



# The College Bulletin

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

Spring 2008

## Lawyers —The First Patriots

★ REPRISE ★

From  
the  
Chair



Steven James

In the last *Bulletin*, I told you about the roles some of our patriotic lawyers played in weaving the core of our Nation's history. The impact of the men and women of the legal community in developing and protecting our free society can never be overstated. That part of our history is worth reprising.

Our Courts still look to the Federalist Papers to help determine the outcome of difficult constitutional questions. One of their two authors was among our greatest Founding Fathers, lawyer Alexander Hamilton. He not only helped shape the United States Constitution as a delegate to the Constitutional Convention (33 of the 55 men in attendance were lawyers), but, prior to that, he served as an aide to General George Washington during the Revolutionary War and eventually as a field commander at the penultimate battle at Yorktown. He was our first Secretary of the Treasury (see him on the \$10 bill). He established our first political party. He pushed for a strong central government with central banking. Unable to lawfully resolve all conflicts he faced, he died on July 12, 1804, after being shot by Aaron Burr in a duel the previous day.

John Pershing, who lead American forces in Europe during World War I, was a lawyer. Andrew Jackson led troops to victory over the British in the Battle of New Orleans. He was a lawyer and our seventh President. Look for his gruffy face on the \$20 bill. As a judge he instructed juries, "Do what is right between the parties. That is what the law always means." Indeed; why have other instructions?

Women lawyers fought patriotic battles too, but in different forums. After the Civil War women pushed for the right to practice law. Belle A. Mansfield is believed to be the first woman admitted to practice law in the

U.S., in Iowa, in 1869. That same year Lemma Barkaloo was admitted as the first woman law student, at Washington University in St. Louis.

She would become the first woman to try a case in court. The first woman to obtain a law degree is believed to be Ada Kepley in 1870 at Union College of Law in Chicago. In Wyoming, that same year, Esther McQuigg Morris became the first female judge when she was appointed as a justice of the peace.

This was a significant period for the right of women to practice law. The first African American woman admitted to the bar was Charlotte Ray in 1872 in the District of Columbia. In 1873 in *Bradwell v. Illinois*, the U.S. Supreme Court held that states may statutorily deny women the right to practice law. Nineteen-year-old Alta Hulett got that law changed even as the case was being considered and became Illinois' first woman lawyer. Bradwell herself was later licensed in 1890 to practice law.

In 1879, Belva Lockwood fought for and obtained the signature of lawyer President Rutherford Hayes on "An Act to Relieve Certain Legal Disabilities of Women." It permitted women lawyers to represent clients in federal courts. Lockwood, who had previously been denied admittance to the bar of the Supreme Court, became the first woman admitted. About 102 years later, Sandra Day O'Connor became the first woman attorney appointed to serve as a Justice on the U.S. Supreme Court. She undoubtedly obtained that prominent post due in large part to her ultra-fine education in the schools of El Paso. She and Justice Ruth Bader Ginsburg are the only two women to serve on the Court out of 114 appointments to-date.

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Genevieve Rose Cline was the first woman appointed as a federal judge in 1928 on the U.S. Customs Court. She was appointed by Calvin Coolidge. Florence Ellinwood Allen was appointed in 1934 by Franklin Delano Roosevelt as the first woman federal appellate judge. She served on the Sixth Circuit. The first woman federal district court judge was Burnita Matthews, appointed by Harry S. Truman in 1949 to the District of Columbia bench. When she was appointed Judge T. Alan Goldsborough said, "Ms. Matthews would be a good judge, but there is just one thing wrong with her, she's a woman." She never retired. She died in 1988.

President Truman in 1947 sought admittance to the Missouri Bar while President, but his unsigned application was returned for signature and he never re-submitted it. He had attended law school for two years. He was admitted posthumously to the Missouri Bar in the 1990s. Imagine, a sitting President who wants to finally become a licensed attorney!

And, last but not least, let's not forget our lawyer heroes defending the Alamo in 1836. Twenty-six-year-old, eight-year lawyer William Barrett Travis from Alabama led the troops. The young James Butler Bonham, who rode to and from the Alamo with Travis' messages, passed the bar in 1830 in South Carolina. He had previously been kicked out of college for organizing a student demonstration over bad food. As a lawyer, when one of his female clients was insulted, he caned the man who did it and spent three months in jail for it. The local women brought him three meals a day in jail.

Twenty-nine-year-old lawyer Green B. Jameson of Kentucky was the engineer who constructed the defensive works at the Alamo and was sent to negotiate, unsuccessfully, with Santa Anna. Davy Crockett had been a magistrate in Tennessee in 1817. He held court in his cabin. He later represented Tennessee in Congress. Some say he left Tennessee because he couldn't get along with Andrew Jackson. Two twenty-four-year-old Kentucky lawyers, Daniel Cloud and Peter James Bailey III, came with Crockett's volunteers.

Prior to fighting at the Alamo, young lawyer Micajah Autry wrote that his brother should study law because Texas "will be the greatest country for that profession as soon as we have a government that ever was known."

Leading the way is not over yet. Recently elected lawyer Senators Mel Martinez of Florida and Ken Salazar of Colorado are the only Hispanic-Americans in the U.S. Senate. In Texas, Wallace B. Jefferson is our first African-American Supreme Court Chief Justice. Janet Reno served as the first female United States Attorney General. Lawyers have always led the way in our great country and it should remain so.

I urge you to mark down May 1, 2008 for the State Bar College's Spring Training seminar at the Hilton Anatole Hotel in Dallas and July 17-19, 2008, for Summer School at beautiful Moody Gardens in Galveston. Let's get together and talk a little history.



