

March-April 2015

San Antonio Lawyer



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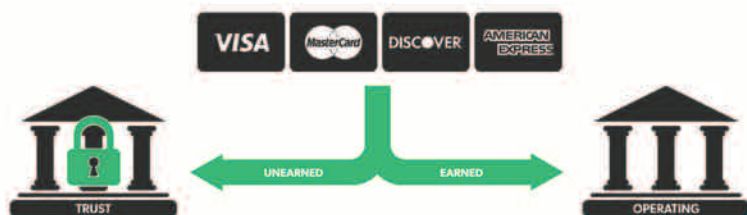


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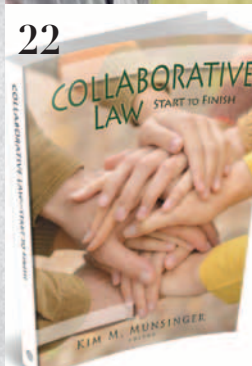
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On the Cover: A woodcut from 1864 depicts King John and the barons at Runnymede.

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100 Dolorosa, San Antonio, Texas 78205
210.227.8822 Fax: 210.271.9614

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CORRECTION

We regret that in the January-February 2015 issue of the San Antonio Lawyer, an incorrect photo was published alongside the In Memoriam listing for Edward Emmanuel DeWees, Jr. Mr. DeWees's correct photo is pictured below.

Edward Emmanuel DeWees, Jr. died in March at the age of 81. The San Antonio native attended Austin College on a basketball scholarship. He entered military service after college and returned to earn his law degree from the University of Texas in 1959. He practiced law for more than fifty years, many of them with the Bexar County District Attorney's office. While in private practice, he concentrated his efforts on family law matters. DeWees was active in his church, First Presbyterian. He was a founding member of the Bachelor's Club of San Antonio and the Christmas Cotillion, a member of the German Club, and past president of the Conopus Club.



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I. RELIC OF FEUDALISM

As the Magna Carta, England's Great Charter of Liberties,¹ marks its eighth centennial, it is appropriate to ask what's in it. The answer, it turns out, lives up to the legend. What's in the Magna Carta is the beginning of modern legal thought.

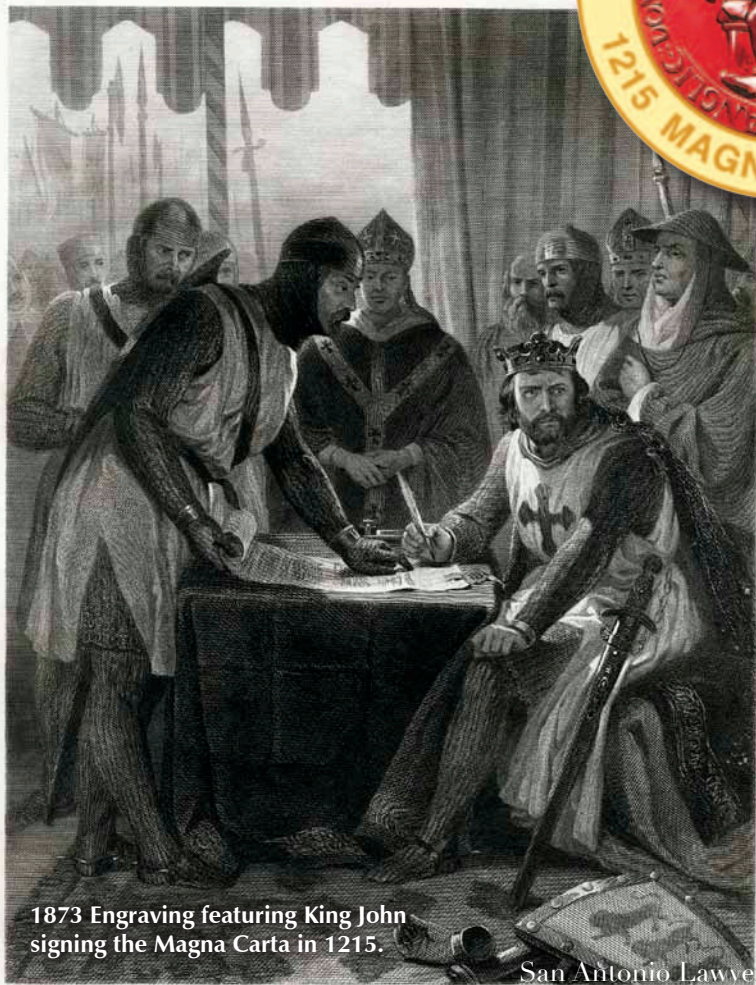
The Great Charter set the expectations that for 800 years have shaped the development of the law in England, America, and around the globe. Like a blazing light piercing medieval darkness, the Magna Carta illuminated the importance of legal principles, fair procedures, proportional punishment, official accountability, and respect for human dignity. It was unlike any legal document that had ever come before.

A. Rooted in War

The terms of the Magna Carta were negotiated on the battle front during a cessation in an English civil war between King John and rebellious barons. The document was not intended to articulate enlightened standards for far-flung places or future ages, but it ended up doing so by focusing on the issues of the day. Those problems included crushing taxation; excessive fines; the freedom of the Church; the rights of widows, children, and heirs; the operation of the courts; the duties of guardians; the rise of French immigrants within the English bureaucracy; and the return of hostages.

The Magna Carta and the Expectations It Set for Anglo-American Law

By Vincent R. Johnson



1873 Engraving featuring King John signing the Magna Carta in 1215.

San Antonio Lawyer

B. Understandable and Still Important

The more than five dozen clauses in the Magna Carta follow no discernible plan of organization. Many of the provisions are concerned with "feudal incidents"—the incidental rights of lords arising from feudalism's hierarchical organization of status relationships.

However, if one can get past the jumbled arrangement of the material and the unfamiliar terminology, many of the provisions can easily be understood.

More surprising is the fact that the Magna Carta's text reflects many concerns that are still central today. Considering that eight centuries have passed, and that there are profound differences between the feudal age and the digital age, these commonalities are remarkable. They suggest that the ancient Magna Carta and modern jurisprudence were "cut from the same cloth."

C. The Many Magna Cartas

There were actually many Magna Cartas. The initial version was sealed by King John (reigned 1199–1216) on a small sheet of parchment dated June 15, 1215.

However, the 1215 Charter was never implemented and soon became a dead letter. Within three months, King John repudiated the charter. It was also nullified by Innocent III, an able pope, on

¹ See J.C. HOLT, *MAGNA CARTA* xvi (2d ed. 1992).

the ground that it had been extracted by coercion. Thus, the English civil war soon resumed. Fortunately, roughly a year later, John died of dysentery on October 19, 1216, leaving his nine-year-old son, Henry III, to succeed him. That royal transition changed the course of history for it gave the Magna Carta a second chance.

For political purposes, the Magna Carta of 1215 was resurrected and reissued in a revised form by the new King's advisers. They retained enough of the 1215 charter to appeal to the barons and the masses, but not so much as to seriously hamper the new King.

The original sixty-three clauses of the 1215 charter dwindled to forty in the 1216 Magna Carta. All this was done with lightning speed.

The 1216 charter was just the beginning. All told, Henry III (reigned 1216-72) and his successor, Edward I (reigned 1272-1307), reissued the Magna Carta at least six times. All of these versions differed substantially from the 1215 version. Thus, depending on which Magna Carta is at issue, the relevant date may be 1215, 1216, 1217, 1225, 1265, 1297, or 1300. Like a comet that appeared by popular demand, the Magna Carta continually re-crossed the dark sky of the thirteenth century.

Until the 18th century, "the 1215 and 1225 charters were hopelessly confused."² The 1225 Magna Carta is the one that was eventually set out in the place of greatest honour at the beginning of England's first roll of statutes in 1297. However, the 1215 Magna Carta is undoubtedly the most famous. That first edition is the one that arose from the dramatic confrontations between King John and the barons that have since been depicted in countless works of art.

In none of the editions of the Magna Carta were the substantive clauses numbered. However, historians inserted numerals into translations for purposes of reference. The numbers and quotations in this article refer to the sixty-three clauses in the 1215 Magna Carta as translated on the website of the British Library.

II. DECISIONS BASED ON LAWS AND EVIDENCE

The most famous provision is Clause 39 which declares, in language still sparkling with gem-like quality, an unquestionable commitment to legal principles. Clause 39 states: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." This product of the medieval world seems entirely modern and enlightened.

A. Due Process

Clause 39 arose directly out of King John's abuses. "In some

cases, John proceeded . . . by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure."³ In other cases, he attacked his enemies by subjecting them to a "travesty of judicial process."⁴ In some cases, John's "political and personal enemies were exiled, or deprived of their estates, by the judgment of a tribunal composed [not of equals but] entirely of Crown nominees."⁵ Driven by the King's avarice, the administration of justice was frequently just machinery for enriching the royal treasury.

Clause 39's essential point was clear. John was no longer to take the law into his own hands. Clause 39 has been credited as the first embodiment of the "English idea of due process" and its American progeny.⁶

B. Trial by Jury

The idea of trial by jury is inextricably linked to the Magna Carta. Thus, when American judges cite the Magna Carta in explaining to citizens called for jury duty the importance of their role, it is with this connection in mind.

