



The College Bulletin

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From the Chair



Chad Baruch

Thoughts on Our Role in American Life

This is my final column as Chair of the Texas Bar College. I thank the Supreme Court of Texas, and the Texas Bar College members, directors, and staff, for the honor and privilege of serving in this role for the past year. It was a wonderful and rewarding experience.

With the able guidance of our Executive Director, Pat Nester, and our Managing Director, Merianne Gaston, we obtained Supreme Court and Bar Board approval to change our name to Texas Bar College (bringing us in line with other bar entities, and doing away with a name too lengthy and cumbersome for the digital era). We completed the transition from a 20th century printed bulletin to a 21st century electronic bulletin (enabling us to reduce cost and expand content). We unveiled a new website with far greater utility to our members. And, of course, we continued the College tradition of providing superior continuing legal education through the Summer School program. It was a great year!

If my time as College Chair has convinced me of anything, it is that the members of our profession have a special role to play in our political system—a role that is more important now than ever.

From the very dawn of our Republic, lawyers have played an outsized role in American political life. More than half of the delegates to the Constitutional Convention were lawyers, as were nearly half of the signers of the Declaration of Independence. Numerous lawyers—men like John Adams, Thomas Jefferson, James Madison, Andrew Jackson, Abraham Lincoln, Franklin Delano Roosevelt,

Richard Nixon, Bill Clinton, and Barack Obama—have served as President. As our country grows more polarized each day, our role in American life also increases in importance—regardless of where we fall on the political spectrum.

First, we can help to elevate political discourse by modeling respect in our professional and political discussions. The rise of social media has triggered a new nastiness in American political discourse; the new norm is to show utter disdain for political opponents. Instead of merely questioning their policies, we attack their integrity, motives, and intelligence (indeed, our past two presidents—each with multiple Ivy League degrees—were assailed as “stupid”). As lawyers, members of a profession that involves continuous conflict, we can model better behavior for our non-lawyer friends by ensuring that our own communications—personal, legal, and political—are made respectfully.

Second, we play a special role in explaining the legal system and laws to non-lawyers. Members of the public count on us to play this important role. It disturbs me when lawyers, for political reasons, make statements about the meaning of our Constitution, our laws, or our legal system that they simply know to be wrong. As lawyers, we immediately recognize the absurdity of these positions—

but members of the public do not, and mistake them for serious legal commentary.

This criticism is not unique to Republicans or Democrats. For years, I (as someone who leans moderately liberal) cringed as liberal lawyers simply misled the public about the meaning and history of the Second Amendment. I have strong opinions about the need for sensible firearm regulation—but not strong enough to compromise the integrity of my constitutional analysis. I wish some of the lawyers presently prominent in American political life felt the same way.

Finally, and perhaps most important, lawyers are the most important defenders of our judicial branch and our judges. Make no mistake. Our judges—state and federal—are under withering attack. Republican and Democratic candidates alike (sadly, many of them lawyers who know better) have found political traction in attacking judges who lack any real means of defense. That defense falls to us. We must explain and promote the important role of a vibrant and independent judiciary not just to our political system, but to the American way of life.

In a bygone era, the terms *judicial activism* and *judicial restraint* referred to competing schools of judicial decision-making—both of them quite reasonable and defensible. Now, when someone refers to judicial activism, it generally means: “A judge who made a decision I don’t like.” We have politicized the nomination process for the United States Supreme Court to unparalleled heights. I find myself wondering if the day soon approaches where the field of candidates who can survive confirmation will be limited to those who never have had an opinion or taken a position on anything. I don’t want to practice law in a legal system where neither Antonin Scalia nor Ruth Bader Ginsburg would be confirmed.

As lawyers, our job is to defend our judges. At every opportunity, we must explain that our judges do an exceptional job of deciding terribly difficult cases. We may disagree with their decisions, but that is not a reason to doubt their integrity, their fitness for office, or their vital role in our government. They are, after all, the final defenders of our liberty and freedom.

Again, thank you so much for the opportunity to lead the College for the past year! ■



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Are you a *Pro* or a *Rookie*?

By Elisa Maloff Reiter, Esq.



Three years ago, our son Alex's wonderful teachers, Dorothy Williams and Tracey Pugh, introduced their students to the mantra that each kid is a "Pro" at some things, and a "Rookie" at others. *If you are a "Pro," you must help a "Rookie" learn, they said. If you are a Pro, you must be patient. If you are a Rookie, you must try. If you are a Pro, you must not let a Rookie try your patience.* Be it as a rookie or a pro, the following were goals for Alex and his classmates, once this paradigm was internalized:

1. **Be patient**
2. **Listen**
3. **Learn**
4. **Respect others**
5. **Do not interrupt**
6. **Do not get frustrated**
7. **Try your best**
8. **Make eye contact**
9. **Use your words**
10. **Ask for help (only) if you need it**
11. **Once you are a Pro at something, you must help a Rookie learn to be a Pro.**

Lawyers – even jaded professionals – have something to learn from these young students.

As a parent, perhaps the most important lesson I have learned is that my child is now my best teacher. I graduated from SMU Law School at the age of 22. I like to think that I am a "Pro" as a lawyer these days, thirty years after my law school graduation. But I have many to thank for the lessons learned along the way – especially true as I am a solo practitioner. In addition to my gratitude for the many lessons learned over the last three decades, I would like to share some anecdotes, as a solo practitioner who likes to think of herself as a "pro" who may now be able to help a "rookie."

Do you know where to find it?

My friends at Bedsole & Bird taught me many things. David Bird is a stacker, hermetically attached to his telephone – as much today as he was in 1985. Bedsole & Bird expected young associates to hit the books if they did not know how to do something, and to ask for help only as a last resort. Research is far easier these days than it was when we had to traverse the library shelves of old. However, woe onto the associate

who darkened David's door without finding the "key" case sought. David would smile tightly, point to one of the many three to four foot high stacks of paper in his office, scratch and say – "that stack of papers, about 18 inches down – there ought to be a Waco opinion on all fours." And inevitably, there was. One learned to keep at the research lest one be embarrassed again. *Be patient* when researching.

A call, a simple call.

Talk. It is significantly under-rated in our computerized era. My colleague, Hugh Hackney, of JAMS, proffers the need to stop perseverating and to pick up the phone. Good alliteration. Good idea too – either gets things off your chest, or stops sores from festering. Civilized too. And what happens when you pick up the telephone? *Listen*, and you might be able to bridge impasses.

Do it again.

Charles Bedsole so redlined my work, that I retaliated by bringing in a can of **red paint** and a thick paint brush, placing the paint and brush on his "in stack," and attaching a daring sticky note thereto reading: "**Perhaps this will make your future redlines of my work easier.**" Fortunately, I was not fired. Thereafter, I also found my work prioritized by the support staff, as they were greatly amused by the prospect of a *chutzpadik* associate standing up to the grey haired Pro in the corner office. Assert yourself as you *learn*. Every draft is a learning experience.

Hire a pro.

Well, for those of you who know my mentor in family law, Ken Fuller, you know that his original advice simply rhymed with "pro." Ironically, shortly after being admonished by Mr. Fuller to hire a "rhymes with pro," I found myself going to trial on a case involving some folks for whom English was not a first language. I sought out a translator from SMU Law for my client. My client was unintelligible when anxious, but

nonetheless was to be a key witness at trial. On the cusp of *voir dire*, I asked the translator (who seemed to phrase things so much better than the client, if you know what I mean), to please tell me his full name so that I might introduce him to the *venire* panel. He grandly told me his name. I had difficulty understanding what the translator said when he stated his name. I still had difficulty understanding his pronunciation of his name when he repeated his name. Seeing my consternation, he reached into the pocket of his bespoke suit, pulled out an old fashioned calling card, and handed the card to me. His formal name? *Spencer Yow Chen HO*. Really. It was a sign. And we won. **Respect others.** Respect the Court. Respect your opposition. Respect your clients, and their strengths and weaknesses. Empower your clients as needed, even if it means hiring a . . . well, you know what Fuller would have said . . .

Let the other side finish.

I'm still trying to refine my skill at the art of not interrupting. I am known to revert to my Yankee roots, to talk fast, and verily, to interrupt when a mediator is valiantly trying to recount where the latest counter stands. It's rude. I have to stop. I am also known to talk with my hands – so much so that Steve Bruneman once objected to my “rampant gesticulation,” asking the Court to rule that I should be ordered to refrain from using my hands when speaking. Sacrilege! Deprive me of using my hands when speaking? It's just wrong! When I responded that I am Jewish and I cannot complete a sentence without using my hands, the Court seemed to agree that Bruneman's objection sought to chill my Constitutional right to free speech. The Court overruled the objection -- at least when the Judge stopped chuckling long enough to rule. **Do not interrupt** (unless you have to control the flow of harmful data, but that's a story for another day).

Language.

Reba Rasor, Theo Bedard, and Louise Raggio, all of beloved memory, never raised their voices. Nor did I ever hear one of them use a foul word. They were, however, always polite, firm, well spoken, well coiffed, well dressed, well shod, and **VERY WELL PREPARED**. And by the way, each told me that women work harder because we have to. Sexist though it may be, I still think that not only were they right, but that women do work harder, and further, that we *still* have to work harder than our male colleagues. Note that 30 years later I aspire to lose the salty language my dad was sure he'd paid all too much for me to acquire at SMU. I aspire to be a pro – and more a lady – like these fine women. I hope to practice long enough for gender to be irrelevant in the law – but in the interim, I plan on fluttering my eyelashes and using my other assets to my best advantage. As you move from rookie to pro, **do not get frustrated**.

Can you do it all?

I recall one of my first bosses, John Diggins popping into my office, declaring that I should get married, kindly adding that he could see a playpen being easily installed in said office. Took all too long to get there (see above), but golly, what sage

words those were. Get a life outside the office! **NOW!! Try your best** in all facets of your life, not just in the law.

Assimilate data.

No one surpasses my former employer Ike Vanden Eykel at assimilating data. We have a shared experience, in that each of us proudly taught Sunday School. When I worked for Ike, I learned that **Ike presents cases as though he is teaching Sunday School – looks them in the eye, gives them a simple story, from the heart**. Always a gentleman. And well dressed to boot. Do your research before you hit the courtroom (even if it is en route, though few can match Ike's ability to assimilate both big picture and nuance on the run). **Make eye contact**.

Use venom judiciously.

