Report from the President

The State Bar Is Still Standing Along With Our Members

Since June 2019, my President's Page columns have focused on how the State Bar of Texas serves our members and how we hope to improve and expand on our member services. The year was going along as planned until the COVID-19 pandemic affected every part of our lives. The State Bar has been affected as well, but our mission to serve our members has not changed.

I am more proud than ever to be the president of our bar. From providing free CLE and working with the Texas Supreme Court to working with the Office of Court Administration and working with local bars and their initiatives, our State Bar has risen to the challenge to address many of the needs and concerns all of us have had during these tumultuous times. I have heard words of thanks from many of you, and I want to personally thank the professionals at the State Bar who have worked long hours to seamlessly help our profession.

There is a dedicated webpage titled "State Bar of Texas Response to Coronavirus Pandemic" that has loads of information and resources. For this page, please allow me to spotlight just a few examples where we have tried to be of assistance:

1. **MCLE Extensions**—The State Bar of Texas MCLE Department is granting extensions for various compliance deadlines.
2. **Court Guidance**—The Texas Supreme Court has issued numerous emergency orders and the Office of Court Administration has issued guidance on court closures, procedures, and travel authorizations.
3. **Free Webinars and CLE Opportunities**—The State Bar is offering 5.5 hours of free CLE on the TexasBarCLE website, including recent webcasts related to the coronavirus.
4. **Telehealth**—For a limited time, the Texas Bar Private Insurance Exchange is offering all State Bar members a complimentary subscription to telehealth services, with only a $10-per-visit copay.
5. **Relevant Educational Materials and Helpful Family Law and Estate Planning Items**—The State Bar is collecting podcasts and articles related to the coronavirus and how it affects the legal profession as well as providing resources for estate planning execution and family law issues.
6. **Well-Being Resources**—Texas Lawyers' Assistance Program professionals have created a webpage of resources to assist the many attorneys, law students, judges, and families who may be isolated and struggling with a mental health issue or needing recovery support.

As always, we know we can do more and do better. Let us hear from you on what you would like to see. Finally, I normally keep any religious overtones out of my messages. For those who want prayer, know I am praying for our lawyers, our judges, our colleagues, and staff at our offices. May we all be safe, healthy, and even happier than before.

Randy Sorrels
President, State Bar of Texas

Randy Sorrels can be reached by email at rsorrels@awtxlaw.com or randy.sorrels@texasbar.com or by phone at 713-222-7211 (office) or 713-582-8005 (cell).

State Commission on Judicial Conduct

March 23, 2020

Hon. Greg Abbott
Governor of the State of Texas
P.O. Box 12428
Austin, TX 78711

Via Email: Peggy.Venable@gov.texas.gov

Hon. Nathan Hecht
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Via Email: Nina.HessHsu@txcourts.gov

Randy Sorrels
President, State Bar of Texas
1414 Colorado Street
Austin, Texas 78701

Via Email: RSorrels@awtxlaw.com

Hon. Ken Paxton
Attorney General, State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Via Email: Darren.McCarty@oag.texas.gov

Re: Notification Pursuant to Tex. Govt. Code Sec. 33.0041

Dear Governor Abbott, Chief Justice Hecht, Mr. Sorrels and General Paxton:

As is my duty as chairperson of the State Commission on Judicial Conduct, I am notifying each of you that potential grounds for removal exist for Commissioner Steve Fischer. *See* Tex. Govt. Code Sec. 33.0041.

On January 9, 2020, I was notified, as the presiding officer of the Commission, of potential misconduct by Commissioner Fischer in violating the Commission's confidentiality rules related to a judicial complaint which was then under investigation. On February 6, 2020, I was notified of a separate complaint related to Commissioner Fischer's persistent public

disclosure of confidential Commission business, including matters discussed in executive session. On February 10, 2020, I was notified of another separate complaint alleging that Commissioner Fischer was involved in a coordinated attempt to cast public discredit on the Commission, had persistently and publicly disclosed confidential Commission business, and made disgraceful public statements about fellow commission members.

Commissioner Steve Fischer attended his first meeting from December 4th to December 6th of 2019. On December 3, 2019, prior to that initial meeting, new members received training mandated by statute. *See* Tex. Govt. Code Sec. 33.0043. On December 4, 2019, I (the Chair) orally admonished all members including Commissioner Fischer on the importance of Commission policy mandates related to confidentiality, managing media relations through the Chair, not making statements that would indicate bias toward Texas judges and our fiduciary duty to the Commission rather than any outside entity.

On December 4, 2019, at 8:36 p.m., Commissioner Fischer posted a Facebook social media message which stated, "Suffice it to say I feel like I'm the voice of every attorney who has ever been mistreated by a judge." A person unknown to me named Willard Scott wrote a Facebook response which stated, "Applaud your efforts…but anything other than a sexual assault by a part-time-non-lawyer-small-town municipal court judge will never see daylight." Commissioner Fischer responded, "I can say we sanctioned small town judges for a lot less."

On December 11, 2019, Mr. Fisher sent an email to the Chair which stated:

> "Having spoken to officers of the State Bar of Texas, media friends, attorneys and others this weekend; I am more certain than ever that the news stories have damaged our credibility. Credibility is key to our operations and functions; in an extreme example a judge with a public sanction could reply "Well consider the source; would you believe anything that commission does?" I disagree with what seems to be a "no comment "policy but once again I am only speaking as an individual member. I know unanswered allegations are taken as true by the public just as a "No contest" plea does not give rise to thoughts of innocence. A response to a direct media question "Go look at our annual report" would at best be considered "non-responsive, and at worst, insulting. If people really understood what we did (and I don't fully myself), they would appreciate us. In my opinion, we should take every opportunity to inform the public. I plain to write columns and speak at various organizations sharing my own views. I know many of the reporters and editors around the state, and can distinguish between those who strive for accuracy, and those who use interviews mainly to justify their pre-conceived notions.
>
> Another issue that has arisen, is the claim that staff or commissioners were providing the Governor's office with confidential information on votes and deliberations. If true, this would be a most serious violation of the rules and constitution. There is no defense of "transparency' or the public's right to know, and if true, the intent was to purge commissioners who did not meet certain ideological guidelines. My initial inquires of past members and others did not provide anything solid that these rules were breached; only circumstantial evidences and "I would guess". That isn't enough.

On December 13, 2019, the Chair sent a letter by email to Commissioner Fischer enclosing the Texas State Commission on Judicial Conduct Commission Operation Guidelines which stated:

> "Dear Commissioner Fischer,
>
> "I am in receipt of the email of December 11, 2019.
>
> "I enclose a copy of the Commission Operating Guidelines. I simply point out that Commissioner members are not to communicate with the media about commission business except through the Commission's executive director or chairperson. This policy is expressly designed to provide an accurate and consistent message to the public.
>
> "I understand and respect your opinion that the practice of generally not responding to media requests for comment is damaging to the Commission's credibility. I ask that you respect my authority, as chairperson of the Commission, to direct media relations even if my opinion differs from your own.
>
> "You will find that I emphasize formality, regular order and conformity to procedure in our operation, including in dealing with disagreement. I again caution you not to write columns or speak to the media about your views of the Commission business.

On December 14, 2019, Commissioner Fischer posted a Facebook social media message which stated:

> "The commissioners work hard but there is turmoil, The moderate Chair Judge Catherine Wylie Houston was forced out by the current chair who admits he was disrespectful , The Gov also purged two moderate Repubs and the Exec Dir resigned. I want to talk about policies- I've had several failures in moving the Commission on Social Issues but great success in one are where judges can be abusive. The Chair says do not write a Texas Tribune Column. reporters from Houston Chronicle, Texas Lawyer, and Texas Tribune have been turned away but at least I'm not rude to them. Normally I would tell the Chair :"FY:" but as I represent you, I'm more restrained."

On December 17, 2019, the Commissioners became aware that a lawsuit had been filed against the Commission by Judge Dianne Hensley in the 170th District Court of McLennan County, Texas. On December 17, 2019, Commissioner Fischer was quoted describing the Commission's legal position or strategy related to immunity in the Washington Times.

On about December 23, 2019, the Commissioners were served with that lawsuit via Commission Interim Executive Director (E.D.) Jacqueline "Jackie" Habersham. The E.D. notified Commissioners that the Texas Attorney General (A.G.) had declined to represent the Commission on any matters involving Judge Hensley. On about December 27, 2019, the E.D. sent a formal request for representation to the A.G. On December 27, 2019, Commissioner Fischer wrote to all Commissioners and the E.D. by email:

> "Thanks. I have an extra issue- I wasn't on the board when that vote was taken.
>
> "I'm looking at perhaps a Plead to the Jurisdiction, General Denial - Motion to Dismiss and assert 33.06 Immunity; This will be an easy case to win-- I'm just a bit rusty on Civ Pro but am getting plenty of advice.
>
> "I'll probably defend myself and would help anyone else for no charge- just cost to go to Waco.
>
> Please send me a file-stamped copy of the suit. I've done cases there with Judge Allen who is probably a Visiting Judge now. Once you get me the court-case number I can get info on the judge ."

On December 29, 2019, Commissioner Fischer wrote to all Commissioners and the E.D. by email:

> "I am one step ahead of you and while you're gathering names-- I have received 15 responses from Waco Attorneys on Judge Meyer in the 170th District Court . You can share this with counsel I assert that I have defenses specific to my situation and will decide on how I plan to deal with them
>
> "Specifically in regards to Judge Meyer.
>
> "A majority of attorneys say he is fair and will follow the law.
>
> A significant minority of attorneys say he will almost always rule in favor of a local attorney rather than out-of-town counsel. One attorney who is also on the editorial board of the Waco Tribune casually offered to act as local counsel.
>
> "There is one Waco firm which the judge favors and several attorneys say he will not go against them if at all possible.
>
> "Judge likes complete written detailed motions and prefers to see well-drafted documents from which he can rule , than oral arguments explaining the documents.
>
> "Judge is good friends with JP Hensley .
>
> "The Waco Herald while mostly conservative will be absolutely fair in its coverage.
>
> "I definitely want to speak to any attorney who is representing a case where my name is involved.
>
> "I have no idea who a makes up the Executive Board, what experience they have in Civil Litigation and specifically with this judge and Waco (McLennan County) Texas"

On December 27, 2019, Commissioner Fischer wrote to all Commissioners and the E.D. by email attachment asking for an item on the next agenda and stating:

> "Some of our discussions are not covered under the definition of "Formal Proceedings" in the government code, nor are they documents or testimony of persons before the commission. Those non-confidential items are protected by the Freedom of Speech – Freedom of Press. Any American, which includes all commission members, has these rights which can not be "abridged" -using the words of our constitution, by any governmental body or agency. A commissioner should state when speaking to groups or the press that "This is solely my opinion and I do not speak for the Commission itself as that is the purview of the chair"
>
> I would like us to have a clear policy that no one misunderstands. I was not selected by the Governor, nor the Texas Supreme Court, but was elected by the Board of Directors of the State Bar of Texas, which is the official body of the 105,000 attorneys in Texas. Every day we fight in our courtrooms for the principles embodied in our Constitution. They can not be abridged by any agency or commission, even by majority vote nor can they be abridged, by the arbitrary action of any member including the Chair. If any of this is in doubt I am certainly willing to defer to an Attorney General Opinion or a "friendly" declaratory judgment proceeding. In deference to the Chair I have not spoken to the press while this matter is pending. I have been asked to be a guest speaker at different bar associations around the state and on that too I have temporarily deferred. Being an American is a lot more than posting a flag on Independence Day, please act accordingly.

