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Who Was That Masked Court - An Introduction to Texas' New Special Court of Review

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Who Was That Masked Court?

An Introduction to Texas' New Special Court of Review

Suppose, for some reason we can only dimly imagine, that an attorney set out to find a Texas legal definition of "chicken----." Since West's key number system was not set up with any particular items of profanity in mind, a savvy legal researcher would start with the computers. A nationwide LEXIS search quickly retrieves a surprisingly large number of cases mentioning "chicken----," including the U.S. Supreme Court's groundbreaking ruling that the phrase is "street vernacular" not warranting a contempt citation for its mere mention in court. Unfortunately, the reported case law contains no satisfactory definition of "chicken----."

But wait ... there is one recent Texas decision, *In re Jimenez*. The case explicitly defines "chicken----" as "feces of a species of the poultry variety," citing as authority Justice Ben Z. Grant and Larry L. King's recently published work, "The Kingfish." Overjoyed by this bit of luck, the attorney would hasten to jot down the LEXIS reference: "Supreme Court of Texas, Nov. 16, 1992." Looking more closely, though, one might notice a few strange items. For example, why does the case heading state that there is "no [docket] number in original?" Don't all cases have docket numbers? And since when did First Court of Appeals Justices Murry Cohen and Margaret Garner Mirabal, as well as Chief Justice Ronald Walker of the Beaumont appeals court, get elevated to the Texas Supreme Court — or even serve on the same court of appeals, for that matter?

Reading a little further, sandwiched in with the names of counsel, an inquiring attorney would find a subheading: "In the Special Court of Review Appointed by the Supreme Court of Texas." A quick glance at a handy Bluebook or Greenbook, though, would find no mention of any such court. So what is going on? The answer is that, for the first

By Jim Paulsen
and James Hambleton

time in 75 years or so, Texas has a brand-new (well, almost brand-new) appeals court. And that event, while perhaps not newsworthy to some, deserves at least a little attention in a legal research column.

There indeed is a "Texas Special Court of Review" — off and on, at least — and there has been one since 1987, when the legislature enacted section 33.034 of the Government Code. This special court of review is a weird judicial animal indeed. Its jurisdiction is limited solely to de novo review of decisions of the State Commission on Judicial Conduct. Its three members are chosen by lot on a case-by-case basis. And its decisions are not appealable (save, presumably, to the U.S. Supreme Court).

The procedure seems simple enough. Any judge sanctioned by the Commission on Judicial Conduct can, within 30 days after the sanction, request that a special court of review be appointed. The Chief Justice of the Texas Supreme Court draws the names of three court of appeals judges — excepting only the court of appeals district within which the affected judge sits. This special court of review selects a hearing site, hears testimony, and renders a decision.

While some aspects of the court's operation are set out by statute, other matters are touched upon only vaguely or omitted altogether. For example, the statute states clearly that there is no right to a jury trial and no

right to appeal. The statute also requires that hearings be public, but sets out no procedures for notifying the public. And procedure is governed only by the statement that, except as otherwise provided, "the review is governed by the rules of law, evidence, and procedure that apply to civil actions."

While the writers of this column have not yet witnessed one of these special courts in operation, some participants (who understandably wish to remain anonymous) report that the hybrid nature of the proceeding can get a bit confusing for all concerned. For example, are evidentiary rulings made by the presiding justice, by the entire panel, or by the presiding justice with instant interlocutory review by the other panel members? And does the trial court custom of letting the lawyers do the questioning or the appellate practice of freewheeling questions from the bench prevail?

The ad hoc nature of these courts also raises some peculiar questions not answered by statute. The legislature — budget-conscious as always — stated that "no additional compensation may be paid" to judges for service on these special courts. In a typical case, however, the court's members may be drawn from as many as three different courts of appeals. They will always be trying a judicial conduct matter arising in another court of appeals district. So who will pay for travel expenses for trial? Court of appeals travel budgets are tight these days. If the randomly-chosen judges are expected to do so, then the legislature has created a new Texas lottery in which everybody loses.

