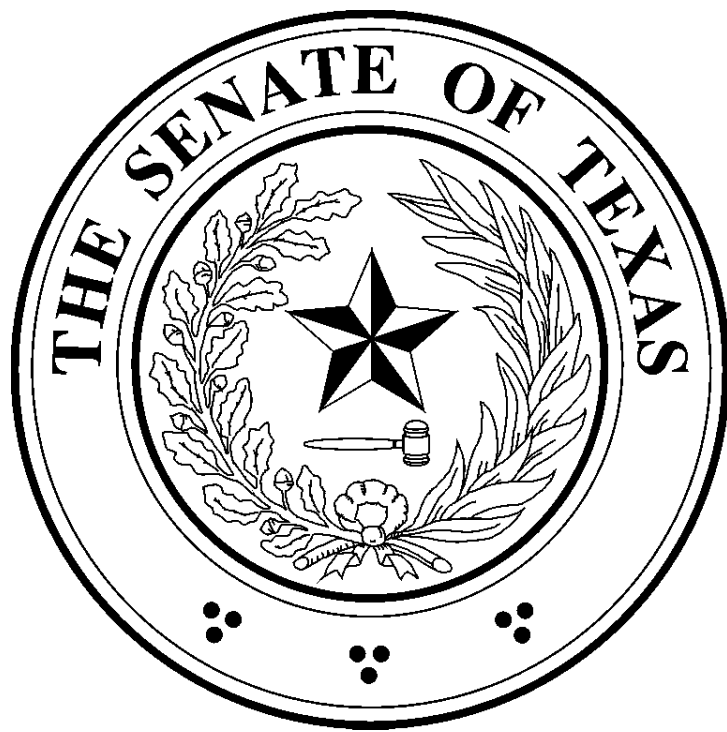


# Senate Committee on Jurisprudence

## Interim Report



Report to the 81st Legislature

December 2008



## **Interim Charges**

The Senate Jurisprudence Committee is charged with conducting a thorough and detailed study of the following issues.

1. Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.
2. Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.
3. Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.
4. Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.

Develop and implement tools for children's advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers. Include the following:

- Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;
- Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and
- Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.

5. Study practices intended to enhance the jury experience and increase jury participation, including:
  - allowing jurors to ask questions of witnesses by submitting them to the judge in writing;
  - allowing lawyers to periodically summarize testimony for the jury;
  - allowing jurors to take notes during trial; and
  - allowing jurors to discuss evidence among themselves during trial.
6. Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.
7. Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.
8. Monitor the implementation of legislation addressed by the Jurisprudence Committee, 80th Legislature, Regular Session, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation.

## **Reports**

The Committee shall submit copies of its final report no later than December 1, 2008. The printing of reports should be coordinated through the Secretary of the Senate. Copies of the final report should be sent to the Lieutenant Governor (5 copies), Secretary of the Senate, Senate Research, Legislative Budget Board, Legislative Council, and Legislative Reference Library.

The final report should include recommended statutory or agency rulemaking changes, if applicable. Such recommendations must be approved by a majority of the voting members of the Committee. Recommendations should also include state and local fiscal cost estimates,

where feasible. The Legislative Budget Board is available to assist in this regard.

### **Budget and Staff**

Travel costs shall be paid from the operating budgets of Senate members. All other costs shall be borne by the Senate Jurisprudence Committee's interim budget, as approved by the Senate Administration Committee. The Committee should also seek the assistance of legislative and executive branch agencies where appropriate.

### **Interim Appointments**

Pursuant to section 301.041, Government Code, it may be necessary to change the membership of a committee if a member is not returning to the Legislature in 2009. This will ensure that the work of interim committees is carried forward into the 81st Legislative Session.

## Hearings by the Senate Committee on Jurisprudence

Date	Location	Charge
May 23, 2008	Houston University of Houston Hilton Hotel	Charges 1 & 4
June 16, 2008	Fort Worth City Council Chamber	Charges 2 & 3
July 16, 2008	Edinburg University of Texas Pan-American	Charge 7
August 5, 2008	San Antonio City Council Chamber	Charge 6
September 17, 2008	Lubbock Texas Tech University School of Law	Charge 5
October 1, 2008	Austin Capitol Extension, E1.012	Decision Meeting
October 27, 2008	Austin Capitol Extension, E1.012	Decision Meeting

## **Executive Summary of Recommendations**

## Executive Summary of Recommendations

### Charge 1

*Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.*

No recommendations were adopted.

### Charge 2

*Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.*

1. If requested by the birth parent, this recommendation would prohibit release of a birth certificate of an adopted child until the death of the birth parent, regardless of the other birth parent's preference. The birth parent may file an updated medical history and contact preference form with the state registrar indicating the level of contact by the adopted child, if any.

If the birth parent requests contact via an intermediary, the birth parent must provide contact information for the intermediary. Finally, DFPS or adoption agencies must provide notice to the adoptive parents relating to the birth parent contact preference, as well as the adoptive child's right to obtain a noncertified copy of their birth certificate.



### **Charge 3**

***Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.***

1. Clarify time limitations on the establishment of heir finder contracts if such contracts request payment, property, or an assigned portion of a decedent's estate.
2. Void an heir finder contract or other agreement that is established within the initial six months that an unclaimed estate is being processed if the contract requests payment, property, or an assigned portion of a decedent's estate.
3. Add enforcement provisions to section 74.507 of the Texas Property Code, which specifies that heir finders may not collect more than 10 percent of a decedent's unclaimed net estate for expenses and services.
4. Specify the liabilities and remedies when a personal representative commits a breach of fiduciary duty to a beneficiary of an unclaimed estate, including but not limited to imposing a lien against the estate or denying payment to the representative.
5. Clearly define penalties for heir finders who operate without a license or violate the provisions of their private investigator's license.
6. Create a licensing, registration, and enforcement program for heir finders at the Texas Department of Public Safety, possibly within the Private Security Bureau which currently licenses private investigators.

