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# The "Official" Texas Court Reports: The Rest of the Story

By James Hambleton and Jim Paulsen

In the January 1986 issue of the *Texas Bar Journal*, this column recounted the checkered tale of the official Texas court reports, from the birth of the *Texas Reports* in the first State Legislature, to their mysterious death at the hands of the Legislature in 1963, and their equally mysterious resurrection by the most recent session, in the form of the Texas Government Code. The authors have since been deluged with reader mail on the subject, and have decided to share excerpts from both letters.

Chief Justice Calvert was able to shed considerable light on the death in 1963 of the *Texas Reports* and *Texas Criminal Reports*. As the reader may (but probably does not) recall, funding for the official court reports ceased in 1963. On the other hand, legislation that would have given the Supreme Court and Court of Criminal Appeals power to designate any publication (i.e., West Publishing Company's *Southwestern Reporter*) as the "official" source for opinions failed to pass. As a result, the state was left with the anomalous situation of an official source for court opinions mandated by statute, but no money for printing or salaries.

As Chief Justice Calvert explains it, interest in abolition of the official court reports was brought into focus in 1961 by the decision of L.K. Smoot, long-time official reporter of the Texas Supreme Court, that it was time to retire. Smoot, who had served as reporter since 1932, went out with a flourish, announcing: "I am 86 years old, have been with the court 69 years, and don't want to stay here too long like I have seen some of the judges do."

L.K. Smoot's retirement led the Texas Supreme Court to reexamine the necessity for official reports. As Chief Justice Calvert recalls the events:

"I had long since decided that publication of the Supreme Court Reports and the Texas Criminal Reports was a

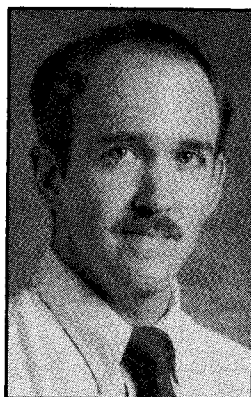
needless waste of public funds; however, to confirm my suspicion I sent out letters to all district and appellate judges inquiring whether in their research they used those official reports or West's *Southwestern Reporter*. As I recall, the replies were virtually unanimous in reporting use only of the *Southwestern Reporter*. As an additional precaution, I sought distribution information from the Secretary of State, whose duty it was to dispose of the printed reports. I was advised that free books were sent to county and district judges, and that books were available for purchase by lawyers and law firms, but that only a very few big law firms bought them."

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*In an earlier article, we traced the history of the Texas Reports. The authors have since been deluged with reader mail on the subject, and have decided to share excerpts from both letters.*

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As the earlier article explained, this impetus to eliminate the official court reports took concrete form in Senate Bill 123, introduced in 1963. This bill passed the Senate without serious opposition, but hit a brick wall in the House of Representatives. The official records of the Texas Legislature reveal no cause for the demise of S.B. 123. As Chief Justice Calvert explains it, though, the House of Representatives was persuaded to kill S.B. 123 out of concern for the reporter of the Texas Court of Criminal Appeals, who would have been out of a job had the bill passed. The reporter who replaced Smoot in the Texas Supreme Court, by the way, was hired with the understanding that the court was in the process of trying to eliminate his position.



James Hambleton, director of the State Law Library, writes and lectures on Texas legal research. He is serving as president of the Southwestern Association of Law Libraries. Hambleton earned his B.A. from Middlebury College (Vermont), his A.M.L.S. from the University of Michigan, and his J.D. from George Washington University.



Jim Paulsen, an associate with the firm of Liddell, Sapp & Zively in Houston is a former briefing attorney for Texas Supreme Court Justice Ted Z. Robertson. He is a 1984 cum laude graduate of Baylor Law School, where he served as editor in chief of the Baylor Law Review.

One question still remains. If the Legislature did not eliminate the official court reports, why did funding cease? Again, Chief Justice Calvert offers an answer: Despite the failure of the House of Representatives to get rid of the official court reports, Gov. John Connally's office was convinced they should go. The governor exercised his line-item veto power, and funding for printing and salaries stopped. An accompanying explanatory note read:

"The Appellate Court Reports are a duplication of a service already provided by other court reports which offer a quicker and more usable reference for use of State Agencies. Even if this service were necessary the funds appropriated for the printing and distributing of the reports are inadequate to accomplish the full purpose."

As Justice Calvert puts it, the official reports were now "comatose." Why did a subsequent Legislature not pull the plug? Some moves were made in 1965 to designate the *Southwestern Reporter* as the "official source for court opinions." As Chief Justice Calvert recalls it, some fears were expressed that this would give West Publishing Company a monopoly, with the result that they could raise their prices at will. As a result, the move to clean up the statutes died. Of course, West Publishing Company already had a practical monopoly on court reports in 1965. And as any law librarian can testify, the presence of the official court report legislation on the books has not deterred West from raising prices at will ever since. See, e.g., Hambleton, *West's Texas Cases: A good New Product, But at a Price*, 46 Tex. B.J. 1318 (1983).

Chief Justice Calvert's explanation does dispel much of the mystery surrounding the "death" of the official court reports in 1963. But what of their resurrection in the Texas Government Code, passed by the most recent Legislature? Again, the authors are grateful to a reader, Steve Collins, assistant director of the Legal Division, Texas Legislative Council, for some valuable explanation.

To recapitulate, sections 22.008 and 22.104 of the new Texas Government Code mandate official publication of the decisions of the state's two high courts. The dead-letter statutes, in essence, were spruced up and placed right in the middle of the new Code.

One of the goals of Texas' continuing codification program is to eliminate "repealed, duplicative, unconstitutional, expired, executed, and otherwise ineffective provisions." Tex. Gov't Code §1.001(b)(3). Since the provisions for official court reports have not been funded for 22 years or so, the authors raised the question of why the statutory provisions were not considered "ineffective."

Collins' letter clarifies the reasons behind the decision of the Texas Legislative Council to include the court reporter provisions in the new Government Code. Explaining that there is a difference between an "ineffective" statute and a "legally ineffective" statute, he adds:

"However quaint, curious, and anomalous it may be for the law to require publication of an official reporter, but for the Legislature not to fund it, it is nonetheless the law and does have at least one continuing purpose: should the Legislature choose to fund these reporters, it may really resurrect them with a simple appropriation. To repeal the statute as ineffective would certainly have substantive effect; since any appropriation requires pre-existing statutory authority. ... The Legislature under

those circumstances would both have to enact a law and make an appropriation in order to restart the series.

If you wish, conceive of this law as Sleeping Beauty. Prince Charming, i.e., the Legislature, may awaken her with merely a kiss. If she were truly dead, he would have to provide for or await her physical rebirth. If you will pardon the pun, the difference is substantial."

Certainly, judgment calls must be made by the Texas Legislative Council. Their statutory mandate, after all, is not a model of clarity. See Tex. Gov't Code §323.007. One may question why a statute for which no funding has been provided for many years is retained, on the chance that the Legislature may one day change its mind, while a statute declared unconstitutional may be dropped from a code, despite the fact that our state Supreme Court has also been known on occasion to change its mind.

Nonetheless, Steve Collins deserves thanks, not only for demonstrating that there was indeed a method underlying the apparent madness in the Texas Government Code, but for contributing perhaps the kindest metaphor ("Prince Charming") used in conjunction with the Texas Legislature, at least in recent history. Collins and Chief Justice Calvert have done much to dispel the confusion surrounding the murky history of Texas Official court reports.