## A VIEW FROM THE BENCH: *The Fundamentals of Oral Argument*

By Justice Kerry FitzGerald and Staff Attorney Greg J. Lensing,  
Fifth District Court of Appeals of Texas

**WHAT IS ORAL ADVOCACY?** Oral argument presents an opportunity to accentuate the principal issues in the brief; it does not serve to rehabilitate or resuscitate a poorly drafted brief or a hopeless cause. Oral argument, therefore, depends upon the quality of the brief. Effective legal advocacy involves education, explanation, and persuasion in a serious dialogue between the Court and counsel concerning important and significant issues. Counsel's presentation must be carefully prepared, legally grounded, zealously presented, and responsive to the concerns of the Court. In addition, it should adhere to the rules of the Court, reflect professional integrity and competence, and be conducive to reasonable resolution of legal issues. Effective legal advocacy is not mean spirited confrontation or open warfare. The process, unstructured and time driven, is one over which counsel has little control. Organization, preparation, and anticipation are, therefore, critical.

**INTEGRITY** of the advocate and the advocate's work product, and the integrity of the Court for that matter, are paramount. Discussion of integrity generally entails comments about honesty and candor of counsel; the focus should also include the accuracy and completeness of the legal briefing and the later oral argument. Those who minimize the importance of integrity ignore an essential component of professionalism and will suffer the consequences. If an advocate's credibility is suspect, the entire product is not worth a grain of salt. Resist the temptation to fudge, push the envelope, stray outside the record, promote half truths, compromise values, or assume the role of the "spin doctor." Instead, reap the advantages of taking the high road; being straightforward pays huge dividends long term. You do not want the Court to tolerate your remarks; you want the Court to truly listen to your argument, harbor no doubts as to your veracity and representations, and be persuaded by what you have to say.

The following observation addresses integrity and should apply to both Court and advocate:

“An opinion writer is entitled to the greatest leeway in his law as in his reasoning, for they are his. But honesty allows no leeway in his statement of the facts, for they are not his. There is no substitute whatever for adherence to the exact and precise record in the case. No ‘result-orientation’ can justify omission of a single relevant fact or the inclusion of a single factual statement that is false. This should go without saying. Unfortunately it needs saying.”

*“Reflections on Appellate Courts: an Appellate Advocate’s Thoughts for Judges”* by Mary Massaron Ross, *THE JOURNAL OF APPELLATE PRACTICE AND PROCESS*, vol. 8, No. 2, Fall 2006 (quoting Lasky, *A Return to the Observatory Below the Bench*, 19 Sw.L.J. 679 (1965)).

**KNOW YOUR AUDIENCE.** We all should realize judges have certain preferences and react differently to various presentations. One size does not fit all. The judicial audience reflects diverse backgrounds, experiences, and attitudes. An argument which may appeal to one judge as wonderful, persuasive, or dynamic may draw a neutral or opposite reaction from another judge. If judges walk away from the arguments impressed, it is a good thing; if judges walk away persuaded, it is a much better thing. While certainly striving for the former, aim for the latter. We have broad common ground: we are all lawyers; we come prepared to tackle substantial, and sometimes sensitive, issues; and we need to address pivotal questions. Certain approaches to this process are recommended because of their fundamental effectiveness. But this is only one perspective; there are many. You decide the road you want to take.

**BEGIN WITH THE END IN MIND: A COMPELLING ARGUMENT.** We have all heard the criticism that an advocate should not make a “jury argument” in an appellate court. In reality, you can project emotion and passion into a well defined legal argument without forgetting you are addressing an appellate court. No one is particularly attentive to a monotonous, lifeless, plodding discourse. We look forward to an interesting, thought-provoking presentation. A compelling argument is founded upon insightful issues, sound reasoning, and legal authorities which apply to specific facts. The Court hopes for a logical, reasonable, and objective argument, one which can be translated into an equally logical, reasonable, and objective decision.

**KNOWLEDGE IS POWER.** Master your facts, issues, and law. The advocate who has reread the relevant portions of the record is leap years ahead of the opponent who just could not find the time to adequately prepare. Knowledge of record, conveyed accurately, completely, and forthrightly, is essential and gives the advocate a clear advantage. Misstating or straying from the record is a major error. Any advantage

occasioned by such misrepresentations will be short-lived in view of the general practice of judges to review the record in depth prior to oral argument. This sort of mistake is particularly mystifying because the Court’s subsequent detailed review of the record will also expose such misrepresentations. In other words, how could an advocate expect to score points with such a devious strategy when the Court has equal access to the same information.

**SURVIVAL OF THE FITTEST.** Selection of issues and prime positions is critical. All issues are not created equal. Bench all but first string issues.

**CONCENTRATE ON STRUCTURE:** Every presentation involves a minimum of five elements: (1) identification of issues; (2) standard of review; (3) relevant facts; (4) supporting authorities; (5) clear analysis leading to desired resolution. The fifth element generally should include a discussion of both error and harm—pro or con, depending on which side the advocate is on.

**GAIN PERSPECTIVE.** Step back a few moments and grasp the “forest/trees” analogy. The advocate risks driving into a dead end if he harps on a particular point to the exclusion of the entire record because a Court will not review a contention in total isolation. The Court will consider the issue in relation to other related events to determine the existence of reversible error under Texas Rule of Appellate Procedure 44 (reversible error in criminal and civil cases). The advocate must think in terms of “context” to show error as well as harm or prejudice. Thus, wisdom and prudence dictate that the advocate takes a broader vision of his own case.

**USE FUNDAMENTAL COMMUNICATION TECHNIQUES.** Listen to others speak at meetings, at church, and in trial and appellate courts, and then double your resolve to articulate your message, loud and clear, at a moderate pace (this is not a NASCAR race), eyes front (not submerged while reading script), engaging the entire court (remember: 3 voting judges). True professionals do not believe practice of their communication skills is beneath them. Use the clock wisely and get to the point in a reasonable time, sooner than later, because the Court already knows the point as related in the legal brief (this is not a mystery novel).

