committee, headed by John Ellisor, presented proposals to remodel the library and to sell regional reporters other than the Southwest reporters. These ideas, which were originally suggested in this newsletter, were approved after some discussion at the Bar's last meeting following a presentation by Mr. Ellisor.

Galveston County has already included the proposed remodeling job

as part of its early planning for the next fiscal budget. The proposed change in the library (which is shown on the diagram below) would use the space saved by getting rid of the seldom-used out-of-state reporters to build a hearing room that could be used by the family court's associate judges, for D.P.S. license revocation hearings and other similar proceedings that currently shift from room to room in the courthouse.

Another important part of the library plan is to build individual study/work carrels like those found in law school libraries. Attorneys will hopefully be able to plug their own laptop computers into connections to use a shared printer, modem and CD ROM device.★

County Mediation Association Plans 1996 Meetings

The Mediation Association of Galveston County invites local attorneys to use its members for mediations and to join if they want to get involved as mediators. Charles Jordan is President of the association this year. Jordan announced that the group will meet at the following times and locations:

August 2 noon Olive Garden,
Texas City
Speaker: Victor Hirsch, Ph.D.

December 6 noon Western Sizzlin
Galveston
Speaker: Judge's Panel

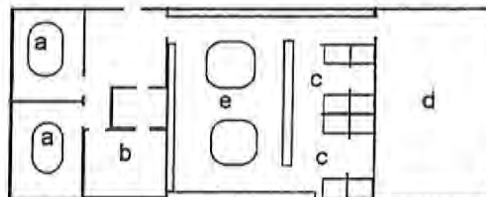
The association is applying for CLE credit for these meetings.

A list of members can be obtained from Manny Espitia at the Galveston County Law Library. Annual Dues are \$25.★

"Babe" Schwartz as Law Professor?

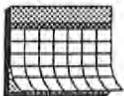
Galveston's legendary former state senator, A. R. "Babe" Schwartz will be teaching a class on the legislative process at the University of Houston Bates School of Law in the fall semester. Attorneys can take the class for CLE credit.★

Galveston County Law Library Proposed Changes



- Key:
- a Mediation/Conference rooms
 - b Attorney lounge
 - c Carrels with laptop computer and modem connections
 - d Hearing room (can also be used for meetings and mediations)
 - e Complete Texas and Federal library

Mark your Calendar....



- June 21 Mainland Bar Assoc. Golf Tournament—Lakeview Co. Club
25 Galv. Co. Young Lawyers—Galvez Hotel: noon (election)
27 Galveston Bar Assoc.—Galveston Hilton (San Luis) : noon
28 Mainland Bar Assoc.—Merchant's Bank in League City: noon

Bar Results

The pass rates for the February 1996 Bar Exam improved overall from 71.7% on the prior exam to 77.9%. Pass rates for selected schools were as follows:

<u>Law School</u>	<u>Pass Rate</u>
Baylor	94.6%
T.S.U.	92.0%
Univ. of Texas	91.5%
South Texas	78.8%
Univ. of Houston	77.3%
St. Mary's	74.1%

Mainland Bar Golf Tourney June 21

The Mainland Bar Association will hold a scramble golf tournament at 1:00 p.m. on Friday, June 21 at the Lakeview Country Club in La Marque. The \$25 registration fee includes a sandwich and drink. Contact Carlton Getty at 409-935-2481 or fax him your handicap at 409-935-2061. Golfers are asked to arrive at noon. ★

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Car Wreck Seminar

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In two and a half hours, this small group seminar will cover every aspect of car wreck injury cases from signing up new clients through settlement or filing of suit. The seminar is limited to no more than 15 lawyers or legal assistants. Participants will receive a seminar book which will include a step-by-step procedure guide and all necessary forms, a computer disk with those forms on it, and a sample client file which will be used to explain how such cases are handled. The seminar will be conducted by Greg Enos, who is Board Certified in Personal Injury Law and has handled car wreck cases for ten years. Cost per participant is \$45. We will apply for two hours of CLE. Because of limited space, you must pre-register to attend. Call (409) 945-2902 or (713) 286-5500.

War Stories

Exclusion of Sex Gear Upheld

The El Paso Court of Appeals has affirmed judgment in favor of the husband in a bizarre divorce/custody case tried in part by Judge Ron Wilson and then by visiting Judge Arthur Leshar. Barry Radcliffe represented the victorious husband and Terry Holmes represented the wife at trial. Thomas McQuage is the wife's appellate lawyer.

The husband and wife worked as researchers at UTMB. The wife took the couple's six year old son to New Zealand while the divorce was pending. The husband had to work through the New Zealand courts and police to get the child returned.

At trial, evidence showed the husband had an affair with another UTMB employee and that they kept a bag of sexual devices in a locker at work. While the wife and child were out of town, the lovers took the bag of toys to the husband's house and somehow lost it. The wife claimed she found the bag on the little boy's bed while the man said a cleaning lady found it and gave it to the wife.

At trial, the wife tried to admit the contents of the bag, which included, "a strap-on artificial penis; two vibrators; a vibrator-like device called a "tiger paw;" a bottle of baby oil; a jar of Vaseline;...a nylon cord knotted at one end; a videotape depicting [the paramour] using a vibrator and [the husband and lover] engaging in sexual intercourse; still pictures excerpted from the videotape; a picture of a nude woman's back; three "swinger" magazines; and three magazines containing explicit pornography."

The Court of Appeals upheld the exclusion of the bag of sex gadgets because the husband testified to its contents and admitted adultery and there was no evidence the boy had been exposed to his dad's activities. In addition, the evidence was deemed

(Continued on page 4)



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Galveston's **Craig Eiland** and **John Nichols**, of Houston, won a \$2.9 million verdict in a death case tried in **Judge Roy Engelke's** court. The parents of a 28 year old man sued the drunk driver who hit the pedestrian as well as the company that owned the truck. The jury found the driver 70% at fault and the company 30% at fault. The verdict includes \$1 million in punitive damages against the driver, which may be uncollectible. However, \$1.9 million in actual damages and over \$300,000 in prejudgment interest should be collectable from the company which was found to have negligently entrusted the vehicle.

Gene Hagood and **Ellen Malow** won a \$315,000 verdict against a Texas City orthopedic surgeon who found to have negligently performed a hip replacement surgery. **Ervin Apffel** and **Genevieve Bacak McGarvey** repre-

sented the doctor before **Judge David Garner**.

A 13 year old boy was found guilty of beating a 68 year old woman to death with board with a nail in it. The juvenile faces a 40 year term in T.Y.C. **Joel Bennett** prosecuted the case.★

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(Continued from page 3)

unduly prejudicial. Exclusion of the evidence was also found not to be harmful error, as the wife got to testify her husband fornicated with many co-workers and fornicated nude on Stewart Beach, getting sunburned in the process. The wife also testified the husband, "masturbates compulsively," and, "engaged in group sex, homosexual sex, bisexual sex, interracial sex, sadomasochistic sex, lesbian sex and sex with animals." Despite, or perhaps because of, such testimony, the husband was awarded custody of the boy. The wife has applied for writ of error to the Supreme Court.★

Editorial Note: It seems to me improper for the Court of Appeals to publish this opinion using the real, full names of the husband, wife and paramour and then recite in detail the unusual facts and allegations presented at trial. Greg Enos.

Galveston County Lawyer

Greg B. Enos
2206 Fair Water Park Drive
League City, Texas 77573

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Galveston County Lawyer

May 8, 1996

Serving the Galveston County Legal Community

Texas City Names New City Attorney: Mary Fischer

Texas City's City Commission has chosen Mary Kay Fischer to be the new City Attorney. Fischer is currently the City Attorney in Texarkana. She will replace Carlos Garza, who has been acting City Attorney since S. Lee Wingate resigned in June.

Fischer is a graduate of South Texas Law School. She was born and raised in Baytown. Fischer was an Assistant City Attorney for Galveston from 1991 through 1993. Fischer expects to start work at her new \$60,000 a year post on June 10.

Other city attorneys in Galveston County include:

Dickinson
Galveston
Hitchcock
Kemah
La Marque
League City

Texas City
Santa Fe

League City is still looking for a permanent replacement for Mark Sokolow, who left his post in February 1996. Denise Lopen, assistant city attorney, has been performing his duties but no formal search for a permanent City Attorney has begun. ☆

Todd Stewart
Barbara Roberts
Steve Baker
Dick Gregg
Ellis Ortego
vacant
Denise Lopen, assistant city attorney
Mary Kay Fischer
Ellis Ortego

Court of Appeals Upholds Attorney Tax Against Local Lawyer's Challenge

Most lawyers merely complain to their bookkeeper when the annual notices for the State Attorney Occupation Tax come in the mail. League City lawyer Robert Graves did a little more than complain. In 1994, Graves filed a declaratory judgment suit challenging the constitutionality of the attorney tax.

On May 1, the Austin Court of Appeals affirmed the trial court's ruling that the State Comptroller can exempt attorneys employed by the state from the \$200 annual tax.

Graves had relied on Art. 8, Sec. 2 of the Texas Constitution, which says, "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Prior cases have held that it is unconstitutional not to collect a tax equally among members of a profession. The Comptroller had exempted judges and all lawyers working directly or indirectly for the state from the tax.

Graves plans to file for Writ of Error to the Supreme Court. Contacted after the Court of Appeals decision against him, Graves vowed to fight on and said that any amicus briefs would be appreciated. ☆

Legal Secretaries Name Boss of the Year

The Galveston Legal Secretaries Association held its Bosses' Appreciation Luncheon on April 16. Richard Crowther of Neves & Crowther was named boss of the year. Belinda New, PLS, who works for Greer, Herz & Adams, was named Secretary of the Year. New officers installed at the meeting included: President Lori Wilson, PLS and Vice-President Jerri Sue Gray, PLS.

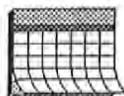
"PLS" stands for Professional Legal Secretary, a designation attained by passing a two day test. ☆

Bar News

Prof. Newton Wins State Bar Election. Texas Tech Law School professor Frank Newton defeated Tom Cunningham of Houston's Fulbright & Jaworski in the recent State Bar election for President-elect. Newton won by a 11,182 to 8,392 vote margin.

Glenn Named Young Lawyer of the Year. Doryn Danner Glenn of Yarbrough, Jameson & Gray was named Young Lawyer of the Year by the Galveston County Young Lawyer's Association at the recent Law Day luncheon. ☆

Mark your Calendar....



May	8	Family Law Bar—Pelican Club: noon
	10	Galv. Co. Criminal Defense Lawyers—Dibella's: noon
	28	Galv. Co. Young Lawyers—Galvez Hotel: noon
	30	Galveston Bar Assoc.—San Luis Hotel: noon
	31	Mainland Bar Assoc.—Merchant's Bank in League City: noon

Trial Reports

Call the Galveston County Lawyer with information about your jury and bench trials at (409)945-2902 or (713) 286-5500. Our fax number is (713) 286-9939. Send Internet e-mail to ENOSLAW@cris.com.

John Thoma's client dodged a huge hit in a dram shop case tried in Judge **David Garner's** court. Thoma represented a bar sued by the parents of two young boys killed by a drunk driver, who was found by the jury to not have been drinking at the defendant club. A default was entered against the drunk driver who had four prior DWI's and is in TDC. Judge Garner awarded a total of \$56.4 million, including \$40 million in punitive damages.

Assistant D.A. **Joe Maida** prosecuted a home invasion-robbery case against a Houston man, who was found guilty of breaking into a Friendswood home. Evidence showed the defendant and his accomplice beat, robbed and threatened the elderly homeowners. The jury found the defendant guilty of two counts of aggravated robbery and sentenced him to 99 years in prison.

HEB triumphed in another slip

and fall case. **Jeffrey and Gerise Kemp** represented the unsuccessful plaintiff.

George Vie and **John Eckel** of Mills, Shirley, Eckel and Bassett defended the City of Tomball and a city councilman and the City Manager against a suit alleging violation of a fired employee's First Amendment rights. The employee reported alleged illegal use of criminal histories and was fired. The jury in Houston Federal Judge David Hittner's court awarded the plaintiff \$150,250 for rights violations and \$900,000 for Whistleblower Act violations.