Clause 39's reference to judgment by one's equals or peers is "what we might think of today as the right to trial by jury."⁷ However, "[w]hether or not the Magna Carta's reference to a judgment by one's peers was a reference to a 'jury' . . . [is] a fact that historians now dispute."⁸ As Oxford professor Arthur L. Goodhart explained, "The word 'judgment' here refers to the preliminary decision concerning the procedure to be adopted at trial, and not a final judgment to be reached in accord with that procedure. . . . [T]he first decision was that of the jury of peers while the final decision was reached by methods that seem strange to us. . . . [T]he jury of peers . . . determined whether the party should be put to his proof in one of the established ways: ordeal by hot iron or by water, compurgation, wager of law, trial by battle, or production of charter."⁹

Adherents of this view argue that trial by jury developed only after trial by ordeal gradually fell out of fashion following the Roman Catholic Church's Fourth Lateran Council. That conclave, held in Rome in 1215, forbade the clergy from taking part in judicial ordeals. Regardless of which view is correct, it is certain that Clause 39 contributed to establishing the principle of trial by jury based on relevant evidence.

Interestingly, the Magna Carta contains a second, longer, less well-known provision that deals with a type of jury which had a role to play in resolving certain controversies between King John of England and King Alexander of Scotland. Clause 59 stated: "With regard to the return of the sisters and hostages of Alexander. . . , his liberties and his rights, . . . [t]his matter shall be resolved by the judgment of his equals in our court." Clause 59 clearly implied that the "equals" would render a final judgment.

² See NICHOLAS VINCENT, *MAGNA CARTA: A VERY SHORT INTRODUCTION* 92 (2012).

³ WILLIAM SHARP McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 377 (2d ed. 1914).

⁴ *Id.*

⁵ *Id.* at 378.

⁶ Hannis Taylor, *Due Process of Law*, 24 YALE L.J. 353, 354 (1915).

⁷ VINCENT, *supra* note 2, at 4.

⁸ *Williams v. Florida*, 90 S. Ct. 1893, 1902 n. 27 (1970).

⁹ ARTHUR L. GOODHART, "LAW OF THE LAND" 19 (1966).



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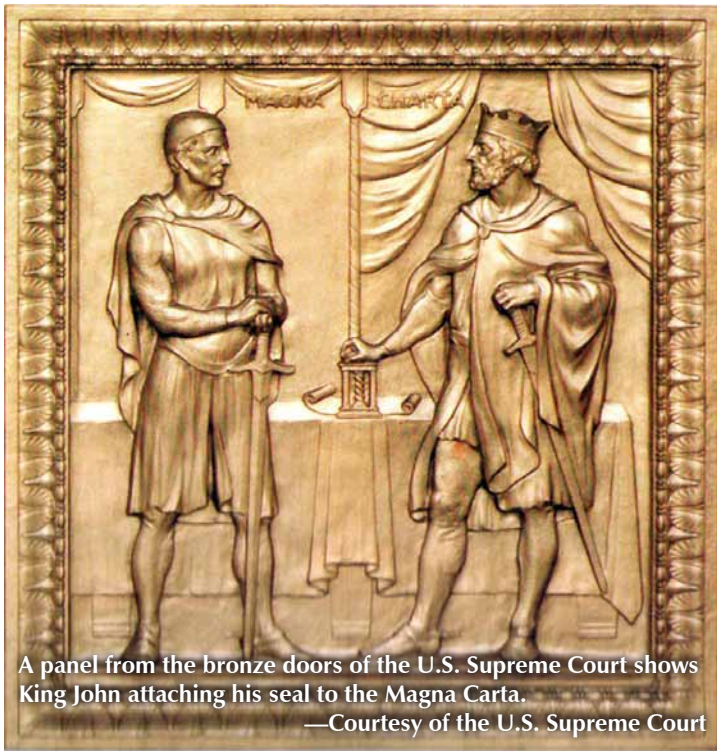
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A panel from the bronze doors of the U.S. Supreme Court shows King John attaching his seal to the Magna Carta.
—Courtesy of the U.S. Supreme Court

C. Evidentiary Support

Clause 38 of the 1215 Magna Carta stated: “In [the] future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.” To modern eyes, this provision seems unsurprising. However, it may have been revolutionary. The provision offered “real protection to the common man” against abuses by arrogant manorial officials.¹⁰

III. ETHICS IN GOVERNMENT

The 1215 Magna Carta contains a trove of anti-corruption provisions. Though framed in terms addressing the realities of thirteenth-century life, those provisions were driven by the same concerns that inspire modern efforts to fight corruption.

A. Justice Is Not for Sale

Clause 40 is the shortest and most elegant provision in the Magna Carta. In language that still glows with ethical clarity, it provides: “To no one will we sell, to no one deny or delay right or justice.”

Bribery of the king and his judges, and delays in rendering judgment, had been serious problems in the decades leading up to the barons’ rebellion. Clause 40 “has been interpreted as a universal guarantee of impartial justice to high and low.”¹¹ Today, the principle that justice is not for sale is a cornerstone of the American principles of judicial ethics which broadly prohibit judges from receiving gifts or other things of value from persons whose cases may come before them.

B. Improper Economic Benefit Is Prohibited

Three additional clauses in the 1215 Charter were intended, in

part, to address other corrupt practices. Clause 28 provided: “No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.” Clause 30 stated: “No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.” And Clause 31 said: “Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.”

These provisions were intended to address abuses related to the royal right of purveyance, the prerogative of the king to requisition supplies from the citizenry as the royal court travelled about England, but with an obligation to pay. The problem was that the persons from whom supplies were requisitioned were often not paid, or were paid too little, or were paid too late. Some were compensated in exchequer tallies, a hated form of currency which could be used only to pay taxes.

The abuses related to the right of purveyance included not only takings to provide for the king’s household, but requisitioning by officials for their own personal benefit. Clauses 28, 30, and 31 were intended to address that kind of abuse, too. In doing so, these clauses presaged the development of a broader, fundamental principle of modern government ethics jurisprudence. That principle holds that a government official or employee may not use official power for personal economic benefit.

C. Officials Must Be Accountable

Under anti-corruption principles, public officials and employees must be accountable for corrupt practices. In modern societies, the procedures often involve criminal indictment or impeachment. The Great Charter sought to achieve the same goal by extracting from King John a promise in Clause 55 that a committee of twenty-five barons could hold him accountable, by majority vote, for failure to return all fines unjustly exacted. Another provision, Clause 12, greatly limited the king’s power to impose unconsented taxation. That provision, which was permanently dropped in 1216, foreshadowed the struggle between the Crown and its American colonies more than five centuries later.

IV. INSTITUTIONAL RESPECTABILITY

A just legal system operates in a manner that merits the respect and confidence of the citizenry. The Magna Carta contained several clauses that contributed to this goal.

A. Professional Qualifications and Temperament

It is often taken for granted that judges will be learned in the law. However, even today, this is not always the case. Because judicial qualifications were also problems in medieval England, the barons forced King John to promise in Clause 45: “We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.”

B. Judicial Jurisdiction

A corollary principle is the idea that judicial tasks should

¹⁰ DORIS M. STENTON, AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES 12 (1965).

¹¹ McKECHNIE, *supra* note 3, at 398.

be performed only by judges. Otherwise, litigants could be harmed by the actions of unqualified judicial interlopers. The barons included as Clause 24 this language: “No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.”

From a modern perspective, it would be easy to applaud this provision as advancing separation of powers and judicial independence, and avoiding the conflicts of interest that would arise if a sheriff responsible for an arrest was tasked with deciding the guilt of the accused. However, those concepts were not well developed in thirteenth-century England. The most that can be said is that Clause 24 was a useful step toward clarifying judicial jurisdiction.

Clause 34 stated: “The writ called *precipe* shall not in [the] future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord’s court.” This provision was drafted against the background of the ongoing struggle that reflected the expanding jurisdiction of the royal courts and the diminishing power of the local feudal courts. Unlike the writ of right, which allowed the royal courts to interfere with the operation of feudal courts only in cases where they had failed to do justice, the writ *precipe* did not require an “allegation of failure of justice but simply ignored the lord’s jurisdiction”¹² by ordering the sheriff to command the tenant to deliver disputed land to another or to appear in the royal court to explain his disobedience.

Jurisdictional disputes between courts are inevitable, but they must be sorted out based on principle. In a world where kings and judges were often bribed, a procedure like the writ *precipe*, by which a “feudal lord was . . . robbed by the King of his jurisdiction,”¹³ invited abuse, and it was important that such a risk be curbed.

C. Accessibility and Transparency

Several provisions in the Magna Carta sought to advance the goals of judicial accessibility and transparency. Until the late twelfth century, it was the custom of the royal courts to travel with the king from place to place as he handled the realm’s business. This often forced litigants and observers to traverse great distances and incur substantial expenses in order to participate in court proceedings. To address these issues, Clause 17 provided: “Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.” Though no particular place was named, Westminster was probably intended. However, royal pleas, in which the Crown had a special interest, were treated differently, and continued to travel with the king.

1. Popular Petty Assizes

Henry II, John’s father, had been a legal innovator. Among his reforms were the three petty assizes (trial sessions). These efficient dispute resolution mechanisms proved popular. They quickly resolved questions about who was entitled to possession of real property.

The grievance of the barons was that the petty assizes were too infrequent and inconvenient. To remedy these deficiencies, Clause 18 stated: “Inquests of novel disseisin, mort d’ancestor, and darrein presentment shall be taken only in their proper county court. We . . . will send two justices to each county four times a year . . .”

Clause 19 further mandated that: “If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind . . . as will suffice for the administration of justice, having regard to the volume of business to be done.”

2. Undermining Trial by Combat

Clause 36 provided: “In [the] future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.” This reform was important because it undermined the system of trial by combat—which sometimes amounted to nothing more than “legalized private revenge.”¹⁴

The writ of inquisition allowed certain criminal defendants to avoid, or at least delay, trial by combat while a diversionary procedure played out. If the accused’s neighbors decided that he was innocent, trial by combat was avoided.

The problem during King John’s reign is that the writ of inquisition was used not to save the innocent from the capricious process of trial by combat, but as an important source of revenue. Thus, the writ was sold only to those with deep purses.

