



# The College Bulletin

News for Members of the College of the State Bar of Texas

Summer 2011

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## Tech Tips for Your Everyday Practice

As this is my last article for the *Bulletin*, I wish to thank all the members of the State Bar College for their active participation and involvement. I would also like to give a personal note of appreciation to our members of the State Bar College Board of Directors who have given so tirelessly of their time and effort. They come from every corner of the State, and their names appear on the first page of this *Bulletin*. Call and let them know that they are appreciated!

This last article is a compilation of Tech Tips to assist you in your everyday practice. I have generously borrowed much of the information from an article written by Charles Hardy of San Antonio. "Kudos" to him for his efforts. If you have any other suggestions that you feel may be helpful, please drop us a line.

### Office Supplies/Equipment

**Spy Pen.** Perfectly sized to pass as a normal pen for nearly undetectable hidden camera usage ([chinagrabber.com](http://chinagrabber.com), \$30-\$70)

**Flash Drive.** Regular flash drives, pens, watches, larger capacity, etc. ([chinagrabber.com](http://chinagrabber.com), various prices)

**Scan Pen.** Compact scanning device that makes it possible to quickly scan a document for download at a later date ([planon.com](http://planon.com), \$299)

**Card Scanner.** Scans business cards, captures information and creates electronic contacts in your favorite contact manager (Staples, \$70)

**Extra Monitor.** (Best Buy, various prices)

**Portable Printer.** Print documents while on the go ([brothers-usa.com](http://brothers-usa.com), \$275)

**Heavy-Duty Shredder.** Staples, various prices

**Hands-Free Headset for Land Lines.** Leave your desk without leaving your calls ([plantronics.com](http://plantronics.com), \$430)

**Wireless Mouse & Keyboard.** A reliable wireless connection gives you the freedom to work and play in more places—like your comfy couch (Best Buy, \$25 & up)

**Video Camera.** For depositions (Best Buy, various prices)

**Digital Dictation Device.** (Best Buy, \$50-\$150)

**Web Camera.** (Best Buy, \$20 & up)

**Gourmet Coffee Machine.** Provide your clients and yourselves with a nice cup of coffee ([jura-capresso.com](http://jura-capresso.com), \$1500)

**Label Maker.** (Staples, \$20 & up)

**iPhones & iPads.** (Apple, \$199 & up)

### iPhone & iPad Apps

**1Password.** Password and identity manager; \$9.99.

**Bento.** Personal database to organize contact, track projects, and manage everything; \$4.99.

**Court Days - Date Calculator for Lawyers.**

Easily calculate how many court days or calendars days until a specific date; \$0.99.

**CLE Mobile.** Listen to CLE programming & earn credits while you're on the go; FREE.

**Cisco WebEx Meeting Center.** Join online meetings while on the go; FREE.

**Square.** Easily accept & process credit cards from phone (with free card reader); FREE sign up (2.75% per swipe).

**LinkedIn.** Puts your professional network just a touch away; FREE.

**FedEx Mobile.** Up-to-date shipment tracking information; FREE.

**iTimeSheet.** Time management application; \$5.99.

**FastCase.** Legal research application; FREE.

**Texas Family Code.** Full text that is easily readable and searchable; \$5.99.

**HHZ Little Black Book.** Directory of Judges, Officials, & Lawyers in Bexar County; FREE.

**Texas Child Support Calculator 2011.** Calculates child support payable in Texas; \$7.99.

**Estate Divider.** Summarize values of estate and divide amongst parties; \$0.99.

From  
the  
Chair



Herman Segovia

**Good Reader.** PDF reader with advanced reading and annotating capabilities; \$4.99.

**PenUltimate.** Allows you to handwrite notes in your iPad; \$1.99.

**White Pages.** Easily search for people and businesses; FREE.

**Doc Scanner.** Take a photo with your iPhone and turn into a PDF; \$2.99

**Zosh.** Complete, sign and send documents; FREE.

**YouSendIt Tracker.** Send and track files up to 2GB; FREE.

**Saving Text Messages.** Hold down top power button and round button to take a picture of the screen.

### Websites (mostly FREE!)

**constantcontact.com:** email marketing, event marketing, online surveys

**ourfamilywizard.com:** reduces divorce conflict between parents by providing a shared tool for scheduling parenting time calendars and visitation schedules, sharing information and managing expenses like un-reimbursed medical bills; \$99 a year per parent

**zillow.com:** free online real estate site where you can search for homes for sale, find home prices, see home values, view recently sold homes, and check mortgage rates.

**google.com:** search engine

**texasbarcle.com:** online classroom, online library, practice manuals

**freeconferencecall.com:** conference call services

**mapquest.com:** free maps and directions

**speak-write.com:** allows you to submit your dictation and other work for transcription using a variety of methods

**efax.com:** send and receive faxes as email attachments; \$15-\$20/ mo.

**googlevoice.com:** telecommunications service to help you manage and customize your phone, voicemail and SMS usage

**bcad.org:** Central Appraisal District, general information about the District and the ad valorem property tax system in Texas, as well as information regarding specific properties within the district.

