



# The College Bulletin

News for Members of the Texas Bar College Spring/Summer 2018

## Sun & CLE! The 20th Annual Summer School is almost here!

See p. 6.

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## From the Chair



John Charles Grace

## Moody Gardens



It is Summer! Which means the 20<sup>th</sup> Annual Texas Bar College Summer School is coming up soon. This year, Summer School will be July 19-21 at the lovely Moody Gardens Hotel on Galveston Island. If you are a regular attendee, now is the time to make your travel plans and hotel reservations. If you have not been to Summer School, I hope you will consider joining us this year.

As you'd expect, this year's CLE lineup is outstanding, with top-rated speakers on a wide range of general legal topics, including a full range of legal updates, and 3.25 hours of ethics. Check out the full agenda on pp. 6-8 of this *Bulletin*, and I believe you'll agree that the program is perfect for solo and general practitioners.

Unlike many CLE programs, Summer School is intended to be the backdrop for a family vacation. While you learn from legal experts on a wide range of subjects, your family can enjoy everything that Galveston has to offer, including the host hotel's private white sand beach and adventure park and the Schlitterbahn Waterpark that sits across the street. The famous Galveston beach is just a short drive away, as is Galveston's Pleasure Pier. If you are looking for something "spooky," Galveston historian and paranormal researcher, Dash Beardsley, can also lead you on a fun "Ghost Tour" of the historic Strand District. See p.9 for more about local attractions to amuse and entertain your whole family. On Thursday evening, gather with all of the attendees and their families for a Party by the Pool, with food, drinks, and live entertainment.

So, make your reservations today, and bring your family to Galveston this Summer! Hope to see you there! ■





# The Texas Anti-SLAPP Law: Essential Tips for Navigation

by Mark C. Walker

**F**or anyone who files suits or defends them, the Texas anti-SLAPP law, found in Chapter 27 of the Texas Civil Practice and Remedies Code,<sup>1</sup> is now an essential part of your claim and defense evaluation. First passed in 2011 and amended in 2013, what is entitled the Texas Citizens Participation Act (“TCPA”) has fast become a cottage industry of early dismissal motions and interlocutory appeals in wide array of cases.

SLAPP is an acronym for “Strategic Lawsuit Against Public Participation,” a pernicious type of legal attack on critical speech, which is essential to the survival of a healthy democracy. In a true SLAPP case, one party with greater resources than another would sue not for success on the merits, but merely to silence the critic. A common example would be where a developer sues a neighboring homeowners association that has made public complaints about a new development. The developer’s aim would be to make it too expensive for the HOA to continue to complain and hold up the new development. Essential to a true SLAPP case are elements of (1) greater economic resources deployed against (2) a critic exercising legal rights of free speech, with (3) frivolous or malicious intent to delay. None of those elements are part of the TCPA analysis.

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<sup>1</sup> Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*

The TCPA provides an expedited dismissal procedure at the outset of the case. A party who has been sued may file a motion to dismiss the “legal action” within 60 days of service.<sup>2</sup> A “legal action” is very broadly defined, beyond what we normally understand an “action” to be – a lawsuit. Instead, a “legal action” includes not only suits, but counterclaims, cross-claims, and “any other judicial pleading or filing that requests legal or equitable relief.”<sup>3</sup> That language could certainly include motions.

Once filed, the motion to dismiss acts to stay all discovery in the case.<sup>4</sup> The trial court is supposed to set the motion for hearing within 60 days after service, but the time may be extended somewhat upon a finding of good cause or if the trial court’s docket conditions require such extension.<sup>5</sup> In no case is the hearing supposed to occur more than 120 days after the service of the dismissal motion.<sup>6</sup>

Assuming the trial court hears the motion, the movant – generally the defendant – has a fairly modest burden to show by a preponderance of the evidence that the legal action was “based on, relates to, or is in response to” the movant’s exercise of rights of speech, petition, or association.<sup>7</sup> In other states, to prevent overbroad interpretation to more than SLAPP or frivolous cases, courts have interpreted the causal language above to mean “only” based on. The Texas Supreme Court has not made that interpretation, but instead has relied upon a literalist interpretation of the statute without reference to existing and long-standing standards in First Amendment litigation. The Texas Supreme Court has said that the relationship can even be “tangential.”<sup>8</sup>

Note that the Legislature did not link the motion to dismiss to any finding that the legal action was frivolous, or based on improper motives, or require that there be any finding of disparity in resources.

In order to fall within the TCPA, the implicated speech right must be made in connection with “a matter of public concern,”<sup>9</sup> a term with which state and federal courts are very familiar in First Amendment litigation. But the Legislature did not explicitly adopt such existing First Amendment litigation standards for determining what constitutes a matter of public concern, and so far the Texas Supreme Court has only literally applied the statutory language without reference to existing state and federal law. Speech rights implicated in successful motions to dismiss include not only defamatory and disparaging comments, but also nondisclosure agreements about paramedic training,<sup>10</sup> discussion among persons alleged to have engaged in theft of trade secrets,<sup>11</sup> and even

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<sup>2</sup> Tex. Civ. Prac. & Rem. Code § 27.003(b).