On December 30, 2019, the A.G. agreed to represent the Commission and assigned attorney Michael Abrams to handle the matter. Mr. Abrams sent to the E.D. a proposed pleading containing the Commission's answer on January 7, 2019 at 11:26 a.m.

On January 9, 2020, I was notified as the presiding officer of potential misconduct by Commissioner Fischer. Specifically, a Complainant A.S. filed a complaint against Judge R. in October 2019, complaining of the judge's decision in a child custody case. The matter had not been presented to the Commission and was pending at that time. Complainant was unhappy that he/she had received no updated response regarding his/her complaint as of January 8, 2020. As such, he/she sent an email to the agency and copied several other unknown persons as well as 2 reporters. Mr. Fischer was apparently a recipient of that initial email and provided a response to Complainant about his/her complaint, to include all other original recipients of the email. Mr. Fischer's response, which including reporters, appears to have violated the Commission's confidentiality rules and practices by validating that a complaint was received by the Commission and was under investigation, which was also evidenced by the judge's name which appears in the subject line and the CJC case number. Further, Mr. Fischer criticized the facts in the complaint and the Complainant's failure to follow Commission "rules and procedures." Mr. Fischer never disclosed this communication to the E.D. or Commissioners.

On January 9, 2020, at 4:25 p.m., the A.G. notified the E.D. of the A.G.'s decision that the Commission's request for representation is not suitable for his office. On January 10, 2019, at 8:29 a.m., I notified all Commissioners of the communication from counsel (the A.G.) declining to represent the Commission and Commissioners.

On January 10, 2020, at 9:07 a.m., Commissioner Fischer emailed all Commissioners and the E.D.:

> Thank you chairman for passing along yet another embarrassment. You didn't want my suggestions when I had top-notch attorneys volunteering. I had also furnished from 15 Waco attorneys valuable information about Judge Jim Meyer, and his likes and dislikes. All ignored.
>
> Please remember to put the item of "confidentiality " on the next agenda. You get to speak for the Commission but as individual members we still live in the United States of America and as long as we don't talk about individual member's deliberations, documents, judges who come before the committee etc we still have that freedom of speech. Think Nancy Pelosi - She is the "Speaker" and the United States House of Representatives does handle confidential information - yet you certainly don't complain if a Republican member presents a different opinion.
>
> Chad Baruch was considering doing an Amicus Brief and I would like to hear if anyone claims he is not one of the best appellate attorneys in the state.
>
> Sorry - perhaps I shouldn't write when I'm upset but I am personally going to be humiliated when they find out the AG isn't going to represent us after all.

At that time, Chad Baruch, with whom Commissioner Fischer was apparently communicating, was attorney of record on an active case involving a judge before the Commission. On January 11, 2019, the E.D. filed an answer on behalf of the Commission in the *Hensley v. SCJC* lawsuit.

The Commission's executive board and E.D. immediately began contacting and conferring with outside counsel to explore options for representation in the *Hensley v. SCJC* suit and discuss terms of engagement. Negotiations were ongoing with counsel from the A.G. as to approval, funding and terms of representation.

On January 27, 2020, I sent a privileged letter to the Commission's designated A.G. counsel requesting that the A.G. reconsider his decision not to represent the Commission and laying out our legal basis for that request.

On January 29, 2020, the Houston Chronicle and, subsequently, the Texas Tribune published articles describing the confidential, privileged attorney-client communications related to the A.G.'s initial decision not to defend the Commission in the *Hensley* lawsuit. Commissioner Steve Fischer was quoted as its source and as a member of the judicial conduct commission in the the Texas Tribune article. According to that article Commissioner Fischer told reporter Emma Platoff:

> "Paxton's office made it clear to the agency from the start that it would not represent it in the legal fight, citing a conflict of interest because Jeff Mateer, Paxton's top aide, had worked at the First Liberty Institute. The attorney general's office pivoted and said it would represent the agency. Finally, just before the commission's response was due to Hensley in court, Paxton's office reversed again and said it would not represent the commission — leaving Habersham scrambling to submit the agency's brief in time. The attorney general should represent the commission regardless of his personal beliefs or his mood for the day. His switching back and forth is totally unprofessional."

It was reported that E.D. Habersham declined to comment, and the attorney general's office did not respond to questions about the decision.

On January 30, 2020, the Commission agenda was published in the SCJC (confidential) state portal to include Mr. Fischer's requested item as the first item to discuss in executive session.

On January 30, 2020, at 9:07 a.m., I sent the following email to Mr. Fischer:

> "Mr. Fischer,
>
> "We are currently in negotiations with the Attorney General to either provide representation or fund our defense. Your comments to the media (which prompt requests for comment) are not helpful during these negotiations. You are not authorized to disclose or discuss anything about our private discussions with counsel. Please, please resist the urge to publicize the Commission's confidential attorney-client matters. Further, there is nothing in the public record with regard to our internal emails or our correspondence to or from our counsel, whether outside counsel or the Attorney General. As you know, that is protected by the attorney-client privilege. Your discussion of those matters publicly ("as a member and attorney") could waive that privilege, which would be problematic."

On January 30, 2020, at 11:29 a.m. Commissioner Fischer sent an email to me (the Chair) stating:

> I did not tell them anything about our negotiations or discussion. They called And messaged me a bunch before I even had the courtesy to respond. Their very first comment after hi Steve was we are doing an FOIA request which doesn't go to me anyway. I commented on the Atty generals actions and the liberty institute and said our staff did a great job on short notice. If you recall and I did not tell the press I had a much better idea right from the start. If this is send all than please share, thank you

On January 30, 2020, at 1:48 p.m. Commissioner Fischer sent an email to all Commissioners and the E.D. stating:

> "By the way by the time they called me, they had already spoken to several people and they knew more than I did. I am never a confidential source I put my name behind what I say. The Ag has been nothing short of an embarrassment. I can provide my quote tonight when back at my hotel . Just ask"

On January 30, 2020, at 2:23 p.m., Commissioner Darrick McGill notified the E.D. and me of a call from a Texas Tribune reporter related to the A.G. "flip-flop" on representation. Commissioner McGill referred the reporter to the E.D. On January 30, 2020, at 2:59 p.m., I sent the following email to all Commissioners:

> "Commissioners,
>
> "Reporters are calling to inquire about the Attorney General's representation of the Commission.
>
> "Again, please do not comment to the media or publicly. Please refer all inquiries to Jackie. We are in the midst of working with our Attorney General to obtain counsel."

On January 30, 2020, Commissioner Fischer posted a comment on the Texas Tribune article criticizing A.G. Paxton for not representing the Commission stating:

> I am a member of the commission- one of the two attorney members. I was planting trees in Washington State when Emma emailed and didn't see it until too late. I wanted to defend myself in this matter because 1. I wasn't even on this commission for this vote. My first meeting was in December . 2 I never trusted Paxton to handle this- his 1st Asst is a member of the group suing us 3. I've gone up against this Liberty Group in the past and relish beating them. 4 Under 33.06 of the Government Code we have absolute immunity. At our next meeting I have an agenda item for increased transparency. The SCJC while far to the right, are hard workers and they try to get each case done correctly. Few people understand the way we work, but we often have 4000 pages of case reading to do provided less than a week before the hearings.

On January 30, 2020, Commissioner Fischer posted the following comment on Facebook advertising and linking his commentary to the above-mentioned Texas Tribune report:

> So while the cat's away-- all hell broke loose with the commission. When I got back to the hotel- a bunch of messages from Texas Tribune, etc., I added a comment. This representation was botched from the get-go.

On February 6, 2020, at about 9:00 a.m., I orally admonished all Commissioners to protect the confidentiality of all of our Commission business so that we could speak freely in our meetings and that our attorney-client conversations would not to be revealed to any outside

person at the risk of waiving privilege. I firmly advised Commissioner Fischer that his continued insistence on public criticism and disclosures by social media were harmful to our Commission and would not be tolerated.

On February 6, 2020, at about 11:00 a.m., Commissioner Fischer sent the following message by Twitter social media:

> Being the first commissioner in attendance at today's Judicial Conduct hearings, I quickly scoured he reception area for snacks; they must be hiding them. I did present on "Confidentiality vs Free Speech-Transparency" and it got a positive reception. Total secrecy is not good. My punishment was "We need new rules - so you're on the committee and write them up". More often than not I fail. Commissioner Fischer's motion fails for lack of a second" I just smiled- because with the transparency breakthrough, I felt warm feeling in my belly- like Rooster after she steals a steak off the table when facing admonition.

This communication accurately described the item on the Commission's executive agenda, the subject of the actual discussion in executive session including Mr. Fischer's position(s), the positions of the Commissioner's with regard to the item, and the Chair's statement with regard to Mr. Fischer's assignment to (a newly formed sub-committee) to draft revisions to operating rules.

I am referring these complaints because I determined that the complaints, in fact, identified potential grounds for removal in SCJC Commissioner Steve Fischer's:

1. Intentional or reckless disclosure of confidential or privileged information, specifically:
   a) by publicly disclosing items on the Commission's Executive Agenda and the positions and/or votes; and,
   b) by disclosing the subjects of privileged communications between the Commission and counsel, to include legal strategies.
2. Persistent intemperate or abusive behavior toward Commission members, Commission staff, Respondent Judges, Respondent Counsel, or others with whom the member deals in an official capacity, specifically by:
   a) publicly claiming and informing the media that staff or commissioners are suspected of providing the Governor's office with confidential information on votes and deliberations;
   b) by accusing the current chairperson of:
      (i) forcing out former chairperson Catherine Wylie in social media posts;
      (ii) of being insulting, ignorant, acting arbitrarily and rude in performance of his duties as chair;
   c) by publicly stating that he would like to tell the chair 'F*** Y**' for asking Mr. Fischer to comply with media rules of the Commission;
   d) by suggesting that the chairperson's American patriotism was lacking because of merely "posting a flag on Independence Day" while not acting to protect freedom of speech and the press.
3. Willful or persistent conduct that casts public discredit upon the Commission, specifically by:
   a) Publicly commenting about his role as a representative of those whom judges have "mistreated" and a conduit for attorneys "eager to air their gripes" about judges;
   b) By publicly describing the Commission as in "turmoil" and secretive

c) By publicly airing unfounded suspicions about "right wing" Commissioners or staff leaking confidential information;
d) By publicly airing his distrust in State government, particularly as to Attorney General Paxton and Governor Abbott.