David Salyer and **Stacey Allen** successfully defended the management company for the Mall of the Mainland against a woman who claimed she fell in water leaking from a skylight. **Russ Burwell, III**, represented the plaintiff in Judge **Frank Carmona's** court.

National Cases

A Milwaukee judge dismissed a

73 year old woman's lawsuit against a Catholic church alleging that she began having multiple orgasms and was attracted to women after an electronic bingo board fell on her.

Appellate Decisions of Note

The Austin Court of Appeals held that a wife's disability benefits paid through her employer were community property where her disability caused by a premarital injury had worsened during the marriage.

Newsome v. Petrilli (4/3/96). ☆

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Congratulations to recently Board Certified Attorneys: **George Vie, III** (Civil Appellate Law) and **Wade Williams** (Personal Injury Trial Law). **Trey Apffel**, our State Bar Director was named to the Bar Board's Executive Committee.

Galveston County Lawyer

April 11, 1996

Serving the Galveston County Legal Community

Video Seminar on Family & Probate Guardians April 19

A video seminar entitled, "Guardianship Issues in Texas Probate and Family Law Courts" will be presented April 19 at the College of the Mainland. The seminar is sponsored by the Galveston County Bar Association and the State Bar and should allow lawyers to be certified as an ad litem for probate court proceedings. Full attendance is worth 5.5 hours of MCLE. The registration fee is \$80, although lawyers licensed less than two years will be charged \$60.

Registration begins at 7:45 a.m.

Law Day Lunch Set for April 25 at Galvez

The annual Law Day luncheon will be Thursday, April 25, at the Galvez Hotel in the Veranda Room. U.S. District Judge Samuel Kent will be the featured speaker. This year's theme is, "We the People: The U.S. Constitution, the Original American Dream." The Liberty Bell award, Outstanding Young Lawyer and scholarships will be awarded. The lunch is free for members of the Bar or Young Lawyers. Guests are \$10. Contact Doryn Glenn (765-5515) or Shauna Berardinelli (713-339-0255) to RSVP.★

and the video presentation will start at 8:45 a.m. in the Technical Vocation Building at COM in Texas City, room T-007.

The seminar features experienced practitioners speaking on topics such as guardianship, what the "best interests" of a ward or minor mean and, "Court's Ears versus the Child's Mouth."★

Justice Mirabal Plans Local Area Receptions

Justice Margaret G. Mirabal of the First Court of Appeals has scheduled two receptions for the Galveston County area. Justice Mirabal won the Democratic nomination for her seat and faces a Republican challenger in November.

A Galveston Island reception for Justice Mirabal is set for Thursday, April 18 in the Tremont House lobby from 5:00 p.m. to 6:30 p.m. A North County reception will be held on Thursday, April 25 at the law offices of Gregg, Mieszkuc, Lewis & Daughtry at 17044 El Camino Real from 6:00 to 8:00 p.m. There is no charge to attend either event. Folks interested in attending should call Justice Mirabal's campaign at (713) 974-2145.★

Whittington to Face Venso for 56th District Bench

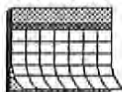
Miles Whittington won the Republican nomination for the 56th District Court by defeating John Wright. Whittington will face Norma Venso in November. Venso defeated Larry Edrozo in the Democratic primary by a 68% to 32% margin.

Campaign finance reports filed by Whittington through the eighth day before the primary election show that he had raised \$9,200 in contributions and spent \$9,043. Whittington has loaned his campaign \$1,000. In contrast, Venso had raised \$40,488 and spent \$31,121 during the same period.

Whittington received \$100 contributions from Ervin Appfel, Jr., Michael Hughes and W. Daniel Vaughn shortly before the election. Whittington's largest contributors are:

Justin Presnal (Fisher, Gallagher & Lewis)	\$1,000
Pam Delpapa	\$750
Joseph Meyer (Houston)	\$500
Shari Daughtry	\$500
Gregg, Mieszkuc, Lewis & Daughtry	\$500
Appfel & Tracey	\$500
Steve Ongert	\$250
Stephen Schulz	\$250
Tim Weatherly	\$250
Gus Saper	\$250

Mark your Calendar....



April 12 Galv. Co. Criminal Defense Lawyers—Dibella's: noon
25 Galv. Co. Young Lawyers—LAW DAY LUNCH-Galvez Hotel: noon
25 Galveston Bar Assoc.—LAW DAY LUNCHEON-Galvez Hotel: noon
26 Mainland Bar Assoc.—Merchant's Bank in League City: noon
Note: The Family Law Bar will meet at the Pelican Club starting in May

Nationally Published Author Opens Family Mediation Practice in Clear Lake

Johnette Duff, attorney and author of three books on the legal and financial aspects of marriage, has opened a family mediation practice serving clients in the Clear Lake/Galveston County area.

Ms. Duff became a lawyer in 1981 and handled primarily family law cases until she took a sabbatical in 1992 to write her books: *The Spousal Equivalent Handbook: A legal and financial guide to living together* (Tutor/Penguin 1991), *The Marriage Handbook: A legal and financial guide to your spousal rights* (Dutton/Penguin 1993), and *Love After Fifty: The complete legal and financial guide* (Love & Money Press 1994).

Duff has been featured on television shows such as *Today*, *Good Morning America* and *CBS This Morning*. A graduate of Clear Creek High School and the University of Texas (with a degree in journalism), Duff got her JD from South Texas College of Law.

"A family mediator can facilitate rational decision-making between even

the most disgruntled soon-to-be ex-spouses, allowing them to explore options not available in the courtroom," said Duff.

Ms. Duff can be contacted at (713) 335-9133.★

Plaintiff Claims Extensive Slip-n-Fall Damages

The Universal Press Syndicate cited a story in the *Carthage, Missouri Press* about a woman suing the county for a fall in an unplowed school parking lot. The plaintiff's petition stated, "All the bones, organs, muscles, tendons, tissues, nerves, veins, arteries, ligaments,...discs, cartilages, and joints of her body were fractured, broken, ruptured, punctured, compressed, dislocated, separated, bruised, contused, narrowed, abraded, lacerated, burned, cut, torn, wrenched, swollen, strained, sprained, inflamed, and infected."★

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Houston Trial Lawyers Association
Houston Young Lawyers Association
Mexican-American Bar Association
North Harris County Bar Association
Piedmont Bar Association

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An average of 20,000 clients are referred annually by the Houston Bar Association's Lawyer Referral Service to its panel members.

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Car Wreck Seminar

Thursday, May 23 - 1:30 p.m. - 4:00 p.m.

at The Enos Law Firm, P.C.

Texas City office: 2501 Palmer, Suite 210

In two and a half hours, this small group seminar will cover every aspect of car wreck injury cases from signing up new clients through settlement or filing of suit. The seminar is limited to no more than 15 lawyers or legal assistants. Participants will receive a seminar book which will include a step-by-step procedure guide and all necessary forms, a computer disk with those forms on it, and a sample client file which will be used to explain how such cases are handled. The seminar will be conducted by Greg Enos, who is Board Certified in Personal Injury Law and has handled car wreck cases for ten years. Cost per participant is \$30. We will apply for 2.25 hours of MCLE. Because of limited space, you must pre-register to attend. Call (409) 945-2902 or (713) 286-5500.

War Stories

Would-be Juror Gets the Blame

This is a regular series on interesting, scary or amusing "war stories" of the sort trial lawyers love to bore each other with. Please send us your war stories.

I was appointed by Judge Dalehite to represent a gentleman accused of burglarizing a store. While my client was indeed arrested with an arm full of clothes running away from the store, he adamantly blamed a gentlemen named Tommy Smith for breaking into the store and stealing the stuff. "I was just walking by and he gave the clothes to me," my client always said.

At trial, the prosecutor outlined his purely circumstantial case in voir dire. When it was my turn to address the venire panel, I began to explain that it was our position that someone else had actually broken into the store. As I spoke, my client began tucking at my sleeve, trying to get my attention. I whispered to him to wait until I was through. However, he continued to pester me. Finally, I leaned down to my client and asked him what he wanted. "That's Tommy Smith, there on the first row!" he hissed. I looked at my list of jurors and sure enough, a fellow with the same name as the guy we were blaming was on the panel.

I turned to Judge Dalehite and asked to approach the bench. The Judge asked why I wanted to approach and all I could say in front of the jury panel was, "it's real important judge." The Assistant D.A. and I went to the bench and I explained the situation. The D.A. confirmed Mr. Smith had a warrant out for his arrest. By this time Mr. Smith was looking real nervous and eyeing the exits. Judge Dalehite then excused the panel except for Mr. Smith, who was arrested.★

Submitted by Jack Ewing.



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Debra January-Bevers and **Jack Ewing** lost an unusual case against the driver of a car allegedly parked so as to block the sidewalk the plaintiff was walking on. The plaintiff suffered a severe ankle fracture requiring surgery and developed sympathetic reflex dystrophy. Trial was before Judge **Frank Carmona**.

Jack Brock and **Maureen Kuzik** of Mills, Shirley, Eckel & Bassett defended a family sued for failing to provide correct financial information in the sale of a business. Brock's clients counter-sued for breach of contract and were awarded over \$1 million in damages and \$259,000 in attorney's fees. The plaintiff, who may now wish he had not sued, was represented by **Richard Schwartz** of Houston.

Anthony Griffin's client was found guilty of manslaughter in Judge **Roy Engelke's** Court but was assessed only ten years probation.

The jury originally voted 7 to 5 for acquittal but then decided to compromise and return a guilty verdict. **Kurt Sistrunk** was the prosecutor.

Neil Baron lost a slip and fall case against H.E.B. in Judge **Frank Carmona's** Court. The plaintiff said she fell in rainwater tracked in by empty shopping carts.

Appellate Decisions of Note

The Houston 14th Court of Appeals ruled in March that a psychologist and a guardian ad litem appointed by the court in a custody suit were absolutely immune from suit, as long as they were acting within the scope of their quasi-judicial roles. *Delcourt v. Silverman*.

The U.S. Fifth Circuit Court of Appeals applied Texas law and ruled that an attorney who withdraws without just cause before the proceedings are terminated forfeits all right to compensation. In this plane

crash-death case, the attorneys withdrew because the plaintiff would not follow their advice to settle for \$625,000. The clients later settled for \$850,000. The court held that quitting because the client will not heed settlement advice is not good cause for withdrawal. *Augustson v. Line Aerea Nacional Chile*.

The Amarillo Court of Appeals ruled in March that when a spouse repudiates an agreement made in mediation, the trial court cannot enter a consent decree to enforce the agreement. *In the Matter of the Marriage of McIntosh*.

Want to Sue UTMB?

Do not forget the six month deadline to give UTMB notice of your claim. Actual notice will meet this requirement. Tex. Civ. Pract. & Rem. Code, Sec. 101.101.

Greg B. Enos

Board Certified in Personal Injury Trial Law.

Galveston County Lawyer

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Galveston County Lawyer

March 7, 1996

Serving the Galveston County Legal Community

Judicial Candidates Reveal Campaign Finances

The primary elections are next Tuesday. Norma Venso and Larry Edrozo, Democratic candidates for the 56th District Court, have filed campaign contribution and expenditure reports that show they are almost even in spending. Venso, however, is far ahead in contributions while Edrozo has made a significant loan to his campaign. The campaign reports of Miles Whittington, who is expected to easily win the GOP nomination for the 56th bench, will be reviewed in the next issue.

Venso has raised \$40,488 and spent \$31,121 through March 4, 1996 while Edrozo has received contributions of \$16,184 and spent \$26,644. Edrozo has loaned his campaign \$15,000.

Not surprisingly, most contributors to both campaigns are lawyers, although relatives of both candidates have made significant contributions.

Some lawyers have supported both campaigns. Houston attorney Arthur Schechter has donated \$1,000 to both campaigns (Schechter's associate, Larry Tylka, is an Edrozo campaign leader). Alvin attorney Robert Clements has also donated to both candidates.