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# The State Commission On Judicial Conduct Annual Report To the Legislature for Fiscal Year 1985

*(Editor's Note: The Texas Government Code requires that the Judicial Conduct Commission's Annual Report be published in the Bar Journal. See Tex. Govt. Code Ann. § 33.005 (Vernon 1986). Herewith is the 1985 annual report).*

## Role of the State Commission on Judicial Conduct

With the addition of retired judges and masters during FY 1985, the State Commission on Judicial Conduct (hereinafter called Commission) assumed jurisdiction over more than 3,000 judicial officers in Texas.

The Commission's primary role is threefold:

- \* to preserve the integrity of all judges in the state;
- \* to ensure public confidence in the judiciary; and
- \* to encourage judges to maintain high standards of both professional and personal conduct.

In obtaining those objectives, the Commission in FY 1985 disposed of 390 complaints, a 15 percent increase over 1984. A variety of sanctions were employed, ranging from public reprimands to private admonitions. In nine cases, judges chose to resign or retire rather than encounter further Commission action. Overall, the Commission ordered sanctions in 20.9 percent of complaints in 1985, compared to 14 percent in 1984. In other instances, the Commission dismissed cases wherein the judge initiated corrective action or improved procedures or policies.

Those who currently come under Commission purview include justices on the Supreme Court of Texas and the Court of Criminal Appeals; justices on all Courts of Appeals; judges on District Courts, including retired judges and masters; judges of County Courts and County Courts-At-Law; Justices of the Peace; and Municipal Judges.

## Authority for Operation of the State Commission on Judicial Conduct

The Texas Constitution, Article V, Section 1-a, and Vernon's Texas Civil Statutes, Article 5966a, are the source of authority under which the Commission operates.

It was in 1965 that the people of Texas approved the Constitutional Amendment that first created the Commission, known at that time as the Judicial Qualifications Commission. Texas was the second state to perceive the need of an agency to which the public could turn in the event of judicial misconduct. Now, every state in the union has such a judicial disciplinary agency.

Through the past two decades, additional Constitutional

Amendments have changed the name of the Commission, and have expanded its jurisdiction and enlarged its powers. In 1984, Texans authorized the inclusion of retired judges and masters in Commission jurisdiction, expanded disciplinary alternatives available to the Commission, and clarified procedures for removal. Representational makeup of the Commission itself was also expanded to include a county court-at-law judge and a municipal judge in the group of citizens, lawyers, and judges who comprise the Commission. The Constitutional changes added three categories of improper judicial conduct: the willful or persistent violation of the rules promulgated by the Supreme Court of Texas; incompetence in performing the duties of office; and willful violation of the Code of Judicial Conduct. The public's attitude toward the work of the Commission was evidenced by the fact that this amendment passed by the largest majority of any of the several amendments offered. The amendment affecting the Commission became effective on Jan. 1, 1985, four months into FY 1985.

Under the provisions of the Constitution and the statute currently in operation, the Commission may dismiss a complaint or may order a public or private warning, a public or private admonition, or a public or private reprimand. A judge may be required to undergo physical or psychiatric examination, or to obtain additional education. A judge charged with a felony criminal offense or a misdemeanor involving misconduct in office may be suspended with or without pay. The Commission may seek the removal or censure of a judge. Subpoena power is provided to enable the Commission to carry out its work.

Delineated as cause for the removal of a judge is willful or persistent conduct that is clearly inconsistent with the proper performance of duties or casts public discredit upon the judiciary or the administration of justice. Improper conduct includes, but is not limited to: failure to execute the business of the court in a timely manner, willful violation of a provision of the Texas Penal Code or the Code of Judicial Conduct, persistent or willful violation of the Rules of the Supreme Court of Texas, and incompetence in the performance of the duties of office. The Commission also condemns the actions of judges who abuse the authority inherent in their positions or who are rude or disrespectful to those appearing in their courts.

The Commission does not have authority to change the decision of any court or to act as an appellate review board. The Commission does not give legal advice. The Commission does not act upon allegations against a judge for reaching a legal decision, making findings of fact, or applying the law as the judge understands it.

Emphasized in both the Constitution and the statute is a requirement for confidentiality concerning the work of the Commission, based upon the Commission's mandate to uphold the public's confidence in the judiciary.

## Procedures of the State Commission on Judicial Conduct

The Constitutional and statutory provisions described in the section on "Authority," together with the Rules and Regulations for the Removal or Retirement of Judges promulgated by the Texas Supreme Court, make up the procedural framework within which the Commission operates.

A file is initiated by a written complaint. Since the Commission's work is confidential in nature and not widely publicized, a telephone inquiry is often the first step in filing a complaint. If the caller has possible grounds for a complaint, he is sent an outline of policies and procedures, together with an affidavit form. While the complaint may be sworn to, the Commission also considers letters and news clippings as the basis for opening a file. Occasionally, the Commission itself may be the complainant in a case where the actions of a judge are reported by the news media and appear to be possible misconduct, or appear to bring discredit upon the judiciary.

When a complaint is received, a file is established and reviewed by the executive director. The case is analyzed and assigned to a staff attorney-investigator, who likewise reviews the allegations. That preliminary screening determines whether further investigation is expedient. Many complaints are in reality against law enforcement officers, corrections officials, lawyers, clerks, or even the federal judiciary. In these cases, the complainant is notified that the Commission has no jurisdiction. In other cases, the complainant may be disgruntled with a judge's decision, particularly in highly emotionally charged litigation such as custody or criminal trials. Such matters are properly matters for appeal, and the judge's good faith decision, even if it is in error, is not judicial misconduct. In all cases, the complainant is notified by mail immediately that his complaint has been received; if it is vague in its allegations, the complainant may be asked for more specific detail, or staff may request additional documentation.

If, after preliminary screening and investigation, it still appears possible that misconduct may have occurred, the judge may be requested to respond to specific inquiries in writing. The judge may be requested to provide legal authority for his actions, or to state whether the allegation is accurate, and if not, in what way it is not accurate. Facts may be further investigated on-site, or through telephone interviews, or both.

Each complaint is briefed by staff and presented to the Commission as a whole when it meets in Austin every other month. The Commission may at that time request additional investigation, or it may ask that the judge provide further information. The Commission may also dismiss the case at its first presentation, in which case both the judge and the complainant are so advised.

The judge may be invited to appear informally to have dialogue with the Commission, or to explain his actions. If a judge elects to appear, the meeting with the Commission is closed, unless the judge chooses to open the meeting. The judge may invite friends or family, or legal counsel if he wishes. If the judge wishes to introduce the testimony of others, it must be written. The judge may testify only under oath.

In a situation where a judge is suspended because of pending criminal charges, the Commission may decide to postpone action on the matter until after the conclusion of the criminal proceedings. At that time, the Commission would then undertake its own examination of the situation. The Commission would not seek to determine the guilt or innocence of the judge beyond a reasonable doubt, but rather whether, by a preponderance of the evidence, the judge had brought discredit upon the judicial system by his actions or engaged in willful or persistent conduct which is clearly inconsistent with the proper performance of his duties.

The Commission may choose to dismiss a case for a variety of reasons — lack of available proof, outside the jurisdiction of

the Commission, the judge acted within his discretion, or that the judge's actions did not rise to the level of judicial misconduct. Sometimes, corrective action is taken by the judge which will avoid the imposition of sanctions.