<sup>3</sup> Tex. Civ. Prac. & Rem. Code § 27.001(6).

<sup>4</sup> Tex. Civ. Prac. & Rem. Code § 27.003(c).

<sup>5</sup> Tex. Civ. Prac. & Rem. Code § 27.004(a)-(b).

<sup>6</sup> Tex. Civ. Prac. & Rem. Code § 27.004(c).

<sup>7</sup> Tex. Civ. Prac. & Rem. Code § 27.003(a).

<sup>8</sup> *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W. 895, 901 (Tex. 2017) (per curiam).

<sup>9</sup> Tex. Civ. Prac. & Rem. Code § 27.001(3).

<sup>10</sup> See *Elliott v. S&S Emergency Training Solutions*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. filed).

<sup>11</sup> See *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin May 5, 2017, pet. dismissed).

lis pendens claims filed by a contentious neighbor.<sup>12</sup>

Neither petition nor association rights need be on matters of public concern to fall under the TCPA. “Petition” includes not only filing suit, but also making a police report,<sup>13</sup> and a Rule 202 petition to perpetuate testimony.<sup>14</sup> “Association” generally includes not only formal associations such as unions, but also more informal groups such as neighborhood watch and other associations.

Once the movant shows the legal action was based on the exercise of a right, the burden then shifts to the nonmovant – the plaintiff – to establish by “clear and specific evidence” a prima facie case on each element of the claim or cause of action.<sup>15</sup> “Clear and specific evidence” is not a recognized burden of proof, and has been determined not to introduce an intermediate burden of proof. As would be expected given that the principal proponents of the TCPA were large media interests and organizations, “clear and specific evidence” is derived from the proof required to overcome the reporter’s privilege and cause reporters to reveal a confidential source. Courts finally determined, from reference to dictionaries, that the term means “free from doubt,” and “specific,” a quality, not quantity, standard.<sup>16</sup>

It turns out that the ability to meet the nonmovant’s standard is often quite difficult, especially when it comes to accumulating sufficient proof on each element of a claim, without the benefit of undertaking discovery. Although the statute itself turns textbook law on its head and requires trial courts to consider not only affidavits, but also the pleadings, as evidence,<sup>17</sup> along with circumstantial evidence, the vast majority of motions to dismiss are successful at least in part.

The principal attraction of the motion to dismiss to defendants, and danger to plaintiffs, lies in the significant and mandatory remedies. If the motion to dismiss is successful, the trial court has no discretion, but must not only dismiss the complained-of legal action, but must also assess fees and sanctions.<sup>18</sup> Under the TCPA there is no sliding scale of sanctions as required under Rules 13 and 215, nor can the trial court reduce the amount of fees below “reasonable” in an attempt to ameliorate the harsh effects of the statute. Nor does the movant have to prove that the legal action was in any way frivolous in order to obtain sanctions. The respondent, or nonmovant, may obtain sanctions against the movant under the TCPA, but only upon a showing that the motion was frivolous.<sup>19</sup> There have been no TCPA cases so far in which a defendant was sanctioned for filing a motion to dismiss. Thus there is little disincentive, and every incentive, to file a motion to dismiss

<sup>12</sup> *Serafine v. Blunt*, 466 S.W.3d 352 (Tex. App.—Austin, June 26, 2015, no pet.).

<sup>13</sup> *Murphy USA, Inc. v. Rose*, No. 12-15-00197-CV, 2016 Tex. App. LEXIS 10829, at \*8 (Tex. App. - Tyler Oct. 5, 2016, no pet.)(mem. op.); see also *Ford v. Bland*, No. 14-15-00828-CV, 2016 Tex. App. LEXIS 13285, 2016 WL 7323309, at \*1 (Tex. App. – Houston [14th Dist.] Dec. 15, 2016, no pet.) (customer of jewelry shop filed complaint with police department; counterclaim by jeweler for defamation and business disparagement; it is unclear whether the Court of Appeals reviewed based on speech or petition rights).

<sup>14</sup> See *Int’l Ass’n of Drilling Contrs. v. Orion Drilling Co.*, 512 S.W.3d 483, 491-92 (Tex. App. – Houston [1st Dist.] 2016, pet. denied); *In re Elliott*, 504 S.W.3d 455, 463 (Tex. App. – Austin 2016, orig. proceeding) (holding that motion to dismiss invoking TCPA stays discovery in a Rule 202 proceeding until the court rules on the motion to dismiss).

<sup>15</sup> Tex. Civ. Prac. & Rem. Code § 27.005(b)-(c).

<sup>16</sup> *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citing *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

<sup>17</sup> Tex. Civ. Prac. & Rem. Code § 27.006(a).

<sup>18</sup> Tex. Civ. Prac. & Rem. Code § 27.009(a).

<sup>19</sup> Tex. Civ. Prac. & Rem. Code § 27.009(b).



in as many cases as possible.

Once filed, the motion to dismiss does not go away with the nonsuit of the offending legal action. Instead, case law so far holds that the request for sanctions survives nonsuit. A number of federal courts have applied the TCPA, although the Fifth Circuit has not yet determined whether, under an *Erie* analysis, the TCPA is procedural or substantive.