In 1994, a grateful client gave me an Agatha Christie Montblanc pen as a thank you gift. The following is attributed to this writing instrument: “Around the cap, made of black precious resin, winds a snake made of 925 sterling silver, which hints at the creeping tension of the author's novels and also serves as the clip of the pen. The eyes of the snake are set with two rubies that glint bewitchingly.” The client added a thank you note in which she quipped: “I bought this Agatha Christie Montblanc pen for you because the clip so reminded me of your opposing counsel. May you always use your venom wisely.” Said differently, my bubbie was right – a word is like a bird, once it's out, it's very hard to catch. **Use your words (wisely)**.

A few tricks can't hurt.

And they need not be high tech. On learning that the husband in a hotly contested divorce was obsessive-compulsive, Kevin Karlson, a trial consultant, smiled and said: “whole new plan. Be a klutz.” I asked Dr. Karlson what he meant – he advised me to wait until the husband was at a key point of testimony and then “stand up – tear a page off your legal pad, shake your head, and try to ‘quietly’ crinkle it up. But appear to be *inadvertently* loud – you know, like when you take a hard candy out of your purse during religious services. The whole sanctuary seems to fill with only the sound emanating from your crinkling candy wrapper. Wait – then drop a book off counsel table.” *Mea culpa* to the Court – but such antics worked like a charm. So put off by these distractions was the obsessive/usually detailed husband, he failed to make the points he intended to – even on re-direct. And so riled was he, he was argumentative on cross. Even an old pro can **ask for help**.

Fifty Shades of Grey.

Got your attention, didn't I? Long before we were all titillated by the book, Don Wilmarth, advised that I – then a baby law clerk – saw the world as all “too black and white.” Don wrote the following to me: “the law, Elisa, like the world, is full of shades of grey. You have the gifts to be a zealous advocate, if you look beyond the black and white to the shades of grey.” Don encouraged me to embrace the grey – and after all, it is not only the rule of law, but the exception to the rule, found

in the penumbra of grey between the polar opposites of black and white, that often wins the case. Blend already! *Don, a pro, helped me become a pro when I was but a rookie. Embrace the shades of grey!*

Give back.

Years ago, Mike and Mary Jo McCurley brought an actor in to present at the Advanced Family Law Seminar. That actor gave us one of those pearls of wisdom. The actor argued that lawyers are, in a sense, acting daily. This was at the advent of the use of the cellphone, yet he suggested "How many of you actually speak before your first Court appearance in the morning? Try out your opening position OUT LOUD in the car! Or at least say AEIOU AEIOU ten times to get your vocal

cords going." That actor gave back to all of us. The McCurleys gave back to all of us by bringing him in to share that pearl.

In the daily grind, it's hard to find time to give back, but there are so many easy ways of doing so. Take on a *pro bono* case. Serve on a State Bar committee. Find an agency whose mission you admire, and join their Board. Make a donation – in time, in cash, or in kind. Teach an associate how to use the power of good language, solid preparation, and civility in the law. Better yet, model that professional behavior daily.

Once you are a pro, help a rookie learn. Let's be patient, instead of trying one another's patience!



Elisa Maloff Reiter, Esq. is Board Certified in Family Law. She is a humble solo practitioner, plying her trade in Dallas, Texas. She has completed two tours of duty on the Board of Directors of the Texas Board of Legal Specialization. She completed in excess of ten years on the Board of Directors of Family Compass, and is the 2016 recipient of their "Spirit of Compassion" Award.. She hopes to one day be as good a teacher as those noted in this article. She aspires to be patient not only as a solo practitioner, but as a parent – be it through the 3,803 steps in her next case, or through the joint assembly with her husband and son of the *Lego Star Wars Death Star* (which coincidentally, consists of 3,083 pieces). Mrs. Reiter can be reached at elisareiter@msn.com. More information can be found at www.elisareiter.com.



Five Fun Facts about a Texas Bar College Member

By Caren Lock



For this issue our victim—I mean, *our volunteer*—is Board Member Patsy Yung Micale.

1

Biggest pet peeve?

My legal pet peeve is media attention which does not accurately portray our immigration laws.

2

Your favorite dinner?

Any variation of sushi, steak, fried chicken, creamed spinach, creamed corn, lobster mac 'n' cheese, loaded baked potato, onion strings, a chocolate dessert and ice cream!!

3

The last time you were surprised?

We found out earlier this year at work that our team was selected for the DHS OGC (Dept. of Homeland Security, Office of General Counsel) Excellence Award for our ongoing litigation work in a particular scheme of cases.

4

Best gift from your husband?

He started a tradition a few years ago of making me an annual CD with our favorite Christmas carols, complete with a cover titled "A Very Muffin Christmas" I, II, III, etc., which is a play on our lovey names for each other, Love Muffin.

5

Funniest thing your kids have said?

On my birthday, without any prompting, Ryan said, "I know how old you are, Mommy. It's 26, right?" Then Mary Elizabeth said, "Oh, yes! Mommy is 26!" Love them!!

Now you know...!



Avoiding Common Mistakes in Family Law Appeals

By Chad Baruch

Family law appeals bring a host of unique challenges. As a result, even experienced appellate lawyers often are reluctant to venture into the family law arena. Here are a few common mistakes Texas lawyers make in family law appeals:

1. Failing to Object (and Object Again)

The conventional wisdom is that evidence rules are “relaxed” in family law cases. Whether or not that is true in the trial courts, it certainly is not true in the appellate courts. Just as in other cases, counsel must object properly to preserve evidentiary error in a family law case. And counsel must object each time the evidence is offered (or obtain a proper running objection). One of the most common errors I see is that the trial attorney objects to the question the first time it is asked, but then fails to object when the question is asked a second time later in the trial. This later failure to object waives appellate complaint.

2. Failing to Preserve Error After Trial

Family law appeals require preservation of error in the aftermath of trial just like other appeals. Remember, a motion for JNOV does not preserve error absent a written ruling. Also remember that a motion for new trial is the sole means of preserving a factual sufficiency challenge to a jury finding. Another common error occurs in family cases where only part of the case is determined by the jury. Lawyers often forget that they waive any factual sufficiency challenge to the jury’s findings without a motion for new trial.

3. Failing to Timely Request Findings of Fact

The Family Code contains special provisions—and procedural rules—for requesting findings of fact in certain types of cases. For example, Section 6.711 requires certain findings (upon request) relating to the characterization of assets and valuation of the community estate’s assets. Section 153.258 provides for specific findings related to certain possession and access rulings. Finally, Section 154.130 requires certain child support findings upon request

or in other circumstances. This section also requires that, in certain cases, a request for child support findings be made within ten days of the hearing—not the judgment.

4. Failing to Appeal from a “Memorandum Ruling” (or Extend Appellate Deadlines)

More and more often, trial judges are deciding divorce and other family law cases by short “memorandum rulings.” The rulings usually are faxed to the parties, and contain a listing of the judge’s decisions in the case. The judge may also order the parties to prepare and tender a formal decree.

The danger is that these memorandum rulings sometimes dispose of all parties and issues in the case, and are signed and dated by the judge. In this situation, the appellate court probably will treat the memorandum ruling as a final judgment—triggering appellate deadlines. If no one takes any action within 30 days, the right to appeal may be lost.

5. Failing to Request Temporary Orders Pending Appeal

Many lawyers—even family or appellate lawyers—do not realize that the Family Code contains special provisions authorizing temporary orders on appeal. These may include temporary orders for spousal support, payment of appellate attorney’s fees, appointment of a receiver for preservation of assets, or exclusive use of a marital residence pending appeal. The key is that the trial court has the power to sign such an order for only 30 days following perfection of the appeal. That is, the order must be signed (not just heard) within 30 days of the filing of a notice of appeal.





The Medicine Shoppe v. Loretta Lynch, et al.: Pharmacists and Prescribing Physicians Are Equally Liable

By Jeffrey C. Grass, JD, MS, ACLM*

On November 3, 2011, the Drug Enforcement Administration (“DEA”) conducted an inspection of The Medicine Shoppe, a small family-owned pharmacy in San Antonio, Texas. DEA Diversion Investigators (“DIs”) seized prescriptions filled by patients of a local physician who was under investigation for possible drug diversion. On October 7, 2013, more than two years after the inspection, the DEA Deputy Administrator issued an Order to Show Cause (“OTSC”) to revoke The Medicine Shoppe’s controlled substances Certificate of Registration (“COR”) on the grounds that the pharmacy had filled prescriptions written by the target physician that were not for a “legitimate medical purpose.”¹ The DEA alleged that The Medicine Shoppe’s pharmacists failed to exercise their “corresponding responsibility,” along with the physician, “to assure that its prescription for controlled substances was issued for a legitimate medical purpose” and “in the practitioner’s usual course of professional practice” under DEA Regulation. The Medicine Shoppe responded that the pharmacists had known both the patients and the prescribing physician for many years and had contacted the prescribing physician’s office to verify the prescriptions before filling them.² Therefore, The Medicine Shoppe argued that it had complied with the requirements of their pharmacists’ professional licenses and absent clear evidence of diversion, the pharmacists were obliged to fill the prescriptions.³

On October 2nd, 2014 the DEA revoked The Medicine Shoppe’s COR.⁴ The Medicine Shoppe then filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit, which has original jurisdiction for appeals of DEA Orders under the Administrative Procedure Act (“APA”).⁵ The Medicine Shoppe appealed on the grounds that imposing a “corresponding responsibility” on pharmacists to ensure that controlled substances are prescribed for a “legitimate medical purpose” requires them to make medical judgments beyond their education and training.⁶ Moreover, should the DEA disagree with a physician’s medical judgment and the medical necessity of a prescribed medication, pharmacists who now share a “corresponding responsibility,” along with the physician, “to assure that its prescription for controlled substances was issued for a legitimate medical purpose” will be subject to the same civil and criminal liability for the physician, despite authenticating the order with the prescribing doctor, as required by state law. Accordingly, Petitioners in *The*

Medicine Shoppe v. Loretta Lynch, et. al. 14-1223 (D.C. Cir. 2014) challenged the DEA’s interpretation of “legitimate medical purpose” under the Controlled Substances Act (“CSA”) and the “corresponding responsibility” standard under DEA Regulation 21 C.F.R. § 1306.04(a) (2014) on the grounds that these standards exceed the United States Attorney General’s and the DEA’s statutory authority under the CSA.⁷ On December 16, 2015, the Court denied The Medicine Shoppe’s petition for review without comment; thereby, leaving open the question of whether or not the United States Attorney General may expand the professional duty of pharmacists to require they either endorse or over-rule the medical judgment of the prescribing physician.