A private admonition is the least onerous of all sanctions that may be imposed by the Commission. An admonition is a letter to the judge suggesting that another action may be a better solution to the particular situation.

A private warning is stronger than an admonition, and a private reprimand is stronger still, spelling out a finding of judicial misconduct, and enumerating the reasons that such conduct is improper or brings discredit upon the judiciary or the administration of justice.

A public admonition or warning would be the same, except that a public admonition or warning would be released to the press.

Most serious of all these sanctions is the public reprimand, which is issued when the Commission believes that a judge has committed serious misconduct, and the judiciary would be best served by a public statement of the judge's misconduct.

Should the Commission determine that formal proceedings for removal are in order, the veil of confidentiality is lifted upon the convening of a formal hearing, and the hearing would be public. The Commission would seek the appointment of a master by the Supreme Court. After a public hearing, with the master presiding, the master would make findings of fact. The Commission would then dismiss, censure, or forward the findings with a recommendation for removal to the Supreme Court. In the event of a recommendation of removal, the Supreme Court would appoint a seven-judge tribunal made up of justices from the Courts of Appeal throughout the state. The tribunal is chosen by lot by the Chief Justice of the Supreme Court. Appeal from a decision of the tribunal would be directly to the Supreme Court, which would consider the case under the substantial evidence rule.

Judges who are removed or retired by the Supreme Court may be prohibited from holding judicial office in the future.

In every case, the complainant is notified of the conclusion of his case. The statute also specifies and limits the manner in which a complainant may be notified: the complaint has been dismissed; appropriate action has been taken, the nature of which may not be disclosed; or, formal proceedings have been instituted. In situations where a public sanction has been taken, the complainant is provided with a copy of that public document.

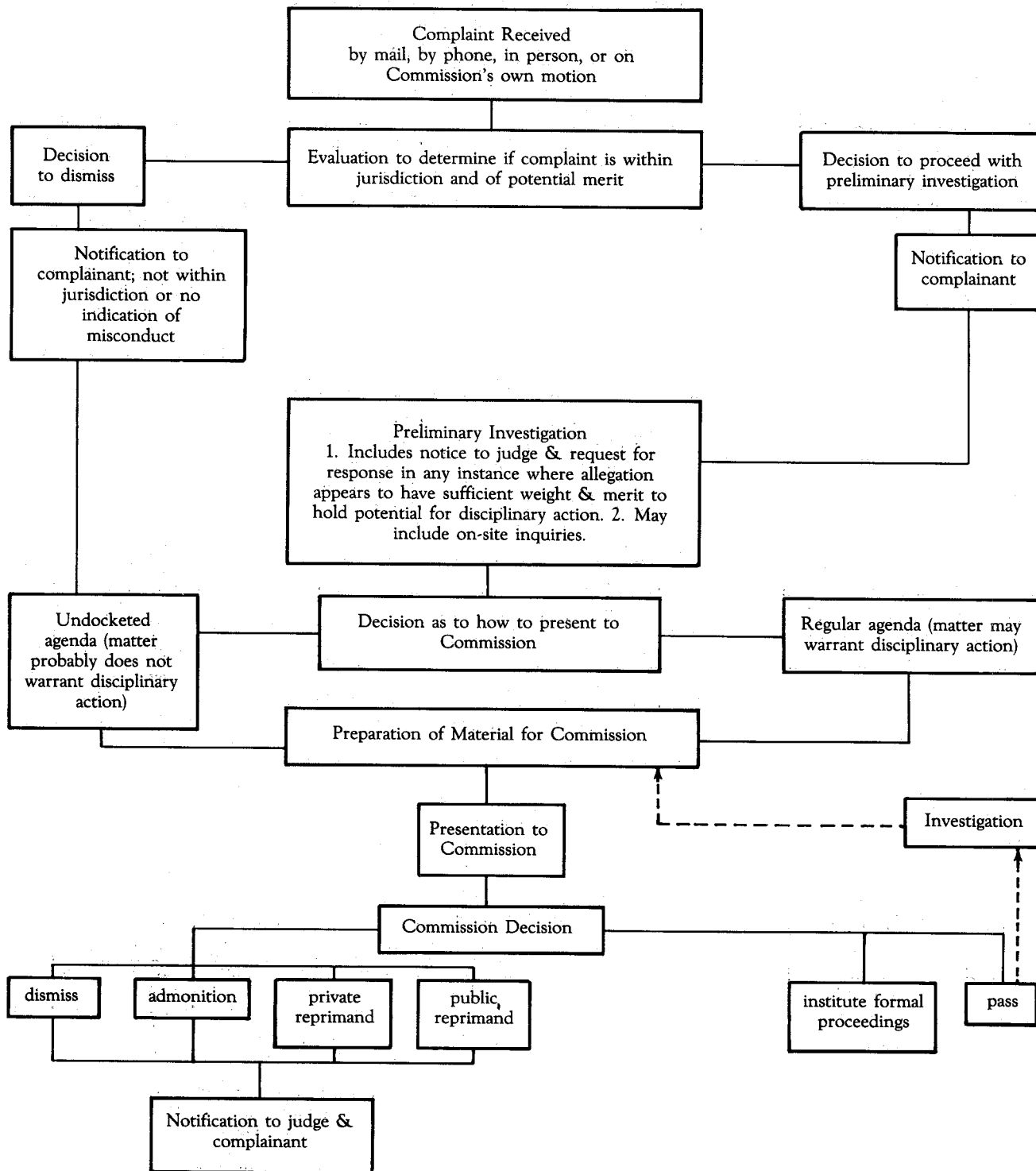
Commission procedures are mapped in the flow chart, Exhibit A, on the following pages.