If the trial court does not timely rule on the motion, then it is deemed overruled by operation of law.<sup>20</sup> The statute again heavily favors defendants by allowing an expedited, interlocutory appeal only when a motion to dismiss is denied.<sup>21</sup> If a motion to dismiss is granted all or in part, there is no appeal until a final judgment. On interlocutory appeal, all matters in the case are stayed, and the appellate court reviews the weighing of burdens of proof *de novo*.

As you can see, the implications of whether the TCPA can be invoked in a case are very significant. Any lawyer representing an aggrieved party who is prepared to go to the courthouse to seek a remedy must first look at the facts in detail, and determine whether an argument can be made that a suit would even be tangentially based on the exercise of rights of speech, petition, or association. If so, the lawyer needs to determine whether she and the party have accumulated sufficient evidence on each element of each cause of action, without discovery.

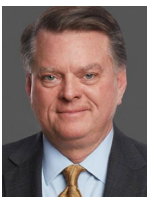
From the defendant's standpoint, you have to look at every case as one in which you might be able to invoke the TCPA, and hopefully catch a plaintiff without all of the evidence necessary to prove her case, even if it is likely she could do so with sufficient discovery. No case is too big or too small to consider invoking the TCPA, especially if the wary defense counsel can find an opportunity to dismiss a claim and punish the opponent without having to prove that a claim is frivolous.

Until the Legislature or the Texas Supreme Court narrow the scope of the TCPA, creative lawyers will continue to find ways to extend its reach to more and more areas of civil litigation. And civil litigation lawyers may find that their standard of care to clients, plaintiff or defendant, now includes a working knowledge of the TCPA. ■

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<sup>20</sup> Tex. Civ. Prac. & Rem. Code § 27.008(a).

<sup>21</sup> Tex. Civ. Prac. & Rem. Code § 51.014(a)(12).



**MARK C. WALKER** is a Member at the Dickinson Wright El Paso Office. As a trial and appellate lawyer for over 30 years, Mark has more than 75 verdicts and 30 appeals to his credit, which demonstrate his commitment to bring tenacity and creativity to the resolution of difficult cases. Mark counsels clients to assume that every case will go to trial, in order to put them in the best position to make informed decisions on the best resolution of a broad array of business, commercial, product liability, administrative, regulatory, and tort and negligence matters. He also counsels clients on election and campaign finance law issues. He has been Board Certified in Personal Injury Trial Law since 1990, was on the examination commission of the Texas Board of Legal Specialization, and is a frequent speaker on litigation issues at state and national conferences.

# Summer School

Cosponsored by the Texas Bar College

Register early and **save up to \$100!**

**Special Pricing** for Texas Bar College members!

Lawyers licensed 5 years or less take **HALF OFF!**

**LIVE Galveston**

July 19-21, 2018

Moody Gardens Hotel

Register by July 5, 2018 to save!



## Purpose and Scope

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 over nineteen practice areas. This superb course provides a smorgasbord of key topics over a broad range of Texas practice areas—easily the best value and most enjoyable TexasBarCLE program.

## Thursday

6.5 hours including 1.5 ethics

7:30 **Registration**  
**Coffee & Pastries Provided**

8:25 **Welcoming Remarks**  
**Course Director**  
Hon. Meca L. Walker, *Houston*  
Walker ADR Services

8:30 **Texas Bar College Update**  
Cori Ann Harbour-Valdez, *El Paso*  
The Harbour Law Firm

8:45 **State of the State Bar Address**  
David E. Chamberlain, *Austin*  
Chamberlain McHaney

9:00 **State Bar of Texas Resources**  
Mark T. Murray, *Houston*  
Stevenson & Murray

### ► UPDATES

9:30 **Texas Supreme Court Update** .5 hr  
Jay Jackson, *Houston*  
Abraham Watkins Nichols Sorrels Agosto & Aziz

10:00 **U.S. Supreme Court Update** .5 hr  
David Coale, *Dallas*  
Lynn Pinker Cox & Hurst

10:30 **Networking Break**

10:45 **Texas Court of Criminal Appeals Update** .5 hr  
Hon. David Newell, *Austin*  
Judge, Texas Court of Criminal Appeals

11:15 **Tech Tips Every Lawyer Needs to Know**

.5 hr ethics

Al Harrison, *Houston*  
Harrison Law Office

11:45 **Break - Lunch Provided**

### ► ETHICS

12:00 **Luncheon Presentation: Professionalism**  
.5 hr ethics  
Kenda Culpepper, *Rockwall*  
Rockwall County Criminal D.A.