**LESS CAN BE MORE.** Brevity or ad nauseam? Many times too many words are used to tackle a subject. How many different ways can an advocate be encouraged to be “brief” (as in the length of a legal brief or of oral argument)? And admittedly authors and speakers fall into the same trap: excessive length. Who wants to read/hear all of the extraneous, collateral “stuff”? We should practice what we preach. Lincoln really did get it right when he suggested we should spend more time to say less. Focus on the proverbial wheat and discard the chaff.

**PREPARE CAREFUL CHECKLISTS.** Use an outline to organize your presentation. Compile an accessible notebook with all

relevant documentation. Prepare a failsafe checklist listing all major points which you believe should be emphasized. Interruptions, unanticipated questions, and the pressure of the moment may derail a plan left solely to memory. Most of us do not enter serious and spirited discussions without a carefully thought out plan of execution reduced to writing.

The Appellate Notebook, in one form, may contain these features: (1) Oral argument outline; (2) Failsafe Checklist; (3) Case outline (all issues); (4) Record excerpts; (5) Anticipated questions and answers; (6) Primary authorities outline; (7) Copies of primary cases; (8) Opponent's case outline, including prepared responses; and (9) Briefs filed.

**KILLER QUESTIONS AND ANXIETY ATTACKS** are common concerns. The unvarnished truth is that most good advocates will admit privately to experiencing a certain amount of healthy fear, alarm, panic, or terror at the prospect of being asked an unanticipated question. We have all been there and have nurtured the hope we do not fall on our faces when questioned. Another candid reality is that a judge does not ever want to appear to have asked a stupid question or one which indicates ignorance or a clear misunderstanding of the case. The only solution I know is to work smart and prepare for the argument.

A good judge does not embarrass a lawyer, set clever traps, or major in debating for the sake of argument. The Court should be focused on identifying pivotal issues, resolving critical points, testing any labored reasoning, and engaging counsel to inform, educate, and explain. The advocate should be aware of the relative importance of facts, the impact of legal authorities, and the ramifications of favorable or unfavorable decisions. Obviously, the advocate will nurture flexible strategies to cover difficult questions and be able to clarify and "nail" key issues.

On occasion, an answer will evade the advocate (just as I may miss the impact of a particular authority cited or the direction the advocate is taking), perhaps because of the complexity of

the case or the pressure of argument. The response "I don't know" is not foreign to my vocabulary. I do not even pretend to know all the answers. In such cases, an advocate may consider filing a supplemental brief on the matter. But bluffing is not recommended. The bottom line is that being alert to potential pitfalls is a good thing; but do not hit the panic button or unduly agonize over so-called "killer questions." They are really a myth. What you will see are reasoned inquiries which you would ask if you had the responsibility of deciding the case.

Because questions occupy a dominant position in the advocate's approach, it may be helpful to categorize the major types of inquiries: (1) Soft ball: easy to handle; (2) Hard ball: challenging; (3) Grand slam: opportunity to persuade the panel of Justices before conference; (4) Titanic: hypotheticals, "do you concede that...", advocate's position restated by judge which may alarm advocate; (5) Policy: impact and ramifications of decision; (6) Equity: what is fair; (7) Bridges and stepping stones: education, information, and clarifications; (8) Pivotal: foundation of entire case; (9) ICU (Intensive care unit): critical legal authority supporting advocate's position; (10) The Doubting Thomas (show me because I am not with you yet); (11) On the fence; and (12) Unpleasant situations.

A clearly acceptable response model to questions posed by judges incorporates the following techniques: (1) Pause argument; (2) Listen carefully to entire question; (3) Clarify question, if necessary; (4) Answer question asked responsively; (5) Based upon knowledge of appellate record; (6) Candidly (honestly, truthfully); (7) Directly; (8) Completely; (9) Immediately; (10) Within reasonable time; (11) Limited by the appellate record; (12) And if counsel does not know the answer, say so, offer to supplement, and move on; (13) If time expires, finish answer within reasonable time and conclude; and (14) Know when to stand tall, when to be flexible, and when to fold.

**CONCLUSION:** We welcome your arguments. We are a lawyer-friendly Court and look forward to the very capable arguments presented by members of our Bar. ■



**JUSTICE KERRY FITZGERALD** has served on the Dallas Court of Appeals since 1999. He obtained his undergraduate degree from Georgetown University, and a B.B.A. in Economics from Southern Methodist University. He obtained his law degree from the University of Texas. Prior to joining the bench, he served as Assistant District Attorney in Dallas County, and later as Chief of the Appellate Section in that office. He is Board Certified in Criminal Law by the Texas Board of Legal Specialization, and a member of the Texas Court of Criminal Appeals Rules Advisory Committee. He also serves on the Texas Bar Journal Editorial Board.



**GREGORY J. LENSING** graduated *summa cum laude* from the University of Dallas. He received his law degree from the University of Texas School of Law with high honors in 1993. He is a former law clerk for the Honorable Carolyn D. King of the United States Court of Appeals for the Fifth Circuit. He also previously served as Senior Counsel in the appellate section at Cowles & Thompson. He currently serves as a Staff Attorney with the Dallas Court of Appeals.

# MCLE in TEXAS – *Better Than You Even Know*

TEXAS has one of the most, if not the most, progressive and well-managed MCLE systems in the country.

*From the Executive Director*



Pat Nester

**O**NE OF THE GOOD THINGS ABOUT LIVING IN TEXAS in the spring is the MCLE rule. Now, before you decide to stop reading by reason of my apparent insanity, let me explain.