Of course, judges are only the tip of the judicial iceberg. The statute makes no provision whatever for court clerks, reporters, bailiffs, or courtroom space. Nor does it make any provision for retention of records. The statute does provide that hearings are to be "held at the location or locations determined by the court." But where does one file documents? And with whom? There's not even a budget for a file stamp.

All these questions are compounded by the fact that there is no judicial "learning curve" on this court. Once a randomly-selected panel has worked its way through ad hoc solutions to these little difficulties and managed to issue an opinion, it dissolves. Another randomly-selected panel is then free to reinvent the wheel in the next case.

Assuming that these problems are surmounted (to date, apparently by a healthy degree of cooperation between the parties and the judges), the court will issue an opinion. And here, from a legal research

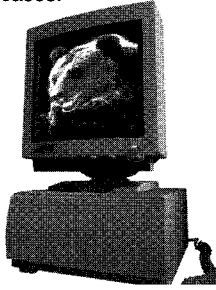
While some aspects of the court's operation are set out by statute, other matters are touched upon only vaguely or omitted altogether.

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point of view, things really begin to get interesting.

As of this writing, the special court of review has issued four decisions. Each has its own peculiarities. In one, *In re Lowrey*, the court took the statute's directive to issue a "decision" literally. The court affirmed the Commission on Judicial Conduct with virtually no written reasoning. In another case, relating to Austin Court of Appeals Justice James Brady, the court wrote a lengthy opinion, handed copies of the opinion to the parties, and went home. Unfortunately, nobody thought of sending a copy to West, or to any other legal publisher.

The third decision, *In re Sheppard*, is the first "reported" opinion by a special court of review. The opinion is printed in volume 815 of the South Western Reporter. At the beginning of the bound volume, West's editors even suggest a cite form, "Tex. Spec. Ct. Rev." That's the good news. The bad news is that the opinion cannot be found on

LEXIS. Nor is West's version free of error. The case is listed with a Fourth Court of Appeals docket number, apparently because two members of the panel (including the opinion's author) sit on the San Antonio appeals court. To make things worse, this docket number duplicates that of another reported San Antonio opinion, creating a problem that docket numbers originally were invented to avoid.

The last opinion to date, and the one with which this column begins, is reported both in LEXIS and in West's system, though LEXIS apparently has not yet figured out which court issued the opinion. Neither version has a docket number, which arguably is correct, since this court by its nature never has more than one case on its docket. Nevertheless, it would be nice if some docket number (perhaps just a continuation of the docket number assigned the original case before the Commission on Judicial Conduct) were to be assigned. It would make finding the cases a little bit easier.

The Texas Supreme Court has taken a preliminary step toward filling some of the gaps left in the basic statute. In the course of promulgating procedural rules governing the removal of judges in May 1992, the high court set out standards governing the publication of special court of review opinions. For the most part, the rules parrot the Rule 90 criteria for publication, though a few odd twists result.

For example, Rule 90 provides for publication of a court of appeals opinion that "establishes a new rule of law [or] alters or modifies an existing rule." The copycat rule for special courts of review provides for publication of opinions when the court "establishes a new rule of ethics or law [or] alters or modifies an existing rule."

Notwithstanding the language of the rule, let us hope that in the course of reviewing a judicial sanction a special court never "establishes, alters or modifies" any rules of ethics, much less publishes the results. Most of us would think of this as a task for the Texas Supreme Court.

Typos aside, it is worth noting that the rule governing publication of special court opinions is more liberal than the existing general rule for appeals court opinions. There is no prohibition against the citation of unpublished opinions as authority. The rule also provides that if the author of any opinion — majority, dissenting or otherwise — believes that the opinion should be published, all opinions in the case should be published.

One final, perhaps ironic, aspect of the Special Court of Review deserves mention. Judging from the date of the statute and press comments at the time, the special court statute may be a reaction to complaints by two Texas Supreme Court justices publicly censured by the Commission on Judicial Conduct that they were denied any effective judicial review of the charges. If this is true, the statute leaves at least one big loophole. The statute just is not drafted with the Texas Supreme Court in mind.