The ten largest contributors to

Larry Edrozo's campaign were:

Robert Clements	\$ 250
Bill Chuoke	\$ 250
Martin & Garza	\$ 500
Warren Burnett	\$1,000
Ray Burnett	\$1,000
Arthur Schechter	\$1,000
Stephen Linekin (Houston)	\$1,000
Greg & Debra Porter (LaMarque)	\$1,000
Henry Leach	\$1,000
Nelle Leach	\$1,000

Venso has received contributions from plaintiffs' lawyers as well as attorneys with major defense firms in Galveston and Houston. Ten attorneys at McLeod, Alexander, Powel & Apffel have given Venso donations as have five lawyers at Mills, Shirley, Eckel & Bassett and six at Greer, Herz & Adams.

Venso's major contributors include:

John Eckel	\$ 500
Fulbright & Jaworski	\$ 500
Mayor, Day, Caldwell & Keeton PAC	\$ 500
Lewis & Williams	\$ 500
Walter Hall	\$ 500
Neil Baron	\$ 500
John McEldowney	\$ 650

(Continued on page 2)

The Courthouse Library: A Radical Proposal

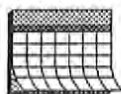
Editorial By Greg Enos

It is possible and fiscally feasible to dramatically change the county law library to better serve attorneys and provide the associate judges for the family law courts with their own hearing room.

The case reporters from other states should be sold and the library boiled down to a complete set of Texas and federal cases, statutes, digests and practice books. A West-law connection would provide access to cases (and much more) from other states. The shelf space that would be saved would allow one third of the library to be converted into a hearing room for the associate judges similar to those in the Harris County Family Law Center (see floor plan on page two).

Study carrels like those in a law school library could be installed with built-in connections for lawyers' laptop computers with a shared laser printer. Some would be available for anyone and some would be leased to help finance the library's remodeling. The two current meeting rooms with steel shelves should be spruced up and rented for mediations. *Call, fax, write or e-mail me with your thoughts and reactions or let John Ellisor on the Bar Library Committee know what you think.* ☆

Mark your
Calendar....



March	8	Galv. Co. Criminal Defense Lawyers—Dibella's: noon
	13	Family Bar Association—Galvez: noon
	26	Galv. Co. Young Lawyers—Galvez Hotel: noon
	28	Galveston Bar Assoc.—San Luis: noon
	29	Mainland Bar — Merchant's Bank in League City: noon

(Continued from page 1)

56th District Court Campaign Finances

Ernest Cannon	\$1,000
Jad Stepp	\$1,000
Hardy & Johns	\$1,000
Joseph Jamail	\$1,000
John Kibler (LaPorte)	\$1,000
Tex. Assoc. of Electrical Workers PAC	\$1,000
Elisa Vasquez	\$1,000
David Miller (Houston)	\$1,000
Anita Anderson (San Anton.)	\$1,000
Mike Martin	\$1,000
Tim Beeton	\$1,000
Anton Todd	\$1,000
William Neuman	\$1,000
Mr./Mrs. Homer Venso	\$2,000

The candidates are required to file additional campaign finance reports after the election which will show a more complete list of contributors.

Mainland Bar Association

The Mainland Bar now meets at Merchant's Bank community room in League City on the last Friday of each month.

Bay Area Custom

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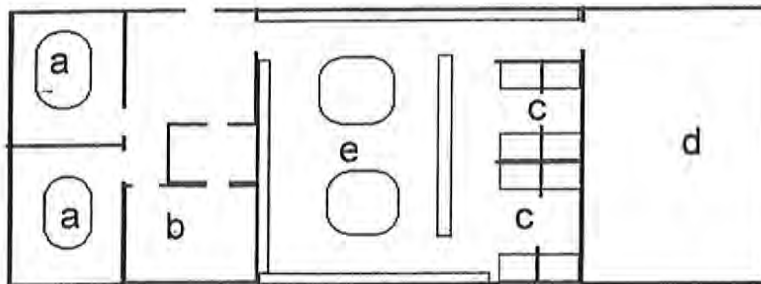
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Galveston County Law Library

Proposed Changes



- Key:
- a Mediation/Conference rooms
 - b Attorney lounge
 - c Carrels with laptop computer and modem connections
 - d Hearing room (can also be used for meetings and mediations)
 - e Complete Texas and Federal library

War Stories

The Psycho Divorce From Hell

This is the first of a regular series on interesting, scary or amusing "war stories" of the sort trial lawyers love to bore each other with. Please send us your war stories.

Last year, I represented myself in a four and half week jury trial of my own divorce (Terry Goodwin of Clear Lake did the voir dire and questioned me and a few other witnesses but I was my own lead counsel). This case, which featured twelve lawyers, two recusals of judges, a witness arrested on the witness stand, a court-ordered psychiatric exam of my ex-wife in the middle of her testimony and her lawyer who sang the theme song to "Married With Children" in his opening statement, could fill a book on courtroom "war stories."

My ex-wife was not only suing for divorce and seeking custody of our two young children, but also suing three of her nine former divorce attorneys for malpractice.

One particularly unusual exchange occurred when my ex-wife's lawyers called a former neighbor to the stand, who testified that one day she heard a scream, went outside and saw Mr. Enos holding his wife by the arm just before he got in his car and left. I was sitting at the crowded counsel table with eleven other lawyers. When they passed the witness, I had just two questions:

Q: *Maam, would you recognize Mr. Enos again if you saw him?*

A: *Yes, I think so.*

Q: *Could you look around the courtroom and point Mr. Enos out to us?*

A: *(she looked past me, scanned the crowded courtroom and then shrugged her shoulders). I don't see him. I then passed the witness.*

Submitted by Greg Enos.



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Trial Reports

Jack Ewing won a \$300,000 verdict against **UTMB** for a 65 year old man given the wrong medication, causing him anxiety, shortness of breath and elevated blood pressure but no physical injuries. **UTMB** argued that the patient had not really been given the wrong medicine and claimed that the nurses had simply made a notation in the wrong chart. True to form, the Attorney General's office had made no settlement offers prior to the trial, which took place in **Judge Jerome Jones'** Probate and County Court.

Two "Not Guilty" verdicts were returned by juries in DWI cases in **Judge Mary Nell Crapitto's** County Court No. One. In one case, prosecuted by **Margaret Guthrie** and defended by **Mike Millican**, there was no breath test but there was a video. In the other case, the breath test was deemed invalid, so the state relied on the officer's testimony and a video. **David Hunter** defended the

second DWI case and **Kerri Foley-Garcia** and **Lonnie Cox** represented the State.

Lloyd Stansberry of Alvin represented a father seeking temporary change of custody of a five year old girl in a case involving molestation allegations against the girl's step-father. A video of the girl made by **CPS** was admitted into evidence. **Greg Enos** represented the mother before Associate-Judge **Jan Yarbrough**, who ruled that the father should have primary possession and the mother would have standard visitation, provided another adult is present.

Tim Beeton represented a woman suing for specific performance of a earnest money contract to buy property and for conspiracy and interference with contract. The jury found that the person who ultimately bought the property intentionally interfered with the sales contract and awarded \$45,000 in dam-

ages. The jury in **Judge Frank Carmona's** court found there was no malice so the punitive damages sought by the plaintiff were not awarded.

Doug Poole of McLeod, Alexander, Powell & Appfel won a **FELA** case in **Judge Roy Engelke's** court. The jury found the injured railroad worker 100% negligent in one accident and 80% at fault for a second mishap. The jury awarded \$12,500 for pain and suffering which was reduced to \$2,500, a figure less than one tenth of what Poole's client had offered to settle the case before trial.

Gene Hagood and **Ellen Malow** won a \$27,550 verdict for a carpenter who injured his knee at **Sterling Chemical**, represented by **Robert Davee** and **Chris Bertini** of **Mills, Shirley, Eckel & Bassett**. The jury put 49% of the fault on the plaintiff. **Judge I. Allan Lerner** denied the plaintiff's motion for **JNOV**. ☆

Galveston County Lawyer

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Galveston County Lawyer

February 7, 1996

Serving the Galveston County Legal Community

Civil Filing Fees Increase \$5, New Court Registry Charges

Galveston County District Clerk Evelyn Wells Robison reminds attorneys that all new civil, tax and family law suits filed after February 1 will be subject to an additional fee of \$5.00. Robison also announced new administrative fees and procedures concerning funds held in the Registry of the Court.

The additional \$5 filing fee was authorized by the last Legislature and will be used as approved by the County Commissioner's Court to accumulate in a special fund that will eventually allow the District Clerk to avoid posting bonds (and so save the county money).

Other additional charges added to filing fees include monies earmarked for the law library, mediation and courthouse security.

Effective February 1, all monies deposited into the Registry of the Court will be subject to a \$50.00 administrative fee payable upon deposit. This fee must be paid before the money will be invested by the District Clerk's office. Orders establishing accounts for minors in the Registry of the Court must include a copy of the minor's birth certificate and social security card.

Robison also announced that funds deposited into the Registry of the Court before February 1,

1996, will be subject to a \$50.00 administrative fee payable upon withdrawal. She urged attorneys to provide for this fee in their orders authorizing withdrawal of funds. ☆

Cruse Recovers, Firms Change

Leonard Cruse has largely recovered from a mild stroke he suffered on January 21. Cruse, who was calling his office within two days of his hospitalization to direct work on his cases, is already back at work.

Phil Hosey has relocated his law offices to 2727 Broadway. Phil's new phone number is 762-4898.

Burwell, Enos & Baron of Texas City is now Burwell, Baron & Burwell after Greg Enos left in January. Russ Burwell, III is a new shareholder.

The Enos Law Firm will handle primarily personal injury and death cases, as well as mediations and child custody litigation. Enos hopes to concentrate on a smaller number of cases and spend more time with his family, which includes his fiancée, Sharon Grice, two teenage stepchildren, and Enos' two young children, who were the subject of a bitter custody fight last year. ☆

Court Reporting Fees Vary From Firm to Firm

A survey of three court reporting firms which do a lot of business in Galveston County shows that charges vary. Attorneys must also consider the experience and size of reporting firms.

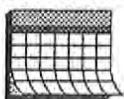
A one hundred page stenographic deposition of a lay witness with ten pages of exhibits taken in the local area without a subpoena would cost \$427.50 at Summit Legal Services, \$412.50 at Pre-Trial Services and \$529.50 at Worldwide Reporting (which offers standard five day delivery).

Summit provides a complimentary ASCII disk while Worldwide charges \$10 for the ASCII disk. Both do not charge for compressed transcripts. Rush 24 hour delivery charges for a lay witness range from \$8.10 a page to \$7.50 per page.

Attorneys choosing a reporting firm for depositions should also ask how many reporters a firm has available, the period of time it has been in business, and the size of its support staff. ☆

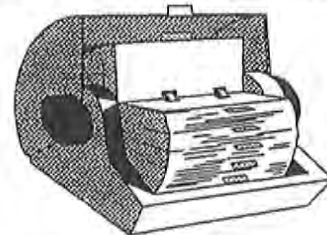
Fees differ among court reporters, but so does experience and ease of scheduling.

Mark your Calendar....