4. Willful disclosure to non-members and/or non-Commission staff of confidential Commission complaints, proceedings, information, papers, deliberations, specifically:
   a) By publicly describing matters related to legal strategies, positions or other privileged communications with counsel for the Commission;
   b) By publicly describing the items on the Commission executive agenda, the subjects deliberated by Commissioners in executive session, and the positions or votes taken by Commissioners in executive session;
   c) By validating that a complaint including the judge's name and case number was received by the Commission and was under investigation, and by offering a critique of the facts in the complaint and (non)compliance with Commission rules and procedures to the Complainant.

5. Repeated willful violation of the *Media Relations* Commission Ethics Policy by communicating with the media regarding Commission business without the express consultation and approval of the Chair.

This summarizes the information presented and available to me. I refer this matter so that appropriate action may be taken.

Yours Truly,

David C Hall

David Hall
Chairperson, State Commission on Judicial Conduct

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March 30, 2020

To the Honorable Texas Supreme Court Chief Justice Hecht, Governor Abbott Jr, Attorney General Ken Paxton and Texas State Commission Chair David Hall:

RESPONSE to the Allegations of "possible violations"

Preface: This was written before last Thursday's SCJC meeting. I spoke to the Commission and told them I would respond vigorously and this would be a battle from which I would not back down. I have been for transparency and free speech ,even before at age 22, I was invited and funded to speak as an expert in free press and confidentiality before the United States House Judiciary in March 1973.

At the meeting and privately, I was informed that I should not take the complaints personally that the Chair "had washed his hand of this and no one even suggested I step down; in fact the suggestions via email were just the opposite. The meeting was the most pleasant and productive of any that I have attended. I still maintain the same position I embraced before I was nominated. I have no plans to have a long tenure; I never applied for confirmation by the State Senate although I believe I would have bi-partisan support. I finally responded as such to the January letter from Senator Buckingham. My inclination, as I have been officially appointed to the subcommittee on Rules, is to present proposals for transparency and public education. Once I feel I have achieved some success, I will retire from the Commission. I have been courting possible successors since before my nomination.

While I support the concept of Senate Bill 467 the "devil is in the details". While it passed unanimously and the Governor vetoed it on May 27, 2019, it needs restructure.

Below is my response of March 30 before our meeting when tensions were high. Much of the advice I have received argues that no response is necessary, however as my name was mentioned specifically, I am responding. I hope and plan to work with the Commission in becoming more transparent. I am always willing to compromise and expect I will have to. If anyone wants to fight; be assured that my deep-seated beliefs in Transparency and the First Amendment to the United States (and the Texas Constitution as well) are issues from which I will not retreat.

Attached to this are the notes sent to each member for the February 2020 State Commission Meeting which were presented as part of the agenda. They were not voted on, as the Chair previously had stated we needed to revamp – revise the old operating procedures and was forming a committee.

The allegations brought by the Commission Chair can be summed up as the inability to distinguish between "Confidentiality" and "Secrecy". I have never once identified any votes or deliberations relating to an identifiable case, nor have any of those documents been released.

The Chair is using "Secrecy" to hide extremely questionable activities which need investigation. While he lists some of my comments, which are pretty much facetious and innocuous, including how my dog might feel after eating a steak; he has refused to investigate the real leaks as to how two Commissioners were removed based on their votes in Hensley v SCJC. That breach of confidentiality was swept under the rug and it is the most serious infraction possible; a commissioner revealing a specific vote made by specific members, with the intent to remove those commissioners who voted the "wrong" way.

Next, the Chair complains about deliberations as to our defense. The Chair has a conflict because it's clear he didn't agree with the decision in Hensley. He asked that we do not defend ourselves on ideological grounds, however, when defending a lawsuit, every possible legal defense should be availed. Finally, even after the Attorney General, said that he had a conflict (his first assistant was affiliated with the other side) and denied representation, the Chair continued to attempt to enlist him as our attorney. He continued this until approximately the day before the answer was due. Finally, he complains about the legal suggestions I offered in one of the emails where I did some "homework" on the judge scheduled to hear our case in Waco. A zealous and responsible attorney, when called upon to present a case in another jurisdiction should investigate and try to ascertain the predilections of the deciding judge. I revealed no details of the case. Because I have an extensive attorney network throughout the state I rapidly found 25 Waco attorneys who were "friends" and simply asked in regards to this suit which had been already widely publicized, (including articles in the Waco Herald) "What can you tell me about this judge?" I had approximately 15 responses in less than an hour and received valuable information. The other attorneys responded later and in more detail, "This judge prefers local counsel" "This judge is friends with Hensley" A few attorneys volunteered to help on a pro-bono basis and as our budget is tight, saving taxpayer funds was vital. In the end, the Commission took my advice and obtained local counsel. Had the Chair known that "local counsel" is a friend; they might not have done so. My social media network of Texas Attorneys, which I started and Andrew Tolchin cultivated, now has over 25,000 attorneys and grows every single day. I want to win this suit.

The Chair wants secrecy in every aspect of the Commission's work and does not speak to the press. I believe the public has a right to know all but deliberations on individual cases. Another issue that needs investigation is the huge turnover, in staff, commissioner and the Executive Director in just the chair's short tenure. The previous chair resigned and my

sources have said they were bullied by the current chair. The chair vigorously denies this. Two other commissioners were removed and one resigned from the last meeting. That last resignation was most likely not related to the current chair, because that commissioner accepted another position. In addition, we have been sued twice and the subject of numerous negative articles among the major newspapers in our state which are not assuaged by “no comment”.

Finally as a backdrop to these issues. Several commissioners had told me privately that they dread meetings, that the acrimony, even before my tenure, was palpable. The Chair at my first meeting said the rules and guidelines were inadequate and in need of revamping. I volunteered to help and the presentation referred to in his letter is accurate. I spoke for 5-10 minutes about the need for transparency and gave examples of what should be considered “confidential” and where the public has a right to know. I explained how in America and Texas, Freedom of Speech is inviolable and cited the statutes as to where confidentiality fits into the scheme. I had planned on presenting another five or ten minutes but as there were no questions, debates or much discussion, I cut it short. I had planned to write a column on “Confidentially vs Free Speech” but after seeking the advice of several commissioners, I explained to the commission because of the acrimony and other issues I would wait. I also promised until we had a working and relevant set of rules, that I would refrain from all but the most innocuous comments. I kept my part of the bargain, Larry McDougal incoming State Bar President cautioned attorneys to stop “tagging me” with their complaints about the commission, which helped immensely as even my “I can’t comment” remarks were not satisfactory to many attorneys. The only comment I recall making in the last couple of months was about the Commission trying “Zoom” for our next meeting. This was in direct response to attorneys – judges seeking information on whether "Zoom” is a viable alternative to in-court appearances. If there were more comments, those who monitor all my social media would have presented them.

Because of this letter “the gloves are off” so to speak. While bullying may have worked with other commissioners, it has the opposite effect with me. I have repeatedly declined comments with the Houston Chronicle, Texas Tribune and the Waco Herald, however, I reserve my right as an American to exercise my Freedom of Speech and Freedom of the Press and while I will not identify individual cases to where judges are identified, policy matters, general attitude and the above complaints are “fair game”. I also believe that with the Chair’s letter, he has “opened the door” to a vigorous defense. While it has not quite escalated to a full-scale conflict I see the “handwriting on the wall”.

I will now address the individual allegations in brief and where prudent.

1. Yes, I did agree to confidentially, I explained the above parameters as described above and explained throughout this response. At the February meeting I went into more detail/

2. Yes, I did make the statement "Suffice it to say that I feel like the voice of every attorney who has ever been mistreated by a judge" and I stand by that today. I've said in meetings that I'm here in an attorney spot and was elected by the State Bar. At that point, a member claimed, "I'm an engineer but you don't see me saying I was elected to represent engineers". I will let that statement stand for itself. Ironically I have tried to defend the Commission and explain that I was a bit surprised members are not lax on judges as was my assumption and is the assumption of a majority of Texas attorneys, if not the public as a whole. Of course, I'm not responsible for the statement of Willard Scott whom I'm not sure I've ever met. As some of my comments are late night and not for publication, I am only guilty of not using a "Spell Check" or a grammar program. In fact, the more of these I read, the guiltier I am! As to substance, I stand by what I said 100%.

3. Refers to a December email to the commissioners – I stand by those statements as well. Since then there has been more negative publicity for our commission. I have served on many boards and commissions- school boards- volunteer boards- city finance boards-non profit boards- redistricting boards, and a multitude of State Bar Boards. When I'm associated with a board I am an active member. I want that board to have a good reputation. We do not. My guess is if deliberations are confidential so are our email deliberations, however I have nothing to hide and waive confidentiality as it relates to any of my writing or comments. Once again I refer to the concept of "opening the door".

4. Relates to a December 14 communication. While I understand and agree that the Chair is the designated person to speak for the Commission, I have in communications which they did not present, explained that this is akin to Speaker of the United States House of Representatives Nancy Pelosi and Congress. They with much more sensitive information then does our commission. Without breaching national security, Republican Congressman often criticize the actions, policies, motives and even the integrity of Ms. Pelosi, even though she is the official "Speaker" of the House. Those Congressmen have the same freedom of speech as is expected in our country. I have made it crystal clear that I do not pretend (or even want) to speak for the Commission, that any opinions are mine alone.

5-6 The December 23rd and 29th Communications with the board. I stand by them as well. There is nothing wrong with clients, and in my case as an attorney-client, throwing about legal ideas -strategies and as previously stated doing some background on the judge. While the Chair did not present the context of these or other statements, I'm quite comfortable with them as written. The suit while technically against the commission, has named me personally. If anything, those communications show my desire to assist the commission in winning this lawsuit.

7. December 27 the communication (presented in their order). I would gather I have said this more than once. We need a clear policy and I have presented such.