Texas got into mandatory CLE in 1986 after a referendum of the lawyers which, somewhat surprisingly, passed by almost a two to one margin. Up until then, 17 states had passed such a rule. Since then, 41 states have adopted mandatory rules, several big ones like California, Florida, New York and Illinois paying close attention to what our experience has been in Texas.

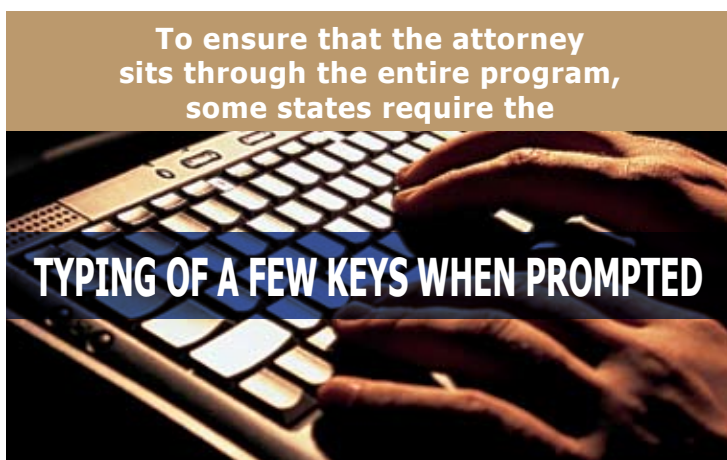
Recently, I attended a national meeting of CLE organizations, not the MCLE regulators but groups that put on CLE programs. One of the workshops was a discussion of the present trend of MCLE rules, especially the rules governing viewing of CLE programs on your computer screen. Most states make provision for at least a substantial portion of one's hours to be claimed through online methods. Texas and a few others allow one to receive all one's hours online, and many attorneys in our demographically disbursed state take full advantage of the opportunity.

In several states, however, the MCLE regulators have adopted techniques that attempt to ensure that the attorney who claims the credit actually sits through the entire program as it plays out on the computer screen. This is done by asking the attorney to type in a few letters when prompts appear during the program. Similar techniques are used in many states to assure that a teenager preparing for his driver's license actually goes through all the materials. If you take "defensive driving" online, to avoid a permanent conviction

for some traffic offense, you will be served up this same technique.

Several of us in the room who were lawyers had a strong reaction to this news. Inside my head, I heard the question unfurl, "Let me get this straight. We are asking all lawyers to endure this childish system of stimulus and response in hopes of frustrating the nefarious intentions of an unknown few who might try to cheat on the MCLE rules? Remember," say I, "these are *lawyers* who have a license from the state to manage the most delicate and confidential and consequential affairs of the citizenry at the highest levels of fiduciary duty! Something is wrong here."

Fortunately, this is not the case in Texas. The MCLE Committee over the years has repeatedly adapted the MCLE



rules, through several generations of regulations, to the best interests of the bar, especially as regards making more good quality CLE available to more lawyers at more convenient times. As a result, Texas has one of the most, if not the most, progressive and well-managed MCLE systems in the country. The Committee has never succumbed to the temptation to treat the practicing bar

as though they were a bunch of potential malefactors just waiting to sneak one by the authorities. I want to say thank you for that. Thank you to Nancy Smith, the director of the MCLE Office at State Bar headquarters. And thank you to the MCLE Committee, this year headed by the Hon. Alice O'Neill of Houston.





# *The Availability of Intentional Infliction of Emotional Distress Claims in an Alienation Setting*

By Eric Beal

**S**O YOU WANT TO PRACTICE FAMILY LAW IN THE POST-TORT-REFORM WORLD in which we find ourselves? You say you haven't had a client come in whose life has been devastated by their spouse's adultery? Well, wait until your second week of practice, you will.

When those clients come in, the first question any creative attorney would ask himself is, "What can I do to gain an advantage and really give the other side something to lose?" You want something more than just the threat of a "disproportionate division" using adultery as a fault ground – that's often not much of a threat. "I've got it, there must be a Tort that will work," you think. Maybe there is.

That brings you to the second question that you have to ask yourself. One that Clint Eastwood, in the role of Dirty Harry put best, "Do I feel lucky? Well, do ya punk?"<sup>1</sup>

The reality is, if you practiced in another state, for example, Mississippi, you may never need to reach the Dirty Harry question. As recently as 2003, several states, including Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah, still recognized Alienation of Affections.<sup>2</sup>

In fact, the United States Supreme Court recently refused to hear an alienation case in which a Mississippi businessman suffered a judgment of \$750,000.00 for having an affair with a married woman.<sup>3</sup> The case was brought by the woman's ex-husband, post-divorce, for the "loss of society, companionship, love and affection, and sexual relations" the innocent spouse had suffered because of his ex-wife's paramour under Mississippi's Alienation of Affection statute. Although six-digit awards against individuals for intentional torts do not raise many eyebrows in and of themselves, the Mississippi case is intriguing.

That combination of factors leads the creative Texas

practitioner to ask: Can that happen here? Can I get that type of result for my client? Since at least 1987, the answer most often given has been: probably not. A careful analysis of Texas case law, including a 2004 case from the Fourteenth Court of Appeals, however, changes the answer to a strong "maybe." And in keeping with the movie theme of this article, in the words of Lloyd Christmas, "So you're telling me there's a chance."<sup>4</sup>

## **"HEART BALM TORTS" IN TEXAS**

**A**t one point or another, in most if not all jurisdictions, the so-called "heart balm torts" were available to innocent spouses, who sought judicial intervention in an attempt to mend a broken heart. Those torts included alienation of affections, criminal conversation, seduction, and breach of promise to marry.<sup>5</sup> While none of the four still exist in Texas, a discussion of criminal conversation and alienation of affections claims is useful in the examination of whether the payday discussed above is possible in Texas.