### **Charge 4**

***Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.***

***Develop and implement tools for children's advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers.***

***Include the following:***

- Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;***
- Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and***
- Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.***

1. Direct the Permanent Judicial Commission for Children, Youth and Families to conduct a study of best practices for representation of children in child abuse and neglect cases, and determine whether further training, oversight or other requirements are necessary.
2. Increase funding to help recruit and develop CASA volunteers to ensure Court Appointed Special Advocates can be appointed for every child in the system.
3. Increase training, including a drug and alcohol component, for judges and attorneys involved in CPS cases.
4. Require the appointed attorney to meet with the child client sufficiently in advance of the hearing to adequately represent the child witness. If the judge finds the attorney is not meeting this requirement, deny eligibility for the appointment list.
5. Increase training requirements for judges and attorneys ad litem.
6. Authorize judges to remove ad litem who fail to meet education and performance requirements.
7. Require the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all the attorneys ad litem, as well as their qualifications and training. The list should be made available to the public at the courthouse and on the Internet.

8. Limit the total number of cases an attorney ad litem is working on at any one time.
9. Require the Supreme Court to develop rules and procedures that make the courtroom environment more child friendly, such as technology for closed circuit testimony for children, and court companions to sit near the child in the courtroom and while testifying.

## **Charge 5**

***Study practices intended to enhance the jury experience and increase jury participation, including:***

- ***allowing jurors to ask questions of witnesses by submitting them to the judge in writing;***
  - ***allowing lawyers to periodically summarize testimony for the jury;***
  - ***allowing jurors to take notes during trial; and***
  - ***allowing jurors to discuss evidence among themselves during trial.***
1. Allow juror questions during civil trials by permitting jurors to anonymously submit additional questions in writing before they begin deliberations. Outside the presence of the jury and witnesses, judges could allow counsel to object to the submitted questions. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim, and counsel would have the opportunity to cross-examine each witness.
  2. Allow juror notetaking during civil trials, but prohibit juror notes during deliberations. The court would keep all notes confidential, destroy them after the jury reaches a verdict, and omit them from the record.

## **Charge 6**

***Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.***

1. Allow transfer of non-probate cases to probate court when it would serve judicial economy AND when venue is permissive in both the court of first filing and the statutory probate court.

## **Charge 7**

*Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.*

No recommendations were adopted.

## **Charge One**



***Charge 1: Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.***

### **Recommendations**

**No recommendations were adopted.**

### **Background**

Currently, provisions in Chapter 153 of the Texas Family Code place a high burden on grandparents seeking access to their grandchildren.<sup>1</sup> The grandparent is required to show that denying access to the child would significantly impair the child's physical health or emotional well-being; the grandparent's child (one of the parents of the child in question) is either in jail, incompetent, dead, or does not have actual possession of the child; and at least one of the parents has not had parental rights terminated.

Originally, the Family Code gave courts the discretionary power to grant reasonable visitation rights to grandparents. Grandparents had standing to request reasonable access to their grandchildren and simply had to show that access would be in the best interests of the child. However, in 2000, the U.S. Supreme Court ruled that it was unconstitutional to allow third parties' access to children over the objection of their parents, unless the parents could be proved to be unfit. *Troxel v. Granville*, 530 U.S. 57 (2000).<sup>2</sup>

If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.<sup>3</sup>

A biological or adoptive grandparent may request possession of or access to a grandchild by filing an original suit or a suit for modification as provided by Chapter 156. The court shall order reasonable possession of or access to a grandchild by a grandparent if: (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had their parental rights terminated; (2) the grandparent requesting possession of

or access to the child overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and (3) a parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition has been found by a court to be incompetent, is dead, or does not have actual or court-ordered possession of or access to the child.<sup>4</sup>

A biological or adoptive grandparent may not request possession of or access to a grandchild if: (1) each of the biological parents of the grandchild has died, had the person's parental rights terminated, or executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.<sup>5</sup>

### *Troxel v. Granville*

*Troxel v. Granville* was brought about by the deceased father's parents who sought to have visitation rights with their two granddaughters. The mother informed the grandparents that they could no longer see the children every weekend and instead sought to limit visitation to once a month. The grandparents filed suit, citing a Washington state law that allowed standing to any person, at any time, to file suit seeking visitation rights so long as visitation might serve in the best interest of the child.<sup>6</sup> The grandparents won in state court but the decision was later reversed in the Washington Court of Appeals on the grounds that the ruling interfered with the rights of parents in raising their children.<sup>7</sup>

The U.S. Supreme Court in a plurality opinion held that state laws granting visitation rights to nonparents may not be overly broad and must respect the substantive component of the Due Process Clause that protects against state interference with certain rights and liberty interests. Therefore, the Supreme Court construed that the Washington law violated the fundamental right of parents to make decisions concerning care, custody, and control of their children.<sup>8</sup>



## **Texas Attorney General Opinion**

In 2004, Senator Wentworth asked the Texas Attorney General for an opinion regarding the constitutionality of Texas statutes granting visitation rights to grandparents.<sup>9</sup> General Abbott opined that the statutes were constitutional if applied according to the standards set by *Troxel*.<sup>10</sup>

In 2005, the Texas Legislature amended Family Code provisions to clearly articulate the presumption that parents act in the best interests of their children **B** a presumption that must be overcome by proving by a preponderance of the evidence that denial of a grandparent's petition for possession of or access to a child would significantly impair that child's physical or emotional well-being.<sup>11</sup>

### **Conclusion**

At the interim hearing in Houston, the Committee received testimony from parents seeking to tighten perceived loopholes in the Family Code, as well as grandparent advocates who believe they face a high threshold in seeking access to their grandchildren.

