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Reviewing the Law Reviews, Texas-Style

By Jim Paulsen
and James Hambleton

All is not well in the publish-or-perish world of legal academia. The number of legal periodicals is growing explosively, and is now more than 700. Established law reviews are sneaking more and more pages of text into each volume. There is a growing consensus, however, that genuine legal scholarship is not expanding at a pace sufficient to fill all these blank pages. Seminar speakers advise new law professors that somewhere there is a law review willing to print anything a professor is willing to put on paper; a little browsing will confirm that those lecturers know whereof they speak.

Moreover, much contemporary legal scholarship is traveling down the roads of "comparative" or "critical" this-and-that or "law-and-whatever" movements. However fascinating and ground-breaking some of these ideas may be, it is well-nigh impossible to work them into the day-to-day business of advising clients or trying and judging lawsuits. It is little wonder that many practitioners and judges are refusing to wade through the 150,000-plus pages that law reviews pump into the "junk stream" of legal literature every year. In these recessionary times, when library budgets and available shelf space are shrinking, a close look into the usefulness of law reviews therefore begins to make sense.

Beginning as early as the 1930s, studies of the "real-world" impact of law reviews have appeared in print. Typically, the author will count citations to law reviews in court opinions or other law review articles, and conclude which law reviews are the "best" or have the most apparent influence on courts or legal scholars. From a Texas standpoint, these studies usually hold little interest, since most of our state's school publications are too new or too provincial to make the national law review hit parades. Fortunately, a decent Texas-oriented statistical study has moved to fill this gap.

Laura Justiss (formerly of Locke, Purnell, now with Mead Data) recently did a cite count of seven Texas-published law reviews as part of a master's degree program. The results of her study were rescued

from academic obscurity by a reader who suggested that she submit the manuscript to the American Association of Law Librarians. The AALL in turn was impressed enough to ask Justiss to present the paper at its 1992 annual meeting and to be recognized as the author of the AALS's outstanding student paper of the year. The full findings will no doubt be published in the near future, and we would not want to hurt Justiss' publication prospects by revealing all the juicy details. Nonetheless, we could not resist devoting a column to a headline news summary.

While many of the figures confirm widely-held beliefs, there are one or two surprises. Perhaps the biggest surprise is the overall "winner" in the combined total number of federal and Texas appeals court citations to articles produced during a 20-year period (1970-89) in the state's "front line" law reviews: the *St. Mary's Law Journal*. With its emphasis on practice-oriented materials, sometimes authored by distinguished jurists (Judge David Hittner and former Justice William Kilgarlin account for many of the recent citations), the *St. Mary's Law Journal* barely nudges out the venerable *Texas Law Review* for the number one position. The *St. Mary's Law Journal's* strength is also reflected in its strong first place ranking in citations by state judges over the same 20-year period.

The *Texas Law Review's* overall showing reflects some success in the school's attempt to "go national." Articles appearing in the *Texas Law Review* between 1970 and 1989 were cited by federal courts more often than all the state's other law reviews combined. On the other hand, the *Texas Law Review* drops to a distant sixth place in citations by state court judges. This showing confirms the derogatory mutterings sometimes heard in the hallways of Texas courthouses (or even, rumor has it, in impromptu remarks by a former Texas Supreme Court chief justice at one *Texas*

Law Review banquet).

The *SMU Law Review*, which recently has undergone a name change from the *Southwestern Law Journal* in an apparent effort to enhance its national name recognition, occupies a unique second place showing in citations by both federal and state appellate courts. The strong showing in federal citations might be explained by the journal's general emphasis of federally-oriented articles; the strong showing in state courts is due largely to *Southwestern's* annual survey issue. Our rough count indicates that the annual survey issue accounts for about two-thirds of all *Southwestern's* state court citations, with Joe McKnight's perennial "Family Law — Husband and Wife" contribution holding a commanding lead within the issue.

While having nothing to do with Justiss' figures per se, we cannot resist adding a side comment or two on this subject. While "annual survey" articles tend to be discounted whenever law school faculties get together to count up scholarly productivity for tenure decisions, they do seem to provide a singularly useful service to the bench and bar. For example, the *Southwestern Law Journal's* "annual survey" issue accounts for more than half of all court citations to that publication, including a substantial number of all federal court citations.