It is unclear exactly when alienation of affections first appeared in Texas law. A look at its genesis leads to Germanic tribal law. There, men were entitled to payment from the wife's lover so that the husband could purchase a new spouse.<sup>6</sup> The theory was that this would "ensure pure bloodlines and discourage adultery."<sup>7</sup> Following the Germanic tradition, the Anglo-Saxons established a mechanism to allow compensation for "interference with the marital relationship" that had as its justification the fact that "wives were viewed as valuable servants to their husband."<sup>8</sup>

<sup>1</sup> "Dirty Harry," 1971, The Malpaso Company, with Clint Eastwood as Inspector Harry Callahan, SFPD.

<sup>2</sup> *Helsel v. Noellsch*, 107 S.W.3d 231, 235 (Mo. 2003) (J. Benton, dissenting).

<sup>3</sup> *Fitch v. Valentine*, 959 So.2d 1012, 1015 (Miss. 2007) (en banc), cert. denied, 128 S.Ct. 911 (2008).

<sup>4</sup> "Dumb and Dumber," 1994, New Line Records, with Jim Carrey as Lloyd Christmas.

<sup>5</sup> W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON TORTS, § 124 (5th Ed. 1984). ("Abolition of Actions").

<sup>6</sup> *Helsel v. Noellsch*, 107 S.W.3d at 231.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Early English common law carried on the tradition of compensation for the innocent males with causes of action for seduction and enticement which were the progeny of the Germanic and Anglo-Saxon laws. Those causes of action eventually appeared in the United States, and became the torts known as alienation of affections and criminal conversation.<sup>9</sup> In fact, Texans were suing each other under “heart balm” theories throughout the 19<sup>th</sup> and early 20<sup>th</sup> Century.<sup>10</sup>

Alienation of affections is one of those wonderful torts that makes it easy for everyone because its name says it all. Criminal conversation, on the other hand, is the exact opposite. It leaves most attorneys that passed the bar after the mid-1970s with the same question: Huh? In short, criminal conversation claim is the tort that, pardon the pun, marries up with adultery. Although Prosser and Keeton state that the “criminal” part of the name derives from the fact that adultery was an “ecclesiastical crime,”<sup>11</sup> at one time in Texas it was also an actual crime.<sup>12</sup>

The elements of alienation of affections were: (1) that the defendant intentionally or purposely enticed away the spouse, (2) that there has been loss of Affection or consortium, and (3) that defendant’s conduct was the controlling cause of the loss.<sup>13</sup> In contrast, the elements for criminal conversation were: (1) an actual marriage between the spouses; (2) sexual intercourse between the defendant and the guilty spouse during the coverture [the inclusion of a woman in the legal person of her husband upon marriage under common law].<sup>14</sup>

<sup>9</sup> See PROSSER AND KEETON ON TORTS, § 124 (“Types of Interference”) (“[Alienation of Affections] seems to have been recognized first in New York in 1866”), cf. *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003) (“Beginning with New York in 1864 . . .”).

<sup>10</sup> See, e.g., *Ex Parte J.B. Warfield*, 40 Tex. Crim. 413, 50 S.W. 933 (Tex. Crim. App. 1899) (contempt proceeding alleging partial alienation of the affections of plaintiff’s wife); *Glasscock v. Shell*, 57 Tex. 215 (1882) (discussing the measure of damages and contrasting it with that of claim for criminal conversation); *Wright v. Wright*, 3 Tex. 168 (Tex. 1848) (referencing tort of seduction); see also *Norris v. Stoneham*, 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932, no writ) (a thorough discussion of the adoption of marital rights law in Texas which concludes with the affirmation of a \$3,000.00 award to a wife for the alienation of her husband’s affections, while noting that it is “not a vice to be friendly, pleasing, and attractive”).

<sup>11</sup> PROSSER AND KEETON ON TORTS, § 124 (“Types of Interference”).

<sup>12</sup> See *Halbadier v. State*, 87 Tex. Crim. 129, 214 S.W. 349 (Tex. Crim. App. 1919) (The defendant having been convicted of adultery, moved to quash the information and complaint, in part because the complainant was an “accomplice,” to wit: the woman with whom he had had sex.)

<sup>13</sup> *McQuarters v. Ducote*, 234 S.W.2d 433, 434 (Tex. Civ. App.—San Antonio 1950, writ ref’d n.r.e.) (Wife-plaintiff filed suit for alienation of affections; lost due to inability to prove causation, finding that prevailing would “reward [her] for the misdeeds and weaknesses of her own husband”).

<sup>14</sup> *McMillan v. Felsenthal*, 482 S.W.2d 9, 12 (Tex. Civ. App.—Tyler 1972), affirmed, 493 S.W.2d 729 (Tex. 1973) (cited by *Smith v.*

In 1987, abrogating over 1000 years of law and tradition the Texas Legislature amended the Texas Family Code to abolish the tort of alienation of affections, having done the same to criminal conversation in 1975.<sup>15</sup> Theoretically, at least, that would put an end to “heart balm torts” in the state of Texas. As the old saying goes, however, “if at first you don’t succeed, try, try again.” In the law, that can often be translated as: just because you can’t sue someone one way, doesn’t mean you can’t sue them another.