Based on this testimony, the Committee focused on whether or not current law meets the fundamental requirements mandated in *Troxel v. Granville*. Existing provisions in the Texas Family Code are compliant with the ruling; therefore, the Committee declined to recommend any changes to current law.



## **Charge Two**



***Charge 2: Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.***

### **Recommendation**

- 1. If requested by the birth parent, this recommendation would prohibit release of a birth certificate of an adopted child until the death of the birth parent, regardless of the other birth parent's preference. The birth parent may file an updated medical history and contact preference form with the state registrar indicating the level of contact by the adopted child, if any.**

**If the birth parent requests contact via an intermediary, the birth parent must provide contact information for the intermediary. Finally, DFPS or adoption agencies must provide notice to the adoptive parents relating to the birth parent contact preference, as well as the adoptive child's right to obtain a noncertified copy of their birth certificate.**

### **Background**

Under current law, when an adoption is finalized, the original birth certificate of the child being adopted is sealed and they are issued a supplemental birth certificate, which replaces the name of their birth parents with the names of their adoptive parents.<sup>12</sup> Supplementary birth certificates differ from standard birth certificates because they do not divulge the name or location of the birth parents, regardless of the wishes of the adopted parents, child or court.

The original birth certificate cannot be accessed without an order issued by the same court that originally granted the adoption. In some cases, an adoptee may not be aware of which court granted his or her adoption, in which case the adoptee must pay a fee to register with the Central Adoption Registry in order to ascertain the court's name.<sup>13</sup> The Central Adoption Registry, maintained by the Department of State Health Services (DSHS)

reunites adult adoptees with birth parents or siblings who register in order to look for them.<sup>14</sup>

## **Senate Bill 221**

Senate Bill 221, 80th Session, enabled adults who were adopted as children to access their original birth certificate without having to go through the courts.<sup>15</sup> The bill established a procedure for adopted persons over the age of 18, or if the adopted person is deceased, his or her adult descendant, adult sibling, or surviving spouse, to obtain a copy of the original birth certificate. In addition, the bill required the Department of Family and Protective Services (DFPS) or a licensed adoption agency to inform the birth parents about the rights of an adopted child to obtain a noncertified copy of the birth certificate.

Senate Bill 221 also created a centralized registry at the Department of State Health Services where birth parents could record their wishes relating to contact and relay health concerns without exposing their identity. Senate Bill 221 created a contact preference form to allow birth parents to communicate with adopted children. In addition, birth parents who do not wish to be reunited with an adopted child could express that preference, or request communication with their adopted child through an intermediary.

The Jurisprudence Committee passed Senate Bill 221 with two important changes. The substitute required adoption entities to provide the contact preference form to the birth parents, and the petition for adoption would not have been granted until the parents had filed a completed form. In addition, the substitute changed the requirements for birth parents prior to January 2008. Instead of opting out of the contact preference form requirement, birth parents could opt in by going onto the DSHS website and filling out the contact preference form/medical history if they choose.

Senate Bill 221 bill died in the House of Representatives.

## **Conclusion**

At the interim hearing in Fort Worth, the Committee received testimony from adoptees who wish to know more about their birth parents, as well as adoption advocates, whose main concern was maintaining the privacy and confidentiality of birth parents.

A required contact preference form would notify birth parents of the contact options available, and allow for updates to any important medical history information. All adoptions after the effective date of the recommendation would require the adoption placement agency to notify the birth parents about the contact preference and updated medical history forms. Birth parents would have the option to fill out the form as "no contact" if they do not wish to be contacted in the future. In addition, birth parents could choose to communicate directly to the adoptee, or through a confidential intermediary.

All adoptions before the effective date of the recommendation would not be affected, and would continue with the current practice for notification preferences. Therefore, birth parents could go onto the Department of State Health Services website and fill out the contact preference form and medical history information if they choose.

The Committee's recommendation should balance the interests of adoptee contact versus birth parent confidentiality by allowing adoptees to communicate to birth parents, yet protect the privacy of birth parents who do not wish to be contacted.





## **Charge Three**



**Charge 3: *Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.***

### **Recommendations**

- 1. Clarify time limitations on the establishment of heir finder contracts if such contracts request payment, property, or an assigned portion of a decedent's estate.**
- 2. Void an heir finder contract or other agreement that is established within the initial six months that an unclaimed estate is being processed if the contract requests payment, property, or an assigned portion of a decedent's estate.**
- 3. Add enforcement provisions to section 74.507 of the Texas Property Code, which specifies that heir finders may not collect more than 10 percent of a decedent's unclaimed net estate for expenses and services.**
- 4. Specify the liabilities and remedies when a personal representative commits a breach of fiduciary duty to a beneficiary of an unclaimed estate, including but not limited to imposing a lien against the estate or denying payment to the representative.**
- 5. Clearly define penalties for heir finders who operate without a license or violate the provisions of their private investigator's license.**
- 6. Create a licensing, registration, and enforcement program for heir finders at the Texas Department of Public Safety, possibly within the Private Security Bureau which currently licenses private investigators.**

### **Background**

Heir finders compose a little-known profession of researchers, search firms or, in some cases, detectives who track down relatives of people who have died without a will or known next of kin. In addition, heir finders seek missing owners of unclaimed property for a fee. Fees for heir finders can be

considerable, typically charging 10 to 33 percent of an estate's value. Many states, however, place caps on the amount an heir finder can claim.<sup>16</sup>

Thirty-six states statutorily limit the fees charged by heir finders. These restrictions on the percentage of value of the property reported, recovered, collected, or claimed range from 5 percent in Washington to 35 percent in New Jersey. Fourteen states do not regulate the charges assessed by heir locators.<sup>17</sup> Section 74.507 of the Texas Property Code states that heir finders may not contract for more than 10 percent of the value of the unclaimed property. This is the only statutory regulation regarding heir finders in Texas.<sup>18</sup>