12:30 **Break**

12:45 **Modern Trends in Retainer Agreements**  
.5 hr ethics  
Mark McPherson, *Dallas*  
McPherson Law Firm

### ► CONSUMER AND COLLECTIONS

1:15 **Fraudulent Transfers** .5 hr  
Karen C. Burgess, *Austin*  
Richardson Burgess

1:45 **Consumer Law Update** .5 hr  
Steven C. James, *El Paso*  
Steven C. James Attorney

### ► TECHNOLOGY/ETHICS

2:15 **Legal Writing: Formatting for E-filing** .75 hr  
Chad Baruch, *Dallas*  
Johnston Tobey Baruch

3:00 **Break**



## ► EMPLOYMENT

- 3:15 **Sexual Harassment** .75 hr  
Katrina Grider, *Houston*  
Ogletree Deakins
- 4:00 **The Evolving Landscape of LGBTQ Protections**  
.5 hr  
Joe Miguez, *Austin*  
McGuireWoods

## ► CRIMINAL/PERSONAL INJURY

- 4:30 **Privacy Claims in the Modern Age of Social Media** .5 hr  
Natalie Cobb Koehler, *Meridian*  
Bosque County Attorney  
Koehler Law Firm
- Carlos Soltero, *Austin*  
Cleveland Terrazas

**5:00 Adjourn**

**6:00 - 8:00 Party by the Pool**

## Friday

7.75 hours including 1.25 ethics

- 7:30 **Coffee & Pastries Provided**
- 8:25 **Announcements**

## ► CRIMINAL LAW

- 8:30 **Basics of Juvenile Law** .5 hr  
Patricia Cummings, *Round Rock*  
Law Office of Patricia Cummings
- 9:00 **The Domino Effect of Criminal Convictions & Protective Orders** .5 hr  
Justin K. Wood, *Austin*  
Travis County District Attorney's Office

## ► REAL ESTATE

- 9:30 **Firearms and Gun Law in Real Estate** .5 hr  
Marc D. Markel, *Boerne*  
Roberts Markel Weinberg Butler Hailey
- 10:00 **Networking Break**
- 10:15 **When Harvey Comes A-Callin' (Again) – Practical Tips and Suggestions for Your Office and Clients**  
1 hr
- Moderator**  
Randall O. Sorrels, *Houston*  
Abraham Watkins Nichols Sorrels Agosto & Aziz

## **Panelists**

Chief W. Nim Kidd, *Austin*  
Texas Department of Emergency Management

Paul T. Martin, *Austin*  
Regional Vice President - Southwest National  
Association of Mutual Insurance Companies

► This panel includes a drawing for a free copy of  
Paul T. Martin's book **Bracing for Impact**.  
Donated by Texas Bar Books

- 11:15 **Eminent Domain: Landowner Issues During and After the Condemnation Case** .5 hr  
Zachary Brady, *Lubbock*  
Brady & Hamilton

11:45 **Break - Lunch Provided**

## ► ETHICS/ADR

- 12:00 **Luncheon Presentation: The Psychology of Settlement** .75 hr ethics  
Claude E. Ducloux, *Austin*  
LawPay
- 12:45 **Texas Bar College Awards**
- 1:00 **Tips and Tricks to Settle Your Mediation or Arbitration Case** 1 hr  
**Moderator**  
Hon. Meca L. Walker, *Houston*  
Walker ADR Services

## **Panelists**

Danielle Comeaux, *Houston*  
Comeaux Mediation

Linda Meekins McLain, *Navasota*  
Linda Meekins McLain PC

Rebecca Vela, *Edinburg*  
Pena & Vela

## ► LITIGATION

- 2:00 **TRO Injunctions and Extraordinary Remedies (including non-competes)** .5 hr  
Anthony Malley, III, *Beaumont*  
Malley Law Firm
- 2:30 **Attorney's Fees** .5 hr ethics  
Bradley Kirklin, *Houston*  
Levinthal Wilkins  
Jared Levinthal, *Houston*  
Levinthal Wilkins
- 3:00 **Break**



## ► IMMIGRATION

- 3:15 **What Every Lawyer Needs to Know About Immigration Law** .5 hr  
Ken Harder, *Houston*  
Dunbar Harder
- 3:45 **When Immigration Law Collides with Criminal and/or Family Law** .5 hr  
Jennifer Gutierrez Corroero, *Houston*  
Law Office of Jennifer A. Gutierrez

## ► ESTATE PLANNING AND PROBATE

- 4:15 **Divorce-Proofing the Estate Plan** .5 hr  
Kristin Brown, *Dallas*  
Davis Stephenson
- 4:45 **Highlights of the New and Improved Texas Durable Power of Attorney Act** .5 hr  
Don Totusek, *Dallas*  
Francis Totusek & Amick 5:15 **Adjourn**

## Saturday

1.5 hours including .5 ethics

7:30 **Coffee & Pastries Provided**

8:25 **Announcements**

## ► FAMILY

- 8:30 **Family Law Basics: From the Beginning to the End** .5 hr  
Cindy V. Tisdale, *Granbury*  
Law Office of Cindy V. Tisdale
- 9:00 **A Peak Behind the Curtain: In Chamber Interviews with Children** .75 hr
- Moderator**  
Lynn Kamin, *Houston*  
Jenkins & Kamin
- Panelists**  
Hon. David D. Farr, *Houston*  
Judge, 312th District Court
- Jonathan Gould, Ph.D., ABPP, *Charlotte, NC*  
Charlotte Psychotherapy & Consultation Group
- 9:45 **The Ruling Is Wrong - Now What? Preparing for Appeal** .5 hr  
Sallee S. Smyth, *Richmond*  
Sallee S. Smyth, Attorney at Law
- 10:15 **Networking Break**
- 10:30 **Presenting Your Case: Protective Orders and Family Violence** .5 hr