- Feb. 9 Galv. Co. Criminal Defense Lawyers—Dibella's: noon
- 14 Family Bar Association—Galvez: noon
- 23 Mainland Bar Assoc.—Garcia's Grill in Dickinson: noon
- 27 Galv. Co. Young Lawyers—Galvez Hotel: noon
- 29 Galveston Bar Assoc.—San Luis: noon

Important Courthouse Phone Numbers



10th District Court The Hon. David E. Garner
Coordinator: Cindy Mora
Reporter: Vickie Brocker (766-2231)
Bailiff: Joseph Sanders

766-2230
Fax: 765-2661*

5th Floor

56th District Court The Hon. I. Allan Lemer
Coordinator: Kathy Allen
Reporter: Doug Faulin (766-2227)
Bailiff: Joseph Banks

766-2226
Fax: 765-2661*

6th Floor

122nd District Court The Hon. Frank T. Carmona
Coordinator: Connie Nolan
Reporter: Judy Hansen (766-2684)
Bailiff: Carl Kelly

766-2275
Fax: 765-2661*

6th Floor

212th District Court The Hon. Roy Engelke
Coordinator: Bridget Hargrove
Reporter: Dale Lee (766-2264)
Bailiff: Charles Delgado

766-2266
Fax: 765-2661*

5th Floor

306th Family Dist. Court Hon. Susan Baker Olsen
Coordinator: Gloria Robledo
Reporter: Jan Boening (766-2254)
Bailiff: Doris Paul Robertson

766-2255
Fax: 766-9754

5th Floor

Houston Line: (713) 996-1710 (ask for court or give extension—last three digits of the phone number)

*mailroom fax

County Court No. 1

The Hon. Mary Nell Crapitto
766-2233 3rd Floor
Coordinator: Nancy Otero
Reporter: Connie Chan
766-2235

County Court No. 2

The Hon. C. G. Dibrell, III
766-2405 6th Floor
Coordinator: Shelly Darnell
Reporter: Marlene Stacey
766-2407

Probate & County Court

The Hon. Jerome Jones
766-2251 3rd Floor
Coordinator: Dura Lee Russell
Reporter: Donna McGuire
Investigator: Gladys Vyvial Burwell
766-9755

District Clerk

The Hon. Evelyn Wells Robison
766-2424 Fax: 766-2292

County Clerk

The Hon. Patricia Richie
766-2200 (no fax)

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Trey Apffel Reports On State Bar

E. A. "Trey" Apffel, III, recently attended the State Bar Board of Directors meeting in El Paso and participated in passage of the State Bar's strategic long-range plan and adoption of the 1996-97 budget. Apffel has several important developments to announce.

MCLE Ethic Requirement

Apffel reports that the Bar Directors approved increasing the MCLE ethics requirement from one hour to three hours per year. The Texas Center for Legal Ethics and Professionalism is sponsoring a course entitled, "The Ethics Course" which all new lawyers will be required to attend within a year of being licensed.

State Bar President Candidates

The Bar nominations committee presented candidates for State Bar President Elect for 1996-97: Tom Cunningham of Fulbright & Jaworski in Houston and Texas Tech Law School Professor Frank Newton.

State Bar President and Staff to Visit Galveston March 28

The March 28 Galveston County Bar Association meeting will host a visit from State Bar President-Elect Colleen McHugh, Bar Executive Director Tony Alvarado, Texas Young Lawyers Association President-Elect Bill Jones, as well as Berry Crowley from the Texas Center for Legal Ethics and Professionalism and the Texas Bar Foundation's chairperson, Tom Cunningham. This two hour luncheon will feature an open discussion of issues facing Texas lawyers.

Grievance Committee Openings

Four or five slots on the local Grievance Committee will come open in July. Anyone interested in serving should contact Trey Apffel at (409) 948-0003 or (713) 488-2281.



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Records: (713) 861-4010

Fax: (713) 861-0796

Trial Reports

Call the Galveston County Lawyer with information about your jury and bench trials at (409)945-2902 or (713) 286-5500. Our fax number is (713) 286-9939.

Trial lawyers, like the gamblers they are, must know when to hold 'em and when to fold 'em. **Alton Todd** proved this rule last week in a rear-end collision, injury case tried before **Judge Roy Engelke**. After the jury had sent a note saying it had reached a verdict, Todd's client settled for \$115,000. Moments later the chagrined State Farm lawyers found that jury had awarded her only \$35,000. The other plaintiff, represented by **Mike Davis** of Alvin, rejected a \$40,000 offer and was awarded only \$1,003. Todd's client had a herniated disc at C6-7 and about \$8,500 in medical bills. There was only \$2,000 in property damage.

Gene Parrish won a "NOT GUILTY" verdict for a man charged with Assault Causing Bodily Injury in County Court No. 1. **Ben Massar** was the prosecutor in the case, which involved an alleged altercation when the father picked up his son for visitation.

A "GUILTY" verdict was returned in a two day DWI case in County Court No. 1, even though there was no breath test and no video taken of the defendant (who ended up being sprayed with mace at the police station). **Lonnie Cox** and **Kerri Foley-Garcia** represented the State and **Stephanie Barnett** represented the defendant, who received punishment of one year in jail, probated for two years, and \$100 fine plus court costs and \$600 for attorney's fees.

Readers of these trial reports may ask themselves if **S. R. "Stretch" Lewis** ever loses, especially after they learn he won another defense verdict in a malpractice case, this time in the 212th District Court. **Lewis** and **James "Rick" Ansell** of McLeod, Alexander defended physicians sued for treating cervical cancer with surgery instead of radiation therapy.

An off-shore worker received a

jury verdict of approximately a third of what he had been offered before trial in a jury trial before 10th District Court Judge **David Garner**. The jury awarded \$139,900 in damages to a man who was hit in the face by a broken crane wire, which cut off most of his nose, cut his lips and broke teeth. The defendant stipulated it was liable and tried the case on damages.

Neil Baron of Texas City won a rare premises liability verdict against a grocery store before Judge **Jerome Jones** in the Probate & County Court. The jury awarded \$8,426 in damages against H.E.B. to a woman who fell in the cookie aisle on something soapy. The plaintiff suffered a bruised and sprained shoulder and bruised hip. ☆

Family Lawyers! We want to report your divorce and custody trials. Call or fax us.

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Galveston County Lawyer

January 5, 1996

Serving the Galveston County Legal Community

Final Candidate Field Fixed As Filing Deadline Passes

The deadline to file as a candidate in the Democrat or Republican primaries was January 2.

The candidates for the 56th District bench being vacated by Judge I. Alan Lerner are Democrats Larry Edrozo and Norma Venso and Republicans Stephen Taylor, Miles Whittington, and John Wright.

Incumbent Judge David Garner of the 10th District Court faces no opposition in the Democratic primary but will face Republican V. Antonio "Tony" Aninao in November.

Mr. Aninao has a general, solo practice in Houston. He got his B.A. summa cum laude in 1975 from Kenyon College in Ohio and received his J.D. in 1979 from Boston College. Mr. Aninao's campaign literature states that he is 43, married, and has three children who attend the Bay Area Christian School.

Incumbent Sheriff Joe Max Taylor faces opposition in the Democratic primary from Santa Fe police officer Carlos Wilson Glaskok. Attorney Paul La Valle filed for Sheriff as a Republican.

State Representative Patricia Gray will again face Republican insurance agent Dave Norman. Dis-

The Galveston County Courthouse will be closed on January 15 to honor Dr. Martin Luther King.



trict 24 representative Craig Eiland escaped without any opposition.

County Commissioner Wayne Johnson will be opposed by Democrat Beverly Delaney-Mitchell, a coordinator at College of the Mainland, and by Republican Lewis Parker, Jr., a businessman, minister and perennial candidate.

Tax Assessor-Collector Chuck Wilson drew Republican opposition from League City accountant Gary Davis and from Jerry Shults of Texas City.

Constables Sam Popovich and Terry Petteway face no opposition. Incumbents Earl Tottenham, Charles Gay, and Deril Oliver all face opponents in the Democratic primary while Jodie Pryor and Daniel Cooper face GOP opponents. ☆

122nd District Court Gets New Court Personnel

The retirement of two long-time employees has brought new faces to Judge Frank Carmona's 122nd District Court. The court's new coordinator is Connie Nolan and the new bailiff is Carl E. Kelly.

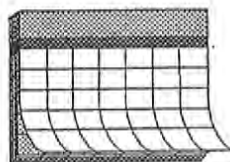
Anita Irwin retired in December after many years of service with the court. Connie Nolan was working at McLeod,

Alexander, Powell & Apfel as a secretary for Ken Bower when Judge Carmona asked her to work for him. Connie was Judge Carmona's legal secretary for several years before she went to work at MAPA. Connie (formerly Connie Bradley until her recent marriage) lives in Santa Fe.

Bailiff John Gober, the humorous guardian of order in Judge Dalehite's court also retired. His replacement is Carl E. Kelly, a Galvestonian who formerly worked at UTMB as a radiology engineer. ☆

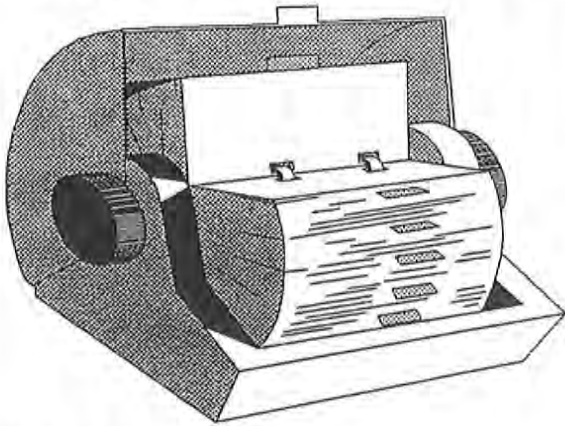
**The 122nd's
new coordi-
nator is
Connie Nolan
and the new
bailiff is Carl
E. Kelly.**

Mark your Calendar....



- Jan. 8 Family Bar Association—Galvez: noon
- 10 Annual Jan Yarbrough Blood Drive—Rosenberg Library
1:00 p.m. - 5:00 p.m. 2310 Sealy Galveston
- 12 Galv. Co. Criminal Defense Lawyers—Dibella's: noon
- 25 Galveston Bar Assoc.—San Luis: noon
- 26 Mainland Bar Assoc.—Garcia's Grill in Dickinson: noon
- 30 Galv. Co. Young Lawyers—Galvez Hotel: noon

Important Courthouse Phone Numbers



Trial Reports (continued)

The case filed by a Southwestern Bell-phone installer in the 122nd District Court. The jury found the dog was abnormally dangerous and the dog's owner was negligent. The jury assessed \$11,992.20 in damages. The plaintiff had \$1,900 in medical bills and \$2,000 in lost wages.

In November, Larry Fatheree of Hitchcock won a \$46,269.97 verdict in the 212th District Court for a man who fled a bar with an angry patron in hot pursuit. The plaintiff ran into a convenience store and asked the clerk to call the police. The clerk refused and ordered him to leave. The man went outside, saw his nemesis waiting and ran back into the store. The plaintiff alleged that the store clerk then jumped over the counter and hit him on the nose with a flashlight, causing a cut that required six stitches. The store clerk denied striking the plaintiff. The plaintiff had just under \$1,800 in medical bills. The jury's verdict included \$33,000 in punitive damages. National Convenience Stores was defended by Bracewell & Patterson of Houston. ☆

306th Family District Court
Hon. Susan Baker Olsen
5th Floor Galveston Co. Courthouse
Coordinator: Gloria Robledo
Court Reporter: Jan Boening (x254)
Bailiff: Doris Paul Robertson
Ass't District Clerk assigned:
Dee Ann Laviolette
(409) 766-2255 Fax: 766-9754
(recorder always on)

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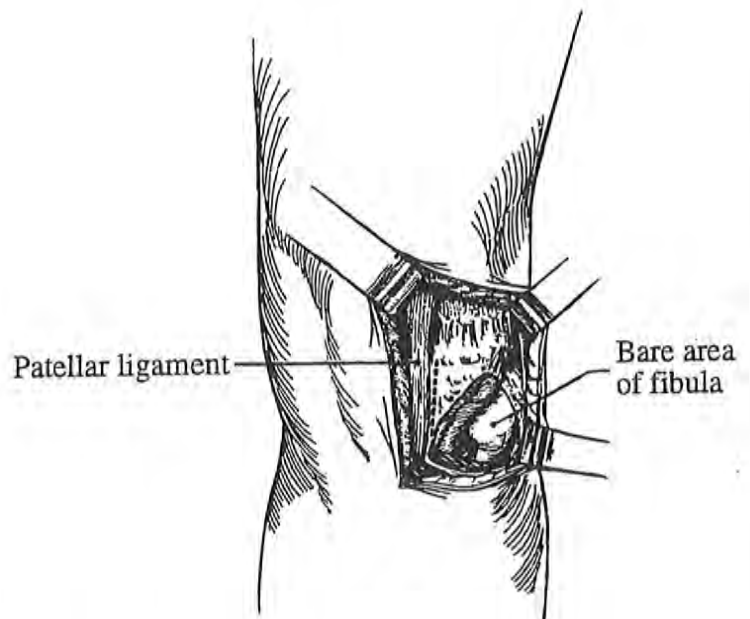
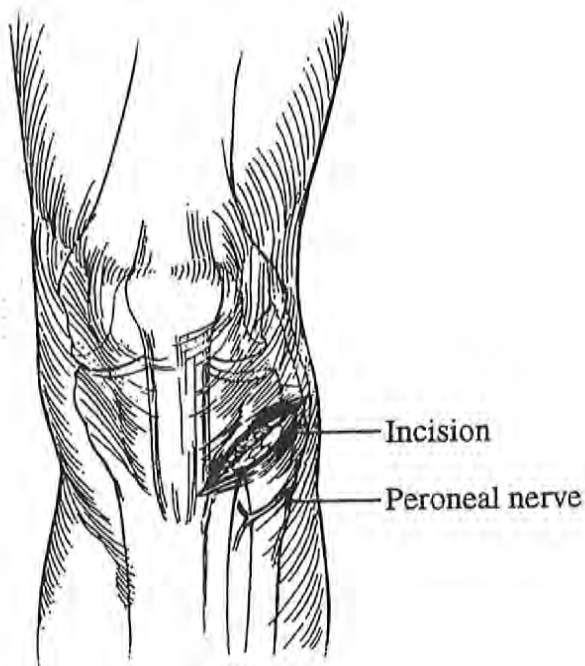
CHANGE IN REGISTRATION PROCEDURES

Instead of calling the law library, parents who wish to register for a seminar must mail in a registration form, which can be obtained at the County Law Library or the District Clerk's office. Attorneys are encouraged to copy the form for their clients and to give them the schedule of seminars.