**sos.state.tx.us:** Texas Secretary of State

**technolawyer.com:** Week after week, newsletters provide you with legal product reviews, practice management tips, and other helpful information on a variety of topics.

**scango.com:** document scanning and imaging

**mediafire.com:** More than just a file hosting web site, MediaFire has the features you need to easily upload, download, manage, and share your documents, presentations, videos, images, and more

**yousendit.com:** YouSendIt makes sending and receiving large files super-fast and easy.

**dropsend.com:** ability to send large files up to 2GB and store files online

**mailbigfile.com:** send large file attachments

**sendthisfile.com:** send files over a secure network

**recordiapro.com:** allows you to record your phone conversations, on any phone, whether you place or receive the call, without any extra hardware or software.

**logmein.com:** access, support, and manage devices anytime, anywhere

**ebldv.com:** online meetings and remote desktop access

**skype.com:** free video calling

**facebook.com:** social media mega-network

**fastcase.com:** legal research service that puts a comprehensive national law library and smarter and more powerful searching, sorting, and visualization tools at your fingertips

**dropbox.com:** Any file you save to Dropbox also instantly saves to your computers, phones, and the Dropbox website

**texasbar.com:** State Bar of Texas main website.

**tripadvisor.com:** millions of reviews describing travellers' best and worst impressions

**vacationstogo.com:** discount cruise vacations

**cruisecritic.com:** cruise line reviews

### Office Software

**Microsoft Office.** 2010 version offers flexible and powerful new ways to deliver your best work—at the office, at home, or at school; \$279.99.

**Microsoft Outlook.** Invite others by email to scheduled appointments.

**ProDoc.** Automate legal documents for entire areas of law, eliminates the tedium of updating, generating, and editing your documents; various prices.

**Westlaw.** Online legal research service for legal and law related materials; various prices.

**Timeslips.** Ideal solution for those who bill for services and wants to turn more of their time into money; various prices.

**Google Chrome.** Loads web pages and applications with lightning speed; FREE.

**E/Pop.** Instant messenger for the office; various prices.

**Adobe Reader.** The global standard for electronic document sharing; FREE.

**Workshare Professional.** Accurate PDF and document comparison, document control for easy and secure management of multi-person document reviews, metadata removal, secure PDF creation and sharing, and complete information security; various prices.

**Calculator.** Comes with Windows and has a date calculator included along with a conversion calculator.

### About the State Bar College

We at the College are dedicated to promoting professionalism through life-long education. With TexasBarCLE we cosponsor two excellent CLE programs annually: **Spring Training**, which took place in Houston on March 24, 2011, and **Summer School**, geared toward the general practitioner, which will be conducted at the beautiful Moody Gardens complex in Galveston on July 21-July 23, 2011 (see pp. 6 & 7). It costs a mere \$60 annually to belong to The College; that includes a free subscription (regularly \$295) to TexasBarCLE's Online Library, housing over 14,000 CLE course articles. Apparently lawyers throughout the state are recognizing this value as we have had a tremendous increase in membership this year. And would you be interested in paying a flat annual fee for unlimited CLE from TexasBarCLE?? Please see the next page of this *Bulletin* for a new dues structure that the College is introducing. Join us!! ■

# COMING SOON— **BIG** CLE SAVINGS FOR COLLEGE MEMBERS

*From the  
Executive  
Director*



*Pat Nester*

**W**hen we ask you to renew your College membership this fall<sup>1</sup>, we'll be presenting you two great opportunities to save on CLE. You'll have the choice to sign up for the

**CLASSIC MEMBERSHIP**—all the present benefits of College membership including unlimited free access to the State Bar's Online Library—for the usual \$60.

**SILVER MEMBERSHIP**—all the benefits of the Classic Membership **plus unlimited free access to the State Bar's Online Classroom**, including fully accredited video versions of all of TexasBarCLE's courses and live webcasts—all available at your desktop 24/7, pause-able, replay-able, with download privileges to your desktop, smartphone, and tablet. Silver Membership will be \$395 per year. If you are presently getting all your required 30 hours from the Online Classroom and webcasts, you will save more than \$800. You will select from 1,500 hours of the best CLE available developed by Texas lawyers for Texas lawyers, targeted to your practice. There will be no travel, lodging, food, and parking costs. Using the download feature, you will take your CLE when and where you want to—in your office, at home, in a car, in a plane, on the treadmill.

**GOLD MEMBERSHIP**—all the benefits of Silver Membership **plus unlimited free attendance (and written materials) at any or all of TexasBarCLE's live and video replay programs**—the advanced courses, specialty courses, skills courses, strategies courses, the boot camps and 101's—more than 80 titles, more than 100 events<sup>2</sup>, the gold standard of CLE<sup>3</sup>. Gold Membership will be \$995 per year. Savings using the Gold Membership run quickly into the thousands but are essentially unlimited.

These benefits are available only to College members, lawyers who make the public commitment to keeping their knowledge and skills at a higher level. We hope that the new levels of College membership enable CLE to become a constantly available, even habitual, way to learn the evolving intricacies of your present practice and, as the need or opportunity arises, to master other subject areas as conveniently as humanly possible.