One study result reflects a real oddity in the history of Texas law reviews. The *South Texas Law Review* (or "*Journal*," until a couple of years ago) comes in with a dismal seventh place showing in the overall standings. While this standing may perplex those who glance over the contents pages and notice occasional good — even great — articles (former Justice C.L. Ray and Yogi McKelvey, Judge David Hittner, Harvard Law Prof. Arthur R. Miller, and Circuit Judge Edith Jones, to name a few of the more recent), the news should come as no surprise to anyone who has tried to cite any article printed in the *South Texas Law Journal* prior to 1985.

For some obscure reason, the editors of the first 25 volumes of the *South Texas Law Journal* did not follow the near-universal

law review practice of including the volume number and year on the running head. Viewed from the perspective of a judge or briefing clerk who discovers this quaint little custom late at night while reading from a xerox copy, with the choice of going back to the library or of just not including a citation, it is a minor miracle that articles from the first quarter-century of the *South Texas Law Journal* have been cited at all. By the way, we have done a quick count of citations in the 1986-91 period, being the first five years after South Texas added running heads, and found that the journal rises to a middle-of-the-pack fourth place position.

One interesting aspect of Justiss' study is the change in standing that she finds when the citation figures are corrected for the total number of pages in each volume of the law review. Different schools' law reviews put out a different number of pages per year, from the *Baylor Law Review's* 1,000 or so undersized pages to the *Texas Law Review's* 1,500-plus. Standardized by "citations per 1,000 pages of text," a couple of interesting changes occur. The *Texas Law Review* drops from second to fourth place and the *Baylor Law Review* rises from fourth to second, coming in just barely behind the *St. Mary's Law Journal*.

Adding to Justiss' analysis, if one includes in the calculations the fact that for almost all of the survey period Baylor had smaller pages and a larger type size than St. Mary's, this refinement would put the *Baylor Law Review* in first place in the "bang for the buck" category. But, then again, the fact that one of this column's authors is a *Baylor Law Review* alum might also enter into the calculations just a little bit.

One overall conclusion of Justiss' survey also bears mention. Breaking down the survey period into four five-year segments, she finds a very significant drop-off in citations to all Texas law reviews over the last five-year period (1985-89). A figure like this offers fruitful ground for speculation. Are lawyers and judges giving up on law reviews altogether, because they find little useful material these days? Is an increasingly conservative judiciary finding less and less reason to cite law review articles, which tend to advocate change? Are appellate judges, overwhelmed by an increasing workload, finding less and less time to read the law reviews? Or is it just a statistical glitch? Justiss wisely does not speculate and we know a good idea when we see one.

Justiss' figures do offer some guidance for anyone evaluating current or future subscriptions to Texas-produced law reviews. The *St. Mary's Law Journal* looks like a good buy for any Texas law office. The *Baylor Law Review* is likewise attractive, offering a lot of utility for a little shelf

space. The *SMU Law Review* may also be worth keeping on the shelves, at least so long as the editors continue to produce the "annual survey" issue. And the *Texas Law Review* may be attractive if one has a substantial federal practice.

Of course, no study of law review citations can provide an answer to the question of how influential law reviews *really* are. For one thing, courts represent only one branch of our tripartite system of government. Who can say what influence the continuing *Baylor Law Review* series on administrative law might be having on Texas administrative agencies? And what "significance" does one assign to a *Texas Tech Law Review* article that advocates legislative change, a change that was adopted at the next session after the article was published? Such an article will rarely, if ever, be cited by courts. Yet it might have had more real-world impact than any two or three dozen court citations.

Even limiting the question to the courts, the fact that a judge may cite a law review article does not mean the article actually influenced the court's decision. Articles may be cited as a courtesy to the author, as a sign of school loyalty by a judge or briefing clerk alumnus, as a bibliographic reference in a string cite, and so on. On occasion, judges even cite law review articles to disagree with the ideas proposed in those articles. Conversely, a law review article may be very helpful to a judge or litigant, providing ideas, references to other authority, and convenient summaries of complex lines of cases, yet never be cited. No rule requires a judge to cite every law review article found to be helpful in arriving at a decision, and some judges prefer to avoid citations to "secondary" authority whenever possible.