The Backdrop of Expanding DEA Enforcement

The DEA has declared prescription drug abuse to be the Nation’s fastest-growing drug problem.⁸ It is of particular concern because legally obtained substances can lead to addiction or death.⁹ One source of this problem is

* Jeffrey C. Grass & Associates, Plano, TX

medical offices, acting as “pill mills” and brick and mortar pharmacies working together promoting the illegal sale of pharmaceuticals.¹⁰ In response to this epidemic, the DEA has stepped up its enforcement efforts against pharmacies suspected of diverting pharmaceutical medicines.¹¹ In doing so, the DEA has broadened the legal standard delineating licit from illicit dispensing of controlled substances.¹²

Controlled Substance Registration

The CSA and its implementing regulations “establish federal requirements regarding both illicit and licit controlled substances.”¹³ A “controlled substance” is defined as “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V.”¹⁴ Under the framework of the CSA, enacted in 1970, “all controlled substance transactions take place within a ‘closed system’ of distribution established by Congress.”¹⁵ Accordingly, the DEA “requires all businesses that import, export, manufacture, or dispense controlled substances; all health care practitioners entitled to give out, administer, or prescribe controlled pharmaceuticals; and all pharmacies authorized to fill prescriptions, to register with the DEA.”¹⁶ The DEA has the unique dual responsibility to not only 1) ensure the supply of pharmaceutical controlled substances for legitimate purposes, but also 2) prevent the diversion of these substances to illicit users/abusers.¹⁷ The DEA administers this provision of the CSA by issuing a COR that authorizes a central individual or entity(s) (“Registrants”) to dispense controlled substances in Schedules II thru V of the CSA.¹⁸ According to the most recent tally by the HHS Office of Inspector General (“OIG”) in March 2014, the DEA had 1.5 million active retail and wholesale Registrants.¹⁹

The DEA actively monitors these Registrants through a system of scheduling, quotas, recordkeeping, reporting, and security requirements.²⁰ The DEA also uses criminal and regulatory tools to identify and determine who is most likely involved in the illicit distribution of controlled substances.²¹ The DEA initiates criminal investigations of those suspected of criminal violations of the CSA. Criminal prosecutions are coordinated with an Assistant United States Attorney or state District Attorney. Criminal cases vary widely in resource requirements and complexity.²²

Administrative Inspection Warrant

Compliance inspections of pharmacies are carried out by the DEA Office of Diversion Control to ensure that they have sufficient measures in place to prevent the diversion of controlled substances.²³ Noncompliance is determined primarily by investigating complaints about the dispensing practices of pharmacies.²⁴ The DEA’s compliance review system includes web sites that monitor the prescribing and dispensing of controlled substances by physicians and pharmacies.²⁵ For example, the DEA uses the Automated

Reports and Consolidated Order System (“ARCOS”) to identify high volume purchasers of narcotic controlled substances.²⁶ Signs of suspicious circumstances are termed “red flags.”²⁷ “Red flags” can constitute evidence of diversion from “legal and medically necessary uses towards uses that are illegal and typically not medically authorized or necessary.”²⁸ If red flags are detected but left unresolved, the DEA will issue an Administrative Inspection Warrant (“AIW”). An AIW is an administrative search warrant that allows DEA DIs access to either a medical practice or pharmacy for the purpose of conducting compliance audits.²⁹

Pharmacists’ Duty to Identify and Resolve “Red Flags”

Individual pharmacists are now required to do more than just “verify the validity and authenticity of a prescription,” as has historically been the case under state and federal law as well as DEA decisional history.³⁰ Pharmacists must “resolve all red flags” before filling the prescription.³¹ Under this new regime, A pharmacist who “knowingly fills an order that is not intended for a legitimate medical purpose, as well as the physician issuing it, will be subject to the penalties provided for violations of the provisions of law relating to controlled substances under the CSA”³² “Knowingly” includes circumstances that are known or should have been known to the pharmacist who may not “close [their] eyes and thereby avoid positive knowledge of the real purpose of the prescription, upon verifying that a physician issued it.”³³ Keeping oneself unaware of facts that would render him or her liable in order to avoid civil or criminal liability is termed “willful blindness,” “ignorance of the law,” or “contrived ignorance” and is not a defense under the law.³⁴ Committing multiple violations of a pharmacist’s “corresponding responsibility” can mean administrative or criminal prosecution resulting in the revocation of a pharmacy’s COR, loss of the pharmacist’s professional license, and possibly criminal prosecution under state or federal controlled substances statutes.³⁵

Revoking Certificates of Registration and Orders to Show Cause

If the Registrant is believed to be non-compliant, the DEA may initiate an OTSC hearing as to why the Registrant’s COR should not be revoked, suspended, or application denied.³⁶ This authority is derived from an amendment to the CSA in 1984, which “gives the United States Attorney General the power to revoke the federal registrations of physicians and pharmacists for the purpose of addressing the severe problem of diversion of drugs of legitimate origin into the illicit market.”³⁷ If the DEA deems the violation to be egregious enough to pose an “imminent threat to public health or safety,” the DEA may issue an immediate suspension order that summarily revokes

the Registrant's authorization to prescribe or dispense controlled substances.³⁸ OTSC hearings and immediate suspension orders are collectively known as "Registrant Actions."³⁹ Since the DEA grants a COR to a pharmacy and not the pharmacist, this legal action refers to the practices of the store, although the actual parties being scrutinized are the pharmacy owners and the registered pharmacists operating it.⁴⁰

Once the DEA Administrator issues an OTSC, the Registrant may either allow the DEA Administrator to issue a Final Decision and Order either modifying or revoking the pharmacy's COR or request an OTSC due process hearing.⁴¹ If the Registrant wants a hearing, a DEA Administrative Law Judge ("ALJ") hears evidence presented by DEA Counsel and the Registrant. The ALJ will make findings as to whether or not a preponderance of the evidence submitted shows the Registrant's continued registration is "inconsistent with the public interest."⁴² The ALJ will then issue his or her Findings of Fact, Conclusions of Law and a Recommended Decision to the DEA Administrator. The DEA Administrator may then agree or disagree with the recommendation of the ALJ and will render his or her final Decision and Order adopting, modifying or rejecting the ALJ's Findings of Fact, Conclusions of Law and a Recommended Decision.⁴³

Pharmacists "Corresponding Responsibility"

The DEA Administrator's decision to allow a pharmacy to continue dispensing controlled substances depends, in part, on whether it has acted responsibly in filling prescriptions. DEA Regulations require pharmacists have a "corresponding responsibility," along with the physician, "to assure that a prescription for a controlled substance "was issued for a legitimate medical purpose" and "in the practitioner's [physician's] usual course of professional practice."⁴⁴ An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."⁴⁵ In other words, the DEA make pharmacists equally responsible as the prescribing doctor that medications the pharmacy dispenses are necessary for treating a patient's medical condition.⁴⁶

Controlled Substances Must be for a "Legitimate Medical Purpose"

Although the "legitimate medical purpose" standard has existed for more than 90 years, the phrase is not defined in the CSA and this omission invites conjecture about its

meaning.⁴⁷ For the most part, "legitimate medical purpose" has been construed by the federal courts and DEA decisional history to require that dispensing controlled substances be done "in accordance with a standard of medical practice recognized and accepted in the United States."⁴⁸ However, the United States Attorney General and state legislatures have repeatedly been at odds when the DEA has interpreted its statutory authority under the CSA in a way that enables it to control healthcare policy.⁴⁹ For example, at issue in *The Medicine Shoppe* case was whether the DEA may interpret this phrase to decide medical standards of care and require pharmacists judge whether prescribed medications are necessary to treat a patient's medical condition.⁵⁰

Federal Pre-emption v. State Police Powers

Since medical standards of care are traditionally determined by the States, a tension has developed between federal and state enforcement in discerning whether a practice is for a "legitimate medical purpose" or "illegitimate nonmedical purpose."⁵¹ More particularly at issue in *The Medicine Shoppe* case is whether the United States Attorney General may expand the professional duty of pharmacists to require they either endorse or over-rule the medical judgment of the prescribing physician. Under Texas state law, and the law of most other states, pharmacists have the duty to "exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order dispensed. If the pharmacist questions the accuracy or authenticity of a prescription drug order, the pharmacist shall verify the order with the practitioner before dispensing."⁵² "A prescription drug order may not be dispensed or delivered if the pharmacist has reason to suspect that the prescription drug order may have been authorized in the absence of a valid patient-practitioner relationship, or otherwise in violation of the practitioner's standard of practice[.]"⁵³ Historically, the DEA's interpretation of pharmacists' duty under the CSA is to require they verify the validity and authenticity of the prescription with the prescriber and to deny the order if it appears suspicious.⁵⁴

However, the DEA contends that it has the authority to expand the professional duty of pharmacists to require they either endorse or over-rule the medical judgment of the prescribing physician even if contrary to State law. The United States Attorney General interprets the CSA's preemption provision, 21 U.S.C. 903 as clearly demonstrating that "Congress expressly intended that there would be a dual system of Federal-State regulation of controlled substances, which reflects that this field of regulation was to be shared by the federal and state governments."⁵⁵ This provision reiterates what is inherent in the supremacy clause of the United States Constitution -- that no state may enact a law relating to controlled substances that present a "positive conflict" with the CSA. The DEA cites the preceding language of the CSA as its authority to make a determination, independent

of state regulators, whether the Registrant's continued authority to handle controlled substances would follow the public interest.⁵⁶ Yet, expanding this interpretation in a way that grants the United States Department of Justice interpretation the power to determine medical necessity has consistently put the Federal government at odds with the States' ability to regulate the use and dispensing of controlled substances their laws.