How, for example, could one determine which judicial district a supreme court justice is from? For that matter, how free would any panel of intermediate appeals court justices feel to criticize a justice who regularly rules on appeals from their courts? And what if, heaven forbid, the chief justice of the Texas Supreme Court is ever placed in a position of drawing by lot a panel to preside over his or her own appeal on a misconduct charge? Would the entire appellate judiciary recuse itself? Or perhaps the chosen judges, like a modern-day trio of Lone Rangers (but without a Tonto among them), would sit masked through trial, then ride into the sunset, leaving only the silver bullet of a per curiam opinion to baffle the admiring town-folk.... Or, then again, maybe not.

Jim Paulsen is an assistant professor of law at the South Texas College of Law. He earned his J.D. at Baylor University School of Law and LL.M. at Harvard Law School. James Hambleton is a professor of law and director of the law library at Texas Wesleyan University Law School. He earned a J.D. at George Washington University and MLS at the University of Michigan. Cris Browning, a second-year student at South Texas, assisted in the preparation of this column. The legal research column is a semi-regular feature of the Texas Bar Journal. The writers welcome comments and suggestions for topics to be covered.

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What A Great State!

By Karen Johnson



Texas, as everybody knows, is a big state. It seems like over the last several months I've seen it all. The stereotypes are big — big mosquitoes, big hats, and big oil wells. Although I have traveled around this state enough to know that the stereotypes are often pretty close to the truth, I have also seen lawyers struggling to make a living in an economy that's not quite well in some areas of the state. It has been a pleasure to be invited to talk to small and big bars about what the State Bar is doing for them and what else it can do. I have also been talking about the advertising referendum and why passing it is good for the profession. I've picked up new ideas for services for small or solo practitioners and heard of problems, challenges, and opportunities faced by Texas lawyers. I also have first hand experience of the big hearts, genuine hospitality, and love of the law possessed by Texas lawyers.

I have eaten barbecue, chicken fried steak, and incredible desserts at local bar meetings throughout the state. I have visited with lawyers about old times, mutual friends (sometimes the state really does *not* seem that big), and the ever-changing weather. But, more to the point, we have discussed issues of importance to the legal profession.

As executive director of the State Bar, I have asked for input about what the State Bar is doing, can do, and should do. Texas lawyers are not shy — I have received lots of comments and valuable advice. Although the state is incredibly diverse and lawyers' practices vary significantly, there are many similarities in the comments I hear.

Top on the list is lawyer image — What can the State Bar do and what is it already doing? This was a primary concern to me when I became executive director and is still an issue we must continually struggle to address. A recent ABA study showed that when the public talks about lawyer discipline for unethical behavior it is talking about more than the small number of dishonest lawyers that we spend a great deal of money trying to get out of the system. The public is concerned about those lawyers whose egos and arrogance have overtaken them or the lawyer who is not organized and forgets what he or she promised to do or does not return phone calls. Those "mistakes" give all lawyers a bad image. Client relations problems are something we can correct. The State Bar is addressing this in many ways. One way is the new CLE pre-

sentation that the State Bar offers live and on video not only in the urban areas but in partnership with smaller local bars across the state. It is called "How to Thrive...Not Just Survive in a Solo/Small Firm." Practical tips are included about how clients want to be treated and what we can do to ensure client satisfaction — I call this "deskside" manner. We must do more than good work; we must also take care of clients other needs. Studies show that the way a client is treated by the staff and lawyer plays a significant role in the perception of the quality of services received.