**T**he College's main goal is to raise the standard of practice in Texas. College members know that CLE is the key. Unlimited CLE sets the bar as high as your aspirations fly. Just how good are you? Just how good can you be?



<sup>1</sup> We anticipate a big demand for the new categories of membership. When you get the College's membership notice this fall, please renew promptly to avoid repeated notices and delay in setting up your account with TexasBarCLE.

<sup>2</sup> Not included are CLE events at the State Bar's Annual Meeting and CLE events that are presented independently by a State Bar Section or other State Bar-related group not in affiliation with TexasBarCLE.

<sup>3</sup> Check out the full line-up at TexasBarCLE.com.



# Through the Spectacles of Judges: 10 Tips for Improving Legal Writing

By Rodney P. Moore

**A**cross the country, legal writing is garnering increased attention from lawyers and judges. Legalese is under siege. Plain language is the rage. Flowery prose laced with five-syllable words is out, in favor of—believe it or not—short, understandable sentences. Brace yourself: there even appears to be a movement afoot to make legal writing interesting.

But, how do judges view legal writing? What do they think is important? What do they find helpful? What distracts them? What infuriates them? These questions, and more, were addressed in a recent survey of judges from Arkansas.<sup>1</sup> Here are 10 tips from that survey:

## **MORE is less.**

Our knack for swinging at every pitch with an overweight slab of rambling verbiage has caught the eye of judges—and not to their liking. The most pervasive—and perhaps the most verbose—comments from the judges: our writing is too long. The old adage that the heaviest paper wins appears to hold no weight with the judges of today. Indeed, 38% of the judges surveyed rated excessive wordiness as infuriating—for the rest, it is annoying.

And they offered suggestions for trimming the fat: omit boilerplate and routine issues (i.e. summary judgment standard) unless in dispute; avoid lengthy block quotations; cleanse your writing of legalese; and don't repeat yourself—did I mention they want legal writing to be shorter?

## **Get to the point and stay there.**

Apparently, our pens run amok. Judges lamented about the lack of focus in legal writing brandishing words like “shot-gun” and “kitchen sink.” To summarize their point: write about the issue and nothing else.

## **Introductions and substantive headings are helpful.**

Ever wondered what part of a motion or brief a trial judge reviews first? According to the survey, they review the end

first—the prayer. Why? They believe that is the fastest way to find out what the motion or brief is about.

Why not move that information to the front of the brief in an introduction and highlight the issues through substantive headings? Most judges responded that an introduction concisely summarizing the issues would be helpful. And, 80% of all judges surveyed responded favorably to substantive headings capturing the essence of the issue being discussed.

## **Remove the barbs from your writing.**

All of us have done it. And most of us know it is wrong. But, alas, it sneaks into our writing through words and phrases like: “specious;” “disingenuous;” “intellectually bankrupt;” “with all due respect, \_\_\_\_\_ and \_\_\_\_\_...;” “learned counsel...;” and—my personal favorite, though not as sneaky—“the goober on the other side.” The temptation to get a barb in at the other side—or more satisfying, opposing counsel—is great. But the cost to your writing and our profession is greater still. Those derogatory comments infuriate 87% of the judges and really annoy the others. Attack the issues, not the people.

## **Trial judges like bullet points.**

Though no question in the survey inquired about them, several trial judges wrote favorably about the use of bullet points. I wonder why?

- Short
- Very simple
- No legalese or boilerplate
- Easy to read
- Highlight the important issues

## **Don't just cite—explain.**

Judges reported that too often attorneys cite authority without explaining its importance to the case being decided. Generally, the judges wanted fewer citations and more analysis. And, while we are on the subject of citing authority, several judges let us know that they notice when we don't cite contrary authority.

**Bonus Tip:** For the really important authority, 74% of trial judges report they would be more likely to read it if the attorney provides a copy—some even suggest a highlighted copy.

<sup>1</sup> Conducted by the Arkansas Bar Association, the survey included Arkansas trial and appellate court judges. A version of this article was originally published by the Arkansas Bar Association in the Summer 2010 issue of *The Arkansas Lawyer* magazine. This article is reprinted with permission.

## Follow the rules.

No surprise, judges—especially appellate judges—want attorneys to follow the rules when submitting motions and briefs. Rule mistakes make several judges' list of "most common mistakes" or "top two pet-peeves."

While preparing the survey questions, a couple of trial judges mentioned their dislike of sur-replies and other filings not specified in the rules. The issue was included in the survey with the judges being asked to rank such filings as either "mildly annoying," "really annoying," or "infuriating." The result: 26% of judges responded that such filings are mildly annoying; 38% rated them as really annoying; and 32% decried them as infuriating. So, perhaps getting the *last* word on some issue is not the *best* word in trying to persuade the judge.

## Clearly, the egregious, horrific, and magnificently ornate writing should cease on or about now.

Judges are not fans of words like "obviously" and "clearly." Nearly half report such words to be either "really annoying" or "infuriating." And over-the-top adjectives fared worse: prompting over 20% of judges to rate them as "infuriating." Flowery prose, boilerplate, and legalese drew fire from the judges too.

So what type of words do the judges want? In the words of one appellate judge: "concise, ordinary English."