Date	Rosenberg Library Galveston	Nessler Center Texas City
Feb. 1		10:00 am - 1:00 pm
7	5:30 pm - 8:30 pm	
15		5:30 pm - 8:30 pm
21	10:00 am - 1:00 pm	
29		10:00 am - 1:00 pm
March 6	5:30 pm - 8:30 pm	
14		5:30 pm - 8:30 pm
20	10:00 am - 1:00 pm	
28		10:00 am - 1:00 pm

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Trial Reports

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122nd District Judge **Frank Carmona** presided over a Jones Act/Unseaworthiness case filed by a sailor whose captain's chair turned over when another tug passed too closely to his vessel. A directed verdict was granted for the plaintiff's employer on the claim of unseaworthiness. The jury found defendant

G&H Towing 75% at fault and the plaintiff 25% at fault. The plaintiff, who had undergone a two level lumbar fusion, was awarded \$370,000 in damages (to be reduced by comparative fault and maintenance and cure paid by the employer). The plaintiff was represented by Michael St. John of Houston.

An instructed verdict was granted by County Court No. 1 Judge Mary Nell Crappito to a defendant appealing a charge of running a red light from Justice of the Peace Court. No one could identify the defendant, who was represented by **David Falk**. The State was represented by **Ben Massar**.

Anne Darring represented a woman sick with cancer who arranged for an ambulance to bring her to the courthouse for her divorce hearing, which was held outside the 306th District Court in the hall. The petitioner, who lay on a gurney during the hearing, was divorcing her husband of 40 years, who was represented by **R. A. Apffel**. Many of the couple's children and grandchildren attended the hearing, which was conducted by Judge **Susan Baker Olsen**.

Mark Stevens defended a dog

(Continued on page 2)

It's That Time again!

The Annual Jan Yarbrough Blood Drive

Date: January 10, 1996
Time: 1:00 p.m. - 5:00 p.m.
Place: Rosenberg Library
2310 Sealy Galveston

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Galveston County Lawyer

December 1, 1995

Serving the Galveston County Legal Community

New Judges: Reilly, Yarbrough & Quintanilla

Pat Reilly and Jan Yarbrough have been chosen to be associate judges for Galveston County's family courts. Roy Quintanilla was selected to be the new municipal judge for the City of Galveston.

Beginning January 2, Ted Almond will become the county's associate judge for juvenile matters. Pat Reilly will be associate judge for family law cases pending in the two County Courts At Law. Yarbrough will be associate judge for the 306th Family District Court. Reilly will hear cases on Mondays and Wednesdays and Yarbrough will hold court on Mondays and Tuesdays. ☆

Holiday Party

The Galveston County Bar Association Holiday party is Wednesday, Dec. 6 at 6:30 p.m. at Gaido's in Galveston. Price is \$25 per person (cash bar). Seats must be reserved before 5:00 p.m. on Dec. 4 by calling Dennis Bettison at (409) 744-9783.



Fred Raschke Leads Galveston United Way Drive

Too few lawyers have the heart and the time to volunteer for worthy community projects. Fred Raschke, partner at Mills, Shirley, Eckel & Bassett, has long been a leader in groups such as the Boy Scouts. However, Fred's selection as Campaign Chairman of the Galveston United Way Fund Drive has special meaning to him, since his daughter, Jordan, received help from a United Way funded agency.

Jordan was born prematurely and her doctors determined she was at high risk for Sudden Infant Death Syndrome (SIDS). The Raschkes soon learned that the nearest facility specializing in SIDS was the SIDS Institute in Lake Jackson, which is funded in part by the United Way.

"The help my family received made me realize how important the United Way is to so many families," Raschke said. ☆

The Galveston United Way has met 86% of its \$770,000 fund raising goal. Tax deductible donations can be sent to P.O. Box 2250, Galveston, TX 77553.

56th Race: One Out, Two join Race

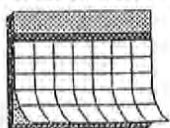
The field of candidates running for the 56th District Court continues to change. Republican Kevin Corcoran has decided to drop out of the race. Galveston attorney Steve Taylor will run in the GOP primary and Texas City Mayor Pro Tem Larry Edrozo will compete with Norma Venso in the Democratic race.

Edrozo has a general practice and served as Justice of the Peace from 1990 until 1994 until he ran for County Court at Law No. 1. He has served as

a City Commissioner for two years. "I have a proven track record as a judge and 13 years practicing law in this county, dealing with people and their problems," said Edrozo.

Steve Taylor, 46, practices criminal law throughout Southeast Texas. He was licensed six years ago after receiving his J.D. from Texas Southern University. Taylor has four children, one of whom attends the U.S. Naval Academy. ☆

Mark your Calendar....



- | | | |
|------|----|--|
| Dec. | 6 | Bar Association Holiday Party: Gaido's 6:30 p.m. |
| | 7 | Young Lawyer's Happy Hour: Toucan's in Galveston |
| | 8 | Galv. Co. Criminal Defense Attorneys—Dibella's: noon |
| | 9 | Mainland Bar Assoc. Holiday Party—Pete Dunten's house at 2709 Williamsburg, Dickinson: 6:30 p.m. |
| Jan. | 25 | Galveston Bar Assoc.—San Luis: noon |

This is not an official publication of the Galveston County Bar Association or any organization. It is one lawyer's attempt at public service.

New EEOC Rules for Job Interviews

by Greg Enos

Recently, a person with a severe facial disfigurement won a \$45,000 verdict under the Americans With Disabilities Act (ADA) in Houston federal court. The jury found that the employer had not discriminated against the man because of his disability. However, the jury found that the company had asked illegal questions about the man's disfigurement and awarded \$15,000 in compensatory damages and \$30,000 in punitive damages. Additional attorney's fees were awarded by the trial court.

A \$45,000 award for asking the wrong question in a job interview should serve as a warning to lawyers when they interview job applicants, but should also encourage lawyers to inquire about the interview process when screening potential discrimination clients.

"EEOC Guidance on Pre-

Employment Inquiries Under the Americans With Disabilities Act" was issued in October 1995 and can be ordered free of charge by calling 800-669-3362. The enforcement guide interprets 42 U.S.C. §12112(d)(2), which prohibits disability related questions before a conditional job offer is made.

Under the new rules, an employer

AUTHORS WANTED! Lawyers are encouraged to submit brief, practical articles on family law, probate, criminal law, appeals, personal injury or trial tactics.

cannot ask about an applicant's disability or require a medical exam until after a conditional job offer has been made. A "disability-related question" is one that is likely to elicit information about a disability. For

example, it is illegal to ask if the applicant has ever injured his back ever had back surgery or ever filed a workers' compensation claim. Likewise, applicants cannot be asked how many days they were sick the prior year or, "what impairments do you have?"

However, if the applicant volunteers that he or she has a disability or if it is obvious, the prospective employer can ask what accommodations would be needed. It is legal to ask about past or current illicit drug use but it is illegal to ask about addiction (since addiction is an impairment protected by the ADA).

The deadline to file an ADA complaint with the EEOC is 300 days from the discriminatory act, while state law gives 180 days to report to the Texas Commission on Human Rights. The Houston EEOC office can be contacted at (713) 653-3320. ☆



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sample conde

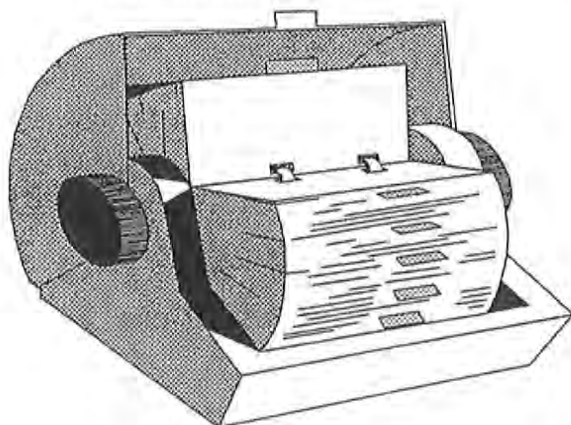
1. Q. I would like to ask you questions regarding the services your company provides. First, how long has your company been in business?
2. A. Summit Reporting has been in business for six years and includes record retrieval as well as reporting services.
3. Q. Who owns Summit Reporting?
4. A. Summit Reporting is owned by Jayne Clark, Claudia Parker, and Rene White.
5. Q. How many reporters do you have and what area does your company serve?
6. A. We have nineteen reporters servicing Houston and surrounding areas. We also have reporters who service our Dallas, Austin, San Antonio & Corpus Christi areas.
7. Q. Please describe the services offered by Summit Reporting.
8. A. Summit Reporting is a full service firm that offers both reporting and record assistance. We offer state-of-the-art computer-aided transcription, complimentary ASCII disk and condensed transcripts with purchase of the original or a copy, process service, record retrieval, Discovery 2X and CATLINKS, expedited transcription and of course, prompt, reliable, and personal attention.

1. Q. Do you have a conference room and is the charge?
2. A. Our conference room is available charge.
3. Q. Would I need to call a video serv addition to your firm if my depos required a videographer?
4. A. No. Our firm provides video servi request. We also can arrange for interpreter should you need one.
5. Q. Is there a charge if I need your in the outlying Houston, Galvesto Beaumont areas?
6. A. No, there is no charge for mileag those areas.
7. Q. How are your rates in comparison other reporting firms?
8. A. Our rates are very competitive a will match our competitors rates
9. Q. Where are you located?
10. A. 55 Vaugh Drive, Suite 505, Hous 77007. Our phone number is 86 reporting and 861-4010 for r fax number is 861-0796. Call u of your legal needs.

Continuing **THE EXCELLENCE**

Important Courthouse Phone Numbers

The Galveston Courthouse will be closed on December 25 & 26 (Monday & Tuesday) and on January 1, 1996 (Monday).



10th District Court
Hon. David E. Garner
5th Floor Galveston Courthouse
Coordinator: Cindy Mora
Court Reporter: Vickie Brocker
Bailiff: Joseph Sanders
District Clerks Assigned:
Civil: Stephanie Saylors
Criminal: Henry Gonzales
(409) 766-2230 Fax: 765-2661

Attorneys on the Move...

New attorneys have joined several area firms. Mills, Shirley, Eckel & Bassett has added **Molly Baer** in the Galveston office and **Ed Cox** in the Houston office. **R. Talmadge ("Tal") Hammock** has joined E.A. "Trey" Apffel, III in Texas City. New associates at McLeod, Alexander, Powel & Apffel are **Robert Berry**, **Lloyd Early**, **Patrice Pujol** and **John McFarland**.

Susan Criss is leaving the District Attorney's office to go into the private practice in Galveston.