Another way to help change the public's negative perception of lawyers is to publicize the good works that lawyers have done and continually do for society. In my travels this year, my faith in the legal profession has been strengthened. I am proud to be a lawyer when I hear about projects developed and implemented by lawyers. Many times I hear about lawyers assisting clients who need help but cannot afford the fee — they get help — for free. At those times I wish I could let the world know what I know about our profession. The State Bar continually tries to get that word out about lawyers. We have press conferences, send articles and releases, and visit with editorial boards across Texas. Unfortunately, the media can report 20 stories about the contributions lawyers make, and one sensational aberration and the public will remember the horror story. We must remain vigilant in ensuring that we ourselves and lawyers in

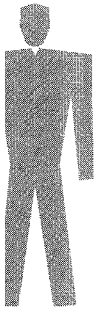
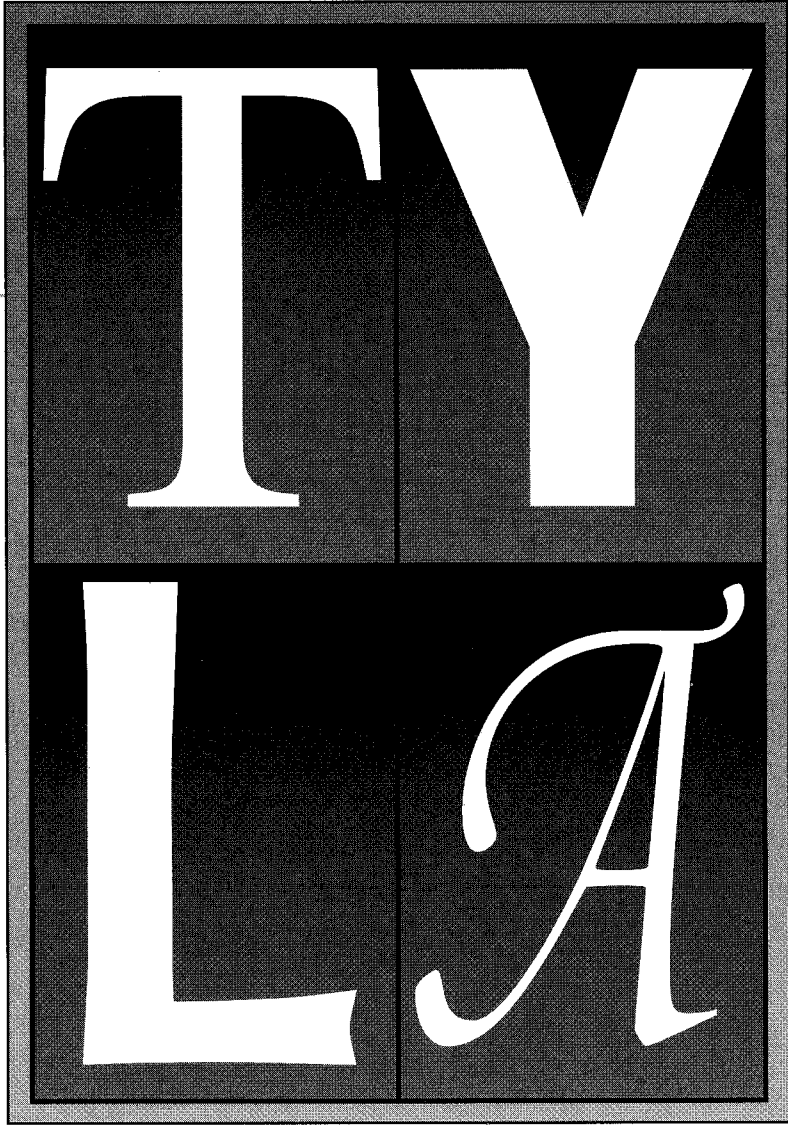
our communities maintain the highest ethical standards.

Another concern I hear is that lawyers want more information about State Bar finances. We have found, over the last three years, new and cheaper ways of doing an even better job of serving Texas lawyers. This year, the proposed budget will be sent to local bars and to any lawyer who wants a copy. Staff will be available to visit with anyone seeking further explanation. I truly believe that questions can be answered and that lawyers will be satisfied with what they hear. If the membership does not like a State Bar service or project, the board certainly needs to hear it. The bar is fiscally sound and will go at least the five years promised by leadership before asking for a dues increase. A longterm plan regarding bar finances is being undertaken by the State Bar Board to ensure that lawyers feel comfortable supporting future proposed increases. As you know, the grievance system is expensive and over the last few years the majority of budgetary increases have gone to that system.