8. January 9. I would definitely need to know more details. In general, as soon as it was announced that I was to be nominated as the Bar's representative to the Commission I was

deluged with calls about specific judges. This happened in less than an hour after the first such post. I explained that I could not, and would not, hear complaints about judges and directed them to the SCJC Website. In cases where they mentioned a judge's name, I would explain that I had to recuse myself. I have at times become frustrated with attorneys who continue to approach me privately and disregard warnings etc. In an abundance of caution, and the record will reflect this, it is fair to say I have recused myself from more cases than the rest of the Commission members combined. The commissioners are well aware of this and this has been the subject of good-natured banter. One Commissioner has offered that for a $100 fee they would hear all my recusal cases together so I could take some time off.

9. The next set of allegations refer to my criticism of our representation of Hensley. The chair was nice enough to print my response which is correct. I have responded to them in my initial remarks. There are 13 Commissioners, The Chair had an ethical and moral obligation that he did not agree with the decision and wanted to limit available defenses, to recuse himself and allow someone else to offer direction on our defense. They excluded one of my defenses that I was not even a member of the Commission for that decision yet was being sued because of it. No one likes being named in a suit and this already was extremely public, and while I was not the person who disclosed that information to the media, I did make my beliefs known. While there is a fine line between what the public should know about legal strategies in this situation I suspect the Chair wants us to lose this case to affirm his anti-LGBT beliefs and clearly the public should be informed.

10. Finally, there is a general allegation that I have had intemperate interaction with staff and commission members. As to staff, this is absolutely false and I hope staff members have the integrity to deny this type of claim. I would gladly release any emails -texts and anything regarding this manner. Staff may be partial to the Chair as that is where their bread is buttered but I have never heard this allegation before and have never received any complaints from staff. As I am affable by nature, I often chat with staff members when I am in contact with them. I have tried to reduce the workload of Kathryn Crabtree by booking my own flights, however, she is an expert at her position and does these arrangements much better than I. I may have made a statement generally regarding the constant trashing of the former Executive Director Eric Vinson behind his back, but any interpretation that I had an opinion as to his overall job performance is erroneous and instigated by the Chair to foment discord.

11. In regards to intemperate remarks towards commission members, I would say many of us have had lapses in civility at times- there is not a cohesive commission. There was an incident where I had lost my cool momentarily and believe both sides apologized. The Commissioner who is an engineer likes to refer to attorneys as "bottom feeders'. Some of his remarks are humorous and I can take a joke as well as any most. At the February meeting, I asked after another member resigned. "Does anyone ever finish their term?" He replied, " Only you greedy lawyers – you have to take all 6 years". I did find this offensive. There is nothing "greedy" about serving a non-paying, work-intensive position. I found this comment especially obnoxious because I had said even before my confirmation that I did not plan to serve the full six years and even recruited possible successors. Specifically where I did get angry was when

during a discussion on a different topic that Commissioner interjected something about my Facebook posts and offered a psychological explanation for my behavior. I replied, challenging his credentials in Psychology and letting him know he was out-of- line. At that point, a responsible even-handed, Chair should have directed the conversation to the topic on hand, but he did not. Tempers flared on all sides, and my recollection is all parties apologized. I certainly did, the chair did, and I believe the Commissioner in question did as well. While I'm far from perfect, I generally treat others as they treat me. When faced with hostility, I respond in kind. I am also almost always to first one to become calm and look for a solution.

12. The allegations include mention that I communicated with Chad Baruch as to representation in this matter. My recollection is he contacted me, stating he was planning on doing an Amicus Brief. While he said nothing of having any current cases before the Commission and I have never saw his name on a docket, he did state that they know him … or perhaps the that Executive Director had known him from past cases. In my opinion Chad Baruch, who has presented CLE Lectures on Governmental Law, and was a Director of The State Bar of Texas, is in the top echelon of Appellate Counsel. I suggested " Hey why not consider just representing us (pro bono) and he may have not taken me literally, and did not respond. I mentioned his name to the Commission anyway. At the time we did not have legal counsel and was trying to be helpful. As stated previously I want to win this case.

I believe this covers the all the "possible violations". The following are my "notes" as emailed and presented to the Commission. My goal is, and always has been to restore inject transparency into the commission, and restore some of its credibility. These are clearly Freedom of Speech, Freedom of the Press and transparency issues and no Chair of any commission will abridge those rights. If the Chair wants to fight.. I am game;

For the February meeting;

Confidentiality vs Transparency, Free Speech, and Freedom of the Press, in relation to the State Commission on Judicial Conduct.

Section 33.001 of the Texas Government Code defines the terms used by our commission:

(6) **"Formal hearing" means the public evidentiary phase of formal proceedings conducted before the commission or a special master.**

(7) **"Formal proceedings" means the proceedings ordered by the commission concerning the public sanction, public censure, removal, or retirement of a judge**

"Confidentially" in our formal proceedings is absolutely necessary to carry out our mission. Judges deserve this, and if our deliberations at formal proceedings were made public, it would inhibit our ability to express our views and speak freely. When information about how commissioners voted on the Hensley Case, was leaked, two members were withdrawn from consideration. This is the worst type of violation. In the same vein, if deliberations were made public, the information could be used publicly to lobby or otherwise influence commissioners. In these situations "Confidentiality " protects free speech by removing inhibitions.

Article 5 Section 10 of the Texas Constitution states specifically: "All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law, and the filing of papers with, and the giving of testimony before the Commission or a Master shall be privileged, unless otherwise provided by law."

Most of us are also aware of the First Amendment to the United States Constitution. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the **press**; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The term "Congress" of course, has been expanded to any governmental body existing in the United States and in my opinion the phrase "unless otherwise protected by law" refers to the 1st Amendment which protects free speech. No rules promulgated by this, or any other agency of any government in the United States can violate the Constitution.

In our rules it also states the Chairman- Chairperson is the only one who can speak officially for the Commission. This also makes sense, as different members may have someone different views of what has been decided and its best to have one person provide the "official "decision. It would be nice if that person would respond to fair questions by the press, because the public has a right to know non-confidential information, and we have been pummeled in both the press and article "comments". That however, is the prerogative of the Chair.

Some of our discussions are not covered under the definition of "Formal Proceedings" in the government code , nor are they documents or testimony of persons before the commission. Those non-confidential items are protected by the Freedom of Speech – Freedom of Press. Any American, which includes all commission members, has these rights which cannot be "abridged" (using the words of our constitution,) by any governmental body or agency. A commissioner should state when speaking to groups or the press that "This is solely my opinion and I do not speak for the Commission itself, as that is the purview of the chair"

Below are some examples of what should, and should not be, permitted.

1. "I am impressed by the amount of effort and preparation commission members put into each case as we were given thousands of pages to read , just a week before our December meeting." Permissible – (I've said this). There is no confidential information involved and it is clearly one member's opinion.

2. "Commissioner XXX voted to reprimand a judge for " Not permissible – the singling out of commissioners votes is never warranted and is perhaps the worst violation of confidentiality

3. "A judge from a small West Texas County went before our commission" . Not Permissible, unless otherwise public. Anything that could ever lead to the identification of a judge, or the misidentification of a judge not before our commission is confidential. If we just say "a judge" with no further identifiers that is a tougher question, the answer to which I don't know.

4. "In my opinion (not speaking for the commission), our commission treats the excessive drinking alcohol by judges on duty or in public, as extremely (or not) seriously." Permissible This would be like a congressman saying "Speaker Pelosi and the majority do not take illegal immigration seriously." Some may not like that, Speaker Pelosi may not like that, but that is what America is all about.

5. "Complaints should not go to me; there is a screening process and investigators and I'll recuse myself if I'm told the facts personally" Permissible – It's informative, and when a commissioner is asked such a question they should answer and not play dumb or silent. We are not sheep.

I would like us to have a clear policy that no one misunderstands. I was not selected by the Governor, nor the Texas Supreme Court, but was elected by the Board of Directors of the State Bar of Texas, which is the official body of the 105,000 attorneys in Texas. Every day we fight in our courtrooms for the principles embodied in our Constitution. They cannot be abridged by any agency or commission, even by majority vote, nor can they be abridged, by the arbitrary action of any member ,including the Chair. If any of this is in doubt I am certainly willing to defer to an Attorney General Opinion or a "friendly" declaratory judgment proceeding. In deference to the Chair I have not spoken to the press while this matter is pending. I have been asked to be a guest speaker at different bar associations around the state and on that too ,I have temporarily deferred. Being an American is a lot more than posting a flag on Independence Day.

Thank you
Steve Fischer

From: Steve Fischer
Date: Wednesday, April 1, 2020 at 4:05 PM
To: "dawn.buckingham@senate.texas.gov" <dawn.buckingham@senate.texas.gov>
Cc: Randall Sorrels, Larry McDougal
Subject: Re; Texas Senate Confirmation - SCJC

Dear Senator Buckingham;

First please accept my apologies for not responding to your January letter concerning my confirmation. I had so many times planned to write that while I am not seeking confirmation, that I would love to explain what I know are serious problems with that commission. I would still like to speak to you. Many attorneys in your district including your long-term friend Jeri Lee Ward were ready to vouch for me, but I had put them on hold.

During my confirmation process; I had posted publicly on Social Media and elsewhere that I was not interested in a 6-year term. I suggested names of attorneys who might be interested. Among other things I would be 76 - I need some retirement time. As you can see with all the resignations and "replacements" during the past 6 months, most don't seem to stay for their term. In fact, when a member resigned two months ago and I asked "Does anyone serve a full-term?"a nother commissioner replied " Only you greedy lawyers want all six years". The atmosphere is not pleasant and the Commission uses "Confidentiality " to justify "Secrecy" in matters that are not related to specific cases.

I am copying this letter to State Bar President Randy Sorrels and incoming Bar President Larry McDougal. While they have known my intent since I was nominated, this letter will formalize the process. I would like them to start finding my replacement starting in October.

My current plans are to serve until the end of year, however I may forego the December meeting.

I so hope that the Texas Senate will introduce the Transparency Measure that passed 31-0 last session. My suggestion is that it go even further as to insure the public is aware of vital and non-privileged information.

I am going to make this public in the near future. The Chair wrote a negative letter because of my struggles with the very issue of transparency.

Once again I apologize for not writing sooner. It is not like me to ignore an important letter dated from January. I was agonizing over how to explain that I did not plan to serve anywhere near the full term. My current plans are to serve until the end of year, however I may forego the December meeting.