## MODERN ALTERNATIVES FOR INNOCENT SPOUSES

The Texas Supreme Court specifically adopted the tort of intentional infliction of emotional distress in 1993 in *Twyman v. Twyman*.<sup>16</sup> *Twyman* was a divorce case in which the wife obtained a \$15,000.00 judgment based on a claim of emotional distress because her husband “intentionally and cruelly” attempted to engage her in “deviant sexual acts.”<sup>17</sup> *Twyman* was significant for both its specific adoption of the intentional infliction of emotional distress claim, and its added recognition that there was no prohibition on bringing it in a divorce action.<sup>18</sup> Prior to *Twyman*, some Texas appellate courts had recognized intentional infliction of emotional distress in limited circumstances, but the Houston Fourteenth Court of Appeals had specifically barred its use in divorce cases.<sup>19</sup>

With *Twyman* the law, the time was right for someone to bring a tort case against their spouse, and presumably the spouse’s paramour, for intentional infliction of emotional distress. Now that it is 2008, the time has been right for fifteen years. Yet, why do so many practitioners believe that intentional infliction of emotional distress claims in which the outrageous behavior involved an adulterous liaison probably will not be permitted in Texas?<sup>20</sup>

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*Smith*, 126 S.W.3d 660 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.), as the case which “adopted” Criminal Conversation as a tort in Texas).

<sup>15</sup> TEX. FAM. CODE ANN. § 1.107 (2007) (former TEX. FAM. CODE ANN. § 4.06)

<sup>16</sup> *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993) (“Today we become the forty-seventh state to adopt the tort of intentional infliction of emotional distress as set out in § 46 (1) of the RESTATEMENT (SECOND) OF TORTS.”)

<sup>17</sup> *Id.* at 621.

<sup>18</sup> *Id.*

<sup>19</sup> *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1989, writ denied) (overruled specifically by *Twyman v. Twyman*, 855 S.W.2d at 624, fn. 15).

<sup>20</sup> See William V. Dorsaneo III, TEXAS LITIGATION GUIDE, § 337.03 (2008) (“Contexts in Which Intentional Infliction Claims Occur”); “Divorce Torts: A Family Law Practitioner’s Guide to Evaluating, Drafting and Prosecuting Interspousal Torts,” Family Law Torts, webcast, recorded September 2007. (“One should not plead adultery as the extreme and outrageous behavior. There has been at least one case where a woman sued her husband’s paramour for the intentional infliction of emotional distress and the court rejected it on the basis that it was legally just a claim



Most of the skepticism stems from the Fort Worth Court of Appeals' decision in *Truitt v. Carnley*.<sup>21</sup> In *Truitt*, the Fort Worth Court of Appeals considered a case in which an aggrieved spouse sued the paramour of her adulterous spouse. The scorned wife's action alleged that his girlfriend "either intentionally or negligently" caused her to "suffer mental anguish."

The plaintiff lost, both at the trial level and in the court of appeals. The *Truitt* court held that the "suit against Carnley was necessarily based upon either one or both" alienation or criminal conversation. Since those had both been abolished, the court reasoned, the plaintiff could not appeal.<sup>22</sup> That decision, however, was prior to *Twyman*.

Following *Twyman*, in 1994, the Fort Worth Court again examined a case in which adultery took center stage.<sup>23</sup> *Stites v. Gillum*, was the appeal of a sanction that was imposed upon a Fort Worth attorney who represented the wife in a divorce. As a part of his counter-petition, the lawyer implied the alleged paramour of his client's spouse. The paramour obtained a summary judgment on the basis that the claims against her were either criminal conversation or alienation claims, and both claims had been abolished. She then obtained \$18,000.00 in sanctions against the lawyer based on the trial court's finding that the pleading was groundless and in bad faith because it was "an action for 'alienation of affections' couched in other terms," and "not an action seeking damages for intentional infliction of emotional

distress."<sup>24</sup> The court also rejected the lawyer's argument that he was merely trying to extend or modify existing law.<sup>25</sup> The court found that the pleadings did not allege any "extreme and outrageous conduct" required to support a claim for intentional infliction of emotional distress.<sup>26</sup>

Nonetheless, the Fort Worth Court of Appeals recognized that, "[i]t is perhaps conceivable that, notwithstanding the prohibition of section 4.06 of the Family Code abolishing the cause of action of alienation of affections by one spouse against a third party, an argument could be made that the cause of action of intentional infliction of emotional distress was viable and should be extended to a situation involving a spouse bringing the cause of action against a third party for conduct involving the other spouse."<sup>27</sup>

In 2004, the Houston Fourteenth Court of Appeals considered a constitutional challenge under the Open Courts provision of the Texas Constitution to the Family Code provisions that abolished alienation and criminal conversation claims.<sup>28</sup> In *Smith v. Smith*, the plaintiff was the former spouse, and the defendant her ex-husband's second wife. The defendant was alleged to have had an affair with the former husband of the plaintiff. The *Smith* court held that both §§ 1.106 and 1.107 of the Texas Family Code were constitutional and therefore upheld the statutory abolition of criminal conversation and alienation claims.<sup>29</sup> Nevertheless, in explaining its rationale, the court stated that a cheated-upon spouse "may also be able to bring a cause of action for intentional infliction of emotional distress against the offending spouse and against a third party based on interference with the marriage relationship."<sup>30</sup>

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based on alienation of affection and criminal conversation, both of which have been abolished by the Texas legislature. *Truitt v. Carnley*, 836 S.W.2d 786, 787 (Tex. App.—Fort Worth 1992, no writ). The facts giving rise to the intentional infliction of emotional distress should be independent of any adulterous affair.").

<sup>21</sup> *Truitt v. Carnley*, 836 S.W.2d 786 (Tex. App.—Fort Worth 1992, writ denied).

<sup>22</sup> *Id.* at 787.

<sup>23</sup> *Stites v. Gillum*, 872 S.W.2d 786 (Tex. App.—Fort Worth 1994, writ denied).

<sup>24</sup> *Id.* at 788, 790.

<sup>25</sup> *Id.* at 789.

<sup>26</sup> *Id.* at 793-94.

<sup>27</sup> *Id.* at 793.

<sup>28</sup> *Smith v. Smith*, 126 S.W.3d 660 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.).