Hon. Angelina Gooden, *Houston*  
Judge, 280th District Court

Barbara D. Nunneley, *Hurst*  
Nunneley Family Law

11:00 **A Road Map Through CPS Litigation** .5 hr (.25 ethics)

Erin R. Clegg, *Denton*  
McCathern, PLLC

11:30 **Dos and Don'ts in Family Court** .75 hr (.25 ethics)

Hon. Cindy Aguirre, *Richmond*  
Associate Judge, 505th Judicial District Court

Hon. Scott A. Beauchamp, *Dallas*  
Associate Judge, 255th District Court

Hon. Roy L. Moore, *Houston*  
Judge, 245th District Court

12:15 **Adjourn**



## MCLE CREDIT

17.75 Hours (3.25 Ethics)

MCLE Course No: 174001267

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

|                                 |      |
|---------------------------------|------|
| Administrative.....             | 2.00 |
| Bankruptcy.....                 | 4.00 |
| Civil Appellate .....           | 8.25 |
| Civil Trial .....               | 9.75 |
| Construction .....              | 2.50 |
| Criminal .....                  | 5.75 |
| Criminal Appellate.....         | 5.75 |
| Estate Planning & Probate.....  | 3.00 |
| Family .....                    | 7.00 |
| Health .....                    | 2.00 |
| Immigration & Nationality ..... | 2.50 |
| Juvenile .....                  | 4.75 |
| Labor & Employment .....        | 5.00 |
| Oil, Gas and Mineral.....       | 2.00 |
| Personal Injury Trial .....     | 3.25 |
| Tax.....                        | 2.00 |
| Workers' Compensation .....     | 2.00 |

## Reserve Your Hotel Room Early

Hotel rooms have been blocked at special rates on a space available basis. To make a reservation, tell the hotel that you will be attending this State Bar of Texas course.

### **GALVESTON ISLAND**

Moody Gardens Hotel,  
Spa and Convention Center  
7 Hope Boulevard  
Galveston Island, TX 77554  
888-388-8484

\$171 for a single/double

Register online: [www.moodygardenshotel.com](http://www.moodygardenshotel.com)

Group Code: SBOT2018

Deadline: June 26, 2018



Visit [TexasBarCLE.com](http://TexasBarCLE.com)  
to view the course  
brochure or register!

Click on

**Live Courses /  
Video Replays,**

then search for the keywords  
"summer school."

Or call TexasBarCLE

M-F 8a-5p at 512-427-1574.

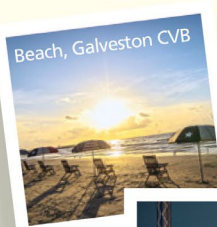
# CLE and the Sun!

# Galveston Island

Dunes, Galveston CVB



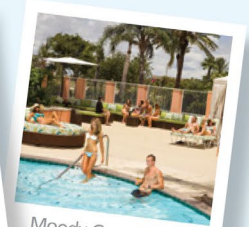
Beach, Galveston CVB



Pleasure Pier,  
Galveston CVB



Moody Mansion,  
Galveston CVB



Moody Gardens Pool,  
Galveston CVB

### ► Ghost Tours of Galveston Island

Dash Beardsley has spent his entire life researching history and paranormal activity in the Galveston area and has packaged his knowledge into tours, offering something for everyone. Founded in 1999, Ghost Tours of Galveston IS Galveston Island's first, foremost, and original haunted historical walking tour. The #1 ghost tour in the state of Texas and the #2 most popular ghost tour in America! 100% fascinating! This unique two hour tour combines history, mystery, ghost stories and legends taking you on a journey into Galveston's richly unknown past. Come view the Island as you have never before. Even if you don't believe in spirits now, you may very well change your mind after walking the brick-lined streets of The Strand.

### ► 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.

### ► Moody Gardens

This tropical destination is ideal for families and groups alike. You can experience life at the Rainforest Pyramid®, featuring exotic and endangered plants and animals from the rainforests of the world. Explore the Aquarium Pyramid® where you can meet a real penguin in our Penguin Encounter. Tour travelling exhibits at the Discovery Museum and immerse yourself at the MG3D, 4D and Ridefilm theaters. Enjoy beautiful Galveston Bay on the Colonel Paddlewheel Boat and a little summer fun on the new lazy river at beautiful Palm Beach. Finally, take a swing at the Moody Gardens Golf Course and escape to the four-diamond Moody Gardens Hotel, Spa & Convention Center. Visit Moody Gardens and prepare to experience life.





# Certification Matters

*Texas Board of Legal Specialization Executive Director Leo Figueroa on How Attorneys Can Distinguish Themselves and Why It is Important*

Attorneys get sworn-in at the annual Texas Board of Legal Specialization induction ceremony. Photograph courtesy of TBLS.

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**S**imilar to the Texas Bar College, the Texas Board of Legal Specialization, or TBLS, the largest legal board certification programs in the country, is a voluntary designation program for attorneys and paralegals. TBLS presents many opportunities for Texas attorneys and paralegals to advance their careers and become distinguished thought leaders in 24 areas of law, including family law, criminal law, oil, gas, and mineral law, and more.