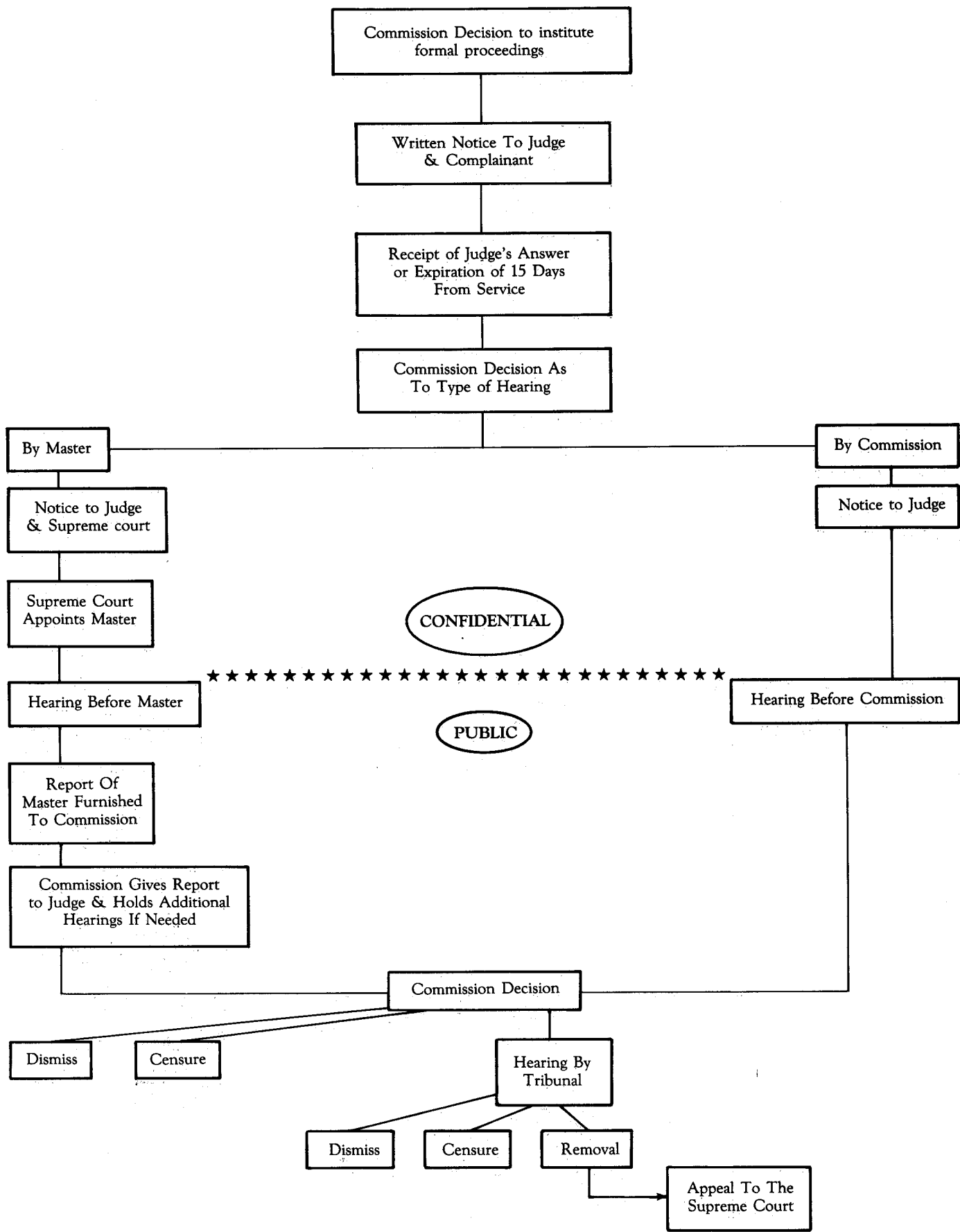
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## COMMISSION PROCEDURES





## Annual Statistical Data

In FY 1985, the Commission disposed of 390 cases, a 15 percent increase over the 343 disposed of during FY 1984. Of the cases disposed of in FY 1985, the Commission ordered sanctions in a total of 77, or 20.8 percent, an increase of 6.8 percent over the previous year. In 1985, 20 judges appeared informally before the Commission.

Total Caseload	390
Dismissed	293
Corrective Action	18
Private Admonishment	27
Private Warning	3
Private Reprimand	6
Public Reprimand	9
Suspensions	5
Monitor	5
Resignation/Retirement*	9
Pending	15

\*Judges counted in this category resigned in lieu of further Commission action. The Commission appreciates that the majority of judges who resign or retire do so to conclude an honorable judicial career.

## Examples of Allegations of Improper Conduct

That the judiciary shares the foibles of all humanity is amply demonstrated by a scanning of the typical and atypical complaints received in the offices of the Commission. Without revealing specifics, the following examples of judicial misconduct were among those reviewed by the Commission in FY 1985:

- A judge advised a defendant to make good on bad checks or go to jail, when the cases on those checks were not before the judge.
- A judge used his judicial office to intimidate an opposing litigant in a civil case in which the judge represented one of the litigants.
- A judge ruled in a case in which he and his son had a financial interest.
- A judge refused to answer questions before a judicial proceeding on the grounds that his answer might incriminate him.
- A judge solicited a litigant to provide beer for a party.
- A judge accepted a bribe.
- A judge acted on a matter that was properly before another court.
- A judge failed to handle the business of his court, including accounting for county funds paid through his court.
- A judge testified, as a character witness, without subpoena, in behalf of a friend in a criminal trial.
- A judge abused his power to arrest.
- A judge was acting as a collection agency for a business in violation of statute, and ordered a litigant to bring his money or go to jail.
- A judge aired his dispute with another public official in the press.
- A judge traded sexual favors for a favorable verdict.
- A judge called a district attorney a liar.
- A judge held a litigant in contempt for threatening to complain to the Commission.
- A judge was drunk on the bench.
- A judge got into an altercation involving fisticuffs.
- A judge had a litigant arrested for contempt when the

litigant failed to pay a money judgment in a civil case.

- A judge harrassed a witness the day after a trial with threats of prosecution for perjury.

## Examples of Judicial Conduct Considered Proper

Often, emotionally involved litigants experience difficulty in determining the difference between judicial error and judicial misconduct. The limits of judicial misconduct are drawn by rules of court, the statutes and codes of ethics under which judges must conduct the business of the court; judicial error, on the other hand, is a decision that a reviewing tribunal determines was wrong. A "wrong" decision is not misconduct.

Without revealing specifics, the following types of conduct were considered by the Commission not to be misconduct in 1985.

- A judge ruled a death a suicide when some evidence of foul play was noted.
- A judge refused an *ex parte* conversation with a litigant.
- A judge did not require prepayment of court costs in gold.
- A judge refused to dismiss a case on grounds that it had been filed by an out-of-state corporation.
- A judge granted managing conservatorship of a child to a parent when some evidence had been introduced that the parent had abused the child.
- A judge refused to rule in a question involving title to land when his court had no jurisdiction over title to land.
- A judge would not instruct a criminal defendant in how to be an effective *pro se* attorney.
- A judge was conducting the business of his court in his commercial business establishment when the county did not provide him a court room or clerical assistance.
- A judge granted a summary judgment on issues of law, thus denying a litigant his "day in court."
- A judge refused to listen to several witnesses who would testify to the same fact.
- A judge believed a witness who was lying.
- A judge was staying in another county but intended his county of residence to be the county where he served.
- A judge entered a one-sided property judgment in a divorce.
- A judge was involved in a civil dispute over his own property line.
- A judge found a defendant guilty of speeding when the defendant proved his speedometer was not working properly.

## Legislative Concerns of the Commission

During FY 1985, the Commission considered some situations wherein the action of a judge raised considerable public outcry, yet may arguably have been within the letter of the law, or in which the law was unclear. Other complaints involved actions of a judge that occurred within a gray area of the law, or where the law was apparently inconsistent. In some of these instances, the Commission reserved action, determining instead to call these issues to the attention of the Legislature:

(1) There is a question as to the propriety of certain "innovative" sentencing practices by a number of judges at different levels throughout the state, who impose as a condition of probation a requirement that a criminal defendant pay monies to a "fund" administered by the court or to specific charities designated by the court. The required payments are distinct and apart from any other fine, restitution, reparation or probation fees authorized by statute. The practice in question may be gaining in popularity and could have a substantial effect in reducing income into state and local coffers from traditional



finances and court costs. The practice is based on the provisions of sections 6(a) of both Articles 42.12 and 42.13 of the Code of Criminal Procedure which provide, in the pertinent parts, that, "Terms and conditions of probation may include, but shall not be limited to..." (it is also noted that Article 45.54 of the Code contains a related provision which allows the justice to require that a defendant, "...comply with any other reasonable condition...").