Clause 38, which made the writ freely available, moved the legal system toward processes under which decisions would be based on relevant evidence rather than physical might. It also limited the corrupt practices of selling justice only to the wealthy.

D. Prompt Remedies

Six provisions in the Magna Carta demonstrated concern with the timeliness of remedies. The most surprising of these



¹² *Id.* at 347.

¹³ *Id.* at 348.

¹⁴ *Id.* at 360.



provisions, Clause 48, imposed tight deadlines for the investigation and abolition of certain “evil” customary practices relating to forests, warrens, and riverbanks. Clause 32 stated: “We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the ‘fees’ concerned.” Clause 52 established a general principle requiring remedies for violations of rights, but with a significant exception that was applicable if King John was on a Crusade. Clause 53 applied the “Crusade exception” to the resolution of legal disputes involving forests and certain other matters. There were many such controversies because English kings had appropriated forests for their exclusive use as sources of wealth and recreation, which interfered with the ability of commoners to forage for food and fuel. Finally, Clauses 56 and 57 specifically guaranteed that Welshmen were entitled to prompt remedies.

V. RESPECT FOR HUMAN DIGNITY

The 1215 Magna Carta demonstrated respect for human dignity by addressing proportionality of punishment and the needs of some of the most vulnerable persons.

A. Proportionality

Clause 20 eloquently stated: “For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein [a feudal tenant] the implements of his husbandry, if they fall upon the mercy of a royal court” This provision reflected a “humane desire not to reduce a poor wretch to absolute beggary.”¹⁵ The same proportionality principle was echoed in Clauses 21 and 23, which dealt specifically with earls, barons, and the ordained religious.

B. Legal Protection of the Vulnerable

In the feudal world, “much of the sovereign’s revenue came from feudal incidents resulting from the king’s control of persons under disabilities.

1. Widows and Surviving Children

A widow “could be married at the wish of her feudal overlord to any man willing to pay the going rate.”¹⁶ However, in rare cases a widow was sufficiently wealthy to be able to outbid suitors and buy a charter from her lord guaranteeing that she would not be forced to remarry. “John did a lively business in payments for the widow’s privilege of remaining single, of remarrying whom she wished, or of keeping control of the lives and fortunes of her minor children.”¹⁷ The payments, which sometimes included chattels (e.g., hunting animals) as well as money, testified “eloquently to the greed of the King, the anxiety of the victims, and the extortionate nature of the system.”¹⁸

The charter addressed these deeply resented practices in language so strong that it is something of a landmark in the recognition of women’s rights. Clause 8 states with certainty: “No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.” This victory for women was qualified. This was only a prohibition against a forced second or later marriage, and a woman could not choose to remarry without her lord’s consent. Moreover, most widows had no option other than to remarry because there were few career opportunities. The alternatives were to face financial destitution or enter a nunnery.

Clause 8 may have been rooted more in concerns about the reputation and status of noble families, than in solicitude for widows. Such familial concerns are reflected in Clause 6 which provides: “Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be made known to the heir’s next-of-kin.”

At the time of the Magna Carta, “[i]t was customary for a landowner to bestow marriage portions [of his land] on his daughters.”¹⁹ In addition, it was usual for a new husband to establish a dowry

¹⁵ *Id.* at 292.

¹⁶ See GEOFFREY HINDLEY, *THE MAGNA CARTA: THE STORY OF THE ORIGINS OF LIBERTY* 167 (2008).

¹⁷ FRANCES GIES & JOSEPH GIES, *WOMEN IN THE MIDDLE AGES* 28 (1978).

¹⁸ *Id.*

¹⁹ McKECHNIE, *supra* note 3, at 216.

for his wife as they were leaving the altar. If the husband failed to do so, the law stepped in and fixed the dower at one-third of all his lands. The problem for a widow was that “she could only enter into possession [of the land] by permission of the King, who had prior claims and could seize everything.”²⁰ To address this problem, Clause 7 provided: “At her husband’s death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband’s house for forty days after his death, and within this period her dower shall be assigned to her.”

Issues remained relating to personal property, including food and other necessities. Those matters were addressed in Clause 26, which provided limited protection to widows and surviving minor children by making clear that their reasonable shares of a deceased man’s estate would not be treated as assets of the estate, except in cases of an unpaid debt to the Crown.

2. Heirs

Clauses 2 and 3 of the 1215 Magna Carta limited the inheritance taxes that could be charged to the male heir of an earl, baron, or other person holding lands directly of the Crown in exchange for military service. Clause 2 capped the amount that would be charged to an heir who had reached majority. Clause 3 then exempted minor male heirs from any such obligation.

3. Duties of Guardians

Guardians of the property of minors “had always strong inducements to exhaust the soil, stock, and timber, uprooting and cutting down whatever would fetch a price, and replacing nothing.”²¹ To protect minor heirs from these abuses, Clause 4 stated: “The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property . . . [and is] answerable to us . . .”

Clause 5 of the 1215 Magna Carta further specified that a guardian “shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself . . . [and when] the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.”

4. Debtors

Clause 9 addressed the treatment of debtors. It provided in part: “Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt.” In an agrarian society, this helped to prevent a creditor from taking away a debtor’s livelihood.

VI. EQUAL TREATMENT

The subject on which the Magna Carta is most at odds with modern sensibilities is the issue of equal rights.

A. Free Men

Clause 1 clearly signalled that the Magna Carta was a charter of liberties only for free men. It provided: “TO ALL FREE MEN OF OUR KINGDOM we have . . . granted . . . all the liberties written out below . . .”

In addition, the most important provision in the Magna Carta—Clause 39, which guaranteed legal protection from criminal sanctions—expressly limited its protection to “free men.”

However, there was at least a hope that non-free men might receive similar treatment. Clause 60 stated: “All these customs and liberties that we have granted . . . Let all men of our kingdom . . . observe them similarly in their relations with their own men.”

More importantly, Clause 40, the elegant provision on access to justice, did not purport to exclude anyone. It said simply: “To no one will we sell, to no one deny or delay right or justice.”

B. Jews in England

Jews in England lent money at high rates. However, they did business only at the mercy of the king, who raked off much of the profits in the form of arbitrary taxes.

The barons, many of whom were debtors, discovered a way to strike at both the money-lenders and at John. That cause was the plight of heirs whose fortunes were likely to be depleted by the high interest rates on loans that had been made to the deceased. Clause 10 provided in part: “If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age . . .”

A second clause—framed in terms of the interests of widows and surviving children—struck at the assets often used as security for loans. Clause 11 provided: “If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his

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²⁰ *Id.* at 215.

²¹ *Id.* at 207.



Prof. Vincent Johnson's students examine the 1216 Magna Carta during a field trip in Durham.

holding of lands. The debt is to be paid out of the residue"

Thus, under Clause 11, a widow's dower lands were beyond the reach of her deceased husband's creditors. In many cases, the effect of this provision was to reduce the security for a loan by one-third. What remained was further reduced by amounts needed to provide necessities for minor children. Historian Paul Johnson says the "Magna Carta undermined the economic basis of English medieval Jewry."²²

C. Testimony by Women

The Magna Carta confirmed the existing rule, which held that the testimony of women was in many instances legally insignificant. Clause 54 stated: "No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband."

This clause, which dealt only with cases involving murder, meant that no woman could sue for harm caused by the death of her father, son, or friend, but only the death of her husband. The charter recognized no similar disability in the case of men.

D. Earls and Barons

Earls and barons were extensively insulated from criminal liability by Clause 21, which effectively created a class privilege for the aristocracy. Clause 21 states: "Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence." The number of earls and barons was small, so it is easy to envision how this provision was conducive to a "conspiracy of silence."

E. Immigrants

One concern of the English barons was the fact that French supporters of King John during his military quests in France had returned with him to England and were promoted to positions of power and authority. To remedy this, King John was

forced to promise that they would be dismissed. Thus, Clause 50 launched an *ad hominem* attack against immigrants whose names are now oddly memorialized in the Great Charter, whom the king promised to "remove completely from their offices."

F. On Balance

The 1215 Magna Carta was in no sense a model of equal treatment under law. However, it is important to remember that the Magna Carta did in fact protect a much wider array of persons and entities than just free men and aristocrats. It recognized the freedom of the church; the rights of "all merchants" and "any man" to travel; the liberties, customs, and obligations of cities and similar entities; and the interests and needs of hostages and mercenaries (in addition to the interests of widows, surviving children, heirs, wards, and persons accused of crime). Though it did not provide for full equality, the Magna Carta moved legal institutions across the globe closer to the ideal of equal justice under law.

VII. OTHER PROVISIONS

Not every provision in the Magna Carta addressed issues of lasting importance. Many clauses dealt with temporary issues such as feudal obligations and taxes, intestate distribution, forests and rivers, standardized units of measure, founders of abbeys, and pardons.

VIII. CONCLUSION

Today, authors are quick to point out that only four of the original sixty-three provisions in the 1215 Magna Carta are still good law in the United Kingdom. Two of those provisions guarantee the freedom of the English Church and the rights of the City of London. The other two provisions deal with the administration of justice, guaranteeing that justice will not be sold or denied, and that persons will be punished only in accordance with the lawful judgment of their equals or the law of the land.

It is not surprising that the other fifty-nine clauses have been repealed. They dealt in specific terms with the problems of a different age. No one would have expected them to last 800 years. The important thing is that the Magna Carta set high expectations for the development of Anglo-American law that continue to inspire the reform and administration of justice.



Vincent R. Johnson is Professor of Law, St. Mary's University. Professor Johnson spent his fall 2014 sabbatical in England researching the Magna Carta at Oxford University (St. Benet's Hall) and Durham University. He taught the Magna Carta module of the Legal History course at Durham Law School and, with his students, examined the only existing original 1216 Magna Carta, which belongs to Durham Cathedral.