Please do not hesitate to call

Sincerely

Steve Fischer

Steve Fischer, Attorney at Law
525 Corto Way - Sunset Heights
El Paso, Texas 79902-3817

Chamberlain Hrdlicka
Attorneys at Law

Practice Areas

- Commercial Litigation
- Construction Law
- Tax Controversy & Litigation
- Energy and Maritime
- Energy Litigation
- State and Local Tax Planning & Controversy
- Tax

Education

- University of Texas-Pan American - Bachelor of Business Administration
- University of Texas School of Law - Juris Doctorate
- Georgetown University Law Center - Executive L.L.M. in Tax - Candidate, degree anticipated 2019

Honors

- Included on Thomson Reuters list of "Texas Super Lawyers"- 2007-2019
- AV Rated - Preeminent, Martindale-Hubbell
- Named a "Top Lawyer" by Houstonia Magazine, 2019

David N. Calvillo

Senior Counsel
Houston

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David Calvillo delivers a multidisciplinary perspective to his clients from the Firm's offices in Houston and San Antonio.

As an accomplished board certified civil trial lawyer, professional neutral, certified public accountant, and certified valuation analyst, he brings a variety of skill sets and focused passion to his practice. David has successfully tried, litigated, and arbitrated matters in diverse practice areas, including breach of contract, business separation, commercial liability, construction, shareholder rights, professional malpractice, personal injury and wrongful death, employment, debt collection, and intellectual property matters.

David is also an experienced professional neutral and actively serves as an arbitrator in commercial, construction, employment, international and health law disputes with the American Arbitration Association, the American Health Lawyer's Association, and in court appointed and party-selected disputes. As a mediator, David has conducted several thousand mediations and has earned the recognition of his peers as a Distinguished Credentialed Mediator. He is one of the few truly bilingual mediators and bilingual arbitrators available throughout the State of Texas. His multidisciplinary expertise has earned him the attention of his colleagues and Texas courts, who have tapped him to serve as a Special Discovery Master and Receiver in scores of complex litigation matters.

David's training and experience with the world's largest public accounting firms as a financial auditor and tax professional as well as his training as a business valuation professional, make him uniquely suited to advise and represent clients in financial and tax matters, including an evolving practice in tax controversy and litigation.

David served the legal profession as an Exam Commissioner for the Civil Trial Specialization Committee of the Texas Board of Legal Specialization, as a member of the Council of the ADR Section, as a member of the Council of the Hispanic Issues Section of the State Bar of Texas, and as an elected member of the American Law Institute. He has previously served as the Chair of the region's State Bar of Texas'

David N. Calvillo, Continued

Bar Admissions

- State Bar of Texas - 1989

Court Admissions

- United States District Court - Southern, Western District of Texas
- United States Court of Appeals - Fifth Circuit
- United States Tax Court
- United States Court of Federal Claims

Clerkships

- Supreme Court of Texas - Justice James P. Wallace - Judicial Intern

Grievance Committee.

David also feels called to participate in and contribute his talents to the community. For example, he has served his parishes throughout the years as a member of the Finance Committee, Pastoral Council, and in various ministries. He has likewise served as an officer and President of the Board of Directors for the local Boy's and Girl's Club, youth sports coach, and currently serves as a fully trained Assistant Scoutmaster with his sons' Boy Scout Troop. He is a charter and continuing member of the Board of Contributors for a historic South Texas newspaper.

A native of the Rio Grande Valley in deep South Texas, David Calvillo is also proudly bicultural and bilingual, fluent in English and Spanish. *Totus Tuus*.

Representative Matters

Commercial Disputes

- Represented a state-wide health care provider in a jury trial obtaining a favorable jury verdict and judgment resulting in a finding of fraud, conversion and breach of fiduciary duty after presenting detailed forensic accounting evidence to the jury
- Represented a multi-national food products company and its Mexican affiliate in a cross-border contractual dispute exonerating the company of the original claim and obtaining a sizable favorable jury verdict and judgment on its counterclaim along with a finding of fraud
- Represented a commercial landowner obtaining a favorable sizable jury verdict and judgment against a national telecommunications carrier and others in a slander of title and business tort action
- Represented a European winemaker and vineyard in contractual dispute with a Texas-based company in obtaining a dismissal for lack of personal jurisdiction due to the company's lack of sufficient connection with the United States
- Represented a national real estate developer asserting claims of interference with existing and prospective contracts resulting in a substantial confidential settlement midway through an expected lengthy jury trial

Construction

- Represented an owner, a governmental entity, in a construction defects action brought against the architects, engineers, and contractors resulting in a full recovery of the relevant insurance policies

David N. Calvillo, Continued

- Defended an engineer against allegations of design defects in a series of commercial projects throughout the State of Texas resulting in a very favorable nuisance settlement
- Defended an architect against allegations of design defects in a custom residential project resulting in a favorable nominal nuisance settlement

Personal Injury

- Defended a nationwide transportation company in deep South Texas and obtained a fully favorable verdict and judgment exonerating its driver and the company from allegations of negligence
- Represented the family of the deceased in a wrongful death and survivorship action resulting in a sizable recovery for the surviving beneficiaries.
- Prosecuted a medical malpractice and medical device products liability action resulting in the health care provider's insurance carrier tendering of its full policy limits and an abundant settlement by the device manufacturer
- Defended a nationwide poultry company in deep South Texas and obtained a defense verdict and judgment exonerating the company and its driver from allegations of negligence

Tax

- Represented a taxpayer in U.S. Tax Court against the Internal Revenue Service resulting in a full concession adopting the taxpayer's position
- Formed nonprofit entities and obtained favorable determinations by the Internal Revenue Service of its 501(c)(3) non-profit status

Special Master

- Appointed as a Special Discovery Master in over two dozen commercial construction cases by multiple state district courts to assist the courts in resolving all discovery disputes
- Appointed a Discovery Master in an automotive products liability action brought against a global auto maker and a well-known industry supplier of technology
- Appointed as a Special Master to issue a Report and Recommendation to the Court on the applicability of privacy restrictions to the production of detailed medical and financial records

Receiverships

- Appointed as a Receiver to preserve the marital estate, including the management and operation of the family's state wide ambulance business monitoring and approving only reasonable and necessary business expenses
- Appointed as a Receiver to gather financial information and related data to provide the court with valuations for a number of ongoing energy-related businesses located throughout North America
- Appointed as a Receiver to collect a judgment rendered against an ongoing health care business

David N. Calvillo, Continued

- Appointed as a Receiver to preserve the marital estate, including managing and operating the family's extensive real estate development business, and manage and initiate litigation to preserve and maximize the value of the estate
- Selected as a Receiver for the benefit of a European creditor to preserve the collateral securing large loans advanced to a health care practice, including liquidating assets to satisfy the debt
- Selected as a Receiver for the benefit of a nationwide lending institution to preserve the collateral and maximize its value, including the management and operation of an apartment complex located in deep South Texas

Seminars and Presentations

- Chamberlain Hrdlicka 42nd Annual Houston Tax and Business Planning Seminar - October 30, 2019 at the Norris Conference Center at City Centre
  October 30, 2019
- Chamberlain Hrdlicka McAllen Tax and Business Planning Seminar - March 2019
  Chamberlain Hrdlicka McAllen Tax and Business Planning Seminar - March 4, 2019
  Home Ownership Center, 500 South 15th Street, McAllen, Texas 78501, March 4, 2019

News

- Chamberlain Hrdlicka to Host 42nd Annual Houston Tax and Business Planning Seminar on October 30th at Norris Conference Center at City Centre
- Chamberlain Hrdlicka Attorneys named 2019 Texas Super Lawyers
- David Calvillo - Practicing Law in "God's Country"
- Houstonia Magazine's 2018 Top Lawyers
- Chamberlain Hrdlicka Attorneys named 2018 Texas Super Lawyers
- Inmigración: Familia Rodríguez Mantiene la Esperanza

Professional Affiliations

- American Law Institute - elected member
- American Board of Trial Advocates
- State Bar of Texas- Council - ADR Section
- Hispanic National Bar Association - former National Membership Chair
- Mexican American Bar Association - former State Treasurer
- National Association of Certified Valuation Analysts
- Institute for Transnational Arbitration
- American Arbitration Association - Roster of Neutrals
- American Health Lawyers Association - Roster of Neutrals

Resolution in Support of Judicial Independence

The State Bar of Texas affirms its support of an independent judiciary, the third and co-equal branch of government, as a crucial pillar of the separation of powers protecting the rights of all Americans guaranteed by the United States Constitution.

The State Bar of Texas is an administrative agency of the judicial branch of the State of Texas. Chapter 81 of the Government Code charges the State Bar of Texas with responsibilities including aiding the courts in carrying on and improving the administration of justice. The mission of the State Bar of Texas includes objectives to support the administration of the legal system and educate the public about the rule of law.

An independent judiciary acts fairly and impartially, grounded in the rule of law, and free from control or influence. Attacks on an independent judiciary are a threat to justice, the rule of law, our constitutional democracy, and freedom itself.

The State Bar of Texas calls on all Americans, including lawyers and elected officials, to support and defend the integrity of an independent judiciary and its role in preserving the fundamental liberties in the United States Constitution.

Adopted this 17th day of April 2020 by the State Bar of Texas Board of Directors.

STATE BAR OF TEXAS BOARD OF DIRECTORS

BOARD OF DIRECTORS RESOLUTION REGARDING AUTHORITY OF EXECUTIVE DIRECTOR DURING COVID-19 PANDEMIC EMERGENCY

WHEREAS, the Governor of Texas has declared a state of disaster regarding COVID-19; and

WHEREAS, the State Bar Board of Directors has a substantial interest in protecting the health and safety of the State Bar staff and members as well as the public during this emergency; and

WHEREAS, the Board of Directors believes it is crucial that the State Bar continue to perform its purposes as set forth in Tex. Govt. Code Ch. 81 and to provide services to its members and the public; and

WHEREAS, due to the volatility and speed with which the COVID-19 emergency changes and progresses, the Board of Directors believes it to be in the best interests of the State Bar staff and members, as well as the public, that the State Bar's responses be timely and flexible; and

WHEREAS, the Board of Directors is of the opinion that the Executive Director should be empowered to take extraordinary measures during the COVID-19 emergency to continue the operations of the State Bar and provide services to its constituents.

NOW THEREFORE BE IT RESOLVED by the State Bar of Texas Board of Directors, at a lawfully called meeting, held in compliance with the Texas Open Meetings Act, that the State Bar Executive Director is hereby authorized and empowered to take the following actions during the COVID-19 emergency, subject to applicable law:

1. Call emergency meetings of the State Bar Board of Directors and the State Bar Executive Committee;

2. Suspend during the COVID-19 emergency the application of State Bar Board Policy Manual provisions as necessary or prudent to continue operations and provide services;

3. Extend, as necessary, deadlines provided for in the Policy Manual and regulations;

4. Defer State Bar penalties and assessments for failure to meet any deadlines set forth in the Policy Manual and regulations;

5. Make expenditures from State Bar reserves to ensure the business, operations, and services of the State Bar continue;

6. Approve other expenditures as necessary;

7. Compromise claims by or against the State Bar; and

8. Take any other action the Executive Director deems necessary or prudent to ensure the business, operations, and services of the State Bar continue through the COVID-19 emergency.