In one instance, in a county which is not among the state's more populous counties, the Commission observed that more than \$188,000 was accumulated in a fund which was available for distribution by the judge. The money was being used for such diverse items as salary supplements, equipment for the sheriff's office, scholarships for county personnel to attend continuing education programs, rape crisis centers, computer equipment and software, consultant fees, etc. Probationers may be required to make one-time, or continuing, payments. It is obvious that the practice in question not only makes large amounts of money available to the judiciary for discretionary distribution, but does so in direct competition with the established system of fines and court costs and to the detriment of traditional budget-making responsibilities at the state and local level.

How far does a judge's discretion extend in establishing conditions for probation? In the past, the Legislature has specified a fee for probation, and a contribution to Crime Stoppers, as acceptable conditions for probation. A current attorney general's opinion JM-307 states that contributions are permissible so long as the contribution is related to protection of the public or rehabilitation. If a fine is ordered, and a contribution as well, may the contribution exceed the fine? May a judge order a contribution in lieu of a fine, so that money which should have gone into the county's general fund to defray the costs of government goes instead to a private charity or cultural organization? May a judge order a contribution to a fund which he controls, and which is used to supplement county salaries or provide government services not budgeted by the appropriate legislative authority?

(2) Through utilization of the electorate as its selection method for judges, Texas subjects its judiciary each election year to public scrutiny, and, occasionally, to scurrilous attack. Politically embattled incumbent judges face the choice of responding with silence, possibly suffering defeat at the polls, or responding in kind, dropping the robe of judicial demeanor the better to engage in mud slinging.

May a candidate for judicial office running against an incumbent judge pursue a course of hard-hitting campaign advertising, while the incumbent judge is held to a judicial ethic of understatement and restraint? How far may an incumbent judge go in public attack upon his opponent? Should all judicial candidates be required to honor judicial ethics? A bitter campaign does not enhance the integrity of the judiciary as a whole, yet the Commission has no authority over a candidate who is not yet a judge.

In Kentucky, when a person announces as a candidate for judge, he comes under the jurisdiction of the judicial discipline agency, so that both parties in these races are held to a high level of judicial ethics in the conduct of the race.

The integrity of the judiciary suffers whether or not the charges hurled in a heated political campaign are truthful. Each election year, the Commission receives complaints that incumbent judges are engaging in unfair political practices in their reelection campaigns.

(3) As mentioned in previous annual reports, the Commission desires clarification of its authority to afford judges an opportunity to appear at Commission meetings prior to the initiation of formal proceedings. Virtually since the Commission came into being, it has invited judges in appropriate cases, to appear informally to respond to allegations of misconduct.

In many instances, the informal appearance by a judge has enabled the Commission to dispose of a complaint in a more timely and effective manner than would otherwise have been possible. Moreover, even though the appearance is informal, the judge's rights are protected since the judge can be, and often is, represented by counsel. Then the 68th Legislature in 1983 passed House Bill 44, which made some comprehensive changes to the statutory provisions governing Commission operations. One clause of that rather extensive amendment has introduced some confusion into the law and appears to be in conflict with other provisions of existing law as well as with constitutional due process requirements. While the Commission believes that the clause in question does not preclude the long established practice of informal appearances, clarifying legislation would be in order. The Commission was gratified to note that during the last Legislative Session, companion bills were introduced in both the House and the Senate (HB# 1483 by Tejeda, and SB# 701 by Mauzy) in an effort to insure that the statutory provisions were clear and in conformity with constitutional due process requirements. Although no opposition to either bill was observed, the legislative session ended prior to passage of either bill. The Commission appreciated the legislative efforts and requests their continuation in the next session.

### The Composition of the Commission

Due to the change in the representation on the Commission that occurred with implementation of the new Constitutional amendment, 12 members are currently serving on the Commission. One appellate judge position will be eliminated when the

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incumbent's term expires, bringing the Commission back down to a membership of 11. Serving on staggered six-year terms will be one justice of a Court of Appeals, one district judge, one county court-at-law judge, one justice of the peace, and one municipal court judge, all appointed by the Supreme Court of Texas. In addition, the Board of Directors of the State Bar of Texas appoints two members of the State Bar, each of whom has practiced for at least 10 consecutive years. Finally, the governor appoints four citizens who are not lawyers or judges and who are at least 30 years of age.

Judge John Boyd of Amarillo, associate justice of the Court of Appeals, Seventh Supreme Judicial District, is currently serving his second term as chairman of the Commission. He has served as chairman of the Judicial Section of the State Bar of Texas and was recipient of the Presidential Citation of the State Bar in 1979. A graduate of the American Judicial Academy and the National College of the State Judiciary, he has served as faculty advisor for the National College of the State Judiciary and as an instructor in criminal law for the Texas College of the Judiciary.

Commissioners for FY 1985 are as follows:

John T. Boyd, Chairman  
Associate Justice, 7th Court of Appeals  
Amarillo, Texas

Robert Parsley, Vice Chairman  
Attorney  
Houston, Texas

Col. Nathan I. Reiter, Jr., Secretary  
Citizen  
Texarkana, Texas

Jamie Clements  
Attorney  
Temple, Texas

Max Emmert, III  
Citizen  
Odessa, Texas

William E. Junnell, Associate Justice  
14th Court of Appeals  
Houston, Texas

J. Ray Kirkpatrick, Judge  
County Court-at-Law  
Marshall, Texas

Raul Longoria, Judge  
139th Judicial District Court  
Edinburg, Texas

W. Jack Richburg  
Justice of the Peace, Pct. 7  
Dallas, Texas

Scott Taliaferro  
Citizen  
Abilene, Texas

Elinor Walters, Judge  
Municipal Court  
Seabrook, Texas

Robert D. Rogers  
Citizen  
Dallas, Texas

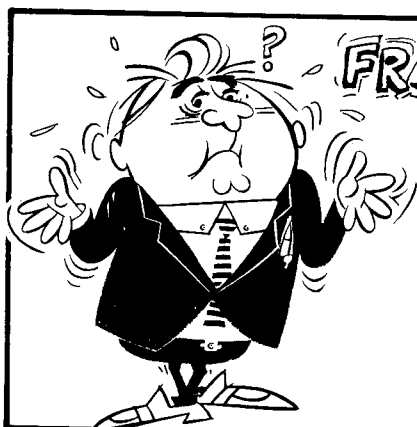
During FY 1985, the Honorable Harry Hopkins of Weatherford was appointed to an appellate bench and therefore was no longer eligible for service as a district judge. Judge Kirkpatrick and Judge Walters were appointed in response to the implementation of the Constitutional Amendment, joining the Commission in early 1985.

### Commission Staff

Staff of the Commission is headed by Robert Flowers, executive director, who has served since the retirement of the previous director in 1983. A graduate of Texas A&M University and the University of Texas School of Law, he began his career in private practice and joined the staff of attorney general of Texas, where he served as chief of the Enforcement Division. Thereafter he served as director of the Criminal Justice Division in the Governor's Office.

Additional staff members are:

Bill Hornung, General Counsel  
Ralph Pearson, Staff Attorney  
Mary Ellen Keith, Case Investigator/Attorney  
Terri Crites, Executive Secretary  
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**4**

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**18-19**

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**21-25**

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**22-26**

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**25**

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**25-27**

### **10th Annual Conference On Immigration And Naturalization**

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**26**

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**26-27**

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# October

2

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3

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## CLE Update

### Advanced Oil, Gas And Mineral Law

Because of the adoption of Oil, Gas and Mineral Law as a specialization by the Texas Board of Legal Specialization, the State Bar will undertake to present an advanced course in this subject every year.