²² See PAUL JOHNSON, *THE OFFSHORE ISLANDERS: FROM ROMAN OCCUPATION TO EUROPEAN ENTRY 155* (1972).

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After 47 Years and
Over 300 Jury Trials,

GEORGE
BRIN

Refocuses on
Righting Arbitration

By Don Philbin

George Brin played the role of a lawyer in a Beeville High School play. He liked the part so much that he made a distinguished career out of playing it not only in the medical malpractice cases for which he is well-known, but also in *pro bono* and public interest cases that forged life lessons. While last year marked his last as an active trial lawyer, George is not slowing down. He is using what he has learned about process to make arbitration live up to its promises through an alternative provider, Conflict Solutions of Texas, of which he serves as founder, president, and a distinguished panel member.

While lamenting the dramatic decline in civil trials and diminished opportunities for young lawyers to obtain trial experience, Brin quickly notes that eliminating uncertainty and the expense of discovery and trial are often the best course for clients. But Brin graduated from SMU Law in a different world. He joined the Corpus Christi litigation firm of Lewright, Dyer & Redford upon graduation in 1967. There, he was quickly assigned what he describes as “a ‘baby’ docket consisting of property damage car wreck cases and minor workers compensation cases to chew on like a puppy on a raw-hide bone.” Discovery often amounted to looking around in the hall adjacent to those JP and County courts for the next witness. Brin credits these smaller-stakes cases with affording him opportunities to experiment and “invent” himself as a trial lawyer.

Brin quickly graduated to more complicated cases where he could use the skills he developed on his “baby” docket: questioning witnesses, arguing law points, and getting juries to see things his way. While working his “baby docket,” Brin developed into a highly skilled trial advocate. Trying ten to twelve jury cases per year for forty-seven years, Brin accumulated very rare experience that is summed up by another terrific trial lawyer, former Fourth Court Chief Justice and former San Antonio Mayor Phil Hardberger:

What George Brin doesn’t know about the litigation process is unknowable. He’s done it all with becoming, and sometimes intimidating, grace and style. If I were asked by a young lawyer what makes a great lawyer, my answer would be “study George Brin, do things half as well as he does, and you will get along fine.” A master litigator with a long line of victories, George in his later life has become more contemplative. He has turned to arbitration and mediation as a more pleasant alternative to the blood and gore of the litigation process. Insightful and, at times, profoundly wise, he’s been able to resolve matters that looked improbable of solution. Good company, too. If there were more George Brins, lawyer jokes would die for lack of material.

Tough Cases Formed Character

To the aspiring lawyer following Mayor Hardberger’s advice, Brin recounts three tough cases that stand out for their life lessons. A *pro bono* civil case righted the wrong of an ineffective prosecution of a criminal rape case. Another pitted personal conviction and moral purpose against established black letter law. And one unearthed fabricated evidence that resulted in harsh sanctions.

*Lesson 1: Pro Bono Work in
Civil Courts Can Change Lives*

In 1979, a group of concerned citizens from Brin's hometown of Beeville approached him for help with a tragedy that had driven a young Japanese exchange student to suicidal thoughts. She claimed she'd been brutally raped by two young men while attending the local junior college. The criminal trial was highly publicized but ill-prepared. The small town prosecutor failed to call the attending physician, who later testified in the civil case filed by Brin in federal court, that the injuries the young student sustained were entirely inconsistent with consensual sex. Without that key testimony, the jury had acquitted the men, and the Japanese student was shamed by the very public result, especially in her much more rigid home country.

The federal court jury found that the young woman's civil rights had been violated and awarded her \$23 million in damages. The judgment was uncollectable but it changed a student's life. As Brin describes it, "The real award was, of course, the redemption of this gentle young woman's reputation and the removal of her shame." Because of George's work, she went on to graduate, marry, and have a wonderful life. And thirty-five years later, she continues to send Brin a Christmas card every year. As for George, he has never been more proud of our profession than on the day of that verdict. *Pro bono* work changed a life.

*Lesson 2: Sometimes You Have to
Apply the Law Even If You Disagree*

Back on his home turf, Brin was defending a surgeon facing a malpractice claim for the death of plaintiff's husband. During discovery, it became clear that the widow had not been born female but became so by gender reassignment surgery and hormone therapy. Brin had no issue with the personal choices involved, especially since it was clear it was a loving and enduring union, but could his personal view cause him to abandon a valid legal defense? To this day, George is troubled by the fact pattern. He is quick to point out that the practice of law at times affords the opportunity to make tactical decisions in conformity with one's

world view and moral compass. These decisions frequently take the form of affording professional courtesies to colleagues rather than insisting on strict enforcement of deadlines or taking legal positions that seem excessively rigid. This prerogative, according to Brin, does not, however, extend to the abandonment of valid, dispositive, legal arguments on the basis of personal philosophy without the informed consent of the client. Since the Wrongful Death Act only allowed "surviving spouses" to recover, and Texas did not recognize same sex marriage, the issue was directly joined.

So despite his personal feeling that the relationship deserved equal treatment under the law, Brin filed and won a summary judgment. Then-Chief Justice Hardberger faced the issue on appeal. Having discussed it since, Hardberger and Brin both hope the legislature recognizes such unions, but both carried out their respective roles at the time. The Fourth Court affirmed the summary judgment grant and a petition for writ of certiorari was, in time, denied by the United States Supreme Court.

*Lesson 3: Sanctionable Conduct Posed
No Ethical Problem—for Brin Anyway*

Another case stands out of the hundreds for conduct with which Brin doesn't think lawyers should be associated. He was hired as part of the team defending Chrysler in a tragic rollover that resulted in several deaths and serious neurological injury to a child in Mexico. Because the car had been recalled, the plaintiffs sought exemplary damages and a total recovery of \$1 billion. A plaintiffs' expert presented a report showing, with numerous photographs, the failure of the very steering de-coupler that had prompted the recall. The failure of the de-coupler was the cause of the accident according to the expert.

What seemed like a very tough liability case changed complexion one morning when Brin received a call from co-counsel in Austin. His colleague had received an anonymous, unmarked envelope containing another version of events from the plaintiffs' accident-scene investigator. The investigator recounted the trip to



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inspect the vehicle shortly after the accident and take pictures of what they expected from the recall notice—a broken steering de-coupler. But it was intact and fully functioning. The inescapable conclusion that the defense team reached was that the photos supporting the plaintiffs' expert report had been staged.

Since the plaintiffs had not disclosed

this accident-scene investigation trip in discovery, Brin reached out to the plaintiffs' attorney by phone to specifically inquire about it. Counsel denied such a trip and further denied any knowledge of the engineer Brin identified by name. So Brin's staff quickly located the engineer in Houston, and George called him. Not only did the engineer remember the case well, but he also recalled how disappointed the plaintiffs and their counsel were at the news that the de-coupler had not failed as expected from the recall notices. His vivid memory was collaborated by negatives of the pictures he had taken at the scene. Brin asked that he preserve the negatives pending direction of the court.

The plot further thickened when the defense team received word from their own private investigator charged with interviewing the Mexican officials who had investigated the accident. One of those officials had been offered a bribe by a "family member" to "forget" that the wife of the deceased driver had originally reported that he had fallen asleep, causing the car to go off the road and rollover.

These developments resulted in a Rule 13 motion for sanctions, which Judge David Peeples granted after three days of testimony. His order dismissing the case with prejudice and awarding attorneys' fees to the defense of nearly \$900,000 was affirmed by the Fourth Court. Brin takes no delight in the outcome but recalls it, hoping young lawyers will take a different path.

Wade Shelton watched Brin as a young lawyer and has helped him

realize his arbitration vision:

As a young lawyer I was aware of George Brin's reputation for skill and integrity. I have since experienced his character. George's personal and professional characters are indistinguishable. I have known him as an awe-inspiring veteran trial lawyer and as an arbitration entrepreneur. His presence is always, unfailingly, marked with grace and humility. He is so talented and effective that one marvels at his capacity to maintain these virtues. Lincoln said, "Character is like a tree and reputation like its shadow." For all but a few lawyers, merely standing in the shadow of George Brin constitutes personal and professional enhancement. My career will be successful if I can honestly recount it by saying, "I emulated George Brin."

Shift to ADR and Righting Arbitration

Perhaps no one loves the arena of litigation more than George Brin. He's always considered the career that sprung from that high school play a gift. While not all cases were as interesting and noteworthy as those Brin recalls as practice lessons—he quickly acknowledges that there is also drudgery and midnight oil—he feels that subjects have been consistently interesting and challenging, and the people intelligent and fascinating.

His pivot to neutral work comes not from exhaustion with trial work or a souring on the civil trial. A working court system that provides credible deadlines is the backdrop for all forms of dispute resolution. Brin enjoys helping people find an agreed solution to their dispute, often incorporating deal points that courts could not award as remedies. But if you really want to see George light up, get him started on arbitration.

The dramatic rise in the use of pre-dispute resolution clauses building in mandatory arbitration through high-cost institutional providers concerned George. He notes that arbitration has been fully supported and protected by the judicial system, particularly the United States Supreme Court, yet



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many feel its early promise of a more-efficient and less-costly alternative to litigation has not been fulfilled. The fact that up-front arbitration filing fees in the thousands of dollars were not successfully challenged led Brin to create an alternative.