Thirteen states require an heir finder to be a licensed private investigator.<sup>19</sup> The Texas Department of Public Safety, Private Security Bureau, licenses heir finders, requiring a Class A - Private Investigation Company license to operate as an heir finder.<sup>20</sup> In five other states, heir finders are required to register with the state office responsible for unclaimed property. States such as Washington and Vermont have much more stringent guidelines. Both states require registration, but Washington requires a Unified Business Identifier and Master Business License, while Vermont insists on a performance bond of not less than \$10,000 for each heir finder.<sup>21</sup>

The Texas Comptroller of Public Accounts handles unclaimed property in Texas. Unclaimed property in Texas is defined as an abandoned financial asset of at least one year or more, including stocks, escrow accounts, checks and bonds.<sup>22</sup> Businesses, governmental agencies, and financial institutions are required to report abandoned property in their custody.<sup>23</sup> Published lists of unclaimed property owners are available online and in newspapers. The Comptroller's Office holds the property in trust until claimed.

Eight states, including Texas, have no statutory provisions regarding the form, terms, or restrictions imposed on a contract to locate property. (See Appendix H for a sample heir finder contract.) During the 80th Legislative Session, House Bill 2479 would have created a liability for certain personal representatives who breach their fiduciary duties to beneficiaries.<sup>24</sup> In addition, the bill attempted to prohibit contracts involving heir finders in Texas in the first six months after filing a pleading. House

Bill 2479 did not pass as several members believed the issue deserved closer examination.

### **Conclusion**

The Committee considered public testimony from probate judges, the Texas Comptroller of Public Accounts, the Texas Department of Public Safety (DPS), and professional heir finder companies. Most witnesses expressed frustration pertaining to the lack of heir finder regulation, the tendency of heir finders to become prematurely involved in the estate distribution process, and the exorbitant fees charged by some heir finder companies.

To ensure appropriate supervision, the Committee recommends that Texas heir finder companies register with DPS to obtain a professional license. Heir finders operating without a license in Texas would be subject to certain penalties. Once a company registers with the Private Security Bureau, DPS could collaborate with the Comptroller to monitor heir finders and enforce fee limitations.

In addition, the Committee recommends requiring a six-month waiting period before the establishment of new heir finder contracts to allow sufficient time for probate courts to initiate the estate distribution process without interruption. Heir finders could offer supplementary information for unlocated heirs after that time, and could charge up to 10 percent of a decedent's unclaimed net estate for expenses and services. For added protection, heir finders could be liable if they breach a fiduciary duty to a beneficiary of an unclaimed estate.

These recommendations should clarify the process for obtaining an heir finder's license, and clearly define their duties and responsibilities in Texas. Furthermore, the recommendations should bring adequate oversight and consistency to the heir finder industry.



## **Charge Four**





**Charge 4: *Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.***

***Develop and implement tools for children’s advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers.***

***Include the following:***

- ***Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;***
- ***Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and***
- ***Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.***

### **Recommendations**

- 1. Direct the Permanent Judicial Commission For Children, Youth and Families to conduct a study of best practices for representation of children in child abuse and neglect cases, and determine whether further training, oversight or other requirements are necessary.**
- 2. Increase funding to help recruit and develop CASA volunteers to ensure Court Appointed Special Advocates can be appointed for every child in the system.**
- 3. Increase training, including a drug and alcohol component, for judges and attorneys involved in CPS cases.**
- 4. Require the appointed attorney to meet with the child client sufficiently in advance of the hearing to adequately represent the child witness. If the judge finds the attorney is not meeting this requirement, deny eligibility for the appointment list.**
- 5. Increase training requirements for judges and attorneys ad litem.**

- 6. Authorize judges to remove ad litem who fail to meet education and performance requirements.**
- 7. Require the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all the attorneys ad litem, as well as their qualifications and training. The list should be made available to the public at the courthouse and on the Internet.**
- 8. Limit the total number of cases an attorney ad litem is working on at any one time.**
- 9. Require the Supreme Court to develop rules and procedures that make the courtroom environment more child friendly, such as technology for closed circuit testimony for children, and court companions to sit near the child in the courtroom and while testifying.**

### **Background**

Prior to September 2007, a judge was required to complete eight hours of training in family violence, sexual assault and child abuse during the first term of office. Judicial officers were required to complete the training within the first four years of service. Judges and judicial officers also had to complete an additional three hours of training every four years thereafter. Currently, the Texas Center for the Judiciary (TCJ) oversees judicial education for district and county court at law judges, and monitors the annual training for active judges and judges eligible for assignment. The TCJ notifies the presiding judges and the Court of Criminal Appeals of judges who have failed to meet the educational requirements. If judges fail to comply with the educational and training requirements, their names are referred to the State Commission on Judicial Conduct for disciplinary action.

Last session, House Bill 3505 amended section 22.110 of the Texas Government Code to require inclusion of certain subjects like child neglect, family violence, sexual assault, and child abuse as part of the judicial training.<sup>25</sup> The bill also added certain subtopics to the mandatory child abuse and neglect instruction, such as the physical and emotional impact on child development. House Bill 3505 required the organization providing the training to have at least three years experience in training professionals on

child abuse and neglect issues or have personnel or planning committee members who have at least five years experience working directly in the field of child abuse and neglect prevention and treatment.

Finally, House Bill 3505 increased the minimum amount of training required from eight to 12 hours. At least four of those hours must be dedicated to issues related to child abuse and neglect, and cover at least two of five required subtopics. The bill also increased continuing education requirements from three to four hours, with at least two of those hours dedicated to issues related to child abuse and neglect.