At the request of the State Bar of Texas, the Supreme Court of Texas established TBLS in 1974 to be the only governing board authorized to certify attorneys in legal specialty areas. It serves the public interest and advances quality standards within the legal profession by awarding a certification of special competence to attorneys and paralegals with demonstrated expertise and knowledge in a specific area of law.

The benefits of being a member of the Bar College and TBLS are very similar and highly regarded. Both organizations aim to advance the profession, have a strong dedication to CLE and are held to the highest practice standards throughout the state.

Although TBLS has been around for more than four decades, there may be things about TBLS that are not common knowledge. The following is an interview with TBLS Executive Director Leo Figueroa, who has been certified in civil trial law and personal injury trial law for 24 years and practiced law for more than 30 years before taking the TBLS job in 2016, about why certification is important, how to become certified, and what's on the horizon for TBLS.

## **There are a variety of ways for attorneys to distinguish themselves. Why should they consider board certification?**

Board certification is an objective measure of an attorney's professional experience, competence, and skill in a particular area of law. It is an achievement that matters to potential clients, fellow lawyers, and the judiciary. More and more Texas attorneys are seeing the value of

board certification, evident by the recent rollout of our new specialty areas—construction law, child welfare law, and property owners association law—as well as the increased number of applicants in recent years. As legal areas get more complex and competitive, board certification helps to set attorneys apart.

### **How many Texas attorneys are board certified?**

There are more than 100,000 active State Bar of Texas members and more than 7,300 who are board certified. Because several board certified attorneys are certified in more than one specialty area, the total number of active certifications is more than 8,400.

### **What are common misperceptions attorneys have about TBLS and its board certification program?**

Although a good number of attorneys generally understand TBLS and board certification, there are a few misperceptions that come to mind. For instance, becoming board certified does not cause your malpractice premiums to increase. In addition, becoming board certified and maintaining certification is not that expensive when compared with price increases in other areas. TBLS has maintained the same fee level for applications and annual examinations and recertifications for more than seven years.

### **What were the first specialty areas to be recognized and when? What was the most recent area and when?**

In 1975, the first criminal, family, and labor law certifications of special competence were awarded to 319 Texas attorneys. Today, the TBLS program encompasses 24 different specialty areas.

In terms of new areas, construction law officially rolled out in 2016, which had one of the highest numbers of new board certified attorney groups of an inaugural specialty in TBLS history. Also, child welfare law and property owners association law were approved as specialty areas last year by the TBLS Board of Directors and Texas Supreme Court. These new specialty areas have long been requested and are expected to have significant interest when applications roll out this year.

### **Which area has the largest number of attorneys who are board certified?**

Personal injury trial law has consistently been our largest group of board certified attorneys. Our other large groups include civil trial, criminal, family, estate planning and probate, and labor and employment.

### **What do current board certified attorneys—younger and older generations—say about their board certifications?**

The Texas Bar Journal produced great commentary from diversified board certified attorneys on Texas Bar Blog in February 2017. I have also heard many wonderful remarks firsthand, such as: “being board certified is an honor,” “it advances the standards of the legal profession,” “it makes a difference in how other lawyers see you,” “it is official recognition of special competence in a particular field of law,” “it enhances the lawyer’s reputation and credibility,” “it sets you apart from the competition,” and “it helps you become a better lawyer.” I can list several more due to the amount of board certified attorneys we have, but that’s just a sample.





Executive Director Leo Figueroa speaks at TBLS' annual induction ceremony. Photograph courtesy of TBLS.

## **What's the process for board certification?**

To become board certified, an attorney must be an active member in good standing with the State Bar of Texas and must have been licensed for at least five years. Applicants for board certification must devote a required percentage of practice to a specialty area for at least three years immediately preceding application, show the required substantial involvement in the specialty area by providing detailed information concerning the substance and complexity of the tasks handled in the specialty area, complete the requisite number of CLE hours in the specialty area, be evaluated by fellow lawyers and judges, and pass a six-hour written examination. To remain certified, attorneys must apply for recertification every five years.

This level of rigor is needed in the process as it helps to ensure only the most qualified attorneys are allowed to be called board certified.

## **Explain how the standards and requirements for specialty areas are determined.**

Establishing the standards for each specialty area, including revisions to existing standards, is a team effort. Advisory commissions are instrumental in drafting the standards for their respective areas. Proposed specialty area standards are then reviewed by the TBLS board to determine whether proposed standards are ready for submission for public comment. After receiving public comment, the TBLS board then determines whether any changes should be made to the proposed standards before submission to the Texas Supreme Court for consideration. The Texas Supreme Court makes the ultimate determination on all proposed standards. You can learn more about our standards process on our website at [tbls.org](http://tbls.org).

## **Who determines whether an applicant is accepted to sit for a specialty certification examination?**

Applications for specialty certification are first reviewed by the TBLS Advisory Commission, which is composed of board certified attorneys for the applicable specialty area. After a thorough review of each application, the advisory commission recommends to the TBLS board whether each application should be accepted or rejected. The TBLS board then considers each application and the recommendation from the advisory commission before making a final decision on the application.