Conflicting Applications of the "Legitimate Medical Purpose" Standard

Chronic Pain Management

In *United States v. Moore*, the United States Supreme Court upheld the conviction of a physician alleged to have "knowingly or intentionally, dispensed or distributed [methadone] by prescription, and who did so other than in good faith in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States."⁵⁷ However, the Court clarified that the CSA extends only to issues related to a practitioner's federal registration and "extends no further."⁵⁸ In so doing, the *Moore* Court limited the DEA's authority to regulate transactions within "the legitimate distribution chain."⁵⁹ Therefore, the holding in *Moore* did not interpret the CSA to "authorize the DEA to set standards of care, but rather reserves those questions for the States."⁶⁰ Nor did the Court extend the ruling to impose an independent duty or "corresponding responsibility" for the medical necessity of the prescribed medications on pharmacists.⁶¹ The Court observed that these were medical standards of care that have traditionally been relegated to the states and applied to the prescribing practitioner.⁶² Therefore, scrutiny of pharmacy practice by the DEA has historically been limited to issues concerning the manner in which controlled substances are stored and distributed.⁶³

Medical Marijuana

Conversely, the authority of the United States Attorney General to set healthcare policy under the doctrine of preemption was embraced by the United States Supreme Court in *Gonzales v. Raich* (previously *Ashcroft v. Raich*). In *Raich*, the Court held that the United States Congress may criminalize the production and use of medical marijuana even where the states approve its use as medically necessary and for a "legitimate medical purpose."⁶⁴ Here, the Court acknowledged Congressional intent to criminalize the possession and use of marijuana for all purposes as a Schedule I controlled substance.⁶⁵ Consequently, federal law and the United States Attorney General's enforcement of the CSA shall preempt state law under the Commerce Clause of the United States Constitution when Congress has manifested its clear intention to do so.⁶⁶

Death with Dignity

Yet, a year later, the Court in *Gonzales v. Oregon* expressly limited the DEA's role in evaluating the medical usefulness of a prescription drug. The *Gonzales* Court held that "the states, not the DEA, have the authority to determine what orders have been issued for a 'legitimate medical purpose.'"⁶⁷ The Court said, "the authority delegated by the US Attorney General permits the Agency to deny, suspend, or revoke a registration that would be "inconsistent with the public interest."⁶⁸ In determining consistency with the public interest, the Attorney General must consider five factors, including the state's recommendation, compliance with state, federal, and local law regarding controlled substances, and public health and safety.⁶⁹ The CSA explicitly contemplates a role for the States in regulating controlled substances. However, the *Gonzales* Court found substantial limitations in the implementation of the CSA by the DEA in this regard.⁷⁰ Justice Kennedy, writing for the Court stated:

The CSA and this Court's case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, the Act manifests no intent to regulate the practice of medicine generally, which is understandable given federalism's structure and limitations. The CSA's structure and operation presume and rely upon a functioning medical profession regulated under the States' police powers. The Federal Government can set uniform standards for regulating health and safety. In connection with the CSA, however, the only provision in which Congress set general, uniform medical practice standards, 42 U.S.C. § 2990bb2a, strengthens the understanding of the CSA as a statute combating recreational drug abuse and also indicates that when Congress wants to regulate medical practice in the given scheme, it does so by explicit statutory language.⁷¹

Consequently, the *Gonzales* Court adhered to a policy of "continuing to give deference to the opinions of the state licensing authorities."⁷² By ruling for the state of Oregon, the Supreme Court is requiring that states, through their legislatures, professional licensing boards, and citizen initiatives, will continue to decide what uses of medications are for a legitimate medical purpose.⁷³ Furthermore, the *Gonzales* Court and its progeny reveal a reluctance to grant the DEA the absolute authority to impose upon pharmacists civil or criminal liability arising from a "corresponding responsibility with physicians that controlled substances

are intended for a legitimate medical purpose” unless there is direct evidence that the pharmacist had actual knowledge that the prescribing physician is diverting drugs. That means that the pharmacist knew that the doctor has “knowingly or intentionally, dispensed or distributed by prescription, other than in good faith in the usual course of professional practice and in accordance with a standard of medical practice recognized and accepted in the United States.”⁷⁴ Therefore, “[a]cts of prescribing or dispensing of controlled substances that are done within the course of the registrant’s professional practice are, for purposes of the Controlled Substances Act, lawful. It matters not that such acts might constitute terrible medicine or malpractice. They may reflect the grossest form of medical misconduct or negligence. They are nevertheless legal.”⁷⁵ Moreover, “[i]n making a medical judgment concerning the right treatment for an individual patient, physicians require a certain latitude of available options.”⁷⁶ Hence, “[w]hat constitutes Bona fide medical practice must be determined upon consideration of the evidence and attending circumstances.”⁷⁷ However, under the guise of treatment, a physician cannot prescribe, and a pharmacy cannot sell drugs to a dealer nor distribute drugs intended to cater to cravings of an addict.⁷⁸ Congress did not intend for doctors to become drug pushers. This general principle does not diminish the difficulty in the application of the legal standards set forth for the proper prescribing and dispensing of controlled substances.⁷⁹

Lethal Injection

Because sodium thiopental is a Schedule III drug, the CSA requires that a qualified medical practitioner writes a prescription for the drug before it may be dispensed.⁸⁰ As lethal injection has become the near exclusive method of execution in this country, challenges to capital punishment will migrate from federal U.S. Const. amend. VIII challenges involving cruel and unusual punishment to whether the drugs used have been dispensed and administered for a “legitimate medical purpose.”⁸¹ Based on this position, the DEA can no longer consistently hold that it should not regulate the drugs used in lethal injections.⁸²

Clear Examples of Illicit Purposes

Decisions in the Fifth Circuit and Sixth Circuit have provided some, but not much guidance to pharmacists as to how they define “legitimate medical purpose,” but mostly these decisions tell stakeholders what is not considered a “legitimate medical purpose.” In *United States v. Rosen*, the Court of Appeals observed that “A majority of cases [in which physicians were alleged to have dispensed controlled substances without a legitimate medical purpose] have dealt with facts which were so blatant that a statement of clear-cut criteria in a form useful in other cases would have been superfluous to the decision.”⁸³ The *Rosen* Court

did, however, “glean from reported cases certain recurring concomitance of condemned behavior to include conclusive evidence of wrongdoing such as providing multiple prescriptions to individuals in fictitious names to avoid detection; trading drugs for sexual favors or money; or, physicians who sell prescriptions to drug dealers or abusers; and evidence of illicit sales”⁸⁴

In *United States v. August*, the Court of Appeals stated that “there are no specific guidelines concerning what is required to support a conclusion that an accused acted outside the usual course of professional practice.... [Rather, the courts] “must engage in a case-by-case analysis of evidence to determine whether a reasonable inference of guilt may be drawn from specific facts”⁸⁵ The *August* Court’s holding essentially declared that the judiciary was no more qualified than the DEA to say what a “legitimate medical purpose” is, but could say in particularly blatant cases what it is not by including a few condemned behaviors that are so flagrant as to warrant concern. For example, (1) an inordinately large quantity of controlled substances was prescribed;⁸⁶ (2) large numbers of prescriptions were issued;⁸⁷ (3) no physical examination was given;⁸⁸ (4) the physician warned the patient to fill prescriptions at different drug stores;⁸⁹ (5) the physician issued prescriptions for a patient known to be delivering the drugs to others;⁹⁰ (6) the physician prescribed controlled drugs at intervals inconsistent with legitimate medical treatment;⁹¹ (7) the physician involved used street slang rather than medical terminology for the drugs prescribed;⁹² (8) there was no logical relationship between the drugs prescribed and treatment of the condition allegedly existing, and (9) the physician wrote more than one prescription on occasions to spread them out.⁹³

The Medicine Shoppe v. Loretta Lynch, et. al.

Factual Background

As noted above, The Medicine Shoppe Pharmacy is a small, family-owned, franchised pharmacy located in San Antonio, Texas. In November 2010, the DEA executed an AIW in connection with its investigation of a local physician. Neither the Pharmacist-In-Charge (“PIC”) nor the pharmacy itself had ever been the subject of a complaint.⁹⁴

On October 7, 2013, over two years after the AIW was executed, the DEA Deputy Administrator issued an OTSC to revoke The Medicine Shoppe’s COR. The grounds for the OTSC were that the pharmacy, two years prior, filled prescriptions written by the physician under investigation and that these prescriptions should not have been filled because they presented unresolved red flags. According to the DEA, the prescriptions presented red flags because they were written for the “holy trinity drug cocktail” of hydrocodone, Xanax and Soma (a muscle relaxant), and were suspicious for that reason.⁹⁵ The Medicine Shoppe

responded that its pharmacists had known both the patients and the prescribing physician for many years.⁹⁶ Moreover, the PIC explained that before filling the prescriptions, the pharmacist contacted the prescribing physician's office to verify the authenticity of the order, the identity of the patient, the physician's contact information and DEA number and the drug dosages. The doctor confirmed this information.⁹⁷ Therefore, The Medicine Shoppe's pharmacists maintained that they had complied with their professional duty within the parameters of their education, training and the scope of their professional licenses.⁹⁸ Moreover, the pharmacists insisted that absent clear evidence of diversion, the pharmacy was obligated to fill the order.⁹⁹

On January 7, 2014, an OTSC hearing was held in San Antonio, Texas, before the DEA's ALJ. Under her review of the evidence presented by the parties, the ALJ recommended the revocation of The Medicine Shoppe's COR, and "to deny any pending applications for renewal or modification of such registration."¹⁰⁰ On October 2nd, 2014 DEA Deputy Administrator Harrigan issued his Final Decision and Order, revoking The Medicine Shoppe's DEA COR on the basis that its continued registration would be "inconsistent with the public interest."¹⁰¹ The Deputy Administrator's Order was premised upon his finding that The Medicine Shoppe's pharmacists had failed to exercise their "corresponding responsibility," along with the physician, "to assure that its prescription for controlled substances was issued for a legitimate medical purpose" and "in the practitioner's usual course of professional practice."¹⁰²

The Medicine Shoppe then filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit challenging this ruling three principal grounds: 1) whether the manner in which the DEA currently imposes on pharmacies a "corresponding responsibility with physicians" exceeds its authority under the CSA; 2) whether the DEA requires pharmacists to act beyond the scope of their state-issued professional licenses by requiring them to make judgments about the medical necessity of the controlled substances being prescribed by practitioners; and 3) whether the "legitimate medical purpose" standard is inconsistently defined and applied by the DEA, thus resulting in arbitrary enforcement actions.¹⁰³ On December 16, 2015, the Appeals Court denied The Medicine Shoppe's Petition for Review without comment or memorandum resulting in the current state of the law.