Rule 2d of the Rules of Judicial Education and Government Code, Section 74.055(c)(5) require former or retired judges who are subject to assignment to comply with the same education requirements that apply to active judges. However, a judge can be exempted from these requirements by filing an affidavit stating that the judge does not hear any cases involving family violence, sexual assault, or child abuse and neglect.

All attorneys licensed in Texas are required to complete 15 hours of continuing legal education (CLE) each year. There are no specific requirements regarding the subject matter unless the attorney is board certified in a specific area. Currently there is no board certification for child abuse and neglect.<sup>26</sup>

Texas Family Code, section 107.004(b) requires an attorney ad litem appointed to represent a child in a CPS case to complete a minimum of three CLE hours relating to child advocacy, including best practices for a removal proceeding. However, this requirement may be waived if a court finds that the attorney ad litem has sufficient experience equivalent to the required education.

### **Children's Advocacy Centers**

Children's Advocacy Centers (CACs) offer safe, neutral settings for the assessment of children and families who have fallen victim to child abuse. CACs perform comprehensive evaluations to determine what services are necessary and available for restoring the lives of the victims. CACs also provide medical and mental health services for the children and their families.

Children's Advocacy Centers also collaborate with agencies investigating and prosecuting child abuse and neglect. CACs coordinate the activities of governmental entities relating to child abuse investigations and facilitate the delivery of services to child abuse victims and their families. A multidisciplinary team is appointed to ensure the efficient and appropriate disposition of child abuse cases through the civil and criminal justice systems.

### **Child Testimony**

In certain cases that involve sex crimes against children, Article 38.072 of the Texas Code of Criminal Procedure provides an exception to the hearsay rule by allowing testimony from an outcry witness. An outcry witness is the first person over the age of 18 to whom the child victim mentioned details of the offense. Common examples of outcry witnesses are family members, teachers, and medical personnel.

CACs employ forensic interviewers who use research-based techniques in a developmentally appropriate manner to help ascertain from child victims the level and type of abuse alleged. However, forensic interviewers rarely qualify as an outcry witness, so they are unable to testify at trial unless called upon to explain and narrate the recorded interviews of the alleged victims, which may not be used at trial due to other statutory restrictions.

### **Admissibility of Prior Extraneous Offenses**

Rule 413 of the Federal Rules of Evidence pertains to admissibility of similar, previously committed crimes in sexual assault cases. In federal sexual assault cases, evidence of the defendant's commission of another offense of sexual assault is admissible, and may be considered on any matter to which it is relevant. In contrast, current Texas law does not allow for admission of similar offenses in sexual assault cases where the victim is an adult.<sup>27</sup>

Rule 414 of the Federal Rules of Evidence allows prosecutors to admit prior evidence of the defendant's commission of a similar offense against another child into criminal cases. Under the Texas Code of Criminal Procedure, however, such evidence is admitted only if the prior bad acts were against the child who is the victim in the alleged offense.<sup>28</sup>

## Case Consolidation and Stacked Punishments

Chapter 3 of the Texas Penal Code states that if cases are consolidated and heard together at one trial, then each of the sentences arising out of convictions for those cases must run concurrently.<sup>29</sup> In order to stack sentences so that they run consecutively, each case must be tried separately. In addition, if the prosecution files a motion to consolidate a defendant's cases into one proceeding, the defendant has an absolute right to veto that decision and sever the cases. However, any resulting sentences from those separate trials can be stacked to run consecutively.

One exception to this general rule is found in Penal Code, section 3.03, which allows sentences for the following offenses to be stacked, even if multiple charges were consolidated and tried in one proceeding:

- Intoxication Assault
- Intoxication Manslaughter
- Online Solicitation of a Minor
- Continuous Sexual Assault of a Young Child\*
- Indecency with a Child\*
- Sexual Assault of a Child\*
- Aggravated Sexual Assault of a Child\*
- Prohibited Sexual Conduct\*
- Sexual Performance by a Child\*
- Improper Photography or Visual Recording
- Possession or Promotion of Child Pornography

\*Only if the victim was under 17 years of age at the time of the offense.

In these cases, the prosecutor may try every allegation in one trial, but request that the sentences, if any, be stacked. However, the ultimate decision whether the sentences run concurrently or consecutively is entirely up to the judge.

Another exception to this general rule concerns drug crimes prosecuted under the Texas Controlled Substances Act. Health and Safety Code, section 481.132 allows a defendant to be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

Unlike Texas, the federal rules provide that sentences arising from consolidated cases can be stacked, with only a few exceptions. 18 U.S.C.

Chapter 227, section 3584 states that multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. In other words, multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

### **Conclusion**

At the interim hearing in Houston, the Committee heard from various stakeholders seeking to improve outcomes for children in child abuse and neglect cases. The Committee received testimony offering methods to strengthen the judicial process in child abuse and neglect cases, improve the representation of children, and increase specialized education for judges and attorneys.

The Committee heard from various witnesses on the need for increased training requirements for both judges and attorneys ad litem. Child Protective Services (CPS) cases commonly involve many issues in addition to abuse and neglect, specifically drug or alcohol abuse. To address these concerns, the Committee recommends increased education and training requirements for judges and attorneys ad litem involved in CPS cases. The additional training should include, at a minimum, a drug and alcohol component in its curriculum to address common, tangential problems regarding child abuse.

To prevent attorneys ad litem from assuming an excessive caseload, many witnesses suggested a limit on the number of cases that can be handled concurrently by any one attorney ad litem. The Committee recommends a reasonable case limit that will promote more efficient, effectual representation, resulting in better outcomes for children.

Current law requires an attorney ad litem to meet with the child-client within a reasonable time after the appointment. The Committee made recommendations to strengthen this requirement, and ensure enforcement by giving judges the ability to deny appointment eligibility when attorneys fail to meet this responsibility.