## **Explain how certification examinations are drafted and who grades the completed examinations.**

Each specialty exam is drafted by a TBLS exam commission, which is made up of attorneys

who specialize in that particular area of law. Appointed by the TBLS board, exam commissions grade essay answers while multiple choice answers are computer graded.

### **Are there educational requirements to continue/upkeep your certification?**

Yes. A certification applicant must complete 60 hours of CLE in the specialty area within the three years immediately preceding application, through December 31 of the year of application. Those who are already board certified must complete 100 hours of CLE in the specialty area by December 31 of each fifth year of certification.

### **What's next for TBLS?**

We have a number of exciting things happening at TBLS. We have begun updating the TBLS website and making it mobile friendly. We are anticipating adding several new specialty areas within the next year or two. Finally, we are always examining our specialty area standards to ensure they remain rigorous and accurately reflect the practice in each specialty area. ■



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# A Judge By Any Other Name

by Former State District Judge  
Stephen Yelenosky,  
June 12, 2017

**A** retired judge accepted an assignment to the district court as a visiting judge. Down the hall a senior judge sat in one county court and a former judge sat in another. In each of the three courtrooms, a litigant objected to the visiting judge. After the court administrator rotated the judges from one court to another, in each court the litigant who had objected to the first judge also objected to the second.

Attorneys know that a litigant is permitted one objection to a visiting judge. With a Central Docket the visiting judges are not assigned to a particular court, and the court administrator can rotate them until each party has used — or has declined to use — the party's single objection. Attorneys also know there is an exception that permits unlimited objections to some judges.

The posted notice of the assignment of a visiting judge must indicate whether the judge is (a) "active" (b) "former" (c) "retired" or (d) "senior." Tex. Gov't Code § 74.053. Which judge is subject to unlimited objections? Most attorneys would answer "b," the former judge.

Prior to 2003, that belief was well founded. The predecessor statute governing objections to visiting judges simply stated, without defining any terms, that unlimited objections applied to "[a] former judge or justice who was not a retired judge ...." 2003 Tex. Sess. Law Serv. Ch. 315 (H.B. 3306). "Former" became shorthand for "not retired," and an attorney knew she could always object to a "former" judge.

In 1997, a mandamus proceeding before the Texas Supreme Court revealed an ambiguity. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997). The visiting judge "was not retired" at what point in time? In *Mitchell Energy*, the visiting judge who had been challenged by objection left office before she was eligible to retire. Over subsequent years of service as a visiting judge, she

earned additional service credits and had retired. The Supreme Court concluded the judge was subject to unlimited objections because the phrase “was not retired” referred to the time the judge left elected office. The court based the holding on textual analysis as well as its determination that the legislature intended “retired” as a proxy for longevity and experience as an *elected* judge. Based on the same understanding of the legislature’s intent, the court interpreted “retired” to mean “vested in retirement.”[1] As a result, “retired” was doubly ambiguous. “Former judge,” however, remained a relatively reliable indication that the exception applied.

In 2003, the legislature amended the statute and changed its purpose entirely. Eligibility for retirement, and therefore experience, ceased to be the touchstone of the statute.[2] The amendment made a judge’s electoral defeat the factor that determined whether a litigant had unlimited objections. Unfortunately, the legislature failed to create a term that would enable litigants to identify those defeated judges. This is not to say defeat at the polls indicates anything about the judge’s competence or fairness. To the contrary, the most likely reason that a judge has lost reelection is that the electorate for that bench has swung from one political party to another. Nonetheless, attorneys usually have a strategic reason to exercise an objection, and they are entitled to know when the exception applies to a visiting judge. Instead of providing that information, the statute mandates the use of identifiers that only serve to confuse litigants.[3]

The 2003 amendment introduced and defined four categories of judges. An **“active”** judge is one who is sitting by election. A **“former”** judge is one who is no longer an elected judge and who has not begun receiving an annuity. A **“retired”** judge is a judge who is receiving an annuity. A **“senior”** judge is a district court or appellate judge who is receiving an annuity and has chosen to sit as a visiting judge.[4]

Accordingly, all of the appellations “former,” “retired,” and “senior” include a judge who lost reelection, a judge who did not seek reelection, and a judge who resigned.

One can only guess why the legislature mandated the notice of irrelevant information about the judge while failing to require notice of the only relevant fact. It may be that the drafting of the categories and definitions was somehow disconnected from the fundamental change in the statute’s purpose, and instead it remained connected to definitions in, and suited only for, the Judicial Retirement System Act. It is also possible the legislature was reluctant to require notice that a judge had been defeated at the polls. Whether due to delicacy or another reason, the current statute leaves it to counsel to find out whether or not a visiting judge lost at the polls.

To return to the anecdote that began this article, with the information given, an attorney can figure out that the “retired” judge had been a county court judge,[5] had served as an elected judge long enough to vest in the retirement annuity, and was receiving that annuity. The attorney also can deduce that the “senior” judge had been a district court judge and was also vested in and receiving an annuity. And it is evident that the “former” judge, who might have been a county or

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district court judge, either has not vested in retirement or has vested but is not yet receiving it. It is not possible to know whether any of the judges can be forced to recuse by a second objection from the same party. Of course, an attorney can ask the judge if she lost reelection, and if the answer is in the affirmative the judge, whatever her reaction, will not be presiding. If the answer is “no,” the judge might wonder why the attorney thought she might have lost an election. An attorney with the temerity to ask should be prepared to persist until the judge gives a responsive answer [6], but any attorney with access to the internet has a better option.