The Executive Director shall report to the Executive Committee and Board of Directors concerning any actions taken pursuant to this Resolution.

The State Bar of Texas Board of Directors hereby suspends any such Board practices and operating procedures to the extent necessary in order to continue the business of the State Bar and the services provided by the State Bar, and to remain in compliance with local, state, and federal laws and directives during this COVID-19 emergency.

Adopted by the State Bar of Texas Board of Directors on April 17, 2020.

_____
Jerry Alexander
Chair of State Bar of Texas Board of Directors

State Bar of Texas

Family Law Section

February 14, 2020

Ad Hoc Submission Committee
c/o John Sirman
Associate Executive Director and Legal Counsel
State Bar of Texas
John.sirman@texasbar.com

Re: Emergency Action Requested Regarding No. 19-0694 in the Texas Supreme Court; In re C.C.

To Members of the Ad Hoc Submission Committee,

Per the State Bar Policy Manual, please allow this letter to serve as the request of the Family Law Section (the "Section") to file an amicus-curiae brief in the above referenced matter.

My contact information is as follow:
The Law Office of Gary Nickelson
5201 West Freeway, Suite 100
Fort Worth, TX 76107
Telephone: 817-735-4000
Fax: 817-735-1480
jcn@nickfamlaw.com

The petition for review, response, reply, brief in support, response, and reply have been filed by the parties. Various amicus curiae briefs have been filed, and the matter is set for oral argument on March 24, 2020. There is no specific deadline for filing of the Family Law Section amicus brief, but without immediate filing, the justices will complete preparation for oral argument without input from the Section. No member of the Family Law Council is personally involved in the underlying proceeding.

The basic facts of this matter appear to be as follows: a prior order in a suit affecting parent-child relationship ("SAPCR") named Mother and Father joint managing conservators and granted Mother the exclusive right to establish the primary residence of the child. Mother filed a modification proceeding. While that suit was pending, Mother passed away in a car wreck. Fiancé of deceased

mother filed a motion to intervene in the SAPCR. Father sought custody of the Child and challenged Fiancé's standing.

The trial court originally found standing for Fiancé and the intervening grandparents. In the first mandamus proceeding, the Second Court of Appeals found the grandparents lacked standing but affirmed as to Fiancé's standing because he had lived in the home with the child for the requisite period of time prescribed by the Texas Family Code. Father then sought mandamus review in the Texas Supreme Court on Fiancé's standing. The court denied relief without a hearing. The case returned to the trial court for a temporary orders hearing.

The trial court entered temporary orders granting Father sole managing conservatorship and granting Fiancé possessory conservatorship with the standard rights and access of a nonparent. Father sought a second mandamus to the Second Court of Appeals arguing that the fit-parent presumption precluded Fiancé from getting access at a temporary hearing and that the evidence was insufficient to rebut the fit-parent presumption. The Second Court of Appeals denied mandamus relief. (http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=00fa71dc-323f-4925-8246-94f8190df500&coa=coa02&DT=Opinion&MediaID=129f7c8d-cdca-4894-a8ef-284cf51c7f18)

Father again filed a petition for writ of mandamus in the Texas Supreme Court, which is the currently-pending proceeding. Therein, Father complains that the fit-parent presumption under Texas Family Code Chapter 153 applies to the current Chapter-156 proceeding and that the trial court clearly abused its discretion in awarding Fiancé conservatorship, rights, and access because Fiancé did not rebut the fit-parent presumption.

The Family Law Section is concerned that Father's arguments and the various amicus briefs filed to date seem to ignore the implication of imposing Chapter 153 onto a Chapter-156 proceeding when the language of the statutes do not provide for that imposition. A selective judicial application of Chapter 153 into Chapter 156, which are drafted as clear and separate chapters, amounts to judicial overreaching and will result in confusion among the courts as to other implications of Chapter 153. Any statutory amendment is the province of the legislature, not the courts.

Furthermore, there are good reasons why the present mandamus action is not the proper case for debating what Father wants to debate: whether the fit-parent presumption should be applied in every modification case, regardless of its unique facts, and whether it also applies during the temporary orders phase of a modification case. This case is not the case for having such a debate because Father is attempting to use the fit-parent presumption as a sword to divest Fiancé of the standing Mother properly conferred upon Fiancé, through the exercise of her own equal rights as a joint managing conservator of the child when she was alive, and not as a shield against government action in an original suit to restrict his rights as a parent, which is why the presumption was created in the first place. Moreover, Father's position runs contrary to the very reason for why temporary orders exist: to maintain the status quo until the case can be tried. Before Mother died, Fiancé had

regular possession of and access to the child. Temporary orders exist to maintain this situation until a trial can be held. If Father's position prevailed, then the trial would be a nullity. This is so since Fiancé would be asking to have conservatorship and possession rights to a child he has not had any contact with for months if not more than a year by the time the case was tried.

The Appellate Committee of the Family Law Section was first made aware of this matter on January 22, 2020. The Appellate Committee voted to support the preparation of an amicus brief, and the Council approved that request by vote tallied on February 3, 2020. I understand the next Board meeting is April 16th, and the next Executive Board meeting is March 26th. As applicable under section 8.02.04 of the State Bar Board Policy Manual we request emergency action on this matter to allow the Ad Hoc Submission Committee to consider approval of the brief.

We appreciate your assistance in this regard, and if I may be of any further assistance, please let me know.

Sincerely,

Chris J. Nickelson
Chair, Family Law Section
State Bar of Texas

JCN.cal

FILED
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tex-42138136
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 19-0694

IN THE TEXAS SUPREME COURT

IN RE C.C.,
RELATOR.

On Petition for Review from the
16th Judicial District Court, Denton County
Cause No. 16-07061-16
The Honorable Sherry Shipman, Judge Presiding

BRIEF OF THE STATE BAR OF TEXAS FAMILY LAW COUNCIL AS AMICUS CURIAE

Respectfully submitted by,

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DISCLOSURE

THIS AMICUS BRIEF IS BEING PRESENTED ONLY ON BEHALF OF THE FAMILY LAW SECTION OF THE STATE BAR. THE SECTION'S POSITION SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE, OR THE GENERAL MEMBERSHIP OF THE STATE BAR. THE FAMILY LAW SECTION IS A VOLUNTARY SECTION OF 6000 MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THIS AMICUS BRIEF IS SUBMITTED AS A RESULT OF A VOTE OF TWO-THIRDS OF THE COUNCIL OF THE FAMILY LAW SECTION, WHICH IS THE GOVERNING BODY OF THE SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THE SECTION HAS BEEN OBTAINED.

A copy of the *Guidelines for Submission of Amicus Curiae Briefs on Behalf of the Family Law Council* is included in this brief's Appendix. **App. 1**.

INDEX OF AUTHORITIES

***Case Law*:**

***Statutes*:**

Court Rules:

BRIEF OF THE STATE BAR OF TEXAS FAMILY LAW COUNCIL AS AMICUS CURIAE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The State Bar of Texas Family Law Council ("Council") submits this Amicus Curiae Brief pursuant to Texas Rule of Appellate Procedure 11 and respectfully requests that it be received and considered by the Court.

I. FAMILY LAW COUNCIL'S INTEREST

The Council, the governing body for the State Bar of Texas Family Law Section, represents the interests of approximately 6000 lawyers practicing family law throughout Texas. The Council is elected by vote of the members of the Family Law Section of the State Bar of Texas. The mission of the Family Law Section is to promote the highest degree of professionalism, education, fellowship, and excellence in the practice of family law. No one was paid for the preparation of this brief.

The issue presented by this mandamus action is whether the trial court possessed the authority, under the unique facts of this case, to appoint the deceased mother's fiancé as a temporary possessory conservator in interim Temporary Orders. It is not the intention of the Council to advocate for any

party to this mandamus action. For the policy reasons set out herein, the Council respectfully requests that the Court deny the petition for writ of mandamus and in so doing decline to apply either a fit-parent presumption or parental presumption to child-custody modification cases brought under Texas Family Code chapter 156.

II.
SUMMARY OF THE ARGUMENT

In this mandamus review of temporary orders in a suit affecting the parent-child relationship, Respondent did not abuse her discretion in appointing the mother's fiancé as temporary possessory conservator because no parental presumption applies in chapter 156 modification proceedings. Thus, no mandamus should issue.

Two different presumptions that apply in certain suits affecting the parent-child relationship have been referenced in the parties' briefs. The two should not be conflated. The first is the "parental presumption," which presumes that in an original suit, appointing a parent as a managing conservator of the child is in the best interest of that child. The second is the "fit-parent presumption," which applies when grandparents, certain other relatives, and persons deemed to have substantial past contact with a child seek possession

of or access to a child. The person seeking to overcome the "fit-parent presumption" must establish that denial of possession of or access to a child would significantly impair the child's physical health or emotional well-being.

This Court has previously determined that the parental presumption does not apply to chapter 156 modification proceedings, and nothing within chapter 156 suggests a Legislative intent to the contrary.

Finally, mandamus is not the proper avenue for the father's debate. The father is attempting to use the fit-parent presumption as a sword to divest the deceased mother's fiancé of standing, which tactic ignores whether the fiancé's continued presence in the child's life would be in the child's best interest—a fact-specific determination properly left to the trial court.

III.
ARGUMENT

A. Standard of Review

For a writ of mandamus to issue, the trial court must have committed a clear abuse of discretion. *In re Prudential Ins.*, 148 S.W.3d 124, 135 (Tex. 2004). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner or without reference to guiding rules and principles. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018).

B. Procedural Posture: Interim Temporary Orders Have Been Issued

The procedural posture of this case is that no final trial has taken place. The trial court has issued interim temporary orders, not final orders. The father has been appointed temporary sole managing conservator, with exclusive rights to make decisions about his child in accordance with section 153.132 of the Texas Family Code.

A court may render a temporary order in a suit for modification, Tex. Fam. Code § 156.006(a), and temporary orders may provide for the temporary conservatorship of the child. *Id.* § 105.001(a)(1). The guiding statutory principles for rendition of a temporary order (in addition to best interest) are the safety and welfare of the child. *Id.* § 105.001(a).