In an effort to encourage judges to appoint qualified attorneys, the Committee recommends adopting procedures for judges to remove an attorney who fails to meet mandatory education and performance

requirements. In addition, the Committee directs the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all local attorneys ad litem, as well as their qualifications and completed training requirements. To increase public awareness of available, qualified attorneys in the region and ensure attorneys ad litem are being appointed on a rotational basis, the list would be available at the courthouse and on the Internet.

To determine further best practices for judges and attorneys ad litem in CPS cases, the Committee recommends the Permanent Judicial Commission for Children, Youth and Families study best practices for representation of children in child abuse and neglect cases, appropriate training and education requirements for judges and attorneys involved in CPS cases, and the potential need for more oversight and enforcement. The Commission would issue a report containing suggested statutory or rule changes by September 1, 2009, allowing the Committee sufficient time to review the recommendations during the interim.

Texas courts depend heavily on Court Appointed Special Advocate (CASA) volunteers to provide effective and efficient guardian ad litem and volunteer advocate services for children in CPS cases.<sup>30</sup> CASA receives federal funding from the Victims of Crime Fund; however, these funds have recently been reduced. Recognizing the importance of CASA in the CPS process, the Committee recommends increased state funding to help recruit and develop more CASA volunteers.

Texas judges currently have the authority to implement certain procedures to create a more supportive setting for children testifying in criminal proceedings, such as closed caption television and court companions. To encourage the proliferation and use of such methods, the Committee recommends requiring the Supreme Court to develop rules and procedures to make the courtroom environment more accommodating to young witnesses.





## **Charge Five**



**Charge 5: *Study practices intended to enhance the jury experience and increase jury participation, including:***

- *allowing jurors to ask questions of witnesses by submitting them to the judge in writing;*
- *allowing lawyers to periodically summarize testimony for the jury;*
- *allowing jurors to take notes during trial; and*
- *allowing jurors to discuss evidence among themselves during trial.*

### **Recommendations**

- 1. Allow juror questions during civil trials by permitting jurors to anonymously submit additional questions in writing before they begin deliberations. Outside the presence of the jury and witnesses, judges could allow counsel to object to the submitted questions. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim, and counsel would have the opportunity to cross-examine each witness.**
  
- 2. Allow juror notetaking during civil trials, but prohibit juror notes during deliberations. The court would keep all notes confidential, destroy them after the jury reaches a verdict, and omit them from the record.**

### **Background**

The Supreme Court of Texas established the Jury Assembly and Administration Task Force (Task Force) in July 2006 to evaluate the need for reliable jury lists, uniform statewide jury plans, trained officials, summons enforcement procedures, and juror exemption processing.<sup>31</sup> The order creating the Task Force also encouraged the elimination of opportunities for local manipulation that could jeopardize random jury selection. The Supreme Court appointed a wide range of professionals to the 29-member panel, including judges, jury administrators, attorneys, and law professors.

The Task Force issued a final report on February 2, 2007 which recognized the need to re-establish integrity in the jury process,

technologically update jury selection, minimize opportunities for experimentation, and harmonize conflicting statutory provisions regarding summoning and qualifying jurors in civil and criminal cases.<sup>32</sup> In addition, the report recommended that the Secretary of State govern certain aspects of the juror process while leaving the establishment and implementation of written jury plans to individual counties, pending approval by the Supreme Court. This approach offered increased uniformity throughout the state, yet allowed for local control.

### **Senate Bill 1300**

Senate Bill 1300, 80th Legislative Session, addressed certain recommendations from the 2007 Task Force report, such as juror exemptions and how to maintain an inclusive, reliable jury pool.<sup>33</sup> The bill also authorized juror notetaking, juror discussions, submission of written questions by jurors, and interim summations by attorneys. Specifically, the bill required the name of a prospective juror not impaneled due to an excuse be immediately returned to the jury wheel, and it provided limitations to jury service exemptions for legislators and legislative staff. Senate Bill 1300 passed the Jurisprudence Committee last session and was placed on the intent calendar, but the bill was not taken up on the Senate floor.

The proposed changes in Senate Bill 1300 would have increased juror participation and comprehension, and assisted jurors in reconstructing evidence during deliberations with the aid of notes and prior discussion. Various studies support that such jury innovations serve as useful memory aids, increase juror confidence, and enhance the quality of deliberations.<sup>34</sup> In addition, the Texas Court of Appeals ruled that allowing jurors in civil cases to submit questions to witnesses does not constitute fundamental error.<sup>35</sup> The Court additionally found that there is nothing inherently improper about allowing occasional questions from jurors in conjunction with appropriate procedural safeguards to protect rights of parties and to prevent undue trial delay. A list of states that allow juror questions and juror notetaking can be found in Appendix J.

Opponents believe that juror notetaking and discussion could encourage jurors to form premature judgments, distract them during the trial, and adversely affect the quality of juror discussions during deliberations. In addition, critics also caution that interim summations may decrease jurors'

focus throughout the trial due to an increased reliance on attorneys' summaries rather than the presented evidence.

## **Conclusion**

At the interim hearing in Lubbock, the Committee received public testimony from numerous witnesses regarding the advantages and disadvantages of juror questions and juror notetaking. Most witnesses supported both concepts, offered relevant examples, and suggested various implementation methods for these innovations.<sup>36</sup> In addition, testimony highlighted a growing frustration that the Supreme Court Jury Task Force suggested similar jury reforms as early as 1997, but the Texas Supreme Court has yet to adopt any of the recommendations.<sup>37</sup>

In contrast, several witnesses objected to juror notes in the deliberation room or juror discussions of evidence during the trial due to the potential bias created by such practices. Certain witnesses expressed concern that juror notes may create a reversible error if they become part of the official court record. Additionally, many witnesses cautioned that interim summations could cause unnecessary delays and create an unfair advantage for certain parties.