To George, it wasn't something to complain about—it was just another challenge. He set up a regional arbitration provider that operates on a different model. High up-front filing fees have been replaced with a usage-driven model. Conflict Solutions of Texas receives a portion of the arbitrator's fee. Since those fees are only triggered by actual usage, there is no up-front filing fee that could be prohibitive to claimants. And the rule-based focus on early and consistent case management quickly scopes the dispute at an early case management conference and keeps the parties on track to a more efficient outcome. Since the parties are involved in the initial conference, they have better ideas about strategies to reduce costs. Parties and their counsel, in consultation with the arbitrator, estimate and agree on amounts deposited for arbitration fees and expenses. Mediation is a structured component of the process. The result has been faster and less expensive resolution with high user satisfaction. That makes Brin brim:

In a way, the trend toward arbitration and away from jury trial is a sad thing for me—having been fortunate enough to have had such an interesting and rewarding career as a trial lawyer. But I am also excited about the possibilities and the opportunity to play a role in making arbitration an efficient and affordable alternative by paying attention to the complaints about the expense and inconvenience of traditional arbitration models being voiced by my friends and colleagues. It's a new adventure for me—and one I am looking forward to.

Brin's revised arbitration model impressed retiring Fourteenth Court Justice Charles Seymore:

We lament the days when lawyers

Do You Play Golf, Charlie?

By Charles D. "Charlie" Butts

In December 1967, I joined District Attorney Jim Barlow's staff as Lead Prosecutor in Judge Anees A. Semaan's 175th District Court.

I chose Bill White as my trial partner, and together we successfully prosecuted many felony cases.

I read in the paper one morning that a man had robbed an HEB store at gun point, as it was closing, by banging on the door and waving a baby bottle and frantically pleading with the clerk to open so that he could buy some milk for his baby. When the unsuspecting clerk obligingly opened the door, the man pointed a pistol at him and demanded the cash from the cash register. He then fled with the cash but never bothered to get any milk for his mythical baby. Having recently come from the Fort Worth DA's office, where I could easily have gotten a jury to award twenty years in such a despicable case, I thought I would like to hammer this defendant.

Lo and behold, I received a phone call from Anthony "Nic" Nicholas of Nicholas and Barrera, saying he represented the HEB robber and would like to work out a plea. I told Nic that I would take twenty years and that the facts were indefensible and most offensive to me. "Oh no," he replied. "I'll take eight years or we will have to try the case." I replied, "No way, it's twenty or, yes, we will try the case before a jury." So, I put the case on the trial docket.

Nic showed up at my office the next morning, a Friday, and asked me, "Do you play golf, Charlie?" When I replied in the affirmative, he invited me to join him, Mayor John Monfree, and Judge Bob Murray on Saturday for a round of golf at the Oak Hills Country Club. He picked me up the next morning and headed for our round of golf. After we teed off on the very first tee, Nic casually said, "I'll still take that eight years, Charlie!" But I firmly replied, "Nic, I told you twenty!" And so it went,

hole after hole, all the way to the "19th Hole" when we sat down for a beer and hamburger: "Eight?" — "No, twenty!"

Nic drove me home after our game of golf. I got out of the car, and as he drove off, Nic waved and good-naturedly said again, "Charlie, I'll take eight!" I shouted back "I told you twenty. We'll see you in court on Monday."

On Monday morning around 8:15, as Bill White and I prepared to pick a jury in the case, Jim Barlow called me into his office asking me if I had a case against Nic and simultaneously asked what I had offered him for a plea. I replied, "Twenty years." To my surprise, because I had not told him what Nic wanted, "Big Jim" laughed and good-naturedly said, "Why not go ahead and give him eight?" So, at docket call I announced that a plea deal had been reached and "Eight" it was!

Nic thanked me profusely in open court before the spectators and Judge Semaan for my fairness in "working out the plea!" I graciously accepted his praise (with tongue in cheek) and thus began our long-lasting friendship.

Anthony "Nic" Nicholas was a Charter Member of the Texas Criminal Defense Lawyers Association (TCDLA) and is a Member of its Hall of Fame. Together we shared the honor as Directors Emeritus of the San Antonio Criminal Defense Lawyers Association. He was one of the best, most tenacious, and worthy advocates against whom I was ever privileged to do battle. He was also one of my best friends in the Bar.



Charles D. "Charlie" Butts is a Chapter Member of TCDLA and a Member of its Hall of Fame. He is a former President of SABA and is married to the Honorable Shirley W. Butts, Senior Justice (Retired), Fourth Court of Appeals.

- continued on page 26 -

Je Suis Charlie¹: Protecting The First Amendment

By Justice Marialyn Barnard

The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech or of the press.”² The recent and ongoing events in France and Denmark are a harsh reminder of the significance of our First Amendment, and how important it is to protect the integrity of the Amendment from those who would seek, by violence or otherwise, to restrict or limit it.

The Texas Court of Criminal Appeals (“CCA”) was recently asked to review a decision from the Fourth Court of Appeals concerning the protections of the First Amendment, and whether a particular criminal statute ran afoul of those protections. See *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014). In *Thompson*, a defendant was charged with improper photography or visual recording under section 21.15 of the Texas Penal Code. See TEX. PENAL CODE ANN. § 21.15 (West 2011); *Thompson*, 442 S.W.3d at 330. This provision is known as the “improper photography or visual recording” statute, and under this statute it is a crime to photograph or record another person under certain circumstances. *Thompson*, 442 S.W.3d at 330.

Thompson was indicted under subsection (b)(1) of section 21.15, which makes it a crime to photograph or record a person, without his or her consent, if the person is not in a bathroom or private dressing room and the photograph or recording is made with the intent to arouse or gratify the sexual desire of any person; it is a catch-all provision. *Id.* (citing TEX. PENAL CODE ANN. § 21.15(b)(1)). Many of the counts in the twenty-six count indictment concerned photographs of females in bathing suits or bikinis allegedly taken by Thompson at a water park. After the indictment, Thompson filed an application for writ of habeas corpus, alleging section 21.15(b)(1)

was facially unconstitutional under the First Amendment. *Thompson*, 442 S.W.3d at 330. The trial court denied his application, and Thompson sought review in the Fourth Court of Appeals, which held—contrary to every other mid-level Texas appellate court that had considered the issue—section 21.15(b)(1) was unconstitutional under the First Amendment. *Id.* (citing *Ex parte Thompson*, 414 S.W.3d 872, 881 (Tex. App.—San Antonio 2013), *aff’d*, 442 S.W.3d 325 (Tex. Crim. App. 2014)). Specifically, the Fourth Court held the statute improperly restricted an individual’s right to photography, a form of speech protected by the First Amendment, and restricted a person’s thoughts, which is in opposition to the philosophy of the First Amendment. *Id.* The State sought review in the CCA.

The CCA affirmed the Fourth Court’s decision, reaching further than even the Fourth Court did, holding review of the statute required strict as opposed to intermediate scrutiny, which requires the statute to be narrowly tailored to serve a compelling government interest to survive a constitutional challenge. *Thompson*, 442 S.W.3d at 344, 348. The CCA concluded the statute was not the least restrictive means available to protect privacy interests that might be threatened by non-consensual photography. The CCA opined this might be resolved by adding language to the statute, e.g., “with intent to invade the privacy of the other person,” or including an element requiring a person’s privacy be invaded as a result of the place where the recording is made, or designating specific places and manners that are proscribed—in a person’s home or under a person’s clothing. *Id.* at 349.

If the statute had been upheld, the creativity and recordings of not just artists, but ordinary people, could have been restricted. Their recordings, and the intent for the recordings,

would be subject to the interpretation of the “thought police,” who might, in their own subjective view, find the recordings to be arousing or potentially sexually gratifying to a segment of the population. Should a parent who photographs her child in the bathtub be subject to prosecution simply because someone might find that photograph sexually arousing? Should an artist who photographs a woman’s feet in high heels (or a woman in a bikini) be subject to arrest for taking such photographs in public because some segment of the population is sexually gratified by the photographs? This is a slippery slope, but fortunately a slope leveled by judicial recognition of the significance and value of our First Amendment rights.

(Endnotes)

¹ As translated, it means “I Am Charlie.” The phrase is a rallying cry in France and around the world to show solidarity with, and pay tribute to, the French journalists slain by Muslim terrorists for their refusal to curb speech that certain factions found offensive.

² Similarly, our own Texas Constitution provides, in part, that “. . . no law shall ever be passed curtailing the liberty of speech or of the press.” TEX. CONST. art. I, § 8.



Justice Marialyn Barnard is in her seventh year as a justice on the Fourth Court of Appeals. She was born and lived the first four years of her life in Tripoli, Libya, attended a live Beatles concert at age eleven, and now, as a grandmother of two, likes to hang glide from Canadian peaks.

The Unaccompanied Children Crisis and What You Can Do as a Legal Advocate

By Laura C. Figueroa
and Angélica Jimenez

In mid-2014, the United States saw a large influx of unaccompanied children (UAC's) fleeing from Honduras, El Salvador, Guatemala and, to a lesser extent, Mexico. The number of children and adults with children from Central America that the Customs and Border Patrol (CBP) apprehended this past fiscal year has astronomically surpassed the figures from prior fiscal years.¹ Many have speculated about the reasons for this drastic increase, with a primary reason being the violence and safety concerns in these countries.²

The vast majority of these children have been reunified with family here in the United States, leaving those children who are either unable to be reunified with their family or do not have family in the United States in foster care and extended-care programs. Nonetheless, when these children were detained by CBP, they were placed in removal proceedings and now must appear before an immigration judge.

This influx of juveniles has left the immigration court system hard-pressed to process these cases in a timely manner. The Executive Office for Immigration Review (EOIR) comes under the Department of Justice, conducting immigration proceedings that are administrative in nature.³ The already overburdened immigration courts nationwide are struggling to keep up with their ever-growing caseloads, especially with all the new juvenile cases.⁴

Whether an attorney wishes to volunteer his or her time to help these juveniles, or currently handles cases with

juveniles from various countries, practitioners should be cognizant of several things. As with all cases involving a child, counsel should keep in mind the age of the child and his or her limited understanding of the law. Children from Central America may be very apprehensive about speaking to an attorney and about sensitive issues relating to any trauma they may have suffered in the past, but a very thorough consultation should be made with the child to identify any of the following issues.