It would be interesting indeed someday to read a law review citation survey that included content or "impact" analysis, if such a survey could be devised. Until that day, however, citation studies — typified by Justiss' well-executed effort — are the best we have. Look for it in print!

Jim Paulsen (J.D. Baylor, LL.M. Harvard) is an assistant professor of law at the South Texas College of Law. James Hambleton (J.D. George Washington, MLS Michigan) is a professor of law and director of the law library at Texas Wesleyan University Law School. Carl Selesky, a second-year student at South Texas, nearly went cross-eyed counting Shepard's cites to verify some of the offhand assertions found in 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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The Lawyer's Guide to Writing Well

Goldstein, Tom, and Jethro K. Lieberman. New York: McGraw-Hill Publishing Co., 1989, 274 pp. \$19.95; Berkeley: Univ. of Calif. Press, 1991, 278 pp. \$14 (paper).

This book lives up to the promise of its title — a guide for lawyers to write well. The authors are eminently qualified in their professional capacities as director of a law school writing program (Lieberman) and as dean of a graduate school of journalism (Goldstein). The authors, who teach the art of writing to lawyers in firms throughout the country, conducted a survey among hundreds of lawyers, professors, and judges on their annoyances with lawyers' writing. The results have yielded many pertinent and meaningful examples. This originally-conceived work appeals to practitioners because of its emphasis on the practical, convincing lawyers to improve their writing for such compelling reasons as efficiency and profitability.

The authors urge lawyers to use journalistic devices like the lead paragraph, which would provide unique, striking introductions for their documents without detracting from the substantive legal meaning. They even insist that large firms should coordinate writing functions much as publishing houses do, with definite allocation of writing, editing, and proofreading tasks. Their recommendations are set forth in a suggested law firm writing audit.

Goldstein and Lieberman also utilize the composition teacher's methods. They look at writing as a process and recommend that lawyer-writers not only examine — before they write — the purpose and audience for each document and then try to allow time for ideas to solidify, but also carefully edit. A list of 10 steps highlights this process.

In a long, detailed chapter, basic usage and language points are illustrated through numerous examples of practical problems taken from the survey and other sources, and immediate solutions are given. The chapter, though well designed with bold heads, indented excerpts, and adequate spacing, may cause readers who scan for particular points to miss major parts of the content.

A glossary and a list of writing authori-

ties are useful for the general, as well as the legal, writer. Of the few flaws that have crept into this work, prime offenders are the overloaded discussion of the parenthetical use of the comma in the text and the confusing and misleading explanation of "due to" in the glossary.

Among the legal writing texts that have proliferated in recent years, this book stands out for its unique features and its obvious concern for lawyers rather than law students. All lawyers who wish to improve their writing should have this indispensable guide in their offices.

Ruth Tone
El Paso

What Every 18 Year-Old Needs To Know About Texas Law

L. Jean Wallace. Austin: University of Texas Press, 1992, 165 pp., \$19.95 cloth, \$8.95 paperback.

A better title for this concise volume might have been *What Every 18 Year-Old Wants To Know About Texas Law*. Despite the lawyer-knows-best sound of the title, Wallace's new book speaks more to the questions that 18 year-olds really ask than to what the title implies — and well it should. As the students' attorney at Texas Tech University for 11 years, Wallace answered those questions on a daily basis.

The book is written in plain language, unencumbered by a lot of legal citations, and with no expectation that the reader will have any working knowledge of the law. It is written, in short, on the level of the student who came into Wallace's office one day with a question about her lease. "How long is it?" Wallace asked. "About this long," the student replied, holding her hands 14 inches apart.

This is not to suggest that the practicing lawyer would have no interest in the book. The topics it discusses are of universal interest — we all drive cars, buy consumer goods, and enter into personal relationships. Clients browsing through a copy while sitting in your waiting room will likely think of questions that could be turned into billable hours later.