## Proofread you're rioting so it makes since.

Spelling and grammar mistakes detract from the substance of writing. And, sometimes, the words just don't make sense. Several judges issued pleas for "proofreading" and "for the attorney actually signing the brief to read it." As the heading of this section demonstrates, spell-check—alone—is not enough.

## Organize your writing.

Less than half of the responding judges believe that briefs are well organized. Some of the comments urged more consideration of the architecture and for the writing to be organized in a logical fashion. Upshot: spend time thinking about how you are organizing the writing and consider whether a different sequence of issues or sentences might tell the story better. Remember, in organizing—as well as writing—to keep the important stuff in focus and let the rest go. ■



**RODNEY P. MOORE** is a partner in the firm of Wright, Berry, Moore & White, P. A. in Arkadelphia, Arkansas. He was selected by peers for inclusion in the "Best Lawyers in America" publication in 2009 and 2010.

## Justice Johnson Honored with Tom Garner Distinguished Service Award



**T**EXAS SUPREME COURT JUSTICE PHILIP W. JOHNSON (at left in photo) was honored with the 2011 Tom Garner Distinguished Service Award by the Texas Board of Legal Specialization (TBLS) at its annual induction ceremony at the Texas Law Center on April 19, 2011. This prestigious award is given to a volunteer who has made significant contributions to the legal specialization program.

"We could not have chosen a more deserving recipient for the Tom Garner Award," said Ruben Robles, Chair of the TBLS Board of Directors (at right in photo). "Justice Johnson has dedicated his time and resources to advancing specialization in Texas. His efforts truly epitomize Tom Garner's legacy."

Justice Johnson is deeply involved with certification. He is Board Certified in Civil Trial Law and Personal Injury Law. In his role as Supreme Court Liaison to TBLS, he has worked for quality communication between the two. And he took extra time to include various stakeholders in discussions on the newest specialty area, Criminal Appellate Law.

Established in 2002, this award is presented annually to a member of the legal community who best personifies the ideals of volunteer service toward legal specialization as set by Tom Garner, former Chair of TBLS, who continually worked to streamline the work of the board and its various commissions. He served on the TBLS board of directors three years as a member, one year as Vice-Chair, and two as Chair.

### About TBLS

Texas Board of Legal Specialization (TBLS) is authorized by the Supreme Court of Texas. It certifies attorneys in 21 specific areas of law and paralegals in six specific areas and lists all certified attorneys and paralegals online. TBLS works to ensure that the citizens of Texas receive the highest quality legal services. To learn more visit [www.tbls.org](http://www.tbls.org). ■

# State Bar College 13th Annual Summer School

**LIVE**

## Galveston Island

July 21-23, 2011

Moody Gardens Hotel

**College members  
get the lowest  
registration price!**

Image Credit: spektgraphix.com

### MCLE CREDIT

#### 17.25 HOURS (3 ETHICS)

#### MCLE COURSE NO: 901217239

Applies to the College of the State Bar of Texas and the Texas Board of Legal Specialization in the following areas and amounts:

Civil Appellate.....	15.5
Civil Trial Law .....	15.5
Consumer and Commercial.....	6
Criminal Law .....	8
Estate Planning and Probate .....	1.75
Family Law.....	8.5
Immigration and Nationality Law .....	6
Labor and Employment Law.....	7.25
Personal Injury Trial Law .....	7
Real Estate Law.....	6