In light of this testimony, the Committee recommends that juror questions and juror notetaking may be permitted during all civil trials, allowing the courts to implement such practices at their discretion. Jurors could submit written questions before deliberation, and after the judge rules on admissibility, the questions would be read aloud. Witnesses could be recalled to answer the question, and counsel would be given a brief cross-examination period. In addition, juror notetaking could be permitted to aid in memory recall and participation, but those notes would be excluded from the deliberation room and would not be part of the official court record. The court would keep the notes confidential and destroy them at the trial's conclusion.

In order to preserve judicial discretion, these recommendations would be permissive, and applied on a case-by-case basis. Allowing juror questioning should increase juror participation and engagement prior to the deliberation phase of the trial. Furthermore, testimony and research support that notetaking should increase jurors' recall of important details and

evidence during deliberation, since jurors would rely exclusively on their memory at that time.

## **Charge Six**





**Charge 6: Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.**

### **Recommendation**

- 1. Allow transfer of non-probate cases to probate court when it would serve judicial economy AND when venue is permissive in both the court of first filing and the statutory probate court.**

### **Background**

Since 1983, statutory probate courts have had the power to transfer cases filed elsewhere that are appertaining or incident to an estate pending in a statutory probate court to themselves for trial and disposition.<sup>38</sup> One of the key reasons for this power is to permit these specialty probate courts to resolve issues upon which the value of the estate depends, promoting the prompt and efficient administration of estates.

The use of this power has been largely uncontroversial, except in personal injury and wrongful death tort cases. Occasionally, a statutory probate court has transferred a personal injury or wrongful death case to itself, even in situations where venue may not otherwise have been proper in the county where the probate court sits. Use of the transfer power in these cases has given rise to accusations of forum shopping.

In 1995, the Legislature enacted section 15.007 of the Civil Practice and Remedies Code (CPRC). This section makes certain that provisions of the CPRC trump conflicting venue provisions of the Probate Code regarding personal injury, death and property damage claims. The enactment of this law failed to eliminate the practice of statutory probate courts transferring tort cases, however, because many probate judges did not consider the current provisions in the Probate Code to be venue provisions.

### ***Gonzalez v. Reliant Energy*<sup>39</sup>**

Both proponents and opponents of the power of statutory probate judges to transfer tort cases filed suit, and the courts of appeal split on the issue. Finally, in 2005, the Supreme Court of Texas conclusively upheld CPRC §15.007 in *Gonzalez v. Reliant Energy*, 159 S.W.3d 615 (Tex. 2005).

The Court ruled that sections 5(b) and 608 of the Probate Code are transfer provisions, and do not confer venue, concluding that CPRC §15.007 controls in connection with the attempted transfer of personal injury, death, or property damage suits.

Therefore, under section 15.007, a statutory probate court cannot effectuate such a transfer unless venue in the county in which the probate court is located would be proper under general venue provisions found under §15.002 of the Civil Practice and Remedies Code.

### **Senate Bill 392**

Senate Bill 392, filed last session, attempted to clarify that a statutory probate court may hear and transfer to themselves non-tort causes of action appertaining or incident to an estate being administered, regardless of whether the venue would otherwise be proper. This bill, and its companion, House Bill 660, were both left pending in the Jurisprudence Committee last session.

### **Conclusion**

At the interim hearing in San Antonio, the Committee heard from several probate judges, who believe the current practice allowing transfers promotes efficiency and judicial economy. However, other witnesses testified that when non-probate cases are transferred to an inappropriate venue, it can constitute forum-shopping.

Texas Probate Code, sections 5B and 608 do not confer venue upon a probate court, instead only provide a mechanism to transfer the case. Therefore, sections 5B and 608 do not allow a statutory probate court to override mandatory venue provisions found in section 15.001(b) of the Texas Civil Practice and Remedies Code.

The Committee agrees with the Texas Supreme Court ruling in *Gonzalez v. Reliant Energy*, and believes that the purpose of sections 5B and 608 should not supplant well-established mandatory venue provisions by conferring venue when it would not otherwise be permissible. Therefore, this recommendation would allow the court of original filing to transfer a case to statutory probate court only if venue is proper in the county where the statutory probate court is located.

## **Charge Seven**



***Charge 7: Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.***

### **Recommendations**

**No recommendations were adopted.**

### **Background**

During the 80th Regular Session, Senate Bill 1317 was the most recent attempt to limit extraterritorial jurisdiction and the ability of municipalities to exert regulatory authority beyond city limits, and addressed the relationship between the unique regulatory authority of state agencies and home-rule municipalities.<sup>40</sup>

According to section 217.042 of the Local Government Code, a municipality may define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside those limits. In addition, Article XI, section 5 of the Texas Constitution forbids municipal ordinances from conflicting with general law. Finally, case law provides that an ordinance of a home-rule that attempts to regulate a subject matter preempted by a state statute is consequently unenforceable to the extent that it conflicts with state law.<sup>41</sup>

### **Proposed Ordinance**

Last year, the City of Houston proposed to regulate air pollution outside of its corporate city limits through a local nuisance ordinance. In February 2007, Houston Mayor Bill White proposed amending the City's nuisance ordinance to help reduce the amount of hazardous pollutants in Houston's air.<sup>42</sup> The proposed ordinance would have allowed Houston to levy fines of up to \$2,000 per day against polluting industrial facilities located outside of its corporate boundaries. In addition, the ordinance would have treated certain pollutants, like benzene and chlorine, more stringently than they are treated under state or federal law.

To prohibit the use of city nuisance ordinances for such purposes, Senate Bill 1317, filed last session, authorized a home-rule municipality to define and prohibit a nuisance within 5,000 feet outside the limits of the municipality. However, the definition could not address levels of emissions authorized in an air permit issued by the Texas Commission on Environmental Quality (TCEQ). Senate Bill 1317 passed the Senate, but later died in the House Calendars Committee.