Professor and former dean Ernest E. Smith of the University of Texas School of Law is serving as director for this year's advanced course which will be held Thursday and Friday, Sept. 18 and 19, at the Wyndham Hotel in San Antonio. Prof. Smith and the planning committee have assembled a first-rate faculty and concentrated the program into two days.

The course is aimed at attorneys with substantial experience in this field of practice, especially those preparing for the specialization examination in October. We do not know what will be asked on that exam, but the topics covered in the course were chosen for their importance and timeliness. Program brochures have been mailed. If you do not have one, please contact the registrations coordinator at 512/463-1429.

### Dealing With Insolvency

Beginning Sept. 25 and running into October, the State Bar will sponsor an eight-city tour of one-day programs entitled "Dealing with Insolvency." Unfortunately, the Texas economy compels almost every Texas attorney to become at least somewhat knowledgeable about workouts, bankruptcy, and attendant liabilities and remedies.

This seminar is aimed at attorneys who do not necessarily specialize but have been in practice for several years. It will approach insolvency from a practical rather than theoretical standpoint. Look for your brochure and contact our registrations coordinator at 512/463-1429 if you have questions.

### New Audiotape Release

"Managing the Small Law Office" is the latest audiotape set offered for sale by the State Bar. Topics include: Successful Financial Management, Law Office Automation and Megatrends, Recruiting and Training Lawyers and Legal Assistants, Compensation for Lawyers and Staff, Getting the Most from Your Staff, and Stress Management. For more information, or to order by phone, please contact the sales desk at 512/463-1411.

### New Video Releases

Videotapes which recently toured Texas and are now available include "Family Law Update: The Parent/Child Relationship" (#2966 — 60 minutes) and "Introduction to Bankruptcy" (#2967 — 90 minutes). The tapes sell for \$60 and \$90, respectively, plus tax and \$5 postage/handling. Each comes with a copy of the master notes which include an outline of the tape with space for further notes.

Tapes may be rented for 30 days at half the purchase price. Order through the State Bar of Texas, Sales Desk — Video Orders, P.O. Box 12487, Capitol Station, Austin 78711.

### MCLE and Video

Attendance at State Bar video tours can count as credit toward meeting MCLE requirements.

State Bar CLE video programs are available for 30-day rental. The cost is half the purchase price, plus tax and a \$5 postage and handling fee. The rental fee may be applied to purchase. Most tapes are accompanied by master notes which include an outline of the program with space for further notes. For more information or a copy of the latest Video Catalog, call Video Education at 512/463-1492.

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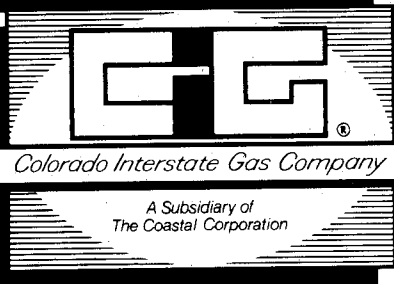
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# Substantive Trust Fund Violations

*Note from State Bar General Counsel Steven Peterson: On July 25, 1986, your general counsel's office conducted a one-day workshop for grievance committee chairpersons. Martin E. Richter, an assistant general counsel and attorney in charge of the Dallas/Fort Worth Regional Office, presented an excellent paper on substantive trust fund violations which I think should be shared with all Texas attorneys. Richter's presentation is reproduced in its entirety.*

## Introduction

Throughout our careers as lawyers, we have delved into and waded through the mystical gray areas of what is generally termed "The Law." We have earned our living trying to persuade the courts, opposing counsel and all who will listen that our shade of gray is the purest, while at the same time, we diligently search for some absolute: something black or something white. No other area of the law was framed from its inception with such fundamental absolutes in mind as Disciplinary Rule 9-102.

## Enabling Provisions

Art. X, Sec. 38, of the State Bar Rules requires that lawyers engaged in the practice of law in the state of Texas shall maintain a separate trust account or accounts. DR 9-102 establishes the minimum standards for preserving the identity of funds and property belonging to a client. This rule mandates that all client funds paid to a lawyer or law firm must be deposited in one or more identifiable accounts in the state where the law office is situated. Furthermore, no funds belonging to a lawyer or law firm may be deposited in these accounts. There are two and only two exceptions to this rule:

(1) Lawyer or law firm funds that are reasonably sufficient to pay bank charges, and

(2) Funds by a client to a lawyer or law firm as an advance for costs and expenses.

Additionally, DR 9-102(B)(3) mandates that the attorney must maintain complete records of such account for a period of five years after disposition of the underlying matter. The attorney must also render appropriate accountings to his client regarding those funds.

As can be seen by the most simplistic analysis of this rule, attorneys are placed in a fiduciary capacity, and must sepa-

rate funds and property belonging to a client from their own. Making the distinction regarding who the funds and property belong to and, therefore, where the funds and property must be deposited, has generated considerable controversy resulting in a number of disciplinary proceedings.

## Common Violations

A discussion of trust fund violations requires a division of the violations into two basic categories: monetary and non-monetary.

### Monetary

**A. Fee Advances** — As a general rule, fee advances must be placed in the attorney trust account. However, the application of the fee advance rule depends on the characterization of the funds passed from the client to the attorney. That is, whether the fund is an advance on the attorney's fee or whether it is a *true* retainer.

The *Texas Bar Journal* in April 1978 printed Opinion 391, distinguishing four different fact situations pertaining to the characterization of client funds:

(1) A lawyer agrees to represent a client on an hourly basis that will be billed monthly. The client is required to pay some amount at the beginning of the representation, however. This constitutes an advanced fee, and since, until completely earned, it belongs in part to the lawyer and in part to the client, it must be deposited in a trust account.

(2) In the second situation the same agreement exists except that part of the advance is a retainer that will be applied to the hourly work done by the lawyer but will not be refunded even if it exceeds the work done. It was determined that this non-refundable retainer belongs exclusively to the lawyer and may be placed in his

personal account. The rest of the advance, however, belongs partly to the client and, therefore, must go into a trust account.

(3) The third situation is that a lawyer agrees to represent a client for a reasonable fee to be determined and billed at the end of the representation. The lawyer demands up front, however, a "retainer" that will be applied against the final fee. This appears to be a refundable advance, not entirely belonging to the lawyer when it came into his possession, and therefore, it must be placed in a trust account.

(4) Under the final fact pattern, the lawyer charges the client a flat fee payable in advance. No understanding is reached between the lawyer and client about the fee's refundability. The opinion, emphasizing the absence of a guarantee that the lawyer would be entitled ultimately to the whole advance, concluded that it must be deposited in a trust account.

**B. Commingling** — An attorney commingles funds when he intermingles the client's money with his own or his firm's funds, and its separate identity is lost so that it could be used for the attorney's expense or be subject to claims of the attorney's creditors. *Black v. State Bar*, 368 P.2d 118 (Cal. 1962). In *Black*, the attorney was disciplined when he received a check jointly payable to himself and to his client, in which he had an interest for his fees. The attorney deposited the check into his own account and failed to separate his agreed interest "at the earliest possible time."