The DEA exceeds its Authority under the CSA

The Medicine Shoppe unsuccessfully argued that the DEA exceeds its statutory authority under the CSA by interpreting the "legitimate medical purpose" provision of the CSA to permit the United States Attorney General the power to (1) impose medical standards of care for physicians; and, (2) impose a "corresponding responsibility" on pharmacists with the prescribing doctors. This interpretation continues

to grant the DEA the same broad authority allowed by the United States Supreme Court in *Moore* and *Raich* but rejected in *Gonzales* adhering to a policy of "continuing to give deference to the opinions of the state licensing authorities."¹⁰⁴ The Medicine Shoppe advocated that the states, through their legislatures, professional licensing boards, and citizen initiatives, should continue to decide what uses of medications are for a legitimate medical purpose.¹⁰⁵ Furthermore, The Medicine Shoppe attempted to persuade the Court of Appeals that it followw the *Gonzales* Court and its progeny's reluctance to grant the DEA the absolute authority to impose upon pharmacists civil or criminal liability arising from a "corresponding responsibility with physicians that controlled substances are intended for a legitimate medical purpose" unless there is direct evidence that the pharmacist had actual knowledge that the prescribing physician is diverting drugs.¹⁰⁶ That means that the pharmacist knew that the physician has "knowingly or intentionally, dispensed or distributed by prescription, other than in good faith in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States."¹⁰⁷ However, the Court of Appeals decision permits the Federal Government to make medical judgments concerning medical necessity beyond setting standards for regulating health and safety combating drug abuse. This authority would presumably allow the Department of Justice to make determinations concerning medical necessity in other areas of law where "medical necessity" is the benchmark for eligibility of benefits and also criminal prosecution.¹⁰⁸

The DEA Requires Pharmacists to Act beyond the Scope of their State License

The Medicine Shoppe argued that the DEA Regulation imposing a "coresponding responsibility" on pharmacists to ensure controlled substances are prescribed for a "legitimate medical purpose" requires they act beyond the scope of their state-issued professional licenses and them to make judgments about the medical necessity of the controlled substances being prescribed by practitioners. This regime requires pharmacists and pharmacy owners must be attentive to their duty to do more than just verify the authenticity of a prescription for controlled substances.¹⁰⁹ They must now make judgments about the medical necessity of the controlled substances being prescribed by practitioners.¹¹⁰ Although, The Medicine Shoppe contended that this standard requires pharmacists take affirmative action beyond their education, training and professional license the DEA maintains that its regulation requires no pharmacist to exercise, overrule, or second-guess a physician's medical judgment.¹¹¹ Rather, it requires a reasonable assessment, within the pharmacist's competence, of whether the prescribing practitioner has exercised medical judgment.¹¹² The DEA further explains that "a pharmacist must exercise professional judgment when filling a prescription issued

by a physician” and “may not reasonably claim that, when presented with a prescription that raised suspicion, state law required its pharmacists to “close [their] eyes and thereby avoid positive knowledge of the real purpose of the prescription,” upon verifying that a physician issued it.”¹¹³ In either case, pharmacists must be aware that the Court of Appeals decision requires that both they and the prescribing physician are subject to regulatory, civil and criminal prosecution for unresolved “red flags.”¹¹⁴

The DEA’s “Legitimate Medical Purpose” Standard is Vague and Arbitrary

The Medicine Shoppe also argued that the “legitimate medical purpose” standard is vague and arbitrary because it is not grounded upon any particular medical standard of care establishing what constitutes proper prescribing, negligent prescribing and criminal drug diversion under the CSA and DEA regulations.¹¹⁵ However, the DEA has refused to set such standards stating its policy is that “the government can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not”¹¹⁶ The DEA further asserts that “it would be incorrect to suggest that DEA must meet some arbitrary standard or threshold evidentiary requirement to commence an investigation of a possible violation of the [CSA].”¹¹⁷ As a result, some pharmacy owners fear the Court of Appeals decision clears the way for the DEA to insert itself into the sensitive equation of the physician-patient relationship, requiring federal law enforcement to make medical and scientific interpretations that should be made by state regulatory authorities.¹¹⁸ This fear has increased the risk of a chilling effect on prescribers and pharmacists providing needed medicines.¹¹⁹ This concern is especially true for the treatment of pain.”¹²⁰

Conclusion - Best Practices for Pharmacies

The CSA, when introduced over forty years ago was a much-needed attempt to stem the abuse of licit and illicit drugs in American society. The numerous amendments to the CSA since then exemplify the difficulties in defining and controlling such a vast and complex problem. The challenges faced in determining the diversion of prescriptive controlled substances in such a way as not to negatively affect the practice of medicine and treatment of pain especially proves to be no less difficult a task. A fresh perspective on the matter is needed to provide better guidance. This change should be considered in light of the relatively long period that has passed since this subject was last addressed by the courts, the vast improvements in technology and our understanding of the effects drugs have on the human body. *The Medicine Shoppe*¹²¹ provides some guidance to pharmacists and pharmacy owners in understanding their duties “corresponding responsibility to assure that its prescriptions for controlled substances

are issued for a legitimate medical purpose” and “in the practitioner’s usual course of professional practice.”¹²²

Pharmacists need to remain vigilant in the war against drug abuse and must decline to fill prescriptions for controlled substances that are suspicious. Pharmacies and the pharmacists operating them are not immune from administrative, regulatory or criminal prosecution under the CSA solely because they have verified a prescription with the prescribing doctor. Rather, they are expected to dispense drugs for the bona fide treatment of a patient’s disease. In doing so, he or she must exercise sound professional judgment when evaluating the legitimacy of a controlled substance prescription. Pharmacists must “resolve all red flags” before filling the prescription. The law does not require pharmacists to dispense every medication, especially if the order is suspicious. To the contrary, pharmacists who deliberately ignore red flags that give them a reason to believe the medication does not serve a legitimate medical purpose may be administratively and criminally prosecuted, along with the issuing practitioner, as a drug trafficker. Drug trafficking is a felony offense, which may result in the loss of one’s COR, professional license or, in recent cases, criminal prosecution.¹²³

(Endnotes)

- 1 The DEA sought revocation despite the fact neither the Pharmacist-In-Charge (“PIC”) nor the pharmacy itself had ever been the subject of a prior complaint or investigation under 21 U.S.C. § 812 (2012). *In the Matter of the Medicine Shoppe* Federal Register / Vol. 79, No. 191 / Thursday, October 2, 2014 / Notices 59504 to 59517.
- 2 See *The Medicine Shoppe v. Loretta Lynch, et al.* 14-223 (2014) Pet. Br. at 4. On January 7, 2014, an OTSC hearing was held in San Antonio, Texas, before the DEA’s ALJ. Pursuant to her review of the evidence presented by the parties, the ALJ issued her *Recommended Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge* to the DEA Deputy Administrator, Thomas M. Harrigan. The ALJ recommended the revocation of The Medicine Shoppe’s COR under 21 U.S.C. § 824(a), and “to deny any pending applications for renewal or modification of such registration under 21 U.S.C. § 823(f).” 79 Fed. Reg. 191 (Jan. 2, 2014)(Jan. 2, 2014) pgs. 59504-59517 – *In the Matter of the Medicine Shoppe; Decision and Order* (October 2, 2014).
- 3 See *The Medicine Shoppe v. Loretta Lynch, et al.* 14-223 (2014) Pet. Br. at 4.
- 4 Deputy Administrator Harrigan issued his final *Decision and Order*, Docket No. 14-01, revoking The Medicine Shoppe’s DEA Certificate of Registration (“COR”) BT8599891 under 21 U.S.C. §§ 823(f), 824(a), on the basis that its continued registration would be “inconsistent with the public interest,” 21 U.S.C. § 59505.
- 5 5 U.S.C. § 551 (2012) *et seq.*
- 6 Pet. Br. At 15-17, *The Medicine Shoppe: Decision and Order* | Insurance News Net, <http://insurancenewsnet.com/article/2014/10/02/the-medicine-shoppe-decision-and-order> (last accessed August 19, 2015).
- 7 *The Medicine Shoppe v. Loretta Lynch, et al.* 14-1223 (D.C. Cir.

- 2014). Pet. Br. 11-16.
- 8 U.S. Department of Justice Drug Enforcement Administration FY 2014 Performance Budget Congressional Submission DEA-18.
- 9 Denisco, R. A. "A pharmacist who knowingly fills a prescription that is not intended for a legitimate medical purpose, as well as the physician issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances under the Federal Controlled Substances Act ("CSA"), Chandler, R. K., & Compton, W. M. (2008), Addressing the Intersecting Problems of Opioid Misuse and Chronic Pain Treatment. *Experimental and Clinical Psychopharmacology*, 16(5), 417-428.
- 10 U.S. Department of Justice Drug Enforcement Administration FY 2016 Performance Budget Congressional Submission, DEA-21.
- 11 DEA's Diversion Control Program ("DCP") is responsible for enforcing the CSA and its regulations pertaining to pharmaceutical controlled substances and listed chemicals.
- 12 "Drug Diversion in the Medicaid Program: State Strategies for Reducing Prescription Drug Diversion in Medicaid," Centers for Medicare & Medicaid Services (Baltimore, MD: January 2012), p. 1. "Drug diversion" is best defined as the diversion of licit drugs for illicit purposes.
- 13 21 U.S.C. § 801 *et seq.*
- 14 21 U.S.C. § 802(6).
- 15 "The DEA was established in 1973 to serve as the primary agency responsible for the enforcement of federal drug laws." Controlled Substances Act, DEA Diversion Control Program Pharmacist's Manual.
- 16 21 U.S.C. § 801 *et seq.* and 21 C.F.R. pt. 1300 (2014) *et seq.*
- 17 Controlled Substances Act. DEA Diversion Control Program Pharmacist's Manual
- 18 U.S. Department of Justice Drug Enforcement Administration FY 2015 Performance Budget Congressional Submission, DEA-79 .No prescriptions may be written for Schedule I substances, and they are not readily available for clinical use. Schedule I drugs are those that have a high potential for abuse. The drug or other substance has no currently accepted medical treatment use in the United States. There is also a lack of accepted safety for use of the drug or substance under medical supervision. The Substances listed in DEA Schedule I include:
 Heroin (diacetylmorphine)
 LSD (Lysergic acid diethylamide)
 Marijuana (cannabis, THC)
 Mescaline (Peyote)
 MDMA (3,4-methylenedioxymethamphetamine or "ecstasy")
 GHB (gamma-hydroxybutyric acid)
 Ecstasy (MDMA or 3,4-Methylenedioxymethamphetamine)
 Psilocybin
 Methaqualone (Quaalude)
 Khat (Cathinone)
 Bath Salts (3,4-methylenedioxypyrovalerone or MDPV)
 NOTE: Tetrahydrocannabinol (THC, marijuana) is still considered a Schedule I drug by the DEA, even though some states have legalized marijuana for personal, recreational, or medical use.
- 19 The Drug Enforcement Administration's Adjudication of Registrant Actions, Evaluation, and Inspections Report I-2014-003. p. 2
- 20 U.S. Department of Justice Drug Enforcement Administration FY 2016 Performance Budget Congressional Submission DEA-81.
- 21 *Ibid.* at DEA – 93.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 *Ibid.*
- 25 According to the National Alliance for Model State Drug Laws (NAMSDL), a Prescription Drug Monitoring Program (PDMP) is a statewide electronic database which collects designated data on substances dispensed in the state. The PDMP is housed by a specified statewide regulatory, administrative or law enforcement agency. The housing agency distributes data from the database to individuals who are authorized under state law to receive the information for purposes of their profession,
- 26 *Ibid.* at DEA-12.
- 27 See *United States v. Ilayayev*, 800 F. Supp. 2d 417, 2011 U.S. Dist. LEXIS 87012(E.D.N.Y., 2011)(holding "red flags" are sufficient for the DEA to issue an OTSC).
- 28 "Drug Diversion in the Medicaid Program: State Strategies for Reducing Prescription Drug Diversion in Medicaid," Centers for Medicare & Medicaid Services (Baltimore, MD: January 2012), p. 1.
- 29 21 C.F.R. § 1316.07 Requirement for administrative inspection warrant; exceptions.
- 30 See *Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195*, 77 Fed. Reg. at 62,340-41 (interpreting 21 C.F.R. § 1306.04(a) limiting a pharmacist's duty to determine the legitimacy of a prescription).
- 31 *A Pharmacist's Obligation: Corresponding Responsibility and Red Flags of Diversion* By Larry Cote on August 11, 2013Posted in DEA Compliance.
- 32 21 C.F.R. § 1306.04(a).
- 33 *The Medicine Shoppe*, 14-1223 Resp. Br. 10 (citing *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy*, 55 Fed. Reg. 4729, 4730 (1990) (interpreting pharmacists' duty under 21 U.S.C. §§ 823, 824).
- 34 Luban, David. *Contrived Ignorance* (1999), Vol. 87 Georgetown Law Journal, 957.
- 35 In other words, DEA regulations make pharmacists liable, with prescribing physicians, for both negligent and criminal acts. The CSA is found in Title 21 of United States Code (21 U.S.C.) 801-971 and the DEA regulations, Title 21, C.F.R Parts 1300 to End 21 U.S.C. § 812.
- 36 <https://oig.justice.gov/reports/2014/e1403-summary.pdf>.
- 37 S. Rep. No. 98-225 at 260, 261-62, 1984 U.S.C. C.A.N. at 343-344)(granting authority to the Attorney General to delegate regulatory authority to the DEA).
- 38 21 U.S.C. §§ 823 & 824, <https://www.oig.justice.gov/reports/2014/e1403.pdf>.
- 39 FY 2014 Annual Performance Report and FY 16 Annual Performance Report available at https://www.justice.gov/sites/default/files/doj/pages/attachments/2015/02/06/fy2014aprfy_2016app2.pdf.
- 40 ARTICLE: DRUG DIVERSION ADMINISTRATIVE REVOCATION AND APPLICATION HEARINGS FOR