Roberto Torres and **Joe Correia** have left the Gulf Coast Legal Foundation and opened their own law firm in Galveston. ☆

McLeod, Alexander, Powel & Apffel, LLP

welcomes as new associates
with the firm:

Robert Berry
Lloyd Early
Patrice Pujol
John McFarland

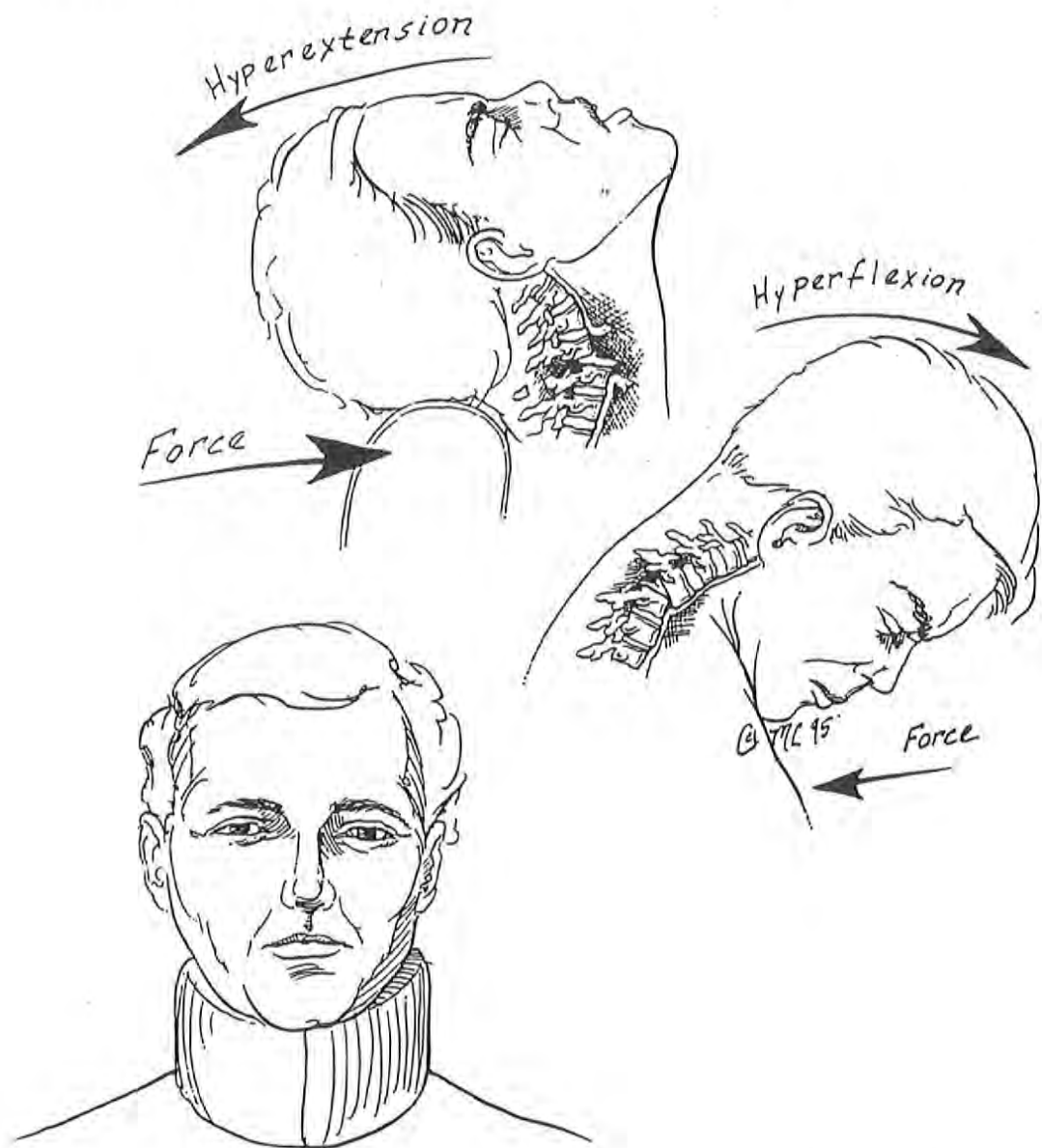
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Taking the "Fifth" in Civil Cases

By Kenneth Kaye

More and more frequently, civil cases are being filed against persons who are, at the same time, facing criminal charges arising out of the same incident. The question which then arises is: what "Fifth Amendment" rights does the defendant have during the discovery and trial stages of the civil litigation?

We all immediately recognize that a person has a privilege against self-incrimination in a criminal case. See, for example, U.S. CONST. Amend. V (made applicable to the States by U.S. CONST. Amend. XIV); TEX. CONST. Art. I, §10. The courts of many jurisdictions allow persons in civil cases to "take the Fifth". See, for example, McCarthy v. Arndstein, 266 U. S. 34, 40 (1924) [the privilege against self-incrimination "applies alike to civil and criminal proceedings, wherever the answer might tend to

subject criminal responsibility to him who gives it."]; 8 Wigmore on Evidence §2250. Texas courts have also allowed a party to a civil proceeding to invoke their "Fifth Amendment" privilege. See, for example, Meyer v. Tunks, 360 S. W. 2d 518, 521 (Tex. 1962); Ex parte Stringer, 546 S. W. 2d 837, 840 (Tex. Civ. App. - - Houston [1st Dist.] 1985, no writ); Burton v. West, 749 S. W. 2d 505, 507 (Tex. App. - - Houston [1st Dist.] 1988, no writ); Denton v. Texas Dept. of Public Safety Officers Ass'n, 862 S. W. 2d 785, 788 (Tex. App. - - Austin 1993) aff'd 897 S. W. 2d 757 (Tex. 1995).

In a criminal case, as we all learned early on, the State may not call the criminal defendant to the stand and require him/her to invoke the "Fifth Amendment" privilege before the jury; the state may not comment upon the silence of the defendant; and no inference may be drawn by the jury from that silence. That is where the civil and criminal law diverge. In a civil case, the fact-finder is entitled to know that the defendant has refused to testify; the defendant may be called to the witness stand and be required to repeatedly "Take the Fifth" before the jury; and the fact-finder may draw what inference it will from that invocation. See, for example, In re Sterling-Harris Ford, Inc., 315 F. 2d 277, 279 (7th Cir. 1963); Sahn v. Pagano, 302 F. 2d 629, 632 (2nd Cir. 1962); Ideda v. Curtis, 261 P. 2d 684 (Wash. 1953); Grognet v. Fox Valley Trucking Service, 45 Wisc. 2d 235, 172 N. W. 2d 812 (1969); Baxter v. Pamigiano, 425 U. S. 308 (1976). Again, Texas courts have reached the same conclusion. See, for example, Meyer v. Tunks, 360 S. W. 2d 518 (Tex. 1962); McInnis v. State, 618 S. W. 2d 389 (Tex. Civ. App. - - Beaumont 1981, writ ref'd n.r.e.); Ex parte Butler, 522 S. W. 2d 196, 197 (1975).

Thus, the plaintiff is entitled to call

the defendant as a witness before the jury, ask him or her all of the "juicy" questions before the jury, and force the defendant, before the jury, to refuse to answer on the ground that the answer might tend to incriminate him or her. Then, during closing arguments, the plaintiff's attorney is entitled to remind the jury of all of this and argue what this means.

Of course, the witness is not the sole judge of what questions he or she will not answer in a civil proceeding. If a defendant invokes his or her "Fifth Amendment" right, whether at trial or discovery, the court is entitled to determine whether the refusal to answer appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. The court's inquiry is necessarily limited because the witness may not be required to disclose to the court, even in camera, what his or her response would be. See, for example, Ex parte Butler, 522 S. W. 2d 196, 198 (Tex. 1975); Smith v. White, 695 S. W. 2d 295, 297 (Tex. App. - - Houston [1st Dist.] 1985, no writ); United States v. Weisman, 111 F. 2d 260, 263 (2nd Cir. 1940); Denton v. Texas Dept. of Public Safety Officers Ass'n, 862 S. W. 2d 785, 792 (Tex. App. - - Austin 1993) aff'd 897 S. W. 2d 757 (Tex. 1995).

The court, in such an inquiry, may compel an answer only if it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answers cannot possibly have [a] tendency to incriminate." Ex parte Butler, 695 S. W. 2d 295, 297 (Tex. App. - - Houston [1st Dist.] 1988, no writ).

Thus simultaneous civil and criminal proceedings against the same defendant can provide extremely powerful and useful ammunition for a plaintiff in a civil case. ☆

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Trial Reports

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William King of Kemah won a \$26,400 verdict in Judge Frank Carmona's court for a driver hit by a garbage truck. The truck driver had passed out or gone to sleep and allowed his truck to cross the center stripe (a driver in another car was killed). Damages included a bruised chest, \$2,700 in medical bills, possible knee surgery and alleged \$28,000 damage to equipment in the plaintiff's vehicle. The case was defended by **Ervin Apffel** and **Melissa Cooney** of McLeod, Alexander, Powel & Apffel.

Grant Gealy of Mills, Shirley, Eckel & Bassett successfully defended a claim filed by an apartment tenant whose property was destroyed in a fire. **Michael Fieglein** represented the plaintiff in Judge Carmona's court.

Brian Abbington represented a juvenile charged with murder in Judge Mary Nell Crapitto's court in a certification hearing. The juvenile

was not certified as an adult. **Ella Anderson** represented the State.

Pat Reilly and **Barry Radcliffe** tried a week-long child custody/modification case before County Court Judge Mary Nell Crapitto. Reilly represented the father who was seeking to switch custody from the mother, represented by Radcliffe. Judge Crapitto ruled that custody would not be changed.

A defense verdict was returned in a medical malpractice case tried in Judge Jerome Jones' Probate Court before a 12 person jury. **Trey Apffel** represented the family of a 38 year old man who went to the E.R. complaining of abdominal pains. He was sent home but was later diagnosed with a burst appendix. He eventually died on necrotizing myelopathy. Rob Swift of Fulbright & Jaworski represented St. Mary's Hospital and Curry Cooksey of Beaumont represented the physician.

Jeff Kemp represented a man who plead guilty to aggravated robbery charges. Punishment of 10 years probation and a \$10,000 fine was assessed by a jury in Judge I. A. Lerner's court. **Jay Wooten** was the prosecutor.

A six day jury trial in Judge David Garner's court ended in a defense verdict in an asbestosis case involving Houston lawyers. The jury found the sick worker, his employer and Owens-Corning equally at fault.

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Legal Article: New EEOC Rules for Job Interview
Important Courthouse Phone Numbers (to clip and save)
Legal Article: Taking the "Fifth" in Civil Cases

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Galveston County Lawyer

November 1, 1995

Serving the Galveston County Legal Community

56th District Court Race Lures Four Candidates

Judge I. Allan Lerner has announced his decision to retire from the 56th District Court. Four attorneys are either running or have expressed interest in running for the 56th: one Democrat, Norma Venso, and three Republicans, Kevin Corcoran, Miles Whittington and John Wright.

Norma Venso is an attorney/mediator in Galveston who lost by 88 votes in 1994 to Frank Carmona in the Democratic primary for the 122nd District Court. Venso graduated from the University of Texas Law School in 1977 and went to work as a trial lawyer in the Midland/Odessa area for the plaintiff's firm of Burette and Adders. Venso moved to the Galveston area in 1982 and started her own practice in 1985.

Venso is Board Certified in Personal Injury Law and has received 108 jury verdicts in state and federal courts. She now works exclusively as a mediator at the Venso Mediation Center. She is married and lives in Galveston.

Kevin Corcoran, age 31, is an associate with the Houston firm of Phillips & Akers, practicing insurance defense. Corcoran received his undergraduate and law degrees

Golfing News

Details on Tim Beeton's amazing hole-in-one and final results of the Galveston County Young Lawyers' Golf Tournament are on pages 4 - 5.



from the University of Texas. Corcoran lives in Friendswood with his wife and three daughters.

"Judge Lerner has been a good judge and I have a lot of respect for him," said Corcoran. "When I heard he was retiring, I wanted to make sure the 56th continued to have such a good judge."

Miles Whittington practices criminal, family and civil litigation in Galveston. He graduated from South Texas College of Law in 1979 and worked in the Galveston District Attorney's office from 1982 - 84 in the misdemeanor and felony sec-

(Continued on page 2)

County Law Library Faces Budget Woes

The County Law Library on the Courthouse's 6th floor faces budget problems.