## Thursday 7 hours including 1.25 hours ethics

- |       |   |       |   |
|-------|---|-------|---|
| 7:45  | <b>Registration and Continental Breakfast</b>   | 12:00 | <b>Luncheon Served</b>  |
| 8:45  | <b>Welcoming Remarks and Program Introductions</b><br><i>Course Director</i><br>Chad Baruch, <i>Rowlett</i><br>Assistant Principal, Yavneh Academy of Dallas<br>Law Office of Chad Baruch | 12:15 | <b>Luncheon Presentation - The Importance of Wellness to Your Practice: Ten Mistakes and What I Learned from Them</b><br>.75 hr ethics<br>Scott Rothenberg, <i>Houston</i><br>Law Offices of Scott Rothenberg |
| 8:55  | <b>State Bar College Update</b><br>Tamara L. Kurtz, <i>Austin</i><br>Vice-Chair, College of the State Bar of Texas<br>Assistant City Attorney<br>City of Austin                           | 1:00  | <b>Break</b>  |
| 9:00  | <b>State of the State Bar Address</b><br>.25 hr<br>Bob A. Black, <i>Beaumont</i><br>President-elect, State Bar of Texas<br>Mehaffy Weber  | 1:15  | <b>State Bar College Awards Presentation</b>  |
| 9:15  | <b>Legislative Update</b> .5 hr<br>Hon. Eric L. Johnson, <i>Dallas</i><br>Texas State Representative<br>District 100<br>The Sandler Law Firm  | 1:30  | <b>Demonstrative Exhibits</b> .5 hr<br>Frank Herrera, Jr., <i>San Antonio</i><br>Herrera Law Firm<br><br>Jorge A. Herrera, <i>San Antonio</i><br>Herrera Law Firm   |
| 9:45  | <b>Supreme Court Update</b> .5 hr<br>Hon. Scott A. Brister, <i>Austin</i><br>Former Justice<br>Supreme Court of Texas<br>Andrews & Kurth  | 2:00  | <b>Attorney Grievance/Malpractice</b><br>.5 hr ethics<br>Randy Johnston, <i>Dallas</i><br>Johnston ♦ Tobey  |
| 10:15 | <b>Break</b>  | 2:30  | <b>Break</b>  |
| 10:30 | <b>Litigation Update</b> .5 hr<br>Hon. David E. Keltner, <i>Fort Worth</i><br>Kelly Hart & Hallman  | 2:45  | <b>Criminal Law Update</b> .5 hr<br>Russell Wilson, II, <i>Dallas</i><br>Burluson Pate & Gibson   |
| 11:00 | <b>Evidence</b> .5 hr<br>George 'Tex' Quesada, <i>Dallas</i><br>Sommerman & Quesada   | 3:15  | <b>DWI's</b> .75 hr<br>Randy T. Leavitt, <i>Austin</i><br>Law Offices of Randy T. Leavitt   |
| 11:30 | <b>Discovery</b> .5 hr<br>Hon. John K. Dietz, <i>Austin</i><br>Judge, 250th District Court  | 4:00  | <b>Juvenile Law</b> .5 hr<br>Hon. Patrick J. Garza, <i>San Antonio</i><br>Associate Judge<br>386th District Court   |
|       |   | 4:30  | <b>Employment Law: Social Media</b><br>.75 hr<br>Katrina Grider, <i>Cypress</i><br>Attorney at Law  |
|       |   | 5:15  | <b>Adjourn</b>  |
|       |   | 7:00  | <b>Party by the Pool!</b>   |





Photo Credit: Galveston.com/Vadim Troshkin

## Friday 7.75 hours including 1.25 ethics

- |  |  |
|--|--|
| <p>8:00 <b>Continental Breakfast</b></p> <p>8:30 <b>Immigration Law</b> .5 hr<br/>Jodilyn M. Goodwin, <i>Harlingen</i><br/>Law Office of Jodi Goodwin</p> <p>9:00 <b>Municipality 101: Did You Know Your City Can Do That?</b> .5 hr<br/>Anne L. Morgan, <i>Austin</i><br/>Assistant City Attorney<br/>City of Austin</p> <p>9:30 <b>Consumer Law Update</b> .5 hr<br/>Andrew E. Sattler, <i>San Antonio</i><br/>John Dwyre &amp; Associates</p> <p>10:00 <b>Break</b></p> <p>10:15 <b>The DTPA: Still Alive and Well</b> .5 hr<br/>Richard M. Alderman, <i>Houston</i><br/>Dwight Olds Chair in Law<br/>University of Houston Law Center</p> <p>10:45 <b>A View from the Bench</b> .5 hr<br/>Hon. Tracy E. Christopher, <i>Houston</i><br/>Justice, 14th Court of Appeals</p> <p>Hon. Rose Guerra Reyna, <i>Edinburg</i><br/>Judge, 206th District Court</p> <p>11:15 <b>Beneficiary Designations</b> .5 hr<br/>Ingrid M. Warren, <i>Dallas</i><br/>Mahomes Bolden &amp; Warren</p> <p>11:45 <b>Luncheon Served</b></p> <p>12:00 <b>Luncheon Presentation: Legal Writing</b> .75 hr<br/>Chad Baruch, <i>Rowlett</i><br/>Assistant Principal, Yavneh Academy<br/>of Dallas<br/>Law Office of Chad Baruch</p> <p>12:45 <b>Break</b></p> <p>1:00 <b>Disciplinary Rules Update</b> .75 hr ethics<br/>Claude E. Ducloux, <i>Austin</i><br/>Hill, Ducloux, Carnes &amp; de la Garza</p> <p>Thomas H. Watkins, <i>Austin</i><br/>Brown McCarroll</p> | <p>1:45 <b>Break</b></p> <p>2:00 <b>Corporate Entities Business Formation Update</b> .5 hr<br/>Bradley L. Whitlock, <i>Dallas</i><br/>Scheef &amp; Stone</p> <p>2:30 <b>Real Estate Update</b> .5 hr<br/>J. Cary Barton, <i>San Antonio</i><br/>Barton, East &amp; Caldwell</p> <p>3:00 <b>The Art of Ethical Contract Drafting Illustrated by Water Contracts</b> .5 hr ethics<br/>Mark McPherson, <i>Dallas</i><br/>McPherson LawFirm</p> <p>3:30 <b>Break</b></p> <p>3:45 <b>Covenants Not to Compete</b> .5 hr<br/>Michael P. Maslanka, <i>Dallas</i><br/>Constangy Brooks &amp; Smith</p> <p>4:15 <b>The Roberts Court at 5 Years: A Panel Discussion</b> .75 hr<br/>Moderator<br/>Chad Baruch, <i>Rowlett</i><br/>Law Office of Chad Baruch</p> <p>Edward C. Dawson, <i>Austin</i><br/>Yetter Coleman</p> <p>James C. Ho, <i>Dallas</i><br/>Gibson, Dunn and Crutcher</p> <p>Allyson Newton Ho, <i>Houston</i><br/>Morgan Lewis &amp; Bockius</p> <p>5:00 <b>Employment Law Update on New Health Care</b> .5 hr<br/>Stanley P. Santire, <i>Houston</i><br/>Santire Law Firm</p> <p>5:30 <b>Adjourn</b></p> |
|--|--|