Rendition of temporary orders in a modification case does not require a finding of a material and substantial change in circumstances. *See id.* §§ 105.001(a), .002, 156.006; *see, e.g.*, *In re Casanova*, No. 05-14-01166-CV, at **6-7 (Tex. App.—Dallas Nov. 20, 2014) (orig. proceeding) (mem. op.) (chapter 156 modification standard does not apply to modification of temporary orders; safety and welfare of child are the standards). So, here, the material and substantial change in circumstances finding to modify

conservatorship and possession in a final order has yet to be made. *See* Tex. Fam. Code § 156.101(a)(1).

C. Parental Presumption Differentiated from Fit-Parent Presumption

At the outset, it is important to distinguish between two presumptions being referenced in this mandamus proceeding: (1) the "parental presumption" and (2) the "fit-parent" presumption.

1. Parental Presumption

The "parental presumption" codified in Texas Family Code section 153.131 creates a rebuttable presumption in favor of appointing a parent as a managing conservator:

> (a) Subject to the prohibition in Section 153.004 [addressing domestic violence and sexual abuse], unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Tex. Fam. Code § 153.131.

2. Fit-Parent Presumption

The "fit-parent presumption" is codified in Texas Family Code section 102.004, entitled "Standing for Grandparent or Other Person," and section 153.433, entitled "Possession of or Access to a Grandchild" (commonly referred to as "the grandparent statute"). *Id.* §§ 102.004, 153.433. After the U.S. Supreme Court issued its opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), the Texas Legislature amended sections 102.004 and 153.433 to conform with the *Troxel* opinion. *See In re J.M.G.*, 553 S.W.3d 137, 141–42 (Tex. App.—El Paso 2018) (orig. proceeding) (grandparent seeking court-ordered possession or access must overcome presumption that parent acts in child's best interest); *In re K.D.H.*, 426 S.W.3d 879, 895–96 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (Jamison, J., dissenting) (noting that requiring a grandparent or certain other relatives to present "satisfactory proof to the court" that "the child's present circumstances would significantly impair the child's physical health or emotional development in Section 102.004(a)(1)—a provision granting standing to file original SAPCR suits—served to ensure the State complied with *Troxel* when parents are fit). In *Troxel*, the Court held that:

> so long as a parent ***adequately cares for his or her children (*****i.e., *****is fit)***, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68–69 (emphasis added).

The "parental presumption" and "fit-parent presumption" are entirely different presumptions. The first applies to the court's consideration of who should be named a conservator in an original suit, and the second concerns possession of and access to a child by a grandparent, certain other relatives, and persons deemed to have substantial past contact with a child. *See* Tex. Fam. Code §§ 102.004(a)(1), (b), 153.131, .433. The "fit-parent presumption" is not the underlying legal basis for section 153.131's "parental presumption." *See id.* § 153.131.

D. Texas Family Code Chapter 153 Proceeding Differentiated from Chapter 156 Proceeding

Next, it is critical to address the differences between a chapter 153 proceeding and a chapter 156 proceeding, both of which are within Subtitle B of Title 5 of the Texas Family Code.

1. Principles of Statutory Construction

In interpreting statutes, this Court must look to the plain language, construing the text in light of the statute as a whole. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) (citation omitted). A statute's plain language is the most reliable guide to the Legislature's intent. *See Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). This Court may not impose its own judicial meaning on a statute by adding words not contained in the statute's language. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (per curiam). If the statute's plain language is unambiguous, this Court interprets its plain meaning, presuming that the Legislature intended for each of the statute's words to have a purpose and that the Legislature purposefully omitted words it did not include. *See id.* at 509 (citation omitted).

2. Structure of Chapters 153 and 156

Title 5 of the Texas Family Code is entitled "The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship." Tex. Fam. Code tit. 5. Title 5 is broken down into five Subtitles, the first two of which are Subtitle A, "General Provisions," and Subtitle B, "Suits Affecting the Parent-Child Relationship." Within Subtitle B, chapter 153 is entitled

"Conservatorship, Possession, and Access," and chapter 156 is entitled "Modification." Tex. Fam. Code chs. 153, 156.

Chapter 153 governs original suits affecting the parent-child relationship, that is, initial suits to determine custody of children. *Id.* §§ 153.001–.709. Within chapter 153 lies the "parental presumption": "It is a rebuttable presumption [absent a finding of a history of family violence by a parent] that the appointment of the parents of a child as managing conservators is in the best interest of the child." *Id.* § 153.131(b). Thus, the "parental presumption" applies to original custody suits brought under chapter 153.

Chapter 156 governs suits that attempt to effect a change in custody following the entry of an initial custody order. *Id.* §§ 156.001–156.105. Although original and modification custody proceedings are governed by distinct statutory schemes, both share one overriding concern: the best interest of the child. *Id.* §§ 153.002 (stating that the "best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession"); 156.101(a) (setting grounds for modification in addition to such being in "the best interest of the child."); *In re R.T.K.*, 324 S.W.3d 896, 900 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

3. Legislative Intent: Parental Presumption Does Not Apply to Chapter 156 Child-Custody Modification Proceedings

The parental presumption does not apply in a suit for modification. *See In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (noting that "there is a difference between an original conservatorship determination and a modification" in that modification suits raise policy concerns such as a child's need for stability that may not be present in original conservatorship determinations); *see also* Tex. Fam. Code ch. 156. "The distinction between an original conservatorship determination and a modification proceeding is more than procedural or semantic." *In re C.A.M.M.*, 243 S.W.3d 211, 215 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). "By including the parental presumption in original suits affecting the parent-child relationship but not in suits for modification of conservatorship, the Legislature balanced the rights of the parent and the best interest of the child." *Id.* at 216.

The Legislature has decided as a matter of public policy that no parental presumption applies in modification cases. *See generally* Tex. Fam. Code ch. 156. It is not this Court's role to "second-guess the policy choices that inform our statutes…." *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003).

4. Legislative Intent: Many Outside Provisions Do Apply to Chapter 156 Child-Custody Modification Proceedings

The Legislature expressly included in chapter 156 specific provisions from outside that chapter but did not include a parental presumption. *See generally* Tex. Fam. Code ch. 156. Section 156.002 provides that persons who have standing to file an original suit under chapter 102 may file for modification. *Id.* § 156.002. Section 156.004 provides that the Texas Rules of Civil Procedure apply to chapter 156. *Id.* § 156.004. Sections 156.006, 156.101, and 156.102 reference certain terms and procedures set out in sections 153.009 and 153.701. *Id.* §§ 156.006(b)(3), (c), .101(a)(3), (b), .102(d). Section 156.104 references offenses defined by the penal code. *Id.* § 156.104. Section 156.1045 references the certain requirements of section 153.004. *Id.* § 156.1045(a). Section 156.105 references definitions in section 153.701. *Id.* § 156.105. Sections 156.401, 156.402, and 156.406 reference provisions within chapter 154. *Id.* §§ 156.401, .402, .406. Section 156.407 references chapter 231. *Id.* § 156.407. Section 156.408 references chapter 159. *Id.* § 156.408. Section 156.409 references chapters 157 and 262. *Id.* § 156.409.

The Legislature understood how to incorporate provisions of other chapters of the Texas Family Code (and provisions outside the Family Code)

into the "Modification" chapter and opted not to include the presumptions of either sections 153.131 (parental presumption) or 153.433 (fit-parent presumption). *See Lippincott*, 462 S.W.3d at 509 (in construing a statute, court presumes that Legislature purposefully omitted words it did not include); *see generally* Tex. Fam. Code ch. 156.

5. Following Legislative Intent, This Court Should Decline to Apply the Parental Presumption or Fit-Parent Presumption in Child-Custody Modification Proceedings

Because the Legislature did not express its intent to apply the parental presumption in chapter 156 modification suits, this Court should not apply the presumption to chapter 156. *In re V.L.K.*, 24 S.W.3d at 343; *see Lippincott*, 462 S.W.3d at 508–09. There is no judicial authority holding that the Constitution requires a "parental presumption" in modification proceedings. The one Texas appellate court that considered a constitutional challenge to the modification statute has rejected it. *In re M.N.G.*, 113 S.W.3d 27, 33 (Tex. App.—Fort Worth 2003, no pet.).

The decision in *Troxel* does not bar the courts from modifying legal relationships involving children. The order under review in *Troxel* was an original determination about grandparent visitation, not a modification of an existing order—which, unlike an original determination, must take into

consideration the need for stability for a child for whom prior orders had already determined conservatorship and possession. *Troxel*, 530 U.S. at 60–61. The *Troxel* Court did not address modification of conservatorship orders and did not call into question the Legislature's decision not to apply the parental presumption in suits to modify conservatorship orders. *See generally Troxel*, 530 U.S. 57. Further, *Troxel* did not dictate any bright-line rules for statutes affecting parental rights. *In re S.A.H.*, 420 S.W.3d 911, 920-21 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Troxel*, 530 U.S. at 73)).

Applying a "fit-parent" overlay to the modification statutes is unnecessary. "As construed by the courts, the Texas modification statute necessarily includes consideration of the fitness of the parent and whether a change in custody would harm the child, regardless of whether those findings are constitutionally required." *In re M.N.G.*, 113 S.W.3d at 35. Moreover, the *Troxel* Court expressly declined to address whether a showing of unfitness or harm is required before rights can be taken from a parent and given to a nonparent. *In re S.A.H.*, 420 S.W.3d at 920–21 (citing *Troxel*, 530 U.S. at 73)).

Two "fit" parents do not lose the right to be free from efforts by third parties to insert themselves in their parental relationship. First, to file a modification suit, a person must have standing to do so. Tex. Fam. Code §

156.002(b) (citing Tex. Fam. Code ch. 102). A non-parent may file suit only under specific circumstances. *See, e.g.*, *id.* § 102.003(a)(9) (granting standing to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition); *see also In re H.S.*, 550 S.W.3d 151, 162–63 (Tex. 2018) (recognizing the distinction between "ordinary third parties" and "persons who have played an unusual and significant parent-like role in a child's life" while reviewing the extent of Texas Family Code § 102.003(a)(9)).[1] Further, to seek modification of conservatorship or possession and access, a person with standing must establish a material and substantial change in circumstances and that the requested modification would be in the best interest of the child. *Id.* § 156.101(a).

E. Child-Custody Modification Proceedings Do Not Preclude Judges from Considering Parents' Fitness or Wishes

Texas Family Code section 156.101, which sets forth the requisite grounds for granting a modification of child custody—material and substantial change in circumstances and the best interest of the child—has not been

[1] *See also In re Clay*, No. 02-18-00404-CV, 2019 WL 545722, at *5 (Tex. App.—Fort Worth 2019, mand. pending) (this case) (court found that the intervening grandparents failed to establish standing under either the Grandparent statute or under Tex. Fam. Code § 102.003(a)(9)).

construed to preclude judges from considering or deferring to the wishes of a child's parents when determining the "best interest of the child," nor does it preclude courts from putting a thumb on the scale in favor of parental custody. Although the parental presumption in Texas Family Code section 153.131 does not apply to modification proceedings, *see In re V.L.K.*, 24 S.W.3d at 338, that does not prohibit courts from requiring a clear demonstration that non-parental custody would better serve the child's interests.