I have seen big mosquitoes. I have eaten dinner while being eaten as dinner. I know some people who must have big oil wells but have demonstrated their willingness to share their time and wealth. I have traveled many of the large interstates and smaller roads of the state. I am sure I have been to most every airport in this state. But most of all, I have been inspired — by lawyers' concern, thought, and willingness to communicate. I believe that with lawyers' great philanthropic minds and true concern for society, we as a profession can make the world a better place. You and I know that lawyers genuinely care about our communities and are genuinely concerned about the public's perception of our profession. It is up to us, not just our state and national lawyer organizations, to work each day to uphold the high traditions of ethics and service we have set for ourselves.

In closing, I would like to thank all of you for your input and support throughout the last year. Please do not hesitate to call the State Bar if you have a comment, idea, or suggestion. Write me at Executive Office, P.O. Box 12487, Austin 78711; call 1/800/204-2222; or fax 512/463-1475. And if I can work it in my schedule I'd love to come visit with you personally about your concerns and what we can do for you.

Happy holidays from the State Bar staff!





*Year-Round Greetings from
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To Thank You for your help and assistance this past year,
I would like to share this poem written by Michael Thomas:

ACCENTUATE THE POSITIVE

Instead of pointing out the bad; accentuate the positive.
No longer wish for what you had; just free yourself to give.
So many things we just don't see; so much just passes by.
We get caught up in one thing: me; and neglect a friendly "Hi!"
We've missed the most important things; the ones that mean the most;
the joy and love a family brings; it's this that we should boast!
Let's thank the Lord for what we've got; no more complaints for what
we've not . . . There's aunts and uncles; grandfolks too.
There's cousins, children; and friends like you.
We've got our parents; and what's more;
Brothers and sisters are here galore!
What else could top this lovely list?
How 'bout the spouse with the loving kiss!
We've got what others wish they had; what some folks only dream of.
So next time think before you're sad; think of all this love.
You say you're feeling not so well; here's something you can do:
Pray for the man whose pain won't quell, be thankful it's not you.
You used your hands and legs today; and thoughts rushed through
your head:
Then praise the Lord this very day; you're living and not dead!
And so I give my thoughts to you; to carry on your way,
In everything that you may do; or in case I forget to say,
You all mean so much more to me; than words could make a point of;
And to each and every one I see; it's you that I do love.

I am looking forward to another pleasurable year working with you.

May you and yours enjoy a very Happy Holiday Season and a
Prosperous New Year

&

May God's Love and Peace be with each of you,

Schatzie Mathews

SCHATZIE MATHEWS

*Peace on Earth
Goodwill to All*



*T*he TYLA section of this month's *Bar Journal* is dedicated to the topic of hate crimes. I encourage you to read these articles to learn more about this appalling and widespread problem. The authors are knowledgeable, the articles are enlightening, and the problem is real.

The antithesis of the hate crime mentality of malice and prejudice is found in the holiday spirit of charity and goodwill. This season encourages a renewed interest in caring for those in all walks of life and respecting those who hold different values. My hope is that we will do our part in the coming year to inspire the holiday spirit of goodwill toward *everyone*, regardless of our differences.