## Saturday

2.5 hours including .5 ethics

- 8:30 **Continental Breakfast**
- 9:00 **Evidentiary Silver Bullets** .5 hr  
Stephen J. Naylor, *Fort Worth*  
Law Office of Stephen J. Naylor
- 9:30 **The Trial of a Property Case** .5 hr  
Warren Cole, *Houston*  
The Law Office of Warren Cole
- 10:00 **Creative Ways to Enforce and Collect Child Support Claims** .5 hr (.25 ethics)  
Karen L. Marvel, *San Antonio*  
Sinkin & Marvel
- 10:30 **Break**
- 10:45 **Defending the CPS Case from Inception Through Temporary Orders** .5 hr  
Randall B. Warmbrodt, *Allen*  
Brisendine, Warmbrodt & Associates
- 11:15 **Who Wants the Kids and Why? Top Ten Custody Tips** .5 hr (.25 ethics)  
Joseph Indelicato, Jr., *Houston*  
Joseph Indelicato, Jr., P.C.
- 11:45 **Adjourn**

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# The Old Becomes New - Reimbursement

By Bruce D. Bain



**T**he rule of reimbursement is purely an equitable one. ... It is not an interest in property or an enforceable debt, per se, but an equitable right which arises upon dissolution of the marriage, ....” *Phillips v. Phillips*, 296 S.W.3d 656, 664 (Tex. App – El Paso 2009 pet denied.)

Although stated only two years ago, the quote above is what we learned in law school about reimbursement. It is still good today - now partly codified within the Texas Family Code. § 3.401 *et seq.* The old economic contribution statute, as well intentioned as it may have been, was unworkable and impracticable *vis a vis* its daily application. The hubris raised by (1) the old statute’s difficult and changing formula, and (2) its ongoing question of when it applied as opposed to common law reimbursement prompted its repeal. In its place came the statutory recognition of part of the old common law reimbursement.<sup>1</sup>

Caveat emptor: be careful to not blindly plead only the ‘new’ statutory claims. The reimbursement statutes do not fully replace common law reimbursement theories. The statutes merely codify certain theories and exclude others. The statutes absolutely must be considered as a complement, not in lieu of, appropriate common law reimbursement pleadings.

## Burden of Proof

The party seeking a claim for reimbursement must plead for the claim and has the burden of proof. *Vallone v. Vallone*, 644 S.W.2d 455, 458-459 (Tex. 1982). This is similarly true for any offset which a party seeks, § 3.402(e), either in defense to a particular reimbursement claim or as an independent claim for relief on the same or other property. *Id.*

## Offsets

Offsets are allowed for the use and enjoyment of property. This offset is important due to the trial court’s discretion in awarding this equitable remedy. § 3.402(b). The discretion to be exercised in evaluating a claim for reimbursement is

<sup>1</sup> The statutory change was brought in part due to the efforts of the Texas Family Law Foundation.



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equally broad as the discretion exercised in making a just and right division of the community estate. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988.)

The exception to an offset claim is that a separate estate can not make an offset claim against the community estate based on the separate estate’s ownership of the primary or secondary residence. § 3.402(c.) Most attorneys view this as being the opposite of generally accepted real life application – in the recurring situation where the separate estate owned the house in which the parties lived. At time of divorce, the community could claim a reimbursement for the reduction in principal of the note and in response the separate estate would assert an offset for the community’s use and enjoyment of the house. Now, reimbursement is allowed for the marital residence owned by one’s separate estate.

## What Is Reimbursable by Statute

The following items are contained within § 3.402 and are the only statutory claims for reimbursement (with some color commentary):

- (1) payment by one marital estate of the unsecured liabilities of another marital estate;
- (2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse; (the old *Jensen* claim; see 665 S.W.2d 107 (Tex. 1984.))
- (3) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage; (careful – if you get a loan after marriage secured by separate property, it may not be reimbursable;)
- (4) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;
- (5) the reduction of the principal amount of that part of a debt, including a home equity loan: (A) incurred during a marriage; (B) secured by a lien on property; and (C) incurred for the acquisition of, or for capital improvements to, property;

- (6) the reduction of the principal amount of that part of a debt that was (A) incurred during a marriage; (B) secured by a lien on property owned by a spouse; (C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and (D) incurred for the acquisition of, or for capital improvements to, property;
- (7) the refinancing of the principal amount described by Subdivisions (3)-(6), to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision;
- (8) capital improvements to property other than by incurring debt (consider looking to Internal Revenue Rules for what is and what is not considered a capital improvement (basically, can you amortize the item's costs)); and
- (9) the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses (this is for repayment of the separate property credit cards, but see what is not allowed below in 3.409.)