Further, the "fit-parent presumption" already applies to efforts by non-parents to insert themselves into the parent-child relationship, but does not apply in situations in which two "fit" parents have invited the government's intrusion into their parenting relationship by asking a court to decide the best interest of the child. As noted by the Third Court of Appeals in *Stillwell v. Stillwell*, No. 03-17-00457-CV, 2018 WL 5024022 (Tex. App.—Austin 2018, pet. denied), "[w]e do not read *Troxel* to suggest that the State is constitutionally prohibited from 'interfering' when competing possession terms are sought by two fit parents—both of whom are presumed to be acting in the best interest of the child in making their requests." The practical reality is that when two "fit" parents invoke the jurisdiction of the court by filing a suit affecting the parent-child relationship, they relinquish the determination

of best interest to the court under the court's role as *parens patriae*. If that were not the case, a court would have no authority to delegate rights between the parties and order specific possession and access for their child. The government must have the right to decide custody issues between two "fit" parents, and the basis for such decision-making is that the parties invited the government to assume the role of decision-maker by filing suit. Applying a "fit-parent presumption" to a suit between two "fit" parents would deprive courts of that right.

F. Deciding Fact-Intensive Custody Disputes is Properly Left to Trial Courts

Custody disputes by their very nature are inherently fact-intensive. *In re De La Pena*, 999 S.W.2d 521, 529 (Tex. App.—El Paso 1999, no pet.). A determination, in a modification case, of whether a material and substantial change in circumstances has occurred also is fact-intensive and is not guided by rigid rules. *In re T.W.E.*, 217 S.W.3d 557, 559 (Tex. App.—San Antonio 2006, no pet.). A trial court is "wisely vested with … discretion" regarding modification of conservatorship because it "is best able to observe the witnesses' demeanor and personalities." *Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied).

G. This is Not the Forum for the Debate Presented

This mandamus action is not the proper case for debating what the father wants to debate: whether the fit-parent presumption should be applied in every modification case, regardless of its unique facts, and whether it also applies during the temporary orders phase of a modification case. The father is attempting to use the fit-parent presumption as a sword to divest the mother's fiancé of the standing properly conferred on him by the mother through the exercise of her own rights as a joint managing conservator of the child when she was alive, and not as a shield against government action in an original suit to restrict his parental rights. In *In re H.S.*, 550 S.W.3d 151 (Tex. 2018), this Court already addressed the issue presented in this mandamus: whether Texas Family Code section 102.003(a)(9), regarding standing, unconstitutionally interfered with the fundamental right of parents to make decisions regarding the care, custody, and control of their children. *Id.* at 161. In determining that *Troxel* did not require overlaying a "fit parent" standard on 102.003(a)(9), this Court found that section 102.003(a)(9) protected parents' fundamental rights with respect to nonparents by establishing a substantial threshold that permits only nonparents who have exercised "actual care, control, and possession" of a child for at least six months to file a suit affecting the parent-child

relationship. *Id.* at 161-62 (concluding "the nonparent standing threshold in Texas is thus much higher and narrower than the one rejected in *Troxel*.").

Moreover, the father's position runs contrary to the very reason why temporary orders exist: to maintain the status quo until the case can be tried. Before the mother died, the fiancé had regular possession of and access to the child. Temporary orders exist to maintain this situation, and stability for the child, until a trial can be held. If the father's position prevailed, then the trial would be a nullity because the fiancé would be asking to have conservatorship and possession rights to a child he has not had any contact with for months, if not more than a year, by the time the case was tried.

PRAYER

Wherefore, premises considered, for all of the foregoing reasons alleged and briefed herein, the Family Council prays that this Court deny the petition for writ of mandamus and decline to apply either a parental presumption or fit-parent presumption to modification cases brought under chapter 156 of the Texas Family Code.

Respectfully submitted,

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CERTIFICATE OF COUNSEL REGARDING WORD COUNT

Pursuant to Texas Rule of Appellate Procedure 9, I certify the word count in this Amicus Curiae Brief, excluding the portions allowed under the rule, **totals 3,677 words**.

/s/ Beth M. Johnson
Beth M. Johnson

CERTIFICATE OF SERVICE

This is to certify that pursuant to Texas Rule of Appellate Procedure 9.5, on April 6, 2020, a true and correct copy of this Amicus Curiae Brief has been forwarded via E-Service to:

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APPENDIX

Tab 1: Guidelines for Submission of Amicus Curiae Briefs on behalf of the Family Law Council

ADDENDUM A – APPELLATE COMMITTEE

Purpose

Review pending appellate cases upon request. The Committee shall only consider those cases which will have a significant impact in the area of family law. The Committee shall report to Council its recommendation on any such cases, and whether the filing of an amicus brief is permitted and appropriate.

Historical Highlights

1. The Appellate committee was formerly known as the Amicus Committee.

2. The guidelines for submission of amicus curiae briefs were promulgated in 1991 and amended twice in 1994. The guidelines are updated intermittently to maintain compliance with the State Bar Board Policy Manual.

Policies & Procedures

1. The Council will submit an amicus brief only in matters involving substantive or procedural law on major issues of importance to the practice of family law. Issues of importance to the practice of family law may arise in cases involving other issues, such as probate or corporate matters, but where the decisions reached will carry over into the family law practice.

2. The Council shall submit no brief which purports to resolve or take a position with regard to factual disputes.

3. The Council shall submit amicus briefs only in the Texas Supreme Court. Briefs may be submitted upon granting of a petition for review or in order to encourage the Court review.

4. In any case in which an officer, member, or liaison member of the Council has participated, either directly or indirectly, that member shall be recused from any discussion, vote, or drafting of Council briefs.

5. Submission of an amicus brief may be suggested to the Appellate Committee by any member of the State Bar. The Committee shall investigate the matter, review existing briefs and opinions, and then vote to recommend for or against the filing of such a brief, and the position to be taken by the Section in such brief, such votes being taken by the Committee Chairman by email or telephone. Upon receiving a request to consider filing a brief in a particular matter, the Committee Chairman may, but is not required to, communicate with counsel for parties, to solicit copies of briefs or other information pertinent to the decision. The Chairman of the Appellate Committee shall communicate the vote of the Committee to the Council Chair, who shall then communicate the vote to the entire Council. The Chair of Council shall conduct a poll of all Council members, by email or telephone, or at a Council meeting. Two-thirds of the Council's voting members must vote in favor of submission of the brief, and the position to be taken in the brief, before an amicus curiae brief may be submitted on behalf of the Section.

6. Upon receipt of the affirmative consensus vote required by these guidelines, the Chair of Council shall notify the chairman of the Appellate Committee to prepare the required request for approval from the State Bar to file an amicus curiae brief in the Section's name and shall begin assignment and preparation of the amicus brief.

7. The Committee Chair shall prepare the draft for the Chair of Council to request approval from the State Bar to file an amicus curiae brief in accordance with the then applicable State Bar Board Policy Manual and shall present the request to the Chair of Council for approval and filing with the State Bar Executive Director. Pursuant to State Bar Policy Manual section 8.02.03, the request shall include the following:
    a. The name and contact information of the person or entity making the request;
    b. The name of the case in which the amicus curiae brief is proposed to be filed;
    c. The court in which the amicus curiae brief is proposed to be filed;
    d. The date by which the amicus curiae brief must be filed;
    e. A description of the facts of the case and the questions presented to the court;
    f. The issue or issues proposed to be addressed by the amicus curiae brief;
    g. A statement of the position and in what way such position satisfies the restrictions provided in section 8.02.02(A) of the State Bar Board Policy Manual;
    h. A draft of the proposed amicus curiae brief, if available at the time of filing the request; and
    i. A disclosure of any personal or professional conflict of interest that any member of the Section's Council may have in the case.

    Any need for expedited or emergency consideration should be referenced in the request. The request must be approved by the appropriate State Bar committee or subcommittee prior to filing of the brief.

8. Upon notification of the affirmative consensus vote of Council, the Committee Chairman shall attempt to notify the lead attorneys involved in the case in question as to the decision of Council to participate. If time permits, the Committee Chairman shall request the attorneys to forward copies of any briefs not available on the Texas Supreme Court website or a letter setting forth their position in the case.

9. The final brief shall be submitted to all Appellate Committee members and Executive Committee members for approval if time permits. Approval by a majority of the Family Law Section's Executive Committee shall be required for submission. In the event of serious time constraints where it is likely that a decision will be delivered before a full review by committees may be had, the Chairman of Council may issue approval for submission.

10. The brief shall be signed by the Chairman of Council on behalf of Council and by the authors of the brief.

11. Any inquiries or comments as to contents of the amicus briefs shall be directed to the Appellate Committee Chairman.

12. Any amicus curiae brief filed by Council shall comply with all requirements by the Texas Rules of Appellate Procedure pertaining to amicus briefs.

13. Any amicus brief filed by Council shall contain any disclosure recommended by the State Bar of Texas, including but not limited to the following "Section Statement" set forth in section 8.02.05 of the State Bar Policy Manual:

    THIS AMICUS BRIEF IS BEING PRESENTED ONLY ON BEHALF OF THE FAMILY LAW SECTION OF THE STATE BAR. THE SECTION'S POSITION SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE, OR THE GENERAL MEMBERSHIP OF THE STATE BAR. THE FAMILY LAW SECTION IS A VOLUNTARY SECTION OF _____ MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

    THIS AMICUS BRIEF IS SUBMITTED AS A RESULT OF A VOTE OF (_____) TO (____) OF THE COUNCIL OF THE FAMILY LAW SECTION, WHICH IS THE GOVERNING BODY OF THE SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THE SECTION HAS BEEN OBTAINED.

    A copy of these guidelines shall be attached to every amicus brief filed by the Council.

14. The substance of the brief and the fact of its filing on behalf of Council will be announced to the membership of the Section by inclusion in the Message from the Chair in the next available Family Law Section Report. The Appellate Committee Chair shall provide a brief summary of the case and contentions of the amicus brief to the Chair of Council prior to the first day of the month immediately preceding the publication month of the next available Family Law Section Report or as soon thereafter as possible. The Editor of the Section Report should be copied with the information provided to the Chair of Council.

15. Any of these Rules can be suspended by affirmative vote of two-thirds of voting Council members.

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