[1] A judge who has vested has met the minimum number of years to be a retiree but might be too young to receive the annuity or might have some other reason, unrelated to years on the bench, for not choosing to receive it.

[2] Another provision did retain experience, as measured by a specified number of months, as a basic qualification to be a visiting judge.

[3] A diplomatic approach might just indicate that Tex. Gov’t Code § 74.053 (d) applies. Lawyers would come to know what that meant, and the judge would not have to face a public reminder of electoral defeat every time he served as a visiting judge.

[4] Instead of the defining the categories this simply, the statute cross-references provisions in the Judicial Retirement System Act. Only by reading those provisions can one figure out that “senior” and “retired” merely differentiate between those who served as state judges and those who served in other judicial positions.

[5] A county court judge can sit as a district court judge in the county where he or she had held office. A district court judge can sit in any trial court in the state, including a county court.

[6] See *Sweetwater Austin Properties, L.L.C. v. SOS All, Inc.*, 299 S.W.3d 879, 882 (Tex. App. 2009) Counsel who *opposed* the objection to a visiting judge seemed to be asking the judge – part of the transcript was inaudible – to confirm for the record that the judge had *not* been defeated at the polls. The judge responded that he was a “Senior District Judge,” which as this article has explained, would not indicate that he had or had not been defeated at the polls. The attorney who had made the objection did not ask for clarification.



**STEPHEN YELENOSKY** is the former State District Judge of the 345th District Court of the State of Texas. He is a mediator, arbitrator, and special judge, and consults on cases in litigation. He also continues to serve on the bench as a visiting judge.



# Spotlight on a New Bar College Member

## Ford W. Harmon

Maddrey PLLC, Dallas

Ford earned his J.D. from SMU Dedman School of Law in 2016 (Cum Laude). He also earned a B.S. in Business Administration with a Concentration in Entrepreneurial Management from LSU in 2013. While in law school, he served as a Chief Student Attorney of the Small Business and Trademark Clinic, served as a Board Member of the SMU Media Company, completed a federal judicial externship in the bankruptcy court of the Honorable Harlin D. Hale in the Northern District of Texas, participated in the SMU-in-Oxford program at University College in Oxford, England, and was a regular member of the Dean's List.

Ford's practice focuses on projects related to business structuring and governance; contracts; intellectual property; and certain—more specific—sub-topics of business law such as laws concerning blockchain-related technologies/cryptoassets; internet and technology law; startup law; and art law.



Outside of work, Ford is actively involved in an array of both professional and non-professional organizations and has taken on a variety of roles within the Dallas community and beyond.

**Why did he join the College?** “The reason I joined the Texas Bar College is rooted in my passion for learning. I am proud to be a member of the Bar College because, in my opinion, the College is comprised of a group of attorneys who are demonstrating a willingness to go well beyond what is minimally required to ensure that they are in a great position to represent each respective client. Regardless if it is curiosity, dedication, or a love of learning that drives an attorney to join the Bar College, the fact that members are willing to put in the effort necessary to meet the requirements is something I admire and have worked to emulate it in my own practice.” ■



# Spotlight on a New Bar College Member



## Helene N. Dang

Foster LLP, Houston

Helene earned her J.D. from the South Texas College of Law in 2002. She practices immigration and nationality law with a focus on employment-based immigration, work visas, permanent residency, and employer compliance.

Helene is Board Certified in Immigration and Nationality by the Texas Board of Legal Specialization. Among her many accolades, she is listed in Best Lawyers in America in Immigration Law this year, Who's Who Legal: Immigration and Houstonia Top Lawyers in 2017, Lawyers of Color's Hot List of Lawyers for the Southwest Region in 2013, Houston's Top Lawyers by H Texas Magazine in 2011 and 2014, and listed as a Rising Star by Texas Monthly Magazine in 2011 and 2012. In 2016, Helene was awarded the Houston Bar Association President's Award.

In her spare time, Helene enjoys "doing anything and everything" with her three children; biking, reading, watching movies. She also devotes much of her time to local community and charitable causes.

Helene is a member of the American Immigration Lawyers Association, the State Bar of Texas Immigration and Nationality Section, Asian American Bar Association, Asian American Bar Foundation, Asia Society, and Houston Volunteer Lawyers. She is also a frequent CLE speaker on immigration topics.

**Why did she join the College?** "I am interested in an organization that promotes continued excellence and professionalism in the legal profession and that offers additional ways for members to give back to the profession and the community." ■

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was established by the College to underwrite projects and services that contribute to promoting professionalism. Through this endowment, the Texas Bar College pledged funding for the Patrick Sheeran & Michael J. Crowley Memorial Trust, an independent entity which assists Texas attorneys and their families affected by substance dependence or mental disorders by ensuring proper treatment. The fund also provides annual scholarships for Legal Aid attorneys to attend the College-cosponsored Summer School Course.

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