*TYLA President Dan Malone,
officers, directors, and staff of TYLA*

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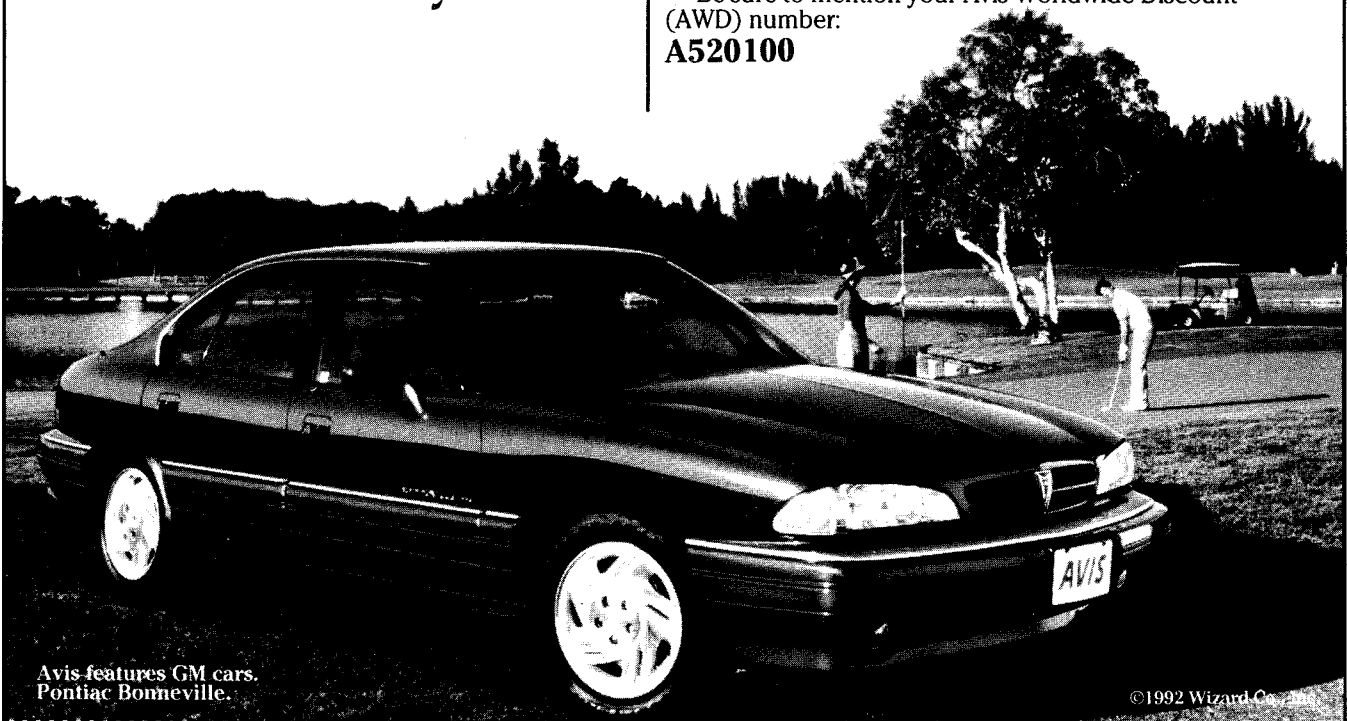
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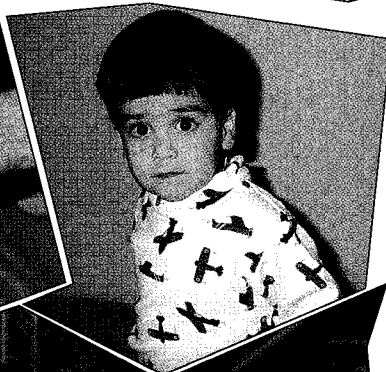
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A Future of Hope — Not Hate



"D

addy, please don't make me go to that school!" the five-year-old girl cried.

"What's wrong with that school? You'll be in the first grade and a lot of your friends will be going there," her father said.

"That's where all the Mexicans go!"

"But honey, you *are* Mexican."

Hate is learned — children aren't born with it. There comes a time in almost every child's life when he or she learns about hate first-hand. It might be as innocuous as being teased for having red hair. It might be as devastating as being attacked for having dark skin. Why is "different" threatening? Why, on the verge of the 21st century, is hate crime on the rise? Is life without hate an unattainable utopia?

Do we leave a legacy of hate — or a legacy of understanding? This is a question that only our children will be able to answer.

The *Bar Journal* presents essays highlighting differing perspectives of the hate crime issue and the constitutionality of legislation regarding such crimes.