MEDICAL AND PHARMACY PRACTITIONERS: A PRIMER FOR NAVIGATING MURKY, DRUG-INFESTED WATERS, 78 Alb. L. Rev. 327 (2014).

41 DEA Regulation 21 C.F.R. § 1307.37(c) states: “OTSC shall call upon registrant to appear before the Administrator and contain a statement of the legal basis for such hearing and for the denial, revocation, or suspension of the registration and a summary of the matters of fact and law asserted.”

42 21 U.S.C. § 824.

43 SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, available at <http://www.leg.state.fl.us/data/session/2001/Senate/bills/analysis/pdf/2001s1042>.

44 21 C.F.R. 1306.04(a).

45 *Ibid.*

46 *A Pharmacist’s Obligation: Corresponding Responsibility and Red Flags of Diversion*
By Larry Cote on August 11, 2013, posted in DEA Compliance.

47 Colin Miller, *Death by Any Other Name: The Federal Government’s Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide*, 17 J.L. & Health 217 (2002-2003).

48 *See United States v. Moore*, 423 U.S. 122, 139 (1975) (quoting jury instructions).

49 U.S. Const. amend. X. In United States constitutional law, police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. Controversies over the exercise of police power arise when its exercise by the federal government conflicts with the rights of the states, or when its exercise by federal or state authorities conflicts with individual rights and freedoms. Willrich, Michael (2012). *Pox*. New York: Penguin. p. 302. ISBN 978-0-14-312078-0.

50 DISPENSING CONTROLLED SUBSTANCES FOR THE TREATMENT OF PAIN. FR Doc E6-14517 [Fed. Reg.: September 6, 2006 (Volume 71, Number 172)] [Notices] [Page 52715-52723].

51 *Ibid.*

52 Tex. Admin.Code (TAC) Title 22, Part 15 TSBP Rule § 291.29(a).

53 *Ibid.* at § 291.29(b)(2), Professional Responsibility of Pharmacists.

54 77 Fed. Reg. at 62,340-41

55 21 U.S.C. 903 states: “No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.”

56 21 C.F.R. 1306; DEA Policy Statement: Dispensing Controlled Substances for the Treatment of Pain; Notice [Docket No. DEA-286P] Fed. Reg. / Vol. 71, No. 172 / Wednesday, September 6, 2006 / Notices at 52716-52717. *Mark P. Koch, D.O.*, 79 Fed. Reg. 18,714, 18,719 (Apr. 3, 2014).

57 *United States v. Moore*, 423 U.S. 122 (1975), 423 U.S. at 138-39.

58 *Moore*, 423 U.S. at 141 (citing H.R.Rep. No. 91-1444, p. 3).

59 *Ibid.*

60 *Moore*, 423 U.S. at 423.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Gonzales v. Raich* (previously *Ashcroft v. Raich*), 545 U.S. 1 (2005). California voters passed Proposition 215 in 1996, legalizing the medical use of marijuana. Defendant Angel Raich used homegrown medical marijuana, which was legal under California law but illegal under federal law. Angel Raich’s physician had stated that, without marijuana, Angel’s life is threatened by excruciating pain. Raich sued to enjoin enforcement of the CSA against him claiming that doing so would violate the Commerce Clause, the Due Process Clause of the U.S. Const. amend. V, the U.S. Const. amend. IX, the U.S. Const. amend. X, and the doctrine of medical necessity.

65 U.S. Const. amend. X.

66 *Supra* n. 18.

67 *Gonzales v. Oregon*, 546 U.S. 243 (2006), . at 244.

68 21 U.S.C. § 824(a) (4), 822(a)(2).

69 21 U.S.C. §823(f).

70 21 U.S.C. §903.

71 *Id.* at 244.

72 *See Gregory v. Ashcroft*, 501 U.S. 452, 461, (1991) (holding that states’ police powers grant them exclusive authority to set licensing standards).

73 In 1994, the state of Oregon enacted by ballot measure the Oregon Death with Dignity Act, the country’s first law authorizing physician-assisted suicide. For Oregon residents to be eligible to request a prescription under the Act. Alexander DeLuca, M.D. *Addiction, Pain, & Public Health. Affirmation of States’ Authority to Define “Legitimate Medical Purpose”* Citing David B. Brushwood. J.D; *American Journal of Health-Systems Pharmacy*; 63(5); 2006, posted: 2006-03-18.

74 *Moore*, 423 at 138-39.

75 Stone S. The investigation and prosecution of professional practice cases under the Controlled Substances Act. *Drug Enforcement* (newsletter). 1983; page 21.

76 *See United States v. Collier*, 478 F.2d 268, 271-72 (5th Cir. 1973) (citing *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973)).

77 *Linder v. United States*, 68 U.S. (5) at 18, 45 S.Ct. (446) at 449, (69 L.Ed. 819 (1925)).

78 *August*, 984 F.2d at 713 (6th Cir. 1992).

79 *Ibid.*

80 21 C.F.R. § 1308.13(c)(1)(iii), 21 U.S.C. §§ 829(b), 841(a)(1).

81 In 2006, the Supreme Court ruled in *Hill v. McDonough*, 437 F. 3d 1084 that death row inmates in the United States could challenge the constitutionality of states’ lethal injection procedures through a federal civil rights lawsuit. Since then, numerous death row inmates have brought such challenges in the lower courts, claiming that lethal injection as currently practiced violates the ban on “cruel and unusual punishment” found in the Eighth Amendment to the United States Constitution. “Memorandum of Intended Decision (Morales)” (PDF). *Death Penalty Clinic, UC Berkeley School of Law*. 2006-12-15.

82 *Ibid.*

83 *United States v. Rosen*, 582 F.2d 1032, 1033 (5th Cir. 1978)..