Similarly, if the attorney has several accounts at the same bank, and as a result of personal financial difficulties, the bank attaches one of his accounts; i.e., trust account, the attorney must arrange his personal finances so that the attachment is withdrawn immediately. *Vaughan v. State Bar*, 494 P.2d 1257 (Cal. 1972). In *Vaughan*, the attorney took no action for more than a year,



thereby allowing his personal funds to be free for use, while allowing the client's trust funds to function as security for his personal obligations. The court in *Vaughan* also stated that it is not necessary that there be a conversion or even misuse of funds to constitute commingling and violate DR 9-102.

Additionally, it is not necessary that client funds be actually in danger of loss or misappropriation in order for the attorney to be subject to discipline. The courts justify this result because the appearance of impropriety undermines public confidence in our profession. *Commission on Professional Ethics v. White*, 209 N.W.2d 11 (Iowa 1973).

**C. Conversion** — Conversion, as distinguished from commingling, is the misappropriation of the client's funds for the attorney's use. Most authorities appear to agree that conversion (misappropriation) is perhaps the most serious breach of an attorney's duty owed to a client, and such action warrants severe disciplinary sanctions. Following are examples of misappropriation:

(1) Writing personal checks on a client's trust account. *Dayton Bar Ass'n v. Hertzog*, 436 N.E.2d 1037 (1982), cert. denied.

(2) Using a client's trust funds to cover business expenses, debts and overhead. *In re Simpson*, 645 P.2d 1233 (Alaska 1982) (bar dues); *Edmondson v. State Bar*, 625 P.2d 812 (Cal. 1981) (business debts); *Gordon v. State Bar*, 647 P.2d 137 (Cal. 1982) (overhead and operating expenses).

(3) Withdrawing funds from the trust account of one client to meet obligations incurred by another client. *Gordon v. State Bar*, 647 P.2d 137 (Cal. 1982).

(4) Check kiting, or drawing checks on recently deposited checks before the deposited checks have cleared. *In re Austin*, 333 N.W.2d 633 (Minn. 1983); *Virginia State Bar Opinion*, 183 (1980).

In order to establish that misappropriation has in fact occurred, the grievance committee does not need to find that the attorney's conduct was willful, intentional, or fraudulent. *Archer v. State*, 548 S.W.2d 71 (Tex. Civ. App. — El Paso 1977). The mere fact that an attorney's trust account balance falls below the amount deposited supports a finding of misappropriation. *Jackson v. State Bar*, 600 P.2d 1326 at 1328 (Cal. 1979). Most authorities recommend disbarment, even when the attorney converts funds in only a single instance and makes full restitution to the client. *In re McCormick*, 576 P.2d 371 at 373 (Ore. 1978).

## Non-Monetary

**A. Property** — The same principles that apply to client funds apply to client property. The only distinction, as a practical matter, is the depository in which the property is kept. Non-monetary property that must be identified, labeled and secured pursuant to DR 9-102(B)(2) include titles to real estate, securities and valuables.

In *Matter of Grubb*, 663 P.2d 1346 (Wash. 1983), the attorney was given a ring as security for his fees. He took it out of his strong box several times, carried it home to show his wife and ultimately lost it. The attorney failed to notify his client for two years, resulting in the attorney being disciplined.

While there are some instances of attorney misconduct where mitigation of punishment is properly considered, trust fund violations is not one of them. Chief Justice Wilentz of the New Jersey Supreme Court stated it most bluntly when he, on behalf of a majority court, said "lest there be any doubt, attorneys who steal will be disbarred in New

Jersey."

Judge Wilentz goes out of his way to render useless various factors, including restitution, which are sometimes used in mitigating these types of cases. Moreover, he states that the difference between "borrowing" from trust funds and stealing is "negligible" for the purposes of imposing discipline. *In re Wilson*, 409 A.2d 1153 (1979). This opinion should lay to rest the senseless notion that since the client suffered no apparent damage, no violation occurred.

## Conclusion

The rules pertaining to the preservation, identity and safekeeping of client funds are, on their face, clear and easy to understand. There are no issues of culpability or intent to decide. There are no shades of gray in which to get bogged down. Failure to recommend severe discipline for any attorney who violates DR 9-102 is to merely wink at those who exploit the professional trust bestowed upon our profession, while the fabric of public confidence continues to erode.



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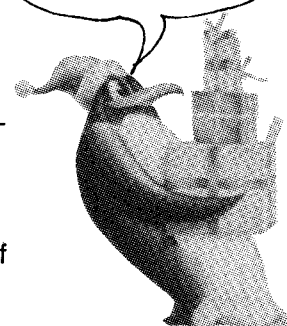
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## Disbarments

**H. Dale Bailey**, a resident of Oklahoma, was disbarred by the 53rd Judicial District Court of Travis County on April 11, 1986. On Aug. 21, 1985, Bailey was convicted of misapplication of fiduciary property, a felony offense, by the 47th Judicial District Court of Randall County. Bailey received deferred adjudication probation.

**Kenneth Guest**, an attorney of Houston, was disbarred by default judgment of the 281st Judicial District Court of Harris County for misappropriating client funds. The court also found that Guest intentionally neglected the cases of 10 clients. The disbarment became final May 13, 1986.

## Suspensions

**Harry Gonzales**, attorney of Houston, agreed to a 60-day suspension on April 25. The suspension was effective from May 25 to July 25. The District 4-G Grievance Committee found that the attorney engaged in conduct prejudicial to the administration of justice and adversely reflected on his fitness to practice law. He failed to obtain the consent of his client to employ another attorney or to disclose the division of attorney's fees with the other attorney, failed to withdraw from employment in a proceeding before a tribunal without its permission, failed to take reasonable steps to avoid foreseeable prejudice to his client, failed to refund to his client any part of a fee paid in advance that was not earned, handled a legal matter without preparation adequate in the circumstances, willfully or intentionally neglected a legal matter entrusted to him, intentionally failed to seek the legal objectives of his client through reasonably available means permitted by law, intentionally failed to carry out a contract of employment entered into with a client, and intentionally prejudiced or damaged his client during the course of the professional relationship.

**Paul Chitwood** of Dallas was suspended from the practice of law for 30 days pursuant to an agreed judgment of the 162nd Judicial District Court of Dallas County. The court found that Chitwood failed to seek securing an occupational driver's license for a client and failed to respond to the grievance. The suspension was effective June 1 to July 1.

**Ralph Shepherd**, Hempstead attorney, formerly of Houston, was suspended for two years by the 9th District Court of Waller County after a jury found that Shepherd signed a deed of trust knowing that a constructive trust had been imposed in favor of a third party on the property that he gave as security and he accepted real property as a fee knowing that his client had fraudulently obtained such property. The court also based its judgment upon jury findings that Shepherd charged a clearly excessive fee, intentionally neglected his client's lawsuit, and deceived his client in causing him to sign a deed. Shepherd's suspension began May 2, 1986.

**Gerald Sprague Smith**, attorney of Hereford, was suspended for 90 days by virtue of an agreed judgment entered by the 222nd Judicial District Court of Deaf Smith County on June 16, 1986. The court found that Smith testified falsely under oath during an official proceeding of the grievance committee. The court further found that Smith had accepted private employment in matters in which he had substantial responsibility while he was a public employee in violation of DR 9-101(B). Smith also had presented, participated in presenting, or threatened to present criminal charges solely to obtain an advantage in a civil matter, in violation of DR 7-105(A).