At the same time, the book can serve as a quick source of reference to answer those pesky little questions on forcible entry and detainer, traffic tickets, and consumer affairs that most lawyers know in the back of their minds but do not deal with on a day-to-day basis. The scope of the book is surprisingly broad, and it contains a complete index that will let you put your finger on the relevant discussion while your client is still on the phone.

More than half of the book is devoted to motor vehicles, insurance, and "pranks and other crimes." There is a comprehensive discussion of what motor vehicle insurance covers and what it does not, and what civil and criminal consequences can result from an accident. The chapter on criminal liability discusses the types of crimes — from hot checks to drugs — with which teenagers, intentionally or not, are most likely to be involved. The remainder of the book concentrates on landlord-tenant, marriage, property, and consumer and employment law — the other principal areas of interest to the nascent adult.

Wallace adopts a conservative, logical, common-sense approach to the advice she offers her readers. She begins with six "Rules to Live By," such as "Life is not fair" and "Anything that sounds too good to be true usually is." She counsels polite behavior, especially toward authority figures. She does not take any knowledge of the subject for granted and endeavors to tell the reader not only what the law is, but what it is not. No law, for instance, requires a business to give a refund if a consumer decides he or she does not want the item; an employer cannot fire an employee for refusing to do an illegal act but the law generally does not prohibit him from waiting awhile and then firing that employee for no cause at all; a patrol officer does not have to show someone he stops the speed that person is accused of going on locked-in radar.

The one thing that sets this book apart from others in the now-you-are-an-adult genre is that Wallace remembers to include the wisdom of experience that becomes second nature to more mature adults. For example, in one of the "True Stories" interspersed to illustrate a point, Wallace describes a young man who ran up a high credit card debt, lost his job, and could not find work for months. He finally found new employment for less pay and was subsequently hounded by a collection agent. He came to Wallace complaining that the bill collector kept him on the phone for an hour and made him late for work. She suggested, simply, that he interrupt the agent's questioning, say goodbye, and hang up.

Wallace covers the rudiments of a lot of law in her book. The common thread running throughout is what to do to stay out of trouble. She advised young people not to try outrunning a police car, letting a mechanic work on a car without a written work order, and refusing to pay rent because a repair has not been made.

The book is, for the most part, entertaining reading. You probably will not find any

Correction

The Bluebook: A Uniform System of Citation (15th ed. The Harvard Law Review Assn., 1991, softcover.) sells for \$7.50, not \$9.95 as published in the December issue.

other book that discusses the law on "mooning or taking a leak." The list of controlled substances is almost as tedious as the list in the statute, though, and it could have been relegated to an appendix. The only significant error I found was in a chart that showed all criminal appeals going directly to the Court of Criminal Appeals. Criminal appeals are really outside the scope of the book, however, so that is easily disregarded.

Young people get into legal trouble for two reasons: they do not know what the law is, and they do not stop to think about the consequences of their actions. This book would make a good text for a preparation for life class for high school seniors. And 16-year olds with cars or a propensity for mischief (or both) would also profit from reading at least the first half.

What Every 18 Year-Old Needs To Know About Texas Law will undoubtedly be popular among parents, grandparents, aunts, and uncles for graduation gifts. But the big question will be whether such a gift is just leading the horse to water. I hope the horse will be willing to drink.

**Ralph H. Brock
Lubbock**

Handbook of Alternative Dispute Resolution

Amy L. Greenspan, ed. *The State Bar of Texas Standing Committee on Alternative Methods of Dispute Resolution, second edition, 1990, 426 pp.*

Alternative Dispute Resolution (ADR) is now firmly established in the Texas courts. This second edition of the handbook reflects the increased application of ADR as well as the greatly-expanded coverage of the various types of ADR.

The first chapter provides an overview of ADR and the development of ADR in response to problems associated with the traditional legal system. ADR is depicted not as a substitute for litigation but rather as an additional tool available for resolving disputes.

The second chapter discusses the preventive use of ADR, suggesting incorporation of ADR provisions in contracts and corporate policies to set the stage for use of ADR should a problem arise.