Special Immigrant Juvenile Status

In the immigration context, several forms of relief available to these children may require filings with the state court having jurisdiction over them. Specifically, Special Immigration Juvenile Status (SIJS) under section 101(a)(27)(J) of the Immigration and Nationality Act (hereinafter, INA) includes a *child*⁵ who: (1) "has been declared dependent by a juvenile court located in the United States," or who has been placed by such court in the custody of a state agency like Child Protective Services (CPS) or other individual or entity; (2) whose reunification with *one or both* of his or her "parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law"; and (3) it would not be in the child's "best interest to be returned to" his or her, or his or her parent's, "previous country of nationality or country of last habitual residence."⁶

¹ U.S. Customs and Border Protection, "Southwest Border Unaccompanied Alien Children," www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

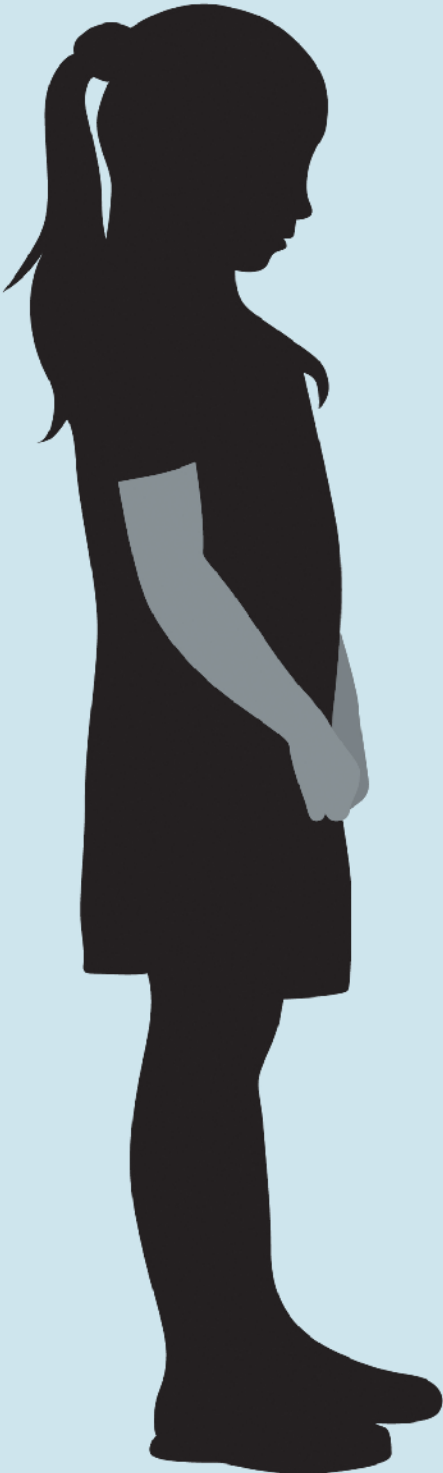
² Alan Greenblatt, "What's Causing the Latest Immigration Crisis? A Brief Explainer," www.npr.org/2014/07/09/329848538/whats-causing-the-latest-immigration-crisis-a-brief-explainer.

³ The United States Department of Justice, Executive Office for Immigration Review, "About the Office," www.justice.gov/eoir/orginfo.htm.

⁴ Daniel Gonzalez, The Arizona Republic, "Surge in Unaccompanied Minors Hits Immigration Courts," www.usatoday.com/story/news/nation/2014/07/31/surge-unaccompanied-minors-courts/13437139/.

⁵ The term "child" is defined under the INA as an "unmarried person under twenty-one years of age" See INA § 101(b)(1) (2013). The author notes that the definition of "child" for immigration purposes is different than for state law purposes.

⁶ See INA § 101(a)(27)(J) (2013) (emphasis added); see also 8 C.F.R. § 204.11 (2013).



State Court Process

Under federal law, a juvenile court is defined as “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.”⁷ Various legal avenues may be used by the court to make the required determinations.⁸ For example, the use of guardianships, juvenile delinquency hearings, declaratory judgments, and suits affecting the parent-child relationship all may contain the necessary legal findings by the court. The most common of these vehicles is the suit affecting the parent-child relationship. As stated previously, federal law requires certain findings that the child was abused, abandoned, or neglected.⁹

In order to prepare for this type of case at the state court level, the attorney must be able to gain the child’s trust and talk with the child in detail regarding his or her situation. Specifically, the child must open up and speak frankly about the abuse, abandonment, or neglect that he or she suffered. This usually takes time and tact on the attorney’s part, as the child may be scared, embarrassed, or

intimidated. In many cases, this may be the first time the child has opened up regarding these issues. However, in some cases, the child may have made an outcry to the Office of Refugee and Resettlement (ORR).¹⁰ The attorney may be able to request the child’s file from ORR.

Each state defines the terms “abuse,” “abandonment,” and “neglect” differently. Federal regulations do not offer a specific definition for these terms. It is, therefore, necessary for the legal advocate to turn to state law for guidance on the standard and definition for each term.¹¹ Any evidence, usually in the form of testimony, must be provided as necessary to the state court judge. In some cases, the immigration court may ask for a transcript of these proceedings, and therefore, care should be taken to ensure that the testimony in state court covers what is required in immigration court as well. Any discrepancy between the testimony in state court and the immigration petition may raise questions as to the credibility of the witness.

Furthermore, there are certain requirements that the state court imposes on an individual in order to be able to take control over a person. Jurisdiction and venue must be proper in the court where the action is filed.¹² Moreover, the petitioner must be able to serve each party in opposition that has the right to due process.¹³ The petitioner must prove that each party was served with process or present a signed and notarized waiver of service on their behalf.¹⁴ Standing must also be proper for the parties bringing the suit.¹⁵

The location, country, and city or village of residence of each of the parties and the situation of each of the individuals involved will affect the type of case that best suits the circumstances of the petitioner and the child who is the subject of the suit. Issues may arise at the

immigration phase due to lack of service or lack of dependency on the court at the civil or state court phase. Whatever the avenue chosen at the state court phase, the petition must include an affidavit in the child’s own words detailing the abuse, abandonment, or neglect that he or she has suffered, with an English translation if it is in any other language.¹⁶

The final order must specify the following findings of fact: (1) the child must be a dependent on the court; (2) reunification with one or both of his or her parents is not possible; and (3) it is not in the child’s best interest to be returned to his or her home country.¹⁷

Immigration Process

In order for the child to make an application for Special Immigrant Juvenile Status to the United States Citizenship and Immigration Services (USCIS) under Form I-360, there must exist an order from a judicial or administrative proceeding that meets the requirements of 101(a)(27)(J) including that: (1) the child is present in the United States; (2) is unmarried and less than 21 years of age; (3) has been declared dependent upon a juvenile court in the United States or has been placed in the custody of an agency or department of a State, an individual, or an entity appointed by a state or juvenile court; (4) has been the subject of a determination by a juvenile court in the United States that reunification with *one or both* of the juvenile’s parents is not viable due to abuse, neglect, abandonment or a similar basis under state law; and the child has been the subject of administrative or judicial proceedings that determined that it would not be in the child’s “best interest to be returned to” his or her, or his or her parent’s, “country of nationality or

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⁷ See 8 C.F.R. § 204.11(a) (2013).

⁸ See 8 C.F.R. § 204.11(c) (2013).

⁹ See INA § 101(a)(27)(J) (2013); see also 8 C.F.R. § 204.11 (2013).

¹⁰ See generally www.acf.hhs.gov/programs/orr/programs/ucs/about.

¹¹ Attorneys should consult their local family law code for definitions. The Texas Family Code defines “abuse” in section 261.001, “abandonment” in section 152.102, and “neglect” in section 261.001.

¹² See TEX. FAM. CODE § 152.201; see also TEX. FAM. CODE § 103.001.

¹³ See TEX. FAM. CODE § 102.009. See generally TEX. R. CIV. P. 103-08.

¹⁴ See TEX. FAM. CODE § 152.202; see also TEX. FAM. CODE § 162.102; TEX. R. CIV. P. 108, 119.

¹⁵ See TEX. FAM. CODE § 102.003.

¹⁶ See generally www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Child_Welfare_Workers_-FINAL.pdf.

¹⁷ See 8 C.F.R. § 204.11(d)(2) (2013).

last habitual residence.”¹⁸

If everything is in order with the I-360 petition, the local adjudicating USCIS office must make a decision on the I-360 within a specified time period. Once the I-360 petition is approved, the child may make an application for lawful permanent residency (LPR). Prior to making these applications, counsel should ensure that there are no inadmissibility or removal grounds requiring a waiver.¹⁹

While the application for Special Immigrant Juvenile Status is done with the state court or USCIS, for those children in removal proceedings, it is necessary for the child and his or her immigration attorney be present in immigration court to give a status update of this application.

Other Forms of Immigration Relief Available

While a vast majority of unaccompanied children will be eligible for SIJS, a few will be ineligible due to reasons such as age or being reunified with both parents who are currently in the United States. This does not mean that the children are left without options. Attorneys should explore the possibility of eligibility for the following forms of relief from removal. Asylum applications can be presented before an immigration judge while applications for a Trafficking Victims Visa (T-Visa) and Crime Victims Visa (U-Visa) must be made to USCIS. In certain circumstances, an asylum application may be made before USCIS.