<sup>29</sup> *Id.* at 664.

<sup>30</sup> *Id.* at 665.

## HOW TO GET THERE FROM HERE

Going back to the cheated-upon client sitting in your office, and considering the first question, “what can I do?,” the answer is clear. Plead a claim for intentional infliction of emotional distress. If the facts support it, implead the paramour, or consider filing a separate action against him or her. As for the obstacles you’ll face, hurdle them one at a time.

### **Hurdle 1: You cannot bring such a claim based upon adultery**

*Stites* illustrates that the key to having your pleading recognized as an *actual* pleading for intentional infliction of emotional distress rather than an attempt to “plead around” an alienation of affections claim is in the facts you allege and the characterization you make. In *Twyman*, the “extreme and outrageous” conduct alleged by the plaintiff included a “continuing course of conduct” of “sodomasochistic bondage activities” which Mr. Twyman insisted Mrs. Twyman participate in, despite his knowledge that “she feared such activities because she had been raped at knife-point before their marriage.”<sup>31</sup> Therefore, make sure your pleading alleges specifically that the conduct was “extreme and outrageous” and have facts to back it up.

### **Hurdle 2: You cannot prove that the intent of the action was to cause the plaintiff distress**

*Twyman* makes clear that the “factfinder should be permitted to consider whether [the defendant] knew with substantial certainty that [his/her] actions would probably cause [the plaintiff] emotional harm.”<sup>32</sup> Additionally, the Court expressly approves the language of the Restatement to the effect that the tort “includes situations in which the actor recklessly inflicts emotional distress,” and describes that as being when the tortfeasor “knows or has reason to know . . . of facts which create a high risk of . . . harm to another, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to that risk.”<sup>33</sup> Therefore, include in your allegations that the emotional distress and mental anguish was inflicted recklessly.

<sup>31</sup> *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993).

<sup>32</sup> *Id.* at 624.

<sup>33</sup> *Id.* quoting RESTATEMENT (SECOND) OF TORTS § 500, cmt. a.

### **Hurdle 3: Some of the case law that suggests this as a viable cause of action speaks in terms of a claim that “may be” available**

The *Smith* court recognized that an important element to consider in the constitutional analysis of a statute which eliminates an established cause of action is the availability of another method to right the wrong. With respect to criminal conversation claims, the Court stated that intentional infliction of emotional distress may be available to protect the aggrieved; with respect to an alienation claim, the court removed the word “may.” Therefore to take the position that such relief is *not* available is really to argue against the abolition of criminal conversation and alienation of affections claims. Offering to plead those two old torts in the alternative to your Intentional Infliction claim and challenge the constitutionality of §§ 1.106 and 1.107, should go a long way in negotiating this hurdle. It seems unlikely that any defendant would invite such a complication.

### **Hurdle 4: One of the last lawyers that attempted to impose tort liability on a cheating spouse and paramour was sanctioned**

That is where the second question we began with comes in. The law available now was not on the books in 1990 when that lawyer filed his pleading, and your pleading will specifically allege the elements of intentional infliction of emotional distress. You will plead facts specifically supporting a finding of “extreme and outrageous” conduct which “intentionally or recklessly” caused your client emotional distress.<sup>34</sup>

At the end of the day, all that’s standing between your cheated-upon client and a Mississippi-like payday is a carefully crafted petition, and your advocacy skills in explaining to a district judge how the law and your pleadings differ from those of the sanctioned attorney. Now that you’re ready, just ask yourself one question: Do I feel lucky? Well, do you?

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<sup>34</sup> *Cautionary Note:* *Twyman* makes clear that the same conduct cannot be used for both disproportionate division and a tort recovery.



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## Winning Before Trial

# Celebrate “May Day” With Some CLE Credit!

Mark your calendar to attend the **State Bar College “Spring Training”** Seminar on Thursday, May 1, 2008, at the Hilton Anatole Hotel in Dallas (phone 214-748-1200). The program’s focus – “Winning Before Trial” – will once again feature current legal trends and pre-trial strategy discussed by top-notch speakers, including Harper Estes, President-Elect of the State Bar, and Tony Alvarado, the Bar’s former Executive Director. The popular program is co-sponsored once again by the Texas Young Lawyer’s Association and TexasBarCLE.

Last year’s program drew a record number of attendees. The planners of this year’s seminar paid close attention to the wish lists of those attendees, and it paid off: The seminar is once again in Dallas, the speakers are among the Bar’s best, and the topics are timely, relevant and cutting-edge.