### What is Not Allowed via the Statute

Several items still are specifically excluded as being reimbursable: (1) payment of child support, alimony, or spousal maintenance; (2) the living expenses of a spouse or child of a spouse; (3) contributions of property of nominal value; (4) the payment of a liability of a nominal amount; and (4) a student loan owed by a spouse. § 3.409.

Be careful to utilize the term reimbursement properly and not as a substitute for a claim of breach of fiduciary duty or as an economic tort. If you have a tort, you argue and prove the appropriate elements and obtain a judgment for the damages against the appropriate estate. See *Schlueter v. Schlueter*, 975

S.W.2d 584 (Tex. 1998); *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999.) But reimbursement is not the correct term for damages to a marital estate nor how a tort based claim is compensated. See *Lucy v. Lucy*, 162 S.W.3d 779 (Tex. App. – El Paso 2005, no pet.)

### Value of the Reimbursable Claim

Generally, the value of the reimbursement will be the enhancement in value to the benefited estate (§ 3.402(d).) The value is not the cost of the enhancement, but the difference in the assets' value prior to and after the addition of the enhancement. This can be viewed in two ways: (1) adding a pool to an existing house may cost \$40k, but the sales price on the open market would only increase by \$15k – the enhancement in value; (2) or look simply at the reduction in the principal of a debt. The timing of that valuation for each claim, in most instances, will be at time of divorce.

The value of the claim may need to be assessed earlier than the time of divorce if the property was disposed of prior to divorce and is no longer in existence. Although the claim matures at time of divorce or death of the spouse, § 3.404(b), there is statutory statement as to when it is to be valued. As an example, if the separate property house was sold three years ago and divorce is occurring today, any reimbursement claim on the house will be valued at time of the house sale. But don't forget that you can still trace the sale proceeds or claim's value forward to today's numbers and/or today's bank account or other asset.

Reimbursement has gone through mutations by both case law and by statute. It currently exists in both forms. If in doubt as to which applies, provide notice pleadings on both causes of action and argue the equities. ■

## “Operation Osobniak-28: The Top-Secret Court-Martial of Major General Robert Grow”

by Ben H. Schleider Jr. and Pete Brewton

“Operation Osobniak-28” is the true account of the 1952 top-secret court-martial of Maj. Gen. Robert Grow, the highest-ranking American military officer to be court-martialed between the Civil War and 1999. Grow, who commanded the 6<sup>th</sup> Armored Division in World War II under Gen. George Patton, served as the senior military attaché in Moscow during the beginning of the Cold War. His personal diary was compromised by Soviet agents and leaked to the East German press. Instead of defending Grow and showing that the communist media accounts of the affair were false, the top Army brass, led by Chief of Staff Gen. J. Lawton Collins, orchestrated Grow's court-martial, and through unlawful command influence, railroaded the military hero and made him the scapegoat for their own incompetence. They were assisted in this in no small part by the inept and even unethical actions of Grow's own defense attorneys and the American press. After 59 years and the top-secret classification of the trial and all the documents, “Operation Osobniak-28” finally sets the record

straight. The manuscript is in pre-publication review.

**Ben H. Schleider Jr.** (Col., U.S. Army Reserve – ret.), (*in photo*) has been licensed to practice law in Texas for 62 years and is an Honored Endowment Fund Scholar of the College of the State Bar with 28 years of consecutive membership. A civil trial lawyer, he has taught at the University of Houston Law School and served as deputy academic adviser at the Judge Advocate General School of the Army at the University of Virginia while on active duty. **Pete Brewton, J.D.**, teaches journalism and media law at Texas Tech University and also serves as the faculty adviser for the University's student newspaper and faculty editor of the College of Mass Communications alumni magazine. He is the author of two books and a former investigative reporter for the Houston Chronicle and the Houston Post. ■



# Birthright Citizenship and the 14<sup>th</sup> Amendment

By James C. Ho

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A coalition of state legislators, motivated by concerns about illegal immigration, is expected to endorse state-level legislation today [January 5, 2011] at the National Press Club Washington, D.C., to deny the privileges of U.S. citizenship to the U.S.-born children of undocumented persons.

This effort to rewrite U.S. citizenship law from state to state is unconstitutional—and curious. Opponents of illegal immigration cannot claim to champion the rule of law and then, in the same breath, propose policies that violate our Constitution.

In the aftermath of the Civil War, members of the 39<sup>th</sup> Congress proposed amending the Constitution to reverse the Supreme Court's notorious 1857 *Dred Scott v. Sandford* ruling denying citizenship to slaves. The result is the first sentence of the 14<sup>th</sup> Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

The plain meaning of this language is clear. A foreign national living in the United States is "subject to the jurisdiction thereof" because he is legally required to obey U.S. law. (By contrast, a foreign diplomat who travels here on behalf of a foreign sovereign enjoys diplomatic immunity from—and thus is not subject to the jurisdiction of—U.S. law.)

During congressional debates, both proponents and opponents of the citizenship clause agreed with the interpretation of the 14<sup>th</sup> Amendment. For example, Pennsylvania Sen. Edgar Cowan opposed the clause precisely because it would extend birthright citizenship to the U.S.-born children of Chinese laborers and other noncitizens who "owe [the U.S.] no allegiance [and] who pretend to own none."