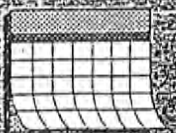
The library is funded by a \$15 fee on each civil suit filed in District and County court. Last year, the library spent \$77,000 on books and salaries. The library budget has been reduced to \$66,000 for this fiscal year, including a \$12,000 reduction in the budget for books.

Two years ago, the County loaned the library \$10,000 to overcome a deficit. This year, the County transferred \$6,050 so the library can start its fiscal year in the black, according to County Purchasing Agent Curtis Brown.

Other county departments short on space are eying the law library for expansion warned Brown.

The Bar Library Committee, headed by John Ellis, must figure out how to trim the library's budget and make more space, possibly by getting rid of some books.

Mark your Calendar



- Nov. 3 Mainland Bar Assoc.—Garcia's Grill in Dickinson: noon
- 15 Judge Garner Reception—Bob Smith Yacht Club: 5 - 7
- 17 Mainland Bar Assoc.—Garcia's Grill in Dickinson: noon
- 30 Galveston County Bar Assoc.—San Luis Hotel: noon
- 28 Young Lawyers' Assoc.: Galvez Hotel: Noon
- Dec. 6 Bar Association Christmas Party: Gaido's

True or False: Are Polygraph Results Admissible?

New tests in federal and state courts for the admissibility of expert opinions may mean the results of polygraph tests are admissible.

The Fifth Circuit Court of Appeals recently held that under some circumstances, the results of so-called lie detector tests may be admissible under the standards for expert testimony now required in Daubert v. Merrill Dow Pharmaceutical, 113 S.Ct. 2786 (1993).

In U.S. v. Posado, 57 F.3d 428 (5th Cir. 1995), defendants in a drug case took polygraph tests to prove they did not consent to a search of their luggage. The District Court refused to consider the polygraph evidence at the suppression hearing. The Fifth Circuit reversed, ruling that Daubert removed "...the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled..." On remand, the

trial court will have to consider the "evidentiary reliability and relevance of the polygraph evidence proffered by the defendants under the principles embodied in the Federal Rules of Evidence and . . . Daubert."

Traditionally in Texas, polygraph test results have not been admissible in criminal cases for any purpose, whether offered by the state or the

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defendant. Nethery v. State, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985). Similarly, Texas civil courts have stated that the results of polygraph examinations are not admissible. see e.g., Pierson v. McLanahan, 531 S.W.2d 672, 676 (Tex. Civ. App. - Austin 1976, writ ref. n.r.e.).

The Texas Supreme Court in E.I. DuPont v. Robinson, 38 Sup. Ct. J. 848 (June 17, 1995) changed the standards for the admissibility of

expert opinion, which under Tex. R. Evid. 702 must be relevant and reliable. In determining if an expert opinion is reliable, the court is to consider the following non-exclusive factors:

- the extent to which the theory has been tested;
- the extent to which the technique relies on the expert's subjective interpretation;
- whether the theory has been subjected to peer review and/or publication;
- the technique's potential error rate;
- whether the technique has been generally accepted as valid by the relevant scientific community; and
- the non-judicial uses the technique has been put to.

An experienced and well-trained polygraph examiner could probably testify favorably on at least 5 of these 6 factors. Four of these factors were those suggested by the U. S. Supreme Court in Daubert to determine the reliability of an expert's opinions. A persuasive argument can be made that if Daubert eliminates the per se

(Continued on page 4)

56th District Court Candidates

(Continued from page 1)

tions. Whittington is married to the former Patricia Apffel and they have a baby on the way.

Whittington feels his experience in criminal law is important for voters to consider. "About 60% of the case load of the 56th District Court is criminal," said Whittington.

John Wright has earned bachelor of science, master of science, Ph.D., J.D. and M.B.A. degrees. He graduated from the University of Mississippi Law School in 1979. Wright worked for the Galveston District Attorney's office from 1983 - 1986, was in private practice for a year and then went to work for the U.S. Securities and Exchange Commission in its Houston office. He left the SEC in 1989 to work for the Houston firm of Hirsch & Westheimer. Since 1992, Wright has been in private practice in Clear Lake, handling criminal, family and commercial cases.

Wright, with his wife and three children, live on a sailboat at Waterford Marina in Clear Lake Shores.

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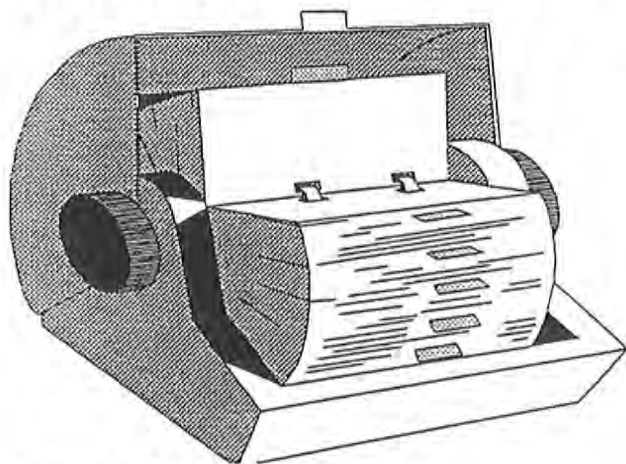
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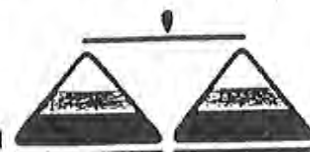
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Law & Order Team Wins Golf Tournament

The Golf Tournament sponsored by the Galveston County Young Lawyer's Association and the Galveston County Bar Association was held October 20 at the Galveston County Country Club. A total of 17 lawyers and friends divided into five teams for the Florida scramble.

First place was won by the team of Tad Nelson, Sam Finegan, Mohamed Ibrahim and Joel Bennett, who split a prize of \$120.

Judge Frank Carmona, John McEldowney and Tom Kain came in second and will split \$90.

S. R. "Stretch" Lewis, Alton Todd and Phil Roberts finished in third place and will divide \$75.

The longest putt was made by John McEldowney.

Money raised by the annual gold tournament will go toward

scholarships for High School seniors to be awarded next Spring by the GCYLA.

"We spent about five hours playing golf in beautiful weather for a good cause," said Taylor Schwab, who helped organize the event.

Admissibility of Polygraphs

(Continued from page 2)

rule against admitting polygraph tests in federal courts, then the extremely similar opinion in Robinson should do the same in Texas civil cases. By the same token, the Texas criminal case which allowed the use of DNA evidence would seem to give

polygraph test results at least a chance of being admitted. Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Lawyers often face cases where a witness' truthfulness is a key issue. Attorneys should consider obtaining a polygraph exam and then try to admit favorable test results.

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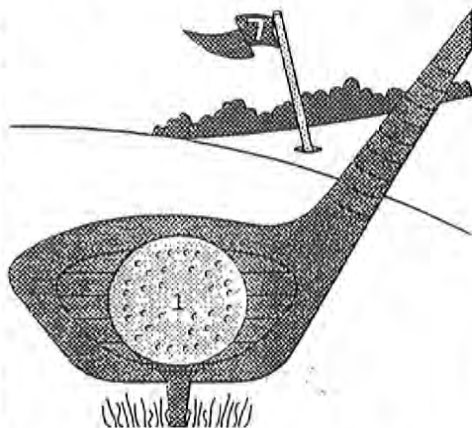
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Beeton: Better To Be Lucky Than Good

Tim Beeton of Simpson & Beeton was as surprised as anyone when he hit a hole-in-one at the recent Texas City-LaMarque Chamber of Commerce Golf Tournament. Beeton won a \$30,000 car and a vacation to Florida—not bad for someone who has been playing golf for under two years and boasts a 35 handicap.

Beeton's hole-in-one came on the Bayou Golf Club's 135 yard hole 7. Contrary to what other papers reported, his shot did not bounce off the cart path. Instead, it hit in front of the green and



rolled from there into the hole. "We couldn't see the cup from the tee, so I had no idea it had gone in

until we saw people on the green jumping up and down," said Beeton.

Beeton says his experience should be an inspiration for all beginning golfers. "This just proves that any golfer, no matter how new, has a chance to do something like this," he stated. Of course, it is best to make your hole-in-one in a tournament that is offering a big prize.

When not golfing, Beeton practices personal injury law in Texas City.

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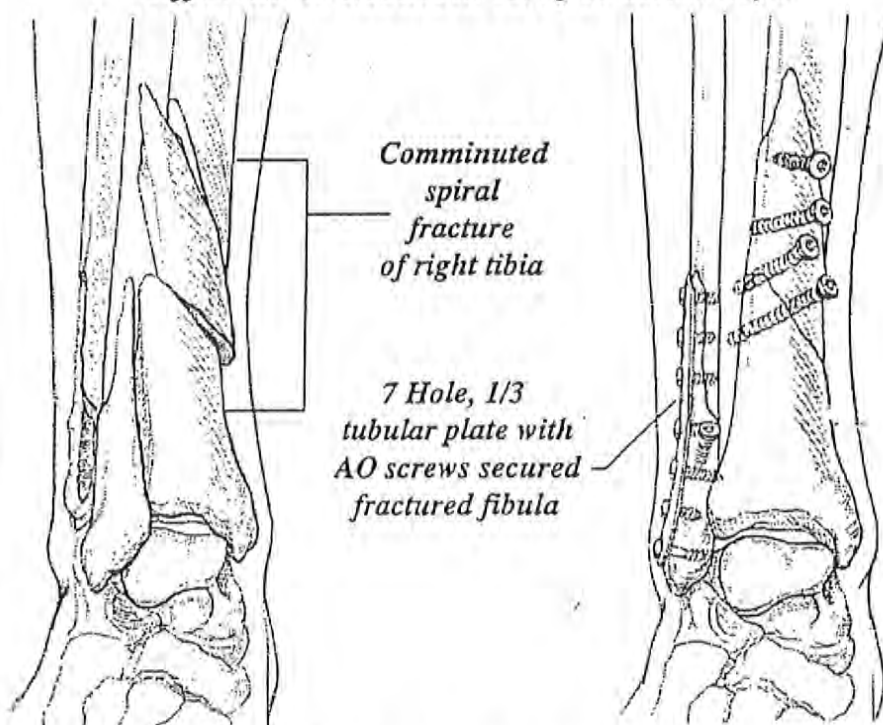
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Corrections....

The Galveston County Lawyer strives for accuracy but occasional mistakes are inevitable. Last month's edition reported that all of the county's district judges went to the judicial conference. Judge Susan Baker-Olsen was on vacation in England and did not attend the conference. I apologize for that error. G.E.

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Trial Reports

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Russell Burwell won an unusual will contest before visiting judge William McCullough. Burwell represented the deceased's nephew who was the proponent of the second will. The decedent's niece contested that will and also sued her brother for sexual battery, alleging improper use of celery and a carrot. The judge found the second will valid and ruled against the niece on her battery claims. The niece was represented by Andrew Vickery of Houston and **John Campbell** of Galveston.

District Attorney **Mike Guarino** and Assistant D.A. **Mohamed Ibrahim** were the prosecutors in Judge **Frank Carmona's** first capital murder case. A jury in the 122nd District Court took less than thirty minutes to sentence Robert Alan Shields, Jr. to die for the murder of a 27 year old Friendswood woman. Shields was represented by Stephen Taylor and **John Ellis**or,

of Galveston. Shields joins four other Galveston County inmates now on death row. Two other Galveston County death row inmates were executed for their crimes in 1994.

Wade Williams of Galveston's Lewis & Williams successfully defended a physician sued for alleged improper treatment of pre-term labor that resulted in the eventual death of the infant born at 25 weeks gestation. The plaintiffs were represented by Robert Talaska of the Haskins Law Firm in Houston.

A mistrial was declared during the fourth day of testimony in an injury case brought by **Gene Hagood** against Sterling Chemicals, which was defended by **Robert Davee** of Mills, Shirley, Eckel & Bassett. A scene that was supposed to have been edited out of a video deposition was played for the jury.