**Billy James Langston**, a resident of Nueces County, has been suspended from the practice of law during his probation for the offense of theft. Langston was placed on deferred adjudication probation for two years by the Judge of the 36th Judicial District Court of San Patricio County. The probation for the conviction of theft is effective from Dec. 16, 1985, to Dec. 16, 1987.

**Gerald H. Klossner** of San Marcos agreed to a 90-day suspension from the practice of law beginning May 29, 1986. The District 15-C Grievance Committee found that Klossner failed to preserve the identity of funds of a client as required by Disciplinary Rule 9-102(A).

**Pat H. Everitt**, attorney of Arlington, was suspended by the 96th Judicial District Court of Tarrant County for six months. The court found that Everitt intentionally neglected a legal matter entrusted to him and practiced law at a time he was administratively suspended for nonpayment of Bar dues. Everitt's suspension became effective June 15, 1986.

**Robert L. Vickers**, attorney of Harris County, agreed to a 120-day suspension from the practice of law effective May 1, 1986. The District 4-A Grievance Committee found that Vickers engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaged in conduct that is prejudicial to the administration of justice, and engaged in conduct that adversely reflects on his fitness to practice law.

**Joel Bailey**, a Dallas attorney, has been suspended from the practice of law effective April 15 by judgment of the 190th Judicial District Court of Dallas County, which found Bailey to have violated Disciplinary Rules 1-102(A)(4); 6-101(A)(1), (2), and (3); 7-101(A)(1), (2), and (3); and Article X, Section 7(4) of the State Bar Rules. Bailey's suspension was set at one year with the possibility of reduction to one month if he reimburses the State Bar of Texas \$4,000 by June 15, to cover the cost of the suit.

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**Edith L. James** of Austin has been suspended from the practice of law for three years beginning May 1, 1986, and ending April 30, 1989. The court found that the attorney failed to appear at a trial setting on behalf of a client, failed to determine the status of her client's case after the date of the trial setting and failed to preserve his right of appeal. Further, the court determined that she made incorrect statements of fact in a motion for continuance and advised her client to file a petition under the Texas Deceptive Trade Practices Act which petition did not state a cause of action under the Act.

On April 22, **Averil Sweitzer** of Dallas was placed on a probated suspension pursuant to an agreed judgment of the 101st Judicial District Court of Dallas County. The court found that Sweitzer had placed advertisements which were false and misleading, failed to designate which lawyer would be responsible for the particular areas of law advertised, and failed to include a disclaimer of Board of Specialization certification.

## Public Reprimands

**Glen Mitchell Williams**, an attorney of Lubbock, agreed to a public reprimand on April 22. The District 16-A Grievance Committee found that the attorney failed to carry out a contract of employment entered into with a client for professional services; willfully neglected a legal matter entrusted to him; handled the legal matter without preparation adequate in the circumstances; failed to adequately inform his client during the course of his representation; and prejudiced or damaged his client during the course of the professional relationship.

**Richard Acevedo**, an attorney of San Antonio, accepted a public reprimand on April 23. The District 10 Grievance Committee found that the attorney failed to appear at a designated time for trial and failed to inform his client of the trial setting. As a result of the attorney's failure to appear, the client was subsequently arrested for failure to appear for trial.

## Correction

*On page 736 of the July 1986 Texas Bar Journal, we stated that a private reprimand was issued to an attorney from Leon County. The attorney should have been identified as a McLennan County attorney. We regret the error.*

**Manuel V. Lopez**, an attorney of San Antonio, consented to a public reprimand on May 12. The District 10 Grievance Committee found that the attorney willfully or intentionally neglected a legal matter entrusted to him, failed to seek the lawful objectives of his client through reasonably available means permitted by law, and refused to timely respond and cooperate with the grievance committee.

**William Jacobs, Jr.**, attorney of Dallas, consented to a public reprimand on May 5, 1986. The District 6 Grievance Committee found that the attorney failed to respond to two grievances filed against him.

**Stephen Meeks**, attorney of Fort Worth, agreed to a public reprimand on April 28, 1986. The District 7-A Grievance Committee found that Meeks willfully and intentionally neglected a legal matter entrusted to him.

## Private Reprimands

An attorney of Dallas agreed to a private reprimand on April 25. The District 6 Grievance Committee found that the attorney neglected a legal matter entrusted to him, undertook a matter that he was not competent to handle and engaged in a course of action prejudicial to the administration of justice.

An attorney of Dallas agreed to a private reprimand on May 2. The District 6 Grievance Committee found that the attorney refused to cooperate with and furnish information to the committee.

On April 16, a Dallas attorney accepted a private reprimand. The District 6 Grievance Committee found the attorney committed intentional neglect and failed to promptly return unused filing fee money when demanded by the client.

An attorney of Dallas accepted a private reprimand on May 5. The District 6 Grievance Committee found that the attorney did not adequately prepare and handle a legal matter entrusted to him.

A Houston attorney agreed to a private reprimand on May 27. The District 4-H Grievance Committee found that the attorney willfully and/or intentionally neglected a legal matter entrusted to him, failed to carry out a contract of employment entered into with a client for professional services, and prejudiced and/or damaged his client during the course of the professional relationship.

An Austin attorney received a private reprimand from the 261st Judicial District Court on May 1. The court found that the attorney failed to appear at a hearing in a driver's license suspension case of a client and then informed the client he would have to pay an additional fee for filing an appeal.

A Houston attorney agreed to a private reprimand. The District 4-F Grievance Committee found that the attorney was engaged to handle a personal injury claim and thereafter failed to pursue this claim.

An attorney of Houston accepted a private reprimand on May 8. The District 4-H Grievance Committee found that the attorney withdrew from employment and failed to promptly deliver to his client as requested by his client the properties in his possession which his client was entitled to receive.

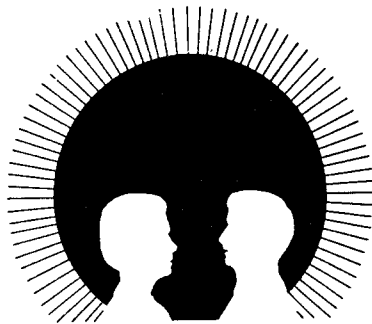
An attorney of Wichita County agreed to a private reprimand on March 17. The District 14-A Grievance Committee found that the attorney willfully or intentionally neglected a legal matter entrusted to him in failing to file an appellate brief in his indigent criminal client's behalf.

An attorney of Dallas agreed to a private reprimand on April 3. The District 6 Grievance Committee found that the attorney did not comply with a client's request for the return of a file.

An attorney of Houston agreed to a private reprimand on May 6. The District 4-D Grievance Committee concluded that the attorney failed to furnish information requested by the grievance committee or to assert the grounds for failure to do so in a timely manner. The committee also found that the attorney willfully neglected a legal matter entrusted to her, failed to carry out a contract of employment entered into with a client for professional services, and failed to refund promptly a fee paid in advance that had not been earned upon withdrawing from employment.

An attorney of Cleburne consented to a private reprimand on June 9. The District 7-B Grievance Committee found that the attorney handled a legal matter without preparation adequate in the circumstances.

An attorney of Dallas consented to a private reprimand on May 5. The District 6 Committee found that the attorney was employed to represent a client in three criminal cases and that the attorney neglected the legal matters entrusted to him.



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