- 84 *Ibid.*
- 85 *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992).
- 86 *United States v. Behrman*, 258 U.S. 280, 42 S. Ct. 303, 66 L. Ed. 619 (1922); *United States v. Warren*, 453 F.2d 738 (2d Cir. 1972), Cert. denied, 406 U.S. 944, 92 S.Ct. 2040, 32 L.Ed.2d 331 (1972); *United States v. Brandenburg*, 155 F.2d 110 (3d Cir. 1946).
- 87 *United States v. Abdallah*, 149 F.2d 219 (2d Cir. 1945), Cert. denied, 326 U.S. 724, 66 S.Ct. 29, 90 L.Ed. 429 (1945).
- 88 *Warren*, 453 F.2d 738; *White v. United States*, 399 F.2d 813 (8th Cir. 1968); *Brown v. United States*, 250 F.2d 745 (5th Cir. 1958), cert. denied, 356 U.S. 938, 78 S.Ct. 779, 2 L.Ed.2d 812 (1958); *Brandenburg*, 155 F.2d 110.
- 89 *Abdallah*, 149 F.2d 219.
- 90 *Warren*, 453 F.2d 738.
- 91 *Brandenburg*, 155 F.2d 110.
- 92 *United States v. Larson*, 507 F.2d 385 (9th Cir. 1974).
- 93 *United States v. Bartee*, 479 F.2d 484 (10th Cir. 1973); *United States v. Larson*, 507 F.2d 385. *United States v. Rosen*, 582 F.2d 1032 (5th Cir. 1978)
- 94 In the Matter of the Medicine Shoppe Fed. Reg. / Vol. 79, No. 191 / Thursday, October 2, 2014 / Notices 59504 to 59517.
- 95 The DEA's statistics reflect that these the combination of these three drugs has the effect of heroin and are highly addictive. From the Pharmacist's Manual, USDOJ DEA.
- 96 See Pet. Br. at 4. *The Medicine Shoppe v. Loretta Lynch, et al.* 14-223 (2014).
- 97 *Supra* n. 96.
- 98 See Pet. Br. at 4.
- 99 *Ibid.*
- 100 See *Recommended Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge* to the DEA Deputy Administrator, Thomas M. Harrigan. (citing 21 U.S.C. § 824(a) & 21 U.S.C. § 823(f)). 79 Fed. Reg. 191 pgs. 59504-59517 – *In the Matter of The Medicine Shoppe*; Decision and Order (October 2, 2014).
- 101 *Id.* at 59505.
- 102 Pharmacy Reporting Form and Memo on Changes to Policy, available at <http://www.nmms.org/news/2013/pharmacy-reporting-form-and-memo-changes-policy-go>
- 103 http://www.ecfr.gov/cgi-bin/text-idx?node=se39.1.952_11.
- 104 See *Gregory v. Ashcroft*, 501 U.S. 452, 461, (1991) (holding that states' police powers grant them exclusive authority to set licensing standards).
- 105 In 1994, the state of Oregon enacted by ballot measure the Oregon Death with Dignity Act, the country's first law authorizing physician-assisted suicide. For Oregon residents to be eligible to request a prescription under the Act. Alexander DeLuca, M.D. Addiction, Pain, & Public Health. Affirmation of States' Authority to Define "Legitimate Medical Purpose" Citing David B. Brushwood. J.D; American Journal of Health-Systems Pharmacy; 63(5); 2006, posted: 2006-03-18.
- 106 See *The Medicine Shoppe v. Loretta Lynch, et al.* 14-223 (2014) Pet. Br. at 4.
- 107 *Moore*, 423 at 138-39.
- 108 Medicare defines "medical necessity" as services or items reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member. If Medicare or other payors determine that services were medically unnecessary after payment has already been made, they treat it as an overpayment and demand that the money be refunded, with interest. Moreover, if a pattern of such claims can be shown and the physician knows or should know that the services are not medically necessary, the physician may face large monetary penalties, exclusion from Medicare program, and criminal prosecution. Nancy W. Miller, Esq. "What is Medical Necessity?" Physician's News Digest. August 2002. http://www.chiro.org/documentation/FULL/What_is_Medical_Necessity.html
- 109 See *Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195*, 77 Fed. Reg. 62,316, 62,340-41 (Oct. 12, 2012) (interpreting 21 C.F.R. § 1306.04(a) limiting a pharmacist's duty to determine the legitimacy of a prescription).
- 110 See *Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195*, 77 Fed. Reg. 62,316, 62,340-41 (Oct. 12, 2012) (interpreting 21 C.F.R. § 1306.04(a) limiting a pharmacist's duty to determine the legitimacy of a prescription).
- 111 *The Medicine Shoppe*, 14-1223 Resp. Br. 10.
- 112 *Ibid.*
- 113 *The Medicine Shoppe*, 14-1223 Resp. Br. 10 (citing *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy*, 55 Fed. Reg. 4729, 455 Fed. Reg. 4729, 4730 (1990).
- 114 <http://www.texas-defense-lawyer.com/Articles/The-Medicine-Shoppe-v-DEA-14-1223-I>.
- 115 *Ibid.*
- 116 *United States v. Morton Salt Co.*, 338 U.S. 632, 642–643 (1950).
- 117 *Ibid.*
- 118 <http://www.kevinmd.com/blog/2012/04/future-medicine-aspiring-young-doctors.html>
- 119 *Ibid.* Advanced Practice Nurses' Use of Prescription Drug Monitoring Program Information Steven D. LeMire, PhD; Sarah G. Martner; Cheryl Rising, RN Journal for Nurse Practitioners. 2012;8(5):383
- 120 *Ibid.*
- 121 This concern is evident from the "specific issues and questions that have been raised on a recurring basis by physicians [and pharmacists] who seek guidance on the subject of dispensing controlled substances for the treatment of pain." *Pharmacy Reporting Form and Memo on Changes to Policy on Good Faith Dispensing of Controlled Substances*, New Mexico Medical Society, May 2013. <http://www.nmms.org/news/2013>. See *United States v. Pawan Kumar Jain*, 2:14-cr-01261-RB, In the United States District Court, District of New Mexico, Las Cruces Division.



Texas Bar College Annual Awards

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

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

Given 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 in the recipient's name to the Texas Equal Access to Justice Foundation or the law school of the recipient's choice.

For 2015 the award goes to **Richard L. Spencer**. Rick is a Fellow of the Texas Bar College and the American College of Real Estate Lawyers. He is board certified in Real Estate Law and has been a member of the Texas Real Estate Forms Committee for twenty-five years. Rick is a past chair of the Real Property, Probate and Trust Law Section and a member of the Texas Board of Legal Specialization Real Estate Advisory Commission. He is also a Fellow of the Texas Bar Foundation and was chair of the Texas Assignment of Rents Act Drafting Committee. Rick served on the State Bar's 4 D-10 Grievance Committee. He is a fixture at real estate related CLE, having served as Course Director for TexasBarCLE's Advanced Real Estate Law Course, its Advanced Real Estate Drafting Course, and its Advanced Real Estate Strategies Course, as well as for UT Law CLE's Mortgage Lending Institute and its Leasing Institute.



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.

For 2015 the award goes to co-authors Justice Jane Bland and Laura Lee Prather for their article, "Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas" published in the Texas Tech Law Review.

Justice Jane Bland was appointed to the First Court of Appeals in 2003 and was elected in 2004, 2006, and 2012. Before becoming an appellate judge, she served for six years as a civil trial judge, having been appointed in 1997 and elected in 1998 and 2002.



Justice Bland is board certified in civil appellate law and civil trial law by the Texas Board of Legal Specialization. She is a member of the American Law Institute. Before serving on the bench, she practiced with Baker Botts L.L.P., focusing on civil trial and appellate work. Before that, she clerked for Judge Thomas Gibbs Gee on the United States Court of Appeals for the Fifth Circuit.

She earned her law degree from the University of Texas School of Law with high honors, where she was Vice-Chancellor, an associate editor of the *Texas Law Review*, and a member of the Order of the Coif. She received her bachelor's degree in accounting and honors business from the University of Texas at Austin, with highest honors.

Justice Bland serves on the Texas Supreme Court's Rules Advisory Committee and its Commission to Expand Civil Legal Services. She is the chair of the State Bar of Texas's Oversight Committee on the Texas Pattern Jury Charges, having previously served on the Business, Consumer and Employment Law volume. In March 2006, while sitting by special commission, she delivered the majority opinion in *Hyundai v. Vasquez* for the Texas Supreme Court.

In November 2010, United States Supreme Court Chief Justice John Roberts presented Justice Bland with the William H. Rehnquist Award, given annually by the National Center for State Courts to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. The Texas Association of Civil Trial and Appellate Specialists named her trial judge of the year in 2003 and appellate judge of the year in 2007 and 2015. She also has twice received President's Awards for her work with both the Houston Bar Association and the Houston Young Lawyers Association. She serves on the boards of Houston Volunteer Lawyers, the UT Law School Foundation, and St. John's School.

Justice Bland is married to Douglas S. Bland, a partner with Vinson & Elkins, L.L.P., and they have two children.



Laura Lee Prather is a partner in the Litigation Practice Group in the Austin office of Haynes and Boone, LLP. Laura focuses her practice on First Amendment, intellectual property and media and entertainment litigation and appeals. She has significant litigation experience, including the first ruling in federal court applying the Texas anti-SLAPP. She also has noteworthy government

relations experience as an advocate at the Texas Legislature on First Amendment and open government concerns.

Laura advises an extensive array of content providers including online and traditional newspapers, magazines, radio and broadcasters, cable television stations, production companies and music and sports entities. She was the lead author and negotiator for four of the most significant pieces of First Amendment legislation in recent history in Texas - the reporters' privilege, the anti-SLAPP statute, the Defamation Mitigation Act, and the third party allegation rule. Through her efforts, Laura both formed and led the coalitions in support of these measures, making Texas the 37th state to pass a reporters' privilege, the 28th state to adopt an anti-SLAPP statute, and the 32nd state to enact a retraction statute.

In addition, she spearheaded the efforts to pass the electronic communications bill codifying the longstanding principal that government business conducted on private devices is subject to the Public Information Act. All of these laws are designed to promote and protect free speech rights in Texas.

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 2015 is **Russell Blair Ross**. Russell Ross is a *magna cum laude* graduate of Vanderbilt University. There, he won the school its first national championship in college debate since the 1980s. Thereafter, he secured his law degree from Emory University and his MBA from Rice University.



With a burning desire to learn, he amassed 700+ CLE hours for this compliance year. During many of those hours, he lost 50+ pounds exercising. Russell enjoys succeeding, but very strongly believes in the necessity of constantly improving at all that he does.

His non-legal work experience includes marketing and community development roles with the NFL Tennessee Titans and NFL Houston Texans. He spent his 2L summer with the Harris County DA's office and MBA summer with Pantheon of Women Producers. He reports that is he is available for the perfect employment opportunity and can be reached at russell@brsolutions.com. Most importantly, he would like to thank all the schools and teams that took a chance on him and gave him the chance to succeed.

Please join us in congratulating our award winners! ■



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PURPOSE:

This is an essential seminar for general practitioners with new topics and updates in most practice areas, including Texas Board of Legal Specialization credit approved in eighteen practice areas.