A civil jury handed down a defense verdict in Judge David Garner's Court in a products liability

case filed by **Jack Ewing** against the seller of an air conditioning unit for a boat, which cut the hand of the plaintiff during installation. The case was defended by Jeff Work of Houston's Oppenheim & Assoc.

Two defendants represented by **John Ellis**or were convicted of Assault Causing Bodily Injury in County Court No. 1. **Lonnie Cox** prosecuted. One defendant received 1 one year probation and the other got two years probation and 15 days in jail.

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Legal Article: Are Polygraph Test Results Admissible?
Important Courthouse Phone Numbers (to clip and save)
Golf Tournament Results

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Galveston County Lawyer

October 1995

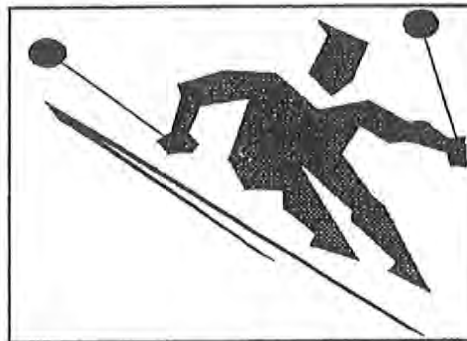
Serving the Galveston County Legal Community

Family Courts Require Seminar Attendance

The three Galveston County judges handling divorce cases now require all parties to divorce and post-divorce actions involving children to attend a three hour "For Kids' Sake" seminar. Attendance at these free seminars by all parties is required before a divorce can be granted or temporary orders can be issued, according to the order signed by Judges Olsen, Dibrell and Crapito.

Many questions have yet to be answered about this program, which is being given a two month trial run. Although almost all lawyers laud the goal of encouraging divorcing parents to put their children first, many attorneys are asking questions about how the seminar requirement will effect family law litigation.

The order signed by the family judges, if taken literally, would prevent temporary orders from being entered when only one spouse has attended the seminar. Constitutional questions have also been raised regarding limiting access to the courts. No provisions have currently been made by seminar planners to ac-



Even non-skiers can enjoy the Annual Lake Tahoe Ski Seminar, set for March 6-10, 1996 at Harvey's Hotel & Casino. Complete package, including airfare, bus transfers, hotel and 8 hours CLE, costs \$590 per person (double occupancy) and \$835 per person (single occupancy). A \$50 deposit is due by Nov. 1. Contact Russ Burwell at (409) 945-0660 or (713) 488-0691.

commodate non-English speakers or the hearing impaired. It would also appear that exceptions would have to be made for emergency situations where there is not time for parties to attend the seminar.

Judges Return From Judicial Conference

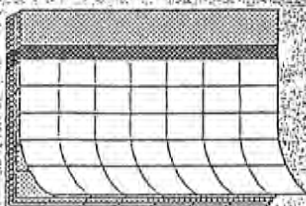
Galveston's judicial corps is back in business after spending three days in San Antonio at the annual Judicial Conference. All five district judges and the three county court judges attended at least some of the conference, which featured seminars, social events and demonstrations of the latest courtroom technology.

Judges from all over Texas were briefed on recent legislative changes and attended seminars on topics such as evidence. A "courtroom of the future" demonstrated simul-

taneous transcription that appears on computers used by lawyers and the judge. There was also time to talk about politics, judicial pay raises and creation of new district courts.

The October Bar Association meeting has been moved to FRIDAY, Oct. 27 at noon at the San Luis to coincide with The Family Law Ad Litem Seminar.

Mark your Calendar...



Oct.	20	GCYLA Golf Tournament: Galv. County Country Club
	27	Galveston County Bar Assoc.—San Luis Hotel: noon (note that usual Thursday meeting is moved to Friday)
	27	Family Bar Assoc. is meeting with Bar Assoc. this month
	27	Family Law Ad Litem Seminar—San Luis Hotel 12 noon - 4:30 pm (\$35 early registration, \$50 after 10/15)
	31	Galveston Young Lawyers—Galvez Hotel: noon
Nov.	1	Deadline to pay \$50 deposit for Lake Tahoe Ski seminar
	28	Galveston County Bar Assoc.—San Luis Hotel: noon
Dec.	6	Bar Association Christmas Party: Gaido's

Suing Shop Owners for False Imprisonment

By Greg B. Enos

In Texas, the elements of false imprisonment are: (1) a willful detention; (2) the absence of authority of law; and (3) a lack of consent by the detained party. J. C. Penney Co. v. Duran 479 S.W.2d 374,379 (Tex. Civ. App. - San Antonio, 1972, writ ref.n.r.e).

"Willful detention" means merely that the defendant intended to confine the plaintiff. Thus, it is not necessary to prove that the defendant intended to hurt the plaintiff or violate the law but merely intended to restrain the plaintiff. The requirement of "confinement" can be met by proof of any restraint of physical mobility, restraint of movement to place to place or in a desired direction. Kroger Company v. Warren 420 S.W.2d 218,222 (Tex. Civ. App. - Houston [1st District] 1967, no writ). The plaintiff does not have to be locked in a room to be confined. Threats which keep a person

from leaving a store can be considered confinement if the threats are such that the threatened person has "a just fear of injury to his or another's person, reputation or property". Randalls Food Market, Inc. v. Johnson 891 S.W.2d 640,645 (Tex. 1995). A threat to do something

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in the future, like calling the police and having the plaintiff arrested, has been held not sufficient to unlawful imprisonment. Morales v. Lee 668 S.W.2d 867,869 (Tex. App. - San Antonio, 1984, no writ).

The absence of adequate legal authority for confinement is an essential element of false imprisonment. J.C. Penney Co. v. Duran, *supra*. However, the burden is on the defendant to prove that the confinement was legally justified when the plaintiff is confined without the authority of an arrest warrant. Bell v. Spraggins 372 S.W.2d 740,741-742 (Tex. Civ. App. - Amarillo 1963, writ ref. n.r.e).

A store owner who detains a suspected shoplifter will usually rely on Tex. Civ. Pract. & Rem. Code §124.001, which states "A person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time in order to investigate ownership of the property".

A victim of false imprisonment may recover as damages

expenses incurred as result of the imprisonment, physical and mental suffering and damage to the plaintiff's reputation. Gibson Discount Center, Inc. v. Cruz 562 S.W.2d 511,513 (Tex. Civ. App. - El Paso 1978, writ ref. n.r.e). Attorney's fees or other expenses incurred in extracting oneself from false confinement are also recoverable. McDonald v. Henderson 250 S.W. 463 (Tex. Civ. App. - Amarillo 1923, no writ).

Potential defendants in a false imprisonment case include the person who actually confines the plaintiff (including a police officer) and the person who directs or requests the unlawful detention. Reicheneder v. Skaggs Drug Center, Inc., 421 F.2d 307,311 (5th Cir. 1970). A private employer can be liable for it's employee's confinement of a customer if the employee who is acting in furtherance of company business, whether or not the particular act was authorized or violated company policy. American Insurance Assoc. v. Smith, 439 S.W.2d 418,422 (Tex. Civ. App. - Texarkana 1969, no writ).

Family Law Ad Litem Seminar

Friday, Oct. 27, 1995
San Luis Hotel
Salon "C"—Argosy Room
12:00 noon - 4:30 p.m.

\$35 early registration
(\$50 after Oct. 13, 1995)
Price includes lunch,
4 hours CLE, compliance with
Fam. Code 107.006

Contact Kathryn Bradfield Lanan
(713) 337-2537 (409) 945-2432

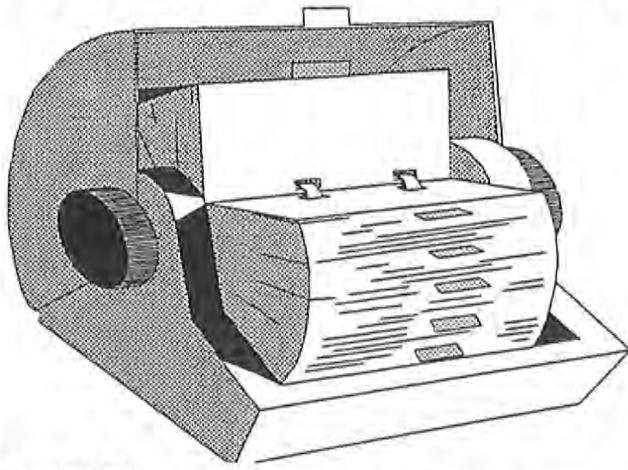
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Important Courthouse Phone Numbers



Practice Tip:

Attorneys who need to set a hearing in Judge Jones' County & Probate Court should address their letter requesting a hearing to Ms. Russell. A letter addressed to the County Clerk filing a motion and requesting a hearing is likely to be stuck in a file and not seen by Ms. Russell. Of course, calling or going in person to get a hearing also usually works.

County & Probate Court

Hon. Jerome Jones

3rd Floor Galv. Co. Courthouse

Coordinator: Dura Lee Russell

Court Reporter: Donna McGuire

Probate Investigator:

Gladys Burwell 766-9755

County Clerk Assigned:

Lucy Smith

(409) 766-2251

fax: 765-2661

FOR KIDS' SAKE

Free seminar required for all parties to
divorce and post-divorce actions
involving children

Oct. 11	Texas City Nessler Center 6:00 pm
Oct. 16	Galveston Rosenberg Library 10:00 a.m.
Oct. 25	Texas City Nessler Center 6:00 p.m.
Oct. 30	Galveston Rosenberg Library 10:00 a.m.
Nov. 8	Texas City Nessler Center 6:00 p.m.
Nov. 13	Galveston Rosenberg Library 10:00 a.m.
Nov. 22	Texas City Nessler Center 6:00 p.m.
Nov. 27	Galveston Rosenberg Library 10:00 a.m.

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Trial Reports

Call the Galveston County Lawyer with information
about your jury and bench trials (713) 334-7165.
Our facsimile number is (713) 334-7519

Galveston's **Anthony Griffin** won a \$275,000 jury verdict against Amoco Oil Co. in Galveston Federal Court before Judge Sam Kent. The plaintiffs alleged Amoco reduced the volume of its maintenance work with Phillips Industrial Contractors because its majority owner was Afro-American. Phillips Industrial asked for a total of \$19 million but the jury did not find a violation of 28 U.S.C. 1981. The jury did find that Amoco had discriminated against the black owner of Phillips and awarded him \$50,000 in compensatory damages and \$225,000 in punitive damages. Attorney's fees for Mr. Griffin have yet to be awarded.

S. R. "Stretch" Lewis of Galveston won a defense verdict for Dr. Ralph Noble in a wrongful death, medical malpractice suit brought by the Houston firm of Berg & Androphy. The suit, tried before Judge Frank Carmona, involved the death of an 18 month old child brought to

the pediatrician, Dr. Noble. In a 10 to 2 verdict, the jury found the deceased child's parents each 50% negligent and found that Dr. Noble was not negligent.

Gordon Davenport successfully defended a boat owner in a suit by Louis Delhomme Marina for breach of a brokerage listing agreement. Judge David Garner granted a directed verdict against the defendant boat-owner's counter-claim for fraudulent inducement and the jury failed to find that the defendant had breached the contract to sell the boat.

The Texas Parks & Wildlife Commission escaped liability for the drowning deaths of two small children at Galveston State Park in a wrongful death suit brought by **Robert O'Connor** of Houston. The jury in Judge I. Allan Lerner's court found that only the kids' mother was negligent for ignoring two dozen warning signs on the beach.

Neil Baron of Texas City lost a premises liability suit against H.E.E. in a jury trial before Judge Roy Engelke. The plaintiff fell in water and oil allegedly dripping from an a.c. unit in the store ceiling.

Jack Ewing Jr. won a Tort Claims suit against the Texas Department of Transportation. A Harris County jury awarded \$2,400.

The Galveston County Lawyer

will publish professional announcements regarding new lawyers, changes in firms' names, board certification and new offices.

Call us for information.
(713) 334-7165

Galveston County Lawyer

Greg B. Enos
2951 Marina Bay Drive
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League City, Texas 77573

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Mark Your Calendar....
Legal Article: Suing Shop Owners for False Imprisonment
Important Courthouse Phone Numbers (to clip and save)
Trial Reports

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