The handbook's various contributing authors discuss mediation, arbitration, summary jury trial, mini trial, moderated settlement conference, private judging, and combined processes. Each author is hand-picked for his or her familiarity with the particular type of ADR and each chapter contains specific practice pointers for all participants. The editor has done a masterful job of organizing the discussions by the various authors into uniform formats.

The second half of the handbook out-

lines the application of ADR in specific areas of the law, analyzing the use of ADR in appellate proceedings, family matters, agricultural loan mediation, construction industry, nonunion employment settings, environmental dispute resolution, and criminal conflicts.

The final section of the handbook is a catch-all. It explores the cost of ADR, its use in federal courts, and considers the ethical and confidentiality aspects of ADR which are the mainstay of the ADR process. The services available at Community Dispute Resolution Centers are discussed and the concept of settlement week is outlined.

The final chapter of the handbook is my personal favorite. It is a detailed bibliography of selected materials in each of the areas addressed in the handbook. Equally useful are the appendices that include the Texas ADR statute, local court rules, and forms.

Any lawyer practicing in Texas should have a copy of this handbook on the credenza. It will not be a book that gathers dust, but one that evidences regular use due to its dog-eared pages.

**F. Beth Morgan
Dallas**

A Primer for New Corporate Lawyers: What Business Lawyers Do

Clifford R. Ennico. *New York: Clark Boardman Co., Ltd., 1990, \$39.95.*

"L.A. Law's" Stuart Markowitz may be one of America's most recognizable office-based lawyers. But how might a real-life counterpart fill a typical work day? Clifford Ennico answers this question in *A Primer for New Corporate Lawyers: What Business Lawyers Do*. The topic is timely since most new lawyers are becoming office-based practitioners (the fastest growing segment of the organized bar), perhaps without a clue about the nature of the work.

Acting as reporter, the author provides clear, step-by-step descriptions of four principal tasks not considered suitable for prime-time viewing: monitoring the client's environment, counseling the client, managing the client's transactions (which included structuring, drafting, and closing skills), and negotiating on the client's behalf. The author draws from his Wall Street law firm and in-house counsel experience to provide occasional anecdotes, practice tips, and candid insights that keep the text readable. Such reading could be especially telling for aspiring office practitioners, their loved ones, and their clients who wonder how someone can earn a living as a lawyer without ever setting foot in a courtroom.

Acting as mentor, the author distinguishes his text from existing works which also

discuss the transition made from law student to lawyer. Ennico's unique contribution is to focus on those skills that cause one to "think and act like a business lawyer." Moreover, to Ennico's credit, the book does not adopt a lawyer bashing tone. In effect, the new business lawyer is urged to develop client handling skills that factor in the differences between an MBA's and J.D.'s approach to solving business problems. Ennico repeatedly hammers away at this last point by suggesting ways to minimize legal risk while looking good in the client's eyes.

The author has clearly done his homework, as evidenced by the extensive selected and annotated bibliographies. Additional chapters touch upon other areas of concern to new business lawyers, most notably how the business lawyer deals with governmental agencies. The author concludes by giving some personal, paternal, and philosophical thoughts on defining success in one's chosen profession.

To the extent that one is interested in the subject of business lawyering, the book will be either insightful or tedious. (Some illustrations could only be appreciated by securities law fans.) Either way, it does answer the question, "Just what might a Stuart Markowitz do on a typical work day," ...in case anyone is asking.

**C. Yonne Avina
San Antonio**

Available for Review

If you are interested in reviewing one of the following titles for the *Texas Bar Journal*, please contact either Kristin A. Cheney or Mary Ann Nelson, Book Appraisals editors, at The University of Texas, Joseph D. Jamail Center for Legal Research, Tarlton Law Library, 727 East 26th St., Austin 78703, 512/471-7726. Book reviews are generally written by Texas attorneys.

A Commitment to Public Service: The History of the Houston Bar Association. Eric L. Frederickson. Houston: Gulf Publishing Co., 1992.

Litigating the Coverage Claim: Denial of Coverage & Duty to Defend. Chicago: Tort and Insurance Practice Section, American Bar Assn., 1992.

Managing Complex Litigation: Procedures and Strategies for Lawyers and Courts. Chicago: Tort and Insurance Practice Section, American Bar Assn., 1992.