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19.25 HOURS (3.75 ETHICS)

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Applies to the Texas Bar College and the Texas Board of Legal Specialization in:

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Civil Trial Law	14.25
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Criminal Law.....	8.75
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Family Law.....	15.25
Health Law	11.50
Immigration and Nationality Law...	14.25
Juvenile Law	11.50
Labor and Employment Law.....	14.25
Oil, Gas and Mineral Law	10.00
Personal Injury Trial Law	11.00
Real Estate Law.....	12.00
Tax Law.....	9.00
Workers' Compensation Law	11.25

Thursday

7.25 hours including 1.75 ethics

8:00 **Registration**
Coffee and Pastries Provided

8:40 **Welcoming Remarks**
Course Director
 John C. Grace, *Lubbock*
 Assistant City Attorney
 City of Lubbock
 Secretary, Texas Bar College

8:50 **Texas Bar College Update**
(No MCLE Credit)
 Patsy Yung Micale, *Dallas*
 Dept. of Homeland Security, USCIS
 Vice Chair, Texas Bar College

9:00 **State of the State Bar Address**
.25 hr
 Roland K. Johnson, *Fort Worth*
 Harris Finely & Bogle
 State Bar President 2009-2010

UPDATES

9:15 **U.S. Supreme Court Update** *.5 hr*
 Daniel L. Geysler, *Dallas*
 Stris & Maher

9:45 **Update on Expert (and Lay Witness) Testimony** *.5 hr*
 Hon. Harvey G. Brown, Jr., *Houston*
 Justice, First Court of Appeals

10:15 **Break**

10:30 **Court of Criminal Appeals Update**
.75 hr
 Hon. David Newell, *Austin*
 Judge, Texas Court of Criminal Appeals
 Hon. Kevin P. Yearly, *Austin*
 Judge, Texas Court of Criminal Appeals

CONSUMER

11:15 **Fair Debt Collection** *.5 hr*
 John Mayer, *Houston*
 Ross Banks May Cron & Cavin

11:45 **Deceptive Trade Practices Act Update** *.5 hr*
 Steven C. James, *El Paso*
 Steven C. James Attorney PLLC

12:15 **Break - Lunch Provided**

ETHICS

12:30 **Luncheon Presentation: The Information of Things - Gathering Case-Related Intelligence from Unexpected Places** *.5 hr (.25 ethics)*
 Aaron Hughes, *Kingwood*
 Vidoc Razor

1:00 **Break**

1:15 **Socially Unacceptable: Ethical Issues in Using Social Media** *.75 hr ethics*
 John G. Browning, *Dallas*
 Passman & Jones

2:00 **Ethical Fee Agreements and Proving up Attorney Fees** *.75 hr ethics*
 Chad Baruch, *Dallas*
 Johnston Tobey Baruch
 Coyt Johnston, Jr., *Dallas*
 Johnston Tobey Baruch

IMMIGRATION

2:45 **Immigration Myths and Facts** *1 hr*
Moderator
 Kenneth James Harder, *Houston*
 Dunbar Harder, PLLC

Panelists

Rehan S. Alimohammad, *Sugar Land*
 Alimohammad & Zafar
 Patsy Yung Micale, *Dallas*
 Dept. of Homeland Security, USCIS

3:45 **Break**

EMPLOYMENT

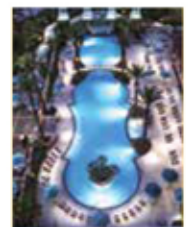
4:00 **Social Media Issues in Employment Law** *.5 hr*
 Kimberly S. Houston, *Dallas*
 Christiansen Davis

4:30 **Hot Topics in Employment Law** *.75 hr*
 Katrina Grider, *Cypress*
 Katrina Grider & Associates

5:15 **Adjourn**

7:00 **Party By the Pool!**

Bring your family for food and refreshments.





Friday

8.25 hours including 1.75 ethics

7:00 **Coffee & Pastries Provided**

7:55 **Morning Announcements**

REAL ESTATE

8:00 **From Drought to Flood: Currents in Water Law** .5 hr

Mark McPherson, *Dallas*
McPherson LawFirm

8:30 **Challenging Your Client's Property Valuation with the Appraisal District** .5 hr

John Brusniak, *Dallas*
Brusniak Law

9:00 **Statutory Notices in Real Estate Sales Contracts** .5 hr

Sara E. Dysart, *San Antonio*
Sara E. Dysart, PC

9:30 **Beyond Cows and Plows: Emerging Legal & Policy Issues for Texas Farms and Ranches** .5 hr

James D. Bradbury, *Fort Worth*
James D. Bradbury, PLLC

10:00 **Break**

ETHICS

10:15 **The Top 10 Ways to Avoid a Meeting with the State Bar of Texas CDC** .5 hr ethics

Mark T. Murray, *Houston*
Stevenson & Murray

10:45 **Emerging Standards of Competence When Dealing with Protected Information** .75 hr ethics

Judy Kostura, *Austin*
Judge, Kostura & Putman
Mitzi S. Mayfield, *Amarillo*
Riney & Mayfield

11:30 **Break - Lunch Provided**

11:45 **Luncheon Presentation: Ten Tips for Lawyers Dealing with Stress, Mental Health, and Substance Use Issues** .5 hr ethics

Allan K. Dubois, *San Antonio*
President, State Bar of Texas

12:15 **Break**

CRIMINAL

12:30 **Overview of the Unlawful Carry Law in Texas** .5 hr

Larry P. McDougal, *Richmond*
Law Office of Larry P. McDougal

1:00 **Domestic Violence** .5 hr

Jaime Esparza, *El Paso*
34th Judicial District Attorney

1:30 **DWI: The Law and the Impact of Missouri vs. McNeely** .5 hr

David Schulman, *Austin*
The Law Office of David A. Schulman

2:00 **Texas Bar College Awards**

2:10 **Break**

LITIGATION

2:15 **The Vanishing Jury Trial** .5 hr

Jim Parsons, *Palestine*
The Law Office of Jim Parsons

2:45 **Supreme Court Cases Important to Trial Lawyers** .5 hr

Jay Jackson, *Houston*
Abraham Watkins Nichols Sorrels
Agosto & Friend

3:15 **Summary Judgments and Declaratory Judgments** .5 hr

Dustin M. Howell, *Austin*
McKool Smith

3:45 **Break**

ESTATE PLANNING AND PROBATE

4:00 **Estate Planning and Probate Basics** .5 hr

Arielle Prangner, *Houston*
Davis & Willms

4:30 **Non-Probate Transfers** .5 hr

Tina R. Green, *Texarkana*
Capshaw Green

5:00 **The Will Execution Ceremony as Inexpensive "Will Insurance"** .5 hr

Professor Gerry W. Beyer, *Lubbock*
Governor Preston E. Smith Regent's
Professor of Law
Texas Tech University School of Law

5:30 **Adjourn**

Saturday

3.75 hours including .25 ethics

7:30 **Coffee and Pastries Provided**

7:55 **Morning Announcements**

FAMILY LAW

8:00 **The Supreme Court's Marriage Equality Decision – Obergefell v. Hodges and Its Effect on Texas** .75 hr

Karen J. Langsley, *Dripping Springs*
LangsleyLaw

8:45 **Juvenile Case Law Update** .5 hr

Hon. Patrick J. Garza, *San Antonio*
Associate Judge, 386th District Court

9:15 **Family Law Case Update** .5 hr

Georganna L. Simpson, *Dallas*
Georganna L. Simpson, PC

9:45 **Break**

10:00 **Modification** .5 hr (.25 ethics)

Stephen J. Naylor, *Fort Worth*
Law Office of Stephen J. Naylor

10:30 **Contempt** .5 hr

John Bo Nichols, *Houston*
Bo Nichols Law Firm

11:00 **Post-Divorce Enforcement** .5 hr

Joseph Indelicato, Jr., *Houston*
Joseph Indelicato, Jr., PC

11:30 **The ABC's of CPS** .5 hr

Hon. Meca L. Walker, *Houston*
Associate Judge, 311th District Court

12:00 **Adjourn**



Galveston Island Attractions

Schlitterbahn Waterpark Directly across the parking lot from the Moody Garden Hotel is the Schlitterbahn Waterpark. Open year round, it is the first climate controlled in-door park in Texas. There is something for everyone! Man-made beaches, hot tubs, three different kids's areas and three speed slides. Free parking, free inner tubes, and picnics welcome. A heated pool with a swim up bar for the adults and a dozen water slides for everyone.

Historic Pleasure Pier - It's back! For decades, the historic Pleasure Pier served as a catalyst for stimulating tourism to Galveston's Seawall Boulevard and Gulf beaches. Originally built in the late 1940s as a recreational facility for the military, the Pier was turned over to the city after World War II and named Pleasure Pier. The Pleasure Pier operated as an iconic family destination until 1961 when Hurricane Carla damaged the property. In 1965, the Flagship Hotel opened on the site and was severely damaged by Hurricane Ike in 2008.

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Schlitterbahn Waterpark



Photo Credit: GICVB

Pleasure Pier



Photo Credit: PleasurePier.com



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THE ENDOWMENT FUND FOR PROFESSIONALISM has been established by the College to underwrite projects and services that contribute to higher standards of education and performance among lawyers. For example, some proceeds for the fund will be used to establish free access for all College members to the State Bar of Texas' Online Library, which provides immediate, word-searchable access to more than 20,000 CLE articles written by experienced members of the bar. Many lawyers find that beginning their research in the Online Library gets them the practical information and analysis they need more quickly and more thoroughly.

Membership in the Fund is by invitation of the Texas Bar College. After five continuous years of College membership, a lawyer becomes eligible to join the Fund. Levels of membership vary according to the lawyer's financial commitment. Choose your membership level:

Endowment Fund Scholar

The Scholar commits to at least a \$1,000 contribution which may be paid out at \$200 per year.

Honored Endowment Fund Scholar

The Scholar has reached the \$1,000 contribution level.

Sustaining Endowment Fund Scholar

The Honored Scholar continues to make annual contributions of at least \$200 per year.

Friends of the Endowment Fund for Professionalism

Non-qualifying Texas Bar College members or non-College members may contribute to the Fund.

Members of the Fund and Friends of the Endowment Fund will be acknowledged by the College. Remember, the Fund will achieve its goals with your commitment. Consider joining the Fund today!



The Endowment Fund for Professionalism

Texas Bar College P. O. Box 12487 Austin, Texas 78711-2487

As a member of the Texas Bar College for five consecutive years, I hereby accept my invitation to join The Endowment Fund for Professionalism. Enclosed is my **tax-deductible** contribution of \$1,000 to fulfill my commitment as an Honored Endowment Fund Scholar or my minimum initial contribution of \$200 as an Endowment Fund Scholar (exact amount indicated below). I recognize that my gift supports professionalism of lawyers through education and contributes to the betterment of the legal profession in Texas.

Please make my **tax-deductible** contribution in honor of or memory of _____.

Amount of contribution: \$1,000 \$200 Other \$ _____

Payment by enclosed check payable to The Endowment Fund for Professionalism of the Texas Bar College.

Please charge my credit card \$1,000 \$200 now, and annually \$200 for the next four years Other \$ _____

Credit Card No. _____ American Express Visa MasterCard Discover

Signature Authorizing Payment _____ Date _____

If paying by credit card, you may fax this form to 512-463-1498 or scan and email it to mgaston@texasbar.com, or you may pay online at <https://texasbarcollege.com/merchandise/endowment-fund>.

Member Name: _____ Bar Card Number: _____

Firm: _____ Email: _____

Address: _____ City/State _____ Zip _____

Office Phone: (_____) _____ Office Fax: (_____) _____

College Members who wish to contribute or pledge less than \$1,000 or who have not achieved five consecutive years of College membership and non-College members may make tax deductible contributions and become a Friend of the Endowment Fund for Professionalism by completing and returning this form.