Tellingly, Cowan's racially charged opposition was met with the following response from California Sen. John Conness: "The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so. . . . We are entirely ready to accept the provision proposed in this constitutional amendment."

Supreme Court precedent further reinforces this view of the 14<sup>th</sup> Amendment. In 1899, the court held that a U.S.-born child of Chinese immigrants was entitled to citizenship. In *United States v. Wong Kim Ark*, it held that the "14<sup>th</sup> Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . including all children here born of resident aliens."

The court reiterated this view in *Plyler v. Doe* (1982). The majority held—and the dissent agreed—that the 14<sup>th</sup> Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of illegal aliens. Likewise, in *INS v. Rios-Pineda* (1985), the court again unanimously agreed that a child born to an undocumented immigrant was in fact a U.S. citizen.

Opponents of birthright citizenship say that they want nothing more than a chance to relitigate the meaning of the 14<sup>th</sup> Amendment. But if that is so, state legislation is a poor strategy.

Determining U.S. citizenship is the unique province of the federal government. It does not take a constitutional expert to appreciate that we cannot have 50 different state laws governing who is a U.S. citizen. As a result, courts may very well strike down these state laws without even invoking the 14<sup>th</sup> Amendment. The entire enterprise appears doomed to failure.

Many Americans have sincere concerns about the rule of law. But there are many tools available to combat illegal immigration. Surely we can do so without wasting taxpayer funds on a losing court battle, reopening the scars of the Civil War, and offending our Constitution and the rule of law.



**JAMES C. HO** is the former solicitor general of Texas and a partner in the Dallas office of the law firm of Gibson, Dunn & Crutcher.

# AWARDS & HONORS

Each year, the College recognizes three persons who demonstrate an exceptional commitment to education or professionalism.

## Jim D. Bowmer Professionalism Award for Outstanding Contributions to the Profession

Awarded annually since 1994, the award is named for Jim D. Bowmer of Temple, the originator of the idea of the State Bar College and a co-founding father of the College. A plaque is given to the recipient and an award of \$1,000 will be given to the Texas Equal Access to Justice Foundation in the name of the recipient. For 2010 the award will go to **Paul N. Gold** of Dallas, a 21-year member of the College and one of its Fellows. Paul is

a partner in the firm of Aversano & Gold, a trial law firm that concentrates in medical malpractice and catastrophic injury cases. Board certified by the Texas Board of Legal Specialization in Personal Injury Trial Law and by the National Board of Trial Advocacy, he is an Associate Member of the American Board of Trial Advocates.

Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in Continuing Legal Education

## Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in Continuing Legal Education

The award is named for Franklin Jones, Jr., a co-founding father of the College. A plaque is awarded to an author of an

outstanding CLE article presented during the year. (Articles must be submitted by December 1 of each year in order to be considered for the award.) For 2010 the award will go to **Pamela Stanton Baron**, a sole practitioner in Austin, for her article, "Texas Supreme Court Docket Analysis" presented at TexasBarCLE's 24th Annual Civil Appellate Practice Course. Board certified in Civil Appellate Law, Pamela has served on the Texas Supreme Court Advisory Committee since 1993. For this year she has been named the Austin Appellate

Lawyer of the Year by Best Lawyers in America.

## Steve Condos Most CLE Hours Award

The award is named for Steve Condos, an influential and hardworking member of the first College Board for a brief period before his untimely death. It is

given annually to the College member who, in his or her initial year of membership, attends the most CLE, with not more than 25 hours counted for any one CLE course. According to the State Bar's MCLE department, the most hours earned by a new member to the College in 2010 is **Abraham Michael Khaleghi**, with 231 hours earned. Abe is the Vice President of Product Development and General Counsel at LokalNow, a technology start-up developing innovative mobile applications. He also serves on the board of directors for the National Science and Technology Association, a Houston-based nonprofit founded to promote technological advancement in the Gulf-coast region. ■



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## CRAWFORD HONORED AS DISTINGUISHED ALUMNA

**Sally L. Crawford**, Immediate Past Chair of the College, was among the honorees presented with a Distinguished Alumni Award by the University of Texas at Dallas at its gala on March 31, 2011.

A partner at Jones Day in Dallas, Sally focuses her practice on mergers and acquisitions, corporate finance, and corporate law. She concentrates on the representation of privately held companies in the technology, transportation, manufacturing, and service industries. Last year, she was named by D Magazine as one of the best women lawyers in Dallas. Involved in pro bono work since the 1980s,

Sally currently serves as the pro bono coordinator for the Jones Day Dallas office. In recognition of her commitment, she was honored as the pro bono attorney of the year by the Women's Legal Advocacy Center and by the Dallas Bar Association. She also received the Frank J. Scurlock Award for outstanding pro bono work in Texas for providing legal services to indigents. Extensively involved in the legal community, she is a director of the Dallas Bar Association and a member of the Dallas Entrepreneurship Institute and Consumer Credit Counseling Services of Greater Dallas. A fellow of the Dallas Bar Foundation, she also serves on the board of the Richardson Symphony. ■

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