### **Houston Regional Air Quality Task Force**

The Houston Regional Air Quality Task Force was organized to develop a comprehensive understanding of the state of air quality in the region, the human health impacts and risks, and key contributors to air quality. The 18-member Task Force was specifically charged with identifying effective regulatory mechanisms and voluntary initiatives that could help reduce air toxin emissions and to make recommendations to enhance air quality improvement efforts in the greater Houston area.

The City of Houston agreed to set aside the proposed amendment to the nuisance ordinance while the Task Force studied alternatives. The Task Force issued its report in September 2007, containing 18 recommendations for the City of Houston, Harris County, the Texas Commission on Environmental Quality, and the Environmental Protection Agency aimed at reducing toxic air pollutants in Houston's air.<sup>43</sup>

In May 2008, Houston Mayor Bill White renewed efforts to reduce air pollution in Houston by issuing a Benzene Action Plan, and requesting local plants to set five-year public goals for reducing emissions, and promised to file objections when plants apply for emission permits or renewals.<sup>44</sup>

### **Conclusion**

At the interim hearing in Edinburg, the Committee heard testimony from various interested parties, including residents and mayors of cities surrounding the Port of Houston, air quality interest groups, representatives from petrochemical companies, City of Houston staff, as well as experts from the Texas Commission on Environmental Quality.

The Committee does not wish to interfere with long-standing principles regarding extraterritorial jurisdiction and nuisance law. In

addition, many of the recommendations suggested were not germane to the scope of the interim charge, nor within the Committee's jurisdiction. Therefore, the Committee declined to make any changes to current law regarding this issue.





## **Endnotes**



## Endnotes

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- <sup>1</sup> Texas Family Code, §153.002.
- <sup>2</sup> See Appendix A.
- <sup>3</sup> Texas Family Code, §153.431.
- <sup>4</sup> Texas Family Code, §153.433.
- <sup>5</sup> Texas Family Code, §153.444.
- <sup>6</sup> Wash Rev. Code, §26.10.160(3).
- <sup>7</sup> *In re Troxel*, 87 Wash. App. 131, 133, 940 P.2d 698, 698-699 (1997).
- <sup>8</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).
- <sup>9</sup> See Appendix B.
- <sup>10</sup> Op. Tex. Atty Gen. GA -0260 (2004).
- <sup>11</sup> Texas Family Code, §153.002.
- <sup>12</sup> Texas Health & Safety Code, §192.008.
- <sup>13</sup> See Appendix C.
- <sup>14</sup> See Appendix D.
- <sup>15</sup> Texas Senate Bill 221, 80th Legislature (2007).
- <sup>16</sup> See Appendix E.
- <sup>17</sup> Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
- <sup>18</sup> See Appendix F.
- <sup>19</sup> Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
- <sup>20</sup> Texas Occupations Code, Title 10, Ch. 1702, Rule 1702.103.
- <sup>21</sup> Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
- <sup>22</sup> Texas Property Code, Title 6, Ch. 72-75.
- <sup>23</sup> See Appendix G.
- <sup>24</sup> Texas House Bill 2479, 80th Legislature (2007).
- <sup>25</sup> Texas House Bill 3505, 80th Legislature (2007).
- <sup>26</sup> State Bar of Texas, Minimum Continuing Legal Education, [http://www.texasbar.com/Template.cfm?Section=Minimum\\_Continuing\\_Legal\\_Ed](http://www.texasbar.com/Template.cfm?Section=Minimum_Continuing_Legal_Ed). Accessed October 13, 2008.
- <sup>27</sup> Texas Code of Criminal Procedure, Art. 38.37.
- <sup>28</sup> Texas Code of Criminal Procedure, Art. 38.37.
- <sup>29</sup> Texas Penal Code, §3.03.
- <sup>30</sup> See Appendix I.
- <sup>31</sup> Texas Supreme Court, Resolution No. 06-9057 (July 11, 2006).
- <sup>32</sup> Task Force on Jury Assembly and Administration, *Task Force on Jury Assembly and Administration Report to the Supreme Court of Texas* (February 2, 2007).
- <sup>33</sup> Texas Senate Bill 1300, 80th Legislature (2007).
- <sup>34</sup> Shari Seidman-Diamond et al., "Inside the Jury Room: Evaluating Juror Discussions During Trial," *Judicature*, vol. 87, no. 2 (September-October, 2003), pp. 54-58; Larry Heuer and Steven Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking," *Law and Human Behavior*, vol. 12, no. 3 (September 1988), pp. 231-261; Leonard B. Sand and Steven Alan Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit," *New York University Law Review*, vol. 60 (June 1985), pp. 423-497; and "Developments in the Law: The Civil Jury," *Harvard Law Review* v. 110 (May 1997) pp. 1408-1536.
- <sup>35</sup> *Hudson v. Markum*, 948 S.W. 2d 1 (Tex. App. B Dallas 1997).
- <sup>36</sup> See Appendices K, L, and M for examples of juror questions, procedure, and format.
- <sup>37</sup> Texas Supreme Court Jury Task Force, *Executive Summary of the Report of the Supreme Court Jury Task Force* (September 8, 1997).
- <sup>38</sup> Texas Probate Code, §§5(b) and 608.
- <sup>39</sup> See Appendix N.

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<sup>40</sup> Texas Senate Bill 1317, 80th Legislature (2007).

<sup>41</sup> *Dallas Merchant's and Concessionaire's Association v. City of Dallas*, 852 S.W. 2d 489 (1993).

<sup>42</sup> Memorandum from the City of Houston, March 6, 2007.

<sup>43</sup> See Appendix O.

<sup>44</sup> See Appendix P.