## Earn 8.5 hours of MCLE credit (including 1.75 hours ethics) in one power-packed day:

7:15	<b>Registration and Continental Breakfast</b>	Harper Estes, <i>Midland</i> , Lynch Chappell & Alsop President-Elect, State Bar of Texas
8:00	<b>Welcoming Remarks</b> Chair, State Bar College Steven C. James, <i>El Paso</i> , Attorney at Law	1:15 Break
8:10	<b>Announcements and Program Introductions</b> Course Director Carolyn F. Moore, <i>Lubbock</i> , Hearing Officer, Division of Workers’ Compensation, Texas Department of Insurance	1:30 <b>Summary Judgments</b> .5 hr Lynne Liberato, <i>Houston</i> , Haynes and Boone
8:15	<b>Ten Nerdy Things You Need to Know About E-Discovery</b> .75 hr Craig D. Ball, <i>Austin</i> , Craig D. Ball, P.C.	2:00 <b>Legal Writing</b> .75 hr Chad Baruch, <i>Rowlett</i> Assistant Principal, Yavneh Academy of Dallas Attorney, Law Office of Chad Baruch
9:00	<b>Discovery Update</b> .5 hr (.25 ethics) Hon. John K. Dietz, <i>Austin</i> , Judge, 250th Dist. Court	2:45 <b>Where Criminal Law Intersects With Civil Law: When Criminal Law Appears in a Civil Case</b> .5 hr Paul E. Coggins, <i>Dallas</i> , Fish & Richardson
9:30	<b>Pre-Trial Motions</b> .75 hr Paul N. Gold, <i>Houston</i> , Aversano & Gold	3:15 Break
10:15	Break	3:30 <b>The Grievance Process</b> .5 hr ethics Betty Blackwell, <i>Austin</i> , Attorney at Law
10:30	<b>Getting Clients Ready to Testify and Preparing for Expert Witnesses</b> .5 hr (.25 ethics) Kimberly Naylor, <i>Fort Worth</i> , Loveless & Naylor	4:00 <b>Mediation Strategies</b> 1 hr (.25 ethics) <u>Moderator</u> Antonio “Tony” Alvarado, <i>Austin</i> Attorney & Counselor At Law
11:00	<b>Giving and Taking Depositions</b> .75 hr Peter T. Hoffman, <i>Houston</i> , Professor, University of Houston Law School	<u>Plaintiff</u> Andrew “Andy” Payne, <i>Dallas</i> , Payne Law Group
11:45	<b>The Trial Notebook</b> .75 hr Dicky Grigg, <i>Austin</i> , Spivey & Grigg	<u>Defense</u> Jackie Robinson, <i>Fort Worth</i> , Gwinn & Roby
12:30	Break - lunch served	5:00 <b>The Difference in Preparing to Go Before a Judge for a Bench Trial vs. Going to a Jury for a Jury Trial</b> .75 hr Victor D. Vital, <i>Dallas</i> , Haynes and Boone
12:45	Luncheon Presentation: <b>The Rule of Law: What You Mean To It</b> .5 hr ethics	5:45 Adjourn

Can’t make May 1st? Attend the video showing on June 12th in Houston at the Holiday Inn Select (phone 713-523-8448). Register for either the live program or the video replay by calling the State Bar at 800-204-2222, ext. 1574, during regular

business hours. Or register online at [TexasBarCLE.com](http://TexasBarCLE.com); click on “Seminars,” then search for “spring training.” The course information and registration options will appear. As always, College members get the lowest price! ■



## State Bar College Seeks Nominations for 2007 Humanitarian Award

Do you know an attorney who has contributed time and energy to improve people's lives? The Humanitarian Award recognizes an attorney whose volunteer efforts have made life easier for others less fortunate. Past Humanitarian Award recipients have raised funds for hurricane survivors, volunteered legal services, and provided assistance at emergency shelters.

If you know an attorney who is deserving, please send a nomination letter to: Bettie Saunders, Coordinator, State Bar College, P.O. Box 12487, Austin, TX 78711-2487. Nominations must be received by 5:00 p.m. Monday, May 19, 2008. ■

## Frank's Casing: Supreme Court Reverses Insurance Ruling on Rehearing

By Warren W. Harris

THE TEXAS SUPREME COURT RECENTLY ISSUED its much anticipated opinion on rehearing in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, No. 02-0730, 2008 WL 274878 (Tex. Feb. 1, 2008). On February 1, 2008, the Court withdrew its controversial 2005 opinion and in a 5-3 decision reversed its prior ruling.

The issue before the Supreme Court was whether an insurer may settle a claim against its insured when coverage is disputed and then seek reimbursement from the insured should coverage later be determined not to exist. The Court ruled on rehearing that unless an insurance policy provides the insurer a right to reimbursement of settlement proceeds following a coverage dispute, the insurer cannot create such a right without the insured's consent.

In May 2005, the Court surprised the bar and the business community when it issued its original 7-0 decision in *Frank's Casing* and effectively overruled prior Texas law on this issue. No. 02-0730, 2005 WL 11252321 (Tex. May 27, 2005). The Court had previously held in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128, 133 (Tex. 2000), that an insurer had a reimbursement right only if it was stated in the insurance policy or the insurer obtained the insured's clear and unequivocal consent to both the settlement and the insurer's right to seek reimbursement.

*Frank's Casing* filed a motion for rehearing, asking the Court to withdraw its May 2005 opinion. The Court granted rehearing and, in an unusual move, ordered a second oral argument. Many amici curiae briefs were filed in support of the rehearing urging the Court to reconsider its ruling because the Court's new rule was unworkable.

Although most court watchers expected the Court to modify its 2005 opinion, it was unclear exactly what the Court might do. Justice Harriet O'Neill, writing for a 5-3 majority on rehearing, withdrew the 2005 opinion and declined to create an exception to the rule in *Matagorda County*. The Court held there was no implied right of reimbursement and reaffirmed that to have a right of reimbursement, the insurer must obtain the insured's consent to the settlement and the insurer's right to seek reimbursement.

*Frank's Casing* is very important to policyholders that have or may in the future have a coverage dispute with their insurer. Although the Supreme Court has reinstated the rule in *Matagorda County*, counsel for an insured should still exercise caution when communicating a plaintiff's *Stowers* demand to the insurer if there is a dispute as to coverage. The safer practice is to have the plaintiff send the demand or to transmit it without also making a demand to settle. Although the implied right to reimbursement appears to be dead in Texas, prudent counsel will exercise caution in making demands on the insurer to settle if there is disputed coverage. ■



WARREN W. HARRIS is a partner in Bracewell & Giuliani LLP in Houston where he heads the firm's appellate group. He is a director of the Houston Bar Association and chair of the appellate practice committee of the International Association of Defense Counsel. Harris is past chair of the Texas Bar Journal editorial board and past chair of the State Bar Appellate Section. He served as lead appellate counsel for *Frank's Casing Crew & Rental Tools, Inc.*



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