Asylum

Generally speaking, an applicant for asylum must be classified as a refugee, a term which includes: (1) any person outside his or her country of nationality; (2) who because of a well-founded fear of persecution (either past or a well-found-

ed fear of future persecution) is unable or unwilling to return to that country; (3) on account of race, religion, nationality, political opinion, or membership in a particular social group.²⁰ Examples include, but are not limited to, those children who were victims of gang violence, extortion, or gang recruitment. Special attention must be paid to asylum cases, as they are generally difficult to win.

Trafficking Victims (T-Visa)

This situation involves individuals who have been the subject of severe trafficking, including where force is used, fraud, coercion for sex trafficking, involuntary servitude, peonage, debt bondage, or slavery.²¹ Furthermore, the child: (1) must be physically present in the United States on account of the trafficking; (2) must have reasonably assisted federal, state, or local law enforcement agencies with the investigation and/or the prosecution of any crime; and (3) would suffer extreme hardship involving unusual and severe harm if removed from the United States.²²

Crime Victims (U-Visa)

This situation may include children who: (1) suffered substantial physical or mental abuse as a result of having been a victim of “qualifying criminal activity”;²³ (2) possess information about the qualifying crime; (3) have been helpful in the prosecution or investigation of the crime by the law enforcement agency; (4) were victims of crime that occurred in the United States;²⁴ and (4) are applicants that are admissible to the United States. An issue of inadmissibility may require a waiver.

Violence Against Women’s Act (VAWA)

This situation includes an unmarried child under the age of 21 who has

been abused by a United States citizen or lawful permanent resident parent.²⁵ A child may also be included in the application of his or her parent if the parent has been abused by a spouse.²⁶

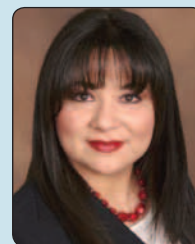
Conclusion

There are numerous legal avenues to help qualified UAC’s who are fleeing their home country. In most cases, this is the first time these children come to the United States, and they are unfamiliar with this country’s legal system. Legal advocates should consider the options discussed above when dealing with these unaccompanied children.



Laura Cristina Figueroa is co-founder of Figueroa & Jimenez, PLLC, a law firm whose principal practice is in the area of immigration and family law. Since graduating from Southern Methodist University Dedman School of Law

in May 2007, she has focused primarily on immigration including family based immigration, employment based immigration, citizenship and naturalization and various specialized visa classifications. Currently, her practice mainly involves removal proceedings and representation before the Executive Office of Immigration Review and its immigration courts.



After a career in finance, Ms. Jimenez followed her life-long dream of becoming a lawyer and graduated from St. Mary's Law School in 2010. In 2013, she and Laura Figueroa founded Figueroa & Jimenez, PLLC, which

focuses in the areas of Immigration and Family Law.

¹⁸ See Instructions for I-360 at www.uscis.gov/i-360.

¹⁹ See INA § 245(h) (2013).

²⁰ See INA § 101(a)(42)(A) (2013).

²¹ See INA § 101(a)(15)(T)(2013); see also 22 U.S.C. § 7102.

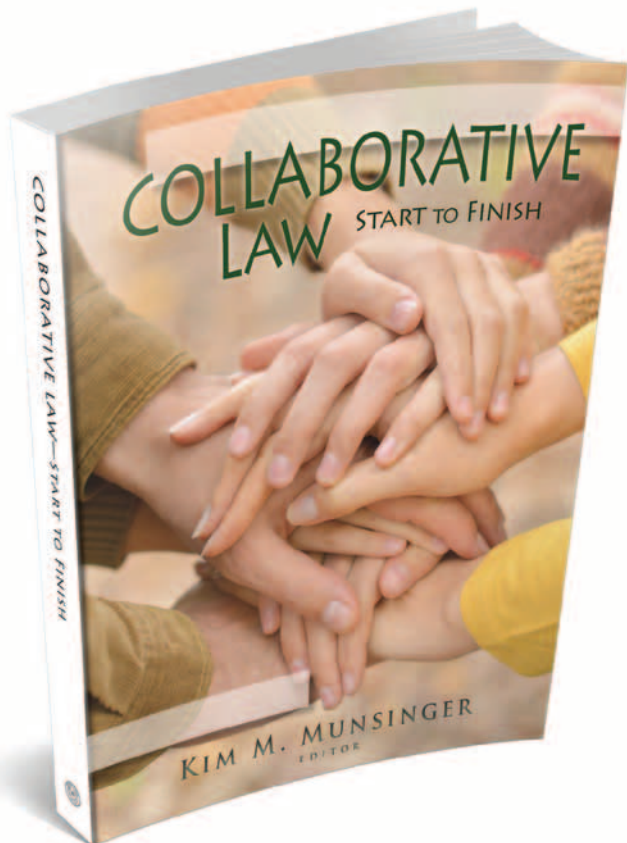
²² See 8 C.F.R. § 214.11(b) (2013).

²³ Qualifying criminal activity includes any of the following or any similar activities in violation of federal, state, or local criminal laws: abduction, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual contact (abusive), sexual exploitation, slave trade, stalking, torture, trafficking, unlawful criminal restraint, witness tampering, or attempt, conspiracy, or solicitation to commit any of these crimes. See INA § 101(a)(15)(U)(iii).

²⁴ See INA § 101(a)(15)(U) (2013).

²⁵ See INA § 101(a)(51) (2013).

²⁶ See *id.*



Book Review: Collaborative Law Start to Finish

By Charla Davies

"Is there a better way?" A question I found myself asking on more than one occasion as a family law attorney. As a young lawyer who wanted to focus my practice on family law, I was fortunate enough to be mentored by some of the very best in our profession. One of the most significant pieces of advice that I received was that our clients with children and their soon-to-be former spouses would need to continue to deal with one another long after my job was complete. Traditional litigation places the parties at odds and can make moving forward as a family after divorce extremely difficult. Even when the parties mediate and come to a consensual division of property and/or parenting plan, it can feel more like a game of tug o' war than a cooperative effort to find the best path forward for the entire family.

Collaborative law is a relatively new approach to domestic relations cases that allows the parties to work together to reach a resolution in a comfortable, private setting. This generally makes it easier for the family to navigate its post-divorce reality. Because the collaborative approach to divorce is generally quicker, less costly, and less adversarial, it has been gaining popularity with practitioners. But collaborative law requires a very different skill set from

traditional family law practice. If you want to transition to a collaborative practice or simply add another dimension to your traditional family law practice, you will need to understand the unique aspects and requirements of a collaborative divorce.

Collaborative Law Start to Finish by Kim Munsinger (editor) is everything a practitioner would need to practice collaborative law. This book is essentially a "tool kit" for the collaborative practitioner. The first section of the book, titled "The Collaborative Process," thoroughly describes the collaborative process and contains various practice tips and examples that can be implemented by the reader. The chapter titled "Problems and Solutions" offers the reader insight into various situations that might arise during the process and offers guidance about how to get through each particular problem. For instance, how do you handle a divorce when there is no community property but a large amount of debt? The book offers ideas for addressing the parties' concerns using a neutral financial professional. It covers a variety of options, including the different options for bankruptcy, either before or after the divorce is finalized.

Not only does the book provide the tools needed to handle a collaborative case, but it also provides guidance in starting and running a collaborative practice. (As many lawyers know, the practical side of running a law firm is not something they teach in law school, but fortunately, this book does not neglect this important topic.) The section titled "Forms" supplies the reader with the essential forms used in a collaborative

case from the engagement agreement to the final decree. *Collaborative Law Start to Finish* is available for download, allowing the reader to make quick use of the forms included in the book. The final section, titled "Essential Documents," provides the reader with the Protocols of Practice for Family Lawyers, and the Collaborative Family Law Act. The protocols were designed to provide the practitioner with helpful insight in dealing with issues that are frequently encountered in collaborative cases, from when the practitioner should decline a case to the seating arrangements for the joint sessions.

Collaborative Law Start to Finish is useful for anyone—from the experienced collaborative professional to the novice practitioner—desiring to implement the collaborative process in their practice. As a collaborative professional, I found myself re-energized and excited about the ways in which the collaborative process has changed the practice of Family Law. I could not have asked for more from *Collaborative Law Start to Finish*.

State Bar of Texas, 2014

338 pages

\$85.00

<http://texasbarbooks.net/collaborative-law-start-to-finish/>



Charla Davies is an Associate at Langley & Banack, Inc., where she practices Family Law, including collaborative law. In October 2014, she made a presentation titled Problems and Solutions in Collaborative Law at

the Collaborative Professional Association of San Antonio, for which Collaborative Law Start to Finish was very helpful.

Please join the San Antonio Bar Foundation on Saturday, March 21 for our annual Peacemaker Awards Ceremony, as we honor and celebrate the accomplishments of San Antonio's outstanding individuals and companies in the tranquil setting of the Japanese Tea Gardens. The picturesque Japanese Tea Gardens is a registered Texas historical landmark, featuring beautiful floral displays, a waterfall and a safe habitat for Koi fish and aquatic plants. The garden opened in an abandoned limestone rock quarry in the early 20th century.

Proceeds from this year's event will benefit the programs and projects supported by the San Antonio Bar Foundation, including the Community Justice Program and the People's Law School Project. Sponsorships are available starting at \$1,500 and individual tickets for \$125. Visit bit.ly/Peacemaker2015 for full details!



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By Soledad Valenciano and Melanie Fry

Summaries of significant decisions rendered by San Antonio federal judges from 1998 to the present are available for keyword searching at Court Web found at <http://courtweb.pamd.uscourts.gov/courtweb>. Full text images of most of these orders can also be accessed through Court Web.

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano or Melanie Fry by phone at 787-4654 or 554-5392 or by email at svalenciano@svtxlaw.com or mlfry@coxsmith.com with the style and cause number of the case, and the entry date and docket number of the order.

Summary Judgment; Motion to Strike; Race Discrimination; Retaliation; Negligent Hiring, Supervision, Training and Retention

Brandon v. Sage Corp., SA-12-CV-1118-DAE (Ezra, Nov. 19, 2014).

Hispanic employee sued employer for race discrimination, wrongful termination, retaliation, and negligent hiring, supervision, training, and retention when supervisor threatened to cut employee's pay in half for hiring a transgender employee. Employer moved for summary judgment on all claims. Court granted employer's motion to strike statements in transgender employee's supporting affidavit as the statements were conclusory, speculative beliefs of others, or not made in the presence of affiant. Supervisor's statements regarding San Antonio's Hispanic population, although offensive, were general and unrelated to employee's employment, and therefore did not satisfy the direct evidence test for a Section 181 race

discrimination claim. Employee could not satisfy circumstantial test for racial discrimination claim, or her retaliation claim, because a mere threat to cut pay in half is not an ultimate employment decision, and employee's resignation after only one day of inappropriate commentary was not reasonable and, therefore, could not support a constructive discharge claim. Employee could not show less favorable treatment, namely that other similarly situated non-Hispanic employees were free of pay cut threats after hiring a transgender employee. Offensive remarks against Hispanics were not severe or pervasive enough to support a hostile work environment claim. While informal opposition to a discriminatory practice can constitute protected activity to support a retaliation claim, a fact question exists as to whether employee's comments in defense of transgender employee constituted protected activity. Employee's claims for negligent hiring, supervision, training, and retention failed because employee did not demonstrate an actionable tort by her supervisor and because supervisor's conduct, even if actionable, was not foreseeable.

Deliberative Process Privilege; Internal Affairs Investigations

Doe v. City of San Antonio, SA-14-CV-102-XR (Rodriguez, Nov. 17, 2014).

Plaintiff sued City, an SAPD officer accused of raping plaintiff, and the SAPD's Police Chief. Plaintiff sought to depose members of Police Chief's Advisory Action Board (CAAB) that made disciplinary recommendations regarding police officer's prior conduct with a female high school student who participated in the SAPD's after-school Police Explorer Program. In a case of first impression in the Fifth Circuit, court denied Defendants' motion for protective order and to quash depositions. Applying *City of Pacifica's* 8-factor test and *King's* 3-factor test, court held that deliberative process privilege does not protect CAAB members from being deposed in connection with their deliberations and

recommendations regarding the police officer at issue.

Motion to Remand

Redus v. Univ. of the Incarnate Word, SA-14-CV-509-DAE (Ezra, Nov. 25, 2014).

University campus police officer shot and killed a student. Suit followed and was removed to federal court. Court granted plaintiffs' motion to remand. Plaintiffs argued removal was improper due to procedural defect and lack of subject matter jurisdiction. Defendants argued that plaintiffs waived right to remand by filing jury demand. Because Notice of Removal's certificate of conference stated removing defendant's counsel had only conferred with counsel for other defendant, plaintiffs argued that removing defendant had not met the Fifth Circuit's *written* consent requirements under 28 USC § 1446(b)(2)(A). However, in response to plaintiffs' Motion to Remand, removing defendant's attorney provided an affidavit that he represented both defendants at the time of removal and, therefore, had authority to act on behalf of both defendants. Therefore, there was no procedural defect in defendants' Notice of Removal. In light of Rule 81(c)'s deadline to file a jury demand within ten (now 14) days of removal, plaintiffs did not waive their right to remand by filing jury demand. Court lacked subject matter jurisdiction over plaintiffs' state law claims for wrongful death, negligence, gross negligence and *respondeat superior* liability. Court rejected argument that the true nature of plaintiffs' claims were Section 1983 claims and that in accordance with the artful pleading doctrine, they should be construed as federal claims. Court disagreed that the Supreme Court's recent ruling in *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014), applied as defendants were in effect asking the court to apply the inverse corollary of the holding in *Johnson*. Court denied plaintiffs' motion for attorneys' fees as defendants had an objectively reasonable basis for seeking removal.

Disability Discrimination; Summary Judgment

Gonzalez v. Texas Health & Human Services Commission, et. al, SA-13-CV-183-DAE (Ezra, Nov. 19, 2014).

Employee sued defendants for failing to provide a reasonable accommodation for her disability. Court found employee was substantially limited in the major life activity of working because she was restricted by her doctor from working overtime and because she was substantially limited in the major life activity of sitting. Employee failed to show whether overtime was an essential function of her current position, and therefore, court found that eliminating that essential function could not be a reasonable accommodation for which employer was responsible. However, employee created a genuine issue of material fact as to whether she was a qualified individual with a disability whom the defendants failed to reasonably accommodate by transferring to an open position that the evidence showed did not require overtime.

Disability Discrimination; Retaliation; Summary Judgment

Gordon v. Acosta Sales & Mktg., SA-13-CV-662-XR (Rodriguez, Dec. 22, 2014).

Employee sued for violations of the ADA. Court granted employer's motion for summary judgment on all claims, ordered a take nothing judgment, and awarded costs to the employer. Employee's failure-to-accommodate claim failed as a matter of law because employee was offered a reasonable accommodation and, upon learning of that accommodation but believing it unsatisfactory, resigned, cutting off the employee-employer interactive process. Following employee's altercation with his supervisor, employer took quick and decisive action to remedy the problem when it investigated and disciplined the supervisor, and no other harassment or incidents occurred after the discipline to support a hostile work environment claim. Even if employer took an adverse employment action following employee's threat to engage in protected activity by complaining to the EEOC, employee could not show a causal connection between the two aside from his own subjective belief. Employee was not constructively

discharged because he failed to demonstrate any of the *Kinney Shoe* factors and because employer did not offer employee "two equally intolerable options" that were worse than the status quo.

Patent Infringement; Patent-Ineligible Concept

Morales v. Square, Inc., SA-13-CV-1092-DAE (Ezra, Dec. 30, 2014).

Plaintiff patented a system that allowed TV viewers to respond to product offers using a remote. The system involved receiving and transmitting an audible signal to a repeater station, which was then relayed to a central data collection system. Plaintiff filed suit for patent infringement against defendant, producer of "Square Reader" which allows users to conduct credit card transactions using a smart phone by connecting through the headphone jack. Since plaintiff complied with Form 18, complaint was immunized from attack regarding the sufficiency of the pleading for a claim of direct infringement. But court granted defendant's motion to dismiss because plaintiff's claim was directed to a patent-ineligible concept. Court held that neither separate claim construction proceedings nor further development of factual record were required before addressing patent-ineligible issue. "Abstract ideas" category of patent-ineligible subject matter is broad and involves a wide variety of systems and processes, and a claim is directed to an abstract idea when it describes a fundamental concept or longstanding practice. Court held plaintiff's claim encompassed an abstract idea because it described the fundamental concept of relaying a signal containing the sender's identity.

Workers' Compensation; Immunity from Suit

Rocha v. United States, SA-13-CA-909-OLG (HJB) (Recommendation by Bemporad Sept. 25, 2014; accepted by Garcia Oct. 20, 2014).

Plaintiff filed workers' compensation claim against government subcontractor and received benefits. Plaintiff sued the Government for negligence. Court dismissed suit for lack of jurisdiction. Pursuant to

Fifth Circuit precedent interpreting Federal Tort Claims Act (FTCA), Government was entitled to same defenses as a private person, including defense under TWCA that workers' compensation benefits are exclusive remedy for employees' work-related injuries. Because Government's contract required subcontractor to provide workers' compensation coverage, Government was in "like circumstances" under FTCA as a Texas statutory employer. Government's failure to adhere to certain procedural requirements in Texas Administrative Code and TWCA did not matter because plaintiff did not allege lack of notice or other prejudice.

Family Medical Leave Act; Summary Judgment

Roberts v. River City Center, SA-13-CV-670-FB (HJB) (Recommendation by Bemporad May 16, 2014; accepted by Biery May 28, 2014).

Court granted defendant's motion for summary judgment on plaintiff's claim for violations of the FMLA. Plaintiff failed to produce evidence sufficient to make prima facie case of a causal connection between his application for FMLA leave and his termination. Defendant's evidence proved that prior to plaintiff's application for FMLA leave, the decision to terminate plaintiff had already been made, although plaintiff did not find out about the decision until a later date. Plaintiff's sworn statement that defendant's evidence was "fictitious" was conclusory and mere subjective belief, and thus insufficient to defeat defendant's motion for summary judgment.



Soledad Valenciano practices commercial and real estate litigation with Spivey Valenciano, PLLC. Melanie Fry practices commercial litigation and appellate law with Cox Smith Matthews.

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George Brin

- continued from page 17 -

handled much of their business by 'word of honor.' George Brin brings back those wonderful days for me! I met George Brin two or three months before I retired from the bench. We had instant rapport while sharing too many courtroom war stories. I was delighted when he asked me to join Conflict Solutions of Texas and work to fulfill the original promise of arbitration. Our profession must continue to hold in highest regard those lawyers who play by the rules and conduct business with honor and integrity.

George Brin has accumulated experience and wisdom beyond his years. While he has earned a reputation as a consummate trial lawyer, he is also a consummate gentleman who takes great pleasure in helping others. Take Mayor Hardberger's advice and study him. There are plenty of opinions on his cases, but he is also very giving of his time. Call him up and ask him for advice. You will get a wonderful story that will answer your question and inform your practice in a non-judgmental way. He remembers his mentors and what they did for him. Almost fifty years ago, one cautioned him to never try to be something or someone in the courtroom that you are not outside of it. It stuck. He's happy to play the role of that mentor now—and he's become that role since he played it in the high school play.



Don Philbin was named the 2014 "Lawyer of the Year" for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of seven Texas mediators listed in The International Who's Who of Commercial Mediation, and is listed in Texas Super Lawyers. He is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.


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